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Final Report of the Illinois Criminal Code Rewrite and Reform Commission

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FINAL REPORT

of the

ILLINOIS CRIMINAL CODE REWRITE AND REFORM COMMISSION

Volume 1

August 2003

This *Final Report* is available online at the website of
the Illinois Criminal Code Rewrite & Reform Commission:

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George H. Ryan
Governor

ILLINOIS CRIMINAL CODE

REWRITE AND REFORM COMMISSION

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GEORGE H. RYAN
GOVERNOR

January 1, 2003

To the People of Illinois,

In the years since it was enacted, the Illinois Criminal Code of 1961 has undergone numerous amendments. The sheer volume of the current code has increased from 72 pages as originally enacted to over 1,200 today. Nearly all of these amendments and additions were made on an *ad hoc* basis and without any comprehensive review of the criminal code as a whole.

As a result, several fundamental problems plague the current criminal code, much as they did prior to 1961. Provisions overlap with or contradict other provisions, offenses have become obsolete or out of touch with significant changes in society, penalties are disproportionate to the harm involved or in comparison to other offenses, major criminal offenses are defined outside the Criminal Code, and many important common-law rules remain in force but uncoded.

In response to these concerns, I ordered the creation of a Commission of over thirty prominent Illinois prosecutors, defense attorneys, law enforcement officials, judges, and law professors to rewrite and reform Illinois criminal law. I charged the Commission and its staff to update the forty-year-old Illinois Criminal Code to more adequately address significant changes in our society, and make it fairer for victims and defendants, while, at the same time, easier to read and understand.

In little more than two years, the Commission undertook a substantive recodification effort that resulted in a new Proposed Criminal Code that is clearer, more comprehensive, and fairer for all the citizens of Illinois, and is a fraction of the size of the current code. The Proposed Code addresses the many significant changes in our society over the last forty years and ensures that the laws of Illinois will provide a cohesive and fair approach to crime and punishment in the years to come.

I thank the Commission and its staff for their hard work.

Sincerely,

A handwritten signature in black ink, reading "George H. Ryan".

GEORGE H. RYAN
Governor



OFFICE OF THE GOVERNOR
JRTC, 100 WEST RANDOLPH, SUITE 16
CHICAGO, ILLINOIS 60601

GEORGE H. RYAN
GOVERNOR

January 1, 2003

Dear Governor,

Enclosed please find the Final Report of the Illinois Criminal Code Rewrite and Reform Commission. The Report includes a Proposed Criminal Code for the State of Illinois and relevant supporting materials, including commentaries explaining the new provisions and how they relate to current law, a table summarizing the relative grades of punishment for all offenses, and tables relating the proposed provisions to their corresponding provisions in current Illinois law.

The Final Report is the culmination of over two years of hard work by the Commission and its staff. Their efforts produced a new Criminal Code that is clearer, more comprehensive, and more rational in its organization and grading than the current code.

I want to personally thank the members of the Commission who regularly attended meetings, studied the numerous draft proposals and supporting materials, and submitted invaluable comments and suggestions on how to better Illinois criminal law. I also thank the Reporter, Paul H. Robinson, and the Commission staff for spending literally thousands of hours initiating draft proposals and producing the volumes of supporting materials without which the Commission could not have done its work.

Sincerely,

A handwritten signature in black ink, reading "Matthew R. Bettenhausen".

Matthew R. Bettenhausen, Chairman
Criminal Code Rewrite and Reform Commission



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REPORTER'S PREFACE

Since the General Assembly adopted the Illinois Criminal Code of 1961, new insights have emerged regarding what a criminal code should address, and how it should do so. Moreover, the broader legal landscape has changed greatly. This Commission was predicated on the belief that — as was the case in 1961, and may well be the case again in another forty or fifty years — the time was ripe to take a step back and conduct a panoramic review of the Illinois Criminal Code. The two volumes of this *Final Report* are the fruits of that review.

The Proposed Criminal 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 law easier to understand and apply; and to ensure that criminal offenses and legal rules 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 Proposed Code.

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 criminal code is to provide notice to citizens of what conduct is prohibited. Clear and accessible writing enables provision of true 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 criminal 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*. A criminal 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 1961 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 Illinois Compiled Statutes rather than in the criminal code. 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 criminal 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 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 about the rules of the criminal law 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 criminal 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 criminal code's substantive prohibitions and 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 Illinois Compiled Statutes, by means of a “conforming amendments” bill to be enacted by the General Assembly contemporaneously with the new criminal code.

Second, the Proposed Code does not address certain categories of offenses. Drug offenses, weapon offenses, and various “crime-control” offenses designed primarily, if not exclusively, 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 (currently empty) Code Articles reserved for such offenses, through “conforming amendments” legislation that will 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” to be presented to the General Assembly. 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. In the event that the General Assembly decides to adopt the Proposed Code, the drafters have prepared more detailed instructions (excluded, due to considerations of length, from these volumes) concerning the necessary conforming amendments.

In other instances, language in the Proposed Code itself makes clear its intent to retain current law as to an issue. For example, the proposed provisions governing abortion (Section 4107) and charging an unlawful fee for an adoption (Section 4108) explicitly incorporate by reference the complicated regulatory schemes currently set forth in the Illinois Abortion Law of 1975 and the Adoption Compensation Prohibition Act, respectively. Similarly, the proposed bid-rigging offense (Section 3110) defines a Class 3 felony criminalizing knowingly engaging in conduct that violates bidding rules currently codified in Article 33E of the current code. Incorporating those rules by reference, but preserving their regulatory content outside Chapter 720, avoids cluttering the Code with technical regulatory provisions. At the same time, it is necessary to overtly incorporate the relevant offenses within the criminal code to avoid application of the rule (stated in proposed Section 902) that non-Code offenses can be graded no higher than Class 4 felonies.

As discussed above, the drafters have sought to retain reasonable policy decisions embodied in current law where possible. In recognition that such value judgments are best left to the legislature, the Proposed Code includes footnotes identifying several substantive policy issues for the General Assembly to resolve. Each footnote presents the arguments on both sides of the issue and states the Reporter’s recommendation, if any. Similarly, the language in proposed Section 1109 incorporating Recommendations 28 and 61 of the Report of the Governor’s Commission on Capital Punishment is

bracketed in recognition that the General Assembly is still in the process of responding to that Commission's proposed procedures and standards of adjudication for death-penalty cases.

As a final matter, it is important to note that proposed Article 900 is not intended to address all issues (or indeed, any issues) regarding the sentencing and disposition of offenders. Rather, Article 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 Article 900 are themselves tentative. The primary focus of the Commission'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 would like to thank the Commission's staff for its excellent and invaluable work, often under difficult circumstances. T.R. Eppel and Scott England have both given dedicated service. We owe a great debt to Michael Cahill, Staff Director, for his inspired leadership. His contributions to this work have been enormous and unheralded.

In closing, I would like to commend Illinois State officials for their foresight and commitment to explore the development of a new criminal code. The serious problems in the current Illinois Criminal 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 Illinois to take the lead in at least exploring how a "second wave" of American criminal law recodifications might be stimulated.

Paul H. Robinson
Reporter, Illinois Criminal Code Rewrite and Reform Commission
Chicago, January 2003

HISTORY OF CCRRC WORK

BACKGROUND

In 1954, the Governor and Supreme Court of Illinois, along with the Illinois State and Chicago Bar Associations, formed a Joint Committee to craft a new criminal code for Illinois. At the time, criminal provisions were scattered throughout more than 100 chapters of the Illinois statutes.¹ Many of the offenses were contradictory and overlapping: for example, there were seventy-four sections involving forms of theft, and eighteen sections relating to assaults.² Moreover, offense penalties were often disproportionate to the harm involved or in comparison to other offenses.³

The Joint Committee began its task by studying the Model Penal Code and recently revised codes of other states. The Joint Committee then formed a subcommittee to handle the day-to-day drafting of the Proposed Code and report regularly to the full Committee. Some six years later, the Joint Committee had completed a draft Code to be presented to the General Assembly. While the new Code recodified practically all criminal offenses, the Code featured few major changes to the substantive criminal law.⁴ For the most part, the Committee borrowed from prior criminal law, where that law's dictates were rational and coherent, in defining offenses and setting penalties.⁵

The Committee's work received widespread support from practitioners, judges, academics, and legislators. Its Proposed Code was enacted in June 1961 with few major revisions. After becoming effective on January 1, 1962, the Code appears to have been accepted by practitioners with little difficulty or controversy.⁶

In the years since 1961, however, numerous amendments have greatly reduced the utility and clarity of the original criminal code. The sheer volume of the code has increased from 72 pages as originally enacted to over 1,200 today.⁷ Nearly all of these amendments and additions were made

¹See ILL. ANN. STAT. ch. 38 (Smith Hurd 1964), Committee Foreword to Tentative Final Draft of the Proposed Illinois Revised Code of 1961 at vii [hereinafter Committee Foreword].

²See id.

³For example, stealing a horse was punished more seriously than stealing a more expensive automobile. See id.

⁴See Charles H. Bowman, The Illinois Criminal Code of 1961, 50 ILL. B.J. 34, 35 (Sept. 1961).

⁵See CLAUDE R. SOWLE, A CONCISE EXPLANATION OF THE ILLINOIS CRIMINAL CODE OF 1961 (1961).

⁶For example, in a meeting on June 29, 1962, the Illinois State's Attorneys Association reported that the Code was "working well in practice with only a few minor problems due primarily to unfamiliarity." Richard B. Austin, Joint Committee to Revise Criminal Code, 51 ILL. B.J. 96 (1962).

⁷See Exec. Order No. 9 (May 4, 2000) (creating the Illinois Criminal Code Rewrite and Reform Commission).

on an *ad hoc* basis and without a comprehensive review of the code as a whole. As a result, several fundamental problems plague the code, much as they plagued Illinois criminal law prior to 1961. Provisions overlap with or contradict other provisions. Offenses have become obsolete or out of touch with current societal norms. Penalties are disproportionate to the harm caused or in comparison with other provisions. Numerous major criminal offenses are defined in statutes outside the criminal code. Conversely, various procedural, sentencing, and regulatory provisions that properly belong elsewhere — in the Code of Criminal Procedure, the Code of Corrections, or another chapter related to the provision’s subject matter — appear within the criminal code. Many pre-existing common law rules, though never codified (and, quite possibly, deliberately rejected) by the General Assembly, remain in force through case law.⁸

FORMING THE COMMISSION

By March 2000, the Criminal Code of 1961 had grown so outdated and unwieldy that Governor George Ryan issued an executive order creating the Illinois Criminal Code Rewrite and Reform Commission (“CCRRC” or “Commission”). In creating the CCRRC, Governor Ryan stated that “the numerous amendments and additions to the Criminal Code have made it overly complex and difficult to interpret and apply,” such that “a substantive re-codification process is necessary to address the significant changes in our society” and “to ensure a cohesive and fair approach to crime and punishment for the next century.”⁹

Governor Ryan appointed more than thirty prominent Illinois law enforcement officials, prosecutors, defense attorneys, judges, and professors to serve as voting Commission members. Deputy Governor of Criminal Justice and Public Safety Matthew Bettenhausen was appointed Chairman of the Commission, and Mark Warnsing, counsel to the Governor, was named Executive Director. Governor Ryan also designated four Vice Chairs for the Commission: Joel Bertocchi, Illinois Solicitor General; Illinois Appellate Court Justice Robert Steigmann; Rita Fry, Cook County Public Defender; and Peter Bensinger, Chairman of the Illinois Criminal Justice Information Authority. In addition, four prominent Illinois professors were invited to assist the Commission: Northwestern University School of Law Professor Paul Robinson agreed to act as the Commission’s Reporter; University of Illinois College of Law Professors Wayne R. LaFave and Andrew Leipold accepted appointments as special counsel; and Illinois State University Professor Paula J. Pomeranke agreed to serve the Commission as a “plain English” drafting consultant.

⁸See generally Why a New Criminal Code?, CCRRC FINAL REPORT vol. 1 at 1st pg–last pg.

⁹Exec. Order, supra note 7.

In addition to the Commission members and staff, various other interested parties were invited to participate in the rewrite process. The Commission leadership and staff kept members of the Illinois General Assembly informed of the Commission's progress in drafting the new Code. Tentative drafts and supporting materials were sent to the leaders of the respective Judiciary Committees of the General Assembly: Representatives Rick Winkel and Mary K. O'Brien and Senators Carl Hawkinson and John Cullerton.¹⁰ Moreover, Commission leaders and staff met on several occasions with the legislative leaders and members of their staffs to explain the proposed drafts and receive comments on the project.¹¹ Other interested parties not on the Commission were also involved in or informed of the drafting process. For example, proposed drafts and supporting materials were routinely sent to Robert P. Boehmer of the Illinois Criminal Justice Information Authority, and in August 2002, a full draft of the Proposed Code with supporting commentaries was sent to the Criminal Law Section of the Illinois State Bar Association.

DEVELOPING A DRAFTING PROCESS

The full Commission first met on August 11, 2000. Prior to that meeting, the Reporter sent a letter to each Commission member including an agenda for the meeting and a package of sample materials, related to theft offenses, designed to help the Commission decide how the drafting process should proceed.¹² The sample materials included proposed new theft provisions and, for purposes of background and comparison, theft provisions from the current criminal code, the original Criminal Code of 1961, the Model Penal Code, and the Report of the National Commission on Federal Criminal Law.¹³ Commissioners were asked to study the theft materials, focusing on two issues: first, their thoughts about the proposed grading scheme for the theft offenses as compared to the existing Illinois provisions; and second, their view of the general theft offenses that were proposed to replace the numerous specialized theft offenses in the existing criminal code.

¹⁰See Letter from Matthew R. Bettenhausen to Representative Rick Winkel and Senator Carl E. Hawkinson, January 17, 2002 (on file with Commission staff).

¹¹Senator Hawkinson, Chairman of the Senate Judiciary Committee, responded to the drafts with several suggestions, stating that he was a "strong supporter of the Commission's task" and that, in general, he believed "the draft proposals reflect progress in bringing better order to the categories and progress toward the goal of proportionality." See Letter from Carl E. Hawkinson to Matthew Bettenhausen, January, 2001 (on file with Commission staff).

¹²Also included for Commission review were selected readings on the principles of criminal code drafting, a proposed table of contents for the entire new Code, including a general part and all the specific offenses, and a sample of different commentary styles for the Code's Official Commentary. *Id.*

¹³The Reporter noted in his cover letter that the materials had not gone through the typical proposed drafting process, in that the background materials had not yet been annotated to include relevant Illinois case law and the proposed provisions had not been reviewed by a drafting committee.

Using these materials as a starting point, the Commission developed an initial drafting process. After reviewing current Illinois law and other relevant sources, the Reporter, with the help of the Commission staff, would generate a first draft of proposed provisions. These drafts, along with a set of background materials similar to those distributed prior to the August 11 meeting, would be distributed to a small group of Commissioners and advisors for a period of review and comment. These reviewers would respond with comments on the proposed drafts, 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 changes, asking the reviewer follow-up questions, or flagging the issue as a policy matter for discussion by the full Commission.

Finally, the Reporter and staff would develop revised drafts for a similar process of review and comment by the entire Commission. The drafts were to be distributed to the full Commission with the relevant background materials and posted on the Commission's website in a special "members only" area. The aim of the process was to create a written dialogue of comments and responses while highlighting those issues that required discussion and resolution by the full Commission.

The Reporter initiated the review-and-comment process in September 2000 by distributing drafts of the proposed property offenses (Articles 2100 to 2400), with corresponding background materials, to the designated small group of reviewers.¹⁴ Each of these reviewers submitted written comments, to which the Reporter provided written responses that either provided further explanation regarding the proposal, adopted the reviewer's suggested change, or highlighted the issue as a policy matter for consideration by the full Commission.

This process resulted in a revised set of property drafts that were sent with the accompanying background materials to the full Commission on October 6, 2000 for a second period of review and comment. Commissioners were asked to review the materials and respond with comments prior to the full Commission meeting scheduled for November 17, 2000. To further facilitate discussion of the drafts, each Commissioner was invited to participate in two small drafting sessions on October 24, 2000, one in Chicago and one in Champaign. In all, seventeen Commissioners and interested parties submitted written comments on the draft property offenses prior to the November

¹⁴In addition to the Reporter, this group consisted of Vice Chairman Justice Robert Steigmann, Professor Andrew Leipold, Cook County Assistant Public Defender Jeffery Howard, Executive Director Mark Warnsing, and staff members Michael Cahill and Theodore Eppel (attorney Scott England had not yet joined the staff). The staff also delivered advance copies of the proposed property offense drafts to the Cook County State's Attorney's Office ("Office"), inviting that Office to participate in the review process, but the Office did not designate an attorney to work with the staff in such a capacity.

meeting.¹⁵ In response to these comments and discussions, the Reporter made various changes to the property drafts and identified twenty-one policy issues for resolution by the full Commission, annotating the proposed draft to include footnotes explaining both sides of each policy issue.

The Reporter sent an agenda and materials to Commissioners in advance of the November 17, 2000 meeting. Included in the materials were an annotated set of property offense drafts that reflected all the changes agreed upon in the review-and-comment period, as well as the “pro-con” footnotes highlighting the twenty-one remaining issues for resolution by the full Commission. The staff also included a “redline” version of the drafts showing all changes that had thus far been made to the original tentative proposed draft; a first draft of commentaries explaining the meaning and effect of the proposed provisions; a table showing the relative grades of the proposed property offenses; and a set of tables that matched the current Chapter 720 property offenses with their corresponding draft provisions, and vice versa.

After full Commission debate, the process to this point would represent a complete cycle of the initially planned drafting process, which would then be repeated for each group of Proposed Code articles and for review of the accumulated articles in a complete Proposed Code draft.

CLARIFYING THE SCOPE OF THE PROJECT

Governor Ryan charged the Commission to update the forty-year-old criminal code to make it “more fair for victims and defendants and easier to read and understand.”¹⁶ To accomplish this task, Governor Ryan asked the Commission to “conduct a comprehensive study and analysis of the existing criminal laws and the procedural and sentencing laws” of Illinois.¹⁷ Following such review, the Commission was to

[p]ropose simple and clear language and a coherent structure for the criminal statutes so that the Illinois criminal laws ... will be more easily applied and understood by both the public and legal practitioners; [r]eview existing offenses...to

¹⁵In addition to the reviewers mentioned above, the following Commissioners or members of their staffs submitted written comments on the draft property offenses: Stephen W. Baker, Richard A. Devine, Don Hays, Walter Jones, William Quinlan, Mark Rotert, Chuck Schiedel, Patrick Tuite, Stewart Umholtz, and Gregory P. Vazquez. Professor William Schroeder of Southern Illinois University School of Law also provided comments.

¹⁶News Release, May 4, 2000.

¹⁷Exec. Order, supra note 7. Although Governor Ryan’s order advised the Commission to review the procedural and sentencing rules in addition to the criminal code, the Commission decided early in the process that it should first focus solely on drafting a new criminal code before addressing procedural or sentencing issues.

determine if the penalty provided is proportional to the seriousness of the offense committed and to the penalties provided for other offenses . . . and [p]ropose new provisions which address the changing nature of crime[.]¹⁸

Although the Governor's order forming the Commission provided a mandate for sweeping change, by the time the Commission had been in existence for a few months, it was clear that there was considerable debate among Commissioners as to the proper scope of the project. Some Commissioners favored a limited "redline" approach, believing that the core of the CCRRC's mission was to eliminate unnecessary provisions rather than to revise existing provisions or create new ones. Others favored a more comprehensive overhaul of the current code.¹⁹ Vice Chair Peter Bensinger summarized the debate in an open letter to Chairman Matthew Bettenhausen, noting that the issue was "[w]hether the Commission should, in essence, correct the existing Criminal Code or provide the General Assembly with an opportunity to enact a new Code, drawing on the case law and legislative intent of the existing Code but not necessarily following the same exact format or language."²⁰ Mr. Bensinger supported the latter course, asserting that "the existing Criminal Code is not only in many cases redundant and contradictory but confusing and difficult to understand."²¹

Commissioner and DuPage County State's Attorney Joseph Birkett expressed a different view in an open letter to Reporter Paul H. Robinson.²² Commissioner Birkett argued that the Commission should not "write a completely new Criminal Code for Illinois," but should devote its resources "to an examination of current laws and suggest appropriate changes in the arrangement of the Code so that it is simplified."²³

The proper scope of the project was discussed at the November 17, 2000 Commission meeting. To meet the concerns of the Commissioners who favored a more limited rewrite of existing criminal law, a revised drafting process was proposed. First, the Reporter committed the staff to working with Commissioners in advance of drafting proposed offenses to identify concerns with existing law. Second, the Reporter agreed to include case law, as well as the existing Code, in preparing background materials describing the current state of Illinois law. Most significantly, the Reporter

¹⁸Id.

¹⁹See Aaron Chambers, Clean-Up of State's Criminal Code is Slow Going, CHI. DAILY L. BULL., Apr. 21, 2001.

²⁰Letter from Peter Bensinger to Matthew Bettenhausen, Nov. 8, 2000 (on file with Commission staff).

²¹Id.

²²Letter from Joseph E. Birkett to Paul H. Robinson, Oct. 24, 2000 (on file with Commission staff).

²³Id.

agreed to provide, for each proposed draft provision, detailed commentary explaining the provision's relation to existing Illinois law — including the criminal code itself, its original commentary, other statutes, case law, and pattern jury instructions — and the bases for any proposed changes.²⁴ As the drafting process went on, the staff also facilitated review and comment by Commissioners by providing other supporting materials, such as tables summarizing how the draft provisions corresponded to current provisions, tables listing the relative grade of punishment for each offense, and memoranda on relevant issues such as the history of the original Criminal Code of 1961 and the proper objectives and purposes of the current reform project.

PREPARING THE PROPOSED CODE AND COMMENTARY

Under the revised process, the Reporter drafted proposed General Part provisions and the staff produced detailed commentaries to those provisions as well as relevant background materials. These materials were distributed to the entire Commission at the June 22, 2001 Commission meeting.²⁵

Commissioners met again on July 20, 2001 to discuss the General Part drafts.²⁶ Due to the amount of materials the staff had distributed, it was agreed that Commissioners would have more time to review the General Part materials and provide written comments. Over the next three months, ten commissioners sent written comments on the General Part drafts, including many suggested changes that were incorporated by the Reporter or became the basis of seven “pro-con” footnotes highlighting policy issues for debate and resolution by the full Commission.

In August 2001, Governor Ryan announced that he would not seek reelection in 2002. The Commission leadership and Reporter thus concluded it was necessary to complete the drafting process before January 2003, when the Governor's term would conclude. To meet this goal, the Reporter and staff set their immediate agenda to draft proposed offenses and supporting materials for the remaining Special Part articles. In January 2002, the Reporter sent Commissioners the proposed drafts for much of the Special Part (Articles 2100 to 6200) with detailed commentaries, conversion tables illustrating how the draft provisions corresponded to current Illinois provisions, and grading tables showing the relative grade for each offense. At the same time, the Reporter sent more preliminary drafts for offenses against the person (Articles 1100 to 1500), for which the supporting materials had not yet been finalized.

²⁴See Letter from Matthew Bettenhausen to Commissioners, Apr. 24, 2001 (on file with Commission staff).

²⁵Following this meeting, the Reporter and staff met with attorneys from the Cook County and DuPage County State's Attorneys' and Public Defenders' offices to discuss in detail the General Part drafts and commentaries.

²⁶Cf. Letter from Matthew Bettenhausen to Commissioners, June 28, 2001 (on file with Commission staff).

In early March 2002, the Reporter sent Commissioners three sets of materials for review and discussion at the March 15, 2002 Commission meeting: (1) updated drafts of proposed Special Part Articles 2100 through 6200, including 31 policy issues for Commission resolution;²⁷ (2) an updated grading table showing the relative grades for all proposed offenses;²⁸ and (3) a detailed memorandum explaining why a new criminal code was necessary in Illinois (reproduced in this *Final Report* as “Why a New Criminal Code?”).

The March 15, 2002 Commission meeting focused primarily on the relative grading of offenses as shown in the grading tables prepared by the staff. Following the meeting, the Reporter revised the grades of several offenses to reflect Commissioners’ comments and concerns. In April 2002, the Reporter sent revised grading tables to Commissioners along with revised drafts for the proposed offenses against the person (Articles 1100 to 1500), their corresponding commentaries, and background materials.

In the ensuing months, recognizing that the upcoming change in administration placed efficiency at a premium, the Reporter and staff worked to finalize the Proposed Code, the official commentaries, and the other supporting materials. Because of the now-limited timetable, it was agreed that the Reporter should move forward to prepare a full “clean” and comprehensive version of the Code and its supporting commentary, rather than taking time for the Commission to discuss and resolve the broad policy issues already identified and flagged on the drafts. Nonetheless, the Reporter and staff highlighted in 39 “pro-con” footnotes those policy issues they thought the General Assembly would likely want to address, including some issues that had initially been raised by individual Commissioners, but not resolved by the full Commission. The staff reviewed the entire Proposed Code to ensure that terminology was consistent across its various Articles and updated and expanded the commentary to clarify all proposed revisions and their bases. This work was completed in December 2002.

The resulting two-volume *Final Report* will be distributed to Commissioners, members of the General Assembly, each county’s State’s Attorney and Public Defender, and various other interested parties in the State, including the Illinois Criminal Justice Information Authority and the Illinois and Chicago Bar Associations, law libraries in the State, and law professors inside and outside of the State who express an interest in the Commission’s work.

²⁷The Reporter concluded that most of the issues highlighted for Commission resolution were value judgments properly best left to the Commission’s discretion, and thus offered no recommendation on 25 of the 31 issues, and only mild recommendations on the others. See Letter from Matthew Bettenhausen to Commissioners, Mar. 7, 2001 (on file with Commission staff).

²⁸The Reporter reminded Commissioners that the purpose of the grading tables was to foster discussion of the relative *grading* of offenses, for purposes of ensuring proportionality, and not the absolute *sentence* assigned to any offense grade, as the sentencing ranges for particular grades had not yet been determined. See id.

WHY A NEW CRIMINAL CODE?

EXECUTIVE SUMMARY

In the forty years since the legislature adopted the Criminal Code of 1961, thousands of individual changes to the law have led to numerous inconsistencies, redundancies, ambiguities, and contradictions in the Code. As was the case in 1961, the time is ripe to take a step back and conduct a more panoramic review of the Illinois Criminal Code.

The Proposed 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 cohesive and relate to one another in a consistent and rational manner.

In developing the Proposed Code, the drafters were guided by five general drafting principles, set forth below. The first three principles relate to the form of the Code; the final two principles relate to its content.

1. Use clear, accessible language and organization

One of the critical functions of a criminal code is to provide notice to citizens of what conduct is prohibited. Clear and accessible writing enables provision of true 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. Current Illinois law, however, is often less clear than it could, and should, be.

- Various current provisions, such as the mail-fraud provision, use undefined terms whose meaning is not obvious, and frequently employ legal terms of art without explaining their meaning. In such cases, users of the criminal code (including judges, lawyers, law enforcement officials, and jury members) must guess at the legislature's intended meaning.
- The current provisions regarding eavesdropping provide an example of poor structure, as they create a complicated maze of offenses, exceptions, defenses, and "exemptions." Some acceptable conduct is noted within the offense definitions; some falls under a separate list of "affirmative defenses;" some is elsewhere stated to be "not unlawful;" some is "not prohibited;" and some is "exempt" under

an entirely separate provision. These various exclusions frequently overlap one another, overlap defenses provided in the current code's General Part, or both.

- Current Illinois law contains numerous offenses that unnecessarily reiterate, or even undermine, General Part provisions. For example, many offenses are defined to prohibit certain conduct *and* “attempting” such conduct. 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.
- Current law requires that the defendant prove the insanity defense by clear and convincing evidence, but all other excuses — and all nonexculpatory defenses — must be disproved by the State beyond a reasonable doubt. These evidentiary rules are inconsistent. If such a burden-shifting rule is appropriate for one excuse defense, it should also apply to other excuses — as well as to nonexculpatory defenses, which do not even involve any claim of blamelessness on the defendant's part.

2. Provide a comprehensive statement of rules

A criminal 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. Following are a few examples of significant provisions current law omits:

- Current Chapter 720 contains no provision dealing with causation, an issue that is often critical in determining whether conduct constitutes a crime.
- Current Chapter 720 lacks a general provision governing when consent will preclude liability, although the absence of consent is defined as an offense element for many specific offenses. Mere use of the phrase “without consent” is inadequate because in various situations, a person's agreement will not constitute valid legal consent (for example, where the person is incompetent or the “consent” is coerced). The current provisions fail to specify those situations clearly.

- The current code does not provide meaningful rules regarding convictions for multiple offenses or counts, but merely defines the term “included offense” and provides that “[n]o person shall be convicted of both the inchoate and the principal offense.” Such basic statements are inadequate to provide proper guidance in this complex area.
- Chapter 720 does not provide an offense of “negligent homicide.” Thus a person who ignores a substantial and unjustifiable risk of killing someone else, and thereby does kill someone else, may escape liability entirely under current law.
- Although current law includes a reckless homicide offense and a reckless conduct offense, there is no offense to cover reckless conduct that actually results in injury (short of death). The reckless conduct offense does not distinguish causing actual harm from merely “endangering” another. As a result, one who recklessly causes a catastrophe — by, for example, recklessly detonating an explosive for a construction project and severely injuring dozens of people — commits the same offense as one who merely creates a risk of physical pain to a single person.

3. Consolidate offenses

The criminal code rewrite project provides a valuable opportunity to consolidate multiple offenses that overlap, contradict, or narrowly focus on particular instances of a general category of improper conduct. 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. The following are a few examples of the numerous problems that suggest enormous potential to consolidate offenses more effectively:

- The sheer verbiage of current law is one indication of its failure to consolidate similar offenses. To take just one example, the current criminal code uses 25,461 words to define its fraud offenses — and current statutes outside the code use at least another 44,205 words to define additional fraud offenses — while the Proposed Code requires only 2,279 words to do so. Overall, the Proposed Code’s Special Part uses only 14.9 percent — less than $\frac{1}{6}$ — of the words in the current code’s Special Part, and only 6.7 percent — about $\frac{1}{15}$ — of the current Special Part plus other, non-criminal code statutory felonies.
- Current Illinois law defines numerous serious crimes outside the criminal code. Hundreds of misdemeanors and Class 4 felonies are scattered throughout the Compiled Statutes, and more than eighty

offenses outside of Chapter 720 (many of which overlap, or simply restate, prohibitions inside of Chapter 720) are graded as Class 3 felonies or higher.

- Current law frequently includes numerous narrow offenses in addition to, or instead of, a single, more general offense. In the area of property damage, for example, in addition to the current general offense, there are separate offenses for damaging library materials, delivery containers, anhydrous ammonia equipment, government-supported property, and animal facilities, to name just a few. Even more exaggerated examples of needless multiplicity of offenses exist for such offense categories as theft, fraud, perjury, and falsification. In many cases, these multiple offenses will impose varying sentencing grades without any apparent basis for the variation.

4. Grade offenses rationally and proportionally

One virtue of a recodification project, relative to the usual piecemeal legislative additions and alterations to the criminal 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. The necessarily *ad hoc* process that has generated current law makes consistent grading difficult, if not impossible. An overall review reveals a great variety of grading problems and inconsistencies, of which the following are merely a few examples:

- Current law grades eavesdropping more seriously than unauthorized videotaping, so that videotaping another person undressing in a locker room (or her own home) is a less serious offense than listening to another's phone conversation.
- The current theft offense aggravates punishment a full grade for thefts from the person and *another* full grade for thefts committed in a school or place of worship. As a result, taking less than \$300 in property from a person while in a school or place of worship is a Class 2 felony. Thus a student who takes another student's lunch money out of his pocket is subject to the same punishment as a person who commits kidnapping, aggravated domestic battery, aggravated criminal sexual abuse, or ordinary theft of up to \$100,000.
- Some unexplained grading anomalies reflect current law's lack of clarity and failure to consolidate similar offenses. For example, current law defines the offense of bribery as a Class 2 felony, but also defines a separate offense covering "kickbacks" (an undefined term) and grades that offense as a Class 3 felony. At the same time, however, current law assigns the failure to report a bribe a *lower*

grade than the failure to report a “kickback” — an especially odd distinction since one would expect the public officials who receive bribe offers to be held to a higher reporting standard than the private citizens who receive “kickback” offers.

- Current law defines a Class 1 felony for parents or guardians who allow another person to engage in various sexual acts with their children, without taking into account the severity of the underlying sexual offense. Under this scheme, a parent who condones another 16-year-old’s intimate touching of her 16-year-old child on a date is exposed to the same liability as a parent who allows her 35-year-old live-in boyfriend to molest her 8-year-old child.
- Current law grades some forms of battery more seriously than second-degree murder (and provides no “provocation” mitigation for such batteries), so that injuring another person may be graded more seriously than killing the person.
- The current consecutive-versus-concurrent grading scheme is too crude to properly deal with complex issues of liability for multiple offenses, as its “double-or-nothing” approach either completely trivializes all offenses other than the most serious one, or else imposes disproportionately lengthy sentences for multiple offenses whose cumulative harm may not reflect the sentence imposed.
- Although its basic sentencing scheme is crude, current law has developed a tangled web of provisions governing whether a concurrent or consecutive sentence is proper. That tortuous scheme has led to such anomalous results as the finding in one recent case that the maximum allowed (consecutive) sentence for a defendant’s *five* offenses of conviction was less than — in fact, less than half of — the sentence for which he would have been eligible had he committed only *one* of the offenses.

5. Retain all (but only) reasonable policy decisions embodied in current law

Because substantive policy decisions about the rules of the criminal law reflect value judgments properly left to the legislature, the Proposed Code seeks 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. Some rules may have been sound when enacted, but no longer reflect current realities or sensibilities and require expansion, alteration, or deletion.

Proposed Illinois Criminal Code

- Chapter 720 contains a number of outdated offenses that do not belong in a modern criminal code, such as the offenses of adultery and fornication. Maintenance of dead-letter statutes of this kind only tends to invite abuse and to undermine the authority of the criminal law as a reflection of the governed community's sensibilities.

WHY A NEW CRIMINAL CODE?

INTRODUCTION

It has been forty years since the legislature adopted the Criminal Code of 1961. 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 criminal code's overall structure, its terminology, or its application. Meanwhile, four decades have passed without an overarching review of the criminal 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 criminal code has numerous inconsistencies, redundancies, ambiguities, and contradictions. As was the case in 1961 — and may well be the case again in another forty or fifty years — the time is ripe to take a step back and conduct a more panoramic review of the criminal 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 Proposed Code.

In developing the Proposed 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 criminal 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 criminal 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 Illinois law's shortcomings in this area.²⁹

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 numerous important terms, many of which have no commonly understood meaning or are complex legal terms, are left undefined. In such cases, users of the criminal 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 Article that lists all defined terms used in that Article.

Current law also sometimes impedes clear understanding by using undefined terms where similar defined terms exist. For example, current 5/4-4 to 5/4-7 clearly define the culpability levels of intent, knowledge,

²⁹For example, numerous other provisions use unclear language. *See, e.g.*, 720 ILCS 5/2-4; 5/3-5(b); 5/4-8(c); 5/6-2(a); 5/12-4.8; 5/12-9(a); 5/12-21.6; 5/16-1.2; 5/16-3(b); 5/16B-2(d); 5/16B-2.1; 5/17-1(A)(iii); 5/17-15; 5/17-17; 5/17-18; 5/17-22; 5/17B-10(b); 5/21-3(c); 5/21-1.1; 5/21.2-2; 5/21.3-5; 5/24-1(c)(1)-(2); 5/24-1.2(5) & (6); 5/24-1.2-5(5) & (6); 5/24-1.5(a); 5/26-1(a)(1); 5/29A-1 & -2; 5/31A-1.2(e); 5/31-5; 5/32-10; 5/32-11; 5/32-12; 5/33C-2 & -3; 5/33E-6(a); 5/33E-16; 125/2; 130/2; 130/2a; 135/1; 135/1-1(l); 150/4.1; 300/1; 360/1; 540/1; 660/2.

recklessness, and negligence. Nevertheless, numerous current Illinois provisions employ other culpability requirements, such as “specific intent,”³⁰ “having reason to know,”³¹ “reasonably should know,”³² “wil[l]fully,”³³ “maliciously,”³⁴ “fraudulently,”³⁵ “designedly,”³⁶ or a combination of the foregoing and others.³⁷ The Proposed Code rejects the use of such outmoded, and undefined,³⁸ culpability terms in defining offenses. Rather, the Proposed Code exclusively uses the culpability levels of intent, knowledge, recklessness, and negligence, which are the nearly universal norm for modern criminal codes.

³⁰See 720 ILCS 5/6-3(a).

³¹See 720 ILCS 5/14-2(a)(2) & (a)(3); 5/12-11; 690/2; see also 20 ILCS 1805/94a(b)(1); 625 ILCS 5/18c-7502(a)(iii).

³²See 720 ILCS 5/11-20.1; 5/12-21; 5/20-1.1; 5/24-1.2; 5/24.6-20; 5/29B-1; 510/11.

³³See 720 ILCS 5/12-4.8; 5/12-9(a); 5/12-21.6; 5/16-1.2; 5/16-3(b); 5/16B-2(d); 5/17-15; 5/17-22; 5/17B-10(b); 5/21-.2-2; 5/32-10; 5/33C-2; 5/33C-3; 5/33E-16; 130/2; 130/2a; 150/4.1; 660/2; see also, e.g., 15 ILCS 520/23; 30 ILCS 230/2b; 35 ILCS 5/1301; 35 ILCS 130/22 & /23; 55 ILCS 5/3-11019; 205 ILCS 5/49; 205 ILCS 620/8-1; 205 ILCS 635/4-4; 205 ILCS 690/36; 215 ILCS 5/1023; 410 ILCS 535/27; 625 ILCS 5/4-103.2(a)(7).

³⁴See 720 ILCS 5/16B-2.1; see also, e.g., 20 ILCS 2305/2.

³⁵See 720 ILCS 5/16G-15(a); 5/17-13; 5/17-16; 5/33C-1; 5/33C-4; see also, e.g., 20 ILCS 4020/22; 35 ILCS 130/22; 35 ILCS 200/21-306(a)(2); 310 ILCS 10/25.04; 320 ILCS 25/9.

³⁶See 720 ILCS 5/17-17.

³⁷See 720 ILCS 5/17-1(A)(iii) (“wilfully, and with . . . specific intent”); 5/17-18 (“wilfully and designedly”); 5/21-1.1 (“wilfully and maliciously”); 5/32-11 (“wickedly and wilfully”); 125/2 (“[w]ilfully obstructs or interferes with . . . specific intent”); 300/1 (“wilfully and maliciously”); 360/1 (“wilfully and maliciously”); 540/1 (“wilfully, corruptly and falsely”); see also, e.g., 55 ILCS 5/3-14043 (“wilfully, corruptly and falsely”); 105 ILCS 10/9 (“wilfully and maliciously”); 210 ILCS 85/65.17 (“wilfully or wantonly”); 605 ILCS 10/28 (“wilfully, maliciously and forcibly”); 610 ILCS 95/1 (“wilfully and maliciously”); 625 ILCS 5/11-503 (“willful or wanton disregard”).

³⁸Currently, there are no pattern jury instructions defining culpability levels other than intent, knowledge, recklessness, and negligence. See IPI (CRIMINAL) 5.01 et seq. (4th ed. 2000). The pattern jury instructions, like current 5/4-5 and 5/4-6, contain language equating “knowingly” with “wilfully,” and “recklessly” with “wantonly.” See IPI (CRIMINAL) 5.01 & 5.01B (4th ed. 2000). Current 5/4-5 and 5/4-6 provide, however, that such equivalence does not exist where a statute “clearly requires a different meaning.” See 720 ILCS 5/4-5; 5/4-6. It is unclear, therefore, whether “wilfully” should be considered synonymous with “knowingly” for the numerous current offenses specifying both culpability levels with respect to a single element or set of elements. Cf., e.g., 720 ILCS 5/12-4.8 (“knowingly and wilfully”); 5/12-9(a) (“knowingly and wilfully”); 5/17B-10(b) (“wilfully facilitates, aids, abets, assists, or knowingly participates in a known violation”); 130/2 (“knowingly or wilfully”); 130/2a (“knowingly or wilfully”).

As an example of the type of legalese the Proposed Code seeks to avoid, current law defines the offense of “party to fraudulent land conveyance” as follows:

A person who is a party to a fraudulent conveyance of lands, tenements or hereditaments, goods or chattels, or a right or interest issuing out of the same, or to a bond, action, judgment, or enforcement thereof; contract or conveyance had, made, or contrived, with intent to deceive and defraud others, or to defeat, hinder, or delay creditors or others of the their just debts, damages, or demands, or who is a party as stated in this Section, at any time wittingly and willingly puts in use, avow, maintain, justify, or defend the same or any of them as true, and done, had, or made in good faith, or upon good consideration, or sells, aliens, or assigns any of the lands, tenements, goods, chattels, or other things mentioned in this Section, to him or her conveyed as stated in this Section, or any part thereof, is guilty of a business offense and shall not be fined exceeding \$1,000.³⁹

Because it uses numerous opaque, yet undefined terms — such as “fraudulent conveyance,” “tenements,” “hereditaments,” “chattels,” “wittingly and willingly,” “good faith,” “good consideration,” “aliens,” and “assigns” — this provision does not clearly communicate its prohibitions to the public, to members of the criminal justice system, or perhaps even to experienced attorneys and judges. The Proposed Code defines a corresponding, but briefer and clearer, offense to punish one who “destroys, removes, conceals, encumbers, transfers, or otherwise deals with any property with intent to defeat or obstruct the claim of any creditor.”⁴⁰

Similarly, the current mail-fraud provision imposes liability on one who

devises or intends to devise any scheme or artifice to defraud or obtain money or property by means of false or fraudulent pretenses, representations or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit security obligation, security, or other article, or anything represented to be or intimidated [*sic*] or held out to be such counterfeit or spurious article.⁴¹

³⁹720 ILCS 5/17-14.

⁴⁰Section 3112(1)(a). The proposed Section also differs from the current provision by requiring knowledge that proceedings for the benefit of creditors are pending or imminent to ensure that the defendant’s conduct is sufficiently blameworthy to warrant criminal sanctions.

⁴¹720 ILCS 5/17-23(b)(1).

The current provision was likely designed to serve as a comprehensive catchall offense, but its vague and overlapping terms — such as “devises,” “scheme or artifice to defraud,” “fraudulent pretenses, representations, or promises,” “counterfeit,” and “spurious” — serve only to make its scope less clear.⁴² In fact, when the mail-fraud provision’s language is analyzed and considered in light of other current code provisions, it becomes clear that the provision is redundant. The Proposed Code does not include a specific offense for “mail fraud,” in recognition that other general offenses (such as theft or attempted theft) already cover such conduct.⁴³

Similarly, the organization of individual provisions, as well as the overall organization of the code (discussed below), affects a criminal code’s comprehensibility. For example, the current provisions regarding eavesdropping — two of which are set out in the margin — create a complicated maze of offenses, exceptions, defenses, and “exemptions.”⁴⁴

⁴²Elsewhere, the provision states that a “‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right to honest services,” but it does not provide any insight as to what a “scheme or artifice” is. 720 ILCS 5/17-23(e)(1).

⁴³See, e.g., Sections 2102 (theft by taking), 2103 (theft by deception).

⁴⁴Two of the relevant provisions (there are also several others) read as follows:

§ 720 ILCS 5/14-2. Elements of the offense; affirmative defense

Sec. 14-2. Elements of the offense; affirmative defense.

(a) A person commits eavesdropping when he:

(1) Knowingly and intentionally uses an eavesdropping device for the purpose of hearing or recording all or any part of any conversation or intercepts, retains, or transcribes electronic communication unless he does so (A) with the consent of all of the parties to such conversation or electronic communication or (B) in accordance with Article 108A or Article 108B of the “Code of Criminal Procedure of 1963,” approved August 14, 1963, as amended [725 ILCS 5/108A-1 et seq. or 725 ILCS 5/108B-1 et seq.]; or

(2) Manufactures, assembles, distributes, or possesses any electronic, mechanical, eavesdropping, or other device knowing that or having reason to know that the design of the device renders it primarily useful for the purpose of the surreptitious hearing or recording of oral conversations or the interception, retention, or transcription of electronic communications and the intended or actual use of the device is contrary to the provisions of this Article; or

(3) Uses or divulges, except as authorized by this Article or by Article 108A or 108B of the “Code of Criminal Procedure of 1963,” approved August 14, 1963, as amended [725 ILCS 5/108A-1 et seq. or 725 ILCS 5/108B-1 et seq.], any information which he knows or reasonably should know was obtained through the use of an eavesdropping device.

(b) It is an affirmative defense to a charge brought under this Article relating to the interception of a privileged communication that the person charged:

1. was a law enforcement officer acting pursuant to an order of interception, entered pursuant to Section 108A-1 or 108B-5 of the Code of Criminal Procedure of 1963 [725 ILCS 5/108A-1 et seq. or 725 ILCS 5/108B-1 et seq.]; and

(continued...)

⁴⁴(...continued)

2. at the time the communication was intercepted, the officer was unaware that the communication was privileged; and

3. stopped the interception within a reasonable time after discovering that the communication was privileged; and

4. did not disclose the contents of the communication.

(c) It is not unlawful for a manufacturer or a supplier of eavesdropping devices, or a provider of wire or electronic communication services, their agents, employees, contractors, or vendors to manufacture, assemble, sell, or possess an eavesdropping device within the normal course of their business for purposes not contrary to this Article or for law enforcement officers and employees of the Illinois Department of Corrections to manufacture, assemble, purchase, or possess an eavesdropping device in preparation for or within the course of their official duties.

(d) The interception, recording, or transcription of an electronic communication by an employee of the Illinois Department of Corrections is not prohibited under this Act, provided that the interception, recording, or transcription is:

(1) otherwise legally permissible under Illinois law;

(2) conducted with the approval of the Illinois Department of Corrections for the purpose of investigating or enforcing a State criminal law or a Department rule or regulation with respect to persons committed to the Department; and

(3) within the scope of the employee's official duties.

§ 720 ILCS 5/14-3. Exemptions

Sec. 14-3. Exemptions. The following activities shall be exempt from the provisions of this Article:

(a) Listening to radio, wireless and television communications of any sort where the same are publicly made;

(b) Hearing conversation when heard by employees of any common carrier by wire incidental to the normal course of their employment in the operation, maintenance or repair of the equipment of such common carrier by wire so long as no information obtained thereby is used or divulged by the hearer;

(c) Any broadcast by radio, television or otherwise whether it be a broadcast or recorded for the purpose of later broadcasts of any function where the public is in attendance and the conversations are overheard incidental to the main purpose for which such broadcasts are then being made;

(d) Recording or listening with the aid of any device to any emergency communication made in the normal course of operations by any federal, state or local law enforcement agency or institutions dealing in emergency services, including, but not limited to, hospitals, clinics, ambulance services, fire fighting agencies, any public utility, emergency repair facility, civilian defense establishment or military installation;

(e) Recording the proceedings of any meeting required to be open by the Open Meetings Act, as amended [5 ILCS 120/1 et seq.];

(continued...)

⁴⁴(...continued)

(f) Recording or listening with the aid of any device to incoming telephone calls of phone lines publicly listed or advertised as consumer “hotlines” by manufacturers or retailers of food and drug products. Such recordings must be destroyed, erased or turned over to local law enforcement authorities within 24 hours from the time of such recording and shall not be otherwise disseminated. Failure on the part of the individual or business operating any such recording or listening device to comply with the requirements of this subsection shall eliminate any civil or criminal immunity conferred upon that individual or business by the operation of this Section;

(g) With prior notification to the State’s Attorney of the county in which it is to occur, recording or listening with the aid of any device to any conversation where a law enforcement officer, or any person acting at the direction of law enforcement, is a party to the conversation and has consented to it being intercepted or recorded under circumstances where the use of the device is necessary for the protection of the law enforcement officer or any person acting at the direction of law enforcement, in the course of an investigation of a forcible felony, a felony violation of the Illinois Controlled Substances Act [720 ILCS 570/100 et seq.], a felony violation of the Cannabis Control Act [720 ILCS 550/1 et seq.], or any “streetgang related” or “gang-related” felony as those terms are defined in the Illinois Streetgang Terrorism Omnibus Prevention Act [740 ILCS 147/1 et seq.]. Any recording or evidence derived as the result of this exemption shall be inadmissible in any proceeding, criminal, civil or administrative, except (i) where a party to the conversation suffers great bodily injury or is killed during such conversation, or (ii) when used as direct impeachment of a witness concerning matters contained in the interception or recording. The Director of the Department of State Police shall issue regulations as are necessary concerning the use of devices, retention of tape recordings, and reports regarding their use;

(h) Recordings made simultaneously with a video recording of an oral conversation between a peace officer, who has identified his or her office, and a person stopped for an investigation of an offense under the Illinois Vehicle Code [625 ILCS 5/1-100 et seq.];

(i) Recording of a conversation made by or at the request of a person, not a law enforcement officer or agent of a law enforcement officer, who is a party to the conversation, under reasonable suspicion that another party to the conversation is committing, is about to commit, or has committed a criminal offense against the person or a member of his or her immediate household, and there is reason to believe that evidence of the criminal offense may be obtained by the recording; and

(j) The use of a telephone monitoring device by either (1) a corporation or other business entity engaged in marketing or opinion research or (2) a corporation or other business entity engaged in telephone solicitation, as defined in this subsection, to record or listen to oral telephone solicitation conversations or marketing or opinion research conversations by an employee of the corporation or other business entity when:

(i) the monitoring is used for the purpose of service quality control of marketing or opinion research or telephone solicitation, the education or training of employees or contractors engaged in marketing or opinion research or telephone solicitation, or internal research related to marketing or opinion research or telephone solicitation; and

(continued...)

⁴⁴(...continued)

(ii) the monitoring is used with the consent of at least one person who is an active party to the marketing or opinion research conversation or telephone solicitation conversation being monitored. No communication or conversation or any part, portion, or aspect of the communication or conversation made, acquired, or obtained, directly or indirectly, under this exemption (j), may be, directly or indirectly, furnished to any law enforcement officer, agency, or official for any purpose or used in any inquiry or investigation, or used, directly or indirectly, in any administrative, judicial, or other proceeding, or divulged to any third party.

When recording or listening authorized by this subsection (j) on telephone lines used for marketing or opinion research or telephone solicitation purposes results in recording or listening to a conversation that does not relate to marketing or opinion research or telephone solicitation; the person recording or listening shall, immediately upon determining that the conversation does not relate to marketing or opinion research or telephone solicitation, terminate the recording or listening and destroy any such recording as soon as is practicable.

Business entities that use a telephone monitoring or telephone recording system pursuant to this exemption (j) shall provide current and prospective employees with notice that the monitoring or recordings may occur during the course of their employment. The notice shall include prominent signage notification within the workplace.

Business entities that use a telephone monitoring or telephone recording system pursuant to this exemption (j) shall provide their employees or agents with access to personal-only telephone lines which may be pay telephones, that are not subject to telephone monitoring or telephone recording.

For the purposes of this subsection (j), “telephone solicitation” means a communication through the use of a telephone by live operators:

- (i) soliciting the sale of goods or services;
- (ii) receiving orders for the sale of goods or services;
- (iii) assisting in the use of goods or services; or
- (iv) engaging in the solicitation, administration, or collection of bank or retail credit accounts.

For the purposes of this subsection (j), “marketing or opinion research” means a marketing or opinion research interview conducted by a live telephone interviewer engaged by a corporation or other business entity whose principal business is the design, conduct, and analysis of polls and surveys measuring the opinions, attitudes, and responses of respondents toward products and services, or social or political issues, or both.

720 ILCS 5/14-2, 5/14-3.

Some acceptable conduct is noted within the offense definitions (“unless he does so . . .”, “except as authorized . . .”); some activity is protected by an “affirmative defense;” some is “not unlawful;” some is “not prohibited;” and some is “exempt.” These various exclusions frequently overlap one another, overlap defenses provided in the current code’s General Part, or both. The proposed provision covers the same substantive ground as the current law’s numerous exceptions, defenses, not-offenses, and exemptions, but does so in less space and clearer fashion by defining the offense to require intercepting a “private” communication and setting forth three explicit defenses.⁴⁵

⁴⁵The provision reads as follows:

Section 2401. Interception of Electronic or Oral Communications

(1) **Offense Defined.** A person commits an offense if he knowingly intercepts any private electronic or oral communication by means of any intercepting device other than equipment being used by a communications common carrier in the ordinary course of its business.

(2) **Definitions.**

(a) “Contents,” when used with respect to any electronic or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, or meaning of that communication.

(b) “Electronic communication” means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of electronic, microwave, radio, cable, satellite, or other connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of communications.

(c) “Intercepting device” means any electronic, mechanical, or other device or apparatus that can be used to intercept an electronic or oral communication, but does not include:

(i) equipment that a communications common carrier, in the ordinary course of its business, furnished to a subscriber or user, or specifically authorized a subscriber or user to use, and that was being used by the subscriber or user in the ordinary course of business; or

(ii) a hearing aid or similar device being used to correct subnormal hearing.

(d) “Interception” of an electronic or oral communication means the visual or aural acquisition, or the recording by any means, of all or part of the contents of the communication.

(e) “Private electronic communication” means an electronic communication sent by a person with an expectation that such communication is not subject to interception under circumstances justifying such expectation.

(f) “Private oral communication” means any oral communication uttered by a person with an expectation that such communication is not subject to interception under circumstances justifying such expectation.

(continued...)

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

A criminal code, and each of its provisions, must be effectively organized so that each component's meaning and function are 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 Illinois law contains numerous offenses that unnecessarily reiterate, or even undermine, General Part provisions. For example, many offenses are defined to prohibit certain conduct *and* "attempting" such conduct.⁴⁶ 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.⁴⁷ Similarly, several current offenses are defined

⁴⁵(...continued)

(3) Defenses. It is a defense to prosecution under this Section or Section 2405 that:

(a) the parties to the communication consented to the interception, disclosure, or use in question; or

(b) the person was authorized by law to engage in the interception, disclosure, or use in question; or

(c) (i) the interception in question was made by or at the request of a party to the communication who reasonably believed that the communication would provide evidence of an offense that another party to the communication had committed, or would commit, against him or a household member; or

(ii) the disclosure or use in question involved an interception described in Subsection (3)(c)(i) and was for the purpose of prosecuting an offense.

(d) Acquiescence is Consent. A party to a communication who continues the communication after receiving a disclosure that the communication is subject to interception thereby consents to any subsequent interception, or disclosure or use of the interception, that falls within the scope of the disclosure.

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

Section 2401. Note that this provision also replaces several other current provisions, in addition to 5/14-2 and 5/14-3. See, e.g., 720 ILCS 5/14-1 (defining such terms as "eavesdropping device" and "electronic communication"); 5/14-4 (grading eavesdropping offense).

⁴⁶See, e.g., 720 ILCS 5/16B-2; 5/16D-3; 5/17-6; 5/17-23; 5/21-1.5; 5/24-3.5; 5/29B-1.

⁴⁷See 720 ILCS 5/8-4.

to include anyone who aids, solicits, or conspires with another in planning or committing the offense,⁴⁸ even though general rules covering accomplice liability, solicitations, and conspiracies are defined in the General Part.⁴⁹ The Proposed Code ensures consistency by avoiding offense definitions that revisit, or revise, rules already included in the General Part.

Finally, a criminal 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.⁵⁰ Recognizing such distinctions is important because a defense's function as a justification, an excuse, or a nonexculpatory defense has significant legal implications.⁵¹ Current Illinois law, however, is not organized to accurately distinguish between these three defense types.⁵²

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

⁴⁸See, e.g., 720 ILCS 5/10-7; 5/17-20; 5/31-7; 5/31A-1.2.

⁴⁹See 720 ILCS 5/5-2 (complicity); 5/8-1 (solicitation); 5/8-2 (conspiracy).

⁵⁰Justification 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.

⁵¹For 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.

⁵²Chapter 720 improperly treats compulsion and — by defining several justifications to protect one who “reasonably believes” himself to be justified — mistake as to a justification as justifications, rather than excuses. See 720 ILCS 5/7-11 (compulsion); see also 5/7-1; 5/7-2; 5/7-3; 5/7-5; 5/7-6; 5/7-9; 5/7-13. The Proposed Code categorizes both of these defenses as excuses, as they relate to the actor's mental state rather than to whether the act itself is objectively justified.

Current Illinois law also does not recognize nonexculpatory defenses as a distinct class of defenses. As a result, current law treats some nonexculpatory defenses, such as the statute-of-limitations defense, as “rights of the defendant,” while improperly placing entrapment among the justification defenses. See 720 ILCS 5/3-5 to -8 (limitation provisions); 5/7-12 (entrapment).

by clear and convincing evidence, but all other excuses must be disproved by the State beyond a reasonable doubt once the defendant has introduced some evidence on the issue.⁵³ These evidentiary rules differ for no obvious reason.⁵⁴ 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.⁵⁵

Similarly, current law requires the State to disprove certain nonexculpatory defenses beyond a reasonable doubt.⁵⁶ 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.⁵⁷

2. PROVIDE A COMPREHENSIVE STATEMENT OF RULES

It is critical not only that a criminal code say things clearly, but that it say everything that needs to be said. A criminal 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

⁵³See 720 ILCS 5/6-2(e); 5/6-4.

⁵⁴Similarly, although current 5/3-2(b) requires the state 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., 720 ILCS 5/24-2(h) (regarding "exemptions" to firearm offenses for peace officers, members of military, and others, "[t]he defendant shall have the burden of proving such an exemption"); *People v. Smith*, 374 N.E.2d 472, 476 (Ill. 1978) (construing 5/24-2). Section 107(3) avoids such anomalies by defining "affirmative defense" to mean "any defense or mitigation other than one that operates by negating a required element of an offense" and providing a default rule that affirmative defenses must be disproved beyond a reasonable doubt.

⁵⁵Section 501(6) adopts a compromise position between current law's inconsistent rules, and places the burden of persuasion on the defendant to prove an excuse defense by a preponderance of the evidence.

⁵⁶See, e.g., *People v. Latona*, 664 N.E.2d 424, 431 (Ill. App. 1994) (once defendant has raised entrapment defense, State must prove beyond reasonable doubt that defendant was not entrapped).

⁵⁷Proposed Section 601(4) provides that, as with excuses, the defendant must prove a nonexculpatory defense by a preponderance of the evidence.

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 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.

Further explanation of this goal follows, along with a representative, but by no means exhaustive, collection of examples of current Illinois law's shortcomings in this area.⁵⁸

A. General Part Rules

Current Chapter 720 contains no provision dealing with causation, an issue that is often critical to the determination of whether conduct constitutes a crime. Whenever an offense definition requires that the offender cause a particular result (such as homicide's requirement that the offender cause another person's death), a potential question arises as to whether a given actor's conduct had a sufficient causal connection to the prohibited result to

⁵⁸For 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 108 (defining "bodily harm" and "great bodily harm"); 501 (general rules governing excuse defenses); 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); 254 (rules governing conviction of multiple grades of an offense); 303 (rules governing transferred intent); 400 (clarifying that justification, excuse, and nonexculpatory defenses bar liability); 411 (general rules governing justification defenses); 415 (justification defense for persons with special responsibilities for others); 601 (general rules governing nonexculpatory defenses); 805 (defense to certain inchoate offenses for defendants 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.*, Sections 1205 (causing mental injury or mental distress to children); 2402 (damaging or destroying private correspondence); 2403(1)(a) (eavesdropping committed other than by use of "eavesdropping device"); 2404 (unlawfully gaining access to information other than through use of computers); 3104 (simulating objects of special value); 3109(2) (breach of duty to act disinterestedly); 5307(1)(a)(iii) (escape by persons civilly committed under statutes other than Sexually Violent Persons Commitment Act); 6205 (abuse of corpse).

support criminal liability. Because of the significance of the causation issue, the Proposed Code includes a provision defining standards for determining whether an act is the legal cause of a result.⁵⁹

Current Chapter 720 similarly lacks a general provision governing when consent will preclude liability, although the absence of consent is defined as an offense element for many specific offenses.⁶⁰ Mere use of the phrase “without consent” fails to provide the rules required to properly determine liability, however, because in various situations, a person’s agreement will not constitute valid legal consent (for example, where the person is incompetent or the “consent” is coerced). The current code defines consent at one point, but the applicability of that definition is explicitly limited to certain specific offenses.⁶¹ The current code also sometimes narrows its language to exclude those who are “unable to give knowing consent,”⁶² but does not explain whom this category would contain and, by using this language in some places but not others, suggests that the risk of ineffective consent is a concern only for certain offenses. The Proposed Code defines a general consent defense and provides detailed rules regarding its scope, thus ensuring that the Code is clear in explaining when consent will provide a valid defense and consistent in its treatment of consent from one offense to another.⁶³

The current Illinois Code also does not provide meaningful rules to control multiple simultaneous offense convictions or their consequences. Rather, the current code merely defines the term “included offense” and provides that “[n]o person shall be convicted of both the inchoate and the principal offense.”⁶⁴ The current code’s failure to deal comprehensively with these critical issues has left the Illinois courts to fall back on the so-called

⁵⁹See Section 203.

⁶⁰See, e.g., 720 ILCS 5/9-1(c)(3); 5/9-1.2(c); 5/9-2.1(e); 5/9-3.2(d); 5/10-1(b); 5/10-5(b); 5/11-23(a); 5/12-4(c); 5/12-14(a)(7); 5/12-14.1(a)(3); 5/12-16(a)(7); 5/12-16.2(d); 5/14-2(a)(1); 5/15-2; 5/16-3(a); 5/20-1(a); 240/1.

⁶¹See 720 ILCS 5/12-17(a).

⁶²See, e.g., 720 ILCS 5/12-13(a)(2) (criminal sexual assault); 5/12-15(a)(2) (criminal sexual abuse); cf. 5/12-32(a) (ritual mutilation; offense occurs if victim does not consent or is “under such circumstances that the defendant knew or should have known that the victim was unable to render effective consent”).

⁶³See Section 251.

⁶⁴720 ILCS 5/8-5; see 720 ILCS 5/2-9 (defining “included offense”).

“one-act, one-crime” rule. The basis of that rule is unclear,⁶⁵ and the rule itself is confused, if not incoherent. One thing that is clear is that the rule is not to be taken literally, as Illinois law sometimes does allow one act to constitute more than one crime. A person who explodes a single bomb that kills 20 people, or fires a single bullet that kills two people, should not be found to have committed “one crime” based on “one act” — and would not, because of the conceptually groundless “multiple victim” exception to the “one-act, one-crime” rule.⁶⁶ The Proposed Code replaces the “one-act, one-crime” rule with a statutory provision that establishes a coherent and consistent scheme for limiting convictions for multiple related offenses.⁶⁷

⁶⁵Federal precedent makes clear that the U.S. Constitution does not require such a rule. See Missouri v. Hunter, 459 N.E.2d 359, 368-69 (1983) (“Where . . . a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the ‘same’ conduct . . . , a court’s task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.”); Albernaz v. United States, 450 U.S. 333, 340 (1981) (“[T]he question of what punishments are constitutionally permissible is no different from the question of what punishment the Legislative Branch intended to be imposed. Where Congress intended . . . to impose multiple punishments, imposition of such sentences does not violate the Constitution.”).

The current criminal code also does not establish any such rule. Indeed, the Legislature likely intended to abolish the rule for many cases in which it is applied. See 730 ILCS 5/5-8-4(a) (mandating consecutive sentences in certain circumstances “for offenses which were committed as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective”). Cf. People v. Rodriguez, 661 N.E.2d 305, 310 (Ill. 1996) (Heiple, J., concurring) (noting that 5/5-8-4(a) “overrules” one-act, one-crime rule).

Further, the Illinois courts have not explained, or even addressed, whether some other source such as the Illinois Constitution may support the rule. In fact, in People v. King, which is the leading case on the one-act, one-crime rule, the Illinois Supreme Court explicitly recognized that “[m]ultiple convictions and consecutive sentences have been permitted against claims of double jeopardy for offenses based on a single act but requiring proof of different facts.” 363 N.E.2d 838, 844 (Ill. 1977) (citing Gore v. United States, 357 U.S. 386 (1958); Blockburger v. United States, 284 U.S. 299 (1931)).

⁶⁶See, e.g., People v. Shum, 512 N.E.2d 1183, 1202 (Ill. 1987) (upholding murder and feticide convictions for “single physical act” of killing mother because “[i]n Illinois it is well settled that separate victims require separate convictions and sentences”); People v. Hanks, 528 N.E.2d 1044, 1047-48 (Ill. App. 1988) (“We conclude defendant was properly convicted of two offenses of aggravated arson against two victims resulting from defendant’s single act of arson.”); People v. Mercado, 456 N.E.2d 331 (Ill. App. 1983) (upholding three convictions for reckless homicide arising from single automobile accident).

The meaning of “one act” has consistently been drawn narrowly so that a defendant will be found to have performed “multiple acts” allowing multiple convictions. See, e.g., People v. Green, 557 N.E.2d 939, 942 (Ill. App. 1990) (affirming consecutive sentences for two offenses premised on defendant’s possession of cocaine because “the armed-violence conviction could be based upon the contents of the right-hand pocket, while the possession with intent to deliver could be based upon the six tested bags of the nine bags subsequently found in the left-hand pocket”).

⁶⁷See Section 254.

B. Special Part Offenses

The current code sometimes fails to criminalize conduct that merits criminal liability. For example, Chapter 720 does not provide an offense of “negligent homicide.” As a result, a person whose inattentiveness to a substantial and unjustifiable risk of killing another person causes another’s death, may escape liability entirely under current law. The Proposed Code joins the overwhelming majority of jurisdictions with modern criminal codes⁶⁸ by imposing liability for negligent homicide.⁶⁹

In other cases, the current code’s failure to define suitable offenses means prosecution is only possible for less serious offenses, resulting in punishment that falls short of the relative gravity of the offense. For example, Chapter 720 criminalizes “knowingly” causing a catastrophe (as a Class X felony), but does not specifically criminalize either recklessly causing a catastrophe or creating a substantial risk of a catastrophe.⁷⁰ Under current law, those acts would count only as ordinary reckless conduct or reckless property damage, both of which are graded as Class A misdemeanors.⁷¹ Similarly, the current reckless conduct offense does not account for the extent of harm resulting from the conduct — indeed, the offense does not even distinguish causing actual harm from merely “endangering” another. As a result, one who recklessly causes a catastrophe — by, for example, recklessly detonating an explosive for a construction project and severely injuring dozens of people — commits the same offense as one who merely creates a risk of physical pain to a single person. The Proposed Code avoids such anomalous results by including, between the extremes of knowingly causing a catastrophe and recklessly endangering another, intermediate offenses covering different levels of recklessly caused harm.⁷²

3. CONSOLIDATE OFFENSES

A third goal is consolidation of all criminal offenses. Perhaps inevitably, four decades of piecemeal modification of the 1961 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 Chapters of the Illinois Compiled Statutes rather than in the criminal code.

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

⁶⁸See Model Penal Code § 210.4 (defining negligent homicide offense); *id.* cmt. n.30 (noting that of 34 states with revised codes as of 1980, all but 5 codes include negligent homicide offense).

⁶⁹See Section 1105 (grading the offense as a Class 4 felony).

⁷⁰See 720 ILCS 5/20.5-5.

⁷¹See 720 ILCS 5/12-5; 5/21-1(1)b).

⁷²See Sections 1202, 2204.

conduct in addition to (or in lieu of) a more general prohibition against all such relevant conduct; or to scatter serious crimes throughout the State's statutory code instead of ensuring that all relevant offenses appear within the criminal 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 overlap⁷³ 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 criminal 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 criminal 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 state's laws increases. It is simply much easier for the layperson to educate herself about the state'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 state 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 criminal 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 criminal code's "default" culpability provision to apply to uncodified offenses. In short, the possibility of criminal offenses appearing outside the criminal code undermines the entire project of setting aside a separate criminal code within the overall state code scheme.

Current Illinois law defines numerous serious crimes outside the criminal code. Hundreds of misdemeanors and Class 4 felonies are scattered throughout the Compiled Statutes, and more than eighty offenses appearing outside Chapter 720 — many of which overlap, or simply restate, prohibitions in current Chapter 720 — are graded as Class 3 felonies or higher. For example, the Illinois Public Aid Code defines several "public assistance fraud" offenses — graded as high as Class 1 felonies — that overlap substantially with several Chapter 720 offenses, such as (among others) theft, state benefits

⁷³According 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.

fraud, public aid wire fraud, and public aid mail fraud.⁷⁴ Similarly, the Illinois Vehicle Code defines several vehicle theft offenses that are principally aimed at “chop shops” in the business of receiving stolen vehicles, and grades the offense of organizing an “aggravated vehicle theft conspiracy” as a Class X felony, although all of the relevant conduct — vehicle theft, receiving stolen vehicles, and conspiracy to commit either of those offenses — is covered by (and graded differently by) provisions in Chapter 720.⁷⁵

Within the criminal 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 Illinois offenses often fail to realize this goal of consolidation within a single, general offense. This occurs in two ways. In some cases, Chapter 720 criminalizes specific forms of conduct *in lieu of* a broader prohibition against such conduct generally. For example, the current forgery offense applies only to “documents apparently capable of defrauding” others,⁷⁶ but does not apply to other sorts of potentially forged writings, necessitating numerous offenses to prohibit forging specific types of writings.⁷⁷ Similarly, current Illinois law contains no general offense banning false written statements made to obtain property or credit, but instead contains various offenses prohibiting false statements made in specific contexts.⁷⁸

⁷⁴Compare 305 ILCS 5/8A-1 *et seq.* (public assistance fraud), *with, e.g.,* 720 ILCS 5/16-1 (theft); 5/17-6 (state benefits fraud); 5/17-9 (public aid wire fraud); 5/17-10 (public aid mail fraud).

⁷⁵Compare, *e.g.,* 625 ILCS 5/4-103 to -108 (Vehicle Code provisions), *with* 720 ILCS 5/16-1(a)(1) (defining offense of theft by taking); 5/16-1(a)(4) (defining offense of receiving stolen property); 5/16-1(b) (grading theft offenses). *Cf.* 5/16-1(b)(2) (cross-referencing Vehicle Code provisions for purposes of recidivism aggravation for theft).

⁷⁶See 720 ILCS 5/17-3.

⁷⁷See, *e.g.,* 5/17-7 & -18 (corporate stock); 5/17-23 (Universal Price Code labels); 5/17B-5(ii) (food stamps and authorizations); 250/14 to /16 (credit and debit cards); 5 ILCS 175/10-140(b) (electronic signature devices); 15 ILCS 335/14A(b)(3) (government-issued identification cards); 20 ILCS 1605/14.2 (lottery tickets); 35 ILCS 130/22 (cigarette tax stamps and imprints); 625 ILCS 5/4-103(a)(2) (vehicle identification numbers); 625 ILCS 5/4-105 (vehicle title and registration documents).

⁷⁸See, *e.g.,* 20 ILCS 4020/22 (“false or fraudulent representations” to obtain benefits provided by Prairie State 2000 Authority Act); 35 ILCS 130/25 (“false or fraudulent” tax returns); 105 ILCS 425/26(1) (“false or misleading” statements to influence persons to enroll in private business and vocational school); 305 ILCS 5/8A-16(b)(1) (“false and misleading” statements in proposing, offering, selling, soliciting, or providing health care services or health plans); 720 ILCS 5/16-3.1(a) (“false reports” of theft, destruction, damage or conversion of property); 720 ILCS 5/17-1(C)(1) (“false statements” to obtain accounts with or credit from financial institutions); 720 ILCS 5/17-6(a) (“misrepresentations” relating to eligibility for state benefits programs); 720 ILCS 5/17-22(a) (“false information” on employment applications for certain agencies providing services to mentally or developmentally disabled persons); 720 ILCS 5/33E-15 (“false entries” in books, reports, or statements of local government unit or school district); 720 ILCS 250/3 (“false statements” to obtain credit or debit cards).

In other cases, Chapter 720 includes narrow, specific offenses *in addition* to a broader prohibition against such conduct generally. For example, although one provision in current Chapter 720 covers theft generally, a number of other provisions in Chapter 720 prohibit the same underlying conduct — theft by taking (or its attempt) — in the context of specific circumstances or forms of property.⁷⁹ The same situation exists for assault offenses⁸⁰ and property damage offenses.⁸¹ Similarly, in addition to its general perjury offense,⁸² current Illinois law contains numerous offenses criminalizing false statements made under oath or affirmation about particular matters, in particular documents, and in particular proceedings.⁸³

⁷⁹Compare 5/16-1 (general theft offense), with, e.g., 5/16A-3(a) (retail theft); 5/16B-2(a) (library theft); 5/16E-3(a)(1) & (4) (delivery container theft).

⁸⁰Compare 5/12-3 (general “battery” offense) with, e.g., 5/12-1 (assault); 5/12-2 (aggravated assault); 5/12-3.1 (battery of an unborn child); 5/12-3.2 (domestic battery); 5/12-3.3 (aggravated domestic battery); 5/12-4 (aggravated battery); 5/12-4.1 (heinous battery); 5/12-4.2 (aggravated battery with a firearm); 5/12-4.2-5 (aggravated battery with a machine gun or a firearm equipped with any device or attachment designed or used for silencing the report of a firearm); 5/12-4.3 (aggravated battery of a child); 5/12-4.4 (aggravated battery of an unborn child); 5/12-4.6 (aggravated battery of a senior citizen).

⁸¹Compare 5/21-1 (general property damage offense), with, e.g., 5/16B-2.1 (damage to library materials); 5/16E-3(a)(3) (defacing delivery containers); 5/21-1.5 (tampering with or damaging anhydrous ammonia equipment); 5/21-4 (damaging government supported property); 215/4 (damaging an animal facility).

⁸²See 720 ILCS 5/32-2(a).

⁸³These overlapping perjury offenses create unnecessary and undesirable confusion. For example, several provisions prohibit the making of a “false oath or affirmation,” rather than the making of a “false statement” under that oath or affirmation. See, e.g., 225 ILCS 41/15-75(a) (oath or affidavit required by Funeral Directors and Embalmers Licensing Code); 225 ILCS 305/36(b) (oath or affirmation required by Illinois Architecture Practice Act of 1989); 225 ILCS 410/4-20(4) (oath or affirmation required by Barber, Cosmetology, Esthetics, and Nail Technician Act of 1985). This phrasing suggests, contrary to current 5/32-2(a), that only one conviction is appropriate for one who tells several lies under a single oath.

Moreover, some offenses do not explicitly impose 5/32-2(a)’s requirement that a false statement be material, but then confusingly proclaim that those who commit them are liable for “perjury.” See, e.g., 110 ILCS 1010/8 (false statement in notice filed pursuant to Section 4 of Academic Degree Act); 225 ILCS 60/58 (false statement under Medical Practice Act of 1987); 225 ILCS 203/90(a) (false statement under oath or affidavit required by Boiler and Pressure Vessel Repairer Regulation Act); 225 ILCS 446/190(a) (false statement under oath or affidavit required by Private Detective, Private Alarm, Private Security, and Locksmith Act of 1993).

Finally, whereas current 5/32-2(e) grades perjury as a Class 3 felony, current Illinois law sometimes provides different grades for overlapping perjury offenses. See, e.g., 55 ILCS 5/1-5013 (swearing falsely concerning right to vote; Class 4 felony); 225 ILCS 41/15-75(a)(6) (oath or affidavit required by Funeral Directors and Embalmers Licensing Code; Class A misdemeanor); 225 ILCS 410/4-20(4) (oath or affirmation required by Barber, Cosmetology, Esthetics, and Nail Technician Act of 1985; Class B misdemeanor); 235 ILCS 5/10-1(c) (making false statement in obtaining liquor license; petty offense).

One useful way to get a rudimentary sense of current law's failure to consolidate offenses is to assess its sheer verbiage. The Proposed Code manages to criminalize the same substantive conduct as current law while using far fewer offense definitions to do so. For example, the Proposed Code article on fraud offenses (Article 3100) uses only 8.6 percent of the words making up the corresponding offenses in current Chapter 720 (2,182 versus 25,461 words) — and when corresponding felony offenses outside Chapter 720 are taken into account, that figure falls to 3.1 percent (2,182 versus 69,666 words). Similarly, the article covering public order and safety offenses (Article 6100) uses only 9.8 percent of the words in corresponding Chapter 720 offenses (1,251 versus 12,810), and only 3.1 percent of the words when felonies outside Chapter 720 are added (1,251 versus 40,133). Overall, the Special Part of the Proposed Code uses only 14 percent — or less than one-seventh — of the words in the current Special Part (17,378 versus 124,505), and only 6.3 percent — or about one-sixteenth — of the current Special Part plus other statutory felonies (17,378 versus 277,852 words). If anything, the latter figure understates the discrepancy, as misdemeanors outside Chapter 720 have not been considered, and the provisions outside Chapter 720 frequently use one section to impose criminal liability for any violation of an entire set of regulations.

The above examples of current Illinois law's shortcomings in this area are representative, but by no means exhaustive.⁸⁴

⁸⁴Including the examples discussed in the text, there are over two dozen offenses outside Chapter 720 that are graded as Class 1 and Class 2 felonies. See 5 ILCS 175/10-140 (fraudulent use of signature device; Class 2 felony); 5 ILCS 175/15-210, -215 (fraudulent use or request of electronic signature certificate; Class 2 felony for each); 5 ILCS 175/15-220 (fraudulent use of signature device of certification authority; Class 2 felony); 20 ILCS 3520/45 (making false statement or report in document before Department of Commerce; Class 2 felony); 30 ILCS 320/4 (fraudulently using state seal or signature; Class 2 felony); 35 ILCS 130/22, /23, /29 (counterfeiting or forging cigarette tax stamps, or selling cigarettes or other tobacco products with forged stamps; Class 2 felony for each); 35 ILCS 505/15 (evading motor fuel sale tax, filing false return or report to Department of Revenue, or selling dyed diesel fuel; Class 2 felony for each); 205 ILCS 685/7 (structuring transaction to evade currency reporting requirements; Class 2 felony); 415 ILCS 5/44(b)-(c) (endangering another by disposing hazardous waste; Class 2 felony); 625 ILCS 5/11-401 (failing to stop when involved in auto accident involving death; Class 2 felony); 625 ILCS 5/11-501 (DUI; Class 2 felony); 625 ILCS 5/18c-7502 (removal of railroad property resulting in serious bodily injury; Class 2 felony); 625 ILCS 45/3A-21 (forging certificate or sticker relating to watercraft; Class 2 felony); 730 ILCS 5/3-6-4 (escaping from correctional institution; Class 2 felony); 730 ILCS 5/5-8A-4.1 (failing to comply with home-monitoring program while armed; Class 1 felony); 765 ILCS 835/1(b) (causing property damage in cemetery; Class 2 felony); 815 ILCS 5/14 (aggravated securities fraud; Class 2 felony); 815 ILCS 515/5 (aggravated home repair fraud; Class 2 felony); 815 ILCS 705/25 (false or misleading statement in selling franchise; Class 2 felony).

(continued...)

⁸⁴(...continued)

In addition to the examples discussed in the text, the Proposed Code also introduces several other offenses generally criminalizing conduct that current Illinois law criminalizes only in particular contexts. Compare, e.g., Section 808 (possessing instruments of crime), with, e.g., 720 ILCS 5/16-6 (possessing coin-operated machine key or device); 720 ILCS 5/16-15 (possessing theft-detection shielding device); 720 ILCS 5/19-2 (possessing burglary tools). Compare Section 3102(1) (tampering with writing, record, or device), with, e.g., 720 ILCS 5/17-20 (tampering with utility meters); 720 ILCS 5/17-21 (tampering with service meters); 10 ILCS 5/29-6 (tampering with election materials); 240 ILCS 40/15-45(c)(3) (tampering with grain records). Compare Section 5202(1)(a) (making false written statement to mislead public servant), with, e.g., 720 ILCS 5/33C-2 (false statement to influence certification of minority- and female-owned business); 720 ILCS 5/33E-14 (false statement to influence consideration of vendor applications); 20 ILCS 3520/45(b) (false statement to influence bonding-assistance action of Department of Commerce and Community Affairs); 205 ILCS 690/36 (false statement to deceive Commission of Banks and Real Estate); 220 ILCS 5/6-106 (false statement to influence Illinois Commerce Commission); 225 ILCS 330/43(c) (false statement to obtain license or registration to practice as professional land surveyor). Compare Section 5202(1)(b) (omitting information from written statement to mislead public servant), with, e.g., 205 ILCS 657/90(h) (omitting information from document filed under Transmitters of Money Act); 240 ILCS 40/15-45(c) (filing “misleading” grain records with Department of Agriculture); 305 ILCS 5/8A-15 (omitting material fact from document related to government-funded or -mandated health plan). Compare Section 5202(2) (making false written statement on form bearing notice false statement is punishable), with, e.g., 35 ILCS 200/21-290(d) (false statement in tax scavenger sale registration application); 305 ILCS 5/8A-2(b) (false statement in public aid benefit application). Compare Section 5203(1)(a)(i) (falsifying document used by government for record), with, e.g., 720 ILCS 5/33E-15 (false entry in document of local government or local school district); 20 ILCS 1605/16 (submitting false information under Illinois Lottery Law); 20 ILCS 3520/45(a) (submitting false statement or report to Department of Commerce and Community Affairs); 415 ILCS 5/44(a) (submitting false information under Environmental Protection Act). Compare Section 5203(1)(a)(ii) (making a false entry in or alteration of document required to be kept for information of government), with, e.g., 35 ILCS 130/14 (records required under Cigarette Tax Act); 35 ILCS 505/15(3.5) (documentation required under Motor Fuel Tax law); 205 ILCS 657/90(h) (documents required under Transmitters of Money Act); 420 ILCS 40/39(b)(2) (documents issued by Department of Nuclear Safety). Compare Section 5303(1) (obstructing administration of law), with, e.g., 720 ILCS 5/33C-3 (obstructing investigation of qualifications of business requesting certification as minority- or female-owned business); 225 ILCS 650/19(A) (obstructing performance of duties under Meat Poultry and Inspection Act); 225 ILCS 735/5(g) (obstructing performance of duties under Timber Buyers Licensing Act); 240 ILCS 40/15-45(e) (obstructing performance of duties under Grain Code); 815 ILCS 370/6 (obstructing performance of duties under Motor Fuel and Petroleum Standards Act).

Overlapping offenses are also a recurring problem in current law. Compare, e.g., 5/17-1(B)(a) (general prohibition against causing another to execute document by deception), with, e.g., 5/17-13 (causing another to enter real estate contract); 35 ILCS 200/21-306(a)(3) (contract involving indemnity judgment proceeds); 50 ILCS 105/4.5(2) (certain government contracts); 815 ILCS 515/3 (home repair contracts); 815 ILCS 602/5-95 (business opportunity contract); 815 ILCS 705/25 (franchise agreement). Compare 720 ILCS 5/33-1 (general bribery offense), with, e.g., 5/33-4b (bribery to excuse persons from jury duty); 5/33E-7(a) (“kickbacks”); 5/33E-8 (bribery of inspectors employed by public contractors); 645/1 & /2 (bribery involving members of General Assembly); 30 ILCS 500/50-25 (bribery to not bid on State contract); 225 ILCS 650/19(B) (bribery to influence meat and poultry inspector); 230 ILCS 10/18(d)(1) (bribery to influence Gaming Board member). Compare 720 ILCS 5/31-6(a) (general offense criminalizing escape from penal institution) with 730 ILCS 5/3-6-4(a) (escape from penal institution of Adult Division).

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 a criminal 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 Illinois 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 criminal 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 increase in the number of offenses, especially offenses outside the criminal 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.

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.

Further explanation of this goal follows, along with a representative, but by no means exhaustive, collection of examples of current Illinois law's shortcomings in this area.⁸⁵

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.

For example, one offense enacted after the 1961 Code defines a Class 1 felony for parents or guardians who allow another to engage in various sexual acts with their children, without taking into account the severity of the underlying sexual offense.⁸⁶ Under this scheme, a parent who condones another 16-year-old's intimate touching of her 16-year-old child on a date is exposed to the same liability as a parent who allows her 35-year-old live-in boyfriend to molest her 8-year-old child. The Proposed Code refines the grading of the offense by adjusting the grade of the offense based on the severity of the underlying harm.⁸⁷

Likewise, current law grades any theft of lost or mislaid property as a petty offense, regardless of its value.⁸⁸ Under the current scheme, the theft of a mistakenly delivered priceless work of art would be graded the same

⁸⁵To list just a few more examples, current law grades unsworn falsification to authorities as anything from a petty offense, *see, e.g.*, 235 ILCS 5/10-1(c) (false statement related to obtaining a liquor license), to a Class 1 felony, *see, e.g.*, 305 ILCS 5/8A-2(b) (false statement in application for public assistance). *Cf.* Section 5202(4) (uniformly grading such offenses as Class A misdemeanor).

Current law grades an actual escape from prison less seriously than the mere possession in prison of a tool that may be used in an escape. *See* 720 ILCS 5/31-6(b) (escape; Class 2 felony); 5/31A-1.1(i) (possession; Class 1 felony). *Cf.* Section 5307 (escape; Class 2 felony); 5309(3)(a) (possession; Class 3 felony). Current law also grades possession of an explosive or catastrophic agent as a Class 1 felony, which is the same as the grade for *using* such an agent in a deliberate attempt to cause a catastrophe. *See* 720 ILCS 5/20-2, 5/20.5-6; *cf.* Section 2205 (providing lower grade for mere possession, a more preliminary offense, than for intentional attempt).

See also 720 ILCS 5/8-2(c) (grading conspiracies to commit various offenses, such as prostitution, weapons offenses, and gambling offenses, *more* seriously than the object offense, although conspiracy is an inchoate offense). *Cf.* Section 807 (grading all conspiracies one grade lower than object offense).

⁸⁶*See* 720 ILCS 150/5.1. *But see* *People v. Maness*, 732 N.E.2d 545 (Ill. 2000) (invalidating 150/5.1 as unconstitutionally vague).

⁸⁷*See* Section 1301(3)(e) (grading offense at one grade lower than it would be for the person engaging in the prohibited sexual conduct).

⁸⁸*See* 720 ILCS 5/16-2.

as the theft of a misplaced wallet. The Proposed Code recognizes grading distinctions for all forms of theft, whether by taking, by deception, or involving lost property, according to the value of the property stolen.⁸⁹

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.

For example, current law defines the offense of bribery as a Class 2 felony, but also defines a separate offense to cover “kickbacks” and grades that offense as a Class 3 felony.⁹⁰ Although current law fails to define the term “kickback,” it appears to be nothing more than a particular form of bribe, and there is no clear reason to suppose that it merits a different punishment from that for other forms of bribery.⁹¹ This is an example of a situation where, as discussed above, current law is internally inconsistent, or at least ambiguous, thereby complicating any effort to track to its stated policy judgments. The Proposed Code creates only one bribery offense and ordinarily grades it as a Class 2 felony.⁹²

Similarly, the current code defines bigamy as a Class 4 felony, but defines a separate Class A misdemeanor for knowingly marrying a bigamist.⁹³ There is little reason to punish a person who knowingly marries a bigamist less severely than the bigamist, as each person causes the same harms (desertion and possible injury to spousal property interests; deception of civil and possibly religious authorities). Moreover, this distinction contravenes normal rules of accountability, under which a knowing accomplice to bigamy would be liable for the same offense and punishment as the bigamist.⁹⁴ The Proposed Code grades bigamy and marrying a bigamist the same.⁹⁵

⁸⁹See Section 2109 and commentary. Liability for theft of lost or mislaid property receives a reduced grade relative to other forms of theft. See Section 2108(2).

⁹⁰See 720 ILCS 5/33-1; 5/33E-7.

⁹¹Another somewhat puzzling distinction is that, although current law assigns bribery a *higher* grade than giving kickbacks, it also assigns the failure to report a bribe a *lower* grade than the failure to report a kickback. See 720 ILCS 5/33E-7(b); 5/33-2. This distinction is especially unusual in that one would expect public officials (who receive bribe offers) to be held to a higher standard of accountability and affirmative duty than private-citizen contractors (who, under the terms of the current provision, receive kickback offers). The Proposed Code grades the failure to report any type of bribe as a Class 4 felony or Class A misdemeanor, depending on the status of the person failing to report. See Section 5102.

⁹²See Section 5101 and commentary.

⁹³See 720 ILCS 5/11-12 to -13.

⁹⁴See 720 ILCS 5/5-1 to -3 (establishing complicity rules); Section 301 (same).

⁹⁵See Section 4102.

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, a criminal 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, consider current law's grading of the theft offenses. The current theft offense aggravates punishment a full grade for thefts from the person and *another* full grade for thefts committed in a school or place of worship.⁹⁶ As a result, taking less than \$300 in property from a person while in a school or place of worship is a Class 2 felony.⁹⁷ Thus a student who takes another student's lunch money out of his pocket is subject to the same punishment as a person who commits kidnaping, aggravated domestic battery, aggravated criminal sexual abuse, or ordinary theft of up to \$100,000.⁹⁸ The Proposed Code eliminates the full grade aggravation for thefts from the person — whose additional harms are more properly addressed through assault or robbery provisions — and reduces the aggravation for thefts committed in a school or place of worship.⁹⁹

The current code also contains three offenses that provide, for discharging a firearm in the direction of another, grades ranging from a Class 1 felony to

⁹⁶720 ILCS 5/16-1(b).

⁹⁷See 720 ILCS 5/16-1(b)(4.1).

⁹⁸See 720 ILCS 5/10-1(c) (kidnaping); 5/12-3.3(b) (aggravated domestic battery); 5/12-16(g) (aggravated criminal sexual abuse); 5/16-1(b)(5) (theft).

⁹⁹See Section 2109 and commentary. Proposed Section 2109(8) grades thefts from a school or place of worship based upon double the value of the property. Under the proposed scheme, the student who takes another student's notebook or calculator would only be subject to a Class A misdemeanor for thefts under \$150 and a Class 4 felony for thefts between \$150 and \$500.

a Class X felony with a minimum imprisonment term of 12 years, depending on the potential victim's occupation and the type of firearm involved.¹⁰⁰ The grading for these offenses, which do not require any resulting injury or death, is unduly severe when compared to the grading for other current offenses criminalizing endangerment or actual infliction of injury or death. For example, recklessly killing another person is only a Class 3 felony under current 5/9-3; even second-degree murder is only a Class 1 felony under current 5/9-2. Knowingly causing a catastrophe — which, in this context, requires “serious physical injury to 5 or more persons” — is a Class X felony under current 5/20.5-5, making it less serious than some firearm discharge offenses where no injury occurs. “Reckless conduct,” which is similar to the discharge offenses in criminalizing risk-creation as opposed to actual infliction of injury, is a mere Class A misdemeanor under current 5/12-5.

Although it is certainly more serious than most of the other conduct covered by the current offense of “reckless conduct,” the act of firing a gun in another’s direction, without any explicitly required culpability as to causing bodily harm, *and without the requirement of any actual resulting harm or injury*, is *less* serious than knowingly causing a catastrophe, knowingly killing another under the influence of an extreme disturbance, or recklessly killing another person. The Proposed Code adopts the view that the conduct in question is more properly treated as a combination of a weapons offense and endangerment (or, where injury or death occurs, an assault or homicide offense) than as a distinct offense. This scheme enables the amount of liability to reflect the actual amount of harm caused.

Other examples of disproportionate grading are plentiful. For example, current law grades certain forms of battery more seriously than second-degree murder (and provides no “provocation” mitigation for such batteries).¹⁰¹ The Proposed Code grades the homicide offense the same as current law, but creates one assault offense whose grade varies depending upon the amount of harm caused, the nature of the conduct, and the status of the victim, but

¹⁰⁰Current 5/24-1.2 grades knowingly discharging any type of firearm in the direction of a building or vehicle one “reasonably should know to be occupied” as a Class 1 felony, but aggravates the offense to a Class X felony where the offense occurs near a school, and to a Class X felony with a minimum imprisonment term of ten years where the firearm is discharged in the direction of certain categories of person (such as peace officers, emergency medical technicians, and teachers). Current 5/24-1.2-5 is similar to 5/24-1.2, but only applies to “machine guns” and guns equipped with silencers; current 5/24-1.2-5 grades discharging such a firearm in the direction of an ordinary person as a Class X felony, and aggravates the offense to a Class X felony with a minimum term of 12 years where the firearm is discharged in the direction of certain persons, as noted above. Finally, current 5/24-3.2(b) treats recklessly discharging a firearm known to be loaded with an “armor piercing bullet” as a Class X felony where the bullet strikes another.

¹⁰¹See 720 ILCS 5/12-4.1 (heinous battery; Class X felony); 5/12-4.2 (aggravated battery with a firearm; Class X felony); 5/12-34 (female genital mutilation; Class X felony); 5/9-2 (second degree murder; Class 1 felony).

never exceeds the penalty for a deliberate homicide.¹⁰² Likewise, current law grades eavesdropping more seriously than unauthorized videotaping,¹⁰³ meaning that someone who videotapes another person undressing in a locker room (or her own home) would be punished less severely than someone who listens to another's phone conversation. The Proposed Code defines a single offense covering violations of this type and imposes a consistent grade.¹⁰⁴

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.¹⁰⁵ 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. In what is probably an effort to avoid this result, the current Illinois Code defines various “combination offenses” which have the effect of ensuring that, where certain independent offenses are committed together, they will be treated as a distinct offense with an enhanced grade to guarantee that each separate harm is reflected in some additional amount of liability. For example, current law defines the offense of “aggravated arson,” a Class X felony, to cover situations where arson results in bodily harm.¹⁰⁶ Without such an offense, the

¹⁰²See Section 1103(3) (“first-degree manslaughter”; analogous offense to current second-degree murder offense); Section 1201 (assault).

¹⁰³See 720 ILCS 5/14-4 (eavesdropping; Class 4 felony); 5/26-4(d) (unauthorized videotaping; Class A misdemeanor).

¹⁰⁴See Section 2403(3) (unlawful eavesdropping or surveillance; Class A misdemeanor).

¹⁰⁵For a discussion of current law rules on consecutive and concurrent sentencing, see the commentary for Section 906.

¹⁰⁶See 720 ILCS 5/20-1.1(b); see also 720 ILCS 5/12-4.2 (“aggravated discharge of a firearm,” offense combining assault and firearm offenses; Class X felony); 5/12-11 (“home invasion,” offense combining burglary, assault, and firearm offenses; Class X felony); 5/18-2 (“armed robbery,” offense combining robbery and firearm offenses; Class X felony).

arsonist who also causes bodily harm would serve only the Class 2 sentence for arson, because any sentence imposed on a separate conviction for causing the injury would be served concurrently. Yet the new “combination offenses” are themselves problematic because the need to elevate the grade frequently results in grading for such offenses that is disproportionate to their total harm, and to the grading for other offenses. In short, to avoid the problems that arise from the crude concurrent-or-consecutive system for multiple convictions, the current code defines additional individual offenses, but the grading of those offenses ultimately raises serious proportionality problems as well — so that the fundamental problem of ensuring appropriate grading remains unsolved, and may even be worsened.

At the same time, current law has developed a complicated maze of provisions to define, but also to limit, the circumstances under which the usual concurrent-sentence rule may be avoided and an offender may be sentenced to consecutive sentences.¹⁰⁷ Perhaps not surprisingly, the current sentencing scheme has been the subject of extensive litigation, often resulting in contradictory or illogical court decisions.¹⁰⁸ For example, current law limits the total aggregate sentence for all consecutive sentences committed as part of a single course of conduct to the sum of the maximum terms for the two most serious offenses.¹⁰⁹ In a recent case interpreting this rule, the Illinois Supreme Court held that the governing statutes required a maximum (consecutive) sentence for the defendant’s *five* offenses of conviction that was less than — in fact, less than half of — the sentence for which he would have been eligible had he committed only *one* of the offenses.¹¹⁰

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.¹¹¹

¹⁰⁷Under 730 ILCS 5/5-8-4(a), consecutive sentences for multiple offenses are *mandatory* when the offenses are committed as part of a single course of conduct and: (i) one of the offenses was first degree murder, a Class X felony, or Class 1 felony, and the defendant inflicted serious bodily injury; or (ii) one of the offenses was a form of criminal sexual assault; or (iii) one of the offenses was armed violence based on one of eleven different predicate offenses. Current 730 ILCS 5/5-8-4(b) requires consecutive sentences under precisely the same circumstances as subsection (a), but where the offenses were not committed as part of a single course of conduct. Even in cases that do not fit any of the above circumstances, the court *may* still sentence a multiple offender to a consecutive sentence in cases where the court finds that such a sentence is necessary to protect the public from further criminal conduct by the defendant. See 730 ILCS 5/5-8-4(b).

¹⁰⁸Cf. GINO V. DIVITO, SENTENCING AND DISPOSITION GUIDE 34-45 (2000) (discussing cases).

¹⁰⁹See 730 ILCS 5/5-8-4(c)(2).

¹¹⁰See People v. Pullen, 733 N.E.2d 1235, 1239 (Ill. 2000) (holding defendant was subject to a 28-year maximum consecutive sentence for committing multiple Class 2 felonies, even though defendant would have been eligible for up to a 60-year sentence, as a Class X offender under 730 ILCS 5/5-3(c)(8), had he committed only one offense).

¹¹¹See Section 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 liability¹¹² — 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, 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 criminal code, the drafters have been forced to modify the existing rule, using supporting commentary to the Proposed Code to describe and justify the proposed change.

Further explanation of this goal follows, along with a representative, but by no means exhaustive, collection of examples of current Illinois law's shortcomings in this area.¹¹³

A. Consistent and Rational Use of Culpability Requirements in Defining Offenses

In creating the Criminal Code of 1961, the drafters recognized the importance and difficulty of comprehensively defining and employing “the

¹¹²A third substantive category, offense grading, is discussed in Section 4 above.

¹¹³Included here are other examples of current policies that are difficult to reconcile with the existing statutory scheme. First, current Illinois law has resurrected the concepts of “specific intent” and “general intent,” which the original 1961 Code rejected in favor of the culpability requirements defined in 5/4-3 (“Mental state”). Accordingly, the 1961 version of 5/6-3(a) provided that intoxication must “negative[] the existence of a mental state which is an element of the offense.” ILL. ANN. STAT. ch. 38 ¶ 6-3 (Smith-Hurd 1964). However, subsequent judicial decisions, instead of reading “mental state” to refer to the culpability terms defined in the Code, read it to refer to the concepts of general and specific intent. See, e.g., *People v. Berlin*, 270 N.E.2d 461, 463 (Ill. App. 1971) (finding intoxication to be no defense to robbery because robbery is not a specific intent offense). The courts’ continued use of the concept of “specific intent” — which later made its way into an amendment to 5/6-3(a) — disregarded the 1961 Code’s deliberate rejection of this concept. The Proposed Code completely abandons the concepts of general and specific intent in favor of the culpability terms defined in Article 200.

(continued...)

mental states which are elements of the various specific offenses.”¹¹⁴ 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.

Perhaps the most significant issue in this area is the courts’ consistent failure to apply current 720 ILCS 5/4-3(b) properly, if at all, to offenses. That provision states that where an offense does not prescribe a particular mental state, “any mental state defined in Sections 4-4, 4-5 or 4-6 [defining intent, knowledge, and recklessness] is applicable.”¹¹⁵ The provision’s own language makes clear that a person may be found liable based on a showing of *any* of the three specified mental states.¹¹⁶ However, the Illinois Supreme Court has

¹¹³(...continued)

Second, the current scheme improperly elevates culpability requirements for inchoate offenses relative to completed offenses. The current formulation for attempt increases the culpability level for all elements of the substantive offense to “intent,” which may cause improper results or confusion. For example, the offense of murder requires only that the actor “kn[ew] that [his] acts create[d] a strong probability of causing death or great bodily harm,” but Illinois courts, following current 5/8-4, have required that *attempted* murder requires “specific intent” (see above) as to all elements of the offense. *See, e.g., People v. Kraft*, 478 N.E.2d 1154 (Ill. App. 1985) (reversing conviction for attempted murder where jury instructions allowed conviction if defendant acted with knowledge that his actions created a strong probability of death, but not with intent to kill). Proposed Article 800 requires that for each inchoate offense, the person need act intentionally only with respect to the conduct that would bring about the underlying offense, but act with the culpability required by the underlying offense for all other elements. *See* proposed Sections 801 to 803 and their corresponding commentaries.

Third, Illinois law is confused as to the proper standard for attempt liability. Under current 5/8-4(a), attempt liability requires conduct constituting a “substantial step” toward commission of an offense. However, although the substantial step test’s true focus is on how far an actor has gone from the *beginning* of the causal chain leading to the offense, Illinois courts have sometimes read the provision as creating a “dangerous proximity” test, which focuses on how close to the *end* of the causal chain he has come. *See People v. Smith*, 593 N.E.2d 533, 537 (Ill. 1992) (finding that defendant did not commit attempted armed robbery where defendant was armed and searching for jewelry store in stolen car he intended to use as getaway car, because defendant had not identified target jewelry store, and thus it would be “improper to conclude that defendant came within a dangerous proximity to success.”). Rather than asking whether there was sufficient evidence for the jury to find that the defendant had taken a substantial step *toward* the offense, the *Smith* court engaged in an independent inquiry as to how far *away* the defendant was from completing the offense. That analysis both misreads the statute and improperly takes the substantial step determination away from the jury. The commentary to proposed Section 801 makes clear that the proper focus is on how far the actor has gone from the beginning of the causal chain leading to the offense, and that the issue is to be decided by the trier of fact.

¹¹⁴720 ILL. ANN. STAT. 5/4-3, Committee Comments — 1961, at 144 (West 1993). *See also* Francis A. Allen, *Criminal Law Revision in Illinois: A Progress Report*, 39 CHI. B. REC. 21 (Oct. 1957) (“One of the most important [sections of the Code] relates to defining the various mental states required to establish criminal liability.”).

¹¹⁵720 ILCS 5/4-3(b).

¹¹⁶720 ILL. ANN. STAT. 5/4-3, Committee Comments — 1961, at 152 (West 1993) (referring to Model Penal Code § 2.02(3), comment at 127 (Tent. Draft No. 4, 1955), which states that “unless the kind of culpability sufficient to establish a material element of an offense has been prescribed by law, it is established if a person acted [intentionally], knowingly, or recklessly with respect thereto”).

interpreted current 5/4-3 as requiring the court to *choose* which *one* of the three mental states should apply to a given offense.¹¹⁷ This reading distorts the clear intent of the legislature and inappropriately restricts the culpability requirements for various offenses. This same provision is standard in modern American criminal codes, based as it is on Model Penal Code Section 2.02(3), and other states have had no such difficulty in its proper interpretation.¹¹⁸

The courts' error may be due to the fact that the current code lacks a provision, of the kind included in the Model Penal Code and most codes based on it (like Illinois'),¹¹⁹ stating that proof of a more serious degree of culpability satisfies an offense definition requiring a lower level of culpability. Accordingly, under current law, culpability levels are seen as mutually exclusive — for example, a “knowing” act will not satisfy a requirement of a “reckless” act. The Proposed Code cures this defect by including the currently omitted provision, so that, for example, when an offense requires recklessness as to an element, it is clear that “the requirement is also satisfied by proof of intent or knowledge as to the element.”¹²⁰ With such a provision in place, it becomes clear that where no mental state is specified as to an offense element and absolute liability was not intended, the default requirement of recklessness will be applied to that element, but proof of intent or knowledge will satisfy the requirement as well.

¹¹⁷See, e.g., *People v. Gean*, 573 N.E.2d 818, 822 (Ill. 1991) (“[W]hen a statute neither prescribes a particular mental state nor creates an absolute liability offense, then either intent, knowledge or recklessness applies. In the case at bar, we believe knowledge is the appropriate mental element.”); *People v. Terrell*, 547 N.E.2d 145, 158 (Ill. 1989) (“[T]he legislature clearly did not intend the aggravated criminal sexual assault statute to define a strict liability or public welfare offense. Accordingly, a mental state of either intent or knowledge implicitly is required[.]”). See also *People v. Nunn*, 396 N.E.2d 27, 29-31 (Ill. 1979) (reading knowledge requirement into vehicle “hit and run” offense based upon legislative history and prior enacted version of the statute, without any reference to 5/4-3).

¹¹⁸More than a dozen other states' codes provide that recklessness, or a higher culpability level, be “read in” where an offense definition does not explicitly prescribe a culpability requirement. See ALA. CODE § 13A-2-4; ARK. CODE ANN. § 5-2-203; DEL. CODE ANN. tit. 11, § 251; HAW. REV. STAT. § 702-204; KAN. STAT. ANN. § 21-3201; MO. REV. STAT. § 562.021; N.D. CENT. CODE § 12.1-02-02; N.J. STAT. ANN. § 2C:2-2; OHIO REV. CODE ANN. § 2901.21; 18 PA. CONS. STAT. § 302; TENN. CODE ANN. § 39-11-301; TEX. PENAL CODE ANN. § 6.02; UTAH CODE ANN. § 76-2-102.

Unlike the Illinois courts, courts in other jurisdictions have not interpreted such read-in provisions to require a selection of a single governing culpability requirement. See, e.g., *Upshur v. State*, 420 A.2d 165, 168 (Del. 1980) (applying read-in provision to carrying and possessing deadly weapons); *State v. Eastman*, 913 P.2d 57, 66 (Haw. 1996) (applying read-in provision to abuse of family or household member and holding that “the prosecution needs only to prove the lowest of the three alternative levels of culpability, i.e. recklessness, in order to satisfy the state of mind requirement”); *State v. Howard*, 926 S.W.2d 579, 587 (Tenn. Ct. App. 1996) (applying read-in provision to aggravated sexual battery); *North v. State*, 598 S.W.2d 634, 636 (Tex. Crim. App. 1980) (applying read-in provision to aggravated rape).

¹¹⁹See MODEL PENAL CODE § 2.02(5); *id.* cmt. at 247 n.39 (listing 19 states with similar provision as of 1985).

¹²⁰Section 205(6).

A related issue is the courts' occasional failure to follow the current statutory rule that a person must have culpability "with respect to each element" of an offense, unless absolute liability is clearly intended.¹²¹ That rule requires that, with respect to each element of an offense, it must be proved that the defendant possessed either (1) the culpability level stated in the offense definition, or (2) where no culpability level is stated, the "default" level of recklessness noted above.¹²² Yet Illinois courts often conclude that no culpability is required as to certain elements of offenses, although there is no suggestion that the legislature intended absolute liability as to the element in question.¹²³ In some cases, this conclusion may not affect the outcome, as the evidence may support an inference of culpability even though the court does

¹²¹720 ILCS 5/4-3(a).

¹²²Current 5/4-3(b) states:

If the statute defining an offense prescribed a particular mental state with respect to the offense as a whole, without distinguishing among the elements thereof, the prescribed mental state applies to each such element. If the statute does not prescribe a particular mental state applicable to an element of an offense (other than an offense which involves absolute liability), any mental state defined in Section 4-4, 4-5 or 4-6 is applicable.

720 ILCS 5/4-3(b). The drafters of the 1961 Code clarified the operation of 5/4-3(b) in their committee comments:

Often, a single mental-state word, such as "knowingly," is placed in a position where grammatically it may apply to all elements of the offense. To so apply it for the purposes of legal interpretation seems logical, since the intent that it shall not apply to certain elements of the offense may be expressed readily by a different sentence structure . . . Or a provision may be so phrased that the mental state expressed applies only to some of the elements of the offense and not to others, although no indication appears that absolute liability is intended to attach to the others. In either situation, the logical conclusion seems to be that the intended mental state to be implied is intent, knowledge, or recklessness

720 ILL. ANN. STAT. 5/4-3, Committee Comments — 1961, at 152 (West 1993).

¹²³See, e.g., *People v. Jones*, 495 N.E.2d 1371, 1372-73 (Ill. App. 1986) (requiring no culpability as to fact that another person owned property in prosecution, under 720 ILCS 5/21-1(a), for "knowingly damaging . . . property of another"); *People v. Wright*, 488 N.E.2d 1344, 1349 (Ill. App. 1986) (finding that 720 ILCS 24-1(a)(7), which prohibits "knowingly . . . possess[ing] . . . a shotgun having one or more barrels less than 18 inches in length," did not require that "the defendant in fact know the shotgun's barrel measured less than 18 inches").

not require that inference.¹²⁴ In other cases, however, the failure to require culpability encourages, and directly leads to, imposition of strict liability — a result that contradicts both the fundamental principles of criminal liability and the stated intent of the General Assembly as expressed in the current code itself.

The Proposed Code addresses these problems in two ways. First, the Code explicitly details, in both the proposed provisions and commentary, how the culpability rules are designed to function.¹²⁵ Second, the Proposed Code takes care to ensure that every offense is drafted with these rules in mind.¹²⁶

Inconsistencies in imposing culpability requirements also exist in current law's treatment of inchoate offenses: attempt, conspiracy, and solicitation. The current law holding that there can be no offense of "attempted second-

¹²⁴For example, in *People v. Rickman*, 391 N.E.2d 1114, 1118 (Ill. App. 1979), the court seemingly ignored the clear language of the aggravated battery statute, which required that a person, "in committing a battery, intentionally or knowingly cause great bodily harm." The defendant, who, while attempting to escape a security guard's grasp, fell on the guard's ankle and caused it to break, claimed on appeal that he did not know his actions would result in great bodily harm to the victim. In rejecting the defendant's claim, the court ruled that the statute did not require any culpability as to the resulting great bodily harm: "the state need only show that he knowingly scuffled with [the victim] and that [the victim] received great bodily harm as a result of the scuffle." *Id.*

Rather than ignoring the clear language of the aggravated battery offense, the court could have reached the same result by finding that there was sufficient evidence for the fact finder to infer the requisite knowledge as to the resulting harm. See *People v. Smith*, 464 N.E.2d 685, 688 (Ill. App. 1984) (affirming conviction for knowingly causing bodily harm, despite defendant's claim that she accidentally cut victim, based on conclusion that it was not unreasonable for lower court to infer that defendant was consciously aware serious injury was practically certain to result from her brandishing a knife and struggling with security guard).

¹²⁵See Section 205 and commentary. Section 205(2) provides: "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."

Section 205(3) provides: "When no culpability requirement is specified with regard to an objective element, a requirement of recklessness is applicable, except [where absolute liability is intended]."

¹²⁶For 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).

degree murder” (or “attempted manslaughter”)¹²⁷ leads to the anomalous, and clearly undesirable, result that many would-be killers are punished *more severely* where the intended victim lives than if they had successfully killed the victim. The Proposed Code, on the other hand, recognizes that causing the resulting harm of an offense — in this case, death — should, if anything, lead to *greater* punishment than failed efforts to cause that result under the same precise circumstances. Both attempted murder under the influence of an extreme disturbance¹²⁸ and attempts based on unreasonable mistakes as to justifications¹²⁹ are punished more severely than the corresponding completed offenses under the Proposed Code.

B. Elimination of the “Common Design” Rule for Complicity Liability

A related situation in which the courts have effectively encouraged strict liability, despite statutory declarations to the contrary, arises in the complicity context. The current complicity provision defines the circumstances in which

¹²⁷*People v. Lopez*, 655 N.E.2d 864, 867 (Ill. 1995) (holding that the offense of “attempted second-degree murder” does not exist, because “one cannot intend either a sudden and intense passion due to serious provocation or an unreasonable belief in the need to use deadly force. . . [, or] to unlawfully kill while at the same time intending to justifiably use deadly force”). Cases that would otherwise be treated as attempted second-degree murder are thus treated as attempted first-degree murder, an offense which is graded more seriously than a *completed* second-degree murder. See 720 ILCS 5/8-4(c)(1) (attempted first-degree murder; Class X felony subject to further aggravation); 5/9-2 (second-degree murder; Class 1 felony).

This result is rooted in the current inchoate offenses’ culpability requirement that the offender must act “with intent that an offense be committed” or “with intent to commit a specific offense.” Such language has the effect of requiring intent as to *all* of the substantive offense’s objective elements — including those for which a lesser culpability level is required to prove the completed offense.

¹²⁸The Proposed Code recognizes “attempted first-degree manslaughter” as an offense and grades it as less serious than the completed offense. See Sections 801 & 807 and corresponding commentary. Attempted first-degree manslaughter is a possible offense under the Proposed Code because, unlike the current attempt provision, Section 801 does not require that the offender act “with intent to commit a specific offense.” 720 ILCS 5/8-4(a). Section 801 requires, rather, intent only to “engage in the conduct that would constitute the offense” — and explicitly provides that “the culpability required for commission of the offense,” rather than an elevated requirement of intent, governs the substantive offense’s other objective elements. See Section 801 and corresponding commentary.

¹²⁹Under Article 1100 and proposed Section 801, attempts based on unreasonable mistakes as to justifications do not count as any form of attempted homicide: Section 511 precludes liability for attempted murder, and the Proposed Code does not generally support liability for attempted reckless or negligent homicide. Article 1200, however, includes specific offenses governing reckless conduct resulting in danger or injury short of death, which will typically allow for conviction of a Class 3 or Class 4 felony for attempts committed under reckless mistakes as to justifications. Where the current rules sometimes result in the anomaly that an attempt is graded much higher than the completed offense, the Proposed Code’s approach ensures that attempts under reckless mistakes are always punished less severely than recklessly causing death. Cf. Section 1104(2) (grading reckless homicide as Class 2 felony).

a person will be held criminally accountable for the conduct of another.¹³⁰ In addition to these explicit statutory rules, however, the Illinois courts have resurrected a common law rule of accountability for which there is no statutory authority.¹³¹ the “common design” rule, which imposes liability on persons for any acts in furtherance of a common criminal design or agreement, whether or not the person had any culpability toward (or even awareness of) those acts.¹³²

As noted above, imposition of strict liability is contrary both to the defined statutory scheme and to any accepted basis for imposing criminal liability.¹³³ It is particularly unusual in the complicity context, as it means that a person may be found liable as an accomplice even where, based on his lack of culpability, he would have *no* liability if he himself had personally committed the crime. Further, the common-design rule is unnecessary, as its most common application — to impose liability for homicide — can be accomplished by applying the felony-murder rule in appropriate situations,

¹³⁰According to the statute, there are three situations in which complicity liability is appropriate: (a) having the culpability required by an offense, the defendant causes another person (who has no culpability) to perform the conduct prohibited by that offense; or (b) the statute defining the offense makes the defendant so accountable; or (c) with intent to promote the commission of an offense, the defendant aids, abets, or attempts to aid in the planning or commission of the offense. See 720 ILCS 5/5-2; see also *id.*, Committee Comments — 1961, at 177 (West 1993) (“It will be observed that liability under this subsection requires proof of an ‘intent to promote or facilitate . . . commission’ of the substantive offense.”).

¹³¹See 2 WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 6.8(b), at 158 n.25 (1986) (noting that Illinois statute has been construed to provide for common-design liability although statute itself does not so provide).

¹³²See, e.g., *In re W.C.*, 657 N.E.2d 908, 923-24 (Ill. 1995) (finding juvenile defendant accountable for murder under common-design rule where defendant, who knew co-defendant was armed and planned to kill victim, hit victim with a stick before co-defendant shot fleeing victim); *People v. Taylor*, 646 N.E.2d 567, 571-72 (Ill. 1995) (finding defendant accountable for murder under common-design rule, although defendant did not participate in planning or execution of a plan to murder the victim, because defendant knew co-defendant wanted to kill victim, knew co-defendant was armed, remained with group during and after murder, and fled when police arrived on scene); *People v. Terry*, 460 N.E.2d 746, 749 (Ill. 1984) (finding defendant liable for murder where defendant shared common design to commit battery against victim and victim died after being stabbed by co-defendant); *People v. Morgan*, 364 N.E.2d 56, 59-60 (Ill. 1977) (upholding conviction for murder where defendant watched others beat victim to death, but did not participate, because defendant was present at scene and shared common design with co-defendants to take money from victim); *People v. Kessler*, 315 N.E.2d 29, 32 (Ill. 1974) (finding defendant accountable for attempted murder, although defendant was in getaway car when co-defendant shot and wounded tavern owner, because defendant had joined in common design to burglarize tavern).

¹³³See LAFAYE & SCOTT, *supra* note 131, at § 6.8(b) at 158 (“The ‘natural and probable consequence’ rule of accomplice liability . . . is inconsistent with more fundamental principles of our system of criminal law. . . . [G]eneral application of [that] rule of accomplice liability is unwarranted.”).

instead of adopting a much broader rule effectively allowing “misdemeanor murder” accomplice liability, even when no such liability may be available for the principal killer himself.¹³⁴

The proposed complicity provision expressly rejects the common-design rule to the extent that it permits the imputation of another’s conduct to one who lacks any culpability with respect to that conduct.¹³⁵

C. Elimination of the “Limited Authority” Doctrine for Burglary and Home Invasion

Illinois courts currently hold, under the “limited authority” doctrine, that any person who enters a building or vehicle with the intent to commit a felony or theft — even if the person has the owner’s permission or the property is open to the public — does so “without authority” (and thereby satisfies the requirements of the burglary, home invasion, or vehicle invasion offense). This conclusion is based on the determination that “authority to enter . . . [a] building open to the public . . . extends only to those who enter with a purpose consistent with the reason the building is open.”¹³⁶

The “limited authority” doctrine contradicts the language and goals of the existing intrusion offenses. Under the doctrine, one offense element (intent to commit a crime) automatically establishes another (the separate statutory “without authority” element), making the second totally irrelevant and ultimately meaning that *any* entry into *any* building will translate the attempted crime (usually theft) into burglary. This completely eliminates any distinction between burglary and theft, and often ends up punishing an *attempt*, or even less than an attempt, to commit theft more severely than the completed theft would be punished. For example, under the rule, a teenager who enters a supermarket planning to shoplift a candy bar, but who is caught, is guilty of burglary (a Class 2 felony) instead of theft (a Class A misdemeanor). Such a result violates any sense of proportional punishment.

The Proposed Code does not incorporate the “limited authority” doctrine and, to emphasize its rejection of the rule, further requires that a burglary (and, by reference, a home invasion) occur “at a time when the premises are not open to the public.”¹³⁷

¹³⁴See, e.g., *People v. Terry*, 460 N.E.2d 746, 750 (1984) (“Defendants argue that the common-design rule should be abolished because it creates a ‘misdemeanor murder rule.’ We agree that the rule does impose liability for murder even though a misdemeanor was originally intended.”).

¹³⁵See Section 301 and corresponding commentary.

¹³⁶*People v. Weaver*, 243 N.E.2d 245, 248 (Ill. 1968) (upholding burglary conviction where defendant entered laundromat during business hours with intent to commit theft); see also *People v. Peeples*, 616 N.E.2d 294, 325 (Ill. 1993) (applying “limited authority” doctrine to home invasion).

¹³⁷See Sections 2301 and 2302 and corresponding commentaries.

D. Revising the Insanity Defense

Since the 1961 Code was adopted, the legislature has adopted provisions that limit the scope of the insanity defense, largely due to a perception that the insanity defense has been subject to abuse. However, various studies (in Illinois and elsewhere) strongly suggest this assumption is empirically unsound.¹³⁸ Meanwhile, additional policy concerns call these limitations into question.

¹³⁸It has been well-documented that the lay public has an exaggerated sense of how often the insanity plea is used as well as how often verdicts of “not guilty by reason of insanity” (NGRI) are granted. For example, people generally believe, wrongly, that the insanity defense is commonly an issue in criminal trials. One study found that people thought that thirty-eight percent of all defendants charged with a crime pleaded NGRI. See Valerie P. Hans, An Analysis of Public Attitudes Toward the Insanity Defense, 24 CRIMINOLOGY 393, 406 (1986); see also Eric Silver et al., Demythologizing Inaccurate Perceptions of the Insanity Defense, 18 LAW & HUM. BEHAV. 63, 67-68 (1994). In reality, an insanity plea is exceedingly rare, raised in a fraction of a percent of even felony cases. See, e.g., Lisa A. Callahan et al., The Volume and Characteristics of Insanity Defense Pleas: An Eight-State Study, 19 BULL. AM. ACAD. PSYCHIATRY & L. 331, 334 (1991). (Note that this is less than one percent of all *felony* cases, while the lay subjects estimated insanity pleas for 38% of all persons charged with *any* crime. See also Richard A. Pasewark & Hugh McGinley, Insanity Plea: National Survey of Frequency and Success, 13 J. PSYCHIATRY & L. 101 (1985) (reporting median rate of one plea per 873 reported crimes). Also contrary to popular belief, more than half of the few cases where an insanity plea is introduced involve nonviolent offenses. See HENRY J. STEADMAN ET AL., BEFORE AND AFTER HINCKLEY: EVALUATING INSANITY DEFENSE REFORM 111 (1993); see also Callahan et al., supra, at 336.)

In addition, it has been reported that even in the rare cases in which the insanity defense is sought, it is usually not granted, yet the public perception is that it is commonly granted. See, e.g., Callahan et al., supra, at 334 (reporting average acquittal rate of 26% on NGRI pleas); Pasewark & McGinley, supra, at 106 (reporting success rate of 15% of pleas); Hans, supra, at 406 (reporting study indicating that public believes over 36% of all NGRI claims, constituting perceived 14% of all criminal cases, result in NGRI verdict); Mary Frain, Professor Says Insanity Defense Seldom Works, TELEGRAM & GAZETTE (Worcester, MA), Jan. 19, 1996, at B1 (quoting chair of psychiatry at the University of Massachusetts Medical Center as saying that general public believes the insanity defense is used in 20 to 50 percent of all criminal cases).

Claims that the defense is abused and employed to manipulate juries are also belied by the fact that most NGRI pleas are not contested, and the vast majority of NGRI verdicts — 93%, in one study — are reached through negotiated pleas or rendered by judges in bench trials, rather than by juries. See Michael L. Perlin, A Law of Healing, 68 U. CIN. L. REV. 407, 425 (2000) (“Nearly 90% of all insanity defense cases are ‘walkthroughs’ — stipulated on the papers.”); Callahan et al., supra, at 334. Another refutation of the abuse concern is the fact that most NGRI acquittees have significant histories of treatment for mental illness. See, e.g., Michael R. Hawkins & Richard A. Pasewark, Characteristics of Persons Utilizing the Insanity Plea, 53 PSYCHOL. REP. 191, 194 (1983); STEADMAN ET AL., supra, at 56.

These massive misconceptions regarding the practical significance of the insanity defense fuel the general sense that the insanity defense is being abused and that something must be done to limit the abuse. See Michael L. Perlin, “The Borderline Which Separated You From Me”: The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment, 82 IOWA L. REV. 1375, 1375 & nn.5-6 (1997) (citing polls suggesting that “ninety percent [of Americans] believe that the insanity plea is overused”).

For example, current law provides for a “guilty but mentally ill” verdict (“GBMI”) as a supposed compromise between a verdict of not guilty by reason of insanity (NGRI) and a conviction.¹³⁹ Although this verdict was meant to reduce NGRI acquittals, the number of NGRI verdicts in Illinois actually increased after the GBMI verdict was enacted.¹⁴⁰ The GBMI verdict is troublesome because it has no legal significance whatever,¹⁴¹ yet distracts the jury into considering the technical clinical issue of whether an offender needs psychiatric treatment, although the determination of guilt should be the jury’s sole responsibility. Moreover, because current rules prohibit the jury from finding out that an NGRI verdict does not result in the defendant’s release from custody,¹⁴² there is a significant likelihood that juries will erroneously conclude that the GBMI verdict is either necessary to ensure that the defendant is not unconditionally released, or the only appropriate way to guarantee needed psychological treatment for the defendant, or both. Another counterintuitive, and troubling, aspect of the GBMI verdict is that although mental illness is normally thought to mitigate culpability, offenders found GBMI receive *longer* average sentences than offenders who are simply found guilty.¹⁴³ This strongly hints that GBMI is being used to usurp the role of civil commitment (protecting society from persons who present a danger for the future) rather than to fulfill the role of criminal liability (sanctioning offenders for their blameworthy conduct in the past).

Likewise, the legislature recently eliminated the “volitional” rule of the insanity excuse, despite research that demonstrates strong public support for an excuse of persons whose mental illness substantially impairs their ability to control their conduct.¹⁴⁴ This standard merits re-inclusion, as it covers persons who are clearly not blameworthy, and there is no demonstrated risk that inclusion of such a standard in the insanity defense will lead to inappropriate acquittals — or, indeed, that it will change the outcome of insanity-defense cases at all.¹⁴⁵ Further, current Illinois law recognizes a volitional-impairment defense where the impairment results from involuntary intoxication. There is no obvious explanation for why substantial control impairment should excuse in that context, but the same impairment should not excuse when it results from mental illness.

¹³⁹See 720 ILCS 5/6-2(c), (d).

¹⁴⁰See Christopher Slobogin, *The Guilty But Mentally Ill Verdict: An Idea Whose Time Should Not Have Come*, 53 GEO. WASH. L. REV. 494, 507 (1985).

¹⁴¹GBMI is not a “middle position” in terms of its consequences; it has the same effect as a guilty verdict, see 730 ILCS 5/5-2-6(a), even in terms of the defendant’s receiving a psychological evaluation, which is required for *all* convicts. See 730 ILCS 5/3-8-2; cf. 730 ILCS 5/5-2-6(b) (giving IDOC discretion as to whether GBMI convicts receive treatment).

¹⁴²See 730 ILCS 5/5-2-4 (providing that NGRI acquittee is to be remanded for psychological evaluation and treatment); *People v. Stack*, 613 N.E.2d 1175, 1183-84 (Ill. App. 1993) (upholding Illinois rule that jury is not to learn of consequences of NGRI verdict).

¹⁴³See STEADMAN ET AL., *supra* note 138, at 117-19.

¹⁴⁴See PUB. ACT 90-593 (1998).

¹⁴⁵See Callahan et al., *supra* note 138.

Finally, current law requires the defendant to prove the insanity defense by clear and convincing evidence, while all other excuse defenses must be disproved by the state beyond a reasonable doubt.¹⁴⁶ There is little rational reason for imposing different burdens for different excuses, and the clear-and-convincing burden for insanity seems unnecessary considering that approximately one percent of felony cases involve an insanity defense, and only about 25 percent of those few cases result in a NGRI verdict.¹⁴⁷

The Proposed Code reflects these policy concerns in rejecting the GBMI verdict, reinstating the volitional rule, and requiring the defendant to prove any excuse defense, including insanity, by a preponderance of the evidence.¹⁴⁸

E. Eliminating Archaic And/or Obsolete Offenses

Chapter 720 contains a number of outdated offenses that do not belong in a modern criminal code. The Proposed Code attempts to identify and eliminate these offenses. For example, the proposed Article covering “offenses against the family” removes the current offenses of adultery and fornication.¹⁴⁹ All indications are that these provisions are currently unenforced, despite the fact that there is no special difficulty in identifying such offenders. Such non-enforcement can only reflect a conscious decision that imposition of criminal liability for these offenses is improper, or at least a waste of State resources. Maintenance of dead-letter statutes of this kind only tends to invite abuse and to undermine the authority of the criminal law as a comprehensive and accurate reflection of the governed community’s sense of what behavior is sufficiently improper to merit imposition of punishment.¹⁵⁰

¹⁴⁶See 720 ILCS 5/6-2(e); see also commentary for Section 501.

¹⁴⁷See Callahan et al., supra note 138.

¹⁴⁸See Sections 501 and 504 and corresponding commentaries.

¹⁴⁹See 720 ILCS 5/11-7 (adultery); 5/11-8 (fornication).

¹⁵⁰For other specific offenses eliminated by the Proposed Code, see, for example, 720 ILCS 5/32-11 (barratry); 5/32-12 (maintenance); 5/32-13 (unlawful clouding of title); 5/37-1 (maintaining public nuisance); 300/1 (statements derogatory to banking institutions); 315/1 (mutilation of horses’ tails); 355/1 (misrepresentation of pedigree and registration of a stallion or jack). Where the conduct prohibited by these offenses is genuinely harmful and blameworthy, it should fall within the more general prohibitions of another proposed provision. For example, mutilation of horses’ tails may constitute a violation of Section 6207 (cruelty to animals).

CONCLUSION

The creation of the Illinois Criminal Code Rewrite and Reform Commission represents a rare and profound opportunity to eradicate the numerous inconsistencies and contradictions that currently plague Illinois criminal 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 Code both simplifies and rationalizes the statutory criminal law of Illinois. 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.

PROPOSED ILLINOIS CRIMINAL CODE

PART I: GENERAL PROVISIONS



ARTICLE 100. PRELIMINARY PROVISIONS

Section 101.	Short Title and Effective Date
Section 102.	Principle of Construction; General Purposes
Section 103.	Applicability
Section 104.	Civil Remedies Preserved
Section 105.	State Criminal Jurisdiction
Section 106.	Place of Trial
Section 107.	Burdens of Proof; Permissive Inferences
Section 108.	Definitions

Section 101. Short Title and Effective Date

(1) This Act shall be known and may be cited as the “Criminal Code of 2003.”

(2) This Code shall take effect on January 1, 2004.

Section 102. Principle of Construction; General Purposes

(1) Principle of Construction. The provisions of this Code shall be construed according to the fair import of their terms but when the language is susceptible of differing constructions, and remains so after resort to general principles of statutory interpretation and available indicia of legislative intent, it shall be interpreted to further these general purposes:

- (a) to forbid and prevent the commission of offenses;
- (b) to define the acts and mental states that constitute each offense, and limit the condemnation of conduct as criminal when it is without fault;
- (c) to prescribe penalties that are proportionate to the seriousness of the offense; and
- (d) to prevent arbitrary or oppressive treatment of persons accused or convicted of offenses.

(2) Effect of Commentary. The commentary accompanying this Code may be used as an aid in construing the provisions of this Code.

(3) Effect of Heading. No heading contained in this Code shall be interpreted to govern, limit, modify, or in any manner affect the scope, meaning, or intent of a provision.

(4) Partial Invalidity. The invalidity of any provision of this Code shall not affect the validity of the remainder of this Code.

(5) Savings Provisions. The provisions of Sections 2, 3, and 4 of “An Act to revise the law in relation to the construction of the Statutes,” approved March 5, 1874, as amended [5 ILCS 70/2, 5 ILCS 70/3 and 5 ILCS 70/4], shall apply in all constructions of this Code.

Section 103. Applicability

(1) No conduct constitutes an offense unless it is defined as an offense in this Code or in another statute of this State.

(2) The provisions of Part I of this Code are applicable to offenses defined by other statutes, unless this Code otherwise provides.

(3) This Section does 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 civil judgment.

Section 104. Civil Remedies Preserved

This Code does 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, for any conduct which this Code makes punishable; and the civil injury is not merged in the offense.

Section 105. State Criminal Jurisdiction

(1) A person is subject to prosecution in this State for an offense that he commits, while either within or outside this State, 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 this State; or

(b) the conduct outside the State constitutes an attempt to commit an offense within this State; or

(c) the conduct outside the State constitutes a conspiracy to commit an offense within this State, and an act in furtherance of the conspiracy occurs in this State; or

(d) the conduct within this State constitutes aid, or an attempt, solicitation, or conspiracy, to commit in another jurisdiction an offense under the laws of both this State and such other jurisdiction.

(2) Definition. An offense is “committed partly within this State” if:

(a) conduct that is an element of the offense, or

(b) a result that is an element of the offense,

occurs within this State.

(3) Permissive Inference. If the body of a homicide victim is found within this State, the trier of fact may infer that the death occurred within this State.

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

Section 106. Place of Trial

(1) An offense may be tried in any county in which the requirements of criminal jurisdiction under Section 105 have been satisfied.

(2) Omission Liability. An offense based on an omission to perform a duty imposed by the law of this State may be tried in the county in which the defendant or a victim resides.

(3) Objection Waived. All objections to the place of trial are waived unless made before trial.

(4) Navigable Water. If an element of the offense occurs on any navigable water bordering this State, the offense may be tried in any county adjacent to any portion of such navigable water.

Section 107. Burdens of Proof; Permissive Inferences

(1) **Presumption of Innocence.** A defendant is presumed innocent until proven guilty.

(2) **Burden of Persuasion.** The burden is on the State:

(a) to prove all elements of an 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 State.** An offense shall be presented to the trier of fact only if the State has presented sufficient evidence, considered in the light most favorable to the State and all reasonable inferences therefrom, to allow a rational factfinder to find that all required elements of the offense have been proven, and any exemptions or exceptions have been disproved, beyond a reasonable doubt.

(b) **Burden on the Defendant.** An affirmative defense or mitigation shall be presented to the trier of fact only if there exists 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 or mitigation are proven by a preponderance of the evidence.

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

(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 trier of fact, 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 trier of fact, 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 trier of fact may regard the facts giving rise to the inference as sufficient evidence of the inferred fact.

Section 108. Definitions

Unless a particular context clearly requires a different meaning:

“Abortion” has the meaning given in Section 1106.

“Acquittal” has the meaning given in Section 605.

“Act” has the meaning given in Section 204.

“Adulterated” has the meaning given in Section 3106.

“Affirmative defense or mitigation” has the meaning given in

Section 107.

“Alcoholic liquor” has the meaning given in 235 ILCS 5/1-3.05.

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

“Association” has the meaning given in Section 701.

“Bodily harm” means substantial physical pain, illness, or any impairment of physical condition, and includes great bodily harm.

“Cannabis” has the meaning given in Section 5309.

“Catastrophe” has the meaning given in Section 2204.

“Catastrophic agent” has the meaning given in Section 2204.

“Circumstance element” has the meaning given in Section 202.

“Community policing volunteer” has the meaning given in

Section 1201.

“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 202.

“Consequence” has the meaning given in Section 303.

“Contents” has the meaning provided in Section 2401.

“Controlled substance” has the meaning given in Section 5309.

“Conviction” has the meaning given in Section 605.

“Corporate agent” has the meaning given in Section 701.

“Correctional employee” has the meaning given in Section 5308.

“Correctional institution” has the meaning given in Section 5309.

“Correctional officer” has the meaning given in Section 414.

“Course or pattern of criminal activity” has the meaning given in

Section 905.

“Credit card” has the meaning given in Section 3108.

“Criminal organization” has the meaning given in Section 905.

“Custodial officer” has the meaning given in Section 5302.

“Cutting tool” has the meaning given in Section 5309.

“Damaging” property has the meaning given in Section 2206.

“Dangerous weapon” has the meaning given in Section 1501.

“Dealer” has the meaning given in Section 2105.

“Debit card” has the meaning given in Section 3108.

“Deception” has the meaning given in Section 2103.

“Defraud” has the meaning given in Section 3101.

“Delinquent minor” has the meaning given in 705 ILCS 405/5-105(3).

“Deprive” has the meaning given in Section 2102.

“Desecrate” has the meaning given in Section 6111.

“Dwelling” has the meaning given in Section 2301.

“Dwelling of another” has the meaning given in Section 2301.

“Electronic communication” has the meaning given in Section 2401.

“Electronic contraband” has the meaning given in Section 5309.

“Element” has the meaning given in Section 202.

“Excuse defense” has the meaning given in Section 501.

“Family member” has the meaning given in Section 1201.

“Financial institution” has the meaning given in Section 2107.

“Firearm” has the meaning given in Section 1501.

“Firearm ammunition” has the meaning given in Section 5309.

“Force” includes confinement or restraint.

“Force likely to cause death or great bodily harm” has the meaning given in Section 414.

“Forcible offense” means an offense whose elements involve the use or threat of physical force or violence against any individual or the creation of a risk of death or great bodily harm.

“Great bodily harm” means bodily harm that:

(a) creates a substantial risk of death, or

(b) causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

Great bodily harm includes death or a life-threatening disease.

“Habitable structure” has the meaning given in Section 2201.

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

“High managerial agent” has the meaning given in Section 701.

“Highly secured premises” has the meaning given in Section 2303.

“Household member” has the meaning given in Section 1201.

“Hypodermic syringe” has the meaning given in Section 5309.

“Improper termination” has the meaning given in Section 605.

“Inchoate offense” has the meaning given in Section 254.

“Included offense” has the meaning given in [current 720 ILCS 5/2-9].

“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 808.

“Intentionally” has the meaning given in Section 206.

“Intercepting device” has the meaning given in Section 2401.

“Interception” has the meaning given in Section 2401.

“Intoxication” has the meaning given in Section 302.

“Involuntary intoxication” has the meaning given in Section 506.

“Item of contraband” has the meaning given in Section 5309.

“Justification defense” has the meaning given in Section 411.

“Knowingly” has the meaning given in Section 206.

“Law enforcement authorities” means public servants who are authorized by law or by governmental agencies to engage in or supervise the prevention, detection, investigation, or prosecution of offenses.

“Loiter” has the meaning given in Section 6108.

“Mental disease or defect” has the meaning given in Section 504.

“Mentally handicapped person” means a person who suffers from a long-term and disabling mental impairment resulting from disease, injury, functional disorder, or congenital condition.

“Mislabeled” has the meaning given in Section 3106.

“Negligently” has the meaning given in Section 206.

“Negligent mistake” has the meaning given in Section 207.

“Nonexculpatory defense” has the meaning given in Section 601.

“Objective elements” has the meaning given in Section 202.

“Obscene” has the meaning given in Section 6204.

“Obstructing” has the meaning given in Section 6109.

“Obtain” has the meaning given in Section 2102.

“Offense committed partly within this State” has the meaning given in Section 105.

“Owner” has the meaning given in Section 2102.

“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.

“Penal custody” has the meaning given in Section 1304.

“Person” means a human being who has been born alive, public or private corporation, government, partnership, or unincorporated association.

“Physically handicapped person” means a person who suffers from a long-term and disabling physical characteristic, resulting from disease, injury, functional disorder, or congenital condition.

“Place open to public view” has the meaning given in Section 6201.

“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 511.

“Private electronic communication” has the meaning given in Section 2401.

“Private oral communication” has the meaning given in Section 2401.

“Private place” has the meaning given in Section 2403.

“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.

“Property of another” has the meaning given in Section 2102.

“Public” inconvenience, annoyance or alarm has the meaning given in Section 6103.

“Public park” has the meaning given in Section 1305

“Public place” has the meaning given in Section 6107.

“Public servant” means any person, including a peace officer, who is:

(a) authorized to perform any official function on behalf of, and is paid by, the United States or this State or any of its political subdivisions, or

(b) elected to office pursuant to statute, or appointed to an office that is established by statute, and whose qualifications and duties are prescribed by statute, to discharge a public duty for the United States or this State or any of its political subdivisions.

“Public service” has the meaning given in Section 2207.

“Put forward” has the meaning given in Section 3102.

“Pyramid sales scheme” has the meaning given in Section 3114.

“Reasonable belief” or “reasonably believes” means a belief that the person is not negligent in holding.

“Reasonable mistake” has the meaning given in Section 207.

“Receiving” has the meaning given in Section 2105.

“Recklessly” has the meaning given in Section 206.

“Reckless mistake” has the meaning given in Section 207.

“Result element” has the meaning given in Section 202.

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

“Securities” has the meaning given in 815 ILCS 5/2.1.

“Services” has the meaning given in Section 2106.

“Severely or profoundly mentally retarded person” has the meaning given in Section 1401.

“Sexual conduct” has the meaning given in Section 1302.

“Sexual intercourse” has the meaning given in Section 1301.

“State” or “this State” means the State of Illinois, and all land and water in respect to which the State of Illinois 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.

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

“Stolen” has the meaning given in Section 2105.

“Storage structure” has the meaning given in Section 2303.

“Substantive offense” has the meaning given in Section 254.

“Suicide” has the meaning given in Section 1107.

“Tool to defeat security mechanisms” has the meaning given in Section 5309.

“Torture” has the meaning given in Section 1201.

“Unborn child” has the meaning given in Section 1106.

“Unemancipated minor” has the meaning given in Section 4104.

“Unjustified” conduct has the meaning given in Section 416.

“Vital public facility” has the meaning given in Section 2201.

“Voluntary and complete renunciation” has the meaning given in Section 806.

“Voluntary intoxication” has the meaning given in Section 302.

“Weapon” has the meaning given in Section 5309.

“Writing” has the meaning given in Section 3101.

“Youth emergency shelter” has the meaning given in 225 ILCS 10/2.21.

ARTICLE 200. BASIC REQUIREMENTS OF OFFENSE LIABILITY

- Section 201. Basis of Liability
- Section 202. Offense Elements Defined
- Section 203. Causal Relationship Between Conduct and Result
- Section 204. Requirement of an Act; Omission Liability;
Possession Liability
- Section 205. Culpability Requirements
- Section 206. Culpability Requirements Defined
- Section 207. Ignorance or Mistake Negating Required Culpability
- Section 208. Mental Disease or Defect Negating Required Culpability
- Section 209. Definitions

Section 201. Basis of Liability

Subject to the provisions of this Article, 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 Article 800 of this Code or in Part II of this Code or in a statute of this State outside of this Code, or
(b) if an element of the offense is missing, it is imputed to him by a provision of Article 300, and
- (2) does not satisfy the requirements of any defense provided in Articles 250, 400, 500, or 600 of this Code.

Section 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 205 and 206, as are contained in the offense definition or the provisions establishing the offense grade or the severity of the punishment.
- (2) Definitions.
 - (a) A “conduct element” is that part of an offense that requires an offender’s act or failure to perform a legal duty.
 - (b) A “result element” is any change of circumstances required to have been caused by the person’s conduct.
 - (c) A “circumstance element” is any objective element that is not a conduct or result element.
 - (d) The “objective elements” of an offense include conduct, attendant circumstances, and result elements, but not culpability requirements.

Section 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 result is not too remote or accidental in its occurrence, and not too dependent upon another's volitional act, to have a just bearing on the actor's liability or on the gravity of his offense; 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) of this section is satisfied as to both persons.

Section 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 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 procured 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 205. Culpability Requirements

- (1) To be guilty of an offense, a person must have some level of culpability, as defined in Section 206, as to every objective element of the offense, except as provided by Subsection (4).
- (2) Application of Stated Culpability Requirement. When an offense 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 Liability. When no culpability requirement is specified with regard to an objective element, no culpability is required as to that element if:

(a) the offense is a misdemeanor, or a petty or business offense, that is not punishable by incarceration or by a fine exceeding \$500, or

(b) the statute defining the offense clearly indicates a legislative purpose to impose absolute liability as to that objective element.

(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, unless the offense 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 also 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 also satisfied by proof of intent or knowledge as to the element. When the law requires knowledge as to an objective element, the requirement is also satisfied by proof of intent as to the element.

Section 206. Culpability Requirements Defined

(1) **Intentionally.** A person acts intentionally or with intent:

(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 he hopes or believes 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, the requirement is satisfied although such intention is conditional, unless the condition negatives the harm or wrong sought to be prevented by the law defining the offense.

(2) **Knowingly.** A person acts knowingly or with knowledge:

(a) with respect to conduct, if he is aware that he is engaging in such conduct, or, as the case may be, 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:

(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 exercise in the person's situation.

(4) 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.

(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 exercise in the person's situation.

Section 207. Ignorance or Mistake Negating Required Culpability

(1) Subject to the limitations of Sections 303 and 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 element of an offense, including a reckless mistake, will negate the existence of intention or knowledge as to that element. A negligent mistake as to an element of an offense will negate the existence of intention, knowledge, or recklessness as to that element. A reasonable mistake as to an element of an offense will negate intention, knowledge, recklessness, or negligence as to that element.

(3) Definitions.

(a) A "reckless mistake" is an erroneous belief that the actor is reckless in forming or holding.

(b) A "negligent mistake" is an erroneous belief that the actor is negligent in forming or holding.

(c) A "reasonable mistake" is an erroneous belief that the actor is non-negligent in forming or holding.

Section 208. Mental Disease or Defect Negating Required Culpability

Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a required culpable mental state.

Section 209. Definitions

- (1) “Act” has the meaning given in Section 204.
- (2) “Circumstance element” has the meaning given in Section 202.
- (3) “Conduct element” has the meaning given in Section 202.
- (4) “Elements of an offense” has the meaning given in Section 202.
- (5) “Intentionally” has the meaning given in Section 206.
- (6) “Knowingly” has the meaning given in Section 206.
- (7) “Mental disease or defect” has the meaning given in Section 504.
- (8) “Negligently” has the meaning given in Section 206.
- (9) “Negligent mistake” has the meaning given in Section 207.
- (10) “Objective elements” has the meaning given in Section 202.
- (11) “Reasonable mistake” has the meaning given in Section 207.
- (12) “Recklessly” has the meaning given in Section 206.
- (13) “Reckless mistake” has the meaning given in Section 207.
- (14) “Result element” has the meaning given in Section 202.

ARTICLE 250. DEFENSES RELATED TO THE OFFENSE HARM OR WRONG

- Section 251. Consent
- Section 252. Customary License; De Minimis Infraction; and Conduct Not Envisaged by Legislature as Prohibited by the Offense
- Section 253. Prosecution When the Defendant Satisfies the Requirements of More than One Offense
- Section 254. Conviction When the Defendant Satisfies the Requirements of More than One Offense or Grade
- Section 255. Definitions

Section 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 wrong sought to be prohibited by the law defining the offense.

(2) Consent to Bodily Harm. When conduct is charged to constitute an offense because it causes or threatens bodily harm, consent to the infliction or threat of such harm is a defense if:

(a) the bodily harm 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 disease or defect, 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;

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

The court shall dismiss a charged offense 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 wrong too trivial to warrant the condemnation of conviction; or

(3) did not actually cause the harm or wrong sought to be prohibited by the law defining the offense.

(4) Requirement of Written Statement. The court shall not dismiss a charged offense under this Section without filing a written statement of its reasons.

(5) 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 253. Prosecution When the Defendant Satisfies the Requirements of More than One Offense

(1) 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.

(2) Limitation on Separate Trials. If the several offenses based on the same act are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution, except as provided in Subsection (3).

(3) Separate Trials. When two or more offenses are charged as required by Subsection (2), the court may order that one or more of such charges be tried separately, as provided in 725 ILCS 5/114-8.

Section 254. Conviction When the Defendant Satisfies the Requirements of More than One Offense or Grade

(1) Limitations on Conviction for Multiple Related Offenses. The trier of fact 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, or
 - (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
 - (iii) the offenses are defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted,

unless the law provides that specific periods of such conduct constitute separate offenses; or

(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 Article 800 of this Code.

(b) "Substantive offense" means any offense other than an inchoate offense.

Section 255. Definitions

(1) "Bodily harm" has the meaning given in Section 108.

(2) "Conduct element" has the meaning given in Section 202.

(3) "Deception" has the meaning given in Section 2103.

(4) "Element" has the meaning given in Section 202.

(5) "Force" has the meaning given in Section 108.

(6) "Inchoate offense" has the meaning given in Section 254.

(7) "Intoxication" has the meaning given in Section 302.

(8) "Mental disease or defect" has the meaning given in Section 504.

(9) "Property" has the meaning given in Section 108.

(10) "Result element" has the meaning given in Section 202.

(11) "Substantive offense" has the meaning given in Section 254.

ARTICLE 300. IMPUTATION OF OFFENSE ELEMENTS

- Section 301. Accountability for the Conduct of Another
- Section 302. Voluntary Intoxication
- Section 303. Divergence Between Consequences Intended or Risked and Actual Consequences
- Section 304. Mistaken Belief Consistent with a Different Offense
- Section 305. Definitions

Section 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, he causes such other person to perform the conduct constituting the offense; or
- (b) *having the culpability required by the offense*,^{*1} he intentionally *aids*,^{*2} solicits, or conspires with such other person in the planning or commission of the offense; or
- (c) the statute defining the offense makes him so accountable.

(2) Exception to Accountability. Notwithstanding Subsection (1), a person is not so accountable for the conduct of another, unless the statute defining the offense provides otherwise, if:

¹Issue: Should the Proposed Code incorporate the common-law “common-design” rule, which imposes complicity liability for all crimes in furtherance of a common criminal design or agreement on all parties to the agreement, whether or not they foresaw, knew about, or ratified those crimes?

Yes: The common-design rule makes it easier to convict an offender’s confederates without a complex and difficult evidentiary showing of culpability.

No: The common-design rule inappropriately allows for liability based on negligence, or even in the absence of culpability as to the offense. The original 1961 Code sought to eliminate the common-design rule, which was then resurrected in case law. To the extent such a complicity rule is considered necessary or desirable in the homicide context, it can be addressed directly through a felony-murder rule.

Reporter: Strongly recommends against expanding liability beyond the current complicity provision.

²Issue: Should sellers of goods and services have a special exemption from complicity liability arising from goods employed to commit a crime?

Yes: Allowing complicity for merchants generates the possibility of criminal liability of salespersons based solely upon their failure to refuse sale to customers of items that are open for public sale. Section 301 should have a special defense for commercial sellers of legal goods.

No: Section 301’s culpability requirements will ensure that the only merchants subject to liability are those who have all the culpability required for the offense and who provide the needed goods while consciously aware of a substantial risk that their goods or services will be used for the criminal purpose. Such persons deserve blame for their culpable facilitation of crime.

Reporter: No recommendation.

- (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 terminates his efforts to promote or facilitate its commission and:
 - (i) wholly deprives his prior efforts of their effectiveness, or
 - (ii) gives timely warning to the proper law enforcement authorities, or
 - (iii) otherwise makes proper efforts to prevent the commission of the offense.

(3) **Exemption from Offense Lost Through Accountability.** A person who is legally incapable of committing a particular offense himself may be convicted of the offense based on his accountability for the conduct of another person who commits the offense, unless such liability would be inconsistent with the purpose of the provision establishing his incapacity.

(4) **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.

(5) **Complicity in Uncommitted Offense.** A person who would have been accountable for the offense conduct of another under Subsection (1) if the other had committed the offense is guilty of an attempt to commit the offense.

(6) **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.

Section 302. Voluntary Intoxication

(1) Except as provided in Section 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 been sober, such unawareness is immaterial.

(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 an offense.

Section 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 and a 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 and the attendant circumstance elements that characterize the result.

Section 304. Mistaken Belief Consistent with a Different Offense

Although ignorance or mistake would otherwise provide a defense under Section 207 to the offense charged, the defense is not available if the defendant would be guilty of another offense of the same, or a higher, grade had the situation been as he supposed.

Section 305. Definitions

- (1) "Circumstance element" has the meaning given in Section 202.
- (2) "Consequence" has the meaning given in Section 303.
- (3) "Intoxication" has the meaning given in Section 302.
- (4) "Law enforcement authorities" has the meaning given in Section 108.
- (5) "Objective elements" has the meaning given in Section 202.
- (6) "Property" has the meaning given in Section 108.
- (7) "Result element" has the meaning given in Section 202.
- (8) "Voluntary intoxication" has the meaning given in Section 302.

ARTICLE 400. JUSTIFICATION DEFENSES

Section 400. General Defenses

- Section 411. General Provisions Governing Justification Defenses.
- Section 412. Lesser Evils
- Section 413. Execution of Public Duty
- Section 414. Law Enforcement Authority
- Section 415. Use of Force by Persons with Special Responsibility for Care, Discipline, or Safety of Others
- Section 416. Defense of Person
- Section 417. Defense of Property
- Section 418. Use of Force by Aggressor
- Section 419. Use of Force Likely to Cause Death or Great Bodily Harm
- Section 420. Definitions

Section 400. General Defenses

The defenses provided in Articles 400, 500, and 600 bar conviction even if all elements of the offense charged have been satisfied.

Section 411. General Provisions Governing Justification Defenses

(1) Definition. A “justification defense” is any defense described in this Article.

(2) Superiority of More Specific Justifications. The justifications provided in Section 412 (Lesser Evils) or Section 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 Article.

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

(4) 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.

(5) 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.

(6) Liability for Culpably Causing Justifying Circumstances.

(a) Notwithstanding Subsection (5), a person commits an offense if, acting with the culpability required by the offense, he causes the circumstances that justify himself or another to engage in the conduct constituting the offense.

(b) Defense. A person may have a general defense to his conduct giving rise to liability under Subsection (6)(a).

Section 412. Lesser Evils

Conduct is justified if:

- (1) it is immediately necessary to avoid a harm or wrong; and
- (2) the harm or wrong 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 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 414. Law Enforcement Authority

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

(a) The conduct of a peace officer, or any person whom he has summoned or directed to assist him, is justified if it is necessary to effect a lawful arrest or detention.

(b) Limitation. Force likely to cause death or great bodily harm 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:
 - (A) has committed or attempted a forcible felony that involves the infliction or threatened infliction of great bodily harm, or
 - (B) is attempting to escape by use of a deadly weapon, or
 - (C) otherwise indicates that he will create a risk to human life or inflict great bodily harm 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 great bodily harm unless such force is immediately necessary to prevent death or great bodily harm 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.

(3) Use of Force to Prevent an Escape.

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

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

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

(b) Escape from a Correctional Institution. The conduct of a correctional officer or peace officer, including the use of force likely to cause death or great bodily harm, is justified if immediately necessary to prevent the escape from a correctional institution of a person lawfully detained in such institution under sentence for an offense or awaiting trial or commitment for an offense.

(4) Definitions.

(a) “Correctional officer” means any person employed to supervise and control inmates incarcerated in, or in the custody of, a correctional institution.

(b) “Force likely to cause death or great bodily harm”

(i) includes:

(A) the firing of a firearm in the direction of a person, even though no intent exists to kill or inflict great bodily harm; and

(B) the firing of a firearm at a vehicle in which a person is riding; and

(ii) does not include discharge of a firearm using ammunition designed to disable or control a person without creating the likelihood of death or great bodily harm.

Section 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 a parent, guardian, teacher or other person similarly responsible for the care or supervision of a person less than 18 years old, or the defendant is a person acting at the request of such responsible person, and the force is necessary to safeguard or promote the welfare of the person less than 18 years old or others, or

(b) the defendant is the guardian or other person similarly responsible for the general care and supervision of a mentally handicapped person, and the force is necessary to safeguard or

promote the welfare of such person, including the prevention of his misconduct, or, when such person is in a hospital or other institution for his care and custody, for the maintenance of reasonable discipline in the institution; and

(c) the force used does not create a substantial risk of causing death, great bodily harm, extreme pain or mental distress, or gross degradation; or

(2) the defendant is a doctor or other licensed medical professional, or a person assisting a doctor 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 person less than 18 years old 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 correctional officer, and:

(a) the force used is necessary to enforce the lawful rules or procedures of a correctional institution, and

(b) if deadly force is used, its use is otherwise justifiable under this Article; or

(4) the defendant is a person responsible for the safety of an airplane, train, motor vehicle, vessel, or other carrier or a person acting at his direction, and

(a) the force used is necessary to prevent interference with the operation of the carrier or obstruction of the execution of a lawful order, and

(b) if deadly force is used, its use is otherwise justifiable under this Article; or

(5) the defendant is a person who is authorized or required by law to maintain order or decorum in an airplane, train, motor vehicle, vessel, or other carrier or in a place where others are assembled, and:

(a) the force used is necessary for such purpose, and

(b) the force used does not create a substantial risk of causing death, bodily harm, or extreme mental distress.

Section 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 Article.

Section 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 either real property or personal property that is lawfully in one's possession or in the possession of another who is a family member or household member or of a person whose property one has a legal duty to protect.

