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Final Report of the Kentucky Penal Code Revision Project

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FINAL REPORT

of the

KENTUCKY PENAL CODE REVISION PROJECT

of the

CRIMINAL JUSTICE COUNCIL

Volume 1

July 2003

FINAL REPORT

of the

**KENTUCKY PENAL CODE
REVISION PROJECT**

Copies of this *Report* may be obtained from:

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REVISION PROJECT**

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SUMMARY OF CONTENTS

Volume 1

Reporter's Preface

History of Penal Code Project Work

Why a New Penal Code?

1. *Use clear, accessible language and organization*
2. *Provide a comprehensive statement of rules*
3. *Consolidate offenses*
4. *Grade offenses rationally and proportionally*
5. *Retain all (but only) reasonable policy decisions embodied in current law*

Penal Code

Table of Contents

General Provisions

Definition of Special Offenses

Appendix

Summary of Proposed Offenses Arranged by Grade

Volume 2

Penal Code Official Commentary

General Provisions

Definition of Special Offenses

Appendix

Translation Tables

Current Law to Proposed Code

Proposed Code to Current Law

Letter from the Office of the Attorney General

VOLUME 1 CONTENTS

Reporter's Preface

History of Penal Code Project Work

Why a New Penal Code?

1. Use clear, accessible language and organization
2. Provide a comprehensive statement of rules
3. Consolidate offenses
4. Grade offenses rationally and proportionally
5. Retain all — but only — rational, defensible policy decisions embodied in current law

Conclusion

Penal Code

Table of Contents

Part I. General Provisions

- Chapter 500. Preliminary Provisions
- Chapter 501. Basic Requirements of Offense Liability
- Chapter 502. Defenses Relating to the Offense Harm or Evil
- Chapter 503. Imputation of Offense Elements
- Chapter 504. Justification Defenses
- Chapter 505. Excuse Defenses
- Chapter 506. Nonexculpatory Defenses
- Chapter 507. Liability of Corporations and Other Non-Human Entities
- Chapter 508. Inchoate Offenses
- Chapter 509. Offense Grades and their Implications

Part II. Definition of Specific Offenses

- Chapter 511. Homicide Offenses
- Chapter 512. Assault, Endangerment, and Threat Offenses
- Chapter 513. Sexual Assault Offenses
- Chapter 514. Kidnapping, Coercion, and Related Offenses
- Chapter 515. Robbery Offenses
- Chapter 521. Theft and Related Provisions
- Chapter 522. Property Damage and Destruction Provisions
- Chapter 523. Burglary and Other Criminal Intrusion Provisions
- Chapter 524. Invasion of Privacy Offenses
- Chapter 531. Forgery and Fraudulent Practices
- Chapter 541. Offenses Against the Family
- Chapter 551. Bribery and Official Misconduct Offenses
- Chapter 552. Perjury and Other Official Falsification Offenses
- Chapter 553. Interference with Governmental Operations
- Chapter 561. Public Order and Safety Offenses
- Chapter 562. Public Indecency Offenses

Appendix

Summary of Proposed Offenses Arranged by Grade

REPORTER'S PREFACE

Since the legislature adopted the Penal Code of 1974, new insights have emerged regarding what a penal code should address, and how it should do so. Moreover, the broader legal landscape has changed greatly. The Penal Code Revision Project was predicated on the belief that the time was ripe to take a step back and conduct a panoramic review of the Kentucky Penal Code, as was done in 1974. The two volumes of this *Final Report* are the fruits of that review.

The Proposed Penal Code seeks to replace the current code with a clear, concise, and comprehensive set of provisions. Specifically, the Proposed Code seeks to include necessary provisions not contained in the current code; to eliminate unnecessary or inconsistent provisions of the current code; to revise existing language and structure to make the Code easier to understand and apply; and to ensure that the offenses and rules contained in the Code are coherent and relate to one another in a consistent and rational manner. At the same time, the Proposed Code aims to track the substantive policy judgments reflected in the original code and its subsequent amendments. When the process of clarifying and reconciling current provisions required drafters to make substantive choices, the proposed changes have been explained and justified in the accompanying commentary.

In developing the Proposed Code, the drafters were guided by five general drafting principles. First, the drafters have made an effort to *use clear, accessible language and organization*. One of the critical functions of a penal code is to provide notice to citizens of what conduct is prohibited. Clear and accessible writing allows real, not just theoretical, notice while also ensuring that no offender escapes liability because of an incomplete or ambiguous offense definition. More straightforward code provisions also promote development of clearer jury instructions, making it easier for jurors to fulfill their critical role. Even for members of the criminal justice system, who work with the Code every day and must be intimately familiar with its rules, plain-language expression is essential.

Second, the Proposed Code endeavors to *provide a comprehensive statement of rules*. An effective penal code must include all necessary rules governing liability. Comprehensiveness helps avoid inappropriate results. Courts, which decide individual cases and act independently of one another, cannot be as effective as a legislature in formulating coherent general doctrines that will work together as the provisions of a comprehensive code can and must. Moreover, an uncoded rule is more likely to be applied differently in similar cases than a codified rule, as the terms of the latter are fixed, explicit, and available to all officials at each stage in the process.

Third, the drafters have aimed to *consolidate offenses*. Perhaps inevitably, four decades of piecemeal modification of the Code have led to the addition of hundreds of new offenses, many of which cover the same conduct as previous offenses or appear in various other chapters of the Kentucky Revised Statutes rather than in the Penal Code in Chapters 500 et seq. Consolidation ensures against the confusion that results when one encounters, and must make sense of, multiple provisions that overlap or contradict, and also against the mistakes that ensue when one fails to notice, or find, provisions that may apply to a given case. Consolidation also aids the task of proper grading, because it is nearly impossible to maintain consistent, proportional grading when offense definitions are based on insignificant, or incomprehensible, distinctions.

Fourth, the drafters have striven to *grade offenses rationally and proportionally*. One virtue of a recodification project, relative to the usual piecemeal legislative additions and alterations to the Code, is the opportunity it provides for a general review of the system of grading offenses, considering how all offenses relate to one another rather than considering individual offenses in a vacuum. For a system of criminal justice to be fair, liability must be assigned according to the relative seriousness of the offense(s) committed. The drafters have sought to recognize all, and only, suitable distinctions among the relative severity of offenses and to develop a scheme to grade each offense proportionally to its gravity in light of those distinctions.

Finally, the Proposed Code seeks to *retain all (but only) reasonable policy decisions embodied in current law*. Because substantive policy decisions on criminal law rules reflect value judgments properly left to the legislature, the Proposed Code aims to follow the substance of current law wherever possible. In some places, however, current law contains multiple contradictory rules — and therefore no clear rule — on a subject. Other rules may have been sound when enacted, but no longer reflect current realities or sensibilities and require expansion, alteration, or deletion. Still other current legal rules have been created by the courts through case law, rather than by the legislature through statutory enactment, and appear to be in direct tension with the governing statutory provision. In those situations where the existing legal rule seems clearly at odds with the goal of producing a rational, coherent penal code, the drafters have had little choice but to modify the existing rule, using supporting commentary to the Proposed Code to describe and justify the proposed change.

A few words are in order regarding issues that the Proposed Code does *not* address. First, the Proposed Code addresses substantive criminal law rules only. It excludes numerous provisions in the current code governing procedural, sentencing, and regulatory issues, retaining only the rules necessary to elaborate or explain the Penal code's substantive rules. This does not mean, however, that the Proposed Code would eliminate those provisions. Rather, the Proposed Code was drafted with the understanding that such provisions would be retained, but moved to other chapters of the Kentucky Revised Statutes, by means of a “conforming amendments” bill to be enacted by the General Assembly contemporaneously with a new penal code.

Second, the Proposed Code does not address certain categories of offenses. Drug offenses, weapon offenses, and various “crime-control” offenses designed primarily to combat ongoing criminal enterprises, are not included in the Proposed Code. Here again, the exclusion of those offenses, and a number of narrow regulatory offenses addressed specifically to particular groups or corporations, does not reflect any judgment about the wisdom of the current provisions governing such conduct. Rather, we anticipate the retention of the relevant current prohibitions, either outside the Code or within the code articles reserved for such offenses, through “conforming amendments” legislation that would bring forward all relevant current provisions.

In many instances, the Code's commentary explicitly states that a particular current offense, procedural or sentencing rule, or civil or regulatory provision should be preserved outside the Proposed Code by means of a “conforming amendment.” Yet the commentary's failure to include such a clear statement with respect to any particular provision — especially one that does not address an issue relating to substantive criminal law — should not be understood to indicate a recommendation that the provision in question should be eliminated.

As discussed above, the drafters have sought to retain all defensible policy decisions embodied in current law. In recognition that such value judgments are best left to the legislature, the Proposed Code includes footnotes identifying several substantive policy issues that require the General Assembly attention. Each footnote presents the arguments on both sides of the issue and states the Reporter's recommendation, if any.

As a final matter, it is important to note that proposed Chapter 900 is not intended to address all issues (or indeed, any issues) regarding the sentencing and disposition of offenders. Rather, Chapter 900 deals only with those basic issues necessary to make clear the meaning of the Proposed Code's general scheme of liability — for example, that offense grades define a certain hierarchy; that the Code contemplates certain broad factors that will operate to aggravate an offense's grade, and addresses those factors by imposing general aggravations rather than applying them to specific offenses; and that the Code anticipates a new scheme for imposing liability for multiple offenses, ensuring that each additional offense of conviction will contribute to an offender's total punishment. The Proposed Code's silence as to other, more complex sentencing issues does not indicate a lack of awareness or concern about such issues, but an understanding that they were beyond the scope of the present project. Moreover, the "authorized" terms of imprisonment and fines appearing in Chapter 900 are themselves tentative. The primary focus of the Project's work has been to ensure that the grading of different offenses is rational and proportional, and not to determine the appropriate absolute severity of punishment attaching to a grade. Accordingly, the proposed offense grades are intended only to convey the relative seriousness of offenses, and not the sentencing consequences of a conviction for any offense.

On a personal note, I thank the Project Staff for their excellent and invaluable work often under difficult circumstances. Attorney John Powell and Professors Les Abramson and Michael Cahill have done a wonderful job and contributed much to the project.

In closing, let me commend the Kentucky Criminal Justice Council for its foresight and commitment to explore the development of a new penal code. The serious problems in the current Kentucky Penal Code are no worse than those existing in other American jurisdictions, and less serious than those in many. With no new national model in sight, such as a Model Penal Code Second, it was courageous of Kentucky to take the lead in exploring how a "second wave" of American criminal law recodifications might be stimulated.

Paul H. Robinson
Philadelphia
July, 2003

HISTORY OF PENAL CODE PROJECT WORK

GENERAL CHRONOLOGY

In July 1998, House Bill 455 (passed in March) took effect, establishing the Kentucky Criminal Justice Council and directing the Council to “review and make written recommendations on . . . the Penal Code.” The first Penal Code Committee meeting, with Professor William Fortune as Chair, occurred in January 1999. In March, the Committee met again to hear presentations from Professor Robert Lawson of University of Kentucky, the primary author of the 1974 code, and Professor Les Abramson of University of Louisville. University of Kentucky Law students undertook research under the supervision of Professor Fortune to survey the amendments to the current code that had been made since its inception, ultimately producing a searchable computer database. The Committee’s work also was helped by a June 2000 questionnaire mailed to constituency groups statewide requesting input and recommendations on penal code reform.

With this groundwork done, the Penal Code reform project was formally undertaken by the Criminal Justice Council in July 2000. An initial briefing of House Leadership staff and the staff of the Senate President’s Office occurred in August 2000. The same month, the Council’s Penal Code Committee drafted and adopted a set of guiding principles for the reform process. The plans for the project were presented to the District Court Judicial College in September.

With a sense that the project would benefit from some professional expertise, the National Council of State Legislatures was contacted to determine what assistance might be available. The Council was referred to Professor Paul H. Robinson, an internationally known criminal code drafting expert, who had recently been invited to make a presentation on the subject of criminal code reform at the National Council’s annual meeting.

In October 2000, Professor Robinson was invited to make a presentation on penal code reform to a joint meeting of the Criminal Justice Council and the Interim Joint Committee on the Judiciary and was soon thereafter hired to serve as Reporter, whose job was to guide the penal code reform project. Initial appointments were made to the subcommittee of the Council’s Penal Code/Sentencing Committee that would be the primary group guiding the drafting and debating process, the Penal Code Work Group. This same month, the code reform project was presented to the Circuit Court Judicial College.

The first steps of the Penal Code/Sentencing Committee were to formally name Professor Robinson Reporter for Kentucky Penal Code Revision Project, to establish a contractual agreement with him, and to approve in November a six-step work process proposed by the Professor. Professor Robinson then began work on the preparation of background materials, the first step in the drafting process, which is described in detail below.

The first draft of the Code's General Part provisions were circulated to the Penal Code Work Group for Comment in July 2001. That same month, Professor Les Abramson was designated to assist as primary draftsman for the official commentary. In September, the first draft of the revision project was distributed statewide.

At its May 2002 meeting, the Penal Code Work Group discussed the desire of the prosecutors' representatives to limit the project to proposing amendments to the existing code. Ultimately a majority of the Work Group concluded that a general rewrite of the code was the best approach to fulfilling the statutory mandate of Penal Code reform. In August 2002, the representatives of the Commonwealth's Attorneys Association and the County Attorneys Association decided that they would rather participate in the reform effort at the Penal Code Committee level and they subsequently withdrew from the Work Group itself. The Attorney General, however, continued to participate in the drafting process at the Work Group level.

In February 2003, after nearly monthly all-day meetings, the Work Group finished its discussion of all the issues flagged by the pro/con footnotes. The proposed text and official commentary was complete.

THE DRAFTING PROCESS

At the start of its work, the Penal Code Work Group, upon suggests of Professor Robinson, developed a drafting process that was repeated in developing each chapter of the Proposed Code. First, the Reporter reviewed all of current Kentucky law, both that within the current penal code and, with the help of Council staff, that outside the code, and brought together from all sources those provisions that concerned each specific subject area. Relevant court decisions and references to existing treatises on Kentucky criminal law were added to this collection of background materials. These background material collections were organized generally according to the subject matter distinctions embodied in the chapter headings of the current Kentucky Penal Code.

The drafting process for each code chapter then began with a careful review of the relevant portion of the background materials collection, after which the Reporter would generate a first draft of the proposed chapter that would capture the legislative judgments contained in current law but in a more coherent and consistent form, using as clear and direct a drafting style as was possible. These drafts, along with the corresponding set of background materials, were then distributed to the criminal law professors on the Penal Code Work Group and, after further revision, to the full Work Group.

The reviewers then responded with written comments on the proposed drafts, often suggesting alternative draft formulations where the original proposal was seen as problematic. The Reporter and staff would then respond to the comments by either making the suggested change or asking the reviewer follow-up questions that would clarify the concern expressed or would offer arguments in support of the proposed draft's formulation.

The reviewer would then respond in writing to these responses and the “dialogue” would continue until all of the reviewer’s concerns had been addressed to his or her satisfaction. Often this “dialogue process” would take four or five “cycles” to resolve all issues. Ultimately, every reviewer comment resulted in either a change to the proposed draft that satisfied the reviewer or was flagged as an issue that was to be put to the full Working Group. The revised drafts developed through this “dialogue process” were then resubmitted to the entire Work Group for further review and comment. The aim of the process was to create a written record of concerns and responses that would highlight for the Legislature in its future work the issues that required discussion and their resolution by the participants of the Work Group.

The end result of the process has been the draft text and commentary contained in this two-volume *Final Report*. The draft text, in Volume 1, is annotated with many dozen “pro-con footnotes.” The footnotes signal those issues on which there was no consensus within the Working Group, and contains a summary of the arguments on each side of the issue that were developed during Working Group discussions. This *Final Report*, which is being widely distributed to participants in the criminal justice system throughout the State (and beyond), will give readers a full appreciation of what is, and what is not, controversial in the proposed text and of the reasons for the points of disagreement.

WHY A NEW PENAL CODE?

INTRODUCTION

It has been nearly thirty years since the legislature adopted the Penal Code of 1974. In that time, the Code has been expanded and amended in numerous ways. Those subsequent alterations, however, have each sought to address the specific matter at hand, with little attention to the general effects of the change on the Code's overall structure, its terminology, or its application. Meanwhile, three decades have passed without an overarching review of the Penal Code as a whole to determine what modifications should, or must, be made to reflect changing times, developing insights, and changes in the broader legal landscape. As a result, the current Penal Code has numerous inconsistencies, redundancies, ambiguities, and contradictions. As was the case in 1974 — and may well be the case again in another thirty or forty years — the time is ripe to take a step back and conduct a more panoramic review of the Penal Code.

The proposed Code attempts to eliminate these problems and replace the current Code with a clear, concise, and comprehensive set of provisions. Specifically, the proposed Code seeks to include necessary provisions not contained in the current Code; to eliminate unnecessary or inconsistent provisions of the current Code; to revise existing language and structure to make the Code easier to understand and apply; and to ensure that the offenses and rules contained in the Code are cohesive and relate to one another in a consistent and rational manner. At the same time, the proposed Code aims to track the substantive policy judgments reflected in the original Code and its subsequent amendments. When the process of clarifying and reconciling current provisions made such substantive choices necessary, the drafters have sought to explain and justify the proposed changes with commentary designed to assist the enactors, and ultimately the users, of the Code.

In developing the proposed Penal Code, the drafters were guided by five general drafting principles, set forth below. The first three principles relate to the form of the Code. Experience shows that proper form can aid, and poor form can hinder, a code's ability to achieve its substantive functions. The final two principles concern the Code's content.

1. USE CLEAR, ACCESSIBLE LANGUAGE AND ORGANIZATION

One of the critical functions of a penal code is to provide notice to citizens of what conduct is prohibited. Indeed, the fundamental principle of legality — the requirement of a clear prior written prohibition as a prerequisite to criminal liability — underlies numerous constitutional and other core criminal-law rules, such as the constitutional prohibition against *ex post facto* laws and the constitutional invalidation of vague offenses. Providing notice also has obvious practical value, for citizens can hardly be expected to obey the law's commands if they are unaware of them, or cannot understand them. Accordingly, clear and accessible writing enables provision of true notice and ensures that no judgment is imposed that was not clearly intended and expressed by the legislature, and that no offender who violates the rules will escape liability because of an incomplete or ambiguous declaration of the law's commands.

The virtues of plain-language drafting extend beyond the direct imposition of liability. The penal code serves functions beyond notifying the general public in advance of the law’s commands of them. The code is also the ultimate basis of guidance for lay juries, who must decide after the fact whether a criminal offense has been committed in a particular situation. More straightforward code provisions promote development of clearer jury instructions, making it easier for jurors to fulfill their role. Even (perhaps especially) for members of the criminal justice system, who work with the code every day, plain language expression is essential. Law-enforcement officers, for example, are charged with implementing the code’s rules fully and fairly. Yet these officers are not lawyers. No less than the general populace, their ability to perform their legal role is enhanced by clarity in the criminal law’s written expression.

Further explanation of this goal follows, along with a representative, but by no means exhaustive, collection of examples of current Kentucky law’s shortcomings in this area.¹

a. Clear language

Several drafting methods promote the goal of clarity. First, effective communication calls for short, commonly used words and avoidance of legal terms of art where possible. When such legal terms are used, they should be defined, and it should be easily apparent that the terms’ use is to be guided by the definition and not left to unguided speculation. One difficulty with current law is that important terms, many of which have no commonly understood meaning or are complex legal terms, are left undefined. In such cases, users of the Code (including judges, lawyers, law enforcement officials, and jury members) must guess at the legislature’s intended meaning. To avoid this problem, the proposed Code includes a provision at the end of each Chapter that lists all defined terms used in that Chapter.

As an example of the type of clear language that the Code requires, the current Penal Code is not clear about whether its provisions relating to offenses, defenses, and other general provisions apply to offenses outside the Penal Code. Proposed Section 103(2) — which ensures that the Code’s culpability terms, defenses, and other general provisions apply to any offense, whether defined in the Code or elsewhere — is consistent with Kentucky Supreme Court opinions applying Penal Code definitions and defenses to cases arising under statutes outside the Penal Code.²

¹ For example, numerous other provisions use unclear language. *See, e.g.*, KRS 501.010(3); 501.030(2); 501.070(1)(a); 501.070(3); 501.090; 502.010(1); 502.020; 503.090(1); 505.020(2)(c)-(d); 532.090; 534.050.

² *See, e.g., Powell v. Commonwealth*, 843 S.W.2d 908 (Ky. App. 1992), overruled on other grounds by *Houston v. Commonwealth*, 975 S.W.2d 925 (Ky. 1998) (definition of “possession” in KRS 500.080(14) is proper definition for jury instructions for cases arising under KRS Chapter 218A); *Farris v. Commonwealth*, 836 S.W.2d 451 (Ky. App. 1992), overruled on other grounds by *Houston v. Commonwealth*, 975 S.W.2d 925 (Ky. 1998) (applying Penal Code definition of entrapment to non-Code drug trafficking offense).

Two other examples also reinforce the importance of clarity. First, Section 204(2) explicitly recognizes that, in the absence of clear language stating otherwise, an offense definition will not preclude omission liability even if it uses terms (such as active verbs) that may appear to require an affirmative act. Current Kentucky law contains no such explicit declaration of this point. For example, a person may be liable for homicide by engaging in conduct causing death. The defendant may also be liable for homicide through an omission causing death, if he had a legal duty and capacity to act but did not.

Second, the default rules of Section 205(2) and (3) differ from KRS 501.040, which states that if an offense does not prescribe a particular mental state, one of the four mental states is applicable to some or all of the material elements of the offense “if the proscribed conduct necessarily involves such culpable mental state.” The current formulation is troublesome in at least three respects: (1) it does not indicate which mental state to apply where one or more might be applicable; (2) it does not say whether any culpability level is needed for conduct that does not “necessarily” involve culpability, or how to tell whether conduct “necessarily” involves culpability; and (3) it does not indicate what to do for circumstance or result elements — as opposed to conduct elements — if no culpability level is prescribed.

In some cases, the current Code’s language, though it may not represent the clearest or simplest method of expressing a rule, has been “defined” and clarified over time by judicial decisions. For this reason and for the mere sake of stability, the drafters have sought to maintain the language of current law whenever that language would give a reader adequate notice of the provision’s intended meaning. Where modification of existing language is considered necessary, the drafters have prepared commentary to explain the relation between the proposed language and existing statutory language, as explicated by current precedent.

b. Clear organization

The Code, and each of its provisions, must be effectively organized so that each component’s meaning and function is plain and all provisions are easily found. For example it invites confusion when issues for which there are rules of general application are addressed a second time in specific offense provisions. Current Kentucky law contains numerous offenses that unnecessarily reiterate, or even undermine, General Part provisions.

For example, many current offenses are defined to prohibit certain conduct *and* “attempting” such conduct.³ For unexplained reasons, this approach to defining offenses short-circuits the general rules for attempts set forth in the General Part, under which attempts are distinguished from completed crimes for grading purposes.⁴

³ See, e.g., KRS 434.225; 434.445; 434.685; 516.110; 518.070; 520.090; 524.040; 524.050; 524.080; 524.090; 526.030; 529.010(2); 529.020; 531.020; 531.030.

Other current offenses define an attempt offense separately from a proscribed, completed offense, without regard to the general provisions governing attempt liability. See, e.g., KRS 434.225; 516.050; 516.070; 520.015.

⁴ See KRS 506.010.

Similarly, several current offenses are defined to include anyone who aids or conspires with another in planning or committing the offense,⁵ even though general rules covering accomplice liability, attempts, and conspiracies are defined in the General Part.⁶ Similar problems exist when current offenses include references to justification⁷ or duress⁸ defenses already defined in the General Part. The proposed Code ensures consistency by avoiding offense definitions that revisit, or revise, rules already included in the General Part.

The Code's various rules should be classified sensibly, to ensure that meaningfully different rules are distinguished and similar rules are treated alike. For example, the proposed Code's organization separates justifications, excuses, and nonexculpatory defenses.⁹ Recognizing such distinctions is important because a defense's function as a justification, an excuse, or a nonexculpatory defense has significant legal implications.¹⁰ Current Kentucky law, however, is not organized to accurately distinguish between these three defense types.¹¹

The failure to properly establish such distinctions has resulted in inconsistent rules, such as the rules involving the burdens of proof for general defenses. Current law requires that the defendant prove the insanity defense, but all other excuses must be disproved by the Commonwealth beyond a reasonable doubt once the defendant has introduced some evidence on the issue.¹²

⁵ See, e.g., KRS 387.990; 434.340; 434.445; 434.855; 517.020; 521.050; 522.040; 524.110.

⁶ See KRS 502.020 (complicity); KRS 506.020 (attempts); 506.040 (conspiracy).

⁷ See, e.g., KRS 525.200; 525.220.

⁸ See, e.g., KRS 521.020(2).

⁹ Justification defenses, such as self-defense and use of force in defense of property, immunize conduct that avoids a harm or evil that is objectively worse than the offense itself. Excuse defenses, such as insanity and immaturity, operate to exculpate persons who cannot properly be held responsible for objectively harmful conduct. Finally, nonexculpatory defenses, such as entrapment and the statute-of-limitations defense, provide exemptions for liability because — even though the actor's conduct is objectively harmful and the actor is responsible for it — some alternative societal interest is deemed to be more important than the assessment of criminal liability.

¹⁰For example, a person enjoying a self-defense justification may be assisted by others, and may not legally be interfered with. On the other hand, an aggressor is entitled to resist a person who enjoys an excuse because he *mistakenly* believes himself to be acting in self-defense; such a person, even if excused, is not justified. Moreover, because justifications recognize conduct that is socially acceptable, and often desirable, it is sensible to require the prosecution to prove that conduct was not justified. Excuses and nonexculpatory defenses, in contrast, operate to prevent liability for harmful conduct that would ordinarily constitute an offense. Accordingly, and because the state-of-mind or other evidence relevant to an excuse or nonexculpatory defense is frequently within the control of the defendant, it is sensible to shift the burden of proof to the defendant for those defenses, as the proposed Code does.

¹¹ KRS Chapter 503 improperly treats — by defining several justifications to protect one who “believes” himself to be justified — mistake as to a justification as justifications, rather than excuses. See KRS 503.120. The proposed Code categorizes this defense as an excuse, as it relates to the actor's mental state rather than to whether the act itself is objectively justified.

Current Kentucky law also does not recognize nonexculpatory defenses as a distinct class of defenses.

¹² See KRS 500.070.

These evidentiary rules differ for no obvious reason.¹³ Since excuse defenses are all the same in terms of their underlying principles and their central issue (the defendant’s blameworthiness for an admitted violation), they should be treated similarly in terms of the burden of proof, as is done in the proposed Code.¹⁴

Similarly, current law requires the Commonwealth to disprove certain nonexculpatory defenses beyond a reasonable doubt.¹⁵ This is plainly inconsistent with the rule shifting the burden of proof to the defendant for the insanity excuse. If such a burden-shifting rule is appropriate for an excuse defense — under which the defendant would be considered blameless in committing the offense — it should also apply to nonexculpatory defenses, which involve *no* claim of blamelessness. The proposed Code employs such a rule.¹⁶

Another benefit of effective organization is found in Section 2101, a consolidation provision for the theft offenses assuring that the offense definitions and grading provisions are read together as applying to different forms of the same offense. Section 2101 avoids the problem of having to charge several different offenses to make sure that an indictment covers conduct that may fall into different theft categories.

¹³ Similarly, although current KRS 500.070 requires the Commonwealth to disprove any affirmative defense other than insanity beyond a reasonable doubt, the defendant may bear the burden of proving the applicability of certain offense “exemptions” and “exceptions” that are not “affirmative defenses.” *See, e.g.*, KRS 527.040(1)(b) (the convicted felon can prove that he had permission to possess a handgun); *Eary v. Com.*, 659 S.W.2d 198 (Ky. 1983) (construing KRS 527.040).

Section 106(3) avoids such anomalies by defining “affirmative defense” to mean “any defense other than one that operates by negating a required offense element” and providing a default rule that affirmative defenses must be disproved beyond a reasonable doubt. Section 106(2)(b).

¹⁴ Section 501(5) places the burden of persuasion on the defendant to prove an excuse defense by a preponderance of the evidence.

¹⁵ *See, e.g.*, *Com. v. Day*, 983 S.W.2d 505 (Ky. 1999) (once defendant has raised entrapment defense, Commonwealth must prove beyond reasonable doubt that defendant was not entrapped).

¹⁶ Proposed Section 601(3) provides that, as with excuses, the defendant must prove a nonexculpatory defense by a preponderance of the evidence.

2. PROVIDE A COMPREHENSIVE STATEMENT OF RULES

It is critical not only that a penal code say things clearly, but that it say everything that needs to be said. The code must be *comprehensive* as well as *comprehensible*. Failure to provide all necessary provisions will necessarily lead to either or both of two results: (1) failures of justice, as the code's omissions and "loopholes" lead to liability where none is deserved or allow an offender to avoid deserved punishment; or (2) a de facto delegation of authority to the courts (or usurpation of authority by the courts), as judicial interpretations try to fill in the gaps left by the legislature. The costs of the first result are obvious. Yet the alternative of judicial intervention, however necessary to achieve sensible or just results in individual cases, may ultimately impose costs as well. The interests of advance notice (discussed above), democracy, and legal consistency and coherence suggest that the legislature, rather than the courts, must bear the primary responsibility for creating criminal law rules.

Insisting on comprehensiveness leads to several important benefits. First, comprehensiveness helps avoid inappropriate results. Courts, which decide individual cases and act independently of one another, cannot be as effective as a legislature in formulating coherent general doctrines that will work together as the provisions of a comprehensive code can and must. Second, an uncodified rule is more likely to be applied differently in similar cases than a codified rule, as the terms of the latter are fixed, explicit, and available to all officials at each stage in the process.

Further explanation of this goal follows, along with a representative, but by no means exhaustive, collection of examples of current Kentucky law's shortcomings in this area.¹⁷

¹⁷ For example, in the General Part, the proposed Code introduces several other currently omitted provisions that govern important common issues and make clear the relationships between various parts of the Code. *See, e.g.*, Sections 106(2) (defining scope of Commonwealth's burden of persuasion; providing default rule that all "other facts," such as jurisdiction and venue, need only be proven by a preponderance of the evidence) 201 (making clear bases of liability); 202 (categorizing and defining offense elements); 205(6) (proof of more culpable mental state satisfies requirement of less serious one); 255 (rules governing conviction of multiple grades of an offense); 303 (rules governing transferred intent); 400 (clarifying that justification, excuse, and nonexculpatory defenses bar liability); 415 (justification defense for persons with special responsibilities for others); 420 (defining "bodily harm" and "great bodily harm"); 602(4) (describing situations that allow for tolling the limitations period); 805 (defense to certain inchoate offenses for defendant who are victims or whose conduct is inevitably incident to the offense); 806 (defense to inchoate offenses for persons who renounce offenses and prevent their commission).

The proposed Special Part also includes several offenses not recognized in current law. *See, e.g.*, Section 2205 (causing or risking a catastrophe).

a. General Part rules

The current Penal Code (as well as the Kentucky Constitution and criminal rules) contains no provision dealing with the presumption of innocence, except in the context of military courts-martial and the content of jury instructions. Section 106(1) of the proposed Code explicitly recognizes a principle fundamental to Western criminal justice: “[a] defendant is presumed innocent until proven guilty.” The proposed Code also provides a number of explicit rules governing the application of general defenses, which, for example, elaborate the relevant evidentiary burdens, describe what happens when a person creates the conditions of his own defense, and clarify what conduct may lawfully be assisted (or resisted) and what conduct may not.¹⁸

Although current law defines consent as a defense for specific offenses,¹⁹ the current Penal Code contains no general defense to govern when the consent of the “victim” operates as a defense to liability. Section 251(1) defines a general consent defense.

b. Special Part offenses

The current Code sometimes fails to criminalize conduct that merits criminal liability. This may mean that no liability is possible for serious conduct or, as is more common, that prosecution is possible only for less serious offenses, resulting in punishment that falls short of the relative gravity of the offense. For example, the Penal Code criminalizes wanton endangerment as a Class D felony,²⁰ but does not specifically criminalize recklessly causing a catastrophe, creating a risk of a catastrophe, threatening to cause a catastrophe, or failure on the part of certain persons to prevent a catastrophe. Under current law, those acts would count only as ordinary wanton endangerment or wanton criminal mischief,²¹ which are graded lower than the proposed Class B felony offense of “causing or risking catastrophe” in Section 2205.

3. CONSOLIDATE OFFENSES

A third goal is consolidation of all criminal offenses. Perhaps inevitably, nearly three decades of piecemeal modification of the Code have led to the addition of hundreds of new offenses, many of which cover the same conduct as previous offenses (but, in some cases, provide for conflicting levels of punishment) or appear in various other areas of the Kentucky Statutes rather than in the Penal Code.

¹⁸ See Sections 411, 501, 601.

¹⁹ See, e.g., KRS 513.030.

²⁰ See KRS 508.060-.070.

²¹ See KRS 512.020-.040.

It is not only redundant, but potentially counterproductive or self-contradictory, to add extra offenses whose prohibitions are identical to an existing offense; or to add prohibitions against narrow, specific forms of conduct in addition to (or in lieu of) a more general prohibition against all such relevant conduct; or to scatter serious crimes throughout the Commonwealth's statutory code instead of ensuring that all relevant offenses appear within the Penal Code, where their significance and relation to one another is clear. Consolidation ensures against the confusion that results when one encounters, and must make sense of, multiple provisions that overlap²² or contradict, and also against the mistakes that ensue when one fails to notice, or find, provisions that may apply to a given case. Consolidation ensures the briefest, clearest statement of the criminal law's rules, while also exposing and eliminating inadvertent omissions, duplications, and inconsistencies in the statutory scheme. The consolidation goal has two aspects. First, all criminal offenses must be defined within the penal code itself, and not elsewhere. Second, superfluous specific offenses must be eliminated in favor of a reduced number of offenses that are defined as broadly as is feasible.

As to the first element, a statutory scheme in which a significant number of important offenses are defined outside of the penal code will have at least three shortcomings. First, and most obviously, the likelihood of notice to the public diminishes as the dispersion of criminal provisions in the Commonwealth's laws increases. It is simply much easier for the layperson to educate herself about the Commonwealth's criminal law if that law can be found in one place. A second, and subtler, "notice" problem will affect the legislature itself. If crimes are spread throughout the Commonwealth's statutory code, the legislature will be less likely to view the criminal law as a consistent, unified scheme. A new offense may be placed outside the code, making it less likely that the legislature will consider how that offense fits within the existing matrix of criminal offenses. Additionally, the penal code itself may be amended without consideration of the amendment's impact on offenses outside the code. Third, the existence of criminal offenses outside the code will generate problems of statutory construction. For example, it may not be clear whether the legislature expected the penal code's "default" culpability provision to apply to uncodified offenses. In short, the possibility of criminal offenses appearing outside the penal code undermines the entire project of setting aside a separate penal code within the overall Commonwealth's code scheme.

Current Kentucky law defines numerous serious crimes outside the Penal Code. Hundreds of misdemeanors and felonies are scattered throughout the Kentucky Revised Statutes. Many of those current non-Code offenses overlap, or simply restate, prohibitions appearing in the current Penal Code. The proposed Code would supersede most of these current non-Code offenses, whose prohibitions are incorporated into the proposed Code's more general offenses.²³

²²According to interpretive canons, such overlapping provisions must be read so that none renders any other superfluous — a task which frequently requires courts to distort the meaning of one provision in order to accommodate another.

²³ Compare Section 5103 (official misconduct), with KRS 6.731-.761; 61.097-64.990; 70.990. Compare Section 5301 (obstructing governmental operations), with KRS 39A.990; 65.341; 149.040; 149.083; 432.590; 438.180; 441.035. Compare Section 5314 (tampering with physical evidence), with KRS 17.170.

Within the Penal Code itself, consolidation is no less important. Formulation of an offense in one provision, rather than many, reduces uncertainty as to the nature and scope of the banned conduct. A general prohibition avoids confusion and grading inconsistency. At the same time, it reduces the need for the legislature to enact additional prohibitions in the future, because a more general provision is more easily adapted to changing circumstances.

Current Kentucky offenses often fail to realize this goal of consolidation within a single, general offense. This occurs in two ways. In some cases, the current Penal Code criminalizes specific forms of conduct *in lieu of* a broader prohibition against such conduct generally. For example, current law has no general prohibition against false statements to the government,²⁴ but includes various offenses prohibiting false statements in particular forms or applications.²⁵ Similarly, current law has no general offense to cover obstruction of governmental operations,²⁶ but defines a variety of specific offenses covering particular forms of obstruction.²⁷

In other cases, Kentucky law includes narrow, specific offenses *in addition to* a broader prohibition against such conduct generally. For example, although one provision in the current Penal Code explicitly covers theft by deception,²⁸ a number of other provisions in Kentucky statutory law prohibit specific forms of such theft or attempts to commit such theft.²⁹

Proposed Section 1201 provides a final example of the advantages of consolidation. Under current law, when particular facts may not exactly fit the definition of a particular assault offense, it becomes necessary to also charge lesser “degrees” of assault, which are defined as distinct offenses. Section 1201(1) defines the offense of assault based on its most fundamental elements only. Section 1201(2) provides a list of grading factors that will aggravate the penalty, thus establishing “degrees” within a single offense. While the baseline penalty for the general assault offense is a Class A misdemeanor, the presence of any (or all) of the five categories of aggravators can result in an increased penalty up to a Class A felony.³⁰

²⁴ Cf. Section 5203(1)(a)(ii) (making false entry in, or alteration of, document required to be kept for information of government)

²⁵ See, e.g., KRS 138.990 (records required under cigarette tax); KRS 138.300 (documentation required under gasoline tax).

²⁶ Cf. Section 5301(1).

²⁷ See, e.g., KRS 257.490 (obstructing performance of duties of Livestock Sanitation Division); KRS 251.990 (obstructing performance of duties relating to grain contracts); KRS 227.270 (obstructing performance of duties by Fire Marshal).

²⁸ See KRS 514.040.

²⁹ See, e.g., KRS 434.095 (obtaining real estate loan by substituting or making false instrument); KRS 434.655 (fraudulent use of credit or debit card after reporting it lost, as stolen, or not received); 434.660 (furnishing goods or services to user of false credit card with intent to defraud); 434.670 (failure to furnish goods, services, etc., represented in writing as furnished); 516.130 (using slugs in coin machine with intent to defraud).

³⁰ Other proposed sections provide similar potential increases in penalty with use of aggravators. See, e.g., Sections 1202, 1204, 1401.

The above examples of current Kentucky law’s shortcomings in this area are representative, but by no means exhaustive.³¹

4. GRADE OFFENSES RATIONALLY AND PROPORTIONALLY

For a system of criminal justice to be fair, liability must be assigned according to the relative seriousness of the offense(s) committed. It is critical that the Code’s system of grading offenses recognize all, and only, suitable distinctions among the relative severity of offenses and develop a scheme to grade each offense proportionally to its gravity in light of those distinctions.

In most cases, determinations of “seriousness” reflect value judgments as to which reasonable people might differ, and as to which the legislature (as the most direct political voice of the people) should have the ultimate authority. Accordingly, the drafters of the proposed Code have sought to defer to the grading determinations instantiated in existing Kentucky law where possible. In some cases, however, broad examination of current grading determinations reveals logical inconsistencies that, it is presumed, the legislature would have sought to avoid had it been aware of them. Such inconsistencies may develop for several reasons. As new offenses are added to a penal code, the legislature may neglect to consider how the grade of each new offense relates to the grades for other, preexisting offenses. As noted earlier, the sheer increasing number of offenses, especially offenses outside the Code itself, makes it difficult to maintain consistency — assuming one even manages to locate and consider all relevant offenses. In any event, the shared experience of various jurisdictions is that over time, proportionality in the grading of offenses diminishes.

One of the virtues of a broad recodification effort is the opportunity it provides to review the grading system as a whole, considering how all offenses relate to one another rather than considering individual offenses in a vacuum. Following such a review, the drafters have altered the grades of certain offenses where doing so seems necessary to maintain any legitimate sense of proportionality. In addition, a “change” in grading in the proposed Code has sometimes been necessitated by the consolidation of offenses. Because current law often contains multiple offenses that overlap and prohibit the same conduct (as discussed in section 3 above), but might impose different grades for that conduct, it is simply impossible to follow “current law” on the matter, and it becomes necessary to choose a single, consistent grade for the prohibited conduct.

³¹ In addition to the examples discussed in the text, the proposed Code also introduces several other offenses generally criminalizing conduct that current Kentucky law criminalizes only in particular contexts. *Compare, e.g.*, Section 808 (possessing instruments of crime), *with, e.g.*, KRS 119.115 (possessing key to voting machine); KRS 511.050 (possessing burglary tools); KRS 514.065 (possessing device for theft of telecommunications services). *Compare* Section 3104(1) (tampering with writing, record, or device), *with, e.g.*, KRS 514.040 (tampering with utility or service meters); KRS 119.115 (tampering with voting machines).

Overlapping offenses are also a recurring problem in current law. *Compare, e.g.*, 514.110 (general prohibition against receiving stolen property), *with, e.g.*, 434.650 (fraudulent use; presumption as to knowledge or revocation); 434.690 (receiving goods, services, etc. obtained by fraud); 434.855 (misuse of computer information). *Compare* KRS 512.020 (general criminal mischief) *with* KRS 434.845 (unlawful access to computer).

The task of grading offenses has three goals: each offense’s grading scheme must recognize all relevant distinctions between degrees of the offense; that scheme must avoid introduction of irrelevant distinctions; and the overall grading scheme must maintain proportionality across offenses. We discuss each of these three goals in turn, and conclude with a discussion of the related, but distinct issue of creating rules to govern the “overall grade” — that is, the total amount of liability — where more than one offense has been committed.

a. Consistently recognize appropriate distinctions

The proposed Code seeks to ensure that the grading for each offense recognizes all relevant distinctions in the relative seriousness of various forms of an offense. In most cases, current law reflects such distinctions, and the proposed offenses’ grading distinctions will tend to track existing distinctions. In a few cases, however, current law’s grading for offenses seems too crude, failing to recognize legitimate distinctions of degree.

Perhaps the most striking example relates to the grading of theft offenses. Current law alters the grading at only one “cut-off” level of \$300 in value for any property involved,³² meaning that theft of \$400 would receive the same grade as theft of \$40,000, or even \$4,000,000. The grading for property damage offenses is similarly crude, recognizing only three levels of value for the amount of damage caused: under \$500, over \$500, and over \$1,000.³³

Section 2110 not only provides a single grading scheme for all forms of theft, but also adds additional “layers” to the grading hierarchy by introducing new grading distinctions at the \$1,000, \$10,000, and \$100,000 levels, and a more limited distinction for certain thefts involving less than \$50. In addition, Section 2110(2)(b) includes a specific grading provision for theft of a motor vehicle. Section 2206 similarly expands the grading categories for property damage, recognizing six different categories of the value of the property damaged.

b. Avoid irrelevant or unclear distinctions

Another goal of the proposed Code is to avoid the inconsistency that results when seemingly similar offenses are graded differently. This goal represents the other side of the offense-degree coin from the goal discussed immediately above; in addition to recognizing all relevant distinctions, the Code must refuse to recognize “distinctions” that do not or should not exist.

³² See KRS 514.130.

³³ See KRS 512.020 to .040.

For example, current law defines arson in the third degree, a Class D felony, as “wanton[ly] destruction or damage to a building of [one’s] own or of another by intentionally starting a fire or causing an explosion when property damage results from the defendant’s dangerous activity.”³⁴ Arson in the second degree, a Class B felony, occurs when one “starts a fire or causes an explosion with intent to destroy or damage a building” that belongs to another, or for purposes of insurance fraud.³⁵ For some reason, the lower-graded offense requires actual resulting property damage while the higher-graded one does not. The scope of the two offenses is the same in nearly all other respects, and particularly with respect to the specific concern that drives the existence of a distinct arson offense (as opposed to the general property damage offense): the element of endangerment. The proposed Code grades arson based on the level of endangerment or physical harm the arson involves.³⁶

To take another example, current theft provisions include unnecessary specialized penalty provisions when the stolen property is anhydrous ammonia.³⁷ No obvious justification exists for specifying this type of property while omitting other types of property. To compound the problems with the current grading of theft, various specific offense outside the Penal Code also criminalize specific forms of theft, and impose penalties that differ widely from the general theft provision.³⁸ Similar grading conflicts between a general Penal Code provision and various specific non-Penal Code provisions also exist in other areas, such as property damage.³⁹

Similarly, under the current law for the offense of harassment, an aggravating factor for increased grading sets a time limit for a prior conviction against the same victim.⁴⁰ The proposed Code eliminates the time limit.⁴¹

³⁴ KRS 513.040(1).

³⁵ KRS 513.030(1).

³⁶ See Section 2203. Other proposed examples of justifiable distinctions for a grading increase include Section 2302 (grading the criminal trespass offense at one grade higher when privacy or security interests are at stake or when the owner has shown a clear intent to bar entry); Section 3101 (grading the forgery offense higher when certain types of writings are involved); Section 4105 (grading for the nonsupport offense depends on whether the nonsupport has exceeded a specific dollar amount or period of time, or whether the nonsupport has resulted in a particular condition such as destitute circumstances); Section 5304 (grading one method of committing the offense of fleeing the police higher when serious physical injury is caused or substantially risked).

³⁷ See KRS 514.030(2) and 514.110

³⁸ Compare KRS 514.030 (theft by taking; Class D felony if amount exceeds \$300, Class A misdemeanor otherwise), with, e.g., KRS 433.865 (theft of dairy equipment; \$100-\$300 fine); KRS 437.420 (theft of animal; six months to one year).

³⁹ Compare KRS 512.020 to .040 (criminal mischief; Class D felony if damage over \$1,000, Class A misdemeanor if damage over \$500, Class B misdemeanor otherwise), with, e.g., KRS 437.420(2) & 437.429 (damaging or destroying animal facility, or any animal or property in or on it; six months to one year and fine of up to \$5,000); KRS 438.060 (making stream, dam, pool, or pond unfit for use; thirty days to six months and \$10-\$100 fine);

⁴⁰ See KRS 508.130.

⁴¹ See Section 1204.

c. Maintain proportionality between various offenses

The two goals discussed above relate to decisions about grading specific offenses or degrees of offenses. A third objective in grading criminal offenses is to ensure that grading remains rational when the grades of different offenses are compared with one another. In other words, the Code must maintain *proportionality* of grading across offenses and make certain that the relative level of liability for different offenses parallels the relative harm or wrong they reflect.

Although the drafters of the proposed Code have deferred, where possible, to the apparent legislative determinations regarding the relative harm of each offense that current grading levels reflect, in a few instances a comparison of different offenses reveals grading discrepancies contrary to any sense of proportionality. For example, the current offense of “theft of identity,” which prohibits possession of personal information with intent to commit theft, is graded as a Class D felony⁴² — the same grade as for an actual completed theft of any amount over \$300.⁴³

Sale or transfer of such information (or possession with intent to do so) for purposes of committing a later theft is a Class C felony,⁴⁴ which is more serious than actual theft of any amount. Numerous other fraud offenses, which typically deal with attempts to commit theft, are also graded as seriously or more seriously than theft.⁴⁵ As noted above, the proposed Code eliminates this grading anomaly by recognizing more distinctions in the grading of theft, and thus enabling actual theft of large amounts to be graded more seriously than mere attempts to defraud.

⁴² See KRS 514.160.

⁴³ See KRS 514.030(2) (theft by taking), 514.040(8) (theft by deception), 514.060(4) (theft of services).

⁴⁴ See KRS 514.170.

⁴⁵ See, e.g., KRS 341.990(5) (false statement to obtain unemployment benefits; Class D felony if “benefits procured or attempted to be procured” exceed \$100, Class A misdemeanor otherwise); KRS 382.990(8) (false statement about value of property; Class D felony); KRS 434.320 (insolvent broker accepting customer’s money; Class D felony); KRS 434.570 (false statement as to identity or financial condition; Class D felony); KRS 434.670 (failure to furnish goods or services represented as furnished; Class D felony if discrepancy in value exceeds \$100, otherwise Class A misdemeanor); KRS 517.060 (defrauding secured creditors; Class D felony if amount involved exceeds \$100).

Some of these offenses do not contradict the grading of theft so much as they appear to add superfluous offenses that complicate the Code for no reason. See also, e.g., KRS 304.47-020(2)(a), (b) (fraudulent insurance acts; graded same as theft); KRS 205.8463(1), (2) (fraudulent statements to obtain payment for health services; graded same as theft).

To take another example, under current Kentucky law, “facilitation” — a form of complicity whereby a person aids another in committing a crime by “knowingly provid[ing]” an offender “with means or opportunity for the commission of the crime” — is treated as a distinct inchoate offense. Although the conduct it covers is not meaningfully different from any other form of aid giving rise to complicity liability, “facilitation” receives a grading “discount” — it is graded as much as three full grades lower than other types of complicity.⁴⁶ Proposed Section 301(6) grades facilitation similarly to other complicity offenses.

d. Develop a rational scheme of liability for multiple offenses

An additional goal of the proposed Code moves beyond grading individual offenses, and even beyond issues of proportionality in grading different offenses, to consider broader grading issues that arise from the challenging problem of “overall grading” of multiple offenses. All too often, this problem is met with “solutions” that themselves compromise the goals of rationality and proportionality in grading.

Some of the problems in the current grading scheme probably relate to current law’s concurrent-versus-consecutive system for sentencing multiple offenses. Except in certain circumstances, current law requires that all sentences for multiple offenses be served concurrently.⁴⁷

Where the exceptions apply, the defendant must serve a full consecutive term for each relevant conviction. This double-or-nothing approach creates one set of undesirable results where offenders may serve no additional jail time for committing additional offenses, and a different but equally undesirable set of results where offenders may face disproportionately lengthy sentences for multiple offenses whose cumulative harm is not great.

Current law’s general rule requiring concurrent sentences for multiple convictions has the regrettable consequence of trivializing, to the point of complete irrelevance, all offenses other than the single most serious one.

The proposed Code addresses all these problems by introducing a system ensuring that each additional offense of conviction leads to additional, but incrementally less, liability. Thus, no offense is trivialized with a concurrent sentence, and the disproportionality of consecutive sentences is avoided.⁴⁸

⁴⁶ See KRS 506.080.

⁴⁷ For a discussion of current law rules on consecutive and concurrent sentencing, see the commentary for Section 905.906.

⁴⁸ See Section 905.906 and commentary.

**5. RETAIN ALL — BUT ONLY — RATIONAL, DEFENSIBLE POLICY DECISIONS
EMBODIED IN CURRENT LAW**

Substantive policy decisions about the rules of the criminal law — such as what conduct should be criminalized and what adjudicative rules should govern the imposition of criminal liability⁴⁹ — reflect value judgments that are properly made by the legislature rather than a group of drafters. For this reason, the proposed Code seeks to follow the substance of current law wherever possible.

In some places, however, the current law contains multiple contradictory rules — and therefore no clear rule — on a subject. Other rules may have been sound when enacted, but no longer reflect current realities or sensibilities and require expansion, alteration, or deletion. Still other current legal rules have been created by the courts through case law, rather than by the legislature through statutory enactment, and thus lack the legitimacy of a clear legislative mandate — in fact, often they are in direct tension with the governing statutory provision. In those situations where the existing legal rule seems clearly at odds with the goal of producing a rational, coherent Penal code, drafters are forced to modify the existing rule, using supporting commentary to the draft Code to describe and justify the proposed change.

a. Consistent and rational use of culpability requirements
in defining principles, offenses, and defenses

In creating the Penal Code of 1974, the drafters recognized the importance and difficulty of comprehensively defining and using the mental states which are elements of the specific offenses. Despite their efforts, in some respects current law is casual or imprecise in its use of culpability requirements in defining offenses, leading to interpretive difficulties.

For example, under current law, when an offense does not prescribe a particular mental state, “a culpable mental state may nevertheless be required . . . with respect to some or all of the material elements [of the offense], if the proscribed conduct necessarily involves such culpable mental state.” As is discussed in section 1.a above, this provision offers very little guidance regarding rules for “reading in” culpability requirements where none is stated.⁵⁰ This failure is especially troublesome given the statutory rule that a person must have culpability with respect to each element of an offense,⁵¹ which demands that culpability must be “read in” for offense elements whenever they are not explicitly stated, which is often the case.

⁴⁹ A third substantive category, offense grading, is discussed in section 4 above.

⁵⁰ See KRS 501.040.

⁵¹ See KRS 501.030(2).

The proposed Code addresses these problems more clearly than current law in two ways. First, the Code explicitly details, in both the draft provisions and commentary, how the culpability rules are designed to function.⁵² Second, the proposed Code takes care to ensure that every offense is drafted with these rules in mind.⁵³

b. Eliminating provisions of confusing or limited application

The current Penal Code contains a number of outdated offenses that do not belong in a modern penal code. The proposed Code attempts to identify and eliminate these provisions. For example, Section 105 does not retain current law that the “bodily impact causing death” counts as a result element for homicide. That special rule creates criminal jurisdiction for a specific, very unusual fact pattern: where the offender’s conduct and the victim’s death occur outside Kentucky, but the physical contact causing death occurs in Kentucky.⁵⁴ Because the rule would be of extremely limited applicability and does not serve any significant policy interest, there is no reason to carve out a specific exception to generally applicable rules of jurisdiction to cover this one situation.

Another example is the current provision stating that the issue of whether a person knew or should have known that the result he caused was rendered substantially more probable by his conduct is a fact issue.⁵⁵ Any culpability requirement, including the required culpability as to causing a prohibited result, will be included within an offense’s definition and will have to be proved beyond a reasonable doubt. Accordingly, proposed Section 203 does not include this unnecessary and confusing language.

⁵² Section 205(2) provides a general rule that a stated culpability requirement for one objective element governs subsequently elaborated objective elements as well, in order to avoid unnecessary repetition. Section 205(3) provides a “read-in” culpability requirement of recklessness where no culpability level is specified (either through direct statement or through application of the rule of Section 205(2)), to avoid excess verbiage and ensure that offenses, or offense elements, do not allow absolute liability for want of an explicit culpability term for each element.

⁵³ For example, the proposed arson offense states:

- (1) Offense. Defined. A person commits an offense if, by means of fire or explosive, he knowingly:
- (a) damages a building or habitable structure of another or a vital public facility; or
 - (b) damages any property, whether his own or another’s, with the intention that insurance be collected for such loss.

Section 2201(1). The structure clearly indicates that the prescribed culpability requirement (knowingly) is intended to apply to each of the offense elements contained in subsections (a) and (b).

⁵⁴ See KRS 500.060(3).

⁵⁵ See KRS 501.060(4).

CONCLUSION

Undertaking the Kentucky Penal Code Reform Project represents a rare and profound opportunity to eradicate the numerous inconsistencies and contradictions that currently plague Kentucky penal law. In nearly all cases, the needed corrections are significant, but should not be at all controversial, for it is usually possible to clean up the form and structure of the law without altering its fundamental goals or rules. The proposed Penal Code both simplifies and rationalizes the statutory criminal law of Kentucky. It is rooted in the values and policy judgments of the present, but its language, organization, and comprehensive scope promise to better serve those interests in the future.

PENAL CODE

TABLE OF CONTENTS

PART I. GENERAL PROVISIONS

Chapter 500. Preliminary Provisions

Section 500.101.	Short Title and Effective Date	1
Section 500.102.	Principle of Construction	1
Section 500.103.	Applicability	1
Section 500.104.	Restrictions on Applicability	1
Section 500.105.	Criminal Jurisdiction	2
Section 500.106.	Burdens of Proof; Affirmative Defenses; Permissive Inferences	2
Section 500.107.	Definitions	4

Chapter 501. Basic Requirements of Offense Liability

Section 501.201.	Basis of Liability	9
Section 501.202.	Offense Elements Defined	9
Section 501.203.	Causal Relationship Between Conduct and Result	10
Section 501.204.	Requirement of an Act; Omission Liability; Possession Liability	10
Section 501.205.	Culpability Requirements	10
Section 501.206.	Culpability Requirements Defined	11
Section 501.207.	Ignorance or Mistake Negating Required Culpability	13
Section 501.208.	Mental Illness or Retardation Negating Required Culpability	13
Section 501.209.	Definitions	14

Chapter 502. Defenses Relating to the Offense Harm or Evil

Section 502.251.	Consent	15
Section 502.252.	Customary License; De Minimis Infraction; and Conduct Not Envisaged by Legislature as Prohibited by the Offense	16
Section 502.253.	Prosecution When the Defendant Satisfies the Requirements of More than One Offense	16
Section 502.254.	Conviction When the Defendant Satisfies the Requirements of More than One Offense	17
Section 502.255.	Definitions	18

Chapter 503. Imputation of Offense Elements

Section 503.301.	Accountability for the Conduct of Another	19
Section 503.302.	Voluntary Intoxication	20
Section 503.303.	Divergence Between Consequences Intended or Risked and Actual Consequences	21
Section 503.304.	Mistaken Belief Consistent with a Different Offense	21
Section 503.305.	Definitions	21

Chapter 504. Justification Defenses

Section 504.400.	General Defenses	23
Section 504.411.	General Provisions Governing Justification Defenses	23
Section 504.412.	Lesser Evils	24
Section 504.413.	Execution of Public Duty	24
Section 504.414.	Law Enforcement Authority	24
Section 504.415.	Use of Force by Persons with Special Responsibility for Care, Discipline, or Safety of Others	26
Section 504.416.	Defense of Person	27
Section 504.417.	Defense of Property	28
Section 504.418.	Use of Force by Aggressor	28
Section 504.419.	Use of Force Likely to Cause Death or Serious Physical Injury	28
Section 504.420.	Definitions	29

Chapter 505. Excuse Defenses

Section 505.501.	General Provisions Governing Excuse Defenses	31
Section 505.502.	Involuntary Acts; Involuntary Omissions	32
Section 505.503.	Impaired Consciousness	32
Section 505.504.	Insanity	33
Section 505.505.	Immaturity; Transfer to Juvenile Court	34
Section 505.506.	Involuntary Intoxication	34
Section 505.507.	Duress	35
Section 505.508.	Ignorance Due to Unavailable Law	36
Section 505.509.	Reliance Upon Official Misstatement of Law	36
Section 505.510.	Reasonable Mistake of Law Unavoidable by Due Diligence	37
Section 505.511.	Mistake as to a Justification	37
Section 505.512.	Definitions	38

Chapter 506. Nonexculpatory Defenses

Section 506.601.	General Provisions Governing Nonexculpatory Defenses	39
Section 506.602.	Prosecution Barred if Not Commenced Within Time Limitation Period	40
Section 506.603.	Entrapment	41
Section 506.604.	Incompetency to Stand Trial or be Sentenced	42
Section 506.605.	Former Prosecution for Same Offense as a Bar to Present Prosecution	42
Section 506.606.	Former Prosecution for Different Offense as a Bar to Present Prosecution	43
Section 506.607.	Former Prosecution in Another Jurisdiction as a Bar to Present Prosecution	43
Section 506.608.	Prosecution Not Barred Where Former Prosecution Was Before Court Lacking Jurisdiction or Was Fraudulently Procured by Defendant	44
Section 506.609.	Definitions	44

Chapter 507. Liability of Corporations and Other Non-Human Entities

Section 507.701.	Liability of Corporation or Unincorporated Association	45
Section 507.702.	Relationship to Corporation or Unincorporated Association No Limitation on Individual Liability or Punishment	46
Section 507.703.	Definitions	46

Chapter 508. Inchoate Offenses

Section 508.801.	Criminal Attempt	47
Section 508.802.	Criminal Solicitation	47
Section 508.803.	Criminal Conspiracy	48
Section 508.804.	Unconvictable Confederate No Defense	48
Section 508.805.	Defense for Victims and for Conduct Inevitably Incident	48
Section 508.806.	Defense for Renunciation Preventing Commission of the Offense	48
Section 508.807.	Grading of Criminal Attempt, Solicitation, and Conspiracy	49
Section 508.808.	Possessing Instruments of Crime	49
Section 508.809.	Definitions	49

Chapter 509. Offense Grades and their Implications

Section 509.901.	Classified Offenses	51
Section 509.902.	Unclassified Offenses	51
Section 509.903.	Authorized Terms of Imprisonment; Death	52
Section 509.904.	Authorized Fines	52
Section 509.905.	General Adjustment to Offense Grade for Prior Offense	53
Section 509.906.	Authorized Sentence for Multiple Offenses	53

PART II. DEFINITION OF SPECIFIC OFFENSES

Chapter 511. Homicide Offenses

Section 511.1101.	Murder in the First Degree	55
Section 511.1102.	Murder in the Second Degree	55
Section 511.1103.	Manslaughter in the First Degree	56
Section 511.1104.	Manslaughter in the Second Degree	56
Section 511.1105.	Grossly Negligent Homicide	56
Section 511.1106.	Causing or Aiding Suicide	56
Section 511.1107.	Definitions	57

Chapter 512. Assault, Endangerment, and Threat Offenses

Section 512.1201.	Assault; Causing Physical Injury	59
Section 512.1202.	Endangerment	60
Section 512.1203.	Terroristic Threats; Menacing	60
Section 512.1204.	Stalking; Intimidation	61
Section 512.1205.	Criminal Abuse	62
Section 512.1206.	Definitions	62

Chapter 513. Sexual Assault Offenses

Section 513.1301.	Aggravated Rape	63
Section 513.1302.	Rape	64
Section 513.1303.	Aggravated Sexual Abuse	65
Section 513.1304.	Sexual Abuse	66
Section 513.1305.	Sexual Misconduct	66
Section 513.1306.	Definitions	66

Chapter 514. Kidnapping, Coercion, and Related Offenses

Section 514.1401.	Kidnapping and Unlawful Restraint	67
Section 514.1402.	Interference with Custody	68
Section 514.1403.	Criminal Coercion	69
Section 514.1404.	Definitions	69

Chapter 515. Robbery Offenses

Section 515.1501.	Robbery	71
-------------------	---------	----

Chapter 521. Theft and Related Provisions

Section 521.2101.	Consolidation of Theft Offenses	73
Section 521.2102.	Theft by Unlawful Taking or Disposition	73
Section 521.2103.	Theft by Deception	74
Section 521.2104.	Theft by Extortion	76
Section 521.2105.	Theft of Services	76
Section 521.2106.	Theft by Unauthorized Sale of Copyrighted Material	77
Section 521.2107.	Theft by Failure to Make Required Disposition of Funds Received	77
Section 521.2108.	Theft of Property Lost, Mislaid, or Delivered by Mistake	77
Section 521.2109.	Receiving Stolen Property	78
Section 521.2110.	Grading of Theft	78
Section 521.2111.	Claim of Right	79
Section 521.2112.	Unauthorized Use of Automobiles and Other Vehicles	79
Section 521.2113.	Definitions	80

Chapter 522. Property Damage and Destruction Provisions

Section 522.2201.	Arson in the First Degree	81
Section 522.2202.	Arson in the Second Degree	82
Section 522.2203.	Endangering by Fire or Explosion	82
Section 522.2204.	Failure to Control or Report a Dangerous Fire	82
Section 522.2205.	Causing or Risking Catastrophe	83
Section 522.2206.	Criminal Damage	83
Section 522.2207.	Consent Defense	84
Section 522.2208.	Definitions	84

Chapter 523. Burglary and Other Criminal Intrusion Provisions

- Section 523.2301. Burglary 85
- Section 523.2302. Criminal Trespass 86
- Section 523.2303. Definitions 86

Chapter 524. Invasion of Privacy Offenses

- Section 524.2401. Unlawful Eavesdropping or Surveillance 87
- Section 524.2402. Unlawfully Acquiring Information 88
- Section 524.2403. Unlawfully Divulging Information 88
- Section 524.2404. Exceptions to Chapter 524 Offenses 89
- Section 524.2405. Definitions 89

Chapter 531. Forgery and Fraudulent Practices

- Section 531.3101. Forgery and Counterfeiting 91
- Section 531.3102. Tampering with Writing, Record, or Device 92
- Section 531.3103. Criminal Simulation 92
- Section 531.3104. Unauthorized Impersonation 93
- Section 531.3105. Deceptive Practices 93
- Section 531.3106. False or Bait Advertising 94
- Section 531.3107. Falsifying Business Records 94
- Section 531.3108. Defrauding Secured Creditors 95
- Section 531.3109. Fraud in Insolvency 95
- Section 531.3110. Issuing False Financial Statement 96
- Section 531.3111. Receiving Deposits in Failing Financial Institution 96
- Section 531.3112. Misapplication of Entrusted Property 96
- Section 531.3113. Operating a Misrepresented Company 97
- Section 531.3114. Commercial Bribery 97
- Section 531.3115. Tampering with a Publicly Exhibited Contest 97
- Section 531.3116. Ticket Scalping 98
- Section 531.3117. Bad Checks 98
- Section 531.3118. Fraudulent Use of Credit or Debit Card 98
- Section 531.3119. Definitions 99

Chapter 541. Offenses Against the Family

Section 541.4101.	Bigamy	101
Section 541.4102.	Incest	101
Section 541.4103.	Concealing Birth of Infant	101
Section 541.4104.	Abandonment of Minor	102
Section 541.4105.	Nonsupport	102
Section 541.4106.	Endangering the Welfare of a Minor	103
Section 541.4107.	Contributing to the Delinquency of a Minor	103
Section 541.4108.	Unlawful Adoption Fees and Representation	103
Section 541.4109.	Abortion	104
Section 541.4110.	Definitions	104

Chapter 551. Bribery and Official Misconduct Offenses

Section 551.5101.	Bribery	105
Section 551.5102.	Unlawful Compensation of a Public Servant	106
Section 551.5103.	Official Misconduct	106
Section 551.5104.	Misuse of Confidential Information	106
Section 551.5105.	Definitions	107

Chapter 552. Perjury and Other Official Falsification Offenses

Section 552.5201.	Perjury and False Swearing	109
Section 552.5202.	Unsworn Falsification to Authorities	111
Section 552.5203.	False Reporting	111
Section 552.5204.	Impersonating a Public Servant	112
Section 552.5205.	Tampering with Public Records	112
Section 552.5206.	Definitions	112

Chapter 553. Interference with Governmental Operations

Section 553.5301.	Obstructing Governmental Operations	113
Section 553.5302.	Compounding a Crime	113
Section 553.5303.	Hindering Prosecution or Apprehension	115
Section 553.5304.	Fleeing or Evading Peace Officer	115
Section 553.5305.	Interfering with or Resisting a Peace Officer	116
Section 553.5306.	Escape	116

Section 553.5307.	Promoting or Possessing Contraband	117
Section 553.5308.	Failure to Appear	117
Section 553.5309.	Bribing a Witness	117
Section 553.5310.	Intimidating, Harassing, or Tampering with a Participant in the Legal Process	118
Section 553.5311.	Retaliating Against a Participant in the Legal Process	119
Section 553.5312.	Bribery of, or Improper Communication with, a Juror	120
Section 553.5313.	Tampering with Physical Evidence	120
Section 553.5314.	Simulating Legal Process	121
Section 553.5315.	Unauthorized Practice of Law	121
Section 553.5316.	Definitions	121

Chapter 561. Public Order and Safety Offenses

Section 561.6101.	Rioting	123
Section 561.6102.	Inciting to Riot	123
Section 561.6103.	Unlawful Assembly	123
Section 561.6104.	Failure to Disperse	124
Section 561.6105.	Disorderly Conduct	124
Section 561.6106.	Harassment	124
Section 561.6107.	Harassing Communications	125
Section 561.6108.	Loitering	125
Section 561.6109.	Public Intoxication	126
Section 561.6110.	Obstructing a Highway or Other Public Passage	126
Section 561.6111.	Disrupting Meetings and Processions	127
Section 561.6112.	Interfering with Communications	127
Section 561.6113.	Definitions	127

Chapter 562. Public Indecency Offenses

Section 562.6201.	Indecent Exposure	129
Section 562.6202.	Causing or Promoting a Sexual Performance by a Minor	129
Section 562.6203.	Distribution of Obscenity	130
Section 562.6204.	Prostitution or Patronizing a Prostitute; Loitering for a Sexual Act	131
Section 562.6205.	Permitting Prostitution	132
Section 562.6206.	Promoting, Supporting, or Profiting from Prostitution	132
Section 562.6207.	Cruelty to Animals	133
Section 562.6208.	Desecration of Venerated Objects	133
Section 562.6209.	Definitions	134

PART I. GENERAL PROVISIONS

CHAPTER 500. PRELIMINARY PROVISIONS

Section 500.101.	Short Title and Effective Date
Section 500.102.	Principle of Construction
Section 500.103.	Applicability
Section 500.104.	Restrictions on Applicability
Section 500.105.	Criminal Jurisdiction
Section 500.106.	Burdens of Proof; Affirmative Defenses; Permissive Inferences
Section 500.107.	Definitions

Section 500.101. Short Title and Effective Date

- (1) This Act shall be known and may be cited as the “Kentucky Penal Code of 2001.”
- (2) This Code shall take effect on [January 1, 2004].

Section 500.102. Principle of Construction

- (1) Principle of Construction. All provisions of this Code shall be liberally construed according to the fair import of their terms, to promote justice, and to effect the objects of the law.
- (2) Effect of Commentary. The commentary accompanying this Code may be used as an aid in construing the provisions of this Code.

Section 500.103. Applicability

- (1) Common law offenses are abolished and no act or omission shall constitute a criminal offense unless defined as an offense under this Code or another statute of this Commonwealth.
- (2) The provisions of Part I of this Code are applicable to offenses defined by other statutes, unless this Code otherwise provides.
- (3) This provision shall not affect the power of a court to punish for contempt or to employ any sanction authorized by law for the enforcement of an order or a civil judgment or decree.

Section 500.104. Restrictions on Applicability

- (1) The provisions of this Code shall not apply to any offense committed prior to [January 1, 2004], notwithstanding KRS 500.040(1). Such an offense must be construed and punished according to the provisions of law existing at the time of the commission thereof in the same manner as if this Code had not been enacted.

(2) For purposes of this Section, an offense shall be deemed to have been committed prior to [January 1, 2004], if any element of the offense occurred prior thereto.

(3) Civil Remedies Unaffected. This Code shall not bar, suspend or otherwise affect any right or liability to damages, penalty, forfeiture or other remedy authorized by law to be recovered or enforced in a civil action.

Section 500.105. Criminal Jurisdiction

(1) A person is subject to prosecution in this Commonwealth for an offense that he commits, while either within or outside the Commonwealth, by his own conduct or that of another for which he is legally accountable, if:

- (a) the offense is committed either wholly or partly within the Commonwealth; or
- (b) the conduct outside the Commonwealth constitutes an attempt to commit an offense within the Commonwealth; or
- (c) the conduct outside the Commonwealth constitutes a conspiracy to commit an offense within the Commonwealth, and an overt act in furtherance of the conspiracy occurs in the Commonwealth; or
- (d) the conduct within the Commonwealth constitutes an attempt, solicitation, or conspiracy to commit in another jurisdiction an offense under the laws of both this Commonwealth and such other jurisdiction.
- (e) the conduct is a violation of a statute of this Commonwealth that expressly prohibits conduct outside the Commonwealth.

(2) An offense is committed partly within this Commonwealth if:

- (a) conduct that is an element of the offense, or
 - (b) a result that is an element of the offense,
- occurs within the Commonwealth.

(3) Permissive Inference. If the body of a homicide victim is found within the Commonwealth, that fact shall sustain the Commonwealth's burden of production in establishing that the death occurred within the Commonwealth.

(4) Omission Liability. An offense that is based on an omission to perform a duty imposed by the law of this Commonwealth is committed within the Commonwealth, regardless of the location of the offender at the time of the omission.

Section 500.106. Burdens of Proof; Affirmative Defenses; Permissive Inferences

- (1) Presumption of Innocence. A defendant is presumed innocent until proven guilty.
- (2) Burden of Persuasion. The burden is on the Commonwealth:

- (a) to prove all elements of the offense beyond a reasonable doubt;
 - (b) to disprove all exceptions, exemptions, defenses, and mitigations beyond a reasonable doubt, unless this Code expressly provides otherwise; and
 - (c) to prove by a preponderance of the evidence all other facts required for liability, unless this Code expressly provides otherwise.
- (3) Burden of Production.

(a) Burden on the Commonwealth. The case shall be presented to the factfinder only if the Commonwealth has presented sufficient evidence, considered in the light most favorable to the Commonwealth and all reasonable inferences therefrom, to allow a rational factfinder to find that all required offense elements have been proven, and any exemptions or exceptions have been disproved, beyond a reasonable doubt.

(b) Burden on the Defendant. The factfinder shall be instructed as to an affirmative defense or mitigation only if there is sufficient evidence, considered in the light most favorable to the defendant and all reasonable inferences therefrom, to allow a rational factfinder to find that all requirements of the defense are proven by a preponderance of the evidence.

(c) Definition. An “affirmative defense” is any defense other than one that operates by negating a required offense element.

(4) Permissive Inferences. When the Code establishes a permissive inference with respect to any fact, it has the following consequences:

(a) when there is evidence of the facts that give rise to the inference, the issue of the existence of the inferred fact must be submitted to the factfinder, unless the Court is satisfied that the evidence as a whole clearly negatives the inferred fact; and

[(b) when the issue of the existence of the inferred fact is submitted to the factfinder, the Court shall charge that while the inferred fact must, on all the evidence, be proved beyond a reasonable doubt, the law declares that the factfinder may regard the facts giving rise to the inference as sufficient evidence of the inferred fact.]¹

¹ **Issue:** Should the Code include (4)(b), which may authorize the use of a permissive inference instruction to the jury?

Pro: This is a standard procedure in other states and there is little reason to think it is problematic. Indeed, if a permissive inference is suitable for use in satisfying the burden of production, which is not disputed, it would seem odd to hide from jurors the fact that the inference is allowed (but not required) by law. The use of permissive inferences has been constitutionally approved. See, e.g., *Patterson v. New York*, 432 U.S. 197 (1977). The Reporter is unable to find any other jurisdiction that does not provide for their use, as is provided in (4)(b). The existence of permissive inferences also is useful in providing a workable compromise when reformers disagree over offense elements – allowing adoption of the more demanding offense requirement but providing a permissive inference instruction that will help the prosecution establish the required element.

Con: Jury instructions for permissive inferences are not generally used in current Kentucky practice, and would be somewhat inconsistent with the Kentucky practice of giving only “bare bones” instructions.

Reporter: No recommendation.

Section 500.107. Definitions

Unless a particular context clearly requires a different meaning:

“Act” has the meaning given in Section 501.204(4).

“Adulterated” has the meaning given in Section 531.3105(2)(a).

“Affirmative defense” has the meaning given in Section 500.106(3)(c).

“Another” means a person or persons as defined in this Code other than the defendant.

“Association” has the meaning given in Section 507.701(2)(c).

“Benefit” has the meaning given in Section 553.5302(2).

“Building” has the meaning given in Section 522.2201(2).

“Business record” has the meaning given in Section 531.3107(2)(a).

“Catastrophe” has the meaning given in Section 522.2205(4)(a).

“Circumstance element” has the meaning given in Section 501.202(4).

“Commonwealth” or “this Commonwealth” means the Commonwealth of Kentucky, and all land and water in respect to which the Commonwealth of Kentucky has either exclusive or concurrent jurisdiction, and the air space above such land and water. “Other state” means any state or territory of the United States, the District of Columbia, or the Commonwealth of Puerto Rico.

“Conduct” means an act, a series of acts, or a failure to act when bound by a legal duty to act.

“Conduct element” has the meaning given in Section 501.202(2).

“Consequence” has the meaning given in Section 503.303(2).

“Contraband” has the meaning given in Section 553.5307(2)(a).

“Corporate agent” has the meaning given in Section 507.701(2)(a).

“Correctional worker” has the meaning given in Section 513.1304(2).

“Credit card” has the meaning given in Section 531.3118(2)(a).

“Dangerous contraband” has the meaning given in Section 553.5307(2)(b).

“Dangerous instrument” has the meaning given in Section 515.1501(3)(a).

“Deadly weapon” has the meaning given in Section 515.1501(3)(b).

“Debit card” has the meaning given in Section 531.3118(2)(b).

“Deprive” has the meaning given in Section 521.2102(4)(a).

“Detention facility” has the meaning given in Section 553.5306(2)(a).

“Deviate sexual intercourse” has the meaning given in Section 513.1301(2)(a).

“Distribute” has the meaning given in Section 562.6203(2)(a).

“Dwelling” means any building or structure, though movable or temporary, which is for the time being either totally or partially in use as a home or place of lodging.

“Element” has the meaning given in Section 501.202(1).

“Enterprise” has the meaning given in Section 531.3107(2)(b).

“Escape” has the meaning given in Section 553.5306(2)(b).

“Fiduciary” has the meaning given in Section 531.3112(2).

“Financial institution” has the meaning given in Section 521.2107(4).

“Force likely to cause death or serious physical injury” has the meaning given in Section 504.419(2).

“Forcible compulsion” has the meaning given in Section 513.1301(2)(b).

“Forcible felony” has the meaning given in Section 504.414(4).

“Government” means the United States, any State, county, municipality, or other political unit, or any department, agency, or subdivision of any of the foregoing, or any corporation or other association carrying out the functions of government.

“Governmental function” has the meaning given in Section 553.5301(2)(a).

“Grossly negligent mistake” has the meaning given in Section 501.207(3)(b).

“Grossly negligently” has the meaning given in Section 501.206(4).

“He” means a “person,” as defined by this Section.

“High managerial agent” has the meaning given in Section 507.701(2)(b).

“Highly secured premises” has the meaning given in Section 523.2303(4).

“Inchoate offense” means any offense defined in Chapter 508 of this Code.

“Included offense.” One offense is an “included offense” of another if:

(1) it is established by proof of the same facts, or less than all the facts, required to establish the commission of the other offense; or

(2) it consists only of an inchoate offense toward commission of the other offense;

or

(3) it differs from the other offense only in the respect that

(i) a less serious injury or risk of injury to the same person, property, or public interest, or

(ii) a lesser kind of culpability, suffices to establish its commission.

“Includes” or “including” means comprehending among other particulars, without limiting the generality of the foregoing word or phrase.

“Instrument of crime” has the meaning given in Section 508.808(2).

“Intentionally” has the meaning given in Section 501.206(1).

“Intoxication” has the meaning given in Section 503.302(3)(a).

“Involuntary intoxication” has the meaning given in Section 505.506(3).

“Knowingly” has the meaning given in Section 501.206(2).

“Law enforcement authority” means a public servant authorized by law or by governmental agencies to engage in or supervise the prevention, detection, investigation, or prosecution of offenses.

“Material false statement” has the meaning given in Section 552.5201(5)(a).

“Matter” has the meaning given in Section 562.6203(2)(b).

“Mental illness or retardation” has the meaning given in Section 505.504(3).

“Mentally incapacitated” has the meaning given in Section 513.1302(2)(a).

“Mentally retarded” has the meaning given in Section 513.1302(2)(b).

“Minor” has the meaning given in Section 541.4104(2).

“Misabeled” has the meaning given in Section 531.3105(2)(b).

“Movable property” has the meaning given in Section 521.2102(4)(b).

