July 1978

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

Alaska Criminal Code Revision Subcommission

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Summary

This pamphlet contains the Commentary on the Alaska Revised Criminal Code, which was passed by the Alaska State Legislature in June 1978 with an effective date of January 1, 1980. The revision followed four years of work by the Alaska Criminal Code Commission and Subcommission from 1975 to 1978. The Revised Criminal Code represents the first comprehensive revision of Alaska's criminal laws, which from 1899 to 1979 were primarily based on Oregon criminal statutes as they existed at the close of the nineteenth century. Earlier drafts of the commentary on the Revised Criminal Code may be found in the six-part Tentative Draft of the Code prepared by the Alaska Criminal Law Revision Subcommission during 1977 and 1978.

Additional information

Originally published in Senate Journal Supplements 47 and 48, Tenth Alaska Legislature (1977–1978).

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 This resulted in a criminal code containing outdated statutes, obsolete terminology, a number of overly specific statutes, a haphazard approach to *mens rea* (the culpable mental state with which a defendant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

COMMENTARY

ON THE

ALASKA REVISED CRIMINAL CODE

(CH. 166, SLA 1978)

Reprinted
by

LEGISLATIVE AFFAIRS AGENCY
Juneau, Alaska

July 1978

COMMENTARY

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ALASKA REVISED CRIMINAL CODE
(Ch. 166, SLA 1978)

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ERRATA

TO THE

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Juneau, Alaska

July 1978

M E M O R A N D U M

TO: SENATOR GEORGE HOHMAN
Chairman, Senate Judiciary Committee

FROM: BARRY STERN
Staff Counsel, Criminal Law Revision Subcommission

DATE: JUNE 12, 1978

This pamphlet contains the Commentary on the Alaska Revised Criminal Code. Earlier drafts of the commentary may also be helpful to the reader reviewing the Code. These drafts may be found in the six-part Tenative Draft of the Code prepared by the Alaska Criminal Law Revision Subcommission during 1977 and 1978. Copies of the Tenative Draft are available in law libraries throughout the state.

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I. Section 11.16.100. LEGAL ACCOUNTABILITY BASED UPON CONDUCT

Section 100 restates the basic principle of criminal law that criminal liability is based upon conduct. When liability exists, it is immaterial whether the elements of the crime are satisfied by the defendant's own behavior, or by the behavior of another person for which he is accountable or by both.

II. Section 11.16.110. LEGAL ACCOUNTABILITY BASED UPON THE CONDUCT OF ANOTHER: COMPLICITY

Section 110 sets out the circumstances under which a person may be criminally liable for the conduct of another.

Subsection (1) recognizes that liability may be imposed on one person for the conduct of another in a specific statute. As an example, a statute could provide that the owner of a bar who knowingly serves an intoxicated person is criminally liable for all crimes committed by that person while intoxicated.

Subsection (2) provides that a person is liable as a traditional accomplice only if he acts "with intent to promote or facilitate the commission of the offense." Acting with that intent, the defendant must either solicit the offense, or aid or abet in the planning or commission of the offense.

Under paragraph (A) a person is liable as an accomplice only if some crime is committed. If the person only solicits the commission of a crime, and conduct which would constitute a crime never occurs, the person can still be charged with solicitation, § 11.31.110.

In paragraph (B) the terms "aids" and "abets" have been included without definition since they have been interpreted in a number of cases. (See Beavers v. State, 492 P.2d 88, 97 (AK 1971); Taylor v. State, 391 P.2d 950 (AK 1964); Mahle v. State, 371 P.2d 21, 25 (AK 1962); Daniels v. State, 383 P.2d 323, 324 (AK 1963), cert. denied 375 U.S. 979 (1964)).

Subsection (3) provides that a defendant can be liable for the conduct of an innocent person or a person who lacks criminal responsibility if he causes that person to engage in the proscribed conduct. In this instance the defendant is only required to act with the culpable mental state required for the offense. For example, under § 11.81.440, a person who commits a crime under duress is not criminally liable. A bank robber who threatens to kill a hostage unless he drives at an excessive rate of speed will be guilty of manslaughter under subsection (3) if the hostage accidentally causes the death of another person. In this regard note that in § 120(a)(2)(C) the Code specifically excludes as a defense to criminal liability based on the conduct of another person that the other person was not guilty of the offense.

III. Section 11.16.120. EXEMPTIONS TO LEGAL ACCOUNTABILITY FOR CONDUCT OF ANOTHER

Subsection (a)(1) provides that a "voluntary and complete" renunciation of criminal intent (defined in § 11.81.900(b)(48)), combined with steps which successfully deprive one's complicity of all its effectiveness in the commission of an offense will remove liability if the accomplice gives timely warning to the police. A "timely warning" would be one which notified the police in time to prevent the commission of the crime if they

acted upon that warning. If timely warning cannot be made by reasonable efforts, an accomplice may still avoid liability by making a reasonable effort to prevent the commission of the offense. For example, the accomplice who supplies a gun to be used in a planned bank robbery could avoid liability by warning the bank manager of the planned crime a day before it is to occur. Note that the defense is an affirmative defense which the defendant must prove by a preponderance of the evidence.

Subsection (a)(2) lists three situations which the Code specifically excludes as defenses to liability for the conduct of another.

Paragraph (A) eliminates the accessory's common law defense that the principal has not been convicted, while paragraph (B) acknowledges the generally accepted principle that a person who is not capable in his individual capacity of committing an offense may nevertheless be liable for the behavior of another who has the capacity to commit that crime.

Paragraph (C) recognizes that a person is nevertheless guilty of the commission of a crime even though the person he aids or solicits could not be convicted of the crime because of some legal disability such as youth or mental condition. The basis for such liability is discussed in the commentary accompanying § 100(3).

Subsection (b) provides for two exemptions to the general principles of § 100. The first exemption, providing that the victim of an offense is not criminally liable as an accomplice appears in paragraph (1).

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

> view them as involved in the commission of the crime confounds the policy embodied in the prohibition; it is laid down, wholly or in part, for their protection.

Model Penal Code § 2.04(5), Comment. at 35 (Tent. Draft No. 1, 1953)

The second exemption requires the legislature to decide whether the conduct inevitably incidental to a crime should be made criminal; for example, is the purchaser of sexual services guilty of prostitution? The Code does not prohibit the criminalization of such conduct; it merely provides that liability does not occur unless a statute specifically provides that it does.

IV. Section 11.16.130. LEGAL ACCOUNTABILITY OF ORGANIZATIONS

Section 130 describes the situations when an organization (defined in § 11.81.900(b)(37)) is legally accountable for the conduct of its agent. Section 12.55.035(c) includes a separate schedule of fines that can be levied against an organization convicted of an offense.

An organization is legally accountable for the conduct of its agent (defined in subsection (b)) constituting an offense under subsection (1)(A) when the agent is acting within the scope of his employment and in behalf or the organization. Subsection (1)(B) provides that the organization will also be liable for the conduct of its agent if it solicits the conduct or subsequently ratifies or adopts the conduct. Finally, an organization will be liable for its agent's conduct when the agent fails to discharge a specific duty imposed on the organization by law (i.e., filing corporate income tax).

CHAPTER 31. ATTEMPT AND SOLICITATION

I. Section 11.31.100. ATTEMPT

To be guilty of an attempt to commit a crime a person must act with an intent to commit a crime. Acting with the requisite intent, the defendant must engage in conduct that constitutes a "substantial step" toward the commission of the attempted crime. The "substantial step" language emphasizes that mere preparatory conduct is not sufficient to constitute an attempt. Alaska Criminal Code Revision, Tenative Draft, Part 2, Commentary at 73-74 (1977) includes guidelines from the Model Penal Code which further define the phrase "substantial step".

Unlike existing law, the Code does not require as an element of the crime of attempt that the attempted crime fail. For example, the state may prosecute for the crime of attempted sexual assault in the first degree without being required to prove beyond a reasonable doubt that penetration did not occur. See, § III, infra.

The defenses of factual and legal impossibility are eliminated in subsection (b). The Alaska Supreme Court has already held that factual impossibility is not a defense to attempt, Gargan v. State, 436 P.2d 968 (Alaska 1968). In excluding the defense of legal impossibility the Code provides, for example, that a person who attempts to receive goods believing them to have been stolen is guilty of attempted theft even though the goods had not been stolen.

Subsection (c) provides that a renunciation of criminal intent which succeeds in preventing the attempted crime is an affirmative defense (defined in § 11.81.900(b)(1)) to attempt. The first element of defense, and probably the most difficult to prove, is that the renunciation must have been "voluntary and complete" (defined in § 11.81.900(b)(48)). The second element is that the defendant must have actually prevented the crime. If the "substantial step" toward the commission of the crime is itself a criminal act, the defendant can be prosecuted for that crime, but not for an attempt to commit the target crime.

With four exceptions, the Code grades attempt one level below the substantive crime, e.g., an attempt to commit a class A felony will be a class B felony. Attempted first or second degree murder or attempted kidnapping are classified as class A felonies while an attempt to commit a B misdemeanor is classified as a B misdemeanor.

II. Section 11.31.110. SOLICITATION

To commit solicitation a person must act with the "intent of causing another to engage in conduct constituting a crime". Acting with that intent, the person must solicit another person to engage in that conduct. "Solicit" is defined in § 11.81.900 (b)(53) as including commands.

Similar to its treatment of attempt, the Code provides that renunciation is an affirmative defense to solicitation. The renunciation must be "voluntary and complete" and the defendant

must actually succeed in preventing the solicited crime. If the solicited crime is committed, the defendant may be charged with the substantive crime. See, § 11.16.110(2)(A).

The Code provides the same punishment for solicitation as it does for attempt. While existing law generally punishes solicitation less severely than attempt, the Code reflects the judgment that solicitation often presents as much danger as an attempt and should be treated similarly for sentencing purposes.

III. Section 11.31.140. MULTIPLE CONVICTIONS BARRED

Subsection (a) is designed to permit prosecution for attempt or solicitation even if the target crime was completed. Although prosecution is allowed for both the preparatory and target crime, subsection (c) prohibits convictions of both crimes. As used in this statute "conviction" refers to the imposition of multiple sentences for the listed offenses and not the jury's return of multiple guilty verdicts.

Subsection (b) precludes conviction of solicitation and attempt for conduct designed to culminate in the commission of the same target crime. The subsection reflects the policy of finding the evil of preparatory action in the danger that it may culminate in the substantive offense that is its object; there is no reason to cumulate convictions of attempt and solicitation to commit the same crime.

Subsection (d) is included to emphasize that subsections (b) and (c) deal only with convictions and not with prosecutions.

IV. Section 11.31.150. SUBSTANTIVE CRIMES INVOLVING ATTEMPT AND SOLICITATION

This section provides that a defendant may not be charged

under § 11.31.100 or 110 if a statute defining an offense provides that an attempt or solicitation to commit the offense itself constitutes the substantive offense. For example, § 11.46.260 provides that the crime of removal of identification marks occurs when a person "attempts to deface . . . any serial number". A person who engages in this conduct must be charged with the substantive crime of removal of identification marks and not with attempt under § 11.31.110.

CHAPTER 41, ARTICLE 1. HOMICIDE

I. Section 11.41.100. MURDER IN THE FIRST DEGREE

Under the Code a person commits murder in the first degree when he intentionally causes the death of another person. The statute does not require that the defendant act with "deliberate and premeditated malice". Instead, the definition of "intentionally" (§11.81.900 (a)(1)) requires that he act with a conscious objective to cause death.

Murder in the first degree also includes causing another to commit suicide through duress or deception. Conduct included in this category could include entering into a suicide pact with the intent not to go through with the act after the other person commits suicide.

Defenses applicable to first degree murder are set out in §115(a) and (d) and are discussed infra.

Murder is an unclassified felony punishable by 20 - 99 years imprisonment in § 12.55.125(a).

II. Section 11.41.110. MURDER IN THE SECOND DEGREE

The crime of murder in the second degree, punishable by 5 - 99 years imprisonment in §12.55.125(b), is described in three subsections.

Subsection (a)(1) covers conduct falling short of intentional killings. A defendant is guilty of murder in the second degree under this subsection if acting with an intent to cause serious physical injury, or with knowledge that his conduct is substantially certain to cause death or serious physical injury, he causes the death of another person.

Shooting into a crowded room without an intent to cause death or serious physical injury would be an example of an act done with knowledge that death or serious physical injury is substantially certain to result.

Subsection (a)(2) describes conduct that is very similar to the "substantially certain" clause in subsection (a)(1). Under this provision, however, the defendant need not necessarily know that his conduct is substantially certain to cause death or serious physical injury. An example of conduct covered by this provision would be shooting through a tent under circumstances where the defendant did not know a person was inside or persuading a person to play "russian roulette". The defendant is only required to intend to perform the act; there is no requirement that he intend to cause death or that he know that his conduct is substantially certain to cause death.

Subsection (a)(3) states the Code's felony-murder rule. Under the rule, a felon is guilty of murder in the second degree if any person causes the death of any nonparticipant during, in furtherance of, or in flight from one of the underlying felonies. The limitation to deaths of nonparticipants insures that a felon will not be liable for the death of his accomplice caused, for example, by a bank guard attempting to apprehend the felons. If a bystander is killed in crossfire between the felons and the guard, however, the felons will be guilty of felony-murder.

III. Section 11.41.115. DEFENSES TO MURDER

Subsection (a) codifies the "heat of passion" defense to murder. If the defense is successfully raised the defendant would still be guilty of manslaughter. See subsection (e). The term "serious provocation" is defined in subsection (f)(2) to preclude consideration of whether the defendant was intoxicated in determining whether the provocation was sufficient to create an intense passion in a reasonable person.

Subsection (b) provides a limited affirmative defense to the felony-murder rule. The defense is available if the defendant was unarmed, unaware that his co-felons, if any, were armed or intended to engage in conduct likely to result in death or serious physical injury, and did not commit, solicit, or aid in the commission of the homicidal act.

Subsection (c) was referred to at Criminal Law Subcommission meetings as the "felony-murder merger doctrine". In considering this extremely limited exemption from the felony-murder rule, it must be recalled that the purpose of the rule is to diminish the risk of unintentional or even accidental killings during the commission of violent felonies. One of these felonies, burglary in the first degree, occurs when a person enters a dwelling with intent to commit a crime. If a person commits burglary in the first degree by breaking into a house with intent to kill the occupant, the felony-murder rule would have no deterent effect.

Permitting a conviction for murder under the felony-murder rule in this circumstance would also have the effect of preventing the jury from considering whether the defendant acted in the "heat of passion".

The Code does not permit a conviction for felony-murder in this situation; the felony is said to "merge" with the homicide. Of course, the defendant can still be charged with first or second degree murder for the intentional killing. The effect of the felony-murder merger doctrine is to prohibit a second degree murder conviction solely on proof that the defendant comitted first degree burglary by entering a dwelling with intent to kill the occupant.

Subsection (d) provides a defense to murder in the first degree and murder in the second degree under subsection (a)(1) if the defendant honestly, but unreasonably, believed circumstances to be such, that had they been as they believed them to be, he would have had a legal justification for the killing. For example, a person who intentionally causes death acting on a reasonable belief that such an action is necessary to defend himself from serious physical injury will not be guilty of murder or any other crime since he can establish the justification of self defense set forth in § 11.81.335. If, however, the trier of fact finds that the belief, though an honest one, was an unreasonable one, the defendant would have a defense to murder but could still be convicted of manslaughter.

IV. Section 11.41.120; 130. MANSLAUGHTER; CRIMINALLY NEGLIGENT HOMICIDE

In the Code, manslaughter is defined as any intentional knowing or reckless killing not amounting to murder. Included in this category would be "heat of passion" killings, killings done under an unreasonable belief as to justification and all reckless killings. Additionally, the crime of manslaughter also specifically covers the situation when a person intentionally aids another to commit suicide. The crime of criminally negligent homicide covers all criminally negligent killings. Manslaughter is classified as a class A felony; criminally negligent homicide is a class C felony.

The culpable mental states of recklessness and criminal negligence (defined in § 11.81.900(a)(3)&(4)) are similar in two respects. Both involve a "substantial and unjustifiable risk that the result will occur" (in the case of a homicide, death) and both require a disregard of that risk constituting "a gross deviation from the standard" of conduct or care that "a reasonable person would observe in the situation." Recklessness, however, requires a "conscious disregard" of that risk - the defendant must subjectively be aware of the risk. The criminally negligent defendant, on the other hand, is unaware of the risk and hence disregards it unconsciously. In one limited situation proof of recklessness need not depend on an actual awareness of risk: "a person who is unaware of a risk of which he would have been aware had he not been intoxicated acts recklessly with respect to that risk." § 11.81.900 (a)(3).

The defendant who consciously disregards a "substantial and unjustifiable risk" that his conduct will cause death is guilty of manslaughter under the Code if death results. The defendant who causes death but was unaware of the risk is guilty of criminally negligent homicide. By requiring that the defendant's conduct or care constitute a "gross deviation from the standard" of conduct or care that "a reasonable person would observe in the situation," the revised manslaughter and criminally negligent homicide statutes incorporate the existing rule that ordinary negligence cannot support a conviction for manslaughter.

V. Section 11.41.140. DEFINITION

To commit any form of homicide, the defendant must cause the death of a person. This section defines "person" as a human being who has been born and was alive at the time of the criminal act. Thus, abortions are excluded from the coverage of this article. The crime of abortion is defined in AS 11.15.060, and that provision is not changed by the Code.

The definition of "alive" is the converse of the definition of "death" appearing in existing AS 9.65.120.

I. Section 11.41.200. ASSAULT IN THE FIRST DEGREE

Assault in the first degree, a class A felony, is the most serious form of assault in the Code. The crime may be committed by any of three methods.

The first, subsection (a)(1), coincides with existing law by providing that an assault by means of a dangerous instrument is treated more severely than other forms of assault. The subsection requires that the defendant act with an intent to cause serious physical injury and that he cause physical injury to any person (of course, excluding himself) by means of a dangerous instrument. An attempt to cause such injury, as with other forms of assault, is covered under the Code's general attempt statute, § 11.31.100. The terms "dangerous instrument", "physical injury" and "serious physical injury" are defined in § 11.81.900(b).

Subsection (a)(2) describes conduct where the defendant, intending to cause serious physical injury, causes such injury by any means. The subsection coincides with the existing mayhem statute.

Subsection (a)(3) is particularly significant when considered in conjunction with § 11.41.110(a)(2) defining the same conduct as second degree murder when death results. The murder provision applies to conduct of extreme depravity, such as shooting a bullet through a tent without any specific homicidal intent. Although this coduct will constitute manslaughter under current law in the event of a fatality, it does not constitute assault if the result was serious but non-fatal injury. This obvious gap in existing law is closed by subsection (a)(3).

