

# **Kansas Criminal Code Recodification Commission**



## **Final Report**



Kansas Criminal Code  
Recodification Commission

2010 Final Report to the  
Kansas Legislature

Volume I-Recodification

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Approved by the Commission  
December 16, 2009

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## EXECUTIVE SUMMARY

The Kansas Criminal Code Recodification Commission has completed its assigned task to recodify the Kansas criminal code and in this final report to the 2010 legislature submits its proposed criminal code. This Final Report is submitted in two volumes. Volume I, entitled Recodification, includes the proposed code where no changes are made to the substantive law. Volume II, entitled Policy Recommendations, includes proposed statutes that recommend revision of the substantive provisions of various statutes.

In K.S.A. 21-4801 the 2007 legislature created the Kansas Criminal Code Recodification Commission and provided the Commission with the mission and directive to recodify the Kansas criminal code. The Commission is composed of sixteen members appointed by the legislative, executive and judicial branches. The Commission members represent a broad spectrum of experience and interest in the criminal law. Professor Tom Stacy of the University of Kansas School of Law is chairman of the Commission and Ed Klumpp is vice chairman.

In 2004, the Legislature enacted K.S.A. 22-5101 establishing the Kansas Criminal Justice Recodification, Rehabilitation and Restoration Project. Included in the work the legislature assigned to the 3R's committee was the task of recodifying the Kansas criminal code. The 3R's recodification could not be completed before the provisions of K.S.A. 22-5101 expired March 31, 2007.

The 2007 Legislature created the Kansas Criminal Code Recodification Commission and assigned to it the mission of recodifying the Kansas criminal code (K.S.A. 21-4801). The 2007 legislative mandate to recodify the criminal code passed on to the Kansas Criminal Code Recodification Commission the task formerly undertaken by the Recodification Subcommittee of the Kansas Criminal Justice Recodification, Rehabilitation and Restoration Project.

The first meeting of the Kansas Criminal Code Recodification Commission (KCCRC), an organizational meeting, was held July 6, 2007. In its initial meeting, and in meetings thereafter, the KCCRC spent much time discussing the scope of its work and its mission to recodify the criminal code as described in the legislative mandate. With the guidance of the legislative members of the Commission, the Commission concluded that its mandate required a comprehensive recodification.

The Kansas criminal code is comprised of seventeen articles in Chapter 21 of the Kansas statutes that include more than 400 statutes. The Commission has considered and discussed each of those statutes section by section. Each proposed statute included with this report has been considered by the Reporter, the Commission's Recodification Subcommittee, and finally the Recodification Commission. This process necessarily has involved compromise. No section is a product of the thinking of any single individual.

The present criminal law of Kansas consists basically of statutes enacted by the 1969 Legislature made effective July 1, 1970. Many additions and amendments have been made since 1970, but often without regard for the relationship to or consistency with prior provisions.

In general, the substance of the Commission's work is divided into two proposals: (1) proposals regarding recodification of existing statutes, and (2) proposed recommendations for policy changes—a change to the substantive law. Some of the objectives in the proposed revisions are to state in clear, simple and understandable terms the elements of the prohibited acts; to organize the code provisions in a more user-friendly manner; to avoid drafting statutes in a manner that a question could be raised regarding the specific offense and general offense issue; to confine the provisions of the criminal code to those matters of substantive law which properly belong there; and to recommend repeal of statutes that no longer have applicability. Recommendations for policy changes to existing statutes include revisions to the substantive provisions of specific statutes, recommendations for repeal of statutes that no longer have application, and proposals for new statutes.

Many statutes which provide penal sanctions are found outside of the Chapter 21 criminal code. The Commission concluded that its work should not attempt to incorporate those statutes into the code as to do so would unduly burden the task of re-drafting the code. The Commission has recognized the existence of such statutes and has sought to avoid conflicts with the proposed code.

During the September, October, and November 2007 meetings much of the Commission's time was devoted to discussion of drug crimes. The Commission's work proposed that the legislature make the changes to present drug crimes statutes that included moving drug crimes from Chapter 65 to Chapter 21 of the Kansas Statutes, and grouping existing statutes into the core offenses of manufacture, distribution, and possession without revising existing Kansas law. The Commission's proposals were included in House Bill 2236 enacted in the 2009 legislature.

The Commission and Subcommittee devoted much time to an effort to clarify the Kansas culpability statute. The present code lacks standardized, consistent, culpability concepts. Culpability, or "criminal intent", is an element in virtually every crime although the intent required differs according to the specific crime. The required intent may involve purpose, intention, knowledge, recklessness, negligence, or other levels of culpability.

The Commission proposes adopting uniform culpability terms that will add clarity to the criminal code, will avoid unnecessary judicial interpretation of culpability terms, and will provide a guide or framework for the legislature in enacting future additions to the code.

## Foreword

The proposed criminal code submitted with this Report is the first comprehensive recodification of the Kansas criminal code in nearly 40 years. In 1963, the Kansas Judicial Council established an Advisory Committee on Criminal Law Revision to recodify the criminal code. The Advisory Committee began its work in 1963 and submitted its proposed code to the 1969 legislature. The proposed code was enacted and became effective July 1, 1970. The 1969 code enactment was the last major recodification of the Kansas criminal laws.

In 2004, the Legislature enacted K.S.A. 22-5101 establishing the Kansas Criminal Justice Recodification, Rehabilitation and Restoration Project (3R's Committee). Included in the work the legislature assigned to the 3R's committee was the task of recodifying the Kansas criminal code. The 3R's recodification could not be completed before the provisions of K.S.A. 22-5101 expired March 31, 2007.

