January 1977

Alaska Criminal Code Revision — Tentative Draft, Part 1: Offenses against the Person

Alaska Criminal Code Revision Subcommission

Suggested citation

Alaska Criminal Code Revision Subcommission. (1977). *Alaska Criminal Code Revision — Tentative Draft, Part 1: Offenses against the Person*. Anchorage, AK: Alaska Criminal Code Revision Subcommission.

Summary

The Alaska Criminal Code Revision Commission was established in 1975, and reestablished in June 1976 as a Subcommission of the newly formed Code Commission, with the responsibility to present a comprehensive revision of Alaska's criminal code for consideration by the Alaska State Legislature. Tentative Draft, Part 1 is comprised of four articles contained in the Offenses Against the Person chapter of the draft Revised Criminal Code: criminal homicide, assault and related offenses, kidnapping and related offenses; and sexual offenses. Commentary following each article is designed to aid the reader in analyzing the effect of the draft Revised Code on existing law and also provides a section-by-section analysis of each provision of the draft Revised Code. Appendices include general definitions of terms used throughout the Code, including definitions of the four culpable mental states; derivations of each provision of the Code; existing law that the Code will revise; status of criminal code revision in other U.S. states; and an index to commentary.

Additional information

As of 1975, Alaska's criminal laws were based primarily on Oregon criminal statutes as they existed at the close of the nineteenth century, with new statutes added and old statutes amended over the succeeding 75 years by Alaska territorial and state legislatures in a piecemeal approach to revision. This resulted in a criminal code containing outdated statutes, obsolete terminology, a number of overly specific statutes, a haphazard approach to *mens rea* (the culpable mental state with which a defendant must perform an act in order to be convicted of a crime) and the lack of a coherent, rational sentencing structure.

The Alaska Criminal Code Revision Commission was established in 1975 with the responsibility to present a comprehensive revision of Alaska's criminal code for consideration by the Alaska State Legislature. (The Commission was reestablished in June 1976 as a Subcommission of the newly formed Code Commission.) Staff services for the Criminal Code Revision Commission and Criminal Code Revision Subcommission were provided by the Criminal Justice Center at University of Alaska, Anchorage (John Havelock, project executive

director; Barry Jeffrey Stern, reporter/staff counsel; Sheila Gallagher, Reporter/Staff Counsel; and Peter Smith Ring, research director). The tentative draft proposed by the Criminal Code Revision Subcommission was substantially amended by the Alaska State Legislature prior to its approval as the Revised Alaska Criminal Code in June 1978 (effective January 1, 1980).

Related publications

Work of the Criminal Code Revision Commission and Criminal Code Revision Subcommission are contained in these volumes:

Alaska Criminal Code Revision: Preliminary Report by Criminal Code Revision Commission (1976)

Alaska Criminal Code Revision — Tentative Draft, Part 1: Offenses against the Person (1977)

Alaska Criminal Code Revision — Tentative Draft, Part 2: General Principles of Criminal Liability; Parties to a Crime; Attempt; Solicitation; Justification; Robbery; Bribery; Perjury (1977)

Alaska Criminal Code Revision — Tentative Draft, Part 3: Offenses against Property (1977)

Alaska Criminal Code Revision — Tentative Draft, Part 4: Conspiracy; Criminal Mischief; Business and Commercial Offenses; Escape and Related Offenses; Offenses Relating to Judicial and Other Proceedings; Obstruction of Public Administration; Prostitution; Gambling (1977)

Alaska Criminal Code Revision — Tentative Draft, Part 5: General Provisions; Justification; Responsibility; Bad Checks; Littering; Business and Commercial Offenses; Credit Card Offenses; Offenses against the Family; Abuse of Public Office; Offenses against Public Order; Miscellaneous Offenses; Weapons and Explosives (1978)

Alaska Criminal Code Revision — Tentative Draft, Part 6: Sentencing: Classification of Offenses Chart; Index to Tentative Draft, Parts 1-6 (1978)

Commentary on the Alaska Revised Criminal Code (Ch. 166, SLA 1978) and Errata to the Commentary (1978)

Additional information about the criminal code revision can be found in the following articles by Subcommission's staff counsel:

Stern, Barry J. (1977). "The Proposed Alaska Revised Criminal Code." *UCLA-Alaska Law Review* 7(1): 1–74 (Fall 1977).

Stern, Barry J. (1978). "New Criminal Code Passes." *Alaska Justice Forum* 2(6): 1, 4–5 (Jul 1978).

ALASKA CRIMINAL CODE REVISION

TENTATIVE DRAFT, PART I

OFFENSES AGAINST THE PERSON

CRIMINAL CODE REVISION SUBCOMMISSION
HONORABLE TERRY GARDINER, CHAIRMAN
FEBRUARY 1977

ALASKA REVISED CRIMINAL CODE

Tentative Draft, Part 1

Chapter 41. Offenses Against the Person

Article 1. Criminal Homicide

Article 2. Assault and Related Offenses

Article 3. Kidnapping and Related Offenses

Article 4. Sexual Offenses

February, 1977

Honorable Terry Gardiner
Chairman

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LAWS OF ALASKA

1976

Source: SCS CSHB 694 (Finance)

Chapter No. 114

AN ACT

Creating a code revision commission; and providing for an effective date.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 24.20 is amended by adding a new section to read:

Sec. 24.20.075. ALASKA CODE COMMISSION. (a) The Code Revision Commission is established as a permanent commission of the legislature.

(b) The commission consists of two legislators, one from each house, appointed by the presiding officer; one public member appointed by the governor; a designee of the chief justice of the supreme court; and a designee of the Alaska Bar Association appointed by the board of governors of the association. Legislative members serve at the pleasure of the presiding officer, and appointed members serve at the pleasure of the appointing authority. Members receive the standard per diem for board members, or the regular legislative per diem if they are legislators, for days spent on commission business. The commission selects its chairman and vice-chairman. The director of legal services for the Legislative Affairs Agency, or his designee, serves as executive secretary for the commission.

(c) The commission shall

(1) examine the statutes of the state and judicial decisions to discover defects and anachronisms in the law;

(2) review and consider proposed changes in the law recommended by the National Law Institute, the National Conference of Commissioners on Uniform State Laws, the Alaska Judicial Council, the supreme court, the state or local bar associations, principal departments, agencies, boards and commissions of the executive or judicial branch, and committees of the legislative branch;

(3) receive and consider suggestions from the Alaska bench and bar, public officials, organizations, and individuals as to areas of law needing review and remedy;

(4) recommend changes in law needed to eliminate antiquated and inadequate rules of law and to bring the law into harmony with current needs and conditions.

(d) The commission may

(1) hold public hearings and other meetings as necessary throughout the state and shall determine an appropriate quorum for conducting business;

(2) establish one or more subcommissions to assist it in the performance of its duties.

(e) The staff of the Legislative Affairs Agency serves as staff for the commission. Subject to appropriation for the purpose, the commission may request the agency to contract with other agencies or persons for the performance of necessary services.

(f) The commission shall submit its reports and recommendations, and draft legislation as to revision of law, to the Legislative Council and shall distribute them to the governor, members of the legislature, and the chief justice of the supreme court.

(g) All branches of state government shall provide information and documents requested by the commission necessary to the accomplishment of its work.

(h) The commission shall make a formal request to the legislative council for funds it considers necessary for the per diem, travel, and contractual expenses of the commission. Funds appropriated to the commission are to be disbursed and accounted for under procedures required by the Legislative Affairs Agency. The commission chairman shall approve all expenditure documents.

* Sec. 2. CRIMINAL LAW REVISION SUBCOMMISSION. (a) There is established as a subcommission of the Code Revision Commission the Criminal Law Revision Subcommission.

(b) The subcommission established in (a) of this section is composed of the following

(1) the chairman of the judiciary committee of the state house of representatives or his designee from that committee and the chairman of the judiciary committee of the state senate or his designee from that committee;

(2) the attorney general, or his designee;

(3) the commissioner of public safety, or his designee;

(4) the director of the division of corrections, Department of Health and Social Services, or his designee;

(5) a judge of the superior court appointed by the chief justice;

(6) a judge of the district court appointed by the chief justice;

(7) the public defender, or his designee;

(8) one mayor or his designee, from a municipality, designated by the council;

(9) one person, representative of rural Alaska, designated by the council;

(10) two attorneys experienced in the practice of criminal law appointed by the Board of Governors of the Alaska Bar Association;

(11) two representatives of the general public appointed by the Legislative Council.

(c) An appointing authority or a designated member of the subcommission may name an alternate to serve in his stead when the member is unable to attend a meeting

(d) Members of the subcommission established in (a) of this section serve ex officio or at the pleasure of the appointing authority.

(e) Public members receive no salary but are entitled to per diem and travel expenses authorized by law for other boards and commissions.

(f) The subcommission shall

(1) advise the governor and the legislature, through the Code Revision Commission, on necessary and appropriate revision of the criminal law;

(2) prepare a comprehensive revision of the state criminal laws including but not limited to necessary substantive and topical revisions of crimes, criminal procedure, sentencing, and parole and probation of offenders, for submission to the legislature;

(3) conduct studies of criminal justice practices and procedures;

(4) subject to approval of the Code Revision Commission, receive and expend grants and appropriations from private and governmental sources for the purpose of carrying out its duties under this section;

(5) request the Legislative Affairs Agency, through the Code Revision Commission, to contract with other agencies or persons for the performance of necessary services;

(6) submit a report with recommendations and draft legislation through the Code Revision Commission to the council concerning substantive or topical revisions to the criminal laws before December 1, 1977.

(g) The subcommission shall select a chairman and vice-chairman from among its members.

(h) The subcommission may hold public hearings and other meetings as necessary throughout the state and shall determine an appropriate quorum for conducting business.

* Sec. 3. The subcommission established by sec. 2 of this Act expires January 15, 1978.

* Sec. 4. This Act takes effect immediately in accordance with AS 01.10.070(c).

Approved by governor: June 3, 1976
Actual effective date: June 4, 1976

Pursuant to this statute, the Criminal Law Revision Subcommission was established with a membership as follows:

The Chairman of the Judiciary Committee of the House

Representative Terry Gardiner

The Chairman of the Judiciary Committee of the Senate

Senator Robert H. Ziegler, Jr. or his designees,

Senator Patrick Rodey

John Abbott, Attorney-at-Law

The Attorney General

Honorable Avrum Gross or his designee

Daniel W. Hickey, Chief Prosecutor

The Commissioner of Public Safety

Richard Burton or his designee,

Colonel Pat Wellington

The Director of the Division of Corrections, Department of Health and Social Services

William Huston or his designee

Walt Jones

A Judge of the Superior Court

Honorable Ralph Moody

A Judge of the District Court

Honorable Laurel Peterson

The Public Defender

Honorable Brian Shortell or his designee,

Beverly Cutler, Assistant Public Defender

A Designee of a Municipality

Honorable Rick Garnett, City Attorney, Anchorage or his designee

Steven Dunning, Assistant City Attorney

A Representative of Rural Alaska

Honorable Nora Guinn

Two Attorneys representing the Alaska Bar Association

William Fuld, Attorney-at-Law and

Bruce Bookman, Attorney-at-Law or their designee,

Doug Pope, Attorney-at-Law

Two Representatives of the General Public

Pam McMillan, ACSW or her designee,

John Pugh and

George Ed. Smith

Staff Support:

John Havelock	Project Executive Director
Barry Jeffrey Stern	Reporter/Staff Counsel
Peter Ring	Research Director
Jim Peterson	Research Assistant September, 1976 - present
Scott Decker	Research Assistant Summer, 1976
Phyl Booth	Administrative Secretary
Margie Yanagawa	Secretary

OUTLINE OF ALASKA REVISED CRIMINAL CODE

Title 11.

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WHY A REVISED CRIMINAL CODE

INTRODUCTION

The Criminal Code Revision Commission was created on February 12, 1975 by a resolution of both houses of the Legislature. That resolution set forth the reasons for creating the Commission.

> WHEREAS the criminal code of the State of Alaska represents a considerable and vital body of law which has not undergone substantive revision and is consequently vastly out of step with constitutional and social developments of recent decades; and
>
> WHEREAS, each year since 1965, a revised criminal code for the state has been before the legislature but has failed to garner the necessary support for passage; and
>
> WHEREAS, once again, a criminal code revision which could serve as a basis for study by persons knowledgeable in the varying aspects of the criminal law is contained in the proposed legislation; and
>
> WHEREAS it is impossible during the course of a legislative session to devote the necessary man-hours required to refine and digest the proposed revision and to have the necessary expertise available to review the proposal;
>
> BE IT RESOLVED by the Alaska State Legislature that the Legislative Council in cooperation with the Attorney General is requested to form a "blue ribbon" commission to study, refine, and to submit to the Second Session of the Ninth Legislature a revision of the proposed code the commission recommends be favorably acted upon;
>
> Senate Concurrent Resolution # 5 am H
> 9th Legislature, 1st session

Recognizing that the need for revision in the law went beyond the Criminal Code, in 1976 the legislature established a permanent Alaska Code Commission and re-established the Criminal Code Revision Commission as a Subcommission of the Code Commission. Once again the mandate of the Subcommission was made clear. By December 1, 1977, it was to "prepare a comprehensive revision of the state criminal laws. "

In establishing the Criminal Code Revision Commission, the Legislature followed a pattern set by some 42 other states which have enacted or are considering completely revised criminal codes. The most recent and the most widely respected revisions, especially those of Oregon, New York, Arizona, Michigan, Illinois and Missouri, were the principal sources of the original drafts considered by the Subcommission. These original drafts were then refined and redone many times over to cover problems which are unique to Alaska or which have arisen under the revised codes of other states. The tentative drafts of February - April, 1977, represent literally thousands of man-hours of effort by legislators, judges, prosecutors, public defenders, other attorneys, peace officers, corrections officers, social workers, professors of law, full-time staff, and ordinary citizens.

The Subcommission has now completed drafts on approximately 75% of a finished code. Completed drafts of crimes

against the person (murder, assault, kidnapping, sexual offenses and robbery), crimes against property (theft, forgery, arson and burglary) and general provisions (culpability, justification, accomplice liability, attempt and related offenses and general definitions) will be submitted in bill form with Commentary to the Legislature in early February. The Subcommission does not expect to submit a fully complete code until December, 1977. However, submission of the work already completed this session will insure adequate time for Judiciary Committee and public hearings to allow for passage of the completed Code during the 1978 legislative session.

While there have been disagreements among the various groups represented on the Subcommission over specific sections of the Revised Code, the overall structural reform has the approval of the entire Subcommission and a consensus was reached on virtually all specific statutory provisions.

Passage of a Revised Code will naturally require that an education program be developed for attorneys, judges, peace officers and correctional officers to enable all segments of the criminal justice system to become acquainted with the new law. However, experience in the 29 states which are now functioning under similar recently revised codes has indicated that the transition to a revised code can be accomplished within a year after its passage. The experiences of other states also strongly suggest that the passage of a revised

criminal code does not create any more appeals seeking clarification of the law than does reliance on old statutes.

I. Total Revision vs. Piecemeal Amendment

The main accomplishment of the Subcommission will be the redrafting of all the criminal law to assure consistency in language and penalty structure. The Alaska Criminal Code has never had such a revision.

In passing the Alaska Government Act of 1884 Congress provided that the general laws of Oregon would apply to Alaska. In 1899, Congress approved a criminal code for Alaska which again was based mostly on Oregon law. Many of these century-old Oregon criminal statutes are still on the books even though the Oregon Criminal Code itself was comprehensively revised in 1973.

Over the past seventy years, Alaskan territorial and state legislatures have added new statutes or amended old sections according to the inspiration of individual legislators, reacting to the atmospheres of different times until today Alaska's criminal statutes are filled with obsolete language, needless distinctions, inconsistent provisions and outdated concepts. While Alaska's criminal statutes are still, for the most part, workable, they are difficult to

understand and are marred by loopholes. A complete revision of the criminal code is necessary because the piecemeal approach followed over the past seventy-five years has failed.

