February 1977

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

Alaska Criminal Code Revision Subcommission

Suggested citation

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

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 2, is comprised of seven articles of the draft Revised Criminal Code: general principles of criminal liability; parties to crime; justification; attempt and related offenses (part 1); robbery; bribery and related offenses; and perjury and related 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 derivations of each provision of the Code; existing law that the Code will revise; 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 This resulted in a criminal code containing outdated statutes, obsolete terminology, a number of overly specific statutes, a haphazard approach to *mens rea* (the culpable mental state with which a defendant must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)

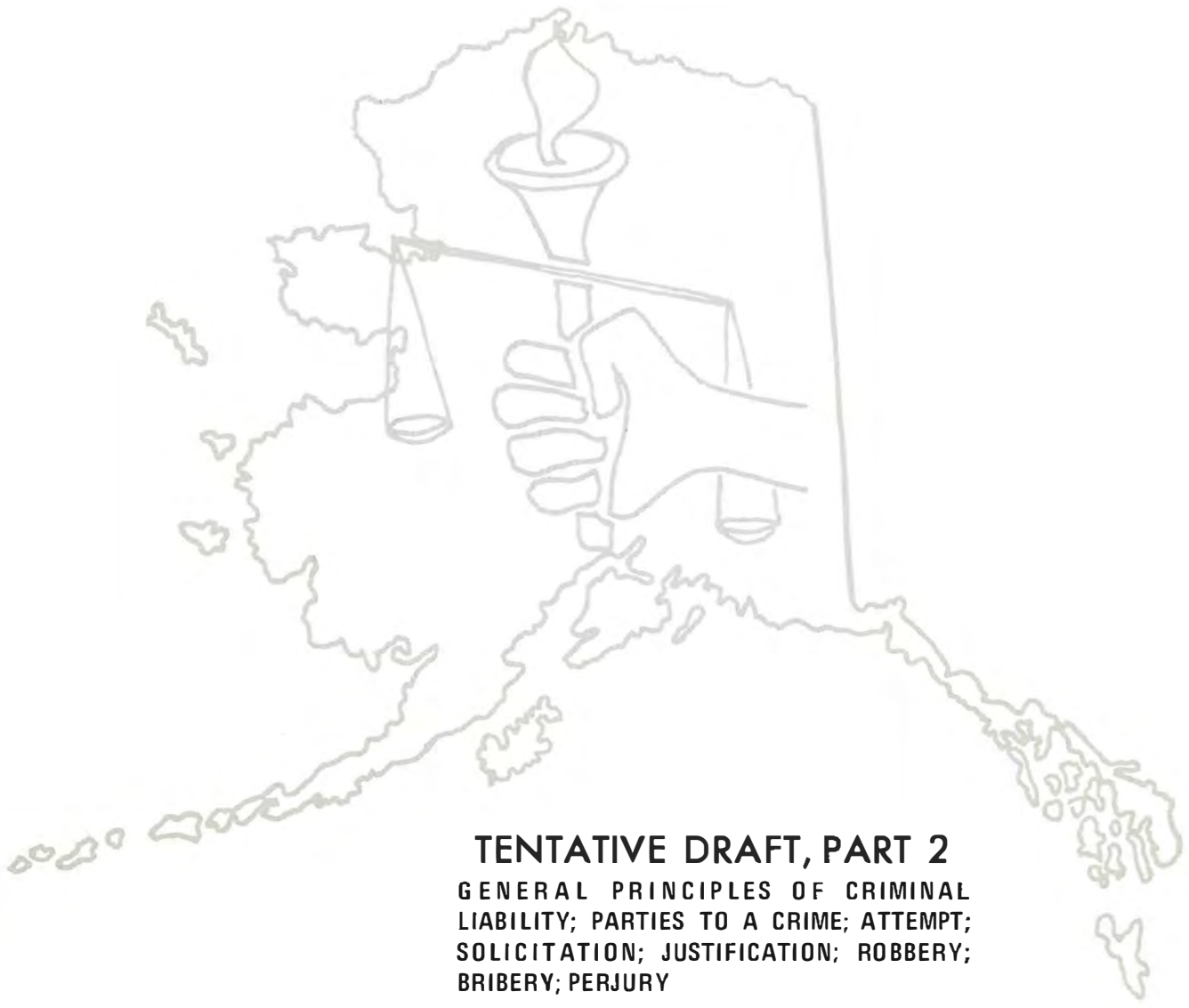
Commentary on the Alaska Revised Criminal Code (Ch. 166, SLA 1978) and Errata to the Commentary (1978)

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 2

GENERAL PRINCIPLES OF CRIMINAL LIABILITY; PARTIES TO A CRIME; ATTEMPT; SOLICITATION; JUSTIFICATION; ROBBERY; BRIBERY; PERJURY

CRIMINAL CODE REVISION SUBCOMMISSION
HONORABLE TERRY GARDINER, CHAIRMAN
FEBRUARY 1977

ALASKA REVISED CRIMINAL CODE

Tentative Draft, Part 2

February, 1977

Honorable Terry Gardiner
Chairman

TABLE OF CONTENTS

INTRODUCTION TO TENTATIVE DRAFT, PART 2

Tentative Draft, Part 2, is comprised of seven articles of the Revised Criminal Code - general principles of criminal liability, parties to crime, justification, attempt and related offenses, robbery, bribery and related offenses and perjury and related offenses.

Tentative Draft, Part 1, was distributed in early February and was 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.

Tentative Draft, Part 3, will be distributed in mid-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.

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

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

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

Finally, Apendix III 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 11. GENERAL PRINCIPLES OF CRIMINAL LIABILITY

SECTION

Sec. 11.11.100. GENERAL REQUIREMENTS OF CULPABILITY. (a) The minimal requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform an act which he is capable of performing.

(b) A person is not guilty of an offense unless he acts with a culpable mental state with respect to each element of the offense that necessarily requires a culpable mental state, except that

(1) no culpable mental state must be proved with respect to any element of an offense if the description of the offense does not specify a culpable mental state and the offense is

(A) a violation;

(B) designated as one of "strict liability";

(2) no culpable mental state must be proved with respect to a particular element of the offense if an intent to dispense with the culpable mental state requirement for that element clearly appears.

Sec. 11.11.110. CONSTRUCTION OF STATUTES WITH RESPECT TO CULPABILITY. (a) When the commission of an offense, or some element of an offense, requires a particular culpable mental state, the mental state is ordinarily designated in the statute defining the offense by use of the terms "intentionally", "knowingly", "recklessly" or "criminal negligence", or by use of terms such as "with intent to defraud" and "knowing it to be false", describing a specific kind of intent or know-

ledge. When only one such term appears in a statute defining an offense, it is presumed to apply to every element of the offense unless an intent to limit its application clearly appears.

(b) Except as provided in sec. 100(b) of this chapter, if a statute defining an offense does not prescribe a culpable mental state, culpability is nonetheless required and is established only if a person acts intentionally, knowingly or recklessly.

(c) When a statute provides that criminal negligence suffices to establish an element of an offense, that element is also established if a person acts intentionally, knowingly or recklessly. If acting recklessly suffices to establish an element, that element also is established if a person acts intentionally or knowingly. If acting knowingly suffices to establish an element, that element is also established if a person acts intentionally.

Sec. 11.11.120. EFFECT OF IGNORANCE OR MISTAKE UPON LIABILITY. (a) Knowledge that conduct constitutes an offense, or knowledge of the existence, meaning or application of the statute defining an offense, is not an element of an offense unless the statute clearly so provides.

(b) A person is not relieved of criminal liability for conduct because he engages in the conduct under a mistaken belief of fact, unless

(1) the factual mistake negates the culpable mental state required for the commission of an offense;

(2) the statute defining the offense or a related statute expressly provides that the factual mistake constitutes a defense or exemption; or

(3) the factual mistake is of a kind that supports a defense of justification as provided in ch. 21 of this title.

Sec. 11.11.130. INTOXICATION OR DRUG USE AS DEFENSE. (a) Volun-

tary intoxication or drug use does not, as such, constitute a defense to a criminal charge, but in a prosecution for an offense, evidence that the defendant used drugs or was intoxicated may be offered whenever it is relevant to negate an element of the crime that requires a culpable mental state.

(b) When recklessness establishes an element of the offense, if the defendant, due to voluntary intoxication or drug use, is unaware of a risk of which he would have been aware had he not been intoxicated or not using drugs, that unawareness is immaterial.

Sec. 11.11.140. DEFINITIONS. (a) 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 the 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.

(b) In this title,

(1) "act" means a bodily movement;

(2) "conduct" means an act or omission and its accompanying mental state;

(3) "culpable mental state" means "intentionally," "knowingly," "recklessly," or with "criminal negligence" as those terms are defined in (a) of this section;

(4) "omission" means a failure to perform an act for which a duty of performance is imposed by law;

(5) "to act" means either to perform an act or to omit to perform an act;

(6) "voluntary act" means a bodily movement performed consciously as a result of effort and determination, and includes the possession of property if the actor was aware of his physical possession or control for a sufficient period to have been able to terminate it.

ALASKA REVISED CRIMINAL CODE

CHAPTER 11. GENERAL PRINCIPLES OF CRIMINAL LIABILITY

COMMENTARY

The Effect of the Revised Code Provisions on the Existing Law of General Principles of Criminal Liability

In defining the four culpable mental states used throughout the Revised Code and in providing specific rules of construction, the General Principles of Criminal Liability Chapter:

1. Eliminates the unnecessary ambiguity in the current description of offenses caused by the haphazard approach of existing law to the critically important concept of mens rea.
2. Provides that at least one of the four culpable mental states will be applicable to each offense in the Revised Code, whether by an explicit listing or through a rule of construction. Currently, at least twenty undefined terms are used without any consistency in the existing statutes. The use of the four culpable mental states throughout the Revised Code will promote clarity and uniformity in the giving of jury instructions and in the interpretation of individual sections.
3. Creates a structure for the classification of offenses according to degrees of blameworthiness. The culpable mental states of intentional, knowing, reckless and criminal negligence provide a four-tiered framework of culpable mental states which clearly establishes levels of blameworthiness.

INTRODUCTION. USE OF MENS REA TERMS IN CURRENT ALASKA STATUTES.

One of the primary goals of the Revised Code is the elimination of unnecessary ambiguity in the current descriptions of many offenses. A primary source of that ambiguity lies in the current law's rather haphazard approach to the definition of mens rea -- the culpable mental state with which a defendant must perform an act before he can be convicted of a crime. As an example of mens rea, under existing law a defendant is guilty of first degree arson only if he starts a fire "wilfully and maliciously."

The area of culpable mental states is of critical importance in the criminal law as the Alaska Supreme Court has held that, except for a limited number of crimes, a defendant may not be convicted under a statute that fails to require that he act with a culpable mental state. See, Speidel v. State, 460 P.2d 77 (AK 1969) and State v. Campbell, 536 P.2d 105 (AK 1975).

Despite the importance of mens rea in the criminal law, many existing statutes make no mention of this factor.[1/]

[1/] For example, existing AS 33.30.055 makes it a crime for a person to introduce, or take or send from a state prison or state correctional facility, a contraband article enumerated in a rule or regulation promulgated by the Commissioner of Health and Social Services. No mention is made as to whether the actor must intend to introduce or take away the contraband article or even know whether it is included within the class of articles determined to be "contraband" by the Commissioner. Other provisions refer to the mental element at one point and not at another. For example, AS 11.30.250 prohibits an officer in custody from "wilfully" destroying, mutilating, defacing, secreting, falsifying, etc., a public document in the officer's custody but later merely refers to an officer who "permits" another to do so.

In some cases such omissions are designed to create strict liability offenses, but in many others, it may be a product of oversight. The difficulty is that one cannot always be sure in which category a specific provision should fall.

Consider, for example, the current statute making it a misdemeanor for a person to misuse, damage or destroy a "camp" not his own which is capable of use for protection of life or property.[2/] It is possible that this law is aimed at those persons who realize or should reasonably realize that the "camp" is capable of use for protection of life or property and is an "improved site". On the other hand, the absence of any reference to a requisite mental element may indicate a legislative intent to impose a strict duty to preserve any "improved site" regardless of knowledge that it in fact is an "improved site." Similar provisions in other areas often specify that the person act "wilfully or maliciously", "maliciously or wantonly", or simply "wilfully" in their abuse of another's property.[3/] Yet others do not -- whether by reason or inadvertence again is unclear.

The absence of any reference to mens rea creates problems of interpretation even when the statute involved is clearly not intended to impose strict liability. Consider, for example, a provision prohibiting the aiding or assisting

---

2/ See, AS 11.20.670 and AS 11.20.690 (the latter defines "camp" as improved site intended for habitation or use during any part of the year).

3/ See, AS 11.20.520; 11.20.525; 11.20.590; 11.20.610.

of a prisoner's escape or attempt to escape by "any means."[4/] The basic nature of this offense indicates that some culpable mental state is required, but at exactly what level is uncertain. Must the actor intend to rescue, aid or assist the prisoner or is reckless disregard of the risk that his conduct will aid an escape sufficient? Must he have knowledge that the person he is aiding is in fact a prisoner or is recklessness in this regard sufficient also? Of course, analogous statutes or common logic may provide satisfactory answers[5/] but the legislature's oversight in failing to specify the requisite mens rea leaves the issue sufficiently open to foster needless litigation.

Unfortunately, the difficulties involved in defining mens rea have hardly been reduced by most legislative attempts to specifically describe the required mental element. The terms most frequently used in the current statutes to describe mens rea are "wilfully," "knowingly," "intentionally" (or "with intent to. . .") and "maliciously."[6/] Apparently, none has a "set" definition. What each term requires seems to

---

4/ See, AS 11.30.080.

5/ See, AS 11.30.120; 11.30.150; 11.30.170; 11.30.080. (These statutes deal with escape wherein the third party individual or official need act "voluntarily or through negligence", "with intent to effect or aid the escape," or "wilfully and wrongfully" in assisting or causing an escape.)

6/ See the various provisions in the following chapters of the current Alaska Criminal Code: Chap. 20 (malicious mischief and trespass); Chap. 40 (crimes against public morality and decency); Chap. 25 (forgery and counterfeiting).

depend primarily on the specific statutory context in which it arises, with very few guidelines for separating one context from another.

The use of mens rea terms is even more confusing where the terms have been used in combination. Closely related provisions in existing law will use the terms conjunctively and sometimes alternatively without suggesting any rational patterns for the variation. For example, statutes prohibiting the falsification or destruction of corporate or company records require wilful and knowing conduct. Another similar statute prohibiting the making or altering of receipts in a warehouse (similar to the above example in that both involve tampering with business documents) punishes those acts only when they are done wilfully or knowingly.[7/]

Legislative efforts to describe the requisite culpable mental state in crimes relating to the breaking or destroying of property provide a vivid illustration of the confusion surrounding mens rea usage in Alaska's criminal statutes. For example, cemeteries, public highways and facilities may not be destroyed or injured "wilfully"; a tenant may not destroy his landlord's property "maliciously or wantonly", while an arsonist may not act "wilfully and maliciously".[8/]

[7/] See, AS 11.20.430; 11.20.440 and 11.25.070.

[8/] See, AS 11.20.590; 11.40.460 and 11.20.010.

SECTION ANALYSIS OF REVISED CODE

I. TD AS 11.11.140. DEFINITIONS.

Subsections (b)(1)-(6) define terms which are used primarily in TD AS 11.11.100.

In subsection (1), "act" is defined as a bodily movement. Subsection (6) defines "voluntary act" as a bodily movement done consciously as a result of effort and determination. Possession is a voluntary act if the possessor knew he had physical control for a sufficient period of time to have been able to terminate his possession. Subsections (2), (4) and (5) stress that omissions to act are included in the concept of conduct, but they must involve a failure to perform a duty required by law.

Subsection (3) lists the four culpable mental states which apply throughout the Revised Code.

Subsections (a)(1)-(4) change Alaska law concerning what constitutes mens rea by defining precisely the kinds of culpable mental states that may be made elements of criminal offenses. Whether the four terms change the mens rea content of a particular crime from existing law can only be determined by looking at the particular section of the Revised Code to see what term is used, and by comparing that section with the existing statute and case law.

