January 1978

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

Alaska Criminal Code Revision Subcommission

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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 5, includes the remaining substantive provisions of the draft Revised Criminal Code not covered in prior parts of the tentative draft: articles on general provisions, justification (part 2), and responsibility (mental disease or defect); remaining sections in the Offenses Against Property chapter (issuing a bad check, littering); articles on business and commercial offenses (part 2) and credit card offenses; offenses against the family; the remaining article in the Offenses Against Public Administration chapter (abuse of public office); two Offenses Against Public Order articles (riot, disorderly conduct, and related offenses; and offenses against privacy of communication); weapons and explosives; and miscellaneous offenses. Commentary following each draft statute 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 and amendments to provisions contained in the Tentative Draft, Parts 1–3.

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 This resulted in a criminal code containing outdated statutes, obsolete terminology, a number of overly specific statutes, a haphazard approach to *mens rea* (the culpable mental state with which a defendant must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)

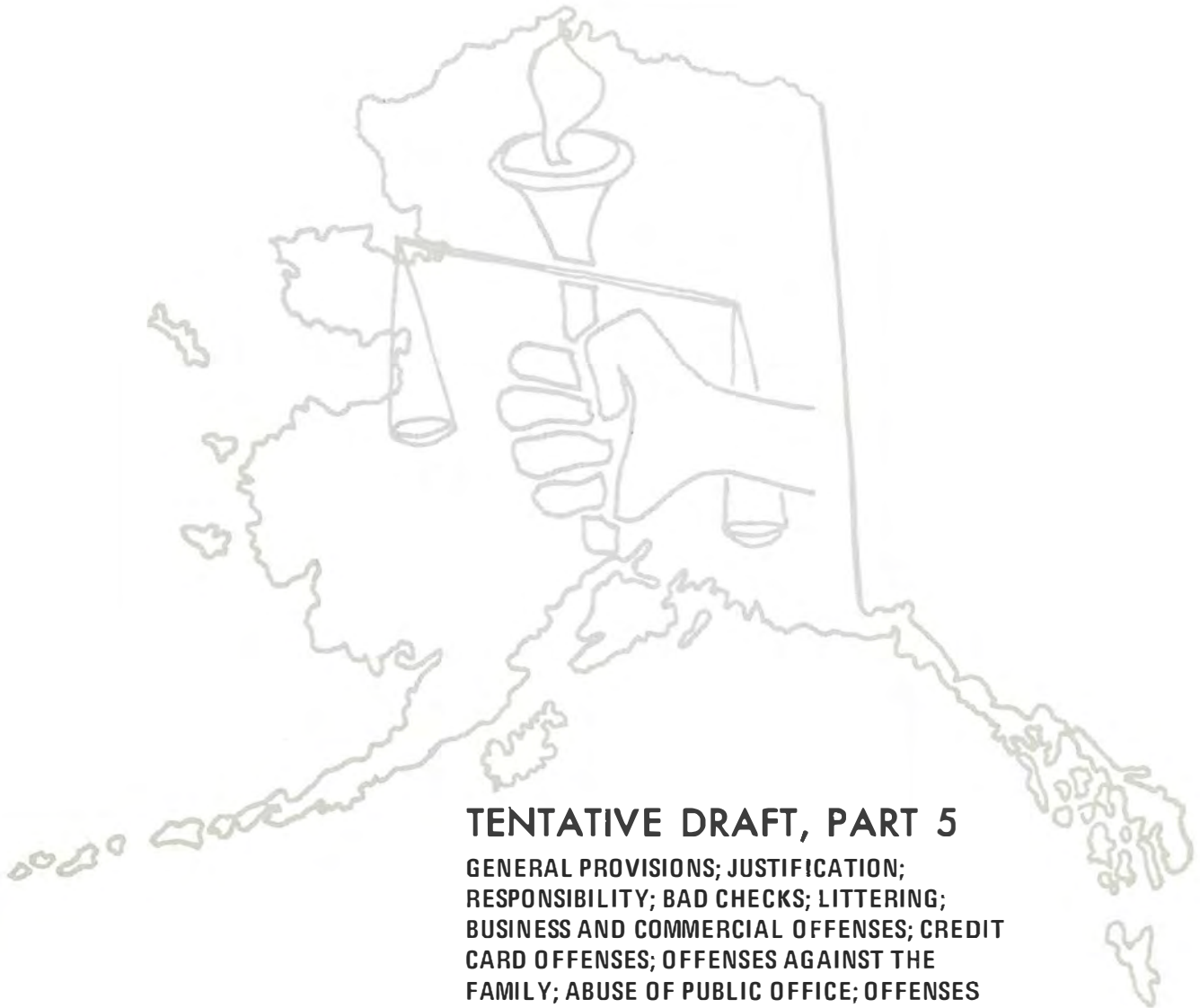
Commentary on the Alaska Revised Criminal Code (Ch. 166, SLA 1978) and Errata to the Commentary (1978)

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 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

CRIMINAL CODE REVISION SUBCOMMISSION
HONORABLE TERRY GARDINER, CHAIRMAN
JANUARY 1978

ALASKA REVISED CRIMINAL CODE

Tentative Draft, Part 5

December, 1977

Honorable Terry Gardiner
Chairman

TABLE OF CONTENTS

INTRODUCTION TO TENTATIVE DRAFT, PART 5

Tentative Draft, Part 5, includes the remaining substantive provisions of the Revised Criminal Code. The final part of the Tentative Draft, Part 6, will be published February 1, 1978, and will include the Code's provision on sentencing.

Tentative Draft, Part 4, was distributed in November, 1977, and was composed of nine articles of the Revised Criminal Code - attempt and related offenses, part 2; arson, criminal mischief and related offenses, part 2; business and commercial offenses; escape and related offenses; offenses relating to judicial and other proceedings; obstruction of public administration; general provisions; prostitution and related offenses; and gambling offenses.

Tentative Draft, Part 3, was distributed in April, 1977, and was composed of five articles in the Offenses Against Property chapter of the Revised Criminal Code - theft and related offenses, burglary and criminal trespass, arson and related offenses, forgery and related offenses and general provisions.

Tentative Draft, Part 2, was distributed in March, 1977, and was composed of seven articles of the 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.

Tentative Draft, Part 1, was distributed in February, 1977, and was composed 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.

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

The Subcommission has made a number of amendments to provisions appearing in Tentative Drafts, Parts 1 - 3. These amendments are listed in Appendix II.

CHAPTER 6. GENERAL PROVISIONS.

SECTION

Sec. 11.06.100. GENERAL PURPOSES. The general purposes of this title are to

(1) insure the public safety by

(A) preventing the commission of offenses through the deterrent influence of the sentences authorized;

(B) confining those convicted when required in the interests of public protection; and

(C) correcting and rehabilitating those convicted;

(2) proscribe conduct that unjustifiably and inexcusably causes or threatens substantial harm to individual or public interests;

(3) give fair warning of the nature of the conduct constituting an offense and of the sentences authorized upon conviction;

(4) define the act or omission and accompanying mental state that constitute each offense and limit the condemnation of conduct as criminal when it is without fault;

(5) differentiate on reasonable grounds between serious and minor offenses and prescribe proportionate penalties for each;

(6) avoid excessive, disproportionate, and arbitrary punishments.

Sec. 11.06.110. APPLICATION OF TITLE 11. (a) Except as provided in ch. 36 of this title, the provisions of this title govern the

construction of and punishment for any offense defined in this title and committed on or after the effective date of this title, as well as the construction and application of any defense to a prosecution for the offense.

(b) The provisions of this title do not apply to or govern the construction of and punishment for any offense committed before the effective date of this title, or the construction and application of any defense to the prosecution for the offense. An offense shall be construed and punished according to the law existing at the time of the commission of the offense in the same manner as if this title had not become law.

(c) When all or part of a criminal statute is amended or repealed, the criminal statute or part of it so amended or repealed remains in force for the purpose of authorizing the accusation, prosecution, conviction, and punishment of a person who violated the statute or part of it before the effective date of the amending or repealing Act.

Sec. 11.06.120. LIMITATION ON APPLICABILITY. This title does not bar, suspend, or otherwise affect any right to or liability for damages, penalty, forfeiture, or other remedy authorized by law to be recovered or enforced in a civil action, regardless of whether the conduct involved in the proceeding constitutes an offense defined in this title.

Sec. 11.06.130. ALL OFFENSES DEFINED BY STATUTE. No conduct constitutes an offense unless it is made an offense

(1) by this title;

(2) by a statute outside this title; or

(3) by a regulation authorized by and lawfully adopted under a statute.

Sec. 11.06.140. BURDEN OF INJECTING THE ISSUE. When the phrase "the defendant has the burden of injecting the issue of a defense" is

used in this title, it means that

(1) some evidence must be admitted which places in issue the defense; and

(2) the state then has the burden of disproving the existence of the defense beyond a reasonable doubt.

Sec. 11.06.150. AFFIRMATIVE DEFENSE. When the phrase "affirmative defense" is used in this title, it means that

(1) some evidence must be admitted which places in issue the defense; and

(2) the defendant has the burden of establishing the defense by a preponderance of the evidence.

ALASKA REVISED CRIMINAL CODE

CHAPTER 6. General Provisions

COMMENTARY

I. TD AS 11.06.100. GENERAL PURPOSES

The first section of Chapter 6 states the general philosophy upon which the Revised Code is based and serves as an aid in the interpretation of particular sections. A more specific provision on the purposes of sentencing appears in TD AS 11.36.020.

II. TD AS 11.06.110. APPLICATION OF TITLE 11

Subsection (a) provides that the provisions of the Revised Code govern the construction of, defenses to and punishment of all offenses in the Code committed after the effective date of revised title 11. The exception "except as provided in ch. 36 of this title" is included to allow the Code's sentencing provisions to apply to offenses defined outside title 11 which are classified as felonies or misdemeanors without further penalty provision. See TD AS 11.36.050(a),(b).

As to existing title 11 offenses committed before the effective date of the Revised Code, a savings clause is included in subsection (b) which provides that the law existing at the time of the commission of the offense governs the construction of, defenses to and punishment of such offenses "in the same manner as if this title had not become law."

Subsection (c) provides that the amendment or repeal of a criminal statute does not affect the "accusation, prosecution, conviction and punishment" of a person who violated the statute prior to the effective date of the repeal or amendment.

A similar, more general provision is found in AS 01.05.021.

III. TD AS 11.06.120. LIMITATION ON APPLICABILITY

This section is based on existing AS 11.75.010 and emphasizes that the applicability of criminal penalties to conduct prohibited in the Revised Code does not affect private rights of action available to victims of such conduct.

The Revised Code does not, however, include provisions authorizing treble damages for violation of specific statutes (compare AS 42.20.070 (authorizing treble damages for use by communications employees of information derived from telegraph messages) with TD AS 11.61.220 (Unauthorized divulgence or use of communications)) since the Subcommission concluded that in many instances actual damages would be nominal. To expressly provide for an award of three times such damages might jeopardize existing rights to recover substantial punitive damages for wilful misconduct. TD AS 11.06.120 is expressly designed to remove any question that compensatory and punitive damages can be recovered in appropriate cases in a civil action based on tortious conduct classified as an offense in the Code.

IV. TD AS 11.06.130. ALL OFFENSES DEFINED BY STATUTE

While the common law has been specifically made applicable to Alaska law by AS 01.10.010, there is strong indication that a conviction based on a violation of an uncodified common law crime would not withstand a constitutional

challenge. In a prestatehood decision, Hotch v. United States, 14 Alaska 594, 602 212 F.2d 280 (9th Cir. 1954), the court adopted a position inconsistent with the recognition of common law crimes. The Ninth Circuit observed that "[w]hile ignorance of the law is no defense, it is conversely true that a law which has not been duly enacted is not a law, and therefore a person who does not comply with its provisions cannot be guilty of any crime."

TD AS 11.06.130 requires all offenses to be declared by statute or regulation and has the effect of abolishing common law crimes which have not been specifically adopted by statute or regulation. This will have the effect of preventing the revival of ancient common law offenses, such as dueling, which have been dropped from the Code as anachronisms. That all offenses should be adequately described by statute or regulation is dictated by fundamental fairness.

V. TD AS 11.06.140; 150. BURDEN OF INJECTING THE ISSUE; AFFIRMATIVE DEFENSE

The Code establishes two classes of defenses. As to both, some evidence must be admitted which places in issue the defense. The defendant will usually come forward with some evidence of facts constituting the defense, unless those facts are supplied by the prosecution's witnesses. See generally Alto v. State, 565 P.2d 492, 497 (Alaska 1977) and cases cited therein.

As to burdens of proof, two different rules are codified. If the defendant has the burden of injecting the

issue of the defense the prosecution is required to disprove the defense beyond a reasonable doubt. If, instead, the defense is labeled an affirmative defense, the defendant is required to establish the defense by a preponderance of the evidence.

The term "burden of injecting the issue" is new to existing law. The definition of that term in TD AS 11.06.140 will be familiar to those who have used the existing insanity statutes.

Existing AS 12.45.087(b) provides that "reliance on mental disease or defect as excluding responsibility is an affirmative defense. The burden of proof beyond a reasonable doubt does not require the prosecution to disprove an affirmative defense unless and until there is evidence supporting the defense." The Supreme Court has further interpreted that statute by requiring that "some" evidence must be admitted before the prosecution is required to disprove mental disease or defect. Alto v. State, 565 P.2d 492, 497 (Alaska 1977).

In the Code, the burden of proof described in the insanity statute is not labeled an "affirmative defense" as it is currently; rather, the defendant is said to have "the burden of injecting the issue" of the defense. The term "affirmative defense" is reserved under the Code for defenses where the defendant has the burden of proof.

The Code defines an affirmative defense as a defense that must be raised and established by the defendant by a preponderance of the evidence. There are 18 affirmative defenses

in the Revised Code. The United States Supreme Court recently upheld the right of a state to require a defendant to prove certain defenses at trial. Patterson v. N.Y., 97 S.Ct. 2319 (1977).

The Alaska Supreme Court has also required a defendant to establish certain defenses at trial. In Batson v. State, No. 1486 (Alaska Sept 9, 1976), the court held that the defendant must establish the defense of entrapment by a preponderance of the evidence. Cf. Johansen v. State, 491 P.2d 759, 766-67 (Alaska 1971). In Johansen, the court held that in a contempt proceeding the burden of proof regarding ability to comply with a child support order is on the defendant. The court justified its classification of "inability to comply" as an affirmative defense by "finding that child support contempt is not wholly a criminal proceeding." 491 P.2d at 767 n.32.

CHAPTER 21. GENERAL PRINCIPLES OF JUSTIFICATION.

Section

Sec. 11.21.220. JUSTIFICATION: PERFORMANCE OF PUBLIC DUTY. (a) Unless inconsistent with secs. 115 - 210 of this chapter, conduct which would otherwise constitute an offense is justified when it is required or authorized by law or by a judicial decree, judgment, or order.

(b) The justification afforded by this section also applies when

(1) the person reasonably believes his conduct to be required or authorized by a decree, judgment, or order of a competent court or tribunal or in the lawful execution of legal process, nothwithstanding lack of jurisdiction of the court or tribunal or defect in the legal process; or

(2) the person reasonably believes his conduct to be required or authorized to assist a peace officer in the performance of his duties, notwithstanding that the officer exceeded his authority.

Sec. 11.21.230. JUSTIFICATION: USE OF PHYSICAL FORCE, SPECIAL RELATIONSHIPS. (a) The use of physical force upon another person that would otherwise constitute an offense is justified under any of the following circumstances:

(1) A parent, guardian, or other person entrusted with the care and supervision of a minor or an incompetent person may use reasonable and appropriate nondeadly physical force upon that minor or incompetent person when and to the extent reasonably necessary and

appropriate to promote the welfare of the minor or incompetent person.

(2) A teacher may, if authorized by school regulations, use reasonable and appropriate nondeadly physical force upon a student when and to the extent reasonably necessary and appropriate to maintain order in the school or classroom and when the use of that force is consistent with the welfare of the students.

(3) A superintendent or other entrusted official of a correctional facility, in order to maintain order, may use such reasonable nondeadly physical force as is authorized by the regulations adopted by the Department of Health and Social Services, when and to the extent reasonably necessary to maintain order.

(4) A person responsible for the maintenance of order in a common carrier of passengers, or a person acting under his direction, may use reasonable nondeadly physical force when and to the extent reasonably necessary to maintain order.

(5) A person who reasonably believes that another is imminently about to commit suicide may use reasonable nondeadly physical force upon that person when and to the extent reasonably necessary to prevent a suicide.

(6) A licensed physician, paramedic, or registered nurse, or a person acting under his direction, or any person who renders emergency care at the scene of an emergency, may use reasonable nondeadly physical force for the purpose of administering a recognized and lawful form of treatment which is reasonably adapted to promoting the physical or mental health of the patient if

(A) the treatment is administered with the consent of the patient, or if the patient is a minor or an incompetent person, with the consent of his parent, guardian, or other person entrusted with his care and supervision; or

(B) the treatment is administered in an emergency if the person administering the treatment reasonably believes that no one competent to consent can be consulted under the circumstances and that a reasonable person, wishing to safeguard the welfare of the patient, would consent.

(b) A person who raises a defense under (a)(1) of this section and claims that the person upon whom force was used was an incompetent has the burden of establishing that, at the time force was used, the person upon whom the force was used

(1) was hospitalized under AS 47.30; or

(2) could have been hospitalized upon court order under AS 47.30.070.

Sec. 11.21.240. DURESS. (a) In a prosecution for an offense, it is an affirmative defense that the defendant engaged in the proscribed conduct because he was coerced to do so by the use or threatened use of unlawful physical force upon him or a third person, which force or threatened force a reasonable person in his situation would have been unable to resist.

(b) The defense of duress is not available when a person recklessly places himself in a situation in which it is probable that he will be subject to duress.

Sec. 11.21.250. ENTRAPMENT. In a prosecution for an offense, it is an affirmative defense that, in order to obtain evidence of the commission of an offense, a public law enforcement official or a person working in cooperation with him induced the defendant to commit the offense by persuasion or inducement as would be effective to persuade an average person, other than one who is ready and willing, to commit the offense. Inducement or persuasion which would induce only a person engaged in an habitual course of unlawful conduct for gain or profit does not constitute entrapment.

ALASKA REVISED CRIMINAL CODE

CHAPTER 21. General Principles of Justification (Part 2)

COMMENTARY

I. TD AS 11.21.220. JUSTIFICATION: PERFORMANCE OF PUBLIC DUTY

A. Existing Law

AS 11.15.090 provides that a homicide is justifiable when committed by a public officer or a person aiding the officer (1) in obedience to the judgment of a competent court; or (2) when necessarily committed in overcoming resistance to the execution of process or to the discharge of a legal duty.

B. The Code Provision

TD AS 11.21.220 provides the defense of justification to all prosecutions under the Code if the chargeable conduct is required or authorized by law or judicial order. The Code provision must be read in conjunction with the other, more specific, sections of the justification chapter which are intended to be controlling if applicable even though the conduct in question involves the performance of public duty. For example, TD AS 11.21.170(b) specifies the circumstances when a peace officer may use deadly force in making an arrest. TD AS 11.21.220 does not expand that authority. Rather, sec. 170(b) explains the application of sec. 220 in a very specific circumstance.

Subsection (a) of sec. 220 provides that statutes or court orders which impose a duty or grant a privilege to act may be followed without the actor incurring criminal liability. If a statutory provision, for example, permits a door to be

broken down in the execution of a search warrant (AS 12.35.040) the officer has not committed criminal mischief in doing so. Similarly, the physician who acts pursuant to a court order permitting a blood transfusion has not committed assault.