“Negligent mistake” has the meaning given in Section 501.207(3)(c).

- “Negligently” has the meaning given in Section 501.206(5).
- “Nonexculpatory defense” has the meaning given in Section 506.601(4).
- “Oath” has the meaning given in Section 552.5201(5)(b).
- “Objective element” has the meaning given in Section 501.202(5).
- “Obscene” has the meaning given in Section 562.6203(2)(c).
- “Obtain” has the meaning given in Section 521.2103(3).
- “Official proceeding” has the meaning given in Section 552.5201(5)(c).
- “Owner” has the meaning given in Section 521.2102(4)(c).
- “Peace officer” means any person who by virtue of his office or public employment is vested by law with a duty to maintain public order or to make arrests for offenses, whether that duty extends to all offenses or is limited to specific offenses.
- “Pecuniary benefit” has the meaning given in Section 553.5309(2)(b).
- “Penal custody” has the meaning given in Section 553.5306(2)(c).
- “Person” means an individual, public or private corporation, government, partnership, or unincorporated association.
- “Personal identity” has the meaning given in Section 531.3104(2).
- “Physical evidence” has the meaning given in Section 553.5313(2).
- “Physical injury” means substantial physical pain, illness, or any impairment of physical condition, and includes throwing or causing to be thrown upon the person feces, or urine, or other bodily fluid.
- “Physically helpless” has the meaning given in Section 513.1301(2)(c).
- “Physically or mentally helpless” has the meaning given in Section 512.1205(2).
- “Place of worship” means a church, synagogue, mosque, temple, or other building, structure, or place used primarily for religious worship and includes the grounds of a place of worship.
- “Primary culpability required by the offense charged” has the meaning given in Section 505.511(4).
- “Private place” has the meaning given in Section 524.2401(1)(e).
- “Promoting the distribution” has the meaning given in Section 562.6203(2)(d).
- “Propelled vehicle” has the meaning given in Section 521.2112(2).
- “Property” has the meaning given in Section 521.2102(4)(d).
- “Property of another” has the meaning given in Section 521.2102(4)(e).
- “Prosecution” means all legal proceedings by which a person’s liability for an offense is determined, commencing with the return of the indictment or the issuance of the information, and including the final disposition of the case upon appeal.
- “Protective order” has the meaning given in Section 512.1204(3).
- “Public performance” has the meaning given in Section 531.3116(2).
- “Public place” has the meaning given in Section 561.6105(2).
- “Public servant” has the meaning given in Section 551.5101(2).
- “Reasonable belief” or “reasonably believes” means a belief that the person is not negligent in holding.
- “Reasonable mistake” has the meaning given in Section 501.207(3)(d).

“Receiving” has the meaning given in Section 521.2109(2).

“Reckless mistake” has the meaning given in Section 501.207(3)(a).

“Recklessly” has the meaning given in Section 501.206(3).

“Relative” has the meaning given in Section 514.1401(3)(b).

“Required or authorized by law” has the meaning given in Section 552.5201(5)(d).

“Restrain” has the meaning given in Section 514.1401(3)(c).

“Result element” has the meaning given in Section 501.202(3).

“Riot” has the meaning given in Section 561.6101(2).

“School” means a public, private, or parochial elementary or secondary school, community college, college, or university and includes the grounds of the school.

“Serious physical injury” means physical injury that creates a substantial risk of death or that causes serious, prolonged disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

“Service animal” has the meaning given in Section 5306(2).

“Services” has the meaning given in Section 521.2105(2).

“Sexual conduct by a minor” has the meaning given in Section 562.6202(2)(b).

“Sexual contact” has the meaning given in Section 562.1304(2).

“Sexual intercourse” has the meaning given in Section 513.1301(2)(a).

“Statement” has the meaning given in Section 552.5201(5)(e).

“Statute” means the Constitution or an Act of the General Assembly of this Commonwealth.

“Storage structure” has the meaning given in Section 523.2303(5).

“Substantive offense” means any offense defined in Part II of this Code.

“Transportation facility” has the meaning given in Section 561.6108(2).

“Unjustified” has the meaning given in Section 504.416(2).

“Unlawful threat” has the meaning given in Section 553.5310(3).

“Vital public facility” has the meaning given in Section 522.2205(4)(b).

“Voluntary intoxication” has the meaning given in Section 503.302(3)(b).

“Without consent” has the meaning given in Section 514.1401(3)(c).

“Writing” has the meaning given in Section 531.3101(2).

CHAPTER 501. BASIC REQUIREMENTS OF OFFENSE LIABILITY

Section 501.201.	Basis of Liability
Section 501.202.	Offense Elements Defined
Section 501.203.	Causal Relationship Between Conduct and Result
Section 501.204.	Requirement of an Act; Omission Liability; Possession Liability
Section 501.205.	Culpability Requirements
Section 501.206.	Culpability Requirements Defined
Section 501.207.	Ignorance or Mistake Negating Required Culpability
Section 501.208.	Mental Illness or Retardation Negating Required Culpability
Section 501.209.	Definitions

Section 501.201. Basis of Liability

Subject to the provisions of this Chapter, a person is liable for an offense if he:

- (1) (a) satisfies all the elements of an offense, and does not satisfy the requirements of any bar to liability, contained in Chapter 508 or Part II of this Code or in a statute of the Commonwealth outside of this Code, or
 - (b) if an element of the offense is missing, it is imputed to him by a provision of Chapter 503, and
- (2) does not satisfy the requirements of any defense provided in Chapters 502, 504, 505, or 506 of this Code.

Section 501.202. Offense Elements Defined

- (1) The “elements” of an offense refer to:
 - (a) (i) such conduct, or
 - (ii) such attendant circumstances, or
 - (iii) such result of conduct, and
 - (b) such culpability requirements, as defined in Sections 501.205 and 501.206, as are contained in the offense definition or the provisions establishing the offense grade.
- (2) A “conduct element” is that part of an offense definition that requires an offender’s act or failure to perform a legal duty.
- (3) A “result element” is any change of circumstances required to have been caused by the person’s conduct.
- (4) A “circumstance element” is any objective element that is not a conduct or result element.
- (5) The “objective elements” of an offense include conduct, attendant circumstances, and result elements, but not culpability requirements.

Section 501.203. Causal Relationship Between Conduct and Result

(1) Conduct is the cause of a result if:

(a) the conduct is an antecedent but for which the result in question would not have occurred; and

(b) the manner of occurrence of the result is rendered substantially more probable by the conduct; and

(c) the relationship between the conduct and result satisfies any additional causal requirements imposed by the Code or by the law defining the offense.

(2) Concurrent Causes. Where the conduct of two or more persons each causally contributes to a result and each alone would have been sufficient to cause the result, the requirement of Subsection (1)(a) of this Section is satisfied as to both persons.

Section 501.204. Requirement of an Act; Omission Liability; Possession Liability

(1) Either Act or Omission to Perform Duty Required. A person is not guilty of an offense unless his liability is based upon an act or a failure to perform a legal duty.

(2) Either Act or Omission to Perform Duty Suffices. Unless an offense definition clearly states otherwise, either an act or a failure to perform a legal duty may satisfy any conduct element of any offense.

(3) Possession an Act. Possession is an act, as required by Subsection (1), if the person:

(a) knowingly obtained or received the thing possessed, or

(b) was aware of his control thereof for a sufficient time to have been able to terminate his possession.

(4) Definition. An “act” is a bodily movement, whether voluntary or involuntary.

Section 501.205. Culpability Requirements

(1) To be guilty of an offense, a person must have culpability, as defined in Section 501.206, as to every objective element of the offense, except as provided by Subsection (4).

(2) Application of Stated Culpability Requirement. When an offense definition contains a stated culpability requirement, that requirement shall apply to all subsequent objective elements within the grammatical clause in which it appears and any subsequent objective elements to which common usage would suggest the legislature intended it to apply.

(3) Absence of a Stated Culpability Requirement. When no culpability requirement is specified with regard to an objective element, a requirement of recklessness is applicable, except as provided in Subsection (4).

(4) Absolute and Ordinary Negligence Liability. An offense may impose liability based on ordinary negligence, or no culpability, as to an objective element only if:

(a) the offense is a misdemeanor or a violation and is not punishable by incarceration or by a fine exceeding \$500, or

(b) the statute defining the offense clearly and explicitly indicates a legislative purpose to:

(i) impose criminal liability based upon no culpability or liability for ordinary negligence, and

(ii) grade the offense more seriously than would be allowed under Subsection (4)(a).

(5) Culpability as to Criminality Not Required. No level of culpability as to whether conduct constitutes an offense, or as to the existence, meaning, or application of the law defining an offense, is required by an offense definition, unless the definition expressly provides that it is required.

(6) Proof of Greater Culpability Satisfies Requirement for Lower. When the law requires negligence as to an objective element, the requirement is satisfied by proof of intent, knowledge, recklessness, [or gross negligence]** as to the element. [When the law requires gross negligence as to an objective element, the requirement is satisfied by proof of intent, knowledge, or recklessness as to the element.]** When the law requires recklessness as to an objective element, the requirement is satisfied by proof of intent or knowledge as to the element. When the law requires knowledge as to an objective element, the requirement is satisfied by proof of intent as to the element.

Section 501.206. Culpability Requirements Defined

(1) Intentionally. A person acts intentionally:

(a) with respect to conduct, if it is his conscious object to engage in such conduct, or, as the case may be, to have another engage in such conduct;

(b) with respect to a circumstance, if it is his hope or belief that such circumstance exists; and

(c) with respect to a result, if it is his conscious object to cause such result.

(d) Requirement of Intention Satisfied if Intention Conditional. When a particular intention is required by an offense definition, the requirement is satisfied although such intention is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense.

(2) Knowingly. A person acts knowingly:

(a) with respect to his own conduct, if he is aware that he is engaging in such conduct, and, with respect to another's conduct, if he is aware that another is engaging or will engage in such conduct;

(b) with respect to a circumstance, if he believes there is a high probability that such circumstance exists; and

(c) with respect to a result, if he is practically certain that his conduct will cause such result.

(3) [Recklessly]. A person acts [recklessly]²:

(a) with respect to conduct, if he consciously disregards a substantial and unjustifiable risk that he or another person is engaging in or will engage in such conduct;

(b) with respect to a circumstance, if he consciously disregards a substantial and unjustifiable risk that such circumstance exists; and

(c) with respect to a result, if he consciously disregards a substantial and unjustifiable risk that his conduct will cause such result.

(d) Disregard Must be a Gross Deviation. The person's disregard of the risk must constitute a gross deviation from the standard of care that a reasonable person would observe in the person's situation.

(4) [With Gross Negligence]. A person acts [with gross negligence]:

(a) with respect to conduct, if he fails to be aware of a substantial and unjustifiable risk that he or another person is engaging in or will engage in such conduct;

(b) with respect to a circumstance, if he fails to be aware of a substantial and unjustifiable risk that such circumstance exists; and

(c) with respect to a result, if he fails to be aware of a substantial and unjustifiable risk that his conduct will cause such result.

(d) Failure to be Aware Must be a Gross Deviation. The person's failure to be aware of the risk must constitute a gross deviation from the standard of care that a reasonable person would observe in the person's situation.

² **Issue:** Should the current culpability terminology of “wantonly,” “recklessly,” and “negligently” be changed to conform to what has become the standard American terminology of “recklessly” and “negligently,” as proposed Section 501.206 reflects?

Pro: Since Kentucky's adoption of the current terms, the rest of the country has come to a consensus on the use of culpability terms, as reflected in the current draft. Current legal dictionaries, for example, now give only those standard meanings. If the Commonwealth does not switch over to standard usage, it will increasingly create confusion for Kentucky lawyers and judges in the use of legal statutes and court opinions from other jurisdictions and standard legal treatises. If Kentucky is to become increasingly involved with other states, as is the clear modern trend, it will eventually have to make the change. To delay the change is only to delay and increase the ultimate transition cost and to suffer unnecessary and avoidable confusion in the interim. Kentucky lawyers and judges were able to successfully change their culpability terminology with the last recodification (the current Kentucky terminology reflects a change in the previous Kentucky law), and there is every reason to believe that they can manage a change this time — this change being the last change they will have to make. Further, the proposed terminology is consistent with the Kentucky terminology used in civil law, thus the proposed change would avoid the confusion of having the same term have different meanings in the criminal and civil context.

Con: The disruption to Kentucky lawyers and judges would not be worth the benefits of the change in terminology.

Reporter: Recommends the change in terminology, as currently reflected in the text.

(5) [Negligently]. A person acts [negligently]:

(a) with respect to conduct, if he fails to be aware of a substantial and unjustifiable risk that he or another person is engaging in or will engage in such conduct;

(b) with respect to a circumstance, if he fails to be aware of a substantial and unjustifiable risk that such circumstance exists; and

(c) with respect to a result, if he fails to be aware of a substantial and unjustifiable risk that his conduct will cause such result.

(6) Effect of Change in Terminology. The change in terminology in itself (from wantonly” to “recklessly” and from “recklessly” to “with gross negligence”) shall have no effect on the meaning of the defined terms.

Section 501.207. Ignorance or Mistake Negating Required Culpability

(1) Subject to the limitations of Sections 503.303 and 503.304, a required culpable mental state is not satisfied if it is negated by a person’s ignorance or mistake as to a matter of either fact or law.

(2) Correspondence Between Mistake Defenses and Culpability Requirements. Any mistake as to an offense element, including a reckless mistake, will negate the existence of intention or knowledge as to that element. A grossly negligent mistake as to an offense element will negate the existence of intention, knowledge, or recklessness as to that element. A negligent mistake as to an offense element will negate the existence of intention, knowledge, recklessness, or gross negligence as to that element. A reasonable mistake as to an offense element will negate intention, knowledge, recklessness, gross negligence, or negligence as to that element.

(3) Definitions.

(a) A “reckless mistake” is an erroneous belief that the actor is reckless in forming, or for which the actor is aware of a substantial risk that the belief is erroneous.

(b) A “grossly negligent mistake” is an erroneous belief that the actor is grossly negligent in forming or is a belief for which the actor should be aware of a substantial risk that the belief is erroneous.

(c) A “negligent mistake” is an erroneous belief that the actor is negligent in forming or is a belief for which the actor should be aware of a substantial risk that the belief is erroneous.

(d) A “reasonable mistake” is an erroneous belief that the actor is non-negligent in forming.

Section 501.208. Mental Illness or Retardation Negating Required Culpability

Evidence that a person suffered from a mental illness or retardation is admissible whenever it is relevant to prove that the person did or did not have a required culpable mental state.

Section 501.209. Definitions

- (1) “Act” has the meaning given in Section 501.204(4).
- (2) “Circumstance element” has the meaning given in Section 501.202(4).
- (3) “Conduct” has the meaning given in Section 500.107.
- (4) “Conduct element” has the meaning given in Section 501.202(2).
- (5) “Element” has the meaning given in Section 501.202(1).
- (6) “Grossly negligent mistake” has the meaning given in Section 501.207(3)(b).
- (7) “Grossly negligently” has the meaning given in Section 501.206(4).
- (8) “Intentionally” has the meaning given in Section 501.206(1).
- (9) “Knowingly” has the meaning given in Section 501.206(2).
- (10) “Mental illness or retardation” has the meaning given in Section 505.504(3).
- (11) “Negligent mistake” has the meaning given in Section 501.207(3)(c).
- (12) “Negligently” has the meaning given in Section 501.206(5).
- (13) “Objective elements” has the meaning given in Section 501.202(5).
- (14) “Reasonable mistake” has the meaning given in Section 501.207(3)(d).
- (15) “Reckless mistake” has the meaning given in Section 501.207(3)(a).
- (16) “Recklessly” has the meaning given in Section 501.206(3).
- (17) “Result element” has the meaning given in Section 501.202(3).

CHAPTER 502. DEFENSES RELATING TO THE OFFENSE HARM OR EVIL

Section 502.251.	Consent
Section 502.252.	Customary License; De Minimis Infraction; and Conduct Not Envisaged by Legislature as Prohibited by the Offense
Section 502.253.	Prosecution When the Defendant Satisfies the Requirements of More than One Offense
Section 502.254.	Conviction When the Defendant Satisfies the Requirements of More than One Offense
Section 502.255.	Definitions

Section 502.251. Consent

(1) In General. The consent of the victim to conduct charged to constitute an offense or to the result thereof is a defense if such consent negatives an element of the offense or precludes the infliction of the harm or evil sought to be prohibited by the law defining the offense.

(2) Consent to Physical Injury. Notwithstanding Subsection (3) of this Section, when conduct is charged to constitute an offense because it causes or threatens physical injury, consent to the infliction or threat of such harm is a defense if:

(a) the physical injury caused or threatened by the conduct consented to is not serious; or

(b) the conduct and the harm are reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport.

(3) Ineffective Consent. Unless otherwise provided by this Code or by the law defining the offense, assent does not constitute consent if:

(a) it is given by a person who is legally incompetent to authorize the conduct charged to constitute the offense; or

[(b) it is given by a person who by reason of youth, mental illness or retardation, or intoxication is manifestly unable, or known by the actor to be unable, to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense;]³

³ **Issue:** Should the Code include (3)(b), which allows lack of consent to be shown from the victim's manifest inability to make a reasonable judgment?

Con: Allowing this form of ineffective consent would be unfair to the intoxicated defendant who fails to see a victim's manifest inability to consent because of his intoxication, as may commonly occur in cases of date rape.

(c) it is given by a person whose improvident consent is sought to be prohibited by the law defining the offense; or

(d) it is induced by force, duress, or deception of a kind sought to be prohibited by the law defining the offense.

Section 502.252. Customary License; De Minimis Infraction; and Conduct Not Envisaged by Legislature as Prohibited by the Offense

The Court shall dismiss a prosecution if, having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds that the defendant's conduct:

(1) was within a customary license, neither expressly negated by the person whose interest was infringed nor inconsistent with the purpose of the law defining the offense;

(2) caused a harm or evil too trivial to warrant the condemnation of conviction; or

(3) did not actually cause the harm or evil sought to be prohibited by the law defining the offense. The Court shall not dismiss a prosecution under this Subsection without filing a written statement of its reasons.

Section 502.253. Prosecution When the Defendant Satisfies the Requirements of More than One Offense

When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense.

Pro: This common form of defining ineffective consent is necessary to protect potential victims who are, for any variety of reasons, unable to make a reasonable judgment. The intoxicated defendant is not improperly disadvantaged here. His proper argument is not to claim that the woman in fact consented, when she was manifestly unable to do so, but rather to claim that he lacked the requisite culpability as to her lack of consent. Whether he may avoid liability based on such a claim will depend on the definition of the offense and the culpability level required as to the element of the victim's lack of consent. In any case, the date rape defendant will be treated no differently with regard to his voluntary intoxication than any other voluntarily intoxicated defendant.

Reporter: No recommendation.

Section 502.254. Conviction When the Defendant Satisfies the Requirements of More than One Offense⁴

(1) Limitations on Conviction for Multiple Related Offenses. The factfinder may find a defendant guilty of any offense, or grade of an offense, for which he satisfies the requirements for liability, but the court shall not enter a judgment of conviction for more than one of any two offenses if

- (a) the two offenses are based on the same conduct and:
 - (i) the harm or wrong of one offense is:
 - (A) entirely accounted for by the other offense,
 - (B) of the same kind, but lesser degree, than that of the other offense; or
 - (ii) the two offenses differ only in that:
 - (A) one is defined to prohibit a designated kind of conduct generally and another to prohibit a specific instance of such conduct, or
 - (B) one requires a lesser kind of culpability than the other; or

⁴ **Issue:** Should the Code delete proposed Section 254 in favor of retaining the current provision, KRS 505.020?

Pro: The current provision has existed since the enactment of the current Penal Code and its rules have been fleshed out over time in the case law. A new rule for multiple convictions would introduce confusion.

Con: The current “rules” governing multiple convictions, as elaborated through KRS 505.020 and the case law, are already confused and confusing. Instead of making an effort to set out underlying principles to guide judgment, the current Penal Code simply leans on the notion of an “included offense,” an idea borrowed from constitutional double jeopardy law, which itself is murky, if not incoherent. The “included offense” concept has not proven useful or clear as a guide to determining when multiple liability is appropriate. Decisions regarding the propriety of imposing multiple liability have, for the most part, been delegated to the courts, with predictably unpredictable results. See, e.g., *Com. v. Burge*, 947 S.W.2d 805 (Ky. 1996) (overruling multiple prior Kentucky Supreme Court double-jeopardy decisions, which themselves appeared to adopt different tests).

The multiple-offense issue is vitally important given that the proposed Code seeks to define a new liability scheme that would eliminate concurrent sentences. See proposed Section 509.906. Currently, the issue of multiple liability can effectively be swept under the rug, as a court can enter additional convictions that have no practical consequence in terms of the defendant’s total liability. But if we take seriously the project of imposing additional liability for all the distinct harms (and only the distinct harms) a defendant has caused, we also need to take care in describing the conditions under which multiple liability is, or is not, allowed.

The current Penal Code reform project represents an opportunity for Kentucky to take the lead in addressing this fundamentally important issue. But even holding aside that opportunity, this matter is simply too significant to allow *ad hoc* judicial decision-making, rather than at least attempting to provide legislative guidelines or at least a statutory explanation of suitable criteria.

Reporter: No recommendation.

- (b) one offense consists only of an inchoate offense toward commission of:
 - (i) the other offense, or
 - (ii) a substantive offense that is related to the other offense in the manner described in Subsection (1)(a);
- (c) each offense is an inchoate offense toward commission of a single substantive offense; or
- (d) the two offenses differ only in that one is based on the defendant's own conduct and another is based on the defendant's accountability, under Section 301, for another person's conduct; or
- (e) inconsistent findings of fact are required to establish the commission of the offenses.

(2) Entry of Judgment. Where Subsection (1) prohibits multiple judgments of conviction, the court shall enter a judgment of conviction for the most serious offense among the offenses in question, including different grades of an offense, of which the defendant has been found guilty.

(3) Definitions.

- (a) "Inchoate offense" means any offense defined in Chapter 508 of this Code.
- (b) "Substantive offense" means any offense other than an inchoate offense.

Section 502.255. Definitions

- (1) "Conduct" has the meaning given in Section 500.107.
- (2) "Conduct element" has the meaning given in Section 501.202(2).
- (3) "Inchoate offense" has the meaning given in Section 500.107.
- (4) "Included offense" has the meaning given in Section 500.107.
- (5) "Intoxication" has the meaning given in Section 503.302(3)(a).
- (6) "Mentally retarded" has the meaning given in Section 513.1302(2)(b).
- (7) "Physical injury" has the meaning given in Section 500.107.
- (8) "Prosecution" has the meaning given in Section 500.107.
- (9) "Result element" has the meaning given in Section 501.202(3).
- (10) "Substantive offense" has the meaning given in Section 500.107.

CHAPTER 503. IMPUTATION OF OFFENSE ELEMENTS

Section 503.301.	Accountability for the Conduct of Another
Section 503.302.	Voluntary Intoxication
Section 503.303.	Divergence Between Consequences Intended or Risked and Actual Consequences
Section 503.304.	Mistaken Belief Consistent with a Different Offense
Section 503.305.	Definitions

Section 503.301. Accountability for the Conduct of Another

- (1) Accountability. A person is legally accountable for conduct of another person if:
- (a) having the culpability required by the offense definition, he causes such other person to perform the conduct constituting the offense; or
 - (b) having the culpability required by the offense definition, he intentionally aids, solicits, commands, or conspires with another in the planning or commission of the offense; or
 - (c) the statute defining the offense makes him so accountable.
- (2) Exception to Accountability. Unless the statute defining the offense provides otherwise, a person is not so accountable for the conduct of another under this Section if:
- (a) he is a victim of the offense committed; or
 - (b) his conduct is inevitably incident to commission of the offense; or
 - (c) before commission of the offense, he:
 - (i) manifests a voluntary and complete renunciation of his criminal purpose, and
 - (ii) deprives his prior effort of its effectiveness or makes proper effort to prevent commission of the offense.
 - (d) Complete and Voluntary Renunciation Defined. A renunciation is not “voluntary and complete” within the meaning of this Section if it is motivated in whole or in part by:
 - (i) a belief that circumstances exist which pose a particular threat of apprehension or detection of the accused or another participant in the criminal enterprise or which render more difficult the accomplishment of the criminal purpose; or
 - (ii) a decision to postpone the criminal conduct until another time or to transfer the criminal effort to another victim or another but similar object.

(3) Unconvicted Principal or Confederate No Defense. A person who is legally accountable for the conduct of another may be convicted upon proof that the objective elements of the offense are satisfied, although the other person claimed to have committed the offense has not been prosecuted or convicted, has been convicted of a different offense or degree of offense, or has been acquitted.

(4) Complicity in Attempted Offense. A person who would be accountable for the offense conduct of another under Subsection (1) if the other committed the offense is guilty of an attempt to commit the offense.

(5) Attempted Complicity. A person who attempts to aid, solicit, or conspire with another in the planning or commission of an offense under Subsection (1) is guilty of an attempt to commit the offense, whether or not the offense is attempted or committed by the other person.

(6) Knowingly Aiding an Offense; Grading of Criminal Facilitation. A person who would be accountable for the offense conduct of another under Subsection (1) except that he only knowingly aids the other in the planning or commission of an offense, is liable as a criminal facilitator of the offense and is subject to a sentence:

- (a) two grades lower than if he had intentionally aided, or
 - (b) for a Class C misdemeanor,
- whichever is greater.

Section 503.302. Voluntary Intoxication

(1) Except as provided in Section 505.506, a person's intoxication at the time of committing an offense is not a defense unless it negatives a required culpability element of the offense.

(2) When recklessness is a required element of the offense, if the person, due to voluntary intoxication, is unaware of a risk of which he would have been aware had he not been intoxicated, such unawareness is not a defense.

(3) Definitions.

(a) "Intoxication" means a disturbance of mental or physical capacities resulting from the introduction of substances into the body.

(b) "Voluntary intoxication" means intoxication caused by substances that the actor knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know, unless he introduces them pursuant to medical advice or under such circumstances as would afford a defense to a charge of crime.

Section 503.303. Divergence Between Consequences Intended or Risked and Actual Consequences

(1) When culpability as to a particular consequence of a person's conduct is required by an offense definition and the consequence that actually occurs is not that designed, contemplated, or risked by the person, as the case may be, the required culpability nonetheless is established if the actual consequence differs from the consequence designed, contemplated, or risked, only in the respect that:

(a) a different person or different property is injured or affected, or

(b) the consequence intended, contemplated, or risked was as or more serious or extensive an injury or harm than the actual consequence.

(2) Definition. "Consequence" means a result element of an offense definition and the attendant circumstance elements that characterize the result.

Section 503.304. Mistaken Belief Consistent with a Different Offense

Although ignorance or mistake would otherwise provide a defense under Section 501.207 to the offense charged, the defense is not available if the person would be guilty of another offense of the same or a higher grade had the situation been as he supposed.

Section 503.305. Definitions

(1) "Circumstance element" has the meaning given in Section 501.202(4).

(2) "Conduct" has the meaning given in Section 500.107.

(3) "Consequence" has the meaning given in Section 503.303(2).

(4) "Element" has the meaning given in Section 501.202(1).

(5) "Intoxication" has the meaning given in Section 503.302(3)(a).

(6) "Objective element" has the meaning given in Section 501.202(5).

(7) "Result element" has the meaning given in Section 501.202(3).

(8) "Voluntary intoxication" has the meaning given in Section 503.302(3)(b).

CHAPTER 504. JUSTIFICATION DEFENSES

Section 504.400.	General Defenses
Section 504.411.	General Provisions Governing Justification Defenses
Section 504.412.	Lesser Evils
Section 504.413.	Execution of Public Duty
Section 504.414.	Law Enforcement Authority
Section 504.415.	Use of Force by Persons with Special Responsibility for Care, Discipline, or Safety of Others
Section 504.416.	Defense of Person
Section 504.417.	Defense of Property
Section 504.418.	Use of Force by Aggressor
Section 504.419.	Use of Force Likely to Cause Death or Serious Physical Injury
Section 504.420.	Definitions

Section 504.400. General Defenses

(1) The defenses provided in Chapters 504, 505, and 506 bar conviction even if all elements of the offense charged have been satisfied.

(2) Civil Remedies Unaffected. The fact a person has a defense provided by Chapters 504, 505, or 506 does not abolish or impair any remedy for such conduct that is available in any civil action.

Section 504.411. General Provisions Governing Justification Defenses

(1) Superiority of More Specific Justifications. The justifications provided in Section 504.412 (Lesser Evils) or Section 504.413 (Execution of Public Duty) are not available if the factual circumstances of a claimed justification are described in one of the other provisions of this Chapter.

(2) Multiple Justifications. Except as provided in Subsection (1) of this Section, if a person's conduct satisfies the requirements of more than one justification defense, all such justification defenses are available.

(3) Assistance of, Resistance to, and Interference With Justified Conduct. Except as otherwise provided by law, conduct that is justified may not lawfully be resisted or interfered with, and lawfully may be assisted by any person.

(4) Causing the Justifying Circumstances No Bar to a Justification Defense. The fact that a person has caused the circumstances giving rise to the need for justified conduct shall not prevent his conduct constituting the offense from being held to be justified.

(5) Liability for Culpably Causing Justifying Circumstances.

(a) Notwithstanding Subsection (4), a person commits an offense if, acting with the culpability required by the offense definition, he causes the circumstances that justify himself or another to engage in the conduct that constitutes the offense.

(b) Defense. A person may have a general defense to his conduct giving rise to liability under Subsection (5)(a).

Section 504.412. Lesser Evils

Conduct is justified if:

- (1) it is immediately necessary to avoid a harm or evil; and
- (2) the harm or evil avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
- (3) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

Section 504.413. Execution of Public Duty

Conduct is justified if it is required or authorized by:

- (1) the law defining the duties or functions of a public servant or the assistance to be rendered to such servant in the performance of his duties; or
- (2) the law governing the execution of legal process; or
- (3) the judgment or order of a competent court or tribunal; or
- (4) any other provision of law imposing a public duty.

Section 504.414. Law Enforcement Authority

(1) Peace Officer's Use of Force in Making an Arrest.

(a) The conduct of a peace officer, [or any person whom he has summoned or directed to assist him,]⁵ is justified if:

⁵ **Issue:** Should the bracketed language be retained, making the law enforcement justification available to persons acting at the direction of peace officers to assist them?

Pro: Peace officers need as much help from citizens as they can get. There is little danger of abuse here, because the proposed justification is available only for conduct that a citizen is "summoned or directed" to do to assist the officer.

Con: This justification should be narrowly and clearly drawn so that its scope is not subject to expansion or abuse. Current Kentucky law does not explicitly include private citizens in its law enforcement justification, but refers to persons "acting under official authority" in "making or assisting in making an arrest." KRS 503.090(1). The current provision authorizes deadly force only where the person using it "is authorized to act as a peace officer." KRS 503.090(2)(a).

Reporter: No recommendation.

- (i) it is necessary to effect a lawful arrest, and
- (ii) the officer expresses his purpose.

(b) Limitation. Force likely to cause death or serious physical injury is not justified under Subsection (1)(a) unless:

(i) such force is necessary to prevent the arrest from being defeated by resistance or escape; and

(ii) the person to be arrested has committed or attempted a forcible felony that involves the infliction or threatened infliction of serious physical injury, or is attempting to escape by use of a deadly weapon, or otherwise ⁶ indicates that he will endanger human life or inflict serious physical injury unless arrested without delay.

(c) Invalid Warrant. Conduct by a peace officer making an arrest pursuant to an invalid warrant is justified if the conduct would have been justified if the warrant were valid, unless he knows that the warrant is invalid.

(2) Private Person's Use of Force in Making an Arrest.

(a) Lawful Arrest. The conduct of a private person who makes, or assists another private person in making, a lawful arrest is justified to the same extent as if he were summoned or directed by a peace officer to make such arrest, except that he is not justified in the use of force likely to cause death or serious physical injury unless such force is immediately necessary to prevent death or serious physical injury to himself or another.

(b) Unlawful Arrest. The conduct of a private person who is summoned or directed by a peace officer to assist in making an arrest that is unlawful is justified to the same extent as if the arrest were lawful, if the private person does not know that the arrest is unlawful.

⁶ **Issue:** Should the provision add language limiting an officer's use of force likely to cause serious physical injury to those instances in which the arrestee "*clearly* indicates" that he will inflict serious physical injury?

Pro: A police officer needs to have notice of when he/she will be allowed to use deadly physical force when facing a life and death decision; a jury also needs to have guidance regarding the use of this force when faced with the choice of whether to take away the liberty of the officer. Requiring a "clear" indication supplies the notice to the officer and the guidance to the jury, valuing the life of the victim balanced with the societal need for protection of the safety of the officer.

Con: Police officers should be authorized to use deadly force when an arrestee's conduct indicates that he will endanger human life. It is in all citizens' interest to give officers this authority. More importantly, the effect of this provision is not to set the standard for police conduct — police officials will do that — but rather to set the standard for *prosecution* of an officer who uses deadly force. Even if one believed that police officials should set a higher standard, such as "*clearly* indicates," an officer should not suffer criminal liability where the arrestee has "indicated" he will endanger human life, even though the arrestee has not "*clearly* indicated" it.

Reporter: No recommendation.

(3) Use of Force to Prevent an Escape.

(a) Escape from Penal Custody. The conduct of a peace officer or other person who has an arrested or lawfully detained person in his penal custody or presence is justified if

(i) necessary to prevent the escape of the arrested person from penal custody, and

(ii) it would be justified if performed to arrest such person.

(b) Escape from a Detention Facility. The conduct of a guard or other peace officer, including the use of force likely to cause death or serious physical injury, is justified if immediately necessary to prevent the escape from a detention facility by a person lawfully detained in such institution under sentence for an offense or awaiting trial or commitment for an offense.

(4) Definition. “Forcible felony” means any felony that, as committed, involves the use or threat of physical force or violence against any individual or creates a substantial risk of death or serious physical injury.

Section 504.415. Use of Force by Persons with Special Responsibility for Care, Discipline, or Safety of Others

The use of force upon or toward the person of another is justified if:

(1) (a) the defendant is the parent, guardian, teacher, or other person similarly responsible for the general care and supervision of a minor or a person acting at the request of such responsible person, and the force is necessary to safeguard or promote the welfare of the minor, [including the maintenance of reasonable discipline in a school, class, or other group;]⁷ or

⁷ **Issue:** Should the bracketed authorization for the use of corporal punishment be deleted?

Pro: “Given that 27 states have now banned corporal punishment in schools (most over the last 30 years), it is time for Kentucky to consider doing so as well. Even the United States Senate, which proposed, as part of the Education bill, legislation to limit teacher civil liability to acts which constitute ‘gross negligence’ or ‘reckless misconduct’ have excluded lawsuits involving corporal punishment from this protection. In a 98-1 vote, this provision states, ‘Nothing in this section shall be considered to affect state or local law (including rule or regulation) or policy pertaining to the use of corporal punishment.’ While this is hardly a ringing endorsement to eliminate the practice, it seems that the Senate considers this particular method of discipline not worth protecting in any special way. Eliminating corporal punishment is an international concern and trend.”

Con: Current law’s authorization of the practice appropriately limits its use. Further, the maintenance of proper order and discipline often is necessary for the safety of those in the group, including those who are disciplined.

Reporter: No recommendation.

(b) the defendant is the guardian or other person similarly responsible for the general care and supervision of an incompetent person, and the force is necessary to safeguard or promote the welfare of the incompetent person, including the prevention of his misconduct, or, when such incompetent person is in a hospital or other institution for his care and custody, for the maintenance of reasonable discipline in such institution; and

(c) the force used does not create a substantial risk of causing death, serious physical injury, disfigurement, extreme pain or mental distress, or gross degradation; or

(2) the defendant is a doctor or other therapist or a person assisting him at his direction,

and:

(a) the force is necessary to administer a recognized form of treatment that is adapted to promoting the physical or mental health of the patient; and

(b) the treatment is administered with the consent of the patient or, if the patient is a minor or an incompetent person, with the consent of his parent or guardian or other person legally competent to consent in his behalf, or the treatment is administered in an emergency when no one competent to consent can be consulted and a reasonable person, wishing to safeguard the welfare of the patient, would consent; or

(3) the defendant is a warden or other authorized official of a detention facility, and:

(a) the force used is necessary to enforce the lawful rules, regulations, or procedures of the facility; and

(b) if force likely to cause death or serious physical injury is used, its use is otherwise justifiable under this Chapter; or

(4) the defendant is a person responsible for the safety of a vessel or an aircraft, or a person acting at his direction or authorized or required by law to maintain order or decorum in a vehicle, train, or other carrier or in a place where others are assembled, and

(a) the force used is necessary to prevent interference with the operation of the vessel or aircraft or obstruction of the execution of a lawful order or to maintain order or decorum; and

(b) if force likely to cause death or serious physical injury is used, its use is otherwise justifiable under this Chapter.

Section 504.416. Defense of Person

(1) The use of force against an aggressor is justified when and to the extent such conduct is immediately necessary to defend oneself or another person against the aggressor's use of unjustified force.

(2) Definition. "Unjustified" conduct is conduct that satisfies the objective elements of an offense and is not justified by this Chapter.

Section 504.417. Defense of Property

The use of force against an aggressor is justified when and to the extent such conduct is immediately necessary to prevent or terminate the aggressor's unjustified trespass on, or other unjustified interference with property that is lawfully in one's possession or in the possession of another for whose protection one acts.

Section 504.418. Use of Force by Aggressor

The justifications described in this Chapter are not available to a person who:

- (1) is attempting to commit, committing, or escaping after the commission of, a forcible felony; or
- (2) initially provokes the use of force against himself, with the intent to use such force as an opportunity to inflict physical injury upon the assailant; or
- (3) otherwise initially provokes the use of force against himself, unless:
 - (a) the force in response to his provocation is so great that he is in imminent danger of death or serious physical injury, and he has exhausted every less harmful means to escape such danger; or
 - (b) in good faith, he withdraws from physical contact with the assailant and indicates clearly to the assailant that he desires to withdraw and terminate the use of force, but the assailant continues or resumes the use of force.

Section 504.419. Use of Force Likely to Cause Death or Serious Physical Injury

- (1) Unless expressly provided otherwise by this Chapter, the use of force likely to cause death or serious physical injury is justified only if such force is immediately necessary to prevent:
 - (a) death or serious physical injury to oneself or another, or
 - (b) the commission of arson, kidnapping, or sexual intercourse compelled by force or threat.⁸

⁸ **Issue:** Should (1)(b) also authorize the use of deadly force to prevent burglary of a dwelling, even if there is no threat of death or serious bodily injury?

Pro: "The use of deadly force to prevent a burglary is consistent with the idea that property owners (owners, renters, or business persons) need legal support to defend their property completely. The inclusion of burglary among the listed felonies broadens the authority for using deadly force for felonies which by their nature involve the potential for violence to the defendant or others."

- (2) Definition. “Force likely to cause death or serious physical injury”
- (a) includes:
 - (i) the firing of a firearm in the direction of a person, even though no intent exists to kill or inflict serious physical injury; and
 - (ii) the firing of a firearm at a vehicle in which a person is riding; and
 - (b) does not include:
 - (i) discharge of a firearm using ammunition designed to disable or control a person without creating the likelihood of death or serious physical injury.

Section 504.420. Definitions

- (1) “Conduct” has the meaning given in Section 500.107.
- (2) “Deadly weapon” has the meaning given in Section 515.1501(3)(b).
- (3) “Detention facility” has the meaning given in Section 553.5306(2)(a).
- (4) “Element” has the meaning given in Section 501.202(1).
- (5) “Escape” has the meaning given in Section 553.5306(2)(a).
- (6) “Force likely to cause death or serious physical injury” has the meaning given in Section 504.419(2).
- (7) “Forcible felony” has the meaning given in Section 504.414(4).
- (8) “Minor” has the meaning given in Section 541.4104(2).
- (9) “Peace officer” has the meaning given in Section 500.107.
- (10) “Penal custody” has the meaning given in Section 553.5306(2)(c).
- (11) “Physical injury” has the meaning given in Section 500.107.
- (12) “Serious physical injury” has the meaning given in Section 500.107.
- (13) “Unjustified” has the meaning given in Section 504.416(2).

Con: Homeowners would have the right to use force to defend their property under proposed Section 504.417. They also would have a right to use deadly force to defend themselves or another person under this provision, proposed Section 504.419. They should not, however, have a right to use deadly force to defend property *when life or limb is not in danger*. Having such a limitation on the use of deadly force is one mark of a civilized society: putting the value of all human life over that of property. The threat to persons that commonly is inherent in a burglary will typically authorize the use of deadly force against a burglar. The only burglary cases where the use of deadly force would be barred under the draft would be those where no danger to persons exists, as where a burglar is running off with property taken from an attached garage.

Reporter: No recommendation.

CHAPTER 505. EXCUSE DEFENSES

Section 505.501.	General Provisions Governing Excuse Defenses.
Section 505.502.	Involuntary Acts; Involuntary Omissions
Section 505.503.	Impaired Consciousness
Section 505.504.	Insanity
Section 505.505.	Immaturity; Transfer to Juvenile Court
Section 505.506.	Involuntary Intoxication
Section 505.507.	Duress
Section 505.508.	Ignorance Due to Unavailable Law
Section 505.509.	Reliance Upon Official Misstatement of Law
Section 505.510.	Reasonable Mistake of Law Unavoidable by Due Diligence
Section 505.511.	Mistake as to a Justification
Section 505.512.	Definitions

Section 505.501. General Provisions Governing Excuse Defenses

(1) Conduct for Which a Person Is Excused Is Not Justified; Assistance of, Resistance to, and Interference With Excused Conduct. Except as otherwise provided by law, conduct for which a person is excused is not justified and lawfully may be resisted and interfered with as justified by law. A person who assists conduct for which another is excused, is not excused for his assistance solely because the principal actor is excused.

(2) Causing the Excusing Conditions No Bar to an Excuse Defense. The fact that a person has caused the conditions giving rise to an excuse under this Chapter, shall not prevent him from being excused for his offense.

(3) Liability for Culpably Causing Excusing Conditions.

(a) Notwithstanding Subsection (2), a person commits an offense if, acting with the culpability required by the offense definition, he causes the conditions that excuse himself or another for engaging in the offense.

(b) Defense. A person may have a general defense to his conduct giving rise to liability under Subsection (3)(a).

(4) Mistake as to an Excuse Is No Defense. Except as otherwise provided by law, it is no defense that a person mistakenly believes he has an excuse defense.

(5) Burden of Persuasion. Unless this Chapter expressly provides otherwise, the defendant carries the burden of persuasion on all excuse defenses by a preponderance of the evidence.⁹

Section 505.502. Involuntary Acts; Involuntary Omissions

(1) Involuntary Act. A person is excused for his offense if his liability is based upon an act and the act is not a product of the person's effort or determination.

(2) Involuntary Omission. A person is excused for his offense if his liability is based upon an omission, and:

(a) the person is mentally or physically incapable of performing, or otherwise cannot reasonably be expected under the circumstances to perform the omitted act; or

(b) the person would be liable for an offense, and would be denied a justification defense, if he performed the omitted act.

Section 505.503. Impaired Consciousness

A person is excused for his offense if, at the time of the offense:

(1) he suffers a physiologically confirmable disease or defect not specifically recognized or rejected as a basis for exculpation by another excuse provision in this Chapter, and

(2) as a result, he lacks substantial capacity either:

(a) to appreciate the criminality of his conduct, or

(b) to conform his conduct to the requirements of law.

⁹ **Issue:** Should the defendant bear the burden of persuasion for excuse defenses (i.e., the defenses defined in this Chapter)?

Pro: Excuses apply only to conduct that is unjustified and otherwise criminal. Further, all excuses involve information and evidence uniquely in the possession of the defendant. For both of these reasons, it is appropriate to shift the burden to the defendant for excuses. Current law places the burden of persuasion on the defendant for the excuse of insanity. See KRS 504.020(3). The same arguments in favor of such a practice would seem to apply equally to all other excuses.

Con: Because excuses are defenses of exculpation, the prosecution should bear the burden of disproving excuses beyond a reasonable doubt.

Reporter: Recommends the proposed provision, under which the defendant bears the burden of persuasion.

Section 505.504. Insanity¹⁰

A person is excused for his offense if, at the time of the offense:

- (1) he suffers from a mental illness or retardation, and
- (2) as a result, he lacks substantial capacity either:
 - (a) to appreciate the criminality of his conduct, or
 - (b) to conform his conduct to the requirements of law.
- (3) Definition. “Mental illness or retardation” does not include:
 - (a) an abnormality manifested only by repeated criminal or otherwise antisocial conduct, or
 - (b) intoxication itself.

¹⁰ **Issue:** Should the Code include a provision allowing for a “guilty but mentally ill” verdict?

Pro: The GBMI verdict provides a useful middle ground for juries who believe a defendant is mentally ill, and in need of treatment, but not criminally insane. The verdict does not undermine the insanity defense; the jury retains the authority to find a defendant not guilty by reason of insanity in appropriate cases. Jury confusion could be addressed by changes in jury instructions.

Con: The GBMI verdict responds to a false concern that the insanity defense is being successfully abused, which substantial empirical evidence rebuts. Further, even if the insanity excuse were subject to abuse, a more rational response would be to shift the burden of persuasion to the defendant, a step that Kentucky has already taken. GBMI is not a “middle position” in terms of its consequences; it has the same sentencing consequences as a guilty verdict (see KRS 504.150(1); cf. KRS 532.055(2)), even in terms of the defendant’s receiving a psychological evaluation and/or treatment, which are generally available. See KRS 532.050(3) (allowing court to order psychiatric examination of any person convicted of felony); 532.050(5) (presentence report for felony “shall identify the counseling treatment, educational, and rehabilitation needs of the defendant and identify community-based and correctional-institutional-based programs and services available to meet those needs”).

If a determination needs to be made of a convicted offender’s need for psychological treatment, it can be more efficiently and effectively made by the court (or correctional officials) than by the jury. Having such criminal justice professionals make the determination would also eliminate the risk of confusion and distraction that exists in the current GBMI system, which intertwines the distinct issues of criminal blameworthiness for a past offense and present or future clinical treatment needs. Jury confusion between the two issues is particularly troublesome because it may induce juries to think about preventive detention issues when they should be thinking about deserved criminal punishment. (Further, the focus on preventive detention will itself be poorly informed, as the jury is not likely to know that an insanity acquittal does not lead to a release from custody, but to mandatory psychological evaluation and treatment. See KRS 504.030.)

Reporter: Recommends against including a GBMI verdict.

Section 505.505. Immaturity; Transfer to Juvenile Court¹¹

A person is excused for his offense if, at the time of the offense, he is less than [12] years of age, or:

- (1) he lacks the maturity of an adult, and
- (2) as a result, he lacks substantial capacity either:
 - (a) to appreciate the criminality of his conduct, or
 - (b) to conform his conduct to the requirements of law.

(3) Presumptions. A person less than [16] years of age at the time of the offense shall be conclusively presumed to have satisfied the requirements of Subsection (1) of this Section, and shall be presumed, subject to rebuttal by proof, to have satisfied the requirements of Subsection (2) of this Section.

(4) Remand to Juvenile Court. Unless required otherwise by KRS 635.020, a person excused under this Section who is less than [18] years of age shall be referred to Juvenile Court, which shall have jurisdiction over all further proceedings in the matter.

Section 505.506. Involuntary Intoxication

A person is excused for his offense if, at the time of the offense:

- (1) he is involuntarily intoxicated, and
- (2) as a result, he lacks substantial capacity either:
 - (a) to appreciate the criminality of his conduct, or
 - (b) to conform his conduct to the requirements of law.

(3) Definition. “Involuntary intoxication” means any intoxication that is not “voluntary intoxication” as defined in Section 503.302(3).

(4) Nothing in this Section shall be deemed to preclude liability under Section 505.501(3) (Liability for Culpably Causing Excusing Conditions).

¹¹ **Issue:** Should the proposed immaturity defense replace current law?

Pro: Current law has the criminal accountability of a youthful offender depend on fixed age cut-offs and/or the transfer determination of a Juvenile Court judge (see the somewhat irrational complexities of KRS 635.020); if a transfer is authorized, the immaturity issue is no longer available for consideration by the adult court. But the moral credibility of the criminal justice system demands that juries be able to excuse offenders who lack a minimum degree of cognition and ability to control behavior. The proposed provision would insure that all persons, without regard to chronological age, will be held to the same standard of excusing conditions – that is, the same degree of required dysfunction – as is required by all other disability excuses, such as insanity or involuntary intoxication. (The proposed provision governs only the availability of a defense in adult court; it has no effect on the operation of the Juvenile Court.)

Con: Current law contains thorough rules governing the exclusion of juveniles from prosecution in adult court, and there is no reason to modify those rules. See KRS 635.020. Juries in the criminal justice system should not be able to consider evidence of immaturity as an excuse.

Reporter: No recommendation.

Section 505.507. Duress

A person is excused for his offense other than an intentional homicide if, at the time of the offense, he:

(1) was coerced to perform the conduct by an unlawful threat [of physical force]¹² that a person of reasonable firmness in the person's situation would have been unable to resist, and

(2) as a result, he is not sufficiently able to resist committing the offense conduct so as to be justly held accountable for it.

(3) Factors to be Considered in Determining Whether a Person of Reasonable Firmness in the Person's Situation Would Have Been Unable to Resist the Threat. In determining whether a person of reasonable firmness in the person's situation would have been unable to resist the threat coercing the person, as required by Subsection (1), the following factors are among those that shall be considered:

(a) [relating to the extent of the threat] the imminence of the threat, the seriousness of the harm threatened, the nature of the harm threatened (e.g., physical, economic, emotional, or other), the object of the threat (e.g., the person himself, a relative, or business associate), the unlawfulness of the threat, and the source of the threat (e.g., another person or natural forces);

(b) [relating to the extent of harm caused by person] the seriousness of the harm caused in relation to the harm threatened and the availability of less harmful but equally effective alternatives to avoiding the threat.

¹² **Issue:** Should the bracketed language — limiting the excuse to cases of coercion by threat of physical force — be removed, thus allowing a jury to consider a defense in cases of threats of other than physical force?

Con: Retention of current law to include only threats of force prevents expansion of the defense to threats, for example, of economic harm, which may expand the risk of fabricated claims. Only a threat of unlawful physical force sufficiently deprives a person of reasonable firmness of self-control, permitting a duress claim. Threats to property or reputation do not cause persons of reasonable firmness to engage in criminal behavior as a result of the coercion.

Pro: As long as the defendant meets the other excusing condition requirements — for example, that “a person of reasonable firmness in the person's situation would have been unable to resist” the coercion — the defendant merits an excuse. This would be an issue in cases where the offense committed was minor and the coercion applied was great, but psychological, rather than physical, in nature. Thus, for example, a threat to reveal a humiliating family secret might be grounds for an excuse for a minor theft if the defendant can persuade the jury that a person of reasonable firmness in the defendant's situation would have been similarly unable to resist the coercion. The point is, the jury ought to be allowed to take account of all relevant evidence in making a judgement about whether the defendant deserves criminal liability and punishment.

Reporter: No recommendation.

Section 505.508. Ignorance Due to Unavailable Law

A person is excused for his offense if:

- (1) before the conduct constituting the offense, the law relating to the offense was not made available in a way that would give notice to the reasonable person, and
- (2) he makes a reasonable mistake regarding that law, and
- (3) as a result, at the time of the offense, he does not know his conduct is criminal.

(4) Factors to be Considered in Determining Whether the Law was Not Made Available to the Reasonable Person. In determining whether a law was not made available in a way that would give notice to the reasonable person and whether the person's mistake was reasonable, as required by Subsections (1) and (2), the following factors are among those that shall be considered: whether the law was published, the nature of the publication, whether the law imposes an unpredictable duty, the length of the period between enactment of the law and the commission of the offense, and the diligence exercised by the person to determine the law.

Section 505.509. Reliance Upon Official Misstatement of Law

A person is excused for his offense if:

- (1) he reasonably relies upon an official misstatement of law, and
- (2) he makes a reasonable mistake as to that law, and
- (3) as a result, at the time of the offense, the person does not know his conduct is criminal.
- (4) Factors to be Considered in Determining the Reasonableness of the Person's Reliance.

In determining whether a person made a reasonable mistake of law because he relied upon an official misstatement of law, as required by Subsections (1) and (2), the following factors are among those that shall be considered: whether the official statement of law was a statute or judicial decision later overruled, whether the person whose statement the defendant relied upon had the authority to interpret the law, whether the person relied upon was responsible for administration or enforcement of the law, whether the person's reliance was upon a specific grant of permission from an authorized official, and whether the overall circumstances demonstrate that it was reasonable for a person exercising due diligence to rely on the statement of the law.

Section 505.510. Reasonable Mistake of Law Unavoidable by Due Diligence¹³

A person is excused for his offense if:

- (1) he pursues with due diligence all reasonably viable means available to ascertain the meaning and application of the offense to his conduct, and
- (2) he honestly and in good faith concludes that his conduct is lawful in circumstances where a law-abiding and prudent person would also so conclude, and
- (3) as a result, at the time of the offense, the person does not know his conduct is criminal.

Section 505.511. Mistake as to a Justification

A person is excused for his offense if:

- (1) he makes a reasonable mistake as to the maximum harm authorized by a justification contained in Chapter 504 to protect or further the interests at stake, or
- (2) he makes a mistake as to whether his conduct is justified, other than a mistake governed by Subsection (1) of this Section, which is:
 - (a) a reasonable mistake, or
 - (b) is less culpable than the primary culpability required by the offense charged,
 and
- (3) as a result, at the time of the offense, the person does not know his conduct is criminal.
- (4) Definition. The “primary culpability required by the offense charged” means:
 - (a) the culpability required for a result element of the offense charged, or
 - (b) if there is no result element, the culpability required for the circumstance element most central to the harm or evil sought to be prohibited by the offense.
- (5) Burden of Persuasion. Notwithstanding Section 505.501(5), the prosecution carries the burden of persuasion for disproving this defense beyond a reasonable doubt.

¹³ **Issue:** Should Section 505.510, which would provide an excuse defense for reasonable mistakes of law, be deleted?

Pro: Allowing this defense would only invite abuse. Defendants would commonly assert this defense based on a claim that they did not know their conduct amounted to an offense. Further, the principle behind this defense conflicts with the maxim that ignorance of the law is no excuse.

Con: Persons who satisfy the fairly rigorous requirements of this provision do not merit criminal liability and punishment for their conduct. New Jersey has had the same defense in its Code for decades, and there are no indications that it has been abused, or even that it has been asserted in more than a handful of cases. The legality principle, which requires the government to provide a clear statement of exactly what the law prohibits before it may enforce the prohibition, is at least as powerful a guiding principle as the “ignorance of the law is no excuse” maxim. Where the law is unclear enough that its rules cannot be ascertained even after exercise of reasonable diligence, the legality principle is not satisfied.

Reporter: No recommendation.

Section 505.512. Definitions

- (1) “Act” has the meaning given in Section 501.204(4).
- (2) “Circumstance element” has the meaning given in Section 501.202(4).
- (3) “Conduct” has the meaning given in Section 500.107.
- (4) “Intoxication” has the meaning given in Section 503.302(3)(a).
- (5) “Involuntary intoxication” has the meaning given in Section 505.506(3).
- (6) “Mental illness or retardation” has the meaning given in Section 505.504(3).
- (7) “Primary culpability required by the offense charged” has the meaning given in Section 505.511(4).
- (8) “Reasonable mistake” has the meaning given in Section 501.207(3)(d).
- (9) “Result element” has the meaning given in Section 501.202(3).
- (10) “Voluntary intoxication” has the meaning given in Section 503.302(3)(b).

CHAPTER 506. NONEXCULPATORY DEFENSES

Section 506.601.	General Provisions Governing Nonexculpatory Defenses
Section 506.602.	Prosecution Barred if Not Commenced Within Time Limitation Period
Section 506.603.	Entrapment
Section 506.604.	Incompetency to Stand Trial or be Sentenced
Section 506.605.	Former Prosecution for Same Offense as a Bar to Present Prosecution
Section 506.606.	Former Prosecution for Different Offense as a Bar to Present Prosecution
Section 506.607.	Former Prosecution in Another Jurisdiction as a Bar to Present Prosecution
Section 506.608.	Prosecution Not Barred Where Former Prosecution Was Before Court Lacking Jurisdiction or Was Fraudulently Procured by Defendant
Section 506.609.	Definitions

Section 506.601. General Provisions Governing Nonexculpatory Defenses

(1) Mistake as to a Nonexculpatory Defense Is No Defense. Unless this code expressly provides otherwise, it is no defense that a person mistakenly believes he has a nonexculpatory defense.

(2) Conduct Under a Nonexculpatory Defense Is Not Privileged. Except as otherwise provided by law, conduct for which a person has a nonexculpatory defense is not justified, and may be resisted and interfered with as justified by law. A person who assists conduct for which the principal actor has a nonexculpatory defense, does not have a defense based solely upon the nonexculpatory defense of the principal actor.

(3) Burden of Persuasion on Defendant. The defendant has the burden of persuasion for a nonexculpatory defense and must prove such defense by a preponderance of the evidence.¹⁴

¹⁴ **Issue:** Should the defendant bear the burden of persuasion for nonexculpatory defenses (i.e., the defenses defined in this Chapter)?

Pro: Like excuse defenses, nonexculpatory defenses apply to conduct that is unjustified and criminal. But unlike excuses, nonexculpatory defenses involve no claim by the defendant that he is not blameworthy or deserving of punishment. Rather, nonexculpatory defenses prevent liability in the service of some other social goal, such as curbing police misconduct or preventing prosecution of old offenses. Accordingly, the case for placing the burden of persuasion on the defendant is even stronger for these defenses than it is for excuses.

Con: The burden of persuasion for these defenses currently rests with the State, and it should remain there. Because these defenses frequently operate to prevent misconduct by State officials, the State should be required to prove beyond a reasonable doubt that no misconduct has occurred.

Reporter: Recommends having the defendant bear the burden of persuasion.

(4) Definition. A “nonexculpatory defense” is any defense or bar to prosecution, pleading, trial, or sentencing described in this Chapter.

(5) Determination by Court. Unless otherwise provided, the defenses in this Chapter are to be determined by the Court.

Section 506.602. Prosecution Barred if Not Commenced Within Time Limitation Period

(1) Time Limitations. A prosecution is barred unless commenced within the following time periods from the time the offense is committed:

[(a) a prosecution for a felony may be commenced at any time;]¹⁵

(b) a prosecution for a misdemeanor must be commenced within [1 year].

(2) Start of the Limitation Period. The period of limitation starts to run on the day after the offense is committed. An offense is committed either when every element occurs, or, if a legislative purpose to prohibit a continuing course of conduct plainly appears, at the time when the course of conduct or the defendant’s complicity therein is terminated.

(3) Commencement of Prosecution. A prosecution is commenced either when an indictment, information, or complaint is filed, or a warrant or other process is issued, provided that such warrant or process is executed without unreasonable delay.

(4) Period of Limitation Tolloed. The period of limitation does not run during any time when:

¹⁵ **Issue:** Should a limitation period be introduced for the less serious felonies? (On the other side, should the limitation period for misdemeanors be extended from 1 year to 2 years?)

Pro: Most other states have some statutes of limitation for most felonies. It is a useful device to allow a community and its members to move on with their lives and to not be preoccupied with the distant past. At very least the less serious felonies should have some limitation period, even if it is a long one. The current 1 year limitation for misdemeanors should not be lengthened.

Con: Statutes of limitation may have made sense back when they were first created several hundred years ago, but no longer do. The fear of conviction based on old, and therefore unreliable, evidence is gone. The rules of evidence now allow defense counsel to demonstrate the weakness of old evidence; the natural degradation of evidence over time naturally works to make prosecution more difficult for the prosecution, which carries the burden of persuasion for the offense elements. If the prosecution has sufficient evidence to prosecute an old case despite the passage of time, it ought to be able to do so, for this is what justice demands. The potential for finding reliable evidence even in an old case is increasingly possible because of advances in forensic science. Thus, if a limitation period were provided, it would produce an increasing number of cases in which a known blameworthy offender would escape the punishment he deserves. Current law has no limitation period for felonies.

Given the minor nature of misdemeanors, a limitation period for misdemeanors does not present the same offense to justice, although it might be best to extend the limitation period to two years.

Reporter: Recommends no limitation period for felonies, and lengthening the misdemeanor limitation period to two years.

- (a) the defendant is not usually and publicly resident within this Commonwealth; or
- (b) the defendant is a public servant, if the offense charged is theft of public funds while in public office; or
- (c) a prosecution against the defendant for the same conduct is pending in this Commonwealth.

Section 506.603. Entrapment

- (1) A person has a defense if the person engages in an offense:
 - (a) because he is induced or encouraged to do so by a law enforcement authority, or agent acting in knowing cooperation with such an authority, and
 - [(b) the authority's or agent's conduct creates a substantial risk that a reasonable law-abiding person in the actor's situation would have been induced to commit the offense, and]¹⁶
 - (c) the person was not predisposed to commit the offense.
- (2) The defense afforded by Subsection (1) is unavailable when causing or threatening physical injury is an element of the offense charged.

¹⁶ **Issue:** Should Subsection (1)(b), which narrows the current entrapment defense, be deleted?

Pro (in opposition to the proposed draft): The need to combat police overreaching is such that the entrapment defense should not be as narrow as the proposed provision suggests. If limiting language is desired, the Code should bar the defense where the police inducement goes beyond “merely afford[ing] the defendant an opportunity to commit an offense,” as current law provides. KRS 505.010(2)(a).

States typically formulate their entrapment defense to require either (1)(b) or (1)(c) but not both.

Con (in support of the proposed draft): The entrapment defense ought to be seen as a disfavored defense because it commonly allows blameworthy offenders to escape the liability and punishment they deserve, which is why this primarily American invention does not exist in most of the rest of the world. The defense allows culpable offenders to escape deserved punishment in order to deter improper police conduct (much as the “Exclusionary rule” can exclude reliable evidence obtained through an illegal search or seizure). The defense ought to be limited to those situations where it is most needed, where the police conduct is most egregious. The current law’s “merely affording an opportunity” language is ambiguous and in apparent conflict with the current law’s other entrapment provisions — it purports to say what entrapment *is not*, but does not say what it *is*.

Both (1)(b) and (1)(c) serve an important purpose. Subsection (1)(b) serves to limit the defense to those instances where the police conduct really is egregious – where it risks causing a reasonable law-abiding person to commit an offense. Subsection (1)(c) excludes from the defense the career criminal who commits the offense while on the prowl. Both of these are important necessary limitations.

Reporter: Recommends narrowing the defense, as provided in the current draft.

[(3) Factfinder Determination. The defense afforded by Subsection (1) is an issue to be determined by the factfinder.]¹⁷

Section 506.604. Incompetency to Stand Trial or be Sentenced

A person may not be required to stand trial or be sentenced if, because of his mental or physical condition, he is unable to appreciate the nature and consequences of the proceedings against him or to assist in his defense.

Section 506.605. Former Prosecution for Same Offense as a Bar to Present Prosecution

When a prosecution is for a violation of the same statutory provision and is based upon the same facts as a former prosecution, it is barred by the former prosecution if:

- (1) the former prosecution resulted in:
 - (a) an acquittal, or
 - (b) a conviction that has not subsequently been set aside; or
- (2) the former prosecution resulted in a determination by the Court that there was insufficient evidence to warrant a conviction; or
- (3) the former prosecution was terminated by a final order or judgment that:
 - (a) has not subsequently been set aside, and
 - (b) required a determination inconsistent with any fact or legal proposition necessary to a conviction in the subsequent prosecution; or
- (4) the former prosecution was improperly terminated after the first witness was sworn but before findings were rendered by a trier of fact.

¹⁷ **Issue:** Should the entrapment defense be determined by the jury rather than the judge?

Pro: The entrapment defense should continue to be a jury issue. The jury is at its best when deciding factual issues that have an equitable component. The entrapment decision involves consideration of whether the government overreached and whether the defendant was predisposed to commit the offense. Both of these are factual issues with an equitable component, and thus would better be determined by a jury. Further, the jury is often the only part of the process standing between the government and a citizen accused. If the judge verifies offensive police misconduct, the judge may be adjudged to be a part of the same government; if the jury verifies the police conduct as not entrapment, then the ultimate verdict has more credibility.

Con: The entrapment defense does not exculpate a defendant. Rather, it is a means of reining in improper police overreaching by denying a conviction of an improperly entrapped defendant. Because the defense does not concern issues of exculpation — as exist with respect to excuse defenses, for example — a jury determination is unnecessary. Indeed, jurors are likely to be confused into thinking that the entrapment defense is some form of excuse. The defense is more akin to exclusionary-rule based defenses, which similarly seek to control police overreaching, and ought to be decided by the judge before trial, as those issues are.

Reporter: No recommendation.

- (5) Improper Termination. For the purposes of Subsection (4), termination is not improper:
- (a) the defendant expressly consents to the termination or by motion for mistrial or in some other manner waives his right to object to the termination; or
 - (b) the Court, in exercise of its discretion, finds that the termination is manifestly necessary.

Section 506.606. Former Prosecution for Different Offense as a Bar to Present Prosecution

Although a prosecution is for a violation of a different statutory provision from a former prosecution or for a violation of the same provision but based on different facts, it is barred by the former prosecution if:

- (1) the former prosecution resulted in an acquittal, a conviction that has not subsequently been set aside, or a determination that there was insufficient evidence to warrant a conviction, and the subsequent prosecution is for:
 - (a) an offense of which the defendant could have been convicted at the first prosecution; or
 - (b) an offense involving the same conduct as the first prosecution, unless each prosecution requires proof of a fact not required in the other prosecution or unless the offense was not consummated when the former prosecution began; or
- (2) the former prosecution was terminated by a final order or judgment that:
 - (a) has not subsequently been set aside, and
 - (b) required a determination inconsistent with any fact necessary to a conviction in the subsequent prosecution; or
- (3) the former prosecution was improperly terminated, as that term is used in Section 506.605(5), and the subsequent prosecution is for an offense of which the defendant could have been convicted had the former prosecution not been improperly terminated.

Section 506.607. Former Prosecution in Another Jurisdiction as a Bar to Present Prosecution

When conduct constitutes an offense within the concurrent jurisdiction of this Commonwealth and of the United States or another state, a prosecution in such other jurisdiction is a bar to a subsequent prosecution in this Commonwealth if:

- (1) the former prosecution resulted in an acquittal, a conviction that has not subsequently been set aside, or a determination that there was insufficient evidence to warrant a conviction, and the subsequent prosecution is for an offense involving the same conduct, unless:

- (a) each prosecution requires proof of a fact not required in the other prosecution;
- or
- (b) the offense involved in the subsequent prosecution was not consummated when the former prosecution began; or
- (2) the former prosecution was terminated in a final order or judgment that:
 - (a) has not subsequently been set aside, and
 - (b) required a determination inconsistent with any fact necessary to a conviction in the subsequent prosecution.

Section 506.608. Prosecution Not Barred Where Former Prosecution Was Before Court Lacking Jurisdiction or Was Fraudulently Procured by Defendant

A prosecution is not a bar within the meaning of Sections 506.605 to 506.607 if:

- (1) it was procured by the defendant without the knowledge of the proper prosecuting officer and with the purpose of avoiding the sentence which otherwise might be imposed; or
- (2) it was before a court that lacked jurisdiction over the defendant or the offense.

Section 506.609. Definitions

- (1) “Law enforcement authority” has the meaning given in Section 500.107.
- (2) “Nonexculpatory defense” has the meaning given in Section 506.601(4).
- (3) “Physical injury” has the meaning given in Section 500.107.
- (4) “Prosecution” has the meaning given in Section 500.107.

CHAPTER 507. LIABILITY OF CORPORATIONS AND OTHER NON-HUMAN ENTITIES

Section 507.701.	Liability of Corporation or Unincorporated Association
Section 507.702.	Relationship to Corporation or Unincorporated Association No Limitation on Individual Liability or Punishment
Section 507.703.	Definitions

Section 507.701. Liability of Corporation or Unincorporated Association¹⁸

(1) A corporation or unincorporated association may be held liable for an offense if the conduct constituting the offense:

(a) consists of a failure to discharge a specific duty imposed upon corporations by law; or

(b) is engaged in, authorized, commanded, or recklessly tolerated by the board of directors or by a high managerial agent acting within the scope of his employment in behalf of the corporation or association; or

(c) is engaged in by a corporate agent of the corporation or association acting within the scope of his employment and in behalf of the corporation or association, and:

(i) the offense is a misdemeanor or violation; or

(ii) the offense is one defined by a statute that clearly indicates a legislative intent to impose such criminal liability on a corporation or unincorporated association.

(2) Definitions.

(a) “Corporate agent” means any officer, director, servant, or employee of the corporation or association, or any other person authorized to act in behalf of the corporation or association.

¹⁸ **Issue:** Should Chapter 700’s provisions apply to unincorporated associations as well as to corporations?

Pro: Unincorporated associations should merit criminal liability to the same extent as corporations, as such associations often resemble corporations in every respect except for the fact they have not formally incorporated. The concerns with deterrence of criminal conduct and punishment of a collective criminal enterprise are present with unincorporated associations no less than with corporations.

Con: The imposition of liability on a corporation is based on a legal fiction — corporations are not independent, autonomous entities, and thus cannot have criminal culpability, even assuming they may engage in “conduct” — and should be narrowly drawn. The current corporate-liability provision, KRS 502.050, does not refer to unincorporated associations.

Reporter: No recommendation.

(b) “High managerial agent” means an officer of a corporation or association or any other corporate or association agent who has duties of such responsibility that his conduct reasonably may be assumed to represent the policy of the corporation or association.

(c) “Association” means a trust, partnership, government or governmental subdivision or agency, or two or more persons having a joint or common economic interest.

**Section 507.702. Relationship to Corporation or Unincorporated Association
No Limitation on Individual Liability or Punishment**

A person is criminally liable for conduct constituting an offense that he performs, or causes to be performed, in the name of or in behalf of a corporation or unincorporated association to the same extent as if the conduct were performed in his own name or behalf.

Section 507.703. Definitions

- (1) “Corporate agent” has the meaning given in Section 507.701(2)(a).
- (2) “High managerial agent” has the meaning given in Section 507.701(2)(b).
- (3) “Association” has the meaning given in Section 507.701(2)(c).

CHAPTER 508. INCHOATE OFFENSES

Section 508.801.	Criminal Attempt
Section 508.802.	Criminal Solicitation
Section 508.803.	Criminal Conspiracy
Section 508.804.	Unconvictable Confederate No Defense
Section 508.805.	Defense for Victims and Conduct Inevitably Incident
Section 508.806.	Defense for Renunciation Preventing Commission of the Offense
Section 508.807.	Grading of Criminal Attempt, Solicitation, and Conspiracy
Section 508.808.	Possessing Instruments of Crime
Section 508.809.	Definition

Section 508.801. Criminal Attempt

(1) Offense Defined. A person is guilty of attempt to commit an offense if, acting with the culpability required for commission of the offense and intending to engage in the conduct that would constitute the offense if the circumstances were as he believed them to be, he takes a substantial step toward commission of the offense.

(2) Conduct Constituting a Substantial Step.

(a) Conduct shall not be held to constitute a substantial step toward commission of the offense under Subsection (1) unless it is strongly corroborative of the person's intention to engage in the offense conduct.

(b) Where a person believed he has completed the conduct constituting the offense or believed that he has completed the last act needed to cause the criminal result, he satisfies the substantial step requirement contained in Subsection (1).

Section 508.802. Criminal Solicitation

(1) Offense Defined. A person is guilty of solicitation to commit an offense if, acting with the culpability required for commission of the offense and intending that the person solicited should engage in the conduct that would constitute the offense if the circumstances were as he believes them to be, he intentionally commands, encourages, or requests the other person to engage in such conduct or in an attempt to commit such conduct.

(2) Uncommunicated Solicitation. It is immaterial under Subsection (1) of this Section that the person fails to communicate with the person he solicits to commit an offense, if his conduct is designed to effect such communication.

Section 508.803. Criminal Conspiracy

(1) **Offense Defined.** A person is guilty of conspiracy to commit an offense if, acting with the culpability required for commission of the offense and intending that one of the conspirators engage in the conduct that would constitute the offense if the circumstances were as he believes them to be, he agrees with another person or persons that one or more of them will engage in such conduct or an attempt or solicitation to commit such conduct.

(2) **Conspiracy With Multiple Criminal Objectives.** If a person conspires to commit a number of offenses, he is guilty of only one conspiracy so long as such multiple offenses are the object of the same agreement or continuous conspiratorial relationship.

(3) **Overt Act.** No person may be convicted of conspiracy to commit an offense, unless an overt act in pursuance of such conspiracy is alleged and proved to have been done by him or by a person with whom he conspired.

Section 508.804. Unconvictable Confederate No Defense

It is no defense for a person who solicits or conspires with another to commit an offense that such other person:

- (1) has not been prosecuted or convicted, or
- (2) has been convicted of a different offense or grade, or
- (3) lacked the capacity to commit an offense, or
- (4) has been acquitted.

Section 508.805. Defense for Victims and for Conduct Inevitably Incident

Unless otherwise provided by the Code or by the law defining the offense, it is a defense to soliciting or conspiring to commit an offense that:

- (1) the person is the victim of the offense; or
- (2) the offense is so defined that the person's conduct is inevitably incident to its commission.

Section 508.806. Defense for Renunciation Preventing Commission of the Offense

(1) In any prosecution for attempt, solicitation, or conspiracy in which the offense contemplated was not in fact committed, it is a defense that, under circumstances manifesting a voluntary and complete renunciation of his criminal purpose, the person prevented the commission of the offense.

(2) Whether a renunciation is "voluntary and complete" within the meaning of this Section is governed by Section 301(2)(d).

(3) Burden of Persuasion on Defendant. The defendant has the burden of persuasion for this defense and must prove such defense by a preponderance of the evidence.

Section 508.807. Grading of Criminal Attempt, Solicitation, and Conspiracy

Unless otherwise provided by this Code, attempt, solicitation, and conspiracy are offenses of one grade lower than the most serious offense that is attempted or solicited or is an object of the conspiracy.

Section 508.808. Possessing Instruments of Crime

(1) Offense Defined. A person commits a Class A misdemeanor if he possesses any instrument of crime with intent to employ it criminally.

(2) Definition. “Instrument of crime” means:

- (a) anything specially made or specially adapted for criminal use; or
- (b) anything commonly used for criminal purposes and possessed by the person under circumstances consistent with unlawful intent.

Section 508.809. Definition

“Instrument of crime” has the meaning given in Section 508.808(2).

CHAPTER 509. OFFENSE GRADES AND THEIR IMPLICATIONS

Section 509.901.	Classified Offenses
Section 509.902.	Unclassified Offenses
Section 509.903.	Authorized Terms of Imprisonment; Death
Section 509.904.	Authorized Fines
Section 509.905.	General Adjustment to Offense Grade for Prior Offense
Section 509.906.	Authorized Sentence for Multiple Offenses

Section 509.901. Classified Offenses

Each offense in this Code shall be classified as:

- (1) a Class X felony; or
- (2) a Class A felony; or
- (3) a Class B felony; or
- (4) a Class C felony; or
- (5) a Class D felony; or
- (6) a Class E felony; or
- (7) a Class A misdemeanor; or
- (8) a Class B misdemeanor; or
- (9) a Class C misdemeanor; or
- (10) a violation.

Section 509.902. Unclassified Offenses

An offense outside of the Code:

- (1) that declares itself to be a felony, is a Class E felony;
- (2) that declares itself to be a misdemeanor, is a misdemeanor of the class specified in the offense, or if no class is specified, is a Class B misdemeanor;
- (3) that provides a sentence of imprisonment of:
 - (a) one year or more is a Class E felony;
 - (b) less than a year but more than 6 months is a Class A misdemeanor;
 - (c) 6 months or less but more than 30 days is a Class B misdemeanor;
 - (d) 30 days or less is a Class C misdemeanor.
- (4) that does not declare itself to be a felony or misdemeanor, or provide a sentence of imprisonment, is a violation.

Section 509.903. Authorized Terms of Imprisonment; Death¹⁹

Except as otherwise provided, the maximum authorized sentence for:

- (1) a Class X felony is [death or life imprisonment];
- (2) a Class A felony is not more than [50 years and not less than 20 years];
- (3) a Class B felony is not more than [20 years and not less than 10 years];
- (4) a Class C felony is not more than [10 years and not less than 5 years];
- (5) a Class D felony is not more than [5 years and not less than 2 years];
- (6) a Class E felony is not more than [2 years and not less than 1 year];
- (7) a Class A misdemeanor is not more than [1 year];
- (8) a Class B misdemeanor is not more than [6 months];
- (9) a Class C misdemeanor is not more than [30 days].
- (10) No term of imprisonment is authorized for a violation.

Section 509.904. Authorized Fines

Except as otherwise provided, the authorized fine for an offense is the greater of:

- (1) twice the harm caused or the gain derived, or
- (2) for a:
 - (a) Class X felony, not more than [\$250,000];
 - (b) Class A felony, not more than [\$150,000];
 - (c) Class B felony, not more than [\$80,000];
 - (d) Class C felony, not more than [\$40,000];
 - (e) Class D felony, not more than [\$20,000];
 - (f) Class E felony, not more than [\$10,000];
 - (g) Class A misdemeanor, not more than [\$5,000];
 - (h) Class B misdemeanor, not more than [\$3,000];
 - (i) Class C misdemeanor, not more than [\$2,000];
 - (j) Violation, not more than [\$1,000].
- (3) Corporate Fines. The authorized fine for a corporation is twice that authorized for an individual.

¹⁹ **Important Note:** All of the prison terms and fine amounts noted here are for illustrative purposes only. A final determination of the specific numbers to be used will obviously be a matter of some discussion at a later point in the process. The point here is simply to illustrate the need for an offense grading system with a sufficient number of offense grade categories to make distinctions between cases that are importantly different and a system that offers a full range of punishment possibilities.

Section 509.905. General Adjustment to Offense Grade for Prior Offense

The authorized sentence for an offense shall be that available if the offense were one grade higher, if:

- (1) a person is convicted of any offense,²⁰
- (2) after having been previously convicted in this Commonwealth or any other jurisdiction of a similar class offense or greater class offense that was committed when the person was 18 years old or older,
- (3) when such conviction has occurred within 5 years after the previous conviction, excluding time spent in custody, and such charges are separately brought and tried and arise out of different series of acts.

Section 509.906. Authorized Sentence for Multiple Offenses²¹

When an offender is being sentenced for more than one offense, the cumulative authorized sentence for all of the offenses of which he has been convicted is equal to:

- (1) the sentence for the most serious offense,
- (2) plus one-half the sentence for the next most serious offense,
- (3) plus one-quarter the sentence for the next most serious offense,
- (4) plus one-eighth the sentence for the next most serious offense,
- (5) continuing in like manner for all offenses for which the offender has been convicted, thereby causing each additional offense to increase the total authorized cumulative sentence, but by a decreasing increment.

²⁰ **Issue:** Should Section 905 be limited to apply only to felony convictions, rather than convictions for any offense?