The confusion attending this area can best be illustrated by a partial list of the wide variety of culpable mental states now found within the existing criminal statutes:

1. Knowingly - used in 18 statutes
2. Wilfully - used in 24 statutes
3. Wilfully and knowingly - used in 8 statutes
4. Wilfully or knowingly - used in 1 statute
5. Wilfully or negligently - used in 1 statute
6. Wilfully and maliciously - used in 8 statutes
7. Wilfully and deliberately - used in 1 statute
8. Maliciously - used in 4 statutes
9. Maliciously or wantonly - used in 2 statutes
10. Purposely and deliberately - used in 1 statute
11. Purposely and maliciously - used in 1 statute
12. Purposely - used in 1 statute
13. Knowingly or recklessly - used in 1 statute
14. Intentionally - used in 4 statutes
15. Surreptitiously - used in 1 statute
16. Negligently or recklessly - used in 1 statute
17. Wilfully and lewdly - used in 1 statute
18. Wilfully and wrongfully - used in 2 statutes
19. Corruptly - used in 3 statutes
20. Unlawfully - used in 2 statutes

The present proliferation of culpable mental states in existing law frustrates one of the principal purposes of the mens rea concept, that of providing a structure for the classification of offenses according to their degree of blameworthiness. The Revised Code solves this problem by providing a four-tiered framework of culpable mental states which clearly establishes levels of blameworthiness.

The culpable mental states defined in subsections (a)(1)-(4) apply throughout the Revised Code. The exclusive use of these terms promotes clarity and uniformity in giving jury instructions and in interpreting the meaning of individual sections.

As an aid to analysis, the Revised Code follows the practice of other criminal code revisions in distinguishing three separate types of elements of offenses to which the culpable mental states apply:

1. the nature of the conduct; and
2. the circumstances surrounding the conduct; and
3. the result of the conduct.

The first type of element, conduct, involves the nature of the proscribed act or the manner in which the defendant acts. Unlawful imprisonment, for example, involves the restraint of another. The conduct involved is the restraint. Intentionally and knowingly are the two culpable mental states associated with conduct.

The second type of element, the circumstances surrounding the conduct, refers to a situation having a bearing on the actor's culpability. Unlawful imprisonment requires that the restraint be without the victim's consent. The lack of consent is an example of a circumstance surrounding the actor's conduct, and is an element of the crime. Knowingly, recklessly and criminally negligent are the culpable mental states associated with circumstances.

The third type of element is the result of the actor's conduct. Unlawful imprisonment may be aggravated if the actor exposes the victim to a risk of serious physical injury. The result of the actor's conduct therefore involves an alteration in the status of the victim. Intentionally, recklessly and criminally negligent are the culpable mental states associated with results.

TD AS 11.11.140(a)(1) and (a)(2) Intentionally and Knowingly

When a statute in the Revised Code provides that a defendant must "intentionally" engage in conduct or cause a result, the state must prove that it was the defendant's "conscious objective to cause that result or to engage in that conduct." Second Degree Assault, for example, requires that the defendant "intentionally" cause the result of physical injury. TD AS 11.41.210(a)(2). The state therefore must prove that it was the conscious objective of the defendant to cause physical injury. Indecent Exposure, however, requires that the defendant "intentionally" engage in the conduct of "exposing" the specified parts of his body. TD AS 11.41.450. In such a case the prosecution must prove that it was the defendant's conscious objective to expose certain parts of his body.

Knowledge, on the other hand, requires an awareness on the part of the defendant that his conduct is of the nature described by the statute defining the offense or that the circumstances described by the statute exist. For example,

unlawful imprisonment occurs when the defendant knowingly "restrains" another. TD AS 11.41.170, 11.11.110(b). The prosecution must therefore prove that the defendant restrained the victim being aware that his conduct was restraining the victim. It would be irrelevant that the defendant's conscious objective was to restrain his daughter who happened to be in the same room.

The Revised Code covers the situation where a person deliberately avoids acquiring knowledge by closing his eyes (sometimes known as "wilful blindness") within the definition of "knowing" by providing that "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." This formulation is based on a current jury instruction of "knowing" which in part provides that "no person can intentionally avoid knowledge by closing his eyes to facts which should promote him to investigate." State v. Elliot #76-4218 (Superior Court, 3d Jud. Dist., 1976).

The great majority of statutes in the Revised Code use "knowingly" as the culpable mental state with respect to conduct. However, if a statute requires that the defendant act "knowingly", the state may nevertheless prove its case by establishing that the conduct was engaged in "intentionally" by virtue of the rule of construction set forth

in TD AS 11.11.110(c). Furthermore, if no mental state appears in the statute, the conduct must be engaged in "knowingly" by virtue of the rule of construction in TD AS 11.11.110(b).

"Intentionally" does not serve as a culpable mental state for an element of an offense which is a circumstance surrounding conduct. Under the Revised Code, a person does not "intend" circumstances; he "knows" of their existence.

"Knowingly" may not serve as a culpable mental state for an element of an offense which is a result; a person "intends" a result. Although one can "know" that a result is practically certain to occur, "intentionally" more properly connotes the active purposeful state of mind with which a result is achieved.

In summary, an actor "intends" a result; he "knows" that a circumstance exists. Conduct can be performed either "knowingly" or "intentionally" but is virtually always required to be "knowing" under the Revised Code.

TD AS 11.15.140(3) and (4) Recklessness and Criminal Negligence

The common denominators of the terms "recklessness" and "criminal negligence" are that the underlying conduct must, in each instance, involve (1) "a substantial and unjustifiable risk" that some result will occur or that circumstances exist, and (2) disregard of that risk constituting a "gross deviation" from a normal standard of care, but not the "mere inadvertence or simple neglect" criticized as a basis for liability in

Alex v. State, 484 P.2d 677, 681 (AK 1971) and Stork v. State, Sup. Ct. Op. No. 1365 (File No. 2708) (1977).

The reckless offender is aware of that risk and "consciously disregards" it. However, a person who is unaware of a risk because of voluntary intoxication or voluntary drug use also acts recklessly with respect to the risk. See also, discussion of TD AS 11.11.130(b), § V, infra. The criminally negligent offender, on the other hand, is not aware of the risk created and, hence, disregards it unconsciously. His liability stems from a culpable failure to perceive the risk. His culpability, though less than that of the reckless offender, is appreciably greater than that required for ordinary civil negligence by virtue of the "substantial and unjustifiable" character of the risk involved and the factor of "gross deviation" from the ordinary standard of care.

There is little discussion in Alaska case law of the standards of recklessness and criminal negligence, though AS 28.35.040 and .045 recognize the crimes of Reckless and Negligent Driving. In De Sacia v. State, 469 P.2d 369, 371 (AK 1970), a case involving a prosecution for manslaughter, the Supreme Court quoted with approval the following jury instructions on "culpable negligence":

> In Ins. No. 12, the court cautioned the jury that culpable negligence must be distinguished from ordinary negligence, and that in order to convict, the jury "must find beyond a reasonable doubt that the defendant's acts constituted culpable negligence, not ordinary negligence. . ." Finally, in Ins. No. 16, the court went to considerable length in defining culpable negligence:

> Culpable negligence is something more than that slight degree of negligence necessary to support a civil action for damages, and is negligence of such a degree, so gross and wanton, as to be deserving of punishment. Culpable negligence implies a reckless disregard of the consequences which might ensue from the doing of an act and constitutes conduct of such a reckless, gross and wanton character as to indicate an utter, heedless indifference to the rights, property, safety and even the lives of others.

The Revised Code's definitions of "criminal negligence" and "recklessness" are consistent with the "culpable negligence" instruction considered in De Sacia, supra, in that all three require that the defendant's culpability be greater than mere civil negligence. However, the Revised Code follows the lead of all recent revisions by scrapping the terms "wanton character" indicating an "utter, heedless indifference" and substituting the phrases "gross deviation" and "substantial and unjustifiable risk" in the definition of recklessness and criminal negligence.

II. TD AS 11.11.100. GENERAL REQUIREMENTS OF CULPABILITY

Subsection (a) states the basic proposition of criminal law that a person is not subject to criminal sanctions unless he has performed at least a voluntary act or omission.

Subsection (b) provides that a culpable mental state is required for each element of the offense "that necessarily requires a culpable mental state." The quoted phrase is designed to emphasize that the Revised Code does not require a culpable mental state with respect to an element of an offense

relating solely to the statute of limitations, jurisdiction, venue and the like. The effect of this provision is to eliminate all "strict liability" offenses from the Revised Code except as provided in subsections (b)(1) and (b)(2).

The rule that conduct unaccompanied by some form of culpable mental state is ordinarily insufficient to warrant the imposition of criminal penalties is well recognized in Alaska.

In both Speidel v. State, supra, and State v. Campbell, supra, the Supreme Court recognized the principle that "although an act may have been objectively wrongful, the mind and will of the doer of the act may have been innocent. In such a case the person cannot be punished for a crime. . . ." Speidel, supra, at 80. Further, in Campbell, at p. 112 the Court noted that recent Criminal Code Revisions (notably in Oregon) had "demonstrate[d] a uniform sensitivity on the part of legislatures. . . to the critical importance of incorporating the requisite criminal intent into newly created statutory offenses."

The effect of the failure to specify any requisite culpable mental state in many of the current Alaska criminal statutes which do not codify common law crimes was well demonstrated in Campbell. In that case, the Supreme Court held that a challenged statute was ". . . constitutionally defective and invalid because of its omission of the requirement of criminal intent." Campbell, supra, at 113.

Subsections (b)(1) and (b)(2) set forth the exceptions to the requirement of a culpable mental state. Subsection (b)(1)(A) provides that no culpable mental state is required for any element of an offense which is a violation (a noncriminal offense) unless a culpable mental state is expressly included in the definition of the offense.

Subsection (b)(1)(B) provides that no culpable mental state is required of any element of an offense if the statute is expressly designated as one of "strict liability." However, the legislature's power to create strict liability offenses is limited by Speidel, supra.

Subsection (b)(2) provides that a culpable mental state is not required for a particular element of an offense if "an intent to dispense with the culpable mental state requirement for that element clearly appears."

III. TD AS 11.11.110. CONSTRUCTION OF STATUTES WITH RESPECT TO CULPABILITY

This statute sets out three rules of construction to be used in determining what particular culpable mental state is required for each element of an offense in the Revised Code.

Subsection (a) provides that when one and only one culpable mental state appears in a statute defining an offense, "it is presumed to apply to every element of the offense, unless an intent to limit its application clearly appears."

If a statute does not mention any culpable mental state, recklessness or a higher culpable mental state is required for each element of the offense, subject to the exceptions set forth in 11.11.100(b). However, for criminal negligence to be sufficient as a mental state, it must be expressly included in the statute. It should be noted that, since "recklessness" does not apply to conduct, a defendant would have to perform conduct at least "knowingly" if no culpable mental state appears in the statute.

Subsection (c) states the uncontroversial principle that if culpability of a "higher" degree than the kind of culpability required is established, the requirement of culpability is satisfied.

IV. TD AS 11.11.120. EFFECT OF IGNORANCE OR MISTAKE UPON LIABILITY

Subsection (a) states the universal principle that, ordinarily, ignorance of the law is no defense. Hotch v. U.S., 212 F.2d 280 (9th Cir. 1954). This rule was acknowledged by the Alaska Supreme Court in Alex v. State, supra, at 681-682 as follows:

> What is essential is not an awareness that a given conduct is a "wrongdoing" in the sense that it is proscribed by law, but rather an awareness that one is committing the specific acts which are defined by law as "wrongdoing". It is, however, no defense that one was not aware his acts were wrong in the sense that they were proscribed by law.

Subsection (b) lists three situations in which a mistaken belief of fact precludes criminal liability.

Subsection (b)(1) precludes liability when a mistake of fact prevents the person from acting with the particular mental state necessary for the crime. For example, pursuant to TD AS 11.46.020, theft requires an "intent to deprive another of property." A person who accidentally picks up another's raincoat mistakenly believing it to be his own has not committed theft, because he has not acted with the required intent.

Subsection (b)(2) provides that mistake of fact is a defense to a crime whenever the statute defining the crime, or a related statute, clearly provides the defense. For example, it is a defense to theft that the defendant reasonably, though mistakenly, believed that he was entitled to the property. TD AS 11.46.040.

Subsection (3) recognizes that conduct is justified if the defendant reasonably believed circumstances existed which would have supported a defense of justification as provided by chapter 21, even though that assessment was based on a mistake of fact. See, Commentary to chapter 21, infra.

V. TD AS 11.11.130. INTOXICATION OR DRUG USE AS DEFENSE

This section restates in terms consistent with the Revised Code the rule, now contained in AS 11.70.030, that evidence of intoxication is relevant in determining whether

a defendant had a culpable mental state at the time of a criminal act.

One substantive change is made in the proposed section from the current statute. Presently, a drug use defense could not be raised unless the drug was used in violation of AS 17.10 or AS 17.12. The Subcommission concluded that the defense should not be limited in this manner. If the drug use negatives an element of the crime that requires a culpable mental state, the defense should be available regardless of the legality of the drug use. It should not be available only to illegal drug users.

Subsection (b) provides, in effect, that a defendant acts recklessly, although he is unaware of a risk, if his unawareness is the result of voluntary intoxication. The reckless offender is aware of and "consciously disregards" it. The criminally negligent offender is not aware of the risk created; therefore he cannot consciously disregard it. The New York commentary provides this illustration of how an offender can act with both forms of culpability:

> [T]he driver of a car. . .stops at a bar, drinks heavily, continues on his way and then runs over a pedestrian whom he fails to see in his intoxicated condition and whom he undoubtedly would have seen had he been sober. Here, his culpability goes well beyond his failure of perception at the time of the accident. By getting drunk in the course of his automobile trip, he consciously disregarded a substantial and unjustifiable risk of accident and, hence, in the overall setting, he acted "recklessly".

New York Penal Law § 15.05, Commentary at 31.

CHAPTER 16. PARTIES TO CRIME

SECTION

Sec. 11.16.100. LIABILITY BASED UPON CONDUCT. A person is guilty of an offense if it is committed by his own conduct or by the conduct of another person for which he is legally accountable, or by both.

Sec. 11.16.110. LIABILITY BASED UPON THE CONDUCT OF ANOTHER: COMPLICITY. A person is legally accountable for the conduct of another person constituting an offense if

(1) he is made legally accountable by a provision of law defining the offense; or

(2) with intent to promote or facilitate the commission of the offense

(A) he solicits or commands the other person to commit the offense;

(B) he aids or abets the other person in planning or committing the offense; or

(C) having a legal duty to prevent the commission of the offense, he fails to make an effort he is legally required to make.

Sec. 11.16.120. EXEMPTIONS TO CRIMINAL LIABILITY FOR CONDUCT OF ANOTHER. (a) Except as otherwise provided by a provision of law defining an offense, a person is not legally accountable for the conduct of another constituting an offense if

(1) he is the victim of that offense;

(2) the offense is so defined that his conduct is inevitably

incidental to its commission; or

(3) under circumstances manifesting a voluntary and complete renunciation of his criminal intent, he terminated his complicity before the commission of the offense and

(A) wholly deprived his complicity of its effectiveness in the commission of the offense; or

(B) gave timely warning to law enforcement authorities or otherwise made proper effort to prevent the commission of the offense.

(b) In a prosecution for an offense in which criminal liability is based upon the conduct of another person, it is not a defense that

(1) the other person has not been prosecuted for or convicted of an offense based upon the conduct in question or has been convicted of a different offense or degree of offense;

(2) the offense, as defined, can be committed only by a particular class or classes of persons to which the defendant does not belong, and he is for that reason legally incapable of committing the crime in an individual capacity; or

(3) the other person is not guilty of the offense because of

(A) lack of criminal responsibility or other legal incapacity or exception;

(B) unawareness of the criminal nature of the conduct in question or of the defendant's criminal purpose; or

(C) any other factor precluding the culpable mental state required for the commission of the offense.

(c) The defense provided by (a)(3) of this section is an affirmative defense. A renunciation under (a)(3) of this section is not "voluntary and complete" if it is motivated in whole or in part by

(1) a belief that circumstances exist which increase the

probability of detection or apprehension of the defendant or another participant in the criminal enterprise, or which render more difficult the accomplishment of the criminal purpose; or

(2) a decision to postpone the criminal conduct until another time or to transfer the criminal effort to another victim or another but similar objective.

Sec. 11.16.130. CRIMINAL LIABILITY OF ORGANIZATIONS. (a) An organization is guilty of an offense if

(1) the conduct constituting the offense is engaged in by an agent of the organization while acting within the scope of his employment or in behalf of the organization and the offense is a misdemeanor or a violation, or the offense is one defined by a statute that clearly indicates a legislative intent to impose criminal liability on an organization;

(2) the conduct constituting the offense consists of an omission to discharge a specific duty of affirmative performance imposed on the organization by law; or

(3) the conduct constituting the offense is knowingly engaged in, authorized, solicited, requested, commanded, ratified or tolerated by the board of directors of a corporation or by the executive board of other types of organizations or by a high managerial agent acting within the scope of his employment or in behalf of the organization.