Under subsection (a), the conduct must in fact be authorized by law or judicial order; the actor's reasonable, though mistaken, belief is not sufficient to establish the defense. Subsection (b) provides two exceptions to the requirement of (a) when the actor has a reasonable belief that the conduct is required or authorized. The first involves a person who acts upon a court order that is defective for lack of jurisdiction but is reasonably believed by him to be authoritative. The second involves a person called upon by a peace officer for assistance that the person reasonably believes to be lawful.

II. TD AS 11.21.230. JUSTIFICATION: USE OF PHYSICAL FORCE - SPECIAL RELATIONSHIPS

TD AS 11.41.230 describes six situations when the use of reasonable nondeadly physical force is justified based on the relationship between the actor and the person upon whom force was used. It must be emphasized that while the term "nondeadly physical force" as used in the Code encompasses all force short of the deadly variety, the degree of force used must, in all cases, be reasonable under the circumstances. If excessive force, even though nondeadly, is used, the force will not be justified.

Existing law recognizes that a homicide is excusable

when committed by "accident or misfortune in lawfully correcting a child." AS 11.15.110(1). See also L.A.M. v. State, 547 P.2d 159, 175 (Alaska 1972). Subsection (a)(1) allows parents, guardians and others entrusted with the care and supervision of a minor or incompetent person to use reasonable and appropriate nondeadly physical force when and to the extent reasonably necessary to promote the welfare of the minor or incompetent person. If force is used against an incompetent, the person who uses the force must also establish the person's incompetency under subsection (b).

Subsection (a)(2) provides a limited privilege from criminal liability to a teacher to use force upon a student in certain situations. The subsection prohibits the use of any physical force in the absence of a school regulation allowing it. Thus the detailed regulation of situations where physical force is allowable, the extent of force to be used and procedural limitations on its use (such as who may administer the force) is left to the detailed regulation of school authorities within the context of each community.

Even school regulations can only allow force that is "reasonable and appropriate", "necessary and appropriate to maintain order" and "consistent with the welfare of the students."

The Subcommission rejected a proposal that would have required parental consent in all cases, being mindful of the broad definition of "physical force" in the Code, which would include, for example, ejecting a student from a classroom, and the inappropriateness of application of the criminal law to a variety

of minor school altercations which might include, for example, a "hurry up" push, breaking up a fight in the classroom and a variety of other occasions where the use and abuse of physical force is best left to community and administrative regulation and the constraints of civil law.

Subsection (a)(3) allows the use of reasonable nondeadly physical force by correctional facility officials to maintain order in a correctional facility when such force is authorized by the regulations adopted by the Department of Health and Social Services. As with the school situation, the criminal law can provide only broad guidelines to behavior which should otherwise be subject to controls pertinent to the requirements of specific situations. The use of deadly force in a correctional facility will be justified only when authorized by other provisions of chapter 21. See TD AS 11.21.210, Use of physical force to prevent escape from correctional facility.

Subsection (a)(4) provides that a person responsible for the maintenance of order on a common carrier of passengers may use reasonable nondeadly force to maintain order on the common carrier. This provision, for example, would authorize a bus conductor to use reasonable force to eject an intoxicated person who is harassing other passengers. As with the other subsections of this Code provision, deadly force will be justifiable only if authorized by other provisions of this chapter. See TD AS 11.21.140, Use of physical force in defense of third persons.

Subsection (a)(5) is new to Alaska and reflects a value only relatively recently given expression in the criminal law. It supports the general policy of the law to discourage suicides. See TD AS 11.41.110(e) (defense to charge of murder, but not manslaughter, that defendant aided a suicide).

Subsection (a)(6) authorizes the use of physical force when required for the administration of reasonably necessary medical treatment. Existing law contemplates that in emergency situations conduct that would otherwise constitute a criminal assault will not result in civil liability. See AS 09.65.090, Civil liability for emergency aid; AS 08.64.366, Liability for services rendered by a physician-trained mobile intensive care paramedic.

Subsection (a)(6)(A) justifies the use of nondeadly force in a medical situation when administered with the consent of the patient, or if the patient is a minor or incompetent, the consent of a parent, guardian or other person entrusted with his care or supervision. Justification is extended by subsection (6)(B) to the use of force without consent of the patient only in emergency situations when no one competent to give consent is available under the circumstances, but when any reasonable person would give consent.

III. TD AS 11.21.240. DURESS

There is no existing statute in Alaska that recognizes the defense of duress though it has been raised in at least two recent cases. Evans v. State, 550 P.2d 830, 841 n.31 (Alaska 1976); State v. Webb, No. 74-1734 (Super. Ct., 3d

Dist. 1974). TD AS 11.21.240 codifies the affirmative defense of duress.

The Subcommission has limited the defense to situations where a person is coerced to act by "the use or threatened use of unlawful physical force upon him or a third person." The Subcommission perceived no valid reason for requiring: that the defendant suffer actual physical injury, that the imperiled victim be the defendant rather than another, that the defendant commit some crime other than murder or that the injury portended be immediate in point of time. It is expected, however, that these factors will be given evidential weight along with other circumstances in determining whether a reasonable person in the defendant's situation would have been unable to resist the commission of the crime.

The duress defense assumes that the defendant acted with the culpable mental state required for the particular offense, an element that the prosecution must establish beyond a reasonable doubt. Once the requisite level of culpability is established (for example, in the case of criminal possession of a forgery device, TD AS 11.46.520(a)(1), that the defendant possessed the device with knowledge of its character) the defendant may escape liability if he proves by a preponderance of the evidence that although he acted with the necessary culpable mental state, he did so out of duress. Of course, if "duress" prevented him from forming the requisite culpable mental state, (for example, in the case of forgery, TD AS 11.46.500, that the defendant while falsely making a written

instrument, did not intend to defraud) the defense would not have to be raised since the prosecution would be unable to establish the requisite elements of the offense in the first instance.

Subsection (b) is intended as a guarantee against the claim of justification being raised by a defendant acting with accomplices, e.g., defendant argues that he fired a weapon during a hold-up only because his accomplice threatened to shoot him if he did not. In such an instance, it is likely that the jury would conclude that the defendant had recklessly placed himself in a situation "in which it [was] probable that he [would] be subject to duress."

IV. TD AS 11.20.250. ENTRAPMENT

Though there is currently no statute on entrapment, the Alaska Supreme Court has recognized the defense. In Grossman v. State, 457 P.2d 226, 229 (1969), the court adopted the "objective" approach to entrapment:

> [U]nlawful entrapment occurs when a public law enforcement official, or a person working in cooperation with him, in order to obtain evidence of the commission of an offense, induces another person to commit such an offense by persuasion or inducement which would be effective to persuade an average person, other than one who is ready and willing, to commit such an offense. Conversely, instigations which would induce only a person engaged in an habitual course of unlawful conduct for gain or profit do not constitute entrapment.

See also, Evans v. State, 550 P.2d 830, 843-46 (Alaska 1976); McKay v. State, 489 P.2d 145, 149-50 (Alaska 1971).

In Grossman, the court adopted the minority opinion in Sherman v. United States, 356 U.S. 369 (1958) (Frankfurter, J.,

dissenting) and explained both the policy behind the law of entrapment and the way in which that policy could best be effected:

> "The courts refuse to convict an entrapped defendant, not because his conduct falls outside the proscription of the statute, but because, even if his guilt be admitted, the methods employed on behalf of the government to bring about conviction cannot be countenanced.... Insofar as they are used as instrumentalities in the administration of criminal justice, the federal courts have an obligation to set their face against enforcement of the law by lawless means or means that violate rationally vindicated standards of justice, and to refuse to sustain such methods by effectuating them. They do this in the exercise of a recognized jurisdiction to formulate and apply 'proper standards for the enforcement of the federal criminal law in the federal courts,'...." 356 U.S. at 380.... The minority then stated that the better way to further this policy is to focus the determination upon the character of the police conduct rather than upon the defendant's predisposition. To rest the determination on the origin of intent is irrelevant because, "In every case of this kind the intention that the particular crime be committed originates with the police, and without their inducement the crime would not have occurred."

457 P.2d 226, 228 (quoting in part from Sherman v. United States, 356 U.S. 369, 380 (1958)(Frankfurter, J., dissenting)).

The Alaska Court then concluded:

> We feel that the proper solution is the objective test which focuses the determination upon the particular conduct of the police in the case presented. Inducements should be limited to those measures which, objectively considered, are likely to provoke to the commission of crime only those persons, and not others, who are ready and willing to commit a criminal offense.

457 P.2d at 229.

The Code incorporates existing law by recognizing the "objective" approach to entrapment. Though the defense will continue to be tried by the court in the absence of a jury, codification of the defense in language virtually

identical to that formulated by the Alaska Supreme Court in Grossman is desirable.

In classifying entrapment as an affirmative defense, which must be raised and established by the defendant by a preponderance of the evidence, the Code provision is consistent with existing Alaska practice. Batson v. State, No. 1486 (Alaska, September 9, 1977).

CHAPTER 26. RESPONSIBILITY.

Section

Sec. 11.26.010. MENTAL DISEASE OR DEFECT EXCLUDING RESPONSIBILITY. (a) A person is not responsible for criminal conduct if at the time of the conduct, as a result of mental disease or defect, he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

(b) As used in this section, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

(c) The defendant has the burden of injecting the issue of a defense of mental disease or defect excluding responsibility under this section.

Sec. 11.26.020. EVIDENCE OF MENTAL DISEASE OR DEFECT. Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a culpable mental state which is an element of the offense. However, evidence of mental disease or defect excluding responsibility is not admissible unless the defendant, at the time of entering his plea of not guilty or within 10 days thereafter or at such later time as the court may for good cause permit, files a written notice of his intent to rely on that defense.

ALASKA REVISED CRIMINAL CODE

CHAPTER 26. Responsibility

COMMENTARY

I. TD AS 11.26.010; 020. MENTAL DISEASE OR DEFECT EXCLUDING RESPONSIBILITY; EVIDENCE OF MENTAL DISEASE OR DEFECT

"Defense of mental disease or defect excluding responsibility" was recently examined by the legislature. Accordingly, the Subcommission has not recommended substantive changes in the statutes adopted in 1972. The Subcommission did, however, conclude that the provisions now found in existing AS 12.45.083(a),(b) and AS 12.45.085 more appropriately belong in the Revised Code. These provisions are reenacted in the Code as TD AS 11.26.010, 020. With the exception of these three substantive provisions, existing statutes in title 12 applicable to the procedure to be followed upon a claim of a defense based on mental disease or defect excluding responsibility will remain in title 12.

TD AS 11.26.010, 020 differ from existing law in three nonsubstantive ways. The three changes discussed below either clarify existing law or conform existing law to the Code's uniform vocabulary.

1. Existing law provides: "The requirement of evidence supporting the affirmative defense [of mental disease or defect as excluding responsibility] is not satisfied solely by evidence of an abnormality which is manifested only by repeated criminal or otherwise antisocial language." AS 12.45.083(b). The Code rephrases this qualification in TD AS 11.26.010(b).

2. Existing law provides: "Reliance on mental disease or defect as excluding responsibility is an affirmative defense. The burden of proof beyond a reasonable doubt does not require the prosecution to disprove an affirmative defense unless and until there is evidence supporting the defense." AS 12.45.083(b). This burden of proof is identical to the Revised Code's standard on "burden of injecting the issue" (TD AS 11.06.140, discussed in this Tentative Draft) and this phrase is used in TD AS 11.26.010(c).

3. Existing law provides: "Evidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense." AS 12.45.085. In the Revised Code, the term "culpable mental state," is used to refer to the four states of mind used throughout the Revised Code, and that term appears in TD AS 11.26.020.

CHAPTER 46. OFFENSES AGAINST PROPERTY.

ARTICLE 1. THEFT AND RELATED OFFENSES.

Section

100 - 270 See Tentative Draft, Part 3

280 Issuing a Bad Check

Sec. 11.46.280. ISSUING A BAD CHECK. (a) A person commits the crime of issuing a bad check if, knowing that he or his principal has insufficient funds with the drawee to cover the check, he utters a check and payment is refused by the drawee upon presentation.

(b) When the drawer of a check has insufficient funds with the drawee to cover it at the time of utterance, the drawer or representative drawer is rebuttably presumed to know of that insufficiency.

(c) It is an affirmative defense to a prosecution under this section that the defendant or a person acting in his behalf made full satisfaction of the amount of the check with costs and fees within 10 days after dishonor by the drawee.

(d) As used in this section,

(1) "drawer" means a person whose name appears on the check as the primary obligor, whether the actual signature be that of himself or of a person purportedly authorized to draw the check on his behalf;

(2) "insufficient funds" means no funds with the drawee or funds with the drawee in an amount less than that of the check;

(3) "representative drawer" means a person who signs a check as a drawer in a representative capacity or as agent of the person whose name appears on the check as the primary obligor;

(4) a person "utters" a check when, as a drawer or representative drawer of the check, he delivers it or causes it to be delivered to a person who thereby acquires a right against the drawer with respect to the check; one who draws a check with intent that it be so delivered is

considered to have uttered it if the delivery occurs.

(e) Issuing a bad check is a class A misdemeanor.

ALASKA REVISED CRIMINAL CODE

CHAPTER 46. Offenses Against Property

ARTICLE 1. THEFT AND RELATED OFFENSES (Part 2)

COMMENTARY

I. TD AS 11.46.280. ISSUING A BAD CHECK

A. Existing Law

Bad check statutes were originally required by common law rules which prevented the application of the law of theft to issuing a bad check. See LaFave & Scott, CRIMINAL LAW at 679-680 (1972). The existing statute on issuing checks without funds or credit, AS 11.20.210, describes four prohibited acts, ranging from writing an insufficient funds check with knowledge of the insufficiency, to writing an otherwise valid check but knowing that by the time it is presented for payment the account will be exhausted. Violation of the statute carries a maximum 1 year imprisonment and/or $1000 fine.

AS 11.20.230 provides that if done with an intent to defraud, certain acts that violate sec. 230 ("makes, draws, utters or delivers to another person a check or draft on a bank or other depository for the payment of money, knowing at the time of the drawing or delivery that he does not have sufficient funds or credit") constitute larceny. AS 11.20.240 provides penalties ranging from one month to ten years for violation of the statute based on the amount of the check.

B. The Code Provision

The Revised Code consolidates theft offenses. See Tentative Draft, Part 3 at 18-23. In doing so, common law

technical defenses which have prevented bad check offenses from being prosecuted as theft have been eliminated.

Check offenses which constitute theft should be prosecuted under the Code's theft statutes. Accordingly, the crime of issuing a bad check is redefined in the Code to cover the more limited area which protects public confidence in negotiable instruments in situations where theft is not necessarily involved.

The offense of issuing a bad check is committed when a person utters (defined in subsection (d)(4)) a check knowing that he or his principal has insufficient funds (defined in subsection (d)(2)) with the drawee to cover the check, and payment is refused by the drawee upon presentation. The Code provision thus differs substantially from the existing issuing checks without funds or credit statute.

The primary reason for the departure from existing law is that the definition of "deception" (TD AS 11.46.990(2) discussed in Tentative Draft, Part 3, at 33-34) makes it possible to prosecute the bad check utterer or passer under the general theft provisions of the Code on the basis of the property or services obtained in return for the bad check; the elimination of the promissory fraud doctrine eliminates the need for a bad check statute in its traditional form. Even if no property or service is obtained, the defendant can still be prosecuted for attempted theft. Additionally, instances of bad check schemes involving 10 or more victims can be prosecuted under the Code provision on scheme to defraud in the

first degree, TD AS 11.46.600, a class B felony.

The Code provision applies only to the drawer or representative drawer (defined in subsections (d)(1) and (d)(3)) of the check. The person who passes an "NSF" check with knowledge of the insufficiency can be prosecuted for theft, attempted theft, or if he acted in concert with the drawer, as an accessory to the crime of issuing a bad check.

The Code provision also modifies existing law by requiring the presence of an additional element. While existing law in part prohibits uttering a check, "knowing at the time of the making, drawing, uttering or delivery that the maker or drawer does not have sufficient funds," the Code provision further requires that payment be "refused by the drawee upon presentation." This provision is consistent with contemporary banking practices which sometimes allow checking patrons to overdraw their accounts. As noted in the commentary to the Proposed Michigan Revised Criminal Code:

> The important thing is not whether at the exact time that the instrument is written or passed the drawee happens to have received funds from or on behalf of the drawer. Rather, the important thing is that by the time the instrument is presented there is some reason to honor it.

Proposed Michigan Revised Criminal Code, § 4040 at 277 (1967).

Under the rebuttable presumption provision in section (b) the state meets its initial burden of proving knowledge if it shows that the issuer of the bad check had insufficient funds with the drawee at the time of the utterance. "[T]he drawer ... having both knowledge and control of his account, may fairly be presumed to have intended the insufficiency

which existed. . . ." N.Y. PENAL LAW, § 190.05 Commentary at 354 (1975).

Subsection (c) provides an affirmative defense to prosecution for issuing a bad check. The defendant must establish by a preponderance of the evidence that he or a person acting on his behalf made full satisfaction of the check with costs and fees within 10 days after dishonor by the drawee. The provision effectively makes restitution within 10 days after dishonor a defense rather than a mitigating factor to be considered upon sentencing.

Under subsection (c), the drawer may, at his peril, utter an NSF check believing he will cover it prior to presentation. The utterance becomes a crime if the check is not covered or made good within ten days of dishonor. The definition of the crime of issuing a bad check does not require that the drawer believe the check will be dishonored or that he act with an intent to defraud. Compare N.Y. PENAL LAW § 190.05(1)(a), MO. REV. STAT. § 570.120(1) (effective January 1, 1979).

Because the bad check statute focuses on general confidence in negotiable instruments, the sanction provided for this offense, a class A misdemeanor, does not vary with the amount of the check. If prosecuted under the theft or attempted theft statute the penalty will vary according to the amount involved.

CHAPTER 46. OFFENSES AGAINST PROPERTY.

ARTICLE 3. ARSON, CRIMINAL MISCHIEF, AND RELATED OFFENSES.

Section

400 - 486 See Tentative Draft, Parts 3 and 4

488 Littering

Sec. 11.46.488. LITTERING. (a) A person commits the offense of littering if he recklessly places or throws litter on any public or private property or in any public or private waters without the consent of the owner and does not immediately remove it.

(b) As used in this section, "litter" means any rubbish, refuse, garbage, offal, paper, glass, cans, bottles, trash, debris, or other foreign substance of whatever kind or description, whether or not it is of value.

(c) Littering is a violation.

COMMENTARY

I. TD AS 11.46.488. LITTERING

A. Existing Law

Alaska currently has a very limited littering statute. AS 11.20.590, "Injury to highways, public recreation facilities, or highway signs," imposes criminal penalties on the person who puts or throws garbage or other substances on a "highway, highway right-of-way, or public recreation facility." It also prohibits the dumping of litter or trash onto private property but only if the actor puts or throws it from a "highway or highway right-of-way." Penalties for such conduct include imprisonment for up to one year and/or a fine of not more than $500. Although "highway" is broadly defined in AS 11.20.590(f), no mention is made of public or private lands, streams, rivers or lakes that may not be highways or "public recreation facilities" but may become repositories for litter.

While several statutes outside title 11 prohibit maintaining air, land and water nuisances, these provisions are principally directed at protection of public health. See, e.g., AS 46.03.800 (prohibiting water nuisance but only if water is or may be used for domestic purposes); AS 46.03.810 (prohibits as air and land nuisance only the dumping of materials that would be "obnoxious, or cause the spread of disease or in any way endanger the health of the community"). Other statutes provide some protection for state land and

waters but are directed principally at curtailing large scale pollution. See, e.g., AS 46.03.740, Oil Pollution; AS 46.03.750, Ballast water discharge. These provisions, which allow for a more severe response to aggravated situations, are not disturbed by the Code provision.

