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REFORMING THE MISSISSIPPI CRIMINAL CODE PART II: NON-HOMICIDE CRIMES AGAINST THE PERSON

By Judith J. Johnson[*]

I. INTRODUCTION

This is the second in a series of articles advocating for change to the Mississippi criminal laws. The first article explained why change is needed.[1] Briefly, our criminal laws have been justifiably criticized.[2] Some of the shortcomings of the Mississippi law include sentencing disparity,[3] enabling defendants who have engaged in the same criminal conduct to have widely disparate sentences. In addition, the Mississippi criminal laws often have vague definitions of the conduct prohibited,[4] as well as confusing or absent definitions of states of mind required to commit the crime. The hallmark of a fair criminal justice system is that whatever is forbidden is clearly defined in the criminal code. Finally, the criminal statutes are disorganized and do not relate to each other.[5]

The Mississippi Judicial Advisory Committee, established in 1993 by the legislature to improve the administration of justice,[6] appointed the Criminal Code Consulting Group (hereinafter referred to as "the Committee") to suggest revisions to the penal code. The Committee has been meeting since 1996 and is finally reaching the end of its charge and

* Professor of Law, Mississippi College School of Law. I want to thank all my research assistants who have provided valuable support over the years to me and to the Committee, especially my current research assistants Benjiman Blakely and Taylor Pilger.

1. Judith J. Johnson, *Why Mississippi Should Reform Its Penal Code*, 37 MISS. C. L.REV. 107 (2019).

2. Paul H. Robinson, Michael T. Cahill, and Usman Mohammed, *The Five Worst (and Five Best) American Criminal Codes,* 95 Northwestern U. L. Rev. 1, 3 n.3 (2000) ranked the Mississippi Criminal Code as being the fifty-second worst criminal code in the U.S. The study included the federal code and the D.C. code in their assessments. *Id.*

3. Many criminal statutes in Mississippi provide a range of decades as a possible sentence, such as one year to thirty years. *See* Johnson, *supra* note 2, discussion accompanying notes 60-63.

4. *See id.* at discussion accompanying notes 67-72.

5. *See id.* at discussion accompanying notes 72-76.

6. MISS. CODE ANN. § 9-21-1 (1993 Cumulative Supplement). The Judicial Advisory Study Committee was eliminated in 2018. H.B. 949 (2018). The Criminal Code Consulting Group (the Committee) is now operating under the auspices of the Mississippi Supreme Court.

will present its proposals to the legislature in the foreseeable future. This Committee, which I have chaired for more than twenty years, is recommending a comprehensive change to the laws to alleviate some of the problems with the current code. The Committee proposals will improve the administration of the criminal justice system by providing clear definitions of the conduct prohibited and the states of mind required for the crimes, which will also be clearly defined.[7]

This second in a series of articles continues to present the case for penal code reform. The purpose of these articles is to explain the Committee's reasoning and the proposed changes to the law. This series of articles is intended to replace comments, which the Committee did not write, although there are extensive comments to the Model Code Penal, on which these proposals are based.

The first article introduced and explained the Committee's process.[8] In addition, the first article explained two important substantive areas of change: states of mind and homicide.[9] This article addresses the most serious crimes against the person, other than homicide, and explains the Committee's recommendations regarding assault and battery and related crimes, kidnapping and related crimes, and sex crimes.[10] Future articles will explain the other groups of crimes and other issues that the Committee has addressed.

Section II of this article briefly reviews the methodology of the Committee's work; Section III explains the proposed changes to assault and battery and related offenses; Section IV explains the proposed changes to kidnapping and related offenses; Section V explains the proposed changes to sex crimes; and Section VI concludes.

II. COMMITTEE METHODOLOGY AND THE MODEL PENAL CODE

As described more fully in the first article,[11] the Committee has been meeting since 1996 and consists of judges, prosecutors, defense attorneys, legislative drafters, and law professors.[12] The Committee has reviewed the

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7. *See* Johnson, *supra* note 2, at V.1.
8. *Id.* at II.
9. *Id.* at V.1.
10. Robbery, which is also a serious crime against the person, will be discussed in the next article, along with arson and burglary.
11. *See* Johnson, *supra* note 2, at II.
12. Current committee members: Professor Judith J. Johnson, chair, Professor Matthew Steffey, reporter, Judge Donna Barnes, Patrick Beasley, Judge John Emfinger, Greta Harris, Caryn Quilter, Professor Ronald J. Ryclak, Kathy Sones, Alison Steiner, Ed Snyder, and Gwynetta Tatum.

most important parts of Title 97 of Mississippi Code of 1972, which contains the principal criminal statutes, working to develop a penal code that is more coherent and comprehensive than current law.[13]

As explained in more detail in the first article,[14] at each monthly meeting, we compare the Mississippi law to the relevant provisions of the Model Penal Code (hereinafter "Model Code"), as well as to the laws of other states.[15] We then propose changes to the Mississippi law to reflect the needs of the state and the need for uniformity, both in the state code and among the codes of other states. The Committee is currently reviewing all the proposed changes it has adopted in preparation for compiling the results for presentation to the Mississippi Legislature for its consideration.[16]

The Committee based the proposed revisions on the Model Code, which virtually all states that have reformed their penal codes have

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Original Committee Members: Professor Judith Johnson, chair, Professor Matthew Steffey, reporter, Judge Fred Banks, co-chair for some period of time, Judge Robert Gibbs, who also co-chaired for some period of time, Judge Robert Bailey, James Craig, Judge Bobby DeLaughter, Rusty Fortenberry, Tom Fortner, Buddy McDonald, Rob McDuff, Bilbo Mitchell, Al Moreton, Professor Ronald J. Rychak, Ed Snyder, Kathy Sones, Judge Leslie Southwick, Frank Trapp, Senator Bennie Turner, Judge Frank Vollor, Professor Carol West, and Amy Whitten.

Others who have served on the Committee: Dewitt Allred, Judge George Carlson, Judge Virginia Carlton, Judge Kay Cobb, Andre DeGruy, Judge Oliver Diaz, David Dykes, Chris Klotz, Katie Lawrence, Frank McWilliams, Margarette Meeks, Faye Peterson, Clarence J. Richardson, Judge Larry Roberts, Judge Keith Starrett, Robert Taylor, Shondra Taylor-Legget, and Philip Weinberg.

Others who attended to help with specific issues: Drs. Phillip Meredith and Reb McMichael, Professor Cecile Edwards, Judge John Hudson, and Dean Emeritus Jim Rosenblatt. Judge Tom Broome also provided valuable input.

13. The Committee has been meeting in Jackson at the Mississippi College School of Law. The law school has furnished the meeting space and paid the research assistant. In addition, the law school also furnished lunch for the committee for several years under the leadership of Dean Jim Rosenblatt. We are very grateful for the support of the law school during all these years. The Administrative Office of the Courts has also furnished valuable support to the committee by sending out meeting notices and providing lunch for the committee for several years.

14. *See* Johnson, *supra* note 2, at II.

15. *See, e.g. infra* note 275.

16. The references to the minutes throughout usually reflect the Committee's most recent review of the statute, although the Committee may have originally adopted the statute much earlier.

referenced.[17] The Model Code, discussed more fully in the first article,[18] serves as a measure of uniformity among the several codes. Two thirds of the states have reformed their penal codes and used the Model Code as the basis for their reforms.[19] Thus, although Mississippi comes late to the process, it may draw from the experience of many other states that have reformed their penal codes.[20]

In addition to establishing some uniformity among criminal codes and crimes, virtually all American law students are introduced to the Model Code and its version of general definitions, as well as many of its crimes and defenses.[21] Also, courts and commentators frequently cite the Model Code as persuasive authority.[22] Finally, the drafters wrote extensive comments, explaining the provisions of the Model Code in detail. Although the comments will not be part of the legislation, lawyers, judges, and courts often rely on the comments to interpret the Model Code provisions.[23]

As noted, the Committee chose not to publish separate comments, other than this series of articles, but to rely instead on the Model Code comments where appropriate. This series of articles will serve to some extent as comments, and the Committee approves each article before publication.

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17. Gerald E. Lynch, *Towards a Model Penal Code, Second (Federal?): The Challenge of the Special Part*, 2 BUFFALO CRIM. L. REV. 297 (1998).

The Model Code is among the most successful academic law reform projects ever attempted. In the first two decades after its completion in 1962, more than two thirds of the states undertook to enact new codifications of their criminal law, and virtually all of those used the Model Penal Code as a starting point. *Id.* The Model Code was developed by the American Law Institute and published in 1961 as a model for states to reform their penal codes, which most states have done. *See* Gerald E. Lynch, *Revising the Model Penal Code: Keeping It Real*, 1 OHIO ST. J. CRIM. L. 219, 297 (2003). The American Law Institute (hereinafter "ALI") was organized in 1923 to improve and clarify the law. It consists of distinguished lawyers, judges, and professors. Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425 (1968).

The American Law Institute is in the process of making some changes to the Model Code, notably in the area of sex crimes. *See, e.g.,* MODEL PENAL CODE Proposed §§ 213.0-213.11 (A.L.I. 2015). The original draft of sex crimes was considered outdated and unsatisfactory. *See, e.g.,* Lynch, *Revising the Model Penal Code: Keeping It Real*, *supra* at 230-31. The Committee also had to completely redraft the sex crimes sections, which will be discussed *infra*. The core provisions of the Model Code, however, have stood the test of time and there would be little to gain from changing them. *See* Lynch, *Towards a Model Penal Code*, at 297.

18. *See* Johnson, *supra* note 2, at III.

19. Lynch, *Towards a Model Penal Code*, *supra*, note at 297.

20. *Id.* at 297-98.

21. *Id.*

22. *Id.*

23. *Id.*

The Model Code divides crimes by seriousness and punishes them accordingly. The Model Code recognizes three degrees of felonies,[24] which the Committee expanded to four degrees.[25] Thus, murder is a felony in the first degree,[26] along with aggravated forms of rape,[27] robbery,[28] and kidnapping.[29] Manslaughter is a felony in the second degree,[30] along with non-aggravated forms of rape,[31] robbery,[32] kidnapping,[33] and others. Negligent homicide is a felony in the third degree,[34] along with non-aggravated burglary, and crimes of similar seriousness.[35] The more serious theft crimes were classified as felonies in the fourth degree,[36] along with others.[37]

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24. MODEL PENAL CODE § 6.01 (AM. LAW INST. 1985).

25. Section 6.01. Minutes of the Consulting Grp. on Mississippi Criminal Code Revision, (September 12, 2014) (hereinafter cited as "Minutes") (on file with the author). The Minutes are unpublished but may be accessed by applying to the author.
The proposed sentencing scheme for felonies is as follows:

> § 6.06. Sentence of Imprisonment for Felony
> A person who has been convicted of a felony may be sentenced to imprisonment, as follows:
> (a) in the case of a felony of the first degree, for a term the minimum of which shall be fixed by the Court at not less than twenty ~~one year nor more than ten~~ years, and the maximum of which shall be life imprisonment;
> (b) in the case of a felony of the second degree, for a term the minimum of which shall be fixed by the Court at not less than ten ~~one year nor more than three~~ years, and the maximum of which shall be ~~ten~~ twenty years;
> (c) in the case of a felony of the third degree, for a term the minimum of which shall be fixed by the Court at not less than 1 year, ~~at not less than one year nor more than two years~~, and the maximum of which shall be ~~five~~ ten years;
> (d) in the case of a felony of the fourth degree, for a term the minimum of which shall be fixed by the Court, and the maximum of which shall be five years.

26. MODEL PENAL CODE § 210.2(2) (AM. LAW INST. 1985).

27. *Id.* at § 213.1(1).

28. *Id.* at § 222.1(2).

29. *Id.* at § 212.1.

30. *Id.* at § 210.3(2).

31. *Id.* at § 213.1(1).

32. *Id.* at § 222.1(2).

33. *Id.* at § 213.1(1).

34. *Id.* at § 210 (2).

35. *Id.* at § 221.1(2).

36. Minutes, *supra* note 26 (September 12, 2012).

37. *See, e.g.,* less serious forms of Criminal Mischief (Minutes, *supra* note 26 (December 2018)) and Obstruction (Minutes, *supra* note 26 (August 2019)); as well as crimes such as Criminal Trespass, (Minutes, *supra* note 26 (September 2018)), Public

The Model Code recognizes misdemeanors but does not divide them according to seriousness.[38] The Committee disagreed with this and divided misdemeanors into four classes, A through D.[39] Finally, the Model Code classifies regulatory offenses as violations,[40] which are not considered true crimes and, thus, not criminal.[41] The Committee adopted the violation category.[42]

As noted, the first article discussed *mens rea* and the most serious crimes against the person, the homicide crimes.[43] This article will continue with the other crimes against the person: assault and battery and related crimes, kidnapping and related offenses, and sex crimes.

First, I want to explain how I dealt with statutes in this article. If the statute is relatively short, I put it in the text. If the statute is discussed fully in the text, but is too long to put in the text, I put the statute in the footnotes to avoid distracting the reader. Statutes that are long and not necessary to understanding the text were added to the appendix. We used basically the same numbers as the Model Code, even if we did not base the statute on the Model Code. I am distinguishing the sections that were not based on the Model Code by simply designating those with sections numbers. If I am referring to the original version of the Model Code, I designated it as the original version Model Code.[44] I otherwise noted changes from the Model Code with underlining and underlined strikeouts. If we used the Mississippi statute as the basis for the proposed statute, I indicated changes from the Mississippi statute with italics and italicized strikeouts. I also drew extensively on the Model Code comments, since these comments are very helpful in understanding the rationale of the proposed statutes, especially

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Drunkenness (Minutes, *supra* note 26 (March 2012)), and Disorderly Conduct (Minutes, *supra* note 26 (March 2012)).

38. MODEL PENAL CODE § 6.08 (AM LAW INST. 1985).

39. *See* Minutes, *supra* note 26 (March 2012); (September 2014). The sentencing scheme for misdemeanors and violations is as follows:

§ 6.08

(a) Sentences of misdemeanors shall be a definite term of imprisonment in the county jail or to hard labor for the county, within the following limitations:

(1) For a Class A misdemeanor, not more than one year.

(2) For a Class B misdemeanor, not more than six months.

(3) For a Class C misdemeanor, not more than three months.

(4) For a Class D misdemeanor, not more than one month.

(b) A violation is punished by a fine of not more than ~~$200~~ <u>$250.</u>

40. *Id.* MODEL PENAL CODE § 1.04.5 (AM LAW INST. 1985).

41. *See* Johnson, *supra* note 2, at 113.

42. *See* Minutes, *supra* note 26 (August 2014).

43. *See* Johnson, *supra* note 2, at V.

44. I neglected to do this in the first article, using the Model Code designation throughout.

when we did not make many changes to the Model Code version. We will begin with assault, which we adopted from the Model Code.

III. Assault and Battery and Related Crimes

A. Assault

Article 211 of the Model Code deals with bodily injury that does not result in homicide, as well as situations in which bodily injury is threatened or risked.[45] These crimes are assault,[46] reckless endangerment,[47] and terroristic threats.[48] The Committee adopted the Model Code's version of assault with few changes. Although we did make some additions, there is no need to separately analyze the version the Committee is proposing and the Model Code. Mississippi actually based its current assault statute on the Model Code, adding some enhancements for assaulting designated public officials, as well as other situations,[49] which the Committee retained

45. *See* MODEL PENAL CODE Art. 211 cmt. at 170 (AM. LAW INST. 1980).

46. *See* MODEL PENAL CODE § 211.1 (AM. LAW INST. 1985).

47. *See id.* at § 211.2.

48. *See id.* at § 211.3.

49. This is the version of § 211.1 adopted by the Committee. Again, the regular text is the Model Code language, while the underlined portions are additions or changes to the Model Code. The italicized portions were taken from the Mississippi Code. *See* MISS. CODE ANN. § 97-3-7. This statute is also reproduced in Appendix C.

(1) Simple Assault. A person is guilty of assault if he:

(a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or

(b) criminally negligently causes bodily injury to another with a deadly weapon; or

(c) attempts by physical menace to put another in fear of imminent serious bodily injury.

Simple assault is a Class A misdemeanor, *except that Simple Assault is a Felony in the Fourth Degree if committed in the following circumstances against the following persons:*

(a) When acting within the scope of his duty, office or employment at the time of the assault: a statewide elected official; law enforcement officer; fireman; emergency medical personnel; public health personnel; social worker, family protection specialist or family protection worker employed by the Department of Human Services or another agency; Division of Youth Services personnel; any county or municipal jail officer; superintendent, principal, teacher or other instructional personnel, school attendance officer or school bus driver; any member of the Mississippi National Guard or United States Armed Forces; a judge of a circuit, chancery, county, justice, municipal or youth court or a judge of the Court of Appeals or a justice of the Supreme Court; district attorney or legal assistant to a district attorney; county prosecutor or municipal prosecutor; court reporter employed by a court, court administrator, clerk or

as well.[50] The Committee also added a domestic violence statute, patterned on the Mississippi statute, which had been adopted by the legislature.[51] The Committee further included the Model Code definitions—which Mississippi has not adopted—remedying the problem of undefined terms in the Mississippi statute.[52]

Assault[53] and battery,[54] at common law, were originally simple misdemeanors.[55] Similarly, at early common law, attempt to commit any crime was a misdemeanor.[56] This idea of punishing all attempts as misdemeanors was carried over into American jurisdictions, in which attempt was often not punished with significant severity.[57] Thus, at one

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deputy clerk of the court; public defender; or utility worker; or
(b) A legislator while the Legislature is in regular or extraordinary session or while otherwise acting within the scope of his duty, office or employment; or
(c) A person who is sixty-five (65) years of age or older or a person who is a vulnerable person, as defined in Section 43-47-5; or
(d) A child who is in the process of boarding or exiting a school bus and the actor is in the course of a violation of Section 63-3-615.

(2) Aggravated Assault. A person is guilty of aggravated assault if he:
(a) attempts to cause a serious bodily injury to another, or causes such injury purposely, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life; or
(b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon.

Aggravated assault under paragraph (a) is a felony of the second degree; aggravated assault under paragraph (b) is a felony of the third degree.
See Minutes, *supra* note 26 (April 2018).

50. *See Id.* italicized portion of the statute.

51. Section 211.X. *See* Appendix A for the complete statute. This statute was taken from the Mississippi assault statute, MISS. CODE ANN. § 97-3-7, which should otherwise be repealed. *See* Appendix C. I am not going to explain in detail current law in Mississippi that the Committee adopted. I will focus instead on the changes to Mississippi law that the Committee is proposing.

52. However, the court has recommended in *Fleming v. State*, 604 So. 2d 280, 293 (Miss. 1992), that the courts look at the Model Code's definition of "serious bodily injury." Although the Model Code defines bodily injury to require "physical pain, illness or any impairment," Mississippi has no definition of "bodily injury," which could lead to confusion. In *Reining v. State*, 606 So. 2d 1098, 1103 (Miss. 1992), for example, the court said that "although there are no degrees of bodily injury stated in the statute, a minor injury is a 'bodily injury' even though it may not be a traumatic injury."