Pro: While it may make sense to enhance a Class B misdemeanor to a Class A misdemeanor, the effect of enhancing Class A misdemeanors to felonies would result in a large influx of felons which we as a state simply cannot afford. Although the statute should retain the proposed 1-grade enhancement, the enhancement should apply to felonies only.

Con: There is no abstract, objectively valid distinction between felonies and misdemeanors for purposes of recidivism enhancements. If we are serious about enhancing penalties for repeat offenders, we should apply those enhancements across the board. Further, some Class A misdemeanors in the proposed Code are fairly serious and involve the type of harms typically subject to a recidivism enhancement.

Reporter: No recommendation.

²¹ **Note:** While there has been no challenge to this Section, and therefore no “pro-con footnote,” it marks a significant departure from current law and merits special mention. The Section is premised on the principle that there ought to be no “free” offenses, that every additional offense ought to result in some additional punishment. It rejects as flawed the common current practice of imposing concurrent sentences, which trivializes one or more offenses. At the same time, the Section acknowledges that our shared intuitions of justice do not envision the same degree of punishment for an offense when it is part of a group of offenses

as when that offense is punished alone. Rather, while every offense ought to trigger additional punishment, each additional offense ought to add increasingly less punishment. It is also worth noting that this provision is meant to apply only to multiple offenses that are truly independent of one another, and not to offenses that are simply different forms of the same harm or evil. This independence is insured by Section 254, which prevents conviction for wholly overlapping offenses.

PART II. DEFINITION OF SPECIFIC OFFENSES

CHAPTER 511. HOMICIDE OFFENSES

- Section 511.1101. Murder in the First Degree
 - Section 511.1102. Murder in the Second Degree
 - Section 511.1103. Manslaughter in the First Degree
 - Section 511.1104. Manslaughter in the Second Degree
 - Section 511.1105. Grossly Negligent Homicide
 - Section 511.1106. Causing or Aiding Suicide
 - Section 511.1107. Definition
-

Section 511.1101. Murder in the First Degree

- (1) Offense Defined. A person commits an offense if he knowingly causes the death of another person.
- (2) Grading. Except as provided in Section 511.1103, the offense is a Class X felony.

Section 511.1102. Murder in the Second Degree²²

- (1) Offense Defined. A person commits an offense if he recklessly causes the death of another person under circumstances manifesting extreme indifference to the value of human life.
- (2) Grading. Except as provided in Section 511.1103, the offense is a Class A felony.

²² **Issue:** Should the conditions defined in Section 1102 as second-degree murder be treated as equivalent to those in Section 1101, first-degree murder, thereby eliminating the two degrees of murder and making all such killings Class X felonies for which the death penalty is available?

Pro: Current Kentucky law allows the death penalty for most unintentional murders (reckless with extreme indifference to human life) when accompanied by aggravating circumstances. In *Tison v. Arizona*, 481 U.S. 137 (1987), the Supreme Court held that the death penalty could constitutionally be imposed on those who kill with extreme indifference to human life.

Con: The criminal law ought to distinguish between those who intend to kill and those who only create a risk of death. There is a growing consensus that the death penalty ought to be reserved for the most egregious of offenses: intentional killings. The Constitution Project, a nonpartisan group including members from both sides of the death penalty debate, has urged States to narrow their death penalty laws to ensure that capital punishment is reserved only for the very worst offenses. While it may not be unconstitutional to treat intentional killings the same as risk-taking killings, it is bad policy and undercuts the moral credibility of the criminal law. The vast majority of jurisdictions distinguish between these two kinds of killings. Even without the death penalty, those who commit second-degree “extreme indifference” murder would still be subject to a severe penalty (currently proposed to be 20-50 years) for committing a Class A felony.

Reporter: No recommendation.

Section 511.1103. Manslaughter in the First Degree

(1) Offense Defined. A person commits an offense if he causes the death of another person under circumstances that would otherwise be murder under Section 511.1101 or Section 511.1102:

(a) under the influence of extreme mental or emotional disturbance

(b) for which there is a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believes them to be.

(2) Burdens of Proof. Notwithstanding Section 500.106, the defendant bears the burdens of production and persuasion in establishing the requirements of Subsections (1)(a) and (1)(b) of this Section.

(3) Grading. The offense is a Class B felony.

Section 511.1104. Manslaughter in the Second Degree

(1) Offense Defined. A person commits an offense if he recklessly causes the death of another person.

(2) Grading. The offense is a Class C felony.

Section 511.1105. Grossly Negligent Homicide

(1) Offense Defined. A person commits an offense if he grossly negligently causes the death of another person.

(2) Grading. The offense is a Class D felony.

Section 511.1106. Causing or Aiding Suicide

(1) Lack Of Causal Accountability No Defense. A person who satisfies the requirements of an offense under this Chapter for causing another's suicide or attempted suicide is not exempt from liability for a failure of causal accountability if he brought about the suicide or attempted suicide by force or duress.

(2) Aiding or Soliciting Suicide: Offense Defined. A person commits an offense if he knowingly aids or solicits another to commit suicide.

(3) Exception: Health Care Professionals. A licensed health care professional does not commit an offense under Subsection (2) if he:

(a) withholds or withdraws a life-sustaining procedure in compliance with KRS 311.622 to 311.644 or KRS 311.970 to 311.976; or

(b) administers, prescribes, or dispenses medications or procedures to relieve another person's pain or discomfort, even if doing so may hasten or increase the risk of death, unless he intends to cause the person's death thereby.

(4) Definition. "Suicide" means intentionally causing one's own death.

(5) Grading. The offense defined in Subsection (2) is:

(a) a Class D felony if the person's conduct causes a suicide, or

(b) a Class E felony if the person's conduct causes an attempted suicide.

(c) Otherwise the offense is a Class A misdemeanor.

Section 511.1107. Definition

"Suicide" has the meaning given in Section 511.1106(4).

CHAPTER 512. ASSAULT, ENDANGERMENT, AND THREAT OFFENSES

Section 512.1201.	Assault; Causing Physical Injury
Section 512.1202.	Endangerment
Section 512.1203.	Terroristic Threats; Menacing
Section 512.1204.	Stalking; Intimidation
Section 512.1205.	Criminal Abuse
Section 512.1206.	Definitions

Section 512.1201. Assault; Causing Physical Injury

(1) Offense Defined. A person commits an offense if he:

- (a) recklessly causes physical injury to another person, or
- (b) grossly negligently causes physical injury to another person with a dangerous instrument.

(2) Grading. The offense is a Class B misdemeanor, except that the grade of the offense under Subsection (1)(a):

- (a) is increased one grade for each of the following:²³
 - (i) the person caused serious physical injury; or
 - (ii) the person either:
 - (A) intentionally caused the injury, or
 - (B) recklessly caused the injury under circumstances manifesting an extreme indifference to the value of human life and created a grave risk of death; or

²³ **Issue:** Should Section 1201(2) employ the proposed approach of aggravating or mitigating by one grade where any of several factors are present, rather than the current law approach of specifying offenses or suboffenses for certain factors or combinations of factors?

Pro: The advantage of the proposed approach is that it increases both consistency and efficiency. The draft's approach of applying each specific factor as a general grading adjustment to a single assault offense, rather than defining a variety of assault offenses, each for a particular combination of factors, enables the Code to consistently aggravate for all factors. Current law, in contrast, takes a drafting approach that obliges it to select certain combinations of factors to define each degree of the offense, *and thereby omit other combinations*. Thus, for example, there is an aggravation for causing physical harm to a police officer (third-degree assault), but no similar aggravation for causing *serious* physical harm to an officer. If the status of the victim (or the extent of injury caused) is considered relevant in some cases, why not in all of them?

Con: The increase/decrease approach of the proposal is confusing.

Reporter: No recommendation.

- (iii) the person caused the injury by use of a dangerous instrument; or
 - (iv) the person assaulted is a peace officer or correctional worker acting in the line of duty;
- and
- (b) is decreased one grade if the person causes the injury:
 - (i) while under the influence of extreme mental or emotional disturbance
 - (ii) for which there is a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believes them to be.

Section 512.1202. Endangerment

(1) Offense Defined. A person commits an offense if he engages in conduct by which he recklessly creates a substantial risk of physical injury to another person.

(2) Grading.

(a) If the person creates a substantial risk of death or serious physical injury under circumstances manifesting an extreme indifference to the value of human life, the offense is a Class D felony.

(b) If the person creates a substantial risk of death or serious physical injury, the offense is a Class E felony.

(c) Otherwise the offense is a Class A misdemeanor.

Section 512.1203. Terroristic Threats; Menacing

(1) Offense Defined. A person commits an offense if:

(a) with the purpose of, or in reckless disregard of the risk of, causing the unnecessary evacuation of a building, place of assembly, or facility of public transport, or otherwise causing unnecessary serious public inconvenience, he falsely reports a threat of catastrophe; or

(b) he threatens to commit any crime likely to cause serious physical injury or substantial property damage to another; or

(c) he intentionally places another person in reasonable apprehension of imminent physical injury.

(2) Grading.

(a) Terroristic Threats.

(i) The offense under Subsection (1)(a) is a Class E felony.

(ii) The offense under Subsection (1)(b) is a Class A misdemeanor.

(b) Menacing. The offense under Subsection (1)(c) is a Class B misdemeanor.

Section 512.1204. Stalking; Intimidation

- (1) Offense Defined: Intimidation. A person commits an offense if he engages in conduct:
- (a) by which he intentionally causes serious alarm, annoyance, intimidation, or harassment of another person,
 - (b) under circumstances in which a reasonable person would suffer substantial mental distress,
 - (c) and such conduct serves no legitimate purpose.

(2) Offense Defined: Stalking. A person commits an offense if he commits an offense under Subsection (1) by engaging in an intentional course of conduct, directed at a specific person or persons, which conveys an explicit or implicit threat with the intent to place that person or those persons in reasonable fear of:

- (a) sexual contact, or
- (b) serious physical injury, or
- (c) death.²⁴

(3) Grading.

- (a) The offense under Subsection (1) is a Class E felony if:
 - (i) a protective order for the victim has been entered against the person,
 - or
 - (ii) the person knows that a criminal complaint is currently pending against him for an offense against the same victim, or
 - (iii) the person has been convicted of a crime against the same victim within the past five years, or
 - (iv) the person had a dangerous instrument on his person at the time of the offense.
- (b) Otherwise the offense under Subsection (1) is a Class B misdemeanor
- (c) The offense under Subsection (2) is one grade higher than the offense under Subsection (1).

²⁴ **Issue:** Should the proposed stalking offense’s threat requirement be reduced to require only a “threat to the physical safety of the person or an immediate family member,” rather than a threat of sexual contact, serious physical injury, or death?

Pro: The stalking offense should aggravate criminal liability for conduct calculated to intimidate or emotionally injure another, even when the threats are less serious than the extremely serious threats now required by the proposed provision. (Note that the offense would not punish the offense’s conduct as a felony unless one of the specified aggravating conditions exists.)

Con: The more narrow threat requirement is necessary to narrow the offense so that it avoids a claim of vagueness, and so that only the most serious threats will be addressed. Too broad a range of conduct might be considered to constitute a threat to “physical safety,” especially given that the threat can be only “implicit.”

Reporter: No recommendation.

(4) Definitions.

(a) “Course of conduct” means a pattern of conduct composed of two (2) or more acts, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of “course of conduct.” If the defendant claims that he was engaged in constitutionally protected activity, the court shall determine the validity of that claim as a matter of law and, if found valid, shall exclude that activity from evidence.

(b) “Protective order” means:

(i) an emergency protective order or domestic violence order issued under KRS 403.715 to 403.785,

(ii) a foreign protective order, as defined in KRS 403.7521(1),

(iii) an order issued under KRS 431.064,

(iv) a restraining order, or

(v) any condition of a bond, conditional release, probation, parole, or pretrial diversion order designed to protect the victim from the offender.

Section 512.1205. Criminal Abuse

(1) Offense Defined. A person commits an offense if he causes (i) a person under 12 years old, or (ii) a physically or mentally helpless person, to be:

(a) subjected to cruel confinement or cruel punishment, or

(b) deprived of services necessary to maintain the person’s health and welfare.

(2) Definition. A “physically or mentally helpless person” means a person who lacks substantial capacity to defend himself or solicit protection from law enforcement authorities.

(3) Grading.

(a) The offense committed knowingly is a Class D felony.

(b) The offense committed recklessly is a Class E felony.

(c) The offense committed grossly negligently is a Class A misdemeanor.

Section 512.1206. Definitions

(1) “Catastrophe” has the meaning given in Section 2205(4)(a).

(2) “Correctional worker” has the meaning given in Section 513.1304(2).

(3) “Dangerous instrument” has the meaning given in Section 515.1501(3)(a).

(4) “Peace officer” has the meaning given in Section 500.107.

(5) “Physical injury” has the meaning given in Section 500.107.

(6) “Physically or mentally helpless person” has the meaning given in Section 512.1205(2).

(7) “Protective order” has the meaning given in Section 512.1204(3).

(8) “Serious physical injury” has the meaning given in Section 500.107.

CHAPTER 513. SEXUAL ASSAULT OFFENSES

Section 513.1301.	Aggravated Rape
Section 513.1302.	Rape
Section 513.1303.	Aggravated Sexual Abuse
Section 513.1304.	Sexual Abuse
Section 513.1305.	Sexual Misconduct
Section 513.1306.	Definitions

Section 513.1301. Aggravated Rape

(1) Offense Defined. A person commits an offense if he engages in sexual intercourse or deviate sexual intercourse with another person:

- (a) who is less than 12 years old,²⁵ or
- (b) by forcible compulsion, or
- (c) who is physically incapacitated.

(2) Definitions.

(a) “Deviate sexual intercourse” means any act of sexual gratification involving the sex organs of one person and the mouth or anus of another; or penetration of the anus of one person by a foreign object manipulated by another person. “Deviate sexual intercourse” does not include penetration of the anus by a foreign object in the course of the performance of generally recognized health-care practices.

²⁵ **Issue:** Should Section 1301(1)(a), and the similar provision in Section 1303(1)(a), add a requirement that the offender be at least 4 years older than the victim?

Pro: One of the most difficult issues currently being addressed in juvenile court is sexual activity between two children. There have been instances of males being prosecuted in juvenile court for consensual sexual encounters with females the same age, or older. This provision will ensure that society expresses its distaste toward sexual behavior between children where there is a significant difference in power between the individuals, and thus a significant effect on the ability of the younger child to genuinely consent. Consensual sexual relations between children near the same age should be addressed by the family, church, and social welfare system, rather than criminalizing the behavior.

Con: While there is a place for limiting liability according to the age difference between the offender and victim, this is not that place. Children under the age of 12 are so clearly inappropriate as sexual partners that even teenagers ought to be liable for serious criminal liability for such conduct.

Young offenders who are too immature to understand the nature or criminality of their conduct are protected from criminal liability by the immaturity defense proposed in Section 505.

Reporter: No recommendation.

(b) “Forcible compulsion” means physical force or threat of physical force, express or implied, [that would place a reasonable person in fear of immediate death or physical injury to self or another person, fear of the immediate kidnap of self or another person, or fear of any offense under this Chapter.]²⁶ Physical resistance on the part of the victim is not necessary to meet this definition.

(c) “Foreign object” means anything used in commission of a sexual act other than the person of the actor.

(d) “Physically incapacitated” means unconscious or for any other reason physically unable to communicate one’s unwillingness to engage in an act.

(e) “Sexual intercourse” means sexual intercourse in its ordinary sense and includes penetration of the sex organs of one person by a foreign object manipulated by another person. Sexual intercourse occurs upon any penetration, however slight; emission is not required. “Sexual intercourse” does not include penetration of the sex organ by a foreign object in the course of the performance of a generally recognized health-care practice.

(3) Grading. The offense:

- (a) under Subsection (1)(a) is a Class A felony, or
- (b) under Subsection (1)(b) and (1)(c) is a Class A felony if the person causes serious physical injury, or
- (c) otherwise is a Class B felony.

Section 513.1302. Rape

(1) Offense Defined. A person commits an offense if he engages in sexual intercourse or deviate sexual intercourse with another person who:

- (a) is not his spouse and is:
 - (i) less than 14 years old, if the defendant is at least 4 years older, or
 - (ii) less than 16 years old, if the defendant is at least 4 years older, or

²⁶ **Issue:** Should this provision require that the force used actually place the victim in fear?

Pro: This is a serious offense. We ought to be sure of both the offender’s culpability and the harm to the victim before we impose liability for it. The draft already eliminates the previous clause in the current definition of “forcible compulsion” requiring that it must “overcome earnest resistance.” To further eliminate the bright line would reduce rape to the “threat of physical force,” however slight, or however it is perceived by the victim. A Class B felony carrying 10-20 years in prison, a violent offender designation, 3 years conditional discharge, and Megan’s Law ramifications, should not rest on such an ambiguous definition.

Con: If force or the threat of force is already required, there seems little reason to require more. Intercourse compelled by threat of force is unambiguously rape; an additional requirement of proof of a particular belief in the victim hardly seems necessary, or even relevant.

Reporter: No recommendation.

(iii) less than 18 years old, if the defendant is 21 years old or older and provides a foster family home, as defined in KRS 600.020, for the victim, or

(iv) mentally retarded; or

(b) is mentally incapacitated.

(2) Definitions.

(a) “Mentally incapacitated” means rendered temporarily incapable of appraising or controlling one’s own conduct as a result of the influence of a controlled or intoxicating substance administered without one’s consent or as a result of any other act committed without one’s consent.

(b) “Mentally retarded” means having significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period, as defined in KRS Chapter 202B.

(3) Grading.

(a) The offense under Subsection (1)(a)(i) is a Class C felony.

(b) Otherwise the offense is a Class D felony.

Section 513.1303. Aggravated Sexual Abuse

(1) Offense Defined. A person commits an offense if he: (i) engages in sexual contact with, or (ii) causes sexual conduct by, another person:

(a) who is less than 12 years old,²⁷ or

(b) by forcible compulsion, or

(c) who is physically incapacitated.

(2) Definition.

(a) “Sexual contact” means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party.

(b) “Sexual conduct” means:

(i) acts of masturbation, homosexuality, lesbianism, bestiality, sexual intercourse, or deviant sexual intercourse, actual or simulated, or

(ii) flagellation or excretion for the purpose of sexual stimulation or gratification, or

(iii) the exposure, in an obscene manner, of the unclothed or apparently unclothed human male or female genitals, pubic area, or buttocks, or the female breast, whether or not subsequently obscured by a mark placed thereon or otherwise altered in any resulting motion picture, photograph, or other visual representation.

(3) Grading.

(a) The offense under Subsection (1)(a) is a Class D felony.

(b) Otherwise the offense is a Class E felony.

²⁷ See footnote accompanying Section 1301.

Section 513.1304. Sexual Abuse

(1) Offense Defined. A person commits an offense if he: (i) engages in sexual contact with, or (ii) causes sexual conduct by, another person:

- (a) who is mentally retarded or mentally incapacitated, or
- (b) who is in the penal custody of the Department of Corrections, if the defendant is a correctional worker, or
- (c) who is less than 14 years old, if the defendant is at least 4 years older, or
- (d) who is less than 16 years old, if the defendant is at least 4 years older, or
- (e) without consent.

(2) Definition. “Correctional worker” means an employee, contractor, vendor, or volunteer of the Department of Corrections or of a detention facility, or of an entity under contract with either the Department or a detention facility for the custody, supervision, evaluation, or treatment of offenders.

(3) Grading.

- (a) The offense under Subsection (1)(a) or (1)(b) is a Class E felony.
- (b) The offense under Subsection (1)(c) is a Class A misdemeanor.
- (c) Otherwise the offense is a Class B misdemeanor.

Section 513.1305. Sexual Misconduct

(1) Offense Defined. A person commits an offense if he engages in sexual intercourse or deviate sexual intercourse with another person without the person’s consent.

(2) Grading. The offense is a Class A misdemeanor.

Section 513.1306. Definitions

- (1) “Correctional worker” has the meaning given in Section 513.1304(2).
- (2) “Detention facility” has the meaning given in Section 553.5306(2)(a).
- (3) “Deviate sexual intercourse” has the meaning given in Section 513.1301(2)(a).
- (4) “Forcible compulsion” has the meaning given in Section 513.1301(2)(b).
- (5) “Foreign object” has the meaning given in Section 513.1301(2)(c).
- (6) “Mentally incapacitated” has the meaning given in Section 513.1302(2)(a).
- (7) “Mentally retarded” has the meaning given in Section 513.1302(2)(b).
- (8) “Penal custody” has the meaning given in Section 553.5306(2)(c).
- (9) “Physically incapacitated” has the meaning given in Section 513.1301(2)(d).
- (10) “Sexual conduct” has the meaning given in Section 513.1303(2)(b).
- (11) “Sexual contact” has the meaning given in Section 513.1303(2)(a).
- (12) “Sexual intercourse” has the meaning given in Section 513.1301(2)(e).

CHAPTER 514. KIDNAPPING, COERCION, AND RELATED OFFENSES

Section 514.1401.	Kidnapping and Unlawful Restraint
Section 514.1402.	Interference with Custody
Section 514.1403.	Criminal Coercion
Section 514.1404.	Definitions

Section 514.1401. Kidnapping and Unlawful Restraint

(1) Offense Defined: Kidnapping. A person commits an offense if he knowingly restrains another person unlawfully with the intent to:

- (a) hold the victim for ransom or reward, or
- (b) advance the commission of a felony, or
- (c) inflict physical injury on, or terrorize, the victim or another, or
- (d) interfere with the performance of a governmental function, or
- (e) use the victim as a shield or hostage.

(2) Offense Defined: Unlawful Restraint. A person commits an offense if he knowingly restrains another person unlawfully.

(3) Grading.

(a) Aggravated Kidnapping. The offense under Subsection (1) is a Class X felony²⁸ if the victim is not released alive, or if the victim dies after release as a result of:

- (i) serious physical injury suffered during the kidnapping, or
- (ii) being released in an unsafe place, or
- (iii) being released under circumstances in which the person was grossly negligent as to a risk of the victim's death.

²⁸ **Issue:** Should aggravated kidnapping be eligible for the death penalty? If not, should it continue to be a Class X felony or should it be reduced to a Class A felony?

For Class X felony, death eligible: Aggravated kidnapping is currently eligible for the death penalty under KRS 509.040(2).

For Class X felony, not death eligible: This offense is less serious than first-degree murder and, therefore, ought to be distinguished from that capital offense. However, it ought not be reduced to a Class A felony. If it were, then all other kidnapping grades would have to be similarly reduced if the grading distinctions are to be maintained.

For Class A felony: This offense is not more serious than causing a death under circumstances manifesting extreme indifference, which is graded as a Class A felony under Section 1102.

Reporter: No recommendation.

(b) The offense under Subsection (1) is a Class A felony if the victim suffers serious physical injury:

(i) during the kidnapping, or

(ii) as a result of being released in an unsafe place, or

(iii) as a result of being released under circumstances in which the person was grossly negligent as to a risk of serious physical injury to the victim.

(c) Kidnapping. Otherwise the offense under Subsection (1) is a Class B felony.

(d) Aggravated Unlawful Restraint. The offense under Subsection (2) is a Class D felony if the restraint exposes the victim to a risk of serious physical injury.

(e) Unlawful Restraint. Otherwise the offense under Subsection (2) is a Class A misdemeanor.

(4) Definitions.

(a) “Relative” means a parent, ancestor, brother, sister, uncle or aunt.

(b) “Restrain” means to restrict another person’s movements without consent in such a manner as to cause a substantial interference with his liberty:

(i) by moving him from one place to another, or

(ii) by confining him either in the place where the restriction commences or in a place to which he has been moved.

(c) A person is moved or confined “without consent” when the movement or confinement is accomplished by physical force, intimidation, or deception, or by any means, including acquiescence of a victim if he:

(i) is less than 16 years old, or

(ii) is substantially incapable of appraising or controlling his own behavior.

(5) Exemption: Restraint Ordinarily Incident. It is not an offense under this Section if the unlawful restraint is no more than that which is ordinarily incident to the commission of another offense for which the offender is convicted.

(6) Defense. It is a defense to an offense under this Section that:

(a) the person was a relative of the victim, and

(b) his only purpose was to assume custody of the victim.

Section 514.1402. Interference with Custody

(1) Offense Defined. A person commits an offense if:

(a) knowing that he has no legal right to do so,

(b) he takes, entices, or keeps from lawful custody

(c) any person entrusted by authority of law to the custody of another person or to an institution.

(2) Grading.

(a) If the person returns the victim voluntarily and before arrest or the issuance of a warrant for arrest, the offense is a Class A misdemeanor.

(b) Otherwise the offense is a Class D felony.

Section 514.1403. Criminal Coercion

(1) Offense Defined. A person commits an offense if, with intent to compel another person to engage in or refrain from conduct, he unlawfully threatens to:

- (a) commit an offense, or
- (b) accuse any person of an offense, or
- (c) expose any secret tending to subject any person to hatred, contempt, or ridicule, or to impair another's credit or business repute, or
- (d) take or withhold action as an official, or cause an official to take or withhold action.

(2) Defense. It is a defense under any Subsection other than (1)(a) that:

- (a) the defendant believed the accusation or secret to be true, or the proposed official action to be justified, and
- (b) his sole purpose was to compel or induce the victim to desist from misbehavior, or to make good a wrong done by the victim.

(3) Grading. The offense is a Class A misdemeanor.

Section 514.1404. Definitions

- (1) "Governmental function" has the meaning given in Section 553.5301(2).
- (2) "Physical injury" has the meaning given in Section 500.107.
- (3) "Relative" has the meaning given in Section 514.1401(4)(a).
- (4) "Restrain" has the meaning given in Section 514.1401(4)(b).
- (5) "Serious physical injury" has the meaning given in Section 500.107.
- (6) "Without consent" has the meaning given in Section 514.1401(4)(c).

CHAPTER 515. ROBBERY OFFENSES

Section 515.1501. Robbery

Section 515.1501. Robbery

(1) Offense Defined. A person commits an offense if, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft.

(2) Grading.

(a) Aggravated Robbery. The offense is a Class B felony if the person:

(i) causes physical injury to any person other than a participant in the crime, or

(ii) uses or threatens to use a dangerous instrument upon any person, or

(iii) is armed with a deadly weapon other than an ordinary hunting knife that the person regularly carries.

(b) Robbery. Otherwise the offense is a Class C felony

(3) Definitions.

(a) “Dangerous instrument” means any instrument, article, or substance that, under the circumstances in which it is used, attempted to be used, or threatened to be used, is capable of causing death or serious physical injury, including:

(i) any part of the human body when serious physical injury is a direct result of the use of that part of the human body, and

(ii) any deadly weapon.

(b) “Deadly weapon” means:

(i) any weapon from which a shot, capable of producing death or other serious physical injury, may be discharged, or

(ii) any knife other than an ordinary pen knife, or

(iii) a billy, nightstick, club, blackjack, slapjack, nunchaku karate sticks, shuriken or death star, or artificial knuckles made from metal, plastic, or other similar hard material.

(c) “Physical injury” has the meaning given in Section 500.107.

CHAPTER 521. THEFT AND RELATED PROVISIONS

Section 521.2101.	Consolidation of Theft Offenses
Section 521.2102.	Theft by Unlawful Taking or Disposition
Section 521.2103.	Theft by Deception
Section 521.2104.	Theft by Extortion
Section 521.2105.	Theft of Services
Section 521.2106.	Theft by Unauthorized Sale of Copyrighted Material
Section 521.2107.	Theft by Failure to Make Required Disposition of Funds Received
Section 521.2108.	Theft of Property Lost, Mislaid, or Delivered by Mistake
Section 521.2109.	Receiving Stolen Property
Section 521.2110.	Grading of Theft
Section 521.2111.	Claim of Right
Section 521.2112.	Unauthorized Use of Automobiles and Other Vehicles
Section 521.2113.	Definitions

Section 521.2101. Consolidation of Theft Offenses

Conduct denominated theft in this Chapter constitutes a single offense. An accusation of theft may be supported by evidence that it was committed in any manner that would be theft under this Chapter.

Section 521.2102. Theft by Unlawful Taking or Disposition

(1) Movable Property. A person commits theft if he unlawfully takes, or exercises unlawful control over, movable property of another with intent to deprive him thereof.

(2) Permissive Inference. The factfinder may infer that a person who intentionally conceals unpurchased merchandise of any mercantile establishment on the premises of such establishment has the intent to deprive the owner of his property without paying the purchase price for it.

(3) Immovable Property. A person commits theft if he unlawfully transfers immovable property of another or any interest therein with intent to benefit himself or another not entitled thereto.

(4) Definitions.

(a) “Deprive” means:

(i) to withhold property of another permanently or for so extended a period as to appropriate a major portion of its economic value, or with intent to restore only upon payment of reward or other compensation; or

(ii) to dispose of the property so as to make it unlikely that the owner will recover it.

(b) “Immovable property” is all property other than movable property.

(c) “Movable property” means property the location of which can be changed, including things growing on, affixed to, or found in land, and documents although the rights represented thereby have no physical location. “Immovable property” is all other property.

(d) “Owner” means a person who has title, license, or other lawful possession of the property, a person who has the right to restrict access to the property, or a person who has a greater right to possession of the property than the actor.

(e) “Property” means anything of value, including real estate, tangible and intangible personal property, contract rights, choses-in-action and other interests in or claims to wealth, admission or transportation tickets, captured or domestic animals, food and drink, electric or other power, personal services, telephone service, access to electronic services, programs, or data, recorded sounds or images, and lottery tickets.

(f) “Property of another” is any property in which any person other than the actor has an interest that the actor is not privileged to infringe, regardless of the fact that the actor also has an interest in the property. Property in possession of the actor shall not be deemed property of another who has only a security interest therein, even if legal title is in the creditor pursuant to a conditional sales contract or other security arrangement.

Section 521.2103. Theft by Deception

(1) Offense Defined. A person commits theft if he obtains property of another by deception with intent to deprive the person thereof.

(2) A person deceives if he [intentionally]:²⁹

(a) creates or reinforces a false impression, including false impressions as to law, value, intention, or other state of mind;

²⁹ **Issue:** Should the culpability requirement of “intentionally” be reduced to “knowingly” for theft generally, that is, here and in the bracketed portions of Sections 2104, 2105, and 2107?

Pro: If a person knows that property belongs to another and that he is acting to obtain that property, he is sufficiently culpable for theft liability to be appropriate, especially where he is doing so through the inherently wrongful means of a deception or threat. In those few cases where a person might have knowledge, but not intent, as to deceiving another person or obtaining another’s property, he is still committing a conscious wrong and bringing about the harm with which the offense is concerned. Particularly in the area of theft by deception, it may be unclear whether the person has the “intent” to deceive, as opposed to the intent to achieve some other benefit by means of a knowing deception, thus an “intent” requirement produces inappropriate proof difficulties for prosecutors.

Con: Intention is the traditional culpability requirement for theft offenses. A knowing, but not intentional, deprivation of another’s property should be resolved through the civil arena. We should punish mere deprivation of property (as opposed to injury to person) with felony imprisonment only where the offender is acting intentionally.

Reporter: No recommendation.

(b) prevents another from acquiring information that would affect judgment of a transaction;

(c) fails to correct a false impression that the deceiver previously created or reinforced, or that the deceiver knows to be influencing another to whom the person stands in a fiduciary or confidential relationship;

(d) fails to disclose a known lien, adverse claim, or other legal impediment to the enjoyment of property that the person transfers or encumbers in consideration for the property obtained, whether the impediment is or is not valid or is or is not a matter of official record; or

(e) issues or passes a check or similar sight order for the payment of money, knowing that it will not be paid by the drawee.

(3) Definition. "Obtain" means:

(a) in relation to property, to bring about a transfer or purported transfer of a legal interest in the property, whether to the obtainer or another; or

(b) in relation to labor or service, to secure performance thereof.

(4) Exception. This offense is not committed if the deception concerns only matters having no pecuniary significance, or is puffing by statements unlikely to deceive ordinary persons in the group addressed.

(5) Inference Not Permitted. Deception as to a person's intention to perform a promise shall not be inferred from the fact alone that he did not subsequently perform the promise.

(6) Permissive Inference Regarding No Account and Refused Payment Check. For purposes of Subsection (1) of this Section, the factfinder may infer that a maker of a check or similar sight order for the payment of money knew that the check or order, other than a postdated check or order, would not be paid, if:

(a) the maker had no account with the drawee at the time the check or order was issued; or

(b) upon presentation within thirty (30) days after issue, payment was refused by the drawee for lack of funds, and the maker failed to make good within ten (10) days after receiving notice of that refusal.

(7) Permissive Inference Regarding Failure to Return Leased Property. The factfinder may infer the intent to commit theft by deception by a person who has leased or rented the personal property of another:

(a) if the person fails to return the personal property to its owner within ten (10) days after the lease or rental agreement has expired; or

(b) if the person presented to the owner identification that is false, fictitious, or not current as to name, address, place of employment, or other items of identification for the purpose of obtaining the lease or rental agreement.

(c) Demand for Return Required. Nothing in this Subsection relieves the owner from making demand for the return of the property leased or rented. A notice addressed and mailed to the lessee or renter at the address given at the time of the making of the lease or rental agreement shall constitute proper demand.

Section 521.2104. Theft by Extortion

(1) Offense Defined. A person commits theft if he [intentionally] obtains property of another by threatening to:

- (a) commit an offense; or
- (b) accuse any person of an offense; or
- (c) expose any secret tending to subject any person to hatred, contempt, or ridicule, or to impair his credit or business repute; or
- (d) take or withhold action as an official, or cause an official to take or withhold action; or
- (e) bring about or continue a strike, boycott, or other collective action, if the property is not demanded or received for the benefit of the group in whose interest the person purports to act; or
- (f) testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or
- (g) inflict any other substantial harm that would not benefit the defendant.

(2) Defense. It is an affirmative defense to a prosecution under Subsection (1)(b), (1)(c), or (1)(d) that the property obtained by threat of accusation, exposure, lawsuit, or other invocation of official action or inaction was honestly claimed as restitution or indemnification for harm done in the circumstances to which such action or inaction relates, or as compensation for property or lawful services.

Section 521.2105. Theft of Services

(1) Offense Defined. A person commits theft if:

- (a) by deception or threat, by false monetary instrument, token, or note, or by other means to avoid payment for the service, he [intentionally] obtains services that he knows are available only for compensation; or
- (b) having control over the disposition of services of others to which he is not entitled, he [intentionally] diverts such services to his own benefit or to the benefit of another not entitled thereto.

(2) Definition. "Services" includes labor; professional service; transportation; telephone, electricity, gas, water, or other public service; accommodation in hotels, restaurants, or elsewhere; admission to exhibitions; use of vehicles or other movable property; use of data or a computer or computer system, network, software, or program to perform tasks; or access to cable television, the internet, or any other electronic service.

(3) Permissive Inference. Where compensation for service is ordinarily paid immediately upon the rendering of such service, as in the case of hotels and restaurants, the factfinder may infer from the person's refusal to pay, or his absconding without payment or offer to pay, that he obtained the service by deception as to his intent to pay.

Section 521.2106. Theft by Unauthorized Sale of Copyrighted Material

A person commits theft if, with intent to deprive the owner of the proceeds from the sale, he sells any copyrighted material.

Section 521.2107. Theft by Failure to Make Required Disposition of Funds Received

(1) **Offense Defined.** A person who obtains property upon agreement, or subject to a known legal obligation, to make a specified payment or other disposition, whether from such property or its proceeds or from his own property to be reserved in equivalent amount, commits theft if he [intentionally] deals with the property obtained as his own and fails to make the required payment or disposition.

(2) **Application to Commingled Property.** The requirements of Subsection (1) are satisfied even if it is impossible to identify particular property as belonging to the victim at the time of the person's failure to make the required payment or disposition.

(3) **Permissive Inference.** The factfinder may infer that a public servant, an officer or employee of a financial institution, a lawyer, or an accountant or other financial professional:

(a) has the requisite knowledge of any legal obligation relevant to his criminal liability under this Section, and

(b) has dealt with the property as his own if he fails to pay or account upon lawful demand, or if an audit reveals a shortage or falsification of accounts.

(4) **Definition.** "Financial institution" means a bank, insurance company, credit union, building and loan association, investment trust, or other organization held out to the public as a place of deposit of funds or medium of savings or collective investment.

Section 521.2108. Theft of Property Lost, Mislaid, or Delivered by Mistake

Offense Defined. A person who comes into control of property of another that he knows to have been lost, mislaid, or delivered under a mistake as to the nature or amount of the property or the identity of the recipient, commits theft if, with intention to deprive the owner thereof, he fails to take reasonable measures to restore the property to a person entitled to have it.

Section 521.2109. Receiving Stolen Property

(1) Offense Defined. A person commits theft if he receives, retains, or disposes of movable property of another while reckless as to whether^{*30} it has been stolen, unless the property is received, retained, or disposed of with intent to restore it to the owner.

(2) Definition. “Receiving” means acquiring possession, control, or title, or lending on the security of the property.

(3) Permissive Inference. The factfinder may infer the requisite recklessness where the person has property in his possession:

- (a) that was recently stolen, or
- (b) for which he knows the serial number or other identification number or mark has been removed, covered, altered, or obscured.

Section 521.2110. Grading of Theft

(1) Theft constitutes a Class [B]^{*31}felony if the amount involved is in excess of \$1,000,000.

(2) Theft constitutes a Class [C]^{*} felony if:

- (a) the amount involved is in excess of \$10,000, or
- (b) the property stolen is a firearm, or
- (c) in the case of theft by receiving stolen property, if the receiver is in the business of buying or selling stolen property.

³⁰ **Issue:** Should the culpability requirement for receiving stolen property be increased from recklessness to knowledge?

Pro: We should not criminalize the mere possession of stolen property unless it is clear that the person possessing the property knew it was stolen. The permissive inference in Subsection (3) can be crafted to address the more difficult cases.

Con: Current law, 514.110(1), requires that a person receive property “knowing that it has been stolen, or *having reason to believe* that it has been stolen.” That requirement is essentially a negligence requirement, which is even lower than the recklessness requirement in the proposed provision. The proposed language thus already reflects an increase in the culpability requirement, which is one reason the permissive inference in Subsection (3) has been included.

Reporter: No recommendation.

³¹ **Issue:** Should the grade of all but the least serious theft offense be reduced one grade? (The analogous issue exists with regard to the grading of property damage offenses, in Section 2206(2).)

Pro: Such property offenses rarely merit felony grading. It is offenses that involve injury to persons that deserves serious punishment.

Con: Theft (and property damage offenses) clearly are less serious than many if not most offenses against the person, but they nonetheless are serious offenses because such violations influence the quality of life, creating anxiety and fear, and often lead to danger and injury to persons.

Reporter: No recommendation.

- (3) Theft constitutes a Class [D]* felony if the amount involved is in excess of \$1,000.
- (4) Theft constitutes a Class [E]* felony if the amount involved is in excess of \$300.
- (5) Theft constitutes a Class [A]* misdemeanor if the amount involved is \$300 or less, except that
- (6) theft constitutes a Class C misdemeanor if:
 - (a) the property was not taken from the person or by threat, or in breach of a fiduciary obligation, and
 - (b) the amount involved was less than \$50.
- (7) Valuation. The “amount involved” in a theft is the fair market value of the property or services involved. Amounts involved in thefts committed pursuant to one scheme or course of conduct, whether from the same person or several persons, may be aggregated in determining the grade of the offense.

Section 521.2111. Claim of Right

It is an affirmative defense to a prosecution for theft that the person:

- (1) acted under an honest claim of right:
 - (a) to the property or service involved, or
 - (b) to acquire or dispose of it as he did; or
- (2) took property exposed for sale:
 - (a) intending to purchase and pay for it promptly, or
 - (b) reasonably believing that the owner, if present, would have consented.

Section 521.2112. Unauthorized Use of Automobiles and Other Vehicles

(1) Offense Defined. A person commits an offense if he knowingly operates, exercises control over, or otherwise uses another’s automobile or other propelled vehicle without consent of the owner.

(2) Definition. “Propelled vehicle” means any vehicle, including but not limited to motor vehicles, aircraft, boats, or construction machinery, that is propelled otherwise than by muscle power, or that is readily capable of being towed otherwise than by muscle power.

(3) Defense. It is an affirmative defense to a prosecution under this Section that the person reasonably believed that the owner would have consented to the operation had he known of it.

(4) Grading. The offense is a Class A misdemeanor.

Section 521.2113. Definitions

- (1) “Deprive” has the meaning given in Section 521.2102(4)(a).
- (2) “Financial institution” has the meaning given in Section 521.2107(4).
- (3) “Government” has the meaning given in Section 500.107.
- (4) “Immovable property” has the meaning given in Section 521.2102(4)(b).
- (5) “Movable property” has the meaning given in Section 521.2102(4)(c).
- (6) “Obtain” has the meaning given in Section 521.2103(3).
- (7) “Owner” has the meaning given in Section 521.2102(4)(d).
- (8) “Propelled vehicle” has the meaning given in Section 521.2112(2).
- (9) “Property” has the meaning given in Section 521.2102(4)(e).
- (10) “Property of another” has the meaning given in Section 521.2102(4)(f).
- (11) “Receiving” has the meaning given in Section 521.2109(2).
- (12) “Services” has the meaning given in Section 521.2105(2).

CHAPTER 522. PROPERTY DAMAGE AND DESTRUCTION PROVISIONS

Section 522.2201.	Arson in the First Degree
Section 522.2202.	Arson in the Second Degree
Section 522.2203.	Endangering by Fire or Explosion
Section 522.2204.	Failure to Control or Report a Dangerous Fire
Section 522.2205.	Causing or Risking Catastrophe
Section 522.2206.	Criminal Damage
Section 522.2207.	Consent Defense
Section 522.2208.	Definitions

Section 522.2201. Arson in the First Degree

(1) Offense Defined. A person commits an offense if:

(a) he starts a fire or causes an explosion with intent to destroy or damage a building,³² and

(b) is reckless as to whether any person sustains serious physical injury as a result of the fire or explosion or the firefighting as a result thereof.

(2) Definition. “Building,” in addition to its ordinary meaning, includes any dwelling, hotel, commercial structure, trailer, sleeping car, railroad car, or any structure with a valid certificate of occupancy.

(3) Grading. The offense is a Class A felony.

³² **Issue:** Should the offenses in Sections 2201 and 2202 apply more broadly to efforts to damage or destroy “property,” rather than only “buildings,” by fire or explosion?

Pro: Setting fire to, for example, a forest should be treated very severely, because of the destruction of the environment and the risk to those who fight the fires. Forest fires cause enormous loss in this state, to individuals as well as to the state. Indeed, setting forest fires is a more serious problem in this state than “conventional” arson. Though many of the fires are set in the Daniel Boone National Forest and are subject to federal prosecution, that is not a compelling reason to ignore such offenses in the Penal Code. Anyone who tries to burn down the forest — it should be kept in mind that the offense requires “intent to destroy or damage” — should be treated at least as severely as one who burns a building.

Con: It is agreed that starting fires on non-building property can be very harmful, but it is typically less harmful than starting a fire in a building. Class A felony status should be reserved for the most serious threats to human life. In instances where great damage, injury, or death is caused by a forest fire, there are other serious offenses available for prosecution. For example, if the fire results in more than \$1,000,000 of property damage, the offense would be a Class B felony under Section 2206.

Reporter: No recommendation.

Section 522.2202. Arson in the Second Degree

(1) Offense Defined. A person commits an offense if he starts a fire or causes an explosion with intent to destroy or damage a building:³³

- (a) of another; or
- (b) of his own or of another, to collect or facilitate the collection of insurance proceeds for such loss; or
- (c) being reckless as to whether the building is inhabited or occupied.

(2) Defense. It is a defense to a prosecution under this Section that the person's sole intent was to destroy or damage the building for a lawful purpose.

(3) Grading. The offense is a Class B felony.

Section 522.2203. Endangering by Fire or Explosion

(1) Offense Defined. A person commits an offense if he knowingly starts a fire or causes an explosion, whether on his own property or another's, and thereby recklessly

- (a) creates a risk of death or physical injury to another person; or
- (b) creates a risk of damage or destruction to a building of another.

(2) Grading.

- (a) The offense is a Class B felony if the person creates a risk of another person's death under circumstances manifesting an extreme indifference to the value of human life.
- (b) Otherwise the offense is a Class C felony.

Section 522.2204. Failure to Control or Report a Dangerous Fire

(1) Offense Defined. A person commits an offense if:

(a) he knows that a fire creates a risk of death to, or damage to a substantial amount of property of, another; and

(b) he fails:

- (i) to give a prompt fire alarm, or
- (ii) to take reasonable measures to put out or control the fire, when he can do so without substantial risk to himself; and

(c) (i) he knows that he is under an official, contractual, or other legal duty to prevent or combat the fire, or

(ii) the fire was started, even if lawfully, by him or with his assent, or on property in his custody or control.

(2) Grading. The offense is a Class A misdemeanor.

³³ See the pro-con footnote attached to Section 2201.

Section 522.2205. Causing or Risking Catastrophe

(1) Causing Catastrophe.

(a) Offense Defined. A person commits an offense if he causes a catastrophe by explosion, fire, flood, avalanche, collapse of building, bridge, or tunnel, release of poison gas, radioactive material, or other harmful or destructive force or substance, or by any other means of causing potentially widespread injury or damage.

(b) Grading. The offense is:

(i) a Class A felony if committed knowingly, and

(ii) a Class B felony if committed recklessly.

(2) Risking Catastrophe.

(a) Offense Defined. A person commits an offense if he recklessly creates a risk of catastrophe in the employment of fire, explosives, or other dangerous means, as described in Subsection (1)(a).

(b) Grading. The offense is a Class D felony.

(3) Failure to Prevent Catastrophe.

(a) Offense Defined. A person who recklessly fails to take reasonable measures to prevent or mitigate a catastrophe commits an offense if:

(i) he knows that he is under an official, contractual, or other legal duty to take such measures; or

(ii) he did or assented to the act causing or threatening the catastrophe.

(b) Grading. The offense is a Class A misdemeanor.

(4) Definitions.

(a) “Catastrophe” means:

(i) serious physical injury to five or more persons, or

(ii) substantial damage to five or more buildings, or

(iii) substantial damage to a vital public facility that seriously impairs its usefulness or operation.

(b) “Vital public facility” includes a facility maintained for use as a bridge (whether over land or water), dam, tunnel, wharf, communications or radar installation, power station, or any other facility that is necessary to ensure or protect the public health, safety, or welfare.

Section 522.2206. Criminal Damage

(1) Offense Defined. A person commits an offense if he:

(a) damages property of another; or

(b) negligently damages property of another in the employment of fire, explosives, or other dangerous means described in Section 522.2205(1)(a); or

(c) tampers with property of another and thereby creates a risk of physical injury or property damage; or

- (d) causes another to suffer pecuniary loss by deception or threat.
- (2) Grading. Criminal damage knowingly caused is:
 - (a) a Class [B]³⁴ felony if the pecuniary loss is in excess of \$1,000,000;
 - (b) a Class [C]* felony if:
 - (i) the pecuniary loss is in excess of \$10,000, or
 - (ii) the person causes a substantial interruption or impairment of public communication, transportation, supply of water, gas or power, or other public service, or
 - (iii) the person substantially damages or destroys a firearm or propelled vehicle;
 - (c) a Class [D]* felony if the pecuniary loss is in excess of \$1,000;
 - (d) a Class [E]* felony if the pecuniary loss is in excess of \$300;
 - (e) a Class [A]* misdemeanor if the pecuniary loss is in excess of \$50.
 - (f) Otherwise the offense is a Class C misdemeanor.
 - (g) Recklessly Causing Criminal Damage. Criminal damage caused recklessly is an offense one grade lower than the grade it would be if caused knowingly.

Section 522.2207. Consent Defense

Whenever in sections 522.2201 to 522.2206 it is an element of the offense that the property is of another, it is a defense to a prosecution for that offense that the owner has consented to the person's conduct with respect to the property.

Section 522.2208. Definitions

- (1) "Building" has the meaning given in Section 522.2201(2).
- (2) "Catastrophe" has the meaning given in Section 522.2205(4)(a).
- (3) "Government" has the meaning given in Section 500.107.
- (4) "Owner" has the meaning given in Section 521.2102(4)(d).
- (4) "Physical injury" has the meaning given in Section 500.107.
- (5) "Property" has the meaning given in Section 522.2102(4)(d).
- (6) "Property of another" has the meaning given it in Section 521.2112(8).
- (7) "Serious physical injury" has the meaning given in Section 500.107.
- (8) "Vital public facility" has the meaning given in Section 522.2205(4)(b).

³⁴ See the pro-con footnote attached to Section 521.2110(2).

CHAPTER 523. BURGLARY AND OTHER CRIMINAL INTRUSION PROVISIONS

Section 523.2301.	Burglary
Section 523.2302.	Criminal Trespass
Section 523.2303.	Definitions

Section 523.2301. Burglary

(1) Offense Defined. A person commits an offense if, knowing he has no license or authority, he:

- (a) enters or
- (b) remains surreptitiously³⁵

in a building at a time when the premises are not open to the public, with the intention to commit an offense therein.

2) Grading.

(a) Burglary in the First Degree. Burglary is a Class B felony if:

- (i) the offender is armed with explosives or a deadly weapon other than an ordinary hunting knife that the person regularly carries; or
 - (ii) causes physical injury to any person who is not a participant in the crime; or
 - (iii) uses or threatens the use of a dangerous instrument against any person who is not a participant in the crime.
-

³⁵ **Issue:** Should the requirement that one who remains in a building do so “surreptitiously” be deleted?

Pro: This element is unnecessary. A person who remains in a building without authority to be there, and with the intent to commit an offense, merits liability regardless of whether his behavior is “surreptitious.”

Con: To the extent cases like *Bowling v. Com.*, 942 S.W.2d 293 (Ky. 1997), suggest that any entry or remaining with intent to commit a crime is automatically “without authority,” such an expansive view of burglary is a bad idea. It would turn every shoplifter into a burglar and undercut the expression of greater seriousness that the burglary offense is meant to contain. Further, the specific harm of the burglary offense is the fear and danger created by an unknown and unwanted intruder. Where a person remains in a building, but does so openly, there is no such harm.

Nor should the conditions of burglary be expanded to situations where the offender is asked to leave. Such cases are simple cases of trespass and theft (or whatever the underlying offense). They do not create the special kind of fear of silent intrusion against which burglary offense is aimed.

Con (with amendment): The “surreptitiously” requirement should be kept but the conditions that trigger burglary should be expanded to also include cases where the offender is explicitly told to leave and refuses. That is, after “surreptitiously” the following words should be added: “or after explicit revocation of license or authority”.

Reporter: No recommendation.

(b) Burglary in the Second Degree. Burglary is a Class C felony if committed in a dwelling.

(c) Burglary in the Third Degree. Otherwise burglary is a Class D felony.

Section 523.2302. Criminal Trespass

(1) Offense Defined. A person commits an offense if he enters or remains in a place where he knows he has no license or authority to be.

(2) Defenses. It is a defense to a prosecution under this section that:

(a) the premises were at the time of entry open to the public and the person complied with all lawful conditions imposed on access to or remaining in the premises; or

(b) the person reasonably believed that the owner of the premises, or other person empowered to license access thereto, would have licensed him to enter or remain.

(3) Grading.

(a) Trespass in the First Degree. Trespassing in a dwelling or in highly secured premises is a Class E felony.

(b) Trespass in the Second Degree. Trespassing in any building, storage structure, separately secured or occupied portion thereof, or in any place so enclosed as manifestly to exclude intruders is a Class A misdemeanor.

(c) Trespass in the Third Degree. Otherwise trespassing is a Class C misdemeanor.

4) Definitions.

(a) “Highly secured premises” means any place that is continuously guarded and where display of visible identification is required of persons while they are on premises.

(b) “Storage structure” means any structure, truck, railway car, vessel, or aircraft that is used primarily for the storage or transportation of property.

Section 523.2303. Definitions

(1) “Building” has the meaning given in Section 522.2201(2).

(2) “Dangerous instrument” has the meaning given in Section 515.1501(3)(a).

(3) “Deadly weapon” has the meaning given in Section 515.1501(3)(b).

(4) “Dwelling” has the meaning given in Section 500.107.

(5) “Highly secured premises” has the meaning given in Section 523.2302(4)(b).

(6) “Physical injury” has the meaning given in Section 500.420(3).

(7) “Reasonable belief” has the meaning given in Section 500.107.

(8) “Storage structure” has the meaning given in Section 523.2302(4)(b).

CHAPTER 524. INVASION OF PRIVACY OFFENSES

Section 524.2401.	Unlawful Eavesdropping or Surveillance
Section 524.2402.	Unlawfully Acquiring Information
Section 524.2403.	Unlawfully Divulging Information
Section 524.2404.	Exceptions to Chapter 524 Offenses
Section 514.2405.	Definition

Section 524.2401. Unlawful Eavesdropping or Surveillance

- (1) Offense Defined. A person commits an offense if, except as authorized by law, he:
- (a) trespasses on property with intention to subject anyone in a private place to eavesdropping or other surveillance; or
 - (b) installs or uses in any private place, without the consent of the person or persons entitled to privacy there, any device for observing, photographing, recording, amplifying, or broadcasting sounds or events in such place; or
 - (c) installs or uses outside a private place any device for hearing, recording, amplifying, or broadcasting sounds originating in such private place that would not ordinarily be audible or comprehensible outside the private place, without the consent of the person or persons entitled to privacy there.
 - (d) uses any device to intercept, record, amplify, or broadcast any part of a wire or oral communication of others without the consent of at least one (1) party thereto.

2) Definition. “Private place” means a place where a person reasonably would expect to be safe from casual or hostile intrusion or surveillance. A private place does not include an area to which the public or a substantial group thereof has access, but does include areas within public places where people reasonably expect to be safe from casual or hostile intrusion or surveillance.

- (3) Grading. The offense is a Class E felony.³⁶

³⁶ **Issue:** Should the grade of this offense be raised to Class D felony?

Pro: The corresponding current offense in 526.020 is a Class D felony. The relevant conduct, which usually involves both trespassing and surveillance, should be graded more seriously than mere trespassing (first degree), which is a Class E felony under Section 2302(3)(a).

Con: The Section 2302(3)(a) offense involves trespass within a dwelling, whereas the “peeping Tom” situation this offense covers will usually involve surveillance of the building from outside, which presents a less immediate threat of placing a resident in fear or danger. This offense is not *more serious* than trespassing inside someone else’s home and should not be graded higher. Where both offenses occur, multiple liability may be appropriate.

Reporter: No recommendation.

Section 524.2402. Unlawfully Acquiring Information

(1) Offense Defined. A person commits an offense if, knowing he is not privileged to do so, he:

- (a) opens or reads a sealed letter or other sealed private communication; or³⁷
- (b) gains access to information or electronic programs or data; or
- (c) obtains in any manner from an employee, officer, or representative of a communications common carrier information with respect to the contents or nature of a communication.

(2) Exception. The offense defined in Subsection (1)(a) does not apply to the censoring of sealed letters or sealed communications for security purposes in official detention or penal facilities.

(3) Grading. The offense is a Class B misdemeanor.

Section 524.2403. Unlawfully Divulging Information

(1) Offense Defined. A person is guilty of an offense if he knowingly divulges:

- (a) or uses information obtained in violation of Sections 524.2401, 524.2402, or 524.2403, or
- (b) information learned in the course of employment with a communications common carrier engaged in transmitting the information, or
- (c) information held by the governmental, the disclosure of which is unlawful under the laws of the Commonwealth.

(2) Grading. The offense is a Class A misdemeanor.

³⁷ **Issue:** Should subsection (1)(a), prohibiting unauthorized tampering with mail, be deleted?

Pro: Opening a letter when you are not privileged to do so should not be a crime. The offense as written could apply to the curious, or individuals who are estranged and vengeful. Industrial espionage and other serious violations of privacy interests are addressed elsewhere in the Code.

Con: The proposed Subsection (1)(a) is identical to KRS 526.050(1)(a). More generally, all subsections of Section 2402 have antecedents in current law (434.855, 526.050, 434.685, 434.845, 434.850) that deal with various specific ways of acquiring information or interference with specific modes of communication (computers, mail, etc.). It seems inconsistent to cover some forms of improper acquisition of private information but not others. This form of tampering with sealed communications is no less serious than other forms of improper acquisition of private information. The underlying interest in protecting privacy is significant and merits protection under the criminal law. Note that the offense is only a Class B misdemeanor.

Reporter: No recommendation.

Section 524.2404. Exceptions to Chapter 524 Offenses

A person does not commit an offense defined in this Chapter if his offense conduct constitutes only:

(1) inadvertently overhearing a communication through a regularly installed telephone party line or on a telephone extension, and he does not divulge the communication; or

(2) intercepting, disclosing, or using a communication transmitted through a communications common carrier for a purpose necessary for mechanical or service quality control checks, while acting in the course of employment with the communications common carrier.

Section 524.2405. Definition

“Private place” has the meaning given in Section 524.2401(2).

CHAPTER 531. FORGERY AND FRAUDULENT PRACTICES

Section 531.3101.	Forgery and Counterfeiting
Section 531.3102.	Tampering with Writing, Record, or Device
Section 531.3103.	Criminal Simulation
Section 531.3104.	Unauthorized Impersonation
Section 531.3105.	Deceptive Practices
Section 531.3106.	False or Bait Advertising
Section 531.3107.	Falsifying Business Records
Section 531.3108.	Defrauding Secured Creditors
Section 531.3109.	Fraud in Insolvency
Section 531.3110.	Issuing False Financial Statement
Section 531.3111.	Receiving Deposits in Failing Financial Institution
Section 531.3112.	Misapplication of Entrusted Property
Section 531.3113.	Operating a Misrepresented Company
Section 531.3114.	Commercial Bribery
Section 531.3115.	Tampering with a Publicly Exhibited Contest
Section 531.3116.	Ticket Scalping
Section 531.3117.	Bad Checks
Section 531.3118.	Fraudulent Use of Credit or Debit Card
Section 531.3119.	Definitions

Section 531.3101. Forgery and Counterfeiting

(1) Offense Defined. A person commits an offense if, with intent to defraud, deceive, or injure another, he:

- (a) alters any writing of another without his authority; or
- (b) makes, completes, executes, authenticates, issues, or transfers any writing so that it purports:

- (i) to be the act of another who did not authorize that act, or
- (ii) to have been executed at a time or place or in a numbered sequence other than was in fact the case, or

- (iii) to be a copy of an original when no such original existed.

- (c) offers any writing that he knows to be forged in a manner specified in Subsections (1)(a) or (1)(b).

(2) Definition. “Writing” includes printing, electronically recorded data, or any other method of recording information, money, coins, tokens, stamps, seals, credit cards, badges, trademarks, digital signatures or other encrypted identifiers, electronic mail routing information, and other symbols of value, right, privilege, or identification.

- (3) Grading. The offense is:
- (a) a Class C felony if the writing is or purports to be part of an issue of:
 - (i) paper money, stamps, securities, or other valuable instruments issued by a government or governmental agency, or
 - (ii) stock, bonds, or other instruments representing interests in or claims against a corporate or other organization or its property;
 - (b) a Class D felony if the writing is or purports to be:
 - (i) a deed, will, codicil, contract, assignment, commercial instrument, credit card, or other instrument that does or may evidence, create, transfer, terminate, or otherwise affect a legal right, interest, obligation, or status, or
 - (ii) a public record or an instrument filed or required or authorized by law to be filed in or with a public office or public servant, or
 - (iii) a writing officially issued or created by a public office, public servant, or governmental agency.
 - (c) Otherwise the offense is a Class A misdemeanor.

Section 531.3102. Tampering with Writing, Record, or Device

- (1) Offense Defined. A person commits an offense if, knowing that he has no privilege to do so, he:
- (a) tampers with, falsifies, destroys, removes, or conceals any writing, record, or device, with intent to deceive or injure anyone or to conceal any wrongdoing; or
 - (b) offers a writing, record, or device, knowing that it has been altered in a manner prohibited by Subsection (1)(a).

- (2) Grading.
- (a) The offense is a Class D felony if the writing is or purports to be:
 - (i) a deed, will, codicil, contract, assignment, commercial instrument, credit card, or other instrument that does or may evidence, create, transfer, terminate, or otherwise affect a legal right, interest, obligation, or status, or
 - (ii) a public record or an instrument filed or required or authorized by law to be filed in or with a public office or public servant, or
 - (iii) a writing officially issued or created by a public office, public servant, or governmental agency.
 - (b) Otherwise the offense is a Class A misdemeanor.

Section 531.3103. Criminal Simulation

- (1) Offense Defined. A person commits an offense if, with intent to defraud, he makes or alters any object in such manner that it appears to have an antiquity, rarity, source, or authorship that it does not in fact possess.

- (2) Grading. The offense is a Class A misdemeanor.

Section 531.3104. Unauthorized Impersonation

(1) Offense Defined. A person commits an offense if, without the person's consent, he:
(a) represents himself to be another person, being reckless as to whether his misrepresentation will:

- (i) deprive the other person of anything of value, or
- (ii) injure the other person's reputation, or
- (iii) give himself a benefit to which he is not entitled; or

(b) represents himself to be another person or to have a characteristic of legal significance that he knows he does not have, with intent to obtain service or property to which he is not entitled; or

(c) manufactures, transfers, sells, or purchases any part of the personal identity or financial information of another person with intent to bring about any result listed in Subsections (1)(a)(i), (ii), or (iii).

(2) Definition. The "personal identity" of a person includes any identifying information of that person, such as one's name, Social Security number, birth date, personal identification number or code, and any other information that could be used to identify the person, including unique biometric data.

(3) Grading.

(a) Trafficking in Stolen Identities. The offense under Subsection (1)(c) is a Class D felony.

(b) Otherwise the offense is a Class A misdemeanor.

Section 531.3105. Deceptive Practices

(1) Offense Defined. A person commits an offense if, [in the course of engaging in a business, occupation, or profession,]³⁸ he knowingly:

(a) uses or possesses for use a false weight or measure or any other device for falsely determining or recording any quality or quantity; or

(b) sells, offers, or exposes for sale, or delivers less than the represented quantity of any commodity or service; or

³⁸ **Issue:** Should the bracketed language be deleted, thereby broadening the offense to include the delineated deceptive practices when they are performed in other than a business context?

Pro: The defined conduct is inherently dishonest. There seems little reason to prohibit such conduct when businesspeople engage in it, but fail to criminalize the same conduct when others engage in it.

Con: The criminal law ought not intrude itself into the private affairs of people in the way that this offense would do if the bracketed language were omitted. Regulating the conduct of business is a proper government function. Attempting to regulate the private conduct of neighbors would trivialize criminal liability.

Reporter: No recommendation.

(c) takes or attempts to take more than the represented quantity of any commodity, thing or service when as a buyer, agency, or receiver he furnishes the weight, measure, or weighing or measuring device by means of which the amount of the commodity, thing, or service is determined; or

(d) sells, offers, or exposes for sale adulterated or mislabeled commodities.

(2) Definition.

(a) “Adulterated” means varying from the standard of composition or quality prescribed by statute or lawfully promulgated administrative regulation or, if none, as set by established commercial usage.

(b) “Mislabeled” means:

(i) varying from the standard of truth or disclosure in labeling prescribed by statute or lawfully promulgated administrative regulation or, if none, as set by established commercial usage; or

(ii) represented as being another person’s product, though otherwise labeled accurately as to quality or quantity.

(3) Grading. The offense is a Class A misdemeanor.

Section 531.3106. False or Bait Advertising

(1) Offense Defined. A person commits an offense if, in any advertisement or other means of communication addressed to the public or to a substantial number of persons:

(a) he knowingly makes or causes to be made a false or misleading statement, or

(b) he offers property or services as part of a scheme or plan with the intent to sell or provide the advertised property or services:

(i) at a higher price than that at which he offered them, or

(ii) in a quantity insufficient to meet the reasonably expected public demand, unless the quantity is specifically stated in the advertisement, or

(iii) not at all.

(2) Grading. The offense is a Class A misdemeanor.

Section 531.3107. Falsifying Business Records

(1) Offense Defined. A person commits an offense if, with intent to defraud, he:

(a) makes or causes a false entry to be made in the business records of an enterprise;

or

(b) alters, erases, obliterates, deletes, removes or destroys a true entry in the business records of an enterprise; or

(c) omits to make a true entry in the business records of an enterprise in violation of a duty to do so which he knows to be imposed upon him by law or by the nature of his position; or

(d) prevents the making of a true entry or causes the omission thereof in the business records of an enterprise.

(2) Definitions.

(a) “Business record” means any writing or article kept or maintained by an enterprise for the purpose of evidencing or reflecting its condition or activity.

(b) “Enterprise” means any entity of one or more persons, corporate or otherwise, public or private, engaged in business, commercial, professional, industrial, eleemosynary, social, political, or governmental activity.

(3) Grading. The offense is a Class A misdemeanor.

Section 531.3108. Defrauding Secured Creditors

(1) Offense Defined. A person commits an offense if he destroys, removes, conceals, encumbers, transfers, or otherwise deals or disposes with property subject to a security interest or payment of a judgment with intent unlawfully to hinder enforcement of that interest or judgment.

(2) Grading. The offense is a Class A misdemeanor or is the grade that would be provided under Section 521.2110 for theft under the same circumstances, whichever is higher.

Section 531.3109. Fraud in Insolvency

(1) Offense Defined. A person commits an offense if, knowing that proceedings have been or are about to be instituted for the appointment of a receiver or other person entitled to administer property for the benefit of creditors, or that any other composition or liquidation for the benefit of creditors has been or is about to be made, he:

(a) destroys, removes, conceals, encumbers, transfers, or otherwise deals with any property with intent to defeat or obstruct the claim of any creditor, or otherwise to obstruct the operation of any law relating to administration of property for the benefit of creditors; or

(b) knowingly falsifies any writing or record relating to the property; or

(c) knowingly misrepresents or refuses to disclose to a receiver or other person entitled to administer property for the benefit of creditors, the existence, amount, or location of the property, or any other information that the actor would be legally required to furnish to such administrator.

(2) Grading. The offense is a Class A misdemeanor or is the grade that would be provided under Section 521.2110 for theft under the same circumstances, whichever is higher.

Section 531.3110. Issuing False Financial Statement

- (1) Offense Defined. A person commits an offense if, with intent to defraud, he:
 - (a) knowingly makes or utters a writing that purports to describe the financial condition or ability to pay of himself or of some other person and that is inaccurate in some material respect; or
 - (b) represents in writing that a writing purporting to describe a person's financial condition or ability to pay as of a prior date is accurate with respect to that person's financial condition or ability to pay, knowing the writing to be materially inaccurate in that respect.
- (2) Grading. The offense is a Class A misdemeanor.

Section 531.3111. Receiving Deposits in Failing Financial Institution

- (1) Offense Defined. A person commits an offense if:
 - (a) as an officer, manager, or other person participating in the direction of a financial institution, or a broker of financial instruments,
 - (b) he knowingly receives or permits the receipt of a deposit or other investment, knowing that the institution is insolvent
- (2) Definition. A financial institution is "insolvent" if it is unable to pay its obligations in the ordinary or usual course of business for any reason.
- (3) Grading. The offense is a Class D felony.

Section 531.3112. Misapplication of Entrusted Property

- (1) Offense Defined. A person commits an offense if he applies or disposes of property that has been entrusted to him as a fiduciary, or property of the government or of a financial institution, in a manner that he knows is unauthorized and involves substantial risk of loss or detriment to the owner of the property or to a person for whose benefit the property was entrusted.
- (2) Definition. "Fiduciary" means a trustee, guardian, executor, administrator, receiver, or any other person subject to a similar duty of fidelity to a principal, investor, or beneficiary.
- (3) Grading. The offense is a Class A misdemeanor or is the grade that would be provided under Section 521.2110 for theft under the same circumstances, whichever is higher.

Section 531.3113. Operating a Misrepresented Company

(1) **Offense Defined.** A person commits an offense if he knowingly establishes or operates a business that falsely represents itself to be a minority business enterprise, or disadvantaged business enterprise, as defined in 79 C.F.R. 23.5 or 15 C.F.R. 1400.2, operated or operating for the purpose of obtaining funds, contracts, subcontracts, services, or other benefits from any government entity.

(2) **Grading.** The offense is a Class D felony.

Section 531.3114. Commercial Bribery

(1) **Commercial Bribery.** A person commits an offense if:

- (a) as an employee, agent, or fiduciary, he knowingly solicits, accepts, or agrees to accept any benefit from another person; and
- (b) such solicitation, acceptance, or agreement is made:
 - (i) without the consent of his employer, principal, or beneficiary, and
 - (ii) with the understanding that he will engage in conduct contrary to his employer's, principal's, or beneficiary's best interests, or otherwise contrary to his legal duty.

(2) **Offering Bribe.** A person commits an offense if he knowingly offers, confers, or agrees to confer any benefit the acceptance of which would be criminal under Subsection (1).

(3) **Definition.** "Benefit" means gain or advantage to the recipient or to a third person pursuant to the desire or consent of the recipient.

(4) **Grading.** The offense is a Class D felony.

Section 531.3115. Tampering with a Publicly Exhibited Contest

(1) **Tampering with a Publicly Exhibited Contest.** A person commits an offense if, with intent to prevent a publicly exhibited contest from being conducted in accordance with the rules and usages purporting to govern it, he:

- (a) offers, confers, or agrees to confer any benefit upon, or threatens any injury to a participant, official, or other person associated with the contest or exhibition; or
- (b) tampers with any person, animal, or thing.

(2) **Soliciting or Accepting Benefit for Tampering.** A person commits an offense if he knowingly solicits, accepts, or agrees to accept any benefit the giving of which would be criminal under Subsection (1).

(3) **Participation in Improperly Conducted Contest.** A person commits an offense if he knowingly engages in, sponsors, produces, judges, or otherwise participates in a publicly exhibited contest knowing that the contest is not being conducted in compliance with the rules and usages purporting to govern it, by reason of conduct that would be criminal under this Section.

(4) **Grading.** Each of the offenses defined in this Section is a Class D felony.

Section 531.3116. Ticket Scalping³⁹

(1) Offense Defined. A person commits an offense if he intentionally sells a ticket to a public performance at a price greater than that charged at the place of admission or printed on the ticket, unless authorized by the issuer or by law.

(2) Definition. “Public performance” means any form of entertainment involving machines, persons, animals, or objects that is viewed by the public, including a sports contest.

(3) Grading. The offense is a violation.

Section 531.3117. Bad Checks

(1) Offense Defined. A person commits an offense if he issues or passes a check or similar sight order for the payment of money, knowing that it will not be honored by the drawee.

(2) Permissive Inference. The trier of fact may infer that an issuer knew that the check or order (other than a postdated check or order) would not be paid, if:

(a) the issuer had no account with the drawee at the time the check or order was issued; or

(b) payment was refused by the drawee for lack of funds, upon presentation within 30 days after issue, and the issuer failed to make good within 10 days after receiving notice of that refusal.

(3) Grading. The offense is a Class A misdemeanor.

Section 531.3118. Fraudulent Use of Credit or Debit Card

(1) Offense Defined. A person commits an offense if he uses a credit or debit card with the intent of obtaining property or services knowing that:

(a) the card is stolen or forged; or

(b) the card has been revoked or cancelled; or

(c) for any other reason his use of the card is unauthorized by the issuer or cardholder.

³⁹ **Issue:** Should Section 3116, defining an offense of ticket scalping, be deleted?

Pro: The current law on this subject is winked at, enforced inconsistently, and contains a hypocritical exception that allows the issuer to sell at more than face value. Many states don't have scalping laws.

Con: If the offense were abolished, scalpers would be encouraged to buy up tickets to high-demand events, and the public would be unable to buy tickets from the box office, and thus forced to deal with scalpers, which would mean paying more and dealing in an uncertain and unregulated market.

Reporter: No recommendation.

(2) Definitions.

(a) “Credit card” means a writing or other evidence of an undertaking to pay for property or services delivered or rendered to or upon the order of a designated person or bearer.

(b) “Debit card” means any instrument or device for the use of the cardholder in obtaining money, goods, services, and anything else of value, payment of which is made against funds previously deposited by the cardholder.

(3) Defense.

(a) It is a defense to prosecution under Subsection (1)(c) that the person had the intent and ability to meet all obligations to the issuer arising out of his use of the card.

(b) The defendant carries the burden of persuasion on the defense in Subsection (3)(a) and must prove such defense by a preponderance of the evidence.

(4) Grading. The offense is a Class A misdemeanor.

Section 531.3119. Definitions

(1) “Adulterated” has the meaning given in Section 531.3105(2)(a).

(2) “Benefit” has the meaning given in Section 531.3114(2).

(3) “Business record” has the meaning given in Section 531.3107(2)(a).

(4) “Credit card” has the meaning given in Section 531.3118(2)(a).

(5) “Debit card” has the meaning given in Section 531.3118(2)(b).

(6) “Enterprise” has the meaning given in Section 531.3107(2)(b).

(7) “Fiduciary” has the meaning given in Section 531.3112(2).

(8) “Financial institution” has the meaning given in Section 521.2107(4).

(9) “Government” has the meaning given in Section 500.107.

(10) “Mislabelled” has the meaning given in Section 531.3105(2)(b).

(11) “Personal identity” has the meaning given in Section 531.3104(2).

(12) “Public performance” has the meaning given in Section 531.3116(2).

(13) “Required or authorized by law” has the meaning given in Section 52.5201(5)(d).

(14) “Writing” has the meaning given in Section 531.3101(2).

CHAPTER 541. OFFENSES AGAINST THE FAMILY

Section 541.4101.	Bigamy
Section 541.4102.	Incest
Section 541.4103.	Concealing Birth of Infant
Section 541.4104.	Abandonment of Minor
Section 541.4105.	Nonsupport
Section 541.4106.	Endangering the Welfare of a Minor
Section 541.4107.	Contributing to the Delinquency of a Minor
Section 541.4108.	Unlawful Adoption Fees and Representation
Section 541.4109.	Abortion
Section 541.4110.	Definitions

Section 541.4101. Bigamy

- (1) Offense Defined. A person commits an offense if the person:
- (a) purports to marry another person knowing he has a husband or wife or knowing the other person has a husband or wife; or
 - (b) cohabits in this Commonwealth after such a purported marriage, whether the purported marriage was conducted in this Commonwealth or elsewhere.
- (2) Grading. The offense is a Class D felony.

Section 541.4102. Incest

- (1) Offense Defined. A person commits an offense if he has sexual intercourse or deviate sexual intercourse with a person he knows to be related to him, without regard to legitimacy, as:
- (a) by blood relationship of either the whole or half blood or by adoption,
 - (i) his ancestor or descendant,
 - (ii) his brother or sister,
 - (iii) his uncle or aunt, or
 - (iv) his nephew or niece; or
 - (b) his stepchild or stepparent, while the marriage creating that relationship lasts.
- (2) Grading. The offense is a Class C felony.

Section 541.4103. Concealing Birth of Infant

- (1) Offense Defined. A person commits an offense if he conceals the corpse of a newborn child with intent to conceal the fact of its birth or to prevent a determination of whether it was born dead or alive.
- (2) Grading. The offense is a Class A misdemeanor.

Section 541.4104. Abandonment of Minor

- (1) Offense Defined. A person is commits an offense if:
 - (a) as a parent, guardian, or other person legally charged with the care or custody of a minor,
 - (b) he deserts the minor in any place:
 - (i) under circumstances endangering his life or health, and
 - (ii) with intent to abandon him.
- (2) Definition. “Minor” means any person who has not reached the age of majority as defined in KRS 2.015.
- (3) Grading. The offense is a Class D felony.

Section 541.4105. Nonsupport

- (1) Offense Defined. A person commits an offense if he:
 - (a) persistently fails to provide support:
 - (i) to a minor, a child adjudged mentally disabled or an indigent spouse,
 - (ii) that he can reasonably provide, and
 - (iii) that he knows he has a duty to provide; or
 - (b) being subject to a court order to pay an amount for the support of a minor child:
 - (i) is delinquent in meeting the full obligation established by such order,
 - (ii) has been so delinquent for a period of at least two (2) months duration.
- (2) Duty to Child and Spouse. A person has a duty to provide support for an indigent spouse, a minor child, or a child adjudged mentally disabled.
- (3) Grading.
 - (a) The offense is a Class D felony if the person is in arrears by more than one thousand dollars (\$5,000).
 - (b) The offense is a Class E felony if:
 - (i) the person is in arrears by more than one thousand dollars (\$1,000); or
 - (ii) the person has made no support payment for six (6) consecutive months;or
 - (iii) the person’s nonsupport has placed the dependent in destitute circumstances.
 - (c) Otherwise the offense is a Class A misdemeanor.
- (4) Permissive Inferences.
 - (a) The factfinder may infer that, if the person satisfies the requirements of duty under Subsection (2), the person knows he has such duty and satisfies Subsection (1)(a)(iii).
 - (b) For the purposes of Subsection (3)(a)(iii), the factfinder may infer that a dependent is in destitute circumstances if the dependent is a recipient of public assistance [as defined in KRS 205.010].

Section 541.4106. Endangering the Welfare of a Minor

- (1) Offense Defined. A person commits an offense if he:
- (a) is a parent, guardian, or other person legally charged with the care or custody of a minor, and
 - (b) fails or refuses to exercise reasonable diligence in the control of such child to prevent him from becoming a neglected, dependent, or delinquent child.
- (2) Grading. The offense is a Class A misdemeanor.

Section 541.4107. Contributing to the Delinquency of a Minor

- (1) Offense Defined. A person commits an offense if:
- (a) not being a retail licensee or a parent or guardian of the minor, he knowingly sells, gives, purchases, or procures any alcoholic or malt beverage for a minor; or
 - (b) knowingly induces, assists, or causes a minor to commit an offense; or
 - (c) knowingly induces, assists, or causes a minor to become a habitual truant; or
 - (d) persistently and knowingly induces, assists, or causes a minor to disobey his parent or guardian.
- (2) Defense. It is an affirmative defense to liability under Subsection (1)(a) that:
- (a) the sale was induced by the use of false, fraudulent, or altered identification papers or other documents, and
 - (b) the appearance and character of the purchaser were such that his age could not have been ascertained by any other means, and
 - (c) the purchaser's appearance and character indicated strongly that he was of legal age to purchase alcoholic beverages.
- (3) Grading.
- (a) An offense under Subsection (1)(b), where the illegal activity is any felony, is a Class D felony.
 - (b) Otherwise the offense is a Class A misdemeanor.

Section 541.4108. Unlawful Adoption Fees and Representation

- (1) Offense Defined. A person commits an offense if he:
- (a) represents both the biological parents and the prospective adoptive parents in an adoption proceeding, or
 - (b) being an adoptive parent, proposed adoptive parent, agency, or intermediary, pays the attorney's fees of a biological parent for any purpose related to an adoption action except as approved by the court.
- (2) Grading. The offense is a Class A misdemeanor.

Section 541.4109. Abortion

A person violating the requirements of KRS Sections 311.715 through 311.820 shall be subject to the penalties provided in KRS Sections 311.990 and 311.992.

Section 541.4110. Definitions

- (1) “Deviate sexual intercourse” has the meaning given in Section 513.1301(2)(a).
- (2) “Minor” has the meaning given in Section 541.4104(2).
- (3) “Physical injury” has the meaning given in Section 500.107.
- (4) “Sexual intercourse” has the meaning given in Section 513.1301(2)(d).