One of the most flagrant examples of the consequences of a piecemeal approach to revision is the bewildering variety of mental states which the state must prove to convict under existing statutes. Existing law uses at least twenty different mental states, some of which have been found through the appellate process to be identical in meaning, to define crimes. They range from "knowingly", "surreptitiously" and "maliciously" to "purposely and deliberately", "wilfully and wrongfully", "maliciously or wantonly" and "wilfully and deliberately". The Revised Code simply assigns one of four clearly defined mental states (intentional, knowing, reckless and criminal negligence) to each crime, thus greatly simplifying what the U. S. Supreme Court has described as "one of the most elusive elements in criminal law".

The piecemeal amendment approach has also resulted in the continued use of antiquated language which originated in English Common Law hundreds of years ago. Terms like "malice", "premeditation" and "assault" have been argued over and interpreted so much through the years that their effective meaning is really understood only by a small group of criminal law specialists. Peace officers generally know the law relating

to the crimes most often encountered, but the average person has to get legal advice in order to understand the laws by which he is expected to govern his conduct. Under the Revised Code, if a person intentionally kills another person, without excuse, justification or mitigating factors, he is guilty of murder. There is no need to complicate and confuse the issue by arguing over what English judges 300 years ago thought "malice" meant to them.

Another pernicious result of piecemeal amendment is a great number of overly specific crimes with inconsistent penalty provisions. For example, the minimum penalty for burglary in a dwelling is less than the minimum penalty for burglary not in a dwelling. Perjury occurring in a criminal case where the defendant faces a possible life sentence has a smaller minimum sentence than perjury occurring in a civil case. The maximum penalty for forging a bill of lading is twenty years while the maximum penalty for aggravated assault is only five.

Offenses in the Revised Code are graded for sentencing purposes by labeling each offense as a Class A, B, or C felony or a Class A or B misdemeanor. These classes of offenses will apply to a general sentencing schedule at the beginning of the Code with an "A" offense punished more severely than a "B" or "C" offense. This system helps eliminate the possibly unintended disparity in penalties attached to similar crimes.

Revising the whole Code at once has the additional benefit of plugging loopholes that have resulted from the Legislature's responses to specific problems as they arose. For example, AS 11.30.215, 11.45.050 and 11.45.055 prohibit false reports of crimes, fires, need for an ambulance and bombs, but do not prohibit false reports of other emergencies to the police. The Revised Code will close this loophole.

Similarly, theft has been divided up over the years into a dozen categories according to the place the property was located, the type and value of the property stolen, the time of day it was stolen, the class of person stealing and the method used to steal. A variance between an indictment claiming one method of stealing and evidence at trial showing a slightly different method may result in the offender's escaping conviction.

To close this loophole, the Subcommission has adopted a consolidated theft statute which has abolished the highly technical distinctions among the various larceny-type offenses. Under the Revised Code a charge of theft will be sufficient without designating the particular manner of stealing, except for theft by extortion.

Finally, rewriting the Criminal Code in fewer, simpler terms, and using those terms consistently, will make the Revised Code easier to learn, understand and use for all who come into contact with it - police, corrections officers, judges, prosecutors, defense attorneys and the general public.

This is especially true with respect to prosecutors and public defenders, who do most of the criminal trial work in Alaska but rarely remain in their positions for more than three years. Most of these attorneys, and virtually all of those who will fill the positions as they become open, were taught criminal law according to the principles appearing in recently revised codes. It thus becomes more difficult and time-consuming for each new prosecutor or public defender to master the intricacies of the Alaska Statutes. Judges, defendants, and the public will all benefit from any changes that will enable the attorneys on the firing line to spend more of their time preparing cases and less time trying to find and understand the law.

II. Substantive Changes

The primary aim of the Revised Code is to eliminate the structural defects in existing law. As a secondary goal, the Subcommission has cautiously updated a few areas of the criminal code to reflect changing community attitudes and needs. The Subcommission has not proposed any substantive changes in areas which the Legislature has recently updated itself, such as the insanity defense and abortion.

The Revised Code does away with some statutes which reach

conduct that was a major problem long ago, but can now be included in broader statutes. Dueling, adulterating gold dust, and driving animals from the range are examples of criminal conduct which no longer require individual statutes.

In furtherance of the goal of establishing the Criminal Code as the principal source of criminal law, the Revised Code recognizes in statutes several doctrines which can now only be found by examining case law. For example, specific guidelines are set forth describing the amount of force justified in defense of self, others, homes and personal property.

In one of its most substantial reforms, the Revised Code fulfills the need for a new homicide statute. The litigation-spawning concept of malice aforethought is abandoned in favor of the clearly defined states of mind used throughout the Revised Code. The rule that murder is reduced to manslaughter by a showing of serious provocation was codified and limited in accordance with case law. Finally, the existing felony murder statute, which is peculiar to Alaska, was rewritten so as to conform with the experience of most states.

III. CONCLUSION

Alaska needs a Revised Criminal Code. The Legislature,

recognizing this need, has attempted in every session for the past eleven years to pass a new code. Those attempts have failed because the time limitations on legislators during the session make it impossible for them to read, understand, discuss and offer thoughtful amendments to such a Code while handling other pressing legislative business. This year, much of the necessary amending and discussing has been done by groups concerned with the administration of criminal law before the bill is introduced. There is no doubt that the Revised Criminal Code is an improvement over existing law. While nobody will agree with every individual section, the people of Alaska will benefit when the Revised Criminal Code is passed.

It is expected that some resistance to the Revised Criminal Code will come from people whose work has required them to become immersed in the complexity of the existing statutory system. Those working with the existing statutes on a daily basis, being long married to it, tend to overlook its defects, particularly those problems which confront others working with the law. A problem once hurdled is soon forgotten and the general impression left is that a statute or two may need amendment but that overall the statutes are sound. While workable they are not sound. A critical analysis of the existing law, section by section, reveals,

time after time, confusion of language or purpose, overbreadth or overnarrowness, contradiction and overlap among sections.

It should be no argument against codification that the existing complexity has become manageable to a few people experienced in criminal law. Education in the unnecessary intricacies of the present law takes time and money which is unwarranted regardless of whether the expense is borne by taxpayers, lawyers or criminal clients. The increased efficiency of administration which will result from the adoption of a Revised Criminal Code will benefit both the state and the defendant.

At least 42 states and the federal government are adopting or seriously considering criminal codes based on a format very similar to Alaska's Revised Code. Within a few years, there will be virtually no other courts rendering decisions based on old-style codes. Since Alaskan history is short and its appellate case load small, we have always relied on decisions from other states to fill the gaps in our case law which occur simply because the fact patterns have not occurred here. This reliance will be rendered increasingly difficult the longer we fail to revise our outdated existing criminal laws.

INTRODUCTION TO TENTATIVE DRAFT, PART 1

Tentative Draft, Part 1 is comprised of four articles contained in the Offenses Against the Person chapter of the Revised Criminal Code - criminal homicide, assault and related offenses, kidnapping and related offenses and sexual offenses. This Tentative Draft represents a small portion of the work completed by the Criminal Code Revision Subcommission in 1976.

Tentative Draft, Part 2 will be distributed in early March. This draft will be comprised of the offenses of robbery, bribery and perjury, and articles on a number of general provisions, including justification and accomplice liability.

Tentative Draft, Part 3 will be distributed in late March and will include articles on theft, burglary, arson and forgery.

Commentary follows each article in the Tentative Draft and is designed to aid the reader in analyzing the effect of the Revised Code on existing law. The Commentary also provides a section-by-section analysis of each provision of the Revised Code. All references in the Commentary to Tentative Draft provisions contain the letters TD before the usual AS cite.

The Tentative Draft also contains several appendixes that will be useful in analyzing the Revised Code.

Appendix I contains general definitions of terms used throughout the Code, including definitions of the four culpable mental states. Though Commentary for these sections is not included in this Tentative Draft, the Commentary will be included in Tentative Draft, Part 2.

Appendix II lists the derivations of all sections in the Revised Code.

Appendix III allows the reader to compare the provisions of the Revised Code with existing law.

Appendix IV lists the status of criminal code revision in other states.

Finally, Appendix V is comprised of an index which can be used in locating the page of Commentary in which a provision of the Revised Code is discussed.

CHAPTER 41. OFFENSES AGAINST THE PERSON.

ARTICLE

1 Homicide (secs. 11.41.100 - 11.41.130)

2 Assault and related offenses (secs. 11.41.200 - 11.41.250)

3 Kidnapping and related offenses (secs. 11.41.300 - 11.41.-370)

4 Sexual offenses (secs. 11.41.400 - 11.41.460)

5 Robbery (secs. 11.41.500 - 11.41.510)

ARTICLE 1. HOMICIDE.

SECTION

100 Criminal Homicide

110 Murder

120 Manslaughter

130 Criminally Negligent Homicide

Sec. 11.41.100. CRIMINAL HOMICIDE. (a) A person commits criminal homicide if, without justification or excuse, he intentionally, knowingly, recklessly, or with criminal negligence causes the death of another human being.

(b) For purposes of this section, a person is "alive" if, in the opinion of a medical doctor who is licensed or exempt from licensing under AS 08.64.170, based on ordinary standards of medical practice, there is spontaneous respiratory or cardiac function or, in the case when respiratory and cardiac functions are maintained by artificial means, there is spontaneous brain function.

(c) In this section

(1) "criminal homicide" means murder, manslaughter, or criminally negligent homicide;

(2) "human being" means a person who has been born and was alive at the time of the criminal act.

Sec. 11.41.110. MURDER. (a) A person commits the crime of murder if

(1) with intent to cause the death of another person or serious physical injury to another person or knowing that his conduct is substantially certain to cause death or serious physical injury to another person, he causes the death of another person; or

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

(3) acting either alone or with one or more persons, he commits or attempts to commit arson in the first degree, kidnapping in the first degree, sexual assault under sec. 410(a)(1) of this chapter or sec. 420(a)(1) of this chapter, burglary in the first degree, escape in the first or second degree, or robbery in any degree and, in the course of or in furtherance of that crime, or in immediate flight from that crime, any person causes the death of a person other than one of the participants.

(b) In a prosecution under (a)(1) of this section, it is a defense that the defendant acted in a heat of passion, before there had been a reasonable opportunity for the passion to cool, when the heat of passion resulted from a serious provocation by the intended victim. Nothing in this subsection precludes a prosecution for or conviction of manslaughter or any other crime. The defendant shall have the burden of injecting the issue of a defense under this section.

(c) In a prosecution under (a)(3) of this section, if the defendant was not the only participant in the underlying crime, it is an affirmative defense that the defendant

(1) did not commit the homicidal act or in any way solicit, request, command, cause or aid in its commission;

(2) was not armed with a dangerous instrument or deadly weapon;

(3) had no reasonable ground to believe that another participant was armed with a dangerous instrument or deadly weapon; and

(4) had no reasonable ground to believe that another participant intended to engage in conduct likely to result in death or serious physical injury.

(d) A person may not be convicted of murder under (a)(3) of this section if the only underlying crime is burglary, the sole purpose of the burglary is a criminal homicide, and the person killed is the intended victim of the defendant. However, if the defendant causes the death of any other person, the defendant may be convicted under (a)(3) of this section. Nothing in this subsection precludes a prosecution for or conviction of murder under (a)(1) or (a)(2) of this section or of any other crime, including manslaughter or burglary.

(e) It is a defense to the charge of murder that the defendant's conduct consisted of aiding, without the use of duress or deception, another person to commit suicide. Nothing contained in this subsection shall constitute a defense to a prosecution for, or preclude conviction of, manslaughter or any other crime. The defendant shall have the burden of injecting the issue of a defense under this section.

(f) In this section

(1) "intended victim" means a person who the defendant was attempting to kill or to whom the defendant was attempting to cause serious physical injury when he caused the death of the person he is charged with killing;

(2) "serious provocation" means conduct which is sufficient to excite an intense passion in a reasonable person in the actor's situation under the circumstances as he reasonably believed them to be;

the term does not include mere insulting words, mere insulting gestures, or hearsay reports of conduct by the intended victim.

(g) A person who is guilty of murder, upon conviction, is punishable by imprisonment for a specific term not to exceed 99 years.

Sec. 11.41.120. MANSLAUGHTER. (a) A person commits the crime of manslaughter when he intentionally, knowingly or recklessly causes the death of another person under circumstances not amounting to murder under sec. 110 of this chapter.

(b) Manslaughter is a class A felony.

Sec. 11.41.130. CRIMINALLY NEGLIGENT HOMICIDE. (a) A person commits the crime of criminally negligent homicide when, with criminal negligence, he causes the death of another person.

(b) Criminally negligent homicide is a class C felony.

ALASKA REVISED CRIMINAL CODE

Chapter 41 - Offenses Against the Person

ARTICLE 1. CRIMINAL HOMICIDE

COMMENTARY

The Effect of the Revised Code Provisions on the Existing Law of Criminal Homicide

In defining the crimes of murder, manslaughter and criminally negligent homicide, the Criminal Homicide Article:

1. Uses the four culpable mental states defined in chapter 11 which apply throughout the Revised Code. Currently, the following undefined, archaic and confusing terms are used: "sound memory and discretion," "purposely. . . deliberate and premeditated malice," AS 11.15.1010; "maliciously," AS 11.15.030; "unlawfully," AS 11.15.040; "purposely and deliberately," AS 11.15.050 and "culpable negligence," AS 11.15.080. The absence of commonly defined culpable mental states in existing law creates significant problems of administration. See, Stork v. State, Sup. Ct. Op. No. 1365 (File No 2708)(1977).
2. Eliminates the much-criticized distinction between first and second degree murder.
3. Repudiates the Gray rule and brings Alaska's felony murder statute into conformity with the rule in 48 states.

4. Eliminates overly specific statutes, (AS 11.15.020; 070; 170), which prohibit conduct which can be adequately covered by more general provisions.
5. Explicitly recognizes the common law doctrine that an act done with a "depraved heart" is murder even though the defendant did not specifically intend to kill.
6. Emphasizes that a criminal homicide occurs only when the defendant acts with a culpable mental state and without justification or excuse.
7. Codifies the common law doctrine that a killing in the "heat of passion" mitigates murder to manslaughter.

SECTION ANALYSIS OF REVISED CODE

I. TD AS 11.41.100 - CRIMINAL HOMICIDE

Under present law, homicides can be either criminal or noncriminal. Noncriminal homicides are those that are justifiable or excusable. (See, AS 11.15.090, Justifiable homicide by public officer or agent; AS 11.15.100, Justifiable homicide; AS 11.15.110, Excusable homicide.) The Revised Code specifically recognizes this distinction by providing that a homicide is criminal only if it occurs "without justification or excuse."

Subsection (a) provides that criminal homicide includes the intentional, knowing or reckless killing of another. Criminal homicide may also be committed by criminal negligence, but the general definition of "criminal negligence" in chapter 11 of the Revised Code [TD AS 11.11.099(4)], emphasizes that "civil" negligence will not constitute criminal homicide. Stork v. State, Supra.

Subsection (c)(1) categorizes criminal homicide as murder, manslaughter or criminally negligent homicide.

The definition of "alive" in subsection (b) is the converse of the definition of "death" appearing in existing AS 9.65.120 and is used in defining the term "human being" in subsection (c)(2).

"Human being" is defined in subsection (c)(2) as a person who has been born and was alive at the time of the criminal act and excludes a lawful or unlawful abortion from the operation of this article. Abortion is covered by AS 11.15.060. While the Revised Code does not change the existing Abortion statute, it does recognize that the unlawful termination of a pregnancy constitutes an aggravated form of assault. In doing so, the Revised Code closes a gap in existing law by specifically providing than an assault which results in the termination of a pregnancy is a serious criminal offense regardless of whether the mother suffers other physical injury.

The degree of the assault, as with all other forms

of assault, will be determined by the culpable mental state of the defendant and the means used to inflict the injury. If, for example, the defendant causes the termination of a pregnancy by an intentional assault, he is guilty of first degree assault, which is classified as seriously as manslaughter. However, if the actor's conduct is an " . operation or procedure to terminate the pregnancy of a nonviable fetus", the provisions of the existing abortion statute will determine whether such conduct is criminal.

II. TD AS 11.41.110. MURDER.

A. Existing Law

Existing law recognizes the crimes of first and second degree murder. First degree murder, AS 11.15.010 and AS 11.15.020, can be committed in three ways. AS 11.15.010 provides that first degree murder is committed when (1) a person "being of sound memory and discretion, purposely, and. . . of deliberate and premeditated malice or by means of poison . . . kills another." First degree murder is also committed pursuant to the "felony murder" provision of AS 11.15.010, when a person "being of sound memory and discretion, purposely . in perpetrating or in attempting to perpetrate, rape, arson, robbery or burglary kills another." Finally, a person commits first degree murder if he causes death by "maliciously" obstructing or injuring a railroad or aircraft, AS 11.15.020.