53. *See* MODEL PENAL CODE Art. 211 cmt. at 176 (AM. LAW INST. 1980).

54. *See id.* at 175. The ALI decided to use the term assault to cover all of the conduct proscribed, although many of the situations are more accurately termed batteries because this is the traditional term for such criminal conduct. The ALI also considered that since assault is the more familiar term, keeping the familiar terminology would enhance the acceptability of the Model Code. *See id.* at 174-75 n.1.

55. *See id.*at 175 (battery); *see also id.* at 180 (assault).

56. MODEL PENAL CODE Art. 211 cmt. at 213 n. 13 (AM. LAW INST. 1980).

57. *See generally* WAYNE R. LAFAVE, CRIMINAL LAW § 11.2(a) (5th ed. 1986).

time, a defendant could get the death penalty for rape but could be charged only with a misdemeanor for an attempted rape.[58] In addition, attempt required the defendant to come very close to commission of the target offense.[59]

The Model Code's version of attempt, which the Committee adopted,[60] corrects both problems, punishing attempt as severely as the crime intended in most cases and requiring only a substantial step that strongly corroborates the defendant's intent, rather than requiring the defendant to be close to success.[61] Because attempt at common law was a misdemeanor, various versions of aggravated assault were devised by legislation to punish more seriously such crimes as attempted murder and attempted rape.[62] Because attempt is punished more severely under the Model Code, there is no longer the same need for aggravated assault.[63] Nevertheless, assault under the Model Code was still divided into simple and aggravated assault, but without the pressing need to fill in the gap left by the earlier practice of punishing all attempts as misdemeanors.[64]

1. Simple Assault

Simple assault combines three related ideas, including common law assault, common law battery, and assault under the definition derived from torts, which is creating apprehension of a battery.[65] Simple assault is defined as: (1) attempting to cause or "purposely, knowingly, or recklessly" causing bodily injury to another;[66] (2) negligently causing "bodily injury to another with a deadly weapon,"[67] or (3) attempting "by physical menace to put another in fear of imminent serious bodily injury."[68]

The common law defined assault as attempt to commit a battery.[69] Thus, under the Model Code, the first kind of assault, attempting to cause bodily injury, is derived from attempting to commit a battery; however, the drafters did not believe that attempt to cause merely an offensive touching, which was sufficient for common law battery, should be sufficient for

58. MODEL PENAL CODE Art. 211 cmt. at 304 (AM. LAW INST. 1980).
59. *Id.* at 184.
60. *See* Minutes, *supra* note 26 (October, November 1996).
61. MODEL PENAL CODE § 5.01 (AM. LAW INST. 1985).
62. *See* MODEL PENAL CODE Art. 211 cmt. at 181-82.
63. *See id.*
64. *See id.*
65. *See infra* discussion accompanying notes 70-94.
66. MODEL PENAL CODE § 211.1(1)(a) (AM. LAW INST. 1985).
67. *Id.* Section 211.1(1)(b).
68. *Id.* Section 211.1(1)(c).
69. *See generally* LAFAVE, *supra* note 58 at § 16.1(a).

criminal liability.[70] Consequently, the Model Code requires that the defendant attempt to cause bodily injury, which the Model Code defines as "physical pain, illness or any impairment of physical condition."[71] The Committee adopted this definition.[72] While under the common law, it was possible that threatening to spit on another would be sufficient to be an assault, under the Model Code, this would not be sufficient. Other forms of offensive touching that do not constitute bodily injury are treated elsewhere.[73]

In addition, the Model Code does not require that assault be closer than other attempts to the completion of the target crime of battery, as required by the common law,[74] by applying the general attempt statute to assault.[75] Attempt is defined in section 5.01 of the Model Code as purposely taking a substantial step that strongly corroborates the defendant's intent.[76] Thus, assault will now include preparatory conduct that should be intercepted.[77] Under this definition, the prior prevailing view

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70. *See* MODEL PENAL CODE Art. 211 cmt. at 185 (AM. LAW INST. 1980).

71. MODEL PENAL CODE § 211.0(2) (AM. LAW INST. 1985).
These are the definitions adopted by the Committee for this section. They are virtually unchanged from the proposed Model Code definitions. The stricken portion represents the only change:
§ 211.0. Definitions
In this Article, the definitions given in § 210.0 apply unless a different meaning plainly is required.
§ 210.0. Definitions.
In Articles 210-213, unless a different meaning plainly is required:
(1) "human being" means a person who has been born and is alive;
(2) "bodily injury" means physical pain, illness or any impairment of physical condition;
(3) "serious bodily injury" means bodily injury that creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ;
(4) "deadly weapon" means any firearm or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is ~~*known to be*~~ capable of producing death or serious bodily injury.
See Minutes, *supra* note 26 (April 2018). These definitions were inadvertently left out of the previous article that included the homicide crimes, to which these definitions also apply.

72. *Id.*

73. Such conduct may, for example, be dealt with as disorderly conduct under § 250.2 or as harassment under § 250.4. *See* MODEL PENAL CODE Art. 211 cmt. at 185 (AM. LAW INST. 1980).

74. *See id.* at 184.

75. *See id.*

76. MODEL PENAL CODE § 5.01 (AM. LAW INST. 1985).

77. MODEL PENAL CODE Art. 211 cmt. at 185 (AM. LAW INST. 1980).

that the defendant had to have the present ability to carry out the battery is consequently also not required.[78]

In keeping with tradition, the Model Code does not use the term "battery," but conduct that would be battery, is termed assault.[79] Therefore, the second form of simple assault is "purposely, knowingly or recklessly" causing "bodily injury to another."[80] This conduct would be simple battery under the common law,[81] except that battery under the common law could be committed if the defendant was criminally negligent.[82] The Model Code drafters thought that causing bodily injury through criminal negligence, which requires only an objective standard, was insufficiently culpable to be criminal. The thought is that if the defendant inadvertently caused bodily injury, he should not be criminally liable.[83] Thus, if the defendant was criminally negligent in causing only bodily injury, he must be using a deadly weapon to be guilty of assault.[84]

As fully discussed in my first article, although the Model Code uses the term "negligence" throughout, the definition of "negligence" comports with the definition of criminal negligence.[85] This is a major defect in the Model Code that the Committee and other states have rectified by using the term "criminal negligence" instead of merely "negligence."[86]

Finally, because most states incorporated the tort definition of assault into their criminal laws, the drafters of the Model Code added a third definition of simple assault. Under this definition, the defendant is guilty of simple assault if he "attempts by physical menace to put another in fear of imminent serious bodily injury**.**"[87] The drafters believed that because assuming a threatening posture is too common and equivocal, the threat required should be "serious bodily injury."[88] Also, the drafters believed

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78. *Id.* at 192.

79. *Id.* at 176 n.14. "The [Model Code] offense was then renamed 'assault' on the grounds that use of the familiar term would enhance acceptability of the Model Code proposals and that the offense as redefined was more in accord with common usage of that term." *Id.* at 175.

80. MODEL PENAL CODE § 211.1 (1)(a) (AM. LAW INST. 1985).

81. MODEL PENAL CODE Art. 211 cmt. at 184 (AM. LAW INST. 1980).

82. *See generally* LAFAVE, *supra* note 58 § 16.2(C).

83. *See* MODEL PENAL CODE Art. 211 cmt. at 189 (AM. LAW INST. 1980).

84. MODEL PENAL CODE § 211.1(1)(b) (AM. LAW INST. 1985).

85. MODEL PENAL CODE § 2.02(2)(d) (AM. LAW INST. 1985).

86. *See* Johnson, *supra* note 2, discussion accompanying notes 111-113. It should be noted that Mississippi adopted the Model Code's version of assault and retained the language of the Model Code relating to negligence without defining it as criminal negligence. *See* MISS. CODE ANN. § 97-3-7. This statute is also reproduced in Appendix C.

87. MODEL PENAL CODE § 211.1(1)(c) (AM. LAW INST. 1985).

88. *See* MODEL PENAL CODE Art. 211 cmt. at 192-93 (AM. LAW INST. 1980).

that merely physically menacing bodily injury, which is defined in part as "physical pain," could be too trivial to be criminalized.[89] The Committee agreed with this position, so that physically menacing bodily injury is insufficient, and that serious bodily injury should be threatened.[90] If the defendant actually intends to cause bodily injury, he will be guilty of assault under the first subsection.[91] In addition he may also be guilty of the felony of terroristic threatening under Section 211.3.[92] Other situations involving verbal, rather than physical menace, may constitute other crimes, such as attempted robbery.[93]

The Committee did make two changes to the Model Code's version of simple assault. One was the addition of enhanced punishments based on official status and other circumstances of the victim, which was preferred by the legislature in the current statute.[94] The second change was to eliminate some of the following: The Model Code added to simple assault that "simple assault is a misdemeanor, *unless committed in a fight or scuffle entered into by mutual consent, in which case, it is a petty misdemeanor*." The Committee proposes that the italicized portion not be included.[95] In addition, the Committee classified assault as a Class A misdemeanor, except for the victim status enhancements noted above, which would be fourth degree felonies.[96] The following forms of aggravated assault are classified as felonies.

2. Aggravated Assault

Even though the need for aggravated forms of assault is not as pressing under the Model Code proposals because of the more serious punishment for attempt as discussed above,[97] there is still a need for some forms of aggravated assault not covered by attempt to commit other violent felonies.[98] Thus, the Model Code punishes attempting to "cause serious bodily injury" or causing "such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of

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89. *Id.*

90. *See* Minutes, *supra* note 26 (April 2018).

91. *See supra* note 50.

92. *See* MODEL PENAL CODE § 211.3 (AM. LAW INST. 1985), discussed *infra Section* III. C.

93. *See* MODEL PENAL CODE Art. 211 cmt. at 193 (AM. LAW INST. 1980).

94. *See* supra note 50; Minutes, *supra* note 26 (January 2020).

95. Minutes, *supra* note 26 (April 2018).

96. *See supra* note 50.

97. *See supra* discussion accompanying notes 57-65.

98. *See infra* discussion accompanying notes 100-112.

human life" as aggravated assault, a second degree felony.[99] The attempt to "cause or purposely or knowingly" causing "bodily injury to another with a deadly weapon" is classified as a third degree felony.[100]

It is obvious that attempting to inflict serious bodily injury should be an aggravating factor for simple assault of the attempted-battery type, which only requires attempted bodily injury. It is also clear that causing such injury should be an aggravating factor for simple assault of the type that would otherwise be simple battery under the common law.[101] Similarly, "causing bodily injury with a deadly weapon" is a common aggravation in statutory forms of aggravated assault.[102] However, causing such injury "purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life" requires some explanation.

This explanation begins with the definition of murder under the Model Code, which includes criminal homicide committed purposely, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life.[103] Because attempt requires that the defendant act purposefully, the only type of murder that may be attempted is purposeful murder.[104] The other forms of murder that require only knowledge or extreme recklessness may not be punished as attempt.[105] Thus, the common law result would be that one who was acting extremely recklessly and brought about the death of a person was guilty of a serious felony. However, one with the exact same state of mind whose victim did not happen to die was guilty of misdemeanor battery, if the victim was injured. If the victim was not injured, the actor would be not be guilty of any crime.[106] Therefore, the Model Code has filled an important gap by punishing as a second degree felony conduct that results in serious bodily injury, when the defendant is acting with the state of mind required for murder but is not acting purposefully.[107]

As noted, a deadly weapon is a common aggravating factor, so when the defendant attempts to cause bodily injury with a deadly weapon, he is

99. MODEL PENAL CODE § 211.1(2)(a) (AM. LAW INST. 1985).
100. *Id.* at § 211.1(2)(b).
101. *See supra* discussion accompanying notes 54-57.
102. MODEL PENAL CODE Art. 211 cmt. at 191 (AM. LAW INST. 1980).
103. MODEL PENAL CODE § 210.1(1). *See* Johnson, *supra* note 2, at n.183.
104. *See generally* LAFAVE, *supra* note 58 at § 11.3(a) (5th ed. 1986).
105. *Id*.
106. MODEL PENAL CODE Art. 211 cmt. at 189 (AM. LAW INST. 1980). The person who shoots at random into a crowd and does not injure anyone will be guilty of reckless endangerment. *See infra* discussion accompanying notes 120-26.
107. *Id.*

guilty of a third degree felony.[108] "Deadly weapon" is defined by the Model Code as "any firearm or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is known to be capable of producing death or serious bodily injury."[109] The Committee adopted this definition but eliminated the requirement that the weapon "be known to be" capable of producing death or serious bodily injury.[110] The Model Code broadly defined deadly weapon to account for various instruments that a defendant might choose to bring about the bad result, such as automobiles, poisons, chemicals, explosives, as well as the obvious, guns and knives.[111]

As discussed above, the Mississippi legislature added various other aggravating factors that the Committee incorporated into the statute, including assault against public officials or a child boarding a school bus.[112] Finally, as noted earlier, the legislature passed a separate domestic violence statute that the Committee retained as a separate statute, making no changes, except to conform the punishment to the Committee's version of the Model Code penalties.[113]

The two other offenses in Article 211 fill in gaps left in the common law, which were only partially filled by specific statutes.[114] Section 211.3, terroristic threats,[115] penalizes serious behavior that went unpunished under the common law because it was not considered an assault or an attempt under the common law.[116] Section 211.2, reckless endangering, covers other possible situations in which the defendant could recklessly endanger another, other than reckless driving or reckless use of firearms, which were commonly specifically proscribed.[117]

B. Reckless Endangering

Prior to the Model Code, only discrete forms of reckless behavior not resulting in injury were commonly criminalized, such as driving recklessly and reckless use of firearms.[118] Some states added more

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108. MODEL PENAL CODE § 211.1(2)(b) (AM. LAW INST. 1985).
109. *Id.* at § 210.0(4) (AM. LAW INST. 1985).
110. Minutes, *supra* note 26 (April, 2018).
111. MODEL PENAL CODE Art. 211 cmt. at 191 (AM. LAW INST. 1980).
112. Minutes, *supra* note 26 (January 2020).
113. Section 211.X Domestic Violence. See Appendix A for the full statute. MISS. CODE ANN. § 97-3-7 would be repealed by the foregoing. *See* Appendix C.
114. MODEL PENAL CODE Art. 211 cmt. at 195 (AM. LAW INST. 1980).
115. MODEL PENAL CODE § 211.3 (AM. LAW INST. 1985).
116. MODEL PENAL CODE Art. 211 cmt. at 195-96 (AM. LAW INST. 1980).
117. MODEL PENAL CODE § 211.2 (AM. LAW INST. 1985).
118. MODEL PENAL CODE Art. 211 cmt. at 195 (AM. LAW INST. 1980).

categories, such as dropping objects from bridges and placing an obstruction on a railroad track.[119] The Model Code replaces such statutes with a general prohibition of any reckless conduct that places another in danger of death or serious bodily injury. The Committee adopted the following version of reckless endangering:

> § 211.2. Recklessly Endangering Another Person.
> A person commits a <u>Class A</u> misdemeanor if he recklessly engages in conduct <u>that</u> ~~which~~ places or may place another person in danger of death or serious bodily injury. Recklessness and danger shall be presumed where a person knowingly points a firearm at or in the direction of another, whether or not the actor believed the firearm to be loaded.[120]

The Model Code added a presumption of recklessness when the defendant merely aims a firearm at another person.[121] If harm actually results, the defendant would be guilty of assault[122] or manslaughter, depending on the severity of the result.[123] Obviously, the defendant who acts with a reckless state of mind that would have resulted in a felony, if the criminally proscribed result had occurred, should be criminally liable even if the result does not occur. The crime is a broad catchall, so the Committee classified it as a Class A misdemeanor.[124]

In addition to reckless endangering, the Model Code filled another gap regarding threats to commit a crime to intimidate a person or the general public by developing the new crime of "terroristic threats."[125]

C. Terroristic Threats

Section 211.3 deals with situations in which the defendant threatens to commit a crime of violence in order to terrorize another person or a group of persons. The section applies to serious threats that impair public order or personal security.[126] Prior law usually covered only criminal coercion, which is also proscribed generally in section 215.5,[127] or crimes that are

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119. *Id.* at 195-96.

120. MODEL PENAL CODE §211.2 (AM. LAW INST. 1985).

121. *Id.*

122. *See supra* note 50.

123. If the incident resulted in the death, the defendant would be guilty of reckless manslaughter. *See* Johnson, *supra* note 2, at V. B.2 (c).

124. MODEL PENAL CODE Art. 211 cmt. at 200-02 (AM. LAW INST. 1980).

125. MODEL PENAL CODE § 211.3 (AM. LAW INST. 1985).

126. MODEL PENAL CODE Art. 211 cmt. at 205 (AM. LAW INST. 1980).

127. MODEL PENAL CODE § 215.5 (AM. LAW INST. 1985).

designed to force the victim to engage in prescribed behavior.[128] For example, robbery requires a threat of violence to compel theft,[129] and extortion requires a threat that also may include a threat of violence.[130] Both of these crimes are also covered specifically in the Model Code.[131] Prior law, however, did not proscribe a threat simply for the purpose of terrorizing, which is the purpose of terroristic threats under section 211.3.[132]

A terroristic threats charge is designed to punish the person who makes phone calls or writes letters to incite fear and distress in the victim, rather than to extort money. In addition, the crime covers the situation in which the defendant makes the threat to cause evacuation of a public place and to cause serious alarm and inconvenience, regardless of whether the defendant intends to carry out the threat.[133]

The Committee made some changes to the Model Code's proposal.[134] The underlined portions were added by the Committee, and the stricken portions were deleted from the original Model Code version:

> § 211.3. Terroristic Threats
> A person is guilty of a felony of the third degree if he <u>explicitly or implicitly</u> threatens to commit ~~any crime of violence~~ <u>serious bodily injury, kidnapping or arson</u> with purpose to terrorize another or to cause evacuation of a building, place of assembly, or facility of public transportation, or otherwise to cause serious public inconvenience, or in reckless disregard of the risk of causing such terror or inconvenience.[135]

The Committee added the language "explicitly or implicitly" to cover a threat such as "I know where your children are," which is an implicit, but not an explicit, threat. The Committee believed that for the defendant to be liable, he should not have to specify a crime to the victim,

128. MODEL PENAL CODE Art. 211 cmt. at 205 (AM. LAW INST. 1980).

129. *Id.*

130. *Id.* The Committee is proposing to include extortion as a type of robbery. *See* Minutes *supra* note 26 (August 2020).

131. MODEL PENAL CODE §§ 221.1 and 223.4. Sex crimes discussed *infra* at V. also may involve threats.

132. MODEL PENAL CODE Art. 211 cmt. at 205 (AM. LAW INST. 1980). Mississippi actually does have a threatening letter statute, but the punishment makes it a misdemeanor. MISS. CODE ANN. § 97-3-85. This statute would be replaced by the Terroristic Threats statute. *See infra* discussion accompanying note 136.