CHAPTER 551. BRIBERY AND OFFICIAL MISCONDUCT OFFENSES

Section 551.5101.	Bribery
Section 551.5102.	Unlawful Compensation of a Public Servant
Section 551.5103.	Official Misconduct
Section 551.5104.	Misuse of Confidential Information
Section 551.5105.	Definitions

Section 551.5101. Bribery

- (1) Offense Defined. A person commits an offense if:
- (a) he offers, confers, or agrees to confer any pecuniary benefit upon a public servant with the intent to influence the public servant's vote, opinion, judgment, exercise of discretion, or other action in his official capacity as a public servant; or
 - (b) while a public servant, he solicits, accepts, or agrees to accept any pecuniary benefit upon an agreement or understanding that his vote, opinion, judgment, exercise of discretion, or other action as a public servant will thereby be influenced.
- (2) Definitions
- (a) "Pecuniary benefit" means benefit in the form of money, property, commercial interests, or anything else the primary significance of which is economic gain.
 - (b) "Public servant" means:
 - (i) any employee who is authorized to perform any official function on behalf of, and is paid by, the United States or this Commonwealth or any of its political subdivisions or governmental instrumentalities; or
 - (ii) any officer who is elected to office pursuant to statute, or who is appointed to an office which is established, and the qualifications and duties of which are prescribed, by statute, to discharge a public duty for the United States or this Commonwealth or any of its political subdivisions or governmental instrumentalities; or
 - (iii) any person exercising the functions of any public employee or officer described in Subsections (a) or (b); or
 - (iv) any person participating as advisor, consultant, or otherwise for any governmental unit or instrumentality, but not including witnesses; or
 - (v) any person elected, appointed, or designated to become a public servant although not yet occupying that position.
- (3) Grading. The offense is a Class C felony.

Section 551.5102. Unlawful Compensation of a Public Servant

(1) Offense Defined. A person commits an offense if (i) he offers or pays a pecuniary benefit to a public servant for, or (ii) being a public servant, he requests or accepts a pecuniary benefit for:

- (a) the performance of an official action knowing that the public servant is required to perform that action without compensation or at a lower level of compensation, or
- (b) giving advice or other assistance in preparing a bill, contract, claim, or other transaction or proposal as to which he knows that the public servant is likely to have an official discretion to exercise.

(2) Grading. The offense is a Class D felony.

Section 551.5103. Official Misconduct

(1) Offense Defined. A person commits an offense if, being a public servant, he knowingly:

- (a) commits an act relating to his office that constitutes an unauthorized exercise of his official functions; or
- (b) refrains from performing a duty imposed upon him by law or clearly inherent in the nature of his office; or
- (c) violates any statute or lawfully adopted rule or regulation relating to his office.

(2) Grading.

(a) The offense is a Class D felony if the public servant intends:

- (i) to obtain or confer a benefit, or
- (ii) to injure another person, or
- (iii) to deprive another person of a benefit.

(b) Otherwise the offense is a Class A misdemeanor

Section 551.5104. Misuse of Confidential Information

(1) Offense Defined. A person commits an offense if, being a public servant, in contemplation of official action by himself or by a governmental unit with which he is associated, or in reliance on information to which he has access in his official capacity and which has not been made public, he:

- (a) accepts or agrees to accept a pecuniary interest in any property, transaction or enterprise that may be affected by such information or official action; or
- (b) speculates or wagers on the basis of such information or official action.

(2) Grading. The offense is a Class D felony.

Section 551.5105. Definitions

- (1) “Benefit” has the meaning given in Section 531.3114(2).
- (2) “Pecuniary benefit” has the meaning given in Section 551.5101(2)(a).
- (3) “Public servant” has the meaning given in Section 551.5101(2)(b).

CHAPTER 552. PERJURY AND OTHER OFFICIAL FALSIFICATION OFFENSES

Section 552.5201.	Perjury and False Swearing
Section 552.5202.	Unsworn Falsification to Authorities
Section 552.5203.	False Reporting
Section 552.5204.	Impersonating a Public Servant
Section 552.5205.	Tampering with Public Records
Section 552.5206.	Definitions

Section 552.5201. Perjury and False Swearing

(1) Offense Defined: Perjury. A person commits an offense if he makes a material false statement that he does not believe to be true:

- (a) in any official proceeding under an oath required or authorized by law, or
- (b) in a subscribed writing for which an oath is required or authorized by law, with the intent to mislead a public servant in the performance of his official functions.

(2) Offense Defined: False Swearing. A person commits an offense if he makes a false statement under oath, required or authorized by law, that he does not believe to be true.

(3) Exception: Retraction. The offense under Subsection (1) is not committed if the person retracted the falsification in the course of the proceeding in which it was made before such false statement substantially affected the proceeding and before it became manifest that its falsity was or would be exposed.

(4) Exception: Denial of Guilt. The offense is not committed if the defendant's false statement is a plea of "not guilty" in a previous criminal trial.

(5) Definitions.

(a) "Material false statement" means any false statement, regardless of its admissibility under the rules of evidence, that could have affected the outcome of the proceeding.

(b) "Oath" means an affirmation or other legally authorized manner of attesting to the truth of a statement. A written statement shall be treated as if made under oath when:

(i) the statement was made on or pursuant to a form bearing notice, required or authorized by law, that false statements made therein are punishable; or

(ii) the document recites that the statement was made under oath, and:

(A) the declarant was aware of such recitation at the time he made the statement, or

(B) the declarant intended that the statement be represented as sworn, or

(C) the statement was in fact so represented by its delivery or utterance with the signed jurat of an officer authorized to administer oaths appended thereto.

(c) “Official proceeding” means a proceeding heard before any legislative, judicial, administrative, or other governmental agency or official authorized to hear evidence under oath, including any referee, hearing examiner, commissioner, notary, or other person taking testimony or depositions in any such proceeding.

(d) “Required or authorized by law” means the oath is provided for by statute, regulation, court rule, or otherwise by law.

(e) “Statement” means any representation, but includes a representation of opinion, belief, or other state of mind only if the representation clearly relates to state of mind apart from or in addition to any facts that are the subject of the representation.

(6) Inconsistent Statements. The offense is committed if a person makes [irreconcilably]⁴⁰ inconsistent statements under oath, even if the prosecution cannot prove which statement was false and not believed to be true by the defendant. If the nature of the different statements would provide different grades of the offense under Subsection (9), the grade of an offense proven under this Subsection shall be the lesser of the grades.

(7) Corroboration. Except as provided by Subsection (6), falsity of a statement may not be established solely through contradiction by the testimony of a single witness.

(8) Certain Irregularities No Defense. It is not a defense to prosecution under this Section that:

(a) the oath or affirmation was administered or taken in an irregular manner or that the declarant was not competent to make the statement, or

(b) the court in which the acts constituting the offense were committed lacked jurisdiction over the person of the accused or the subject matter.

(9) Grading.

(a) The offense under Subsection (1)(a) is a Class D felony.

(b) The offense under Subsection (1)(b) is a Class E felony.

(c) Otherwise the offense is a Class A misdemeanor.

⁴⁰ **Issue:** Should Subsection 5201(6), which explicitly allows liability where two or more mutually inconsistent statements are made under oath, be limited to instances where the statements are “irreconcilably” inconsistent?

Con: Where a witness makes two or more statements under oath that are inconsistent with one another, one of them must be a lie and therefore perjury. The prosecution should not be required to prove which of the statements is a lie. If the inconsistent statements are made in the course of a single proceeding, the witness would have the opportunity to retract one of the statements and thus avoid liability, as Section 5201(3) provides. If the witness does not avail himself of this opportunity, he should be liable for perjury.

Pro: Inconsistent statements are the norm in the trial of a case, including police officer witnesses. Prosecutors should not be allowed to simply put up two inconsistent statements in order to be able to prove perjury. If this shortcut to prosecution is allowed, it ought to be limited to situations where it is clear that there is no way to reconcile the statements that are in apparent conflict.

Reporter: No recommendation.

Section 552.5202. Unsworn Falsification to Authorities

(1) Offense Defined. A person commits an offense if, with an intent to mislead a public servant in the performance of his duty, he:

(a) makes a material false written statement that he does not believe to be true in an application for any pecuniary or other benefit or in a record required by law to be submitted to any governmental agency, or

(b) submits or invites reliance on any writing that he knows to be forged, or

(c) submits or invites reliance on any sample, specimen, map, boundary mark, or other object he knows to be false.

(2) Exception: Denial of Guilt. The offense is not committed if the defendant's false statement is a plea of "not guilty" in a previous criminal trial.

(3) Grading. The offense is a Class A misdemeanor.

Section 552.5203. False Reporting

(1) Offense Defined. A person commits an offense if:

(a) (i) after having been warned that giving a false name or address would be criminal,

(ii) he gives a false name or address to a peace officer who has asked for the same in the lawful discharge of his official duties,

(iii) with the intent to mislead the officer as to his identity; or

(b) he knowingly causes a false alarm of fire or other emergency to be transmitted to or within any organization, official or volunteer, that deals with emergencies involving danger to life or property; or

(c) he reports to law enforcement authorities an offense or incident within their official concern knowing that it did not occur; or

(d) he furnishes law enforcement authorities with information allegedly relating to an offense or incident within their official concern when he knows he has no information relating to such offense or incident; or

(e) he knowingly gives false information to any law enforcement authority with intent to implicate another; or

(f) he initiates or circulates a report or warning of an alleged occurrence or impending occurrence of a fire or other emergency under circumstances likely to cause public inconvenience or alarm when he knows the information reported, conveyed, or circulated is false or baseless.

(2) Grading.

(a) The offense under Subsection (1)(a) is a Class B misdemeanor.

(b) Otherwise the offense is a Class A misdemeanor.

Section 552.5204. Impersonating a Public Servant

- (1) Offense Defined. A person commits an offense if
 - (a) he pretends to:
 - (i) be a public servant, or
 - (ii) represent a public agency, or
 - (iii) act with the authority or approval of a public agency,
 - (b) with intent to induce another to:
 - (i) submit to such pretended official authority, or
 - (ii) otherwise act in reliance upon that pretense to his prejudice
- (2) Grading.
 - (a) If the person impersonates a peace officer, the offense is a Class D felony.
 - (b) Otherwise the offense is a Class A misdemeanor.

Section 552.5205. Tampering with Public Records

- (1) Offense Defined. A person commits an offense if:
 - (a) he knowingly makes a false entry in or falsely alters any public record, or
 - (b) knowing he lacks the authority to do so, he intentionally destroys, mutilates, conceals, removes, or otherwise impairs the availability of any public record, or
 - (c) knowing he lacks the authority to retain it, he intentionally refuses to deliver up a public record in his possession upon proper request of a public servant lawfully entitled to receive such record for examination or other purposes.
- (2) Grading. The offense is a Class D felony.

Section 552.5206. Definitions

- (1) “Law enforcement authority” has the meaning given in Section 500.107.
- (2) “Material false statement” has the meaning given in Section 552.5201(5)(a).
- (3) “Oath” has the meaning given in Section 552.5201(5)(b).
- (4) “Official proceeding” has the meaning given in Section 552.5201(5)(c).
- (5) “Peace officer” has the meaning given in Section 500.107.
- (6) “Public servant” has the meaning given in Section 551.5101(2)(b).
- (7) “Required or authorized by law” has the meaning given in Section 552.5201(5)(d).
- (8) “Statement” has the meaning given in Section 552.5201(5)(e).
- (9) “Writing” has the meaning given in Section 531.3101(2).

CHAPTER 553. INTERFERENCE WITH GOVERNMENTAL OPERATIONS

Section 553.5301.	Obstructing Governmental Operations
Section 553.5302.	Compounding a Crime
Section 553.5303.	Hindering Prosecution or Apprehension
Section 553.5304.	Fleeing or Evading Police
Section 553.5305.	Interfering with or Resisting a Police Officer
Section 553.5306.	Escape
Section 553.5307.	Promoting or Possessing Contraband
Section 553.5308.	Failure to Appear
Section 553.5309.	Bribing a Witness
Section 553.5310.	Intimidating, Harassing, or Tampering with a Participant in the Legal Process
Section 553.5311.	Retaliating Against a Participant in the Legal Process
Section 553.5312.	Bribery of, or Improper Communication With, a Juror
Section 553.5313.	Tampering with Physical Evidence
Section 553.5314.	Simulating Legal Process
Section 553.5315.	Unauthorized Practice of Law
Section 553.5316.	Definitions

Section 553.5301. Obstructing Governmental Operations

- (1) Offense Defined. A person commits an offense if:
 - (a) he intentionally obstructs, impairs, or hinders the performance of a lawful governmental function
 - (b) by using or threatening to use violence, force, or physical interference.
- (2) Definition. “Governmental function” means any activity that a public servant is legally authorized to undertake on behalf of the governmental unit that he serves.
- (3) Grading. The offense is a Class A misdemeanor.⁴¹

Section 553.5302. Compounding a Crime

- (1) Offense Defined. A person commits an offense if:
 - (a) he solicits, accepts, or agrees to accept any benefit upon an agreement or understanding that he will refrain from initiating a prosecution for a crime; or

⁴¹ The Working Group determined that the specialized offense of “Assault on a Service Animal” was unnecessary because the conduct was already covered by a variety of other offenses in this Chapter. If such

(b) he confers, offers, or agrees to confer any benefit upon another person upon agreement or understanding that such other person will refrain from initiating a prosecution for a crime.

(2) Defense. It is a defense that the benefit did not exceed an amount that the defendant reasonably believed to be due as restitution or indemnification for harm caused by the offense.

(3) Grading. The offense is a Class A misdemeanor.

an offense were added to the Penal Code, it might look something like the following:

Section 553.53__ . Assault on a Service Animal

(1) Offense Defined. A person commits an offense if he intentionally causes physical injury to what he knows is a service animal, whether the animal is on or off duty at the time of the offense.

(2) Definition. "Service animal" includes a:

(a) "bomb detection dog," which means a dog that is trained to locate bombs or explosives by scent;

(b) "narcotic detection dog," which means a dog that is trained to locate narcotics by scent;

(c) "patrol dog," which means a dog that is trained to protect a peace officer and to apprehend a person;

(d) "tracking dog," which means a dog that is trained to track and find a missing person, escaped inmate, or fleeing felon;

(e) "search and rescue dog," which means a dog that is trained to locate lost or missing persons, victims of natural or man-made disasters, and human bodies;

(f) "accelerant detection dog," which means a dog that is trained for accelerant detection, commonly referred to as arson canines;

(g) "cadaver dog," which means a dog that is trained to find human remains;

(h) "assistance dog," which means any dog that is trained to meet the requirements of KRS 258.500;

(i) Any dog that is trained in more than one (1) of the disciplines specified in paragraphs (a) to (h) of this subsection; or

(j) "Police horse," which means any horse that is owned, or the service of which is employed, by a law enforcement agency for the principal purpose of aiding in detection of criminal activity, enforcement of laws, and apprehension of offenders.

(3) Grading.

(a) If the person intentionally causes the death of the service animal, or causes such physical injury that it becomes physically incapable of ever returning to service, the offense is a Class E felony.

(b) Otherwise the offense is a Class B misdemeanor.

Section 553.5303. Hindering Prosecution or Apprehension

(1) Offense Defined. A person commits an offense if:

(a) with the intent to hinder the apprehension, prosecution, conviction, or punishment of another who is being sought in connection with the commission of an offense,

(b) he:

(i) harbors or conceals such person; or

(ii) warns such person of impending discovery or apprehension, except that this does not apply to a warning given in connection with an effort to bring another into compliance with law; or

(iii) provides such person with money, transportation, dangerous instrument, disguise, or other means of avoiding discovery or apprehension; or

(iv) prevents or obstructs, by means of force, deception, or intimidation, anyone from performing an act that might aid in the discovery or apprehension of such person; or

(v) provides false information to a law enforcement authority; or

(vi) suppresses by an act of concealment, alteration, or destruction any physical evidence that might aid in the discovery or apprehension of such person.

(2) Defense. It is a defense that the accused is the spouse, parent, child, brother, sister, grandparent, or grandchild of the person whose discovery or apprehension he sought to prevent.

(3) Grading.

(a) If the person assisted is being sought in connection with a Class X felony or Class A felony, the offense is a Class D felony.

(b) Otherwise the offense is a Class A misdemeanor.

Section 553.5304. Fleeing or Evading Peace Officer

(1) Offense Defined. A person commits an offense if:

(a) with intent to elude or flee,

(b) he recklessly disobeys a direction to stop, given by a person he knows to be a peace officer.

(2) Grading.

(a) The offense is a Class D felony if, by fleeing or eluding, the person is the cause of, or creates a substantial risk of, serious physical injury or death to another person or substantial damage to another's property.

(b) Otherwise the offense is a Class A misdemeanor, except that

(c) the offense is a Class C misdemeanor if the person's conduct involves only failing to comply with a directive of a traffic control officer.

Section 553.5305. Interfering with or Resisting a Peace Officer

- (1) Offense Defined. A person commits an offense if:
- (a) knowing a peace officer is acting within the scope of his official duties,
 - (b) he intentionally acts to interfere with or resist the performance of such duties
- by:
- (i) using or threatening to use physical force or violence against the peace officer or another, or
 - (ii) using any other means to create a substantial risk of causing physical injury to the peace officer or another, or
 - (iii) any other means.
- (2) Grading.
- (a) If the conduct includes removing from or depriving the officer of use of a firearm or other deadly weapon, the offense is a Class D felony.
 - (b) Except as provided in Subsection (2)(a), the offense under Subsections (1)(b)(i) and (ii) is a Class A misdemeanor.
 - (c) Otherwise the offense is a Class B misdemeanor.

Section 553.5306. Escape

- (1) Offense Defined. A person commits an offense if he escapes from a detention facility or from penal custody.
- (2) Definitions.
- (a) “Detention facility” means any building and its premises used for the confinement of a person:
 - (i) charged with or convicted of an offense; or
 - (ii) alleged or found to be delinquent; or
 - (iii) held for extradition or as a material witness; or
 - (iv) otherwise confined pursuant to an order of court for law enforcement purposes.
 - (b) “Escape” means departure from penal custody or the detention facility in which a person is held or detained when the departure is not permitted, or failure to return to penal custody or detention following a temporary leave granted for a specific purpose or for a limited period.
 - (c) “Penal custody” means restraint by a law enforcement authority pursuant to lawful arrest, detention, or an order of court for law enforcement purposes, but does not include supervision of probation or parole or constraint incidental to release on bail.
- (3) Grading.
- (a) If the escape is by use of force or threat of force, the offense is a Class C felony.

(b) If the escape is from a detention facility other than a residence used to impose home incarceration, the offense is a Class D felony.

(c) If the escape is from penal custody based upon charge or conviction for a felony, the offense is a Class E felony.

(d) Otherwise the offense is a Class B misdemeanor.

Section 553.5307. Promoting or Possessing Contraband

(1) Offense Defined. A person commits an offense if:

(a) he knowingly introduces contraband into a detention facility; or

(b) being a person confined in a detention facility, he knowingly makes, obtains, or possesses contraband.

(2) Definitions.

(a) “Contraband” means any article or thing that a person confined in a detention facility is prohibited from obtaining or possessing by statute, departmental regulation, or posted institutional rule or order.

(b) “Dangerous contraband” means contraband that is capable of use to endanger the safety or security of a detention facility or persons therein, including dangerous instruments, any controlled substances, any quantity of an alcoholic beverage, any quantity of marijuana, and saws, files, and similar metal cutting instruments.

(3) Grading.

(a) If involving dangerous contraband, the offense is a Class D felony.

(b) Otherwise the offense is a Class A misdemeanor.

Section 553.5308. Failure to Appear

(1) Offense Defined. A person commits an offense if:

(a) having been released from penal custody by court order, with or without bail, upon condition that he subsequently appear at a specified time and place,

(b) he intentionally fails to appear at that time and place.

(2) Defense. It is a defense that the defendant proves that his failure to appear was unavoidable and due to circumstances beyond his control.

(3) Grading.

(a) If release is from a felony charge, the offense is a Class D felony.

(b) Otherwise the offense is a Class A misdemeanor.

Section 553.5309. Bribing a Witness

(1) Offense Defined. A person commits an offense if:

(a) he:

(i) offers, confers, or agrees to confer any pecuniary benefit upon a witness or a person he believes may be called as a witness in any official proceeding, or

(ii) being a witness or a person who may be called as a witness in any official proceeding, he solicits, accepts, or agrees to accept any pecuniary benefit, (b) upon an agreement or understanding that such will:

(i) influence testimony; or

(ii) induce the avoidance of legal process summoning the person to testify;

or

(iii) induce the person to absent himself from an official proceeding to which he has been legally summoned.

(2) Grading. The offense is a Class D felony.

Section 553.5310. Intimidating, Harassing, or Tampering with a Participant in the Legal Process

(1) Offense Defined. A person commits an offense if:

(a) with intent to:

(i) influence the testimony, vote, decision, or opinion of the participant in the legal process, or

(ii) induce the participant in the legal process to avoid legal process summoning him to testify, or

(iii) induce the participant in the legal process to absent himself from an official proceeding to which he has been legally summoned, or

(iv) induce the participant in the legal process to withhold a record, document, or other object from an official proceeding, or

(v) induce the participant in the legal process to alter, destroy, mutilate, or conceal an object in order to impair the object's integrity or availability for use in an official proceeding, or

(vi) hinder, delay, or prevent the communication to a law enforcement authority or judge of information relating to the possible commission of an offense or a violation of conditions of probation, parole, or release pending judicial proceedings, or

(vii) hinder, delay, or prevent law enforcement authorities from seeking the arrest of another person in connection with an offense,

(b) he:

(i) uses physical force or makes a threat of violence against:

(A) a participant in the legal process, or

(B) a person he believes may be called as a witness in any official proceeding, or

(C) an immediate family member of a person described in Subsection (1)(b)(i)(A) or (B); or

(ii) induces the participant in the legal process to absent himself or otherwise avoid appearing or testifying at the official proceeding in order to influence the outcome thereby; or

(iii) knowingly makes any false statement, practices any fraud or deceit, or engages in misleading or unlawful conduct.

(2) No Defense. It is no defense that:

(a) an official proceeding is not pending or about to be instituted at the time of the offense; or

(b) the testimony, record, document or other object is not admissible in evidence or free of a claim of privilege.

(3) Definitions.

(a) “Judge” means:

(i) any current justice or judge of the Court of Justice, or

(ii) a trial commissioner of the Court of Justice, or

(iii) any person serving as a judge at a trial or judicial proceeding of or authorized by the Court of Justice.

(b) “Juror” means a person who is a member of any impaneled jury, including a grand jury, or any person who has been drawn or summoned to attend as a prospective juror.

(c) “Participant in the legal process” means any judge, prosecutor, attorney defending a criminal case, juror, or witness, and includes persons who have been elected or appointed, but have not yet taken office.

(d) “Prosecutor” means a Commonwealth’s attorney, assistant Commonwealth’s attorney, county attorney, assistant county attorney, attorney general, deputy attorney general, assistant attorney general, or special prosecutor appointed pursuant to law.

(e) “Threat of violence” means any direct threat to cause the death of, or physical injury to, a person.

(f) “Witness” means any person who has testified, has been called to testify, is testifying, or may be called to testify, in an official proceeding.

(4) Grading.

(a) The offense under Subsection (1)(b)(i) is a Class D felony.

(b) Otherwise the offense is a Class E felony.

Section 553.5311. Retaliating Against a Participant in the Legal Process

(1) Offense Defined. A person commits an offense if:

(a) he engages or threatens to engage in conduct causing or intended to cause

(i) physical injury to, or

(ii) damage to the tangible property of, a current or former participant in the legal process or a person he believes may be called as a witness in any official proceeding,

- (b) because of the current or former participant's or the potential witness's:
 - (i) attending an official proceeding, or giving or producing any testimony, record, document, or other object produced at such a proceeding, or
 - (ii) giving information to a law enforcement authority relating to the possible commission of an offense or a violation of conditions of probation, parole, or release pending judicial proceedings, or
 - (iii) vote, decision, or opinion, or
 - (iv) performance of his or her duty.
- (2) Grading. The offense is a Class D felony.

Section 553.5312. Bribery of, or Improper Communication with, a Juror

- (1) Offense Defined. A person commits an offense if:
 - (a) with intent to influence the person's vote, opinion, decision, or other action as a juror, he offers, confers, or agrees to confer any pecuniary benefit upon a juror; or
 - (b) he solicits, accepts, or agrees to accept any pecuniary benefit upon an agreement or understanding that his vote, opinion, decision, or other action as a juror will thereby be influenced; or
 - (c) with intent to influence the person's vote, opinion, decision, or other action as a juror, he communicates, directly or indirectly, with a juror other than as part of the proceedings in the trial of the case.
- (2) Grading.
 - (a) The offense under Subsections (1)(a) and (1)(b) is a Class D felony.
 - (b) Otherwise the offense is a Class E felony.⁴²

Section 553.5313. Tampering with Physical Evidence

- (1) Offense Defined. A person commits an offense if he:
 - (a) destroys, mutilates, conceals, removes, or alters physical evidence that he believes is to be used in an official proceeding, with intent to impair its verity or availability in the official proceeding; or

⁴² **Issue:** Should all forms of this offense be graded the same, as a Class D felony?

Con: Cases involving conferring a pecuniary benefit, under Subsection (1)(a), are more serious offenses than communications to influence that do not involve conferring a pecuniary benefit. They present a greater danger to the integrity of the system and are a more crass attempt to manipulate than use of non-pecuniary means, such as an appeal to friendship.

Pro: All forms of improper influence undercut the integrity of jury process and reflect an equally harmful violation.

Reporter: No recommendation.

(b) fabricates any physical evidence with intent that it be introduced in an official proceeding or offers any physical evidence, knowing it to be fabricated or altered.

(2) Definitions. “Physical evidence” means any article, object, document, record, or other thing of physical substance.

(3) Grading. The offense is a Class D felony.

Section 553.5314. Simulating Legal Process

(1) Offense Defined. A person commits an offense if:

(a) he delivers to another a request for the payment of money on behalf of a creditor,

(b) knowing that in form and substance it simulates a legal process issued by a court of this state.

(2) Grading. The offense is a Class A misdemeanor.

Section 553.5315. Unauthorized Practice of Law

(1) Offense Defined. A person commits an offense if he engages in the practice of law in violation of the rules by which the Supreme Court authorizes the practice of law.

(2) Grading. The offense is a Class B misdemeanor.

Section 553.5316. Definitions

(1) “Benefit” has the meaning given in Section 531.3114(2).

(2) “Contraband” has the meaning given in Section 531.5307(2)(a).

(3) “Dangerous contraband” has the meaning given in Section 531.5307(2)(b).

(4) “Dangerous instrument” has the meaning given in Section 515.1501(3)(a).

(5) “Deadly weapon” has the meaning given in Section 515.1501(3)(b).

(6) “Detention facility” has the meaning given in Section 531.5306(2)(a).

(7) “Escape” has the meaning given in Section 531.5306(2)(b).

(8) “Governmental function” has the meaning given in Section 531.5301(2).

(9) “Judge” has the meaning given in Section 531.5310(3)(a).

(10) “Juror” has the meaning given in Section 531.5310(3)(b).

(11) “Law enforcement authority” has the meaning given in Section 500.107.

(12) “Official proceeding” has the meaning given in Section 531.5201(5)(c).

(13) “Participant in the legal process” has the meaning given in Section 531.5310(3)(c).

(14) “Peace officer” has the meaning given in Section 500.107.

(15) “Pecuniary benefit” has the meaning given in Section 551.5101(2)(a).

- (16) “Penal custody” has the meaning given in Section 531.5306(2)(c).
- (17) “Physical evidence” has the meaning given in Section 531.5313(2).
- (18) “Physical injury” has the meaning given in Section 500.107.
- (19) “Prosecutor” has the meaning given in Section 531.5310(3)(d).
- (20) “Public servant” has the meaning given in Section 551.5101(2)(b).
- (21) “Reasonable belief” has the meaning given in Section 500.107.
- (22) “Serious physical injury” has the meaning given in Section 500.107.
- (24) “Threat of violence” has the meaning given in Section 531.5310(3)(e).
- (25) “Witness” has the meaning given in Section 531.5310(3)(f).

CHAPTER 561. PUBLIC ORDER AND SAFETY OFFENSES

Section 561.6101.	Rioting
Section 561.6102.	Inciting to Riot
Section 561.6103.	Unlawful Assembly
Section 561.6104.	Failure to Disperse
Section 561.6105.	Disorderly Conduct
Section 561.6106.	Harassment
Section 561.6107.	Harassing Communications
Section 561.6108.	Loitering
Section 561.6109.	Public Intoxication
Section 561.6110.	Obstructing a Highway or Other Public Passage
Section 561.6111.	Disrupting Meetings and Processions
Section 561.6112.	Interfering with Communications
Section 561.6113.	Definitions

Section 561.6101. Rioting

- (1) Offense Defined. A person is guilty of an offense if he knowingly participates in a riot.
- (2) “Riot” means a public disturbance involving an assemblage of 5 or more persons that by tumultuous and violent conduct:
 - (a) creates grave danger of physical injury to persons or damage to property, or
 - (b) substantially obstructs law enforcement or other governmental function.
- (3) Grading.
 - (a) The offense is a Class D felony if in the course of, and as a result of, such riot:
 - (i) a person other than one of the participants suffers physical injury or
 - (ii) substantial property damage occurs.
 - (b) Otherwise the offense is a Class A misdemeanor.

Section 561.6102. Inciting to Riot

- (1) Offense Defined. A person commits an offense if he incites or urges 5 or more persons to create or engage in a riot.
- (2) Grading. The offense is a Class A misdemeanor.

Section 561.6103. Unlawful Assembly

- (1) Offense Defined. A person commits an offense if:
 - (a) he assembles with 5 or more persons for the purpose of engaging or preparing to engage with them in a riot, or

- (b) being present at an assembly that either has or develops such a purpose, he remains there with intent to advance that purpose.
- (2) Grading. The offense is a Class B misdemeanor.

Section 561.6104. Failure to Disperse

- (1) Offense Defined. A person commits an offense if:
 - (a) he participates with 2 or more persons in a course of disorderly conduct likely to cause substantial harm or serious inconvenience, annoyance, or alarm, and
 - (b) intentionally refuses to disperse when ordered to do so by a law enforcement authority.
- (2) Grading. The offense is a Class B misdemeanor.

Section 561.6105. Disorderly Conduct

- (1) Offense Defined. A person commits an offense if, in a public place, while reckless as to causing public inconvenience, annoyance, or alarm, he:
 - (a) engages in fighting or in violent, tumultuous, or threatening behavior, or
 - (b) makes unreasonable noise, or
 - (c) refuses to obey an official order to disperse issued to maintain public safety in dangerous proximity to a fire, hazard, or other emergency, or
 - (d) creates a hazardous or physically offensive condition by any act that serves no legitimate purpose.
- (2) Definition. “Public place” means a place to which the public or a substantial group of persons has access and includes highways, transportation facilities, schools, places of amusements, parks, places of business, playgrounds, and hallways, lobbies, and other portions of apartment houses and hotels not constituting rooms or apartments designed for actual residence. An act is deemed to occur in a public place if it produces its offensive or proscribed consequences in a public place.
- (3) Grading. The offense is a Class B misdemeanor.

Section 561.6106. Harassment

- (1) Offense Defined. A person commits an offense if, with intent to harass, annoy, or alarm another person, he:
 - (a) strikes, shoves, kicks, or otherwise subjects the person to physical contact, or
 - (b) attempts or threatens to strike, shove, kick, or otherwise subject the person to physical contact, or
 - (c) in a public place, makes an offensively coarse utterance, gesture, or display, or addresses abusive language to any person present, or
 - (d) follows a person in or about a public place or places, or

(e) engages in a course of conduct or repeatedly commits acts that alarm or seriously annoy such other person and that serve no legitimate purpose.

(2) Grading.

(a) The offense under Subsection (1)(a) is a Class B misdemeanor.

(b) Otherwise the offense is a violation.

Section 561.6107. Harassing Communications

(1) Offense Defined. A person commits an offense if, with intent to harass, annoy, or alarm another person he:

(a) communicates with a person, anonymously or otherwise, by telephone, telegraph, mail, or any other form of communication in a manner that causes annoyance or alarm and serves no purpose of legitimate communication, or

(b) makes a telephone call, whether or not conversation ensues, with no purpose of legitimate communication.

(2) Grading. The offense is a Class B misdemeanor.

Section 561.6108. Loitering

(1) Offense Defined. A person commits an offense if he:

(a) loiters or remains in a public place for the purpose of unlawful gambling with cards, dice, or other gambling paraphernalia, or

(b) loiters or remains in a public place for the purpose of unlawfully using a controlled substance, or

(c) loiters or remains in or about a school, not having any reason or relationship involving custody of or responsibility for a pupil or student or any other specific legitimate reason for being there, and not having written permission from anyone authorized to grant the same, or]

(d) loiters or remains in any transportation facility, unless specifically authorized to do so, for the purpose of soliciting or engaging in any business, trade or commercial transactions involving the sale of merchandise or services.]⁴³

⁴³ **Issue:** Should Subsections 6108(1)(c) and (1)(d) be deleted?

Con: These subsections embody current law. See KRS 525.090(1)(c)&(1)(d). Presumably the legislature judged that these public places were of special concern and/or deserving of special protection. Also, the offense is only a violation.

Pro: Unlike the preceding two subsections, subsections (1)(c) and (1)(d) are problematic in that they require no specific unlawful purpose.

Further, one might question why these two specific locations are singled out. As a policy matter, there may be many other places that similar in relevant respects to a university or transportation facility, but are not identified as locales at which for criminal liability will attach. Without an accompanying criminal trespass, the conduct identified in these subsections should not (and perhaps cannot constitutionally) be criminalized.

Reporter: No recommendation.

(2) Definition. “Transportation facility” means any conveyance, premises, or place used for or in connection with public passenger transportation by air, railroad, motor vehicle, or any other method. It includes aircraft, watercraft, railroad cars, buses, and air, boat, railroad, and bus terminals and stations and all appurtenances thereto.

(3) Grading. The offense is a violation.

Section 561.6109. Public Intoxication

(1) Offense Defined. A person commits an offense if:

(a) he appears in a public place manifestly under the influence of alcohol, a controlled substance, or other intoxicating substance, not therapeutically administered,

(b) to the degree that he may endanger himself or other persons or property, or unreasonably annoy persons in his vicinity.

(2) Grading. The offense is a Class C misdemeanor.⁴⁴

Section 561.6110. Obstructing a Highway or Other Public Passage

(1) Offense Defined. A person commits an offense if:

(a) having no legal privilege to do so, he, alone or with other persons, recklessly renders any highway or public passage impassable without unreasonable inconvenience or hazard, or

(b) being a person in a gathering, he refuses to obey a reasonable official request or order to move:

(i) to prevent obstruction of a highway or other public passage, or

(ii) to maintain public safety by dispersing those gathered in dangerous proximity to a fire or other hazard.

⁴⁴ **Issue:** Should the offense be mitigated if the source of the intoxication is alcohol?

Against an alcohol mitigation: No matter what the source of the public intoxication — whether it is caused by alcohol or something else — the societal injury is the same. Grading as a Class C Misdemeanor seems appropriate because it would authorize brief incarceration, if needed. (Note that chronic offenders can be dealt with more severely, because Section 905 authorizes them to be dealt with as a Class B Misdemeanor.)

For an alcohol mitigation: Alcohol intoxication ought to be less serious than other intoxications because, rightly or wrongly, our society has authorized the use of intoxicating alcohol.

For exempting alcohol intoxication from the offense altogether: Most of those who come before the courts for public alcohol intoxication are alcoholics and should be treated for the disease rather than punished. Such intoxication should not be an offense, as long as there is some other means by which the police may take custody of such persons for their own safety.

Reporter: No recommendation.

(2) Exception. No person shall be deemed guilty of recklessly rendering a passage impassable in violation of Subsection (1)(a) solely because of a gathering of persons to hear him speak or otherwise communicate, or solely because of being a member of such a gathering.

(3) Reasonableness of Order to Move. An order to move, addressed to a person whose speech or other lawful behavior attracts an obstructing audience, shall not be deemed reasonable if the obstruction can be readily remedied by control by peace officers of the size or location of the gathering.

(4) Grading.

(a) If the person persists after warning by a peace officer, the offense is a Class B misdemeanor.

(b) Otherwise the offense is a violation.

Section 561.6111. Disrupting Meetings and Processions

(1) Offense Defined. A person commits an offense if:

(a) with intent to prevent or disrupt a lawful meeting, procession, or gathering,

(b) he:

(i) does any act tending to obstruct or interfere with it physically, or

(ii) makes any utterance, gesture, or display designed to outrage the sensibilities of the group.

(2) Grading. The offense is a Class B misdemeanor.

Section 561.6112. Interfering with Communications

(1) Offense Defined. A person commits an offense if he knowingly prevents, obstructs, or delays the sending, transmission, conveyance, or delivery of any message, communication, or data through any telegraph, telephone, internet, or any other mode of communication.

(2) Grading. The offense is a Class A misdemeanor

Section 561.6113. Definitions

(1) “Governmental function” has the meaning given in Section 553.5301(2).

(2) “Law enforcement authority” has the meaning given in Section 500.107.

(3) “Peace officer” has the meaning given in Section 500.107.

(4) “Physical injury” has the meaning given in Section 500.107.

(5) “Public place” has the meaning given in Section 561.6105(2).

(6) “Riot” has the meaning given in Section 561.6101(2).

(7) “School” has the meaning given in Section 500.107.

(8) “Transportation facility” has the meaning given in Section 561.6108(2).

CHAPTER 562. PUBLIC INDECENCY OFFENSES

Section 562.6201.	Indecent Exposure
Section 562.6202.	Causing or Promoting a Sexual Performance by a Minor
Section 562.6203.	Distribution of Obscenity
Section 562.6204.	Prostitution or Patronizing a Prostitute; Loitering for a Sexual Act
Section 562.6205.	Permitting Prostitution
Section 562.6206.	Promoting, Supporting, or Profiting from Prostitution
Section 562.6207.	Cruelty to Animals
Section 562.6208.	Desecration of Venerated Objects
Section 562.6209.	Definitions

Section 562.6201. Indecent Exposure

(1) Offense Defined. A person commits an offense if he intentionally exposes his genitals under circumstances in which he knows or should know his conduct is likely to cause affront or alarm.

(2) Grading. The offense is a Class B misdemeanor.

Section 562.6202. Causing or Promoting a Sexual Performance by a Minor

(1) Offense Defined. A person commits an offense if he:

(a) employs, authorizes, or induces a person under the age of 18 years to engage in, or

(b) produces, directs, or promotes, a public performance that he knows includes sexual conduct by the minor.

(2) Definitions.

(a) “Public performance” has the meaning given in Section 531.3116(2).

(b) “Sexual conduct” has the meaning given in Section 513.1303(2)(b).

(3) Grading. If the minor involved in the sexual performance is:

- (a) less than 16 years old at the time, the offense is a Class [D]⁴⁵ felony; or
- (b) less than 18 years old at the time, the offense is a Class [E]^{*} felony.

Section 562.6203. Distribution of Obscenity

(1) Offense Defined. A person commits an offense if he prepares, publishes, advertises, prints, exhibits, distributes, promotes the distribution, or possesses with intent to distribute or exhibit any obscene matter.

(2) Definitions.

(a) “Distribute” means to transfer possession of, whether with or without consideration.

(b) “Matter” means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture, or other pictorial representation or any statue or other figure, or any recording transcription or mechanical, chemical, or electrical reproduction or any other articles, equipment, machines, or materials.

(c) “Obscene” means:

(i) to the average person, applying contemporary community standards, the predominant appeal of the matter taken as a whole is to prurient interest in sexual conduct; and

(ii) the matter depicts or describes the sexual conduct in a patently offensive way; and

(iii) the matter taken as a whole lacks serious literary, artistic, political, or scientific value.

(iv) Sexual Performance by a Minor. Obscene matter includes any material portraying sexual conduct by a minor.

⁴⁵ **Issue:** Should the grading of this offense be increased one or more grades? Should it be reduced one grade?

Pro: The offenses are more serious than Class D and E felonies; they should be graded as B and C felonies.

Con: B felonies include manslaughter and rape. C felonies include reckless killing. A B/C felony grading is much too high for this offense. It is important to remember that this offense is *not* the offense that punishes the damaging effect of such conduct on the minor. That harm is punished by the sexual abuse offenses in Chapter 513, which take into account the exact nature and effect of the abuse. Those offenses can be charged and punished in addition to this offense, if their abuse requirements are satisfied. The only point of this promoting-performance offense is to punish the coarsening of public life that such conduct entails. In other words, the offense is simply an aggravated form of indecent exposure and distribution of obscenity, both of which are graded as Class B misdemeanors.

Reporter: No recommendation.

(d) “Promoting the distribution” of matter includes:

- (i) knowingly requiring, as a condition to a sale, allocation, consignment, or delivery for resale of any merchandise, that the purchaser or consignee receive any matter reasonably believed by the purchaser or consignee to be obscene, or
- (ii) denying or revoking or threatening to deny or revoke a franchise, or imposing any penalty, financial or otherwise, because a person fails to accept such matter or returns such matter.

(3) Permissive Inference. The factfinder may infer from the possession of more than one copy of obscene matter an intent to distribute that matter.

(4) Exemption. The offense does not include conduct by a person having a bona fide scientific, educational, governmental, or other similar justification for his offense conduct.

(5) Grading.

(a) If the material portrays the sexual performance of a person that the defendant knows or reasonably should know is under the age of 18 years, the offense is a Grade D felony.

(b) If the person:

- (i) has in his possession more than one copy of a piece of obscene matter, or
- (ii) distributes obscene matter to a person he knows to be under the age of 18 years, or
- (iii) uses a person he knows to be under the age of 18 years to distribute obscene matter,

the offense is a Class A misdemeanor.

(c) Otherwise the offense is a Class B misdemeanor.

Section 562.6204. Prostitution or Patronizing a Prostitute; Loitering for a Sexual Act

(1) Offense Defined: Prostitution or Patronizing a Prostitute. A person commits an offense if he pays, accepts, offers, or solicits a fee to perform sexual intercourse or to have sexual contact.

(2) Offense Defined: Loitering for a Sexual Act. A person commits an offense if he loiters or remains in a public place for the purpose of engaging in prostitution.

(3) Grading.

(a) An offense under Subsection (1) is a Class B misdemeanor.

(b) An offense under Subsection (2) is a Class C misdemeanor.

Section 562.6205. Permitting Prostitution

(1) Offense Defined. A person commits an offense if, having possession or control of premises and being grossly negligent as to the fact that they are being used for prostitution purposes, he fails to make reasonable and timely effort to halt or abate such use.

(2) Grading. The offense is a Class B misdemeanor.

Section 562.6206. Promoting, Supporting, or Profiting from Prostitution

(1) Offense Defined. A person commits an offense if he knowingly:

- (a) causes or aids a person to engage in prostitution, or
- (b) procures or solicits patrons for prostitution, or
- (c) provides persons or premises for prostitution purposes, or
- (d) operates or assists in the operation of a house of prostitution or a prostitution enterprise, or
- (e) engages in any conduct designed to institute, aid, or facilitate an act or enterprise of prostitution, or
- (f) accepts or receives money or other property pursuant to an agreement or understanding that he will share in the proceeds of prostitution activity.

(2) Grading.

(a) If the prostitution is by a person less than 16 years old, the offense is a Class [C]^{*46} felony.

(b) If the prostitution is by a person less than 18 years old, the offense is a Class [D]^{*} felony.

(c) If the person manages, supervises, controls, or owns, either alone or in association with others, a house of prostitution or a prostitution business or enterprise involving prostitution activity by two or more prostitutes, the offense is a Class D felony.

(d) Otherwise the offense is a Class A misdemeanor.

(e) If, prior to the commission of the crime, the person knew or had been informed that he tested positive for the human immunodeficiency virus and could possibly communicate such disease to another person through sexual activity, the offense is one grade higher than it would otherwise be.

⁴⁶ See the pro-con footnote attached to Section 6202(3).

Section 562.6207. Cruelty to Animals

- (1) Offense Defined. A person commits an offense if he:
- (a) subjects any animal to cruel or injurious mistreatment, including mutilation, beating, torturing, tormenting, failing to provide adequate food, drink, space, or health care, or by any other means, or
 - (b) participates in any way, including as a spectator or vendor, in a fight among animals that is arranged for pleasure or profit, or
 - (c) knowingly causes the death of any animal.
- (2) Exceptions. The offense does not include:
- (a) causing the death of an animal:
 - (i) pursuant to a license to hunt, fish, or trap, or
 - (ii) incident to the processing as food or for other commercial purposes,or
 - (iii) for humane purposes, or
 - (iv) for any other purpose authorized by law; or
 - (b) activities of animals engaged in hunting, field trials, dog training, or other activities authorized either by a hunting license or by the Department of Fish and Wildlife.
- (3) Grading.
- (a) For the owner of the animal, the owner of the property on which a fight is conducted if the owner knows of the fight, and anyone who participates in the organization of the fight, a violation under Subsection (1)(b) is a Class E felony.
 - (b) Otherwise the offense is a Class A misdemeanor.

Section 562.6208. Desecration of Venerated Objects

- (1) Offense Defined. A person commits an offense if he:
- (a) intentionally excavates or disinters human remains for the purpose of commercial sale or exploitation of the remains themselves or of objects buried contemporaneously with the remains, or
 - (b) intentionally treats a corpse in a way that would outrage ordinary family sensibilities, or
 - (c) mutilates the graves, monuments, fences, shrubbery, ornaments, grounds, or buildings in or enclosing any cemetery or place of sepulture, or
 - (d) violates the grave of any person by destroying, removing, or damaging the headstone or footstone, or the tomb over the enclosure protecting any grave, or
 - (e) digs into or plows over or removes any ornament, shrubbery, or flower placed upon any grave or lot, or

(f) desecrates any public monument or object or place of worship, including a military heritage site or object, or

(g) desecrates in a public place the national or state flag or other patriotic or religious symbol that is an object of veneration by the public or a substantial segment thereof.

(2) Exception. It is not an offense under this Section to engage in conduct that is specifically authorized by law.

(3) Grading.

(a) The offense is a Class D felony if:

(i) it violates Subsection (1)(a), or

(ii) it violates Subsection (1)(b) and involves sexual intercourse or deviate sexual intercourse with the corpse, or

(iii) the desecration is motivated by the race, color, religion, sexual orientation, or national origin of another individual or group of individuals.

(b) Otherwise the offense is a Class A misdemeanor.

Section 562.6209. Definitions

(1) “Deviate sexual intercourse” has the meaning given in Section 513.1301(2)(a).

(2) “Distribute” has the meaning given in Section 562.6203(2)(a).

(3) “Matter” has the meaning given in Section 562.6203(2)(b).

(4) “Minor” has the meaning given in Section 541.4104(2).

(5) “Obscene” has the meaning given in Section 562.6203(2)(c).

(6) “Public performance” has the meaning given in Section 531.3116(2).

(7) “Promoting the distribution” has the meaning given in Section 562.6203(2)(d).

(8) “Public place” has the meaning given in Section 561.6105(2).

(9) “Sexual conduct” has the meaning given in Section 1303(2)(b).

(10) “Sexual contact” has the meaning given in Section 513.1303(2).

(11) “Sexual intercourse” has the meaning given in Section 513.1301(2)(d).

APPENDIX

SUMMARY OF PROPOSED OFFENSES ARRANGED BY GRADE

**Kentucky Penal Code:
Table of Proposed Offenses Grouped by Grade**

<i>Section</i>	<i>Felony – Class X</i>
511.1101	intentional or knowing killing (1st degree murder)
514.1401 (3)(a)	knowingly restraining another unlawfully (kidnapping), victim dies as a result

<i>Section</i>	<i>Felony – Class A</i>
511.1102	reckless killing manifesting extreme indifference to human life (2nd degree murder)
513.1301 (3)(a)	sexual intercourse, victim under 12 years old (aggravated statutory rape)
513.1301 (3)(b)	sexual intercourse by force, or where victim is physically incapacitated, and serious injury results (aggravated rape)
514.1401 (3)(b)	knowingly restraining another unlawfully (kidnapping), victim suffers serious injury
522.2201	using fire with intent to damage building while reckless as to building being inhabited or occupied or serious injury resulting (arson 1 st)
522.2205 (1)(b)(i)	knowingly causing catastrophe

<i>Section</i>	<i>Felony – Class B</i>
511.1103	acting under extreme emotional disturbance to commit what otherwise would be murder (manslaughter)
513.1301 (3)(c)	sexual intercourse by force or where victim is physically helpless (rape)
514.1401 (3)(c)	knowingly restraining another unlawfully (kidnapping); intent to ask for ransom, commit a felony, or use the victim as a hostage
515.1501 (2)(a)(i)	using or threatening use of force in the course of committing a theft (robbery), victim suffers injury
515.1501 (2)(a)(ii), (iii)	using or threatening use of force in the course of committing a theft (robbery), defendant is armed or uses dangerous instrument
521.2110 (1)	theft greater than \$1,000,000
522.2202	using fire with intent to (damage another's building) or (damage any building to collect insurance) or (being reckless as to occupancy) (arson 2 nd)
522.2203 (2)(a)	knowingly using fire and recklessly placing another in danger of death, manifesting extreme indifference to value of human life
522.2205 (1)(b)(ii)	recklessly causing catastrophe
522.2206(2)(a)	knowingly damaging property of another, loss is greater than \$1,000,000
523.2301 (2)(a)	entering building with intent to commit crime (burglary); defendant (armed with deadly weapon), (causes injury), or (threatens use of dangerous instrument)
531.3108 (2)	Hiding/destroying property (greater than \$1,000,000) subject to a security interest in order to hinder the enforcement of the interest
531.3109	knowingly trying to keep property (greater than \$1,000,000) from creditors in insolvency
531.3112	fiduciary using property (greater than \$1,000,000) in unauthorized manner involving substantial risk of loss

<i>Section</i>	<i>Felony – Class C</i>
511.1104	reckless killing (second degree manslaughter)
512.1201	recklessly (or grossly negligently with a deadly weapon) causing injury to another, four additional aggravating factors (assault)
513.1302 (3)(a)	sexual intercourse, victim is less than 16 and defendant is at least four years older (statutory rape)
515.1501 (2)(b)	using or threatening use of force in the course of committing a theft (robbery)
521.2110 (2)	theft greater than \$10,000, or property was a firearm, or receiver was in the business of receiving stolen property
522.2203 (3)(b)	knowingly using fire and recklessly placing (another in danger of injury) or (building in danger of damage)
522.2206 (2)(a), (g)	recklessly damaging property of another or negligently damaging property of another with fire, loss is greater than \$1,000,000
522.2206 (2)(b)	knowingly damaging property of another, loss is greater than \$10,000
523.2301 (2)(b)	entering dwelling with intent to commit crime (burglary)
531.3101 (3)(a)	with intent to deceive, altering the writing of another without authority, writing is part of an issue of stamps or money (counterfeiting)
531.3108 (2)	Hiding/destroying property (greater than \$10,000) subject to a security interest in order to hinder the enforcement of the interest
531.3109	knowingly trying to keep property (greater than \$10,000) from creditors in insolvency
531.3112	fiduciary using property (greater than \$10,000) in unauthorized manner involving substantial risk of loss
541.4102	sexual intercourse with one known to be an ancestor, descendant, sibling, or uncle, aun, niece, nephew - includes half / step / adopted children (incest)
551.5101	offering / accepting pecuniary benefit in exchange for influence with respect to public official (bribery)
553.5307 (3)(a)	escaping from detention facility or custody (escape), using or threatening use of force

562.6202 (3)(a)	inducing a minor to engage in a performance known to include sexual conduct, victim is under 16 (D felony?)
562.6206 (2)(a)	aiding or facilitating or operating an act or enterprise of prostitution (promoting prostitution), prostitute is less than 16

<i>Section</i>	<i>Felony – Class D</i>
511.1105	grossly negligently causing the death of another (grossly negligent murder)
511.1106 (5)(a)	Knowingly aiding or soliciting a suicide and such suicide occurs
512.1201	recklessly (or grossly negligently with a deadly weapon) causing injury to another, three additional aggravating factors (assault)
512.1202 (2)(a)	recklessly, with extreme indifference to human life, creating a risk of death or serious injury (aggravated endangerment)
512.1204 (3)(a), (c)	two or more acts of intentional harassment under circumstances that would cause a reasonable person mental distress, with threat of sexual contact, injury, or death, if (i) in violation of a protective order, or (ii) against a former crime victim, or (iii) if previously convicted of crime against same victim, or (iv) while in possession of a weapon (stalking)
512.1205 (3)(a)	knowingly causing person under 12 or helpless person to suffer cruel confinement or punishment or be deprived of necessary services
513.1302 (3)(b)	sexual intercourse, victim is mentally incapacitated (rape)
513.1303 (3)(a)	sexual contact, victim is less than 12 (aggravated sexual abuse)
514.1401 (3)(d)	knowingly restraining another unlawfully (unlawful restraint), victim is exposed to the risk of serious injury
514.1402(2)(b)	knowingly taking or keeping from lawful custody any person entrusted by authority of law to the custody of another
521.2110 (3)	theft greater than \$1,000
522.2205 (2)(b)	recklessly creating a risk of catastrophe with fire or other dangerous means
522.2206 (2)(b), (g)	recklessly damaging property of another or negligently damaging property of another with fire, loss is greater than \$10,000
522.2206 (2)(c)	knowingly damaging property of another, loss is greater than \$1,000
523.2301 (2)(c)	entering building with intent to commit crime (burglary)
531.3101 (3)(b)	with intent to deceive, altering the writing of another without authority (forgery), writing is a public record
531.3102 (2)(a)	knowingly tampering with a writing with intent to deceive; writing was a deed, will, contract, or public record
531.3104 (3)(a)	manufacturing or selling of personal identity of another
531.3108 (2)	Hiding/destroying property (greater than \$1000) subject to a security interest in order to hinder the enforcement of the interest

531.3109	knowingly trying to keep property (greater than \$1000) from creditors in insolvency
531.3111	director of a financial institution knowingly receives investment knowing that the institution is insolvent
531.3112	fiduciary using property (greater than \$1000) in unauthorized manner involving substantial risk of loss
531.3113	knowingly establishing or operating a business that falsely represents itself to be a minority business
531.3114	knowingly offering or accepting benefit with understanding that benefit will influence conduct contrary to employer's best interests
531.3115	tampering with a publicly exhibited contest
541.4101	person purports to marry another knowing he already is married (bigamy)
541.4104	parent or guardian deserts a minor under circumstances endangering health with intent to abandon
541.4105 (3)(a)	persistently failing to provide support when under a duty to do so (flagrant nonsupport), person owes over \$5,000
541.4107 (3)(a)	knowingly inducing minor to engage in felony other than sexual or controlled substances activity
551.5102	offering a pecuniary benefit to public servant for performance of official act or provision of improper assistance
551.5104	in contemplation of official action, public servant uses nonpublic information for his benefit
552.5201 (9)(a)	making a material false statement that one does not believe to be true in an official proceeding (perjury)
552.5204 (2)(a)	impersonating a peace officer
552.5205	knowingly making a false entry on or destroying a public record
553.5303 (3)(a)	with intent to hinder arrest or prosecution, harboring or helping someone sought in connection with the commission of Class X or Class A felony
553.5304 (3)(a)	with intent to elude, recklessly disobeying order to stop from known police officer, causing substantial risk of death or injury to another
553.5305 (2)(a)	intentionally resisting arrest (resisting arrest), defendant deprives officer of his firearm
553.5306 (3)(b)	escaping from detention facility (escape)
553.5307 (3)(a)	knowingly introducing dangerous contraband into a detention facility

553.5307 (3)(a)	inmate makes or possesses dangerous contraband
553.5308 (3)(a)	intentionally failing to appear after released from custody with a condition to later appear, defendant in custody on a felony charge
553.5309	offering or accepting a benefit to influence testimony of a witness
553.5310 (4)(a)	with intent to influence witness or other participant in legal process, using or threatening force against the witness
553.5311	causing or threatening to cause injury to a witness or damage to his property
553.5312 (3)(a)	threatening a juror or his family in order to influence the juror
553.5312 (2)(a)	offering or accepting a benefit in exchange for influencing a juror's vote or decision
553.5313	altering, destroying, or making up physical evidence
561.6101 (3)(a)	knowingly participating in a riot, if someone other than a participant suffers injury or substantial property damage occurs
562.6202 (3)(b)	inducing a minor to engage in a performance known to include sexual conduct, victim is under 18 (E felony?)
562.6203 (6)(a)	dissemination of obscene material, material depicts sexual performance by a minor
562.6206 (2)(b)	aiding or facilitating or operating an act or enterprise of prostitution (promoting prostitution), prostitute is less than 18
562.6206 (2)(c)	aiding or facilitating or operating an act or enterprise of prostitution (promoting prostitution), person manages activity by 2 or more prostitutes
562.6208 (3)(a)	intentionally excavating human remains for future sale, or sexually desecrating a corpse, or desecration based on race or religion

<i>Section</i>	<i>Felony – Class E</i>
511.1106 (5)(b)	Knowingly aiding or soliciting an attempted suicide
512.1201	recklessly (or grossly negligently with a deadly weapon) causing injury to another, two additional aggravating factors (assault)
512.1202 (2)(b)	recklessly creating a risk of death or serious injury (endangerment)
512.1203 (2)(a)(i)	falsely reporting a catastrophe in order to terrorize another
512.1204 (3)(a)	intentional harassment under circumstances that would cause a reasonable person mental distress, if (i) in violation of a protective order or (ii) against a former crime victim or (iii) if previously convicted of crime against same victim or (iv) while in possession of a weapon (harassment)
512.1205 (3)(b)	recklessly causing person under 12 or helpless person to suffer cruel confinement or punishment or be deprived of necessary services
513.1303 (3)(b)	sexual contact by forcible compulsion or where victim is physically incapacitated (sexual abuse)
513.1304 (3)(a)	subjecting another (excluding spouse) to sexual contact, victim is mentally retarded or incapacitated
513.1304 (3)(a)	subjecting another (excluding spouse) to sexual contact, victim an inmate and defendant is an employee of Corrections
521.2110 (4)	theft greater than \$300
522.2206 (2)(c), (g)	recklessly damaging property of another or negligently damaging property of another with fire, loss is greater than \$1,000
522.2206 (2)(d)	knowingly damaging property of another, loss is greater than \$300
523.2302 (3)(a)	entering or remaining without authority (criminal trespass), in a dwelling or highly secured premises
524.2401	without consent from at least one party, trespassing on property to eavesdrop, or installing surveillance equipment to record events in a private place (eavesdropping)
531.3108 (2)	Hiding/destroying property (greater than \$300) subject to a security interest in order to hinder the enforcement of the interest
531.3109	knowingly trying to keep property (greater than \$300) from creditors in insolvency
531.3112	fiduciary using property (greater than \$300) in unauthorized manner involving substantial risk of loss

541.4105 (3)(b)	persistently failing to provide support when under a duty to do so (flagrant nonsupport), person owes over \$1,000 or is 6 months behind or places child in destitute circumstances
551.5103 (2)(a)	public servant intentionally committing an unauthorized official act, if done to obtain, confer, or deprive another of a benefit
552.5201 (9)(b)	making a material false statement that one does not believe to be true in a subscribed written instrument for which an oath is required (perjury)
553.5306 (3)(c)	escaping from penal custody on felony charge (escape)
553.5310 (4)(b)	with intent to influence a witness or other participant in legal process, misleading or inducing a witness to be absent, or alter testimony or vote, or withhold document
562.6207 (3)(a)	defendant is owner of animal or property used for fight among animals or participates in fight organization

<i>Section</i>	<i>Misdemeanor – Class A</i>
511.1106 (5)(c)	Knowingly aiding or soliciting a suicide and such suicide is not attempted
512.1202 (2)(c)	recklessly creating a risk of injury (endangerment)
512.1203 (2)(a)(ii)	threatening to commit a crime likely to cause serious injury or property damage
512.1204 (3)(c)	intentional harassment directed at a specific person under circumstances that would cause a reasonable person mental distress, with threat of sex, serious injury, or death (stalking)
512.1205 (3)(c)	grossly negligently causing person under 12 or helpless person to suffer cruel confinement or punishment or be deprived of necessary services
513.1304 (3)(b)	subjecting another (excluding spouse) to sexual contact, victim is less than 14 and the defendant is at least 4 years older
513.1305	sexual intercourse without consent (sexual misconduct)
514.1401 (3)(e)	knowingly restraining another unlawfully (unlawful restraint)
514.1403	to compel another to take action or refrain from action, unlawfully threatening to commit a crime, accuse another of a crime, expose a secret, take or withhold official action (criminal coercion)
521.2110 (5)	theft of \$300 or less, except as provided in 521.2110(6)
522.2204	failing to give alarm or put out or control fire when duty to do so
522.2205 (3)(b)	recklessly failing to prevent or mitigate catastrophe when under a duty to do so
522.2206 (2)(d), (g)	recklessly damaging property of another or negligently damaging property of another with fire, loss is greater than \$300
522.2206 (2)(e)	knowingly damaging property of another, loss is greater than \$50
523.2302 (3)(b)	entering or remaining without authority (criminal trespass) in a place enclosed so as to exclude intruders
524.2402 (1)(a), (c)	knowingly, and without consent, opening or reading a sealed private communication, or obtaining from a communications common carrier information about contents of a communication
524.2402 (1)(b)	knowingly gaining access to electronic data without being privileged to do so

524.2403	knowingly divulging information gained by illegal surveillance, learned as an employee of a communications common carrier, or learned as employee of the Commonwealth
531.3101 (3)(c)	with intent to deceive, altering the writing of another without authority (forgery)
531.3102 (2)(b)	knowingly tampering with a writing, or device with intent to deceive
531.3103	with intent to defraud, altering object such that it appears to have antiquity or rarity that it does not have
531.3104 (3)(b)	representing oneself as another or representing oneself to have a characteristic of legal significance that one does not have
531.3105	knowingly selling mislabeled, adulterated, or less than the represented quantity of commodity or service; using false weight or measure (deceptive practices)
531.3106	knowingly making false statement in an advertisement (bait advertising)
531.3107	with intent to defraud, falsifying a business record
531.3108 (2)	Hiding/destroying property (less than \$300) subject to a security interest in order to hinder the enforcement of the interest
531.3109	knowingly trying to keep property (less than \$300) from creditors in insolvency
531.3110	issuing false financial statement with intent to defraud
531.3112	fiduciary using property (less than \$300) in unauthorized manner involving substantial risk of loss
531.3117	knowingly issuing bad check
531.3118	using stolen, forged, revoked, canceled, or otherwise unauthorized credit or debit card with intent to obtain property or services
541.4103	concealing the corpse of a newborn in order to conceal its birth
541.4105 (3)(c)	persistently failing to provide support when under a duty to do so (nonsupport)
541.4106	person charged with care of minor fails to exercise reasonable diligence to prevent minor from becoming neglected, dependent, delinquent
541.4107 (3)(b)	knowingly giving alcohol to minor or knowingly inducing minor to become habitual truant or disobey parent

541.4108	representation of both sets of parents, or unlawful payment of fees, in adoption proceeding
551.5103 (2)(b)	public servant knowingly commits an act that is an unauthorized exercise of his official functions
552.5201 (9)(c)	making a material false statement that one does not believe to be true
552.5202	misleading a public servant via materially false written statement or other forged or false writing
552.5203 (2)(b)	giving false alarm or false information to a peace officer with intent to implicate
552.5204 (2)(b)	impersonating a public servant other than a peace officer
553.5301	intentionally hindering a government function through threat of violence or force
553.5302	accepting or giving a benefit in exchange for initiating prosecution for a crime
553.5303 (3)(b)	with intent to hinder arrest or prosecution, harboring or helping someone sought in connection with the commission of a crime
553.5304 (3)(b)	with intent to elude, recklessly disobeying order to stop from known peace officer
553.5305 (2)(b)	intentionally resisting arrest, where defendant uses or threatens force against the officer or another creating risk of injury
553.5307 (3)(b)	inmate makes or possesses contraband
553.5307 (3)(b)	knowingly introducing contraband into a detention facility
553.5308 (3)(b)	intentionally failing to appear after released from custody with a condition to later appear
553.5312 (2)(b)	communicating with a juror other than as part of proceedings
553.5314	delivering a request for money on behalf of a creditor such that it simulates legal process issued by a court
561.6101 (3)(b)	knowingly participating in a riot
561.6102	urging 5 or more people to riot
561.6112	knowingly preventing or hindering any communication
562.6203 (6)(b)	dissemination of obscene material, if person has more than one copy or if distributed by or to a minor

562.6206 (2)(d)	aiding or facilitating or operating an act or enterprise of prostitution
562.6207 (3)(b)	injurious maltreatment of an animal, including fights among animals arranged for pleasure or profit
562.6208 (3)(b)	desecrating a grave, corpse, church, or religious symbol

<i>Section</i>	<i>Misdemeanor – Class B</i>
512.1201	recklessly (or grossly negligently with a deadly weapon) causing injury to another (assault)
512.1203(2)(b)	intentionally placing another in reasonable apprehension of imminent injury
512.1204 (3)(b)	intentional harassment under circumstances that would cause a reasonable person mental distress
513.1304 (3)(c)	subjecting another (excluding spouse) to sexual contact, if without consent or victim is less than 16 and the defendant is 4 years older
522.2206 (2)(e), (g)	recklessly damaging property of another or negligently damaging property of another with fire, loss is greater than \$50
522.2206 (2)(f)	knowingly damaging property of another, loss is equal to or less than \$50
552.5203 (2)(a)	giving false name or address to peace officer after having been warned that it is an offense to do so
553.5305 (2)(c)	intentionally resisting arrest
553.5306 (3)(d)	escaping from detention facility or custody (escape)
553.5315	unauthorized practice of law
561.6103	assembling with 5 or more others in preparation to riot, or remaining in such an assembly with intent to advance purpose
561.6104	participating with 2 or more others in disorderly conduct and refusing to disperse when ordered to do so by police
561.6105	being reckless as to causing public inconvenience, fighting, creating a hazard, or refusing to obey official at an emergency
561.6106 (2)(a)	intentional harassment involving physical contact
561.6107	intentional harassment involving telephone, mail, or other form of communication
561.6109(2)(a)	appearing at a public place while under the influence of drugs, to such a degree that one is unreasonably annoying
561.6110 (4)(a)	recklessly rendering highway impassible without legal privilege to do so after a warning by a law officer
561.6111	intentionally obstructing a meeting or procession or making a gesture or utterance designed to outrage members in the meeting or procession
562.6201	intentionally exposing one's genitals under conditions likely to cause alarm

562.6203 (6)(c)	dissemination of obscene material
562.6204 (3)(a)	offering or accepting a fee to have sexual contact (prostitution)
562.6205	person having possession of premises that he knows is being used for prostitution fails to take measures to stop it

<i>Section</i>	<i>Misdemeanor – Class C</i>
521.2110 (6)	theft less than \$50 and not taken by threat or in breach of fiduciary duty
523.2302 (3)(c)	entering or remaining in a place without authority (criminal trespass)
553.5304(3)(c)	with intent to evade or flee, failing to comply with directive of traffic control officer
561.6109(2)(b)	appearing at a public place while under the influence of alcohol, to such a degree that one is unreasonably annoying
562.6204(3)(b)	Loitering in a public place for the purpose of offering or accepting a fee to have sexual contact (prostitution)

<i>Section</i>	<i>Violation</i>
531.3116	intentionally selling a ticket to an event at a cost greater than face value of ticket (scalping)
561.6106 (2)(b)	intentional harassment, no physical contact
561.6108	loitering around a school or transportation facility without authorization
561.6108	loitering in a public place to gamble or engage in business
561.6110 (4)(b)	recklessly rendering highway impassible without legal privilege to do so



FINAL REPORT

of the

KENTUCKY PENAL CODE REVISION PROJECT

of the

CRIMINAL JUSTICE COUNCIL

Volume 2

July 2003

FINAL REPORT

of the

**KENTUCKY PENAL CODE
REVISION PROJECT**

Copies of this *Report* may be obtained from:

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SUMMARY OF CONTENTS

Volume 1

Reporter's Preface

History of Penal Code Project Work

Why a New Penal Code?

1. *Use clear, accessible language and organization*
2. *Provide a comprehensive statement of rules*
3. *Consolidate offenses*
4. *Grade offenses rationally and proportionally*
5. *Retain all (but only) reasonable policy decisions embodied in current law*

Penal Code

Table of Contents

General Provisions

Definition of Special Offenses

Appendix

Summary of Proposed Offenses Arranged by Grade

Volume 2

Penal Code Official Commentary

General Provisions

Definition of Special Offenses

Appendix

Translation Tables

Current Law to Proposed Code

Proposed Code to Current Law

Letter from the Office of the Attorney General

VOLUME 2 CONTENTS

Penal Code Commentary

Table of Contents

Part I. General Provisions

- Chapter 500. Preliminary Provisions
- Chapter 501. Basic Requirements of Offense Liability
- Chapter 502. Defenses Relating to the Offense Harm or Evil
- Chapter 503. Imputation of Offense Elements
- Chapter 504. Justification Defenses
- Chapter 505. Excuse Defenses
- Chapter 506. Nonexculpatory Defenses
- Chapter 507. Liability of Corporations and Other Non-Human
Entities
- Chapter 508. Inchoate Offenses
- Chapter 509. Offense Grades and their Implications

Part II. Definition of Specific Offenses

- Chapter 511. Homicide Offenses
- Chapter 512. Assault, Endangerment, and Threat Offenses
- Chapter 513. Sexual Assault Offenses
- Chapter 514. Kidnapping, Coercion, and Related Offenses
- Chapter 515. Robbery Offenses
- Chapter 521. Theft and Related Provisions
- Chapter 522. Property Damage and Destruction Provisions
- Chapter 523. Burglary and Other Criminal Intrusion Provisions
- Chapter 524. Invasion of Privacy Offenses
- Chapter 531. Forgery and Fraudulent Practices
- Chapter 541. Offenses Against the Family
- Chapter 551. Bribery and Official Misconduct Offenses
- Chapter 552. Perjury and Other Official Falsification Offenses
- Chapter 553. Interference with Governmental Operations
- Chapter 561. Public Order and Safety Offenses
- Chapter 562. Public Indecency Offenses

Appendix

Translation Tables

Current Law to Proposed Code
Proposed Code to Current Law

Letter from the Office of the Attorney General

PENAL CODE COMMENTARY

TABLE OF CONTENTS

PART I. GENERAL PROVISIONS

Chapter 500. Preliminary Provisions

Section 500.101.	Short Title and Effective Date	153
Section 500.102.	Principle of Construction	153
Section 500.103.	Applicability	154
Section 500.104.	Restrictions on Applicability	154
Section 500.105.	Criminal Jurisdiction	155
Section 500.106.	Burdens of Proof; Affirmative Defenses; Permissive Inferences	156
Section 500.107.	Definitions	158

Chapter 501. Basic Requirements of Offense Liability

Section 501.201.	Basis of Liability	161
Section 501.202.	Offense Elements Defined	162
Section 501.203.	Causal Relationship Between Conduct and Result	163
Section 501.204.	Requirement of an Act; Omission Liability; Possession Liability	164
Section 501.205.	Culpability Requirements	165
Section 501.206.	Culpability Requirements Defined	168
Section 501.207.	Ignorance or Mistake Negating Required Culpability	170
Section 501.208.	Mental Illness or Retardation Negating Required Culpability	171
Section 501.209.	Definitions	171

Chapter 502. Defenses Relating to the Offense Harm or Evil

Section 502.251.	Consent	173
Section 502.252.	Customary License; De Minimis Infraction; and Conduct Not Envisaged by Legislature as Prohibited by the Offense	174
Section 502.253.	Prosecution When the Defendant Satisfies the Requirements of More than One Offense	175
Section 502.254.	Conviction When the Defendant Satisfies the Requirements of More than One Offense	175
Section 502.255.	Definitions	182

Chapter 503. Imputation of Offense Elements

Section 503.301.	Accountability for the Conduct of Another	183
Section 503.302.	Voluntary Intoxication	184
Section 503.303.	Divergence Between Consequences Intended or Risked and Actual Consequences	185
Section 503.304.	Mistaken Belief Consistent with a Different Offense	186
Section 503.305.	Definitions	186

Chapter 504. Justification Defenses

Section 504.400.	General Defenses	187
Section 504.411.	General Provisions Governing Justification Defenses	188
Section 504.412.	Lesser Evils	189
Section 504.413.	Execution of Public Duty	190
Section 504.414.	Law Enforcement Authority	190
Section 504.415.	Use of Force by Persons with Special Responsibility for Care, Discipline, or Safety of Others	191
Section 504.416.	Defense of Person	192
Section 504.417.	Defense of Property	193
Section 504.418.	Use of Force by Aggressor	193
Section 504.419.	Use of Force Likely to Cause Death or Serious Physical Injury	193
Section 504.420.	Definitions	194

Chapter 505. Excuse Defenses

Section 505.501.	General Provisions Governing Excuse Defenses	195
Section 505.502.	Involuntary Acts; Involuntary Omissions	197
Section 505.503.	Impaired Consciousness	198
Section 505.504.	Insanity	199
Section 505.505.	Immaturity; Transfer to Juvenile Court	200
Section 505.506.	Involuntary Intoxication	200
Section 505.507.	Duress	201
Section 505.508.	Ignorance Due to Unavailable Law	202
Section 505.509.	Reliance Upon Official Misstatement of Law	202
Section 505.510.	Reasonable Mistake of Law Unavoidable by Due Diligence	203
Section 505.511.	Mistake as to a Justification	203
Section 505.512.	Definitions	204

Chapter 506. Nonexculpatory Defenses

Section 506.601.	General Provisions Governing Nonexculpatory Defenses	205
Section 506.602.	Prosecution Barred if Not Commenced Within Time Limitation Period	206
Section 506.603.	Entrapment	206
Section 506.604.	Incompetency to Stand Trial or be Sentenced	207
Section 506.605.	Former Prosecution for Same Offense as a Bar to Present Prosecution	208
Section 506.606.	Former Prosecution for Different Offense as a Bar to Present Prosecution	208
Section 506.607.	Former Prosecution in Another Jurisdiction as a Bar to Present Prosecution	208
Section 506.608.	Prosecution Not Barred Where Former Prosecution Was Before Court Lacking Jurisdiction or Was Fraudulently Procured by Defendant	209
Section 506.609.	Definitions	209

Chapter 507. Liability of Corporations and Other Non-Human Entities

Section 507.701.	Liability of Corporation or Unincorporated Association	211
Section 507.702.	Relationship to Corporation or Unincorporated Association No Limitation on Individual Liability or Punishment	211
Section 507.703.	Definitions	212

Chapter 508. Inchoate Offenses

Section 508.801.	Criminal Attempt	213
Section 508.802.	Criminal Solicitation	214
Section 508.803.	Criminal Conspiracy	215
Section 508.804.	Unconvictable Confederate No Defense	216
Section 508.805.	Defense for Victims and for Conduct Inevitably Incident	216
Section 508.806.	Defense for Renunciation Preventing Commission of the Offense	217
Section 508.807.	Grading of Criminal Attempt, Solicitation, and Conspiracy	218
Section 508.808.	Possessing Instruments of Crime	218
Section 508.809.	Definitions	218

Chapter 509. Offense Grades and their Implications

Section 509.901.	Classified Offenses	219
Section 509.902.	Unclassified Offenses	219
Section 509.903.	Authorized Terms of Imprisonment; Death	219
Section 509.904.	Authorized Fines	220
Section 509.905.	General Adjustment to Offense Grade for Prior Offense	221
Section 509.906.	Authorized Sentence for Multiple Offenses	221

PART II. DEFINITION OF SPECIFIC OFFENSES

Chapter 511. Homicide Offenses

Section 511.1101.	Murder in the First Degree	223
Section 511.1102.	Murder in the Second Degree	223
Section 511.1103.	Manslaughter in the First Degree	224
Section 511.1104.	Manslaughter in the Second Degree	225
Section 511.1105.	Grossly Negligent Homicide	226
Section 511.1106.	Causing or Aiding Suicide	226
Section 511.1107.	Definitions	227

Chapter 512. Assault, Endangerment, and Threat Offenses

Section 512.1201.	Assault; Causing Physical Injury	229
Section 512.1202.	Endangerment	231
Section 512.1203.	Terroristic Threats; Menacing	231
Section 512.1204.	Stalking; Intimidation	232
Section 512.1205.	Criminal Abuse	233
Section 512.1206.	Definitions	234

Chapter 513. Sexual Assault Offenses

Section 513.1301.	Aggravated Rape	235
Section 513.1302.	Rape	236
Section 513.1303.	Aggravated Sexual Abuse	237
Section 513.1304.	Sexual Abuse	238
Section 513.1305.	Sexual Misconduct	239
Section 513.1306.	Definitions	240

Chapter 514. Kidnapping, Coercion, and Related Offenses

Section 514.1401.	Kidnapping and Unlawful Restraint	241
Section 514.1402.	Interference with Custody	242
Section 514.1403.	Criminal Coercion	242
Section 514.1404.	Definitions	242

Chapter 515. Robbery Offenses

Section 515.1501.	Robbery	243
-------------------	---------	-----

Chapter 521. Theft and Related Provisions

Section 521.2101.	Consolidation of Theft Offenses	245
Section 521.2102.	Theft by Unlawful Taking or Disposition	245
Section 521.2103.	Theft by Deception	246
Section 521.2104.	Theft by Extortion	247
Section 521.2105.	Theft of Services	248
Section 521.2106.	Theft by Unauthorized Sale of Copyrighted Material	249
Section 521.2107.	Theft by Failure to Make Required Disposition of Funds Received	249
Section 521.2108.	Theft of Property Lost, Mislaid, or Delivered by Mistake	250
Section 521.2109.	Receiving Stolen Property	250
Section 521.2110.	Grading of Theft	251
Section 521.2111.	Claim of Right	252
Section 521.2112.	Unauthorized Use of Automobiles and Other Vehicles	252
Section 521.2113.	Definitions	253

Chapter 522. Property Damage and Destruction Provisions

Section 522.2201.	Arson in the First Degree	255
Section 522.2202.	Arson in the Second Degree	256
Section 522.2203.	Endangering by Fire or Explosion	256
Section 522.2204.	Failure to Control or Report a Dangerous Fire	257
Section 522.2205.	Causing or Risking Catastrophe	257
Section 522.2206.	Criminal Damage	258
Section 522.2207.	Consent Defense	260
Section 522.2208.	Definitions	260

Chapter 523. Burglary and Other Criminal Intrusion Provisions

- Section 523.2301. Burglary 261
- Section 523.2302. Criminal Trespass 263
- Section 523.2303. Definitions 264

Chapter 524. Invasion of Privacy Offenses

- Section 524.2401. Unlawful Eavesdropping or Surveillance 265
- Section 524.2402. Unlawfully Acquiring Information 266
- Section 524.2403. Unlawfully Divulging Information 266
- Section 524.2404. Exceptions to Chapter 524 Offenses 267
- Section 524.2405. Definitions 267

Chapter 531. Forgery and Fraudulent Practices

- Section 531.3101. Forgery and Counterfeiting 269
- Section 531.3102. Tampering with Writing, Record, or Device 270
- Section 531.3103. Criminal Simulation 271
- Section 531.3104. Unauthorized Impersonation 271
- Section 531.3105. Deceptive Practices 272
- Section 531.3106. False or Bait Advertising 272
- Section 531.3107. Falsifying Business Records 273
- Section 531.3108. Defrauding Secured Creditors 273
- Section 531.3109. Fraud in Insolvency 274
- Section 531.3110. Issuing False Financial Statement 274
- Section 531.3111. Receiving Deposits in Failing Financial Institution 275
- Section 531.3112. Misapplication of Entrusted Property 275
- Section 531.3113. Operating a Misrepresented Company 275
- Section 531.3114. Commercial Bribery 276
- Section 531.3115. Tampering with a Publicly Exhibited Contest 276
- Section 531.3116. Ticket Scalping 277
- Section 531.3117. Bad Checks 277
- Section 531.3118. Fraudulent Use of Credit or Debit Card 278
- Section 531.3119. Definitions 279

Chapter 541. Offenses Against the Family

Section 541.4101.	Bigamy	281
Section 541.4102.	Incest	281
Section 541.4103.	Concealing Birth of Infant	281
Section 541.4104.	Abandonment of Minor	282
Section 541.4105.	Nonsupport	282
Section 541.4106.	Endangering the Welfare of a Minor	283
Section 541.4107.	Contributing to the Delinquency of a Minor	283
Section 541.4108.	Unlawful Adoption Fees and Representation	284
Section 541.4109.	Abortion	284
Section 541.4110.	Definitions	284

Chapter 551. Bribery and Official Misconduct Offenses

Section 551.5101.	Bribery	285
Section 551.5102.	Unlawful Compensation of a Public Servant	285
Section 551.5103.	Official Misconduct	286
Section 551.5104.	Misuse of Confidential Information	286
Section 551.5105.	Definitions	286

Chapter 552. Perjury and Other Official Falsification Offenses

Section 552.5201.	Perjury and False Swearing	287
Section 552.5202.	Unsworn Falsification to Authorities	288
Section 552.5203.	False Reporting	289
Section 552.5204.	Impersonating a Public Servant	289
Section 552.5205.	Tampering with Public Records	289
Section 552.5206.	Definitions	290

Chapter 553. Interference with Governmental Operations

Section 553.5301.	Obstructing Governmental Operations	291
Section 553.5302.	Compounding a Crime	291
Section 553.5303.	Hindering Prosecution or Apprehension	292
Section 553.5304.	Fleeing or Evading Peace Officer	292
Section 553.5305.	Interfering with or Resisting a Peace Officer	293
Section 553.5306.	Escape	293

Section 553.5307.	Promoting or Possessing Contraband	294
Section 553.5308.	Failure to Appear	294
Section 553.5309.	Bribing a Witness	295
Section 553.5310.	Intimidating, Harassing, or Tampering with a Participant in the Legal Process	295
Section 553.5311.	Retaliating Against a Participant in the Legal Process	296
Section 553.5312.	Bribery of, or Improper Communication with, a Juror	296
Section 553.5313.	Tampering with Physical Evidence	297
Section 553.5314.	Simulating Legal Process	297
Section 553.5315.	Unauthorized Practice of Law	298
Section 553.5316.	Definitions	298

Chapter 561. Public Order and Safety Offenses

Section 561.6101.	Rioting	299
Section 561.6102.	Inciting to Riot	299
Section 561.6103.	Unlawful Assembly	299
Section 561.6104.	Failure to Disperse	300
Section 561.6105.	Disorderly Conduct	300
Section 561.6106.	Harassment	300
Section 561.6107.	Harassing Communications	301
Section 561.6108.	Loitering	301
Section 561.6109.	Public Intoxication	302
Section 561.6110.	Obstructing a Highway or Other Public Passage	302
Section 561.6111.	Disrupting Meetings and Processions	303
Section 561.6112.	Interfering with Communications	303
Section 561.6113.	Definitions	303

Chapter 562. Public Indecency Offenses

Section 562.6201.	Indecent Exposure	305
Section 562.6202.	Causing or Promoting a Sexual Performance by a Minor	305
Section 562.6203.	Distribution of Obscenity	306
Section 562.6204.	Prostitution or Patronizing a Prostitute; Loitering for a Sexual Act	308
Section 562.6205.	Permitting Prostitution	308
Section 562.6206.	Promoting, Supporting, or Profiting from Prostitution	309
Section 562.6207.	Cruelty to Animals	310
Section 562.6208.	Desecration of Venerated Objects	310
Section 562.6209.	Definitions	310

PENAL CODE OFFICIAL COMMENTARY

CHAPTER 500. PRELIMINARY PROVISIONS COMMENTARY**

**When the Commentary to any part of the Draft Code notes that a proposed Section is identical or substantially identical to a provision in the current Penal Code, the reader should consult the Commentary to the 1974 Penal Code for that provision for a more complete explanation of its meaning and, thus, the proposed Section's meaning.

