

Approved: 14 June 1991  
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Chairperson Senator Wint Winter Jr. at 9:30 a.m. on March 22, 1991 in room 514-S of the Capitol.

All members were present except: Senators Yost, Kerr and Morris who were excused.

Committee staff present:

Mike Heim, Legislative Research Department  
Gordon Self, Office of Revisor of Statutes  
Judy Crapser, Secretary to the Committee

Conferees appearing before the committee:

Ben Coates, Kansas Sentencing Commission  
Carla Stovall, Kansas Parole Board  
Emil Tonkovich, Kansas Judicial Council

Chairman Winter called the meeting to order to continue focus on SB 382.

SB 382 - enacting a presumptive sentencing guidelines system.

Ben Coates, Executive Director of the Kansas Sentencing Commission, continued his briefing on the KSC recommendations, SB 382. He noted for the Committee that he had been meeting with the consultant who prepared the NIC grant report. The primary differences were related to the beginning assumptions. The NIC report began with the prison population while the KSC began with the number of convictions, or the actual number to be sentenced. Mr. Coates also noted for the Committee that the KSC was closely split on their decision to not recommend "good time."

Chairman Winter requested Mr. Coates prepare a chart that plots on a line graph, with bed capacity as the base line, projections of: (1) if no guidelines are adopted, (2) with recommended guidelines, and (3) guidelines with a retroactive measure. He also requested sample options for considerations to effect a decline in bed requirements.

Carla Stovall, Chairman of the Kansas Parole Board, addressed the Committee with suggested changes amendments to SB 382. (ATTACHMENT 1)

The Committee turned to a listing of policy issues on SB 382, prepared by staff person Mike Heim, Kansas Legislative Research Department. (ATTACHMENT 2)

The Committee began discussion on the issues raised by SB 382 and reached a consensus on a number of points:

- that a determinate sentencing system is necessary to replace the current indeterminate system;
- rehabilitation programs will not have a dominate place as before but, they are still important and have a very special function;
- some system of "good time" credits or "bad time" deterrent is necessary;
- a retroactive measure should be adopted.

Senator Bond moved to amend SB 382 by adopting the technical bad time proposal of the Department of Corrections. Senator Petty seconded the motion. The motion to amend carried.

Senator Martin moved to amend SB 382 by adopting a retroactive function, following the pattern of the Rich/Barbara proposal, interview/review/ screen by parole board, allow final determination by district court, with mechanism for appeal by both parties if not agree with the parole board decision, with mechanism for victim and public input. Senator Gaines seconded the motion. The motion carried. The Chairman requested staff to draft the language for the amendment and have it reviewed by the committee before final approval.

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,  
room 514-S, Statehouse, at 9:30 a.m. on March 22, 1991.

Chairman Winter advised the committee that, due to the lack of time remaining in the 1991 Legislative Session, it was his intention to retain SB 382 in Committee and continue to address the policy issues. He turned the Committee's attention to SB 358.

SB 358 - amendments to the Kansas criminal code.

Professor Emil Tonkovich, University of Kansas School of Law, testifying for the Kansas Judicial Council, briefed the Committee on SB 358. He explained the bill was introduced in an attempt to revise the entire criminal code, important to look at now because of SB 382. (ATTACHMENT 3) Professor Tonkovich added that if SB 382 did not move forward this year, the Judicial Council would work on a complete package to offer to the 1992 Legislature.

SB 287 - unlawful acts of individuals infected with human immunodeficiency virus.

Chairman Winter asked Professor Tonkovich his opinion on whether the current criminal code would satisfy the federal requirements for the "Ryan White Act," SB 287.

Professor Tonkovich replied that, in his opinion, the current statute is not adequate to fulfill those requirements.

The meeting was adjourned.



SUGGESTED CHANGES IN SB 382

Presented to  
Senate Judiciary Committee  
by Carla J. Stovall, Chairperson  
on behalf of the  
Kansas Parole Board

P 4, L 11: Change "board" to "Kansas parole board"

P 9, L 21: Change "may be" to "is"

P 23, L 10: Omit "calculating"

P 23, L 11: Change "how time will be lost" to "how the sentence can be increased pursuant to (a)(2)"

*always*  
P 123, L 32: Change "may" to "shall"

P 123, L 34,35: Replace "if restitution is later ordered as a condition of parole or conditional release" with "at such time as the defendant is released."

