

Comments to 1991 Senate Bill 358

[NOTE: The text of 1991 S.B. 358 may be found in the 1992 Sessions Laws, Chapter 298.]

Comment to Section 1 (K.S.A. 8-1567)

Subsection (a)(3) is revised to parallel subsections (a)(4) and (5). See *State v. Reeves*, 233 Kan. 702 (1983).

Comment to Section 2 (K.S.A. 21-3201)

The statutory terms used to describe the two types of criminal intent are replaced with terms that are more commonly used by the legal profession and the general public. "Willful" is replaced with "intentional." "Wanton" is replaced with "reckless." These revisions merely clarify the statute and are not substantive in nature.

Comment to Section 3 (K.S.A. 21-3401)

The two types of first degree murder -- premeditated and felony murder -- are divided into subsections (a) and (b) respectively. For all practical purposes, the revisions merely clarify the statute.

(a) Premeditated murder

The statutory language is simplified and generally patterned from the Model Penal Code. "Willfully" is replaced with "intentionally" because the latter term is better understood. "Deliberately" is deleted because it is redundant. "Maliciously" is deleted because it is unnecessary and confusing. The deletion of the term "maliciously" is not a substantive revision and is not intended to affect defenses. The definition of "premeditation" is deleted because it is unnecessary.

(b) Felony murder

The statutory language describing the underlying felony is changed from "any felony" to "an inherently dangerous felony." This revision accurately reflects the case law and presumably the legislative intent. Inherently dangerous felonies are listed in a separate definition section. The list is limited to felonies that have been specifically recognized by the Kansas Supreme Court or that clearly support felony murder. Note: The Kansas Supreme Court held that child abuse merges and does not support felony murder. *State v. Lucas*, 243 Kan. 462 (1988). However, the Kansas Legislature subsequently added child abuse to the statute. (L. 1989, ch. 87 § 1) Consequently, child abuse is listed as an inherently dangerous felony. Similarly, the drug offenses are listed because the Kansas Legislature specifically added them to the statute in 1990. (L. 1990, ch. 100s § 2) For a discussion on distinct criminal homicides as underlying felonies for felony murder, see *Lucas*, supra at 466; but see *State v. Leonard*, 248 Kan. 427, 430-31 (1991).

The statutory language "in the commission of, attempt to commit, or flight from" more accurately reflects the law and is more easily understood. The 1990 language ". . . as a result of . . ." when specifically referring to underlying drug felonies is deleted.

Comment to Section 4 (K.S.A. 21-3402)

Second degree murder is divided into two subsections. Subsection (a) covers intentional murders and merely clarifies the statute. Subsection (b) is new and covers "depraved-heart" murders.

(a) Intentional murder

The statutory language is simplified and generally patterned from the Model Penal Code. "Intentionally" is added because it accurately reflects this type of murder and is easily understood. "Without deliberation or premeditation," "not in perpetration or attempt to perpetrate a felony," and "maliciously" are deleted because they are unnecessary and confusing. The deletion of the term "maliciously" is not a substantive revision and is not intended to affect defenses.

(b) Depraved-heart murder

This new subsection covers extremely reckless murders. The proposed statutory language is patterned from the Model Penal Code. A majority of states recognize common law depraved-heart murder.

Depraved-heart murder, as defined by the Model Penal Code, is a reckless killing done "under circumstances manifesting extreme indifference to the value of human life." Model Penal Code § 210.2 (1)(b) (1980).

Depraved-heart murder includes extremely reckless killings and intent-to-do-serious-bodily-injury killings. Examples of depraved-heart murder include: (1) killing a child while target shooting at school windows during school hours; and (2) killing a person while beating him with a baseball bat with the intent to severely injure him.

The majority of states as well as the Model Penal Code categorizes this conduct as murder. Most states include depraved-heart murder within second degree murder. Categorizing this crime as murder provides a greater deterrent to this extremely dangerous conduct.

Adding depraved-heart murder also gives theoretical continuity to the criminal homicide statutes, thereby improving plea bargains and verdicts. Depraved-heart murder is fundamentally similar to felony murder and involuntary manslaughter. In felony murder cases, the commission of the underlying felony provides the extreme recklessness required for criminal liability. In involuntary manslaughter cases, the commission of the underlying unlawful act or the reckless conduct provides the necessary recklessness. Depraved-heart murder, in terms of degree, falls between felony murder (first degree murder) and involuntary manslaughter. As illustrated in the above two examples, this extremely reckless conduct is at least as dangerous to human life as most felony murder situations. Adding depraved-heart murder provides a middle category to cover

extremely reckless conduct, thus improving plea bargains and verdicts.