II. Section 11.41.210. ASSAULT IN THE SECOND DEGREE

Assault in the second degree is a class B felony that may be accomplished by any of three methods.

Subsection (a)(1) parallels subsection (a)(2) of the first degree statute. In committing second degree assault, however, the defendant need only act with an intent to cause physical injury. An intent to cause serious physical injury is required under the first degree provision.

Subsection (a)(2) provides that intentionally placing another person in fear of imminent serious physical injury by means of a dangerous instrument is a serious felony offense. The subsection is an aggravated form of assault in the third degree under subsection (a)(3). Note that the definition of dangerous instrument includes loaded as well as unloaded firearms.

Subsection (a)(3) covers the reckless causing of serious physical injury by means of a dangerous instrument. As an intoxicated person acts recklessly (§ 11.81.900(a)(3)) and because an automobile can be a dangerous instrument, (§ 11.81.900(b)(11)), it is expected that this subsection will primarily be used to prosecute drunk drivers who seriously injure their victims.

III. Section 11.41.230. ASSAULT IN THE THIRD DEGREE

Assault in the third degree is a class A misdemeanor. The three subsections of the statute require that the victim be threatened with physical injury or that he suffer physical injury.

Subsection (a)(1), by providing that intentionally or recklessly causing physical injury to another person constitutes misdemeanor assault, parallels the existing assault and assault and battery statute, AS 11.15.230.

Under subsection (a)(2) a person commits assault in the third degree if he acts with the culpable mental state of criminal negligence and causes physical injury to another person by means of a dangerous instrument. Unlike existing AS 11.15.200 the statute is not limited to firearms but includes all dangerous instruments.

Subsection (a)(3), the nonaggravated form of second degree assault under § 210(a)(2), provides that intentionally placing another in fear of immenent physical injury is a class A misdemeanor.

IV. Section 11.41.250. RECKLESS ENDANGERMENT

If a person engages in reckless conduct and death results, he will be guilty of either murder in the second degree or manslaughter depending on the presence of "extreme indifference to the value of human life." If the person engages in the same conduct but no one is killed, but someone is injured, he will be guilty of some degree of assault. The crime of reckless endangerment covers the situation where the person acts with the same degree of recklessness as regards human life, but no one is injured. The person, for example, who shoots a bullet through a tent and fortunately does not kill or injure anyone could be charged with reckless endangerment.

CHAPTER 41, ARTICLE 3. KIDNAPPING AND CUSTODIAL INTERFERENCE

I. Section 11.41.300. KIDNAPPING

There are three methods of committing kidnapping under the Code. Each requires that the defendant restrain his victim. "Restrain" is defined in sec. 11.41.370(3). Restraint may be accomplished by moving a person or by confining him. The person's movements must be restricted unlawfully and without his consent. Paragraphs (A) and (B) of the definition describe when a restraint is "without consent".

Kidnapping will occur when the defendant restrains his victim with one of the five intents specified in paragraphs (A) - (E) of subsection (a)(1). The intents describe the most typical kidnapping situations. Note that there is no requirement that the intent actually be carried out.

Paragraph (A) covers the intent to hold the victim for ransom, reward or other payment. The phrase "or other payment" would cover the situation where a child was taken from his parents to be sold to a "blackmarket" adoption ring. Paragraph (D) refers to an intent to interfere with the performance of any governmental or political function. This would include, for example, kidnapping a legislator so that he would be unable to participate in an official debate. Paragraph (E) covers a restraint with intent to facilitate a felony. Movements that are merely incidental to the commission of another crime do not fall within this provision.

Holding a person at gunpoint during a robbery, for example, will not be elevated to kidnapping even though the person's movements are restricted.

Kidnapping will also occur when a person is restrained under subsection (a)(2). Because it is impossible to list all the unlawful intents that may be involved in kidnapping under subsection (a)(1) and because proof of the defendant's intent may sometimes be impossible, paragraph (A) of subsection (a)(2) provides that restraining another person by secreting and holding him in a place where he is not likely to be found is kidnapping.

Pursuant to paragraph (b) of subsection (a)(2), restraining another person under circumstances which expose him to a substantial risk of serious physical injury will also qualify as kidnapping. The primary application of this provision will be in situations where the victim is not secreted and it is impossible to establish whether the defendant's intent fell within subsection (a)(1).

Subsection (b) provides that a relative (defined in §370(2)) has an affirmative defense to a charge of kidnapping under (a)(2)(A) if he restrians a child under 18 or an incompetent person with the primary intent to assume custody over him. The justification for preferential treatment accorded relatives is the view that relatives who take a child or incompetent person from their lawful custodian or acting in response to understandable, if misguided, domestic passion and have a genuine interest or affection for the victim. Their conduct is neither as culpable as that of the

stranger who takes the child nor are they as likely to endanger the victim's welfare or sense of security as would the stranger. However, while the relative has not committed kidnapping under subsection (a)(2)(A), he could still be charged with custodial interference or kidnapping under subsection (a)(1) or (a)(2)(B).

Subsection (c) provides that kidnapping is an unclassified felony punishable by a 5-99 year term of imprisonment in sec. 12.55.125(b). However, the offense can be reduced to an A felony if the defendant successfully establishes the affirmative defense specified in subsection (d).

Subsection (d) provides an affirmative defense (which the defendant must prove by a preponderance of the evidence) to kidnapping. The successful raising of the defense will not free the defendant; it merely reduces the penalty for kidnapping. The defense is available if the defendant voluntarily releases the victim in a safe place before arrest, or within 24 hours after arrest, without having caused serious physical injury to him and without having sexually assaulted him. This affirmative defense should encourage the defendant to exercise care in the custody of a victim and to release the victim when doubts arise in the kidnapper's mind.

II. Section 11.41.320; 330. CUSTODIAL INTERFERENCE IN THE FIRST AND SECOND DEGREE

While aimed primarily at eliminating kidnapping charges from child custody disputes, the statutes on custodial interence protect "parental custody against all unlawful interruption, even when the child itself is a willing, undeceived participant in the attack on this interest of its parent". Model Penal Code § 212.4, Comments (Tent. Draft No. 11,1960).

The second degree crime, a class B misdemeanor, encompasses any interference with lawful custody rights by a relative acting with the intent to hold the victim for a protracted period. The defendant must know he has no legal right to interfere with the custody of the victim. The statute covers not only child custody situations, but also interference with children in state custody, incompetents or others who are entrusted by law to the custody of another person or institution.

Custodial interference is aggravated to a C felony when the defendant removes the victim from the state.

CHAPTER 41, ARTICLE 4. SEXUAL OFFENSES

I. Section 11.41.410. SEXUAL ASSAULT IN THE FIRST DEGREE

Sexual assault in the first degree is the most serious sexual offense in the Code and is classified as a class A felony. The statute prohibits four forms of conduct involving sexual penetration or an attempt to engage in sexual penetration. As with the other sections of the article, the crime is "sex-neutral". Sexual assault in the first degree can be committed by a male or female defendant with a male or female victim. The term "his" is used throughout the article for drafting convenience.

Subsection (a)(1) prohibits sexual penetration without consent. The term "sexual penetration" is defined in § 11.81.900(b)(52) to include genital and anal intercourse as well as oral sexual acts. Additionally, any intrusion, however slight, of an object or any part of a persons body into the genital or anal opening of another person will constitute sexual penetration. The definition does not require that the presence of semen be shown to establish that sexual penetration has occurred. Note also that each party to the acts defined as "sexual penetration" is considered to be engaged in sexual penetration. If the defendant, for example, forces his victim to perform fellatio, the defendant has engaged in sexual penetration with another person.

The term "without consent" is defined in § 11.41.470(3) in a manner to eliminate the need for proving resistance by the victim when he or she was coerced by the use of force against person or property or by one of the three specified threats.

Additionally, sexual penetration will be "without consent" when the victim is incapacitated (defined in § 11.41.470(1)) as a result of an act of the defendant (i.e., knock-out drug placed in drink).

Subsection (a)(2) covers instances of sexual assaults involving attempts to engage in sexual penetration when the victim suffers serious physical injury.

Subsection (a)(3) prohibits sexual penetration with a person under 13 regardless of whether the act was consensual. Sexual penetration with persons under 16 but over 13 is prohibited in § 11.41.440(a)(1).

Subsection (a)(4) provides that the final form of sexual assault in the first degree occurs when a person 18 or older engages in sexual penetration with a person under 18 who is entrusted to his care by authority of law (i.e., ward) or who is his son or daughter. Insofar as the statute applies to a victim under 18 who is the defendant's son or daughter, it raises what would be a C felony under the incest statute, § 11.41.450, to an A felony.

II. Section 11.41.420. SEXUAL ASSAULT IN THE SECOND DEGREE

The crime of sexual assault in the second degree provides that it is a B felony to coerce a person to engage in sexual contact by causing physical injury to anyone or by threatening anyone with imminent death, imminent physical injury or imminent kidnapping. If the victim was coerced to engage in sexual contact by such a threat or by the infliction of physical injury, it is immaterial whether resistance occurred.

The term "sexual contact" is narrowly defined in § 11.81.900(b)(51) to cover specified types of intentional sexual touchings.

The definition covers acts where the defendant touches the victim as well as acts where the defendant causes the victim to touch himself or the defendant.

III. Section 11.41.430. SEXUAL ASSAULT IN THE THIRD DEGREE

This statute, a class C felony, prohibits sexual penetration with two classes of persons that the legislature has determined require special protection under the law, regardless of whether the act occurs "without consent". If, however, the act occurs "without consent" of the victim, prosecution should be brought under § 11.41.410(a)(1).

Subsection (a)(1) prohibits sexual penetration with a person who is known by the defendant to be suffering from a mental disorder or defect which renders him incapable of appraising the nature of his conduct. To insure that the criminal law does not deny mentally incapacitated persons the right to have sexual relationships, the provision further requires that the conduct occur under circumstances in which a person who is capable of appraising the nature of the conduct would not have engaged in the sexual act.

Subsection (a)(2) prohibits sexual penetration with a person who is known to be incapacitated. "Incapacitated" is defined in § 11.41.470(a)(1) as a person who is temporarily incapable of appraising the nature of his conduct and who is physically unable to express unwillingness to act. Sexual penetration with an intoxicated person who has "passed out" would be covered by the section. If the sexual act occurs "without consent", prosecution should be brought under the more serious offense of sexual assault in the first degree, § 11.41.410(a)(1).

IV. Section 11.41.440; 445(b). SEXUAL ABUSE OF A MINOR; AFFIRMATIVE DEFENSE

This provision, a class C felony, prohibits sexual penetration with children under 16 and sexual contact with children under 13. The crime occurs regardless of whether the child consented to the sexual act.

Subsection (a)(1) applies to a person 16 or older who engages in sexual penetration with a person who is under 16 but 13 or older. If the victim is under 13, prosecution should be brought under § 410(a)(3). If the victim is under 18 and the defendant's son or daughter or is entrusted to the defendant's care under authority of law, prosecution should be brought under § 410 (a)(4).

Sexual contact between a person 16 or older and a person under 13 is covered in subsection (a)(2). If the victim is under 16 but over 13, and the defendant is 19 or older, prosecution should be brought under the "contributing" statute, § 11.51.130 (a)(4).

In § 445(b), the Code recognizes the limited affirmative defense (which the defendant must establish by a preponderance of the evidence) of reasonable mistake as to age when liability for sexual assault or sexual abuse of a minor is dependent on that factor. The defense may only be raised when the victim is 13 or older at the time of the assault. If the victim is less than 13, the defendant will be strictly liable regardless of his belief as to the victim's age.

V. Section 11.41.445(a). GENERAL PROVISIONS - "SPOUSAL IMMUNITY"

Under existing law, a person can never be charged with the rape of his spouse. The Code substantially limits this immunity from prosecution by providing for the affirmative defense specified in § 445(a). A person charged with a sexual assault of his spouse under the Code will only be afforded a defense if the spouses were not living apart at the time of assault and if he did not cause physical injury to his spouse.
injury to his spouse.

VI. Section 11.41.450. INCEST

This statute prohibits consensual acts of sexual penetration by a person 18 or older with a person who falls in one of the three classes of relationships listed in (a)(1)-(3). Incest is a class C felony.

VII. Section 11.41.455. UNLAWFUL EXPLOITATION OF A MINOR

Though this section is new to Alaska 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 18 to perform an act . . . which would manifestly tend to cause him to become or remain a delinquent."

The statute can be violated by a person who induces or employs a child under 16 to engage in one of the six sexual acts specified in paragraphs (1)-(6) as well as by the person who photographs, films or televises such conduct. The defendant must act with the intent of producing a depiction of the act for a commercial purpose.

Paragraphs (2), (3) and (6) require that the sexual act be "obscene." The Code does not define what is obscene but leaves such a determination for Alaska courts to decide.

CHAPTER 41, ARTICLE 5. ROBBERY, EXTORTION, AND COERCION

I. Section 11.41.500; 510. ROBBERY IN THE FIRST AND SECOND DEGREE

Two degrees of robbery exist in the Code. Robbery in the second degree contains the basic statement of the crime, with section 500 providing that certain aggravating factors will raise the crime to robbery in the first degree.

The second degree provision will be used in prosecuting unarmed robberies. By referring to takings from the "immediate presence and control of a person" the statute is broad enough to cover takings directly from the person as well as takings which, though not from the person, pose identical dangers - i.e., the taking of a pocketbook placed on a park bench accomplished by threatening the owner who is sitting on the bench.

Section 500 raises the crime to robbery in the first degree if at least one of three aggravating factors is present. First, a defendant commits first degree robbery if he is armed with a deadly weapon, regardless of whether the victim is aware that the defendant is so armed.

Second, the robbery becomes first degree if the defendant represents by word or conduct that he or another participant is armed with a deadly weapon or dangerous instrument, even if nobody is so armed. This aggravating factor is present when a robber uses a note, a fake weapon or a "hand in pocket" technique to convey the impression that he is armed.

Third, the robbery is elevated to first degree if the defendant uses or attempts to use a dangerous instrument, or causes or attempts to cause serious physical injury.

II. Section 11.41.520. EXTORTION

The extortion statute in the Code is virtually identical to the statute passed by the legislature in 1974. The only changes that have been made were necessary to conform the statute to the Code's uniform general definitions (i.e., in paragraph (1) the term "bodily injury" was changed to "physical injury").

Extortion is a B felony regardless of the value of the property that was obtained. In this regard, extortion differs from the theft provisions by not making the classification dependent on the value of the property.

Under paragraph (1), extortion can be committed by obtaining property of another by threatening physical injury. It is important to note that while this conduct is similar to robbery, the extortion statute specifically excludes situations amounting to robbery from its coverage. Thus, if the threat is of immediate physical injury, the crime is robbery; if the threat involves other than the immediate infliction of physical injury, the crime is extortion.

Extortion requires that the defendant actually obtain property by means of a threat.

If a threat is made and the victim does not comply with the demand, prosecution should be brought for attempted extortion, a class C felony under sec. 11.31.100.

III. Section 11.41.530. COERCION

Coercion is classified as a C felony. Coercion of a person to do or abstain from any act when he has a legal right to do the opposite is prohibited. The crime of coercion describes conduct that is very similar to extortion. However, there is one primary distinction between the two crimes. Under extortion, the defendant must threaten his victim and obtain property. Under the crime of coercion, any act may be compelled by means of a threat.

The type of threats that will be the basis of a charge of coercion are specified in paragraphs (1)-(6). These threats are identical to the threats listed in the same paragraphs of the extortion statute. One threat listed in the extortion statute is not, however, included in the coercion provision. Paragraph (7) of the extortion statute prohibits a threat to"inflict any other harm which would not benefit the person making the threat or suggestion". By not including this rather broad provision in the coercion statute, the code is consistent with the existing blackmail statute, AS 11.15.300, the current equivalent of the coercion statute, which defines the proscribed threats more narrowly than the extortion provision.

CHAPTER 46, ARTICLE 1. THEFT AND RELATED OFFENSES

I. Section 11.46.100. THEFT DEFINED

The primary purpose of this article is the consolidation of the traditionally distinct crimes of larceny, larceny by trick, embezzlement, theft of mislaid property, obtaining property by false pretenses, receiving stolen property and theft of services into the crime of theft. "Theft" is defined in §100. The crime of theft is divided for purposes of punishment into four degrees in §130-150, depending primarily on the value of the property or services that was the subject of theft. The prohibited conduct is designated as "theft" to avoid any implication that the crime is limited by the scope of common law larceny.

Subsection (1) describes conduct traditionally classified as larceny or embezzlement. The defendant must act with "intent to deprive another of property or to appropriate property of another". The terms "appropriate" and "deprive" are defined in §990(1),(2).

Subsections (2)-(6) refer to sections describing how theft of lost property, theft by deception, theft by receiving, theft of services, and theft by failure to make required disposition of funds received or held may be committed. It is important to note that the conduct described in these sections do not define separate crimes. Conduct described as theft by deception in §180, for example, is theft under §100, and depending on the value of the property involved will be punished as theft in the first, second, third, or fourth degree.

There is no separate offense of theft by deception in the Code. Se also, §110(a).

To commit theft under paragraphs (1), (2), (3) and (6) the defendant must "obtain" property of another. The definition of "obtain" in §900(5) extends the concept of taking to include constructive acquisition of property. Because asportation or "carrying away" of property is not an element of theft under the consolidated theft statute, theft of real property is possible under the Code, even though it was not included within the common law crime of larceny.

The question of what can be the subject of larceny is resolved in existing law by an extensive, specific listing of various items which could not be the subject of larceny at common law. The Code simply prohibits theft of property or services. Property is defined broadly in §11.81.900(b)(44) as "an article, substance, or thing of value". If the subject of theft is a thing of value it will be covered by the Code regardless of whether it was included under the more restrictive common law definition of property.

With regard to property subject to a security interest, the Code recognizes in §990(6) that possession of the property is the most important factor. A person in possession does not commit theft if he withholds property from a secured party.

The conduct, however, may be criminal under §730, defrauding creditors, Note also that in the absence of a specific agreement to the contrary, a secured party commits theft if he repossesses property without the consent of the party in possession.

II. Section 11.46.110. CONSOLIDATION OF THEFT OFFENSES: PLEADING AND PROOF

Section 110 specifies the procedural consequences resulting from the consolidation of theft offenses. Under the Code a charge of theft is sufficient without designating the particular means by which the property or services was obtained. The section serves to underscore one of the chief aims of the article: elimination of the confusing distinctions among the most typical theft offenses. See generally, State v. Jim White, 508 P.2d 430 (Or. App. 1973) interpreting similar language in the Oregon consolidated theft statute.

III. Sections 11.46.120-150; 990 THEFT IN THE FIRST, SECOND, THIRD, AND FOURTH DEGREE; VALUE OF PROPERTY

A. Section 11.46.120. Theft in the First Degree

A person commits theft in the first degree, a class B felony, when he commits theft as described in §100 and the value of the property or service that is the subject of theft is $25,000 or more.