Though the felony murder rule at common law and in

48 states is designed to prevent all killings (even accidental ones) during the perpetration of specific felonies, it has been held that a person cannot be convicted of felony murder under the current Alaska statute unless the killing "is purposely done." Gray v. State, 463 P.2d 897 (AK 1970).

Second degree murder, AS 11.15.030, is committed by one who "purposefully and maliciously kills another" except as provided in the two first degree murder sections, AS 11.15.010 and .020.

B. The Code Provision - Relationship to Existing Law

1. Subsection (a)(1) -- Elimination of Distinction between First and Second Degree Murder

In subsection (a)(1) murder is defined in terms of intentionally or knowingly causing the death of another. Consistent with common law, murder is defined to include situations where the defendant only intends to cause serious physical injury but death results. The Revised Code does not require the deceased to be the intended victim and thus recognizes the common law doctrine of "transferred intent."

The Revised Code recognizes only one degree of murder. The chief distinction presently between first and second degree murder in Alaska, and in other states which make the distinction, is the element of premeditation.

The court decisions in Alaska, as well as in most other states, have narrowed the factor of premeditation to a distinction without a difference. The term has come to mean that any prior design to kill, though it is formed only an instant before the act is sufficient to constitute premeditation. In Gray, supra at 906, the Court held that ". . . the law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. . . It was not the duration of time, but rather the extent of the reflection that mattered."

As noted in the commentary to the New York Revised Penal Law, the concept of premeditation is not clear even to those well versed in the intricacies of existing law.

> Under [the Gray] formulation -- almost inevitable because of the impossibility of a definition based upon length of time -- the determination of whether premeditation occurred in a particular instance frequently amounted to no more than an exercise in semantics, and a jury's decision upon the matter turned upon an issue which not even experienced attorneys truly understood. N.Y. Penal Law § 125.25, commentary (McKinney 1975).

A more basic objection to breaking murder into degrees is the view that no single factor or list of factors can satisfactorily form the basis of sentencing distinctions. A man who lies in wait to kill his wife's lover is probably not as dangerous to society as the man who fires a pistol into a crowded room without intending

to kill any particular person. Yet the betrayed husband is guilty under present law of first degree murder while the second actor is guilty, at the most, of second degree murder. It seems wiser to charge each simply with murder and let the judge treat each man according to his dangerousness through imposition of appropriately different sentences. Premeditation and deliberation are relevant to the penalty to be imposed and can be considered in the setting of the penalty.

2. Subsection (a)(2) -- Recklessly Causing Death Under Circumstances Manifesting Extreme Indifference to the Value of Human Life

Subsection (a)(2) is a modern formulation of the common law rule that a killing committed "with a depraved heart" constitutes murder even though there was no specific intent to kill. An example of conduct falling under this subsection is firing a gun into a house where the actor knows people are present, without any intent to kill or cause serious physical injury but with almost complete indifference to whether death results. If the killing was done recklessly, but not under circumstances manifesting extreme indifference to the value of human life, the defendant is guilty of manslaughter. See, § III., infra.

3. Subsection (a)(3) -- Felony Murder

In considering the Revised Code's approach to the felony murder statute, it must be recalled that the purpose

of a felony murder rule is to deter all killings during the commission of felonies which involve a high potential for violence. By holding the felon liable for an unintended and even accidental death occurring in the course of or in furtherance of the felony, the rule provides a powerful incentive not to commit inherently dangerous crimes, or at the very least to plan and carry out such crimes with increased regard for physical dangers.

For all practical purposes Alaska does not now have a felony murder rule. In Gray, supra at 904, the Supreme Court held that an "intent to kill" is a necessary element of felony murder under existing law. Consequently, an accidental killing occurring during the commission of an enumerated felony does not render an actor guilty of felony murder under the existing statute.

Subsection (a)(3) specifically eliminates the Gray requirement that a felon "purposely" kill during the commission of an enumerated felony. In doing so, the Revised Code brings Alaska's felony murder rule into conformance with the rule in 48 states.

Existing Alaska law lists the crimes of rape, arson, robbery and burglary as felonies sufficient to trigger the application of the felony murder rule. The felony murder provision in subsection (a)(3) of the Revised Code only lists those degrees or forms of arson, burglary and sexual assault which create a serious risk of violence. Because all degrees

of robbery involve the use or threatened use of physical force, the commission of any degree of robbery is sufficient to bring into play the felony murder rule.

The Revised Code also expands the existing list of enumerated felonies by including kidnapping in the first degree and felonious escape since these felonies were viewed as involving a high degree of danger to human life.

Under subsection (a)(3) a felon will be criminally liable not only for deaths caused by the participants to the crime, but for deaths of non-accomplices caused by anyone. For example, if a bystander is killed by a policeman's stray bullet during a gunfight with bank robbers, the robbers are guilty of murder.

Finally, subsection (a)(3) broadens the felony murder rule by rendering it applicable not only to a killing perpetrated during the commission of the felony, but also to one perpetrated during "immediate flight therefrom." The latter is as culpable as the former, and this expansion should eliminate many technical issues which inevitably arise when it is essential to determine whether the underlying felony was completed at the time of the death or whether it was still in progress.

4. Defenses to Murder

Having defined the three general categories of murder, the Revised Code then lists three defenses to the crime.

(a) Subsection (b) -- A Killing in the "Heat of Passion" Mitigates Murder to Manslaughter

The first defense is a restatement of the common law doctrine of "voluntary manslaughter" which has been recognized and codified in most American jurisdictions and recognized, but not codified, in Alaska. The doctrine provides that murder is reduced to manslaughter by a mitigating factor variously termed "heat of passion," "sudden passion," "provocation," and the like. The theory of the principle is one of extending a degree of mercy to a defendant who, though intending to kill, acted after a serious provocation in a heat of passion rather than in "cold blood".

The subsection places the burden of injecting the issue of a defense of a "heat of passion" on the defendant but leaves the burden of persuasion beyond a reasonable doubt on the state. This means that if there is no evidence to indicate that the defendant acted in a heat of passion, the defendant has not succeeded in "injecting the issue" and the Court will not inform the jury of the existence of the defense. If there is some evidence of "heat of passion", the defendant will be convicted of murder only if the state proves beyond a reasonable doubt that the killing was not committed in the "heat of passion."

(b) Subsection (c) -- Affirmative Defense to Felony Murder

Subsection (c) creates an affirmative defense to

felony murder which has been recognized in most revised codes.

In a murder charge arising out of one of the felonies enumerated in the felony murder section, this subsection establishes a defense if the defendant can prove by a preponderance of the evidence that he was not alone in the crime, that he did not commit or solicit the act of killing, that he was not armed with a deadly weapon or dangerous instrument and did not have reason to believe a co-felon was so armed, and that he had no reasonable ground to believe any other participant in the underlying felony intended to engage in conduct likely to result in death or serious physical injury. Support for this section is found in the Commentary to the New York Revised Penal Law.

> "Finally, . the exception [allows] a defendant an opportunity to fight his way out of a felony murder charge by persuading a jury, by way of affirmative defense, that he not only had nothing to do with the killing itself but was unarmed and had no idea that any of his confederates was armed or intended to engage in any conduct dangerous to life. This phase of the provision is based upon the theory that the felony murder doctrine, in its rigid automatic envelopment of all participants in the underlying felony, may be unduly harsh in particular instances; and that some cases do arise, rare though they may be, where it would be just and desirable to allow a non-killer defendant of relatively minor culpability a chance of extricating himself from liability for murder, though not, of course, from liability for the underlying felony." NY Penal Law § 125.25, commentary (McKinney 1975).

It is not anticipated that this defense will often be successful. The defendant has the burden of affirmatively

asserting the defense and proving each element of it by a preponderance of the evidence.

(c) Subsection (d) -- Felony Murder Merger Doctrine

Subsection (d) is based on the "merger doctrine" which has been formulated by the California Supreme Court in People v. Ireland, 450 P.2d 580 (Cal 1969), People v. Wilson, 462 P.2d 22 (Cal 1969) and People v. Burton, 491 P.2d 793 (Cal 1971).

In considering the "merger doctrine" it must be recalled that the purpose of the felony murder rule is to deter unintentional and even accidental killings during the commission of certain felonies. One of those felonies is burglary in the first degree - unlawfully entering a dwelling with intent to commit a crime. If a person commits burglary in the first degree by breaking into someone's house with intent to kill the occupant, the felony murder rule has no deterrent effect. Permitting a conviction for murder based on the felony murder rule in these circumstances would prevent the jury from considering, for example, whether the defendant acted in the "heat of passion", since that doctrine is not a mitigating factor for felony murder. Since it is intended that the jury consider the issue of whether the defendant acted in "heat of passion" in intentional killings regardless of whether or not they take place in a dwelling, the

California courts do not permit felony murder convictions in cases like this one. The felony is said to "merge" with the homicide. Of course, the defendant can be convicted of murder for the intentional killing. The effect of the merger doctrine is to prohibit a murder conviction merely on proof that the defendant committed first degree burglary by entering a dwelling with intent to commit a crime. The Subcommission adopted subsection (d) to obtain this result.

(d) Subsection (e) -- Aiding a Suicide

Subsection (e) is consistent with existing Alaska law which provides that one who aids or procures another to commit "self-murder" is guilty of manslaughter. AS 11.15.050.

This subsection embodies two purposes. One is to indicate a duty not to knowingly facilitate suicide. The second, and perhaps more important, purpose is to make clear that this activity is not to be viewed as murder unless the defendant uses duress or deception in bringing about the suicidal act.

III. AS 11.41.120. MANSLAUGHTER

A. The Code Provision -- Relationship to Existing Law

There is presently only one statutory crime of manslaughter, although it is defined in four statutes,

AS 11.15.040, .050, .070 and .080.

In accord with recent code revisions and Alaska case law, the revised manslaughter statute specifically repudiates the doctrine that a homicide is manslaughter if it resulted from an unlawful act. Instead, under the Revised Code the homicide must occur as a consequence of an intentional, knowing or reckless act not amounting to murder, thus encompassing aiding a suicide, a killing committed during a "heat of passion" or a death as a result of a reckless act.

By requiring that the crime of manslaughter be committed at least "recklessly," the statute incorporates the existing rule that ordinary negligence is not sufficient to support a conviction for manslaughter. Stork v. State, supra. The definition of "reckless" in TD AS 11.11.099(3) requires conscious awareness of a risk and disregard of it by the defendant rather than inadvertent risk taking as with "criminal negligence". The test for recklessness is subjective rather than objective.

In one situation, however, recklessness does not require subjective awareness of risk. In chapter 11, General Principles of Criminal Liability, the Revised Code provides that "a person who is unaware of a risk of which he would have been aware had he not been intoxicated or using drugs also acts recklessly with respect to that risk."

IV. TD AS 11.41.130. CRIMINALLY NEGLIGENT HOMICIDE.

A. The Code Provision -- Relationship to Existing Law

AS 11.14.080, the current negligent homicide statute, provides that "every killing of a human being by the culpable negligence of another. . . is manslaughter." While the current statute has been interpreted so as to include situations where an actor is aware as well as unaware of a risk, De Sacia v. State, 469 P.2d 369, 371 (AK 1970), the criminally negligent homicide statute in the Revised Code covers only situations where the defendant was unaware of the risk and classifies that form of criminal homicide as criminally negligent homicide instead of manslaughter.

Key to this section is the definition of "criminal negligence" appearing in TD AS 11.11.099(4):

> "Criminal Negligence." A person acts with criminal negligence with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

The basic difference between manslaughter and criminally negligent homicide is that in recklessness constituting manslaughter, a conscious disregard of the risk exists, while in criminally negligent homicide the risk is unknowingly disregarded. It is expected that this statute will be used primarily to prosecute homicides resulting from criminally negligent operation of a motor vehicle.

ARTICLE 2. ASSAULT AND RELATED OFFENSES.

SECTION

200 Assault in the first degree

210 Assault in the second degree

220 Assault in the third degree

230 Assault in the fourth degree

240 Simple assault

250 Reckless endangerment

Sec. 11.41.200. ASSAULT IN THE FIRST DEGREE. (a) A person commits the crime of assault in the first degree when

(1) with intent to cause physical injury to another person he causes or attempts to cause physical injury to any person by means of a deadly weapon;

(2) with intent to cause serious physical injury to another person he causes serious physical injury to any person; or

(3) he recklessly causes serious physical injury to another person under circumstances manifesting extreme indifference to the value of human life.

(b) Assault in the first degree is a class A felony.

Sec. 11.41.210. ASSAULT IN THE SECOND DEGREE. (a) A person commits the crime of assault in the second degree when

(1) with intent to cause physical injury to another person he causes or attempts to cause physical injury to any person by means of a dangerous instrument;

(2) with intent to cause physical injury to another person he causes serious physical injury to any person;

(3) he recklessly causes physical injury to another person by means of a deadly weapon; or

(4) he intentionally places or attempts to place another

person in fear of imminent serious physical injury by means of a deadly weapon or dangerous instrument.

(b) Assault in the second degree is a class B felony.

Sec. 11.41.220. ASSAULT IN THE THIRD DEGREE. (a) A person commits the crime of assault in the third degree when

(1) with criminal negligence he causes serious physical injury to another person by means of a deadly weapon or dangerous instrument; or

(2) he recklessly causes serious physical injury to another person.

(b) Assault in the third degree is a class C felony.

Sec. 11.41.230. ASSAULT IN THE FOURTH DEGREE. (a) A person commits the crime of assault in the fourth degree when

(1) with intent to cause physical injury to another person, he causes physical injury to any person;

(2) he recklessly causes physical injury to another person;

(3) with criminal negligence he causes physical injury to another person by means of a deadly weapon or dangerous instrument; or

(4) by word or conduct he intentionally places or attempts to place another person in fear of imminent physical injury.

(b) Assault in the fourth degree is a class A misdemeanor.

Sec. 11.41.240. SIMPLE ASSAULT. (a) A person commits the crime of simple assault when he intentionally touches another person with reckless disregard for the offensive, provocative, injurious or insulting effect which the act may have on that person.

(b) Simple assault is a class B misdemeanor.

Sec. 11.41.250. RECKLESS ENDANGERMENT. (a) A person commits the crime of reckless endangerment when he recklessly engages in conduct which creates a substantial risk of serious physical injury to another

person.

(b) Reckless endangerment is a class A misdemeanor.

ALASKA REVISED CRIMINAL CODE

Chapter 41 - Offenses Against the Person

ARTICLE 2. ASSAULT

COMMENTARY

The Effect of the Revised Code Provisions on the Existing Law of Assault

In defining the crimes of assault, simple assault and reckless endangerment, the Proposed Assault and Related Offenses Article:

1. Recognizes and defines four degrees of assault in which the seriousness of the offense is determined by (a) the defendant's culpable mental state, (b) the seriousness of the injury inflicted, and (c) the dangerousness of the means used to commit the assault. Existing law does not define assault, but divides the crime into ten separate statutory offenses, describing at least 28 ways in which assault may be committed, each of which embraces some special peculiarities of assaultive conduct in terms not necessarily related to the other statutes.
2. Provides that an assault can be accomplished by criminally negligent conduct. The Revised Code thus eliminates the anomaly that now exists whereby criminally negligent conduct which causes death is punishable as homicide but such conduct which merely inflicts injury does not constitute

an assault unless it occurs by means of a firearm.

3. Eliminates the offenses of assault with intent to rob, rape or kill which are treated as attempted robbery, attempted rape or attempted murder under the Revised Code.

4. Specifically recognizes that placing or attempting to place another in fear of injury is an assault, even though there is no present ability to carry out the threat. Further, provides that an assault with a deadly weapon can be committed with an unloaded firearm.

5. Recognizes that reckless conduct which creates a substantial risk of serious physical injury is criminal by itself though no injury occurs.

6. Covers conduct involving offensive touchings not causing physical injury in the separate crime of simple assault.

Definitions Applicable to Assault Article

Key to the assault article of the Revised Code are four definitions which appear in the general definition section.