The 2007 Legislature created the Kansas Criminal Code Recodification Commission and assigned to it the mission of recodifying the Kansas criminal code (K.S.A. 21-4801). The 2007 legislative mandate to recodify the criminal code passed on to the Kansas Criminal Code Recodification Commission (KCCRC) the task formerly undertaken by the Recodification Subcommittee of the Kansas Criminal Justice Recodification, Rehabilitation and Restoration Project (3R's Recodification Subcommittee).

In K.S.A. 21-4801 the legislature directs the Commission to prepare and submit interim reports to the legislature on or before February 1, 2008 and February 1, 2009. The final report is to be submitted to the legislature on or before January 11, 2010. The provisions of the statute expire July 1, 2010.

In compliance with the statutory directive the Kansas Criminal Code Recodification Commission has submitted interim reports to the 2008 and 2009 legislatures. The Commission has completed its assigned task to recodify the criminal law and in this final report to the 2010 legislature submits its proposed criminal code.

This Final Report is submitted in two volumes. The Kansas Criminal Code Recodification Commission divided its work into (1) recodification, without substantive changes to the criminal code, and (2) recommendations for policy changes to existing law. In reviewing the entire criminal code the Commission discovered several areas where some revision to the substantive law would improve the description of the offense or the code as a whole.

Volume I, entitled Recodification, includes the proposed code where no changes are made to the substantive law.

Volume II, entitled Policy Recommendations, includes proposed statutes that recommend revision of the substantive provisions of the statute. The statutory language and citations in these recommendations are based on the proposed recodification. Language to be removed is stricken and new language is in italics.

## I. Legislative Directive

In K.S.A. 21-4801 the 2007 legislature created the Kansas Criminal Code Recodification Commission and provided the Commission with the following mission and directive:

**“(b) The commission shall re-codify the Kansas criminal code by:**

**(1) Reviewing the American law institute model penal code, the criminal codes of other states, and other criminal law study resources, and making recommendations concerning proposed modifications, amendments and additions to the code.**

**(2) Analyzing and reviewing all criminal statutes and making recommendations for legislation that would ensure that the sentences are appropriate and proportionate to other sentences imposed for criminal offenses, with particular emphasis on the sentencing guidelines grid for drug crimes.**

**(3) Reviewing and determining the severity of the Kansas sentencing policies in relation to other states and review possible adjustments which may relieve or eliminate prison capacity issues in Kansas.**

**(4) Studying and making recommendations concerning the statutory definitions of crimes and criminal penalties and evaluate whether certain criminal conduct may be combined into one criminal statute, thus alleviating any potential problems of having two statutes prohibiting the same criminal conduct.**

**(5) Studying and making revisions to clarify the code to facilitate just and expedient resolution of criminal prosecutions and resolve or prevent statutory conflicts.”**

## II. Commission Membership

The Kansas Criminal Code Recodification Commission is composed of sixteen members appointed by the legislative, executive and judicial branches. The Commission members represent a broad spectrum of experience and interest in the criminal law.

The members of the KCCRC:

<u>Commission Member</u>	<u>Statutory Authority for Appointment</u>
Senator John Vratil	Senate Judiciary Committee, appointed by the President of the senate.
Senator David Haley	Senate Judiciary Committee, appointed by the Minority Leader of the Senate.
Representative Lance Kinzer	House of Representatives Judiciary Committee, appointed by the Speaker of the House of Representatives.
Representative Paul Davis (July 2007- April 2009)	House of Representatives Judiciary Committee, appointed by the Minority Leader of the House of Representatives.
Rep. Jan Pauls (May 2009-Present)	House of Representatives, Judiciary Committee, appointed by the Minority Leader of the House of Representatives.
Hon. Christel Marquardt	Judge, Court of Appeals, appointed by the Chief Justice of the Supreme Court.
Ed Klumpp	Chief of Police, Topeka, retired, appointed by the Attorney General.
Ed Collister	Defense attorney, appointed by the Governor.
Kim Parker	Deputy District Attorney, Sedgwick County, appointed by the Kansas County and District Attorneys Association.
Professor Tom Stacy	Professor of Law, appointed by the Dean of the University of Kansas School of Law.
Professor Michael Kaye	Professor of Law, appointed by the Dean of the Washburn University School of Law.
Steven L. Opat	County Attorney, Geary County, appointed by the Kansas Judicial Council Criminal Law Advisory Committee.

Debra Wilson	Appellate Defender, appointed by the Kansas Judicial Council Criminal Law Advisory Committee.
Hon. Richard Smith	District Judge, 6th Judicial District, appointed by the Kansas District Judges Association.
Hon. Larry Solomon (July 2007-December 2007) Rep. Jan Pauls (January 2008-April 2009) Tom Drees (May 2009-Present)	District Judge, 30 <sup>th</sup> Judicial District, appointed by the Kansas Sentencing Commission. House of Representatives, District 102, appointed by the Kansas Sentencing Commission. County Attorney, Ellis county, appointed by the Kansas Sentencing Commission.
Jacqie Spradling (July 2007-December 2008) Kristafer Ailslieger (January 2009-Present)	Assistant Attorney General, appointed by the Attorney General.  Assistant Solicitor General, appointed by the Attorney General.
Timothy Madden	Department of Corrections, appointed by the Secretary of Corrections.

## III. Background

### Introduction

In 1962 the American Law Institute published the Model Penal Code. In 1963, the Kansas Judicial Council established an Advisory Committee on Criminal Law Revision to recodify the criminal code. The criminal law of Kansas then consisted basically of statutes enacted by the first Kansas territorial legislature, which convened in 1855. Until the 1960's effort, a comprehensive or systematic revision of the criminal code had never been undertaken.

The Advisory Committee began its work on September 1, 1963. It submitted its proposed code to the 1969 legislature. The proposed code was enacted and became effective July 1, 1970. The 1969 code enactment was the last major recodification of the Kansas criminal laws.