133. MODEL PENAL CODE Art. 211 cmt. at 207 (AM. LAW INST. 1980).

134. Minutes, *supra* note 26 (June 2018).

135. MODEL PENAL CODE § 211.3 (AM. LAW INST. 1985).

but only make an implicit threat.[136] We also defined the crimes that would be subject to the threat requirement to preclude inclusion of a threat to commit a simple assault, which would not be serious enough to justify punishment for a third degree felony.[137] Finally, the defendant does not have to intend to terrorize but must only act "in reckless disregard of causing such terror or inconvenience."[138] If the victim is restrained in order to terrorize him, the crime would relate to kidnapping and related crimes, which we will discuss next.

IV. KIDNAPPING AND RELATED CRIMES

Article 212 of the Model Code was intended to restructure the law of kidnapping.[139] The main problem with many kidnapping laws, as exemplified by the current Mississippi law,[140] is that the laws are too broad, imposing severe penalties for what could be trivial conduct.[141] For this reason, the Model Code divided kidnapping and related offenses into crimes of diminishing seriousness, from section 212.1, which may be a first degree felony; to felonious restraint in section 212.2, which is a third degree felony; to false imprisonment, which is a misdemeanor.[142] Article 212 also includes the related crimes of interference with custody in section 212.4 and criminal coercion in section 212.5.[143]

The Committee changed the Model Code's term "kidnapping" under section 212.1 to "Aggravated Kidnapping" and rearranged the

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136. Minutes, *supra* note 26 (April 2018). This statute would replace the following Mississippi statute:

> § 97-3-85. Threats and intimidation; by letter or notice
> If any person shall post, mail, deliver, or drop a threatening letter or notice to another, whether such other be named or indicated therein or not, with intent to terrorize or to intimidate such other, he shall, upon conviction, be punished by imprisonment in the county jail not more than six months, or by fine not more than five hundred dollars, or both.

The Committee is still working on an internet bullying and assisted suicide statute.

137. *See supra* note 26.

138. MODEL PENAL CODE § 211.3 (AM. LAW INST. 1985).

139. MODEL PENAL CODE Art. 212 cmt. at 210 (AM. LAW INST. 1980).

140. *See infra* discussion accompanying notes 177-81.

141. MODEL PENAL CODE Art. 212 cmt. at 210 (AM. LAW INST. 1980).

142. MODEL PENAL CODE Art. 212 cmt. at 217 (AM. LAW INST. 1980).

143. The Committee had added Interstate Removal of a Child Under Age Fourteen by Noncustodial Parent or Relative but decided that since this statute was part of a uniform law, we would delete it in favor of the current Mississippi scheme. MISS. CODE ANN. § 97-3-51. *Compare* Minutes, *supra* note 26 (October 1998) *with* Minutes, *supra* note 26 (June 2018).

statute, as will be noted below.[144] However, the basic concept of the Model Code's most serious kidnapping offense was retained.[145] The Committee also designated section 212.2 as simply "kidnapping," again retaining the Model Code's basic idea expressed in the original version of section 212.2, which the Model Code termed "felonious restraint."[146]

A. Kidnapping (Aggravated Kidnapping)

Section 212.1 of the Model Code defines the most serious offense as kidnapping,[147] which, as noted, the Committee re-named "aggravated kidnapping."[148] This most serious form of kidnapping involves substantial removal or confinement for specified purposes: to hold for ransom or reward, to interfere with the performance of a governmental function, to inflict bodily injury or to terrorize anyone, or to facilitate the commission of a felony.[149] The removal or confinement must be by "force, threat or

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144. The Committee adopted the following:

Section 212.0 Definitions

> 1) In this article, the definitions given in Section 210.0 apply unless a different meaning plainly is required.
>
> 2) For purposes of this Article, "unlawful" or "unlawfully" refers to any ~~affirmative~~ violation ~~of legal duty, whether it amounts to a violation~~ of the criminal law, civil law, or administrative regulation.

Minutes, *supra* note 26 (August 2019). See *supra* note 72 for the definitions in Section 210.0 that apply.

145. Minutes, *supra* note 26 (June 2018).

146. *Id.*

147. MODEL PENAL CODE § 212.1 (AM. LAW INST. 1985).

148. Minutes, *supra* note 26 (June 2018).

149. This is the original Model Penal Code version:

> § 212.1 Kidnapping. A person is guilty of kidnapping if he unlawfully removes another from his place of residence or business, or a substantial distance from the vicinity where he is found, or if he unlawfully confines another for a substantial period in a place of isolation, with any of the following purposes:
>
> (a) to hold for ransom or reward, or as a shield or hostage; or
>
> (b) to facilitate commission of any felony or flight thereafter; or
>
> (c) to inflict bodily injury on or to terrorize the victim or another; or
>
> (d) to interfere with the performance of any governmental or political function.
>
> Kidnapping is a felony of the first degree unless the actor voluntarily releases the victim alive and in a safe place prior to trial, in which case it is a felony of the second degree. A removal or confinement is unlawful within the meaning of this section if it is accomplished by force, threat or deception, or, in

deception (or in the case of a person who is under the age of fourteen or incompetent, without consent of a parent, guardian or other person responsible for general supervision of his welfare)."[150] Under the Model Code, kidnapping is a felony of the first degree unless the victim is voluntarily released without serious bodily injury prior to trial. If not, kidnapping is a felony of the second degree.[151] The Committee agreed with most of the Model Code's ideas, but rearranged, re-named, and re-worded the statute as follows:

> Section 212.1 Aggravated Kidnapping.
> A person is guilty of aggravated kidnapping if, by force, threat or deception (or in the case of a person who is under the age of 14 or incompetent, without consent of a parent, guardian or other person responsible for general supervision of his welfare) he:
>
> (a) confines or removes another to hold for ransom or reward, or as a shield or hostage; or
>
> (b) removes another from his place of residence or business, or moves him a substantial distance from the vicinity where he is found, or confines another for a substantial period in a place of isolation, with any of the following purposes:
>
> (1) to facilitate commission of any felony or flight thereafter; or
>
> (2) to inflict serious bodily injury on or to terrorize the victim or another.
>
> Aggravated Kidnapping is a felony of the first degree unless the defendant establishes, as an affirmative defense, that the defendant voluntarily released the victim without serious bodily injury in a safe place prior to trial, in which case it is a felony of the second degree. That the defendant voluntarily released the victim without serious bodily injury and in a safe place prior to trial mitigates aggravated kidnapping

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> the case of a person who is under the age of 14 or incompetent, if it is accomplished without the consent of a parent, guardian or other person responsible for general supervision of his welfare.

MODEL PENAL CODE § 212.1 (AM. LAW INST. 1985).

150. MODEL PENAL CODE Art. 211 cmt. at 223-24 (AM. LAW INST. 1980).

151. *Id.* at 227.

> from a first degree felony to a second degree felony and need not be proven in any prosecution under this section.[152]

At noted above, one of the main deficiencies in the then-current statutes cited by the drafters of the Model Code was that kidnapping could apply to trivial conduct that amounted to some exercise of physical control over another person, such as a situation in which a defendant merely held another person by the arm to make a point.[153] Thus, what would otherwise be kidnapping was divided into three separate crimes, punishing less serious forms of physical restraint more proportionately. The challenge was to distinguish this other less serious conduct from kidnapping.[154]

One of the important innovations of the Model Code was to confine kidnapping to specified purposes. In addition to requiring that the defendant use force, threat, or deception,[155] the defendant must also remove the victim with a purpose to: (a) to hold the victim for ransom or reward, or as a shield or hostage, or (b) to facilitate commission of any felony or flight thereafter, or (c) to inflict bodily injury on or to terrorize the victim or another, or (d) to interfere with the performance of any governmental or political function.[156] The Committee adopted purposes (a) through (c), but did not adopt subsection (d) for reasons discussed below.[157]

Another problem with earlier kidnapping statutes that had been developed in this country was derived from substantially weakening or eliminating the common law requirement of asportation or moving the victim. Under these statutes, kidnapping could be charged in any type of unlawful physical control of another, such as in the case of rape.[158] The need for removing the asportation requirement might have been caused by inadequacies in the law of attempt, as discussed with regard to the assault crimes.[159]

To summarize the earlier discussion, at common law, attempt to commit any crime was a misdemeanor.[160] The Model Code's version of attempt punishes attempt as severely as the crime intended in most cases. Attempt under the Model Code also requires only that the defendant's act

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152. Minutes, *supra* note 26 (June 2018). Compare this version with the Model Code version cited *supra* note 150.

153. MODEL PENAL CODE Art. 212 cmt. at 220 (AM. LAW INST. 1980).

154. *Id.*

155. Or, in the case of a child under fourteen or an incompetent person, without consent of the parent or guardian. MODEL PENAL CODE § 212.1 (AM. LAW INST. 1985).

156. MODEL PENAL CODE § 212.1 (AM. LAW INST. 1985).

157. *See infra* discussion accompanying note 167.

158. MODEL PENAL CODE Art. 211 cmt. at 212 (AM. LAW INST. 1980).

159. *See supra* discussion accompanying notes 57-63.

160. MODEL PENAL CODE Art. 212 cmt. at 213 (AM. LAW INST. 1980).

be a substantial step to be sufficient for attempt, rather than requiring the defendant to be close to success.[161] Therefore, using kidnapping to punish behavior that is preparation for another crime is no longer necessary.[162]

The Committee agreed with the idea that kidnapping should contemplate unlawful substantial removal or confinement with regard to the other specified purposes, but thought that "holding for ransom and using as a shield" should be treated as aggravated kidnapping without requiring that the victim be moved a substantial distance.[163] Thus, if the defendant removes or confines the victim to hold him for ransom or to use him as a hostage, he is guilty of aggravated kidnapping. Otherwise, to be guilty of kidnapping under section 212.1, the defendant must—with purpose to inflict serious bodily injury or to terrorize the victim or to facilitate a felony—remove the victim from his residence or move him a substantial distance or confine the victim for a substantial period of time.[164]

One of the important innovations of the Model Code was to limit kidnapping to specified purposes, as noted above.[165] The Committee agreed that the following are important and clear purposes: to hold for ransom or reward, to use the victim as a shield or hostage, to terrorize the victim, or to facilitate a crime. However, with regard to the purpose of interfering "with the performance of any governmental or political function," the Committee feared that interference with a public function would be too broad, so we are not proposing the adoption of that part of the Model Code.[166]

The original version of the Model Code requires that the confinement or removal must be "unlawful," which is defined as "by force, threat or deception."[167] However, in the case of a child under fourteen or one who is incompetent, the thought was that either could be enticed without consent of a guardian, so that force, threat, or deception was not a necessary requirement. The Committee re-drafted the statute, so that there is no need to specify that the confinement or removal is unlawful because the purposes for which the person is confined or removed would clearly be unlawful: to hold for ransom or as hostage or to commit a crime or to terrorize him. The Committee believed that the word "unlawful" in this statute would cause confusion.[168]

161. MODEL PENAL CODE § 5.01 (AM. LAW INST. 1985).
162. MODEL PENAL CODE Art. 212 cmt. at 213 (AM. LAW INST. 1980).
163. Minutes, *supra* note 26 (June 2018).
164. *Id.*
165. *See supra* discussion accompanying notes 148-150.
166. Minutes, *supra* note 26 (June 2018).
167. *Id.*
168. Minutes, *supra* note 26 (June 2018).

The Committee agreed with the Model Code's idea that, if the defendant voluntarily releases the victim without serious bodily injury before the trial, the crime should be reduced to a second-degree felony. The extreme sanction of a first degree felony, which is also imposed only for murder and a very few aggravated felonies,[169] should be reserved for situations in which the victim is not released voluntarily or is seriously injured.[170] Section 210.0(3), as adopted by the Committee, defines "serious bodily injury" as any physical injury that "creates a substantial risk of death or that causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ."[171] The rationale is to encourage the defendant to voluntarily release the victim alive and not seriously harmed. The great fear in all kidnapping cases is that the victim will be killed in the process. Deterring this result is surely a worthy goal.[172]

The Committee believed that the affirmative defense of "releasing the victim prior to trial" should be clarified, in addition to the other changes discussed above. The Committee reporter, Matthew Steffey, redrafted the statute to reflect these changes, as he often did, and we adopted this version, dividing the crime into aggravated kidnapping and kidnapping,[173] the latter having been denominated "felonious restraint" in the original Model Code version.[174] We also clarified that, as opposed to the usual procedure for affirmative defenses under the Model Code, the prosecution does not have the burden of disproving this affirmative defense once it is raised.[175]

The current Mississippi statute concerning kidnapping suffers from all the deficiencies cited by the drafters of the Model Code.[176] First, it could

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169. MODEL PENAL CODE § 212.1 (AM. LAW INST. 1985).

170. *Id.*

171. Minutes, *supra* note 26 (April 2018); note 72.

172. MODEL PENAL CODE Art. 212 cmt. at 233 (AM. LAW INST. 1980).

173. Minutes, *supra* note 26 (June 2018).

174. *See infra* notes 183-84.

175. *Compare infra* note 256 *with* discussion accompanying notes 174-76.

176. MISS. CODE ANN. § 97-3-53. Kidnapping; punishment

> Any person who, without lawful authority and with or without intent to secretly confine, shall forcibly seize and confine any other person, or shall inveigle or kidnap any other person with intent to cause such person to be confined or imprisoned against his or her will, or without lawful authority shall forcibly seize, inveigle or kidnap any vulnerable person as defined in Section 43-47-5 or any child under the age of sixteen (16) years against the will of the parents or guardian or person having the lawful custody of the child, upon conviction, shall be imprisoned for life in the custody of the Department of Corrections if the punishment is so fixed by the jury in its verdict. If the jury fails to agree on fixing the

apply to trivial conduct. In addition, the same conduct by different defendants could be punished by a sentence from one year to thirty years,[177] a defect in the Mississippi criminal statutes generally, and one of the main reasons Mississippi ranks dead last among criminal codes.[178] The current statute does not require asportation or even confinement for a substantial period of time, so that kidnapping could be charged in addition to other crimes against the person that require restraint, such as rape.[179]

For these reasons, this statute would be repealed by the adoption of sections 212.1-3. Section 212.2 (felonious restraint) and section 212.3 (false imprisonment) are lesser included offenses to kidnapping[180] and will now be discussed.

B. Felonious Restraint (Kidnapping)

The Committee adopted the Model Code version of felonious restraint,[181] renaming it simply "kidnapping."[182] I will refer to it as "simple kidnapping" for purposes of this discussion to distinguish it from the more serious form of the crime, which the Committee denominated "aggravated kidnapping." The Committee proposes the following:

> Section 212.2 Kidnapping
> A person is guilty of kidnapping if he knowingly:
> (a) restrains another unlawfully in circumstances exposing him to risk of serious bodily injury; or
> (b) holds another in a condition of involuntary servitude.
> Kidnapping is a felony of the third degree.[183]

> penalty at imprisonment for life, the court shall fix the penalty at not less than one (1) year nor more than thirty (30) years in the custody of the Department of Corrections.
> This section shall not be held to repeal, modify or amend any other criminal statute of this state.

177. *Id.*

178. *See* Johnson, *supra* note 2, at IV.

179. For example, rape requires restraint. *See infra* discussion accompanying note 290.

180. *See* Appendix D.

181. MODEL PENAL CODE § 212.2 (AM. LAW INST. 1985). Original Model Penal Code version:

Section 212.2 Felonious Restraint
A person commits a felony of the third degree if he knowingly:
(a) restrains another unlawfully in circumstances exposing him to risk of serious bodily injury; or
(b) holds another in a condition of involuntary servitude.

182. Minutes, *supra* note 26 (June 2018).

183. *Id.*

Section 212.2 applies when the defendant holds another in involuntary servitude or unlawfully restrains another in such a manner as to expose him to risk of serious bodily injury.[184] Section 212.2 requires only that the victim be subjected to the *risk* of serious bodily injury.[185]

Simple kidnapping is distinguished from aggravated kidnapping by eliminating the elements of substantial removal or confinement required for aggravated kidnapping, as well as defining less serious purposes than those required for aggravated kidnapping.[186] For example, if a defendant unlawfully restrains another person for an insubstantial period of time and exposes him to a risk of serious bodily injury even in a public place, he may be guilty of kidnapping but not aggravated kidnapping. In such cases, the defendant has not substantially removed or isolated the victim from protection of the law, which could have increased the dangerousness of the crime. Simple kidnapping does not require the specified purposes of subjecting the victim to serious bodily injury, terrorizing or holding him for ransom or as a hostage, or facilitating the commission of a crime.[187] For example, if the defendant uses a weapon to force the victim to drive him to another place, he is guilty of aggravated kidnapping if he is escaping from a bank robbery. If he is not fleeing the commission of a crime and has none of the other purposes specified for aggravated kidnapping but just needs a ride, he may be guilty of simple kidnapping. This is because he is armed and is exposing the victim to risk of serious bodily harm.[188] Simple kidnapping is still a serious felony of the third degree.[189]

While aggravated kidnapping requires that the defendant act purposefully, in other words that he intends one of the specified purposes, simple kidnapping requires the defendant to act knowingly, which means that he must know that "his conduct is of that nature or that such circumstances exist."[190] Accordingly, he must be aware that he is unlawfully restraining his victim and exposing him to the risk of danger.

In simple kidnapping, the action giving rise to a risk of danger must amount to unlawful restraint. Because aggravated kidnapping requires serious purposes, the necessity of adding the term "unlawful" to the statute is obviated. However, sections 212.2 and 212.3 do not require the same purposes. Consequently, for simple kidnapping and false imprisonment, there is a need for the restraint to be unlawful, which the Committee defined as:

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184. See *supra* note 72 for the definition of serious bodily injury.
185. MODEL PENAL CODE § 212.2 (AM. LAW INST. 1985).
186. MODEL PENAL CODE Art. 212 cmt. at 240 (AM. LAW INST. 1980).
187. *Id.* at 241.
188. *Id.*
189. MODEL PENAL CODE § 212.1 (AM. LAW INST. 1985).
190. MODEL PENAL CODE § 2.02(3) (AM. LAW INST. 1985).

> Section 212.0 Definitions
>
> . . . .
>
> 2) For purposes of this Article, "unlawful" or "unlawfully" refers to any ~~affirmative~~ violation ~~of legal duty, whether it amounts to a violation~~ of the criminal law, civil law, or administrative regulation.[191]

This definition applies to the final form of unlawful restraint, section 212.3, False Imprisonment, as well.

As discussed below with regard to section 212.4 (interference with custody), restraint by one parent in violation of a custody order would be included within the prohibition of section 212.2 as "unlawful" conduct. However, the purposes required for kidnapping, involuntary servitude or risk of serious bodily injury, would generally not be present. If they were, the non-custodial parent could be guilty of kidnapping, but not aggravated kidnapping, which requires that the child be taken without consent of a parent.[192] The effect of all this is to include within the kidnapping offense removal of a child under the age of fourteen by a stranger without the consent of an appropriate guardian. The offense was not designed to broaden liability for parental conduct nor to extend the offense of kidnapping into intra-family custody disputes.[193]

We will now look at false imprisonment, the least serious form of unlawful restraint.