(b) In this section

(1) "agent" means any director, officer or employee of an organization, or any other person who is authorized to act in behalf of the organization;

(2) "high managerial agent" means an officer of an organization who exercises authority with respect to the formulation of organizational policy, or a supervisor acting in the capacity of manager of

subordinate employees, or any other agent in a position of comparable authority.

Sec. 11.16.140. CRIMINAL LIABILITY OF AN INDIVIDUAL FOR ORGANIZATION CONDUCT. A person is criminally liable for conduct constituting an offense which he performs or causes to be performed in the name of or in behalf of an organization to the same extent as if that conduct were performed in his own name or behalf.

ALASKA REVISED CRIMINAL CODE

CHAPTER 16 - PARTIES TO A CRIME

COMMENTARY

The Effect of the Revised Code on the Existing Law of Parties to a Crime

In defining those circumstances in which a person or organization may be criminally liable for the conduct of another, Chapter 16 of the Revised Code:

1. Codifies the numerous Alaska Supreme Court decisions which determine when a person is legally accountable for the conduct of another. Existing statutes in this area are at such a high level of generality that they are difficult to apply to actual cases. As a result, numerous appeals have been required to clarify their application. The Revised Code codifies these holdings into a more accessible form.
2. Settles areas of silence in the existing law of parties to a crime, such as the defense of renunciation, by specifically recognizing or excluding various defenses which may or may not have been recognized at common law and which otherwise would require appeals for clarification.

SECTION ANALYSIS OF REVISED CODE

I. TD AS 11.16.100 - LIABILITY BASED UPON CONDUCT

TD AS 11.16.100 restates the basic principle that

criminal liability is based upon conduct. When criminal liability exists, it is immaterial whether the elements of the crime are satisfied by the defendant's own behavior, or by the behavior of another person for which he is accountable, or by both. Anthony v. State, 521 P.2d 486 (AK 1974). This treatment is consistent with existing AS 12.15.010, which abolishes the distinction between accessories before the fact and principals, but not accessories after the fact.

The subject of accessories after the fact is not covered in this chapter; such behavior amounts to an interference with the administration of justice and is dealt with in Chapter 56 of the Revised Code.

II. TD AS 11.16.110 - LIABILITY BASED UPON THE CONDUCT OF ANOTHER: COMPLICITY

There is no statute in existing law similar to TD AS 11.16.110 which sets forth the basis of legal accountability for the behavior of another. Nevertheless, a substantial number of cases have been decided in Alaska which have examined this subject. See, e.g., Evans v. State, 550 P.2d 830 (AK 1976); Daniels v. State, 527 P.2d 459 (AK 1974); Anthony v. State, supra. Relying substantially on these cases, TD AS 11.16.110 sets out the circumstances under which a person may be criminally liable for the conduct of another.

Subsection (1) recognizes that liability may be imposed on one person for the conduct of another in a specific

statute. For example, TD AS 11.16.130(a) provides that an organization (which is included in the definition of "person") is liable under certain circumstances for the acts of its agents.

Subsection (2) codifies the current case law that one is liable as a traditional "accomplice" only if he acts "with intent to promote or facilitate the commission of the offense". Tarneff v. State, 512 P.2d 923, 928 (AK 1973), citing Thomas v. State, 391 P.2d 18, 25 (AK 1964). Acting with that intent, the defendant must, under the Revised Code, either "solicit or command" the offense, "aid or abet" the offense or fail to make an effort to prevent the offense which he is legally required to make. These required acts are consistent with Alaska Supreme Court decisions which have held defendants to be accomplices when they solicit a crime, Anthony v. State, supra, or when they "aid, abet, assist or participate in the crime..." Galauska v. State, supra, at p. 468.

Under both the Revised Code and existing law, a person is liable as an accomplice only if some criminal act is committed. If a person does no more than solicit another to perform a criminal act, and conduct which would constitute a crime never occurs, he commits the crime of Solicitation, TD AS 11.31.110.

With regard to Subsection (B), the terms "aids" and "abets" have been included without definition since they have been interpreted in a number of cases. [See, Beavers v. State, 492 P.2d 88, 97 (AK 1971); Taylor v. State, 391 P.2d 950

(AK 1964); Mahle v. State, 371 P.2d 21, 25 (AK 1962); Daniels v. State, 383 P.2d 323, 324 (AK 1963), cert. denied 375 U.S. 979 (1964)].

Subsection (c) provides that liability is imposed on a person who has a legal duty to act but fails to do so. For example, at common law a person had a duty to protect his spouse if possible. Thus, a husband who stood by while another raped his wife was held guilty as an accomplice to the rape. People v. Chapman, 62 Mich. 280, 28 NW 896 (1836).

III. TD AS 11.16.120 - EXEMPTIONS TO CRIMINAL LIABILITY FOR CONDUCT OF ANOTHER

A. Subsection (a) Exemptions from Liability

Subsection (a) provides for exemptions to the general principals of TD AS 11.16.110. The first two exemptions are well recognized throughout the United States. The third deals with a situation on which there is a greater division of authority.

The first exemption, providing that the victim of an offense is not criminally liable as an "accomplice" appears in paragraph (1). This exemption was examined in the Commentary to the Oregon Revised Criminal Code.

> It seems clear that the victim of a crime should not be held as an accomplice in its perpetration, though his conduct in a sense assists in the commission of the crime. The businessman who yields to the extortion of a racketeer, the parent who pays ransom to the kidnapper, may be unwise or even may be thought immoral; [but] to view them as involved in the commission of the

> crime confounds the policy embodied in the prohibition; it is laid down, wholly or in part, for their protection.

ORS §161.165, Commentary at 14.

The justification for the exclusion in paragraph (2) of conduct which is inevitably incidental to the crime, is also well stated in the Oregon commentary:

> Exclusion of the victim does not wholly meet the problems that arise....Should the man who has intercourse with a prostitute be viewed as an accomplice in the act of prostitution, the purchaser an accomplice in the unlawful sale, the unmarried party to a bigamous marriage an accomplice of the bigamist, the bribe giver an accomplice of the taker?

ORS §161.165, Commentary at 14-15.

Of course, conduct which is "inevitably incidental" to the commission of an offense may itself be made a crime, e.g., AS 11.56.110, Bribery. Paragraph (2) merely provides that such conduct by itself does not automatically give rise to accomplice liability.

Paragraph (3) is based on the view that even though action sufficient for complicity may have occurred, the law should provide that liability may be averted if the reason for liability disappears before the crime has been committed. This defense is commonly referred to as "renunciation". Unlike the defenses provided in paragraphs (1) and (2), the defense of renunciation is an affirmative defense which the defendant must prove by a preponderance of the evidence.

Subsection (3)(A) provides that a "voluntary and complete" renunciation, as defined in subsection (c),

combined with steps which successfuly deprive one's complicity of all its effectiveness in the commission of the offense, removes liability. Of course, the action necessary to deprive one's conduct of effectiveness will vary with the accessorial behavior. For example, if the accomplice provides guns, a statement of withdrawal is not sufficient. What is important is that he get back the weapons.

It is contemplated that there will be some situations where the only way that the accomplice can deprive his conduct of its effectiveness is to make independent efforts to prevent the crime. Consequently, subsection (3)(B) provides that if the accomplice gives "timely" warning to the police he will avoid liability for the crime. A "timely" warning is one which notifies the police in time to prevent the commission of the crime if they act upon that warning.

Finally, an accomplice may also avoid liability by making "proper effort to prevent the commission of the crime." For example, the accomplice who supplies a gun to be used in a planned bank robbery may avoid liability by warning the bank manager of the planned crime a day before it is to occur.

The basic rationale supporting the adoption of the renunciation defense, as well as its relationship to existing law, is discussed in this report in the commentary to TD AS 11.31.100(c), infra, discussing a similar renunciation provision applicable to attempt.

B. Subsection (c) - No Defense

Subsection (c) lists three situations which the Revised Code specifically excludes as defenses to liability for the conduct of another.

Subsection (1) eliminates the accessory's common law defense that the principal has not been convicted. Alaska, like most jurisdictions, has abolished the distinction between principals and accessories before the fact, AS 12.15.010, and with it this defense.

Subsection (2) acknowledges the generally accepted principle that a person who is not capable in his individual capacity of committing an offense may nevertheless be liable for the behavior of another who has the capacity to commit that crime. This principle is identified in other specific sections of the Revised Code, such as TD AS 11.41.400(b).

Subsection (3) recognizes that a person is nevertheless guilty of the commission of a crime when the person he aids could not be convicted of the crime because of some legal disability such as youth or mental condition.

III. TD AS 11.16.130; 140 - CRIMINAL LIABILITY OF ORGANIZATIONS: CRIMINAL LIABILITY OF AN INDIVIDUAL FOR ORGANIZATION CONDUCT

TD AS 11.16.130 indicates the circumstances in which an organization may be held criminally liable. Because an organization cannot be imprisoned, the Revised Code will contain a specific provision covering fines for organizations convicted of an offense. It is expected that these fines will be collected in the manner authorized by civil law.

"Organization" is defined in Chapter 06 as "a legal entity, and shall include 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." TD AS 11.06.010(7).

Subsection (a)(1) indicates the offenses for which an organization may be held criminally liable because of the conduct of an agent acting within the scope of his employment or in behalf of the organization.

This provision may expand the principle of respondeat superior to impose liability on an organization when its agent is acting either within the scope of his employment or in behalf of the organization. However, liability based on subsection (a)(1) is limited to offenses that are misdemeanors or violations. Any exceptions to this limitation must be clearly indicated by the legislature in a statute imposing liability on an organization for its' agent's felony.

Subsection (a)(2) affirms the responsibility of an organization for the commission of an offense through omission of a duty specifically imposed on that organization by law.

Subsection (a)(3) states a basis for liability that relates more to the actual responsibility of the organization that the theory of respondeat superior. It provides that the organization is responsible for activities which were known specifically to high organization executives.

Presently, there is no specific statutory provisions dealing with organizational criminal liability. However, existing AS 11.75.070 defines "person" to include corporations as well as natural persons. The Subcommission concluded that the considerations which support holding corporations liable for crimes apply equally to organizations which happen to be unincorporated. This conclusion is embodied in the Proposed Federal Criminal Code § 402 and the Revised Arkansas Criminal Code § 41-402.

CHAPTER 21. GENERAL PRINCIPLES OF JUSTIFICATION.

SECTION

Sec. 11.21.100. JUSTIFICATION: BURDEN OF INJECTING THE ISSUE. In any prosecution for an offense, the defendant shall have the burden of injecting the issue of a defense of justification as defined in secs. 110 - 210 of this chapter.

Sec. 11.21.110. JUSTIFICATION: PERFORMANCE OF PUBLIC DUTY. [reserved]

Sec. 11.21.120. JUSTIFICATION: NECESSITY. Conduct which would otherwise be an offense is justifiable by reason of necessity to the extent permitted by common law when

(1) neither this title nor other statute defining the offense provides exceptions or defenses dealing with the justification of

necessity in the specific situation involved; and

(2) a legislative purpose to exclude the justification of necessity does not otherwise plainly appear.

Sec. 11.21.130. JUSTIFICATION: USE OF PHYSICAL FORCE IN DEFENSE OF SELF. (a) A person may, subject to the provisions of (b) and (c) of this section, use or threaten to use physical force upon another person when and to the extent he reasonably believes it necessary to defend himself from what he reasonably believes to be the use or imminent use of unlawful physical force by the other person, unless

(1) the physical force involved is the product of mutual combat not authorized by law;

(2) the person claiming the defense of justification provoked the other person's conduct with intent to cause physical injury to the other person; or

(3) the person claiming the defense of justification was the initial aggressor.

(b) In circumstances described in (a) of this section, the person claiming the defense of justification may use physical force if he has withdrawn from the encounter and effectively communicated his withdrawal to the other person, but the other person persists in continuing the incident by the use or imminent use of unlawful physical force.

(c) A person may, subject to the provisions of (d) of this section, use or threaten to use deadly physical force upon another person when and to the extent he reasonably believes it necessary to defend himself from what he reasonably believes to be the use or imminent use by the other person of unlawful

(1) physical force while the other person is committing or attempting to commit a kidnapping, a robbery, or a sexual assault under AS 11.41.410(a)(1) or 11.41.420(a)(1); or

(2) deadly physical force.

(d) A person may not use deadly physical force if he knows that he can with complete safety as to himself and others avoid the necessity of so doing by retreating, except there is no duty to retreat if the person is

(1) in his dwelling and not the initial aggressor; or

(2) a peace officer or a person assisting a peace officer under sec. 180 of this chapter.

Sec. 11.21.140. JUSTIFICATION: USE OF PHYSICAL FORCE IN DEFENSE OF A THIRD PERSON. A person may use or threaten to use physical force upon another person when and to the extent he reasonably believes it necessary to defend a third person when, under the circumstances as the person claiming the defense of justification reasonably believes them to be, the third person would be justified under sec. 130 of this chapter in using or threatening to use that degree of physical force to defend himself.

Sec. 11.21.150. JUSTIFICATION: USE OF PHYSICAL FORCE IN DEFENSE OF PREMISES. (a) A person may use or threaten to use nondeadly physical force upon another person when and to the extent he reasonably believes it necessary to prevent or terminate what he reasonably believes to be the commission or attempted commission by the other person of a crime involving damage to premises. He may use or threaten to use deadly physical force when and to the extent he reasonably believes it necessary to prevent or terminate what he reasonably believes to be the commission or attempted commission of arson upon a dwelling or occupied building.

(b) A person in possession or control of any premises, or an express or implied agent of that person, may use or threaten to use nondeadly physical force upon another person when and to the extent he

reasonably believes it necessary to prevent or terminate what he reasonably believes to be the commission or attempted commission by the other person of a criminal trespass upon the premises.

(c) A person may use or threaten to use physical force upon another person when and to the extent he reasonably believes it necessary to terminate what he reasonably believes to be a burglary in a dwelling or occupied building.

Sec. 11.21.160. JUSTIFICATION: USE OF PHYSICAL FORCE IN DEFENSE OF PROPERTY. (a) A person may use or threaten to use nondeadly physical force upon another person when and to the extent he reasonably believes it necessary to prevent what he reasonably believes to be the commission or attempted commission by the other person of any degree of theft, criminal mischief or criminal tampering.

(b) A person may use deadly physical force under circumstances described in (a) of this section only when the use of deadly physical force is authorized under other sections of this chapter.

Sec. 11.21.170. JUSTIFICATION: USE OF PHYSICAL FORCE BY PEACE OFFICER IN MAKING AN ARREST OR PREVENTING AN ESCAPE. (a) A peace officer need not retreat or desist from efforts to effect the arrest, or from efforts to prevent the escape from custody, of a person he reasonably believes to have committed an offense because of resistance or threatened resistance of the arrestee. In addition to using or threatening to use physical force authorized under other sections of this chapter, a peace officer is, subject to the provisions of (b) and (c) of this section, justified in using or threatening to use physical force when he reasonably believes it necessary to effect an arrest, to prevent an escape from custody, or to effect a lawful stop.

(b) A peace officer in effecting an arrest or in preventing an escape from custody is justified in using deadly physical force only

when

(1) deadly physical force is authorized under other sections of this chapter; or

(2) the peace officer reasonably believes it necessary to effect the arrest or prevent the escape of a person he reasonably believes

(A) has committed or attempted to commit a felony involving the use or threatened use of physical force against a person;

(B) is attempting to escape while in possession of a deadly weapon on or about his person; or

(C) may otherwise endanger life or inflict serious physical injury unless arrested without delay.

(c) Using or threatening to use physical force in making an arrest is not justified under this section unless the peace officer reasonably believes the arrest is lawful.

Sec. 11.21.180. JUSTIFICATION: USE OF PHYSICAL FORCE BY PRIVATE PERSON ASSISTING AN ARREST OR PREVENTING AN ESCAPE. (a) Subject to the provisions of (b) of this section, a person who has been directed by a person he reasonably believes to be a peace officer to assist him in making an arrest or preventing an escape from custody is justified in using or threatening to use physical force when and to the extent that he reasonably believes it necessary to carry out the peace officer's direction.

(b) A person who has been directed to assist one whom he reasonably believes to be a peace officer under circumstances specified in (a) of this section may use or threaten to use deadly physical force to make an arrest or to prevent an escape only when

(1) use of deadly physical force is authorized under other

sections of this chapter; or

(2) the person is directed or authorized by the peace officer to use deadly physical force unless he knows that the peace officer himself is not authorized to use deadly physical force under the circumstances.