B. Section 11.46.130. Theft in the Second Degree

Subsection (1) provides that theft in the first degree, a class C felony, is committed if a person commits theft as described in §100 and the value of the property or services that is the subject of theft is $500 or more.

Subsection (2) provides that the theft of any firearm or explosive, regardless of value, is theft in the second degree. This provision is included because of the frequency with which stolen firearms and explosives are used in committing other crimes. The terms "firearm" and "explosive" are defined in §11.46.900(b).

Subsection (3) provides that the theft of any property from the person is treated as second degree theft. This is consistent with existing AS 11.15.250, larceny form a person, which treats non-forcible thefts from the person (i.e., picking a pocket) as a felony, regardless of the value of the stolen property. Note, however, that if force is used the defendant has committed the more serious crime of robbery.

C. Sections 11.46.140-150. Theft in the Third and Fourth Degree

Theft of property or services worth between $50 and $500 or the theft of a credit card (defined in §11.81.990 (b)(8)) is a class A misdemeanor, theft in the third degree.

Theft in the fourth degree, a class B misdemeanor, is committed by the theft of property or services worth less than $50.

D. Section 11.46.980. Value of Property

Because the degree of theft is primarily determined by the value of the property involved, the Code includes rules for determining value. While discussed in the context of the theft provisions, the rules specified in this section apply to all offenses in Chapter 46 in which it is necessary

to determine value.

Subsection (a) provides that value will ordinarily mean the market value of the property at the time of the theft. If this cannot reasonably be ascertained, value means the cost of replacing the property.

Subsection (b)(1) provides that the value of a written instrument constituting an evidence of debt, such as a check, draft, or promissory note, shall be considered the amount due or collectable on the instrument. Pursuant to subsection (b)(2), the value of any other written instrument is considered the greatest amount of economic loss which the owner might reasonably suffer because of the theft.

Subsection (c) provides that amounts involved in criminal acts committed under on course of conduct are to be aggregated in determining the degree of theft.

> (Subsection (c)) permits the cumulation of small amounts taken from the same or several persons pursuant to one. . . course of conduct . . . As an example of its application, a bus driver or several bus drivers might pursue a scheme in which each day he or they would withhold not more than two or three dollars from the day's receipts. Or a transient operator might move from house to house in a neighborhood promising to seal roofs at $65 a roof, either absconding with the payment or dabbing at the roof with a few cents worth of tar. In either instance the employer, the householder and the community incur substantial financial loss. The . . . course of conduct is calculated enough that it suggests a need for a substantial term or imprisonment or a period under probation. However, so long as each taking is considered a separate

> offense all the acts will be in the misdemeanor category only . . . By aggregating the amounts, the defendant may be brought into the felony range of punishments. . .

Proposed Revision of the Michigan Criminal Code, at 222 (Michigan State Bar 1967).

IV. Section 11.46.160. THEFT OF LOST OR MISLAID PROPERTY

Pursuant to §100(2), a person commits theft if he commits conduct described in §160, theft of lost or mislaid property.

The requirements of this statute are (1) the obtaining of property by the defendant (2) knowing it to have been lost, mislaid or delivered to him by mistake and (3) failing to take reasonable measures to restore the property to its owner (4) with intent to deprive the owner of the property. Subsection (b) specifically lists notification of a peace officer or the owner as a "reasonable measure" to restore property.

V. Section 11.46.180. THEFT BY DECEPTION

Section 180 provides that a person commits theft if, acting with the specified intent "he obtains property of another by deception." To insure that the criminal courts are not swamped with cases which should be treated as civil breach of contract claims, subsection (b) requires that the deception be established by more than a mere showing that the defendant's promise was not kept.

"Deception" is defined in §11.46.900(b)(14) to cover five forms of conduct. Paragraph (A) codifies the traditional false pretenses concept of knowingly creating a false impression, but broadens its scope to include confirming another's impression which the defendant does not believe to be true. The false impression may relate to law, value, intention or other state of mind. The traditional restriction to "existing facts" is rejected, as is the requirement of a "false token".

If the defendant knowingly fails to correct a false impression which he has previously created he has committed deception under paragraph (B). Paragraph (C) provides that deception also occurs when a seller knowingly prevents a buyer from acquiring relevant information to the disposition of property or services.

Paragraph (D) reaches the conduct currently covered by AS 11.20.400 - conveying an interest in property and failing to disclose a claim which impairs the enjoyment of the property.

Paragraph (E) provides that a person obtains property by deception if he promises performance which he intends or knows will not be performed. The original promise is actually the creating of a false impression under paragraph (A). However, it is adviseable to provide specifically for theft by a false promise to emphasize that the common law restriction to "existing facts" cannot be interpreted to exempt false promises from the coverage of the theft statute.

Section 180(c) provides that "deception" does not include falsity as to matters having no pencuniary significance, such as a false statement by a car salesman that he belongs to the Elks in order to sell a car to an enthusiastic Elk. The subsection also provides that "deception" does not include "puffing" by statements unlikely to deceive ordinary persons in the group addressed. An example of "puffing" would be a salesman's statement that "this shampoo will make persons of the opposite sex fall all over you".

It should also be noted in §11.46.985 the Code specifically rejects any possible defense that deception cannot occur unless a person was deceived. Frauds involving machines, ranging from inserting a slug into a parking meter to large scale computer frauds, will be covered under the consolidated theft statute.

VI. Section 11.46.190. THEFT BY RECEIVING

The Code provision provides that a person commits theft if he "buys, receives, retains, conceals, or disposes of stolen property with reckless disregard that the property was stolen". The term "stolen property" is defined in §11.46.990(7).

The statute does not require that the defendant "know" that the property was stolen; reckless disregard as to this element is sufficient. The definition of recklessly in §11.81.900(a)(3) would require the state to establish that the defendant was actually aware and consciously disregarded

a substantial and unjustifiable risk that the property was stolen. Further, the defendant's disregard of the risk that the property was stolen must constitute "a gross deviation from the standard of conduct that a reasonable person would observe in the situation". Buying a new color television from a person in the street for $50 would be an example of conduct done with "reckless disregard" as to whether the property was stolen.

VII. Section 11.46.200. THEFT OF SERVICES

The purpose of §11.46.200 is to protect both individuals and commercial enterprises that supply services to the public from conduct not only partly covered by existing statutes. "Services" is defined broadly in §11.46.900(b)(50) to include all types of services mentioned in existing law but, in addition, specifically covers theft of labor and professional services.

Subsection (a)(1) covers the obtaining of services by deception, force, threat or other means to avoid payment for the services. Enforceability is simplified by subsection (b), which provides that absconding without paying for hotel, restaurant or other similar services is prima facie evidence that the services were obtained by deception.

Theft of services also occurs when a person improperly diverts services under his control to his or another's benefit. Paragraph (a)(2) would cover, for example, the foreman of a painting crew who has his subordinates paint his house on company time.

VIII. Section 11.46.210. THEFT BY FAILURE TO MAKE REQUIRED DISPOSITION OF FUNDS RECEIVED OR HELD

It is questionable whether existing Alaska law covers the situation where a person receives property or services by promising to dispose of it in a certain way, exercises control over the property or services and fails to fulfill the obligation. The most typical examples are the employer who withholds amounts from his employees' pay for taxes, or the storekeeper who receives contributions for charity later to be transmitted by check to the ultimate charity recipient, and simply keeps the money.

The conduct described by subsection (a)(1) is criminal only if the holder of the funds knows of his legal obligation to pay. Enforcement of this section is made easier by the prima facie evidence provision of subsection (c) that an employee or officer of the government or a financial institution or a fiduciary knows his relevant legal obligations. Such a person is also presumed to have dealt with the held funds as his own if he fails to account for the funds on lawful demand, or if an audit reveals a shortage or falsification of accounts. The terms "government" and "fiduciary" are defined in sec. 11.81.990(b). The term "financial institution" is defined in sec. 11.46.900(3).

Subsection (b) provides an exception to the rule that

requires stolen property to be specifically identified. A person who violates this section will not escape conviction simply because he has mingled the victim's money with his own funds.

IX. Section 11.46.220;230. CONCEALMENT OF MERCHANDISE; REASONABLE DETENTION AS A DEFENSE

Section 220 is derived from existing AS 11.20.275 but allows for felony prosecutions when over $500 in merchandise is involved.

Section 230 is derived from existing AS 11.20.277. It provides that a peace officer, or the owner of a store or his agent can detain a person when he has probable cause that the person has committed shoplifting. Note that the more clearly defined term "probable cause" has been substituted for the existing term "reasonable cause" in subsection (a)(1).

X. Section 11.46.260-270. REMOVAL OF IDENTIFICATION MARKS: UNLAWFUL POSSESSION

The crime of removal of identification marks prohibits the defacing, erasing or the altering of a serial number or identification mark "with intent to cause interruption to the ownership of another." The intent element prevents conviction of persons who alter their own property.

The crime of unlawful possession prohibits the possession of property "knowing that the serial number or identification mark . . . has been erased, altered, changed or removed with the intent of causing interruption to ownership of another."

There should be few problems in convincing a jury that a person discovered, for example, with ten television sets in his basement, all with their serial numbers removed, possessed that property knowing it had been altered with the intent to cause interruption to the ownership of another.

XI. Section 11.46.280. ISSUING A BAD CHECK

The crime of issuing a bad check is committed when a person issues (defined in subsection (c)(3)) a check (defined in subsection (c)(2)) knowing that it will not be honored by the drawee. The penalty for issuing a bad check parallels the general theft provisions and is based on the face value of the check.

Under subsection (b), the state meets its initial burden of proving knowledge if it shows that the issuer of the bad check had no account with the drawee at the time the check was issued or that the drawee refused the check within 30 days of issue and the drawer of the check failed to make full satisfaction within 15 days after notice of dishonor was sent to him.

XII. Sections 11.46.285-290. FRAUDULENT USE OF A CREDIT CARD; OBTAINING A CREDIT CARD BY FRAUDULENT MEANS

Obtaining property or services through the unauthorized use of a credit card is proscribed in §285. Penalties for the prohibited conduct parallel those provided for theft. However, because it is highly unlikely that the fraud will involve $25,000, B felony penalties are not provided.

Note that amounts obtained pursuant to one course of conduct may be aggregated in determining the degree of the crime. See §III C, supra.

The crime of obtaining a credit card by fradulent means specifies three forms of unlawful acts involving credit cards. The penalty for the conduct described in subsection (a)(1) and (2) is a class C felony, while A misdemeanor penalties are provided for violation of subsection (a)(3).

I. Sections 11.46.300-310. BURGLARY IN THE FIRST AND SECOND DEGREE

The Code provides for two degrees of burglary; the first degree offense is a class B felony, the second degree offense is a class C felony.

A person commits burglary in the second degree when he "enters or remains unlawfully" in a building with intent to commit a crime. The quoted phrase is defined in sec. 11.46.350(a). The term "building" is defined in sec. 11.81.900(b)(3) Note that the defendant is not required to form the intent to commit the crime at the time he enters the building. An initial lawful entry, followed by an unlawful remaining will be sufficient to establish this element.

Burglary will be aggravated to a class B felony when one of four factors is present. First, any burglary of a dwelling will be first degree burglary. There is no requirement that the dwelling be occupied or that the conduct occur in the nighttime. "Dwelling" is defined in sec. 11.81.900(b)(17) and would include hotel rooms as well as tents.

Burglary of a building will also be burglary in the first degree if (1) the defendant is armed with a firearm (note, there is no requirement that the defendant use the firearm), (2) causes or attempts to cause physical injury,

or (3) uses or threatens to use a dangerous instrument. The terms "firearm", "physical injury", and "dangerous instrument" are defined in sec. 11.46.900(b).

II. Sections 11.46.320-330. CRIMINAL TRESPASS IN THE FIRST AND SECOND DEGREE

Similar to burglary, criminal trespass is divided into two degrees. The first degree offense is a class A misdemeanor, the second degree offense is a class B misdemeanor. Criminal trespass in the second degree occurs when a person "enters or remains unlawfully" in or upon premises. The term "premises" is defined in sec. 11.46.900(b)(42) to mean real property including any building. Criminal trespass in the second degree also occurs when a person enters or remains unlawfully in a propelled vehicle. Note that the taking of a propelled vehicle would be prosecuted under the code provisions on theft or criminal mischief. Section 11.46.330(a)(2) covers relatively trivial conduct, such as unlawfully entering an automobile to take a nap.

Criminal trespass in the first degree covers two forms of conduct. The first is entering or remaining upon real property with intent to commit a crime on the property. Ordinarily such conduct would be prosecuted under sec. 330(a)(1). However, proof that the defendant intended to commit a crime on the land during his trespass will aggravate the crime to a class A misdemeanor.

Criminal trespass in the first degree also occurs when a person enters or remains unlawfully in a dwelling. This conduct would be prosecuted as burglary in the first degree if it could be established that the person entered or remained unlawfully in the dwelling with intent to commit a crime.

The issue of whether land must be posted to sustain a conviction for trespass is addressed in sec. 11.46.350(b). Ordinarily, posting is required in a reasonably conspicious manner. However, if it can be established that the person entered onto the land with intent to commit a crime (for example, to commit theft of property on the land) it is not required that the land was posted.

III. Section 11.46.350. DEFENSE: EMERGENCY USE OF PREMISES

This affirmative defense is based on existing AS 11.20.135. One change should be noted. The existing provision requires that the person who used the premises in an emergency notify the owner or the police of such entry within 15 days after using the facility. This requirement ignores the practicalities of providing such timely notice in a remote bush area as well as providing too much leeway in the event of a trespass near a population center. In place of the rigid 15 day requirement, the Code requires that notice be given "as soon as reasonably practical after the entry".

CHAPTER 46, ARTICLE 3. ARSON, CRIMINAL MISCHIEF, AND RELATED OFFENSES

I. Sections 11.46. 400-430. ARSON IN THE FIRST AND SECOND DEGREE, CRIMINALLY NEGLIGENT BURNING

The most serious arson offense in the Code is arson in the first degree, a class A felony. To commit the crime a person must intentionally damage any property by fire or explosion. As a result of that act, another person must be placed in danger of serious physical injury. Note that while the defendant must intend to damage any property, (his own or another's), there is no requirement that he intend to place another person in danger. Recklessness as to this result is sufficient. Note also that there is no requirement that a person actually suffer serious physical injury. Merely placing a person in danger of serious physical injury will be sufficient.

Arson in the second degree, a class B felony, covers the damaging of any building by fire or explosion. A number of distinctions should be noted between this provision and the first degree statute. Under the second degree provision the property that is damaged must be a building, while under the first degree provision any property can be damaged. However, while the first degree provision requires that a person be placed in danger of injury, a similar requirement does not exist under the second degree statute.

An affirmative defense to arson in the second degree is provided in subsection (b). The defense recognizes that in some instances the most economical method of removing a building is to burn it. Such conduct is exempted from the coverage of the statute if the defendant establishes that no other person had an interest in the property, or if they did, that they consented to the burning, and that the burning was for a lawful purpose. Burning a building to defraud an insurance company would not be a burning for a lawful purpose. Note that a similar defense does not apply to the first degree statute. If the burning recklessly places another person in danger of serious physical injury, the defendant has committed first degree arson even if he acted for a lawful purpose.

The crime of criminally negligent burning, a class A misdemeanor, covers the criminally negligent damaging of the property of another by fire or explosion. The person who falls asleep in a hotel bed with a cigarette in his hand, for example, would violate the statute if the bed caught on fire. If physical injury or death results, prosecution would be brought under the Code's homicide or assault statutes.

II. Section 11.46.450. FAILURE TO CONTROL OR REPORT A DANGEROUS FIRE

Existing AS 41.15.110(a) creates an affirmative duty on a person to exercise due care to prevent the uncontrolled spread of a fire when he knows of a fire or sets a fire on forest lands, owned, possessed or controlled by him.

The Code provision broadens existing law by providing that the failure to control or report a dangerous fire is in some circumstances a criminal offense, regardless of whether it occurs on forest lands. The crime may be committed by two classes of persons.

Subsection (a)(1) recognizes that a person "under an official, contractual or other legal duty to prevent or combat the fire" commits the crime if, knowing that the fire is dangerous, he either fails to take reasonable measures to control the fire or fails to give a prompt fire alarm.

Subsection (a)(2) places the same duty on any person, not just one who is under a duty to act, when the fire was started by him or with his assent, or if the fire was started on property in his custody.

III. Section 11.46.480-486. CRIMINAL MISCHIEF IN THE FIRST, SECOND, THIRD, AND FOURTH DEGREE

A. Section 11.46.480 Criminal Mischief in the First Degree

The most aggravated form of criminal mischief, a class B felony, can be committed by any of three methods. Subsection (a)(1) would apply to conduct such as the destruction of a power line or the placing of sugar in the gas tanks of an ambulance fleet when substantial interruption or impairment of the service results.

Subsection (a)(2) covers the person who acting with an intent to damage property, damages property of another in an amount exceeding $100,000 by the use of "widely dangerous means." Note that only an intent to damage property by the use of widely dangerous means is required. The defendant is not required to intend $100,000 in damage. The definition of "widely dangerous means" in §490(4) insures that the statute is only applicable when a person employs a difficult to confine force such as an avalanche, radioactive material, or flood to cause substantial property damage. The likelihood of serious physical injury resulting from the use of a "widely dangerous means" to intentionally cause damage to property justifies classification of this conduct as more serious than other forms of property damage.

Subsection (3) parallels existing AS 11.20.517(a), enacted during the 1977 legislative session.

B. Section 11.46.482. Criminal Mischief in the Second Degree

Criminal mischief in the second degree, a class C felony, may be committed in four ways. The first, described in subsection (a)(1), occurs when a person intentionally damages property of another and causes damage in an amount of $500 or more.

Subsection (a)(2) parallels the coverage of existing AS 11.20.517(b) which, like AS 11.20.517(a), was enacted during the 1977 legislative session. One change should be noted. The statute covers the act of tampering with an airplane or helicopter with reckless disregard for the risk of harm to the property. The possibility that such conduct will result in serious physical injury or death necessitates felony penalties for such an improper interference.

Subsection (a)(3) prohibits conduct similar to that described in subsection(a)(2) of the first degree statute. The second degree offense, however, does not require that the defendant actually damage property of another; reckless creation of a risk of damage in excess of $100,000 to property of another by the use of a widely dangerous means is made punishable by subsection (a)(3). The culpable mental state of "recklessly," defined in §11.81.900(a)(3), requires that the person be "aware of and consciously disregard a substantial and unjustifiable risk that" the damage will occur. Neither ordinary negligence nor criminally negligent behavior are sufficient to constitute a violation of the statute.