In 2004, the Legislature enacted K.S.A. 22-5101 establishing the Kansas Criminal Justice Recodification, Rehabilitation and Restoration Project (3R's Committee). Included in the work the legislature assigned to the 3R's committee was the task of recodifying the Kansas criminal code. The 3R's recodification could not be completed before the provisions of K.S.A. 22-5101 expired March 31, 2007.

The 2007 Legislature created the Kansas Criminal Code Recodification Commission and assigned to it the mission of recodifying the Kansas criminal code (K.S.A. 21-4801). The 2007 legislative mandate to recodify the criminal code passed on to the Kansas Criminal Code Recodification Commission (KCCRC) the task formerly undertaken by the Recodification Subcommittee of the Kansas Criminal Justice Recodification, Rehabilitation and Restoration Project (3R's Recodification Subcommittee).

### 3R's Recodification Subcommittee

The 2004 Legislature enacted K.S.A. 22-5101 establishing the Kansas Criminal Justice Recodification, Rehabilitation and Restoration Project (3R's Committee). The legislature created the Project to (1) Recodify the Kansas criminal code; (2) Identify ways to rehabilitate offenders and to work with offenders on community-based supervision; and (3) Identify ways to restore the offender into society as a productive member. The work of the 3R's Committee was divided and assigned to three subcommittees. The provisions of K.S.A. 22-5101 expired March 31, 2007.

In a report prepared in March, 2007 the 3R's Recodification Subcommittee discussed the need for recodification of the criminal code. The Kansas Criminal Code was comprehensively codified in 1969. Since then, many crimes had been added to the code without adequate attention regarding (1) organization (2) coherency of its parts and (3) proportionality of sentences. The problems resulted in protracted criminal proceedings to ascertain legislative intent regarding definitions, overlapping offenses, and punishment.

Through the enactment of K.S.A. 22-5101, the 2004 Legislature authorized the 3R's subcommittee to recodify the Kansas Criminal Code by:

“(A) Analyzing and reviewing all criminal statutes and criminal procedure, making recommendations for legislation that would ensure that the sentences are appropriate and proportionate to other sentences imposed for criminal offenses, with particular emphasis on the sentencing guidelines grid for drug crimes.

(B) Studying and making recommendations concerning the statutory definitions of crimes and criminal penalties and evaluate whether certain criminal conduct may be combined into one criminal statute, thus alleviating any potential problems of having two statutes prohibiting the same criminal conduct.

(C) Reviewing and making recommendations concerning proposed criminal law modifications and amendments.

(D) Reviewing and determining the severity of the Kansas sentencing policies in relation to other states and review possible adjustments which may relieve or eliminate prison capacity issues in Kansas.

(E) Reviewing the enactment of K.S.A. 2006 Supp. 21-4729, and amendments thereto, the nonprison sanction of certified drug abuse treatment programs for certain offenders, and review and recommend how best to enhance the sentence for an offender who is not subject to treatment.”

After a formative meeting in October, 2004, the 3R’s Recodification Subcommittee held meetings until December, 2005. Tom Stacy, professor of law at the University of Kansas School of Law, chaired the subcommittee. During much of 2005, Judge David S. Knudson, a retired judge of the Kansas Court of Appeals served as Reporter for the subcommittee. Subcommittee members devoted countless hours of time to the recodification project. The Subcommittee had support of staff members from the offices of the Revisor of Statutes and Legislative Research. In addition, through the efforts of Professor Stacy and the University of Kansas School of Law, the Subcommittee had the assistance of legal research and memorandums of law from seven University of Kansas law students enrolled in a "Criminal Recodification Workshop."

In December, 2005, the Kansas Judicial Council authorized its Criminal Law Advisory Committee to participate in the work of the 3R’s Recodification Subcommittee. Criminal Law Advisory Committee members Stephen L. Opat of Junction City and Debra Wilson of Topeka were appointed to participate in the work of the recodification project. Ed Collister, a member of both the 3R’s Committee and the Kansas Judicial Council’s Criminal Law Advisory Committee, participated in the Subcommittee’s work from the beginning.

From December 2005 until September 2006 the subcommittee did not meet. In December, 2005 Judge Knudson resigned as Reporter. Judge John W. White, a retired Kansas district court judge, assumed the duties of Reporter in August, 2006. The subcommittee resumed its meetings in September, 2006. In November 2006, Judge J. Patrick Brazil, retired Chief Judge of the Kansas Court of Appeals, joined in the Reporter’s work.

In a report prepared in 2006 the subcommittee stated:

“The 1969 codification of the code was more than four years in the making. Understandably, the present effort to recodify the code will take considerably more time than presently proposed by the legislature. The subcommittee has not completed a preliminary review of the entire code. Drafts of Articles 31, 32, 33, and those sections of Article 34 relating to Homicides and Assaults have been approved. Other articles of the code are in an early stage of development. The subcommittee has before it the complex and contentious issue of recommending proposals to mitigate prison overcrowding and real world alternatives to provide for nonviolent offenders and the re-entry of inmates into our communities. The subcommittee is committed to finishing the task given to it by the legislature, but needs both time and funds to complete the mission. “

Although the 3R’s Recodification Subcommittee had done much work toward recodification of the Kansas Criminal Code its work was far from complete when the authority of the 3R’s Committee expired March 31, 2007.

#### Kansas Criminal Code Recodification Commission

The first meeting of the Kansas Criminal Code Recodification Commission (KCCRC), an organizational meeting, was held July 6, 2007. During the organizational meeting Professor Tom Stacy was elected Commission chairman and Ed Klumpp was elected vice-chairman. Professor Stacy previously served as chairman and Ed Klumpp as a member of the 3R’s Recodification Subcommittee.