P 123, L 37: Omit "maximum"

P 123, L 39: Omit "maximum"

P 123, L 40: Omit "maximum"

P 150, L 6: Replace "applicant seeking pardon, commutation of sentence, or parole shall contract for or receive a fee contingent upon the granting of such application." with "individual before the board for pardon, commutation of sentence, parole or revocation of parole, conditional release or postrelease supervision shall contract for or receive a fee contingent upon a certain decision by the board."

P 150, L 9: Change "his" to "a"

P 150, L 10: Change "Kansas adult authority" to " Kansas parole board"

P 150, L 11: Change "his" to "his/her"

P 150, L 12: Change "he" to "he/she"

P 150, L 12: Omit "or has represented"

P 150, L 13: Change "him" and "him" to "him/her" and "him/her"

P 150, L 14-16: Omit "upon the granting or denial of such application for pardon, commutation of sentence, or parole."

P 150, L 16-18: Replace "If any person representing any applicant for pardon, commutation of sentence, or parole shall fail to file such affidavit the application

shall not be considered." with "If any such person shall fail to file such affidavit he/she may not, at the board's discretion, be allowed to represent the individual before the board.

P 150, L 19-22: Omit all italicized words.

P 150, L 29-32: Change "to order the denial, grant or revocation of an inmate's parole, or for crimes committed on or after July 1, 1992, grant parole for off-grid crimes or to order the revocation of an inmate's conditional release" to "to order the denial, grant, or revocation of an inmate's parole or conditional release, or for crimes committed after July 1, 1992, grant parole for off-grid crimes or revocation of postrelease supervision,"

P 150, L 37: Change "or for crimes committed on or after July 1, 1992, off-grid crimes" to "or off-grid crimes committed after July 1, 1992)

P 151, L 9: Omit "a report with statistical and other data of its work, including research studies which it may make of probation, sentencing, parole, postrelease supervision or related functions, and a compilation and analysis of dispositions of criminal cases by district courts throughout the state or by executive authority." Replace with "its annual report."

*Confidential matter*  
P 151, L 16: Strike "and" and insert coma. After "supervision history" add "and written comments of the victims, members of the public, or officials"

P 151, L 26: Continue the sentence with "and does not put another at risk." Add "In no event, however, shall the content of any comments opposing an inmate's release or the identity of any person submitting such comments be disclosed directly or indirectly to an inmate."

P 154, L 1: Replace "will" with "may"

*} no authority to seek change*

P 154, L 3-6: Omit "special" and change the rest of the sentence to read "conditions it deems necessary or desirable."

P 154, L 14: Add "This provision shall not be in effect after July 1, 1992."

P 155, L 13: Add "revocation hearings" after "postrelease supervision reviews"

P 155, L 14: Change "parolees" to "releasees"

P 155, L 17: Omit "special"

P 155, L 28: Replace "parole" with "release"

P 156, L 14: Modify "is released" to "is to be released"

P 156, L 15: Modify "shall provide" to "shall, 30 days prior to release, provide"

P 156, L 23: Correct "person" to "prison"

P 156, L 23: End the sentence with "and any behavior attitude adjustment time which was added to their sentence."

P 157, L 5-7: Omit the italicized words.

P 157, L 11: Create a new sentence after "thereto," which reads "When an inmate has reaches the end of the postrelease supervision period, the parole board shall issue a certificate of discharge to the releasee."

P 179, L 35: Make the sentence read "...eligible for parole or entitled to postrelease supervision..."

P 179, L 38: Replace "the inmate must yet satisfactorily complete" with "are not completed."