Comment to Section 5 (K.S.A. 21-3403)

Voluntary manslaughter is divided into two subsections. Subsection (a) covers "heat of passion" manslaughters and merely clarifies the statute. Subsection (b) is new and covers "imperfect right to self-defense" manslaughters.

(a) "Heat of passion" manslaughters

The statutory language is simplified. "Unlawful" and "without malice" are deleted because they are unnecessary and confusing.

(b) "Imperfect right to self-defense" manslaughter

This new subsection covers intentional killings that result from an unreasonable but honest belief that deadly force was justified in self-defense. In essence, the defendant meets the subjective, but not the objective, test for self-defense. The so-called "imperfect right to self-defense" is recognized in various forms. Kansas apparently recognizes it for unintentional killings under involuntary manslaughter. *State v. Gregory*, 218 Kan. 180 (1975); *State v. Warren*, 5 Kan. App. 2d 754 (1981); *State v. Meyers*, 245 Kan. 471 (1989). The Model Penal Code also follows this approach. Some states, e.g. Illinois, recognize this partial defense for intentional killings. See Lafave, *Criminal Law*, pp. 665-66 (1986).

Applying this partial defense to intentional killings is simply a recognition of the practical realities of plea bargaining and jury verdicts. Often it is unjust to prosecute and convict such killers of murder and it is equally unjust to acquit them. This new subsection provides a middle category that is theoretically sound and legitimizes the realities of plea bargaining and jury verdicts.

Comment to Section 6 (K.S.A. 21-3404)

The two types of involuntary manslaughter -- reckless and unlawful act -- are divided into subsections (a) and (b) respectively. The former statutory language was very confusing and did not reflect the 1968 Judicial Council comment. The statutory revisions correct these problems and follow majority law. Also, aggravated vehicular homicide (21-3405a) is incorporated into this statute.

(a) Reckless involuntary manslaughter

The statutory language is simplified. "Wanton" is replaced with "recklessly" because the latter term is better understood. Furthermore, "reckless" is a better legal term and it parallels other statutory revisions. "Unlawful" and "without malice" are deleted because they are unnecessary and confusing.

(b) Unlawful act involuntary manslaughter

Inherently dangerous felonies (defined by statute) and local ordinances are excluded. The former are covered under felony murder; the latter could cause harsh results and are covered if the conduct is reckless. K.S.A. 8-1566, 8-1567 and 8-1568 are specifically included to incorporate the former aggravated vehicular homicide (21-3405a). A separate statute is unnecessary and confusing.

The statutory language "in the commission of, attempt to commit, or flight from" more accurately reflects the law, is more easily understood, and parallels the felony murder language.

Comment to Section 7 (K.S.A. 21-3405)

"Unintentional" is added to clarify the state of mind and to parallel the other homicide statutes. The one-year limitation is deleted because it unnecessarily limits liability and is not found in other homicide statutes.

Comment to Section 8 (K.S.A. 21-3406)

The revisions merely clarify the statute to cover aiding and abetting attempted suicides.

Comment to Section 9 (K.S.A. 21-3408)

The revisions merely clarify the statute. Kansas only recognizes tort-type assault. Most jurisdictions also include attempted-battery assault, which covers situations where the victim is unaware that a battery was attempted. This conduct, however, can be prosecuted in Kansas by simply charging attempted battery.

Comment to Section 10 (K.S.A. 21-3410)

The revisions clarify the statute and more concisely incorporate the elements of simple assault.

Comment to Section 11 (K.S.A. 21-3412)

Battery is divided into two subsections. This division is necessary to incorporate reckless battery.

Reckless battery is necessary to punish reckless conduct that results in bodily harm. (If such reckless conduct resulted in death it would be some type of criminal homicide.) Most jurisdictions recognize reckless batteries.

Subsection (a) covers batteries that result in bodily harm. Intentional and reckless conduct is covered. "Unlawful" is deleted because it is unnecessary and confusing.

Subsection (b) covers conduct that intentionally causes insulting contact. "Insolent" is replaced with "insulting" because the latter term is better understood. Reckless conduct is not covered under subsection (b).

Comment to Section 12 (K.S.A. 21-3414)

The revisions clarify the statute and incorporate the revised elements of simple battery.

Consequently, an aggravated battery can be committed recklessly. (See comment to 21-3412) The modifier "any" is deleted to clarify that the statute does not refer to minor disfigurement. The term "dismemberment" has been deleted on the basis it is adequately covered by "great bodily harm."