Section 418. Use of Force by Aggressor or Arrestee

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

- (1) initially provokes the use of force against himself, unless:
 - (a) (i) the force in response to his provocation is so great that he is in imminent danger of death or great bodily harm, and
 - (ii) 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; or
- (2) is resisting an arrest, whether lawful or unlawful, unless:
 - (a) the force being used to effect the arrest is unjustified, and
 - (b) he is in imminent danger of death or great bodily harm, and
 - (c) he has exhausted every less harmful means to escape such danger.

Section 419. Use of Force Likely to Cause Death or Great Bodily Harm

Unless expressly provided otherwise by this Article, the use of force likely to cause death or great bodily harm is justified only if such force is immediately necessary to prevent:

- (1) death or great bodily harm to oneself or another, or
- (2) the commission of a forcible felony.

Section 420. Definitions

- (1) "Bodily harm" has the meaning given in Section 108.
- (2) "Correctional institution" has the meaning given in Section 5309.
- (3) "Correctional officer" has the meaning given in Section 414.
- (4) "Element" has the meaning given in Section 202.
- (5) "Family member" has the meaning given in Section 1201.
- (6) "Firearm" has the meaning given in Section 1501.
- (7) "Force" has the meaning given in Section 108.
- (8) "Force likely to cause death or great bodily harm" has the meaning given in Section 414.
- (9) "Forcible felony" has the meaning given in Section 108.
- (10) "Great bodily harm" has the meaning given in Section 108.
- (11) "Household member" has the meaning given in Section 1201.

- (12) “Justification defense” has the meaning given in Section 411.
- (13) “Mentally handicapped person” has the meaning given in Section 108.
- (14) “Peace officer” has the meaning given in Section 108.
- (15) “Public servant” has the meaning given in Section 108.
- (16) “Unjustified” has the meaning given in Section 416.

ARTICLE 500. EXCUSE DEFENSES

- Section 501. General Provisions Governing Excuse Defenses
- Section 502. Involuntary Acts; Involuntary Omissions
- Section 503. Impaired Consciousness
- Section 504. Insanity
- Section 505. Immaturity; Transfer to Juvenile Court
- Section 506. Involuntary Intoxication
- Section 507. Duress
- Section 508. Ignorance Due to Unavailable Law
- Section 509. Reliance Upon Official Misstatement of Law
- Section 510. Reasonable Mistake of Law Unavoidable by Due Diligence
- Section 511. Mistake as to a Justification
- Section 512. Definitions

Section 501. General Provisions Governing Excuse Defenses

(1) Definition. An “excuse defense” is any defense described in this Article.

(2) 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 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.

(3) 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 Article shall not prevent him from being excused for his offense.

(4) Liability for Culpably Causing Excusing Conditions.

(a) Notwithstanding Subsection (3), a person commits an offense if, acting with the culpability required by the offense, 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 (4)(a).

(5) 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.

(6) *Burden of Persuasion.* Unless expressly provided otherwise by this Article, the defendant carries the burden of persuasion on all excuse defenses by a preponderance of the evidence.*³

Section 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 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 Article, and

(2) as a result, he:

- (a) does not perceive the physical nature or foresee the physical consequences of his conduct, or
- (b) does not know his conduct is wrong or criminal, or
- (c) is not sufficiently able to control his conduct so as to be justly held accountable for it.

³**Issue:** Should the defendant bear the burden of persuasion for excuse defenses?

Yes: Excuses apply only to conduct that is unjustified and considered criminal, and 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 on the defendant (to prove by "clear and convincing" evidence) for the excuse of insanity. There is no reason to distinguish that excuse from all others.

No: Because excuses are defenses of exculpation, the prosecution should bear the burden of disproving excuses beyond a reasonable doubt.

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

Section 504. Insanity^{*4}

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

- (1) he suffers from a mental disease or defect, and
- (2) as a result, he:
 - (a) does not perceive the physical nature or foresee the physical consequences of his conduct, or
 - (b) does not know his conduct is wrong or criminal, or
 - (c) is not sufficiently able to control his conduct so as to be justly held accountable for it.
- (3) Definition. “Mental disease or defect” does not include:
 - (a) an abnormality manifested only by repeated criminal or otherwise antisocial conduct, or
 - (b) intoxication itself.

Section 505. Immaturity; Transfer to Juvenile Court

The court shall dismiss a prosecution of a person for his offense if, at the time of the offense:

- (1) he lacks the maturity of an adult, and

⁴**Issue:** Should the Code include a provision allowing for a “guilty but mentally ill” verdict?

Yes: 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.

No: The GBMI verdict responds to a false concern that the insanity defense is being successfully abused. And even if the insanity excuse were being abused, a more rational response would be to shift the burden of persuasion to the defendant, a step that Illinois has already taken. GBMI is not a “middle position” in terms of its consequences; it has the same effect as a guilty verdict (see 730 ILCS 5/5-2-6(a)), even in terms of the defendant’s receiving a psychological evaluation, which is required for *all* convicts. See 730 ILCS 5/3-8-2; cf. 730 ILCS 5/5-2-6(b) (giving IDOC discretion as to whether GBMI convicts receive treatment). Moreover, even if it were proper to use GBMI verdicts to reduce insanity acquittals, the evidence suggests that their effect in Illinois, peculiarly enough, has been to increase such acquittals.

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 blameworthiness. (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.)

Reporter: Recommends against including a GBMI verdict.

(2) as a result, he:

- (a) does not foresee the physical consequences of his conduct, or
- (b) does not know his conduct is wrong or criminal.

(3) Presumptions. A person:

(a) less than 12 years of age at the time of the offense shall be conclusively presumed to have satisfied the requirements of this excuse;

(b) 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) Transfer to Juvenile Court. A person who is excused under this Section, [but who is subject to the jurisdiction of the Juvenile Court,] shall be referred to the Juvenile Court, which shall have exclusive jurisdiction over all further proceedings in the matter.

Section 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:

(a) does not perceive the physical nature or foresee the physical consequences of his conduct, or

(b) does not know his conduct is wrong or criminal, or

(c) is not sufficiently able to control his conduct to be justly held accountable for it.

(3) Definition. “Involuntary intoxication” means any intoxication that is not voluntary intoxication.

(4) Nothing in this Section shall be deemed to preclude liability under Section 501(4).

Section 507. Duress

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

(1) he is coerced to perform the offense conduct by a threat 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 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); and

(b) relating to the extent of harm caused by the 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.

Section 508. Ignorance Due to Unavailable Law

A person is excused for his offense if:

(1) before the conduct constituting the offense was committed, the law relating to the offense was not made available in a way that would give notice to the reasonable person, and

(2) the person makes a reasonable mistake regarding 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 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 defendant'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 defendant to determine the law.

Section 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 defendant'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 510. Reasonable Mistake of Law Unavoidable by Due Diligence

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 511. Mistake as to a Justification

A person is excused for his offense if:

- (1) he makes a mistake as to whether his conduct is justified, which is:
 - (a) a reasonable mistake, or
 - (b) is less culpable than the primary culpability required by the offense charged, and
- (2) as a result, at the time of the offense, the person does not know his conduct is criminal.
- (3) 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 wrong sought to be prohibited by the offense.

Section 512. Definitions

- (1) “Circumstance element” has the meaning given in Section 202.
- (2) “Excuse defense” has the meaning given in Section 501.
- (3) “Involuntary intoxication” has the meaning given in Section 506.
- (4) “Justification defense” has the meaning given in Section 411.
- (5) “Mental disease or defect” has the meaning given in Section 504.
- (6) “Primary culpability required by the offense charged” has the meaning given in Section 511.
- (7) “Reasonable mistake” has the meaning given in Section 207.
- (8) “Result element” has the meaning given in Section 202.
- (9) “Voluntary intoxication” has the meaning given in Section 302.

ARTICLE 600. NONEXCULPATORY DEFENSES

- Section 601. General Provisions Governing Nonexculpatory Defenses
- Section 602. Prosecution Barred if Not Commenced Within Time Limitation Period
- Section 603. Entrapment
- Section 604. Unfitness to Plead, Stand Trial, or be Sentenced
- Section 605. Former Prosecution for Same Offense as a Bar to Present Prosecution
- Section 606. Former Prosecution for Different Offense as a Bar to Present Prosecution
- Section 607. Former Prosecution in Another Jurisdiction as a Bar to Present Prosecution
- Section 608. Prosecution Not Barred Where Former Prosecution Was Before Court Lacking Jurisdiction or Was Fraudulently Procured by Defendant or Resulted in Conviction Held Invalid
- Section 609. Definitions

Section 601. General Provisions Governing Nonexculpatory Defenses

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

(2) Mistake as to a Nonexculpatory Defense Is No Defense. Except as otherwise provided by this Code, it is no defense that a person mistakenly believes he has a nonexculpatory defense.

(3) Conduct Subject to a Nonexculpatory Defense Is Not Justified; Assistance of, Resistance to, and Interference With Conduct Subject to a Nonexculpatory Defense. 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.

(4) *Burden of Persuasion on Defendant. Unless expressly provided otherwise, the defendant has the burden of persuasion for a nonexculpatory defense and must prove such defense by a preponderance of the evidence.*^{*5}

⁵**Issue:** Should the defendant bear the burden of persuasion for nonexculpatory defenses?

Yes: Like excuses, 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 to show that such a defense applies is even stronger for these defenses than for excuses.

No: 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.

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

Section 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 Class [X plus] or Class X felony may be commenced at any time;

(b) a prosecution for a Class 1 felony must be commenced within 10 years;^{*6}

(c) a prosecution for any other felony must be commenced within 5 years;^{*6}

(d) a prosecution for any other offense must be commenced within 2 years.

(2) Extended Periods. If the period prescribed in Subsection (1) has expired, a prosecution nevertheless may be commenced:

(a) within one year after discovery of the offense by an aggrieved party who is himself not a party to the offense, but in no case shall this provision extend the period of limitation otherwise applicable by more than 3 years; and

(b) for any offense of which the alleged victim is less than 18 years old, within one year of the alleged victim attaining the age of 18 years.

(3) 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 of the offense 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.

^{*6}Issue: Should the Proposed Code extend the limitation periods for felonies beyond those now provided in current law? (The proposed provision extends the limitation period for felonies to 5 or 10 years from the current 3 years set in 720 ILCS 5/3-5.)

No: Limitation periods continue to serve the important goals of preventing stale prosecution, encouraging prompt investigation, and placing a reasonable limit on the long arm of the law. If a long period of time has passed, the community impulse for punishment may have passed. And, indeed, punishment may no longer be necessary because the defendant may be rehabilitated.

Yes: Changing circumstances have diminished the need for short limitation periods, and have underscored significant problems with such periods. New forensic science advances (including, but not limited to, DNA testing) have made it possible to find highly reliable evidence that remains long after the commission of an offense. At the same time, trial procedures that did not exist when limitation periods were first created at common law now give defendants full opportunity to highlight the weaknesses, if any, of old evidence. The rationale that an offender may have reformed after a prolonged period is an argument for lenient sentencing rather than absolute exoneration — and ignores the fact that limitation rules bar prosecution of old crimes by career criminals as well as by reformed citizens.

Reporter: No recommendation.

(4) Commencement of Prosecution. A prosecution is commenced when an indictment is returned or an information or complaint is filed.

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

(a) the defendant is not usually and publicly resident within this State; 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 State.

(6) Period During Which Prosecution is Pending. A prosecution is pending from the time it is commenced through the final disposition of the case, including the final disposition of the case upon appeal.

Section 603. Entrapment

(1) A person has a defense if:

(a) the person engages in an offense because he is induced to do so by a law enforcement authority, or an 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 would have been induced to commit the offense, and

(c) the person was not predisposed to commit the offense.

(2) The defense afforded by Subsection (1) is unavailable when causing or threatening bodily harm is an element of the offense charged.

(3) A defendant may raise the defense afforded by Subsection (1) only if he first admits that he performed the conduct constituting the offense for which he seeks to raise the defense.

Section 604. Unfitness to Plead, Stand Trial, or be Sentenced

(1) A defendant may not be required to plead, stand trial, or be sentenced if, because of his mental or physical condition, he is unable to understand the nature and purpose of the proceedings against him or to assist in his defense.

(2) The application of this rule is governed by Chapter 725, Article 104 (Fitness for Trial, to Plead or to be Sentenced).

Section 605. Former Prosecution for Same Offense as a Bar to Present Prosecution

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

(1) the former prosecution resulted in an acquittal. There is an "acquittal" if the prosecution resulted in a finding of not guilty by the trier of fact or in a determination that there was insufficient evidence to warrant a

conviction. A finding of guilty of an included offense is an acquittal of the inclusive offense, although the conviction is subsequently set aside.

(2) the former prosecution was terminated, after the information or complaint was filed or the indictment was returned, by a final order or judgment for the defendant, which has not been set aside, reversed, or vacated, and that necessarily required a determination inconsistent with a fact or a legal proposition that must be established for conviction of the offense.

(3) the former prosecution resulted in a conviction. There is a “conviction” if the prosecution resulted in a judgment of conviction that has not been reversed or vacated, a verdict of guilty that has not been set aside and that is capable of supporting a judgment, or a plea of guilty accepted by the court. In the latter two cases failure to enter judgment must be for a reason other than a motion of the defendant.

(4) the former prosecution was improperly terminated. Except as provided in this Subsection, there is an “improper termination” of a prosecution if the termination is for reasons not amounting to an acquittal, and it takes place after the first witness is sworn but before verdict. Termination under any of the following circumstances is not improper:

(a) The defendant consents to the termination or waives, by motion to dismiss or otherwise, his right to object to the termination.

(b) The trial court finds that the termination is necessary because:

(i) it is impossible to proceed with the trial in conformity with law; or

(ii) there is a legal defect in the proceedings that would make any judgment entered upon a verdict reversible as a matter of law; or

(iii) prejudicial conduct, in or outside the courtroom, makes it impossible to proceed with the trial without injustice to either the defendant or the State; or

(iv) the jury is unable to agree upon a verdict; or

(v) false statements of a juror on voir dire prevent a fair trial.

(5) Definition. “Included offense” has the meaning given in [current 720 ILCS 5/2-9].

Section 606. Former Prosecution for Different Offense as a Bar to Present Prosecution

Although a prosecution is for a violation of a different provision of the statutes than a former prosecution or is based on different facts, it is barred by such former prosecution under the following circumstances:

(1) The former prosecution resulted in an acquittal or in a conviction and the subsequent prosecution is for:

(a) any offense of which the defendant could have been convicted on the first prosecution; or

(b) any offense based on the same conduct or arising from the same criminal episode for which the defendant was tried on the first prosecution, if such offenses were known to the prosecuting officer at the time of the commencement of the first trial and were within the jurisdiction of the same court that tried the first prosecution, unless the court ordered a separate trial of the charge of such offense; or

(c) the same conduct, unless:

(i) the offense of which the defendant was formerly convicted or acquitted and the offense for which he is subsequently prosecuted each requires proof of a fact not required by the other and the law defining each of such offenses is intended to prevent a substantially different harm or wrong, or

(ii) the second offense was not consummated when the former trial began.

(2) The former prosecution was terminated, after the information or complaint was filed or the indictment was returned, by an acquittal or by a final order or judgment for the defendant that has not been set aside, reversed, or vacated and which acquittal, final order, or judgment necessarily required a determination inconsistent with a fact that must be established for conviction of the second offense.

(3) The former prosecution was improperly terminated 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 607. Former Prosecution in Another Jurisdiction as a Bar to Present Prosecution

When conduct constitutes an offense within the concurrent jurisdiction of this State and of the United States or another State, a prosecution in any such other jurisdiction is a bar to a subsequent prosecution in this State under the following circumstances:

(1) The former prosecution resulted in an acquittal or in a conviction and the subsequent prosecution is based on the same conduct, unless:

(a) the offense of which the defendant was formerly convicted or acquitted and the offense for which he is subsequently prosecuted each requires proof of a fact not required by the other and the law defining each of such offenses is intended to prevent a substantially different harm or wrong, or

(b) the second offense was not consummated when the former trial began; or

(2) The former prosecution was terminated, after the information or complaint was filed or the indictment was returned, by an acquittal or by a final order or judgment for the defendant that has not been set aside, reversed, or vacated and which acquittal, final order, or judgment necessarily required a determination inconsistent with a fact that must be established for conviction of the offense of which the defendant is subsequently prosecuted.

Section 608. Prosecution Not Barred Where Former Prosecution Was Before Court Lacking Jurisdiction or Was Fraudulently Procured by Defendant or Resulted in Conviction Held Invalid

A prosecution is not a bar within the meaning of Sections 605 to 607 under any of the following circumstances:

- (1) The former prosecution was before a court that lacked jurisdiction over the defendant or the offense; or
- (2) The former prosecution was procured by the defendant without the knowledge of the appropriate prosecuting officer and with the purpose of avoiding the sentence that might otherwise be imposed; or
- (3) The former prosecution resulted in a judgment of conviction that was held invalid in a subsequent proceeding.

Section 609. Definitions

- (1) “Acquittal” has the meaning given in Section 605.
- (2) “Bodily harm” has the meaning given in Section 108.
- (3) “Conviction” has the meaning given in Section 605.
- (4) “Element” has the meaning given in Section 202.
- (5) “Improper termination” has the meaning given in Section 605.
- (6) “Included offense” has the meaning given in [current 720 ILCS 5/2-9].
- (7) “Law enforcement authorities” has the meaning given in Section 108.
- (8) “Nonexculpatory defense” has the meaning given in Section 601.
- (9) “Public servant” has the meaning given in Section 108.

**ARTICLE 700. LIABILITY OF CORPORATIONS AND
OTHER NON-HUMAN ENTITIES**

- Section 701. Liability of Corporation [or Unincorporated Association]
Section 702. Relationship to Corporation [or Unincorporated Association] No Limitation on Individual Liability or Punishment
Section 703. Definitions

Section 701. Liability of Corporation [*or Unincorporated Association*]^{*7}

(1) A corporation [or unincorporated association] may be prosecuted for the commission of an offense if:

- (a) (i) the offense is a misdemeanor, or a petty or business offense, or
the offense provision indicates a legislative purpose to provide liability for a corporation [or association]; and
- (ii) a corporate agent performs the offense conduct while acting in behalf of the corporation [or association] within the scope of his office or employment, except that if the law defining the offense designates the corporate agents for whose conduct the corporation [or association] is accountable or the circumstances under which it is accountable, such provisions shall apply; or
- (b) the offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations [or unincorporated associations] by law; or
- (c) [in the case of a corporation,] the commission of the offense is authorized, requested, commanded, or performed, by the board of directors or by a high managerial agent who is acting in behalf of the corporation [or association] within the scope of his employment.

(2) Due Diligence Defense. It is a defense to a prosecution under Subsection (1)(a) that the corporation [or association] proves by a preponderance of the evidence that a high managerial agent having

Issue: Should Article 700's provisions apply to unincorporated associations as well as to corporations?

Yes: 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.

No: 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. Current 5/5-4 and 5/5-5 do not apply to unincorporated associations.

Reporter: No recommendation.

supervisory responsibility over the conduct constituting the offense exercised due diligence to prevent the commission of the offense, unless:

- (a) such a defense would be inconsistent with the legislative purpose of the statute defining the offense, or
- (b) the offense is one for which absolute liability is imposed.

(3) Definitions.

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

(b) “High managerial agent” means an officer of the corporation [or unincorporated association], or any other corporate agent who has a position of comparable authority for the formulation of policy or the supervision of subordinate employees in a managerial capacity.

[(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 702. Relationship to Corporation [or Unincorporated Association] No Limitation on Individual Liability or Punishment

(a) Membership in Corporation [or Association] No Shield from Liability. A person is legally accountable for offense conduct that he performs, or causes to be performed, in the name 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.

(b) Punishment for Individuals Applies. An individual who has been convicted of an offense by reason of his legal accountability for the conduct of a corporation [or unincorporated association] is subject to the punishment authorized by law for an individual upon conviction of such offense, although only a lesser or different punishment is authorized for the corporation [or association].

Section 703. Definitions

- (1) “Association” has the meaning given in Section 701.
- (2) “Corporate agent” has the meaning given in Section 701.
- (3) “High managerial agent” has the meaning given in Section 701.

ARTICLE 800. INCHOATE OFFENSES

Section 801.	Criminal Attempt
Section 802.	Criminal Solicitation
Section 803.	Criminal Conspiracy
Section 804.	Unconvictable Confederate No Defense
Section 805.	Defense for Victims and for Conduct Inevitably Incident
Section 806.	Defense for Renunciation Preventing Commission of the Offense
Section 807.	Grading of Criminal Attempt, Solicitation, and Conspiracy
Section 808.	Possessing Instruments of Crime
Section 809.	Definitions

Section 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 given his perception of the circumstances, 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 believes he has completed the conduct constituting the offense or believes that he has completed the last act needed to cause the result element of the offense, he satisfies the substantial step requirement contained in Subsection (1).

Section 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 to bring about the conduct that would constitute the offense given his perception of the circumstances, he intentionally commands, encourages, or requests another 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 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 to bring about the conduct that would constitute the offense

given his perception of the circumstances, 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 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 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:

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

Section 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 defendant prevented the commission of the offense.

(2) **Voluntary and Complete Renunciation Defined.** A renunciation is not "voluntary and complete" within the meaning of this section when it is motivated in whole or in part by:

- (a) a belief that circumstances exist that pose a particular threat of apprehension or detection of the accused or another participant in the criminal enterprise or that render more difficult the accomplishment of the criminal purpose; or
- (b) 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) **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 807. Grading of Criminal Attempt, Solicitation, and Conspiracy

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 808. Possessing Instruments of Crime

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

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

Section 809. Definitions

(1) “Instrument of crime” has the meaning given in Section 808.

(2) “Result element” has the meaning given in Section 202.

(3) “Voluntary and complete renunciation” has the meaning given in Section 806.

ARTICLE 900. OFFENSE GRADES AND THEIR IMPLICATIONS

- Section 901. Classified Offenses
- Section 902. Unclassified Offenses
- Section 903. Authorized Terms of Imprisonment
- Section 904. Authorized Fines
- Section 905. General Adjustments to Offense Grade
- Section 906. Authorized Sentence for Multiple Offenses
- Section 907. Definitions

Section 901. Classified Offenses

Each offense in this Code shall be classified as:

- (1) a Class [X plus] felony; or
- (2) a Class X felony; or
- (3) a Class 1 felony; or
- (4) a Class 2 felony; or
- (5) a Class 3 felony; or
- (6) a Class 4 felony; or
- (7) a Class A misdemeanor; or
- (8) a Class B misdemeanor; or
- (9) a Class C misdemeanor; or
- (10) a petty offense or business offense.

Section 902. Unclassified Offenses

An offense outside of the Code:

- (1) that declares itself to be a felony, is a Class 4 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 4 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 petty offense or a business offense.

Section 903. Authorized Terms of Imprisonment

Except as otherwise provided, the authorized term of imprisonment for:

- (1) a Class [X plus] felony is [life imprisonment and not less than 12 years];

- (2) a Class X felony is not more than [30 years and not less than 6 years];
- (3) a Class 1 felony is not more than [15 years and not less than 4 years];
- (4) a Class 2 felony is not more than [7 years and not less than 3 years];
- (5) a Class 3 felony is not more than [5 years and not less than 2 years];
- (6) a Class 4 felony is not more than [3 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 petty offense or business offense.

Section 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 plus] felony, not more than [\$250,000];
 - (b) Class X felony, not more than [\$150,000];
 - (c) Class 1 felony, not more than [\$80,000];
 - (d) Class 2 felony, not more than [\$40,000];
 - (e) Class 3 felony, not more than [\$20,000];
 - (f) Class 4 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) petty offense or business offense, not more than [\$1,000].
- (3) Corporate Fines. The authorized fine for a corporation is either the amount authorized by Subsection (1) or twice the amount authorized by Subsection (2).

Section 905. General Adjustments to Offense Grade

If the court finds that factor (1) or (2) exists or that both such factors exist, or if a trier of fact finds beyond a reasonable doubt that one or more of factors (3) or (4) exist, and if a relevant specific provision of the Code has not already taken the factor into account, the authorized sentence for an offense shall be that available if the offense were increased by one grade:

- (1) if a defendant is convicted of any offense, after having been previously convicted in Illinois or any other jurisdiction of a similar class offense or greater class offense, when such conviction has occurred within 10 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; or

- (2) if a defendant:
 - (a) who was at least 17 years of age at the time of the commission of the offense, is convicted of a felony, and
 - (b) has been previously adjudicated a delinquent minor under the Juvenile Court Act of 1987 [705 ILCS 405/1-1 et seq.] for an act that if committed by an adult would be a Class X or Class 1 felony when the conviction has occurred within 10 years after the previous adjudication, excluding time spent in custody; or
- (3) if a defendant is convicted of any felony and the offense was accompanied by exceptionally brutal or heinous behavior indicative of reckless cruelty; or
- (4) if:
 - (a) a defendant is convicted of a felony other than conspiracy and the felony was committed under an agreement with two or more other persons to commit that offense, and
 - (b) the defendant, with respect to the other individuals, occupied a position of organizer, supervisor, financier, or any other position of management or leadership, and
 - (c) the felony committed was related to or in furtherance of the criminal activities of a criminal organization or was motivated by the defendant's leadership in a criminal organization.
- (5) Definitions.
 - (a) "Criminal organization" means any confederation, alliance, network, or conspiracy of three or more persons that, through its membership or through the agency of any member, engages in a course or pattern of criminal activity. A "course or pattern of criminal activity" exists when:
 - (i) three or more offenses are committed wholly or partly within this State, within three years of each other, and
 - (ii) at least one such offense was a felony, or an inchoate offense toward commission of a felony.
 - (b) "Delinquent minor" has the meaning given in 705 ILCS 405/5-105(3).

Section 906. Authorized Sentence for Multiple Offenses

When a defendant 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 defendant has been convicted, thereby causing each additional offense to increase the total authorized cumulative sentence, but by a decreasing increment.

Section 907. Definitions

(1) “Course or pattern of criminal activity” has the meaning given Section 905.

(2) “Criminal organization” has the meaning given in Section 905.

(3) “Delinquent minor” has the meaning given in 705 ILCS 405/5-105(3).

(4) “Offense committed partly within this State” has the meaning given in Section 105.

PROPOSED ILLINOIS CRIMINAL CODE

PART II: THE SPECIAL PART

ARTICLE 1100. HOMICIDE OFFENSES

- Section 1101. Murder in the First Degree
- Section 1102. Murder in the Second Degree
- Section 1103. Manslaughter in the First Degree
- Section 1104. Manslaughter in the Second Degree
- Section 1105. Negligent Homicide
- Section 1106. Homicide of an Unborn Child
- Section 1107. Causing or Aiding Suicide
- Section 1108. Concealing a Homicide
- Section 1109. Procedures and Standards in Adjudication of Sentence for Capital Offense
- Section 1110. Definitions

Section 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. The offense is a Class [X plus] offense for which the death penalty may be imposed, subject to the procedures and standards of Section 1109.

Section 1102. Murder in the Second Degree

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

(a) recklessly causes the death of another person under circumstances manifesting an extreme indifference to the value of human life, or

(b) in fact causes the death of another person while attempting or committing a forcible felony other than an assault that causes the death.

(2) Permissive Inference. The trier of fact may infer the existence of the recklessness and indifference required by Subsection (1)(a) if the person unlawfully delivered a controlled substance to the victim and the victim dies as a result of injecting, inhaling, or ingesting any amount of that controlled substance.

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

Section 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 otherwise would be murder under Sections 1101 or 1102:

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

(b) for which there is a reasonable explanation, 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) Burden of Persuasion. The defendant carries the burden of persuasion on the mitigating factors in Subsections (1)(a) and (b) and must prove such factors by a preponderance of the evidence.

(3) Grading. The offense is a Class 1 felony.

Section 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 2 felony.

Section 1105. Negligent Homicide

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

(2) Grading. The offense is a Class 4 felony.

Section 1106. Homicide of an Unborn Child

(1) Offense Defined. A person commits an offense if he causes the death of an unborn child under circumstances that would be an offense under Section 1101, 1102(1)(a), 1103, or 1104 if the unborn child had been born.

(2) Exceptions. The offense does not include conduct performed:

(a) by the pregnant woman whose unborn child is killed, or

(b) during any abortion to which the pregnant woman has consented, or

(c) pursuant to usual and customary standards of medical practice during diagnostic testing or therapeutic treatment.

(3) Definitions.

(a) "Abortion" means the use of any instrument, medicine, drug, or any other substance or device to terminate the pregnancy of a woman known to be pregnant with an intention other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, or to remove a dead fetus.

(b) An "unborn child" is any individual of the human species from fertilization until birth.

(4) Grading. The offense is an offense of one grade less than it would be if the unborn child had been born.

Section 1107. Causing or Aiding Suicide

(1) Causing Suicide. A person may be convicted of an offense under this Article for causing another to commit suicide if, and only if, he causes such suicide by force, duress or deception.

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

(3) Exception. The offense defined in Subsection (2) does not include a good-faith attempt at compliance with the Illinois Living Will Act [755 ILCS 35/1 et seq.], the Health Care Surrogate Act [755 ILCS 40/1 et seq.], or the Powers of Attorney for Health Care Law [755 ILCS 45/4-1 et seq.].

(4) Definition. “Suicide” means intentionally causing one’s own death.

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

- (a) a Class 3 felony if his conduct causes such suicide,
- (b) a Class 4 felony if his conduct causes an attempted suicide.
- (c) Otherwise the offense is a Class A misdemeanor.

Section 1108. Concealing a Homicide

(1) Offense Defined. A person commits an offense if he conceals a person’s death knowing that the death was caused by a person.

(2) Grading. The offense is a Class 4 felony.

Section 1109. Procedures and Standards in Adjudication of Sentence for Capital Offense

[Insert provision incorporating recommendations # 28 and 61 of the Report of the Governor’s Commission on Capital Punishment.]

Section 1110. Definitions

- (1) “Abortion” has the meaning given in Section 1106.
- (2) “Controlled substance” has the meaning given in Section 5309.
- (3) “Deception” has the meaning given in Section 2103.
- (4) “Force” has meaning given in Section 108.
- (5) “Forcible felony” has the meaning given in Section 108.
- (6) “Suicide” has the meaning given in Section 1107.
- (7) “Unborn child” has the meaning given in Section 1106.

ARTICLE 1200. ASSAULT, ENDANGERMENT, AND THREAT OFFENSES

Section 1201. Assault

Section 1202. Reckless Injuring; Endangerment

Section 1203. Terroristic Threats

Section 1204. Stalking

Section 1205. Abuse and Gross Neglect

Section 1206. Definitions

Section 1201. Assault

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

(a) causes bodily harm to another person, or

(b) makes physical contact of an insulting or provoking nature with another person.

(2) Grading.

(a) Heinous Assault. The offense is a Class 2 felony if the person knowingly:

(i) causes great bodily harm, or

(ii) tortures another person, or

(iii) circumcises, excises, or infibulates, in whole or in part, the labia majora, labia minora, or clitoris of another person.

(b) Aggravated Assault. The offense is a Class 3 felony if the person knowingly:

(i) causes bodily harm by administering a food or drug to the victim without his or her consent, or

(ii) *commits the offense in a public place*,^{*8} or

(iii) commits the offense against a family member or household member, and the defendant has previously been convicted of any forcible offense against the victim, or

(iv) commits the offense in violation of an order of protection.

^{*8}**Issue:** Should Section 1201(2)(b)(ii) be deleted, thereby eliminating the aggravation for assaults committed in public places?

Yes: The public-place aggravation appears designed to punish the risk to others, public affront, and potential for escalation attendant to a public assault. Where those dangers or harms arise, however, liability for endangerment, disorderly conduct, and/or riot is available. Moreover, when coupled with Section 1201(2)(b)(iii)'s aggravation for domestic assault, Section 1201(2)(b)(ii) creates a "special" aggravation that seems likely to swallow the basic offense. Also, where Section 1201(2)(d)'s grade adjustment for certain victims applies, cases of public assault would be graded as seriously as the offense of reckless homicide.

No: The public-place aggravation punishes endangering innocent bystanders and generally preserves public order. Current law similarly grades assault as a Class 3 felony where it is committed "on or about a public way, public property or public place of accommodation or amusement." 720 ILCS 5/12-4(b)(8).

Reporter: No recommendation.

- (c) Otherwise the offense:
 - (i) under Subsection (1)(a) is a Class 4 felony, and
 - (ii) under Subsection (1)(b) is a Class A misdemeanor.
- (d) Grade Adjustment for Certain Victims. The grade of the offense under Subsection (2)(b) or (2)(c) is one grade higher than it would otherwise be if the victim is:
 - (i) a peace officer, custodial officer, or community policing volunteer, performing his or her duty, or
 - (ii) pregnant, or
 - (iii) a physically handicapped or mentally handicapped person, or
 - (iv) more than 60 years old or less than 13 years old.
- (3) Definitions.
 - (a) “Community policing volunteer” means a person who is summoned or directed by a peace officer or any person actively participating in a community policing program and who is engaged in lawful conduct intended to assist any unit of government in enforcing any criminal or civil law. For the purpose of this Section, “community policing program” means any plan, system, or strategy established by and conducted under the auspices of a law enforcement agency in which citizens participate with and are guided by the law enforcement agency and work with members of that agency to reduce or prevent crime within a defined geographic area.
 - (b) “Family member” means a spouse, former spouse, parent, grandparent, brother, sister, child, or grandchild, whether by whole blood, half-blood, or adoption, and includes a step-parent, step-grandparent, step-brother, step-sister, step-child, or step-grandchild.
 - (c) “Household member” means a person who regularly resides in a person’s household, or who, within the prior 6 months, regularly resided in the person’s household.
 - (d) “Torture” means infliction of, or subjection to, extreme physical pain, motivated by an intent to increase or prolong the pain, suffering, or agony of the victim.

Section 1202. Reckless Injuring; Endangerment

- (1) Offense Defined. A person commits an offense if he engages in conduct by which he recklessly creates a substantial risk of bodily harm to another person.
- (2) Grading.
 - (a) Reckless Injuring.
 - (i) If great bodily harm is caused, the offense is a Class 3 felony.
 - (ii) If bodily harm is caused, the offense is a Class A misdemeanor.
 - (b) Endangerment.

- (i) If the person creates a substantial risk of death or great bodily harm, the offense is a Class 4 felony.
- (ii) Otherwise the offense is a Class B misdemeanor.

Section 1203. Terroristic Threats

- (1) Offense Defined. A person commits an offense if:
 - (a) being reckless as to terrorizing another person,
 - (b) he threatens to commit any offense likely to cause great bodily harm, unlawful confinement or restraint, or substantial property damage to another.
- (2) Grading. The offense is a Class A misdemeanor.

Section 1204. Stalking

- (1) Offense Defined. A person commits an offense if he:
 - (a) knowingly follows or surveils another person on at least two separate occasions, and
 - (b) places that person in reasonable apprehension that he, or a household member, will receive bodily harm or unlawful confinement or restraint.
- (2) Grading.
 - (a) The offense is a Class 3 felony if the person violates an order of protection.
 - (b) Otherwise the offense is a Class 4 felony.

Section 1205. Abuse and Gross Neglect

- (1) Offense Defined. A person commits an offense if, having a duty to provide medical or personal care or maintenance, he recklessly causes mental injury or substantial emotional distress to, or fails to provide the care or maintenance necessary for the safety and welfare of, a victim who:
 - (a) is more than 60 years old, or
 - (b) is less than 18 years old, or
 - (c) is a physically handicapped or mentally handicapped person.
- (2) Grading.
 - (a) If the offense is committed knowingly, it is a Class 2 felony.
 - (b) Otherwise the offense is a Class 3 felony.

Section 1206. Definitions

- (1) “Bodily harm” has the meaning given in Section 108.
- (2) “Community policing volunteer” has the meaning given in Section 1201.
- (3) “Custodial officer” has the meaning given in Section 5302.
- (4) “Damaging” property has the meaning given in Section 2206.
- (5) “Family member” has the meaning given in Section 1201.
- (6) “Forcible offense” has the meaning given in Section 108.
- (7) “Great bodily harm” has the meaning given in Section 108.
- (8) “Household member” has the meaning given in Section 1201.

- (9) “Mentally handicapped person” has the meaning given in Section 108.
- (10) “Peace officer” has the meaning given in Section 108.
- (11) “Physically handicapped person” has the meaning given in Section 108.
- (12) “Property” has the meaning given in Section 108.
- (13) “Public place” has the meaning given in Section 6107.
- (14) “Torture” has the meaning given in Section 1201.

ARTICLE 1300. SEXUAL ASSAULT OFFENSES

- Section 1301. Sexual Assault; Aggravated Sexual Assault
- Section 1302. Sexual Abuse; Aggravated Sexual Abuse
- Section 1303. Sexual Exploitation of a Child
- Section 1304. Custodial Sexual Misconduct
- Section 1305. Prohibited Conduct by Convicted Child Sex Offender
- Section 1306. General Provisions Relating to this Article
- Section 1307. Definitions

Section 1301. Sexual Assault; Aggravated Sexual Assault

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

- (a) not his spouse who is less than 17 years old, or
- (b) by force or threat of force, or
- (c) who the defendant knows is unable to:
 - (i) understand the nature of the act, or
 - (ii) knowingly consent to it.

(2) **Omission Liability of Parents and Guardians.** It is an offense for a parent, step-parent, or legal guardian of a child less than 17 years old to knowingly allow another person to engage in the conduct constituting the offense under Subsection (1) with the child.

(3) **Definition.** “Sexual intercourse” means:

- (a) any contact, however slight, between the sex organ or anus of one person by an object, the sex organ, mouth, or anus of another person, or
- (b) any intrusion, however slight, of any part of the body of one person or of any animal or object into the sex organ or anus of another person, including cunnilingus, fellatio, or anal penetration.
- (c) Evidence of emission of semen is not required to prove sexual intercourse.

(4) **Grading.**

(a) **Aggravated Sexual Assault.** The offense under Subsection

(1) is a Class X felony if:

- (i) the victim is less than 9 years old and the defendant is at least 17 years old; or
- (ii) the defendant causes bodily harm to, or impregnates, the victim; or
- (iii) the defendant threatens, or creates a risk of, the victim’s death.

(b) **Sexual Assault.** The offense under Subsection (1) is a Class 1 felony if:

- (i) the victim is less than 13 years old and the defendant is at least 4 years older than the victim, or

- (ii) the victim is less than 17 years old and the defendant:
 - (A) is 17 years old or older, and
 - (B) holds a position of trust, authority, or supervision in relation to the victim, or
- (iii) the offense is committed under Subsections (1)(b) or (1)(c).
- (c) The offense under Subsection (1)(a) is a Class 2 felony if the defendant is at least 4 years older than the victim.
- (d) The offense under Subsection (1)(a) is a Class 4 felony if the victim is less than 13 years old and the defendant is less than 4 years older than the victim.
- (e) Otherwise the offense is a Class A misdemeanor.
- (f) Omission Liability. The offense under Subsection (2) is an offense of one grade less that it would be for the person engaging in the intercourse.

Section 1302. Sexual Abuse; Aggravated Sexual Abuse

(1) **Offense Defined.** A person commits an offense if he engages in sexual conduct with another person:

- (a) not his spouse who is less than 17 years old, or
- (b) by force or threat of force, or
- (c) who the defendant knows is unable to:
 - (i) understand the nature of the act, or
 - (ii) knowingly consent to it.

(2) **Definition.** “Sexual conduct” means any knowing touching or fondling by the victim or the accused, either directly or through clothing, of:

- (a) the sex organs, anus or breast of the victim or the accused, or
- (b) any part of the body of a child under 13 years of age, or
- (c) any transfer or transmission of semen by the accused upon any part of the clothed or unclothed body of the victim, with intent to achieve sexual arousal or gratification of the victim or the accused.

(3) **Grading.**

- (a) **Aggravated Sexual Abuse.** The offense is a Class 2 felony if:
 - (i) the victim is less than 13 years old and the defendant is at least 4 years older than the victim, or
 - (ii) the defendant causes bodily harm or pregnancy to the victim, or
 - (iii) the defendant threatens to cause, or creates a risk of, the victim’s death.
- (b) **Sexual Abuse.**
 - (i) The offense is a Class 4 felony if:
 - (A) the offense is committed under Subsections (1)(b) or (1)(c), or
 - (B) the victim is less than 17 years old and the defendant is at least 4 years older than the victim, or

(C) the victim is less than 17 years old and the defendant:

(I) is 17 years old or older and

(II) holds a position of trust, authority, or supervision in relation to the victim.

(ii) The offense is a Class A misdemeanor if the victim is less than 13 years old and the defendant is less than 4 years older than the victim.

(iii) Otherwise the offense is a Class B misdemeanor.

Section 1303. Sexual Exploitation of a Child

(1) **Offense Defined.** A person commits an offense if, with intent to achieve sexual arousal or gratification of himself or the other person, he entices, coerces, or persuades a person less than 17 years old to remove clothing.

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

Section 1304. Custodial Sexual Misconduct

(1) **Offense Defined.** A person commits an offense if he engages in sexual intercourse or sexual conduct with a person not his spouse who is:

(a) in the penal custody of the correctional system for which he is a correctional employee, or

(b) a detainee, probationer, parolee, or releasee under his supervisory, disciplinary, or custodial authority, including a person he is employed as a custodial officer to supervise and control.

(2) **Definition.** “Penal custody” means:

(a) pretrial incarceration or detention following arrest, or

(b) incarceration or detention under a sentence or commitment to a State or local correctional institution, or

(c) parole or mandatory supervised release, or

(d) electronic home detention, or

(e) probation.

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

Section 1305. Prohibited Conduct by Convicted Child Sex Offender

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

(a) being a person who:

(i) has been convicted of any sexual offense for which the victim was less than 17 years old, and

(ii) has been notified that he is a person subject to this offense, and

(b) he knowingly approaches, contacts, or communicates with a person less than 17 years old while at or in:

(i) a public or private pre-school, elementary, or secondary school, or

(ii) a vehicle for the transportation of school children, or

- (iii) a public park building or grounds, or
 - (iv) a facility providing programs or services exclusively for persons less than 18 years old.
- (2) Exception. A person does not commit the offense if:
 - (a) he is a parent or guardian of a person less than 18 years old who is present, or
 - (b) the superintendent, principal, school board, park manager, facility manager, or other person responsible for the operation of the facility has given him permission to be present.
- (3) Definition. “Public park” includes a park, forest preserve, or conservation area under the jurisdiction of the State or a unit of local government.
- (4) Grading. The offense is a Class 4 felony.

Section 1306. General Provisions Relating to this Article

- (1) Culpability as to Age. Unless expressly provided otherwise, where an offense in this Article requires that the victim be under a specific age, it need be proven only that the defendant was negligent as to the victim being under that age.
- (2) Exemption of Medical Treatment. A medical examination or procedure conducted by a physician, licensed medical professional, parent, or caretaker for the purpose of providing and in a manner consistent with reasonable medical standards is not an offense under this Article.

Section 1307. Definitions

- (1) “Bodily harm” has the meaning given in Section 108.
- (2) “Correctional employee” has the meaning given in Section 5308.
- (3) “Correctional institution” has the meaning given in Section 5309.
- (4) “Custodial officer” has the meaning given in Section 5302.
- (5) “Force” has the meaning given in Section 108.
- (6) “Loiter” has the meaning given in Section 6108.
- (7) “Penal custody” has the meaning given in Section 1304.
- (8) “Public park” has the meaning given in Section 1305.
- (9) “Sexual conduct” has the meaning given in Section 1302.
- (10) “Sexual intercourse” has the meaning given in Section 1301.

ARTICLE 1400. KIDNAPING, COERCION, AND RELATED OFFENSES

Section 1401. Kidnaping; Aggravated Kidnaping

Section 1402. Unlawful Restraint; Aggravated Unlawful Restraint

Section 1403. Interference with Custody

Section 1404. Criminal Coercion

Section 1405. Definitions

Section 1401. Kidnaping; Aggravated Kidnaping

(1) **Offense Defined.** A person, other than a parent exercising authority over his child, commits an offense if he knowingly:

- (a) confines another secretly and against his will, or
- (b) with intent to confine him secretly, moves another from one place to another against his will:
 - (i) by force or threat of force, or
 - (ii) by deception or enticement.

(2) **Child Under 13.** If a child less than 13 years old consents to confinement or movement, such confinement or movement is nonetheless “against his will” if it is done without the consent of the child’s parent or legal guardian.

(3) **Grading.**

(a) **Aggravated Kidnaping.** The offense is a Class X felony if the person:

- (i) intends to obtain ransom or the performance of other demands, or
- (ii) commits a felony, other than the offense under this Section, against the victim.

(b) The offense is a Class 1 felony if:

- (i) the victim is a child less than 13 years old or a severely or profoundly mentally retarded person, or
- (ii) the confinement lasts for longer than 24 hours.

(c) **Kidnaping.** Otherwise the offense is a Class 2 felony.

(4) **Definition.** “Severely or profoundly mentally retarded person” means a person:

- (a) whose intelligence quotient does not exceed 40, or
- (b) whose intelligence quotient does not exceed 55 and who suffers from significant mental illness to the extent that the person’s ability to exercise rational judgment is impaired.

Section 1402. Unlawful Restraint; Aggravated Unlawful Restraint

(1) **Offense Defined.** A person commits an offense if he knowingly detains another against his will without authority.

(2) **Grading.**

(a) **Aggravated Unlawful Restraint.** The offense is a Class 2 felony if:

- (i) the person intends to obtain ransom or the performance of other demands, and
- (ii) the victim is a peace officer, correctional employee, or community policing volunteer, and is engaged in the performance of his duties.
- (b) Unlawful Restraint. Otherwise the offense is a Class 4 felony.

Section 1403. Interference with Custody

- (1) Offense Defined. A person commits an offense if he intentionally conceals, detains, retains, moves, or otherwise affects the custody of:
 - (a) a person less than 18 years old, or
 - (b) a severely or profoundly mentally retarded person,in a way that violates a court order relating to custody of the child or retarded person.
- (2) Grading.
 - (a) The offense is a Class C misdemeanor if it is a violation of the visitation provisions of a court order.
 - (b) Otherwise the offense is a Class 4 felony.

Section 1404. Criminal Coercion

- (1) Offense Defined. A person commits an offense if, with intent to cause another to perform or to omit to perform an act, he threatens to unlawfully:
 - (a) inflict bodily harm on any person, subject any person to physical confinement or restraint, or damage property; or
 - (b) accuse any person of an offense; or
 - (c) expose a secret tending to subject any person to hatred, contempt, or ridicule; or
 - (d) take or withhold action as a public servant, or cause a public servant to take or withhold action; or
 - (e) bring about or continue a strike, boycott, or other collective action.
- (2) Grading.
 - (a) The offense is a Class 2 felony if the person commits the offense in furtherance of the activities of a criminal organization.
 - (b) The offense is a Class 3 felony if:
 - (i) the victim was a peace officer, correctional officer, or community policing volunteer, and
 - (ii) the person intended to interfere with or retaliate for the performance of an official duty.
 - (c) Otherwise the offense is a Class 4 felony.

Section 1405. Definitions

- (1) “Bodily harm” has the meaning given in Section 108.
- (2) “Community policing volunteer” has the meaning given in Section 1201.
- (3) “Correctional employee” has the meaning given in Section 5308.
- (4) “Correctional officer” has the meaning given in Section 414.
- (5) “Criminal organization” has the meaning given in Section 905.
- (6) “Damaging” property has the meaning given in Section 2206.
- (7) “Deception” has the meaning given in Section 2103.
- (8) “Force” has the meaning given in Section 108.
- (9) “Peace officer” has the meaning given in Section 108.
- (10) “Property” has the meaning given in Section 108.
- (11) “Public servant” has the meaning given in Section 108.
- (12) “Severely or profoundly mentally retarded person” has the meaning given in Section 1401.

ARTICLE 1500. ROBBERY OFFENSES

Section 1501. Robbery; Aggravated Robbery

Section 1501. Robbery; Aggravated Robbery

(1) **Offense Defined.** A person commits an offense if he takes property from the person or presence of another by force or threat of force.

(2) **Grading.**

(a) The offense is a Class 1 felony if:

- (i) the amount involved is in excess of \$10,000, or
- (ii) the property taken is a firearm, automobile, airplane, motorcycle, motorboat, or other motor vehicle.

(b) The offense is a Class 2 felony if:

- (i) the amount involved is in excess of \$1,000; or
- (ii) the victim is:
 - (A) a physically handicapped or mentally handicapped person, or
 - (B) more than 60 years old, or
 - (C) less than 17 years old; or
- (iii) the offense is committed in a school or place of worship; or
- (iv) the person by his words or actions indicates to the victim that he is armed with a dangerous weapon, whether he is or not.

(c) Otherwise the offense is a Class 3 felony.

(3) **Valuation.** The “amount involved” in a robbery is governed by Section 2109(7).

(4) **Definitions.**

(a) “Dangerous weapon” means:

- (i) anything readily capable of lethal use and possessed under circumstances not manifestly appropriate for any lawful use it may have, or

(ii) any implement for the infliction of great bodily harm that serves no common lawful purpose.

Dangerous weapons include any firearm; any gun not ordinarily used as a weapon; any stun gun or taser; any sharp-edged or sharply pointed knife or razor blade; any axe or hatchet; and any billy, blackjack, bludgeon, or metal knuckles.

(b) “Firearm” means any device that is designed to expel a projectile or projectiles by the action of an explosion, expansion of gas, or escape of gas, but excludes any gun not ordinarily used as a weapon.

(c) “Force” has the meaning given in Section 108.

(d) “Gun not ordinarily used as a weapon” means:

(i) any pneumatic gun, spring gun, paint ball gun, or B-B gun which either expels a single globular projectile not exceeding .18 inch in diameter and which has a maximum muzzle velocity of less than 700 feet per second or breakable paint balls containing washable marking colors;

(ii) any device used exclusively for signaling or safety and required or recommended by the United States Coast Guard or the Interstate Commerce Commission; or

(iii) any device used exclusively for the firing of stud cartridges, explosive rivets, or similar industrial ammunition.

(e) “Mentally handicapped person” has the meaning given in Section 108.

(f) “Physically handicapped person” has the meaning given in Section 108.

(g) “Place of worship” has the meaning given in Section 108.

(h) “Property” has the meaning given in Section 108.

(i) “School” has the meaning given in Section 108.

ARTICLE 2100. THEFT AND RELATED PROVISIONS

- Section 2101. Consolidation of Theft Offenses
- Section 2102. Theft by Unlawful Taking or Disposition
- Section 2103. Theft by Deception
- Section 2104. Theft by Extortion
- Section 2105. Receiving Stolen Property
- Section 2106. Theft of Services
- Section 2107. Theft by Failure to Make Required Disposition of Funds Received
- Section 2108. Theft of Property Lost, Mislaid, or Delivered by Mistake
- Section 2109. Grading of Theft
- Section 2110. Claim of Right
- Section 2111. Unauthorized Use of Automobiles and Other Vehicles
- Section 2112. Definitions

Section 2101. Consolidation of Theft Offenses

Conduct denominated theft in this Article 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 Article.

Section 2102. Theft by Unlawful Taking or Disposition

(1) **Offense Defined.** A person commits theft if he knowingly obtains or exerts unauthorized control over property of another with intent to deprive the owner thereof.

(2) **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) “Obtain” means:

- (i) 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
- (ii) in relation to labor or services, to secure performance thereof.

(c) “Owner” means a person, other than the defendant, who has possession of or any other interest in the property involved, even though such interest or possession is unlawful, and without whose consent the defendant has no authority to exert control over the property.

(d) “Property of another” is any property in which a person other than the defendant has an interest that the defendant has no authority to defeat or impair, even though the defendant may also have an interest in the property.

(3) Permissive Inferences. The trier of fact may infer that:

(a) a lessee of property has the intent to deprive the owner thereof if the lessee:

(i) fails to return the property to the owner within 10 days after receiving written demand from the owner for its return, or

(ii) fails to return the property to the owner within 24 hours after receiving written demand from the owner for its return, if the lessee had presented materially fictitious identification information to the owner.

(iii) Written demand. A notice in writing, given after the expiration of the leasing agreement, addressed and mailed by registered mail to the lessee, at the address given by him and shown on the leasing agreement, shall constitute proper demand for purposes of this provision; or

(b) 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.

Section 2103. Theft by Deception

(1) Offense Defined. A person commits theft if he knowingly obtains property of another by deception.

(2) Deception Defined. A person deceives if he knowingly:

(a) creates or confirms another’s false impression, including a false impression as to law, value, or intention or other state of mind; but 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; or

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

(c) prevents another from acquiring information that would affect his judgment of a transaction; or

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

(3) 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.

(4) Permissive Inference. The trier of fact may infer that the elements of this offense are satisfied if a person:

(a) promises to perform services for the owner for consideration of \$10,000 or more; and

(b) accepts a down payment of 10% or more of the agreed consideration; and

(c) intentionally, and without cause, fails to substantially perform the promise, unless the owner initiated the suspension of performance; and

(d) fails, within 45 days of receiving written demand from the owner, to respond to the demand or to return all payments he accepted under the promise, including the down payment.

(e) Written demand. A notice in writing, addressed and mailed by registered mail to the promisor at the promisor's last known address, shall constitute proper demand for purposes of this provision.

Section 2104. Theft by Extortion

(1) Offense Defined. A person commits theft if he knowingly obtains property of another by threatening to:

(a) inflict bodily harm on any person, subject any person to physical confinement or restraint, or commit any other offense; or

(b) accuse any person of an offense; or

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

(d) take or withhold action as a public servant, or cause a public servant 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 the person purports to represent; 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 harm that would not benefit the defendant.

(2) Defense. It is a defense to prosecution under Subsections (1)(b) to (1)(g) of this Section 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 2105. Receiving Stolen Property

(1) Offense Defined. A person commits theft if he knowingly receives, retains, or disposes of stolen property, while reckless as to whether the property has been stolen.

(2) Exception. It is not an offense if the person received, retained, or disposed of the property with the intent to restore it to the owner.

(3) Definitions.

(a) “Receiving” means acquiring possession, control, or title, or lending on the security of the property.

(b) “Stolen” property means property over which control has been obtained by theft.

(4) *Permissive Inference. The trier of fact may infer the requisite recklessness in the case of a person who:*

(a) is found in possession or control of property:

(i) that has been stolen from more than one person on separate occasions, or

(ii) for which he knows the serial number or other identification number or mark has been removed, covered, altered, or obscured; or

(b) has received stolen property in another transaction within the year preceding the transaction charged; or

(c) being a dealer in property of the sort received, acquires it for a consideration that he knows is far below its reasonable value.

(d) Definition. “Dealer” means a person in the business of buying or selling goods, including a pawnbroker.”⁹

Section 2106. 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 knowingly 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 knowingly uses or appropriates such services to his own benefit or to the benefit of another not entitled thereto.

⁹Issue: Should the permissive inferences established in Section 2105(4) be deleted?

Yes: The evidence that would be required to establish these inferences would be overly prejudicial, amounting to “other crimes” evidence used to support an improper “propensity” inference.

No: The facts supporting these inferences are highly probative, as they strongly support the conclusion that the defendant is knowingly trafficking in stolen goods. Several states have adopted these specific presumptions; at least ten additional states have adopted similar presumptions; New York, California, New Jersey, and some other states have adopted even stronger presumptions (e.g., presuming knowledge absent a reasonable inquiry by the buyer into the seller’s rights in the property). Although current law does not explicitly provide such inferences, the current provision (720 ILCS 5/16(a)(4)) also has a lesser culpability requirement — knowledge or reason to know, rather than actual knowledge — as to whether the property is stolen.

Reporter: No recommendation.

(2) Definition. “Services” includes labor; professional service; advertising services; transportation, telephone, or other public service; accommodation in hotels, restaurants, or elsewhere; admission to exhibitions; use of vehicles, copyrighted or patented material or other intellectual property, or other property; 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 trier of fact may infer an intention to obtain the services without paying from a person’s refusal to pay or absconding without payment or offer to pay.

Section 2107. Theft by Failure to Make Required Disposition of Funds Received

(1) Offense Defined. A person who knowingly 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 deals with the property obtained as his own and fails to make the required payment or disposition.

(2) Mixed Property. Subsection (1) applies notwithstanding that it may be 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 trier of fact may infer from the fact that a person is a public servant, an officer or employee of a financial institution, a lawyer, or an accountant or other financial professional that the person:

(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 2108. Theft of Property Lost, Mislaid, or Delivered by Mistake

(1) **Offense Defined.** A person commits theft if, having come 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, and with intent to deprive the owner thereof, he fails to take *reasonable measures*^{*10} to restore the property to a person entitled to have it.

(2) **Grading.** The grade of this offense is one grade lower than it would be under Section 2109.

Section 2109. Grading of Theft

(1) Theft constitutes a Class 1 felony if the amount involved is in excess of \$100,000.

(2) Theft constitutes a Class 2 felony if:

(a) the amount involved is in excess of \$10,000, or

(b) the stolen property is a firearm, automobile, airplane, motorcycle, motorboat, or other motor vehicle, or

(c) in the case of theft by receiving stolen property, if the receiver is in the business of buying or selling stolen property.

(3) Theft constitutes a Class 3 felony if the amount involved is in excess of \$1,000.

(4) Theft constitutes a Class 4 felony if:

(a) the amount involved is in excess of \$300, or

(b) the stolen property is a credit or debit card.

(5) Theft constitutes a Class A misdemeanor if the amount involved is \$300 or less,

¹⁰**Issue:** Should the phrase “reasonable measures” be replaced with some more specific requirement?

Yes: The phrase “reasonable measures” reaches too far and does not provide sufficient notice of what conduct is required. Cf. *People v. Maness*, 732 N.E.2d 545, 550-51 (Ill. 2000) (invalidating as vague 720 ILCS 150/5.1, requiring parent or guardian to “take reasonable steps to prevent . . . commission or future occurrences of” acts of criminal sexual abuse or assault).

No: It is difficult to be any more specific here, because the intuitive sense of what is a “reasonable measure” is proportional to the value (and perhaps uniqueness) of the thing in question. That is, the person who finds a \$5 bill on the street is not expected to do much about it, while the person who accidentally receives a valuable painting in the mail would be expected to do quite a lot. The corresponding current Illinois provision uses the phrase “reasonable measures.” See 720 ILCS 5/16-2(b).

Reporter: Mild recommendation to retain the draft language.

(6) *except that, if the property was not taken from the person or by threat, or in breach of a fiduciary obligation, and the amount involved was less than \$50, the offense constitutes a Class C misdemeanor.*^{*11}

(7) Valuation. The “amount involved” in a theft is the highest value, by any reasonable standard, of the property or services acquired by theft. 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.

(8) *Theft committed in a school or place of worship, or committed upon a victim who is more than 60 years old, has the grade provided by this Section based upon double the value of the property.*^{*12}

Section 2110. Claim of Right

It is a defense to prosecution for theft that the person reasonably believed that the owner, if present, would have consented to the person’s obtaining or using the property.

Section 2111. Unauthorized Use of Automobiles and Other Vehicles

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

(a) he operates another’s automobile, airplane, motorcycle, motorboat, or other motor vehicle without consent of the owner; or

¹¹**Issue:** Should the Code include the grading category recognized in Section 2109(6), which reduces theft of less than \$300 from a Class A to a Class C misdemeanor where the amount stolen was less than \$50 and was not taken from the person, by threat, or by a breach of fiduciary obligation?

Yes: Section 2109(6)’s grading category applies to cases that involve less harm than other cases within the general category of thefts involving amounts under \$300. Although any theft certainly merits liability, there is a meaningful difference between stealing a candy bar, a compact disc, or a \$5 bill, and stealing a television. Grading theft of a trivial amount as a Class A misdemeanor would be disproportionate to its relative seriousness.

No: Theft involving any amount of property is more serious offense than other Class C misdemeanors in the Proposed Code, such as criminal trespass (Section 2303), refusing to aid an officer (Section 5305), and disrupting meetings and processions (Section 6110). The offense would also do little to deter shoplifting if the base-level offense were graded as a mere Class C misdemeanor. Current law does not recognize such a grading category. See 720 ILCS 5/16-1(b).

Reporter: No recommendation.

¹²**Issue:** Should Section 2109(8), providing special aggravations for theft, be deleted?

Yes: The distinctions this provision creates are arbitrary. Although it may be true that offenses against these specific victims or in these places seem particularly undesirable, numerous other factors might be equally relevant (such as the nature or uniqueness of the item stolen, or the wealth of the victim) yet would not be recognized. For the grading system to be completely evenhanded, it would have to recognize so many distinctions as to become unwieldy. Singling out specific factors, while ignoring others, is haphazard.

No: Offenders who steal from churches, schools, and the elderly are especially blameworthy and should be subject to enhanced punishment, as current law provides in 720 ILCS 5/16-1(b).

Reporter: No recommendation.

(b) having custody of another's motor vehicle pursuant to an agreement that it is to be returned to the owner at a specified time or on request, he knowingly retains possession without consent of the owner for so lengthy a period beyond the specified time or the request for return as to be a gross deviation from the agreement; or

(c) having custody of another's motor vehicle pursuant to an agreement that he will provide maintenance or repairs for compensation, the person operates the vehicle without consent of the owner for his own purpose in a manner constituting a gross deviation from the agreed purpose of his custody.

(2) Defense. It is a defense to prosecution under this Section that the person reasonably believed that the owner would have consented to the operation had he known of it.

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

Section 2112. Definitions

- (1) "Bodily harm" has the meaning given in Section 108.
- (2) "Credit card" has the meaning given in Section 3108.
- (3) "Dealer" has the meaning given in Section 2105.
- (4) "Debit card" has the meaning given in Section 3108.
- (5) "Deception" has the meaning given in Section 2103.
- (6) "Deprive" has the meaning given in Section 2102.
- (7) "Financial institution" has the meaning given in Section 2107.
- (8) "Firearm" has the meaning given in Section 1501.
- (9) "Obtain" has the meaning given in Section 2102.
- (10) "Owner" has the meaning given in Section 2102.
- (11) "Place of worship" has the meaning given in Section 108.
- (12) "Property" has the meaning given in Section 108.
- (13) "Property of another" has the meaning given in Section 2102.
- (14) "Public servant" has the meaning given in Section 108.
- (15) "Reasonably believes" has the meaning given in Section 108.
- (16) "Receiving" has the meaning given in Section 2105.
- (17) "School" has the meaning given in Section 108.
- (18) "Services" has the meaning given in Section 2106.
- (19) "Stolen" has the meaning given in Section 2105.

ARTICLE 2200. PROPERTY DAMAGE AND DESTRUCTION PROVISIONS

Section 2201. Arson

Section 2202. Endangering by Fire or Explosion

Section 2203. Failure to Control or Report a Dangerous Fire

Section 2204. Causing or Risking Catastrophe

Section 2205. Possession of a Device or Substance for Catastrophic Effect

Section 2206. Criminal Damage

Section 2207. Tampering With or Damaging a Public Service

Section 2208. Definitions

Section 2201. Arson

(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.

(2) **Definitions.**

(a) "Habitable structure" means a structure or vehicle:

(i) where any person lives or carries on business or other calling; or

(ii) where people assemble for purposes of business, government, education, religion, entertainment, or public transportation; or

(iii) that is used for overnight accommodation of persons.

(iv) Any such structure or vehicle is deemed to be "habitable" regardless of whether a person is actually present. If a building or structure is divided into separately habitable units, any unit that is property of another constitutes a habitable structure of another.

(b) "Vital public facility" means a facility that is necessary to ensure or protect the public health, safety, or welfare. Vital public facilities include bridges (whether over land or water), dams, tunnels, wharves, communications or radar installations, and power stations.

(3) *Grading. The offense is a Class 2 felony.*^{*13}

¹³**Issue:** Should there be an increased penalty — i.e., to a Class 1 felony — for arson where the offender damages a person's residence, or knows a person or persons are present, or causes serious bodily injury?

Yes: The instances of arson described above differ meaningfully from arson cases that do not involve the same degree of jeopardy or actual harm. Such an enhanced punishment is currently provided in 720 ILCS 5/20-1.1 and 5/21-1.2.

(continued...)

Section 2202. 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 bodily harm to another; or
- (b) creates a risk of damaging another's building or habitable structure or a vital public facility.

(2) *Grading.*

(a) The offense is a Class 3 felony if the person creates a substantial risk of death under circumstances manifesting an extreme indifference to the value of human life.

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

Section 2203. 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) *(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; and

(c) *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.

(2) *Grading.* The offense is a Class A misdemeanor.*¹⁴

¹³(...continued)

No: As to residential arson, it is not a special case of arson needing special treatment, as the underlying basis for *any* arson offense is the element of endangerment it creates. For the instances of arson described above other than residential arson, the offender would already be subject to additional liability for aggravated assault or other similar offenses. Cf. proposed Sections 254, 906 (allowing multiple liability and non-concurrent sentencing in this situation). Where five or more persons are injured, the offender would be subject to liability for causing a catastrophe, which is punished as a Class X felony. Arson is already a specialized offense that punishes a combination of property destruction and endangerment. Attempts to combine even more offenses, such as assault, within the arson offense's scope are likely only to create more problems.

Reporter: No recommendation.

¹⁴**Issue:** Should proposed Section 2203, imposing an affirmative duty on certain specified persons to control or report a dangerous fire, be deleted?

Yes: Omission liability should be avoided for all but very rare and serious circumstances. This provision is not clear in specifying the situations to which it applies, which is a particularly serious failing in a criminal provision imposing a duty to act. Current law does not include such a provision.

No: This provision addresses rare and serious circumstances for which omission liability is appropriate. The provision applies only to those who are already under a legal duty to take action, or who started the fire. Several state codes, and the Model Penal Code, include similar provisions.

Reporter: Mild recommendation to retain the draft provision.

Section 2204. Causing or Risking Catastrophe

(1) Causing Catastrophe.

(a) **Offense Defined.** A person commits an offense if he causes a catastrophe by fire, flood, avalanche, collapse of building, bridge, or tunnel, use of a catastrophic agent, or by any other means of causing potentially widespread injury or damage.

(b) **Definition.** A “catastrophic agent” means an explosive, an explosive or incendiary device, a timing or detonating mechanism for such device, poison or poisonous gas, a deadly biological or chemical contaminant or agent, or a radioactive substance.

(c) **Grading.** The offense is:

- (i) a Class X felony if committed knowingly, and
- (ii) a Class 1 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 3 felony.

(3) Threatening to Cause Catastrophe.

(a) **Offense Defined.** A person commits an offense if he threatens to cause a catastrophe in the employment of fire, explosives, or other dangerous means, as described in Subsection (1)(a).

(b) **Grading.** The offense is a Class 4 felony.

(4) 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.

(5) Catastrophe Defined. “Catastrophe” means:

- (a) great bodily harm to five or more persons, or
- (b) substantial damage to five or more buildings or habitable structures, or
- (c) substantial damage to a vital public facility that seriously impairs its usefulness or operation.

Section 2205. Possession of a Device or Substance for Catastrophic Effect

(1) **Offense Defined.** A person commits an offense if he possesses a catastrophic agent with the intent to use it to commit a felony or with the knowledge that another will use it to commit a felony.

(2) **Grading.** The offense is a Class 3 felony.

Section 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, as described in Section 2204(1)(a);*^{*15} or
 - (c) tampers with property of another and thereby creates a risk of bodily harm to another or damage to property; or
 - (d) causes another to suffer pecuniary loss by deception or threat.
- (2) Definition. “Damaging” property means impairing its usefulness or value by any means, and includes deleting or altering computer programs or other electronically recorded data.
- (3) Grading. Where damage or loss is knowingly caused, the offense is:
 - (a) a Class 1 felony if the pecuniary loss is in excess of \$100,000;
 - (b) a Class 2 felony if the pecuniary loss is in excess of \$10,000;
 - (c) a Class 3 felony if the pecuniary loss is in excess of \$1,000;
 - (d) a Class 4 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) Other violations. Otherwise the offense is a Class B misdemeanor.
 - (g) Recklessly Causing Damage. Where damage or loss is caused recklessly, the offense is one grade lower than it would be if caused knowingly.
 - (h) *Institutional Vandalism. Damage to the property of a place of worship, burial or memorializing the dead, or school, has the grade*

¹⁵**Issue:** Should Section 2206(1)(b), imposing negligence liability in criminal damage cases that involve fire, explosion or other dangerous means, be deleted?

Yes: Negligence is generally to be avoided as a basis for criminal liability. The offense already provides liability for those acting recklessly, thus guaranteeing the truly blameworthy will be punished. Current law (720 ILCS 5/21-1) does not provide for negligence liability for property damage, and imposes a recklessness requirement for damage caused through fire or explosives.

No: The offense is limited to cases involving fire, explosives, and 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.

Reporter: Mild recommendation to retain the draft provision.

*provided by this Section based upon double the value of the damage done.*¹⁶*

Section 2207. Tampering With or Damaging a Public Service

(1) **Offense Defined.** A person commits an offense if he causes a substantial interruption or impairment of a public service by:

- (a) damaging or tampering with the property of another; or
- (b) negligently damaging the property of another by fire, explosive, or other dangerous means, as described in Section 2204(1)(a); or
- (c) incapacitating an operator of such service.

(2) **Definition.** “Public service” includes any public water, gas, or power supply; any telecommunications service; any transportation service, facility, or road; any service furnished by a public utility owned by this State or any of its political subdivisions; any service subject to regulation by the Illinois Commerce Commission; or any service furnished by an electric cooperative.

(3) **Grading.** The offense is:

- (a) a Class 3 felony if the person causes the interruption or impairment intentionally; or
- (b) a Class 4 felony if the person causes the interruption or impairment knowingly.
- (c) Otherwise the offense is a Class A misdemeanor.

¹⁶**Issue:** Should 2206(2)(h) be deleted, thereby omitting the aggravation for vandalism to certain institutions?

Yes: The distinctions this provision creates are arbitrary. Although it may be true that offenses against these specific types of property seem particularly undesirable, numerous other factors might be equally relevant (such as the antiquity or rarity of the damaged object, or the identity of its owner) yet would not be recognized. For the grading system to be completely evenhanded, it would have to recognize so many distinctions as to become unwieldy; singling out specific factors, while ignoring others, is haphazard. Further, this section may authorize serious liability for students who recklessly damage school property.

No: Offenders who damage churches, schools, and burial grounds are especially blameworthy and should be subject to enhanced punishment, as current law provides in 720 ILCS 5/21-1(2).

Reporter: No recommendation.

Section 2208. Definitions

- (1) “Bodily harm” has the meaning given in Section 108.
- (2) “Catastrophe” has the meaning given in Section 2204.
- (3) “Catastrophic agent” has the meaning given in Section 2204.
- (4) “Damaging” property has the meaning given in Section 2206.
- (5) “Great bodily harm” has the meaning given in Section 108.
- (6) “Habitable structure” has the meaning given in Section 2201.
- (7) “Owner” has the meaning given in Section 2102.
- (8) “Place of worship” has the meaning given in Section 108.
- (9) “Property” has the meaning given in Section 108.
- (10) “Property of another” has the meaning given in Section 2102.
- (11) “Public service” has the meaning given in Section 2207.
- (12) “School” has the meaning given in Section 108.
- (13) “Vital public facility” has the meaning given in Section 2201.

ARTICLE 2300. BURGLARY AND OTHER CRIMINAL INTRUSION PROVISIONS

Section 2301. Home or Car Invasion

Section 2302. Burglary

Section 2303. Criminal Trespass

Section 2304. Residential Picketing

Section 2305. Definitions

Section 2301. Home or Car Invasion

(1) Home Invasion Defined. A person commits an offense if, during commission of or flight from burglary of the dwelling of another, he uses or threatens force on any person within such dwelling.

(2) Vehicle Invasion Defined. A person commits an offense if, while or after entering or reaching into a vehicle with intent to commit a *felony*^{*17} therein, he uses or threatens force against an occupant of the vehicle.

(3) Definitions.

(a) “Dwelling” means any building or structure, though movable or temporary, or a portion thereof, that is at the time of an alleged offense used as a human habitation, home, or residence.

(b) “Dwelling of another” includes a dwelling where the defendant maintains a tenancy interest but from which the defendant has been barred by a divorce decree, judgment of dissolution of marriage, order of protection, or other court order.

(4) Grading. The offense is a Class 1 felony.

¹⁷**Issue:** Should “commit a felony therein” be changed to “commit an offense therein” in proposed Section 2301(2)?

Yes: One who invades a vehicle and threatens or uses force against an occupant is intrusive and dangerous, regardless of the seriousness of the crime he originally intended to commit when he entered or reached into the vehicle. (Current law requires intent to commit a felony or theft. See 720 ILCS 5/12-11.1.)

No: Entering or reaching into a vehicle is less intrusive than entering a dwelling, and may also be consistent with a lawful purpose. Requiring an intent to commit a felony ensures that the defendant’s conduct is sufficiently serious to warrant punishment on a par with that for home invasion, and parallels Section 2301(1)’s incorporation of the felony of burglary.

Reporter: No recommendation.

Section 2302. Burglary

(1) **Offense Defined.** A person commits an offense if, without license or authority, he enters or *surreptitiously*^{*18} remains in a building or habitable structure *at a time when the premises are not open to the public*,^{*19} with intent to commit an *offense*^{*20} therein.

¹⁸**Issue:** Should the word “surreptitiously” in proposed Section 2302(1) be deleted?

Yes: Remaining in a building with the intent to commit a crime therein should be punishable as burglary whether it has the element of covertness or not, as current law provides in 720 ILCS 5/19-1.

No: The modifier “surreptitiously” ensures that the burglary offense captures only conduct that specifically creates the elements of invasion and fear that this distinct offense aims to punish. Without those elements of invasion and fear, there is little reason to give the conduct special treatment as burglary, rather than just punishing it as trespass and an attempt to commit the intended crime.

Reporter: Mild recommendation to retain the draft language.

¹⁹**Issue:** Should the phrase “at a time when the premises are not open to the public” be deleted from proposed Section 2302(1)?

Yes: This language eliminates the Illinois courts’ “limited authority” doctrine, which holds that one who enters a building or vehicle with the intent to commit a crime does so “without authority.” The “limited authority” doctrine is desirable, as it properly recognizes that one who opens his door to the public does not thereby give visitors permission to commit crimes on his property.

No: The “limited authority” doctrine is undesirable, and also contradicts the language and goals of the existing intrusion statutes. Under the doctrine, one offense element (intent to commit a crime) automatically establishes another (the separate statutory “without authority” element), making the second totally irrelevant and ultimately meaning that *any* entry into *any* building will translate the attempted crime (usually theft) into burglary. This eliminates any distinction between burglary and theft, and often ends up punishing an *attempt*, or even less than an attempt, to commit theft more severely than the completed theft would be punished. For example, under the “limited authority” rule, a teenager who enters a supermarket planning to shoplift a candy bar, but who is caught, is currently guilty of burglary (a Class 2 felony) instead of attempted theft (a Class A misdemeanor). Such a result violates any sense of proportional punishment.

Reporter: Mild recommendation to retain the draft language.

²⁰**Issue:** Should the phrase “commit an offense therein” be changed to “commit a felony therein” in proposed Section 2302(1)?

Yes: Intent to commit a misdemeanor is not serious enough to warrant punishment as burglary. (Current law requires intent to commit a felony or theft. See 720 ILCS 5/19-1, 19-3.)

No: The arousal of fear and the invasion of one’s sense of security that the burglary offense is meant to punish exist irrespective of the precise crime the burglar intends to commit — which, after all, need not occur for burglary liability to exist. The codes of about half the states, and the Model Penal Code, contain similar language.

Reporter: No recommendation.

- (2) Grading.
 - (a) If committed in the dwelling of another, the offense is a Class 2 felony.
 - (b) Otherwise the offense is a Class 4 felony.

Section 2303. 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) Grading. Committing the offense in:
 - (a) a dwelling or in highly secured premises is a Class 4 felony;
 - (b) any building, habitable structure, 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) Otherwise the offense is a Class C misdemeanor.
- (3) 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 the premises.
 - (b) “Storage structure” means any structure, truck, railway car, vessel, or aircraft that is used primarily for the storage or transportation of property.
- (4) Defenses. It is a defense to prosecution under this Section that:
 - (a) the premises were at the time of entry open to members of 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.

Section 2304. Residential Picketing

- (1) Offense Defined. A person commits an offense if he pickets before or about the dwelling of another that is not used as a place of business or of public assembly.
- (2) Grading. The offense is a Class B misdemeanor.

Section 2305. Definitions

- (1) “Dwelling” has the meaning given in Section 2301.
- (2) “Dwelling of another” has the meaning given in Section 2301.
- (3) “Force” has the meaning given in Section 108.
- (4) “Habitable structure” has the meaning given in Section 2201.
- (5) “Highly secured premises” has the meaning given in Section 2303.
- (6) “Reasonably believes” has the meaning given in Section 108.
- (7) “Storage structure” has the meaning given in Section 2303.

ARTICLE 2400. INVASION OF PRIVACY PROVISIONS

Section 2401. Interception of Electronic or Oral Communications

Section 2402. Interception of Private Written Correspondence

Section 2403. Unlawful Eavesdropping or Surveillance

Section 2404. Unlawful Access to Information

Section 2405. Unlawful Disclosure of Information

Section 2406. Definitions

Section 2401. Interception of Electronic or Oral Communications

(1) **Offense Defined.** A person commits an offense if he knowingly intercepts any private electronic or oral communication by means of any intercepting device other than equipment being used by a communications common carrier in the ordinary course of its business.

(2) **Definitions.**

(a) “Contents,” when used with respect to any electronic or oral communication, includes any information concerning the identity of the parties to such communication or the existence, substance, or meaning of that communication.

(b) “Electronic communication” means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of electronic, microwave, radio, cable, satellite, or other connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of communications.

(c) “Intercepting device” means any electronic, mechanical, or other device or apparatus that can be used to intercept an electronic or oral communication, but does not include:

(i) equipment that a communications common carrier, in the ordinary course of its business, furnished to a subscriber or user, or specifically authorized a subscriber or user to use, and that was being used by the subscriber or user in the ordinary course of business; or

(ii) a hearing aid or similar device being used to correct subnormal hearing.

(d) “Interception” of an electronic or oral communication means the visual or aural acquisition, or the recording by any means, of all or part of the contents of the communication.

(e) “Private electronic communication” means an electronic communication sent by a person with an expectation that such communication is not subject to interception under circumstances justifying such expectation.

(f) “Private oral communication” means any oral communication uttered by a person with an expectation that such communication

is not subject to interception under circumstances justifying such expectation.

(3) *Defenses.*^{*21} It is a defense to prosecution under this Section or Section 2405 that:

- (a) *the parties*^{*22} to the communication consented to the interception, disclosure, or use in question; or
- (b) the person was authorized by law to engage in the interception, disclosure, or use in question; or
- (c) (i) the interception in question was made by or at the request of a party to the communication who reasonably believed that the communication would provide evidence of an offense that another party to the communication had committed, or would commit, against him or a household member; or
 - (ii) the disclosure or use in question involved an interception described in Subsection (3)(c)(i) and was for the purpose of prosecuting an offense.
- (d) *Acquiescence is Consent.* A party to a communication who continues the communication after receiving a disclosure that the communication is subject to interception thereby consents to any subsequent interception, or disclosure or use of the interception, that falls within the scope of the disclosure.

²¹**Issue:** Should proposed Section 2401(3) include an explicit exemption for employers who monitor employees' computer activities?

Yes: Employers increasingly seek to oversee and limit worker use of the Internet and e-mail for legitimate, business-related reasons.

No: Under the proposed provision, the employer who wishes to surveil an employee's computer use need only set the employee's consent as a condition of employment, thus falling within the consent defense in proposed Section 2401(3)(a). Requiring consent would give the employee notice that his computer use will be surveilled, so he would have no expectation of privacy. (Current law has no such special exemption for employers.)

Reporter: No recommendation.

²²**Issue:** Should "the parties" in proposed Section 2401(3)(a) be changed to "a party," thereby requiring only one-party consent?

Yes: A person who feels he is being improperly intimidated, harassed, threatened, or the like, should be able to lawfully record any conversation to support his claim — or, to put it differently, the threat-maker should not be able to escape responsibility simply by being a convincing liar. Allowing one-party consent empowers victims to protect themselves, and empowers citizens to marshal evidence of others' improper behavior. Further, the non-consenting party has a limited expectation of privacy because he is, after all, speaking to the recording party, who presumably may repeat the conversation if he does not record it. Thus, the primary effect of the two-party-consent rule is to give the speaker a right to falsely deny what he said.

No: One-party consent allows some people to invade other people's privacy without notification. Current Illinois law requires all-party consent. See 720 ILCS 5/14-2(a)(1)(A).

Reporter: No recommendation.

- (4) Grading. The offense is a *Class 3 felony*.^{*23}

Section 2402. Interception of Private Written Correspondence

(1) Offense Defined. A person commits an offense if, knowing that a letter or other written private correspondence has not yet been delivered to the person to whom it is directed, and knowing that he does not have the consent of the sender or receiver of the correspondence, he:

- (a) damages or destroys the correspondence; or
 - (b) opens or reads sealed correspondence, with intent to discover its contents.
- (2) Grading. The offense is a Class A misdemeanor.

Section 2403. Unlawful Eavesdropping or Surveillance

(1) Offense Defined. A person commits an offense if, except as authorized by law, he:

- (a) trespasses on property with intent 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.

(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 A misdemeanor.

²³**Issue:** Should the offense in proposed Section 2401 (interception of communications) be graded higher for offenses involving communications of a law-enforcement official?

Yes: Such communications are especially sensitive, and must be accorded greater weight in the punishment provisions. Such an aggravation is currently provided in 720 ILCS 5/14-4(b), which aggravates the offense from a Class 4 felony to a Class 1 felony.

No: The provision as drafted increases the general grade of the offense from a Class 4 felony to a Class 3 felony. No further increase is warranted. Moreover, although it may be true that offenses involving these communications seem particularly undesirable, numerous other intrusions might be equally harmful (such as those involving confidential communications between attorney and client, doctor and patient, or other government officials such as military personnel) yet would not be recognized.

Reporter: No recommendation.

Section 2404. Unlawful Access to Information

(1) **Offense Defined.** A person commits an offense if, knowing he is not privileged to do so, he knowingly gains access to *information or*^{*24} electronic programs or data.

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

²⁴**Issue:** Should proposed Section 2404(1)'s prohibition on gaining access to "information" be deleted, thus limiting the offense to those who access computer programs and data?

Yes: Limiting liability to accessing computer programs or data better assures that only blameworthy persons are within the offense's reach. Current law only prohibits access to "a computer or any part thereof, or a program or data." See 720 ILCS 5/16D-3(a)(1).

No: Accessing information without privilege causes harm regardless of whether one uses a computer or some other means to invade another's privacy. There seems little reason to distinguish between one who steals information from a computer file and one who steals from a paper file. In fact, current law includes a separate offense criminalizing obtaining private insurance information by deception. See 215 ILCS 5/1023. It seems reasonable to think that current law's special prohibition should apply more broadly. Requiring that the defendant know he has no privilege to access the information ensures that the offense does not criminalize innocent conduct.

Reporter: No recommendation.

Section 2405. Unlawful Disclosure of Information

(1) **Offense Defined.** A person commits an offense if he discloses or uses information that he *knows*^{*25} was obtained *in a manner prohibited by Section 2401, 2402, 2403, or 2404.*^{*26}

(2) **Defenses.** The defenses defined in Subsection 2401(3) are available as defenses to this offense.

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

²⁵**Issue:** Should the culpability requirement in proposed Section 2405(1) be lowered to allow liability for one who is reckless as to whether the information was unlawfully obtained?

Yes: Requiring knowledge as to the unlawfulness of initially acquiring the information would preclude liability in many cases. Moreover, disclosing or using private information is often much more harmful — and may involve a greater invasion of privacy — than initially acquiring it. The current eavesdropping offense imposes liability on one who discloses or uses information that he “knows or reasonably should know” was unlawfully obtained. See 720 ILCS 5/14-2(a)(3).

No: Requiring knowledge as to the unlawfulness of initially acquiring the information ensures that only the truly blameworthy — and not mere gossipmongers — are within the offense’s reach.

Reporter: No recommendation.

²⁶**Issue:** Should Section 2405’s offense (unlawful disclosure of information) be expanded to criminalize improperly using or disclosing private information that was *lawfully* obtained in the first instance?

Yes: Disclosing or using sensitive information often invades privacy regardless of whether it was lawfully obtained. People often willingly share very sensitive information — such as information in medical records, insurance records, and records relating to sexual abuse — under an understanding that the person receiving the information will not share it, or will share it only in specific contexts. A person, such as a doctor or accountant, who violates that trust and unlawfully shares confidential information merits criminal punishment. Several current offenses outside Chapter 720 criminalize disclosing information that was lawfully obtained. See, e.g., 20 ILCS 301/30-5 (contents of medical records); 210 ILCS 85/6.17 (hospital or medical record information); 325 ILCS 5/11 & 5/11.2 (records relating to sexual abuse).

No: Although disclosing or using private information that was lawfully acquired may invade privacy, a Code offense that generally criminalizes such conduct risks punishing the blameless. Prohibition of the disclosure or use of specific kinds of information is better handled through the particular regulatory schemes governing the persons who oversee that information.

Reporter: No recommendation.

Section 2406. Definitions

- (1) “Contents” has the meaning provided in Section 2401.
- (2) “Electronic communication” has the meaning given in Section 2401.
- (3) “Household member” has the meaning given in Section 1201.
- (4) “Intercepting device” has the meaning given in Section 2401.
- (5) “Interception” has the meaning given in Section 2401.
- (6) “Private electronic communication” has the meaning given in Section 2401.
- (7) “Private oral communication” has the meaning given in Section 2401.
- (8) “Private place” has the meaning given in Section 2403.
- (9) “Reasonably believes” has the meaning given in Section 108.

ARTICLE 3100. FORGERY AND FRAUDULENT PRACTICES

- Section 3101. Forgery and Counterfeiting
- Section 3102. Tampering with Writing, Record, or Device
- Section 3103. Securing Execution of Documents by Deception
- Section 3104. Simulating Objects of Special Value
- Section 3105. Unauthorized Impersonation
- Section 3106. Deceptive Practices
- Section 3107. Bad Checks
- Section 3108. Fraudulent Use of Credit or Debit Card
- Section 3109. Commercial Bribery and Breach of Duty to Act Disinterestedly
- Section 3110. Bid Rigging
- Section 3111. Rigging Publicly Exhibited Contest
- Section 3112. Defrauding Secured Creditors
- Section 3113. Fraud in Insolvency
- Section 3114. Receiving Deposits in a Failing Financial Institution
- Section 3115. Selling Participation in a Pyramid Sales Scheme
- Section 3116. Definitions

Section 3101. Forgery and Counterfeiting

(1) Offense Defined. A person commits an offense if, with intent to defraud *or injure*²⁷ anyone, 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 other than was in fact the case, or
 - (iii) to be a copy of an original when no such original existed; or
- (c) puts forward any writing that he knows to be forged in a manner specified in Subsections (1)(a) or (1)(b).

²⁷**Issue:** Should the references to “injuring” another in Sections 3101(1) (forgery) and 3102(1) (tampering with writing, record, or device) be deleted?

Yes: Culpability with respect to “injuring” another is vague and is not sufficiently serious to warrant liability for these offenses. The current forgery provision does not include “intent to injure,” but refers only to an intent to defraud. See 720 ILCS 5/17-3(a).

No: Imposing liability where one acts with an intent to injure covers persons who intend to inflict harm (such as harming another’s reputation) that may not be pecuniary in nature, and serves more generally to guard against the undermining of confidence in the legitimacy of writings, records, and devices.

Reporter: No recommendation.

(2) Definitions.

(a) “Defraud” means to obtain anything of value through deception.

(b) “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 electronic identifiers, electronic mail routing information, and other symbols of value, right, privilege, or identification.

(3) Grading. The offense is:

(a) a Class 2 felony if the writing is or purports to be part of an issue of money, securities, postage, or revenue stamps, or other instruments issued by the government, or part of an issue of stock, bonds, or other instruments representing interests in or claims against any property or enterprise;

(b) a Class 3 felony if the writing is or purports to be a will, deed, contract, release, commercial instrument, or other document evidencing, creating, transferring, altering, terminating, or otherwise affecting legal relations.

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

Section 3102. Tampering with Writing, Record, or Device

(1) Offense Defined. A person commits an offense if, with intent to deceive *or injure*²⁸ anyone or to conceal any wrongdoing:

(a) knowing that he has no privilege to do so, he tampers with, falsifies, destroys, removes, or conceals any writing, record, or device, or

(b) he puts forward a writing, record, or device, knowing that it has been altered in a manner prohibited by Subsection (1)(a).

(2) Definition. To “put forward” a writing, record, device, or object means to issue, authenticate, transfer, publish, circulate, present, display, or otherwise give currency to such writing, record, device, or object.

(3) Grading.

(a) The offense is a Class 3 felony if the writing is a will, deed, mortgage, security instrument, or other writing for which the law provides public recording.

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

Section 3103. Securing Execution of Documents by Deception

(1) Offense Defined. A person commits an offense if by deception he causes another to execute any instrument affecting or purporting to affect or likely to affect the pecuniary interest of any person.

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

²⁸[See footnote 27 on page 90.]

Section 3104. Simulating Objects of Special Value

(1) **Offense Defined.** A person commits an offense if, with intent to defraud anyone, he makes, alters, or puts forward any object so that it appears to have value because of antiquity, rarity, source, or authorship that it does not possess.

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

Section 3105. Unauthorized Impersonation

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

(a) represents himself to be another person, being reckless as to whether his misrepresentation will deprive the other person of anything of value or injure the other person's reputation; 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.

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

Section 3106. Deceptive Practices

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

(a) makes a false or misleading written statement with intent to obtain property or credit; or

(b) makes a false or misleading statement in any advertisement addressed to the public or to a substantial segment thereof with intent to promote the purchase or sale of property or services; or

(c) makes a false or misleading written statement with intent to promote the sale of securities, or omits information required by law to be disclosed in written documents relating to securities; or

(d) uses or possesses for use a false weight or measure, or any other device for falsely determining or recording any quality or quantity of a commodity to be sold; or

(e) sells, offers, or exposes for sale, or delivers less than the represented quantity of any commodity or service; or

(f) takes more than the represented quantity of any commodity or service when as buyer he furnishes the weight or measure; or

(g) sells, offers, or exposes for sale adulterated or mislabeled commodities.

(2) **Definitions.**

(a) "Adulterated" means varying from the standard of composition or quality prescribed by or pursuant to any statute providing criminal penalties for such variance, or set by established commercial usage.

(b) "Mislabeled" means varying from the standard of truth or disclosure in labeling prescribed by or pursuant to any statute providing criminal penalties for such variance, or set by established commercial usage.

(c) “Securities” has the meaning given in Section 2.1 of the Illinois Securities Law of 1953 [815 ILCS 5/2.1].

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

Section 3107. 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 3108. 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.

(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 3109. Commercial Bribery and Breach of Duty to Act Disinterestedly

(1) Commercial Bribery. A person commits an offense if he knowingly solicits, accepts, or agrees to accept any benefit as consideration for violating or agreeing to violate a duty of fidelity to which he is subject as:

- (a) partner, agent, or employee of another;
- (b) trustee, guardian, or other fiduciary;
- (c) lawyer, physician, accountant, appraiser, or other professional adviser or informant;
- (d) officer, director, manager, or other participant in the direction of the affairs of an incorporated or unincorporated association; or
- (e) arbitrator or other purportedly disinterested adjudicator or referee.

(2) *Breach of Duty to Act Disinterestedly.* A person who holds himself out to the public as being engaged in the business of making disinterested selection, appraisal, or criticism of commodities or services commits an offense if he knowingly solicits, accepts, or agrees to accept any benefit to influence his selection, appraisal, or criticism.^{*29}

(3) Offering Bribes. A person commits an offense if he knowingly confers, offers, or agrees to confer any benefit the acceptance of which would be an offense under Subsections (1) or (2).

(4) Grading. Each of the offenses defined in this Section is a *Class 4 felony*.^{*30}

²⁹**Issue:** Should the offense in proposed Section 3109(2) (breach of duty to act disinterestedly) be deleted?

Yes: The prohibited conduct is not sufficiently serious to warrant criminal liability. Current law does not criminalize such conduct.

No: The sort of dishonesty covered by the offense — such as surreptitiously accepting money to overestimate the value of an antique or to write a favorable movie review — deceives the public and undermines its confidence in honest recommendations, appraisals, and criticisms.

Reporter: No recommendation.

³⁰**Issue:** Should the grade for the offenses defined in proposed Section 3109 (commercial bribery) be lowered?

Yes: The prohibited conduct is not serious enough to warrant felony status. Civil remedies sufficiently address any serious harm caused by these offenses. Current law grades commercial bribery as a business offense. See 720 ILCS 5/29A-3.

No: Grading these offenses at this level reflects their close relation to bribery of public officials, which both current law (see 720 ILCS 5/33-1) and proposed Section 5101 grade as a Class 2 felony. Although not as harmful as the bribery of public officials, the conduct prohibited by these offenses is sufficiently serious to warrant status as a Class 4 felony.

Reporter: No recommendation.

Section 3110. Bid Rigging

(1) **Offense Defined.** A person commits an offense if he knowingly engages in conduct that violates the laws governing the bidding process for a public contract, as set out in [current 30 ILCS 500/50-25 and 720 ILCS 5/33E-3, -4, -11, -14, and -18].

(2) **Grading.** The offense is a Class 3 felony.

Section 3111. Rigging Publicly Exhibited Contest³¹

(1) **Rigging 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) confers, offers, or agrees to confer any benefit upon, or threatens bodily harm 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 Rigging.** A person commits an offense if he knowingly solicits, accepts, or agrees to accept any benefit the giving of which would be an offense under Subsection (1).

(3) **Participation in Rigged 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 an offense under this Section.

(4) **Grading.**

(a) An offense under Subsection (1) or (2) is a Class 4 felony.

(b) An offense under Subsection (3) is a Class A misdemeanor.

Section 3112. Defrauding Secured Creditors

(1) **Offense Defined.** A person commits an offense if he destroys, removes, conceals, encumbers, transfers, or otherwise deals with property subject to a security interest with intent to hinder enforcement of that interest.

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

³¹**Issue:** Should proposed Section 3111 (rigging publicly exhibited contest) be expanded to cover bribes designed to influence amateur athletes' decisions to attend particular schools, participate in competitions, or retain agents for professional sports contracts?

Yes: Amateur athletics are a major source of revenue for schools. A bribe to an amateur athlete can result in the player's ineligibility to compete and in athletic-association violations carrying serious consequences for the school involved. Current law also criminalizes such conduct. See 720 ILCS 5/29-1(b) & (c); 5/29-3.

No: Such conduct is not sufficiently serious to warrant criminal liability, and is already controlled with greater specificity by athletic associations' rules, regulations, and penalties.

Reporter: No recommendation.

Section 3113. 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 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 person could be legally required to furnish in relation to such administration.

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

Section 3114. Receiving Deposits in a Failing Financial Institution

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

- (a) being an officer, manager, or other person directing or participating in the direction of a financial institution,
- (b) he knowingly receives or permits the receipt of a deposit, premium payment, or other investment in the institution,
- (c) knowing that:
 - (i) due to financial difficulties the institution is about to suspend operations or go into receivership or reorganization; and
 - (ii) the person making the deposit or other payment is unaware of the precarious situation of the institution.

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

Section 3115. Selling Participation in a Pyramid Sales Scheme

(1) **Offense Defined.** A person commits an offense if he knowingly sells the right to participate in a pyramid sales scheme.

(2) **Definition.** “Pyramid sales scheme” means any plan or operation whereby a person, in exchange for anything of value, acquires the opportunity to receive anything of value, which is primarily based upon the inducement of additional persons to participate in the same plan or operation and is not primarily contingent on the quantity of property to be sold or distributed for purposes of resale to customers. For purposes of this subsection, “anything of value” does not include payments made for sales demonstration equipment and materials furnished on a nonprofit basis for use in making sales and not for resale.

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

Section 3116. Definitions

- (1) “Adulterated” has the meaning given in Section 3106.
- (2) “Association” has the meaning given in Section 701.
- (3) “Bodily harm” has the meaning given in Section 108.
- (4) “Credit card” has the meaning given in Section 3108.
- (5) “Debit card” has the meaning given in Section 3108.
- (6) “Deception” has the meaning given in Section 2103.
- (7) “Defraud” has the meaning given in Section 3101.
- (8) “Mislabeled” has the meaning given in Section 3106.
- (9) “Property” has the meaning given in Section 108.
- (10) “Put forward” has the meaning given in Section 3102.
- (11) “Pyramid sales scheme” has the meaning given in Section 3115.
- (12) “Securities” has the meaning given in 815 ILCS 5/2.1.
- (13) “Services” has the meaning given in Section 2106.
- (14) “Stolen” has the meaning given in Section 2105.
- (15) “Writing” has the meaning given in Section 3101.

ARTICLE 4100. OFFENSES AGAINST THE FAMILY

- Section 4101. Incest
- Section 4102. Bigamy
- Section 4103. Child Abandonment
- Section 4104. Harboring or Assisting a Runaway
- Section 4105. Contributing to the Delinquency of a Minor
- Section 4106. Persistent Non-Support
- Section 4107. Abortion
- Section 4108. Charging Unlawful Fee for Adoption
- Section 4109. Definitions

Section 4101. Incest

(1) **Offense Defined.** A person commits an offense if he engages in sexual intercourse or sexual conduct with a person to whom he knows he is related as:

- (a) brother or sister, either of the whole blood or the half blood;
- or
- (b) father or mother, regardless of whether the child is legitimate, is of the whole blood or half blood, or is adopted; or
- (c) stepfather or stepmother.

(2) **Grading.** The offense is a Class 3 felony.

Section 4102. Bigamy

(1) **Bigamy.** A person commits an offense if, having a spouse, the person subsequently marries another or resides in the State after such marriage.

(2) **Marrying a Bigamist.** An unmarried person commits an offense if the person marries another under circumstances known to him that would render the other guilty of an offense under Subsection (1), or resides in the State after such marriage.

(3) **Defense: Absent Spouse.** It is a defense to prosecution under this Section that the prior spouse had been continually absent for a period of 5 years during which time the defendant did not know the prior spouse to be alive.

(4) **Grading.** The offenses defined are each a Class A misdemeanor.

Section 4103. Child Abandonment

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

- (a) being a parent, guardian, or other person having physical custody or control of a child,
- (b) without regard for the mental or physical health, safety, or welfare of the child,

(c) he knowingly leaves a child under the age of 13 without supervision by a responsible person over the age of 14 for a period of 24 hours or more.

(2) Factors to Consider. For the purposes of determining whether the child was left without regard for the mental or physical health, safety, or welfare of that child, under Subsection (1)(b), the trier of fact shall consider the following factors:

- (a) the age of the child;
- (b) the number of children left at the location;
- (c) special needs of the child, including whether the child is a physically handicapped person or a mentally handicapped person, or otherwise in need of ongoing prescribed medical treatment such as periodic doses of medications;
- (d) the duration of time in which the child was left without supervision;
- (e) the condition and location of the place where the child was left without supervision;
- (f) the time of day or night when the child was left without supervision;
- (g) the weather conditions, including whether the child was left in a location with adequate protection from the natural elements such as adequate heat or light;
- (h) the location of the parent, guardian, or other person having physical custody or control of the child, and the physical distance of the child from the person;
- (i) whether the child's movement was restricted, or the child was otherwise locked within a room or other structure;
- (j) whether the child was given a phone number of a person or location to call in the event of an emergency and whether the child was capable of making an emergency call;
- (k) whether there was food and other provision left for the child;
- (l) whether any of the conduct is attributable to economic hardship or illness and whether the parent, guardian or other person having physical custody or control of the child made a good faith effort to provide for the health and safety of the child;
- (m) whether the child was left under the supervision of another person, and the age and physical and mental capabilities of such person;
- (n) any other factor that would endanger the health or safety of the child.

(3) Grading. The offense is a Class 4 felony.

Section 4104. Harboring or Assisting a Runaway

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

(a) without the consent of the unemancipated minor's parents or legal guardians and without notifying local law enforcement authorities,

(b) he knowingly shelters an unemancipated minor for more than 48 hours, and

(c) is not an agency or association providing crisis intervention services, as authorized by Section 3-5 of the Juvenile Court Act of 1987 [705 ILCS 405/3-5], or an operator of a youth emergency shelter.

(2) Definitions.

(a) "Unemancipated minor" means a person less than 18 years old, other than a mature minor who has been emancipated under the Emancipation of Mature Minors Act [750 ILCS 30/1 et seq.].

(b) "Youth emergency shelter" has the meaning given in Section 2.21 of the Child Care Act of 1969 [225 ILCS 10/2.21].

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

Section 4105. Contributing to the Delinquency of a Minor

(1) Soliciting Minor to Commit an Offense. A person more than 21 years old commits an offense if, with the intent to promote or facilitate the commission of an offense, he solicits, compels, or directs any person less than 18 years old to commit an offense.

(2) Improper Supervision. A person commits an offense if he:

(a) is a parent, guardian, or other person having custody or control of a person less than 18 years old, and

(b) knowingly permits the person to associate with persons engaged in criminal activity, to commit lewd acts, or to violate a municipal curfew ordinance.

(3) Grading. The offense:

(a) under Subsection (1) is a Class A misdemeanor;

(b) under Subsection (2) is a petty offense.

Section 4106. Persistent Non-Support

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

(a) refuses to provide for the support of his or her spouse, or his or her child less than 18 years old; and

(b) knows that the spouse or child is in need of such support, or that a support payment is required under a court or administrative order for support, and the required support payment:

(i) has remained unpaid for longer than 6 months, or

(ii) is more than \$5,000 in arrears; and

(c) has the ability to provide the support.

(2) Permissive Inference. The trier of fact may infer that the person has the ability to provide the support, as required by Subsection (1)(c), if:

(a) there exists a court or administrative order of support that was not based on a default judgment, and

(b) the support order required the payment for which the failure to pay constitutes the offense.

(3) Grading.

(a) The offense is a Class 4 felony if, being subject to a support obligation under a court or administrative order for support:

(i) the person leaves the State with the intent to evade the obligation, or

(ii) the obligation has remained unpaid for longer than 6 months, or

(iii) the obligation is more than \$10,000 in arrears.

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

Section 4107. Abortion

A person violating the requirements of the Illinois Abortion Law of 1975 (720 ILCS 510/1 to 510/15) is subject to the penalties provided therein.

Section 4108. Charging Unlawful Fee for Adoption

A person violating the requirements of the Adoption Compensation Prohibition Act (720 ILCS 525/0.01 to 525/5) is subject to the penalties provided therein.

Section 4109. Definitions

(1) "Abortion" has the meaning given in Section 1106.

(2) "Law enforcement authorities" has the meaning given in Section 108.

(3) "Mentally handicapped person" has the meaning given in Section 108.

(4) "Physically handicapped" has the meaning given in Section 108.

(5) "Reasonably believes" has the meaning given in Section 108.

(6) "Sexual conduct" has the meaning given in Section 1302.

(7) "Sexual intercourse" has the meaning given in Section 1301.

(8) "Unemancipated minor" has the meaning given in Section 4104.

(9) "Youth emergency shelter" has the meaning given in 225 ILCS 10/2.21.

ARTICLE 5100. BRIBERY AND OFFICIAL MISCONDUCT OFFENSES

Section 5101. Bribery

Section 5102. Failure to Report a Bribe Offer

Section 5103. Official Misconduct

Section 5104. Definitions

Section 5101. Bribery

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

(a) he knowingly solicits, accepts, or agrees to accept any benefit as consideration for influencing or agreeing to influence the performance of any act related to the employment or function of any:

- (i) public servant,
- (ii) independent contractor working on a public project,
- (iii) juror,
- (iv) witness, or
- (v) voter, and

(b) he is not authorized by law to accept such benefit.

(2) **Offering Bribes.** A person commits an offense if he knowingly confers, offers, or agrees to confer any benefit the acceptance of which would be an offense under Subsection (1).

(3) **Grading.**

(a) The offense under Subsections (1)(a)(i) to (1)(a)(iv) is a Class 2 felony.

(b) The offense under Subsection (1)(a)(v) is a Class 4 felony.

Section 5102. Failure to Report a Bribe Offer

(1) **Offense Defined.** A person commits an offense if he fails to promptly report to law enforcement authorities any offer made to him in violation of Section 5101.

(2) **Grading.**

(a) If the defendant is a public servant, independent contractor working on a public project, juror, or witness, the offense is a Class 4 felony.

(b) Otherwise, the offense is a Class A misdemeanor.

Section 5103. Official Misconduct

(1) **Offense Defined.** A person commits an offense if, being a public servant acting in his official capacity, he knowingly:

- (a) fails to perform any mandatory duty as required by law, or
- (b) performs an act that is forbidden by law to perform, or
- (c) performs an act in excess of his authority believing it will advantage himself or another, or
- (d) solicits or accepts for the performance of any act a fee or reward that is not authorized by law.

(2) Grading. The offense is a Class 3 felony. A public servant of this State or any of its political subdivisions who is convicted of violating any provision of this Section forfeits his office or employment.

Section 5104. Definitions

- (1) “Law enforcement authorities” has the meaning given in Section 108.
- (2) “Property” has the meaning given in Section 108.
- (3) “Public servant” has the meaning given in Section 108.

ARTICLE 5200. PERJURY AND OTHER OFFICIAL FALSIFICATION OFFENSES

Section 5201. Perjury

Section 5202. Unsworn Falsification to Authorities

Section 5203. Tampering with Public Record or Notice

Section 5204. False Reports to Law Enforcement Authorities

Section 5205. False Personation

Section 5206. Exercising False Authority

Section 5207. Simulating Legal Process

Section 5208. False Alarms to Agencies of Public Safety

Section 5209. Definitions

Section 5201. Perjury

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

(a) under oath or affirmation in a proceeding or in any other matter,

(b) he makes a false statement of fact that he does not believe to be true.

(2) Exception: Admission of Falsity. It is not an offense under Subsection (1) if:

(a) a person makes contradictory statements in a proceeding, and

(b) the person admits the falsity of a contradictory statement in that same proceeding, and

(c) the admission is made:

(i) before the false statement substantially affects the proceeding, and

(ii) before it becomes manifest that the statement's falsity has been or will be exposed.

(3) Defense: Statement Not Material.

(a) It is a defense to prosecution under this Section that the defendant's false statement was not material to the issue or point in question.

(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) Defense: Oath Not Authorized.

(a) It is a defense to prosecution under this Section that the oath or affirmation was not authorized by law.

(b) The defense in Subsection (4)(a) is to be determined by the court.

(5) Evidentiary Rules.

(a) Proof of Falsity. Where contradictory material statements are made under oath or affirmation in the same or in different proceedings, the prosecution need not specify which statement is false.

- (b) Corroboration Required. No person shall be convicted of an offense under this Section where proof of falsity rests solely upon contradiction by testimony of a single person other than the defendant.
- (6) Grading. The offense is a Class 3 felony.

Section 5202. Unsworn Falsification to Authorities

(1) Offense Defined: Unsworn Falsification. A person commits an offense if, with intent to mislead a public servant in performing his official function, he:

- (a) makes any written false statement that he does not believe to be true, or
- (b) intentionally omits information necessary to prevent a written statement from being misleading, or
- (c) submits or invites reliance on any writing or object that he knows to be forged, altered, lacking in authenticity, or otherwise false.

(2) Offense Defined: Statements “Under Penalty.” A person commits an offense if he makes a written false statement that he does not believe to be true, on or pursuant to a form bearing notice, authorized by law, to the effect that false statements made therein are punishable.

(3) Proof of Falsity. Where two unsworn written statements are contradictory, in a prosecution under Subsections (1)(a) or (2), the prosecution need not specify which statement is false.

- (4) Grading. The offense is a Class A misdemeanor.

Section 5203. Tampering with Public Record or Notice

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

- (a) knowingly makes a false entry in, or false alteration of, any writing:
 - (i) belonging to, or received or kept by, the government for information or record, or
 - (ii) required by law to be kept by others for information of the government; or
- (b) knowingly alters, destroys, defaces, removes, or conceals:
 - (i) any public record or device, or
 - (ii) any public notice, posted according to law, during the time for which the notice was to remain posted.

(2) Grading.

- (a) The offense under Subsection (1)(b)(ii) is a Class C misdemeanor.
- (b) Otherwise the offense is a Class 4 felony.

Section 5204. False Reports to Law Enforcement Authorities

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

- (a) knowingly gives false information to law enforcement authorities relating to an offense or incident within their concern, or

(b) reports to law enforcement authorities a past, present, or imminent offense or other incident within their concern knowing that it did not or will not occur.

(2) Grading.

(a) The offense is a Class 4 felony if committed with the intent to implicate another in an offense.

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

Section 5205. False Personation

(1) Offense Defined. A person commits an offense if he falsely represents himself to be:

(a) an attorney authorized to practice law, with intent to receive compensation or consideration, or

(b) a peace officer, or

(c) the parent, legal guardian, or other relation of a person less than 18 years old to any public servant, or elementary or secondary school employee or administrator, or

(d) a public servant.

(2) Grading. The offense:

(a) under Subsection (1)(a) or (1)(b) is a Class 4 felony; and

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

Section 5206. Exercising False Authority

(1) Offense Defined. A person commits an offense if, knowing that his performance is not authorized by law, he:

(a) conducts a marriage ceremony; or

(b) acknowledges the execution of any document that by law may be recorded; or

(c) becomes a surety for any party in any civil or criminal proceeding, before any court or public servant authorized to accept such surety.

(2) Grading. The offense is a Class 4 felony.

Section 5207. Simulating Legal Process

(1) Offense Defined. A person commits an offense if he issues or delivers any document that he knows falsely purports to be any civil or criminal process.

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

Section 5208. False Alarms to Agencies of Public Safety

(1) Offense Defined. A person commits an offense if he knowingly causes a false alarm of fire or other emergency to be transmitted to or within any organization, official or volunteer, for dealing with emergencies involving danger to life or property.

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

Section 5209. Definitions

- (1) “Law enforcement authorities” has the meaning given in Section 108.
- (2) “Peace officer” has the meaning given in Section 108.
- (3) “Public servant” has the meaning given in Section 108.
- (4) “Writing” has the meaning given in Section 3101.

ARTICLE 5300. INTERFERENCE WITH GOVERNMENTAL OPERATIONS; ESCAPE

- Section 5301. Obstructing Justice
- Section 5302. Resisting or Obstructing a Peace Officer or Custodial Officer
- Section 5303. Obstructing Administration of Law or Other Government Function
- Section 5304. Obstructing Service of Process
- Section 5305. Refusing to Aid an Officer
- Section 5306. Concealing or Aiding a Fugitive
- Section 5307. Escape; Failure to Report to a Correctional Institution or to Report for Periodic Imprisonment
- Section 5308. Permitting Escape
- Section 5309. Bringing or Allowing Contraband into a Correctional Institution; Possessing Contraband in a Correctional Institution
- Section 5310. Improperly Influencing a Witness or Juror
- Section 5311. Failure to Appear
- Section 5312. Definitions

Section 5301. Obstructing Justice

(1) **Offense Defined.** A person commits an offense if, with intent to prevent the apprehension of or to obstruct the prosecution or defense of any person, he knowingly:

- (a) destroys, alters, conceals, or disguises physical evidence, plants false evidence, furnishes false information; or
- (b) induces a witness having knowledge material to the subject at issue to leave the State or conceal himself; or
- (c) possessing knowledge material to the subject at issue, he leaves the State or conceals himself.

(2) **Grading.**

- (a) If committed in furtherance of the activities of a criminal organization, the offense is a Class 3 felony.
- (b) Otherwise the offense is a Class 4 felony.

Section 5302. Resisting or Obstructing a Peace Officer or Custodial Officer

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

- (a) he knowingly resists, obstructs, or interferes with the performance of any authorized act within the official capacity
- (b) of one known to the person to be a peace officer or custodial officer.

(2) **Definition.** “Custodial officer” means:

- (a) a correctional officer; or

(b) any person employed to supervise and control persons who have been civilly committed, or are being detained awaiting civil commitment.

(3) Grading.

(a) If the offense conduct includes disarming a peace officer of his firearm while he is engaged in his official duties, the offense is a Class 2 felony.

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

Section 5303. Obstructing Administration of Law or Other Government Function

(1) **Offense Defined.** A person commits an offense if he intentionally obstructs, impairs, or perverts the administration of law or other governmental function by physical interference or obstacle, breach of official duty, or any unlawful act.

(2) **Grade.** The offense is a Class A misdemeanor.

Section 5304. Obstructing Service of Process

(1) **Offense Defined.** A person commits an offense if he knowingly resists or obstructs the authorized service or execution of any civil or criminal process or order of any court.

(2) **Grade.** The offense is a Class B misdemeanor.

Section 5305. Refusing to Aid an Officer

(1) **Offense Defined.** A person commits an offense if, when requested to do so, he knowingly fails to provide reasonable aid to a person known by him to be a peace officer in:

(a) apprehending a person whom the officer is authorized to apprehend; or

(b) preventing the commission of any offense by another.

(2) **Grading.** The offense is a Class C misdemeanor.

Section 5306. Concealing or Aiding a Fugitive

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

(a) not standing in the relation of husband, wife, parent, child, brother, or sister to an offender, and

(b) with intent to prevent the apprehension of the offender, he harbors, aids, or conceals the offender.

(2) **Grading.** The offense is a Class 3 felony.

Section 5307. Escape; Failure to Report to a Correctional Institution or to Report for Periodic Imprisonment

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

(a) he is:

(i) in penal custody pursuant to a conviction or charge for an offense, or

- (ii) in the lawful penal custody of a peace officer, or
 - (iii) civilly committed, or detained awaiting civil commitment, and
- (b) he knowingly:
 - (i) escapes from the place of detention or from the penal custody of an employee of that institution, or
 - (ii) fails to report to the place of detention or to report for periodic detention at the time required, or
 - (iii) fails to return from furlough or from work or day release, or
 - (iv) fails to abide by the terms of home confinement.
- (2) Grading.
 - (a) The offense under Section (1)(b)(i) is a Class 2 felony if the underlying offense is a felony.
 - (b) The offense under Section (1)(b)(ii)-(iv) is a Class 3 felony if the underlying offense is a felony.
 - (c) *Otherwise the offense is a Class 4 felony.*^{*32}

Section 5308. Permitting Escape

- (1) Offense Defined. A person commits an offense if:
 - (a) being a correctional employee,
 - (b) he recklessly permits any prisoner in his custody to escape.
- (2) Definition. “Correctional employee” means any elected or appointed officer, trustee, or employee of a correctional institution or of the governing authority of the correctional institution, or any person who performs services for the correctional institution pursuant to contract with the correctional institution or its governing authority, and includes a correctional officer.
- (3) Grading. The offense is a Class A misdemeanor.

Section 5309. Bringing or Allowing Contraband into a Correctional Institution; Possessing Contraband in a Correctional Institution

- (1) Offense Defined. A person commits an offense if, knowingly and without authority, he:

³²**Issue:** Should proposed Section 5307(2)(c) (grading the escape offense) be amended to lower the offense grade where the underlying offense is a misdemeanor, or to track (2)(a) and (b)’s grading distinction between different means of committing the offense?

Yes: One should not be subject to greater liability for escaping from custody for a misdemeanor than he would be for the misdemeanor itself. It is inconsistent to recognize a distinction between different means of committing the offense for felons, but not for misdemeanants. (Current law grades this offense as a Class A or Class B misdemeanor, depending on the means by which it is committed. See 720 ILCS 5/31-6(b), (c), & (c-6).)

No: Regardless of how it is committed, this offense constitutes a seriously wrongful act that reflects (and promotes) disrespect for lawful authority and which must be strongly deterred. Accordingly, Class 4 felony liability is appropriate as a minimum sanction.

Reporter: No recommendation.

- (a) brings into a correctional institution, or
- (b) places in such proximity to a correctional institution as to give an inmate access to, or
- (c) knowingly possesses in a correctional institution, an item of contraband.

(2) Definitions.

(a) “Correctional institution” means any penitentiary, State farm, reformatory, prison, jail, house of correction, police detention area, half-way house, or other institution or place for the incarceration or custody of persons under sentence for offenses or awaiting trial or sentence for offenses, under arrest for an offense, a violation of probation, a violation of parole, or a violation of mandatory supervised release, or awaiting a bail setting hearing or preliminary hearing.

(b) “Item of contraband” includes any of the following items in or being brought into a correctional institution:

- (i) a firearm, stun gun, or taser;
- (ii) “firearm ammunition,” meaning any self-contained cartridge or shotgun shell that is designed to be used or adaptable to use in a firearm;
- (iii) a catastrophic agent;
- (iv) a “controlled substance,” meaning a drug, substance, or immediate precursor in the Schedules of Article II of the Illinois Controlled Substances Act [currently codified at 720 ILCS 570/201 et seq.];
- (v) a hypodermic syringe or hypodermic needle, or any instrument adapted for use of controlled substances or cannabis by subcutaneous injection;
- (vi) a dangerous weapon, or a broken bottle or other piece of glass that could be used as a dangerous weapon, or any other instrument of like character.
- (vii) a “tool to defeat security mechanisms,” including a handcuff or security restraint key, tool designed to pick locks, or device or instrument capable of unlocking handcuff or security restraints, doors to cells, rooms, gates, or other areas of the correctional institution;
- (viii) a “cutting tool,” including a hacksaw blade, wirecutter, or device, instrument or file capable of cutting through metal;
- (ix) “electronic contraband,” including any electronic, video recording device, computer, or cellular communications equipment, including cellular telephones, cellular telephone batteries, videotape recorders, pagers, computers, and computer peripheral equipment;
- (x) “cannabis,” as that term is defined in the Cannabis Control Act [currently codified at 720 ILCS 550/3(a)] including marijuana, hashish and other substances which are identified

as including any parts of the plant *Cannabis Sativa*, whether growing or not; the seeds thereof, the resin extracted from any part of such plant; and any compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or resin, including tetrahydrocannabinol (THC) and all other cannabinol derivatives, including its naturally occurring or synthetically produced ingredients, whether produced directly or indirectly by extraction, or independently by means of chemical synthesis or by a combination of extraction and chemical synthesis; but shall not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil or cake, or the sterilized seed of such plant which is incapable of germination;

(xi) “alcoholic liquor,” as such term is defined in Section 1-3.05 of The Liquor Control Act of 1934 [235 ILCS 5/1-3.05].

(3) *Grading.*

(a) *The offense is:*

(i) *a Class 2 felony if the contraband is defined in Subsections (2)(b)(i)-(iii);*

(ii) *a Class 3 felony if the contraband is defined in Subsections (2)(b)(iv)-(ix);*

(iii) *a Class 4 felony if the contraband is defined in Subsection (2)(b)(x).*

(iv) *Otherwise it is a Class A misdemeanor.*³³*

(b) If committed by a correctional employee, the offense is one grade higher than it would otherwise be.

³³**Issue:** Should the grades for the offense defined in proposed Section 5309 (bringing, allowing, possessing contraband in correctional institution) be increased?

Yes: Higher grading is needed for this offense to maintain order and security in prisons. Because the offense usually applies to people who are already in prison, it must impose significant additional liability to have a deterrent effect. (Current law grades the offense as anything from a Class 4 felony to a Class X felony, depending on the nature of the contraband involved. See 720 ILCS 5/31A-1.1, -1.2.)

No: More serious grading for this offense would be disproportionate to its relative seriousness. Under the proposed grading scheme, the offense may be graded up to a Class 1 felony based on Section 5309(3)(b)’s aggravation for employees of correctional institutions. This is a fairly high “ceiling” for contraband offenses, and a higher ceiling is inappropriate because, although having contraband in prisons is harmful and dangerous, bringing even a firearm into a prison is inherently less serious than other Class X felonies, such as murder and causing a catastrophe. There is also no clear indication that increasing the grade will have any added deterrent effect on prisoners, who (a) have already shown that they do not take the criminal law’s commands seriously, and (b) may be unlikely to consider the possibility of continued incarceration as a serious cost, especially if they are already serving a long prison sentence.

Reporter: No recommendation.

Section 5310. Intimidating, Improperly Influencing, or Retaliating Against a Public Servant, Witness, Juror, or Voter

- (1) Offense Defined. A person commits an offense if:
 - (a) with intent to:
 - (i) influence a juror or public servant in the performance of his duties, or
 - (ii) deter a party or witness from testifying freely, fully, or truthfully in any legal proceeding, or
 - (iii) annoy, harass, intimidate, or victimize a current or former public servant, witness, juror, or voter because of that person's past, present, or potential future testimony, vote, or other act or omission related to performance of his duties,
 - (b) he:
 - (i) commits, or threatens to commit, any offense likely to cause great bodily harm, unlawful confinement or restraint, or substantial property damage to another; or
 - (ii) commits or threatens any other offense; or
 - (iii) communicates, directly or indirectly, with such other person otherwise than as authorized by law.
- (2) Grading. The offense is:
 - (a) a Class 2 felony under Subsection (1)(b)(i);
 - (b) a Class 3 felony under Subsection (1)(b)(ii);
 - (c) a Class 4 felony under Subsection (1)(b)(iii).

Section 5311. Failure to Appear

- (1) Offense Defined. A person commits an offense if, having been admitted to bail for appearance before any court of this State or released on personal recognizance, he:
 - (a) fails to appear on the date directed, or
 - (b) violates a condition of release.
- (2) Grading. The offense is one grade lower than the grade of his underlying offense, but not higher than a Class A misdemeanor.

Section 5312. Definitions

- (1) "Alcoholic liquor" has the meaning given in 235 ILCS 5/1-3.05.
- (2) "Bodily harm" has the meaning given in Section 108.
- (3) "Cannabis" has the meaning given in Section 5309.
- (4) "Catastrophic agent" has the meaning given in Section 2204.
- (5) "Controlled substance" has the meaning given in Section 5309.
- (6) "Correctional employee" has the meaning given in Section 5308.
- (7) "Correctional institution" has the meaning given in Section 5309.
- (8) "Correctional officer" has the meaning given in Section 414.
- (9) "Criminal organization" has the meaning given in Section 905.
- (10) "Custodial officer" has the meaning given in Section 5302.
- (11) "Cutting tool" has the meaning given in Section 5309.
- (12) "Dangerous weapon" has the meaning given in Section 1501.

- (13) “Electronic contraband” has the meaning given in Section 5309.
- (14) “Firearm” has the meaning given in Section 1501.
- (15) “Firearm ammunition” has the meaning given in Section 5309.
- (16) “Hypodermic syringe” has the meaning given in Section 5309.
- (17) “Item of contraband” has the meaning given in Section 5309.
- (18) “Peace officer” has the meaning given in Section 108.
- (19) “Penal custody” has the meaning given in Section 1304.
- (20) “Property” has the meaning given in Section 2102.
- (21) “Tool to defeat security mechanisms” has the meaning given in Section 5309.

ARTICLE 6100. PUBLIC ORDER AND SAFETY OFFENSES

- Section 6101. Riot
- Section 6102. Failure to Disperse
- Section 6103. Disorderly Conduct
- Section 6104. False Public Alarms
- Section 6105. Harassment
- Section 6106. Hate Crime Aggravation
- Section 6107. Public Drunkenness; Drug Incapacitation
- Section 6108. Loitering or Prowling
- Section 6109. Obstructing Highways and Other Public Passages
- Section 6110. Disrupting Meetings and Processions
- Section 6111. Desecration of Venerated Objects
- Section 6112. Definitions

Section 6101. Riot

- (1) **Offense Defined.** A person commits an offense if he participates with two or more other persons in a course of disorderly conduct:
 - (a) with intent to commit or facilitate the commission of a felony or misdemeanor, or
 - (b) with intent to prevent or coerce official action.
- (2) **Grading.** The offense is a *Class 4 felony*.^{*34}

Section 6102. Failure to Disperse

- (1) **Offense Defined.** A person commits an offense if:
 - (a) he and two or more other persons are participating in a course of disorderly conduct likely to cause substantial harm or serious inconvenience, annoyance, or alarm, and
 - (b) law enforcement authorities engaged in executing or enforcing the law order the participants and others in the immediate vicinity to disperse, and

³⁴**Issue:** Should the grade for the offense in proposed Section 6101 (riot) be lowered?

Yes: This offense is aimed at conduct that often is also covered by other offenses, such as disorderly conduct, criminal damage, theft, or assault, or attempt offenses. Under the proposed rules for charging and sentencing multiple offenses, such serious cases will be subject to increased penalties. See proposed Sections 254 and 906 and corresponding commentaries. Cases not involving those other offenses will be less serious and therefore will not merit felony punishment. For example, current law grades the corresponding offense as a Class 4 felony only in cases where the person uses force or violence; otherwise the offense is a Class C misdemeanor. See 720 ILCS 5/25-1.

No: The conduct this offense prohibits presents a serious risk of group lawlessness and disorder that, regardless of whether other offenses are committed, deserves felony punishment. Moreover, in many riot cases it will be difficult to prove individual instances of theft, assault, or damage.

Reporter: No recommendation.

- (c) the person refuses or knowingly fails to obey such an order.
- (2) Grading. The offense is a Class A misdemeanor.

Section 6103. Disorderly Conduct

- (1) Offense Defined. A person commits an offense if, while recklessly creating a risk of public inconvenience, annoyance, or alarm, he:
 - (a) engages in fighting or threatening, or in violent or tumultuous behavior; or
 - (b) makes unreasonable noise or offensively coarse utterance, gesture, or display, or addresses abusive language to any person present; or
 - (c) creates a hazardous or physically offensive condition by any act that serves no legitimate purpose of the actor.
- (2) Definition. “Public” means affecting or likely to affect persons in a place to which the general populace or a substantial group has access; among the places included are highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, or any neighborhood.
- (3) Grading.
 - (a) The offense is a Class B misdemeanor if:
 - (i) the actor intends to cause substantial harm or serious inconvenience, or
 - (ii) he persists in disorderly conduct after reasonable warning or request to desist.
 - (b) Otherwise the offense is a petty offense.

Section 6104. False Public Alarms

- (1) Offense Defined. A person commits an offense if he:
 - (a) knowingly initiates or circulates a false or baseless report or warning of an impending bombing or other offense or catastrophe,
 - (b) being reckless as to whether such report or warning will cause evacuation of a building, place of assembly, or facility of public transport, or cause public inconvenience or alarm.
- (2) Grading. The offense is a *Class A misdemeanor*.^{*35}

³⁵**Issue:** Should the penalty for the offense defined in proposed Section 6104 (false public alarms) be increased to a Class 4 felony?

Yes: False alarms of this nature are likely to cause major public inconvenience or alarm such that felony punishment is appropriate. Current law recognizes this by grading false reports of a fire as a Class 4 felony and false reports of a bomb or deadly substance as a Class 3 felony. See 720 ILCS 5/26-1(a)(2), (a)(3), (b)(1).

No: This offense is generally not serious enough to merit felony punishment. Where serious harm, inconvenience, or damage results, the offender may already be subject to increased punishment for a variety of other offenses, such as endangerment (Section 1202), criminal damage (Section 2206), false report to law enforcement authorities (Section 5204), or false alarm to an agency of public safety (Section 5208).

Reporter: No recommendation.

Section 6105. Harassment

(1) **Offense Defined.** A person commits an offense if, with intent to harass another, he:

- (a) makes or sends an electronic communication without the intent to engage in legitimate communication; or
- (b) insults, taunts, or challenges another in a manner likely to provoke violent or disorderly response; or
- (c) makes repeated communications anonymously or at extremely inconvenient hours, or in offensively coarse language; or
- (d) engages in any other course of alarming conduct serving no legitimate purpose of the actor.

(2) **Grading.**

- (a) The offense is a Class A misdemeanor if it is in violation of an order of protection.
- (b) Otherwise the offense is a Class B misdemeanor.

Section 6106. Hate Crime Aggravation^{*36}

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

- (a) commits an offense against a victim,
- (b) believing it may intimidate or terrorize a group of persons who identify with the victim through race, national origin, ethnicity, religion, gender, or sexual preference.

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

Section 6107. Public Drunkenness; Drug Incapacitation

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

- (a) *he appears in any public place manifestly under the influence of alcohol, narcotics, or other drug, not therapeutically administered,*
- (b) *to the degree that he may endanger himself or other persons or property, or annoy persons in his vicinity.*

(2) **Definition.** “Public place” means a place to which the general populace or a substantial group has access; among the places included are

³⁶**Issue:** Should Section 6106 (hate crime aggravation) be formulated differently, to focus on the offender’s motivation in committing the offense, rather than the resulting harm to the affected group?

Yes: The proper focus of the hate-crime inquiry is on the offender’s bias against his victim, not on his willingness or intent to harm the group to which the victim belongs. Current Illinois law (720 ILCS 5/12-7.1) and many other jurisdictions reflect these concerns by punishing offenders based upon such improper motives.

No: The proper concern of hate-crime statutes is the *harm* the offense causes, not the underlying psychological motivation of the offender. Focusing on the person’s particular motive for committing an offense is problematic. It will often be difficult, if not impossible, to prove that an offender acted based on a particular motive. Moreover, proving such an improper motive will often involve the introduction of prejudicial character evidence, or worse, an encroachment upon the defendant’s First Amendment rights. Such an approach may lead to arbitrary application of the offense against disfavored groups, even groups whom the statutes were originally intended to protect.

Reporter: No recommendation.

highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, or any neighborhood.

(3) *Grading.* The offense is a petty offense.*³⁷

Section 6108. Loitering or Prowling

(1) *Offense Defined.* A person commits an offense if he loiters or prowls in a place, at a time, or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity.

(2) *Definition.* “Loiter” means to stand or sit idly.

(3) *Factors to be Considered.* Among the circumstances that may be considered in determining whether such alarm is warranted is the fact that the actor takes flight upon appearance of a peace officer, refuses to identify himself, or manifestly endeavors to conceal himself or any object.

(4) *Request to Identify and Explain Required.* Unless flight by the actor or other circumstance makes it impracticable, a peace officer shall prior to any arrest for an offense under this section afford the actor an opportunity to dispel any alarm that would otherwise be warranted, by requesting him to identify himself and explain his presence and conduct.

(5) *Exception.* No person shall be convicted of an offense under this Section if the peace officer did not comply with Subsection (4), or if it appears at trial that the explanation given by the actor was true and, if believed by the peace officer at the time, would have dispelled the alarm.

(6) *Grading.* The offense is a petty offense.*³⁸

³⁷**Issue:** Should proposed Section 6107, creating an offense to prohibit public drunkenness, be deleted?

Yes: Truly disruptive behavior will already be covered by another offense, such as disorderly conduct or harassment. Where a person has committed no such offense, he will not be sufficiently blameworthy to merit punishment because he will have no culpability as to disturbing the peace. Current law does not include such an offense.

No: Persons who appear in public in a clearly intoxicated state may present an inherent risk of danger or inconvenience to themselves, property, or others. Other offenses, such as disorderly conduct, often will not cover such persons, precisely because such persons may lack the requisite intent to cause public disorder.

Reporter: No recommendation.

³⁸**Issue:** Should proposed Section 6108, defining an offense for persons who loiter under circumstances that warrant alarm for the safety and welfare of others, be eliminated?

Yes: The offense infringes on, and invites abuse of, citizens’ civil rights. The offense may not provide sufficient notice to citizens of what conduct is prohibited. The offense is unnecessary because truly improper behavior will likely be subject to liability under another provision. Moreover, the offense is subject to abuse by law enforcement officials who may use it to harass disfavored persons or groups. Current law does not include such an offense.

No: The offense is necessary to prevent the fear and intimidation caused by the presence of persons or groups, such as street gangs, who remain in an area without any legitimate purpose. In such situations, other offenses do not address the conduct, because law enforcement officials often will be unable to prove that a particular offense was contemplated or attempted. Moreover, Section 6108 avoids arbitrary enforcement by requiring that peace officers inquire as to the person’s identity and presence.

Reporter: No recommendation.

Section 6109. Obstructing Highways and Other Public Passages

- (1) **Offense Defined.** A person commits an offense if:
 - (a) having no legal privilege to do so, he recklessly obstructs any highway or other public passage, whether alone or with others; 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.
- (2) **Definition.** “Obstructing” a highway or public passage means rendering it impassable without unreasonable inconvenience or hazard.
- (3) **Exception.** No person shall be deemed guilty of recklessly obstructing 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.
- (4) **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 police control of the size or location of the gathering.
- (5) **Grading.**
 - (a) If the person persists after warning by law enforcement authorities, the offense is a Class A misdemeanor.
 - (b) Otherwise the offense is a petty offense.

Section 6110. 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 does any act tending to obstruct or interfere with it physically, or
 - (c) makes any utterance, gesture, or display designed to outrage the sensibilities of the group.
- (2) **Grading.** The offense is a Class C misdemeanor.

Section 6111. Desecration of Venerated Objects

- (1) **Offense Defined.** A person commits an offense if:
 - (a) knowing it will outrage the sensibilities of persons likely to observe or discover his action,
 - (b) he intentionally desecrates:
 - (i) any public monument or structure, or place of worship or burial, or
 - (ii) any other object of veneration by the public or a substantial segment thereof in any public place.

(2) Definition. “Desecrate” includes defacing, damaging, polluting, or otherwise physically mistreating.

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

Section 6112. Definitions

(1) “Catastrophe” has the meaning given in Section 2204.

(2) “Desecrate” has the meaning given in Section 6111.

(3) “Electronic communication” has the meaning given in Section 2401.

(4) “Law enforcement authorities” has the meaning given in Section 108.

(5) “Loiter” has the meaning given in Section 6108.

(6) “Obstructing” has the meaning given in Section 6109.

(7) “Peace officer” has the meaning given in Section 108.

(8) “Public” has the meaning given in Section 6103.

(9) “Public place” has the meaning given in Section 6107.

ARTICLE 6200. PUBLIC INDECENCY OFFENSES

- Section 6201. Public Indecency
- [Section 6202. Prostitution; Patronizing a Prostitute]
- [Section 6202. Solicitation of a Sexual Act]
- Section 6203. Promoting, Supporting, or Living Off the Proceeds of Prostitution
- Section 6204. Disseminating Obscene Material
- Section 6205. Abuse of Corpse
- Section 6206. Sale of Human Body Parts
- Section 6207. Cruelty to Animals
- Section 6208. Definitions

Section 6201. Indecent Exposure

- (1) Offense Defined. A person commits an offense if:
 - (a) he is more than 17 years old; and
 - (b) he is in:
 - (i) a place open to public view, or
 - (ii) the presence of a person less than 17 years old; and
 - (c) he performs:
 - (i) an act of sexual intercourse or sexual conduct, or
 - (ii) an exposure of the sex organs, anus, or breast, done with intent to arouse or to satisfy the sexual desire of himself or another person.
- (2) Definition. “Place open to public view” means any place where the conduct may reasonably be expected to be viewed by others without their prior knowledge or consent.
- (3) Exception. Breast-feeding of infants is not an offense under this Section.
- (4) Grading. The offense is a Class A misdemeanor.

[Section 6202. Prostitution; Patronizing a Prostitute]

[(1) Offense Defined. A person commits an offense if he or she offers or accepts anything of value to perform any act of sexual conduct or sexual intercourse.

*(2) Grading. The offense is a Class A misdemeanor.]*³⁹

³⁹**Issue:** Should the Code adopt the first formulation of Section 6202 (prostitution), which criminalizes the prostitution transaction of sex for money, or the second, which criminalizes only the offer or solicitation of a sexual act, and not the “trade” itself?

First Version: In the vast majority of cases, there will be little danger of prosecution where conduct involves innocent sexual relations as opposed to an overt monetary transaction between a prostitute and a client. Current Illinois law employs a formulation like the second one. See 720 ILCS 5/11-14.

(continued...)

[Section 6202. Solicitation of a Sexual Act]

[(1) Offense Defined. A person commits an offense if he or she offers or solicits a person not his or her spouse to perform an act of sexual intercourse or sexual conduct for anything of value.

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

Section 6203. Promoting, Supporting, or Living Off the Proceeds of Prostitution

(1) Offense Defined. A person commits an offense if, to obtain anything of value, he:

- (a) compels a person to become a prostitute; or
- (b) arranges a situation in which a person may commit prostitution; or
- (c) allows the use of a place, over which he exercises control, while negligent as to its being used for prostitution; or
- (d) being a parent, step-parent, or legal guardian of a child less than 16 years old, allows the child to engage in prostitution; or
- (e) receives anything of value from a prostitute, not for a lawful consideration, knowing it was earned in whole or in part from the practice of prostitution.

(2) Grading.

(a) Juvenile Prostitution. The offense is a Class 2 felony if the person is negligent as to the prostitute being:

- (i) less than 16 years old, or
- (ii) a severely or profoundly mentally retarded person.

(b) Except as provided in Subsection (2)(a), a violation under Subsections (1)(a) to (1)(d) is a Class 4 felony.

(c) Except as provided in Subsection (2)(a), a violation under Subsection (1)(e) is a Class A misdemeanor.

Section 6204. Disseminating Obscene Material

(1) Offense Defined. A person commits an offense if, with knowledge of its obscene nature or content, or recklessly failing to exercise reasonable inspection that would have disclosed the obscene nature or content, he:

- (a) sells, delivers, or provides any obscene writing, picture, record, or other representation or embodiment of the obscene; or

³⁹(...continued)

Second Version: Most modern codes employ the second formulation of the prostitution offense. They take this view in part for fear of extending criminalization to common interactions regarding sexual relations: partners, even spouses, may engage in tacit agreements to “trade” sex for other things under a variety of circumstances. Instead, most modern codes define the offense as “making one’s living as a prostitute” or “soliciting a prostitute,” focusing on the explicit offer or acceptance of a direct trade of sex for money.

Reporter: No recommendation.

(b) presents or directs an obscene play, dance, or other performance or participates directly in the portion that makes it obscene; or

(c) publishes, exhibits, or otherwise makes available anything obscene; or

(d) performs an obscene act or otherwise presents an obscene exhibition of his body for gain; or

(e) advertises or otherwise promotes the sale of material represented or held out by him to be obscene, whether or not it is obscene; or

(f) creates, buys, procures or possesses obscene matter or material with intent to disseminate it in violation of this Section, or of the penal laws or regulations of any other jurisdiction.

(2) Obscene Defined. Any material or performance is “obscene” if the average person, applying contemporary adult community standards of this State, would find that:

(a) taken as a whole, it appeals to the prurient interest; and

(b) it depicts or describes, in a patently offensive way, ultimate sexual acts or sadomasochistic sexual acts, whether normal or perverted, actual or simulated, or masturbation, excretory functions, or lewd exhibition of the genitals; and

(c) taken as a whole, it lacks serious literary, artistic, political, or scientific value.

(3) Permissive Inference. The trier of fact may infer an intent to disseminate from the creation, purchase, procurement, or possession of a mold, engraved plate, or other embodiment of obscenity specially adapted for reproducing multiple copies, or the possession of more than 3 copies of the obscene material.

(4) Defenses. It is a defense to prosecution under this Section that the dissemination:

(a) was not for gain and was made to personal associates other than persons less than 18 years old; or

(b) was to institutions or individuals having scientific or other special justification for possession of such material.

(5) Grading.

(a) Child Pornography. The offense is a Class 2 felony if the person is negligent as to the obscene material or performance including a victim who is:

(i) less than 16 years old, or

(ii) a severely or profoundly mentally retarded person.

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

Section 6205. Abuse of Corpse

(1) Offense Defined. A person commits an offense if, except as authorized by law, he treats a corpse in a way that he knows would outrage ordinary family sensibilities.

- (2) Grading. The offense is a Class B misdemeanor.

Section 6206. Sale of Human Body Parts

(1) Offense Defined. A person commits an offense if he knowingly buys or sells any part of a human body.

- (2) Exceptions. The offense does not include:

(a) an anatomical gift made in accordance with the Uniform Anatomical Gift Act [755 ILCS 50/1 et seq.]; or

(b) the removal and use of a human cornea in accordance with the Illinois Corneal Transplant Act [755 ILCS 55/1 et seq.]; or

(c) reimbursement of actual expenses, including medical costs, loss of income, and travel expenses, incurred by a living person in donating any body part or fluid for medical or scientific use; or

(d) payments provided under a plan of insurance or other health care coverage; or

(e) reimbursement of reasonable costs associated with the removal, storage, or transportation of a human body or part thereof donated for medical or scientific purposes; or

(f) purchase or sale of blood, plasma, blood products, or derivatives, other body fluids, or human hair; or

(g) purchase or sale of drugs, reagents, or other substances made from human bodies or body parts, for use in medical or scientific research, treatment, or diagnosis.

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

Section 6207. Cruelty to Animals

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

(a) subjects any animal to cruel mistreatment, or

(b) subjects any animal in his custody to cruel neglect, or

(c) kills or injures any animal belonging to another without legal privilege or consent of the owner.

(2) Exception. Subsections (1)(a) and (1)(b) are inapplicable to accepted veterinary practices and activities carried on for scientific research.

- (3) Grading. The offense is:

(a) a Class A misdemeanor if committed intentionally, and

(b) a Class C misdemeanor if committed recklessly.

Section 6208. Definitions

(1) “Obscene” has the meaning given in Section 6204.

(2) “Place open to public view” has the meaning given in Section 6201.

(3) “Severely or profoundly mentally retarded person” has the meaning given in Section 1201.

(4) “Sexual conduct” has the meaning given in Section 1302.

(5) “Sexual intercourse” has the meaning given in Section 1301.

ARTICLE 7100. WEAPONS OFFENSES

Section 7101. Possession or Use of a Dangerous Weapon During a Felony

Section 7101. Possession or Use of a Dangerous Weapon During a Felony

(1) **Offense Defined.** A person commits an additional offense if he possesses or uses a dangerous weapon in the course of committing a felony.

(2) **Grading.**

(a) If the person discharges a firearm, the offense is a Class 3 felony.

(b) If the person displays or threatens to use a firearm, the offense is a Class 4 felony.

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

(3) **Definitions.**

(a) “Dangerous weapon” has the meaning given in Section 1501.

(b) “Firearm” has the meaning given in Section 1501.

PROPOSED ILLINOIS CRIMINAL CODE:

GRADING SUMMARY



Class X-plus Felony	
<u>Offense Description</u>	<u>Section</u>
knowingly causing death of another person (first-degree murder)	1101

Class X Felonies	
<u>Offense Description</u>	<u>Section</u>
recklessly causing death of another person under circumstances manifesting extreme indifference to value of human life (second-degree murder)	1102(1)(a)
causing, in fact, the death of another person in course of attempting or committing forcible felony (felony murder)	1102(1)(b)
sexual assault, where victim is under 9 and offender is over 17, or victim suffers harm, pregnancy, or threat to life	1301(4)(a)
kidnaping (secret confinement against one's will) for ransom or where kidnaper commits felony against victim	1401(3)(a)
knowingly causing a catastrophe (great bodily harm to 5+ people, or substantial damage to 5+ buildings or vital public facility)	2204(1)(c)(i)

[N.B. It should not be assumed that current sentencing ranges apply to the proposed grades. The grades are intended only to assess the relative seriousness of offenses, and not the sentencing consequences of a conviction for any offense.]

Class 1 Felonies	
<u>Offense Description</u>	<u>Section</u>
knowingly causing death of another while under influence of extreme mental or emotional disturbance (first-degree manslaughter)	1103
parent knowingly allowing sexual intercourse with child under 9	1301(4)(a), (f)
engaging in sexual intercourse with child aged 9-13, or with child under 17 where offender holds position of authority	1301(4)(b)(i), (ii)
engaging in sexual intercourse by force or threat, or with person unable to consent	1301(4)(b)(iii)
kidnaping (secret confinement against one's will) where confinement lasts for 1 day or more, or victim is under 13 or mentally retarded	1401(3)(b)
robbery (taking property from another by use or threat of force), where (1) amount involved exceeds \$10,000, or (2) property taken is firearm or motor vehicle	1501(2)(a)
theft of over \$100,000	2109(1)
theft of over \$50,000 from school, place of worship, victim age 60 or older	2109(1), (8)
recklessly causing a catastrophe (great bodily harm to 5+ people, or substantial damage to 5+ buildings or vital public facility)	2204(1)(c)(ii)
knowingly causing damage resulting in loss of over \$100,000	2206(3)(a)
knowingly damaging religious or educational building, or place of burial, resulting in loss of over \$50,000	2206(3)(a), (h)
using or threatening force during a dwelling burglary or vehicle invasion	2301(4)
employee bringing, possessing, or giving inmate access to firearm, ammunition, or catastrophic agent in penal institution	5309(3)(a)(i), (3)(b)

[N.B. It should not be assumed that current sentencing ranges apply to the proposed grades. The grades are intended only to assess the relative seriousness of offenses, and not the sentencing consequences of a conviction for any offense.]

Class 2 Felonies	
<u>Offense Description</u>	<u>Section</u>
recklessly causing death of another person (second-degree manslaughter)	1104
knowingly causing great bodily harm (heinous assault)	1201(2)(a)(i)
knowingly causing bodily harm, where assailant tortures another person (heinous assault)	1201(2)(a)(ii)
knowingly causing bodily harm (assault), where assailant mutilates female genitalia	1201(2)(a)(iii)
knowingly causing bodily harm (assault), where caused by administration of food or drug to victim, and where victim is peace officer, correctional employee, community policing volunteer performing duty, pregnant, physically or mentally handicapped, over 60, or under 13	1201(2)(b)(i), (2)(d)
knowingly causing bodily harm or making physical contact of insulting or provoking nature (assault), where (1) assailant knowingly commits offense in public place, and (2) victim is peace officer, correctional employee, community policing volunteer performing duty, pregnant, physically or mentally handicapped, over 60, or under 13	1201(2)(b)(ii), (2)(d)
knowingly causing bodily harm or making physical contact of insulting or provoking nature (assault), where (1) in violation of protective order or second or subsequent assault against family or household member, and (2) victim is peace officer, correctional employee, community policing volunteer performing duty, pregnant, physically or mentally handicapped, over 60, or under 13	1201(2)(b)(iii)-(iv), (2)(d)
knowingly causing mental injury or emotional distress, or failing to provide needed care, for elderly or handicapped person or minor	1205(2)(a)
parent knowingly allowing sexual intercourse with child aged 9-13, or with child under 17 where offender holds position of authority	1301(4)(b)(i) & (ii), (4)(f)

[N.B. It should not be assumed that current sentencing ranges apply to the proposed grades. The grades are intended only to assess the relative seriousness of offenses, and not the sentencing consequences of a conviction for any offense.]

Class 2 Felonies (continued)	
<u>Offense Description</u>	<u>Section</u>
engaging in sexual intercourse with child aged 13-17, where offender is at least 4 years older than victim	1301(4)(c)
engaging in sexual conduct (short of intercourse) with minor, or by force or threat, or with person unable to consent, where victim is under 13 and offender is at least 4 years older, or victim suffers harm, pregnancy, or threat to life	1302(3)(a)
secret confinement against one's will, or coerced transportation with intent to confine (kidnaping)	1401(3)(c)
knowingly detaining another for ransom or demand, where victim is peace officer, correctional employee, or community policing volunteer	1402(2)(a)
threatening bodily harm, restraint, accusation of offense, etc., with intent to influence another's behavior (criminal coercion), if in furtherance of criminal organization	1404(2)(a)
robbery (taking property from another by use or threat of force), where (1) amount involved exceeds \$1,000, (2) victim is under 17, over 60, or handicapped, (3) committed in school or place of worship, or (4) offender suggests he is armed	1501(2)(b)
theft of over \$100,000 of property that was lost, mislaid, or delivered by mistake	2108(2), 2109(1)
theft of firearm, vehicle, or \$10,000-100,000	2109(2)(a)
receiver of stolen property is in the business of same	2109(2)(c)
theft of \$5,000-50,000 from school, place of worship, victim age 60 or older	2109(2), (8)
knowingly causing fire or explosion that damages building, habitable structure, or vital public facility	2201(1)(a)
knowingly causing fire or explosion that damages property for insurance	2201(1)(b)
recklessly causing damage resulting in loss of over \$100,000	2206(3)(a), (g)

[N.B. It should not be assumed that current sentencing ranges apply to the proposed grades. The grades are intended only to assess the relative seriousness of offenses, and not the sentencing consequences of a conviction for any offense.]

Class 2 Felonies (continued)	
<u>Offense Description</u>	<u>Section</u>
recklessly damaging religious or educational building, or place of burial, resulting in loss of over \$50,000	2206(3)(a), (g), (h)
knowingly causing damage resulting in loss of \$10,000-100,000	2206(3)(b)
knowingly damaging religious or educational building, or place of burial, resulting in loss of \$5,000-50,000	2206(3)(b), (h)
entering a building to commit a crime (burglary), in dwelling	2302(2)(a)
counterfeiting money, securities, postage, stock, etc.	3101(3)(a)
offering or accepting property with intent to influence performance of public duties (bribery)	5101(3)(a)
disarming police officer of firearm while engaged in official duties	5302(3)(a)
felon knowingly escaping from detention	5307(2)(a)
non-employee bringing, possessing, or giving inmate access to firearm, ammunition, or catastrophic agent in penal institution	5309(3)(a)(i)
employee bringing, possessing, or giving inmate access to controlled substance, syringe, weapon, lockpicking implement, saw, electronic contraband in penal institution	5309(3)(a)(ii), (3)(b)
causing or threatening bodily harm, confinement or restraint, substantial property damage against public servant, witness, juror, or voter	5310(2)(a)
compelling, promoting, supporting, or living off the proceeds of prostitution while negligent as to prostitute's minority or mental retardation	6203(2)(a)
disseminating pornographic material that contains victim who is under 16 or severely and profoundly mentally retarded	6204(5)(a)

[N.B. It should not be assumed that current sentencing ranges apply to the proposed grades. The grades are intended only to assess the relative seriousness of offenses, and not the sentencing consequences of a conviction for any offense.]

Class 3 Felonies	
<u>Offense Description</u>	<u>Section</u>
knowingly aiding or soliciting another to commit suicide (if death results)	1107(5)(a)
knowingly causing bodily harm (assault), where caused by administration of food or drug to victim	1201(2)(b)(i)
knowingly causing bodily harm (assault), where assailant knowingly commits offense in public place	1201(2)(b)(ii)
knowingly causing bodily harm (assault), if in violation of protective order or if second or subsequent assault against family or household member	1201(2)(b)(iii)-(iv)
recklessly causing great bodily harm	1202(2)(a)(i)
knowingly following or surveilling another on at least two occasions, thus placing person in apprehension of harm or restraint (stalking), where offender violates protection order	1204(2)(a)
recklessly causing mental injury or emotional distress to, or failing to provide needed care for, elderly or handicapped person or minor	1205(2)(b)
parent knowingly allowing sexual intercourse with child aged 13-17, where offender is at least 4 years older than victim	1301(4)(c), (f)
engaging in sexual intercourse or conduct with person under offender's custodial supervision	1304
threatening bodily harm, restraint, accusation of offense, etc., with intent to influence another's behavior (criminal coercion), knowing victim is peace officer, correctional employee, or community policing volunteer, and intending to interfere with or retaliate for exercise of official duty	1404(2)(b)
robbery (taking property from another by use or threat of force)	1501(2)(c)
theft of firearm, vehicle, or \$10,000-100,000 of property, that was lost, mislaid, or delivered by mistake	2108(2), 2109(2)
theft of \$1,000-10,000	2109(3)

[N.B. It should not be assumed that current sentencing ranges apply to the proposed grades. The grades are intended only to assess the relative seriousness of offenses, and not the sentencing consequences of a conviction for any offense.]

Class 3 Felonies (continued)	
<u>Offense Description</u>	<u>Section</u>
theft of \$500-5,000 from school, place of worship, victim age 60 or older	2109(3), (8)
knowingly causing fire or explosion, while recklessly endangering another, and manifesting extreme indifference to value of human life	2202(2)(a)
recklessly creating risk of catastrophe (great bodily harm to 5+ people, or substantial damage to 5+ buildings or vital public facility)	2204(2)
possession of a device or substance for catastrophic effect	2205
recklessly damaging religious or educational building, or place of burial, resulting in loss of \$5,000-50,000	2206(3)(b), (g), (h)
recklessly causing damage of \$10,000-100,000	2206(3)(b), (g)
knowingly causing damage resulting in loss of \$1,000-10,000	2206(3)(c)
knowingly damaging religious or educational building, or place of burial, resulting in loss of \$500-5,000	2206(3)(c), (h)
intentionally causing interruption of public service	2207(3)(a)
knowing interception of communication using intercepting device	2401
forgery (altering another's writing or creating, executing, etc., unauthorized writing) of will, deed, contract, commercial instrument, etc.	3101(3)(b)
tampering with publicly recorded document (will, deed, mortgage, security)	3102(3)(a)
violating bidding process for public contract (bid rigging)	3110
incest (sexual intercourse or conduct with one's sibling or child)	4101
public employee knowingly failing to perform mandatory public duty	5103(1)(a)

[N.B. It should not be assumed that current sentencing ranges apply to the proposed grades. The grades are intended only to assess the relative seriousness of offenses, and not the sentencing consequences of a conviction for any offense.]

Class 3 Felonies (continued)	
<u>Offense Description</u>	<u>Section</u>
public employee knowingly performing forbidden act	5103(1)(b)
public employee performing act in excess of lawful authority	5103(1)(c)
public employee soliciting or accepting unauthorized fee	5103(1)(d)
making false statement of fact under oath (perjury)	5201
obstructing justice (destroying, altering, concealing evidence; leaving state or hiding, or inducing another witness to do so) in furtherance of criminal organization	5301(2)(a)
harboring, aiding, or concealing a known criminal or fugitive	5306
felon knowingly failing to report or return to place of detention, or failing to abide by terms of home confinement	5307(2)(b)
non-employee bringing, possessing, or giving inmate access to controlled substance, syringe, weapon, lockpicking implement, saw, electronic contraband in penal institution	5309(3)(a)(ii)
employee bringing, possessing, or giving inmate access to cannabis in penal institution	5309(3)(a)(iii), (3)(b)
causing or threatening offense against public servant, witness, juror, or voter	5310(2)(b)
discharging a firearm in course of committing felony	7101(2)(a)

[N.B. It should not be assumed that current sentencing ranges apply to the proposed grades. The grades are intended only to assess the relative seriousness of offenses, and not the sentencing consequences of a conviction for any offense.]

Class 4 Felonies	
<u>Offense Description</u>	<u>Section</u>
negligently causing the death of another person	1105
knowingly aiding or soliciting another to attempt suicide (if no death results)	1107(5)(b)
concealing a homicide	1108
knowingly causing bodily harm (assault), where victim is peace officer performing duty, pregnant, mentally retarded, over 60, or under 13	1201(2)(c)(i), (d)
recklessly creating substantial risk of death or great bodily harm	1202(2)(b)(i)
knowingly following or surveilling another on at least two occasions, placing person in apprehension of harm or restraint (stalking), generally	1204(2)(b)
engaging in sexual intercourse with victim under 13, where offender is less than 4 years older	1301(4)(d)
engaging in sexual conduct (short of intercourse) by force or threat, or with person unable to consent, or where victim is under 17 and offender is at least 4 years older or in position of authority	1302(3)(b)(i)
approaching, making contact, or communicating with minor in certain public places by convicted child sex offender	1305
knowingly detaining another	1402(2)(b)
interfering with custody of minor or mentally retarded person in violation of court order	1403(2)(b)
threatening bodily harm, restraint, accusation of offense, etc., with intent to influence another's behavior (criminal coercion)	1404(2)(c)
theft of \$1,000-10,000 of property that was lost, mislaid, or delivered by mistake	2108(2), 2109(3)
theft of \$300-1,000 or credit or debit card	2109(4)
theft of \$150-500 from school, place of worship, victim age 60 or older	2109(4), (8)

[N.B. It should not be assumed that current sentencing ranges apply to the proposed grades. The grades are intended only to assess the relative seriousness of offenses, and not the sentencing consequences of a conviction for any offense.]