P 179, L 41,42: Omit "required" and "other elements" and "special"

P 181, L 15: Change "shall be limited to a 90-day period of confinement" to "shall not exceed a 90-day period of confinement from the date of the revocation hearing before the board,"

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1-3/3

**Kansas Sentencing Commission Recommendations  
S.B. 382 – Policy Issues**

**Issues Raised By S.B. 382**

1. Should a determinate sentencing system be adopted to replace the current indeterminate system?

(Kansas Sentencing Commission; Professor Rich, WU; Olander, KCDA; Professor Barbara, WU)

- a. Should the state retain its current indeterminate sentencing system?

(Judge Sandborn; Stoval, KPB)

- b. Should a sentence review commission be established to insure lack of bias in sentencing if the current system is retained?

(Judge Sell)

- c. What role should rehabilitation play in a new determinate sentencing system?

(Representative Hamilton; Stoval, KPB; Sister Theresa)

2. Should some system of good time credits be retained under a determinate sentencing system?

(Stoval, KPB; Gottlieb, KU; Davies, DOC)

- a. What system of bad time should be used?

3. Should theft, burglary, or other crimes be treated other than as proposed in S.B. 382?

(Isabell, KCK; Gottlieb, KU; Olander, KCDA)

*Senate Judiciary Committee*  
*3-22-91*  
*Attachment 2*

4. Should drug crimes be treated differently than as proposed in S.B. 382?  
(Ney, Sedgwick Public Defender; Gottlieb, KU)
5. Should the ability to depart from the grid sentence be enhanced, more restricted, abolished, or actually built into the grids?  
(Kunen, Appellate Defender; Ney, Sedgwick Public Defender; Johnson, Council on Crime; Gottlieb, KU)
  - a. Should all departures from the grid by judges be monitored?
6. Should diversions be treated as convictions?
7. Should consecutive sentences be treated differently than as provided in S.B. 382?  
(Kunen, Appellate Defender; Johnson, Council on Crime)
8. Should a defendant have a right to appeal a consecutive sentence?  
(Kunen, Appellate Defender)
9. Should more crimes on the grid be considered for sentences of presumptive probation or presumptive community corrections?
10. Should the 120-day call-back be eliminated?  
(Davies, DOC)
11. What role should the Parole Board play if a determinate sentence system is adopted?  
(Stoval, KPB)
12. Should judicial discretion be enhanced beyond what is provided in S.B. 382?  
(Judge Sandborn)
13. What role should social and economic factors such as employment, marital status, and education play in the sentencing process?



### Items Not in S.B. 382 Which Need Consideration

1. Should the determinate sentencing system be made retroactive?  
(Kunen, Appellate Defender; Ney, Sedgwick Public Defender; Johnson, Council on Crime; Judge Rulon; Davies, DOC; Professor Rich, WU; Professor Barbara, WU)
  - a. Should the Kansas Parole Board or the Courts play a role in the retroactive application of a determinate sentencing system?
  
2. Should a trigger mechanism be included so that when the state's prison population reaches a certain level the grid system is temporarily revised to shorten sentences or provide for more defendants who are eligible for presumptive probation or presumptive community corrections?  
(Davies, DOC; Professor Rich, WU; Professor Barbara, WU)
  - a. Should the Kansas Parole Board have a role in screening prisoners for early release when the trigger mechanism is employed?
  
3. Should the Kansas Sentencing Commission be made a permanent body?  
(Judge Rulon; Stevens, KPOA)
  - a. What role should the Kansas Sentencing Commission have in the process of enacting new criminal laws, enhancing penalties of existing crimes, or amending the grid?
  - b. Should the make-up of the Kansas Sentencing Commission be changed to include more minority members?  
(Johnson, Council on Crime; Pastor Royal)

### Items for Future Consideration

1. Should probation, parolee, and community correction services be consolidated?
2. Should a reporting system of misdemeanor violations in municipal court be developed?
3. Should the KBI be given responsibility for collecting misdemeanor records?
4. Will prison guard staff need enhancement due to the more violent nature of persons incarcerated?

5. What impact will S.B. 382 have on local jails?  
(Isabell, KCK)
6. What impact will S.B. 382 have on community corrections and boot camps?
7. Should a determinate sentencing grid be established for misdemeanor crimes?
8. Should a determinate sentencing grid be established for juvenile offenders?
9. Should prosecutor's plea bargaining guidelines be adopted?  
(Gottlieb, KU; Judge Rulon)

Sec. 1 (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.