B. The Code Provision

The Code broadens the existing law on littering on the highway by providing that littering, a violation, is committed by one who throws litter onto any public or private property or waters without the consent of the owner and does not immediately remove it. "Litter" is broadly defined in subsection (b) to include any foreign substance, whether or not it is of value.

The aggravated offense of "Obstruction of Highways," TD AS 11.61.150, covers situations where the dumping constitutes a hazard to public safety and is treated as a B misdemeanor.

CHAPTER 46. OFFENSES AGAINST PROPERTY.

ARTICLE 5. BUSINESS AND COMMERCIAL OFFENSES.

Section

600-700 See Tentative Draft, Part 4

710 Deceptive Business Practices

720 Misrepresentation of Use of a Propelled Vehicle

730 Defrauding Secured Creditors

740 Defrauding Judgment Creditors

750 Fraud in Insolvency

Sec. 11.46.710. DECEPTIVE BUSINESS PRACTICES. (a) A person commits the crime of deceptive business practices if, in the course of engaging in a business, occupation, or profession, he

(1) makes or causes to be made a false statement in an advertisement or communication addressed to the public or to a substantial number of persons in connection with the promotion of the sale of property or services or to increase the consumption of property or services;

(2) makes or causes to be made a material false statement to any person in connection with the sale of property or services;

(3) uses or possesses for use a false weight or measure, or any other device for falsely determining or recording any quality or quantity;

(4) sells, offers for sale, exposes for sale, or delivers less than the represented quantity of a commodity or service;

(5) sells, offers for sale, or exposes for sale adulterated commodities; or

(6) sells, offers for sale, or exposes for sale mislabeled commodities.

(b) It is a defense to a prosecution under this section that the defendant did not act at least recklessly. The burden of injecting the

issue of this defense is on the defendant.

(c) As used in (a)(1) of this section, "false statement" includes but is not limited to an offer to sell or provide property or services if the offeror does not intend to sell or provide the advertised property or services

(1) at the price or of the quality advertised;

(2) in a quantity sufficient to meet the reasonably expected public demand unless quantity is specifically stated in the advertisement; or

(3) at all.

(d) As used in this section,

(1) "adulterated" means varying from the standard of composition or quality prescribed by statute or administrative regulation or, if none, as set by established commercial usage;

(2) "mislabeled" means

(A) varying from the standard of truth or disclosure in labeling prescribed by statute or administrative regulation or, if none, as set by established commercial usage; or

(B) represented as being another person's product, though otherwise labeled accurately as to quality and quantity.

(e) Deceptive business practices is a class A misdemeanor.

Sec. 11.46.720. MISREPRESENTATION OF USE OF A PROPELLED VEHICLE. (a) A person commits the crime of misrepresentation of use of a propelled vehicle if, with intent to deceive any person, he sells, leases, or offers or exposes for sale or lease a propelled vehicle knowing that a usage registering device on the vehicle has been disconnected, adjusted or replaced so as to misrepresent the miles traveled by the vehicle or the hours of engine use.

(b) As used in this section, "usage registering device" means any

odometer, speedometer, recording tachometer, hobbsmeter, or other instrument that registers the miles traveled by the vehicle or the hours of engine use.

(c) Misrepresentation of use of a propelled vehicle is a class A misdemeanor.

Sec. 11.46.730. DEFRAUDING SECURED CREDITORS. (a) A person commits the crime of defrauding secured creditors if, knowing that property is subject to a security interest, he

(1) intentionally fails to disclose that interest to a buyer of the property; or

(2) destroys, removes, conceals, encumbers, transfers, or otherwise deals with property subject to a security interest with intent to hinder enforcement of that interest.

(b) Defrauding secured creditors is a class A misdemeanor.

Sec. 11.46.740. DEFRAUDING JUDGMENT CREDITORS. (a) A person commits the crime of defrauding judgment creditors if he assigns, secretes, conveys, or otherwise disposes of his property with intent to defraud an existing judgment creditor.

(b) Defrauding judgment creditors is a class A misdemeanor.

Sec. 11.46.750. FRAUD IN INSOLVENCY. (a) A person commits the crime of fraud in insolvency when, knowing that proceedings have been or are about to be instituted for the appointment of an administrator or that a composition agreement or other arrangement for the benefit of creditors has been or is about to be made, he, with intent to defraud any creditor,

(1) conveys, transfers, removes, conceals, destroys, encumbers, or otherwise disposes of any part of or interest in the debtor's estate;

(2) obtains a substantial part of or interest in the debtor's

estate;

(3) presents to any creditor or to the administrator a writing or record relating to the debtor's estate knowing that it contains a false statement; or

(4) misrepresents or fails to disclose to the administrator the existence, amount, or location of any part of or interest in the debtor's estate, or any other information which he is legally required to furnish to the administrator.

(b) As used in this section, "administrator" means an assignee or trustee for the benefit of creditors, a liquidator, a receiver, or any other person entitled to administer property for the benefit of creditors.

(c) Fraud in insolvency is a class A misdemeanor.

ALASKA REVISED CRIMINAL CODE

CHAPTER 46. Offenses Against Property

ARTICLE 5. BUSINESS AND COMMERCIAL OFFENSES (Part 2)

COMMENTARY

I. TD AS 11.46.710. DECEPTIVE BUSINESS PRACTICES

A. Existing Law

Currently, deceptive business practices are prohibited by the Unfair Trade Practices and Consumer Protection Act. AS 45.50.471-.561. Section 551 of the Act provides both civil and criminal penalties for engaging in the 25 prohibited acts listed in AS 45.50.471. Criminal penalties are available when the defendant engages in a "course of conduct" declared unlawful by section 471. AS 45.50.551(c).

In addition, numerous statutes and regulations outside title 45 prohibit deceptive business practices. These provisions overlap, carry inconsistent penalty provisions and often fail to specify the culpable mental state element.

For example, AS 17.05.060 sets the required vitamin and mineral content of flour. AS 17.05.150 prescribes a fine of not more than $200 or imprisonment for not more than 30 days for a violation of section 060. A more general provision appearing in the Food, Drug and Cosmetic Act, AS 17.20.290(1), prohibits the sale of any adulterated food. A penalty of imprisonment for not more than 6 months and/or a fine of not more than $500 is authorized for violations of section 290. AS 17.20.310.

Aside from the inconsistent penalty provisions

applicable to these two overlapping statutes, no culpability requirement is specified. While the legislature may have intended to provide for strict liability for the sale of any adulterated good, other overlapping provisions specify culpability. AS 17.05.020, for example, provides that a person "who sells or offers for sale a substance [intended for meat or drink] knowing it is adulterated" is guilty of an offense carrying a three month to one year sentence or a $50-$500 fine.

Numerous other examples exist. The statutes just discussed are included merely as a sample of the inconsistent and confusing maze of criminal provisions now regulating this area.

B. The Code Provision

TD AS 11.46.710 prohibits six forms of deceptive business practices and classifies the prohibited conduct as a class A misdemeanor. The offense of deceptive business practices differs from the crime of theft since there is no requirement that the defendant obtain property or that he act intentionally.

Upon passage of the Revised Code, the existing criminal penalties applicable for a violation of the Unfair Trade Practices and Consumer Protection Act as well as the criminal penalty provisions found in overlapping deceptive business practices statutes and regulations outside title 45 would be repealed. The Code provision will provide a uniform penalty provision and culpable mental state requirement for the deceptive business practices prohibited by TD AS 11.45.710.

With the exception of the criminal penalty provisions, however, the existing statutes and regulations outside title 11 regulating similar conduct would not be repealed, and could be enforced civilly.

Though the offense of deceptive business practices is initially defined as one of strict liability, subsection (b) provides that once the defendant denies that he acted with a culpable mental state, the state must establish that the defendant acted at least recklessly. Mere civil negligence, or even criminal negligence, will not be sufficient to establish a violation of the statute once the issue of culpability is raised. As under the existing Unfair Trade Practices Act, prohibited forms of deceptive business practices require that the defendant commit the prohibited act while "in the course of engaging in a business, occupation or profession."

The first form of deceptive business practice prohibited by the statute is false advertising. Subsection (a)(1) prohibits the making of a false statement in any advertisement or communication addressed to a substantial number of persons. The definition of "false statement" in subsection (c) is drafted so as to specifically include conduct commonly referred to as "bait advertising," a practice now prohibited under AS 45.50.471(b)(8),(9).

Subsection (a)(2) prohibits the making of any material false statement in connection with the sale of property or services. Note that there is no requirement that the statement be part of an advertisement or made to a substantial number of persons; a single statement to a single person will be sufficient.

The prosecution must, however, establish that the statement was material to the transaction. Thus, the auto repairman who makes the single false statement to a customer that he has been repairing auto transmissions for ten years will violate the statute if his statement is likely to affect the customer's decision to leave his car with him.

Subsection (a)(3) prohibits a person from using or possessing a false weight or measure for falsely determining or recording any measurement of quality or quantity. Subsection (a)(4) prohibits a person from selling, offering for sale or delivering less than the represented quantity of a commodity or service.

Subsections (a)(5) and (a)(6) prohibit a person from selling, offering for sale or exposing for sale adulterated or mislabeled commodities. The terms "adulterated" and "mislabeled" are defined in TD AS 11.46.710(d)(1), .710(d)(2). Note that the determination of whether a commodity is "adulterated" or "mislabeled" is based, for the most part, on existing statutes and regulations. Thus TD AS 11.46.710 operates as a "piggy-back" provision on already existing statutes and regulations; it does not determine what is adulterated or mislabeled, it merely punishes the sale of such commodities.

II. TD AS 11.46.720. MISREPRESENTATION OF USE OF A PROPELLED VEHICLE

A. Existing Law

AS 45.50.471(18) provides that "disconnecting, turning back or resetting the odometer of a vehicle to reduce the

number of miles indicated" is a deceptive act in the conduct of trade or commerce. Criminal penalties for violation of the statute are provided in AS 45.50.551. The person who engages in a course of conduct declared unlawful by section 471 may be sentenced to imprisonment for up to a year and/or $1,000 fine.

B. The Code Provision

The Code provision on misrepresentation of use of a propelled vehicle provides that it is a class A misdemeanor to sell or lease a propelled vehicle with intent to deceive and with knowledge that the usage registering device on the vehicle has been disconnected, adjusted or replaced to misrepresent the miles traveled by the vehicle or the hours of engine use. As defined in subsection (b), "usage registering devices" would include recording tachometers, hobbsmeters and similar instruments as well as devices commonly associated only with automobiles such as speedometers and odometers. The effect of this definition is to extend the coverage of the statute to airplanes, construction equipment and other propelled vehicles the use of which is measured by hours of operation rather than miles traveled.

Unlike existing law, the statute does not require that the seller or lessor tamper with the device. Sale or lease with intent to deceive and with knowledge of the tampering will violate the statute.

III. TD AS 11.46.730. DEFRAUDING SECURED CREDITORS

A. Existing Law

AS 11.20.400 provides "a person who, with intent to

defraud, conveys goods, chattels, or personal property to which he does not have title or which is subject to a lien, pledge, conditional sale contract, mortgage or other security interest without informing the buyer of the existence and effect of the security interest" is punishable by imprisonment for not more than one year, and/or a $500 fine.

B. The Code Provision

The Code provisions on theft are drafted in terms of appropriation of "property of another." A security interest, however, does not make the secured party an owner; the property, by reason of the security interest alone, is not the "property of another." See TD AS 11.46.990(8), Tentative Draft, Part 3, at 102 ("property of another" defined). This limitation makes necessary specific coverage of the disposal by debtors of property subject to a security interest in ways that hinder enforcement of the interest by the creditor.

The Code provision may be violated in either of two ways. The first is by selling secured property and intentionally failing to disclose the existence of the security interest to the buyer. The second is by dealing with the secured property with intent to hinder enforcement of the security interest.

Defrauding secured creditors is classified as a class A misdemeanor, regardless of the value of the secured property involved. This treatment differs from the classification of theft offenses into three degrees depending on the value of the property. The person who interferes with property

in his possession that is subject to a security interest is viewed as engaging in less serious behavior than the person who takes property upon which no reasonable claim to possession could have been made. It must be stressed, however, that in cases where it can be established that the defendant, at the time he undertook the security obligation, intended to commit a fraud, felony penalties will be available under the general theft provisions.

IV. TD AS 11.46.740. DEFRAUDING JUDGMENT CREDITORS

A. Existing Law

AS 34.40.010 provides that "a conveyance or assignment, in writing or otherwise, of an estate or interest in lands, or in goods. . . made with the intent to hinder, delay, or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts, or demands. . . as against the persons so hindered, delayed, or defrauded is void."

B. The Code Provision

The Code provision differs from existing law by specifically providing criminal penalties for the act of defrauding an existing judgment creditor. The defendant must secrete, assign, convey or otherwise dispose of his property with the intent to defraud an existing judgment creditor. Such conduct parallels that proscribed by TD AS 11.46.730, Defrauding secured creditors, and is classified accordingly as a class A misdemeanor.

V. TD AS 11.46.750. FRAUD IN INSOLVENCY

A. Existing Law

See discussion of AS 11.34.010 at IV, A, supra.

B. The Code Provision

The fraud in insolvency statute closes a gap in existing law. The Federal Bankruptcy Act's criminal penalties are applicable only when an insolvent files for bankruptcy. Not every insolvent will do so; he may choose instead to reach an informal settlement with his creditors - a composition agreement. Despite the identity of conduct and intent, fraudulent acts pursuant to a composition agreement may not be punishable under existing law. The Code provision insures that specified conduct done with an intent to defraud a creditor will be subject to criminal penalties regardless of whether the insolvent has filed for bankruptcy.

To commit fraud in insolvency, a class A misdemeanor, the defendant must know that proceedings have been or are about to be instituted for the apointment of an administrator (defined in subsection (b)) or that a composition agreement or similar arrangement has been or is about to be made. Acting with that knowledge and with an intent to defraud, the defendant must engage in one of the four forms of conduct described in subsections (a)(1)-(4).

CHAPTER 46. OFFENSES AGAINST PROPERTY.

ARTICLE 6. CREDIT CARD OFFENSES.

Section

Sec. 11.46.800. THEFT OF A CREDIT CARD OR OBTAINING A CREDIT CARD BY FRAUDULENT MEANS. (a) A person commits the crime of theft of a credit card or obtaining a credit card by fraudulent means if he

(1) obtains or withholds a credit card from the possession, custody, or control of any person without the cardholder's consent through conduct referred to in sec. 100 of this chapter;

(2) receives a credit card knowing it to have been obtained illegally, lost, mislaid, or delivered under a mistake as to the identity or address of the cardholder and retains possession of the credit card with intent to use it himself, or transfer it to a person other than the issuer or the cardholder;

(3) buys a credit card from a person other than the issuer or, as other than the issuer, sells a credit card; or

(4) with intent to defraud, obtains control of a credit card as a security for debt.

(b) Theft of a credit card or obtaining a credit card by fraudulent

means is a class A misdemeanor.

Sec. 11.46.810. FORGERY OF A CREDIT CARD. (a) A person commits the crime of forgery of a credit card if, with intent to defraud, he

(1) makes or draws, in whole or in part, a device or instrument which purports to be the credit card of a named issuer but which is not such a credit card because that issuer did not authorize the making or drawing;

(2) without the authorization of the named issuer, completes a credit card by adding any of the matter, other than the signature of the cardholder, which an issuer requires to appear on the credit card issued by it before the credit card may be used by a cardholder;

(3) as other than the cardholder or a person authorized by him, signs the name of any actual or fictitious person to a credit card;

(4) alters a credit card which was validly issued; or

(5) utters a device, instrument, or credit card that has been made, drawn, completed, signed, or altered in violation of this section.

(b) Forgery of a credit card is a class C felony.

Sec. 11.46.820. FRAUDULENT USE OF A CREDIT CARD. (a) A person commits the crime of fraudulent use of a credit card if, with intent to defraud, he

(1) uses for the purpose of obtaining property or services a credit card obtained or retained illegally or a credit card which he knows is forged, expired, cancelled, or revoked; or

(2) obtains property or services by

(A) representing that he is the holder of a credit card, and the card has not in fact been issued; or

(B) representing, without the consent of the cardholder, that he is the holder of a specified credit card.

(b) Fraudulent use of a credit card is a

(1) class C felony if the value of the property or services obtained is $500 or more;

(2) class A misdemeanor if the value of the property or services obtained is $50 or more but less than $500;

(3) class B misdemeanor if the value of the property or services obtained is less than $50.

Sec. 11.46.830. FRAUD BY A PERSON AUTHORIZED TO PROVIDE PROPERTY OR SERVICES. (a) A person who is authorized by an issuer to provide property or services or any agent or employee of that person commits the crime of fraud by a person authorized to provide property or services if, with intent to defraud, he

(1) furnishes property or services upon presentation of a credit card obtained, retained, or used illegally or a credit card which he knows is forged, expired, cancelled, or revoked; or

(2) fails to furnish property or services which he represents in writing to the issuer or a participating party that he has furnished.

(b) Fraud by a person authorized to provide property or services is

(1) under (a)(1) of this section

(A) a class C felony if the value of the property or services furnished is $500 or more;

(B) a class A misdemeanor if the value of the property or services furnished is $50 or more but less than $500;

(C) a class B misdemeanor if the value of the property or services furnished is less than $50;

(2) under (a)(2) of this section

(A) a class C felony, if the difference between the value of the property or services actually furnished, if any, and the value represented is $500 or more;

(B) a class A misdemeanor if the difference between the value of the property or services actually furnished, if any, and the value represented is $50 or more but less than $500;

(C) a class B misdemeanor is the difference between the value of the property or services actually furnished, if any, and the value represented is less than $50.

Sec. 11.46.840. POSSESSION OF MACHINERY, PLATE, OR OTHER CONTRIVANCE OR INCOMPLETE CREDIT CARD. (a) A person commits the crime of possession of machinery, plate, or other contrivance or incomplete credit card if he

(1) possesses an incomplete credit card with intent to complete it without the consent of the issuer; or

(2) possesses, with knowledge of its character, machinery, plates, or any other contrivance designed to reproduce an instrument or device purporting to be the credit card of an issuer, and the issuer has not consented to the preparation of the credit card.

(b) A credit card is "incomplete" if part of the matter, other than the signature of the cardholder, which an issuer requires to appear on the credit card before it may be used by a cardholder has not yet been stamped, embossed, imprinted, or written on it.

(c) Possession of machinery, plate, or other contrivance or incomplete credit card is a class C felony.

Sec. 11.46.850. RECEIPT OF ANYTHING OF VALUE OBTAINED BY FRAUDULENT USE OF A CREDIT CARD. (a) A person commits the crime of receipt of anything of value obtained by fraudulent use of a credit card if he buys or receives property or services obtained in violation of sec. 820 of this chapter knowing that the property or services were so obtained.

(b) Receipt of anything of value obtained by fraudulent use of a credit card is

(1) a class C felony if the value of the property or services bought or received is $500 or more;

(2) a class A misdemeanor if the value of the property or services bought or received is $50 or more but less than $500;

(3) a class B misdemeanor if the value of the property or services bought or received is less than $50.

Sec. 11.46.860. DEFINITIONS. As used in secs. 800 - 860 of this chapter, unless the context requires otherwise,

(1) "cancelled or revoked credit card" means a credit card which is no longer valid because permission to use it has been suspended, revoked, or terminated by the issuer;

(2) "cardholder" means the person

(A) named on the face of a credit card to whom or for whose benefit the credit card is issued by an issuer; or

(B) in possession of a credit card with the consent of the person to whom the credit card was issued;

(3) "credit card" means any instrument or device, whether known as a credit card, credit plate, courtesy card, or identification card or by any other name, issued with or without fee by an issuer for the use of the cardholder in obtaining property or services on credit;

(4) "expired credit card" means a credit card which is no longer valid because the term shown on it has elapsed;

(5) "forged" refers to conduct which violates sec. 810 of this chapter;

(6) "issuer" means the business organization or financial institution, or its authorized agent, which issues a credit card;

(7) "participating party" means a business organization or financial institution which is obligated or permitted by contract to acquire from a merchant a sales slip, sales draft, or instrument for the

payment of money evidencing a credit card transaction and from whom an issuer is obligated or permitted by contract to acquire that sales slip, sales draft, or instrument;

(8) "receives" or "receiving" means acquiring possession or control or accepting as security for debt.