Class 4 Felonies (continued)	
<u>Offense Description</u>	<u>Section</u>
threatening to cause a catastrophe (great bodily harm to 5+ people, or substantial damage to 5+ buildings or vital public facility)	2204(3)
recklessly causing damage resulting in loss of \$1,000-10,000	2206(3)(c), (g)
recklessly damaging religious or educational building, or place of burial, resulting in loss of \$500-5,000	2206(3)(c), (g), (h)
knowingly causing damage resulting in loss of \$300-1,000	2206(3)(d)
knowingly damaging religious or educational building, or place of burial, resulting in loss of \$150-500	2206(3)(d), (h)
knowingly causing interruption of public service	2207(3)(b)
entering a building, other than a dwelling, to commit a crime (burglary)	2302(2)(b)
trespass of dwelling or highly secured premises	2303(2)(a)
accepting bribe to breach duty of fidelity or duty to act disinterestedly (commercial bribery)	3109(1), (2)
offering commercial bribe	3109(3)
rigging publicly exhibited contest through bribery or tampering	3111(1)
accepting bribe to rig publicly exhibited contest	3111(2)
parent or guardian knowingly leaving child under 13 without supervision for 24 hours or more	4103
failure to provide child support of more than \$10,000, or for more than 6 months, or by fleeing the state	4106(3)(a)
offering or accepting property with intent to influence performance of voter (bribery of voter)	5101(3)(b)
public servant, independent contractor, juror, or witness failing to report bribe offer to law enforcement officials	5102(2)(a)

[N.B. It should not be assumed that current sentencing ranges apply to the proposed grades. The grades are intended only to assess the relative seriousness of offenses, and not the sentencing consequences of a conviction for any offense.]

Class 4 Felonies (continued)	
<u>Offense Description</u>	<u>Section</u>
knowingly making false entry in government record	5203(1)(a), (2)(b)
knowingly altering, destroying, removing public record	5203(1)(b)(i), (2)(b)
knowingly giving false information, or reporting offense or other incident that did not occur, to law enforcement authorities with intent to implicate another	5204(2)(a)
falsely representing oneself to be attorney or police officer	5205(2)(a)
performing unauthorized marriage ceremony, execution of recorded document, surety for party to litigation	5206
obstructing justice (destroying, altering, concealing evidence; leaving state or hiding, or inducing another witness to do so)	5301(2)(b)
misdemeanant knowingly escaping from detention, failing to report or return to place of detention, or failing to abide by terms of home confinement	5307(2)(c)
non-employee bringing, possessing, or giving inmate access to cannabis in penal institution	5309(3)(a)(iii)
employee bringing, possessing, or giving inmate access to liquor in penal institution	5309(3)(a)(iv), (3)(b)
communicating with juror without authority	5310(2)(c)
participating in course of disorderly conduct with intent to facilitate crime or affect official action (riot)	6101
compelling, promoting, or supporting prostitution (pimping)	6203(2)(b)
displaying, or threatening use of, firearm in course of committing felony	7101(2)(b)

[N.B. It should not be assumed that current sentencing ranges apply to the proposed grades. The grades are intended only to assess the relative seriousness of offenses, and not the sentencing consequences of a conviction for any offense.]

Class A Misdemeanors	
<u>Offense Description</u>	<u>Section</u>
possessing instrument of crime with intent to employ it criminally	808
knowingly aiding or soliciting another to commit suicide if no suicide or attempt results	1107(5)(c)
knowingly causing bodily harm (assault)	1201(2)(c)(i)
knowingly making physical contact of insulting or provoking nature (assault), where victim is peace officer, correctional employee, or community policing volunteer performing duty, pregnant, physically or mentally handicapped, over 60, or under 13	1201(2)(c)(ii), (2)(d)
recklessly causing bodily harm	1202(2)(a)(ii)
threatening to commit crime likely to cause great bodily harm, unlawful confinement or restraint, or substantial property damage, while reckless as to risk of terrorizing another	1203
parent knowingly allowing sexual intercourse with victim under 13, where offender is less than 4 years older	1301(4)(d), (f)
engaging in sexual intercourse with child aged 13-17, where offender is less than 4 years older than victim	1301(4)(e)
engaging in sexual conduct (short of intercourse), where victim is under 13 and offender is less than 4 years older	1302(3)(b)(ii)
inducing minor to remove clothing	1303
theft of credit or debit card or \$300-1,000 of property that was lost, mislaid, or delivered by mistake	2108(2), 2109(4)
theft of \$300 or less	2109(5)
theft of \$150 or less from school, place of worship, victim age 60 or older	2109(5), (8)
unauthorized use of vehicle	2111
knowingly causing fire or explosion, while recklessly endangering another, a building, or a vital public facility	2202(2)(b)

[N.B. It should not be assumed that current sentencing ranges apply to the proposed grades. The grades are intended only to assess the relative seriousness of offenses, and not the sentencing consequences of a conviction for any offense.]

Class A Misdemeanors (continued)	
<u>Offense Description</u>	<u>Section</u>
failure to control or report dangerous fire	2203
failure, by one with duty to do so, to prevent a catastrophe (great bodily harm to 5+ people, or substantial damage to 5+ buildings or vital public facility)	2204(4)
recklessly causing damage resulting in loss of \$300-1,000	2206(3)(d), (g)
recklessly damaging religious or educational building, or place of burial, causing loss of \$150-500	2206(3)(d), (g), (h)
knowingly causing damage resulting in loss of \$50-300	2206(3)(e)
knowingly damaging religious or educational building, or place of burial, causing loss of \$25-150	2206(3)(e), (h)
recklessly or negligently causing interruption of public service	2207(3)(c)
trespass of enclosed space	2303(2)(b)
damaging, opening, or reading contents of correspondence	2402
trespass for purposes of surveillance or eavesdropping	2403(1)(a)
installing or using recording device to surveil or eavesdrop on private place	2403(1)(b), (c)
knowingly gaining access to privileged information	2404
disclosure of improperly obtained information	2405
altering writing of another; making, executing, issuing writing so that it purports to be writing of another or executed at false time or place (forgery)	3101(3)(c)
tampering with writing or record with intent to deceive	3102(3)(b)
securing execution of document by deception	3103
simulating object of special value with intent to defraud	3104

[N.B. It should not be assumed that current sentencing ranges apply to the proposed grades. The grades are intended only to assess the relative seriousness of offenses, and not the sentencing consequences of a conviction for any offense.]

Class A Misdemeanors (continued)	
<u>Offense Description</u>	<u>Section</u>
unauthorized impersonation	3105
deceptive practices: false or misleading written statement to obtain credit, advertise, sell securities; using false weight or measure or selling less than represented quantity; selling adulterated or mislabeled goods	3106
issuing or passing bad check	3107
using stolen, forged, revoked, cancelled credit card	3108
knowingly participating in rigged contest	3111(3)
defrauding secured creditors by destroying, transferring, etc., secured property	3112
destroying, transferring, etc., property to avoid creditors' claims in insolvency	3113(1)(a)
knowingly falsifying records, or misrepresenting status of property, to avoid creditors' claims in insolvency	3113(1)(b), (c)
receiving deposit in failing financial institution	3114
knowingly selling right to participate in pyramid scheme	3115
bigamy (marrying another when one is already married); knowingly marrying a bigamist	4102
knowingly sheltering runaway for more than 48 hours	4104(3)
separate offense where person over 21 solicits or directs person under 18 to commit offense	4105(3)(a)
failure to provide child support of more than \$5,000	4106(3)(b)
failing to report bribe offer to law enforcement officials	5102(2)(b)
making false or misleading written statement, or inducing reliance on false document, with intent to mislead public servant	5202(1), (4)

[N.B. It should not be assumed that current sentencing ranges apply to the proposed grades. The grades are intended only to assess the relative seriousness of offenses, and not the sentencing consequences of a conviction for any offense.]

Class A Misdemeanors (continued)	
<u>Offense Description</u>	<u>Section</u>
making false written statement on form authorizing punishment for doing so	5202(2), (4)
knowingly reporting crime that did not occur, or furnishing false information relating to crime	5204(2)(b)
falsely representing oneself to be public servant, or parent or guardian of a child	5205(2)(b)
knowingly causing false alarm of fire or emergency	5208
resisting, obstructing, interfering with police or correctional officer	5302(3)(b)
intentionally obstructing, impairing, perverting administration of law or other governmental function	5303
employee of penal institution recklessly permits prisoner to escape	5308
non-employee bringing, possessing, or giving inmate access to liquor in penal institution	5309(3)(a)(iv)
participating in course of disorderly conduct and knowingly failing to obey order to disperse by law enforcement authorities	6102
knowingly initiating or circulating false report or warning of catastrophe (great bodily harm to 5+ people, or substantial damage to 5+ buildings or vital public facility) or other offense while being reckless as to causing public inconvenience or alarm	6104
harassment in violation of order of protection	6105(2)(a)
separate offense for committing offense believing it will intimidate group based on race, religion, etc. (hate crime)	6106
persisting in recklessly obstructing highway or public passage after warning by law enforcement authorities	6109(5)(a)
performing lewd act or exposure in public	6201
prostitution, patronizing prostitute, or soliciting sex act	6202(2)

[N.B. It should not be assumed that current sentencing ranges apply to the proposed grades. The grades are intended only to assess the relative seriousness of offenses, and not the sentencing consequences of a conviction for any offense.]

Class A Misdemeanors (continued)	
<u>Offense Description</u>	<u>Section</u>
living off proceeds of prostitution	6203(2)(c)
disseminating pornography	6204(5)(b)
buying or selling human body parts	6206
intentionally subjecting animal to cruel mistreatment or neglect	6207(3)(a)
possessing firearm in course of committing felony	7101(2)(c)

Class A Misdemeanor [or, if lower, 1 below underlying offense]	
person released on bail or own recognizance fails to appear or violates condition of release	5311(2)

[N.B. It should not be assumed that current sentencing ranges apply to the proposed grades. The grades are intended only to assess the relative seriousness of offenses, and not the sentencing consequences of a conviction for any offense.]

Class B Misdemeanors	
<u>Offense Description</u>	<u>Section</u>
recklessly creating substantial risk of bodily harm	1202(2)(b)(ii)
knowingly making physical contact of insulting or provoking nature (assault)	1201(2)(c)(ii)
parent knowingly allowing sexual intercourse with child aged 13-17, where offender is less than 4 years older than victim	1301(4)(e), (f)
engaging in sexual conduct (short of intercourse) with person aged 13-17, where offender is less than 4 years older than victim	1302(3)(b)(iii)
theft of credit or debit card, or less than \$300 of property, that was lost, mislaid, or delivered by mistake	2108(2), 2109(5)
recklessly causing damage resulting in loss of \$50-300	2206(3)(e), (g)
recklessly damaging religious or educational building, or place of burial, resulting in loss of \$25-150	2206(3)(e), (g), (h)
knowingly causing damage resulting in loss of \$50 or less	2206(3)(f)
knowingly damaging religious or educational building, or place of burial, resulting in loss of \$25 or less	2206(3)(f), (h)
unlawful residential picketing	2304
issuing false service of legal process	5207
knowingly resisting or obstructing service of process	5304
engaging in fighting, threatening, noisy, coarse, offensive, or hazardous behavior, intending to cause substantial harm or inconvenience	6103(3)(a)(i)
engaging in fighting, threatening, noisy, coarse, offensive, or hazardous behavior, and persisting after request to desist	6103(3)(a)(ii)
harassment by offensive or irritating communication; insults or taunts in manner likely to provoke; offensive touching	6105(2)(b)
abusing corpse	6205

[N.B. It should not be assumed that current sentencing ranges apply to the proposed grades. The grades are intended only to assess the relative seriousness of offenses, and not the sentencing consequences of a conviction for any offense.]

Class C Misdemeanors	
<u>Offense Description</u>	<u>Section</u>
interfering with custody of minor or mentally retarded person in violation of visitation provisions of court order	1403(2)(a)
theft of less than \$50, not from person, no threat, and no breach of fiduciary duty	2109(6)
recklessly causing damage resulting in loss of \$50 or less	2206(3)(f), (g)
trespass generally	2303(2)(c)
knowingly altering, destroying, removing public notice	5203(1)(b)(ii), (2)(a)
knowingly failing to provide requested aid to police officer	5305
obstructing, interfering with, or provoking public meeting or gathering	6110
intentionally desecrating public monument, place of worship or burial, or other object of public veneration	6111
recklessly subjecting animal to cruel mistreatment or neglect	6207(3)(b)

[N.B. It should not be assumed that current sentencing ranges apply to the proposed grades. The grades are intended only to assess the relative seriousness of offenses, and not the sentencing consequences of a conviction for any offense.]

Petty Offenses	
<u>Offense Description</u>	<u>Section</u>
parent or guardian knowingly permits child to associate with criminals or violate curfew	4105(3)(b)
engaging in fighting, threatening, noisy, coarse, offensive, or hazardous behavior	6103(3)(b)
appearing in public under influence of drugs or alcohol and creating likelihood of danger or annoyance	6107
loitering or prowling under circumstances warranting alarm	6108
recklessly obstructing highway or public passage	6109(5)(b)

[N.B. It should not be assumed that current sentencing ranges apply to the proposed grades. The grades are intended only to assess the relative seriousness of offenses, and not the sentencing consequences of a conviction for any offense.]

[1 grade below completed offense]	
<u>Offense Description</u>	<u>Section</u>
attempt, solicitation, or conspiracy to commit an offense	807

[1 grade below applicable standard offense]	
<u>Offense Description</u>	<u>Section</u>
homicide of unborn child	1106

[N.B. It should not be assumed that current sentencing ranges apply to the proposed grades. The grades are intended only to assess the relative seriousness of offenses, and not the sentencing consequences of a conviction for any offense.]



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ILLINOIS CRIMINAL CODE

REWRITE AND REFORM COMMISSION

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PROPOSED ILLINOIS CRIMINAL CODE
OFFICIAL COMMENTARY
PART I: GENERAL PROVISIONS



Article 100. Preliminary Provisions

Section 101. Short Title and Effective Date

Corresponding Current Provision(s): 720 ILCS 5/1-1; 5/34-4

Comment:

Generally. This provision gives a name for the Code and specifies the date on which it becomes legally effective.

Relation to current Illinois law. Section 101(1) is similar to current 5/1-1. Section 101(2) is similar to current 5/34-4.

Section 102. Principle of Construction; General Purposes

Corresponding Current Provision(s): 720 ILCS 5/1-2; 5/34-1 to -3

Comment:

Generally. This provision articulates the general legislative purposes of the Code and sets forth the principles of construction to be used in its interpretation.

Relation to current Illinois law. Section 102 states principles of construction that appear in four separate provisions under Chapter 720.

Section 102(1) is similar to current 5/1-2, but imposes a new default rule of construction requiring that Code provisions must first “be construed according to the fair import of their terms.” Section 102(1)’s default rule of construction codifies the rule recognized by Illinois courts that “the language of a statute is the best indication of the legislative drafter’s intent.” *People v. Brooks*, 633 N.E.2d 692, 694 (Ill. 1994). The proposed provision makes clear, however, that when the language of a statute is subject to differing constructions, the courts should first “resort to general principles of statutory interpretation and available indicia of legislative intent.”¹ Only if, after using such rules in an effort to determine the intent behind a specific provision, the language remains ambiguous, should a court employ the general principles listed in Section 102(1)(a) to (d). Such a construction ensures that these

¹ Illinois courts use various rules of statutory construction to aid in determining legislative intent. See, e.g., *People v. Beam*, 384 N.E.2d 1315, 1316 (Ill. 1979) (finding State’s right to exercise preemptory challenges omitted from a revised version of statute by legislative oversight and was not intentionally deleted); *People v. Wallace*, 312 N.E.2d 263, 290 (Ill. 1974) (finding it proper to rely on Committee Comments in ascertaining legislative intent); *People v. Hairston*, 263 N.E.2d 840, 846 (Ill. 1970) (holding entire Code should be considered in determining legislative intent of a particular section). The proposed provision is not intended to affect the use of any of these rules, or to endorse or criticize any rule. The provision merely makes clear that such methods should be applied before a court resorts to the general principles stated in Section 102.

general principles do not “trump” a more specific legislative intent with respect to a particular provision.

The proposed provision expands on the rule of construction in current 5/1-2, which simply states that Code provisions should be “construed in accordance with the general purposes hereof,” but does not specify when, or how, courts should resort to those general purposes. Moreover, Section 102(1) eliminates the common-law rule of “strict construction,” which mandated that penal statutes “be strictly construed in favor of an accused without, however, defeating the legislative intent.” People v. Brooks, 633 N.E.2d 692, 694 (Ill. 1994); see also Faheem-El v. Klinciar, 527 N.E.2d 307, 310 (Ill. 1988); People v. Haywood, 515 N.E.2d 45, 49 (Ill. 1987). Section 102(1)’s rule is more flexible than the strict construction principle, which effectively creates a presumption in the defendant’s favor. The “fair import” language is designed to allow consideration, and balancing, of the twin goals that citizens have reasonable notice of criminal prohibitions and that the courts have the discretion to interpret the Code without frustrating legislative intent.

Section 102(1)(a) to (d) are substantively similar to 5/1-2(a) to (d), with two alterations. First, Section 102(1)(b) omits as redundant 5/1-2(b)’s reference to “adequately” defining the act and mental state that constitute each offense. Second, Section 102(1)(c) does not list as a general purpose the development of penalties that “permit recognition of differences in rehabilitation possibilities among individual offenders.” Although useful in identifying the most appropriate method of sanction, potential rehabilitation is not useful in determining the existence and extent of an offender’s liability. Rehabilitative goals are more properly addressed after liability has been found and the appropriate grade of penalty has been imposed.

Section 102(2) provides that this commentary “may be used as an aid in construing” the Code. The provision does not specify how much weight courts are to give the commentary in interpreting the Code, but merely points out that they may use the commentary as a guide.

Section 102(3) is similar to current 5/34-1, but generally refers to “heading[s]” or “provision[s]” rather than specifying “Section, Article, and Title headings” and “[t]he provisions of any Section, Article, or Title.”

Section 102(4) and (5) are identical to current 5/34-2 and 5/34-3, respectively.

Section 103. Applicability

Corresponding Current Provision(s): 720 ILCS 5/1-3

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 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 Illinois law. Section 103(1) and (3) are identical to current 5/1-3.

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 Illinois Supreme Court decisions finding that the culpability provisions of 5/4-3 to 5/4-9 apply “to all criminal penalty provisions, including those outside the Criminal Code of 1961.” In re K.C., 714 N.E.2d 491, 493-94 (Ill. 1999); see also People v. Gean, 573 N.E.2d 818, 820-21 (Ill. 1991); People v. Valley Steel Prods. Co., 375 N.E.2d 1297, 1304-05 (Ill. 1978).

Section 104. Civil Remedies Preserved

Corresponding Current Provision(s): 720 ILCS 5/1-4

Comment:

Generally. This provision makes clear that the Code does not affect rights or liabilities in civil actions related to conduct made punishable by the Code.

Relation to current Illinois law. Section 104 is identical to current 5/1-4.

Section 105. State Criminal Jurisdiction

Corresponding Current Provision(s): 720 ILCS 5/1-5

Comment:

Generally. This provision provides the rules for determining whether a person is subject to prosecution in the State for an offense.

Relation to current Illinois law. Section 105(1) is identical to current 5/1-5(a), with one alteration. Section 105(1)(d), unlike 5/1-5(a)(4), provides for jurisdiction where a person's conduct in Illinois provides “aid” for an offense in another jurisdiction, thus subjecting the person providing the aid to complicity liability in Illinois for the offense committed elsewhere. See proposed Section 301 (providing for complicity liability where one “intentionally aids” another in committing an offense). For example, a person based in Illinois who provides material support to a terrorist group committing crimes in another jurisdiction, whether or not he enters a “conspiracy” to commit any particular offense, would be subject to complicity liability in Illinois for the offenses committed elsewhere.

Section 105(2) clarifies when an offense is “committed partly within this State” for purposes of establishing jurisdiction under Section 105(1)(a).

Subsection (2) restates the first sentence of current 5/1-5(b), but uses “conduct” and “a result” instead of “the conduct” and “the result,” as an offense may have more than one conduct or result element. Cf. infra note 2 and corresponding text (discussing felony murder).

Section 105(3) is substantively similar to the second clause of the last sentence of current 5/1-5(b), but uses “the trier of fact may infer” rather than “is presumed” to make clear that a permissive inference rather than a categorical presumption is being established. (For discussion of the rules regarding permissive inferences, see infra commentary for proposed Section 107(4).)

Section 105(4) is identical to current 5/1-5(c), allowing jurisdiction over offenses based on an omission to perform a duty within Illinois, regardless of whether the defendant is in Illinois at the time of the omission.

Section 105 does not incorporate current 5/1-5(b)’s two special rules related to homicide offenses. First, the proposed provision eliminates the special rule that in cases of felony murder, jurisdiction is proper if the attempt or commission of an underlying felony other than second-degree murder occurs in Illinois. Such a specific rule is unnecessary given the general rule in Section 105(1)(a) that the State has jurisdiction over offenses committed partly within this State. Under proposed Section 105(2), the commission or attempt of an underlying felony in Illinois would be sufficient to find that the felony murder was committed partly within this State, as the underlying felony would constitute a conduct element of the felony murder.² (See proposed Section 1102 and corresponding commentary.)

The proposed provision also eliminates current 5/1-5(b)’s special rule for homicide cases that the result element may either be the physical contact which causes the death or the death itself. The current rule appears to be aimed at the extremely rare case where the offender’s conduct and the victim’s death occur outside Illinois, but the physical contact causing death occurs in Illinois — for example, where a person standing in Wisconsin shoots a victim who is in Illinois, but who crosses into Wisconsin (or Indiana) before dying. In such cases, neither the result nor the conduct element³ of the murder occurred in

² It appears that the General Assembly adopted this special felony-murder rule in response to the Illinois Supreme Court’s decision in People v. Holt, 440 N.E.2d 102, 107 (Ill. 1982). In Holt, the court held the State did not have jurisdiction over a murder that occurred in Wisconsin, even though the victim was initially kidnaped in Illinois. Id. The Holt court reasoned that the conduct of kidnaping the victim was not *the* conduct which was an element of the offense of felony murder as required by 5/1-5(b). Holt, 440 N.E.2d at 105. Under the proposed provision, conduct constituting the predicate felony in a charge of felony murder would be “conduct that is *an* element of the offense” and thus be subject to jurisdiction in this State. See supra commentary for Section 105(2).

³ The proposed Code makes clear that, in this example, the conduct element of the murder occurs in Wisconsin and not Illinois. Under proposed Section 202, a “conduct element” is the part of the offense that requires an offender’s act. Section 204 defines an “act” as bodily movement. Thus the offender’s act of pulling the trigger, and not the bullet hitting the victim, is the conduct element of the murder. Note, however, that Illinois would have jurisdiction for an assault under Section 1201, as the result element of bodily harm did occur in Illinois. See proposed Section 1201 and corresponding commentary.

Illinois, and the case would not be covered under the general rule in Section 105(1)(a). 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 106. Place of Trial

Corresponding Current Provision(s): 720 ILCS 5/1-6

Comment:

Generally. This provision provides the rules for determining where a criminal action may be tried.

Relation to current Illinois law. Section 106 maintains most of the substantive venue rules of current 5/1-6, but eliminates 5/1-6's specific formulations for particular offenses and factual situations. Section 106 also adds a venue rule for offenses based on omission liability.

Section 106(1) sets forth a permissive venue rule: criminal offenses “*may* be tried in any county in which the requirements of criminal jurisdiction under Section 105 have been satisfied” (emphasis added). Under the mandatory general venue rule articulated in current 5/1-6(a), in contrast, “[c]riminal actions *shall* be tried in the county where the offense was committed, except as otherwise provided by law” (emphasis added). But Illinois courts have read 5/1-6(a)'s rule to be similar to that in proposed Section 106, finding that “[v]enue is proper in any county where any element of the offense was committed.” People v. Eggerman, 685 N.E.2d 948, 952 (Ill. App. 1997); see also People v. Lambert, 552 N.E.2d 300, 303 (Ill. App. 1990).

Section 106(1) also achieves the same results as all but a few of the special permissive venue rules contained in current 5/1-6(b) to (r) and in case law. Section 106(1) allows venue where any conduct or result element of the offense has occurred; this avoids the problem of having to determine a single county in which the offense was committed. For offenses committed while in transit, for which “it cannot be readily determined in which county the offense was committed,” current 5/1-6(f) provides that venue is proper in any county through which the defendant passed. In most cases, Section 106(1) would achieve the same result as current 5/1-6(f), as it would permit venue in any county through which the defendant passed while an ongoing conduct or result element was occurring. With respect to the offense of treason,⁴ Section 106(1) dictates that venue is proper in any county in which the defendant committed the offense conduct, whereas current 5/1-6(k) provides that venue is proper in any county. Similarly, Section 106(1) would permit venue for

⁴ 720 ILCS 5/30-1.

the offenses of cannabis trafficking⁵ and controlled substance trafficking⁶ in the counties where the conduct or result element occurred, rather than in any county, as prescribed by current 5/1-6(r). For inchoate offenses, Section 106(1) achieves venue results that are substantively similar to those achieved by current 5/1-6(m), but would also permit prosecution for attempt in the county in which the substantive crime would have been completed, in addition to any counties in which offense elements occurred. Finally, Section 106(1) would permit the offense of official misconduct⁷ to be tried in any county in which the misconduct occurred, whereas an Illinois appellate court has also permitted prosecution in the county of the official's office. See People v. Clark, 389 N.E.2d 911, 922-23 (Ill. App. 1979).

Section 106(1) also omits, as redundant, the second and third sentences of current 5/1-6(a), which provide that “[t]he State is not required to prove during trial that an alleged offense occurred in any particular county” and that all proceedings concerning the propriety of venue shall be conducted under Section 114-1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/114-1). The deletion of these provisions is not intended to reintroduce the State’s burden of proving venue beyond a reasonable doubt at trial. Rather, under Section 107(2)(c), the State is only required to prove proper venue by a preponderance of the evidence. See proposed Section 107(2)(c) and corresponding commentary. The procedures for contesting and proving venue would still be governed by current 725 ILCS 5/114-1.

Section 106(2), which introduces a supplementary venue rule for offenses imposing omission liability — allowing trial where a victim⁸ or defendant resides — has no corresponding provision under Chapter 720. Section 106(2) provides a default rule to clarify venue given that the locus of an omission is conceptually difficult to identify. This approach differs from the offense-specific holdings of some Illinois courts. See People v. Choura, 405 N.E.2d 493, 495 (5th Dist. 1980) (venue proper for offense of failure to report a bribe⁹ only in county where bribe offer occurred); cf. People v. Hennefent, 42 N.E.2d 633 (Ill. App. 1942) (venue for offense of “neglect and refusal to support minor child” proper only in the county where wife and the neglected child lived, and not in county where defendant lived).

Section 106(3) is substantively similar to the last sentence of current 5/1-6(a).

⁵ 720 ILCS 550/1.

⁶ 720 ILCS 470/401.

⁷ 720 ILCS 5/33-3.

⁸ Note that not every offense to which Section 106(2) applies will necessarily have a “victim.” For example, there is no easily identifiable victim for the current offense of failing to report a bribe. See 720 ILCS 5/33-2. In cases where the defendant resides outside Illinois and the victim is difficult to identify, or is an entity without a particular residence (such as the State where the offense is failure to file a tax return), venue would be appropriate in any county of the State.

⁹ 720 ILCS 5/33-2.

Section 106(4) is substantively similar to current 5/1-6(e), but makes two minor amendments. The current law provides that if “an offense is committed” on a bordering navigable water, venue is proper in “any county adjacent to such navigable water.” Section 106(4) provides that the special venue rule is triggered if “an element of the offense occurs” on a bordering navigable water, ensuring that the rule applies when either a conduct or result element occurs on such water. Section 106(4) also clarifies that, under such circumstances, venue is proper in “any county adjacent to *any portion* of such navigable water.” Hence, if an element of an offense occurs on Lake Michigan, Section 106(4) clarifies that the offense may be tried in any county bordering Lake Michigan, rather than only in the nearest county.

Section 107. Burdens of Proof; Affirmative Defenses; Permissive Inferences

Corresponding Current Provision(s): 720 ILCS 5/3-1; 5/3-2

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 proposed Code.

Relation to current Illinois law. Section 107(1) is the same as the first sentence of current 5/3-1, but says that “[a] defendant,” rather than “[e]very person,” is presumed innocent until proven guilty.

Section 107(2) and (3) establish two distinct evidentiary burdens for different stages of a criminal proceeding. Section 107(2) sets forth the ultimate burden of *persuasion*. Section 107(2) provides that the State must prove: (1) the elements of the offense beyond a reasonable doubt; (2) unless the Code provides otherwise, the absence of any exception, exemption, defense, 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.¹⁰ The scope of the State’s burden of persuasion remains the same with respect to elements of the offense and defenses as under current 5/3-2(b), but Section 107(2) provides a default rule that all other facts need only be proven by a preponderance.

Section 107(3) sets forth the burdens of *production* for the State 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 “trier

¹⁰ Illinois courts have sometimes said that the State must prove jurisdiction beyond a reasonable doubt. See *People v. Holt*, 440 N.E.2d 102, 108 (Ill. 1988); *People v. Young*, 727 N.E.2d 386, 388 (Ill. App. 2000). Yet Chapter 720 provides that the State need not prove *venue* at trial. See 720 ILCS 5/1-6(a). Under proposed Section 107(2)(c), neither jurisdiction nor venue would have to be proved beyond a reasonable doubt. It is also anticipated that, under proposed Section 106(3), the issue of venue (and thus also the issue of jurisdiction) will be resolved by the court prior to trial. See 725 ILCS 5/114-1.

of fact” (the jury in a jury trial, or the court in a bench trial). Section 107(3)(a) imposes the same burden of production on the State as exists under current Illinois law. See *People v. McLaurin*, 703 N.E.2d 11, 21 (Ill. 1998); see also *Jackson v. Virginia*, 443 U.S. 307, 316-20 (1979).

Section 107(3)(b) clarifies the defendant’s burden of production with respect to affirmative defenses and mitigations. Under the current statutory provision, a defendant properly raises an affirmative defense by presenting “some evidence” supporting the defense. See 720 ILCS 5/3-2(a); *People v. Jones*, 676 N.E.2d 646, 649 (Ill. 1997); *People v. Everett*, 565 N.E.2d 1295, 1298-99 (Ill. 1990). The Illinois Supreme Court has stated, though, that even if the defendant presents some evidence on an affirmative defense, the court may refuse to instruct the jury on the defense if “the evidence before the trial court is so clear and convincing as to permit the court to find as a matter of law that there is no affirmative defense.” *Jones*, 676 N.E.2d at 649; see also *People v. Larry*, 494 N.E.2d 1212 (Ill. App. 1986) (affirming refusal to give instruction on defense).

Like the restriction in *Jones*, Section 107(3)(b) provides that a defendant is entitled to an instruction on an affirmative defense only if “there exists¹¹ 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 107(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 107(3)(b) prevents defendants from being able to obtain an instruction for any frivolous defense, no matter how weak the supporting evidence.

Section 107(3)(c) defines “affirmative defense or mitigation.” Current Chapter 720 discusses and designates certain defenses as “affirmative defenses,” but does not define the term. See, e.g., 720 ILCS 5/3-2; 5/4-8; 5/6-4; 5/7-14. Section 107(3)(c) defines the term as any defense or mitigation that does not operate by negating an offense element. Affirmative defenses receive the same evidentiary treatment under Section 107(3)(b), coupled with Section 107(2)(b), that they receive under current 5/3-2. (The burden of persuasion for the insanity defense and other excuses, and for nonexculpatory defenses, is addressed elsewhere. See proposed Sections 501 and 601 and corresponding commentary.) Section 107(3) 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 1103 (defining statutory mitigation to reduce liability from murder to manslaughter).

¹¹ The “there exists” language is meant to make clear that, as under current law, the defendant need not present the necessary evidence himself if it is provided by the State’s case. See, e.g., *People v. Bailey*, 439 N.E.2d 4, 9 (Ill. App. 1982); *People v. Rorer*, 358 N.E.2d 681, 684 (Ill. App. 1976).

Section 107(4) explains the significance of permissive inferences established elsewhere in the proposed Code. Section 107(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 trier of fact, has no corresponding provision under current law. Section 107(4)(b) reflects the current rule that permissive inferences leave the trier of fact “free to reject or accept the suggested presumption,” People v. Hester, 544 N.E.2d 797, 801 (Ill. 1989) (citing County Court v. Allen, 442 U.S. 140, 157 (1979)), but are not permitted to “undermine the fact finder’s responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt.” People v. Ferguson, 561 N.E.2d 1118, 1124 (Ill. App. 1990) (citing Allen, 442 U.S. at 156).

Although Chapter 720 does not contain a provision similar to Section 107(4), the Illinois Supreme Court has addressed the constitutionality of permissive inferences. Under current Illinois law, “when there is some corroborating evidence of the defendant’s guilt, . . . the permissive presumption will satisfy due process concerns if the presumed fact is more likely than not to flow from the predicate fact.” People v. Watts, 692 N.E.2d 315, 321 (Ill. 1998) (citing Allen, 442 U.S. at 167). Where the permissive inference is the “sole and sufficient basis for a finding of guilt,” the presumed fact must flow beyond a reasonable doubt from the proven, predicate fact” to satisfy due process concerns. Watts, 692 N.E.2d at 321 (quoting Allen, 442 U.S. at 166-67). As long as there is a sufficiently close nexus between the proven predicate fact and the presumed fact, a permissive inference is not unconstitutional *per se* under Illinois law. See Watts, 692 N.E.2d at 321; Hester, 544 N.E.2d at 801-02; People v. Housby, 420 N.E.2d 151, 153-54 (Ill. 1981).

Section 108. Definitions

Corresponding Current Provision(s): 720 ILCS 5/2-3; -4; -8; -10; -13; -15; -15a; -15b; -17 to -19.5; -22; 5/15-1; see also 5/12-12(b),(d)

Comment:

Generally. Section 108 catalogues every defined term used in the proposed Code. Terms that are used regularly throughout the Code are defined directly in Section 108. Terms that are used in only one or a few sections are defined where appropriate, and that section of the Code is referenced in Section 108. For every defined term used in the Code, whether defined in Section 108 or elsewhere, a reference to the section defining the term is provided at the end of each article in which the term is used. Terms that are defined outside of this provision are discussed in the commentary for the referenced provision.

Relation to current Illinois law. Section 108’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 5/2-.5.

The definition of “another” is defined as a person other than the defendant and is identical to that in current 5/2-3.

The term “bodily harm” is defined as “substantial physical pain, illness, or any impairment of physical condition, and includes great bodily harm.” Chapter 720 uses this term often, but does not provide a general definition. In requiring “substantial physical pain,” however, the proposed definition seems to be somewhat more strict than the current standard for “bodily harm.” *Cf. People v. Mays*, 437 N.E.2d 633, 635-36 (Ill. 1982) (finding that bodily harm in the context of battery requires “some sort of physical pain or damage to the body, like lacerations, bruises or abrasions, whether temporary or permanent”). The proposed definition is not meant to include minor physical discomfort or pain, but only a “substantial” injury. Current 5/12-12(b) provides that, in the context of sexual offenses, the term means “physical harm” and includes “sexually transmitted disease, pregnancy and impotence.” The proposed provision expands on that definition and removes the references to STDs, pregnancy, and impotence so that the definition may be used throughout the Code.¹² In addition, the proposed definition specifically includes great bodily harm to ensure that the showing of great bodily harm will always satisfy an offense requirement of bodily harm.

The definition of “conduct” is substantively similar to that in current 5/2-4, but omits that provision’s inappropriate reference to “the accompanying mental state” as a component of conduct. *See* proposed Section 202 and corresponding commentary. The proposed definition also adds that conduct includes “a failure to act when bound by a legal duty to act.” This language is necessary as every offense contains a conduct element, but not every offense requires an act. *See* proposed Sections 202 and 204 and their corresponding commentaries.

“Force” is defined in a limited fashion, to make clear that “confinement or restraint” will satisfy an offense’s requirement of “force.” The current Code uses, but does not generally define, the term “force.” Like the term “bodily harm,” current Illinois law provides a narrow definition of “force or threat of force” in the context of sexual offenses, but that provision is not particularly helpful in explaining the phrase’s meaning, as it merely repeats the terms “force” and “threat” within the definition. *See* 720 ILCS 5/12-12(d) (defining “force or threat of force” as “the use of force or violence,

¹² The proposed definition covers STDs and impotence, as such conditions constitute illness and an impairment of a physical condition, respectively. Although the proposed definition is likely broad enough to include pregnancy, the proposed offenses of sexual assault and sexual abuse both contain an aggravation in cases where the offender causes bodily harm or pregnancy. *See* proposed Sections 1301 and 1302 and their respective commentaries.

or the threat of force or violence”). The current definition also provides two examples, but the first is similarly unhelpful, as it merely refers to “when the accused threatens to use force or violence” and the victim reasonably believes the threat will be executed. Id. The other example, which discusses “overcom[ing] the victim by use of superior strength or size, physical restraint or physical confinement,” id., is similar to the proposed explicit inclusion of “confinement or restraint.”

The definition of “forcible offense” is similar to the definition of “forcible felony” in current 5/2-8, but with three important differences. First, the term has been changed to forcible “offense” to include misdemeanors that involve the use or threat of force or create a risk of bodily harm. See, e.g., proposed Section 1203 (terroristic threats).

Second, the proposed definition omits the current provision’s list of specific offenses that qualify as “forcible felonies.” The current list approach appears to promote clarity and precision, but, in fact, has lead to irrational results. See People v. Johnson, 711 N.E.2d 787, 788 (Ill. App. 1999) (holding residential burglary not a forcible felony because previous version of current 5/2-8, which specifically included the *less serious* offense of burglary, did not specifically include residential burglary) (emphasis added); see also People v. McCarty, 769 N.E.2d 985, 993-94 (Ill. App. 2002) (holding aggravated possession of a stolen motor vehicle a forcible felony even though not specifically listed in 5/2-8, in part because the offense was inherently more dangerous than burglary, a crime that *is* listed as a forcible felony) (emphasis added); cf. People v. Berg, 660 N.E.2d 1003, 1004 (Ill. App. 1996) (refusing to apply 5/3-5(a)’s rule allowing prosecutions for “arson” to be commenced at any time in case involving *aggravated* arson, because that crime was not specifically listed in 5/3-5(a)). To avoid such results, the proposed provision employs only a general definition of what offenses are forcible.

Third, the determination of whether an offense is “forcible” looks to the statutory elements, rather than to the facts of a particular case.¹³ This method parallels the current method of listing specific offenses that count as “forcible felonies” in the abstract, though it differs from the rule reflected in current

¹³ Although the proposed definition looks to the elements of the charged offense, it is not always necessary that the offense *explicitly* require the use or threat of force or the creation of a risk of great bodily harm so long as the offense in some way contemplates or implies the use of force or the creation of a risk. For example, the offense of arson does not explicitly require the creation of a risk of great bodily harm, but the offense is clearly designed to punish the risk to both people and property inherent in starting fires. See proposed Section 2201 and corresponding commentary. Thus arson would be a forcible offense, while a crime like theft (Section 2102), which is only concerned with harm to a person’s property, would not.

Note, however, that proposed Section 7101 creates a separate felony offense any time a person uses, displays, or threatens to use a firearm during the commission of a felony. See proposed Section 7101 and corresponding commentary. In such cases, the offense in Section 7101 would be a forcible offense. Thus, the use or threatened use of a firearm during the commission of a non-forcible offense such as theft could serve as a predicate felony in the felony-murder context, even though the underlying theft would not. See proposed Section 1102 and corresponding commentary.

case law. See People v. Golson, 207 N.E.2d 68, 73 (Ill. 1965) (allowing conspiracy to steal from mails to serve as forcible felony; relevant inquiry is “whether, under the facts of a particular case, it is contemplated that violence might be necessary to enable the conspirators to carry out their common purpose”). In using an offense-elements analysis, rather than the current facts-of-the-case approach, the proposed rule promotes clarity regarding the question of whether an offense is forcible or not, and authorizes the courts to resolve that issue as a legal matter rather than leaving it to the determination of the jury in each individual case. Cf. People v. Banks, 678 N.E.2d 348, 353 (Ill. App. 1997) (affirming trial court’s finding that mob action was a forcible felony and rejecting defendant’s requested jury instruction on the definition of forcible felony).

The term “great bodily harm” is defined as “bodily harm that creates a substantial risk of death, or causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.” The term “great bodily harm” is often used, but is not defined, in Chapter 720.¹⁴ The proposed definition significantly expands on the definition adopted by the Illinois courts. See People v. Edwards, 770 N.E.2d 507, 509 (Ill. App. 1999) (holding that great bodily harm requires “an injury of graver and more serious character” than bodily harm). The proposed definition specifically includes death to ensure that proof of death will always satisfy an offense requirement of bodily harm. The definition also specifically includes life-threatening diseases to cover serious illnesses such as AIDS.

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 definitions of “includes” and “including” are identical to those in current 5/2-10.

The term “law enforcement authorities” is meant to cover all the governmental personnel and agencies that engage in law enforcement activities. The term includes prosecutors and peace officers, as well as other government employees who investigate or prevent offenses in more specific contexts, such as workers at the Department of Children and Family Services who investigate child abuse, or members of the Department of Public Health who investigate abuses at nursing homes. Cf. commentary for Section 5204. Chapter 720 uses, but does not define, this term. See, e.g., 720 ILCS 5/33E-7.

The term “mentally handicapped person” is used, but not defined, in current Chapter 720. See, e.g., 720 ILCS 5/12-21.5. The proposed definition parallels the proposed definition for “physically handicapped person,” see infra, and is meant to cover people who suffer disabling mental impairments. The proposed definition requires the mental impairment be “long-term,” but

¹⁴ See, e.g., 720 ILCS 5/2-8 (defining “forcible felony”); 5/7-1 to 5/7-6, 5/7-9, 5/7-11 (justifications for use of force and “compulsion”); 5/9-1(a) (first-degree murder based on intent to cause great bodily harm); 5/10-2(a)(3), (8) (aggravated kidnapping based on causing great bodily harm); 5/12-4 (aggravated battery based on causing great bodily harm).

not permanent. This formulation ensures that people who suffer severe and potentially long-lasting conditions, such as schizophrenia or bipolar disorder, are covered, regardless of whether they may be “cured” at some later point in time, but people suffering from some form of “temporary insanity” are excluded.

The definition of “peace officer” is substantively similar to that in current 5/2-12, but omits the language in the second paragraph thereof regarding federal officers, agents, and employees also qualifying as “peace officers” for the purposes of certain provisions. Nevertheless, such persons may still qualify as “peace officers” under the proposed definition — provided that, by virtue of their offices or employment, they are “vested by law with a duty to maintain public order or to make arrests for offenses.”

The definition of “person” is the same as that in current 5/2-15, except that the word “individual” has been replaced with “human being who has been born alive” to make the definition conform to the legislative declaration in 720 ILCS 510/6(3). Cf., e.g., 720 ILCS 5/9-1, 5/9-1.2 (distinguishing, for homicide purposes, between “individual” and “unborn child”); proposed Sections 1101, 1106 (same, but using “person” instead of “individual”).

The definition of “physically handicapped person” is similar to that in current 5/2-15a, with one substantive change. The proposed definition requires that the disability be long-term rather than permanent. The proposed change covers people who suffer a long-lasting impairment, even though the defect may be “cured” at some point in the future, but excludes a person whose condition, such as a broken leg, is merely temporary. See supra discussion of “mentally handicapped person.”

The definition of “place of worship” is identical to that in current 5/2-15b.

The general definition of “property” as “anything of value” is the same as current 5/15-1. However, the proposed definition is not limited, as the current definition is, to the property offense sections. Moreover, the proposed definition provides a less comprehensive list of items that are included in the definition of property in recognition that all the items specifically listed in current 5/15-1 are already covered by the general definition of property as “anything of value.” The list of items that constitute property is meant to be illustrative and not exhaustive. Cf. proposed Section 108’s definition of “including.”

The term “public servant” replaces the current law terms “public employee” and “public officer.”¹⁵ The proposed definition combines the current terms into one definition in recognition that the two current terms are interrelated and often used together. See, e.g., 720 ILCS 5/3-6. The proposed definition is nearly identical to the current definitions, except that the new definition specifically includes peace officers and persons who perform official functions on behalf of the United States government.

¹⁵ See 720 ILCS 5/2-17 and 5/2-18.

The definitions of “reasonable belief” and “reasonably believes” are substantively similar to those in current 5/2-19, but are generalized to apply to all beliefs, rather than beliefs concerning the existence of “described facts.” Also, the proposed Code explicitly defines “reasonable belief” by reference to negligence to make clear that the term fits within the general culpability scheme set out in Article 200. Without such an explicit reference, the relation between “reasonable belief” and the “standard” defined culpability requirements is unclear. The proposed definition makes clear that a person with a “reasonable belief” is a person who lacks the culpability level of negligence.

The definition of “school” is identical to that in current 5/2-19.5.

The definitions of “State,” “this State” and “other state” are identical to those in current 5/2-21.

The definition of “statute” is identical to that in current 5/2-22.

The following terms that appear in Article 2 and elsewhere in current Chapter 720 are omitted from the proposed Code: “armed with a firearm” (5/2-3.6); “emergency medical technician” (5/2-6.5); “felony” (5/2-7); “laser” or “laser device” (5/2-10.2); “laser gunsight” (5/2-10.3); “laser pointer” (5/24.6-5); “laser sight” (5/24.6-5); “misdemeanor” (5/2-11); “offense” (5/2-12 and 5/8-6); “personally discharged a firearm” (5/2-15.5); and “solicit” (5/2-20).

ARTICLE 200. BASIC REQUIREMENTS OF OFFENSE LIABILITY

Section 201. Basis of Liability

Corresponding Current Provision(s): None

Comment:

Generally. This provision establishes the bases of liability for an offense under the proposed Code. Section 201 makes clear the relevance and function of the other Articles 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 its elements, except where a provision in Article 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 Article 800,¹⁶ in the Code’s Special Part,¹⁷ or outside the Code.¹⁸ Section 201(2) provides that the defenses set forth in Articles 250, 400, 500, and 600 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 Illinois law. The principles expressed in Section 201 reflect the current understanding of the basis of criminal liability. No current Chapter 720 provision contains an explicit statement of the material in Section 201.

Section 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

¹⁶ See proposed Section 805 (providing defense to solicitation and conspiracy for victims and conduct inevitably incident to offense’s commission); proposed Section 806 (providing renunciation defense for inchoate offenses).

¹⁷ See, e.g., proposed Section 2104(2) (providing defense to theft by extortion); proposed Section 2110 (providing claim-of-right defense for theft offenses); proposed Section 2303(4) (providing defense to criminal trespass); proposed Section 3108(3) (providing defense to fraudulent use of credit or debit card).

¹⁸ Cf., e.g., 625 ILCS 5/4-103(a)(5), 5/4-103.2(a)(4) (providing affirmative defenses to offenses related to receiving stolen motor vehicles); 625 ILCS 5/5-401.3(c) (providing affirmative defense to regulatory offense applying to scrap processors); 810 ILCS 5/9-315.02(5) (providing affirmative defense to offense of unlawful disposal of collateral by debtor).

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 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) defines the terms “conduct element,” “result element,” “circumstance element,” and “objective elements.” Section 202(2)(a) defines a “conduct element” as any element of an offense that requires an offender’s “act” (as defined in Section 204(4)) or “failure to perform a legal duty.” For example, the offense of arson requires that a person “damage[]” property; any physical act or failure to perform a legal duty leading to such damage will satisfy the conduct element. See proposed Section 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(2)(b) 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 2201.

Section 202(2)(c) 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, the offense of arson requires damage “by means of fire or explosive” to “a building or habitable structure of another.” See proposed Section 2201.

Section 202(2)(d) 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 Illinois law. Current Illinois law discusses conduct, circumstance, and result elements. See 720 ILCS 5/1-5; 5/4-4 to 5/4-7. Of these terms, however, current law defines only “conduct.” Section 202(2)(a)’s definition of “conduct element” is substantively similar to current 5/2-4’s definition of “conduct,” but omits that definition’s improper reference to mental state. See 720 ILCS 5/2-4 (conduct is “an act or series of acts, and the accompanying mental state”). Culpability terms define relevant mental states that must accompany a person’s conduct; it is misleading and inaccurate to include mental state within the definition of conduct itself.

Section 203. Causal Relationship Between Conduct and Result**Corresponding Current Provision(s):** None**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.

Relation to current Illinois law. Current Chapter 720 includes no provision dealing with a causation requirement. Section 203 is in keeping, however, with decisions of the Illinois courts recognizing that causation is an implied requirement of offenses, such as homicide, that require a certain result.¹⁹ See, e.g., People v. Lara, 683 N.E.2d 480, 483 (Ill. App. 1997) (“The evidence must show ‘that the defendant’s act was, beyond a reasonable doubt, a contributing cause to a death such that the death did not result from a source unconnected with the defendant’s act.’”) (quoting People v. Brown, 373 N.E.2d 459, 461 (Ill. App. 1978)); People v. Kent, 444 N.E.2d 570, 574 (Ill. App. 1982) (“In every murder prosecution, proof of death and proof of criminal agency are elements the state must prove beyond a reasonable doubt.”).

Section 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 prohibited result must not be so far removed from the defendant’s conduct that imposing liability would be unjust. These requirements are in keeping with the holdings of Illinois courts, which require both but-for causation and proximate causation for criminal liability to be imposed. See, e.g., People v. Hall, 652 N.E.2d 1266, 1269 (Ill. App. 1996) (requiring defendant’s act to be the actual or “but for” cause and the legal or “proximate” cause of victim’s injury); cf. IPI (CRIMINAL) 23.28A (4th ed. 2000) (defining proximate cause as “any cause which, in the natural or probable sequence, produced the [harm]”).

Section 203(1)(b) also explicitly points out that a defendant’s act will not satisfy the proximate cause requirement where the result in question was

¹⁹ As under current Illinois law, the State must prove causation beyond a reasonable doubt whenever an offense contains a result element. See proposed Section 107(2)(a) (State bears burden of persuasion to prove offense elements beyond reasonable doubt); cf. proposed Section 202(1)(a) (defining “elements” to include conduct and “such result of conduct” contained in offense definition or grading provisions).

Also as under current law, causation is generally an issue for the trier of fact. See People v. Brackett, 510 N.E.2d 877, 881 (Ill. 1987); People v. McCarty, 769 N.E.2d 985, 995 (Ill. App. 2002). Section 203’s language is intended to provide guidance to the courts, but causation is ultimately a factual or mixed determination for the jury, rather than a legal issue for the court.

“too dependent upon another’s volitional act.” Such independent “intervening acts” are typically held to frustrate the proximate-cause requirement.²⁰ See People v. Brackett, 510 N.E.2d 877, 880 (Ill. 1987) (“The courts in Illinois have repeatedly held that an intervening cause completely unrelated to the acts of the defendant does relieve a defendant of criminal liability.”); People v. Dordies, 377 N.E.2d 245, 249 (Ill. App. 1978) (holding non-IPI instruction erroneous because it “may have mistakenly led the jury to believe that ... defendant was guilty of murder, even if unconnected, intervening factors caused the death”).

Section 203(1)(c) requires satisfaction of any additional causation requirements imposed elsewhere (including the offense definition itself). Section 203(1)(c) makes it 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 contributes to a 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. Section 203(2) is consistent with Illinois courts’ holdings that a person’s conduct need only be a contributing cause of a prohibited result. See, e.g., People v. Brackett, 510 N.E.2d 877, 880 (Ill. 1987) (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); see also IPI (CRIMINAL) 7.15 (4th ed. 2000) (for homicide, “it is not necessary that . . . the acts of the defendant were the sole and immediate cause of death”). Section 203(2) clarifies, however, that an offense’s causation requirement is satisfied only if the defendant’s conduct “alone would have been sufficient to cause the result.” Cf. IPI (CRIMINAL) 23.28A (4th ed. 2000) (stating that, for offense of aggravated driving under the influence, defendant’s contribution to result “is sufficient if it concurs with some other cause acting at the same time, which in combination with it, causes the [harm].”).

²⁰ Some authority, however, suggests that Section 203(1)(b) may vary in some respects from the current law of causation as developed by the Illinois courts. Cf. People v. McCarty, 769 N.E.2d 985, 997 (Ill. App. 2002) (stating that, in felony-murder prosecution, fact that third party caused death “is irrelevant”); People v. Gulliford, 407 N.E.2d 1094, 1098 (Ill. App. 1980) (“It is generally held that a defendant who inflicts a dangerous wound upon his victim . . . is responsible for the victim’s death despite unskillful or even improper medical treatment which aggravates the wound or contributes to cause the death because the unskillful medical treatment is reasonably foreseeable.”). Section 203 supersedes the current common law concerning causation to the extent that it is inconsistent with the proposed provision as to this issue. At the same time, as noted above, whether a result was “too dependent on another’s volitional act” would generally be a factual question, and the factfinder would be free to resolve that question in either direction except in extreme cases.

Section 204. Requirement of an Act; Omission Liability;
Possession Liability

Corresponding Current Provision(s): 720 ILCS 5/2-2; 5/4-1; 5/4-2

Comment:

Generally. Section 204 sets the minimum conduct requirements for criminal liability. Section 204(1) prohibits liability absent an overt act or the failure to perform a legal duty.²¹ 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 “act.”

Relation to current Illinois law. Section 204(1) is substantively similar to current 5/4-1. Section 502 covers current 5/4-1’s requirement that the act must be voluntary. See proposed Section 502 and corresponding commentary.

Section 204(2) is substantively similar to current 5/2-2 and 5/4-1, but clarifies the relationship between omission liability and the elements of an offense. Current 5/2-2 and 5/4-1, respectively, define “act” to include a failure to act and provide that an omission to perform a legal duty may satisfy the act requirement. 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.

Section 204(3) is substantively the same as current 5/4-2, but divides certain clauses into subparts to enhance clarity. Cf. IPI (CRIMINAL) 4.15 (4th ed. 2000).

Section 204(4) corresponds to current 5/2-2, but provides an affirmative definition for “act,” whereas 5/2-2 states only that a “failure or omission to take action” also counts as an act. That definition fails to say what an act is,

²¹ 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). The Illinois courts have similarly allowed omission liability to be premised on the failure to perform civil duties. See *People v. Stanciel*, 606 N.E.2d 1201, 1211 (Ill. 1992) (citing civil case as basis for parent’s duty to care for child); *People v. Haycraft*, 278 N.E.2d 877, 882 (Ill. App. 1972) (affirming theft conviction based on omission to perform regulatory duty now appearing at 35 ILCS 200/20-55). 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 only be imposed if the defendant also satisfies the offense’s remaining elements — including its culpability requirements.

and also explicitly includes things that fall outside any intuitive definition of “act.” Additionally, defining “act” to include omissions effectively eviscerates the general requirement of an affirmative act. As Section 204(1) specifies, omission liability is appropriate only in certain specific situations — namely, where one is bound by a legal duty to act.

Section 205. Culpability Requirements

Corresponding Current Provision(s): 720 ILCS 5/4-3, 5/4-9

Comment:

Generally. Section 205 establishes rules governing the application of culpability requirements to objective elements. Section 205(1) specifies that some level of culpability is normally required as to each objective element of an offense. (Note that this 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. 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 is satisfied by proof of a more serious culpability level.

Relation to current Illinois law. Section 205(1) is substantively similar to current 5/4-3(a), with two differences. First, Section 205(1) 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.”

Second, Section 205(1) explicitly requires culpability as to “every objective element” of an offense (except where Section 205(4) would allow absolute liability), whereas current 5/4-3(a)’s rule is limited to elements contained in the “statute defining the offense.” The Illinois courts have construed 5/4-3(a)’s language (which also appears in current 5/4-3(b)) very narrowly, and hold that the ordinary rules governing culpability requirements do not apply to provisions that impose “enhancing factors” that aggravate

punishment for certain offenses.²² The proposed Code rejects such a narrow application. 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.²³ 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. Under current 5/4-3(b)’s first sentence, a stated culpability requirement applies to every element in an offense if it is “prescribed . . . with respect to the offense as a whole.” This language is confusing, as it is difficult to determine when a requirement is meant to apply to the entire offense as opposed to a specific objective element. 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), like current 5/4-3(b)’s second sentence, 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. Specifically, recklessness is set as the default level because it is the minimum level of culpability normally considered appropriate for criminal liability. This default rule tracks current 5/4-3(b), which similarly states that if an offense does not prescribe a particular mental state, “any mental state defined in Sections 4-4, 4-5 or 4-6 [i.e., intent, knowledge, and recklessness] is applicable.” This clearly means

²² See People v. Brooks, 648 N.E.2d 626, 629 (Ill. App. 1995) (“Section 4-3(a) speaks of scienter being necessary for each element ‘described by the statute defining the offense.’ . . . For the same reason, the provision of section 4-3(b) of the Criminal Code, which speaks of the mental state set forth in the ‘statute defining an offense’ as prevailing as to ‘each such element,’ refers to elements of the offense described in the defining statute. Thus, these provisions have no relevance to the elements of the enhancing statute.”); see also People v. Daniels, 718 N.E.2d 1064, 1070-72 (Ill. App. 1999); People v. Pacheco, 666 N.E.2d 370, 375-76 (Ill. App. 1996).

²³ Section 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 1201(2)(d) (authorizing grade adjustment for assault based on victim’s status); proposed Section 1202(2)(a)(i) (aggravating offense grade where “great bodily harm is caused”); proposed Section 1301(4)(a) (grading sexual assault as Class X felony where “victim is less than 9 years old” or other factors are satisfied).

that a person may be found liable based on a showing of *any* of those three mental states.

However, the Illinois Supreme Court has interpreted 5/4-3 as requiring the court to *choose* which *one* of the three mental states should apply to a given offense — or has imposed a different culpability requirement altogether.²⁴ This judicial gloss distorts the statutory meaning and inappropriately restricts the culpability requirements for various offenses. The current Code’s failure to point out that lesser culpability requirements include stricter ones may have contributed to this fundamental misreading of a central Code provision. That failure tacitly reinforces the misunderstanding that the culpability requirements are meant to be mutually exclusive, so that each objective element must have one, and only one, corresponding culpability requirement. See infra commentary for proposed Section 205(6).

Moreover, as a general matter, Illinois courts have sometimes failed to follow 5/4-3(a)’s rule that a person must have culpability “with respect to each element” of an offense — a rule which is reinforced by 5/4-9’s prohibition of absolute liability unless an offense “clearly indicates a legislative purpose to impose” such liability. This failure has taken three forms. First, courts have failed to apply 5/4-3(b)’s rule that a culpability requirement prescribed for an offense as a whole “applies to each . . . element” of the offense.²⁵ Second,

²⁴ See, e.g., People v. Gean, 573 N.E.2d 818, 822 (Ill. 1991) (“[W]hen a statute neither prescribes a particular mental state nor creates an absolute liability offense, then either intent, knowledge or recklessness applies. In the case at bar, we believe knowledge is the appropriate mental element.”); People v. Terrell, 547 N.E.2d 145, 158 (Ill. 1989) (“[T]he legislature clearly did not intend the aggravated criminal sexual assault statute to define a strict liability or public welfare offense. Accordingly, a mental state of either intent or knowledge implicitly is required[.]”); People v. Sevilla, 547 N.E.2d 117, 122 (Ill. 1989) (“Where a statute neither prescribes a particular mental state nor creates an absolute liability offense, then either intent, knowledge or recklessness applies. . . . [K]nowledge is the mental state element implied under the [Retailers’ Occupation Tax] Act.”); People v. Whitlow, 433 N.E.2d 629, 633, 634 (Ill. 1982) (stating that “it is necessary to determine which of the[] mental states [referenced in 5/4-3(b)] should apply to securities law violations,” and requiring “scienter . . . [which] embraces intentional or knowing misconduct”); People v. Banks, 388 N.E.2d 1244 (Ill. 1979) (finding robbery to be a “general intent” crime).

²⁵ See People v. Jones, 495 N.E.2d 1371, 1372-73 (Ill. App. 1986) (requiring no culpability as to fact that another person owned property in prosecution under 5/21-1(a) for “knowingly damaging . . . property of another”); People v. Ivy, 479 N.E.2d 399, 403-04 (Ill. App. 1985) (requiring no culpability as to fact of firearm’s type in prosecution under 5/24-1(a)(7)(ii) and (b) for “knowingly . . . possess[ing] . . . a shotgun having one or more barrels less than 18 inches in length”); People v. Rickman, 391 N.E.2d 1114, 1117-18 (Ill. App. 1979) (requiring no culpability as to extent of resulting harm in prosecution under 5/12-4(a) for “intentionally or knowingly caus[ing] great bodily harm”).

In some instances, interpretive problems have been caused by offense drafting that ignores current 5/4-3(b)’s rule of construction. See, e.g., People v. White, 608 N.E.2d 1220, 1229 (Ill. App. 1993) (requiring no culpability as to victim’s age in prosecution under 5/12-4(b)(10) for “knowingly . . . caus[ing] bodily harm to an individual of 60 years of age or older”) (citing People v. Jordan, 430 N.E.2d 389 (Ill. App. 1981) (finding that General Assembly indicated requirement of knowledge as to victim’s status in other provisions in 5/12-4(b) by using the phrase “knows the individual harmed to be”)).

where no culpability requirement is specified for an entire offense, courts have failed to “read in” the culpability requirement of recklessness that 5/4-3(b) requires. This failure has most commonly related to two facts: the fact of a victim’s age in prosecutions under 5/12-14(b)(1) (now 5/12-14.1(a)(1)) for aggravated criminal sexual assault;²⁶ and the fact of the proximity of certain types of property in prosecutions under 570/407(b) for delivery of a controlled substance.²⁷ Third, where the courts acknowledge that the “read-in” culpability requirement of 5/4-3(b) applies, they nonetheless hold that the jury need not be instructed about the culpability requirement.²⁸

Section 205(4) is substantively similar to current 5/4-9, with a few minor modifications. First, Section 205(4) makes clear that it applies only to those objective elements for which a culpability requirement is not stated, rather than to entire offenses. Otherwise, any offense satisfying the criteria for absolute liability might be read to impose absolute liability as to *all* elements, even those for which a culpability requirement is stated. Second, Section 205(4) uses the term “culpability” in place of the phrase “one of the mental states described in Sections 4-4 through 4-7.” Third, as makes logical sense, Section 205(4)(a) extends current 5/4-9’s rule covering misdemeanors to petty and business offenses. (Note that Section 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. See, e.g., proposed Section

²⁶ See People v. Barfield, 543 N.E.2d 157, 161 (Ill. App. 1989); cf. People v. Griffin, 616 N.E.2d 1242, 1251 (Ill. App. 1993) (prosecution based on complicity theory; noting that strict liability is *mens rea* for aggravated criminal sexual assault against victim under 13 years old).

²⁷ See People v. Daniels, 718 N.E.2d 1064, 1070-72 (Ill. App. 1999) (church); People v. Pacheco, 666 N.E.2d 370, 375-76 (Ill. App. 1996) (school); People v. Brooks, 648 N.E.2d 626 (Ill. App. 1995) (public housing property). As noted above, the courts’ holdings in these cases are based, in part, on a narrow interpretation of current 5/4-3’s use of the phrase “statute defining the offense.” See supra commentary for proposed Section 205(1).

²⁸ See People v. Simms, 736 N.E.2d 1092, 1113-15 (Ill. 2000) (aggravated criminal sexual assault and armed robbery); People v. Adams, 638 N.E.2d 254, 258 (Ill. App. 1994) (armed violence); People v. Garland, 627 N.E.2d 377, 380-82 (Ill. App. 1993) (armed robbery); People v. Franzen, 622 N.E.2d 877, 891-92 (Ill. App. 1993) (aggravated criminal sexual assault); People v. DeBusk, 595 N.E.2d 1156, 1163-64 (Ill. App. 1992) (robbery); People v. Coleman, 560 N.E.2d 991, 1001-02 (Ill. App. 1990) (armed robbery); People v. Burton, 558 N.E.2d 1369, 1371-74 (Ill. App. 1990) (aggravated criminal sexual assault); People v. Podhrasky, 554 N.E.2d 578, 581-82 (Ill. App. 1990) (aggravated assault); People v. Avant, 532 N.E.2d 1141, 1145-47 (Ill. App. 1989) (robbery); People v. Talley, 531 N.E.2d 1139 (Ill. App. 1988) (armed robbery); People v. Ortiz, 508 N.E.2d 490, 494 (Ill. App. 1987) (any offense involving sexual penetration); People v. Anderson, 417 N.E.2d 663, 668-69 (Ill. App. 1981) (armed robbery, rape, deviate sexual assault).

Illinois law generally holds, however, that “certain instructions, such as the burden of proof and *elements of the offense*, are essential to a fair trial and that the failure to give such instructions constitutes grave error when, viewing the record as a whole, it appears that the jury was not apprised of the People’s burden of proof.” People v. Reddick, 526 N.E.2d 141, 147 (Ill. 1988) (emphasis added).

1102(1)(b) (imposing felony-murder liability where one “in fact causes the death of another person” while committing forcible felony).)

Section 205(5) is substantively similar to current 5/4-3(c). The word “knowledge” in 5/4-3(c) has been generalized to “culpability.”

Section 205(6), which specifies that proof of a more culpable mental state will satisfy an offense’s requirement of a less serious one, has no corresponding provision in Chapter 720. The absence of such a provision has led Illinois courts to maintain a rigid distinction between culpable mental states, so that satisfaction of a higher level of culpability may preclude liability for an offense requiring a lower level of culpability. For example, the Illinois Supreme Court has found that “recklessness and knowledge are mutually inconsistent culpable mental states.” People v. Fornear, 680 N.E.2d 1383, 1387 (Ill. 1997) (reversing, as legally inconsistent, convictions for multiple offenses where one required knowledge and another required recklessness) (relying on People v. Spears, 493 N.E.2d 1030 (Ill. 1986)). 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),²⁹ or both.

Section 206. Culpability Requirements Defined

Corresponding Current Provision(s): 720 ILCS 5/4-4 to 5/4-7

Comment:

Generally. Section 206 defines four culpability requirements — intent, knowledge, recklessness, and negligence — as they relate to each type of offense element: conduct, circumstance, and result. The proposed Code uses these four culpability levels, which are the norm for modern criminal

²⁹ Perhaps because the Illinois Criminal Code currently lacks a provision similar to Section 205(6), numerous offenses in current Chapter 720 provide alternative culpability requirements for the same objective element or group of objective elements. See, e.g., 720 ILCS 5/9-2.1(b) (“intentionally or knowingly”); 5/11-9.1(a) (“with intent or knowledge”); 5/12-3(a) (“intentionally or knowingly”); 5/12-3.1(a) (“intentionally or knowingly”); 5/12-3.2(a) (“intentionally or knowingly”); 5/12-3.3(a) (“intentionally or knowingly”); 5/12-4(a) (“intentionally or knowingly”); 5/12-4.3(a) (“intentionally or knowingly”); 5/12-4.4(a) (“intentionally or knowingly”); 5/12-4.6(a) (“intentionally or knowingly”); 5/14-2(a)(2) (“knowing or having reason to know”); 5/16-1(a)(4) (“knowing . . . or under such circumstances as would reasonably induce him to believe”); 5/16-7(a)(1)-(4) (“Intentionally, knowingly or recklessly”); 5/16-8(a) (“intentionally, knowingly, recklessly or negligently”); 5/16D-3(a)(4) (“knowing or having reason to believe”); 5/16F-4(a)(2)(i) (“knowing or having reason to believe”); 5/24-3.2(a),(b) (“knowingly or recklessly”); 5/24-6-20(a) (“intentionally or knowingly”); 5/33-3 (“intentionally or recklessly”). Section 205(6) eliminates any need to mention more than a single culpability level as to a particular objective element.

codes, exclusively. Numerous current Illinois provisions, in contrast, employ other culpability requirements — such as “specific intent,”³⁰ “having reason to know,”³¹ “reasonably should know,”³² “wil[ly]fully,”³³ “maliciously,”³⁴ “fraudulently,”³⁵ “designedly,”³⁶ or a combination of the foregoing and others.³⁷ The proposed Code rejects the use of such outmoded, and undefined,³⁸ culpability terms in defining offenses.

Relation to current Illinois law. Section 206 is generally similar to current 5/4-4 through 5/4-7. *Cf.* IPI (CRIMINAL) 5.01 to 5.02 (4th ed. 2000). However, for each of the defined culpability levels, Section 206 breaks the definition down into subsections for each of the three element types: conduct, circumstance, and result. (The current definitions are structurally inconsistent, and incomplete, in this respect: whereas current 5/4-5 defines “knowledge” with respect to conduct, results, and the “attendant circumstances of . . . conduct,” current 5/4-4 fails to define “intent” as to circumstance elements, and 5/4-6 and 5/4-7 fail to define “recklessness” and “negligence,”

³⁰ See 720 ILCS 5/6-3(a).

³¹ See 720 ILCS 5/14-2(a)(2),(3); 5/12-11; 690/2; *see also* 20 ILCS 1805/94a(b)(1); 625 ILCS 5/18c-7502(a)(iii).

³² See 720 ILCS 5/11-20.1; 5/12-21; 5/20-1.1; 5/24-1.2; 5/24.6-20; 5/29B-1; 510/11.

³³ See 720 ILCS 5/12-4.8; 5/12-9(a); 5/12-21.6; 5/16-1.2; 5/16-3(b); 5/16B-2(d); 5/17-15; 5/17-22; 5/17B-10(b); 5/21-2-2; 5/32-10; 5/33C-2; 5/33C-3; 5/33E-16; 130/2; 130/2a; 150/4.1; 660/2; *see also, e.g.*, 15 ILCS 520/23; 30 ILCS 230/2b; 35 ILCS 5/1301; 35 ILCS 130/22, /23; 55 ILCS 5/3-11019; 205 ILCS 5/49; 205 ILCS 620/8-1; 205 ILCS 635/4-4; 205 ILCS 690/36; 215 ILCS 5/1023; 410 ILCS 535/27; 625 ILCS 5/4-103.2(a)(7).

³⁴ See 720 ILCS 5/16B-2.1; *see also, e.g.*, 20 ILCS 2305/2.

³⁵ See 720 ILCS 5/16G-15(a); 5/17-13; 5/17-16; 5/33C-1; 5/33C-4; *see also, e.g.*, 20 ILCS 4020/22; 35 ILCS 130/22; 35 ILCS 200/21-306(a)(2); 310 ILCS 10/25.04; 320 ILCS 25/9.

³⁶ See 720 ILCS 5/17-17.

³⁷ See 720 ILCS 5/17-1(A)(iii) (“wilfully, and with . . . specific intent”); 5/17-18 (“wilfully and designedly”); 5/21-1.1 (“wilfully and maliciously”); 5/32-11 (“wickedly and willfully”); 125/2 (“[w]ilfully obstructs or interferes with . . . specific intent”); 300/1 (“willfully and maliciously”); 360/1 (“wilfully and maliciously”); 540/1 (“wilfully, corruptly and falsely”); *see also, e.g.*, 55 ILCS 5/3-14043 (“wilfully, corruptly and falsely”); 105 ILCS 10/9 (“wilfully and maliciously”); 210 ILCS 85/65.17 (“wilfully or wantonly”); 605 ILCS 10/28 (“wilfully, maliciously and forcibly”); 610 ILCS 95/1 (“willfully and maliciously”); 625 ILCS 5/11-503 (“willful or wanton disregard”).

³⁸ Currently, there are no pattern jury instructions defining culpability levels other than intent, knowledge, recklessness, and negligence. *See* IPI (CRIMINAL) 5.01 *et seq.* (4th ed. 2000). The pattern jury instructions, like current 5/4-5 and 5/4-6, contain language equating “knowingly” with “willfully,” and “recklessly” with “wantonly.” *See* IPI (CRIMINAL) 5.01, 5.01B (4th ed. 2000). Current 5/4-5 and 5/4-6 provide, however, that such equivalence does not exist where a statute “clearly requires a different meaning.” *See* 720 ILCS 5/4-5; 5/4-6. It is unclear, therefore, whether “willfully” should be considered synonymous with “knowingly” for the numerous current offenses specifying both culpability levels with respect to a single element or set of elements. *Cf., e.g.*, 720 ILCS 5/12-4.8 (“knowingly and willfully”); 5/12-9(a) (“knowingly and willfully”); 5/17B-10(b) (“willfully facilitates, aids, abets, assists, or knowingly participates in a known violation”); 130/2 (“knowingly or willfully”); 130/2a (“knowingly or wilfully”).

respectively, with respect to conduct elements.) Section 206's formulation provides a consistent and precise structure for defining the culpability requirements for each offense. 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. The modifier "consciously" has generally been removed from the term "aware" as redundant.

Other than the differences explained above, Section 206(1)'s definition of "intent" is similar to current 5/4-4. However, Section 206(1)(d) adds language to clarify that conditional intent satisfies the requirement of intention required by an offense, "unless the condition eliminates the harm or wrong 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 therein) will satisfy a culpability requirement of intent.

Section 206(2) is substantively similar to current 5/4-5, but makes three modifications to the definition of knowledge. First, Section 206(2) eliminates the current language equating "knowingly" with "wilfully" in order to keep the culpability terms limited and consistent. Second, Section 206(2)(b)'s definition of knowledge with respect to circumstances replaces "is consciously aware" with "believes." Although an offense definition may require the actual existence of a circumstance for liability for the completed offense, the proposed provision's language allows for inchoate liability where one's subjective belief is not objectively true. Third, Section 206(2)(b) requires belief of a "high," rather than a "substantial," probability that a circumstance exists to more clearly distinguish knowledge from the less culpable mental state of recklessness.

Section 206(3) is substantively similar to current 5/4-6, but eliminates the language equating "recklessly" with "wantonly" in order to keep the culpability terms limited and consistent.

Section 206(4) is substantively similar to current 5/4-7's definition of "negligence," but requires that the departure from the standard of care must be "gross" rather than "substantial." This modification distinguishes criminal negligence from mere tort negligence and ensures that an actor's failure to be aware of something is sufficiently blameworthy to warrant the criminal law's condemnation.

Section 207. Ignorance or Mistake Negating Required Culpability

Corresponding Current Provision(s): 720 ILCS 5/4-8(a)

Comment:

Generally. Section 207 makes it explicit that an offense definition's requirements are not satisfied if a person's ignorance or mistake as to a fact or law negates a required culpability level.

Relation to current Illinois law. Section 207(1) is substantively similar to current 5/4-8(a), with three minor modifications. First, Section 207(1) provides that “a required culpable mental state is not satisfied” if it is negated by ignorance or a mistake, whereas current 5/4-8(a) states that ignorance or mistake provides a “defense” in such a situation. Section 207(1) avoids the current “defense” formulation to make clear that the provision does not remove or reduce the prosecution’s burdens of production and persuasion as to all elements of the offense, including culpability requirements. See proposed Section 107 and corresponding commentary.

Second, 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.

Third, Section 207(1) omits as unnecessary current 5/4-8(a)’s reference to 5/4-3(c)’s rule that knowledge as to criminality is not required unless the relevant statute clearly so provides. This omission does not limit or otherwise affect the operation of Section 205(5)’s similar rule regarding culpability as to criminality.

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, negligent, or reasonable.³⁹ 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 or holding a mistaken belief should not preclude liability where the offense definition itself requires only recklessness as to the subject of the belief. Accordingly, Section 207(2) states that a reckless mistake may negate only intention or knowledge; a negligent mistake negates intention, knowledge, and recklessness; and a reasonable mistake negates any of the four culpability levels.

Section 207(3) defines the terms “reckless 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 Section 206(3) and (4).

³⁹ Under Section 207, a mistake can be, at most, reckless. One cannot make an intentional or knowing mistake.

Section 208. Mental Disease or Defect Negating Required Culpability

Corresponding Current Provision(s): None

Comment:

Generally. Section 208 recognizes that a mental disease or defect, like ignorance or mistake, may negate an offense’s culpability requirement. Section 208 makes clear that evidence of mental disease or defect may be relevant in contexts other than those covered by the proposed Code’s excuse defense for insanity and nonexculpatory defense for incompetent persons. See proposed Sections 504 and 604 and corresponding commentary. For example, the insanity defense provides a freestanding excuse when a person satisfies all culpability requirements of the offense itself, but merits exoneration because he could not control his conduct or understand the criminal nature of his act. Section 208, on the other hand, would apply in cases where the person’s mental incapacity prevented him from satisfying the offense’s elements in the first place, as where an offense requires knowledge and the person’s mental incapacity prevented him from “knowing” something another person might know. For example, where, due to a mental disease or defect, a defendant enters another’s home believing it to be his own, he would not satisfy all the elements of trespass, in that he would lack the requisite knowledge that he entered a place where he had no license or authority to be. See proposed Section 2303. In such a case, the admissibility of evidence related to the defendant’s mental disease or defect should not rest on his ability to present sufficient evidence to properly raise an insanity excuse under Section 504.

Relation to current Illinois law. Although Section 208 has no corresponding provision in current Chapter 720, Illinois courts have implicitly recognized that mental disease or defect may negate the culpability requirement for an offense element. See, e.g., People v. Leppert, 434 N.E.2d 21, 23 (Ill. App. 1982) (considering defendant’s claim that, due to mental defect, he lacked the requisite intent to attempt murder).

Section 209. Definitions

Corresponding Current Provision(s): 720 ILCS 5/2-2; 5/4-4; 5/4-5; 5/4-6; 5/4-7; 5/6-2(b)

Generally. This provision collects defined terms used in Article 200 and provides cross-references to the provisions in which they are defined.

Relation to current Illinois law. For discussion of the relationship between Article 200’s defined terms and current law, refer to the commentary for the provision in which each term is initially defined.

ARTICLE 250. DEFENSES RELATED TO THE OFFENSE HARM OR WRONG

Section 251. Consent

Corresponding Current Provision(s): Various; see, e.g., 720 ILCS 5/9-1.2(c); 5/10-1(b); 5/11-23(a); 5/12-13(a)(2); 5/12-15(a)(2); 5/12-16.2(d); 5/12-17(a); 5/12-32(a); 5/14-2(a)(1), 5/16-3(a), 5/20-1(a); 5/21-1(1); 5/21-1.2(a); 5/21-1.3(a); 5/21-4(1).

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 Illinois law. Section 251 has no directly corresponding provision in current Chapter 720, which instead defines consent as a defense, or its absence as an offense element, for several specific offenses.⁴⁰ Current Illinois 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 Code⁴¹ explicitly include the absence of a person's "consent"

⁴⁰ See, e.g., 720 ILCS 5/9-1.2(c); 5/10-1(b); 5/11-23(a); 5/12-13(a)(2); 5/12-15(a)(2); 5/12-16.2(d); 5/12-17(a); 5/12-32(a); 5/14-2(a)(1), 5/16-3(a), 5/20-1(a); 5/21-1(1); 5/21-1.2(a); 5/21-1.3(a); 5/21-4(1).

⁴¹ See, e.g., proposed Sections 1301(1)(c)(ii) and 1302(1)(c)(ii) (requiring knowledge as to victim's inability to consent); proposed Section 2111(1)(a)-(c) (requiring conduct be performed "without consent of the owner"); proposed Section 2402(1) (requiring knowledge as to absence of victim's consent); proposed Section 4104(1) (requiring conduct be performed "without the consent" of parent or guardian).

as an offense element.⁴² Less obviously, Section 251(1) would also apply to offenses requiring that the defendant accomplish something by “force or threat of force,”⁴³ against another’s “will,” or without “authority.”⁴⁴

Section 251(1) also provides a defense for situations where consent does not negative an explicit offense element, but nevertheless “precludes the infliction of the harm or wrong sought to be prohibited” by an offense. For example, proposed Article 2200 includes several offenses that criminalize damaging or endangering the property of “another.” See, e.g., proposed Sections 2201(1)(a), 2202(1)(b), 2203, 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 in recognition that, in limited circumstances, consent to such harm should preclude criminal liability even though it does not negative either an offense element or the harm the offense seeks to punish. Section 251(2)’s rules operate independently of Section 251(1)’s general rules regarding consent — that is, a consent defense exists if either Section 251(1) or Section 251(2) is satisfied; both are not required.

Section 251(2)(a) provides that consent to bodily harm is a defense where the bodily harm is not “serious.” Current Illinois law also typically denies a consent defense for offenses involving severe harm, although it provides that consent may preclude liability for such serious conduct as mutilating another or exposing another to HIV. See 720 ILCS 5/12-16.2(d) (consent

⁴² Under current law, there is disagreement between the Illinois courts and the pattern jury instructions as to whether “without consent” is an offense element or an affirmative defense for property-damage offenses. Compare, e.g., *People v. May*, 262 N.E.2d 908, 910 (Ill. 1970) (consent is affirmative defense for which defendant bears burden of production), with IPI (CRIMINAL) 16.01 (absence of consent is offense element for which State bears burden of production). The proposed Code treats an offense definition’s requirement of the absence of consent as a circumstance element for which the prosecution bears the burdens of production and persuasion. See proposed Section 107(2) and (3) (State bears burden of proof as to offense “elements”); proposed Section 202(1) (defining “elements” to include requirements “contained in the offense definition or the provisions establishing the offense grade or the severity of the punishment”). Because the absence of consent is an element, the proposed Code’s culpability rules apply to that issue. See proposed Section 205 and corresponding commentary.

⁴³ Section 251(1)’s rule is in keeping with current 5/12-17(a)’s first sentence, which provides that a victim’s consent precludes liability for sexual assault and abuse offenses requiring the use or threat of force. Section 251(1) is broader than 5/12-17(a), however, and would allow consent to serve as a defense for other sorts of offenses (such as proposed Section 1501(1)’s robbery offense) that involve “force or threat of force.”

⁴⁴ See, e.g., proposed Section 1301(1)(b) (sexual assault committed where one has sexual intercourse by “force or threat of force”); proposed Section 1401(1) (kidnaping committed where one secretly confines or moves another “against his will”); proposed Section 1501(1) (robbery committed where one takes property “by force or threat of force”); proposed Section 2102(1) (theft by taking committed where one obtains “unauthorized control” of property of another); proposed Section 2302(1) (burglary committed where one enters or remains in place “without license or authority”); proposed Section 3101(1)(a) (forgery committed where one alters another’s writing “without his authority”).

to HIV exposure presents defense to offense of “criminal transmission of HIV”); 5/12-32(a) (absence of victim’s consent element of offense of “ritual mutilation”). Section 251(2)(a), by contrast, uniformly provides that consent does not preclude liability for offenses involving serious bodily harm.⁴⁵

Section 251(2)(b), consistent with current law, recognizes consent as a defense where the bodily harm caused or threatened occurs in a lawful sport or athletic contest. *Cf. People v. Hussey*, 279 N.E.2d 732, 734 (Ill. App. 1972) (“Consent . . . justifies a battery, or rather, excuses it, as in a boxing match, football game, or being jostled on a crowded bus.”); 2 JOHN F. DECKER, ILLINOIS CRIMINAL LAW: A SURVEY OF CRIMES AND DEFENSES § 19.57, at 396 (3d ed. 2000) (“Since societal values accept some forms of infliction of physical attacks, most notably in legitimate athletic contests such as boxing and football, the willingness of the participants will prevail.”).

Section 251(3) recognizes four sets of circumstances under which a victim’s assent will not constitute effective consent. Section 251(3)’s rules are generally consistent with the understanding that consent “implies a willingness, voluntariness, free will, reasoned or intelligent choice, physical or moral power of acting, or an active act of concurrence (as opposed to a passive assent) unclouded by fraud, duress, or mistake.” *People v. Whitten*, 647 N.E.2d 1062, 1067 (Ill. App. 1995). Section 251(3)(a) provides that a person’s agreement will not provide a defense where he is legally incompetent to authorize the conduct constituting the offense. Section 251(3)(a) makes clear, for example, that permission to operate a motor vehicle by one who merely pretends to be the owner will not itself preclude liability for joyriding.⁴⁶ *Cf. proposed Section 2111(1)(a).*

Section 251(3)(b) makes clear that consent will not preclude liability where the victim lacks the mental capacity to consent. Current Chapter 720 sometimes defines offenses to require that the actor know the victim is “unable to give knowing consent.” *See, e.g.,* 720 ILCS 5/12-13(a)(2) (criminal sexual assault); 5/12-15(a)(2) (criminal sexual abuse); *cf.* 5/12-32(a) (ritual mutilation; offense occurs if victim does not consent or is “under such circumstances that the defendant knew or should have known that the

⁴⁵ Section 251(2)(a) is not intended, however, to impair the rights to sexual intimacy that seem to motivate current 5/12-16.2(d)’s consent defense for HIV exposure. Although liability for reckless endangerment might be appropriate where an infected person has consensual, but unprotected, sex with another, Section 1202’s requirement of creating a “substantial” risk of harm would seem to preclude liability for consent cases involving “safe” sex.

⁴⁶ An actor’s mistake as to consent will ordinarily be immaterial where consent operates strictly as an affirmative defense. Where the absence of consent is an offense element as to which culpability is required, however, a mistake as to consent may negative that requirement. For example, although the assent of a person merely pretending to be a car’s owner would not constitute effective consent, a defendant’s reasonable or negligent mistake as to the assent’s effectiveness would negative the joyriding offense’s requirement of recklessness as to the absence of consent. *See proposed Section 207 and corresponding commentary; proposed Section 2111(1)(a) and corresponding commentary.* A mistake as to consent may similarly negative offense elements other than the absence of “consent” *per se*, such as whether the actor had “authority” or was acting “against another’s will.” *See supra* note 44.

victim was unable to render effective consent”). In the absence of a provision similar to Section 251(3)(b), however, such language does not provide guidance concerning what sorts of people might lack the capacity to consent, or the extent to which their judgment must be impaired. Moreover, by using such language in some places but not others, current Illinois law suggests that the risk of ineffective consent is a concern only for certain offenses.

Section 251(3)(c) provides that assent does not constitute effective consent where it is given by one whose imprudent consent the law seeks to protect against. For example, a minor’s consent to sexual intercourse will not preclude liability for “statutory rape,” precisely because that offense aims to prevent such improvident consent. See proposed Section 1301(1)(a) and corresponding commentary.

Finally, Section 251(3)(d) provides that consent is not a defense where it is induced by force, duress, or deception. Section 251(3)(d) is similar to current 5/12-17(a)’s rule that “consent” includes only “freely given agreement,” but is not limited to only sexual assault and abuse offenses.

Section 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” — actually modifications of the meaning of the underlying offense definitions — 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 Illinois law. Section 252 has no corresponding provision in current Chapter 720. Section 252’s defenses are consistent, however, with the well-accepted rule of construction that a statute should not be interpreted to produce an absurd result.⁴⁷

⁴⁷ See, e.g., People v. Murphy, 752 N.E.2d 19, 27 (Ill. 2001) (noting that courts have a “duty to avoid construing a statute to defeat the purpose of the legislation or yield an absurd or unjust result”); People v. Love, 687 N.E.2d 32, 35 (Ill. 1997) (noting that courts have a “duty to interpret statutes so as to avoid absurd consequences”); People v. Haywood, 515 N.E.2d 45, 48 (Ill. 1987) (“It cannot be presumed that the General Assembly, in legislating, intended obscurity, or ‘to override common sense.’”) (quoting United States v. Brown, 333 U.S. 18, 25 (1948)); People v. Beam, 384 N.E.2d 1315, 1316 (Ill. 1979) (“Courts are not bound . . . by a literal reading of a statute if that reading was clearly not intended.”); cf. People v. Bailey, 657 N.E.2d 953, 960 (Ill. 1995) (“While the stalking and aggravated stalking statutes do not contain the phrase ‘without lawful authority,’ we interpret the statutes as proscribing only conduct performed ‘without lawful authority.’”).

Section 252(1) provides that conduct may be exempt from liability if it is within a “customary license.” For example, where a landowner had previously allowed his neighbors to use his yard as a shortcut, even though the yard was posted against trespassing, Section 252(1) would provide a defense to the neighbors if the landowner unexpectedly decided to accuse them of 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 to warrant a criminal conviction. For example, one might technically commit an offense by being less than a minute late in reporting for periodic detention. See proposed Section 5307(1)(b)(ii).

Section 252(3) provides a defense where one did not actually cause the harm or wrong at which the offense is aimed. For example, the current public indecency offense would appear to reach private, consensual sex between spouses. See 720 ILCS 5/11-9 (public indecency involves exposure in “any place where the conduct may reasonably be expected to be viewed by others”). Section 252(3) would allow the court to dismiss a prosecution based on such conduct, because it would not involve the sort of harm the offense aims to prohibit.

Section 252(4) and (5) place important limitations on the defenses to ensure that they are not abused. Section 252(4) 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 252(5) provides that the defendant bears the burden of persuasion and must prove the defenses by a preponderance of the evidence.

Section 253. Prosecution When the Defendant Satisfies the Requirements of More than One Offense

Corresponding Current Provision(s): 720 ILCS 5/3-3

Comment:

Generally. This provision sets out the rules for prosecuting persons whose conduct may violate two or more offenses at the same time.

Relation to current Illinois law. Section 253(1), which provides that a defendant whose conduct satisfies the requirements of multiple offenses may be prosecuted for each such offense, is identical to current 5/3-3(a).⁴⁸

⁴⁸ Section 253(1), like current 5/3-3(a), clearly states that a defendant who commits multiple offenses by the same conduct “may be prosecuted for each . . . offense.” Thus “where conduct violates two criminal statutes possessing different elements or defenses . . . the State is free to prosecute under whichever carries the greater penalty.” *People v. Simmons*, 430 N.E.2d 1032, 1035 (Ill. 1981); see also *People v. Brooks*, 357 N.E.2d 1169, 1172 (Ill. 1976); *People v. Gordon*, 355 N.E.2d 3, 6 (Ill. 1976). (continued...)

Section 253(2) provides that multiple offenses based on the same conduct should, as a general rule, be prosecuted together. Section 253(2) is the same as current 5/3-3(b), except that the phrase “based on the same act” has been moved to enhance clarity.

Section 253(3) allows for separate trials for offenses based on the same conduct. Section 253(3) is nearly identical to current 5/3-3(c), but omits the word “shall” as superfluous and replaces the current phrase “in the interest of justice” with an explicit reference to 725 ILCS 5/114-8, which governs severance of trials, to avoid arguments that this provision grants the court residual authority beyond that provided in the Code of Criminal Procedure.

Section 254. Conviction When the Defendant Satisfies the Requirements of More than One Offense or Grade

Corresponding Current Provision(s): 720 ILCS 5/2-9; 5/8-5

Comment:

Generally. Section 254 defines the circumstances under which the court may enter multiple convictions when a person’s criminal conduct satisfies the requirements of more than one offense. Significantly, this provision 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 provision 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.

⁴⁸ (...continued)

In the context of drug conspiracies, however, Illinois courts have stated that the more specific conspiracy offenses appearing in the Cannabis Control Act and the Controlled Substances Act may “preempt” current 5/8-2’s general conspiracy offense. See People v. Robinson, 614 N.E.2d 531, 532 (Ill. App. 1993) (“[W]here more than two conspirators are involved, the more specific conspiracy provision of the Cannabis Control Act pre-empts prosecution under the general conspiracy statute.”); People v. Caballero, 604 N.E.2d 1028, 1036 (Ill. App. 1992) (“[A] specific statute, such as the calculated criminal drug conspiracy statute at issue here, preempts a prosecution under the general conspiracy statute . . . to the extent that the specific statute is applicable.”); People v. Urban, 553 N.E.2d 740, 742 (Ill. App. 1990) (“[W]here the defendant has been charged with conspiracy to deliver more than 30 grams but no more than 500 grams of . . . cannabis, the Cannabis Control Act preempts section 8-2.”); People v. Taylor, 309 N.E.2d 595, 596 (Ill. App. 1974) (“Did the legislature by the passage of the Cannabis Control Act preempt in toto a possible prosecution for conspiracy to violate that Act? We conclude that it did.”).

The proposed Code does not provide for such “preemption.” Although Section 254 may limit the entry of multiple *convictions* based on the same conduct, Section 253 does not limit multiple *prosecutions* (i.e., multiple counts or charges) based on the same conduct.

Relation to current Illinois law. Current Chapter 720 provides little guidance regarding when multiple convictions are allowed or appropriate. Rather, the current Code merely defines the term “included offense,” see 720 ILCS 5/2-9, and provides that “[n]o person shall be convicted of both the inchoate and the principal offense.” See 720 ILCS 5/8-5. The current Code’s failure to deal comprehensively with this critical issue has left the Illinois courts to fall back on the so-called “one-act, one-crime” rule, which has two components: (1) multiple convictions may not be “carved from the same physical act,” and (2) liability may not be imposed for one offense that is included in another.⁴⁹ See, e.g., People v. McLaurin, 703 N.E.2d 11, 32-34 (Ill. 1998); People v. Rodriguez, 661 N.E.2d 305 (Ill. 1996); People v. King, 363 N.E.2d 838, 844-45 (Ill. 1977).

The first aspect of this rule is problematic. Sometimes a single act merits liability as more than one offense, for it may cause several independent harms at once. For example, an offender who commits murder by setting his victim on fire also, by the same act, creates the risk of property damage and further jeopardy to life that the arson offense seeks to punish. In People v. McLaurin, however, the Illinois Supreme Court vacated the defendant’s arson conviction under those facts because it ran afoul of the “one-act, one-crime” rule. See 703 N.E.2d at 34.

In apparent recognition of its shortcomings, the Illinois courts have placed three important limitations on the “one-act, one-crime” rule that enable multiple convictions where a defendant causes multiple harms. First,

⁴⁹ The basis of the “one-act, one-crime” rule is unclear. Federal precedent makes clear that the U.S. Constitution does not require such a rule. See Missouri v. Hunter, 459 N.E.2d 359, 368-69 (1983) (“Where . . . a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the ‘same’ conduct . . . , a court’s task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.”); Albernaz v. United States, 450 U.S. 333, 340 (1981) (“[T]he question of what punishments are constitutionally permissible is not different from the question of what punishment the Legislative Branch intended to be imposed. Where Congress intended . . . to impose multiple punishments, imposition of such sentences does not violate the Constitution.”).

The current Criminal Code also does not establish any such rule. Indeed, the General Assembly may have intended to abolish the rule for many cases in which it is applied. See 730 ILCS 5/5-8-4(a) (mandating consecutive sentences in certain circumstances “for offenses which were committed as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective”); cf. People v. Rodriguez, 661 N.E.2d 305, 310 (Ill. 1996) (Heiple, J., concurring) (noting that 5/5-8-4(a) “overrules” the “one-act, one-crime” rule).

Further, the Illinois courts have not explained, or even addressed, whether some other source such as the Illinois Constitution mandates the rule. In fact, People v. King, the leading case on the “one-act, one-crime” rule, explicitly recognized that “[m]ultiple convictions and consecutive sentences have been permitted against claims of double jeopardy for offenses based on a single act but requiring proof of different facts.” 363 N.E.2d 838, 844 (Ill. 1977) (citing Gore v. United States, 357 U.S. 386 (1958); Blockburger v. United States, 284 U.S. 299 (1931)).

the courts have created a “multiple victim” exception to the rule.⁵⁰ Second, the Illinois Supreme Court has held that, even where there are not multiple victims, the “one-act, one-crime” rule does not necessarily prevent liability for multiple offenses that share a common act.⁵¹ Finally, the scope of what counts as “one act” has been drawn narrowly, so that defendants are frequently found to have performed “multiple acts” allowing multiple convictions.⁵²

⁵⁰ See, e.g., People v. Shum, 512 N.E.2d 1183, 1202 (Ill. 1987) (upholding murder and feticide convictions for “single physical act” of killing mother because “[i]n Illinois it is well settled that separate victims require separate convictions and sentences”); People v. Hanks, 528 N.E.2d 1044, 1047-48 (Ill. App. 1988) (“We conclude defendant was properly convicted of two offenses of aggravated arson against two victims resulting from defendant’s single act of arson.”); People v. Mercado, 456 N.E.2d 331 (Ill. App. 1983) (upholding three convictions for reckless homicide arising from single automobile accident).

Section 254 similarly would not preclude multiple convictions in the multiple-victim situation. For example, Section 254(1)(a)(i)(A) would not bar liability for killing one victim and endangering another by the same conduct; in such a case, the offense of homicide would not account for the harm of endangerment, precisely because the latter offense involves a different victim.

⁵¹ See People v. Rodriguez, 661 N.E.2d 305, 307-08 (Ill. 1996) (“Applying King to the present case, we conclude that the aggravated criminal sexual assault offense and the home invasion offense were based on separate acts. Although both offenses shared the common act of defendant threatening the victim with a gun, ‘[a] person can be guilty of two offenses when a common act is part of both offenses.’”) (quoting People v. Lobdell, 459 N.E.2d 260, 263 (Ill. App. 1983)); People v. Tate, 436 N.E.2d 272, 276 (Ill. App. 1982) (“one-act, one-crime” rule does not preclude multiple liability “when a common act is part of both offenses or part of one offense and the only act of another”).

Not surprisingly, this second exception to the “one-act, one-crime” rule appears to be the source of some confusion in the lower courts. Compare, e.g., People v. White, 724 N.E.2d 572, 582 (Ill. App. 2000) (“Although both offenses shared the common act of possession of a weapon, armed violence required the additional act of possession of the drugs, and unlawful possession of a weapon by a felon required the additional element of status as a felon. Accordingly, the two offenses did not result from precisely the same physical act.”), with People v. Williams, 707 N.E.2d 980, 982 (Ill. App. 1999) (“In the case decided herein, the common act is a felon possessing a gun and drugs simultaneously. There is no separate act. In one instance the gun is combined with possession of a controlled substance to constitute armed violence, and in the other it is combined with the act of a convicted felon status to create a separate offense [of unlawful possession by a felon]. We hold that the one-act, one-crime rule does apply to these

⁵² See, e.g., People v. Green, 557 N.E.2d 939, 942 (Ill. App. 1990) (affirming consecutive sentences for two offenses premised on defendant’s possession of cocaine because “the armed-violence conviction could be based upon the contents of the right-hand pocket, while the possession with intent to deliver could be based upon the six tested bags of the nine bags subsequently found in the left-hand pocket”). Rather than providing meaningful guidance as to what constitutes an “act” for purposes of the “one-act, one-crime” rule, the Illinois Supreme Court has approached tautology in stating that an act is “any overt or outward manifestation which will support a different offense.” People v. King, 363 N.E.2d 838, 844-45 (Ill. 1977); see also People v. Rodriguez, 661 N.E.2d 305, 307 (Ill. 1996). The Illinois Supreme Court’s failure to definitively state what constitutes an “act” for purposes of the “one-act, one-crime” rule has resulted in considerable confusion at the appellate level. See, e.g., People v. Bowens, 718 N.E.2d 602, 607-08 (Ill. App. 1999) (citing several cases holding that multiple gunshots and blows constitute separate acts and several cases holding that they constitute a single act).

The second aspect of current law's "one-act, one-crime" rule, which bars convictions for both a greater offense and an included offense, also fails to satisfactorily resolve multiple-liability issues. Current Illinois law uses the "charging instrument" approach to determine whether one offense is "included" in another. The approach focuses on the particular facts of each case, rather than referring to abstract offense definitions, to determine when multiple convictions are appropriate. See People v. Novak, 643 N.E.2d 762, 769 (Ill. 1994) (adopting charging instrument approach). Under this approach, one offense includes another if its charging instrument establishes the "main outline" of the lesser offense, and the lesser offense's elements "can be inferred from the language of the charging instrument."⁵³ This approach has led to problematic or undesirable results, such as disallowing multiple convictions where a burglar commits his intended crime upon entering a place. Illinois courts currently vacate the conviction for the subsequent offense, under the theory that it is "necessarily implied" by an indictment alleging the mere intent to commit that crime.⁵⁴ Disallowing multiple liability in these cases, however, trivializes the significance role of the additional harm that occurs when a burglar commits his intended crime — which may be as serious as, or more serious than, the burglary itself.

Section 254 replaces the "one-act, one-crime" rule with a comprehensive statutory provision governing the acceptability of multiple convictions for separate offenses. Importantly, Section 254 does not alter current Illinois law regarding when a jury may be instructed on, or find a defendant guilty of, multiple offenses or included offenses.⁵⁵ 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.

⁵³ People v. Baldwin, 764 N.E.2d 1126, 1130 (Ill. 2002). The vagueness of this test appears to be one cause of inconsistency in current law's resolution of included-offense issues. Compare, e.g., People v. Novak, 643 N.E.2d at 773 (finding sexual abuse was not included offense of sexual assault where charging instrument alleged sexual penetration rather than sexual conduct), with People v. Jones, 595 N.E.2d 1071, 1075-76 (Ill. 1992) (finding that theft's requirement of intent to permanently deprive another's property was implicit in robbery charge of taking victim's property by force).

⁵⁴ See, e.g., People v. Oparah, 742 N.E.2d 1272, 1277 (Ill. App. 2001) (vacating arson conviction because burglary conviction was premised on intent to commit arson); People v. Milton, 723 N.E.2d 863, 868 (Ill. App. 1999) (vacating theft conviction because burglary conviction was premised on intent to commit theft).

⁵⁵ As to the jury's ability to return multiple guilty verdicts, see, for example, People v. Burnridge, 687 N.E.2d 813, 815 (Ill. 1997) (noting that trial judge instructed jury on battery as included offense of aggravated criminal sexual abuse, then vacated battery conviction when jury returned guilty verdicts for both offenses); People v. Kettler, 446 N.E.2d 550, 553 (Ill. App. 1983) ("[A] jury may, and frequently does, return verdicts of guilty upon both the charged offense and its lesser included offense.").

As to when the jury may receive an instruction on an included offense, see People v. Hamilton, 688 N.E.2d 1166, 1169 (Ill. 1997); People v. Landwer, 655 N.E.2d 848, 854 (Ill. 1995); People v. Novak, 643 N.E.2d 762, 769-70 (Ill. 1994).

Section 254(1) does not employ the concept of an “included offense,” which is significant in the context of jury instructions, but is conceptually distinct from the question of when multiple liability should be allowed. Unlike current Illinois law, the rules established in Section 254 do not depend on consideration of the particular facts of specific cases. Rather, they present issues of law⁵⁶ 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,⁵⁷ enhancing predictability, stability, and evenhandedness in the imposition of multiple liability.

Section 254(1)(a) provides rules governing liability for multiple offenses that 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 beats the victim to facilitate, or 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 convictions are not barred for *all* situations where the same conduct constitutes multiple offenses. (In practice, the “one-act” rule has similarly been narrowed to allow multiple liability in situations of the kind that would fall outside Section 254(1)(a)’s strictures. *See supra* note 50.) 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

⁵⁶ Whether Section 254 allows multiple convictions is a 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 would probably prefer in the usual case to postpone such determinations until after the jury has returned its verdicts.

⁵⁷ Because Section 254(1)(a) applies only when two offenses are “based on the same conduct,” a ruling that Section 254(1)(a) prohibits multiple convictions would govern only subsequent cases where those two offenses were again based on the same conduct. Multiple convictions for the two offenses would remain acceptable where they are not both based on the same conduct.

another, the proposed standard calls for a consideration of the relevant offenses' purposes. Consider the following examples:

- Section 254(1)(a)(i)(A) would bar convictions for both felony murder and another homicide offense based on a single death. Cf. proposed Section 1102(1)(b) (defining felony murder). As Illinois courts have noted, an “included offense” approach to multiple liability does not adequately deal with this situation, as each offense includes an element that the other does not. See People v. Sandy, 544 N.E.2d 1248, 1254 (Ill. App. 1989) (“Conviction for felony murder does not require proof of an independent mental state. Technically, therefore, involuntary manslaughter, which involves a reckless mental state, cannot be an included offense of felony murder.”) (citations omitted). The proposed provision, by contrast, prevents multiple liability because each homicide offense accounts for the same harm: causing another person’s death.
- Section 254(1)(a)(i)(A) would not bar convictions for both felony murder and the predicate forcible felony (or attempted forcible felony). The proposed Code’s felony-murder provision punishes only the harm of causing another person’s death, and does not account for the harm of the predicate offense. Current Illinois law, by contrast, bars conviction for both offenses, under the theory that the underlying forcible felony is an “included offense” of felony murder. See People v. Smith, 701 N.E.2d 1097, 1100 (Ill. 1998) (“Because the armed robbery . . . is a lesser included offense of felony murder in this case, the included offense of armed robbery will not support a separate conviction and sentence.”). The proposed approach avoids trivializing the underlying offense — which will, by virtue of being a “forcible felony,” itself be a serious offense.
- Section 254(1)(a)(i)(A) would bar convictions, based on the same conduct, for both forcible sexual assault and unlawful restraint. Cf. proposed Section 1301(1)(b) (defining sexual assault by force); proposed Section 1402 (defining unlawful restraint). As Illinois courts have recognized, the harm of restricting movement in such a situation is incidental to, and accounted for by, the sexual assault offense. See People v. Bowen, 609 N.E.2d 346, 362 (Ill. App. 1993) (“The unlawful restraint charged in the indictment was that which the legislature addressed in the criminal sexual assault statute and is conduct inherent in every case of criminal sexual assault by force. As the restraint charged was not independent of the sexual assault, it cannot be punished as such.”). Yet 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 detention that was independent of, and occurred before or after, a sexual assault, as where the offender forces the victim into a locked room or dark alleyway before committing the assault.

- Section 254(1)(a)(i)(A) would bar convictions, based on the same conduct, for both sexual assault and assault by contact of an “insulting or provoking nature.” Cf. proposed Section 1201(1)(b) (defining assault); proposed Section 1301 (defining sexual assault); People v. Margiolas, 453 N.E.2d 842, 845 (Ill. App. 1983) (noting the “undeniable verity that inherent in every crime of rape is an intentional physical contact of an outrageously insulting, as well as provoking, character”).
- Section 254(1)(a)(i)(A) would bar convictions, based on the same conduct, for both aggravated sexual assault under proposed Section 1301(4)(a)(ii) and assault under proposed Section 1201(1)(a). Section 1301(4)(a)(ii)’s aggravation fully accounts for the bodily harm, which is the only harm the assault provision addresses. 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 1301 (defining sexual assault); proposed Section 4101 (defining incest).
- Section 254(1)(a)(i)(A) would not bar convictions for both criminal coercion and sexual exploitation of a child where the defendant coerced a victim to remove clothing. Cf. proposed Section 1303 (defining sexual exploitation of a child); proposed Section 1404 (defining criminal coercion). The coercion offense punishes the harm of wrongfully interfering with another’s freedom of action, but does not account for the exploitation offense’s harm of sexually victimizing a child.
- 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 same harm (causing fear) as the threat offense. Cf. proposed Section 1203 (defining terroristic threats); proposed Section 1404 (defining criminal coercion).

- Section 254(1)(a)(i)(A) would bar convictions for both robbery and theft based on a single taking of property. Cf. proposed Section 1501 (defining robbery); proposed Section 2102 (defining theft by taking). The offense of robbery is essentially a compound offense comprised of theft and an assault offense, and thus fully accounts for the harm of wrongfully taking another's property.
- Where a defendant obtains property by conduct that is itself criminal, Section 254(1)(a)(i)(A) typically would not bar convictions 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 2103 (defining theft by deception); proposed Section 3101 (defining forgery).
- Section 254(1)(a)(i)(A) would not bar convictions for both assault and home invasion where the offender physically injures another during the home invasion. Cf. proposed Section 1201 (defining assault); proposed Section 2301(1) (defining home invasion). Home invasion's requirement of using or threatening "force" does not account for any bodily harm resulting from such force. The provision would, however, bar convictions for both home invasion and terroristic threats based on a single threat of force, insofar as home invasion fully accounts for the fear for personal safety and security that the threat offense addresses. Cf. proposed Section 1203 (defining terroristic threats).
- 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 2302 (defining burglary); proposed Section 2303 (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 is essentially a compound offense consisting of trespassing and an attempt to commit another offense. The Illinois courts similarly recognize that trespassing is an "included offense" of burglary. See People v. Austin, 576 N.E.2d 505, 507 (Ill. App. 1991) ("[B]ecause the elements of criminal trespass to residence are subsumed in the offense of residential burglary, we conclude that criminal trespass to residence is a lesser-included offense of residential burglary.").

- Section 254(1)(a)(i)(A) would also bar convictions 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 bar convictions for both burglary and attempted theft, however, where a burglary conviction is based on 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.
- Section 254(1)(a)(i)(A) would not bar 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 4105(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 promoting-delinquency offense does not account for the harm of the underlying offense. The promoting-delinquency offense operates, rather, as an "add-on" offense that provides additional punishment so that soliciting a child is punished more severely than soliciting an adult to commit an offense.
- Section 254(1)(a)(i)(A) would not bar convictions for both official misconduct and any other crime the misconduct constitutes. Liability for official misconduct may, but need not, arise from conduct that is itself criminal. Cf. proposed Section 5103 (defining official misconduct). The proposed misconduct offense punishes the harms of abusing authority, violating the public's trust, and disrupting the proper functioning of government, but does not account for any independent harm caused by the misconduct. For example, an official-misconduct conviction based on embezzling public funds would not account for the wrongful taking of property, which would support a separate theft conviction.
- Section 254(1)(a)(i)(A) would not bar convictions 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 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)(A) would not bar convictions for both a hate-crime or weapons offense and the underlying predicate offense. The provisions defining the hate-crime and weapons offenses

explicitly state that they constitute “additional” offenses. See proposed Section 6106(1) (defining hate crime aggravation); proposed Section 7101 (defining offense for possession of dangerous weapon during felony).

Section 254(1)(a)(i)(B) bars 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 bar convictions for both sexual assault and sexual abuse based on the same conduct. Cf. proposed Section 1301 (defining sexual assault); proposed Section 1302 (defining sexual abuse). Section 254(1)(a)(i)(B) also makes clear that convictions for both homicide and assault may not be based on the same conduct. Cf. proposed Section 1101 (defining first-degree murder); proposed Section 1201 (defining assault).

Section 254(1)(a)(ii) and (iii) bar 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. These rules embody specific aspects of the current “one-act, one-crime” rule (and its numerous exceptions), but are narrower, thus avoiding its drawbacks.

Section 254(1)(a)(ii)(A) bars multiple convictions where two offenses differ only in that one prohibits a kind of conduct generally and the other criminalizes a specific subset of the same conduct. The proposed Code has been drafted to avoid such overlap, but current Illinois law has offenses illustrating the desirability of such a provision. For example, current 5/21-1.3’s “criminal defacement” offense differs from 5/21-1(1)(a)’s general property-damage offense only in requiring that property be damaged “by the use of paint or any similar substance, or by the use of a writing instrument, etching tool, or any other similar device.” Section 254(1)(a)(ii)(A) makes clear that convictions for both property damage and criminal defacement based on the same conduct (such as a particular instance of “tagging” a subway car with one’s name) would be inappropriate.

Section 254(1)(a)(ii)(B) 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 an offender 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 Illinois courts have similarly held that a single death cannot support multiple homicide convictions. See, e.g., People v. Fuller, 2002 WL 254030, at *21 (Ill. 2002) (“If only one person has been murdered, there can be but one conviction for murder.”) (citing People v. Kuntu, 752 N.E.2d 380, 385 (Ill. 2001)).

Section 254(1)(a)(iii) bars multiple liability where an offense is defined as a continuing course of conduct and the offender’s conduct is uninterrupted. For example, the proposed offense definition for bigamy prohibits “resid[ing] in the State” after a second marriage. Section 254(1)(a)(iii)’s rule makes

clear that multiple bigamy convictions would not be appropriate based on a defendant's single, uninterrupted residence in Illinois. 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 General Assembly to override 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 rule of current 5/8-5 barring convictions for both an inchoate offense and the completed target offense. Section 254(1)(b)(ii) expands on this rule to bar convictions for both (1) an inchoate offense, and (2) any offense that relates to the inchoate offense's target offense in such a way that Section 254(1)(a) would bar convictions for both of them. 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. Illinois' current "one-act, one-crime" rule would reach the same result in these cases. See, e.g., People v. Thomas, 531 N.E.2d 84, 88 (Ill. App. 1988) (vacating aggravated battery conviction where same stabbing was basis for attempted murder conviction).

Section 254(1)(c), barring convictions for multiple inchoate offenses toward a single substantive offense, has no corresponding provision in current Chapter 720. Because Chapter 720 lacks such a provision, Illinois courts have held that convictions for multiple inchoate offenses are permissible as a matter of law, provided that one inchoate offense does not include another as charged. See People v. Stroner, 449 N.E.2d 1326 (Ill. 1983) (affirming defendant's convictions for solicitation to commit murder, conspiracy to commit murder, and attempted murder on theory of accountability for single, unconsummated offense). As a matter of policy, however, there is little justification for permitting convictions of multiple inchoate offenses toward the same substantive offense. A conviction of a single inchoate offense sufficiently punishes an offender for his incomplete efforts toward an offense. Moreover, because proposed Section 906 dispenses with concurrent sentences for multiple offenses, Section 254(1)(c) is necessary to prevent the possibility of punishing an offender who does not complete an offense more severely than one who does. (See proposed Section 906 and corresponding commentary.) For example, a person convicted of both attempt and conspiracy to commit a Class 2 felony would be liable for two Class 3 felonies, with a corresponding sentence of 3 to 7½ years, whereas a person who actually committed the Class 2 felony would be subject to a possible sentence of only 3 to 7 years. (Under Section 254(1)(b)(i), completing the Class 2 felony would bar conviction for the inchoate efforts toward it.)

Section 254(1)(d) codifies the current Illinois rule 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 another's conduct toward the same 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 each one's accountability for the other's conduct. See People v. Hicks, 693 N.E.2d 373, 376 (Ill. 1998) ("In essence, accountability provides an alternative basis of liability, not an additional basis for liability. Once a defendant's guilt as a *principal* has been established through his own conduct or behavior, there is no longer any need to base a conviction for the same crime on the doctrine of accountability.") (emphasis in original).

Section 254(1)(e) tracks current Illinois law in prohibiting legally inconsistent simultaneous convictions. See, e.g., People v. Fornear, 680 N.E.2d 1383, 1388-89 (Ill. 1997); People v. Becker, 734 N.E.2d 987, 996-99 (Ill. App. 2000).

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 Illinois law.⁵⁸

Section 254(3) defines "inchoate offense" and "substantive offense." Current Chapter 720 uses, but does not define, the terms "inchoate offense" and "principal offense."

Section 255. Definitions

Corresponding Current Provision(s): 720 ILCS 5/6-2(b); 5/15-1;
5/15-4

Generally. This provision collects defined terms used in Article 250 and provides cross-references to the provisions in which they are defined.

Relation to current Illinois law. For discussion of the relationship between Article 250's defined terms and current law, refer to the commentary for the provision in which each term is initially defined.

⁵⁸ See People v. Lego, 507 N.E.2d 800, 808 (Ill. 1987) ("When multiple convictions are obtained for offenses arising out of a single act, sentence may be imposed only for the most serious offense."); People v. Donaldson, 435 N.E.2d 477, 479-80 (Ill. 1982) (where defendant found guilty of both armed violence and aggravated battery, "[j]udgment should have been entered and sentence imposed only on the more serious offense"); People v. Cosby, 711 N.E.2d 1174, 1186 (Ill. App. 1999) ("Where a defendant stands convicted of multiple offenses arising from the same physical act, it is the more serious offense upon which judgment should be entered and sentence imposed.").

ARTICLE 300. IMPUTATION OF OFFENSE ELEMENTS

Section 301. Accountability for the Conduct of Another

Corresponding Current Provision(s): 720 ILCS 5/5-1 to -3⁵⁹

Comment:

Generally. This provision sets out the circumstances according to which one person may be held accountable for the conduct of another person.

Relation to current Illinois law. Section 301(1)(a) and (b) are similar to current 5/5-2(a) and (c),⁶⁰ defining two standards for liability: the first applies where the defendant's assistance is a "but-for" cause of the crime; the second applies where the defendant's objective contribution to the crime is less substantial, but the accomplice has culpability of "intent" as to his assistance. In addition to minor alterations for clarity (changing "conduct" to "conduct constituting the offense" in (a), and replacing "another" with "such other person" in (a) and (b) to make the reference clear),⁶¹ three changes have been made to current 5/5-2(a) and (c):

- (1) The mental state elements of the current provisions have been rephrased. The phrase "having the culpability required by the offense" replaces "having a mental state described by the statute defining the offense" in 5/5-2(a), and has been added to 5/5-2(c). The imputation of one person's conduct to another person should not alter the culpability level required by the offense. Rather, the person held accountable for another's conduct should satisfy the standard culpability level for the underlying offense — no more, no less. Replacing 5/5-2(a)'s "mental state" with "culpability" tracks the use of the word "culpability" elsewhere in the Code, and may help avoid problems in interpreting the phrase "mental state," as have arisen previously. See, e.g., commentary for proposed Section 302.

⁵⁹ Some other specific provisions include prohibitions on "aiding and abetting" the offenses they define. See, e.g., 5 ILCS 312/3-103(d); 20 ILCS 1605/15; 50 ILCS 105/4.5(3); 625 ILCS 5/18b-108(c); 720 ILCS 5/10-7(a)(i); 5/11-6.5(a); 5/16-10(a)(3),(4); 5/16-12(a); 5/16D-3(a-5); 5/16F-4(a); 5/17-9(b); 5/17-10(b); 5/17-15; 5/31-7(a) to (e); 5/31-7(f-5),(f-6); 5/32-3; 250/9; 250/10; 365/1(e),(f).

⁶⁰ Section 301 also incorporates the substance of current 5/5-1 in defining when a person is accountable for the conduct of another. Other sections make clear when a person is accountable for his own conduct.

⁶¹ In addition, 5/5-2(c)'s phrase "before or during the commission of an offense" has been deleted as redundant. Aiding "in the planning or commission" of an offense may only occur "before or during" the offense. As under current law, there can be no accountability liability after all elements of the offense are complete — that is, proposed Section 301 does not allow for liability as an "accessory after the fact." See, e.g., *People v. Dennis*, 692 N.E.2d 325 (Ill. 1998).

The phrase “with the intent to promote or facilitate such commission” in 5/5-2(c) has been changed to “intentionally” in Section 301(1)(b). The current phrasing is confusing, as it is unclear whether the requisite “intent” relates to the person’s *conduct* in helping the confederate, or to the desired *result* of that help (commission of the offense). (Current Illinois pattern jury instructions retain the “intent to promote or facilitate” language, but also add “knowingly” before “solicits, aids, [etc.],” indicating that the former requirement applies to the result. See IPI (CRIMINAL) 5.03 (4th ed. 2000).) The new wording makes clear that only the conduct must be intentional. The culpability level with respect to the completed offense, on the other hand, is the same as it would be if the “helper” committed the offense himself.⁶²

- (2) The purpose of the phrase “and the other person in fact or by reason of legal incapacity lacks such a mental state” in 5/5-2(a) — namely, ensuring that an accomplice may be held liable even where the principal himself may not — is now addressed in Section 301(4) (see infra). The phrase in 5/5-2(a) is misleading, as the principal actor’s mental state should not be relevant if the defendant’s assistance satisfies the requirement of causing the actor’s conduct.⁶³

⁶² Illinois cases recognize that “[a]ccountability, tied as it is to the crime charged, must comport with the requirements of that crime,” but use the now-defunct common-law notions of “specific intent” and “general intent” to define the culpability requirements of offenses for accountability purposes. See, e.g., People v. Stanciel, 606 N.E.2d 1201, 1210 (Ill. 1992) (“Thus, for example, the charge of assault with intent to rape, a specific intent crime, must require a specific intent for one who is accountable as well. Under this analysis, then, one whose guilt of murder, a general intent crime, is established through accountability, need only possess a general intent, with all the requirements that state of mind entails.”). This understanding of culpability is inconsistent with the scheme defined in current 5/4-3. See also commentary for proposed Section 302.

Adding to the confusion, Illinois courts have also interpreted current 5/5-2(c) as incorporating the “common design” rule, which abandons the requirement of the culpability level defined in the underlying offense to provide that “[w]here two or more persons engage in a common criminal design or agreement, any acts in furtherance of that common design committed by one party are considered to be the acts of all parties to the design or agreement and all are equally responsible for the consequences of the further acts.” In re W.C., 657 N.E.2d 908, 923-24 (Ill. 1995); see also People v. Terry, 460 N.E.2d 746, 749 (Ill. 1984); People v. Kessler, 315 N.E.2d 29, 32 (Ill. 1974). Section 301(1)(b) rejects the “common design” rule, which has no statutory authority and inappropriately allows imposition of liability without regard to a defendant’s lack of criminal culpability.

⁶³ The scope of this provision is limited by two other provisions. First, under Section 203(1)(b), the resulting offense must not be “too remote or accidental” from the defendant’s actions in causing the offense, nor may the result be “too dependent upon another’s volitional act.” Second, under Section 205(3)’s “read-in” provision, the defendant must be at least reckless as to causing another to commit the crime. Current law is similar in this regard. Cf. People v. Cooper, 743 N.E.2d 32, 38 (Ill. 2000) (finding defendants were not accountable for killing of fellow gang member by rival gang because they neither “intended” to have the rival gang shoot their fellow member, “nor sought the caused result”).

- (3) The phrase “solicits, aids, abets, agrees or attempts to aid” has been replaced with “aids, solicits, or conspires with” in 301(1)(b). The term “abet” is redundant of “aid.” “Conspires with” is a legal term of art that is defined elsewhere in the Code, whereas the meaning of “agrees” is nebulous. “Attempts” to aid are now addressed in Section 301(5) and (6) (see infra).

Section 301(1)(c) is the same as 5/5-2(b).

Section 301(2) is the same as the second sentence of 5/5-2(c), but has been placed into a separate subsection as an exception to the general rules regarding accountability. A few minor changes have been made to enhance clarity: adding the phrase “for the conduct of another” after “so accountable”; rephrasing “the offense is so defined that his conduct was inevitably incident” as “his conduct is inevitably incident to . . . the offense”; dividing the “does one of the following” clauses into discrete subsections; and deleting “in such commission” in Section 301(2)(c)(i) (current 5/5-2(c)(3)) as superfluous. Cf. IPI (CRIMINAL) 5.04 (4th ed. 2000).

Section 301(3) has no corresponding provision in Chapter 720. The proposed provision provides that a person who may have been legally incapable of committing an offense himself may still be convicted of the offense based on his accountability for the conduct of another who commits the offense.⁶⁴ Many offenses require that the defendant occupy a special position before he may be liable for certain conduct. This provision precludes a defense for defendants who, though they do not occupy the required position, aid, solicit, or encourage another who does in fact occupy such a position. For example, proposed Section 1301(4)(b)(i) requires that the defendant be at least four years older than the victim for the offense to be liable for Class 1 sexual assault. One who is only three years older than the victim, but aids or encourages a person ten years older than the victim to commit the sexual assault, causes the same degree of harm, and is as blameworthy, as the accomplice who is more than four years older than the victim. In other words, the accomplice should not escape liability simply because he does not occupy the same position as the person for whose conduct he is accountable. But see People v. Anderson, 604 N.E.2d 424, 430 (Ill. App. 1992) (holding defendant could not be held accountable for sexual assault of her sister by her boyfriend because she was not at least five years older than victim as required by the statute).

Section 301(4) is largely the same as current 5/5-3. The title has been changed from “Separate conviction of person accountable” to “Unconvicted

⁶⁴ Section 301(1) requires the accomplice have the culpability required by the underlying offense. Thus, the accomplice would still be able to assert any defense which negated his culpability as to the offense, as well as any general defense for which he qualifies under Articles 400, 500, and 600. Lastly, Section 301(3) specifically precludes accomplice liability in cases where such liability would be inconsistent with the purpose of the provision establishing their incapacity, e.g., where the accomplice is also a victim of the offense. See supra proposed Section 301(2) and corresponding commentary.

Principal or Confederate No Defense” to clarify the section’s relevance. The phrase “upon proof that the offense was committed and that he was so accountable” has been replaced with “upon proof that the objective elements of the offense are satisfied.” This change makes clear that the accomplice may be liable even if the principal lacks the requisite mental state or has an excusing condition; in such a situation, an offense has not technically been committed, even though all objective elements are satisfied. The phrase “or is not amenable to justice” has been removed as unnecessary. *Cf.* IPI (CRIMINAL) 5.05, 5.06 (4th ed. 2000).

Section 301(5) has no corresponding provision in Chapter 720. Section 301(5) makes clear that liability (for an inchoate offense) is appropriate where one satisfies the requirements of Section 301(1), but the person for whose conduct he would have been accountable does not commit the offense. Section 301(5) imposes reduced liability in recognition of the fact that the harm of the substantive offense does not occur in such situations. (The same result should follow from proper application of Sections 301(1) and 801. This subsection, and Section 301(6), have been added mainly to clarify the Code’s position as to a confusing issue of law.)

Section 301(6) is similar to current 5/5-2(c) in imposing liability for an “attempt to aid,” with a few modifications. Section 301(6) applies “whether or not the offense is attempted or committed by the other person,” thus clarifying that one is subject to liability for an unsuccessful attempt to aid, solicit, or conspire with another. Section 301(6) also imposes liability for attempts to solicit or conspire as well as attempts to aid. Finally, Section 301(6) recognizes — as current Illinois law generally does — that inchoate efforts toward an offense should not be sanctioned as severely as completed offenses. Section 301(6) therefore reduces the liability for attempted complicity relative to actual complicity.

Section 302. Voluntary Intoxication

Corresponding Current Provision(s): 720 ILCS 5/6-3(a)

Comment:

Generally. This provision governs the imputation of culpability to a person who engages in offense conduct after voluntarily becoming intoxicated. (For conduct performed under the influence of *involuntary* intoxication, see proposed Section 506 and corresponding commentary.)

Relation to current Illinois law. Section 302 takes a different approach from current law with respect to the significance of voluntary intoxication. Illinois recently eliminated its voluntary intoxication “defense,” which applied in cases where the intoxication was “so extreme as to suspend the power of reason and render [the defendant] incapable of forming a specific intent which is an element of the offense.” *See* 720 ILCS 5/6-3(a) (West 2000); *cf.* IPI (CRIMINAL) 24-25.02, 24-25.02A (4th ed. 2000). By eliminating

the specific defense, the General Assembly apparently intended to make it more difficult for defendants to successfully assert a voluntary intoxication defense by shifting the burden of proof on the issue to the defendant.⁶⁵

It is not clear, however, that elimination of the 5/6-3(a) defense has affected defendants' ability to obtain an acquittal based on voluntary intoxication. Defendants are generally allowed to introduce evidence indicating that they lacked an offense definition's required culpability, whether the offense requires "specific intent" or something else. Although 5/6-3, as amended, now has no defense categorically stating that certain voluntarily intoxicated persons are not "criminally responsible" (a phrase whose meaning is unclear), it is not clear that the provision creates a *per se* rule prohibiting the introduction of evidence of intoxication to negate an offense's culpability requirement. *Cf.* Mont. Code Ann. § 45-2-203 (explicitly stating that a person's "intoxicated condition . . . may not be taken into account in determining the existence of a mental state which is an element of [an] offense," unless intoxication is involuntary). Thus it seems that defendants may still be able to introduce evidence of intoxication to support a claim that the State has failed to prove culpability beyond a reasonable doubt.

Proposed Section 302 takes a sounder approach to the issue of voluntary intoxication by treating it as a basis for imputation, and not as a special defense — its special relevance is that it will *inculpate*, rather than exculpate, defendants in certain cases. Under Section 302(2), intoxication may be used to hold a defendant accountable *as if* he were culpably reckless, whether or not it can be proved that he had a mental state of recklessness. Where the imputation rule does not apply, and where the person does not otherwise satisfy the culpability requirements of the offense, there would be no liability — as would be true in any case where the defendant lacked the culpability required by the offense.⁶⁶ Section 302(1), requiring that intoxication must "negative[] a required culpability element," expresses this more clearly than prior 5/6-3(a), which applied if the defendant's intoxication "suspend[ed] the

⁶⁵ According to Sen. Dennis J. Jacobs (D-Moline), the change was designed to shift the burden of proof on the issue of voluntary intoxication to the defendant. *See* Daniel C. Vock, Panel Votes to End Defense of Intoxication, CHI. DAILY L. BULL., Mar. 7, 2001, at 1. The impetus for the change appears to have come from a high-profile case in which the trial court found a man not guilty of aggravated sexual assault on the basis of his voluntary intoxication. *See id.*

⁶⁶ Note, however, that a person could be liable for an offense, regardless of his intoxication, if he possessed the culpability required by the offense *when he became intoxicated*. Consider, for example, a person who intentionally becomes intoxicated knowing that he will assault his spouse when drunk. Although the person may ultimately become so intoxicated that he may not be contemporaneously aware of, or intend, his actions in beating his spouse, the person's earlier culpability at the time he became intoxicated could support liability for the assault. In such a case, the State could argue that the person had the requisite culpability for the assault at the time he became intoxicated, and that his conduct in becoming intoxicated caused the prohibited result of bodily harm. *See* proposed Section 1201 (assault) and corresponding commentary; *see also* proposed Section 203 and corresponding commentary for a discussion of the rules of causation.

power of reason and render[ed] him incapable of forming a specific intent which is an element of the offense.”⁶⁷

Section 302(2) creates a rule imputing recklessness to acts performed while intoxicated. Current law has no general imputation rule, but intoxication creates a statutory presumption of recklessness for vehicular homicide. 720 ILCS 5/9-3(b); see also *People v. Spencer*, 709 N.E.2d 687, 693 (Ill. App. 1999). Illinois courts have found intoxication to bear on recklessness for other offenses as well. See, e.g., *People v. Roberts*, 345 N.E.2d 132, 137-38 (Ill. App. 1973) (involuntary manslaughter).

Section 302(3) defines “intoxication” and “voluntary intoxication.” Current law defines neither term, although 5/9-3(c) defines “under the influence of alcohol or other drugs.”

Section 303. Divergence Between Consequences Intended or Risked and Actual Consequences

Corresponding Current Provision(s): None

Comment:

Generally. Section 303 addresses 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. In such a case, 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.)

⁶⁷ Prior 5/6-3(a) was flawed in that it used the term “specific intent,” a common-law mental state that Chapter 720 does not otherwise recognize. The original 1961 Code rejected the notions of “general intent” and “specific intent” in favor of the culpability requirements defined in 5/4-3 (“Mental state”) *et seq.* Accordingly, the 1961 version of 5/6-3(a) provided that intoxication must “negative[] the existence of a mental state which is an element of the offense.”

However, subsequent judicial decisions, instead of reading “mental state” to refer to the culpability terms defined in the Code, read it to refer to the concepts of general and specific intent. See, e.g., *People v. Harkey*, 386 N.E.2d 1151, 1153 (Ill. App. 1979) (“It is a well established rule in Illinois that the defense of voluntary intoxication may be used only in cases in which the crime involves specific intent (*i.e. a mental state which is an element of the crime*) and that it is not available where the offense charged is a general intent crime.”) (emphasis added); *People v. Saunders*, 461 N.E.2d 1006, 1016 (Ill. App. 1984) (denying defense, as “[d]eviate sexual assault and rape are general intent crimes, in that no specific mental state is required to be alleged”); *People v. Berlin*, 270 N.E.2d 461, 463 (Ill. App. 1971) (denying defense for “robbery, an offense for which no specific intent is required”).

The courts’ continued use of the concept of “specific intent” — which later made its way into an amendment to 5/6-3(a) — disregarded the 1961 Code’s deliberate rejection of this concept.

Section 303(1) uses the term “consequence” instead of “result” because in some cases, it may not be immediately clear 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 “sexual intercourse with a minor,” it is unclear whether the result requirement is “sexual intercourse” and the person’s age is merely an attendant specific circumstance, or whether the result requirement is “sex with a minor” specifically. Section 303(2) avoids this ambiguity by including attendant circumstances within the definition of “consequence.”

Relation to current Illinois law. There is no statutory section on transferred intent generally. However, the statutory offense of first-degree murder imposes liability on one who kills another person if he “intends to kill or do great bodily harm to that individual *or another*.” 720 ILCS 5/9-1(a)(1) (emphasis added); see also People v. Shelton, 688 N.E.2d 831, 833 (Ill. App. 1997). Illinois courts have also applied the doctrine of transferred intent to offenses lacking such express statutory language. See, e.g., People v. Psichalinos, 594 N.E.2d 1374, 1381 (Ill. App. 1992) (aggravated battery of a child).

Although Section 303 would permit imputation in cases such as Psichalinos, it would not allow the level of liability permitted in that case, where the defendant’s attempt to hit an adult was used to ground liability for aggravated battery of a child, an offense requiring that one “intentionally or knowingly . . . cause great bodily harm . . . to any child under the age of 13.” 720 ILCS 5/12-4.3(a). A person who tries to hit an adult, but accidentally hits a child, would lack the required culpability of knowledge or intent as to the victim’s being under 13 years of age, so it would be impossible to impute his culpability as to that requirement. It would be possible, however, to sustain a conviction for the “standard” aggravated battery offense by imputing the person’s culpability to the result. (In the opposite situation, where a person swings at a child but hits an adult, there also could not be liability for aggravated battery of a child, because that offense’s required *result* would not have occurred. The person could, however, be found liable for aggravated battery or for attempted aggravated battery of a child.)

Section 304. Mistaken Belief Consistent with a Different Offense

Corresponding Current Provision(s): 720 ILCS 4-8(c)

Comment:

Generally. This provision addresses situations where a person has a mistaken belief, but is not entitled to a defense under proposed Section 207 because even under his mistaken view, he was committing an offense. In such cases, culpability as to the committed offense will be imputed based on the person’s culpability as to the intended offense.

Relation to current Illinois law. Section 304 is substantively similar to current 5/4-8(c), but has been rephrased for clarity. Current 5/4-8(c) provides that a defendant's mistake or ignorance does not preclude conviction for "an included offense of which he would be guilty." This language is confusing — if, indeed, it makes conceptual sense — for if the defendant's conduct has in fact caused the greater offense, it has in fact also caused any result necessary for an included offense, so that imputation of either conduct or culpability would be unnecessary for that offense. Section 304 more clearly provides that mistake or ignorance is not a defense if the defendant who *did* commit the lesser offense mistakenly thought he was committing a similar or more serious offense.⁶⁸ In other words, the defendant's culpability as to the greater offense will be imputed to make him liable for the lesser offense.

Section 305. Definitions

Corresponding Current Provision(s): 720 ILCS 5/15-1

Comment:

Generally. This provision collects defined terms used elsewhere in Article 300.

Relation to current Illinois law. For a discussion of the relationship between Article 300's defined terms and current law, refer to the commentary for the provision in which the term in question is defined.

⁶⁸ Where the defendant would be guilty of another offense of a *lower* grade had the situation been as he supposed, in contrast, attempt liability for the less serious offense may be appropriate under proposed Section 801. See proposed Section 801 and corresponding commentary.

ARTICLE 400. JUSTIFICATION DEFENSES

Section 400. General Defenses

Corresponding Current Provision(s): None

Comment:

Generally. This provision explains the implications of the existence of a defense for a person’s possible criminal liability. Section 400 states a principle implicit in the notion of a “defense”: it applies even if one has done something that would otherwise constitute an offense.

Relation to current Illinois law. Section 400’s rule reflects current law, under which defenses similarly preclude conviction even if all offense elements are satisfied. Indeed, raising an affirmative defense sometimes requires the defendant tacitly or explicitly to admit that he has committed the offense elements. *See, e.g., People v. Landwer*, 655 N.E.2d 848, 855 (Ill. 1995) (“[I]n order to rely on the defense of entrapment, a defendant must admit to committing all the elements of the charged offense.”).

Section 400 also obviates the need for language in numerous current homicide and assault offenses requiring that defendants act “without lawful justification” or “without legal justification.”⁶⁹ Current Illinois law’s use of those phrases suggests, inconsistently with the actual governing legal rules, that the absence of a justification is an offense element for which the prosecution bears the burden of production.⁷⁰ Section 400 makes clear that justifications — as well as excuses and nonexculpatory defenses — may bar criminal liability, but does so without undermining the rule that the defendant bears the burden of production for affirmative defenses. *See* proposed Section 107 and corresponding commentary.

⁶⁹ *See* 720 ILCS 5/9-1(a); 5/9-1.2(a); 5/9-2.1(a); 5/9-3(a); 5/9-3.2(a); 5/12-2(a)(11),(12); 5/12-2(a-5); 5/12-3(a); 5/12-3.1(a); 5/12-3.2(a); 5/12-4(a)(10),(15); 5/12-4(d-3); 5/12-4.3(a); 5/12-7.3(a); 5/12-11.1(a); 5/26-2(a).

⁷⁰ Chapter 720 otherwise treats justifications as affirmative defenses for which the defendant bears the burden of production. *See* 720 ILCS 5/3-2(a) (defendant bears burden of production for affirmative defenses); 5/7-14 (denominating defenses in current Article 7 “affirmative defenses”). Illinois case law and the current pattern jury instructions have concluded that the phrases “without lawful justification” and “without legal justification” describe an affirmative defense, rather than an offense element, so that instructions for murder, attempted murder, or battery need not include the phrase “without lawful justification” or “without legal justification” unless the defendant has properly raised a justification defense. As to battery, *see People v. Sambo*, 554 N.E.2d 1080, 1085 (Ill. App. 1990); *People v. Voda*, 388 N.E.2d 206, 212 (Ill. App. 1979); *People v. Mills*, 374 N.E.2d 233, 235 (Ill. App. 1978); *People v. Looney*, 361 N.E.2d 18, 22 (Ill. App. 1977); *People v. Worsham*, 326 N.E.2d 134, 137 (Ill. App. 1975); *IPJ* (CRIMINAL) 11.05 (4th ed. 2000). As to murder and attempted murder, *see People v. Smith*, 500 N.E.2d 605, 611 (Ill. App. 1986); *People v. McNutt*, 496 N.E.2d 1089, 1096 (Ill. App. 1986); *IPJ* (CRIMINAL) 6.05X (attempted first-degree murder), 7.01 (first-degree murder) (4th ed. 2000).

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 persuasion to the defendant for those defenses. (See proposed Sections 411, 501, and 601 and corresponding commentary.)

Proposed Article 400 alters the language of current Chapter 720 to reflect this understanding of justification defenses: instead of saying “a person is justified” or “a peace officer is justified,” it says “conduct is justified” or “conduct of a peace officer is justified.” (In corresponding fashion, Section 502 and the other provisions in Article 500 use the language “a person is excused . . .” rather than Chapter 720's “a person is not criminally responsible . . .” This language better reflects the distinction between justified conduct and excused persons — a distinction of considerable practical importance. See proposed Sections 411(4), 501(2) and (5), and corresponding commentary.)

Section 411. General Provisions Governing Justification Defenses

Corresponding Current Provision(s): Various; see 720 ILCS 5/7-4; 5/7-5; 5/7-13

Comment:

Generally. This provision sets out several general rules applying to justification defenses. Section 411(1) defines the term “justification defense.” Section 411(2) creates a rule mandating the supremacy of more specific justifications over more general ones. This is because the more specific justifications set out in full the legislative determinations that have

been made regarding liability for specific forms of conduct. To allow a more general provision to supersede or complement the more specific one would enable circumvention of the particular determinations the legislature has made regarding such conduct. At the same time, Section 411(3) 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(4) notes that justified conduct, beyond merely being non-criminal, merits heightened legal status: one person may lawfully assist, and may not lawfully seek to impede, another’s justified conduct. Section 411(5) and (6) cover situations where an actor causes the circumstances that give rise to the justification for his conduct.

Relation to current Illinois law. Section 411(1) through 411(4) have no directly corresponding provisions in current Chapter 720. Section 411(1) defines a justification defense as any defense described in Article 400.

Section 411(2) corresponds to the basic principle of statutory construction that “the specific controls the general.” *See, e.g., People v. Alejos*, 455 N.E.2d 48, 53 (Ill. 1983). Based on this principle, Section 411(2) denies any justification where the legislature has made a more nuanced decision that specific types of conduct are or are not justified, regardless of whether they satisfy the requirements of the more generalized “lesser evils” and public-duty justifications. *See* proposed Section 412 (lesser-evils justification); proposed Section 413 (justification for execution of public duty). For example, Article 400’s provisions governing the defense of property and the use of deadly force together provide that using deadly force to protect only property is never justified. *See* proposed Section 417 (failing to expressly authorize use of deadly force in defense of property); proposed Section 419 (authorizing use of deadly force only to prevent serious bodily injury or commission of forcible felony). Section 411(2) makes clear that — regardless of the monetary value or rarity of the property involved — the lesser-evils justification can never be used to circumvent that rule. Illinois courts have allowed multiple instructions on such asserted justifications, which may inappropriately allow the general justification to “trump” the more narrowly drawn one. *See, e.g., People v. Veatch*, 495 N.E.2d 674, 678 (Ill. App. 1986) (allowing instructions on both “necessity” and “defense-of-another” justifications). Section 411(2) would, however, allow instructions as to both the lesser-evils justification and an asserted *excuse* defense. *See, e.g., People v. Blake*, 522 N.E.2d 822 (Ill. App. 1988) (allowing instruction regarding both “necessity” justification and “compulsion” excuse).

Section 411(3), which provides that multiple justification defenses are available in situations not governed by Section 411(2), is in keeping with the

Illinois courts' general practice, mentioned above, of allowing instructions for more than one justification defense. See Veatch, 495 N.E.2d at 678.

Section 411(4)'s rule that one may not interfere with justified conduct is consistent with current Illinois law. For example, a police officer may use force against one who mistakenly thinks himself to be justified, whereas an aggressor may not use force against one who is in fact justified. See 720 ILCS 5/7-4; 5/7-5. Unjustified conduct also may not be assisted — although the assisting person may be excused based on his own reasonable mistake as to whether his conduct is justified. See People v. Smith, 312 N.E.2d 355, 357 (Ill. App. 1974) (giving defense to person who tried to protect third party from plainclothes police officer based on reasonable belief that third party needed protection from unlawful force).

Section 411(5) and (6) have no directly corresponding provisions in current Chapter 720, but three current provisions discuss the availability of justifications where the actor himself has caused the justifying conditions. See 720 ILCS 5/7-4(b) (use of force not justified where defendant “[i]nitially provokes the use of force . . . with the intent to use such force as an excuse to inflict bodily harm”); 5/7-4(c) (use of force not justified where defendant “[o]therwise initially provokes the use of force against himself”); 5/7-13 (“necessity” defense only available if defendant “was without blame in occasioning or developing the situation”). Section 411(5) and (6) follow the same general rule as those current provisions: where the actor was not culpable in causing the justifying circumstances, he is justified, but where he was culpable, he is not justified. Cf. proposed Section 418 and corresponding commentary; IPI (CRIMINAL) 24-25.11 (4th ed. 2000) (denying justification for use of force where defendant provokes assailant with *intent* to use provoked force as excuse to inflict harm).

Section 411(5) and (6) differ from the current rules governing causing the conditions of one's own justification, however, in three respects. First, the proposed provisions set forth rules applying to justification defenses generally, whereas the current provisions apply only to the self-defense and necessity justifications. This broader scope enables consistent treatment of similar issues. For example, current 5/7-4(b) ostensibly applies to defense of another, but denies a justification defense only where the defendant provokes the use of force “against himself.” Proposed Section 411(6)(a) also clearly denies the defense-of-person justification where the defendant provokes the use of force against *another* — by, for example, accusing that person of a misdeed — as an expedient for justifying his own use of force.

Second, Section 411(5) and (6) provide that the availability of a justification defense uniformly depends on whether the defendant caused the justifying conditions with the culpability required by the charged offense. The current provisions, by contrast, prescribe standards that are inconsistent and problematic. While current 5/7-4(b) narrowly precludes the self-defense justification only where the defendant “provokes” the victim with the “intent” to cause the justifying conditions, current 5/7-13 more broadly bars the necessity defense whenever the defendant is to “blame” in causing

the situation.⁷¹ Section 411(6)(a)'s formulation provides that the culpability required as to causing the justifying conditions should be the same as the culpability requirement(s) of the charged offense.

Finally, Section 411(6)(b) introduces a new rule recognizing the availability of general defenses in cases where the defendant causes the conditions of his own justification defense. Just as a person may have a justification, excuse, or nonexculpatory defense as to the offense itself, it seems appropriate to allow such a defense as to an actor's conduct in causing the conditions of a justification. For example, Section 411(6)(b) might allow a duress defense in a case where one is coerced at gunpoint to cause the conditions of a lesser-evils justification.

Section 412. Lesser Evils

Corresponding Current Provision(s): 720 ILCS 5/7-13

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, an ambulance may exceed the speed limit or pass through a traffic light, or property may be destroyed to prevent the spread of a fire.

Relation to current Illinois law. Section 412(1) and (2) are substantively similar to current 5/7-13, except that Section 412(1) requires that the actor's conduct be *immediately* necessary to avoid the threatened harm. This shifts the requirement of immediacy from the threat, see *People v. Kite*, 605 N.E.2d 563, 566 (Ill. 1992) (requiring proof of "specific and immediate" threat as threshold requirement), to the 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.

⁷¹ Section 418(1), like current 5/7-4(c), precludes justification defenses for one who "initially provokes" the use of force against himself, except under certain limited circumstances. Section 418(1) does not itself justify any conduct, but rather serves as a limitation on justification defenses described elsewhere in Article 400. Although Section 411(5) and (6) may overlap with Section 418(1) to some extent, they do not preempt Section 418(1).

Section 412(3) has no corresponding provision in current Chapter 720. Like Section 411(2) (q.v.), Section 412(3) follows the principle of statutory construction, generally recognized by Illinois courts, that “the specific controls the general.” See, e.g., *People v. Alejos*, 455 N.E.2d 48, 53 (Ill. 1983). Based on this principle, Section 412(3) denies the general lesser-evils justification where the legislature has already made a more particular determination regarding the interests involved. For example, Section 412(3) would deny the lesser-evils defense where an inmate has escaped from a correctional institution to avoid poor prison conditions. The legislature’s decision to criminalize escape reflects a determination that the harms of that offense — public fear and institutional disorder — outweigh the harms associated with poor prison conditions.⁷² The proposed limitation ensures that such a legislative determination is not defeated by the actor’s own balancing of the interests involved.

Section 412 omits current 5/7-13’s requirement that defendant must be “without blame in occasioning or developing the situation,” which is instead addressed by proposed Section 411(5) and (6) (q.v.). Current 5/7-13’s “reasonable belief” language is addressed by proposed Section 511’s excuse defense for mistakes as to justifications (q.v.).

Section 413. Execution of Public Duty

Corresponding Current Provision(s): 720 ILCS 5/7-10; see also 720 5/10-5.5(g); 5/11-20.1(b)(3); 5/12-7.2(b); 5/21-1.4(c); 5/24-1.5(d); 5/32-2(d); 125/2; 15 ILCS 335/14(c); 625 ILCS 5/4-103(a)(5); 625 ILCS 5/6-301.2(d)

Comment:

Generally. This provision creates a justification for conduct explicitly allowed by a governmental institution with the lawful power to authorize the conduct. Section 413 incorporates, rather than reiterating, the law governing public duties. Section 413(1) justifies conduct authorized by laws defining the powers and duties of public servants. Section 413(2) provides a defense for conduct authorized by laws governing the execution of legal process. Section 413(3) immunizes conduct sanctioned by a court or tribunal. Finally,

⁷² Section 412(3) would not preclude a lesser-evils defense, however, where a prisoner escapes prison to avoid a more particularized harm not contemplated by the legislature. *Cf.* *People v. Unger*, 362 N.E.2d 319 (Ill. 1977) (holding “necessity” defense was properly raised where defendant was told he was going to be killed just prior to escaping).

Section 413(4) is a catchall provision justifying conduct authorized by other laws imposing public duties.

Relation to current Illinois law. Section 413 expands the justification provided by current 5/7-10, which justifies execution of a death sentence, to offer a justification for any conduct undertaken pursuant to an official public duty or with explicit legal authorization. Section 413 also renders unnecessary numerous offenses’ exemptions, exceptions, and affirmative defenses for conduct authorized by laws imposing public duties. See, e.g., 720 ILCS 5/10-5.5(g); 5/11-20.1(b)(3); 5/12-7.2(b); 5/21-1.4(c); 5/24-1.5(d); 5/32-2(d); 125/2; see also 15 ILCS 335/14(c); 625 ILCS 5/4-103(a)(5); 625 ILCS 5/6-301.2(d).

Section 414. Law Enforcement Authority

Corresponding Current Provision(s): 720 ILCS 5/7-5; 5/7-6; 5/7-8; 5/7-9

Comment:

Generally. This provision creates a justification for conduct — specifically, the use of force — necessary to bring a person into lawful custody, or prevent a person’s escape from custody.

Relation to current Illinois law. Section 414(1) provides a justification for the conduct of a peace officer, or one assisting a peace officer, in making a lawful arrest or detention. Section 414(1)(a) is substantively similar to the first two sentences of current 5/7-5(a), but makes three modifications to the current provision. First, Section 414(1)(a) applies to any “conduct” necessary to effect a lawful arrest *or* “lawful . . . detention,” whereas current 5/7-5(a) much more narrowly justifies only the “use of . . . force” to make lawful arrests. The proposed provision’s broader language makes clear that the justification applies to conduct other than force — so that a peace officer is also justified in, for example, trespassing or speeding to effect an arrest — and that the justification applies to such non-arrest detentions as Terry stops.

Second, Section 414(1)(a) omits as unnecessary the “need not retreat . . .” language of current 5/7-5(a)’s first sentence, which merely makes a general statement without elaborating an actual justification; it is 5/7-5(a)’s second sentence that defines the scope of the justification.

Third, Section 414(1)(a) omits current 5/7-5’s requirement of a “reasonable belief” that an arrest is necessary in recognition of the applicability of proposed Section 511’s excuse defense for mistakes as to justifications (q.v.).

Section 414(1)(b), governing the use of severe force in connection with arrests, is substantively the same as current 5/7-5(a)(1) and (2), but uses

the phrase “create a risk” rather than “endanger.”⁷³ The defense-of-person language in 5/7-5(a)’s second and third sentences is addressed by proposed Section 416 and 419 (q.v.).

Section 414(1)(c)’s rule governing arrests pursuant to invalid warrants is nearly identical to current 5/7-5(b), but reaches all conduct rather than only the use of force. Section 414(1) generally omits current 5/7-5’s “reasonable belief” aspects, as those are addressed by proposed Section 511 (q.v.).

Section 414(2) provides a justification for the conduct of a private person making a lawful arrest⁷⁴ when not summoned or directed by a peace officer. Section 414(2)(a) is substantively similar to current 5/7-6(a)’s rules governing lawful arrests by citizens, with three differences. First, Section 414(2)(a) justifies the use of deadly force only if it is “immediately” necessary to prevent death or great bodily harm to oneself or another; this modification brings 414(2)(a)’s language into conformity with Section 419’s general rules governing the use of severe force. Cf. commentary for proposed Section 412(1).

Second, Section 414(2)(a) justifies any conduct, whereas current 5/7-6(a) immunizes only the “use of force.” Section 414(2)(a)’s broader language makes clear that conduct such as trespassing may also be justified even though it does not amount to “force.”

Finally, as with Article 400’s other provisions, Section 414(2)(a) omits 5/7-6(a)’s “reasonable belief” language in recognition of Section 511 (q.v.).

Section 414(2)(b) is substantively the same as current 5/7-6(b), but more broadly applies to “conduct” rather than the “use of force.”

Section 414(3) provides a justification defense for conduct necessary to prevent escape. Section 414(3)(a) is substantively similar to current 5/7-9, but explicitly covers lawful detentions, clarifies that the justification applies where an offender escapes from an officer’s “presence” — that is, before

⁷³ Like current Illinois law, Article 400 may appear to impose more stringent requirements for a peace officer’s use of severe force to prevent an offense than for a private citizen’s use of such force for the same purpose. Whereas Section 419(2), current 5/7-1, and current 5/7-3 allow a private citizen to use deadly force to prevent the commission of *any* forcible felony, Section 414(1)(b)(ii)(A) and current 5/7-5(a)(2) justify the use of severe force only where the arrestee has attempted or committed a forcible felony that “involves the infliction or threatened infliction of great bodily harm.” The latter standard is based on the United States Supreme Court’s pronouncements concerning the constitutionality of the use of severe force under the Search and Seizure Clause. See Tennessee v. Garner, 471 U.S. 1, 11-12 (1985) (“Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape . . .”).

⁷⁴ As under current law, whether an arrest is “lawful” for purposes of Section 414(2) is governed by 725 ILCS 5/107-3, which provides that a private person “may arrest another when he has reasonable grounds to believe that an offense other than an ordinance violation is being committed.” See People v. Perry, 327 N.E.2d 167, 170 n. 3 (Ill. App. 1975) (stating that current 5/7-6 only applies to arrests that are lawful under 725 ILCS 5/107-3).

formal “custody” has been established — and covers “conduct” that may not constitute the use of force.

Section 414(3)(b) is substantively similar to current 5/7-9(b), but requires that the use of deadly force be “immediately” necessary to prevent escape, uses “conduct” rather than “use of force,” omits the current provision’s “reasonable belief” elements in light of proposed Section 511, and uses the defined term “correctional officer” rather than the undefined term “guard.”

Section 414(4)(a) defines “correctional officer” in a manner similar to current 5/31-1(b)’s definition of “correctional institution employee,” but uses the term “correctional institution” rather than reiterating the particular kinds of correctional institutions that are included in Section 5309(2)(a)’s definition of that term.

Section 414(4)(b)’s definition of “force likely to cause death or great bodily harm” is substantively the same as current 5/7-8.

Section 415. Use of Force by Persons with Special Responsibility for Care, Discipline, or Safety of Others

Corresponding Current Provision(s): 730 ILCS 5/3-6-4(b); see also 720 ILCS 5/12-4(c); 5/12-4.9; 5/12-10.1; 5/12-18(b); 5/12-19(a); 5/12-21(d); 5/12-33(b); 5/12-34

Comment:

Generally. This provision creates a justification for the use of force by those charged with a special responsibility for others. 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 article.⁷⁵ 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.⁷⁶

⁷⁵ 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.

⁷⁶ Note that, as with Article 400’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 Illinois law. Section 415(1) provides a justification defense for persons responsible for the care and supervision of children and mentally handicapped persons.⁷⁷ Section 415(1) has no corresponding statutory provision, but, with respect to children, is in keeping with Illinois cases stating that a parent or teacher is subject to criminal liability for discipline or punishment only if it is “unreasonable.” See People v. Ball, 317 N.E.2d 54, 57 (Ill. 1974) (“[S]ince teachers by statute stand *In loco parentis* in matters of discipline of students within their charge in the schools, we think it follows that teachers should be subject to the same standard of reasonableness which has long been applicable to parents in disciplining their children.”); People v. Walker, 473 N.E.2d 995, 997 (Ill. App. 1985) (“A parent’s right to exercise authority over a child is broad, but it is not absolute. In matters of discipline or punishment a standard of reasonableness has been applied to determine whether a parent’s conduct . . . was legally justified and authorized by law.”).