Section 500.101. Short Title and Effective Date

Corresponding Current Provision(s): 500.010

Comment:

Generally. This provision gives a name for the Code and specifies the date on which it becomes legally effective.

Relation to current Kentucky law. Section 500.101(1), which provides the Code's title, is similar to current KRS 500.010.

Section 101(2), which states the Code's effective date, has no corresponding provision in the current Penal Code.

Section 500.102. Principle of Construction

Corresponding Current Provision(s): 500.030; 500.100

Comment:

Generally. This provision states the principle of construction that should guide interpretation of the Code.

Relation to current Kentucky law. Section 500.102(1) and (2) are identical to current KRS 500.030 and 500.100, respectively. The Kentucky Supreme Court has read those provisions to mean that doubts in construction of the Code should be resolved "in favor of lenity and against a construction that would produce extremely harsh or incongruous results." *Boulder v. Com.*, 610 S.W.2d 615, 618 (Ky. 1980).

Section 500.103. Applicability

Corresponding Current Provision(s): 500.020

Comment:

Generally. This provision prohibits common-law offenses by requiring that offenses be defined in the Code or another statute. At the same time, the provision recognizes and preserves the courts' inherent powers to punish for contempt and to enforce orders and civil judgments. Section 500.103 also provides that the Code's General Part applies to offenses defined by statutes other than the Code, unless the Code otherwise provides.

Relation to current Kentucky law. Section 103(1) and (3) are identical to current 500.020(1) and (2), except that the phrase "designated a crime or violation" in 500.020(1) has been replaced with "defined as an offense" to be consistent with the proposed Code's terminology, which uses the word "offense" rather than "crime."

Section 103(2) — which ensures that the Code's culpability terms, defenses, and other general provisions apply to any offense, whether defined in the Code or elsewhere — is consistent with Kentucky Supreme Court opinions applying Penal Code definitions and defenses to cases arising under statutes outside the Penal Code. See, e.g., *Powell v. Com.*, 843 S.W.2d 908 (Ky. App. 1992), overruled on other grounds by *Houston v. Com.*, 975 S.W.2d 925 (Ky. 1998) (definition of "possession" in KRS 500.080(14) is proper definition for jury instructions for cases arising under KRS Chapter 218A); *Farris v. Com.*, 836 S.W.2d 451 (Ky. App. 1992), overruled on other grounds by *Houston v. Com.*, 975 S.W.2d 925 (Ky. 1998) (applying Penal Code definition of entrapment to non-Code drug trafficking offense). In addition, KRS 532.005 applies the penalty provisions of the Penal Code "to all classes of crimes committed outside the provisions of the penal code."

Section 500.104. Restrictions on Applicability

Corresponding Current Provision(s): 500.040

Comment:

Generally. This provision recognizes the transition from the existing Code to the criminal law established by the Code as amended. However, the provision makes clear that the Code, and its application, does not affect rights or liabilities in civil actions.

Relation to current Kentucky law. Section 500.104(1) is identical to current 500.040(1). This provision ensures that the Code will not be applied retroactively. See *Cole v. Com.*, 553 S.W.2d 468 (Ky. 1977). Offenses committed prior to the effective date must be construed and punished according to the law as it existed at the time the offense was committed. See *Kimbrough v. Com.*, 550 S.W.2d 525 (Ky. 1977).

Section 104(2) is identical to current 500.040(3).

Section 104(3) is identical to current 500.040(2).

Section 500.105. Criminal Jurisdiction**Corresponding Current Provision(s):** 500.060**Comment:**

Generally. This provision provides the rules for determining whether a person is subject to prosecution in the Commonwealth for an offense.

Relation to current Kentucky law. Section 500.105 is substantially similar to current 500.060.

Section 105(1)'s introductory language is similar to that in current KRS 500.060(1), but replaces the phrase "may be convicted" with "is subject to prosecution," and adds that a person may be prosecuted for an offense he committed "while either within or outside the Commonwealth." The introductory language also eliminates as unnecessary the limitation "[e]xcept as otherwise provided in this section."

Section 105(1)(a) and (2) restate the current concept in KRS 500.060(1)(a): jurisdiction exists over a person who commits an offense "either wholly or partly within the Commonwealth," meaning that either "conduct" or "a result" that forms an element of the offense occurs in the Commonwealth. KRS 500.060(1)(a) refers to "*the* conduct" and "*the* result"; the proposed Section recognizes that an offense may have more than one conduct or result element. The proposed provision is consistent with case law. See, e.g., *Hayes v. Com.*, 698 S.W.2d 827 (Ky. 1985) (noting that a defendant may be convicted of receiving stolen property "any place where he is found with the stolen property in his possession" even if the theft occurred in another jurisdiction).

Section 105(1)(a) and (2) eliminate the exception contained in current KRS 500.060(2), which bars liability for conduct outside Kentucky that causes a result prohibited in Kentucky but not in the state where the conduct occurs, unless the person knew the result would occur in Kentucky. The comity interest that presumably supported the exception would not seem to outweigh Kentucky's interest in prosecuting a person who causes a criminal result in this Commonwealth.

Section 105(1)(b), (c), (d) and (e) are substantially similar to current KRS 500.060(1)(b), (c), (d), and (f), respectively. The phrase "is sufficient to constitute" has been replaced with "constitutes" in (b) and (c). Current 500.060(1)(d)'s reference to conduct establishing "complicity in the commission of" an offense has been deleted as superfluous; proposed 105(1)(a), couple with the introductory language regarding "conduct . . . of another for which [one] is legally accountable," would establish jurisdiction for such conduct.

Section 105(3) is substantively similar to the second sentence of current KRS 500.060(3), but states that the relevant fact "shall sustain the Commonwealth's burden of production" instead of stating that it provides "prima facie evidence." Section 105 does not retain 500.060(3)'s rule that the "bodily impact causing death" counts as a result element for homicide. That special rule creates criminal jurisdiction for a specific, very unusual fact pattern — where the offender's conduct and the victim's death occur outside Kentucky, but the physical contact causing death occurs in Kentucky. Because the rule would be of extremely limited applicability and does not serve any significant policy interest, there is no reason to carve out a specific exception to the generally applicable rules of jurisdiction to cover this one situation.

Section 105(4), establishing jurisdiction for omission liability, is substantively similar to current KRS 500.060(1)(e).

Section 500.106. Burdens of Proof; Affirmative Defenses; Permissive Inferences

Corresponding Current Provision(s): 500.070

Comment:

Generally. This provision sets forth the presumption that a defendant is innocent until proven guilty, establishes two distinct burdens of proof, and provides rules for the consequences of permissive inferences established elsewhere in the draft Code.

Relation to current Kentucky law. Section 500.106(1), establishing the presumption of innocence, has no corresponding provision in the Kentucky Constitution, statutes, or rules of criminal procedure (except in the context of military courts-martial and the content of jury instructions).

Sections 106(2) and (3) establish two distinct evidentiary burdens for different stages of a criminal proceeding. Section 106(2) sets forth the ultimate burden of persuasion. The Commonwealth must prove: (1) the elements of the offense beyond a reasonable doubt; (2) unless there is an express exception, the absence of any defense, exception, exemption, or mitigation beyond a reasonable doubt; and (3) unless there is an express exception, all other facts required for liability by a preponderance of the evidence.¹ (Significantly, such an “express exception” exists for two entire categories of defenses: excuses and nonexculpatory defenses, as to which the defendant bears the burden of persuasion under the proposed Code. See proposed Sections 501(5), 601(3).) The scope of the State’s burden of persuasion remains the same with respect to elements of the offense and defenses as under current KRS 500.070(1) and (3), but Section 106(2) provides a default rule that all other facts — such as jurisdiction and venue — need only be proven by a preponderance of the evidence. Cf. *Rounds v. Com.*, 139 S.W.2d 736 (1940) (“Venue must be proved, but since it does not affect the issue of guilt or innocence, although the instructions submit it as one of the elements to be proven beyond a reasonable doubt, in this jurisdiction it has been consistently held that slight evidence, supported by inferences and reasonable presumptions of knowledge by local jurors, is sufficient.”).

¹ Cf. *Peak v. Com.*, 34 S.W.3d 80 (Ky. App. 2000) (burden of proof on defendant to establish choice of evils defense).

Section 106(3) sets forth the burdens of production for the Commonwealth and the defendant. The burdens of production define the requisite threshold amount of evidence the burdened party must present to have an issue sent to the jury. The current Code does not include a provision dealing explicitly with the burden of production, but Section 106(3)(a) imposes the same burden of production on the Commonwealth as exists under current Kentucky law. See KRS 500.070(1), (3); *Com. v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991); see also *Jackson v. Virginia*, 443 U.S. 307, 316-20 (1979).

Section 106(3)(b) states that for affirmative defenses and mitigations,² the defendant has the burden of production (although the Commonwealth typically retains, under Section 106(2)(b), the burden of persuasion to disprove the defense). Section 106(3)(b) imposes a more rigorous burden of production on the defendant with respect to affirmative defenses than exists under current law. Under current Kentucky law, a defendant who has properly raised an affirmative defense by presenting some evidence supporting the defense may receive a jury instruction thereon.³ To be entitled to a jury instruction under Section 106(3)(b), in contrast, there must be “sufficient evidence, considered in the light most favorable to the defendant and all reasonable inferences therefrom, to allow a rational factfinder to find that all requirements of the defense are proven by a preponderance of the evidence.” Section 106(3)(b)’s burden of production follows the constitutional requirement that a conviction must be reversed “if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt.” *Jackson*, 443 U.S. at 324. Section 106(3)(b) prevents defendants from being able to obtain a jury instruction for any frivolous defense, no matter how weak the supporting evidence.

²The provision explicitly mentions “mitigations” as well as defenses to make clear that it may apply to rules that reduce liability as well as to rules that exonerate the defendant entirely. See, e.g., proposed Section 511.1103 (defining statutory mitigation to reduce liability from murder to manslaughter).

³ See *Jewell v. Com.*, 549 S.W.2d 807 (Ky. 1977), overruled on other grounds by *Payne v. Com.*, 623 S.W.2d 867 (Ky. 1981) (“A defense is so raised by the presentation of evidence that could justify a reasonable doubt of the defendant’s guilt. The sufficiency of the evidence to accomplish that purpose is a question of law for the courts to determine on a case-by-case basis.”).

Section 106(3)(c) defines “affirmative defense” as any defense that does not operate by negating an offense element. See Chapters 504 (justification defenses); 505 (excuse defenses); and 506 (nonexculpatory defenses). Nearly all affirmative defenses receive the same evidentiary treatment under Section 106(3), coupled with Section 106(2)(b), that they receive under current KRS 500.070(3). (The burden of persuasion for the insanity defense and other excuses, and for nonexculpatory defenses, is addressed elsewhere. The proposed Code places the burden of persuasion on the defendant for such defenses, whereas under current law, the defendant bears the burden of persuasion only for insanity. See proposed Sections 505.501 and 506.601 and corresponding commentary.)

Section 106(4) explains the significance of permissive inferences established elsewhere in the draft Code. Section 106(4)(a), which sets forth the circumstances under which courts are obligated to submit the issue of the existence of an inferred fact to the jury, has no corresponding provision under current law. The proposed rule clarifies one aspect of the significance of a permissive inference: it enables a party to satisfy its burden of production as to the inferred fact by giving evidence of the facts supporting the inference. Such a rule serves to prevent judges from dismissing cases without jury involvement, unless the evidence clearly negatives the inferred fact.

Section 106(4)(b) — authorizing instruction to the jury that it may, but need not, make the inference in question based on the supporting facts — is consistent with *Patterson v. Com.*, 556 S.W.2d 909 (Ky. 1977) (adopting the view from *Barnes v. United States*, 412 U.S. 837 (1973)) (“If a statutory inference submitted to the jury as sufficient to support conviction satisfies the reasonable doubt standard (that is, the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt) as well as the more-likely-than-not standard, then it clearly accords with due process.”)

A permissive inference in a jury instruction differs from a presumption, which invades the province of the jury by *requiring* rather than merely *allowing* a certain finding as to the inferred fact. See, e.g., *Wells v. Com.*, 561 S.W.2d 85 (Ky. 1978) (invalidating use of a presumption as a jury instruction); *County Court v. Allen*, 442 U.S. 140, 156-57 (1979).

Section 500.107. Definitions

Corresponding Current Provision(s): 500.080

Comment:

Generally. Section 500.107 provides general definitions for terms that appear elsewhere in the draft Code.

Relation to current Kentucky law. Section 107’s initial statement that the terms defined therein have the designated meanings “[u]nless a particular context clearly requires a different meaning” is substantively similar to current KRS 500.080.

For discussion of the relationship between current law and the defined terms for which Section 107 provides a cross-reference, refer to the commentary for the provision in which the term in question is defined.

The definitions of “Commonwealth” and “this Commonwealth” differ in function from the definition of “Commonwealth” in KRS 453.255(1). The proposed definitions relate to the Commonwealth as a *geographic* entity, whereas the definition in KRS 453.255(1) is used to define the Commonwealth in terms of its constituent *political* entities. The definition of “other state” is comparable to KRS 446.010(30).

The term “conduct” is not defined in the current Code, although the current definitions of culpable mental states refer to “conduct.” See, e.g., KRS 501.020(1)-(2). See also proposed Section 501.202 and corresponding commentary.

The definition of “dwelling” is the same as that in current 503.010(2), which is superior to the slightly different definition in current KRS 511.010(2). The latter definition has produced litigation about the meaning of “usually occupied.”⁴

The definition of “government” is identical to current KRS 500.080(6).

The term “he” is defined to equate with “person” to make clear that both sexes, and nonhuman entities, may be included within that pronoun where it is used. The definition differs slightly from the current definition in KRS 500.080(7), as it includes governments as well as natural persons, corporations, and unincorporated associations. Cf. *infra* discussion of “person.”

The term “inchoate offense” is used, but not defined, in current KRS Chapter 506. This definition clearly identifies the particular offenses the term comprehends.

The term “included offense” is defined in current KRS 505.020(2). Subsection (1) of Section 107’s definition is nearly identical to current KRS 505.020(2)(a), but the word “charged” has been deleted. Subsection (2) is similar to KRS 505.020(2)(b), but excludes the current provision’s reference to attempts toward commission of an included offense — which is instead reflected in the language of proposed Section 254(2)(c)(ii) — and covers *all* inchoate offenses, rather than merely attempts. See also proposed Section 502.254 and corresponding commentary. Subsection (3) is nearly identical to current KRS 505.020(2)(c)-(d), but reorganizes these provisions.

The terms “includes” and “including” are not defined in the current Code.

The term “law enforcement authority” is not defined in the current Code, and is used for provisions for which it seems appropriate to include authorities in addition to peace officers, such as prosecutors.

⁴The proposed definition is also consistent with cases like *Shackleford v. Com.*, 757 S.W.2d 193 (Ky. App. 1988), which held that a home is not fit for usual occupation after being irreparably damaged by a tornado. See proposed Section 2305 and corresponding commentary.

The definition of “peace officer” is substantively similar to KRS 431.005(3)(a)-(b). Nothing in this definition is intended to alter the grant of authority and powers contained in KRS 196.037.

The definition of “person” is comparable to KRS 500.080(12).

The definition of “physical injury” differs from the current definition in KRS 500.080(13) only in that it explicitly includes “illness” and “throwing or causing to be thrown upon the person feces, or urine, or other bodily fluid.”

The definition of “place of worship” has no analogue in current law.

The term “prosecution” is used, but not defined, in the current Code.

The terms “reasonable belief” and “reasonably believes” are used, but not defined, in the current Code. See, e.g., KRS 514.020(1)(c), 519.030(2), 531.060(1), 531.330(2).

The definition of “school” is comparable to KRS 160.345.

The definition of “serious physical injury” is similar to that in KRS 500.080(15), but does not refer to “prolonged impairment of health.”

The definition of “statute” has no analogue in current law.

The term “substantive offense” is introduced to distinguish a completed offense from an inchoate offense toward commission of a completed offense.

The following terms that appear in KRS 500.080 are omitted from Section 500.107: “crime”; “felony”; “law”; “misdemeanor”; “offense”; “possession”; “unlawful”; “and “violation.”

CHAPTER 501. BASIC REQUIREMENTS OF OFFENSE LIABILITY COMMENTARY

Section 501.201. Basis of Liability

Corresponding Current Provision(s): None

Comment:

Generally. This provision establishes the bases of liability for an offense under the criminal code. Section 501.201 makes clear the relevance and function of the other Chapters of the Code in relation to the determination of criminal liability for both Code and non-Code offenses. Section 201(1) provides that an actor may be liable for an offense only if he or she satisfies all of its elements, except where a provision in Chapter 300 operates to impute a missing element. Section 201(1)(a) also clarifies that liability may not be imposed where the defendant satisfies the requirements of a “bar to liability” (whether defined as a defense, exception, or other rule) set out in Chapter 800,⁵ in the Code’s Special Part,⁶ or outside the Code. Section 201(2) provides that the defenses set forth in Chapters 502, 504, 505, and 506 will preclude liability even though all of an offense’s elements are satisfied or imputed. Such provisions differ from the “bars to liability” covered by Section 201(1)(a) in that they present general, rather than special, defenses (and thus apply to *any* offense, rather than to a particular offense or group of offenses).

Relation to current Kentucky law. The principles expressed in Section 201 reflect the current understanding of the basis of criminal liability. No current Penal Code provision contains an explicit statement of the material in Section 201.

⁵See proposed Section 508.805 (providing defense to solicitation and conspiracy for victims and conduct inevitably incident to offense’s commission); proposed Section 508.806 (providing renunciation defense for inchoate offenses).

⁶See, e.g., proposed Section 521.2104(2) (providing defense to theft by extortion); proposed Section 521.2111 (providing claim-of-right defense for theft offenses); proposed Section 523.2302(2) (providing defense to criminal trespass); proposed Section 531.3118(3) (providing defense to fraudulent use of credit or debit card).

Section 501.202. Offense Elements

Corresponding Current Provision(s): None

Comment:

Generally. This provision categorizes and defines offense elements in terms of conduct, circumstances, results, and culpability requirements. Defining offense elements in this manner enables a systematic and clear approach to offense definition. Specifically, the offense element definitions aid in defining culpability requirements, which can be more precisely elaborated by reference to their application to each type of offense element.

As Section 501.202(1) makes explicit, offense elements may appear not only in the offense definition itself, but also in the provisions that define the offense grade or otherwise specify a specific level of liability that will attach to the offense. *Cf. Apprendi v. New Jersey*, 530 U.S. 466 (2000) (establishing constitutional rule that facts affecting defendant’s potential maximum punishment are offense elements and must be proved to jury beyond reasonable doubt).

Section 202(2) to (5) define the terms “conduct element,” “result element,” “circumstance element,” and “objective elements.” Section 202(2) defines a conduct element as any element of an offense that requires an offender’s “act” (as defined in Section 501.204(1)) or “failure to perform a legal duty.” For example, the offense of arson requires that a person “starts a fire or causes an explosion” property; any physical act or failure to perform a legal duty leading to such damage will satisfy the conduct element. (See proposed Section 522.2201.) (The causation and culpability requirements, however, will operate to limit the range of conduct for which a person will be criminally liable.)

Section 202(3) defines a result element as any change of circumstances caused by a person’s conduct. For example, the offense of arson requires the result of damage. (See proposed Section 522.2201.)

Section 202(4) defines a circumstance element as any objective element of an offense that is not a conduct or result element. Most offenses will have one or more circumstance elements that define the requisite conditions for a given act and result to generate criminal liability. For example, one form of first-degree arson requires damage to a “building [that is] inhabited or occupied.” (See proposed Section 522.2201(1)(a).)

Section 202(5) defines an offense’s “objective elements.” This term distinguishes an offense’s conduct, circumstance, and result elements from its culpability requirements. The distinction makes it clear that the culpability requirements set out in proposed Section 205 apply only to an offense’s objective elements and not its specified culpability requirements themselves.

Relation to current Kentucky law. Current Kentucky law discusses conduct, circumstance, and result elements (see, e.g., KRS 501.020), but does not define them.

Section 501.203. Causal Relationship Between Conduct and Result

Corresponding Current Provision(s):

501.060

Comment:

Generally. This provision specifically defines the minimum causal nexus between given conduct and its attendant results that will allow imposition of criminal liability for the conduct. Section 501.203(1)(a) establishes that the conduct must be the factual or “but-for” cause of the result an offense prohibits. Section 203(1)(b) imposes an additional “proximate cause” requirement, holding that “the manner of occurrence of the result [must be] rendered substantially more probable by the [defendant’s] conduct.” Section 203(1)(c) requires satisfaction of any additional causation requirements imposed elsewhere (including in the offense definition itself). Section 203(1)(c) makes clear that the legislature would be free to require, for example, that a particular offense’s result element occur within a certain amount of time.

Section 203(2) provides that in cases where more than one person contributed to the prohibited result and each person’s conduct alone would have caused the result, each person is considered to have caused the result. This provision prevents equally blameworthy persons from escaping liability due to the fortuity that someone else independently caused the prohibited result.

Relation to current Kentucky law. Section 203 corresponds to current KRS 501.060, which deals with issues of causation. The current section, however, discusses causal relationships in terms of particular culpable mental states. For example, KRS 501.060(2) addresses causation issues in situations where intent is the applicable culpable mental state. Section 203, on the other hand, does not address causation as a function of mental states. Causation is an objective issue regarding the relationship between an act and a result; its inherent complexity is only further muddled by the introduction of subjective mental-state issues into the definition of causation itself. The definitions of the culpability requirements independently discuss the required level of culpability regarding the likelihood of a result flowing from one’s conduct. In addition, a separate provision, proposed Section 303, deals with the logically discrete issue (currently addressed in KRS 501.060(2)(a) and (3)(a)) of imputing a person’s culpable mental state as to one potential result to impose liability where another harmful, and prohibited, result occurs.

The requirements of Section 203(1) are consistent with Kentucky statutory law, which requires both but-for causation and proximate causation for criminal liability to be imposed. Section 203(1)(a) substitutes the phrase “but for” for KRS 501.060(1)(a)’s phrase “without which.” Section 203(1)(b) adopts the approach to proximate causation reflected in KRS 501.060(2)(b) and (3)(b) by stating that the prohibited result must be “rendered substantially more probable by the conduct.” Section 203(2) is consistent with Kentucky court holdings that a person’s conduct need only be a contributing cause of a prohibited result. See, e.g., *Adcock v. Com.*, 702 S.W.2d 440 (Ky. 1986) (finding that defendant’s conduct need not be sole and immediate cause of victim’s injury; defendant may be found guilty if he contributed to the injury)

Section 203 eliminates as unnecessary and confusing KRS 501.060(4), which states that the issue of whether a person knew or should have known that the result he caused was rendered substantially more probable by his conduct is a fact issue. Any culpability requirement, including the requisite culpability as to causing a prohibited result, will be included within an offense’s definition and will have to be proved beyond a reasonable doubt.

Section 501.204. Requirement of an Act; Omission Liability; Possession Liability

Corresponding Current Provision(s): 501.030; 501.010(3)

Comment:

Generally. This section sets the minimum conduct requirements for criminal liability. Section 501.204(1) prohibits liability absent an overt act or the failure to perform a legal duty.⁷ A fundamental principle of criminal law holds that it is inappropriate to punish “mere thoughts” unaccompanied by a physical act or failure to discharge a specified legal duty. Section 204(2) provides that, in the absence of clear language to the contrary, an offense’s conduct element may be satisfied by either an affirmative act or a failure to perform a legal duty. Section 204(3) defines the circumstances under which possession is considered an “act” for purposes of criminal liability. Section 204(4) defines the term “act.”

Relation to current Kentucky law. Section 204(1) is substantively similar to current KRS 501.030(1). The requirement in KRS 501.030(1) that the act must be voluntary is addressed by proposed Section 505.502 (which also requires, like KRS 501.030(1), that the person who has failed to perform a legal duty must be physically capable of performing that duty). Like 501.030(1), Section 204(1) specifies that omission liability is appropriate only in certain specific situations — where one is bound by a legal duty to act.

Section 204(2) explicitly recognizes that, in the absence of clear language stating otherwise, an offense definition will not preclude omission liability even if it uses terms (such as active verbs) that may appear to require an affirmative act. Current Kentucky law contains no such explicit declaration of this point. For example, a person may be liable for homicide by engaging in conduct causing death. The defendant may also be liable for homicide through an omission causing death, if he had a legal duty and capacity to act but did not.

⁷ Section 204(1) authorizes omission liability based on a failure to perform any “legal duty.” Such duties may arise, for example, from statutes imposing criminal liability for omitting to act, from civil statutes requiring certain conduct, from contractual obligations, or from case law (including civil decisions). Although an offense’s conduct element may be satisfied, under Section 204, by the failure to perform various sorts of legal duties, omission liability may be imposed only if the defendant also satisfies the offense’s remaining elements — including its culpability requirements.

Section 204(3) establishes when possession counts as an “act.” Section 204(3)(a) states that possession is an act when a person “knowingly obtains or receives the thing possessed.” This rule is added to Section 204(3)(b)’s rule treating possession as an act when the person “was aware of his control . . . for a sufficient time to have been able to terminate his possession,” which is identical to the latter part of current KRS 501.010(3).

Section 204(4)’s definition of “act” is broader than KRS 501.010(3)’s definition of a “voluntary act,” as it includes both voluntary and involuntary bodily movement. This provision merely establishes the basic “act requirement” of criminal law, which may be satisfied by any objective conduct. The issue of voluntariness, on the other hand, relates to the separate question of whether a person who performed an act had a blameworthy mental state as to that act. Accordingly, involuntary acts — and involuntary omissions — are the subject of an excuse defense, set out in proposed Section 505.502.

Section 501.205. Culpability Requirements

Corresponding Current Provision(s): 501.030, .040, .050(1)

Comment:

Generally. This provision establishes rules governing the application of culpability requirements to objective elements. Section 501.205(1) specifies that some level of culpability is normally required as to each objective element of an offense. (This rule, and Section 205’s other requirements, apply to those elements defined in the grading provisions as well as to elements appearing in the offense definition itself. Cf. proposed Section 202(1) (defining “element” to include issues appearing in grading provisions).) Section 205(2) provides a general rule that a stated culpability requirement for one objective element governs subsequently elaborated objective elements as well, in order to avoid unnecessary repetition. Section 205(3) provides a “read-in” culpability requirement of recklessness where no culpability level is specified (either through direct statement or through application of the rule of Section 205(2)), to avoid excess verbiage and ensure that offenses, or offense elements, do not allow absolute liability for want of an explicit culpability term for each element. Section 205(4) sets prerequisites for imposition of absolute liability or liability based on ordinary negligence. Section 205(5) establishes that culpability as to the criminality of one’s conduct is not required unless the offense definition so provides. For example, one need not know specifically that one is committing a crime, or intend to commit “a crime” *per se*, to be subject to liability. Section 205(6) points out that the requirement of a given culpability level may be satisfied by proof of a more serious culpability level.

Relation to current Kentucky law. Section 205(1) is substantively similar to current KRS 501.030(2), but makes clear that culpability requirements apply only to “objective” elements, and not to stated culpability elements themselves. (For example, a person need not be consciously aware that he is acting “recklessly,” or know that he is acting “knowingly.”) Section 205(1) explicitly requires culpability as to “every objective element” of an offense (except where Section 205(4) would allow absolute liability). Section 205(1) requires some level of culpability as to each objective element of the offense, regardless of whether it appears in an offense definition, grading provision, or other provision establishing the extent of liability.⁸ See proposed Section 202(1) (defining “elements” of an offense to include its grading provisions); cf. *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (establishing constitutional rule that facts affecting defendant’s potential maximum punishment are offense elements and must be proved to jury beyond reasonable doubt).

Section 205(2) clarifies the application of a stated culpability requirement within an offense definition, and has no analogue in current law. Section 205(2) makes clear that sentence structure will govern application; a stated culpability requirement applies to all subsequent objective elements in the same grammatical clause, and any other subsequent objective elements where the legislature has suggested an intent to apply the same requirement.

Section 205(3) establishes recklessness as the “read-in” culpability requirement for offense elements that otherwise have no specified culpability requirement. This “read-in” rule would apply to elements appearing in the grading provision as well as to elements in the offense definition itself. Cf. proposed Section 202(1) (defining “element” to include issues appearing in grading provisions). Generally, setting a default culpability level keeps offense definitions readable and ensures that absolute liability is avoided.⁹ Specifically, recklessness is set as the default level in Section 205(3), because it is the minimum level of culpability normally considered appropriate for criminal liability.

The default rules of Section 205(2) and (3) differ from KRS 501.040, which states that if an offense does not prescribe a particular mental state, one of the four mental states is applicable to some or all of the material elements of the offense “if the proscribed conduct necessarily involves such culpable mental state.” The current formulation is troublesome in at least three respects: (1) it does not indicate which mental state to apply where one or more might be applicable; (2) it does not say whether any culpability level is needed for conduct that does not “necessarily” involve culpability, or how to tell whether conduct “necessarily” involves culpability; and (3) it does not indicate what to do for circumstance or result elements if no culpability level is prescribed.

⁸Section 205(1)’s rule applies, for example, to grading provisions in the proposed Code that enhance punishment based on the existence of certain objective elements. With Section 205(3), Section 205(1) requires that a culpability requirement of recklessness be “read in” as to all objective elements in grading provisions for which a culpability requirement is not otherwise specified. See, e.g., proposed Section 512.1201(2)(a)(iv) (authorizing grade adjustment for assault based on victim being law-enforcement authority); proposed Section 513.1301(3)(b) (aggravating sexual assault offense where offender “causes serious physical injury”).

⁹The Kentucky Court of Appeals has applied KRS 501.040 to avoid the use of absolute liability. See *Covington v. Com.*, 849 S.W.2d 560 (Ky. App. 1993) (“In effect, the culpable mental state required for assault in the third degree is written into KRS 508.025(1)(b) by KRS 501.040.”)

Section 205(4) is narrower than current KRS 501.050(1) as to when absolute liability may be imposed. (Unlike KRS 501.050(1), Section 205(4) also imposes similar restrictions on the imposition of liability for “ordinary negligence.”) The current provision allows absolute liability whenever a provision specifies no mental state and is a violation or misdemeanor; proposed Section 205(4)(a) allows such liability only for violations or misdemeanors not punishable by incarceration or by a fine exceeding \$500. Section 205(4)(b), however, also allows for absolute or ordinary-negligence liability where the legislature clearly expresses its intent for such liability to apply in a specific case.¹⁰ Section 205(4)(b) is similar to KRS 501.050(2), except that the proposed provision would apply to offenses within the Penal Code as well as offenses outside the Code.

Section 205(5) employs a different approach from current KRS 501.070(3) regarding the significance of culpability as to the criminality of one’s acts. The current law fails to state a general proposition on the subject, but rather sets out four limited circumstances in which ignorance of the legal prohibition may operate as a defense. Rather than relying on a list of circumstances from another statutory section, as in current law, Section 205(5) sets out a general principle that awareness of the law is relevant to criminal liability *only* if the particular offense definition itself expressly provides. The proposed provision is very similar to Model Penal Code § 2.02(9), which has been adopted by several states. See, e.g., Ill. Stat. Ann. 5/4-3(c); Minn. Stat. § 609.02(9)(5); N.J. Stat. § 2C:2-2(d); Pa. Cons. Stat. tit. 18, § 302(h). See also Sections 505.508 to .510 for provisions addressing ignorance due to unavailable law, mistakes due to an official misstatement of law, and reasonable mistakes of law unavoidable by due diligence.

¹⁰Section 205(4)(b)’s requirement of a clear indication of legislative purpose to impose absolute liability is typically satisfied by employing the phrase “in fact” in place of a culpability requirement for a specific element of an offense. The offense would refer, for example, to “in fact causing injury” rather than, say, “knowingly causing injury.”

Section 205(6), which specifies that proof of a more culpable mental state will satisfy an element definition requiring a less serious one, has no corresponding provision in current law. Failure to define criminal mental states as constituting a hierarchy — so that proof of deliberate intent will satisfy an objective element requiring only recklessness — will either lead to absurd results, or force the criminal code to define multiple culpability requirements for each objective element (thus becoming awkward and unwieldy), or both.¹¹

Section 501.206. Culpability Requirements Defined

Corresponding Current Provision(s): 501.020

Comment:

Generally. This section defines five culpability requirements — intent, knowledge, recklessness, gross negligence, and negligence — as they relate to each type of offense element: conduct, circumstance, and result.

Relation to current Kentucky law. Section 501.206 is generally similar to current KRS 501.020. However, for each of the defined culpability levels, Section 206 breaks the definition into subsections for each of the three element types: conduct, circumstance, and result. This formulation provides a consistent and precise structure for defining the culpability requirement for each offense. These elements are used in current law and made explicit by Section 202. Moreover, with respect to the conduct element of each culpability level definition, Section 206 adds language to cover situations, like conspiracy, where the actor enlists another to engage in the prohibited conduct.

¹¹ Cf. *Com. v. Wolford*, 4 S.W.3d 534, 539 (Ky. 1999) (“The jury was not required to believe that the circumstantial evidence offered to prove intent in this case was sufficient to support a conviction of murder. That does not mean that in order to convict of an offense requiring a less culpable mental state, the Commonwealth was required to prove alternative circumstances indicating wantonness or recklessness.”). But cf. *Fields v. Com.*, 12 S.W.3d 275, 287-88 (Ky. 2000) (“It is important to realize that, unlike at common law, the culpable mental states defined at KRS 501.020 are fully and clearly defined so as to be mutually exclusive. . . . Although the draft Model Penal Code included a provision which defined less culpable mental states as fully encompassed within its definition of ‘purposely’ (what the Kentucky Penal Code refers to as intentional conduct in an identical definition), the General Assembly did not adopt this subsection, and defined the culpable mental states so that a given act is undertaken *either* intentionally *or* knowingly *or* wantonly *or* recklessly. The trial court should only instruct the jury on both intentional murder and second-degree manslaughter, offenses with conflicting mental states, when the evidence presents a question as to whether a given act was accomplished intentionally or wantonly. However, when all of the evidence proves beyond a reasonable doubt that someone acted intentionally, as is the case here, the requirements of another competing mental state, as a matter of law, cannot be established.”).

Other than the differences explained above, Section 206(1) is similar to current KRS 501.020(1). However, Section 206(1)(b) further specifies that intent as to a circumstance requires “hope or belief that such circumstance exists.” In addition, Section 206(1)(d) adds language to clarify that conditional intent satisfies an offense’s requirement of intention, “unless the condition eliminates the harm sought to be prevented by the offense.” This conditional-intent provision makes clear that a person whose intent is predicated on some factual situation (e.g., the burglar who intends to steal from the premises, but only if he finds something valuable there) will satisfy an intent requirement.¹² Section 206(1)(d) is very similar to Model Penal Code § 2.02(6), which has been adopted by several states. See, e.g., Del. Stat. tit. 11, § 254; Haw. Stat. § 702-209; Pa. Cons. Stat. tit. 18, § 302(f).

Section 206(2) is substantively similar to current KRS 501.020(2), but adds a definition for acting knowingly with respect to a result: the person must be “practically certain that his conduct will cause such result.” The current provision fails to provide a definition for the culpability level of “knowing” as it applies to result elements. The proposed definition with respect to results is very similar to Model Penal Code § 2.02(2)(b)(ii), which has been adopted by numerous states. Section 206(2) also slightly softens the requirements of the “knowing” culpability level as it relates to circumstances: whereas current 501.020(2) requires a person to be “aware . . . that the circumstance exists,” Section 206(2)(b) requires only that the person “believes there is a high probability that such circumstance exists.” This language would enable liability in cases where the defendant is mistaken as to his actual circumstances, or where he recognizes that something is probably the case even though he is not fully certain or “aware” of it.

Section 206(3) is substantively similar to current KRS 501.020(3), but uses the term “recklessly” for what currently is termed “wantonly.” It also addresses the issue of recklessness as to conduct.

Section 206(4) is substantively similar to current KRS 501.020(4), but uses the term “with gross negligence” for what is currently known as “recklessly.” It also addresses the issue of gross negligence as to conduct. As with current law, Section 206(4) requires that the departure from the standard of care must be “gross,” thereby distinguishing criminal negligence from mere tort negligence, and holds that an actor’s failure to be aware of something may be sufficiently blameworthy to warrant the criminal law’s condemnation.

Section 206(5) also is substantively similar to current KRS 501.020(4), but uses the term “negligently” for a slightly diluted form of what is currently known as “recklessly.” (“Negligence” does not require the departure from the standard of care to be “gross.”) It also addresses the issue of negligence as to conduct. The Code recognizes that the legislature may impose criminal liability for ordinary negligence with regard to one or more offense elements.

¹²A recent example of the use of conditional intent was noted in *Holloway v. United States*, 526 U.S. 1 (1999), in which the Court held that the intent requirement in the federal carjacking statute is satisfied by proof that, at the moment the defendant demanded or took control over the driver’s automobile, he possessed the conditional intent to seriously harm or kill the driver if necessary to steal the car.

Section 206(6) makes explicit that the proposed Code’s change in terminology regarding culpability requirements — from “wantonly” to “recklessly” and from “recklessly” to “with gross negligence” — is not intended to make any substantive change in and of itself.

Section 501.207. Ignorance or Mistake Negating Required Culpability

Corresponding Current Provision(s): 501.070

Comment:

Generally. This section makes explicit that when a person’s ignorance or mistake as to fact or law negates a required culpability level, the requirements of an offense definition are not satisfied.

Relation to current Kentucky law. Section 501.207 is similar to current KRS 501.070(1)(a), providing that a mistake may negate a required culpability level, but is more specific and precise.

Section 207(1) explicitly recognizes that in some cases — such as where one mistakenly believes that he is committing a more serious offense — proposed Sections 303 and 304 will permit imputation of an offense’s culpability requirement in spite of the actor’s ignorance or mistake as to an objective element.

Section 207(2) refines current law by explaining the conditions under which a mistake “negatives” an offense’s culpability requirement. Section 207(2) categorizes mistakes as reckless, grossly negligent, negligent, or reasonable.¹³ Just as there are different levels of culpability as to conduct, there are different categories of mistakes — some innocent, some not — and a mistake at which a person arrives through culpability equal to, or greater than, the requirement of the offense itself should not exonerate the person. In other words, a person’s recklessness as to forming a mistaken belief should not prevent liability where the crime itself requires only recklessness for liability. Accordingly, Section 207(2) states that a reckless mistake may negate only intention or knowledge; a grossly negligent mistake negates intention, knowledge, and recklessness; a negligent mistake negates intention, knowledge, recklessness, and gross negligence; and a reasonable mistake negates any culpability level.

Section 207(3) defines the terms “reckless mistake,” “grossly negligent mistake,” “negligent mistake,” and “reasonable mistake.” Section 207(3)(a) and (3)(b)’s definitions of “reckless mistake” and “negligent mistake” require, respectively that the actor be “reckless” or “negligent” in forming or holding an erroneous belief. Section 207(3)(c)’s definition of “reasonable mistake” applies to erroneous beliefs that an actor forms or holds neither recklessly nor negligently. Section 207(3)’s definitions are intended to incorporate by reference Section 206’s definitions of the culpability levels of recklessness and negligence; whether a mistake is reckless, negligent, or reasonable is to be determined with reference to the standards set forth in Sections 206(3) and (4).

¹³ Under Section 207, a mistake can be, at most, reckless. One cannot make an intentional or knowing mistake.

Section 501.208. Mental Illness or Retardation Negating Required Culpability

Corresponding Current Provision(s): None

Comment:

Generally. This provision recognizes that a mental illness or retardation, like ignorance or mistake, may negate culpability for an offense. The “defense” this provision provides does not change in any way what would otherwise already be the case under the current or proposed Code — if a person lacks the culpability required by an offense, he cannot be held liable for that offense. The “defense” does nothing but confirm that evidence relevant to the required mental state may be introduced on that issue. To adopt a contrary rule — maintaining that culpability is required for an offense, yet excluding evidence relevant to the issue of culpability — would be inconsistent, if not disingenuous.

At the same time, it should be noted that many commonly offered forms of evidence — such as psychiatric testimony, or evidence regarding disorders that impair ability to control conduct — do not truly relate to whether the defendant acted with the required culpability. Accordingly, such evidence may be rejected on strict relevance grounds, which provide the most sound and consistent basis for determining whether the issue may be litigated and what evidence may be introduced.

Relation to current Kentucky law. No provision in the current Penal Code generally deals with mental impairment negating culpability, but Kentucky courts have read specific defense provisions of the Code to implicitly recognize that mental illness or retardation may negate the culpability requirement for an offense element. Cf. *McGuire v. Com.*, 885 S.W.2d 931, 934 (Ky. 1994) (“Intoxication, whether voluntary or involuntary, is a defense to an intentional crime if the effect of the intoxication is to completely negate the element of intent; it causes the defendant’s mental state to equate with insanity.”).

Section 501.209: Definitions

Corresponding Current Provision(s): [various]

Comment:

Generally. This provision collects the defined terms used in Chapter 501.

Relation to current Kentucky law. For discussion of the relationship between Chapter 501’s defined terms and current law, refer to the commentary for the provision in which the term in question is defined.

CHAPTER 502. DEFENSES RELATED TO THE OFFENSE HARM OR EVIL

COMMENTARY

Section 502.251. Consent

Corresponding Current Provision(s): [Various]

Comment:

Generally. Section 251 establishes rules governing when the consent of one who would otherwise be the victim of an offense will preclude criminal liability. Section 251(1) defines the general rule; Section 251(2) provides special rules for offenses involving bodily harm; and Section 251(3) defines the circumstances under which a person’s agreement will not constitute valid legal consent.

Relation to current Kentucky law. There is no general consent defense corresponding to Section 251(1), but consent is defined as a defense — or the lack of consent as an offense element — for many specific offenses. See, e.g., KRS 510.040, 510.060, 510.110, 510.140. Current law’s repeated use of the phrase “without consent” fails to clearly articulate the rules required to properly determine liability. Section 251 recognizes that a person’s agreement will not always constitute valid legal consent (for example, where the person is incompetent or the “consent” is coerced), and ensures that the proposed Code is both clear in explaining when consent precludes liability and consistent in its treatment of consent from one offense to another.

Section 251(1) provides that a victim’s consent will preclude liability, as a general matter, if it negatives either an offense element or the harm or wrong at which the offense is aimed. For example, several offense definitions in the proposed Code¹⁴ explicitly include the absence of a person’s “consent” as an offense element. Less obviously, Section 251(1) would also apply to offenses requiring that the defendant accomplish something by “force or threat of force,” against another’s “will,” or without “authority.”¹⁵

¹⁴ See, e.g., proposed Sections 513.1304(1)(e) (sexual abuse); 513.1305(1) (sexual misconduct); 514.1401(4)(b) (unlawful restraint); 521.2112(1) (unauthorized use of vehicle; requiring conduct be performed “without consent of the owner”); proposed Section 524.2401(1) (surveilling or eavesdropping without consent of “persons entitled to privacy”).

¹⁵ See, e.g., proposed Section 513.1301(1)(b), (2)(b) (sexual assault committed where one uses “forcible compulsion,” meaning “force or threat of force”); proposed Section 1501(1) (robbery committed where one uses or threatens “immediate use of physical force”); proposed Section 531.3101(1)(a) (forgery committed where one alters another’s writing “without his authority”).

Section 251(1) also provides a defense for situations where consent does not negative an offense element, but nevertheless “precludes the infliction of the harm or evil sought to be prohibited” by an offense. For example, proposed Chapter 2200 includes several offenses that criminalize damaging or endangering the property of “another.” See, e.g., proposed Sections 522.2202(1)(a), 2203(1)(b), 2204(1)(a), 2206. Although a victim’s consent does not negative such offenses’ requirement that the property involved belong to “another,” it does negative the harm at which the offenses are aimed.

Section 251(2) creates special rules for consent to bodily harm, because in limited circumstances, consent to such harm may be valid even though it does not negate an element or preclude the harm the offense seeks to punish. Current law includes no such provision, but appears to support this principle. (For example, with some forms of infliction of physical attacks, as in legitimate athletic contests like boxing and football, the willingness of the participants will prevent liability.) Section 251(2)’s special rules for consent to bodily harm operate independently of Section 251(1)’s general rules regarding consent’s effectiveness as a defense. Consent to conduct causing or threatening bodily harm may, therefore, provide a defense even if it does not negative an offense element or preclude the harm or wrong at which an offense is aimed.

Section 251(3) recognizes that a victim’s agreement may not always constitute valid legal consent. “Consent” is not a defense where the person giving it is one who is obviously, or is known by the offender to be, incompetent or lacking the mental capacity to consent; or against whose imprudent consent the law seeks to protect; or who is coerced into giving consent.

Section 502.252. Customary License; De Minimis Infraction; and Conduct Not Envisaged by Legislature as Prohibited by the Offense

Corresponding Current Provision(s): None

Comment:

Generally. This provision sets out defenses for persons whose conduct was within a customary license, was too insignificant to merit criminal punishment, or did not cause the harm contemplated by the offense’s existence. These provisions enable the court to dismiss prosecutions on these bases, creating an additional safeguard beyond the usual reliance on prosecutorial discretion. These defenses are to be presented to, and ruled on by, the court prior to trial, rather than to the jury at trial.

Relation to current Kentucky law. Current Kentucky law does not explicitly recognize these defenses. Section 252’s defenses are in keeping, however, with the well-accepted rule of construction that a statute should not be interpreted to produce an absurd result.

Section 252(1) provides that conduct may be exempt from liability if it is within a “customary license.” For example, Section 252(1) would provide a defense to trespassing where a landowner has never previously objected to neighbors using his yard as a shortcut, even though it is posted against trespassing. Section 252(1)’s defense is not available, however, where a license has been “expressly negated by the person whose interest was infringed” or is inconsistent with the relevant offense.

Section 252(2) recognizes a defense for conduct that, although technically constituting an offense, is too trivial to fairly warrant a criminal conviction. For example, one might technically commit an offense for being less than a minute late in reporting for periodic detention. See proposed Section 5307(1), (2)(b).

Section 252(3) provides a defense where one did not actually cause the harm or wrong at which the offense is aimed. Sections 252(3) also provides that the court may not dismiss a charge on the basis of a defense set forth in Section 252 without filing a written statement of its reasons for doing so.

Section 502.253. Prosecution When the Defendant Satisfies the Requirements of More than One Offense

Corresponding Current Provision(s): 505.020

Comment:

Generally. This provision sets out the rules for prosecuting persons whose conduct may violate two or more offenses at the same time. Sections 502.253 and .254 attempt to ensure that convictions for multiple related offenses are logical, that they track the legislature’s intention as what are different harms, and that comport with constitutional double jeopardy requirements.

Relation to current Kentucky law. Section 253 is the same as the first sentence of current KRS 505.020(1), except that the phrase “single course of conduct” in KRS 505.020(1) has been replaced with the phrase “same conduct.”

Section 502.254. Conviction When the Defendant Satisfies the Requirements of More than One Offense or Grade

Corresponding Current Provision(s): 505.020; 506.110

Comment:

Generally. Section 254 defines the circumstances under which a person may receive multiple convictions when he satisfies the requirements of more than one offense. Significantly, this Section does *not* restate (or even directly relate to) the constitutional prohibition on double jeopardy, but is more comprehensive, addressing broad general issues regarding the appropriateness of multiple liability that go beyond the Constitution’s minimum requirements. Moreover, this Section

does not address any procedural issues relating to how, or when, a jury is to be instructed regarding various offenses, such as “included offenses” of charged offenses. Section 254 speaks only to the issue of when multiple liability is appropriate and allowed under the proposed Code.

Relation to current Kentucky law. No state has ever developed a clear statute seeking to explain comprehensively the basis for punishing multiple offenses. Instead of making an effort to set out underlying principles to guide judgment, legislatures almost always simply lean on the notion of an “included offense,” an idea borrowed from constitutional double jeopardy law, which itself is murky, if not incoherent. The “included offense” concept has not proven useful or clear as a guide to determining when multiple liability is appropriate. Decisions regarding the propriety of imposing multiple liability have, for the most part, been delegated to the courts, with predictably unpredictable results.¹⁶ This issue is too critical to allow *ad hoc* decision-making rather than at least attempting to provide legislative guidelines or an explanation of suitable criteria.

This issue is critical given that the proposed Code also seeks to define a new liability scheme that would eliminate concurrent sentences. Currently, the issue of multiple liability can effectively be swept under the rug, as a court can enter additional convictions that have no practical consequence in terms of the defendant’s total liability. But if we take seriously the project of imposing additional liability for all the distinct harms (and only the distinct harms) a defendant has caused, we also need to take care in describing the conditions under which multiple liability is, or is not, allowed.

Consider the case where an offense has both a “base offense” and an aggravating factor, such as causing physical injury, that increases the offense’s grade, and there is another offense that prohibits the aggravating factor (causing injury) specifically. Although it may be true that the second offense and the aggravated form of the first offense (considered as a whole, rather than considering the aggravator specifically) each requires something that the other does not. Even so, counting the same harm toward both the aggravator and a distinct offense may amount to “double counting” of a single harm. See, e.g., *Grundy v. Com.*, 25 S.W.3d 76 (Ky. 2000), (allowing convictions for both first-degree burglary, based on physical injury aggravator, and second-degree assault, under intentional physical injury with a dangerous instrument theory, as “each required proof of a fact or facts unique to each charge”); *McClain v. Com.*, 607 S.W.2d 421 (Ky. 1980) (affirming convictions for first-degree escape and first-degree assault).

¹⁶ For example, the Kentucky Supreme Court recently overturned a line of double-jeopardy precedent. See *Com. v. Burge*, 947 S.W.2d 805 (Ky. 1996), *cert. denied*, 118 S. Ct. 422 (overruling *Ingram v Com.*, 801 S.W.2d 321; *Walden v. Com.*, 805 S.W.2d 102; *Hall v. Com.*, 819 S.W.2d 3; *Jones v. Com.*, 756 S.W.2d 462; *Hellard v. Com.*, 829 S.W.2d 427; *Hamilton v. Com.*, 659 S.W.2d 201; *Denny v. Com.*, 670 S.W.2d 847).

At the same time, there may be cases where one offense is technically an “included offense” of another, but under the facts of the case, each offense represents a distinct harm or wrongful act. Cf. *Bush v. Com.*, 839 S.W.2d 550 (Ky. 1992) (disallowing conviction for both DUI and wanton murder). One difficult issue under “included offense” analysis is whether there can be liability for two offenses where one includes efforts toward the other: for example, burglary (which requires an intent to commit a felony) and the subsequent felony. The purpose of the burglary offense is to punish the intrusion itself, which represents an independent harm from the later felony; it makes sense, then, that the later felony should not be discounted or merged into the burglary offense. The same is true of the current Code’s definition of robbery, which punishes the discrete harm of intimidation and fear created “in the course of committing theft” and does not require a completed theft, but only the “intent to accomplish the theft.” KRS 515.020, 515.030. But see, e.g., *Jordan v. Com.*, 703 S.W.2d 870 (Ky. 1985) (where defendant who has pled guilty to theft is subsequently found guilty of first-degree robbery arising out of same circumstances, theft plea must be eliminated); cf. *Marshall v. Com.*, 625 S.W.2d 581 (Ky. 1981) (pointing gun at certain persons prior to seizure of loot, which gave rise to wanton endangerment charge, was in reality part of elements of robbery and could not be punished separately); *Watson v. Com.*, 579 S.W.2d 103 (Ky. 1979) (terroristic threat is included in wanton endangerment).

Section 254 defines a comprehensive statutory provision addressing the propriety of multiple convictions for separate offenses. Importantly, Section 254 does not alter current law regarding when a jury may be instructed on, or find a defendant guilty of, multiple offenses or included offenses.¹⁷ Section 254 imposes limitations on multiple *judgments of conviction* by the court, as opposed to multiple guilty verdicts by the jury, where an offender satisfies the requirements of more than one offense.

Section 254(1) does not employ the concept of an “included offense,” which is significant in the context of jury instructions, but is conceptually separable from the question of when multiple liability should be allowed. The rules established in Section 254 do not depend on consideration of the particular facts of specific cases. Rather, they present issues of law¹⁸ regarding how defined offenses relate to each other — specifically, whether their relation is such that multiple liability is appropriate, or whether imposing liability for one offense would needlessly and improperly duplicate liability already imposed by a conviction for another offense. Accordingly, a court’s finding regarding the appropriateness of multiple convictions for two separate offenses would be binding on all future cases involving those same offenses, enhancing predictability, stability, and evenhandedness in the imposition of multiple liability.

¹⁷ As to that issue, see, e.g., *Com. v. Day*, 983 S.W.2d 505 (Ky. 1999) (“An instruction on a lesser included offense is required only if, considering the totality of the evidence, the jury could have a reasonable doubt as to the defendant’s guilt of the greater offense, and yet believe beyond a reasonable doubt that he is guilty of the lesser offense.”).

¹⁸ The propriety of multiple convictions under Section 254 is question of law for the court, rather than a question of fact for the jury. In some instances, the court may be able to withhold jury instructions for an offense because Section 254 would preclude a conviction. To avoid the risk of a reversal requiring a new trial, however, the court might be wise to postpone such determinations until after the jury has returned its verdicts.

Section 254(1)(a) defines rules to limit liability for multiple offenses when those offenses are “based on the same conduct.” Importantly, Section 254(1)(a) does not in any way limit convictions for related offenses arising out of different conduct. For example, Section 254(1)(a)(i)(A) would preclude assault liability where the bodily harm involved consists solely of sexual penetration that is accounted for by a sexual assault conviction. Multiple liability would be appropriate, however, where the bodily harm involved is independent of the sexual penetration — such as where the defendant hits the victim in the course of a sexual assault. Similarly, Section 254(1)(a)(i)(B) would preclude convictions for both homicide and assault where the defendant shot the victim with a single bullet, but would not bar convictions for both offenses where the defendant caused bodily harm with one shot and death with another.

Section 254(1)(a) imposes additional requirements, however, so that multiple liability is not barred for *all* situations where the same conduct may constitute multiple offenses. Section 254(1)(a)(i)(A) precludes liability for two offenses arising out of the same conduct where one offense is concerned with a harm or wrong that is “entirely accounted for by” the other offense. Rather than considering the theoretical possibility of committing one offense without committing another, the proposed standard calls for a consideration of the relevant offenses’ purposes. Consider the following examples:

- The proposed multiple-conviction provision would preclude convictions for both sexual assault by the use of force and unlawful restraint based on the same conduct. Cf. proposed Section 513.1301(1)(b) (defining sexual assault by force); proposed Section 1401(2) (defining unlawful restraint). Nevertheless, multiple liability *would* be appropriate where the sexual assault and unlawful restraint are based on different conduct. For example, an unlawful restraint conviction could be based on a lengthy detention that was independent of, and occurred before or after, a sexual assault.

- Convictions would not be permitted, based on the same conduct, for both aggravated sexual assault under proposed Section 513.1301(3)(b) and assault under proposed Section 512.1201. Section 1301(3)(b)’s aggravation fully accounts for the assault offense’s focus on bodily harm. A conviction for assault would be permitted, however, where a factor other than bodily harm (such as the victim’s age) aggravates the sexual assault offense, or where the sexual-assault aggravation is based on different conduct.

- Section 254(1)(a)(i)(A) would not bar convictions for both sexual assault and incest based on a single act of sexual penetration, insofar as sexual assault does not in any way account for the harm to families at which the incest offense is aimed. Cf. proposed Section 513.1301 (defining sexual assault); proposed Section 541.4102 (defining incest).

- Section 254(1)(a)(i)(A) would bar convictions for both criminal coercion and terroristic threats based on the same threat to commit an offense, insofar as the coercion offense accounts for the harm of causing fear that is criminalized by the threat offense. Cf. proposed Section 512.1203 (defining terroristic threats); proposed Section 514.1403 (defining criminal coercion).
- Where a defendant obtains property by conduct that is itself criminal, Section 254(1)(a)(i)(A) will often permit liability for both theft and the other offense. For example, liability for both theft by deception and forgery would be appropriate where one acquires property by passing a counterfeit bill, insofar as the offense of theft does not account for the forgery offense's harm of undermining public confidence in paper currency and the monetary system. See proposed Section 521.2103 (defining theft by deception); proposed Section 531.3101 (defining forgery).
- Section 254(1)(a)(i)(A) would bar convictions for both burglary and trespassing based on the same entry into a building. Cf. proposed Section 523.2301 (defining burglary); proposed Section 523.2302 (defining criminal trespass). The harm addressed by the offense of trespassing (interfering with property, and perhaps privacy, interests by physical intrusion) is fully accounted for by the offense of burglary — which, after all, is essentially a compound offense consisting of trespassing and an attempt to commit another offense.
- In like manner, Section 254(1)(a)(i)(A) would also preclude liability for both burglary and *attempted* theft where the burglary charge is premised on the defendant's intention to steal property upon entering a building. Section 254(1)(a)(i)(A) would not preclude liability for both burglary and attempted theft, however, where a burglary conviction is premised upon the defendant's intention to commit a second offense. Liability for both burglary and theft would also be appropriate where a burglar actually steals property, given that the offense of burglary does not account for the completed theft offense's harm of actually taking another's property. The same would be true of robbery and theft: liability for both robbery and an attempted theft would not be allowed, but liability for both robbery and a completed theft would be allowed.
- Section 254(1)(a)(i)(A) would not prevent convictions for both contributing to the delinquency of a minor and the inchoate offense of solicitation based on the same solicitation to commit an offense. Cf. proposed Section 541.4107(1) (defining offense of contributing to delinquency of minor). In such a case, the inchoate offense does not account for the harm of corrupting a juvenile, while the contribution offense does not account for the harm of the underlying offense. The proposed Code's contribution offense operates, rather, as an "add-on" offense that provides additional punishment beyond that imposed for soliciting an adult to commit an offense.

· The proposed multiple-conviction provision would also not bar liability for both official misconduct and any other offense the misconduct constitutes. Liability for official misconduct may, but need not, arise from conduct that is itself criminal. Cf. proposed Section 551.5103 (defining official misconduct). The proposed misconduct offense punishes the harm of abusing authority by certain conduct, but does not account for any independent harm caused by such conduct. For example, an official-misconduct conviction premised on embezzlement of public funds would not account for the wrongful taking of property addressed by the theft offense.

· Section 254(1)(a)(i)(A) would not preclude liability for both escape and the offense for which the offender was originally in custody. Cf. proposed Section 5307 (defining escape). The offense of escape punishes the harm of interfering with governmental operations, but of course does not account for the harm of the underlying offense — for which, in a great number of escape cases, the offender will already be under sentence.

Section 254(1)(a)(i)(B), which is substantively similar to KRS 505.020(2)(d), prevents convictions for two offenses based on the same conduct where the harm or wrong of one offense is “of the same kind, but lesser degree than” the harm or wrong of the other offense. This provision would, for example, prevent liability for both sexual assault and sexual abuse based on the same conduct. Cf. proposed Section 513.1301 (defining sexual assault); proposed Section 513.1302 (defining sexual abuse). Section 254(1)(a)(i)(B) also precludes convictions for both homicide and assault based on the same conduct. Cf. proposed Section 511.1101 (defining first-degree murder); proposed Section 512.1201 (defining assault).

Sections 254(1)(a)(ii) and (iii) prevent multiple convictions for specific and general offenses punishing the same conduct, or offenses that differ only in their culpability requirements, or offenses defined as a continuing course of conduct. Section 254(1)(a)(ii)(A) precludes multiple convictions where two offenses differ only in that one prohibits a kind of conduct generally and the other criminalizes a specific kind of such conduct.

Section 254(1)(a)(ii)(B), which is substantively similar to KRS 505.020(2)(c), provides that multiple liability may not be imposed where two offenses differ only in that “one requires a lesser kind of culpability than the other.” Where one causes the death of a single person, for example, convictions would not be permitted for both first-degree murder (which requires knowingly causing death) and second-degree manslaughter (which requires recklessly causing death). The Kentucky courts have similarly held that multiple homicide convictions may not obtain from a single death.

Section 254(1)(a)(iii), which is nearly identical to current KRS 505.020(1)(c), limits multiple liability for offenses defined as a continuing course of conduct based on uninterrupted conduct. For example, the proposed offense definition for bigamy reaches one who “resides in the State” after a second marriage. Section 254(1)(a)(iii)’s rule makes it clear that multiple bigamy convictions would not be appropriate based on a defendant’s single, uninterrupted residence in Kentucky. Cf. *Brown v. Ohio*, 432 U.S. 161, 169 (1977) (“The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units.”). (Section 254(1)(a)(iii) allows the legislature to circumvent this general rule against multiple convictions, however, by expressly providing that specific periods of continuing conduct constitute separate offenses.)

Section 254(1)(b)(i) adopts the current rule of KRS 506.110(1) prohibiting convictions for both an inchoate offense and the completed offense, but expands that rule to all inchoate offenses, rather than only attempt. Section 254(1)(b)(ii) prohibits simultaneous convictions for both (1) an inchoate offense toward commission of a target offense, and (2) any offense that is so closely related to the target offense that Section 254(1)(a) would bar liability for both the target offense and that other offense. For example, 254(1)(b)(ii) would preclude convictions (based on the same conduct) for both battery and attempted aggravated battery, or for attempted battery and aggravated battery.

Section 254(1)(c), preventing convictions for multiple inchoate offenses toward a single substantive offense, adopts the same substantive rule as exists in current KRS 506.110(3).

Section 254(1)(d) states that a person cannot be convicted of the same offense twice where one conviction is based on his own conduct and one is based on his complicity for the conduct of another participant in the offense. Thus, where two people jointly commit the offense of home invasion, each may be convicted on one count of home invasion, but not for another count based solely on the accountability of each for the conduct of the other. The current Code contains no such explicit rule, although the proposed rule seems to be consistent with Kentucky law.

Section 254(1)(e), prohibiting legally inconsistent simultaneous convictions, is identical to KRS 505.020(1)(b).

Section 254(2) makes clear that where multiple convictions conflict and only one may be entered into judgment, the court must enter a conviction for the most serious of those offenses (or the more serious of two grades of the same offense). This rule is consistent with current Kentucky law.

Section 254(3) defines “inchoate offense” and “substantive offense.”

Section 502.255: Definitions

Corresponding Current Provision(s): [various]

Comment:

Generally. This provision collects the defined terms used in Chapter 502.

Relation to current Kentucky law. For discussion of the relationship between Chapter 502's defined terms and current law, refer to the commentary for the provision in which the term in question is defined.

CHAPTER 503. IMPUTATION OF OFFENSE ELEMENTS

COMMENTARY

Many traditional doctrines inculcate a person despite the absence of a required element of the offense definition. For example, if a person causes another to engage in conduct constituting a criminal offense, the person may be liable for the offense even though he has not performed the required conduct himself. The person is liable despite the absent element(s) because the conduct of the other person (the principal) is imputed to him under the doctrine of complicity. Similarly, a culpable mental state (typically, recklessness — the conscious disregard of a known risk) commonly is imputed to a person if he lacked such a mental state because of his voluntary intoxication. Under these doctrines, although the person does not satisfy the required offense element, some other behavior on the person’s part makes it appropriate to impute that element and hold him liable for the offense.

Section 503.301. Accountability for the Conduct of Another

Corresponding Current Provision(s): 502.010-040; 506.020-.040, .080-.100

Comment:

Generally. This provision sets forth the circumstances in which one person may be held accountable for the conduct of another person.

Relation to current Kentucky law. Sections 503.301(1)(a) and (b) are substantively similar to KRS 502.010(1) and 502.020, respectively, in defining complicity liability. However, Section 301(1)(a) imposes complicity liability generally for causing “another” to commit an offense, rather than only for causing “an innocent or irresponsible person” to do so, as current 502.010(1) does. One who causes another person to commit an offense should be held accountable whether the other person was “innocent” or not. Section 301(1)(b), like KRS 502.020, defines a second standard of liability where the defendant intentionally assists in planning or committing the offense. (Note that the intent requirement applies only to the person’s conduct; as to the offense’s circumstances or result, the person must have the culpability required by the offense definition.) The term “conspire,” as used in this Section, has the same meaning as in Chapter 508. Section 301(1)(c), allowing for complicity liability if an offense definition specifically provides for it, has no corresponding provision in the current Code.

Section 301(2)(a), providing an exception to accountability if the person in question is a victim of the offense, has no corresponding provision in the Penal Code. Section 301(2)(b) is substantively similar to KRS 502.040(1). Section 301(2)(c) is similar to current 502.040(2).

Section 301(3) is substantively similar to KRS 502.030(1). Section 301(3) adds the phrase “upon proof that the objective elements of the offense are satisfied,” clarifying that the accomplice still is liable even if the person assisted lacks the requisite mental state or has an excusing condition. In such a situation, all the objective elements for liability are satisfied, although the principal may not be held liable for an offense. Section 301(3) also finds support in current 502.010, which explicitly provides for complicity liability where the person performing the offense conduct may not be convicted.

Section 301(4) and (5) are substantively similar to KRS 506.010(3), imposing attempt liability for attempt to aid in an offense.

Section 301(6) is comparable to KRS 506.080(1) for knowing complicity, also referred to as facilitation. (The exemptions in KRS 506.090 and 506.100 are covered by Section 301(2) and (3).) The grading of the offense in Section 301(6)(a)-(b) is similar to KRS 506.080(2). The grading differences in current law give facilitation more of a “discount” from the substantive offenses than they give for attempt liability.

Section 503.302. Voluntary Intoxication

Corresponding Current Provision(s): 501.080(1); 501.010(2) and (4)

Comment:

Generally. This provision defines what constitutes voluntary intoxication and governs the imputation of culpability to a person who commits an offense after becoming voluntarily intoxicated. (For rules governing conduct performed under the influence of *involuntary* intoxication, see proposed Section 505.506 and corresponding commentary.)

Relation to current Kentucky law. Section 503.302(1) is substantively similar to current KRS 501.080(1). Both recognize the prevailing idea that intoxication generally does not provide a defense to a criminal charge, except where the intoxication negates an element of the offense. The commentary to current KRS 501.080(1) indicates that the “element” to which the statute refers typically is the capacity to form the required culpable mental state. Thus, where a person successfully demonstrates he did not know what he was doing because he was intoxicated, this defense precludes conviction for an offense that requires a showing of intent. Section 302(1) expresses this more clearly by requiring within the statute itself that intoxication negative “a required culpability element of the offense.”

Section 302(2) creates a rule specifying that voluntary intoxication allows imputation of recklessness even if the person’s intoxication prevented him from actually having a reckless mental state (i.e., prevented him from being aware of a substantial risk he should have recognized). This parallels the rule set out in the last sentence of KRS 501.020(3). (In keeping with that provision, Kentucky judicial decisions have allowed a voluntary intoxication “defense” only for offenses that require intent or knowledge. See *Brown v. Com.*, 575 S.W.2d 451 (Ky. 1978).)

Section 302(3)(a) and (b), defining “intoxication” and “voluntary intoxication,” are identical to current KRS 501.010(2) and (4), respectively, except that 302(3)(b) replaces the word “duress” with “circumstances.”

Section 503.303. Divergence Between Consequences Intended or Risked and Actual Consequences

Corresponding Current Provision(s): 501.060

Comment:

Generally. This provision addresses the problems of legal causation that arise where the actual (harmful) results of a person's conduct vary from the (harmful) results the person intended, foresaw, or risked. This is sometimes described as the "transferred intent" situation. Where a person intends, foresees, or risks one result that would be an offense and ends up causing or risking another result that is also an offense, liability may be imposed for the unintended offense that actually results. (Where a person causes *both* the intended result *and* another result that is also an offense, he may be held liable for both offenses. Where the intended result does not occur, the person may be held liable for attempting to commit the intended offense as well as for committing the unintended offense.)

Section 503.303(1) uses the term "consequence" instead of "result" because in some cases, it may be ambiguous whether an offense element is a circumstance element or a result element, as those terms are defined in proposed Section 202. For example, if an offense prohibits causing injury to a police officer, it is unclear whether the result requirement is "injury" and the "police officer" element is merely an attendant circumstance of that result, or whether the result requirement is "injury to a police officer" specifically. Section 303(2) avoids this ambiguity by including attendant circumstances within the definition of "consequence."

Relation to current Kentucky law. Section 303 is substantively similar to current KRS 501.060(2)(a) and (3)(a) in its application of the doctrine of transferred intent to intentional, reckless, and negligent offenses. Section 303(1)(a) and (b) set forth the circumstances in which the required culpability of a particular result is deemed established, notwithstanding the variance between actual results and the results intended or created by defendant's risk-taking. The first of these circumstances is the situation where the results differ only in the respect that a different person or property is injured or affected. Thus, where an actor intends to kill one person but kills another, liability may be imposed. See *Smith v. Com.*, 734 S.W.2d 437 (Ky. 1987) (intentional context); *Lofthouse v. Com.*, 13 S.W.3d 236 (Ky. 2000) (reckless or negligent context). The second circumstance occurs where the intended harm was as or more serious than the actual resulting harm, as where an actor intends to kill a person but only injures him.

Section 503.304. Mistaken Belief Consistent with a Different Offense

Corresponding Current provision(s): 501.070(2)

Comment:

Generally. This provision applies to those situations where a person has a mistaken belief, but is not entitled to a defense because even under his mistaken view, he was committing an offense. The provision imputes culpability as to the committed offense based on the person’s culpability as to the intended offense.

Relation to current Kentucky law. Section 503.304 is substantially the same as current 501.070(2), but has been restated for clarity. The phrase “another offense” has been changed to “another offense of the same or higher grade.” This change highlights that it is inappropriate to impute culpability as to a more serious offense based on actual culpability as to a less serious one.

Section 503.305: Definitions

Corresponding Current Provision(s): [various]

Comment:

Generally. This provision collects the defined terms used in Chapter 503.

Relation to current Kentucky law. For discussion of the relationship between Chapter 503’s defined terms and current law, refer to the commentary for the provision in which the term in question is defined.

CHAPTER 504. JUSTIFICATION DEFENSES

COMMENTARY

Chapters 504, 505, and 506 address affirmative defenses of justification, excuse, and nonexculpatory defenses, respectively. Justifications and excuses are similar, because both exculpate a person, that is, they are defenses based on the defendant's blamelessness. Justified conduct adheres to the criminal law's rules of conduct and should be encouraged, or at least tolerated, in similar future situations. Deciding whether conduct is justified requires that one focus on the person's act and its circumstances, rather than on the person. Under special justifying circumstances, the harm caused by justified behavior is outweighed by the need to avoid an even greater harm or to promote a greater societal interest. For example, for the justification of self-defense, the defender's right to bodily integrity, combined with the wrongfulness of the physical harm threatened, entitle a person to use physical force against another even though such force is normally not condoned.

Section 504.400. General Defenses

Corresponding Current Provision(s): 503.020

Comment:

Generally. This provision explains the implications of the existence of a defense for a person's possible criminal or civil liability. Section 504.400(1) states a principle implicit in the notion of a "defense": it applies even if one has done something that would otherwise constitute an offense. Section 400(2) explains that a defense to criminal liability is not necessarily a defense to civil liability. The determination that a person's conduct does not merit criminal liability does not automatically shield that person from bearing the costs of that conduct.

Relation to current Kentucky law. This provision is substantively similar to KRS 503.020 and reflects current law. See *Holbrook v. Com.*, 925 S.W.2d 191 (Ky. App. 1995) (directed verdict of acquittal should be granted when the evidence conclusively establishes justification).

General Comment Regarding Justifications:

Justifications differ from excuses in that they relate to specific *conduct*, not specific *persons* — although sometimes, only particular persons are authorized to perform the justified conduct. In other words, an *act* is (or is not) justified, whereas an *actor* is (or is not) excused. Justifications exist independently of an actor's state of mind: in common-law legal terms, a justification negates the existence of an *actus reus*, not the existence of a *mens rea*.

This distinction is important because a defense’s status as a justification, an excuse, or a nonexculpatory defense has significant legal implications. For example, a person acting in self-defense may be assisted by others, and may not legally be interfered with. On the other hand, an aggressor is entitled to resist a person who *mistakenly* believes himself to be acting in self-defense; such a person, even if excused, is not justified. Moreover, because justifications recognize conduct that is socially acceptable, and often desirable, it is sensible to require the prosecution to prove that conduct was not justified. Excuses and nonexculpatory defenses, by contrast, operate to prevent liability for harmful conduct that would ordinarily constitute an offense. Accordingly, and because the state-of-mind or other evidence relevant to an excuse or nonexculpatory defense is frequently within the control of the defendant, it is sensible to shift the burden of proof to the defendant for those defenses. (See Sections 504.411, 505.501, and 506.601 and corresponding commentary.)

Section 504.411. General Provisions Governing Justification Defenses

Corresponding Current Provision(s): None

Comment:

Generally. This provision sets forth the general rules governing the use of justification as a defense. Section 504.411(1) creates a specific provision mandating the supremacy of specific justification defenses over more general ones. This reflects the fact that the more specific justifications represent the legislative determinations that have been made concerning liability for specific types of conduct. At the same time, Section 411(2) makes clear that conduct may relate to several justification rules at once — for example, an aggressor’s conduct may threaten both a person’s life and his property. Where this is the case, the actor may act according to the allowances of any relevant justification — for example, in the above situation, if the self-defense provision authorizes deadly force, the person may employ such force even though the defense-of-property provision standing alone would not allow it.

Section 411(3) makes clear that where conduct is justified, a person may not unlawfully impede, and may lawfully assist, such conduct. Finally, Section 411(4) and (5) govern circumstances where the actor seeking to use justification has caused the situation that gives rise to the justification for his conduct. Section 411(4) clarifies that such circumstances will not necessarily prevent a person from making use of the justification. However, Section 411(5) qualifies the applicability of 411(4) in those circumstances where the person causing the situation has acted with culpability.

Relation to current Kentucky law. Section 411(1) maintains the principle in current KRS 503.030(1) and KRS 503.040(1) that allows the choice-of-evils and execution-of-public-duty justifications only when they are not inconsistent with other justifications or with other parts of the Code. This is also in keeping with Kentucky law regarding statutory construction, which provides that “the specific provisions of statutes take precedence over general provisions.” See *Hughes v. Com.*, 875 S.W.2d 99 (Ky. 1994).