C. False Imprisonment

The Committee adopted the Model Code version of false imprisonment, classifying it as a Class A misdemeanor:[194]

> Section 212.3 False Imprisonment
>
> A person commits a Class A misdemeanor if he knowingly restrains another unlawfully so as to interfere substantially with his liberty.[195]

While simple kidnapping under section 212.2 includes unlawful restraint that exposes the victim to risk of serious bodily injury or that holds another

191. Minutes, *supra* note 26 (July 2019).
192. MODEL PENAL CODE § 212.1 (AM. LAW INST. 1985).
193. MODEL PENAL CODE Art. 212 cmt. at 251 (AM. LAW INST. 1980).
194. Minutes, *supra* note 26 (June 2018).
195. MODEL PENAL CODE § 212.3 (AM. LAW INST. 1985).

in involuntary servitude,[196] false imprisonment requires only that the defendant "knowingly restrain another unlawfully so as to interfere substantially with his liberty."[197] Both offenses require knowledge of the unlawful nature of the restraint,[198] as defined above.[199] The restraint must be unlawful, so that restraint of a child by a parent, for example, would not be false imprisonment; however, restraint of a child unlawfully by another adult would constitute false imprisonment. The restraint must also "substantially" interfere with the victim's liberty to preclude application in situations that may justify civil, but not criminal, sanction.[200]

Because of the serious purposes required for simple kidnapping, it is a felony of the third degree, while false imprisonment is a misdemeanor,[201] which the Committee classified as a Class A misdemeanor.[202] Furthermore, criminal coercion under section 212.5, discussed below,[203] may cover other situations in which the victim's liberty is interfered with.[204] Because of the possibly broad coverage of section 212.3 and because more serious conduct is punished in other sections, a Class A misdemeanor punishment was considered appropriate.[205]

The next statutes are related to kidnapping, but without the requirement of physical restraint. While simple restraint of a child by a parent would not be considered criminal, interfering with custody of a child could be.

D. Interference With Custody

Section 212.4 defines the offense of interference with custody.[206] The offense applies to situations in which the defendant takes or entices a

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196. MODEL PENAL CODE § 212.2 (AM. LAW INST. 1985).

197. MODEL PENAL CODE § 212.3 (AM. LAW INST. 1985).

198. *Compare* MODEL PENAL CODE § 212.2 (AM. LAW INST. 1985) *with* MODEL PENAL CODE § 212.3 (AM. LAW INST. 1985).

199. Section 212.0(2), as added by the Committee. *See supra* discussion accompanying note 192.

200. MODEL PENAL CODE Art. 212 cmt. at 247 (AM. LAW INST. 1980).

201. *Compare* MODEL PENAL CODE § 212.3 *with* MODEL PENAL CODE § 212.2 (AM. LAW INST. 1985).

202. Minutes, *supra* note 26 (June 2018).

203. *See infra* Section IV. E.

204. In addition, MODEL PENAL CODE §243.1 (AM LAW INST. 1985) applies to restraint amounting to official oppression, such as illegal arrest. See Minutes, *supra* note 26 (July 2011) for the Committee's version of §243.1.

205. Minutes, *supra* note 26 (June 2018).

206. MODEL PENAL CODE § 212.4 (AM LAW INST. 1985). The committee originally adopted a statute borrowed from the Uniform Child Custody Act but decided to retain the uniform act as it stands in the Mississippi Code. *See* Minutes, *supra* note 26 (June 2018).

child or committed person from lawful custody. The Committee adopted the Model Code version, with a few changes, as noted:

> Section 212.4
> (1) Custody of Children. A person commits an offense if he knowingly or recklessly takes or entices any child under the age of 18 from the custody of its parent, guardian or other lawful custodian, when he has no privilege to do so. It is an affirmative defense that:
>
> > (a) the actor reasonably believed that his action was necessary to preserve the child from danger to its welfare; or
> > (b) the child, being at the time not less than 14 years old, was taken away at its own instigation without enticement and without purpose to commit a criminal offense with or against the child.
> > Proof that the child was below the critical age gives rise to a presumption that the actor knew the child's age or acted in reckless disregard thereof. The offense is a Class A misdemeanor unless the actor, not being a parent or person in equivalent relation to the child, acted with knowledge that his conduct would cause serious alarm for the child's safety, or in reckless disregard of a likelihood of causing such alarm, in which case the offense is a felony of the ~~third~~ fourth degree.
>
> (2) Custody of Committed Persons. A person is guilty of a Class A misdemeanor if he knowingly or recklessly takes or entices any committed person away from lawful custody when he is not privileged to do so. "Committed person" means, in addition to anyone committed under judicial warrant, any orphan, neglected or delinquent child, mentally defective or insane person, or other dependent or incompetent person entrusted to another's custody by or through a recognized social agency or otherwise by authority of law.[207]

Interference with custody could occur if the child is taken from a parent, guardian, or other lawful custodian. Thus, the non-custodial parent could be guilty of interference with custody, rather than kidnapping, which could have been charged under earlier statutes.[208] The section is drafted in part to limit the intrusion of the criminal law into child custody disputes but

207. Minutes, *supra* note 26 (June 2018).
208. MODEL PENAL CODE Art. 212 cmt. at 249 (AM. LAW INST. 1980).

at the same time to permit criminal intervention in appropriate cases.[209] Section 212.4 also applies when a defendant takes or entices from lawful custody a person who has been committed.[210] Section 212.4 is a lesser included offense to kidnapping in cases in which the kidnapping purposes cannot be shown, but custody has been infringed on by persons having no legal authority to do so.[211]

As opposed to simple and aggravated kidnapping, which protect against abduction causing physical danger, extortion, terrorization, or involuntary servitude,[212] section 212.4 is directed at interference with lawful custody of children and committed persons.[213] Because the person interfering with custody will often be another parent, relative, or person who acts based on the perceived best interest of the child or committed person, the offense is punished less severely than kidnapping and has special defenses.[214] A kidnapping charge is still possible if the requisite purposes are present; however, if not, the defendant is guilty of the lesser offense of interference with custody.[215]

The offense regarding interference with custody of children requires that the actor knowingly or recklessly take or entice a child under eighteen from its legal custodian when he has no privilege to do so.[216] Such privilege could come from consent by the custodian, court order, or statute.[217] There are two affirmative defenses recognized under this subsection. The first is that the actor "believed that his action was necessary to preserve the child from danger to its welfare."[218] The Committee decided that the actor should "reasonably" believe that the action was necessary.[219] Reasonable belief under section 1.13 requires that the actor not be criminally negligent in his

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209. *Id.* at 253.

210. MODEL PENAL CODE § 212.4 (AM. LAW INST. 1985). (as adopted by the Committee. Minutes, *supra* note 26 (June 2018).(AM. LAW INST. 1985).

211. *Compare* MODEL PENAL CODE § 212.2 (AM. LAW INST. 1985) *with* MODEL PENAL CODE § 212.4 (AM. LAW INST. 1985). *See* MODEL PENAL CODE § 1.07 (AM. LAW INST. 1985), which defines lesser included offenses. This will be the subject of a later article.

212. MODEL PENAL CODE §§ 212.1; 212.2 (AM. LAW INST. 1985). (as adopted by the Committee. Minutes, *supra* note 26 (June 2018). (AM LAW INST. 1985).

213. MODEL PENAL CODE § 212.4 (AM. LAW INST. 1985). (as adopted by the Committee. Minutes, *supra* note 26 (June 2018). (AM LAW INST. 1985).

214. MODEL PENAL CODE Art 212 cmt. at 251-52 (AM. LAW INST. 1980).

215. *See supra* discussion accompanying note 208.

216. MODEL PENAL CODE § 212.4 (AM. LAW INST. 1985). (as adopted by the Committee. Minutes, *supra* note 26 (June 2018). (AM LAW INST. 1985).

217. MODEL PENAL CODE Art. 212 cmt. at 257 (AM. LAW INST. 1980).

218. MODEL PENAL CODE § 212.4 (AM. LAW INST. 1985). (AM LAW INST. 1985).

219. Minutes, *supra* note 26 (June 2018).

belief;[220] otherwise, the affirmative defense would require the actor's belief to be at least reckless to lose the defense. This would occur by operation of section 2.02, which provides that any element of an offense without a specified state of mind will generally require recklessness.[221] The Committee usually did not approve of leaving state of mind to the operation of section 2.02 but preferred wherever possible to specify the state of mind.

The second defense recognizes that a child between the ages of fourteen and eighteen has a mind of his own. If he arranges for his own removal without being enticed, and the actor has no purpose of committing a criminal offense with or against the child, the actor should have a defense.[222]

If the child is actually under the age of eighteen under subsection (1) (or less than fourteen under the affirmative defense provided for in subsection (1)(b)), there is a presumption that the actor knew or recklessly disregarded the child's age.[223] This offense is a Class A misdemeanor unless the actor is not a parent or person in equivalent relation, and he knew or acted with reckless disregard that the removal would cause serious alarm, in which case the offense is a felony in the fourth degree.[224] In the case of a parent who may also cause such alarm, the assumption is that fear for safety is less justified because the child is with a parent who has a protective instinct with regard to his own child.[225] If the child is in fact threatened with harm, the offense could rise to the level of kidnapping.[226]

The comments to the Model Code discuss three possible scenarios to illustrate the effect of the section. The first is the removal of a child over the age of eighteen who is not under a commitment order. If such a removal does not involve force, threat, or deception required for aggravated

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220. MODEL PENAL CODE § 1.13 (AM. LAW INST. 1985).
General Definitions
. . . .
(16) "reasonably believes" or "reasonable belief" designates a belief that the actor is not reckless or <u>criminally </u>negligent in holding.
Minutes, *supra* note 26 (December 2006).

221. MODEL PENAL CODE § 2.02 (AM LAW INST. 1985). *See* Johnson, *supra* note 2, at IV.

222. MODEL PENAL CODE Art. 212 cmt. at 258 (AM. LAW INST. 1980).

223. MODEL PENAL CODE § 212.4 (AM. LAW INST. 1985). (as adopted by the Committee. Minutes, *supra* note 26 (June 2018). (AM. LAW INST. 1985).

224. *Id.* (as adopted by the Committee. Minutes, *supra* note 26 (June 2018). (AM. LAW INST. 1985). The original version of the MPC only had three degrees of felonies. The Committee added fourth degree felony. *See supra* note 26. This offense was classified as a third-degree felony under the original Model Code Version MODEL PENAL CODE § 212.4 (AM. LAW INST. 1985).

225. MODEL PENAL CODE Art. 212 cmt. at 261 (AM. LAW INST. 1980).

226. *Id.*

kidnapping or any of the purposes required for simple kidnapping, this would not be kidnapping or interference with custody.[227] A child of this age is capable of consenting, even if the legal guardian has not consented.[228]

The second situation is removal of a child between the ages of fourteen and eighteen from the custody of a legal guardian without that person's consent. Again, if there is no force, threat, or deception or a prohibited purpose, the offense would not be kidnapping because the victim has consented. However, this offense would be interference with custody because the legal custodian must also consent, unless an affirmative defense applies.[229] Third, if the child is under fourteen and, therefore, incapable of consenting or is incompetent, this would be kidnapping, if the prohibited purposes were present. If the prohibited purposes were not shown, the offense would be interference with custody, absent an affirmative defense.[230]

A parent may not be guilty of aggravated kidnapping of his own underage child because aggravated kidnapping specifically provides for lack of parental consent,[231] but he may be guilty of interference with custody.[232] If one of the prohibited purposes is present, the parent may also be guilty of simple kidnapping if he knows the restraint is unlawful, which could include violating a custody order.[233] The fact that simple kidnapping requires knowledge that the conduct is unlawful would prevent the section from operating in a situation in which custody is in dispute.[234] A parent violating a custody order may also be guilty of false imprisonment under section 212.3, which is also a misdemeanor, and only requires that the actor know the restraint to be unlawful, which would include violating a custody agreement.[235]

With regard to custody of committed persons under subsection (2), if the actor knowingly or recklessly takes or entices any committed person from lawful custody without privilege, he is guilty of a Class A misdemeanor. "Committed person" is defined as anyone "under judicial warrant, any orphan, neglected or delinquent child, mentally defective or

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227. *Id.* at 253.

228. *Id.*

229. *Id.*

230. *Compare* MODEL PENAL CODE §§ 212.1-2 (AM. LAW INST. 1985) (as adopted by the Committee. Minutes, *supra* note 26 (June 2018)(AM. LAW INST. 1985) w*ith* MODEL PENAL CODE § 212.3 (AM. LAW INST. 1985).

231. MODEL PENAL CODE § 212.1 (AM. LAW INST. 1985). (as adopted by the Committee. Minutes, *supra* note 26 (June 2018). (AM. LAW INST. 1985).

232. *Id.*

233. MODEL PENAL CODE Art. 212 cmt. at 256 (AM. LAW INST. 1980).

234. *Id.*

235. MODEL PENAL CODE § 212.2 (AM. LAW INST. 1985). (as adopted by the Committee. Minutes, *supra* note 26 (June 2018). (AM. LAW INST. 1985).

insane person, or other dependent or incompetent person entrusted to another's custody by or through a recognized social agency or otherwise by authority of law."[236] Special defenses are not provided in this subsection because of the fact that the committed person is subject to judicial authority, which should put the actor on notice that his conduct is wrongful.[237] However, as noted in the comments, if any of the defenses to subsection (1) were present in a case under subsection (2), prosecutorial discretion should be exercised.[238]

The next section is related to kidnapping in that the victim's freedom of action is restrained. Even if he is not restrained physically, he is still limited in his actions by the actor's threats.

E. Criminal Coercion

Section 212.5 defines the offense of criminal coercion.[239] This section is designed as a residual offense, punishing threats to take specified action with a purpose to unlawfully restrict the freedom of action of another person to his detriment.[240] The Committee adopted the following version of criminal coercion, making several changes from the original version, as indicated:

Section 212.5 Criminal Coercion

(1) Offense Defined. A person is guilty of criminal coercion if, with purpose ~~unlawfully~~ to restrict another's freedom of action to engage or refrain from engaging in conduct ~~to his detriment~~, he ~~*recklessly*~~ threatens, explicitly or implicitly, to:

(a) commit any criminal offense; or

(b) accuse anyone of a criminal offense; or

(c) expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business repute; or

(d) take or withhold action as an official, or cause an official to take or withhold action.

~~It is an affirmative defense to prosecution based on paragraphs (b), (c) or (d) that the actor reasonably believed the accusation or secret to be true or the proposed official action justified and that his purpose was limited to compelling the other to behave in a way~~

236. MODEL PENAL CODE § 212.4 (AM. LAW INST. 1985).
237. MODEL PENAL CODE Art. 212 cmt. at 262 (AM. LAW INST. 1980).
238. *Id.*
239. MODEL PENAL CODE § 212.5 (AM. LAW INST. 1985).
240. MODEL PENAL CODE Art. 212 cmt. at 264 (AM. LAW INST. 1980).

> ~~reasonably related to the circumstances which were the subject of the accusation, exposure or proposed official action, as by desisting from further misbehavior, making …good a wrong done, refraining from taking any action or responsibility for which the actor believes the other disqualified.~~
>
> (2) It is an affirmative defense to a prosecution under this section that:
>
> > (a) the actor reasonably believed the accusation or secret to be true or the proposed action justified, and
> > (b)(i) that the primary purpose of the threat was to cause the other to conduct himself in his own best interest; or
> > (b)(ii) that a purpose of the threat was to cause the other to desist from immoral or unreasonable conduct, ~~engage in behavior from which he could not lawfully abstain,~~ make good a wrong done by him, or refrain from taking any action or responsibility for which he was disqualified.
>
> ~~(2)~~ (3) Grading. (a) Criminal Coercion is a felony in the third degree if the threat is to commit a felony in the first or second degree or the actor's purpose is felonious in the first or second degree.
> (b) Criminal Coercion is a felony in the fourth degree if the threat is to commit a felony in the third degree or the actor's purpose is to commit a felony in the third degree.
> (c) Otherwise, Criminal Coercion is a Class A Misdemeanor.[241]

Since criminal coercion is a residual offense, it compliments other offenses involving threats,[242] such as extortion[243] and robbery,[244] both of which require that the threat be made to acquire property.[245] To avoid overbroad enforcement, criminal coercion applies only to a limited category of threats that must be made with an improper purpose to limit a person's freedom of action.[246]

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241. Minutes, *supra* note 26 (November 2019).
242. *Id.*
243. *Id.*
244. *Id.*
245. MODEL PENAL CODE Art. 212 cmt. at 264 (AM. LAW INST. 1980). In addition, the following crimes also involve threats: Theft of Services under § 223.7, Terroristic Threats under § 211.3, Assault under § 211.1, Criminal Mischief under § 220.3, and Improper Influence Over Public Officials and Others under § 240.2. *See id.* In addition, some of the sex crimes, discussed *infra* at V. involve threats.
246. MODEL PENAL CODE Art. 212 cmt. at 265 (AM. LAW INST. 1980).

There are four types of threats. Again, they all must be made with the purpose of unlawfully restricting another's freedom of action.[247] The Committee made several changes to the language of the Model Code. First, the Committee decided that the threat could be "explicit or implicit."[248] The original Model Code version defined "freedom of action" in the comments, but not in the statute, to be anything the victim does not want to do or not do that works to his detriment.[249] The Committee decided that this was unclear, so we added to "freedom of action" in the statute "to engage or refrain from engaging in conduct."[250] We also eliminated "to his detriment" because we believed that limiting freedom of action sufficiently defined the conduct.[251]

The original Model Code provided that, if the action is for the good of the person, it is not covered by this section[252] since the action must limit the victim's freedom of action to his detriment.[253] This idea was also reinforced in the affirmative defenses, discussed below. [254] As noted, the Committee removed the language "to his detriment," deciding that a proper purpose should be an affirmative defense.[255]

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247. *Id.* at 264.

248. Minutes, *supra* note 26 (November 2019).

249. MODEL PENAL CODE Art. 212 cmt. at 265 (AM. LAW INST. 1980).

250. *See supra* Committee's version of the statute § 212.5(2) at discussion accompanying note 242.

251. *Id.*

252. *Id.*

256. MODEL PENAL CODE § 212.5(1)(d) (AM. LAW INST. 1985).

254. *Id.*

255. MODEL PENAL CODE Art. 212 cmt. at 265 (AM. LAW INST. 1980). The Committee adopted the Model Code's scheme for affirmative defenses, which requires the defendant to raise the defense and the prosecution to prove its absence beyond a reasonable doubt. Minutes, *supra* note 26 (October, November, December 2006). MODEL PENAL CODE § 1.12 (AM. LAW INST. 1985).