Section 415(2)’s justification defense applies to medical treatment by doctors and other licensed medical professionals. Although Section 415(2) has no directly corresponding provision in current Chapter 720, current Illinois law recognizes medical exceptions for several specific offenses that are similar to the proposed provision. See 720 ILCS 5/12-4(c); 5/12-4.9; 5/12-10.1; 5/12-18(b); 5/12-19(a); 5/12-21(d); 5/12-33(b); 5/12-34.

Section 415(3) immunizes the use of force by a correctional officer to enforce the rules or procedures of a correctional institution. Section 415(3) is substantively similar to current 730 ILCS 5/3-6-4(b)’s rule authorizing correctional employees to use “all suitable means to . . . enforce the observance of discipline” in correctional institutions, but omits the current provision’s language regarding “attempts to injure in a violent manner,” property damage, and escape. Those rules are instead covered by Article 400’s defense-of-person, defense-of-property, and law-enforcement-authority justifications. See proposed Sections 414, 416, and 417 and corresponding commentary.

Section 415(4) and (5) provide justification defenses for persons who are responsible for the safety of, or required to maintain order in, public vehicles and common carriers. Section 415(4) and (5) have no corresponding provisions in current Chapter 720, but Illinois cases have recognized defenses for such persons. See, e.g., People v. Ibom, 185 N.E.2d 690, 695 (Ill. 1962) (“That a passenger upon a public vehicle or common carrier may not remain thereon without payment of the established fare, and that the employee of the carrier in charge of the vehicle may request the nonpaying passenger to leave and insist that he do so, even to the point of using such force as may be reasonably necessary to accomplish the eviction, is the settled law of this State.”).

⁷⁷ Section 415(1)(b) applies to those responsible for the care of mentally handicapped persons of any age, but is not intended to preclude the concurrent availability of Section 415(1)(a) where one is responsible for a person who is both mentally handicapped *and* a minor.

Section 416. Defense of Person

Corresponding Current Provision(s): 720 ILCS 5/7-1

Comment:

Generally. This provision entitles a person to use force to protect himself or another from physical attack.

Relation to current Illinois law. Section 416(1) is substantively similar to the first sentence of current 5/7-1,⁷⁸ with three differences. First, Section 416(1) replaces the current provision's requirement that the other person's use of force be "imminent" with the requirement that the use of force be "immediately necessary." The proposed language recognizes that response to some threats may be appropriate, and even necessary, before they become "imminent." For example, a kidnapping victim whose kidnaper threatens to kill him after a week does not face an imminent threat until the moment the kidnaper advances to kill him, but at that point, he may not have an opportunity to defend himself or escape. (See also commentary for proposed Section 412.)

Second, Section 416(1) differs from current 5/7-1 in justifying the use of force to defend oneself or another from "unjustified," rather than "unlawful," force. Current Chapter 720 does not define "unlawful," but the commentary for the original 1961 Code states that the drafters intended a very broad understanding of the term that would include conduct that "constitutes either a tort or an offense (or an element thereof) or both." 720 ILL. COMP. STAT. ANN. 5/7-1 Committee Comments at 293 (West 1993). The current provision's language improperly suggests that even *justified* conduct may be lawfully resisted if it is "unlawful" in some respect. Yet this is not the case: for example, under both current 5/7-7 and proposed Section 418(2), an unlawful arrest (which might sometimes even amount to a tort) would still be justified and could not ordinarily be resisted lawfully. Section 416's use of the term "unjustified" as defined in Section 416(2) more clearly defines the defense-of-person justification without the need to resort to tort-law concepts.

Third, Section 416(1) omits current 5/7-1's "reasonable belief" element, which is instead addressed by proposed Section 511's excuse defense for mistakes as to justifications. See proposed Section 511 and corresponding commentary.

Section 416(2), defining "unjustified" conduct, has no corresponding provision in current Chapter 720. Section 416(2)'s definition makes clear that conduct is "unjustified" where it satisfies the *objective* elements of an offense (i.e., those elements that relate strictly to objective facts and not to the person's mental state) and does not satisfy the requirements of a defense in Article 400.

⁷⁸ Proposed Section 419 covers the material appearing in current 5/7-1's second sentence. See proposed Section 419 and corresponding commentary.

Section 417. Defense of Property**Corresponding Current Provision(s):** 720 ILCS 5/7-2; 5/7-3**Comment:**

Generally. This provision entitles the owner of property, or someone with a special relation to the owner, to use force to protect property from invasion, destruction, or theft.

Relation to current Illinois law. Section 417 merges the justifications provided in the first sentences of current 5/7-2 and 5/7-3, and largely tracks the language of 5/7-3. Section 5/7-2's language — requiring “unlawful entry into or attack upon a dwelling” — is captured by Section 417's requirement of “unjustified trespass on or other unjustified interference with” property. Section 417 also differs from current 5/7-3 in using “unjustified” rather than “tortious or criminal”; requiring that the use of force be “immediately” necessary; applying to property in the possession of any, rather than only an “immediate,” family or household member; and omitting the current provision's “reasonable belief” elements, which are instead covered by proposed Section 511 (q.v.).

The second sentences of 5/7-2 and 5/7-3 are covered by proposed Section 419's rules governing the use of force likely to cause death or great bodily harm (q.v.).

Section 418. Use of Force by Aggressor or Arrestee**Corresponding Current Provision(s):** 720 ILCS 5/7-4; 5/7-7**Comment:**

Generally. This provision denies a justification for an aggressor who provokes another's use of force as a makeweight to justify his own, and for one resisting an arrest.

Relation to current Illinois law. Section 418(1) limits the availability of justification defenses for one who initially provokes the use of force against himself.⁷⁹ Section 418(1) is substantively similar to current 5/7-4(c), except that, as makes logical sense, it applies to all justifications, rather than only those regarding defense of person or property.

Section 418(1)(a), like current 5/7-4(c)(1), generally denies a justification defense to an aggressor, but permits the use of severe force in certain situations where another responds to the use of nondeadly force with severe force. Section 418(1)(a) omits current 5/7-4(c)(1)'s “reasonable

⁷⁹ Importantly, Section 418 does not itself justify any conduct, but rather *limits* justifications afforded by other provisions in Article 400. Section 418(1)(a), for example, would not justify a fleeing felon's use of retaliatory force against a peace officer who has placed him in “imminent danger of death or great bodily harm.”

belief” language as unnecessary in light of proposed Section 511’s excuse defense for mistakes as to justifications (q.v.), and omits the phrase “other than the use of force which is likely to cause death or great bodily harm to the assailant” as superfluous.

Section 418(1)(b) is identical to current 5/7-4(c)(2).

Section 418(2) is substantively similar to current 5/7-7 in making clear that a justification defense is ordinarily unavailable to one resisting even an unlawful arrest, but allows one to resist unjustified, severe force where “he has exhausted every less harmful means to escape such danger.” Section 418(2)’s rule is in keeping with Section 418(1)(a) and current 5/7-4(c)(1), which both allow an initial aggressor who is faced with severe force a justification under the same conditions.

Section 418 omits current 5/7-4(a) and (b). Section 418(1)’s rules governing the use of force by one who “initially provokes” the use of force against himself covers current 5/7-4(a), which denies a justification defense to one who is attempting, committing, or escaping from a forcible felony. Section 411’s rules governing culpably causing the conditions of one’s justification cover 5/7-4(b), which provides that justification defenses are unavailable to one who provokes the use of force against himself “with the intent to use such force as an excuse to inflict bodily harm.” See proposed Section 411(6) and corresponding commentary.

Section 419. Use of Force Likely to Cause Death or Great Bodily Harm

Corresponding Current Provision(s): 720 ILCS 5/7-1 to 5/7-3; see also 720 ILCS 5/7-5; 5/7-6

Comment:

Generally. This provision limits the scope of Article 400’s justifications to impose restrictions on the use of severe force.⁸⁰

Relation to current Illinois law. Section 419 corresponds to provisions included in current 5/7-1 to 5/7-3, and also covers language regarding the use of severe force in defense of persons appearing in 5/7-5 and 5/7-6. Section 419 replaces 5/7-2’s reduced requirements for use of deadly force in defense of a dwelling, which allow such force to prevent any “assault . . . or offer of personal violence” rather than only to prevent death or great bodily harm, or to prevent any felony instead of only forcible felonies. That standard is inconsistent with the standard for justified conduct expressed in the other provisions cited above.

Section 419 largely tracks the standards for the use of severe force set forth in 5/7-1, 5/7-3, 5/7-5, and 5/7-6, with three differences. First, Section

⁸⁰ Like Section 418, Section 419 does not independently authorize the use of force, but rather limits justification defenses afforded elsewhere in Article 400.

419 omits the current provisions' "reasonable belief" language, which is instead covered by proposed Section 511's excuse defense for mistakes as to justifications. See proposed Section 511 and corresponding commentary. Second, Section 419 requires that severe force be "immediately necessary" to prevent serious injury or a forcible felony, whereas the current provisions inconsistently require that such force be merely "necessary" or "necessary to prevent imminent . . . harm." See proposed Section 412 and corresponding commentary. Finally, Section 419 uses the defined phrase "force likely to cause death or great bodily harm," whereas current 5/7-1 to 5/7-3 use the undefined "force which is intended or likely to cause death or great bodily harm."⁸¹

Section 420. Definitions

Corresponding Current Provision(s): 720 ILCS 5/2-7.5; 5/2-8; 5/2-13; 5/2-14; 5/2-17; 5/2-18; 5/7-8; 5/12-7.3(h); 5/31-1(b); 5/31A-1.1(c)(1); 725 ILCS 5/112A-3(3)

Comment:

Generally. This provision collects defined terms used in Article 400 and provides cross-references to the provisions in which they are defined.

Relation to current Illinois law. For discussion of the relationship between Article 400's defined terms and current law, refer to the commentary for the provision in which each term is initially defined.

⁸¹ Current 5/7-8's definition for the phrase "force likely to cause death or great bodily harm" is substantively the same as proposed Section 414's definition. Because current 5/7-8's definition is limited to the phrase's use in current 5/7-5 and 5/7-6, however, the meaning of the similar phrase "force which is intended or likely to cause death or great bodily harm" is unclear.

ARTICLE 500. EXCUSE DEFENSES

Section 501. General Provisions Governing Excuse Defenses

Corresponding Current Provision(s): 720 ILCS 5/6-2(e); 5/6-4

Comment:

Generally. Section 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 for proposed Section 411.)

Section 501(1) defines an “excuse defense” as any defense defined in Article 500.

Section 501(2) makes clear that excuses differ from justifications; justified conduct may be assisted and may not be resisted,⁸² 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.

Section 501(3) and (4) 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. 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,⁸³ 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. (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 Section 501(3) and (4), be eligible for liability only for offenses requiring recklessness.)

⁸² See proposed Section 411 and corresponding commentary.

⁸³ See *infra* proposed Section 507 and corresponding commentary.

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(4) 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 effectively 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(4)(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 example above 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(5) 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(6) states that the defendant has the burden of proving an excuse defense by a preponderance of the evidence.

Relation to current Illinois law. Section 501(1) to (5) have no corresponding provisions in current law. Illinois courts have, contrary to Section 501(3) and (4), refused to allow a compulsion defense when it arises from the defendant's own negligence or fault. See People v. Humphries, 630 N.E.2d 104, 111 (Ill. App. 1994); People v. Lee, 408 N.E.2d 335, 344 (Ill. App. 1980), rev'd on other grounds, 429 N.E.2d 461 (Ill. 1981); People v. Rodriguez, 332 N.E.2d 194, 196 (Ill. App. 1975). As discussed above, the proposed Code would impose liability only when the defendant acted with the culpability required by the offense at the time he caused the excusing condition. Where a defendant was negligent as to causing the circumstances of duress, liability would be possible only for offenses whose culpability requirements are satisfied by negligence, such as negligent homicide.⁸⁴

The current rule requiring the defendant be without negligence or fault in causing his own duress defense seems to be concerned with the potential for defendants to abuse the defense. In other words, the courts in those cases did not really seem to consider the defendant's asserted duress defense to be legitimate in the first place. See, e.g., Humphries, 630 N.E.2d at 111 (rejecting defendant's compulsion defense because defendant failed to show he was threatened with imminent harm at the time he committed the

⁸⁴ See proposed Section 1105 and corresponding commentary.

offense); Lee, 408 N.E.2d at 343 (noting that “there is serious doubt whether the defense of compulsion is applicable in a murder prosecution” and finding that defendant’s testimony failed to establish the “some evidence” necessary to have the jury instructed on the compulsion defense); Rodriguez, 332 N.E.2d at 196 (finding no evidence that defendant was ever threatened with bodily harm). In those cases, the excuse under Section 507 would not be available regardless of the circumstances leading to the “duress,” because the excuse’s requirements would not be satisfied. But in the rare case where the defendant is able to show he truly was forced to commit the offense, and was unable to control his conduct, he should not face liability unless he culpably created the circumstances leading to his duress.⁸⁵

Section 501(6) adopts a “compromise position” between current 5/6-2(e) and 5/6-4, as it places the burden of persuasion on the defendant to prove an excuse defense by a preponderance of the evidence. Under current law, the defendant must prove the insanity defense by clear and convincing evidence, but all other excuses must be disproved by the state beyond a reasonable doubt once the defendant has introduced some evidence on the issue. (For a description of the difference between the “preponderance” standard and the “clear-and-convincing” standard, see IPI (CRIMINAL) 4.18, 4.19 (4th ed. 2000).) 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 Code considers it appropriate to shift the burden to the defendant for excuses. At the same time, there does not appear to be any particular reason to require proof by clear and convincing evidence, rather than simply a preponderance. For example, approximately one percent of felony cases rely on an insanity defense, and only about 25 percent of those are successful — even though some states do not shift the burden of proof for the insanity defense at all. See Lisa A. Callahan et al., The Volume and Characteristics of Insanity Defense Pleas: An Eight-State Study, 19 BULL. AM. ACAD. PSYCHIATRY & L. 331 (1991).

⁸⁵ Note that proposed Section 501(6) places the burden of persuasion on the defendant to prove duress, or any other excuse defense, by a preponderance of the evidence. This is a higher burden for the defendant than under current law, which only requires that the defendant produce “some evidence” to raise the defense, then requires the State to disprove the defense beyond a reasonable doubt. See People v. Colone, 372 N.E.2d 871 (Ill. App. 1978).

Section 502. Involuntary Acts; Involuntary Omissions**Corresponding Current Provision(s):** 720 ILCS 5/4-1**Comment:**

Generally. Section 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 Illinois law. Section 502 takes the voluntariness element from current 720 ILCS 5/4-1 — the rest of which is addressed in proposed Section 204 (q.v.) — 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 — it applies when special conditions or circumstances demonstrate an actor's blamelessness for a violation of the rules of conduct. Although current Chapter 720 merges voluntariness with the act requirement, Illinois 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, e.g., People v. Grant*, 377 N.E.2d 4, 8 (Ill. 1978) (recognizing a defense, separate from insanity, of involuntary conduct, but finding trial court did not err in failing to instruct jury on the defense *sua sponte*); *People v. Wirth*, 395 N.E.2d 1106, 1110 (Ill. App. 1979) (finding insufficient evidence to support defendant's proffered instruction on an involuntary act defense).

Section 502(1) defines involuntary acts as acts that are “not a product of the person's effort or determination.” Current Chapter 720 offers no definition of “voluntary” or “involuntary,” but the Illinois Supreme Court has referred to involuntary acts as those which a person “lacks the volition to control or prevent.” *Grant*, 377 N.E.2d at 8.

Section 502(2)(a), like current 5/4-1, provides a defense to persons who are incapable of performing a required act. The proposed provision

expands the current rule to include cases where the person is mentally incapable of performing, or otherwise cannot reasonably be expected under the circumstances to perform, the omitted 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 (q.v.).

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 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 medically demonstrable physiological disease or defect, rather than a “mental disease or defect” as in insanity, that negates the person's blameworthiness. This provision recognizes that there can be physiological causes of the kind of dysfunction that merits an excuse, like epilepsy, 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 “involuntary act” excuse 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 Illinois law. No provision in current Chapter 720 corresponds to Section 503, whose form is very similar to proposed Sections 504 and 506 (q.v.). Illinois case law, however, hints at the desirability of a specific defense of this kind. Courts have struggled to consider cases of the type Section 503 covers within the confines of the “automatism” defense or the insanity defense. See, e.g., People v. Grant, 377 N.E.2d 4, 7-9 (Ill. 1978) (epilepsy).

Section 504. Insanity**Corresponding Current Provision(s):** 720 ILCS 5/6-2**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 Illinois law. Section 504(1) and (2) correspond to 5/6-2(a), but are worded more precisely. Section 504(2)(a) covers the presumably uncontroversial situation where the person literally does not know what he is doing — or does not know the situation in which he is doing it. Section (2)(b) substantively corresponds to current 5/6-2(a), under which a defendant is excused if “he lacks substantial capacity to appreciate the criminality of his conduct.” The current wording is nebulous, for it leaves open the question of how great a capacity is “substantial capacity,” and it uses the undefined word “appreciate” rather than a clearer word such as “know.” Section (2)(c) is a variation on language (“lacks substantial capacity to . . . conform his conduct to the requirements of law”) that was recently deleted from 5/6-2(a). See PUB. ACT 90-593 (1998). This standard merits re-inclusion, as it covers persons who in the abstract are clearly not blameworthy, and there is no demonstrated risk that inclusion of such a standard in the insanity defense will lead to inappropriate acquittals — or, indeed, that it will change the outcome of insanity-defense cases at all. (See commentary for proposed Section 501.) Moreover, to the extent concern exists that the insanity defense is subject to abuse, such concern should lie with the relatively broad “capacity” aspect of the defense rather than the narrow “volitional” rule. Further, current Illinois law recognizes a volitional-impairment defense where the impairment results from involuntary intoxication, see 720 ILCS 5/6-3(b); it is inconsistent to deny the defense where the impairment arises from the defendant’s mental illness. Cf. 720 ILCS 5/7-11 (providing a defense where a defendant is unable to control his conduct due to compulsion). Research demonstrates strong public support for an excuse covering persons whose mental illness impairs their ability to control their conduct; abolition of the “volitional” aspect of the insanity defense therefore controverts popular sentiment without conveying any legitimate benefit.⁸⁶

Section 504(3)(a) is the same as current 5/6-2(b). Section 504(3)(b) explicitly excludes from the definition of “mental disease or defect” intoxication, which other proposed provisions address. (See proposed Sections 302 and 506 and corresponding commentary.)

⁸⁶ See, e.g., PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY AND BLAME 128-39 (1995); Daniel S. Bailis et al., Community Standards of Criminal Liability and the Insanity Defense, 19 LAW & HUM. BEHAV. 425 (1995).

Section 504 does not include the “guilty but mentally ill” (GBMI) provisions in current 5/6-2(c) and (d). The underlying basis for the GBMI verdict — that the insanity defense has been subject to abuse — is empirically unsound. Indeed, following enactment of the GBMI verdict in Illinois, the number of insanity acquittals actually increased. See Christopher Slobogin, The Guilty But Mentally Ill Verdict: An Idea Whose Time Should Not Have Come, 53 GEO. WASH. L. REV. 494, 507 (1985). (See also commentary for proposed Section 501.) 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.⁸⁷ 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. (Note, however, that although the GBMI verdict raises significant policy concerns, it has recently been held constitutional by the Illinois Supreme Court. See People v. Lantz, 712 N.E.2d 314, 320-22 (Ill. 1999).)

As to the burden of proof for insanity (current 5/6-2(e)), see commentary for proposed Section 501(6).

Section 505. Immaturity; Transfer to Juvenile Court

Corresponding Current Provision(s): 720 ILCS 5/6-1

Comment:

Generally. This provision creates a “defense” for persons whose immaturity prevents them from understanding the wrongfulness or nature of their conduct. Any person under the age of 18 who is found to be immature is automatically transferred to juvenile court.

Relation to current Illinois law. Section 505 replaces the “all-or-nothing” immaturity defense of 5/6-1 — according to which any person under age 13 is conclusively deemed immature, while any person over that age is conclusively deemed mature — with a more nuanced approach. The proposed provision lowers to 12 the age at which a defendant receives a conclusive presumption of immaturity. It also provides a presumption of immaturity for defendants under age 16, but requires those defendants

⁸⁷ Note that a finding of GBMI does not even require treatment in all cases. Rather, the Department of Corrections is only required to conduct a “periodic inquiry” into the inmate’s mental illness and may provide any level of treatment, including no treatment, as “it determines necessary.” See 730 ILCS 5/5-2-6(b).

to show that their immaturity prevented them from appreciating the wrongfulness or consequences of their actions. Defendants over age 16 are given no presumption, 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(6)) that they are entitled to it.

Section 505 governs only the treatment of juveniles in *adult* court and should have no impact on proceedings in *juvenile* court. Thus, Section 505 is not anticipated to interfere with the jurisdictional or other rules set out in the Juvenile Court Act of 1987. See 705 ILCS 405/1-1 et seq.

Section 506. Involuntary Intoxication

Corresponding Current Provision(s): 720 ILCS 5/6-3(b)

Comment:

Generally. Section 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 Illinois law. Section 506 is substantively similar to current 5/6-3(b), but replaces the negative phrasing of 5/6-3(b) (“is responsible . . . unless”) with a more direct statement (“is excused . . . if”). Cf. IPI (CRIMINAL) 24-25.03 (4th ed. 2000) (stating that a person “is not criminally responsible for his conduct if” involuntarily intoxicated). The precise formulation of the excuse standard in Section 506(2) has been altered in a fashion that parallels the alteration for the insanity defense set out in proposed Section 504 (q.v.). (The voluntary intoxication rule of 5/6-3(a) is in fact a rule of imputation of an offense element and is addressed in proposed Section 302 (q.v.).) Section 506(4) makes clear that, as with other excuse defenses, a person may be liable for an offense if he is culpable in causing his own involuntary intoxication. See supra proposed Section 501(4) and corresponding commentary.

Section 507. Duress

Corresponding Current Provision(s): 720 ILCS 5/7-11

Comment:

Generally. Section 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 Illinois law. Section 507 is similar to current 5/7-11, but creates a “sliding scale” for duress rather than a fixed standard for the necessary level of compulsion. Current law requires “compulsion of threat or menace of the imminent infliction of death or great bodily harm.”

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(1) requires “a 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. 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.

For example, current law denies the duress defense in cases of murder. See 720 ILCS 5/7-11 (barring defense for “an offense punishable with death”); People v. Gleckler, 411 N.E.2d 849, 854 (Ill. 1980). In nearly all cases, the proposed list of factors would lead the factfinder to deny the defense for such a serious offense. However, unlike current law, Section 507 would allow the defendant to assert a defense in the rare case (e.g., defendant faces a serious threat of death to himself and his family if he does not obey) where the defendant is able to prove by a preponderance of the evidence that a person of reasonable firmness would have been unable to resist the threat and would have committed the offense. Likewise, current 5/7-11 precludes the defense in cases where someone other than the defendant is threatened with harm; the proposed provision would allow the defendant the opportunity to prove to the factfinder that a reasonable person in his position would have acted similarly.⁸⁸

Section 508. Ignorance Due to Unavailable Law

Corresponding Current Provision(s): 720 ILCS 5/4-8(b)(1)

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

⁸⁸ As discussed above, the proposed Code also abandons the rule, established in case law, that a person may not assert a duress defense if he was negligent or “at fault” in causing the circumstances of the duress. However, a person may be liable for an offense if he causes the excusing condition while acting with the culpability required by the offense. See supra commentary for Section 501(4).

where the defendant did not know, and could not reasonably have known, that his conduct was criminal.

Section 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.

Relation to current Illinois law. Section 508 corresponds to current 5/4-8(b)(1), but is broader, as it includes any unavailable law, rather than only administrative regulations or orders. The same fairness concerns apply with equal force to any other statement of the law as to the forms of statement included in 5/4-8(b)(1).

Section 508(4) reorganizes the elements of the defense in 5/4-8(b)(1) into a set of factors for the court to consider in deciding whether the law was made available to the reasonable person. The factors in Section 508(4) 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. See commentary for proposed Section 507.

Section 509. Reliance Upon Official Misstatement of Law

Corresponding Current Provision(s): 720 ILCS 5/4-8(b)(2)-(4)

Comment:

Generally. Section 509, like Section 508 (q.v.), 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 Illinois law. Section 509 is substantively similar to current 5/4-8(b)(2)-(4). However, like proposed Section 508, Section 509 reorganizes the elements of the defenses in subsections (b)(2) to (4) into a set of factors for the court to consider. This approach does not draw fixed, arbitrary lines as current law does. For example, under current law, based on an interpretation of the term "public officer" in 5/4-8(b)(4), a person may reasonably rely on the official statement of an administrative agency, but may not rely on the official statement of a circuit judge. See *People v. Knop*, 557 N.E.2d 970, 974-75 (Ill. App. 1990). See commentary for proposed Section 507.

Section 510. Reasonable Mistake of Law Unavoidable by Due Diligence

Corresponding Current Provision(s): None

Comment:

Generally. Section 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(6)) 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 Illinois law. Section 510 has no corresponding provision in current Chapter 720.

Section 511. Mistake as to a Justification

Corresponding Current Provision(s): Various; see 720 ILCS 5/7-1, -2, -3, -5, -6, -9, -13

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.

Relation to current Illinois law. Section 511 has no single corresponding provision in current law, but reflects a rule embodied in Chapter 720's provisions covering specific justifications, which are defined to require that the actor "reasonably believes" himself to be justified. See 720 ILCS 5/7-1, -2, -3, -5, -6, -9, -13. A defense for some actors who mistakenly believe themselves to be justified is appropriate, but is more properly addressed by means of a separate provision such as Section 511, for at least two reasons. First, the rationale for this defense relates to the actor's mental state, not to whether the act itself is objectively justified; therefore, this defense is more appropriately treated as an excuse rather than as a justification. Second, the current Chapter 720 formulation requiring "reasonable belief" in a justification means that an honest, but negligent, belief that one's conduct is justified may give rise to criminal liability. Negligence liability is generally considered inappropriate, especially for serious offenses, and justifications frequently apply to serious offenses.

Section 511(1) and (2) provide that the requisite culpability level as to one's mistaken belief that one is justified should parallel the culpability level imposed by the underlying offense itself. Accordingly, in some circumstances even an unreasonable belief that one is justified may enable a defense that precludes or mitigates liability. Cf. 720 ILCS 5/9-2(a)(2) (providing mitigation from first-degree to second-degree murder based on *unreasonable* belief that use of force is justified). For example, a person who kills another while under the reckless belief that the act is in self-defense may have an excuse defense to intentional murder under proposed Section 1101, but may still be liable for reckless homicide under proposed Section 1104.

Section 511(3) defines the term “primary culpability required by the offense charged.” Because different elements of an offense may have different culpability requirements, it is necessary to make clear which element of the offense governs whether a person’s mistake as to a justification will excuse his conduct. Section 511(3) provides that in cases involving an offense with a result element, the relevant culpability level is that required by the result element (e.g., for reckless homicide, recklessness as to causing death). Where the offense has no result element, the primary culpability is that required for the circumstance element most central to the harm or wrong sought to be prohibited by the offense (e.g., for the terroristic threats offense, see proposed Section 1203, recklessness as to terrorizing another person).

Section 512. Definitions

Corresponding Current Provision(s): 720 ILCS 5/6-2

Comment:

Generally. This provision collects defined terms used in Article 500 and provides cross-references to the sections in which they are defined.

Relation to current Illinois law. For a discussion of the relationship between Article 500’s defined terms and current law, refer to the commentary for the provision in which the term is initially defined.

ARTICLE 600. NONEXCULPATORY DEFENSES

Section 601. General Provisions Governing Nonexculpatory Defenses

Corresponding Current Provision(s): None

Comment:

Generally. Section 601 describes the rules that govern the operation of the nonexculpatory defenses set out in Article 600. Section 601(1) defines “nonexculpatory defense.” Section 601(2) and (3) parallel proposed Section 501(2) and (5). Conduct subject to a nonexculpatory defense (such as conduct by one who has been entrapped) 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(4) provides a general rule that the defendant must prove all nonexculpatory defenses by a preponderance of the evidence. Current Illinois law shifts the burden of persuasion to the defendant, and requires clear and convincing evidence, 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(5) specifies that, unless expressly provided otherwise, 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 Illinois law. Section 601 has no directly corresponding provision in current Chapter 720, which does not recognize nonexculpatory defenses as a distinct class of defenses. However, Illinois courts have addressed the issue raised in Section 601(4) for the specific nonexculpatory defenses of statute of limitation⁸⁹ and

⁸⁹ See *People v. Morris*, 554 N.E.2d 150, 153 (Ill. 1990) (“Where an indictment on its face shows that an offense was not committed within the applicable limitation period, it becomes an element of the State’s case to allege and prove the existence of facts which invoke

(continued...)

entrapment.⁹⁰ Both defenses are currently treated as standard affirmative defenses for which the defendant must raise the defense, but the State has the burden of proving beyond a reasonable doubt that the defenses do not exist.

In the absence of a provision similar to Section 601(5), nonexculpatory defenses are sometimes resolved by the court, and sometimes by the jury, under current Illinois law. See 725 ILCS 5/114-1(a)(2) (authorizing court to dismiss charge where prosecution barred by former prosecution or statute of limitation); IPI (CRIMINAL) 24-25.04 (4th ed. 2000) (jury instruction defining entrapment); 24-25.23 (jury instruction for prosecutions under exception to statute of limitation).

Section 602. Prosecution Barred if Not Commenced Within Time Limitation Period

Corresponding Current Provision(s): 720 ILCS 5/2-16; 5/3-5 to -8;
725 ILCS 5/111-1; 5/111-2

Comment:

Generally. Section 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 have committed serious crimes.

Relation to current Illinois law. Section 602(1) sets time limitations for prosecutions according to offense grades. This organization assures that the time limitation for bringing a prosecution corresponds to the seriousness of the offense. In contrast, current 5/3-5(a) sets limitation periods by providing lists of specific crimes.⁹¹ That organization creates the risk that serious crimes,

⁸⁹ (...continued)

an exception to the limitation period.”); People v. Gwinn, 627 N.E.2d 699, 701 (Ill. App. 1994) (citing 725 ILCS 5/114-1(a)(2) and (b) for proposition that defendant is required to raise issue or risk waiving the defense); People v. Clark, 389 N.E.2d 911, 931 (Ill. App. 1979) (State has burden of proving that offense occurred within limitation period).

⁹⁰ See People v. Tipton, 401 N.E.2d 528, 532-33 (Ill. 1980) (once defendant has raised the defense, State must prove beyond reasonable doubt that defendant was not entrapped); People v. Latona, 644 N.E.2d 424, 431 (Ill. App. 1994) (same). The current entrapment defense is codified in Article 7 of the Criminal Code, and thus is treated as an “affirmative defense” for which the prosecution bears the burden of persuasion. See 720 ILCS 5/3-2(b) (“If the issue involved in an affirmative defense . . . is raised then the State must sustain the burden of proving the defendant guilty beyond a reasonable doubt as to that issue together with all the other elements of the offense”); 5/7-14 (“A defense of . . . exoneration[] based on the provisions of this Article is an affirmative defense.”).

⁹¹ In addition, other specific offenses defined outside Chapter 720 contain their own limitation provisions. See, e.g., 35 ILCS 105/14 (establishing 3-year limitation period for violations of Use Tax Act); 35 ILCS 505/15(7) (establishing 5-year limitation period for violations of Motor Fuel Tax Law); 740 ILCS 10/6(2) (establishing 4-year limitation period for violations of Illinois Antitrust Act).

which should be subject to longer limitation periods, will fall under the three-year limitation period in 5/3-5(b). See, e.g., People v. Berg, 660 N.E.2d 1003, 1004 (Ill. App. 1996) (refusing to apply 5/3-5(a)'s rule allowing prosecutions for "arson" to be commenced at any time in case involving *aggravated* arson, because that crime was not specifically listed in 5/3-5(a)).

For many crimes, Section 602(1) extends the limitation period found in 5/3-5. For example, under 5/3-5(b), any felony not listed in 5/3-5(a) is subject to a three-year limitation period, while under Section 602(1) those crimes could be brought within five years, ten years, or at any time, depending on the offense's grade. Similarly, Section 602(1)(d) extends the limitation period for offenses other than felonies from one and a half years to two years.⁹²

Section 602(2) greatly simplifies current 5/3-6's rules governing extended limitation periods. Current law defines extended limitation periods according to specific types of criminal activity, thereby requiring ten different and overlapping subsections. That organization is needlessly confusing. For example, 5/3-6(a)(1), (d), and (j) all apply to crimes involving juvenile victims, and 5/3-6(c), (e), (i), and (j) all apply to sex crimes. Moreover, current law's organization of the extended limitation periods creates the risk that crimes deserving an extended limitation period will be excluded because they are not specifically mentioned in 5/3-6. See, e.g., People v. Sifford, 617 N.E.2d 499, 501 (Ill. App. 1993) (holding that 5/3-6's rule extending limitation period for sexual assault and sexual abuse crimes does not apply to offense of "indecent liberties with a child"). In contrast to current law, Section 602(2) uses only two subsections, covering any crime involving a juvenile victim and any crime whose discovery may have been delayed.

Section 602(3) states more precisely than current 5/3-5(b) exactly when the limitation period begins. Current 5/3-5(b) simply states that a prosecution must be commenced within three years or 18 months after the commission of an offense. Current law's lack of a precise statement regarding the start of the limitation period creates serious ambiguity and has prompted at least one Illinois court to suspend logic in an effort to avoid a limitation defense. See People v. Calderon, 633 N.E.2d 890, 892 (Ill. App. 1994) (limitation period for criminal sexual assault began to run on day the victim gave birth to child resulting from assault, and not on day of assault), vacated, 640 N.E.2d 946 (Ill. 1994). In contrast, Section 602(3) explicitly states that the limitation period starts to run the day after every element in an offense has occurred. This reflects the principle applied by most Illinois courts. See, e.g., People v. Mudd, 507 N.E.2d 869, 873 (Ill. App. 1987) ("Statutes of limitations normally begin to run only 'when the crime is complete[.]' . . . and the crime here was complete only upon the existence of the last element, the death of the victim.") (internal citation omitted). With respect to crimes involving a

⁹² Section 602(1)(d) also differs from current 5/3-5(b)'s treatment of offenses other than felonies in applying to "any other offense," thus making it clear that it imposes the same limitation period for petty and business offenses as it does for misdemeanors.

series of acts or continuing conduct, Section 602(3) is substantively similar to current 5/3-8, but clarifies the start of the limitation period for cases involving the defendant's complicity in a continuing course of conduct.

Section 602(4) is substantively similar to current 5/2-16's definition of "prosecution" in providing that a prosecution is commenced when an indictment is returned or an information is filed, but also incorporates the Code of Criminal Procedure's rule that a prosecution may be commenced by filing a "complaint." See 725 ILCS 5/111-1 (providing that "prosecution may be commenced by . . . [a] complaint"); 5/111-2(b) (prosecutions for misdemeanors and petty and business offenses "may be by . . . complaint"); cf. *People v. Robins*, 338 N.E.2d 222, 225 (Ill. App. 1975) ("[I]t is clear that the statutory definition of 'prosecution' must be read to include the word 'complaint.'").

Section 602(5) is substantively similar to current 5/3-7, but omits 5/3-7(c) and (d).⁹³ The omission of current 5/3-7(c)'s language regarding quashed charging instruments and subsequent proceedings on appeal is not meant to change the current rule that those specific situations toll the running of the limitation period; rather, 5/3-7(c)'s language is covered by the general rule of proposed Section 602(5)(c). Section 602(5) omits current 5/3-7(d), on the other hand, to simplify the tolling rules and prevent the general rules from being overwrought by numerous specific provisions; under Section 602, any proceedings that occur before a grand jury has returned an indictment are not part of a "pending" prosecution, and do not toll the statute of limitation.

Section 602(6) is functionally similar to current 5/2-16's definition of "prosecution" in providing that a prosecution is "pending" for tolling purposes "through the final disposition of the case upon appeal."

Section 603. Entrapment

Corresponding Current Provision(s): 720 ILCS 5/7-12

Comment:

Generally. Section 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

⁹³ Section 602(5)(b) also differs from current 5/3-7(b) in tolling for time that the defendant is a "public servant" rather than a "public officer." Proposed Section 108's definition of "public servant" is broader than current 5/2-18's definition of "public officer." See proposed Section 108 and corresponding commentary. This terminological difference is not of substantive import, however, as Section 602(5)(b) only applies where the defendant is charged with theft of funds while in "public office." Like current 5/3-7(b), Section 602(5)(b) aims to prevent officeholders from benefitting by using their powers while in office to conceal their own prior misdeeds.

blameworthiness in the defendant, who has committed a crime under circumstances that would not provide a truly exculpating defense such as duress.

Relation to current Illinois law. Section 603(1) is substantively similar to current 5/7-12, with two differences. First, Section 603(1) omits as superfluous current 5/7-12's requirement that inducement be "for the purpose of obtaining evidence for . . . prosecution."

Second, Section 603(1)(b) limits the defense by requiring that the government's conduct created a "substantial risk that a reasonable law-abiding person" would also have been induced to commit the offense. Section 603(1)(b)'s language makes clear that the entrapment defense does not apply in situations where a defendant is "induced" to commit an offense by governmental conduct that is neither coercive nor manipulative.

Section 603(2), limiting the entrapment defense by prohibiting its use in cases where the defendant causes or threatens bodily harm, has no corresponding provision in current Chapter 720. Section 603(2) reflects the view that such crimes are sufficiently serious that an otherwise blameworthy offender should not be exonerated because of police misconduct. (Note that the entrapment defense differs significantly from the duress defense in this regard. The duress defense exculpates and excuses the defendant, but where the entrapment defense applies, it reflects no determination that the defendant's behavior was anything other than fully culpable and wrongful. See proposed Section 507 and corresponding commentary.)

Section 603(3) requires a defendant to admit that he performed the conduct constituting the alleged offense before he will be allowed to raise an entrapment defense. Illinois courts interpret the existing entrapment defense to require a defendant to admit that he committed the underlying offense. See, e.g., People v. Landwer, 665 N.E.2d 848, 855 (Ill. 1995); People v. Gillespie, 557 N.E.2d 894, 896 (Ill. 1990). Section 603(3) differs slightly in that it would enable the defendant to litigate whether he possessed the requisite culpability or was entitled to an exculpating excuse defense, such as a duress defense, in addition (or in the alternative) to having been entrapped.

Section 604. Unfitness to Plead, Stand Trial, or be Sentenced

Corresponding Current Provision(s): 725 ILCS 5/104-10 et seq.

Comment:

Generally. Section 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 Illinois law. Section 604(1) is functionally the same as current 725 ILCS 5/104-10's presumption of fitness to plead, stand trial, or be sentenced.

Section 604(2) incorporates by reference the rules and standards regarding fitness that are set forth in Article 104 of the Code of Criminal Procedure.⁹⁴

Section 605. Former Prosecution for Same Offense as a Bar to Present Prosecution

Corresponding Current Provision(s): 720 ILCS 5/2-1; 5/2-5; 5/2-9; 5/3-4(a)

Comment:

Generally. Section 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 Illinois law. Section 605 is generally similar to current 5/3-4(a). Section 605(1) and (3) are substantively similar to 5/3-4(a)(1) in barring prosecution where the defendant was previously acquitted or convicted, but the proposed subsections directly incorporate the definitions of "acquittal" and "conviction" currently set out in 5/2-1 and 5/2-5. The last sentence of Section 605(1) is substantively similar to the last paragraph of current 5/3-4(a), but provides that a "finding of guilty" — rather than a "conviction" — of an included offense is an acquittal of the greater offense; this modification is consistent with decisions holding that a plea of guilty to an included offense, although resulting in a conviction, is not an acquittal of the greater offense. *See People v. McCutcheon*, 368 N.E.2d 886, 888-89 (Ill. 1977); *cf. Ohio v. Johnson*, 467 U.S. 493, 501-02 (1984).

Section 605(2) is substantively the same as current 5/3-4(a)(2), but uses "after the information or complaint was filed or the indictment was returned" rather than "before trial" to make clear that a prosecution terminated prior to the creation of a charging instrument will not bar a subsequent prosecution.

Section 605(4) clarifies 5/3-4(a)(3) by describing situations that do not constitute "improper termination" of a prosecution. Section 605(4) codifies Illinois case law in that it expressly excludes prosecutions that were improperly terminated but do not warrant a former-prosecution defense, either

⁹⁴ Section 604(2) incorporates Article 104 in its entirety, including its provisions governing burdens of persuasion for, and jury determinations of, fitness issues. *See, e.g.*, 725 ILCS 5/104-11(c) ("When a bona fide doubt of the defendant's fitness has been raised, the burden of proving that the defendant is fit by a preponderance of the evidence and the burden of going forward with the evidence are on the State."); 725 ILCS 5/104-12 ("The issue of the defendant's fitness may be determined in the first instance by the court or by a jury."). These explicit provisions would supersede the rules provided in proposed Section 601(4) and (5).

because the defendant consented to the termination or because the court was not able to enter judgment due to a necessary mistrial or legal defect. See, e.g., People v. Camden, 504 N.E.2d 96, 99 (Ill. 1987) (no double-jeopardy issue where mistrial “can be said to be attributable to the defendant by virtue of his motion or consent”); People v. Yarbrough, 534 N.E.2d 695 (Ill. App. 1989) (prior prosecution which, due to circumstances beyond the control of parties or court, resulted in mistrial does not bar subsequent prosecution for same offense).

Section 605(5) cross-references the definition of “included offense” that is currently codified at 720 ILCS 5/2-9. It is anticipated that the definition will be moved into the Code of Criminal Procedure by the conforming amendments bill to be presented with the Code to the General Assembly.

Section 606. Former Prosecution for Different Offense as a Bar to Present Prosecution

Corresponding Current Provision(s): 720 ILCS 5/3-3; 5/3-4(b)

Comment:

Generally. Section 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 (q.v.), 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 Illinois law. Section 606 is generally similar to current 5/3-4(b). Section 606(1)(b) clarifies 5/3-4(b)(1) by specifically elaborating when an offense should have been charged in a previous prosecution. Current 5/3-4(b)(1) indirectly incorporates this language by referencing current 5/3-3. Section 606(1)(c)(i) also clarifies that prosecution is barred where a former prosecution was based on the same conduct and resulted in a conviction or acquittal of an offense that does not “prevent a substantially different harm or wrong.”

Section 606(2) clarifies 5/3-4(b)(2) by changing the phrase “before trial” to “after the information or complaint was filed or the indictment was returned.” (See proposed Section 605(2) and corresponding commentary.) Section 606(2) also makes clear that prosecution is barred where a former prosecution was terminated by an “acquittal” requiring a determination that is inconsistent with a fact that must be established for conviction.

Section 606(3) is substantively the same as current 5/3-4(b)(3), and incorporates Section 605(4)’s definition of “improper termination.”

Section 607. Former Prosecution in Another Jurisdiction as a Bar to Present Prosecution

Corresponding Current Provision(s): 720 ILCS 5/3-4(c)

Comment:

Generally. Section 607 sets out the rules governing the effect of former prosecutions from different jurisdictions. Like Section 605 (q.v.), 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 Illinois law. Section 607 is generally similar to current 5/3-4(c), with three differences. First, like Section 606(1)(c)(i), Section 607(1)(a) clarifies that prosecution is barred where a former prosecution was based on the same conduct and resulted in a conviction or acquittal of an offense that does not “prevent a substantially different harm or wrong.” Second, Section 607(2) clarifies 5/3-4(c)(2) by changing the term “before trial” to “after the information or complaint was filed or the indictment was returned,” see proposed Section 605(2) and corresponding commentary, and by providing that the rule applies to terminations by acquittals. See proposed Section 606(2) and corresponding commentary.

Section 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): 720 ILCS 5/3-4(d)

Comment:

Generally. Section 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 Illinois law. Section 608 is substantively the same as current 5/3-4(d), but omits 5/3-4(d)(2)’s references to the “setting aside, reversal, or vacating” of convictions as redundant of being “held invalid” and exception for convictions resulting in acquittals as superfluous. As Illinois courts recognize with respect to current 5/3-4(d)(2), subsequently invalidated convictions are excluded from the former-prosecution defenses because, unlike acquittals, they do not address the merits of the defendant’s conviction. See, e.g., People v. Williams, 664 N.E.2d 164, 166 (Ill. App. 1996) (“The fact that a conviction is later vacated for constitutional reasons is generally not considered to be the functional equivalent of an acquittal, absent some suggestion that the evidence was insufficient to convict.”) (citing Montana v. Hall, 481 U.S. 400, 403 (1987)).

Section 609. Definitions

Corresponding Current Provision(s): 720 ILCS 5/2-1; 5/2-5; 5/2-9;
5/2-17; 5/2-18

Generally. This provision collects defined terms used in Article 600 and provides cross-references to the provisions in which they are defined.

Relation to current Illinois law. For discussion of the relationship between Article 600's defined terms and current law, refer to the commentary for the provision in which each term is initially defined.

ARTICLE 700. LIABILITY FOR CORPORATIONS AND OTHER NON-HUMAN ENTITIES

General Comment:

The proposed Code has added the phrase “or unincorporated association” in brackets after “corporation” throughout, so that the General Assembly may consider imposing liability on these groups to the same extent as incorporated associations. 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.

Section 701. Liability of Corporation [or Unincorporated Association]

Corresponding Current Provision(s): 720 ILS 5/5-4

Comment:

Generally. Section 701 sets out the circumstances under which a corporation may be held criminally liable for its actions. Liability is imposed on corporations in certain circumstances to deter their agents from violating the law or failing to perform a legal duty. Liability under this provision is limited by the due diligence defense in Section 701(2), which prevents liability (except for absolute-liability offenses) in situations where a corporate agent attempted in good faith to follow the law.

Relation to current Illinois law. Section 701(1)(a) is substantively similar to 5/5-4(a)(1), but employs a slightly different approach. Current 5/5-4(a)(1), in addition to imposing two general rules (that corporate liability may attach to all misdemeanors and to all offenses for which the legislature has expressed its intent to impose liability), provides a “laundry list” of specific offenses — most of them environmental offenses — for which liability will apply. It is inappropriate to select certain offenses for which corporations are subject to liability unless there is a general principle behind the selection; if such a principle exists, the Code should express the principle rather than listing offenses individually.

Section 701(1)(a) has been drafted with this idea in mind. The proposed Code is substantively similar to current 5/5-4(a)(1), but excludes reference to the specific statutory provisions listed therein. Rather, the proposed provision more broadly allows corporate liability for any misdemeanor, petty offense, or business offense. Moreover, Section 701 allows corporate liability for any offense that indicates a legislative purpose to provide corporate liability. This formulation maintains a default rule similar to current Illinois law: serious

criminal liability will not be imposed on corporations absent a legislative expression of intent. However, the proposed provision slightly lowers the threshold for imposition of liability on corporations by eliminating the current requirement that legislative intent to impose liability be “clearly” indicated.

Section 701(1)(b) has no directly corresponding provision in current law. However, several provisions in current Illinois law specifically impose liability on corporations for their omission to discharge a specific duty. See, e.g., 35 ILCS 105/14 (imposing liability on corporations for failing to file a use tax return).

Section 701(1)(c) is the same as current 5/5-4(a)(2), except that one phrase has been moved to enhance clarity.

Section 701(2) is the same as current 5/5-4(b) in providing a due diligence defense, except that the sentence has been reorganized, and divided into subsections, to enhance clarity.

Section 701(3), like current 5/5-4(c), defines terms used in the provision. The proposed provision replaces “the high managerial agent” with “a high managerial agent,” as there may be more than one high managerial agent with the authority described. In addition, the term “agent” has been changed to “corporate agent” to avoid potential confusion, as the proposed Code also uses the term “agent” in other contexts.

Section 702. Relationship to Corporation [or Unincorporated Association] No Limitation on Individual Liability or Punishment

Corresponding Current Provision(s): 720 ILS 5/5-5

Comment:

Generally. This provision prevents individuals from escaping liability by virtue of having acted on behalf of a corporation, and establishes that individuals may be punished fully as individuals even though their liability stems from the actions of their corporation.⁹⁵

Relation to current Illinois law. Section 702 is the same as current 5/5-5, except that explanatory introductory phrases have been added, and the sentence in Section 702(1) has been reorganized to enhance clarity. Cf. IPI (CRIMINAL) 5.11 (4th ed. 2000) (using similar sentence structure).

⁹⁵ As under current law, a person may only be accountable for conduct he performs on behalf of a corporation to the same extent he would be liable for performing such conduct on his own behalf. In other words, a person may not be accountable under this provision for an offense that applies only to corporations, and not to individuals. See People v. Parvin, 533 N.E.2d 813, 817 (Ill. 1988) (finding defendant not accountable for corporation’s failure to file retailers’ occupation tax return where defendant, as an individual, was not subject to the filing requirements).

Section 703. Definitions

Corresponding Current Provision(s): 720 ILS 5/5-4(c)

Comment:

Generally. This provision collects defined terms used throughout Article 700 and provides cross-references to the sections in which they are defined.

Relation to current Illinois law. For a discussion of the relationship between Article 700's defined terms and current law, refer to the commentary for the provision in which the term is initially defined.

ARTICLE 800. INCHOATE OFFENSES

Section 801. Criminal Attempt

Corresponding Current Provision(s): 720 ILCS 5/8-4

Comment:

Generally. Section 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."⁹⁶ 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 evidence that the actor did, in fact, have a culpable mental state.

⁹⁶ Current 5/8-4(a) also establishes a "substantial step" test. However, although the substantial step test's true focus is on how far an actor has gone from the *beginning* of the causal chain leading to the offense, Illinois courts have sometimes read the provision as creating a "dangerous proximity" test, which focuses on how close to the *end* of the causal chain he has come. See *People v. Smith*, 593 N.E.2d 533, 537 (Ill. 1992); *People v. Terrell*, 459 N.E.2d 1337, 1341 (Ill. 1984) (quoting *Hyde v. United States*, 225 U.S. 347, 388 (1912) (Holmes, J., dissenting)). For example, in *Smith*, the Illinois Supreme Court reversed a conviction for attempted robbery, finding that the defendant's acts were not a "substantial step" because it would be "improper to conclude that defendant came within a dangerous proximity to success." *Smith*, 593 N.E.2d at 537. The Court so held as a matter of law, although whether a defendant has taken a "substantial step" toward committing an offense should normally be a question for the jury. Rather than asking whether there was sufficient evidence for the jury to find that the defendant had taken a substantial step *toward* the offense, the Court engaged in an independent inquiry as to how far *away* the defendant was from completing the offense. That analysis both misreads the statute and improperly takes the substantial step determination away from the jury.

Relation to current Illinois law. Section 801(1) is similar to current 5/8-4(a),⁹⁷ with two important differences. First, although Section 801(1) requires that a person must “intend[] to engage in the conduct that would constitute the offense,” as to other elements he need only have “the culpability required for commission of the offense,” whereas 5/8-4(a) requires that a person act “with intent to commit a specific offense.” (Note that the offender must have intent not only as to the conduct constituting a substantial step, but as to all the conduct that would constitute the offense. That is, the person must actually, and intentionally, perform a substantial step, but must also have the intent to perform all the other conduct that would amount to the completed offense for attempt liability to be appropriate.)

The current formulation, on the other hand, increases the culpability level for all elements of the substantive offense to “intent,” which may cause improper results or confusion. For example, current 5/9-1(a)(2) imposes liability for the completed offense of first-degree murder where the actor “knows” his conduct creates “a strong probability of death or great bodily harm,” but Illinois courts, following 5/8-4(a), have required that *attempted* first-degree murder requires “specific intent” as to all elements of the offense.⁹⁸ By imposing a requirement of intent for all attempt elements,

⁹⁷ Current Illinois law also defines numerous offenses to prohibit both completing certain conduct *and* “attempting” such conduct. See, e.g., 720 ILCS 5/16B-2(c) (library theft committed where one “borrows or attempts to borrow” library material); 5/16D-3(a)(4) (computer tampering committed where one “inserts or attempts to insert” virus); 5/17-6(a) (state benefits fraud committed where one “obtains or attempts to obtain” government money or benefits); 5/17-24(c)(1) (financial institution fraud committed where one “executes or attempts to execute” plan to defraud); 5/21-1.5(b) (offense committed where one “transfers or attempts to transfer” anhydrous ammonia); 5/24-3.5(b) (unlawful purchase of firearm committed where one “purchases or attempts to purchase” firearm); 5/29B-1(a) (money laundering committed where one “engages or attempts to engage” in financial transaction); 625 ILCS 5/16-201 (one who “attempts to commit” Vehicle Code offense “shall be guilty of such offense”). This approach to defining offenses often short-circuits, for no clear reason, the general grading rules for attempts set forth in the General Part, under which attempted felonies are typically graded one grade lower than the completed offense, see 720 ILCS 5/8-4. The proposed Code ensures that matters addressed by Section 801 are dealt with consistently by omitting such references from offense definitions.

⁹⁸ Accordingly, an attempted-murder charge cannot be based on current 5/9-1(a)(2), which allows for murder liability where one kills another person and “knows [his] acts create a strong probability of death or great bodily harm to that individual or another.” See People v. Trinkle, 369 N.E.2d 888, 890, 892 (Ill. 1977) (“It is not sufficient that the defendant shot a gun ‘knowing such act created a strong probability of death or great bodily harm.’ . . . To obtain a conviction on the charge of attempted murder, the indictment must charge a specific intent to commit the specific offense, and the jury must be accordingly instructed”); People v. Holmes, 627 N.E.2d 98, 102 (Ill. App. 1993) (“Clearly, the instructions given in this case would allow the jury to convict defendant upon a showing that he acted with knowledge that his actions created a strong probability of death or great bodily harm. Since such instructions would permit the jury to convict defendant even if they did not believe he acted with the intent to kill the victim, the instructions given were improper.”); People v. Kraft, 478 N.E.2d 1154,

(continued...)

current law may make it more difficult to prosecute some attempts than their corresponding completed crimes. For example, the current offense of “predatory criminal sexual assault of a child” may require recklessness, or even no culpability, as to the circumstance element of the victim’s age.⁹⁹ But under current 5/8-4(a), in a case of *attempted* predatory criminal sexual assault, the State apparently would have to prove a “specific intent” that the victim be underage. This heightened culpability standard for attempts relative to completed crimes leads to inconsistencies and improper results under the criminal law.

Second, Section 801(1) requires an intent to engage in conduct that is an offense “given [the offender’s] perception of the circumstances.” This language allows for the imposition of liability where, because the offender is mistaken as to the circumstances, the crime he attempts would be impossible to commit. Accordingly, it is similar to current 5/8-4(b)’s rule that impossibility

⁹⁸ (...continued)

1157-58 (Ill. App. 1985) (“All authorities agree that the crime of attempt is a specific intent crime and ‘an instruction must make it clear that to convict for attempted murder nothing less than a criminal intent to kill must be shown.’ . . . [I]t is clear that a discrepancy exists between the culpable mental state for attempt which requires an intent to commit the offense and the alternative culpable mental states for murder which include not only intent to kill another, but also intent to do great bodily harm . . . or knowledge that one’s acts create a strong probability of death or great bodily harm.”) (quoting *People v. Harris*, 377 N.E.2d 28 (Ill. 1977)).

Applying similar principles, the Illinois Supreme Court has held that the offense of “attempted second-degree murder” (or “attempted manslaughter”) does not exist in Illinois. See *People v. Lopez*, 655 N.E.2d 864, 867 (Ill. 1995) (“[T]he intent required for attempted second degree murder, if it existed, would be the intent to kill without lawful justification, plus the intent to have a mitigating circumstance present. However, one cannot intend either a sudden and intense passion due to serious provocation or an unreasonable belief in the need to use deadly force.”); see also *People v. Reagan*, 457 N.E.2d 1260 (Ill. 1983).

Attempted “second-degree murder,” as that offense is currently defined — intentional killing mitigated by provocation or a mistake as to a justification — would exist under Section 801(1), although “attempted reckless homicide” would not. Cf. commentary for proposed Section 1103. Because that offense’s conduct element is defined only in relation to causing the result element of death, one cannot intend “to engage in the conduct that would constitute the offense,” i.e., conduct that would cause death, while being only reckless as to causing death. Section 801(1) *would* allow attempt liability, however, for other 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 the conduct necessary for the offense of reckless endangerment, but was prevented from doing so.

⁹⁹ It is unclear what level of culpability is required as to the victim’s age under current 5/12-14.1. On the one hand, proper application of current 5/4-3(b) would require a culpability level of recklessness to be “read in” as to that circumstance element. On the other hand, current 5/12-17(b) provides a “defense” for reasonable mistakes as to the victim’s age for certain kinds of criminal sexual abuse and aggravated criminal sexual abuse, but not for predatory criminal sexual assault — thereby suggesting that, notwithstanding 5/4-3(b), 5/12-14.1 might impose absolute liability as to the victim’s being underage. See commentary for proposed Section 1306(1).

is no defense to attempt. At the same time, this language maintains the possibility of liability where the offender's "perception" is inaccurate and, in fact, his conduct (if completed) *would* constitute the offense although he does not realize it. Taking the example of statutory rape under the proposed Code, an offender's negligently inaccurate "perception" that the victim has reached the age of consent will not excuse him from liability. See proposed 207(2) (only "reasonable" mistake negates requirement of negligence); proposed Section 1306(1) (requiring negligence as to victim's age for Article 1300 offenses not providing otherwise). In short, this language reflects the view that a person's faulty "perception" of the circumstances may lead to liability, either where the person perceives himself to be committing a crime, or where the person's subjective perception rests on a culpably faulty understanding of the surrounding circumstances.

Section 801(2)(a) states that conduct constitutes a "substantial step" under Section 801(1) only if it is "strongly corroborative of the person's intention to engage in the offense conduct." Because the substantial step test may lead to liability at an earlier point in the chain of conduct leading to an offense than the dangerous-proximity test endorsed by the Illinois courts, see supra note 96, it is important to impose such a limitation to ensure that attempt liability will arise only where the person's intent to engage in criminal behavior is clear.

Section 801(2)(b) establishes that a person satisfies the substantial step requirement if he believes he has completed the conduct constituting an offense or believes he has committed the last act needed to cause a prohibited result. Section 801(2)(b) does not alter the standard of Section 801(1), but merely establishes a bright-line rule that performing all the requisite conduct toward an offense will always meet the substantial step test. There is no directly corresponding provision in current law.

Section 802. Criminal Solicitation

Corresponding Current Provision(s): 720 ILCS 5/8-1; 5/8-1.1; 5/8-1.2; see also 720 ILCS 5/8-3

Comment:

Generally. Section 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 Illinois law. Section 802 is similar to current 5/8-1, and would also replace current 5/8-1.1 and 5/8-1.2, addressing solicitation

of murder and solicitation of murder for hire, respectively.¹⁰⁰ Current 5/8-1.1 and 5/8-1.2 differ from 5/8-1 only with respect to their grading provisions; grading of inchoate offenses is addressed in proposed Section 807 (q.v.).

Section 802(1) is similar to current 5/8-1(a), with two modifications that track Section 801's modifications to attempt. See proposed Section 801(1) and corresponding commentary. First, 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 5/8-1, 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. See *People v. Latona*, 644 N.E.2d 424, 431 (Ill. App. 1994) ("Solicitation of murder is a specific intent crime. Therefore, it is not sufficient that defendant solicited the commission of an act knowing 'that such act[] create[d] a strong probability of death or great bodily harm.'") (citations omitted); cf. 720 ILL. COMP. STAT. ANN. 5/8-1 Committee Comments at 408 (West 1993) ("Specific intent that the principal offense be committe[d] is required, and the offense of solicitation is complete when the principal offense is commanded, encouraged or requested with that intent.").

Second, like Section 801(1), Section 802(1) allows for liability based on the offender's perception of the circumstances, which effectively eliminates the impossibility defense for solicitation in current 5/8-3. The rationale for preventing an impossibility defense applies to conspiracies and solicitations with equal force as to attempts. There seems to be no compelling reason to treat inchoate crimes differently from one another in this respect, as current law does.

Section 802(2) has no directly corresponding provision in Chapter 720. 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, by fortuity, the communication was never received. For example, under Section 802(2), a person sending a letter soliciting another to commit murder would not escape liability simply because the letter was not received. Illinois courts

¹⁰⁰ Current Illinois law also defines several specific offenses imposing liability on one who "solicits" another in the planning or commission of an offense, thus duplicating current 5/8-1. See, e.g., 10 ILCS 5/29-20(1),(2) (imposing liability for one who "solicits" another to unlawfully apply for or cast absentee ballot); 720 ILCS 5/11-20.1(a)(7) (child pornography committed where one "solicits" another to provide minor child); 5/31A-1.2(c)(2) (imposing liability where correctional institution employee "solicits the delivery" of contraband to inmate). The proposed Code generally omits such language from offense definitions to ensure that the matters addressed by Article 800 are dealt with consistently from one offense to another. Cf. supra note 97 (discussing current provisions criminalizing both completing and "attempting" certain conduct).

have not expressly ruled on whether a solicitation must be successfully received in order for a defendant to be found guilty of solicitation; existing case law is unclear on the issue. See, e.g., People v. McCommon, 399 N.E.2d 224, 231 (Ill. App. 1974) (“The offense of solicitation is complete when the principal offense is commanded, requested or encouraged with specific intent that the principal offense be committed.”).

Section 803. Criminal Conspiracy

Corresponding Current Provision(s): 720 ILCS 5/8-2(a); see also, e.g., 720 ILCS 5/46-3; 550/9; 570/405 to 570/405.2; 10 ILCS 5/29-18; 610 ILCS 95/3; 625 ILCS 5/4-103.1

Comment:

Generally. Section 803 establishes liability for the offense of conspiracy, which is committed when two or more persons enter an agreement 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 Illinois law. Section 803 corresponds to the current general conspiracy provision (5/8-2), but current Illinois law also includes numerous provisions covering conspiracy to commit various specific offenses.¹⁰¹ Under current law, with both a general provision and specific provisions, there is sometimes confusion as to which provision should apply. See, e.g., People v. Robinson, 614 N.E.2d 531, 532 (Ill. App. 1993)

¹⁰¹ Some of current law’s overlapping conspiracy provisions restate much of current 5/8-2’s content, including 5/8-2(b)’s rules regarding unconvictable co-conspirators. See, e.g., 625 ILCS 5/4-103.1 (vehicle theft conspiracy); 720 ILCS 5/46-3 (conspiracy to commit fraud); 720 ILCS 570/405.1 (drug conspiracy). Several other current offenses are defined to criminalize “conspiring” to perform certain conduct, but less clearly incorporate, or track, current law’s general conspiracy provision. See, e.g., 35 ILCS 200/21-306(a)(4) (imposing liability where one “conspires to violate” prohibitions against indemnity fund fraud); 230 ILCS 5/36(a) (imposing liability where one administers or “conspires to administer” drug to racehorse); 305 ILCS 5/8A-13(b) (imposing liability where one executes or “conspires to execute” plan to defraud); 610 ILCS 95/3 (imposing liability where two or more persons “willfully and maliciously combine or conspire together” to impede railroad business); 625 ILCS 5/16-201 (one who “conspires to commit” Vehicle Code offense “shall be guilty of such offense”); 720 ILCS 5/31A-1.2(c)(2) (imposing liability where correctional institution employee “conspires to deliver” item of contraband to inmate); 720 ILCS 370/1 (imposing liability for one who “conspires with” another to tamper with pay telephone).

(acknowledging that specific conspiracy provision usually preempts general provision, but finding no preemption in this case, as specific provision in Cannabis Control Act did not apply to facts). Section 803 provides one uniform formulation, thus eliminating this problem.

Section 803(1) is similar to current 5/8-2(a), but includes the alterations reflected in the other proposed inchoate offenses: focusing on the conduct and culpability requirements defined in the underlying offense rather than imposing a uniform “intent” requirement, and denying an impossibility defense. See commentary for proposed Sections 801 and 802. 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 — and also requires an intent to carry out (or that a co-conspirator carry out) all the other conduct that would constitute the substantive offense. See commentary for proposed Section 801(1).

Like the proposed attempt and solicitation provisions, Section 803(1) imposes liability based on the defendant’s “perception of the circumstances.” Section 803(1) thus amends current law to allow prosecution for unilateral agreements: it would impose 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. Under current Illinois law, a person will face liability only if there was mutual agreement between the two (or more) conspirators. For example, current Illinois law would not impose liability where the co-conspirator was an undercover officer who never intended to further the criminal objective. See *People v. Foster*, 457 N.E.2d 405, 409 (Ill. 1983) (holding that current conspiracy provision “encompasses the bilateral theory of conspiracy”); cf. *People v. Breton*, 603 N.E.2d 1290, 1294-95 (Ill. App. 1992) (holding that current offense of “solicitation of murder for hire” does not require actual agreement, but noting that “a purported agreement between a defendant and a government agent only feigning agreement will not support a conspiracy conviction”). 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. This formulation is consistent with the rule in current 5/8-2(b) that a conspirator’s liability is independent of his co-conspirators’ liability.

Section 803(2), barring multiple convictions for a single conspiracy to commit several offenses, has no directly corresponding provision in current law. Section 803(2) is similar to the Illinois courts’ rule that multiple conspiracy convictions may not be premised on a single agreement, but broadens that rule to also prevent multiple inchoate convictions arising from a single “continuous conspiratorial relationship.” Cf. *People v. Burleson*, 365 N.E.2d 1162, 1166 (Ill. App. 1977) (“[A] person charged with multiple conspiracies cannot be convicted of more than a single conspiracy if he has with the necessary intent entered into a single agreement to commit a crime

even if multiple overt acts are committed in furtherance of that agreement. . . . [H]owever, . . . a person charged with multiple conspiracies can be convicted of those multiple conspiracies if, with the necessary intent, he entered into multiple, although partially overlapping agreements to commit crimes so long as overt acts are committed in furtherance of those agreements.”). By declining to focus solely on whether the conspiracies involved were formed as part of the same “agreement,” Section 803(2) avoids any need to inquire into the precise times at which various objectives were agreed to.

Section 803(3) requires an overt act in furtherance of the conspiracy. Section 803(3) is substantively the same as current 5/8-2(a)’s final sentence, but changes “act” to “overt act,” “furtherance” to “pursuance,” “agreement” to “conspiracy,” “committed” to “done,” and “co-conspirator” to “person with whom he conspired.”

Section 804. Unconvictable Confederate No Defense

Corresponding Current Provision(s): 720 ILCS 5/8-2(b)

Comment:

Generally. Section 804 makes clear that a person may not escape liability for 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 for conspiracy. See commentary for proposed Section 803(1).

Relation to current Illinois law. Section 804 is nearly identical to current 5/8-2(b),¹⁰² with two minor differences. First, Section 804 omits 5/8-2(b)(3)’s rule regarding co-conspirators who are “not amenable to justice” as vague and redundant. Second, Section 804(2) clarifies that a co-conspirator’s conviction of a different “grade” of an offense, like a co-conspirator’s conviction for a different “offense,” does not provide a defense to conspiracy.

¹⁰² Current 5/8-2(b)’s rules are also reiterated in several specific offenses that unnecessarily duplicate the general conspiracy provision by criminalizing conspiracies to commit specific offenses. *See, e.g.,* 625 ILCS 5/4-103.1(b) (vehicle theft conspiracy); 720 ILCS 5/46-3(b) (conspiracy to commit fraud); 570/405.1(b) (drug conspiracy).

Section 805. Defense for Victims and Conduct Inevitably Incident

Corresponding Current Provision(s): None

Comment:

Generally. Section 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(a) 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(b) 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 for proposed Section 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(b), 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 Illinois law. Although no provision in Chapter 720 directly corresponds to Section 805, current 5/5-2(c) provides a similar defense to complicity liability. Since the same rationale for allowing the defense in complicity situations applies to the offenses of solicitation and conspiracy, the defense has been added for those offenses.

Section 806. Defense for Renunciation Preventing Commission of the Offense

Corresponding Current Provision(s): None

Comment:

Generally. Section 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.) Under Section 806(3), the defendant would bear the burden of proving this defense by a preponderance of the evidence.

Relation to current Illinois law. Section 806 has no directly corresponding provision in current law. Illinois courts have ruled that renunciation (also termed “withdrawal” or “abandonment”) may provide a defense to the completed crime, but will not create a defense to conspiracy or attempt. See, e.g., People v. Adams, 530 N.E.2d 1155, 1158 (Ill. App. 1988) (“The traditional rule is that since the crime of conspiracy is complete

with the agreement and an overt act, no subsequent action can exonerate the conspirator of that crime.”); People v. Davis, 388 N.E.2d 887, 890 (Ill. App. 1979) “[T]he weight of authority appears to be that once the elements of criminal attempt are complete, abandonment of the criminal purpose will not constitute a defense to the charge of attempt.”).¹⁰³ Sound policy considerations oppose that rule, however.

One obvious beneficial effect of a renunciation defense is that it rewards actors who abandon a criminal undertaking, and gives an incentive to prevent others from committing the offense. Allowing the defense makes further sense in the attempt context when a substantial step test is used to determine liability. As noted above,¹⁰⁴ Illinois courts have misread the substantial step test in the current statute as a “dangerous proximity” test. Under a “proximity” test, there is little need for a renunciation defense, as inchoate offense liability will not arise until a point when it has become highly unlikely that the actor would be able to renounce, even if he wanted to do so. However, when the focus is properly on the steps an actor makes *toward* an offense, it is more likely that there will be cases where an actor has done enough to incur inchoate liability, but still has sufficient time and power to renounce his criminal purpose and prevent the offense from occurring. Moreover, given the Illinois courts’ misreading of the substantial step test, many of the defendants who would enjoy Section 806’s renunciation defense would likely not even be subject to attempt liability under current law.

Section 806 places three important limitations on the renunciation defense to ensure that it is not abused. First, Section 806(1) requires that renunciation be both “voluntary and complete.” As Section 806(2)’s definition of “voluntary and complete” makes clear, renunciation will not provide a defense if it is motivated by a fear of apprehension, or a decision to pursue the crime at another time or against a different victim. Second, Section 806(1) limits the defense to cases in which the defendant has actually “prevented” the offense from occurring. Finally, under Section 806(3), the defendant bears the burden of persuasion to prove the renunciation defense by a preponderance of the evidence.

¹⁰³ However, in People v. Brown, 414 N.E.2d 475, 480 (Ill. App. 1980), the court recognized that “[n]oted and distinguished commentators on criminal law” are strongly supportive of a rule that allows a defense of voluntary abandonment to an attempt charge and that several states have aligned themselves with this progressive view. Although it was unwilling to unilaterally create such a rule in Illinois, the court stated that it supported the rule and urged the legislature to “seriously consider . . . the arguments . . . with regard to the salutary and beneficial, as well as equitable, effects from establishing the defense of voluntary abandonment.” Brown, 414 N.E.2d at 481.

¹⁰⁴ See supra commentary for proposed Section 801, especially at note 96.

Section 807. Grading of Attempt, Solicitation, and Conspiracy

Corresponding Current Provision(s): 720 ILCS 5/8-1(b); 5/8-1.1(b); 5/8-1.2(b); 5/8-2(c); 5/8-4(c); see also 720 ILCS 5/46-3; 550/9; 570/405 to 570/405.2; 10 ILCS 5/29-18; 610 ILCS 95/3; 625 ILCS 5/4-103.1

Comment:

Generally. Section 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 Illinois law. Section 807 introduces consistency to the grading of inchoate offenses. Current Illinois law has no single rule governing the proper grade for an inchoate crime relative to a completed offense, and instead provides separate grading rules for each type of inchoate offense. Section 807 is substantively the same as current 5/8-4(c) and 5/8-1(b) in grading attempts and solicitations of felonies one grade lower than the target offense,¹⁰⁵ but extends that rule to also apply to *misdemeanors*. Current 5/8-4(c) and 5/8-1(b), by contrast, abandon the grading scheme for felonies by providing that attempts and solicitations of misdemeanors may be punished the same as the target offense.

Section 807 also greatly simplifies the grading for conspiracies. Current 5/8-2(c) creates a complicated grading scheme punishing some conspiracies more severely than their target offenses, some less severely, and some at the same level. Current 5/8-2(c) first sets forth a general rule that conspiracies may be punished at the same level as their target offenses. That general rule, however, has three exceptions. First, current 5/8-2(c) grades conspiracies to commit 11 specific prostitution, weapons, gambling, and drug offenses as Class 3 felonies;¹⁰⁶ the completed forms of those offenses, on the other hand,

¹⁰⁵ Current Chapter 720 also sets forth separate grading rules for solicitation of murder (5/8-1.1(b)), solicitation of murder for hire (5/1.2(b)), and attempted first-degree murder (5/8-4(c)(1)). Section 807 does not provide special grading rules for particular offenses, but would, like the current provisions, grade an inchoate offense toward first-degree murder as a Class X felony. Cf. proposed Section 1101(2) (grading first-degree murder as Class [X-plus] felony). Section 807 also declines to address the appropriate minimum and maximum sentences for particular kinds of solicitations and attempts and aggravations for attempts involving firearms. Those matters are instead addressed, respectively, by the proposed authorized terms of imprisonment for Class X felonies and Article 7100's proposed offense for using a firearm during a felony. See proposed Section 903; proposed Section 7101.

¹⁰⁶ Current 5/8-2(c) purports to grade conspiracies toward both the completed and *inchoate* forms of the 11 listed offenses as Class 3 felonies, thus suggesting the possibility of liability for conspiring to commit an attempt, a solicitation, or perhaps even a conspiracy. The proposed Code rejects such “double-inchoate” liability as conceptually impossible.

are graded as anything from a Class B misdemeanor to a Class 2 felony. Second, current Illinois law provides that conspiracies to commit first-degree murder, aggravated kidnapping, and treason — three of the most serious offenses in current Chapter 720 — may be graded no higher than Class 2 felonies. Finally, current 5/8-2(c) provides that, with the exception of certain drug conspiracies, all other conspiracy offenses — including conspiracies to commit such serious offenses as causing a catastrophe and sexually assaulting a child — may be graded no higher than Class 4 felonies. Section 807's general rule imposing liability of one grade, but only one grade, lower than the completed offense grades conspiracy consistently across offenses, and consistently with other inchoate offenses.

Section 807 also replaces the grading provisions of other specific conspiracy offenses found elsewhere in Chapter 720 and outside the Criminal Code. See commentary for proposed Section 803. To the extent that they punish “conspiracies” *more* severely than the ordinary substantive offense, those provisions appear to reflect a concern with the independent harm of group criminality, rather than an effort to punish the inchoate offense of conspiracy toward a substantive offense.¹⁰⁷ That concern is more properly addressed in the sentencing provisions. See proposed Section 905(4) and corresponding commentary.

Section 808. Possessing Instruments of Crime

Corresponding Current Provision(s): Various; see, e.g., 720 ILCS 5/14-2(a)(2); 5/16-6; 5/16-15; 5/16D-3(a-5); 5/16F-4; 5/17-1(C)(2) to (4); 5/17-23(a),(b); 5/19-2; 5/21-1.4; 250/17

Comment:

Generally. Section 808 establishes an offense for the possession of instruments of crime. Section 808(1) defines the offense to prohibit possession of an instrument of crime with the intent to use it criminally. Section 808(2) defines the term “instrument of crime.” Section 808(3) grades the offense as a Class A misdemeanor.

¹⁰⁷ For example, current 720 ILCS 550/9 and 570/405 impose greater penalties for drug-related conspiracies than exist for the underlying drug offenses. However, those sections also require that the conspiracy consist of three or more people and that the defendant either obtain something worth more than \$500 or organize, direct, or finance the transaction. Similarly, current 570/405.2 imposes a greater penalty where an offense is committed by three or more people in furtherance of the activities of an organized gang and the defendant occupied a position of management. These sections seem designed to punish the organized or group nature of the offenses, rather than punishing the underlying efforts toward accomplishing the offense itself.

Relation to current Illinois law. Chapter 720 includes no general possession offense, but includes numerous specific offenses criminalizing the possession of various instruments of crime. See, e.g., 720 ILCS 5/14-2(a)(2) (defining Class 4 felony for possession of eavesdropping device); 5/16-6 (defining Class A misdemeanor for possession of coin-operated machine key or device); 5/16-15 (defining Class A misdemeanor for possession of theft detection shielding device); 5/16D-3(a-5) (defining Class B misdemeanor for possession of software designed to enable “falsification of electronic mail transmission information or other routing information”); 5/16F-4 (defining Class A misdemeanor for possession of “unlawful wireless device”); 5/17-1(C)(2) to (4) (defining Class A misdemeanors for possession of fraudulently-obtained checks, implements of check fraud, and checking identification cards); 5/17-23(a),(b) (defining Class 3 and Class 4 felonies for possession of counterfeit UPC labels); 720 ILCS 5/19-2 (defining Class 4 felony for possession of burglary tools); 5/21-1.4 (defining Class A misdemeanor for possession of “jackrocks”); 250/17 (defining Class 3 felony for possession of “contrivance designed to reproduce instruments purporting to be credit cards or debit cards”). Section 808 replaces these offenses with one concise and consistent offense definition.

Section 809. Definitions

Corresponding Current Provision(s): None

Generally. This provision collects defined terms used in Article 800 and provides cross-references to the provisions in which they are defined.

Relation to current Illinois law. For discussion of the relationship between Article 800’s defined terms and current law, refer to the commentary for the provision in which each term is initially defined.

ARTICLE 900. OFFENSE GRADES AND THEIR IMPLICATIONS

General Comment Regarding Article 900:

Article 900 is not intended to address all issues regarding the sentencing and disposition of offenders. It is anticipated that such issues will be dealt with more comprehensively in other statutory chapters on sentencing or in a set of sentencing guidelines. Article 900 deals only with those basic issues necessary to make clear the meaning of the Criminal Code's general scheme of liability. For example, it provides a frame of reference without which the offense grades set out in the Special Part of the Code would be incomprehensible. Article 900'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 are beyond the scope of the current project.

The current degrees of liability, such as maximum and minimum sentences, discussed in the proposed Code are also preliminary. The primary focus of the current project is 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, proposed grades are intended only to assess the relative seriousness of offenses, and not the sentencing consequences of a conviction for any offense. The proper sentencing ranges and fines that should apply to a given grade are for the General Assembly to determine.

Section 901. Classified Offenses

Corresponding Current Provision(s): 730 ILCS 5/5-5-1

Comment:

Generally. This provision provides a classification of all criminal offenses into grades for purposes of determining the extent of liability.

Relation to current Illinois law. Section 901 is substantively similar to current 5/5-5-1, but replaces 5/5-5-1(b)'s separate category for first-degree murder with a new offense category — “Class [X-plus]” — that may include other offenses as well. Section 901 also recognizes “petty offenses and business offenses” as an offense category; under current 5/5-5-1(d), such offenses are “not classified.”

Section 902. Unclassified Offenses

Corresponding Current Provision(s): 730 ILCS 5/5-5-2

Comment:

Generally. This provision provides classifications for offenses that are defined outside the Code.

Relation to current Illinois law. Section 902 is substantively similar to current 5/5-5-2, but makes one amendment to current 5/5-5-2(a). Whereas 5/5-5-2(a) classifies as Class 4 felonies only those non-Code felonies that do not specify a particular felony classification, Section 902(1) more broadly classifies *all* felonies outside the Code as Class 4 felonies. This ensures that no serious felony offense will appear outside the Criminal Code.¹⁰⁸

Section 903. Authorized Terms of Imprisonment

Corresponding Current Provision(s): 730 ILCS 5/5-5-3(c)(5);
5/5-8-1; 5/5-8-3

Comment:

Generally. This provision establishes the maximum and minimum terms of imprisonment for each class of offenses.¹⁰⁹ The proposed sentencing ranges are bracketed to reflect the fact that the draft proposals are merely tentative. See “General Comment,” *supra*.

Relation to current Illinois law. Section 903 consolidates the authorized terms of imprisonment for felonies and misdemeanors, which currently appear in two separate provisions in Chapter 730. Section 903(1) through (6), which provide the authorized terms of imprisonment for felonies, are substantively similar to current 5/5-8-1(a), but omit the current law’s references to aggravating factors for specific categories of offenders in 5/5-8-1(a)(1) through (2.5). Because the authorized terms of imprisonment in Section 903 are subject to exceptions provided elsewhere in the Code, the special rules provided in current 5/5-8-1(a) may be set forth — and they are more appropriately set forth — in the specific provisions to which they apply.

Section 903(1) corresponds to current 5/5-8-1(a)(1)(a), but amends the current law in applying to other possible offense(s) (categorized as “Class [X-plus]”) in addition to first-degree murder, lowering the minimum term of imprisonment from 20 years to 12 years, and raising the maximum term from 60 years to life.

¹⁰⁸ It is anticipated that some offenses currently outside the Code — specifically, offenses related to weapons, drugs, and gambling, and provisions directed at facilitating prosecutions against criminal enterprises or similar “crime-control” offenses — will be moved into Articles 7100 to 7400 of the new Code by means of “conforming amendments” legislation. See, e.g., 205 ILCS 685/7 (structuring a transaction; Class 2 felony). Section 902’s rules for non-Code offenses obviously would not apply to such offenses once they were moved into the Criminal Code.

¹⁰⁹ Determination of the specific sentence within the appropriate range, currently addressed by 5/5-5-3.1 and 5/5-5-3.2(a), is an issue to be resolved by other statutory chapters or by development of detailed sentencing guidelines.

Section 903(2) to (6) are identical to current 5/5-8-1(a)(3) to (7).

Section 903(7) is substantively similar to current 5/5-8-3(a)(1), but prescribes a maximum sentence of one year rather than allowing “any term less than one year.”

Section 903(8) and (9) are identical to current 5/5-8-3(a)(2) and (3).

Section 903(10), in declining to authorize imprisonment for petty and business offenses, is substantively similar to current 5/5-5-3(c)(5).

Section 903 omits current 5/5-8-1(b) through (f), which address various procedural issues related to felony sentences of imprisonment.¹¹⁰ Because these issues relate to treatment of offenders after they have been convicted and sentence has been imposed, they are more properly addressed in the Code of Corrections.

Similarly, Section 903 omits current 5/5-8-3(b), which explicitly provides that the County Jail Good Behavior Allowance Act, 730 ILCS 130/1 *et seq.*, applies to sentences of imprisonment for misdemeanor violations. This statement is probably unnecessary, and if needed, it properly belongs in that Act or in the Code of Corrections.

Section 904. Authorized Fines

Corresponding Current Provision(s): 730 ILCS 5/5-9-1; 5/5-9-1.3(a)

Comment:

Generally. This provision establishes the maximum fine for each class of offenses. The proposed maximum fines are bracketed to reflect the fact that the draft proposals are merely tentative. See supra “General Comment.”

Relation to current Illinois law. Section 904, like current 5/5-9-1(a), provides “default” rules for fines that may be modified by specific offense provisions. Section 904, however, always acts only as a default, enabling a specific provision to raise or lower the applicable fine range; by contrast, current 5/5-9-1(a) sometimes defers to other provisions and sometimes controls them. Current 5/5-9-1(a)(1) and (a)(2) allow specific provisions to *raise* the maximum fine, but not to *lower* it; (a)(4) allows specific provisions

¹¹⁰ Current 5/5-8-1(b) provides that the sentencing judge “shall set forth his reasons for imposing the particular sentence.” (The Illinois Supreme Court, however, has construed the term “shall” to be “permissive rather than mandatory.” *People v. Davis*, 442 N.E.2d 855, 858 (Ill. 1982) (holding that term “shall,” if read to impose mandatory requirement, would unconstitutionally infringe on separate powers of judiciary).) Current 5/5-8-1(c) provides the circumstances under which sentences may be reduced. Current 5/5-8-1(d) provides parole and mandatory supervised release terms for various offenses and offense categories. Current 5/5-8-1(e) establishes procedures whereby certain defendants’ sentences may be ordered to run concurrently with previous and unexpired sentences of imprisonment imposed by other jurisdictions. Finally, current 5/5-8-1(f) allows for the reduction of previous and unexpired sentences of imprisonment imposed by Illinois courts where defendants are subsequently sentenced to terms of imprisonment by other jurisdictions.

to *lower* the maximum fine, but not to *raise* it; (a)(3) is silent on the issue, suggesting no modification of the range is allowed; and (a)(5) specifies no range, thus deferring completely to the specific provision. To the extent it operates to prevent particularized fine ranges, current 5/5-9-1(a) runs counter to the general statutory principle that specific statements govern general ones, and also inappropriately cabins the legislature's discretion to tailor fines for specific offenses as it sees fit.

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.¹¹¹

Section 904(1) is similar to current 5/5-9-1.3(a) — which authorizes a fine of “twice the amount of the value of the property which is the subject of the offense” for theft, computer crime, and deceptive practices felonies — but generalizes the principle, authorizing a maximum fine of “twice the harm caused [by] or the gain derived” from *any* offense. Section 904(1) recognizes more broadly what current 5/5-9-1.3(a) recognizes with respect to a small number of felony offenses: criminal fines may provide better deterrence against certain offenses, and fairer punishment of certain offenders, when they are based on the harm caused by or gain derived from criminal acts. Consider, for example, theft of lost or mislaid property, a petty offense under current law (720 ILCS 5/16-2). A person finding \$10,000 worth of property belonging to his neighbor is more likely to give it back if he faces a maximum prospective fine of \$20,000 (leaving him \$10,000 poorer than before the theft), rather than \$1,000 (leaving him \$9,000 richer), for keeping it. The larger fine is both a better deterrent and a fairer punishment.¹¹²

Further, Section 904(1) generally assures that authorized criminal monetary penalties will at least parallel — and in most cases, exceed — corresponding civil penalties, thus maintaining and reinforcing the moral authority and sanctioning power of criminal law relative to civil law.

¹¹¹ The material in current Chapter 720 Articles 36 to 38, establishing rules for the seizure and forfeiture of property upon conviction for various offenses, deals with procedural matters properly addressed outside the Criminal Code. It is anticipated that these provisions will be transferred to the Code of Corrections by means of the “conforming amendments” legislation to be introduced to the General Assembly with the proposed Code.

¹¹² This is especially true for many regulatory offenses outside the Code, which will commonly be punished through fines rather than imprisonment. *See, e.g.*, 35 ILCS 505/15 (evading motor fuel sales tax); 205 ILCS 657/90 (failure to obtain a banking license); 240 ILCS 40/15-45 (withholding records relating to grain sales); 415 ILCS 5/44 (improper disposal of hazardous waste); 815 ILCS 5/14 (acting as securities dealer or investment advisor without a license); 815 ILCS 705/25 (making false statement or omitting any material fact in the course of selling a franchise). Regulatory offenses of this type are typically committed by corporations or unincorporated associations for which significant jail time will not be appropriate. Section 904's increased fine structure ensures that these non-Code offenses may still receive serious punishment even where an offense's grade is lowered to a Class 4 felony by operation of proposed Section 902.

Section 904(2) is similar to current 5/5-9-1(a), but more 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 5/5-9-1(a). 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(2)(a) through (f) specify six different maximum fines for each of the six felony classes, ranging from \$10,000 for Class 4 felonies to \$250,000 for Class [X-plus] felonies. Current 5/5-9-1(a)(1), in contrast, authorizes a single maximum fine of \$25,000 for all felonies. Section 904(2)(g) through (i) authorize three different maximum fines for each of the three misdemeanor classes, ranging from \$2,000 for Class C misdemeanors to \$5,000 for Class A misdemeanors. Current 5/5-9-1(a)(2) and (3), in contrast, authorize a single maximum fine of \$1,500 for Class B and Class C misdemeanors, and a higher maximum fine of \$2,500 for Class A misdemeanors. Section 904(2)(j) is substantively similar to current 5/5-9-1(a)(4) in authorizing a maximum fine of \$1,000 for petty offenses, but also establishes a \$1,000 maximum fine for business offenses where the statute defining the offense does not specify a fine.

Section 904(3) follows the form of current 5/5-9-1(a)(1), which 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.

Section 904 omits current 5/5-9-1(b) through (f), which address assorted issues related to criminal fines, because these issues are more properly addressed in the Code of Corrections.¹¹³ Section 904 also eliminates several provisions regarding additional fines for specific offenses and the proper distribution of proceeds therefrom. See 730 ILCS 5/5-9-1.1 to -1.3; -1.5 to -1.8; -1.10; -1.11. Potential fine amounts are adequately covered by the general fine structure in proposed Section 904(2); issues relating to distribution of those amounts may be addressed in the Code of Corrections.

¹¹³ Current 5/5-9-1(b) explicitly provides that “[a] fine may be imposed in addition to a sentence of conditional discharge, probation, periodic imprisonment, or imprisonment.” Current 5/5-9-1(c) imposes “an additional penalty of \$5 for each \$40, or fraction thereof, of fine imposed” that is to be added to fines for most offenses. Current 5/5-9-1(c-5) requires the imposition of an additional fee for offenses involving driving under the influence of alcohol or drugs. Current 5/5-9-1(d) sets forth the factors that courts are required to consider in determining the amount and method of paying a fine. Current 5/5-9-1(e) authorizes the court to order the manner in which fines are to be paid. Current 5/5-9-1(f) requires that certain fines, fees, and penalties be collected and disbursed by the circuit clerk.

Section 905. General Adjustments to Offense Grade

Corresponding Current Provision(s): 730 ILCS 5/5-8-2; 5/5-5-3.2(b) to (d); 740 ILCS 147/10; see also 705 ILCS 405/5-105(3)

Comment:

Generally. This provision allows for extended terms of imprisonment by increasing the grade of an offense by one grade where an enumerated aggravating factor is present.

Relation to current Illinois law. Section 905 corresponds to current 5/5-8-2(a) and 5/5-5-3.2(b).¹¹⁴ Section 905's initial statement is similar to current 5/5-5-3.2(b) in authorizing extended terms of imprisonment based on the existence of specified aggravating factors, but clarifies that the court may impose an extended term of imprisonment if any one of the specified factors exists, rather than saying that all the factors "may be considered by the court." Section 905 also points out that a factor should not be used to aggravate punishment if it is already reflected in the elements of the underlying offense of conviction. Compare, e.g., Section 905(3) (authorizing aggravation if "offense was accompanied by exceptionally brutal or heinous behavior indicative of reckless cruelty"), with proposed Section 1102(1)(a) (defining second-degree murder offense for homicide committed "recklessly . . . under circumstances manifesting an extreme indifference to the value of human life").

In keeping with current constitutional law, Section 905 allows that the fact of a prior conviction (at issue in Section 905(1) and (2)) may be found by the court, but all other facts (such as those at issue in Section 905(3) and (4)) must be found beyond a reasonable doubt by the trier of fact.¹¹⁵

Section 905(1) is similar to current 5/5-5-3.2(b)(1) but extends the aggravation for previous convictions of any offense of the same grade or a

¹¹⁴ Illinois courts have read current 5/5-8-2(a) to create a general rule that "extended-term sentences may only be imposed for the offenses within the most serious class of offense of which the accused is convicted." People v. Jordan, 469 N.E.2d 569, 576 (Ill. 1984). Where the defendant is sentenced to death or life imprisonment for murder, however, extended-term sentences may be imposed for offenses of other classes. See People v. Terry, 700 N.E.2d 992, 993-96 (Ill. 1998); People v. Young, 529 N.E.2d 497, 503-06 (Ill. 1988). Illinois courts also hold that extended-term sentences may be imposed for "separately charged, differing class offenses that arise from unrelated courses of conduct regardless of whether the cases are separately prosecuted or consolidated." People v. Coleman, 652 N.E.2d 322, 327 (Ill. 1995). In contrast, Section 905 provides that a grade adjustment is appropriate with respect to *any* offense of conviction for which a specified aggravating factor is present.

¹¹⁵ Although Apprendi v. New Jersey, 530 U.S. 466 (2000), does not require the jury to make factual findings regarding prior convictions, and although other amendments in Public Act 91-953 make a corresponding exception for such findings, that Act's amendment to 730 ILCS 5/5-8-2 does not exempt the fact of prior conviction — one of the factors set forth in 730 ILCS 5/5-5-3.2(b) — from the requirement of a jury finding beyond a reasonable doubt. Section 905 allows the court to find that a prior conviction exists, avoiding the potential prejudice that would result from requiring submission of a defendant's criminal history to the jury.

higher grade, rather than just felonies. The proposed change replaces similar aggravations for recidivist behavior provided in numerous substantive provisions with one general aggravation covering all offenses.¹¹⁶

Section 905(2) is identical to current 5/5-5-3.2(b)(11).

Section 905(3) is identical to current 5/5-5-3.2(b)(2), but has deleted the reference to “the court find[ing]” the factor, as Appendi v. New Jersey, 530 U.S. 466 (2000), requires that the jury find this fact beyond a reasonable doubt. Section 905(3) also replaces the word “wanton” with “reckless” — which has the same meaning under current law, see 720 ILCS 5/4-6 — because the proposed Code does not define or use the term “wanton.”

Section 905(4) is similar to current 5/5-5-3.2(b)(8), in that it is designed to aggravate punishment for group activity. However, Section 905(4) broadens the reach of the rule to cover group activity committed in furtherance of any “criminal organization,” rather than just the activities of “organized gangs.”

Section 905(5)(a) defines the term “criminal organization” and is similar to the definition of “organized gang” in current 740 ILCS 147/10. However, Section 905(6) broadens the reach of the provision by eliminating the requirement that the criminal organization have an “established hierarchy.” In addition, Section 905(5)(a) defines the term “course or pattern of criminal activity” similarly to 147/10, except that it requires the commission of three or more crimes within a three-year period, whereas 147/10 requires only two or more crimes within a five-year period. Commission of two crimes separated by five years does not suggest ongoing, organized criminal activity strongly enough to warrant imposition of a one-grade sentencing increase.

Section 905(5)(b) defines the term “delinquent minor” by reference to current 705 ILCS 405/5-105(3).

Section 905 omits current 5/5-5-3.2(b)(3), (b)(4) to (7), (b)(9) and (10), (c), and (d), which set forth special aggravating factors justifying extended terms of imprisonment for specific offenses. These special aggravating factors are of limited applicability and are more appropriately provided in the particular provisions to which they might apply.¹¹⁷ See 720 ILCS 5/5-5-

¹¹⁶ The material in current Chapter 720 Article 33B, providing mandatory life sentences for third or subsequent offenses, deals with more particular sentencing issues — as opposed to grading issues — properly addressed outside the Criminal Code. It is anticipated that these provisions, should the General Assembly choose to retain them, will be transferred to the Code of Corrections by means of the “conforming amendments” legislation to be introduced to the General Assembly with the proposed Code.

¹¹⁷ Current law’s use of general aggravations that apply to all felonies, while also employing specific aggravations within specific offenses, creates needless overlap and introduces confusion, if not incoherence. Such overlap recently led an Illinois court to find that the competing, and inconsistent, aggravations for theft against persons over 60 years of age violated the Proportionate Penalties clause (Article I, § 11) of the Illinois Constitution. See People v. Graves, 773 N.E.2d 1243, 1248 (Ill. App. 2002) (finding penalty for “theft by deception” against victim over 60 years old, which provides for a maximum sentence of 7 years, unconstitutionally disproportionate to penalty for “unauthorized theft,” which allows maximum extended sentence of 14 years for same conduct).

3.2(b)(3) (multiple homicide offenses); 5/5-5-3.2(b)(4) (felonies committed against certain categories of victim); 5/5-5-3.2(b)(5) (criminal sexual assault and aggravated criminal sexual assault — gang-rape situation); 5/5-5-3.2(b)(6) (aggravating for felony “committed as part of a ceremony, rite, initiation, observance, performance, practice or activity of any actual or ostensible religious, fraternal, or social group”); 5/5-5-3.2(b)(7) (first-degree murder by past serious offender); 5/5-5-3.2(b)(9) (unlawful use of weapons — gang member); 5/5-5-3.2(b)(10) (aggravating for “using a firearm with a laser sight attached to it”); 5/5-5-3.2(c) (aggravating for certain sexual offenses where the victim is a minor); 5/5-5-3.2(d) (unlawful use of weapons — weapon “not readily distinguishable”).

Section 906. Authorized Sentence for Multiple Offenses

Corresponding Current Provision(s): 730 ILCS 5/5-8-4

Comment:

Generally. This provision establishes a rule for determining cumulative authorized sentences for defendants convicted of more than one offense.

Relation to current Illinois law. Section 906 is functionally similar to current 5/5-8-4 in addressing the terms of imprisonment for defendants convicted of multiple offenses. Section 906’s initial statement that the provision applies “[w]hen a defendant is being sentenced for more than one offense” is substantively similar to that in the first sentence of 5/5-8-4(a), and makes clear the proposed sentencing scheme only applies to convictions tried together in the same trial as provided by current law’s joinder rules. *See* 725 ILCS 5/111-4; 5/114-7. The current rules for sentencing offenses that are not tried together remain unchanged.

Section 906 eliminates current 5/5-8-4’s special rules for particular offenses and factual circumstances and provides a universal sentencing rule that authorizes neither consecutive nor concurrent sentences for multiple offenses. 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.¹¹⁸ 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.

¹¹⁸ In the event that an offense is overturned on appeal, the defendant should be resentenced in accordance with this scheme, reapplying 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.

Section 906's mechanism for sentencing multiple convictions provides fairer punishment than the crude consecutive-or-concurrent dichotomy of current 5/5-8-4(b). Consecutive sentencing often results in cumulative sentences that seem overly severe as measures of the total harm caused.¹¹⁹ 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.

Current 5/5-8-4(a) requires that multiple sentences of imprisonment be served either consecutively or concurrently. Consecutive sentences are required under current law if one of the offenses of conviction is: (1) first-degree murder, a Class X felony, or a Class 1 felony and the defendant — or another person for whose conduct the defendant is accountable¹²⁰ — inflicted serious bodily injury;¹²¹ (2) sexual assault, aggravated sexual assault, or predatory criminal sexual assault of a child; (3) armed violence based upon one of several specified predicate offenses; (4) committed while the defendant was committed to the Department of Corrections; (5) escape or attempted escape under 730 ILCS 5/3-6-4; (6) a felony committed while on pretrial

¹¹⁹ In recognition of the potential harshness of consecutive sentences, current 5/5-8-4(c) imposes limitations on the length of cumulative consecutive sentences. Current 5/5-8-4(c)(1) and (2) set forth separate rules for the laws in effect prior to and on or after February 1, 1978, respectively. Under both provisions, the maximum cumulative consecutive sentence for felonies is determined by reference to the maximum authorized sentence “for the 2 most serious felonies involved.” (5/5-8-4(c)(2) differs from (c)(1), however, in that it looks to the maximum *extended-term* sentences for the two most serious felonies, and applies only to sentences for offenses “committed as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective.”) With respect to defendants sentenced only for misdemeanors, both (c)(1) and (c)(2) provide that the cumulative consecutive sentence may not exceed “the maximum for one Class A misdemeanor.”

The scheme 5/5-8-4(c) imposes may lead to anomalous and undesirable results. For example, courts have read 5/5-8-4(c)(2) in some circumstances to limit a defendant's total maximum sentence for multiple offenses to an amount less than the maximum authorized sentence if the defendant had committed only one offense. See *People v. Pullen*, 733 N.E.2d 1235, 1239 (Ill. 2000) (holding defendant was subject to 28-year maximum consecutive sentence for committing multiple Class 2 felonies, even though defendant would have been eligible for up to a 30-year sentence, as a Class X offender under Section 5/5-5-3(c)(8), had he committed one offense).

¹²⁰ See *People v. Sangster*, 437 N.E.2d 625, 627-28 (Ill. 1982).

¹²¹ Before 5/5-8-4(a)(i) was amended to refer to first-degree murder, the provision was construed as “requiring consecutive sentencing where the defendant has been convicted of either a Class X or Class 1 felony and where he had inflicted severe bodily injury *during the commission of that felony*.” *People v. Whitney*, 720 N.E.2d 225, 229 (Ill. 1999) (emphasis added). The Illinois Supreme Court has yet to re-examine *Whitney* in light of the recent amendment to 5/5-8-4(a)(i).

release or in pretrial detention for another felony of which the defendant was also convicted; or (7) a felony committed while free on bond or in detention following conviction for another felony. See 730 ILCS 5/5-8-4(b), (f) to (i).

Current law requires that sentences run concurrently if: (1) consecutive sentences are not required and the “offenses were committed as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective”; (2) the defendant was serving a sentence of imprisonment for a misdemeanor when convicted of a felony; or (3) the court does not specify that sentences are to run consecutively. See 730 ILCS 5/5-8-4(a), (d).

Where neither a consecutive nor a concurrent sentence is required under 5/5-8-4, the sentencing court may impose either consecutive or concurrent terms, subject to 5/5-8-4(b)’s limitation that the court may impose a consecutive sentence only if it finds that such a sentence “is required to protect the public from further criminal conduct by the defendant.”¹²²

Section 906 omits current 5/5-8-4(c) and (e). Current 5/5-8-4(c) sets forth rules governing the maximum length of consecutive sentences and is therefore unnecessary under the proposed scheme, which eliminates consecutive sentences. Current 5/5-8-4(e) establishes rules for serving consecutive sentences where at least one of the sentences is for a felony.

Section 907. Definitions

Corresponding Current Provision(s): 705 ILCS 405/5-105(3); 720 ILCS 5/1-5; 740 ILCS 147/10

Comment:

Generally. This provision collects defined terms used in Article 900 and provides cross-references to the sections in which they are defined.

Relation to current Illinois law. For a discussion of the relationship between Article 900’s defined terms and current law, refer to the commentary for the provision in which the term is initially defined.

¹²² Current 5/5-8-4(b) provides that the court “shall” set forth the basis for a consecutive sentence in the record. The Illinois Supreme Court, however, has construed the term “shall” to be “permissive rather than mandatory.” People v. Hicks, 462 N.E.2d 473, 477 (Ill. 1984) (holding that term “shall,” if read to impose mandatory requirement, would unconstitutionally infringe on separate powers of judiciary).

PROPOSED ILLINOIS CRIMINAL CODE
OFFICIAL COMMENTARY
PART II: DEFINITION OF SPECIFIC OFFENSES



ARTICLE 1100. HOMICIDE OFFENSES

General Comment Regarding Article 1100:

In addition to the substantive changes discussed in the commentary below, Article 1100 changes some of the nomenclature of Illinois homicide law. As a result, Article 1100 and current Illinois law sometimes use the same name to refer to different offenses, and also sometimes use different names to refer to the same offense. Most significantly, most of the conduct criminalized by Section 1102's offense of "second-degree murder" is currently treated as "first-degree murder" under current 5/9-1(a)(2) and (a)(3), while much of what current 5/9-2 calls "second-degree murder" is labeled "first-degree manslaughter" under Section 1103. Section 1104 uses the term "second-degree manslaughter" to refer to the conduct criminalized by current 5/9-3's separate offenses of "involuntary manslaughter" and "reckless homicide." Except where the context indicates otherwise, the commentary uses the proposed offense names rather than the current ones.

Section 1101. Murder in the First Degree

Corresponding Current Provision(s): 720 ILCS 5/9-1(a)(1); 730 ILCS 5/5-8-1(a)(1)(a); see also 730 ILCS 5/5-8-2(a)(1)

Comment:

Generally. Section 1101 defines first-degree murder to require knowingly causing the death of another person, and grades it as the most serious offense in the proposed Code.

Relation to current Illinois law. Section 1101(1) is substantively similar to current 5/9-1(a)(1) in imposing liability where one knowingly causes death,¹ but makes three substantive modifications to the offense definition to ensure that first-degree murder liability is imposed for only the most serious offenses and to avoid overlap with General Part provisions.

¹ Section 1101(1) rejects the common-law concept of "malice" in favor of the culpability scheme set forth in Article 200. The 1961 Code also intended to abolish any requirement of "malice." See 720 ILL. COMP. STAT. ANN. 5/9-1, Committee Comments — 1961, at 13 (West 1993) ("Section 9-1 is intended . . . to avoid the use of the difficult 'malice' language. . . . The words relating to the mental states of intent and knowledge are used in the sense in which they are defined in Article 4."); *People v. Jeffries*, 646 N.E.2d 587, 594 (Ill. 1995) ("Because the term 'malice aforethought' was not susceptible to clear definition, the legislature eliminated any reference to it in the definition of murder in the new criminal code.") (citations omitted).

Nevertheless, Illinois courts occasionally suggest that malice remains an element of murder. See, e.g., *People v. Stokes*, 689 N.E.2d 625, 630 (Ill. App. 1997) ("To sustain a charge of attempt to murder, it is sufficient to discharge a weapon in the direction of another (continued...)")

First, Section 1101(1) requires knowingly causing the death of another,² and does not apply where one causes death while intending only to inflict great bodily harm. Section 1101(1)'s formulation reflects the view that the offense should reach only those who satisfy a stated culpability requirement as to causing the specific harm the offense prohibits. Although one who intends to cause great bodily harm is certainly blameworthy — and in nearly all cases will at least satisfy the culpability requirements for second-degree murder, second-degree manslaughter, or negligent homicide under the proposed Code — there is a meaningful difference between intending injury and knowingly killing another person. For this reason, “[m]ost modern codes define murder as not including the intent-to-do-serious-bodily-injury type.” 2 WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 7.3, at 198 (1986); see also *id.* n.5 (citing 22 jurisdictions that do not include such cases as murder, versus 9, including Illinois, that do).

Section 1101(1)'s formulation also avoids potential confusion in jury instructions for attempted first-degree murder. Under current law, courts ordinarily give a general attempt instruction along with an instruction for the substantive offense. Because current 5/9-1 does not require culpability specifically as to causing death, however, Illinois is forced to use a special instruction for attempted first-degree murder requiring a finding that the defendant acted with an “intent to kill.” See IPI (CRIMINAL) 6.05X (4th ed. 2000). This approach appears to conflict with current 5/8-4's general rules for attempt liability, but is necessary to distinguish battery (or its attempt) from attempted first-degree murder. It has also “served as a continuing source of confusion and uncertainty among members of the bar.” *People v. Kraft*, 478 N.E.2d 1154, 1157 (Ill. App. 1985); see also *People v. Holmes*, 627 N.E.2d 98, 102 (Ill. App. 1993) (“Numerous courts confronted with the exact situation presented here have found error.”); *People v. Jeter*, 616 N.E.2d 1256, 1260 (Ill. App. 1993) (observing that erroneous “instructions continue to be used by the trial courts” and citing 15 cases finding attempted-murder instructions erroneous). Section 1101(1) anticipates the availability of attempt liability under Section 801, and avoids confusion by omitting the intent-to-injure murder formulation.

¹ (...continued)

individual, either with malice or total disregard for human life.”); *People v. Medrano*, 648 N.E.2d 218, 223 (Ill. App. 1995) (“Murder is the unlawful killing of another person with malice aforethought.”); *People v. Jerome*, 564 N.E.2d 221, 225 (Ill. App. 1990) (“In drafting the murder . . . statute, the legislature intended to retain the common-law concepts of express and implied malice but to replace those terms with the more modern and less ambiguous terms of intent and knowledge respectively.”). As one Illinois court has observed, this reading “diminishes both the clear language of these . . . statutes and the legislative intent in enacting them.” *People v. Newbern*, 579 N.E.2d 583, 595 (Ill. App. 1991).

² Section 1101(1), like current 5/9-1(a)(1), also imposes liability where one intentionally causes the death of another. Section 1101(1) omits 5/9-1(a)(1)'s language concerning one who “intends to kill,” however, in recognition of proposed Section 205(6)'s stated rule that proof of intent will satisfy a culpability requirement of knowledge.

Second, Section 1101(1) omits as redundant current 5/9-1(a)'s requirement that the offender act "without lawful justification," since proposed Section 400 clearly provides that justifications are complete defenses barring liability. See proposed Section 400 and corresponding commentary. Section 1101(1)'s omission of this language also makes clear that the absence of a justification is not an element of the offense for which the prosecution bears the burden of production. See proposed Section 107(3) (imposing burden of production on State for "offense elements," but on defendant for "affirmative defenses").

Third, Section 1101(1) omits current 5/9-1(a)(1)'s language covering cases where the offender kills one person while intending to harm another as unnecessary in light of Section 303, which permits imputation of intent or knowledge in the "transferred intent" situation. See proposed Section 303 and corresponding commentary (imputation appropriate where "a different person . . . is injured").

Section 1101(2) is substantively similar to current 730 ILCS 5/5-8-1(a)(1)(a) in authorizing longer prison sentences for first-degree murder than for Class X felonies, but does so by grading the offense as a Class [X-plus] felony rather than by prescribing a unique sentence. This approach eliminates any need for aggravating factors warranting life imprisonment or an "extended" imprisonment term, because life imprisonment is always an authorized sentence for Class [X-plus] felonies under Article 900. See proposed Section 903 and corresponding commentary; cf. 730 ILCS 5/5-8-1(a)(1)(b),(c) (listing aggravating factors warranting life imprisonment); 5/5-8-2(a)(1) (authorizing "extended" term of up to 100 years based on certain aggravating factors). Current 730 ILCS 5/5-8-1(a)(1)(d)'s mandatory added sentences for cases involving firearms, however, would remain as sentencing rules defining the level of punishment a defendant would receive within the assigned grade.

Section 1101(2) also provides that, subject to the standards and procedures to be set forth in Section 1109, first-degree murder is an offense "for which the death penalty may be imposed." Using this language in Section 1101(2), rather than in Article 900 for Class [X-plus] felonies generally, makes clear that the death penalty may be imposed only for first-degree murder — and not for Class X felonies that are aggravated to Class [X-plus] felonies for sentencing purposes. Cf. proposed Section 905 (authorizing one-grade adjustment based on certain aggravating factors).

Section 1101 omits current 5/9-1(a)(2) and (a)(3), which impose first-degree murder liability for homicidal acts known to "create a strong probability of death or great bodily harm" and for felony murder, respectively. Section 1101's rejection of first-degree murder liability for these offenses, like its exclusion of those who intend only great bodily harm, reflects the view that the Code's most serious offense should not reach those who are reckless, negligent, or have no culpability whatever as to causing the particular harm (death) with which it is concerned. Second-degree murder liability will be available, however, for most of the conduct covered by 5/9-1(a)(2) and (a)(3). See proposed Section 1102 and corresponding commentary.

Section 1102. Murder in the Second Degree

Corresponding Current Provision(s): 720 ILCS 5/9-1(a)(2),(3); 5/9-3.3; 730 ILCS 5/5-8-1(a)(1)(a); see also 730 ILCS 5/5-8-2(a)(1)

Comment:

Generally. This provision defines and grades the offense of second-degree murder and establishes a special permissive inference for the offense. Section 1102 imposes an intermediate punishment for offenses that, though considered less serious than first-degree murder, are considered more serious than the reckless killings covered by Section 1104.

Relation to current Illinois law. Section 1102(1) defines two bases for second-degree murder liability. Section 1102(1)(a) is substantively similar to current 5/9-1(a)(2), but amends the offense definition to clearly distinguish second-degree murder from reckless homicide.³ Section 1102(1)(a) prohibits “recklessly caus[ing] the death of another person under circumstances manifesting an extreme indifference to the value of human life.” Current 5/9-1(a)(2), by contrast, prohibits causing death through acts one knows to “create a strong probability of death or great bodily harm.” Like Section 1102(1)(a), current 5/9-1(a)(2) is intended to apply to offenders who, although they did not knowingly cause death, are thought to be more blameworthy and dangerous than others who recklessly cause death. See 720 ILL. COMP. STAT. ANN. 5/9-1, Committee Comments — 1961, at 15 (West 1993) (“Clearly, no sharp dividing line can be drawn, but the Committee chose ‘strong probability’ as the plainest description of the situation which lies between the ‘practical certainty’ of the preceding subsection [requiring culpability of ‘knowledge’], and the ‘likely cause’ and ‘substantial and unjustifiable risk’ of the involuntary manslaughter provision (§ 9-3, using ‘recklessly’ as defined in § 4-6).”).

Current 5/9-1(a)(2)’s “strong probability” requirement, however, does not clearly communicate a more demanding culpability requirement than current 5/9-3’s requirement of recklessness as to causing death.⁴ Although knowingly creating a “strong probability” would seem to require

³ Section 1102(1)(a) also omits current 5/9-1(a)(2)’s language covering the “transferred intent” situation and 5/9-1(a)’s requirement that the offender act “without lawful justification,” as proposed Sections 303 and 400 cover the omitted language. See also commentary for proposed Section 1101(1).

⁴ The 1961 Code drafters expressed a belief that the “strong probability” requirement “would seem to require a minimum of further definition in jury instructions, and to permit ready comparison with the other two situations mentioned, when the evidence requires instructions thereon.” 720 ILL. COMP. STAT. ANN. 5/9-1, Committee Comments — 1961, at 15 (West 1993). The term has, in fact, received no “further definition in jury instructions” at all. See IPI (CRIMINAL) 7.01 et seq. (4th ed. 2000) (failing to define knowingly creating a “strong probability”). Accordingly, there has been no clear resolution of the tensions noted in the text between the “strong probability” requirement and the standard definition of recklessness.

a greater disregard of potential harm than the “substantial risk” required for recklessness, it is unclear whether current 5/9-1(a)(2)’s culpability requirement is more stringent than the recklessness standard in all respects. Whereas the “strong probability” test focuses only on the objective magnitude of the risk of harm, recklessness also requires consideration of the actor’s subjective awareness of the risk and the context in which the risk is created. See 720 ILCS 5/4-6 (requiring disregard of “unjustifiable” risk constituting “gross deviation from the standard of care which a reasonable person would exercise in the situation”); cf. 2 LAFAYE & SCOTT, SUBSTANTIVE CRIMINAL LAW § 7.4, at 202 n.17 (1986) (noting current 5/9-1(a)(2) “seems incorrectly to focus exclusively upon the degree of risk”). Thus it is possible that a person whose acts lead to another’s death could be liable under 5/9-1(a)(2)’s “strong probability” formulation, but not satisfy the requirements of the reckless homicide offense, which is meant to define a lower standard of liability.⁵ It may be due to the ambiguity of the relation between the “strong probability” test and the recklessness standard that only one other jurisdiction allowing culpability as to harm, rather than death, as a basis for murder liability appears to use 5/9-1(a)(2)’s “strong probability” language. See N.M. STAT. ANN. § 30-2-1(B).

⁵ Although current law’s distinction between the “strong probability” requirement and recklessness is unclear, Illinois courts have often held as a matter of law that certain factual situations may satisfy one, but categorically do not satisfy the other. That is, they have refused to allow jury instructions for current 5/9-3’s reckless homicide offense where a defendant who pointed a gun in the decedent’s “general direction” claims that he intended neither death nor injury. See, e.g., People v. Jefferson, 631 N.E.2d 1374, 1386 (Ill. App. 1994) (“Illinois courts consistently hold that when the defendant intends to fire a gun, points it in the general direction of her intended victim, and shoots, such conduct is not reckless, regardless of the defendant’s assertion that she did not intend to kill anyone.”); People v. Hennon, 593 N.E.2d 587, 592 (Ill. App. 1992) (“Generally, an involuntary manslaughter instruction is not warranted where a defendant voluntarily and willfully commits an act which has a natural tendency to cause death or great bodily harm.”); cf. People v. Cannon, 273 N.E.2d 829, 831 (Ill. 1971) (instructions on involuntary manslaughter properly refused despite testimony that defendant “did not intend to kill anyone”); People v. Latimer, 220 N.E.2d 314, 317 (Ill. 1966) (instructions on involuntary manslaughter properly refused despite testimony that defendant “merely intended to frighten” decedent).

Although a rational jury may certainly find that such a case warrants murder liability, it seems questionable to impose a *de facto* rule that it would be irrational for a jury to impose reckless-homicide liability instead. As some Illinois courts have recognized, a jury *may* rationally find — when given the opportunity to do so — that a defendant in such a case caused death only recklessly. See, e.g., People v. Kelly, 322 N.E.2d 527, 532 (Ill. App. 1975) (“It was a question for the jury whether firing a gun aimed toward the decedent was a reckless performance of an act likely to cause death or bodily harm to a person 18 feet away. Obviously the jury believed defendant’s testimony that he did not intend to kill”); cf. People v. Hines, 334 N.E.2d 233, 238 (Ill. App. 1974) (reducing conviction to involuntary manslaughter because jury could have rationally found that defendant intended only to “scare” decedent). It is anticipated that under the proposed Code, in most cases of this kind, it would be appropriate to provide jury instructions under both Section 1102(1)(a) and Section 1104 and allow the jury to determine what degree of liability the offender deserves.

Section 1102(1)(a), by contrast, clearly articulates a higher culpability requirement than recklessness by explicitly incorporating the recklessness standard and adding an additional requirement.⁶ The provision requires that the offender recklessly cause death “under circumstances manifesting an extreme indifference to the value of human life.” This formulation limits the offense to offenders who, although lacking the culpability required for first-degree murder, are more blameworthy than those who recklessly cause death without such depraved indifference. Section 1102(1)(a)’s language would also cover most of the intent-to-injure cases that are treated as first-degree murder under current Illinois law.⁷ See 720 ILCS 5/9-1(a)(1) (imposing first-degree murder liability where defendant “intends to . . . do great bodily harm”).

Section 1102(1)(b) is substantively similar to current 5/9-1(a)(3) in imposing liability where one causes death in the course of attempting or committing a forcible felony,⁸ but makes three substantive modifications to the definition of felony murder. First, Section 1102(1)(b) requires that the offender “in fact” cause the death of another person. This language makes it clear that Section 1102(1)(b) imposes absolute liability as to causing the death of another person,⁹ which is in keeping with the Illinois courts’ general rule that “[f]elony murder is premised on strict liability for one who kills or is

⁶ Because Section 1102(1)(a)’s offense requires recklessness as to causing death, the proposed Code does not impose liability for attempts to commit that offense. As discussed in the commentary for the proposed second-degree manslaughter offense, proposed Section 801’s requirement that one intend to “engage in the conduct that would constitute the offense” precludes the possibility of attempting an offense that requires recklessness as to a result element. See *infra* note 29.

⁷ A defendant’s intent to inflict great bodily harm is relevant to the determinations of both his recklessness as to causing death and whether he acted with “extreme indifference to the value of human life.” Therefore, in nearly all such cases a jury may be instructed, and may find the defendant liable, under Sections 1102(1)(a) and/or 1104. The proposed formulations reflect a slightly different focus than current law, however, because they directly address the defendant’s culpability as to the central harm involved in a homicide case — causing death — rather than using his culpability as to a different form of harm (causing injury) as a proxy for that issue.

⁸ Because Section 1102(1)(b) requires the attempt or commission of a forcible felony, felony murder’s offense elements incorporate the offense elements of the predicate forcible felony. See proposed Section 202(1) (defining “elements of the offense” to include objective elements and culpability requirements “contained in the offense definition”). Thus, as under current 5/1-5(b)’s second sentence, jurisdiction for felony murder is appropriate where the predicate felony is attempted or committed in Illinois. See proposed Section 105(2) and corresponding commentary.

⁹ Because Section 1102(1)(b) imposes absolute liability as to causing death, inchoate liability for felony murder is not possible under the proposed Code. This is consistent with the Illinois courts’ rejection of attempt liability for felony murder under current 5/9-1(a)(3). See *People v. Viser*, 343 N.E.2d 903, 910 (Ill. 1975) (“There can be no felony murder where there has been no death, and the felony murder ingredient of the offense of murder cannot be made the basis of an indictment charging attempt murder. . . . There is no such criminal offense as an attempt to achieve an unintended result.”).

responsible for a killing during the course of a felony.”¹⁰ Section 1102(1)(b)’s use of the phrase “in fact” avoids the application of a culpability requirement of recklessness under the General Part’s “read-in” provision. See proposed Section 205(4) and corresponding commentary.¹¹ In imposing absolute liability (as to the element of causing death), however, Section 1102(1)(b) does not dispense with the proposed Code’s general rules governing causation and accountability for the conduct of another. Section 1102(1)(b) imposes the

¹⁰ People v. Hall, 683 N.E.2d 1274, 1280 (Ill. App. 1997); see also People v. Shaw, 713 N.E.2d 1161, 1173 (Ill. 1999) (“Whether the perpetrator *intended* to murder the victim during the course of a felony is irrelevant.”).

There is Illinois authority stating that felony murder requires knowledge that one’s conduct creates a “strong possibility” of death. See People v. McEwen, 510 N.E.2d 74, 78 (Ill. App. 1987) (“To summarize, a killing constitutes felony murder where it is shown that an actor intentionally brought about the death of another or that the actor had knowledge that his conduct was practically certain to cause death or created a strong possibility that death would result.”). The Illinois Supreme Court case cited in support of this proposition, however, merely states that culpability with respect to death is required for forms of murder *other than* felony murder. See People v. Guest, 503 N.E.2d 255, 266 (Ill. 1986) (discussing requirements of murder under 5/9-1(a)(1) and (a)(2)).

¹¹ As Illinois courts have recognized, the prosecution must still prove any culpability required for the forcible felony upon which felony murder is predicated. See People v. Harper, 665 N.E.2d 474, 484 (Ill. App. 1996).

There is current case law authority holding that “the predicate felony upon which the murder conviction is based must involve a knowing or intentional state of mind.” People v. Land, 523 N.E.2d 711, 719 (Ill. App. 1988) (reversing felony-murder conviction predicated on reckless cruelty to child). Under the proposed Code, the fact that an offense definition requires less than knowledge as to one, some, or even all its objective elements would not, by itself, compel the conclusion that the offense is not a “forcible felony.” Section 108’s definition of “forcible offense” includes any felony whose offense elements require the creation of “a risk of death or great bodily harm.” For example, sexual assault of a minor requires only negligence as to the minor’s age under proposed Section 1306, but that offense could be considered a forcible felony under the proposed definition.

same requirements for causation¹² and accountability¹³ as are required for any other offense. See proposed Sections 203 and 301 and corresponding commentary.

Second, Section 1102(1)(b) is substantively similar to current 5/9-1(a)(3) in requiring that the offender cause death in the course of “attempting or committing a forcible felony,” but states explicitly that the offender must cause death “while” the predicate offense is occurring. Although 5/9-1(a)(3) also uses the present tense to impose liability where “in performing the acts which cause the death . . . [the offender] is attempting or committing” a felony, the Illinois Supreme Court has read 5/9-1(a)(3) to allow liability

¹² Section 1102(1)(b) requires that the offender, or one for whose conduct he is accountable, “cause[] the death of another person”; current 5/9-1(a)(3) similarly imposes liability only where one “kills an individual” and commits or attempts a forcible felony “in performing the acts which cause the death.”

Perhaps because the Illinois Criminal Code currently lacks a provision establishing rules to govern the causation issue, the Illinois courts have been unclear in articulating the causation requirement for felony murder. The Illinois courts often state that the defendant is liable if death was a “foreseeable consequence of his initial criminal acts.” People v. Lowery, 687 N.E.2d 973, 978, 979 (Ill. 1997); see also People v. Hickman, 319 N.E.2d 511, 513 (Ill. 1974) (holding that accidental killing of police officer by fellow officer was “direct and foreseeable consequence” of escape from burglary and would support liability); People v. Pugh, 634 N.E.2d 34, 35 (Ill. App. 1994); People v. Graham, 477 N.E.2d 1342 (Ill. App. 1985). Some of the same cases suggest, however, that there is no true requirement of proximate causation for felony murder. See, e.g., People v. Jenkins, 545 N.E.2d 986, 996 (Ill. App. 1989) (approving instruction omitting causation requirement altogether, because it “stated the law . . . more accurately” than IPI instruction including causation requirement); see also Pugh, 634 N.E.2d at 35 (stating that “forcible felonies are so inherently dangerous that a resulting homicide, even an accidental one, is strongly probable”); People v. Davis, 527 N.E.2d 552, 558 (Ill. App. 1988) (holding that Hickman’s language regarding death as “direct and foreseeable consequence” of defendant’s conduct did not state an “essential element” of felony murder); cf. Lowery, 687 N.E.2d at 978 (upholding liability for defendant where death was caused by independent act of another person). Proposed Section 203 would supersede current case law concerning felony murder’s causation requirement to the extent that it is inconsistent with that provision.

¹³ Although the accomplice (like the principal) need have no culpability as to causing death, accomplice liability for felony murder is appropriate only where the offender had the culpability required for the predicate forcible felony and either (1) caused the person to commit the forcible felony, or (2) intentionally aided, solicited, or conspired with the person in the forcible felony’s planning or commission. Accomplice liability is inappropriate, though, where the conduct causing death occurs during the attempt or commission of a forcible felony for which the defendant is not accountable. See proposed Section 301 and corresponding commentary. For this reason, Section 1102(1)(b) does not adopt the Illinois courts’ “common-design” rule, or any similar rule applicable in the context of felony murder, to the extent that such a rule would permit accomplice liability for felony murder where the defendant does not satisfy the rules governing complicity as to the specific forcible felony used as a basis for felony-murder liability.

for killings taking place before¹⁴ or after¹⁵ the attempt or commission of the predicate felony. Section 1102(1)(b)'s language makes clearer that felony-murder liability is improper where the conduct causing death occurs before or after the underlying offense. (Like current law, however, Section 1102(1)(b) requires only that the conduct causing death — and not the death itself — occur “while” the underlying offense is being attempted or committed. Thus a burglar could be held liable where he shoots someone during the burglary, but the victim does not die of the gunshot wounds until much later.)

Third, Section 1102(1)(b) explicitly states that felony murder must be predicated on a felony “other than an assault that causes the death.” This language is in keeping with the Illinois courts’ construction of current 5/9-1(a)(3), under which liability may not be imposed “where the acts constituting forcible felonies arise from and are inherent in the act of murder itself.”¹⁶ Section 1102(1)(b) allows neither an assault (a category that includes such other offenses as endangerment) nor another form of homicide (such as manslaughter, as current 5/9-1(a)(3) explicitly states, or reckless or negligent homicide) to serve as a predicate for felony-murder liability. Otherwise, any grading distinctions between these offenses would be lost, as *all* homicides, and all assaults resulting in death, could be elevated to felony murder automatically. As the Illinois Supreme Court has observed, the effect of allowing felony-murder liability to be predicated on an assault causing death “could be to . . . effectively eliminate the need for the State to prove an

¹⁴ See People v. Pitsonbarger, 568 N.E.2d 783, 790 (Ill. 1990) (holding that State need only prove that killing and underlying felony were part of the “same criminal episode”). The Pitsonbarger court appears to have incorrectly based its holding on current 5/9-1(b)(6), which provides that the defendant is eligible for the death penalty for committing murder “in the course of another felony,” rather than on current 5/9-1(a)(3)’s offense definition.

¹⁵ The Illinois Supreme Court has repeatedly held that felony-murder liability is appropriate where death is caused during an *escape* from a forcible felony, under the theory that “the period of time and activities involved in escaping to a place of safety are part of the crime itself.” People v. Hickman, 319 N.E.2d 511, 513 (Ill. 1974); see also People v. Lowery, 687 N.E.2d 973, 979 (Ill. 1997); People v. Bongiorno, 192 N.E. 856, 857 (Ill. 1934). Yet as the Illinois Supreme Court has recognized in the context of accomplice liability for robbery, an escape is ordinarily not “part of the crime,” because it is not an offense element. See People v. Shaw, 713 N.E.2d 1161, 1172 (Ill. 1998) (reversing felony-murder conviction where defendant aided only in escape, because “[t]he offense of robbery is complete when force or threat of force causes the victim to part with possession or custody property against his will”); People v. Dennis, 692 N.E.2d 325, 334 (Ill. 1998) (reversing armed robbery conviction where defendant aided only in escape, because “[i]n a case where an escape is accomplished without force, it cannot reasonably be argued that such escape is part of the substantive offense”). Under Section 1102(1)(b), the underlying felony’s offense definition would guide the determination of whether the defendant caused death “while attempting or committing” that felony.

¹⁶ People v. Morgan, 758 N.E.2d 813, 838 (Ill. 2001). Prior to Morgan, current law was not entirely clear on this issue. Cf. People v. Viser, 343 N.E.2d 903, 908-09 (Ill. 1975) (rejecting rule, adopted in other jurisdictions, that “an assault upon the person killed cannot be made the basis of a felony murder charge”); People v. Toney, 722 N.E.2d 643, 650 (Ill. App. 1999) (observing that lower court’s holding in Morgan was “seemingly inconsistent” with Viser), vacated, 759 N.E.2d 1 (Ill. 2001).

intentional or knowing killing in most murder cases.” People v. Morgan, 758 N.E.2d 813, 838 (Ill. 2001).

Section 1102(2) establishes a permissive inference that Section 1102(1)(a)’s culpability requirements are established where the defendant “unlawfully delivered a controlled substance to the victim and the victim dies as a result.” Section 1102(2) is similar in its effect to current 5/9-3.3(a), but achieves that result by employing a permissive inference rather than defining a separate offense of “drug-induced homicide.” In doing so, Section 1102(2) facilitates prosecution for second-degree murder in such cases, but avoids imposition of absolute liability and thereby enables the defendant to litigate the issue where he can demonstrate a lack of culpability.¹⁷ See proposed Section 107(4) and corresponding commentary.

Section 1102(2) also makes two substantive modifications to assure that recklessness and extreme indifference are not inappropriately inferred.¹⁸ First, the permissive inference operates only if the defendant “delivered a controlled substance to the victim,” whereas current 5/9-3.3(a) imposes liability on any person in the chain of supply, no matter how far removed from the transaction causing death. Section 1102(2) limits the inference’s applicability in recognition that the person who delivers the drug is much more likely to know the victim, and the amount of drug delivered to that particular victim, and therefore to satisfy the offense’s culpability requirements. Of course, despite the limited reach of the inference, other persons in the chain of supply would also be subject to second-degree murder liability if they could be shown to satisfy Section 1102(1)(a)’s requirements.

Second, Section 1102(2) omits current 5/9-3.3(a)’s reference to the death of “any person” as a result of drug use. The current provision’s use of this language appears designed to clarify that any person in a drug-using decedent’s chain of supply may be held liable, but suggests that liability may also be imposed where the drug user causes the death of a third person. Section 1102(2) explicitly requires that the offender deliver drugs “to the victim” in recognition that his behavior clearly reflects a depraved indifference toward only that person’s life. If the drug user’s condition caused him to kill another person while driving, for example, the dealer might be held liable as an accomplice to reckless homicide — or also might be held

¹⁷ It is not clear whether current 5/9-3.3 effectually provides for absolute liability as to causing death. Although the provision seems designed to impose absolute liability, current 5/4-3(b) would require recklessness to be “read in” as to causing death unless the offense definition “clearly indicates a legislative purpose to impose absolute liability.” 720 ILCS 5/4-9. The Illinois courts have not yet ruled on whether current 5/9-3.3 “clearly indicates” a legislative intent to impose absolute liability.

¹⁸ Section 1102(2) also omits as unnecessary current 5/9-3.3(a)’s requirement that one “violate[] Section 401 of the Illinois Controlled Substances Act” (720 ILCS 570/401) in delivering a controlled substance. Section 1102(2)’s ban on “unlawfully” delivering a controlled substance would reach any delivery violating 570/401 (which criminalizes any unauthorized delivery of a controlled substance) or any of current law’s other complex regulations governing the delivery of controlled substances. See 720 ILCS 570/100 *et seq.*

liable under Section 1102(1)(a); the only difference is that the automatic permissive inference would not apply in such a case.

Section 1102(3) corresponds to current 730 ILCS 5/5-8-1(a)(1)(a).¹⁹ The current provision treats the offenses corresponding to Section 1102(1)(a) and (1)(b) as first-degree murder. Section 1102(3) grades second-degree murder as a Class X felony based on the understanding that, even though the offenses it covers are among the most serious offenses in the Criminal Code, they are less serious than the offenses falling within Section 1101's definition of first-degree murder, a Class [X plus] felony. See commentary for proposed Section 1101(2). Section 1102(3)'s lower grading also reflects the availability of Class [X plus] sentencing in especially serious cases.²⁰ See proposed Section 905 (authorizing one-grade adjustment based on certain aggravating factors).

Section 1103. Manslaughter in the First Degree

Corresponding Current Provision(s): 720 ILCS 5/9-2

Comment:

Generally. Section 1103 defines first-degree manslaughter, which provides a mitigation from murder where an offender acted under the influence of an extreme disturbance. Although the influence of such a disturbance does not absolve all responsibility for the objectively harmful, and wrongful, act of killing another, it is thought to reduce the offender's blameworthiness relative to those who commit murders unattributable to any such influence.

Relation to current Illinois law. Section 1103(1) allows mitigation from first- or second-degree murder to first-degree manslaughter where the offender causes (or attempts to cause) death "under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation." Section 1103(1) is functionally similar to current 5/9-2(a)(1)'s mitigation to what is currently called "second-degree murder," but broadens the reach of the mitigation to better assure that its scope is consistent with its purpose.

¹⁹ Based on the application of Section 1102(2), see supra, Section 1102(3) also corresponds to the grading provisions for "drug-induced homicide" in current 5/9-3.3(b) and (c). Section 1102(3) is the same as current 5/9-3.3(b) in grading the offense as a Class X felony, but omits 5/9-3.3(c)'s increased minimum sentences for cases involving particular kinds of drug-offense violations to ensure consistent grading with other means of committing second-degree murder. Under the proposed Code, the offender would be subject to liability for both the homicide and the underlying drug offense, and the liability for the latter would obviously vary depending on the offense. See proposed Sections 254 and 906 and corresponding commentary (defining rules to govern convictions and sentencing for multiple offenses).

²⁰ The death penalty is not available, however, where second-degree murder is aggravated to a Class [X plus] felony under proposed Section 905. The death penalty is imposed solely for first-degree murder under the proposed Code. See proposed Section 1101(2) and corresponding commentary.

Section 1103(1)(a) allows mitigation where one kills another “under the influence of extreme mental or emotional disturbance,” whereas current 5/9-2(a)(1) requires that the offender act “under a sudden and intense passion.” Section 1103(1)(a)’s standard recognizes that the basis for the mitigation defense is similar to that for excuses. An act that, though deliberate, was driven by the influence of an extreme disturbance is thought to deserve less punishment than one that reflects the exercise of deliberation or unhampered free will.²¹ By requiring consideration of the actor’s state of mind at the time of the killing, Section 1103(1)(a) also abandons the current standard’s implicit “cooling off” requirement, which bars mitigation where sufficient time has passed for the reasonable person to have cooled his passions. See, e.g., People v. Yarbrough, 645 N.E.2d 423, 426 (Ill. App. 1994) (“We find that the length of time which passed and the defendant’s actions within that period were such that defendant was not acting under sudden and intense passion[.]”). Section 1103 would not apply where the offender had “cooled off” and was not acting under any provoking influence, but its more flexible approach also recognizes that one’s disturbance might actually *increase* as frustration and anger grow over time. At the same time, Section 1103(1)(b) limits the potential for long-delayed responses to support the mitigation, as it retains the requirement that the offender’s response to the influence must be “reasonable” (*see infra*).

Section 1103(1)(a) also omits current 5/9-2(a)(1)’s requirement that the offender’s act result from “serious provocation” by the victim (or intended victim²²). Under the “serious provocation” standard, the Illinois courts have held that an emotional disturbance, “no matter how violent,” may not provide a mitigation unless it results from a specific type of “provocation which the law recognizes as reasonable.” People v. Garcia, 651 N.E.2d 100, 110 (Ill. 1995); *see also* People v. Tenner, 626 N.E.2d 138, 152 (Ill. 1993); People v. Austin, 549 N.E.2d 331, 334 (Ill. 1989). Current Illinois law recognizes only the following types of provocation as reasonable: “substantial physical injury or substantial physical assault, mutual quarrel or combat, illegal arrest, and adultery with the offender’s spouse.” Garcia, 651 N.E.2d at 110; *see also* Tenner, 626 N.E.2d at 151-52; People v. McCarthy, 547 N.E.2d 459, 463 (Ill. 1989); People v. Chevalier, 544 N.E.2d 942, 944 (Ill. 1989).

The Illinois courts’ use of these rigid categories has resulted in an arbitrarily narrow mitigation defense. For example, the Illinois courts have consistently held that “[w]ords, . . . no matter how vile, can never constitute serious provocation.” Garcia, 651 N.E.2d at 110; *see also* People v. Simpson,

²¹ Current Illinois homicide law, in fact, elsewhere explicitly recognizes the relevance of acting “under the influence of extreme mental or emotional disturbance” to an offender’s relative blameworthiness. See 720 ILCS 5/9-1(c)(2) (providing that extreme disturbance is mitigating factor relevant to imposition of death penalty).

²² Section 1103(1) does not incorporate current 5/9-2(a)(1)’s explicit rule regarding offenders who try to kill people who have provoked them but “negligently or accidentally” kill third persons, as proposed Section 303 defines a general rule for the “transferred intent” situation that language addresses.

384 N.E.2d 373, 375 (Ill. 1978); People v. Crews, 231 N.E.2d 451, 453 (Ill. 1967). Similarly, the Illinois courts have generally limited the “adultery” category of provocation to cases “where the parties are discovered in the act of adultery or immediately before or after such act, and the killing immediately follows such discovery.”²³ In Chevalier, the Illinois Supreme Court relied on both of these restrictions in upholding refusals of mitigation instructions in two cases involving admissions of adultery accompanied by highly provocative conduct. See 544 N.E.2d at 943 (noting that, during arguments, one spouse “disparaged the defendant’s sexual abilities” and the other “flaunted the fact that she slept with the victim in the marital bed”). Under the current approach, the issue of provocation becomes a strictly legal determination rather than a factual determination for the jury to make regarding the relative moral severity of the crime. Section 1103(1)(a) makes no explicit conclusions regarding the adequacy of certain kinds of “provocation” or any other causes of extreme disturbance, and instead allows the jury to focus on the actor’s state of mind in determining whether mitigation is appropriate.

Section 1103(1)(b) is substantively similar to current 5/9-2(b) in requiring that there be a reasonable basis for the offender’s disturbance, but provides that reasonableness is to be determined “from the viewpoint of a person in the defendant’s situation”²⁴ and “under the circumstances as the defendant believes them to be.” Section 1103(1)(b)’s language, which is similar to that used in the General Part’s definitions of “recklessness” and “negligence,” makes clear that an *individualized* objective standard is appropriate. See proposed Section 206(3)-(4) and corresponding commentary. This standard reinforces the mitigation’s general focus on the actor’s blameworthiness relative to one who does not act under the influence

²³ Chevalier, 544 N.E.2d at 944. There is also authority holding that mitigation is barred where one discovers infidelity by a partner other than a spouse, regardless of the relationship’s duration or resemblance to marriage. See People v. McDonald, 212 N.E.2d 299, 302 (Ill. App. 1965) (where defendant lived with decedent for 25 years, court would not apply the “exculpatory features of *crime passionel* to the killing of a mistress”); cf. McCarthy, 547 N.E.2d at 463 (“Illinois has not recognized the validity of common law marriages since the early part of this century . . . , and therefore it could be argued that allowance of the partial exculpation of voluntary manslaughter in the circumstances described would be inconsistent with that longstanding expression of public policy.”); Yarbrough, 645 N.E.2d at 427 (“To date, no Illinois court has extended the adultery category beyond a legal marriage to marital-type relationships.”).

²⁴ “The defendant’s situation” is intended to include both the factual context of the offense and certain characteristics of the defendant. Current Illinois law, by contrast, appears to consider only the surrounding factual circumstances in determining whether the defendant’s passion was reasonable. Cf. People v. Austin, 549 N.E.2d 331, 335 (Ill. 1989) (“[I]t has been held that the alleged provocation on the part of the victim must cause the same passionate state of mind in an ordinary person under the same circumstances.”). With respect to the defendant’s characteristics, Section 1103(1)(b) is intended to require consideration of specific and demonstrable factors like the defendant’s physical attributes, age, and any disabilities, but not such broad and intangible aspects as his genetic make-up, intelligence, or general temperament. Because no identifiable principle can properly distinguish those characteristics that should be considered from those that should not, Section 1103(1)(b) leaves the proper extent of individualization as an issue to be determined by the court and/or the jury on a case-by-case basis.

of an extreme disturbance. Section 1103(1)(b) ensures that the manslaughter mitigation does not reduce liability for one who is disturbed for no good reason, but covers one whose extreme disturbance was understandable given the facts of the case.

Section 1103(1) generally differs from current 5/9-2(a)(1) in allowing for mitigation to first-degree manslaughter from *any* form of murder, including felony murder. Section 1103(1)'s broader scope reflects the view that it is inconsistent to allow mitigation for one who intentionally kills another, but not for one who lacks culpability altogether as to causing death. Moreover, as some Illinois courts have recognized, the current practice serves to bar mitigation for many cases of intentional murder, because felony murder is commonly charged where the defendant intentionally causes death.²⁵

Section 1103(1) also allows for mitigation where one *attempts* murder under the influence of an extreme disturbance, but does not cause death. Under current Illinois law, by contrast, the Illinois Supreme Court has held that the offense of “attempted second-degree murder” (or “attempted manslaughter”) does not exist, because “one cannot intend . . . a sudden and intense passion due to serious provocation.” People v. Lopez, 655 N.E.2d 864, 867 (Ill. 1995). Current law's failure to extend the mitigation defense to attempted murder leads to an anomalous and clearly undesirable result: because attempted murder is a more serious offense than first-degree manslaughter, the offender is punished *more severely* if his intended victim lives than if he dies.²⁶ Section 1103(1), in conjunction with Article 800's rules for attempt liability, avoids such an anomaly. The proposed Code recognizes

²⁵ See People v. Kidd, 692 N.E.2d 455, 459 (Ill. App. 1998) (disregarding 5/9-2(a)(1)'s plain language because legislature did not “intend an illusory second degree murder statute . . . that exists at the choice of the prosecutor and will be applied only in cases in which it could be of no benefit to the defendant”), abrogated by People v. Morgan, 758 N.E.2d 813 (Ill. 2001).

Section 1102(1)(b)'s requirement that felony murder be predicated on a forcible felony “other than an assault that causes the death” avoids such a short-circuiting of Section 1103's mitigation in many, but not necessarily all, intentional murder cases. Cf. People v. Williams, 517 N.E.2d 745, 751 (Ill. App. 1987) (“[A] defendant facing two people in mutual combat can be seriously provoked, and if he kills both, he is guilty of two counts of voluntary manslaughter. It would be absurd to state that under the identical facts, if one of the victims dies and one lives, he is now guilty of murder because as to the one that lives, he is guilty of aggravated battery, and hence, under the felony murder doctrine, the affirmative defense of provocation is inapplicable.”), abrogated by People v. Morgan, 758 N.E.2d 813 (Ill. 2001).

²⁶ Curiously, the Illinois courts' failure to recognize the offense of “attempted second-degree murder” does not appear to be the only respect in which current law rewards an offender acting under a “sudden and intense passion” for actually causing the death of another, as opposed to merely attempting to cause death. Current 5/33A-2 defines three “armed violence” offenses criminalizing committing felonies while armed with a dangerous weapon. Current 5/33A-3 grades the offenses from a Class 2 felony to a Class X felony with a minimum term of imprisonment of 25 years. Originally, the provision did not provide any exceptions to the general rule that “any felony” may predicate an armed violence conviction. In the face of that seemingly unambiguous language, the Illinois Supreme Court held that the legislature did not intend voluntary manslaughter (now second-degree murder) to serve as a predicate felony for armed violence. See People v. Alejos, 455 N.E.2d 48 (Ill. 1983). The Illinois Supreme Court also held that *involuntary* manslaughter may not serve as a predicate offense for armed violence. See People v. Ferneti, 470 N.E.2d 501 (Ill. 1984). (continued...)

attempted first-degree manslaughter as an offense²⁷ and grades it as less serious than the completed offense. See proposed Sections 801 and 807 and corresponding commentary.

Section 1103(2) is substantively the same as current 5/9-2(c)'s first sentence in providing that the defendant carries the burden of persuasion on the manslaughter mitigation by a preponderance of the evidence. Section 1103(1)'s requirement that first-degree manslaughter be committed "under circumstances that otherwise would be murder," along with the General Part's rules governing evidentiary burdens, cover 5/9-2(c)'s second and third sentences. Section 1103(2), like current law, does not permit liability for first-degree manslaughter unless the State has proved the elements of murder beyond a reasonable doubt. See proposed Section 107 and corresponding commentary.

Section 1103(3), like current 5/9-2(d), grades the offense as a Class 1 felony.

Section 1103 omits current 5/9-2(a)(2)'s "imperfect self-defense" mitigation, which is instead covered by Section 511's rules governing mistakes as to justifications. Section 511, like current 5/9-2(a)(2), operates to lower the grade of homicide where one causes death under an unreasonable mistake as to the justifying conditions — such as where a person recklessly or negligently believes that he is being attacked by an armed assailant. Section 511's effect is substantively similar to current 5/9-2(a)(2), with three important differences. First, Section 511 effectively lowers the grade of homicide only where there is an unreasonable mistake as to a *justification*,

²⁶ (...continued)

As a result of this construction, one who commits aggravated battery by knowingly causing great bodily harm while armed with — but not necessarily using — a Category II weapon (such as a knife with a three-inch blade) would be imprisoned for a minimum of ten years. By contrast, one who used the same weapon to knowingly cause another's *death* under a "sudden and intense passion" — a circumstance that provides a mitigation for homicide, but not for battery — would be liable for a Class 1 felony and imprisoned for a minimum term of only four years. Moreover, the State may not circumvent the courts' construction of 5/33A-2 by charging what was really a second-degree murder as the less serious offense of aggravated battery. See *People v. Drakeford*, 564 N.E.2d 792, 793 (Ill. 1990) (holding that armed violence conviction could not be "predicated on aggravated battery when a simultaneous conviction for second degree murder is returned for the same act"). Illinois courts have yet to reevaluate this construction in light of 5/33A-2's current language, which explicitly recognizes exceptions to the general rule that "any felony" may predicate an armed violence charge, but does not include second-degree murder or its attempt within the exceptions.

By contrast, any felony — including any homicide offense — may predicate proposed Section 7101's offense for possessing or using a dangerous weapon during a felony.

²⁷ Attempted first-degree manslaughter is a possible offense under the proposed Code because, unlike the current attempt provision, Section 801 does not require that the offender act "with intent to commit a specific offense." 720 ILCS 5/8-4(a). Section 801 requires, rather, intent only to "engage in the conduct that would constitute the offense" — and explicitly provides that "the culpability required for commission of the offense," rather than an elevated requirement of intent, governs the substantive offense's other objective elements. See proposed Section 801 and corresponding commentary.

whereas current 5/9-2(a)(2) also allows mitigation for unreasonable mistakes as to compulsion (an excuse) and entrapment (a nonexculpatory defense). The proposed Code does not recognize a defense for *any* mistakes as to excuses or nonexculpatory defenses, much less for unreasonable mistakes. See proposed Sections 501(5) and 601(2) and corresponding commentary.

Second, because Section 511 treats an unreasonable mistake as to a justification as an excuse rather than as a mitigation, it “lowers” the grade of homicide in a different way than current 5/9-2(a)(2)’s mitigation. Under Section 511, an unreasonable mistake provides a complete defense, rather than a mitigation, for most forms of murder liability.²⁸ Nevertheless, Section 511 allows liability for second-degree manslaughter where the unreasonable mistake is reckless, or for negligent homicide where it is negligent. Current 5/9-2(a)(2)’s approach, by contrast, punishes one who makes an unreasonable mistake at the same level as one who acts under the influence of an extreme disturbance — regardless of whether the mistake is reckless or negligent. Section 511’s approach follows the views that killing based on an unreasonable mistake as to a justification is less serious than killing without any pretense of justification, and that one who makes a reckless mistake deserves greater punishment than one who is only negligently mistaken. See proposed Section 511 and corresponding commentary.

Finally, Section 511’s approach ensures rational treatment of cases where one attempts murder under a reckless or negligent mistake as to a justification, but does not cause death. As with current 5/9-2(a)(1)’s mitigation defense, the Illinois Supreme Court has held that 5/9-2(a)(2) does not allow for an offense of “attempted second-degree murder,” because “one cannot intend . . . an unreasonable belief in the need to use deadly force . . . [or] to unlawfully kill while at the same time intending to justifiably use deadly force.” People v. Lopez, 655 N.E.2d 864, 867 (Ill. 1995). As a result of this deficiency, current Illinois law grades committing murder under an unreasonable mistake as a Class 2 felony, but grades the inherently less serious offense of *attempting* murder under an unreasonable mistake as a Class X felony. By comparison, current Illinois law typically grades a completed reckless homicide as a Class 3 felony. See 720 ILCS 5/9-3.

The proposed Code, on the other hand, recognizes that causing the resulting harm of an offense — in this case, death — should, if anything, lead to *greater* punishment than failed efforts to cause that result under

²⁸ Under Section 511(1)(b), an unreasonable mistake bars liability for an offense if it “is less culpable than the primary culpability required by the offense charged.” One cannot make an intentional or knowing mistake — a mistake can be, at most, reckless — so any mistake would negate the required culpability for Section 1101(1) (knowingly causing death). A mistake would also negate culpability under Section 1102(1)(a) (requiring recklessness and extreme indifference to the value of human life), unless the mistake was both reckless and reflected the necessary indifference to the value of human life. See proposed Section 511 and corresponding commentary. Felony-murder liability, on the other hand, requires no culpability and thus admits of no mistake defense.

the same precise circumstances. Under Article 1100 and proposed Section 801, attempts based on unreasonable mistakes as to justifications would not count as any form of attempted homicide: Section 511 precludes liability for attempted murder, and the proposed Code does not generally support liability for attempted reckless or negligent homicide. See commentary for proposed Sections 1104(1) and 1105(1). Article 1200, however, includes specific offenses governing reckless conduct resulting in danger or injury short of death, which will typically allow for conviction of a Class 3 or Class 4 felony for attempts committed under reckless mistakes as to justifications. Whereas the current rules sometimes result in the anomaly that an attempt is graded much higher than the completed offense, the proposed Code's approach ensures that attempts under reckless mistakes are always punished less severely than recklessly causing death. Cf. 1104(2) (grading reckless homicide as Class 2 felony).

Section 1104. Manslaughter in the Second Degree

Corresponding Current Provision(s): 720 ILCS 5/9-3; see also 625 ILCS 40/5-7(e); 625 ILCS 45/5-16(A)(5); 720 ILCS 5/12-2.5; 720 ILCS 5/12-21.6

Comment:

Generally. Section 1104 criminalizes recklessly causing the death of another.

Relation to current Illinois law. Section 1104(1)'s offense definition is substantively similar to current 5/9-3(a), but states more directly that the offender must "recklessly" cause death,²⁹ whereas current 5/9-3(a) less clearly requires that the "acts . . . which cause the death are such as are likely to cause death or great bodily harm" and are performed "recklessly." Section 1104(1)'s simpler phrasing avoids introduction of a separate, and potentially confusing, reference to the likelihood of harm, since proposed Section 206(3)'s definition of recklessness already requires the offender to "consciously disregard[] a substantial and unjustifiable risk" of causing

²⁹ The proposed Code does not allow for an offense of *attempted* second-degree manslaughter. Under the General Part's attempt provision, attempt liability requires that one intend to "engage in the conduct that would constitute the offense," and this cannot typically be shown for crimes of recklessness where the prohibited resulting harm does not occur. See proposed Section 801(1) and corresponding commentary. Relevant cases would properly be treated as assault under proposed Section 1201, or reckless endangerment (or injuring) under proposed Section 1202, rather than as a form of attempted homicide.

Current 5/8-4(a)'s requirement that one act "with intent to commit a specific offense" similarly precludes the possibility of "attempted involuntary manslaughter" or "attempted reckless homicide" under current law. Cf. People v. Lopez, 655 N.E.2d 864, 867 (Ill. 1995) (holding that attempted second-degree murder does not exist in Illinois).

death. Section 1104(1)'s culpability requirement is in keeping with the Illinois courts' construction of current 5/9-3(a)'s language.³⁰

Section 1104(1) also consolidates 5/9-3(a)'s separate offenses of "involuntary manslaughter" and "reckless homicide," as well as the Vehicle Code offenses for homicides resulting from driving a snowmobile or watercraft while intoxicated, into the single offense of second-degree manslaughter. The original 1961 Code, responding to a concern that juries might be reluctant to convict motorists of "manslaughter," even where the offender's conduct was reckless, treated "reckless homicide" as a separate offense and graded it as a less serious offense than other types of "involuntary manslaughter." See 720 ILL. COMP. STAT. ANN. 5/9-3, Committee Comments — 1961, at 604-05 (West 1993). Since that time, however, community sentiments concerning reckless driving have changed significantly. A contemporary jury is unlikely to return a not-guilty verdict for one who has recklessly killed another, merely because he did so with a vehicle rather than by other means. In fact, the current Code already reflects the decline of the sensibilities that originally motivated the 1961 Code's distinction, as 5/9-3 now generally grades "reckless homicide"

³⁰ See People v. DiVincenzo, 700 N.E.2d 981, 988 (Ill. 1998) (noting that "a defendant may act recklessly where he commits deliberate acts but disregards the risks of his conduct"); People v. Jakupcak, 656 N.E.2d 442, 448 (Ill. App. 1995) (noting that recklessness as to death or great bodily harm required for "reckless homicide").

The Illinois courts have sometimes suggested, though, that current 5/9-3(a)'s "reckless homicide" offense requires a level of culpability other than recklessness. See, e.g., People v. Harvey, 528 N.E.2d 1053, 1054 (Ill. App. 1988) ("[C]riminal liability does not attach to every act of negligence resulting in injury, or even death, but only to negligence of such a reckless or wanton characteristic as to show an utter disregard for the safety of others under circumstances likely to cause injury.") (citing People v. Crego, 70 N.E.2d 578, 581 (Ill. 1946)); People v. LaCombe, 432 N.E.2d 672, 676 (Ill. App. 1982) ("Reckless conduct alone is not sufficient to sustain a conviction; the reckless conduct must be wilful and wanton."); People v. Friesen, 374 N.E.2d 15, 19 (Ill. App. 1978) ("[T]he gist of [reckless homicide] is not merely negligence, but criminal negligence."); People v. Chiappa, 368 N.E.2d 925, 927 (Ill. App. 1977) ("The gravamen of the offense of involuntary manslaughter with a motor vehicle is criminal negligence, which must be reckless or wanton negligence."). Section 1104(1) imposes a culpability requirement of "recklessness" as it is defined in the Code's General Part. See proposed Section 206(3) and corresponding commentary.