A reduced penalty for a reckless aggravated battery is provided to avoid a reckless act resulting in great bodily harm carrying a higher penalty than a reckless act resulting in death (involuntary manslaughter).

Comment to Section 13 (K.S.A. 21-3415)

The section continues the policy of providing an increased penalty for an intentional aggravated battery committed against a law enforcement officer. A reckless aggravated battery committed against a law enforcement officer is covered by the general provision on reckless aggravated battery (21-3414(1)(b)). Increasing the penalty one felony class for an aggravated reckless battery based on its commission against a law enforcement officer would result in a higher penalty than that for a reckless act causing the death of a law enforcement officer.

Comment to Section 14 (K.S.A. 21-3419)

The section covers a broad range of conduct and has been relabeled as "criminal" rather than "terroristic" threat. "Wanton" is replaced by "reckless" because the latter term is more commonly used and better understood.

Comment to Section 15 (K.S.A. 21-3424)

The section is relabeled as "criminal" restraint and the gender references are removed.

Comment to Section 16 (K.S.A. 21-3426)

The revisions merely clarify the statute.

Comment to Section 17 (K.S.A. 21-3427)

The reference to K.S.A. 21-3426 has been added to parallel the form of other aggravated statutes such as aggravated assault and aggravated battery.

Comment to Section 18 (K.S.A. 21-3428)

The revision clarifies the previous statute. Also, it makes clear that the "accusations or statements" threatened to be communicated may be information know to the public.

Comment to Section 19 (K.S.A. 21-3434)

The revision makes the organization liable for promoting or permitting hazing. This revision was made because the original statute may have been a "more specific crime" and this may have enabled serious offenders to escape appropriate punishment.

Comment to Section 20 (K.S.A. 21-3502)

Subsection (1)(b) is added to make sexual intercourse with a child under 12 rape regardless of whether the child actually consents to the act. Subsection (1)(b) constitutes statutory rape and stands for the proposition that children under the age of 12 cannot legally consent to sexual acts. Twelve years represents the common-law age at which a female has the capacity to enter into a marriage and Kansas recognizes such common-law marriages. Subsection (1)(a) covers nonconsensual sexual intercourse.

Comment to Section 21 (K.S.A. 1990 Supp. 21-3503)

As revised, the section addresses acts of "lewd fondling or touching" with children 12 or more years of age but less than 16. Lack of consent is not an element. Sexual intercourse with children under 12 is rape under 21-3502(b). Sexual intercourse with children 12 to 16 years of age and "lewd fondling or touching" of children under 12 years of age are covered by aggravated indecent liberties with a child (21-3504).

Subsection (1)(c) is deleted. Acts of solicitation are covered under 21-3510 (Indecent Solicitation of a Child).

Prior to 1989, nonmarriage of the child and the offender was an element of indecent liberties with a child. The Legislature deleted this element and made marriage of the child to the accused at the time of the offense a defense to a charge of indecent liberties with the child. (L. 1989, ch. 89 § 1) As revised, nonmarriage is reinserted as an element of the offense and the affirmative defense of marriage is deleted. The element of nonmarriage was not viewed as substantially different from other elements of criminal offenses and it was deemed inconsistent to single it out as an appropriate matter for an affirmative defense. There is also the concern that making marriage an affirmative defense may compel self-incrimination since, in instances of a common-law marriage, the defendant will have to testify as to the existence of the marriage to successfully put the defense in issue.

Comment to Section 22 (K.S.A. 21-3504)

As revised, the section covers sexual intercourse with a child 12 or more but less than 16 and "lewd fondling or touching" of a child under 12. Lack of consent is not an element. Under the former statutes, the severity of the crime as reflected in the penalty classification, varied with the status (e.g. parent, guardian, proprietor of foster home) of the offender. Under the revised statutes, the severity of the act depends on the sexual act involved and the age of the victim, not on the status of the offender.

Soliciting a child under 12 to engage in "lewd fondling" is covered under 21-3511 (Aggravated Indecent Solicitation of a Child).

Nonmarriage is an element under subsection (a), but not under subsection (b) which covers

certain acts with children under 12 years of age. Since there is no minimum statutory age for marriage in Kansas, the common law governs and fixes the age at 12 for females. *State v. Wade*, 244 Kan. 136 (1989).

Comment to Section 23 (K.S.A. 21-3505)

New subdivisions are added to subsection (1). The reference to age in subsection (1)(a) is added to accommodate and parallel other provisions. Subsections (1)(b) and (c) address sodomy with children who are 12 or more years of age but less than 16. Violations of (1)(b) and (c) constitute felonies presumably of the same severity as sexual intercourse with a child between 12 and 16 (21-3504(a), aggravated indecent liberties with a child). Lack of consent is not an element. If there is a lack of consent, aggravated criminal sodomy could be charged.