"Dangerous Instrument" means anything that under the circumstances in which it is used, attempted to be used, or threatened to be used is capable of causing death or serious physical injury.

"Deadly physical force" means physical force that under the circumstances in which it is used is capable of causing death or serious physical injury.

"Deadly weapon" means any firearm, loaded or unloaded, or anything designed for and capable of causing death or serious physical injury, including but not limited to a knife, axe, club, metal knuckles, explosive, or any weapon from which a shot capable of causing death or serious physical injury may be discharged.

"Physical injury" means physical pain or an impairment of physical condition.

OVERVIEW OF ASSAULT PROVISIONS IN EXISTING LAW AND REVISED CODE

Existing Alaska Law

At common law, assault was defined either as (1) an offer with force or violence to do a corporal hurt to another (attempted battery), or (2) an unlawful act which places another in reasonable apprehension of receiving an immediate battery. Battery was defined as the unlawful application of force to the person of another or an offensive touching. Both assault and battery were misdemeanors at common law. There was no crime of felonious or aggravated battery. Mayhem, a common law felony, was defined as "violently

depriving another of the use of such of his members as may render him less able in fighting either to defend himself or to annoy his adversary."

Existing Alaska statutes dealing with criminal assaults do not define the crime but rather provide for various types of assaults. The factors which aggravate an assault tend to fall into three categories:

(1) Motivation for the Assault: Assault is now frequently aggravated according to the actor's intent in committing the assault.

(a) AS 11.15.160 - assault with intent to kill or commit rape or robbery (1 - 15 years)

(b) AS 11.15.150 - shooting, stabbing or cutting with intent to kill, wound or maim (1 - 20 years)

(2) Dangerous means, whether or not resulting in injury: Under present law an assault committed with a dangerous weapon carries a higher penalty than assault committed while unarmed:

(a) AS 11.15.220 - Assault with dangerous weapon (6 months - 10 years and/or fine of $100 - $1000)

(b) AS 11.15.190 - Assault while armed (1 - 10 years and/or fine of $100 - $1000)

(c) AS 11.15.295 - Use of firearms during the commission of certain crimes, including assault (first offense not less than 10 years, second offense not less than 25 years).

(3) Serious bodily injury actually inflicted. Assault is aggravated when serious bodily injury is inflicted:

(a) AS 11.15.140 - Mayhem (1 - 20 years)

(b) AS 11.15.225 - Aggravated assault causing "great bodily injury" (6 months - 5 years and/or fine $100 - $1000).

The above three aggravating factors which are now recognized in Alaska law have been incorporated into the Revised Code and are used with other factors in determining the degree of assault.

Under present law virtually all asssault offenses require a general intent to commit a battery. "A general intent to do a harm is required and is necessarily included within the definition of the term 'assault' but not a specific intent to do any particular kind of injury to the victim." Herrin v. State, 449 P.2d 674, 677 (AK 1969). Some provisions, however, require a "specific intent" to do a particular act. See, Hallback v. State, 361 P.2d 336 (AK 1961).

Finally, Alaska is one of the few jurisdictions which provides that an assault by means of an unloaded gun is not an assault with a dangerous weapon because there is no present ability to carry out the assault. Hobbs v. State 363 P.2d 357 (AK 1961).

Revised Code

As defined by the Revised Code, assault is primarily

the causing of physical injury committed with the particular culpable mental state specified in each individual assault provision.

There are three exceptions to this rule. The Revised Code differs from most recent revisions, but is consistent with existing law, by not requiring that a defendant actually cause physical injury when he intentionally uses a deadly weapon or dangerous instrument against another person. Similarly, TD AS 11.41.210(4) and 230(4) do not require that physical injury be inflicted if the defendant intends to frighten the victim. Finally, simple assault requires only an offensive touching short of physical injury. With these three exceptions, conduct which does not cause physical injury is treated by the Revised Code as an attempted assault.

The Revised Code defines four degrees of assault in addition to simple assault.

The basic offense is aggravated by the following factors which, whether singly or in combination, raise the degree of the offense:

(1) The actor's culpable mental state (e.g., intent to cause serious physical injury);

(2) The seriousness of the injury actually inflicted;

(3) The dangerousness of the means employed to inflict injury.

SECTION ANALYSIS OF REVISED CODE

I. TD AS 11.41.200. ASSAULT IN THE FIRST DEGREE.

TD AS 11.41.200, which is classified as an A felony, is the most serious form of assault. A defendant can commit first degree assault by any of three methods.

The first, subsection (1) coincides with existing AS 11.15.220, Assault with a Dangerous Weapon and AS 11.15.150, Shooting with Intent to Kill, by providing that an assault by means of a deadly weapon is treated more severely than other forms of assault. The subsection requires that the defendant intend to cause physical injury and cause or attempt to cause physical injury to any person by means of a deadly weapon.

Subsection (2) also classifies as an assault in the first degree conduct in which the defendant, intending to cause serious physical injury by any means, causes such injury. The subsection corresponds with the existing mayhem statute, AS 11.15.140. It also includes conduct now classified as aggravated assault, AS 11.15.225, except that a specific intent to cause serious physical injury must be

proved as opposed to the existing requirement of a showing of an intent to cause any degree of injury.

Subsection (3), the final form of first degree assault, is especially significant when considered in conjunction with TD AS 11.41.110(a)(2) defining the same conduct as murder when death results. The murder provision applies to conduct of extreme depravity, such as throwing a bomb into a crowd without any specific homicidal intent. Although this may constitute murder under current law in the event of a fatality, it does not constitute assault if the result was a serious but non-fatal injury. This obvious gap is filled by this section which renders the actor guilty of assault in the first degree. Upon this subject it is pertinent to note that, even though the bomb does not explode, the defendant is still guilty of reckless endangerment, TD AS 11.41.250, infra.

II. TD AS 11.41.210. ASSAULT IN THE SECOND DEGREE.

Assault in the second degree is an aggravated form of assault and is classified as a Class B felony. While assault in the first degree and assault in the second degree parallel each other in significant ways, certain aggravating factors present in the first degree offense are absent in this section. Assault in the second degree may be accomplished by any of four methods.

Subsection (1) parallels subsection (1) of assault in the first degree except that a dangerous instrument is used instead of a deadly weapon. Thus, an assault with an object designed for causing death or serious physical injury, such as a gun, is treated more severely than assault with an object that only becomes dangerous because of the manner in which it is used, such as a telephone.

Similarly, subsection (2) parallels subsection (2) of the first degree assault statute, except that in committing second degree assault the defendant need only intend to cause physical injury as opposed to the intent to cause serious physical injury.

Subsection (3) provides that a defendant commits second degree assault if he recklessly causes physical injury by means of a deadly weapon.

Subsection (4) makes it clear that intentionally frightening, or attempting to frighten, a person is a crime. There is a split of authority among jurisdictions as to whether such conduct is a crime or only a tort. Nearly all of the revised criminal codes include such a provision with some defining it as a separate offense called "menacing". This subsection is an aggravated form of assault in the fourth degree, TD AS 11.41.230(4), because the frightening is accomplished by means of a deadly weapon or a dangerous

instrument. A detailed discussion of both provisions appears in § IV., infra.

III. TD AS 11.41.220. ASSAULT IN THE THIRD DEGREE.

Assault in the third degree is classified as a Class C felony because of the seriousness of the victim's injury despite the fact that the defendant did not intend the result.

Both forms of assault in the third degree require that serious physical injury occur. Subsection (1) provides that the defendant commits the crime if he acts with criminal negligence (he is unaware of the risk of serious physical injury) and causes serious physical injury by means of a deadly weapon or dangerous instrument. Subsection (2), however, provides that if the defendant acts recklessly (he disregards a known risk) there is no requirement that the harm be inflicted by a particular means. It is expected that the statute will primarily be used to prosecute drunk drivers who seriously injure their victims.

IV. TD AS 11.41.230. ASSAULT IN THE FOURTH DEGREE.

Assault in the fourth degree, the basic non-aggravated assault statute, is a Class A misdemeanor. The four subsections of this statute require that the victim be threatened with physical injury or receive such injury.

Subsections (1) and (2), by providing that intentionally or recklessly causing physical injury constitutes misdemeanor assault, parallel the existing Assault and Assault and Battery statute, AS 11.15.230.

In subsection (3) the defendant commits assault in the fourth degree if he acts with the culpable mental state of criminal negligence and causes physical injury by means of a deadly weapon or dangerous instrument.

Subsection (4), and its aggravated form in second degree assault, TD AS 11.41.210(4), expand existing law by including within the prohibitions of the assault statute the "tort" theory of assault -- intentionally placing another in fear of receiving an imminent battery regardless of whether there is present ability to carry out that threat. In addition, subsection (4) provides that the assault occurs even though the defendant fails to place the victim in apprehension, as long as he intentionally attempts to do so.

The Commentary to the Oregon Revised Code, from which the provision was derived, provides examples of the type of conduct prohibited by this subsection.

> (1) The victim apprehends the danger but does not fear it;
> (2) The actor's conduct is such as would cause fear to a reasonable man but the intended victim is aware that the actor will not inflict the threatened harm, e.g., victim knows the actor's gun is not loaded;
> (3) The intended victim is unaware of the actor's threat, e.g., he is blind and does not know the actor is pointing a gun at him.
>
> ORS § 163.190, Commentary at p. 124.

During Subcommission discussions, there was some sentiment to substitute the word "threaten", which is used in current law, in place of the words "places or attempts to place another person in fear. . ." However, it was finally agreed that the draft language is preferable because it emphasizes that there is no requirement that the victim actually be placed in fear - all that is necessary is that the defendant attempt to place him in fear. Of course, the draft language would cover a conditional threat of imminent injury if a demand is not met - i.e., "Bring that book to me or I'll kill you."

V. TD AS 11.41.240. SIMPLE ASSAULT.

This section is derived directly from the Missouri Revised Criminal Code. The Commentary to that code considered the issue of whether such behavior should be made criminal:

> While it is open to question whether the criminal law should deal with [simple offensive touching], such a section has advantages. It allows for official intervention in a situation which could expand into one of physical danger, and gives the offended person the opportunity to call for official protection. Some offensive touchings are covered in the sex offenses chapter, but not all touchings of a sexual nature are covered by that section. Proposed Mo. Criminal Code § 10.070 (West 1973), Commentary at 135.

The simple assault provision, TD AS 11.41.240, was primarily drafted to cover sexual touchings which do not qualify as sexual contact under the sexual assault article. However, by the inclusion of the word "injurious" the statute is broad

enough to cover "mere physical contact which does not produce [physical] injury" such as "trivial slaps, shoves, kicks, etc." [See, ORS 163.185, Commentary at p. 121.]

It should be noted that the New York and Oregon Codes classified this type of conduct as "Harassment" rather than as an assault. However, the Subcommission concluded that the Revised Code should cover all forms of assault, other than those described in the sexual offenses article, in a single article.

VI. TD AS 11.41.250. RECKLESS ENDANGERMENT.

TD AS 11.41.250, though new to existing Alaska law, has its equivalent in nearly all of the revised codes. If a person engages in reckless conduct and death results, he will be guilty of either murder or manslaughter depending on the presence of "extreme indifference to the value of human life." If the person engages in the same conduct but no one is killed, but someone is injured, he will be guilty of some degree of assault. This subsection covers the situation where he acts with the same degree of recklessness as regards human life but, fortunately, no one is injured. In most crimes defined in terms of causing a result such as death or physical injury, if the actor fails to achieve the result he will be guilty of a lesser degree of crime by virtue of the attempted crimes. However, crimes defined in terms of recklessly causing a result cannot be "attempted" and so a separate section is needed to fill this gap.

ARTICLE 3. KIDNAPPING AND RELATED OFFENSES.

SECTION

Sec. 11.41.300. KIDNAPPING IN THE FIRST DEGREE. (a) A person commits the crime of kidnapping in the first degree if he abducts another person with intent to

(1) hold him for ransom;

(2) use him as a shield or hostage;

(3) inflict physical injury upon him, or sexually assault him;

(4) place the victim or a third person in apprehension that the victim will receive serious physical injury or will be sexually assaulted;

(5) interfere with the performance of any governmental or political function; or

(6) facilitate the commission of any felony or flight after commission of a felony, during the course of the kidnapping.

(b) It is an affirmative defense to a prosecution under (a) of this section that the defendant voluntarily causes the release of the victim in a safe place before trial, alive and without having caused serious physical injury to the victim and without having sexually assaulted him. Nothing in this subsection constitutes a defense to a prosecu-

tion or precludes a conviction of kidnapping in the second degree or any other crime.

(c) Kidnapping in the first degree is a class A felony.

Sec. 11.41.310. KIDNAPPING IN THE SECOND DEGREE. (a) A person commits the crime of kidnapping in the second degree if he abducts another person.

(b) It is an affirmative defense to a prosecution under (a) of this section that

(1) the defendant is a relative of the person abducted;

(2) the sole intent of the defendant is to assume control of that person; and

(3) the abduction is not coupled with intent to use or to threaten to use deadly physical force or to sexually assault or to threaten to sexually assault the victim.

(c) Kidnapping in the second degree is a class B felony.

Sec. 11.41.320. CUSTODIAL INTERFERENCE IN THE FIRST DEGREE. (a) A person commits the crime of custodial interference in the first degree if he violates sec. 330 of this chapter and

(1) causes the person taken, enticed, or kept from his lawful custodian to be removed from the state; or

(2) exposes the person to a substantial risk of illness or physical injury.

(b) Custodial interference in the first degree is a class C felony.

Sec. 11.41.330. CUSTODIAL INTERFERENCE IN THE SECOND DEGREE. (a) A person commits the crime of custodial interference in the second degree if, knowing that he has no legal right to do so, he takes, entices, or keeps a person from his lawful custodian with intent to hold him permanently or for a protracted period.

(b) Custodial interference in the second degree is a class A misdemeanor.

Sec. 11.41.340. UNLAWFUL IMPRISONMENT IN THE FIRST DEGREE. (a) A person commits the crime of unlawful imprisonment in the first degree if he restrains another person under circumstances which expose the person to risk of serious physical injury.

(b) Unlawful imprisonment in the first degree is a class A misdemeanor.

Sec. 11.41.350. UNLAWFUL IMPRISONMENT IN THE SECOND DEGREE. (a) A person commits the crime of unlawful imprisonment in the second degree if he restrains another person.

(b) It is an affirmative defense to a prosecution under (a) of this section that

(1) the person restrained is less than 12 years old;

(2) the defendant is a relative of the person restrained;

(3) his sole intent is to assume control of the child; and

(4) the restraint is not coupled with intent to use or to threaten to use deadly physical force or to sexually assault or to threaten to sexually assault the victim.

(c) Unlawful imprisonment in the second degree is a class B misdemeanor.

Sec. 11.41.360. COERCION. (a) A person commits the crime of coercion if he compels or induces another person to engage in conduct from which the other person has a legal right to abstain, or to abstain from engaging in conduct in which the other person has a legal right to engage, by instilling in him a fear that, if the demand is not complied with, the actor or another will

(1) cause physical injury to any person;

(2) cause damage to property;

(3) subject any person to physical confinement or restraint;

(4) engage in conduct constituting a crime;

(5) accuse any person of a crime or cause criminal charges to be instituted against any person;

(6) expose a secret or publicize an asserted fact, whether true or false, tending to subject any person to hatred, contempt, or ridicule or to impair his credit or business repute;

(7) testify or provide information or withhold testimony or information with respect to another's legal claim or defense;

(8) use or abuse his position as a public servant by performing some act within or related to his official duties, or by failing or refusing to perform an official duty, in a manner which will affect some person adversely;

(9) bring about or continue a strike, boycott or other collective action, if the property is not demanded or received for the benefit of the group in whose interest the person purports to act; or

(10) inflict any other harm which would not benefit the person making the threat.

(b) A threat to perform any of the acts described in (a) of this section includes an offer to protect another from any harmful act when the offeror has no apparent means to provide the protection or when the price asked for rendering the protection service is grossly disproportionate to its cost to the offeror.

(c) In a prosecution under (a)(5) of this section, it is an affirmative defense that the defendant reasonably believed the threatened charge to be true and that his sole intent was to compel or induce the victim to take reasonable action to correct the wrong which is the subject of the threatened charge.

(d) Coercion is a class A misdemeanor.