Subsection (a)(4) covers aggravated instances of "joyriding" in which the propelled vehicle suffers $500 or more in damages the owner incurs reasonable expenses of $500 or more as a consequence of his loss of the use of the vehicle (i.e., car rentals). The term "propelled vehicle" is defined in AS 11.81.900(b)(43).

If it can be established that the defendant acted with an intent to deprive the owner of the vehicle or to appropriate the vehicle to himself, prosecution should be brought under the Code's consolidated theft statute.

C. Section 11.46.484. Criminal Mischief in the Third Degree

Criminal mischief in the third degree, a class A misdemeanor, can be committed three ways. The first, subsection (a)(1), is similar to the same subsection of the second degree offense. To be guilty of the third degree offense, however, the damage need only exceed $50. The second degree offense requires at least $500 damage.

Subsection (a)(2) is the non-aggravated form of "joyriding" under sec. 482(a)(4).

Subsection (a)(3) criminalizes "unreasonable deviations" from the terms of a rental agreement for the use of a propelled vehicle. Renting a car in Anchorage and agreeing to return it the next day could be the basis of a prosecution under the statute if the car was found in a parking lot in Fairbanks two months later.

D. Section 11.46.486. Criminal Mischief in the Fourth Degree

Criminal mischief in the fourth degree, a class B misdemeanor, covers the person who merely "tampers" (defined in §490(2)) with property. The defendant must act with either a reckless disregard for the risk of harm to the property or with an intent to cause substantial inconvenience to another.

Subsection (a)(2) provides that the intentional damaging of property of another in an amount less than $50 is criminal mischief in the fourth degree. The statute is broad enough to cover such acts as the destruction of posted signs as well as the defacing of property.

Subsection (a)(3) covers the conduct of a person who knowingly rides in a stolen automobile or an automobile that is being used in violation of secs. 482(a)(4) or 494(a)(2) of the criminal mischief provisions. If it can be established that the rider acted with an intent to facilitate the commission of the underlying offense and in fact aided in the commission of the offense, the rider should be prosecuted as an accomplice to the theft or the criminal mischief.

IV. Section 11.46.688. LITTERING

This offense provides a $300 fine for littering. Since no culpable mental state is specified, the offense is one of strict liability. (sec. 11.81.600(b)(1)(A).

CHAPTER 46. ARTICLE 4. FORGERY & RELATED OFFENSES

I. Sections 11.46.500-510. FORGERY IN THE FIRST, SECOND AND THIRD DEGREE

The crime of forgery is divided into three degrees. Forgery in the first degree is a class B felony, forgery in the second degree is a class C felony, and forgery in the third degree is a class A misdemeanor. The three statutes cover all the different methods of creating, possessing and passing forged written instruments.

Any "written instrument" may be the subject of forgery. The definition in § 11.46.580(b)(3) is broad enough to cover all instruments which traditionally have been the subject of forgery, as well as such recent innovations as microfilm, electronic tape and computerized records. The effect of the definition is to restore the common law principle that forgery can be committed with respect to any writing as well as its modern day equivalents which can be used as the means of defrauding another.

To commit forgery, the defendant must act with the culpable mental state of "intent to defraud". Section 11.46.990(4) defines "intent to defraud" as "an intent to injure someone's interest which has value, or an intent to use deception." The term "deception" is discussed in the commentary accompanying the theft by deception statute, § 11.46.180. Paragraph (B) of the definition makes it clear that a forger commits an offense even though he does not defraud the person to whom he sells or passes the forged instrument as long as he knows that he is facilitating an

eventual fraud, i.e., selling forged stock certificates that are represented to be forged, to a third person who will pass them as genuine.

Forgery may be commited by any of three methods. Section 510(a)(1) provides that forgery occurs when a person falsely makes, completes or alters a written instrument. The terms "falsely alter", "falsely complete" and "falsely make" are defined in § 580(a). Forgery also occurs when a person knowingly possesses or utters a forged instrument. "Utter" is defined in § 580(b)(2) to include all the various methods of making use of the instrument prescrived by existing law.

Forgery will be a felony when the written instrument falls into one of the four categories described in paragraphs (1)-(2) of § 500 or § 505. The forging of these instruments merit felony classification since the conduct will usually be preliminary to a large scale fraud.

II. Section 11.46.520. CRIMINAL POSSESSION OF A FORGERY DEVICE

This statute reaches back to a point before actual forgery commences to penalize those who posses either (1) devices with little or no use other than forgery, or (2) other devices that can be adapted and are intended to be adapted for use in committing forgery. The prohibition applies to devices for forging any written instrument. Both subsections of the statute require that the defendant act with an intent to use the device or to aid another to use the device for purposes of forgery.

III. Section 11.46.530. CRIMINAL SIMULATION

The primary application of this statute is directed at fraudulent misrepresentation of antique or rare objects such as paintings or other objects of art, antiques, books, manuscripts, and archeological artifacts. While a completed transaction will amount to theft, this provision allows intervention at a time even prior to the attempted passing of the simulated article. The penalty for this offense is based on the value of what the object purports to represent.

IV. Section 11.46.540. OBTAINING A SIGNATURE BY DECEPTION

This section provides that a person commits a class A misdemeanor if he "causes another to sign or execute a written instrument by deception" such as a letter of recommendation to a prospective employer or a will. To fall within this section, the signature must be obtained "with intent to defraud". The terms "deception" and "intent to defraud" are defined in § 11.81.900(b)(14) and § 11.46.990(4).

This section is necessary because the obtaining of the signature by deception will not always be covered by other sections of the Code. The conduct is not forgery because the resulting document is not a "forged written instrument". The document is precisely what is purports to be - it just would not have been created without the defendant's deception. The conduct is also not theft because a signature is not "property".

V. Section 11.46.550. OFFERING A FALSE INSTRUMENT FOR RECORDING

The Code punishes the filing of a forged instrument in the public records just as it does any other uttering of a forged written instrument - as forgery. This section, a class C felony, is necessary to cover the filing of a written instrument, done with an intent to defraud, knowing that it contains false statements or information.

The coverage of this statute is limited to written instruments "relating to or affecting real or personal property or directly affecting a contractual relationship" because the files containing these documents are consulted and relied upon by the general public.

VI. Section 11.41.570. CRIMINAL IMPERSONATION

A defendant who assumes a false identity or falsely claims to represent someone else commits criminal impersonation when he does an act in that character with intent to defraud.

This statute, a class A misdemeanor, can be used to arrest a professional con man as soon as he is discovered to be a fake, without having to take the risk of waiting for him to make substantial progress in his scheme.

I. Section 11.46.600. SCHEME TO DEFRAUD

The crime of scheme to defraud provides class B felony penalties for frauds involving five or more victims or a scheme to obtain $10,000 or more from one or more persons. It is not an element of the crime that a specific dollar loss was suffered by a victim of the scheme. The defendant, however, must obtain property or services from at least one of his victims in accordance with the scheme. Note that there is no requirement that all the property or services that is the target of scheme be obtained. The obtaining of any property or services will satisfy paragraph (2).

Subsections (a)(A) and (B) of the statute are based on 18 U.S.C. § 1341 (1970) and the revised versions of that provision appearing in the Proposed Federal Criminal Code § 1437 95th Cong., 1st Sess. § 1734 (1977). The federal provision is commonly referred to as the mail fraud statute.

A substantial body of case law has developed around the mail fraud statute making it an effective tool in the area of large scale consumer frauds. Because the language of the proposed statute in part parrallels that of the mail fraud statute, it is expected that the judicial decisions under the federal provision will be highly relevant in the construction of the Code provision. As noted in the Senate Comm. on the Judiciary, 94th Congress, 2nd Sess., Report to Accompany S.1, Criminal Justice Reform Act of 1975, 699 (Comm. Print 1976), the cases prosecuted under the mail fraud statute have in part established the following principles:

A. The phrase "scheme and artifice to defraud" is to be broadly interpreted; for example, it has been held to reach a scheme calculated to deceive persons of ordinary prudence and comprehension even though no misrepresentation is made.

B. Any scheme which involves elements of trickery or deceit is within the mail fraud statute.

C. A scheme to defraud may be shown by statements of half truths or the concealment of material fact, as well as by affirmative misrepresentation.

D. One who acts with reckless indifference as to whether a representation is true or false is as liable as if he had actual knowledge of the falsity.

E. The success or failure of the scheme is immaterial, and it is not necessary to show that any person was in fact defrauded.

F. A scheme to defraud encompasses false representations as to future intentions, as well as existing facts.

G. A promoter's sincere belief in the ultimate success of his enterprise will not excuse false representations.

H. The mail fraud statute was intended to protect the gullible, the ignorant and the over-credulous as well as the more skeptical. The "monumental credulity of the victim is no shield for the accused."

I. Proof of reliance on the false representation is not necessary.

II. Section 11.46.620. MISAPPLICATION OF PROPERTY

The Code provision applies to two classes of persons: (1) those who hold property as a "fiduciary", a term defined in § 11.81.900(b)(20), and (2) those who have access to property belonging to the government (defined in § 11.81.900(b)(23)) or a financial institution (defined in § 11.46.990(3)). The culpability element requires knowledge that the actor is misapplying property. Subsection (c) describes conduct that constitutes misapplication. The potential defense that it may be impossible to identify the particular property involved due to commingling is specifically eliminated in subsection (b).

The statute does not require that the misapplication involve a risk of loss or detriment to the owner. Any knowing misapplication will result in the imposition of criminal penalties.

Misapplication of property is classified as a class A misdemeanor. This sanction is sufficient to deter persons from wrongfully dealing with property when they have no intent to deprive the owner of it. If such an intent can be established, the defendant may be prosecuted for theft.

III. Section 11.46.630. FALSIFYING BUSINESS RECORDS

The crime of falsifying business records, a class C felony, is directed at conduct preliminary to the commission of fraud. As an element of the offense the state must establish that the defendant acted with an "intent to defraud". The term "intent to defraud" is defined in § 11.46.990(4). Acting with that intent the defendant must make a false entry in, or omit, remove or prevent the making of a true entry in the business records of an enterprise. The crime is also committed when the defendant causes the omission of a true entry or causes the making of a false entry in business records.

IV. Section 11.46.660-670. COMMERCIAL BRIBE RECEIVING; COMMERCIAL BRIBERY

Though the crimes of commercial bribe receiving and commercial bribery are new to existing law, similar provisions appear in a significant number of recently revised codes.

> Through the last century, most states attempted to regulate the behavior of unscrupulous public officials through laws that defined bribery and extortion of public officials as a criminal offense. In the last few years, however, states have begun to recognize that bribery in the private sector can also be a major threat -- one that can undermine a competitive economic system. As a result some thirty states have moved to specifically prohibit commercial bribery.
>
> The dangers of ignoring commercial bribery are quite clear. Gifts of endless variety are traded to influence an employee to improperly carry out a responsibility entrusted to him by an individual or corporation. But when bribery successfully gives a firm an unfair advantage over competitors, other businesses may be forced to do the same in order to survive.

The States Combat White Collar Crime, National Conference of State Legislatures at 10 (1976).

Commercial bribe receiving, a class C felony, covers commercial bribe solicitors and receivers. The crime occurs when a person solicits, accepts or agrees to accept a benefit with intent to violate a duty to which he is subject as one of the five general classes of persons described in subsections (a)(1)(A)-(E).

The five general classes are defined broadly to cover all areas where a duty of fidelity is owed.

> The nature and scope of such duties are defined by common and statutory law regulating or creating the various legal relationships involved. Thus, for example, the duty of an employee to an employer may be not to give away trade secrets, whereas the duty of a fiduciary to his beneficiary or a union representative of an employee's welfare fund to employees may be to exercise independent judgment.

HAW. REV. STAT. 6 708-88-, Commentary at 227 (Special Pamphlet 1975).

Commercial bribery, is also a class C felony. The crime covers the person who offers or gives a bribe and parallels the Code's general bribery statute, § 11.56.100.

V. Section 11.46.710. DECEPTIVE BUSINESS PRACTICES

The Code provision describes five forms of deceptive business practices and classifies the prohibited conduct as

a class A misdemeanor. Since no culpability is specified, the prosecution must establish that the defendant acted knowingly as to his conduct and recklessly as to the result of his conduct and to circumstnaces surrounding the conduct. See § 11.81.610(b). Mere civil negligence, or even criminal negligence, will not be suffieient to establish a violation of the statute. As under the existing Unfair Trade Practices Act, AS 45.50.471-561, the 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."

Subsection (a)(1) prohibits the making of a false statement in any advertisement or communication to a substantial number of persons. "False statement" is defined in subsection (b)(2) to mean conduct commonly referred to as "bait advertising."

Subsection (a)(2) 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)(3) prohibits a person from selling, offering for sale or delivering less than the represented quantity of a commodity or service.

Subsections (a)(4) and (a)(5) prohibit a person from selling, offering for sale or exposing for sale adulterated or mislabeled commodities. The terms "adulterate" and "mislabeled" are defined in §§ 710(b)(1) and (3). Note that the determination of whether a commodity is "adulterated" or "mislabeled" is based, for the most part, on existing statutes and regulations. Thus the statute operates as a "piggy-back" provision on existing law; it does not determine

what is adulterated or mislabeled, it merely punishes the sale of such commodities.

The Code repeals the criminal penalties now provided for violation of the consumer protection act. In doing so, it is not the intention of the legislature to narrow the coverage of the consumer protection act, but rather to provide that violations of the act should be dealt with civilly.

VI. Section 11.46.720. MISREPRESENTATION OF USE OF A PROPELLED VEHICLE

The Code provision on misrepresentantion 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 travelled.

VII. Section 11.46.730. DEFRAUDING CREDITORS

This section proscribes conduct that defrauds secured creditors, judgment creditors and creditors of an insolvent. The classification of the crime is based on whether the creditor incurs a loss as a result of the defendant's conduct. If the defendant merely hampers enforcement of the creditor's interest, the conduct is an A misdemeanor. If the creditor suffers a loss, the classification is dependent on the amount of loss suffered by the creditor.

CHAPTER 51. OFFENSES AGAINST THE FAMILY

I. Section 11.51.100; 120. ENDANGERING THE WELFARE OF A MINOR; CRIMINAL NONSUPPORT

In reviewing the statutes that follow, it must be remembered that the Code's assault and homicide provisions provide comprehensive coverage of conduct involving physical abuse of children. The statutes in this chapter merely supplement that coverage. If the child suffered serious physical injury or was assaulted by means of a dangerous instrument, prosecution should be brought under the general assault statutes, or in the extreme case, under the homicide provisions.

A. Endangering the Welfare of a Minor

The crime of endangering the welfare of a minor, a class C felony, is committed when a person legally charged with the care or custody of a child under 10 years of age 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. The Code provision would not cover the parent who, for example, left a child in the custody of a relative for two days even though the parent had agreed to return in four hours.

B. Criminal Nonsupport

The nonsupport statute, a class A misdemeanor, is based on existing AS 11.35.010. 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 makes 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. Section 11.51.125. FAILURE TO PERMIT VISITATION WITH A MINOR

Because existing AS 11.36.010 was adopted by the legislature less than a year ago, it has been included in the Code virtually unchanged. The Code provision does, however, use the term "intentionally" instead of "wilfully" to describe the culpable mental state requirement. Since the only punish-

ment 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. Section 11.51.130. CONTRIBUTING TO THE DELINQUENCY OF A MINOR

The Code provision on "contributing" provides that a person commits a class A misdemeanor if he engages in one of four forms of prohibited conduct. To be charged with the crime the defendant must have been 19 or older at the time he engaged in the prohibited conduct. A minor is unable to contribute to the delinquency of a minor under the Code.

Subsection (a) applies to the person who "aids, causes, or encourages a child under 18 years of age to do any act in fact prohibited by state law." 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, solicited commission of the offense or aided or abetted in the planning or commission of the offense.

Since no culpability is specified regarding defendant's knowledge of the age of the minor, it must be established that he acted at least recklessly as to this element. (§ 11.81.610(b)).

Subsection (b) provides that a person commits "contributing" if he induces, causes, or permits a child under 18 to participate in unlawful gambling. Subsection (c) extends the coverage of the statute to a person who knowingly permits a minor to enter or remain in a building where the unlawful sale of a drug occurs. The term "drug" is defined in § 11.81.900(b)(10) and is supplemented by the definitions in § 900(b)(4) and (6).

"Contributing" also occurs when a person engages in sexual contact with a person under 16 but 13 or older. If the child is under 13, or if the sexual act occurs without consent, prosecution should be brought under the sexual assault provisions of the Code which provide felony penalties for such conduct. (§ 11.41.420, 440(a)(2)).

V. Section 11.51.140. UNLAWFUL MARRYING

The Code substantially restates the existing polygamy statute, AS 11.40.050, but makes several minor changes in the 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.

I. DEFINITIONS OF "BENEFIT" AND "PUBLIC SERVANT"

Key to the article are the definitions of two terms - "benefit" and "public servant."

A. Section 11.56.130. BENEFIT

"Benefit" is defined in § 11.81.990(b)(2) as "a present or future gain or advantage to the beneficiary or to a third person pursuant to the desire of consent of the beneficiary." When first considered by the Criminal Law Revision Subcommission, the term "benefit" was qualified by the word "pecuniary". The definition of "pecuniary benefit" required that the benefit have a primary significance of economic gain. This definition was considered unduly restrictive since not all benefits are economic (i.e., favorable action by college admissions officer in processing application of public servant's son).

In using the broad term "benefit" the bribery statutes insure coverage in all appropriate cases. However, benefits which serve only to provide a "climate for discussion" with a public servant (i.e., picking up a dinner tab or golfing fee) are beyond the scope of the statutes because the granting of the "benefit" is not in itself intended or expected to influence an official decision. The giving and receiving of such insignificant benefits, though not covered by the Code, is, however, an appropriate topic to be addressed in conflict of interest statutes and ethical conduct regulations and standards.

Insofar as they are reported in accordance with AS 15.13 (State Elections Campaigns), political campaign contributions have been specifically excluded from the definition of "bene-

fit". This qualification is intended to make it clear that legitimate, reported political campaign contributions, though made with an intent to advance a political viewpoint, are not to be punished as bribery. Also required to be excluded from the broad definition of "benefit" for purposes of the bribery statutes are instances of "logrolling" and election support (i.e., volunteer campaign work) solicited by a public servant or offered by any person in an election. If, however, the support consists of a campaign contribution, the contribution must be reported in accordance with AS 15.13 for it to be excluded from the coverage of the definition of "benefit".

B. Section 11.81.900(b)(47). PUBLIC SERVANT

The term "public servant" is defined broadly to include not only every category of government or public officer, but every employee of every such office or agency, every person retained to perform some government service and every person who, though not having yet assumed his official duties, has been selected to become a public servant.

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

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

servant functioning gratuitously can be as effective in corrupting governmental process as the paid functionary.