The Illinois courts have also often stated that liability may not be imposed where one "accidentally" causes death. See, e.g., People v. Buckley, 668 N.E.2d 1082, 1088 (Ill. App. 1996) ("It is well-settled that an act performed accidentally[sic], carelessly, or even negligently is insufficient to prove or sustain a conviction for involuntary manslaughter."); People v. Hoover, 620 N.E.2d 1152, 1161 (Ill. App. 1993) ("An accident is not to be equated with recklessness, and an accidental discharge of a gun will not support a conviction for involuntary manslaughter."); People v. Spani, 361 N.E.2d 377, 378 (Ill. App. 1977) ("An act that is committed accidentally does not involve a mental state cognizable to . . . involuntary manslaughter."); People v. Carlton, 326 N.E.2d 100, 104 (Ill. App. 1975) ("If the jury believed that the shooting was an accident, the elements of the crimes of murder and involuntary manslaughter as stated in those instructions could not have been proven. . . . An accident is not a voluntary act."). This line of cases seems to bar liability only for non-reckless "accidents" causing death. Section 1104 is consistent with these cases to the extent they would still allow liability for "accidents" that result from someone's reckless behavior.

as seriously as it grades other types of “involuntary manslaughter” — and in some cases treats it as a *more* serious offense. See 720 ILCS 5/9-3(e) (aggravating reckless homicide to Class 2 felony where driver was under influence of alcohol or drugs). Accordingly, there is no longer any reason to maintain separate offenses for different means of recklessly causing the death of another.

Section 1104(1) omits as unnecessary current 5/9-3(a)’s requirement that the offender kill “without lawful justification” and its statement that liability may be predicated on either “lawful or unlawful” acts. Section 400 provides that justifications are complete defenses barring liability, and Section 1104(1) would reach any other reckless acts, whether lawful or unlawful, as the offense definition makes no exception for unjustified but “lawful” acts.

Section 1104(1) also makes one minor substantive change. The proposed provision requires recklessness as to causing death, whereas current 5/9-3(a) also allows liability for one who is reckless as to causing great bodily harm. Given proposed Section 108’s definition of “great bodily harm” as harm that “creates a substantial risk of death,” nearly all offenders who are reckless as to causing great bodily harm will be reckless as to causing death as well. At the same time, it is appropriate for the reckless homicide offense to focus on the offender’s culpability as to the specific harm that offense prohibits, rather than using culpability as to some other harm as a proxy. In the limited cases where one was reckless as to causing great bodily harm but not death, liability for negligent homicide or for reckless injuring would be appropriate. See proposed Sections 1105 and 1202 and corresponding commentary.

Section 1104(2) grades the offense as a Class 2 felony. Current 5/9-3(d) ordinarily grades the offense as a Class 3 felony,³¹ but current 5/9-3(e) and (f) aggravate the offense to a Class 2 felony where the offender is under the influence of alcohol or drugs,³² or causes the death of a family or household member. Moreover, current 5/12-2.5(b) grades a specific category of reckless homicides — those where endangering a vehicle results in death — as a Class 1 felony. Section 1104(2)’s grade reflects a desire to grade all cases of reckless homicide uniformly and a recognition that reckless homicide is more serious than such Class 3 felonies as recklessly causing between \$10,000 and \$100,000 in property damage. See proposed Section 2206(3)(b) and (3)(g).

Section 1104 omits current 5/9-3(b) and (c), which together establish that recklessness “shall be presumed” for persons driving under the influence

³¹ The Vehicle Code offenses for homicides resulting from driving a snowmobile or watercraft while intoxicated, and the offense of “endangering the life or health of a child” when death results, are also graded as Class 3 felonies. See 625 ILCS 40/5-7(e); 625 ILCS 45/5-16(A)(5); 720 ILCS 5/12-21.6(d).

³² Current 5/9-3(e-5) also aggravates the offense level where the offender kills more than one person under the influence of alcohol or drugs. Under the proposed Code, multiple counts of second-degree manslaughter (such as where one recklessly causes multiple victims’ deaths in an automobile accident) would be subject to additional punishment for each offense of conviction. See proposed Section 906 and corresponding commentary.

of alcohol and drugs. The Illinois Supreme Court recently held that this language creates an unconstitutional mandatory presumption. See People v. Pomykala, 784 N.E.2d 784, 790 (Ill. 2003) (“Section 9-3(b) contains language of a mandatory presumption that a reasonable juror could conclude requires a finding of recklessness without any factual connection between the intoxication and the reckless act, unless this presumed connection is disproved.”). Rather than creating a constitutionally questionable mandatory presumption of recklessness, the proposed Code achieves the same result by treating voluntary intoxication as a basis for imputing recklessness. See proposed Section 302(2) and corresponding commentary.

Section 1105. Negligent Homicide

Corresponding Current Provision(s): None

Comment:

Generally. Section 1105 defines the offense of negligent homicide. Although the criminal law generally considers recklessness the minimum culpability level for which liability is appropriate, Section 1105 departs from that usual standard in recognition that the harm involved — the death of a human being — is much graver than those punished by other offenses.³³ Section 1105 imposes liability on those who ignore a “substantial and unjustifiable risk” of causing death and whose acts, constituting a “gross deviation” from the reasonable person’s standard of care, kill another person. See proposed Section 206(4) (defining negligence).

Relation to current Illinois law. Section 1105(1) has no corresponding provision in current Chapter 720, which does not include a negligent homicide offense. The proposed Code joins the overwhelming majority of jurisdictions that have enacted modern criminal codes by imposing liability for negligent homicide. See MODEL PENAL CODE § 210.4 (defining negligent homicide offense); *id.* cmt. n.30 (noting that of 34 states with revised codes as of 1980, all but 5 codes include negligent homicide offense).

Section 1105(2) grades the offense as a Class 4 felony.

Section 1106. Homicide of an Unborn Child

Corresponding Current Provision(s): 720 ILCS 5/9-1.2; 5/9-2.1; 5/9-3.2; see also 720 ILCS 510/2(4)

Comment:

Generally. This provision criminalizes homicide of an unborn child. An independent offense criminalizing such conduct is necessary because the

³³ The proposed Code does not allow for an offense of *attempted* negligent homicide, for the same reasons that it would preclude attempted second-degree manslaughter. See supra note 29; see also proposed Section 801 and corresponding commentary.

offense definitions for murder and manslaughter require causing the death of another “person,” which Section 108 defines to include only “a human being who has been born alive.” Section 1106 provides exceptions to liability for the unborn child’s mother, conduct performed during abortions, and medical acts performed during diagnostic testing and therapeutic treatment.

Relation to current Illinois law. Section 1106 consolidates current 5/9-1.2, 5/9-2.1, and 5/9-3.2. Section 1106(1) defines the offense as causing “the death of an unborn child under circumstances that would be [murder or manslaughter] . . . if the unborn child had been born.” Section 1106(1)’s offense definition is substantively similar to those under current law, with two differences. First, Section 1106(1) incorporates the elements of murder and manslaughter by reference,³⁴ whereas current 5/9-1.2, 5/9-2.1, and 5/9-3.2 unnecessarily restate those offenses’ requirements in the context of homicide of an unborn child. Section 1106(1) differs from the current unborn-child offense definitions in the same substantive respects that proposed Sections 1101 through 1104 differ from the current offense definitions for murder and manslaughter. See proposed Sections 1101 to 1104 and corresponding commentary.

Second, Section 1106(1) omits as unnecessary current 5/9-1.2(a)(1) and (a)(2)’s language concerning the sufficiency of causing or creating a risk of harm “to the pregnant woman,” as well as 5/9-1.2(a)(3)’s requirement of knowledge of the woman’s pregnancy. Section 1106(1) requires the same culpability as to causing the death of an unborn child as the corresponding murder or manslaughter offense definition would require as to killing “another person.” The General Part’s “transferred intent” provision allows for imputation of the required culpability as to causing the death of an “unborn child” where the offender has that level of culpability (or a higher one) as to causing the death of “another person.” (The offender’s culpability as to causing the pregnant mother’s death may satisfy the required culpability as to causing the death of an “unborn child,” regardless of his culpability as to the specific fact of her pregnancy.) See proposed Section 303(1)(b) and corresponding commentary.

Section 1106(2) states three exceptions to the offense. Section 1106(2)(a)’s exception for the unborn child’s mother has the same substantive effect as the rule in current 5/9-1.2(b)(2), 5/9-2.1(d)(2), and 5/9-3.2(c)(2) that the offense cannot be committed by “the pregnant woman whose unborn child is killed.”

Section 1106(2)(b)’s exception for abortions to which the pregnant woman has consented is substantively the same as the first sentences of current 5/9-1.2(c), 5/9-2.1(e), and 5/9-3.2(d).

³⁴ Like current law, Section 1106(1) does not recognize the offenses of “felony murder of an unborn child” or “negligent homicide of an unborn child.” Cf. 5/9-1.2(a) (tracking elements of current 5/9-1(a)(1) and (a)(2), but not (a)(3), the felony-murder provision).

Section 1106(2)(c)'s exception for conduct performed “pursuant to usual and customary standards of medical practice during diagnostic testing or therapeutic treatment” is identical to those in the second sentences of current 5/9-1.2(c), 5/9-2.1(e), and 5/9-3.2(d).

Section 1106(3)(a)'s definition of “abortion” is identical to that in current 510/2(4).

Section 1106(3)(b)'s definition of “unborn child” is identical to those in current 5/9-1.2(b)(1), 5/9-2.1(d)(1), and 5/9-3.2(c)(1).

Section 1106(4) grades the offense as one grade lower than the corresponding murder or manslaughter offense, whereas the current provisions generally grade causing the death of an unborn person on a par with causing the death of a person who has been born. Section 1106(4)'s lower grading is in keeping, however, with current 5/9-1.2(d)(1), which recognizes that first-degree murder of an unborn child is less serious than “ordinary” first-degree murder by explicitly providing that “the death penalty may not be imposed” where one intentionally causes the death of an unborn child. Moreover, additional punishment for an offense based on causing or creating a risk of harm to the pregnant mother will be available in the vast majority of cases involving homicide of an unborn child.

Section 1107. Causing or Aiding Suicide

Corresponding Current Provision(s): 720 ILCS 5/12-31

Comment:

Generally. Section 1107 criminalizes causing, aiding, or soliciting a suicide. Although Article 1100 declines to recognize attempted suicide as an offense, instead limiting homicide liability to causing “another’s” death, Section 1107 recognizes that the concerns motivating the rejection of liability for attempting one’s own suicide are not present where one is culpably involved in another person’s suicide. Section 1107’s offenses clarify the availability of homicide liability for causing another to commit suicide, and they allow for liability analogous to inchoate or accomplice liability where one aids or solicits another to commit suicide.

Relation to current Illinois law. Section 1107(1) is substantively similar to current 5/12-31(a)(1) in criminalizing causing another to commit suicide, but makes four modifications to the offense definition that clarify the offense’s relationship to Article 1100’s other offenses. First, Section 1107(1) treats causing suicide as one specific form of murder, manslaughter, or negligent homicide, whereas current 5/12-31(a)(1) treats it as a separate offense — and, in the case of intentionally or knowingly causing a suicide, a less serious crime than murder or first-degree manslaughter. Section 1107(1)’s approach recognizes that one who causes a suicide satisfies the homicide offenses’ shared requirement of causing the death of another

person. This formulation also allows offenses under Section 1107(1) to incorporate grading distinctions, as homicide offenses generally do, between the various levels of culpability as to causing death.³⁵

Second, Section 1107(1) is substantively similar to current 5/12-31(a)(1) in imposing liability where one causes another to commit suicide by duress, but omits 5/12-31(a)(1)'s limitation of liability to specific kinds of coercion, and also imposes liability where one causes a suicide by force or deception. Section 1107(1)'s broader scope recognizes that an offender who satisfies a homicide offense's culpability requirements, in addition to Section 203's causation requirements,³⁶ should not escape liability for causing a suicide merely because he employed one unacceptable means of inducing the other person's suicide rather than another.

Third, Section 1107(1) clarifies that liability for causing another to commit suicide is appropriate "only if" the conditions set forth in the offense definition are satisfied. This language makes clear that liability for murder, manslaughter, or negligent homicide may not be imposed where one causes a suicide by means other than force, duress, or deception. Thus, Section 1107(1) would preclude homicide liability for one who "knowingly causes" her lover to commit suicide by ending the relationship in the face of repeated warnings that he would kill himself if she were to ever leave him.

Finally, Section 1107(1) requires that one cause another to commit suicide, whereas current 5/12-31(a)(1) also imposes liability where one causes another to "attempt" suicide. Section 1107(1)'s omission of this language recognizes the availability of attempt liability for efforts that do not lead to the victim's completed suicide. See proposed Section 801 and corresponding commentary.

Section 1107(2) is substantively similar to current 5/12-31(a)(2) in criminalizing knowingly aiding another in committing suicide, but broadens the offense in two respects. First, Section 1107(2) omits current 5/12-31(a)(2)'s requirement that the aid consist of either "provid[ing] the "physical means" or "participat[ing] in a physical act" by which suicide

³⁵ Current 5/12-31(b) grades 5/12-31(a)(1)'s offense as a Class 2 or Class 3 felony, depending on whether the offender's conduct results in suicide or its attempt. Section 1107(1), by contrast, grades the offense as high as a Class [X plus] felony and as low as a Class 4 felony, depending on the offender's culpability as to causing death. Where an offender causes a suicide attempt by force, duress, or deception, attempt liability will ordinarily be appropriate. See proposed Section 801(1) and corresponding commentary.

³⁶ Section 1107(1) defines the offense as "causing" another to commit suicide by force, duress, or deception, whereas current 5/12-31(a)(1) requires that suicide or its attempt be a "direct result" of coercion. Section 1107(1)'s language makes it clear that proposed Section 203 governs the required causal relation between the offender's conduct and the victim's suicide. Section 203 complements Section 1107(1)'s requirement that death be caused by force, duress, or deception by explicitly providing that conduct is not a "proximate cause" of a result where it is "too dependent upon another's volitional act." See proposed Section 203 and corresponding commentary.

is “attempted or committed.” Section 1107(2)’s broader scope reflects the view that one who knowingly aids another in committing suicide merits criminal punishment, regardless of the particular means by which he renders assistance. (Under Section 1107(5), whether a suicide or attempted suicide actually resulted from the assistance is a factor relevant to grading.)

Second, Section 1107(2) differs from current 5/12-31(a)(2) in imposing liability not only for aiding another’s suicide, but also for soliciting a suicide. This language allows the offense to reach one who knowingly commands, encourages, or requests another to commit suicide, thus enabling liability for such conduct as encouraging one already contemplating suicide to jump from a high window ledge, or convincing another to join a “suicide pact.”

Section 1107(3)’s exception for good-faith attempts to comply with the Illinois Living Will Act, the Health Care Surrogate Act, or the Power of Attorney for Health Care Law, is substantively the same as current 5/12-31(c).

Section 1107(4), defining “suicide” to mean “intentionally causing one’s own death,” has no corresponding provision in current Chapter 720. Because of this limited definition, Section 1107(1)’s offense does not affect potential homicide liability for one who culpably causes another to “kill himself” unintentionally, as where a victim jumps from a window to escape an assailant and dies.

Section 1107(5) grades Section 1107(2)’s offense as a Class 3 felony, Class 4 felony, or Class A misdemeanor, depending on the offender’s role in causing a suicide or attempted suicide. This scheme is similar to current 5/12-31(b)’s grading for violations of current 5/12-31(a)(2), with two differences. First, Section 1107(5)(a) and (5)(b) require that the offender “cause” another person to commit or attempt suicide, whereas current 5/12-31(b) require that the suicide or attempt be a “direct result” of the prohibited conduct. The proposed language makes clear that proposed Section 203 governs the required causal relation between the offender’s conduct and the victim’s suicide. See also supra note 36.

Second, Section 1107(5)(a) and (5)(b) increase the offense grades for assistance resulting in suicide from a Class 4 felony to a Class 3 felony, and assistance resulting in an attempted suicide from a Class A misdemeanor to a Class 4 felony. Under the proposed scheme, a successful effort to cause another to commit suicide is an offense whose grade falls between the grade for reckless homicide (a Class 2 felony under Section 1104) and that for negligent homicide (a Class 4 felony under Section 1105). This scheme seeks to strike a balance between the offender’s culpability in encouraging another to commit suicide and the fact that the suicide victim’s own independent intervening act was the direct cause of his death.

Section 1107 omits current 5/12-31(a)’s definition of “attempted suicide.” The meanings of the terms “attempted suicide,” “duress,” and “solicits” should be determined by reference to the relevant terms defined and used in the proposed Code’s General Part. See proposed Sections 507

(defining excuse of duress), 801 (defining inchoate offense of attempt), 802 (defining inchoate offense of solicitation).

Section 1108. Concealing a Homicide

Corresponding Current Provision(s): 720 ILCS 5/9-3.1

Comment:

Generally. Section 1108 criminalizes concealing the death of someone known to have been killed. Such conduct harmfully interferes with governmental operations associated with possible homicides, such as gathering evidence for a criminal investigation.

Relation to current Illinois law. Section 1108(1) is substantively similar to current 5/9-3.1(a) in criminalizing concealing another person's death,³⁷ but states the offender must know the death was caused "by a person" rather than "by homicidal means," which is less clear.³⁸ Unlike the current offense, Section 1108(1) would reach the case where a person conceals a death caused by suicide. Although it would be the unusual case in which a person would knowingly conceal a suicide, Section 1108(1)'s broader scope assures that the offense reaches all those who interfere with potential police investigations,³⁹ and also those who know a death was inflicted by a person, even if they do not know whether it was a suicide or homicide.

³⁷ There is authority stating, in spite of current 5/9-3.1(a)'s requirement of concealing the "death" of another, that liability may be imposed where one conceals only the *cause* of death. See *People v. Hummel*, 365 N.E.2d 122, 124 (Ill. App. 1977) (offense committed "where the body itself is concealed or where the homicidal nature of death is actively concealed, as in making a homicide appear an accident") (quoting *People v. Vath*, 347 N.E.2d 813, 817 (Ill. App. 1976)). Under the proposed Code, liability for an obstructing-justice offense, also a Class 4 felony, would be available for the vast majority of cases involving concealing the cause of another's death. See proposed Section 5301.

³⁸ In criminalizing concealing a death knowing that it was caused "by a person," Section 1108(1) does not require that the conduct causing death constitute a crime. Section 1108(1) is consistent with current Illinois law's understanding of the phrase "homicidal means" in this respect. See IPI (CRIMINAL) 7.13 (4th ed. 2000) (defining "homicidal means" as "any act[s], lawful or unlawful, of a person which cause the death of another person"); see also *People v. Mahon*, 395 N.E.2d 950, 958 (Ill. App. 1979) (upholding instruction stating that homicide includes "cases in which the law justifies or excuses the taking of human life"); *People v. Coslet*, 349 N.E.2d 496, 499 (Ill. App. 1976) (instruction limiting offense to unjustified killing "would have led to a strained and inaccurate reading of the statute"), *rev'd in part on other grounds*, 364 N.E.2d 67 (Ill. 1976).

³⁹ The Illinois courts have held — even though the offense definition contains no language imposing such a requirement — that current 5/9-3.1(a) requires concealing a homicide "with the specific purpose of preventing or delaying its discovery." *People v. Kirkman*, 522 N.E.2d 588, 591 (Ill. App. 1988); see also *People v. Stiles*, 360 N.E.2d 1217, 1220 (Ill. App. 1977); IPI (CRIMINAL) 7.14 (4th ed. 2000) (defining "concealed" to require acting "for the purpose of preventing or delaying . . . discovery"). While preventing or delaying a misdeed's discovery will probably be the motive for most cases of concealing of homicide, the proposed provision, like current 5/9-3.1(a), does not treat such a requirement as an offense element.

Section 1108(2) grades concealing a homicide as a Class 4 felony, whereas current 5/9-3.1(c) grades the offense as a Class 3 felony — the same grade current 5/9-3(d) assigns for reckless homicide. Section 1108(2)'s grading recognizes the offense's closer resemblance to negligent homicide and obstructing justice, which are also graded as Class 4 felonies. See proposed Sections 1105 and 5301 and corresponding commentary.

Section 1108 omits current 5/9-3.1(b), which provides that multiple convictions and consecutive sentences are required where the offender committed murder or manslaughter against the person whose death he concealed. The proposed Code already allows for multiple convictions and enhanced punishment in this situation. See proposed Sections 254 (providing rules governing multiple convictions) and 906 (providing rules governing sentences for multiple offenses).

Section 1109. Procedures and Standards in Adjudication of Sentences for Capital Offense

Corresponding Current Provision(s): 720 ILCS 5/9-1(b) to (h)

Comment:

Generally. [This provision, which will set forth the procedures and standards of adjudication for death-penalty cases, will be based on recommendations # 28 and 61 of the Report of the Governor's Commission on Capital Punishment.]

Relation to current Illinois law. [Commentary explaining the differences between Section 1109 and current law's procedures and standards of adjudication for death-penalty cases will be inserted here.]

Section 1110. Definitions

Corresponding Current Provision(s): 720 ILCS 5/2-8; 5/9-1.2(b)(1);
5/9-2.1(d)(1); 5/9-3.2(c)(1);
5/15-4; 510/2(4); 570/102(f)

Comment:

Generally. This provision collects the defined terms used in Article 1100 and provides cross-references to the provisions in which they are defined.

Relation to current Illinois law. For discussion of the relationship between Article 1100's defined terms and current law, refer to the commentary for the provision in which the term in question is initially defined.

ARTICLE 1200. ASSAULT, ENDANGERMENT, AND THREAT OFFENSES

Section 1201. Assault

Corresponding Current Provision(s): Various; see, e.g., 720 ILCS 5/2-3.5; 5/4-1(b)(14); 5/12-1; 5/12-2; 5/12-3; 5/12-3.1; 5/12-3.2; 5/12-3.3; 5/12-4; 5/12-4.1; 5/12-4.2; 5/12-4.2-5; 5/12-4.3; 5/12-4.4; 5/12-4.6; 5/12-4.7; 5/12-7.3(h); 5/12-10; 5/12-10.1; 5/12-16.2; 5/12-32; 5/12-34; 725 ILCS 5/112A-3(3)

Comment:

Generally. This provision defines and grades the offense of assault. Section 1201 uses the term “assault,” rather than “battery,” to refer to causing bodily harm or making physical contact of an insulting or provoking nature. Most cases involving conduct prohibited by current 5/12-1 and 5/12-2’s offenses of “assault” and “aggravated assault” — which criminalize “plac[ing] another in reasonable apprehension of receiving a battery” — would be treated as attempted assault under Section 1201. Cases involving threats to commit assault are covered by Section 1203’s offense for terroristic threats.

Relation to current Illinois law. Section 1201 consolidates the prohibitions of over a dozen offenses in current Chapter 720. Section 1201(1)’s definition of the basic offense is substantively the same as current 5/12-3(a), but makes three minor formal modifications. First, Section 1201(1) omits current 5/12-3(a)’s language concerning one who acts “intentionally” in recognition of proposed Section 205(6)’s general rule that proof of intent will satisfy a culpability requirement of knowledge.

Second, Section 1201 omits as redundant current 5/12-3(a)’s requirement that the defendant act “without lawful justification.” The proposed General Part provides that justifications, excuses, and nonexculpatory defenses are complete defenses barring liability. See proposed Section 400 and corresponding commentary.

Finally, Section 1201(1) omits as superfluous current 5/12-3(a)’s statement that the offense occurs when a prohibited harm is caused “by any means.”

Section 1202(2)(a) through (2)(c) separate the offense into four offense grades, ranging from a Class 2 felony to a Class A misdemeanor.⁴⁰ Current Chapter 720 also grades assault as low as a Class A misdemeanor, see 5/12-3(b), but grades it as high as a Class X felony with a minimum imprisonment term of 20 years, see 5/12-4.2-5(b) (causing bodily harm to peace officer or medical technician with machine gun or gun with silencer) — a more severe penalty than current Illinois law typically imposes for attempted first-degree murder, see 5/8-4(c)(1). By grading the most serious violations as Class 2 felonies, Section 1202(2)(a) ensures that assault is never graded as high as the more serious offense of knowingly killing another under the influence of an extreme disturbance. Cf. proposed Section 1103(3) (first-degree manslaughter; Class 1 felony).

Section 1201(2)(a) grades “heinous assault” as a Class 2 felony. Section 1201(2)(a)(i) is substantively the same as current 5/12-4(a) in criminalizing knowingly causing great bodily harm,⁴¹ but grades the offense as a Class 2 felony rather than as a Class 3 felony.⁴² Section 1201(2)(a)(i) increases the offense grade on the understanding that knowingly causing great bodily harm, or torturing another, is a serious offense on a par with recklessly killing another person or engaging in sexual intercourse with a minor, and more serious than any other form of injuring or endangerment. Section 1201(2)(a) also covers much of the conduct covered by current 5/12-16.2’s Class 2 felony for “criminal transmission of HIV,” insofar as transmitting a life-threatening disease constitutes causing “great bodily harm.” See proposed Section 108 (defining “great bodily harm” to include “life-threatening disease”).

Section 1201(2)(a)(ii) is substantively similar to current 5/12-32(a)’s “ritual mutilation” offense in grading an assault involving torture as a Class 2 felony, but with three modifications. First, Section 1201(2)(a)(ii) does not limit aggravation to cases where torture occurs “as part of a ceremony, rite, initiation, observance, performance or practice.” Section 1201(2)(a)(ii)’s broader scope

⁴⁰ The offense elements set out in Section 1201(2)’s grading provisions, like any other elements, are governed by Article 200’s rules concerning the requirements for liability, such as Section 203’s causation rules and 205’s culpability rules. See proposed Section 202(1) (defining “elements” of an offense to include elements “contained in the . . . provisions establishing the offense grade”) and corresponding commentary.

⁴¹ Although current 5/12-4(a) defines the offense to reach only one who “knowingly causes great bodily harm,” at least one Illinois court has held that the current offense definition requires no culpability as to the extent of resulting harm. See People v. Rickman, 391 N.E.2d 1114, 1118 (Ill. App. 1979) (requiring no culpability as to extent of bodily harm because “[a]nyone who engages in a scuffle must be deemed to be aware that someone may be injured as a result”). By its terms, Section 1201(2)(a)(i), like current 5/12-4(a), requires knowledge as to causing “great” bodily harm. Cf. proposed Section 205(2) and corresponding commentary.

⁴² Section 1201(2)(a)(i) also omits as unnecessary current 5/12-4(a)’s explicit culpability requirement of acting “intentionally” and imposition of liability for one who causes “permanent disability or disfigurement.” See proposed Section 108 (defining “great bodily harm” to include causing “serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ”); proposed Section 205(6) (allowing proof of intent to satisfy culpability requirement of knowledge).

reflects the view that torturing another, regardless of the factual context in which the torture occurs, is seriously harmful and wrongful conduct.

Second, Section 1201(2)(a)(ii) omits current 5/12-32(a)'s aggravation for one who "mutilates" or "dismembers" another, which is instead covered by 1201(2)(a)(i)'s grading provision for causing "great bodily harm."

Third, Section 1201(2)(a)(ii) omits current 5/12-32(a)'s requirement that torture occur without the victim's effective consent. Current 5/12-32(a) requires the absence of consent as an offense element, even though current 5/12-3(a) does not recognize consent as a defense to the less serious offense of causing ordinary bodily harm. The proposed General Part includes a general consent provision stating that consent to bodily harm provides a defense if "the bodily harm . . . consented to is not serious." See proposed Section 251(2) and corresponding commentary.

Section 1201(2)(a)(iii) is substantively similar to current 5/12-34 in criminalizing female circumcision, with three differences. First, Section 1201(2)(a)(iii) omits as unnecessary current 5/12-34(a)'s language providing that consent is not a defense, as the General Part's consent provision would apply to this offense, and consent to infliction of serious bodily harm is not a defense under that provision. See proposed Section 251(2) and corresponding commentary.

Second, Section 1201(2)(a)(iii) omits current 5/12-34(b)'s exception for surgical procedures, which is covered by Section 415's justification defense for medical treatment. See proposed Section 415(2) and corresponding commentary.

Finally, under Section 1201(2)(a)(iii), female circumcision is graded as a Class 2 felony, whereas current 5/12-34(c) grades the offense as a Class X felony. The proposed grading for this offense is based on the understanding that Class X felony liability should be reserved for the most serious offenses, and that female circumcision is closer to knowingly causing great bodily harm, torturing, or recklessly causing death, than to such Class X felonies as second-degree murder and attempted first-degree murder.

Section 1201(2)(b) grades "aggravated assault" as a Class 3 felony. Section 1201(2)(b)(i) is similar to current 5/12-4(c) and (d) in grading assault as a Class 3 felony where one causes bodily harm by administering a food or drug,⁴³ but differs from the current provisions in a few respects. With respect to drugs, Section 1201(2)(b)(i) provides a grade for any offense involving causing bodily harm with any type of drug, whereas current 5/12-4(c) provides an unnecessarily long list including any "intoxicating, poisonous, stupefying, narcotic, anesthetic, or controlled substance."⁴⁴

⁴³ Section 108 defines "bodily harm" to include the "impairment of physical condition." Thus, Section 1201(2)(b)(i) would cover cases where one knowingly causes another to become intoxicated by administering a drug without the victim's consent.

⁴⁴ Section 1201(2)(b)(i) also omits current 5/12-4(c)'s phrase "causes him to take" as redundant of "administers"; omits "by threat or deception" as redundant of "without his consent"; and omits "for other than medical purposes" as covered by the General Part's justification for medical treatment, see proposed Section 415(2) and corresponding commentary.

With respect to food, Section 1201(2)(b)(i) aggravates the offense whenever one knowingly causes bodily harm by administering food, whereas current 5/12-4(d) imposes liability only where one “gives” another food “that contains any substance or object . . . intended to cause physical injury.” Section 1201(2)(b)(i) would not impose offense liability, but would allow attempt liability, where an offender gives another person food for the purpose of causing injury, but does not actually cause harm. Yet Section 1201(2)(b)(i) is also broader than 5/12-4(d) in that it would aggravate for causing any kind of bodily harm by administering food without consent, rather than merely physical injury resulting from a foreign substance or object. See proposed Section 108 (defining bodily harm as “physical pain, illness, or any impairment of physical condition”). As with drugs, Section 1201(2)(b)(i) would apply where the food itself causes bodily harm, such as where one causes illness by deliberately giving another spoiled meat, or food to which the victim is allergic. At the same time, the provision’s culpability requirement that the offender “knowingly” cause bodily harm would preclude liability for unwittingly giving someone adulterated or spoiled food.

Section 1201(2)(b)(ii), like current 5/12-4(b)(8), grades an assault committed in public as a Class 3 felony, but uses the simpler phrase “in a public place” instead of “on or about a public way, public property or public place of accommodation or amusement.”

Section 1201(2)(b)(iii) and (2)(b)(iv) incorporate the aggravations for domestic battery⁴⁵ in current 5/12-3.2(b)’s second and third sentences.⁴⁶

⁴⁵ Section 1201(2)(b)(iii) and (2)(b)(iv) also correspond to current 5/12-4(b)(16)’s aggravation to a Class 3 felony where assault is committed in or near a domestic violence shelter. Section 1201(2)(b) omits this specific aggravation, as the vast majority of cases where 5/12-4(b)(16) would apply will be graded as a Class 3 felony under (2)(b)(ii), (iii), and/or (iv).

⁴⁶ Section 1201 omits current 5/12-3.2’s other rules and 5/12-3.3’s offense of “aggravated domestic battery.” As current 5/12-3.2 makes clear in tracking 5/12-3(a)’s offense definition and in assigning a first domestic battery violation the same offense grade that current 5/12-3(b) prescribes, current Illinois law retains a separate domestic battery offense only to establish special sentencing and civil liability rules for domestic violence. Section 1201 displaces only the provisions in current 5/12-3.2 that define and grade the offense of domestic battery.

Under the proposed Code, domestic assaults not covered by 1201(2)(b)(iii) and (2)(b)(iv)’s aggravations are graded, as they are under 5/12-3.2(b)’s first sentence, at the same level as assaults against victims who are not family or household members. It is anticipated that current 5/12-3.2(b)’s fourth and fifth sentences (which require “48 consecutive hours of imprisonment” for certain repeat offenders) and 5/12-3.2(c) (which concerns liability for counseling costs where a child witnesses a domestic battery) will be preserved elsewhere in Illinois law through the “conforming amendments” bill to be presented to the General Assembly. (As discussed in the text above, Section 1201(2)(b)(iii) and (2)(b)(iv) cover current 5/12-3.2(b)’s second and third sentences.)

Similarly, Section 1201(2)(a)(i)’s aggravation to a Class 2 felony where the offender knowingly causes great bodily harm covers current 5/12-3.3’s Class 2 felony of “aggravated domestic battery.” The mandatory minimum terms of imprisonment imposed by 5/12-3.3(b)’s second and third sentences would remain as sentencing options under Section 1201(2)(a)(i), and could be explicitly mandated in the Code of Corrections through the “conforming amendments” enactment.

Section 1201(2)(b)(iii) is substantively similar to current 5/12-3.2(b)'s third sentence in increasing the offense grade for assaulting a family or household member, but aggravates to a Class 3 felony rather than a Class 4 felony. Section 1201(2)(b)(iii) also makes two modifications to the facts giving rise to aggravation. First, Section 1201(2)(b)(iii) applies where the defendant has previously been convicted of "any forcible offense" whereas current 5/12-3.2(b)'s third sentence aggravates only for prior convictions for the particular forcible offenses of aggravated battery, stalking, aggravated stalking, unlawful restraint, or aggravated unlawful restraint. Section 1201(2)(b)(iii)'s broader scope would allow for enhanced penalties where the defendant has previously committed of any type of assault against the victim, including sexual assault.

Second, because Section 1201(2)(b)(iii)'s aggravation provides a greater enhancement and is broader in its application to prior offenses than the current aggravation, it has been limited to situations where the defendant has previously been convicted of a forcible offense "against the victim." Current 5/12-3.2(b), on the other hand, increases the offense grade for prior violence against any family or household member. Since Section 1201(2)(c)(i) increases the base grade for assaults causing bodily harm to Class 4 felony, however, most assaults against other family members would have the same grade under the proposed Code that they have under 5/12-3.2(b).

Section 1201(2)(b)(iv) is substantively similar to current 5/12-3.2(b)'s⁴⁷ second sentence in increasing the offense grade where the offender violates an order of protection,⁴⁸ with three modifications. First, Section 1201(2)(b)(iv) aggravates the offense grade where the offender commits assault in violation of an order of protection, whereas current 5/12-3.2(b)'s second sentence only applies where the defendant has *previously* violated an order of protection. By treating the order of protection itself, rather than a violation thereof, as being on a par with a prior conviction for a crime of violence, Section 1201(2)(b)(iv) punishes the independent harm that occurs when one disregards a court's commands.

Second, Section 1201(2)(b)(iv) increases the offense grade for an assault against any person, whereas current 5/12-3.2(b)'s second sentence

⁴⁷ The proposed Code does not incorporate two other current provisions that address matters related to orders of protection. It is anticipated that current 5/1-8's procedural rule regarding orders of protection will be preserved in either the Code of Criminal Procedure (725 ILCS 5/100-1 *et seq.*) or the Domestic Violence Act (750 ILCS 60/101 *et seq.*) through the "conforming amendments" bill to be presented to the General Assembly. Section 1201(2)(b)(iv), along with the proposed stalking and harassment offenses, addresses the conduct prohibited by current 5/12-30's separate offense for violating orders of protection. See proposed Section 1204(2) and corresponding commentary; proposed Section 6105(2)(a) and corresponding commentary.

⁴⁸ Section 1201(2)(b)(iv) omits the aggravation for a prior domestic battery conviction in 5/12-3.2(b)'s second sentence, which is instead covered by Article 900's grade adjustment for repeat offenders. See proposed Section 905(1).

only applies where the offender commits domestic battery. Section 1201(2)(b)(iv)'s broader scope reflects the view that assaulting another in violation of a court order is always relevant to the offense's seriousness, regardless of whether the victim is a family or household member. For example, a person who violates a restraining order and assaults the person the order protects merits aggravated punishment, even though his victim is not a member of his household.

Finally, Section 1201(2)(b)(iv) increases the offense grade to a Class 3 felony, rather than a Class 4 felony, in recognition that most assaults will be graded as Class 4 felonies under Section 1201(2)(c)(i).

Section 1201(2)(c) grades the base-level offense according to the type of assault committed. Assault is a Class 4 felony where the offender causes bodily harm, and a Class A misdemeanor where the offender makes physical contact of an insulting or provoking nature. Current 5/12-3(b), by contrast, grades the offense as a Class A misdemeanor regardless of the type of assault. Section 1201(2)(c)'s higher grading for violations of Section 1201(1)(a) reflects the view that knowingly causing bodily harm is more serious and harmful than an offensive touching. The definition of "bodily harm" in Section 108 requires the offender to cause "substantial physical pain," which would demand something more serious than a mere shove, slap, or (in nearly all cases) single punch. Moreover, grading contact of an insulting or provoking nature as a Class A misdemeanor makes sense in light of the proposed harassment offense, which treats the similar, but less serious, conduct of insulting in a manner likely to provoke as a Class B misdemeanor. See proposed Section 6105.

Section 1201(2)(d) provides for a one-grade adjustment for assaulting certain types of victims. Section 1201(2)(d)'s adjustment applies to violations that would otherwise constitute "aggravated assault" under 1201(2)(b) or the base-level offense under 1201(2)(c).⁴⁹ Section 1201(2)(d)(i) is substantively similar to current 5/12-4(b)(6)⁵⁰ in increasing the offense grade where the

⁴⁹ Section 1201(2)(d)'s grade adjustment may not be used, however, to increase 1201(2)(a)'s "heinous assault" offense to a Class 1 felony. As discussed above, Section 1201(2) does not allow assault to be graded higher than a Class 2 felony, on the understanding that the offense is less serious than, for example, first-degree manslaughter. Cf. proposed Section 1103(3) (first-degree manslaughter; Class 1 felony).

⁵⁰ Section 1201(2)(d)(i) also corresponds to current 5/12-4(d-5)'s offense for "throwing, tossing, or expelling" blood, seminal fluid, urine, or feces at a correctional employee. Such conduct constitutes making "physical contact of an insulting or provoking nature," which is criminalized by Section 1201(1)(b). Unlike current 5/12-4(d-5), however, Section 1201(2)(d)(i) would not itself reach "attempts" to cause correctional employees to come into contact with such substances. Rather, liability for attempted assault is governed by the proposed attempt provision. See Section 801 and corresponding commentary. Because of the definition of "custodial officer" in Section 5302(2), Section 1201(2)(d)(i) also tracks 5/12-4(d-5)'s aggravation for a sexual offender who throws such substances at a Department of Human Services employee.

victim is a peace officer, custodial officer,⁵¹ or community policing volunteer, but differs from the current provision in four respects. First, Section 1201(2)(d)(i)'s adjustment applies to both "aggravated assault" violations under 1201(2)(b) and the base-level offense under 1201(2)(c), whereas current 5/12-4(b)(6) only increases the grade of the basic offense. Section 1201(2)(d)(i)'s grade adjustment allows, as do Section 1201(2)(d)'s other provisions, for more severe punishment where more than one aggravating factor is present.⁵²

Second, Section 1201(2)(d)(i) applies only where one assaults an officer or volunteer "performing his or her duty," whereas current 5/12-4(b)(6) also increases the offense grade where one assaults the person "to prevent" or "in retaliation for" the performance of duties. Assaults that interrupt an officer's immediate ability to perform his duties are especially significant and merit aggravation. (The proposed aggravation would also apply where the assault "prevented" an officer's efforts to perform his duty.)

Third, Section 1201(2)(d)(i) requires recklessness as to the victim's status, whereas current 5/12-4(b)(6) requires the defendant "[k]now[] the individual harmed to be" a peace officer, custodial officer, or community policing volunteer. Cf. proposed Section 205(3) (providing that culpability level of recklessness is to be "read in" where none otherwise stated). Section 1201(2)(d)(i)'s lower culpability requirement reflects the view that assaulting a peace officer while reckless as to the victim's status is sufficiently wrongful and serious to merit aggravation.

Finally, Section 1201(2)(d)(i) omits current 5/12-4(b)(6)'s aggravations for assaulting firemen and Department of Human Services employees supervising and controlling sexual offenders, as it does 5/12-4's other aggravations for assaulting teachers ((b)(3)), park-district employees ((b)(4)), public-aid employees ((b)(5)), emergency medical technicians ((b)(7)), public-transportation employees and passengers ((b)(9)), judges ((b)(12)), Department of Children and Family Services employees ((b)(13)), and merchants who detain defendants under allegations of retail theft ((b)(15)). Section 1201(2)(d)(i)'s narrower scope reflects the view that assaulting a peace officer is more serious than assaulting, for example, a park-district employee, and that the current recognized categories of victim reflect a certain arbitrariness — it is not clear, for example, why the aggravation should not apply to all public employees, rather than just the ones currently

⁵¹ "Custodial officer" is defined in Section 5302(2) to include correctional officers and those who supervise civil detainees. This term therefore includes the victims covered by the aggravation in current 5/12-4(b)(6) for assaults against employees of the Department of Human Services who supervise or control sexually dangerous or sexually violent persons.

⁵² Current 5/12-4(e) has been recently amended to similarly account for multiple aggravating factors for assaults of peace officers. Whereas assaulting a peace officer is ordinarily a Class 3 felony, current 5/12-4(e) grades the offense as a Class 2 felony where the offender knowingly causes great bodily harm. Section 1201(2)(a)(i), by contrast, grades knowingly causing great bodily harm to *any* victim as a Class 2 felony.

listed.⁵³ Moreover, an aggravation from the base offense will be available under Section 1201(2)(b)(ii)'s provision for assaulting a person "in a public place" in most cases.

Section 1201(2)(d)(ii) is substantively similar to current 5/12-4(b)(11)'s aggravation for assaulting a pregnant victim, but applies to "aggravated assault" violations under 1201(2)(b) in addition to base-level violations under 1201(2)(c) and lowers the required culpability as to the victim's pregnancy from knowledge to recklessness. Section 1201(2)(d)(ii)'s grade adjustment for assaulting a pregnant woman also covers current 5/12-3.1 and 5/12-4.4's separate offenses of battery, and aggravated battery, of unborn children — which unnecessarily duplicate 5/12-4(b)(11)'s consideration of harm to fetuses. It is difficult to envision a case that involves knowingly causing bodily harm to an unborn child without also being at least reckless as to causing bodily harm to the pregnant mother. Indeed, bodily harm or great bodily harm to the unborn child will usually constitute bodily harm or great bodily harm to the pregnant mother. See proposed Section 108 (defining "bodily harm" and "great bodily harm"). There is no need to aggravate twice based on the same concern: the risk or infliction of harm to the unborn child.

Section 1201(2)(d)(iii) aggravates for assaulting a physically or mentally handicapped person. With respect to physically handicapped persons, Section 1201(2)(d)(iii)'s grade adjustment is substantively similar to current 5/12-4(b)(14), but applies to violations under both 1201(2)(b) and 1201(2)(c) and lowers the required culpability as to the victim's disability from knowledge to recklessness.

Section 1201(2)(d)(iii)'s aggravation for assaulting a mentally handicapped person is similar to current 5/12-4.3's offense, but differs from the current provision in three respects. First, Section 1201(2)(d)(iii) aggravates for assaulting a "mentally handicapped person," whereas current 5/12-4.3 more narrowly criminalizes assaulting a "severely or profoundly mentally retarded person." Section 1201(2)(d)(iii)'s broader scope reflects the judgment that assaulting any mentally handicapped person is seriously wrongful conduct and deserves punishment equivalent to that for assaulting a physically handicapped person.

Second, as with Section 1201(2)(d)'s grade adjustments for other victims, the proposed provision increases the offense grade for both "aggravated assault" and the basic offense. Current 5/12-4.3, by contrast, aggravates only where one causes great bodily harm. Section 1201(2)(d)(iii) more generally recognizes the significance of harming such persons by also providing a grade adjustment for assaults not resulting in great bodily harm.

Third, Section 1201(2)(d)(iii) does not allow the offense to be graded any higher than a Class 2 felony, whereas current 5/12-4.3 grades the offense

⁵³ The availability of liability under proposed Section 5310 also addresses much of the content of current 5/12-4(b) that is not covered by Section 1201(2)(d)(i)'s grade adjustment. See proposed Section 5310(2) (committing offense against public servant with the intent to influence performance of duties, or annoy, harass, intimidate, or victimize because of performance of duties; Class 2 or Class 3 felony).

as a Class X felony. Section 1201(2)(d)'s lower grading reflects the view, as does its refusal to grade other types of assault higher than a Class 2 felony, that even the most serious forms of assault are less serious than the Class 1 felony of first-degree manslaughter, and much less serious than such Class X felonies as second-degree murder or attempted first-degree murder.

Section 1201(2)(d)(iv) adjusts the offense grade where the victim is more than 60, or less than 13, years old. Section 1201(2)(d)(iv)'s aggravation for young victims corresponds to current 5/12-4.3, and differs from that provision in the same respects that Section 1201(d)(iii) does.

Section 1201(2)(d)(iv)'s aggravation for assaulting a senior is substantively similar to current 5/12-4(b)(10),⁵⁴ with one modification.⁵⁵ Section 1201(2)(d)(iv) provides a one-grade aggravation for any type of aggravated or ordinary assault, whereas current 5/12-4(b)(10) only aggravates to a Class 3 felony where the offender "causes bodily harm" to a senior. See People v. Lewis, 763 N.E.2d 422, 426 (Ill. App. 2002) (holding that 5/12-4(b)(10) "requires a finding that the accused caused bodily harm to the victim").

Section 1201(3) provides definitions of terms used in the offense definition and grading provisions for assault. Section 1201(3)(a)'s definition of "community policing volunteer" is identical to that in current 5/2-3.5. Section 1201(3)(b)'s definition of "family member" is similar to the first sentence of current 5/12-7.3(h) — which defines "family member" for purposes of the stalking offense — but adds spouses and former spouses, to make the definition more similar to the separate current definition of "family or household members" in 725 ILCS 5/112A-3(3), and also adds grandchildren and step-grandchildren. Section 1201(3)(c)'s definition of "household member" is the same as the second sentence of current 5/12-7.3(h)'s definition of "family member." Section 1201(3)(d) defines "torture," which current Chapter 720 does not define for purposes of current 5/12-32's offense of ritual mutilation. Section 1201(3)(d)'s definition is, however, identical to current 5/9-1(b)(14)'s definition of "torture" for purposes of establishing an aggravating factor for murder.

⁵⁴ Section 1201(2)(d)(iv) is also analogous to current 5/12-4.6, which aggravates assault to a Class 2 felony where one "knowingly causes great bodily harm . . . to an individual of 60 years of age or older." Under Section 1201(2)(a)(i), however, knowingly causing great bodily harm is always a Class 2 felony, regardless of the victim's age.

⁵⁵ Section 1202(2)(d)(iv) lowers the required culpability as to the victim's seniority from knowledge to recklessness. Cf. proposed Section 205(3) (providing that culpability level of recklessness is to be "read in" where none otherwise stated). But although current 5/12-4(b)(10) imposes liability only where one "knowingly . . . causes bodily harm to an individual of 60 years of age or older," there is authority stating that the provision requires no culpability as to the victim's age because the legislature indicated a requirement of knowledge as to the victim's status in other provisions in 5/12-4(b) by using the phrase "knows the individual harmed to be." See People v. White, 608 N.E.2d 1220, 1229 (Ill. App. 1993) ("The knowledge element refers to the *mens rea* for the offense and does not mean that the defendant had to have prior knowledge of the victim's age.") (citing People v. Jordan, 430 N.E.2d 389 (Ill. App. 1981)). This construction of the offense definition, although somewhat understandable given the provision's less-than-transparent language, fails to properly apply current 5/4-3(b)'s rule that a culpability requirement prescribed for an offense as a whole "applies to each . . . element" of the offense. See also proposed Section 205(2) and corresponding commentary.

Finally, Section 1201 omits several current assault offenses and aggravations that are either covered by other offenses⁵⁶ or criminalize conduct that does not merit a distinct offense or aggravation.⁵⁷

Section 1202. Reckless Injuring; Endangerment

Corresponding Current Provision(s): 720 ILCS 5/12-5; see also, e.g., 5/12-2.5; 5/12-4.5; 5/12-4.8; 5/12-4.9; 5/12-5.1; 5/12-5.5; 5/12-21.6; 5/45-2; 120/5; 415 ILCS 5/44; 625 ILCS 5/11-501; 5/11-503; 40/5-7; 45/5-16

Comment:

Generally. Section 1202 defines and grades the offenses of endangerment and reckless injuring. Section 1202(1) criminalizes recklessly creating a risk

⁵⁶ Most significantly, Section 1201 omits current Chapter 720's numerous offenses and aggravations for assaults involving weapons, such as 5/12-4(b)(1), 5/12-4.2, 5/12-4.2-5, and 5/12-4.3. Additional liability is available for assaults that involve firearms and other weapons under Article 7100. Moreover, liability for attempted homicide is available for much of the conduct prohibited by the current offenses and aggravations. For example, in nearly any possible case of causing bodily injury by discharging a firearm, firearm with a silencer, or machine gun, see 5/12-4.2 and 5/12-4.2-5, the defendant would be liable for attempted first-degree murder.

Similarly, Section 1201 omits current 5/12-4.1's Class X felony for causing great bodily harm "by means of a caustic or flammable substance, a poisonous gas, a deadly biological or chemical contaminant or agent, a radioactive substance, or a bomb or explosive compound." Any harm in addition to causing great bodily harm, which is itself a Class 2 felony under Section 1201(2)(a)(i), is addressed by the availability of liability for endangerment under Section 1202 or for possessing and using catastrophic devices under Sections 2204 and 2205.

Finally, Section 1201 does not incorporate current 5/12-4(b)(2)'s aggravation for cases where the defendant is "hooded, robed or masked, in such manner as to conceal his identity," because such conduct is incidental to the commission of the offense and does not reflect any additional harm or injury.

⁵⁷ Section 1201 omits current 5/12-4.7's Class 1 felony of "drug induced infliction of great bodily harm," which appears designed to impose absolute liability as to causing great bodily harm and to aggravate punishment for drug offenses. Article 1200 declines to depart from the ordinary rule that recklessness is the minimum culpability level appropriate for criminal liability. Moreover, current 5/12-4.7 often does not operate to aggravate punishment for drug offenses because the predicate drug-offense violation is an included offense of "drug induced infliction of great bodily harm" — and is often as, or more, serious than the 5/12-4.7 offense. (Current Illinois law bars liability for both a greater and an included offense. See commentary for proposed Section 254.)

Section 1201 also omits current 5/12-10 and 5/12-10.1, which criminalize, respectively, tattooing a minor and piercing the body of a minor without a parent's written consent. Assuming that consent does not provide a defense under the facts of a particular case, assault liability may be appropriate for such conduct. Cf. proposed Section 251 (providing rules governing availability of consent defense). The omission of current 5/12-10 and 5/12-10.1 reflects the view that the prohibited conduct is not so inherently serious as to merit inclusion of special tattooing and body-piercing offenses in the proposed Code.

of bodily harm. Section 1202(2) grades the offense as anything from a Class B misdemeanor to a Class 3 felony, depending on both the seriousness of the risk created and whether someone is actually injured as a result.

Relation to current Illinois law. Section 1202(1) is substantively similar to current 5/12-5(a)'s offense for "reckless conduct," but makes four minor changes to the offense definition.⁵⁸ First, Section 1202(1) defines the offense to apply where one "creates a substantial risk" of harm, whereas current 5/12-5(a) applies where one "endangers" another. Section 1202(1)'s definition makes clear, using language that tracks the definition of "recklessness," that the offense does not criminalize creating a minor risk of injury. See proposed Section 206(3)(c) (recklessness as to result requires disregard of "substantial . . . risk" that conduct will cause result).

⁵⁸ In addition to current 5/12-5, current Illinois law contains numerous offenses criminalizing creating a risk of bodily harm by specific means or to certain persons, such as by causing "an object to fall from an overpass in the direction of a moving motor vehicle traveling upon any highway" (5/12-2.5); tampering with food, drugs, or cosmetics (5/12-4.5); possessing infected domestic animals (5/12-4.8); inducing or encouraging a child athlete to ingest a drug designed for quick weight gain or loss (5/12-4.9); permitting residential real estate to deteriorate (5/12-5.1); "gross carelessness or neglect" in operating a steamboat or other public conveyance (5/12-5.5); "willfully" permitting a child to be endangered (5/12-21.6); disclosing the location of a domestic violence victim (5/45-2); and hazing (120/5). Such overlap is unnecessary and potentially harmful, as it may introduce confusion or contradiction between different offenses. By addressing the various sorts of endangerment and reckless assault together in a single provision, Section 1202 ensures that the offense is defined and graded consistently. (Article 1200 also excludes current 5/12-5.2's civil remedies against managers of dangerous residential real estate, which are expected to be preserved elsewhere in Illinois law through the "conforming amendments" bill to be presented with the proposed Code.)

The proposed Code still allows for additional punishment where a person commits another offense (such as a homicide or property damage offense by dropping a brick from an overpass) or endangers multiple persons (such as by tampering with food to be served to several patrons of a restaurant). Cf. proposed Section 254 (providing rules for multiple convictions); proposed Section 906 (providing rules governing authorized sentences for multiple convictions); proposed Section 2204 (defining offense of causing or risking catastrophe). It is also anticipated that civil or regulatory consequences associated with violations of current law's overlapping offenses will be preserved through the "conforming amendments" bill to be presented to the General Assembly.

Section 1202 would also cover the conduct prohibited by several offenses outside Chapter 720 that criminalize endangering others by, for example, disposing of hazardous waste (415 ILCS 5/44), driving recklessly (625 ILCS 5/11-503), and driving under the influence (625 ILCS 5/11-501, 40/5-7 and 45/5-16). The proposed Code would prevent such non-Code offenses from being graded any higher than Class 4 felonies, see proposed Section 902(1) and corresponding commentary, but would not displace the regulatory or collateral consequences currently associated with such offenses. For example, it is anticipated that the current collateral consequences of driving under the influence — such as the suspension or revocation of driving privileges — would be preserved through the "conforming amendments" bill to be presented to the General Assembly with the proposed Code.

Second, Section 1202(1) criminalizes creating a substantial risk of “bodily harm,” whereas current 5/12-5(a) prohibits endangering another’s “bodily safety.” Section 1202(1)’s language makes explicit the offense’s relation to assault, which both Article 1200 and current Illinois law define in terms of causing “bodily harm.” See 720 ILCS 5/12-3(a)(1); proposed Section 1201(1)(a). Section 1202(1)’s language also renders unnecessary current 5/12-5(a)’s imposition of liability where one actually “causes bodily harm,” which is instead treated as a grading factor under 1202(2)(a).

Third, Section 1202(1) shifts the offense’s focus from the conduct creating the risk of harm to the creation of the risk itself. Current 5/12-5(a) defines the offense to prohibit “perform[ing] recklessly the acts which cause the harm or endanger safety,” which suggests that liability depends on the defendant’s awareness of his own conduct, rather than on his overall awareness of creating a risk of harm by his conduct. Section 1202(1) more clearly and concisely imposes liability on one who “recklessly creates a substantial risk of bodily harm.”

Finally, Section 1202(1) omits as superfluous current 5/12-5(a)’s language that liability may be imposed for endangering “by any means,” and regardless of whether the conduct is “otherwise . . . lawful or unlawful.” Article 400 deals exhaustively with any justifications that would prevent liability, and Section 1104(1) would reach any other reckless acts, whether lawful or unlawful, as the offense definition makes no exception for unjustified but “lawful” acts.

Section 1202(2) imposes differing grades for the offense, ranging from a Class 3 felony to a Class B misdemeanor, based on consideration of both the seriousness of the risk created and on the extent of harm actually caused, if any. Current 5/12-5(b), by contrast, neither accounts for the seriousness of the risk created nor distinguishes causing actual harm from merely “endangering” another⁵⁹ — and would grade equally, as a Class A

⁵⁹ Although current 5/12-5(b) does not distinguish between endangerment and actually causing bodily harm, some of current law’s other specific endangerment offenses recognize resulting harm as a relevant grading factor. See 720 ILCS 5/12-2.5(b) (vehicular endangerment; Class 1 felony where death results); 5/12-21.6(d) (endangering life or health of a child; Class 3 felony where death results); 120/10 (hazing; Class 4 felony where death or great bodily harm results); 625 ILCS 5/11-501(d)(1)(C) (DUI; Class 3 felony where great bodily harm results); 625 ILCS 5/11-503(c) (aggravated reckless driving; Class 4 felony where great bodily harm results); 625 ILCS 40/5-7(d),(e); 625 ILCS 45/5-16(A)(4),(5) (operating snowmobile or watercraft under the influence; Class 4 felony where great bodily harm results, Class 3 felony where death results).

misdemeanor, either recklessly causing great bodily harm, or merely creating a risk of physical pain.⁶⁰

Section 1202(2)'s more sophisticated approach to recklessly caused harm avoids such anomalous results. Section 1202(2)(a) applies where injury occurs, and grades the offense as a Class 3 felony in cases of great bodily harm and as a Class A misdemeanor in cases of ordinary bodily harm. Section 1202(2)(b) applies where the offender endangers another, and grades the offense as a Class 4 felony in cases involving a risk of death or great bodily harm and as a Class B misdemeanor in cases involving a risk of ordinary bodily harm.

The proposed Code does not incorporate current 5/24-1.2, 5/24-1.2-5, and 5/24-3.2(b), which criminalize knowingly discharging a firearm in the direction of others. Current Illinois law grades the discharge offenses from a Class 1 felony to a Class X felony with a minimum imprisonment term of 12 years, depending on the potential victim's occupation and the type of firearm involved.⁶¹ The grading for these offenses is unduly severe when compared to the grading for other current offenses criminalizing endangerment or actual infliction of injury or death. For example, current 5/20.5-5 grades knowingly causing a catastrophe — which, in this context, requires “serious physical injury to 5 or more persons” — as a Class X felony. Similarly, current 5/9-2 grades the current second-degree murder offense — which requires knowingly causing another's death under a sudden and intense passion — as a Class 1 felony. Current 5/9-3 grades recklessly killing another person as a Class 3 felony. By contrast, current 5/12-5 grades “reckless conduct,” which is similar to the discharge offenses in criminalizing risk-creation as opposed to actual infliction of injury, as a mere Class A misdemeanor.

⁶⁰ In fact, because Chapter 720 does not criminalize either recklessly causing a catastrophe or creating a substantial risk of catastrophe, recklessly causing great bodily harm to five or more persons would currently also be an offense only under 5/12-5(b), and would therefore also be graded as a Class A misdemeanor — the same grade 5/12-5(b) assigns for merely creating a risk of physical pain to a single person. Article 2200, by contrast, specifically criminalizes recklessly causing, or creating a risk of, a catastrophe. See proposed Section 2204 and corresponding commentary. Together, Articles 1200 and 2200 present a more nuanced approach to reckless conduct that more comprehensively distinguishes between various levels of recklessly created harm or risk.

⁶¹ Current 5/24-1.2 grades knowingly discharging any type of firearm in the direction of a building or vehicle one “reasonably should know to be occupied” as a Class 1 felony, but aggravates the offense to a Class X felony where the offense occurs near a school, and to a Class X felony with a minimum imprisonment term of ten years where the firearm is discharged in the direction of certain categories of person (such as peace officers, emergency medical technicians, and teachers). Current 5/24-1.2-5 is similar to 5/24-1.2, but only applies to “machine guns” and guns equipped with silencers; current 5/24-1.2-5 grades discharging such a firearm in the direction of an ordinary person as a Class X felony, and aggravates the offense to a Class X felony with a minimum term of 12 years where the firearm is discharged in the direction of certain persons, as noted above. Finally, current 5/24-3.2(b) treats recklessly discharging a firearm known to be loaded with an “armor piercing bullet” as a Class X felony where the bullet strikes another.

Although it is certainly more serious than most of the other conduct covered by the current offense of “reckless conduct,” the act of firing a gun in another’s direction, without any explicitly required culpability as to causing bodily harm, *and without the requirement of any actual resulting harm or injury*, is *less* serious than knowingly causing a catastrophe, knowingly killing another under the influence of an extreme disturbance, or recklessly killing another person.⁶² The proposed Code adopts the view that the conduct in question is more properly treated as a combination of a weapons offense and endangerment (or, where injury or death occurs, an assault or homicide offense) than as a distinct offense. This scheme enables the amount of liability to reflect the actual amount of harm caused.

Section 1202 grades recklessly creating a substantial risk of great bodily harm — which will almost invariably occur where one knowingly or recklessly discharges a firearm in another’s direction — as a Class 4 felony, and aggravates the offense grade to a Class 3 felony where the defendant causes great bodily harm. In recognition that the endangerment offense does not fully account for the special harms presented by cases involving guns, proposed Section 7101 would impose additional liability for a Class 3 felony where one endangers another by discharging a firearm. Moreover, the proposed Code preserves the current regulatory offenses criminalizing the possession of particularly dangerous items, such as current 5/24-2.1’s Class 3 felony for possessing armor-piercing bullets. Significantly, under the proposed sentencing rules for multiple offenses, the offender would be punished for each additional offense of conviction. See proposed Section 906 and corresponding commentary.

Section 1203. Terroristic Threats

Corresponding Current Provision(s): 720 ILCS 5/12-1; 5/12-2;
5/12-4(d-3); 5/12-9

Comment:

Generally. Section 1203 criminalizes creating a risk of terror by threatening to commit a serious offense. The offense addresses the grave fear for personal safety or security that such threats may cause, even when the threatened crime is not carried out, or even intended.

⁶² The proposed Code would, of course, impose liability for attempted murder where one discharges a gun in another’s direction with the intent to kill that person. See proposed Section 801(1) (imposing attempt liability where one takes substantial step toward offense “with the culpability required for commission of the offense”). Like current 5/8-4(c)(1), the proposed Code grades attempted first-degree murder as a Class X felony. See proposed Section 807 (grading inchoate offenses one grade lower than substantive offense); proposed Section 1101(2) (grading first-degree murder as Class [X plus] felony).

Relation to current Illinois law. Section 1203(1) is similar to, but expands the scope of, current 5/12-9(a)'s offense for threatening public officials.⁶³ Section 1203(1) criminalizes terrorizing *any* person by threat. In the absence of an offense like Section 1203(1), current Illinois law imposes liability for terrorizing a person who is not a public official only if the defendant threatens to commit an assault against that person.⁶⁴ Section 1203(1) recognizes that one may terrorize another by threatening to commit crimes other than assault, and that the gravity and harmfulness of such conduct exist even if the victim is not a public official.

Section 1203(1) also makes three other slight modifications to the offense as set out in 5/12-9(a). First, Section 1203(1)(a) defines the offense as “being reckless as to terrorizing” another person, whereas current 5/12-9(a) applies where one makes a threat that “would place” another “in reasonable apprehension of” harm. Section 1203(1) requires recklessness as to “terrorizing,” rather than as to causing “reasonable apprehension,” to ensure that the offense punishes only serious threats made by offenders who culpably disregard a risk of causing serious alarm.

Second, Section 1203(1)(b) applies where the threatened offense is likely to cause “great bodily harm” or “substantial property damage.” Current 5/12-9(a), by contrast, reaches threats to cause ordinary “bodily harm” or any level of property damage.⁶⁵ Here again, Section 1203(1)(b) increases the required seriousness of the threatened conduct to better assure that the offense only reaches those who are reckless as to the risk of terrorizing others.

Finally, Section 1203(1)(b) uses the simple term “threatens,” whereas current 5/12-9(a)'s offense uses the language “delivers or conveys . . . a communication . . . containing a threat.” The current language is unnecessarily elaborate, and might also be read to suggest that the offense does not reach a verbal threat issued in person or a threat implied by conduct, such as brandishing a knife. Section 1203(1)(b) uses the term “threatens” in its ordinary sense, which is less similar to 5/12-9's formulation than to current

⁶³ In generalizing the offense to include threats to persons other than public officials, Section 1201 also omits current 5/12-9(a)(2)'s requirement that the defendant threaten “because of . . . [a] factor relating to the official's public existence” and 5/12-9(b)'s definitions of “public official” and “immediate family.”

⁶⁴ See 720 ILCS 5/12-1(a), 5/12-2(a) (assault or aggravated assault committed where one “places another in reasonable apprehension of receiving a battery”); cf. 5/12-4(d-3) (aggravated battery committed where one “shines or flashes a . . . laser device that is attached or affixed to a firearm, or used in concert with a firearm, so that the laser beam strikes upon or against the person of another”).

Several offenses in current Chapter 720 include as offense elements threats to commit crimes other than assault, but those offenses require some additional conduct, or are aimed at some additional harm, beyond the threat itself. See, e.g., 720 ILCS 5/12-6 (intimidation); 5/12-7.3 (stalking); 5/32-4(b) (jury and witness tampering); 5/32-4a (harassing family members of jurors, witnesses, or representative of child in custody proceeding).

⁶⁵ Section 1203(1)(b) also omits current 5/12-9(a)(1)(i)'s language regarding threats to commit sexual assault as redundant of the phrase “any offense likely to cause . . . unlawful confinement or restraint,” which would cover such threats.

5/12-7.3(g)’s definition of the phrase “transmits a threat” to include “a verbal or written threat or a threat implied by a pattern of conduct or a combination of verbal or written statements or conduct.” Section 1203(1)(b)’s broader understanding of threats recognizes that the seriousness of terrorizing another by threat does not depend fundamentally on the means of issuing the threat.

Section 1203(2) grades the offense as a Class A misdemeanor, whereas current 5/12-9(c) grades the offense of threatening a public official as a Class 3 felony — the same grade that would apply for actually causing great bodily harm to, or even recklessly causing the death of, a public official. Cf. 720 ILCS 5/9-3(d)(1) (involuntary manslaughter; Class 3 felony); 5/12-4(e) (aggravated battery; Class 3 felony). At the same time, current Illinois law treats threatening great bodily harm to a person other than an official as a mere Class C misdemeanor. See 720 ILCS 5/12-1(b). Section 1203(2) reflects the view that the offense is neither as serious as other Class 3 felonies (such as Section 1201(2)(b)’s aggravated assault offense) nor as trivial as other Class C misdemeanors (such as Section 5305’s offense for refusing to aid a peace officer). Section 1203(2) instead provides that the offense is a Class A misdemeanor, the same grade current 5/12-2(b) typically prescribes for the somewhat analogous current offense of “aggravated assault.”

Section 1204. Stalking

Corresponding Current Provision(s): 720 ILCS 5/12-7.3; 5/12-7.4;
see also 720 ILCS 5/12-7.5

Comment:

Generally. This provision defines and grades the offense of stalking, which is aimed at the intrusiveness, harassment, and terror associated with repeatedly being followed or watched by another. As the Illinois Supreme Court has observed, the offense of stalking is designed “to prevent violent attacks by allowing the police to act before the victim [is] actually injured and to prevent the terror produced by harassing actions.” People v. Bailey, 657 N.E.2d 953, 960 (Ill. 1995).

Relation to current Illinois law. Section 1204 consolidates the prohibitions of current 5/12-7.3 and 5/12-7.4.⁶⁶ Section 1204(1)(a) is substantively the same as current 5/12-7.3(a)’s introductory language, but

⁶⁶ Section 1204 does not incorporate current 5/12-7.5’s separate offense of “cyberstalking.” Whereas Section 1204(1) and current 5/12-7.3 and 5/12-7.4 require that the defendant follow or place the victim under surveillance, the current “cyberstalking” provision creates a special offense for one who “harasses another through the use of electronic communication” — conduct that does not involve “stalking” as that offense is defined and generally understood. Harassment by electronic communications does not create the same level of fear or invasion as — and is therefore meaningfully different from — being physically followed or placed under surveillance. Instead, liability under proposed Section 1203 (terroristic threats) and/or 6105 (harassment) would be appropriate for such conduct.

omits the phrase “without lawful justification” as covered by proposed Section 400, uses “surveils” rather than “places . . . under surveillance,” and omits “or any combination thereof” as superfluous.

Section 1204(1)(b) is substantively similar to current 5/12-7.3(a) in imposing liability where the offender recklessly places the victim in reasonable apprehension that he or another person will receive bodily harm or unlawful confinement or restraint,⁶⁷ with three modifications. First, Section 1204(1)(b) limits liability to cases involving threats to the victim or a “household member,” whereas current 5/12-7.3(a)(3) allows liability where a threat involves any household member or family member, presumably including family members who do not live with the victim. Section 1204(1)(b) does not allow liability to be predicated on threats to family members who are not household members, as such threats seem closer to the conduct prohibited in Section 1203 (terroristic threats) than to the specific concerns of the stalking offense: direct intimidation, a sense of menace, and disruption of one’s feeling of safety within one’s own home.

Second, Section 1204(1)(b) omits as superfluous current 5/12-7.3(a)’s language regarding a threat of either “immediate or future” bodily harm (the proposed language covers both), and also omits the current language regarding threats to commit sexual assault as redundant of the reference to apprehension of “unlawful confinement or restraint,” which would cover such threats.

Finally, Section 1204(1)(b) omits current 5/12-7.3(a)(1)’s language requiring the offender to “transmit[] a threat” as redundant of the requirement that the defendant place the victim in reasonable apprehension of harm.

Section 1204(2) grades the offense as a Class 3 felony if the defendant violates an order of protection in committing the offense, and as a Class 4 felony otherwise. Section 1203(2)(a) is substantively the same as current 5/12-7.4(a)(3) in aggravating the offense to a Class 3 felony where the defendant violates an “order of protection,” but omits as redundant the current provision’s references to a “temporary restraining order” or an injunction under current 750 ILCS 60/214, as the general phrase “order of protection” comprehends both of those types of court orders.

⁶⁷ As under current 5/12-7.3(a), Section 1204(1) requires recklessness as to causing a reasonable apprehension of bodily harm or unlawful confinement or restraint. See 720 ILCS 5/4-3(b) (imposing “read-in” culpability requirement of recklessness); proposed Section 205(3) (same). Unlike Section 1203’s terroristic threats offense, Section 1204(1) only imposes liability where the defendant actually causes fear of impending harm. Section 1204 requires that the offender follow or surveil the victim on two separate occasions — conduct that may be objectively reasonable and harmless in some circumstances, but may be extremely disturbing in others — whereas Section 1203 requires an overt threat, whose tendency to arouse fear is obvious and clearly intended by the offender.

Because Section 1204 depends on the actual elicitation of fear, but defines an offense that may be highly disturbing where some fear is aroused, Section 1204(1) requires only a “reasonable apprehension” of harm, rather than Section 1203’s stricter requirement of conduct tending to “terrorize” the victim.

Section 1204(2)(a) omits current 5/12-7.4(a)(1) and (a)(2)’s aggravations to a Class 3 felony for cases involving bodily harm, confinement, or restraint, in recognition that such conduct is separately criminalized by other offenses in the proposed Code and, in fact, is sometimes graded more seriously standing alone than under current 5/12-7.4’s “aggravated stalking” offense. See proposed Section 1201(2) (grading knowingly causing bodily harm from Class 4 to Class 2 felony); proposed Section 1202(2)(a) (grading recklessly causing bodily harm as Class A misdemeanor and recklessly causing great bodily harm as Class 3 felony); proposed Section 1401(3) (grading kidnapping from Class 2 to Class X felony); proposed Section 1402(2) (grading unlawful restraint as either Class 2 or Class 4 felony).

Section 1204(2)(b), like current 5/12-7.3, grades the offense as a Class 4 felony.

Finally, Section 1204 omits as unnecessary current 5/12-7.3(b-5) through (g) and 5/12-7.4(c) and (d). Current 5/12-7.3(b-5) unnecessarily provides that the fact that the defendant is incarcerated does not bar prosecution; if an incarcerated person (or one for whose conduct he is accountable) satisfies the offense elements, the fact of incarceration would not preclude liability under the terms of Section 1204.

Current 5/12-7.3(c) to (f) and 5/12-7.4(c) and (d) set forth exemptions and offense definitions that are intended to make clear that the offense does not reach certain constitutionally protected or otherwise innocent conduct, such as “picketing . . . that is otherwise lawful and arises out of a bona fide labor dispute,” “following” another in one’s own home, or “surveiling” another by remaining at one’s own home. Section 1204 is not intended to criminalize either constitutionally protected conduct (such as any exercise of First Amendment rights) or otherwise innocent conduct (such as conduct in one’s own home), and should be construed accordingly. Cf. proposed Section 252(3) (providing for dismissal where defendant’s conduct “did not actually cause the harm or wrong sought to be prohibited by the law defining the offense”); People v. Bailey, 657 N.E.2d 953, 960 (Ill. 1995) (“While the stalking and aggravated stalking statutes do not contain the phrase ‘without lawful authority,’ we interpret the statutes as only proscribing conduct performed ‘without lawful authority.’”).

Finally, Section 1204 omits current 5/12-7.3(g)’s definition of “transmits a threat” because it does not use that phrase.

Section 1205. Abuse and Gross Neglect

Corresponding Current Provision(s): 720 ILCS 5/12-19; 5/12-21; 5/12-21.6; 5/12-33

Comment:

Generally. This provision criminalizes the abuse and neglect of the elderly, the disabled, and children by those with a legal duty to provide

care or maintenance for such persons. Section 1205(1) prohibits recklessly causing mental harm to, or recklessly failing to perform a legal duty to provide necessary care for, the elderly, the disabled, and children.

Relation to current Illinois law. Section 1205 corresponds to and consolidates prohibitions contained in current 5/12-19 and 5/12-21. Section 1205(1) is substantively similar to current 5/12-19(a) and 5/12-21(a), but makes three modifications to the current offense definitions. First, Section 1205(1) applies to any person “having a duty to provide medical or personal care or maintenance” for a senior, child, or handicapped person, whereas current 5/12-19 and 5/12-21 list specific persons (such as employees of long-term care facilities and other caregivers) who owe legal duties to provide care or maintenance for the elderly and disabled. It is anticipated that those portions of current 5/12-19 and 5/12-21 imposing such legal duties will be preserved elsewhere in Illinois law through the “conforming amendments” bill to be presented to the General Assembly.

Second, Section 1205(1) imposes a uniform culpability requirement of recklessness as to the offense’s remaining objective elements. The current provisions, by contrast, inconsistently require knowledge for the offenses in 5/12-19(a)’s first sentence and in 5/12-21(a)(1), recklessness for the offense in 5/12-19(a)’s second sentence, and the negligence-like standard of “knowingly” failing to perform acts which one “reasonably should know are necessary” for the offense in 5/12-21(a)(2).⁶⁸ Section 1205(1) requires recklessness in recognition of the inherent difficulty of proving that one “knowingly” caused mental injury or substantial distress, while ensuring that the offense only reaches those who are sufficiently culpable to merit criminal liability.

Third, Section 1205(1)’s requirement that the defendant fail to provide care or maintenance that is “necessary for the safety and welfare” of the victim covers current 5/12-19(a), 5/12-21(a)(1), and 5/12-21(a)(2)’s requirements⁶⁹ that particular sorts of harm (such as physical injury, deterioration, endangerment, or a sexual offense) occur. Moreover, liability for causing bodily harm, endangering the victim, or a sexual offense is available — regardless of whether one is under a legal duty to the victim — under the proposed assault, endangerment, and sexual offense provisions. See proposed Section 1201 (assault); proposed Section 1202 (endangerment); proposed Article 1300 (defining sex offenses).

⁶⁸ Current 5/12-21(a)(1) and (2) are particularly inconsistent in that they effectively require knowledge as to causing harm by performing affirmative acts, but only negligence as to causing harm by failing to act. Section 1205(1) avoids such inconsistencies by imposing a culpability requirement of recklessness for both causing mental harm and failing to provide necessary care.

⁶⁹ Current 5/12-21(a)(3) also imposes liability where a caregiver knowingly “abandons” an elderly or disabled person. Section 1205(1) does not explicitly address abandonment because, in any serious case, one who abandons a person for whom he has a legal duty to provide necessary care will satisfy the offense’s requirement of recklessly failing to provide such care.

Section 1205(1)(a) to (c) require that the victim be over 60 years old, under 18 years old, or a physically or mentally handicapped person. Section 1205(1)(a) is similar to current 5/12-21(b)(1)'s definition of "elderly person," but does not include the current provision's requirement that the victim suffer from a "disease or infirmity associated with advanced age" that renders him "incapable of adequately providing for his own health and personal care." Section 1205(1) omits this requirement in light of the inherent seriousness of recklessly causing mental injury to the elderly and of failing to perform a legal duty to provide care or maintenance that is "necessary for the safety and welfare" of an elderly person.

Section 1205(1)(b), providing that the offense applies to children, is analogous to the offense of "endangering the life or health of a child" under current 5/12-21.6. Current 5/12-21.6 seems to be at least partially directed at parents who fail to adequately care for their children in imposing liability for those who "willfully . . . permit" the "health" of children to be endangered. Unlike Section 1205(1), however, current 5/12-21.6 does not explicitly address causing mental harm to children⁷⁰ or disregarding a legal duty to provide necessary care for children.

Subsection 1205(1)(c) provides that the offense applies to the abuse and neglect of a "physically handicapped person" or "mentally handicapped person." Proposed Section 108's definitions of those terms are substantively similar to current 5/12-21(b)(2)'s definition of "disabled person," but require that the victim's impairment be "long-term and disabling" rather than "permanent." See proposed Section 108 and corresponding commentary. Section 1205(1)'s requirement of a legal duty to provide "necessary" care renders unnecessary current 5/12-21(b)(2)'s requirement that the impairment "render[] such person incapable of adequately providing for his own health and personal care."

⁷⁰ Current 5/12-33's offense for "ritualized abuse of a child" also seems designed to punish causing mental harm to children, but its prohibitions against performing certain conduct on, or "in the presence of," children — such as torturing or mutilating another, administering a drug without consent, sexually abusing the child, threatening to commit a crime, and placing the child in a coffin with a human corpse — apply only if the conduct is "part of a ceremony, rite or any similar observance." Section 1205(1) criminalizes causing mental injury or substantial emotional distress by any means by those having a duty to care for children, and would thus allow for liability regardless of whether the harmful conduct is performed as part of a ritual.

Additional liability for much of the conduct prohibited by current 5/12-33 is also available under other offenses in the proposed Code. See proposed Section 1201 (assault); proposed Section 1203 (terroristic threats); proposed Article 1300 (sexual offenses); proposed Section 6205 (abuse of corpse); proposed Section 6207 (cruelty to animals). Where that conduct is performed before a child, liability under both Section 1205 and the other relevant offense(s) would be allowed. Cf. proposed Section 254 (providing rules for multiple convictions); proposed Section 906 (providing rules governing authorized sentences for multiple convictions).

Section 1205(2) grades the offense as either a Class 2 or Class 3 felony, depending on whether it is committed knowingly or recklessly.⁷¹ Current Illinois law, by contrast, grades “abusing” a long-term care facility resident under 5/12-19(a) and “neglecting” an elderly or disabled person under 5/12-21(a) as Class 3 felonies, “grossly neglecting” a long-term facility resident under 5/12-19(a) as a Class 4 felony, and “endangering the life or health of a child” as a Class A misdemeanor. Section 1205(2)’s higher grading reflects the view that the offense is at least as serious as knowingly causing ordinary bodily harm to an elderly person or child, which is graded as a Class 3 felony. See proposed Section 1201(2) and corresponding commentary.

Section 1205 omits several provisions in current 5/12-19 and 5/12-21 that establish regulatory offenses and are designed to exempt justified, innocent, or constitutionally protected conduct. Section 1205(1)’s culpability requirement of “recklessness” and the General Part’s justification for medical treatment cover current 5/12-19(a) and 5/12-21(d)’s exemptions for good-faith efforts to treat patients. See proposed Section 415(2) and corresponding commentary. Current 5/12-19(e) and 5/12-21(e) exempt persons who provide treatment by prayer or spiritual means. Section 1205 is likewise not intended to criminalize conduct that is constitutionally protected, and should not be construed to impair the First Amendment rights of those who rely on treatment by prayer or spiritual means.

Finally, Section 1205 omits current 5/12-19(b) and (c)’s petty and business offenses. It is anticipated that these offenses will be preserved elsewhere in the Illinois statutes through the “conforming amendments” bill to be presented to the General Assembly.

Section 1206. Definitions

Corresponding Current Provision(s): 720 ILCS 5/2-3.5; 5/2-8; 5/2-13; 5/2-15a; 5/9-1(b)(14); 5/12-7.3(h); 5/15-1; 5/31A-1.2(d)(2); 725 ILCS 5/112A-3(3)

Comment:

Generally. This provision collects the defined terms used in Article 1200 and provides cross-references to the provisions in which they are defined.

Relation to current Illinois law. For discussion of the relationship between Article 1200’s defined terms and current law, refer to the commentary for the provision in which the term in question is initially defined.

⁷¹ Section 1205(1) does not incorporate current 5/12-21(f)’s rule that a defendant’s reasonable belief that the victim was not an elderly or disabled person “shall not be a defense.” Section 1205(1) requires recklessness as to the offense’s elements, including the victim’s age or physical or mental impairment. See proposed Section 205(3). For an offense to constitute a Class 2 felony under Section 1205(2)(a), the defendant must satisfy a requirement of knowledge as to those elements. See proposed Section 202(1) and corresponding commentary.

ARTICLE 1300. SEXUAL ASSAULT OFFENSES

Section 1301. Sexual Assault; Aggravated Sexual Assault

Corresponding Current Provision(s): 720 ILCS 5/12-12(f) to -14.1;
5/12-15; 5/12-16; 150/5.1

Comment:

Generally. Section 1301 creates an offense prohibiting persons from engaging in sexual intercourse with another person in situations indicating a lack of consent: either where the intercourse is occasioned by the use or threat of force, or where the victim is unable to give legally valid consent due to incapacity or youth.

Relation to current Illinois law. Section 1301 replaces the offenses in current 5/12-13 to 5/12-14.1, but also covers some of the conduct prohibited in current 5/12-15, 5/12-16, and 150/5.1.⁷² The proposed provision is substantively similar to the current offenses, but includes important changes in the way those offenses are organized and graded.

Section 1301(1) defines the offense of sexual assault to include three categories of prohibited sexual intercourse. Section 1301(1)(a) generally prohibits sexual intercourse with any person, other than one's spouse,⁷³ who is under 17 years old. Current law, on the other hand, addresses sexual intercourse with minors in five different sections: 5/12-13, 5/12-14, 5/12-14.1, 5/12-15, and 5/12-16. As noted below, Section 1301 recognizes the same distinctions as those various current offenses, but does so by including them as grading factors rather than defining separate offenses. The proposed provision also imposes a uniform rule requiring that the victim be under 17 years old. The current offenses involving sexual intercourse, on the other

⁷² The proposed Code does not define separate solicitation offenses such as those in current 5/11-6 (indecent solicitation of a child) and 5/11-6.5 (indecent solicitation of an adult), because the conduct in question would fall within the general complicity, attempt, and solicitation offenses. *See* proposed Sections 301, 801, and 802 and corresponding commentary.

Although both current offenses address the inchoate conduct of soliciting another to commit a sex offense, 5/11-6.5 grades the solicitation of another adult to engage in a sex act with a child the same as the underlying offense, while 5/11-6 grades the direct solicitation of a child to engage in a sex act at one grade lower than the underlying offense. There is no obvious reason to grade direct solicitation of a child *less* seriously than solicitation of an adult to perform the same act with a child. The proposed Code grades any solicitation of an offense one grade lower than the completed offense. *See* proposed Section 807 and corresponding commentary. In the case of solicitation of an adult, if the person's efforts at solicitation resulted in a completed offense, he could be held fully liable for the other adult's offense on a complicity theory. *See* proposed Section 301.

⁷³ This limitation is necessary because Illinois law allows certain persons under 17 years of age to marry. *See* 750 ILCS 5/203 (allowing persons aged 16 to 18 to marry with parental or judicial consent).

hand, sometimes apply where the victim is up to 18 years old, although they typically apply only where the victim is under 17 years old.⁷⁴

Section 1301(1)(b) and (c) are nearly identical to current 5/12-13(a)(1) and (2), but are organized slightly differently to enhance clarity. These subsections prohibit a person from committing sexual intercourse with another by force, or the threat of force, or where he knows the other is unable to understand the nature of the act or consent to it.⁷⁵

Section 1301(2), which corresponds to current 150/5.1, creates omission liability for parents or guardians who knowingly allow another to engage in prohibited sexual intercourse with their child. The Illinois Supreme Court recently held current 150/5.1 to be unconstitutionally vague. *See People v. Maness*, 732 N.E.2d 545, 550-51 (Ill. 2000) (finding provision, which required that parent or guardian take “reasonable steps” to prevent prohibited sexual acts involving children, provided inadequate guidelines regarding what affirmative actions sufficed to prevent liability). In addition to removing the current provision’s requirement that a parent take “reasonable steps,” the proposed provision changes the current offense by limiting liability for merely “allowing” another’s offense to more serious cases — that is, only cases involving sexual intercourse, and not cases of sexual conduct. (Current 150/5.1 applies to any sexual act prohibited in 5/12-13 to 5/12-16, including sexual conduct.) Where a parent or guardian does not only “allow” an offense, but affirmatively aids or facilitates another’s offense — whether the offense involves sexual intercourse or sexual conduct — full liability against the parent for the offense would be possible under the complicity provision. *See* proposed Section 301 and corresponding commentary.

Section 1301(3)’s definition of “sexual intercourse” is identical to current 5/12-12(f)’s definition of “sexual penetration,” but has been broken down into subsections to enhance clarity. The proposed Code uses the term “sexual intercourse” instead of “sexual penetration” because the definition includes various acts that would not intuitively constitute “penetration,” so the current term might be misleading.

⁷⁴ Compare, e.g., 720 ILCS 5/12-13(a)(3) (offender family member, victim under 18); 5/12-13(a)(4) (offender in position of authority, victim under 18), with 5/12-15(b), (c) (offender under 17 or less than 5 years older, victim under 17); 5/12-16(d) (general prohibition for offenders at least 5 years older; victim under 17).

⁷⁵ The proposed Code does not create an offense to parallel current 5/12-13(a)(3) (prohibiting intercourse with an underage family member). The conduct that provision prohibits is covered both by Section 1301(1)(a) (prohibiting sex with persons under 17) and by the incest offense in proposed Section 4101. Under the proposed rules governing conviction and sentencing for multiple offenses, an offender whose conduct violated current 5/12-13(a)(3) would be liable for both sexual assault and incest. *See* proposed Sections 254 and 906 and corresponding commentaries. Accordingly, no separate offense combining those two offenses is necessary.

Section 1301(4) grades the sexual assault offense.⁷⁶ Like current law, Section 1301(4)(a) grades as a Class X felony the most serious cases of the offense, described as “aggravated sexual assault.” Section 1301(4)(a)(i), corresponding to current 5/12-14.1(a)(1), grades the offense as a Class X felony where the victim is particularly young and the defendant is 17 or older. The proposed provision, however, lowers (from 13 to 9 years old) the maximum age of the victim that will support Class X liability. Under proposed Section 1301(4)(b)(i), cases involving victims between 9 and 13 are graded as Class 1 felonies. Although any age cutoff included within a sexual assault offense will be somewhat arbitrary, cases involving children under age 9, who are almost certain to be prepubescent, seem especially serious. Current law recognizes the under-age-9 category in imposing liability for offenders under 17. See, e.g., 720 ILCS 5/12-14(b)(i).

Section 1301(4)(a)(ii) and (iii), like current 5/12-14(a)(2) and (3), grade the offense as a Class X felony where the defendant causes bodily harm to or threatens or endangers the life of the victim. Unlike current law, the proposed provision does not aggravate the penalty in cases where the defendant threatens or endangers the life of a person other than the victim. However, in such cases, the defendant may be liable for a separate offense against that person. See, e.g., proposed Section 1201 (assault); Section 1202 (reckless endangerment); Section 1203 (terroristic threats).⁷⁷ In addition, Section 1301(4)(a)(ii) specifically defines the aggravation to apply where the offender impregnates the victim, thus avoiding the need for a special definition of “bodily harm” that includes pregnancy and applies only to sex offenses, as in current 5/12-12(b).⁷⁸

⁷⁶ Under proposed Section 205(3), the “read-in” culpability requirement of recklessness applies to offense elements with no stated culpability term, whether they appear in the offense definition or in grading provisions. Thus, a defendant must satisfy the requirement of recklessness as to any elements in Section 1301(4), other than the age of the victim, for which proposed Section 1306(1) provides an explicit rule allowing negligence to suffice. Cf. People v. Terrell, 547 N.E.2d 145, 159 (Ill. 1989) (applying the current “read-in” provision to the aggravated sexual assault offense); proposed Section 205 and corresponding commentary.

⁷⁷ For a discussion of the proposed rules for convicting and sentencing multiple offenses, see proposed Sections 254 and 906 and corresponding commentary.

⁷⁸ Note that the definition of “bodily harm” in proposed Section 108 specifically includes physical illnesses and thus includes sexually transmitted diseases. Cf. current 5/12-12(b). The proposed Code does not incorporate the remaining definitions in current 5/12-12. Current 5/12-12(a), defining “accused,” is unnecessary because the proposed Code uses the word “defendant.” Current 5/12-12(c), defining “family member,” is no longer relevant to Article 1300, as sexual acts between family members are now covered by the incest offense in proposed Section 4101. The definition of “force or threat of force” in current 5/12-12(d) hardly clarifies the phrase’s meaning, as the definition includes the terms it purports to define. Current 5/12-12(g), defining “victim,” is unnecessary as that term is within the common understanding of the trier of fact.

Section 1301(4)(a) does not directly retain a number of other factors in current 5/12-14 and 5/12-14.1 that aggravate the offense grade to Class X felony. Most such factors aggravate for conduct that is properly seen as amounting to an additional offense. The aggravating factors in current 5/12-14(a)(1), (4), and (7) to (10), and 5/12-14.1(a)(1.1) to (3) address conduct covered by other offenses under the proposed Code.⁷⁹

Three other current factors that aggravate liability to Class X, all of which relate to the status of the victim, have also not been retained in Section 1301(4)(a). See 720 ILCS 5/12-14(a)(5) (victim is age 60 or older); 5/12-14(a)(6) (victim is handicapped); 5/12-14(c) (victim is severely or profoundly mentally retarded). Sexual assaults involving elderly or handicapped victims will often cause bodily harm or endanger the victim's life, and will therefore be a Class X felony under proposed Section 1301(4)(a)(ii) and (iii). Where they do not, the victim's status will often be more appropriate as a factor to govern proper sentencing for a Class 1 felony, rather than one that merits a *per se* full-grade aggravation to the Class X category, which includes such extremely serious offenses as second-degree murder. Similarly, offenses against severely or profoundly mentally retarded persons, although serious enough to merit Class 1 felony categorization, are not uniquely worse than other offenses involving force or victims unable to give valid consent.

Finally, proposed Section 1301(4)(a) does not impose Class X liability for offenders under age 17 whose victims are under age 9, as current 5/12-14(b)(i) does. Under Section 1301(4)(b), such offenders (as long as they are four years older than the victim) would be guilty of a Class 1 felony. (Under Section 1301(4)(a)(ii), an underage offender who caused bodily harm or threatened the victim's life would still be liable for a Class X felony, as is true for underage offenders who use or threaten force under current 5/12-14(b)(ii).) Such younger offenders seem to merit slightly reduced punishment vis-à-vis mature adults who engage in the same conduct. Cf. *supra* discussion of Section 1301(4)(a)(i) (aggravating liability to Class X felony where victim is under 9 and offender is over 17).

Section 1301(4)(b)(i) grades sexual assault as a Class 1 felony in cases where the victim is less than 13 years old and the defendant is at least four years older. As noted above, for victims between age 9 and 13, this is generally one grade lower than under current law. However, where the victim is between 9 and 13 and the offender is at least four years older but under 17, Section 1301(4)(b)(i) imposes a higher grade than the Class A misdemeanor

⁷⁹ Under proposed Sections 254 and 906, defendants in these cases will be subject to additional punishment because they have committed multiple offenses. See 720 ILCS 5/12-14(a)(1),(8)-(10); 5/12-14.1(a)(1.1), (1.2) (sexual assault involving weapon; aggravating factor is an offense under proposed Article 7100); 5/12-14(a)(4) (sexual assault plus additional felony; factor is an offense by definition); 5/12-14(a)(7), 5/12-14.1(a)(3) (sexual assault plus delivery of controlled substance; factor is an assault under Section 1201, a drug offense under Article 7200, or both); 5/12-14.1(a)(2) (sexual assault involving great bodily harm; factor is an offense under proposed Section 1201).

defined in current 5/12-15(b). For offenders under age 17, the current scheme changes liability from a Class X felony to a Class A misdemeanor based on whether the victim was more or less than 9 years old. Compare 5/12-14(b)(i) with 5/12-15(b). This is a dramatic change in grade based on a distinction that is fundamentally arbitrary and that, at the edges, separates cases that do not differ a great deal in seriousness. The proposed Code seeks to make the consequences of these inevitable grading distinctions more rational, containing fewer and less dramatic discrepancies based on arbitrary distinctions.

Section 1301(4)(b)(ii) and (iii), like current 5/12-13(a)(1), (2), and (4), grade sexual assault as a Class 1 felony where: (1) the defendant was over 17 and held a position of trust, authority, or supervision in relation to a victim who was under 17; (2) force was used or threatened; or (3) the defendant knew the victim could not understand the nature of the act or consent to it.

Section 1301(4)(c), like current 5/12-16(d), grades sexual assault as a Class 2 felony where the victim is between ages 13 and 17 and the defendant is significantly older. Section 1301(4)(c) reduces the required age difference between offender and victim to four years from five years. The current offenses attribute significance in other circumstances to the offender's being age 17 or more, and a four-year requirement assures that any offender over age 17 will face significant liability for an offense against any victim under 13. Similarly, the age of 21 has legal significance in other respects (such as granting the right to consume alcohol), so it seems sensible to ensure that offenders over age 21, who are expected to be mature, will face significant liability for sexual intercourse with any minor under 17.

Section 1301(4)(d) grades sexual assault as a Class 4 felony where the victim is under 13 and the offender is less than four years older. This increases the grade for sexual assault (from a Class A misdemeanor) where the victim is between 9 and 13 and the offender is less than four years older. See 720 ILCS 5/12-15(b). Such an increase recognizes the significance of two factors: (1) that offenses involving sexual penetration are more serious than offenses involving sexual conduct; and (2) that offenses involving victims under age 13 are more serious than offenses involving victims between ages 13 and 17. Current law nearly always makes grading decisions that recognize these factors, but in the case of offenders under 17, current 5/12-15(b) and (c) treat intercourse the same as conduct and treat all victims between ages 9 and 17 the same, imposing Class A misdemeanor liability for any such offense. The proposed grading scheme seeks to make the noted factors relevant in this context as well.

At the same time, Section 1301(4)(d) would operate to reduce the grade from Class X felony, see 720 ILCS 5/12-14(b)(i), to Class 4 felony in the limited set of cases where the victim is under 9 and the offender is less than four years older. This change will only reduce liability for offenders who are a maximum of 13 years old. Reduced liability for such youthful offenders seems appropriate, and imposing such a grade in this situation also maintains

the consistency of the complex overall age-cutoff scheme the proposed Code imposes for sexual assault and sexual abuse offenses.

Section 1301(4)(e), like current 5/12-15(b) and (c), grades sexual assault as a Class A misdemeanor in the remaining cases — that is, those where the victim is between 13 and 17, the defendant is less than four years older than the victim, and the assault involves no use or threat of force.

Section 1301(4)(f) sets omission liability for parents who knowingly allow their underage children to engage in sexual intercourse at one grade lower than it would be for the person engaging in the intercourse. The proposed formulation, which ties the grade of punishment to the underlying harm caused, is more nuanced than current 150/5.1, which grades any violation as a Class 1 felony regardless of the offense committed or the harm caused.

Section 1302. Sexual Abuse; Aggravated Sexual Abuse

Corresponding Current Provision(s): 720 ILCS 5/12-12(e); 5/12-15; 5/12-16

Comment:

General. Section 1302 creates an offense similar to Section 1301's sexual assault offense, but prohibiting improper sexual conduct other than "sexual intercourse" as defined in Section 1301.

Relation to current Illinois law. Section 1302(1)(a) generally prohibits sexual conduct with any person, other than one's spouse,⁸⁰ who is under 17 years old. Current law, on the other hand, addresses sexual conduct with minors in both 5/12-15 and 5/12-16. As noted below, and as with proposed Section 1301, Section 1302 recognizes the same distinctions as the multiple current offenses, but does so by including them as grading factors rather than defining separate offenses. The proposed provision also imposes a uniform rule requiring that the victim be under 17 years old. The current offenses involving sexual conduct, on the other hand, sometimes apply where the victim is up to 18 years old, although they typically apply only where the victim is under 17 years old.⁸¹

Section 1302(1)(b) and (c) are nearly identical to current 5/12-15(a)(1) and (2), but are organized slightly differently to enhance clarity. These subsections prohibit a person from committing sexual intercourse with

⁸⁰ This limitation is necessary because Illinois law allows certain persons under 17 years of age to marry. See 750 ILCS 5/203 (allowing persons aged 16 to 18 to marry with parental or judicial consent).

⁸¹ Compare, e.g., 720 ILCS 5/12-16(b) (offender family member, victim under 18); 5/12-16(f) (offender in position of authority, victim under 18), with 5/12-15(b), (c) (offender under 17 or less than 5 years older, victim under 17); 5/12-16(d) (general prohibition for offenders at least 5 years older; victim under 17).

another by force, or the threat of force, or where he knows the other is unable to understand the nature of the act or consent to it.

Section 1302(2) provides the same definition of “sexual conduct” as current 5/12-12(e), but reorganizes it to enhance clarity.

Section 1302(3) grades the sexual abuse offense. Subsection 1302(3)(a), like current 5/12-16, grades “aggravated sexual abuse” as a Class 2 felony. Section 1302(3)(a)(i) is similar to current 5/12-16(c)(1)(i), which imposes Class 2 felony liability where the victim is less than 13 and the defendant is at least 17, but the proposed provision is slightly more expansive in that it reaches any offender who is at least four years older than the victim, and thus may apply where the offender is under 17. At the same time, Section 1302(3)(a)(i) narrows the scope of current 5/12-16(c)(2)(i), which imposes Class 2 felony liability where the victim is under 9 and the offender is under 17. The proposed provision would also impose Class 2 liability, but only where the offender is at least four years older than the victim. This age-cutoff system only excludes especially young offenders from the aggravation (any offender over age 13 would automatically receive Class 2 felony liability), and it enables the sexual abuse offense to employ a consistent grading scheme — relying on the age differential between victim and offender, rather than sometimes using a fixed cutoff line for the offender’s age and sometimes not — and also to track the distinctions made in the sexual assault offense. See proposed Section 1301(4)(b)(i), (d) and corresponding commentary.

Section 1302(3)(a)(ii) and (iii) retain the current Class 2 felony grade for offenses where the defendant causes bodily harm to, impregnates, or threatens or endangers the life of, the victim. See 720 ILCS 5/12-16(a)(2), (a)(5). Like proposed Section 1301(4)(a)(ii), this provision specifically mentions pregnancy as an aggravating factor, thus avoiding the need to specifically include pregnancy as “bodily harm.” See 720 ILCS 5/12-12(b).

Section 1302(3)(b)(i)(A), like current 5/12-15(a)(1) and (2), grades the offense as a Class 4 felony where the defendant uses or threatens to use force, or knows the victim is unable to consent.

Section 1302(3)(b)(i)(B) grades the offense as a Class 4 felony where the victim is between 13 and 17 and the defendant is at least four years older.⁸² Current 5/12-16(d) grades this offense as a Class 2 felony. The current provision, however, includes all offenses involving either sexual intercourse or sexual conduct. Offenses involving intercourse, which are generally considered more serious under the statutory scheme than those involving sexual conduct, remain a Class 2 felony under proposed Section 1301(4)(c).

Section 1302(3)(b)(i)(C) grades the offense as a Class 4 felony where the defendant is 17 or older and holds a position of trust, authority, or supervision over a victim who is between 13 and 17. Current 5/12-16(f)

⁸² As with the proposed sexual assault offense, the proposed sexual abuse offense imposes a four-year minimum age differential, as opposed to current law’s five-year minimum differential. See supra commentary for Section 1301(4)(c).

grades this offense as a Class 2 felony. As is reflected in both the current and proposed grading for sexual *assault* offenses, however, these cases seem less serious than those involving bodily harm, threats, or victims under 13 years old. Accordingly, the proposed Code applies the distinction recognized in those offenses to the sexual abuse offenses as well.

Section 1302(3)(b)(ii) grades the offense as a Class A misdemeanor where the victim is less than 13 years old and the defendant is less than four years older. Current 5/12-15(b) does not include this distinction, but grades all cases involving either sexual intercourse or sexual conduct as a Class A misdemeanor where the offender is under 17 and the victim is between 9 and 17. The proposed grade is one grade lower than the grade for the corresponding category of sexual assault, and one grade higher than the grade for relevant sexual abuses involving victims over 13, in order to recognize the significance of different age categories of victim and of the difference between intercourse and sexual conduct. See supra commentary for Section 1301(4)(d).

Section 1302(3)(b)(iii)'s residual grading provision for all remaining cases corresponds to current 5/12-15(c), as it would apply where the victim is between 13 and 17, the defendant is less than four years older than the victim, and the offense does not involve the use or threat of force. The proposed provision grades this offense as a Class B misdemeanor, whereas the 5/12-15(c) offense is a Class A misdemeanor. The current provision, however, includes offenses involving either sexual intercourse or sexual conduct. Offenses involving intercourse, which are generally considered more serious under the statutory scheme than those involving sexual conduct, remain a Class A misdemeanor under proposed Section 1301(4)(e).

The proposed provision does not retain other currently employed aggravating factors. Some of those factors aggravate for conduct already addressed by other offenses. See 720 ILCS 5/12-16(a)(1) (sexual abuse plus weapons offense); 5/12-16(a)(6) (sexual abuse plus other felony); 5/12-16(a)(7) (sexual abuse plus assault and/or drug offense); 5/12-16(b) (sexual abuse plus incest). Under the proposed scheme for multiple convictions, additional punishment could be imposed in such cases for the other offense, so that aggravation of the penalty for the sexual abuse offense is unnecessary. See proposed Sections 254 and 906 and corresponding commentary; see also supra note 75 (discussing incest issue in sexual assault context).

Three current aggravations that deal with specific categories of victim have not been retained in the proposed Code. See 720 ILCS 5/12-16(a)(3) (victim is age 60 or older); 5/12-16(a)(4) (victim is handicapped); 5/12-16(e) (victim is severely or profoundly retarded person). Sexual assaults involving elderly or handicapped victims will often cause bodily harm or endanger the victim's life, and will therefore be aggravated to a Class 2 felony under proposed Section 1302(3)(a)(ii) and (iii). Where they do not, the victim's status will often be more appropriate as a factor to govern proper sentencing, rather than one that merits a full-grade aggravation. See also supra commentary for Section 1301(4).

Section 1303. Sexual Exploitation of a Child

Corresponding Current Provision(s): 720 ILCS 5/11-9.1

Comment:

General. Section 1303 defines an offense to prohibit a person from encouraging a child to engage in illicit self-exposure.

Relation to current Illinois law. Section 1303 is substantively similar to current 5/11-9.1(a-5), but has been reorganized to enhance clarity.⁸³ The indecency offense addressed in current 5/11-9.1(a) is now included within the proposed general indecency offense. See proposed Section 6201 and corresponding commentary. The offense in proposed Section 1303 addresses harms to children that specifically victimize the children and relate to their sexuality, rather than the distinct indecent act of exposing oneself to others.

Section 1303(2) grades the offense as a Class A misdemeanor, the same as current 5/11-9.1, but removes the aggravation for subsequent offenses, as there is a general aggravation for recidivism in proposed Section 905.

Section 1303 eliminates the definitions in current 5/11-9.1(b) as they are no longer necessary to the provision.

Section 1304. Custodial Sexual Misconduct

Corresponding Current Provision(s): 720 ILCS 5/11-9.2

Comment:

General. Section 1304 creates an offense covering correctional employees and custodial officers who engage in sexual conduct or intercourse with others under their custodial supervision.

Relation to current Illinois law. Section 1304 is substantively similar to current 5/11-9.2, but it has been rephrased to enhance clarity, and it does not incorporate certain parts of the current provision. Current 5/11-9.2(d) has not been retained in the proposed Code, as it addresses a procedural matter that belongs outside the Code. Current 5/11-9.2(e) has been deleted as unnecessary; that provision states that consent is not a defense, but the proposed General Part already includes a provision pointing out that consent is not a defense unless it negates an element of an offense. See proposed Section 251 and corresponding commentary. The exemption for married couples in 5/11-9.2(f)(1) has been incorporated into the offense definition. There is no need to retain current 5/11-9.2(f)(2), as the effect of that provision's exemption is merely to restate the offense's "read-in" culpability of recklessness as to whether the victim was in custody. See proposed Section 205(3).

⁸³ As in other provisions in the proposed Code, Section 1303 replaces the term "purpose" with "intent," as "purpose" is not one of the defined culpability terms in proposed Section 206.

Section 1304(2) retains the definition in current 5/11-9.2(g)(1), but uses the term “penal custody” to distinguish this specific context from other contexts in which the Code uses the term “custody,” as when it refers to custody of a child. Current 5/11-9.2(g)(2)’s definition of “penal system” has been eliminated, as the defined term “correctional employee” limits the meaning of “penal system.” The definition of “employee” in current subsection (g)(3) is now addressed by proposed Section 5308 (q.v.). Current 5/11-9.2(g)(4)’s cross-reference to definitions appearing elsewhere has been removed, as Section 1307 includes a summary of, and cross-reference to, all defined terms in the Article. The definitions of “probation officer” and “supervising officer” in 5/11-9.2(g)(5) and (6) have been removed as unnecessary, because those terms are not used in the proposed provision. The offense is inherently limited to those who have “custody” of or “authority” over their victims; it is redundant to further define the offender to be a particular type of official exercising such authority.⁸⁴

Section 1304(3) grades the offense as a Class 3 felony, as does current 5/11-9.2(c).

Section 1305. Prohibited Conduct by Convicted Child Sex Offender

Corresponding Current Provision(s): 720 ILCS 5/11-9.3; 5/11-9.4

Comment:

General. Section 1305 creates an offense prohibiting convicted child sex offenders from knowingly approaching, contacting, or communicating with children in certain public places where children are expected to be present.

Relation to current Illinois law. Section 1305 corresponds to current 5/11-9.3 and -9.4. Section 1305(1) defines an offense similar to current law,⁸⁵ but makes three substantive changes and has been reorganized and consolidated to enhance brevity and clarity.

The most significant change from current law is that the proposed offense only applies where the offender knowingly approaches, contacts, or communicates with a child in one of the enumerated public places. Section 1305 eliminates the current prohibitions against loitering or residing within a certain distance of such a public place. Those offenses reach considerably further than the proposed offense, and thereby — because all the underlying

⁸⁴ Section 1304(1)(b) uses the term “custodial officer,” which is defined in Section 5302(2) to include both correctional officers and those who supervise civil detainees. Section 1304(1)(b) is thus similar to current 5/11-9.2 in criminalizing engaging in sexual conduct with one who has been civilly committed under the Sexually Violent Persons Commitment Act, but would also reach misconduct involving persons who have been civilly committed under other statutes.

⁸⁵ As under current 5/11-9.3(c)(3) and 5/11-9.4(d)(3), the phrase “any sexual offense” is meant to include convictions for child sex offenses from other state and federal jurisdictions.

conduct addressed by these offenses is inchoate and preliminary in nature — run the risk of criminalizing innocent or even unavoidable or unwitting conduct. The proposed provision limits liability to conduct that is less likely to be purely innocent, yet still expands the scope of liability for this type of inchoate conduct beyond what is normally required for an attempt, in order to provide additional protection against would-be child sex offenders.⁸⁶

Second, Section 1305(1)(a)(ii) states that liability may only be imposed where the sex offender knows, or has been notified, that he is a person subject to the offense.⁸⁷ As discussed above, the proposed offense does not require any actual harm, but addresses conduct that is at most preparatory in nature, thus increasing the risk that liability will be imposed on persons whose conduct was innocent and who may have had no reason to be aware of the offense's prohibitions. Moreover, it remains possible to impose attempt liability on offenders whose conduct amounts to a substantial step toward a sex offense, regardless of whether the offender was on notice as to the separate Section 1305 offense. See proposed Section 801 and corresponding commentary.

Third, Section 1305(1) changes the age requirement for the children involved in the prior and current offenses from under 18 years old to under 17 years old, tracking the age requirements in the proposed underlying sex offenses (Sections 1301 through 1303).

Section 1305(2) corresponds to current 5/11-9.3(a) and 5/11-9.4(a) by providing exceptions for parents or guardians who have children present and persons who obtain suitable permission to be present at the location in question. The proposed Code removes these exceptions from the offense definition and places them into a separate subsection to enhance clarity.

Section 1305(3) incorporates current 5/11-9.4(d)(4)'s definition of "public park."

⁸⁶ In addition to the offense under Section 1305, such offenders may commit an attempted sex offense if, under the circumstances, their conduct in approaching or contacting a child can be considered a substantial step toward the commission of the sex offense. See proposed Section 801 and corresponding commentary. Where the offender engages in prohibited conduct separate from that required by the proposed offense (e.g., touching or abducting the child), the offender may face liability for multiple offenses. For a discussion of the proposed rules for convicting and sentencing multiple offenses, see commentary for proposed Sections 254 and 906.

⁸⁷ The exact procedures for notifying convicted child sex offenders that they are subject to this offense would need be added to the Code of Corrections, or another chapter of current law, as conforming amendments to the Criminal Code. One obvious way to provide such notice would be to inform persons when they are sentenced for a child sex offense, or released from custody for such an offense, that they are subject to Section 1305. Cf. 730 ILCS 150/1 et seq. (Sex Offender Registration Act).

Section 1305 does not include the definitions of "child sex offender" and "sex offense" in current 5/11-9.3(c)(1) and (2) and 5/11-9.4(d)(1) and (2), as it is anticipated that these definitions will be included in the provisions governing procedures for notification of offenders.

The definition of “school” in current 5/11-9.3(c)(4) has not been used, as the proposed offense incorporates the definition into the offense definition. This change avoids the problem of having one definition of the term “school” solely for this offense and another general definition for the rest of the Code. See proposed Section 108 (defining “school” to include colleges and universities).

The definitions in current 5/11-9.3(c)(6) (“school official”), and 5/11-9.4(d)(5) (“facility providing programs,” etc.) have not been incorporated, as the terms are within common understanding and the current definitions do not clarify the terms’ meanings.

Section 1305(4) grades the offense as a Class 4 felony, as do both current 5/11-9.3(d) and 5/11-9.4(e).

Section 1306. General Provisions Relating to this Article

Corresponding Current Provision(s): 720 ILCS 5/12-17; 5/12-18

Comment:

General. Section 1306 provides two general rules that govern each of the provisions in Article 1300. Section 1306(1) clarifies that where an offense requires a victim to be of a certain age, the defendant need only be negligent as to the person’s age, unless expressly provided otherwise.⁸⁸ In other words, a reasonable mistake (but not an unreasonable or reckless mistake) as to the victim’s age may negate the required culpability for an offense.⁸⁹ See proposed Section 207 and corresponding commentary. Section 1306(2) provides an exemption to the offenses in this Article for medical examinations or procedures performed by doctors, licensed medical professionals, parents, or caretakers in a manner consistent with reasonable medical standards.

Relation to current Illinois law. Section 1306(1) corresponds to current 5/12-17(b), but restates that provision’s “defense” as a culpability requirement.⁹⁰ In addition, Section 1306 applies to every offense in this

⁸⁸ Section 1306 thus provides a default rule of negligence as to a victim’s age, but preserves the General Assembly’s prerogative to impose a different culpability requirement for a specific offense by expressly stating the requirement within that offense.

⁸⁹ A reasonable mistake as to age would provide a complete defense only where the defendant reasonably believed the victim to be over 17 years of age. In all other cases, the defendant would still be liable for the grade of the offense that would apply if the victim were the age the defendant reasonably believed the victim to be. For example, an adult defendant who had sexual intercourse with someone he reasonably believed was 14, but who was in fact 12, would be liable for a Class 2 felony under proposed Section 1301(4)(c).

⁹⁰ Under current law, this provision defines an affirmative defense, requiring the defendant to raise some evidence of his reasonable mistake to obtain a jury instruction on the issue. See People v. Lemons, 593 N.E.2d 1040, 1044 (Ill. App. 1992). Under the proposed Code, the defendant would not bear the burden of production on the issue. See proposed Section 107 and corresponding commentary. Because the defendant’s negligence as to the victim’s age is a culpability requirement like any other, it seems appropriate to place a similar burden on the State as exists for culpability with respect to any other element.

Article, and not just to sexual abuse and aggravated sexual abuse, as the current provision provides. There is no obvious reason to require negligence as to age for some sex offenses, but require either recklessness (if it is intended that current 5/4-3(b)'s "read-in" provision applies to these elements) or no culpability (if it does not) for others. In selecting a uniform rule, negligence seems appropriate because it will allow for liability in nearly all cases, but still enables those who acted reasonably and could not have been expected to know otherwise to show that their acts were reasonable.

Section 1306(2)'s exemption for medical procedures is nearly identical to current 5/12-18(b).⁹¹

Section 1306 does not incorporate the remaining provisions in current 5/12-17 to -18.1. The consent definition in current 5/12-17(a) is unnecessary, because the proposed General Part includes a provision to govern the significance of consent. See proposed Section 251 and corresponding commentary. (As with the current provision, a lack of verbal or physical resistance and/or dressing in a certain fashion would not constitute consent under proposed Section 251.)

Current 5/12-18(a), which imposes an "anti-presumption" forbidding presumptions of an offender's lack of capacity to commit an offense, is confusing and unnecessary. A person's capacity to commit an offense is always governed by the offense definition and by any relevant defenses in the General Part. Current 5/12-18(c) to (g) address procedural matters properly addressed outside the Code. Current 5/12-18.1 has been removed, as it addresses matters of civil liability properly addressed outside the Code.

Section 1307. Definitions

Corresponding Current Provision(s): 720 ILCS 5/2-14; 5/11-9.2(g)(2); 5/11-9.3(c)(5); 5/11-9.4(d)(4),(6); 5/12-12; 5/31A-1.1(c)(1); 5/31A-1.2(d)(2)

Comment:

General. This provision collects defined terms used in Article 1300 and provides cross-references to the provisions in which they are defined.

Relation to current Illinois law. For a discussion of the relationship between Article 1300's defined terms and current law, refer to the commentary for the provision in which the term is initially defined.

⁹¹ In People v. Foster, 552 N.E.2d 1112, 1131 (Ill. App. 1990), the court found that because current 5/12-18(b) defines an "exception," rather than a defense or an element of the offense, the burden was on the defendant to prove by a preponderance that he was entitled to the exception. Under the proposed Code, this exemption is an affirmative defense as to which the defendant bears the burden of production, but the State bears the burden of persuasion beyond a reasonable doubt. See proposed Section 107 and corresponding commentary.

ARTICLE 1400. KIDNAPING, COERCION, AND RELATED OFFENSES

Section 1401. Kidnaping; Aggravated Kidnaping

Corresponding Current Provision(s): 720 ILCS 5/10-1; 5/10-2

Comment:

Generally. Section 1401 creates an offense prohibiting a person from knowingly confining another person against his will.

Relation to current Illinois law. The proposed offense corresponds to current 5/10-1 and 5/10-2. Section 1401 combines the two current offenses into one offense that is substantively similar to current law, but with several differences in the offense's grading.

Section 1401(1) defines the basic offense in nearly identical fashion to current 5/10-1(a), but adds an explicit codification of the current Illinois rule, developed in case law, that parents cannot commit the offense of kidnaping their own children.⁹² Under the proposed Code, parents could still be liable for unlawful restraint and/or interference with custody. *See* proposed Sections 1402 and 1403 and corresponding commentary.

Section 1401(1)(a), like current 5/10-1(a)(1), prohibits a person from confining another secretly and against his will. As in current law, the proposed provision will support liability where either the fact of confinement or the place of confinement is secret. *See People v. Mulcahey*, 381 N.E.2d 254, 256 (Ill. 1978) (finding defendant, who entered victim's home while she was alone, taped her to chair, and phoned her husband for ransom, had "secretly confined" victim under kidnaping statute).

⁹² *See, e.g., People v. Marin*, 269 N.E.2d 303, 305 (Ill. 1971) (finding defendant not guilty of aggravated kidnaping in scheme to extort ransom from child's grandfather because child's father had consented to scheme); *People v. Algarin*, 558 N.E.2d 457, 462 (Ill. App. 1990) (finding defendant, because he was victim's biological father, not guilty of kidnaping where he grabbed his estranged child against her will and physically carried her for blocks while running from police and armed with knife).

The court in *Marin* based its finding on an interpretation of current 5/10-1(b), which states that a child is kidnaped "against his will" if the child's parent has not consented to the confinement. The *Marin* court read that provision to preclude liability in any case where a parent *has* consented, regardless of whether the defendant-kidnaper is actually the child's parent or whether the child has consented. This reading of 5/10-1(b) is questionable, and although the proposed Code adopts the rule barring parental liability, it might still support liability — in appropriate cases, and where proposed Section 415's justification defense does not apply — for a non-parent where the parent consents and the child does not.

In addition, although a parent may not be held liable for kidnaping his or her own child, the proposed Code would allow the parent to be convicted as an accomplice to kidnaping in a case, like *Marin*, where the parent is legally accountable for the conduct of another in kidnaping the child. *See* proposed Section 301(3) and corresponding commentary. And where, as in *Marin*, the parent attempted to extort a ransom from a third party, he or she might be subject to potential liability for theft, or for an attempt or conspiracy to commit theft, in addition to aggravated kidnaping.

Section 1401(1)(b) is substantively similar to current 5/10-1(a)(2) and (3), but slightly alters the wording and organization of the current definition for purposes of clarity and brevity. The proposed definition punishes a person who “moves” another against his will in place of current 5/10-1(a)(2)’s prohibition against one who “carries” another against his will. The proposed language more clearly expresses the intent of the provision, which is to prohibit any forceful moving of another, as opposed to an actual physical “carrying” of another. This change in language would not mark a substantive change, as Illinois courts currently read the term “carries” broadly to include any movement of another. See People v. Casiano, 571 N.E.2d 742, 746 (Ill. App. 1991) (finding “carries” requirement in kidnaping statute did not mean defendant had to physically carry victim, but should be read more broadly to mean asportation or movement of another person).

Section 1401(2) is similar to current 5/10-1(b) and clarifies that confinement or movement of a child under age 13 is against the child’s will, despite the child’s consent, if it is done without the consent of the child’s parent or guardian. Where the child has not consented, the provision does not apply, and the conduct may, in appropriate cases, constitute kidnaping even if the parent consents. See supra note 92.

Section 1401(3) grades the kidnaping offense. Section 1401(3)(a)(i) and (ii), like current 5/10-2(a)(1) and (3), grade the offense as a Class X felony where the defendant intends to obtain a ransom⁹³ or commits another felony against the victim. Section 1401(3)(a)(i) also adds an aggravation where the offender kidnaps the victim to obtain “performance of other demands,” so that the grading for this offense parallels that in proposed Section 1402 (unlawful restraint). The proposed provision eliminates as redundant the “inflicts great bodily harm” element in current 5/10-2(a)(3), as such conduct constitutes a felony against the victim under proposed Section 1201.

Section 1401(3)(b) adds a middle grading tier, not present in current law, that provides Class 1 felony grading for two types of offenses. Subsection (3)(b)(i) covers cases where the victim is under 13 years old or severely or profoundly mentally retarded. The proposed provision lowers current 5/10-2(a)(2)’s penalty from a Class X felony to a Class 1 felony, because such cases do not seem to merit a two-grade aggravation over the base offense, nor do they seem as serious as other Class X offenses, such as second-degree murder. See proposed Section 1102 and corresponding commentary. Subsection (3)(b)(ii) creates an aggravation not present in current law,

⁹³ As in current law, the offense of aggravated kidnaping is completed once the defendant secretly confines or moves the victim against his will with the intent to obtain a ransom. The offense does not require that the defendant communicate the demand or ultimately receive the ransom. See People v. Bolla, 448 N.E.2d 996, 1000 (Ill. App. 1983). In some cases, the defendant may also be liable for theft if he actually obtains the ransom. See proposed Section 2104 and corresponding commentary; see also proposed Sections 254 and 906 and corresponding commentary (defining rules to govern convictions and sentencing for multiple offenses).

grading the offense as a Class 1 felony where the confinement lasts longer than 24 hours. Such cases present a greater imposition on, and source of potential terror and harm for, the victim and deserve increased punishment over cases where the abduction lasts only a few minutes or hours.⁹⁴

Section 1401(3) does not incorporate the aggravation in current 5/10-2(a)(4) for cases where the defendant wears a hood or conceals himself, because such conduct is incidental to the commission of the offense and does not reflect any additional harm or injury. The proposed Code also eliminates the aggravations in current 5/10-2(a)(5) through (8) for cases involving weapons. Most of the cases covered by these aggravations will necessarily involve another felony and will therefore already be subject to aggravation under Section 1401(3)(a)(ii). Moreover, the offender may be subject to additional liability for separate weapons offenses under proposed Article 7100. See proposed Sections 254 and 906 and corresponding commentary (defining rules to govern convictions and sentencing for multiple offenses); see also infra commentary for Section 1402(2).

Section 1401(3)(c) grades the base offense of kidnaping as a Class 2 felony, the same as current 5/10-1(c).

Section 1401(4) defines “severely or profoundly mentally retarded person” in similar fashion to current 5/2-10.1.

⁹⁴ Like current law, Section 1401 does not require that the confinement of a person last a certain period of time, or that the movement cover a certain amount of space, to constitute an offense. Even a brief confinement or short movement may constitute a kidnaping, although whether it does may depend on the facts of the particular case. Compare, e.g., People v. Ware, 751 N.E.2d 81, 88 (Ill. App. 2001) (finding that defendant kidnaped victim when he moved her a few feet from hallway to bathroom and detained her for only a few minutes), with People v. Lamkey, 608 N.E.2d 406, 409-10 (Ill. App. 1992) (finding that where victim was only detained for two minutes in an area open to public view, asportation of victim was merely incidental to offense of aggravated criminal sexual assault, and was therefore a lesser included offense of the assault).

Under the proposed Code, whether the restraint or movement of another person may lead to additional liability beyond that for another related offense, such as sexual assault by force, is governed by the multiple-offense liability rules in proposed Section 254. Where the restraint offense under Section 1401 or 1402 is “based on the same conduct” as the sexual assault, liability for both offenses should be precluded; because sexual assault presupposes and requires some degree of restraining the victim, the harm of that incidental restraint or movement is “entirely accounted for by” the sexual assault offense. See proposed Section 254(1)(a)(i) and corresponding commentary. However, when the restraint or movement is distinct from the sexual assault (e.g., the restraint or movement lasts over a long period, or occurs at a different time or in a different place than the sexual assault, as when the offender first restrains the victim and drags the victim to another location where he commits the assault), the two offenses will no longer be based on the “same conduct,” and the limitations in proposed Section 254(1)(a) will no longer apply.

Section 1402. Unlawful Restraint; Aggravated Unlawful Restraint

Corresponding Current Provision(s): 720 ILCS 5/10-3; 5/10-3.1;
5/10-4; 5/11-19.2

Comment:

Generally. Section 1402 creates an offense prohibiting persons from knowingly detaining another against his will and without authority.

Relation to current Illinois law. Section 1402 consolidates current 5/10-3, 5/10-3.1, and 5/10-4.⁹⁵ Section 1402(1) defines the offense in similar fashion to current 5/10-3(a). The proposed offense, like the current provision, broadly prohibits any knowing detention of another, when the detention is against the person's will⁹⁶ and without authority.⁹⁷ As under current law, the offense could apply to cases involving parents or guardians who detain their own children without authority.⁹⁸

Section 1402(2) grades the offense in similar fashion to current law. Section 1402(2)(a) covers the same conduct as current 5/10-4(a)(2) (forcible detention), but aggravates for restraining peace officers, correctional employees, or community policing volunteers,⁹⁹ and grades the offense the same, as a Class 2 felony. Section 1402(2)(b) grades the base offense of unlawful restraint as a Class 4 felony, as does current 5/10-3(b).

⁹⁵ Section 1402 does not explicitly incorporate the offense in current 5/11-19.2 (exploitation of a child), although an offense under that provision would typically also be an offense under Section 1402. The conduct the current offense prohibits is also covered by proposed Sections 1401 (kidnaping; Class X to Class 2 felony) and 6203 (promoting, supporting, or living off proceeds of prostitution; Class 2 felony). In many cases, the defendant may be convicted for both an Article 1400 offense and a Section 6203 offense and be subject to additional liability for each. *See* proposed Sections 254 and 906 and corresponding commentary (defining rules to govern convictions and sentencing for multiple offenses).

⁹⁶ Although the requirement that the restraint be against the person's will may seem to be inherent in the requirement of "without authority," the proposed provision specifically adds the element to make the point clear and to parallel the similar requirement in proposed Section 1401.

⁹⁷ The proposed offense replaces the term "legal authority" with "authority." Any actual "authority" cannot be illegal or unlawful, so the word "legal" would be redundant. *See, e.g.,* proposed Section 5103. The revision is not intended to effect any substantive change.

⁹⁸ *See, e.g., People v. Algarin*, 558 N.E.2d 457, 464 (Ill. App. 1990) (finding defendant, who was victim's estranged father, guilty of aggravated unlawful restraint after he grabbed victim and physically carried her against her will while armed and running from the police); *People v. Warner*, 424 N.E.2d 747, 749 (Ill. App. 1981) (finding defendant-guardian guilty of unlawful restraint for confining victim to his room for 30 days).

Proposed Section 415, however, would prevent the application of Section 1402 in cases involving ordinary household discipline. That provision defines an explicit justification defense, not included in the current Code, for parents or guardians who use force to discipline or restrain their children, where the force is necessary to safeguard or promote the welfare of the children.

⁹⁹ *Cf. infra* commentary for proposed Section 1404(2)(b).

Section 1402 does not incorporate the weapons aggravations in current 5/10-3.1 and 5/10-4(a)(1). The current scheme of aggravating certain offenses based on the presence or use of a weapon, while also defining separate general weapons offenses, has created a complex and confusing sentencing scheme whose application Illinois courts have found unconstitutional on more than one occasion.¹⁰⁰ The proposed Code defines, in Article 7100, separate weapons offenses that would subject a defendant to additional liability beyond the unlawful detention offense. See proposed Sections 254 and 906 and corresponding commentary (defining rules to govern convictions and sentencing for multiple offenses).

¹⁰⁰ For example, in People v. Wisslead, 446 N.E.2d 512, 515-16 (Ill. 1983), the defendant was charged with unlawful restraint and armed violence based on detaining his wife with a handgun. Under the armed violence statute, the defendant could be held liable for a Class X felony for committing unlawful restraint while armed. See 720 ILCS 5/33A-2, -3; Wisslead, 446 N.E.2d at 514. Although unlawful restraint is a lesser included offense of aggravated kidnapping (which includes kidnapping while armed), the latter offense would have only subjected the defendant to liability for a Class 1 felony. Id. Because the defendant was subject to a greater penalty for the lesser offense of armed violence based upon unlawful restraint, the Illinois Supreme Court ruled the armed violence statute violated the Proportionate Penalties clause (Article I, § 11) of the Illinois Constitution. Id.; see also People v. Christy, 564 N.E.2d 770, 774 (Ill. 1990) (finding sentence for armed violence based on kidnapping unconstitutionally disproportionate to sentence for identical offense of aggravated kidnapping).

The legislature apparently attempted to correct this problem by creating the offense of aggravated unlawful restraint, which grades use of a deadly weapon during an unlawful restraint as a Class 3 felony. Despite this change, an offender is still subject to two vastly different penalties for essentially the same conduct: aggravated unlawful restraint is a Class 3 felony under 5/10-3.1, while armed violence predicated on unlawful restraint remains a Class X felony with an enhanced minimum term under 5/33A-2 and -3. In People v. Murphy, 635 N.E.2d 110, 112-13 (Ill. App. 1994), the court rejected the defendant's argument that these offenses created disproportionate penalties for the same conduct. The court found that the two offenses were not identical, because armed violence required the use of a "dangerous weapon," while aggravated unlawful restraint required the use of a "deadly weapon." See Murphy, 635 N.E.2d at 112. (Note, however, that current law does not define the term "deadly weapon," so it is impossible to know how it differs from a "dangerous weapon." Moreover, one would intuitively suppose that using a "deadly weapon" would be more serious than using a "dangerous weapon," but the current grading scheme grades it *less* seriously.) Even so, the court found the statute unconstitutional due to the continuing grading disparity between aggravated kidnapping and armed violence based on unlawful restraint.

The legislature acted again to correct that disparity by raising the penalties for aggravated kidnapping (based on use of a weapon) to be comparable to armed violence (Class X felony with enhancements). However, the disparity described above still exists between the grading of aggravated unlawful restraint and armed violence based on unlawful restraint. The proposed Code eliminates these concerns by creating separate offenses to address the use of weapons and declining to incorporate weapon-based enhancements for other offenses.

Section 1403. Interference with Custody

Corresponding Current Provision(s): 720 ILCS 5/10-5; 5/10-5.5; 5/10-7

Comment:

Generally. Section 1403 creates an offense covering a person who interferes with a parent's custody or visitation rights in violation of a court order.

Relation to current Illinois law. Section 1403 corresponds to current 5/10-5(b)(1), (2) and (9), and 5/10-5.5(b). Section 1403(1) makes clear that the offense applies only where conduct violates a court order regarding rights to "custody" of a child, which would include orders regarding visitation authority. (As under current law, the offense may apply even if the court issuing the order is in a jurisdiction other than Illinois.) Section 1403 does not include the definitions of "child," "detain," and "lawful custodian" in current 5/10-5(a). "Lawful custodian" is not used in the proposed Code, while "child" and "detain" are terms whose definitions are within the common understanding of the trier of fact.

In cases, such as those covered by current 5/10-5(b)(3) through (9), where a court has not issued a custody or visitation order, the conduct will either constitute kidnaping under Section 1401 (assuming the defendant is not a parent), unlawful restraint under Section 1402 (assuming the defendant does not have lawful authority to detain the child), or no offense at all. The proposed Code limits the offense to those cases involving a court order to ensure that, in matters relating to disputes over the custody of children, only serious interference with clearly defined and established custody rights is subject to criminal liability. Cases where one parent obtains physical custody of a child and another asserts, but has not yet conclusively established, legal custody essentially involve family-law disputes properly handled by civil, rather than criminal, authorities.

Section 1403 also eliminates the luring offense in current 5/10-5(b)(10), as the relevant conduct would likely constitute either kidnaping (Section 1401), unlawful restraint (Section 1402), or an attempt to commit either of those offenses (Section 801).

Section 1403 eliminates the affirmative defenses in current 5/10-5(c). The affirmative defense in current 5/10-5(c)(1) is superfluous under the proposed Code, because the offense requires the violation of a court order. The proposed provision also eliminates as unnecessary the defense in current subsection 5/10-5(c)(2) for unavoidable failure to return a child temporarily in one's custody. Like current 5/10-5(b), Section 1403(1) imposes a culpability requirement of "intentionally" as to both exerting control over the child and violating a court order. *See* proposed Section 205(2) (governing application of stated culpability term). In the cases addressed by 5/10-5(c)(2), the defendant has no intent to violate the order. Current 5/10-5(c)(3), providing a defense in cases where the defendant is fleeing an incident or pattern of domestic violence, is addressed by several of the justification offenses in

proposed Article 400. See proposed Section 412 (lesser evils); see also proposed Section 415 (allowing use of force by parent to promote welfare of child); cf. proposed Section 108 (defining “force” to include confinement and restraint). Current 5/10-5(c)(4) is likewise unnecessary because, as noted above, the proposed offense no longer covers the luring or attempted luring of children under 16.

Section 1403(2) grades the offense slightly differently than current law. Section 1403(2)(a) raises the grade for cases involving interference with visitation rights from a petty offense to a Class C misdemeanor, taking the position that such interference is not so drastically different from interference with custody as to merit such a dramatically reduced relative grade. Section 1403(2)(b) grades interference with custody as a Class 4 felony, the same as current 5/10-5(d).

Section 1403 eliminates the recidivist provisions in current 5/10-5(d) and 5/10-5.5(c) in favor of the general recidivist provision in proposed Section 905. Section 1403 also does not incorporate the remaining sentencing and procedural provisions in current 5/10-5(d) through (i), and 5/10-5.5(d) through (h), as those provisions deal with matters properly addressed in the Code of Criminal Procedure or the Code of Corrections, rather than the Criminal Code. Section 1403 does not incorporate current 5/10-7 (aiding and abetting child abduction), as that provision addresses conduct already covered by the general complicity provision in proposed Section 301.

Section 1404. Criminal Coercion

Corresponding Current Provision(s): 720 ILCS 5/12-6; 5/12-6.1; 5/12-6.2; see also 720 ILCS 5/12-6.3; 5/12-7; 5/12-7.2

Comment:

Generally. Section 1404 creates an offense covering persons who threaten unlawful acts in order to compel another to engage in certain conduct.

Relation to current Illinois law. Section 1404 corresponds to current 5/12-6 to -6.2.¹⁰¹ Section 1404(1) defines the offense similarly to current 5/12-6(a). (The provision’s organization also parallels proposed Section 2104 (theft by extortion), which also deals with improper threats.) In addition, the proposed provision eliminates as redundant current 5/12-6(a)’s introductory language regarding the means of communication of the threat, as such communication is implicit in the requirement that the person “threaten”

¹⁰¹ Section 1404(1) also covers the conduct prohibited by current 5/12-6.3 (interfering with the reporting of domestic violence); 5/12-7 (compelling confession or information by force or threat); and 5/12-7.2 (educational intimidation).

another.¹⁰² Section 1404(1) also replaces the current phrase “without lawful authority” with “unlawfully,” but the alteration is not intended to effect a substantive change.

Section 1404(1)(a) merges the content of current 5/12-6(a)(1) and (2). The proposed provision replaces the current phrase “physical harm” with the Code’s defined term “bodily harm.” See proposed Section 108 and corresponding commentary. Section 1404(1)(b) is the same as current 5/12-6(a)(4). Section 1404(1)(c) is similar to current 5/12-6(a)(5), but clarifies that the threatened exposure to “hatred, contempt, or ridicule” must involve a “secret,” as merely revealing an embarrassing fact that is already known or obvious is a minor threat. Section 1404(1)(d) is similar to current 5/12-6(a)(6), but replaces the term “public official” with the proposed Code’s defined term “public servant.” See proposed Section 108 and corresponding commentary. Section 1404(1)(e) is the same as current 5/12-6(a)(7).

Section 1404(1) does not incorporate the prohibition in current 5/12-6(a)(3) against threatening “any criminal offense,” because any relevant and significant conduct is already covered by the other subsections of this offense, or by proposed Section 1203 (terroristic threats). Moreover, the current provision is likely unconstitutionally overbroad, as it extends to even the most minor infractions. See *United States ex rel. Holder v. Circuit Court*, 624 F. Supp. 68, 71 (N.D. Ill. 1985).

Proposed Section 1404(2) generally grades each form of the offense at one grade lower than current law. Section 1402(2)(c) lowers the grade of the base offense from a Class 3 felony to a Class 4 felony. A Class 3 felony grade seems disproportionate for this offense when compared to other Class 3 felonies, such as recklessly creating a risk of catastrophe. Moreover, where the offender carries through on the threat and commits another offense, he may be subject to additional liability for that offense. See proposed Sections 254 and 906 and corresponding commentary (defining rules to govern convictions and sentencing for multiple offenses).

Section 1404(2)(a) corresponds to current 5/12-6.1 and 5/12-6.2(a)(1) and grades the offense as a Class 2 felony where the offense is in furtherance of the activities of a criminal organization. To the extent current 5/12-6.1 covers activities in furtherance of legitimate non-criminal organizations, such cases do not seem worthy of Class 2 felony status, a level of punishment reserved for offenses such as kidnaping and reckless homicide.

Section 1404(2)(b) corresponds to 5/12-6.2(a)(3), but grades cases involving coercion of a peace officer, correctional officer, or community policing volunteer as a Class 3 felony, rather than as a Class 2 felony. The proposed provision eliminates the aggravation in current law for cases involving firemen. Firemen do not protect the public peace, apprehend

¹⁰² As under current law, the threat must have a reasonable tendency to coerce the victim to omit or perform the intended act. See, e.g., *People v. Gallo*, 297 N.E.2d 569, 574 (Ill. 1973).

criminal offenders, or have the same amount of interaction with the public, and thus do not seem as likely to be victimized by this offense or to merit a *per se* full-grade aggravation in all cases. Cases involving firemen may appropriately be addressed by the court at sentencing. Moreover, the distinction recognized in current law seems somewhat arbitrary, as it may be just as sensible to recognize other similar groups of special victims, such as emergency workers, medical professionals, or public officials. To avoid such arbitrary distinctions, the proposed provision retains the aggravation only for the clearly serious cases involving peace officers and those who serve similar functions.

Section 1404 eliminates the special grading provisions in current 5/12-6.3 (interfering with the reporting of domestic violence); 5/12-7 (compelling confession or information by force or threat); and 5/12-7.2 (educational intimidation). Section 1404(1) addresses the conduct those offenses prohibit, and there is no obvious reason to grade that conduct differently from other forms of coercion. The proposed Code also eliminates the provision in current 5/12-7.2(d) regarding civil liability, as such issues are properly addressed outside the Criminal Code. It is anticipated that 5/12-7.2(d) will be preserved by means of “conforming amendment” legislation.

Section 1405. Definitions

Corresponding Current Provision(s): 720 ILCS 5/2-3.5; 5/2-10.1; 5/2-13; 5/2-17; 5/2-18; 5/15-1; 5/15-4; 5/31-1(b); 5/31A-1.2(d)(2); 740 ILCS 147/10

Comment:

Generally. This provision collects defined terms used in Article 1400 and provides cross-references to the provisions in which they are defined.

Relation to current Illinois law. For discussion of the relationship between Article 1400’s defined terms and current law, refer to the commentary for the provision in which each term is initially defined.

ARTICLE 1500. ROBBERY OFFENSES

Section 1501. Robbery; Aggravated Robbery

Corresponding Current Provision(s): 720 ILCS 5/2-7.1; 5/2-7.5; 5/18-1 to -5; see also 720 ILCS 5/2-15a; 5/2-15b; 5/2-19.5; 5/15-1

Comment:

Generally. Section 1501 creates an offense covering the taking of property from the person or presence of another through the use or threat of force. Although the offense involves the taking of property,¹⁰³ it differs from theft by taking (Section 2102) in that it does not require that the actor possess the intent to permanently deprive the owner of the property. It is immaterial whether the offender intended to keep the property, or whether the property belonged to the victim or another.¹⁰⁴ Robbery also differs from theft by

¹⁰³ The Illinois Supreme Court has stated that the defendant need not ever possess the property for there to be a completed robbery. See People v. Gaines, 430 N.E.2d 1046, 1059 (Ill. 1981). In Gaines, the defendant pointed a gun at the victim and stated, “This is a stick-up.” The victim testified that he pulled two dollars out of his pocket and put them on the floor. After the defendant fired his pistol and fled, the victim noticed that one of the bills remained, and he did not see what happened to the other bill. The defendant argued that there was no evidence of what happened to the other bill, and thus no evidence that he ever took physical possession of the money. The Illinois Supreme Court rejected the defendant’s argument, finding that it was not necessary to prove that the defendant “picked up and carried off any of the bills.” Id. Under the proposed Code, the defendant would have been guilty of attempted robbery, rather than robbery, if he never actually gained possession or control of the money. See proposed Section 801 and corresponding commentary. On these facts, however, it is possible that the jury may reasonably have inferred that the defendant took one of the bills. Additionally, the defendant might be subject to liability for an attempted homicide offense under Article 1100, an assault or endangerment offense under Article 1200, and/or a weapons offense under Article 7100 for using and firing a firearm.

¹⁰⁴ See, e.g., People v. Banks, 388 N.E.2d 1244, 1246 (Ill. 1979) (affirming robbery conviction where defendant took two rings from wife by force, despite his claim that the rings were his). Under current law, the offender also need not have the intent to take another’s property at the time he uses or threatens force. There must, however, be some “concurrence” between the use or threat of force and the taking of the property for conduct to constitute robbery. See People v. Williams, 515 N.E.2d 1230, 1234-35 (Ill. 1987) (affirming robbery conviction where defendant struck victim and sexually assaulted her before leaving scene with her necklace); see also People v. Lewis, 651 N.E.2d 72, 88 (Ill. 1995) (affirming robbery conviction where defendant stabbed victim repeatedly, then took key to victim’s apartment from victim’s body as he fled apartment).

Under the terms of Section 1501, an offender’s acquisition of the property must be directly based on his use or threat of force. Where this is not the case, however, the person may be charged with separate counts of an assault offense (or attempt) and a theft offense (or attempt), and may face liability for both. See proposed Sections 254 and 906 and corresponding commentary (defining rules to govern convictions and sentencing for multiple offenses).

imposing additional requirements. Robbery requires the taking to be from the person or presence of another,¹⁰⁵ and also requires that the offender take the property “by force or threat of force.”

Yet although theft and robbery do not precisely overlap, as each contains elements not found in the other, there typically should *not* be liability for both offenses under the proposed Code where the same conduct gives rise to both offenses. Proposed Section 254(1)(a)(i) would preclude multiple-offense liability in such cases, as the harm addressed by the theft offense (taking another’s property without consent) is entirely accounted for by the robbery offense. See proposed Section 254 and corresponding commentary; cf. People v. Jones, 595 N.E.2d 1071, 1074-75 (Ill. 1992) (holding theft a lesser included offense of robbery and that information charging robbery implicitly set forth requirement that property be taken with intent to deprive owner). This is made clear by Section 1501’s grading provision, which (like Section 2109’s grading provision for theft) takes account of the value of the property the offender obtained in determining the grade for robbery.

Relation to current Illinois law. Section 1501(1) defines the offense in nearly identical fashion to current 5/18-1, and also covers the conduct prohibited in 5/18-2 to 5/18-5. Thus, Section 1501 does not include the exception for motor vehicles in current 5/18-1(a).

Because the central concern of the robbery offense is the direct use or threat of force against the victim, Section 1501 would not apply where the property taken was merely in the victim’s “constructive possession,” as the current provisions have been read to apply. See People v. Smith, 399 N.E.2d 1289, 1292-93 (Ill. 1980) (affirming robbery conviction where victim, a store manager, took \$4,500 in cash from store and left it in a bag for defendant, in response to defendant’s phone threat that he would detonate an explosive in the store if victim did not comply with his demand for money). Where property is not taken directly from the victim, the offender might be guilty of both theft and another offense under Section 1203 (terroristic threats) or 1404 (criminal coercion), and would face additional liability for each of those offenses. See proposed Sections 254 and 906 and corresponding commentary (defining rules to govern convictions and sentencing for multiple offenses). He would not, however, be guilty of robbery under Section 1501.

Section 1501 does not require any specific level of force; as under current law, a purse-snatching case, for example, may constitute robbery. Compare, e.g., People v. Bowel, 488 N.E.2d 995, 998 (Ill. 1986) (finding defendant took victim’s purse by force when he pulled the purse from her arm while holding her hand immobile and turning her body “slightly”), with People v. Patton, 389 N.E.2d 1174, 1177 (Ill. 1979) (reversing robbery conviction where defendant took victim’s purse from her body “without any sensible or material violence to the person,” despite fact that victim’s arm

¹⁰⁵ Unlike the current theft offense, see 720 ILCS 5/16-1(b), the proposed theft offenses do not aggravate the penalty for theft where it is from the person. See proposed Section 2109.

was thrown back “a little bit”). Whether an offender has exerted force in taking another’s property is generally an issue to be decided by the trier of fact.

Section 1501(1) refers only to the “threat of force,” and not to “threatening the imminent use of force,” as current 5/18-1 does. Robbery liability seems appropriate even where the threatened injury may not occur immediately — although it is also not anticipated that merely any vague threat of harm in the future will suffice for liability. The proposed language is also consistent with other provisions in the proposed Code that prohibit “force or threat of force.”

Section 1501(2) grades the offense. The grading categories recognized in Section 1501(2)(a) and (b)(i) track proposed Section 2109(2) and (3), and are designed to ensure that robbery of property will always be as serious an offense as, and nearly always a more serious offense than, mere theft of the same property. Section 1501(2)(a) grades the offense as a Class 1 felony where the property taken is worth over \$10,000¹⁰⁶ or is a firearm or motor vehicle. Corresponding thefts are graded as Class 2 felonies under Section 2109(2). The grading for motor-vehicle robbery ensures that the offense is graded more seriously than proposed Section 2301’s car invasion offense, which does not require that the offender acquire, or attempt to acquire, the car. The grading for motor-vehicle robbery is also the same as under current 5/18-3’s “vehicular hijacking” offense. Section 1501(2)’s general maximum grade of Class 1 felony is the same as exists under 5/18-1.

Section 1501(2)(b)(i) grades the offense as a Class 2 felony where the property taken is worth over \$1,000. Corresponding thefts are graded as Class 3 felonies under Section 2109(3).

Section 1501(2)(b)(ii) and (iii), like current 5/18-1(b), aggravate the penalty above the base grade for robberies whose victims are handicapped¹⁰⁷ or over 60, and for robberies committed in a school or place of worship. Section 1501(2)(b)(ii)(C) adds an aggravation for victims under 17 years old, for the sake of consistency, as this category of victim is recognized elsewhere as having special status. Cf. 720 ILCS 5/18-4(a)(2) (aggravating vehicular hijacking offense where person under 16 is in vehicle). Section 1501(2)(b)(iv) retains the aggravation in 5/18-5(a) for cases where the offender indicates he is armed with a dangerous weapon, regardless of whether or not he is actually

¹⁰⁶ Where the property taken is worth over \$100,000, the Class 1 felony grade is the same for both robbery and theft. This grading reflects two considerations: (1) at this monetary level, the value of the property is a significant part of the seriousness of the offense, whether it is theft or robbery; and (2) at this grading level, the value of the property and the force used may both properly guide sentencing determinations, but probably do not collectively warrant aggravation to a Class X felony — a category reserved for such serious offenses as second-degree murder.

¹⁰⁷ The proposed aggravation applies to mentally handicapped as well as physically handicapped victims, both because such victims seem equally deserving of special status and in order to maintain consistency with other grading aggravations in the Code.

armed. In all these cases, the offense is aggravated to a Class 2 felony, whereas the current provisions aggravate to a Class 1 felony.¹⁰⁸

Section 1501(2)(c) grades all other offenses as a Class 3 felony, one grade below current 5/18-1's Class 2 felony grade for the base offense. This grade reflects the fact that more serious liability under Section 1501(2)(a) or (b), and/or additional liability for an Article 1200 offense, or liability under both Article 1200 and Section 2109, will be available where a significant amount of property is taken and/or an assault is committed against the victim.

The proposed Code eliminates the offense of armed robbery in current 5/18-2, as such cases will already be covered by the aggravation in 1501(2)(b)(iv) and would also be subject to additional liability for a weapons offense under Article 7100. See proposed Sections 254 and 906 and corresponding commentary (defining rules to govern convictions and sentencing for multiple offenses). Likewise, the proposed Code eliminates the aggravated vehicular hijacking offense in current 5/18-4, as the conduct described in that offense is already covered by the general robbery offense, the felony-murder provision (Section 1102(1)(b)), assault offenses (Article 1200), and/or weapons offenses (Article 7100).¹⁰⁹

Section 1501(3) makes clear that the value of the property involved in a robbery is to be determined according to the same rules governing the value of property involved in a theft under Section 2109(7).

¹⁰⁸ The conduct prohibited in current 5/18-5(a-5) (robbery plus injection of a controlled substance) is covered by the base robbery offense and the proposed assault offense (Section 1201). Under the proposed rules for convicting and sentencing multiple offenses, an offender under current 5/18-5(a-5) would likely face punishment for *both* offenses under the proposed Code, and thus a total sentence close to the current Class 1 felony penalty for aggravated robbery. See proposed Sections 254 and 906 and corresponding commentary.

¹⁰⁹ Both 5/18-2's armed-robbery offense and 5/18-4's aggravated-vehicular-hijacking offense have, when compared to current 5/33A-2's armed-violence offense, been held to create violations of the Illinois Constitution's Proportionate Penalties clause (Art. I, § 11). In People v. Lewis, 677 N.E.2d 830 (Ill. 1997), a case involving a robbery with a handgun, the Illinois Supreme Court compared the penalty for armed violence predicated on robbery to the penalty for armed robbery. Although the offenses required the same elements — committing robbery while armed with a dangerous weapon — 5/18-2 graded armed robbery as a Class X felony, while 5/33A-3 graded armed violence with a "Category I weapon" (such as a handgun) as a "Class X felony for which the defendant shall be sentenced to a minimum term of imprisonment of 15 years." The Illinois Supreme Court held that those penalties were unconstitutionally disproportionate. See 677 N.E.2d at 835.

The legislature subsequently amended 5/18-2 to grade armed robbery involving a firearm as a "Class X felony for which 15 years shall be added to the term of imprisonment imposed by the court." In People v. Walden, 769 N.E.2d 928 (Ill. 2002), the Illinois Supreme Court held that this amended penalty, when compared to the penalty for armed violence predicated on aggravated robbery, *still* creates a constitutionally impermissible disproportionality. Whereas armed violence with a firearm imposes a minimum sentence of either 10 or 15 years, depending on the type of firearm involved, current 5/18-2 imposes a sentence of 21 to 45 years for armed robbery while in possession of a firearm. See also People v. Garcia, 770 N.E.2d 208 (Ill. 2002); People v. Blanco, 770 N.E.2d 214 (Ill. 2002).

(continued...)

Section 1501(4)(a) provides a definition of the term “dangerous weapon.” Current 5/18-2 uses, but does not define, this term. As a result, Illinois courts have identified four categories of weapons which may or may not be found to be dangerous, depending on the ability of the item to inflict serious injury in a given case. See, e.g., People v. Skelton, 414 N.E.2d 455, 458 (Ill. 1980) (holding as a matter of law that toy gun used by defendant was not sufficiently susceptible of use in a manner likely to cause serious injury); People v. Elliott, 702 N.E.2d 643, 647 (Ill. App. 1998) (finding evidence sufficient for jury to reasonably conclude that pepper spray was a dangerous weapon). The proposed provision offers a definition to guide courts in deciding whether a given item is a dangerous weapon. In addition, the definition includes an illustrative list of items that will always be considered dangerous weapons. The list explicitly includes both any “firearm” and any “gun not ordinarily used as a weapon,” meaning that such items will satisfy an offense element requiring a “dangerous weapon.”

Section 1501(4)(b) defines “firearm” in nearly identical fashion to current law, but uses the defined term “gun not ordinarily used as a weapon” to exclude items like pneumatic guns and signaling devices, rather than listing all the specific types of non-firearm “guns.” See 720 ILCS 5/2-7.1 (incorporating by reference the definition of “firearm” provided in 430 ILCS 65/1.1); 5/2-7.5 (same).

Section 1501(4)(c) cross-references Section 108’s definition of “force,” a term that current Chapter 720 defines only in the context of sexual offenses. See proposed Section 108 and corresponding commentary.

¹⁰⁹ (...continued)

Similarly, in People v. Beard, 679 N.E.2d 456 (Ill. App. 1997), a case involving a hijacking of a car with a sawed-off shotgun, the court compared the penalty for armed violence predicated on vehicular hijacking to the penalty for aggravated vehicular hijacking. Although the offenses criminalized essentially the same conduct — taking another’s motor vehicle while armed with a dangerous weapon — 5/18-4 graded aggravated vehicular hijacking as a Class X felony, while 5/33A-3 graded armed violence with a sawed-off shotgun as a Class X felony with a minimum term of imprisonment of 15 years. The Illinois Supreme Court held that the penalty for armed violence predicated on vehicular hijacking with a Category I weapon violated the Proportionate Penalties clause. See id. at 458.

The legislature has since amended 5/18-4(b) in similar manner to the armed-robbery amendment noted above, grading an aggravated vehicular hijacking involving a firearm as a “Class X felony for which 15 years shall be added to the term of imprisonment imposed by the court.” The Illinois courts have yet to evaluate this new penalty, but it would appear to be unconstitutionally disproportionate to that for armed violence. As with the amended armed-robbery grading provision found unconstitutional in Walden, whereas armed violence with a firearm imposes a minimum sentence of either 10 or 15 years, depending on the type of firearm involved, current 5/18-4(b) imposes a more severe sentence of 21 to 45 years for aggravated vehicular hijacking while in possession of a firearm.

The proposed Code avoids such concerns about constitutionality by defining a single general offense to address the actual use or possession of a weapon — as opposed to Section 1501(2)(b)(iv)’s aggravation for *indicating* that one is armed — in the course of any felony. See proposed Section 7101 (criminalizing possession or use of dangerous weapon in course of felony).

Section 1501(4)(d) defines the term “gun not ordinarily used as a weapon” to cover nearly all the items excluded by the current definition of “firearm.” See 720 ILCS 5/2-7.1 (incorporating by reference the definition of “firearm” provided in 430 ILCS 65/1.1); 5/2-7.5 (same). Because this term does not include antique or historical guns, however, such guns would fall within the proposed Code’s definition of “firearm,” whereas they are specifically excluded from the current definition of “firearm.” To the extent such guns present similar dangers to other firearms, it seems sensible to treat them as “firearms” in the unlikely event that one is used in the commission of an offense. Moreover, it is easier to draw a clear definitional line excluding such non-weapon “guns” as pneumatic guns and rivet guns, whereas the distinction between a “normal” firearm and an “old” firearm may be narrower and more difficult to draw in specific cases.

Section 1501(4)(e) through (i) provide cross-references for other defined terms used in Section 1501. For discussion of the relationship between those terms and current law, refer to the commentary for the provision in which each term is initially defined.

ARTICLE 2100. THEFT AND RELATED PROVISIONS

Section 2101. Consolidation of Theft Offenses

Corresponding Current Provision(s): None

Comment:

Generally. This provision assures that the offense definitions and grading provisions in Article 2100 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 receipt of stolen goods. 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 Article 2100 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 253 and 254 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 Illinois law. Section 2101 has no corresponding provision in current Chapter 720.

Section 2102. Theft by Unlawful Taking or Disposition

Corresponding Current Provision(s): 720 ILCS 5/15-2; 5/15-3; 5/15-7; 5/16-4; 5/16-1(a)(1), (5); 5/16-1.1; 5/16A-3(a); 5/16E-3(a)(1), (4); 5/16G-25; 5/20-1(b); *see also* 625 ILCS 5/18c-7502; 720 ILCS 5/42-1; 215/4; 370/1; 765 ILCS 835/1

Comment:

Generally. This provision defines the most straightforward form of theft: knowingly taking property that belongs to another person.

Relation to current Illinois law. Section 2102(1) corresponds to current 5/16-1(a)(1),¹¹⁰ but adopts several organizational and substantive changes.

¹¹⁰ Section 2101 also addresses most of the thefts covered by current 5/16-1(a)(5). Any other such thefts would be covered by proposed Section 2105 (q.v.).