Sec. 11.41.370. DEFINITIONS. In secs. 300 - 360 of this chapter, unless the context otherwise requires

(1) "abduct" means to restrain a person with intent to prevent his liberation by either

(A) secreting or holding him in a place where he is not likely to be found; or

(B) using or threatening to use deadly physical force;

(2) "lawful custodian" means a parent, guardian, or other person responsible by authority of law for the care, custody or control of another;

(3) "relative" means a parent or stepparent, ancestor, descendant, sibling, uncle or aunt, including a relative of the same degree through marriage or adoption;

(4) "restrain" means to restrict a person's movements unlawfully and without consent, so as to interfere substantially with his liberty by moving him from one place to another, or by confining him either in the place where the restriction commences or in a place to which he has been moved; a restraint is "without consent" if it is accomplished by

(A) physical force, intimidation or deception; or

(B) any means, including acquiescence of the victim, if he is less than 12 years old or an incompetent person, and his lawful custodian has not acquiesced in the movement or confinement.

ALASKA REVISED CRIMINAL CODE

Chapter 41 - Offenses Against the Person

ARTICLE 3. KIDNAPPING AND RELATED OFFENSES

COMMENTARY

The Effect of the Revised Code Provisions on the Existing Law of Kidnapping and Related Offenses.

In defining the crimes of kidnapping, custodial interference, unlawful imprisonment and coercion, the Kidnapping and Related Offenses Article:

1. Broadens the existing "Child Stealing" provision into a general statute covering all forms of custodial interference.
2. Creates the crime of unlawful imprisonment which criminalizes the restraint of a person without the aggravating factors necessary for kidnapping.
3. Clearly defines the terms "abduct" and "restrain" as the distinction between kidnapping and unlawful imprisonment.

SECTION ANALYSIS OF REVISED CODE

I. TD AS 11.41.370. DEFINITIONS

The terms "abduct" and "restrain", defined in subsections (1) and (4), form the foundation of the kidnapping article of the Revised Code.

The term "abduct" is used, but not defined, in the existing kidnapping statute. The Revised Code defines

"abduction" as the most serious form of restraint, involving significant movement of the victim, isolation or violence which are popularly associated with the concept of kidnapping.

In the Revised Code "restraint" is the form of action involved in the crime of unlawful imprisonment while "abduction" is necessary to a kidnapping. "Restrain" is defined as an unlawful, non-consensual removal or confinement of a person of a sort "to interfere substantially with his liberty". The term includes conduct from the most serious cases down to removals and confinements not involving a high degree of isolation, dissappearance or violence.

The term "lawful custodian", subsection (2), is used in defining "restrain" as well as in the custodial interference statutes. The term includes parents, guardians and institutions whose permission must be obtained for the lawful removal of persons under their care.

"Relative" is defined in subsection (3) to include both parents and close relatives. The term is used in TD AS 11.41.310 and 320 in connection with defenses to kidnapping in the second degree and custodial interference in the second degree.

II. TD AS 11.41.300, 310. KIDNAPPING IN THE FIRST AND SECOND DEGREE

A. Existing Law

Kidnapping is an aggravated form of false imprisonment which originally involved transportation out of the

realm, and thus beyond the power of the sovereign's authority to protect the victim by law. Alaska, like most states, has a specific kidnapping statute, AS 11.15.260. Explicitly exempted from the coverage of the existing statute is the abduction of a minor by his parent. Punishment is for any term of imprisonment up to life. The statute has never been interpreted by the Supreme Court.

B. The Code Provision

The Revised Code retains the primary thrust of the existing kidnapping statute. The basic act for kidnapping is "abduction", defined in TD AS 11.41.370(2) to mean "restraint" which is aggravated by intent to prevent the victim's liberation either by secreting or holding him in a place where he is not likely to be found, or by using or threatening to use deadly physical force. It is thus the factor of either secret restraint or the actual or threatened use of life-endangering physical force that sets kidnapping apart from unlawful imprisonment. In effect, then, kidnapping is an aggravated form of unlawful imprisonment as it was at common law.

Kidnapping in the second degree embraces the entire spectrum of kidnapping conduct, other than child custody cases. The most heinous forms of kidnapping have been singled out in first degree kidnapping for purposes of imposing a higher penalty.

First degree kidnapping, TD AS 11.41.310, aggravates the penalties for kidnapping if the actor has

a further intent than that embodied in the definition of abduction itself. The first class of aggravating intents is set out in subsection (a)(1), the intent to hold the victim for ransom. The second, (a)(2), is the intent to use the victim as a shield or hostage, again a potentially highly dangerous motivation. The third, (a)(3), is the intent to inflict physical injury on the victim or to sexually assault him. A fourth motivation, (a)(4), is an intent to place the victim or a third person in apprehension that the victim will receive serious physical injury or will be sexually assaulted. The fifth motivation, (a)(5), is to interfere with the performance of any governmental or political function. This would include, for example, kidnapping a legislator so that he would be unable to participate in official debates.

Subsection (a)(6) punishes an abduction with intent to facilitate a felony. The Proposed Missouri Criminal Code provides a discussion of the policy behind subsection (a)(6)

> [First degree] Kidnapping is not meant to cover the confinement or movement which is merely incidental to the commission of another offense. For example, many robberies will involve temporary confinement or movement for a short distance (as when the victim is made to move to another part of the room). To take such incidental confinement or movement and punish it as kidnapping would be making two crimes out of what is basically one offense. In these situations the movement or confinement does not add any additional danger to what is already present from the crime of robbery, and there is no purpose served by punishing this movement or confinement as the very serious offense of kidnapping....Commentary, §10.110, p 137-138.

TD AS 11.41.300(b) recognizes an affirmative defense (which the defendant must prove by a preponderance of the evidence) to kidnapping in the first degree. The defense is available if the defendant voluntarily releases the victim in a safe place before trial without having caused serious physical injury to him and without having sexually assaulted him. In theory this affirmative defense will encourage the defendant to exercise care in the custody of a victim and to release the victim when doubts arise in the kidnapper's mind. The defense only applies to kidnapping in the first degree; if voluntary release occurs, the defendant could still be convicted of kidnapping in the second degree, unlawful imprisonment or assault.

TD AS 11.41.310(b) provides that a relative has an affirmative defense to kidnapping in the second degree if he abducts the victim with the sole intent to assume control over him and the abduction is not coupled with intent to use or threaten to use deadly physical force or intent to sexually assault the victim.

The justification for the preferential treatment accorded relatives in this subsection is the view that relatives who abduct victims are acting in response to understandable if misguided domestic passion and have a genuine interest or affection for the victim. Thus, their conduct is neither as culpable as that of the kidnapper who is not related nor are they as likely to endanger the

victim's welfare or sense of security as would the stranger who abducts. However, while the relative has not committed kidnapping he may have committed custodial interference.

III. TD AS 11.41.320, 330. CUSTODIAL INTERFERENCE IN THE FIRST AND SECOND DEGREE - RELATIONSHIP TO EXISTING LAW - THE CODE PROVISION

AS 11.15.290, the child stealing statute, has never been interpreted by the Alaska Supreme Court. A review of that statute read in conjunction with the existing provision raises the serious question of whether existing law provides penalties for the non-consensual abduction by a parent of a child over 12 but under 18 since the kidnapping statute does not cover the abduction of a minor by his parent, while the child stealing statute appears to only protect children under 12.

Under the Revised Code, the crime of custodial interference includes the conduct proscribed by existing AS 11.15.290. However, the offense goes beyond the present statute by protecting not only the interference with custody of children under the age of 12, but with the custody of any person who has a custodian. The draft also would repeal AS 11.20.420, "Substituting a Child for Infant Committed to One's Care". This offense would now be covered under TD AS 11.41.310.

The crime of custodial interference is intended to cover the typical "child-stealing" situation committed by a relative. The language of the Revised statute is

broad enough to encompass any interference with lawful custody rights by a person having no legal right to do so if he has the intent to hold the person taken for a protracted period. Thus, the section covers not only child-custody situations, but also children in state custody, incompetents or others who are entrusted by law to the custody of another person or institution.

Custodial interference in the first degree, TD AS 11.41.330, is an aggravated form of the basic offense, the aggravating factors being:

1. the victim is taken out of the state; or
2. the victim is exposed to a substantial risk of illness or physical injury.

IV. TD AS 11.41.340, 350 - UNLAWFUL IMPRISONMENT IN THE FIRST OR SECOND DEGREE - THE CODE PROVISION

Though Alaska Law currently does not provide for the crime of false imprisonment not amounting to kidnapping or child-stealing, TD AS 11.41.340, 350 create this offense.

In view of the broad definition of the word "restrain", TD AS 11.41.370, unlawful imprisonment embraces every type of unlawful restraint ranging from the most sinister kidnapping conduct down to relatively trivial confinements. The principal utility or application of the section is to the cases not falling within the scope of the kidnapping statutes because the aggravating intent factors cannot be proved.

The basic element of the offense is defined entirely by reference to the word "restraint". "Restrain" is defined in TD AS 11.41.370(1) to mean a substantial and unlawful interference with a person's liberty by moving him from one place to another or by confining him. A person is restrained when his freedom to go where he pleases is restricted by physical force, intimidation or deception, or, if he is under 12 years of age or an incompetent, by any means including his own acquiescence in the absence of consent by his legal custodian.

As TD AS 11.41.350 indicates, a defendant has an affirmative defense to unlawful imprisonment if he is a relative and the sole motivation for the restraint is to assume control of the "victim" without abusing him. Under the definition of restraint, agreement to the taking by a child under 12 years of age is legally irrelevant. If a child who is at least 12 consents without being deceived, he is not "restrained".

TD AS 11.41.340 raises the crime of unlawful imprisonment from an A misdemeanor to a C felony when the restriction involves an element of danger to the victim. Such would be the case if, for example, a person were locked in a closet for a brief time but under circumstances entailing a substantial risk of suffocation.

The combined effects of TD AS 11.41.310, 330 and and 350 render the provisions on unlawful imprisonment and kidnapping inapplicable to consensual and nonforceful

acquisition of control over another because of familial considerations and create a special offense for unauthorized interference with lawful custody. While aimed primarily at eliminating kidnapping and unlawful imprisonment offenses from child custody disputes, these provisions do protect "parental custody against all unlawful interruption, even when the child itself is a willing, undeceived participant in the attack on this interest of its parent". Model Penal Code § 212.4, Comments (Tent. Draft No. 11, 1960). In addition, the provisions fill a similar need to protect the lawful custody of persons who are entrusted to institutional care under authority of law.

V. TD AS 11.41.370. COERCION

A. Existing Law

Existing law now contains two statutes which cover the conduct denominated as Coercion in the Revised Code - AS 11.20.345, Extortion, and AS 11.15.300, Blackmail.

The existing extortion statute requires that property be obtained by one of the enumerated threats. The existing blackmail statute does not require that anything be obtained from the victim but only recognizes three forms of threats by which the crime may be committed. The blackmail statute also encompasses the crime of attempted extortion ("threatens ... with intent to extort property"). Finally, while the blackmail statute covers some of the acts described in the Coercion statute, it only covers conduct

done with an intent to compel an actor to do an act, not conduct done with an intent to compel the actor to refrain from doing an act.

B. The Revised Code Provision

Coercion consists of compelling a person by intimidation to commit or refrain from committing an act.

Coercion is separated from the offense of theft by extortion. Extortion is basically a form of coercion in which the act compelled is the payment of money. With the crime of coercion any act may be compelled. Nevertheless, the statute defines coercion in terms similar to theft by extortion; the kinds of threats which form a basis for the offense of coercion are the same as those contained in the extortion section.

Coercion requires intimidation; the victim must actually act or refrain from acting because of fear instilled by the defendant. A mere threat or attempt, failing of its coercive purpose, would constitute attempted coercion.

The coercion statute is based on the premise that the forceful compulsion by means of a threat ought to be recognized as a crime even though the offense committed cannot be measured by a monetary standard. The problem arises in coercion as to how to measure the gravity of the actor's misconduct since the act sought to be compelled may be of slight significance such as threatening to call the police unless the victim ceases seeing the defendant's daughter or the act may be

as serious as attempting to compel the victim to leave town. The Model Penal Code, § 212.5(2), attempts to measure the gravity of the defendant's misconduct on the basis of whether the threat is to commit a felony or the actor's purpose is felonious. New York Revised Penal Law § 135.65 raises the offense a degree on the basis of (1) the kind of threat specified and (2) the kind of conduct which he compels the victim to perform.

The Revised Code adopts neither of these measures but defines only one degree of coercion. This affords some protection against such threats but avoids imposing additional penalties on the basis of distinctions of questionable validity. This is in accord with the committee commentary to the Proposed Michigan Revised Criminal Code, which states:

> "The committee is not persuaded that the utility in subjecting some persons who commit coercion to extended prison terms outweighs the difficulties inherent in classifying the particular threats made." (§2125)

Subsection (b) parallels the similar provision in the extortion statute and is derived directly from existing law.

Subsection (c) is the counterpart to the defense to extortion where there is an honest claim to the property obtained as restitution or indemnification for harm done. It would be incongruous to hold the actor not guilty of extortion if property passes, but to hold him guilty of coercion if some other act is involved. The

subsection also preserves freedom to negotiate out-of-court settlements. As an example, a defendant accused of coercion for having compelled a youth, by threat of charging him with criminal mischief, to repaint the defendant's fence which the youth had vandalized would have this defense available to him.

ARTICLE 4. SEXUAL OFFENSES.

SECTION

Sec. 11.41.400. GENERAL PROVISIONS. (a) In secs. 400 - 460 of this chapter

(1) whenever the criminality of conduct depends upon a victim being less than a certain age, it is an affirmative defense that, at the time of the alleged offense, the defendant reasonably believed the victim to be above that age. This belief shall not be considered reasonable if the victim was less than 13 years of age at the time of the alleged offense;

(2) whenever the criminality of conduct depends upon a victim being incapacitated, it is a defense that, at the time of the alleged offense, the defendant reasonably believed that the victim was not incapacitated and reasonably believed that the victim consented to the act. The defendant shall have the burden of injecting the issue of a defense under this paragraph.

(b) A person does not commit the crime of sexual assault if the victim is his or her legal spouse unless the spouses are living apart and one of them has filed for divorce. This subsection may not be construed to preclude accomplice liability of a spouse.

Sec. 11.41.410. SEXUAL ASSUALT IN THE FIRST DEGREE. (a) A person commits the crime of sexual assault in the first degree if

(1) being any age, he knowingly engages in sexual penetration with a person without consent of that person;

(2) being any age, he engages in sexual penetration with another person under 13 years of age; or

(3) being 18 years of age or older, he knowingly engages in sexual penetration with a person under 18 years of age who is related to him, either legitimately or illegitimately, as

(A) his ancestor or descendant of the whole or half blood, or by adoption;

(B) his brother or sister of the whole or half blood;

(C) his uncle, aunt, nephew or niece of the whole or half blood, or by adoption; or

(D) his stepchild, while the marriage creating the relationship exists.

(b) Sexual assault in the first degree is a class A felony.

Sec. 11.41.420. SEXUAL ASSAULT IN THE SECOND DEGREE. (a) A person commits the crime of sexual assault in the second degree if

(1) being any age, he knowingly engages in sexual contact with a person without consent of that person;

(2) being any age, he engages in sexual contact with another person under 13 years of age; or

(3) being 18 years of age or older, he knowingly engages in sexual contact with a person under 18 years of age who is related to him, either legitimately or illegitimately, as

(A) his ancestor or descendant of the whole or half blood, or by adoption;

(B) his brother or sister of the whole or half blood;

(C) his uncle, aunt, nephew or niece of the whole or half blood, or by adoption; or

(D) his stepchild, while the marriage creating the relationship exists.

(b) Sexual assault in the second degree is a class B felony.

Sec. 11.41.430. SEXUAL ASSAULT IN THE THIRD DEGREE. (a) A person commits the crime of sexual assault in the third degree if

(1) being 18 years of age or older, he engages in sexual penetration with a person under 16 years of age; or

(2) being any age, he engages in sexual penetration with another person who is incapable of consent by reason of incapacitation.

(b) Sexual assault in the third degree is a class C felony.

Sec. 11.41.440. SEXUAL ASSAULT IN THE FOURTH DEGREE. (a) A person commits the crime of sexual assault in the fourth degree if

(1) being 19 years of age or older, he engages in sexual contact with a person under 16 years of age, or

(2) being any age, he engages in sexual contact with another person who is incapable of consent by reason of incapacitation.