Sec. 11.21.190. JUSTIFICATION: USE OF PHYSICAL FORCE BY PRIVATE PERSON IN MAKING ARREST OR PREVENTING ESCAPE. (a) Subject to (b) of this section and to the extent authorized by AS 12.25.030, a person, acting on his own account, may use or threaten to use physical force to effect the arrest or prevent the escape from custody of a person who he reasonably believes has committed an offense in his presence when and to the extent he reasonably believes it necessary to effect an arrest, or to prevent an escape from custody.

(b) A person in effecting an arrest or in preventing an escape from custody is justified in using or threatening to use deadly physical force only

(1) when it is authorized under other sections of this chapter; or

(2) when and to the extent he reasonably believes it necessary to effect the arrest of a person who he reasonably believes has committed murder, manslaughter, robbery or sexual assault under AS 11.41.410(a)(1) or 11.41.420(a)(1) or who is in immediate flight after commission of one of these crimes.

Sec. 11.21.200. JUSTIFICATION: USE OF PHYSICAL FORCE IN RESISTING ARREST. A person may not use or threaten to use physical force to resist an arrest by a peace officer who is known by him, or reasonably appears, to be a peace officer, whether the arrest is lawful or unlawful unless the physical force used by the peace officer exceeds that allowed by sec. 170 of this chapter.

Sec. 11.21.210. JUSTIFICATION: USE OF PHYSICAL FORCE TO PREVENT ESCAPE FROM CORRECTIONAL FACILITY. A guard or other peace officer employed in a correctional facility may use or threaten to use physical force upon another person when and to the extent he reasonably believes it necessary to prevent the escape of a prisoner from a correctional facility.

Sec. 11.21.220. DURESS. [reserved]

Sec. 11.21.230. ENTRAPMENT. [reserved]

ALASKA REVISED CRIMINAL CODE

CHAPTER 21. GENERAL PRINCIPLES OF JUSTIFICATION

COMMENTARY

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

In defining the various defenses of justification, the General Principles of Justification Article:

1. Codifies an area of law which under our present statutes is for the most part left to the common law research skills of the judge, the argument of attorneys and to the unfettered imagination of all other citizens.
2. Sets out the circumstances under which the use of force is justified rather than constituting a crime. The use of force is classified according to whether it is "physical force" or, a special level of physical force: "deadly physical force." The justifiable use of deadly physical force is limited to certain carefully defined situations.
3. Provides that a person's otherwise justifiable conduct is not rendered criminal if it is based upon a reasonable, though mistaken, belief that certain circumstances exist. Under the existing "justifiable homicide" statutes, a person claiming the defense must be correct in his evaluation of the circumstances

justifying the use of force. For instance, to justify the use of force in making an arrest, a felony in fact must have been committed. The Revised Code is based on the principle that a "reasonable belief" as to circumstances is sufficient. Thus, the peace officer who reasonably believes that a felony has been committed will be justified in using force in making an arrest even though his evaluation of the circumstances may have been mistaken.

4. Broadens an existing provision which permits the use of force only in defense of a narrow class of persons related to the defender. The Revised Code will allow a person to use force in defense of anyone.

5. Clarifies existing law by explicitly allowing the use of physical force in defense of property while ordinarily prohibiting the use of deadly physical force except in defense of a person's home.

6. Provides that a peace officer may use deadly physical force in making an arrest based on the officer's reasonable assessment that the person to be arrested is dangerous, while providing that only non-deadly physical force may be used to arrest a person who has committed a non-violent felony and who is otherwise unlikely to inflict serious injury.

7. Recognizes that an escape from a correctional facility

usually poses a greater danger to society than an escape from a peace officer by providing that a guard or peace officer employed in a correctional facility may use any necessary degree of physical force to prevent an escape from a correctional facility.

Use of terms "physical force," "deadly physical force" and "non-deadly physical force" in Justification chapter

Key to the Justification Article of the Revised Code are three terms - "physical force," "deadly physical force" and "non-deadly physical force."

"Physical force" is defined in the General Provisions Article, Chapter 06, as "force used upon or directed toward the body of another person; the term includes confinement." "Deadly physical force" means "physical force that under the circumstances in which used is capable of causing death or serious physical injury."

The phrase "use or threaten to use physical force" covers situations in which any degree of force may be appropriate including deadly force. Thus, sections of the Tentative Draft which allow the defense also refer specifically to the use of deadly force. For example, TD AS 11.21.130 provides that a person may "use or threaten to use physical force" in self-defense but specifically recognizes that the use of force is "subject to the provisions of (c) of this section," which

limits the use of "deadly physical force" to specifically defined situations. See, discussion of self-defense at § II B, infra.

Any use of force is justifiable only "when and to the extent [the person claiming the defense] reasonably believes it necessary." Therefore, even though the use of "deadly physical force" may be authorized in a particular section, it is not justified if the person claiming the defense believed at that time that he could accomplish his purpose by the use of non-deadly force.

SECTION ANALYSIS OF REVISED CODE

I. TD AS 11.21.120. JUSTIFICATION: NECESSITY

Though the defense of necessity has long been recognized at common law, there is no existing statute or case law on the subject in Alaska.

Under the necessity defense, conduct which would otherwise be criminal may be justifiable if the actor avoids a greater injury by engaging in that conduct. Examples of possible application of the necessity defense would include blasting a building to prevent a major fire from spreading or forcibly restraining a person infected with a highly contagious and dangerous disease.

The most important issues regarding the necessity defense are whether it should be codified, and, if so, with what degree of detail. See, The Necessity Defense, 52 DENVER L.J. 874 (1975).

While most revised codes have codified the defense [see, ORS 161.200, N.Y. Penal Law § 35.05(2)] the Subcommission followed the New Jersey approach by declining to adopt a detailed statutory formulation. Instead, the necessity defense was incorporated into the Revised Code "to the extent permitted by common law" with the qualifications described in subsections (1) and (2).

The Subcommission concluded, as did the Commentary to the New Jersey Code, that "it is more appropriate to leave this issue to the judiciary. . . the rarity of the defense and the imponderables of the particulars of specific cases convinces us that the Courts can better define and apply this defense than can be done through legislation." The Necessity Defense, supra.

II. TD AS 11.21.130. JUSTIFICATION: USE OF PHYSICAL FORCE IN DEFENSE OF SELF

A. Existing Law

A literal reading of AS 11.15.100 might suggest that a homicide is always justifiable to prevent the commission of any felony upon oneself. However, the Alaska Supreme Court has held that "[i]f the statute were so interpreted it would be in conflict with all . . . the law of self-defense. We adopt the Oregon interpretation of this statute which requires a finding of necessity before the homicide can be justifiable." Gray v. State, 463 P.2d 897 (AK 1970).

Thus, while the existing statute seems to provide an unchecked grant of authority to use deadly physical force in self-defense, that authority is significantly limited by the implied requirement of "necessity" found by the Supreme Court in the statute.

Though existing AS 11.15.100 is too broad in one respect, it is also too restrictive in a number of situations.

The existing statute provides that a homicide may be justifiable in self-defense, but it provides no guidance to the person who is a victim of a less than deadly assault. How far can a person go in self-defense? Unfortunately, the existing statutes provide no guidelines and offer no community value judgments concerning the extent to which force can be used and under what circumstances.

While purporting to explain the law of justification, however vaguely, whenever a person is acting to prevent the commission of a felony upon himself, AS 11.15.100 says nothing about the use of physical force to defend against an assault that is only a misdemeanor. A persistent student of the law will find that situation partially addressed in Title 12, the Criminal Procedure Code. The statute, "Resistance to Commission of Crime," AS 12.60.010, allows "lawful resistance to the commission of a crime by the party about to be injured, or by another person in aid or defense of the person about to be injured to prevent (1) a crime against his person or his family. . . ." So under present law, if a victim knows what

kind of resistance is "lawful", he may use it to protect a special class of persons.

B. The Code Provision

TD AS 11.21.130 formulates statutory guidelines to be followed in determining when and to what degree a person is justified in using physical force against another in self-defense.

1. Degree of Force

Subsection (a) allows a person to defend himself from what he reasonably believes to be the use or imminent use of unlawful physical force. Subject to the limitations on the use of deadly physical force, he may exercise that degree of force which he reasonably believes to be necessary.

Paragraphs (1) - (3) qualify the right of a person to use physical force in self-defense. Under paragraph (1), neither party to mutual combat which is not authorized by law can claim self-defense; both parties are guilty of assault. Paragraph (2) prohibits a person from provoking another into using force, and later claiming that his use of force in self-defense was justified. This is consistent with the existing rule "that a person who provokes a difficulty thereby forfeits his right to self-defense." Gray, supra at 908. Finally, paragraph (3) prevents an initial aggressor from claiming self-defense.

Subsection (b) provides that even in the three circum-

stances described in paragraphs (1) - (3) a person can nevertheless use physical force if he withdraws from the encounter and effectively communicates his withdrawal to the other person. If the other person continues the incident by the use or imminent use of physical force, physical force may be used in self-defense.

Subsection (c) allows a person to use deadly physical force when he reasonably believes it necessary to defend himself from what he reasonably believes to be the use or imminent use by another of deadly force, or any degree of force during the commission of a kidnapping, a robbery, or a forcible sexual assault.

2. Duty to retreat

There is currently no specifically stated duty to retreat in Alaska before one may use deadly physical force in self-defense. De Groot v. U S, 78 F.2d 244 (9th Cir. 1935). However, it is likely that the presence of an obviously safe method of avoiding the encounter would have a bearing on a jury's determination on whether the use of deadly physical force was "necessary". Frank v. U S, 42 F.2d 623 (9th Cir.1930). The Subcommission determined that a greater degree of clarity was required without imposing a general duty to retreat in all situations.

TD AS 11.21.130(d) requires a person to retreat prior to using deadly physical force "if he knows that he can with complete safety as to himself and to others avoid the [use of deadly physical force] by retreating." Retreat is not required

when the person is in his dwelling and not the original aggressor or is a peace officer making an arrest or person assisting the officer. There is no duty to retreat prior to using non-deadly physical force. Further, the defendant must "know" that he has a safe retreat; it is not sufficient that a reasonable person would have believed he could retreat safely.

III. TD AS 11.21.140. DEFENSE OF THIRD PERSON

Under existing law, AS 11.15.100(1), a homicide is justifiable only if it is committed in defense of a third person who stands in a certain relationship to the actor. For example, under this statute a homicide is justifiable if it is committed in defense of one's "master or mistress" but is criminal if committed in defense of one's grandmother. While AS 12.60.010 may broaden that authority somewhat, even that statute appears to be limited to the defense of "family".

The Revised Code allows a person to come to the aid of any third person when the rescuer reasonably believes that the third person would be justified in using physical force to defend himself. The intervenor may use that degree of physical force which he reasonably believes the third person would be justified in using in his own defense.

In redefining these standards, the Subcommission was conscious of the awakening sense of social interdependence and the value of "the good Samaritan," the absence of which was symbolized by the "Kitty Genovese" case - a woman in New York

who was stabbed to death while hundreds heard her cries a decade ago.

IV. TD AS 11.21.150; 160. JUSTIFICATION: USE OF PHYSICAL FORCE IN DEFENSE OF PREMISES: USE OF PHYSICAL FORCE IN DEFENSE OF PROPERTY

A. Existing Law

A literal reading of the existing "justifiable homicide" statute might lead a person to believe that he may kill another to prevent the commission of any felony upon his property:

> The killing of a human being is justifiable when committed by any person . . . to prevent the commission of a felony upon his property, or upon property in his possession, or upon or in a dwelling house where he may be. AS 11.15.100(2).

As defined in existing AS 01.10.060(9): "'Property' includes both real and personal property."

The existing Alaska statute is based on the now-repealed Oregon provision, ORS 163.100. However, the Oregon Supreme Court noted in dicta that a person is not justified in using deadly physical force solely in defense of property even before the Oregon Revised Code explicitly so provided.

> The defendant in his brief concedes that the use of a dangerous weapon is, as a matter of law, excessive force when used solely in the defense of property. This proposition is supported by the authorities.

State v. Weber, 246 Or 312, 423 P.2d 767, cert. denied 389 US 863 (1967).

The Weber opinion also approves this statement from 1 Wharton, Criminal Law & Procedure 709:

> The use of a deadly weapon in protection of property is generally held, except in extreme cases, to be the use of more than justifiable force, and to render the owner of the property liable criminally for the assault.

Weber, supra, at 319-320.

The court then concludes by noting:

> The "extreme cases" ordinarily are those in which either the home is intruded upon or in which there is an imminent threat to person as well as property.

Weber, supra, at 320.

The opinion contains no mention of ORS 163.100 and the point was not at issue in Weber, nor in any other Oregon or Alaska Case. A reasonable inference can be drawn from the opinion, notwithstanding the seemingly broad language of the repealed Oregon and existing Alaska statute, that the killing of a person solely to prevent the commission of a felony upon personal property would not be justifiable. Cf., State v. Nodine, 259 P.2d 1056 (Or 1953). However, as noted in Weber, different considerations come into play when ". . . the home is intruded . . . or [when] there is an imminent threat to person as well as property." The use of deadly physical force in defense of personal property is not an issue that should be left open to speculation as it is today.

B. The Code Provisions

1. TD AS 11.21.160 - DEFENSE OF PROPERTY

TD AS 11.21.160 covers the limited situation of the use of force to prevent theft, criminal mischief or criminal

tampering with property which is not a dwelling or occupied building.

Consistent with the interpretation likely to be given existing AS 11.15.100(2) by the Alaska Supreme Court in light of Weber, supra, the Revised Code provides that a person may use only non-deadly physical force when the sole justification claimed is defense of property.

Subsection (b) recognizes that a person defending property may be justified in using deadly physical force based on some other section of the Justification Chapter. For example, one who destroys a person's only means of transportation from a remote bush site has in effect used deadly force against the owner if the destruction creates a substantial risk of serious physical injury -- i.e., exposure, starvation. In this case the use of deadly physical force in defense of the person (not property) would be appropriate under TD AS 11.21.130.

2. TD AS 11.21.150 - DEFENSE OF PREMISES

Under TD AS 11.21.150, deadly physical force may be used in defense of premises when it is reasonably believed necessary ". . .to prevent or terminate what [the person] reasonably believes to be the commission or attempted commission of arson upon a dwelling or occupied building," TD AS 11.21.150(a), "or when it is reasonably believed necessary . . . to terminate what [the person] reasonably believes to be a burglary in a dwelling or occupied building."

Only non-deadly force may be used to prevent or terminate a crime involving damage to premises not amounting to arson, or to prevent or terminate a criminal trespass.

The Revised Code, in allowing a greater degree of physical force to be used by a person in defense of a dwelling than would be justifiable in defense of a person generally or in defense of property generally, is consistent with the traditional concept that "a man's home is his castle" which has long been favored by the law. This concept is expanded in the Revised Code to include the use of deadly physical force to prevent or terminate arson or to terminate the burglary of an occupied building. Because burglary and arson inherently involve a high potential for physical injury to the occupants of a building or dwelling, the use of physical force should not be limited by other than the requirement that the force is "reasonably believed necessary" to accomplish the prevention or termination of arson or the termination of burglary.

After much discussion concerning problems of mistake when persons other than the owner of a dwelling or occupied building intervene in defense of premises, the Subcommission concluded that any person, not just the owner, should be allowed to use force to prevent damage to property or to prevent burglary. However, if the only crime is criminal trespass (usually, unlawful entry onto land) a person will be allowed to use force only if he is in possession or control

of the premises, or is an "express or implied agent" of the owner of the premises, a term broad enough to cover a person who discovers a trespasser on his neighbor's land.

At a certain point, the seriousness of the offense is low enough that the relationship of the actor to the perceived offender and the property becomes significant. Any use of force involves the danger of escalating violence to a level of seriousness far beyond the original conduct. Where the actor has few or no significant ties with the situation, the risk of a mistake setting off a chain of serious consequences outweighs the policy of encouraging the Samaritan.

In considering the use of physical force in defense of premises and property, the topic of the use of "spring guns" and similar traps was discussed. The Subcommission concluded that the use of such items is never justifiable if the device is capable of causing serious physical injury. To permit the use of such life-endangering devices in defense of property conflicts with one of the main requirements of the Justification chapter -- that the person claiming the defense reasonably believe the use of force necessary. Because such traps will automatically be triggered whenever there is an intrusion into premises, a judgment on the necessity for using such force has not been made. The potential for unintended injury is too great to justify the use of such devices in defense of property or premises.