Witnesses and jurors are excluded from the definition. Bribery and bribe receiving of and by such persons is covered in Article 4 of the Chapter.

II. Section 11.56.100; 110. BRIBERY; RECEIVING A BRIBE

The Code makes only minor changes in existing law. The crime of bribe receiving has been broadened to include solicitation of bribes by public servants, conduct not now prohibited by the existing statute. The statutes do not use the word "corruptly", but prohibit without qualification the giving or receiving of any benefit with intent to influence official decision-making.

The bribery statute penalizes offers made with the intent to influence a public servant. No meeting of the minds is required before the offeror of a bribe may be prosecuted. The recipient, however, must have either solicited the bribe or have accepted it, or agreed to accept it, upon an agreement or understanding with the offeror before the public servant has committed bribe receiving.

Subsection 100(b) contains a further application of the doctrine of impossibility which is discussed in the commentary accompanying the attempt statute.

III. Section 11.56.130. RECEIVING UNLAWFUL GRATUTIES

The bribery statutes cover all cases of reward for improper conduct on the part of a public servant. The crime of receiving unlawful gratuities covers all cases of improper reward for conduct which the public servant was required or authorized to perform.

Note that the statute prohibits solicitations of benefits by public servants without regard to the value of the benefit. However, when the public servant accepts a benefit, without soliciting it, the benefit must have a value of $50 or more for the crime to have occured. This limitation is intended to insure that public servants will not be subject to criminal prosecution for accepting such minor items as a box of candy on Christmas when the public servant did not accept the benefit upon an understanding that his actions would, as a public servant, be influenced.

It must be emphasized that the Judiciary Committees do not approve the practice of public servants accepting tips. However, the Committees concluded that regulation of such activity is more properly left to personnel regulations and ethical guidelines rather than to the criminal law.

I. Section 11.56.240. DEFINITIONS

"Statement" is defined in subsection (1) to mean any representation of fact, including a statement of opinion or belief when the opinion or belief relates to a state of mind. Thus, the statement "I believe the car was red" is a false statement only if the defendant did not have the stated belief; its falsity does not depend on the actual color of the car.

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

II. Section 11.56.200. PERJURY

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

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

Perjury is classified as a class B felony. This classification is consistent with existing law which provides that most forms of perjury carry a 10 year maximum penalty.

III. Section 11.56.210. UNSWORN FALSIFICATION

The purpose of section 210 is to eliminate the need for numerous statutes outside Title 11 covering unsworn falsifications and to replace them with one provision applicable to all unsworn falsifications. As its title indicates, the crime does not require that the false statement be made under oath.

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

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

Unsworn falsification may also be committed pursuant to subsection (a)(2) by making a false statement on a form which bears a notice, authorized by law, that false statements made therein are criminal.

IV. Section 11.56.220. PROOF OF GUILT

The Code does not require corroboration in a perjury prosecution. While there is currently no statute mandating that a perjury prosecution is subject to special rules of proof, the Alaska Supreme Court has held that a perjury conviction cannot be based on the uncorroborated testimony of a single witness. Nelson v. State, 546 P.2d 592 (Alaska 1976).

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

V. Section 11.56.230. PERJURY BY INCONSISTENT STATEMENTS

The crime of perjury requires that the defendant make a false statement. Substantial problems of proof may arise when a defendant has made two statements under oath that are irreconcilably inconsistent to the degree that one of them is necessarily false, but the prosecution is unable to prove which statement was false.

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

Section 230 creates the separate offense of perjury by inconsistent statements. Under the statute, the prosecution cannot simply rely on the introduction of the irreconcilable statements; it must also establish that the defendant did not believe one of the statements to be true at the time the statement was made.

This section is restricted to inconsistent statements made in Alaska within the period of the statute of limitations.

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

VI. Section 11.56.235. RETRACTION AS A DEFENSE

The Code provides that it is an affirmative defense to a prosecution for perjury or unsworn falsification that the defendant expressly retracted his false statement. The reason for this section is that it is desirable to provide an incentive for the person to correct his misstatement and tell the truth.

If the defendant committed perjury during an official proceeding (defined in § 11.81.900(b)(35)) retraction must

have occurred during the same proceeding, before discovery of the falsification became known to the defendant, before reliance upon the false statement, and, if the official proceeding involved a trier of fact, before the subject matter of the proceeding was submitted to the trier of fact. Thus, a false statement made by a witness during a trial could usually be retracted prior to the case being submitted to the jury. On the other hand, if a false statement is made to a magistrate to obtain a search warrant, retraction would not be a defense once the magistrate relied on the statement and issued the warrant.

The requirements for a retraction involving a false sworn statement not made in an official proceeding (i.e., under penalty of perjury) or a retraction involving false unsworn statements are specified in subsections (b) and (c).

CHAPTER 56, ARTICLE 3. ESCAPE AND RELATED OFFENSES

I. Section 11.56.300 - 350. ESCAPE; UNLAWFUL EVASION

During the 1976 legislative session, the escape statute was substantially amended and the new crime of unlawful evasion was adopted. Escape, AS 11.30.090, was divided into three degrees. Unlawful evasion, AS 11.30.093, was divided into two degrees. Punishment for escape was set at imprisonment for from 3 months (AS 11.20.095(c)) to 5 years (AS 11.30.095(a)). Punishment for unlawful evasion was set at imprisonment for a minimum of 30 days (AS 11.30.095(e)) to a maximum of one year. The existing statute also includes provisions governing the "suspensions of imposition or execution of sentence or granting of parole" for persons convicted of escape or unlawful evasion. AS 11.30.095(f) - (i).

The Code makes three significant changes in existing law. The changes are summarized below:

1. The Code provides that the most serious form of escape, a class A felony, occurs when a person removes himself from official detention by means of a deadly weapon. The term "official detention" is defined in § 11.81.900(b)(34). The definition is not intended to cover placement of a juvenile in a foster home pursuant to a temporary custody order.
2. The Code classifies all escapes from correctional facilities (defined in § 11.81.900(b)(7)) as escape in the second degree, a B felony. Existing law differentiates between an escapee who has committed

a felony and one who has committed a misdemeanor; an escape by a misdemeanant from a correctional facility is classified as a misdemeanor. The danger to society resulting from correctional facility escapes is substantial, regardless of whether the escapee is a felon or misdemeanant. Note, however, that the Code continues to distinguish between other escapes from official detention (e.g., escape from custody of a peace officer) based on the class of offense committed by the escapee.

3. The crime of escape in the third degree, a class C felony, covers escapes "during any lawful movement or activity incident to confinement within a correctional facility on a charge of a misdemeanor." Conduct of this nature would include an escape from a courtroom by a convicted misdemeanant prior to being transported to a correctional facility.

II. Section 11.56.370. PERMITTING AN ESCAPE

The Code retains the coverage of existing AS 11.30.120 but broadens it beyond the peace officer to cover the actions of "any public servant who is authorized and required by law to have charge of any person charged with or convicted of any crime." Such a person commits the crime of permitting an escape if "with criminal negligence he permits a person under official detention to escape." The potential danger resulting from such escapes justifies the imposition of criminal liability based on criminally negligent behavior. The offense is classified as a class C felony.

III. Section 11.56.389; 390. PROMOTING CONTRABAND IN THE FIRST AND SECOND DEGREE

The crime of promoting contraband is divided into two degrees depending on the type of contraband that is involved. The term contraband is defined in § 11.56.390. If the contraband is a deadly weapon (defined in § 11.81.900(b)(12)), an article that is intended by the defendant to be used as a means of facilitating an escape (i.e., a pass key), or a controlled substance (defined in § 11.81.900(b)(6)) promoting contraband in the first degree, a class C felony, has occured. If the prohibited article does not fall in one of these three categories, the crime is promoting contraband in the second degree, a class A misdemeanor.

Note that the crimes can be committed by either the person who brings the contraband into the facility (§ 380(a)(1)) or the person confined in the facility (§380(a)(2)). Use of the culpability term "knows" in § 380(a)(2) and its absence in (a)(1) indicates that the person who brings the contraband into the facility is not required to know that the item is contraband. Recklessness is sufficient as to that element (§ 11.81.610(b)(2)). Such recklessness could be established by the nature of the item (i.e., firearm) or by the posting by correctional officials of a list of contraband items near the entrance of the facility.

CHAPTER 56, ARTICLE 4. OFFENSES RELATING TO JUDICIAL AND OTHER PROCEEDINGS

I. Sections 11.56.510; 520. INTERFERENCE WITH OFFICIAL PROCEEDINGS; RECEIVING A BRIBE BY A WITNESS OR JUROR

The crime of interference with official proceedings, a class B felony, prohibits the subversion of official proceedings through the use of force against, or bribery of, witnesses and jurors. "Official proceeding" is defined in § 11.81.900(b)(35) as a proceeding "heard before a legislative judicial, administrative or other governmental body or official authorized to hear evidence under oath". The terms "juror" and "witness" are defined in § 11.56.900(3) and (6).

"Witness" is defined to include not only persons summoned or appearing in an official proceeding but also persons whom the "defendant believes may be called as a witness in an official proceeding, present or future." This definition avoids confusion as to when an individual actually becomes a witness and emphasizes that the harm in the conduct prohibited in this article is the attempt to interfere with the course of an official proceeding. Note that the "defendant" referred to in the definition of "witness" is the person charged with a violation of chapter 56; not the defendant in a criminal case.

Interference with official proceedings occurs pursuant to subsection (1) when a person uses force on anyone, damages the property of anyone or threatens anyone with one of the intents specified in paragraphs (A)-(D). The terms "force" and "threat" are defined in § 11.81.900(b).

Paragraph (A) refers to an intent to "improperly influence a witness." Conduct which qualifies as improperly influencing a witness is defined in § 11.56.900(1). Note that under paragraph (A) any attempt to influence the testimony of a witness by one of the methods described in subsection (a)(1) is prohibited. Beating up a witness to make him testify truthfully is as criminal as beating him up with intent to make his testify falsely. Subsection (D), referring to "otherwise affect the outcome of an official proceeding" would include offering a bribe to a witness with intent to cause a mistrial.

Subsection (2) prohibits bribery of a witness or juror. This provision is similar to the Code's general bribery statute.

Similar to the Code's general bribe receiving statute, the crime of receiving a bribe by a witness or juror provides B felony penalties for the witness or juror who solicits a benefit, or accepts or agrees to accept a benefit upon an agreement or understanding that he will be improperly influenced as a witness or that his decision as a juror will be influenced.

II. Sections 11.56.540; 590. TAMPERING WITH A WITNESS; JURY TAMPERING

The crime of tampering with a witness differs in three primary respects from the crime of interference with official proceedings. First, the means by which tampering with a witness is committed (inducing or attempting to induce) are not as culpable or as overt as the means specified in the crime of interference with official proceedings (force, threat or bribery). Tampering with a witness is consequently graded as a class A misdemeanor.

Second, unlike the interference statute, an attempt to induce a prospective witness to avoid process is not made an offense. This distinction is discussed in the Commentary to the Proposed Michigan Revised Criminal Code § 5020 at 414.

> [W]hile [§ 11.56.510] make[s] it unlawful to use a bribe or threat to induce a witness to avoid legal process, [§ 11.56.540] does not bar an attempt to achieve that objective by persuasion or argument. A defense attorney, for example, would not be prohibited from attempting by persuasion or pleading to induce a witness to avoid process by leaving the state. Although the attorney's activity might raise certain ethical issues, it should not give ise to criminal liability, since neither the means used nor the objective sought is unlawful in itself.

Finally, while interference with official proceedings includes acts done with intent to induce a witness to "withhold testimony", tampering with a witness requires an intent to induce a witness to "unlawfully withhold testimony." While it would not be tampering with a witness to persuade a witness to lawfully refuse to testify on grounds of personal privilege, i.e., privilege against self-incrimination, it would be interference with official proceedings to attempt to do so by force, threat or bribe.

The crime of jury tampering differs in only one respect from the crime of interference with official proceedings. The means by which tampering with a juror is committed (communicating with intent to influence) are less culpable than the means specified in the crime of interference with official proceedings. Tampering with a juror is consequently only graded as a class C felony.

III. Section 11.56.600. MISCONDUCT BY A JUROR

The crime of misconduct by a juror is similar to the crime of receiving a bribe by a juror in that both require that the juror improperly agree to be influenced as a juror. However, unlike the crime of receiving a bribe by a juror, the crime of misconduct by a juror does not require that the juror agree to be influenced as a consequence of the acceptance of a benefit. Mere agreements to vote for a party in the official proceeding or to otherwise influence the official proceeding are proscribed in this section, a class C felony.

IV. Section 11.56.610. TAMPERING WITH PHYSICAL EVIDENCE

This provision prohibits tampering with "physical evidence", a term defined in § 11.56.900(4) to mean any "article, object, document, record or other thing of physical substance." Proceedings protected include both criminal investigations and official proceedings.

Paragraph (1) is directed at the intentional destruction, mutilation, alteration, concealment or removal of physical evidence with intent to impair its verity or availability in a criminal investigation or official proceeding. Paragraph (2) prohibits making, presenting or using evidence known to be false in an effort to mislead jurors or public servants engaged in official proceedings or criminal investigations. Paragraph (3) prohibits the use of force, deception, or threats to prevent the production of physical evidence in official proceedings and criminal investigations. In paragraph (4), the statute criminalizes conduct identical to that proscribed by paragraphs (1)-(3) but engaged in with the intent to prevent the institution of an offical proceeding.

V. Section 11.56.620. SIMULATING LEGAL PROCESS

This section is designed to protect the legitimacy of governmental administration and prevent the impairment of public confidence in genuine documents. Subsection (a)(1) covers the person who, in attempting to collect a debt, issues a form that falsely simulates legal process. Subsection (a)(2) expands the coverage of subsection (a)(1) in nondebt situations to cover simulation of process of any court or official body, including those of other jurisdictions. Statutory authority of state agencies and other official bodies to issue subpoenas or other legal process is specifically recognized by subsection (a)(2).

CHAPTER 56, ARTICLE 5. OBSTRUCTION OF PUBLIC ADMINISTRATION

I. Section 11.56.700. RESISTING OR INTERFERING WITH ARREST

The crime of resisting or interfering with arrest, a class A misdemeanor, prohibits a person from resisting the arrest of himself or interfering with the arrest of another by any of three methods. The person must know that a peace officer is making an arrest and act with the intent of preventing the officer from making the arrest.

Subsection (a)(1) prohibits resisting or interfering with an arrest by the use of force. "Force" is defined in § 11.81.900(b)(23) to include any bodily impact as well as threats of such impact. The issue of whether force may be used to resist an unlawful arrest is addressed in § 11.81.400.

A person also violates the statute by committing any degree of criminal mischief (i.e., tampering with the officer's squad car) or by doing any act that creates a "substantial risk of physical injury" (i.e., fleeing in an automobile at high speeds through a residential area). Mere non-submission to an arrest does not reach the level of resisting or interfering with arrest.

II. Section 11.56.720. REFUSING TO ASSIST A PEACE OFFICER OR JUDICIAL OFFICER

The Code provides that it is a violation to unreasonably fail to make a good faith effort to physically assist a peace officer or judicial officer (defined in § 11.56.900(2)) in the exercise of his official duties. The limitation to "physical" assistance is intended to exclude from the coverage of the statute mere refusals to provide information to an officer.

The statute requires that the citizen know that the person requesting assistance is a peace officer or judicial officer. Further, the citizen must unreasonably refuse to assist. The statute does not authorize peace officers or judicial officers to foist unreasonably dangerous duties upon citizens. Neither does it authorize them to command citizens to aid them in the performance of their every day duties.

Subsection (b) extends the "good samaritan" protections of AS 09.65.090 to situations where a citizen physically aids a peace officer pursuant to subsection (a).

III. Section 11.56.770; 780. HINDERING PROSECUTION IN THE FIRST AND SECOND DEGREE

Conduct which would give rise to liability as an accessory after the fact under existing law is classified as the crime of hindering prosecution under the Code. The degree of the crime is geared to the class of crime committed by the fugitive.

To commit either degree of hindering prosecution, the defendant must act with an "intent to hinder the apprehension, prosecution, conviction or punishment" of a person or to assist a person "in profiting or benefiting from the commission of the crime". The first degree offense, a class C felony, requires that a felon be aided. The defendant is not required to know that the crime committed by the person he aided was a felony. Strict liability is applied to this element. The second degree offense expands existing law by prohibiting acts of rendering assistance to persons who have committed misdemeanors punishable by imprisonment for more than 90 days.

Unlike existing law, the Code establishes the precise acts needed to commit either degree of hindering prosecution. The six methods described in § 770(b)(1)-(6) present a narrower concept of aid than in common law. This difference is discussed in the Commentary to the Model Penal Code at § 208.32, Commentary at 198-200 (Tent. Draft No. 9, 1959).

IV. Section 11.56.790. COMPOUNDING

The common law offense of compounding prohibited agreements for consideration to refrain from giving information to law enforcement authorities concerning a crime. Under the existing statute, AS 11.30.190, only the person who receives the consideration commits compounding; the person who gives the consideration does not.

The Code expands existing law by providing that both the receiver and the giver of the consideration commit compounding, a class A misdemeanor. Both parties are viewed as being equally culpable and are punished identically. The Code describes the prohibited consideration as a "benefit", a term defined in § 11.81.990(b)(2). The benefit must be offered or accepted in consideration for concealing the offense, refraining from initiating or aiding in the prosecution of the offense or withholding evidence of the offense.

Note that the statute specifically recognizes that existing law allows compromise of actions in certain situations. If the offer or acceptance of the benefit is made pursuant to these statutes, the participants have not committed compounding.

V. Section 11.56.800; 810. MAKING A FALSE REPORT, TERRORISTIC THREATENING

The crime of making a false report is a class A misdemeanor. The statute covers three types of false reports. Subsection (a)(1) covers giving false information to a peace officer which the defendant knows to be false, with intent to implicate another in a crime. Note that false reports to peace officers made with an intent to hinder the apprehension, prosecution, conviction or punishment of another are prohibited in the two degrees of hindering prosecution, discussed supra.

Subsection (a)(2) prohibits false reports to peace officers that a crime has occurred or is about to occur. Such conduct is subject to criminal penalties because of the likelihood that substantial amounts of law enforcement resources will be misapplied in investigating the report.

Subsection (a)(3) extends beyond the present "false alarms" statute in its application to fictitious reports of "incidents calling for an emergency response" rather than solely false reports to firefighters or ambulance operators. This assures coverage of reports concerning matters that may not be crimes in themselves, but are nevertheless within a proper area of investigation.

The crime of terroristic threatening, a class C felony, describes three aggravated forms of making a false report. The defendant must knowingly make a false report that a circumstance dangerous to human life exists or is about to exist. As a result of the false report, one of the three results described in paragraphs (1)-(3) must occur.