First, Section 2102(1) effectively adopts the culpability requirement of current 5/16-1(a)(A), eliminating the alternative culpability requirements in current 5/16-1(a)(B) and (C).¹¹¹ These alternative culpability requirements were originally intended to cover “special situations” where it may be difficult to prove the intent to deprive. See ILL. ANN. STAT. ch. 38 ¶ 16-1 Committee Comments (Smith-Hurd 1964). However, these alternative requirements are needlessly confusing and rarely used by prosecuting authorities. See 1 JOHN F. DECKER, ILLINOIS CRIMINAL LAW: A SURVEY OF CRIMES AND DEFENSES § 11.14 - § 11.15, at 572-73 (3d ed. 2000). Further, most of the situations covered by these additional culpability requirements have been incorporated into the definition of “deprive” in proposed Section 2102(2) (q.v.).

In addition, Section 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 from coin-operated machines (5/16-5; entitled “theft,” but defines a property damage offense); retail theft (5/16A-3(a)); library theft (5/16B-2(a)); delivery container theft (5/16E-3(a)(1),(4)); looting (5/42-1); animal research facility theft (215/4); and telephone coin box tampering (370/1). The overlap created by such provisions introduces unnecessary and undesirable confusion.¹¹²

Section 2102(2) defines several terms. Section 2102(2)(a), defining “deprive,” is substantively similar to current 5/15-3, but specifically includes situations where the actor withholds the property for such an extended period as to appropriate a major portion of its economic value. This addition, as well as Section 2102(2)(a)(ii)’s inclusion of “dispos[ing]” of property, should cover the situations that current 5/16-1(a)(B) and (C)’s “uses, conceals or abandons” language addresses.

Section 2102(2)(b), defining “obtain,” is similar to current 5/15-7, but includes a “purported transfer” as well as an actual transfer and replaces “interest or possession” with “legal interest.” Section 2102(2)(c), defining

¹¹¹ Under proposed Section 205(2), the culpability requirement of “knowingly” should be read to apply to the subsequent elements within the grammatical clause in which it appears. As a result, the State must prove that the defendant knew the property taken belonged to another. But cf. *People v. Jones*, 495 N.E.2d 1371, 1372-73 (Ill. App. 1986) (requiring no culpability as to fact that another person owned property in prosecution under 5/21-1(a) for “knowingly damaging . . . property of another”).

¹¹² The proposed Code also eliminates as unnecessary other provisions related to the current offenses noted in the text. See 720 ILCS 5/16A-1 to -2.13, -5, -6, -8, -9; 5/16B-1, -4; 5/16E-1, -2; 215/1 to /3; 370/2. Current 5/16A-4 and -5, addressing the rights of merchants to detain suspected shoplifters, are addressed by the justification rules for private persons’ use of force in making arrests. See proposed Section 414 and corresponding commentary. It is anticipated that other related provisions, concerning regulatory matters, will be preserved by means of “conforming amendments” legislation. See 720 ILCS 5/16A-7; 5/16B-3; 215/6 to /8.

“owner,” is the same as current 5/15-2. Section 2102(2)(d), defining “property of another,” uses the same definition as current 5/20-1(b),¹¹³ but replaces “building or other property, whether real or personal” with “any property.”¹¹⁴

Section 2102(3) creates two permissive inferences related to theft. Section 2102(3)(a) is substantively similar to current 5/16-1.1 and adopts most of 5/16-1.1’s wording. The proposed provision, however, makes clear that its rule creates a permissive inference, as opposed to 5/16-1.1’s “prima facie evidence” rule, whose evidentiary significance is less transparent. (See proposed Section 107 and corresponding commentary for a discussion of permissive inferences.) Section 2102(3)(a)(ii) also inserts the word “receiving” before “written demand” to clarify the rule for when the statutory failure-to-respond periods begin. Finally, subsection (3)(a)(iii) replaces “identification . . . that contained a materially fictitious name, address, or telephone number” with “materially fictitious identification,” which is briefer and more inclusive.

Section 2102(3)(b) creates an inference of intent to deprive in cases where a person intentionally conceals unpurchased merchandise on the premises of a mercantile establishment. The proposed provision is substantively similar to the inference in current 5/16A-4.

Section 2103. Theft by Deception

Corresponding Current Provision(s): 720 ILCS 5/15-4; 5/16-1(a)(2); 5/16-1.2; 5/16-1.3, 5/16A-3(f); 5/16B-2(c); 5/16C-2; 5/16G-15, -20; see also, e.g., 225 ILCS 470/56; 230 ILCS 10/18; 765 ILCS 1040/8

¹¹³ The proposed Code eliminates the similarly defined term “offenders [sic] interest in property” in current 5/16G-25. That term relates to the specific current offense of financial-identity theft, which the proposed Code does not incorporate, as it is addressed by the proposed offense for unauthorized impersonation, as well as the more general offense of theft by deception. See *infra* proposed Sections 2103 and 3105 and corresponding commentary.

¹¹⁴ The term “property” is defined broadly in proposed Section 108 as “anything of value.” See commentary for Section 108 for a discussion of the relation between the proposed definition and that in current 5/15-1.

The proposed Code eliminates current 5/15-8, defining “obtains control,” as redundant of the definition of “obtains” in Section 2102(2)(b). Likewise, current 5/16-4 has been eliminated as redundant of the definition of “property of another” in Section 2102(2)(d).

Comment:

Generally. This provision covers situations where the offender knowingly obtains the property of another¹¹⁵ by means of trickery or falsehood rather than by “taking” it outright, as in proposed Section 2102.

Relation to current Illinois law. Section 2103 addresses the offense of theft by deception in one provision, replacing the general theft-by-deception provisions in current law (5/15-4 and 5/16-1(a)(2)) as well as other specific deception-related sections in current law.¹¹⁶

Section 2103(1) is similar to current 5/16-1(a)(2), but eliminates the additional intent-to-deprive culpability requirement imposed on that provision by 5/16-1(a)(A). (As for the culpability requirements in 5/16-1(a)(B) and (C), see *supra* commentary for proposed Section 2101.) Theft by deception differs from theft by taking in that the offender’s intent to deprive the owner of the property is made clear by his deliberate deceptive act itself, rendering a separate additional culpability requirement unnecessary for this offense.

¹¹⁵ As with Section 2102 (theft by taking), this provision should be read to require that the actor know that the property belongs to another. See *supra* commentary for Section 2102 and *infra* commentary for Sections 2104 and 2110(1)(a).

¹¹⁶ See, e.g., 720 ILCS 5/16-1.3 (financial exploitation of an elderly person or person with a disability); 5/16A-3(f) (retail theft); 5/16B-2(c) (library theft); 5/16C-1 to 5/16C-3 (unlawful sale of household appliances); 235/1 (use of coin slugs).

Current Illinois law also contains dozens of offenses criminalizing making very specific kinds of misrepresentations “with the intent to” or “for the purpose of” obtaining property, as well as performing certain conduct “fraudulently,” with an “intent to defraud,” or as part of a “scheme,” “design,” “artifice to defraud,” or “deception.” See, e.g., 720 ILCS 5/16-3.1 (making false report of loss with “intent to defraud” insurer); 5/16D-5(a) (using computer as part of “scheme, artifice to defraud, or as part of a deception”); 5/16G-15 and -20 (using another’s financial identity to “fraudulently” obtain property); 5/17-1(B)(d),(e) (passing bad check with “intent to defraud”); 5/17-1(C)(2)-(4) (possessing check, “implement of check fraud,” or cash machine card with “intent to defraud”); 5/17-6(a) (using false identification or “misrepresentation” to obtain state benefits); 5/17-8(a) (attempting to obtain health care benefits with “intent to defraud or deceive”); 5/17-9 (using wires as part of “scheme or design” to unlawfully obtain public aid benefits); 5/17-10 (using mail as part of “scheme or design” to unlawfully obtain public aid benefits); 5/17-11 (resetting or disconnecting odometer with “intent to defraud”); 5/17-11.1 (resetting or disconnecting hour meter of used farm implement with “intent to defraud”); 5/17-13 (“fraudulently” selling real property twice); 5/17-16 (“fraudulently” producing infant to claim inheritance); 5/17-24 (using wires or mail as part of “scheme or artifice to defraud,” or attempting to execute “scheme or artifice to defraud” financial institution); 5/17A-1 and -3 (unlawful acquisition of benefits by person subject to deportation); 5/17B-0.05 *et seq.* (“WIC fraud”); 5/33C-4 (“fraudulently” obtaining public funds reserved for minority- or female-owned business); 5/33E-14 (making false statement on vendor application); 250/10 to /12 and /17.01 to /17.03 (credit card fraud). Where an offender unsuccessfully attempted to obtain property using a fraudulent scheme, he would be liable *either* for attempted theft or one of the applicable fraud offenses in Article 3100. Where an offender actually obtained property by means of such a scheme, he would likely be liable for *both* the theft and the applicable fraud offense in Article 3100. See proposed Section 254 and corresponding commentary.

Section 2103(2) incorporates the definition of deception from current 5/15-4. Section 2103(2)(a) is similar to current law, with several changes. First, Section 2103(2)(a) expands upon current 5/15-4(a) in making clear that the false impression may be one of law, value,¹¹⁷ intention, or other state of mind. Second, this subsection combines current 5/15-4(a) and (e) into one provision. The prohibited conduct in current 5/15-4(e) — promising performance that the offender knows will not be performed — is included within Section 2103(2)(a)’s prohibition against knowingly creating a false impression. Third, Section 2103(2)(a) clarifies the evidentiary rule in current 5/15-4(e) regarding a person’s failure to perform a promise. Current 5/15-4(e) states that the failure to perform standing alone is “not evidence” of the person’s intention to perform. One reading of that section would operate to completely exclude a person’s failure to perform a promise as evidence of his intent to perform. Therefore, Section 2103(2)(a) makes clear that although such a failure is *some* evidence, it is not *sufficient* evidence; more than the mere failure to perform a promise is needed to support an inference of deceptive intent. Finally, 2103(2)(a) changes the phrase “impression which is false and which the offender does not believe to be true” in current 5/15-4(a) to the simpler language “false impression.” However, this alteration does not make a substantive change, as the culpability requirement of “knowingly” would require proof that the offender knew the impression was false. (See proposed Section 205(2) and corresponding commentary.)

Section 2103(2)(b) incorporates the language of current 5/15-4(b), but also expands the prohibition to include circumstances where the defendant stands in a fiduciary or confidential relationship to a person and knows that the person is being influenced by the false impression.

Section 2103(2)(c) is similar to current 5/15-4(c), except that the phrase “pertinent to the disposition of the property” has been changed to “that would affect his judgment of a transaction.” The term “pertinent” is ambiguous and unclear, failing to provide a clear standard for deciding whether the information in question is sufficiently significant. The proposed language clarifies the focus of the inquiry, making central the potential impact of the information on the victim’s willingness to engage in the transaction. Illinois courts similarly require that a deception induce the victim’s reliance. See, e.g., *People v. Davis*, 491 N.E.2d 1153, 1156 (Ill. 1986).

Section 2103(2)(d) is the same as current 5/15-4(d), but has been reorganized to enhance clarity.

Section 2103(3) has no corresponding provision in current Chapter 720. Section 2103(3) limits the reach of the offense of theft by deception in two areas. Section 2103(3) excludes from the offense deceptions which are irrelevant to any pecuniary interest, such as when a salesman misrepresents

¹¹⁷ The creation of a false impression as to value would include a person’s use of a “false monetary instrument, token, or note,” as is also prohibited in the provision covering theft of services. See proposed Section 2106.

his personal opinions or beliefs to establish a better rapport with a customer. Section 2103(3) also excludes “puffing” by statements that are unlikely to deceive an ordinary person in the group addressed. Illinois courts have recognized a similar limitation on the offense by requiring that a deception actually induce the victim’s reliance. See, e.g., People v. Davis, 491 N.E.2d 1153, 1156 (Ill. 1986).

Section 2103(4) is similar to current 5/16-1.2, with two changes. First, Section 2103(4) creates a “permissive inference,” as opposed to the “prima facie evidence” rule in current 5/16-1.2. (See supra commentary for Section 2102(3); see also proposed Section 107 and corresponding commentary for a discussion of permissive inferences.) Second, the amount of consideration required to trigger the inference has been raised from \$3,000 to \$10,000 to adjust for inflation and to limit the inference to larger-scale service contracts such as building renovation or construction.

Section 2104. Theft by Extortion

Corresponding Current Provision(s): 720 ILCS 5/15-5; 5/16-1(a)(3)

Comment:

Generally. This provision covers situations where the offender obtains another person’s property¹¹⁸ by means of a threat rather than by outright taking (Section 2102) or deception (Section 2103).

Relation to current Illinois law. Section 2104(1) is similar to current 5/16-1(a)(3), but eliminates the additional intent-to-deprive culpability requirement imposed on that provision by 5/16-1(a)(A). (As for the culpability requirements in 5/16-1(a)(B) and (C), see supra commentary for proposed Section 2102(1).) As with the offense of theft by deception, a person using a threat to obtain another’s property thereby shows his intent to deprive the other person of the property. (See proposed Section 2103 and corresponding commentary.) Therefore, the additional culpability requirement of intent is superfluous.

Section 2104(1)(a) merges current 5/15-5(a) to (c) into one subsection. The proposed subsection is the same as current law, except that Section 2104(1)(a) uses the term “bodily harm,” rather than “physical harm,” to keep this provision’s language consistent with other provisions in the proposed Code. (See proposed Section 108 and corresponding commentary.)

Section 2104(1)(b) is similar to current 5/15-5(d) but, like Section 2104(1)(a), eliminates the word “criminal” as redundant of “offense.”

¹¹⁸ As with other forms of theft, this provision should be read to require that the actor know that the property belongs to another. See supra commentary for Sections 2102 and 2103 and infra commentary for Section 2110(1)(a).

Section 2104(1)(c) combines current 5/15-5(e) to (g) into one subsection and requires that the information that would “expose any person to hatred, contempt, or ridicule” or “harm [his] credit or business repute” must be “a secret.”

Section 2104(1)(d) is substantively similar to current 5/15-5(h), but has been rephrased to enhance clarity. Moreover, the proposed Code uses the more inclusive term “public servant” rather than “public official.” Cf. proposed Section 108 (defining “public servant”).

Section 2104(1)(e) to (g) are identical to current 5/15-5(i) to (k).

Section 2104(2) has no corresponding provision in current Chapter 720. Section 2104(2) creates a defense for property obtained by an honest claim of restitution, indemnification, or compensation. This defense would protect, for example, property obtained in settlement of a legitimate legal claim.

Section 2105. Receiving Stolen Property

Corresponding Current Provision(s): 720 ILCS 5/15-6; 5/16-1(a)(4); 5/16-16, -16.1; 250/4; see also 625 ILCS 5/4-103 to -104; 720 ILCS 245/1; 335/1

Comment:

Generally. This provision creates an offense governing receipt or possession of stolen property.

Relation to current Illinois law. Section 2105 creates an offense similar to current 5/16-1(a)(4),¹¹⁹ but with three important changes. First, Section 2105(1) requires recklessness as to whether the property has been stolen,¹²⁰ instead of knowledge or reason to know. Current 5/16-1(a)(4) effectively creates a negligence standard as to whether the offender knew the property was stolen; negligence is generally disfavored, in Illinois law and elsewhere, as a basis for criminal liability. Section 2105(4) achieves a similar practical result by creating permissive inferences to govern cases where a reckless disregard of a substantial risk that the property was stolen seems especially likely, but allowing the defendant to litigate the issue where he was genuinely unaware, and had no objective reason to be aware, that the property was stolen.

¹¹⁹ Section 2105 would also cover any thefts under current 720 ILCS 5/16-1(a)(5); 5/16-16 and 5/16-16.1; or 250/13 that would not be covered by proposed Section 2102 (q.v.), as well as the offense of “possession of a stolen motor vehicle” as defined in current 625 ILCS 5/4-103.

¹²⁰ Section 2105, like current law, still requires that the property must actually have been stolen. See, e.g., People v. Karreker, 633 N.E.2d 150, (Ill. App. 1994) (holding that because the State failed to prove there was an owner of the property other than the defendant, it could not prove that the property was stolen).

Second, Section 2105(1) extends the offense beyond receiving stolen property to include situations where a person retains or disposes of property after learning that it is stolen property. Current 5/16-1(a)(4) imposes liability only on persons who knew the property was stolen at the time they obtained it. But cf. People v. Dickerson, 353 N.E.2d 427, 428 (Ill. App. 1976) (holding that the defendant, who did not know when he received property that it was stolen, could not be charged under 16-1(d) [current 5/16-1(a)(4)] for “receiving” stolen property, but noting that he could have been charged under the theft-by-taking section [current 5/16-1(a)(1)] for exerting unauthorized control over the property once he became aware it had been stolen).

Third, the proposed offense eliminates the additional culpability requirement, imposed by current 5/16-1(a)(5)(A), that the offender intend to permanently deprive the owner. Section 2105(2) achieves a similar practical result, however, by creating an exception that excludes from liability situations where the accused received, retained, or disposed of the property with the intention to restore it to the owner.

Section 2105(3)(a), defining “receiving,” has no corresponding provision in current Chapter 720. Section 2105(3)(a) broadly defines “receiving” to cover cases of actual and constructive possession. Illinois courts have adopted a similar rule in interpreting current law. See, e.g., People v. Mertens, 396 N.E.2d 595, 600 (Ill. App. 1979) (finding that each of the four defendant family members had constructive possession of stolen property where the property was found throughout the house where the family resided).

Section 2105(3)(b), defining “stolen,” uses the same definition as current 5/15-6.

As noted above, Section 2105(4) establishes four separate permissive inferences to allow a jury to infer that a person was reckless as to the property being stolen. The inferences are aimed at people who regularly deal in stolen merchandise, such as vehicle “chop shops,” fences, and black markets, or where it is objectively clear that the merchandise has been stolen. Together these inferences cover much of the conduct addressed in the stolen motor vehicle provisions in Chapter 625.¹²¹

Section 2105(4)(a)(i) creates an inference in cases where the person is found in possession or control of property that has been stolen multiple

¹²¹ See 625 ILCS 5/4-103 et seq. Current 625 ILCS 5/4-103.1 and -103.3 create vehicle theft conspiracy offenses that *aggravate* the penalty from a Class 2 to a Class 1 or Class X felony. Under the proposed Code, this inchoate conduct would, like any other conspiracy, be graded at one offense grade lower than the object offense. To the extent that the current offenses are aimed at inchoate conduct, there is no reason to grade that conduct differently than any other conspiracy. To the extent that the current offenses are aimed at participation in a criminal enterprise, such conduct may subject the offenders to Class 1 liability under the proposed aggravation in Section 905(4) for offenses committed in furtherance of a criminal organization. In any event, Class X liability seems inappropriate for a theft offense, as motor-vehicle theft is less serious than such Class X felonies as second-degree murder.

(continued...)

times. Section 2105(4)(a)(ii) creates an inference in cases where the person possess or controls property knowing that its serial number or identifying marks have been removed, altered, or obscured.¹²² Section 2105(4)(b) creates an inference in cases where the person has received other stolen property within a year of the charged offense. Section 2105(4)(c) creates an inference where the person is a dealer and knowingly acquires the property at far below its reasonable value. Section 2105(4)(d) defines “dealer,” a term used several times in current Chapter 720, but defined only with respect to dealers of air rifles. See 720 ILCS 535/1(3). Section 2105(3)(d)’s definition is consistent with current law.

Section 2106. Theft of Services

Corresponding Current Provision(s): 720 ILCS 5/16-3(a), (c), 5/16-7 to -11, 5/16-17, 5/16F-3; see also 740 ILCS 90/5

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.

¹²¹ (...continued)

Current 625 ILCS 5/4-103.2 creates an aggravated Class 1 felony offense for various forms of conduct related to vehicle theft. Most of the conduct in this current offense would violate multiple provisions of the proposed Code or constitute multiple counts of the same offense, and thus may be subject to increased liability under the proposed rules for convicting and sentencing multiple offenses. See proposed Sections 254 and 906 and their corresponding commentaries. Current 625 ILCS 5/4-103.2 (a)(1) and (2) aggravate the offense in cases where the person is found in possession of multiple stolen vehicles or parts, or commits multiple offenses within a period of a year. The proposed Code would achieve similar results by aggregating the value of the stolen property under Section 2109(7). Current 625 ILCS 5/4-103.2(a)(3) and (5) aggravate to a Class 1 felony for cases involving particularly valuable vehicles. Where the vehicle in question was valued at over \$100,000, the proposed Code would again achieve the same result. Current subsection (a)(4) creates an aggravated offense related to the possession of vehicle identification documents. Such conduct is addressed by the offenses in proposed Sections 3101 and 5203. Current 5/4-103.2(a)(6) and (a)(7) address conduct likely covered by both a theft offense and an Article 5300 offense. Current 5/4-103.2(a)(8) creates an aggravated false report offense covered by proposed Section 5204.

¹²² This inference is intended to address the theft-related conduct in several current provisions involving the destruction or altering of serial numbers, identification numbers, or marks. See 720 ILCS 5/16-16 (removal or alteration of serial number on a firearm); 5/16C-2 (unlawful sale of household materials); 5/16E-3(a)(3) (defacing, removing, or concealing name or mark of a delivery container); 245/1 (defacing identification number on construction equipment); 335/1 (destruction or alteration of manufacturer’s serial numbers); see also 625 ILCS ILCS 5/4-103. To the extent that a person damages the property of another in this manner without obtaining control, he would be liable for criminal damage under proposed Section 2206.

Relation to current Illinois law. Section 2106 covers the general theft of service offense in current 5/16-3 and several other specific theft-of-services offenses in current law. Section 2106(1)(a) defines the offense in similar fashion to 5/16-3(a), but requires culpability of “knowing” as to obtaining the services and as to the fact that they are normally provided only for compensation. Current 5/16-3(a) provides no culpability term for either of these elements, thus imposing a recklessness standard for both under the “read-in” culpability provision (5/4-3(b)). The proposed formulation heightens the culpability standard to ensure that only truly blameworthy persons are subject to prosecution, and to make the culpability requirement uniform with that for other forms of theft. Section 2106(1)(a) also adds a phrase covering theft by means of a worthless “payment.”

Section 2106(1)(b), regarding embezzlement of services, has no directly corresponding provisions in current Chapter 720, but is intended to cover the conduct in current 5/16-7 to 5/16-11 and 5/16F-3.¹²³

Section 2106(2), defining “services,” has no corresponding provision in current Chapter 720. The proposed provision provides an illustrative list of items that qualify as services. Cf. proposed Section 108 (defining “includes”). Section 2106(2) specifically includes “copyrighted or patented material or other intellectual property” in order to protect intangible property rights like the recorded sounds and images covered by current 5/16-7 and -8. The proposed definition of “services” also includes “advertising services,” meaning that Section 2106 would cover the conduct addressed by the current “theft of advertising services” offense. See 720 ILCS 5/16-17.

Section 2106(3), creating a permissive inference of intent for “dine-and-dash”-type situations, has no corresponding provision in current Chapter 720.

Section 2106 eliminates the special grading provisions in current 5/16-3(c) and 5/16-7 to -8. Under proposed Section 2109, theft of services is graded the same as other forms of theft.¹²⁴ For example, proposed Section 2109 would grade theft of services valued at \$15,000 as a Class 2 felony, while the same crime would only constitute a Class A misdemeanor under current 5/16-3.

¹²³ The proposed Code eliminates current 5/16-12, 5/16-13, 5/16F-2, and 5/16F-4 to -6. Current 5/16-12 and 5/16F-4 address conduct covered by the general inchoate offenses in Article 800. Current 5/16-13 and 5/16F-6 address civil-liability issues properly addressed outside the Criminal Code. Current 5/16F-2 contains definitions that no longer appear in the Code. Current 5/16F-5 provides for restitution and belongs in the Code of Corrections.

¹²⁴ Current 5/16-7 and -8 contain specialized grading provisions related to the number of unauthorized recordings involved in the offense. This scheme appears designed to account for the difficulty of valuing intangible rights. Cf. People v. Zakarian, 460 N.E.2d 422, 426 (Ill. App. 1984) (holding recorded sounds or images are not property and thus not subject to the current theft offense). However, under proposed Section 2109(7), the “amount involved” in a theft is “the highest value[] by any reasonable standard.” This approach allows prosecutors to prove the value of the services stolen by showing such things as profits derived from illegal sales or usage, or the standard licensing fees for the stolen material.

Section 2107. Theft by Failure to Make Required Disposition of Funds Received

Corresponding Current Provision(s): Various; see, e.g., 720 ILCS 5/17-1(A)(i); 5/17B-10(a); 15 ILCS 520/21; 20 ILCS 1605/10.3, 10.4; 215 ILCS 5/508.1; 225 ILCS 454/20-20(h)(8), 20-80; 760 ILCS 55/17; 810 ILCS 5/9-306.01

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 Illinois law. Section 2107 has no directly corresponding provision in current Chapter 720. However, other provisions in Illinois law recognize the criminal nature of the conduct prohibited in Section 2107 for specific persons and types of property. See, e.g., 720 ILCS 5/17B-10(a) (administrator misappropriating, misusing, withholding, or converting WIC funds; maximum Class 1 felony); 15 ILCS 520/21 (official making profit or emolument from public moneys; Class 3 felony); 20 ILCS 1605/10.3, 10.4 (lottery agent commingling or using lottery proceeds; Class 4 felony); 215 ILCS 5/508.1 (insurer knowingly misappropriating premiums; maximum Class 3 felony); 225 ILCS 454/20-20(h)(8), /20-80 (real estate agent commingling or using principal's money or other property; Class C misdemeanor); 760 ILCS 55/17 (trustee intentionally using over \$1,000 of charitable trust funds for personal benefit; Class 2 felony); 810 ILCS 5/9-306.01 (debtor disposing of secured collateral without paying secured party; Class 3 felony).

Section 2107(4), defining "financial institution," is similar to 5/17-1(A)(i), but also lists insurance companies and investment trusts and includes organizations "held out to the public as" depositories or investment centers.

Section 2108. Theft of Property Lost, Mislaid, or Stolen by Mistake

Corresponding Current Provision(s): 720 ILCS 5/16-2

Comment:

Generally. This provision defines as theft the unlawful retention of property that the possessor knows to belong to someone else.

Relation to current Illinois law. Section 2108 is similar to current 5/16-2, but with several important differences. First, Section 2108(1) expands the offense to cover mistakenly delivered property as well as lost property. Mistakenly delivered property may not technically have been “lost,” as it may not have been in the possession of its rightful owner, but a person who keeps \$1,000 of delivered goods meant for his neighbor is as blameworthy as the person who keeps \$1,000 in cash that he finds in a lost wallet.

Second, Section 2108(1) replaces 5/16-2’s specific knowledge-of-ownership requirement — that the offender know the identity of the owner or know of a reasonable method of identifying the owner — with a requirement that the person take “reasonable measures to restore the property to a person entitled to have it.” Under this formulation, the offender’s knowledge or potential knowledge of the owner’s identity would obviously be a factor in determining the reasonableness of his efforts. 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 2108(1) also adjusts for the elimination of the knowledge-of-ownership requirement by requiring the offender to know that the property was lost, mislaid, or delivered by mistake. This requirement prevents the extension of the offense to innocent conduct.

Finally, Section 2108(2) raises the grading of the offense from a petty offense to one grade lower than it would otherwise receive under proposed Section 2109. For example, theft of a lost item valued in excess of \$10,000 would be a Class 3 felony. This grading system recognizes that a person who fails to take reasonable measures to return lost, and valuable, property merits more serious liability than petty-offender classification would allow, although arguably less serious liability than a person who takes another’s property outright.

Section 2109. Grading of Theft

Corresponding Current Provision(s): 720 ILCS 5/15-9; 5/16-1(b); see also, e.g., 5 ILCS 175/10-140, /15-210, /15-215; 305 ILCS 5/8A-6; 720 ILCS 5/16-1.3(a); 5/16-3(c); 5/16-7(c), -8(b); 5/16-10(b); 5/16-11(e); 5/16A-10; 5/16B-5; 5/16E-4(a); 5/16G-15, -20; 5/17A-3; 5/17B-20; 5/42-2

Comment:

Generally. Section 2109 provides a uniform set of offense grades for all forms of theft defined in Article 2100.

Relation to current Illinois law. Section 2109 provides a single grading scheme for all forms of theft. This scheme is broadly similar to that in current 5/16-1(b), but is not limited to certain forms of theft. Current law, in addition to providing a grading scheme in 5/16-1(b), employs specific penalties for numerous other specific theft offenses.¹²⁵ Section 2109 eliminates these specific penalties, as there is no obvious reason for distinguishing these specific forms of theft from other thefts for grading purposes.

Section 2109's general method of grading thefts according to the value of property involved is similar to current 5/16-1(b), except that Section 2109 adds additional "layers" to the grading hierarchy, introducing a new grading distinction at the \$1,000 level and a more limited distinction for certain thefts involving less than \$50. The current scheme alters the grade at three "cut-off" value levels: \$300, \$10,000, and \$100,000. As in current 5/16-1(c), the value of the theft involved is an element of the offense that the State must prove beyond a reasonable doubt. Although the provision does not contain an explicit culpability requirement as to value, a requirement of recklessness must be read in under proposed Section 205.¹²⁶

Section 2109(2), like current law, grades theft of a firearm or motor vehicle as a Class 2 felony. (Theft of a firearm or motor vehicle worth more than \$100,000, however, would be a Class 1 felony. See proposed Section 254(2).)

Section 2109(4)(b) includes a special grading provision for theft of a credit or debit card, as such items may have little or no inherent value, or at least, a value that is difficult to ascertain. Theft of such cards is graded as a

¹²⁵ See, e.g., 720 ILCS 5/16-1.3(a) (financial exploitation of elderly or disabled person; Class 4 felony to Class 1 felony); 5/16-3(c) (theft of services, Class A misdemeanor; theft of rented property, Class 4 felony); 5/16-7(c), -8(b) (unlawful use of recorded sounds or images, or of unidentified sound or video recordings; Class 4 felony for each); 5/16-10(b) (theft of cable television; Class A misdemeanor or Class 4 felony); 5/16-11(e) (theft of cable television; Class A misdemeanor); 5/16A-10 (retail theft; Class A misdemeanor to Class 3 felony); 5/16B-5 (library theft; petty offense to Class 3 felony); 5/16E-4(a) ("delivery container theft"; Class B misdemeanor).

Current law also contains a number of provisions that are couched in the language of fraud, but appear to be aimed more at theft of property, as they punish the offender according to the amount of property involved. See, e.g., 5 ILCS 175/10-140, /15-210, /15-215 (fraud offenses involving the unlawful use of a signature device; Class 2 felony for frauds involving more than \$50,000); 305 ILCS 5/8A-6 (public aid fraud; Class A misdemeanor to Class 1 felony); 720 ILCS 5/16G-15 (financial identity theft; Class A misdemeanor to Class 1 felony); 5/16G-20 (aggravated financial identity theft; Class 4 felony to Class X felony); 5/17A-3 (unlawful acquisition of welfare benefits; Class A misdemeanor to Class 1 felony); 5/17B-20 (WIC fraud; Class A misdemeanor to Class 1 felony).

¹²⁶ Under proposed Section 207, a reasonable or negligent mistake as to the value of property stolen would, if believed by the trier of fact, constitute a defense to the offense of theft, but with two important limitations. First, a thief who steals jewelry mistakenly believing it to be \$100 costume jewelry, but later realizes that its true value is \$10,000, will lose the mistake defense if he subsequently attempts to capitalize on the higher value. Moreover, even where the thief never finds out the jewelry's true value, he remains liable for theft at the value he assumed the jewelry to be worth (\$100).

Class 4 felony, which is the same grade imposed under current 720 ILCS 250/4 (“receiving” another’s credit card without consent) and 250/5 (“receiving” and retaining lost credit card). Improper *use* of a credit or debit card may also constitute a separate offense under proposed Section 3108 (q.v.).

Section 2109(7) expands current 5/15-9 by allowing prosecutors to prove value by any reasonable standard. In most cases, that standard will be the fair market value of the property or services acquired. In special cases, such as with copyrighted materials or trade secrets, the State may use other standards of valuation. See supra commentary for proposed Section 2106. By contrast, current 5/15-9 uses the term “market value” for negotiable instruments and “actual value” for non-negotiable interests, but does not clarify the distinction between those two concepts. Section 2109(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 aggregated to determine the grade of the offense.

Section 2109(8), like current law, provides an aggravation for thefts at schools or places of worship, and for thefts from an elderly victim, but combines all these aggravating factors into a single provision stating a general enhancement rule. Instead of the current general rule favoring a one-grade increase, the proposed rule aggravates by doubling, for grading purposes, the value of the property stolen. This ensures that grading variations will continue to track the value of the stolen property, and also ensures that the upper and lower bounds of liability are not distorted to inappropriate levels due to an automatic alteration of grade for certain offenders.

Section 2109(8) also expands current 5/16-1(b)(7) and 5/16-1.3 to enhance the grade for *all* thefts whose victim is 60 years old or older, and not just thefts involving certain values of property, or deception, or especially infirm victims. The resulting increase tends to lead to similar or slightly higher grading for such thefts relative to either 5/16-1(b)(7)¹²⁷ or 5/16-1.3.¹²⁸

Section 2109 generally does not consider whether a theft was “from the person” in assigning a grade, as nearly all thefts from the person are adequately penalized under the robbery offense. See, e.g., People v. Bowel, 488 N.E.2d 995 (Ill. 1986) (affirming robbery conviction for defendant who grabbed victim’s hand and pulled her arm while taking her purse). Where theft from the person does not involve sufficient force or threat to constitute robbery, a one-grade aggravation of liability seems unwarranted and may lead to inappropriate results. For example, under current 5/16-1(b)(4.1), a student who takes a pencil from a fellow student’s pocket in school might be liable for a Class 2 felony.

¹²⁷ Section 2109(8), like 5/16-1(b)(7), would grade all thefts over \$5,000 as a Class 2 felony, but unlike 5/16-1(b)(7), is clear in holding that theft of still higher amounts (i.e., more than \$50,000) would lead to even higher liability.

¹²⁸ Section 2109(8) grades thefts between \$500 and \$5,000 (rather than between \$300 and \$5,000) as a Class 3 felony, thefts of \$5,000-\$50,000 (rather than \$5,000-\$100,000) as a Class 2 felony, and thefts over \$50,000 (rather than over \$100,000) as a Class 1 felony.

Section 2109 does not contain a grading provision for repeat offenders as appears in current 5/16-1(b)(2), as Article 900 of the General Part includes a general provision governing aggravation of offense grade for repeat offenders. See proposed Section 905 and corresponding commentary.

Section 2110. Claim of Right

Corresponding Current Provision(s): None

Comment:

Generally. Section 2110 provides a defense in cases where the actor takes or uses property of another, but reasonably believed the owner would have consented to his use or acquisition of the property (for example, where a person repeatedly borrows his neighbor's lawnmower, but does not request permission in each specific instance).

Relation to current Illinois law. Section 2110 has no corresponding provision in current Chapter 720.

Section 2111. Unauthorized Use of Automobiles and Other Vehicles

Corresponding Current Provision(s): 720 ILCS 5/16-3(b); 5/21-2;
see also 620 ILCS 5/43a

Comment:

Generally. This provision defines as a criminal offense the use or retention of a vehicle without consent. Section 2111 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 Illinois law. Section 2111(1)(a) is similar to current 5/21-2 and covers "joyriding" cases.

Section 2111(1)(b) and (c) also correspond to current 5/16-3(b), but apply only to motor vehicles and cover vehicles given to another person for repair as well as rental. In addition, the proposed subsections replace current 5/16-3's bright-line rule, requiring return within three days of the owner's mailing a written demand, with a flexible standard requiring a "gross deviation" from the terms of the agreement. In many situations, the rightful owner of the vehicle should not be required to submit written demand and wait until an additional three days have expired before the unauthorized user will be held accountable.

Section 2111(2) has no corresponding provision in current Chapter 720. The defense excludes from liability cases where the defendant had an objectively 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 State would be required to disprove it. See proposed Section 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.

Section 2111(3) grades each form of unauthorized use as a Class A misdemeanor. Under current 5/21-2, the "joyriding" offense is a Class A misdemeanor; under current 5/16-3(c), the unlawful-retention offense is a Class 4 felony. There seems to be no compelling reason to grade these similar situations differently.

Section 2112. Definitions

Corresponding Current Provision(s): 720 ILCS 5/2-7.1; 5/2-7.5; 5/2-15b; 5/2-17; 5/2-18; 5/2-19.5; 5/15-1; 5/15-2; 5/15-3; 5/15-4; 5/15-6; 5/15-7; 5/16G-25; 5/17-1(A)(i); 5/20-1(b); 250/2.03; 250/2.15

Comment:

Generally. This provision collects defined terms used in Article 2100 and provides cross-references to the provisions in which they are defined.

Relation to current Illinois law. For discussion of the relationship between Article 2100's defined terms and current law, refer to the commentary for the provision in which the term in question is initially defined.

ARTICLE 2200. PROPERTY DAMAGE AND DESTRUCTION PROVISIONS

Section 2201. Arson

Corresponding Current Provision(s): 720 ILCS 5/2-6, 5/20-1 to -1.2, 5/21-4(1)(b)

Comment:

Generally. This provision defines the offense of arson, a crime that combines the harms of the two separate offenses of property damage and endangerment.

Relation to current Illinois law. Current Illinois law has three separate provisions covering arson: current 5/20-1 (general arson provision); 5/20-1.1 (aggravated arson); and 5/20-1.2 (residential arson) — plus a separate part of another provision to cover arson of government-supported property (current 5/21-4(a)(b)). Section 2201 merges these offenses into one arson offense.

Unlike current 5/20-1(a), Section 2201 does not cover arson to property other than buildings or habitable structures, as such arson typically does not involve the key element that motivates the creation of a distinct arson offense: placing human life in jeopardy.¹²⁹ Such conduct may be punishable as criminal property damage (under proposed Section 2206) or, where appropriate, endangering by fire or explosion (under proposed Section 2202). At the same time, Section 2201(1)(a) expands current law to include damage to a “vital public facility” as arson.

Section 2201(1)(b), addressing arson with the intention to collect insurance, is similar to current 5/20-1(b), with two minor changes. First, Section 2201(b) eliminates the minimum value amount of \$150 in current law. It is unlikely that many cases of insurance-fraud arson will involve less than \$150 worth of property, and in any event, there is no clear reason to exclude such cases if they also involve a risk of physical injury. Second, Section 2201(b) replaces 5/20-1(b)’s “intent to defraud an insurer” with “intention that insurance be collected for such loss,” to avoid reference to another offense that might indicate a separate need to prove the elements of that offense. “Intent to defraud” may be more difficult to prove than the intent to collect insurance, as the person may lack the subjective belief that his conduct was fraudulent or prohibited. Further, a person who starts a fire for

¹²⁹ Similarly, under the Criminal Code of 1961, the offense of arson was limited to the damage of buildings and habitable vehicles unless the damage was caused by the use of explosives. See ILL. ANN. STAT. ch. 38 ¶ 20-1 (Smith-Hurd 1964). The 1961 Committee’s comments state that “it seemed desirable to redefine the various types of burning offenses so as to bring within statutory arson the more serious offenses, with a common penalty, and the less serious burning offenses into the more accurate description of Criminal Damage to Property[.]” 720 ILL. ANN. STAT. 5/20-1, Committee Comments — 1961, at 165 (West 1993).

the sake of collecting insurance creates the same risk to persons and property whether he “intended to defraud” the insurance company or believed his conduct was lawful.

Section 2201(2)(a), defining “habitable structure,” is similar to current 5/2-6 (defining “dwelling”). However, its definition is broader, as it includes business space and sites of public assembly as well as places in which people dwell or reside.

Section 2201(2)(b), defining “vital public facility,” is similar to current 5/20.5-5(b), but eliminates the specific facilities contained in that provision, as all of them clearly fit within the definition of “habitable structure” as well as the general definition of “vital public facility.” Section 2209(2)(b) instead provides a non-comprehensive list of facilities whose status under the definition is less obvious.

Section 2201(3), like current 5/20-1, categorizes arson as a Class 2 felony. However, the proposed provision employs that categorization for all types of arson, while current law aggravates the punishment for residential arson (Class 1 felony) and aggravated arson (Class X felony). The current scheme is troublesome because it grades aggravated arson the same as the inherently more serious offense of causing a catastrophe.¹³⁰ Also troubling is that current 5/20-1.1 aggravates the arson offense to a Class X felony based on factors that require only negligence, or no culpability level, on the part of the offender.¹³¹ Other existing offenses — such as endangerment, aggravated assault, and reckless homicide or felony murder — may be used separately to enhance an offender’s liability where he has knowingly or recklessly caused or risked bodily harm. Significantly, under the proposed system of liability for multiple offenses, an additional conviction for any such offense would impose additional punishment on the offender, rather than being rendered insignificant by inclusion within a concurrent sentence. See proposed Section 906 and corresponding commentary.

Section 2202. Endangering by Fire or Explosion

Corresponding Current Provision(s): 720 ILCS 5/12-5; 5/21-1(1)(b), (c)

Comment:

Generally. This offense more generally covers conduct that, like arson, creates a risk of harm to persons or property and is therefore socially

¹³⁰ Section 2201 leaves open the possibility of an intermediate punishment grade (i.e., Class 1 felony) for aggravated offenses that result in more serious harm than “standard” arson, but are less serious than causing a catastrophe.

¹³¹ Under current 5/20-1.1(a), the following factors aggravate arson from a Class 2 to a Class X penalty: (1) he knows or reasonably should know that one or more persons are present (negligence); (2) any person suffers great bodily harm, or permanent disability or disfigurement (strict liability); or (3) a fireman or policeman acting in the line of duty is injured (strict liability).

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 knowledge.

Relation to current Illinois law. Section 2202 is similar to current 5/12-5, but specifically punishes reckless endangerment through the use of fire or explosives, rather than general reckless conduct. Cf. proposed Section 1202 (defining general endangerment offense). Section 2202 is also similar to current 5/21-1(1)(b) and (c), but those sections require that property damage result from the dangerous activity, while Section 2202 focuses instead on the element of endangerment, which does not require resulting harm to be undesirable and blameworthy. By contrast with 5/21-1(1)(b) and (c), Section 2202 addresses conduct that generates a specific set of more serious threats — to safety, buildings, or vital public facilities — 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 2206 and corresponding commentary.

Section 2202(2)(a) grades the offense as a Class 3 felony if the offender “creates a substantial risk of death under circumstances manifesting an extreme indifference to the value of human life.” Otherwise, the offense is graded as a Class A misdemeanor, the same as current 5/12-5. However, the current offense grades all forms of reckless endangerment as a Class A misdemeanor, thus failing to account for the increased risk of harm addressed in Section 2202(2)(a).

Likewise, the grading scheme of the current law criminal damage offense (720 ILCS 5/21-1) seems inadequate in punishing the conduct covered by Section 2202. Current 5/21-1(2) bases the offense grade on the extent of property damage, but that liability scheme fails to account for 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 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. Thus, Section 2202 fills the gap in punishment that exists in current law between arson (a Class 2 to X felony) and reckless conduct (a Class A misdemeanor).

Section 2203. 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. A number of state codes, and the Model Penal Code, include a similar provision. Section 2203(2) grades the offense as a Class A misdemeanor.

Relation to current Illinois law. Section 2203 has no corresponding provision in current Chapter 720.

Section 2204. Causing or Risking Catastrophe

Corresponding Current Provision(s): 720 ILCS 5/12-5; 5/20-5.5;
5/16D-4

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 Illinois law. Section 2204 is similar to 5/20.5-5, but 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 2203, are bound by a legal duty) to prevent a catastrophe.

Section 2204(1)(a), defining the offense of causing a catastrophe, is substantively similar to current 5/20.5-5(a), but has been reorganized to promote clarity. The proposed provision covers all the means of causing a catastrophe in current 5/20.5-5(a) either expressly or by use of the term “catastrophic agent.” Section 2204(1)(b), defining “catastrophic agent,” includes the dangerous substances listed in current 5/20-2(a) (explosives, explosive or incendiary devices, or timing or detonating mechanisms) and 5/20.5-6(a) (poison or poisonous gas, radioactive substances, and deadly biological or chemical contaminant or agents).

Section 2204(1)(c)(i), like current 5/20-5.5(c), grades knowingly causing a catastrophe as a Class X felony, but proposed Section 2204(1)(c)(ii) expands the offense beyond the current definition to include a Class 1 offense for catastrophes caused recklessly rather than knowingly. Like proposed Section 2202, this formulation prohibits an aggravated form of reckless conduct, which under current law is only punished as a Class A misdemeanor. See proposed Section 2202 and corresponding commentary.

Section 2204(2) defines a Class 3 felony for persons who recklessly create a risk of catastrophe. This provision further expands upon the reckless

conduct offense in current law (5/12-5) by punishing the risk of endangerment to buildings and vital public facilities as well as people.

Section 2204(3) has no corresponding provision in Chapter 720. This provision creates a Class 4 felony for threatening to cause a catastrophe. Mere threats are punished in this context because of their potential for widespread fear and disruption of the social order.

Section 2204(4) has no corresponding provision in Chapter 720. The proposed provision imposes a duty on certain persons to take reasonable measures to prevent or mitigate a catastrophe. As in proposed Section 2203, 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 2203 and corresponding commentary.) Section 2204(4)(b) grades this offense as a Class A misdemeanor.

Section 2204(5) defines the term “catastrophe” in similar fashion to current 5/20-5.5(b). See also Section 2201(2)(b) (defining “vital public facility”) and corresponding commentary.

Section 2205. Possession of Device or Substance for Catastrophic Effect

Corresponding Current Provision(s): 720 ILCS 5/20-2, 5/20.5-6

Comment:

Generally. Ordinarily, possession offenses will be covered by the proposed inchoate possession offense. See proposed Section 808. This provision covers the unusually serious situation where possession of the object in question may itself pose an inherent danger.

Relation to current Illinois law. Section 2205 corresponds to current 5/20-2 and 5/20.5-6. Section 2205(1) combines these two similar offenses from current law into one offense prohibiting the possession of catastrophic agents with the intent to use them, or knowledge that another will use them, in the commission of a felony. Section 2204(1)(b)’s definition of “catastrophic agent” makes the offense’s prohibition similar to current 5/20.5-6. See proposed Section 2204(1)(b) and corresponding commentary.

Section 2205(2) grades the offense as a Class 3 felony, whereas current 5/20-2 and 5/20.5-6 each grades its offense as a Class 1 felony with an increased maximum sentence of 30 years. Categorization as an enhanced Class 1 felony seems overly high given the preliminary and inchoate nature of the prohibited conduct — mere possession, as opposed to any form of use — especially in comparison to the substantive offense of causing a catastrophe, which is punished as a Class X or Class 1 felony, depending on culpability level. It is also worth bearing in mind that any “substantial step” toward committing any offense with a catastrophic agent could be punished

separately as an attempt to commit that offense.¹³² See proposed Section 801. Moreover, such efforts — which go beyond mere possession — would frequently allow for liability that, although substantial, is lower than the enhanced-Class-1 status given the more preliminary offense under current law. For example, a deliberate attempt to create a catastrophe would be graded as a Class 1 felony under either current law or the proposed General Part. See 720 ILCS 5/8-4(c)(2) and proposed Section 807. The less serious act of possession merits a significantly lower offense grade.

Section 2206. Criminal Damage

Corresponding Current Provision(s): 720 ILCS 5/21-1; see also 720 ILCS 5/16-5(a),(c); 5/16B-2.1, -5; 5/16D-3; 5/21-1.1; 5/21-1.2; 5/21-1.3; 5/21-1.5; 5/21-4; 215/4, /5; 360/1; 20 ILCS 3435/3; 625 ILCS 5/18c-7502(a)(i); 765 ILCS 835/1(a) to (b-5)

Comment:

Generally. This provision defines, and sets out the offense grades for, the offense of criminal property damage.

Relation to current Illinois law. Current Chapter 720 contains various provisions that define different types of property damage; each provision has its own grading section. 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 2206 defines the prohibited conduct more generally than current 5/21-1(1). Current 5/21-1(1)'s offense definition contains seven subsections, covering various forms of prohibited conduct and culpability levels. By contrast, Section 2206 defines four more general forms of criminal damage that address a broad range of conduct, including that which was covered by current 5/21-1(1).

Section 2206(1)(a) generally prohibits knowing and reckless property damage. The proposed Code defines “damaging” property broadly to mean “impairing its usefulness or value by any means . . . includ[ing] deleting

¹³² Note that in cases where the offender committed a substantial step towards using the device, he may face liability both under Section 2205 and for an attempt. Under proposed Section 254(1)(a), multiple-offense liability is only precluded if the offenses are “based on the same conduct.” See proposed Section 254 and corresponding commentary. In the case described above, the substantial step could constitute conduct separate from mere possession, taking the case outside the limitations described in proposed Section 254. Should the offender be convicted of both offenses, he would face additional liability for *each* offense. See proposed Section 906 and corresponding commentary.

or altering computer programs or other electronically recorded data.” See Section 2206(2). This broad formulation addresses most of the conduct described in 5/21-1(1).¹³³ Likewise, Section 2206(1)(a) covers a variety of damage prohibitions found throughout the current Code.¹³⁴ See, e.g., 720 ILCS 5/16-5(a) (damaging a coin-operated machine); 5/16B-2.1 (criminal mutilation or vandalism of library materials); 5/16D-3(a)(3) (damaging or destroying a computer or altering or deleting a computer file); 5/21-1.1 (damaging, defacing, or destroying fire fighting equipment); 5/21-1.3 (criminal defacement of property);¹³⁵ 5/21-1.4 (jackrocks); 5/21-4 (criminal damage to government supported property); 215/4 (damaging or vandalizing animal research facilities and unauthorized killing or injuring animals);¹³⁶ 360/1 (injuring or destroying telegraph or telephone lines, wires, cables or poles).¹³⁷

Section 2206(1)(b) allows for negligence liability where the offender uses fire, explosives, or other dangerous means. Current 5/21-1(1)(b) provides for liability based on recklessness in such situations. 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.

¹³³ The proposed provision directly covers the conduct prohibited in current 5/21-1(1)(a), (d), and (f). Current 5/21-1(1)(b) has been expanded to reach any reckless damage, regardless of the means employed. Current 5/21-1(1)(c) and (g) are covered to the extent property is actually damaged; otherwise the conduct is likely prohibited by proposed Sections 2202 and 2206(1)(c), the general endangerment offense in Section 1202, and/or one of the weapons offenses (Article 7100). Current 5/21-1(1)(e), which bans depositing stink bombs on another’s property, would be covered under Section 2206(1)(a) by virtue of the broad definition of “damage” in Section 2206(2).

¹³⁴ Provisions outside the Code also address conduct now covered by Section 2206(1)(a). See 20 ILCS 3435/3 (disturbing archaeological resource); 625 ILCS 5/18c-7502(a)(i) (tampering with rail car or property); 765 ILCS 835/1(a) to (b-5) (damaging human remains, burial ground, gravestone, or memorial site).

¹³⁵ Under the proposed definition of “damaging” in Section 2206(2), conduct that had been considered criminal defacement (e.g., spray-painting a building) is now covered by the general damage section.

¹³⁶ Section 2206 is not meant to cover any conduct in current 215/4 that constitutes theft, attempted theft, or attempted criminal damage, as such conduct is addressed by other offenses. See proposed Articles 800 (inchoate offenses) and 2100 (theft). Current 215/2, 215/3, 215/5(c), and 215/6 to /8, dealing with civil and regulatory issues involving animal research facilities, have been deleted as moot. If desired, those provisions may be transferred to other chapters outside the Criminal Code by means of “conforming amendments” legislation.

¹³⁷ The offense in current 360/1 is also addressed by other provisions within the proposed Code. See proposed Sections 802 (solicitation); 803 (conspiracy); 2207 (tampering with or damaging a public service); 2401 (interception of electronic or oral communication). In appropriate cases, liability could be imposed for such acts under both Section 2206 and another relevant provision. See proposed Section 254 and corresponding commentary.

Section 2206(1)(c) prohibits tampering with another's property such that a person or property is placed in danger. This provision 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 — such as by placing a foreign substance in an automobile gas tank, moving a railroad switch, or infecting a computer hard drive with a virus. Subsection (1)(c) covers some or all of the conduct in current 5/16D-3(a)(4) (tampering with computers or programs), 5/21-1(1)(c),(g) (starting a fire, or shooting a firearm at a train); 5/21-1.5 (tampering with anhydrous ammonia equipment); and 360/1 (tampering with phone lines). 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 2206(3).

Section 2206(1)(d) prohibits indirectly causing property damage by means of a deception or threat. This provision, which has no directly corresponding current provision, 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 the other's 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 2206(2), defining "damaging," has no corresponding provision in current Chapter 720, which frequently uses, but never defines, the term "damage." The proposed provision defines damage broadly as "impairing [property's] usefulness or value by any means." Under this standard, acts such as defacing, altering, or tampering may constitute damage if they impair the usefulness or value of the property. Moreover, the definition specifically includes deleting or altering computer programs and recorded data to cover conduct criminalized by current 5/16D-3(a)(3).

Section 2206(3) grades the offense according to the value of the property loss. The proposed formulation is similar to current 5/21-1(2),¹³⁸ except that the proposed provision also alters the penalty according to the offender's culpability level with respect to the damage that results from his conduct. In addition, Section 2206(3) adds a grading distinction for cases involving losses in excess of \$1,000 (current 5/21-1(2) alters the grade at \$300, \$10,000, and \$100,000). This has the effect of elevating the penalties one grade level for cases involving losses in excess of \$1,000, \$10,000, and \$100,000 so that they become Class 3, Class 2, and Class 1 felonies, respectively. Section 2206(3)(e) and (f) also add a grading distinction for cases involving losses of less than \$50, which would now be Class B rather than Class A misdemeanors.

¹³⁸ Section 2206(3) is intended to replace both current 5/21-1(2) and the grading provisions for the specific criminal damage offenses discussed above. See supra commentary for proposed Section 2206(1).

As under current law, the value of the property damaged is an element of the proposed offense that must be proved by the State beyond a reasonable doubt.¹³⁹ In addition, the proposed Code requires the State to prove that the defendant was at least reckless as to the amount of property damaged. See proposed Section 205 and corresponding commentary; see also commentary for proposed Section 2109.

Section 2206(3)(f) provides a “residual” grade of Class B misdemeanor for offenses not otherwise covered in Section 2206(3). 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. (Current 5/21-1 does not provide for negligence liability.)

Section 2206(3)(g) reduces the penalty one grade at each value level for damage that is caused recklessly. Current 5/21-1 makes no grading distinction between knowing and reckless conduct.

Current law provides enhanced penalties for criminal damage to various institutions in both current 5/21-1(2) (criminal damage) and 5/21-1.2 (institutional vandalism). Section 2206(3)(h) eliminates the current institutional vandalism offense (5/21-1.2). Instead of that offense’s grading scheme, under which institutional vandalism is either a Class 3 or Class 2 felony, Section 2206(3)(h) provides for an across-the-board increase that aggravates liability by doubling, for grading purposes, the value of the property lost or damaged. See also proposed Section 2109(8) and corresponding commentary.

Section 2207. Tampering With or Damaging a Public Service

Corresponding Current Provision(s): 720 ILCS 5/16-14(b); 5/16D-4; 360/1

Comment:

Generally. This provision creates a separate offense for interruption or impairment of public services. Such conduct merits treatment in a separate offense, because impairment or interruption of a public service potentially

¹³⁹ See 720 ILCS 5/21-1(1). Under current law, the State is not required to prove the exact amount of damage, but need only prove the minimum amount necessary to justify conviction under the relevant offense grade. People v. Carraro, 394 N.E.2d 1194, 1196 (Ill. 1979). Evidence of the cost of repairs is sufficient to prove the value of the damage, unless the defendant raises the issue by presenting evidence of an alternative measure of damage. Id. The same rules would apply under the structure of the proposed Code.

harms every member of the general public who depends on the service, regardless of the amount of tangible property damage or loss (if any).¹⁴⁰

Relation to current Illinois law. Section 2207(1) generally corresponds to current 5/16-14(1). Under Section 2207(1), however, the impairment or interruption must be “substantial.” The culpability requirement has also been reduced from knowledge to recklessness or, in cases involving inherently dangerous means, negligence. Section 2207(1) does not include 5/16-14’s prohibition of “diversion,” as the proposed Code punishes theft or diversion of services in the theft article. See proposed Section 2106 and corresponding commentary.

Section 2207(1) also corresponds to and replaces current 5/16D-4(a)(1) (computer tampering that causes interference with vital public services or operations) and 360/1 (willful injury to telephone wires and property).

Section 2207(2), defining “public service,” is substantively similar to current 5/16-14(b), but adds “telecommunications service” and “transportation service” to the enumerated services.

Section 2207(3) grades the offense according to the offender’s culpability level. Interference or impairment is a Class 3 felony if caused intentionally; a Class 4 felony if caused knowingly; and a Class A misdemeanor if caused recklessly or negligently. In most cases, the proposed formulation would raise the penalty from current law, which grades the offense as a Class A misdemeanor or, for a second offense or offense committed for payment, a Class 4 felony. The proposed grading scheme seeks to calibrate the offense grade to the blameworthiness of the offender and to impose liability proportionate to other offenses, given the harm this offense seeks to prevent.

Section 2208. Definitions

Corresponding Current Provision(s): 720 ILCS 5/2-6; 5/2-15b; 5/2-19; 5/15-1; 5/15-2; 5/16-14(b); 5/16G-25; 5/20-1(b); 5/20.5-5(b)

Comment:

Generally. This provision collects defined terms used in Article 2200 and provides cross-references to the provisions in which they are defined.

Relation to current Illinois law. For discussion of the relationship between Article 2200’s defined terms and current law, refer to the commentary for the provision in which the term in question is initially defined.

¹⁴⁰ An offender who causes interruption to a public service by damaging or tampering with property may be liable both under this provision and under proposed Section 2206 for the underlying property damage. (For a discussion of the propriety of multiple convictions where the defendant satisfies the requirements of more than one offense, see proposed Section 254 and corresponding commentary.)

ARTICLE 2300. BURGLARY AND OTHER CRIMINAL INTRUSION PROVISIONS

Section 2301. Home or Car Invasion

Corresponding Current Provision(s): 720 ILCS 5/2-6; 5/12-11; 5/12-11.1

Comment:

Generally. This provision defines and grades home invasion and vehicle invasion, two offenses that are similar in objective and scope: both prohibit the use or threat of force in connection with an invasion made with unlawful intent.

Relation to current Illinois law. Section 2301(1), defining home invasion, corresponds to current 5/12-11(a), but changes the offense's formulation in two ways. First, Section 2301(1) defines home invasion with specific reference to burglary, thereby explicitly incorporating that offense's elements. Current 5/12-11(a), by contrast, fairly closely tracks the objective elements of current 5/19-3's offense of "residential burglary" by requiring an unauthorized entry of a dwelling, but departs from residential burglary's culpability requirements by requiring that the offender "know[] or ha[ve] reason to know that one or more persons is present" upon entry, rather than that he intend to commit an offense. Section 2301(1)'s approach both saves verbiage and makes clear that the offenses of burglary and home invasion are related: both penalize the danger, intrusion, and possible physical harm inflicted by one who invades another's home with unlawful intent.¹⁴¹ (See also proposed Section 2302 and corresponding commentary.) Section 2301(1) also clarifies that the requisite use or threat of force may occur "during commission of or flight from" the underlying burglary.

Second, Section 2301(1) combines the specific offense elements of current 5/12-11(a)(1) to (6) into a general prohibition of the use or threat of force.¹⁴² The variations in current law, as 5/12-11(c) makes evident,

¹⁴¹ In defining home invasion by reference to proposed Section 2302(1)'s definition of burglary, Section 2301(1) also reflects that provision's rejection of the "limited authority" doctrine. See proposed Section 2302 and corresponding commentary; see also *People v. Bush*, 623 N.E.2d 1361, 1364 (Ill. 1993) (applying "limited authority" doctrine to home invasion); *People v. Peebles*, 616 N.E.2d 294, 325 (Ill. 1993) (same).

¹⁴² Section 2301(1)'s requirement of using or threatening "force" covers the vast majority of conduct criminalized by current 5/12-11(a)(6), which addresses an intruder's commission of sexual assault or sexual abuse. See proposed Section 108 (defining force to include "confinement or restraint"). Current Illinois law would likely bar convictions for both home invasion and the predicate sexual offense, however, based on the view that sexual assault or sexual abuse is an "included offense" of 5/12-11(a)(6). The proposed Code, by contrast, would allow liability for both offenses, insofar as Section 2301 does not entirely account for the harm of any sexual assault or sexual abuse committed by an intruder. See proposed Section 254 and corresponding commentary.

are set out solely for the purpose of making grading distinctions. Section 2301(1) articulates the offense in a way that makes its purpose and scope more transparent.¹⁴³ Section 2301(1)'s definition eliminates the need for the affirmative defense set out in 5/12-11(b),¹⁴⁴ which exempts from liability those persons who do not actually use or attempt force against anyone, and also eliminates the need for 5/12-11(a)'s requirement that the offender "knows or has reason to know that one or more persons is present." Like proposed Section 1501, Section 2301(1) also eliminates the current requirement that the threat of force be "imminent." A burglar who invades someone's home and threatens violence merits liability even though the threatened injury may not occur at that immediate moment.

Section 2301(2), defining vehicle invasion, is substantively similar to current 5/12-11.1(a), with a few modifications. First, Section 2301(2) requires that the invader have the intent to commit a felony, whereas 5/12-11.1(a) also covers intent to commit theft. Section 2301(2)'s requirement of an intent to commit a felony parallels Section 2301(1)'s incorporation of the felony of burglary. Entering or reaching into a vehicle is less intrusive than entering a dwelling, and may also be consistent with a lawful purpose. Requiring an intent to commit a felony thus ensures that the defendant's conduct is sufficiently serious to warrant punishment on a par with the punishment for home invasion.

Second, Section 2301(2) replaces 5/12-11.1(a)'s requirement that the offender's *entry* be by force with a requirement that the offender use or threaten force toward "an occupant of the vehicle." By paralleling the definition of home invasion set forth in Section 2301(1), this language makes clear that the seriousness of vehicle invasion consists in the threat or occurrence of harm to persons rather than property.¹⁴⁵ Because of this shift in focus, Section 2301(2) also specifies that the use or threat of force may occur "while or after" entering or reaching into the vehicle.

Finally, Section 2301(2)'s culpability requirements for vehicle invasion track those of the home invasion offense, thereby requiring only recklessness, whereas 5/12-11.1(a) requires that one act knowingly. Cf. proposed Section 205(3) (imposing "read-in" culpability requirement of recklessness where none is otherwise stated).

¹⁴³ Three of current 5/12-11(a)'s subsections prohibit a threat of imminent force by an armed intruder. See 720 ILCS 5/12-1(a)(1) (offender armed with "dangerous weapon[] other than a firearm"); 5/12-11(a)(3) (offender armed with firearm); 5/12-11(a)(4) (offender discharged firearm). None of these provisions, however, prohibit an *unarmed* intruder's threat of imminent force, which proposed Section 2301(1) would cover.

¹⁴⁴ Section 2301(1) also omits current 5/12-11(a)'s exception for "a peace officer acting in the line of duty." This exception is covered by the justifications for law enforcement activity in the General Part. See proposed Sections 413, 414(1) and (3) and corresponding commentary.

¹⁴⁵ Section 2301(2) also omits as unnecessary 5/12-11.1(a)'s requirement that the entry be "without lawful justification." Even without this language, a lawful justification will bar liability despite the fact that all elements of the offense are satisfied. See proposed Section 400 and corresponding commentary.

Section 2301(3)(a) presents a single definition of “dwelling” that is substantively similar to and blends elements of current 5/2-6(a)’s general definition of the term and 5/2-6(b)’s special definition for residential burglary. Section 2301(3)(a) uses the phrase “building or structure, though movable or temporary,” rather than 5/2-6(a)’s examples of “enclosed spaces” and 5/2-6(b)’s examples of “living quarters”; generalizes 5/2-6(a)’s rule that a “portion” of a building may be a dwelling, so that it also applies to structures; includes, like 5/2-6(a), places “used as a human habitation, home, or residence,” but excludes places merely “intended” for such use; and incorporates 5/2-6(b)’s rule that a place must have been a dwelling “at the time of the alleged offense.”

Section 2301(3)(b)’s definition of “dwelling of another” is the same as current 5/12-11(d).

Under Section 2301(4), home and vehicle invasion are Class 1 felonies. While current law similarly grades vehicle invasion as a Class 1 felony, current 5/12-11(c) grades a home invasion not involving a firearm as a Class X felony.¹⁴⁶ The current grading for home invasion essentially equates the offense, which requires no resulting physical injury at all, with second-degree murder. The proposed offense, and grading structure, more carefully disaggregate the various harms and risks at stake in the burglary situation and allow for separate, appropriate punishment for each such harm or risk. Under the proposed scheme, the fear and risk of injury specifically imposed by the use or threat of force aggravate the offense of residential burglary from a Class 2 to a Class 1 felony. Any other, independent aggravating factors — such as sexual assault, the risk of harm created by use of a dangerous weapon, or any physical injury or death resulting from the use of force — may be punished as distinct offenses under Articles 1100, 1200, 1300, and/or 7100. Significantly, under the proposed system of liability for multiple offenses, there would be no concurrent sentencing for such multiple convictions, so each independent harm or risk would be sure to result in additional liability for the offender. See proposed Section 906.

¹⁴⁶ Current 5/12-11(c) also grades home invasion as a Class X felony where a firearm is involved, and requires an additional 15, 20, or 25 years of imprisonment, depending on whether the defendant used, discharged, or injured another with a firearm. Rather than adding a certain number of years to an offender’s term of imprisonment for home invasion, the proposed Code imposes liability for an additional offense where the offender uses a firearm or other dangerous weapon in the commission of a felony. See proposed Section 7101. The proposed homicide and assault offenses would address any injury or death caused by the use of such weapons. See proposed Articles 1100 and 1200. Significantly, each additional offense of conviction would increase an offender’s total liability. See proposed Section 906.

Section 2302. Burglary

Corresponding Current Provision(s): 720 ILCS 5/19-1; 5/19-3;
see also 720 ILCS 215/4(4),(6)

Comment:

Generally. This provision defines 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 that may be created by a stealthy intruder who invades another's property to commit a crime.

Relation to current Illinois law. Section 2302(1) consolidates the prohibitions of current 5/19-1 and 5/19-3.¹⁴⁷ Current 5/19-3's principal purpose is to aggravate the grade of residential burglaries; Section 2302 accomplishes this by aggravating the grade for such burglaries in Section 2302(2)(a).

Section 2302(1) requires only the intent to commit an offense, while 5/19-1 and 5/19-3 require intent to commit a felony or theft. Section 2302's broader formulation follows the understanding that the intended crime 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 crime the burglar intends to commit — which, after all, need not occur for burglary liability to exist. For similar reasons, Section 2302(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 actor is guilty only of trespass and attempt to commit the other intended crime (and can be charged with both of those offenses).

Section 2302(1) prohibits entering or remaining in a “building or habitable structure,” rather than using 5/19-1's list of a “building, house trailer, watercraft, aircraft, motor vehicle[,], . . . railroad car, or any part thereof,”¹⁴⁸ for brevity and to limit the offense's application according to its purpose. The

¹⁴⁷ Section 2302(1) also covers current 215/4(4) and (6), which criminalize entering or remaining in an animal research or production facility with the intent to commit an offense. Section 2302(2), like current 215/5(a)(1), would grade such a burglary as a Class 4 felony. Other offenses set forth in current 215/4 are covered by the proposed offenses for theft, property damage, and trespassing. *See* proposed Sections 2102, 2206, and 2303 and corresponding commentary. It is anticipated that current 215/2, 215/3, 215/5(c), and 215/6 to /8, dealing with civil and regulatory issues involving animal research and production facilities, will be preserved outside Chapter 720 through the “conforming amendments” bill to be presented to the General Assembly.

¹⁴⁸ Both current 5/19-1(a) and 5/19-3(a) criminalize entering or remaining in a place “or any part thereof.” Section 2302(1) omits the phrase “or any part thereof” as superfluous; one who enters or remains in a part of a place necessarily enters or remains in the place itself. Because one typically does not enter or remain within an entire place at once, but only a “part thereof” at any given time, adding a distinction between being in a “place” and being in a “part” of a place is only likely to introduce confusion.

independent harms of intrusion and provocation of fear are less likely to exist where the property is a vehicle rather than a building (and where they do exist, the offender would probably be liable for vehicle invasion under proposed Section 2301(2)). Section 2302(1)'s use of "habitable structure" also renders unnecessary current 5/19-1(a)'s exception for the vehicle offenses set out in 625 ILCS 5/4-102 (which defines misdemeanor offenses involving removing parts of, tampering with, and damaging vehicles). In most cases, a vehicle is not a "habitable structure" (although a houseboat or motor home would be).

Section 2302(1) requires a culpability level of recklessness with respect to each offense element, other than requiring the burglar's intent to commit another offense. *Cf.* proposed Section 205(3) (imposing "read-in" culpability requirement of recklessness where none is otherwise stated). Current 5/19-1 and 5/19-3 specify "knowingly" for the element of entering, and for remaining in a dwelling, but recklessness as to remaining in a place other than a dwelling and burglary's other elements. *Cf.* 720 ILCS 5/4-3(b) (imposing "read-in" culpability requirement of recklessness where none is otherwise stated). Section 2302(1) imposes a uniform culpability requirement of recklessness because a trespasser who intends to commit a crime on another's property merits punishment, even in the highly unlikely situation that he is not certain that he is entering or remaining in a building or habitable structure.

Section 2302(1) imposes liability only if one enters or remains with neither license nor authority, and "at a time when the premises are not open to the public," whereas current 5/19-1 and 5/19-3 merely require that one enter or remain "without authority." Illinois courts currently hold, under the "limited authority" doctrine, that one who enters a building or vehicle with the intent to commit a felony or theft — even if the person has permission or the property is open to the public — does so "without authority," insofar as the "authority to enter . . . [a] building open to the public . . . extends only to those who enter with a purpose consistent with the reason the building is open."¹⁴⁹ The "limited authority" doctrine is undesirable, for it renders the "without authority" requirement a nullity. In doing so, it eliminates the distinction between burglary and the underlying intended crime (usually theft), and often punishes conduct that amounts only to an attempt, or even less than an attempt, more severely than the completed offense would be punished. Section 2302(1) does not incorporate the "limited authority" doctrine and

¹⁴⁹ *People v. Weaver*, 243 N.E.2d 245, 248 (Ill. 1968) (upholding burglary conviction where defendant entered laundromat with intent to commit theft); *see also* *People v. Blair*, 288 N.E.2d 443, 445 (Ill. 1972) (upholding burglary conviction where defendants entered car wash stall with intent to commit theft); *People v. Bailey*, 543 N.E.2d 1338, 1343 (Ill. App. 1989) ("We think it contrary to reason and ordinary human understanding to suppose that the permission extended to the instant defendant by his brother to enter and use the van included authority to enter it in order to steal part of its contents."); *People v. Fisher*, 404 N.E.2d 859, 862-63 (Ill. App. 1980) ("Because defendants were given authority to enter the apartment for the purpose of a social visit only, the criminal actions they planned were inconsistent with this limited authority, and served to vitiate the consent given for their entry.").

further requires that a burglary occur “at a time when the premises are not open to the public” to emphasize its rejection of the rule.¹⁵⁰

Section 2302(2) grades burglary as a Class 4 felony and residential burglary as a Class 2 felony, whereas 5/19-1(b) grades burglary as a Class 2 felony and 5/19-3(b) grades residential burglary as a Class 1 felony. This adjustment reflects the fact that home invasion, an inherently more serious form of residential burglary, is graded as a Class 1 felony. It also reflects the fact that the proposed grading and liability scheme enables additional liability for any additional harms or risks involved in the burglary, such as use of a weapon or infliction of physical injury. See supra commentary discussing proposed Section 2301(4).

Section 2302(2) does not recognize 5/19-1(b)’s aggravation for burglary in schools and places of worship, as there is no additional likelihood in those cases of causing fear and invading security. Those aggravating factors appear to reflect a concern as to the other crime the burglar intends, but the attempt to commit that crime may be punished separately.

Section 2303. Criminal Trespass

Corresponding Current Provision(s): 720 ILCS 5/19-4; 5/21-2; 5/21-3; 5/21-5; 5/21-7; see also 720 ILCS 215/4(3)

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 2303(1) defines the offense; Section 2303(2) provides offense grades; and Section 2303(3) defines two defenses.

¹⁵⁰ Section 2302(1) also rejects a closely related doctrine under which the Illinois courts have held that one who enters a place with permission to commit a crime therein may still do so “without authority,” because the person giving permission may himself lack authority to permit an offense. See, e.g., People v. Martin, 449 N.E.2d 1039, 1041 (Ill. App. 1983) (“The younger Layoff, as an unemancipated minor living in a house which his father rented and controlled, may have the ability to authorize entries into his parents’ house for lawful purposes. We hold, however, that he could not authorize the defendant’s entry into his parents’ house for the unlawful purpose of stealing his parents’ jewelry.”); People v. Castile, 339 N.E.2d 366, 370 (Ill. App. 1975) (“John Price, as assistant manager, had no more authority to consent to an entry for the purpose of theft than he did to steal merchandise himself. The fact that Price had access to keys to the premises did not confer upon him the ability to authorize entry for the purpose of theft. In the absence of such authority, the defendants’ argument that their entry was authorized must fail.”). Under Section 2302(1), the relevant inquiry in such cases is whether the person giving permission is authorized to permit *entry*, rather than the intended offense. If entry is authorized, the person entering would be liable for any subsequent offense, but not for burglary; the person allowing entry may also be accountable for the other person’s subsequent offense. See proposed Section 301.

Relation to current Illinois law. Section 2303(1) merges the prohibitions of five current trespass offenses¹⁵¹ into a single offense definition by prohibiting entering or remaining in any “place” generally, whereas each of the current provisions prohibits entering or remaining¹⁵² in a particular kind of place.¹⁵³ Section 2303(1)’s general language covers all the types of property protected by current law and eliminates any need for additional specialized trespass offenses.

Section 2303(1) requires that one enter or remain in a place that he “knows he has no license or authority¹⁵⁴ to be.” Current Chapter 720 implicitly imposes such a knowledge requirement for several forms of trespass by defining the offenses as entering or remaining after having received notice that such presence is forbidden¹⁵⁵ (5/21-3(a)(2)-(a)(4), 5/21-5, 5/21-7); other forms of trespass impose a requirement of recklessness as to lack of authority (5/19-4, 5/21-2, 5/21-3(a)(1)). By requiring knowledge as to one’s lack of license or authority, Section 2303(1) replaces the numerous notice specifications included in 5/21-3, 5/21-5, and 5/21-7, and obviates the need for 5/21-3(a)’s various exemptions for persons who lack such knowledge.

Section 2303(1) requires recklessness with respect to entering or remaining in a place. Current Chapter 720 also requires recklessness as to this element for some forms of trespass (5/21-3(a)(2)-(a)(4), 5/21-5, and 5/21-7), but requires knowledge for other forms (5/19-4, 5/21-2, 5/21-3(a)(1)). Section 2303(1) imposes a culpability level of recklessness under the view that one

¹⁵¹ Section 2303(2) also corresponds to current 215/4(3)’s prohibition of “obtaining access” to an animal research or production facility for the purpose of performing unauthorized acts. Current 215/4’s other offenses are addressed by the proposed offenses for theft, property damage, and burglary. *See* proposed Sections 2102, 2206, and 2302 and corresponding commentary.

Additionally, Section 2303 corresponds to the recently adopted offense of “criminal trespass to a nuclear facility,” effective on January 1, 2003. *See* 720 ILCS 5/21-8.

¹⁵² Current 5/21-2, however, prohibits entering or *operating* a vehicle, but not remaining in a vehicle. Assuming that the offense’s other elements are satisfied, Section 2303(1) imposes liability upon one who remains in a vehicle, insofar as there is no apparent reason to treat vehicles differently from other places. Unlike 5/21-2, Section 2303(1) does not impose liability for operating a vehicle, insofar as such conduct is beyond the offense’s aim. Liability for operating another’s vehicle without consent is available, however, under the proposed “joyriding” offense. *See* proposed Section 2111(1)(a) and corresponding commentary.

¹⁵³ *See* 720 ILCS 5/19-4 (residence); 5/21-2 (“vehicle, aircraft, watercraft or snowmobile”); 5/21-3 (real property); 5/21-5 (State-supported land); 5/21-7 (“restricted area” or “restricted landing area” at airport).

¹⁵⁴ Section 2303(1) uses the phrase “license or authority” to make clear that either permission (“license”) or an independent privilege that exists regardless of permission (“authority”) to enter or remain in a place will bar conviction for criminal trespass.

¹⁵⁵ In some unusual situations, however, one who receives notice from an owner that entry is forbidden may not know that he lacks license or authority to enter a place. *Cf. Williams v. Nagel*, 643 N.E.2d 816, 822 (Ill. 1994) (denying plaintiffs’ claims that they enjoyed statutory right to enter premises under defense set forth in current 5/21-3(c) because “plaintiffs had been barred from the premises by management[,] . . . [and] any attempt by tenants to invite the plaintiffs onto the premises would be invalid”).

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 when (as recklessness requires) he is consciously aware of a risk that he is on that property.

Section 2303(2)(a) grades criminal trespass of a dwelling or highly secured premises as a Class 4 felony, in recognition of the special privacy and security interests at stake for such property. Current Chapter 720 grades residential trespass as a Class A misdemeanor (5/19-4) and does not aggravate for trespass on highly secured premises. (Chapter 720 also grades as a Class A misdemeanor trespass in a dwelling, vehicle, State-supported property, or restricted area in an airport; all other trespass is graded as a Class B misdemeanor.)

Section 2303(2)(b) grades 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.¹⁵⁶ This reflects the understanding such violations involve lower levels of intrusiveness than those covered by (2)(a), but greater levels of intrusiveness than ordinary trespass, which Section 2303(2)(c) grades as a Class C misdemeanor.

Section 2303(3) defines the terms “highly secured premises” and “storage structure,” which are not used in current Chapter 720.

Section 2303(4) defines two defenses to criminal trespass. Section 2303(4)(a) is similar to the first clause of 5/21-3(a)’s last paragraph, but does not provide an absolute defense where one enters or remains “while the building is open to the public.” Rather, Section 2303(4)(a) notes that one may not enjoy a license if he fails to comply with any “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 2303(4)(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. This defense would cover those currently covered by 5/21-3(d)’s exemption for those who beautify certain “unoccupied and abandoned residential and industrial properties.”

Section 2303(4) omits current 5/21-3(e), which provides that persons enjoying a defense under 5/21-3(d) are not civilly liable. Section 5/21-3(f)’s defense for persons entering real property for “emergency purposes” is covered by proposed Section 412’s lesser evils defense (q.v.).

¹⁵⁶ Section 2303(2)(b) grades trespass as a Class A misdemeanor if the offense is committed “in any place so enclosed as manifestly to exclude intruders.” Where a property owner has gone out of his way to exclude intruders — for example, by erecting a wall around his property — an intruder’s clear defiance of that effort represents a greater level of intrusiveness than, for example, where a person wanders onto someone else’s open field.

Section 2304. Residential Picketing

Corresponding Current Provision(s): 720 ILCS 5/21.1-1 to 5/21.1-3

Comment:

Generally. This provision defines and grades the offense of residential picketing.

Relation to current Illinois law. Section 2304(1) is substantively similar to current 5/21.1-2, but translates the current provision's two long sentences into a single sentence that is shorter than either of them. Section 2304(1) simply prohibits picketing the "dwelling of another," rather than defining the offense as picketing the "residence or dwelling of any person" and then providing an exception for a "person peacefully picketing his own residence or dwelling," as 5/21.1-2 does. Section 2304(1) also uses the phrase "place of . . . public assembly" rather than "place of holding a meeting or assembly on premises commonly used to discuss subjects of general public interest."

Section 2304(2), like current 5/21.1-3, provides that residential picketing is a Class B misdemeanor.

Section 2305. Definitions

Corresponding Current Provision(s): 720 ILCS 5/2-6; 5/2-19;
5/12-11(d)

Comment:

Generally. This provision collects defined terms used in Article 2300 and provides cross-references to the provisions in which they are defined.

Relation to current Illinois law. For discussion of the relationship between Article 2300's defined terms and current law, refer to the commentary for the provision in which the term in question is initially defined.

ARTICLE 2400. INVASION OF PRIVACY PROVISIONS

General Note:

A number of provisions in current Article 14, though probably appropriate for administrative regulations, do not properly belong in the Criminal Code. See, e.g., 720 ILCS 5/14-3A; 5/14-3B; 5/14-5 to 5/14-9. It is expected that many of these provisions will be preserved elsewhere in state law via the “conforming amendments” bill to be proposed along with the Code in the General Assembly.

Section 2401. Interception of Electronic or Oral Communications

Corresponding Current Provision(s): 720 ILCS 5/14-1 to 5/14-4; 145/1

Comment:

Generally. This provision defines, provides defenses to, and grades the offense of intercepting a private electronic or oral communication.

Relation to current Illinois law. Section 2401(1) is substantively similar to current 5/14-2(a)(1) in prohibiting intentional interceptions of both electronic and oral communications by use of an intercepting device, but with some modifications.¹⁵⁷ First, Section 2401(1) omits current 5/14-2(a)(1)’s exceptions for interceptions made with consent or pursuant to Article 108A or Article 108B of the Code of Criminal Procedure; those defenses are covered by the defenses set forth in Section 2401(3)(a) and (3)(b), respectively.

Second, Section 2401(1) alters 5/14-2(a)(1)’s prohibition against intercepting “any conversation” to prohibit intercepting a “private oral communication.” This language limits the offense’s application to cases where the harm with which the offense is concerned — invasion of privacy — actually occurs. There is no privacy violation when a speaker recognizes that third parties can hear him, or unreasonably expects that

¹⁵⁷ Section 2401(1) omits current 5/14-2(a)(2) — which criminalizes manufacturing, assembling, distributing, and possessing eavesdropping devices — as unnecessary, as an offense in the General Part prohibits the possession of “any instrument of crime with intent to employ it criminally.” See proposed Section 808 and corresponding commentary.

Section 2401 also omits as unnecessary current 5/14-2(c)’s special defenses for manufacturers, suppliers, and service providers who “manufacture, assemble, sell, or possess” devices “within the normal course of their business,” and for law enforcement officers and Department of Corrections employees who “manufacture, assemble, purchase, or possess” devices “within the course of their official duties.” Proposed Section 808 imposes liability only where the offender possesses a device “with intent to employ it criminally.”

they cannot.¹⁵⁸ Additionally, Section 2401(1)'s privacy requirement renders unnecessary current Illinois law's numerous exemptions for intercepting oral communications that are not private.¹⁵⁹

Third, Section 2401(1) applies the word "intercepts" to both oral and electronic communications, whereas 5/14-2(a)(1) uses "hearing or recording" for oral communications and "intercepts, retains, or transcribes" for electronic communications. As defined in proposed Section 2401(2)(d), "interception" covers the conduct prohibited by current 5/14-2(a)(1).

Fourth, Section 2401(1) generally requires that the offender use an "intercepting device." Current 5/14-2(a)(1) explicitly requires use of a device for the interception of conversations, but not for the interception of electronic communications.

Finally, Section 2401(1) specifies a culpability level of "knowledge" that applies to intercepting and the offense's other objective elements, whereas current 5/14-2(a)(1) effectively prescribes a more demanding culpability requirement by confusingly requiring that one act both "[k]nowingly and intentionally." Section 2401(1)'s clearer culpability requirement reflects the view that one who knowingly invades another's privacy is sufficiently blameworthy to warrant liability.

Section 2401(2) provides definitions for terms that are initially used in Section 2401.¹⁶⁰ Section 2401(2)(a) defines the term "contents," a term that current Chapter 720 uses but does not define.

Section 2401(2)(b) and (e), defining "electronic communication" and "private electronic communication," respectively, are substantively similar to current 5/14-1(e)'s definition of "electronic communication," with two minor modifications. First, Section 2401(2)(b) omits some of 5/14-1(e)'s examples of electronic communication technologies, and instead simply requires that the communication be made by use of a "connection" furnished or operated by a common carrier. This language eliminates any need to amend the definition as new communication technologies are invented or popularized.

¹⁵⁸ Although current 5/14-2(a)(1) broadly prohibits intercepting "any conversation," the provision recognizes the importance of expectations of privacy with respect to interceptions of electronic communications. Current 5/14-1(e) defines "electronic communication" to include only communications "where the sending and receiving parties intend the electronic communication to be private," and requires that interception occur "in a surreptitious manner." Unlike 5/14-2(a)(1), Section 2401(1)(a) treats electronic and oral communications alike and, as to both, criminalizes interceptions of private communications only.

¹⁵⁹ See 720 ILCS 5/14-3(a) (listening to publicly-made radio, wireless, and television communications); 5/14-3(c) (any radio, television, or other broadcast); 5/14-3(d) (recording or listening to emergency communications); 5/14-3(e) (recording proceedings of open meetings).

Section 2401(1)'s offense definition also incorporates current 5/14-3(b)'s exemption for interceptions of oral communications made by common carriers in the ordinary course of business, and extends the exemption to apply to interceptions of electronic communications.

¹⁶⁰ Section 2401(2) omits as unnecessary current 5/14-1's definitions of "eavesdropper" and "principal," which current Chapter 720 uses solely for the purpose of determining civil remedies available to persons whose communications have been intercepted. See 720 ILCS 5/14-6(1).

Second, Section 2401(2)(e) requires that the sending party have “an expectation that such communication is not subject to interception under circumstances justifying such expectation” whereas current 5/14-1(e) requires that the parties “intend” the communication to be private and that any interception be “surreptitious.” Section 2401(2)(e)’s definition of “private electronic communication” parallels Section 2401(2)(f)’s definition of “private oral communication” and, like that provision, reflects the view that one’s privacy is not invaded when he either recognizes that his communication is subject to interception or unreasonably expects that it is not.

Section 2401(2)(c)’s definition of “intercepting device” is substantively similar to current 5/14-1(a)’s definition of “eavesdropping device,” but substitutes “electronic, mechanical, [and] other device” for “any device”; uses “intercept” rather than “hearing or recording” and “intercept, retain, or transcribe”; and omits as unnecessary the phrase “whether such conversation or electronic communication is conducted in person, by telephone, or by any other means.”

Section 2401(2)(c)(i)’s exception is substantively similar to Illinois courts’ construction of current 5/14-1(a)’s definition of “eavesdropping device” as excluding telephones that have not been functionally altered,¹⁶¹ but also provides a defense for other communication devices furnished or authorized by common carriers.

Section 2401(2)(c)(ii)’s exception for hearing aids and similar devices is substantively similar to current 5/14-1(a)’s last clause.

Section 2401(2)(d) provides a definition for “interception,” a term that current Chapter 720 uses but does not define. See 720 ILCS 5/14-1; 5/14-2; 5/14-3A; 5/14-3B; 5/14-5.

Section 2401(2)(f) provides a definition for “private oral communication,” a term that current Chapter 720 uses but does not define. See 720 ILCS 5/14-3A(a); 5/14-3B(a)(2).

Section 2401(3) sets forth three defenses to Section 2401(1)’s offense of interception of electronic or oral communications and Section 2405(1)’s offense of unlawful disclosure of information. Section 2401(3) clearly denominates its contents as “defenses,” whereas current 5/14-2 and 5/14-3 create a byzantine collection of offenses, exceptions, defenses, and exemptions. In Chapter 720, some acceptable conduct is noted within the offense definitions (see, e.g., 5/14-2(a)(1) (“unless he does so . . .”); 5/14-2(a)(3) (“except as authorized . . .”)); some activity is protected by an “affirmative defense” (5/14-2(b)); some is “not unlawful” (5/14-2(c)); some is “not prohibited” (5/14-2(d)); and some is “exempt” (5/14-3). These various exclusions frequently overlap one another, overlap excuses in the

¹⁶¹ See People v. Shinkle, 539 N.E.2d 1238, 1242 (Ill. 1989) (unaltered extension telephone not rendered “eavesdropping device” by police officer’s act of placing hand over mouthpiece); People v. Gervasi, 434 N.E.2d 1112, 1114 (Ill. 1982) (extension telephone with speaking element removed from mouthpiece was “eavesdropping device”).

General Part, or both. Section 2401(3)'s three defenses, in conjunction with Section 2401(1)'s requirement that intercepted communications be "private," cover substantially the same ground as current law's numerous exceptions, defenses, not-offenses, and exemptions.

Section 2401(3)(a) is substantively similar to current 5/14-2(a)(1)(A) in providing a defense where *all* the parties to a communication consent to an interception, but also provides a defense where the parties consent to the use or disclosure of unlawfully obtained information. Section 2401(3)(a)'s broader defense ensures that Section 2401(1) and Section 2405(1)'s offenses parallel one another, and complements the General Part rule that a victim's consent provides a defense if it "precludes the infliction of the harm or wrong sought to be prohibited" by the offense. See proposed Section 251(1) and corresponding commentary.

Section 2401(3)(b) provides a defense where one is "authorized by law" to intercept a communication or use or disclose information. This language is in harmony with the General Part's public duty justification (see proposed Section 413 and corresponding commentary) and covers the law-enforcement-related exceptions in current 5/14-2(a)(1)(B) and 5/14-2(a)(3).¹⁶² Section 2401(3)(b)'s defense also covers the authority conveyed by several other provisions in current 5/14-2 and 5/14-3.¹⁶³ It is anticipated that those current provisions will be preserved elsewhere in state law via the "conforming amendments" bill to be presented with the Code in the General Assembly.

Section 2401(3)(c) provides a defense for interceptions made by or at the request of parties who reasonably believe that a communication will bear evidence of a criminal offense against them or their families. Section 2401(3)(c) is substantively similar to current 5/14-3(i), but applies to interceptions of electronic communications in addition to oral communications, and clarifies that the defense protects subsequent disclosure or use for the purpose of prosecuting an offense for which evidence is obtained.

Section 2401(3)(d) is substantively similar to current Illinois law in providing that a party consents to interception by continuing a communication after being informed that it is subject to interception. See In re Estate of Stevenson, 256 N.E.2d 766, 770 (Ill. 1970) (holding that defendant informed that conversations were being recorded acquiesced in recordings and that "such acquiescence constitutes consent"). Section 2401(3)(d) also

¹⁶² Because it captures the rules and procedures for law-enforcement-related interception, use, and disclosure set forth in Articles 108A and 108B of the Code of Criminal Procedure, Section 2401(3)(b) does not result in any substantive amendments to those provisions. See 725 5/108A-1 et seq.; 5/108B-1 et seq. Section 2401(3)(b)'s defense incorporates, rather than displaces, Articles 108A and 108B.

¹⁶³ See 720 ILCS 5/14-2(b) (law enforcement officer's interception of privileged communications); 5/14-2(d) (Department of Corrections employee's interception of electronic communications); 5/14-3(f) (interception of calls to consumer "hotlines"); 5/14-3(g) (interception necessary for protection of person investigating certain offenses); 5/14-3(h) (law enforcement officer's video recording of person stopped for traffic violation).

covers, and renders unnecessary, current 5/14-3(j)'s exemption and complex regulations for business monitoring of telemarketers.

Section 2401(4) grades interception as a Class 3 felony, whereas current 5/14-4(a) grades it as a Class 4 felony. Section 2401(4) omits current 5/14-4(a)'s aggravation for repeat offenders as unnecessary, as the General Part has a provision addressing repeat offenders. See proposed Section 905(1) and corresponding commentary. Section 2401(4) also omits current 5/14-4(b)'s aggravation to a Class 1 felony where the offender intercepts the communications of certain government officers. This modification reflects the views that grading the offense as a Class 3 felony results in sufficiently serious punishment for all offenders and that other Class 1 felonies — such as first-degree manslaughter, sexual assault of a child under 13, and recklessly causing a catastrophe — are significantly more serious.

Section 2402. Interception of Private Written Correspondence

Corresponding Current Provision(s): None

Comment:

Generally. This provision defines, and grades as a Class A misdemeanor, the offense of interception of private written correspondence, and complements proposed Section 2401's offense for intercepting private electronic or oral communications. The offense prohibits damaging, destroying, opening, or reading the contents of letters and other private written correspondence. Section 2402 recognizes the State's authority to prosecute offenses of this type, which it may increasingly choose to exercise as such conduct no longer implicates exclusive federal control. Due to the proliferation of modern private courier services, the federal government no longer enjoys a monopoly with respect to private written correspondence.

Relation to current Illinois law. Section 2402 has no corresponding provision in Chapter 720.

Section 2403. Unlawful Eavesdropping or Surveillance

Corresponding Current Provision(s): 720 ILCS 5/14-2(a)(1); 5/14-4; 5/26-1(a)(5), (b); 5/26-4; 110/3

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 2403 is similar to proposed Section 2401, but covers improper intrusions into private physical *spaces* rather than improper interceptions of private *communications*. Where conduct simultaneously constitutes a violation of both Section 2403 and

Section 2401 — that is, if it included physical intrusion, use of a device, and interception of one or more private oral communications — the prosecutor would be entitled to charge either offense. See proposed Section 253(1) and corresponding commentary.

Relation to current Illinois law. Section 2403(1)(a) is substantively similar to current 5/26-1(a)(5) in covering the common “peeping Tom” case, but protects the privacy of those in any “private place” rather than only those in “dwellings,” and requires that one “trespass” with the intent to subject another to *any* kind of surveillance, rather than “enter” and subsequently look into a place “for a lewd or unlawful purpose.” With respect to eavesdropping, Section 2403(1)(a) has no directly corresponding provision in current Chapter 720. Although current 5/14-2(a)(1) covers some cases within Section 2403(1)(a)’s scope, that provision addresses only surveillance of conversations by use of an “eavesdropping device.”

Section 2403(1)(b) prohibits installing or using a device in a private place for hearing or seeing occurrences therein. Section 2403(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 visual surveillance, Section 2403(1)(b) expands the reach of current 5/26-4(a) (which applies only to restrooms, tanning beds, tanning salons, locker rooms, changing rooms, and hotel bedrooms) and 110/3(a)(1) (which applies only to communications companies that observe what is occurring in a subscriber’s household).

With respect to audio surveillance, Section 2403(1)(b) and (1)(c) are similar to current 5/14-2(a)(1), but address intrusions into private places rather than interceptions of communications, and hence also “sounds” rather than “conversations.”¹⁶⁴ Section 2403(1)(b) and (1)(c) are similar to current 110/3(a)(1), but apply to any person’s use or installation of a device to hear what is occurring in a “private place,” rather than only to a communication company’s use of a device to listen to what is occurring in a subscriber’s home.¹⁶⁵

Section 2403(2) defines the term “private place,” which is not used in Chapter 720.

Section 2403(3) grades the offense as a Class A misdemeanor, the same grade that 5/26-1(b) provides for visual surveillance into dwellings and that 5/26-4(d) provides for visual surveillance of certain private places. Current 110/3(b), in contrast, grades a communication company’s surveillance of

¹⁶⁴ Section 2403(1)(b) and (1)(c) use the term “private place,” which Section 2403(2) defines as a place where a person reasonably expects privacy. Current 5/14-2(a)(1), by contrast, prohibits intercepting “any conversation.” Section 2403(2)’s definition of “private place” limits the offense’s application to cases in which another’s privacy interests are actually implicated.

¹⁶⁵ Section 2403(1)(b) might also cover some of the conduct criminalized by current 110/3(a)(4)’s offense for unauthorized installation of a “home-protection scanning device in a dwelling as part of a communication service.” Other provisions in the Communications Consumer Privacy Act, including 110/3(a)(2) and (a)(3)’s regulatory offenses, are expected to be preserved elsewhere in Illinois law through “conforming amendments” legislation.

a subscriber's household as a business offense. Section 2403(3) grades the offense as a Class A misdemeanor rather than as a petty or business offense in recognition of its relative seriousness. Because of its particular threat to privacy interests, this offense merits a more serious grade than ordinary trespassing, which the proposed Code grades as a Class C misdemeanor. See proposed Section 2303(2).

Section 2404. Unlawful Access to Information

Corresponding Current Provision(s): 720 ILCS 5/16D-3(a)(1); 5/16D-3(b)(1); 215 ILCS 5/1023

Comment:

Generally. This provision defines and grades the offense of unlawful access to information. The offense prohibits a person from gaining access to information, electronic programs, or data without privilege. Section 2404 covers instances of tampering or intrusion in which neither property damage nor theft occurs — that is, instances where the central harm is a privacy violation. Section 2404 is similar to proposed Section 2401(1) in prohibiting invasions of others' privacy interests in electronic information, but more broadly applies to “gain[ing] access” to information, programs, and data regardless of whether they are parts of “communications” between two points. Section 2404(1) is designed to protect, among other things, the privacy of electronic information that can be accessed through the Internet — through which one may acquire information that is not necessarily being “communicated” from one place to another.

Relation to current Illinois law. Section 2404(1)'s offense definition is substantively similar to that in current 5/16D-3(a)(1),¹⁶⁶ with three modifications. First, Section 2404(1) prohibits accessing *any* information without privilege, rather than merely electronic programs, data, and other information that may be stored in or accessed by means of computers. Section 2404(1)'s broader scope reflects the view that accessing information without privilege results in harm regardless of whether one uses a computer to invade another's privacy. Section 2404(1) is similar to current 215 ILCS 5/1023 in this respect, but prohibits gaining access to any information rather than only obtaining insurance information.

¹⁶⁶ Section 2404(1) does not incorporate current Article 16D's other offenses, which are covered by other provisions in the proposed Code governing endangerment (Article 1200), theft (Article 2100), property damage (Article 2200), fraud (Article 3100), and possessing instruments of crime (Section 808). It is anticipated that current 5/16D-6's forfeiture provision will be preserved elsewhere in the Illinois statutes through “conforming amendments” legislation.

Second, Section 2404(1) prohibits accessing without “privilege,” whereas current 5/16D-3(a)(1) prohibits accessing “without the authorization of a computer’s owner . . . or in excess of the authority granted to him.” Section 2404(1) omits 5/16D-3(a)(1)’s requirement of using another’s computer to access information, recognizing that as information networks are currently structured, one may use his own computer to violate another’s privacy. Section 2404(1) thus applies regardless of whether one uses his own computer or another’s to improperly access information, programs, or data.

Third, Section 2404(1) requires that the offender know he lacks privilege to access the information, whereas current 5/16D-3(a)(1) imposes a culpability requirement of recklessness as to the lack of authority. *Cf.* 5/4-3(b) (imposing “read-in” culpability requirement of recklessness where none is otherwise specified). Section 2404(1)’s heightened culpability requirement limits the offense’s reach in light of the increasing ease with which one may unwittingly gain access to electronic information.

Section 2404(2) grades the offense as a Class A misdemeanor, whereas current 5/16D-3(b)(1) grades computer tampering as a Class B misdemeanor, and 215 ILCS 5/1023 grades obtaining insurance information under false pretenses as a Class 4 felony.

Section 2405. Unlawful Disclosure of Information

Corresponding Current Provision(s): 720 ILCS 5/14-2(a)(3); 5/14-4

Comment:

Generally. Section 2405 complements Sections 2401 to 2404 by prohibiting anyone who knows that information was obtained in violation of those provisions from using or disclosing that information. One who uses or discloses the acquired information knowing that it was unlawfully obtained causes additional harm, as such use or disclosure further invades the privacy of the information. At the same time, Section 2405’s requirement of knowledge as to the unlawfulness of initially acquiring the information ensures that only the truly blameworthy — and not mere gossipmongers — are within the offense’s reach.

Relation to current law. Section 2405(1) is substantively similar to current 5/14-2(a)(3), with three important modifications to the offense definition. First, Section 2405(1)’s offense applies to the use or disclosure of information obtained in a manner prohibited by any of Article 2400’s offenses, whereas current 5/14-2(a)(3) applies only to information obtained by “eavesdropping devices.” Section 2405(1)’s broader scope reflects the view that the seriousness of using or disclosing information that has been unlawfully acquired does not depend on the particular means of

acquisition — and serves to more generally punish the invasion of privacy caused by such use and disclosure.¹⁶⁷

Second, Section 2405(1) explicitly requires that the information used or disclosed have been initially obtained in an unlawful manner. Current 5/14-2(a)(3), in contrast, states that it applies where the information was merely “obtained through the use of an eavesdropping device.” Although presumably meant to apply only to unlawfully acquired information, by its terms, the current use or disclosure offense is so broad that it might criminalize merely discussing an item from a broadcast of the evening news.¹⁶⁸

Third, Section 2405(1) makes a modification to 5/14-2(a)(3)’s culpability requirements.¹⁶⁹ (As to the general culpability requirement, Section 2405, like current 5/14-2(a)(3), requires only recklessness as to use or disclosure. Cf. 720 ILS 5/4-3(b) (imposing “read-in” culpability requirement of recklessness where none is otherwise specified).) Under Section 2405(1), the offender must know the information was unlawfully obtained, whereas current 5/14-2(a)(3) would impose liability where one “knows or reasonably should know” that information was “obtained through the use of an eavesdropping device.” Section 2405(1)’s heightened requirement reflects the view that mere negligence with respect to the offense’s gravamen — the invasion of privacy — is insufficient to warrant criminal liability.

Section 2405(2) incorporates the defenses set out in proposed Section 2401(3), whose relation to the defenses allowed under current law is discussed supra in the commentary for that provision.

Section 2405(3) grades the offense as a Class A misdemeanor. Current 5/14-4(a) grades the 5/14-2(a)(3) offense as a Class 4 felony. It seems appropriate, however, to impose reduced liability on one who uses improperly obtained information relative to the person who deliberately and unlawfully obtained the information in the first place. At the same time, where the same person both intercepts *and* later uses or discloses the information, that person could be found liable for both offenses. Cf. proposed Sections 254 and 906 (discussing rules for imposition of, and sentencing on, multiple convictions). Current 5/14-2 and 5/14-4 are unclear as to whether multiple convictions would be allowed in this situation. Moreover, a grade

¹⁶⁷ Current 140/1 criminalizes the disclosure of information that was lawfully obtained by businesses assisting taxpayers in preparing tax returns. It is anticipated that current 140/1’s offense, and the other provisions in the Taxpreparer Disclosure of Information Act, will be preserved elsewhere in Illinois law through “conforming amendments” legislation.

¹⁶⁸ Because current 5/14-2’s eavesdropping offense does not require that an intercepted conversation be “private,” current 5/14-3(a) sets forth an exemption for public “radio, wireless and television communications.” As a technical matter, however, that exemption applies only to “listening” to such communications, and does not protect the disclosure or use of information obtained through public broadcasts.

¹⁶⁹ Section 2405(1) also omits 5/14-2(a)(3)’s exception for use or disclosure authorized by Article 108A or Article 108B of the Code of Criminal Procedure, which is covered by proposed Section 2401(3)(b)’s defense for persons “authorized by law” to disclose or use intercepted communications.

of Class A misdemeanor reflects the extension of this offense to use or disclosure of other forms of unlawfully obtained information than are covered by current 5/14-2. The offenses defined in Sections 2402 to 2404 are Class A misdemeanors, and it does not make sense to impose higher liability for using information obtained through such an offense than for the underlying offense itself. Finally, the grade imposed in Section 2405(3) is consistent with the current grading for other offenses relating to improper disclosure of private information. Cf., e.g., 20 ILCS 301/30-5 (disclosing contents of medical records; Class A misdemeanor); 210 ILCS 85/6.17 (disclosing hospital or medical record information; Class A misdemeanor); 325 ILCS 5/11, 5/11.1 (disclosing certain records relating to abused children; Class A misdemeanor); 325 ILCS 15/5 (disclosing certain records relating to sexual abuse; Class A misdemeanor); 705 ILCS 405/5-145 (disclosing certain records relating to juvenile offenders; Class A misdemeanor); 750 ILCS 50/18.1, 18.8 (disclosing certain confidential information relating to adoption; Class A misdemeanor).

Section 2406. Definitions

Corresponding Current Provision(s): 720 ILCS 5/2-19; 5/12-7.3(h); 5/14-1; 725 ILCS 5/112A-3(3)

Comment:

Generally. This provision collects defined terms used in Article 2400 and provides cross-references to the provisions in which they are defined.

Relation to current Illinois law. For discussion of the relationship between Article 2400's defined terms and current law, refer to the commentary for the provision in which the term in question is initially defined.

ARTICLE 3100. FORGERY AND FRAUDULENT PRACTICES

General Comment Regarding Article 3100:

Several of Article 3100'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 Article 3100 and Article 2100. 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 254, and their consequences in terms of overall liability would be governed by proposed Section 906.

Section 3101. Forgery and Counterfeiting

Corresponding Current Provision(s): 720 ILCS 5/17-3; see also, e.g., 720 ILCS 5/16D-3(a)(5); 5/17-1(A)(iii),(B); 5/17-17; 5/17-18; 5/17-23; 5/17B-5(ii); 250/2.07; 250/14 to /16; 5 ILCS 175/10-140(b); 15 ILCS 335/14A(b)(3); 20 ILCS 1605/14.2; 35 ILCS 130/22; 625 ILCS 5/4-103(a)(2),(4); 625 ILCS 5/4-105; 625 ILCS 5/6-301.1(b)(2); 625 ILCS 5/6-301.2(b)(2)

Comment:

Generally. Section 3101 criminalizes forgery, an offense which aims to protect the authenticity of documents and other writings.¹⁷⁰ Like other offenses

¹⁷⁰ There is some Illinois authority suggesting that liability for forgery is appropriate where one makes a genuine document containing false information. See People v. East-West University, 516 N.E.2d 482 (Ill. App. 1987) (indictment sufficiently stated offense of forgery in alleging that documents “‘contained the names and credit hours of students . . . who were entitled’ to the named funds ‘when, in fact, [defendants] knew that the documentation contained the names of persons who were not entitled to said funds’”); cf. People v. Mau, 36 N.E.2d 235, 239 (Ill. 1941) (holding, under repealed forgery statute, that “‘anyone authorized to make up the record or to execute the authentic matter of a public nature[] will be guilty of forgery if he makes such record or executes such authentic matter, knowing that its contents are false and untrue, and if by so doing he intends to defraud”). Section 3101, however, is concerned with the authenticity of writings themselves, and not with the truth or accuracy of information contained in genuine documents, so no liability would obtain under Section 3101 for deceptions of this kind (although liability would very likely lie under one or more of the other provisions in Article 3100).

prohibited in Article 3100, forgery is typically performed for the purpose of consummating a theft. Section 3101 treats forgery as an independent offense, however, recognizing that (1) forged writings are often used to accomplish especially far-reaching fraudulent activities, and (2) beyond the specific theft achieved or attempted, forgery imposes the additional discrete harm of reducing public confidence in the forged item (for example, counterfeiting, which is one form of the Section 3101 offense, tends to undermine trust in paper currency and the monetary system).

Relation to current Illinois law. Section 3101 corresponds to current 5/17-3, but reflects several organizational and substantive changes. Section 3101(1)'s introductory clause sets forth a common culpability requirement for the offense. Section 3101(1) is substantively similar to current 5/17-3(a) in imposing liability where one acts with an "intent to defraud," but also allows for liability where the defendant intends to "injure" another. Section 3101(1)'s broader language covers offenders who intend to inflict harm (such as harming another's reputation) that may not be pecuniary in nature, and serves more generally to guard against the undermining of public confidence in signed or authenticated documents.

Section 3101(1)(a) through (1)(c) correspond to current 5/17-3(a)(1) and (a)(2),¹⁷¹ but more broadly apply to "writings" rather than merely "documents apparently capable of defrauding" others. Section 3101(1)'s use of the broader term "writing" serves, as do its culpability requirements, to reach deceptions undertaken to inflict harm other than pecuniary loss and legal obligation.¹⁷² Section 3101(1)'s term is also clearer, as it is easier to define and identify "writings" than the vague category of "documents apparently capable of defrauding" others, and its broader scope renders unnecessary numerous current offenses that prohibit forging specific types of writings, such as electronic mail (5/16D-3(a)(5)); checks (5/17-1(B)(d), (e)); record of charge forms (250/12); corporate stock (5/17-17, 5/17-18); Universal Price Code labels (5/17-23); food stamps and authorizations (5/17B-5(ii)); credit and debit cards (250/14 to 250/16); electronic signature devices (5 ILCS 175/10-140(b)); government-issued identification cards (15 ILCS 335/14A(b)(3)); lottery tickets (20 ILCS 1605/14.2); cigarette tax stamps and imprints (35 ILCS 130/22); vehicle identification numbers (625 ILCS 5/4-103(a)(2),(4)); and vehicle title and registration documents (625 ILCS 5/4-105). The use of the broader term "writing" allows for uniform

¹⁷¹ A culpability requirement of recklessness will be "read in" with respect to those objective elements in Section 3101(1)(a) through (1)(c) for which a culpability requirement is not stated, cf. proposed Section 205(3), whereas current 5/17-3(a) requires that one act knowingly. Section 3101(1) lowers this culpability requirement in recognition that the culpability requirement stated at the beginning of the provision — which requires intent to defraud or injure — ensures that only truly blameworthy persons are within the offense's reach.

¹⁷² Nevertheless, Section 3101(3)(b) continues to recognize the legal significance of the fact that a writing is a "document apparently capable of defrauding another" by grading the forgery of such a writing as a Class 3 felony.

offense requirements and a rational grading scheme by making it clear that such items fall within Section 3101(1).

Section 3101(1)(a) is substantively similar to current 5/17-3(a)(1) in covering one who alters a writing, but is much clearer in simply requiring that the writing be “of another without his authority” rather than altered “in such manner that it purports to have been made by another or at another time, or with different provisions, or by authority of one who did not give such authority.”¹⁷³

Section 3101(1)(b) is substantively similar to current 5/17-3(a)(1) in covering one who “makes” unauthentic writings, but also applies to one who “completes, executes, authenticates, issues, or transfers” to make clear that wholesale manufacture (i.e., counterfeiting) is not required.

Section 3101(1)(b)(i) applies where one forges a writing so that it purports “to be the act of another who did not authorize that act” and covers current 5/17-3(a)(1)’s prohibition against making a document so that it appears “to have been made by another . . . or by authority of one who did not give such authority.”¹⁷⁴

Section 3101(1)(b)(ii) is substantively similar to current 5/17-3(a)(1) in prohibiting one from executing a writing so that it purports to have been made at a different time, but also covers executions that purport to have been made in a different “place” in recognition that the place of execution is often relevant to the effect given to certain writings (for example, the place of execution of a contract may affect the governing law).

Section 3101(1)(b)(iii), covering writings that purport to be “copies” of originals that do not truly exist, has no corresponding provision in

¹⁷³ Consistent with current Illinois law, Section 3101(1)(a) covers an agent who, in altering another’s writing, exceeds his authority. See *People v. Kubanek*, 19 N.E.2d 573, 574 (Ill. 1939) (“The general rule is that where authority is given to one to fill in blanks in an instrument, a filling in of such blanks other than as authorized constitutes forgery, where the other elements of forgery are present.”); *People v. Murrah*, 627 N.E.2d 1138, 1142 (Ill. App. 1993) (“When defendant filled out his name as an employee to receive an additional card on the corporate account, he did so other than as authorized inasmuch as [his employer] had repeatedly stated he had never authorized . . . the issuance of an additional card on the corporate account.”).

¹⁷⁴ Section 3101(1)(b)(i)’s language applies to a defendant’s use of a fictitious name by which he is not ordinarily known. For example, executing a negotiable instrument using a fictitious name purports to be the act of “another” — of someone other than the signer — who, because he does not exist, clearly could not have authorized the act. Illinois courts have similarly construed the phrase “purports to have been made by another” to prohibit one’s use of a fictitious name. See *People v. Bell*, 318 N.E.2d 526 (Ill. App. 1974); *People v. Lanners*, 258 N.E.2d 390 (Ill. App. 1970).

Section 3101(1)(b)(i) is also consistent with current Illinois law in covering one who exceeds his authority to act on another’s behalf in issuing a genuine instrument that purports to have been issued by that person. See *People v. Young*, 311 N.E.2d 609, 613 (Ill. App. 1974) (“[T]he fact that defendant was president of the corporation authorized to sign the certificate in question . . . does not negate a basis for a conviction for forgery . . . if such was done without authority being given — here by the corporation. . . . [I]t was apparent that the certificate which was the subject matter of the indictment[] was issued without authority of the corporation.”).

current Illinois law. Section 3101(1)(b)(iii) fills a technical gap in proposed 3101(1)(b)(i), and is necessary because copies commonly do not purport to have been made by the original's author.

Section 3101(1)(c) is substantively similar to current 5/17-3(a)(2), but uses the broader “puts forward” in place of the phrase “issues or delivers.” As it is defined in Section 3102(2), the phrase “puts forward” covers the case where one uses a forged writing but does not necessarily dispose of it, such as by displaying it.¹⁷⁵ Section 3101(1)(c)'s broader scope renders unnecessary several current offenses prohibiting putting forward certain kinds of forged writings with the intent to defraud. See, e.g., 20 ILCS 1605/14.2 (“uttering” forged lottery ticket); 35 ILCS 130/22 (“uttering” forged cigarette tax stamps and imprints); 625 ILCS 5/6-301.1(b)(2) (displaying “unlawfully altered” driver's license or permit); 625 ILCS 5/6-301.2(b)(2) (displaying “fraudulent” driver's license or permit).

Section 3101(2)(a) defines the term “defraud” to uniformly mean “to obtain anything of value through deception.” Current Illinois law, by contrast, variously defines “intent to defraud” to mean acting either “wilfully, and with the specific intent to deceive or cheat, for the purpose of causing financial loss to another, or to bring some financial gain” (see 5/17-1(A)(iii)) or with the intent to “cause another to assume, create, transfer, alter or terminate any right, obligation or power” (see 5/17-3(b); 250/2.07). Section 3101(2)(a)'s definition includes only deception designed to result in gain to the defendant or another.¹⁷⁶ Where the actor deceives solely for the purpose of causing pecuniary loss — and not to obtain or assist another in obtaining something of value — liability for property damage is appropriate. See proposed Section 2206(1)(d) and corresponding commentary.

Section 3101(2)(b) defines the term “writing,” which is not used in current Chapter 720, to include “any . . . method of recording information . . . and . . . symbols of value, right, privilege, or identification.” Section 3101(2)'s comprehensive definition covers current 5/17-3(c)'s definition of a “document apparently capable of defrauding another,” current 5/17-3(a)(4)

¹⁷⁵ The offense defined in current 5/17-3(a)(3), which criminalizes knowingly possessing a forged document with the intent to issue or deliver it, covers conduct that is more preliminary than actual forgery and would therefore be treated as attempted forgery under the proposed Code. See also proposed Section 801 and corresponding commentary.

¹⁷⁶ The Illinois courts have occasionally held that current 5/17-3(b)'s definition of “intent to defraud” and 5/17-3(c)'s definition of “document apparently capable of defrauding another” are “broad enough to include an intent to deceive for reasons other than pecuniary gain.” See People v. Muzzarelli, 770 N.E.2d 1232, 1235 (Ill. App. 2002) (upholding forgery conviction based on counterfeit letter asking court for leniency in sentencing). The courts' construction of the current statutory definitions appears to be at least partially premised on a misreading of current 5/17-3(b)'s use of the term “assume.” Cf. People v. Merchant, 283 N.E.2d 724, 725 (Ill. App. 1972) (“[W]hen defendant presented the forged prescription it was clearly with the intention to cause another to assume a right or power with respect to a person or property. Paraphrased, the presentation of the prescription caused the druggist to assume he had the right to dispense a prescriptive drug (property) to the defendant (a person).”).

and (a)(5)'s offenses for forging digital and electronic signatures, and various other offenses for forging particular kinds of writings, as noted above.

Section 3101(3) grades the offense according to the importance and extent of reliance upon the genuineness of the type of writing involved. Section 3101(3)(a) grades the offense as a Class 2 felony where the writing purports to be an instrument issued by the government or representing interests in or claims against property and businesses. Current Illinois law, by contrast, variously grades forging such writings as a Class 2 felony (e.g., 35 ILCS 130/22 (cigarette tax stamps and imprints)), Class 3 felony (e.g., 5/17-17 (corporate stock)), or Class 4 felony (e.g., 20 ILCS 1605/14.2 (lottery tickets)).

Section 3101(3)(b) is substantively the same as current 5/17-3(d) in grading the offense as a Class 3 felony where the writing is a document purporting to affect legal relations.

Section 3101(3)(c) grades the offense as a Class A misdemeanor where the writing does not purport to affect legal relations. Although current Illinois law contains no single offense generally covering writings not purporting to affect legal relations, current Chapter 720 sometimes grades forging particular types of such writings as a Class 4 felony. *See, e.g.,* 5/17-3(a)(4), (5) (digital signature and electronic signature); 5/17-23 (Universal Price Code label).

Section 3102. Tampering with Writing, Record, or Device

Corresponding Current Provision(s): Various; *see, e.g.,* 720 ILCS 5/17-11; 5/17-11.1; 5/17-20; 5/17-21; 10 ILCS 5/29-6; 10 ILCS 5/29-20(4); 15 ILCS 335/14A(b)(1); 410 ILCS 535/27(1)(b),(c); 420 ILCS 40/39(b)(2); 625 ILCS 5/4-103(a)(2),(4); 755 ILCS 5/6-1(b)

Comment:

Generally. This offense criminalizes both tampering with a writing, record, or device and inviting reliance on writings, records, and devices that one knows to have been tampered with. Section 3102 supplements proposed Section 5203, and applies to tampering with writings, records, and devices that may not qualify as “public records” or “public notices.” As applied to “writings,” Section 3102 also complements proposed Section 3101, and reaches conduct that is not forgery because the defendant either tampers with a writing in a manner not affecting its genuineness or deceives for a purpose other than defrauding or injuring another.

Relation to current Illinois law. Section 3102(1)(a) criminalizes tampering with, falsifying, destroying, removing, or concealing a writing, record, or device for the purpose of covering up a misdeed or deceiving or injuring another. Section 3102(1)(a) has no directly corresponding provision

under current Illinois law, which instead prohibits tampering with specific kinds of writings, records, and devices, such as odometers of used motor vehicles (5/17-11); hour meters of used farm implements (5/17-11.1); utility meters (5/17-20); service meters (5/17-21); election materials (10 ILCS 5/29-6); absentee ballots (10 ILCS 5/29-20(4)); grain records (240 ILCS 40/15-45(c)(3)); vital records (410 ILCS 535/27(1)(b)); writings relevant to radiation protection regulations (420 ILCS 40/39(b)(2)); vehicle identification numbers (625 ILCS 5/4-103(a)(2)); and wills (755 ILCS 5/6-1(b)).

Section 3102(1)(b) provides that the offense is also committed if one puts forward a writing, record, or device “knowing that it has been altered in a manner prohibited by Subsection (1)(a).” Section 3102(1)(b) has no directly corresponding provision under current Illinois law, which instead criminalizes putting forward assorted types of writings that have been tampered with, such as identification cards (15 ILCS 335/14A(b)(1)); vital records (410 ILCS 535/27(1)(c)); and vehicle identification numbers (625 ILCS 5/4-103(a)(4)).

Section 3102(2) provides a definition for the phrase “puts forward” that appears consistent with current Illinois law’s occasional use of the undefined term “utter.” See, e.g., 20 ILCS 1605/14.2; 35 ILCS 130/22; 35 ILCS 135/28.

Section 3102(3) grades the basic offense as a Class A misdemeanor, and aggravates to a Class 3 felony where it involves a writing for which the law provides public recording. Current Illinois law, by contrast, grades the offense as anything from Class B misdemeanor (see 5/17-20, 5/17-21) to a Class 2 felony (see 625 ILCS 5/4-103(a)(2),(4)). Current Illinois law’s grading appears to reflect concerns as to other crimes the defendant intends to commit by means of writings, records, and devices that have been tampered with; preliminary efforts toward committing those offenses may be punished separately, however, as attempts. See proposed Section 801 and corresponding commentary.

Section 3103. Securing Execution of Documents by Deception

Corresponding Current Provision(s): 720 ILCS 5/17-1(B)(a); see also, e.g., 720 ILCS 5/17-13; 35 ILCS 200/21-306(a)(3); 50 ILCS 105/4.5(2); 815 ILCS 515/3; 815 ILCS 602/5-95

Comment:

Generally. This offense applies to one whose deception causes another to execute an instrument affecting, or purporting or likely to affect, that or another person’s pecuniary interest. Section 3103 complements Section 2103’s prohibition of theft by deception. In most cases where the defendant’s

deception causes another to execute an instrument actually affecting a pecuniary interest, the defendant will obtain property and be liable under Section 2103; in such cases, the General Part's multiple-conviction provision would preclude liability for both theft by deception and Section 3103's offense. See proposed Section 254 and corresponding commentary. Section 3103 is principally designed to cover the case where the defendant creates a risk of pecuniary harm to another without really "obtaining" something of value by his deception — and would apply to one who tricks another into executing such diverse instruments as trusts, licenses, releases, guaranties, employment contracts, and partnership agreements.

Relation to current Illinois law. Section 3103(1) is substantively similar to current 5/17-1(B)(a), with three modifications. First, Section 3103(1) applies only where one causes another to execute an instrument "by deception," and does not apply where one secures execution "by threat." The intimidation aspects of current 5/17-1(B)(a) are covered by the proposed criminal coercion provision (see proposed Section 1404).

Second, Section 3103(1) requires the execution of an instrument "affecting or purporting to affect or likely to affect" a pecuniary interest, whereas current 5/17-1(B)(a) applies only to documents¹⁷⁷ actually disposing of property or otherwise incurring a pecuniary obligation. Section 3103(1)'s broader language better assures that litigation will focus on issues regarding the defendant's blameworthiness rather than on technical issues of contract law, and covers the case where an instrument does not actually incur a pecuniary obligation because the defendant's deception renders it void *ab initio*. Section 3103(1)'s language also covers, in conjunction with proposed Section 801's rules for attempt liability, numerous current offenses prohibiting misrepresentations used to induce others to enter into specific kinds of contracts. See, e.g., 720 ILCS 5/17-13 (real estate contracts); 35 ILCS 200/21-306(a)(3) (contracts involving indemnity judgment proceeds); 50 ILCS 105/4.5(2) (certain government contracts); 815 ILCS 515/3 (home repair contracts); 815 ILCS 602/5-95 (business opportunity contracts).

Finally, Section 3103(1) modifies current 5/17-1(B)(a)'s culpability requirements. Like 5/17-1(B), Section 3103(1) provides no explicit culpability term for its objective elements, thus imposing a recklessness standard under the "read-in" culpability level provision. See 5/4-3(b); proposed Section 205(3). Section 3103(1) differs from current law, however, in omitting 5/17-1(B)'s additional requirement that the defendant have an

¹⁷⁷ Section 3103(1)'s use of the term "instrument" rather than "document" is not intended to substantively amend current law.

“intent to defraud.”¹⁷⁸ The “intent to defraud” requirement causes needless confusion by demanding intent with respect to elements for which 5/17-1(B)(a) also requires recklessness.¹⁷⁹

Section 3103(2), like current 5/17-1(B), grades the offense as a Class A misdemeanor.

Section 3104. Simulating Objects of Special Value

Corresponding Current Provision(s): 720 ILCS 5/17-4

Comment:

Generally. This offense prohibits making, altering, or putting forward objects of special value with an intent to defraud. Section 3104 complements proposed Section 3101’s forgery prohibition by criminalizing making, altering, or putting forward objects that are not “writings,” such as artwork, antiques, and jewels. The simulation of such objects presents concerns similar to those that forgery presents; false objects of special value may also be used to accomplish major and far-reaching fraud and similarly undermine public confidence in that which is genuine.

Relation to current Illinois law. Section 3104 has no directly corresponding provision under current Illinois law. Section 3104(1) is similar to current 5/17-4(a) and 5/17-4(b), which criminalize altering “any coin to increase the value of the coin to coin collectors” and putting forward such a coin, but the proposed provision explicitly requires that the defendant act with an “intent to defraud” to parallel the culpability requirement for forgery.

Section 3104(2) grades the offense as a Class A misdemeanor, the same grade current 5/17-4(c) prescribes for deceptively altering or offering collectible coins.

¹⁷⁸ The original 1961 Code also did not require an “intent to defraud.” See ILL. ANN. STAT. ch. 38 § 17-1(a) (Smith-Hurd 1964). Nevertheless, subsequent judicial decisions imposed the culpability requirement for the offense of issuing or delivering bad checks, under the theory that its omission was inadvertent. See, e.g., *People v. Samples*, 224 N.E.2d 284, 286-87 (Ill. App. 1967); *People v. Billingsley*, 213 N.E.2d 765, 768 (Ill. App. 1966). In apparent response to those decisions, the legislature inexplicably amended Section 17-1 (now 5/17-1(B)) to require an “intent to defraud” not only for the bad checks offense, but for *all* the offenses defined therein.

¹⁷⁹ Current 5/17-1(A)(iii)’s definition of “intent to defraud” is at tension with 5/17-1(B)(a)’s offense definition in requiring that one “act wilfully” rather than recklessly, have a “specific intent to deceive” rather than recklessly deceive another, and have a “purpose of causing financial loss . . . or to bring . . . financial gain” rather than be reckless as to incurring a pecuniary obligation.

Section 3105. Unauthorized Impersonation

Corresponding Current Provision(s): Various; see, e.g., 720 ILCS 5/16G-15; 5/16G-20; 5/17-2; 5/17-6; 5/17B-5(i); 5/17B-20; 15 ILCS 335/14(a)(2) to (a)(4); 15 ILCS 335/14A(b)(1); 15 ILCS 335/14B(b)(1); 225 ILCS 25/40; 225 ILCS 110/30; 625 ILCS 5/6-301(a)(2),(3); 625 ILCS 5/6-301.1(b)(1); 625 ILCS 5/6-301.2(b)(1)

Comment:

Generally. This offense criminalizes the unauthorized impersonation of others. Impersonation, like other conduct prohibited in Article 3100, is often used to achieve theft. Section 3105 serves three functions that complement Article 2100's prohibitions against theft. First, Section 3105(1)(a) serves to punish harm to impersonated persons, such as injury to reputation, that theft offenses do not address. Second, Section 3105(1)(b) criminalizes conduct that may not constitute theft, such as an underage person's pretending to be of age (by claiming to be either a real or fictitious adult) for the purpose of purchasing alcohol. Finally, where one impersonates another to steal property whose value is low or difficult to determine, Section 3105(2) grades the offense as a Class A misdemeanor; where more serious violations can be proven, more severe sanctions will be available under Article 2100.

Relation to current Illinois law. Section 3105(1)(a) has no directly corresponding provision in current Illinois law, but most closely resembles current 5/16G-15's financial-identity-theft offense.¹⁸⁰ Section 3105(1)(a) differs from 5/16G-15, however, by requiring recklessness as to either depriving the impersonated person of something of value or harming that person's reputation; Section 3105(1)(a) does not require that the defendant actually "obtain" something of value "in the name of the other person." Where one impersonates another to accomplish theft — whether by using "personal identifying information," a "personal identification document," or

¹⁸⁰ In addition to current 5/16G-15, current Illinois law also contains numerous offenses criminalizing specific kinds of impersonation that may deprive the impersonated person of something of value or injure his reputation. See, e.g., 720 ILCS 5/17-6(a) (impersonating to receive state benefits); 5/17B-5(i) (impersonating to receive WIC benefits); 225 ILCS 25/40 (impersonating to practice dentistry); 225 ILCS 110/30 (impersonating to practice speech-language pathology). Most of these offenses appear, however, to be more concerned with another offense committed by means of impersonation — most commonly theft or practicing a profession without a license — than with any independent harm caused by impersonation itself.

other means — liability will be appropriate under Article 2100.¹⁸¹ Section 3105(1)(a)’s requirements serve to punish the additional harm caused by impersonation — such as harming another’s credit rating — and to ensure that the offense does not merely restate Article 2100’s prohibitions against theft (or attempted theft).

Section 3105(1)(b) also has no directly corresponding provision in current Illinois law, and most closely corresponds to several offenses criminalizing possessing or displaying identification cards and drivers’ licenses that belong to another, contain false information, or are forged.¹⁸² See 15 ILCS 335/14(a)(2) to (a)(4); 335/14A(b)(1); 335/14B(b)(1); 625 ILCS 5/6-301(a)(2),(3); 625 ILCS 5/6-301.1(b)(1); 625 ILCS 5/6-301.2(b)(1). Section 3105(1)(b) differs from these provisions, however, in allowing liability for any means of misrepresentation as to identity or a characteristic of legal significance rather than merely for misrepresentations achieved by using false identification.¹⁸³ Section 3105(1)(b) also requires that one act with an “intent to obtain service or property to which he is not entitled” to limit the offense’s application to inappropriate and wrongful deceptions.¹⁸⁴

¹⁸¹ Current 5/16G-20 also sets forth an offense of “aggravated financial identity theft” for cases involving elderly and disabled persons. Although Section 3105 does not recognize a similar aggravation, the proposed grading provision for theft imposes additional punishment for committing that offense against an elderly person. See proposed Section 2109(8) and corresponding commentary.

¹⁸² Section 3105(1)(b) would also cover some of the conduct prohibited by current 5/17-2(a), which criminalizes impersonating a member of a “public safety personnel organization.” Some of 5/17-2(a)’s conduct would also be covered by Section 5205(1)(b). For the most part, however, current 5/17-2 sets forth a regulatory offense, and it is anticipated that the offense will be preserved elsewhere in Illinois law through the “conforming amendments” bill to be presented to the General Assembly.

The proposed Code, however, eliminates current 5/17-2(b), which criminalizes using words like “Chicago Police” or “Chicago Sergeant” in the name of an “organization, magazine, or other publication” without the Chicago Police Board’s permission. The unauthorized use of an organization’s name — whether it is “Chicago Police,” “Peoria Police,” or another governmental institution — is better addressed by the availability of civil liability for such conduct. Moreover, any such conduct truly meriting criminal liability would amount to forgery (Section 3101), false personation (Section 5205), or attempted theft (Article 2100) under the proposed Code.

¹⁸³ Section 3105(1)(b) only punishes one who falsely “represents” his identity or a characteristic of legal significance. Unlike the current offenses, Section 3105(1)(b) does not itself criminalize merely possessing a false identification card. Liability for possession and other preliminary efforts toward committing Section 3105(1)(b)’s offense is to be determined under the standards for inchoate liability established in Article 800. See proposed Sections 801(1) and 808 and corresponding commentary. Liability for tampering with a writing, or an attempt to do so, will also often be available for those who possess or use false identification cards. See proposed Section 3102 and corresponding commentary.

¹⁸⁴ Although Section 3105(1)(b)’s additional culpability requirement does not correspond to any language in current law’s offense definitions for using false identification cards, those offenses’ grading provisions strongly suggest that the offenses are principally aimed at attempted underage drinking, which the proposed culpability requirement would cover. See, e.g., 15 ILCS 335/14(b)(1) (stating that community service sentence is to be served “preferably at an alcohol abuse prevention program”).

Section 3105(2) grades the offense as a Class A misdemeanor. By contrast, current 5/16G-15(d) closely tracks current 5/16-1(b)'s grading for theft and grades financial identity theft according to the value of property obtained. Under the proposed Code's multiple-conviction provision, however, additional liability may be imposed where the defendant achieves theft by means of impersonating another. See proposed Section 254 and corresponding commentary. Current law grades possessing or displaying a false identification card as a Class A misdemeanor where the card belongs to another and as a Class 4 felony where it contains false information or is forged. The mere *possession* of false identification would at most constitute an attempt of Section 3105's offense, and therefore would be graded as a Class B misdemeanor. See proposed Section 807 (grading inchoate offense one grade lower than target offense). Liability might alternatively be available under the proposed general inchoate possession offense. See proposed Section 808 (offense for possessing "instruments of crime"; Class A misdemeanor). Moreover, where the offender has more serious criminal objectives, inchoate liability under Section 3101 or Section 3102 may be imposed. See proposed Sections 3101 and 3102.

Section 3106. Deceptive Practices

Corresponding Current Provision(s): 720 ILCS 5/17-1(B)(c); 225 ILCS 470/56; 815 ILCS 5/12; see also, e.g., 720 ILCS 5/17-1(C)(1); 5/17-6(a); 5/17-12; 5/33C-2; 5/33E-14; 5/33E-15 250/3; 290/1 to /3; 295/1a, 1b; 390/0.01 to /2; 565/0.1 to /4 20 ILCS 3520/45(c); 20 ILCS 4020/22; 35 ILCS 105/14; 220 ILCS 5/6-106; 225 ILCS 305/36(a); 225 ILCS 325/39(b)(5); 225 ILCS 330/43(f); 225 ILCS 410/4-20(2); 305 ILCS 5/8A-2(a); 305 ILCS 5/8A-3(a); 305 ILCS 5/8A-16; 410 ILCS 620/3.1; 765 ILCS 86/10-25; 815 ILCS 602/5-110; 815 ILCS 705/25

Comment:

Generally. This provision criminalizes several common deceptive practices that operate to cheat others. Section 3106 supplements Article 2100's theft offenses by prohibiting inherently deceptive conduct that, even under proposed Section 801's "substantial step" test, may not constitute attempted theft. Cf. proposed Section 801 and corresponding commentary. Section 3106 removes any doubt that these practices are criminal, and

addresses them in a single provision to ensure that they are defined and graded consistently.¹⁸⁵

Relation to current Illinois law. Section 3106(1)(a) criminalizes making a “false or misleading written statement” for the purpose of obtaining property or credit. Section 3106(1)(a) has no single directly corresponding provision in current Illinois law, which instead contains dozens of offenses prohibiting making or giving “false or misleading statements” (815 ILCS 705/25); “false statements” (e.g., 5/17-1(C)(1); 5/33C-2; 250/3); “false statements or reports” (e.g., 5/33E-14); “false statements or representations” (305 ILCS 5/8A-3(a)); “false statements or willful misrepresentations” (305 ILCS 5/8A-2(a)); “false or fraudulent representations” (e.g., 20 ILCS 4020/22); “fraudulent misrepresentations” (e.g., 225 ILCS 410/4-20(2)); “misrepresentations” (e.g., 5/17-6(a)); “false entries” (e.g., 5/33E-15); and “false information” (e.g., 35 ILCS 105/14) for the purpose of obtaining property or credit.

Section 3106(1)(b) criminalizes making false or misleading statements in advertisements. Section 3106(1)(b) is substantively similar to current 5/17-1(B)(c),¹⁸⁶ with a few modifications. First, Section 3106(1)(b) requires recklessness, rather than knowledge, as to making a false or misleading statement in an advertisement, cf. proposed Section 205(3) (imposing “read-in” culpability requirement of recklessness where none is otherwise stated), and omits current 5/17-1(B)’s requirement that the defendant act with an “intent to defraud.” Section 3106(1)(b)’s culpability requirements reflect the view that one who chooses to ignore a substantial and unjustifiable risk that

¹⁸⁵ Note that Section 3106 does not purport to affect the scope of proposed Section 801. Section 3106’s explicit prohibition of certain practices is not meant to reflect, or suggest, any judgment as to the appropriateness of liability — as attempted theft or under another theory — for other deceptive practices.

¹⁸⁶ In addition to 5/17-1(B)(c), current 295/1a provides that it is a Class A misdemeanor to make an advertisement containing “any assertion, representation or statement of fact which is untrue, misleading or deceptive.” Moreover, there are numerous other corresponding current offenses applying to particular kinds of misrepresentations and advertisements. See, e.g., 720 ILCS 5/17-12 (fraudulent use of corporate name); 295/1b (misrepresentation of intent to sell at advertised price); 390/0.01 to /2 (use of university stationery or seal for “private promotional scheme”); 225 ILCS 305/36(a) (misrepresentation as to being licensed architect); 225 ILCS 325/39(b)(5) (misrepresentation as to being licensed engineer); 225 ILCS 330/43(f) (misrepresentation as to being licensed land surveyor); 305 ILCS 5/8A-16 (health care advertisements); 765 ILCS 86/10-25 (real estate advertisements); 815 ILCS 602/5-110 (business opportunity advertisements). Such overlap causes unnecessary and undesirable confusion. Section 3106(1)(b) introduces uniformity by criminalizing any “false or misleading statement” — including a false statement concerning the seller’s intent to sell an item at a certain price — in any advertisement addressed to a substantial portion of the public.

Section 3106(1)(b) also indirectly relates to, but does not cover, other regulatory provisions related to advertising in Chapter 720 that are expected to be preserved elsewhere in Illinois law through “conforming amendments” legislation: current 720 ILCS 5/17-12 (rules relating to use of trade name, partnership name, etc.); 295/1c (regulatory offense and injunctive relief relating to deceptive advertisements of out-of-state real estate); 295/1d (exemption for good-faith conduct).

his advertisement is deceptive is sufficiently blameworthy to warrant criminal liability. Current Illinois law implicitly recognizes this by including current 295/1a, which similarly requires recklessness under the “read-in” culpability provision (5/4-3(b)) without proof that the defendant acted with an “intent to defraud.”

Section 3106(1)(b) also clarifies that it applies to advertisements addressed to a “substantial segment” of the public and those that promote the “purchase” of property or services, omits “deceptive” as redundant of “misleading,” and omits 5/17-1(B)(c)’s reference to “directing another,” in recognition that complicity liability is provided for under proposed Section 301(1) (q.v.).

Section 3106(1)(c) contains two prohibitions relating to sales of securities that correspond to various provisions in current 815 ILCS 5/12.¹⁸⁷ Section 3106(1)(c)’s first prohibition is substantively similar to 5/12(E) and (H) in addressing false or misleading written statements, but makes three modifications so that the offense definition parallels the treatment of misrepresentations in Section 3106(1)(a) and (1)(b). First, Section 3106(1)(c) criminalizes making a false or misleading written statement in *any* document, whereas current 5/12(E) and (H) apply only to documents required to be filed or circulated under the Illinois Securities Law of 1953. Second, Section 3106(1)(c) does not require that a false or misleading statement relate to a “material” fact, and instead requires that such a statement be made “with intent to promote the sale of securities.” Third, Section 3106(1)(c) prescribes a culpability level of recklessness regardless of the type of document in which a misrepresentation is made, whereas 5/12(E) requires recklessness for documents required to be “filed” and 5/12(H) requires negligence for documents required to be “circulated.”

Section 3106(1)(c)’s second prohibition is substantively similar to current 815 ILCS 5/12(B) in criminalizing omitting information that the law requires be disclosed, but applies more generally to any “written document relating to securities,” rather than only prospectuses.

Section 3106(1)(d) is substantively similar to current 225 ILCS 470/56(1)(A)¹⁸⁸ in prohibiting the use or possession of false weights and measures, with two differences. First, Section 3106(1)(d) requires that the device be used to record the quality or quantity “of a commodity to be sold,” whereas the current provision requires that it be used for a “commercial purpose.” Section 3106(1)(d)’s broader applicability reflects the fact that the conduct constituting the offense is inherently deceptive, regardless of whether it is performed by merchants. Second, Section 3106(1)(d) omits

¹⁸⁷ Section 3106(1)(c) also covers language in current 295/1a and 220 ILCS 5/6-106 criminalizing making false or misleading written statements to promote sales of securities.

¹⁸⁸ Section 3106(1)(d) also covers current 225 ILCS 470/56(2)(A), which defines a Class 3 felony for one who “[a]dds to or modifies a commercial weight or measure by the addition of a device or instrument that would allow the sale . . . of less than the quantity represented . . . or falsification of the weight or measure.”

current 470/56(1)(A)’s references to “selling” and “hiring” in recognition that liability for merchants who sell false weights and measures themselves is more appropriately determined under the standards for complicity liability set forth in proposed Section 301(1).

Section 3106(1)(e) is the same as current 225 ILCS 470/56(1)(E), but clarifies that liability is appropriate for one who “delivers” less than the represented quantity of a commodity or service and omits 470/56(1)(E)’s reference to “things” as redundant.

Section 3106(1)(f) is substantively identical to current 225 ILCS 470/56(1)(F), but omits the phrase “by means of which the amount . . . is determined” and the current reference to “things” as redundant.

Section 3106(1)(g) has no directly corresponding provision in current Illinois law, which only prohibits selling, offering, or exposing for sale certain kinds of adulterated or mislabeled commodities, such as articles that purport to be made of gold or silver (see 720 ILCS 290/1 to /3),¹⁸⁹ goods with obliterated or used containers (see 720 ILCS 565/0.1 to /4), and foods, drugs, and cosmetics (see 410 ILCS 620/3.1). Section 3106(1)(g)’s broader scope permits liability for those who ignore a substantial and unjustifiable risk that their wares do not comply with established standards, regardless of the type of commodity involved.

Section 3106(2)(a) and (b) define “adulterated” and “mislabeled” to incorporate by reference standards established by criminal statutes and commercial usage. Section 3106(2)’s definitions therefore preserve current Illinois regulations regarding the purity and branding of various commodities, such as foods (see 410 ILCS 620/10, 620/11), drugs (see 410 ILCS 620/14, 620/15), and cosmetics (see 410 ILCS 620/18, 620/19). Section 3106(2)(c) incorporates current 815 ILCS 5/2.1’s definition of “securities” by reference.

Section 3106(3) uniformly grades the proscribed deceptive practices as Class A misdemeanors. Current Illinois law, by contrast, grades the conduct prohibited by Section 3106 as anything from a business offense to a Class 2 felony. See, e.g., 20 ILCS 3520/45(c) (grading false statement in document furnished to Department of Commerce and Community Affairs as Class 2 felony); 225 ILCS 470/56(1) (grading offenses corresponding to 3106(1)(d) to (1)(f) as business offenses). Section 3106(3)’s grading reflects the view that the criminalized conduct is sufficiently harmful to warrant imprisonment, but not serious enough to merit felony sanctions. Felony sanctions are available, however, where the defendant satisfies the requirements of theft or attempted theft.

¹⁸⁹ Current 290/2 and 290/3, which criminalize selling, offering, or exposing for sale items that falsely purport to be made of “silver,” “sterling silver,” or “coin silver,” contain some regulatory content concerning the required purity of such products that, it is anticipated, will be preserved elsewhere in Illinois law through “conforming amendments” legislation.

Section 3107. Bad Checks

Corresponding Current Provision(s): 720 ILCS 5/17-1(B)(d)-(e); see also, e.g., 720 ILCS 5/17-1(C)(2),(3); 35 ILCS 105/14; 35 ILCS 143/10-50; 35 ILCS 145/8

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 Article 2100'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 Illinois law. Section 3107(1) is substantively similar to current 5/17-1(B)(d)'s first sentence and current 5/17-1(B)(e).¹⁹⁰ In addition to making some minor modifications to the current provisions' language,¹⁹¹ Section 3107(1) differs from current Illinois law in two substantive respects. First, Section 3107(1) omits current 5/17-1(B)'s "intent to defraud" requirement as unnecessary in light of the requirement that the defendant issue a check "knowing that it will not be honored by the drawee." The original 1961 Code also did not require an "intent to defraud," see ILL. ANN. STAT. ch. 38 § 17-1(d) (Smith-Hurd 1964), but subsequent judicial decisions nevertheless imposed the requirement under the theory that its omission was inadvertent. See, e.g., People v. Samples, 224 N.E.2d 284, 286-87 (Ill. App. 1967); People v. Billingsley, 213 N.E.2d 765, 768 (Ill. App.

¹⁹⁰ Section 3107 also corresponds to current 5/17-1(C)(2) and (C)(3), which criminalize the possession of, respectively, stolen or forged checks and "implements of check fraud." Liability for an attempted Section 3107 violation would be appropriate for many cases covered by 5/17-1(C)(2) and (C)(3). In most cases, offenses under current 5/17-1(C)(2) and (C)(3) would also be subject to liability (or attempt liability) under proposed Sections 808 (possessing instruments of crime), 2103, and 2106 (theft by deception and theft of services), and/or 3101 (forgery). (A recent amendment to 5/17-1(C)(2), effective January 1, 2003, also criminalizes other efforts to "obtain access to funds of another person," including making false statements to a financial institution or presenting a check for payment without the account holder's authorization. Under the proposed Code, most such conduct would constitute theft (or its attempt), forgery, and/or deceptive practices. The last sentence of the amended version of 5/17-1(C)(2)'s first paragraph, which provides a civil rule for certain disputes between financial institutions and account holders, may be preserved elsewhere in Illinois law through a "conforming amendment.")

Acts in violation of current 5/17-1(C)(4) (possessing cash machine cards) would lead to potential attempt liability under proposed Article 2100 (theft), Section 3101 (forgery), and/or Section 3108 (fraudulent use of a debit card).

¹⁹¹ Section 3107(1) uses "passes" rather than "delivers," "similar sight order" rather than "other order upon a real or fictitious depository," and "honored by the drawee" rather than "paid by the depository." Section 3107(1)'s use of these terms and phrases does not substantively amend current law.

1966). In apparent response to those decisions, the legislature later amended Section 17-1 (now 5/17-1(B)) to require an “intent to defraud” for the bad checks offense.

Section 3107(1)’s requirement that the defendant issue a draft “knowing that it will not be honored by the drawee” fully addresses the concerns underlying current 5/17-1(B)’s “intent to defraud” requirement. The Illinois Supreme Court has stated that the additional culpability requirement is necessary to prevent liability where one “writes a check for more than the balance in one’s account, intending to deposit funds to cover it, or agreeing with the payee that the latter not present it immediately but hold it as a note.” See People v. Ogunsola, 429 N.E.2d 861, 864 (Ill. 1981). Section 3107(1) would not impose liability in either case, as such defendants would lack the requisite knowledge that their checks would not be paid.

Section 3107(1) also differs from current law in omitting 5/17-1(B)(d) and 5/17-1(B)(e)’s requirement that the defendant’s check be used to obtain property,¹⁹² to pay for property or services, or to satisfy a tax obligation.¹⁹³ Section 3107(1)’s broader scope is consistent with the offense’s purposes. Although most prosecutions will undoubtedly relate to drafts used to pay for goods and services, Section 3107(1) reflects the view that bad checks are harmful even when they are issued without consideration; a check issued as a gift, for example, may not “cheat” the payee of anything, but may cause harm later by being negotiated to others for value.¹⁹⁴

Section 3107(2) establishes two permissive inferences with respect to the defendant’s knowledge that the drawee would not honor a draft that was not postdated. Section 3107(2)(a), allowing for an inference of knowledge where the defendant did not have an account with the depository when he issued the draft, has no corresponding provision in current Chapter 720. Section 3107(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.

¹⁹² Because Section 3107(1) does not require that the defendant intend to obtain “property” by use of a bad check, the proposed offense definition also omits the recent amendment to 5/17-1(B)(d), effective January 1, 2003, clarifying that “‘property’ includes rental property (real or personal).”

¹⁹³ Section 3107(1) also covers various current tax offenses’ language criminalizing passing a check to the Department of Revenue “knowing that it will not be paid by the depository.” See, e.g., 35 ILCS 105/14 (Use Tax Act); 143/10-50 (Tobacco Products Tax Act of 1995); 145/8 (Hotel Operators’ Occupation Tax Act).

¹⁹⁴ Because it reflects the view that bad checks are harmful even where they are not used to cheat another, Section 3107(1) omits current 5/17-1(B)(e)’s additional requirements that a bad check issued in a credit transaction be for a certain amount and that the defendant fail to promptly make it good after learning of its dishonor. Nevertheless, Section 3107(2)(b) continues to recognize the legal significance of one’s failure to promptly make a dishonored draft good — but uses that fact in establishing a permissive inference as to the defendant’s knowledge, rather than as an additional offense requirement.

Section 3107(2)(b) is functionally similar to 5/17-1(B)(d)'s last sentence, but amends current law to make its evidentiary significance clearer and to better assure that knowledge is not inappropriately inferred. Section 3107(2)(b) denominates its presumption as a "permissive inference," making it clear that proposed Section 107(4)'s jury instruction standards apply and that an unconstitutional categorical presumption is not being established. Current 5/17-1(B)(d)'s use of the ambiguous term "prima facie evidence," by contrast, has resulted in the exclusion of the current presumption from pattern jury instructions. See IPI (CRIMINAL) 13.38A (4th ed. 2000) ("The term is a legal one which . . . might be read by a jury as creating a type of presumption that is constitutionally impermissible in criminal cases.") (citing People v. Gray, 426 N.E.2d 290 (Ill. App. 1981)).

Section 3107(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. Current 5/17-1(B)(d)'s last sentence, by contrast, provides that either the fact that the defendant had insufficient funds to cover a check when he issued it or the fact that the check was subsequently dishonored twice within one week constitutes "prima facie evidence" that the defendant knew that it would be dishonored and had an intent to defraud.¹⁹⁵ Section 3107(2)(b)'s requirements better assure that knowledge is not inferred where the defendant makes a simple miscalculation or "kites" a check with the intent to promptly cover it.

Section 3107(3) is substantively similar to current Illinois law in grading the offense as a Class A misdemeanor, but does not aggravate it to a Class 4 felony where one uses a bad check to obtain property worth more than \$150. 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 2109.

Section 3108. Fraudulent Use of Credit or Debit Card

Corresponding Current Provision(s): 720 ILCS 250/2.03; 250/2.15; 250/8; see also, e.g., 720 ILCS 250/7; 250/9; 250/10; 250/14 to /17

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

¹⁹⁵ Current 5/17-1(B)(d)'s presumption of an intent to defraud where one issues a check for an amount exceeding his current account balance is at tension with the rationale underlying current law's "intent to defraud" requirement: the presumption encourages, rather than prevents, liability where one "writes a check for more than the balance in one's account, intending to deposit funds to cover it, or agreeing with the payee that the latter not present it immediately but hold it as a note." See People v. Ogunsola, 429 N.E.2d 861, 864 (Ill. 1981).

of wrongfully acquiring property. Nevertheless, credit and debit card fraud create harm not addressed by Article 2100'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 Illinois law. Section 3108(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 3108(1)'s offense definition is substantively similar to current 250/8(i),¹⁹⁶ with three modifications.¹⁹⁷ First, Section 3108(1) omits current 250/8(i)'s "intent to defraud" requirement, which is instead reflected in Section 3108(3)'s defense for good-faith use.

Second, Section 3108(1)(c) applies where one's "use" of a credit or debit card is not authorized by the issuer or cardholder, whereas current 250/8(i)'s catchall provision applies where the card was "obtained or retained" in violation of the Credit Card and Debit Card Act or without the cardholder's consent. Section 3108(1)(c)'s language allows for liability for one, such as an agent, who obtains another's card with consent, but knowingly exceeds his authority in using it. Unlike current 250/8(i), however, Section 3108(1)(c)'s language would not impose liability where one uses a card that was initially procured based on an inaccurate or exaggerated statement of the cardholder's

¹⁹⁶ Section 3108(1) also relates to, but does not incorporate, current 250/7, 250/9, 250/10, and 250/14 to /17. Current 250/7 criminalizes obtaining or transferring a credit or debit card as security for a debt with the intent to defraud; it is unclear what conduct current 250/7 is intended to criminalize that is not already covered by theft or current 250/8. Current 250/9 and 250/10 cover persons who, with the intent to defraud, assist others in fraudulent use by either allowing others to use their credit or debit cards or furnishing property or services. Under the proposed Code, liability for such conduct would be determined according to Section 3108(1) and the standards for complicity liability set forth in proposed Section 301(1). Current 250/14 to 250/17 prohibit forgery and counterfeiting of credit and debit cards. The proposed Code would treat such conduct as forgery in violation of Section 3101, an attempt of Section 3108(1)'s offense, and, in some cases, possession of an instrument of crime in violation of Section 808.

Section 3108 omits other provisions in the Credit Card and Debit Card Act because they are covered by other provisions in the proposed Code, such as Section 107(4)'s rules governing permissive inferences (250/18); Section 905(1)'s grade adjustment for repeat offenders (250/19); Section 2103 and Section 2106's prohibitions of theft of property or services by deception (e.g., 250/11; 250/12); Section 2105's offense for receiving stolen property (e.g., 250/4, 250/6, 250/13); Section 2108's prohibition of theft of property lost, mislaid, or delivered by mistake (e.g., 250/5); and Section 3106(1)(a)'s deceptive practices offense (250/3). It is anticipated, however, that current 250/17.03's regulatory offense will be preserved elsewhere in the Illinois statutes by the "conforming amendments" bill to be presented to the General Assembly.

¹⁹⁷ Section 3108(1) also makes some minor modifications to current 250/8(i)'s language, such as replacing "purpose of obtaining money, goods, property, services or anything else of value" with the clearer phrase "intent of obtaining property or services," clarifying that the offense applies to the use of "stolen" and "cancelled" cards, and omitting the reference to "counterfeited" cards as redundant of "forged" cards. These alterations do not substantively amend current law.

financial security or ability to meet payment obligations, insofar as the cardholder's use in such a situation is authorized by the issuer.¹⁹⁸

Finally, Section 3108(1) imposes a uniform culpability requirement of knowledge with respect to the wrongfulness of use. Current 250/8(i), by contrast, requires knowledge that a credit or debit card is forged, revoked,¹⁹⁹ or expired, but only recklessness as to whether a card is wrongfully "obtained or retained." Cf. 720 ILCS 5/4-3(b) (imposing "read-in" culpability requirement of recklessness where none is otherwise stated). There is no identifiable policy reason for imposing different culpability requirements for different types of fraudulent use.

Section 3108(2) defines the terms "credit card" and "debit card."²⁰⁰ Section 3108(2)(a)'s definition of "credit card" is substantively the same as current 250/2.03. Section 3108(2)(b)'s definition of "debit card" is substantively the same as current 250/2.15's first sentence.²⁰¹ (Section 3108(2)(b) omits 250/2.15's second sentence regarding dual-purpose cards, however, because neither the fact nor extent of liability depends on whether such an instrument was used as one kind of card rather than the other under Section 3108.)

Section 3108(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 3108(3) is substantively similar to current 250/8(i)'s "intent to defraud" requirement, but 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 3108(3) is designed to protect, such as using an expired

¹⁹⁸ Proposed Section 3108(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.

In addition, proposed Section 3106(1)(a) would support liability for one who makes a false or misleading written statement to obtain a credit card. In such a case, the credit issuer may also have civil remedies against the cardholder for misrepresentations in the credit application.

¹⁹⁹ Section omits current 250/8's statements that "[k]nowledge of revocation" and "notice of revocation" "shall be presumed to have been received" under certain circumstances insofar as they appear to create mandatory conclusive presumptions, which are unconstitutional. See *People v. Watts*, 692 N.E.2d 315, 321 (Ill. 1998) ("The United States Supreme Court has long held that mandatory irrebuttable presumptions are unconstitutional.") (citing *People v. Sandstrom*, 442 U.S. 510, 521-23 (1979)).

²⁰⁰ Section 3108(2)'s definitions are not intended to limit the offense's application to only the wrongful use of a physical card in a face-to-face transaction. Section 3108(1)'s prohibition against wrongful "use" of a card includes wrongful use of the card's identifying information — such as an account number — in a mail-order, telephone, or Internet transaction. Section 3108(1) therefore covers current 250/8(ii)'s language regarding one who uses a card "by representing . . . that he is the holder."

²⁰¹ Section 3108 omits as unnecessary current law's definitions for other terms used in the Credit Card and Debit Card Act. See 720 ILCS 250/2 to /2.02; 250/2.04 to /2.06; 250/2.08 to /2.14; 250/2.16.

card or exceeding a credit limit. Section 3108(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.