Comment to Section 24 (K.S.A. 21-3506)

Subsections (a) and (b) are revised to cover children under 12 years of age. Lack of consent is not an element. This parallels the revision making sexual intercourse with a child under 12 statutory rape. (See 21-3502(b)) Sodomy with children between 12 and 16 years of age is covered in 21-3505. However, if there is a lack of consent in a case involving a child between 12 and 16 years of age, it would constitute aggravated criminal sodomy under subsection (c). Subsection (c) parallels 21-3502(1)(a) (Rape).

Comment to Section 25 (K.S.A. 21-3508)

In subsection (a), the reference to "any person or animal" is deleted as unnecessary. The phrase "otherwise lawful" is added to distinguish violations of the subsection from nonconsensual or unlawful acts covered by other sections with more severe penalties. Subsection (b) was expanded to include any public exposure of a sex organ.

Comment to Section 26 (K.S.A. 21-3510)

The section is revised to address certain acts with children 12 or more years of age but less than 16. Subsection (2) incorporates acts proscribed by 21-3509 (enticement of a child). The term "accosting" is deleted as unnecessary.

The offense is elevated from a class A misdemeanor to a felony. Similar acts with children under 12 years of age are covered by 21-3511 (aggravated indecent solicitation of a child).

Comment to Section 27 (K.S.A. 21-3511)

The section is revised to address certain acts with children under 12 years of age. Subsection (2) incorporates acts proscribed by 21-3509 (enticement of a child). The term "accosting" is deleted as unnecessary.

Comment to Section 28 (K.S.A. 21-3513)

Promoting prostitution when the prostitute is under 16 years of age is raised to a D felony. In

such cases, the person is promoting acts which are D, C or B felonies.

When the prostitute is 16 or more years of age, the section is revised in conjunction with the repeal of 21-3514 (habitually promoting prostitution) to make a prior conviction a factor which enhances punishment rather than an element of a crime.

Comment to Section 29 (K.S.A. 1990 Supp. 21-3516)

The addition of subsection (1)(d) incorporates 21-3519 into the section. Consequently, the reference to 21-3519 in subsection (2) is deleted.

Comment to Section 30 (K.S.A. 21-3517)

The section is revised to cover situations in which the victim is 16 or more years of age. Similar acts with children under 16 are covered by 21-3503 (indecent liberties with a child) and 21-3504 (aggravated indecent liberties with a child). Lack of consent is not an element under such statutes. "Unlawful" is deleted as unnecessary.

Comment to Section 31 (K.S.A. 21-3518)

The section is revised to make sexual battery aggravated in the same circumstances which would make sexual intercourse rape under 21-3502(1)(a). This represents the substance of former subsections (a), (d) and (e) of this section.

Former subsection (b) concerning sexual battery against children under 16 years of age is deleted. Such acts are addressed by 21-3503 (indecent liberties with a child) and 21-3504 (aggravated indecent liberties with a child) which do not contain lack of consent as an element.

Former subsection (c) made it aggravated sexual battery to commit a sexual battery ". . . in another's dwelling by one who entered into or remained in the dwelling without authority; . . ." A similar result is achieved by revisions to the burglary statutes (see 21-3715 and 3716).

Comment to Section 33 (K.S.A. 21-3602)

This offense is narrowed to only include otherwise lawful acts. The revisions make it clear that unlawful acts should be prosecuted under the statutes making such acts unlawful.

Comment to Section 34 (K.S.A. 21-3603)

See comment to 21-3602. The revision narrows this offense to exclude crimes covered under other statutes.

Comment to Section 35 (K.S.A. 1991 Supp. 21-3605)

The first and last sentences of former subsection (1)(f) are deleted. The first sentence contained a reduced standard of proof for parentage which was held to violate the constitutional requirement that every element of a crime be proven beyond a reasonable doubt. *State v. Rupert*, 247 Kan. 512, 515 (1990). The last sentence added little and appeared to create an evidentiary presumption

which impermissibly relieved the state of its burden of proof beyond a reasonable doubt on the essential element of intent. See generally, *State v. DeVries*, 13 Kan. App. 2d 609 (1989).

Comment to Section 36 (K.S.A. 21-3608)

Former subsection (1)(a) is deleted. It covered causing or permitting a child under 18 ". . . to suffer unjustifiable physical pain or mental distress." This provision was found to be unconstitutional since it was so vague and indefinite it failed to establish reasonably definite standards of guilt. *State v. Meinert*, 225 Kan. 816 (1979). Adequate coverage is provided by the remainder of subsection (1).