Sec. 2 (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. 100, § 2) For a discussion on distinct criminal homicides as underlying felonies for felony murder, see Lucas, supra at 466.

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

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3-22-91  
*Attachment 3*

Sec. 3 (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.

## Sec. 4 (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. This 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. 665-666 (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 legitmizes the realities of plea bargaining and jury verdicts.

## Sec. 5 (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.

## sec. 5 cont'd

### (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.

## Sec. 6 (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.

## Sec. 7 (21-3406)

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

## Sec. 8 (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.

## Sec. 9 (21-3410)

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

## Sec. 10 (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 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).

## Sec. 11 (21-3414)

The revisions clarify the statute and more concisely 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 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."

## Sec. 12 (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.

## Sec. 13 (21-3424)

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

## Sec. 14 (21-3426)

The revisions merely clarify the statute.

## Sec. 15 (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.

## Sec. 16 (21-3428)

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

## Sec. 17 (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.

## Sec. 18 (21-3501)

Further revisions are made to the definition of sodomy in subsection (2). In State v. Moppin, 245 Kan. 639 (1989), the court held that oral-genital stimulation between the tongue of a male and the genital area of a female, commonly known as cunnilingus, is not included in the definition of sodomy. The legislature amended the definition of sodomy to specifically address Moppin. (L. 1990, ch. 149, § 14) However, the 1990 amendment does not cover the problems presented in cases such as State v. Schad, 247 Kan. 242 (1990) (Oral-genital contact between mother and five-year-old daughter). As further revised, the definition covers such cases. Furthermore, penetration is not a required element for sodomy by oral-genital contact.

## Sec. 19 (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.



## Sec. 20 (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.

## Sec. 21 (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)]

## Sec. 22 (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.

## Sec. 23 (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).

## Sec. 24 (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 this 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.

## Sec. 25 (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).

## Sec. 26 (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.

## Sec. 27 (21-3513)

Subsection (2) is revised and subsection (3) is added to produce the following results: Promoting prostitution when the prostitute is 16 or older is raised from an A misdemeanor to a felony; promoting prostitution when the prostitute is under 16 is deemed a higher class felony; and a second or subsequent offense is deemed a still higher class of felony, regardless of the age of the prostitute in either the present or prior offense.

## Sec. 28 (21-3516)

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

## Sec. 29 (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.

## Sec. 30 (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).

## Sec. 31 (21-3525)

## Sec. 32 (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.

## Sec. 33 (21-3603)

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

## Sec. 34 (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.

## Sec. 35 (21-3703)

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

## Sec. 36 (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.

## Sec. 37 (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.

## Sec. 38 (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.

## ec. 39 (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.

## Sec. 40 (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.

## Sec. 41 (21-3722)

Littering is expanded to include reckless littering. The other revisions are designed to prevent loopholes and improve enforcement.

## Sec. 42 (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.

### Sec. 43 (21-3729)

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

### Sec. 44 (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.

### Sec. 45 (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."

### Sec. 46 (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.

Sec. 47 (21-4201)

Sec. 48 (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 right-of-way regardless of whether permission of the owner of 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.

New Sec. 49 (See comment to 20-3401)

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CRIMINAL HOMICIDES

Intentional

Reckless

3401(a) Premeditated

3401(b) Felony-murder

3402(a) Intentional  
w/o premeditation

3402(b) Depraved-heart

3403 Voluntary manslaughter

3404 Invol. manslaughter

SEX CRIMES

W/O Consent

12-15

Under 12

Intercourse: 3502  
Rape  
(any age)

3504  
Agg. Indec. Lib.

3502  
Rape

Sodomy: 3506  
Agg. Sodomy  
(any age)

3505  
Sodomy

3506  
Agg. Sodomy

"Battery": 3517-18  
Sex./Agg. Sex. Battery  
(16 and over)

3503  
Indec. Lib

3504  
Agg. Indec. Lib.