Section 3108(4) grades the offense as a Class A misdemeanor. Current 250/8, by contrast, grades the offense as either a Class 3 or Class 4 felony, depending on whether the value of things obtained or sought over a six-month period exceeds \$300. Section 3108(4) abandons current 250/8's two-tiered grading scheme in recognition that the value of property or services obtained or sought will be used to determine the grading for theft and attempted theft where those offenses are committed. See proposed Section 2109. Section 3108(4)'s grading serves to punish the independent harm that occurs where one fraudulently uses a credit or debit card.

Section 3109. Commercial Bribery and Breach of Duty to Act Disinterestedly

Corresponding Current Provision(s): 720 ILCS 5/29A-1 to 5/29A-3; see also 230 ILCS 10/18(d)(1),(2); 305 ILCS 5/8A-14(b); 305 ILCS 5/8A-16(b)(5)

Comment:

Generally. This offense criminalizes bribes designed to induce breaches of professional duties owed by persons in positions of special trust. Section 3109(1) applies to bribes accepted or sought by persons, such as agents, fiduciaries, and professional advisers, owing a duty of fidelity to others. Section 3109(2) applies to bribes accepted or sought by professionals who pretend to the public to be disinterested in recommending, valuing, or reviewing commodities or services. Section 3109(3) criminalizes the conferring or offering of bribes prohibited by Section 3109(1) and (2).

Relation to current Illinois law. Section 3109(1) is substantively similar to current 5/29A-2, but makes three modifications to enhance clarity and limit the offense's reach to truly blameworthy conduct. First, Section 3109(1) explicitly prescribes a culpability requirement of knowledge as to all the offense's objective elements. Current 5/29A-2, by contrast, confusingly first requires recklessness as to soliciting, accepting, or agreeing to accept a benefit under the "read-in" culpability provision (5/4-3(b)), but then indicates that knowledge is required by demanding that there be an "agreement or understanding" with respect to the benefit's purpose. Section 3109(1)'s phrasing makes the offense's scope much clearer.

Second, Section 3109(1) requires that one solicit, accept, or agree to accept the benefit "as consideration for violating or agreeing to violate a duty of fidelity" rather than "upon an agreement or understanding that such

benefit will influence his conduct in relation to his employer's or principal's affairs." This language makes it clearer that the offense does not require an actual agreement,²⁰² renders unnecessary 5/29A-2's requirement that the defendant act "without consent of his employer or principal," and ensures that the offense does not punish those — such as purchasing agents who conform with trade usages in accepting free promotional products from sales representatives — who do not knowingly betray an obligation of loyalty.

Third, Section 3109(1) requires that the defendant be subject to a duty of fidelity in one of several specified professional capacities. Section 3109(1)'s list makes it clear that partners, agents, employees, fiduciaries, professional advisers, officers and directors, and arbitrators are subject to liability for commercial bribery. Under current 5/29A-2, by contrast, only employees, agents, and fiduciaries are subject to liability. It is unclear whether 5/29A-2 uses the term "fiduciary" in its narrow sense — as Section 3109(1) does — to refer to a person who holds property on behalf of or in trust for others, or in its broader sense to refer to any "person who accepts the responsibility of acting on behalf of another." See *Graham v. Mimms*, 444 N.E.2d 549, 555 (Ill. App. 1982) (treating trustees, guardians, executors, administrators, agents, attorneys, partners, joint venturers, and officers and directors as "[c]ommon examples of fiduciaries").

Section 3109(2) has no corresponding provision in current Illinois law. Section 3109(2) covers one who pretends to act disinterestedly in selecting, valuing, or reviewing something, but seeks or accepts a benefit to influence his selection, valuation, or review. This sort of dishonesty — such as accepting money to overestimate the value of an antique or to write a favorable movie review — deceives the public and undermines its confidence in honest recommendations, appraisals, and criticisms. Section 3109(2)'s offense is limited to those who purport to be "engaged in the business of making" disinterested selections, appraisals, and criticisms to make clear that it does not apply to endorsements — such as those in advertisements — that are obviously financially motivated.

Section 3109(3) criminalizes conferring, offering, or agreeing to confer a bribe prohibited by Section 3109(1) or (2). Section 3109(3) is structurally similar to current 5/29A-1²⁰³ in tracking the elements of accepting a

²⁰² Current Illinois law's use of the phrase "upon an agreement or understanding" suggests that there must be an actual agreement, which is at tension with other language suggesting otherwise in current 5/29A-2 ("solicits . . . or agrees to accept").

²⁰³ In addition to current 5/29A-1 and 5/29A-2, Section 3109(1) and (3) also cover several current provisions criminalizing offering and accepting particular kinds of commercial bribes. See, e.g., 230 ILCS 10/18(d)(1),(2) (bribe to "person . . . connected with" riverboat casino); 305 ILCS 5/8A-14(b) (bribe to health care official); 5/8A-16(b)(5) (bribe to "select or to refrain from selecting any health care service, health plan, or health care provider").

commercial bribe, and therefore differs from the current provision in the same respects that Section 3109(1) differs from current 5/29A-2.²⁰⁴

Section 3109(4) grades the offense as a Class 4 felony, whereas current 5/29A-3 grades commercial bribery as a mere business offense. Section 3109(4)'s enhanced grading reflects the offense's resemblance to bribery of public officials, which both current 5/33-1 and proposed Section 5101 grade as a Class 2 felony. Although not as harmful as the bribery of public officials, the conduct prohibited by Section 3109 is sufficiently serious to warrant felony status.

Section 3110. Bid Rigging

Corresponding Current Provision(s): 720 ILCS 5/33E-3; 5/33E-4; 5/33E-11; 5/33E-14; 5/33E-18; 30 ILCS 500/50-25

Comment:

Generally. This provision criminalizes conduct that interferes with, and impairs confidence in, the system of bidding for and executing public contracts. Although the evasion of bidding and other contracting regulations may not ordinarily constitute theft, or even its attempt — because the winning bidder may actually satisfy the contract under terms agreed to by the government, and thus may not clearly deprive the government of any property — such conduct is inherently deceptive and may lead to higher costs, poorer work in execution of contracts, or both. As current 5/33E-1 recognizes, “the cost to the public is increased and the quality of goods, services and construction paid for by public monies is decreased when contracts . . . are obtained by any means other than through independent noncollusive submission of bids or offers by individual contractors and suppliers.”

Relation to current Illinois law. Section 3110(1) defines the offense to incorporate, by reference, conduct prohibited by the offenses currently codified at 720 ILCS 5/33E-3, 5/33E-4, 5/33E-11, 5/33E-14, 5/33E-18, and 30 ILCS 500/50-25. It is anticipated that the regulatory content of the current provisions will be preserved elsewhere in Illinois law through the “conforming amendments” bill to be presented to the General Assembly. (Article 33E’s other offenses are addressed by the proposed Code’s bribery

²⁰⁴ Section 3109(3) tracks Section 3109(1)'s culpability requirements, and requires that the defendant know that the recipient is violating a duty of fidelity. Current Illinois law, by contrast, appears to elevate the required culpability as to influencing the recipient's conduct from knowledge in 5/29A-2 (“upon an agreement or understanding that such benefit will influence”) to intent in 5/29A-1 (“with intent to influence”).

and official misconduct offenses. See proposed Sections 5101 and 5103 and corresponding commentary.²⁰⁵)

Section 3110(2) grades the offense as a Class 3 felony, which is the same grade current Illinois law prescribes for 5/33E-3's bid-rigging offense, 5/33E-11's offense for false statements in certifications, and 5/33E-14's offense for false statements in vendor applications. The conduct covered by current 5/33E-4's offense of "bid rotating" (currently a Class 2 felony), current 5/33E-18's offense of "unlawful stringing of bids" (currently a Class 4 felony), and current 30 ILCS 500/50-25's offense of "inducement" does not differ significantly enough from that in the other incorporated provisions to warrant different grading.

Section 3111. Rigging Publicly Exhibited Contest

Corresponding Current Provision(s): 720 ILCS 5/29-1 to 5/29-3; see also 230 ILCS 5/36(a); 230 ILCS 5/37(a); 230 ILCS 5/39(a)(1); 230 ILCS 10/18(d)(1),(2)

Comment:

Generally. This provision criminalizes corruption in sporting events and other publicly exhibited contests. Section 3111 is designed to discourage gambling fraud and to generally protect the integrity of legitimate contests.

Relation to current Illinois law. Section 3111(1) is substantively similar to current 5/29-1(a),²⁰⁶ but more generally protects the integrity of contests. First, Section 3111(1) differs from current 5/29-1(a) in applying to any "publicly exhibited contest"²⁰⁷ rather than only athletic and sporting contests, and thus criminalizes rigging a broader range of exhibitions that includes television quiz shows, art competitions, beauty contests, and dog shows. Although the threat of gambling fraud is not as great as for athletic and sporting events, rigging such contests deceives the public and undermines its confidence in legitimate entertainment.

²⁰⁵ It is anticipated that, with the exceptions of current 5/33E-7 and 5/33E-8 (which are fully covered by the proposed Code's bribery offense, see proposed Section 5101 and corresponding commentary), the regulatory content of current Article 33E's other offenses and provisions will also be preserved outside Chapter 720 through "conforming amendments" legislation.

²⁰⁶ Section 3111 also covers current offenses outside Chapter 720 criminalizing efforts to rig casino games and horse races by bribing a person associated with a contest or tampering with a racehorse. See 230 ILCS 5/36(a) (administering drug or chemical substance to racehorse); 230 ILCS 5/37(a) (attempting to affect racehorse's speed by using battery or buzzer, or by sponging horse's nostrils); 230 ILCS 5/39(a)(1) (bribe to person involved in horse race); 230 ILCS 10/18(d)(1),(2) (bribe to "person . . . connected with" riverboat casino).

²⁰⁷ Section 3111(1) does not apply, however, to public exhibitions — such as professional wrestling matches — that are contests merely in form.

Second, Section 3111(1) prohibits bribing, threatening bodily harm, or tampering with a person, animal, or thing with the intent to prevent a contest “from being conducted in accordance with the rules and usages purporting to govern,” whereas current 5/29-1(a) merely prohibits bribing with the intent to influence another “not to use his best efforts.”²⁰⁸ Section 3111(1) thus covers current 5/29-1(a)’s prohibition against inducements to lose, “shave” points, or officiate unfairly, but also imposes liability for other blameworthy means of affecting a contest’s outcome.

Section 3111(2) criminalizes accepting a bribe prohibited by Section 3111(1)(a). Section 3111(2) is structurally similar to current 5/29-2 in tracking the elements of offering a bribe, and differs from the current provision in the same respects that Section 3111(1) differs from current 5/29-1(a).²⁰⁹ Additionally, Section 3111 clarifies that, as with commercial bribery under proposed Section 3109(1) and current 5/29A-2, liability is appropriate for one who “solicits” a prohibited bribe.

Section 3111(3) allows for liability for those who, although their efforts may not support liability as accomplices under proposed Section 301(1), assist others in deceiving the public by knowingly participating in a rigged contest.²¹⁰ Section 3111(3) has no corresponding provision in current Chapter 720.

Section 3111 does not incorporate current 5/29-1(b) and (c), which criminalize, respectively, a bribe used to influence an athlete’s decision to attend a school and a bribe by an agent who seeks to represent a college athlete “in future negotiations for employment with any professional sports team.” It is anticipated that current 5/29-1(b) and (c)’s regulatory offenses will be preserved elsewhere in Illinois law through “conforming amendments” legislation. Section 3111 also omits current 5/29-3’s offense for failing to report a bribe, making the offense consistent with commercial bribery, for which current Illinois law does not criminalize the failure to report.

Section 3111(4)(a) tracks current 5/29-1(a) and 5/29-2 in grading 3111(1) and 3111(2)’s offenses as Class 4 felonies.

Section 3111(4)(b) grades Section 3111(3)’s offense as a Class A misdemeanor.

²⁰⁸ Section 3111(1)(a) tracks the offense definitions for offering commercial bribes in current 5/29A-1 and proposed Section 3109(3) by punishing one who “confers, offers, or agrees to confer any benefit.” Current 5/29-1(a), by contrast, modifies the language to reach one who “gives, offers or promises any . . . thing of value or advantage.” Such phraseological inconsistency may cause unnecessary confusion.

²⁰⁹ Section 3111(2) requires that one know that a benefit is being given to prevent a contest from being conducted in accordance with its purported rules and usages, and is similar to current 5/29-2, which appears to less clearly impose a culpability requirement of knowledge by requiring that the defendant act “with the intent, understanding or agreement that he will not use his best efforts.”

²¹⁰ Section 3111(3) applies only to direct and active participation in rigged portions of publicly exhibited contests — and does not reach either inactive “participants,” such as spectators, or those that actively participate in only unrigger portions of contests.

Section 3112. Defrauding Secured Creditors

Corresponding Current Provision(s): 810 ILCS 5/9-315.01, 5/9-315.02;
see also 720 ILCS 5/17-14; 240/1

Comment:

Generally. This offense criminalizes dealing with property for the purpose of hindering a secured creditor's interest therein. Section 3112 will often apply to debtors who fraudulently deal with collateral in their rightful possession. Section 3112 complements proposed Articles 2100 and 2200; under Section 2102(2)'s definition of "property of another," an actor's own interest in property that is subject to a security interest will not preclude liability for theft or property damage. Section 3112 independently addresses security interests for those cases in which the debtor does not appropriate or damage the collateral, or another requirement of theft or property damage is not satisfied.

Relation to current Illinois law. Section 3112(1) corresponds to current 810 ILCS 5/9-315.01 and 5/9-315.02's offenses for wrongfully disposing of collateral subject to a security interest, but more comprehensively criminalizes efforts to defraud secured creditors.²¹¹ First, Section 3112(1) differs from current 5/9-315.01 and 5/9-315.02 in prohibiting fraudulently dealing with *any* property that is subject to a security interest, and covers those who seek to impair security interests, such as real property mortgages, that are not within the scope of Article 9 of the Uniform Commercial Code.

Second, Section 3112(1) criminalizes "dealing with" collateral for the purpose of hindering enforcement of a security interest, whereas current 5/9-315.01 and 5/9-315.02's prohibitions relate only to dispositions that violate

²¹¹ Section 3112(1) also corresponds to current 5/17-14 and 240/1. Section 3112(1) is similar to current 5/17-14 in criminalizing dealing with property with the intent to hinder creditors, but applies only to property "subject to a security interest." This requirement ensures that the offense does not criminalize "mere thoughts." See proposed Section 3113(1) and corresponding commentary.

Current 240/1 criminalizes dealing with personalty obtained under a conditional sales contract "without the written consent of the title holder." As Illinois law otherwise recognizes, however, the seller's "reservation of title" in a sales contract merely creates a security interest. See 810 ILCS 5/2-401(1) ("Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest."). Section 3112(1) therefore does not treat the seller's lack of consent as a sufficient condition for liability, and imposes the same requirements with respect to security interests created by conditional sales contracts as for those created by other security devices.

security agreements.²¹² Section 3112(1) allows for liability for those who seek to impair security interests by means other than transferring collateral to another, such as by destroying, removing, concealing, or encumbering it.

Section 3112(2) grades the offense as a Class A misdemeanor, whereas current law grades 5/9-315.01's offense as a Class 3 felony and 5/9-315.02's offense as a Class A misdemeanor. Section 3112(2)'s grading reflects the availability of more severe sanctions for more serious violations where the defendant satisfies the requirements for theft or property damage.

Section 3113. Fraud in Insolvency

Corresponding Current Provision(s): 720 ILCS 5/17-14

Comment:

Generally. This offense criminalizes fraudulent conduct by one who knows that certain proceedings for the benefit of creditors, such as a liquidation proceeding or a proceeding seeking the appointment of a receiver, have been or are about to be instituted.

Relation to current Illinois law. Section 3113(1)(a) criminalizes dealing with property with the intent to adversely affect creditors' claims or otherwise interfere with the administration of a receivership. Section 3113(1)(a) is substantively similar to current 5/17-14 in protecting creditors' interests by prohibiting a debtor's fraudulent conveyance of even unencumbered property, but requires that proceedings for the benefit of creditors be pending or imminent.²¹³ By further requiring the defendant's knowledge as to this objective element, Section 3113(1)(a) ensures that the defendant's conduct is sufficiently blameworthy to warrant criminal sanctions. Criminalizing the ordinarily legal act of alienating one's own unencumbered property simply because one engages in that act based on what is considered a bad motivation (i.e., to avoid creditors' claims), as current 5/17-14 does, comes perilously close to punishing "mere thoughts."

²¹² Section 3112(1)'s requirement that one act "with intent to hinder enforcement" is functionally similar to current 5/9-315.01's requirement that the debtor "willfully and wrongfully" fail to pay proceeds and current 5/9-315.02's affirmative defense for prompt payment of the proceeds. Section 3112(1)'s culpability requirement differs from current law, however, by declining to attribute special significance to the fact that the debtor fails to pay proceeds within ten days. *See* 5/9-315.01(1) (failure to pay proceeds within 10 days "prima facie evidence" that was "willful and wanton"); 5/9-315.02(5) (affirmative defense only available if proceeds paid within 10 days). Such evidence might — indeed, it is rather likely to — be relevant as to the issue of the defendant's intent, but does not establish a *per se* rule under the proposed Code.

²¹³ Where one deals with or damages property to which an appointed receiver has taken title, liability for theft or property damage may be appropriate under proposed Articles 2100 and 2200.

Section 3113(1)(b) and (1)(c) have no corresponding provisions in current Chapter 720. Section 3113(1)(b) prohibits falsifying writings relating to property that one knows is, or is about to be, subject to insolvency proceedings. Section 3113(1)(c) criminalizes misrepresenting or refusing to disclose information legally required to be given to a receiver. The conduct covered by Section 3113(1)(b) and (1)(c) is harmful in that it interferes with the expeditious and fair administration of an insolvent estate.

Section 3113(2) grades the offense as a Class A misdemeanor, whereas current law grades 5/17-14's offense as a business offense. Section 3113(2)'s enhanced grading is appropriate in light of 3113(1)'s additional requirement of knowledge that insolvency proceedings are pending or imminent.

Section 3114. Receiving Deposits in a Failing Financial Institution

Corresponding Current Provision(s): 720 ILCS 5/17-1(B)(b)

Comment:

Generally. This offense criminalizes receiving deposits and other investments in failing financial institutions. Section 3114's offense is closely related to theft by deception, insofar as receiving a deposit with knowledge that insolvency is imminent will ordinarily amount to an implicit misrepresentation as to the institution's ability to pay the depositor on demand. Unlike Section 2103, however, Section 3114 does not require proof that the offender obtained the property "by" such deception.

Relation to current Illinois law. Section 3114(1) is substantively similar to current 5/17-1(B)(b), but breaks the offense definition down into subsections for greater clarity and makes two changes to the offense requirements. First, Section 3114(1)(c)(i) requires the defendant know that "the institution is about to suspend operations or go into receivership or reorganization" rather than that it is "insolvent." Section 3114(1)(c)(i) avoids current 5/17-1(B)(b)'s use of the term "insolvent" for clarity; as Illinois law reveals, there is some ambiguity as to whether insolvency means that liabilities exceed current assets at their current value or rather at some hypothetical future value. Compare 740 ILCS 160/3(a) ("A debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation."), with People v. Clark, 160 N.E.233, 237 (Ill. 1928) ("[A] bank is insolvent . . . when the cash value of its assets realizable in a reasonable time, in case of liquidation by its proprietors, as ordinarily prudent persons would generally close up their business, is not equal to its liabilities, exclusive of stock liabilities.").

Second, Section 3114(1)(c)(ii) requires that the defendant know that the person making a deposit or other investment is unaware of the prospect of financial ruin. Section 3114(1)(c)(ii)'s additional requirement addresses the same concerns that current 5/17-1(B)'s "intent to defraud" requirement appears to address. Section 3114(1)(c)(ii) recognizes that there is no implicit

misrepresentation as to the institution's ability to meet its deposit obligation where the depositor also knows that insolvency is imminent, and precludes liability where one accepts deposits made for the very purpose of preventing financial ruin.

Section 3114(2), like current 5/17-1(B), grades the offense as a Class A misdemeanor.

Section 3115. Selling Participation in a Pyramid Sales Scheme

Corresponding Current Provision(s): 720 ILCS 5/17-17

Comment:

Generally. This offense criminalizes selling the right to participate in a pyramid sales scheme. As Illinois courts have recognized, such schemes are “inherently deceptive . . . because the market eventually becomes saturated and the seemingly endless chain must end; consequently, many participants cannot even recoup their investments, let alone make a profit.” People ex rel. Fahner v. Walsh, 461 N.E.2d 78, 82-83 (Ill. App. 1984).

Relation to current Illinois law. Section 3115(1) is substantively the same as current 5/17-7(b), but defines the offense to prohibit only actually selling the right to participate in a pyramid sales scheme; offers and other attempts to sell such rights are governed by proposed Section 801.

Section 3115(2) is nearly identical to current 5/17-7(a), but eliminates a few redundancies — for example, by replacing “money or other thing of value” with “anything of value.”

Section 3115(3), like current 5/17-7(b), grades the offense as a Class A misdemeanor.

Section 3116. Definitions

Corresponding Current Provision(s): 720 ILCS 5/15-1; 5/15-4; 5/15-6; 5/17-1(A)(iii); 5/17-3(b); 5/17-7(a); 250/2.03; 250/2.07; 250/2.15; 815 ILCS 5/2.1

Comment:

Generally. This provision collects defined terms used in Article 3100 and provides cross-references to the provisions in which they are defined.

Relation to current Illinois law. For discussion of the relationship between Article 3100's defined terms and current law, refer to the commentary for the provision in which the term in question is initially defined.

General Comment Regarding Current Law:

Current Illinois law describes numerous offenses, including many of the provisions noted above, as “fraud,” and criminalizes various specific kinds of misrepresentations made for the purpose of obtaining property, as well as performing certain conduct “fraudulently,” with an “intent to defraud,” or as part of a “scheme,” “design,” or “artifice to defraud.” See, e.g., 720 ILCS 5/16D-5(a) (“computer fraud”); 5/17-6 (“state benefits fraud”); 5/17-8 (“health care benefits fraud”); 5/17-9 (“public aid wire fraud”); 5/17-10 (“public aid mail fraud”); 5/17-13 (“fraudulent land sales”); 5/17-16 (“fraudulent production of infant”); 5/17-23 (“fraudulent schemes and artifices”); 5/17B-0.05 et seq. (“WIC fraud”); 5/46-1 (“insurance fraud”); 5/46-1.1 (“fraud on a governmental entity”); 5/46-2 (“aggravated fraud”); 5/46-3 (“conspiracy to commit fraud”); 5/46-4 (“organizer of an aggravated fraud conspiracy”); 365/0.01, /1 (Telephone Charge Fraud Act).

Under the proposed Code, liability for theft, or its attempt, would be appropriate for most of the conduct criminalized by these current “fraud” offenses. See proposed Section 2103 (theft by deception), Section 2106 (theft of services), and corresponding commentary. For example, the current offenses of “insurance fraud” (5/46-1) and “fraud on a governmental entity” (5/46-2) are aimed at the very specific conduct of attempting to obtain property by making a false insurance claim. Such conduct would be properly characterized as attempted theft by deception under the proposed Code.²¹⁴ Additional liability would be available, however, if the particular means by which one attempts to achieve such “insurance fraud” or “fraud on a governmental entity” involves an independent harm. For example, forgery liability would be appropriate where one submits a forged police report to an insurance company in support of a false claim. See proposed Section 3101 and corresponding commentary.

Similarly, 5/17B-5 and 5/17B-10’s offenses criminalizing “WIC fraud”²¹⁵ are aimed at efforts to accomplish theft through the Special

²¹⁴ The proposed Code also omits other provisions in current Article 46. The proposed Code does not incorporate current 5/46-2’s aggravation for filing three or more false claims within an 18-month period, but the proposed grading provision for theft would allow for aggregation of amounts of “thefts committed pursuant to one scheme or course of conduct.” See proposed Section 2109(7) and corresponding commentary. Current 5/46-3’s offense for “conspiracy to commit fraud” is addressed by Article 800’s inchoate offense for conspiracy. See proposed Section 803 and corresponding commentary. Current 5/46-4’s additional offense for being an “organizer of an aggravated fraud conspiracy” is addressed by Section 905(4)’s grade adjustment for leaders of criminal organizations. Current 5/46-5, authorizing civil damages, is expected to be preserved elsewhere in Illinois law through “conforming amendments” legislation.

²¹⁵ Current 5/17B-15 also sets forth an offense criminalizing possessing another’s WIC identification card “for an unlawful purpose.” Under the proposed Code, such inchoate conduct would be probably be treated as attempted impersonation, see proposed Section 3105; an attempt of the crime intended to be committed with the identification card; or perhaps a violation of the proposed offense for possession of an “instrument of crime,” see proposed Section 808.

Supplemental Nutrition Program for Women, Infants and Children, whether by stealing commodities that would be used by program participants or by stealing public funds used for the program. This objective is made clear by current 5/17B-20, which grades the offense, like theft, according to the value of the property involved in the violation.²¹⁶ Where one attempts or accomplishes theft by means that cause independent harm, however, the proposed Code's multiple-conviction provision will allow liability for both theft (or attempted theft) and another offense.²¹⁷ For example, liability for both theft by deception and forgery — rather than a single offense of “WIC fraud,” as under current 5/17B-5(i) — would be appropriate where one obtains groceries by using a counterfeit food instrument.

In addition to the current provisions noted above, Chapter 720 contains a variety of offenses that have not been incorporated because they address narrow regulatory issues that properly belong outside the Criminal Code: 305/0.01 to /2 (Gasoline Price Advertising Act); 320/0.01 to /4 (Horse Racing False Entries Act); 325/1 to /5 (Insurance Claims for Excessive Charges Act); 330/0.01 to /2 (Loan Advertising to Bankrupts Act); 350/1 to /4 (Sale Price Ad Act); 720 ILCS 355/0.01, /1 (the Stallion and Jack Pedigree Act); 625/0.01 to /3 (Grain Coloring Act).

Finally, the proposed Code omits current law's provision of criminal liability in 5/17A-1 and 5/17A-3 for former Nazis who receive state benefits

²¹⁶ Another aim of the current “WIC fraud” provisions is to impose corporate liability. See 720 ILCS 5/17B-20 (grading offense for violation by “firm, corporation, association, agency, institution, or other legal entity”). The proposed Code's provision governing corporate liability would not allow for felony liability for corporations, insofar as the proposed theft provisions do not “indicate[] a legislative purpose to provide liability for a corporation.” See proposed Section 701 and corresponding commentary. Nevertheless, serious fines will be available for corporations under proposed Article 900, which, in addition to authorizing fines for corporations that are twice as much as those for individuals, authorizes fines in the amount of “twice the harm caused or gain derived” by an offense. See proposed Section 904 and corresponding commentary.

Additionally, it is anticipated that 5/17B-25's forfeiture rules and 5/17B-30's civil provision regarding future participation in the WIC program will be preserved elsewhere in the Illinois statutes through the “conforming amendments” bill to be presented to the General Assembly.

²¹⁷ Another example is current 5/33C-1's offense of “fraudulently” obtaining or retaining certification as a minority- or female-owned business. Under the proposed Code, theft liability would be appropriate for acquiring such a certification, which is certainly “property,” by deception. Additionally, although 5/33C-1 does not explicitly require making a false written statement, “fraudulently” obtaining a certification as a minority- or female-owned business will almost invariably involve a violation of at least proposed Section 5202's offense for unsworn falsification, if not Section 5201's perjury offense for sworn falsification. (It is anticipated, however, that the portion of current 5/33C-1 criminalizing fraudulently *retaining* a certification will be preserved elsewhere in Illinois law through a “conforming amendment,” as would current 5/33C-5's definitions if that offense were moved somewhere other than the Business Enterprise for Minorities, Females and Persons with Disabilities Act, 30 ILCS 575/1 et seq.)

despite being subject to deportation orders for acts committed abroad several decades ago. Although it is unlikely that these offenses would apply to many people, the conduct covered by current 5/17A-1 and 5/17A-3 would seem to almost invariably involve a falsification offense of some sort, and, if benefits are actually acquired through deception as to one's Nazi past, theft by deception. See proposed Section 2103 (theft by deception), Section 5202 (unsworn falsification), and corresponding commentary. Moreover, the regulatory content of current Article 17A, including 5/17A-3.1's rule regarding restoration of benefits, may be preserved elsewhere in the Illinois statutes if desired.

ARTICLE 4100. OFFENSES AGAINST THE FAMILY

Note:

Article 4100 eliminates the current offenses of adultery and fornication. See 720 ILCS 5/11-7, 5/11-8. All indications are that these provisions are currently unenforced, despite the fact that they present no special difficulty in terms of identifying offenders. Such non-enforcement can only reflect a conscious decision that imposition of liability for these offenses is improper, or at least a waste of State resources. Maintenance of dead-letter statutes of this kind provides no benefit, but imposes significant costs, as it tends to invite abuse and to undermine the criminal law's authority as a comprehensive and accurate reflection of the governed community's sense of what behavior is sufficiently serious to merit imposition of the criminal sanction. Accordingly, the proposed Code abolishes these criminal offenses. Any civil-law consequences of the underlying conduct, however, would remain in force. See proposed Section 104.

Section 4101. Incest

Corresponding Current Provision(s): 720 ILCS 5/11-11

Comment:

Generally. This provision prohibits sexual relations between certain family members.

Relation to current Illinois law. Section 4101 is substantively similar to current 5/11-11, with three differences. First, the term “sexual penetration” has been replaced with “sexual intercourse” to keep this provision’s terminology consistent with other offenses in the proposed Code. Cf. proposed Section 1301(3) (defining “sexual intercourse”). Second, and more importantly, the offense has been expanded to include “sexual conduct” between family members. Such conduct merits inclusion because it addresses significant sexual acts not encompassed within the definition of sexual intercourse, such as the touching or fondling of genitalia. See proposed Section 1302(2) (defining “sexual conduct”); 720 ILCS 5/12-12(e) (same).

Third, Section 4101 eliminates the requirement in current law that the child of an offending parent or step-parent must be over the age of 18 for the sexual act to constitute incest. Presumably, current law includes the minimum-age requirement to distinguish this offense from sexual assault offenses that are specifically defined to prohibit sexual intercourse with minor family members. See, e.g., 720 ILCS 5/12-13(a)(3). Under the proposed Code, the independent harms from sexual relations between family members and sexual relations with minors are addressed separately, under Section 4101 and the Article 1300 offenses. In cases where both harms are involved, the offender could be charged, and convicted, of both incest and

the relevant sexual assault offense. (Cf. proposed Sections 253 and 254 and corresponding commentary.) Under the proposed scheme for multiple convictions, each such conviction would contribute to the offender's total sentence, so neither would be irrelevant. (See proposed Section 906 and corresponding commentary.)

Section 4102. Bigamy

Corresponding Current Provision(s): 720 ILCS 5/11-12; 5/11-13

Comment:

Generally. This provision prohibits marriage by persons already married.

Relation to current Illinois Law. Section 4102(1) and (2) cover the offenses in current 5/11-12 and 5/11-13, with one minor difference. Section 4102 includes any bigamist (or person who marries a bigamist) who resides in Illinois following an unlawful second marriage, while current 5/11-12(a) reaches only one who “cohabits” in Illinois following such a marriage. There seems to be no reason to limit the reach of bigamy as current law does, as the harms of bigamy — desertion, and possible injury to the spousal property interests, of the lawful spouse; deception of civil and possibly religious authorities and, in all likelihood, the second spouse — exist whether the bigamist lives with the second spouse or not.

Section 4102(3) retains the absent-spouse defense in current 5/11-12(b)(3), but eliminates the other defenses in 5/11-12(b) as unnecessary. Current 5/11-12(b)(1), which provides an affirmative defense in cases where the prior marriage was dissolved or declared invalid, is redundant of the offense requirement that the defendant “hav[e] a spouse” at the time of the second marriage. The defenses in current 5/11-12(b)(2) and (b)(4) for one who reasonably believes his spouse to be dead, or that he is legally eligible to remarry, are also unnecessary, as the offense requires that the offender be at least reckless as to the fact that he still has a spouse. See proposed Section 205(3) (providing that culpability level of recklessness is to be “read in” where none otherwise stated). A reasonable mistake as to the prior spouse's death or the offender's ability to remarry would negate the offense's culpability requirement, precluding liability. See proposed Section 207 and corresponding commentary.

Section 4102(4) imposes the same offense grade (Class A misdemeanor) for both bigamy and marrying a bigamist. Under current law, bigamy (5/11-12) is a Class 4 felony, while marrying a bigamist (5/11-13) is a Class A misdemeanor. There appears to be little reason to punish a person who knowingly marries a bigamist any less severely than the bigamist, as each person causes the same harm. Moreover, a person who knowingly marries a bigamist would be subject to the same penalty under normal accountability rules. (See proposed Section 301 and corresponding commentary.)

Section 4103. Child Abandonment

Corresponding Current Provision(s): 720 ILCS 5/12-21.5; 5/12-21.6; 130/1 to 130/2; 150/1; 150/2; 150/4.1; 150/5

Comment:

Generally. This provision defines an offense penalizing parents or legal guardians who leave a child without adequate supervision for an extended period of time, thereby jeopardizing the child's welfare.

Relation to current Illinois law. Section 4103 is nearly identical to current 5/12-21.5,²¹⁸ except that Section 4103(1) breaks down the corresponding language in 5/12-21.5(a) into subsections to enhance clarity, and 4103(2)(m) merges into one subsection the factors in current 5/12-21.5(b)(13) and (15). Additionally, Section 4103 eliminates as unnecessary the grade enhancement in current 5/12-21.5(d) for subsequent offenses, as the proposed Code contains a general enhancement provision for recidivism. (See proposed Section 905(1) and corresponding commentary.)

Section 4103 (along with some other proposed provisions, as noted below) replaces or supersedes several specific child-safety provisions in current law. First, current 5/12-21.6 (endangering the life or health of a child) has been eliminated, as the conduct prohibited in that section is covered by the general endangerment offense (proposed Section 1202). (Current 5/12-22, covering special sentencing and disposition issues related to child abandonment, has also been removed, as those issues are properly addressed in the Code of Corrections.)

Second, Sections 4103 to 4105 (and proposed Section 1202) also replace the Neglected Children Offense Act (720 ILCS 130/1 *et seq.*), which prohibits parents and guardians from causing minors to become dependent or neglected children. The special sentencing rules in current 130/2 and 130/2a have been removed, as they are properly addressed in the Code of Corrections. Current 130/3 addresses an evidentiary issue that properly belongs in the Code of Criminal Procedure.

Finally, the proposed Code replaces the Wrongs to Children Act (720 ILCS 150/1 *et seq.*). Within that act, current 150/1 and 150/2 impose liability for allowing or encouraging children under age 14 to be employed as street or circus entertainers. Such conduct falls within proposed Section 4103 and proposed Section 1202 (endangerment). Current 150/3 and 150/3.1 address family law matters that are properly dealt with outside the Criminal Code. Current 150/4.1, prohibiting abandonment by school bus drivers, is covered by the general endangerment offense (proposed Section 1202). Current 150/5.1, which punishes parents or guardians who permit children to be sexually

²¹⁸ Like the current offense, Section 4103 is not intended to apply to one who "relinquishes a child in accordance with the Abandoned Newborn Infant Protection Act [325 ILCS 2/1 *et seq.*]." 720 ILCS 5/12-21.5(a).

abused, was recently ruled unconstitutional on its face. See People v. Maness, 732 N.E.2d 545 (Ill. 2000). The conduct prohibited in that section is covered by proposed Sections 1301(2) and 6203(1)(d) (q.v.).

Section 4104. Harboring or Assisting a Runaway

Corresponding Current Provision(s): 720 ILCS 5/10-6; cf. 5/10-8; see also 225 ILCS 10/2.21; 705 ILCS 405/3-5; 750 ILCS 30/1 et seq.

Comment:

Generally. This provision creates an offense to penalize adults who harbor or assist a child in running away from home without parental consent.

Relation to current Illinois Law. Section 4104 is substantively similar to current 5/10-6. The proposed provision does not incorporate the offense contained in current 5/10-8 (defining a Class C misdemeanor for unlawful sale of public conveyance travel ticket to minor), for two reasons: (1) that offense seems too trivial to warrant criminal condemnation, and (2) that offense imposes liability for negligence, and the criminal law is usually reluctant to impose such liability. The conduct 5/10-8 seeks to prevent is more properly addressed by means of civil business regulations.

Section 4105. Contributing to the Delinquency of a Minor

Corresponding Current Provision(s): 720 ILCS 5/33D-1; 130/1 to /3; 150/1; 150/5; 640/1; 640/2

Comment:

Generally. This provision covers conduct by adults that contributes to the delinquency of a minor by exposing the minor to, or inducing the minor to participate in, criminal activity.

Relation to current Illinois law. Section 4105(1) is nearly identical to current 5/33D-1(a).

Section 4105(2) is substantively similar to current 640/1 to /2 and is intended to cover the same conduct as the current offense. However, the proposed provision replaces several of the prohibited associations in current law with the more general and inclusive phrase “persons engaged in criminal activity.”

Section 4105(3)(a) grades the offense under Section 4105(1) as a Class A misdemeanor, regardless of the severity of the underlying crime. Current 5/33D-1(b), by contrast, punishes the offense at one grade higher than the underlying crime committed by the juvenile. Section 4105(3)(a) rejects that grading method based on the recognition that the offending adult’s responsibility for the underlying crime is already addressed by

standard rules governing accountability or inchoate liability for solicitation. (See proposed Sections 301 and 802 and corresponding commentary.) If accountable for the juvenile's crime, the defendant would be eligible to receive a total sentence for the multiple offenses similar to the sentence for which current 5/33D-1(b) provides. (See proposed Sections 254 and 906 and corresponding commentary.) Section 4105(3)(a) thus disaggregates the harm from the adult's solicitation of, or participation in, the underlying crime from the distinct harm of contributing to the minor's delinquency, and imposes a sanction that addresses only the latter harm, with which this provision is specifically concerned.

Section 4105(3)(b), like current 640/2, grades improper supervision as a petty offense.

Section 4106. Persistent Non-Support

Corresponding Current Provision(s): 750 ILCS 16/15

Comment:

Generally. This provision creates liability for persons who habitually fail to provide financial support for their children or spouse.

Relation to current Illinois law. Section 4106 is substantively similar to current 750 ILCS 16/15, with four minor changes. First, Section 4106(1) eliminates the “willfully” requirement from current 16/15(a), as that word no longer reflects a culpability term used in the Code. (See proposed Section 206 and corresponding commentary.) The proposed provision states no culpability term, thus requiring recklessness as to the refusal or failure to provide support. (See proposed Section 205(3) and corresponding commentary.) Second, Section 4106(2) formally changes the presumption in current 16/15(a-5) to a permissive inference, as is already required under the Constitution. (See proposed Section 107 and corresponding commentary.) Third, the aggravation provided for in 16/15(a)(3) and (4) and (b) has been changed so that either flight from the State, *or* failure to pay for six months or in an amount totaling \$5,000, will aggravate the offense to a Class 4 felony, rather than both being required. Finally, the grade enhancement in current 16/15(b) for subsequent offenses has been removed as unnecessary, as the proposed Code contains a general enhancement provision for recidivism. (See proposed Section 905(1) and corresponding commentary.)

Section 4106 also removes from 750 ILCS 16/15 two subsections (16/15(c) and (d)) that belong outside the Code, as they address sentencing issues that are more properly addressed in the Code of Corrections.

Section 4107. Abortion

Corresponding Current Provision(s): 720 ILCS 510/1 to /15

Comment:

Generally. This provision covers conduct related to early termination of pregnancies.

Relation to current Illinois law. Section 4107 incorporates current 510/1 to 510/15 of the Illinois Abortion Law of 1975 (720 ILCS 510/1 et seq.).

Current 513/1 to 513/99 of the Partial-Birth Abortion Ban Act (720 ILCS 513/1 et seq.) have not been incorporated, as that act has recently been declared unconstitutional. See Hope Clinic v. Ryan, 249 F.3d. 603 (7th Cir. 2001).

Section 4108. Charging Unlawful Fee for Adoption

Corresponding Current Provision(s): 720 ILCS 525/0.01 to /5

Comment:

Generally. This provision covers the payment of fees related to the adoption of children.

Relation to current Illinois law. Section 4108 incorporates current 525/0.01 to 525/5 of the Adoption Compensation Prohibition Act (720 ILCS 525/0.01 et seq.).

Section 4109. Definitions

Corresponding Current Provision(s): 720 ILCS 5/2-15a; 5/2-19; 5/12-12; 510/2(4); see also 225 ILCS 10/2.21; 750 ILCS 30/1 et seq.

Comment:

Generally. This provision collects defined terms used in Article 4100 and provides cross-references to the provisions in which they are defined.

Relation to current Illinois law. For a discussion of the relationship between Article 4100's defined terms and current law, refer to the commentary for the provision in which the term in question is initially defined.

ARTICLE 5100. BRIBERY AND OFFICIAL MISCONDUCT

Section 5101. Bribery

Corresponding Current Provision(s): 720 ILCS 5/33-1; see also 720 ILCS 5/32-4b; 5/33E-7; 5/33E-8; 645/1; 645/2; 10 ILCS 5/29-1 to -3; 225 ILCS 650/19; 230 ILCS 5/39; 230 ILCS 10/18; 305 ILCS 5/8A-3; 305 5/8A-6; 305 ILCS 5/8-14; 305 ILCS 5/8A-16

Comment:

Generally. This provision creates an offense covering the use of property or personal advantage to influence a public servant in the performance of his duties.

Relation to current Illinois Law. Section 5101 is similar to current 5/33-1, but has been reorganized and expanded to incorporate numerous other bribery offenses in current law. Section 5101(1) covers the conduct in current 5/33-1(d) and (e) by prohibiting a person from knowingly soliciting, accepting, or agreeing to accept a bribe. Section 5101(2) covers the conduct in current 5/33-1(a) to (c) by prohibiting a person from knowingly conferring, offering, or agreeing to confer any benefit that would constitute a bribe under Section 5101(1).

The proposed formulation alters current 5/33-1 in four minor respects. First, Section 5101 requires that the offender act knowingly in soliciting or offering the bribe, but requires only recklessness as to whether he or the other person is “authorized by law” to accept the benefit. See proposed Section 205(3) (providing that culpability level of recklessness is to be “read in” where none otherwise stated). The current offense is similar, but sometimes requires an additional “intent to influence” an official, or knowledge of another’s intent to influence an official. Section 5101 requires only that the person be “knowing” as to the benefit’s serving as “consideration for influencing or agreeing to influence” an official’s performance. This formulation captures all cases in which the offender understands the improper nature of the transaction, and avoids a potentially complex requirement of knowledge of another person’s “intent.”

Second, Section 5101 defines a single offense that includes bribes, offers, or solicitations made to any person.²¹⁹ The current provision, on the other hand, rather clumsily defines several different offenses for bribes to actual public servants, people thought to be public servants, and people meant to influence public servants — even though all the offenses have the same grade.

Third, Section 5101(2) changes the conduct element of “promises or tenders” in current 5/33-1(a) to (c) to “confers, offers, or agrees to offer.” The new language is not meant to effect a substantive change, but is considered plainer and easier to understand than the somewhat legalistic term “tenders.” Moreover, the proposed provision is worded to be consistent with the commercial bribery provision in Section 3109.

Fourth, Section 5101 has been broadened to include public contractors and voters in addition to public servants,²²⁰ jurors, and witnesses. By expanding the scope of the offense beyond the groups covered by current 5/33-1, Section 5101 is able to cover the many specific bribery offenses in current law.²²¹

²¹⁹ It might be contended that someone who is not a public servant is “authorized by law to accept” an offered bribe, so that such an offer would fall outside the scope of Section 5101(1)(b). The proposed Code, however, is not meant to contemplate any such result. A recipient of a bribe offer is not “authorized by law” to obtain anything of value either as consideration for trying to influence official conduct, or by deceiving the offeror into thinking that he intends to do so. In the first case, the person would himself be violating Section 5101(1), and in the second case, he may be guilty of theft by deception under proposed Section 2103. In any case, any residual conduct that 5/33-1 covers, but that would not be a substantive offense under Section 5101(1), would constitute an *attempt* to violate Section 5101(1) under proposed Section 801.

²²⁰ The proposed Code replaces the terms “public officer” and “public employee” with the more inclusive term “public servant.” See proposed Section 108 and corresponding commentary.

²²¹ Two related offenses, current 5/32-4c (covering payments to witnesses and potential witnesses for their testimony) and 5/32-4d (covering payments to jurors following a legal proceeding), are not incorporated within the proposed Code. Section 5101 does not cover current 5/32-4c, as the current provision does not require any objective of improperly influencing the proceeding, and appears aimed only at the appearance of impropriety. Likewise, 5/32-4d’s prohibition against payments to jurors after a proceeding falls outside Section 5101, as the payments would not relate to the “function” of a juror. It is expected that current 5/32-4c and -4d will be preserved and moved outside the Criminal Code by means of “conforming amendments” legislation.

Section 5101 replaces four bribery offenses in Chapter 720.²²² The first of these is current 5/32-4b, which defines a Class 3 felony prohibiting bribery to excuse persons from jury duty. Section 5101 includes bribes to jurors and grades them as a Class 2 felony — that is, the same offense grade as any other form of bribery. See also proposed Section 5310 (improperly influencing juror by threat; Class 2 felony).²²³

Second, Section 5101 replaces current 5/33E-7(a),²²⁴ which creates a separate Class 3 felony for “kickbacks.” Although not defined in current law, kickbacks appear to be a specific type of bribe involving a payment of money to influence the awarding of public contracts. Section 5101(1) covers this conduct by prohibiting bribery with the intent to influence any “independent contractor working on a public project.” Again, Section 5101 grades this type of bribery the same as other forms of bribery, as a Class 2 felony.

The third specific current offense, 5/33E-8, relates to bribery of inspectors employed by public contractors. The provision defines a Class 4 felony for offering such a bribe and a Class 3 felony for any person employed by a public contractor to accept such a bribe in return for wrongful certification. Section 5101 replaces this offense and grades such conduct — as an attempt to influence an “act related to the employment or function of . . . an independent contractor working on a public project” — as a Class 2 felony, the same as all other forms of bribery, regardless of whether the person is offering or accepting the bribe or whether any wrongful certification is in fact provided.²²⁵

²²² Section 5101 also replaces a number of specific bribery provisions outside current Chapter 720. See, e.g., 10 ILCS 5/29-1 to -3 (buying, promising, or selling of votes; Class 4 felony); 225 ILCS 650/19(B) (bribe to influence meat and poultry inspector; Class 4 felony); 230 ILCS 5/39(a)(1) (bribe to horse racing official or jockey; Class 4 felony); 230 ILCS 10/18(d)(1) (bribe to influence Gaming Board member or outcome of game; Class 4 felony); 305 ILCS 5/8A-3, -6 (public assistance kickbacks; Class A misdemeanor to Class 1 felony, depending on amount of funds affected); 305 ILCS 5/8A-14 (bribery relating to government-funded health plan; Class A misdemeanor to Class 1 felony, depending on amount of funds affected); 305 ILCS 5/8A-16(b)(5) (“kickback, bribe, reward, or benefit” to influence selection of health plan; Class A misdemeanor). Each of these sections imposes an offense grade that differs from current law’s general bribery offense. As there appears to be no logical reason for these grading distinctions, Section 5101 grades all forms of bribery the same.

²²³ Section 5101 does not incorporate the procedural rules in current 5/32-4b regarding jury commissioners convicted of bribery, as those are more properly addressed outside the Code in the Jury Commission Act (705 ILCS 310/1 et seq.).

²²⁴ Current 5/33E-7(b) is covered by proposed Section 5102. Section 5101 also does not incorporate current 5/33E-7(d), as that provision addresses civil matters more properly addressed outside the Code.

²²⁵ As with current law, Section 5101 generally does not require the actual performance of an illegal or unauthorized act in return for the offer or payment of a bribe. See, e.g., People v. Wright, 434 N.E.2d 26, 28 (Ill. App. 1982).

Finally, Section 5101 replaces current 645/1 and 645/2, which define a separate Class 3 felony covering bribery involving members of the General Assembly. There appears no rational reason to punish this specific type of bribery less severely than other forms of bribery.

Section 5101(3)(b) makes an exception to the uniform grading scheme in the case of bribery involving voters. Unlike the other classifications in 5101(1)(a), bribery in the voting context usually involves, and likely would require, numerous instances of the offense in order to substantially affect the public process involved (e.g., a statewide election or primary). As such, the harmful impact of each instance of the offense is somewhat diluted relative to bribery of, for example, a single juror, which may profoundly affect the outcome of a proceeding. Further, an offender may be subject to multiple-offense liability for multiple counts of bribing voters, thus raising his total sentence beyond that authorized for a single Class 4 offense. See proposed Sections 254 and 906 and corresponding commentaries. Current 10 ILCS 5/29-1 to -3 and -20 similarly grade buying or selling of votes as a Class 4 felony.

Section 5102. Failure to Report a Bribe

Corresponding Current Provision(s): 720 ILCS 5/33-2; see also 720 ILCS 5/33E-7(b); 5/33E-8(b)

Comment:

Generally. Section 5102 criminalizes the failure of a public official, employee, contractor, juror, or witness to report a bribery offer to the proper authorities.

Relation to current Illinois law. Section 5102(1) is similar to the first paragraph of current 5/33-2,²²⁶ but has been reorganized to enhance clarity. Section 5102 also covers the same conduct as two other, more specific current failure-to-report offenses, 5/33E-7(b) and 5/33E-8(b).

Because the offense may apply to private citizens, such as public-contract bidders, and not only to public servants (who are more likely to be aware of a more specific duty), the proposed Code follows 5/33E-7(b) and 5/33E-8(b) rather than 5/33-2, imposing a general obligation to report a bribe offer to “law enforcement authorities” (a defined term under the proposed Code, see proposed Section 108), rather than a more specific duty to report to particular officials.

Section 5102(2) grades the offense as a Class 4 felony when the party failing to report is someone generally bound by a public duty — for example, a public servant — and as a Class A misdemeanor for others. Liability for this

²²⁶ The second paragraph of 5/33-2, requiring the police to relay a report of a bribe offer to the State’s Attorney, has not been incorporated, as such matters may be addressed outside the Criminal Code.

omission offense is thus more limited for members of the general public, who are less likely to know they are bound by an official duty to report misconduct of this sort. By contrast, current law grades the failure to report kickbacks (5/33E-7) and bribes (5/33E-8) involving public contractors as Class 4 felonies, whereas the 5/33-2 offense for an official's failure to report a bribe offer is a Class A misdemeanor. No logical basis for this grading scheme is apparent; if anything, it would make sense for public servants to be held to a higher standard of affirmative duty than private contractors.

Section 5103. Official Misconduct

Corresponding Current Provision(s): 720 ILCS 5/33-3; see also, e.g., 720 ILCS 5/25-2; 5/33E-5, -6, -9, -16, -17; 310/1; 310/2; 15 ILCS 520/21 to /23; 30 ILCS 230/2b; 40 ILCS 5/15-189; 50 ILCS 705/6.1; 55 ILCS 5/3-11019; 210 ILCS 45/3-212; 225 ILCS 705/4.20 to /4.22; 305 ILCS 5/8A-5 to -6

Comment:

Generally. This provision creates a general offense covering situations where public employees or officials abuse their positions by acting outside their lawful authority.

Relation to current Illinois law. Section 5103 is nearly identical to current 5/33-3, except that the culpability term “intentionally” has been eliminated from current 5/33-3(a) as superfluous and potentially confusing. Under the proposed General Part, proof of an intentional act would satisfy Section 5103(1)’s “knowingly” requirement. (See proposed Section 205(6) and corresponding commentary.) Section 5103, like current 5/33-3, prohibits public officials and employees from engaging in a broad range of unlawful activities.²²⁷

²²⁷ Official misconduct may be predicated upon a defendant’s violation of another statute, a Supreme Court rule, or an administrative rule or regulation, regardless of whether the underlying rule prescribes a penalty for its violation. See People v. Samel, 451 N.E.2d 892, 896-97 (Ill. App. 1983).

Section 5103 addresses conduct prohibited by six specific misconduct offenses in current Chapter 720.²²⁸ Current 5/33E-5 and 5/33E-6 prohibit the wrongful acquisition, disclosure, interference, or awarding of bidding information by public officials or employees, while current 5/33E-9 prohibits public officials and employees from approving change orders in violation of specified procedures.²²⁹ Depending on the type of violation, current 5/33E-5 and 5/33E-6 grade such conduct as either a Class 3 or Class 4 felony, and current 5/33E-9 defines a Class 4 felony. Section 5103 grades all such offenses as Class 3 felonies.²³⁰

²²⁸ Section 5103 also addresses some of the conduct prohibited in current 5/12-7 (compelling confession or information by force or threat); 5/25-2 (police misconduct in allowing lynchings of suspected criminals); 5/32-4 (prohibiting peace officers and correctional officers from committing acts in furtherance of gang-related activities); and 5/32-5 (intentional failure to comply with criminal procedure rules regarding the chain of custody of evidence).

Moreover, current law contains a number of specific official misconduct offenses outside the Code that overlap with the general misconduct offense. *See, e.g.*, 15 ILCS 520/21 to /23 (profiting from public monies or misappropriating state securities; Class 3 felony); 30 ILCS 230/2b (failure to keep proper books, participating in trust fund of money received due to office, or any other violation of Act; Class 4 felony); 40 ILCS 5/15-189 (member of board of State Universities Retirement System having direct interest in investments); 50 ILCS 705/6.1 (failure of convicted police officer to report conviction; Class 4 felony); 55 ILCS 5/3-11019 (county officer using county money for profit, Class 3 felony; any other violation of Act, Class 4 felony); 210 ILCS 45/3-212 (nursing home inspector profiting from confidentiality violation, Class 4 felony, or giving prior notice of inspection, Class A misdemeanor); 225 ILCS 705/4.20 to /4.22 (state mine inspector or Department of Natural Resources employee accepting or soliciting contribution or gratuity; Class 4 felony); 305 ILCS 5/8A-5 to -6 (misappropriation of public assistance funds; Class A misdemeanor to Class 1 felony, depending on amount).

Many specific provisions outside Chapter 720 define Class 4 felonies prohibiting specific types of officials from taking a financial interest in any contract with the government entity to which they belong. *See, e.g.*, 20 ILCS 1705/44 (Department of Human Services employee); 50 ILCS 105/3 to /4 (any person holding office under state law); 60 ILCS 1/85-45 (township official); 65 ILCS 5/3.1-55-10 (municipal official); 65 ILCS 5/4-8-6 (officer in commission form of government); 70 ILCS 210/25.3 (Metropolitan Pier and Exposition Authority member); 70 ILCS 705/4 (fire protection district officer); 70 ILCS 2605/11.18 (sanitary district officer); 105 ILCS 5/10-9 (school board member); 110 ILCS 805/3-48 (community college board member); 605 ILCS 5/6-411.1 (road district officer).

²²⁹ Note that Section 5103 is intended to cover conduct distinct from that prohibited by proposed Section 3110, which generally applies to public contract bidders, rather than the officials who deal with their bids. Where a person's conduct violates both Section 5103 and the bid-rigging offense in Section 3110, however, liability for both offenses would be governed by proposed Section 254.

²³⁰ With respect to State officials and employees, the conduct forbidden in current 5/33E-5 and 5/33E-6 is likely also covered by current sections 500/20-10, 20-35, 50-1, 50-45, and 50-50 of the Illinois Procurement Code (30 ILCS 500/1-1 *et seq.*), as well as by various administrative rules and regulations. There appears to be no existing statute outside the Criminal Code that specifically proscribes the conduct covered in current 5/33E-9. To the extent it would remain necessary or desirable for Illinois law to point out that the specific underlying conduct described in 5/33E-5, -6, and -9 is "forbidden by law" or "in excess of . . . lawful authority," such prohibitions should be codified in a proper place outside the Criminal Code (e.g., in the specific regulations governing relevant officials or employees) through "conforming amendments" legislation. It is also anticipated that the related provisions in current 5/33E-1, -2, -10, and -13 will be preserved outside the Criminal Code through conforming amendments.

Current 5/33E-16 and 5/33E-17 prohibit officials or employees of a local government or school district from misapplying funds or participating in a public contract with the intent to defraud. The conduct covered in those sections would clearly count as “forbidden by law” — in fact, it is explicitly *criminal* under the proposed theft and fraud sections, and therefore would violate those provisions in addition to proposed Section 5103(1)(b) and (c). Like the current provisions, Section 5103 grades these acts as Class 3 felonies.

Current 310/1, which forbids certain sales between governments and their officials and employees, has not been incorporated by the proposed provision, as it properly belongs outside the Criminal Code.

Section 5103(2) retains the special grading provision in current 5/33-3(d) requiring a public servant to forfeit his employment, but clarifies that the provision only applies to public servants of this State or any of its political subdivisions, as opposed to federal public servants.

Section 5104. Definitions

Corresponding Current Provision(s): 720 ILCS 5/2-17, 5/2-18; 5/15-1

Comment:

General. This provision collects defined terms used in Article 5100 and provides cross-references to the provisions in which they are defined.

Relation to current Illinois law. For a discussion of the relationship between Article 5100’s defined terms and current law, refer to the commentary for the provision in which the term in question is initially defined.

ARTICLE 5200. PERJURY AND OTHER OFFICIAL FALSIFICATION OFFENSES

Section 5201. Perjury

Corresponding Current Provision(s): 720 ILCS 5/32-2; 5/32-3; see also, e.g., 720 ILCS 540/0.01, /1; 10 ILCS 5/29-10(a); 15 ILCS 335/14C(a)(3); 55 ILCS 5/1-5013; 110 ILCS 1010/8; 205 ILCS 657/90(h); 220 ILCS 5/6-106; 225 ILCS 41/15-75(a)(6); 225 ILCS 60/58; 225 ILCS 203/90(a); 225 ILCS 305/36(b); 225 ILCS 410/4-20(4); 225 ILCS 446/190(a); 235 ILCS 5/10-1(c); 415 ILCS 5/44(h)(1)

Comment:

Generally. This provision defines the offense of perjury, which, like other offenses in Article 5200, aims to protect the integrity of information relied on by the government. Section 5201 treats perjury as especially serious because the offense involves falsification under an oath or equivalent affirmation. As the Illinois Supreme Court has recognized, “[t]he law attaches superior effect to statements made under oath, and [the offense] is designed to insure that all such statements merit the trustworthiness which the law assigns to them.” Loraitis v. Kukulka, 116 N.E.2d 329, 331 (Ill. 1953).

Relation to current Illinois law. Section 5201(1) is substantively the same as current 5/32-2(a),²³¹ but removes from the offense definition the

²³¹ In addition to current 5/32-2(a), current Illinois law contains numerous offenses criminalizing making false statements under oath or affirmation about particular matters, in particular documents, and in particular proceedings. See, e.g., 720 ILCS 540/0.01, /1 (swearing, affirming, or testifying “wilfully, corruptly and falsely” on application to become surety or bail); 10 ILCS 5/29-10(a) (perjury under Election Code); 15 ILCS 335/14C(a)(3) (perjury under Identification Card Act); 205 ILCS 657/90(h) (making false statement in document required to be maintained or filed under Transmitters of Money Act); 220 ILCS 5/6-106 (false statement in Illinois Commerce Commission proceeding regarding issuance of stocks or bonds by public utility); 415 ILCS 5/44(h)(1) (false statement in application for permit or license required to deal with hazardous waste). These overlapping offenses create unnecessary and undesirable confusion.

For example, several provisions prohibit the making of a “false oath or affirmation,” rather than the making of a “false statement” under that oath or affirmation. See, e.g., 225 ILCS 41/15-75(a)(6) (“making false oath or affidavit required by” Funeral Directors and Embalmers Licensing Code); 225 ILCS 305/36(b) (“making of any wilfully false oath or

(continued...)

current provision's requirements that the false statement be "material to the issue or point in question" and made under an oath or affirmation that was legally required. Those requirements are instead addressed by Section 5201(3) and (4).²³² Section 5201(1) also codifies the Illinois courts' construction of current 5/32-2(a) by explicitly requiring that one make a false statement "of fact."²³³ See *People v. White*, 322 N.E.2d 1, 3 (Ill. 1974) (false statement must be "a statement of fact and not a conclusion, opinion or deduction drawn from given facts").

Section 5201(2) is substantively similar to current 5/32-2(c)'s rule governing admissions of falsity, with two modifications. First, Section 5201(2) applies more generally to admissions of falsity made in the same "proceeding" rather than in the same "trial." Section 5201(2)'s broader scope reflects the view that providing an incentive to "come clean" is as desirable in pre- and post-trial proceedings as it is at trial. There is no identifiable policy reason for providing a defense for one who admits the falsity of a contradictory statement he made earlier in the same trial, but not for one who corrects a misrepresentation made earlier in the same grand jury investigation, bond hearing, or hearing on a post-trial motion. (The defense

²³¹ (...continued)

affirmation in any matter or proceeding where an oath or affirmation is required by" Illinois Architecture Practice Act); 225 ILCS 410/4-20(4) ("wilfully making any false oath or affirmation whenever an oath or affirmation is required by" Barber, Cosmetology, Esthetics, and Nail Technology Act). This phrasing suggests, contrary to current 5/32-2(a), that only one conviction is appropriate for one who tells several lies under a single oath.

Moreover, some offenses do not explicitly impose 5/32-2(a)'s requirement that a false statement be material, but proceed to state that those who commit them are liable for "perjury." See, e.g., 110 ILCS 1010/8 ("making any false statement in any notice or amendment thereto filed pursuant to Section 4 of [the Academic Degree] Act is . . . perjury"); 225 ILCS 60/58 (person "wilfully swear[ing] or affirm[ing] falsely, or mak[ing] or fil[ing] any affidavit wilfully and corruptly," in submission under the Medical Practice Act, "shall be sentenced . . . for perjury"); 225 ILCS 203/90(a) ("If any person in making any oath or affidavit required by [the Boiler and Pressure Vessel Repairer Regulation] Act swears falsely, such person is guilty of perjury[.]"); 225 ILCS 446/190(a) ("If any person in making any oath or affidavit required by [the Private Detective, Private Alarm, Private Security, and Locksmith] Act swears falsely, the person is guilty of perjury[.]").

Finally, whereas current 5/32-2(e) grades perjury as a Class 3 felony, current Illinois law provides for various grades for other overlapping offenses. See, e.g., 55 ILCS 5/1-5013 (swearing falsely concerning right to vote; Class 4 felony); 225 ILCS 41/15-75(a)(6), noted *supra* (Class A misdemeanor); 225 ILCS 410/4-20(4), noted *supra* (Class B misdemeanor); 235 ILCS 5/10-1(c) (making false statement in obtaining liquor license; petty offense).

²³² If the materiality and "legally required" issues continued to be defined as offense elements, it is unlikely that, under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), it would still be possible to shift the burden of persuasion to the defendant for the first, or to treat the second (as both current law and Section 5201 contemplate) as an issue for the court to resolve, rather than an offense element to be proved to the jury beyond a reasonable doubt.

²³³ Section 5201(1)'s requirement that one make a false statement "of fact" does not preclude liability, however, for one who makes a false statement of fact concerning a subjective matter. This is consistent with Illinois case law holding that "a statement of belief or opinion may constitute perjury when, as a matter of fact, the witness had no such belief or opinion." *People v. Drake*, 380 N.E.2d 522, 524 (Ill. App. 1978).

is unavailable, however, where one admits the falsity of a statement made in an earlier “proceeding,” even though it remains the same *litigation*. One may not avoid liability, for example, by admitting in a post-trial proceeding that he lied at trial.)

Second, Section 5201(2)(c) introduces two limitations to ensure that the exception is not abused. Section 5201(2)(c)’s rules make it clear that perjury liability remains appropriate where one admits a false statement only after its damage is done, or only after learning that his deceit has been, or will be, discovered.

Section 5201(3)(a) provides a defense where the false statement involved is “not material to the issue or point in question.” Section 5201(3)(a) uses the same language as current 5/32-2(a), but treats materiality as a matter of defense, rather as an offense requirement, for two reasons. First, this makes clear that culpability as to materiality is not required.²³⁴ Second, treating materiality as a defense enables Section 5201(3)(b) to place the burden of persuasion on the defendant to prove that his false statement was not material by a preponderance of the evidence. Section 5201(3)(b)’s burden of persuasion recognizes the defense’s similarity to Article 250’s *de minimis* defense, for which the defendant also bears the burden of persuasion by a preponderance of the evidence. See proposed Section 252 and corresponding commentary. As with the *de minimis* defense, the defense of materiality is concerned more with the extent — rather than the existence — of the offense’s harm. If the State can establish that the defendant engaged in improper and culpable conduct by lying in a legal proceeding, it is sensible to require the defendant to demonstrate that the lie worked no harm or prejudice.

Section 5201(3) does not remove the issue of materiality from the jury, however. Current Illinois law, on the other hand, withholds the issue of materiality from the jury — although it is clearly an element of the offense under current 5/32-2(a) — under the theory that it is a “question of law for the court.”²³⁵ United States Supreme Court precedent makes it clear that this

²³⁴ A culpability requirement of recklessness is not to be “read in” under Section 205(3) as to either Section 5201(3) or Section 5201(4). Section 205(3) only operates to prescribe recklessness as to an “objective element” for which a culpability requirement is not specified. See proposed Section 205(3) and corresponding commentary. As Section 202(1) and (2)(d) make clear, “objective elements” are found only in “the offense definition or the provisions establishing the offense grade or the severity of the punishment.” See proposed Section 202 and corresponding commentary. Because Section 5201(3) and (4) are defenses, rather than offense definitions or grading provisions, no culpability is required with respect to either materiality or the legal authorization of the oath or affirmation.

²³⁵ *People v. Olinger*, 615 N.E.2d 794, 797 (Ill. App. 1993); see also *People v. Powell*, 513 N.E.2d 1162, 1166 (Ill. App. 1987) (“[T]he determination of materiality involves the relationship between an allegedly false statement and the nature of the proceeding at which it was made. We conclude that this determination is one best suited for a court with its legal expertise and is therefore a question of law.”); cf. IPI (CRIMINAL) 22.01 (4th ed. 2000) (excluding requirement from offense definition in jury instruction).

current Illinois practice is unconstitutional.²³⁶ Under proposed Section 5201, because materiality is *not* an offense element, it *would* be constitutional to allow the court to determine the issue (as Section 5201(4)(b) provides for the provision's other defense). It is thought, however, that the issue of materiality is significant enough, and relates closely enough to the seriousness of the defendant's wrongdoing, to be an appropriate jury issue. Moreover, placing the burden on the defendant to establish immateriality, as Section 5201(3)(b) does, should address any possibility of abuse or jury confusion leading to improper acquittals.

Section 5201(4)(a) treats as a defense the current requirement that the oath or affirmation be legally authorized. As with Section 5201(3)'s non-materiality defense, this makes clear that the legal authorization issue does not require either culpability or submission to the jury. Section 5201(4)(a) differs from current 5/32-2(a) in requiring proof that the oath or affirmation was "authorized," rather than "required," by law. This modification is consistent with the Illinois courts' construction of current 5/32-2(a), which has "seemingly broadened this statute so that an oath that is 'authorized,' not just 'required,' by law . . . will also support a perjury conviction." People v. Doss, 426 N.E.2d 324, 326 (Ill. App. 1981) (citing Loraitis v. Kukulka, 116 N.E.2d 329, 331 (Ill. 1953)); see also People v. House, 560 N.E.2d 1224, 1234 (Ill. App. 1990).

Section 5201(4)(b) tracks current Illinois law by providing that the legal authorization of the oath or affirmation under which the statement was made is "to be determined by the court." See People v. Dyer, 366 N.E.2d 572, 574 (Ill. App. 1977) (whether oath or affirmation was required "present[s] question[] of law for the court to decide"); cf. IPI (CRIMINAL) 22.01 (4th ed. 2000) (excluding requirement from offense definition in jury instruction).

Section 5201(5) sets forth two special evidentiary rules relating to the offense of perjury. Section 5201(5)(a) is substantively the same as current 5/32-2(b), but generally states that the "prosecution need not specify" which of two contradictory statements is false rather than specifically addressing that rule's application to charging instruments and trials.

Section 5201(5)(b) has no corresponding provision in current Chapter 720, but is substantively similar to the Illinois courts' modified "two-witness" rule, under which the direct testimony of a single witness "is sufficient . . . if it is confirmed or corroborated by other evidence of material circumstances tending to establish the falsity of the alleged perjured statement." People v. Harrod, 488 N.E.2d 316, 321 (Ill. App. 1986); see also People v. Alkire, 151 N.E.2d 518, 519 (Ill. 1926); People v. Beaton, 371 N.E.2d 131, 133-34 (Ill. App. 1977). Like the Illinois courts' current rule, Section 5201(5)(b) "requires

²³⁶ 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.").

only corroboration which tends to establish the falsity of the statement alleged to be perjurious.” Harrod, 488 N.E.2d at 322. Section 5201(5)(b)’s modified phrasing makes it clearer, however, that the rule does not require that falsity be proved by direct contradicting testimony in every case; liability is not precluded, for example, where proof of falsity rests solely upon a defendant’s written out-of-court admission.

Section 5201(6), like current 5/32-2(e), grades the offense as a Class 3 felony.

Section 5201 does not explicitly preserve current 5/32-2(d) and 5/32-3, as their content is addressed elsewhere under the proposed Code. Proposed Section 413’s general justification defense for conduct authorized by laws imposing public duties covers current 5/32-2(d)’s exemption for peace officers who are authorized by law to use fictitious names. It is anticipated that current 5/32-2(d)’s last sentence, which provides an exception to the exemption, will be preserved through a “conforming amendments” bill in those statutes outside the Criminal Code that authorize the use of fictitious names.

Current 5/32-3(a) defines a separate offense for subornation of perjury and grades it as a Class 4 felony. The proposed Code, in contrast, reaches those who solicit others to commit perjury under the general principles of complicity and inchoate liability that apply to other offenses. Section 301(1) allows for full perjury liability for one who, acting with “the culpability required by the offense,”²³⁷ successfully solicits another to commit the offense. See proposed Section 301(1) and corresponding commentary. In cases of unsuccessful solicitation, liability for the inchoate offense of solicitation is appropriate, and the offense will be graded as a Class 4 felony. See proposed Sections 802(1) and 807 and corresponding commentary.

²³⁷ Section 5201(1)(b), like current 5/32-2(a), requires that one make a false statement that he “does not believe to be true.” This language clearly falls short of requiring that the defendant actually know or believe that the statement is false. Cf. ILL. ANN. STAT. ch. 38 § 32-3 Committee Comments (Smith-Hurd 1964) (observing that “‘knows to be false’ involves a stricter requirement of proof in subornation than ‘does not believe to be true’ in perjury”). Nevertheless, several Appellate Court decisions state that “[k]nowledge of the falsity of the statement made at the time it was made is an essential element of the crime of perjury.” People v. Kang, 646 N.E.2d 279, 382 (Ill. App. 1995); see also People v. Penn, 533 N.E.2d 383, 384 (Ill. App. 1988); People v. Boyd, 401 N.E.2d 304, 306 (Ill. App. 1980); People v. Drake, 380 N.E.2d 522, 524 (Ill. App. 1978); People v. Taylor, 286 N.E.2d 122, 124 (Ill. App. 1972). Similarly, the pattern jury instructions define perjury to require that one make a false statement and “at the time he makes the statement believes it is not true.” See IPI (CRIMINAL) 22.01 (4th ed. 2000). Under the proposed Code, one’s knowledge or belief that a statement is false, although sufficient, is not necessary to prove that he “does not believe it to be true.”

Section 5202. Unsworn Falsification to Authorities

Corresponding Current Provision(s): Various; see, e.g., 720 ILCS 5/17-6(a); 5/17-15; 5/17A-1; 5/17A-3; 5/33C-1; 5/33C-2; 5/33E-14; 10 ILCS 5/29-8; 20 ILCS 3520/45(b); 30 ILCS 500/50-5(d); 35 ILCS 130/22(f); 35 ILCS 200/21-290(d); 205 ILCS 657/90(h); 205 ILCS 690/36; 220 ILCS 5/6-106; 225 ILCS 25/40; 225 ILCS 330/43(c); 235 ILCS 5/10-1(c); 240 ILCS 40/15-45(c); 305 ILCS 5/8A-2; 305 ILCS 5/8A-15; 410 ILCS 535/27(1)(c); 415 ILCS 5/44(h)(6), (j)(4)(A),(C); 625 ILCS 5/4-105(a)(5); 625 ILCS 5/6-302(a)(1); 820 ILCS 220/2(i)

Comment:

Generally. This provision complements Section 5201 by defining several offenses involving unsworn falsification to authorities. In place of perjury's oath or affirmation requirement, Section 5202 requires that unsworn falsification be either accompanied by an "intent to mislead a public servant in performing his official function" or "on or pursuant to a form bearing notice . . . to the effect that false statements therein are punishable."

Relation to current Illinois law. Section 5202(1) defines four offenses each requiring that the defendant act "with intent to mislead a public servant in performing his official function." Section 5202(1) has no directly corresponding provision in current Illinois law, which instead contains a variety of regulatory offenses criminalizing efforts to mislead the government. By prohibiting such conduct generally, Section 5202(1) allows for uniform offense requirements and consistent grading, and eliminates the need to criminalize very specific types of deception.

Section 5202(1)(a) criminalizes making false written statements for the purpose of misleading a public servant, and covers an assortment of current Illinois offenses prohibiting making false written statements in documents for the purpose of deceiving particular governmental entities and officials.²³⁸ See, e.g., 720 ILCS 5/17-6(a) (false statement to obtain state benefits); 5/33C-2 (false statement to influence certification of minority- and female-owned business); 5/33E-14 (false statement to influence consideration of vendor

²³⁸ Other current offenses, while not explicitly requiring a false written statement, will almost invariably involve a violation of Section 5202. See, e.g., 720 ILCS 5/17A-1, 5/17A-3 (former Nazi subject to deportation order receiving state benefits); 5/33C-1 ("fraudulently" obtaining or retaining certification as minority- or female-owned business).

applications); 20 ILCS 3520/45(b) (false statement to influence bonding-assistance action of Department of Commerce and Community Affairs); 205 ILCS 690/36 (false statement on registration to sell certain kinds of checks with intent to deceive Commission of Banks and Real Estate); 220 ILCS 5/6-106 (false statement to influence Illinois Commerce Commission to make order authorizing issuance of stock by public utility); 225 ILCS 330/43(c) (false statement to obtain license or registration to practice as professional land surveyor).

Section 5202(1)(b) criminalizes efforts to mislead public servants by intentionally omitting information from written statements. Section 5202(1)(b) has no directly corresponding provision in current Illinois law, which instead contains several regulatory offenses criminalizing making misleading statements in, or omitting information from, documents submitted to particular governmental entities. *See, e.g.*, 205 ILCS 657/90(h) (knowingly omitting material entry from document filed under Transmitters of Money Act); 240 ILCS 40/15-45(c) (knowingly filing misleading grain records with Department of Agriculture); 305 ILCS 5/8A-15 (“knowingly and willfully” omitting material fact “by any trick, scheme, artifice or device” from document related to government-funded or -mandated health plan). Section 5202(1)(b) is substantively similar to some of the current offenses in recognizing that liability based on insignificant omissions is inappropriate, but does so by requiring that the omitted information be “necessary to prevent [the] written statement from being misleading” rather than “material.”

Section 5202(1)(c) criminalizes submitting, or inviting reliance on, a writing or object one knows to be lacking in authenticity. Section 5202(1)(c) complements proposed Section 3101(1)(c) and 3104(1)’s offenses by allowing for liability where one puts forward an inauthentic writing or object for the purpose of misleading a public servant, rather than to defraud or injure another. *See* proposed Sections 3101(1)(c) and 3104(1) and corresponding commentary. Section 5202(1)(c) covers, and renders unnecessary, several current prohibitions against submitting or inviting reliance on particular kinds of unauthentic writings. *See, e.g.*, 10 ILCS 5/29-8 (adding or mixing forged ballots and applications to vote with authentic ones); 35 ILCS 130/22(f) (uttering forged cigarette tax imprint to evade tax); 225 ILCS 25/40 (filing forged affidavit of identification or qualification to practice dentistry); 410 ILCS 535/27(1)(c) (using forged certificate, record, or report “for any purpose of deception”); 625 ILCS 5/4-105(a)(5) (using forged manufacturer’s identification number in vehicle title or registration application); 625 ILCS 5/6-302(a)(1) (displaying or presenting false identification in making application for driver’s license or permit).

Section 5202(2) criminalizes making a false written statement on or pursuant to a form bearing legally authorized notice that the false statement is punishable. Section 5202(2) has no directly corresponding provision in current Illinois law, which is inconsistent in its treatment of such false statements “under penalty.” Some current provisions appear to recognize that the offense is less serious than perjury by grading it as a Class A misdemeanor

rather than a Class 3 felony. See, e.g., 35 ILCS 200/21-290(d) (false statement in application required to be “executed under penalty of perjury as though under oath or affirmation” under 35 ILCS 200/21-270). Other provisions, however, provide that making a false statement under penalty is *itself* perjury under current 5/32-2(a) — even though that offense’s oath or affirmation requirement is not satisfied.²³⁹ See, e.g., 305 ILCS 5/8A-2(b) (false statement in application required to contain “a written declaration that it is made under penalties of perjury” under 305 ILCS 5/11-15(3)).

Adding to the confusion, the Illinois courts have applied current 5/32-2(a)’s perjury offense not only to false statements made under penalty, see People v. Coleson, 322 N.E.2d 600, 602 (Ill. App. 1975), but also to false statements in forms apparently bearing no notice that misrepresentations contained therein are punishable.²⁴⁰ Section 5202(2)’s simple offense definition introduces clarity and uniformity to an area of law that is currently unclear and inconsistent.

Section 5202(3), providing that the prosecution need not prove which of two contradictory written statements is false in a prosecution under 5202(1)(a) or (2), has no corresponding provision in current Illinois law. Section 5202(3) recognizes that the policies underlying Section 5201(5)(a), to which it bears substantial similarity, are as compelling in the context of unsworn falsification as they are in the context of perjury.

Section 5202(4) grades unsworn falsification as a Class A misdemeanor. Illinois grades current offenses corresponding to Section 5202(1), in contrast, as anything from petty offenses (e.g., 235 ILCS 5/10-1(c)) to Class 1 felonies (e.g., 305 ILCS 5/8A-2(b)). Current Illinois law’s grading for these offenses appears to reflect concerns as to other crimes the defendant intends to commit by means of unsworn falsification; the defendant’s efforts toward committing another offense may be punished separately, however, as that offense or as

²³⁹ Current Illinois law’s confusion concerning false statements made under penalty may be attributable to a misunderstanding of the phrase “oath or affirmation” in current 5/32-2(a)’s definition of perjury. Section 5201(1) does not use the term “affirmation” to dispense with the ordinary requirement that an oath be “administered to the defendant by a duly authorized officer,” People v. Beacham, 365 N.E.2d 737, 741 (Ill. App. 1977), but rather to make clear that the offense applies to one who makes the nonreligious equivalent of an oath. Cf. 5 ILCS 255/4 (authorizing affirmation where person has “conscientious scruples against taking an oath”).

²⁴⁰ See People v. Barrios, 500 N.E.2d 415, 419 (Ill. 1986) (affirming perjury conviction based on false statement in application containing signed declaration “that the information I have furnished is true to the best of my knowledge or belief”). Section 5202(2) also corresponds to current offenses that, although not requiring that a false statement be made “under penalty,” similarly criminalize making false “certifications.” See, e.g., 720 ILCS 5/17-15 (falsely certifying that proof and acknowledgment of property conveyance was duly proven); 30 ILCS 500/50-5(d) (false certification that state contractor not barred from being awarded contract); 415 ILCS 5/44(h)(6), (j)(4)(A),(C) (false certifications regarding environmental waste and pollution permits); 820 ILCS 220/2(i) (false certifications under Safety Inspection and Education Act). Although Section 5202(2) would not reach false “certifications” unless they are made on or pursuant to a form giving notice of possible criminal liability, Section 5202(1)(a) would impose liability where one makes a false certification with the intent to mislead a public servant.

an attempt.²⁴¹ See proposed Section 801 and corresponding commentary. Section 5202(4)'s grading for Section 5202(2)'s offense recognizes that false statements under penalty are less serious than perjury insofar as they do not amount to sworn falsification. Illinois law often tracks this grading scheme. See supra discussion of Section 5202(2).

Section 5203. Tampering with Public Record or Notice

Corresponding Current Provision(s): 720 ILCS 5/32-8; 5/32-9; see also, e.g., 720 ILCS 5/33E-15; 10 ILCS 5/29-6; 10 ILCS 5/29-20(4); 35 ILCS 5/1301; 35 ILCS 130/14; 35 ILCS 505/15(3.5); 205 ILCS 657/90(h); 240 ILCS 40/15-45(c); 410 ILCS 535/27(1)(b); 415 ILCS 5/44(h)(2) to (h)(5); 420 ILCS 40/39(b)(2); 625 ILCS 5/5-402.1(f)

Comment:

Generally. This provision defines several offenses criminalizing impairing the integrity of writings that the government relies on for information or record and tampering with public records and notices.

Relation to current Illinois law. Section 5203(1)(a), defining two offenses involving false entries in or false alterations of documents, has no directly corresponding provision in current Chapter 720. Section 5203(1)(a)(i) criminalizes knowingly falsifying a writing “belonging to, or received or kept by, the government for information or record.” Section 5203(1)(a)(i) replaces numerous current prohibitions against making false entries in particular kinds of documents for the information or record of particular governmental entities. See, e.g., 720 ILCS 5/33E-15 (making false entry in document of local government or local school district); 10 ILCS 5/29-6 (falsifying voting materials); 35 ILCS 5/1301 (entering false information on tax return); 240 ILCS 40/15-45(c) (filing false record with Department of Agriculture); 415 ILCS 5/44(h)(2),(4) (making false statement or representation in document submitted under Environmental Protection Act).

Section 5203(1)(a)(ii) criminalizes knowingly making a false entry in or a false alteration of a writing “required by law to be kept by others for information of the government,” and covers numerous current prohibitions against falsifying documents required to be maintained for inspection or information under particular regulatory schemes. See, e.g., 35 ILCS 130/14

²⁴¹ Moreover, under Section 906's rule for determining cumulative authorized sentences, multiple counts of unsworn falsification (such as where one attempts to “vote” with multiple forged ballots) would be subject to additional punishment for each offense of conviction. See proposed Section 906 and corresponding commentary.

(falsifying records required to be kept under Cigarette Tax Act); 35 ILCS 505/15(3.5) (entering false information on documentation required to be kept under Motor Fuel Tax law); 205 ILCS 657/90(h) (false entry in documented maintained under Transmitters of Money Act); 420 ILCS 40/39(b)(2) (altering credential, certificate, license, or registration issued by Department of Nuclear Safety); 625 ILCS 5/5-402.1(f) (false entries in required invoice for essential automobile parts).

Section 5203(1)(b)(i) and (1)(b)(ii) are substantively similar to current 5/32-8 and 5/32-9, respectively,²⁴² but clarify that liability is appropriate for tampering with a public “device” (such as a voting machine), and omit the current provisions’ requirements that one act “without lawful authority” as unnecessary in light of Section 413’s general justification defense. See proposed Section 413 and corresponding commentary.

Section 5203(2) increases current 5/32-8’s grade for tampering with a public notice from a petty offense to a Class C misdemeanor, and tracks current 5/32-8 in grading tampering with a public record and Section 5203(1)(a)’s offenses as Class 4 felonies.

Section 5204. False Reports to Law Enforcement Authorities

Corresponding Current Provision(s): 720 ILCS 5/26-1(a)(4), (b); see also 720 ILCS 5/16-3.1; 5/26-1(a)(7), (a)(8), (a)(10), (a)(11); 5/31-4(a); 625 ILCS 5/4-103(a)(6)

Comment:

Generally. This provision defines two offenses prohibiting making false reports to law enforcement authorities. Such false reports harmfully interfere with governmental operations and often result in the unavailability of law enforcement resources to address genuine reports.

Relation to current Illinois law. Section 5204(1)(a) has no directly corresponding provision in current Chapter 720. Section 5204(1)(a) is similar to proposed Section 5301(1)(a) and current 5/31-4(a)’s prohibitions against obstructing justice by furnishing false information, but does not require that one give false information to “prevent the apprehension of or to obstruct the prosecution or defense” of another. Section 5204(1)(a)’s language makes it clear that the offense applies to giving any false information to law

²⁴² In addition to current 5/32-8’s general offense for tampering with a public record, Section 5203(1)(b) would also cover several current offenses criminalizing tampering with particular kinds of public records, such as election materials (10 ILCS 5/29-6), absentee ballots (10 ILCS 5/29-20(4)), vital records (410 ILCS 535/27(1)(b)), and records required to be made or maintained under the Environmental Protection Act (415 ILCS 5/44(h)(3),(5)).

enforcement authorities regarding matters within their concern²⁴³ — and that liability does not depend on whether a person has been formally charged.

Section 5204(1)(b) is substantively similar to current 5/26-1(a)(4), with a few modifications.²⁴⁴ First, Section 5204(1)(b) differs from current 5/26-1(a)(4) in applying to one who falsely reports an offense “or other incident” to law enforcement authorities. This language ensures that the offense reaches false reports that are likely to induce reliance by governmental entities responsible for enforcing laws that are not necessarily criminal in nature. Both false reports of offenses and false reports of such incidents often cause governmental resources to be wasted and unavailable to address real incidents. Section 5204(1)(b)’s broader language also covers current 5/26-1(a)(7), (a)(8), and (a)(10)’s offenses for falsely reporting abuse or neglect of children and the elderly to the Department of Children and Family Services, the Department on Aging,²⁴⁵ and the Department of Public Health.²⁴⁶

Second, Section 5204(1)(b) differs from current 5/26-1(a)(4) in prescribing a culpability requirement of recklessness rather than knowledge as to reporting. *Cf.* proposed Section 205(3) (imposing “read-in” culpability requirement of recklessness where none is otherwise stated). Section 5204(1)(b)’s lowered culpability requirement ensures that the offense reaches one who knows his report of an event is false even if he does not “know” specifically that the event counts as an “offense” or “other incident” within the concern of law enforcement authorities.

Finally, Section 5204(1)(b) defines the offense more succinctly by substituting “reports . . . a past, present, or imminent offense” for “[t]ransmits

²⁴³ Section 5204(1)(a) also complements Section 5204(1)(b)’s offense by criminalizing falsely reporting “information . . . relating to” an offense or incident rather than the occurrence of the offense or incident itself. Section 5204(1)(a) is intended to allow liability for one who impedes an investigation of an actual offense or incident by furnishing a fictitious lead.

²⁴⁴ Section 5204(1)(b) also corresponds to current 5/16-3.1(a) and 625 ILCS 5/4-103(a)(6). Current 5/16-3.1 criminalizes falsely reporting a theft or other loss to the government for the purpose of defrauding insurers. Current 625 ILCS 5/4-103(a)(6) similarly prohibits making a false report of a theft or conversion of a motor vehicle to law enforcement authorities. Assuming that the requirements of Articles 800 and 2100 are also satisfied, one who makes such a false report may be convicted of both Section 5204(1)(b)’s offense and attempted theft. *Cf.* proposed Section 254(1) (providing limitations on multiple convictions for related offenses).

²⁴⁵ Current 5/26-1(a) criminalizes falsely reporting abuse or neglect of the elderly to the Department on Aging only where the report is made pursuant to a special information-gathering project established by the Elder Abuse Demonstration Project Act. *See* 720 ILCS 5/26-1(a)(10); 320 ILCS 15/4.1. Current Illinois law does not criminalize false reports of abuse or neglect that the Department on Aging receives pursuant to the Elder Abuse and Neglect Act. *See* 320 ILCS 20/1 *et seq.* Section 5204(1)(b), in contrast, would reach false reports of such abuse regardless of the particular statute governing the report.

²⁴⁶ Section 5204(1)(b) also corresponds to current 5/26-1(a)(11), which imposes liability on one who makes a false report to a “public safety agency without the reasonable grounds necessary to believe that transmitting such a report is necessary for the safety and welfare of the public.” Although the scope of this language is not entirely clear, Section 5204(1)(b), in conjunction with proposed Sections 5208 and 6104, should criminalize any conduct prohibited by current 5/26-1(a)(11) that genuinely merits criminal liability.

or causes to be transmitted in any manner . . . a report to the effect that an offense will be committed, is being committed, or has been committed,” “law enforcement authorities” for “peace officer, public officer or public employee,” and “knowing that it did not or will not occur” for “knowing . . . that there is no reasonable ground for believing that such an offense will be committed, is being committed, or has been committed.”

Section 5204(2)(a) tracks current 5/31-4(d)(1) in providing that the offense is a Class 4 felony where the offender acts with the intent to implicate another. Section 5204(2)(a)’s grading recognizes that making a false report with the intent to implicate another is less serious than perjury, but more serious than acting without such a motive in light of the harm that the offense causes to the person implicated.

Section 5204(2)(b) grades the offense as a Class A misdemeanor where the offender did not intend to implicate another in an offense, whereas current 5/26-1(b) grades 5/26-1(a)(4)’s offense as a Class 4 felony.

Section 5205. False Personation

Corresponding Current Provision(s): 720 ILCS 5/32-5; 5/32-5.1; 5/32-5.2; 5/32-5.3; see also 720 ILCS 5/17-2; 5/17-5; 815 ILCS 515/3(b)(2)

Comment:

Generally. This provision defines four false personation offenses.

Relation to current Illinois law. Section 5205(1) consolidates the false personation offenses in current 5/32-5, 5/32-5.1, and 5/32-5.3.²⁴⁷ Section 5205(1)(a) is substantively similar to current 5/32-5(a), with two differences. First, Section 5205(1)(a) uses “intent” rather than “purposes” to make the culpability requirement with respect to compensation or consideration clear. Cf. proposed Section 206(1) (defining intent). Second, Section 5205(1)(a) omits current 5/32-5(a)’s exception for an attorney “who unintentionally fails to pay attorney registration fees established by Supreme Court Rule,” which is covered by imposing a culpability requirement of recklessness as

²⁴⁷ Section 5205(1) omits current 5/32-5.2, which aggravates false personation of a peace officer from a Class 4 felony to a Class 3 felony where it is committed “in attempting or committing a felony.” Because the other offense is necessarily an included offense of current 5/32-5.2, such “aggravated false personation” only aggravates where the defendant attempts a Class 3 or Class 4 felony or completes a Class 4 felony. (Current Illinois law bars liability for both a greater and an included offense. See commentary for proposed Section 254.) Under Section 906’s rule for determining cumulative authorized sentences, in contrast, any offense of conviction in addition to false personation will — regardless of its grade — increase the defendant’s total authorized sentence. See proposed Section 906 and corresponding commentary.

to the falsity of a representation that one is authorized to practice law.²⁴⁸ Cf. proposed Section 205(3) (imposing “read-in” culpability requirement of recklessness where none is otherwise stated).

Section 5205(1)(b) is substantively similar to current 5/32-5.1,²⁴⁹ but omits “of any jurisdiction” as superfluous, and requires recklessness rather than knowledge as to representing oneself to be a peace officer. Cf. proposed Section 205(3). Section 5205(1)(b) reduces this culpability requirement so that the offense of impersonating a peace officer is defined consistently with Section 5205(1)’s other false personation offenses. One is no more likely to represent himself to be a peace officer without being aware that he is doing so than to unwittingly represent himself to be an attorney, parent, or public servant.

Section 5205(1)(c) and (1)(d) are substantively the same as current 5/32-5.3 and 5/32-5(b),²⁵⁰ respectively.

Section 5205(2)(a) tracks current 5/32-5(a) and 5/32-5.1 in grading impersonating an attorney or peace officer as a Class 4 felony.

Section 5205(2)(b) grades both 5205(1)(c) and (1)(d)’s offenses as Class A misdemeanors, whereas current Illinois law grades current 5/32-5.3’s offense as a Class A misdemeanor and 5/32-5(b)’s offense as a Class B misdemeanor. Section 5205(2)(b)’s enhanced grading for Section 5205(1)(d)’s offense reflects the view that one who impersonates a public servant is as blameworthy as one who impersonates a parent or legal guardian.

²⁴⁸ Current 5/32-5(a), like Section 5205(1)(a), requires recklessness as to the falsity of a representation that one is authorized to practice law. Cf. 720 ILCS 5/4-3(b) (imposing “read-in” culpability requirement of recklessness where none is otherwise stated). The Illinois Appellate Court has held, however, that current 5/32-5(a) requires *knowledge* as to falsity. See *People v. Abdul-Mutakabbir*, 692 N.E.2d 756, 759 (Ill. App. 1998). This holding follows a misreading of current 5/4-3(b) by the Illinois Supreme Court that the proposed Code deliberately rejects. See commentary for proposed Section 205(3).

²⁴⁹ Section 5205(1)(b) would also cover some of the conduct prohibited by current 5/17-2(a) and 5/17-5(a), which criminalize, respectively, impersonating a member of a “public safety personnel organization” and impersonating a peace officer to collect a debt. Some of 5/17-2(a)’s conduct would also be covered by Section 3105(1)(b). Moreover, Section 5205(1)(d)’s offense for impersonating a “public servant” would cover 5/17-5(a)’s prohibitions of impersonating public employees other than peace officers with the intent to collect a debt, and proposed Section 6105 would also reach any collection practices amounting to serious harassment. See proposed Section 6105 and corresponding commentary. For the most part, however, 5/17-2 and 5/17-5 set forth regulatory offenses, and it is anticipated that they will be preserved elsewhere in Illinois law by the “conforming amendments” bill to be presented to the General Assembly. See also commentary for proposed Section 3105(1)(b) at note [182] (discussing 5/17-2(a) in context of “unauthorized impersonation” offense).

²⁵⁰ Section 5205(1)(d) also corresponds to current 815 ILCS 515/3(b)(2), which criminalizes impersonating a public servant to achieve “home repair fraud.” Under the proposed Code, one who impersonates a public servant for the purpose of cheating another will ordinarily be liable for both Section 5205’s offense and attempted theft. Cf. proposed Section 254(1) (providing limitations on multiple convictions for related offenses).

Section 5206. Exercising False Authority

Corresponding Current Provision(s): 720 ILCS 5/32-6

Comment:

Generally. This provision criminalizes performing certain official acts that one lacks authority to perform.

Relation to current Illinois law. Section 5206(1)'s offense definition is substantively the same as current 5/32-6. Section 5206(2) tracks the current provision by grading the offense as a Class 4 felony.

Section 5207. Simulating Legal Process

Corresponding Current Provision(s): 720 ILCS 5/32-7

Comment:

Generally. This provision criminalizes issuing or delivering a document that one knows falsely purports to be a legal process.

Relation to current Illinois law. Section 5207(1) is substantively the same as current 5/32-7, but omits the term “simulates” as redundant of “purports to be.”

Section 5207(2), like current 5/32-7, grades the offense as a Class B misdemeanor.

Section 5208. False Alarms to Agencies of Public Safety

Corresponding Current Provision(s): 720 ILCS 5/261(a)(2),(3),(9),(12)

Comment:

Generally. This provision criminalizes transmitting false alarms of emergencies to public safety organizations. Section 5208 is similar to proposed Section 6104, but addresses a different aspect of the harmfulness of false alarms. Whereas Section 6104 addresses the inconvenience and fear that false alarms cause to members of the public, Section 5208 is concerned with the adverse effects of false alarms on the operation and resources of public safety organizations. Unlike Section 6104, Section 5208 therefore requires that the false alarm be knowingly “transmitted to or within any organization . . . for dealing with emergencies involving danger to life or property.”

Relation to current Illinois law. Section 5208(1)'s offense definition corresponds to current 5/26-1(a)(2), (a)(3), and (a)(9).²⁵¹ Section 5208(1) is similar to current Illinois law, but criminalizes transmitting false alarms of emergencies to public safety organizations generally, rather than separately prohibiting false alarms of specific types of emergencies to specific types of organizations. Section 5208(1) also defines the offense more succinctly by substituting “causes . . . to be transmitted” for “transmits or causes to be transmitted in any manner” and “knowing” for “knowing . . . that there is no reasonable ground for believing.”

Section 5208(2) grades the offense as a Class A misdemeanor, whereas current 5/26-1(b) grades (a)(2) and (a)(9)'s offenses as Class 4 felonies and (a)(3)'s offense as a Class 3 felony.²⁵² Current 5/26-1(b)'s grading scheme appears to reflect the relative probability that the particular kind of false alarm will inconvenience or frighten members of the public. To the extent that one commits the offense while being reckless as to causing such public inconvenience or alarm, liability under both Section 5208 and proposed Section 6104 may be appropriate.

Section 5209. Definitions

Corresponding Current Provision(s): 720 ILCS 5/2-13; 5/2-17; 5/2-18

Comment:

Generally. This provision collects defined terms used in Article 5200 and provides cross-references to the provisions in which they are defined.

Relation to current Illinois law. For discussion of the relationship between Article 5200's defined terms and current law, refer to the commentary for the provision in which the term in question is initially defined.

²⁵¹ Section 5208(1) also corresponds to current 5/26-1(a)(12), which criminalizes calling “the number ‘911’ for the purpose of making or transmitting a false alarm or complaint and reporting information” where the defendant “knows that the call or transmission could result in the emergency response of any public safety agency.” Under the proposed Code, attempt liability under Section 5204(1)(b) or 5208(1) would be appropriate for such conduct. The culpability requirement for both proposed offenses differs from 5/26-1(a)(12)'s requirement by requiring only the defendant's knowledge of the falsity of the report, rather than additional “knowledge” of the possibility of (which is more properly seen as recklessness as to) an emergency response — a more speculative issue, and one that has less direct bearing on the defendant's blameworthiness.

²⁵² Section 5208(2) omits 5/26-1(b)'s language requiring that a fine between \$3,000 and \$10,000 be imposed for violations of 5/26-1(a)(3). There is no obvious policy reason for requiring that a fine be imposed for causing a false alarm of one kind of emergency but not for others.

ARTICLE 5300. INTERFERENCE WITH GOVERNMENTAL OPERATIONS; ESCAPE

Section 5301. Obstructing Justice

Corresponding Current Provision(s): 720 ILCS 5/31-4

Comment:

Generally. This provision defines the offense of obstructing justice.

Relation to current Illinois law. Section 5301(1) is substantively the same as current 5/31-4(a) through (c).²⁵³

Section 5301(2), like current 5/31-4(d), grades the offense as a Class 4 felony. Section 5301(2) differs from the current provision, however, in aggravating the offense to a Class 3 felony where it is committed in furtherance of the “activities of a criminal organization” rather than “streetgang related or gang-related activity.” Cf. commentary for proposed Section 905(5) (comparing “criminal organization” and “organized gang”).

Section 5302. Resisting or Obstructing a Peace Officer or Custodial Officer

Corresponding Current Provision(s): 720 ILCS 5/31-1; 5/31-1a; see also 720 ILCS 5/19-5; 625 ILCS 5/11-204, 5/11-204.1

Comment:

Generally. This provision criminalizes resisting, obstructing, or interfering with a peace officer or custodial officer.

Relation to current Illinois law. Section 5302(1) is substantively similar to current 5/31-1(a), but reaches one who “interferes with” as well as one who “resists” or “obstructs” a peace officer or custodial officer.²⁵⁴ Section

²⁵³ Section 5301 is not meant to displace, or otherwise affect, the Illinois courts’ holdings concerning the “exculpatory no” doctrine, which some jurisdictions have recognized as an exception to liability for obstructing justice and other offenses that criminalize making false statements. Cf. People v. Ellis, 765 N.E.2d 991 (Ill. 2002) (declining to recognize doctrine as exception to liability under current 5/31-4(a)).

²⁵⁴ Section 5302(1) also covers current 625 ILCS 5/11-204’s Class A misdemeanor for a driver who “flees or attempts to elude” a peace officer after having been directed to bring his vehicle to a stop. Current 625 ILCS 5/11-204.1’s aggravation to a Class 4 felony where the offender exceeds the speed limit by at least 21 miles per hour, causes bodily injury to another, or causes property damage is addressed by proposed Section 1202’s offenses for reckless endangerment and reckless injuring and Section 2206’s offense for property damage (q.v.).

Current 5302(1) also corresponds to current 5/19-5’s offense of “criminal fortification of a residence or building,” which criminalizes fortifying property that is used for drug offenses with the intent to prevent lawful entry by law enforcement authorities. The appropriateness of liability for such inchoate conduct is to be determined under the standards set forth in the General Part’s attempt provision. See proposed Section 801 and corresponding commentary.

5302(1)'s language is in keeping with the Illinois courts' application of current 5/31-1(a) to conduct other than merely physically counteracting or creating a physical obstacle to the performance of an authorized act.²⁵⁵ See People v. Gibbs, 253 N.E.2d 117, 120 (Ill. 1969) (holding that defendant who caused police to lose control of arrests by directing arrestees to private property did not "merely argue" with officers, but rather obstructed them "as completely and as effectively as if he physically touched or otherwise physically interfered with the officers"). Section 5302(1) also divides current 5/31-1(a)'s offense definition into subsections for greater clarity.

Section 5302(2)'s definition of "custodial officer" includes "correctional officers," which proposed Section 414(4)(a) defines in a manner similar to current 5/31-1(b)'s definition of "correctional institution employee." The broader term "custodial officer," however, also includes those who supervise *civil* detainees, thus incorporating the provisions of current 5/31-1(b), which apply to persons employed to supervise and control civilly committed "sexually dangerous" and "sexually violent" persons.

Section 5302(3)(a) grades the offense as a Class 2 felony where one disarms a "peace officer of his firearm while he is engaged in his official duties." Section 5302(3)(a) is functionally the same as current 5/31-1a's separate offense for such conduct, but omits as redundant of "disarming" the current provision's requirement that the firearm be taken "from the person of the peace officer or from an area within the peace officer's immediate presence without the peace officer's consent."

Section 5302(3)(b), like current 5/31-1(a), grades the offense as a Class A misdemeanor where it does not include disarming a peace officer.

Section 5302(3) omits current 5/31-1(a-5) and (a-7). It is anticipated that current 5/31-1(a-5), which sets forth a sentencing rule requiring either "48 consecutive hours of imprisonment" or community service, will be preserved elsewhere in Illinois law through the "conforming amendments" bill to be presented to the General Assembly. The proposed Code's assault offense addresses current 5/31-1(a-7)'s aggravation for cases of resistance or obstruction causing bodily harm to a peace officer. See proposed Section 1201(2)(d) (aggravating grade of assault where victim is peace officer or custodial officer).

²⁵⁵ Section 5302(1) does not displace, however, the Illinois courts' construction of current 5/31-1(a) as not prohibiting "'mere argument with a policeman about the validity of an arrest or other police action, but . . . only some *physical act*[,] . . . such as going limp, forcefully resisting arrest or physically aiding a third party to avoid an arrest.'" People v. Raby, 240 N.E.2d 595, 599 (Ill. 1968) (quoting Landry v. Daley, 280 F. Supp. 938, 959 (N.D. Ill. 1968)) (emphasis added); see also People v. Weathington, 411 N.E.2d 862, 863-64 (Ill. 1980) (holding that defendant's "mere argument" with officer as to when he would answer booking questions did not constitute violation).

Section 5303. Obstructing Administration of Law or Other Government Function

Corresponding Current Provision(s): Various; see, e.g., 720 ILCS 5/33C-3; 225 ILCS 650/19(A); 225 ILCS 735/5(g); 240 ILCS 40/15-45 (d),(e); 415 ILCS 60/15(7); 505 ILCS 90/22; 510 ILCS 5/26(a); 815 ILCS 370/6

Comment:

Generally. This provision criminalizes intentionally interfering with governmental functions by physical means, breach of an official duty, or an unlawful act.

Relation to current Illinois law. Section 5303(1) defines the offense to cover one who “obstructs, impairs, or perverts the administration of law or other governmental function by physical interference or obstacle, breach of official duty, or any unlawful act.” Section 5303(1) has no directly corresponding provision in current Illinois law, which instead contains numerous offenses that variously criminalize “obstructing,” “impeding,” “resisting,” “opposing,” “interfering with,” “hindering,” “preventing,” “attempting to prevent,” and “refusing to permit” specific governmental activities. See, e.g., 720 ILCS 5/33C-3 (investigation of qualifications of business requesting certification as minority- or female-owned business); 225 ILCS 650/19(A) (performance of duties under Meat Poultry and Inspection Act); 225 ILCS 735/5(g) (performance of duties under Timber Buyers Licensing Act); 240 ILCS 40/15-45(d),(e) (performance of duties under Grain Code); 415 ILCS 60/15(7) (performance of duties under Pesticide Act); 505 ILCS 90/22 (performance of duties under Insect Pest and Plant Disease Act); 510 ILCS 5/26(a) (impeding enforcement of Animal Control Act); 815 ILCS 370/6 (performance of duties under Motor Fuel and Petroleum Standards Act). By prohibiting such conduct generally, Section 5303(1) ensures that the offense is defined consistently and eliminates any need to define offenses of such limited scope.

Section 5303(2) uniformly grades the offense as a Class A misdemeanor. Current Illinois law, in contrast, is inconsistent in its grading of corresponding current offenses, and variously grades the prohibited conduct as a petty offense (e.g., 510 ILCS 5/26(a), noted supra), Class B misdemeanor (e.g., 505 ILCS 90/22, noted supra), Class A misdemeanor (e.g., 225 ILCS 650/19, noted supra), or Class 2 felony (e.g., 720 ILCS 5/33C-3, noted supra). Current Illinois law’s grading appears to reflect the relative seriousness of other offenses that may motivate obstruction; those offenses may be punished separately, however, where they are also committed. See proposed Section 906 and corresponding commentary (increasing defendant’s total authorized sentence for each additional offense of conviction).

Section 5304. Obstructing Service of Process

Corresponding Current Provision(s): 720 ILCS 5/31-3

Comment:

Generally. This provision criminalizes resisting or obstructing the service and execution of legal processes and court orders.

Relation to current Illinois law. Section 5304 is nearly identical to current 5/31-3, but has been rephrased to parallel the form of other provisions in the proposed Code.

Section 5305. Refusing to Aid an Officer

Corresponding Current Provision(s): 720 ILCS 5/31-8

Comment:

Generally. This provision criminalizes knowingly failing to provide reasonable assistance to a peace officer in apprehending a person or preventing an offense.

Relation to current Illinois law. Section 5305(1) is substantively the same as current 5/31-8, but substitutes “when requested” for “upon command” and omits “refuses” as redundant of “knowingly fails.”

Section 5305(2) increases the offense grade from a petty offense to a Class C misdemeanor. Section 5305(2)’s grading reflects the view that one who declines to provide assistance that he *knows* to be reasonable is sufficiently blameworthy to warrant a minor jail sentence in appropriate cases.

Section 5306. Concealing or Aiding a Fugitive

Corresponding Current Provision(s): 720 ILCS 5/31-5

Comment:

Generally. This provision defines an offense criminalizing harboring, aiding, or concealing a fugitive for the purpose of preventing apprehension.

Relation to current Illinois law. Section 5306(1)’s offense definition is substantively similar to current 5/31-5, but does not impose liability on one who “conceals his knowledge that an offense has been committed.” Although the meaning of the omitted language is unclear, it appears to duplicate proposed Section 5301(1) and current 5/31-4’s offenses for those who either furnish false information or, having knowledge material to the subject at issue, leave the state or conceal themselves. To the extent that current 5/31-5’s omitted language criminalizes conduct that does not amount to obstructing justice, however, one who “conceals his knowledge that an offense has been committed” is certainly far less blameworthy than one

who affirmatively harbors, aids, or conceals an offender for the purpose of preventing his apprehension. Section 5306(1) also breaks current 5/31-5's offense definition down into subsections for greater clarity.

Section 5306(2) grades the offense as a Class 3 felony, whereas current 5/31-5 grades it as a Class 4 felony. Section 5306(2)'s higher grading reflects both the relative blameworthiness of one who harbors, aids, or conceals a fugitive for the purpose of preventing his apprehension and the relative importance of the governmental operations with which such conduct interferes.

Section 5307. Escape; Failure to Report to a Correctional Institution or to Report for Periodic Imprisonment

Corresponding Current Provision(s): 720 ILCS 5/31-6; 730 ILCS 5/3-6-4; 730 ILCS 5/5-8A-4.1

Comment:

Generally. This provision criminalizes escaping from custody, failing to report to a place of detention or for periodic detention, failing to return from release to a place of detention, and failing to abide by the terms of home confinement.

Relation to current Illinois law. Section 5307(1) consolidates the provisions of current 5/31-6(a) through (c-6).²⁵⁶ Section 5307(1)(a) sets out three categories of persons who are subject to liability. Section 5307(1)(a)(i)

²⁵⁶ Section 5307 also corresponds to current 730 ILCS 5/3-6-4(a) and 5/5-8A-4.1. Current 730 ILCS 5/3-6-4(a) defines an "escape" offense applicable only to persons in the custody of a correctional institution of the Adult Division. Like Section 5307 and current 5/31-6(a), current 5/3-6-4(a) provides that "escaping" from such a correctional institution, or an employee thereof, is a Class 2 felony, and that failing to return from furlough or work or day release is a Class 3 felony.

Section 5307 differs from current 5/3-6-4(a), however, in four important respects. First, Section 5307(1) does not define the offense to prohibit "attempting" escape, as a separate General Part provision addresses attempted offenses. See proposed Section 801 and corresponding commentary. Second, Section 5307(2) follows current 5/31-6 in recognizing whether the offender's underlying offense was a felony as a relevant grading factor, whereas current 5/3-6-4(a)'s silence as to that factor implies that it is irrelevant to persons in the custody of the Adult Division. Third, Section 5307(1)(b) and (2), like current 5/31-6(a) and (b), specifically address the liability of persons who fail to report to correctional institutions or for periodic imprisonment, and grade such failure on a par with failing to return from furlough or work or day release; current 5/3-6-4(a), in contrast, is silent as to these matters, and presumably (although not definitely) treats failures to report as "escaping." Finally, Section 5307(1) omits from the offense definition current 5/3-6-4(a)'s references to holding hostages and damaging property during riots. Such conduct is criminalized elsewhere in the proposed Code, in Articles 1200, 1400, 2200, and 6100.

Current 5/5-8A-4.1 merely restates current 5/31-6(a) and (b)'s rules for persons who fail to abide by the terms of home confinement.

provides that the offense applies to one “in penal custody pursuant to a conviction or charge for an offense,” and, like current 5/31-6(a) and (b), covers persons in correctional institutions, persons required to report to correctional institutions or for periodic imprisonment, persons on release through furlough or work or day release, and persons subject to home confinement.

Section 5307(1)(a)(ii) is similar to current 5/31-6(c) through (c-6) in providing that the offense applies to one in the lawful custody of a peace officer, but uses the defined term “penal custody” in lieu of listing the particular reasons for such custody.

Finally, Section 5307(1)(a)(iii) provides that the offense applies to one “civilly committed, or detained awaiting civil commitment.” Section 5307(1)(a)(iii) is substantively similar to current 5/31-6(b-1), but reaches persons civilly committed or detained awaiting civil commitment under statutes other than the Sexually Violent Persons Commitment Act. Section 5307(1)(a)(iii) thus also allows for liability for persons civilly committed or detained awaiting civil commitment under the Mental Health and Developmental Disabilities Code (405 ILCS 5/1-100 et seq.), Article 104 of the Code of Criminal Procedure (725 ILCS 5/104-10 et seq.), and the Sexually Dangerous Persons Commitment Act (725 ILCS 205/1 et seq.).

Section 5307(1)(b) specifies four alternative means by which persons subject to liability under Section 5307(1)(a) may commit the offense. Section 5307(1)(b) is substantively similar to current 5/31-6(a) through (c-6), with two differences. First, Section 5307(1)(b) uniformly prescribes a culpability requirement of knowledge as to its objective elements, whereas the current provisions require intent as to “escaping” from a place or person, and knowledge as to failing to report, failing to return, and failing to abide by the terms of home confinement. Section 5307(1)(b)’s lowered culpability requirement with respect to escaping, however, is of little substantive import. It would be highly unusual for one to know that he was escaping from a place or person, yet not intend to do so.

Second, Section 5307(1)(b)(ii) differs from current 5/31-6(a) and (b) in clarifying that a person required to report to a place of detention or for periodic imprisonment is liable only if he fails to report “at the time required” rather than “at any time.”

Section 5307(2)(a) and (b) grade the offense where the underlying offense²⁵⁷ is a felony. Section 5307(2)(a) and (b), like current 5/31-6(a), (b-1), (c), and (c-5), grade the offense as a Class 2 felony where the offender “escapes” from a place or person, and as a Class 3 felony where the offender fails to report, fails to return, or fails to abide by the terms of home confinement.

²⁵⁷ Section 5307(2) uses the term “underlying offense” to refer to the offense pursuant to which the offender was in custody. With respect to persons in the lawful custody of a peace officer for an alleged violation of a term or condition of probation, conditional discharge, parole, or mandatory supervised release, the “underlying offense” would be the offense pursuant to which the term or condition was imposed, rather than the violation itself.

Section 5307(2)(c) grades the offense as a Class 4 felony where the underlying offense is a misdemeanor. Current 5/31-6(b), (c), and (c-6), in contrast, grade the offense as a Class A misdemeanor where the offender “escapes” from a place or person, and as a mere Class B misdemeanor where the offender fails to report, fails to return, or fails to abide by the terms of home confinement. Section 5307(2)(c)’s higher grading reflects the view that the offense — regardless of the means by which it is committed — is more serious than other Class A misdemeanors, such as resisting or obstructing a peace officer or correctional officer (proposed Section 5302) and theft of under \$300 (proposed Section 2109(5)).

Section 5307 omits current 5/31-6(d), which aggravates the offense to a Class 1 felony where the offender is armed with a dangerous weapon, in recognition of the availability of Section 5309’s offense for possession of contraband in a correctional institution as well as anticipated weapons offenses in Article 7100.

Section 5308. Permitting Escape

Corresponding Current Provision(s): 720 ILCS 5/31-7(f); 5/31A-1.2(d)(2)

Comment:

Generally. This provision defines an offense for correctional employees who recklessly permit prisoners in their custody to escape.

Relation to current Illinois law. Section 5308 is nearly identical to current 5/31-7(f), but has been rephrased to parallel the form of other provisions in the proposed Code. Section 5308(2)’s definition of “correctional employee” is nearly identical to current 5/31A-1.2(d)(2)’s definition of “employee,” but clarifies that the term “includes a correctional officer.”²⁵⁸ Section 5308(3), like current Illinois law, grades the offense as a Class A misdemeanor.

Article 5300 omits current 5/31-7’s other provisions, which are covered elsewhere in the proposed Code. Proposed Section 301 performs the same function as current 5/31-7(a) through (e), (f-5), and (f-6) in imposing liability on one who aids or attempts to aid another in escaping, with two differences. First, Section 301 requires intent as to the conduct requirement of “aiding” another for complicity liability, but makes clear that the substantive offense’s culpability requirements are not to be altered by requiring that one aid with the “culpability required by the offense.” The omitted provisions in current 5/31-7, in contrast, impose inconsistent culpability requirements for accomplice liability. With respect to the required culpability as to “aiding,” some of the current offenses require intent (see 5/31-7(a),(f-5),(f-6)), while others require

²⁵⁸ Section 5308(2)’s definition of “correctional employee” would include parole and probation officers, insofar as such persons are employees of the governing authority of correctional institutions.

knowledge (see 5/31-7(b)-(e)). Similarly, some of the omitted offenses track the culpability requirements of the corresponding substantive offenses in current 5/31-6 (see 5/31-6(a); (b) (second clause), (c) (second clause), (f-5) & (f-6)), but others *lower* the corresponding offenses' culpability requirements (see 5/31-6(b) (first clause), (c) (first clause), (d), (e)).

Second, Section 301 covers current 5/31-7(a)'s offense for one who attempts to aid a prisoner in escaping by giving him something to use in escaping, but grades the offense one grade lower than the substantive offense for which complicity was attempted, rather than simply as a Class A misdemeanor. See proposed Section 301(6) and corresponding commentary. This approach enables Section 301 to track Section 5307(2)'s grading distinctions in determining the appropriate grade for attempted complicity.

Section 5308 omits current 5/31-7(g), which aggravates the offense to a Class 2 felony where the offender is armed with a dangerous weapon, in recognition of the availability of Section 5309's offense for bringing contraband into a correctional institution as well as anticipated weapons offenses in Article 7100.

Section 5309. Bringing or Allowing Contraband into a Correctional Institution; Possessing Contraband in a Correctional Institution

Corresponding Current Provision(s): 720 ILCS 5/2-14; 5/31A-1.1;
5/31A-1.2

Comment:

Generally. This provision protects the safety and order of correctional institutions by criminalizing bringing contraband into a correctional institution, placing contraband close enough to a correctional institution that an inmate may access it, or possessing contraband.

Relation to current Illinois law. Section 5309(1)'s offense definition consolidates the prohibitions of current 5/31A-1.1 and 5/31A-1.2. Section 5309(1) is substantively similar to current 5/31A-1.1 and 5/31A-1.2 in requiring that one act "without authority," with two differences. First, Section 5309(1) omits as superfluous the current provisions' requirements that the authority be from "any person designated or authorized to grant such authority." Second, Section 5309(1) uniformly imposes the "without authority" requirement as an offense element; current Illinois law, in contrast, requires the absence of authority for every means of committing the offense except possession of contraband under 5/31A-1.1(b), but provides a special affirmative defense for authorized possession under 5/31A-1.1(k).

Section 5309(1) sets forth three means of committing the offense. Section 5309(1)(a) is substantively the same as current 5/31A-1.1(a)(1) in criminalizing bringing an item of contraband into a correctional institution, but omits current 5/31A-1.2(a)(2)'s offense in light of the availability of

complicity liability under proposed Section 301 for one who “causes another” to commit the offense. See proposed Section 301(1)(a) and corresponding commentary.

Section 5309(1)(b) is substantively the same as current 5/31A-1.1(a)(3) in providing that the offense is committed where one places contraband “in such proximity to a correctional institution as to give an inmate access” thereto.

Section 5309(1)(c) is substantively similar to current 5/31A-1.1(b) and 5/31A-1.2(b) in allowing for liability for possession of contraband, with two modifications. First, Section 5309(1)(c) requires that the defendant “knowingly” possess contraband, whereas the current provisions require recklessness as to possession and the nature of the item possessed. Cf. 720 ILCS 5/4-3(b) (imposing “read-in” culpability requirement of recklessness where none is otherwise stated).²⁵⁹ Section 5309(1)(c) raises the culpability requirement so that possessing contraband is treated the same as other means of committing the offense. There is no reason to require knowledge, as current law does, as to “bringing” and “placing” contraband, but not as to “possessing” it.

Second, Section 5309(1)(c) omits as unnecessary current 5/31A-1.1(b) and 5/31A-1.2(b)’s language stating that liability is appropriate “regardless of the intent with which” one possesses contraband.²⁶⁰

Section 5309(2)(a)’s definition of “correctional institution” is substantively the same as current 5/31A-1.1(c)(1)’s definition of “penal institution,”²⁶¹ but omits as unnecessary the current provision’s language stating that the term does not include parts of public buildings that are unrelated to incarceration or custody.

Section 5309(2)(b)’s definitions of the term “item of contraband” and of the various types of contraband are substantively similar to current 5/31A-

²⁵⁹ The Illinois Supreme Court has held, however, that current 5/31A-1.1(b) requires *knowledge* as to possessing contraband. See People v. Farmer, 650 N.E.2d 1006, 1112 (Ill. 1995) (concluding that provision does not clearly indicate legislative purpose to impose absolute liability and holding that “knowledge is the appropriate mental state”). The Court’s construction of current 5/31A-1.1(b) in Farmer is premised on a misreading of current 5/4-3(b) that the proposed Code deliberately rejects. See commentary for proposed Section 205(3).

²⁶⁰ The current provisions’ language appears designed to clarify that the offense does not require that the defendant possess contraband with the intent to do something with it, such as committing a criminal act or delivering it to another. Section 5309(1)(c)’s omission of this language, of course, does not imply an invitation to read such a requirement into the offense definition.

²⁶¹ Section 5309(2)(a)’s definition of “correctional institution” also corresponds to, and substantively similar to, current 5/2-14’s definition of “penal institution.” The definition used in Section 5309(2)(a) and current 5/31A-1.1(c)(1) covers all the institutions in 5/2-14, but uses broader catch-all language.

1.1(c)(2) and 5/31A-1.2(d)(4)'s definitions,²⁶² but 5309(2)(b)(iii) uses the defined term “catastrophic agent” in place of the narrower “explosive” and 5309(2)(b)(vi) uses the defined term “dangerous weapon” in place of “knife, dagger, dirk, billy, razor, [or] stiletto.” See proposed Section 1501(4)(a) (defining “dangerous weapon”); proposed Section 2204(1)(b) (defining “catastrophic agent”).

Section 5309(3)(a) separates the offense under 5309(1)(a) through (c) into four offense grades ranging from a Class A misdemeanor to a Class 2 felony. Current 5/31A-1.1(d) through (j), in contrast, separate the offense into five offense grades ranging from a Class 4 felony to a Class X felony. Section 5309(3)(a)(i) is structurally similar to current 5/31A-1.1(j), but grades the offense as a Class 2 felony rather than a Class X felony where the contraband involved is a firearm,²⁶³ stun gun, or taser;²⁶⁴ firearm ammunition; or an explosive.²⁶⁵ Section 5309(3)(a)(i)'s grading recognizes that, although the presence of such deadly weapons in correctional institutions is harmful, the criminalized conduct is inherently much less serious than other Class X

²⁶² Current Chapter 720 provides two different definitions of “firearm ammunition.” Section 5309(2)(b)(ii) tracks current law's special definition for the offense of contraband appearing in current 5/31A-1.1(c)(vii), but omits that definition's explicit inclusion of particular kinds of firearm ammunition as superfluous. Section 5309(2)(b)(ii) declines to track current 5/2-7.1's general definition — which, by incorporating 430 ILCS 65/1.1's definition by reference, explicitly *excludes* the types of “firearm ammunition” included by 5/31A-1.1(c)(vii) — which current Illinois law uses only to define offenses not included in the proposed Code.

²⁶³ Because Section 5309(2)(b)(i) includes only a “firearm, stun gun, or taser,” this grading provision would not include any “gun not ordinarily used as a weapon,” as defined in Section 1501(4)(d). Current 5/31A-1.1(c)(2)(vi) and 5/31A-1.2(d)(4)(vi), on the other hand, include such guns within their definitions of “firearm.” Those definitions, however, are unique to the contraband offenses and differ from the standard definitions of “firearm” used everywhere else in the current Criminal Code. See 720 ILCS 5/2-7.1, -7.5.

Section 5309 declines to create a different and unique definition of “firearm” solely for the contraband provision, or to provide for enhanced punishment for possession of a non-“firearm” gun relative to other weapons. It would be extremely rare that such a gun — that is, one falling only within the more expansive definition, such as a rivet gun or pneumatic gun — would be found as contraband in a prison. And in any event, under the definition in Section 1501(4)(a), any such gun would constitute a “dangerous weapon” and would therefore fall within Section 5309(2)(b)(vi). The corresponding grade, Class 3 felony, for possession or introduction of such a gun reflects its somewhat diminished level of dangerousness relative to a typical firearm.

²⁶⁴ Although “stun guns” and “tasers” also fit within the general definition of “dangerous weapon,” see proposed Section 1501(4)(d), and would accordingly otherwise fall under Section 5309(2)(b)(vi), their specific inclusion within Section 5309(2)(b)(i) is meant to make clear that the aggravated penalty applies to those specific dangerous weapons. Unlike other non-firearm guns, these weapons are likely to appear as contraband and present a serious danger if placed in inmates' hands.

²⁶⁵ Section 5309(2)(b)(iii) uses the term “catastrophic agent” in place of “explosive,” which is a particular type of “catastrophic agent” under Section 2204(1)(b)'s definition. Section 5309(3)(a)(i)'s grading category is therefore broader than that in current 5/31A-1.1(j), insofar as it includes catastrophic agents that are not explosives. See proposed Section 2204(1)(b) and corresponding commentary.

offenses, such as second-degree murder and knowingly causing a catastrophe. By grading the most serious violations of Section 5309(1)(a) through (1)(c) as Class 2 felonies, Section 5309(3)(a)(i) ensures that the offense is never graded higher than a Class 1 felony after Section 5309(3)(b)'s aggravation for correctional employees. This "ceiling" for contraband offenses reflects the view that Class X grading should be reserved for only the most serious offenses.

Section 5309(3)(a)(ii) applies where the contraband involved is defined in Section 5309(2)(b)(iv) through (b)(ix). Section 5309(3)(a)(ii) corresponds to current 5/31A-1.1(f) through (i), but does not track the current grading distinction between the various schedules of controlled substances and grades the offense as a Class 3 felony rather than a Class 1 or Class 2 felony. Section 5309(3)(a)(ii)'s grading follows the current provisions in recognizing that such contraband is less harmful than the items governed by (3)(a)(i), but also recognizes that one who brings in a tool that a felon may eventually use to escape from a correctional institution should not be punished more severely than a felon who actually escapes. *Cf.* proposed Section 5307(2)(a) (grading escape of felon as Class 2 felony); current 5/31-6 (same).

Section 5309(3)(a)(iii) applies where the contraband involved is cannabis. Section 5309(3)(a)(iii) is functionally similar to current 5/31A-1.1(e) in recognizing that this form of the offense is less serious than violations subject to 5309(3)(a)(ii), but grades it as a Class 4 felony rather than a Class 3 felony.

Section 5309(3)(a)(iv) provides that the offense is a Class A misdemeanor where alcohol is involved, whereas current 5/31A-1.1(d) grades such a violation as a Class 4 felony.

Section 5309(3)(b) requires a one-grade aggravation for a correctional employee who commits a Section 5309 offense. Current 5/31A-1.2(e), in contrast, attempts to aggravate the grade of the offense where an employee is either responsible for contraband being brought into a correctional institution under 5/31A-1.2(a) or possesses contraband in violation of 5/31A-1.2(b). Because both current 5/31A-1.2(a) and (b) impose liability only with respect to alcohol, drugs, and hypodermic syringes, however,²⁶⁶ the effect of current 5/31A-1.2(e)'s grading rules for "violations" of those provisions involving other types of contraband is questionable; Section 5309(3)(b) makes clear that aggravation is appropriate for an employee responsible for any kind of contraband being brought into a correctional institution.

²⁶⁶ Because its provisions apply generally to employees as well as non-employees, Section 5309 provides for employee liability regardless of the type of contraband involved, whereas current 5/31A-1.2(a) imposes liability only with respect to alcohol, drugs, and hypodermic syringes. Section 5309(1)(d)'s broader scope recognizes that bringing other types of contraband — especially weapons, explosives, and tools to defeat security mechanisms — inherently presents risks to the maintenance of security and order in correctional institutions. Section 5309(1) nevertheless ensures that only blameworthy persons are within the offense's reach by requiring that the defendant act "without authority."

Section 5309(3)(b) does not track current 5/31A-1.2(f)'s further aggravation where an employee is culpable with respect to the delivery of contraband to an inmate. The omission of this additional grading distinction (which current 5/31A-1.1 also declines to recognize with respect to non-employees) reflects the view that Section 5309(3)(b) provides sufficient punishment in grading the most serious form of the offense as a Class 1 felony.

Finally, Section 5309 omits current 5/31A-1.1(l), 5/31A-1.1(m), and 5/31A-1.2(g). Current 5/31A-1.1(l)'s affirmative defense for a person who brings contraband into a correctional institution "as a direct and immediate result of his arrest" is covered by the proposed Code's general rule governing when possession may be deemed an act. See proposed Section 204(3) and corresponding commentary. Current 5/31A-1.1(m) and 5/31A-1.2(g) merely reiterate regulatory rules stated elsewhere regarding the retention and disposition of confiscated items.

Section 5310. Intimidating, Improperly Influencing, or Retaliating Against a Public Servant, Witness, Juror, or Voter

Corresponding Current Provision(s): 720 ILCS 5/12-9; 5/32-4; 5/32-4a; 10 ILCS 5/29-4; 10 ILCS 5/29-20; see also 720 ILCS 5/32-4d

Comment:

Generally. This offense criminalizes performing certain conduct that harmfully interferes with the duties of public servants, witnesses, jurors, and voters.

Relation to current Illinois law. Section 5310 consolidates several current offenses criminalizing efforts to intimidate, influence, or retaliate against particular persons performing public functions. Section 5310(1)(a) requires that the defendant act with intent to (i) influence a juror or public servant; (ii) deter a party or witness from testifying freely, fully, or truthfully; or (iii) annoy, harass, intimidate, or victimize a current or former public servant, witness, juror, or voter because of conduct related to the performance of the victim's duties. Section 5310(1)(a)'s alternative culpability requirements together cover the improper motives addressed by the current offenses in 5/12-9 (threatening public officials), 5/32-4 (communicating with jurors and witnesses), 5/32-4a (harassing jurors and witnesses), 10 ILCS 5/29-4 (prevention of voting), and 10 ILCS 5/29-20 (intimidation of voter by absentee ballot).²⁶⁷

²⁶⁷ A related offense, current 5/32-4d, covers payments to jurors "[a]fter a verdict has been rendered." Section 5310 does not cover current 5/32-4d, as the current provision does not require any objective of improperly influencing the proceeding, and appears aimed only at the appearance of impropriety. It is expected that current 5/32-4d will be preserved and moved outside the Code by means of a conforming amendment.

Section 5310(1)(b) sets forth three alternative means by which the offense's objective elements may be committed: (1) committing, or threatening, an offense "likely to cause great bodily harm, unlawful confinement or restraint, or substantial property damage to another"; (2) committing or threatening any other offense; or (3) improperly communicating with the public servant, witness, juror, or voter. Section 5310(1)(b) is substantively similar to the current offenses' requirements, with two minor differences.

First, Section 5310(1)(b) omits some less serious, or very particular, conduct covered by the current provisions. Section 5310(1)(b) does not incorporate current 5/32-4(b)'s language allowing for liability where the defendant merely communicates "false information" to a party or witness. The omission of this language reflects the view that communicating false information is not as serious, even if the person doing so acts with the intent required by 5310(1)(a), as performing the other conduct covered by Section 5310(1)(b).²⁶⁸ Section 5310(1)(b) also does not incorporate current 5/32-4a(b)'s language criminalizing communicating with certain legal representatives of children "in such manner as to produce mental anguish or emotional distress," as nearly any significantly harmful communication of this type would fall under Section 5310(1)(b)(i) or (ii).

Second, Section 5310(1)(b) does not cover particular means of influencing the performance of public duties that are already addressed by other provisions. For example, Section 5310(1)(b) omits current 5/32-4(b)'s reference to one who "offers or delivers or threatens to withhold . . . [a] thing of value" with the intent to influence testimony, as such conduct is covered by the proposed bribery offense. See proposed Section 5101 and corresponding commentary.

Section 5310(2) grades the offense as a Class 2, Class 3, or Class 4 felony, depending on the means by which it is committed. Section 5310(2)'s grading is generally in keeping with the corresponding current provisions, which grade threatening jurors as a Class 2 felony (5/32-4a(a)), threatening public officials as a Class 3 felony (5/12-9), and communicating with a juror as a Class 4 felony (5/32-4(a)). Section 5310(2) also grades the most serious form of the offense as a Class 2 felony in recognition of its close resemblance to bribing a witness — which both proposed Section 5101(3) and current 5/33-1 grade as a Class 2 felony.

²⁶⁸ Where the defendant engages in the more serious conduct of communicating false information with the objective of causing another to commit perjury, however, liability for perjury or attempted perjury may be appropriate. See proposed Sections 301(5), 801, and 5201 and corresponding commentary.

Section 5311. Failure to Appear

Corresponding Current Provision(s): 720 ILCS 5/32-10; 725 ILCS 5/110-2

Comment:

Generally. This offense applies to a defendant who has been released from custody and later fails to appear in court as required or violates a condition of his release.

Relation to current Illinois law. Section 5311 consolidates the prohibitions of current 5/32-10 and 725 ILCS 5/110-2, which contain separate failure-to-appear offenses for persons admitted to bail and persons released on personal recognizance. Section 5311(1)'s offense definition is substantively similar to the current provisions, with three differences.

First, Section 5311(1) imposes a culpability requirement of recklessness as to the objective elements set forth in (1)(a) and (1)(b). See proposed Section 205(3) (imposing "read-in" culpability requirement of recklessness where none is otherwise stated). Current Illinois law, in contrast, inconsistently requires recklessness as to failing appear on the date directed under 5/32-10(a) and 5/110-2, and as to violating the conditions of release under 5/32-10(a-5) (cf. 720 ILCS 5/4-3(b) (imposing "read-in" culpability requirement of recklessness where none is otherwise stated)), but knowledge as to violating the terms of a release under current 5/32-10(b). Section 5311(1)'s culpability requirement reduces the risk of liability being precluded by prefabricated excuses for failure to appear (such as "forgetting" the time or date), while avoiding liability for those who have failed to appear for legitimate reasons (such as not being notified of a change to the time or date).

Second, Section 5311(1)(a) is substantively the same as current 5/110-2 in providing that the offense is committed where the defendant fails to appear when required, and omits current 5/32-10(a)'s additional requirement that the defendant subsequently "fail[] to surrender himself within 30 days" of forfeiting his bail. Section 5311(1)(a) tracks current 5/110-2's definition of the offense rather than 5/32-10(a)'s in recognition of the harmfulness of failing to make a required appearance, and reflects the view that the defendant's forfeiture of his bail does not make him any less blameworthy.

Third, Section 5311(1)(b) is substantively similar to current 5/32-10(a-5) and (c), but allows for liability for any violation of a condition of release, regardless of whether the defendant is released upon payment of bail security or on his own recognizance. Current 5/32-10(a-5) and (c), in contrast, apply only to specific violations committed by persons admitted to bail. Section 5311(1)(b)'s broader scope ensures that those admitted to bail and those released on personal recognizance are treated the same, and also serves to more generally protect the integrity of the release system.

Section 5311(2) is similar to current 5/32-10(a) and 5/110-2 in grading the offense one grade lower than the defendant's underlying offense. Section

5311(2) differs from the current provisions, however, in limiting the offense to a Class A misdemeanor. Although the seriousness of the defendant's underlying offense is relevant to the seriousness of his failure to appear or violation of another term of his release, Section 5311(2)'s lower grading reflects the view that a maximum term of one year in prison sufficiently punishes the harm of this independent offense.

Section 5311 omits current 5/32-10(c) and (d). Current 5/32-10(c)'s procedural rule requiring the appearance of certain persons before bail is set belongs elsewhere, and it is anticipated that it will be preserved through a "conforming amendments" bill to be presented with the proposed Code. Section 5311 omits current 5/32-10(d)'s first sentence, clarifying that the offense does not affect the courts' power to punish contempt, as unnecessary in light of proposed Section 104's preservation of civil remedies. Section 5311 omits current 5/32-10(d)'s second sentence, under which sentences for violations of the current provision are to be served consecutively to the underlying offense, insofar the proposed Code deliberately rejects the usual version of consecutive sentencing for multiple offenses. See proposed Section 906 and corresponding commentary.

Section 5312. Definitions

Corresponding Current Provision(s): 235 ILCS 5/1-3.05; 720 ILCS 5/2-7.1; 5/2-7.5; 5/2-13; 5/2-14; 5/15-1; 5/31-1(b); 5/31A-1.1(c); 5/31A-1.2(d); 550/3(a); 570/102(f); 740 ILCS 147/10

Comment:

Generally. This provision collects defined terms used in Article 5300 and provides cross-references to the provisions in which they are defined.

Relation to current Illinois law. For discussion of the relationship between Article 5300's defined terms and current law, refer to the commentary for the provision in which the term in question is initially defined.

General Comment Regarding Current Law:

In addition to the current provisions noted above, Chapter 720 includes four offenses — treason (5/30-1), misprision of treason (5/30-2), advocating the overthrow of government (5/30-3), and compounding a crime (5/32-1) — that the proposed Code omits for policy reasons. Current 5/30-1 to 5/30-3 apply where one "[l]evies war" against Illinois, "[a]dheres to the enemies" of Illinois, or advocates violently overthrowing or reforming the government of Illinois. Any truly blameworthy conduct covered by such offenses would merit liability under the nearly identical offenses included in the Federal

Criminal Code. See 18 U.S.C. §§ 2381 (treason), 2382 (misprision of treason), 2385 (advocating overthrow of government).

Article 5300 omits current 5/32-1's petty offense of "compounding a crime" because it is inconsistent with policy judgments reflected in the criminal law generally. The offense of compounding a crime is thought to have utility, if at all, to the extent that it encourages victims to report crimes. As a general matter, however, Illinois — like the overwhelming majority of other jurisdictions — does not criminalize a victim's failure to report an offense. The fact that the victim has received or been offered consideration does not necessarily make his failure to prosecute any more harmful, insofar as the consideration involved may constitute a good-faith attempt to compensate the victim for the harm of the offense. Any sensible effort to criminalize compounding a crime would therefore provide an affirmative defense for restitution or indemnification. Article 5300 opts to omit the offense and avoid the considerable complexity that would be introduced by having an affirmative defense to a mere petty offense.

Article 5300 also omits the Aircraft Crash Parts Act, which addresses narrow regulatory issues that properly belong outside the Criminal Code. See 720 ILCS 205/0.01 et seq.

ARTICLE 6100. PUBLIC ORDER AND SAFETY OFFENSES

Section 6101. Riot

Corresponding Current Provision(s): 720 ILCS 5/25-1; see also 720 ILCS 5/21.2-1 to -6

Commentary:

Generally. This provision defines an offense to prevent groups of people from assembling for an unlawful purpose in a way that threatens the public peace. Although the offenses of conspiracy, attempt, and disorderly conduct limit the need to define a distinct offense to cover the riot offense's elements of creating a public disturbance and collaboration toward a criminal end, the separate offense of riot is included to reflect the greater threat or danger posed by disorderly conduct on the part of a larger group. In addition to creating greater public alarm, mob behavior (as opposed to individual disorderly conduct) poses special problems for law enforcement officials.

Relation to current Illinois law. Section 6101 is similar to current 5/25-1, with several important differences. Section 6101 specifically incorporates by reference the elements of the offense of disorderly conduct. To be liable for the offense of riot, the defendant and others must have engaged in some form of conduct prohibited in proposed Section 6103(1). The specific conduct elements incorporated from Section 6103 replace the vague requirement in current 5/25-1(a)(1) that the defendant disturb the "public peace." (See proposed Section 6103 and corresponding commentary.)

Section 6101 requires the participation of three persons before a course of disorderly conduct elevates to the offense of riot, while current 5/25-1 requires the involvement of only two persons. Although either number requirement is somewhat arbitrary, the requirement of three persons better distinguishes between group and individual behavior and establishes a more likely point at which behavior by multiple actors would increase potential risks and become difficult to control.

In addition, Section 6101 modifies the circumstances under which group disorderly conduct will rise to the level of a riot. Section 6101(1)(a) requires that the actor intend to commit, or facilitate the commission of, a felony or misdemeanor. This subsection covers the conduct prohibited in current 5/25-1(a)(1) to (3), but without raising the constitutional concerns raised by current 5/25-1(a)(2).²⁶⁹ Section 6101(1)(b) requires that the actor

²⁶⁹ In *Landry v. Daley*, 280 F. Supp. 938, 955 (N.D. Ill. 1968), a three-judge panel held 5/25-1(a)(2) facially invalid as vague and overbroad under the First Amendment to the United States Constitution. The court perpetually enjoined and restrained the State and the City of Chicago from bringing or enforcing prosecutions under the law. *Id.* In *People v. Nance*, 724 N.E.2d 889, 891 (Ill. 2000), the Illinois Supreme Court ruled that the injunction was

(continued...)

intend to prevent or coerce official action. This subsection provides a basis for liability in cases where the participants may not intend to commit any crime, but intend to turn an otherwise lawful protest into a riot through the use of forbidden means (e.g., fighting, threatening, or unreasonable noise).

Section 6101(2) removes the grading distinction in current 5/25-1, which grades the offense as a Class 4 felony if it involves “use of force or violence disturbing the public peace” and a Class C misdemeanor otherwise, and punishes any case of riot as a Class 4 felony. All situations falling within the proposed offense create a significant disturbance of the peace and threat of mayhem or injury.

Section 6101 does not cover current 5/25-1(e), as the conduct that provision prohibits is now defined as a separate offense in proposed Section 6102. Section 6101 eliminates current 5/25-1(f), as that provision addresses matters that more properly belong in the Code of Corrections.²⁷⁰

Section 6102. Failure to Disperse

Corresponding Current Provision(s): 720 ILCS 5/25-1(e)

Generally. This provision establishes an offense in situations where a group of three or more persons engaged in a course of disorderly conduct likely to cause substantial harm, inconvenience, annoyance, or alarm fail to disperse upon order by law enforcement authorities.

Relation to current Illinois law. Section 6102 corresponds to current 5/25-1(e). The proposed provision is somewhat more expansive than the current provision in that it might warrant liability even when it cannot be proven that the offenders were participating in a “mob action” or “riot” before being ordered to disperse. Section 6102 instead requires a “course of disorderly conduct likely to cause substantial harm or serious inconvenience,” thereby eliminating the unlawful-intent requirements of the mob action or riot offense.

Moreover, Section 6102(1) covers orders to disperse given by any law enforcement authority, and not just peace officers, as under current 5/25-1. The proposed change recognizes that State’s Attorneys, the Attorney General’s office, and other such authorities may be involved in the process of controlling a crowd.

²⁶⁹ (...continued)

still in effect and refused to overturn the federal court’s ruling stating that the federal courts were the proper forum to challenge the injunction. The Landry court had found the section invalid because it could apply to persons who merely intended to commit a civil or regulatory offense and was not limited to criminal ordinances. Section 6101(1)(a) avoids this concern by requiring an intent to commit a felony or misdemeanor.

²⁷⁰ Current 5/25-1.1, creating an offense of unlawful contact with streetgang members, also has not been incorporated into Section 6101, as it addresses parole violation issues that are more properly addressed in the Code of Corrections.

As under current 5/25-1(e), the proposed offense is graded as a Class A misdemeanor.

Section 6103. Disorderly Conduct

Corresponding Current Provision(s): 720 ILCS 5/26-1(a)(1)

Comment:

Generally. This provision creates an offense to cover situations where people recklessly engage in public conduct that is likely to cause public inconvenience, annoyance, or alarm.

Relation to current Illinois law. Section 6103 corresponds to current 5/26-1, but differs in four significant ways. First, Section 6103(1) specifically expands the offense to cases where the defendant “recklessly creat[es] a risk” of public disorder. The commentary for the 1961 Code reveals a similar intention on the part of the drafters, stating that the offense was meant to reach unreasonable conduct that the defendant “knew or should have known would tend to disturb, alarm or provoke others.” 720 ILL. COMP. STAT. ANN. 5/26-1, Committee Comments — 1961, at 337 (West 1993). However, because that intention was not specifically stated in the text of that statute, the Illinois courts have refused to find defendants guilty of the offense unless their acts actually caused a public disturbance. *See, e.g., People v. Trester*, 421 N.E.2d 959, 960 (Ill. App. 1981) (finding “the prohibited conduct must actually bring about a breach of the peace and not merely tend to do so as the comments indicate”); *cf. People v. Albert*, 611 N.E.2d 567, 569 (Ill. App. 1993) (finding defendant guilty where defendant “knew or should have known” that her shouting in the street at 2 a.m. on a workday would disturb the public).

Second, Section 6103(1) eliminates the phrase “breach of the peace,” an early common-law term that Illinois courts have acknowledged “defies easy definition.” *People v. Allen*, 680 N.E.2d 795, 798 (Ill. App. 1997). Section 6103(1) replaces “breach of the peace” with the more specific requirement that the person cause, or create a risk of, “public inconvenience, annoyance, or alarm.”

Third, Section 6103(1) sets out specific types of conduct prohibited by the offense. Current 5/26-1 prohibits a person from performing “any act in such unreasonable manner” as to provoke a breach of the peace. Such a broad definition of the prohibited conduct leaves the offense susceptible to differing interpretations by the courts. *Compare City of Chicago v. Morris*, 264 N.E.2d 1, 3-4 (Ill. 1970) (finding defendant violated the City’s disorderly conduct statute, which was identical to current 5/26-1, when he got into an argument with police officers in a “loud,” but “reasonable,” tone of voice as a crowd of people gathered), *with People v. Douglas*, 331 N.E.2d 359, 363 (Ill. App. 1975) (finding defendant not guilty of disorderly conduct where defendant screamed obscenities loudly at police officers as a crowd looked on). In contrast, Section 6103(1) requires that the offender: (a) engage in fighting,

threatening, or violent or tumultuous behavior; (b) make unreasonable noise, an offensively coarse utterance, gesture, or display, or address abusive language to any person present; or (c) create any hazardous or physically offensive condition that fails to serve a legitimate purpose.²⁷¹

Fourth, Section 6103 clarifies current law by requiring that the prohibited conduct cause a “public” disturbance. Section 6103(2) defines a “public” disturbance as one that is “likely to affect persons in a place to which the general populace or a substantial group has access,” including “highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, or any neighborhood.” Current law provides no such definition, and courts have sometimes applied the offense to disturbances that are not meaningfully “public.” See *People v. Davis*, 413 N.E.2d 413, 415-16 (Ill. 1980) (finding that defendant committed disorderly conduct when he harassed an 81-year-old woman and another inside woman’s home). Such private conduct is more properly be covered by trespass or harassment offenses. See proposed Sections 2303 and 6105 and corresponding commentaries.

Section 6103 further streamlines and clarifies the offense by removing eleven subsections of current 5/26-1 that cover cases involving false alarms, false reports, harassment, and peeping Toms. Each of those situations are covered under separate offenses in the proposed Code.²⁷²

Finally, Section 6103(3) slightly alters the offense’s grading scheme to take into account the relative seriousness of the public disruption. Current 5/26-1(b) grades all breaches of the peace as Class C misdemeanors. Section 6103(3) provides a grade of Class B misdemeanor for the more serious cases where the actor intends to cause serious harm or inconvenience or creates a persistent disruption. Otherwise, disorderly conduct is graded as a petty offense.

²⁷¹ The proposed Code eliminates current Article 47, which covers various forms of public nuisance. Much of this conduct is covered by proposed Sections 2206 (criminal damage), 6103(1)(c) (disorderly conduct), 6105 (harassment), and 6109 (obstructing highways and other public passages). Beyond the conduct covered by the proposed offenses, current Article 47 appears to reach conduct that may be bothersome, but lacks the significant harm or blameworthy purpose normally associated with criminal liability. Accordingly, such conduct is more properly addressed through private tort remedies than criminal offenses.

²⁷² The false alarm and report offenses, subsections (a)(2) through (4) and (a)(7) through (12), are covered by proposed Sections 5204, 5208, and 6104. The peeping Tom offense, subsection (a)(5), is covered by proposed Section 2403. The collection agency harassment offense, subsection (a)(6), is covered by proposed Section 6105.

Section 6104. False Public Alarms

Corresponding Current Provision(s): 720 ILCS 5/26-1(a)(2) to (4), (7), (9), (11), (12)

Comment:

Generally. Section 6104 creates a general offense covering situations where a person spreads a false report of an impending bomb, crime, or catastrophe that is likely to cause major public inconvenience or alarm.

Relation to current Illinois law. Section 6104 corresponds to current 5/26-1(a)(2) to (4), (7), (9), (11), and (12). Current law addresses false public alarms with seven separate subsections — all defined within the general disorderly conduct offense — addressing various specific fact patterns, requiring different elements, and imposing different penalties. Section 6104 replaces all those specific subsections with a general and separate offense covering any type of false public alarm.²⁷³

Section 6104(2) grades the offense as a Class A misdemeanor. Penalties under current law for the various 5/26-1(a) offenses range from Class B misdemeanor to Class 3 felony. There appears to be no justification for distinguishing between, for example, a false public report of a fire (currently a Class 4 felony under (a)(2)), a false report of a bomb or deadly substance (currently a Class 3 felony under (a)(3)), or a different form of false report to a public safety agency (currently a Class A misdemeanor, under (a)(11)), as all are likely to cause similar levels of public inconvenience and alarm. Moreover, when compared to other Class 3 felony offenses in current law, such as aggravated battery (current 5/12-4) or involuntary manslaughter (current 5/9-3), a Class 3 felony grade for this offense seems disproportionate to the harm caused.²⁷⁴

²⁷³ Although similar, Section 6104 addresses a different harm than proposed Sections 5204 and 5208. Sections 5204 and 5208 address the disruption and interference with the ordinary operations of the government resulting from a false report to a law enforcement agency or public safety organization, regardless of whether such a report tends to cause public inconvenience or alarm. Section 6104 is concerned with the direct disruptive effect of false reports on the general public, rather than the harm to the government agencies themselves (which indirectly harms the people those agencies serve).

²⁷⁴ Although, in some situations, Section 6104's proposed penalty is lower than current law, an offender may also be liable for other offenses — under proposed Sections 5204 or 5208 or other provisions — thus increasing his total criminal liability. (See proposed Section 906 and corresponding commentary.) For example, a false report of a bomb that was transmitted to a public safety and/or law enforcement agency and also caused a public disturbance would constitute at least two offenses.

Section 6105. Harassment**Corresponding Current Provision(s):** 720 ILCS 135/1 to /2**Comment:**

Generally. Section 6105 addresses various forms of conduct that harass another but otherwise would not constitute any criminal offense.

Relation to current Illinois law. Section 6105 corresponds to current 135/1 to 135/2.²⁷⁵ Like current law, Section 6105 describes a variety of prohibited conduct that, when engaged in with the intent to harass, constitutes a criminal offense. Section 6105 differs from current law in that it defines one general offense to cover various forms of harassment, as opposed to the three specific offenses defined in current 135/1 to 135/1-2.

Section 6105(1)(a), (b), and (c) cover the conduct prohibited by current 135/1 to 135/1-2.²⁷⁶ Section 6105(1)(a), covering a single phone call or communication made without the intent to engage in legitimate communication, addresses the typical obscene phone call.

Section 6105(1)(b) expands the harassment offense to include behavior often referred to as “fighting words.” Unlike the current harassment offenses, such insults, taunts, or challenges need not be communicated via the phone or other electronic means. However, the insult, taunt, or challenge must be directed to a particular person or group and must be sufficiently offensive to raise a probability of physical retaliation.

Section 6105(1)(c) prohibits repeated communications, made anonymously, at extremely inconvenient hours, or in offensively course language. Subsection (c) applies even if there is an ostensibly legitimate purpose for the communications. For example, a relentless debt collector would face liability if he repeatedly called during late hours or used offensively course language with the intent to harass a person into repaying a debt.

²⁷⁵ Current 5/17-5.5 defines a similar, but narrow, harassment-based regulatory offense of “unlawful attempt to collect compensated debt against a crime victim.” Section 6105 does not directly correspond to that provision; rather, it is anticipated that, by means of the “conforming amendments” legislation to be enacted with the proposed Code, the 5/17-5.5 offense would be preserved in Illinois law as part of the Crime Victims Compensation Act, 740 ILCS 45/1 *et seq.*

²⁷⁶ Several sections from the current provisions, which are not part of the offense definitions, have been eliminated. Current 135/1-1(5), providing for accomplice liability, has been eliminated because such liability is governed by the general accountability rules in proposed Section 301. The requirement at the end of current 135/1-1 that warnings be posted in all telephone directories has been removed, as it properly belongs outside the Code. Current 135/1-3, which allows certain evidence of a person’s intent to harass, properly belongs in the Code of Criminal Procedure. Current 135/1-4, discussing psychiatric examinations, addresses an issue properly addressed in the Code of Corrections.

Section 6105(1)(d), which has no directly corresponding provision in current law,²⁷⁷ acts as a catchall provision covering a range of harassing conduct not already covered by the other subsections. The proposed provision covers any type of alarming conduct made with the intent to harass and serving no legitimate purpose of the actor. For example, the section might be used to impose liability for a cross burning, or leaving a carcass or foul-smelling trash on a neighbor's front lawn, or repeatedly aiming a laser pointer at a peace officer, see 720 ILCS 5/24.6-20.

Section 6105(2)(a) aggravates the offense to a Class A misdemeanor where the harassing conduct violates an order of protection. That aggravation, with proposed Sections 1201(2)(b)(iv) and 1204(2)(a) (q.v.), addresses the conduct prohibited in current 5/12-30. Section 6105(2)(b), like current 135/2(a), grades the base harassment offense as a Class B misdemeanor.

Section 6105 does not incorporate the specific grade adjustments for subsequent offenses found in current 135/2, because the proposed Code already provides a general aggravation for recidivism. See proposed Section 905(1) and corresponding commentary.

Section 6106. Hate Crime Aggravation

Corresponding Current Provision(s): 720 ILCS 5/12-7.1

Comment:

Generally. This provision defines a distinct offense to cover the independent harm that results when an offense is committed with the intent to intimidate or otherwise harass a specific minority group.

Relation to current Illinois law. Section 6106 is similar to current 5/12-7.1, but defines the offense in terms of its resulting harm — the intimidation of the affected group — rather than the subjective mental state or motivation of the offender.

²⁷⁷ As discussed supra note 271, this provision covers some of the conduct prohibited in the current nuisance offenses in Article 47. However, unlike current law, the proposed provision only prohibits the conduct if the actor engages in the conduct with the intent to harass another and the conduct serves no legitimate purpose. Any conduct proscribed in current Article 47 that would fall outside the proposed offenses because of the actor's lack of culpability is more properly addressed outside the Criminal Code. Therefore, it is anticipated that these provisions will be moved elsewhere through "conforming amendments" legislation.

Similarly, the provisions in current 5/17-5 (deceptive collection practices) mostly deal with conduct properly addressed outside the Criminal Code.

Section 6106(2) grades the offense as a Class A misdemeanor, whereas 5/12-7.1 grades the offense as a Class 4 felony. However, Section 6106(1) states that it defines “an additional offense” to make explicitly clear that an offender may be found liable for both the underlying offense and the Section 6106 offense, which is likely to lead to greater total liability than would be available under the current provision. See proposed Sections 254 and 906 and corresponding commentary.

Section 6107. Public Drunkenness; Drug Incapacitation

Corresponding Current Provision(s): None

Comment:

Generally. This provision addresses persons who appear in any public place in an obviously intoxicated state to the degree that they may endanger themselves, property, or others, or annoy persons in their vicinity.

Relation to current Illinois law. Section 6107 has no directly corresponding provision in current law. Under current law, drunk and disorderly persons have been convicted under the disorderly conduct offense (current 5/26-1). See, e.g., People v. Duncan, 631 N.E.2d 2d 359, 363 (Ill. App. 1975) (finding defendant guilty of disorderly conduct where, while intoxicated, he urinated in public 30 feet from the outside eating area of a restaurant).

Section 6107(2) defines the term “public place” as an area “to which the general populace or a substantial group has access.” Current 5/11-9(b) (public indecency) defines a “public place” as “any place where . . . conduct may reasonably be expected to be viewed by others” — a definition similar to that used in proposed Section 6201 (indecent exposure), for similar purposes, to define the term “place open to public view.” Section 6107(2) defines the term differently, because this offense is concerned less with the fact that the offender’s intoxication may be seen than with the fact that it occurs in a place where it may directly harm or irritate other persons in the area, creating a public nuisance.