The substance of subsection (2) is unchanged. The impact of subsection (2) appears to be limited to prosecutions for endangering a child and would not affect potential prosecutions under the homicide and battery statutes.

Comment to Section 37 (K.S.A. 21-3609)

Abuse of a child is raised from a D to a C felony to make the penalty consistent with that for intentional aggravated battery (K.S.A. 21-3414(1)(a)).

Comment to Section 38 (K.S.A. 21-3612)

The term "traffic offender" is deleted from subsection (1)(a). "Traffic offender" was defined in K.S.A. 38-802 of the old juvenile code and the other terms defined in that code (delinquent, miscreant, wayward, deprived, truant) have been deleted from (1)(a) in previous years. Causing or encouraging a child to commit a traffic infraction or a traffic offense which is a misdemeanor is covered by (1)(b), as amended. Also deleted from (1)(a) is causing or encouraging a child to become or remain a "juvenile offender." "Juvenile offender" is defined in K.S.A. 38-1602(b). Causing a child to be a juvenile offender by virtue of committing a misdemeanor or violation of 41-727 or 74-8810 (j) is covered by (1)(b), as amended. Causing a child to be a juvenile offender by virtue of committing a felony is covered by (1)(e). Without the amendments, causing a child to commit a felony would be a violation of both subsections (1)(a) and (e) and different penalties are prescribed for violations of these subsections.

Former subsection (1)(b) covered "causing or encouraging a child under 18 years of age not to attend school as required by law." It is deleted since subsection (1)(a) refers to a "child in need of care." "Child in need of care" is defined to include a person under 18 who "is not attending school as required by K.S.A. 72-977 or 72-1111 . . ." (K.S.A. 38-1502 (a)(6))

Causing or encouraging a child to commit a felony is viewed as the most serious violation of the section and is raised to a class D felony.

Comment to Section 39 (K.S.A. 21-3701)

The provision on the removal in a lawful manner of personal property unlawfully placed or left

upon real property is deleted because it is unnecessary.

The provision regarding municipal ordinances is deleted because enhanced sentences should be based on convictions from a court of record.

Comment to Section 40 (K.S.A. 21-3703)

The statute is revised to make reference to the "lawful" owner to address situations involving found contraband.

Comment to Section 41 (K.S.A. 21-3704)

"Lodging" has been added to the services covered under subsection (2). Consequently, K.S.A. 36-206 and 207 (relating to defrauding an inn keeper) are repealed.

Comment to Section 42 (K.S.A. 21-3705)

The provision on the removal in a lawful manner of personal property unlawfully placed or left upon real property is deleted because it is unnecessary.

Comment to Section 43 (K.S.A. 1991 Supp. 21-3707)

Subsection (4) is revised to parallel the provisions of 21-3701 relating to enhanced penalties for repeated, misdemeanor thefts. Formerly, this subject was addressed in 21-3708 (habitually giving a worthless check) under which a misdemeanor worthless check was escalated to an E felony if the person had been twice convicted of giving a worthless check within the immediately preceding two years. Under 21-3708, the prior convictions were an element of the offense. The revisions to 21-3707 and 3708 make enhancement based on prior convictions a sentencing issue, as it is under the theft statute. The period for considering prior convictions is enlarged from two to five years, as is done under the theft statute.

Comment to Section 44 (K.S.A. 1991 Supp. 21-3715)

The burglary statutes are revised to cover entering or remaining without authority with intent to commit a sexual battery. Former 21-3518(c) made it aggravated sexual battery to commit a sexual battery in another's dwelling by one who entered into or remained in the dwelling without authority.

Comment to Section 45 (K.S.A. 1991 Supp. 21-3716)

Structural and vehicular burglaries are put in separate categories. This revision parallels the 1989 amendment to the burglary statute (21-3715). In regard to the revision concerning sexual battery, see the comment to 21-3715.

Comment to Section 46 (K.S.A. 21-3721)

The revision expands coverage of the statute to nonnavigable bodies of water. This revision is supported by a 1990 Kansas Supreme Court decision. The Kansas Supreme Court held that if a

stream is nonnavigable the landowner's title extends to the middle of the stream bed by the same title that he owns the adjoining land. (The Court found that only the Kansas, Arkansas, and Missouri rivers have been declared navigable.) The Court concluded that owners of the bed of a nonnavigable stream have exclusive right of control of everything above the stream bed, subject only to constitutional and statutory limitations, restrictions, and regulations; and that the public has no right to the use of nonnavigable water overlying private lands for recreational purposes without the consent of the landowner. *State ex rel. Meeks v. Hays*, 246 Kan. 99 (1990). See Attorney General Opinions 80-161 and 74-137.