#### Recodification Objectives

In its initial meeting, and in meetings thereafter, the KCCRC spent much time discussing the scope of its work and its mission to recodify the criminal code as described in the legislative mandate. The Commission considered and discussed whether the legislative mandate to recodify the criminal law anticipated simple revisions to the code or whether it anticipated a comprehensive recodification. Simple revisions to the code could include reorganizing the statutes to place them in a more user-friendly order, revising the statutory language to add clarity, combining statutes to reduce their number and eliminating unnecessary statutes.

The Commission considered issues within the existing code that needed to be addressed through recodification. The following description of those issues was included in the 2007 Interim Report :

- The code lacks standardized, consistent, culpability concepts. This failure is confusing and often requires the courts to divine legislative intent. As examples, consider: K.S.A. 21-3436 ("intentional, malicious, and repeated"); 21-3608 ("intentionally and unreasonably"); 21-3608a (intentionally and

recklessly"); 21-3737 ("willfully and maliciously"; 21-3761 ("maliciously or wantonly"); 21-3832(a) (knowingly and maliciously"); 21-3848 ("negligently failing"); 21-3902 ("maliciously cause harm"); 21-4005 ("maliciously circulating"); 21-4005 ("for the purpose of"); 21-4006 ("maliciously exposing"); 21-4102 ("for the purpose of"); 21-4219 ("malicious, intentional, and unauthorized"). Many of these terms lack meaningful definition and the specific crimes compound confusion by conjoining undefined terms;

- The code is poorly organized. Forty-two years of ad hoc legislation has led to increasing problems in determining which statute or penalty is to be applied (general law versus specific law; two or more laws proscribing the same conduct or overlapping application). Once again, this has required the Kansas appellate courts to search for legislative intent or order the imposition of the lesser of two potential penalties. Similarly, words or phrases have been given judicial construction that may or may not be consistent with legislative intent. This problem could be rectified by appropriate legislative action rather than defaulting to the courts for a necessary solution;
- Many offenses have been added to the code that criminalizes both a completed offense and an *attempt to commit the offense* despite the code's general attempts provision, K.S.A. 21-3301. See, for examples, K.S.A. 21-3428 (blackmail), 21-3815 (attempting to influence a judicial officer); and 21-4403 (deceptive commercial practices). Such redundancies, but with differing penalties, unduly complicate the code and invite judicial construction to determine legislative intent;
- Over the past forty-two years, crimes have been added to the code that are separate offenses but clearly subsets of the general crime. Examples are fraud offenses (welfare fraud, workers compensation fraud, securities fraud); battery offenses (battery against a law enforcement officer, domestic battery, battery against firefighter, battery against a correctional officer, battery against a school official, battery against a mental health employee); and a multitude of endangerment laws. This has resulted in a patchwork of disparate sentencing provisions that challenge the goal of a crimes code to be coherent in the punishments provided for various offenses; and
- Within the code are numerous outdated and unused criminal statutes that should be considered for repeal.

The Commission recognized that changes to the substantive law require the making of policy decisions that are within the sole province of the legislature. To avoid assuming the policy-making role of the legislature, the KCCRC decided that its final report to the legislature should be in two parts; the first part to include statutory revisions that do not involve change in substantive law and the second part to include recommendations to the legislature for changes in policy.

The Commission considered whether proposed changes to the code should be presented to the legislature in piecemeal fashion or whether the Commission's work should be completed before it is forwarded to the legislature as a proposed criminal code for Kansas. The Commission concluded that with the exception of a section on drug crimes the proposed code should be submitted upon completion of the Commission's work rather than submitting sections of the code as they are completed.

An example of how change to one statute may affect recommendations concerning other statutes arose in the Commission's consideration of the criminal intent (culpability) statute in Article 32 of Chapter 21. That statute and its effect on other statutes are discussed in a following section.

With the guidance of the legislative members of the Commission, the Commission concluded that its mandate required a comprehensive recodification and that it should approach its work within the following framework:

1. reorganize the statutes to place them in a more user-friendly order, revise the statutory language to add clarity, and combine statutes to reduce their number;
2. make recommendations for amending , deleting or adding statutory provisions that change the substantive law of the code;
3. the Commission should recodify the criminal code without making changes to the substantive law which involve policy decisions, but, where appropriate, in a separate document recommendations should be made to the legislature for policy changes, and
4. the Commission's work product, with the exception of the section on drug crimes, should not be presented to the legislature as sections of the code are completed but should be presented as an entire code at the conclusion of the Commission's work.

Additionally, the Commission recognized the importance of technology in crime reporting and recording of other data within various agencies of the local, state, and national criminal justice systems. Staff attorney Brett Watson met with representatives of law enforcement and the judiciary to discuss the effect revisions to statutes may have upon computer-based data recording systems. The Commission has made every effort to make changes in a form that would comply with existing crime reporting requirements.

#### Organization and Staff

During its organizational meeting, held July 6, 2007, the Commission discussed procedures to be followed and staff needed in accomplishing the Commission's work. The Commission approved hiring of reporters and a staff attorney.

At the July 25 meeting the Commission approved a contractual arrangement with Judges John W. White and J. Patrick Brazil to act as Reporters for the Commission. Brett Watson was introduced as staff attorney at the August 22 meeting. Staff members from the Office of Revisor of Statutes and Kansas Legislative Research Department have attended each Commission meeting.

In August, a KCCRC listserv was established through the courtesy of the Washburn Law School. Prior to each Commission meeting a meeting agenda, minutes of the previous meeting, documents and correspondence to be discussed at the meeting were posted on the listserv. Any party interested in viewing the Commission's archives could do so through a subscription to the listserv.

In September Professor Stacy announced the resignation of Judge Brazil as a Commission reporter.