Section 6107(3) grades the offense as a petty offense.

Section 6108. Loitering or Prowling

Corresponding Current Provision(s): 720 ILCS 5/11-9.3(c)(5);
5/11-9.4(d)(6)

Comment:

Generally. This provision covers persons who remain in one place at a time or in a manner not usual for law-abiding citizens, under circumstances that warrant alarm for the safety of persons or property in the area. Section 6108(1) defines the offense and prohibits a person from loitering or prowling

in a manner not usual for law-abiding citizens under circumstances that warrant alarm for the safety or persons or property in the vicinity. Section 6108(2) defines “loiter.”

The proposed offense’s potentially wide scope is limited in three respects. First, Section 6108(3) lists several factors to be considered in determining whether the person’s conduct warrants alarm: flight upon appearance of a peace officer, refusal to identify oneself, or a manifest attempt to conceal oneself or an object. Second, Section 6108(4) requires, when practical, that peace officers ask the person to identify himself and explain his presence and conduct. Finally, Section 6108(5) prevents the person from being convicted where the officer did not comply with Section 6108(4) or it appears that the actor’s explanation was true and, if believed by the peace officer at the time, would have dispelled the alarm.

Section 6108(6) grades the offense as a petty offense.

Relation to current Illinois law. There is no corresponding provision in current Illinois law. (Section 6108(2)’s definition of “loiter” as “to stand or sit idly” is similar to current 5/11-9.3(c)(5) and -9.4(d)(6), however.) The City of Chicago enacted a loitering provision, but that provision was recently invalidated by the United States Supreme Court. In City of Chicago v. Morales, 527 U.S. 41 (1999), the Court found the city’s ordinance unconstitutionally vague for failing to provide fair notice to citizens of the conduct prohibited and for failing to provide minimal guidelines to govern law enforcement. The Court found that the ordinance’s definition of loitering as remaining “in any one place with no apparent purpose” failed to notify ordinary citizens what conduct was forbidden and gave police far too much discretion in determining whether a person was loitering. Morales, 527 U.S. at 56-64.

The proposed provision suffers from neither of these constitutional infirmities. Section 6108 provides notice to citizens by requiring that the person loiter under circumstances that warrant alarm and by listing several factors that may be considered in determining whether such alarm is warranted. In addition, Section 6108 guides the police by requiring, where possible, that they inquire as to the person’s identity and conduct before an arrest.

Section 6109. Obstructing Highways and Other Public Passages

Corresponding Current Provision(s): 720 ILCS 5/47-5, -25

Comment:

Generally. Section 6109 creates an offense covering persons who either (1) recklessly obstruct a highway without legal privilege to do so, or (2) while in a gathering, refuse to obey a reasonable official request to move. The provision is designed to prevent the danger and inconvenience that may result from unjustified obstruction of public passages, while at the same time protecting lawful assemblies from the threat of unreasonable legal sanction. The proposed provision balances the State’s right to protect the public interest

in unobstructed streets and citizens' access to public places for free speech and assembly by providing clear guidelines on what conduct is prohibited and by limiting police discretion in enforcing the offense.

Section 6109(1)(a) creates an offense covering persons who recklessly block passageways without legal privilege, thus exempting persons who obtain permits or official permission to block off streets. Section 6109(3) limits the scope of the offense by precluding liability based solely on the fact that a group of people gathers to hear the actor speak, or because the actor is a member of such a gathering.

However, such persons may face liability under Section 6109(1)(b) if they fail to leave once the gathering becomes a significant obstacle. Section 6109(1)(b) creates an offense covering persons who refuse to obey a reasonable order to move. Such an order may only be given for the purpose of preventing obstruction of a public passage or to maintain public safety. Section 6109(4) narrowly defines when such orders are reasonable, to exclude cases where the police can readily handle the obstruction without stopping the assembly.

Section 6109(2) further limits the scope of both of these offenses by defining "obstructing" to require that the actor or actors render the passageway "impassable without unreasonable inconvenience or hazard." Thus, otherwise lawful activity will not be precluded on the grounds of a trivial inconvenience.

Relation to current Illinois law. Section 6109 is similar to current 5/47-5(5), but expands the offense to impose liability on persons who refuse a reasonable official order or request to move. Moreover, Section 6109 specifically excludes from liability persons who gather to speak or hear a person speak.

Section 6109(5)(b) grades the base offense as a petty offense, as current 5/47-25 does. Section 6109(5)(a), however, increases the grade to a Class A misdemeanor in cases where the person persists in obstructing after receiving an explicit warning from law enforcement authorities. Cf. 720 ILCS 5/25-1(e) (failure to comply with police officer's command to withdraw from mob action; Class A misdemeanor).

Section 6110. Disrupting Meetings and Processions

Corresponding Current Provision(s): 720 ILCS 5/21.2-2; 26-1(a)(1)

Comment:

Generally. Section 6110 creates an offense covering conduct designed to disrupt a lawful meeting, procession, or gathering. Although some of the proscribed conduct is already covered by proposed Section 6103, Section 6110 has several unique features that seek to protect the rights and safety of persons engaged in lawful assemblies. Section 6110 does not require a risk of "public" alarm, as Section 6103 does. The disruptive efforts may be directed

toward, and have an effect on, only the assembling group, and need not be objectively offensive or unreasonable.

Section 6110 grades the offense as a Class C misdemeanor, whereas many disorderly conduct cases under Section 6103 would be graded as petty offenses. The higher penalty reflects the importance of protecting lawful assembly, religious practice, and freedom of association.

Relation to current Illinois law. Section 6110 roughly corresponds to current 5/21.2-2²⁷⁸ and 5/26-1(a)(1). However, unlike current 5/21.2-2, the proposed offense does not require the threat or use of force or violence. Moreover, the offense applies to any lawful meeting or gathering and is not limited to public institutions of higher learning. Section 6110 differs from current 5/26-1(a)(1) in that the actor need not act unreasonably in disrupting the meeting.

Section 6110(2), like both 5/26-1(a)(1) and 5/21.2-4, grades the offense as a Class C misdemeanor.

Section 6111. Desecration of Venerated Objects

Corresponding Current Provision(s): 720 ILCS 620/1

Comment:

Generally. This provision creates an offense prohibiting the intentional desecration of venerated objects such as public monuments and places or worship or burial. Section 6111(1) requires that the desecrated objects be public or appear in a public place. Likewise, the offense definition requires that the actor know that his conduct will outrage the sensibilities of persons likely to observe or discover his action. These limitations exclude from liability persons who act in private or have innocent motives.

Relation to current Illinois law. Section 6111 is similar to current 620/1. The current offense prohibits any mistreatment of a flag, whether by public mutilation or by simple marking, drawing, picture, or advertisement.²⁷⁹

²⁷⁸ The proposed Code does not incorporate current 5/21.2-1, -3, -5 and -6, as those provisions relate specifically to the more particular terms of current 5/21.2-2 and are unnecessary in the context of Section 6110. To the extent their content remains necessary, it may be preserved elsewhere in the Illinois statutes by means of “conforming amendments” legislation.

²⁷⁹ Both federal and state case law indicate that current 620/1 is unconstitutional. In People v. Lindsay, 282 N.E.2d 399, 406 (Ill. 1972), the Illinois Supreme Court found an almost identical prior version of the statute unconstitutional as applied to the defendant because there was no showing that the defendant’s conduct caused a breach of the peace. In United States v. Eichman, 496 U.S. 310, 315-16 (1990), the United States Supreme Court found that a similar statute violated the First Amendment because the statute was clearly “related to the suppression of free expression.” See also Texas v. Johnson, 491 U.S. 397 (1989); Spence v. Washington, 418 U.S. 405 (1974).

(continued...)

Section 6111 broadens current 620/1 to include other venerated objects besides flags. At the same time, the proposed provision limits the scope of the offense to intentional acts of public desecration.

In some cases, Section 6111(3)'s grade for the offense, Class C misdemeanor, is the same as that imposed by current 620/1. Current law, however, increases the penalty to a Class 4 felony for public displays of desecration. Section 6111 recognizes that the offense generally is only meant to prohibit public displays and not private expressions.

Section 6112. Definitions

Corresponding Current Provision(s): 720 ILCS 5/2-13; 5/11-9.3(c)(5); 5/11-9.4(d)(6); 5/14-1; 5/20.5-5(b)

Comment:

Generally. This provision collects defined terms used in Article 6100 and provides cross-references to the provisions in which they are defined.

Relation to current Illinois law. For discussion of the relationship between Article 6100's defined terms and current law, refer to the commentary for the provision in which the term in question is initially defined.

General Comment Regarding Current Law:

In addition to the current provisions noted above, Chapter 720 contains a variety of offenses that address very specific public safety or public order concerns. Some of these sections have been eliminated altogether from the proposed Code, because they address harms covered by other offenses or seem to serve no useful purpose: current 720 ILCS 5/17-19 (use of name of Pawner's Society); 5/26-2 (interference with emergency communication over CB radio); 5/32-11 (barratry); 5/32-12 (maintenance); 5/32-13 (unlawful clouding of title); 5/44-1 to -3 (unlawful transfer of communications device to minor); 300/1 (Derogatory Statements About Banks Act); 505/1 (Abandoned Refrigerator Act); and 595/1 (Draft Card Mutilation Act).

²⁷⁹ (...continued)

Section 6111 is doubtless constitutional as applied to persons who destroy or deface any public object of veneration, including flags. However, the State may still face difficulty in applying the statute against, for example, a person burning his own flag during a political rally, as the government's interest would likely be found related to the suppression of free expression. In cases where the person also satisfied the elements of trespass, disorderly conduct, or riot, the State should be able to prosecute those offenses without running afoul of the First Amendment. *See, e.g., Johnson*, 491 U.S. at 408 (noting that no breach of the peace occurred or threatened to occur); *Spence*, 418 U.S. at 409 (citing as significant the fact that the defendant had not engaged in any trespass or disorderly conduct, and that there was no evidence of any risk of breach of the peace).

Other sections have been removed because they address narrow regulatory issues that properly belong outside the Criminal Code: current 720 ILCS 5/21.3-5 (solicitation on school property); 5/26-3 (use of a facsimile machine in unsolicited advertising or fundraising); 125/1 to /4 (Hunter Interference Prohibition Act); 220/1 to /4 (Appliance Tag Act); 225/1 to /2 (Auction Sales Sign Act); 230/1 to /2 (Business Use of Military Terms Act); 340/1 to /2 (Sale of Maps Act); 345/1 to /2 (Sale or Pledge of Goods by Minors Act); 375/1 to /4 (Ticket Scalping Act); 380/1 to /2 (Title Page Act); 395/1 to /4 (Video Movie Sales and Rentals Act); 400/1 to /2 (Wild Plant Conservation Act); 530/1 to /3 (Aerial Exhibitors Safety Act); 555/1 to /2 (Child Curfew Act); 560/1 to /4 (Illinois Clean Public Elevator Air Act); 585/1 to /4 (Illinois Dangerous Animals Act); 590/1 to /3 (Discrimination in Sale of Real Estate Act); 605/1 (Excavation Fence Act); 615/1 (Fire Extinguisher Service Act); 630/1 (Guide Dog Access Act); 650/1 (Nitroglycerin Transportation Act); 655/1 to /2 (Outdoor Lighting Installation Act); 660/1 to /4 (Party Line Emergency Act); 665/1 to /3 (Peephole Installation Act); 675/1 to /2 (Sale of Tobacco to Minors Act); and 680/1 to /4 (Smokeless Tobacco Limitation Act).

ARTICLE 6200. PUBLIC INDECENCY OFFENSES

Section 6201. Indecent Exposure

Corresponding Current Provision(s): 720 ILCS 5/11-9, -9.1

Comment:

Generally. This provision defines an offense prohibiting sexual intercourse, sexual conduct, or other indecent exposures of the body in places open to public view or in the presence of a minor.

Relation to current Illinois law. Section 6201 corresponds to current 5/11-9 and 5/11-9.1 (aside from 5/11-9.1(a-5), which is addressed by proposed Section 1303). The proposed provision combines and reorganizes the current indecency offenses to enhance brevity and clarity. Section 6102(1) defines the offense in similar fashion to current 5/11-9(a) and 5/11-9.1(a).²⁸⁰ Section 6201(1)(c) expands the offense to exposures performed with the intent to arouse the defendant “or another person,” thus covering the conduct related to sexually gratifying children in current 5/11-9.1(a)(2).

Section 6201(2)’s definition of “place open to public view” is similar to current 5/11-9(b)’s definition of “public place,” but adds the phrase “without their prior knowledge or consent” to specifically exclude from liability private consensual acts not involving children, including commercial erotic displays. *See People v. Haven*, 618 N.E.2d 260, 262 (Ill. App. 1992) (finding that current 5/11-9 was not intended to apply to commercial erotic displays); *see also* 720 ILL. STAT. ANN. 5/11-9, Committee Comments — 1961, at 91-92 (West 1993) (noting that the lewd exposure provision was purposely limited to “exposures which were shocking and disturbing to the immediate audience, leaving commercial erotic displays for separate consideration”).

Section 6201(3) retains the exception in current 5/11-9(a)(2) for breast-feeding of infants.

Like both 5/11-9(c) and 5/11-9.1(c), Section 6201(4) grades the offense as a Class A misdemeanor. Section 6201 does not incorporate the current provisions’ grade aggravation for subsequent offenses, as the proposed General Part already contains a general recidivism aggravation. *See* proposed Section 905(1).

²⁸⁰ Section 6201(1)(c)(i) replaces the terms “sexual penetration” and “sexual act” with “sexual intercourse” and “sexual conduct” in order to remain consistent with other provisions in the proposed Code. *See, e.g.*, proposed Sections 1301(3) (defining “sexual intercourse”) and 1302(2) (defining “sexual conduct”) and corresponding commentary.

[Section 6202. Prostitution; Patronizing a Prostitute]²⁸¹

Corresponding Current Provision(s): 720 ILCS 5/11-14; 5/11-18

Comment:

Generally. This provision criminalizes the act of providing sexual conduct or intercourse in return for anything of value.

Relation to current Illinois law. Section 6202 corresponds to current 5/11-14 and 5/11-18. Current law uses two offenses to prohibit the performance of sexual acts in return for anything of value:²⁸² one offense for soliciting a sex act (5/11-14) and one for patronizing a prostitute (5/11-18). Current 5/11-14 prohibits the prostitute from selling sexual intercourse²⁸³ or sexual conduct²⁸⁴ for anything of value, while current 5/11-18 only prohibits the client from engaging in sexual penetration with the prostitute. Section 6202(1) combines the two current sections into one offense that assigns equal liability to the prostitute and the client for trading sexual conduct or intercourse for anything of value.²⁸⁵

Current 5/11-14 and 5/11-18 both contain inchoate forms of the offense, which Section 6202 eliminates in favor of the general inchoate offenses in proposed Article 800. Current 5/11-14 punishes a prostitute who “agrees to perform” sexual acts. Such conduct would likely be covered by

²⁸¹ This provision is bracketed because the proposed Code includes two formulations of the same offense. Most modern codes do not employ this formulation of the prostitution offense, which criminalizes the “selling” of a sexual act, in part because the dynamic at play with respect to any individual act may be complex — partners, even spouses, may “trade” sex for other things under a variety of circumstances. Instead, most modern codes define the offense as “making one’s living as a prostitute” or “soliciting a prostitute.” (See *infra* for discussion of the proposed alternative formulation of this provision.)

²⁸² Throughout Article 6200, the proposed provisions do not incorporate the current list of specific items that fall within the meaning of “anything of value” (“money, property, token, object, or article”), but merely use the general inclusive phrase “anything of value,” which includes all those specific items.

²⁸³ The proposed Code replaces the term “sexual penetration” with “sexual intercourse” to remain consistent with language employed in other Code provisions. See proposed Section 1301(3) (defining “sexual intercourse”).

²⁸⁴ Section 6202(1) replaces the phrase “any touching or fondling of the sex organs of one person by another person” in current 5/11-14 with the defined term “sexual conduct.” See proposed Section 1302(2) (defining “sexual conduct”).

²⁸⁵ The proposed Code eliminates the offense of patronizing a juvenile prostitute in current 5/11-18.1. A person who engages in sexual conduct or intercourse with a juvenile prostitute would be liable for both patronizing a prostitute under proposed Section 6202 and for sexual assault or sexual abuse under proposed Sections 1301 and 1302, respectively. Under the proposed sentencing rule for multiple offenses, the defendant would receive an additional sanction for each conviction. (See proposed Section 906 and corresponding commentary.)

The affirmative defense in current 5/11-18.1(b) for defendants who reasonably believed the prostitute to be 17 years old or older is unnecessary because, under proposed Sections 1301 and 1302, a culpability requirement of negligence as to the victim’s age is already required. See proposed Section 1306(1).

the proposed attempt or conspiracy provisions.²⁸⁶ See proposed Sections 801 and 803. Current 5/11-18 prohibits the inchoate act of entering a place of prostitution with the intent to engage in sexual penetration. Such conduct would be punishable, under proposed Section 801, as an attempt to patronize a prostitute.

Section 6202(2) grades the offense a Class A misdemeanor, the same as current 5/11-14(b) and 5/11-18(b). However, Section 6202 eliminates the current provisions' aggravation for subsequent offenses in favor of the general aggravation in proposed Section 905. Section 6202 also eliminates the aggravation for engaging in the prohibited conduct within 1,000 of a school found in current 5/11-14(c) and 5/11-18(c). Such an aggravation seems too trivial and arbitrary to warrant a full-grade aggravation. Moreover, public solicitations of prostitution may also violate proposed Section 6103 (disorderly conduct), and sexual acts or solicitations that actually involve minors would be covered by proposed Sections 1301 to 1303, 4105(1), and 6203(2)(a), thus exposing the actor to potential multiple convictions and additional liability.

[Section 6202. Solicitation of a Sexual Act]²⁸⁷

Corresponding Current Provision(s): 720 ILCS 5/11-14; 5/11-14.1;
5/11-18

Comment:

Generally. This provision creates an offense to prohibit solicitation of a person to perform sexual acts for anything of value.

Relation to current Illinois law. Section 6202 is similar to current 5/11-14.1. Section 6202(1) simplifies the offense definition by replacing current language with the terms “anything of value,” “sexual intercourse,” and “sexual conduct.” See *supra* notes 282 to 284.

Section 6202(2) grades the offense as a Class A misdemeanor. Current 5/11-14.1 grades solicitation as a Class B misdemeanor. The proposed provision grades soliciting a sexual act the same as current law grades the act of engaging in prostitution and patronizing a prostitute, under the assumption that the general prostitution offense will be eliminated.

²⁸⁶ Such conduct would constitute a criminal attempt under proposed Section 801 or a conspiracy under proposed Section 803, provided the prostitute took a substantial step towards the commission of the offense (e.g., accepting money) or committed an overt act in pursuance of the conspiracy (e.g., obtaining a hotel room).

²⁸⁷ This alternative formulation of the offense is necessary only if the other, more general prostitution offense is not used. See *supra* note 281. If the general prostitution offense is used, there is no need for a separate offense of soliciting a sexual act, as that conduct would be covered by the general inchoate offenses in proposed Section 802. If this alternative is preferred, the definitional references currently in the first provision should be transferred to this one.

Section 6203. Promoting, Supporting, or Living Off the Proceeds of Prostitution

Corresponding Current Provision(s): 720 ILCS 5/11-15 to -17.1;
5/11-19; 5/11-19.1

Comment:

Generally. This provision defines an offense to create liability for persons who promote, support, or live off the proceeds of prostitution.

Relation to current Illinois law. Section 6203 creates one offense to replace seven different current provisions.²⁸⁸ Proposed Section 6203(1)(a) and (b) are identical to current 5/11-16(a)(1) and (2), but would also cover the conduct in current 5/11-15.²⁸⁹ See People v. Wiler, 545 N.E.2d 1014, 1016 (Ill. App. 1989) (noting that conduct which violated current 5/11-15 may also violate 5/11-16).

Section 6203(1)(c) corresponds to current 5/11-17. The proposed provision replaces the three alternative forms of keeping a place of prostitution in current 5/11-17(a) with a single offense definition that covers the same conduct.

Section 6203(1)(d), imposing liability for parents and guardians who allow their children to engage in prostitution, has no directly corresponding provision in current Chapter 720, although it is similar to current 5/11-20.1(a)(5) (prohibiting parent from allowing child “to appear in any stage play, live performance, film, videotape, photograph or other similar visual presentation, portrayal or simulation or depiction by computer” of a sex act).

Section 6203(1)(e) is nearly identical to current 5/11-19(a), but eliminates the current list in favor of the general phrase “anything of value.” See supra note 282.

Section 6203(2)(a) aggravates the offense to a Class 2 felony for any violation where the actor was negligent as to the prostitute being under 16 years old or severely or profoundly mentally retarded.²⁹⁰ This is one grade lower than current 5/11-15.1, 5/11-17.1,²⁹¹ and 5/11-19.1 provide. The offense is graded as a Class 2 felony because it seems less serious than

²⁸⁸ Current law’s use of these distinct but similar offenses has caused confusion for prosecutors in charging defendants and, in at least one case, has led the court to invalidate the defendant’s conviction because the State charged the defendant under the wrong section. See, e.g., People v. Anderson, 493 N.E.2d 410, 413 (Ill. App. 1986).

²⁸⁹ To the extent that current 5/11-15 and 5/11-16 reach inchoate conduct not covered by Section 6203 (such as soliciting for a prostitute or offering to arrange a meeting with a prostitute), such conduct would be covered by the general inchoate offenses in Article 800.

²⁹⁰ This formulation eliminates the need for the affirmative defense in current 5/11-15.1(b), 5/11-17.1(b), and 5/11-19.1(b) for defendants who reasonably believed the prostitute was 16 or older or that the prostitute was not severely or profoundly mentally retarded.

²⁹¹ Section 6203 removes the forfeiture provision in 5/11-17.1(d), as that issue is more properly addressed in the Code of Corrections.

other offenses, graded as Class 1 felonies, that actually involve direct sexual relations with a juvenile. See proposed Sections 1301 and 1302. Additional liability may be imposed for such offenses if they occur, or are attempted. See proposed Sections 254 and 906 and corresponding commentary.

Section 6203(2)(b) grades offenses under Section 6203(1)(a) through (d)²⁹² as Class 4 felonies, while similar violations are Class A misdemeanors under current 5/11-15(b), 5/11-16(b), and 5/11-17(b). Section 6203(2)(c) lowers the grade to Class A misdemeanor — the same as under current 5/11-19(b) — when the person violates Section 6203(1)(e), as receiving proceeds from prostitution is less serious than the conduct described in Subsections (1)(a) to (1)(d).

Section 6203(2) does not incorporate the grade aggravation for subsequent convictions in current 5/11-15, 5/11-17, and 5/11-19, as there is a general aggravation for subsequent convictions in proposed Section 905(1). Section 6203 also eliminates the aggravation in current 5/11-15(c), 5/11-16(c), and 5/11-19(c) for offenses committed within 1,000 feet of a school, as the grade of the base offense has already been raised. See supra commentary for proposed Section 6202 (first version).

Section 6204. Disseminating Obscene Material

Corresponding Current Provision(s): 720 ILCS 5/11-20 to -21; see also 720 ILCS 670/1 to /3

Comment:

Generally. This provision covers a wide range of conduct related to the dissemination of obscene material.

Relation to current Illinois law. Section 6204 replaces current 5/11-20, 5/11-20.1, 5/11-21, and 670/1 to /3 with one offense covering the dissemination of obscene material.

Section 6204(1)(a) to (f) prohibit various forms of prohibited conduct in nearly identical fashion to current 5/11-20(a)(1) to (6).²⁹³ The proposed provision also covers conduct prohibited in current 5/11-21 and 670/1 to /3 to the extent those provisions apply to obscene material.²⁹⁴

Section 6204(2) provides the same definition of “obscene” as current 5/11-20(b), but divides the definition into subsections for enhanced clarity.

²⁹² Because the offense under Section 6203(1)(d) requires the child to be under 16, and because a parent should always be at least negligent as to this fact, that offense will presumably always be graded as a Class 2 felony under Section 6203(2)(a).

²⁹³ The inchoate offense of offering or agreeing to sell, deliver, or provide obscene material in current 5/11-20(a)(1) is covered by the general inchoate offenses in Article 800.

²⁹⁴ To the extent these current sections apply to non-obscene material, the offenses are likely unconstitutional or do not warrant criminal sanction.

Section 6204(3) retains current 5/11-20(e)'s inference of intent to disseminate, but restates it as a permissive inference, rather than using the less clear term "prima facie evidence."

Section 6204(4) provides the same affirmative defense as current 5/11-20(f).

Section 6204(5)(a) grades the offense as a Class 2 felony where the obscene material or performance includes a victim the defendant reasonably should know is under 16 years of age or severely or profoundly mentally retarded. The proposed aggravation, in conjunction with the conduct prohibited in Section 6204(1), replaces, in part, the separate offense of child pornography defined in current 5/11-20.1(a).

Specifically, Section 6204(5)(a) covers the conduct prohibited in current 5/11-20.1(a)(1) to (3) and (6). The inchoate conduct prohibited by current 5/11-20.1(a)(4) and (7) is covered by the general solicitation offense in proposed Section 802. Current 5/11-20.1(a)(5)'s offense for parents or guardians who allow or encourage minors to appear in child pornography is addressed by proposed Sections 1301(2) and 6203(1)(d).²⁹⁵

Section 6204(5)(a) grades the child pornography offense as a Class 2 felony, whereas current law grades child pornography as either a Class 1 or Class 3 felony, depending on the type of conduct. The proposed penalty is consistent with the penalty for promoting, supporting, or living off the proceeds of a juvenile prostitute in proposed Section 6203. In addition, in many cases, the defendant may be eligible for additional offenses related to child pornography, such as sexual assault, sexual abuse, and promoting prostitution. Under the proposed sentencing rules for multiple offenses, these child pornography defendants may be eligible for total sentences equal to, if

²⁹⁵ The proposed Code eliminates the remaining provisions in current 5/11-20.1. The affirmative defense in current 5/11-20.1(b)(1) is unnecessary because the proposed offense does not apply unless the defendant was negligent as to the material's containing a victim who was underage or mentally retarded. Likewise, the defenses in 5/11-20.1(b)(3) and (5) are covered by the general justification and excuse defenses in proposed Articles 400 and 500. Proposed Section 6204(3) replaces the presumption in current 5/11-20.1(b)(4). Current 5/11-20.1(d), (e), and (e-5) address procedural issues properly addressed outside the Code. The definitions in current 5/11-20(f) and the re-enactment findings in subsection (g) have also been deleted as unnecessary.

The proposed Code also does not incorporate current 5/11-20.1A, 5/11-20.2, and 5/11-22, as those provisions discuss procedural or regulatory matters properly addressed outside the Criminal Code. It is expected that these provisions will be retained outside the Criminal Code through "conforming amendments" legislation.

Similarly, current 5/11-23 addresses mostly regulatory matters properly addressed outside the Criminal Code and should be preserved elsewhere. In moving that provision outside the Code, however, its Class 3 felony aggravation for offenses involving victims under the age of 17 will be eliminated, as the proposed Code limits the grade for offenses outside the Criminal Code to a Class 4 felony. See proposed Section 902. To the extent 5/11-23 relates to preparatory conduct toward a sexual assault or sexual abuse offense, however, such conduct may constitute an attempt to commit one of those offenses under the proposed Code. See proposed Section 801 (attempt), Section 1301 (sexual assault), Section 1302 (sexual abuse), Section 1303 (sexual exploitation of a child), and corresponding commentary.

not longer than, those under current law. See proposed Sections 254 and 906 and corresponding commentary.

Section 6204(5)(b) and current 5/11-20(d) both grade the offense as a Class A misdemeanor. Section 6204(5)(b) eliminates the grading aggravation for subsequent offenses, as proposed Section 905(1) already contains a general aggravation for subsequent convictions.

Section 6205. Abuse of Corpse

Corresponding Current Provision(s): see 720 ILCS 5/12-33(a)(7); cf. 410 ILCS 5/1 et seq.; 410 ILCS 18/1 et seq.; 410 ILCS 505/1 et seq.; 410 ILCS 510/1 et seq.

Comment:

Generally. This provision creates an offense covering persons who treat a human corpse in a way that they know would outrage ordinary family sensibilities. The offense covers sexual indecency, physical abuse, mutilation, gross neglect, and other outrageous treatment. The exception for treatment authorized by law excludes from the offense all the lawful acts that may be done to a corpse, such as embalming, autopsy, scientific research, and medical examination. Likewise, the requirement that the person know their conduct would outrage family sensibilities excludes from liability persons who inadvertently offend a relative of the deceased.

Relation to current Illinois law. Section 6205 has no directly corresponding provision in current Chapter 720. Current 5/12-33(a)(7) punishes the unlawful dissection, mutilation, or incineration of a human corpse, but only if the conduct is performed in the presence of a child and as part of a ceremony, rite, or other observance.

In addition, current law contains a number of provisions addressing the lawful treatment of corpses during burial (410 ILCS 5/1 et seq.), cremation (410 ILCS 18/1 et seq.), autopsies (410 ILCS 505/1 et seq.), and research (410 ILCS 510/1 et seq.). Section 6205 addresses treatment of human corpses that falls outside of these provisions.

Section 6205(2) grades the offense as a Class B misdemeanor.

Section 6206. Sale of Human Body Parts

Corresponding Current Provision(s): 720 ILCS 5/12-20; see also 755 ILCS 50/8.1; 755 ILCS 55/1.1

Comment:

Generally. This provision covers persons who unlawfully buy or sell human body parts. The offense excludes the lawful donation of organs,

blood, bodily fluids, and hair. The offense also does not apply to the payment or reimbursement of actual medical costs or costs associated with the lawful transportation of body parts.

Relation to current Illinois law. Section 6206 is nearly identical to current 5/12-20,²⁹⁶ with two minor changes. Section 6206 removes the inchoate offense of offering to buy or sell body parts, as that offense is addressed by the general inchoate offenses in Article 800. Section 6206 also removes the grading aggravation for subsequent convictions, as there is already a general recidivism aggravation in proposed Section 905(1).

Section 6207. Cruelty to Animals

Corresponding Current Provision(s): 510 ILCS 70/3.01 to .03; 70/16; 720 ILCS 5/26-5; see also 510 ILCS 70/4.01 to /7.15; 720 ILCS 315/1; 720 ILCS 610/1 to /5

Comment:

Generally. This provision punishes the unlawful killing of another's animal and the cruel mistreatment or neglect of any animal, except in cases where the person followed accepted veterinary practices or carried on the activities for lawful scientific research.

Relation to current Illinois law. There is no directly corresponding provision in current Chapter 720. Current law punishes animal cruelty outside the Criminal Code, in the Humane Care for Animals Act (510 ILCS 70/1 et seq.) That act contains three basic animal cruelty provisions, 510 ILCS 70/3.01 to 3.03, that are covered by Section 6207.²⁹⁷ The proposed provision replaces the current provisions with three concise forms of the offense covering the cruel mistreatment or neglect of any animal, and the killing or injuring of another's animal.²⁹⁸

²⁹⁶ Section 6206 also replaces two offenses outside the Code that cover the same conduct. See 755 ILCS 50/8.1; 755 ILCS 55/1.1.

²⁹⁷ The Act also contains a number of other provisions that address more specific forms of animal cruelty and would largely be covered by the proposed provision — e.g., offenses covering the use of animals in entertainment (70/4.01), teasing, striking, or tampering with police dogs (70/4.03), injuring or killing police dogs (70/4.04), horse poling or tripping (70/5.01), poisoning dogs or other domestic animals (70/6), transportation of animals (70/7), confinement of animals in motor vehicles (70/7.1), and guide, hearing, and support dogs (70/7.15).

Section 6207 is not intended to eliminate any other provisions in the Act addressing regulatory or procedural matters properly belonging outside the Code.

²⁹⁸ As under current law, the killing of another's animal might also fall under the criminal damage offense. See proposed Section 2206 and corresponding commentary; 720 ILCS 5/21-1(1)(d). In appropriate situations, a person who kills another's animal could be held liable under both Section 2206 and Section 6207. See proposed Section 254 and corresponding commentary. The killing of one's own animal would be an offense under Section 6207(1) only if the death were caused by cruel mistreatment or neglect.

Section 6207 also replaces the current Chapter 720 offense of “dog fighting,” which is graded from a Class A misdemeanor to a Class 3 felony. See 720 ILCS 5/26-5; see also 510 ILCS 70/4.01, 70/16. Section 6207, in conjunction with proposed Section 301, covers the conduct criminalized by 5/26-5(a) to (i).²⁹⁹

Section 6207(2) excepts from liability treatment of animals that is otherwise lawful under accepted veterinary practices or as part of scientific research. Cf. 510 ILCS 70/3.03(4) (defining exceptions to animal torture provision).

Section 6207(3) grades the offense as a Class C misdemeanor in cases where the person acts recklessly, and as a Class A misdemeanor in cases where the person acts intentionally. Current 510 ILCS 70/16(e) grades intentional animal cruelty as a Class A misdemeanor. Section 6207(3) eliminates the grade aggravation in current 70/16(g) for animal torture and the aggravation for subsequent offenses. See proposed Section 906. The proposed grading is lower than the grade for some forms of the current 5/26-5 offense, but tracks current 510 ILCS 70/16(a)(6), which grades “cruel treatment” not involving dog-fighting as a Class A misdemeanor. Moreover, in most of the situations that current 5/26-5 addresses, an offender will have committed multiple offenses under Section 6207, each of which will increase his total liability. See proposed Section 906.

Section 6208. Definitions

Corresponding Current Provision(s): 720 ILCS 5/2-10.1; 5/11-9(b), 5/11-20(b); 5/12-12(e) and (f)

Comment:

Generally. This provision collects defined terms used in Article 6200 and provides cross-references to the provisions in which they are defined.

Relation to current Illinois law. For discussion of the relationship between Article 6200’s defined terms and current law, refer to the commentary for the provision in which the term in question is initially defined.

²⁹⁹ Current 5/26-5(j) to (m) set forth sentencing and regulatory rules that would be preserved elsewhere in Illinois law by means of the “conforming amendments” legislation to be enacted with the proposed Criminal Code.

ARTICLE 7100. WEAPONS OFFENSES

Section 7101. Possession or Use of a Dangerous Weapon During a Felony

Corresponding Current Provision(s): various; see 720 ILCS 5/33A-1 et seq.; see also, e.g., 5/10-4; 5/12-4; 5/12-4.2; 5/12-4.2-5; 5/12-11; 5/12-14; 5/18-2; 5/18-4; 5/24-1.2; 5/24-1.2-5; 5/24-3.2

Comment:

Generally. Section 7101 defines a separate offense to aggravate punishment where another underlying offense involves a weapon. The precise contours of the offense, and its grading, remain tentative; proposed Section 7101 is included to give a sense of one possible framework for such an offense and, by means of explication through the commentary for other offenses, to suggest one means by which a single offense could replace the numerous weapons aggravations in current law and to indicate how such a distinct weapons offense might interact with other offenses in the proposed Code.

Relation to current Illinois law. Because proposed Section 7101 is included largely for purposes of explaining how a separate weapons offense would relate to the other, underlying offenses whose corresponding liability it would aggravate, discussion of proposed Section 7101 appears in the commentary for relevant underlying offenses. See, e.g., commentary for proposed Sections 1103; 1202; 1501; 2301.

PROPOSED ILLINOIS CRIMINAL CODE

CONVERSION TABLE: **TRANSLATION FROM CURRENT LAW TO DRAFT**

Conversion Table: Translation From Current Law to Draft

ILCS Chap	ILCS Provision	Draft Provision	ILCS Chap	ILCS Provision	Draft Provision
5	175/10-140(a)	3101	15	335/14B(b)	808
5	175/10-140(b)	3101 3105			3101 3105(1)(b)
5	175/15-210	3101	15	335/14C(a)(1)	5202(1)
5	175/15-215	3105	15	335/14C(a)(2)	5202(1) (301)
5	175/15-220	3101	15	335/14C(a)(3)	5201(1)
5	312/3-103(d)	5103	15	520/21	2107 5103
5	312/3-103(d)	5202(1) (301)	15	520/22	2107 5103
10	5/29-1	5101	15	520/23	5103
10	5/29-2	5101	20	1605/10.3 & /10.4	2107(1)
10	5/29-3	5101	20	1605/14.2	3101 5202(1)
10	5/29-4	1404 5310	20	1705/44	5103
10	5/29-6	3102 5203	20	1805/87	1201 1202
10	5/29-8	5202(1)	20	3520/45	3106(1)(a) 5202(1)
10	5/29-10(a)	5201(1)	20	4020/22	2103(1) 3106(1)(a) 5202(1)
10	5/29-20(1)	802	30	230/2b	5103
10	5/29-20(2)	802	30	320/4	3101
10	5/29-20(3)	1404 5310	30	500/50-5(d)	5202(2)
10	5/29-20(4)	3102 5203	30	500/50-25	3110
15	335/14(a)(2) to (4)	3105(1)(a)	35	5/1301	5202(1) 5203(1)(a)
15	335/14A(b)	808 3101 3102 3105(1)(a) 3106(1)(a) 5202(1) 5203(1)(a)			

[Note: An entry of “CA” means that although the proposed Code does not itself incorporate the provision in question, it is anticipated that the provision will be preserved in the Illinois Statutes by means of a conforming amendment.]

Conversion Table: Translation From Current Law to Draft

ILCS Chap	ILCS Provision	Draft Provision	ILCS Chap	ILCS Provision	Draft Provision
35	105/14	2103 2107 3106(1)(a) 3107 5202(1) 5203(1)(a)	35	200/21-290(d)	3106(1)(a) 5202(2)
35	130/14	5203(1)(a)	35	200/21-306(a)(3)	3103
35	130/22	3101 5202(1)	35	200/21-306(a)(4)	803
35	130/23	3101 5202(1)	35	505/15(1)	2107
35	130/25	5202(1) 5203(1)(a)	35	505/15(2)	2107
35	135/22	5203(1)(a)	35	505/15(3.5)	5203(1)(a)
35	135/28	3101 5202(1)	35	505/15(3.7)	801
35	135/29	3101 5202(1)	35	505/15(6)	5202(1) 5203(1)(a)
35	135/31	5202(1) 5203(1)(a)	35	505/15(8)	5202(1)
35	143/10-50	2107 3107 5202(1) 5203(1)(a)	35	505/15(9)	5202(1)
35	145/8	2103 2107 3107 5202(1) 5203(1)(a)	35	505/15(11)	-
35	200/21-290(b)	5202(2)	35	630/19	2107 5202(1) 5203(1)(a)
			40	5/15-189	5103
			50	105/4	5103
			50	105/4.5	5201(1)
			50	105/4.5(1)	5202(1)
			50	105/4.5(2)	3103
			50	105/4.5(3)	301
			50	705/6.1(e)	5103
			55	5/1-5013	5201(1) 5202(1)
			55	5/3-11019	5103
			60	1/85-45	5103
			65	5/3.1-55-10	5103
			65	5/4-8-6	5103
			70	210/25.3	5103
			70	705/4	5103

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Conversion Table: Translation From Current Law to Draft

ILCS Chap	ILCS Provision	Draft Provision	ILCS Chap	ILCS Provision	Draft Provision
70	2605/11.18	5103	225	41/15-75(a)(3)	2103
105	5/10-9	5103			3106(1)(a)
105	425/26(2)	2107	225	41/15-75(a)(6)	5201(1)
110	805/3-48	5103			5202(1)
110	1010/4 & /8	5201(1)	225	60/49 & /59	3106(1)(b)
205	5/49	5202(1)	225	60/52 & /59	3106(1)(b)
		5203(1)(a)	225	60/53 & /59	2103
205	105/7-7(a)	5202(1)	225	60/54 & /59	3105(1)(a)
		5203(1)(a)	225	60/56 & /59	5202(1)
205	620/8-1	5202(1)	225	60/57 & /59	3105(1)(a)
205	635/4-4(b)	5202(1)	225	60/58 & /59	5201(1)
205	657/90(h)	5201(1)	225	110/30	3101
		5202(1) & (2)			3105(1)(a)
		5203(1)(a)			5202(1)
205	690/36	5202(1)	225	125/105(a)(1)	5202(1)
210	45/3-212(a-1) & (a-2)	5103	225	125/105(a)(4)	5202(1)
215	5/131.24(4)	5202(1)	225	125/105(a)(11)	5202(1)
215	5/134	3106(1)(a)			5203(1)(a)
		5202(1)	225	125/220(a)	3106(1)(b)
		5203(1)(a)	225	203/90	5201(1)
215	5/363a(9)(c)	-	225	203/90(a)(2)	2103
215	5/1023	2404			3106(1)(a)
220	5/6-106	3106(1)(a)			5202(1)
		3106(1)(c)	225	305/36(a)	3106(1)(b)
		5201	225	305/36(b)	5201(1)
		5202(1)	225	305/36(e)	3105(1)(a)
225	15/26	3106(1)(b)	225	305/36(f)	5202(1)
225	25/40	3101	225	305/36(g)	3106(1)(b)
		3105(1)(a)	225	310/27	3101
		5202(1)			3105(1)(a)
					5202(1)

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Conversion Table: Translation From Current Law to Draft

ILCS Chap	ILCS Provision	Draft Provision	ILCS Chap	ILCS Provision	Draft Provision
225	325/39(b)(2)	5201(1)	225	650/19(B) & (B-5)	5101
225	325/39(b)(3)	3105(1)(a)	225	650/19(D)	3106(g)
225	325/39(b)(5)	3106(1)(b)	225	705/4.20 to /4.22	5103
225	325/39(b)(6)	5202(1)	225	735/5(a)	2102
225	330/43(b)	5201	225	735/5(b)	2102 2206(1)(a)
225	330/43(c)	5202(1)	225	735/5(c)	5202(1)
225	330/43(d)	3105(1)(a)	225	735/5(g)	5303
225	330/43(f)	3106(1)(b)	225	745/160(b)(2)	5201(1)
225	340/34(a)	3106(1)(b)	225	745/160(b)(3)	3105(1)(a)
225	340/34(b)	5201	225	745/160(b)(5)	3106(1)(b)
225	340/34(e)	3105(1)(a)	225	745/160(b)(6)	5202(1)
225	340/34(f)	5202(1)	230	5/36 & 5/37	3111(1)(b)
225	340/34(g)	3106(1)(b)	230	5/39(a)(1)	3111(1)(a)
225	410/2A-4(b)(2)	2107			5101
225	410/3B-4(2)	2107	230	5/39(a)(2)	2103 3101
225	410/4-20(2)	2103 3106(1)(a) 5202(1)	230	10/18(d)(1) & (2)	3109 3111(1)(a) 5101
225	410/4-20(4)	5201	230	10/18(d)(3)	3102
225	446/190(a)	5201	230	10/18(d)(5)	808
225	446/190(a)(3)	2103 3106(1)(a) 5202(1)	230	10/18(d)(6)	2103
225	470/56(1)(A) & (2)(A)	3106(1)(d)	230	10/18(d)(8)	2102
225	470/56(1)(E) & (2)(A)	3106(1)(e)	230	10/18(d)(9)	2103 3101
225	470/56(1)(F)	3106(1)(f)	230	10/18(d)(10)	808
225	470/56(2)	-	230	30/12	5202(1)
225	650/19(A)	1201(2) 5303	235	5/10-1(c)	5201(1) 5202(1)

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Conversion Table: Translation From Current Law to Draft

ILCS Chap	ILCS Provision	Draft Provision	ILCS Chap	ILCS Provision	Draft Provision
240	40/15-45(a)	2103 3106(1)(e)	305	5/8A-14(b) & -6	3109 5101
240	40/15-45(b)	2102 3106(1)(e)	305	5/8A-15	3101 3102 5202(1)
240	40/15-45(c)	5202(1) 5203(1)(a)	305	5/8A-16(b)(1)	3106(1)(b)
240	40/15-45(d)	5303	305	5/8A-16(b)(5)	3109 5101
240	40/15-45(e)	5303	320	25/9	2106 (801) 3106(1)(a) 5202(1)
305	5/8A-2(a) & -6	2103 3106(1)(a) 5202(1)	325	5/4	5204
305	5/8A-2(b) & -6	5202(2)	410	18/55(2)	5203(1)(a)
305	5/8A-2.5(a) & -6	2106 3101	410	18/55(4)	3106(1)(b)
305	5/8A-3 & -6	5101	410	535/27(1)(a)	5202(1) 5203(1)(a)
305	5/8A-3(a) & -6	2103 2106 3106(1)(a) 5202(1)	410	535/27(1)(b)	5203(1)(b) 3102
305	5/8A-4 & -6	2103 3101	410	535/27(1)(c)	3102 5202(1)
305	5/8A-4A & -6	2103 3101	410	535/27(1)(d)	3105(1)(a)
305	5/8A-5(a) & -6	2107 5103	410	620/3.1	3106(1)(g)
305	5/8A-5A & -6	3105(1)(a)	415	5/44(a)	5202(1)
305	5/8A-13(b) & -6	2103(1) 2106(1) 5202(1)	415	5/44(b)	1202
305	5/8A-13(b)(2) & -6	3106(1)(a)	415	5/44(c)	1202
			415	5/44(e)	1202
			415	5/44(f)	1202
			415	5/44(g)	5301(a)
			415	5/44(h)(1)	5201
			415	5/44(h)(2)	5202(1) 5203(1)(a)

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Conversion Table: Translation From Current Law to Draft

ILCS Chap	ILCS Provision	Draft Provision	ILCS Chap	ILCS Provision	Draft Provision
415	5/44(h)(3)	5203(1)(b)	625	5/4-103(a)(1)	2105
415	5/44(h)(4)	5202(1) 5203(1)(a)	625	5/4-103(a)(2)	2105(4)(a) 3101 3102
415	5/44(h)(5)	5203(1)(b)	625	5/4-103(a)(3)	2105(4)(a) 3102
415	5/44(h)(6)	5202(2)	625	5/4-103(a)(4)	2105(4)(a) 3101 3102
415	5/44(i)	5202(2)	625	5/4-103(a)(5)	2105
415	5/44(j)(4)(A)	5202(1) & (2)	625	5/4-103(a)(6)	5204(1)
415	5/44(j)(4)(B)	5203	625	5/4-103.1	2105 (803)
415	5/44(j)(4)(C)	5202(1) & (2)	625	5/4-103.2(a)(1) to (7)	2105
415	5/44(j)(4)(D)	5203(1)	625	5/4-103.3	905(4) 2105 (803)
415	5/57.17	5202(1) 5203(1)(a)	625	5/4-104	-
415	60/15(7)	5303	625	5/4-105(a)	2105 3101
420	40/39(b)(1)	5202(1)	625	5/4-105(a)(1) to (4)	5203(1)(a)
420	40/39(b)(2)	3102 5203(1)(a)	625	5/4-105(a)(5)	5202(1)
505	90/22	1201(2) 3102 3105(1)(a) 5202 5203(1)(a) 5303	625	5/4-105.1(a)	5203(1)(a)
510	5/26(a)	5202(1) 5203(1)(a) 5303	625	5/5-402.1(f)	5202(1) 5203(1)(a)
510	5/26(b)	1202	625	5/6-301(a)(2) & (3)	3105(1)(a)
510	70/3.01 & /16	6207	625	5/6-301.1(b)	808 3101 3102 3105(1)(a) 5203(1)(a)
510	70/3.02 & /16	6207			
510	70/3.03 & /16	6207			
605	5/6-411.1(e)	5103			
610	100/1 & /2	1202			

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Conversion Table: Translation From Current Law to Draft

ILCS Chap	ILCS Provision	Draft Provision	ILCS Chap	ILCS Provision	Draft Provision
625	5/6-301.2	3105(1)(b)	625	45/3A-21(c)	3101
625	5/6-301.2(b)	808 3101	625	45/3A-21(d)	5202(1)
625	5/6-302(a)	5203(1)(a) 5201 5202(1)	625	45/3A-21(g)	5203(1)(a)
625	5/7-603	3102 5203(1)(a)	625	45/5-16	1104(2) 1202
625	5/11-204(a)	5302(1)	720	5/1-1	101(1)
625	5/11-204.1(a)	5302(1)	720	5/1-2	102(1)
625	5/11-501	1202	720	5/1-3	103
625	5/11-503	1202	720	5/1-4	104
625	5/11-1301.6	808	720	5/1-5	105
625	5/18b-103.1	5302(1)	720	5/1-6	106
625	5/18b-106.1 & -108	1202	720	5/1-8	CA
625	5/18b-108(c)	301	720	5/2-.5	108
625	5/18c-7502(a)(i)	1202 2102 2206(1)(a) & (c)	720	5/2-1	605(1)
625	5/18c-7502(a)(ii)	2102 2105	720	5/2-2	204(4)
625	5/18c-7502(a)(iii)	2105	720	5/2-3	108
625	40/5-7	1104(2) 1202	720	5/2-3.5	1201(3)(a)
625	45/3A-21	2105 3102	720	5/2-3.6	-
625	45/3A-21(a)	3101 5203(1)(a)	720	5/2-4	108
625	45/3A-21(b)	3101 5203(1)(a)	720	5/2-5	605(3)
			720	5/2-6	2201(2)(a) 2301(3)(a)
			720	5/2-6.5	-
			720	5/2-7	-
			720	5/2-7.1	1501(4)(b)
			720	5/2-7.5	1501(4)(b)
			720	5/2-8	108
			720	5/2-9	605(5) (CA)
			720	5/2-10	108
			720	5/2-10.1	1401(4)
			720	5/2-10.2	-

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ILCS Chap	ILCS Provision	Draft Provision	ILCS Chap	ILCS Provision	Draft Provision
720	5/2-10.3	-	720	5/4-2	204(3)
720	5/2-11	-	720	5/4-3(a)	205(1)
720	5/2-12	-	720	5/4-3(b)	205(2) & (3)
720	5/2-13	108	720	5/4-3(c)	205(5)
720	5/2-14	5309(2)(a)	720	5/4-4	206(1)
720	5/2-15	108	720	5/4-5	206(2)
720	5/2-15.5	-	720	5/4-6	206(3)
720	5/2-15a	108	720	5/4-7	206(4)
720	5/2-15b	108	720	5/4-8(a)	207(1)
720	5/2-16	602(4) & (6)	720	5/4-8(b)(1)	508
720	5/2-17	108	720	5/4-8(b)(2) to (4)	509
720	5/2-18	108	720	5/4-8(c)	304
720	5/2-19	108	720	5/4-8(d)	107(3)(c)
720	5/2-19.5	108	720	5/4-9	205(4)
720	5/2-20	-	720	5/5-1	301(1)
720	5/2-21	108	720	5/5-2(a)	301(1)
720	5/2-22	108	720	5/5-2(b)	301(1)
720	5/3-1	107	720	5/5-2(c)	301(1); (2) & (6)
720	5/3-2	107	720	5/5-3	301(4)
720	5/3-3	253 606(1)(b)	720	5/5-4	701
720	5/3-4(a)	605	720	5/5-5	702
720	5/3-4(b)	606	720	5/6-1	505
720	5/3-4(c)	607	720	5/6-2(a) & (b)	504
720	5/3-4(d)	608	720	5/6-2(c) & (d)	-
720	5/3-5	602(1)	720	5/6-2(e)	501(6)
720	5/3-6	602(2)	720	5/6-3(a)	302(1) & (2)
720	5/3-7	602(5)	720	5/6-3(b)	506(1) & (2)
720	5/3-8	602(3)	720	5/6-4	107(3)(c) 501(6)
720	5/4-1	204(1) 502			

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ILCS Chap	ILCS Provision	Draft Provision	ILCS Chap	ILCS Provision	Draft Provision
720	5/7-1	416(1) 419 511	720	5/8-1(b)	807
			720	5/8-1.1(a)	802
			720	5/8-1.1(b)	1101 (807)
720	5/7-2	417 419 511	720	5/8-1.2(a)	802
			720	5/8-1.2(b)	1101 (807)
			720	5/8-2(a)	803
720	5/7-3	417 419 511	720	5/8-2(b)	804
			720	5/8-2(c)	807
			720	5/8-3	802 & 803
720	5/7-4(a)	418(1)	720	5/8-4(a)	801
720	5/7-4(b)	411(5) & (6)	720	5/8-4(b)	-
720	5/7-4(c)	411(5) & (6) 418(1)	720	5/8-4(c)	807 1101 (807)
720	5/7-5	414(1) 419 511	720	5/8-5	254
			720	5/8-6	105(1)(d)
			720	5/9-1(a)(1)	1101(1)
720	5/7-6	414(2) 419 511	720	5/9-1(a)(2)	1102(1)(a)
			720	5/9-1(a)(3)	1102(1)(b)
			720	5/9-1(b) to (j)	1109
720	5/7-7	418(2)	720	5/9-1(b)(14)	1201(3)(d)
720	5/7-8	414(4)	720	5/9-1.2(a)	1106(1)
720	5/7-9	414(3) 511	720	5/9-1.2(b)	1106(2)(a) & (3)(b)
720	5/7-10	413	720	5/9-1.2(c)	1106(2)(b) & (c)
720	5/7-11	507	720	5/9-1.2(d)	1106(4)
720	5/7-12	603	720	5/9-1.2(e)	-
720	5/7-13	411(5) & (6) 412 511	720	5/9-2(a)(1)	1103(1)
			720	5/9-2(a)(2)	511
720	5/7-14	107(3)(c)	720	5/9-2(b)	1103(1)
720	5/8-1(a)	802	720	5/9-2(c)	107 1103(2)

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Conversion Table: Translation From Current Law to Draft

ILCS Chap	ILCS Provision	Draft Provision	ILCS Chap	ILCS Provision	Draft Provision
720	5/9-2(d)	1103(3)	720	5/10-2(a)(5) to (7)	1401 (and 7101)
720	5/9-2.1(a)	1106(1)	720	5/10-2(a)(8)	1401 (and 7101) [Art. 1100] [Art. 1200]
720	5/9-2.1(b)	511	720	5/10-2(b)	1401(3)(a)(i); (a)(ii) & (b)(i) [Art. 1100] [Art. 1200] [Art. 7100]
720	5/9-2.1(c)	1106(4)	720	5/10-3(a)	1402(1)
720	5/9-2.1(d)	1106(2)(a) & (3)(b)	720	5/10-3(b)	1402(2)(b)
720	5/9-2.1(e)	1106(2)(b) & (c)	720	5/10-3.1	1402 (and 7101)
720	5/9-3(a)	1104(1)	720	5/10-4(a)(1)	1402 (and 7101)
720	5/9-3(b)	302	720	5/10-4(a)(2)	1402(2)(a)
720	5/9-3(c)	-	720	5/10-4(b)	1402(2)(a) [Art. 7100]
720	5/9-3(d)	1104(2)	720	5/10-5(a)	-
720	5/9-3(e) to (f)	-	720	5/10-5(b)(1)	1403(1)
720	5/9-3.1(a)	1108(1)	720	5/10-5(b)(2)	1403(1)
720	5/9-3.1(b)	254	720	5/10-5(b)(3) to (8)	-
720	5/9-3.1(c)	1108(2)	720	5/10-5(b)(9)	1403(1)
720	5/9-3.2(a)	1106(1)	720	5/10-5(b)(10)	1401(1)
720	5/9-3.2(b)	1106(4)	720	5/10-5(c)(1)	1403(1)
720	5/9-3.2(c)	1106(2)(a) & (3)(b)	720	5/10-5(c)(2)	1403(1)
720	5/9-3.2(d)	1106(2)(b) & (c)	720	5/10-5(c)(3) & (4)	-
720	5/9-3.2(e)	-	720	5/10-5(d)	1403(2)(b)
720	5/9-3.3(a)	1102(2)	720	5/10-5(d)	-
720	5/9-3.3(b)	1102(3)			
720	5/10-1(a)	1401(1)			
720	5/10-1(b)	1401(2)			
720	5/10-1(c)	1401(3)(c)			
720	5/10-2(a)(1)	1401(3)(a)(i)			
720	5/10-2(a)(2)	1401(3)(b)(i)			
720	5/10-2(a)(3)	1401(3)(a)(ii)			
720	5/10-2(a)(4)	-			

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720	5/10-5(e)	CA	720	5/11-9.1(b)	1301(3) 1302(2)
720	5/10-5(f)	104	720	5/11-9.1(c)	1303(2) 6201(4)
720	5/10-5(g) to (i)	CA	720	5/11-9.2(a)	1304(1)
720	5/10-5.5(a)	-	720	5/11-9.2(b)	1304(1)
720	5/10-5.5(b)	1403(1)	720	5/11-9.2(c)	1304(3)
720	5/10-5.5(c)	1403(2)(a)	720	5/11-9.2(d)	CA
720	5/10-5.5(d) to (f)	CA	720	5/11-9.2(e)	-
720	5/10-5.5(g)(1)	412	720	5/11-9.2(f)(1)	1304(1)
720	5/10-5.5(g)(2)	251	720	5/11-9.2(f)(2)	1304(1)
720	5/10-5.5(g)(3)	413	720	5/11-9.2(g)(1)	1304(2)
720	5/10-5.5(h)	-	720	5/11-9.2(g)(2) to (6)	-
720	5/10-6	4104	720	5/11-9.3(a) to (b-5)	1305(1) & (2)
720	5/10-7(a)(i)	1401 & 1403 (301)	720	5/11-9.3(c)(1) to (3)	CA
720	5/10-7(a)(ii)	5301(1)	720	5/11-9.3(c)(4)	108
720	5/10-7(b)	1401(3) 1403(2) 5301(2)	720	5/11-9.3(c)(5)	6108(2)
720	5/10-8	-	720	5/11-9.3(c)(6)	-
720	5/11-6(a)	1301 & 1302 (802)	720	5/11-9.3(d)	1305(4)
720	5/11-6(b)	-	720	5/11-9.4(a) to (c)	1305(1) & (2)
720	5/11-6(c)	1301 & 1302 (807)	720	5/11-9.4(d)(1) to (3)	CA
720	5/11-6.5(a)	1301 & 1302 (301)	720	5/11-9.4(d)(4)	1305(3)
720	5/11-6.5(b)	1301(4) 1302(3)	720	5/11-9.4(d)(5)	-
720	5/11-7	-	720	5/11-9.4(d)(6)	6108(2)
720	5/11-8	-	720	5/11-9.4(d)(7)	-
720	5/11-9	6201	720	5/11-9.4(e)	1305(4)
720	5/11-9.1(a)	6201(1)	720	5/11-11	4101
720	5/11-9.1(a-5)	1303(1)	720	5/11-12	4102
			720	5/11-13	4102

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720	5/11-14(a)	6202(1)	720	5/11-19.2	1401(1) & (3) 6203(2)(a)
720	5/11-14(b)	6202(2)	720	5/11-19.2(D)	CA
720	5/11-14(c)	-	720	5/11-20(a)	6204(1)
720	5/11-14.1	6202	720	5/11-20(b)	6204(2)
720	5/11-15(a)	6203(1)(b)	720	5/11-20(c)	CA
720	5/11-15(b)	6203(2)(b)	720	5/11-20(d)	6204(5)(b)
720	5/11-15(c)	-	720	5/11-20(e)	6204(3)
720	5/11-15(d)	CA	720	5/11-20(f)	6204(4)
720	5/11-15.1	6203(2)(a)	720	5/11-20(g)	CA
720	5/11-16(a)	6203(1)(a)	720	5/11-20.1(a)(1) to (3)	6204(5)(a)
720	5/11-16(b)	6203(2)(b)	720	5/11-20.1(a)(4)	6204(5)(a) (802)
720	5/11-16(c)	-	720	5/11-20.1(a)(5)	1301(2) 1301 (802) 1302 (802) 6204(5)(a)
720	5/11-17(a)	6203(1)(c)	720	5/11-20.1(a)(6)	6204(5)(a)
720	5/11-17(b)	6203(2)(b)	720	5/11-20.1(a)(7)	6204(5)(a) (802)
720	5/11-17.1	6203(2)(a)	720	5/11-20.1(b)(1)	6204(5)(a)
720	5/11-17.1(d)	CA	720	5/11-20.1(b)(3)	413
720	5/11-18(a)(1)	6202(1)	720	5/11-20.1(b)(4)	6204(3)
720	5/11-18(a)(2)	6202 (801)	720	5/11-20.1(b)(5)	204(3) 502
720	5/11-18(b)	6202(2) (807)	720	5/11-20.1(c)	1301(4) (807) 1302(3) (807) 6204(5)(a) (807)
720	5/11-18(c)	-	720	5/11-20.1(d) to (e-5)	CA
720	5/11-18.1(a)	1301(1) 1302(1) 6202(1)	720	5/11-20.1(f)	-
720	5/11-18.1(b)	1306(1)			
720	5/11-18.1(c)	1301(4) 1302(3) 6202(2)			
720	5/11-19(a)	6203(1)(e)			
720	5/11-19(b)	6203(2)(c)			
720	5/11-19(c)	-			
720	5/11-19.1	6203(2)(a)			

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Conversion Table: Translation From Current Law to Draft

ILCS Chap	ILCS Provision	Draft Provision	ILCS Chap	ILCS Provision	Draft Provision
720	5/11-20.1A	CA	720	5/12-4(b)(2) to (5)	-
720	5/11-20.2	CA	720	5/12-4(b)(6)	1201(2)(d)(i)
720	5/11-21	6204	720	5/12-4(b)(7)	-
720	5/11-22	CA	720	5/12-4(b)(8)	1201(2)(b)(ii)
720	5/11-23	6204 (CA)	720	5/12-4(b)(9)	-
720	5/12-1(a)	1201 (801) 1203(1)	720	5/12-4(b)(10)	1201(2)(d) (iv)
720	5/12-1(b)	1201 (807) 1203(2)	720	5/12-4(b)(11)	1201(2)(d) (ii)
720	5/12-1(c)	-	720	5/12-4(b)(12) & (13)	-
720	5/12-2(a) & (a-5)	1201 (801) 1203(1)	720	5/12-4(b)(14)	1201(2)(d) (iii)
720	5/12-2(b)	1201 (807) 1203(2)	720	5/12-4(b)(15)	-
720	5/12-2.5(a)	1202(1)	720	5/12-4(b)(16)	1201(2)(b) (iii) & (iv)
720	5/12-2.5(b)	1104(2) 1202(2)	720	5/12-4(c)	1201(2)(b)(i)
720	5/12-2.5(c)	-	720	5/12-4(d)	1201(2)(b)(i)
720	5/12-3(a)	1201(1)	720	5/12-4(d-3)	1203 (and 7101)
720	5/12-3(b)	1201(2)(c)	720	5/12-4(d-5)	1201(1)
720	5/12-3.1	-	720	5/12-4(e)	1201(2) 1203(2) [Art. 7100]
720	5/12-3.2(a)	1201(2)(b) (iii)	720	5/12-4.1	1201(2)(a)(i) 2204 2205
720	5/12-3.2(b)	1201(2)(b) (iii) (CA)	720	5/12-4.2	1101 (801) 1201 (and 7101)
720	5/12-3.2(c)	CA	720	5/12-4.2-5	1101 (801) 1201 (and 7101)
720	5/12-3.3(a)	1201(2)(a)(i)			
720	5/12-3.3(b)	1201(2)(a)(i) (CA)			
720	5/12-4(a)	1201(2)(a)(i)			
720	5/12-4(b)(1)	1201 (and 7101)			

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Conversion Table: Translation From Current Law to Draft

ILCS Chap	ILCS Provision	Draft Provision	ILCS Chap	ILCS Provision	Draft Provision
720	5/12-4.3(a)	1201(2)(d)(iv)	720	5/12-7.1(d)	-
720	5/12-4.3(b)	1201(2)(d)(iv) [Art. 1100] [Art. 7100]	720	5/12-7.2(a)	1404(1)
			720	5/12-7.2(b)	413
			720	5/12-7.2(c)	1404(2)
			720	5/12-7.2(d)	CA
720	5/12-4.4	-	720	5/12-7.3(a)	1204(1)
720	5/12-4.5	1202	720	5/12-7.3(b)	1204(2)
720	5/12-4.6	1201(2)(d)(iv)	720	5/12-7.3(c) to (g)	-
720	5/12-4.7	-	720	5/12-7.3(h)	1201(3)(b) & (c)
720	5/12-4.8	CA	720	5/12-7.4(a)(1)	1201(1) 1202(1) 1204(1)
720	5/12-4.9	1202	720	5/12-7.4(a)(2)	1204(1) 1401(1) 1402(1)
720	5/12-5(a)	1202(1) 2202(1)(a)	720	5/12-7.4(a)(3)	1204(2)
720	5/12-5(b)	1202(2) 2202(2)	720	5/12-7.4(b)	1201(2) 1202(2) 1204(2) 1401(3) 1402(3)
720	5/12-5.1	1202	720	5/12-7.4(c) & (d)	-
720	5/12-5.2	CA	720	5/12-7.5	1203 6105
720	5/12-5.5	1202	720	5/12-9(a)	1203(1) 5310(1)
720	5/12-6(a)	1404(1)	720	5/12-9(b)(1)	108
720	5/12-6(b)	1404(2)(c)	720	5/12-9(b)(2)	-
720	5/12-6.1	1404(2)(a)	720	5/12-9(c)	1203(2) 5310(2)
720	5/12-6.2(a)(1)	1404(2)(a)	720	5/12-10	-
720	5/12-6.2(a)(2)	-			
720	5/12-6.2(a)(3)	1404(2)(b)			
720	5/12-6.2(b)	1404(2)(a) & (b)			
720	5/12-6.3	-			
720	5/12-7	1404			
720	5/12-7.1(a)	6106(1)			
720	5/12-7.1(b)	6106(2) (CA)			
720	5/12-7.1(c)	CA			

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Conversion Table: Translation From Current Law to Draft

ILCS Chap	ILCS Provision	Draft Provision	ILCS Chap	ILCS Provision	Draft Provision
720	5/12-10.1	-	720	5/12-13(a)(3)	4101(1)
720	5/12-11(a)(1)	2301 (and 7101)	720	5/12-13(a)(4)	1301(4)(b)(ii)
720	5/12-11(a)(2)	1201(1)	720	5/12-13(b)	1301(4) 4101(2)
		2301(1)	720	5/12-14(a)	1301(1) 4101(1)
720	5/12-11(a)(3)	2301 (and 7101)	720	5/12-14(a)(1)	1301 (and 7101)
720	5/12-11(a)(4)	2301 (and 7101)	720	5/12-14(a)(2)	1301(4)(a)(ii)
720	5/12-11(a)(5)	2301 (and 7101) [Art. 1100] [Art. 1200]	720	5/12-14(a)(3)	1301(4)(a)(iii)
720	5/12-11(a)(6)	[Art. 1300]	720	5/12-14(a)(4)	906
720	5/12-11(b)	-	720	5/12-14(a)(5) & (6)	-
720	5/12-11(c)	2301(4) [Art. 1100] [Art. 1200] [Art. 1300] [Art. 7100]	720	5/12-14(a)(7)	1301(4)(a)(ii)
720	5/12-11(d)	2301(3)(b)	720	5/12-14(a)(8) & (9)	1301 (and 7101)
720	5/12-11.1(a)	2301(2)	720	5/12-14(a)(10)	1301 (and 7101) [Art. 1100] [Art. 1200]
720	5/12-11.1(b)	2301(4)	720	5/12-14(b)(i)	1301(1) & (4)(d)
720	5/12-12(a)	-	720	5/12-14(b)(ii)	1301(1) & (4)(b)(iii)
720	5/12-12(b)	108	720	5/12-14(c)	1301(1)
720	5/12-12(c)	1201(3)(b)	720	5/12-14(d)	1301(4) 4101(2) [Art. 1100] [Art. 1200] [Art. 7100]
720	5/12-12(d)	108	720	5/12-14.1(a)	1301(1)
720	5/12-12(e)	1302(2)	720	5/12-14.1(a)(1)	1301(4)(b)(i)
720	5/12-12(f)	1301(3)			
720	5/12-12(g)	-			
720	5/12-13(a)	1301(1)			
720	5/12-13(a)(1) & (2)	1301(4)(b)(iii)			

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Conversion Table: Translation From Current Law to Draft

ILCS Chap	ILCS Provision	Draft Provision	ILCS Chap	ILCS Provision	Draft Provision
720	5/12-14.1(a)(1.1) & (1.2)	1301 (and 7101)	720	5/12-16(c)(1)(ii)	1302(3)(b)(i) (A)
720	5/12-14.1(a)(2)	1301(4)(a)(ii) & (iii)	720	5/12-16(c)(2)(i)	1302(3)(a)(i)
720	5/12-14.1(a)(3)	1301(4)(a)(ii)	720	5/12-16(c)(2)(ii)	1302(3)(b)(i) (A)
720	5/12-14.1(b)	1301(4) [Art. 7100]	720	5/12-16(d)	1301(1) & (4) (c) 1302(3)(b)(i) (B)
720	5/12-15(a)	1302(1) & (3)(b)(i)(A)	720	5/12-16(e)	1302(1)
720	5/12-15(b)	1301(1); (4)(d) & (4)(e) 1302(1) & (3)(b)(ii)	720	5/12-16(f)	1302(1) 1302(3)(b)(i) (C)
720	5/12-15(c)	1301(1) & (4)(e) 1302(1) & (3)(b)(iii)	720	5/12-16(g)	1301(4) 1302(3) 4101(2) [Art. 7100]
720	5/12-15(d)	1301(4) 1302(3)	720	5/12-16.2(a)	1202(1)
720	5/12-16(a)	1302(1)	720	5/12-16.2(b) to (d)	-
720	5/12-16(a)(1)	1302 (and 7101)	720	5/12-16.2(e)	1202(2)
720	5/12-16(a)(2)	1302(3)(a)(ii)	720	5/12-17(a)	251
720	5/12-16(a)(3) & (4)	-	720	5/12-17(b)	1306(1)
720	5/12-16(a)(5)	1302(3)(a) (iii)	720	5/12-18(a)	-
720	5/12-16(a)(6)	906	720	5/12-18(b)	1306(2)
720	5/12-16(a)(7)	1302(3)(a)(ii)	720	5/12-18(c) to (g)	CA
720	5/12-16(b)	1302(1)	720	5/12-18.1	CA
		4101(1)	720	5/12-19(a)	1205
720	5/12-16(c)	1302(1)	720	5/12-19(b) & (c)	CA
720	5/12-16(c)(1)(i)	1302(3)(a)(i)	720	5/12-19(d)(1) & (2)	1205
			720	5/12-19(d)(3) to (e)	-
			720	5/12-20	6206

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Conversion Table: Translation From Current Law to Draft

ILCS Chap	ILCS Provision	Draft Provision	ILCS Chap	ILCS Provision	Draft Provision
720	5/12-21(a)	1205	720	5/12-33(a)	1205(1)
720	5/12-21(b)(1)	-	720	5/12-33(a)(1)	1201(1) 6207(1)
720	5/12-21(b)(2)	108	720	5/12-33(a)(2) & (3)	1201(1)
720	5/12-21(b)(3)	CA	720	5/12-33(a)(4)	[Art. 1300]
720	5/12-21(b)(4)	-	720	5/12-33(a)(5)	-
720	5/12-21(c)	104	720	5/12-33(a)(6)	1203(1)
720	5/12-21(d) to (f)	-	720	5/12-33(a)(7)	6205(1)
720	5/12-21.5(a)	4103(1)	720	5/12-33(b)	-
720	5/12-21.5(b)	4103(2)	720	5/12-33(c)	1201(2) 1203(2) 1205(2) 6205(2) 6207(2) [Art. 1300]
720	5/12-21.5(c)	4103(3)	720	5/12-33(d)	-
720	5/12-21.6(a)	1202(1) 1205(1)	720	5/12-34(a)	1201(2)(a) (iii)
720	5/12-21.6(b)	1202(2) 1205(2) [Art. 1100]	720	5/12-34(b)	415(2)
720	5/12-22	CA	720	5/12-34(a)	1201(2)(a) (iii)
720	5/12-30(a)	1201(2)(b) (iv) 1204(2)(a) 6105(2)(a)	720	5/14-1(a)	2401(2)(c) (CA)
720	5/12-30(b) & (c)	-	720	5/14-1(b) to (d)	CA
720	5/12-30(d)	1201(2)(b) (iv) 1204(2)(a) 6105(2)(a) (CA)	720	5/14-1(e)	2401(2)(b) & (e) (CA)
720	5/12-30(e)	-	720	5/14-2(a)(1)	2401(1); (3)(a) & (3)(b) 2403(1)(c)
720	5/12-31(a)(1)	1107(1)	720	5/14-2(a)(2)	808
720	5/12-31(a)(2)	1107(2)			
720	5/12-31(b)	1107(5)			
720	5/12-31(c)	1107(3)			
720	5/12-32	1201(2)(a)(i) & (ii)			

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Conversion Table: Translation From Current Law to Draft

ILCS Chap	ILCS Provision	Draft Provision	ILCS Chap	ILCS Provision	Draft Provision
720	5/14-2(a)(3)	2401(3)(b) 2405(1)	720	5/16-1(a)(1)	2102
720	5/14-2(b)	2401(3)(b) (CA)	720	5/16-1(a)(2)	2103
720	5/14-2(c)	808	720	5/16-1(a)(3)	2104
720	5/14-2(d)	2401(3)(b) (CA)	720	5/16-1(a)(4)	2105
720	5/14-3(a) to (e)	2401(1)	720	5/16-1(a)(5)	2105
720	5/14-3(f) to (h)	2401(3)(b) (CA)	720	5/16-1(b)	2109
720	5/14-3(i)	2401(3)(c)	720	5/16-1(c)	202(1)
720	5/14-3(j)	2401(3)(d)	720	5/16-1.1	2102(3)(a)
720	5/14-3A	CA	720	5/16-1.2	2103(4)
720	5/14-3B	CA	720	5/16-1.3(a)	2103(1) 2104(1) 2109(8)
720	5/14-4(a)	2401(4) 2403(3) 2405(3)	720	5/16-1.3(b)(1) to (3)	-
720	5/14-4(b)	-	720	5/16-1.3(b)(4)	2103(2)
720	5/14-5	CA	720	5/16-1.3(c) to (f)	-
720	5/14-6	CA	720	5/16-1.3(g)	CA
720	5/14-7	CA	720	5/16-2(a) to (c)	2108(1)
720	5/14-8	CA	720	5/16-2(d)	2108(2)
720	5/14-9	CA	720	5/16-3(a)	2106(1)
720	5/15-1	108	720	5/16-3(b)	2102(3)(a) 2106(1) 2111(1)(b)
720	5/15-2	2102(2)(c)	720	5/16-3(c)	2109 2111(3)
720	5/15-3	2102(2)(a)	720	5/16-3.1(a)	2103 (801) 5204(1)
720	5/15-4	2103(2)	720	5/16-3.1(b)	2109 (807) 5204(2)
720	5/15-5	2104(1)(a) to (g)	720	5/16-4	2102(2)(d)
720	5/15-6	2105(3)(b)	720	5/16-5(a)	2102 2206
720	5/15-7	2102(2)(b)			
720	5/15-8	-			
720	5/15-9	2109(7)			

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Conversion Table: Translation From Current Law to Draft

ILCS Chap	ILCS Provision	Draft Provision	ILCS Chap	ILCS Provision	Draft Provision
720	5/16-5(b)	-	720	5/16-14(a)	2106 2207(1)(a)
720	5/16-5(c)	2109 2206(3)	720	5/16-14(b)	2207(2)
720	5/16-6(a)	808 2206	720	5/16-14(c)	-
720	5/16-6(b)	CA	720	5/16-14(d)	2109 2207(3)
720	5/16-6(c)	-	720	5/16-15	808
720	5/16-7(a)	2106	720	5/16-16(a)	2105(1) & (4)(a)
720	5/16-7(b)	-	720	5/16-16(b)	2109(2)(b)
720	5/16-7(c)	2109	720	5/16-16.1(a)	2105
720	5/16-7(d) to (g)	-	720	5/16-16.1(b)	2105(4)(a)
720	5/16-7(h)	CA	720	5/16-16.1(c)	2109
720	5/16-7(i)	-	720	5/16A-1	-
720	5/16-8(a)	2106	720	5/16A-2 to 2.5	-
720	5/16-8(b)	2109	720	5/16A-2.6 & -2.7	108
720	5/16-8(c) & (d)	-	720	5/16A-2.8 to 2.13	-
720	5/16-8(e)	CA	720	5/16A-3(a)	2102
720	5/16-10(a)(1)	-	720	5/16A-3(b)	2103 (801)
720	5/16-10(a)(2)	2106	720	5/16A-3(c)	2102 (801)
720	5/16-10(a)(3) & (4)	2106 (301)	720	5/16A-3(d) & (e)	2102(1)
720	5/16-10(b)	2109	720	5/16A-3(f)	2103(1)
720	5/16-11(a)	2106	720	5/16A-3(g)	808
720	5/16-11(b) to (d)	-	720	5/16A-3(h)	2102(3)(a)
720	5/16-11(e)	2109	720	5/16A-4(a)	2102(3)(b)
720	5/16-12(a)	808 2106 (301)	720	5/16A-4(b)	-
720	5/16-12(b) to (d)	-	720	5/16A-5	-
720	5/16-12(e)	808 2109	720	5/16A-6	-
720	5/16-13	CA	720	5/16A-7	CA
			720	5/16A-8	-

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Conversion Table: Translation From Current Law to Draft

ILCS Chap	ILCS Provision	Draft Provision	ILCS Chap	ILCS Provision	Draft Provision
720	5/16A-9	-	720	5/16D-3(a-5)	3101 (301) 808
720	5/16A-10	807 2109	720	5/16D-3(b)(1) to (3)	808 2109 2206(3) 2404(2) 3101(3)
720	5/16B-1	-	720	5/16D-3(b)(4) to (c)	CA
720	5/16B-2(a)	2102	720	5/16D-4(a)	2206(1)(a) 2404(1)
720	5/16B-2(b)	2102 (801)	720	5/16D-4(a)(1)	2206(1)(c) 2207(1)(a)
720	5/16B-2(c)	2103	720	5/16D-4(a)(2)	1202(1)
720	5/16B-2(d)	2102(3)(a) (CA)	720	5/16D-4(b)	1202(2) 2206(3) 2207(3) 2404(2)
720	5/16B-2.1	2206(1)(a)	720	5/16D-5(a)	2404(1)
720	5/16B-3	CA	720	5/16D-5(a)(1)	2103 (801) 2106 (801)
720	5/16B-4	-	720	5/16D-5(a)(2)	2102 2206(1)(a)
720	5/16B-5(a) to (c)	807 2109	720	5/16D-5(a)(3)	2102 2103 2106
720	5/16B-5(d) & (e)	2206(3)	720	5/16D-5(b)	807 2109 2206(3) 2404(2)
720	5/16C-1	-	720	5/16D-6	CA
720	5/16C-2(a)	2103 (801) 2105(4)(a)			
720	5/16C-2(b)	807 2109			
720	5/16C-2(c)	-			
720	5/16C-3	-			
720	5/16D-1	-			
720	5/16D-2	CA			
720	5/16D-3(a)(1)	2404			
720	5/16D-3(a)(2)	2102 2106 2404			
720	5/16D-3(a)(3)	2206(1)(a) 2404			
720	5/16D-3(a)(4)	2206(1)(c)			
720	5/16D-3(a)(5)	3101(1)			

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Conversion Table: Translation From Current Law to Draft

ILCS Chap	ILCS Provision	Draft Provision	ILCS Chap	ILCS Provision	Draft Provision
720	5/16D-7	-	720	5/16G-20(a)	2103
720	5/16E-1	-			2106
720	5/16E-2	-			3105(1)(a)
720	5/16E-3(a)(1)	2102	720	5/16G-20(b)	-
720	5/16E-3(a)(2)	2102(1)	720	5/16G-20(c)	202(1)
720	5/16E-3(a)(3)	2105(4)(a) 2206(1)	720	5/16G-20(d)	-
720	5/16E-3(a)(4)	2102(1)	720	5/16G-20(e)	2109 3105(2)
720	5/16E-3(b)	-	720	5/16G-21	CA
720	5/16E-4	2109 2206(3)	720	5/16G-25	2102(2)(d)
720	5/16F-1	-	720	5/17-1(A)(i)	2107(4)
720	5/16F-2	-	720	5/17-1(A)(ii)	-
720	5/16F-3(a)	2106	720	5/17-1(A)(iii)	3101(2)(a)
720	5/16F-3(b)	2109	720	5/17-1(B)	2109 (807) 3101(3) 3103(2) 3106(3) 3107(3) 3114(2)
720	5/16F-4(a)	808 2106 (301)	720	5/17-1(B)(a)	3103(1)
720	5/16F-4(b)	808 2109	720	5/17-1(B)(b)	3114(1)
720	5/16F-5	-	720	5/17-1(B)(c)	3106(1)(b)
720	5/16F-6	CA	720	5/17-1(B)(d)	2103 (801) 2106 (801) 3107(1) & (2)
720	5/16G-1	-	720	5/17-1(B)(e)	2103 (801) 2106 (801) 3101(1) 3107(1)
720	5/16G-5	-			
720	5/16G-10	-			
720	5/16G-15(a)	2103 2106 3105(1)(a)			
720	5/16G-15(b)	-			
720	5/16G-15(c)	202(1)			
720	5/16G-15(d)	2109 3105(2)			

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Conversion Table: Translation From Current Law to Draft

ILCS Chap	ILCS Provision	Draft Provision	ILCS Chap	ILCS Provision	Draft Provision
720	5/17-1(C)(1)	2103 (801) 3105(1) 3106(1)(a)	720	5/17-3(a)(5)	3101(1) 3105(1)
720	5/17-1(C)(2)	808 2103 (801) 3101 (801) 3107 (801)	720	5/17-3(b)	3101(2)(a)
			720	5/17-3(c)	3101(2)(b)
720	5/17-1(C)(3)	808 2103 (801) 3101 (801) 3107 (801)	720	5/17-3(d)	807 3101(3) 3105(2)
			720	5/17-4	3104
720	5/17-1(C)(4)	808 2103 (801) 3107 (801) 3108 (801)	720	5/17-5(a)	5205 (CA)
			720	5/17-5(b) to (d)	CA
720	5/17-1a	CA	720	5/17-5.5	CA
720	5/17-2(a)	3105(1)(b) 5205(1) (CA)	720	5/17-6(a)	2103 2106 3105(1)(a) 3106(1)(a) 5202(1)
720	5/17-2(a-5)	3105(1)(b) (CA)	720	5/17-6(b) & (c)	CA
720	5/17-2(b)	-	720	5/17-6(d)	2109 3105(2) 3106(3) 5202(4)
720	5/17-2(c-1) to (c-5)	CA	720	5/17-7(a)	3115(2)
720	5/17-2(d)	3105(2) 5205(2)	720	5/17-7(b)	3115(1) & (3)
720	5/17-3(a)(1)	3101(1)(a)	720	5/17-8(a)	2106
720	5/17-3(a)(2)	3101(1)(c)	720	5/17-8(b)	2109
720	5/17-3(a)(3)	3101 (801)	720	5/17-9(a)	2103 (801) 2106 (801)
720	5/17-3(a)(4)	3101(1) 3105(1)	720	5/17-9(b)	2103 (301) 2106 (301)
			720	5/17-9(c)	2109 (807)

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Conversion Table: Translation From Current Law to Draft

ILCS Chap	ILCS Provision	Draft Provision	ILCS Chap	ILCS Provision	Draft Provision
720	5/17-10(a)	2103 (801) 2106 (801)	720	5/17-20	2106 (801) 2109 (807) 2206 3102
720	5/17-10(b)	2103 (301) 2106 (301)			
720	5/17-10(c)	2109 (807)	720	5/17-21	2106 (801) 2109 (807) 2206 3102
720	5/17-11	2103 (801) 2109 (807) 3102			
720	5/17-11.1	2103 (801) 2109 (807) 3102	720	5/17-22	CA
720	5/17-12	CA	720	5/17-23(a)	808 2103 (801) 2109 (807) 3101
720	5/17-13	2103 2109 3103	720	5/17-23(b)	808 2103 (801) 2109 (807) 3101
720	5/17-14	3112 3113			
720	5/17-15	2103 (301) 2103 (801) 2109 (807) 5202(2)	720	5/17-23(d)	-
720	5/17-16	2103 (801) 2109 (807)	720	5/17-24	2103 (801) 2106 (801) 2109 (807)
720	5/17-17	2103 2109 3101	720	5/17A-1	CA
720	5/17-18	3101	720	5/17A-2	-
720	5/17-19	-	720	5/17A-3	2103 & 2109 5202
			720	5/17A-3.1	CA
			720	5/17A-4	-
			720	5/17B-0.05	-
			720	5/17B-1	-
			720	5/17B-5(i)	2102 3105(1)(b)

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Conversion Table: Translation From Current Law to Draft

ILCS Chap	ILCS Provision	Draft Provision	ILCS Chap	ILCS Provision	Draft Provision
720	5/17B-5(ii)	2103 3101	720	5/18-5(a-5)	1501 (and 1200)
720	5/17B-10(a)	2102 2107 5103	720	5/18-5(b)	1501(2)(b)(iv)
720	5/17B-10(b)	-	720	5/19-1	2302
720	5/17B-15	808 3105 (801)	720	5/19-2	808
720	5/17B-20(a)	808 2109 3101 3105(2) 3105 (807)	720	5/19-3	2302
720	5/17B-20(b)	905(1)	720	5/19-4	2303
720	5/17B-25	CA	720	5/20-1	2201 2102(2)(d)
720	5/17B-30	CA	720	5/20-1.1	2201
720	5/18-1(a)	1501(1)	720	5/20-1.2	2201
720	5/18-1(b)	1501(2)(b)(ii) & (2)(c)	720	5/20-2	2205
720	5/18-2	1501 (and 7101) [Art. 1100] [Art. 1200]	720	5/20.5-5(a)	2204(1)(a)
720	5/18-3(a)	1501(1)	720	5/20.5-5(b)	2201(2)(b) 2204(5)
720	5/18-3(b)	-	720	5/20.5-5(c)	2204(1)(c)
720	5/18-3(c)	1501(2)(a)(ii)	720	5/20.5-6	2204(1)(b)
720	5/18-4	1501(2)(b)(ii) 1501 (and 7101) [Art. 1100] [Art. 1200]	720	5/20.5-6	2205
720	5/18-5(a)	1501(2)(b)(iv)	720	5/21-1(1)(a)	2206(1)(a) 2207(1)(a)
			720	5/21-1(1)(b)	2206(1)(b) 2202(1)(b)
			720	5/21-1(1)(c)	2202(1)(b)
			720	5/21-1(1)(d)	2206(1)(a)
			720	5/21-1(1)(e)	6103(1)(c)
			720	5/21-1(2)	2202(2) 2206(3)(a) to (f) 2206(3)(h) 2207(3)
			720	5/21-1(3)	CA

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Conversion Table: Translation From Current Law to Draft

ILCS Chap	ILCS Provision	Draft Provision	ILCS Chap	ILCS Provision	Draft Provision
720	5/21-1.1	2206 2207	720	5/21-7	2303(2)(b)
720	5/21-1.2(a) & (b)	2206(3)(h)	720	5/21-8	2303
720	5/21-1.2(c)	CA	720	5/21.1-1	-
720	5/21-1.3(a)	2206(1)(a)	720	5/21.1-2	2304(1)
720	5/21-1.3(b)	2206(3) (CA)	720	5/21.1-3	2304(2)
720	5/21-1.4	808 2206 (801) 5302 (801)	720	5/21.2-1	-
720	5/21-1.5	CA	720	5/21.2-2	6101(1) 6103(1) 6110(1)
720	5/21-2	2111 2303	720	5/21.2-3	-
720	5/21-3(a)	2303(1) & (2) 2303(4)(a)	720	5/21.2-4	6101(2) 6103(3) 6110(2)
720	5/21-3(b)	-	720	5/21.2-5	-
720	5/21-3(c)	2303(1)	720	5/21.2-6	-
720	5/21-3(d)	2303(4)(b)	720	5/21.3-5	CA
720	5/21-3(e)	CA	720	5/24-1	CA [Art. 7100]
720	5/21-3(f)	2303(4)(b)	720	5/24-1.1	CA [Art. 7100]
720	5/21-4(1)	2201(3) 2202(2) 2206(3)	720	5/24-1.2	-
720	5/21-4(1)(a)	2206(1)(a)	720	5/24-1.2-5	-
720	5/21-4(1)(b)	2201(1)(a) 2206(1)(a)	720	5/24-1.5	-
720	5/21-4(1)(c)	2202(1)(b)	720	5/24-1.6	CA [Art. 7100]
720	5/21-4(1)(d)	6103(1)(c)	720	5/24-2	CA [Art. 7100]
720	5/21-4(2)	-	720	5/24-2.1	CA [Art. 7100]
720	5/21-5(a)	2303	720	5/24-2.2	CA [Art. 7100]
720	5/21-5(b)	-	720	5/24-3	CA [Art. 7100]
720	5/21-6	CA [Art. 7100]			

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Conversion Table: Translation From Current Law to Draft

ILCS Chap	ILCS Provision	Draft Provision	ILCS Chap	ILCS Provision	Draft Provision
720	5/24-3.1	CA [Art. 7100]	720	5/26-1(a)(4)	5204(1) 6104(1)
720	5/24-3.2	-	720	5/26-1(a)(5)	2403(1)(a)
720	5/24-3.3	CA [Art. 7100]	720	5/26-1(a)(6)	6105(1)
720	5/24-3.4	CA	720	5/26-1(a)(7)	5204(1)
720	5/24-3.5	-	720	5/26-1(a)(8)	5204(1)
720	5/24-3.6	-	720	5/26-1(a)(9)	5208(1) 6104(1)
720	5/24-3A	-	720	5/26-1(a)(10)	5204(1)
720	5/24-4	CA	720	5/26-1(a)(11)	5208(1) 6104(1)
720	5/24-5	CA [Art. 7100]	720	5/26-1(a)(12)	5204(1) 5208(1) 6104(1)
720	5/24-6	CA	720	5/26-1(b)	2403(3) 5204(2) 5208(2) 6103(3) 6105(2)
720	5/24-7	CA	720	5/26-1(c)	CA
720	5/24-8	CA	720	5/26-2	5303
720	5/24-9	CA [Art. 7100]	720	5/26-3	CA
720	5/24.5-5 <i>et seq.</i>	CA [Art. 7200]	720	5/26-4(a) & (a-5)	2403(1)(b)
720	5/24.6-5	-	720	5/26-4(a-10)	-
720	5/24.6-20	1203	720	5/26-4(b)	2403(1)
		6105	720	5/26-4(c)	2403(1)
720	5/25-1(a)	6101(1)	720	5/26-4(d)	2403(3)
720	5/25-1(b) to (d)	6101(2)	720	5/26-5(a) to (i)	6207
720	5/25-1(e)	6102	720	5/26-5(j) to (m)	CA
720	5/25-1(f)	CA	720	5/28-1 <i>et seq.</i>	CA
720	5/25-1.1	CA	720	5/29-1(a)	3111
720	5/25-2	-			
720	5/26-1(a)(1)	6103(1)			
720	5/26-1(a)(2)	5208(1) 6104(1)			
720	5/26-1(a)(3)	5208(1) 6104(1)			

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Conversion Table: Translation From Current Law to Draft

ILCS Chap	ILCS Provision	Draft Provision	ILCS Chap	ILCS Provision	Draft Provision
720	5/29-1(b) & (c)	CA	720	5/31A-1.1(c)(2)	5309(2)(b)
720	5/29-2	3111	720	5/31A-1.1(d) to (j)	5309(3)(a)
720	5/29-3	-	720	5/31A-1.1(k)	5309(1)
720	5/29A-1	3109(3)	720	5/31A-1.1(l)	5309(1)
720	5/29A-2	3109(1)	720	5/31A-1.1(m)	CA
720	5/29A-3	3109(4)	720	5/31A-1.2(a) to (c)	5309(1)
720	5/29B-1	CA [Art. 7300]	720	5/31A-1.2(d)(1)	5309(2)(a)
720	5/29D-5 <i>et seq.</i>	CA [Art. 7300]	720	5/31A-1.2(d)(2)	5308(2)
720	5/30-1	-	720	5/31A-1.2(d)(3)	-
720	5/30-2	-	720	5/31A-1.2(d)(4)	5309(2)(b)
720	5/30-3	-	720	5/31A-1.2(e) & (f)	5309(3)(b)
720	5/31-1(a)	5302(1) 5302(3)(a)	720	5/31A-1.2(g)	CA
720	5/31-1(b)	5302(2)	720	5/32-1	-
720	5/31-1a	5302(3)(a)	720	5/32-2(a) to (c) & (e)	5201
720	5/31-3	5304	720	5/32-2(d)	CA
720	5/31-4	5301	720	5/32-3	5201 (301)
720	5/31-5	5306	720	5/32-4(a)	5310
720	5/31-6(a) to (c-6)	5307	720	5/32-4(b)	5101 5310
720	5/31-6(d)	5307 (and 7101)	720	5/32-4a(a) & (b)	1203 5310 6105
720	5/31-7(a) to (e)	5307 (301)	720	5/32-4a(c)	1201(3)(b)
720	5/31-7(f)	5308	720	5/32-4b	5101 (CA)
720	5/31-7(f-5) & (f-6)	5307(2) (301)	720	5/32-4c	CA
720	5/31-7(g)	5307 (and 7101)	720	5/32-4d	CA
720	5/31-8	5305	720	5/32-5	5205 (CA)
720	5/31A-1.1(a)	5309(1)	720	5/32-5.1	5205
720	5/31A-1.1(b)	5309(1)	720	5/32-5.2	-
720	5/31A-1.1(c)(1)	5309(2)(a)			

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Conversion Table: Translation From Current Law to Draft

ILCS Chap	ILCS Provision	Draft Provision	ILCS Chap	ILCS Provision	Draft Provision
720	5/32-5.3	5205	720	5/33E-6	5103 (CA)
720	5/32-6	5206	720	5/33E-7(a) & (c)	5101
720	5/32-7	5207	720	5/33E-7(b) & (c)	5102
720	5/32-8	5203	720	5/33E-7(d)	CA
720	5/32-9	5203	720	5/33E-8	5101
720	5/32-10(a) to (b)	5311	720	5/33E-8(b)	5102
720	5/32-10(c)	CA	720	5/33E-9	5103 (CA)
720	5/32-10(d)	104	720	5/33E-10	CA
720	5/32-11	-	720	5/33E-11	3110 (CA) 5202
720	5/32-12	-	720	5/33E-12	5103 (CA)
720	5/32-13(a); (b) & (c-5)	5202	720	5/33E-13	CA
720	5/32-13(c) & (d)	-	720	5/33E-14	3110 (CA) 5202
720	5/33-1	5101	720	5/33E-15	5203 (CA)
720	5/33-2	5102 (CA)	720	5/33E-16	5103 (CA)
720	5/33-3	5103	720	5/33E-17	5103 (CA)
720	5/33-4	CA	720	5/33E-18	3110 (CA)
720	5/33-5	CA	720	5/33F-1 <i>et seq.</i>	CA [Art. 7100]
720	5/33A-1 <i>et seq.</i>	7101	720	5/34-1	102(3)
720	5/33B-1 <i>et seq.</i>	CA	720	5/34-2	102(4)
720	5/33C-1	5202 (CA)	720	5/34-3	102(5)
720	5/33C-2	3106 5202	720	5/34-4	101(2)
720	5/33C-3	5303	720	5/35-1	-
720	5/33C-4	2103 2109	720	5/36-1 <i>et seq.</i>	CA
720	5/33C-5	-	720	5/37-1 <i>et seq.</i>	CA
720	5/33D-1	4105	720	5/38-1 <i>et seq.</i>	CA
720	5/33E-1 & -2	CA	720	5/39-1 <i>et seq.</i>	CA [Art. 7300]
720	5/33E-3	3110 (CA)	720	5/42-1	2102 2302(1)
720	5/33E-4	3110 (CA)			
720	5/33E-5	5103 (CA)			

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Conversion Table: Translation From Current Law to Draft

ILCS Chap	ILCS Provision	Draft Provision	ILCS Chap	ILCS Provision	Draft Provision
720	5/42-2	2109 2302(2)	720	5/46-4(d)	2109 (807)
720	5/44-1 <i>et seq.</i>	CA	720	5/46-5	CA
720	5/45-1	-	720	5/47-5	6103(1)(c) 6105(1)(d) 6109(1) (CA)
720	5/45-2	1202	720	5/47-10	CA
720	5/46-1(a)	2103 3106(1)(a)	720	5/47-15	2206 6103(1)(c) 6105(1)(d) (CA)
720	5/46-1(b)	2109 3106(3)	720	5/47-20	6103(1)(c) (CA)
720	5/46-1(c)	2109(7)	720	5/47-25	6103(3) 6105(2) 6109(5) (CA)
720	5/46-1(d)	-	720	110/1	-
720	5/46-1.1(a)	2103 3106(1)(a) 5202(1)	720	110/2	-
720	5/46-1.1(b)	2109 3106(3) 5202(4)	720	110/3(a)(1) & (4)	2403(1)(b)
720	5/46-2(a)	2103 3106(1)(a) 5202(1)	720	110/3(a)(2) & (3)	CA
720	5/46-2(b)	2109 3106(3) 5202(4)	720	110/3(b)	2403(3) (CA)
720	5/46-3(a)	2103(1) (803)	720	120/5	1202(1)
720	5/46-3(b)	804	720	120/10	1202(2)
720	5/46-3(c)	905(4)	720	125/0.01 <i>et seq.</i>	CA
720	5/46-3(d)	2109 (807)	720	130/1 to /2	4103 (CA)
720	5/46-4(a)	905(4) 2103(1) (803)	720	130/2a	-
720	5/46-4(b)	804	720	130/3	CA
720	5/46-4(c)	905(4)	720	135/1	6105

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Conversion Table: Translation From Current Law to Draft

ILCS Chap	ILCS Provision	Draft Provision	ILCS Chap	ILCS Provision	Draft Provision
720	135/1-1	6105(1)(a) & (c) (CA)	720	215/4(1)	2102 2206(1)(a)
720	135/1-2	6105(1)(a) & (c)	720	215/4(2)	2102 2206(1)(a)
720	135/1-3	-	720	215/4(3)	2303(1)
720	135/1-4	CA	720	215/4(4)	2302(1)
720	135/2(a)	6105(2)(b) (CA)	720	215/4(5)	2103(1) 2206(1)(a)
720	135/2(b)	(CA)	720	215/4(6)	2302(1)
720	140/0.01 <i>et seq.</i>	CA	720	215/5(a)	2109 2206(3) 2302(2)(b) 2303(2)
720	145/0.01	-	720	215/5(b)	2109 (807)
720	145/1	2401	720	215/5(c)	CA
720	150/1	1202(1) 4103(1) 4105(1)	720	215/6	CA
720	150/2	1202(1) 4103(1) 4105(1)	720	215/7	CA
720	150/3	CA	720	215/8	CA
720	150/3.1	CA	720	215/9	-
720	150/4.1	1202(1) 4103(1)	720	220/0.01 <i>et seq.</i>	CA
720	150/5	1202(2) 4103(3) 4105(3) (CA)	720	225/0.01 <i>et seq.</i>	CA
720	150/5.1(A)	1301(2)	720	230/0.01 <i>et seq.</i>	CA
720	150/5.1(B)	1301(4)(f)	720	235/1	2106
720	205/0.01 <i>et seq.</i>	CA	720	240/1	3112
720	210/0.01 <i>et seq.</i>	CA	720	245/0.01 <i>et seq.</i>	CA
720	215/1 to /3	-	720	250/1 to /2.02	-
			720	250/2.03	3108(2)(a)
			720	250/2.04 to /2.14	-
			720	250/2.15	3108(2)(b)
			720	250/2.16	-
			720	250/3	3106(1)(a)

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Conversion Table: Translation From Current Law to Draft

ILCS Chap	ILCS Provision	Draft Provision	ILCS Chap	ILCS Provision	Draft Provision
720	250/4	2102 2105	720	250/17.01	2103 3101
720	250/5	2108	720	250/17.02(a)	2102 (801) 2401 3101
720	250/6	2105	720	250/17.02(b)	2102
720	250/7	3108	720	250/17.03	CA
720	250/8(i)	2103 (801) 2106 (801) 3101 3108	720	250/18	107(4)
720	250/8(ii)	2103 2106 3108	720	250/19	905
720	250/9	2106 (301) 3108 (301)	720	250/20	-
720	250/10	2103 (301) 2106 (301) 3108 (301)	720	250/24	-
720	250/11	2103 2106	720	290/1	3106(1)(g)
720	250/12	2103 (801) 2106 (801) 3101 3106(1)(a)	720	290/2 & /3	3106(1)(g) (CA)
720	250/13	2105	720	295/1a	3106(1)(b) & (c)
720	250/14	3101	720	295/1b	3106(1)(c) (CA)
720	250/15	3101 3108 (801)	720	295/1c	CA
720	250/16	3101 3108 (801)	720	295/1d	CA
720	250/17	808 3101 (801)	720	300/1	-
			720	305/1 <i>et seq.</i>	CA
			720	310/1 <i>et seq.</i>	CA
			720	315/0.01 <i>et seq.</i>	CA
			720	320/1 <i>et seq.</i>	CA
			720	325/1 <i>et seq.</i>	CA
			720	330/0.01 <i>et seq.</i>	CA
			720	335/1 <i>et seq.</i>	CA
			720	340/0.01 <i>et seq.</i>	CA
			720	345/0.01 <i>et seq.</i>	CA
			720	350/0.01 <i>et seq.</i>	CA
			720	355/0.01 <i>et seq.</i>	CA

[Note: An entry of “CA” means that although the proposed Code does not itself incorporate the provision in question, it is anticipated that the provision will be preserved in the Illinois Statutes by means of a conforming amendment.]

Conversion Table: Translation From Current Law to Draft

ILCS Chap	ILCS Provision	Draft Provision	ILCS Chap	ILCS Provision	Draft Provision
720	360/1	2207	720	590/0.01 <i>et seq.</i>	CA
720	365/1(a) & (b)	3108(1)	720	595/1	-
720	365/1(a) to (d)	2106	720	600/1 <i>et seq.</i>	CA [Art. 7200]
720	365/1(e) & (f)	2106 (301)	720	605/0.01 <i>et seq.</i>	CA
720	365/1(g)	2106	720	610/0.01 <i>et seq.</i>	CA
720	365/1(g)	2109 3108(4)	720	615/0.01 <i>et seq.</i>	CA
720	370/1	2102 (801)	720	620/1	6111
720	370/2	-	720	620/2	-
720	375/0.01 <i>et seq.</i>	CA	720	620/4	-
720	380/0.01 <i>et seq.</i>	CA	720	625/0.01 <i>et seq.</i>	CA
720	385/0.01 <i>et seq.</i>	CA	720	630/0.01 <i>et seq.</i>	CA
720	390/0.01 <i>et seq.</i>	CA	720	635/0.01 <i>et seq.</i>	CA [Art. 7200]
720	395/1 <i>et seq.</i>	CA	720	640/1 & /2	4105
720	400/0.01 <i>et seq.</i>	CA	720	645/1 & /2	5101
720	505/1	CA	720	650/0.01 <i>et seq.</i>	CA
720	510/1 to /15	4107	720	655/0.01 <i>et seq.</i>	CA
720	513/1 <i>et seq.</i>	-	720	660/0.01 <i>et seq.</i>	CA
720	525/1 to /5	4108	720	665/0.01 <i>et seq.</i>	CA
720	540/1	5201	720	670/1	6204
720	530/0.01 <i>et seq.</i>	CA	720	670/2	6204
720	535/0.01 <i>et seq.</i>	CA [Art. 7100]	720	670/3	-
720	545/0.01 <i>et seq.</i>	CA [Art. 7100]	720	675/0.01 <i>et seq.</i>	CA
720	550/1 <i>et seq.</i>	CA [Art. 7200]	720	680/1 <i>et seq.</i>	CA
720	555/0.01 <i>et seq.</i>	CA	720	685/1 <i>et seq.</i>	CA [Art. 7200]
720	560/1 <i>et seq.</i>	CA	720	690/0.01 <i>et seq.</i>	CA [Art. 7200]
720	565/0.01 <i>et seq.</i>	CA	725	5/104-10 <i>et seq.</i>	604
720	570/100 <i>et seq.</i>	CA [Art. 7200]	725	5/110-2	5311
720	585/0.1 <i>et seq.</i>	CA	725	5/111-1 & -2	602(4)

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Conversion Table: Translation From Current Law to Draft

ILCS Chap	ILCS Provision	Draft Provision	ILCS Chap	ILCS Provision	Draft Provision
725	5/112A-3(3)	1201(3)(b) & (c)	755	55/1.1	6206
730	5/3-6-4(a)	5307	760	55/17	2107
730	5/3-6-4(b)	415(3)	760	100/23	5201
730	5/5-5-1	901	765	86/10-25	3106(1)(b)
730	5/5-5-2	902	765	835/1(a) to (b-5)	2102 2206
730	5/5-5-3(c)(5)	903(10)	765	835/1(f)	2303
730	5/5-5-3.2(b)(1)	905(1)	765	1040/8	3101
730	5/5-5-3.2(b)(2)	905(3)	810	5/9-315.01	3112
730	5/5-5-3.2(b)(8)	905(4)	810	5/9-315.01(1)	2107
730	5/5-5-3.2(b)(11)	905(2)	810	5/9-315.02	3112
730	5/5-8-1(a)	903(1) to (6)	815	5/2.1	3106(2)(c)
730	5/5-8-1(a)(1)	1101(2)	815	5/12	3106(1)(c)
730	5/5-8-1(a)(1)	1102(3)	815	5/12(E)	5202(1)
730	5/5-8-3(a)	903(7) to (9)	815	5/12(G)	2103
730	5/5-8-4	906	815	5/14	3106(3)
730	5/5-8A-4.1(a)	5307	815	370/6	1201(2) 5303
730	5/5-8A-4.1(b)	5307	815	505/2AA(j)(2)	2102
730	5/5-8A-4.1(c)	5307 (7100)	815	505/2AA(j)(4)	3106(1)(b)
730	5/5-9-1(a)	904(2)	815	515/3(a)(1) & (2)	3103
730	5/5-9-1(a)(1)	904(3)	815	515/3(b)(1)	2206(1)(a)
730	5/5-9-1.3(a)	904(1)	815	515/3(b)(2)	3103 5205
730	150/10	5202(1)	815	515/5	2103
735	5/1-109	5202(2)	815	602/5-95	3103
740	147/10	905(5)(a)	815	602/5-110	3106(1)(b)
750	16/15(a) to (b)	4106	815	705/25	2103 3106(1)(a)
750	30/1	4104(2)(a)	820	220/2(i)	5202(1) & (2) 5203(1)(a)
750	61/15(d)	5201 5202(2)			
755	5/6-1(b)	3101 3102			
755	50/8.1	6206			

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PROPOSED ILLINOIS CRIMINAL CODE

CONVERSION TABLE: **TRANSLATION FROM DRAFT TO CURRENT LAW**

Conversion Table: Translation From Draft to Current Law

Draft Provision	ILCS Chap	ILCS Provision	Draft Provision	ILCS Chap	ILCS Provision
101(1)	720	5/1-1	108 - <i>see also</i>	720	5/11-9.3(c)(4) 5/12-12(b) & (d)
101(2)	720	5/34-4	201	-	-
102(1)	720	5/1-2	202	-	-
102(2)	-	-	203	-	-
102(3)	720	5/34-1	204(1)	720	5/4-1
102(4)	720	5/34-2	204(2)	-	-
102(5)	720	5/34-3	204(3)	720	5/4-2
103	720	5/1-3	204(4)	720	5/2-2
104	720	5/1-4	205(1)	720	5/4-3(a)
104 - <i>see also</i>	720	5/10-5(f)	205(2)	720	5/4-3(b)
105	720	5/1-5	205(3)	720	5/4-3(b)
105(1)(d)	720	5/8-6	205(4)	720	5/4-9
106	720	5/1-6	205(5)	720	5/4-3(c)
107	720	5/3-1	205(6)	-	-
107	720	5/3-2	206(1)	720	5/4-4
108	720	5/2-3	206(2)	720	5/4-5
108	720	5/2-4	206(3)	720	5/4-6
108	720	5/2-8	206(4)	720	5/4-7
108	720	5/2-10	207(1)	720	5/4-8(a)
108	720	5/2-13	207(2)	-	-
108	720	5/2-15	207(3)	-	-
108	720	5/2-15a	208	-	-
108	720	5/2-15b	251	-	-
108	720	5/2-17	252	-	-
108	720	5/2-18	253	720	5/3-3
108	720	5/2-19	254	720	5/8-5
108	720	5/2-19.5	301(1)	720	5/5-1
108	720	5/2-21	301(1)	720	5/5-2
108	720	5/2-22	301(2)	720	5/5-2(c)
108	720	5/15-1	301(3)	-	-

Conversion Table: Translation From Draft to Current Law

Draft Provision	ILCS Chap	ILCS Provision	Draft Provision	ILCS Chap	ILCS Provision
301(4)	720	5/5-3	413	720	5/7-10
301(5)	-	-	414(1)	720	5/7-5
301(6)	720	5/5-2(c)	414(2)	720	5/7-6
301 - <i>see also</i>	5	312/3-103(d)	414(3)	720	5/7-9
	20	1605/15	414(4)	720	5/7-8
	50	105/4.5(3)	415(1) & (2)	-	-
	625	5/18b-108(c)	415(3)	730	5/3-6-4(b)
	720	5/10-7(a)(i)	415(4) to (6)	-	-
		5/11-6.5(a)	416(1)	720	5/7-1
		5/16-10(a)(3) & (4)	416(2)	-	-
		5/16-12(a)	417	720	5/7-2
		5/16D-3(a-5)	417	720	5/7-3
		5/16F-4(a)	418(1)	720	5/7-4
		5/17-9(b)	418(2)	720	5/7-7
		5/17-10(b)	419	720	5/7-1
		5/17-15	419	720	5/7-2
		5/31-7(a) to (e)	419	720	5/7-3
		5/31-7(f-5) & (f-6)	419	720	5/7-5
		5/32-3	419	720	5/7-6
		250/9	501(1) to (5)	-	-
		250/10	501(6)	720	5/6-2(e)
		365/1(e) & (f)	501(6)	720	5/6-4
302(1) & (2)	720	5/6-3(a)	502	720	5/4-1
302(3)	-	-	503	-	-
303	-	-	504	720	5/6-2(a) & (b)
304	720	5/4-8(c)	505	720	5/6-1
400	-	-	506(1) & (2)	720	5/6-3(b)
411	-	-	506(3)	-	-
412	720	5/7-13	506(4)	-	-
			507	720	5/7-11
			508	720	5/4-8(b)(1)

Conversion Table: Translation From Draft to Current Law

Draft Provision	ILCS Chap	ILCS Provision	Draft Provision	ILCS Chap	ILCS Provision
509	720	5/4-8(b)(2) to (4)	801 - <i>see also</i>		5/12-2(a) & (a-5)
510	-	-			5/12-4.2
511	720	5/7-1 to -3; -5; -6; -9 & -13			5/12-4.2-5
601	-	-			5/16-3.1(a)
602(1)	720	5/3-5			5/16A-3(b) & (c)
602(2)	720	5/3-6			5/16B-2(b)
602(3)	720	5/3-8			5/16C-2(a)
602(4)	720	5/2-16			5/16D-5(a)(1)
602(4)	725	5/111-1 & -2			5/17-1(B)(d) & (e)
602(5)	720	5/3-7			5/17-1(C)(1) to (4)
602(6)	720	5/2-16			5/17-3(a)(3)
603	720	5/7-12			5/17-9(a)
604	725	5/104-10 <i>et seq.</i>			5/17-10(a)
605	720	5/3-4(a)			5/17-11
605(1)	720	5/2-1			5/17-11.1
605(3)	720	5/2-5			5/17-15
605(5)	720	5/2-9			5/17-16
606	720	5/3-4(b)			5/17-20
606(1)(b)	720	5/3-3			5/17-21
607	720	5/3-4(c)			5/17-23(a) & (b)
608	720	5/3-4(d)			5/17-24
701	720	5/5-4			5/17B-15
702	720	5/5-5			5/21-1.4
801	720	5/8-4(a)			250/8(i)
801 - <i>see also</i>	35	505/15(3.7)			250/12
	320	25/9			250/15 to /17
	720	5/11-18(a)(2) 5/12-1(a)			250/17.02(a)
					370/1

Conversion Table: Translation From Draft to Current Law

Draft Provision	ILCS Chap	ILCS Provision	Draft Provision	ILCS Chap	ILCS Provision
802	720	5/8-1(a)	808 - <i>see also</i>	15	335/14A
802	720	5/8-1.1(a)		15	335/14B
802	720	5/8-1.2(a)		230	10/18(d)(10)
802	720	5/8-3		625	5/6-301.1(b)
802 - <i>see also</i>	10	5/29-20(1) & (2)		625	5/6-301.2(b)
	720	5/11-6(a)		625	5/11-1301.6
		5/11-20.1(a)(4)		720	5/14-2(a)(2)
		5/11-20.1(a)(5)			5/16D-3(a-5)
		5/11-20.1(a)(7)			5/16F-4
803	720	5/8-2(a)			5/17-1(C)(2) to (4)
803	720	5/8-3			5/17-23(a) & (b)
803 - <i>see also</i>	35	200/21-306(a)(4)	901	730	5/5-5-1
	625	5/4-103.1	902	730	5/5-5-2
		5/4-103.3	903(1) to (6)	730	5/5-8-1(a)
	720	5/46-3(a)	903(7) to (9)	730	5/5-8-3(a)
		5/46-4(a)	903(10)	730	5/5-5-3(c)(5)
804	720	5/8-2(b)	904(1)	730	5/5-9-1.3(a)
805	-	-	904(2)	730	5/5-9-1(a)
806	-	-	904(3)	730	5/5-9-1(a)(1)
807	720	5/8-1(b)	905(1)	730	5/5-5-3.2(b)(1)
807	720	5/8-1.1(b)	905(2)	730	5/5-5-3.2(b)(11)
807	720	5/8-1.2(b)	905(3)	730	5/5-5-3.2(b)(2)
807	720	5/8-2(c)	905(4)	625	5/4-103.3
807	720	5/8-4(c)	905(4)	720	5/46-4(a)
808	720	5/16-6	905(4)	730	5/5-5-3.2(b)(8)
808	720	5/16-15	905(5)(a)	740	147/10
808	720	5/19-2	905(5)(b)	705	405/5-105(3)
808	720	250/17	906	730	5/5-8-4

Conversion Table: Translation From Draft to Current Law

Draft Provision	ILCS Chap	ILCS Provision	Draft Provision	ILCS Chap	ILCS Provision
1101(1)	720	5/9-1(a)(1)	1107(4)	-	-
1101(2)	730	5/5-8-1(a)(1)	1107(5)	720	5/12-31(b)
1102(1)(a)	720	5/9-1(a)(2)	1108(1)	720	5/9-3.1(a)
1102(1)(b)	720	5/9-1(a)(3)	1108(2)	720	5/9-3.1(c)
1102(2)	720	5/9-3.3(a)	1109	720	5/9-1(b) to (j)
1102(3)	720 730	5/9-3.3(b) 5/5-8-1(a)(1)	1201	720	5/12-33(a)(1) to (3)
1103(1)	720	5/9-2(a)(1)	1201(1)	720	5/12-3(a)
1103(1)	720	5/9-2(b)	1201(2)(a)(i)	720	5/12-3.3
1103(2)	720	5/9-2(c)	1201(2)(a)(i)	720	5/12-4(a)
1103(3)	720	5/9-2(d)	1201(2)(a)(i)	720	5/12-4.1
1104(1)	720	5/9-3(a)	1201(2)(a)(ii)	720	5/12-32
1104(2)	720	5/9-3(d)	1201(2)(a)(iii)	720	5/12-34
1105	-	-	1201(2)(b)(i)	720	5/12-4(c) & (d)
1106(1)	720	5/9-1.2(a)	1201(2)(b)(ii)	720	5/12-4(b)(8)
1106(1)	720	5/9-2.1(a)	1201(2)(b)(iii)	720	5/12-3.2
1106(1)	720	5/9-3.2(a)	1201(2)(b)(iii)	720	5/12-4(b)(16)
1106(2)	720	5/9-1.2(b) & (c)	1201(2)(b)(iv)	720	5/12-4(b)(16)
1106(2)	720	5/9-2.1(d) & (e)	1201(2)(b)(iv)	720	5/12-30
1106(2)	720	5/9-3.2(c) & (d)	1201(2)(c)	720	5/12-3(b)
1106(3)(a)	720	510/2(4)	1201(2)(d)(i)	720	5/12-4(b)(6)
1106(3)(b)	720	5/9-1.2(b)	1201(2)(d)(ii)	720	5/12-4(b)(11)
1106(3)(b)	720	5/9-2.1(d)	1201(2)(d)(iii)	720	5/12-4(b)(14)
1106(3)(b)	720	5/9-3.2(c)	1201(2)(d)(iv)	720	5/12-4(b)(10)
1106(4)	720	5/9-1.2(d) 5/9-2.1(c) 5/9-3.2(b)	1201(2)(d)(iv)	720	5/12-4.3
1107(1)	720	5/12-31(a)(1)	1201(2)(d)(iv)	720	5/12-4.6
1107(2)	720	5/12-31(a)(2)	1201(3)(a)	720	5/2-3.5
1107(3)	720	5/12-31(c)	1201(3)(b)	720	5/12-7.3(h)
			1201(3)(b)	725	5/112A-3(3)
			1201(3)(c)	720	5/12-7.3(h)
			1201(3)(c)	725	5/112A-3(3)
			1201(3)(d)	720	5/9-1(b)(14)

Conversion Table: Translation From Draft to Current Law

Draft Provision	ILCS Chap	ILCS Provision	Draft Provision	ILCS Chap	ILCS Provision
1201 (and 7101)	720	5/12-4.2	1202 - <i>see also</i>	20	1805/87
1201 - <i>see also</i>	20	1805/87		415	5/44(b) to (f)
	225	650/19(A)		510	5/26
	505	90/22		610	100/1 & /2
	720	5/12-4(d-5)		625	5/11-501 & -503
		5/12-7.4			5/18b-106.1 & -108
		5/12-33			5/18c-7502
	815	370/6			40/5-7
1202(1)	720	5/12-5(a)			45/5-16
1202(1)	720	5/12-2.5(a)		720	5/12-7.4
1202(1)	720	5/12-4.5(a)			5/16D-4
1202(1)	720	5/12-4.9(a)			120/5 & /10
1202(1)	720	5/12-5.1(a)			150/1; /2; /4.1 & /5
1202(1)	720	5/12-5.5	1203(1)	720	5/12-1(a)
1202(1)	720	5/12-16.2(a)	1203(1)	720	5/12-2(a)
1202(1)	720	5/12-21.6(a)	1203(1)	720	5/12-9(a)
1202(1)	720	5/45-2	1203(2)	720	5/12-1(b)
1202(2)	720	5/12-2.5(b)			5/12-2(b)
		5/12-4.5(b)			5/12-9(c)
		5/12-4.9(b)	1203 - <i>see also</i>	720	5/12-4(d-3)
		5/12-5(b)			5/12-7.5
		5/12-5.1(b)			5/24.6-20
		5/12-5.5			5/32-4a
		5/12-16.2(e)	1204(1)	720	5/12-7.3(a)
		5/12-21.6(a)	1204(2)	720	5/12-7.3(b)
		5/45-2			5/12-7.4(a)(3); (b)
					5/12-30(a) & (d)

Conversion Table: Translation From Draft to Current Law

Draft Provision	ILCS Chap	ILCS Provision	Draft Provision	ILCS Chap	ILCS Provision
1205	720	5/12-19(a)	1301(4)(b)(iii)	720	5/12-13(a)(1) & (2)
1205	720	5/12-21(a)	1301(4)(b)(iii)	720	5/12-14(b)(ii)
1205	720	5/12-21.6	1301(4)(c)	720	5/12-16(d)
1205 - <i>see also</i>	720	5/12-33	1301(4)(d)	720	5/12-14(b)(i)
1301(1)	720	5/12-13(a); 5/12-14(a) to (c); 5/12-14.1(a); 5/12-15(b) & (c); 5/12-16(d)	1301(4)(d)	720	5/12-15(b)
1301(1) - <i>see also</i>	720	5/11-18.1	1301(4)(e)	720	5/12-15(b)
1301(2)	720	150/5.1(A)	1301(4)(e)	720	5/12-15(c)
1301(2) - <i>see also</i>	720	5/11-20.1(a)(5)	1301(4)(f)	720	150/5.1(B)
1301(3)	720	5/12-12(f)	1301 (and 7101)	720	5/12-14(a)(1) & (8) to (10)
1301(4)	720	5/12-13(b); 5/12-14(d); 5/12-14.1(b); 5/12-15(d); 5/12-16(g)	1301 (and 7101)	720	5/12-14.1(a) (1.1) & (1.2)
1301(4)(a)(i)	-	-	1302(1)	720	5/12-15(a) to (c) 5/12-16(a) to (f)
1301(4)(a)(ii)	720	5/12-14(a)(2)	1302(1) - <i>see also</i>	720	5/11-18.1 5/12-33(a)(4)
1301(4)(a)(ii)	720	5/12-14.1(a)(2)	1302(2)	720	5/12-12(e)
1301(4)(a)(ii) - <i>see also</i>	720	5/12-14(a)(7)	1302(3)	720	5/12-15(d) 5/12-16(g)
	720	5/12-14.1(a)(3)	1302(3)(a)(i)	720	5/12-16(c)(1)(i)
1301(4)(a)(iii)	720	5/12-14(a)(3)	1302(3)(a)(i)	720	5/12-16(c)(2)(i)
1301(4)(a)(iii)	720	5/12-14.1(a)(2)	1302(3)(a)(ii)	720	5/12-16(a)(2)
1301(4)(b)(i)	720	5/12-14.1(a)(1)	1302(3)(a)(ii) - <i>see also</i>	720	5/12-16(a)(7)
1301(4)(b)(ii)	720	5/12-13(a)(4)	1302(3)(a)(iii)	720	5/12-16(a)(5)
			1302(3)(b)(i)(A)	720	5/12-15(a)
			1302(3)(b)(i)(A)	720	5/12-16(c)(1) (ii)
			1302(3)(b)(i)(A)	720	5/12-16(c)(2) (ii)

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Draft Provision	ILCS Chap	ILCS Provision	Draft Provision	ILCS Chap	ILCS Provision
1302(3)(b)(i)(B)	720	5/12-16(d)	1401 - <i>see also</i>	720	5/10-5
1302(3)(b)(i)(C)	720	5/12-16(f)			5/11-19.2
1302(3)(b)(ii)	720	5/12-15(b)			5/12-7.4
1302(3)(b)(iii)	720	5/12-15(c)	1402(1)	720	5/10-3(a)
1302 (and 7101)	720	5/12-16(a)(1)	1402(2)(a)	720	5/10-4(a)(2) & (b)
1303(1)	720	5/11-9.1(a-5)	1402(2)(b)	720	5/10-3(b)
1303(2)	720	5/11-9.1(c)(1)	1402 - <i>see also</i>	720	5/12-7.4
1304(1)	720	5/11-9.2(a); (b) & (f)(1)	1403(1)	720	5/10-5(b)(1); (2) & (9)
1304(2)	720	5/11-9.2(g)(1)	1403(1)	720	5/10-5(c)(1) & (2)
1304(3)	720	5/11-9.2(c)	1403(1)	720	5/10-5.5(b)
1305(1) & (2)	720	5/11-9.3(a) to (b-5)	1403(2)(a)	720	5/10-5.5(c)
1305(1) & (2)	720	5/11-9.4(a) to (c)	1403(2)(b)	720	5/10-5(d)
1305(3)	720	5/11-9.4(d)(4)	1404(1)	720	5/12-6(a)
1305(4)	720	5/11-9.3(d) 5/11-9.4(e)	1404(2)(a)	720	5/12-6.1
1306(1)	720	5/12-17(b)	1404(2)(a)	720	5/12-6.2(a)(1) & (b)
1306(2)	720	5/12-18(b)	1404(2)(b)	720	5/12-6.2(a)(3) & (b)
1401(1)	720	5/10-1(a)	1404(2)(c)	720	5/12-6(b)
1401(2)	720	5/10-1(b)	1404 - <i>see also</i>	10	5/29-4
1401(3)(a)(i)	720	5/10-2(a)(1) & (b)		10	5/29-20(3)
1401(3)(a)(ii)	720	5/10-2(a)(3) & (b)		720	5/12-7
1401(3)(b)(i)	720	5/10-2(a)(2) & (b)		720	5/12-7.2
1401(3)(b)(ii)	-	-	1501(1)	720	5/18-1(a)
1401(3)(c)	720	5/10-1(c)	1501(2)(a)(i)	-	-
1401(4)	720	5/2-10.1	1501(2)(a)(ii)	720	5/18-3
			1501(2)(b)(i)	-	-
			1501(2)(b)(ii)	720	5/18-4(a)(1) & (2)
			1501(2)(b)(iii)	-	-

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Draft Provision	ILCS Chap	ILCS Provision	Draft Provision	ILCS Chap	ILCS Provision	
1501(2)(b)(iv)	720	5/18-5(a)	2102(2)(a)	720	5/15-3	
1501(2)(b)(iv)	720	5/18-5(b)	2102(2)(b)	720	5/15-7	
1501(2)(c)	720	5/18-1(b)	2102(2)(c)	720	5/15-2	
1501(3)	-	-	2102(2)(d)	720	5/16G-25	
1501(4)(a)	-	-	2102(2)(d)	720	5/20-1(b)	
1501(4)(b)	720	5/2-7.5	2102(2)(d)	720	5/16-4	
1501 (and 7101)	720	5/18-2	2102(3)(a)	720	5/16-1.1	
1501 (and 7101)	720	5/18-4(a)(3) to (6)	2102(3)(a)	720	5/16-3(b)	
2101	-	-	2102(3)(a)	720	5/16A-3(h)	
2102(1)	720	5/16-1(a)(1)	2102(3)(a)	720	5/16B-2(d)	
2102(1) - <i>see also</i>	225	735/5(a) & (b)	2102(3)(b)	720	5/16A-4(a)	
	230	10/18(d)(8)	2103(1)	720	5/16-1(a)(2)	
	240	40/15-45(b)	2103(1) - <i>see also</i>	20	4020/22	
	625	5/18c-7502(a)		35	105/14	
	720	5/16-5(a) 5/16A-3(a); (c) to (e) 5/16B-2(a) 5/16D-5(a)(2) & (3) 5/16E-3(a)(1); (2) & (4) 5/17B-5(i) 5/17B-10(a) 5/42-1 215/4(1); (2) & (5) 250/17.02(b)		35	145/8	
				225	41/15-75(a)(3) 60/53	
				230	203/90(a)(2) 410/4-20(2) 446/190(a)(3)	
					5/39(a)(2)	
					10/18(d)(6) & (9)	
					40/15-45(a)	
				240	5/8A-2	
				305	5/8A-3(a)	
					5/8A-4	
					5/8A-4A	
					5/8A-13(b)	
815				505/2AA(j)(2)		

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Draft Provision	ILCS Chap	ILCS Provision	Draft Provision	ILCS Chap	ILCS Provision
2103(1) - <i>see also</i>	720	5/16-1.3(a)	2104(2)	-	-
		5/16A-3(b) & (f)	2105(1)	720	5/16-1(a)(4)
		5/16B-2(c)	2105(1)	720	5/16-1(a)(5)
		5/16D-5(a)(3)	2105(1)	720	5/16-16(a)
		5/16G-15(a)	2105(1)	720	5/16-16.1(a)
		5/16G-20(a)	2105(1)	720	250/4
		5/17-6(a)	2105(1)	720	250/6
		5/17-13	2105(1)	720	250/13
		5/17-17	2105(1) - <i>see also</i>	625	5/4-103(a)(1); (5)
		5/17A-3			5/4-103.2(a)(1)-(7)
		5/17B-5(ii)			5/4-105(a)
		5/33C-4			5/18c-7502(a)(iii)
		5/46-1(a)			45/3A-21
		5/46-1.1(a)	2105(3)(a)	-	-
		5/46-2(a)	2105(3)(b)	720	5/15-6
		215/4(5)	2105(4)(a)	720	5/16E-3(a)(3)
		250/8(ii)	2105(4)(a)	720	5/16C-2(a)
		250/11 & /17.01	2105(4)(a) - <i>see also</i>	625	5/4-103(a)(2) to (4)
	815	5/12(G)	2105(4)(b) to (d)	-	-
		515/5	2106(1)	720	5/16-3(a) & (b)
		705/25	2106(1)	720	5/16-7(a)
2103(2)	720	5/15-4	2106(1)	720	5/16-8(a)
2103(2)	720	5/16-1.3(b)(4)	2106(1)	720	5/16-10(a)(2)
2103(3)	-	-	2106(1)	720	5/16-11(a)
2103(4)	720	5/16-1.2	2106(1)	720	5/16D-5(a)(3)
2104(1)	720	5/16-1(a)(3)	2106(1)	720	5/16F-3(a)
2104(1)	720	5/16-1.3(a)	2106(1)	720	5/16G-15(a)
2104(1)(a) to (g)	720	5/15-5	2106(1)	720	5/16G-20(a)

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Draft Provision	ILCS Chap	ILCS Provision	Draft Provision	ILCS Chap	ILCS Provision
2106(1)	720	5/17-6(a)	2108(1)	720	5/16-2(a) to (c)
2106(1)	720	5/17-8(a)	2108(1)	720	250/5
2106(1)	720	235/1	2108(2)	720	5/16-2(d)
2106(1)	720	250/8(ii)			250/5
2106(1)	720	250/11	2109(1) to (6)	720	5/16-1(b)
2106(1)	720	365/1(a) to (d)	2109(1) to (6) - <i>see also</i>	720	5/16-3(c)
2106(1)	720	365/1(g)			5/16-3.1(b)
2106(1) - <i>see also</i>	305	5/8A-2.5(b) 5/8A-3(a) 5/8A-13(b)			5/16-5(c)
2106(2)	-	-			5/16-7(c)
2106(3)	-	-			5/16-8(b)
2107(1)	-	-			5/16-10(b)
2107(1) - <i>see also</i>	15	520/21; /22			5/16-11(e)
	20	1605/10.3 & 10.4			5/16-16(b)
	35	105/14			5/16-16.1(c)
		143/10-50			5/16A-10
		145/8			5/16B-5(a) to (c)
		505/15			5/16C-2(b)
		630/19			5/16D-5(b)
	105	425/26(2)			5/16E-4
	225	410/2A-4(b)(2) 410/3B-4(2)			5/16F-3(b)
					5/16G-20(e)
	720	5/17B-10(a)			5/17-6(d)
					5/17-8(b)
	760	55/17			5/17-13
	810	5/9-315.01(1)			5/17-17
2107(2)	-	-			5/17A-3
2107(3)	-	-			5/17B-20
2107(4)	720	5/17-1(A)(i)			5/33C-4
					5/42-2
					5/46-1(b)

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Draft Provision	ILCS Chap	ILCS Provision	Draft Provision	ILCS Chap	ILCS Provision
2109(1) to (6) - <i>see also</i>		5/46-1.1(b)	2201(2)(a)	720	5/2-6
		5/46-2(b)	2201(2)(b)	720	5/20.5-5(b)
		215/5(a) & (b)	2201(3)	720	5/20-1(c)
		235/1			5/20-1.1(b)
		250/4			5/20-1.2(b)
		250/6			5/21-4(1)
		250/8	2202(1)(a)	720	5/12-5(a)
		250/9	2202(1)(b)	720	5/21-1(1)(b) & (c)
		250/11	2202(1)(b)	720	5/21-4(1)(c)
		250/12	2202(2)	720	5/12-5(b)
		250/13			5/21-1(2)
		250/17.01			5/21-4(1)
		250/17.02(b)	2203	-	-
		365/1(g)			
2109(7)	720	5/15-9	2204(1)(a)	720	5/20.5-5(a)
2109(7)	720	5/46-1(c)	2204(1)(b)	720	5/20-2(a)
2109(8)	720	5/16-1.3(a)	2204(1)(b)	720	5/20.5-6
2110	-	-	2204(1)(c)	720	5/20.5-5(c)
2111(1)(a)	720	5/21-2	2204(2)	-	-
2111(1)(a)	620	5/43a	2204(3)	-	-
2111(1)(b)	720	5/16-3(b)	2204(4)	-	-
2111(1)(c)	-	-	2204(5)	720	5/20.5-5(b)
2111(2)	-	-	2204 - <i>see also</i>	720	5/12-4.1
2111(3)	620	5/43a	2205(1)	720	5/20-2(a)
	720	5/16-3(c)	2205(1)	720	5/20.5-6(a)
	720	5/21-2	2205(2)	720	5/20-2(b)
2201(1)(a)	720	5/20-1(a)	2205(2)	720	5/20.5-6(b)
2201(1)(a)	720	5/20-1.1(a)	2205 - <i>see also</i>	720	5/12-4.1
2201(1)(a)	720	5/20-1.2(a)	2206(1)(a)	720	5/16B-2.1
2201(1)(a)	720	5/21-4(1)(b)	2206(1)(a)	720	5/16D-3(a)(3)
2201(1)(b)	720	5/20-1(b)	2206(1)(a)	720	5/16D-5(a)(2)
			2206(1)(a)	720	5/21-1(1)(a)

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2206(1)(a)	720	5/21-1.1	2207(1)(a)	720	5/16D-4(a)(1)
2206(1)(a)	720	5/21-1.3(a)	2207(1)(a)	720	360/1
2206(1)(a)	720	5/21-4(1)(a) & (b)	2207(1)(a) - <i>see also</i>	720	5/21-1(1)(a) 5/21-1.1
2206(1)(a)	720	215/4(1) & (2)	2207(1)(b)	-	-
2206(1)(a) - <i>see also</i>	225 625 815	735/5(b) 5/18c-7502(a)(i) 515/3(b)(1)	2207(1)(c)	-	-
2206(1)(b)	720	5/21-1(1)(b)	2207(2)	720	5/16-14(b)
2206(1)(c)	720	5/16D-3(a)(4)	2207(3)	720	5/16-14(d) 5/16D-4(b) 5/21-1(2) 5/21-1.1 360/1
2206(1)(c)	720	5/16D-4(a)	2301(1)	720	5/12-11(a)
2206(1)(c)	720	5/21-1.1	2301(2)	720	5/12-11.1(a)
2206(1)(c)	720	5/21-1.5(a) & (b)	2301(3)(a)	720	5/2-6
2206(1)(c) - <i>see also</i>	625	5/18c-7502(a)(i)	2301(3)(b)	720	5/12-11(d)
2206(1)(d)	-	-	2301(4)	720	5/12-11(c) 5/12-11.1(b)
2206(2)	-	-	2302(1)	720	5/19-1(a)
2206(3)(a) to (f)	720	5/21-1(2)	2302(1)	720	5/19-3(a)
2206(3)(a) to (f) - <i>see also</i>	720	5/16B-5(d) & (e) 5/21-1(2) 5/21-1.3(b) 5/21-1.5(c) 5/21-4(1) 215/5(a)	2302(1) - <i>see also</i>	720	5/42-1 215/4(4) & (6)
2206(3)(g)	-	-	2302(2)(a)	720	5/19-3(b)
2206(3)(h)	720	5/21-1(2) 5/21-1.2(a) & (b)	2302(2)(b)	720	5/19-1(b) 5/42-2 215/5(a)
2207(1)(a)	720	5/16-14(a)	2303(1)	720	5/19-4(a)
			2303(1)	720	5/21-3(a)
			2303(1)	720	5/21-3(c)
			2303(1)	720	215/4(3)

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2303(2)	720	5/19-4(b) 5/21-3(a) 215/5(a)	2403(1)(b)	720	5/26-4(a) & (a-5)
2303(3)	-	-	2403(1)(b) - <i>see also</i>	720	110/3(a)(1) & (4)
2303 - <i>see also</i>	720	5/21-2 5/21-5(a) 5/21-7 5/21-8	2403(1)(c)	720	5/14-2(a)(1)
2303(4)(a)	720	5/21-3(a)	2403(2)	-	-
2303(4)(b)	720	5/21-3(d) & (f)	2403(3)	720	5/14-4(a) 5/26-1(b) 5/26-4(d) 110/3(b)
2304(1)	720	5/21.1-2	2404(1)	720	5/16D-3(a)(1) to (3)
2304(2)	720	5/21.1-3	2404(1)	720	5/16D-5(a)
2401(1)	720	5/14-2(a)(1)	2404(2)	720	5/16D-3(b)
2401(2)(a)	-	-	2404(2)	720	5/16D-5(b)
2401(2)(b)	720	5/14-1(e)	2404 - <i>see also</i>	215	5/1023
2401(2)(c)	720	5/14-1(a)	2405(1)	720	5/14-2(a)(3)
2401(2)(d)	-	-	2405(2)	-	-
2401(2)(e)	720	5/14-1(e)	2405(3)	720	5/14-4(a)
2401(2)(f)	-	-	3101(3)	720	5/17-3(d)
2401(3)(a)	720	5/14-2(a)(1)	3101(1)	720	5/17-3(a)
2401(3)(b)	720	5/14-2(a)(1) & (3)	3101(2)(a)	720	5/17-3(b)
2401(3)(b)	720	5/14-2(b) & (d)	3101- <i>see also</i>	5	175/10-140; /15-210; -220
2401(3)(b)	720	5/14-3(f) to (h)		15	335/14A 335/14B
2401(3)(c)	720	5/14-3(i)		20	1605/14.2
2401(3)(d)	720	5/14-3(j)		30	320/4
2401(4)	720	5/14-4(a)		35	130/22; /23 135/28; /29
2401- <i>see also</i>	720	145/1 250/17.02		225	25/40
2402	-	-			110/30 310/27
2403(1)(a)	720	5/26-1(a)(5)			

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3101- <i>see also</i>	230	5/39(a)(2) 10/18(d)(9)	3102 - <i>see also</i>	10	5/29-6 5/29-20(4)
	305	5/8A-2.5(a); -4; 4A 5/8A-15		15	335/14A
	625	5/4-103(a)(2) & (4) 5/4-105 5/6-301.1 5/6-301.2 45/3A-21(a) to (c)		230	10/18(d)(3)
				305	5/8A-15
				410	535/27(1)(b) & (c)
				420	40/39(b)(2)
				505	90/22
	720	5/16D-3(a)(5) 5/17-1(B) 5/17-17 5/17-18 5/17-23(a) & (b) 5/17B-5; -20 250/8 250/12 250/14 to /16 250/17.01 250/17.02		625	5/4-103(a)(2) to (4) 5/6-301.1 5/7-603 45/3A-21
				720	5/17-11 5/17-11.1 5/17-20 5/17-21
				755	5/6-1(b)
			3103(1)	720	5/17-1(B)(a)
			3103(2)	720	5/17-1(B)
			3103 - <i>see also</i>	35	200/21- 306(a)(3)
				50	105/4.5(2)
	755	5/6-1(b)		720	5/17-13
	765	1040/8		815	515/3(a)(1) & (2) 515/3(b)(2) 602/5-95
3102	-	-			

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3104	720	5/17-4	3106(1)(a)	720	5/17-1(C)(1)
3105(1)(a)	720	5/16G-15(a)	3106(1)(a) - <i>see also</i>	20	3520/45
3105(1)(b)	-	-			4020/22
3105(2)	720	5/16G-15(d)		35	105/14
3105 - <i>see also</i>	5	175/15-215			200/21-290(d)
	15	335/14(a)(2) to (4)		215	5/134
		335/14A		220	5/6-106
		335/14B		225	41/15-75(a)(3)
	225	25/40			203/90(a)(2)
		60/54			410/4-20(2)
		60/57			446/190(a)(3)
		110/30		305	5/8A-2(a)
		305/36(e)			5/8A-3(a)
		310/27			5/8A-13(b)(2)
		325/39(b)(3)		320	25/9
		330/43(d)			
		340/34(e)		720	5/17-6(a)
		745/160(b)(3)			5/33C-2
	305	5/8A-5A			5/33E-14
	410	535/27			5/33E-15
	505	90/22			250/3
	625	5/6-301(a)(2) to (3)			250/12
		5/6-301.1		815	705/25
			3106(1)(b)	720	5/17-1(B)(c)
	720	5/17-2	3106(1)(b)	720	295/1a & /1b
		5/17-3			
		5/17-6(a) & (d)			
		5/17B-5; -15 & -20			

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Draft Provision	ILCS Chap	ILCS Provision	Draft Provision	ILCS Chap	ILCS Provision
3106(1)(b) - <i>see also</i>	225 305 410 765 815	15/26	3106(2)(b)	-	-
		60/49; /52 & /59	3106(2)(c)	815	5/2.1
		125/215 & /220	3106(3)	225	470/56(1) & (2)
		305/36(a) & (g)		720	5/17-1(B) 5/17-1(C) 295/1a & /1b
		325/39(b)(5)		815	5/14
		330/43(f)	3107(1)	720	5/17-1(B)(d) & (e)
		340/34(a) & (g)		35	105/14 143/10-50 145/8
		745/160(b)(5)	3107(2)	720	5/17-1(B)(d)
		5/8A-16	3107(3)	720	5/17-1(B)
		18/55(4)	3108(1)	720	250/7
3106(1)(c)	815	5/12	3108(1)	720	250/8
		5/6-106	3108(1)	720	365/1(a) & (b)
3106(1)(c) - <i>see also</i>	720	295/1a	3108(2)(a)	720	250/2.03
		470/56(1)(A) & (2)(A)	3108(2)(b)	720	250/2.15
3106(1)(d)	225	470/56(1)(E) & (2)(A)	3108(3)	-	-
3106(1)(e)	225	40/15-45(a) & (b)	3108(4)	720	250/7 250/8 365/1
3106(1)(e) - <i>see also</i>	240	470/56(1)(F)	3109(1)	720	5/29A-2
3106(1)(f)	225	-	3109(2)	-	-
3106(1)(g)	-	-	3109(3)	720	5/29A-1
3106(1)(g) - <i>see also</i>	225	650/19(D)	3109(4)	720	5/29A-3
	410	620/3.1			
	720	290/1 to /3			
3106(2)(a)	-	-			

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3109 - <i>see also</i>	230 305	10/18(d)(1) & (2) 5/8A-14 5/8A-16(b)(5)	4103 - <i>see also</i>	720	130/1; /2 150/1; /2; /4.1 & /5
3110	720	5/33E-3; -4; -11; -14 & -18	4104	720	5/10-6
3110 - <i>see also</i>	30	500/50-25	4104 - <i>see also</i>	225 705 750	10/2.21 405/3-5 30/1
3111(1)(a)	720	5/29-1(a)	4105(1)	720	5/33D-1(a)
3111(1)(a) - <i>see also</i>	230	5/39(a)(1) 10/18(d)(1) & (2)	4105(2)	720	640/1
3111(1)(b)	230	5/36 & 5/37	4105 - <i>see also</i>	720	130/1 150/1; /2 & /5
3111(2)	720	5/29-2	4105(3)	720	5/33D-1(a) 640/2
3111(3)	-	-	4106	750	16/15(a) to (b)
3111(4)	720	5/29-1(a) 5/29-2	4107	720	510/1 to /15
3112	810	5/9-315.01	4108	720	525/1 to /5
3112	810	5/9-315.02	5101(1)	720	5/33-1(d) & (e)
3112 - <i>see also</i>	720	5/17-14 240/1	5101(2)	720	5/33-1(a) to (c)
3113	-	-	5101(3)	720	5/33-1(f)
3113 - <i>see also</i>	720	5/17-14	5101 - <i>see also</i>	10 225 230 305 720	5/29-1 to -3 650/19(B) & (B-5) 5/39(a)(1) 10/18(d)(1) & (2) 5/8A-3; -6; -14 & -16 5/32-4 5/32-4b 5/33E-7(a) & (c) 5/33E-8 645/1 & /2
3114(1)	720	5/17-1(B)(b)			
3114(2)	720	5/17-1(B)			
3115(1)	720	5/17-7(b)			
3115(2)	720	5/17-7(a)			
3115(3)	720	5/17-7(b)			
4101	720	5/11-11			
4101 - <i>see also</i>	720	5/12-13; -14 & -16			
4102	720	5/11-12			
4102	720	5/11-13			
4103	720	5/12-21.5			

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5102	720	5/33-2	5201	720	5/32-2
5102 - <i>see also</i>	720	5/33E-7(b) & (c) 5/33E-8(b)	5201 - <i>see also</i>	10	5/29-10(a)
5103	720	5/33-3		15	335/14C(a)(3)
5103 - <i>see also</i>	5	312/3-103(d)		50	105/4.5
	15	520/21; /22 & /23		55	5/1-5013
	20	1705/44		110	1010/4 & /8
	30	230/2b		205	657/25
	40	5/15-189			657/90(h)
	50	105/3 to /4		220	5/6-106
		705/6.1(e)		225	41/15-75(a)(6)
	55	5/3-11019			60/58
	60	1/85-45			203/90
	65	5/3.1-55-10			305/36(b)
		5/4-8-6			325/39(b)(2)
	70	210/25.3			330/43(b)
		705/4			340/34(b)
		2605/11.18			410/4-20(4)
	105	5/10-9			446/190(a)
	110	805/3-48			745/160(b)(2)
	210	45/3-212(a-1) & (a-2)		235	5/7-1
	225	705/4.20 to /4.22			5/10-1(c)
	305	5/8A-5 & -6		415	5/44(h)(1)
	605	5/6-411.1		625	5/6-302(a)(3)
	720	5/17B-10(b)		720	540/1
		5/33E-5; -6; -9; -16 & -17			
		310/1 & /2		750	61/15(d)
				760	100/23
			5202(1)	-	-

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5202(1) - <i>see also</i>	10	5/29-8	5202(1) - <i>see also</i>		110/30
	15	335/14A(b)(10)			125/105(a)(1); (4);
		335/14C(a)(1)			(11) & /215
	20	1605/14.2			203/90(a)(2)
		1605/16			305/36(f)
		3520/45			310/27
		4020/22			325/39(b)(6)
	35	5/1301			330/43(c)
		105/14			340/34(f)
		130/22; /23 & /25		225	410/4-20(2)
		135/28; /29 & /31			446/190(a)(3)
		143/10-50			735/5(c)
		145/8			745/160(b)(6)
		505/15(6)		230	30/12
		630/19		235	5/10-1(c)
	50	105/4.5(1)		240	40/15-45(c)
	55	5/1-5013		305	5/8A-2(a)
	205	5/49			5/8A-3(a)
		105/7-7(a)			5/8A-13(b)
		620/8-1			5/8A-15
		635/4-4		320	25/9
		657/90(h)		410	535/27(1)(a) & (c)
	215	690/36		415	5/44(a); (h)(2) & (4); (j)(4)(A) & (C)
		5/131.24(4)			5/57.17
	220	5/134		420	40/39(b)(1)
	225	5/6-106		510	5/26
		25/40		625	5/4-105(a)(5)
		41/15-75(a)(6)			
		60/56			

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5202(1) - <i>see also</i>		5/5-402.1(f) 5/6-302 45/3A-21(d) 720 5/17-6(a) 5/17A-3 5/33C-1 & /33C-2 5/33E-14 730 150/10 815 5/12(E) 820 220/2(i)	5203(1)(a)	-	-
5202(2)	30	500/50-5(d)	5203(1)(a) - <i>see also</i>	10	5/29-6 5/29-20(4) 15 335/14A(b)(8) 35 5/1301 105/14 130/14 130/25 135/22 135/31 143/10-50 145/8 505/15(3.5) & (6) 630/19 205 5/49 105/7-7(a) 215 657/90(h) 225 5/134 125/105(a)(11) & /215 240 40/15-45(c) 410 18/55(2) 535/27(1)(a) 415 5/44(h)(2) & (4) 5/57.17 420 40/39(b)(2) 505 90/22 510 5/26 625 5/4-105(a)(1) to (4) 5/4-105.1(a)
5202(2)	35	200/21-290(b) & (d)			
5202(2)	205	657/90(h)			
5202(2)	225	325/39(b)(6)			
5202(2)	305	5/8A-2(b)			
5202(2)	415	5/44(h)(6)			
5202(2)	415	5/44(i)			
5202(2)	415	5/44(j)(4)(A) & (C)			
5202(2)	720	5/17-15			
5202(2)	735	5/1-109			
5202(2)	750	61/15(d)			
5202(2)	820	220/2(i)			
5202(3)	-	-			
5202(4)	720	5/17-6(d) 5/17-22(b) 5/33C-1 5/33C-2 5/33E-14			

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5203(1)(a) - <i>see also</i>		5/5-402.1(f) 5/6-301.1(b)(8) 5/6-302 5/7-603 45/3A-21(a) & (b)	5205(1)(a)	720	5/32-5(a)
	720	5/33E-15	5205(1)(b)	720	5/32-5.1
	820	220/2(i)	5205(1)(c)	720	5/32-5.3
5203(1)(b)	720	5/32-8	5205(1)(d)	720	5/32-5(b)
5203(1)(b)	720	5/32-9	5205(2)	720	5/32-5(a) & (b) 5/32-5.1 5/32-5.3
5203(1)(b) - <i>see also</i>	10	5/29-6 5/29-20(4) 535/27(1)(b) 5/44(h)(3) & (5)	5205 - <i>see also</i>	720	5/17-2 5/17-5(a)
	410			815	515/3(b)(2)
	415		5206	720	5/32-6
5203(2)	720	5/32-8 5/32-9 5/33E-15	5207	720	5/32-7
5204(1)	720	5/26-1(a)(4); (7); (8); (10) & (12)	5208(1)	720	5/26-1(a)(2); (3); (9) & (11)
5204(1) - <i>see also</i>	325	5/4	5208(2)	720	5/26-1(b)
	625	5/4-103(a)(6)	5301	720	5/31-4
	720	5/16-3.1(a) 5/31-4(a)	5301- <i>see also</i>	415	5/44(g)
5204(2)	720	5/16-3.1(b) 5/26-1(b) 5/31-4(d)		720	5/10-7(a)(ii) & (b)
			5302(1)	720	5/31-1(a)
			5302(2)	720	5/31-1(b)
			5302(3)(a)	720	5/31-1(a)
			5302(3)(b)	720	5/31-1a
			5302 - <i>see also</i>	625	5/11-204; 204.1 5/18b-103.1
			5303	-	-

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5303 - <i>see also</i>	225	650/19(A) 735/5(g)	5309(3)(a)	720	5/31A-1.1(d) to (j)
	240	40/15-45(d) & (e)	5309(3)(b)	720	5/31A-1.2(a) to (c); (e) & (f)
	415	60/15(7)	5310	720	5/32-4
	505	90/22	5310	720	5/32-4a(a) & (b)
	510	5/26(a)	5310 - <i>see also</i>	10	5/29-4 & -20(3)
	720	5/33C-3		720	5/12-9
	815	370/6	5311	720	5/32-10(a) to (b)
5304(1)	720	5/31-3	5311	725	5/110-2
5305	720	5/31-8	6101(1)	720	5/25-1(a)
5306	720	5/31-5	6101(2)	720	5/25-1(b) to (d)
5307	720	5/31-6 (a) to (c-6)	6101 - <i>see also</i>	720	5/21.2-2; -4
5307 - <i>see also</i>	730	5/3-6-4(a) 5/5-8A-4.1(a) & (b)	6102	720	5/25-1(d)
			6103	720	5/21.2-2
5308(1)	720	5/31-7(f)	6103	720	5/21.2-4
5308(2)	720	5/31A-1.2(d)(2)	6103(1)	720	5/26-1(a)(1)
5308(3)	720	5/31-7(f)	6103(2)	-	-
5309(1)	720	5/31A-1.1(a); (b) & (k)	6103(3)	720	5/26-1(b)
5309(2)(a)	720	5/31A-1.1(c)(1)	6103 - <i>see also</i>	720	5/21.2-2; -4 5/47-5 to -25
5309(2)(a) - <i>see also</i>	720	5/2-14	6104	720	5/26-1(a)(2) to (4); (9); (11)
5309(2)(b)	720	5/31A-1.1(c)(2) & -1.2(d)(4)	6105(1)(a)	720	135/1 to /1-2
5309(2)(b) - <i>see also</i>	720	570/102(f) 570/201 <i>et seq.</i>	6105(1)(b)	-	-
			6105(1)(c)	720	135/1 to /1-2
			6105(1)(d)		
			6105(2)(a)	720	5/12-30
			6105(2)(b)	720	135/2

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6105 - <i>see also</i>	720	5/24.6-20 5/32-4a(a) & (b) 5/47-5; -15; -25	6203(2)(b)	720	5/11-15(b) 5/11-16(b) 5/11-17(b) 5/11-20.1(c)
6106	720	5/12-7.1	6203(2)(c)	720	5/11-19(b)
6107	-	-	6204(1)	720	5/11-20(a)
6108	-	-	6204(2)	720	5/11-20(b)
6109(1)	720	5/47-5(5)	6204(3)	720	5/11-20(e)
6109(2)	-	-	6204(3)	720	5/11-20.1(b)(4)
6109(3)	-	-	6204(4)	720	5/11-20(f)
6109(4)	-	-	6204(5)(a)	720	5/11-20.1(a)(1) to (3); (5) & (6)
6109(5)	720	5/47-25	6204(5)(a)	720	5/11-20.1(b)(1)
6110	-	-	6204(5)(a)	720	5/11-20.1(c)
6110 - <i>see also</i>	720	5/21.2-2 & -4	6204(5)(b)	720	5/11-20(d)
6111	720	620/1	6204 - <i>see also</i>	720	5/11-21; -23 670/1; /2
6201	720	5/11-9.1(a) & (c)	6205	-	-
6202	720	5/11-14	6205 - <i>see also</i>	410	5/1 <i>et seq.</i> 18/1 <i>et seq.</i> 505/1 <i>et seq.</i> 510/1 <i>et seq.</i>
6202	720	5/11-14.1		720	5/12-33(a)(7)
6202	720	5/11-18	6206	720	5/12-20
6202	720	5/11-18.1	6206 - <i>see also</i>	755	50/8.1 55/1.1
6203(1)(a)	720	5/11-16(a)	6207	510	70/3.01 to /3.03 & /16
6203(1)(b)	720	5/11-15(a)	6207 - <i>see also</i>	720	5/26-5(a) to (i)
6203(1)(c)	720	5/11-17(a)	7101	720	5/33A-1 <i>et seq.</i>
6203(1)(d)	720	5/11-20.1(a)(5)			
6203(1)(e)	720	5/11-19(a)			
6203(2)(a)	720	5/11-15.1 5/11-17.1 5/11-19.1 5/11-19.2			

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7101 - <i>see also</i>	720	5/10-2(a)(5) to (8) 5/10-3.1 5/10-4(a)(1) 5/12-4(b)(1) 5/12-4(d-3) 5/12-4.2 5/12-4.2-5 5/12-11(a)(1) 5/12-11(a)(3) to (5) 5/12-14(a)(1) 5/12-14(a)(8) to (10) 5/12-14.1(a) (1.1) & (1.2) 5/12-16(a)(1) 5/18-2 5/18-4 5/31-6(d) 5/31-7(g)			