VI. Section 11.56.820. TAMPERING WITH PUBLIC RECORDS

The crime of tampering with public records, a class A misdemeanor, penalizes conduct which undermines confidence in the accuracy of public records. The central purpose of the statute is not the protection of potential victims of altered public records. Consequently, the statute does not require that the tampering be made with an intent to defraud as do the sections on forgery and falsification of business records. Further, there is no requirement that the information in the public record be made under oath or sworn to, as required by the sections on perjury. The offenses of forgery and perjury do, however, complement the crime of tampering with public records when the aggravating circumstances are present.

Key to the statute is the definition of "public record" appearing in § 11.81.900(b)(46). Two categories of conduct are prohibited. Subsection (a)(1) covers false entries or the false altering of a public record. Subsection (a)(2) covers the problem of access to public records. Included in this category are acts of destruction and mutilation as well as the suppression or concealment of a public record. This subsection is broad enough to cover the situation where a public servant prevents access to public records.

Both subsections require that the defendant act knowingly. Under subsection (a)(1) he must know he is making a false entry or alteration. Under subsection (a)(2) he must destroy, mutilate or conceal documents, knowing that he has no legal authority to do so.

VII. Section 11.56.830. IMPERSONATING A PUBLIC SERVANT

The Code provision, a class B misdemeanor, prohibits the impersonation of any public servant. The defendant must pretend to be a public servant and must do an act in that capacity.

The existing requirement that the impersonator require another to aid or assist him is not retained in the Code. Thus, the Code insures coverage in situations where no specific aid is requested, but the defendant has acted improperly. For example, a person who falsely pretends to be a housing inspector and obtains entrance to an apartment has violated the statute. The requirement that an act be performed in the capacity of public servant insures that otherwise innocent impersonations, such as wearing a judge's robes to a costume ball, are not covered by the statute.

Subsection (b)(1) rejects any possible defense based upon nonexistence of the office the impersonator pretended to hold while subsection (b)(2) recognizes that a public servant can commit the offense by impersonating another public servant. The exclusion provided in subsection (c) is necessary to insure that peace officers engaged in undercover work in which it is necessary to impersonate a public servant will not be subject to criminal penalties for the impersonation.

I. Section 11.56.850. OFFICIAL MISCONDUCT

The Code provision on official misconduct applies to all "public servants," a term defined in § 11.81.900(b)(47) and discussed in the commentary to § 11.56.100. To commit the offense, a class A misdemeanor, the public servant must act with an intent to obtain a "benefit" (defined in § 11.81.900(b)(3)) or with an intent to injure or deprive another person of a benefit. Mere negligent behavior, or awareness that a person is being injur 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.

II. Section 11.56.860. MISUSE OF CONFIDENTIAL INFORMATION

The Code provision restates existing AS 37.51.010, but applies to all public servants. If disclosure of confidential information occurs in a legal proceeding it must be in conformity with a court order. By requiring that 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 provision prohibits the public servant from disclosing confidential information in the legal proceeding so long as the disclosure is in conformity with a court order.

It is important to note that the provision is very strict in defining what is confidential information; unless the information is classified pursuant to a specific statute it is not "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, ARTICLE 1. RIOT, DISORDERLY CONDUCT AND RELATED OFFENSES.

I. Section 11.61.100. RIOT

Riot is classified as a C felony. Rioters who commit crimes during the course of a riot will additionally be subject to prosecution under statutes describing specific offenses.

Since the statute does not specify a culpable mental state the general rules of culpability apply (§ 11.81.610(b)). The rioter must act recklessly; he must be aware of and consciously disregard a substantial and unjustifiable risk that his conduct is causing or that he is creating a substantial risk of causing property damage or physical injury. The requirement in the definition of recklessly 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 whould observe" insures that the statute does not apply to such trivial injury to property as walking on seeded grass adjacent to a sidewalk.

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 P2d 286 (1974); Marks v. City of Anchorage, 500 P2d 644 (1972)), the statute 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. Section 11.61.110. DISORDERLY CONDUCT

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 paragraph (1) of that statute.

Paragraph (1) of the Code provision 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 on the same premises, the Code recognizes the privacy right of persons to act as they wish within their home so long as their conduct does not infringe upon others beyond the home.

Under paragraph (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 makes "unreasonably loud noise." The subsection also covers recklessly disturbing another's peace and privacy, i.e., boisterous party. The provision guards against vagueness and uneven enforcement problems in this situation by requiring that the defendant be warned that his conduct is disturbing others and that he continue his noisemaking before the offense has occured.

Paragraph (2) parallels paragraph (1) but does not require that the person who is disturbed be on separate premises if the defendant is in a public place (defined in § 11.81.900(b)(45) or on private property of another without the owner's consent.

In Marks v. City of Anchorage, 500 P.2d 644 (Alaska 1972) the court noted that the phrase "unreasonable noise" without more might be considered "indefinite." Subsection (b) both clarifies the meaning of unreasonably loud noise and insures that free speech will not be infringed upon by specifically providing that "noise" does not include speech that is constitutionally protected. Under the Code the exercise of protected first amendment rights can never constitute disorderly conduct.

The phrase "peace and privacy" in paragraphs (1) and (2) is also intended to take into account the varying nature of circumstances surrounding the noise making. Persons attending a sporting event or a peace officer, 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).

Paragraphs (3) and (4) are taken from existing AS 11.45.030(a)(2). Paragraph (3), punishing a refusal to disperse in a public place when a crime has occured, has been upheld against a claim of unconstitutionality. State v. Martin, 532 P.2d 316 (Alaska 1975). Paragraph (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).

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

Paragraph (7) covers intentionally exposing specified parts of the body to another with reckless disregard for the offensive or insulting effect the act may have on that person. The provision is considerably broader than a typical indecent exposure statute since it does not require that the defendant act with an intent to gratify his or another's sexual desires. Note, however, that the provision would not apply if the viewer consented to the conduct, or if exposure took place under circumstances where the actor was not reckless as to the effect of the conduct - i.e., dancer in a topless bar.

III. Section 11.61.120. HARASSMENT

The crime of harassment, a class B misdemeanor, can be committed in any of five ways, each of which requires that the defendant act with an "intent to harass or annoy" another. The terms "harass" and "annoy" have in other contexts, been subject to strict constitutional scrutiny when used to describe results of conduct. See, Poole v. State, 524 P.2d 286 (Alaska (1974); Marks v. City of Anchorage, 500 P.2d 644 (Alaska 1972). 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).

Paragraph (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).

Paragraph (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. The defendant must act with an intent to impair the ability of the person to place or receive telephone calls.

Paragraph (3) prohibits repeated telephone calls at extremely inconvenient hours. Use of the word "repeated" is intended to preclude a prosecution based on a single call. However, if the calls continue, and if it can be shown that the defendant acted with an intent to harrass or annoy the recipient, prosecution could then be brought. Paragraph (4) applies to the making of a single anonymous or obscene telephone call or a call that threatens physical injury.

Paragraph (5) covers subjecting a person to offensive physical contact if done with an intent to harass or annoy. Conduct included in this category would be minor shoves or slaps that do not qualify as "physical injury" as well as sexual touchings that do not qualify as sexual assaults.

IV. Section 11.61.130. MISCONDUCT INVOLVING A CORPSE

This statute provides that a person commits the crime of misconduct involving a corpse, a class A misdemeanor, if he intentionally disinters, removes, conceals, mutilates or engages in sexual penetration of a corpse. By including within the coverage of the statute the act of concealing a corpse, the provision allows for prosecution of the person who conceals the death of a child, conduct now prohibited in AS 11.40.090.

The qualifying phrase in paragraph (1) "except as authorized by law or in an emergency" exempts from coverage of the statute the legitimate activities of persons such as coroners, physicians, ambulance attendants, and morticians as well as the good samaritan who might remove a corpse from a fire or automobile wreck.

Misconduct involving a corpse also occurs when a person detains a corpse for a debt. This prohibition parallels the coverage of the existing "attaching or detaining a dead body for debt" statute, AS 11.40.450.

V. Section 11.61.140. CRUELTY TO ANIMALS

The Code classifies as an A misdemeanor the intentional infliction of "severe and prolonged physical pain or suffering on an animal." "Animal" is defined in subsection (c) to exclude human beings, fish and nonvertebrates. If the animal is simply killed without the consent of the owner and without the defendant inflicting severe pain, the conduct will constitute criminal mischief under § 11.46.482-486.

Subsection (b) provides that it is a defense that the conduct conformed to accepted veterinary practice or was part of scientific research governed by accepted standards. The additional granting of the defense when the 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.

Subsection (a)(2)&(3) substantially restate existing AS 11.40.520. Under subsection (3), as under existing law, persons who attend exhibitions of fighting animals are held to be equally culpable as persons who organize such conduct.

V. Section 11.61.150. OBSTRUCTION OF HIGHWAYS

The Code provides that the crime of obstruction of highways, a class B misdemeanor, may take place in either of two ways. The first, described in subsection (a)(1), imposes liability if the defendant knowingly places, drops or permits dangerous material to be left on a highway. This provision would cover, for example, the conduct of a person hauling ground glass to a dump when he knows that part of his load has fallen onto the road. Subsection (c) grants the defendant an affirmative defense if he can establish that he took immediate steps to rectify the situation and that, in fact, no one was injured.

Subsection (a)(2) covers the defendant who knowingly renders a highway impassable. The person who parks his car in the middle of a busy road to watch salmon spawning in a near-by stream, for example, would violate the statute if he knew that his conduct would result in making the road "impassable, or passable only with unreasonable inconvenience or hazard."

CHAPTER 61, ARTICLE 2. WEAPONS AND EXPLOSIVES

I. Section 11.61.200. 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 felons from possessing firearms capable of being concealed on their person.

Subsection (a)(2) expands existing law by covering the person who sells or transfers a firearm capable of being concealed on the person knowing that the transferee has been convicted of a felony. The transferor who acts with such knowledge is viewed as equally culpable and deserving of identical punishment as the transferee.

Subsection (b) provides an affirmative defense to subsections (a)(1) and (2) that the felon has received a pardon, that the prior conviction has been set aside, or if a period of five years has elapsed from the date of the defendant's unconditional discharge on the prior felony and the date of the possession, sale or transfer of the firearm. "Unconditional discharge" is defined in 12.55.185(8) in a manner to insure that the five year period does not begin to run until the defendant has completed any probationary period or time on parole.

Subsection (a)(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 provision is the definition of "prohibited weapon" in subsection (e)(1). 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)(3) are inapplicable if possession of the weapon was pursuant to registration under the National Firearms Act.

Subsection (d) exempts peace officers acting within the scope and authority of their employment from the prohibitions against "prohibited weapons". If the use of a prohibited weapon has been authorized by a law enforcement agency, peace officers should not be subject to prosecution for possession of such weapons when they act within the scope and authority of their employment.

Subsection (a)(4) covers the person who sells or transfers a firearm to a person knowing that the physical or mental condition of that person is substantially impaired. The buyer or transferee of such weapon is covered in § 210(a)(1).

Subsection (a)(5) and (6) prohibit removing or destroying the manufacturer's serial number on a firearm with intent to render the firearm untraceable, or possessing a firearm knowing that the serial number has been removed with intent to render the firearm untraceable. Such conduct has no legitimate purpose and indicates future use of the firearm in criminal activity.

II. Section 11.61.210. MISCONDUCT INVOLVING WEAPONS IN THE SECOND DEGREE

The second degree weapons offense, a class A misdemeanor, prohibits three forms of conduct.

Subsection (a)(1) is based on the prohibition found in existing AS 11.55.070, Possession of firearm while under the influence of intoxicating liquor or drug. The Code provision 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) is based substantially on existing AS 11.55.065. The term "highway" is defined in §11.81.900(b)(24).

Subsection (a)(3) prohibits a person from discharging a firearm with reckless disregard for the risk of damage to property or risk of physical injury. The prohibition is similar to the crime of reckless endangerment, §11.41.250, but covers a broader range of behavior.

III. Section 11.61.220. MISCONDUCT INVOLVING WEAPONS IN THE THIRD DEGREE

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

Subsection (a)(1) prohibits a person from knowingly possessing a deadly weapon, other than an ordinary pocket knife, that is concealed on his person. Subsection (e) describes when a deadly weapon is concealed on a person. A weapon that is concealed in an automobile is not concealed on a person.

The affirmative defense provided in subsection (b)(1) recognizes that the privacy right of Alaska's citizens to carry concealed weapons in their dwelling or on property appurtenant to their dwelling outweighs law enforcement's interest in regulating such activity. The defense specified in subsection (b)(2) was added to insure that a person actually engaged in lawful hunting, fishing, trapping or other lawful outdoor sporting activity that necessarily involved the carrying of a weapon for personal protection, would not be subject to prosecution under the concealed weapons statute. Carrying a weapon under a parka, for example, to prevent it from getting wet should not result in criminal sanctions if the person is engaged in lawful hunting activity. The term "other lawful sporting activity" is broad enough to include activity such as hiking, if it can be shown that the carrying of the weapon was necessary for personal protection.

Note that at the time of the possession the person must actually be engaged in the activity. The exclusion would not apply while the person was on his way to or from the activity. Under such circumstances the weapon must be carried openly or in a visible holster or case which gives notice of its contents.

As under existing law, peace officers acting within the scope and authority of their employment are excluded from the concealed weapon prohibition in subsection (c).

Subsection (a)(2) prohibits a person from possessing on his person a loaded firearm in any place where intoxicating liquor is sold for consumption on the premises. Subsection (f) describes when a firearm is loaded. This prohibition is supported by a survey of the 1975-76 arrest records of the Anchorage Police Department compiled by the Criminal Justice Center. The survey indicates that 18% of firearm assaults in Anchorage occurred in bars. Two exclusions to the prohibition are provided. Subsection (d) allows the owner of the establishment and his employees to possess such weapons within the course of their employment. Of course, if the weapon is concealed, the owner or his employees would be subject to prosecution under subsection (a)(1). Peace officers are excluded from the coverage of this prohibition under subsection (c).

Subsection (a)(3) prohibits the possession of a firearm by an unemancipated minor under 16 without the consent of his parents.

IV. Section 11.61.230. POSSESSION OF BURGLARY TOOLS

The Code provides that it is a class A misdemeanor to possess, with intent to use, any tool, instrument or device adapted or designed for committing any of three property crimes - burglary, theft from the person, or theft of services.

A preparatory offense, §230 is narrowly drafted to insure that otherwise innocent conduct does not fall within its coverage. The state must establish that the defendant possessed the item with intent to use or permit its use in the commission of one of the three target crimes. 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. That the tool was "commonly used for committing" the offense is not sufficient. This exclusion is necessary to insure that possession of items such as screwdrivers, toothpicks or rubber gloves will 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 §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.

IV. Sections 11.61.240;250. CRIMINAL POSSESSION OF EXPLOSIVES: UNLAWFUL FURNISHING OF EXPLOSIVES

Both provisions prohibit unlawful transactions with explosives and are new to existing law. The statues cover 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. The substantial danger of widespread physical injury and property damage resulting from the unlawful use of explosives necessitates specific coverage of such conduct. The term "explosive" is defined in §11.81.900(b)(18).

As a preparatory crime, criminal possession of explosives is similar to the Code's general attempt statute, §11.31.100. As noted in commentary to the Model Penal Code, the combination of an "intent to use" plus possession of materials which are specifically 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, §240 requires the state to establish that the defendant intended to commit a crime.

The classification 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 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 under §11.16.110.

I. Section 11.66.150. DEFINITIONS

The term "person" is defined in § 11.81.900(b)(39) to include all natural persons. Consequently, the offenses defined in this article are "sex-neutral" and may be committed by a male or female. The masculine pronoun is used for drafting convenience.

A. Paragraph (1). Place of Prostitution

This term is designed to insure that criminal sanctions can be applied against persons who use physical locations other than houses or apartments, such as boats, trailers or vans, for prostitution activities.

B. Paragraph (2). Prostitution Enterprise

This definition is designed to include agreements between a prostitute and a pimp, between two prostitutes, or larger scale activities. By the use of the term "organized," the definition excludes transactions involving only a prostitute and a patron.

C. Paragraph (3). Sexual Conduct

This term is defined to insure that prostitution is not limited to heterosexual genital intercourse. By broadening the range of conduct covered by the article, the definition takes into account the realities of commerce in sexual services.

II. Section 11.66.100. PROSTITUTION

This section describes the underlying offense of the article and classifies it as a B misdemeanor. Only the acts of the prostitute are covered; the patron of the prostitute does not commit a crime.

Prostitution may be committed by a person engaging in sexual conduct in return for a fee or agreeing to or offering to engage in sexual conduct in return for a fee. The commercial character of the prohibited conduct is fixed by the use of the term "for hire." As with existing law, cash consideration is not required. Note also that the statute covers all offers to engage in sexual conduct for hire. Solicitation is prohibited regardless of whether the offer occurs in a public place.

III. Section 11.66.110. PROMOTING PROSTITUTION IN THE FIRST DEGREE

This section, a class B felony, is designed to deal with the coercive aspects that may be involved in prostitution.

Paragraph (1) imposes liability if the defendant uses force to cause a person to engage in prostitution. If the force used qualifies as assault in the first degree, prosecution would be brought under that statute, a class A felony.

Paragraph (2) provides that a person commits the first degree offense if, as other than a patron, he causes a person under 16 to engage in prostitution. Subsection (b) denies the defendant the defense of reasonable mistake as to age. The defendant is held strictly liable regarding the age of the victim.

Paragraph (3) is designed to reach persons who may induce children, incompetents, or others in their legal custody to engage in prostitution.

IV. Section 11.66.120. PROMOTING PROSTITUTION IN THE SECOND DEGREE

This section imposes C felony penalties on persons who run a prostitution enterprise other than a place of prostitution or procure or solicit patrons or prostitutes. The statute is aimed primarily at the pimp. Note that paragraph (1) specifically excludes the conduct of running a place of prostitution. While deserving of criminal sanction, this conduct is not serious enough to warrant felony classification. The person who runs a place of prostitution will be covered under § 130(a)(1).

V. Section 11.66.130. PROMOTING PROSTITUTION IN THE THIRD DEGREE

The conduct prohibited in this section, a class A misdemeanor, must be engaged in with the specific intent to promote prostitution. The section is not intended to cover, for example, the landlord who unintentionally or unknowingly rents to prostitutes. Further, even if a landlord knowingly rents to a prostitute, he could not be held liable unless he acted with the intent to promote prostitution.

Paragraph (1) covers the person who runs a place of prostitution. Aimed primarily at the "madame" the statute would also apply to any person who owned a place of prostitution. It is important to note that if the defendant runs a prostitution enterprise, other than a place of prostitution, the provisions of § 120(a)(1) would apply.