ALASKA REVISED CRIMINAL CODE

CHAPTER 46. Offenses Against Property

ARTICLE 6. CREDIT CARD OFFENSES

COMMENTARY

A. Existing Law

Credit cards are subject to extensive coverage in existing law. Eleven statutes contained in AS 11.22, Alaska Credit Card Crimes Act, (enacted, 1970) provide criminal penalties for such conduct as the theft of a credit card, AS 11.22.010; forgery of a credit card, AS 11.22.050; and receipt of anything of value obtained by fraudulent use of a credit card, AS 11.22.110. Two statutes proscribe frauds committed by merchants who accept credit cards. AS 11.22.080, 090.

B. The Code Provisions

Because existing Alaska law now contains specific and comprehensive coverage of credit card offenses, and because those statutes are of recent origin, the Subcommission concluded that existing chapter 22 should be reenacted in the Revised Code as a separate article to be included in Chapter 46, Offenses Against Property, despite some overlapping with the Code's general theft and forgery provisions.

To conform the existing credit card act with the rest of the Code, several nonsubstantive language changes were required. Additionally, a number of statutes were consolidated. Finally, the Subcommission classified credit card offenses for sentencing purposes in a manner consistent with the Code's classification of theft and forgery offenses.

A comparison between the Code's article on credit card offenses and existing law follows below.

1. TD AS 11.46.800. THEFT OF A CREDIT CARD OR OBTAINING A CREDIT CARD BY FRAUDULENT MEANS

The Code provision consolidates existing AS 11.22.010-040. The crime is classified as a class A misdemeanor consistent with the existing maximum one year sentence of imprisonment authorized for violations of AS 11.22.010-040.

2. TD AS 11.46.810. FORGERY OF A CREDIT CARD

The Code provision consolidates existing AS 11.22.050 and 060. The crime is classified as a class C felony, consistent with AS 11.22.050 and the Code's general forgery statute, TD AS 11.46.500. The class C felony classification, however, increases the sentence authorized for signing the credit card of another, which currently carries a maximum one year sentence. AS 11.22.060. Subsections (3) and (5) of the Code provision expand existing law by including within the statute, uttering, with intent to defraud, a credit card that has been improperly signed.

3. TD AS 11.46.820. FRAUDULENT USE OF A CREDIT CARD

The Code provision is based on existing AS 11.22.070. As with the remaining sections of the chapter, the phrase "property or services" is substituted for the existing phrase "money, goods,

services or anything else of value." The Code's general definition of property, TD AS 11.46.990(7) specifically includes any "thing of value, including but not limited to money."

Punishment for violation of the statute differs somewhat from existing law. Currently, two degrees of the crime exist: a maximum one year sentence is authorized if the value of the property obtained does not exceed $500 in any six month period; if the value exceeds $500, the maximum sentence is increased to three years.

Under the Code, three degrees of the crime exist. This degree structure is consistent with the three degrees of theft in the Code (TD AS 11. 46.130-150, discussed at Tentative Draft Part 3, at 25-27) which provide class C felony penalties if the value of the property is $500 or more, class A misdemeanor penalties if the value is less than $500, and class B misdemeanor penalties if the value is less than $50.

The Code provision does not contain a specific reference to aggregation of property or services obtained during a six month period, since TD AS 11. 46.980, applicable to all property offenses provides that "in determining the degree of an offense under this chapter, amounts involved in criminal acts committed under one course of conduct, whether from the

same person or several persons shall be aggregated." See discussion at Tentative Draft, Part 3 at 28.

4. TD AS 11.46.830. FRAUD BY PERSON AUTHORIZED TO PROVIDE PROPERTY OR SERVICES

This section consolidates existing AS 11.22.080 and 090. The penalty structure for the offense parallels that described in Section 3, supra.

5. TD AS 11.46.840. POSSESSION OF MACHINERY, PLATE, OR OTHER CONTRIVANCE OR INCOMPLETE CREDIT CARD

This section is taken from existing AS 11.22.100. The offense is classified as a C felony. While existing law prohibits possession of two or more incomplete credit cards or a device to make credit cards, the Code provision also covers possession of a single card or a device to make a single credit card without the consent of the issuer.

6. TD AS 11.46.850. RECEIPT OF ANYTHING OF VALUE OBTAINED BY FRAUDULENT USE OF A CREDIT CARD

This section is based on existing AS 11.22.110. While existing law provides a maximum 1 year sentence for violation of the statute, the Code provision allows for felony prosecutions if the value of the property or services obtained is $500 or more. The culpable mental state for violation of the statute is "knowing" consistent with the Code's theft by receiving statute, TD AS 11.46.180.

CHAPTER 51. OFFENSES AGAINST THE FAMILY.

Section

Sec. 11.51.100. ENDANGERING THE WELFARE OF A MINOR IN THE FIRST DEGREE. (a) A person commits the crime of endangering the welfare of a minor in the first degree if, being a parent, guardian or other person legally charged with the care of a child under 10 years of age, he intentionally deserts the child in any place under circumstances creating a substantial risk of physical injury to the child.

(b) Endangering the welfare of a minor in the first degree is a class C felony.

Sec. 11.51.110. ENDANGERING THE WELFARE OF A MINOR IN THE SECOND DEGREE. (a) A person having custody or control of a child under 13 years of age commits the crime of endangering the welfare of a minor in the second degree if, with criminal negligence, he

(1) leaves the child unattended under such circumstances as to create a substantial risk of physical injury to the child;

(2) subjects the child to cruel confinement;

(3) subjects the child to cruel punishment; or

(4) deprives the child of necessary food, clothing, or shelter.

(b) Endangering the welfare of a minor in the second degree is a class B misdemeanor.

Sec. 11.51.120. CRIMINAL NONSUPPORT. (a) A person commits the crime of criminal nonsupport if, being a person legally charged with the support of a child under 18 years of age, he refuses or neglects without lawful excuse to provide support for the child.

(b) As used in this section "support" includes, but is not limited to, necessary food, care, clothing, shelter, medical attention, and education. There is no failure to provide medical attention to a child if he is provided treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination by an accredited practitioner of the church or denomination.

(c) Criminal nonsupport is a class A misdemeanor.

Sec. 11.51.125. FAILURE TO PERMIT VISITATION WITH A MINOR. (a) A custodian commits the offense of failure to permit visitation with a minor if he intentionally, and without just excuse, fails to permit visitation with a child under 18 years of age in his custody in substantial conformance with a court order that is specific as to when he must permit another to have visitation with that child.

(b) The custodian may not be charged under this section with more than one offense in respect to what is, under the court order, a single continuous period of visitation.

(c) In a prosecution under this section, existing provisions of law prohibiting the disclosure of confidential communications between husband and wife do not apply, and both husband and wife are competent to testify for or against each other as to all relevant matters, if a court order has awarded custody to one spouse and visitation to the other.

(d) As used in this section,

(1) "court order" means a decree, judgment, or order issued by a court of competent jurisdiction;

(2) "custodian" means a natural person who has been awarded custody, either temporary or permanent, of a child under 18 years of age;

(3) "just excuse" includes illness of the child which makes it dangerous to the health of the child for visitation to take place in conformance with the court order; "just excuse" does not include the wish of the child not to have visitation with the person entitled to it.

(e) Failure to permit visitation with a minor is a violation.

Sec. 11.51.130. CONTRIBUTING TO THE DELINQUENCY OF A MINOR. (a) A person commits the crime of contributing to the delinquency of a minor if he knowingly aids, causes, or encourages a child under 18 years of age to do any act in fact prohibited by state law.

(b) Contributing to the delinquency of a minor is a class A misdemeanor.

Sec. 11.51.135. UNLAWFUL EXPLOITATION OF A MINOR. (a) A person commits the crime of unlawful exploitation of a minor if, in this state and with the intent of producing for any commercial purpose a live performance, film, photograph, negative, slide, book, or magazine that depicts such conduct, he knowingly induces or employs a child under 18 years of age to engage in, or photographs, films, or televises a child under 18 years of age engaged in, explicit sexual penetration, sexual contact, bestiality, or lewd exhibition of the child's genitals.

(b) Unlawful exploitation of a minor is a class C felony.

Sec. 11.51.140. UNLAWFUL MARRYING. (a) A person commits the crime of unlawful marrying if he knowingly marries or purports to marry

(1) another person when he or the other person is lawfully

married to a third person;

(2) more than one person simultaneously; or

(3) a person who simultaneously is marrying another person.

(b) Unlawful marrying is a class A misdemeanor.

Sec. 11.51.150. FAILURE TO COMPLY WITH ORDER OF PEACE OFFICER TO LEAVE DWELLING. (a) A peace officer may, with or without a warrant, when he has reasonable grounds to believe that one member of a household has recently inflicted physical injury on another member of the same household, whether or not that physical injury has occurred in his presence,

(1) enter the dwelling and make reasonable inquiry of the person upon whom he believes physical injury has been recently inflicted, and of any other witnesses, to ascertain whether there is probable danger of further physical injury being inflicted upon that person by the other person; and

(2) when he has reasonable grounds to believe that there is such probable danger, order either person to leave the dwelling for a cooling-off period of up to four hours.

(b) A person who fails to comply with a reasonable order of a peace officer under (a) of this section or who returns to the dwelling before the expiration of the cooling-off period commits the crime of failure to comply with order of peace officer to leave dwelling.

(c) This section does not limit the power of a peace officer to take any other action authorized by law.

(d) A peace officer who orders a person to leave a dwelling under this section is not liable for civil damages as a result of his order. This subsection does not preclude liability for civil damages as a result of reckless, wilful, wanton, or intentional misconduct.

(e) As used in this section, "household" means the social unit

comprised of those living together in the same dwelling.

(f) Failure to comply with order of peace officer to leave dwelling is a class B misdemeanor.

ALASKA REVISED CRIMINAL CODE

CHAPTER 51. Offenses Against the Family

COMMENTARY

I. TD AS 11.51.100-.120. ENDANGERING THE WELFARE OF A MINOR IN THE FIRST AND SECOND DEGREES; CRIMINAL NONSUPPORT

A. Existing Law

Desertion, abandonment and refusal to support a spouse or a child under sixteen are prohibited in AS 11.35.010. Punishment is set at imprisonment for up to one year and/or a maximum $500 fine. Additionally, several statutes outside of title 11 require doctors, teachers and others to report cases of child neglect and abuse the the Department of Health and Social Services. See AS 47.17.

B. The Code Provision

The subject of child neglect and abuse was one of the most debated, difficult and divisive topics considered by the Subcommission. The Subcommission agreed that the application of the criminal law in this area was rarely appropriate. In certain instances, however, there may be no choice but to resort to criminal sanctions to protect the child or vindicate societal norms. The Code provides this alternative.

In reviewing the Code provisions that follow, it must be remembered that the Code's general assault and criminal homicide provisions provide comprehensive coverage of conduct involving physical abuse of children. The Code's endangering the welfare of a minor statutes merely supplement that coverage. If it can be established that the child suffered serious physical injury or was assaulted by means of a deadly weapon or dangerous

instrument, prosecution should be brought under the general assault provisions which are classified more seriously than the crimes discussed below.

1. Endangering the Welfare of a Minor

The Code provides for two degrees of the crime of endangering the welfare of a minor. The first degree provision, a class C felony, is committed when a person legally charged with the care or custody of a child less than ten intentionally deserts the child under circumstances creating a substantial risk of physical injury.

Use of the term "deserts" requires that the defendant act with an intent to permanently sever his relationship with the child rather than to merely create a temporary physical separation. Not only must the defendant desert the child but he must do so under circumstances creating a substantial risk of physical injury to the child. See generally State v. Laemoa, 533 P.2d 370, 375 (Ore. Ct. App. 1975). The Code provision would not cover the parent who, for example, left the child in the custody of a relative for two days even though the parent had agreed to return in four hours.

The first degree provision only applies to children less than ten. The criterion for the choice of the age of ten was at what age the child would, under the circumstances, be able to call his plight to the attention of others and to identify himself.

Endangering the welfare of a minor in the second degree, a class B misdemeanor, can be violated by any person who has custody or control of a child less than 13. The

babysitter who leaves a child unattended in a locked car during the dead of winter for any significant period would be subject to the statute in the same manner as the parent engaging in identical conduct.

By providing that the statute can be violated by a defendant acting with the culpable mental state of "criminal negligence," the Code imposes a high standard of care. Liability is not dependent on a showing that the defendant was aware of the risk that his conduct would cause a result described in subsections (a)(1)-(a)(4); liability can be established by a showing that failure to be aware of the risk constituted a gross deviation from the standard of care that a reasonable person would observe. Ordinary negligence, however, would not be sufficient to establish culpability. See Tentative Draft, Part 2, at 17-19.

Subsections (a)(2) and (a)(3) are new to existing law and proscribe conduct that might not otherwise be covered under the Code, i.e., chaining a child to a stove or smearing feces on the child's face. In these situations, there may be no physical injury to the child which would qualify the conduct as assault. Nevertheless, the emotional and psychological harm to the child may be substantial.

Subsection (a)(4) parallels TD AS 11.51.210, Criminal nonsupport, discussed infra. The subsection differs from the nonsupport statute, however, since it does not require that the defendant be legally obligated to provide support. The aunt or neighbor, for example, having custody of the child at the

request of his vacationing parents will violate the statute by depriving the child of necessary food, clothing or shelter.

2. Criminal Nonsupport

The Code's criminal nonsupport statute, TD AS 11.51.120, an A misdemeanor, is based on existing AS 11.35.010, Desertion or nonsupport of a spouse or child. Several changes from existing law should be noted.

The Code provision only applies to the support of children; it does not apply to support of spouses. The increased availability of legal services and the variety of civil remedies available to deserted spouses militates against continued criminal sanctions in this area.

The Code provision raises the age of the child from 16, as it appears in AS 11.35.010, to 18. This change takes into account the longer period of time during which children are expected to remain in school and dependent on their parents.

Like the existing statute, the Code provision makes liability dependent on the absence of a "lawful excuse." Thus, a defendant may not be convicted under the statute for failure to provide support to his minor child if he is in fact financially unable to provide support and his poverty is not self-induced. See Johansen v. State, 491 P.2d 759 (Alaska 1971). The term "support" is defined in subsection (b) and is derived from existing AS 11.35.010(b).

II. TD AS 11.51.125. FAILURE TO PERMIT VISITATION WITH A MINOR

A. Existing Law

Enacted in 1977, AS 11.36.010 provides that the custodian of a minor child who "wilfully and without just excuse" fails to permit visitation with the child in substantial conformance with a court order specifying visitation rights is punishable by a $200 fine.

B. The Code Provision

Because AS 11.36.010 was adopted by the legislature less than a year ago, it has been included in the Code virtually unchanged. TD AS 11.51.125 does, however, use the term "intentionally" instead of "wilfully" to describe the culpable mental state requirement. Since the only punishment provided by AS 11.36.010 is a fine, the Code classifies the conduct as a violation, a noncriminal offense punishable by a fine not to exceed $300.

III. TD AS 11.51.130. CONTRIBUTING TO THE DELINQUENCY OF A MINOR

A. Existing Law

Existing law provides for two degrees of the crime of contributing to the delinquency of a child. As defined in AS 11.40.150, a "delinquent child" is a person under 18 who meets at least one of 12 additional requirements, i.e., "is in danger of becoming or remaining a person who leads an idle, dissolute, lewd, or immoral life," or "habitually wanders

about railroad yards or tracks." AS 11.40.150(5), (10).

Existing AS 11.40.130(a) provides that it is a misdemeanor to commit an act or omit to perform a duty, which "causes or tends to cause, encourage or contribute to the delinquency of a child under the age of 18 years." AS 11.40.130(b) provides that it is a felony, punishable by imprisonment for between one and two years, to induce a child by "threat, command or persuasion ... to perform an act or follow a course of conduct which would cause or manifestly tend to cause him to become or remain a delinquent."

The vagueness of the language used in AS 11.40.130 to describe the conduct prohibited in conjunction with the defintiion of delinquent found in AS 11.40.150 has rendered the existing statutes particularly susceptible to constitutional attack. See, Hanby v. State, 479 P.2d 486 (Alaska 1972) ("phrases such as 'to cause any child to become a delinquent,' ... [and] 'leading an idle, dissolute, lewd or immoral life' cannot meet the strict standard of specificity required in a criminal statute affecting expression protected by the first amendment"). See also State v. Hodges, 457 P.2d 491 (Or. 1969) (OR. REV. STAT. § 167.210 on which AS 11.40.130 based held unconstitutional).

B. The Code Provision

The Code provision on "contributing" provides that a person commits a class A misdemeanor if he "knowingly aids, causes, or encourages a child under 18 years of age to

do any act in fact prohibited by state law." Vagueness problems are diminished by providing that only an act of the defendant which "aids, causes or encourages" a minor to violate state law is prohibited. This conduct would not generally be punishable under the complicity provisions of the Code unless the defendant acted with an intent to "promote or facilitate the commission of the offense" and, in fact, solicitated or commanded commission of the offense or aided or abetted in the planning or commission of the offense. TD AS 11.16.110(2)(A),(B).

Note that the defendant must know that the person is under the age of 18 years. Use of the phrase "in fact prohibited by state law," however, clearly limits application of the culpable mental state of "knowing." Under TD AS 11.51.130, it will be sufficient that the actor knows the person whom he encourages is less than 18; strict liability is imposed as to the circumstance that the act is prohibited by law.

IV. TD AS 11.51.135. UNLAWFUL EXPLOITATION OF A MINOR

Though this section is new to existing law, similar conduct has arguably been covered by the broad proscription of existing AS 11.40.130, which imposes felony penalties on one who "by threats, command or persuasion endeavors to induce a child under the age of 18 years to perform an act. . . which would manifestly tend to cause him to become or remain a delinquent."

TD AS 11.51.135, a class C felony, provides that the crime of unlawful exploitation of a minor can be committed in either of two ways. The first requires that the defendant

induce or employ a person under 18 to engage in one of the specified forms of sexual conduct. The second covers the defendant who may not have induced the minor to engage in sexual conduct, but nevertheless filmed, televised or photographed such conduct.

Applicable to both forms of prohibited conduct are the requirements that the defendant's acts take place in this state, that he know the person whom he employs or photographs is under 18, and that he act with the intent to produce, for a commercial purpose, any "live performance, film, photograph, negative, slide, book or magazine" that depicts the minor engaged in "explicit sexual penetration, sexual contact, bestiality or lewd exhibition of that person's genitals." Compare N.Y. PENAL LAW § 263.15 (McKinney Supp. 1977) discussed in St. Martin's Press, Inc. v. Carey, 22 Crim. L. Rep. (BNA) 2282 (N.Y. Nov. 28, 1977).

Use of the term "explicit" in describing the prohibited forms of sexual conduct set out in the statute is intended to exclude simulated sexual acts from coverage. The term "lewd exhibition" was included solely to insure that the statute would not apply to photographs taken for legitimate medical textbooks. See Anderson v. State, 562 P.2d 351 (Alaska, 1977) (upholding AS 11.15.134, Lewd or lascivious acts toward children, against vagueness challenge: "phrase 'lewd or lascivious act' is not to be judged on vagueness grounds in isolation from the rest of the statute).