During the April 2008 meeting Chairman Stacy recommended appointment of a Recodification Subcommittee. Under Professor Stacy's proposal, work prepared by the Reporter and Staff attorney would be submitted to the subcommittee and, after approval by the subcommittee would be forwarded to the full Commission. The Commission approved the proposal and Commission members Kinzer, Pauls, Smith, Opat, Madden, Klumpp, and Stacy were appointed to the subcommittee. Implementation of Professor Stacy's subcommittee proposal significantly expedited the Commission's work.

The Recodification Subcommittee held its first meeting in June 2008. The subcommittee met monthly thereafter with its last meeting in November 2009; in some months the subcommittee met for two days. In addition to the appointed members, Commission member Kim Parker attended many of the subcommittee's meetings.

#### KCCRC's Work Process

The Kansas criminal code is comprised of seventeen articles, Articles 31-47, in Chapter 21 of the Kansas statutes. There are more than 400 statutes in the seventeen articles. The Commission has considered and discussed each of those statutes section by section.

The Commission's work process has been to preserve the existing Kansas statutes wherever the Commission considers that the statutes are serving well the citizens of Kansas.

The Commission member's experience with other projects demonstrated a necessity for research and the preparation of preliminary drafts of proposed revisions and the need for centering this responsibility upon a single individual or group. Accordingly, the Commission appointed Judge John White as Reporter for the KCCRC. The drafting process originated with the Reporter, who examined each section of the existing law together with relevant judicial opinions. Also, similar statutes in other states were reviewed, particularly those of neighboring states and those states who have recently revised their codes. The Reporter drafted a suggested revision of each section, supported by comments and materials from cases, statutes and other authorities. The Reporter's suggestions were, prior to appointment of the KCCRC Recodification Subcommittee, submitted to the Commission that closely examined and evaluated each proposal. In many instances the drafting process was repeated several times before final approval.

After the Recodification Subcommittee was appointed the drafting process involved the additional step of examination of the proposal by the subcommittee. The proposal was submitted first to the subcommittee and was not forwarded to the full Commission until it had been approved by the subcommittee. Again, the sections were exposed to careful examination. Often one or more additional re-drafts were required before subcommittee approval was given.

Thus, each recommended section that is here published has been considered by the Reporter, the KCCRC Recodification Subcommittee, and finally the Recodification Commission. This process necessarily has involved compromise. No section is a product of the thinking of any single individual.

## IV. Recodification-Chapter 21 Crimes

The present criminal law of Kansas consists basically of statutes enacted by the 1969 Legislature made effective July 1, 1970. The 1970 code was, in some instances patterned after the American Law Institutes Model Penal Code. In other instances the 1970 provisions retained provisions of the prior Kansas criminal law. As discussed in a previous section, many additions and amendments have been made since 1970, but often without regard for the relationship to or consistency with prior provisions.

Certain considerations relevant to crimes and punishments are matters of state policy which lie outside the task of the technical redrafting of the criminal code. For example, the Commission has not felt it appropriate to make any recommendation concerning changes to the Kansas Sentencing Guidelines or some recent statutory enactments such as those statutes involving gang-related activities or weapons of mass destruction.

In general, the substance of the Commission's work is divided into two proposals: (1) proposals regarding recodification of existing statutes, and (2) proposed recommendations for policy changes—a change to the substantive law. Proposals for recodification are included in this volume; proposals for policy recommendations are included in Volume II.

The Commission has sought to make unlawful under the proposed code all conduct that is prohibited by the present law.

The proposed recodification version of the Chapter 21 criminal code statutes are attached to this volume of the report as Appendix A. Some of the objectives in the proposed revisions may be summarized as follows:

1. to state in clear, simple and understandable terms the elements of the prohibited acts. An attempt has been made to define each crime in language sufficiently specific that the individual who reads the statute can readily understand the conduct that is prohibited. Specific note should be made that most of the proposed statutes clarify the culpability standard required for the prohibited conduct.
2. to organize the code provisions in a more user-friendly manner. Statutes regarding similar conduct are placed in one section. For example, all homicide statutes are included in one section rather than the present circumstance where first-degree murder is found in KSA 21-3401 and capital murder is found in KSA 21-3439. Statutes are merged wherever it is practical to do so. Offenses involving a crime and aggravated crime have been merged into one statute although the crime/aggravated crime terminology is retained.
3. to avoid drafting statutes in a manner that a question could be raised regarding the specific offense and general offense issue. Discussion of these crimes often centered around the *State v McAdam* case.
4. to confine the provisions of the criminal code to those matters of substantive law which properly belong there. The present chapter 21 includes a few procedural and administrative

provisions which are not properly parts of a substantive criminal code. It is suggested that these sections be transferred to more appropriate chapters.

5. to recommend repeal of statutes that no longer have applicability. There are statutes in the articles regarding sentencing that are no longer applicable.

Many statutes which provide penal sanctions are found outside of the Chapter 21 criminal code. The Commission concluded that it should not attempt to incorporate those statutes into the code as to do so would unduly burden the task of re-drafting the code. The Commission has recognized the existence of such statutes and has sought to avoid conflicts with the proposed code. An exception to not including penal statutes from other chapters of the statutes is the drug code that has been drafted, and enacted, and moved from Chapter 65 to Chapter 21.

## V. Recodification-Chapter 65 Drug Crimes

As noted above, the Commission concluded that it should submit its proposed recodification in one report rather than piecemeal to the legislature. An exception was the section on drug crimes. During the 2007-2008 meetings much of the Commission's time was devoted to discussion of drug crimes. The Commission approved a recommendation to the legislature that drug crimes now included in Chapter 65 should be moved to the criminal code. House Bill 2236, New Sections 1 through 17 represent the work of the KCCRC in recodifying Kansas drug crimes.

The KCCRC's work proposed that the legislature make the following changes to present drug crimes statutes:

- To move drug crimes from Chapter 65 to Chapter 21 of the Kansas Statutes, and
- To group existing statutes into the core offenses of manufacture, distribution, and possession without revising existing Kansas law.