V. TD AS 11.21.170. JUSTIFICATION: USE OF PHYSICAL FORCE BY PEACE OFFICER IN MAKING AN ARREST OR PREVENTING ESCAPE

A. Existing Law

Currently a homicide is justifiable when committed ". . . in the attempt, by lawful means, to arrest a person who has committed a felony." AS 11.15.100(3). However, this authority is subject to the limitation "that no peace officer or private person . . . may employ more than necessary force in making an arrest. . . ." Wilson v. State, 473 P.2d 633 (AK 1970); AS 12.25.070.

The common law distinction between felonies and misdemeanors is manifestly inadequate in determining when deadly physical force may be used in making an arrest and may be unconstitutional. Mattis v. Schnarr, ___ F.2d ____ (8 Cir 1976); 20 Crim L Rptr 2245.

The felony-misdemeanor distinction arose hundreds of years ago when only a limited number of crimes were classified as felonies, with most involving a high danger to human life. Because the punishment for conviction of a common law felony was death, it did not appear particularly harsh to authorize a peace officer to use deadly physical force in effecting a felony arrest. Today, most crimes in existing law as well as in the Revised Code are classified as felonies. While some of these felonies involve the potential of danger to human life, others do not.

B. The Code Provision

In subsection (a), the Revised Code recognizes that, subject to the limitations on the use of deadly physical force, a peace officer may always use or threaten to use physical force whenever he reasonably believes it necessary to effect an arrest or to prevent an escape from custody. Further, in providing that physical force may be used to effect a lawful stop, subsection (a) insures that a peace officer will not be criminally liable for an assault prosecution for conducting a lawful search for weapons of the kind described in Terry v. Ohio, 392 U.S. 1 (1968) when the use of physical force is necessary to accomplish this limited type of search. If in conducting this search, sufficient probable cause is established to warrant an arrest, the continued use of physical force will be justified if necessary to effectuate that arrest.

Unlike existing law, the Revised Code does not require that the arrestee actually have committed the crime for the officer's use of force to be justified. The use of force will be justified if the peace officer reasonably, though mistakenly, believes that a crime has been committed.

The first sentence of TD AS 11.21.160 makes it clear that a peace officer is under no duty to retreat in making an arrest, establishing an exception to the self-defense provision on retreat in TD AS 11.21.130(d)(2).

Subsections (a) and (b)(1) recognize that TD AS 11.21.170 supplements the other provisions in chapter 21

governing the justifiable use of physical force. For example, if in making an arrest the peace officer reasonably believes that the use of force is necessary in self-defense, the provisions of TD AS 11.21.130 will supplement the authority to use the force prescribed in this section.

With regard to the issue of when deadly force may be used by a peace officer in making an arrest or preventing an escape from custody, the Revised Code makes several changes in existing law.

Pursuant to paragraph (A) of subsection (b)(2), a peace officer may use deadly physical force when he reasonably believes it necessary to make an arrest or prevent the escape of a person he reasonably believes "has committed or attempted to commit a felony involving the use or threatened use of physical force against a person." Under this paragraph, for example, the use of deadly physical force would be justified in arresting a fleeing burglar, robber or a person who has committed or attempted to commit an assault involving physical injury but would not be justified in using deadly force to arrest a person who the officer believes has committed a non-violent felony such as forgery or theft, unless the deadly force is justified by (B) or (C) of this section.

Another situation justifying the use of deadly physical force by a peace officer involves the armed fleeing criminal. Under paragraph (B) a peace officer may use deadly

physical force to effect the arrest of a person who is fleeing while in possession of a deadly weapon on or about his person. Insofar as this paragraph allows a peace officer to use deadly physical force against a non-felon escapee who is not necessarily using his weapon, it expands existing law. However, the Subcommission concluded that the factors of flight plus possession of a deadly weapon should be sufficient evidence of dangerousness to justify the use of deadly force if necessary to effect an arrest.

Paragraph (C) recognizes that a peace officer may use deadly physical force to effect an arrest or prevent an escape of a person who "may otherwise endanger life or inflict serious physical injury unless arrested without delay." This section gives the police necessary leeway to deal with a person who may not have committed a forceful felony, and who is not in possession of a deadly weapon but is nevertheless highly dangerous.

Paragraph (C) specifically provides that the use of physical force by a peace officer is not justifiable unless the officer reasonably believes the arrest to be lawful.

VI. TD AS 11.21.180. JUSTIFICATION: USE OF PHYSICAL FORCE BY PRIVATE PERSON ASSISTING AN ARREST OR PREVENTING ESCAPE

Existing law, AS 12.25.090,recognizes that "a peace officer making an arrest may orally summon as many persons as he considers necessary to aid him in making the arrest." TD AS 11.21.180 protects the citizen who is ordered by a peace officer to assist in making an arrest pursuant to this statute.

As with other sections of this chapter, this statute allows a person to act on appearances provided he does so reasonably. Thus, a citizen who has been called upon by a person he reasonably believes to be a peace officer to make an arrest is justified in using non-deadly physical force "when and to the extent that he reasonably believes it to be necessary to carry out the peace officer's direction."

Pursuant to subsection (b) a citizen may use deadly physical force to assist a peace officer only when such force is authorized by other sections of chapter 21, or when he is directed or authorized by the officer to use such force unless he knows that the officer lacks the authority to employ such force under the circumstances.

VII. TD AS 11.21.190. JUSTIFICATION: USE OF PHYSICAL FORCE BY PRIVATE PERSON IN MAKING AN ARREST OR PREVENTING AN ESCAPE

Ordinarily, a private person is not expected or encouraged to make arrests on his own account because he has not been trained in the restrained use of force or to appreciate such factors as probable cause and the possibility of mistake. Therefore, the rules in the Revised Code governing the use of physical force by private persons making arrests on their own account are generally more stringent than those controlling peace officers as well as persons assisting peace officers.

Existing AS 11.25.010 and .030 recognize that a private person has the same arrest powers as a peace officer, and consequently a homicide is justifiable if committed by a private person in the attempt to arrest a fleeing felon. AS 11.15.100(c). However, while AS 12.25.080 recognizes that a peace officer may "use all the necessary and proper means to effect the arrest", the statute does not refer to the private citizen. Whether this statute limits the amount of force which can be used by the private citizen acting on his own account is not clear.

The Revised Code changes existing law by providing that in certain situations the use of physical force by a private citizen acting on his own in making an arrest or in preventing an escape from custody is more limited than the power granted to a peace officer.

TD AS 11.21.190(a) provides that the use of physical force in effecting an arrest or preventing an escape from custody is justified only when the citizen reasonably believes a crime has been committed in his presence. The Subcommission recognizes that as a consequence of this change, AS 12.24.030, Grounds for Arrest by Private Person . . . Without Warrant, will require amendment.

However, insofar as existing law imposes strict liability on the citizen's assessment of the right to use deadly force, (under AS 11.15.100, homicide is justifiable

only if the person arrested has in fact committed a felony), the Revised Code provides greater protection to the citizen acting on his own account. As one commentator has noted, the strict liability approach is subject to criticism.

> The imposition of strict liability . . . suggests that the conduct in question is to be approved only in the most extreme circumstances; it marks a fundamental departure from the premise that if conduct is justifiable, one should be able to engage in it according to the same standards of perception that customarily guide his behavior in activities for which he claims no defense. The result of this rule is to place enormous risks on public-spirited citizens. If a legislative decision is made approving citizen's arrests, it would be fairer to the citizen to restrict the crimes to which it applies, rather than undermine the privilege itself by making it extremely difficult to assert.

Justification Defenses, 75 COLUM. L. REV. 914, 948.

Consistent with the other provisions in chapter 21, TD AS 11.21.190(a) provides that a citizen who acts upon a reasonable belief that a crime has been committed in his presence will be justified in his use of force even though his belief may have been mistaken.

Subsection (b) provides that a citizen acting on his own account may use deadly physical force when he reasonably believes the suspect has committed in his presence murder, manslaughter, robbery or forcible sexual assault.

The citizen may also use deadly physical force to arrest a person who is in immediate flight after commission of one of these crimes. In this limited situation, there is no requirement that the offense be committed in the citizen's presence, but the crime must in fact have been committed.

VIII. TD AS 11.21.200. JUSTIFICATION: USE OF PHYSICAL FORCE IN RESISTING ARREST

In Miller v. State, 462 P.2d 421 (1969) and Gray v. State, supra, the Alaska Supreme Court adopted the rule proposed to be codified in TD AS 11.21.100.

In Miller, at p. 427 the Court held as follows:

> [A] private citizen may not use force to resist peaceful arrest by one he knows or has good reason to believe is an authorized peace officer performing his duties, regardless of whether the arrest is illegal in the circumstances of the occasion. It should be noted that the rule we formulate today has no application when the arrestee apprehends bodily injury, or when an unlawful arrest is attempted by one not known to be a peace officer. Quite different problems are then presented.

In Gray, at 908 the Court specifically considered the issue of an officer's unprivileged use of force in making an arrest:

> [A]n officer in making an arrest is privileged by statute to use only that force which is necessary to restrain the arrested person. To the use of necessary force the arrested person cannot claim the privilege of self-defense. If more than necessary force is used, then the officer commits an unprivileged use of force, the arrested person must have the right to use reasonable force to defend himself.

IX. TD AS 11.21.210. USE OF PHYSICAL FORCE TO PREVENT ESCAPE FROM CORRECTIONAL FACILITY

Under existing law, a guard in a correctional facility may use only the same amount of physical force in preventing an escape from a correctional facility as could have been used

in making the original arrest. AS 11.15.090(3); 12.25.120; 12.25.130. As deadly physical force may not be used under existing law to arrest a misdemeanant, such force cannot now be used to prevent his escape.

By restricting the use of deadly physical force to preventing escapes by felons, existing law may discourage guards from using the degree of force necessary to prevent an escape, thereby increasing the chances of a successful escape. Since in many instances a guard will have no way of knowing whether the escapee is a misdemeanant or felon, a rule which depends upon that distinction will force the guard into a guessing game and may result in a failure to use deadly force when it would be necessary to prevent the escape. In the long run, a rule which clearly authorizes the use of deadly force when necessary to prevent an escape, which is understood by guard and prisoner alike, will lead to fewer attempted escapes and reduce the number of incidents where deadly force is used.

Because the danger to society resulting from an escape from a correctional facility is greater than the danger posed by the defeat of an arrest on the street, the Revised Code specifically permits a guard or peace officer employed in a correctional facility to "use physical force when and to the extent he reasonably believes it necessary to prevent the escape of a prisoner from a correctional facility."

X. TD AS 11.21.100. JUSTIFICATION: BURDEN OF INJECTING THE ISSUE

The section places the burden of injecting the issue of a defense of justification 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's acts were justified, 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 justification, the defendant will be convicted only if the state proves beyond a reasonable doubt that the criminal act was not justified.

CHAPTER 31. ATTEMPT AND RELATED OFFENSES

Section

Sec. 11.31.100. ATTEMPT. (a) A person commits the crime of attempt when, with intent to commit a crime, he engages in conduct which constitutes a substantial step toward the commission of the crime.

(b) In a prosecution under (a) of this section, it is not a defense that it was factually or legally impossible to commit the crime which was the object of the attempt when the conduct engaged in by the defendant would be a crime had the attendant circumstances been as he believed them to be.

(c) In a prosecution under (a) of this section, it is an affirmative defense that the defendant, under circumstances manifesting a voluntary and complete renunciation of his criminal intent, prevented the commission of the attempted crime by abandoning his criminal effort and, if the mere abandonment is insufficient to accomplish this avoidance, doing everything necessary to prevent the commission of the attempted crime and in fact the attempted crime is prevented.

(d) An attempt is a

(1) class A felony if the offense attempted is murder;

(2) class B felony if the offense attempted is a class A felony;

(3) class C felony if the offense attempted is a class B felony;

(4) class A misdemeanor if the offense attempted is a class

C felony;

(5) class B misdemeanor if the offense attempted is a class A or class B misdemeanor.

Sec. 11.31.110. SOLICITATION. (a) A person commits the crime of solicitation if, with the intent of causing another to engage in specific conduct constituting a crime, he commands or solicits the other person to engage in that conduct.

(b) In a prosecution under (a) of this section it is an affirmative defense that the defendant under circumstances manifesting a voluntary and complete renunciation of his criminal intent, after soliciting or commanding another person to commit a crime, persuaded the person solicited or commanded not to commit the crime or otherwise prevented the commission of the crime.

(c) Solicitation is a

(1) class A felony if the offense solicited is murder;

(2) class B felony if the offense solicited is a class A felony;

(3) class C felony if the offense solicited is a class B felony;

(4) class A misdemeanor if the offense solicited is a class C felony;

(5) class B misdemeanor if the offense solicited is a class A or class B misdemeanor.

ALASKA REVISED CRIMINAL CODE

CHAPTER 31 - ATTEMPT AND RELATED OFFENSES

COMMENTARY

The Effect of the Revised Code on the Existing Law of Attempt and Related Offenses

1. Codifies existing case law making intent to commit a crime an essential element of the crime of attempt.
2. Codifies the widely recognized doctrine that mere preparation to commit a crime does not constitute an attempt.
3. Eliminates the present limitation that a person cannot be convicted of attempt unless it is proven that the attempt failed.
4. Eliminates factual and legal impossibility as a defense to attempt.
5. Provides that a "voluntary and complete" abandonment of criminal effort which succeeds in preventing the crime is an affirmative defense to attempt and solicitation.

I. TD AS 11.31.100 - ATTEMPT

A. Culpable Mental State Required

Consistent with existing law, the Revised Code provides that a defendant must act "with intent to commit a crime" to be guilty of attempt. While the present statute, AS 11.05.020, does not explicitly refer to the

element of intent, the Alaska Supreme Court has held that a defendant is guilty of attempted larceny only if he had the "intent to commit the crime of larceny", Gargan v. State, 436 P.2d 968 (AK 1968). Further, the Oregon Supreme Court interpreted a statute similar to the present Alaska attempt provision to require an intent to commit the attempted crime. State v. Duffy, 295 P 953 (Ore. 1931).

B. Act Required

The Revised Code also deals with the problem of distinguishing acts of preparation from an attempt. The existing attempt statute requires the prosecution to prove only "any act towards the commission of the crime." AS 11.05.020. However, this has been interpreted as excluding merely preparatory conduct.

In Gargan, supra, the court cited Lemke v. United States, 211 F.2d 73 (9th Cir. 1954) for the basic proposition that "mere preparation to commit a crime, not followed by an overt act done towards its commission, does not constitute an attempt." In Gargan, the defendant was caught unscrewing the lock on a coin box attached to a washing machine and convicted of attempted larceny in a building. The Supreme Court held that the evidence presented a jury question of whether the defendant "had committed an unequivocal overt act towards the commission of the crime." Gargan, supra, at 971.

The Revised Code requires that the defendant's conduct be a "substantial step" towards the commission of

the crime to constitute an attempt to commit that crime. The Subcommission recognized, consistent with the approach taken by the Oregon Code, that specificity beyond this point would be self-defeating. However, the commentary to the Oregon Attempt statute notes and approves the Model Penal Code's partial explanation of what is mean by a "substantial step".

> In § 5.01(2) the Model Penal Code states that to be a substantial step the act must be "strongly corroborative of the actor's criminal purpose". The MPC then proceeds to list the kinds of acts which could be held to be substantial in light of the "strongly corroborative" provision. The Commission believes that the listing of these acts more properly belongs in the section comments as a matter of legislative history. In keeping with this view the Model Penal Code examples of acts which should not be held insufficient as a matter of law to constitute a substantial step are approved and are set out as follows:
>
> (a) lying in wait, searching for or following the contemplated victim of the crime;
>
> (b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;
>
> (c) reconnoitering the place contemplated for the commission of the crime;
>
> (d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;
>
> (e) possession of materials to be employed in the commission of the crime, which are specially designed for such unlawful use or which can serve no lawful purpose of the actor under the circumstances;
>
> (f) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, where such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances;

(g) soliciting an innocent agent to engage in conduct constituting an element of the crime.

ORS 161.405, Commentary at 49-50.

C. Elimination of Requirement that Attempt Fail

The Revised Code does not require that the target offense of the attempt fail as a prerequisite to conviction for attempt. The requirement of proving beyond a reasonable doubt that an attempt was unsuccessful places an unnecessary and unjustifiable burden upon the prosecution.