V. TD AS 11.51.140. UNLAWFUL MARRYING

A. Existing Law

AS 11.40.050, Polygamy, currently punishes by imprisonment for between one and seven years, a person who "having a spouse, marries another. . . or simultaneously or on the same day, marries more than one person." That AS 11.40.050 incorporates the common law doctrine of strict liability as to the existence of a valid prior marriage is underscored by the statute that follows it. AS 11.40.060 provides that an offense is not committed by persons legally divorced or by a person "whose spouse has been continuously absent for five consecutive years, and is not known by the person to be living and is believed by the person to be dead."

B. The Code Provision

The Code substantially restates AS 11.40.050 but makes several changes in existing law. The name of the crime has been changed to "unlawful marrying" since both the Code and existing law prohibit what is commonly thought of as bigamy as well as polygamy.

The Code provision also reflects the modern view that bigamy should not be treated as a strict liability offense. Thus, the Code imposes class A misdemeanor penalties only if it is established that the defendant acted knowingly as to each of the elements set out in the statute, i.e., he must know that either he or his prospective spouse is already lawfully married to another or that either he or the prospective spouse is marrying more than one person simultaneously. Note that unlike existing AS 11.40.050, the Code imposes liability on both parties to the bigamous marriage, irrespective of which of them is already married, so long as they act knowingly.

VI. TD AS 11.51.150. FAILURE TO COMPLY WITH ORDER OF PEACE OFFICER TO LEAVE DWELLING

This Code provision is new to Alaska law. It is designed to provide increased protection for the person who is physically abused by another member of his household. Though drafted primarily to deal with the problem of spouse abuse, the coverage of the statute is much broader than that. It applies to all persons living in the same household. The term "household" is defined in subsection (e) as "the social unit comprised of those living together." Thus, in addition to protecting spouses it would also apply, for example, to the mother-in-law who is assaulted by her son-in-law and the female who is beaten up by the male she is living with.

The Code provision is necessary since most instances of physical abuse occurring in the household will be a misdemeanor. A peace officer may only arrest for a misdemeanor if the assault takes place in his presence. AS 12.25.030. Forcing the abused woman to make a citizen's arrest of her spouse, for example, provides an uncertain remedy that is more likely to occur in theory than in practice.

TD AS 11.51.150 allows a peace officer who has reasonable grounds to believe that one member of a household has recently inflicted physical injury upon another member of the same household, to enter the dwelling with or without a warrant and make reasonable inquiry to determine whether there is probable danger of further physical harm. If he "has reasonable grounds to believe that there is such probable danger,"

he may "order either person to leave the dwelling for a cooling-off period of up to four hours." Failure to comply with a reasonable order to leave the dwelling will constitute a class B misdemeanor. Subsection (d) provides immunity from civil liability to officers acting pursuant to the statute for conduct not amounting to gross negligence or intentional misconduct.

Subsection (c) clarifies that the intent of the statute is not to limit the power of a peace officer to take any other action authorized by law. Thus, should it appear that a felony has been committed under the assault provisions of TD AS 11.41.200-.220, the peace officer still retains the power to arrest for the felony under AS 12.25.030.

CHAPTER 56. OFFENSES AGAINST PUBLIC ADMINISTRATION.

ARTICLE 6. ABUSE OF PUBLIC OFFICE.

Section

850 Official Misconduct

860 Misuse of Confidential Information

Sec. 11.56.850. OFFICIAL MISCONDUCT. (a) A public servant commits the crime of official misconduct if, with intent to obtain a benefit or to injure or deprive another person of a benefit, he

(1) commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that that act is unauthorized; or

(2) knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office.

(b) Official misconduct is a class __ _____.

Sec. 11.56.860. MISUSE OF CONFIDENTIAL INFORMATION. (a) A person who is or has been a public servant commits the crime of misuse of confidential information if he

(1) learns confidential information through his employment; and

(2) while in office or after leaving office, uses the confidential information for personal gain or in a manner not connected with the performance of his official duties other than by giving sworn testimony or evidence in a legal proceeding in conformity with a court order.

(b) As used in this section, "confidential information" means information which has been classified confidential by law.

(c) Misuse of confidential information is a class __ _____.

ALASKA REVISED CRIMINAL CODE

CHAPTER 56. Offenses Against Public Administration

ARTICLE 6. ABUSE OF PUBLIC OFFICE

COMMENTARY

I. TD AS 11.56.850. OFFICIAL MISCONDUCT

A. Existing Law

AS 11.30.230, "Receiving unauthorized fees; nonfeasance in office" applies to an officer of the state, borough, city or other municipal or public corporation, other than the governor or judge of the supreme court. The statute prohibits three acts: (1) charging an unauthorized fee for official services; (2) wilfully neglecting or refusing to perform a duty or service with intent to injure or defraud; or (3) wilfully neglecting or refusing to perform a duty or service to the injury of another, or to the manifest hindrance or obstruction of public justice or business, whether intended or not. Punishment is set at three months to one year in jail, or $50 - $500 fine and/or dismissal from office.

B. The Code Provision

The Code provision on official misconduct applies to all "public servants." A definition and discussion of that term appears in Tentative Draft, Part 2, at 87, 89-93. To commit the offense, a class A misdemeanor, the public servant must act with an intent to obtain a benefit (defined and discussed in Tentative Draft, Part 2, at 87-79) or to injure or deprive another person of a benefit. Mere negligent behavior, or awareness that a person is being injured or deprived of a

benefit will not establish the requisite culpability. The statute covers acts of both malfeasance and nonfeasance. The public servant must act or refrain from acting with a conscious objective to obtain a benefit or to injure or deprive another person of a benefit. Acting with the requisite intent, the public servant can violate the statute in one of two ways.

Subsection (1) applies to acts constituting a knowing unauthorized exercise of the public servant's function.

> For example, a court clerk may be on notice that papers in a pending action were ordered "sealed," subject to inspection only upon a further court order. If such clerk, with intent to benefit a certain party, knowingly displays the "sealed" papers to such party without the requisite court order, he would be guilty of official misconduct as defined in subdivision 1, i.e., he committed an act relating to his office but such act constituted an unauthorized exercise of his official functions.

N.Y. PENAL LAW § 195.00, Commentary at 386 (1975).

Under subsection (2) the crime may be committed by the public servant knowingly refraining from performing a duty. Subsection (2) requires knowledge both of the duty and that it is imposed by law or clearly inherent in the nature of the office. For example, an employment security clerk administering workmen's compensation who fails to certify eligibility of a person he knows is eligible because the person was rude to him or for some other private reason would be guilty of this offense.

II. TD AS 11.56.860. MISUSE OF CONFIDENTIAL INFORMATION

A. Existing Law

AS 39.51.010, enacted in 1975, provides as follows:

> A person who is or has been an employee of any state or local agency which keeps or has access to confidential information and through his employment learns confidential information and who, while in office or after leaving office, uses the information for personal gain or in a manner not connected with the performance of his official duties other than giving sworn testimony or evidence in a legal proceeding, is guilty of a misdemeanor and upon conviction is punishable by imprisonment for not more than one year, or by a fine of not more than $5,000, or by both. As used in this section "confidential information" means information which has been classified confidential by law.

B. The Code Provision

TD AS 11.56.860 restates existing AS 37.51.010 but applies to all public servants, not just "employees of any state or local agency which keeps or has access to confidential information." If disclosure of confidential information occurs in sworn testimony in a legal proceeding it must be in conformity with a court order. By requiring a court order be obtained prior to disclosure, the Code makes it less likely that the statute will be circumvented in private litigation where the person whose privacy interests are at stake may not be represented. Nothing in the Code provision prohibits the public servant from disclosing "confidential information" in the court proceeding so long as his disclosure is in conformity with a court order.

It is important to note that Alaska law is very strict in defining what is "confidential" information; unless the information is classified pursuant to a specific statute it can never be "confidential." Thus, the Code provision does not give rise to the same kind of issues which have arisen,

for example, when recent federal legislation has been challenged as inhibiting public disclosure of governmental misconduct or shielding documents which had been classified "secret" by a bureaucrat acting on his own concept of what is "confidential."

CHAPTER 61. OFFENSES AGAINST PUBLIC ORDER.

ARTICLE 1. RIOT, DISORDERLY CONDUCT, AND RELATED OFFENSES.

Section

Sec. 11.61.100. RIOT. (a) A person commits the crime of riot if, while participating with five or more persons, he engages in tumultuous and violent conduct in a public place and thereby recklessly causes, or creates a substantial risk of imminently causing, damage to property or physical injury to a person.

(b) Riot is a class C felony.

Sec. 11.61.110. DISORDERLY CONDUCT. (a) A person commits the crime of disorderly conduct if,

(1) with intent to disturb the peace and privacy of another not physically on the same premises or with reckless disregard that his conduct is having that effect after being informed that it is having that effect, he makes unreasonably loud noise;

(2) in a public place or in a private place of another without consent, and with intent to disturb the peace and privacy of another or with reckless disregard that his conduct is having that effect after being informed that it is having that effect, he makes unreasonably loud noise;

(3) in a public place, when a crime has occurred, he refuses to comply with a lawful order of a peace officer to disperse;

(4) in a private place, he refuses to comply with an

order of a peace officer to leave premises in which he has neither a right of possession nor the express invitation to remain of a person having a right of possession;

(5) in a public or private place, he challenges another to fight or engages in fighting other than in self-defense; or

(6) he recklessly creates a hazardous condition for others by an act which has no legal justification or excuse.

(b) As used in this section, "unreasonably loud noise" means noise which constitutes a gross deviation from the standard of conduct that a reasonable person would follow in the same situation as the defedant, considering the nature and purpose of the conduct of the defendant and the circumstances known to him, including the nature of the location and the time of day or night.

(c) Disorderly conduct is a class B misdemeanor and is punishable as authorized in ch. 36 of this title except that a sentence of imprisonment, if imposed, shall be for a definite term of not more than 10 days.

Sec. 11.61.120. HARASSMENT. (a) A person commits the crime of harassment if, with intent to harass or annoy another person, he

(1) insults, taunts, or challenges another person in a manner likely to provoke an immediate violent response.

(2) telephones another and fails to terminate the connection with intent to impair the ability of that person to place or receive telephone calls; or

(3) makes repeated telephone calls anonymously, at extremely inconvenient hours, in obscene language, or that threaten physical injury;

(b) Harassment is a class B misdemeanor.

Sec. 11.61.130. ABUSE OF A CORPSE. (a) A person commits the

crime of abuse of a corpse if, except as authorized by law, he intentionally disinters, removes, conceals, mutilates, or engages in sexual penetration of a corpse.

(b) Abuse of a corpse is a class A misdemeanor.

Sec. 11.61.140. CRUELTY TO ANIMALS. (a) A person commits the crime of cruelty to animals if, except as authorized by alw, he

(1) intentionally influcts severe and prolonged physical pain or suffering on an animal;

(2) owns, possesses, keeps, or trains an animal with intent that it be engaged in an exhibition of fighting; or

(3) instigates, promotes, attends or has a pecuniary interest in an exhibition of fighting animals.

(b) It is a defense to prosecution under this section that the conduct of the defendant

(1) conformed to accepted veterinary practice;

(2) was part of scientific research governed by accepted standards; or

(3) was necessarily incident to lawful hunting or trapping activities.

(c) The defendant has the burden of injecting the issue of a defense under (b) of this section.

(d) As used in this section, "animal" means a vertebrate living creature not a human being, but does not include fish.

(e) Cruelty to animals is a class A misdemeanor.

Sec. 11.61.150. OBSTRUCTION OF HIGHWAYS. (a) A person commits the crime of obstruction of highways if he

(1) places, drops, or permits to drop on a highway any substance that creates a substanital risk of physical injury to others using the highway; or

(2) recklessly renders a highway impassable or passable only with unreasonable inconvenience or hazard.

(b) Obstruction of highways under (a)(1) of this section is an offense of strict liability.

(c) It is an affirmative defense to prosecution under (a)(1) of this section that

(1) the defendant took reasonable steps to remove the substance from the highway; and

(2) no person suffered physical injury as a result of the presence of the substance on the highway.

(d) Obstruction of highways is a class B misdemeanor.

ALASKA REVISED CRIMINAL CODE

CHAPTER 61. Offenses Against Public Order

ARTICLE 1. RIOT, DISORDERLY CONDUCT AND RELATED OFFENSES

COMMENTARY

I. TD AS 11.61.100. RIOT

A. Existing Law

At common law, the offense of riot required a tumultuous disturbance of the peace. AS 11.45.020 differs substantially from the common law definition by defining "riot" to mean the unlawful "use of force or violence, or threat to use force or violence, if accompanied by immediate power of execution, by three or more persons acting together." The statute is broad enough to cover three persons who are committing a robbery. AS 11.45.010 punishes one who engages in a riot (1) as a principal in any crime committed during the riot; (2) by fifteen years imprisonment if the person was disguised, carried a "species of dangerous weapon," or solicited acts of force; or (3) by from three months to one year imprisonment or by a $50-$500 fine in "all other cases."

B. The Code Provision

The Revised Code adopts the modern approach to riot by shifting the emphasis of the crime from the commission of other crimes by rioters, to "tumultuous and violent conduct in a public place" that "recklessly causes, or creates a substantial risk of causing damage to property or physical injury to a person."

Riot is classified as a C felony. Rioters who engage

in specific forms of criminal conduct during the course of a riot will additionally be subject to prosecution under statutes describing specific offenses.

The statute requires that the rioter act recklessly; he must be aware of and consciously disregard a substantial and unjustifiable risk that his conduct is causing or is creating a substantial risk of causing property damage or physical injury. The requirement that the risk 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" is intended to insure that the statute will not apply to trivial injury to property such as walking on seeded grass adjacent to a sidewalk. See TD AS 11.11.140(a)(3) (definition of "recklessly").

Unlike existing law, the Code requires that the conduct occur in a "public place," (defined at TD AS 11.88.100( ) see commentary accompanying TD AS 11.71.110) and that the defendant participate with five other persons. The public place requirement follows from the shift in focus to conduct likely to cause public alarm. The increased number of participants necessary for conviction reflects the Subcommission's determination as to how many rioters could create substantial enforcement problems for a mobile force.

In accordance with recent Alaska Supreme Court decisions emphasizing the importance of safeguarding the exercise of constitutional rights (see, e.g., Poole v. State, 524 P.2d 286 (1974); Marks v. City of Anchorage, 500 P.2d 644 (1972)), TD AS 11.61.100 requires that the rioter's conduct

be tumultuous and violent. This element precludes application of the statute to persons exercising constitutionally protected rights of speech and assembly. Behavior that is merely tumultuous will be insufficient to sustain a conviction under the statute.

II. TD AS 11.61.110. DISORDERLY CONDUCT

A. Existing Law

In Marks v. City of Anchorage, 500 P.2d 644 (Alaska 1972) the Alaska Supreme Court overturned Anchorage's municipal disorderly conduct ordinance on the ground that, on its face, the ordinance purported to reach speech engaged in "to the annoyance and disturbance of others." Two years later, in Poole v. State, 524 P.2d 286 (Alaska 1974), the court invalidated a similar state disorderly conduct statute.

The existing disorderly conduct statute, AS 11.45.030, was adopted following the Marks and Poole decisions. The statute, in part, prohibits shouting and other "loud noises" made with "reckless disregard for the peace and privacy of others."

In the most recent test of AS 11.45.030, the state conceded error in the arrest and conviction of a person charged with shouting in an Anchorage bar. The state urged the court, however, to uphold the constitutionality of AS 11.45.030(a)(1) by reading in the limitation that loud noises in public places are prohibited only if they are made with an "intent to invade and disturb ... [the] peace and privacy" of others, and if they are, in fact, "grossly incompatible with and actually

disruptive of the general activities" of others. When the "loud noise" is speech, the state formulation would additionally require that the actor's "communicative intent" be negligible. See Brief for Appellee at 21, Fuselier v. State, No. 3233 (Alaska, filed September 19, 1977).

B. The Code Provision

Disorderly conduct is a class B misdemeanor carrying a maximum term of imprisonment of 10 days. The Code provision substantially restates existing AS 11.45.030 but is designed to avoid constitutional problems that have arisen under subsection (a)(1) of that statute.

1. Subsections (a)(1), (a)(2) and "unreasonably loud noise"

Subsections (a)(1) and (a)(2) replace existing AS 11.45.030(a)(1). Subsection (a)(1) is directed primarily at noisemaking within the confines of one's home or on private property of another with that person's consent. By requiring that the victim not be "physically on the same premises," the Code recognizes the privacy right of persons to act as they wish within their home so long as such conduct does not infringe upon others beyond the home.

Under subsection (a)(1), a person acting with an intent to disturb the peace and privacy of another not physically on the same premises need not be shown to have actually disturbed that person so long as he creates "unreasonably loud noise." The subsection also covers, for example, the boisterous private party when the party-goers are aware of and disregard a substantial and unjustifiable risk that they are disturbing the

peace and privacy of neighbors. The Code guards against vagueness and uneven enforcement in this situation by requiring that the defendant be warned that his conduct is disturbing others and that he continue his conduct before the offense is committed.

Subsection (a)(2) parallels (a)(1) but does not include the requirement that the person disturbed be on separate premises if the actor himself is in a public place or on private property of another without the owner's consent.

In Marks, supra at 663, the court noted that the phrase "unreasonable noise" without more might be considered "indefinite." Subsection (b) both clarifies the meaning of "unreasonably loud" and insures that free speech will not be infringed upon by requiring that noisemaking constitute a "gross deviation from the standard of conduct that a reasonable person would follow in the same situation." The intent of the Subcommission is clear: the legitimate exercise of first amendment rights can never constitute disorderly conduct.

The phrase "peace and privacy" is also intended to take into account the varying nature of circumstances surrounding conduct. Persons attending a sporting event or peace officers, for example, would have a lower expectation of peace and privacy than a person attending a poetry reading or the ordinary citizen. C.f. Anniskette v. State, 489 P.2d 1012, 1015 n.5 (Alaska 1971) discussed infra.

2. Subsections (a)(3), (a)(4), (a)(5) and (a)(6)

The remaining subsections of the proposed statute are taken from existing AS 11.45.030. Subsection (a)(3) which punishes a refusal to disperse in a public place when a crime has occurred has been upheld against a claim of unconstitutionality. State v. Martin, 532 P.2d 316 (Alaska 1975). Subsection (a)(5) encompasses unlawful fighting, and challenging another to fight. Though such a challenge is in fact a communication, it generally falls beyond the pale of protected speech since it constitutes an incitement to a breach of the peace. See Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

Subsection (a)(6) prohibits the reckless creation of "a hazardous condition for others by an act which has no legal justification or excuse." Examples of conduct covered under this provision would include turning off the lights or shouting "fire" in a crowded public auditorium.

III. TD AS 11.61.120. HARASSMENT

A. Existing Law

AS 11.45.035, Illegal use of telephones, currently punishes by imprisonment for between three months and one year and/or by $1000 fine, a person who "anonymously telephones another person repeatedly for the purpose of annoying, molesting, abusing, through vile and obscene language or harassing that person or his family."

B. The Code Provision

The crime of harassment, a class B misdemeanor, can be committed in any of three ways, each of which requires that the defendant act with an "intent to harass or annoy another person." The terms "harass" and "annoy" have, in other contexts, been subject to strict constitutional scrutiny when used to describe results. See, Poole v. State, 524 P.2d 286 (Alaska 1974); Marks v. City of Anchorage, 500 P.2d 644 (Alaska 1972) (since conduct which disturbs or annoys one person might not annoy another, "men of common intelligence must necessarily guess at [the ordinance's] meaning"). The Code, however, uses these terms not to describe a result of conduct which might vary with the "ideological vicissitudes" of the victim, but rather to describe the specific intent with which the defendant must act. See Anniskette v. State, 489 P.2d 1012, 1015 (Alaska 1971).

Subsection (a)(1) prohibits insulting, taunting, or challenging another in a manner likely to provoke an immediate and violent response. Directed principally at preserving the public peace, the provision will penalize speech only when it falls within the unprotected "fighting words" category. See Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

Subsection (a)(2) covers another form of harassing conduct in which a call may be placed, and the line held open indefinitely after the call is answered.