First, regarding the proposal to move drug crimes from Chapter 65 to Chapter 21 the Commission received testimony that cases involving drug crimes have a major impact on the work of law enforcement, the courts, the department of corrections, and other agencies of the criminal justice system. Although drug convictions account for approximately 18% of our prison population drug offenses were not in the criminal code but were found in Chapter 65 of Kansas statutes in the section generally devoted to regulation of pharmacists.

Highly technical definitions included in the definitions statute (K.S.A. 65-4101) were not easily understood by prosecutors, defense attorneys, judges, and jurors. Conduct considered criminal need not comport with highly technical definitions understood by chemists and pharmacists. Moving the drug offenses to the criminal code and providing traditional and readily understandable definitions of criminal conduct will improve and modernize our drug laws.

Second, the proposal to group core drug offenses into offenses involving possession, distribution and manufacture was directed to the law then existing where serious drug felonies currently were not grouped together in Chapter 65 and instead appeared in different portions of that Chapter. The proposed recodification grouped all of these offenses together. In addition, it ordered these offenses around the core offenses of manufacture, distribution, and possession. These changes make the drug provisions more coherent, clear, and user-friendly without revising current Kansas law.

In preparing New Sections 1-17, the Commission solicited input from the KBI technology section, from Kyle Smith, formerly of the Kansas Bureau of Investigation, and from the Kansas Board of Pharmacy. Kyle Smith presented testimony to the Commission. His comments provided valuable assistance to the Commission in our work on the drug crimes statutes.

We have met with a representative from the Kansas Board of Pharmacy. The Board of Pharmacy had no objections to the proposals.

In its work on drug crimes, and other crimes, the Commission's staff met with members of the KBI technology section. The Commission attempted to avoid any changes that would affect the KBI's crime reporting and data collection systems.

House Bill 2236 was enacted in the 2009 legislature. Drug crimes are now included in the Chapter 21 criminal code.

## VI. Recodification-Culpability

The Commission and Subcommittee devoted much time to an effort that it believes will clarify the Kansas culpability statute. The proposed culpability statutes are included in Appendix A. Because of its importance to the proposed code and the Commission's work, it is discussed in this section.

As noted in the interim reports, the present code lacks standardized, consistent, culpability concepts. Culpability, or "criminal intent", is an element in virtually every crime although the intent required differs according to the specific crime. The required intent may involve purpose, intention, knowledge, recklessness, negligence, or other levels of culpability.

The Kansas criminal intent statute, K.S.A. 21-3201, establishes and defines two levels of culpability, "intentional" conduct and "reckless" conduct. In various statutes other terms, which are undefined and not included in K.S.A. 21-3201, are used to describe criminal intent—or culpability. As examples: K.S.A. 21-3608 ("intentionally and unreasonably"); 21-3608a (intentionally and recklessly"); 21-3727 ("willfully and maliciously"); 21-3761 ("maliciously or wantonly"); 21-3832 (knowingly and maliciously"); 21-3848 ("negligently failing"); 21-3902 ("maliciously cause harm"); 21-4005 ("maliciously circulating"); 21-4005 ("for the purpose of"); 21-4006 ("maliciously exposing"); 21-4102 ("for the purpose of"); 21-4219 ("malicious, intentional, and unauthorized"). Many of these terms lack meaningful definition and the specific crimes compound confusion by conjoining undefined terms.

K.S.A. 21-3201 was enacted in the 1970 code. As previously discussed Kansas patterned some of its statutes after similar Model Penal Code provisions. The Model Penal Code (MPC) describes four levels of culpable conduct—"purposeful," "knowing," "reckless," and "negligent". As noted above, in the Kansas code myriad terms have been used: intentional, willful, malicious, knowing, criminally negligent, wanton, reckless, depraved, etc. Culpability is central to the definition of criminal offenses. A code becomes simpler, more accessible, and more coherent when it uses a limited number of culpability terms whose meaning is standardized. Over the last several decades, newly drafted state codes have moved in this direction.

The Commission believes that adopting uniform culpability terms will add clarity to the criminal code, will avoid unnecessary judicial interpretation of culpability terms, and will provide a guide or framework for the legislature in enacting future additions to the code.

The following statutes are proposed as amendments to the Kansas Criminal Code.

### **21-32-101. Requirement of Voluntary Act or Omission (New)**

- (a) A person commits an offense only if such person voluntarily engages in conduct, including an act, an omission, or possession.**
- (b) A person who omits to perform an act does not commit an offense unless a law provides that the omission is an offense or otherwise provides that such person has a duty to perform the act.**

This new section defines a crime as an act or an omission. The proposed statute is added to clarify that both acts and omissions maybe be punishable. The section codifies Kansas case law by requiring a voluntary act or omission.

Kansas statutes are silent as to the nature of the act required for criminal liability except as to the definition of a crime in K.S.A. 21-3105 where crime is defined as “an act or omission defined by law” and in K.S.A. 21-3110 where “act” is defined as including “a failure or omission to take action.” PIK 54.01 the Kansas Judicial Council’s PIK Advisory Committee cites the following part of the instruction as a rule of evidence. “Ordinarily, a person intends all of the usual consequences of (his)(her) voluntary acts.” The Model Penal Code and codes of many states include a description that the act or omission must be voluntary.

The proposed statute is patterned after the voluntary acts and omissions provision of the Texas Penal Code.