Comment to Section 47 (K.S.A. 21-3722)

sions are designed to prevent loopholes and improve enforcement.

Comment to Section 48 (K.S.A. 21-3728)

The statutory language defining criminal hunting is clarified and expanded to include trapping. The physical areas in which criminal hunting is prohibited are expanded to include nonnavigable bodies of water (see 21-3721 comment) and public road right-of-ways. This expansion apparently follows legislative intent.

Also, the statutory language regarding the landowner's permission is revised. Taken literally, the former statute allowed a landowner to give a hunter permission to hunt from an adjoining public road. The statutory language was revised to avoid confusion and apparently follow legislative intent. (Similar revisions are made in 21-4217).

The clause regarding the pursuit of a wounded animal is deleted. Although pursuing wounded animals is desirable, it poses significant danger to unaware landowners. Furthermore, by simply claiming pursuit of a wounded animal, an unlawful hunter has a virtual irrebuttable defense. Hunters should always receive permission to enter private property.

Comment to Section 49 (K.S.A. 1990 Supp. 21-3729)

The section has been relabeled as "criminal" use of a financial card.

Comment to Section 50 (K.S.A. 21-3734)

Subsection (2) is revised to make this section consistent with other property crimes where the dollar amount of harm determines the penalty classification.

Comment to Section 51 (K.S.A. 21-3755)

Subsection (2)(c) is revised to make this section consistent with other property crimes where the dollar amount of harm determines the penalty classification. The revised section refers to "criminal" computer access and substitutes "intentionally" for "willfully."

Comment to Section 52 (K.S.A. 1991 Supp. 21-3805)

"Intentionally" is substituted for "willfully" and an apparent omission made in 1989 amendments

is corrected by inserting ":(1)" after "falsely" so that "falsely" applies to subsection (a)(2).

Comment to Section 53 (K.S.A. 21-3807)

Subsection (1)(b) is added to specifically address matters which arguably are not covered under (1)(a).

Comment to Section 54 (K.S.A. 21-3813)

"Willfully" is replaced with "intentionally."

Comment to Section 55 (K.S.A. 21-3818)

The section is broadened to cover falsely reporting a crime to a state investigative agency. This extension is consistent with the intent of the statute to prevent malicious harassment through false accusation.

Comment to Section 56 (K.S.A. 21-3820)

"Reasonably" is deleted from (1)(a) as unnecessary.

Comment to Section 57 (K.S.A. 21-3824)

"Public" is inserted prior to "employee" to avoid any potential ambiguity. "Public employee" is defined in K.S.A. 21-3110(18).

Comment to Section 58 (K.S.A. 21-3826)

The section is revised to delete outdated terminology and provide a comprehensive definition of "penal institution."

Comment to Section 59 (K.S.A. 21-3827)

"Unlawful" is replaced with "Criminal."

Comment to Section 60 (K.S.A. 21-3829)

The section is revised to cover possession of other weapons in addition to firearms.

Comment to Section 61 (K.S.A. 21-3901)

As revised, a public officer or employee convicted of bribery is no longer forever disqualified from holding public office or employment in Kansas. Other statutes in the area of crimes affecting public trusts do not contain such a provision and its effectiveness is questionable in light of the ability to have a bribery conviction expunged.

Comment to Section 62 (K.S.A. 21-3902)

"Willfully" is replaced with "Intentionally."

"Oppression" and "partiality" are deleted from subsection (a) as unnecessary.

Comment to Section 63 (K.S.A. 21-3904)

The section is revised to make it consistent with other crimes where the dollar amount of harm determines the penalty classification.

Comment to Section 64 (K.S.A. 21-3905)

The section is revised to make it consistent with other crimes where the dollar amount of harm determines the penalty classification.

Comment to Section 65 (K.S.A. 21-3911)

The section is changed from an unclassified to a class C misdemeanor.

Comment to Section 66 (K.S.A. 21-4111)

The above statute is a consolidation of four statutes: K.S.A. 21-4111, Criminal Desecration; K.S.A. 21-4112, Desecrating a Dead Body; K.S.A. 21-4114, Desecration of Flags; and K.S.A. 21-4115, Desecrating a Cemetery.

Damaging a public monument and damaging a place of worship are revised to add a dollar amount to increase penalties for greater damage. Similar amendments were made to K.S.A. 21-4115 in 1990. (L. 1990, ch. 101, § 3) The revisions result in the same penalty applying to acts of desecration which cause monetary damage as would apply if such acts were covered under K.S.A. 21-3720 (criminal damage to property). An offender is still appropriately labeled as a "desecrator" but does not as a consequence evade the more severe penalty for property damage.