> (1) No person shall be convicted of an offense unless each element of such offense is proven beyond a reasonable doubt. In the absence of such proof, the innocence of the defendant is assumed.
>
> (2) Subsection (1) of this Section does not:
>
> (a) Require the disproof of an affirmative defense unless and until there is evidence supporting such defense; or
>
> (b) Apply to any defense that the Code or another statute plainly requires the defendant to disprove by a preponderance of the evidence; or
>
> . . . .

Thus, absent a statutory requirement, the prosecution must disprove any affirmative defense not plainly requiring the defendant to prove by a preponderance of the evidence.

The original version of the Model Code also required that the actor restrain the victim's freedom of action "unlawfully."[256] However, as opposed to the other sections in this Article that use the term unlawfully—defining it as "any violation of the criminal law, civil law or administrative regulation"[257]—the Model Code comments defined "unlawfully" differently in this section: The actor has to intend to coerce conduct he has no legal right to require. Again, this definition was suggested by the Model Code comments but was not defined in the statute.[258] The Committee deleted the reference to "unlawfully" because the addition to "freedom of action" of "engaging in or refraining from conduct," which should cover what the victim does or does not want to do.[259]

The list of threats for criminal coercion does not include all the threats included for extortion, which requires the purpose of acquiring property; the justification being that this is more obviously wrongful.[260] The first threat that could be criminal coercion is to threaten "to commit any criminal offense."[261] The second is "to accuse anyone of a criminal offense."[262] The third threat is less obvious and, that is, to threaten to "expose a secret that would cause the person to be ridiculed, hated, held in contempt, or that would impair his credit or business repute."[263] The last is to threaten to "take or withhold official action," either because the defendant is an official or because the victim is an official.[264]

When the actor's purpose is benign, coercion should not be criminal. Therefore, the Committee adopted the Model Code's affirmative defenses in this regard but restructured and clarified them.[265] The affirmative defenses are designed to prevent interference with legitimate bargaining and other similar situations.[266] The defenses do not apply to subsection (a) because commission of a crime would never be justified under this subsection. However, with regard to the other purposes, if the actor believed the accusation or secret to be true or the proposed official action justified, the defense would apply. In addition, the purpose must be to require the person to correct his unreasonable or immoral behavior, right

256. MODEL PENAL CODE § 212.5 (AM. LAW INST. 1985).

257. Minutes, *supra* note 26 (July 2019).

258. MODEL PENAL CODE Art. 212 cmt. at 265 (AM. LAW INST. 1980).

259. Minutes, *supra* note 26 (November 2019).

260. MODEL PENAL CODE Art. 212 cmt. at 266. The Committee is proposing to include extortion as a type of robbery. *See* Minutes *supra* note 26 (August 2020).

261. MODEL PENAL CODE § 212.5(1)(a) (AM. LAW INST. 1985).

262. MODEL PENAL CODE § 212.5(1)(b) (AM. LAW INST. 1985).

263. MODEL PENAL CODE § 212.5(1)(c) (AM. LAW INST. 1985).

264. MODEL PENAL CODE § 212.5(1)(d) (AM. LAW INST. 1985).

265. *See supra* note 256.

266. MODEL PENAL CODE Art. 212 cmt. at 267 (AM. LAW INST. 1980).

a wrong, or prevent the other person from taking action for which he is disqualified.[267] The original Model Code version used the term "misbehavior." The Committee substituted the term "immoral or unreasonable behavior," which is the definition suggested by the Model Code comments.[268]

Advising a driver to slow down or be reported would be an example of requiring the person to cease unreasonable or immoral behavior.[269] An example of threatening to expose a secret to encourage the victim to correct his unreasonable or immoral behavior would be to threaten to disclose an alcoholic's secret drinking to force him into treatment. Threatening to accuse another of theft if he does not return the property would be an example of righting a wrong within the defense.[270] Using a threat to prevent another from assuming a position for which he is unqualified would also apply here.[271]

The Committee refined the grading scheme so that, if the threat is to commit a felony in the first or second degree or the actor has a purpose that is felonious in the first or second degree, criminal coercion is a felony in the third degree. If the felony intended or threatened is a felony in the third degree, the offense is a felony in the fourth degree. The offense is otherwise a misdemeanor, which the Committee classified as a Class A misdemeanor.[272]

We turn now to the most controversial set of crimes, sex crimes.

V. SEX CRIMES

Article 213 of the Model Code, which relates to sex crimes, was outdated and unsatisfactory, so the Committee completely revamped the sex crimes article by referring to Mississippi statutes that existed at that time.[273] The Committee also reviewed the sex crimes statutes of other states and decided to use Tennessee statutes as a model.[274]

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267. *Id.* at 268.

268. *Id.* at 265; *Id.* at 268.

269. *Id.*

270. *Id.*

271. *Id.*

272. Minutes, *supra* note 26 (June 2018).

273. *See* Minutes, *supra* note 26 (May, July, August, and September 1999). The Committee reviewed these recently and added some updates. Minutes, *supra* note 26 (June 2018).

274. *See* TN. ST. §§ 39-5-501-506. Since none of the statutes proposed by the Committee, except for indecent exposure, are based on the Model Code, the reference will just be to section numbers. These may coincide with the Model Code sections, but this is only for the sake of consistency.

After the Committee's original adoption of its revised sex crimes statutes, the American Law Institute (ALI) decided to strike Article 213 of the Model Code and revise it.[275] The Committee had presciently managed to avoid the main criticisms of the later stricken article by not applying sex crimes to a particular gender of victim or perpetrator,[276] loosening the restrictions on the most serious forms of sexual assault,[277] as well as limiting the marital exemption.[278]

The efforts by the ALI to revise the Model Penal Code are ongoing.[279] The Committee reviewed the current proposals but decided that the version we had adopted was preferable for our purposes.[280] Using

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275. 2012 A.L.I. Proceedings 257.

276. *See* MODEL PENAL CODE §§ 213.1-5 (AM. LAW INST. 1985).

277. *See id.* at §§ 213.1-3.

278. *See id.* at § 213.4 (AM. LAW INST. 1985).

279. The comment accompanying the stricken article indicated that the criticisms included "gendered language," "tight restrictions" on the most serious form of rape, designating forms of sexual conduct as "deviate," retention of a broad marital exemption, "antiquated procedural provisions," and outdated reasoning and phraseology in the comments. See *id.* at §§ 213.0-5.

280. Sections 213.1-5. I will cite these sections in this manner, since we did not take them from the Model Code, as noted above.

These are the definitions that the Committee adopted for § 213. They will be discussed as they arise in the discussion.

Section 213.0 Definition

(1) "Coercion" means <u>use of or</u> threat of immediate or future kidnapping, extortion, force or violence or the use of parental, custodial, or other official authority over a child less than fifteen (15) years of age;

(2) "Intimate" parts include the primary genital area, groin, inner thigh, buttock, or breast of a human being;

(3) "Mentally incapacitated" means that at the time of the act the victim is incapable of appraising or controlling his conduct due to the mental disease or defect or the influence of a narcotic, anesthetic or other substance administered to him without his consent, or due to any other acts committed upon him without his consent;

(4) "Physically helpless" means the victim is unconscious, asleep or for any other reason physically or verbally unable to communicate unwillingness to do an act;

(5) "Sexual contact" includes the knowing touching of the victim's, the actor's, or any other person's intimate parts, or the knowing touching of the clothing covering the immediate area of the victim's, the actor's, or any other person's intimate parts, if that touching can be reasonably construed as being for the purpose of sexual arousal or the gratification;

(6) "Sexual penetration" means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however, slight, of any part of a person's body or of any object

Mississippi statutes and looking at other states, as well as the Model Code, the Committee drafted statutes on rape and aggravated rape, rape of a child, sexual battery, and aggravated sexual battery.[281] The Committee also adopted a version of indecent exposure based on the Model Code. In addition, we adopted a limited spousal exception and revised the Mississippi statute on protective orders and procedure.[282] We will begin with rape and aggravated rape.

A. Section 213.1 Rape; Aggravated Rape

Traditional rape statutes allowed only for a female victim and a male perpetrator.[283] These statutes also required that the victim show that she used "utmost resistance,"[284] which required that the "intensity of the struggle must reflect the victim's physical capacity to oppose sexual aggression; and that her efforts must not have abated during the encounter."[285] Utmost resistance would not be required if the victim was raped by the use of "fear of grave harm."[286] Courts often required that the "woman's fear must encompass harm of extreme gravity" and that her reaction be reasonable.[287] Essentially, the actor had to give the victim a reasonable belief of imminent harm.[288] The Committee rejected the gender specific requirement and the requirement of resistance by the victim, as reflected in the rape and aggravated rape statute proposed, as follows:

> Section 213.1 Rape and Aggravated Rape
> (1) Rape is the sexual penetration of a victim by the actor or of the actor by a victim when:

> into the genital or anal openings of the victim's, the actor's, or any other person's body, but emission of semen is not required; and
> (7) "Spouse" means a married person. "Married Person" means living together when neither spouse has filed for separate maintenance or divorce.
> (8) "Victim" means the person alleged to have been subjected to criminal sexual conduct.

281. Minutes, *supra* note 26 (November 2018).

282. *Id.*

283. MODEL PENAL CODE Art. 213 cmt. at 303 (AM. LAW INST. 1980). Although the Official Comments have been stricken by the ALI, they remain useful for historical purposes. *See supra* note 276.

284. MODEL PENAL CODE Art. 213 cmt. at 304 (AM. LAW INST. 1980).

285. *Id.* at 305.

286. *Id.*

287. *Id.* at 308.

288. *Id.* at 309.

> (a) the sexual penetration is accomplished by ~~force or~~ coercion; or
>
> (b) the sexual penetration is accomplished without consent of the victim and the actor knows or recklessly disregards that sexual penetration is accomplished without the consent of the victim; or
>
> (c) the victim is mentally incapacitated or physically helpless and the actor knows or recklessly disregards that the victim is mentally incapacitated or physically helpless and is incapable of consenting.
>
> Rape is a second-degree felony.
>
> (2) Aggravated rape is rape accompanied by one or more of the following:
>
> (a) The actor is armed with a deadly weapon; or
>
> (b) The actor causes bodily injury to the victim; or
>
> (c) the actor is aided or abetted by one (1) or more persons; or
>
> (d) the victim is less than sixteen (16) years old.
>
> Aggravated Rape is a first-degree felony.[289]

Rape is sexual penetration without consent, by coercion, or if the victim is physically helpless or mentally incapacitated. The important terms are defined in the Committee's version of Section 213.0.[290] "Sexual penetration means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of the victim's, the actor's, or any other person's body, but emission of semen is not required."[291] With regard to sexual penetration accomplished by coercion, that term is defined in the Committee's version of Section 213.0(1) as "use of or threat of immediate or future kidnapping, extortion, force or violence or the use of parental, custodial, or other official authority over a child less than fifteen (15) years of age."[292] The Committee decided to eliminate "force" from the statute and leave "force" in the definition of coercion. The word "force" in the statute could mean slight force, which should be insufficient to be a serious crime. In context of the definition, sandwiched

289. Minutes, *supra* note 26 (November 2018).
290. *See supra* note 281.
291. *Id.*
292. *Id.*

as it is between threat of a serious felony or violence, force would indicate something more serious.[293]

If the sexual penetration is accomplished without consent or the victim is physically helpless or mentally incapacitated, the actor must have knowledge or be reckless in believing that the victim was consenting under such circumstances.[294] Knowledge would require that the person be aware that the victim is not consenting.[295] Recklessness would only require the actor to be consciously aware of a substantial risk that the victim is not consenting.[296] "Physically helpless" applies to the situation in which the victim is unconscious or otherwise physically helpless or unable to communicate.[297] "Mentally incapacitated" applies to the situation in which the actor administers a drug or other substance against the victim's will that renders him incapable of consenting or in the case of mental disease or defect.[298] Obviously there is some overlap among these categories, but the Committee thought that these were the situations in which culpability is

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293. The doctrine of ejusdem generis would apply here. Ejusdem generis is "a canon of construction that holds that when a general term follows a list of particular terms, the general terms only applies to things similar." https://www.law.cornell.edu/wex/ejusdem_generis.

294. Minutes, *supra* note 26 (March 2018).

295. The Committee adopted Model Code's § 2.02 defining knowledge and recklessness is as follows:

> (b) Knowingly. A person acts knowingly with respect to a material element of an offense when:
>
> (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
> (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.
>
> (c) Recklessly. A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

Minutes, *supra* note 26 (March 2018). *See* Johnson, *supra* note 2, at V. A. 1.

296. *Id.*

297. *See supra* note 281.

298. *Id.*

most serious. The final definition clarifies that "victim means the person alleged to have been subjected to criminal sexual conduct."[299]

Aggravated rape is elevated to a felony in the first degree and occurs when the actor uses a deadly weapon, causes bodily injury, is aided by another person, or when the victim is younger than sixteen years old.[300] "Bodily injury" is defined as "physical pain, illness, or any impairment of physical condition."[301] "Deadly weapon" is defined as "any firearm or other weapon, device, instrument, material or substance, whether animate or inanimate, which in the manner it is used or is intended to be used is capable of producing death or serious bodily injury."[302] The Committee believed that precise definitions were especially important since Mississippi lacks crucial definitions in this difficult area.[303]

The oldest Mississippi statute on rape is termed "Rape; Assault with Intent to Ravish," and it requires, among other things, that the victim be of chaste character, so it has fallen out of use. This statute also only applies to female victims.[304] The statute does have the advantage of a stated *mens rea*, which none of the other Mississippi statutes expressly have.[305] This statute should be repealed by Section 213.1, among others.[306]

The Mississippi statute that covers statutory rape also includes a section that prohibits forcible sexual intercourse with any person, which includes administering a substance to cause the person to be unable to

299. *Id.*

300. Section 213.1.

301. Minutes, *supra* note 26 (April 2018).

302. *See supra* note 72.

303. *See* Appendix E. There is a definition section, but it does not include many of the relevant terms.

304. MISS. CODE ANN. § 97-3-71.

305. *See* statutes listed in Appendix E.

306. *See id.*

resist.[307] This statute provides for a life sentence.[308] This part of the statute, as noted in common with the other Mississippi statutes on sex crimes, suffers from having no *mens rea* requirement.[309] In addition there is no definition of "forcible," so the force could be anything from slight to requiring "utmost resistance."[310] This statute should also be repealed by the rape statutes proposed by the Committee.[311] The remainder of the statutory rape statute would be repealed by the following proposed section.[312]

C. Rape of a Child

Under the common law, it was illegal to have sex with someone ten years of age or younger. Most statutory schemes consider sex with a child a heinous crime and punish it more severely than rape of a mature person.[313] The age cut-off for statutory rape varies from state to state.[314] Many states graduate punishment according to the age of the victim.[315] The original

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307. MISS. CODE ANN. § 97-3-95.
In addition, the following subsection of MISS. CODE ANN. § 97-3-6597-3-65 also covers forcible sexual intercourse:

> (4) (a) Every person who shall have forcible sexual intercourse with any person, or who shall have sexual intercourse not constituting forcible sexual intercourse or statutory rape with any person without that person's consent by administering to such person any substance or liquid which shall produce such stupor or such imbecility of mind or weakness of body as to prevent effectual resistance, upon conviction, shall be imprisoned for life in the State Penitentiary if the jury by its verdict so prescribes; and in cases where the jury fails to fix the penalty at life imprisonment, the court shall fix the penalty at imprisonment in the State Penitentiary for any term as the court, in its discretion, may determine.

308. MISS. CODE ANN. § 97-3-65. *See infra* note 318 for the complete statute.

309. *See infra* statutes cited in Appendix E.

310. *See supra* discussion accompanying notes 287-89. The caselaw does not appear to have defined "forcible" either. *See, e.g. Madere v. State*, 794 So. 2d 200, p.cite (2001), in which the court said:

> People of ordinary intelligence have the ability to understand what behavior "forcible sexual intercourse" is designed to discourage. The word "forcible" is no more vague or overly broad than "forcibly ravish." We find that the statutory purpose and meaning of the amended statute, § 97–3–65(3)(a) (2000), is purely common sense to any reasonable person.

311. *See* Appendix E.

312. MISS. CODE ANN. § 97-3-65.

313. MODEL PENAL CODE Art. 213 cmt. at 324 (AM. LAW INST. 1980).

314. *Id.*

315. *Id.* at 325.

version of the Model Code provided for strict liability in the case of children under the age of ten but modified this position in the case of older children.[316] The Committee basically followed this approach but thought that under eleven years old was more appropriate for strict liability. The Committee adopted the following statute that would replace statutory rape under the Mississippi Code:[317]

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316. *Id.* at 326.

317. MISS. CODE ANN. § 97-3-65.

Statutory rape; enhanced penalty for forcible sexual intercourse or statutory rape by administering certain substances; criminal sexual assault protection order

(1) The crime of statutory rape is committed when:

(a) Any person seventeen (17) years of age or older has sexual intercourse with a child who:

(i) Is at least fourteen (14) but under sixteen (16) years of age;

(ii) Is thirty-six (36) or more months younger than the person; and

(iii) Is not the person's spouse; or

(b) A person of any age has sexual intercourse with a child who:

(i) Is under the age of fourteen (14) years;

(ii) Is twenty-four (24) or more months younger than the person; and

(iii) Is not the person's spouse.

(2) Neither the victim's consent nor the victim's lack of chastity is a defense to a charge of statutory rape.

(3) Upon conviction for statutory rape, the defendant shall be sentenced as follows:

(a) If eighteen (18) years of age or older, but under twenty-one (21) years of age, and convicted under subsection (1) (a) of this section, to imprisonment for not more than five (5) years in the State Penitentiary or a fine of not more than Five Thousand Dollars ($ 5,000.00), or both;

(b) If twenty-one (21) years of age or older and convicted under subsection (1)(a) of this section, to imprisonment of not more than thirty (30) years in the State Penitentiary or a fine of not more than Ten Thousand Dollars ($10,000.00), or both, for the first offense, and not more than forty (40) years in the State Penitentiary for each subsequent offense;

(c) If eighteen (18) years of age or older and convicted under subsection (1)(b) of this section, to imprisonment for life in the State Penitentiary or such lesser term of imprisonment as the court may determine, but not less than twenty (20) years;

(d) If thirteen (13) years of age or older but under eighteen (18) years of age and convicted under subsection (1)(a) or (1)(b) of this section, such imprisonment, fine or other sentence as the court, in its discretion, may determine.

(4) (a) Every person who shall have forcible sexual intercourse with any person, or who shall have sexual intercourse not constituting forcible

sexual intercourse or statutory rape with any person without that person's consent by administering to such person any substance or liquid which shall produce such stupor or such imbecility of mind or weakness of body as to prevent effectual resistance, upon conviction, shall be imprisoned for life in the State Penitentiary if the jury by its verdict so prescribes; and in cases where the jury fails to fix the penalty at life imprisonment, the court shall fix the penalty at imprisonment in the State Penitentiary for any term as the court, in its discretion, may determine.