**21-32-102. Culpability requirement; definitions; application .**

- (a) Except as otherwise provided, a culpable mental state is an essential element of every crime defined by this code. A culpable mental state may be established by proof that the conduct of the accused person was committed “intentionally,” “knowingly,” or “recklessly.”**
- (b) Culpable mental states are classified according to relative degrees, from highest to lowest, as follows:
  - (1) intentionally;**
  - (2) knowingly;**
  - (3) recklessly.****
- (c) Proof of a higher degree of culpability than that charged constitutes proof of the culpability charged. If recklessness suffices to establish an element, that element also is established if a person acts knowingly or intentionally. If acting knowingly suffices to establish an element, that element also is established if a person acts intentionally.**
- (d) If the definition of a crime does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition plainly dispenses with any mental element.**
- (e) If the definition of a crime does not prescribe a culpable mental state, but one is nevertheless required under subsection (d), “intent,” “knowledge,” or “recklessness” suffices to establish criminal responsibility.**
- (f) If the definition of a crime prescribes a culpable mental state that is sufficient for the commission of a crime, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the crime, unless a contrary purpose plainly appears.**

- (g) If the definition of a crime prescribes a culpable mental state with regard to a particular element or elements of that crime, the prescribed culpable mental state shall be required only as to specified element or elements, and a culpable mental state shall not be required as to any other element of the crime unless otherwise provided.**
- (h) A person acts “intentionally”, or “with intent,” with respect to the nature of such person’s conduct or to a result of such person’s conduct when it is such person’s conscious objective or desire to engage in the conduct or cause the result. All crimes defined in this code in which the mental culpability requirement is expressed as "intentionally" or "with intent" are specific intent crimes. A crime may provide that any other culpability requirement is a specific intent.**
- (i) A person acts “knowingly”, or “with knowledge,” with respect to the nature of such person’s conduct or to circumstances surrounding such person’s conduct when such person is aware of the nature of such person’s conduct or that the circumstances exist. A person acts “knowingly,” or “with knowledge,” with respect to a result of such person’s conduct when such person is aware that such person’s conduct is reasonably certain to cause the result. All crimes defined in this code in which the mental culpability requirement is expressed as "knowingly," “known,” or "with knowledge" are general intent crimes.**
- (j) A person "acts recklessly" or is reckless when such person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.**

In addition to the number of terms used to define the levels of culpability the MPC, and states following it, discuss the application of those terms to the (1) nature of the conduct and (2) the result. In K.S.A. 21 -3201 Kansas refers simply to the conduct.

As discussed above the present culpability statute in the Kansas criminal code, K.S.A. 21-3201, defines two levels of culpability, “intentional” and “reckless”. In the proposed statute the culpability term “intentionally” is retained. “Intentionally” is found in virtually every criminal code as a term describing a level of culpability regardless of whether the state is an MPC state. The exception are those states where the MPC term “purposely” is used and in those instances the words “purposely” and “intentionally” are synonymous.

21-32-102 proposes use of the term “knowingly” as a culpability term separate from the term “intentional”. In K.S.A. 21-3201 “knowingly” is included in “intentionally” although the two words are not synonymous. “Knowingly” is a word that is easily understood and a forms of the word “know” are a part of everyday language.

“Knowingly”, or a form of the word “know”, appears in approximately 80 statutes of the current criminal code. “Knowing” or “knowingly” is frequently found in phrases such as “knowingly and willfully,” “knowingly and intentionally,” “knowingly and with intent,” “knowingly and maliciously,”

“knowingly, willfully, and with the intent,” “knowingly and purposely,” and is often found standing alone as a term of culpability, “knowingly”. There are the statutes that seem to provide a choice of culpability--“knowingly or intentionally” “knowingly or recklessly.”

Because of the extensive use of the culpability term “knowing”, or “knowingly”, the Commission decided it should be included in code’s culpability terms with an appropriate definition.

An added feature of the proposed statute is included in subsections (h) and (i) where the statute provides that use of the culpability term “intentional”, or a form thereof denotes a specific intent crime and use of the term “knowing”, or one of its forms, indicates that the crime is one of general intent. Kansas appellate decisions include many cases where the courts have been required to interpret the crime’s definition as to whether it is a general intent or specific intent crime. The proposal is intended to avoid the necessity for such judicial interpretation.

“Reckless” is in K.S.A. 21-3201 and 21-32-102. “Reckless” conduct is defined in K.S.A. 21-3201(c) as “conduct done under circumstances that show a realization of the imminence of danger to the person of another and a conscious and unjustifiable disregard of that danger.” In 21-32-102 a person’s conduct is “reckless” with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

The Model Penal Code culpability term “criminally negligent” is not included in proposed 21-32-102. Of the four terms of culpability included in the MPC it has not been adopted as often as “intentionally,” “knowingly,” or “recklessly.” Of the 34 or so states that have adopted a version of the MPC, “criminally negligent” behavior has been adopted as a culpability level in approximately 25 of those states.

Other than those statutes that refer to “reckless” conduct, the vehicular homicide statute appears to be the only statute in the Kansas criminal code that uses a negligence standard to describe culpability and the word “negligence” is not used in that statute. Except in K.S.A. 21-3201, the word “negligent”, or one of its forms, does not appear in the code.

After much consideration, the Commission concluded that it did not want to criminalize a new area of conduct not previously defined as being criminal.

The Commission’s proposal establishing three culpability terms—“intentional”, “knowing”, and “reckless” is intended to provide a framework for the legislature and Revisor’s office in drafting of future legislation defining criminal offenses. Many of the statutes in the present code do not include a culpability term. The absence of such terms often leads to court cases requiring judicial interpretation of the statutory language to determine legislative intent.

By limiting the number of culpability terms and providing a definition for them the legislature will have a guide that may be used in drafting future legislation whereby the legislature will determine the level of culpability required rather than leaving it to judicial determination. It should be noted that while

the proposal includes three culpability terms there is no prohibition against use of another culpability term where the legislature chooses to do so.