Sections 411(2) to (4) have no corresponding provisions in the current Code. However, Kentucky courts have recognized the principle, reflected in Section 411(2), that a defendant is entitled to an instruction on any relevant defense he seeks to assert. See *Springer v. Com.*, 998 S.W.2d 439 (Ky. 1999) (defendant in homicide is entitled to both self-protection and intoxication instructions if competent evidence is produced that would establish such defenses). See also *Taylor v. Com.*, 995 S.W.2d 355 (Ky. 1999).

Section 411(5) is substantively similar to KRS 503.030(2) and 503.060(2). This provision makes clear that where a person was culpable in causing the circumstances that give rise to the justification, he may not rely on justification as a defense.

Section 504.412. Lesser Evils

Corresponding Current Provision(s): 503.030(1)

Comment:

Generally. This provision ensures that conduct will not give rise to criminal liability where the conduct is objectively necessary to avoid a threatened harm even greater than that caused by the conduct itself. For example, a druggist may dispense drugs without a prescription to alleviate suffering in an emergency, and an ambulance may exceed the speed limit or pass through a traffic light.

Relation to current Kentucky law. Sections 504.412(1) and (2) are substantively similar to current KRS 503.030(1), except that the proposed Section refers to avoiding a “harm or evil” instead of a “public or private injury,” and also shifts the requirement of immediacy from the perceived threat to the person’s need to respond to the threat. Some threats, although foreseeable, may not become “imminent” for some time — at which point it may be too late to respond and prevent the threat. For example, the crew on a ship that is leaking or has low rations, but whose captain refuses to return to port, may not face the imminent threat of capsizing or starvation for some time, at which point the ship may be too far out to return to shore. At the same time, forbidding the crew to mutiny until such action becomes immediately necessary — until they have reached the “point of no return” — gives the captain time to relent.

Like Section 411(1), Section 412(3) follows the principle of statutory construction recognized by Kentucky law that specific provisions of statute take precedence over general provisions. See *Hughes v. Com.*, 875 S.W.2d 99 (Ky. 1994). As such, Section 412(3) denies the use of “lesser evils” as a justification where the legislature has evidenced plain intent to impose criminal liability, notwithstanding the possibility that the conduct may satisfy the requirements of “lesser evils.”

A Kentucky court has stated, inconsistent with the current statute, that the defendant has the burden of proving a “lesser evils” defense. See *Peak v. Com.*, 34 S.W.3d 80 (Ky. App. 2000); proposed Section 500.106(2) and its commentary.

Section 504.413. Execution of Public Duty

Corresponding Current Provision(s): 503.040

Comment:

Generally. This provision creates a justification for conduct explicitly permitted by a governmental institution with the lawful power to authorize such conduct.

Relation to current Kentucky law. Section 504.413(1) is similar to KRS 503.040(1) — and also to 503.040(2)(b), except that 413(1) justifies only objectively authorized conduct and does not cover mistakes as to authorization. Section 413(1) is consistent with current case law, which authorizes the public-duty defense for third parties whose actions are at the direction of a public officer. See *Baird v. Com.*, 709 S.W.2d 458 (Ky. App.1986) (convicted felon entitled to instruction as to defense where he admitted possession of a handgun, but sought justification because he was doing undercover work for a police officer).

Section 413(2) is similar to KRS 503.040(2)(a), but justifies only objectively authorized conduct and does not cover mistakes as to authorization.

Section 413(3) and (4) are similar to KRS 503.040(1).

Current KRS 503.040(2)'s mistake components are addressed by proposed Section 505.511.

Section 504.414. Law Enforcement Authority

Corresponding Current Provision(s): 503.090(1)-(3); 431.005

Comment:

Generally. This provision sets forth the requirements for the use of force, by a peace officer or private citizen, necessary to bring a person into lawful custody, or to prevent a person's escape from custody.

Relation to current Kentucky law. Section 504.414(1)(a) is substantively similar to KRS 503.090(1), but differs in two respects. First, it merges the language of KRS 503.090(1)(a) and (c). Second, it clarifies the application of the provision to those who assist a peace officer at such officer's direction. This is in keeping with the extent of the justification provided by Section 413(1).

Section 414(1)(b) is substantively similar to KRS 503.090(2) and the relevant portion of 503.090(3), although it amends the language "deadly physical force" to "force likely to cause death or serious physical injury" and "felony" to "forcible felony." This change reflects the language and reasoning used elsewhere in this Chapter.

Section 414(1)(c) tracks KRS 503.090(1)(c) in allowing the justification even where the underlying warrant is unlawful, as long as the officer did not know it was unlawful.

Section 414(2), regarding a private person’s use of force in making an arrest, has no corresponding provision in the current Penal Code, although KRS 431.005 addresses a private person’s power to make an arrest on his own volition.

Section 414(3) is substantively similar to KRS 503.090(3).

Section 414(4), defining “forcible felony,” has no corresponding provision in the current Code. The limitation on effecting an arrest through deadly force to those arrests involving offenders who have committed or will commit a forcible felony is consonant with the restrictions imposed by *Tennessee v. Garner*, 471 U.S. 1 (1985).

Section 504.415. Use of Force by Persons with Special Responsibility for Care, Discipline, or Safety of Others

Corresponding Current Provision(s): 503.110

Comment:

Generally. The provision sets forth the circumstances in which the use of force by those with a special duty of care for others may be justified. This conduct — including parents’ or teachers’ authority to protect or discipline children, wardens’ authority to impose order on a prison population, and medical professionals’ need to administer care or restrain those posing a danger to others or themselves — might not otherwise fall within the scope of the justifications set out in this Chapter.¹⁹ Each part of the provision specifies the categories of person to whom it applies and the range of conduct allowed. For example, Section 415(1) applies to any of the persons specified in subsections (a) and (b), but imposes in subsection (c) a general limitation on the acceptable use of force by such persons.²⁰

¹⁹ Section 415 does not justify the use of force against a justified actor; the provision may not be used to circumvent Section 416’s rule that the use of force in defense of another is justified only to the extent that it is immediately necessary to defend against an aggressor’s use of “unjustified” force. For example, Section 415(1)(a) does not justify a father’s use of force against a police officer who is using justified force against his son.

²⁰ Note that, as with Chapter 504’s other defenses, an excuse defense may be available for one who makes a mistake as to a justification set forth in Section 415. One who makes a reasonable mistake as to the necessity of his force, for example, may be excused under Section 511. *See* proposed Section 511 and corresponding commentary.

Relation to current Kentucky law. This section is substantively similar to KRS 503.110, recognizing that for persons who have a responsibility for the welfare of others, moderate physical force in the satisfaction of such responsibility has traditionally been allowed. For example, a “teacher is privileged to use whatever force is necessary” so long as it is not designed to cause a serious risk of death or injury. See *Holbrook v. Com.*, 925 S.W.2d 191 (Ky. App. 1995) (teacher did not use excessive force in paddling student). Section 415(2) eliminates as redundant current KRS 503.110(2)(b), requiring that the use of force by a corrections official must not be forbidden by any other statute. Use of force exceeding an official’s authority would be unlawful, and thus unjustified.

As with the other provisions of this Chapter, defense for mistake as to a justification under this Section is addressed in Section 505.511.

Section 504.416. Defense of Person

Corresponding Current Provision(s): 503.050(1) and 503.070(1)

Comment:

Generally. This provision justifies a person’s use of force to protect himself or another from physical attack.

Relation to current Kentucky law. Section 504.416 merges the substantively similar provisions in KRS 503.050(1) (governing protection of self) and KRS 503.070(1) (governing protection of a third person). KRS 503.050(3) is not included within the proposed Code, as it relates to evidentiary issues.

As in Section 412, the requirement that the threatened use of force be imminent has been replaced with a requirement that the need to use force be immediately necessary to afford a defense. This change recognizes that in some instances, responses to a less than imminent threat may not only be appropriate, but also necessary.

Section 416(2), defining “unjustified,” has no corresponding provision in the current Penal Code. This term is used to make clear that, as Section 411(3) states, only unjustified conduct may lawfully be resisted or interfered with. A person may not, for example, use force in “self-defense” against a peace officer who is arresting him, as the peace officer’s conduct would be justified under Section 414.

The use of deadly force to defend oneself or a third person, currently found in KRS 503.050(2) and 503.070(2), is addressed in Section 419. Mistakes as to the need to defend oneself or a third person are covered by Section 505.511.

Section 504.417. Defense of Property**Corresponding Current Provision(s):** 503.080(1)**Comment:**

Generally. This provision entitles the owner of property, or someone with a special relation to the owner, to use force to protect such property from invasion, destruction, or theft.

Relation to current Kentucky law. This provision is substantively similar to, but more general than, KRS 503.080(1). Section 504.417 streamlines KRS 503.080(1)(a)-(b), making a general and cohesive rule rather than defining the justification by reference to the prevention of different specific offenses. As in the provisions in proposed Sections 412 to 416, a mistaken belief that the defense of property is justified is governed under proposed Section 505.511. The use of deadly force to defend property is addressed in proposed Section 419.

Section 504.418. Use of Force by Aggressor**Corresponding Current Provision(s):** 503.060**Comment:**

Generally. This provision denies an aggressor the use of justification as a defense where he provokes another into assault for the purpose of using the assault as an excuse to respond.

Relation to current Kentucky law. Section 504.418(1) expands the circumstances in which a justification defense is unavailable to an aggressor. Currently, this applies most often to situations where the aggressor is resisting arrest, whether or not the arrest is lawful. See, e.g., *Baze v. Com.*, 965 S.W.2d 817 (Ky. 1997). Section 418(1) broadens the unavailability of justification to include circumstances in which the aggressor is attempting to commit, or is committing, a forcible felony.

Section 418(2)-(3) are substantively similar to KRS 503.060(2)-(3).

Section 504.419. Use of Force Likely to Cause Death or Great Bodily Harm**Corresponding Current Provision(s):** 503.050(2); 503.070(2);
503.080(2)**Comment:**

Generally. This provision limits the scope of this Chapter's justifications by imposing restrictions on the use of severe force.

Relation to current Kentucky law. This provision merges the concepts in KRS 503.050(2) and 503.070(2), governing the use of deadly force to defend oneself or another. It also replaces KRS 503.080(2)'s broader privilege for the use of such force in the protection of property, which permits deadly force to prevent the commission or attempt of a burglary, arson, or dispossession.

Section 419(2), defining "force likely to cause death or serious physical injury," replaces KRS 503.010(1)'s definition of "deadly physical force," which is flawed to the extent it turns on the intent or knowledge of the user. Section 419(2) instead bases its rule on the distinction between force that is objectively likely to cause death or serious injury, regardless of the intent of the user, and force that is not.

Section 504.420: Definitions

Corresponding Current Provision(s): [various]

Comment:

Generally. This provision collects the defined terms used in Chapter 504.

Relation to current Kentucky law. For discussion of the relationship between Chapter 504's defined terms and current law, refer to the commentary for the provision in which the term in question is defined.

CHAPTER 505. EXCUSE DEFENSES

COMMENTARY

Like justification defenses, excuses are general defenses applicable to all offenses and available even though the person satisfies the offense's elements. However, excuse defenses concentrate on the person's lack of subjective blameworthiness, while justification defenses focus on the person's conduct. Excuses admit that the act may cause or threaten a harm the criminal law normally disallows, but excuse the person because his characteristics or situation suggest that he does not merit criminal liability. Criminal liability arises in part from the choice a person makes to engage in conduct that constitutes a criminal harm. Without sufficient capacity to choose, blame is improper. An excuse defense represents a legal conclusion that even though a person's conduct is wrong, liability is inappropriate because some characteristic of the person or his situation vitiates the person's blameworthiness.

Section 505.501: General Provisions Governing Excuse Defenses

Corresponding Current Provision(s): 504.020(3)

Comment:

Generally. Section 505.501 sets out general rules relating to all excuse defenses. These rules are distinctly relevant to excuse defenses and may be articulated only in a Code that distinguishes excuses from other defenses. (See general commentary preceding commentary to proposed Section 504.411.)

Section 501(1) makes clear that excuses differ from justifications; justified conduct may be assisted and may not be resisted, while neither of these collateral rules applies where a person is excused but not justified. This is because it is not the *act* that is excused, but the *actor*; the act is still considered improper and undesirable.

Sections 501(2) and 501(3) state that a person's excuse remains valid even if he created the conditions giving rise to the excuse, unless he did so with the same level of culpability required by the offense. In such a situation, the basis for criminal liability is not the conduct causing the offense (because that conduct is excused), but the actor's earlier conduct in causing the conditions of his excuse. Accordingly, the relevant culpability requirement must be applied to that earlier conduct, and not to the later offense conduct. For example, a young person may join a gang knowing that it frequently engages in criminal activity and, indeed, has its own "laws" requiring participation in criminal activity. Later, the person may be forced by other gang members at gunpoint to commit a crime he would otherwise not commit. Though the person might normally be eligible for a duress excuse because he was compelled to commit the crime,²¹ the fact that he knew about the gang's customs and the likelihood that he would be forced into criminal activity vitiates the rationale behind the defense and supports holding the gang member liable for his offense.

²¹ See *infra* proposed Section 507 and commentary.

(This person, who knew of the gang’s tendencies, could be held liable for an offense requiring knowledge; a person who was reckless as to the gang’s involvement in crime would, under Sections 501(3) and (4), be eligible for liability only for offenses requiring recklessness.)

Generally, one of three culpability rules is applied to a person’s conduct creating an excusing condition: a general culpability rule of negligence, a general culpability rule of recklessness, or a culpability rule tracking the culpability requirement for the (excused) offense ultimately committed. Section 501(3) follows the third rule, as it seems appropriate to require the culpability normally required for the offense committed rather than some alternative, possibly conflicting requirement. A contrary rule would operate to impute criminal responsibility to persons based on an actual level of culpability lower than that usually required for the offense in question.

However, as Section 501(3)(b) provides, the actor may also have a defense for that earlier conduct, notwithstanding the fact that he had the requisite culpability when he performed that conduct. For example, the gang member in the above scenario might have an immaturity defense, or might have a defense of duress if he were forced against his will to join the gang in the first place.

Section 501(4) states that a mistaken belief in an excuse, unlike a mistaken belief in a justification, cannot be a defense to criminal liability. While justifications relate to the context and circumstances of an actor’s conduct, excuses relate to whether the actor suffers from a disability. The actor’s own erroneous belief that such a disability exists (“I thought I was insane”) is not relevant to a determination of criminal liability.

Section 501(5) states that the defendant has the burden of proving an excuse defense by a preponderance of the evidence.

Relation to current Kentucky law. Sections 501(1), (3)(b), and(4) have no corresponding provisions in current law.

Section 501(2) and (3)(a) differ somewhat from KRS 501.090(2), which denies the defense of duress to a defendant who intentionally or wantonly places himself in a situation where it is probable that he would be subjected to coercion. Kentucky courts have refused to allow a compulsion defense when it arises from the defendant’s own fault. See *Foster v. Com.*, 827 S.W.2d 670 (Ky. 1991). Section 501(3)(a) defines a specific, but flexible, standard for what constitutes “fault” in causing the conditions of one’s own excuse: if one’s culpability in creating the conditions is equal to or greater than the culpability required for the offense itself, no excuse will be allowed.

Section 501(5) is consistent with KRS 504.020(3), which places the burden of persuasion on the defendant on the issue of mental illness or retardation. Section 501(5) imposes on the defendant the burden to prove *all* excuse defenses by a preponderance of the evidence.²²

Under current law, the defendant must prove the insanity defense, but all other excuses must be disproved by the state beyond a reasonable doubt once the defendant has introduced some evidence on the issue. These evidentiary rules are inconsistent. Excuse defenses are all the same in terms of both their underlying principles and their central evidentiary issue (the defendant's state of mind). Accordingly, they should be treated similarly with respect to the burden of proof. Because excuses apply only to conduct normally considered criminal, and because all excuses involve information and evidence uniquely in the possession of the defendant, the proposed draft considers it appropriate to shift the burden to the defendant for excuses. In an excuse situation, the defendant has admittedly caused an unjustified harm.

Section 505.502: Involuntary Acts; Involuntary Omissions

Corresponding Current Provision(s): 501.030(1); 501.010(3)

Comment:

Generally. Section 505.502 creates a defense for persons whose conduct would normally constitute an offense, but was not voluntary and could not be controlled by the actor. The involuntary act defense in Section 502(1) is applicable in cases where the defendant's conduct is not the product of his effort or determination, as where the defendant is sleepwalking or suffers a seizure. This defense differs from the defenses of impaired consciousness (Section 503) or insanity (Section 504) in that the defendant's lack of control over his conduct at the time of the offense need not result from a confirmable psychological or physiological disease or defect. At the same time, in most cases addressed by proposed Sections 503 and 504, the defendant's impairment will not be so severe as to render his conduct completely involuntary. Section 502(2) provides a similar defense in cases where liability is based on an omission.

Relation to current Kentucky law. Section 502 takes the voluntariness element from current KRS 501.010(3) — the rest of which is addressed in proposed Section 501.204 — and creates a distinct provision treating involuntariness as an excuse, rather than describing voluntariness as a basic offense requirement. Voluntariness does not describe the harm or evil of the offense, nor is it a necessary component of the requirement of “an act” as opposed to an omission. Rather, *involuntariness* indicates that a person is not blameworthy for his conduct, even though that conduct satisfies all requirements of an offense. In other words, involuntariness is an excusing condition —

²²The court in *Gall v. Com.*, 607 S.W.2d 97, 110 (Ky. 1980), overruled on other grounds by *Payne v. Com.*, 623 S.W.2d 867 (Ky. 1981) found that the correct terminology for the evidentiary burden issue for an insanity instruction is “from the evidence” rather than “by a preponderance of the evidence.” Section 501(5), by contrast, explicitly defines the defendant's burden, clarifying what a defendant must prove in a case where he relies on an excuse defense.

it applies when special conditions or circumstances demonstrate an actor's blamelessness for a violation of the rules of conduct. Although current KRS 501.010(3) merges voluntariness with the act requirement, Kentucky pre-Penal Code case law reflects a view of the voluntariness issue as a potential excuse rather than an offense requirement. The courts have not treated voluntariness as an element of the offense, but have seen its absence as an affirmative "automatism defense" rooted in the absence of criminal responsibility, and regarding which the defendant is required to introduce evidence. See *Fain v. Com.*, 78 Ky. 183 (1879) (defendant who killed another while in somnambulistic state exonerated because his conduct occurred while he was asleep).

Section 502(1) defines involuntary acts as acts that are "not a product of the person's effort or determination." Current KRS 501.010(3) offers a definition of "voluntary" which refers to "bodily movement performed consciously as a result of effort or determination."

Section 502(2)(a) provides a defense to persons who are incapable of performing a required act. Imposing liability on such persons is inconsistent with any basis for criminal punishment; granting a defense is consistent with similar provisions regarding incapacity to control one's conduct, as set out in proposed Sections 503, 504, and 506. Section 502(2)(a) is broader than current KRS 501.030(1). The former applies when a person is either "mentally or physically incapable of performing or otherwise cannot reasonably be expected under the circumstances to perform the omitted act," while the current law applies to a legal duty which a person "is physically capable of performing."

Section 502(2)(b) recognizes the potential conflict that arises when an actor may be subject to omission liability if he does not act, yet may be subject to liability for commission of another offense if he does act: for example, where the defendant is charged with failing to pay mandated benefits, but is in liquidation or in bankruptcy proceedings that prohibit such payments. Because Section 502(2)(b) applies only if the avoided act is unjustified, that act must be one that the legislature has found significant and blameworthy, and that does not satisfy the "lesser evils" provision. Where this is the case, inaction is by definition a lesser or equal evil and therefore preferable to action, even if the inaction would also normally constitute an offense. Section 502(2)(b) is necessary to avoid the problem of conflicting liabilities. In the very limited (and perhaps only theoretical) set of circumstances where the actor's conduct is required by a legal duty, yet also constitutes an offense and is *not* justified under a recognized justification defense, he should not be held liable for his failure to act.

Section 505.503: Impaired Consciousness

Corresponding Current Provision(s):

None

Comment:

Generally. This provision creates an excuse for cases where a person's consciousness is altered due to a physiological disease, rather than "mental illness or retardation" as in insanity, that negates the person's blameworthiness. This section recognizes that there can be physiological causes

of the kind of dysfunction that merits an excuse, like brain tumors, chemical imbalances, etc., that may not qualify as “mental illnesses” and thus may not fall within the scope of the insanity defense. Additionally, the terms of Section 502’s “voluntary act” requirement are extremely strict and would cover very few of these cases, as hardly any acts are not “a product of the person’s effort or determination.” Section 503 covers acts that involve *some* cognitive control, and therefore fall outside Section 502, but where there is still sufficient impairment of control that the person should not be held accountable for his acts.

Relation to current Kentucky law. No provision in the current Penal Code corresponds to Section 505.503, whose form is very similar to proposed Sections 504 and 506. Kentucky case law, however, hints at the desirability of a specific defense of this kind. Courts have either struggled to fit cases of the type Section 503 covers within the confines of the “automatism” defense or the insanity defense, or have denied an excuse altogether. See, e.g., *Smith v. Com.*, 268 S.W.2d 937 (Ky. 1954) (approving instruction submitting a defense of “black outs caused by epilepsy,” but not holding failure to give such an instruction to be reversible error); *McGuire v. Com.*, 885 S.W.2d 931 (Ky. 1994) (erroneous to instruct jury on asserted temporary mental incapacity that goes beyond Penal Code’s statutory terms); *Cooley v. Com.*, 459 S.W.2d 89 (Ky. 1970) (defendant who claimed that at time of fatal stabbing he did not know what he was doing as result of psychomotor epilepsy not entitled to a specific instruction on epilepsy where general instruction on insanity was given and adequately presented issue).

Section 505.504: Insanity

Corresponding Current Provision(s): 504.020, .120(4)

Comment:

Generally. This provision sets out a defense excusing persons who perform conduct constituting an offense, but do so under the influence of an uncontrollable mental illness, making criminal liability inappropriate.

Relation to current Kentucky law. Sections 505.504(1) and (2) are the same as KRS 504.020(1), but have been reorganized to enhance clarity.

Section 504(3)(a) is identical to KRS 504.020(2). Section 504(3)(b) explicitly excludes from the definition of “mental illness or retardation” intoxication, which other proposed provisions address. (See proposed Sections 503.302 and 505.506 and corresponding commentary.)

As to the burden of proof for insanity, see commentary for proposed Section 501(5).

Generally speaking, Section 504 does not incorporate, replace, or otherwise affect the procedural provisions currently codified at KRS 504.030 to 504.150. It is anticipated that these provisions will be retained, but relocated in the Revised Statutes by means of conforming amendments legislation to be enacted with the proposed Code. Because those provisions relate to procedural matters, they are properly addressed outside the Penal Code.

One significant exception, however, is the “guilty but mentally ill” verdict (GBMI), which the proposed Code eliminates. The underlying basis for the GBMI verdict — that the insanity defense has been subject to abuse — is empirically unsound. In addition, allowing the verdict raises significant concerns. It is problematic for the factfinder (often a lay jury) to make a clinical determination of whether an offender is in need of psychiatric treatment. The GBMI verdict also enables, and encourages, jurors to consider matters unrelated to guilt, when determination of guilt is their sole responsibility. Finally, a jury faced with the choice between a verdict of “not guilty by reason of insanity” and GBMI may select the latter, not because it finds the offender blameworthy, but because it believes the offender needs confinement and treatment. Such insane-but-dangerous offenders should be dealt with through civil commitment standards rather than the GBMI verdict. In *Brown v. Com.*, 934 S.W.2d 242 (Ky. 1996), the Kentucky Supreme Court recognized that the GBMI verdict raises significant policy concerns.

Section 505.505: Immaturity; Transfer to Juvenile Court

Corresponding Current Provision(s): None

Comment:

Generally. This provision creates a “defense” for a defendant who can satisfy two requirements: first, he must lack the maturity of an adult; and second, his immaturity must prevent him from understanding the wrongfulness or nature of his criminal conduct. Any person under the age of 18 who is found to be immature is automatically transferred to juvenile court.

Relation to current Kentucky law. Under Section 505.505, a defendant receives an automatic immaturity defense until reaching the age of 12 years. Section 505 also provides a conclusive presumption of immaturity for any defendant under age 16, and a rebuttable presumption until that age that the defendant’s immaturity prevented him from appreciating the wrongfulness or consequences of his actions. Defendants over age 16 are given no presumption (either as to immaturity or as to inability to appreciate the wrongfulness of conduct), but may still litigate the issue and obtain the defense if they can demonstrate (by a preponderance of the evidence, according to proposed Section 501(5)) that they are entitled to it.

Section 505.506: Involuntary Intoxication

Corresponding Current Provision(s): 501.080

Comment:

Generally. Section 505.506 provides a defense for a person who commits an offense while under the influence of a state of intoxication that he did not voluntarily create.

Relation to current Kentucky law. Section 506 is substantively similar to current KRS 501.080(2), but replaces its negative phrasing (“is a defense only if . . . not voluntarily produced”) with a more direct statement (“is excused if”). As with insanity, the formulation of the excuse is the same as under current law, but has been reorganized to enhance clarity. (The voluntary intoxication rule of KRS 501.080(1) is in fact a rule of imputation and is addressed in proposed Section 503.302.)

Section 505.507: Duress

Corresponding Current Provision(s): 501.090

Comment:

Generally. Section 505.507 defines a defense for persons who were forced to perform a criminal act under coercion that an ordinary person would not be able to resist.

Relation to current Kentucky law. Section 507 is similar to current KRS 501.090 — including that provision’s rejection of duress as a defense to intentional homicide — but creates a “sliding scale” for duress rather than a fixed standard for the necessary level of compulsion. Current law requires coercion “by the use of, or threat of the use of, unlawful physical force against him or another person.” That formulation fails to recognize the possibility that a reasonable person might feel compelled to commit a minor offense based on a serious, but less severe, threat. Section 507 requires “an unlawful threat that a person of reasonable firmness in the person’s situation would have been unable to resist.” Under Section 507’s formulation, if the offense the actor is coerced to commit is not especially serious, a less serious degree of coercion is necessary to make the defense available.

Section 507(3) provides a list of factors to consider in determining whether the level of coercion was sufficient to provide a duress defense. This list has been placed in brackets, as the Reporter takes no position regarding whether or not it should be included in the provision. The advantage of such an approach is that it allows the factfinder to consider all relevant facts and circumstances, and suggests to the factfinder what factors may be relevant, without requiring the defendant to satisfy a rigid set of elements that may not be dispositive, or even significant, in every case. Its possible disadvantage is that it may not list all relevant factors or may seem too much like a strict “checklist.”

As to the rule of current KRS 501.090(2), under which persons who intentionally or wantonly place themselves in a situation where duress is likely cannot claim the defense, see Section 501(3) and corresponding commentary.

Section 505.508: Ignorance Due to Unavailable Law

Corresponding Current Provision(s): None

Comment:

Generally. This provision upholds the *legality principle* of criminal law, which allows criminal liability only where a written statement of the law’s commands exists prior to the alleged violation of those commands. While ignorance of the law is generally not an excuse, fairness dictates that citizens not be punished for conduct if the government provided inadequate notice of the conduct’s prohibition. The rationale for criminal liability does not apply where the defendant did not know, and could not reasonably have known, that his conduct was criminal.

Section 505.508(3) requires that the defendant not know that the conduct in question is criminal. This prevents exploitation of the law’s unavailability by persons for whom that unavailability was irrelevant.

Section 508(4) provides a set of factors to consider in deciding whether the law was made available to a reasonable person. These factors focus both on the government’s efforts in making the law available and on the defendant’s efforts in determining the actual state of the law. This list has been placed in brackets, as the Reporter takes no position regarding whether it should be included in the Code. (See commentary for proposed Section 507.)

Relation to current Kentucky law. Section 508 does not correspond to any current Kentucky statute.

Section 505.509: Reliance Upon Official Misstatement of Law

Corresponding Current Provision(s): 501.070(3)

Comment:

Generally. Section 505.509, like Section 508, upholds the legality principle, but instead of applying in the case where no statement of the law is available, it applies where an existing official statement of the law is inaccurate, and a person relies on that inaccurate statement.

Relation to current Kentucky law. Section 509 is substantively similar to KRS 501.070(3). However, Section 509 reorganizes the elements of the defenses in KRS 501.070(3)(a)-(d) into a set of factors for the court to consider. This approach does not draw fixed, arbitrary lines as current law does. The list of factors has been placed in brackets, as the Reporter takes no position regarding whether or not it should be included in the Code. (See commentary for proposed Section 507.)

Section 505.510: Reasonable Mistake of Law Unavoidable by Due Diligence**Corresponding Current Provision(s):** None**Comment:**

Generally. Section 505.510 creates a defense for persons who, even after affirmatively seeking in good faith to determine the law’s requirements, make a reasonable mistake as to those requirements and unwittingly engage in prohibited conduct. The defense is allowed only if the offender exercised due diligence in an effort to determine the law’s requirements, and only if the subsequent mistake is reasonable. There is little likelihood that the defense would be subject to abuse, as (under proposed Section 501(5)) the defendant has the burden of proving by a preponderance of the evidence that he exercised due diligence, that he was honestly mistaken, and that the mistake was reasonable.

Relation to current Kentucky law. Section 510 has no corresponding provision in current Kentucky law.

Section 505.511: Mistake as to a Justification**Corresponding Current Provision(s):** 503.120; 501.070(1)(c)**Comment:**

Generally. This provision sets out a defense for people who perform conduct that constitutes a defense, but do so under the mistaken impression that the conduct is legally justified in their situation. Under Section 505.511, a person could have an excuse even if his mistake were unreasonable, if he is charged with an offense of greater level of culpability than the person’s level of culpability as to the mistake about the justification. Thus, a reckless mistake as to justification would provide a defense to intentional murder, but not reckless homicide.

Relation to current Kentucky law. Section 511 reflects a rule comparable to KRS 503.120 and 501.070(1)(c), which allow a defense where a person “believes” himself to be justified, unless his mistake involves culpability equal to that necessary to be liable for the offense — for example, liability for reckless homicide would be allowed for a defendant who made a reckless mistake as to whether he was justified. Section 511 has the same effect, but restructures current provisions by dealing with all the mistake issues in one provision and treating mistake as an excuse rather than a justification, thus leaving all of the justification defenses in purely objective form to more clearly state the rule of conduct for persons to follow. A defense for some actors who mistakenly believe themselves to be justified is appropriate, but is more properly addressed by means of an excuse provision such as Section 511, as the rationale for this defense relates to the actor’s mental state, not to whether the act itself is objectively justified.

Section 511(5) retains the current rule that the Commonwealth bears the burden of disproving the mistake defense beyond a reasonable doubt. As an excuse, this defense would otherwise be subject to Section 501(5)'s burden-shifting rule.

Section 505.512: Definitions

Corresponding Current Provision(s): [various]

Comment:

Generally. This provision collects the defined terms used in Chapter 505.

Relation to current Kentucky law. For discussion of the relationship between Chapter 505's defined terms and current law, refer to the commentary for the provision in which the term in question is defined.

CHAPTER 506. NONEXCULPATORY DEFENSES

COMMENTARY

Nonexculpatory defenses involve a balancing of competing interests similar to the balancing that occurs for justification defenses. However, the nature of the balancing is different. Justification defenses weigh the harm from the person's act against the harm avoided or the benefit gained from that conduct; a person can claim a justification defense when his conduct causes no net societal harm. With nonexculpatory defenses, the person's conduct creates no social benefit and avoids no societal harm. The societal benefit from these defenses arises not from the person's conduct, but from forgoing imposition of liability for that conduct. The defenses further competing interests that are deemed more important than imposing liability on guilty persons.

Section 506.601. General Provisions Governing Nonexculpatory Defenses

Corresponding Current Provision(s): None

Comment:

Generally. Section 506.601 describes the rules that govern the operation of the non-exculpatory defenses set out in Chapter 506. Sections 601(1) and (2) parallel proposed sections 501(1) and (4). Conduct subject to a nonexculpatory defense (such as the use of force by an incompetent person) may be resisted, whereas justified conduct (such as the use of force in self-defense) may not. A person who is mistaken as to a nonexculpatory defense — who, for example, thinks he has been entrapped by the police when he has not — is not entitled to any defense.

Section 601(3) provides that the defendant must prove all nonexculpatory defenses by a preponderance of the evidence. Current Kentucky law shifts the burden of persuasion to the defendant for the excuse defense of insanity. If such a burden-shifting rule is appropriate for an excuse defense — under which the defendant would be considered blameless for committing the offense — it should also apply to nonexculpatory defenses, under which the defendant makes no assertion of a lack of responsibility for his offense. These defenses are not based on a judgment that the underlying conduct is not harmful or that the actor is not blameworthy. They apply in situations involving conduct ordinarily subject to liability, but where some alternative social interest is deemed to override the assessment of criminal liability. Because these defenses do not exculpate, the burden should be on the defendant to prove that one of them applies.

Section 601(4) defines “nonexculpatory defense.” Section 601(5) specifies that nonexculpatory defenses are to be ruled on by the court rather than the jury. As noted above, these defenses do not involve determinations of guilt, innocence, or moral blame, and accordingly do not demand jury resolution. Resolution by the court will also be more expedient and may render unnecessary a full trial of the facts.

Relation to current Kentucky law. Section 601 has no corresponding provision in current law. However, Kentucky courts have addressed the issue raised in Section 601(3) for one of the specific nonexculpatory defenses: entrapment. In *Com. v. Day*, 983 S.W.2d 505 (Ky. 1999), the Kentucky Supreme Court that “[a]s with any other ‘defense’ under the penal code, once the defendant introduces enough evidence to create a doubt, the burden of proof shifts to the Commonwealth.” Thus under current law, unlike Section 601(3), the Commonwealth has the burden of proving beyond a reasonable doubt that the defenses do not exist. Moreover, Section 601(5) is inconsistent with *Day*’s statement that in entrapment cases it a question for the jury to determine whose mind initiated the criminal intent.

Section 506.602. Prosecution Barred if Not Commenced Within Time Limitation Period

Corresponding Current Provision(s): 500.050

Comment:

Generally. Section 506.602 sets time limitations for bringing prosecutions and provides rules governing the operation of the limitations. Time limitations encourage prompt investigation of crimes and prevent stale prosecutions. This goal must be balanced against the goal of prosecuting blameworthy offenders, especially those who committed serious crimes.

Relation to current Kentucky law. Section 602(1) is consistent with KRS 500.050(1)-(2) by setting no time limit within which a felony prosecution must commence and a one-year period within which a misdemeanor must commence. See *Reed v. Com.*, 738 S.W.2d 818 (Ky. 1987) (court refuses to declare a limitation period in face of contrary statute).

Section 602(2) defines the beginning of a limitations period, and restates KRS 500.050(3) regarding when an offense is considered to have been committed.

Section 602(3) — stating that prosecution begins when an indictment, information, or complaint is filed or a warrant issued — reflects current Kentucky law. See *Reed v. Com.*, 738 S.W.2d 818 (Ky. 1987) (“The significant delay which occurred was prior to arrest, indictment or the bringing of any formal charge.”)

Section 602(4), tolling the limitation period in certain situations, has no analogue in current Kentucky criminal law.

Section 506.603. Entrapment

Corresponding Current Provision(s): 505.010

Comment:

Generally. Section 506.603 sets out a defense covering cases where the defendant likely would not have committed the crime had the police not induced him to do so. This defense is

meant to curb excessively coercive or manipulative police conduct. It does not, however, suggest a lack of blameworthiness in the defendant, who has committed a crime under circumstances that would not provide a truly exculpatory defense such as duress. The entrapment defense uses the threat of acquittal of the defendant as a means of deterring improper police conduct.

Relation to current Kentucky law. Section 603 is similar to current KRS 505.010, but uses the narrower term “law enforcement authority” (which is defined in Section 107) rather than “public servant” in referring to the person who might induce the defendant. Section 603(1)(a) follows current law when it emphasizes the inducement or encouragement from a law enforcement authority. But current 505.010(2)(a) also unnecessarily creates confusion by including an exception when the authority “merely affords the defendant an opportunity to commit an offense.” Under proposed 603(1)(a), merely “afford[ing] an opportunity to commit an offense” would not qualify as “induc[ing] or encourag[ing]” the offense, so the defense would be unavailable in that situation. Further, Section 603(1)(b) limits the definition of the defense itself to exclude cases where the authority “merely affords an opportunity,” stating that “the official’s conduct [must create] a substantial risk that a reasonable law-abiding person in the actor’s situation would have been induced to commit the offense.” While 601(1)(b) supplements Section 603(1)(a)’s reference to the nature of the official’s conduct, Section 603(1)(c) also adds a subjective requirement that the defendant was not predisposed to commit the offense.

Section 603(2)’s limitation on the defense is somewhat broader than that in current law, which restricts the exception for offenses involving physical injury to cases where the injury or threat involved “a person other than the person perpetrating the entrapment.”

Section 506.604. Incompetency to Stand Trial or be Sentenced

Corresponding Current Provision(s):

504.090; RCr 8.06

Comment:

Generally. Section 506.604 sets the fitness standard under which defendants will not be required to face criminal adjudication. This defense ensures that all criminal defendants will have the mental capacity to exercise their constitutional rights to aid in their own defense, testify on their own behalf, confront witnesses, and effectively communicate with counsel.

Relation to current Kentucky law. Section 604 is substantively similar to current Rule of Criminal Procedure 8.06 and the principle in KRS 504.090. Section 604 differs from the procedural rule in that the latter states more nebulously that there must be “reasonable grounds” to believe that the defendant lacks capacity to understand the proceedings or assist in his own defense. The proposed provision requires that the defendant must actually be found to lack capacity.

Section 506.605. Former Prosecution for Same Offense as a Bar to Present Prosecution

Corresponding Current Provision(s): 505.030

Comment:

Generally. Section 506.605 sets out the rules governing the effect of former prosecutions for the same offense. This provision protects a defendant’s Fifth Amendment right not to be tried or punished twice for the same offense.

Relation to current Kentucky law. Section 605 is practically identical to current KRS 505.030, except that the second sentence of subsection (4) has been made into subsection (5) and subsection (3) has been reorganized to enhance clarity.

Section 506.606. Former Prosecution for Different Offense as a Bar to Present Prosecution

Corresponding Current Provision(s): 505.040

Comment:

Generally. Section 506.606 sets out rules governing the effect on a criminal prosecution of former prosecutions for a different offense. This provision requires, in certain circumstances, that different crimes arising out of the same conduct be tried together. Like Section 605, this provision protects a defendant’s Fifth Amendment rights by preventing the prosecution from relitigating a factual issue decided in the defendant’s favor at a previous trial.

Relation to current Kentucky law. Section 606 is practically identical to current KRS 505.040, except that subsection (2) has been reorganized to enhance clarity.

Section 506.607. Former Prosecution in Another Jurisdiction as a Bar to Present Prosecution

Corresponding Current Provision(s): 505.050

Comment:

Generally. Section 506.607 sets out the rules governing the effect of former prosecutions from different jurisdictions. Like Section 605, this provision protects defendants from multiple prosecutions for the same acts. The rationale for this defense applies even though the prosecution occurred in a different jurisdiction.

Relation to current Kentucky law. Section 607 is practically identical to current KRS 505.050, except that subsection (2) has been reorganized to enhance clarity.

Section 506.608. Prosecution Not Barred Where Former Prosecution Was Before Court Lacking Jurisdiction or Was Fraudulently Procured by Defendant or Resulted in Conviction Held Invalid

Corresponding Current Provision(s): 505.060

Comment:

Generally. Section 506.608 excludes various cases where former prosecutions should not act as a bar to subsequent prosecutions, because the original court lacked jurisdiction to hear the case; the defendant surreptitiously obtained the prior prosecution with the intent of avoiding a harsher sentence; or the prior conviction was invalidated on due process grounds unrelated to the merits.

Relation to current Kentucky law. Section 608 is practically identical to current KRS 505.060.

Section 506.609: Definitions

Corresponding Current Provision(s): [various]

Comment:

Generally. This provision collects the defined terms used in Chapter 506.

Relation to current Kentucky law. For discussion of the relationship between Chapter 506's defined terms and current law, refer to the commentary for the provision in which the term in question is defined.

**CHAPTER 507. LIABILITY OF CORPORATIONS AND OTHER
NON-HUMAN ENTITIES
COMMENTARY**

Section 507.701. Liability of Corporation or Unincorporated Association

Corresponding Current Provision(s): 502.050

Comment:

Generally. This provision sets forth the circumstances in which a corporation or unincorporated association may be held criminally liable for its actions. The purpose of such a provision is to deter a corporation or its agents from violating the law or failing to perform a legal duty.

Relation to current Kentucky law. This provision reflects the principle that a corporation may be indicted if authorized by statute. See *Com. v. Fortner LP Gas Co., Inc.*, 610 S.W.2d 941 (Ky. App. 1980). Section 507.701(1) is practically identical to current 502.050(1) except that, in keeping with proposed Section 501.206, it substitutes the term “recklessly” for the current statute’s use of “wantonly.”

Section 507.701(2)(a) and (b), defining “corporate agent” and “high managerial agent,” is identical to current KRS 502.050(2), except that the term “corporate agent” rather than “agent” is used to make clear that when the term “agent” is used elsewhere in the Penal Code, it may not have the specific meaning given by this definition.

Section 701(2)(c) defines “association” as “a trust, partnership, government or governmental subdivision or agency, or two or more persons having a joint or common economic interest.” The current Penal Code does not define this term. Although the current corporate-liability provisions do not explicitly include unincorporated associations, the current definitions of such terms as “actor,” “government,” “he,” and “person,” refer to unincorporated associations. See KRS 500.080(1), (6), (7), (12).

Section 507.702. Relationship to Corporation No Limitation on Individual Liability or Punishment

Corresponding Current Provision(s): 502.060

Comment:

Generally. This provision ensures an individual cannot escape liability by virtue of having acted on behalf of a corporation, and establishes that such individual may be punished in the same manner as if his conduct had been on his own behalf.

Relation to current Kentucky law. Section 507.702 is identical to current KRS 502.060.

Section 507.703. Definitions

Corresponding Current Provision(s): 502.050(2)

Comment:

Generally. This provision collects the defined terms used in Chapter 507.

Relation to current Kentucky law. For discussion of the relationship between Chapter 507's defined terms and current law, refer to the commentary for the provision in which the term in question is defined.

CHAPTER 508. INCHOATE OFFENSES

COMMENTARY

Section 508.801. Criminal Attempt

Corresponding Current Provision(s): 506.010

Comment:

Generally. Section 508.801 defines the requirements for liability for an attempt to commit an offense. Attempts are subject to liability because, like completed offenses, they involve a culpable mental state and overt conduct. Yet attempts differ from completed offenses in that, due either to fortuity of circumstance or the actor’s refraining from further conduct, the offense’s resulting harm does not occur, or occurs to a lesser extent.

As defined in Section 801(1), attempt liability requires that a person engage in some conduct that would constitute a “substantial step toward commission of the offense.” Attempt liability, like criminal liability generally, requires an overt act. The general requirement of an act ensures that the criminal law does not punish “mere thoughts.” The specific requirement of a “substantial step” ensures that the law does not punish “mere preparation,” where the actor still has an opportunity to recant and abandon his criminal plan, and that only would-be criminals who have shown a certain degree of firmness of criminal purpose are subject to liability. The performance of an overt act amounting to a substantial step also supplies corroborative evidence that the actor did, in fact, intend to engage in the offense conduct.

Relation to current Kentucky law. Section 801(1) is similar to current KRS 506.010(1)(a). Like the current statute, Section 801(1) requires that a person must have intent as to his conduct, but as to other elements he need only have “the culpability required for commssion of the crime.”²³

²³The Kentucky Court of Appeals has found that the offense of “attempted manslaughter in the first degree,” when based on an intent to cause serious physical injury, does not exist in Kentucky. See *Prince v. Com.*, 987 S.W.2d 324 (Ky. App. 1997) (no error in denying instruction on attempt to commit manslaughter in first degree as defined in KRS 507.030(1)(a); cannot attempt to achieve unintended result). As first-degree manslaughter is defined in KRS 507.030(1)(a), such an offense also would not exist under Section 801(1) — where death did not result, a person who intended to cause serious physical injury would be guilty of battery (or attempted battery) but not attempted homicide, as he would lack the “inten[t] to engage in the conduct that would constitute the offense.”

As defined in KRS 507.030(1)(b), however, there could be attempted first-degree manslaughter under Section 801(1), where a person acting under extreme emotional disturbance intended to engage in conduct causing death, but death did not result. Section 801(1) would also allow attempt liability for crimes of recklessness where the offense was not completed; for example, a person stopped just before spilling a toxic chemical into the water supply could be convicted of “attempted reckless endangerment,” because that person intended to perform all of the conduct necessary for the offense of reckless endangerment, but was prevented from doing so.

Section 801(2) differs from KRS 506.010(2), in that it establishes alternative means for measuring satisfaction of the “substantial step” requirement. KRS 506.010(2) states that conduct satisfies the substantial step requirement only if it “leaves no reasonable doubt as to the defendant’s intention to commit the crime which he is charged with attempting.”¹ Section 801(2)(a) adopts a similar but somewhat less strict approach, stating that the substantial-step element requires conduct that is “strongly corroborative” of his criminal intent. The jury will ultimately be required to find that the defendant’s culpability has been established beyond a reasonable doubt in any case, yet they should be allowed to make this determination based on evidence other than the evidence establishing that the offense’s conduct requirement, the substantial-step test, has been satisfied.

Section 801(2)(b) states that a person satisfies the substantial step test if he either believes he has completed the conduct constituting an offense, or believes he has committed the last act needed to cause a prohibited result. Section 508.801(2)(b) does not alter the standard of Section 801(1), but merely establishes a bright-line rule that performing all of the requisite conduct toward an offense will always meet the substantial step test.

Section 508.802. Criminal Solicitation

Corresponding Current Provision(s): 506.030

Comment:

Generally. Section 508.802 provides for liability for a person who solicits another person to commit an offense. The offense of solicitation recognizes that a person who intends to promote an offense, and is willing to instigate such conduct, merits criminal liability. The independent act of solicitation takes the place of the “substantial step” toward commission of the offense required for attempt liability, or the “overt act” toward commission of the offense required for conspiracy liability.

Relation to current Kentucky law. Section 802(1) is similar to current KRS 506.030, with three modifications. First, as with the offense of attempt under proposed Section 801(1), for offense elements other than conduct (which requires intent) the person need only act with the culpability required by the underlying offense. This language prevents an elevation of culpability levels for circumstance and result elements that could lead to undesirable outcomes. For example, under current KRS 506.030, it could be argued that a person who encouraged another to engage in conduct, knowing that such conduct would result in a person’s death, would not be liable for solicitation of murder because he did not *intend* anyone to die. Second, the offense definition incorporates the idea that impossibility is not a defense; the solicited conduct need only “constitute the offense if the circumstances were as [the defendant] believes them to be.” This idea is already recognized by current attempt law, see KRS 506.010(1)(a) (using similar formulation), but its application to solicitation is less clear. See 506.030(1) (prohibiting solicitation to engage in conduct that would be crime “or an attempt to commit that crime”). Finally, Section 802 also adds the appropriate term “requests” to the “commands” and “encourages” of the current statute. Persons soliciting others for criminal activity typically make a request, rather than commanding or encouraging others.

Section 802(2) has no directly corresponding provision in the current Code. Section 802(2) makes clear that a person need not actually communicate with another to be held liable for solicitation, provided the person's conduct is designed to effect such communication. The person's endeavor to communicate his criminal intentions makes his culpability clear; it does not matter that the person solicited does not respond affirmatively or that, by fortuity, the communication is never received. Kentucky courts have not expressly ruled on whether a solicitation must be successfully received in order for a defendant to be found guilty of solicitation, and have split on the issue of whether the response is relevant. Compare *Landrith v. Com.*, 709 S.W.2d 833 (Ky. App. 1986) (response does not matter), with *Maynard v. Com.*, 558 S.W.2d 628 (Ky. App. 1977) (proof of immediate rejection is necessary element of solicitation).

Section 508.803. Criminal Conspiracy

Corresponding Current Provision(s):

506.040; 506.050

Comment:

Generally. Section 508.803 establishes liability for the offense of conspiracy, which is committed when a person enters an agreement with another to commit a crime. Conspiracy differs from other inchoate offenses in that criminal enterprises are considered harmful in and of themselves, rather than merely insofar as they are unsuccessful efforts to commit other substantive offenses. Conspiracy liability, like attempt liability, requires more than mere intent to commit a crime; an “overt act” in furtherance of the conspiracy is also necessary.

Relation to current Kentucky law. Section 803 is similar to the current general conspiracy provision, KRS 506.040, but includes the alterations reflected in the other proposed inchoate offenses (see commentary to proposed Sections 801 and 802), focusing on the conduct and culpability requirements defined in the underlying offense rather than imposing a uniform “intent” requirement, and denying an impossibility defense. However, like proposed Section 801(1), Section 803(1) does maintain an intent requirement as to the conduct element of conspiracy — the formation of an agreement. (See commentary to proposed Section 801(1).)

Section 803(1) is also consistent with KRS 506.040(1)(a)-(b) by allowing prosecution for unilateral agreements: it imposes liability on any person who agrees with another to commit a crime, even if the agreement is that only one person will engage in conduct constituting a crime, and even if the other person does not actually agree to the conspiracy at all. Section 803(1) recognizes that a conspirator who believes he is agreeing with another to commit a crime is as deserving of liability as one whose agreement is actually reciprocated. Such a person has expressed his intent to pursue a criminal objective and made steps in furtherance of that objective.

Section 803(2) corresponds to KRS 506.050(2), stating that an agreement with multiple objectives should be charged as a single conspiracy. The remaining part of KRS 506.050(2), which classifies the conspiracy as a function of the most serious offense that is the object of the conspiracy, is addressed in Section 808.

Section 803(3) is nearly identical to KRS 506.050(1), and makes no substantive changes.

Section 508.804. Unconvictable Confederate No Defense

Corresponding Current Provision(s): 506.070

Comment:

Generally. Section 508.804 makes clear that a person may not escape liability for solicitation or conspiracy solely because his co-conspirator(s) are not subject to prosecution or conviction for the same offense. One conspirator’s blameworthiness for his agreement to pursue criminal objectives is not contingent on the status of any other members of the criminal enterprise. For example, where one member of a conspiracy manipulates or coerces another person who lacks the capacity to appreciate the criminality of his conduct, the manipulator should not escape liability merely because the confederate cannot be found criminally liable. Indeed, the manipulative co-conspirator is arguably even more culpable in such a situation. This rule is consistent with the unilateral-agreement rule adopted in proposed Section 803. (See commentary to proposed Section 803(1).)

Relation to current Kentucky law. Section 804 is similar to current KRS 506.070(1) and (2). Section 804(1) and (2) allow no defense that the person solicited or conspired with was not prosecuted or convicted, or was convicted of a different offense or grade.

Section 804(3) disallows any defense that the other person “lacked the capacity to commit an offense.” This is comparable to KRS 506.070(1) and (2), which prohibit a defense if the other person has a “legal incapacity or exemption,” or was unaware of the criminal nature of the conduct contemplated, or due to “any other factor precluding the mental state required for commission of the crime.”

Section 804(4) permits a prosecution against a conspirator or solicitor even though the other person was acquitted. This explicitly differs from KRS 506.070(3), which prohibits a conspiracy conviction if all “co-conspirators have been acquitted or discharged under circumstances amounting to an acquittal.” The rule of KRS 506.070(3) is inconsistent with KRS 506.070(1) and (2), as it is clear that any person with the lack of capacity contemplated by those provisions should, if tried, obtain an acquittal. Whether or not the person solicited or the co-conspirator is amenable to prosecution, or prosecuted but acquitted, is irrelevant to the defendant’s blameworthiness.

Section 508.805. Defense for Victims and Conduct Inevitably Incident

Corresponding Current Provision(s): 506.050(4)

Comment:

Generally. Section 508.805 provides a defense to the offenses of solicitation and conspiracy where the defendant is a victim of the offense or his conduct is inevitably incident to its commission. Section 805(1) protects people who are victims of the underlying offense — such as, for example, a person who agrees to pay money to an extortionist, thereby technically entering into a “conspiracy” with the extortionist.

Section 805(2) covers situations where, because a person’s conduct is ancillary to the underlying crime, it is unclear whether the person should be held liable. (See commentary to proposed Section 503.301(2).) For example, it is not clear whether an unmarried partner should be liable for conspiracy to commit bigamy, or whether the purchaser should be liable for conspiracy to traffic in stolen goods. Under Section 805(2), the legislature would still be free to decide on a case-by-case basis that such people should be subject to liability by writing the specific underlying offense to reflect that understanding.

Relation to current Kentucky law. No provision in current law directly corresponds to Section 805(1).

Section 805(2) is practically identical to a portion of KRS 506.050(4), but the proposed section applies to solicitation as well as conspiracy.

Section 508.806. Defense for Renunciation Preventing Commission of the Offense

Corresponding Current Provision(s): 506.020; 506.060

Comment:

Generally. Section 508.806 provides a defense for persons who, after committing an inchoate offense, voluntarily renounce their criminal purpose and prevent the inchoate offense from becoming a completed offense. As Section 806(2) makes clear, however, renunciation is not “voluntary” when it is merely a response to a fear of being caught, or a tactical decision to pursue the crime in a different way or at a different time. Under Section 806(3), the defendant would bear the burden of proving this defense by a preponderance of the evidence.

Relation to current Kentucky law. Section 806 corresponds to KRS 506.020 and 506.060. Current law has slightly different rules for different inchoate offenses: to effectively renounce a conspiracy or solicitation, the person must actually prevent commission of the offense; but to effectively renounce an attempt, the person merely must take “necessary affirmative steps to prevent” commission of the offense. Section 806(1) applies the current rule for conspiracy and solicitation to all inchoate offenses. An actor who has risked attempt liability by taking a substantial step toward the offense should still have sufficient time and power — at least as much as one who solicits or conspires, and likely more — to renounce his criminal purpose and prevent the offense from occurring.

The definition of a voluntary and complete renunciation appears in proposed Section 503.301(2)(d) and is identical to that in KRS 506.020(2) and 506.060(2).

There is no provision in the current Penal Code corresponding to Section 806(3), regarding the burden of proof for renunciation.

Section 508.807. Grading of Attempt, Solicitation, and Conspiracy

Corresponding Current Provision(s): 506.010; 506.030; 506.040

Comment:

Generally. Section 508.807 grades all inchoate offenses one grade lower than the most serious offense attempted, solicited, or agreed to. This system relates the seriousness of the inchoate offense to that of the underlying offense, but recognizes that the inchoate offense does not generate the resulting harm with which the underlying offense is concerned.

Relation to current Kentucky law. Section 807 differs somewhat from current law (KRS 506.010, 506.030, and 506.040), which usually grades an inchoate offense one grade below the crime attempted, solicited, or contemplated by the conspiracy. The main differences are that under current law, an inchoate offense toward a Class C felony is a Class A misdemeanor (i.e., two grades lower), and an inchoate offense toward a capital offense is a Class B felony (also two grades lower).

Section 508.808. Possessing Instruments of Crime

Corresponding Current Provision(s): 511.050

Comment:

Generally. Section 508.808 establishes an offense for the possession of instruments of crime. Section 808(1) defines possession of an instrument of crime with the intent to use it criminally as a Class A misdemeanor. The prosecution would have to prove the defendant’s intent beyond a reasonable doubt. Section 808(2) defines the term “instrument of crime.” See also Section 204(3), which defines the act of possession.

Relation to current Kentucky law. Section 808 is similar in purpose to KRS 511.050, which addresses the possession of burglar’s tools. KRS 511.050’s inclusion of liability for possession with “knowledge that some other person intends to use the same in the commission of an offense” is simply an expression of complicity, and would subject the defendant to liability under proposed Section 503.301.

Section 508.809: Definition

Corresponding Current Provision(s): [various]

Comment:

Generally. This provision collects the defined terms used in Chapter 508.

Relation to current Kentucky law. For discussion of the relationship between Chapter 508’s defined terms and current law, refer to the commentary for the provision in which the term in question is defined.

CHAPTER 509. OFFENSE GRADES AND THEIR IMPLICATIONS COMMENTARY

Section 509.901. Classified Offenses

Corresponding Current Provision(s): 500.080(17); 532.010; 532.090

Comment:

Generally. This provision provides a classification of all criminal offenses into grades for purposes of determining the extent of liability.

Relation to current Kentucky law. Section 509.901 is substantively similar to current KRS 532.010 and reflects the additional categories in 532.090 and 500.080(17), but adds three new offense categories: “Class X felony” for capital offenses, Class E felony, and Class C misdemeanor.

Section 509.902. Unclassified Offenses

Corresponding Current Provision(s): 532.020

Comment:

Generally. This provision provides classifications for offenses that are defined outside the Code.

Relation to current Kentucky law. Section 509.902 is substantively similar to current KRS 532.020, but classifies the offenses according to the revised authorized terms of imprisonment and/or fines in Sections 903 and 904. Unlike 532.020, Section 902 states that all felonies defined outside the Code, regardless of their stated classification or term of imprisonment, will be treated as Class E felonies. This ensures that all serious offenses must be included within the Penal Code.

Section 509.903. Authorized Terms of Imprisonment

Corresponding Current Provision(s): 532.030; 532.060; 532.090

Comment:

Generally. This provision establishes the maximum and minimum terms of imprisonment for each class of offenses.

Relation to current Kentucky law. Section 509.903 consolidates the authorized terms of imprisonment for felonies and misdemeanors, which currently appear in separate provisions in KRS Chapter 532.

Section 903(1) categorizes any offense with death or life imprisonment as a Class X felony. Cf. KRS 532.030 (authorizing, for capital offenses, a maximum sentence of death, life imprisonment with no parole for a minimum of 25 years, or life imprisonment, and a minimum sentence of 20 years).

Section 903(2) to (4) are identical to KRS 532.060(2)(a)-(c), except that Section 903(2) provides for a maximum of 50 years' imprisonment rather than life imprisonment.

Section 903(5) is similar to KRS 532.060(2)(d), but prescribes a minimum sentence of two years rather than one year.

Section 903(6) authorizes imprisonment for 1-2 years for the new category of Class E felony.

Section 903(7) is comparable to KRS 532.090(1).

Section 903(8) is substantively similar to KRS 532.090(2), but prescribes a maximum sentence of six months instead of 90 days.

Section 903(9) authorizes imprisonment up to 30 days for the new category of Class C misdemeanor.

Section 903(10), like KRS 500.080(17), states that no imprisonment is authorized for violations.

Section 509.904. Authorized Fines

Corresponding Current Provision(s): 534.030; 534.040; 534.050

Comment:

Generally. This provision establishes the maximum fine for each class of offenses.

Relation to current Kentucky law. Section 509.904, like KRS 534.030-.040, provides “default” rules for fines that may be modified by specific offense provisions.

Section 904 generally authorizes the greater of two amounts as the maximum fine for an offense: (1) twice the amount of the harm caused thereby or gain derived therefrom; or (2) the amount specified for its offense class. These methods are set out in Section 904(1) and (2), respectively. Section 904(1) authorizes a fine of the greater of “twice the harm cause or the gain derived” for any offense, or the amount authorized in Section 904(2). The first phrase is similar to current KRS 534.030(1) for felonies and KRS 534.050 for corporations. KRS 534.040 authorizes only maximum fines.

Unlike current law, Section 904(2) closely tracks the seriousness of offenses and the blameworthiness of offenders by authorizing a unique maximum fine for each offense class. Section 904(2), on the whole, also authorizes higher fines than current law. The authorized maximum fines have been raised to account for inflation and to provide a viable alternative or supplement to imprisonment, increasing the sanctioning options available for imposition of criminal liability.

Section 904(3) provides that the maximum authorized fine for corporations is twice that authorized for individuals, but applies the rule to all offense classes rather than just felonies. That differs significantly from KRS 534.050, which authorizes a maximum \$20,000 for any felony, and lesser amounts for classes of misdemeanors and violations.

Section 509.905. General Adjustment to Offense Grade for Prior Offense**Corresponding Current Provision(s):** 532.080**Comment:**

Generally. This provision allows for extended terms of imprisonment by increasing the grade of an offense by one grade, for sentencing purposes, where the defendant is a recidivist offender.

Relation to current Kentucky law. Section 509.905 is similar in function and effect to current KRS 532.080, which governs sentencing for “persistent felony offenders.” Section 905, however, applies to second or subsequent convictions for any offense, rather than only felonies, although it is limited to cases where the prior offense was at least as serious as the current offense. Like current 532.080(2) and (5), Section 905 provides that where a person is convicted of a second offense less than five years after a previous conviction of a similar or more serious offense, the offense will be treated for sentencing purposes as if it were one grade higher. (The current provision uses the phrase “next highest degree,” which makes it sound as if the sentence will be *reduced* relative to the normal grade, but seems to intend what Section 905 provides.)

Section 905(2), like KRS 532.080, requires that the offense underlying the earlier conviction must have occurred when the offender was at least 18 years old.

Section 905(3)’s requirement that the second conviction must be “within 5 years after the previous conviction, excluding time spent in custody,” employs one general rule that covers current 532.080(2)(c)’s five specific rules regarding the relative timing of the prior and current convictions.

Section 905 does not include current 532.080(3) and (6)’s rules regarding “persistent felony offenders in the first degree,” i.e., those who have been convicted of *two* prior felonies. The only distinction between the sentences available for such offenders under 532.080(6) and the sentences available for one-time recidivists under 532.080(5) appears to be that a Class D felony offense of conviction would be sentenced as a Class B felony, rather than a Class C felony, for such an offender. That rule thus seems to impose additional, more severe sentencing rules only on *lower*-graded felonies. Less serious felonies, however, should be of relatively lesser concern with respect to recidivism rules, which are meant to address especially dangerous and incorrigible offenders.

Section 509.906. Authorized Sentence for Multiple Offenses**Corresponding Current Provision(s):** KRS 532.110; see also 532.120, 533.060**Comment:**

Generally. This provision establishes a rule for determining cumulative authorized sentences for defendants convicted of more than one offense.

Relation to current Kentucky law. Section 906 provides a universal sentencing rule for multiple offenses that authorizes neither consecutive nor concurrent sentences. Under Section 906, each additional offense of conviction increases the defendant’s total authorized sentence, but the defendant serves a full sentence only for the most serious offense.²⁵ As a defendant’s offenses become more numerous and less serious, the defendant’s total authorized sentence continues to increase, but in progressively smaller amounts.

Section 906’s mechanism for sentencing multiple convictions provides fairer punishment than the crude consecutive-or-concurrent dichotomy of current Kentucky law.²⁶ Consecutive sentencing often results in cumulative sentences that seem overly severe as measures of the total harm caused. Concurrent sentencing, conversely, provides no punishment at all for a defendant’s less serious offenses, thus trivializing to the point of total irrelevance any offenses other than the most serious one. Section 906 provides an intermediate approach to sentencing for multiple offenses, ensuring that each additional offense leads to some increase in overall punishment while avoiding raw aggregation of offenses into an unduly severe cumulative sentence.

²⁵ In the event that an offense is overturned on appeal, the defendant should be re-sentenced in accordance with this scheme, re-applying the scheme using only those offenses that remain in effect. Thus, if the most serious offense were overturned on appeal, on remand the court would give the *full* sentence for the most serious *remaining* offense, and so on, rather than simply deleting that portion of the sentence represented by the most serious offense without enhancing the punishment for the remaining offenses.

²⁶ See KRS 532.055(2) (“The jury shall recommend whether the sentences shall be served concurrently or consecutively.”); 532.110(1) (“When multiple sentences of imprisonment are imposed on a defendant for more than one (1) crime . . . the multiple sentences shall run concurrently or consecutively as the court shall determine at the time of sentence.”).

CHAPTER 511. HOMICIDE OFFENSES

Section 511.1101: Murder in the First Degree

Corresponding Current Provision(s): 507.010, 507.020

Comment:

Generally. This provision defines the offense of murder in the first degree, carrying a maximum penalty of death.

Relation to current Kentucky law. Current Kentucky law does not divide the offense of murder into two degrees. Instead, current KRS 507.020 contains both intentional murder and wanton murder committed with extreme indifference to human life.

Section 511.1101 defines only the offense of knowingly (or intentionally, see proposed Section 501.205(6)) causing the death of another person. The mitigating factor of extreme mental or emotional disturbance is recognized in Section 511.1103(1). Section 1101 does not incorporate the current reference to the defendant causing the death of a third person, as that language is addressed by Section 503.304's rules relating to transferred intent.

Section 1101(2) grades murder in the first degree as a Class X felony. This grading assumes that the procedures following a conviction for murder in the first degree allow for a penalty phase which can result in a jury recommendation of a penalty less than death.

The definition of homicide, which originally appeared in the Model Penal Code for historical reasons and is found in current KRS 507.010, has been deleted as unnecessary.

Section 511.1102: Murder in the Second Degree

Corresponding Current Provision(s): 507.020

Comment:

Generally. This provision creates an offense of murder in the second degree.

Relation to current Kentucky law. The proposed offense of murder in the second degree includes the "other" current type of murder offense, recklessly causing the death of another under circumstances manifesting extreme indifference to the value of human life.

The extreme-indifference version of murder covers any conduct showing extreme carelessness, therefore making it unnecessary to explicitly include the operation of a motor vehicle (as exists in current KRS 507.020(1)(b)). The proposed culpability requirement of recklessness can be imputed under the voluntary-intoxication provision. See proposed Section 503.302.

Section 1102(2) grades the offense as a Class A felony, whereas first-degree murder is graded as a Class X felony. Current 507.020(2) grades both forms of murder as a capital offense. The proposed grading is based on the view that the criminal law ought to distinguish between those who intend to kill and those who lack intent. The death penalty, for example, ought to be reserved for the most egregious of offenses: intentional killings. The vast majority of jurisdictions distinguish between intentional and other killings.

Moreover, if extreme-indifference murder were made death-eligible as a Class X felony, it might be necessary to consider making other, apparently equally serious offenses death-eligible as well. Indeed, most or all other Class A felonies, which generally require intentional or knowing (rather than reckless) conduct, might seem to merit death eligibility if this offense does.

Section 511.1103: Manslaughter in the First Degree

Corresponding Current Provision(s): 507.030

Comment:

Generally. This provision creates the offense of first-degree manslaughter.

Relation to current Kentucky law. Under current KRS 507.030, there are two forms of manslaughter in the first degree. Section 1103 incorporates a version of the mitigation defined in KRS 507.030(1)(b), which arises when a defendant intentionally causes the death of another person while acting under the influence of an extreme emotional disturbance.

The current concept of extreme emotional disturbance reappears in a modified form in Section 1103(1)(a) as extreme *mental* or emotional disturbance. This additional language clarifies, and is consistent with, *Wellman v. Commonwealth*, 694 S.W.2d 696 (Ky. 1985), where the Kentucky Supreme Court noted that mental illness can be relevant to show how a defendant reacts to any circumstance causing an extreme emotional disturbance. A mental disturbance and an emotional disturbance involve the same degree of dysfunction. In either case, the mitigation provided by this section relates to the jury's assessment of the defendant's reaction to the circumstances. The jury's assessment of the presence or absence of a mitigating disturbance is not confined to any specific category such as "sudden heat of passion," nor is any "triggering factor" necessary for the jury to conclude that an extreme disturbance existed.

In addition, Section 1103(1)(b) emphasizes that the important point is whether the disturbance provides a reasonable explanation or excuse, and provides that "reasonableness" in this context "is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believes them to be." In other words, the jury is not to impose a strictly objective standard as to what constitutes "reasonable" behavior, but is to consider the specific actor and the context in which he acted. Similarly, under current law, the question is whether the disturbance provoked *this* defendant at the time of the offense. See *Smith v. Com.*, 734 S.W.2d 437 (Ky. 1987).

Section 1103(2) places the burdens of production and persuasion for the manslaughter mitigation on the defendant. Current law is similar as to the burden of production, holding that the presence or absence of the requisite “distress is a matter of evidence, not an element of the crime.” *Wellman v. Com.*, 694 S.W.2d 696 (Ky. 1985). Thus the prosecution currently has no burden to establish the absence of the distress as part of its case-in-chief for an offense such as murder in the first degree. The proposed provision also places the burden of persuasion on the defendant to establish the mitigation by a preponderance of the evidence. Because the defendant has committed the offense under circumstances that would normally constitute first-degree murder and is seeking a mitigation based solely on a less blameworthy mental state, this mitigation is similar to an excuse defense, for which the defendant bears the burden of persuasion under proposed Section 505.501(5).

The other current form of manslaughter in the first degree, set out in KRS 507.030(1)(a), relates to causing the death of another when the defendant had the intent to cause serious physical injury. The proposed Code does not incorporate that version of the manslaughter offense. Under such an offense definition, an undesirable potential exists for the imposition of liability against a defendant who lacks the typically required culpability as to the specific harm with which homicide is concerned, namely, causing another’s death. The proposed formulation reflects the view that a homicide offense should reach only those who satisfy a stated culpability requirement as to causing another’s death. Although acting with intent to cause great bodily harm is certainly wrongful — and in nearly all cases will at least satisfy the culpability requirements for second-degree manslaughter or grossly negligent homicide under the proposed Code — there is a meaningful difference between intending injury and knowingly killing another person. Further, where the person’s acts can be shown to reflect recklessness “manifesting extreme indifference to the value of human life,” he may be liable for second-degree murder under proposed Section 1102. Where such indifference is not present, however, culpability as to injury should not be raised to the status of direct culpability as to causing death.

Section 511.1104: Manslaughter in the Second Degree

Corresponding Current Provision(s): 507.040

Comment:

Generally. This provision creates a second form of the offense of manslaughter, which is committed when a person recklessly causes another’s death.

Relation to current Kentucky law. Section 511.1104’s definition of second-degree manslaughter uses the proposed Code’s nomenclature for culpability terms, i.e., it defines the offense in terms of “recklessly” rather than “wantonly” killing another person. Also, as with the extreme-indifference form of murder, the proposed section removes, as superfluous, the specific example of causing death during “the operation of a motor vehicle.”

If a person kills another while voluntarily intoxicated, an imputation rule in the proposed Code’s General Part may allow imposition of liability as if that person possessed the recklessness necessary for this offense. See Section 503.302.

Section 511.1105: Grossly Negligent Homicide

Corresponding Current Provision(s): 507.050

Comment:

Generally. This provision creates an offense of grossly negligent homicide.

Relation to current Kentucky law. The proposed offense is identical to the current offense of “reckless homicide,” except for a change in the stated culpability requirement that tracks the proposed Code’s general culpability terms. See proposed Section 501.206.

Section 511.1106. Causing or Aiding Suicide

Corresponding Current Provision(s): 216.302

Comment:

Generally. This provision sets out a rule in Section 1106(1) to govern homicide liability for causing another’s suicide, and an offense in Section 1106(2) for assisting a suicide. (Aside from their similar subject matter, Sections 1106(1) and (2) are not related to each other.)

Section 1106(1) does not define a distinct offense. Rather, it merely makes clear that a person who causes another person’s suicide (or attempted suicide) through force or duress may be convicted of another defined homicide offense, such as murder or manslaughter — the offender’s culpability would determine the relevant offense — notwithstanding the situation’s potential conflict with the usual causation rules, because of the suicide’s own intervening act. See proposed Section 502.251. In other words, Section 1106(1) merely clarifies the scope of the other homicide offenses, stating explicitly that “causing death” includes death by suicide, where brought about by force or duress. The other relevant Chapter 511 provision would set the culpability requirement and the grade for the offense.

Section 1106(2), however, does define a new offense. The (2) offense addresses the problem that the General Part’s complicity and solicitation rules do not apply to suicide, because suicide is not itself an offense.

Relation to current Kentucky law. Section 1106(1) adopts a slightly different form than current KRS 216.302(1), in that it establishes liability for causing suicide by force or duress by means of the standard homicide offenses, rather than by defining a distinct offense. In substance and scope, however, Section 1106(1) and (2) are otherwise similar to current KRS 216.302, except for the proposed provision’s grading, which differs in two ways. First, Section 1106(1) would have the effect of establishing different grades for the act of causing a suicide based on the offender’s culpability, as is the case with any other homicide offense (the underlying theory being that this is just like any other homicide, but for the need to clarify the causation rule). Second, both Sections 1106(1) and (2) reflect grading adjustments based on whether the resulting harm (the other’s death) of the offense actually results. (Causing an attempted suicide under Section 1106(1)

would be *attempted* murder or manslaughter.) The occurrence or non-occurrence of the victim's death is considered relevant in all other homicide situations, so it is sensible and consistent to retain the relevance of that result in this context.

Section 1106(3) adopts the exceptions for licensed health professionals in current KRS 216.304.

Section 1106(4) defines "suicide" as "intentionally causing one's own death," which is similar to current KRS 216.300(2)'s definition as "the act or instance of taking one's own life voluntarily and intentionally."

Section 1106(5) grades the offense under Section 1106(2), taking account of whether the resulting death occurs. Aiding a suicide is a Class D felony if suicide results, a Class E felony if an attempt results, and a Class A misdemeanor if neither a suicide nor an attempt results. Current KRS 216.302(2) grades the analogous offense as a Class D felony whether death occurs or not.

Section 511.1107. Definition

Corresponding Current Provision(s):

Comment:

Generally. This provision collects defined terms used in Chapter 511 and provides cross-references to the provisions in which they are defined.

Relation to current Kentucky law. For a discussion of the relationship between Chapter 511's defined terms and current law, refer to the commentary for the provision in which the term is initially defined.

CHAPTER 512. ASSAULT, ENDANGERMENT, AND THREAT OFFENSES

Section 512.1201: Assault; Causing Physical Injury

Corresponding Current Provision(s): 508.010, 508.020, 508.025, 508.030,
508.032, 508.040, 518.090

Comment:

Generally. This provision creates a general offense of assault for the infliction of physical injury. Noninjury offenses, where physical contact occurs without a resulting injury, are addressed by the proposed offenses of endangerment, terroristic threats, and harassment.

Relation to current Kentucky law. Current law has several assault offenses with varying combinations of aggravating factors that increase the penalty to a more serious grade. For example, a defendant who intentionally causes serious physical injury to another person is guilty of assault in the fourth degree under KRS 508.030. If the assault is committed with a dangerous instrument *or* causes a serious physical injury, the accused is guilty of assault in the second degree under KRS 508.020. If the assault is committed with a dangerous instrument *and* causes a serious physical injury, the defendant is guilty of assault in the first degree under KRS 508.010. However, intentionally causing physical injury to a state peace officer constitutes only assault in the third degree under KRS 508.025, with no available further aggravation (other than that available for any other assault) to address a serious injury or the means by which the injury was inflicted. When particular facts do not exactly fit the specific aggravating factors included in the definition of a specific offense, it becomes necessary to identify a less serious version of assault for prosecution, so that any given factor, or combination of factors, will *sometimes* but may not *always* be relevant to the extent of an offender's liability.

Section 512.1201(1) creates a general assault offense which may be committed either by recklessly causing physical injury to another, or by grossly negligently causing such injury to another with a dangerous instrument. Section 512.1201(2) provides a list of four aggravating categories that increase the relevant penalty based on (1) the victim suffering "serious physical injury," rather than "physical injury," (2) the defendant acting with intent or extreme indifference, rather than recklessness, (3) the defendant using a weapon, and/or (4) the victim being a law-enforcement official who is acting in the line of duty. While the baseline penalty for the general assault offense is a Class B misdemeanor, the presence of any (or all) of the four categories of aggravators can result in an increased penalty up to a Class C felony, or a Class B felony if proposed Section 905's recidivism aggravation also applies.

Section 1201 thus gives voice to the aggravators in all cases, rather than only in particular combinations, as under current law. The advantage of the proposed approach is that it increases both consistency and efficiency. Applying these specific factors as general grading adjustments to a single assault offense, rather than defining a variety of assault offenses, each for a particular combination of factors, enables the Code to consistently aggravate for all factors. The current law approach, in contrast, takes a drafting approach that obliges it to select certain combinations of factors to define each degree of the offense, and thereby omit other combinations. Thus, for example, there is an aggravation for causing physical harm to a police officer (third-degree assault), but no similar aggravation for causing *serious* physical harm to an officer. If the status of the victim (or the extent of injury caused) is considered relevant in some cases, it seems appropriate to make that factor relevant in all cases.

As to any of the four categories of grade increase in Section 512.1201(2)(a), there can be only one grade increase for an offense per category. For example, even if it could be shown under Section 512.1201(2)(a)(ii) that the accused both acted with intent and displayed extreme indifference to human life, there could be only a one-grade increase to the overall offense grade.

The four aggravators listed in proposed Section 512.1201(2)(a)(i)-(iv) are elements of the current assault offenses. The enhancement in Section 1201(2)(a)(iv) is similar to the enhancements in current KRS 508.025(1)(a), but applies only to assaults against a “peace officer or correctional worker,” and not to such other people as social workers. (The definition of “correctional worker” in proposed Section 513.1304(2), however, is meant to include such figures as probation and parole officers.) The narrow identified categories of law-enforcement authorities include those people whose work most often entails “front-line” contact with offenders. If the enhancement category is expanded beyond law-enforcement officials, it is unclear where the line should be drawn for the aggravation: if it included prosecutors and advocates, for example, it might seem sensible to also include public defenders, judges, and bail bondsmen — at which point, it seems reasonable to include assaults against any public servant.

The recidivism enhancement in current KRS 508.032 has not been retained for assault specifically, as there is a general enhancement for repeat offenders in proposed Section 509.905.

Section 1201(2)(b) allows for a decrease by one grade if the accused was acting under extreme mental or emotional disturbance for which there is a reasonable explanation or excuse. See the commentary to Section 511.1103 for the application of “extreme mental or emotional disturbance” to the homicide offense. Under current law, such mitigation can be used for offenses defined in KRS 508.010, 508.020, and 508.030, but not for the assault offense defined in KRS 508.025.

Section 512.1202: Endangerment**Corresponding Current Provision(s):** 508.060, 508.070, 530.080**Comment:**

Generally. This provision creates a general offense of endangerment, i.e., criminalizing behavior that creates a significant risk of injury or death.

Relation to current Kentucky law. As with the current assault offenses, the current wanton endangerment offenses are defined using specific combinations of aggravating factors. Section 512.1202 takes the elements in current KRS 508.060 and 508.070 and gives full voice to all of these aggravators rather than limiting their impact to certain combinations. The endangerment offense would also cover situations currently addressed by elements of, or aggravations for, other specific offenses. For example, a person who has intercourse with another while knowing himself to be infected with HIV, and without informing the other person of this fact, commits an endangerment offense. See, e.g., KRS 529.090.

Section 512.1202(2) provides two aggravating categories, the presence of which increases the relevant penalty based upon the injury risked and the indifference to human life displayed by the defendant. While the baseline penalty for the general endangerment offense is a Class A misdemeanor, the presence of the two aggravators can result in an increased penalty up to a Class D felony.

Section 512.1203: Terroristic Threats; Menacing**Corresponding Current Provision(s):** 508.050, 508.075, 508.078, 508.080**Comment:**

Generally. This provision creates a general offense of terroristic threats and menacing.

Relation to current Kentucky law. Section 512.1203 expands the scope of the most serious form of terroristic threatening beyond the school context to which current KRS 508.075 is limited. The proposed offense includes unnecessary evacuation of any building, assembling place, or public transport. The conduct elements of the proposed offense are similar to the current terroristic threatening offenses. However, the grading of the offense as a Class E felony, or as a Class A misdemeanor for threats to commit injury or property damage, represents a middle ground among the current terroristic threatening offenses.