(b) This subsection (4) shall apply whether the perpetrator is married to the victim or not.

(5) In all cases where a victim is under the age of sixteen (16) years, it shall not be necessary to prove penetration where it is shown the genitals, anus or perineum of the child have been lacerated or torn in the attempt to have sexual intercourse with the child.

(6) (a) Upon conviction under this section, the court may issue a criminal sexual assault protection order prohibiting the offender from any contact with the victim, without regard to the relationship between the victim and offender. The court may include in a criminal sexual assault protection order any relief available under Section 93-21-15. The term of a criminal sexual assault protection order shall be for a time period determined by the court, but all orders shall, at a minimum, remain in effect for a period of two (2) years after the expiration of any sentence of imprisonment and subsequent period of community supervision, conditional release, probation, or parole. Upon issuance of a criminal sexual assault protection order, the four (24) hours of issuance, with no exceptions for weekends or holidays as provided in Section 93-21-25, and a copy must be provided to both the victim and offender.

(b) Criminal sexual assault protection orders shall be issued on the standardized form developed by the Office of the Attorney General.

(c) It is a misdemeanor to knowingly violate any condition of a criminal sexual assault protection order. Upon conviction for a violation, the defendant shall be punished by a fine of not more than Five Hundred Dollars ($ 500.00) or by imprisonment in the county jail for not more than six (6) months, or both. Any sentence imposed for the violation of a criminal sexual assault protection order shall run consecutively to any other sentences imposed on the offender. The court shall also be empowered to extend the criminal sexual assault protection order for a period of one (1) year for each violation. The incarceration of a person at the time of the violation is not a bar to prosecution under this section. Nothing in this subsection shall be construed to prohibit the imposition of any other penalties or disciplinary action otherwise allowed by law or policy.

(7) For the purposes of this section, "sexual intercourse" shall mean a joining of the sexual organs of a male and female human being in which the penis of the male is inserted into the vagina of the female or the penetration of the sexual organs of a male or female human being in which the penis or an object is inserted into the genitals, anus or perineum of a male or female.

> Section 213.2 Rape of a Child
>
> (1)(a) Sexual penetration of the victim by the actor or of the actor by the victim when the victim is less than eleven (11) years old and the actor is at least sixteen (16) years old is a first degree felony. Mistake as to the victim's age is no defense.
>
> (b) Sexual penetration of the victim's body by the actor or of the actor by the victim when the victim is less than eleven (11) years old and the actor is less than sixteen (16) years old is a second degree felony. Mistake as to the victim's age is no defense.
>
> (2) Sexual penetration of the victim by the actor or of the actor by the victim when the victim is at least eleven (11) years old but less than sixteen (16) years old and the actor is at least four years older than the victim is a second degree felony. It is a defense that the actor neither knew nor recklessly disregarded that the victim was less than sixteen (16) years old. Mistake as to the victim's age is a defense under this subsection (2).
>
> (3) Sexual penetration of the victim by the actor or of the actor by the victim is a third-degree felony when the victim is at least eleven (11) years old but less than sixteen (16) years old, and the actor is less than 21 years old but at least four (4) years older than the victim. It is a defense that the actor neither knew nor recklessly disregarded that the victim was less than 16 years old. Mistake as to the victim's age is a defense under this subsection (3).
>
> (4) A person does not commit an offense under this section if the victim is the spouse of the actor.[318]

The Committee was concerned about the across-the-board strict liability imposed by the Mississippi statute, as well as the narrow age difference required between the actor and the victim.[319] The proposed statute addresses these concerns by limiting the imposition of strict liability to rape of a child under eleven. Thus, mistake of age is no defense if the child is less than eleven, while mistake of age is a defense if the child is at least eleven. The Committee thought it was highly unlikely that a child under eleven could ever be mistaken for anything but a child. If the actor

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See Alexandra Hutton Oglesby, *Eliminating Injustice: Revising Mississippi's Statutory Rape Laws,* 76 MISS. L.J. 1067 (2007), for a criticism of the law.

318. Minutes, *supra* note 26 (November 2018).

319. *Id.*

is less than sixteen, the offense is a second-degree felony, otherwise it is a first-degree felony.[320]

The proposed statute on rape of a child requires that the actor must be at least four years older than the victim.[321] The current Mississippi statute has only a three-year age difference,[322] which could apply to students only separated by two or three grades in the same school. Under the proposed statute, if the victim is between eleven and sixteen, the actor must either know or recklessly disregard the victim's age.[323] Again, rape is defined as sexual penetration by the actor of the victim or the victim by the actor.[324] This conduct is punished as a second-degree felony or third-degree felony if the actor is younger than twenty-one.[325]

The Committee was aware that there are marriages where the ages of the victim and actor are within the statute. Thus, if the victim is the spouse of the actor, there is no offense under this statute.[326] However, the Committee adopted a statute with a limited spousal immunity, which allows for prosecution of spouses for rape under more conditions than the current Mississippi spousal exemption.[327]

C. Section 213.4 Limited Spousal Exclusion; Spousal Rape

The common law recognized a spousal exclusion from rape, so that a man could not be guilty of raping his wife.[328] The basis for this exemption was the historical treatment of women, especially wives, as chattels.[329] Although the latter idea was eventually abandoned, nevertheless, there was a belief that marriage constituted "a blanket consent to intimacy which the woman may revoke only by dissolving the marital relationship."[330] Today, marriage is viewed as an equal relationship that should always only require consensual sex.[331] The Committee adopted the following limited spousal exclusion, which is presented out of order, since it is an exemption to the rape statutes just discussed:

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320. *Compare* MISS. CODE ANN. § 97-3-65 *with* proposed § 213.2.
321. *Id.*
322. MISS. CODE ANN. Section 97-3-65.
323. Section 213.2(1).
324. *Id.*
325. *Id.*
326. Section 213.2(4).
327. Section 213.4.
328. MODEL PENAL CODE Art. 213 cmt. at 341 (AM. LAW INST. 1980).
329. *Id.* at 343.
330. *Id.* at 342.
331. *Id.* at 345.

> Section 213.4 Limited Spousal Exclusion; Spousal Rape
> (1) Except as provided in subsection (2), a person does not commit an offense under this Article if the victim is the spouse of the actor.
> (2) Spousal rape is sexual penetration of one spouse by the other when:
> (a) Sexual penetration is accomplished by coercion or knowingly without the consent of the victim; or
> (b) The actor causes serious bodily injury to the victim or sexual penetration is accomplished by the use or threatened use of a deadly weapon.
> Spousal rape under section (2)(a) is a second-degree felony.
> Spousal rape under section (2)(b) is a first-degree felony.[332]

The Committee decided to maintain a spousal exception but limited it. The concern is that allegation of this crime could be used as leverage in divorce actions, so that rape is only an offense if the actor's state of mind is more culpable. Thus, spousal rape under section (2)(a) may be charged when the actor knows that the sexual penetration is without consent or is accomplished by coercion.[333] Knowledge requires the actor to be consciously aware that the victim is not consenting.[334]

Under the rape statute, section 213.1, the actor must only be reckless with regard to whether the victim is consenting.[335] The only difference for spousal rape is that the actor must be practically certain that the spouse is not consenting, as opposed to being aware of a substantial risk that the spouse is not consenting.[336] Spousal rape under this subsection is a second degree felony, as is rape under Section 213.1.[337] Under subsection (2)(b), if the sexual penetration causes bodily injury or is accomplished with a deadly weapon, there is no spousal exemption, and spousal rape is a first degree felony as it is under Section 213.1.[338]

Mississippi currently has an apparently very limited general spousal rape exclusion, which seems to adhere to the outdated view that marriage includes consent to sex for purposes of rape and sexual battery and is even named "Defense of Marriage." The exclusion does not apply if the spouses

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332. Minutes, *supra* note 26 (November 2018).

333. Section 213.4.

334. *See* MODEL PENAL CODE § 2.02(3) (AM. LAW INST. 1985); discussion accompanying note 296.

335. Section 213.1.

336. *Compare* MODEL PENAL CODE § 2.02(2)(b) *with* § 2.02(2)(c) (AM LAW INST. 1985).

337. *Compare* § 213.1(1) *with* § 213.4(1).

338. *Compare* § 213.1(2) *with* § 213.4(2).

are separated at the time.[339] However, there are two important exceptions that ameliorate the effect of the exclusion. The most important one is in the "Defense of Marriage" statute, which provides that "the legal spouse of the alleged victim may be found guilty of sexual battery if the legal spouse is engaged in forcible sexual penetration without the consent of the alleged victim."[340] In addition, the exclusion does not apply to forcible sexual intercourse or administration of a substance rendering the victim helpless, even if the victim and actor are married, which is contained in another section.[341] The effect of these two sections together makes a distinction between forcible sexual penetration and sexual penetration merely without consent. Since there is no clear definition of forcible sexual penetration and no *mens rea* stated for when the sexual penetration is without consent, it is difficult to predict when the exemption will apply.[342]

The Mississippi marital exclusion applies to sexual battery as well, except as indicated. Since the Mississippi sexual battery statute requires sexual penetration, the exemption works out to apply only to cases of actual sexual penetration.[343] Sexual battery as proposed by the Committee would cover other cases of sexual assault, while the proposed rape statute applies

339. MISS. CODE ANN.§ 97-3-99.

Sexual battery, defense of marriage

A person is not guilty of any offense under Sections 97-3-95 [95 sexual battery; 97 definitions;101 punishment and protective orders] through 97-3-103 {other statutes unaffected] if the alleged victim is that person's legal spouse and at the time of the alleged offense such person and the alleged victim are not separated and living apart; provided, however, that the legal spouse of the alleged victim may be found guilty of sexual battery if the legal spouse engaged in forcible sexual penetration without the consent of the alleged victim.

340. MISS. CODE ANN.§ 97-3-99.

341. MISS. CODE ANN.§ 97-3-65.

(4) (a) Every person who shall have forcible sexual intercourse with any person, or who shall have sexual intercourse not constituting forcible sexual intercourse or statutory rape with any person without that person's consent by administering to such person any substance or liquid which shall produce such stupor or such imbecility of mind or weakness of body as to prevent effectual resistance, upon conviction, shall be imprisoned for life in the State Penitentiary if the jury by its verdict so prescribes; and in cases where the jury fails to fix the penalty at life imprisonment, the court shall fix the penalty at imprisonment in the State Penitentiary for any term as the court, in its discretion, may determine.

(b) This subsection (4) shall apply whether the perpetrator is married to the victim or not.

342. *See supra* note 342.

343. *See id; supra* discussion accompanying notes 340-43.

only to sexual penetration.[344] The Committee chose to apply Section 213.4, the marital exemption, only to rape and not to sexual battery, which has its own exemption for simple sexual battery but not for aggravated sexual battery.[345]

D. Section 213.3 Sexual Battery; Aggravated Sexual Battery

The Committee is proposing the following statute to cover sexual contact not amounting to sexual penetration:

> Section 213.3 Sexual Battery; Aggravated Sexual Battery
> (1) Sexual battery is sexual contact of a victim by the actor or of the actor by a victim if:
> (a) The sexual contact is accomplished by ~~force or~~ coercion or the actor's fraudulent misrepresentation that the parties are legally married; or
> (b) The sexual contact is accomplished without consent of the victim, and the actor knows or recklessly disregards that the sexual contact is accomplished without the consent of the victim; or
> (c) The victim is mentally incapacitated or physically helpless, and the actor knows or recklessly disregards that the victim is mentally incapacitated or physically helpless; or
> (d) The victim is less than eighteen (18) years of age, and the actor used his supervisory, disciplinary, custodial, or parental authority to accomplish the sexual contact.
> (e) A person does not commit an offense under this subsection if the victim is the spouse of the actor.
> Sexual battery is a felony in the fourth degree.
> (2) Aggravated sexual battery is sexual battery accompanied by one or more of the following:
> (a) The actor is armed with a deadly weapon; or
> (b) The actor causes bodily injury to the victim; or
> (c) The actor is aided or abetted by one (1) or more persons; or
> (d) The victim is less than sixteen (16) years old.

344. *Compare* § 213.1 *with* § 213.3.
345. *See* § 213.3(1).

> Aggravated sexual battery is a felony in the second degree.[346]

Sexual battery was patterned after the rape statute to cover sexual assault in cases in which there is no sexual penetration.[347] "'Sexual contact' includes the knowing touching of the victim's, the actor's, or any other person's intimate parts, or the knowing touching of the clothing covering the immediate area of the victim's, the actor's, or any other person's intimate parts, if that touching can be reasonably construed as being for the purpose of sexual arousal or the gratification."[348] As noted earlier, Mississippi applies sexual battery only to actual penetration.[349] With the exception of a child fondling statute,[350] there is no statute in Mississippi that punishes sexual assault when there is no penetration. This conduct would not be punished under the assault statute because even simple assault requires bodily injury, not just offensive touching.[351] Bodily injury is defined under the Model Code as "physical pain, illness or any impairment of physical condition."[352] The term is not defined under the Mississippi Code, which otherwise adopted the language of simple assault from the Model Code, including bodily injury.[353] The Committee believed that sexual assault, even without penetration, may be just as traumatizing as sexual penetration and that such assaults should be seriously punished. There have been bills introduced in the Mississippi legislature to punish sexual assault, but none has passed.[354]

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346. Minutes, *supra* note 26 (November 2018).

347. Minutes, *supra* note 26 (November 2018).

348. *See supra* note 281. This is contrasted with sexual penetration, which "means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of the victim's, the actor's, or any other person's body, but emission of semen is not required." *See id*. This definition is essentially the same as the Mississippi definition of sexual penetration, but the latter only applies to another person, not to sexual penetration of the actor himself. MISS. CODE ANN.§ 97-3-97(a).

349. MISS. CODE ANN.§ 97-3-95.

350. MISS. CODE ANN. § 97-5-23.

351. See *supra* note 50.

352. *See supra* note 72.

353. *See supra* note 53.

354. Conversation with Caryn Quilter, Staff Attorney, Mississippi State Senate for almost 30 years. She has been a valuable member of the Committee for almost as many years. The following are the bills proposed, all of which died in committee: *See* H.B 221, 271,1020; S.B. 2420 (2019); H.B. 195, 922; S.B 2273 (2018); H.B. 1368,1382; S.B. 2900 (2017); H.B. 563, 579; S.B. 2766 (2016); S.B.2094 (2015); H.B. 1058; S.B. 2219 (2013); S.B. 2078 (2012); S.B. 2327, 2525 (2011); H.B. 28; S.B. 2340; S.B. 2715 (2007); S.B.2253 (2009); S.B. 2226 (2008); S.B. 2460 (2006).

Non-aggravated sexual battery, or simple sexual battery, is a felony in the fourth degree.[355] Such sexual battery is sexual contact by the actor or actor by the victim.[356] There are four situations that may be sexual battery. The first prohibits sexual contact by coercion or fraudulent representation of marriage.[357] The second addresses sexual contact without consent of the victim when the actor recklessly disregards the victim's consent. [358] The third applies when the actor recklessly disregards that the victim is mentally or physically incapacitated.[359] The fourth situation is when the victim is less than eighteen, and the actor used his supervisory authority to accomplish the sexual contact.[360] There is a spousal exemption for simple sexual battery,[361] but not for aggravated sexual battery.[362]

Aggravated sexual battery is a felony in the second degree and occurs when the actor is armed with a deadly weapon, causes bodily injury to the victim, is aided by another or the victim is less than sixteen years old.[363] Again, "bodily injury" under the Model Code is defined as "physical pain, illness or any impairment of physical condition."[364]

The Committee also drafted a new statute to add the procedure from the current Mississippi Statutes on rape and sexual battery.[365] The procedure was taken from the current Mississippi statute, section 97-3-101, but was conformed to the proposed statutory scheme.[366] We are recommending that the remainder of the statute be eliminated and replaced by the foregoing.

The Committee did adopt one of the Model Code's sex crimes statutes to cover indecent exposure, revising the statute with the needs of the State in mind.

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355. Section 213.3.
356. Section 213.3.
357. Section 213.3(1)(a).
358. Section 213(1)(b).
359. Section 213(1)(c).
360. Section 213(1)(d).
361. Section 213.3(1)(e).
362. Section 213.3(2).
363. Section 213.1(b).
364. Section 213.0(2).

§ 213.0. Definitions

In this Article, the definitions given in § 210.0 apply unless a different meaning plainly is required.

These definitions are set out in an earlier footnote. *See supra* note 72.

365. *See* Appendix B.
366. Section 213.5 Protective orders; Procedure for introducing evidence of sexual conduct of complaining witness; "complaining witness" defined.

E. Section 213.5 Indecent Exposure

The Committee adopted the following statute on indecent exposure:

> Section 213.5 Indecent Exposure
> (1) A person commits the offense of indecent exposure if, for the purpose of arousing or gratifying sexual desire of himself or of any other person, he exposes his genitals under circumstances in which he knows his conduct is likely to cause affront or ~~fear~~ alarm.
> A first or second conviction of section (1) is a Class B misdemeanor. A third or subsequent conviction of section (1) is a Class A misdemeanor.
> (2) A person commits the offense of indecent exposure to a child if, for the purpose of arousing or gratifying sexual desire of himself or of any other person, he exposes his genitals to a person known to be under sixteen years of age under circumstances in which he knows his conduct is likely to cause affront or alarm.
> A first conviction of section (2) is a Class A misdemeanor. A second or subsequent conviction of section 215.5 is a Fourth Degree Felony.[367]

The Model Code's version of indecent exposure deals with one who displays his genitals in circumstances known to carry risk of affront or fear "for the purpose of arousing or gratifying sexual desire."[368] The Committee decided to substitute the word "alarm" for "fear."[369] Another offense, "open lewdness," addresses the situation in which an actor may lack a purpose to arouse or gratify sexual desire and yet engage in objectively lewd display that shocks or outrages observers.[370] Open lewdness under section 251.1 is a Class D misdemeanor and will be discussed in a future article on crimes against public decency.