**21-32-103. Guilt without culpable mental state, when.**

**A person may be guilty of an offense without having a culpable mental state if the crime is:**

- (a) A misdemeanor, cigarette or tobacco infraction or traffic infraction and the statute defining the offense clearly indicates a legislative purpose to impose absolute liability for the conduct described;**
- (b) a felony and the statute defining the offense clearly indicates a legislative purpose to impose absolute liability for the conduct described;**
- (c) a violation of K.S.A. 8-1567 or 8-1567a and amendments thereto; or**
- (d) a violation of K.S.A. 22-4901 et. seq. and amendments thereto.**

Proposed 21-32-103 is K.S.A. 21-3204 with revisions in terminology from “criminal intent” to “culpable mental state”. This statute defines those instances where strict liability is imposed for the conduct described—i.e., that no culpable mental state is required for a person to be guilty of a crime.

**21-32-104. Culpability; exclusions.**

**Proof of a culpable mental state does not require:**

- (a) proof of knowledge of the existence or constitutionality of the statute under which the accused is prosecuted, or the scope or meaning of the terms used in that statute.**
- (b) proof that the accused had knowledge of the age of a minor, even though age is a material element of the crime with which he is charged.**

This section incorporates K.S.A. 21-3202. The terminology is revised to be consistent with the proposed culpability statute. The term “criminal intent” is replaced with “culpable mental state.”

As a final note to this section, the Commission has reviewed all statutes in the code that include a definition of a crime. The Commission revised the statutes to address the following issues:

- (1) In some statutes of the present code more than one culpability term is used, such as “knowingly and intentionally”. In those instances the Commission selected the single term that it felt was consistent with legislative intent. Where “knowingly and intentionally” were used, the Commission looked to case law to determine whether the crime defined was a general intent or specific intent crime.

- (2) In statutes where no culpability term is used, the Commission inserted the culpability term that it felt was consistent with legislative intent except in those instances where it believed that the legislature intended for the crime to be a strict liability crime.

## IX. Maintaining the Criminal Code

In our work in proposing a comprehensive recodification of Chapter 21, we have identified the following guidelines as useful in promoting the clarity and coherence of our criminal code. We pass these guidelines onto the Kansas Legislature. Our hope is that as our Legislature establishes new criminal offenses some of the problems we have identified in our current criminal code can be avoided. These guidelines should prove useful whether or not our proposed recodification is enacted into law.

### Culpability

- A. Use culpability terms defined in the general provisions. In our current code, offenses sometimes use culpability terms that are not defined in the general provisions. Our proposed recodification uses the terms “intentional”, “knowing”, and “reckless” and defines them. Use of undefined culpability terms leads to uncertainty and litigation. Use of a few culpability terms whose meaning is defined promotes simplicity and clarity.
- B. Specify the culpability required respecting each offense element. In our current code, offenses often do not specify the required culpability respecting any element or do not make clear to which element(s) a specified culpability term applies. This produces uncertainty and litigation. It is ideal that the text of the offense explicitly prescribe the culpability required respecting each element. In the absence of such text, the general provisions in our proposed recodification prescribe the culpability required respecting each element by default. It should be ascertained whether these default prescriptions reflect the intent of the Legislature. If not, the text of the offense must so provide to make the departure from default prescriptions clear and effective.
- C. Do not specify that the offense requires no culpability respecting the age of a minor. The general provisions provide that no culpability is required respecting the age of a minor when that is an element of the offense. Doing so may lead to courts interpreting other statutes without an internal statement of intent to not include the general no culpability rule.

### Coherence of Particular Offenses with the Code’s General Provisions

- A. Culpability. Part I outlines several guidelines for maintaining coherence between particular offenses and the code’s general culpability provisions.
- B. Attempts. Generally avoid including an attempt in the definition of an offense. The general provisions operate to criminalize an attempt to commit an offense. There are, however, two reasons to depart from this general guideline and to include an attempt in the definition of an offense. First, the Legislature may wish to punish an attempt at a different level than the general provisions provide. Second, the Legislature may wish to be more specific about the overt acts sufficient to constitute an attempt.
- C. Act/Omission. The definition of an offense generally should not include an omission. The general provisions in our proposed recodification defines an act to include an omission to act in the face of a legal duty to act. It is dangerous for an offense to include omissions when the Legislature’s intent is to

capture only omissions in face of a duty of action imposed by other sources of law such as contracts, special relationship, creation of danger, or other statutes. This raises an inference that other offenses that do not explicitly criminalize such omissions are meant to exclude them from their ambit. The definition of an offense should include an omission only when the Legislature intends to create a duty to act that is not already imposed by other sources of law.

D. Definitions. When an offense uses a term that is defined in a general definitions provision generally the offense should not contain a definition. Such a special definition is necessary only if the Legislature intends for a different definition to apply. In such circumstances, the offense should state explicitly that the general definition does not apply.

#### Relationship Between Offenses

An offense should specify its relationship with other overlapping offenses. Is the offense intended to be a more “specific” offense such that the Legislature intends for that offense to be used *instead of* another “general” offense? Does the Legislature intend to allow a choice between offenses so that a defendant may be convicted of and punished for *either but not for both*? Or does the Legislature intend to permit both offenses to be used so that a defendant may be convicted of and punished *for both*? In our current code, the text of offenses rarely addresses these issues. The result is uncertainty and often confusing judicial decisions. It is better that the Legislature address these questions and that the offense’s text reflect the Legislature’s intent.

#### Sentencing Proportionality

The sentence prescribed by the statute should be proportional to other crimes of similar harm and designed to enhance public safety through deterrence of future criminal action, to rehabilitate the offender, and to appropriately punish for committing the offense. Sentencing severity should not be ruled by the emotions of the “crime of the year” nor, when possible, by bed impact. To determine the appropriateness of sentencing, the legislature should consider what types of crimes are also sentenced at the level being considered and examples of offenses currently sentenced at slightly higher and slightly lower severity levels.