K.S.A. 21-4112 has been expanded to cover any dead human body such as a cadaver donated for authorized medical purposes, but then used for unauthorized purposes.

K.S.A. 21-4114 has been rewritten to remove the constitutional problems that were present in light of the recent U.S. Supreme Court decision on freedom of speech.

Comment to Section 67 (K.S.A. 21-4201)

"Unlawful" is replaced with "Criminal."

Former 21-3732 (possession or transportation of incendiary or explosive device) is incorporated into subsection (1)(i).

Violations of (1)(f) (possessing a silencer) are raised to an E felony. Other than the exemption provided in subsection (4), there appears to be no legitimate reason to possess such a device. The other misdemeanor violations are raised from class B to class A misdemeanors.

Comment to Section 68 (K.S.A. 21-4202)

The section is revised to provide an increased penalty for aggravated violations of subsections (1)(f), (g) and (h) of 21-4201. Formerly, aggravated and nonaggravated violations of (1)(g) and (h) carried the same penalty.

Comment to Section 69 (K.S.A. 1991 Supp. 21-4203)

"Unlawful" is replaced with "Criminal."

Comment to Section 70 (K.S.A. 1991 Supp. 21-4204)

"Unlawful" is replaced with "Criminal."

Comment to Section 71 (K.S.A. 21-4209)

"Unlawful" is replaced with "Criminal."

As revised, subsections (1)(b) and (c) follow the language used in other criminal provisions on weapons and explosives.

Comment to Section 72 (K.S.A. 21-4209a)

"Unlawful" is replaced with "Criminal."

The section is revised to delete the former exemption for possession of explosives in the course of a person's lawful employment.

Comment to Section 73 (K.S.A. 21-4217)

The section is redesignated as "criminal" discharge of a firearm. Subsection (a) is further subdivided to prohibit shooting from a public road, public road right-of-way or railroad adjoining lands is obtained. In (a)(1), the physical areas in which permission of the owner or person in possession is required is expanded to include nonnavigable bodies of water (see comment to 21-3721). In (b)(3), "Kansas" is deleted in recognition of the fact that national guard units from other states are at times in Kansas to perform official duties.

Comment to Section 74 (K.S.A. 1991 Supp. 65-4127a)

As revised, the penalty is lowered one felony class for a first conviction if such first conviction is for possession. Second, third and subsequent convictions under this section continue to carry enhanced penalties regardless of whether such subsequent convictions are for possession or sale. Consequently, a first conviction based on possession is no longer deemed equivalent for penalty purposes to a first conviction based on sale.

The reference to a sentence of life imprisonment for a class A felony in subsection (c) is deleted as unnecessary.

Subsection (e) is revised to cover persons 18 "or more" years of age to remove any ambiguity resulting from the former language of "over 18 years of age."

Comment to Section 75 (K.S.A. 1991 Supp. 65-4127b)

Subsection (e) is revised to cover persons 18 "or more" years of age to remove any ambiguity resulting from the former language of "over 18 years of age."

Comment to Section 76 (K.S.A. 1991 Supp. 65-4141)

The section is revised to cover use of a communication facility in the unlawful manufacture of a controlled substance. When this section was adopted in 1989, unlawful manufacture was covered in 65-4127a and 4127b. In 1990, unlawful manufacture was transferred to a new section (65-4159) which technically is not part of the Uniform Controlled Substances Act.

As revised, the section also covers the use of a communication facility in an attempt to commit a felony under the cited drug statutes as well as in a conspiracy to commit or the solicitation of such a felony.

Comment to Section 77

See comment to 21-3401.

COMMENTS TO SECTIONS REPEALED BY SB 358

Comment to K.S.A. 21-3405a

Repealed and incorporated into involuntary manslaughter (21-3404).

Comment to K.S.A. 21-3405b

Repealed and incorporated into battery (21-3412). Reckless batteries are covered under the revised battery statute, therefore, this statute is unnecessary.

Comment to K.S.A. 21-3417

This section is repealed because the proscribed acts are covered by attempted murder and attempted aggravated battery.

Comment to K.S.A. 21-3433

This section is repealed because the conduct is adequately covered by other crimes and federal statutes.

Comment to K.S.A. 21-3509

This section is repealed and incorporated into 21-3510 and 3511.

Comment to K.S.A. 21-3514

This section is repealed. See the comment to revision of 21-3513.