(b) Sexual assault in the fourth degree is a class A misdemeanor.

Sec. 11.41.450. INDECENT EXPOSURE. (a) A person commits the crime of indecent exposure if he intentionally exposes, directly or through clothing, his genitals, buttock, or anus, or directly exposes her female breast to another with reckless disregard for the offensive, provocative, or insulting effect the act may have on that person.

(b) Indecent exposure is a class A misdemeanor.

Sec. 11.41.460. DEFINITIONS. In secs. 400 - 450 of this chapter

(1) "actor" means the person accused of sexual assault;

(2) "incapacitated" means a physical or mental condition, temporary or permanent, in which a person is incapable of appraising the nature of his conduct or of expressing unwillingness to act;

(3) "sexual contact" means

(A) the intentional touching by the actor of the victim's genitals, anus or female breast or the intentional touching by the actor of the victim's genitals or anus through clothing; or

(B) the actor's intentionally causing the victim to touch the actor's or victim's genitals, anus or female breast, or causing the victim to touch the actor's or victim's genitals or anus through clothing;

(4) "sexual penetration" means genital intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of an object or any part of a person's body into the genital or anal opening of another person's body, but emission of semen is not required;

(5) "victim" means the person alleged to have been subjected to sexual assault;

(6) "without consent" means that a person

(A) with or without resisting, is coerced by the use of physical force against a person or property, or by the express or implied threat of imminent death, imminent physical injury, or imminent kidnapping to be inflicted on anyone; or

(B) is incapacitated as a result of an act committed by the actor.

The Effect of the Revised Code Provisions on the Existing Law of Sexual Offenses

In defining the crimes of sexual assault and indecent exposure, the Sexual Offenses Article:

1. Establishes four degrees of sexual assault which are distinguished on two general grounds: (1) whether sexual penetration, as opposed to sexual contact, occurred, and (2) whether certain forceful elements were present in the commission of the crime. Penetration is required for first and third degree sexual assault, whereas the second and fourth degree provisions apply only to sexual contact. Sexual penetration or sexual contact that occurs without the consent of the victim qualifies as first or second degree sexual assault. Existing law categorizes a sexual assault short of penetration as a misdemeanor assault rather than as a sexual offense, and at best is unclear on whether rape occurs if the victim does not forcibly resist.
2. Substitutes the defined terms "sexual penetration", "sexual contact" and "without consent" for the archaic term "carnal knowledge" and the archaic

and undefined terms "lewd and lascivious acts" and "forcibly and against the will".

3. Specifically recognizes that penetration of an object into the genital or anal opening constitutes sexual penetration.
4. Eliminates, by the definition of "without consent", any contention that under the existing rape statute a victim must forcibly resist a sexual assault to the utmost and that resistance must continue until the act has been terminated.
5. Recognizes that a physically or mentally incapacitated person who is incapable of appraising the nature of his conduct or of expressing unwillingness to act requires protection from sexual activity even though the act did not occur "without consent".
6. Expands the coverage of the existing incest statute by recognizing the potential for abuse of adoptive relatives and step-children.
7. Specifically lists the types of acts which violate the indecent exposure statute.
8. In revising the sexual offenses article to cover behavior which poses a real threat to the victim or to society, the Subcommission broadened the coverage of several statutes to cover antisocial conduct which is not now criminal. At the same time, the subcommission found an absence of compelling state interest in some (but not all) applications of a

number of statutes which criminalize private sexual activity between consenting adults - Adultery, AS 11.40.010, Cohabitation, AS 11.40.040 and Sodomy, AS 11.40.120. Insofar as these statutes involve sexual activity between minors, sexual activity that is non-consensual, or sexual activity in public, the sexual offenses article provides greater protection than is found in existing law.

However, because these statutes go further and prohibit consensual activity between adults in private, the Tentative Draft has eliminated these applications from the Revised Code.

In doing so, the Subcommission recognized that any statute prohibiting private consensual sexual activity between adults is subject to constitutional attack in light of the court's holding in Ravin v. State, 537 P.2d 494, 504 (Ak. 1975), that " citizens of the State of Alaska have a basic right to privacy in their houses under Alaska's Constitution." Indeed, in the earlier case of Harris v. State, 457 P.2d 638, 645 (Ak. 1969), though the issue was not before the court, the Alaska Supreme Court noted that " ... at least some of us might perceive a right to privacy claim" if the sodomy statute was used to prosecute cases involving consensual activity between adults.

The Subcommission recognized that large numbers of people share with them strong sentiment regarding the immorality of some of the conduct which would not be criminal under the Tentative Draft.

But as justice professionals and citizens, the Subcommission also recognized that there are limits beyond which utilization of criminal sanctions loses its meaning and may become destructive to social interest as a result of capricious special applications, constitutional infringements or non-enforcement leading to general contempt for law or misallocation of limited law-enforcement resources.

The careful line which the Subcommission has drawn is well illustrated by the absence of any history in this state of criminal prosecutions in all the classes of behavior excluded from the reach of the criminal law under the Tentative Draft.

SECTION ANALYSIS OF REVISED CODE

I. TD AS 11.41.460 - DEFINITIONS

Key to the Sexual Offenses article of the Revised Code are definitions of four key terms, "sexual penetration", "without consent", "incapacitated" and "sexual contact".

A. Subsections (1) and (5). Actor and Victim

The terms "actor" and "victim" are defined to aid in drafting the definitions and general provisions which follow.

It should be noted that the term "person" is not defined in the sexual assault article. Instead, it is defined with the other general definitions which apply throughout the Revised Code. That definition includes all natural persons. Consequently, the offenses defined in this article are "sexless" ones and may be committed by a

male or female actor upon a male or female victim. The use of the pronoun "his" throughout the article is merely used for drafting convenience and is not intended in any way to detract from the Revised Code's "sex-neutral" approach to sexual offenses.

B. Subsection (2). Incapacitated

When first considered by the Subcommission, the concept of incapacitation was presented in three sections defining "mentally incapacitated", "mentally defective" and "physically helpless" victims. It was decided that these concepts should be contained in the single definition of "incapacitated".

Though not explicitly found in existing law, the concept of "incapacitation" is designed to offer special protection to those who are deemed by the law to be incapable of giving effective consent. This concept is based on the provisions in existing law that recognize that the consent of a person under 16 is irrelevant in determining whether a sexual assault has occurred.

C. Subsection (3). Sexual Contact

Existing AS 11.15.134 prohibits "lewd or lascivious acts" with a child. The definition of "sexual contact" in subsection (3) replaces the existing term and sets forth the specific acts which are currently left undefined.

The definition of "sexual contact" has been broken into two parts to insure that it includes both situations where the actor touches the victim in specified areas as

well as situations where the actor causes the victim to touch the actor or the victim. Further, the definition specifically includes the touching of the genitals or anus through clothing as "sexual contact".

The definition is drafted in a manner to insure that less serious forms of sexual conduct are not subjected to the penalty structure of this article. For example, an actor who slaps the buttock of another has not committed a sexual assault since the definition of "sexual contact" does not include a touching of the buttock. While this conduct does not qualify as sexual assault, it nevertheless qualifies as a simple assault pursuant to TD AS 11.41.240 as it does under existing law.

D. Subsection (4). Sexual Penetration

Existing AS 11.15.120(b) requires that the defendant "carnally know" the victim to have committed rape. "Carnal knowledge" is defined to include "sexual, oral and anal intercourse, with some penetration, however slight". In the Revised Code the term "sexual penetration" is substituted for the archaic term "carnal knowledge".

The definition of "sexual penetration" is consistent with existing law by including oral-genital sex and anal penetration within the defintion of "sexual penetration" but broadens existing coverage by including the intrusion "... of an object or any part of a person's body into the genital or anal opening of another person's body".

E. Subsection (6). Without consent

The definition of "without consent", is used in the Revised Code in place of the presently used term "forcibly and against the will". This definition is of critical importance in defining the offenses of sexual assault in the first and second degrees.

Though the phrase "forcibly and against the will" has not been interpreted by the Alaska Supreme Court, decisions in other states interpreting similar language in statutes which have recently been repealed have required that the victim resist the sexual assault " ... from the inception to the close." People v. Murphy, 108 N.W. 1009 (Mich. 1906). The Oregon Supreme Court once held that resistance must be " ... continued to the extent of the woman's ability until the act has been consummated " State v. Risen, 235 P 2d 764, 765 (Ore. 1951).

By requiring the victim to resist to the utmost until the act is completed or until the victim's mind is overcome by abject fear of her life, statutes similar to Alaska's existing provision have required of a rape victim a level of resistance required in no other crime of violence. Interpretations of now discredited statutes similar to the existing Alaska provision have denied the victim of a sexual assault the opportunity to rationally assess the danger and choose the safest course of action. Under the existing law, the victim may be required to ignore the advice

generally given by the police about victim behavior in the course of armed robberies and other crimes of violence.

While it is probable that today the Alaska Supreme Court would not interpret the phrase "forcibly and against the will" as restrictively as the courts in Risen and Murphy, supra, the definition of "without consent" eliminates any inference that the victim must forcibly resist the sexual assault. Instead, in a prosecution for sexual assault that occurs "without consent" of the victim, the state is required to prove that the victim was coerced by the actual use of force against any person or property or by the "express or implied threat of imminent death, imminent physical injury, or imminent kidnapping to be inflicted on anyone".

Finally, the definition also provides that sexual penetration or contact is "without consent" if it is committed upon a victim who was incapacitated by an act committed by the defendant, i.e., slipping a narcotic in a drink.

II. TD AS 11.41.400 - GENERAL PROVISIONS

A. Subsection (a)(1) Mistake as to Age

Subsection (a)(1) allows reasonable mistake as to the age of the victim as an affirmative defense under limited circumstances where criminal liability depends on that factor. While existing law recognizes that "persons having illegal relations with children do so at their own peril", Anderson v. State 384 P 2d 669, 671 (Ak. 1963), the Revised

Code allows a defendant to escape liability if he proves by a preponderance of the evidence that he reasonably believed the victim to be above 16 when criminality depends on the victim being less than 16. However, subsection (a)(1) specifically provides that no defense exists if the victim was less than 13 at the time of the sexual assault.

The following excerpts from People v. Hernandez, 393 P.2d 673, 674 (Cal. 1964), one of the leading cases in this area, provides a valuable framework for consideration of this affirmative defense. The court, in ruling that a reasonable mistake of age could be a defense to statutory rape, stated:

> [We] are dealing here, of course, with statutory rape where, in one sense, the lack of consent of the female is not an element of the offense. In a broader sense, however, the lack of consent is deemed to remain an element but the law makes a conclusive presumption of the lack thereof because she is presumed too innocent and naive to understand the implications and nature of her act. (Citations ommitted). The law's concern with her capacity or lack thereof to so understand is explained in part by a popular conception of the social, moral and personal values which are preserved by the abstinence from sexual indulgence on the part of a young woman. An unwise disposition of her sexual favor is deemed to do harm both to herself and the social mores by which the community's conduct patterns are established.
>
> Hence the law of statutory rape intervenes in an effort to avoid such a disposition. This goal, moreover, is not accomplished by penalizing the naive female but by imposing criminal sanctions against the male, who is conclusively presumed to be responsible for the occurrence. (Citations ommitted).

> The assumption that age alone will bring an understanding of the sexual act to a young woman is of doubtful validity. Both learning from the cultural group to which she is a member and her actual sexual experiences will determine her level of comprehension... Nevertheless, even in circumstances where a girl's actual comprehension contradicts the law's presumption, the male is deemed criminally responsible for the act, although himself young and naive and responding to advances which may have been made to him.

In providing that the defense of mistake as to age is inapplicable when the victim is less than 13, the following factors were considered by the Subcommission.

(1) A child of such age would be considerably below the age of sexual pursuit by normal persons;

(2) Sexual conduct with a child below this age can be extremely dangerous, both physically and mentally to the child;

(3) In such cases there is little probability that the actor is proceeding on normal, if misguided, sexual motivation.

B. Subsection (a)(2). Mistake as to Incapacitation

Consistent with its treatment of reasonable mistake as to age, the Revised Code begins with a strict liability approach as to whether the victim was incapacitated. Thus, if the only evidence at trial establishes that the defendant engaged in sexual penetration or contact with an incapacitated victim, the state has proved its case.

Subsection (a)(2) allows the defendant to escape liability if he raises a reasonable doubt that he reasonably

believed the victim was not incapacitated and consented to the act. However, unlike the affirmative defense in subsection (a)(1), which the defendant must prove by a preponderance of the evidence, subsection (a)(2) provides that the defendant only has the burden of injecting the defense. Consequently, once the defendant has come forward with some evidence on the issue, the state must prove beyond a reasonable doubt that the defendant had no such reasonable belief.

C. Subsection (b). Spousal Immunity

Subsection (b) excludes from the article's coverage sexual activity between spouses and restates the existing principle that a spouse may be criminally liable as an accomplice for a sexual assault of his spouse, i.e., defendant assists a person in sexually assaulting his spouse.

The exclusion of conjugal intercourse, though forced, from the prohibition of a rape statute has long been recognized under existing law though there is no explicit statutory exclusion.

Subsection (b) would modify this exclusion only in those situations where two certain and provable events have occurred:

(1) the couple is living apart, and

(2) one of them has filed for divorce.

This would protect marital privacy when the marriage is still viable and ongoing, but also would protect a large

and seriously victimized group presently ignored by the law. Of course, a person still living with their spouse is not immune from a prosecution under the general assault provisions of the Revised Code.

III. TD AS 11.41.410, 430. SEXUAL ASSAULT IN THE FIRST AND THIRD DEGREES

A. Existing Law

Rape is currently defined in AS 11.15.120. The statute defines two separate though related offenses, Sekinoff v. U.S., 283 F. 38 (9th Cir. 1922). The first offense is similar to the common law definition of rape and includes forcible sexual intercourse.

The second offense is commonly referred to as "statutory rape" and includes both consensual and non-consensual sexual intercourse with a person under 16. Torres v. State, 521 P.2d 386 (Ak. 1974). A person under 16 is deemed in law "incapable of consent". Hutson v. U.S., 238 F.2d 167 (9th Cir. 1956). A person presently commits statutory rape if he "carnally knows and abuses" a victim under 16.

AS 11.14.130 provides for three different penalty schemes for punishment of rape depending on such factors as the age of the defendant, the age of the victim and the relationship of the victim to the actor. Penalties range from "any term of years" [AS 11.15.130(a)] to "not more than 20 years nor less than one year" [AS 11.15.150(c)].

The offense of incest, AS 11.40.110, currently provides for a penalty of 3 - 15 years. Incest occurs when a person "marries or cohabits or has sexual intercourse" with a person related to him "within and not including the fourth degree of consanguinity, computed according to the rules of the civil law".

B. The Revised Code

Sexual Assault in the First Degree, TD AS 11.41.410, the most serious form of sexual assault, lists three forms of sexual assaults which are considered of equal culpability for sentencing purposes.

Subsection (1) classifies sexual penetration accomplished without consent of the victim as first degree sexual assault. The definitions of "sexual penetration" and "without consent", supra, are of critical importance in defining this form of sexual assault.

Subsection (2) provides that sexual assault in the first degree also includes sexual penetration with a person under 13 years of age - conduct now classified as rape but commonly referred to as "statutory rape". While existing law requires that the defendant be over 16, the Revised Code provides that the actor may be any age.

This change makes sense because, unlike existing law, the Revised Code recognizes two degrees of "statutory rape", depending on whether the victim is less than 13 or is between 13 and 16. The apparent purpose of the existing

requirement that the actor be over 16 is to avoid labeling as felonious a consensual sexual act between two 15-year-olds. That purpose is served in the Revised Code by providing in third and fourth degree sexual assault that when the victim is a 13- to 16-year-old the defendant must be over 18. However, with regard to first and second degree sexual assault, the Subcommission concluded that it was inappropriate to adopt a statute which would apparently legitimize sexual activity with children under 13, and consequently provided that any person who engages in such activity commits a crime. In eliminating the age requirement for a defendant in the first and second degree crime it was recognized that, in practice, minors who engage in prohibited sexual activity will be treated under juvenile procedure rather than under the criminal justice system.