The proposed offense and grading of menacing is substantially identical to the offense in current KRS 508.050.

Section 512.1204. Stalking; Intimidation

Corresponding Current Provision(s): 508.130 to 508.155; 525.070, 525.080

Comment:

Generally. This provision defines an offense of intimidation, and an additional offense of stalking which covers patterns of intimidation conduct of a specific type.

Relation to current Kentucky law. The proposed offenses are similar to the current offenses of stalking in the first and second degrees, found in KRS 508.140 and 508.150.²⁷ But in addition to the current stalking offenses, which require a “course of conduct,” the proposed provision also applies to single instances of intimidating behavior, which also have the potential to cause serious alarm or fear.

Section 1204(1)’s proposed intimidation offense has three requirements: (1) intentionally causing serious alarm, annoyance, intimidation, or harassment of another person; (2) under circumstances in which a reasonable person would suffer substantial mental distress; (3) with no legitimate purpose. The proposed offense definition mirrors a part of the current definition of the term “stalk” found in current KRS 508.130(1)(a) and (b). The current definition of stalking, however, also requires a “threat.” The intimidation offense does not require a threat — such a single threat would be covered by the terroristic threat offense in proposed 512.1203.

Section 1204(2)’s pattern-based stalking offense, however, like the current stalking offenses, retains the threat requirement, and also requires a “course of conduct directed at a specific person or persons.” When combined with the requirements of Section 1204(1), which it explicitly incorporates, Section 1204(2) imposes the same requirements as the current stalking offenses in KRS 508.130 to .150.

Under Section 1204(3)(a) and (b), the baseline penalty for intimidation is a Class B misdemeanor, but the presence of any of four aggravators can result in an increased penalty up to a Class E felony. The four aggravators in proposed Section 512.1204(3)(a)(i)-(iv) track those in current KRS 508.140(1)(b) (defining aggravators for first-degree stalking), with two minor differences. First, Section 1204(3)(a)(ii) explicitly requires that the defendant “knows” a criminal complaint is pending against him, rather than the substantively similar but unnecessarily specific requirement that he have “been given actual notice.” Second, Section 1204(3)(a)(iii) applies when the defendant has previously been convicted of any crime, rather than only a felony or Class A misdemeanor, against the victim.

²⁷The proposed “harassment” offense, Section 561.6106, also addresses much of the conduct prohibited by the current stalking offenses.

Section 1204(3)(c) grades the stalking offense as a Class A misdemeanor, or a Class D felony when one of the aggravating factors is present. These are the same grades as exist under current KRS 508.140(2) and 508.150(2).

Section 1204(4)(a), defining “course of conduct,” is identical to current KRS 508.130(2). Section 1204(4)(b), defining “protective order,” is identical to current KRS 508.130(3), except that Section 1204(4)(b)(iv) refers to any “restraining order” and not just to restraining orders issued under KRS 508.155.

Section 512.1205: Criminal Abuse

Corresponding Current Provision(s): 508.090, 508.100, 508.110, 508.120

Comment:

Generally. This provision creates a general offense of criminal abuse.

Relation to current Kentucky law. Current law has several criminal-abuse offenses that share identical circumstance and conduct elements, but differ from one another based on the culpability element. For example, a defendant who intentionally abuses another in his custody, thereby causing serious physical injury, is currently guilty of criminal abuse in the first degree under KRS 508.100, while a person who acts recklessly (“wantonly” in terms of current law) in the same situation is guilty of a lesser degree of the offense under KRS 508.110. The proposed offense similarly grades the seriousness of the offense as a function of culpability, but does so using one general offense.

Section 512.1205 adjusts the scope and grading of the criminal-abuse offense to reflect the fact that other offenses in the proposed Code cover the more serious conduct addressed by the current provisions. For example, the current law’s language addressing the results of the defendant’s conduct (such as causing serious physical injury or torture) is covered under proposed Section 512.1201, dealing with assault. Likewise, the result of placing the victim in a situation that may cause him serious physical injury would fall under the definition of endangerment in proposed Section 512.1202. The proposed provision, in contrast to the current scheme, captures only the aspect of the current offenses that deals specifically with causing cruel confinement or cruel punishment to the victim. Where physical injury or serious risk is also involved, the defendant could be convicted of another offense under Chapter 1200 as well as an offense under Section 1205, and would be subject to additional punishment for the other offense. See proposed Section 509.906.

Section 1205(1)(b) also adds language from the current definition of “abuse,” i.e., the deprivation of services necessary to maintain the victim’s health or welfare, as a prohibited result. The remaining part of the current definition of “abuse” in KRS 508.090(1) has not been incorporated, as it would be duplicative of the proposed definition or of the assault offense in proposed Section 512.1201. Section 1205(2) defines “physically or mentally helpless person” similarly to current KRS 508.090(2).

Section 512.1206: Definitions

Corresponding Current Provision(s): 508.090, 508.130

Comment:

Generally. This provision collects defined terms used in Chapter 512 and provides cross-references to the provisions in which they are defined.

Relation to current Kentucky law. For a discussion of the relationship between Chapter 512's defined terms and current law, refer to the commentary for the provision in which the term is initially defined.

CHAPTER 513. SEXUAL ASSAULT OFFENSES

General Comment Regarding Culpability:

Under the proposed Code, in cases requiring that the victim be below a certain age or have a lack of capacity to consent, the required culpability as to the victim's age or incapacity would be recklessness. (As is generally true where no culpability term is explicitly stated, proposed Section 501.205(3)'s "read-in" rule operates here to impose a recklessness requirement.) Current KRS 510.030 currently provides a defense where the offender did not have knowledge of the victim's age or mental infirmity. In certain contexts, however, the courts have held that no culpability is required for rape. See *Malone v. Com.*, 636 S.W.2d 647 (Ky. 1982). Imposing a general requirement of recklessness as to age and/or incapacity reflects a compromise that harmonizes the inconsistencies of current law.

Section 513.1301: Aggravated Rape

Corresponding Current Provision(s): 510.010, 510.015, 510.030, 510.035, 510.040, 510.070

Comment:

Generally. This provision creates the offense of aggravated rape.

Relation to current Kentucky law. The proposed offense of aggravated rape is currently found in the Penal Code as rape in the first degree and sodomy in the first degree. Aggravated rape is commonly understood to include any kind of sexual intercourse, deviate or otherwise. The aggravated rape offense is committed in any of three circumstances: when a defendant has sexual intercourse or deviate sexual intercourse with another person (1) who is less than 12 years old, or (2) by forcible compulsion, or (3) who is physically helpless.

Section 513.1301(2)'s definitions of "sexual intercourse," "deviate sexual intercourse," "forcible compulsion," "foreign object," and "physically incapacitated" are identical to the current definitions of the same terms in KRS 510.010(1)-(2), (6), (8), and (9), except for one modification to the definition of "forcible compulsion." Instead of requiring the offender to actually place the victim in fear, the definition now requires such force as "would place a reasonable person in fear." This makes the definition more objective and less dependent on the victim's own experience of the encounter; accordingly, less reliance on the victim's own testimony would presumably be needed under the proposed standard. An objective standard places the focus where it belongs, on the actual extent of the force used by the assailant, rather than on the victim's personal state of mind. An assailant who uses a sufficient level of force should not be able to argue that no liability is warranted merely because the Commonwealth cannot prove subjective fear on the victim's part.

Unlike the lower-graded offense of rape in proposed Section 513.1302, the aggravated offense may be committed by a person against his spouse. The provision in current KRS 510.035 prohibiting sex offense prosecutions for married couples does not apply to the circumstances described in the proposed aggravated rape offense.

Issues relating to consent or the lack of consent are addressed in proposed Section 502.251. Current KRS 510.030 provides that a defendant may prove that he did not know of the facts or conditions responsible for a victim's incapacity to consent. The current provision is probably unconstitutional, as it negates the culpability requirement as to a required element of every offense in this Chapter — lack of consent — thereby improperly shifting the burden of proof to the defendant. The absence of the “defense” in the proposed Code does not convert the sexual-assault offenses to strict-liability offenses, because, where no culpability requirement is stated as to the offender's awareness of the victim's incapacity, a culpability requirement of recklessness is to be read in under proposed Section 501.205(3). In addition, use of the term “know” imposes a higher culpability requirement than the default culpability of recklessness under the proposed Code (equivalent to “wantonly” under the current Penal Code). Thus, shifting the burden to the prosecution requires that it prove that the defendant was aware of the likelihood that the person was incapable of consenting.

The grading of the offense is identical to the corresponding current Penal Code offenses.

Section 513.1302: Rape

Corresponding Current Provision(s): 510.010, 510.035, 510.050, 510.060, 510.080, 510.090

Comment:

Generally. This provision creates the offense of rape.

Relation to current Kentucky law. Each of the circumstances described in the rape offense definition involves situations in which the consent of the victim is ineffective. This offense tracks the current second- and third-degree offenses of rape and sodomy. The definitions of “mentally retarded” and “mentally incapacitated” in proposed Section 513.1302(2) are substantially identical to the definitions of the same terms in current KRS 510.010((4)-(5)).

Unlike the aggravated rape offense, rape as defined in Section 1302(1)(a) cannot be committed by a person against his spouse. Generally, this provision is similar to current KRS 510.035, which indicates that no sex offense is committed by a person against his spouse merely because the latter is less than sixteen years old or mentally retarded. Under Section 1302(1)(b), however, any intercourse with a person who is “mentally incapacitated” is rape, even if the victim is the offender's spouse. Although minors and mentally retarded persons are allowed under Kentucky law to marry and must be permitted to have consensual sex with their spouses when they are married, there is no reason to allow a person to engage in intercourse with a spouse who is incapacitated and therefore is not a voluntary participant in the act.

More generally speaking, issues relating to consent or the lack of consent are addressed in proposed Section 502.251. See the commentary to proposed Section 513.1301 for a discussion of why the current “defense” of proving that a victim was incapable of consenting is not carried forward in the proposed Code.

The grading of the offense is identical to the corresponding current Penal Code offenses.

Section 513.1303: Aggravated Sexual Abuse

Corresponding Current Provision(s): 510.010, 510.035, 510.110

Comment:

Generally. This provision creates the offense of aggravated sexual abuse.

Relation to current Kentucky law. The proposed offense of aggravated sexual abuse is currently found in the Penal Code as sexual abuse in the first degree (KRS 510.110).

The offense is committed when a defendant has sexual contact with, or causes sexual conduct by,²⁸ another person under the same conditions as for aggravated rape under proposed Section 513.1301: the conduct occurs with a person who is less than 12 years old, or by forcible compulsion, or with a person who is physically incapacitated. The definition of “sexual contact” in Section 513.1303(2) is identical to the current definition of the same term in KRS 510.010(7). The definition of “sexual conduct” in proposed Section 513.1303(2)(b) is identical to the definition of “sexual conduct by a minor” in current KRS 531.300(4), with three slight differences: (1) it omits an exception for private family exposures not intended for distribution; (2) it is not limited in scope to acts by minors; and (3) it does not include the language referring to “physical contact with, or willful or intentional exhibition of the genitals,” as that language is duplicative of the definition of “sexual contact” and with Section 1303(2)(b)(iii), respectively.

Unlike the lower-graded offense of sexual abuse in proposed Section 513.1304, the aggravated offense may be committed by a person against his spouse. The provision in current KRS 510.035 prohibiting prosecutions for married couples does not apply to the circumstances described in the proposed aggravated sexual abuse offense.

Issues relating to consent or the lack of consent are addressed in proposed Section 502.251. See the commentary to proposed Section 513.1301 for a discussion of why the current “defense” of proving that a victim was incapable of consenting is not carried forward in the proposed Code.

The grading for the offense is the same as the current offense of sexual abuse in the first degree, except that the offense is a Class E felony when committed by forcible compulsion or against someone who is physically helpless.

²⁸ The “causing sexual conduct” language is designed to apply to situations such as that arising in *Gilbert v. Commonwealth*, 838 S.W.2d 376 (Ky. 1991) (applying “promoting sexual performance by minor” offense to defendant who required his daughter to disrobe in his presence). Although *Gilbert* probably read the “promoting performance” offense too broadly, given that offense’s basic concern with the *public* nature of the “performance,” the case highlights the importance and desirability of including language within the sexual abuse offenses to cover the conduct in question.

Section 513.1304: Sexual Abuse

Corresponding Current Provision(s): 510.035, 510.110, 510.120

Comment:

Generally. This provision creates the offense of sexual abuse.

Relation to current Kentucky law. Each of the circumstances described in the sexual abuse offense definition involves situations in which the consent of the victim is ineffective. This offense generally tracks the current second- and third-degree offenses of sexual abuse in KRS 510.120 and 510.130. However, proposed Section 513.1304(1)(c) changes current law when it defines the offense as having sexual contact with, or causing sexual conduct by,²⁹ a person who is less than 14 years old when the defendant is at least 4 years older. Current law defines the offense being committed by a person of any age when the victim is less than 14 years old, which is not symmetrical to the current provision for the offense of rape. Thus under current law, for persons younger than 18, it is criminal to have sexual contact with a person under age 14, but not criminal to have sexual intercourse.

In addition, Section 1304 defines the offense to include sexual contact or conduct involving a person under age 16 when the defendant is at least 4 years older. Current law notes in KRS 510.130(1)(b)3 that it is a defense that the defendant was five years older than the victim. As noted in the previous paragraph, current law thus creates the asymmetry of making it criminal for a person younger than 21 to have sexual contact with a person under age 16, but not criminal to have sexual intercourse.

Unlike the aggravated sexual abuse offense, sexual abuse cannot be committed by a person against his spouse. Generally, this provision is similar to current KRS 510.035, which indicates that no sex offense is committed by a person against his spouse merely because the latter is less than sixteen years old or mentally retarded.

Issues relating to consent or the lack of consent are addressed in proposed Section 502.251. See the commentary to proposed Section 513.1301 for a discussion of why the current “defense” of proving that a victim was incapable of consenting is not carried forward in the proposed code.

The definition of “correctional worker” used in Section 513.1304(2) is substantially identical to the description of the same term in current KRS 510.120(1)(c). The grading of the offense is similar to the corresponding current Penal Code offenses, except that the grade for sexual abuse of a mentally retarded or incapacitated person, or a person under the offender’s custodial authority, has been increased from a Class A misdemeanor to a Class E felony, on the view that the first case involves a victim who is unusually and obviously unable to consent, and the second case involves a breach of the offender’s legal duty of appropriate treatment toward the victim. The general aggravator in KRS 510.015 for a third misdemeanor sexual offense conviction has not been incorporated, as the proposed Code has a general recidivism provision. See proposed 509.905.

²⁹ As with the similar language in proposed Section 1303, this language is meant to reach cases like *Gilbert v. Commonwealth*, 838 S.W.2d 376 (Ky. 1991). See *supra* note [2.]

Section 513.1305: Sexual Misconduct**Corresponding Current Provision(s): 510.140****Comment:**

Generally. This provision creates the offense of sexual misconduct, which is a default sexual assault offense under the proposed Code.

Relation to current Kentucky law. This offense is substantially identical to the sexual misconduct offense in current KRS 510.140. The general aggravator in KRS 510.015 for a third misdemeanor sexual offense conviction has not been incorporated, as the proposed Code has a general recidivism provision. See proposed 509.905.

Issues relating to consent or the lack of consent are addressed in proposed Section 502.251. See the commentary to proposed Section 513.1301 for a discussion of why the current “defense” of proving that a victim was incapable of consenting is not carried forward in the proposed Code.

The proposed offense applies residually to any form of non-consensual sexual intercourse not otherwise covered by another offense. It differs in this respect from the description of current KRS 510.140 in the earlier Code’s commentary, which stated that the offense sought to “preserve the concept of statutory rape and statutory sodomy . . . designed primarily to prohibit nonconsensual sexual intercourse or deviate sexual intercourse under two circumstances: when the victim is 14 or 15 and the defendant is less than 21; or when the victim is 12, 13, 14, or 15 and the defendant is less than 18 years of age. In this context the ages of the defendant and the victim are critical. Force is not an element of this offense. The victim is statutorily incapable of consent.” In *Cooper v. Commonwealth*, 550 S.W. 2d 478 (Ky. 1977), the current provision was held inapplicable to cases where both persons are over the age of 21 and neither is physically or mentally incapacitated. See also *Spencer v. Commonwealth*, 554 S.W.2d 355 (Ky. 1977); *Johnson v. Commonwealth*, 864 S.W.2d 266 (Ky. 1993) (stating that “the giving of an instruction on sexual misconduct in this case would not have thwarted the long-standing rule that KRS 510.140 was intended to apply only in cases where the victim is fourteen or fifteen and the defendant less than twenty-one, or where the victim is twelve-to-fifteen and the defendant is less than eighteen years of age”). Proposed Section 1305 is not meant to apply only to offense involving persons in certain age groups; it applies to any non-consensual sexual intercourse between any two persons.

The offense of indecent exposure, which does not involve a physical injury, is relocated in proposed Section 562.6201 with the public indecency offenses.

Section 513.1306: Definitions

Corresponding Current Provision(s): 510.010

Comment:

Generally. This provision collects defined terms used in Chapter 513 and provides cross-references to the provisions in which they are defined.

Relation to current Kentucky law. For a discussion of the relationship between Chapter 513's defined terms and current law, refer to the commentary for the provision in which the term is initially defined. The only definition that is not carried forward from current law is the definition of "mental illness" in current KRS 510.010(3).

CHAPTER 514. KIDNAPPING, COERCION, AND RELATED OFFENSES

Section 514.1401: Unlawful Restraint and Kidnapping

Corresponding Current Provision(s): 509.020-.060

Comment:

Generally. This provision creates the offenses of unlawful restraint and kidnapping.

Relation to current Kentucky law. Section 514.1401 combines the current unlawful imprisonment and kidnapping offenses and defenses found in current KRS 509.020-.060. The basic offense is defined as knowingly restraining another unlawfully, which is the same as the current offense of unlawful imprisonment in the second degree.

The other offenses relate to aggravators which require an increase in grading. The next most seriously graded offense is aggravated unlawful restraint, which is substantially similar to the current offense of unlawful imprisonment in the first degree found in current KRS 509.020.

Kidnapping is defined in the same manner as the current kidnapping offense in KRS 509.040(1)(a)-(e), except that term “physical injury” is substituted for the term “bodily injury.” Aggravated kidnapping also is defined in proposed Section 514.1501(3)(a) in the same manner as the grading aggravator is described in current KRS 509.040(2). See *Brown v. Com.*, 890 S.W.2d 286 (Ky. 1994) (finding the language “when the victim is not released alive” is not overbroad and vague).

The exemption in current KRS 509.050 is brought forward in a condensed form in proposed Section 514.1401(5) and still constitutes a question of law. See *Harris v. Com.*, 793 S.W.2d 802 (Ky. 1990). The “other offense” referred to in the exemption logically must be located outside Chapter 514. See, e.g., *Smith v. Com.*, 610 S.W.2d 602 (Ky. 1980). The “ordinarily incident” language is consistent with the current law under *Timmons v. Com.*, 555 S.W.2d 234 (Ky. 1977). That case interpreted the current phrase “immediately with and incidental to” to mean that the other offense must be not only ordinarily incident to the other crime’s commission, see *Miller v. Com.*, 925 S.W.2d 449 (Ky. 1996), but also “close in distance and brief in time” in order for the exemption to apply. In assessing whether the interference was ordinarily incident to the commission of another offense, issues of time and space may well be relevant, i.e., the closer in time and space the interference is with the other offense, the more likely it is that the exemption will apply. Even without the exemption, if the other offense dealt with restraint, conviction for both this offense and the other offense would be precluded under proposed Section 502.254(2).

The proposed exemption language also eliminates the current exemption’s inapplicability to criminal escapes.

Section 514.1401(6) incorporates the defenses to these offenses in current KRS 509.060.

The definitions of “relative” and “restrain” in current KRS 509.010 also are carried forward in proposed section 514.1401(3)(b)-(c). The definition of “physical injury” is already found in proposed Section 504.420(3).

The grading of the offenses is the same as under current law for comparable conduct.

Section 514.1402: Interference with Custody

Corresponding Current Provision(s): 509.070

Comment:

Generally. This provision creates the offense of interfering with custody.

Relation to current Kentucky law. Section 514.1402 is substantially identical to current KRS 509.070. However, the defense provided in current law for returning the victim voluntarily is carried forward, not as a defense, but as a mitigator for purposes of grading. Characterizing the voluntary return of the victim as a complete defense may provide a person with the incentive to take the victim repeatedly and return the victim only when there is a fear of imminent arrest.

Section 514.1403: Criminal Coercion

Corresponding Current Provision(s): 509.080

Comment:

Generally. This provision creates the offense of criminal coercion.

Relation to current Kentucky law. Section 514.1403 is substantially identical to current KRS 509.080.

Section 514.1404: Definitions

Corresponding Current Provision(s): 509.010

Comment:

Generally. This provision collects defined terms used in Chapter 514 and provides cross-references to the provisions in which they are defined.

Relation to current Kentucky law. For a discussion of the relationship between Chapter 514’s defined terms and current law, refer to the commentary for the provision in which the term is initially defined.

CHAPTER 515. ROBBERY OFFENSES

Section 515.1501: Robbery

Corresponding Current Provision(s): 500.080, 515.010, 515.020, 515.030

Comment:

Generally. This provision creates the offense of robbery.

Relation to current Kentucky law. Section 515.1501 defines the basic offense of robbery, along with aggravators that increase the grading of the offense. The basic offense is the same as the current offense of robbery in the second degree (KRS 515.030), and is defined as using or threatening the immediate use of physical force on another person in the course of theft with the intent to accomplish the theft.

Section 1501(2)(a), enhancing the grade of the offense for aggravated robbery, is substantially identical to the current offense of robbery in the first degree in KRS 515.020.

To support liability for robbery, the property need not be taken directly from the victim or his presence, and the theft may be complete at the time the physical force was used or threatened. See, e.g., *Williams v. Com.*, 639 S.W.2d 786 (Ky. App. 1982).

The definitions of “dangerous instrument” and “deadly weapon” are carried forward from the current Penal Code definitions in KRS 500.080, although instead of excluding a “hunting knife” from the definition of “deadly weapon” itself, the proposed provision includes such items — instead excluding only “pen knives” from the definition — but, in Section 1501(2)(a)(iii), defines the offense to cover cases where the offender is armed with a weapon “other than an ordinary hunting knife that the person regularly carries.” The definition of “physical force” in KRS 515.010 has not been incorporated, as is it does not helpfully add to the term itself.

The grading of the offense is the same as under current law.

CHAPTER 521. THEFT AND RELATED PROVISIONS

Section 521.2101: Consolidation of Theft Offenses

Corresponding Current Provision(s): None

Comment:

Generally. Section 521.2101 assures that the offense definitions and grading provisions in Chapter 521 are read together as applying to different forms of the same offense. The Code could achieve the same result by having one very large theft section with many subsections, but such an approach would be awkward. A consolidation provision avoids the problem of having to charge several different offenses to make sure an indictment covers conduct that may fall into different categories, such as theft, embezzlement, or receiving stolen property. In this way, the provision preempts issues regarding offense liability or grading that stem from disputes as to “which kind” of theft a defendant’s conduct constitutes. The consolidation of theft offenses also enables Chapter 521 to have a unified grading provision and unified defense provisions.

A consolidation provision making theft “a single offense” does *not* preclude the possibility of charging multiple *counts* of that offense — just as, for example, arson is a “single offense” but may be charged in multiple counts. (See proposed Sections 502.253 to 502.255 and corresponding commentary for rules governing the circumstances under which there may be a conviction for multiple counts of the same offense.)

Relation to current Kentucky law. Section 521.2101 has no corresponding provision in current KRS Chapter 514.

Section 521.2102: Theft by Unlawful Taking or Disposition

Corresponding Current Provision(s): 514.030; 514.140; 217.181; 218A.1418, 433.234, 433.865, 434.580, 437.420(1)

Comment:

Generally. This provision defines the most straightforward form of theft: taking property that belongs to another person.

Relation to current Kentucky law. Section 521.2102(1) corresponds to current KRS 514.030. The key aspect of the offense is unauthorized transfer of possession or ownership, not the particular method of transfer. Section 521.2102(1) covers the same conduct addressed by other current provisions that prohibit theft by taking in the context of specific circumstances or forms of property, such as theft of mail matter (KRS 514.140); theft of legend drugs (KRS 217.181); and theft of controlled substances (KRS 218A.1418). The overlap created by such provisions introduces unnecessary and undesirable confusion.

Current KRS 433.234 provides a presumption of intent to deprive an owner of property in shoplifting situations when there is “willful concealment of unpurchased merchandise” on the premises of the store. Section 521.2102(2) substitutes a permissive inference for the current presumption, which is consistent with constitutional principles. See proposed Section 500.106(4) and corresponding commentary for a discussion of permissive inferences.

Section 521.2102(3) is substantively similar to current KRS 514.030(2) and adopts most of its wording. Section 2102(3), however, replaces “obtains” with “transfers” to clarify that theft of immovable property can occur without the need for the person to obtain the property. The requirement that the person “transfer” the immovable property excludes a trespasser from theft liability. The trespasser situation can be addressed by the trespass offense. See proposed Section 523.2302.

The use of the term “unlawfully” in proposed Sections 521.2102(1) and (3) has the effect of providing a consent defense. Therefore, the general consent defense in proposed Section 502.251 would apply.

Section 2102(4)(e), like current law, broadly defines “property” as “anything of value,” and provides a broader list of examples than current law. Section 2102(4)’s other definitions are similar to those in current law.

Section 521.2103: Theft by Deception

Corresponding Current Provision(s): 342.035, 342.335, 342.615, 434.650-.655, 434.670 514.020(3); 514.040; 514.090; 514.120; 514.160; 514.170

Comment:

Generally. This provision covers situations where the offender knowingly obtains another person’s property by means of trickery or falsehood, rather than by “taking” it outright, as in proposed Section 521.2102.

Relation to current Kentucky law. Section 521.2103 addresses the offense of theft by deception in one provision, replacing the general theft-by-deception provisions in current law, KRS 514.040, as well as other specific deception-related sections in current law, such as KRS 514.120 (obscuring identity of machine or other property) and KRS 514.160 (theft of identity).

Theft by deception differs from theft by unlawful taking in that the offender’s intent to deprive the owner of the property is made clear by his deliberate deceptive act itself. Section 521.2103(1) is similar to current KRS 514.040, but eliminates the reference to deception regarding “services,”³⁰ which is addressed in Section 521.2112. Section 521.2103(1) serves as a general description of the theft by deception offense. Current KRS 514.040(6)-(7) contain statements of specific types of theft by deception, which undercut the force of the general offense description and are unnecessarily confusing.

³⁰See *Butts v. Com.*, 581 S.W.2d 565 (Ky. 1979) (KRS 514.040(3) applies to theft of services by deception).

Section 521.2103(2) incorporates the definition of deception from current KRS 514.040(1)(a)-(e). When an intentional deception involves forgery or fraud, the conduct may violate forgery or fraud offenses. See generally Chapter 531 and corresponding commentary.

Section 521.2103(3) is comparable to current KRS 514.040(2), and limits the reach of the offense of theft by deception in two areas. Section 521.2103(3) excludes from the offense deceptions that are irrelevant to any pecuniary interest, such as when a salesman misrepresents his personal opinions or beliefs to establish a better rapport with a customer. Section 521.2103(3) also excludes “puffing” by statements that are unlikely to deceive an ordinary person in the group addressed.

Section 521.2103(4) is comparable to KRS 514.040(3) by precluding any inference about a person’s intent to perform a promise merely from the later failure to perform the promise.³¹ For example, if a check turns out to be unsupported by sufficient funds, there is no necessary connection between the lone fact that there are insufficient funds to cover the check and the person’s intent at the time the check was written. As Section 521.2103(5) makes clear, however, the existence of other circumstances may permit a permissive inference about the person’s knowledge.

Section 521.2103(5) and (6) create permissive inferences about a person’s knowledge from the fact that a check would not be paid or the fact that leased property was not returned, as opposed to the “presumption” in current KRS 514.040(4) and 514.020(3). (See proposed Section 500.106(4) and corresponding commentary for a discussion of permissive inferences.) Section 2103(6) does not incorporate the language from the second sentence of current KRS 514.040(4)(b) to 514.040(5), because the conduct in question does not support a permissive inference of intent to deceive at the time a check was written.

Section 2103 covers the conduct prohibited by current KRS 342.035, 342.335, 342.615, 434.650-.655, and 434.670.

Section 521.2104: Theft by Extortion

Corresponding Current Provision(s): 514.080

Comment:

Generally. This provision covers situations where the offender obtains another person’s property by means of a threat rather than by outright taking (Section 521.2102) or deception (Section 521.2103). Threats of immediate serious bodily harm constitute the offense of robbery, see Chapter 515, while theft by extortion relates to other improper threats as well as threats of future harm.

³¹ This is consistent with *Com. v. Miller*, 575 S.W.2d 467 (Ky. 1978).

Relation to current Kentucky law. Section 521.2104(1)(a)-(f) is similar to current KRS 514.080(1). Section 521.2104(1)(d) streamlines the language in KRS 514.080(1)(d), but makes the same conceptual point.

Section 521.2104(1)(g) has no comparable section in current law. Its addition recognizes that the specification of criminal threats found in current 514.080(1)(a)-(f) is insufficient to cover all situations that may constitute extortion. Thus, the language “inflict any other substantial harm” provides a residual category that broadens the scope of the provision to include other harms not currently addressed. However, the language “that would not benefit the defendant” limits the applicability of this type of extortion to the extent that the threat was made to secure a benefit for which the defendant may have some legitimate claim. The Model Penal Code’s commentary gives several examples of cases that would fall within this “catchall” provision, but not any of the other specific provisions in this Section:

One would be the case of the foreman in a manufacturing plant who requires the workers to pay him a percentage of their wages on pain of dismissal or other employment discrimination. Another would be the friend of the purchasing agent of a large corporation who obtains money from an important supplier by threatening to influence the purchasing agent to divert his business elsewhere, or the variation where the purchasing agent himself insists on personal payments by means of the same threat. The section would even apply to a law professor who obtains property from a student by threatening to give him a failing grade or to influence a prospective employer to hire someone else.

Model Penal Code § 223.4 cmt. at 223 (1980).

Section 521.2104(2) retains the defense set out in current KRS 514.080(2), but expresses the defense in simpler language. The defense covers property obtained by an honest claim of restitution or indemnification. This defense would protect, for example, property obtained in settlement of a legitimate legal claim.

Section 521.2105: Theft of Services

Corresponding Current Provision(s): 514.060; 514.065

Comment:

Generally. This provision makes clear that, as with other forms of property, it is theft to obtain unlawfully another person’s labor or services.

Relation to current Kentucky law. Section 521.2105(1)(a) and (b) are similar to KRS 514.060(1)(a) and (c). Section 521.2105(3), creating a permissive inference of intent for “dine-and-dash”-type situations, is similar to the presumption found in current KRS 514.060(2). See proposed Section 500.106(4) and corresponding commentary for a discussion of permissive inferences.

The presumption in current KRS 514.060(3) for theft of public services such as gas and water is included within the general theft of services provision of Section 521.2105(1)(a). It is clear from that general provision that the theft of services offense includes gas, water, etc., and there is no special need for a permissive inference covering public utilities. The definition of services includes computer data, computer software or hardware, and access to electronic media.

Several provisions from current law are omitted from the proposed Code. Specialized provisions in KRS 514.060(1)(b) and 514.065 list several examples of theft of communications services, which already are included in Section 521.2105(1)(a), without the need for specificity. Other portions of KRS 514.060(1)(b) address privacy issues addressed in Chapter 524.

Section 521.2106: Theft by Unauthorized Sale of Copyrighted Material

Corresponding Current Provision(s): 434.445

Comment:

Generally. This provision covers the unauthorized sale of copyrighted matter.

Relation to current Kentucky law. Section 521.2106 defines an offense for depriving the owner of copyrighted material any proceeds from its sale. It is a streamlined version of current KRS 434.445, which prohibits the unauthorized reproduction and distribution of such material. The inchoate and accomplice aspects of current law are covered by proposed Sections 508.801 and 503.301, respectively.

Section 521.2107: Theft by Failure to Make Required Disposition of Funds Received

Corresponding Current Provision(s): 514.070

Comment:

Generally. This provision defines as an offense the retention of funds received subject to an agreement to transfer the funds to a third party. In some situations, one who promises to make certain payments or other disposition of property should be punished for dealing with the property as his own. Without such a provision, the conduct in question would constitute breach of contract, but arguably not theft, as the offender has obtained control of the victim's funds with the victim's agreement.

Relation to current Kentucky law. Section 521.2107(1)-(2) are similar to current KRS 514.070(1)-(2). Section 521.2107(3) establishes a permissive inference that is comparable to the presumption in current KRS 514.070(3). See proposed Section 500.106(4) and corresponding commentary for a discussion of permissive inferences.

Section 521.2108: Theft of Property Lost, Misplaced, or Stolen by Mistake

Corresponding Current Provision(s): 434.590, 514.050; 365.710

Comment:

Generally. This provision defines as theft the unlawful retention of property that the possessor knows to belong to someone else.

Relation to current Kentucky law. Section 521.2108 is similar to current KRS 514.050(1). The offender’s knowledge or potential knowledge of the owner’s identity is a factor in determining the reasonableness of his efforts to return the property. This standard, however, also allows consideration of, and adjustment for, the nature of the property when deciding what measures are reasonable. The person who accidentally comes into possession of an extremely valuable or unique item should be required to undertake a more thorough search for the rightful owner than the person who finds a \$5 bill on a busy street corner. Section 521.2108 also adjusts for the elimination of the knowledge-of-ownership requirement by requiring the offender to know that the property was lost, misplaced, or delivered by mistake. This requirement prevents the extension of the offense to innocent conduct.

Current KRS 514.050 contains an exception for the provision in KRS 365.710, which deals with receipt of unsolicited goods. The knowledge culpability requirement of proposed Section 521.2108 already takes care of this exception and is therefore unnecessary.

Section 2108 covers the conduct prohibited by current KRS 434.590.

Section 521.2109: Receiving Stolen Property

Corresponding Current Provision(s): 434.580, 434.690, 514.110; 514.120(2);
514.150

Comment:

Generally. This provision creates an offense governing receipt or possession of stolen property.

Relation to current Kentucky law. Section 521.2109 addresses the offense of receiving stolen property in one provision, replacing the general provision in current law, KRS 514.110, as well as another specific section in current law, KRS 514.150 (possession of stolen mail matter).

Section 521.2109(1) is identical to current KRS 514.110(1), except that the culpability requirement for the offense is recklessness. The current provision, 514.110(1), requires that a person receive property “knowing that it has been stolen, or having reason to believe that it has been stolen.” This requirement is lower than recklessness; the provision effectively imposes a negligence standard. The proposed provision thus reflects an increase in the culpability requirement, which is one reason the permissive inference in Section 521.2109(2)(a) has been added. That inference replaces the presumption in current KRS 514.110(2) but is otherwise comparable, given the change in culpability. 521.2109(2)(b)’s permissive inference is comparable to the presumption in current KRS 514.120(2). See proposed Section 500.106(4) and corresponding commentary

for a discussion of permissive inferences.

Section 2109 covers the conduct prohibited by current KRS 434.580 and 434.690.

Section 521.2110: Grading of Theft

Corresponding Current Provision(s): 514.030(2); 514.040(8); 514.050(2);
514.060(4); 514.065(4); 514.070(4);
514.080(3); 514.090(3); 514.110(3);
514.120(4); 514.140(2); 514.150(2);
514.160(2); 514.170(3)

Comment:

Generally. Section 521.2110 provides a uniform set of offense grades for all forms of theft defined in Chapter 521.

Relation to current Kentucky law. Section 521.2110 provides a single grading scheme for all forms of theft. Current law uses specific penalties for numerous theft offenses. Section 521.2110 eliminates these specific penalties, as there is no obvious reason for distinguishing these specific forms of theft from other thefts for grading purposes.

Section 521.2110's general method of grading thefts according to the value of property involved is similar to current law, except that Section 521.2110 adds additional "layers" to the grading hierarchy, introducing new grading distinctions at the \$1,000,000, \$10,000, and \$1,000 levels and a more limited distinction for certain thefts involving less than \$50. The current scheme alters the grade at only one "cut-off" value level: \$300. Accordingly, any theft of more than \$300 is typically a Class D felony under current law, whereas theft of more than \$10,000 or \$1,000,000 would be treated as a Class C or Class B felony, respectively, under the proposed Code.

Section 521.2110(2)(b) grades theft of a firearm as a Class C felony. Section 521.2110(2)(c) grades theft as a Class C felony "in the case of theft by receiving stolen property, if the receiver is in the business of buying or selling stolen property." In either case, a theft could be punished at a higher level if it also satisfied the requirements of that level, so that a dealer in stolen property worth more than \$1,000,000 would be liable for a Class B felony.

Section 521.2110(7) sets the amount involved in a theft in terms of the "fair market value" of the property or services acquired. By contrast, current law uses the term "value" for property or services. Section 521.2110(7) further clarifies current law by establishing that amounts involved in multiple thefts, whether committed against one or multiple persons, "pursuant to one scheme or course of conduct" may be aggravated to determine the grade of the offense.

Section 521.2110 generally does not consider whether a theft was "from the person" in assigning a grade. To the extent theft from the person involves an independent harm related to the potential for injury or fright, that harm is addressed by the distinct offense of robbery defined in proposed Section 515.1501.

Section 521.2110 does not contain a grading provision for repeat offenders as appears in current KRS 514.030(2)(a), 514.065(4), and 514.110(3)(b). Proposed Section 509.905 includes a general provision governing aggravation of offense grade for repeat offenders.

Section 521.2110 also does not include specialized penalty provisions such as KRS 514.030(2)(b) and 514.110, when the property is anhydrous ammonia. No justification exists for specifying this type of property but omitting other types of property. Higher grading provisions are provided in Section 521.2110 whereby higher quantities of property will meet higher values.

Section 521.2111: Claim of Right

Corresponding Current Provision(s): 514.020(1)(b)-(c)

Comment:

Generally. This provision clarifies the state of mind that makes an act of theft suitable for criminal sanction. A person acting under an honest claim of right to property may in one sense have the “intention” to deprive another person of the property, in that, believing himself the rightful owner, he wants to exert control over the property. He does not, however, have the unlawful intent — the intent to take away property known to be another person’s — that makes liability for theft appropriate.

Relation to current Kentucky law. Section 521.2111 is almost identical to KRS 514.020(1)(b)-(c). KRS 514.020(1)(a) is omitted from the proposed Code. It provided a defense³² for theft if the person was unaware that the property or service was that of another. This provision is unnecessary, because it would conflict with every theft offense that already has a culpability requirement as to the property or services stolen belonging to “another.”

Section 521.2112: Unauthorized Use of Automobiles and Other Vehicles

Corresponding Current Provision(s): 514.100

Comment:

Generally. This provision defines as a criminal offense the use or retention of a vehicle without consent. Section 521.2112 covers cases where the offender lacks the intent to permanently deprive the owner of the vehicle and therefore has not committed theft.

Relation to current Kentucky law. Section 521.2112(1) is similar to current KRS 514.100(1) and covers “joyriding” cases.

³² See *Smith v. Com.*, 587 S.W.2d 266 (Ky.Ct.App. 1979) (claim of right is not an element of theft). To invoke a claim of right, a defendant must admit the act charged and seek to justify its commission. *Howard v. Com.*, 608 S.W.2d 62 (Ky.Ct.App. 1980).

Section 521.2112(3) has no corresponding provision in current KRS Chapter 514. The defense excludes from liability cases where the defendant had a reasonable belief that the owner would have consented to his use of the vehicle. (The defendant would be required to advance some evidence supporting this belief before the Commonwealth would be required to disprove it. See proposed Section 500.107(3)(b).) For example, a person who borrowed a relative's car for an afternoon, where the relative had freely allowed the defendant's similar use in the past, would not merit criminal liability. For the defense to apply, however, the jury would have to find not only that the defendant held the belief, but that the belief was objectively reasonable under the circumstances.

The penalty for violation of Section 521.2112(1) is separate from the theft offenses. It grades each form of unauthorized use as a Class A misdemeanor. Under current law, the "joyriding" offense is a Class A misdemeanor unless the person has a prior conviction for the offense, in which case it is a Class D felony. See proposed Section 509.905 (providing enhancement for repeat offender).

Section 521.2113: Definitions

Corresponding Current Provision(s): 514.010; 514.020(2)

Comment:

Generally. This provision collects defined terms used in Chapter 521 and provides cross-references to the provisions in which they are defined.

Relation to current Kentucky law. For a discussion of the relationship between Chapter 521's defined terms and current law, refer to the commentary for the provision in which the term is initially defined.

CHAPTER 522. PROPERTY DAMAGE AND DESTRUCTION PROVISIONS

Section 522.2201. Arson in the First Degree

Corresponding Current Provision(s): 513.020

Comment:

Generally. This provision defines the offense of arson in the first degree, a crime that combines the harms of the two separate offenses of property damage and endangerment.

Relation to current Kentucky law. Section 522.2201 is comparable to current KRS 513.020, also known as arson in the first degree. Section 522.2201(1) differs from KRS 513.020(1) only by requiring that the defendant is reckless about either of the conditions in (1)(a) or (1)(b).

Section 522.2201(1)(a) differs from current KRS 513.020(1)(a) by defining arson to require recklessness as to causing serious physical injury, rather than providing arson liability when the defendant “has reason to believe the building may be inhabited or occupied.” In many cases, the defendant will have the requisite recklessness as to injury where the building is likely to be occupied. Defining the offense this way, however, ensures a focus on its fundamental concern: the defendant’s creating a risk of serious injury. Where recklessness as to inhabitation or occupation, but not injury, can be shown, the defendant will remain liable for arson in the second degree under proposed Section 522.2202.

Section 522.2201(1)(b) is almost identical to current KRS 513.020(1)(b).

Section 522.2201 does not cover arson to property other than buildings. Such arson typically does not involve the key element that motivates the creation of a distinct arson offense: placing human life in jeopardy. For this reason, Section 2201(2)’s definition of “building” does not include vehicles (other than trailers or trains), as burning vehicles does not necessarily create the same inherent risk to human safety. The current, more expansive definition applies in situations involving no serious threat to safety — or at least, no threat to safety more serious than that posed by other instances of recklessly starting a fire. See, e.g., *Com. v. Plowman*, 86 S.W.3d 47 (Ky. 2002) (holding that KRS 513.010’s definition of “building” includes bulldozers). Such conduct may, however, be punishable as criminal damage (under proposed Section 522.2206) or, where appropriate, endangerment (under proposed Section 522.2203), or both.

As with current law, there are no defenses to arson in the first degree. Section 522.2201(2), like current KRS 513.020(2), categorizes arson in the first degree as a Class A felony.

Section 522.2202. Arson in the Second Degree

Corresponding Current Provision(s): 513.030

Comment:

Generally. Section 522.2202 is similar to current KRS 513.030. Sections 522.2202(1)(a)-(b) are comparable to current KRS 513.030(1)(a)-(b), which also covers the current offense in KRS 513.060 (burning personal property to defraud insurer). Section 522.2202(1)(c) retains the offense covering cases where the defendant is reckless as to the building being inhabited or occupied. See commentary for proposed Section 522.2201.

KRS 522.2202(2) provides a defense to second-degree arson that differs from current KRS 513.030(2) in that the proposed defense is narrower than the current defense, deleting the application of the defense to cases where the defendant is the only person with a possessory or proprietary interest to the offense. The reference in the current version of the defense to the others' consent to the burning or explosion is addressed in Section 522.2207. See also Section 502.251.

As under current KRS 513.030, arson in the second degree is a Class B felony.

Section 522.2203. Endangering by Fire or Explosion

Corresponding Current Provision(s): 513.040; 512.070

Comment:

Generally. This offense more generally covers conduct that, like arson, creates a substantial risk of harm to persons or property and is therefore socially undesirable and morally blameworthy. Unlike arson, this offense does not require that damage to another's property result from an offender's dangerous activity. The offense also has a lower culpability requirement than arson — recklessness, rather than intent.

Relation to current Kentucky law. Section 522.2203 differs substantially from current KRS 513.040, arson in the third degree. It specifically punishes reckless endangerment through the use of fire or explosives, rather than general reckless conduct. KRS 513.040 requires that property damage result from the dangerous activity, while Section 522.2203 focuses instead on the risk of danger, which does not require resulting harm to be undesirable and blameworthy. Unlike KRS 513.040, Section 522.2203 addresses conduct that generates a specific set of more serious threats — to personal safety or to buildings — that jeopardize more than mere monetary value and therefore merit separate and additional punishment. If, on the other hand, the sole harm threatened or caused by a person's conduct is property damage, that conduct would fall under the general property damage provision. See proposed Section 522.2206 and commentary.

Section 522.2203 grades the offense as a Class C felony, or a Class B felony if the offender “creates a risk of another person’s death under circumstances manifesting an extreme indifference to the value of human life.” (Current KRS 513.040 punishes the defendant’s conduct as a Class D felony.) The proposed liability places emphasis on the independent harm caused by placing people or property in serious jeopardy. For example, a person who sets a fire that threatens to burn down a neighbor’s occupied home, but that is put out by firefighters before doing so, should not receive only trifling liability (or be completely exonerated) based on the fortuity that no actual harm resulted.

Section 522.2203 also covers most offenses currently defined as “criminal littering” in KRS 512.070(1)(a), (c)-(d). Despite their name, those offenses go beyond mere littering.

Section 522.2204. Failure to Control or Report a Dangerous Fire

Corresponding Current Provision(s): None

Comment:

Generally. This provision imposes a duty on certain persons to report or control a fire for which they bear legal responsibility. In general, imposition of criminal liability for failure to act should be carefully limited. This provision creates omission liability, but the duty to act applies only in especially grave circumstances, and only to persons responsible for dealing with those circumstances: those who have a preexisting legal duty to do so (such as construction site managers), or those who are responsible for the existence of the dangerous situation. The duty is further limited in that it only requires one of two affirmative actions: giving a prompt alarm, or, if it can be done without substantial risk to oneself, taking reasonable measures to put out the fire.

Section 522.2204(2) punishes the omission as a Class A misdemeanor.

A number of state codes, and the Model Penal Code, include a similar provision.

Relation to current Kentucky law. This section has no corresponding provision in the current Penal Code.

Section 522.2205. Causing or Risking Catastrophe

Corresponding Current Provision(s): 438.240, 508.060-.070; 527.200-.210

Comment:

Generally. This provision imposes serious criminal liability for persons who cause or risk severe harm to numerous individuals, numerous buildings, or a vital public facility.

Relation to current Kentucky law. Section 522.2205 is far broader than current KRS 508.060, wanton endangerment. Most of the defined offenses have no corresponding offenses in current law. It expands liability to include recklessly causing a catastrophe, creating a risk of catastrophe, threatening to cause a catastrophe, or failure on the part of certain persons (specifically, those who, as in proposed Section 522.2204, are bound by a legal duty) to prevent a catastrophe. Recently enacted offenses in KRS 527.200-.210 for the use of a weapon of mass destruction are similar in focus to Section 522.2205's concern with causing or risking catastrophic events.

Section 522.2205(1)(a) defines the offense of causing a catastrophe. The proposed provision covers numerous means of causing a catastrophe. Under Section 522.2205(1)(b), the grade of the offense depends on the level of the defendant's culpable mental state. Section 522.2205(1)(b) includes a Class B felony penalty for cases where the offense is committed recklessly, rather than knowingly (which is Class A felony). Like proposed Section 522.2203, this formulation prohibits an aggravated form of reckless conduct, which under current law is only punished as a Class D misdemeanor. (See proposed Section 522.2203 and commentary.)

Section 522.2205(2) defines a Class D felony for persons who recklessly create a risk of catastrophe. This section punishes the risk of endangerment to buildings and vital public facilities as well as people.

Section 522.2205(3) imposes a duty on certain persons to take reasonable measures to prevent or mitigate a catastrophe. As in proposed Section 522.2204, this provision creates omission liability, but the duty to act applies only in especially grave circumstances, and only to persons responsible for dealing with those circumstances: those who have a preexisting legal duty to do so, or those who are responsible for the existence of the dangerous situation. (See proposed Section 522.2204 and commentary.) Section 522.2205(3)(b) grades this offense as a Class A misdemeanor.

Section 522.2205(4)(a) defines the term "catastrophe." Section 522.2205(4)(b) defines the term "vital public facility."

Section 2205 covers the conduct described in KRS 438.240.

Section 522.2206. Criminal Damage

Corresponding Current Provision(s): 149.380, 253.990, 433.750, 433.770,
433.873, 433.875, 437.420(2)-(3),
438.060, 512.020-.080

Comment:

Generally. This provision defines, and sets out the offense grades for, the offense of criminal property damage.

Relation to current Kentucky law. Current KRS Chapter 512 contains various provisions that define different types of property damage; each provision has its own grading section. These specific offenses cover such things as damage to criminal mischief (512.020-.040); use and possession of noxious substances (512.050-.060); littering (512.070); and unlawfully posting advertisements (512.080). To the extent the offense grades for these various provisions are the same, they are superfluous; to the extent they differ, they are inconsistent. Therefore, the proposed Code employs one general criminal damage offense.

Section 522.2206 defines the prohibited conduct more generally than the offenses in current KRS Chapter 512. Section 522.2206(1)(a) generally prohibits property damage; it substitutes “property of another” for the current reference to property in KRS 512.020, although current law assumes that the property damaged belongs to another person. If “property of another” is used, there is no need for the language in current KRS 512.020-.040 regarding the defendant “having no right to do so or any reasonable ground to believe that he has such right” to destroy property. Section 522.2206 also covers the current offenses in KRS 512.050-.060 — if a noxious substance damages property, it is an offense under Section 522.2206. For the traditional type of littering, as well as for unlawfully posting advertisements in KRS 512.080, any damage caused by the littering or posting would be covered by Section 522.2206.

Section 522.2206(1)(b) allows for negligence liability where the offender uses fire, explosive, or other dangerous means. In cases involving such inherently dangerous activities, negligent behavior will nearly always be objectively reckless. Reducing the culpability requirement to negligence, however, ensures that a defendant cannot avoid liability merely by saying that he was not consciously aware of the dangerousness of his activity. Such ignorance should not entirely exonerate a person who engages in conduct that is objectively dangerous.

Section 522.2206(1)(c) prohibits tampering with another’s property and thereby creating a risk of physical injury or property damage. This section covers cases where the offender has not directly destroyed or even “damaged” property, but has tampered with or altered the property, thereby creating a risk of harm. An offender who tampers with property is punished based on the amount of damage or loss he causes or, where the risk does not lead to actual damage or loss, would be subject to Class B misdemeanor liability. See *infra* commentary for proposed Section 522.2206(2).

Section 522.2206(1)(d) prohibits indirectly causing property damage by means of a deception or threat. This section covers cases where the offender causes a loss, but has not personally damaged (or stolen) the property. For example, a person who falsely tells another that his winning lottery ticket has no value, leading the owner to tear up the ticket, has caused a loss and merits criminal liability just as if he had torn or stolen the ticket himself.

Section 522.2206(2) grades the offense according to the value of the property loss. The proposed formulation is similar to current law for degrees of criminal mischief, except that the proposed section raises the penalties and values for grading, and also alters the penalty according to the offender’s culpability level with respect to the damage that results from his conduct. The grading is almost identical to that for theft under proposed Section 521.2110.

Section 522.2206(2)(b)(iii) imposes Class C felony liability where the offender causes serious damage to a propelled vehicle or firearm.

Section 522.2206(2)(f) provides a “residual” grade of Class B misdemeanor for offenses not otherwise covered in Section 522.2206(2). This would include cases where the offender knowingly or recklessly causes less than \$50 in damage; negligently causes damage to property (regardless of the extent of the loss); or tampers with property, thereby placing persons or property in danger, but causes no actual loss or damage.

Section 522.2206(2)(g) reduces the penalty one grade at each value level for damage that is caused recklessly.

Section 2206 covers the conduct defined in current KRS 149.380 (“Setting fire on land owned by another”), KRS 253.990 (altering or defacing marks or brands on another person’s cattle); KRS 433.750 (“Injuring public property or right of way”), KRS 433.770 (“Willfully removing or damaging boundary marker”), KRS 433.873 (“Wrongful disturbance or damage to cave surfaces or material found therein”), KRS 433.875 (“Unlawful dumping, disposal or burning within cave”), KRS 437.420 (animal offenses), and KRS 438.060 (contaminating a watercourse).

Section 522.2207. Consent Defense

Corresponding Current Provision(s): None

Comment:

Generally. This provision makes clear that a person will not be criminally liable for conduct that damages another’s property where the owner has consented to that conduct.

Relation to current Kentucky law. There is no corresponding provision in current law. Classification of consent as a defense, rather than defining the absence of consent as an offense element, has no impact on the ultimate burden of persuasion for the issue; the Commonwealth would still have to prove the absence of consent beyond a reasonable doubt. See proposed Section 502.251 and corresponding commentary. The only significance of this approach is that the defendant would have the burden of production, i.e., would be required to raise the issue at trial, even though the Commonwealth would then be required to (dis)prove it. See proposed Section 502.251 and corresponding commentary. It seems reasonable to infer the absence of consent where one person damages another’s property, and to require the defendant to suggest that consent existed. Information about consent, where it exists, will always be in the defendant’s possession, and the defendant will know to raise the issue.

Section 522.2208. Definitions

Corresponding Current Provision(s): 513.010; 512.010

Comment:

Generally. This provision collects defined terms used in Chapter 522 and provides cross-references to the provisions in which they are defined.

Relation to current Kentucky law. For a discussion of the relationship between Chapter 522’s defined terms and current law, refer to the commentary for the provision in which the term is initially defined.

CHAPTER 523. BURGLARY AND OTHER CRIMINAL INTRUSION PROVISIONS

Section 523.2301. Burglary

Corresponding Current Provision(s): 511.020-.050; 511.090, 437.420(4)

Comment:

Generally. This provision defines and grades the offense of burglary, which punishes trespasses where the trespasser has an additional criminal intent. The distinct offense of burglary recognizes the independent harm caused by the fear and intrusion created by an intruder who invades another's property to commit an offense.

Relation to current Kentucky law. Section 523.2301(1) consolidates the prohibitions of current KRS 511.020-.040. KRS 511.020's principal purpose is to aggravate the grade of burglaries when the person is armed³³ or threatens or causes physical injury. Section 523.2301 accomplishes the same purpose by aggravating the grade for such burglaries in Section 523.2301(2)(a).³⁴

Section 523.2301(1) continues current law by requiring that the person intend to commit an offense, following the understanding that the intended offense is not of central importance to the distinct offense of burglary. The provocation of fear and the invasion of one's sense of security that the offense is meant to punish exist irrespective of the offense the burglar intends to commit. For similar reasons, Section 523.2301(1) requires that one must "surreptitiously" remain on another's property to be liable for burglary. Without the specific harms that clandestine intrusion creates, the person is guilty only of trespass and attempt to commit the other intended crime (and can be charged with both of those offenses). To the extent cases like *Bowling v. Com.*, 942 S.W.2d 293 (Ky. 1997), suggest that any entry or remaining with intent to commit a crime is automatically "without authority," the proposed Code would not track the current view. That view effectively turns any would-be shoplifter into a burglar and undercuts the expression of greater seriousness that the burglary offense is meant to contain. Where a person remains in a building, but does so openly, the specific harm of the burglary offense — the fear and danger created by an unknown and unwanted intruder — is not present.

³³ See *Baker v. Com.*, 860 S.W.2d 760 (Ky. 1993) (defendant need not be armed at every moment during flight from dwelling); *Jackson v. Com.*, 670 S.W.2d 828 (Ky. 1984) (defendant who enters unarmed and steals a gun becomes "armed with a weapon").

³⁴ The term "armed" under Section 523.2301(2)(a)(i) is not meant to include every situation where a person has a weapon in his possession. For example, a person whose gun is fake, or inoperable, or left in his glove compartment while he invades the home, is not "armed." The offender must be "armed" with a genuine, operable weapon under circumstances that suggest its possible use.

Section 523.2301(1) prohibits entering³⁵ or remaining in a “building,”³⁶ rather than using KRS 511.010(1)’s list of “a structure, vehicle, watercraft, or aircraft.” The independent harms of intrusion and provocation of fear are less likely to exist when the property is a vehicle rather than a building. In most cases, a vehicle is not a “dwelling.”

Section 523.2301(1) requires a culpability level of knowledge with respect to each offense element other than the intention to commit an offense. Current KRS 511.020-.040 also specify “knowingly.”

Section 523.2301(1) imposes liability only if one enters or surreptitiously remains, knowing he has no authority,³⁷ “at a time when the premises are not open to the public.” This concept under current law is located in general provision KRS 511.090, but it is preferable to place the concept in the definition of the offense itself. Similarly, the same current section contains a provision defining what it means to enter or surreptitiously remain. Again, the proposed section simply locates the concept in the definition of the offense. The current reference to a person remaining “unlawfully” is omitted to avoid the necessity of the Commonwealth having to prove that the defendant was aware that he was not licensed to enter the place.

Section 2301 covers the conduct addressed by current KRS 437.420, relating to burglary of an animal facility.

Section 523.2301(2) grades burglary in the same manner as current law. As mentioned, first-degree burglary with its aggravators is a Class B felony. Like the robbery offense in Section 1501, and in keeping with the modification to the definition of “deadly weapon” in that provision, the burglary aggravation for being armed with a deadly weapon does not include cases where the offender is carrying “an ordinary hunting knife that [he] regularly carries.” See proposed Section 515.1501 and corresponding commentary. Second-degree burglary must be committed in a dwelling and is a Class C felony. Any other burglary, much like the current third-degree offense, is a Class D felony.

Possession of burglar’s tools (KRS 511.050) is treated under the proposed law as a possessory offense for instruments of crime. See proposed Section 501.204.

³⁵ Entry by any part of a defendant’s person or by an instrument suffices for an entry. See *Stamps v. Com.*, 602 S.W.2d 172 (Ky. 1980) (defendant broke through rear wall of store into air pockets of concrete blocks; sufficient for entry).

³⁶ See *Funk v. Com.*, 842 S.W.2d 476 (Ky. 1992) (first-degree burglary applies to every structure meeting the definition of a building, regardless of whether it is inhabited or inhabitable).

³⁷ See *Bowling v. Com.*, 942 S.W.2d 293 (Ky. 1997) (license expires when defendant’s conduct is inconsistent with purpose of business, such as committing criminal acts).

Section 523.2302. Criminal Trespass**Corresponding Current Provision(s):** 511.060-.080**Comment:**

Generally. This provision defines, grades, and provides special defenses to the offense of criminal trespass, which prohibits a person's unlawful presence on another's property. Section 523.2302(2) provides offense grades, and Section 523.2302(3) defines two defenses.

Relation to current Kentucky law. Section 523.2302(1) merges the prohibitions of three current trespass offenses into a single offense definition by prohibiting entering or remaining in any "place" generally, whereas each of the current provisions prohibits entering or remaining in a particular kind of place (first-degree: dwelling; second-degree: building or premises where notice is given; third-degree: premises). Section 523.2302's general language covers the types of property protected by current law and eliminates any need for additional specialized trespass offenses.

Section 523.2302(1) requires that one enter or remain "in a place where he knows he has no license or authority to be." Current KRS 511.070(1) defines the offense as entering or remaining after receiving notice by fencing or other enclosure that such presence is forbidden. Current KRS 511.060(1) and 511.080(1) define trespass without regard to notice. Instead, what is important to those two offenses is that a person has entered or remained unlawfully in a dwelling or on premises (which is currently defined to include a building). The notice aspect in current law does not seem as important to culpability as the fact that a building or place is marked as an enclosure, because the "notice" does not address the harm to persons or property. Section 523.2302(1) requires recklessness with respect to entering or remaining in a place. Current law requires knowledge of entering or remaining unlawfully. Section 523.2302 imposes recklessness under the view that one who knows he lacks license or authority to be on certain property should bear the burden of avoiding an unlawful presence on that property, and should be liable if (as recklessness requires) he is consciously aware of a risk that he is on that property.

Section 523.2302(2) defines two defenses to criminal trespass, neither of which exists in current law. Section 523.2302(2)(a) does not provide an absolute defense where one enters or remains while "the premises were at the time of entry open to the public." Instead, it notes that one may not enjoy license if he fails to comply with "lawful conditions imposed on access to or remaining in the premises." The use of the modifier "lawful" ensures that one may not be convicted of trespass on the basis of an unlawfully discriminatory exclusion.

Section 523.2302(2)(b) provides a defense for those who enter or remain in a place under a reasonable belief that another "would have licensed" them to do so. Such persons may know their presence is formally unauthorized, but if they believe it would be condoned and the circumstances indicate that such a belief is objectively reasonable, they lack the blameworthiness of those who are fully aware that their presence is prohibited.

Section 523.2302(3)(a) grades criminal trespass of a dwelling or highly secured premises as a Class E felony, in recognition of the special privacy and security interests at stake for such property. Current KRS 511.060 grades residential trespass as a Class A misdemeanor and does not aggravate for highly secured premises.

Section 523.2302(3)(b) grades criminal trespass as a Class A misdemeanor when it occurs in buildings, structures, and places where the owner has shown a clear intent to bar entry. This reflects the understanding that such violations involve lower levels of intrusiveness than those covered by (3)(a), but greater levels of intrusiveness than ordinary trespass, which Section 523.2302(3)(c) grades as a Class C misdemeanor.

Section 523.2302(4) defines the terms “highly secured premises” and “storage structure,” which are used to differentiate degrees of the trespass offense.

Section 523.2303. Definitions

Corresponding Current Provision(s): 511.010

Comment:

Generally. This provision collects defined terms used in Chapter 523 and provides cross-references to the provisions in which they are defined.

Relation to current Kentucky law. For a discussion of the relationship between Chapter 523’s defined terms and current law, refer to the commentary for the provision in which the term is initially defined.

CHAPTER 524. INVASION OF PRIVACY PROVISIONS

Section 524.2401. Unlawful Eavesdropping or Surveillance

Corresponding Current Provision(s): 526.020

Comment:

Generally. This provision defines the offense of unlawful eavesdropping or surveillance, prohibiting improper intrusions made for the purpose of hearing or seeing things within private places. Section 524.2401 covers improper intrusions into private physical *spaces* rather than improper interceptions of private *communications*.

Relation to current Kentucky law. Section 524.2401(1)(a), prohibiting trespassing “with intention to subject anyone in a private place to eavesdropping or other surveillance,” has no directly corresponding provision in current KRS Chapter 526. Section 524.2401(1)(a) covers the common “peeping Tom” case, which often involves visual surveillance performed without a device.

The definition of “eavesdrop” in current KRS 526.010 is not carried forward in Chapter 524 offenses, but instead the language connoting eavesdropping is inserted into the various offenses themselves.

Section 524.2401(1)(b) prohibits installing or using a device in a private place for hearing or seeing occurrences therein, and essentially combines trespass and eavesdropping concerns. This provision broadens current law, which is restricted to oral communications, not images. Section 524.2401(1)(c) prohibits installing or using a device *outside* a private place to hear sounds that ordinarily cannot be heard or understood.

With respect to audio surveillance, Sections 2401(1)(b) and (1)(c) are similar to current KRS 526.020, but address intrusions into private places rather than interceptions of communications, and hence also “sounds” rather than “communications” or conversations. Sections 524.2401(1)(b) and (1)(c) apply to any person’s use or installation of a device to hear what is occurring in a “private place.”

This offense does not carry forward the language in current KRS 526.020 that the offense may be committed “whether or not [the person] is present at the time.” It is unnecessary and confusing for the definition of the offense to state that the person need not be present, and that rule remains in place under the proposed Code despite the absence of that specific language.

Section 524.2401(2) defines the term “private place,” which is not used in KRS Chapter 526.

Section 524.2401(3) grades the offense as a Class E felony, the same grade as is imposed for first-degree trespass under proposed Section 2302(3)(a). That offense involves trespass within a dwelling, whereas the “peeping Tom” situation this offense covers will usually involve surveillance of the building from outside, which presents a less immediate threat of placing a resident in fear or danger. Where both offenses occur, multiple liability for both the trespass and the surveillance may be appropriate. See proposed Sections 502.254 and 509.906.

The current offense for installing eavesdropping devices in KRS 526.030 is adequately covered by the law of criminal attempts. See Proposed Section 508.801 and the corresponding commentary.

The current offense for possession of eavesdropping device in KRS 526.040 is adequately covered by the law of possessing instruments of crime. See Proposed Section 508.808 and the corresponding commentary.

Section 524.2402. Unlawfully Acquiring Information

Corresponding Current Provision(s): 434.855, 526.050

Comment:

Generally. This provision defines and grades as a Class B misdemeanor the offense of tampering with private communications, and complements proposed Section 524.2401’s offense for unlawfully eavesdropping. The offense prohibits opening or reading private communications, and obtaining communications common carrier information.

Relation to current Kentucky law. Section 524.2402 is similar to current KRS 526.050 for knowingly tampering with private communications, as well as its exception, but grades the offense as a Class B rather than a Class A misdemeanor. The current law’s reference to a person opening or reading a sealed letter or obtaining communications common carrier information “unlawfully” is omitted to avoid the necessity of the Commonwealth having to prove that the defendant was aware that he was not authorized to tamper with such communications.

The conduct prohibited by current KRS 434.855(1)(b) is included in proposed Section 524.2402(1)(a). The receipt of proceeds prohibited by current KRS 434.855(1)(a) is covered by the accomplice liability provisions in proposed Section 503.301.

Section 524.2403. Unlawfully Divulging Information

Corresponding Current Provision(s): 6.734, 434.840, 526.060

Comment:

Generally. This provision defines, and grades as a Class A misdemeanor, the offense of interception of unlawfully divulging illegally obtained information.

Relation to current Kentucky law. Section 524.2404 is almost identical to current KRS 526.060. The conduct prohibited by current KRS 6.734 is included in this proposed section.

Section 524.2404. Exceptions to Chapter 524 Offenses

Corresponding Current Provision(s): 526.070

Comment:

Generally. This provision lists exceptions to criminal liability for Chapter 524 offenses.

Relation to current Kentucky law. Section 524.2405 is quite similar to current KRS 526.070. Section 524.2405(1) duplicates the exception in current KRS 526.070(1). Section 524.2405(2) is very similar to current KRS 526.070(2), but deletes the provision about conduct the communications common carriers must avoid. Such rules are more properly included in administrative regulations rather than as part of a penal code.

Section 524.2405. Definitions

Corresponding Current Provision(s):

Comment:

Generally. This provision collects defined terms used in Chapter 524 and provides cross-references to the provisions in which they are defined.

Relation to current Kentucky law. For a discussion of the relationship between Chapter 524's defined terms and current law, refer to the commentary for the provision in which the term is initially defined.

CHAPTER 531. FORGERY AND FRAUDULENT PRACTICES

General Comment Regarding Chapter 531:

Several of Chapter 531's offenses criminalize deceptive conduct that is usually undertaken as part of an effort to wrongfully obtain property or services — that is, to steal. There is therefore a close relationship between Chapter 531 and Chapter 521. In many, perhaps most, cases, a single act or course of conduct will satisfy the requirements of both a fraud offense (or attempt) and a theft offense (or attempt). In such situations, the propriety of multiple convictions would be governed by the rules set forth in proposed Section 502.254, and their consequences in terms of overall liability would be governed by proposed Section 509.906.

Section 531.3101: Forgery and Counterfeiting

Corresponding Current Provision(s): 116.047, 434.095, 434.155, 434.225(6), 434.442, 434.630-.640, 516.020, 516.030, 516.040, 516.120, 516.130

Comment:

Generally. This provision creates an offense for forgery and counterfeiting. It deals with conduct not already included within the harms addressed by offenses such as theft by deception, e.g., the method of the taking. Forgery and counterfeiting cause harm beyond what is caused by theft, as the relevant conduct also destabilizes documents of value. For that reason, the grading of forgery offenses is set; rather than being a function of the amount taken, as in theft by deception, forgery grading focuses on the disruption caused by the misrepresentation.

Relation to current Kentucky law. Section 531.3101 is similar to the three degrees of forgery found in current KRS 516.020-.040. Section 531.3101(1)(a) makes clear that one way in which the offense is committed occurs when the person alters the writing of another without the latter's permission. If another has consented to the alteration, the person is acting with authority from the other, but a general grant of authority does not assure that there is consent to alter a particular writing. See proposed Section 502.251 (providing general rules regarding consent).

The other way in which the offense is committed occurs when the person affects a writing so that it purports to be something it is not. Proposed Section 531.3101(1)(b)(i)-(iii) identify the effects of the person's misrepresentation in language analogous to current KRS 516.020(1), 516.030(1) and 516.040(1). The proposed section is expanded to include both forgery and counterfeiting, such as the current offenses of using slugs in KRS 516.120 and 516.130. More broadly than the use of slugs, proposed Section 531.3101(1)(b)(iii) deals with both coin and paper, as well as any other situation in which the person is misrepresenting something to be something that it is not.

The definition of a “written instrument” in current KRS 516.010(1) is built into the offense itself in Section 531.3101(2) as a “writing.” The proposed definition is explicitly broader than the current definition, in order to include any method for recording any “symbols of value, right, privilege or identification.”

The grading of the offense depends on the nature of the writing, i.e., whether it is or purports to be of a particular character. If the writing is of one of the types enumerated in proposed Section 531.3101(3)(a), the offense is a Class C felony. It is a Class D felony if the writing is one of the types enumerated in 531.3101(3)(b). Otherwise, the offense is a Class A misdemeanor. Because Section 3101(3)(a) applies only to writings that purport to be “paper money,” cases involving manipulation of coins or slugs would not fall into the Class C felony category. Counterfeiting coins would now fall within the residual grading provision, Section 3101(3)(c), and be a Class A misdemeanor, which falls in between 516.120’s Class D felony for “first-degree” slug use and 516.130’s Class B misdemeanor for “second-degree” slug use.

The possessory offenses in current KRS 516.050, 516.060, and 516.070 are inchoate forms of the forgery offenses. Under the proposed attempt provision, liability requires only the person’s intent to complete the conduct that would constitute the offense, rather than the person’s intent as to all circumstances of the forgery offense. See proposed Section 508.801.

Possession of a forgery device under current KRS 516.090 likewise is not carried forward, because it is a possessory offense covered by proposed Sections 501.204 and 508.808.

Section 531.3101 covers the conduct prohibited by current KRS 116.047, 434.095, 434.155, 434.225(6), 434.442, 434.630-.640, and 434.680.

Section 531.3102: Tampering with Writing, Record, or Device

Corresponding Current Provision(s): 342.400(2), 516.040

Comment:

Generally. This provision creates an offense for tampering with writing, record or device, in order to deceive another or conceal wrongdoing.

Relation to current Kentucky law. Section 531.3102 tracks much of current KRS 516.040, which rather than being a forgery offense is in reality more of a tampering offense. The proposed offense is broader than current law, because the latter’s conduct elements include concealment of a writing.

Section 3102(2) grades the offense as a Class D felony if the writing is, or purports to be, a legal document or public record, and as a Class A misdemeanor otherwise. The grading of this proposed offense somewhat differs from 531.3101, because tampering does not have the same destabilizing effects as forgery and counterfeiting.

Section 3102 covers the conduct prohibited by current KRS 342.400(2).

Section 531.3103: Criminal Simulation**Corresponding Current Provision(s):** 516.110**Comment:**

Generally. This provision creates an offense for altering an object with the effect that it appears to have a quality that it does not in fact possess.

Relation to current Kentucky law. Section 531.3103 is substantially similar to current KRS 516.110(1)(a). However, KRS 516.110(1)(b) is not carried forward, because it constitutes a possessory offense which is covered under proposed Sections 501.204 and 508.808.

Section 531.3104: Unauthorized Impersonation**Corresponding Current Provision(s):** 365.015, 365.100, 434.570, 514.160, 514.170**Comment:**

Generally. This provision creates an offense for one person representing himself to be another or have the characteristic of another.

Relation to current Kentucky law. Section 531.3104 is somewhat similar to current KRS 514.160. Section 3104(1)(a) duplicates much of current KRS 514.160. Liability for “depriv[ing] a person of anything of value” in Section 3104(1)(a)(i) carries forward the language in current KRS 514.160(1)(a), (b), and (e). Section 3104(1)(a)(ii) is potentially broader than current law, in that it allows liability for a person impersonating another to harm the latter’s reputation. While current law prohibits hurting another by impersonating the latter and making financial transactions, the proposed language broadens the reckless conduct to include any harm to the other person’s reputation. Section 3104(1)(a)(iii) is potentially broader than current law, prohibiting an impersonation in which the person is reckless about whether the impersonation gives the person any unjustified benefit. This phrasing is broader than, for example, using the impersonation to “avoid detection,” as in current KRS 514.160(1)(d).

Section 3104(1)(b) is somewhat broader than current KRS 514.160(1), addressing impersonation of another person or of a characteristic that the person knows he lacks, with intent to obtain service or property.

Section 3104(1)(c) repeats much of the conduct currently prohibited under the trafficking in stolen identity offense in current KRS 514.170, and adds the requirement that the person has the intent to do any of the reckless acts referred to in Section 3104(1)(a).

Section 3104(2) is substantially similar to the definition of “personal identity” in current KRS 514.170(1). The prima facie provision in current KRS 514.170(2) is not carried forward, as it is irrelevant to the offense.

Section 3104(3) grades trafficking in stolen identities as a Class D felony, and otherwise grades the offense as a Class A misdemeanor. The grading of the proposed offense is similar to current law.

Section 3104 does not include the two sections of the current law which render it inapplicable to the use of the identity of another to obtain privileges such as tobacco and to credit or debit card fraud under KRS 434.550-.730. Therefore, the proposed offense applies to those factual situations. (The current statute also includes procedural provisions about venue and forfeiture.)

Section 3104 covers the conduct prohibited by current KRS 365.015 and 434.570. The conduct prohibited by current KRS 365.100 would constitute an attempt to commit the offense defined by this proposed section.

Section 531.3105: Deceptive Practices

Corresponding Current Provision(s): 217.175, 365.020-.050, 434.600, 517.010(1), (5); 517.020

Comment:

Generally. This provision creates an offense for deceptive practices.

Relation to current Kentucky law. Section 531.3105 is similar to current KRS 517.020. In many cases, the relevant conduct will also amount to theft by deception, or its attempt, under proposed Section 521.2103. See also proposed Section 502.254 and 509.906 (providing rules for imposition of liability for multiple offenses).

Definitions in current KRS 517.010(1) and (5) for “adulterated” and “misabeled” are incorporated verbatim into the offense in proposed Section 531.3105(2).

Section 3105 covers the conduct prohibited by current KRS 217.175, 365.020-.050, 434.600, and 434.610.

Section 531.3106: False or Bait Advertising

Corresponding Current Provision(s): 517.030, 517.040

Comment:

Generally. This provision creates an offense for misleading statements in advertising.

Relation to current Kentucky law. Section 531.3106 is substantially similar to current KRS 517.030 and 517.040. Section 531.3106(1)(a) defines the conduct for the current offense of false advertising, while Section 531.3106(1)(b) is the same as the current offense of bait advertising.

Section 531.3107: Falsifying Business Records**Corresponding Current Provision(s):** 342.265(2), 517.010(2)-(3), 517.050**Comment:**

Generally. This provision creates an offense for creating or maintaining sham business records.

Relation to current Kentucky law. Section 531.3107 is substantially similar to current KRS 517.050. In some cases, the conduct constituting the offense may also amount to an offense under proposed Section 531.3103 or the offense of theft by deception, or its attempt, under Section 521.2103. See also proposed Section 502.254 and 509.906 (providing rules for imposition of liability for multiple offenses).

The definitions in current KRS 517.010(2) and (3) are incorporated verbatim into the offense in proposed Section 531.3107(2).

The conduct prohibited by current KRS 342.265 is included in this proposed section.

Section 531.3108: Defrauding Secured Creditors**Corresponding Current Provision(s):** 517.060, 517.070**Comment:**

Generally. This provision creates an offense for defrauding different types of creditors.

Relation to current Kentucky law. Section 531.3108 is substantially similar to current statutory sections on defrauding secured and judgment creditors. The language of the proposed section is phrased primarily in the language of current KRS 517.060 (defrauding secured creditors). The offense is broader than current KRS 517.070, which requires that the defrauded party be a “judgment creditor.” Section 3108(1) requires only that the property be “subject to *a security interest or* payment of a judgment” — it would apply not only before attachment of a judgment, but before the judgment had even been obtained, if the offender intended “to hinder enforcement of [the security] interest.” The proposed language focuses the offense on the offender’s efforts to defraud, rather than imposing an additional requirement that the victim (the creditor) must have obtained a judgment against the offender before it will apply. Like current KRS 517.070, the proposed provision also covers the situation where a judgment debtor alienates unencumbered property (not subject to a security interest) to keep it from being executed on, even if the judgment has not yet attached.

The grading of the proposed offense has been modified to reflect the more sophisticated grading scheme that has been developed for theft offenses. See proposed Section 521.2110 and corresponding commentary. However, unlike a typical theft offense, the grading for Section 3108 imposes a “floor” of Class A misdemeanor liability for any offense. In some situations involving violations of Section 3108, it will be possible, and entirely appropriate, to impose liability *both* for

the Section 3108 offense *and* for theft, in which case the Section 3108 offense would be a Class A misdemeanor, as the punishment for the theft would already reflect the value of the property obtained. There may also be numerous cases, however, where it will be difficult or impossible to impose theft liability because the offender’s mishandling of the property may not demonstrate a conversion of ownership. In other words, the defrauded person may still “own” the property (or at least, the person committing the fraud may not have taken it for himself) even though the offender has misappropriated or misused it in a way that greatly reduces its value or affects the proper owner’s interest in the property. In such cases, the amount of liability for the Section 3108 offense should track the amount of the property involved in the fraud.

Section 531.3109: Fraud in Insolvency

Corresponding Current Provision(s): 517.080

Comment:

Generally. This provision creates an offense for engaging in fraudulent conduct when the person knows that insolvency proceedings have been or are about to be instituted.

Relation to current Kentucky law. Section 531.3109 is almost identical to current KRS 517.080.

As with Section 3108, the grading scheme for Section 3109 has been modified to track more closely the proposed grading scheme for theft. For a discussion of the relation between this offense, its grading, and the proposed theft offenses, see proposed Section 531.3108 and corresponding commentary.

Section 531.3110: Issuing False Financial Statement

Corresponding Current Provision(s): 342.465, 434.310, 434.570 517.090

Comment:

Generally. This provision creates an offense for misrepresentation of his or another’s financial condition in a “writing,” which is defined in proposed Section 531.3101.

Relation to current Kentucky law. Section 531.3110 is almost identical to current KRS 517.090, except that the term “writing” is substituted for “written instrument.” The definition of a “writing” appears in proposed Section 531.3101(2).

Section 3110 covers the conduct prohibited by current KRS 342.465, 434.310, and 434.570.