Paragraph (2) covers the conduct of a person other than a patron who causes a person 16 or older to engage in prostitution. If the person was under 16, prosecution would be brought under § 110(a)(2). If the defendant ran a prostitution enter-

prise, other than a place of prostitution, or procured patrons for the prostitute, prosecution would be brought under § 120.

Paragraph (3) is directed at the person who knowingly derives a profit from prostitution while paragraph (4) is intended to reach conduct which enables prostitution activities to occur such as the procurring of prostitutes or the transportation of prostitutes. It bears repeating that the conduct must be engaged in with the intent to promote prostitution. This paragraph would not reach the conduct of a cab driver who drove a person to a place of prostitution not knowing it to be such; or, knowing it to be such but not acting with the intent to promote prostitution.

VI. Section 11.66.140. EVIDENCE REQUIRED FOR SECTIONS 120 - 130 OF THIS CHAPTER

This section will reverse the effect of AS 12.45.040, as interpreted by the Alaska Supreme Court in Johnson v. State, 501 P.2d 762 (Alaska 1972). The existing statute requires corroboration of the testimony of a prostitute to insure that alleged "victims" were not motivated by blackmail, malice or abnormal psychological conditions. As drafted, § 140 is consistent with the Code provision regarding corroboration in perjury cases (see § 11.56.220) and with existing corroboration requirements in rape cases.

CHAPTER 66, ARTICLE 2. GAMBLING OFFENSES

Introduction

This article initiates a comprehensive revision of Alaska's gambling laws. For the most part the coverage of existing law has been preserved although emphasis has been changed in several instances. The code changes existing law in two significant ways.

1. The Code excludes from the prohibitions of the criminal law the "friendly poker game" by recognizing an affirmative defense to gambling that the defendant engaged in gambling solely as a player in a home where no house income, other than personal winnings, resulted from the game.

2. The Code focuses on organized crime by creating a felony offense of promoting gambling which applies to the person who promotes or profits from an unlawful gambling enterprise.

I. Section 11.66.280(2). DEFINITION OF "GAMBLING"

In the Code,"'gambling' means that a person stakes or risks something of value upon the outcome of a contest of chance or a future contingent event not under his control or influence, upon an agreement or understanding that he or someone else will receive something of value in the event of a certain outcome." See State v. Pinball Machines, 404 P.2d 923, 925 (Alaska 1965). The terms "contest of chance"

and "something of value" are defined in § 280 (1)&(10). The definition includes any activity that brings a profit based on chance and includes ordinary lotteries. Games of pure skill, i.e., chess, will not be considered gambling if the contestants bet against each other. Placing a side bet on a game of chess, however, would be gambling because, from the onlooker's perspective, the outcome depends on "chance" as he has no control over the outcome.

The exceptions to the definition of "gambling" in subsection (A) are necessary to exclude stock, commodity, and insurance transactions from the scope of the gambling definition. The exception in subsection (B) excludes from the definition of "gambling" playing a pinball machine that is only able to "pay-off" in free games. The provision changes existing law under which such machines have been held to be gambling implements subject to seizure. Pinball Machines v. State, 371 P.2d 805 (Alaska 1962); State v. Pinball Machines, 404 P.2d 932 (Alaska 1965). Note, however, that any pinball machine that contains any method or device (commonly referred to as a "knock-off" button) whereby free games may be cancelled or revoked does not come under the exception. A machine that has such a device indicates the strong likelihood that "free games" are being exchanged for some other form of consideration.

II. Section 11.66.280(1). DEFINITION OF "CONTEST OF CHANCE"

In Morrow v. State, 511 P.2d 127 (Alaska 1973) the court considered the issue of whether a "football card" is a lottery. The court adopted the "dominant factor" approach by holding that a "scheme constitutes a lottery where chance dominates the distribution of prizes even though such a distribution is affected to some degree by the exercise of skill or judgement." The Code follows the approach taken by other revised codes, [see, e.g., N.Y. PENAL LAW § 225.00(1); OR. REV. STAT. § 167.177(1)] in postulating a similar definition, but not adopting the "dominant factor" test.

In many instances it will be virtually impossible to determine whether chance or skill dominates. "It should be sufficient that, despite the importance of skill in any given game, the outcome depends in a material degree upon an element of chance." N.Y. PENAL LAW § 225.00, Commentary at 23 (McKinney 1967).

III. Section 11.66.200. GAMBLING

Subject to the "social game" affirmative defense, the Code prohibits all forms of unlawful gambling. A first conviction of gambling is classified as a violation punishable by a maximum $300 fine. See § 12.55.035(b)(4). Second and subsequent convictions, however, are punishable as B misdemeanors. The definition of "unlawful" [§ 11.66.280(11)] provides that no gambling practice is lawful unless it is specifically authorized by statute. See generally, AS 05.15 (Bingo, Raffles and Ice Pools).

The affirmative defense in subsection (b) (which the defendant must establish by a preponderance of the evidence) exempts "friendly games" and "friendly best" from the coverage of the statute. The defense requires that the defendant first establish that he is a player. "Player" is defined in § 280(6). That definition requires that the person engage in gambling solely as a contestant or bettor without receiving any profit from the gambling other than his winnings and without rendering material assistance to the gambling. Conduct directed toward the establishment of a social game is specifically excluded from the definition of "material assistance." The equal risk and chance provision in the definition of "player" does not refer to the advantage enjoyed by a skilled player; rather, it excludes the affirmative defense to those who cheat at otherwise social games.

The affirmative defense also requires that the player establish that he participated in a "social game". That term is defined in § 280(9) as "gambling in a home where. . . there is no house income from the operation of the game." If the house or banker has an advantage because of the way the game is conducted, the affirmative defense is denied to all participants since a social game requires that no "house player, house bank or house odds exist." Thus, under the Code, gambling in a home where there is no house player, bank, odds, or income is not subject to criminal penalties. If the gambling occurs elsewhere, for example, in a park or in a bar, the affirmative defense is denied even though no house income or odds exist.

IV. Sections 11.66.210-220. PROMOTING GAMBLING IN THE FIRST AND SECOND DEGREE

Sections 210 and 220 provide broad coverage of all forms of gambling exploitation. In doing so, the Code changes existing law by providing felony penalities for the promoting of or profiting from large schale gambling enterprises. Both the terms "profits from gambling" and "promoting gambling" are defined to exclude the person who merely participates in gambling as a player. The player is covered by § 200, Gambling.

Section 220 provides that it is a class A misdemeanor to engage in either of two forms of gambling activity. The first is "promoting" unlawful gambling. This term is defined in § 280(8) to include any activity that goes beyond being a player, including setting up the game, acquisition of the necessary equipment, bringing in the players, and financing the operation. Again, note that the person who merely arranges for a social game is a "player" and does not fall within the coverage of either degree of promoting gambling.

The second activity prohibited is "profiting" from unlawful gambling. This term is defined in § 280(7) and covers the receipt by persons other than players of money or other property as proceeds from gambling activity based on a prior agreement or understanding to that effect.

Section 210 provides class C felony penalities for promoting or profiting from an unlawful gambling enterprise. The term "gambling enterprise" is defined in § 280(4). Subsections (A) and (B) of that definition are taken directly from the federal gambling statute. 18 U.S.C. § 1955. It is expected that federal case law interpreting 18 U.S.C. § 1955 will be highly relevant in the interpretation of these sections of the Code definition.

A "qualified organization", as defined in AS 05.15.210(15), is excluded from the definition of "gambling enterprise" by sebsection (C). This provision insures that groups such as non profit charitable or fraternal organizations are not subject to felony penalities if unlawful gambling occurs on their premises. It should be noted, however, that such organizations would be subject to misdemeanor penalities for promoting or profiting from such activity under § 220.

V. Sections 11.66.230-.240. POSSESSION OF GAMBLING RECORDS IN THE FIRST AND SECOND DEGREE

Sections 230 and 240 prohibit the possession of "gambling records". The term "gambling record" is defined in 11.66.280(5) as any writing or paper of a kind commonly used in the operation or promotion of unlawful gambling." Both provisions require that the defendant possess the gambling record with knowledge of its contents or character.

Division of the offense into two degrees parallels the Code's treatment of promoting gambling by distinguishing between large and small scale operators. If the gambling

record is of a kind commonly used in the operation of an unlawful gambling enterprise (i.e., records reflecting the operation of a large scale gambling business) the possessor has committed the first degree offense, a class C felony. Possession of other gambling records is a class A misdemeanor.

The Code recognizes three affirmative defenses to the possession offenses. The first defense, applicable only to the first degree crime, appears in § 250(a) and is intended to preclude felony convictions in cases where the defendant is in possession of football cards or other tokens evidencing his own participation as a player in a gambling enterprise. Note that the affirmative defense applies only in a prosecution for the first degree offense; player status is no defense to prosecution under the second degree statute.

The two remaining affirmative defenses appearing in § 250(b) apply to both degrees of possession of gambling records. Subsection (b)(1) allows a defense when the defendant establishes that the gambling record is not intended to be used in the operation or promotion of unlawful gambling. Subsection (b)(2) provides an affirmative defense that the writing or paper is "used or intended to be used by the defendant in a social game" despite the fact that even "social games" are, by definition, unlawful gambling. Thus, the person who engages in a social game, will not be penalized for keeping score sheets or other writings or papers commonly used during such games.

VI. Section 11.66.260. POSSESSION OF A GAMBLING DEVICE

This section prohibits the unlawful possession of all gambling devices. Possession of a gambling device is a class A misdemeanor. The term "gambling device", is defined in Sec. 11.66.280(3) as "any device, machine, paraphernalia or equipment that is used or usable in the playing phases of unlawful gambling", other than lottery tickets or policy slips (possession of which is punishable as possession of gambling records, Sec. 11.66.230, 240). The definition of gambling device also specifically excludes pinball machines that only "pay-off" in free games.

The conduct prohibited by the statute includes the manufacture, sale, transportation, and possession of any gambling device or the conducting or negotiating of any transaction affecting or designed to affect ownership, custody or use of such items. The prosecution must establish that the defendant knew that the device was to be used in the promotion of unlawful gambling. This culpable mental state requirement insures that a prima facie case of possession of a gambling device cannot rest on proof that the defendant possessed such otherwise innocuous items as chips or a deck of playing cards, which would otherwise be covered because of the broad definition of a gambling device.

VII. Section 11.66.270. FORFEITURE.

This provision authorizes the forfeiture of gambling devices, gambling records and money used as a bet or a stake in unlawful gambling. Paragraph (2) authorizes the forfeiture of all money seized during a gambling raid if that money is not found on the person, i.e., on a poker table. Seizure of

money found on the person is authorized under paragraph (B) only if it is found on a person who directs an unlawful gambling enterprise. Note that this section does not specify the procedure for forfeiture or the methods of disposing of the forfeited property. These issues should be addressed in future legislation.

CHAPTER 76. MISCELLANEOUS OFFENSES

I. Section 11.76.100. SELLING OR GIVING TOBACCO TO A MINOR

This section prohibits a person 19 or older from giving or selling tobacco to a person under 16. Violation of the statute is punishable by a $300 fine.

II. Section 11.76.110. INTERFERENCE WITH CONSTITUTIONAL RIGHTS

This section consolidates two existing statutes based on U.S.C. § 241, 242 (1970) into a single provision, classified as an A misdemeanor.

Subsections (a)(1) and (a)(2) substantially restate existing AS 11.60.340 but unlike existing law, do not require that the defendant conspire with another. While the developing concept of rights guaranteed by the state constitution requires protection, the risks inherent in application of a conspiracy law to very generally described conduct outweighs 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 consitituting 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.

Subsection (a)(3) parallels existing AS 11.60.350 and requires that the defendant, acting under color of 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.

While the section generally requires that the defendant act intentionally, use of the phrase "in fact" to describe the protected rights 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). 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.

CHAPTER 81. GENERAL PROVISIONS

ARTICLE 1. GENERAL PURPOSES

I. Section 11.81.100. GENERAL PURPOSES

This section states the general philosophy behind the Title 11 revisions and serves as an aid in the interpretation of individual sections.

ARTICLE 2. APPLICABILITY OF CRIMINAL STATUTES

II. Section 11.81.200. EFFECT OF AMENDMENT OR REPEAL OF CRIMINAL STATUTES

This section 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. Section 11.81.210. 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 Code does not affect private rights of action available to victims of such conduct.

This Code does not, however, include provisions authorizing treble damages for violation of specific statutes since 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. This section is 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. Section 11.81.220. ALL OFFENSES DEFINED BY STATUTE

This section 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.

ARTICLE 3. CLASSIFICATION OF OFFENSES

V. Section 11.81.250. CLASSIFICATION OF OFFENSES

This section lists the six classes of offenses in title 11: Class A, B and C felonies, class A and B misdemeanors and violations. Only three offenses are not classified: murder in the first and second degree and kidnapping.

The terms "offense," "crime," "felony," "misdemeanor," and "violation" are defined in § 11.81.900. All forms of prohibited conduct described in the Code are offenses. An offense is either a crime or a violation. A crime is an offense for which a sentence of imprisonment is authorized. Crimes are either felonies or misdemeanors. A felony is a crime for which a sentence of imprisonment of more than one year is authorized. A misdemenaor is a crime for which a sentence for a term of more than one year may not be imposed. A violation is a non-criminal offense punishable only by a fine.

Offenses are classified based on the type of injury "characteristically caused or risked by commission of the offense and the culpability of the defendant." The injury risked or caused may be to a person, property, the family, public administration, public order, or public health and decency. The "culpability of the defendant" refers to which culpable mental state -- intentionally, knowingly, recklessly, criminal negligence the defendant committed the acts constituting the offense.

I. INTRODUCTION

Key to the article are three terms -- "force," "deadly force" and "nondeadly force."

"Force" is defined in § 11.81.900(b)(22) as "any bodily impact, restraint, or confinement; force includes deadly and nondeadly force." "Deadly force" means "force which the person uses with the intent of causing, or uses under circumstances which he knows creates a substantial risk of causing, death or serious physical injury; 'deadly force' includes intentionally discharging a firearm in the direction of another person or in the direction in which another person is believed to be", § 11.81.900(b)(12). The term "nondeadly force" "means force other than deadly force," § 11.81.900(b)(32).

The use of any degree of force is justified only "when and to the extent. . .[the person claiming the defense] reasonably believes. . .[force] necessary." The defendant must subjectively believe that the use of force is necessary and that belief must have been objectively reasonable under the circumstances. A reasonable man standard is adopted. Further, even though a particular degree of force may be authorized, the use of such force will not be justified if it was not reasonable to believe that such force was necessary to accomplish the person's objective. For example, while deadly force is authorized in § 350 to terminate burglary in an occupied building, the shooting of a burglarer who is known to be an unarmed juvenile is not likely to be viewed by the trier of fact as reasonably necessary to terminate the burglary. Nondeadly force should have been used, or deadly force should have been threatened.

II. Section 11.81.300. JUSTIFICATION: DEFENSE

The section classifies the various forms of justification described in § 320-430 as defenses. If some evidence of justification is admitted at trial the state will have the burden of disproving the defense beyond a reasonable doubt. See definition of "defense" in § 11.81.900(b)(15).

III. Section 11.81.320. JUSTIFICATION: NECESSITY

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

The Code does not contain a statutory formulation of the necessity defense. Instead, the defense is incorporated into the Code "to the extent permitted by common law." Under subsection (1) the defense will be inapplicable if another statute covers the defense in the particular situation involved. See, e.g., § 11.46.340. Subsection (2) provides that the defense does not apply if a legislative intent to exclude the defense plainly appears.

IV. Sections 11.81.330; 335. JUSTIFICATION: USE OF NONDEADLY AND DEADLY FORCE IN DEFENSE OF SELF

A. Section 11.81.330 - NONDEADLY FORCE

Subsection (a) allows a person to use nondeadly force to defend himself from what he reasonably believes to be the use of unlawful force. Since force is defined to include the threat of imminent bodily impact, a person may defend himself from threats of imminent impact as well as actual impact.

Paragraphs (1)-(3) qualify the right of a person to use nondeadly force in self-defense. Under paragraph (1), neither party to mutual combat which is not authorized by law can claim self-defense. Paragraph (2) prohibits a person from provoking another person into using force and later claiming that his use of force in self-defense was justified. Finally, paragraph (3) prevents an initial aggressor from claiming self-defense.

Subsection (b) provides that even in the three circumstances described in paragraphs (1)-(3) a person can nevertheless use nondeadly force if he withdraws from the encounter and effectively communicates his withdrawal to the other person. If the other person continues the incident by the use of unlawful force, nondeadly force may then be used in self-defense.

B. Section 11.81.335 - DEADLY FORCE

As a prerequisite to the use of deadly force in self-defense, subsection (a)(1) requires that the use of nondeadly force would have been justified. If the use of nondeadly force would have been justified, subsection (a)(2) allows a person to use deadly force when and to the extent he reasonably believes it necessary to defend himself from death, serious physical injury, kidnapping, forcible sexual assault or robbery.

Subsection (b) requires a person to retreat prior to using deadly force. Retreat is not required when the defender is (1) on premises, including a dwelling, which he owns or leases and when he is not the original aggressor, (2) a peace officer acting within the scope and authority of his employment, or (3) a person assisting a peace officer in making an arrest. Note that there is no duty to retreat prior to using nondeadly

force. Further, the defendant must know that he has a safe retreat; it is not enough that a reasonable person would have believed he could have retreated safely.

V. Section 11.81.340. JUSTIFICATION: USE OF FORCE IN DEFENSE OF A THIRD PERSON

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

VI. Section 11.81.350. JUSTIFICATION: USE OF FORCE IN DEFENSE OF PROPERTY AND PREMISES

Subsection (a) provides that a person may use nondeadly force to terminate the commission or attempted commission of an unlawful taking or damaging of property or services. Included in this category would be the crimes of theft, criminal mischief and concealment of merchandise. Deadly force may be used under subsection (b) to terminate the commission or attempted commission of arson upon a dwelling or occupied building.

Under subsection (c) a person in possession or control of premises, or an express or implied agent of that person may use nondeadly force to terminate the commission or attempted commission of a criminal trespass, and deadly force to terminate a burglary occurring in an occupied dwelling or building. Subsection (d) recognizes that a person defending property or land may be justified in using deadly force based on other sections of the justification article. For example, one who

destroys a person's only means of transportation from a remote bush site has in effect used deadly force against the owner if the destruction creates a substantial risk of serious physical injury -- i.e., exposure, starvation. In this case the use of deadly force in defense of person (not property) would be appropriate.

Note that any person, not just the owner, is allowed to use force to prevent damage to property including arson. However, if the crime is criminal trespass (usually, unlawful entry onto land) or burglary, a person will be allowed to use force only if he is in possession or control of the premises, or is an "express or implied agent" of the owner of the premises, a term broad enough to cover a person who discovers a trespasser on his neighbor's land or a burglar in his neighbor's dwelling.