Subsection (a)(3) includes activity not covered by the existing incest statute by specifically including within its prohibitions sexual activity between a defined class of persons legitimately or illegitimately related whether by whole or half-blood. In addition, certain adoptive relationships are covered, as well as step-children. While existing law refers to the prohibitive class of relatives as those "related to another person within and not including the fourth degree of consanguinity" the Revised Code specifically lists the class in language more understandable to the general public as well as to most

attorneys. In including consensual sexual penetration with relatives as first degree sexual assault, the Revised Code is consistent with existing law which also treats such activity as an aggravated form of rape.

It should be noted that the prohibitions of (a)(3) apply only if sexual penetration is with a victim under 18 years of age. Thus, under the Revised Code a consensual relationship between adult relatives is not necessarily criminal. This change would not affect existing law which renders incestuous marriage void, AS 09.55.080.

TD AS 11.41.430, Sexual Assault in the Third Degree, prohibits sexual penetration with two classes of persons who are viewed as requiring special protection under the law regardless of whether penetration is "without consent".

Subsection (1) prohibits a person 18 or older from engaging in sexual penetration with a person under 16 years of age. If the victim is under 13, the defendant has committed first degree sexual assault, supra. This provision changes existing law by providing that the actor must be at least 18 to have committed sexual assault; existing law requires the actor to be at least 16.

Subsection (2) provides that sexual penetration with a person who is incapable of consent by "reason of incapacitation" constitutes sexual assault in the third degree. If it is established that the assault occurred "without consent", first degree sexual assault has occurred.

The principal utility of this provision is to penalize sexual activity with an incapacitated person who is incapable of consenting to a sexual act.

IV. TD AS 11.41.420, 440 - SEXUAL ASSAULT IN THE SECOND AND FOURTH DEGREES

A. Existing Law

The existing Lewd or Lascivious Statute, AS 11.15.134, provides that a person "who commits a lewd or lascivious act ... upon the body of a child under 16 years of age, intending to arouse, appeal to, or gratify his lust, passions, or sexual desires, or the lust, passions, or sexual desires of the child ..." is guilty of a felony. Not only does the statute fail to provide guidance to the courts in determining what qualifies as a "lewd or lascivious act" but the provision is of limited use since it only applies to victims who are under 16.

Consequently, under existing law, if the victim of a sexual assault is 16 or older, and the state is unable to prove "carnal knowledge" because penetration cannot be established, only the offenses of assault, assault with intent to commit rape and attempted rape remain as possible charging alternatives.

While the crimes of assault with intent to commit rape and attempted rape carry substantial penalties, they are difficult to prove since the state must establish that

the defendant acted with a specific intent to accomplish penetration. A conviction for assault pursuant to existing AS 11.15.230 carrying only a maximum six month sentence is inadequate to penalize acts which, if they occur with children, are described as "lewd or lascivious" and are punished by a maximum of 10 years imprisonment.

B. The Code Provision

The crimes of sexual assault in the second and fourth degree parallel with one major and one minor difference the crimes of sexual assault in the first and third degree.

The major difference is that all forms of sexual assault in the second and fourth degree involve sexual contact as opposed to penetration. Thus, the Revised Code closes a gap in existing law by classifying as a form of sexual assault specifically defined forms of sexual contact that are accomplished without the consent of a victim over 16.

Sexual assault in the second degree, TD AS 11.41.420, prohibits sexual contact without consent, sexual contact with persons under 13, and sexual contact with relatives within the classification discussed in § III, supra. The statute is identical to the first degree crime except the term "sexual contact" is substituted for "sexual penetration".

Subsection (a)(1) of sexual assault in the fourth degree prohibits sexual contact with a person under 16 but over 13. This subsection parallels TD AS 11.41.430 (a)(1)

covering sexual penetration with a person under 16, but raises the age of the actor to 19 as opposed to 18, to insure that conduct such as "petting" among high school students is not criminalized.

Subsection (a)(2) parallels TD AS 11.41.430 (a)(2) and prohibits sexual contact with persons who are incapable of consent by reason of incapacitation.

V. TD AS 11.41.450 - INDECENT EXPOSURE

Relationship of Code Provision to Existing Law

By referring to an exposure of "private parts" or the taking " ... part in a model artist exhibition...", the existing indecent exposure statute provides an excellent example of the antiquated language that is currently found in the Alaska Criminal Statutes.

To commit the crime of indecent exposure under the Revised Code the defendant must intentionally expose, either directly or through clothing, his genitals, buttock or anus, or directly expose her female breast, to another. Hence, a mere inadvertant exposure is not sufficient. Further, the actor must act with a culpable mental state of "reckless disregard for the offensive, provocative or insulting effect such act may have on that person." Thus, the statute does not require that the actor know that his exposure will cause that effect, but rather that he recklessly disregarded the

act's possible effect on the victim. Finally, the proposed statute does not require that the victim was in fact "offended, provoked or insulted" as a consequence of the act. Rather, all that is required is that the defendant was reckless as to effect of his exposure of the victim. Thus, if the actor had good reason to know that his exposure would not be offensive to the viewer, no crime has been committed.

APPENDIX 1.

Sec. 11. DEFINITIONS. In this title, unless the context otherwise requires,

(1) "benefit" means a present or future gain or advantage to the beneficiary or to a third person pursuant to the desire or consent of the beneficiary, but does not include political campaign contributions reported in accordance with the requirements of AS 15.13;

(2) "building", in addition to its usual meaning, includes any vehicle, watercraft, aircraft or structure adapted for overnight accommodation of persons or for carrying on business; when a building consists of separate units, including but not limited to apartment units, offices, or rented rooms, each unit is considered a separate building;

(3) "dangerous instrument" means anything which under the circumstances in which it is used, attempted to be used, or threatened to be used, is capable of causing death or serious physical injury;

(4) "deadly physical force" means physical force that under the circumstances in which used is capable of causing death or serious physical injury;

(5) "deadly weapon" means any firearm, loaded or unloaded, or anything designed for and capable of causing death or serious physical injury including, but not limited to, a knife, axe, club, metal knuckles, explosive, or any weapon from which a shot capable of causing death or serious physical injury may be discharged;

(6) "dwelling" means a building which is usually occupied by a person at night, whether or not a person is actually present;

(7) "organization" means a legal entity, including a corporation, company, association, firm, partnership, joint stock company, foundation, institution, society, union, club, church, or any other group of persons organized for any purpose;

(8) "peace officer" means a public servant vested by law with

a duty to maintain public order or to make arrests, whether the duty extends to all offenses or is limited to a specific class of offenses or offenders;

(9) "person" means a natural person and, when appropriate, an organization, government or governmental instrumentality;

(10) "physical force" means force used upon or directed toward the body of another person; the term includes confinement;

(11) "physical injury" means physical pain or an impairment of physical condition;

(12) "possess" means having physical possession or the exercise of dominion or control over property;

(13) "premises" means real property, including a building;

(14) "public servant" means each of the following, whether compensated or not, but does not include jurors or witnesses:

(A) an officer or employee of the state, a political subdivision of the state, or governmental instrumentality of the state, including, but not limited to, legislators, members of the judiciary and peace officers;

(B) a person who participates as an advisor, consultant or assistant at the request or direction of the state, a political subdivision, or governmental instrumentality;

(C) a person who serves as a member of a board or commission created by statute or by legislative, judicial, or administrative action by the state, a political subdivision, or governmental instrumentality;

(D) a person nominated, elected, appointed, employed, or designated to act in a capacity defined in (A) - (C) of this paragraph, but who does not occupy the position;

(15) "serious physical injury" means physical injury which

creates a substantial risk of death or which causes serious and protracted disfigurement, protracted impairment of health, or protracted loss or impairment of the function of a bodily organ, or physical injury which unlawfully terminates a pregnancy.

CHAPTER 11. GENERAL PRINCIPLES OF CRIMINAL LIABILITY.

Sec. 11.11.099. DEFINITIONS. For purposes of this title, unless the context otherwise requires,

(1) a person acts "intentionally" with respect to a result or to conduct described by a provision of law defining an offense when his conscious objective is to cause that result or to engage in that conduct;

(2) a person acts "knowingly" with respect to conduct or to a circumstance described by a provision of law defining an offense when he is aware that his conduct is of that nature or that the circumstance exists; when knowledge of the existence of a particular fact is an element of an offense, that knowledge is established if a person is aware of a substantial probability of its existence, unless he actually believes it does not exist;

(3) a person acts "recklessly" with respect to a result or to a circumstance described by a provision of law defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that disregard of it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation; a person who is unaware of a risk of which he would have been aware had he not been intoxicated or using drugs acts recklessly with respect to that risk;

(4) a person acts "with criminal negligence" with respect to a result or to a circumstance described by a provision of law defining an offense when he fails to perceive a substantial and unjustifiable

risk that the result will occur or that the circumstance exists; the risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

ALASKA REVISED CRIMINAL CODE

Chapter 41 - Offenses Against the Person

DERIVATIONS

ARTICLE 1 - CRIMINAL HOMICIDE

TD AS 11.41.100 - Criminal Homicide

Subsections (a), (c)(1) and (c)(2) are derived directly from ORS 163.005(1)-(3).

TD AS 11.41.110 - Murder

Subsection (a)(1) is based on Illinois Criminal Code, Ch. 38 § 9-1(a)(1) and (2).

Subsection (a)(2) and (a)(3) are based on ORS 161.115(1)(b) and (c).

Subsection (b) is based on Illinois Criminal Code, Ch. 38 § 9-2(a).

Subsection (c) is based on ORS 163.115(2).

Subsection (d) codifies common law.

Subsection (3) is based on ORS 163.115(3).

TD AS 11.41.120 - Manslaughter

This section is based on AS 11.15.040.

TD AS 11.41.130 - Criminally Negligent Homicide

This section is derived directly from ORS 163.145.

ARTICLE 2 - ASSAULT AND RELATED OFFENSES

TD AS 11.41.200, 210 - Assault in the First to Fourth Degree

The degree structure of the assault statutes and the various aggravating factors that are used are based on the degrees of assault found in the New York and Oregon statutes, ORS §§ 163.165 - 190 and N.Y. Penal Law §§ 120.00 - 15, as well as existing Alaska law.

TD AS 11.41.240 - Simple Assault

This section is based on Proposed Missouri Criminal Code § 10.070(e) and Proposed Arizona Revised Criminal Code § 1202(a)(3).

TD AS 11.41.250 - Reckless Endangerment

This section is derived directly from N.Y. Penal Law § 120.20.

ARTICLE 3 - KIDNAPPING AND RELATED OFFENSES

TD AS 11.41.300 - Kidnapping in the First Degree

Subsections (a)(1) - (a)(3) are based on ORS 162.235.

Subsection (a)(4) is based on Proposed Arizona Revised Criminal Code § 1303(a)(4).

Subsection (a)(5) is based on N.Y. Penal Law § 135.25(2)(d).

Subsection (a)(6) is based on Proposed Missouri Criminal Code § 10.110(1)(d).

Subsection (b) is based on Proposed Arizona Revised Criminal Code § 1303(b).

TD AS 11.41.310 - Kidnapping in the Second Degree

Subsection (a) is based on N.Y. Penal Law § 135.20.

Subsection (b) is based on N.Y. Penal Law § 135.30.

TD AS 11.41.320 - Custodial Interference in the First Degree

This section is based on ORS 163.257.

TD AS 11.41.330 - Custodial Interference in the Second Degree

This section is based on ORS 16.245.

TD AS 11.41.340 - Unlawful Imprisonment in the First Degree

This section is based on N.Y. Penal Law § 135.10.

TD AS 11.41.350 - Unlawful Imprisonment in the Second Degree

This section is based on N.Y. Penal Law § 136.05 and § 135.15.

TD AS 11.41.360 - Coercion

This section is based on ORS 163.275.

TD AS 11.41.370 - Definitions

This section is based on N.Y. Penal Law § 135.00.

ARTICLE 4 - SEXUAL OFFENSES

TD AS 11.41.400 - General Provision

Subsections (a)(1) and (a)(2) are based on Proposed Missouri Criminal Code § 11.020.

Subsection (b) is based on Michigan Compiled Law § 750.520(1) and AS 11.15.120(b).

TD AS 11.41.410, 440 - Sexual Assault in the First to Fourth Degree

The degree structure in the sexual assault statutes is based primarily on Michigan Compiled Laws 750.520(b) - (e).

The listing of prohibitive classes of relatives in TD AS 11.41.410(a)(3) and 11.41.420(a)(3) is based on Missouri Proposed Criminal Code § 13.020(1).

TD AS 11.41.450 - Indecent Exposure

This section is based on Proposed Arizona Revised Criminal Code § 1403.

TD AS 11.41.460 - Definitions

Subsection (1) is based on Michigan Compiled Law § 750.520(a).

Subsection (2) is based on Proposed Missouri Criminal Code § 1.120(12).

Subsection (3) is based on Michigan Compiled Law 750.520(a) and Proposed Arizona Revised Code § 1400(b).

Subsection (4) is based on Michigan Compiled Law 750.520(a).

Subsection (5) is based on Michigan Compiled Law 750.520(a).

Subsection (6) is based on Proposed Arizona Revised Criminal Code § 1400(e)(1).

ALASKA REVISED CRIMINAL CODE

Chapter 41 - Offenses Against the Person

EXISTING LAW

ARTICLE 1 - CRIMINAL HOMICIDE

Sec. 11.15.010. FIRST DEGREE MURDER. A person who, being of sound memory and discretion, purposely, and either of deliberate and premeditated malice or by means of poison, or in perpetrating or in attempting to perpetrate, rape, arson, robbery, or burglary kills another, is guilty of murder in the first degree, and shall be sentenced to imprisonment for not less than 20 years to life.

Sec. 11.15.020. OBSTRUCTING OR INJURING RAILROAD OR AIRCRAFT. A person who maliciously (1) places an obstruction upon a railroad or street railroad, or displaces or injures anything appertaining to a railroad or street railroad, or does any other act with intent to endanger the passage of a locomotive or car, and thereby occasions the death of another, or (2) causes or attempts to cause damage or injury to, or places obstruction or explosive material on, in or about an aircraft, or who commits any other act with intent to endanger the safety of flight, operation or passage of an aircraft and thereby occasions or implements the death of another, is guilty of murder in the first degree, and shall be sentenced to imprisonment for not less than 20 years to life.

Sec. 11.15.030. SECOND DEGREE MURDER. Except as provided in §§ 10 and 20 of this chapter, a person who purposely and maliciously kills another is guilty of murder in the second degree, and shall be sentenced to imprisonment for a term of not less than 15 years to life.

Sec. 11.15.040. MANSLAUGHTER. Except as provided in §§ 10 - 30 of this chapter, a person who unlawfully kills another is guilty of manslaughter, and is punishable by imprisonment in the penitentiary for not less than one year nor more than 20 years.

Sec. 11.15.050. PROCURING ANOTHER TO COMMIT SELF-MURDER. A person who purposely and deliberately procures another to commit self-murder or assists another in the commission of self-murder is guilty of manslaughter, and is punishable accordingly.

Sec. 11.15.070. PHYSICIAN ADMINISTERING POISON OR DOING ACT RESULTING IN DEATH WHILE INTOXICATED. A physician, or person acting as or pretending to be a physician who, while in a state of intoxication, without a design to cause death, administers any poison, drug, or medicine, or does another act to a person which produces the death of the person, is guilty of manslaughter, and is punishable accordingly.

Sec. 11.15.080. NEGLIGENT HOMICIDE. Every killing of a human being by the culpable negligence of another, when the killing is not murder in the first or second degree, or is not justifiable or excusable, is manslaughter, and is punishable accordingly.

Sec. 11.15.170. DUELING. A person who fights a duel, or is second to a person who fights a duel, or challenges another to fight a duel, or accepts a challenge to fight a duel, or is knowingly the bearer of a challenge, or is present at the fighting of a duel as aid or surgeon, or advises, encourages, or promotes a duel, is punishable by imprisonment in the penitentiary for not more than 10 years nor less than one year.

Sec. 11.15.140. MAYHEM. A person who, with malicious intent to maim or disfigure: (1) cuts, bites, or slits the nose, ear, or lip, cuts out or disables the tongue, puts out or destroys an eye, cuts off or disables a limb or any member of another person; or (2) throws or pours upon or throws at another person, any scalding hot water, vitriol, or other corrosive acid or caustic substance; or (3) assaults another person with a dangerous instrument, is punishable by imprisonment in the penitentiary for not more than 20 years nor less than one year.