Under existing law, the prosecution is faced with a real dilemma when it brings a prosecution for a crime which may or may not have been completed, but for which there is no doubt that "a substantial step" sufficient to support an attempt conviction has occurred. The Subcommission discussed the example of rape, where there often is a reasonable doubt over whether penetration occurred. Under these circumstances the prosecution should be allowed to prosecute for the crime of attempted rape without being required to show beyond a reasonable doubt that there was no penetration, and hence no completed crime.

D. Subsection (b) - Impossibility - No Defense to Attempt

Subsection (b) provides that neither legal or factual impossibility is a defense to attempt.

"Impossibility" is said to be of two kinds; factual and legal. The classic example of factual impossibility is an attempt to pick an empty pocket. In Gargan, supra, the Alaska Supreme Court recognized that such conduct would

constitute attempted larceny and adopted the so-called "empty pocket doctrine". However, the court's holding was limited to "factual impossibility".

In a number of jurisdictions, "legal impossibility" is recognized as a defense to a charge of attempt. For example, the defense of "legal impossibility" provides that a person who receives goods which he believes to have been stolen, but which were not then stolen, is not guilty of an attempt to receive stolen goods.

The rationale in favor of recognizing legal impossibility as a defense to attempt is that, judging the defendant's conduct in the light of the actual facts, what he intended to do did not amount to a crime. However, the Subcommission rejected this approach as it exonerates defendants in situations where attempt liability should be imposed. In all cases of legal impossibility (1) criminal purpose has been clearly demonstrated, (2) the defendant has gone as far as he could in implementing that purpose, and (3) as a result, the defendant's dangerousness is plainly manifested. Therefore, the Revised Code explicitly excludes legal as well as factual impossibility as a defense to attempt.

E. Subsection (c) - Renunciation as a Defense to Attempt

Subsection (c) provides that a "voluntary and complete" abandonment of criminal effort which succeeds in preventing a crime is a defense to a prosecution for

attempt. There is currently no statute or reported cases on this subject in Alaska.

The defense of abandonment of criminal effort, or "renunciation", is an affirmative defense - the defendant must prove all the elements of the defense by a preponderance of the evidence.

The first element of the defense, and probably the most difficult to prove, is that the renunciation must be "voluntary and complete". TD AS 11.31.150, (inadvertently ommitted in this Draft from Chapter 31), provides a strict standard:

> a renunciation is not "voluntary and complete" if it is motivated in whole or in part by
>
> (1) a belief that circumstances exist which increase the probability of detection or apprehension of the defendant or another participant in the criminal enterprise, or which render more difficult the accomplishment of the criminal purpose; or
>
> (2) a decision to postpone the criminal conduct until another time or to transfer the criminal effort to another victim or another but similar objective.

The second element of the defense is that the defendant must actually prevent the crime. In pursuit of that goal, the defendant must abandon his criminal effort. If the mere abandonment is insufficient by itself to prevent the crime, the defendant must do whatever is necessary to prevent the crime. Of course, if the defendant's "substantial step" toward the commission of the crime is itself a crime, he would be guilty of that crime (e.g., possession of explosives), but not of an attempt to commit the crime (e.g., arson).

In explicitly recognizing this defense, the Sub-commission concluded that a voluntary and complete renunciation of attempt negatives the inference of dangerousness which justifies punishing attempt in the first place.

F. Subsection (d) - Punishment of Attempt

With two exceptions, subsection (d) grades attempt at one level below that for the substantive crime, e.g., an attempt to commit a class A felony will be a class B felony. However, attempted murder, an unclassified crime, is classified as a class A felony while an attempt to commit a B misdemeanor is classified as a B misdemeanor.

II. TD AS 11.31.110 - SOLICITATION

Existing law, AS 11.10.070, provides that the crime of Inciting Commission of a Crime is committed by one who "wilfully and knowingly solicits, incites or induces" another to commit a crime. If the offense solicited is a felony, the maximum punishment is three years. If a misdemeanor is solicited, the maximum penalty is six months.

The Solicitation statute of the Revised Code, TD AS 11.31.110, provides that the defendant must act "with the intent of causing another to engage in conduct constituting a crime". This culpable mental state requirement is essentially the same as that required for attempt.

Under the Revised Code, solicitation is not limited to attempts to serve as the initial instigator of criminal conduct; it also encompasses a defendant who seeks to encourage further one already considering the possibility of committing

a crime [See generally 1 Wharton Criminal Law § 81 (Anderson Ed. 1957)]. The defendant must, however, do more than merely express approval of plans to engage in illegal activities. He must affirmatively promote the commission of the illegal act.

It is believed that the definition of the acts necessary for the crime, the actus reus, should be narrowly drawn to prevent the imposition of liability based on casual remarks. Consequently, the term "solicits" was used in the provision because it is an historic legal term that carries with it established limitations. The term "commands" has been added because technically it might not fall within the dictionary meaning of solicitation, i.e., entreating, importuning, etc., yet it certainly involves the same form of affirmative promotion.

Subsection (a) requires that the actor solicit specific conduct. This limitation is designed to eliminate the potential for solicitation prosecution in cases involving, for example, political agitation. A general exhortation to "go out and revolt" does not consitute solicitation, although it may in particular circumstances constitute incitement to riot.

In its usual case, criminal solicitation will involve the solicitation of another to engage in conduct constituting a complete crime. The Revised Code, of course, covers this, but it also covers the unusual situation where the solicitor actually solicits an attempted crime. This would occur in the case where the crime contemplated could

not be completed because of "legal impossibility." A person should not escape liability for soliciting a crime simply because, for example, the pocket he wished another to pick is empty.

Subsection (b) provides for the affirmative defense of "renunciation" similar to that provided for attempt. The person who has solicited a crime must actually prevent the crime under circumstances manifesting a "complete and voluntary renunciation of his criminal intent." See §I E, supra.

Subsection (c) provides punishment for solicitation on the same level as attempts. While existing law punishes solicitation less severely than attempt, the Revised Code reflects the judgment that solicitation often presents as much danger as an attempt and should be placed in the same general category.

ARTICLE 5. ROBBERY.

SECTION

500 Robbery in the first degree

510 Robbery in the second degree

Sec. 11.41.500. ROBBERY IN THE FIRST DEGREE. (a) A person commits the crime of robbery in the first degree if he violates sec. 510 of this chapter and in the course of committing the acts specified in sec. 510 of this chapter, or in immediate flight after an attempt or commission, either the defendant or another participant

(1) is armed with a deadly weapon or represents by word or conduct that he or another participant is so armed;

(2) uses or attempts to use a dangerous instrument or represents by word or conduct that he or another participant is armed with a dangerous instrument; or

(3) causes or attempts to cause serious physical injury to any person.

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

Sec. 11.41.510. ROBBERY IN THE SECOND DEGREE. (a) A person commits the crime of robbery in the second degree if, in the course of taking or attempting to take property from the person or the immediate presence and control of a person, he uses or threatens the immediate use of physical force upon another person with the intent of

(1) preventing or overcoming resistance to his taking of the property or to his retention of the property after taking; or

(2) compelling the other person to deliver the property or to engage in other conduct which might aid in the taking of the property.

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

ALASKA REVISED CRIMINAL CODE

Chapter 21 - Offenses Against the Person

ARTICLE 5. ROBBERY

COMMENTARY

The Effect of the Revised Code on the Existing Law of Robbery

1. Eliminates the existing limitation that robbery does not occur unless property is actually taken from the victim.
2. Consolidates the existing crimes of Robbery, Assault with Intent to Rob and Use of Firearms during a Robbery.

TD AS 11.41.500; 510 - ROBBERY IN THE FIRST AND SECOND DEGREE

This article provides for two ascending degrees of robbery. TD AS 11.41.510, Second Degree Robbery, contains the basic statement of the crime, with TD AS 11.41.500 providing that certain aggravating factors will raise the crime to Robbery in the First Degree.

The Revised Code does not require, for either degree of robbery, that property actually be taken from the victim. Under existing law, robbery is only committed if the robber "steals or takes anything of value", AS 15.15.240. If the would-be robber fails to acquire any property, he is guilty of Assault with Intent to Commit Robbery, AS 11.15.160, or simply Attempted Robbery. This approach emphasizes the property aspects of the crime and treats it as an aggravated form of theft. If, however, the primary concern is with the physical danger to the victim and his difficulty in

protecting himself from sudden attacks against his person, then the actual taking of property becomes less important. The Revised Code emphasizes the person, rather than the property, aspects of the offense.

Under the Revised Code, a person commits Robbery in the Second Degree if "in the course of taking or attempting to take property from the person or the immediate presence and control of a person he uses or threatens the immediate use of physical force upon another person with intent of either (a) preventing or overcoming resistance to his taking of the property or his retention immediately after taking or (b) compelling the other person to deliver the property to engage in other conduct which might aid in the commission of theft." This statute will normally be used to prosecute the unarmed type of robbery. By requiring a threat of "immediate use" of physical force, this section is distinguishable from Theft by Extortion, TD AS 11.46.100.

TD AS 11.41.500 raises the crime to Robbery in the First Degree if at least one of several aggravating factors is present. First, a defendant commits first degree robbery if he is armed with a deadly weapon, regardless of whether the victim is aware that the defendant is so armed. This aggravating factor parallels the existing statute which provides harsher penalties for "carrying" a firearm during a robbery, AS 11.15.295. In effect, it is presumed that the robber would not have been carrying the weapon unless he was willing to use it.

Second, the robbery becomes first degree if the robber represents by word or conduct that he or another participant is armed with a deadly weapon or dangerous instrument, even if nobody is so armed. This aggravating factor is present when a robber uses a note, a fake weapon or a "hand in pocket" technique to convey the impression that he is armed. The justification for this factor is the additional terror instilled in the victim by the threat inherent in the apparent presence of a weapon. Furthermore, that additional terror could lead to a more violent response or attempted response to the robber's threat by the victim or another, thereby endangering everyone in the vicinity.

Third, the robbery is elevated to first degree if the robber uses or attempts to use a dangerous instrument, or causes or attempts to cause serious physical injury. This aggravating factor serves somewhat the same function as the present AS 11.15.160, Assault with Intent to Commit Robbery, which currently carries the same penalty as Robbery.

First Degree Robbery is committed when any of the three aggravating factors occur in the course of taking or attempting to take property or in immediate flight after an attempt or taking. The defendant's willingness to use force against those who would restrain him in flight strongly suggests that he would have employed it to effect the taking of property.

CHAPTER 56. OFFENSES AGAINST PUBLIC ADMINISTRATION

ARTICLE

1 Bribery and Related Offenses

2 Perjury and Related Offenses

ARTICLE 1. BRIBERY AND RELATED OFFENSES

SECTION

100 Bribery

110 Receiving a Bribe

120 Receiving Unlawful Gratuities

Sec. 11.56.100. BRIBERY. (a) A person commits the crime of bribery if he offers, confers, or agrees to confer a benefit upon a public servant with the intent to influence the public servant's vote, opinion, judgment, action, decision or exercise of discretion in his official capacity.

(b) In a prosecution under (a) of this section it is not a defense that the person sought to be influenced was not qualified to act in the desired way, whether because he had not assumed office, lacked jurisdiction or for any other reason.

(c) Bribery is a class B felony.

Sec. 11.56.110. RECEIVING A BRIBE. (a) A public servant commits the crime of receiving a bribe if he

(1) solicits a benefit with the intent that his vote, opinion, judgment, action, decision or exercise of discretion as a public servant will be influenced; or

(2) accepts or agrees to accept a benefit upon an agreement or understanding that his vote, opinion, judgment, action, decision or exercise of discretion as a public servant will be influenced.

(b) Receiving a bribe is a class B felony.

Sec. 11.56.120. RECEIVING UNLAWFUL GRATUITIES. (a) A

public servant commits the crime of receiving unlawful gratuities when he solicits, accepts or agrees to accept a benefit for having engaged in an official act which he was required or authorized to perform, and for which he was not entitled to any special or additional compensation.

(b) Receiving unlawful gratuities is a class A misdemeanor.

ALASKA REVISED CRIMINAL CODE

Chapter 56 - Offenses Against Public Administration

ARTICLE 1. BRIBERY AND RELATED OFFENSES

COMMENTARY

The Effect of the Revised Code Provision on the Existing Law of Bribery and Related Offenses:

1. Clearly defines who may be bribed and with what. By using one definition of "public servant", the reader of the bribery statute is spared the presently required task of consulting 10 provisions, 7 of them outside the existing Criminal Code, to determine who may be bribed.
2. Specifically recognizes that it is not a defense to bribery that the public servant could not in fact take the action desired by the person conferring the benefit.
3. Eliminates the adjective "corruptly" from the existing bribery statutes to prohibit without qualification the giving or receiving of any benefit with intent to affect official decision making.
4. Specifically provides that the solicitation of a bribe by a public servant constitutes the crime of bribe receiving.

SECTION ANALYSIS OF REVISED CODE

GENERAL DEFINITIONS OF "BENEFIT" AND "PUBLIC SERVANT"

Key to an understanding of the Bribery provisions of the Revised Code are the definitions of two terms defined in Chapter 6 - "Benefit" and "Public Servant".

> "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.
>
> "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.

A. Benefit

Current law defines the consideration sufficient to constitute a bribe to include not only a "gift, gratuity, valuable consideration" but also any "other thing", AS 11.30.040. The Revised Code uses the term "benefit" to describe this consideration.

When first considered by the Subcommission, the term "benefit" was qualified by the word "pecuniary". The original definition of "pecuniary benefit" required that the benefit have a primary significance of economic gain. The Subcommission concluded that this definition was unduly restrictive since it could be argued that the primary significance of, for example, a plane ticket to Hawaii was not "economic gain" but rather spiritual well-being.

In substituting the term "benefit" for the more restrictive term "pecuniary benefit" the Subcommission intended to insure coverage in all appropriate cases.

However, the Subcommission was in agreement with the observation made in the Commentary to the Oregon Revised Code that by themselves "[g]ratuities of an insignificant value, in the form of a social amenity or holiday gift, are ... beyond the scope of the bribery sections...." ORS §162.005, Commentary at 81.

Further, "benefits" which serve only to provide a "climate for discussion" with a public servant (i.e., picking up a dinner tab or a golfing fee) are also beyond the scope of the proposed bribery statutes because the granting of the "benefit" is not in itself intended or expected to influence an official decision. Such minor "gifts", not apparently related to the performance of a service, and "climate for discussion" benefits, though

outside the criminal code, are highly appropriate topics to be covered in conflict of interest statutes and ethical conduct regulations and standards.

Insofar as they are reported in accordance with AS 15.13 (State Election Campaigns), political campaign contributions have been specifically excluded from the scope of "benefit". This qualification is intended to make it clear that legitimate, reported political campaign contributions, though made with an intent to advance a political viewpoint, are not to be punished as bribery.

B. Public Servant

1. Existing Law

Currently, AS 11.30.040 provides that bribery can be committed only in relation to a "peace officer, judicial officer, executive officer or public official". Separate statutes, many of them outside of Title 11, must be consulted in order to understand the meaning of those four terms.

The definition of "peace officer" is found in the general definitions section of Title 1, AS 01.10.060 as

> any officer of the State Troopers, members of the police force of any incorporated city or borough, U. S. Marshals and their deputies, and other officers whose duty is to enforce and preserve the public peace....

"Judicial officer" is defined for purposes of the bribery sections in AS 11.30.060 as a person

(1) authorized to act as a judge in a court;

(2) summoned as a juror in a court, in an inquest, or before any officer, from the time he is summoned; or

(3) who is a referee, umpire, or arbitrator, from the time of his appointment.

The definition of "executive officer" appears in AS 11.30.070 and includes all officers

> of the state ... borough, town, or other municipal or public corporation not included in the definition of judicial officers ... from the time of his election or appointment....

To determine who is a "public official", the reader must consult AS 11.30.075, which in turn refers him to "the definitions appearing in AS 39.50.200(1), as supplemented by AS 39.50.200(e)".

Following instructions, the reader finds among the statutes on conflict of interest the following definition:

> "public official" means a judicial officer, a member of the legislature, the governor, the lieutenant governor, a person hired or appointed as the head or deputy head of, or director of a division within, a department in the executive branch, an assistant to the governor, chairman or member of a state commission or board, and each appointed or elected municipal officer....

As promised by the statute which referred the reader to Title 39 in the first place, this definition is explained by an additional definition in AS 39.50.090(e):

> "public official" includes ... chairmen and members of all commissions and boards created by statute or administrative action as agencies of the state.

Both of these definitions use the term "state commission or board", which is defined in turn by AS 39.50.200(9):

> "state commission or board" means the...[there then appears a list of 38 commissions or boards, which presumably should be amended every time a new board or commission is created.]