Subsection (a)(3) substantially restates AS 11.45.035 but closes a gap in existing law by not requiring that all

calls be made anonymously. See Anniskette v. State, 489 P.2d 1012 (Alaska 1971). Repeated obscene calls, for example, will be covered even if the caller identifies himself. Subsection (a)(3) also expands existing law by encompassing repeated calls that threaten physical injury. If it can be established that the caller placed the person in fear of imminent physical injury he may be prosecuted for a single phone call under the Code's general assault provisions. TD AS 11.41.230(4).

IV. TD AS 11.61.130. ABUSE OF A CORPSE

A. Existing Law

AS 11.40.440 provides a maximum two year sentence for disinterring, digging up, removing or conveying away a human body or its remains. A second statute proscribes the detaining of a body for a debt and makes such conduct punishable by imprisonment for up to six months and/or a $500 fine. AS 11.40.450.

B. The Code Provision

TD AS 11.61.130 provides that a person commits the crime of Abuse of a corpse, a class A misdemeanor, if he intentionally "disinters, removes, conceals, mutilates or engages in sexual penetration of a corpse." By including mutilation and sexual penetration within the ambit of the statute, the Code recognizes that such conduct may outrage family sensibilities as much as an actual unlawful taking of the corpse. Note, however, that the phrase "except as authorized by law" exempts from coverage of the statute the legitimate

activities of persons such as coroners, physicians and morticians.

The existing offense of Attaching or detaining dead body for debt, AS 11.40.450, is not retained in the Code. While such conduct may be offensive, the Subcommission felt that existing civil remedies were adequate. See Edwards v. Franke, 364 P.2d 60 (Alaska 1961); AS 08.42.090(6) (mortician's license may be revoked for failure to promptly surrender custody of corpse on order of person lawfully entitled to custody).

V. TD AS 11.61.140. CRUELTY TO ANIMALS

A. Existing Law

Cruelty to animals is currently regulated by nine statutes in Title 11: AS 11.40.480, Cruelty to animals; AS 11.40.490, Penalties for cruelty to domestic animals; AS 11.40.500, Abandoning disabled animals to die; AS 11.40.510, Use of live birds as targets; AS 11.40.520, Fighting or baiting animals or creatures and related offenses; AS 11.40.530, Maintaining kennel or pet shop in unsanitary or inhumane manner; AS 11.40.540, Humane and scientific uses excepted; and AS 11.40.550, Legal impounding and extermination of animals excepted. Misdemeanor penalties ranging from a fine of "not more than $50" (AS 11.40.530) to imprisonment for up to six months plus a fine of $500 (AS 11.40.520) are authorized for these offenses. More stringent penalties of imprisonment for one year and a fine of $3,000 are authorized for one who

"maliciously or wantonly kills, wounds, disfigures or injures any animal which is the property of another ... or maliciously exposes poison with the intent that it be taken by any animal." AS 11.20.520, Malicious or wanton injury to animals.

B. The Code Provision

The Code consolidates the many provisions of existing law into a single statute which classifies as an A misdemeanor, the intentional infliction of "severe and prolonged physical pain or suffering on any animal." TD AS 11.61.140(a)(1). TD AS 11.61.140(d) expressly defines the term "animal" to exclude human beings, fish and other non-vertebrates. If the animal is simply killed without the consent of the owner, such conduct will constitute criminal mischief. TD AS 11.46.482-.486.

Subsection (b) provides that it is a defense to prosecution under (a)(1) that the defendant's conduct conformed to generally accepted veterinary practice or was part of scientific research governed by accepted standards. The additional granting of the defense when defendant's conduct is necessarily incident to lawful hunting or trapping activities avoids unnecessary overlap and potential conflict with rules and regulations established by the Board of Fish and Game pursuant to AS 16.05.250.

Subsection (a)(2) substantially restates existing AS 11.40.520, Fighting or baiting animals or creatures and related offenses. Under this provision, as under existing law, persons who attend exhibitions of fighting animals are

held to be equally as culpable as persons who organize such conduct.

VI. TD AS 11.61.150. OBSTRUCTION OF HIGHWAYS

A. Existing Law

AS 11.20.590, Injury to highways, public recreation facilities, or highway signs, currently punishes by imprisonment for up to one year and/or a $500 fine, a person who "damage[s], destroy[s] or intending to prevent free use of it by the public, obstruct[s] a highway." Similar sanctions are imposed on a person who "build[s] or place[s] a barbed wire fence across any well traveled trail" which has been in common use for over a year unless he places "on the outside of the top tier of the barbed wire on the fence a board, pole, or other suitable protection which is at least 16 feet in length." A separate statute outside title 11 imposes misdemeanor penalties on a person who "purposely obstruct[s] or block[s] traffic on any roadway." AS 28.35.140, Unlawful obstruction or blocking of traffic.

B. The Code Provision

The Code recognizes that obstruction of highways, a class B misdemeanor, may take place in either of two ways. The first, described in subsection (a)(1), imposes strict liability for allowing dangerous materials to be left on a highway. This provision would cover, for example, the person hauling rubbish to a dump when part of his load slides off into the road and creates a substantial risk of physical injury to subsequent highway users. Subsection (c), however, would grant

the person an affirmative defense if he can establish that he took immediate steps to rectify the situation and that, in fact, no one was injured. The broad definition of "highway" set forth in the Commentary accompanying TD AS 11.71.110 would also allow liability to be imposed upon a person who, for example, leaves material on a sidewalk staircase under circumstances in which a passerby might slip on the material and suffer physical injury.

Subsection (a)(2) of the proposed statute, however, requires that the defendant have been at least reckless as to whether his conduct impeded highway travel. Thus, one who parks his car in the middle of a busy road in order to watch salmon spawning in a nearby stream would violate TD AS 11.61.150(a)(2) if he is "aware of but disregards a substantial and unjustifiable risk" that his conduct will result in making the road "impassable, or passable only with unreasonable inconvenience or hazard."

CHAPTER 61. OFFENSES AGAINST PUBLIC ORDER.

ARTICLE 2. OFFENSES AGAINST PRIVACY OF COMMUNICATION.

Section

Sec. 11.61.200. EAVESDROPPING. (a) A person commits the crime of eavesdropping if, with intent to hear or record all or part of an oral conversation, he uses an eavesdropping device without the consent of a party to the conversation.

(b) Eavesdropping is a class A misdemeanor.

Sec. 11.61.210. INTERCEPTION OF PRIVATE CORRESPONDENCE. (a) A person commits the crime of interception of private correspondence if, without consent of the sender or intended recipient, he intentionally

(1) intercepts, opens, or reads private correspondence; or

(2) destroys or detains private correspondence to delay or prevent reception by the person entitled to it.

(b) Interception of private correspondence is a class A misdemeanor.

Sec. 11.61.220. UNAUTHORIZED DIVULGENCE OR USE OF COMMUNICATIONS. (a) A person commits the crime of unauthorized divulgence or use of communications if he knowingly divulges or uses for his own or another's benefit any information concerning a communication

(1) with reckless disregard that the information was obtained in violation of sec. 200 or 210 of this chapter; or

(2) to which he has access as an employee or officer of the communications common carrier transmitting the communication.

(b) The provisions of (a)(2) of this section do not apply to divulgence through authorized channels of transmission or reception to

(1) the intended recipient or his agent;

(2) a person employed or authorized to forward a communication to its destination;

(3) proper accounting or distributing officers of communication centers over which the communication may be passed;

(4) the master of a ship under whom the employee or officer is serving;

(5) another on demand of lawful authority;

(6) in response to a subpoena issued by a court of competent jurisdiction.

(c) Unauthorized divulgence or use of communications is a class A misdemeanor.

Sec. 11.61.230. EXEMPTIONS. Sections 210 and 220 of this chapter do not apply to

(1) listening to radio or wireless communications of any sort when the same are publicly made;

(2) hearing a communication when heard by an employee or officer of a communications common carrier incidental to the normal course of his employment in the operation, maintenance, or repair of the equipment of the common carrier, if information concerning the communication is not used or divulged in any manner by the hearer;

(3) a broadcast by radio or other means whether it is a live broadcast or recorded for the purpose of later broadcasts of any function where the public is in attendance and the conversations which are overheard are incidental to the main purpose for which the broadcast is then being made; or

(4) recording or listening with the aid of any device to an

emergency oral conversation made in the normal course of operations by an organization which deals with emergencies involving danger to life or property.

Sec. 11.61.240. DEFINITIONS. As used in secs. 200 - 240 of this chapter, unless the context requires otherwise,

(1) "communication" means an oral conversation or private correspondence;

(2) "eavesdropping device" means a device capable of being used to hear or record oral conversations but does not include devices used for the restoration of the deaf or hard of hearing to normal or partial hearing;

(3) "information concerning a communication" means the existence, contents, substance, purport, effect, or meaning of a communication;

(4) "intercept" means to acquire the contents of a communication and includes the acquisition of the contents by simultaneous transmission or recording;

(5) "oral conversation" means a communication by speech, whether conducted in person, by telephone, or by any other means;

(6) "private correspondence" means a communication other than by speech, including but not limited to telegraph messages and sealed letters, sent

(A) by a person exhibiting an expectation that the communication is not subject to being intercepted, opened, or read other than by its intended recipient or an employee or officer of a communications common carrier acting in the usual course of business; and

(B) under circumstances reasonably justifying that expectation.

ALASKA REVISED CRIMINAL CODE

CHAPTER 61. Offenses Against Public Order

ARTICLE 2. OFFENSES AGAINST PRIVACY OF COMMUNICATION

COMMENTARY

A. Existing Law

Privacy of communications is subject to considerable protection in existing law. See, e.g., AS 11.20.660, Opening or publishing contents of sealed letters; AS 11.60.280, Unauthorized publication or use of communications; AS 11.60.290, Eavesdropping; AS 42.20.090, Punishment and civil liability for opening or obtaining message addressed to another; AS 42.20.070, Punishment and civil liability for use by employee of information derived from message. While existing statutes vary, in that they prohibit separate and specific ways of interfering with communications, they are similar in that each generally contains extensive language that prohibits the divulgence or use of information by one who obtains it unlawfully or in the course of an authorized transmission. Most statutes describe misdemeanor offenses punishable by fine and/or a maximum term of imprisonment of one year. See, e.g., AS 11.60.280. But see AS 42.20.890 (civil damages in addition to misdemeanor penalties); AS 42.20.070 (treble damages in addition to misdemeanor penalties).

B. The Code Provision

The Revised Code continues the coverage of existing law by consolidating into three proposed statutes the scattered

provisions that currently proscribe instrusions upon the privacy of communications. The first two statutes prohibit unlawful interception of messages while the third punishes divulgence of information obtained unlawfully or in the course of an authorized transmission. A comparison of the Code's article with existing law follows.

1. TD AS 11.61.200. EAVESDROPPING

The Code provision, classified as an A misdemeanor, substantially restates existing AS 11.60.290(1) which prohibits the use of an eavesdropping device to overhear or record oral conversations. Note that conduct covered by AS 11.60.290(2)-(4), relating to divulgence or use of information obtained through eavesdropping, is now covered under TD AS 11.61.220, Unauthorized divulgence or use of communications.

2. TD AS 11.61.210. INTERCEPTION OF PRIVATE CORRESPONDENCE

Conduct now prohibited by existing AS 11.20.660 and AS 42.20.090 includes opening, reading, or detaining sealed letters and telegraph messages. The Code consolidates these statutes by including sealed letters, telegraph messages and other nonverbal communications within the definition of "private correspondence." TD AS 11.61.210 authorizes imposition of A misdemeanor penalties on a person who intentionally and without consent of either the sender or intended recipient, "intercepts, opens or reads private correspondence" or who "destroys or detains ... [it] to delay or prevent reception by the person entitled to it." Note that while the definition of "private correspondence" covers all nonverbal communications,

the communications must have been sent by a person expecting privacy and "under circumstances reasonably justifying that expectation." TD AS 11.61.240(6).

As with the proposed eavesdropping statute, TD AS 11.61.200, conduct covered by existing prohibitions relating to divulgence or use of unlawfully obtained information is covered under TD AS 11.61.220, Unauthorized divulgence or use of communications.

3. TD AS 11.61.220. UNAUTHORIZED DIVULGENCE OR USE OF COMMUNICATIONS

This provision effects a major consolidation of the various provisions on using and divulging information that accompany each separate existing statute that prohibits the unlawful obtaining of messages and communications. Classified as an A misdemeanor, the Code provision parallels existing AS 11.60.280, Unauthorized publication or use of communications, and applies as well to the unauthorized use or divulgence of information obtained by persons through their employment with communications common carriers.

Note that a person who becomes acquainted with information contained in a communication but is not at least reckless as to the lack of consent of the parties to it incurs no liability for using or divulging the information unless he is the employee or agent of a communications common carrier. Similar conduct is currently subject to misdemeanor penalties under subsection (c) and (e) of existing AS 11.60.280. Note also that the proposed statutes contain no reference to civil

damages. The Subcommission felt that in most cases, actual damages would be nominal and that a specific reference to treble damages might be interpreted as foreclosing the possibility of an award of punitive damages in appropriate cases. See also Commentary accompanying TD AS 11.06.120.

4. TD AS 11.61.230. EXEMPTIONS

This section substantially restates AS 11.60.300. The phrase "organization which deals with . . . emergencies involving danger to life or property," used in TD AS 11.41.480, Criminal mischief in the first degree, has been substituted for the existing list of such organizations. Subsection (5) of AS 11.60.300 previously exempted "inadvertent interception of telephone conversations over party lines." This provision has been omitted as unnecessary since this form of interception would not violate the proposed eavesdropping statute unless engaged in with an "intent to hear or record all or part of an oral conversation."

CHAPTER 71. WEAPONS AND EXPLOSIVES.

Section

Sec. 11.71.100. MISCONDUCT INVOLVING WEAPONS IN THE FIRST DEGREE. (a) A person commits the crime of misconduct involving weapons in the first degree if he

(1) possesses a firearm capable of being concealed on his person after having been convicted inside or outside this state of a felony involving violence;

(2) knowingly sells or transfers a firearm capable of being concealed on one's person to a person who has been convicted inside or outside this state of a felony involving violence; or

(3) manufactures, possesses, transports, sells, or transfers a prohibited weapon.

(b) The provisions of (a)(1) and (2) of this section do not apply if

(1) the person convicted of the prior offense on which the action is based received a pardon for that conviction; or

(2) a period of five years or more, excluding any periods of incarceration, has elapsed between the date of conviction of the prior offense on which the action is based and the date of the possession, sale, or transfer of the firearm.

(c) The provisions of (a)(3) of this section do not apply if the

manufacture, possession, transportation, sale, or transfer of the prohibited weapon is in accordance with registration under the National Firearms Act (26 U.S.C. sec. 5801 et seq.).

(d) Misconduct involving weapons in the first degree is a class C felony.

Sec. 11.71.110. MISCONDUCT INVOLVING WEAPONS IN THE SECOND DEGREE. (a) A person commits the crime of misconduct involving weapons in the second degree if he

(1) possesses on his person a deadly weapon while his physical or mental condition is substantially impaired as a result of the introduction of an intoxicating liquor or a drug into his body;

(2) sells or transfers a deadly weapon to a person knowing that the physical or mental condition of that person is substantially impaired as a result of the introduction of an intoxicating liquor or a drug into his body;

(3) intentionally defaces a firearm or knowingly possesses a firearm that has been intentionally defaced;

(4) discharges a firearm on, along, or across a highway; or

(5) flourishes, points, or discharges a firearm in a city of any class or in or at a public place.

(b) The provisions of (a)(5) of this section do not apply to flourishing, pointing, or discharging a firearm in a shooting range, shooting event, hunting area, or similar location or activity when that conduct is specifically authorized by law.

(c) Misconduct involving weapons in the second degree is a class A misdemeanor.

Sec. 11.71.120. MISCONDUCT INVOLVING WEAPONS IN THE THIRD DEGREE. (a) A person commits the crime of misconduct involving weapons in the third degree if he

(1) knowingly possesses a deadly weapon concealed on his person or concealed in any place about his person where the deadly weapon is readily accessible for use;

(2) knowingly possesses on his person a firearm in any place where intoxicating liquor is sold for consumption on the premises;

(3) being an unemancipated minor under 18 years of age, possesses a firearm without the consent of his parent or guardian; or

(4) knowingly sells or transfers a firearm to an unemancipated minor under 18 years of age whose parent or guardian has not consented to the sale or transfer.

(b) The provisions of (a)(1) of this section do not apply to a person

(1) who is engaged at the time of his possession in lawful hunting, fishing, or other outdoor sporting activity; or

(2) in his dwelling or on property owned by or leased to him.

(c) The provisions of (a)(1) of this section do not apply to a weapon that

(1) is carried in a belt or shoulder holster if the holster is wholly or partially visible; or

(2) is carried in a scabbard, sheath, or case designed for carrying weapons if the scabbard, sheath, or case is wholly or partially visible.

(d) The provisions of (a)(2) of this section do not apply to a person or his employees in business premises owned by or leased to that person.

(e) Misconduct involving weapons in the third degree is a class B misdemeanor.

Sec. 11.71.130. POSSESSION OF BURGLARY TOOLS. (a) A person commits the crime of possession of burglary tools if he possesses a

burglary tool with the intent to use or permit use of the tool in the commission of

(1) any degree of burglary;

(2) a crime referred to in AS 11.46.130(a)(3); or

(3) theft of services.

(b) As used in this section, "burglary tools" means

(1) nitroglycerine, dynamite, or any other tool, instrument, or device adapted or designed for use in committing a crime referred to in (a)(1) - (3) of this section; or

(2) an acetylene torch, electric arc, burning bar, thermal lance, oxygen lance, or other similar device capable of burning through steel, concrete, or other solid material.

(c) Possession of burglary tools is a class A misdemeanor.

Sec. 11.71.140. CRIMINAL POSSESSION OF EXPLOSIVES. (a) A person commits the crime of criminal possession of explosives if he possesses or manufactures an explosive substance or device and intends to use that substance or device to commit a crime.

(b) Criminal possession of explosives is a

(1) class A felony if the crime intended is murder;

(2) class B felony if the crime intended is a class A felony;

(3) class C felony if the crime intended is a class B felony;

(4) class A misdemeanor if the crime intended is a class C felony;

(5) class B misdemeanor if the crime intended is a class A or class B misdemeanor.

Sec. 11.71.150. UNLAWFUL FURNISHING OF EXPLOSIVES. (a) A person commits the crime of unlawful furnishing of explosives if he furnishes an explosive substance or device to another knowing that that person intends to use the substance or device to commit a crime.

(b) Unlawful furnishing of explosives is a class C felony.

Sec. 11.71.160. DEFINITIONS. As used in this chapter, unless the context requires otherwise,

(1) "deadly weapon" means any firearm, or anything designed for and capable of causing death or serious physical injury, including but not limited to a knife other than an ordinary pocket knife, an axe, a club, metal knuckles, or an explosive;

(2) "deface" means to remove, cover, alter, or destroy the manufacturer's serial number;

(3) "firearm" means a loaded or unloaded pistol, revolver, rifle, shotgun, or other weapon from which a shot capable of causing death or serious physical injury may be discharged; "firearm" does not include a firearm in a permanently inoperable condition which is kept as a curio or museum piece or for educational purposes;

(4) "prohibited weapon" means any

(A) explosive, incendiary, or noxious gas

(i) mine or device that is designed, made, or adapted for the purpose of inflicting serious physical injury or death;

(ii) rocket, other than emergency flare, having a propellant charge of more than four ounces;

(iii) bomb;

(iv) grenade;

(B) device designed, made, or adapted to muffle the report of a firearm;

(C) device that consists of finger rings or guards made of a hard substance and designed, made, or adapted for inflicting serious physical injury or death by striking a person with an enclosed fist;

(D) switchblade or gravity knife;

(E) firearm that is capable of shooting more than one shot automatically, without manual reloading, by a single function of the trigger; or

(F) rifle with a barrel length of less than 16 inches or shotgun with a barrel length of less than 18 inches, or any firearm made from a rifle or shotgun which, as modified, has an overall length of less than 26 inches.