Comment to K.S.A. 21-3519

This section is repealed and incorporated into 21-3516.

Comment to K.S.A. 21-3606

This section is repealed. Where prosecutions do occur in this area it is redundant in light of the provisions for nonsupport of a spouse in K.S.A. 21-3605(2)(a). K.S.A. 21-3605(2)(a) was amended in 1970 to cover failure without just cause to provide support for a spouse "in necessitous circumstances." Prior to the 1970 amendment, 21-3605(2)(a) covered an individual's failure without just cause to support a spouse "where such individual knows of an existing legal obligation to provide such support." To the extent the scope of K.S.A. 21-3606 may arguably exceed that of 21-3605(2)(a), adequate coverage is provided by the homicide and battery statutes.

Comment to K.S.A. 21-3706

This section is repealed because the acts proscribed are adequately covered by attempted theft.

Comment to K.S.A. 21-3708

This section is repealed. The enhancement of misdemeanor violations to felonies based on prior convictions is addressed as a sentencing issue under the revisions to 21-3707.

The provision on giving two or more worthless checks on the same day is unnecessary in light of the enhanced penalties for repeated misdemeanor violations and the civil penalties available in connection with worthless checks.

Comment to K.S.A. 21-3714

This section is repealed. It is sufficient to make conduct criminal when it rises to the level of attempted forgery.

Comment to K.S.A. 21-3717

This section is repealed. It is sufficient to make conduct criminal when it rises to the level of attempted burglary.

Comment to K.S.A. 21-3732

This section is repealed. K.S.A. 21-4201 (unlawful use of weapons) is revised to cover acts

proscribed by this section.

Comment to K.S.A. 21-3733

This section is repealed. Acts proscribed by this section are adequately covered in K.S.A. 21-4201(1)(c).

Comment to K.S.A. 21-3735

This section is repealed. The proscribed conduct is covered by K.S.A. 21-3711 (making a false writing).

Comment to K.S.A. 21-3736

This section is repealed. The proscribed acts are covered by making a false writing (21-3711), theft (21-3701) and attempted theft.

Comment to K.S.A. 21-3740

This section is repealed. The proscribed acts are covered by criminal damage to property or attempted theft.

Comment to K.S.A. 21-3741

This section is repealed. It is sufficient to make conduct criminal when it rises to the level of attempted theft or attempted criminal damage to property.

Comment to K.S.A. 21-3745

This section is repealed. The proscribed acts are covered by 21-3701 (theft) and 21-3704 (theft of services).

Comment to K.S.A. 21-3753

This section is repealed. The proscribed acts are covered by K.S.A. 21-3701 (theft).

Comment to K.S.A. 21-3754

This section is repealed. The proscribed acts are covered by K.S.A. 21-3711 (making a false writing).

Comment to K.S.A. 21-3803

This section if repealed as unnecessary. It is doubtful it is ever used or contains any deterrent value. Acts constituting "criminal syndicalism" can be prosecuted under a variety of criminal statutes as can solicitation and conspiracy to commit such acts.

Comment to K.S.A. 21-3804

This section is repealed. See the comment to the repeal of 21-3803 (practicing criminal syndicalism).

Comment to K.S.A. 21-3906

This section is repealed as overly broad. For example, it would cover the purchase by a public officer or employee of a government obligation which, due to a below market interest rate, has a market price less than face value.

Comment to K.S.A. 21-3909

This section is repealed. It appears to serve no purpose due to the abolition of courts presided over by justices of the peace.

Comment to K.S.A. 21-4108

This section is repealed. Virtually all of the section's provisions appear to be unconstitutional.

Comment to K.S.A. 21-4112 and 21-4114

These sections are repealed and consolidated into 21-4111, as revised.

Comment to K.S.A. 23-102 and 23-103

K.S.A. 23-102 and 23-103 are repealed because they contain obsolete provisions and the proscribed acts are covered by other statutes.

Comment to K.S.A. 32-1013

See revisions to 21-3728 (criminal hunting).

Comment to K.S.A. 36-206 and 36-207

See revisions to 21-3704 (theft of services).

Comment to K.S.A. 65-4129

This section is repealed. A special double jeopardy provision is unnecessary in light of 21-3108 (effect of former prosecution) and 21-3102(2) which makes provisions of the criminal code applicable to crimes outside chapter 21.

Comment to K.S.A. 65-4154

This section is repealed. It was declared unconstitutional since it is geographically overbroad in that it prohibits advertising in Kansas the sale of objects which are legal in other states. *Kansas Retail Trade Cooperative v. Stephen*, 522 F. Supp. 632 (1981).