Furthermore, the original definition of "public official" in AS 39.50.200(1) uses the terms "judicial officer", "municipal officer" and "assistant to the governor" which are defined in AS 39 50.200(2), (6) and (10), respectively.

> "[J]udicial officer" means a person appointed as a justice to the supreme court or as a judge to the superior court, district court or magistrate court;
>
> "municipal officer" includes a borough or city mayor, borough assemblyman, city councilman, school board member, elected utility planning or zoning commission within a home rule or general law city or borough, including but not limited to a unified municipality under AS 29.68;
>
> "assistant to the governor" includes any executive, legislative, special, administrative or press assistant to the governor, and any person similarly employed....

The reader will be spared the listing of further definitions of the terms appearing in the definition of "municipal officer".

Clearly, the existing approach to defining who may be bribed is unnecessarily confusing, and in fact leaves loopholes. For example, in AS 39.50.200(a) the Criminal Code Revision Subcommission is not included among the 38 other boards and commissions whose members are considered "public officials". Consequently, a person could not be prosecuted under existing law for bribing a member of the Criminal Code Revision Subcommission with intent to influence his decision on the definition of "public servant" appearing in this report.

2. The Code Provision

The problems with the existing definition of "public official" are resolved in the Revised Code by the use of the comprehensive term, "public servant". This term is defined broadly to include not only every category of government or public officer, but every employee of every such office or agency, every person retained to perform some government service and every person who, though not having yet assumed his official duties, "has been nominated, elected, appointed, employed or designated to become a public servant". As so defined, the blanket term, "public servant", permits the formulation of relatively few statutes in this area to replace many existing sections and also produces considerable language simplification within each statute.

The definition of "public servant" has been drafted to make it clear that those serving "political subdivisions" and "governmental instrumentalities" within the state are included. Coverage is also intended to reach persons who serve governmental instrumentalities, political subdivisions or the state in advisory or consultative capacities.

The words "whether compensated or not" have been added to insure that the bribery statutes cover individuals who are serving in a compensatory position as well as those serving without pay. The gist of the offense is the intent to influence the course of public administration. The

public servant functioning gratuitously may often be as effective in corrupting governmental process as the paid functionary.

Consistent with existing law, subsection (c) insures that the bribery statute cover those individuals who serve on the many state and local boards and commissions.

I. TD AS 11.56.100,110 - BRIBERY; RECEIVING A BRIBE

The gist of the crime of bribery is an effort to secure an improper advantage in the judicial, administrative or legislative decision-making process.

The proposed sections make only minor changes in existing law. Bribe Receiving has been broadened to include solicitation of bribes by public servants, which is not prohibited by the existing statute.

The bribery statutes eliminate the use of the word "corruptly" and prohibit without qualification the giving or receiving of any benefit to influence official decision-making.

Consistent with existing law, TD AS 11.56.100 penalizes offers made with the intent to influence a public servant. No meeting of the minds is required before the offeror of a bribe may be prosecuted. The recipient, however, must have either solicited the bribe or have accepted it upon an agreement or understanding with the offeror before he has committed bribe receiving.

TD AS 11.56.100(b) is a further application of the doctrine of impossibility which is discussed in Article 31.

The Subcommission considered and rejected the following defense to bribery:

> In a prosecution [for bribery] it is a defense that the defendant offered, conferred or agreed to confer the benefit as a result of the public servant's conduct constituting extortion or coercion.

The Subcommission rejected this provision because it was felt to reward wrong-doing. However, such pressure would be a relevant consideration in the determination of the penalty upon conviction. Similarly, cooperation in reporting a bribe would be a valid consideration in the state's decision whether or not to prosecute.

II. TD AS 11.56.120 - RECEIVING UNLAWFUL GRATUITIES

TD AS 11.56.120 is derived from existing AS 11.30.230(1) without major substantive changes.

The bribery statute, TD AS 11.56.100 covers all cases of reward for improper conduct on the part of a public servant. Receiving Unlawful Gratuities, TD AS 11.56.120 covers all cases of improper reward for conduct which the public servant was required or authorized to perform.

The need for TD AS 11.56.120 is apparent. "Tipping" a public servant undermines the integrity of governmental administration, especially if the public servant directly or indirectly solicits the "tip". The giver of unlawful gratuities to a public servant puts all citizens who have such an official under pressure to "tip" or risk his disfavor. This statute will also provide a public servant with a graceful but effective way of refusing tips.

ARTICLE 2. PERJURY AND RELATED OFFENSES

SECTION

Sec. 11.56.200. PERJURY. (a) A person commits the crime of perjury if he makes a false sworn statement, which he does not believe to be true.

(b) In a prosecution under this section, it is not a defense that

(1) the statement was inadmissible under the rules of evidence; or

(2) the oath or affirmation was taken or administered in an irregular manner.

(c) Perjury is a class A felony.

Sec. 11.56.210. UNSWORN FALSIFICATION. (a) A person commits the crime of unsworn falsification if, with the intent to mislead a public servant in the performance of his duty, he submits a false written or recorded statement which he does not believe to be true

(1) in an application for a benefit; or

(2) on a form bearing notice, authorized by law, that false statements made in it are punishable.

(b) Unsworn falsification is a class A misdemeanor.

Sec. 11.56.220. PROOF OF GUILT. In a prosecution for perjury or unsworn falsification it is not necessary that proof be made by a particular number of witnesses or by documentary or other type of evidence.

Sec. 11.56.230. PERJURY BY INCONSISTENT STATEMENTS. (a) A person

commits the crime of perjury by inconsistent statements when

(1) in the course of one or more official proceedings he makes two or more statements under oath which are irreconcilably inconsistent to the degree that one of them is necessarily false;

(2) he does not believe one of the statements to be true at the time the statement is made; and

(3) each statement is made within the jurisdiction of this state and within the period of the statute of limitations for the crime charged.

(b) In a prosecution under (a) of this section it is not necessary for the state to prove which statement was false but only that one or the other was false and not believed by the defendant to be true at the time he made the statement. Proof of the irreconcilable inconsistency of the statements is prima facie evidence that one or the other of the statements was false.

(c) Perjury by inconsistent statements is a class B felony.

Sec. 11.56.240. DEFINITIONS. As used in secs. 200 - 230 of this chapter, unless the context requires otherwise,

(1) "statement" means a representation of fact and includes a representation of opinion, belief or other state of mind where the representation clearly relates to state of mind apart from or in addition to any facts which are the subject of the representation;

(2) "sworn statement" means

(A) a statement knowingly given under oath or affirmation attesting to the truth of what is stated, including a notarized statement; or

(B) a statement knowingly given under penalty of perjury under AS 09.65.012.

ALASKA REVISED CRIMINAL CODE

CHAPTER 56 - OFFENSES AGAINST PUBLIC ADMINISTRATION

ARTICLE 2. PERJURY AND RELATED OFFENSES

COMMENTARY

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

In defining the crimes of Perjury, Unsworn Falsification and Perjury by Inconsistent Statements, the Perjury and Related Offenses Article:

1. Replaces the numerous provisions scattered throughout the Alaska statutes covering false statements in some applications for specific benefits with the single crime of Unsworn Falsification applicable to all applications for benefits.
2. Eliminates the existing corroboration requirement for perjury.
3. Recognizes that Perjury by Inconsistent Statements occurs when a defendant makes two statements under oath which are irreconcilable to a degree that one of them is necessarily false even though it may be impossible to prove which statement was false.

SECTION ANALYSIS OF REVISED CODE

I. TD AS 11.56.240 - DEFINITIONS

"Statement" is defined in subsection (1) to mean any representation of fact, including a statement of opinion

or belief. Thus, the statement "I believe the car was red" is a false statement only if the defendant did not have the stated belief; its falsity does not depend on the actual color of the car.

A "sworn statement" is defined in subsection (2) as a statement given under oath or affirmation including a notarized statement as well as a statement made "under penalty of perjury" pursuant to existing AS 09.65.012.

II. TD AS 11.56.200 - PERJURY

A. Existing Law

Existing AS 11.30.010 establishes the necessary elements of perjury as (1) taking a legally required or authorized oath or affirmation, and (2) wilful swearing or affirming falsely, (3) in regard to any material or immaterial matter. Nelson v. State, 546 P.2d 592, 594 (AK 1976).

Existing AS 11.30.020 establishes three grades of punishment for perjury and subornation of perjury and in doing so provides that the minimum penalty for perjury committed in a criminal proceeding for a crime punishable by life imprisonment is less than the minimum penalty for perjury committed in all other judicial proceedings.

The crime of Endeavor to Procure Perjury is found in existing AS 11.30.030. This statute will be replaced by the general solicitation statute in Chapter 31 of the Revised Code.

B. The Code Provision

Perjury under the Revised Code requires proof

of a false sworn statement which the person does not believe to be true. Consistent with existing law, it is not required that the statement be material to the proceeding.

Subsection (b)(1) recognizes that it is no defense to perjury that the testimony was subject to objection and should not have been received while subsection (b)(2) codifies the generally accepted rule that irregularity in the administration of the oath is not a defense. (See 3 Wharton on Criminal Law 1297).

In the Revised Code, perjury is classified as a Class A felony, the most serious category of offense, with the exception of murder. This classification is consistent with existing law which recognizes that most forms of perjury carry a 10-year maximum penalty. AS 11.30.020(b).

In classifying perjury as a Class A felony, the Subcommission concluded that under certain circumstances perjury can be one of the most serious crimes contained in the Revised Code. A person who makes a false sworn statement which sends an innocent man to jail, or which unjustly deprives a person of his life savings, should be punished severely.

III. TD AS 11.56.210 - UNSWORN FALSIFICATION

A. Existing Law

There is no general provision in the existing Criminal Code which criminalizes unsworn falsification. Instead, there is presently scattered throughout the Alaska statutes an abundance of provisions dealing with false

statements in specific statutes without any consistency as to penalty. For example, a false statement in an application for unemployment compensation is punishable by a maximum $200 fine and/or 60 days in jail, AS 23.20.485, while a false statement in a claim under the workmen's compensation law is punishable by a maximum $1000 fine and/or one year in jail, AS 23.30.250.

B. The Code Provision

The purpose of TD AS 11.56.210 is to eliminate the numerous provisions outside Title 11 covering unsworn falsification and to replace them with one statute applicable to all unsworn falsifications. As the title indicates, the crime of Unsworn Falsification does not require that the false statement be made under oath.

The proposed section offers a major advantage over existing law, in that it fills potential loopholes that result when the Legislature authorizes a form of economic grant or special license, but fails to enact a companion provision punishing falsification of the written or recorded application for such benefits.

The essential elements of unsworn falsification under subsection (a)(1) are: (1) an intent to mislead a public servant in the performance of his duty, (2) an application for any "benefit" (defined in Chapter 6), containing (3) a false written or recorded statement (4) which the person does not believe to be true.

Unsworn falsification may also be committed pursuant

to subsection (a)(2) by making a false statement on a form which bears notice that false statements made therein are criminal. The Commentary to § 20.060 of the Proposed Missouri Criminal Code discusses the value of subsection (a)(2):

> [This section] ... picks up a common modern device by which the government indicates the special gravity which it attaches to truth in a particular document. It is especially useful as an alternative to prescribing oaths before notaries, avoiding inconvenience and expense ... The specification that this device can be used only by legislative authority is intended to make sure that it is not overused, merely on the whim of officials, with consequent depreciation of its value.

IV. RETRACTION

The Subcommission considered several provisions establishing timely retraction as a defense to perjury but after much debate concluded that the defense should not be recognized.

The Subcommission agreed with the approach taken by the U.S. Supreme Court:

> The argument [in favor of the retraction defense] overlooks the tendency of such a view to encourage false swearing in the belief that if the falsity be not discovered before the end of the hearing it will have its intended effect, but, if discovered, the witness may purge himself of crime by resuming his role as witness and substituting the truth for his previous falsehood. It ignores the fact that the oath administered to the witness calls on him freely to disclose the truth in the first instance and not to put the court and the parties to the disadvantage, hindrance, and delay of ultimately extracting the truth by cross-examination, extraneous investigation or other collateral means.

U. S. v. Norris, 300 U.S. 564, 574 (1937).

While the Subcommission rejected retraction as an absolute defense, it did recognize that a person's retraction of his false statement should be relevant to the prosecutor's decision to charge as well as to the judge's imposition of sentence upon conviction.

V. TD AS 11.56.220 - PROOF OF GUILT

While there is currently no statute mandating that a perjury prosecution be subjected to special rules of proof, the Alaska Supreme Court has held that a perjury prosecution cannot be based on the uncorroborated testimony of a single witness. Nelson v. State, supra, at 595.

In the Revised Code, perjury and unsworn falsification, like any other crimes, must be proved beyond a reasonable doubt. There is no requirement that any special number of witnesses appear against the defendant, or that the testimony of one witness must be corroborated.

The main argument in favor of retaining the corroboration rule is that testimonial evidence is inherently so unreliable and the crime of perjury so peculiarly subject to testimonial evidence at cross-purposes that something more than testimony of a single witness should be required. If two witnesses, for instance, attempt to frame an innocent defendant for perjury, contradictions between testimony will appear.

The argument that two witnesses are required so that false accusations can be discovered has been rejected by the Alaska Supreme Court in permitting conviction on the testimony

of one witness plus corroborating evidence. Risher v. State, 418 P.2d 983, 985 (AK 1966). The existing requirement that the testimony of a single witness must be corroborated conflicts with the concept of proof beyond a reasonable doubt. If a single witness is believed, and the elements of perjury are proved, the traditional standard of proof beyond a reasonable doubt seems sufficient to protect an innocent defendant.

The corroboration requirement undoubtedly makes perjury convictions more difficult to obtain. It has been argued that a less stringent rule may create a greater likelihood of false accusations of perjury, while the more exacting rule still adequately protects the interests of society. A similar argument was considered and rejected by the Minnesota Supreme Court in State v. Storey, 182 NW 613, 615 (Minn. 1921).

> We find ourselves unable to approve the doctrine that perjury is a more heinous crime than murder, or that one charged with perjury should have greater immunity than one charged with murder.... With what consistency can it be said that a quality of testimony which will justify a court in condemning a defendant to life imprisonment, or, in some jurisdictions, to be hanged, is insufficient to sustain a conviction of the falsifier of the crime of perjury....

Perjury and unsworn falsification are no exceptions to the rule that guilt must be proved beyond a reasonable doubt. The number of witnesses as well as the corroborating evidence in support of the witnesses becomes simply one of several factors that a jury may take into consideration in arriving at a verdict.

VI. TD AS 11.56.230 - PERJURY BY INCONSISTENT STATEMENTS

Under existing law and in the Revised Code, the crime of perjury requires that the defendant make a false statement. Consequently, substantial problems may arise when a defendant has made two statements under oath that are irreconcilably inconsistent to the degree that one of them is necessarily false, but the prosecution is unable to prove which statement was false.

As an example, consider the situation where Jones testifies at a preliminary hearing that Brown came to his office and attempted to extort money from him. At the subsequent trial, Jones testifies that he has never met Brown, that Brown never came to his office and that no one ever attempted to extort money from him. If there is no other way to prove whether Brown came to Jones' office to extort money, other than by the testimony of Jones, the state may not be able to convict Jones of perjury even though Jones' two statements are ireconcilable to the degree that one of them is necessarily false.

While there is no existing Alaska statute providing for the crime of perjury by inconsistent statements, the offense is equated with perjury in some revised codes and has been read into the existing perjury statute in other states. See, Arizona Rev. Stat. § 13.562; N.Y. Penal Law §210.20; Ill. Crim. Code §32-2(b) and Oglesby v. State, 337 So.2d 381 (Ala. 1976).

In TD AS 11.56.230 the Revised Code recognizes the separate offense of Perjury by Inconsistent Statements. The section is a compromise between the common law position that the prosecution is required to prove which of two sworn contradictory statements was false and the existing law in some jurisdictions which provides that swearing to the truth of two inconsistent sworn statements is perjury.

Under this statute, the prosecution cannot simply rely on the introduction of the two irreconcilable statements; it must also be shown that the defendant did not believe one of the statements to be true at the time the statement was made.

This section is restricted to inconsistent statements (1) both having been made within the period of the statute limitations, and (2) within Alaska.