ALASKA REVISED CRIMINAL CODE

CHAPTER 71. Weapons and Explosives

COMMENTARY

I. TD AS 11.71.100 - .120. MISCONDUCT INVOLVING WEAPONS IN THE FIRST, SECOND AND THIRD DEGREE

A. Existing Law

AS 11.55.010, .020 provide a maximum 100 day jail sentence and a fine of $200 for carrying concealed about the person "a revolver, pistol, or other firearm, or knife, other than an ordinary pocket knife, or dirk or dagger, slingshot, metal knuckles, or an instrument by the use of which injury could be inflicted upon the person or property of another."

A person who has been convicted of a felony, assault with a dangerous weapon, burglary, robbery and other similar crimes is prohibited by AS 11.55.030 from owning, possessing or having under his custody or control a "firearm capable of being concealed on his person," or carrying "concealed about his person a knife with a blade over two inches long or a dirk or dagger, slingshot, metal knuckles, or an instrument commonly considered to be a weapon." Violation of this statute carries a maximum 5 year sentence and a fine of $500. AS 11.55.040.

Punishable by a maximum sentence of six months is the flourishing, pointing or discharging of a firearm in a city, or in or on a "railway coach, steamboat or steamship, or in or near a park or public grounds, or at a public place."

AS 11.55.060 provides a maximum 1 year sentence and a fine of $500 for shooting a firearm "at, into, in, through or against" certain buildings, while AS 11.55.065 provides the same sentence for discharging a firearm "from, on, or across a highway."

A maximum 1 year sentence is provided by AS 11.55.070 for possessing a firearm while under the influence of an intoxicating liquor or drug. AS 11.15.295 provides punishment of up to 25 years for a person who uses or carries a firearm during the commission of a robbery, assault, murder, rape, burglary or kidnapping.

B. The Code Provision

1. TD AS 11.71.100. Misconduct involving weapons in the first degree

Misconduct involving weapons in the first degree is the most serious weapons offense in the Code and is classified as a class C felony.

Subsection (a)(1) prohibits a person from possessing a firearm capable of being concealed on his person if he has been convicted, either inside or outside the state, of a felony involving violence. The term firearm is defined in TD AS 11.71.160(3) and consistent with existing law (Davis v. State, 499 P.2d 1025, 1038 (Alaska 1972), rev'd on other grounds, 415 U.S. 308 (1974)) specifically includes unloaded as well as loaded firearms. The term "possess" is defined in the Code's general definition section as "having physical possession or the exercise of dominion or control over property." TD AS 11.

81.100( ). As in existing law (see Davis, supra, 499 P.2d at 1038 n.54) the Code requires that the defendant be aware of his possession. See TD AS 11.11.100(a), .140(b)(6).

The proposed statute refers to felonies "involving violence" and is intended to codify that part of [1962] OP. ATT'Y GEN., No. 19, which concluded that the existing statute was inapplicable to persons convicted of nonviolent felonies. Note that the proposed statute does not refer to a felon who carries concealed on his person deadly weapons other than firearms. Such conduct would be punishable under TD AS 11.71.120(a)(1), discussed infra.

The subsection (a)(2) expands existing law by including within its prohibitions the person who sells or transfers a firearm capable of being concealed on one's person knowing that the transferee has been convicted of a violent felony. The Subcommission concluded that the tranferor who acts with such knowledge is equally culpable and deserving of the same punishment as the felon.

Subsection (b) provides that subsections (a)(1) and (2) do not apply if the felon has received a pardon or if a period of five years, excluding periods of incarceration, has elapsed from the date of conviction of the underlying felony and the date of the possession, sale or transfer of the firearm. This provision is based on existing AS 11.55.030 but reduces the period by five years. The existing ten year prohibition was viewed by the Subcommission as being unduly harsh since the livelihood of substantial numbers of Alaskans living in the bush may depend on the ability to possess firearms. A five year prohibition should provide a sufficient sanction.

Subsection (3) is new to existing law and is patterned after the prohibitions found in the National Firearms Act, 26 U.S.C. §§ 5801-5872. Key to the prohibition is the definition of "prohibited weapon" found in TD AS 11.71.160(4). The definition extends to any (1) explosive, incendiary or noxious gas bomb, grenade, rocket or mine; (2) firearm silencers; (3) "brass or metal knuckles"; (4) switchblade or gravity knives; (5) automatic weapons; and (6) "sawed-off" shotguns and rifles. Such weapons have little or no legitimate function, are unnecessary for protection and are not commonly used for commercial or recreational purposes. Substantial risk of harm to others and the furtherance of crime result from private possession of such weapons. The conduct proscribed is the manufacture, possession, transportation, sale or transfer of the weapon. Subsection (c) provides that the prohibitions of subsection (a)(2) are inapplicable if possession of the weapon was pursuant to registration under the National Firearms Act.

The Code does not contain a separate offense of carrying weapons during the commission of certain crimes. Instead, this factor serves to aggravate the substantive offense. For example, robbery is aggravated to a class A felony if the defendant is armed with a deadly weapon or represents that he is so armed. See TD AS 11.41.500, discussed in Tentative Draft, Part 2, at 80-83.

2. TD AS 11.71.110. Misconduct involving weapons in the second degree

The second degree weapons offense, a class A misdemeanor, prohibits five forms of conduct, three of which are

substantially based on existing law.

Subsection (a)(1) extends the prohibition of existing AS 11.55.070, Possession of firearm while under the influence of intoxicating liquor or drug, to possession of all "deadly weapons" as that term is defined in TD AS 11.71.160(1). The Code provision, however, requires that the person's physical or mental condition be substantially impaired, a standard that will cover a narrower range of behavior than the existing "under the influence" test. Subsection (a)(2) expands existing law by including within the prohibition the person who sells or transfers a deadly weapon to a person knowing that the physical or mental condition of that person is substantially impaired.

Subsection (a)(3) is new to existing law and prohibits intentionally defacing a firearm or possessing a firearm knowing it has been defaced. "Deface" is defined as "to remove, cover, alter, or destroy the manufacturer's serial number." TD AS 11.71.160(2). The defacing of a firearm and the possession of a defaced firearm with knowledge that it had been defaced were viewed by the Subcommission as conduct having no legitimate purpose and indicating future use of the firearm in criminal activity.

Subsections (a)(4) and (a)(5) are based substantially on existing AS 11.55.050, .065. The terms "highway" and "public place" are defined in the general definition chapter of the Code:

> "Highway" means any road, road right-of-way, street, alley, bridge, walk, trail, tunnel, path or similar or related facility and includes ferries and all such related facilities.

TD AS 11.81.100( ).

> "Public place" means a place to which the public or a substantial group of persons has access and includes highways, transportation facilities, schools, places of amusement or business, parks, playgrounds, prisons, and hallways, lobbies and other portions of apartment houses and hotels not constituting rooms or apartments designed for actual residence.

TD AS 11.81.100( ).

The exclusions in subsection (b) are based on existing AS 11.55.050(b) which allows firearms to be used in state parks open to shooting despite the broader prohibition on using a firearm in a city. The exclusions under the Code are broader than the existing exclusion in that the Code provision permits the use of firearms at shooting ranges, shooting events, hunting areas or similar locations or activities. To be within the sporting activity exclusion, the firearm use must be specifically authorized by law.

The Code does not retain the existing statute on "shooting at buildings." If such conduct occurs in a city, it will violate TD AS 11.71.110(a)(4). In any event, the Code provision on reckless endangerment, TD AS 11.41.250, will cover this conduct if it creates a substantial risk of serious physical injury to another person. If injury or death results, the person may be charged with assault or homicide. See TD AS 11.41.200(a)(3), Assault in the first degree; TD AS 11.41.210(a)(3), Assault in the second degree; TD AS 11.41.100(a)(2), Murder; TD AS 11.41.120, Manslaughter.

3. TD AS 11.71.120. Misconduct involving weapons in the third degree

Misconduct involving weapons in the third degree, a class B misdemeanor, prohibits four forms of conduct.

Subsection (a)(1) is based on existing AS 11.55.010

and prohibits possessing a concealed deadly weapon on the person or any place about the person where the weapon is readily accessible for use. The definition of deadly weapon, TD AS 11.71.160(1), supplemented by the exclusions of TD AS 11.71.120(b) and (c) are key to this subsection.

The definition of "deadly weapon" parallels existing law by excluding ordinary pocket knives from its ambit. The Subcommission concluded, however, that the existing prohibition directed at any "instrument by the use of which injury could be inflicted upon the person or property of another" was overbroad, since virtually any item, even this volume, would be included in this category. Under the Code, the concealed weapon must be "designed for and capable of causing death or serious physical injury, including but not limited to a knife other than an ordinary pocket knife, or axe, club, metal knuckles or explosives." The term firearm is defined in TD AS 11.71.160(3).

The exclusion provided in (b)(1) was added to insure that the person engaged in lawful hunting or other outdoor sporting activity would not be subjected to prosecution under the statute. Carrying a weapon under a parka, for example, to prevent it from getting wet should not be subject to criminal sanctions if the person is engaged in lawful outdoor sporting activity. Note that at the time of the possession the person must be engaged in the activity. Thus the exclusion would not apply to the concealment of weapons on or about the person while the person was on his way to or from the activity. Under such circumstances the weapon must be carried in a visible

holster or case which gives notice of its contents.

Subsection (b)(2) provides that the prohibition against carrying concealed weapons is also inapplicable when the person is in his own dwelling, or on property owned by or leased to him. This exclusion only extends to the act of carrying the concealed weapon. Any use or threatened use of the weapon will be subject to the Code's assault and criminal homicide statutes as supplemented by the sections defining the justifiable use of physical force.

The final exemptions in subsection (c) were added to exclude weapons carried in belt or shoulder holsters, scabbards, sheaths or cases designed for carrying weapons if the scabbard, sheath or case is wholly or partially visible. If the holster, sheath, scabbard or case is at least partially visible, other persons are put on notice that the actor may in fact be carrying a deadly weapon.

Note that subsection (a)(1) specifically refers to weapons concealed "in any place about his person where the deadly weapon is readily accessible for use." This provision was included by the Subcommission to insure that weapons concealed in areas such as under the front seat of an automobile or in an unlocked glove compartment would be prohibited by the subsection.

The Code provision does not contain the specific exclusion found in AS 11.55.020 applicable to peace officers whose duty it is to serve process or make arrests. Such conduct as well as the possession by a peace officer of a firearm in a place where intoxicating liquor is served (discussed infra) would be justifiable under the Code's general

provision on justification in the performance of public duty, TD AS 11.21.220.

Subsection (a)(2) is new to existing law. It prohibits a person from possessing on his person a firearm in any place where intoxicating liquor is sold for consumption on the premises. Unlike TD AS 11.71.110(a)(1), it is not required that the person's condition be substantially impaired. The subsection reflects the determination by the Subcommission that firearms and bars do not mix. This conclusion is supported by a survey of the arrest records of the Anchorage Police Department from 1975-76 compiled by the Criminal Justice Center which indicates that 18% of firearm assaults in Anchorage occurred in bars. One exclusion to the prohibition is provided. Subsection (d) allows the owner of the establishment and his employees to possess such weapons.

Subsections (a)(3) and (4) are also new to existing law. The two provisions prohibit the possession of a firearm by an unemancipated minor under 18 without the consent of his parents and the transfer of a firearm to an unemancipated minor under 18 with knowledge that such sale is without the consent of the minor's parent or guardian.

II. TD AS 11.71.130. POSSESSION OF BURGLARY TOOLS

The crime of possession of burglary tools is new to existing law. The Code provides that it is an A misdemeanor to possess, with intent to use, any tool, instrument or device

adapted or designed for committing any of three property crimes - Burglary, TD AS 11.46.300-310; Theft from the person, TD AS 11.46.130(a)(3); and Theft of services, TD AS 11.46.200.

A preparatory offense, TD AS 11.71.130 is narrowly drafted to insure that otherwise innocent conduct does not fall within its coverage. The definition of the crime requires that the state establish that the defendant possessed the tool with intent to use or permit its use in the commission of one of the three target crimes. Mere possession "under circumstances evincing" that intent is not sufficient. Compare TD AS 11.71.130 with N.Y. PENAL LAW § 140.35. Additionally, unless the defendant possessed nitroglycerine, dynamite, "an acetylene torch, electric arc, burning bar, thermal lance, oxygen lance or other similar device capable of burning through steel, concrete, or other solid material," the state must establish that the tool was "adapted or designed for use" in committing one of the three target crimes. The Subcommission specifically rejected the phrase "commonly used for committing" to insure that possession of items such as screwdrivers, toothpicks or rubber gloves would not give rise to prosecution under the statute.

It should be noted that some instances of possession of burglary tools can give rise to an attempted burglary prosecution under TD AS 11.31.100. The crime of possession of burglary tools, however, allows official intervention in instances where the defendant possesses the tool with the requisite intent, but has not yet taken a substantial step toward the target offense.

III. TD AS 11.71.140, .150. CRIMINAL POSSESSION OF EXPLOSIVES; UNLAWFUL FURNISHING OF EXPLOSIVES

Both Code provisions prohibit unlawful transactions with explosives and are new to existing law. The statutes provide that the possession of explosives with intent to commit a crime and the furnishing of explosives with knowledge that the person to whom they are furnished intends to commit a crime is subject to criminal penalties. The substantial danger of widespread personal injury and property damage resulting from the unlawful use of explosives necessitates specific coverage of such conduct.

The term "explosive" is defined in the general definitions chapter of the Code:

> "Explosive" means a chemical compound, mixture or device that is commonly used or intended for the purpose of producing a chemical reaction resulting in a substantially instantaneous release of gas and heat, including but not limited to dynamite, blasting powder, nitroglycerin, blasting caps and nitrojelly, but excluding saleable fireworks as defined in AS 18.72.050(4), black powder, smokeless powder, small arms ammunition and small arms ammunition primers.

TD AS 11.81.100( ).

As a preparatory crime, TD AS 11.71.140, Criminal possession of explosives, is similar to the Code's general attempt statute, TD AS 11.31.100, (discussed in Tentative Draft, Part 2, at 69-76). As noted in commentary to the Model Penal Code, the combination of an "intent to use" plus possession of materials which are specially designed for unlawful use or which can serve no lawful purpose of the defendant under the circumstances, should not be held insufficient as a matter

of law to establish the substantial step requirement for attempt. MODEL PENAL CODE § 5.01, Comment at 49 (Tent. Draft No. 10, 1960). Like the attempt statute, TD AS 11.71.140 requires the state to establish that the defendant intended to commit a crime.

The classification, for sentencing purposes, of criminal possession of explosives is identical to attempt and is based on the crime intended by the defendant. Punishment is generally set at one degree below the target offense. Possession of explosives with intent to commit a class A felony, for example, is classified as a class B felony.

The crime of unlawful furnishing of explosives, TD AS 11.71.150, provides that it is a class C felony to furnish an explosive substance or device to another knowing that the other person intends to use it to commit a crime. If it can be established that the defendant furnished the explosives "with intent to promote or facilitate the commission of the offense" the defendant would be legally accountable for the crime committed by the person to whom he furnished the explosives. TD AS 11.16.110.

CHAPTER 76. MISCELLANEOUS OFFENSES.

Section

100 Selling or Giving Tobacco to a Minor

110 Interference with Constitutional Rights

Sec. 11.76.100. SELLING OR GIVING TOBACCO TO A MINOR. (a) A person commits the offense of selling or giving tobacco to a minor if he knowingly sells, exchanges, or gives cigarettes, cigars, or tobacco to a child under 18 years of age.

(b) Selling or giving tobacco to a minor is a violation for the first offense. Selling or giving tobacco to a minor is a class B misdemeanor for the second and each subsequent offense.

Sec. 11.76.110. INTERFERENCE WITH CONSTITUTIONAL RIGHTS. (a) A person commits the crime of interference with constitutional rights if

(1) he injures, oppresses, threatens, or intimidates another person with intent to deprive that person of a right, privilege, or immunity in fact granted by the constitution or laws of this state;

(2) he injures, oppresses, threatens, or intimidates another person because that person has exercised or enjoyed a right, privilege, or immunity in fact granted by the constitution or laws of this state; or

(3) under color of law, ordinance, or regulation of this state or a municipality or other political subdivision of this state, he intentionally deprives another of a right, privilege, or immunity in fact granted by the constitution or laws of this state.

(b) In a prosecution under this section, whether the injury, oppression, threat, intimidation, or deprivation concerns a right, privilege, or immunity granted by the constitution or laws of this state is a question of law.

(c) Interference with constitutional rights is a class A misdemeanor.

ALASKA REVISED CRIMINAL CODE

CHAPTER 76. Miscellaneous Offenses

COMMENTARY

I. TD AS 11.76.100. SELLING OR GIVING OF TOBACCO TO A MINOR

The Code provision restates existing AS 11.60.080 and .090 and requires that the defendant act with the culpable mental state of "knowingly."

II. TD AS 11.76.110. INTERFERENCE WITH CONSTITUTIONAL RIGHTS

A. Existing Law

Two existing statutes, based on 18 U.S.C. §§ 241, 242 (1970), now prohibit conduct that interferes with a person's exercise of rights guaranteed by state laws or the Alaska constitution. Under AS 11.60.340, Conspiracy against rights of persons, a person who conspires with another to "injure, oppress, threaten or intimidate" another because that person seeks to or has exercised or enjoyed a right, privilege, or immunity granted by the state constitution or laws, is punishable by imprisonment for two years and by a fine of $1,000. AS 11.60.350, Deprivation of rights under color of law, authorizes imposition of imprisonment for one year and a fine of $1,000 on a person who, under color of any political subdivision or state law, ordinance or regulation, "wilfully deprives another person of a right, privilege or immunity granted by the constitution or laws of this state or ... subjects another person to different punishments, pains or penalties because of that person's race, color, creed or national origin." Other

statutes outside Title 11 authorize penalties for violations of specific civil rights. See AS 18.80.200-.250 (discriminatory practices prohibited).

B. The Code Provision

The Code provision consolidates the two existing statutes into a single provision, classified as an A misdemeanor entitled "Interference with constitutional rights."

Subsections (a)(1) and (a)(2) substantially incorporate AS 11.60.340 but unlike existing law, do not require that the defendant conspire with another. By a narrow majority, the Subcommission decided that interference with constitutional rights should not be included as a target offense in TD AS 11.31.120, the Code's limited conspiracy statute. Subcommission members generally felt that while the developing concept of rights guaranteed by the state constitution needed protection, the risks inherent in the application of conspiracy law to very generally described conduct outweighed possible benefits in protecting those rights.

Elimination of the existing conspiracy requirement simultaneously broadens the coverage of the statute while restricting its application to conduct that achieves the unlawful objective of interference with protected rights. A single defendant, acting with the requisite intent, who injures, oppresses, threatens or intimidates another, or engages in conduct constituting a substantial step toward the commission of such acts, will be subject to criminal penalties under the Code, irrespective of whether he has conspired with another.

On the other hand, a person who conspires with another to injure, oppress, threaten or intimidate a third person either with intent to deprive that third person of a protected right or because he has exercised such a right, will not be subject to criminal penalties unless he has completed the "substantial step" necessary for attempt. See TD AS 11.31.100.

Subsection (a)(3) parallels existing AS 11.60.350 and requires that the defendant, acting under color of a law, ordinance, or regulation of the state or one of its political subdivisions, "intentionally deprive another of a right, privilege or immunity," granted by state law or the state constitution. When engaged in by a public servant, conduct similar to that prohibited by (a)(3) would also constitute official misconduct under TD AS 11.56.850.