Section 531.3111: Receiving Deposits in Failing Financial Institution

Corresponding Current Provision(s): 434.320, 434.340, 517.100

Comment:

Generally. This provision creates an offense for anyone in a directorial position of a financial institution permitting the receipt of a deposit when he knows that the institution is insolvent.

Relation to current Kentucky law. Section 531.3111 is almost identical to current KRS 517.100, except that it is broadened by the inclusion of the conduct prohibited by current KRS 434.320.

Section 531.3112: Misapplication of Entrusted Property

Corresponding Current Provision(s): 517.010(4), 517.110

Comment:

Generally. This provision creates an offense for the unauthorized application or disposal of entrusted property.

Relation to current Kentucky law. Section 531.3112 is almost identical to current KRS 517.110. Section 531.3112(2)'s definition of "fiduciary" is similar to that in current KRS 517.010(4).

As with Sections 3108 and 3109, the grading scheme for Section 3112 has been modified to track more closely the proposed grading scheme for theft. For a discussion of the relation between this offense, its grading, and the proposed theft offenses, see proposed Section 531.3108 and corresponding commentary.

Section 531.3113: Operating a Misrepresented Company

Corresponding Current Provision(s): 517.010(6), 517.120

Comment:

Generally. This provision creates an offense for operating a business that falsely represents itself to be a minority or disadvantaged business enterprise.

Relation to current Kentucky law. Section 531.3113 is similar to current KRS 517.120. The term "misrepresented company" is substituted for "sham or front company." The first part of the current definition of "sham or front company" in KRS 517.010(6) is incorporated into the proposed offense definition. However, the listing in the current definition to governmental units from which the misrepresented company derives benefits is deleted in favor of referring to obtaining funds or services "from *any* government entity."

Two of the four conduct elements of the current offense are not carried forward, because they are in the nature of accomplice liability and therefore are already addressed by the proposed section on complicity. See proposed Section 503.301. The other two conduct elements are identical to the current law.

Section 531.3114: Commercial Bribery

Corresponding Current Provision(s): 518.020, 518.030

Comment:

Generally. This provision creates an offense for persons seeking with benefits to influence employees, agents, or fiduciaries, or as the employees, etc., seeking or accepting benefits, contrary to the best interests of the employer, principal, or fiduciary's beneficiary.

Relation to current Kentucky law. Section 531.3114 is similar to current KRS 518.020 and 518.030. Section 3114 combines the current offenses of commercial bribery and receiving a commercial bribe. The penalty for the proposed offense is the same as the current penalties.

As to the distinction between bribery and conspiracy, see commentary to proposed Section 551.5101.

Section 531.3115: Tampering with a Publicly Exhibited Contest

Corresponding Current Provision(s): 518.040, 518.050, 518.060

Comment:

Generally. This provision creates an offense for tampering with a publicly exhibited contest, seeking or accepting a benefit for such tampering, or by knowing participation in such a contest.

Relation to current Kentucky law. Section 531.3115 is similar to the current law on sports bribery, receiving a sports bribe, and rigging a sports contest, except that it applies to more than sports contests, which is the scope of current KRS 518.060. The proposed offense applies to *any* publicly exhibited contest, which would include state fair competitions, beauty pageants, etc.

As with the proposed offense of commercial bribery, proposed Section 531.3115 punishes those who solicit or accept such benefits in return for tampering with a competition. Beyond the scope of commercial bribery, this offense also punishes persons who participate in a rigged contest, knowing that the contest is not being conducted by governing rules or customs. As to the distinction between the substantive offense and a conspiracy to commit the offense, see commentary to proposed Section 551.5101.

Section 531.3116: Ticket Scalping**Corresponding Current Provision(s):** 518.010(2)-(3), 518.070**Comment:**

Generally. This provision creates an offense for selling tickets to a public performance at a price in excess of that charged or printed on the ticket.

Relation to current Kentucky law. Section 531.3116 is substantially similar to current KRS 518.070.

Section 531.3116(2)'s definition of "public performance" is similar to that in current KRS 518.010(3).

Section 531.3117: Bad Checks**Corresponding Current Provision(s):** 514.040(6), (7); 514.090(2)**Comment:**

Generally. This offense criminalizes passing bad checks. Although they are often used as a means of avoiding paying for property or services, bad checks cause additional harm not addressed by Chapter 521's theft offenses: they disrupt ordinary commerce by being negotiated by the payee and subsequent holders for value, and undermine the public's confidence in checks and the checking system generally.

Relation to current Kentucky law. This offense covers, among other things, the conduct addressed by current KRS 514.040(6) and (7) and 514.090(2). Passing a bad check may not count as a theft offense because the person may have already obtained the property or service he is "purchasing" with the check, and may not have had the requisite intent to deprive another person of property at that time. Further, issuing bad checks represents an independent harm aside from the improper deprivation of property, as noted above.

Section 3117(2) establishes two permissive inferences with respect to the defendant's knowledge that the drawee would not honor a draft that was not postdated. (See proposed Section 500.106(4) and corresponding commentary for a discussion of permissive inferences.) Section 3117(2)(a) allows for an inference of knowledge where the defendant did not have an account with the depository when he issued the draft. Section 3117(2)(a)'s permissive inference applies in a situation where it is extremely unlikely that the defendant issued a bad check due to an innocent mistake.

Section 3117(2)(b)'s permissive inference operates where the payee promptly presents the draft, the drawee dishonors it due to insufficient funds, and the defendant fails to promptly make good after learning of the refusal. Section 3117(2)(b)'s requirements are designed to allow for an inference of knowledge in appropriate cases while assuring that knowledge is not inferred where the defendant makes a simple miscalculation or "kites" a check with the intent to promptly cover it.

Section 3117(3) is substantively similar to current KRS 514.040(6) and (7) and 514.090(2) in grading the offense as a Class A misdemeanor, but does not aggravate it to a Class D felony where one uses a bad check to obtain property worth more than \$300. The value of property obtained by means of bad checks will be used to determine the grading for theft where the requirements of that offense are satisfied. See proposed Section 521.2110; see also proposed Section 502.254 and 509.906 (providing rules for imposition of liability for multiple offenses).

Section 531.3118: Fraudulent Use of Credit or Debit Card

Corresponding Current Provision(s): 434.550 to .730

Comment:

Generally. This offense criminalizes the fraudulent use of a credit or debit card. Credit and debit cards are often fraudulently used for the purpose of wrongfully acquiring property. Nevertheless, credit and debit card fraud create harm not addressed by Chapter 521’s prohibitions against theft. As is the case with passing bad checks, credit and debit card fraud undermine confidence in payment systems and are harmful to the ordinary operation of commerce.

Relation to current Kentucky law. Section 3118(1) prohibits using a credit or debit card to obtain something of value with knowledge that the card is stolen, forged, revoked, or cancelled, or that such use is unauthorized for any other reason. Section 3118(1)(c) applies where one’s “use” of a credit or debit card is not authorized by the issuer or cardholder, allowing for liability for one, such as an agent, who obtains another’s card with consent, but knowingly exceeds his authority in using it. Section 3118(1)(c)’s language would not impose liability, however, where one uses a card that was initially procured based on an inaccurate or exaggerated statement of the cardholder’s financial security or ability to meet payment obligations, insofar as the cardholder’s use in such a situation is authorized by the issuer.³⁸

Section 3118(2) defines the terms “credit card” and “debit card.”

Section 3118(3) provides a defense where one knows that his use of a credit or debit card is unauthorized, but intends and is able to meet his obligations to the issuer arising from such use. Section 3118(3) does not apply where one uses a card he knows to be stolen, forged, revoked, or cancelled. The knowing use of such instruments differs materially from the conduct Section 3118(3) is designed to protect, such as using an expired card or exceeding a credit limit. Section 3118(3) treats good-faith use as a defense for which the defendant bears the burden of persuasion — rather than treating its absence as an offense requirement — in recognition that the defendant will be uniquely in possession of evidence regarding his intent and ability to settle the matter with the issuer.

³⁸ Proposed Section 3118(1)(c) could, however, support liability for someone who uses a card that he knows was issued to a fictitious person. A “cardholder” who does not exist cannot possibly authorize the card’s use.

Section 3118(4) grades the offense as a Class A misdemeanor. In addition to that liability, the value of property or services obtained or sought would determine the grading for theft and attempted theft where those offenses are also committed. See proposed Section 521.2110; see also proposed Section 502.254 and 509.906 (providing rules for imposition of liability for multiple offenses). Section 3118 punishes the independent harm that occurs where one fraudulently uses a credit or debit card.

Section 531.3119: Definitions

Corresponding Current Provision(s): 516.010, 517.010, 518.010

Comment:

Generally. This provision collects defined terms used in Chapter 531 and provides cross-references to the provisions in which they are defined.

Relation to current Kentucky law. For a discussion of the relationship between Chapter 531's defined terms and current law, refer to the commentary for the provision in which the term is initially defined.

CHAPTER 541. OFFENSES AGAINST THE FAMILY

Section 541.4101: Bigamy

Corresponding Current Provision(s): 530.010

Comment:

Generally. This provision creates an offense for simultaneous marriages.

Relation to current Kentucky law. Section 541.4101 is substantially similar to current KRS 530.010, but deletes the explicit defense recognized in current law.

Section 541.4102: Incest

Corresponding Current Provision(s): 530.020

Comment:

Generally. This provision creates an offense governing sexual intercourse with a blood relative or with a close relative by adoption or marriage.

Relation to current Kentucky law. Section 541.4102 is substantially similar to current KRS 530.020. Importantly, “ancestors [and] descendents . . . of either the whole or half blood” should include not only members of a person’s direct lineage (such as parents or grandparents) but also their siblings — thus, for example, sexual relations between an uncle and a niece would be prohibited.

Section 541.4103: Concealing Birth of Infant

Corresponding Current Provision(s): 530.030

Comment:

Generally. This provision creates an offense for concealment of the corpse of a newborn.

Relation to current Kentucky law. Section 541.4103 is substantially similar to current KRS 530.030.

Section 541.4104: Abandonment of Minor

Corresponding Current Provision(s): 530.040

Comment:

Generally. This provision creates an offense governing desertion of a minor by the person charged with the minor’s care.

Relation to current Kentucky law. Section 541.4104 is substantially similar to current KRS 530.040. In addition, the statutory definition of a “minor” is included for clarification.

Section 541.4105: Nonsupport

Corresponding Current Provision(s): 530.050

Comment:

Generally. This provision defines an offense for failure to provide support to persons to whom a legal duty of support is owed.

Relation to current Kentucky law. Section 541.4105 is rewritten, but substantially similar to current KRS 530.050. The proposed provision, however, eliminates the portion of the offense imposing a duty to provide for an indigent parent. One may have a moral duty to care for one’s parents, but the criminal law generally hesitates to impose affirmative duties of this kind, especially where, as here, the duty would likely be unenforceable or subject to highly selective enforcement.

Section 4105(3) grades the offense based on whether the nonsupport has exceeded a specific dollar amount or period of time, or whether the nonsupport has resulted in a particular condition, i.e., destitute circumstances. Section 4105(3)(a) grades the offense as a Class D felony where the amount of nonsupport exceeds five thousand dollars, and Section 4105(3)(b) grades the offense as a Class E felony where the amount exceeds one thousand dollars. Under current law, the offense is a Class D felony whenever the amount exceeds one thousand dollars. The grading modification has been proposed to reflect the fact that the proposed grading scheme includes a new felony classification, Class E felony, that enables more nuanced categorization for offenses such as this one. As under current law, all offenses involving nonpayment of more than one thousand dollars are graded as the lowest level of felony, but the grade is enhanced slightly for even more serious cases.

Section 541.4105(4)(a) creates permissive inferences about a person’s knowledge about his duty of support for child or spouse from the relationships described in proposed Section 541.4105(2), as opposed to the “presumption” in current KRS 530.050(3) and (4). (See proposed Section 500.106(4) and corresponding commentary for a discussion of permissive inferences.) Similarly, Section 541.4105(4)(b) creates a permissive inference that a dependent is in destitute circumstances when the person receives public assistance, as opposed to the presumption about the same subject in current KRS 530.050(2)(c).

Section 541.4106: Endangering Welfare of Minor**Corresponding Current Provision(s):** 530.060**Comment:**

Generally. This provision creates an offense for failure of a person to use reasonable diligence in controlling a minor in his care or custody.

Relation to current Kentucky law. Section 541.4106 is substantially similar to current KRS 530.060.

Section 541.4107: Contributing to the Delinquency of a Minor**Corresponding Current Provision(s):** 530.064, 530.065, 530.070**Comment:**

Generally. This offense criminalizes conduct which encourages the delinquency of a minor.

Relation to current Kentucky law. Section 541.4107 is retitled and rewritten, but is substantially the same as current KRS 530.064-530.070. The exception for criminal liability in current KRS 530.064(1) for offenses involving minors in promotion of prostitution (KRS 529.030) and pornography (KRS Chapter 531) offenses is deleted. See proposed Sections 502.253-502.254.

Section 4107(3) does not aggravate the grade for specific offenses involving sex, drugs, or victims under a specific age. Cf. KRS 530.064, 530-065. Where an offense results in physical injury, cf. KRS 530.064(2)(c), the injury will constitute a separate offense under Chapter 1200 and may be charged as such. Any additional offense based on the injury will add to the defendant's total criminal liability, see proposed Section 509.906, and because it will arise under Chapter 1200's more sophisticated scheme, the offense will be able to account for the nature and extent of the injury, rather than merely the fact of injury. Similarly, a defendant's separate drug offense or sex offense may lead to a distinct charge and conviction for that other offense. Where the offender "induces, assists, or causes" the minor to commit the other offense, the offender would clearly satisfy the Code's causation or accountability requirements as to that offense, notwithstanding the minor's independent act. See proposed 501.203, 503.301.

This offense applies only where the minor is the perpetrator of the criminal activity. When the minor is the victim — as, for example, where the minor engages in sexual relations with an adult — this statute would not impose additional liability beyond that for the other offense the adult commits. In other words, this offense does not apply to the "statutory rape" situation, because in that case, the sex offense and the Section 4107 offense cover the same harm, making multiple liability inappropriate. See proposed Section 502.254. The proposed provision differs from Kentucky law in this respect. See *Young v Com.*, 968 S.W.2d 670 (Ky. 1998) (holding that current offense applies where defendant asked minor to have sex with him).

Section 541.4108: Unlawful Adoption Fees and Representation

Corresponding Current Provision(s): 199.492, 199.493

Comment:

Generally. This provision creates an offense for conflicts of interest relating to legal representation or legal fees for an adoption.

Relation to current Kentucky law. Section 541.4108 is substantially similar to current KRS 199.492 and 199.493.

Section 541.4109: Abortion

Corresponding Current Provision(s): 311.715-311.820

Comment:

Generally. This offense criminalizes conduct relating to abortion.

Relation to current Kentucky law. Section 541.4109 recognizes the current offenses relating to abortion in KRS 311.715-311.820, the penalties for which are in current KRS 311.990 and 311.992.

Section 541.4110: Definitions

Corresponding Current Provision(s): 2.015

Comment:

Generally. This provision collects defined terms used in Chapter 541 and provides cross-references to the provisions in which they are defined.

Relation to current Kentucky law. For a discussion of the relationship between Chapter 541's defined terms and current law, refer to the commentary for the provision in which the term is initially defined.

CHAPTER 551. BRIBERY, CORRUPT INFLUENCE, AND OFFICIAL MISCONDUCT OFFENSES

Section 551.5101: Bribery

Corresponding Current Provision(s): 107.990, 432.350, 521.020, 521.050

Comment:

Generally. This provision creates an offense for offering a bribe to a public servant or acceptance of a bribe by a public servant.

Relation to current Kentucky law. Section 551.5101 is substantially similar to the conduct elements of current KRS 521.020(1). The pertinent definitions of “pecuniary benefit” and “public servant” are included for this offense. Current KRS 521.020(2) is not carried forward into the proposed section because it is covered by the defense of duress. See proposed Section 505.507. Current KRS 521.020(3) also is not carried forward because its provisions are addressed under impossibility in the law of attempts. See Proposed Section 508.801.

The provisions of current KRS 521.050 (Providing a Pecuniary Benefit for Bribery of a Public Servant) include the same subject as the proposed section, but are in the form of complicity. See proposed Section 503.301.

Section 551.5101 covers the conduct prohibited by current KRS 107.990 and 432.350.

Importantly, there is a distinction between the substantive offense of bribery and inchoate offenses toward that offense. The substantive bribery offense is complete (for the offeror) when the offer is made or (for the official or other would-be recipient) when it is solicited or accepted. (And an “agreement” *between offeror and recipient* that the offeror will offer a bribe is itself an offer, hence a violation of the substantive offense.) It is not necessary to show any actual transfer of funds, or that any actual official act was performed under the influence of the bribe. The substantive offense does not, however, apply to “agreements to offer” *among two conspirators*, as where two private citizens get together and agree to offer an official a bribe. That conduct would constitute a conspiracy to commit bribery, not a completed bribery offense.

Section 551.5102: Unlawful Compensation of a Public Servant

Corresponding Current Provision(s): 521.030, 521.040

Comment:

Generally. This provision creates an offense for offering unlawful compensation to a public servant or acceptance of unlawful compensation by a public servant.

Relation to current Kentucky law. Section 551.5102 is almost identical in language to current KRS 521.030 and 521.040. The grading of the offense has been increased from a Class A or B misdemeanor to a Class D felony, as it is considered similarly serious to other felony-graded offenses in Chapter 551 and elsewhere.

Section 551.5103: Official Misconduct

Corresponding Current Provision(s): 6.731-.761, 61.997-64.990, 70.990, 522.020, 522.030

Comment:

Generally. This provision creates an offense for public servants whose conduct falls outside their official duties.

Relation to current Kentucky law. Section 551.5103 is substantially identical to the current KRS 522.020 and 522.030. Again, the grading of the current offenses appears low. Under the proposed provision, if the offense is committed intentionally, it is a Class D felony, but it is a Class A misdemeanor if the person acts knowingly. A person convicted under this provision would also forfeit his office, under the terms of section 227 of the Kentucky Constitution, which provides for “indictment of public officials for malfeasance and loss of office on conviction.”

The conduct prohibited by current KRS 6.731-.761, 61.097-64.990, and 70.990 is included in proposed Section 551.5103(1)(c).

Section 551.5104: Misuse of Confidential Information

Corresponding Current Provision(s): 11A.040, 522.040, 387.990(2)

Comment:

Generally. This provision creates an offense for abusing his access to confidential information gained as a public servant.

Relation to current Kentucky law. Section 551.5104 is substantially similar to most of the offense defined in current KRS 522.040. Current KRS 522.040(1)(c) is in the form of complicity, and is not carried forward in its current form as it is covered by proposed Section 503.301.

Section 551.5105: Definitions

Corresponding Current Provision(s): 521.010, 522.010

Comment:

Generally. This provision collects defined terms used in Chapter 551 and provides cross-references to the provisions in which they are defined.

Relation to current Kentucky law. For a discussion of the relationship between Chapter 551’s defined terms and current law, refer to the commentary for the provision in which the term is initially defined.

CHAPTER 552. PERJURY AND OTHER OFFICIAL FALSIFICATION OFFENSES

Section 552.5201: Perjury and False Swearing

Corresponding Current Provision(s): 365.992(1), 523.010, 523.020, 523.030, 523.040, 523.050, 523.060, 523.070, 523.080, 523.090

Comment:

Generally. This provision creates an offense for making material false statements³⁹ that the person knows are not true.

Relation to current Kentucky law. Section 552.5201 is substantially similar to current law on perjury and false swearing. Proposed Section 552.5201(1)(a) is comparable to the one type of first-degree perjury offense in KRS 523.050(1); Subsection (1)(b) is similar to the other way in which the first-degree perjury offense is expressed in KRS 523.020(2). However, the special limitation of this subsection, confining it to cases where the person is seeking a warrant against a spouse for a sex offense, is unnecessarily narrow and is dropped from the proposed Code, because the offense definition should not be confined to certain offenses or a particular class of victims.

Section 552.5201(2) is almost identical to the current KRS 523.040 offense of false swearing. Likewise, proposed Sections 552.5201(3)-(4) express an exception to the foregoing offenses for a retraction and a previous trial's not-guilty plea in substantially the same language as current KRS 523.090 and 523.070, respectively.

The current definitions of "material false statement," "oath," "official proceeding," "required or authorized by law," and "statement" in KRS 523.010(1)-(5) are substantially carried forward in proposed Section 552.5201(5)(a)-(e).⁴⁰ However, the definition of "oath" in proposed Section 552.5201(5)(b)(I)-(iii) differs from current KRS 523.010(2)(b)2.a-c. when it expresses the three descriptive conditions for a recitation that the statement was made under oath in the disjunctive rather than the conjunctive under current law.

³⁹ Although some states have treated materiality as an issue of law for the court to determine, recent United States Supreme Court precedent makes it clear that such a practice is unconstitutional. See *United States v. Gaudin*, 515 U.S. 506, 511 (1996) ("The Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged; one of the elements in the present case is materiality; respondent therefore had a right to have the jury decide materiality."). Accordingly, under proposed Section 5201, the issue of materiality is to be decided by the jury.

⁴⁰ As the current commentary points out, "required or authorized by law" means that "[t]he oath must be authorized by statute or regulatory directive, court rule, or otherwise by law and is not 'authorized' merely because it is not expressly prohibited." KRS 523.020, Commentary.

Proposed Section 552.5201(6) is a clearer expression of the principles in current KRS 523.050 on inconsistent statements. Where a witness makes irreconcilably inconsistent statements under oath, one of them must be false, and the witness is therefore liable for perjury without the State having to prove which statement was the false one. If the inconsistent statements are made in the course of a single proceeding, the witness would have the opportunity to retract one of the statements and thus avoid liability, as Section 5201(3) provides. If the witness does not avail himself of this opportunity, however, he is subject to liability for perjury. The reference in KRS 523.050(1) to the statute of limitations is dropped because it is controlled by principles in the General Part. Otherwise, the proposed provision states the current principles in more concise language.

The issues of corroboration and irregularities are addressed in proposed Section 552.5201(7)-(8) in the same manner as in current KRS 523.060 and 523.080.

The grading of the offenses in proposed Section 552.5201(9) is consistent with the penalties for the current perjury and false-swearing offenses in KRS Chapter 523, but Section 5201(9)(b) and (9)(c) impose grades of Class E felony and Class A misdemeanor instead of current law's Class A misdemeanor and Class B misdemeanor. This slight upward adjustment reflects the Working Group's view, following a comprehensive review of the proposed grading for all offenses, that the offenses in question were more serious than the original grades suggested and should be increased slightly. Such an increase is also possible because of the proposed Code's added grade of Class E felony, which makes more sophisticated distinctions possible at this level of offense.

The conduct prohibited by current KRS 365.992(1) is included in this proposed section.

Section 552.5202: Unsworn Falsification to Authorities

Corresponding Current Provision(s): 523.100

Comment:

Generally. This provision creates an offense for making certain false statements in a writing or on an object, without the presence or existence of an oath.

Relation to current Kentucky law. Section 552.5202 is substantially identical to current KRS 523.100. Under proposed Section 552.5202(1)(b), the issue of whether a writing is forged is controlled by proposed Section 531.3101.

Section 5202(3) grades the offense as a Class A misdemeanor, whereas current KRS 523.100 grades its offense as a Class B misdemeanor. This change is in keeping with, and maintains consistency and proportionality with, the grading modifications in proposed Section 5201(9).

Section 552.5203: False Reporting

Corresponding Current Provision(s): 519.040, 523.110

Comment:

Generally. This provision creates an offense for falsely reporting an incident to an officer or giving the officer a false name or address.

Relation to current Kentucky law. Section 552.5203 is substantially similar to and is a combination of current KRS 519.040 and 523.110. The grading of the current offenses is carried forward in proposed Section 552.5203(2).

Section 552.5204: Impersonating a Public Servant

Corresponding Current Provision(s): 519.050, 519.055

Comment:

Generally. This provision creates an offense for impersonating a public servant.

Relation to current Kentucky law. Section 552.5204 is substantially similar to and is a combination of current KRS 519.050 and 519.055. However, the distinction drawn in current law between peace officers and public servants occurs only in the grading of the offense. The grading remains the same in the proposed provision as in current law.

Section 552.5205: Tampering with Public Records

Corresponding Current Provision(s): 519.060

Comment:

Generally. This provision creates an offense for a variety of conduct relating to interfering with public records.

Relation to current Kentucky law. Section 552.5205 is substantially identical to current KRS 519.060.

Section 552.5206: Definitions

Corresponding Current Provision(s): 523.010

Comment:

Generally. This provision collects defined terms used in Chapter 552 and provides cross-references to the provisions in which they are defined.

Relation to current Kentucky law. For a discussion of the relationship between Chapter 552's defined terms and current law, refer to the commentary for the provision in which the term is initially defined.

CHAPTER 553. INTERFERENCE WITH GOVERNMENTAL OPERATIONS

Section 553.5301: Obstructing Governmental Operations

Corresponding Current Provision(s): 39A.990, 65.7641, 149.040, 149.083,
149.090, 432.590, 438.180, 441.035,
519.020

Comment:

Generally. This provision creates an offense for interfering with governmental functions.

Relation to current Kentucky law. Section 553.5301 is substantially similar to current KRS 519.020(1). Section 553.5301(1)(a) requires that the governmental function in question must be “lawful.” Use of that term renders unnecessary the exemption language in current KRS 519.020’s reference to the obstruction, etc., of “unlawful action.” The other two parts of the current exemption section similarly add nothing new to the offense definition; one of them, for example, refers to an omission, and omission liability is already addressed by proposed Section 501.204.

Section 553.5301(2)’s definition of “governmental function” is nearly identical to that in current KRS 519.010(3). The term “public servant” is defined in proposed Section 551.5101(2)(b).

Section 5301 covers the conduct prohibited by current KRS 39A.990, 65.7641, 149.040, 149.083, 432.590, 438.180, and 441.035. KRS 149.090 covers the same conduct but is in the form of an omission to act. See proposed Section 501.204.

Section 553.5302: Compounding a Crime

Corresponding Current Provision(s): 519.030

Comment:

Generally. This provision creates an offense for compounding a crime.

Relation to current Kentucky law. Section 553.5302 is substantially identical to current KRS 519.030.

Section 553.5303: Hindering Prosecution or Apprehension

Corresponding Current Provision(s): 520.110, 520.120, 520.130

Comment:

Generally. This provision creates an offense for assisting a person being sought for commission of an offense.

Relation to current Kentucky law. Section 553.5303 is substantially identical to the offenses in current KRS 520.120 and 520.130, as well as the defense in KRS 520.110(2). In addition, the list of ways in which a person renders assistance to another person from current KRS 520.110 is carried forward, with one exception. Current KRS 520.110(1)(e), which refers to “volunteer[ing]” false information to a law enforcement authority, is carried forward as “provid[ing]” such information. The use of the verb “provides” is less ambiguous than “volunteers,” which may define liability based on whom asks first for information: the officer or the person.

The grading of the offense remains the same as under current law.

Section 553.5304: Fleeing or Evading Peace Officer

Corresponding Current Provision(s): 520.095, 520.100

Comment:

Generally. This provision creates an offense for disobeying a direction to stop given by a person known to be a peace officer.

Relation to current Kentucky law. Section 553.5304 is somewhat similar to current KRS 520.095 and 520.100. Distinctions under current law between disobeying a direction as an operator of a vehicle and as a pedestrian are dropped. Consistent with the designation changes for culpability made in proposed Section 501.206, the culpability requirement in the proposed subsection (1)(b) is “recklessly” disobeying rather than “knowingly” or “wantonly,” as under current law.

The conditions listed under current law to describe how a person commits the offense, while disobeying a direction to stop, is deleted. The first three conditions — persons fleeing immediately after committing domestic violence, committing DUI, and driving on a suspended license — in current KRS 520.095(1)(a)1-3 are unnecessarily narrow; there is no reason to single out those offenses from others. Without these conditions, a person still can be convicted of domestic violence or assault, DUI, or driving on a suspended license. The fourth condition — that the person in fleeing or eluding is the cause of serious physical injury or creates a substantial risk of serious physical injury — likewise is unnecessary, because a person could be charged with fleeing plus assault or reckless endangerment. See proposed Section 502.254 and 509.906 (providing rules for imposition of liability for multiple offenses). The last condition is recognized in the proposed section as an aggravator with a higher grading.

The current law's exception for liability in KRS 520.100(2) when the failure relates to noncompliance with a traffic control officer's direction appears in Section 5304(2)(c) as a grade reduction to Class C misdemeanor.

Section 553.5305: Interfering with or Resisting a Peace Officer

Corresponding Current Provision(s): 508.160, 520.090

Comment:

Generally. This provision creates an offense for obstructing an officer's discharge of his duties.

Relation to current Kentucky law. Section 553.5305 is much broader than current KRS 508.160 and 520.090, which merely identifies specific examples of interfering with an officer or resisting arrest. There is a broader concern about interfering with the officer's performance of his duties that should be addressed, in addition to the specific concerns under current law. For example, under the proposed section, a person can be prosecuted for not following an officer's directive to move on in a crowd control situation.

The phrase "recognized to be acting under color of his official authority" in the current law on resisting arrest is changed in the proposed section to the culpability requirement of "knowing" that the officer is acting within the scope of his duties. Similarly, neither of the exceptions to liability in current KRS 508.160(3) is necessary, because there are already culpability requirements in the proposed section as well as a condition that the officer must be acting within the scope of his official duties.

The reference to "attempts to prevent" a peace officer from arresting someone is dropped because it is included as an inchoate offense under proposed Section 508.801.

Section 553.5306: Escape

Corresponding Current Provision(s): 520.010(2), (4), (5); 520.015, 520.020, 520.030, 520.040,

Comment:

Generally. This provision creates an offense for escaping from the custody of law enforcement personnel.

Relation to current Kentucky law. Section 553.5306 is substantially similar to current KRS 520.020 through 520.040. The grading under the current law is preserved.

The definitions in KRS 520.010(2), (4), and (5) are carried forward substantially intact. The definition of "penitentiary" is not carried forward, because it is used only in connection with current KRS 525.015 — attempting to escape from a penitentiary — which is an inchoate offense and thus not carried forward as a separate offense. See proposed Section 508.801 (defining rules for attempt liability).

Section 553.5307: Promoting or Possessing Contraband

Corresponding Current Provision(s): 520.010(1), (3); 520.050, 520.060

Comment:

Generally. This provision creates an offense for introducing contraband into, or possessing contraband within, a detention facility.

Current law refers to the place where the offense may be committed as a “detention facility or a penitentiary.” The reference to a penitentiary is dropped, because the definition of detention facility includes a penitentiary.

The definitions of current KRS 520.010(1) and (3) for “contraband” and “dangerous contraband” are carried forward verbatim, and the grading of the offenses remains the same as current law.

Section 553.5308: Failure to Appear

Corresponding Current Provision(s): 258.990, 431.545, 520.070, 520.080

Relation to current Kentucky law. Section 553.5307 is substantially similar to current.
Comment:

Generally. This provision creates an offense for failing to appear at a scheduled court appearance.

Relation to current Kentucky law. Section 553.5308 is substantially similar to the current offenses of bail jumping in KRS 520.070 and 520.080. The justification for the person’s failure to appear in subsection (2) of each of the current offenses is retained in proposed Section 553.5308(2). The grading of the offenses remains the same.

The conduct prohibited by current KRS 258.990 and 431.545 is included in the proposed section.

Section 553.5309: Bribing a Witness

Corresponding Current Provision(s): 524.010(3)-(4), 524.020, 524.030

Comment:

Generally. This provision creates an offense for offering a bribe to a witness or receiving a bribe by a witness.

Relation to current Kentucky law. Section 553.5309 is substantially similar to current KRS 524.020 and 524.030.

Section 553.5310: Intimidating, Harassing, or Tampering with a Participant in the Legal Process

Corresponding Current Provision(s): 514.080, 524.040, 524.045, 524.050

Comment:

Generally. This provision creates an offense for doing anything that may affect the willingness of a witness to testify.

Relation to current Kentucky law. Section 553.5310 consolidates the current offenses of intimidating, harassing, and tampering with a participant in the legal process. References in the current offense for intimidating a participant in the legal process to attempts to intimidate are dropped because they are inchoate offenses covered by proposed Section 508.801. Otherwise, the conduct elements in the current offense of intimidating a participant in the legal process are carried forward as the objects of the person’s intent (“with intent to”) in Section 5310(1)(a)(i)-(vii).

Many of the effects of the person’s conduct in harassing a participant in the legal process in current KRS 524.040(1)(a)-(d) are already included in the current offense of intimidating a participant in the legal process, and are also carried forward in a modified form as conduct elements in Section 5310(1)(b)(i). The remaining portions of the conduct elements in Section 5310(1)(b)(ii)-(iii) are taken from the current offense of tampering with a participant in the legal process in current KRS 524.050.

Both the intimidating and the harassing offenses in current law contain provisions negating two possible defenses to those charges. Those provisions are carried forward in Section 5310(2). The definitions in current KRS 524.010(1) are carried forward in proposed Section 5310(3).

Section 5310(4) grades the offense as a Class D felony where force, or the threat of force, is involved, and as a Class E felony otherwise. Current law grades these offenses as a Class D

felony and a Class A misdemeanor, respectively. The proposed increase reflects the Working Group's view, following a comprehensive review of the grading of all proposed offenses, that this offense was more serious than other Class A misdemeanors. Because of the availability of the added Class E felony category under the proposed Code, it was thought that this offense's grade could be increased while retaining an aggravation for offenses involving potential violence that would treat such offenses as a Class D felony.

Section 553.5311: Retaliating Against a Participant in the Legal Process

Corresponding Current Provision(s): 524.055

Comment:

Generally. This provision creates an offense for retaliation against a participant in the legal process.

Relation to current Kentucky law. Section 553.5311 is substantially identical to current KRS 524.055.

Section 553.5312: Bribery of, or Improper Communication with, a Juror

Corresponding Current Provision(s): 524.010(1), 524.060, 524.070, 524.090, 524.120

Comment:

Generally. This provision creates an offense for bribing a juror or bribe receiving by a juror.

Relation to current Kentucky law. Section 553.5312 is substantially similar to current offenses relating to juror bribery, intimidation, and tampering. In addition, the offense of judge intimidation is included as part of the offense. Section 5312(1)(a) corresponds to the current offense of bribing a juror in KRS 524.060, Section 5312(1)(b) matches the current offense of bribe receiving by a juror in KRS 524.070, and Section 5312(1)(c) corresponds with the current offense of jury tampering in KRS 524.090. The "attempt" provision of the current intimidating a juror provision has not been incorporated, because it is covered by proposed Section 508.801.

The grading of the offenses is similar to current law, but Section 5312(2)(b) increases the grade for the improper-communication offense from Class A misdemeanor to Class E felony. The proposed increase reflects the Working Group's view, following a comprehensive review of the grading of all proposed offenses, that this offense was more serious than other Class A misdemeanors. Because of the availability of the added Class E felony category under the proposed Code, it was thought increasing this offense's grade would appropriately maintain it as an offense one grade less serious than the juror bribery offenses, which are treated as Class D felonies in both the current and proposed Codes.

Section 553.5313: Tampering with Physical Evidence

Corresponding Current Provision(s): 17.170, 524.010(2), 524.100

Comment:

Generally. This provision creates an offense for interfering with the integrity of physical evidence to be used in an official proceeding.

Relation to current Kentucky law. Section 553.5313 is substantially identical to the current tampering with evidence offense in KRS 524.100, except that the reference to a “pending proceeding” is deleted. The person committing the offense must still believe that the matter tampered with is evidence to be presented at a hearing. Thus, not all evidence is covered.

Section 5313(2) carries forward the definition of “physical evidence” in current KRS 524.010(2).

The conduct prohibited by current KRS 17.170 is included in the proposed section.

Section 553.5314: Simulating Legal Process

Corresponding Current Provision(s): 524.110

Comment:

Generally. This provision creates an offense for fabricating a request for the payment of money in a form made to appear legitimate.

Relation to current Kentucky law. Section 553.5314 is substantially similar to current KRS 524.110, except for the phrase “or causes to be delivered” in the current law. Section 5314 does not incorporate that phrase because it is unnecessary given the existence of proposed Section 503.301 relating to complicity.

Section 5314(2) grades the offense as a Class A misdemeanor, whereas the offense under current KRS 524.110 is a Class B misdemeanor. The proposed increase reflects the Working Group’s view, following a comprehensive review of the grading of all proposed offenses, that this offense was more serious than other Class B misdemeanors and as serious as proposed Class A misdemeanors.

Section 553.5315: Unauthorized Practice of Law

Corresponding Current Provision(s): 524.130

Comment:

Generally. This provision creates an offense for practicing law without a license.

Relation to current Kentucky law. Section 553.5315 is a consolidated version of current KRS 524.130. The essence of the offense is a violation of Kentucky Supreme Court rules on the practice of law. Currently, both offense definitions essentially define the same offense. Thus, the proposed offense simply states the offense one time and grades it in the same manner as current law. In addition, the exception clause in current law is dropped.

Section 553.5316: Definitions

Corresponding Current Provision(s): 520.010, 524.010, 525.010

Comment:

Generally. This provision collects defined terms used in Chapter 553 and provides cross-references to the provisions in which they are defined.

Relation to current Kentucky law. For a discussion of the relationship between Chapter 553's defined terms and current law, refer to the commentary for the provision in which the term is initially defined.

CHAPTER 561. PUBLIC ORDER AND SAFETY OFFENSES

Section 561.6101: Rioting

Corresponding Current Provision(s): 525.010(5), 525.020, 525.030

Comment:

Generally. This provision creates an offense for participating in a riot.

Relation to current Kentucky law. Section 561.6101 is substantially similar to current KRS 525.020 and 525.030. The culpability requirement is still “knowingly.” The definition of “riot” in current KRS 525.010(5) is carried forward in substantially identical form. As with the current first- and second-degree offenses, the proposed section grades the offenses according to the occurrence of physical injury or property damage.

Section 561.6102: Inciting to Riot

Corresponding Current Provision(s): 525.040

Comment:

Generally. This provision creates an offense for inciting at least five others to riot.

Relation to current Kentucky law. Section 561.6102 is substantially similar to current KRS 525.040.

Section 561.6103: Unlawful Assembly

Corresponding Current Provision(s): 525.050

Comment:

Generally. This provision creates an offense for assembling with at least five other persons in order to engage in a riot.

Relation to current Kentucky law. Section 561.6103 is substantially similar to current KRS 525.050.

Section 561.6104: Failure to Disperse

Corresponding Current Provision(s): 525.160

Comment:

Generally. This provision creates an offense for refusing to disperse when ordered by a law enforcement authority.

Relation to current Kentucky law. Section 561.6104 is almost identical to current KRS 525.160.

Section 561.6105: Disorderly Conduct

Corresponding Current Provision(s): 525.010(3), 525.060

Comment:

Generally. This provision creates an offense for engaging in disorderly behavior.

Relation to current Kentucky law. Section 561.6105 is substantially similar to current KRS 525.060. Consistent with the designation changes for culpability made in proposed Section 501.206, the culpability requirement in the proposed section is “recklessly” rather than “wantonly.” In addition, although the current reference to “intentionally” committing the offense is omitted, the proposed Code would allow liability where the conduct was intentional. See Proposed Section 501.205(6).

The definition of “public place” currently used in KRS 525.010(3) is placed as part of the proposed offense. As part of its definition, “public place” uses the term “includes,” which is defined in the General Part in proposed Section 500.107 to mean “includes but is not limited to.”

Section 561.6106: Harassment

Corresponding Current Provision(s): 525.070

Comment:

Generally. This provision creates an offense for annoying or bothering others.

Relation to current Kentucky law. Section 561.6106 is almost identical to current KRS 525.070, maintaining the same conduct provisions and grading.

Section 561.6107: Harassing Communications

Corresponding Current Provision(s): 525.080

Comment:

Generally. This provision creates an offense for communicating in such a manner as to harass or alarm another person.

Relation to current Kentucky law. Section 561.6107 is substantially similar to current KRS 525.080. The term “written” is removed from modifying the term communication in order to broaden the scope of the offense to include “any other form of communication.”

Section 561.6108: Loitering

Corresponding Current Provision(s): 525.010(4), 525.090

Comment:

Generally. This provision creates an offense for remaining in a public place for unlawful purposes.

Relation to current Kentucky law. Section 561.6108 is similar to current KRS 525.090, with several exceptions. Section 561.6108(1)(a) and (b) gives the police arrest powers when a person remains in a public place for a particular illegal purpose. Section 6108(1)(a) changes the current law from gambling to unlawful gambling, in recognition of numerous forms of legal gambling that exist but are not intended to be included within the scope of this offense.

Unlike the preceding two subsections, Section 6108(1)(c) and (1)(d) do not require a specific unlawful purpose. They are bracketed to call attention to an issue of why the two places referred to in those sections are singled out for the locale of criminal liability. As a policy matter, there may be many other places which are the equivalent of a school or transportation facility but are not identified for criminal liability. Without an accompanying criminal trespass, the issue arises as to whether the conduct identified in these subsections can be criminalized.

Section 6108(2)’s definition of a “transportation facility” is the same as that in current KRS 525.010(4).

Section 561.6109: Public Intoxication

Corresponding Current Provision(s): 525.100

Comment:

Generally. This provision creates an offense for being under the influence of an intoxicating substance.

Relation to current Kentucky law. Section 561.6109 is comparable to current KRS 525.100. The current exclusion for intoxication caused solely by alcohol has been deleted, because regardless of the source of the public intoxication — whether it is caused by alcohol, other legal means, or illegal means — the societal injury is the same.

In part because of this expansion of its scope, the grade of the offense has been reduced from a Class B to a Class C misdemeanor. This grade seems appropriate because it would authorize brief incarceration, if needed, while still treating the offense as minor. Further, chronic offenders may be dealt with more severely; under proposed Section 905, a second offense would be a Class B misdemeanor.

Section 561.6110: Obstructing a Highway or Other Public Passage

Corresponding Current Provision(s): 525.140

Comment:

Generally. This provision creates an offense for blocking a public passage.

Relation to current Kentucky law. Section 561.6110 is similar to current KRS 525.140. Consistent with the designation changes for culpability made in proposed Section 501.206, the culpability requirement in Section 6110(1)(a) is “recklessly” rather than “wantonly.” In addition, while the current reference to “intentionally” committing the offense is omitted, the proposed Code allows for liability based on intentional conduct. See Proposed Section 501.205(6).

The current exception in KRS 525.140(2) is rewritten for clarity in Section 6110(2).

Section 561.6110(1)(b) adds that the offense may be committed if, after first being given a reasonable order to move, the person refuses to do so. As described in proposed Section 6110(3), the reasonableness of the peace officers’ order depends on whether they have another way of managing the situation before shutting down the gathering. Section 561.6110(3) is similar to current KRS 525.140(3).

Section 561.6111: Disrupting Meetings and Processions

Corresponding Current Provision(s): 525.150

Comment:

Generally. This provision creates an offense for interfere with gatherings.

Relation to current Kentucky law. Section 561.6111 is substantially similar to current KRS 525.150.

Section 561.6112: Interfering with Communications

Corresponding Current Provision(s): 438.210, 438.160

Comment:

Generally. This provision creates an offense for interfering with modern communications.

Relation to current Kentucky law. Section 561.6112 is a modernized version of current KRS 438.210. Section 561.6112 replaces the culpability requirements of “willfully” and “maliciously” with the defined term of “knowingly.” See proposed Section 501.206(2). In addition, while the current law relates to telegraph lines, telephone lines, wire or cable, the proposed offense would include any mode of communication, including the Internet.

Current KRS 438.160, emergency use of telephone party line, is not carried forward in the proposed Code because party lines is no longer relevant.

Section 561.6113: Definitions

Corresponding Current Provision(s): 525.010

Comment:

Generally. This provision collects defined terms used in Chapter 561 and provides cross-references to the provisions in which they are defined.

Relation to current Kentucky law. For a discussion of the relationship between Chapter 561’s defined terms and current law, refer to the commentary for the provision in which the term is initially defined.

CHAPTER 562. PUBLIC INDECENCY OFFENSES

Section 562.6201: Indecent Exposure

Corresponding Current Provision(s): 510.150

Comment:

Generally. This provision creates an offense governing intentional exposure of a person’s genitals when the conduct will likely cause affront or alarm.

Relation to current Kentucky law. Section 562.6201 is substantially identical to KRS 510.150.

Section 562.6202: Causing or Promoting a Sexual Performance by a Minor

Corresponding Current Provision(s): 531.300(4), 531.310, 531.320

Comment:

Generally. This provision creates an offense governing causing or promoting a sexual performance by a minor.

Relation to current Kentucky law. Section 562.6202 is substantially identical to KRS 531.310 and 531.320. Section 6202(1)(a) omits the reference to consent found in current KRS 531.310(1), because the issue of consent is addressed in proposed Section 502.251.

The definition of “sexual conduct,” which appears in proposed Section 513.1303(2)(b), is identical to the definition of “sexual conduct by a minor” in current KRS 531.300(4), except that it omits an exception for private family exposures not intended for distribution. That exception is unnecessary, because if a photograph is created or used entirely for private or family purposes, then it would not be a “public performance” under 3116(2)’s definition. A “public performance” must be exhibited before an audience. The definition of “public performance” in Section 531.3116(2), like the definition of “performance” in current KRS 531.300(5), is broad: the proposed definition covers “any form of entertainment . . . that is viewed by the public,” while the current definition covers “any play, motion picture, photograph, dance, or any other visual representation exhibited before an audience.” It is anticipated that any conduct falling within the current definition would also fall within the proposed definition of “public performance,” so long as the conduct is performed publicly.⁴¹

⁴¹ It is not anticipated, however, that the definition would reach conduct performed in private, such as that in *Gilbert v. Commonwealth*, 838 S.W.2d 376 (Ky. 1991) (applying “promoting sexual performance by minor” offense to defendant who required his daughter to disrobe in his presence). The conduct in *Gilbert* would be a sexual abuse offense. See *supra* commentary for proposed Sections 513.1303, 513.1304.

Section 6202(3) grades the offense as a Class D felony if the minor is under 16, and as a Class E felony if the minor is under 18. The grading of the offense under proposed Section 6202(3) has been reduced relative to current law because the direct harm to the minor is covered by offenses in Chapter 1300. See proposed Sections 513.1303, 513.1304 and corresponding commentary. Section 6202's offense is directed only at the *social* harm that arises when there is a *public* performance of this type of conduct. The purpose of the “promoting performance” offense is rather to punish the coarsening of public life that such conduct entails — a more aggravated form of indecent exposure. Importantly, a person who violates Section 6202 would also almost certainly commit an offense under Chapter 1300 at the same time, and under the proposed Code's liability rules, the person would face additional liability for each offense. See proposed Section 509.906.

There is no analogue in the proposed code for current KRS 531.330(2), which appears to be unconstitutional under *Patterson v. New York*, 432 U.S. 197 (1977) and *Mullaney v. Wilbur*, 421 U.S. 684 (1975), because the defendant has to disprove an element of the offense. See proposed Section 501.207, regarding a mistake negating required culpability for an offense.

Section 562.6203: Distribution of Obscenity

Corresponding Current Provision(s): 531.010(3), 531.020, 531.030-.070,
531.340-.370

Comment:

Generally. This provision creates an offense governing the distribution of obscenity.

Relation to current Kentucky law. Section 562.6203 is similar to current provisions governing distribution of obscene material, both to adults and to minors. Section 562.6203(1) lists prohibited conduct from current KRS 531.020(1)(c) and 531.030(1): “prepares,” “publishes,” “prints,” “exhibits,” “distributes,” and “possesses with intent to distribute or exhibit.” The term “advertises” is similar to “advertising” used in current KRS 531.050 (Advertising obscene material).

Statutory references in current KRS 531.020(1)(c)6 and 531.030(1)(c) to “offers to distribute” and possession with intent to offer to distribute are in the nature of inchoate offenses and are covered in proposed Sections 508.801-508.802.

The Section 562.6203(1) phrase “promotes the distribution,” defined in Section 562.6203(3), is broader than the phrase “promotes the sale” found in current KRS 531.060(1) and covers a broader category of conduct.

The definition of “distribute” in Section 562.6203(2)(a) is identical to the definition in current KRS 531.010(1) and 531.300(1).

The definition of “matter” in Section 562.6203(2)(b) is identical to the definition in current KRS 531.010(2) and 531.300(2).

The definition of “obscene” in Section 562.6203(2)(c) is identical to the definition in current KRS 531.010(3). Section 562.6203(2)(c)(iv) adds another definition of obscene: material portraying a sexual performance by a minor. This definition carries forward the language in current KRS 531.340, using the offense of distribution of obscene material to carry forward all current prohibitions relating to distribution of sexual performances by a minor. Section 562.6203(2)(c)(iv) is implicitly referred to in the grading for the offense in Section 562.6203(6)(a).

The defined term “promoting the distribution” of material in 562.6203(2)(d) is not exhaustive, due to the reference that it “includes” the conduct described. The examples used in the definition are almost identical to current KRS 531.060(1).

KRS 531.335 (*possession* of matter portraying a sexual performance by a minor) is not included in the proposed code. There is no current criminal prohibition for possession of obscene material generally. Moreover, criminalization of private possession of this type of obscene material raises constitutional concerns.

Jurisdictional provisions in current KRS 531.020(1)(a)-(b) are omitted because they are addressed in proposed Section 500.105(1)-(2).

Section 562.6203(4) creates a permissive inference that a jury may decide that possessing more than one copy of material shows an intent to distribute. (See proposed Section 500.106(4) and corresponding commentary for a discussion of permissive inferences.) Such information is relevant to the intent to distribute. Current law uses the possession of more than one unit of material as a method of enhancing the penalty for the offense of distribution of obscene matter in KRS 531.020(2).

The exemption in Section 562.6203(5) is comparable to the exemption in current KRS 531.070.

The grading of 562.6203(6) is somewhat harsher than current law, but the grading of the offense as a Class D felony occurs only when the person knew or had reason to know that the matter portrays a sexual performance by a minor. The remainder of the grading section defines the conduct as a Class A misdemeanor, which is consistent with current criminal conduct such as possessing more than one copy of obscene material (KRS 531.020(2)), distributing obscene matter to a minor (KRS 531.030(2)), and using a minor to distribute the obscene matter (KRS 531.0040(2)). Without such aggravating circumstances, the offense is a Class B misdemeanor.

There is no analogue in the proposed Code for current KRS 531.330(1), which appears to be an unconstitutional presumption as to age under *Sandstrom v. Montana*, 442 U.S. 510 (1979). No permissive inference is provided on this issue, because such a jury instruction would be confusing to the jury, which would wonder why the court is instructing about something it can decide for itself.

Section 562.6204: Prostitution or Patronizing a Prostitute; Loitering for a Sexual Act

Corresponding Current Provision(s): 529.020, 529.080, 529.090, 510.010(7)-(8)

Comment:

Generally. This provision creates an offense governing prostitution and loitering in order to engage in prostitution.

Relation to current Kentucky law. Section 562.6204 is broader than current law because it refers to the offer, acceptance, payment, or solicitation of a fee either by the person performing the intercourse or contact or by another. The reference in current KRS 529.020(1) to “offers to engage” is omitted from the proposed section, because it is in the nature of an inchoate offense and is covered in proposed Sections 508.801-508.802.

Section 562.6204(2) also provides for liability based on public loitering for the purpose of engaging in prostitution. Such loitering presents a public harm not addressed by the prohibition on the private prostitution transaction itself.

The grading for the offense of prostitution under Section 6204(1), Class B misdemeanor, is identical to current law. Section 6204(2)’s loitering offense is graded as a Class C misdemeanor.

Current KRS 529.090’s provisions relating to knowing transmission of HIV are addressed by the proposed endangerment offense. See proposed Section 512.1202 and commentary.

Section 562.6205: Permitting Prostitution

Corresponding Current Provision(s): 529.070

Comment:

Generally. This provision creates an offense for permitting prostitution.

Relation to current Kentucky law. Section 562.6205 is substantially identical to current KRS 529.070, except that the culpability for the offense is grossly negligently instead of knowingly.

Section 562.6206: Promoting, Supporting, or Profiting from Prostitution

Corresponding Current Provision(s): 529.010(1), 529.030, 529.040, 529.050, 529.090

Comment:

Generally. This provision creates an offense governing promotion, support or profit from prostitution.

Relation to current Kentucky law. Section 521.6206(1)(a)-(e) defines the offense in examples identical to current KRS 529.010(1)'s definition of "advancing prostitution." The offense described in Section 562.6206(1)(f) is taken from the definition of "profiting from prostitution" in current KRS 529.010(2). However, the proposed offense does not include the inchoate conduct defined in the current KRS 529.010(2) definition. This specific language replaces the defined terms currently used in KRS 529.030-.050.

The conduct defined in current KRS 529.030(1)(a) is deleted, because its reference to "compelling a person by force or intimidation" to engage in prostitution is actually a form of sexual assault, which is addressed in proposed Chapter 513. The current law creates a specialized combination offense (promoting prostitution by compelling sexual assault) that is better addressed under sexual assault. The same is true of the grading in current KRS 529.030(2)(c), which defines the offense as a Class A felony when a minor is physically injured.

The grading for this offense is increased one grade from its current penalty when the person knew that he had tested positive for the HIV virus which could be communicated to another through sexual activity. Otherwise, the grading of the offense is similar to current law found in the respective degrees of promoting prostitution in KRS 529.030-.050, except that Section 6206(2)(a) and (b) grades the offense as a Class C felony if the minor is under 16, and as a Class D felony if the minor is under 18. The grading of the offense under proposed Section 6206(3) has been reduced relative to current law because the direct harm to the minor is covered by offenses in Chapter 1300. See proposed Sections 513.1303, 513.1304. Section 6206's offense is directed only at the specific harm that arises from the promotion of prostitution, as opposed to the sex act itself. Importantly, a person who violates Section 6206 would also almost certainly commit an offense under Chapter 1300 at the same time, and under the proposed Code's liability rules, the person would face additional liability for each offense. See proposed Section 509.906.

Section 562.6207: Cruelty to Animals

Corresponding Current Provision(s): 525.125, 525.130

Comment:

Generally. This provision creates an offense governing cruelty to animals.

Relation to current Kentucky law. Section 562.6207 is comparable to current KRS 525.125-525.130, except that knowingly is the culpability of the offense in Section 562.6207(1)(c).

Section 6207(3)(a) grades the aggravated form of the offense as a Class E felony, whereas current KRS 525.125 grades its similar offense as a Class D felony. The modification reflects the Working Group's view, following a comprehensive review of the grading of all proposed offenses, that this offense was similarly serious to other Class E felonies. Because of the availability of the added Class E felony category under the proposed Code, it was thought that grading this offense as a Class E felony would appropriately place it within the lowest felony grade, as is true under current law, for which Class D felony is the lowest such grade.

Section 562.6208: Desecration of Venerated Objects

Corresponding Current Provision(s): 525.105, 525.110, 525.113, 525.115,
525.120

Comment:

Generally. This provision creates an offense governing the defiling of venerated objects.

Relation to current Kentucky law. Section 562.6208 is comparable to current law. The offense also is graded similarly, although in a different format.

Section 562.6209: Definitions

Corresponding Current Provision(s): 510.010(7)-(8); 531.010(1)-(3);
531.300(1)-(2), (5)

Comment:

Generally. This provision collects defined terms used in Chapter 562 and provides cross-references to the provisions in which they are defined.

Relation to current Kentucky law. For a discussion of the relationship between Chapter 562's defined terms and current law, refer to the commentary for the provision in which the term is initially defined.

APPENDIX

Translation Tables

TRANSLATION TABLE

CURRENT LAW TO PROPOSED CODE

Current Law	Proposed Code	Current Law	Proposed Code
2.015	541.4110	216.302	511.1106
6.731	551.5103	217.175	531.3105
6.734	524.2403	217.181	521.2102
	551.5103	218A.1418	521.2102
6.737	551.5103	253.990	522.2206
6.741	551.5103	258.990	553.5308
6.744	551.5103	311.715	541.4109
6.747	551.5103	311.720	541.4109
6.750	551.5103	311.723	541.4109
6.751	551.5103	311.725	541.4109
6.754	551.5103	311.732	541.4109
6.755	551.5103	311.733	541.4109
6.757	551.5103	311.735	541.4109
6.760	551.5103	311.750	541.4109
6.761	551.5103	311.760	541.4109
11A.040	551.5104	311.765	541.4109
17.170	553.5313	311.770	541.4109
39A.990	553.5301	311.780	541.4109
61.097 - .990	551.5103	311.790	541.4109
65.7641	553.5301	311.800	541.4109
70.990	551.5103	311.810	541.4109
107.990	551.5101	311.820	541.4109
116.047	531.3101	342.035	521.2103
149.040	553.5301	342.265(2)	531.3107
149.083	553.5301	342.335	521.2103
149.090	553.5301	342.400(2)	531.3102
149.380	522.2206	342.465	531.3110
199.492	541.4108	342.615	521.2103
199.493	541.4108	365.015	531.3104
216.300	511.1107	365.020	531.3105

Current Law	Proposed Code	Current Law	Proposed Code
365.030	531.3105	434.610	531.3118
365.040	531.3105	434.620	531.3118
365.050	531.3105	434.630	531.3101
365.100	531.3104		531.3118
365.710	521.2108	434.640	531.3101
365.992(1)	552.5201		531.3118
387.990(2)	551.5104	434.650	521.2103
431.005	504.414		531.3118
431.545	553.5308	434.655	521.2103
432.350	551.5101	434.660	531.3118
432.590	553.5301	434.670	521.2103
433.234	521.2102		531.3118
433.750	522.2206	434.680	531.3118
433.770	522.2206	434.685	531.3118
433.865	521.2102	434.690	521.2109
433.873	522.2206		531.3118
433.875	522.2206	434.695	531.3118
434.095	531.3101	434.700	531.3118
434.155	531.3101	434.710	531.3118
434.225(6)	531.3101	434.715	531.3118
434.310	531.3110	434.720	531.3118
434.320	531.3111	434.730	531.3118
434.340	531.3111	434.840	524.2403
434.442	531.3101	434.855	524.2402
434.445	521.2106	437.420(1)	521.2102
434.550	531.3118	437.420(2)	522.2206
434.560	531.3118	437.420(3)	522.2206
434.570	531.3104	437.420(4)	523.2301
	531.3110	438.060	522.2206
	531.3118	438.160	561.6112
434.580	521.2102	438.180	553.5301
	521.2109	438.210	561.6112
	531.3118	438.240	522.2205
434.590	521.2108	441.035	553.5301
	531.3118	500.010	500.101
434.600	531.3105	500.020	500.103
	531.3118	500.030	500.102

Current Law	Proposed Code	Current Law	Proposed Code
500.040	500.104	503.050(1)	504.416
500.050	506.602	503.050(2)	504.419
500.060	500.105	503.060	504.418
500.070	500.106	503.070(1)	504.416
500.080	500.107	503.070(2)	504.419
	515.1501	503.080(2)	504.419
500.080(17)	509.901	503.090(1)	504.414
500.100	500.102	503.090(2)	504.414
501.010(2)	503.302	503.090(3)	504.414
501.010(3)	501.204	503.110	504.415
	505.502	503.120	505.511
501.010(4)	503.302	503.808(1)	504.417
501.020	501.206	504.020	505.504
501.030	501.204	504.020(3)	505.501
	501.205	504.090	506.604
501.030(1)	505.502	504.120(4)	505.504
501.040	501.205	505.010	506.603
501.050(1)	501.205	505.020	502.253
501.060	501.203	505.020	502.254
	503.303	505.030	506.605
501.070	501.207	505.040	506.606
501.070(1)(c)	505.511	505.050	506.607
501.070(2)	503.304	505.060	506.608
501.070(3)	505.509	506.010	508.801
501.080	505.506		508.807
501.080(1)	503.302	506.020	503.301
501.090	505.507		508.806
502.010	503.301	506.030	503.301
502.020	503.301		508.802
502.030	503.301		508.807
502.040	503.301	506.040	503.301
502.050	507.701		508.803
502.050(2)	507.703		508.807
502.060	507.702	506.050	508.803
503.020	504.400	506.050(4)	508.805
503.030(1)	504.412	506.060	508.806
503.040	504.413	506.070	508.804

Current Law	Proposed Code	Current Law	Proposed Code
506.080	503.301	509.010	514.1404
506.090	503.301	509.020	514.1401
506.100	503.301		514.1501
506.110	502.254	509.030	514.1401
507.010	511.1101		514.1501
507.020	511.1101	509.040	514.1401
	511.1102		514.1501
507.030	511.1103	509.050	514.1401
507.040	511.1104		514.1501
507.050	511.1105	509.060	514.1401
508.010	512.1201		514.1501
508.020	512.1201	509.070	514.1402
508.025	512.1201	509.080	514.1403
508.030	512.1201	510.010	513.1301
508.032	512.1201		513.1302
508.040	512.1201		513.1303
508.050	512.1203		513.1306
508.060	512.1202		513.1307
	522.2205	510.010(7)	562.6204
508.070	512.1202		562.6209
	522.2205	510.010(8)	562.6204
508.075	512.1203		562.6209
508.078	512.1203	510.015	513.1301
508.080	512.1202	510.030	513.1301
	512.1203	510.035	513.1301
508.090	512.1201		513.1302
	512.1205		513.1303
	512.1206		513.1304
508.100	512.1205	510.040	513.1301
508.110	512.1205	510.050	513.1302
508.120	512.1205	510.060	513.1302
508.130	512.1204	510.070	513.1301
	512.1206	510.080	513.1302
508.140	512.1204	510.090	513.1302
508.150	512.1204	510.110	513.1303
508.155	512.1204		513.1304
508.160	553.5305	510.120	513.1304

Current Law	Proposed Code	Current Law	Proposed Code
510.140	513.1305	514.060	521.2105
510.150	562.6201	514.060(4)	521.2110
511.010	523.2303	514.065	521.2105
511.020	523.2301	514.065(4)	521.2110
511.030	523.2301	514.070	521.2107
511.040	523.2301	514.070(4)	521.2110
511.050	508.808	514.080	521.2104
	523.2301		553.5310
511.060	523.2302	514.080(3)	521.2110
511.070	523.2302	514.090	521.2103
511.080	523.2302	514.090(2)	531.3117
511.090	523.2301	514.090(3)	521.2110
512.010	522.2208	514.100	521.2112
512.020	522.2206	514.110	521.2109
512.030	522.2206	514.110(3)	521.2110
512.040	522.2206	514.120	521.2103
512.050	522.2206	514.120(2)	521.2109
512.060	522.2206	514.120(4)	521.2110
512.070	522.2203	514.140	521.2102
	522.2206	514.140(2)	521.2110
512.080	522.2206	514.150	521.2109
513.010	522.2208	514.150(2)	521.2110
513.020	522.2201	514.160	521.2103
513.030	522.2202		531.3104
513.040	522.2203	514.160(2)	521.2110
514.010	521.2113	514.170	521.2103
514.020(1)	521.2111		531.3104
514.020(2)	521.2113	514.170(3)	521.2110
514.020(3)	521.2103	515.010	515.1501
514.030	521.2102	515.020	515.1501
514.030(2)	521.2110	515.030	515.1501
514.040	521.2103	516.010	531.3119
514.040(6)	531.3117	516.020	531.3101
514.040(7)	531.3117	516.030	531.3101
514.040(8)	521.2110	516.040	531.3101
514.050	521.2108		531.3102
514.050(2)	521.2110	516.110	531.3103

Current Law	Proposed Code	Current Law	Proposed Code
516.120	531.3101	520.010(2), (4), (5)	553.5306
516.130	531.3101	520.015	553.5306
517.010	531.3119	520.020	553.5306
517.010(1)	531.3105	520.030	553.5306
517.010(2)	531.3107	520.040	553.5306
517.010(3)	531.3107	520.050	553.5307
517.010(4)	531.3112	520.060	553.5307
517.010(5)	531.3105	520.070	553.5308
517.010(6)	531.3113	520.080	553.5308
517.020	531.3105	520.090	553.5305
517.030	531.3106	520.095	553.5304
517.040	531.3106	520.100	553.5304
517.050	531.3107	520.110	553.5303
517.060	531.3108	520.120	553.5303
517.070	531.3108	520.130	553.5303
517.080	531.3109	521.010	551.5105
517.090	531.3110	521.020	551.5101
517.100	531.3111	521.030	551.5102
517.110	531.3112	521.040	551.5102
517.120	531.3113	521.050	551.5101
518.010	531.3119	522.010	551.5105
518.010(2)	531.3116	522.020	551.5103
518.010(3)	531.3116	522.030	551.5103
518.020	531.3114	522.040	551.5104
518.030	531.3114	523.010	552.5201
518.040	531.3115		552.5206
518.050	531.3115	523.020	552.5201
518.060	531.3115	523.030	552.5201
518.070	531.3116	523.040	552.5201
519.020	553.5301	523.050	552.5201
519.030	553.5302	523.060	552.5201
519.040	552.5203	523.070	552.5201
519.050	552.5204	523.080	552.5201
519.055	552.5204	523.090	552.5201
519.060	552.5205	523.100	552.5202
520.010	553.5316	523.110	552.5203
520.010(1), (3)	553.5307	524.010	553.5316

Current Law	Proposed Code	Current Law	Proposed Code
524.010(1)	553.5312	525.125	562.6207
524.010(2)	553.5313	525.130	562.6207
524.010(3), (4)	553.5309	525.140	561.6110
524.020	553.5309	525.150	561.6111
524.030	553.5309	525.160	561.6104
524.040	553.5310	526.020	524.2401
524.045	553.5310	526.050	524.2402
524.050	553.5310	526.060	524.2403
524.055	553.5311	526.070	524.2404
524.060	553.5312	527.200	522.2205
524.070	553.5312	527.205	522.2205
524.090	553.5312	527.210	522.2205
524.100	553.5313	529.010(1)	562.6206
524.110	553.5314	529.020	562.6204
524.120	553.5312	529.030	562.6206
524.130	553.5315	529.040	562.6206
525.010	553.5316	529.050	562.6206
	561.6113	529.070	562.6205
525.010(3)	561.6105	529.080	562.6204
525.010(4)	561.6108	529.090	562.6204
525.010(5)	561.6101		562.6206
525.020	561.6101	530.010	541.4101
525.030	561.6101	530.020	541.4102
525.040	561.6102	530.030	541.4103
525.050	561.6103	530.040	541.4104
525.060	561.6105	530.050	541.4105
525.070	512.1204	530.060	541.4106
	561.6106	530.064	541.4107
525.080	512.1204	530.065	541.4107
	561.6107	530.070	541.4107
525.090	561.6108	531.010(1)	562.6209
525.100	561.6109	531.010(2)	562.6209
525.105	562.6208	531.010(3)	562.6203
525.110	562.6208		562.6209
525.113	562.6208	531.020	562.6203
525.115	562.6208	531.030	562.6203
525.120	562.6208	531.040	562.6203

Current Law	Proposed Code
531.050	562.6203
531.060	562.6203
531.070	562.6203
531.300(1)	562.6209
531.300(2)	562.6209
531.300(4)	562.6202
531.310	562.6202
531.320	562.6202
531.340	562.6203
531.350	562.6203
531.360	562.6203
531.370	562.6203
532.010	509.901
532.020	509.902
532.030	509.903
532.060	509.903
532.080	509.905
532.090	509.901
	509.903
532.110	509.906
532.120	509.906
533.060	509.906
534.030	509.904
534.040	509.904
534.050	509.904
RCr 8.06	506.604

TRANSLATION TABLE

PROPOSED CODE TO CURRENT LAW

Proposed Code	Current Law	Proposed Code	Current Law
500.101	500.010	503.301	502.010
500.102	500.030		502.020
	500.100		502.030
500.103	500.020		502.040
500.104	500.040		506.020
500.105	500.060		506.030
500.106	500.070		506.040
500.107	500.080		506.080
501.201	none		506.090
501.202	none		506.100
501.203	501.060	503.302	501.010(2)
501.204	501.010(3)		501.010(4)
	501.030		501.080(1)
501.205	501.030	503.303	501.060
	501.040	503.304	501.070(2)
	501.050(1)	503.305	various
501.206	501.020	504.400	503.020
501.207	501.070	504.411	none
501.208	none	504.412	503.030(1)
501.209	various	504.413	503.040
502.251	various	504.414	431.005
502.252	none		503.090(1)
502.253	505.020		503.090(2)
502.254	505.020		503.090(3)
	506.110	504.415	503.110
502.255	various	504.416	503.050(1)
			503.070(1)
		504.417	503.808(1)
		504.418	503.060

Proposed Code	Current Law	Proposed Code	Current Law
504.419	503.050(2)	508.805	506.050(4)
	503.070(2)	508.806	506.020
	503.080(2)		506.060
504.420	various	508.807	506.010
505.501	504.020(3)		506.030
505.502	501.010(3)		506.040
	501.030(1)	508.808	511.050
505.503	none	508.809	various
505.504	504.020	509.901	500.080(17)
	504.120(4)		532.010
505.505	none		532.090
505.506	501.080	509.902	532.020
505.507	501.090	509.903	532.030
505.508	none		532.060
505.509	501.070(3)		532.090
505.510	none	509.904	534.030
505.511	501.070(1)(c)		534.040
	503.120		534.050
505.512	various	509.905	532.080
506.601	none	509.906	532.110
506.602	500.050		532.120
506.603	505.010		533.060
506.604	504.090	511.1101	507.010
	RCr 8.06		507.020
506.605	505.030	511.1102	507.020
506.606	505.040	511.1103	507.030
506.607	505.050	511.1104	507.040
506.608	505.060	511.1105	507.050
506.609	various	511.1106	216.302
507.701	502.050	511.1107	216.300
507.702	502.060	512.1201	508.010
507.703	502.050(2)		508.020
508.801	506.010		508.025
508.802	506.030		508.030
508.803	506.040		508.032
	506.050		508.040
508.804	506.070	512.1201	508.090

Proposed Code	Current Law	Proposed Code	Current Law
512.1202	508.060	513.1305	510.140
	508.070	513.1306	510.010
	508.080	513.1307	510.010
512.1203	508.050	514.1401	509.020
	508.075		509.030
	508.078		509.040
	508.080	514.1401	509.050
512.1204	508.130		509.060
	508.140	514.1402	509.070
	508.150	514.1403	509.080
	508.155	514.1404	509.010
	525.070	514.1501	509.020
	525.080		509.030
512.1205	508.090		509.040
	508.100		509.050
	508.110		509.060
	508.120	515.1501	500.080
512.1206	508.090		515.010
	508.130		515.020
513.1301	510.010		515.030
	510.015	521.2101	none
	510.030	521.2102	217.181
	510.035		218A.1418
	510.040		433.234
	510.070		433.865
513.1302	510.010		434.580
	510.035		437.420(1)
	510.050		514.030
	510.060		514.140
	510.080		
	510.090		
513.1303	510.010		
	510.035		
	510.110		
513.1304	510.035		
	510.110		
	510.120		

Proposed Code	Current Law	Proposed Code	Current Law
521.2103	342.035	521.2110	514.030(2)
	342.335		514.040(8)
	342.615		514.050(2)
	434.650		514.060(4)
	434.655		514.065(4)
	434.670		514.070(4)
	514.020(3)		514.080(3)
	514.040		514.090(3)
	514.090		514.110(3)
	514.120		514.120(4)
	514.160		514.140(2)
	514.170		514.150(2)
521.2104	514.080		514.160(2)
521.2105	514.060		514.170(3)
	514.065	521.2111	514.020(1)
521.2106	434.445	521.2112	514.100
521.2107	514.070	521.2113	514.010
521.2108	365.710		514.020(2)
	434.590	522.2201	513.020
	514.050	522.2202	513.030
521.2109	434.580	522.2203	512.070
521.2109	434.690		513.040
	514.110	522.2204	none
	514.120(2)	522.2205	438.240
	514.150		508.060
			508.070
			527.200
			527.205
			527.210

Proposed Code	Current Law	Proposed Code	Current Law
522.2206	149.380	531.3101	116.047
	253.990		434.095
	433.750		434.155
	433.770		434.225(6)
	433.873		434.442
	433.875		434.630
	437.420(2)		434.640
	437.420(3)		516.020
	438.060		516.030
	512.020		516.040
	512.030		516.120
522.2206	512.040		516.130
	512.050	531.3102	342.400(2)
	512.060		516.040
	512.070	531.3103	516.110
	512.080	531.3104	365.015
522.2207	none		365.100
522.2208	512.010		434.570
	513.010	531.3104	514.160
523.2301	437.420(4)		514.170
	511.020	531.3105	217.175
	511.030		365.020
	511.040		365.030
	511.050		365.040
	511.090		365.050
523.2302	511.060		434.600
	511.070		517.010(1)
	511.080		517.010(5)
523.2303	511.010		517.020
524.2401	526.020	531.3106	517.030
524.2402	434.855		517.040
	526.050	531.3107	342.265(2)
524.2403	434.840		517.010(2)
	526.060		517.010(3)
	6.734		517.050
524.2404	526.070	531.3108	517.060
524.2405	none		517.070

Proposed Code	Current Law	Proposed Code	Current Law
531.3109	517.080	531.3118	434.570
531.3110	342.465		434.580
	434.310		434.590
	434.570		434.600
	517.090		434.610
531.3111	434.320		434.620
	434.340		434.630
	517.100		434.640
531.3112	517.010(4)		434.650
	517.110		434.660
531.3113	517.010(6)		434.670
	517.120		434.680
531.3114	518.020		434.685
	518.030		434.690
531.3115	518.040		434.695
	518.050		434.700
	518.060		434.710
531.3116	518.010(2)		434.715
	518.010(3)		434.720
	518.070		434.730
531.3117	514.040(6)	531.3119	516.010
	514.040(7)		517.010
	514.090(2)		518.010
531.3118	434.550	541.4101	530.010
	434.560	541.4102	530.020
		541.4103	530.030
		541.4104	530.040
		541.4105	530.050
		541.4106	530.060
		541.4107	530.064
			530.065
			530.070
		541.4108	199.492
			199.493

Proposed Code	Current Law	Proposed Code	Current Law
541.4109	311.715	551.5103	522.020
	311.720		522.030
	311.723		6.731
	311.725		6.734
	311.732		6.737
	311.733		6.741
	311.735		6.744
	311.750		6.747
	311.760		6.750
	311.765		6.751
541.4109	311.770		6.754
	311.780		6.755
	311.790		6.757
	311.800		6.760
	311.810		6.761
	311.820		61.097 - .990
541.4110	2.015		70.990
551.5101	107.990	551.5104	11A.040
	432.350		387.990(2)
	521.020		522.040
	521.050	551.5105	521.010
551.5102	521.030		522.010
	521.040	552.5201	365.992(1)
			523.010
			523.020
			523.030
			523.040
			523.050
			523.060
			523.070
			523.080
		552.5201	523.090
		552.5202	523.100
		552.5203	519.040
			523.110
		552.5204	519.050
			519.055

Proposed Code	Current Law	Proposed Code	Current Law
552.5205	519.060	553.5310	514.080
552.5206	523.010		524.040
553.5301	149.040		524.045
	149.083		524.050
	149.090	553.5311	524.055
	39A.990	553.5312	524.010(1)
	432.590		524.060
	438.180		524.070
	441.035		524.090
	519.020		524.120
	65.7641	553.5313	17.170
553.5302	519.030		524.010(2)
553.5303	520.110		524.100
	520.120	553.5314	524.110
	520.130	553.5315	524.130
553.5304	520.095	553.5316	520.010
	520.100		524.010
553.5305	508.160		525.010
	520.090	561.6101	525.010(5)
553.5306	520.010(2), (4), (5)		525.020
	520.015		525.030
	520.020	561.6102	525.040
	520.030	561.6103	525.050
	520.040	561.6104	525.160
553.5307	520.010(1), (3)	561.6105	525.010(3)
	520.050		525.060
	520.060	561.6106	525.070
553.5308	258.990	561.6107	525.080
	431.545	561.6108	525.010(4)
	520.070		525.090
	520.080	561.6109	525.100
553.5309	524.010(3), (4)	561.6110	525.140
	524.020	561.6111	525.150
	524.030	561.6112	438.160
			438.210
		561.6113	525.010
		562.6201	510.150

Proposed Code	Current Law	Proposed Code	Current Law
562.6202	531.300(4)	562.6209	510.010(7)
	531.310		510.010(8)
	531.320		531.010(1)
562.6203	531.010(3)		531.010(2)
	531.020		531.010(3)
	531.030		531.300(1)
	531.040		531.300(2)
	531.050		
	531.060		
	531.070		
	531.340		
562.6203	531.350		
	531.360		
	531.370		
562.6204	510.010(7)		
	510.010(8)		
	529.020		
	529.080		
	529.090		
562.6205	529.070		
562.6206	529.010(1)		
	529.030		
	529.040		
	529.050		
	529.090		
562.6207	525.125		
	525.130		
562.6208	525.105		
	525.110		
	525.113		
	525.115		
	525.120		

APPENDIX

Letter from the Office of the Attorney General



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

ALBERT B. CHANDLER III
ATTORNEY GENERAL

1024 CAPITAL CENTER DRIVE
FRANKFORT, KY 40601-8204

May 19, 2003

Mr. Nick Muller
Executive Director
Kentucky Criminal Justice Council Bush Building
403 Wapping Street
Frankfort, Kentucky 40601

Dear Mr. Muller:

I am writing to you concerning the *Final Report* of the Penal Code Workgroup, a subcommittee of the Criminal Justice Council's Penal Code and Sentencing Committee. Specifically, the purpose of this letter is to set out the position of the Office of the Attorney General regarding the Work Group's *Final Report*.

At the May 2002 meeting of the Work Group I, along with representatives of the commonwealth's Attorneys Association and the County Attorneys Association proposed limiting the scope of the project to amendments to Kentucky's existing penal code. Then, as now, we believe that an entirely new penal code is unwarranted, especially since a comprehensive Northwestern University study released in May 2000 ranked Kentucky's current criminal code as the 11th best in the nation for clarity and effectiveness. An entirely new penal code is unnecessary and would lead to years of uncertainty and new litigation as an entirely new penal code is interpreted by the appellate courts.

While the Office of the Attorney General shared the concerns voiced by the representatives of the Commonwealth's Attorneys Association and the County Attorneys Association, I continued to attend the Work Group meetings. The purpose of my continued participation in the Work Group was to monitor the Work Group's activities and express concerns when appropriate. My participation in those meetings should not be construed or interpreted as an approval by the Office of the Attorney General of the scope of the project or of the proposed new penal code contained in the *Final Report*.

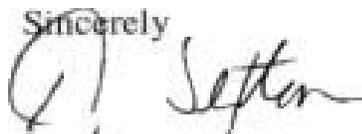
Mr. Nick Muller

May 19, 2003

Page Two

As I have stated throughout my involvement in the Work Group, there has not been sufficient justification set out for a complete rewrite of the Kentucky Penal Code and all the years of uncertainty and new appellate litigation that will necessarily follow if Kentucky abandons our well-developed body of law. Where changes do need to be made to address problems in the law, it should be done in relation to our current penal code. I thank you for your time and attention to this letter and I look forward to working with you in the future.

Sincerely

A handwritten signature in black ink, appearing to read "D. Sexton". The signature is written in a cursive style with a large initial "D" and a long horizontal stroke at the end.

David A. Sexton