Sec. 11.15.150. SHOOTING, STABBING OR CUTTING WITH INTENT TO KILL, WOUND OR MAIM. A person who maliciously shoots, stabs, cuts, or shoots at another person with intent to kill, wound, or maim him is punishable by imprisonment in the penitentiary for not more than 20 years nor less than one year.

Sec. 11.15.160. ASSAULT WITH INTENT TO KILL OR COMMIT RAPE OR ROBBERY. A person who assaults another with intent to kill, or to commit rape or robbery upon the person assaulted, is punishable by imprisonment in the penitentiary for not more than 15 years nor less than one year.

Sec. 11.15.190. ASSAULT WHILE ARMED. A person who unlawfully assaults or threatens another in a menacing manner, or unlawfully strikes or wounds another, having at the time in his possession a dangerous weapon, with intent to prevent the other person from resisting or defending himself, is punishable by imprisonment for not more than 10 years nor less than one year, or by a fine of not more than $1,000 nor less than $100, or by both.

Sec. 11.15.200. CARELESS USE OF FIREARMS. (a) A person who intentionally, and without malice, points or aims a firearm at or toward a person, or discharges a firearm so pointed or aimed at a person, or points and discharges a firearm at or toward a person or object without knowing the identity of the object and maims or injures a human being, is guilty of the careless use of firearms, and upon conviction is punishable by a fine of not more than $1,000, or imprisonment for not more than one year, or by both. It an offense specified in this section was committed by a person licensed to hunt and

was committed while he was hunting, upon conviction, the court shall, in addition to the penalty imposed in this section, revoke the person's hunting license. A person whose license has been revoked may not purchase another hunting license of any class for a period of not less than one year nor more than 10 years from the date of revocation as determined by the court. If an offense specified in this section was committed by a person not licensed to hunt and was committed while he was hunting, the court shall, in addition to the penalty imposed in this section, prohibit the person from purchasing any class hunting license for a period of not less than one year nor more than 10 years as determined by the court.

(b) If death ensues from the maiming or injuring, the person discharging the firearm may, in the discretion of the prosecuting officer or grand jury, be charged with the crime of manslaughter.

(c) This section does not apply to a case where firearms are used in self-defense or in the discharge of official duty, or in case of a justifiable homicide.

Sec. 11.15.210. POISONING. A person who administers poison to a person, with intent to kill or injure him, or mingles poison with food, drink, or medicine, with intent to kill or injure a human being, or wilfully poisons a well, spring, cistern, or reservoir of water, is punishable by imprisonment in the penitentiary for not more than 15 years nor less than two years.

Sec. 11.15.220. ASSAULT WITH DANGEROUS WEAPON. A person armed with a dangerous weapon, who assaults another with the weapon, is punishable by imprisonment for not more than 10 years nor less than six months, or by a fine of not more than $1,000 nor less than $100, or by both.

Sec. 11.15.225. AGGRAVATED ASSAULT. A person who unlawfully assaults another, or who unlawfully strikes or wounds another, and causes great bodily injury, is guilty of aggravated assault. Upon conviction, a person guilty of aggravated assault is punishable by imprisonment for not less than six months nor more than five years, or by a fine of not less than $100 nor more than $1,000, or by both.

(b) Under this section, "great bodily injury" means bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of any body member or organ.

Sec. 11.15.230. ASSAULT AND ASSAULT AND BATTERY. A person who unlawfully assaults or threatens another in a menacing manner, or unlawfully strikes or wounds another, is punishable by a fine of not more than $500, or by imprisonment for not more than six months, or by both.

Sec. 11.15.295. USE OF FIREARMS DURING THE COMMISSION OF CERTAIN CRIMES. A person who uses or carries a firearm during the commission of a robbery, assault, murder, rape, burglary, or kidnapping is guilty of a felony and upon conviction for a first offense is punishable by imprisonment for not less than 10 years. Upon conviction for a second or subsequent offense in violation of this section, the offender shall be imprisoned for not less than 25 years.

Sec. 11.15.260. KIDNAPPING. A person who knowlingly and without lawful reason kidnaps, abducts or carries away and holds for ransom, reward or other unlawful reason another person, except in the case of a minor by his parent, is punishable by imprisonment for a term of years or for life.

Sec. 11.15.270. CONSPIRACY TO KIDNAP. If two or more persons conspire to violate § 260 of this chapter and one or more of them does any overt act to effect the object of the conspiracy, each is punishable by imprisonment for a term of years or for life.

Sec. 11.15.280. RECEIVING, POSSESSING, OR DISPOSING OF RANSOM. A person who receives, possesses, or disposes of money or other property or a portion of it which at any time has been delivered as ransom or reward in connection with a kidnapping under § 260 of this chapter, knowing it to be money or property delivered as ransom or reward, is punishable by a fine of not more than $10,000, or by imprisonment for not less than one year nor more than 10 years, or by both.

Sec. 11.15.290. CHILD STEALING. A person who maliciously, forcibly or fraudulently takes or entices away a child under the age of 12 years, in a manner other than as provided in § 260 of this chapter, with intent to detain and conceals the child from its parent, guardian, or other person having the lawful charge of the child, is punishable by imprisonment in the penitentiary for not more than 10 years not less than six months, or by imprisonment in jail for not more than one year, or by a fine of not more than $500, or by both.

Sec. 11.15.300. BLACKMAIL. A person who, either verbally or by written or printed communication, (1) threatens injury to the person or property of another or to the person and property of a person standing in the relation of parent or child, husband or wife, or sister or brother to such other; or (2) threatens to accuse another of a crime, or of immoral conduct which, if true, would tend to degrade and disgrace him or to expose or publish any of his infirmities or failings; or (3) threatens in any

way to subject him to the ridicule or contempt of society, with intent to extort pecuniary advantage or property from him, or with intent to compel him to do an act against his will, is punishable by imprisonment in the penitentiary for not more than five years nor less than six months, or by imprisonment in a jail for not more than one year nor less than three months.

Sec. 11.20.345. EXTORTION. (a) A person is guilty of extortion if he obtains the property of a person by threatening to or suggesting that he or another may

(1) inflict bodily injury on anyone, except under circumstances constituting robbery, or commit any other criminal offense;

(2) accuse anyone of a criminal offense;

(3) expose confidential information or a secret, whether true or false, tending to subject a person to hatred, contempt or ridicule, or to impair his credit or business repute;

(4) take or withhold action as a public official, or cause a public official to take or withhold action;

(5) bring about or continue a strike, boycott or other collective unofficial action, if the property is not demanded or received for the benefit of the group in whose interest the person making the threat or suggestion purports to act;

(6) testify or provide information or withhold testimony or information with respect to a person's legal claim or defense; or

(7) inflict any other harm which would not benefit the person making the threat or suggestion.

(b) A person who is convicted of extortion is punishable by a fine of not more than $5,000, or by imprisonment for not more than five years, or by both.

(c) A threat or suggestion to perform any of the acts described in (a) of this section includes an offer to protect another from any harmful act when the offeror has no apparent means to provide the protection or where the price asked for rendering the protection service is grossly disproportionate to its cost to the offeror.

(d) It is a defense to prosecution based on (a) (2), (3) or (4) of this section that the property obtained by threat of accusation, exposure, lawsuit or other invocation of official action was honestly claimed as restitution or indemnification for harm done in the circumstances to which the accusation, exposure, lawsuit or other official action relates, or as compensation for property or lawful services.

ARTICLE 4 - SEXUAL OFFENSES

Sec. 11.15.120. RAPE. (a) A person who (1) has carnal knowledge of another person, forcibly and against the will of the other person, or (2) being 16 years of age or older, carnally knows and abuses a person under 16 years of age, is guilty of rape.

(b) A person who assists another to force or compel a third person to engage in a sexual act without consent is considered an accomplice to rape, irrespective of the legal status of that person with respect to the person forced or compelled to engage in a sexual act against his will.

(c) For purposes of this section, the terms "carnal knowledge" and "sexual act" include sexual, oral and anal intercourse, with some penetration, however slight.

Sec. 11.15.130. PUNISHMENT FOR RAPE. (a) A person 19 years of age or older convicted of rape upon his daughter, son, sister or brother, or upon a person under 16 years of age, is punishable by imprisonment in the penitentiary for any term of years.

(b) A person less than 19 years of age convicted for rape upon his daughter, son, sister or brother, or a person under 16 years of age, is punishable by imprisonment in the penitentiary for not more than 20 years.

(c) A person convicted of rape upon any other person is punishable by imprisonment in the penitentiary for not more than 20 years nor less than one year.

Sec. 11.15.134. LEWD OR LASCIVIOUS ACTS TOWARD CHILDREN. (a) A person who commits a lewd or lascivious act, including an act constituting another crime, upon or with the body of a child under 16 years of age, intending to arouse, appeal to, or gratify his lust, passions, or sexual desires, or the lust, passions, or sexual desires of the child is punishable by imprisonment for not more than 10 years nor less than one year.

Sec. 11.15.160. ASSAULT WITH INTENT TO KILL OR COMMIT RAPE OR ROBBERY. A person who assaults another with intent to kill, or to commit rape or robbery upon the person assaulted, is punishable by imprisonment in the penitentiary for not more than 15 years nor less than one year.

Sec. 11.15.230. ASSAULT AND ASSAULT AND BATTERY. A person who unlawfully assaults or threatens another in a menacing manner, or unlawfully strikes or wounds another, is punishable by a fine of not more than $500, or by imprisonment for not more than six months, or by both.

Sec. 11.40.010. ADULTERY. A married person who voluntarily has sexual intercourse with a person other than the offender's husband or wife is guilty of adultery, and is punishable by a fine of not more than $200, or by imprisonment in a jail for not more than three months.

Sec. 11.40.040. COHABITING IN STATE OF ADULTERY OR FORNICATION. A person who cohabits with another in a state of adultery or fornication is punishable by a fine of not more than $500, or by imprisonment in the penitentiary for not less than one year nor more than two years or by both.

Sec. 11.40.080. INDECENT EXPOSURE AND EXHIBITION. A person who wilfully and lewdly exposes his person or the private parts of his person in a public place, or in a place where there are present other persons to be offended or annoyed, or who takes part in a model artist exhibition, or makes other exhibition of himself to public view, or to the view of a number of persons, which is offensive to decency, or which is adapted to excite vicious or lewd thoughts or acts, upon conviction, is punishable by imprisonment in a jail for not less than three months nor more than one year, or by a fine of not less than $50 nor more than $500.

Sec. 11.40.110. INCEST. A person related to another person within and not including the fourth degree of consanguinity, computed according to the rules of the civil law, who marries or cohabits with or has sexual intercourse with that person, knowing him to be within that degree of relationship, is guilty of incest, and upon conviction is punishable by imprisonment in the penitentiary for not less than three years nor more than 15 years.

Sec. 11.40.120. SODOMY. A person who commits sodomy is, upon conviction, punishable by imprisonment for not less than one year nor more than 10 years.

STATUS OF CRIMINAL CODE REVISION IN OTHER STATES

I. REVISED CODES: EFFECTIVE DATES: (29)

ARK. STAT. ANN., TIT.41 (1975); 1/1/1976.
COLO. REV. STAT. ANN., TIT. 18 (1973); 7/1/1972.
CONN. GEN. STAT. ANN., TIT. 53a (1972); 10/1/1971.
DEL. CODE ANN.,TIT. 11 (1975); 7/1/1973.
FLA. STAT. ANN., TIT. 44 (1975 Cum. Ann. Pocket Part); 7/1/1975.
GA. CODE ANN., TIT. 26 (1972); 7/1/1969.
HAWAII REV. STAT., TIT. 37; HAWAII SESS. LAWS 1972 ACTS 9 & 102; 1/1/1973.
ILL. ANN. STAT., CH. 38, § 1-1 (Smith-Hurd 1972); 1/1/1962.
ILL. UNIFIED CODE OF CORRECTIONS, ILL. ANN. STAT., CH. 38, § 1001-1-1 (Smith-Hurd 1973); 1/1/1973.
IND. P.L. 148, ACTS OF 1976 (to be codified as IND. CODE, TIT. 35); 7/1/1977.
KAN. STAT. ANN., CH. 21 (1974); 7/1/1970.
KY. REV. STAT., CH. 500 (1975); 1/1/1975.
LA. REV. STAT. ANN., TIT. 14 (West 1974); 1942.
ME. REV. STAT. ANN., TIT. 17-A (Special Pamphlet: Criminal Code, 1975); Amended 4/9/1976 (P.L., CH. 740 [1976]); 5/1/1976.
MINN. STAT. ANN., CH. 609 (1964); 9/1/1963.
MONT. REV. CODES ANN., TIT. 94 (1976 Special Pamphlet); 1/1/1974.
N.H. REV. STAT. ANN., TIT. 62 (1974); 11/1/1973.
N.M. STAT. ANN., CH. 40A (1972); 7/1/1963.
N.Y. PENAL LAW (McKinney 1975); 9/1/1967.
N.D. CENT. CODE, TIT. 12.1 (Special Pamphlet: Criminal Code, 1975); 7/1/1975.
OHIO REV. CODE, TIT. 29 (1974 Replacement Unit); 1/1/1974.
ORE. REV. STAT., TIT. 16 (1973 Replacement Part); 1/1/1972.
PA. STAT. ANN., TIT. 18 (1973); 6/6/1973.
P.R. PENAL CODE, ACT 115 OF JULY 22, 1974; 1/22/1975.
S.D. (S.B. 29, enacted 2/26/1976, to be codified as S.D.C.L., TIT. 22); 4/1/1977.
TEX. PENAL CODE (1974); 1/1/1974.
UTAH CODE ANN., TIT. 76 (Supp. 1975); 7/1/1973.
VA. CODE ANN., TIT. 18.2 (1975); 10/1/1975.
WASH. REV. CODE, § 9A.04.010 (Special Pamphlet: Criminal Code, 1975); 7/1/1976.
WIS. STAT. ANN., TIT. 45 (1958); 7/1/1956.

II. CURRENT SUBSTANTIVE PENAL CODE REVISION PROJECTS:

A. REVISION COMPLETED: NOT YET ENACTED: (13)

Alabama (Hearings on bill introduced May 1975 held during year by Joint Committee of Legislature; bill to be reintroduced May 1976)
Arizona (1975 Final Draft of Revised Criminal Code assigned to Special Committees of Legislature for study)
California (Proposed Criminal Code, S.B. 565, pending in Legislature)
Iowa (S.F. 85 passed by Senate in 1975 as amended; passed by House 4/22/1976 with further amendment; currently before Senate)
Maryland (Proposed Code being studied by Special Committee of Legislative Council)
Michigan (Criminal Code Committee has reconvened to bring 1967 Michigan Proposed Code up to date for resubmission to Legislature)
Missouri (Proposed Criminal Code reintroduced [S.B. 735] in Senate 1976; no action at this session)
Nebraska (Leg. Bill 623, introduced Jan. 1976 by Judiciary Committee, to be reintroduced in 1977 Legislature)
New Jersey (Proposed Penal Code reintroduced [Assembly Bill 642] 2/19/1976 pending in Assembly Committee on Judiciary)
Oklahoma (S.B. 46 in Senate Committee on Criminal Jurisprudence)
South Carolina (S.B. 208, introduced 2/11/1975, pending in Senate Judiciary Committee)
Tennessee (S.B. 600 pending in 1976 legislative session but not enacted)
United States (S. 1 amended and reported to full Committee on the Judiciary 10/21/1975) (H.R. 333, introduced 1/15/1975, H.R. 3907, introduced 2/27/1975, H.R. 18050, introduced 11/20/1975 & H.R. 12504, introduced 3/15/1976, pending before Judiciary Subcommittee on Criminal Justice)

B. REVISION WELL UNDER WAY: (2)

North Carolina, West Virginia

C. REVISION AT VARYING PRELIMINARY STAGES (1)

District of Columbia

D. CONTEMPLATING REVISIONS: (1)

Rhode Island

This compilation was prepared by the American Law Institute in April 1976.

APPENDIX V.

INDEX TO COMMENTARY ON TENTATIVE DRAFT

INDEX TO COMMENTARY ON TENTATIVE DRAFT (continued) Page