Indecent exposure is a type of sexual assault and is a Class B misdemeanor for a first or second offense, except in the case of a victim known to be under sixteen. The Committee decided that a subsequent offense should be a Class A misdemeanor. We also added a subsection that would punish the first indecent exposure to a child known to be under

367. Minutes, *supra* note 26 (January 2020).
368. MODEL PENAL CODE § 213.5 (AM. LAW INST. 1985).
369. Minutes, *supra* note 26 (January 2020).
370. MODEL PENAL CODE § 251.1 (AM. LAW INST. 1985).

sixteen as a Class A misdemeanor. Subsequent such offenses would be fourth-degree felonies.[371]

Indecent exposure requires exhibition of the genitals. Display of buttocks or breast is not covered.[372] The Code provision requires that the actor have a purpose to arouse or gratify the sexual desire of himself or of another who is not his spouse. We left out the reference to a spouse because we thought purpose to affront or alarm would be sufficient to criminalize the exposure regardless of who the person was.[373]

The requirement of sexual gratification would exclude prankster exhibitionism. Such conduct may be punished as "open lewdness" under section 251.1.[374] Indecent exposure requires that the actor know that his conduct is likely to cause alarm. Thus, nudists and exotic dancers would not be covered.[375]

Section 215.5 defines indecent exposure more narrowly than prior statutes. For example one of the Mississippi statutes prohibits "willfully and lewdly" exposing ones person, or private parts.[376] Another statute prohibits "indecent exposure of his or her person," as well as abusive language in or near the dwelling of another.[377] Both statutes must be

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371. *Id.*

372. MODEL PENAL CODE Art. 213 cmt. at 410 (AM. LAW INST. 1980).

373. Minutes, *supra* note 26 (January 2020).

374. MODEL PENAL CODE Art. 213 cmt. at 410 (AM. LAW INST. 1980).

375. MODEL PENAL CODE Art. 213 cmt. at 407 (AM. LAW INST. 1980).

376. MISS. CODE ANN. SECTION 97-29-31. Indecent exposure
A person who willfully and lewdly exposes his person, or private parts thereof, in any public place, or in any place where others are present, or procures another to so expose himself, is guilty of a misdemeanor and, on conviction for a first offense, shall be punished by a fine not exceeding Five Hundred Dollars ($500.00) or be imprisoned not exceeding six (6) months, or both. Upon conviction for a second offense within five (5) years, such person shall be guilty of a misdemeanor and shall be punished by a fine of not more than One Thousand Dollars ($1,000.00) or shall be imprisoned not exceeding one (1) year, or both. Upon conviction of a third or subsequent offense within five (5) years, such person shall be guilty of a felony and shall be punished by a fine of not more than Five Thousand Dollars ($5,000.00) or shall be imprisoned for not more than five (5) years in the State Penitentiary, or both. It is not a violation of this statute for a woman to breast-feed.

377. MISS. CODE ANN. § 97-35-11.
Disturbance by abusive language or indecent exposure
Any person who enters the dwelling house of another, or the yard or curtilage thereof, or upon the public highway, or any other place near such premises, and in the presence or hearing

intended to cover breast exposure because they both exclude breast feeding.[378] The rationale for limiting the coverage to genitalia in the proposed statute is to limit the offense to "visual sexual aggression against the unwilling viewer."[379] This would exclude private conduct that is conducted without "due regard to privacy."[380] This section is intended to prohibit intentional sexual exposure for sexual gratification, which is serious enough for the actor to be treated as a sex offender.[381]

VI. CONCLUSION

As have other states and the federal government, Mississippi has recognized the need for criminal justice reform.[382] As part of this effort, the criminal code should be updated and improved. Mississippi has been justifiably criticized for its criminal laws,[383] but this should not be the main impetus for this effort to revise the penal code. In the interests of justice and fairness, the conduct prohibited by the criminal law should be clearly defined with appropriate requirements for *mens rea*. Also important is that the punishment should be more carefully related to the seriousness of the crime. The Committee has attempted to propose new laws that are designed to serve the goals and the interests of our state.[384]

The first article, *inter alia*, explained the proposals for homicide crimes against the person.[385] This article has explained the proposals for non-homicide crimes against the person. Other than the homicide crimes, there is no area that requires clarity and definition more than this one, which includes assault and battery, kidnapping, and sex crimes. The current versions of these in the Mississippi Code often lack any *mens rea* requirement or definition of important terms.[386] Adoption of the Committee's proposals will supply these crucial elements.

> of the family or the possessor or occupant thereof, or of any member thereof, makes use of abusive, profane, vulgar or indecent language, or is guilty of any indecent exposure of his or her person at such place, shall be punished for a misdemeanor. The act of breast-feeding shall not constitute indecent exposure.

This statute would also be repealed by Art. 213.

378. *Id.*

379. MODEL PENAL CODE Art. 213 cmt. at 408 (AM. LAW INST. 1980).

380. *Id.*

381. *Id*. at 410.

382. H.B. 1352 (2019).

383. *See supra* discussion accompanying notes 3-6.

384. *See* Johnson, *supra* note 2, at IV.

385. *See* Johnson, *supra* note 2, at V. B.

386. *See* Appendix C, D and E.

Appendix A

Domestic Violence Statute Proposed:

Section 211.X Domestic Violence

(1) A person shall be guilty of domestic violence when the offense is committed against a current or former spouse of the defendant or a child of that person, a person living as a spouse or who formerly lived as a spouse with the defendant or a child of that person, a parent, grandparent, child, grandchild or someone similarly situated to the defendant, a person who has a current or former dating relationship with the defendant, or a person with whom the defendant has had a biological or legally adopted child.

(2) A person is guilty of simple domestic violence if he:

> (i) Attempts to cause or purposely, knowingly or recklessly causes bodily injury to another;
>
> (ii) Criminally negligently causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm; or
>
> (iii) Attempts by physical menace to put another in fear of imminent serious bodily harm.
>
> The offense is a Class A misdemeanor, except that it is Felony in the Fourth degree if at the time of the commission of the offense in question, he has two (2) prior convictions, whether against the same or another victim, within seven (7) years, for any combination of simple domestic violence under this subsection (2) or aggravated domestic violence as defined in subsection (3) of this section or substantially similar offenses under the law of another state, of the United States, or of a federally recognized Native American tribe.

(3) A person is guilty of aggravated domestic violence if he:

> (i) Attempts to cause serious bodily injury to another, or causes such an injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life;

(ii) Attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm.

The offense is a Felony in the Fourth Degree, except that

(i) the offense is a felony in the third degree if at the time of the commission of the offense, he has two (2) prior convictions within the past seven (7) years, whether against the same or another victim, for any combination of aggravated domestic violence under this subsection or simple domestic violence, which is defined as a felony in the fourth degree, as set forth in Subsection (2) or substantially similar offenses under the laws of another state, of the United States, or of a federally recognized Native American tribe.

(ii) the offense is a felony in the second degree if has at least three (3) previous convictions, whether against the same or different victims, for any combination of offenses defined in subsection (3) of this section or substantially similar offenses under the law of another state, of the United States, or of a federally recognized Native American tribe.

(4) Reasonable discipline of a child, such as spanking, is not an offense under this section.

(5) A person convicted under subsection (3) of this section shall not be eligible for parole under the provisions of Section 47-7-3(1)(c) until he shall have served one (1) year of his sentence.

(6) For the purposes of this section, "Dating relationship" means a social relationship as defined in Section 93-21-3.

(7) Every conviction under subsection (3) of this section may require as a condition of any suspended sentence that the defendant participate in counseling or treatment to bring about the cessation of domestic abuse. The defendant may be required to pay all or part of the cost of the counseling or treatment, in the discretion of the court.

(8) (a) Upon conviction under subsection (3) of this section, the court shall be empowered to issue a criminal protection order prohibiting the defendant from any contact with the victim. The court may include in a criminal protection order any other condition available under Section 93-21-15. The

duration of a criminal protection order shall be based upon the seriousness of the facts before the court, the probability of future violations, and the continued safety of the victim or another person. However, municipal and justice courts may issue criminal protection orders for a maximum period of time not to exceed one (1) year. Circuit and county courts may issue a criminal protection order for any period of time deemed necessary. Upon issuance of a criminal protection order, the clerk of the issuing court shall enter the order in the Mississippi Protection Order Registry within twenty-four (24) hours of issuance with no exceptions for weekends or holidays, pursuant to Section 93-21-25.

(b) A criminal protection order shall not be issued against the defendant if the victim of the offense, or the victim's lawful representative where the victim is a minor or incompetent person, objects to its issuance, except in circumstances where the court, in its discretion, finds that a criminal protection order is necessary for the safety and well-being of a victim who is a minor child or incompetent adult.

(c) Criminal protection orders shall be issued on the standardized form developed by the Office of the Attorney General and a copy provided to both the victim and the defendant.

(d) It shall be a Class B misdemeanor to knowingly violate any condition of a criminal protection order.

(9) When investigating allegations of a violation of subsection (3) of this section, whether or not an arrest results, law enforcement officers shall utilize the form prescribed for such purposes by the Office of the Attorney General in consultation with the sheriff's and police chief's associations. However, failure of law enforcement to utilize the uniform offense report shall not be a defense to a crime charged under this section. The uniform offense report shall not be required if, upon investigation, the offense does not involve persons in the relationships specified in subsections (1) of this section.

(10) In any conviction under subsection (3) of this section, the sentencing order shall include the designation "domestic violence." The court clerk shall enter the disposition of the matter into the corresponding uniform offense report.

Appendix B

Protective Orders and Procedure Statute Proposed:

Section 213.5 Protective orders; Procedure for introducing evidence of sexual conduct of complaining witness; "complaining witness" defined

(1) (a) Upon conviction section 213.1-4, the court may issue a criminal sexual assault protection order prohibiting the offender from any contact with the victim, without regard to the relationship between the victim and offender. The court may include in a criminal sexual assault protection order any relief available under Section 93-21-15. The term of a criminal sexual assault protection order shall be for a time period determined by the court, but all orders shall, at a minimum, remain in effect for a period of two (2) years after the expiration of any sentence of imprisonment and subsequent period of community supervision, conditional release, probation, or parole. Upon issuance of a criminal sexual assault protection order, the clerk of the issuing court shall enter the order in the Mississippi Protection Order Registry within twenty-four (24) hours of issuance, with no exceptions for weekends or holidays as provided in Section 93-21-25, and a copy must be provided to both the victim and offender.

(b) Criminal sexual assault protection orders shall be issued on the standardized form developed by the Office of the Attorney General.

(c) It is a Class B misdemeanor to knowingly violate any condition of a criminal sexual assault protection order. ~~Upon conviction for a violation, the defendant shall be punished by a fine of not more than Five Hundred Dollars ($ 500.00) or by imprisonment in the county jail for not more than six (6) months, or both.~~ Any sentence imposed for the violation of a criminal sexual assault protection order shall run consecutively to any other sentences imposed on the offender. The court shall also be empowered to extend the criminal sexual assault protection order for a period of one (1) year for each violation. The incarceration of a person at the time of the violation is not a bar to prosecution under this section. Nothing in this subsection shall be construed to prohibit the imposition of any other penalties or disciplinary action otherwise allowed by law or policy.

(2) In any prosecution under Sections 213.1-4, ~~for rape under Section 97-3-65, former 97-3-67 or 97-3-71~~, if evidence of sexual conduct of the complaining witness is offered to attack the credibility of said complaining witness, the following procedure shall be followed:

> (a) A written motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the sexual conduct of the complaining witness proposed to be presented and its relevancy in attacking the credibility of the complaining witness.
>
> (b) The written motion shall be accompanied by an affidavit in which the offer of proof shall be stated.
>
> (c) If the court finds that the offer of proof is sufficient, the court shall order a closed hearing in chambers, out of the presence of the jury, if any, and at such closed hearing allow the questioning of the complaining witness regarding the offer of proof made by the defendant.
>
> (d) At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant regarding the sexual conduct of the complaining witness is relevant and otherwise admissible, the court may make an order stating what evidence may be introduced by the defendant, and the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.

(3) As used in this section ~~and Section 97-3-70 [Repealed]~~, "complaining witness" means the alleged victim of the crime charged, the prosecution of which is subject to this section.

(4) In all cases where a victim is under the age of sixteen (16) years, it shall not be necessary to prove penetration where it is shown the genitals, anus or perineum of the child have been lacerated or torn in the attempt to have sexual intercourse with the attempt to have sexual intercourse with the child.

Appendix C

Mississippi Assault Statutes That Would Be Repealed:

MISS. CODE ANN. § 97-3-7 Simple assault; aggravated assault; simple domestic violence; simple domestic violence third; aggravated domestic violence; aggravated domestic violence third

(1) (a) A person is guilty of simple assault if he (i) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; (ii) negligently causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm; or (iii) attempts by physical menace to put another in fear of imminent serious bodily harm; and, upon conviction, he shall be punished by a fine of not more than Five Hundred Dollars ($ 500.00) or by imprisonment in the county jail for not more than six (6) months, or both.

(b) However, a person convicted of simple assault upon any of the persons listed in subsection (14) of this section under the circumstances enumerated in subsection (14) shall be punished by a fine of not more than One Thousand Dollars ($ 1,000.00) or by imprisonment for not more than five (5) years, or both.

(2) (a) A person is guilty of aggravated assault if he (i) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; (ii) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm; or (iii) causes any injury to a child who is in the process of boarding or exiting a school bus in the course of a violation of Section 63-3-615; and, upon conviction, he shall be punished by imprisonment in the county jail for not more than one (1) year or in the Penitentiary for not more than twenty (20) years.

(b) However, a person convicted of aggravated assault upon any of the persons listed in subsection (14) of this section under the circumstances enumerated in subsection (14) shall be punished by a fine of not more than Five Thousand Dollars ($ 5,000.00) or by imprisonment for not more than thirty (30) years, or both.

(3) (a) When the offense is committed against a current or former spouse of the defendant or a child of that person, a person living as a spouse or who formerly lived as a spouse with the defendant or a child of that person, a parent, grandparent, child, grandchild or someone similarly situated to the defendant, a person who has a current or former dating relationship with

the defendant, or a person with whom the defendant has had a biological or legally adopted child, a person is guilty of simple domestic violence who:

(i) Attempts to cause or purposely, knowingly or recklessly causes bodily injury to another;

(ii) Negligently causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm; or

(iii) Attempts by physical menace to put another in fear of imminent serious bodily harm.

Upon conviction, the defendant shall be punished by a fine of not more than Five Hundred Dollars ($ 500.00) or by imprisonment in the county jail for not more than six (6) months, or both.

(b) *Simple domestic violence: third.* A person is guilty of the felony of simple domestic violence third who commits simple domestic violence as defined in this subsection (3) and who, at the time of the commission of the offense in question, has two (2) prior convictions, whether against the same or another victim, within seven (7) years, for any combination of simple domestic violence under this subsection (3) or aggravated domestic violence as defined in subsection (4) of this section or substantially similar offenses under the law of another state, of the United States, or of a federally recognized Native American tribe. Upon conviction, the defendant shall be sentenced to a term of imprisonment not less than five (5) nor more than ten (10) years.

(4) (a) When the offense is committed against a current or former spouse of the defendant or a child of that person, a person living as a spouse or who formerly lived as a spouse with the defendant or a child of that person, a parent, grandparent, child, grandchild or someone similarly situated to the defendant, a person who has a current or former dating relationship with the defendant, or a person with whom the defendant has had a biological or legally adopted child, a person is guilty of aggravated domestic violence who:

(i) Attempts to cause serious bodily injury to another, or causes such an injury purposely, knowingly or recklessly under

circumstances manifesting extreme indifference to the value of human life;

(ii) Attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm; or

(iii) Strangles, or attempts to strangle another.

Upon conviction, the defendant shall be punished by imprisonment in the custody of the Department of Corrections for not less than two (2) nor more than twenty (20) years.

(b) *Aggravated domestic violence; third.* A person is guilty of aggravated domestic violence third who, at the time of the commission of that offense, commits aggravated domestic violence as defined in this subsection (4) and who has two (2) prior convictions within the past seven (7) years, whether against the same or another victim, for any combination of aggravated domestic violence under this subsection (4) or simple domestic violence third as defined in subsection (3) of this section, or substantially similar offenses under the laws of another state, of the United States, or of a federally recognized Native American tribe. Upon conviction for aggravated domestic violence third, the defendant shall be sentenced to a term of imprisonment of not less than ten (10) nor more than twenty (20) years.

(5) *Sentencing for fourth or subsequent domestic violence offense.* Any person who commits an offense defined in subsection (3) or (4) of this section, and who, at the time of the commission of that offense, has at least three (3) previous convictions, whether against the same or different victims, for any combination of offenses defined in subsections (3) and (4) of this section or substantially similar offenses under the law of another state, of the United States, or of a federally recognized Native American tribe, shall, upon conviction, be sentenced to imprisonment for not less than fifteen (15) years nor more than twenty (20) years.

(6) In sentencing under subsections (3), (4) and (5) of this section, the court shall consider as an aggravating factor whether the crime was committed in the physical presence or hearing of a child under sixteen (16) years of age who was, at the time of the offense, living within either the residence of the

victim, the residence of the perpetrator, or the residence where the offense occurred.

(7) Reasonable discipline of a child, such as spanking, is not an offense under subsections (3) and (4) of this section.

(8) A person convicted under subsection (4) or (5) of this section shall not be eligible for parole under the provisions of Section 47-7-3(1)(c) until he shall have served one (1) year of his sentence.

(9) For the purposes of this section:

> (a) "Strangle" means to restrict the flow of oxygen or blood by intentionally applying pressure on the neck, throat or chest of another person by any means or to intentionally block the nose or mouth of another person by any means.

(b) "Dating relationship" means a social relationship as defined in Section 93-21-3.

(10) Every conviction under subsection (3), (4) or (5) of this section may require as a condition of any suspended sentence that the defendant participate in counseling or treatment to bring about the cessation of domestic abuse. The defendant may be required to pay all or part of the cost of the counseling or treatment, in the discretion of the court.

(11) (a) Upon conviction under subsection (3), (4) or (5) of this section, the court shall be empowered to issue a criminal protection order prohibiting the defendant from any contact with the victim. The court may include in a criminal protection order any other condition available under Section 93-21-15. The duration of a criminal protection order shall be based upon the seriousness of the facts before the court, the probability of future violations, and the continued safety of the victim or another person. However, municipal and justice courts may issue criminal protection orders for a maximum period of time not to exceed one (1) year. Circuit and county courts may issue a criminal protection order for any period of time deemed necessary. Upon issuance of a criminal protection order, the clerk of the issuing court shall enter the order in the Mississippi Protection Order Registry within twenty-four (24) hours of issuance with no exceptions for weekends or holidays, pursuant to Section 93-21-25.

(b) A criminal protection order shall not be issued against the defendant if the victim of the offense, or the victim's lawful representative where the

victim is a minor or incompetent person, objects to its issuance, except in circumstances where the court, in its discretion, finds that a criminal protection order is necessary for the safety and well-being of a victim who is a minor child or incompetent adult.

(c) Criminal protection orders shall be issued on the standardized form developed by the Office of the Attorney General and a copy provided to both the victim and the defendant.

(d) It shall be a misdemeanor to knowingly violate any condition of a criminal protection order. Upon conviction for a violation, the defendant shall be punished by a fine of not more than Five Hundred Dollars ($ 500.00) or by imprisonment in the county jail for not more than six (6) months, or both.

(12) When investigating allegations of a violation of subsection (3), (4), (5) or (11) of this section, whether or not an arrest results, law enforcement officers shall utilize the form prescribed for such purposes by the Office of the Attorney General in consultation with the sheriff's and police chief's associations. However, failure of law enforcement to utilize the uniform offense report shall not be a defense to a crime charged under this section. The uniform offense report shall not be required if, upon investigation, the offense does not involve persons in the relationships specified in subsections (3) and (4) of this section.