Note that subsection (a)(3) does not carry forward the specific reference to one who "subjects another person to different punishments, pains, or penalties because of that person's race, color, creed, or national origin." The right to be free from such discrimination is specifically guaranteed by Art. I §§ 1, 3 of the Alaska Constitution and thus is covered by the broader language "right, privilege or immunity granted by the constitution or laws of this state."

While TD AS 11.76.110 generally requires that the defendant act intentionally, use of the phrase "in fact" to describe the rights protected under the Code provision means the defendant need not be aware that the right, privilege or immunity with which he is interfering is of statutory or

constitutional origin. This conforms with case law under the parallel federal statute. See, Screws v. United States, 325 U.S. 91 (1945) in which the Supreme Court held that to be liable under 18 U.S.C. § 242 (1970), a defendant must act intentionally and with reference to the constitutional rights of his victims, but he need not know that their rights were in fact of constitutional or statutory origin. Under subsection (b), whether the right, privilege or immunity is "in fact" secured by the constitution or laws of the state is a question of law rather than one for jury determination.

APPENDIX I

ALASKA REVISED CRIMINAL CODE

Chapters 06, 21, 26, 46 (Articles 1, 3, 5 and 6), 51, 56 (Article 6), 61 and 76

DERIVATIONS

CHAPTER 06 - GENERAL PROVISIONS

TD AS 11.06.100 - General Purposes

This section is based on ORS 161.025.

TD AS 11.06.110 - Application of Title 11

This section is based on ORS 161.035.

TD AS 11.06.120 - Limitation on Applicability

This section is based on ORS 161.045.

TD AS 11.06.130 - All Offenses Defined by Statute

This section is based on HAW. REV. STAT. § 701-102.

TD AS 11.06.140, 150 - Burden of Injecting the Issue; Affirmative Defense

These sections are based on MO. REV. STAT. § 556.051, .056 (effective January 1, 1979).

CHAPTER 21 - GENERAL PRINCIPLES OF JUSTIFICATION

TD AS 11.21.220 - Justification: Performance of Public Duty

This section is based on ARIZ. REV. STAT. § 13-402 (effective Oct. 1, 1978).

TD AS 11.21.230 - Justification: Use of Physical Force - Special Relationships

This section is based on ARIZ. REV. STAT. § 13-403 (effective Oct. 1, 1978).

TD AS 11.21.240 - Duress

This section is based on N.Y. PENAL LAW § 40.00.

TD AS 11.21.250 - Entrapment

This section is based on the Alaska Supreme Court's holding in Grossman v. State, 457 P.2d 226 (Alaska 1969).

CHAPTER 26 - RESPONSIBILITY

The two statutes in this chapter are based on existing AS 12.45.083(a),(b) and AS 12.45.085.

CHAPTER 46 - OFFENSES AGAINST PROPERTY

ARTICLE 1 - THEFT AND RELATED OFFENSES

TD AS 11.46.280 - Issuing a Bad Check

This section is based on N.Y. PENAL LAW §§ 190.05(1)(a), 190.10(1), 190.50(1).

ARTICLE 3 - ARSON, CRIMINAL MISCHIEF AND RELATED OFFENSES

TD AS 11.46.488 - Littering

This section is based on ARIZ. REV. STAT. § 13-603 (effective Oct. 1, 1978).

ARTICLE 5 - BUSINESS AND COMMERCIAL OFFENSES

TD AS 11.46.710 - Deceptive Business Practices

This section is based on ARIZ. REV. STAT. §§ 13-2202, 2203 (effective Oct. 1, 1978).

TD AS 11.46.720 - Misrepresentation of Use of Propelled Vehicle

This section is based on AS 11.45.471(18).

TD AS 11.46.730 - Defrauding Secured Creditors

This section is based on ARIZ. REV. STAT. § 13-2204 (effective Oct. 1, 1978).

TD AS 11.46.740 - Defrauding Judgment Creditors

This section is based on ARIZ. REV. STAT. § 13-2205 (effective Oct. 1, 1978).

TD AS 11.46.750 - Fraud in Insolvency

This section is based on ARIZ. REV. STAT. § 13-2206 (effective Oct. 1, 1978).

ARTICLE 6 - CREDIT CARD OFFENSES

This article is based on existing AS 11.22.

CHAPTER 51 - OFFENSES AGAINST THE FAMILY

TD AS 11.51.100 - Endangering the Welfare of a Minor in the First Degree

This section is based on ARK. STAT. ANN. § 41-2407.

TD AS 51.110 - Endangering the Welfare of a Minor in the Second Degree

This section is based on OR. REV. STAT. § 163.545 and ANCHORAGE, AK., PENAL CODE § 8.05.060 (1977).

TD AS 51.120 - Criminal Nonsupport

This section is based on existing AS 11.35.010.

TD AS 11.51.125 - Failure to Permit Visitation with Minor Child

This section is based on existing AS 11.36.010.

TD AS 11.51.130 - Contributing to the Delinquency of a Minor

This section is based on ARK. STAT. ANN. § 41-2406(a).

TD AS 11.51.135 - Unlawful Exploitation of a Child

This section is based on ANCHORAGE, AK., PENAL CODE § 8.05.425 (1977).

TD AS 11.51.140 - Unlawful Marrying

Subsection (a)(1) is based on OR. REV. STAT. § 163.515. Subsections (a)(2) and (a)(3) are based on existing AS 11.40.050.

TD AS 11.51.150 - Failure to Comply with Order of Peace Officer to Leave Dwelling

This section is based on HAW. REV. STAT. § 709-906(1)-(4).

CHAPTER 56 - OFFENSES AGAINST PUBLIC ADMINISTRATION

ARTICLE 6 - ABUSE OF PUBLIC OFFICE

TD AS 11.56.850 - Official Misconduct

This section is based on N.Y. PENAL LAW § 195.00.

TD AS 11.56.860 - Misuse of Confidential Information

This section is based on existing AS 39.51.010.

CHAPTER 61 - OFFENSES AGAINST PUBLIC ORDER

ARTICLE 1 - RIOT, DISORDERLY CONDUCT AND RELATED OFFENSES

TD AS 11.61.100 - Riot

This section is based on OR. REV. STAT. § 166.015 and S. 1437, 95th Cong., 1st Sess. § 1834 (1977).

TD AS 11.61.110 - Disorderly Conduct

Subsections (a),(c) are based on existing AS 11.45.030. Subsection (b) is based on HAW. REV. STAT. § 711-1101(2).

TD AS 11.61.120 - Harassment

Subsections (a)(1),(2) are based on existing AS 11.45.035. Subsection (a)(3) is based on HAW. REV. STAT. § 711-1106(b).

TD AS 11.61.130 - Abuse of a Corpse

This section is based on ME. REV. STAT. tit 17A, § 508.

TD AS 11.61.140 - Cruelty to Animals

This section is based on ME. REV. STAT. tit 17A, § 510(1)(B), (1)(D), (3).

TD AS 11.61.150 - Obstruction of Highways

Subsection (a)(1) is based on ARIZ. REV. STAT. § 13-1603(1) (effective Oct. 1, 1978). Subsection (a)(2) is based on HAW. REV. STAT. § 711-1105(1). Subsection (b) is based on ARIZ. REV. STAT. § 13-1603(3) (effective Oct. 1, 1978).

ARTICLE 2 - OFFENSES AGAINST PRIVACY OF COMMUNICATIONS

TD AS 11.61.200 - Eavesdropping

This section is based on existing AS 11.60.290(a).

TD AS 11.61.210 - Interception of Private Correspondence

This section is based on existing AS 11.20.660 and AS 42.20.090.

TD AS 11.61.220 - Unauthorized Divulgence or Use of Communications

This section is based on existing AS 11.60.280.

TD AS 11.61.230 - Exemptions

This section is based on existing AS 11.60.300.

TD AS 11.61.240 - Definitions

Subsections (1)-(3),(5) are based on existing AS 11.60.280-300. Subsections (4),(6) are based on S. 1437, 95th Cong., 1st Sess. § 1526(d),(c) (1977).

CHAPTER 76 - MISCELLANEOUS OFFENSES

TD AS 11.76.100 - Selling or Giving of Tobacco to a Minor

This section is based on existing AS 11.60.080.

TD AS 11.76.110 - Interference with Constitutional Rights

This section is based on existing AS 11.60.340, 350 and S. 1437, 95th Cong., 1st Sess. §§ 1501, 1502 (1977).

APPENDIX II

AMENDMENTS TO CODE PROVISIONS

APPEARING IN

TENTATIVE DRAFT, Parts 1 - 3

The following substantive amendments have been made by the Subcommission to proposed statutes appearing in Tentative Draft, Parts 1 - 3. The amendments primarily reflect changes recommended by the Alaska Bar Association Standing Committee on Criminal Law.

Additions in underlines

Deletions in [CAPITAL BRACKETS]

Tentative Draft, Part 1

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

(1) with intent to cause physical injury to another person he causes [OR ATTEMPTS TO CAUSE] physical injury to any person by means of a deadly weapon;

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

(1) with intent to cause physical injury to another person he causes [OR ATTEMPTS TO CAUSE] physical injury to another person by means of a dangerous instrument;. . .

(4) he intentionally places [OR ATTEMPTS TO PLACE] another person in fear of imminent serious physical injury by means of a deadly weapon or dangerous instrument.

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

(4) by word or conduct he intentionally places [OR ATTEMPTS TO PLACE] another person in fear of imminent physical injury.

Sec. 11.41.310. KIDNAPPING IN THE SECOND DEGREE.

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

(2) the [SOLE] primary intent of the defendant is to assume [CONTROL] custody of that person;

Sec. 11.41.320. CUSTODIAL INTERFERENCE IN THE SECOND DEGREE.

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

Sec. 11.41.340. UNLAWFUL IMPRISONMENT IN THE FIRST DEGREE.

(b) Unlawful imprisonment in the first degree is a class [A MISDEMEANOR] C felony.

Sec. 11.41.350. UNLAWFUL IMPRISONMENT IN THE SECOND DEGREE.

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

(1) the person restrained is less than [12] 18 years old;. . .

(3) his [SOLE] primary intent is to assume [CONTROL] custody of the child;

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

Sec. 11.41.360. COERCION. (a) A person commits the crime of coercion if he compels or induces another person to engage in conduct from which the other person has a legal right

to abstain, or to abstain from engaging in conduct in which the other person has a legal right to engage, by instilling in him a fear that, if the demand is not complied with, the actor or another will carry out a threat.

Subsections (a)(1)-(10),(b) and (c) are deleted. The term "threat" will be defined in the general definition section of the Code. The definition of "threat" now appears in TD AS 11.46.990(10).

"threat" means

(A) a menace, however communicated, to

(i) cause physical injury in the future to a person;

(ii) cause damage to property;

(iii) subject a person to physical confinement or restraint;

[(iv) ENGAGE IN OTHER CONDUCT CONSTITUTING A CRIME;]

[(v)] (iv) accuse a person of a crime or cause criminal charges to be instituted against a person;

[(vi)] (v) expose a secret or publicize an asserted fact, whether true or false, tending to subject a person to hatred, contempt or ridicule or

to impair his credit or business repute;

[(vii)](vi) testify or provide information or withhold testimony or information with respect to another's legal claim or defense;

[(viii)](vii) use or abuse one's position as a public servant by performing some act within or related to his official duties, or by failing or refusing to perform an official duty, in such manner as to affect some person adversely;

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

[(x)](ix) inflict any other harm which would not benefit the person making the threat;

(B) the offer to protect another person from an act described in (A) of this paragraph when the offeror has no apparent means to provide the protection or when the price asked for rendering the protective service is grossly disproportionate to its cost to the offeror.

(C) An expression of intent to engage in conduct described in subsections (A)(iv),(v) is not a threat if made in the reasonable belief that the charge, secret or other fact is true and with the sole intent

(i) to obtain property claimed as restitution, indemnification for harm done or lawful compensation for property or services in the circumstances

to which the accusation or exposure relates; or

(ii) to compel or induce the victim to take reasonable action to correct the wrong which is the subject of the charge, secret or other fact or to refrain from committing an offense.

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

(1) being any age, he knowingly engages in sexual penetration with a person without consent of that person or in attempting to do so causes serious physical injury to that person.

Sec. 11.41.450. INDECENT EXPOSURE. (a) A person commits the crime of indecent exposure if he intentionally exposes [DIRECTLY OR THROUGH CLOTHING,] his genitals, buttock, or anus, [OR DIRECTLY EXPOSES HER FEMALE BREAST] to another with reckless disregard for the offensive, provocative, or insulting effect the act may have on that person.

(b) Indecent exposure is a class A misdemeanor.

Tentative Draft, Part 2

Sec. 11.16.110. LIABILITY BASED UPON THE CONDUCT OF ANOTHER: COMPLICITY.

(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 substantially motivated in whole or in part by. . .

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] and in behalf of the organization. . .

(3) the conduct constituting the offense. . . acting within the scope of his employment [OR] and in behalf of the organization.

Sec. 11.21.150. JUSTIFICATION: USE OF PHYSICAL FORCE IN DEFENSE OF 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.]

(c) A person in possession or control of a dwelling or building, or an express or implied agent of that person, may use or threaten to use physical force upon another when and to the extent he reasonably believes it necessary to terminate what he reasonably believes to be a burglary occurring in an occupied dwelling or building.

Sec. 11.21.170. JUSTIFICATION: USE OF PHYSICAL FORCE BY PEACE OFFICER IN MAKING AN ARREST OR PREVENTING AN ESCAPE. (a) 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) and (d) of this section. . .

(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] firearm on or about his person; or

[(C) MAY OTHERWISE ENDANGER LIFE OR INFLICT SERIOUS PHYSICAL INJURY UNLESS ARRESTED WITHOUT DELAY.]

(c) A peace officer is justified in using deadly physical force in making a lawful stop only when the use of deadly physical force is authorized under other sections of this chapter.

[(c)](d)

TD AS 11.56.200. PERJURY

(c) Perjury is a class [A] C felony.

TD AS 11.56.230. PERJURY BY INCONSISTENT STATEMENTS.

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

Sec. 11.46.120. DEFENSE[S] [TO THEFT] PRECLUDED. [(A) IN A PROSECUTION FOR THEFT, IT IS A DEFENSE THAT THE PERSON ACTED UNDER AN HONEST CLAIM OF RIGHT IN THAT

(1) HE WAS UNAWARE THAT THE PROPERTY WAS THAT OF ANOTHER; OR

(2) HE REASONABLY BELIEVED THAT HE WAS ENTITLED TO THE PROPERTY OR WAS AUTHORIZED TO DISPOSE OF IT AS HE DID.]

[(b)] (a) In a prosecution for theft, it is not a defense that the property involved is that of the defendant's spouse. [UNLESS THE PROPERTY

(1) DOES NOT CONSTITUTE HOUSEHOLD BELONGINGS; OR

(2) CONSTITUTES HOUSEHOLD BELONGINGS BUT IS THE SUBJECT OF THEFT WHILE THE PARTIES ARE MAINTAINING SEPARATE HOUSEHOLDS AND WITHOUT A CLAIM OF RIGHT MADE IN GOOD FAITH.

(C) IN (b) OF THIS SECTION, "HOUSEHOLD BELONGINGS" MEANS FURNITURE, PERSONAL EFFECTS, VEHICLES, MONEY, OR ITS EQUIVALENT IN AMOUNTS CUSTOMARILY USED FOR HOUSEHOLD PURPOSES AND OTHER PROPERTY USUALLY FOUND IN AND ABOUT THE COMMON DWELLING AND ACCESSIBLE TO ITS OCCUPANTS.

(D) IT IS NOT A DEFENSE TO A PROSECUTION FOR THEFT THAT THE PERSON FROM WHOM THE PROPERTY WAS TAKEN, APPROPRIATED, OBTAINED OR WITHHELD HIMSELF OBTAINED THE PROPERTY BY MEANS OF THEFT.]

Sec. 11.46.990(8). "property of another" means property in which a person has an interest which the actor is not privileged

to infringe, whether or not the actor also has an interest in the property[.] and whether or not the person from whom the property was taken, appropriated, obtained or withheld himself obtained the property by means of theft. . .

Sec. 11.46.190. THEFT BY RECEIVING.

[(d) IN ADDITION TO THE CRIMINAL PENALTY PROVIDED IN SECS. 130-150 OF THIS CHAPTER, A PERSON WHO COMMITS THEFT BY RECEIVING IS LIABLE IN A CIVIL ACTION TO THE OWNER OF THE STOLEN PROPERTY FOR THREE TIMES THE AMOUNT OF ACTUAL DAMAGES SUSTAINED BY HIM BY THE LOSS OF THE PROPERTY, AS WELL AS ALL COSTS AND REASONABLE ATTORNEY FEES.]

Sec. 11.46.195. EXTORTION.

[(B) IN A PROSECUTION BASED UPON A THREAT AS DEFINED IN SEC. 990(10)(A)(v) OF THIS CHAPTER, IT IS AN AFFIRMATIVE DEFENSE THAT THE DEFENDANT REASONABLY BELIEVED THE THREATENED CHARGE TO BE TRUE AND THAT HIS SOLE INTENT WAS TO COMPEL OR INDUCE THE VICTIM TO TAKE REASONABLE ACTION TO CORRECT THE WRONG WHICH IS THE SUBJECT OF THE THREATENED CHARGE.]

Sec. 11.46.240. UNAUTHORIZED USE OF A PROPELLED VEHICLE.

[(c) WHEN A MINOR IS ACCUSED OF A VIOLATION UNDER THIS SECTION, HE MAY BE CHARGED, PROSECUTED AND SENTENCED IN THE SAME MANNER AS AN ADULT EXCEPT THAT A PARENT, GUARDIAN OR LEGAL CUSTODIAN SHALL BE PRESENT AT ALL PROCEEDINGS AGAINST THE MINOR.]

Sec. 11.46.250. UNAUTHORIZED OCCUPANCY OF A PROPELLED VEHICLE. (a) A person commits the crime of unauthorized occupancy of a propelled vehicle if he rides in a propelled

vehicle [WHICH, AT THE TIME HE ENTERED IT, HE KNEW OR HAD BEEN INFORMED THAT THE VEHICLE HAD] with reckless disregard that it had been stolen or was being used or was to be used in violation of sec. 240 of this chapter.

SEC. 11.46.415. DEFENSE TO SECS. 400 AND 410 OF THIS CHAPTER. (a) In a prosecution under sec. 400(a)(1) or 410 of this chapter, it is a defense that all persons having possessory or proprietary interests in the property consented to the starting of the fire or explosion. The defendant has the burden of injecting the issue of a defense under this section.

Sec. 11.46.990(2) "deception"

(A) means to knowingly

(i) create or confirm another's false impression [OF] including false impressions as to law, value. . .

[(B) DOES NOT INCLUDE FALSITY AS TO MATTERS HAVING NO PECUNIARY SIGNIFICANCE, OR PUFFING BY STATEMENTS UNLIKELY TO DECEIVE ORDINARY PERSONS IN THE GROUP ADDRESSED;]

(B) In any prosecution for an offense that requires "deception" as an element, it is not a defense that the defendant deceived or attempted to deceive a machine. For purposes of this section "machine" includes but is not limited to a vending machine, computer, turnstile and automated teller machine.

Sec. 11.46.180. THEFT BY DECEPTION.

(b) In a prosecution for theft by deception

(1) the term "deception" does not include falsity as to matters having no pecuniary significance or "puffing"

by statements unlikely to deceive ordinary persons in the group addressed.

[(b) IN A PROSECUTION FOR THEFT BY DECEPTION,]

(2) the defendant's intention or belief that a promise would not be performed shall not be established solely by or inferred solely from the fact that the promise was not performed.