The first limitation is designed to prevent a person from being indirectly punished for an old offense. The purpose of the second restriction is based on the rule that Alaska courts can punish only crimes committed in Alaska. The problems that otherwise arise can best be shown by the following hypothetical situation: assume that Jones testified as a witness in a trial in Oregon, then subsequently appeared before an Alaska court and testified in a manner inconsistent with his Oregon testimony. If the Alaska testimony was false, Jones committed perjury in Alaska, but if the Alaska testimony was true, no crime was committed in Alaska. Without the second limitation, if it were shown that the Oregon statement was false,

Jones would stand convicted in Alaska for having committed a crime in Oregon and for having testified truthfully in Alaska. Subsection (a)(1) avoids this result by requiring that both inconsistent statements be made in Alaska. Thus, it becomes unimportant to determine which one was true and which was false; one of them was false, and since it was made in Alaska the crime was committed in this state.

APPENDIX I

ALASKA REVISED CRIMINAL CODE

Chapters 11, 16, 21, 31, 41 (Article 5), and 56 (Articles 1 and 2)

DERIVATIONS

CHAPTER 11 - GENERAL PROVISIONS OF CRIMINAL LIABILITY

TD AS 11.11.100 - General Requirements of Culpability

Subsection (a) is derived directly from ORS 161.095(1).

Subsection (b) is based on ORS 161.095(2).

Subsection (b)(1)(A) is based on ORS 161.105(a).

Subsection (b)(1)(B) is based on N.Y. Penal Law § 15.15(2).

Subsection (b)(2) is based on ORS 161.105(b) and Proposed Arizona Revised Criminal Code § 203(b).

TD AS 11.11.110 - Construction of Statutes With Respect to Culpability

Subsection (a) is based on N.Y. Penal Law § 15.15(1).

Subsections (b) and (c) are based on Proposed Arizona Revised Criminal Code § 203(b) and (c).

TD AS 11.11.120 - Effect of Ignorance or Mistake on Liability

Subsection (a) is derived directly from ORS 161.115(4).

Subsection (b) is based on N.Y. Penal Law § 15.20(1).

TD AS 11.11.130 - Intoxication or Drug Use as Defense

This section is based on ORS 161.125.

TD AS 11.11.140 - Definitions

Subsection (a)(1) is based on N.Y. Penal Law § 15.05(1).

Subsection (a)(2) is based on N.Y. Penal Law § 15.05(2). and Illinois Annotated Statutes Chapter 38 § 4-5.

Subsection (a)(3) is based on N.Y. Penal Law § 15.05(3).

Subsection (a)(4) is based on N.y. Penal Law § 15.05(4).

Subsection (b) is derived directly from N.Y. Penal Law § 15.00.

CHAPTER 16 - PARTIES TO CRIME

TD AS 11.16.100 - Liability Based on Conduct

This section is based on ORS 161.150.

TD AS 11.16.110 - Liability Based Upon the Conduct of Another: Complicity

This section is based on ORS 161.155.

TD AS 11.16.120 - Exemptions to Criminal Liability for Conduct of Another

Subsections (a)(1) and (a)(2) are based on ORS 161.165.

Subsection (a)(3) is based on N.Y. Penal Law §40.10(1).

Subsection (b) is based on ORS 161.160 and N.Y. Penal Law § 20.05(1).

Subsection (c) is derived directly from N.Y. Penal Law § 40.10(5).

TD AS 11.16.130 - Criminal Liability of Organizations

This section is based on Revised Arkansas Criminal Code §§ 41-401 and 41-402.

TD AS 11.16.140 - Criminal Liability of an Individual for Organization Conduct

This section is based on ORS 161.175.

CHAPTER 21 - JUSTIFICATION

TD AS 11.21.100 - Justification: Burden of Injecting the Issue

This section is based on Proposed Missouri Criminal Code § 8.050(4).

TD AS 11.21.120 - Justification: Necessity

This section is based on Proposed New Jersey Criminal Code §___.

TD AS 11.21.130 - Justification: Use of Physical Force in Defense of Self

This section is based on N.Y. Penal Law § 35.15.

TD AS 11.21.140 - Justification: Use of Physical Force in Defense of a Third Person

This section is based on Proposed Arizona Revised Criminal Code § 406(1).

TD AS 11.21.150 - Justification: Use of Physical Force in Defense of Premises

This section is based on N.Y. Penal Law § 35.20.

TD AS 11.21.160 - Justification: Use of Physical Force in Defense of Property

This section is based on N.Y. Penal Law § 35.25.

TD AS 11.21.170 - Justification: Use of Physical Force by Peace Officer in Making an Arrest or Preventing an Escape

This section is based on N.Y. Penal Law § 35.30(1) and Proposed Missouri Criminal Code § 8.080.

TD AS 11.21.180 - Justification: Use of Physical Force by Private Person Assisting an Arrest or Preventing Escape

This section is based on N.Y. Penal Law § 35.30(3).

TD AS 11.21.190 - Justification: Use of Physical Force by Private Person in Making Arrest or Preventing Escape

This section is based on N.Y. Penal Law § 35.30(4).

TD AS 11.21.200 - Justification: Use of Physical Force in Resisting Arrest

This section is based on ORS 161.260.

TD AS 11.21.210 - Justification: Use of Physical Force to Prevent Escape from Correctional Facility

This section is based on ORS 161.265.

CHAPTER 31 - ATTEMPT AND RELATED OFFENSES

TD AS 11.31.100 - Attempt

This section is based on N.Y. Penal Law §§ 110.00-10 and N.Y. Penal Law § 40.10(3) and (5).

TD AS 11.31.110 - Solicitation

This section is based on ORS 161.435-440.

CHAPTER 41 - OFFENSES AGAINST THE PERSON

ARTICLE 5 - ROBBERY

TD AS 11.41.500 - Robbery in the First Degree

This section is based on ORS 164.415.

TD AS 11.41.510 - Robbery in the Second Degree

This section is based on ORS 164.395.

CHAPTER 56 - OFFENSES AGAINST PUBLIC ADMINISTRATION

ARTICLE 1 - BRIBERY AND RELATED OFFENSES

TD AS 11.56.100 - Bribery

This section is based on ORS 162.015 and 162.035, but uses "benefit" instead of "pecuniary benefit".

TD AS 11.56.110 - Receiving a Bribe

This section is based on ORS 162.025; but uses "benefit" instead of "pecuniary benefit".

TD AS 11.56.120 - Receiving Unlawful Gratuities

This section is based on N.Y. Penal Law § 200.35.

ARTICLE 2 - PERJURY

TD AS 11.56.200 - Perjury

This section is based on N.Y. Penal Law § 210.05.

TD AS 11.56.210 - Unsworn Falsification

This section is based on Proposed Missouri Criminal Code § 20.060(1)(a).

TD AS 11.56.220 - Proof of Guilt

This section is based on Proposed Arizona Revised Criminal Code § 2706.

TD AS 11.56.230 - Perjury by Inconsistent Statements

This section is based on N.Y. Penal Law § 210.20 and Proposed Arizona Revised Criminal Code § 2704.

TD AS 11.56.240 - Definitions

This section is based on ORS 162.055 (3) and (4).

APPENDIX II

ALASKA REVISED CRIMINAL CODE

EXISTING LAW

CHAPTER 16. PARTIES TO A CRIME

Sec. 11.10.010. PARTIES TO CRIME CLASSIFIED. The parties to crime are
(1) principals;
(2) accessories.

Sec. 11.10.050. PUNISHMENT OF ACCESSORIES. Except in cases where a different punishment is prescribed by law, an accessory to a felony, upon conviction, is punishable by imprisonment in the penitentiary for not less than one year nor more than five years, or by imprisonment in a jail for not less than three months nor more than one year, or by a fine of not less than $100 nor more than $500.

Sec. 12.15.010. ABROGATION OF DISTINCTIONS BETWEEN ACCESSORIES AND PRINCIPALS. The distinction between an accessory before the fact and a principal, and between principals in the first and second degree is abrogated; and all persons concerned in the commission of a crime, whether they directly commit the act constituting the crime or, though not present, aid and abet in its commission, shall be prosecuted, tried, and punished as principals.

Sec. 12.15.020. ACCESSORIES AFTER THE FACT. All persons who, after the commission of any felony, conceal or aid the offender with knowledge that he has committed a felony and with intent that he may avoid or escape from arrest, trial, conviction, or punishment are accessories. There are no accessories in misdemeanors.

Sec. 12.15.030. PROSECUTION OF ACCESSORY AFTER THE FACT. An accessory after the fact to the commission of a felony may be prosecuted, tried, and punished, though the principal felon is neither prosecuted nor tried.

CHAPTER 21 - JUSTIFICATION

Sec. 11.15.090. JUSTIFIABLE HOMICIDE BY PUBLIC OFFICER OR AGENT. The killing of a human being is justifiable when committed by a public officer or a person acting in the aid and assistance and by the command of a public officer

(1) in obedience to the judgment of a competent court;

(2) when necessarily committed in overcoming resistance to the execution of legal process or to the discharge of a legal duty;

(3) when necessarily committed in retaking persons charged with or convicted of crime who have escaped or been rescued; or

(4) when necessarily committed in arresting a person fleeing from justice who has committed a felony.

Sec. 11.15.100. JUSTIFIABLE HOMICIDE. The killing of a human being is justifiable when committed by any person

(1) to prevent the commission of a felony upon him, or upon his husband, wife, parent, child, master, mistress, or servant;

(2) to prevent the commission of a felony upon his property, or upon property in his possession, or upon or in a dwelling house where he may be;

(3) in the attempt, by lawful means, to arrest a person who has committed a felony, or in the lawful attempt to suppress a riot or preserve the peace.

Sec. 11.15.110. EXCUSABLE HOMICIDE. The killing of a human being is excusable when committed

(1) by accident or misfortune in lawfully correcting a child, or in doing any other lawful act, by lawful means, with usual and ordinary caution and without unlawful intent; or

(2) by accident or misfortune in the heat of passion, upon a sudden and sufficient provocation, or upon a sudden combat, without premeditation or undue advantage being taken, and without a dangerous weapon or thing being used, and not done in a cruel or unusual manner.

Sec. 12.25.010. PERSONS AUTHORIZED TO ARREST. An arrest may be made by a peace officer or by a private person.

Sec. 12.25.030. GROUNDS FOR ARREST BY PRIVATE PERSON OR PEACE OFFICER WITHOUT WARRANT. A private person or a peace officer without a warrant may arrest a person

(1) for a crime committed or attempted in his presence;

(2) when the person has committed a felony, although not in his presence;

(3) when a felony has in fact been committed, and he has reasonable cause for believing the person to have committed it.

Sec. 12.25.060. METHOD OF ARREST BY OFFICER WITHOUT WARRANT. When making an arrest without a warrant, the peace officer shall inform the person to be arrested of his authority and the cause of the arrest, unless the person to be arrested is then engaged in the commission of a crime, or is pursued immediately after its commission or after an escape.

Sec. 12.25.070. LIMITATION ON RESTRAINT IN ARREST. No peace officer or private person may subject a person arrested to greater restraint than is necessary and proper for his arrest and detention.

Sec. 12.25.080. MEANS TO EFFECT RESISTED ARREST. If the person being arrested either flees or forcibly resists after notice of intention to make the arrest, the peace officer may use all the necessary and proper means to effect the arrest.

Sec. 12.25.090. AUTHORITY TO SUMMON AID TO MAKE ARREST. A peace officer making an arrest may orally summon as many persons as he considers necessary to aid him in making the arrest. A person when required by an officer shall aid him in making the arrest.

Sec. 12.25.120. RETAKING ESCAPED PRISONER. If a person arrested escapes or is rescued, the person from whose custody he escaped or was rescued may immediately pursue and retake him at any time and in any place in the state.

Sec. 12.25.130. MEANS USABLE TO RETAKE PRISONER. To retake the person escaping or rescued, the person pursuing may use the same means and do any act necessary and proper in making an original arrest.

Sec. 12.60.010. RESISTANCE TO COMMISSION OF CRIME. Lawful resistance to the commission of crime may be made by the party about to be injured, or by another person in aid or defense of the person about to be injured to prevent

(1) a crime against his person or his family;

(2) an illegal attempt by force to take or injure property in his possession.

CHAPTER 31. ATTEMPT AND RELATED OFFENSES

Sec. 11.05.020. PUNISHMENT FOR ATTEMPT. A person who attempts to commit a crime, and in the attempt does any act toward the commission of the crime, but fails, or is prevented or intercepted in the perpetration of the crime, when no other provision is made by law for the punishment of the attempt, upon conviction, is punishable as follows.

(1) If the crime attempted is punishable by imprisonment in the penitentiary or state jail, the punishment for the attempt is by the same imprisonment, as the case may be, for a term not more than half the longest period prescribed as a punishment for the crime. If the period prescribed as a punishment for the crime is an indeterminate or life term, the punishment for the attempt shall be fixed by the court at a term not more than 10 years.

(2) If the crime attempted is punishable by a fine, the punishment for the attempt shall be by a fine of not more than half the amount of the largest fine prescribed as a punishment for the crime.

Sec. 11.10.070. INCITING COMMISSION OF CRIME. A person who wilfully and knowingly solicits, incites or induces another to commit a felony or a misdemeanor in the state,

(1) if the act solicited, incited or induced is a felony, is guilty of a felony and upon conviction is punishable by a fine of not more than $3000, or by imprisonment for not more than three years, or by both;

(2) if the act solicited, incited or induced is a misdemeanor, is guilty of a misdemeanor and upon conviction is punishable by a fine of not more than $500, or by imprisonment for not more than six months, or by both.

CHAPTER 41. ARTICLE 5 - ROBBERY

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. 11.15.240. ROBBERY. A person who, by force or violence, or by putting in fear, steals and takes anything of value from the person of another is guilty of robbery, and is punishable by imprisonment in the penitentiary for not more than 15 years nor less than one year.

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.

CHAPTER 56. ARTICLE 1 - BRIBERY

Sec. 11.30.040. BRIBERY. A person who corruptly gives, offers, or promises to give a gift, gratuity, valuable consideration or other thing, or corruptly promises to do or causes to be done an act beneficial to a peace officer, judicial officer, executive officer or public official, with intent to influence the vote, opinion, decision, judgment, or official conduct of the officer or official in a matter, question, duty, cause, or proceeding which is or by law may come or be brought before him, or with intent to influence the person to act in his official capacity in a particular manner to produce or prevent a particular result, upon conviction, is punishable by imprisonment for not less than two years nor more than 10 years.

Sec. 11.30.050. ACCEPTING A BRIBE. A peace officer, judicial officer, executive officer or public official who corruptly accepts or receives a gift, gratuity, valuable consideration, or thing, or a promise

of one of them, or a promise to do or cause to be done an act beneficial to him, with the understanding or agreement, express or implied, that the officer or official will give his vote, opinion, decision, or judgment in a particular manner in a matter, question, duty, cause, or proceeding which then is or may by law come or be brought before him, or with the understanding or agreement that the person will in his official capacity act in a particular manner to produce or prevent a particular result, upon conviction, is punishable by imprisonment for not less than five years nor more than 15 years.

Sec. 11.30.230. RECEIVING UNAUTHORIZED FEES; NONFEASANCE IN OFFICE. An officer of the state, borough, city, or other municipal or public corporation, other than the governor or judge of the superior court, who (1) wilfully and knowingly charges, takes, or receives a fee or compensation, other than that authorized or permitted by law, for an official service or duty performed by him;

CHAPTER 56. ARTICLE 2 - PERJURY

Sec. 11.30.010. PERJURY AND SUBORNATION OF PERJURY. (a) A person authorized by law to take an oath or affirmation, or a person whose oath or affirmation is required by law, who wilfully and falsely swears or affirms in regard to a matter concerning which an oath or affirmation is authorized or required, is guilty of perjury.

(b) A person who procures another to commit the crime of perjury is guilty of subornation of perjury.

Sec. 11.30.020. PUNISHMENT FOR PERJURY OR SUBORNATION OF PERJURY. (a) A person convicted of perjury committed in a criminal action or proceeding for a crime punishable by imprisonment for life is punishable by imprisonment in the penitentiary for not less than two years nor more than 20 years.

(b) A person convicted of perjury committed in a proceeding in a court other than a criminal action referred to in (a) of this section is punishable by imprisonment in a penitentiary for not less than three years nor more than 10 years.

(c) A person convicted of perjury committed otherwise than in a proceeding before a court of justice, or a person convicted of the crime of subornation of perjury, however committed, is punishable by imprisonment in the penitentiary for not less than one year nor more than five years.

Sec. 11.30.030. ENDEAVOR TO PROCURE PERJURY. A person who endeavors to procure or incite another to commit the crime of perjury, though no perjury is committed, upon conviction, is punishable by imprisonment in the penitentiary for not less than one year nor more than three years.

APPENDIX III

INDEX TO COMMENTARY ON TENTATIVE DRAFT

INDEX TO COMMENTARY ON TENTATIVE DRAFT (Continued) Page