(13) In any conviction under subsection (3), (4), (5) or (11) of this section, the sentencing order shall include the designation "domestic violence." The court clerk shall enter the disposition of the matter into the corresponding uniform offense report.

(14) Assault upon any of the following listed persons is an aggravating circumstance for charging under subsections (1)(b) and (2)(b) of this section:

> (a) When acting within the scope of his duty, office or employment at the time of the assault: a statewide elected official; law enforcement officer; fireman; emergency medical personnel; public health personnel; social worker, family protection specialist or family protection worker employed by the Department of Human Services or another agency; Division of Youth Services personnel; any county or municipal jail officer; superintendent, principal, teacher or other instructional personnel, school attendance officer or school bus

> driver; any member of the Mississippi National Guard or United States Armed Forces; a judge of a circuit, chancery, county, justice, municipal or youth court or a judge of the Court of Appeals or a justice of the Supreme Court; district attorney or legal assistant to a district attorney; county prosecutor or municipal prosecutor; court reporter employed by a court, court administrator, clerk or deputy clerk of the court; public defender; or utility worker;
>
> (b) A legislator while the Legislature is in regular or extraordinary session or while otherwise acting within the scope of his duty, office or employment; or
>
> (c) A person who is sixty-five (65) years of age or older or a person who is a vulnerable person, as defined in Section 43-47-5.

MISS. CODE ANN. § 97-3-85. Threats and intimidation; by letter or notice

> If any person shall post, mail, deliver, or drop a threatening letter or notice to another, whether such other be named or indicated therein or not, with intent to terrorize or to intimidate such other, he shall, upon conviction, be punished by imprisonment in the county jail not more than six months, or by fine not more than five hundred dollars, or both.

Appendix D

Kidnapping Statutes That Would Be Repealed:

MISS. CODE ANN. § 97-3-1. Abduction for purposes of marriage
Every person who shall take any person over the age of fourteen (14) years unlawfully, against his or her will, and by force, menace, fraud, deceit, stratagem or duress, compel or induce him or her to marry such person or to marry any other person, or to be defiled, and shall be thereof duly convicted, shall be punished by imprisonment in the penitentiary not less than five (5) years and not more than fifteen (15) years.

MISS. CODE ANN. § 97-3-53. Kidnapping; punishment
Any person who, without lawful authority and with or without intent to secretly confine, shall forcibly seize and confine any other person, or shall inveigle or kidnap any other person with intent to cause such person to be confined or imprisoned against his or her will, or without lawful authority shall forcibly seize, inveigle or kidnap any vulnerable person as defined in Section 43-47-5 or any child under the age of sixteen (16) years against the will of the parents or guardian or person having the lawful custody of the child, upon conviction, shall be imprisoned for life in the custody of the Department of Corrections if the punishment is so fixed by the jury in its verdict. If the jury fails to agree on fixing the penalty at imprisonment for life, the court shall fix the penalty at not less than one (1) year nor more than thirty (30) years in the custody of the Department of Corrections.
This section shall not be held to repeal, modify or amend any other criminal statute of this state.

MISS. CODE ANN. § 97-23-83. Threats or coercion to prevent lawful conduct of business
If any person shall in any manner threaten with bodily harm, intimidate or coerce another person to prevent said person from lawfully trading or carrying on business, including buying or selling, he shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by imprisonment for not more than one (1) year in the county jail or be fined not more than one thousand dollars ($ 1,000.00) or both.

MISS. CODE ANN. § 97-3-13. False confinement; sending sane person to psychiatric hospital or institution.
Every person or officer who maliciously sends to or confines in a psychiatric hospital or institution or other place, any sane person as a person with mental illness, knowing the person to be sane, shall be guilty of a

felony, and, on conviction, shall be punished by a fine of not more than Five Hundred dollars.

Appendix E

Sex crimes statutes that would be repealed:

MISS. CODE ANN. § 97-3-65. Statutory rape; enhanced penalty for forcible sexual intercourse or statutory rape by administering certain substances; criminal sexual assault protection order

(1) The crime of statutory rape is committed when:

(a) Any person seventeen (17) years of age or older has sexual intercourse with a child who:

(i) Is at least fourteen (14) but under sixteen (16) years of age;

(ii) Is thirty-six (36) or more months younger than the person; and

(iii) Is not the person's spouse; or

(b) A person of any age has sexual intercourse with a child who:

(i) Is under the age of fourteen (14) years;

(ii) Is twenty-four (24) or more months younger than the person; and

(iii) Is not the person's spouse.

(2) Neither the victim's consent nor the victim's lack of chastity is a defense to a charge of statutory rape.

(3) Upon conviction for statutory rape, the defendant shall be sentenced as follows:

(a) If eighteen (18) years of age or older, but under twenty-one (21) years of age, and convicted under subsection (1) (a) of this section, to imprisonment for not more than five (5) years in the State Penitentiary or a fine of not more than Five Thousand Dollars ($ 5,000.00), or both;

(b) If twenty-one (21) years of age or older and convicted under subsection (1)(a) of this section, to imprisonment of not more than thirty (30) years in the State Penitentiary or a fine of not more than Ten Thousand Dollars ($ 10,000.00), or both, for the first offense, and not more than forty (40) years in the State Penitentiary for each subsequent offense;

(c) If eighteen (18) years of age or older and convicted under subsection (1)(b) of this section, to imprisonment for life in the State Penitentiary or such lesser term of imprisonment as the court may determine, but not less than twenty (20) years;

(d) If thirteen (13) years of age or older but under eighteen (18) years of age and convicted under subsection (1)(a) or (1)(b) of this section, such imprisonment, fine or other sentence as the court, in its discretion, may determine.

(4) (a) Every person who shall have forcible sexual intercourse with any person, or who shall have sexual intercourse not constituting forcible sexual intercourse or statutory rape with any person without that person's consent by administering to such person any substance or liquid which shall produce such stupor or such imbecility of mind or weakness of body as to prevent effectual resistance, upon conviction, shall be imprisoned for life in the State Penitentiary if the jury by its verdict so prescribes; and in cases where the jury fails to fix the penalty at life imprisonment, the court shall fix the penalty at imprisonment in the State Penitentiary for any term as the court, in its discretion, may determine.

(b) This subsection (4) shall apply whether the perpetrator is married to the victim or not.

(5) In all cases where a victim is under the age of sixteen (16) years, it shall not be necessary to prove penetration where it is shown the genitals, anus or perineum of the child have been lacerated or torn in the attempt to have sexual intercourse with the child.

(6) (a) Upon conviction under this section, the court may issue a criminal sexual assault protection order prohibiting the offender from any contact with the victim, without regard to the relationship between the victim and offender. The court may include in a criminal sexual assault protection order any relief available under Section 93-21-15. The term of a criminal sexual assault protection order shall be for a time period determined by the court, but all orders shall, at a minimum, remain in effect for a period of

two (2) years after the expiration of any sentence of imprisonment and subsequent period of community supervision, conditional release, probation, or parole. Upon issuance of a criminal sexual assault protection order, the clerk of the issuing court shall enter the order in the Mississippi Protection Order Registry within twenty-four (24) hours of issuance, with no exceptions for weekends or holidays as provided in Section 93-21-25, and a copy must be provided to both the victim and offender.

(b) Criminal sexual assault protection orders shall be issued on the standardized form developed by the Office of the Attorney General.

(c) It is a misdemeanor to knowingly violate any condition of a criminal sexual assault protection order. Upon conviction for a violation, the defendant shall be punished by a fine of not more than Five Hundred Dollars ($ 500.00) or by imprisonment in the county jail for not more than six (6) months, or both. Any sentence imposed for the violation of a criminal sexual assault protection order shall run consecutively to any other sentences imposed on the offender. The court shall also be empowered to extend the criminal sexual assault protection order for a period of one (1) year for each violation. The incarceration of a person at the time of the violation is not a bar to prosecution under this section. Nothing in this subsection shall be construed to prohibit the imposition of any other penalties or disciplinary action otherwise allowed by law or policy.

(7) For the purposes of this section, "sexual intercourse" shall mean a joining of the sexual organs of a male and female human being in which the penis of the male is inserted into the vagina of the female or the penetration of the sexual organs of a male or female human being in which the penis or an object is inserted into the genitals, anus or perineum of a male or female.

MISS. CODE ANN. § 97-3-68. Rape; procedure for introducing evidence of sexual conduct of complaining witness; "complaining witness" defined

(1) In any prosecution for rape under Section 97-3-65, former 97-3-67 or 97-3-71, if evidence of sexual conduct of the complaining witness is offered to attack the credibility of said complaining witness, the following procedure shall be followed:

(a) A written motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the sexual conduct of the complaining

witness proposed to be presented and its relevancy in attacking the credibility of the complaining witness.

(b) The written motion shall be accompanied by an affidavit in which the offer of proof shall be stated.

(c) If the court finds that the offer of proof is sufficient, the court shall order a closed hearing in chambers, out of the presence of the jury, if any, and at such closed hearing allow the questioning of the complaining witness regarding the offer of proof made by the defendant.

(d) At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant regarding the sexual conduct of the complaining witness is relevant and otherwise admissible, the court may make an order stating what evidence may be introduced by the defendant, and the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the court.

(2) As used in this section and Section 97-3-70 [Repealed], "complaining witness" means the alleged victim of the crime charged, the prosecution of which is subject to this section.

MISS. CODE ANN. § 97-3-69. Rape; "chaste character" presumed; uncorroborated testimony of victim insufficient

In the trial of all cases under the last preceding section, it shall be presumed that the female was previously of chaste character, and the burden shall be upon the defendant to show that she was not; but no person shall be convicted upon the uncorroborated testimony of the injured female.

MISS. CODE ANN. § 97-3-71. Rape; assault with intent to ravish

Every person who shall be convicted of an assault with intent to forcibly ravish any female of previous chaste character shall be punished by imprisonment in the penitentiary for life, or for such shorter time as may be fixed by the jury, or by the court upon the entry of a plea of guilty.

MISS. CODE ANN. § 97-3-95. Sexual battery

(1) A person is guilty of sexual battery if he or she engages in sexual penetration with:

(a) Another person without his or her consent;

(b) A mentally defective, mentally incapacitated or physically helpless person;

> (c) A child at least fourteen (14) but under sixteen (16) years of age, if the person is thirty-six (36) or more months older than the child; or
>
> (d) A child under the age of fourteen (14) years of age, if the person is twenty-four (24) or more months older than the child.

(2) A person is guilty of sexual battery if he or she engages in sexual penetration with a child under the age of eighteen (18) years if the person is in a position of trust or authority over the child including without limitation the child's teacher, counselor, physician, psychiatrist, psychologist, minister, priest, physical therapist, chiropractor, legal guardian, parent, stepparent, aunt, uncle, scout leader or coach.

MISS. CODE ANN. § 97-3-97. Sexual battery; definitions
For purposes of Sections 97-3-95 through 97-3-103 the following words shall have the meaning ascribed herein unless the context otherwise requires:

> (a) "Sexual penetration" includes cunnilingus, fellatio, buggery or pederasty, any penetration of the genital or anal openings of another person's body by any part of a person's body, and insertion of any object into the genital or anal openings of another person's body.
>
> (b) A "mentally defective person" is one who suffers from a mental disease, defect or condition which renders that person temporarily or permanently incapable of knowing the nature and quality of his or her conduct.
>
> (c) A "mentally incapacitated person" is one rendered incapable of knowing or controlling his or her conduct, or incapable of resisting an act due to the influence of any drug, narcotic, anesthetic, or other substance administered to that person without his or her consent.
>
> (d) A "physically helpless person" is one who is unconscious or one who for any other reason is physically incapable of communicating an unwillingness to engage in an act.

MISS. CODE ANN. § 97-3-99. Sexual battery; defense of marriage

A person is not guilty of any offense under Sections 97-3-95 through 97-3-103 if the alleged victim is that person's legal spouse and at the time of the alleged offense such person and the alleged victim are not separated and living apart; provided, however, that the legal spouse of the alleged victim may be found guilty of sexual battery if the legal spouse engaged in forcible sexual penetration without the consent of the alleged victim.

MISS. CODE ANN. § 97-3-101. Sexual battery; penalty; criminal sexual assault protection order

(1) Every person who shall be convicted of sexual battery under Section 97-3-95(1)(a), (b) or (2) shall be imprisoned in the State Penitentiary for a period of not more than thirty (30) years, and for a second or subsequent such offense shall be imprisoned in the Penitentiary for not more than forty (40) years.

(2) (a) Every person who shall be convicted of sexual battery under Section 97-3-95(1)(c) who is at least eighteen (18) but under twenty-one (21) years of age shall be imprisoned for not more than five (5) years in the State Penitentiary or fined not more than Five Thousand Dollars ($ 5,000.00), or both;

(b) Every person who shall be convicted of sexual battery under Section 97-3-95(1)(c) who is twenty-one (21) years of age or older shall be imprisoned not more than thirty (30) years in the State Penitentiary or fined not more than Ten Thousand Dollars ($ 10,000.00), or both, for the first offense, and not more than forty (40) years in the State Penitentiary for each subsequent offense.

(3) Every person who shall be convicted of sexual battery under Section 97-3-95(1)(d) who is eighteen (18) years of age or older shall be imprisoned for life in the State Penitentiary or such lesser term of imprisonment as the court may determine, but not less than twenty (20) years.

(4) Every person who shall be convicted of sexual battery who is thirteen (13) years of age or older but under eighteen (18) years of age shall be sentenced to such imprisonment, fine or other sentence as the court, in its discretion, may determine.

(5) (a) Upon conviction under this section, the court may issue a criminal sexual assault protection order prohibiting the offender from any contact with the victim, without regard to the relationship between the victim and offender. The court may include in a criminal sexual assault protection

order any relief available under Section 93-21-15. The term of a criminal sexual assault protection order shall be for a time period determined by the court, but all orders shall, at a minimum, remain in effect for a period of two (2) years following the expiration of any sentence of imprisonment and subsequent period of community supervision, conditional release, probation, or parole. Upon issuance of a criminal sexual assault protection order, the clerk of the issuing court shall enter the order in the Mississippi Protection Order Registry within twenty-four (24) hours of issuance with no exceptions for weekends or holidays as provided in Section 93-21-25, and a copy must be provided to both the victim and offender.

(b) Criminal sexual assault protection orders shall be issued on the standardized form developed by the Office of the Attorney General.

(c) It is a misdemeanor to knowingly violate any condition of a criminal sexual assault protection order. Upon conviction for a violation, the defendant shall be punished by a fine of not more than Five Hundred Dollars ($ 500.00) or by imprisonment in the county jail for not more than six (6) months, or both. Any sentence imposed for the violation of a criminal sexual assault protection order shall run consecutively to any other sentences imposed on the offender. The court may extend the criminal sexual assault protection order for a period of one (1) year for each violation. The incarceration of a person at the time of the violation is not a bar to prosecution under this section. Nothing in this subsection shall be construed to prohibit the imposition of any other penalties or disciplinary action otherwise allowed by law or policy.

MISS. CODE ANN. § 97-3-103. Sexual battery; relationship with other criminal statutes
Sections 97-3-95 through 97-3-103 shall not be held to repeal, modify or amend any other criminal statute of this state.

MISS. CODE ANN. § 97-5-23. Fondling child; punishment

(1) Any person above the age of eighteen (18) years, who, for the purpose of gratifying his or her lust, or indulging his or her depraved licentious sexual desires, shall handle, touch or rub with hands or any part of his or her body or any member thereof, or with any object, any child under the age of sixteen (16) years, with or without the child's consent, or a mentally defective, mentally incapacitated or physically helpless person as defined in Section 97-3-97, shall be guilty of a felony and, upon conviction thereof, shall be fined in a sum not less than One Thousand Dollars ($1,000.00) nor more than Five Thousand Dollars ($5,000.00), or be committed to the

custody of the State Department of Corrections not less than two (2) years nor more than fifteen (15) years, or be punished by both such fine and imprisonment, at the discretion of the court.

(2) Any person above the age of eighteen (18) years, who, for the purpose of gratifying his or her lust, or indulging his or her depraved licentious sexual desires, shall handle, touch or rub with hands or any part of his or her body or any member thereof, any child younger than himself or herself and under the age of eighteen (18) years who is not such person's spouse, with or without the child's consent, when the person occupies a position of trust or authority over the child shall be guilty of a felony and, upon conviction thereof, shall be fined in a sum not less than One Thousand Dollars ($1,000.00) nor more than Five Thousand Dollars ($5,000.00), or be committed to the custody of the State Department of Corrections not less than two (2) years nor more than fifteen (15) years, or be punished by both such fine and imprisonment, at the discretion of the court. A person in a position of trust or authority over a child includes without limitation a child's teacher, counselor, physician, psychiatrist, psychologist, minister, priest, physical therapist, chiropractor, legal guardian, parent, stepparent, aunt, uncle, scout leader or coach.
(3) Upon a second conviction for an offense under this section or a substantially similar offense under the laws of another state, the person so convicted shall be punished by commitment to the State Department of Corrections for a term not to exceed twenty (20) years.

MISS. CODE ANN. **§** § 97-5-41. Carnal knowledge of certain children

(1) Any person who shall have carnal knowledge of his or her unmarried stepchild or adopted child younger than himself or herself and over fourteen (14) and under eighteen (18) years of age, upon conviction, shall be punished by imprisonment in the penitentiary for a term not exceeding ten (10) years.

(2) Any person who shall have carnal knowledge of an unmarried child younger than himself or herself and over fourteen (14) and under eighteen (18) years of age, with whose parent he or she is cohabiting or living together as husband and wife, upon conviction, shall be punished by imprisonment in the penitentiary for a term not exceeding ten (10) years.

MISS. CODE ANN. § 97-29-31. Indecent exposure
A person who willfully and lewdly exposes his person, or private parts thereof, in any public place, or in any place where others are present, or procures another to so expose himself, is guilty of a misdemeanor and, on

conviction for a first offense, shall be punished by a fine not exceeding Five Hundred Dollars ($500.00) or be imprisoned not exceeding six (6) months, or both. Upon conviction for a second offense within five (5) years, such person shall be guilty of a misdemeanor and shall be punished by a fine of not more than One Thousand Dollars ($1,000.00) or shall be imprisoned not exceeding one (1) year, or both. Upon conviction of a third or subsequent offense within five (5) years, such person shall be guilty of a felony and shall be punished by a fine of not more than Five Thousand Dollars ($5,000.00) or shall be imprisoned for not more than five (5) years in the State Penitentiary, or both. It is not a violation of this statute for a woman to breast-feed.

MISS. CODE ANN. § 97-35-11. Disturbance by abusive language or indecent exposure

Any person who enters the dwelling house of another, or the yard or curtilage thereof, or upon the public highway, or any other place near such premises, and in the presence or hearing of the family or the possessor or occupant thereof, or of any member thereof, makes use of abusive, profane, vulgar or indecent language, or is guilty of any indecent exposure of his or her person at such place, shall be punished for a misdemeanor. The act of breast-feeding shall not constitute indecent exposure.