VII. Section 11.81.370. JUSTIFICATION: USE OF FORCE BY PEACE OFFICER IN MAKING AN ARREST OR TERMINATING AN ESCAPE

Subsection (a) provides that a peace officer may use nondeadly force and may threaten to use deadly force whenever he reasonably believes it necessary to make an arrest, to terminate an escape or attempted escape from custody, or to make a lawful stop. In providing that nondeadly force may be used to effect a lawful stop, the Code insures that a peace officer will not be criminally liable for an assault prosecution for conducting a lawful stop of the kind described in Coleman v. State, 553 P.2d 40, 46 (Alaska 1976).

The introductory phrase "in addition to using force justified under other sections of this chapter" emphasizes that this section supplements the other sections in article 4 describing the justifiable use of force. For example, if in making an arrest the officer reasonably believes that the use of force is necessary in self-defense, the provisions of § 335 will supplement the authority to use force described in this section.

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

Pursuant to paragraph (1), a peace officer may use deadly force when and to the extent he reasonably believes it necessary to make an arrest or terminate an escape or attempted escape of a person he reasonably believes "has committed or attempted to commit a felony which involved the use of force against a person." The felony had to be defined as involving the use of force against a person and the officer must have reasonably believed that force was in fact involved. Under this standard, for example, the use of deadly force would be justified in arresting a fleeing burglar who the officer reasonably believes has used force against an occupant of a building, a robber or a person who has committed or attempted to commit a felony assault. Deadly force would not be justified to arrest a person who the officer believes has committed a nonviolent felony such as forgery or theft, unless the use of deadly force is justified under paragraphs (2) or (3).

Another situation justifying the use of deadly force by a peace officer involves the armed fleeing escapee. Under

paragraph (2) a peace officer may use deadly force to retake a person who has escaped or is attempting to escape from custody while in possession of a firearm on or about his person. Insofar as this paragraph allows a peace officer to use deadly force against a misdemeanant escapee who is not necessarily using his firearm it expands existing law. However, the factors of flight plus possession of a firearm should be sufficient evidence of dangerousness to justify the use of deadly force if necessary to retake the escapee. Note also that a peace officer in the immediate vicinity of a correctional facility at the time of an escape is afforded additional authority in using deadly force under § 410, discussed infra.

Paragraph (3) provides that a peace officer may use deadly force to effect an arrest or terminate an escape or attempted escape of a person who the officer reasonably believes "may otherwise endanger life or inflict serious physical injury unless arrested without delay." This section should give peace officers the necessary leeway to apprehend a person who has not committed a violent felony and who is not an escapee in possession of a firearm, but is nevertheless highly dangerous.

Subsection (b) provides that the use of force by a peace officer is not justifiable unless the officer reasonably believes the arrest or stop to be lawful.

Subsection (c) is included to emphasize that the provisions of this section only effect the right to use or threaten force in making an arrest. If an officer, for example, merely draws his weapon prior to entering a building in search of a criminal, the provisions of this section would be inapplicable since force had not been used or threatened against anyone.

VIII. Section 11.81.380. USE OF FORCE BY PRIVATE PERSON ASSISTING AN ARREST OR TERMINATING AN ESCAPE

AS 12.25.090 provides that "a peace officer making an arrest may orally summon as many persons as he considers necessary to aid him in making an arrest." Section 380 protects the citizen who is requested by a peace officer to assist in making an arrest or in terminating an escape or attempted escape.

As with the other sections of this chapter, this statute allows a person to act on appearances provided he does so reasonably. Thus, a citizen who has been called upon by a person he reasonably believes to be a peace officer to make an arrest is justified in using nondeadly force "when and to the extent that he reasonably believes it to be necessary to carry out the peace officer's direction." Deadly force may only be used when the citizen is directed by the officer to use such force. If the citizen believes the peace officer is not justified in using force under the circumstances, the use of force by the citizen would not be justified.

IX. Section 11.81.390. JUSTIFICATION: USE OF FORCE BY PRIVATE PERSON IN MAKING AN ARREST OR TERMINATING AN ESCAPE

The use of nondeadly force by a private person in making an arrest or terminating an escape or attempted escape from custody is justified when the citizen reasonably believes the arrestee has committed a misdemeanor in his presence or a felony, regardless of whether the felony was committed in his presence. Deadly force may be used when he reasonably believes the suspect has committed a felony which involved the use of force against a person or is escaping or has escaped from custody while in possession of a firearm.

X. Section 11.81.400. JUSTIFICATION: USE OF FORCE IN RESISTING OR INTERFERING WITH ARREST

Ordinarily a person may not resist or interfere with an

unlawful arrest. However, the Code provides two exceptions to this rule. Under subsection (a)(1) a person may resist or interfere with an unlawful arrest if the peace officer is using excessive force in making the arrest. In allowing resistance under such circumstances the Code is consistent with existing law. See, Gray v. State, 463 P.2d 897, 908 (Alaska 1970). Note that subsection (b) provides that the amount of force used in resisting the arrest may not exceed the amount of force that would be authorized in self defense. For example, if the peace officer is using excessive nondeadly force in making the arrest, only nondeadly force may be used in resisting the arrest.

Subsection (a)(2) provides a limited right to use nondeadly force in resisting (but not in interfering with) an unlawful arrest. This provision is necessary since the crime of resisting arrest, § 11.56.700, is committed when a person uses force against an officer. The definition of force (§ 11.81.900(b)(22)) is broad enough to cover virtually all physical resistance to an arrest.

To lawfully resist an unlawful arrest three conditions must be met: (1) the arrest must in fact be unlawful, (2) the resister must know the arrest to be unlawful, and (3) deadly force may not be used. One example of a situation in which nondeadly force would be justified is this: a peace officer requests a bribe from a citizen. The citizen refuses and the officer places the citizen under arrest for disorderly conduct. Under these circumstances, the citizen may use nondeadly force in resisting the arrest.

XI. Section 11.81.410. USE OF FORCE BY GUARDS

Subsection (a) allows guards and peace officers employed in correctional facilities to use reasonable and appropriate nondeadly force to maintain order in the facility if the use of

nondeadly force has been authorized by regulations adopted by the Department of Health and Social Services.

Because of the danger to society from escapes from correctional facilities is greater than the danger posed by the defeat of an arrest on the street, subsection (b), subject to the limitation in subsection (c), provides that a guard or peace officer employed in a correctional facility or a peace officer in the immediate vicinity of the facility at the time of the escape may use deadly force "when and to the extent he reasonably believes it necessary to terminate the escape or attempted escape of a prisoner from a correctional facility." Subsection (c) provides that only nondeadly force may be used to terminate a correctional facility escape if the person knew that the escapee was a misdemeanant and did not believe he was armed with a firearm.

II. Section 11.81.420. JUSTIFICATION: PERFORMANCE OF PUBLIC DUTY

This section provides the defense of justification to all prosecutions under the Code if the chargeable conduct is required or authorized by law, judicial decree, judgment or 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, § 370 specifies the circumstances when a peace officer may use deadly force in making an arrest. Section 420 does not expand that authority. Rather § 370 explains the application of § 420 in a very specific circumstance.

Subsection (a) provides that the laws and court orders, decrees or judgments which impose a duty or grant a privilege to act may be followed without incurring criminal liability.

broken down in the execution of a search warrant (AS 12.35.040) the officer has not committed criminal mischief in doing so.

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 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 to be authoritative. The second involves a person called upon by a peace officer for assistnace that the person reasonably believes to be lawful.

XIII. Section 11.81.430. JUSTIFICATION: USE OF FORCE; SPECIAL RELATIONSHIPS

This provision describes five situations when the use of reasonable nondeadly 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 force" includes 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 conduct will not be justified. See generally § I, supra.

Subsection (a)(1) allows parents, guardians and others entrusted with the care and supervision of a minor or incompetent to use reasonable and appropriate nondeadly force when and to the extent reasonably necessary to promote the welfare of the minor or incompetent person (defined in § 11.81.900(b)(26)). The person who uses the force must also establish the person's incompetency under subsection (b).

Subsection (a)(2) allows a teacher to use nondeadly force

upon a student in limited situations. The subsection prohibits the use of any force in the absence of a school regulation and the decision of the school principal to allow 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 school authorities within the context of each community.

Subsection (a)(3) 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 provision, deadly force will be justifiable only if authorized by other provisions of this chapter.

Subsection (a)(4) 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.

Subsection (a)(5) authorizes the use of 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; AS 08.64.366.

Paragraph (A) justifies the use of nondeadly force 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 paragraph (B) to the use of force without consent of the patient only in emergency situations when no noe competent to give consent is available under the circumstances, but when any reasonable person would give consent.

XIV. Section 11.81.440. DURESS

Though the defense of duress is not now codified, 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. Section 440 codifies the affirmative defense of duress.

The defense is limited to situations where a person is coerced to act by "the use of unlawful force upon him or a third person." The defense does not require that the defendant suffer 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.

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."

XV. Section 11.81.450. ENTRAPMENT

The Code incorporates existing law by recognizing the "objective" approach to entrapment. See Grossman v. State, 457 P. 2d 226 (Alaska 1969). In classifying entrapment as an affirmative defense, which must be 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 81, ARTICLE 5. GENERAL PRINCIPLES OF CRIMINAL LIABILITY

I. Section 11.81.900(a)(1)-(4). DEFINITIONS

As discussed in the Alaska Criminal Code Revision, Tentative Draft, Part 2, Commentary at 8-11 (1977), the important area of culpable mental states is one of great confusion and uncertainty in existing law. The proliferation of culpable mental state terms coupled with their haphazard use hampers the interpretation of individual sections and frustrates one of the principal purposes of the mens rea concept: providing a structure for the classification of offenses according to their degree of blameworthiness. Additionally, some statutes are exposed to constitutional attack by their failure to specify a culpable mental state, or by their specification of an unconstitutional form of culpability.

The Code addresses itself to these three problems by replacing the myriad of existing terms with a four-tiered framework of culpable mental states that clearly establishes levels of blameworthiness. Only four culpable mental states apply throughout the Code: intentionally, knowingly, recklessly and criminal negligence. The terms are defined in § 11.81.900 (a)(1)-(4). Use of one or more of these terms, whether specifically included in a statute or implied through a rule of construction, should promote clarity and uniformity in the interpretation of individual sections and in the formulation of jury instructions.

The Code distinguishes between three elements of offenses to which the culpable mental states apply:

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

The first element, conduct, involves the nature of the proscribed act or the manner in which the defendant acts. Kidnapping, for example, requires that one person restrain another. The conduct might be the locking of the only door to a windowless room. Knowingly is the culpable mental state applicable to conduct. The second element, circumstances surrounding the conduct, refers to a situation having a bearing on the actor's culpability. Kidnapping requires that the person inside the room not consent to being restrained. Lack of consent is an example of a circumstance surrounding the actor's conduct, and is an element of the crime. Knowingly, recklessly, and criminal negligence are the culpable mental states associated with the existence of circumstances. The result of the actor's conduct constitutes the final element. Kidnapping can occur if the victim is exposed to a substantial risk of serious physical injury. Intentionally, recklessly and criminal negligence are the culpable mental states associated with results.

a. Section 11.81.900(a)(1)-(2). INTENTIONALLY AND KNOWINGLY

When a statute in the Code provides that a defendant must intentionally cause a result, the state must prove that it

was the defendant's conscious objective to cause that result. This culpable mental state is comparable to the existing form of culpability commonly referred to as "specific intent." Bribery, for example, requires that the defendant confer a benefit upon a public servant with intent to influence him; the state must prove that it was the conscious objective of the defendant to cause the public servant to be influenced.

Under the Code, knowledge requires an awareness on the part of the defendant that his conduct is of the nature described by the statute defining the offense or that the circumstances described by the statute exist. The definition also covers the situation where a person deliberately avoids acquiring knowledge by closing his eyes (sometimes referred to as "wilful blindness") by providing that "when knowledge of the existence of a particular fact is an element of an offense, that knowledge is established if a person is aware of a substantial probability of its existence, unless he actually believes it does not exist."

Whether "knowing" should be defined subjectively or objectively was one of the issues most debated by the Subcommission. Under the Code the test for knowledge is a subjective one -- the defendant must actually be aware of the fact critical to culpability or of at least a substantial probability of its existence. A defendant who is unaware of the critical fact or of a substantial probability of its existence does not "know," regardless of whether a reasonable man would have been aware. Note, however, that a person who is not aware because he is volun-

tarily intoxicated is held, nevertheless, to have acted "knowingly", see also § VI, infra.

b. Section 11.81.900(a)(3)-(4). RECKLESSLY AND CRIMINAL NEGLIGENCE

When a statute in the Code provides that a person must recklessly cause a result or disregard a circumstance, criminal liability will result if the defendant "is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists." The test for recklessness is a subjective one -- the defendant must actually be aware of the risk. On the other hand, if criminal negligence is the applicable culpable mental state, the defendant will be criminally liable if he "fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists." The test for criminal negligence is an objective one -- the defendant's culpability stems from his failure to perceive the risk.

Both terms require the risk to "be of such a nature and degree" that either the disregard of it (in the case of recklessness) or the failure to perceive it (in the case of criminal negligence) constitutes a "gross deviation" from the standard of conduct or care that "a reasonable person would observe in the situation." This definition of the applicable risk involved insures that proof of ordinary civil negligence will not give rise to criminal liability.

As with the definition of "knowingly", an intoxicated person who is unaware of a risk which he would have been aware had he not been intoxicated is held to act "recklessly." Since

"criminal negligence" is defined objectively, an intoxicated person would be held to act with criminal negligence if a reasonable person would have been aware of the risk.

II. Section 11.81.600. GENERAL REQUIREMENTS OF CULPABILITY

Subsection (a) restates the basic principle of criminal law that a person is not subject to criminal sanctions unless he performs a voluntary act (defined in § 11.81.900(b)(56)) or an omission (defined in § 11.81.900 (b)(36)). Generally, some culpable mental state must be established as to each element of an offense. Proof of culpability is unnecessary in three limited situations.

First, no culpable mental state is required as to any element of an offense classified as a "violation" (defined in § 11.81.900(b)(55)) unless the statute defining the offense requires proof of culpability. Second, no culpable mental state is necessary as to any element of an offense when the statute defining that offense expressly designates it as one of "strict liability." Finally, proof of a culpable mental state is not required as to a particular element of an offense if "an intent to dispense with the culpable mental state requirement for that element clearly appears." In the article on sexual assault, for example, an intent to dispense with proof of defendant's knowledge that his victim was under thirteen is apparent. See, 11.41.445(b).

III. Section 11.81.610. CONSTRUCTION OF STATUTES WITH RESPECT TO CULPABILITY

This section includes three important rules of construction to be applied in determining which culpable mental state must be proven as to each element of an offense. The first provides that when only one culpable mental state appears in a statute defining an offense, "it is presumed to apply to every element of the offense, unless an intent to limit its application clearly appears."

Under subsection (b), if a statute does not specify any culpable mental state, conduct is required to be engaged in "knowingly" and results and circumstances are required to be engaged in "recklessly." "Criminal negligence" will not apply unless the term is expressly included in the statute defining the offense.

The final rule of construction states the uncontroversial principle that when a higher degree of culpability than necessary is established, the requirement of culpability is satisfied. If, for example, a statute defining an offense requires that a prohibited result be recklessly caused, proof that the result was intentionally caused will also establish the offense.

IV. Section 11.81.615. OFFENSES DEFINED BY AGE OR VALUE

This section has been included in the Code to insure that a prosecution can be brought when a reasonable doubt exists with respect to the value of property or services or the age of the victim between two degrees of an offense, but where there is no resonable doubt with respect to either element in terms of the lower degree of offense. For example, if

Subsection (b)(3) recognizes that conduct is justified if the defendant reasonably, though mistakenly, believed circumstances existed that supported a defense of justification as provided by Chapter 81, Article 4.

VI. Section 11.81.630. INTOXICATION AS A DEFENSE

This section is intended to restate existing law and provides that while voluntary intoxication ("intoxicated" is defined in § 11.81.900(b)(27) to include intoxication from drugs as well as alcohol) is not a defense to an offense, evidence that a defendant was intoxicated may be offered whenever it is relevant to negate an element of an offense that requires that a defendant intentionally cause a result.

SECTION 11 - ARREST AUTHORITY

This section amends existing AS 12.25.030 by providing authority for peace officers to make probable cause arrests for misdemeanor assaults committed between members of the same household. Not that this authority is limited to assaults under AS 11.41.230(a)(1). That provision covers the intentional or reckless causing of physical injury. Merely placing a person in fear of such injury does not give rise to the authority to make probable cause misdemeanor arrests.

While this provision was drafted to provide one alternative in dealing with the problem of spouse abuse, it is broader than that. The term "household" is defined in subsection (b) as the "social unit comprised of those living together in the same dwelling." Thus, in addition to protecting spouses, the section would also apply, for example, to the mother-in-law who is assaulted by her son-in-law and the person who is beaten up by the person he or she is living with.

June 17, 1978 Saturday No. 48

ERRATA

SENATE JOURNAL SUPPLEMENT No. 47 SCS HB 661

(Commentary on the Alaska Revised Criminal Code SCS FOR HOUSE BILL NO. 661 by the Senate Judiciary Committee printed June 12, 1978)

JUNE 17, 1978

1. Table of Contents, page 2, last two lines; Page 146 should read 147; Page 147 should read 148.

2. Page 3, paragraph 3, last line: § 100(3) should read § 110(3).

3. Page 3, paragraph 4, second line: § 100(3) should read § 110(3).

4. Page 32, Roman numeral III: Sections 11.46.120-150; 990 should read Section 11.46.120-150; 980.

5. Page 38, paragraph 1, line 3: "public from conduct not only . . ." should read "public from conduct now only . . .".

6. Page 66, paragraph 2, line 1 should read: Subsection (a)(1) applies .

7. Page 66, paragraph 4, line 1 should read: Subsection (a)(2) provides .

8. Page 66, paragraph 4, line 3 should read: Subsection (a)(3) extends .

9. Page 66, paragraph 4, last line should read: . . . definitions in § 11.81.900(b)(4) and (6).

10. Page 70, Roman numeral III should read . . . GRATUITIES.

11. Page 82, paragraph 2, line 10 should read: give rise to criminal . .

12. Page 85, paragraph 3: i.e., on line 2 and 4 should read e.g.,.

13. Page 96, paragraph 2, line 8: after "apply" delete remainder of line 8, add "the" after "if" on line 9. On line 10, change i.e., to e.g.,.

14. Page 110, paragraph 1, line 2: after "enterprise" , other than a place of prostitution, or who pro-.

15. Page 111, paragraph 2, line 7 should read: consistent with the Code provision dispensing with corroboration in

16. Page 113, line 4: change i.e., to e.g.,.

17. Page 117, second paragraph, line 5: "penalities" should be spelled penalties.

18. Page 117, third paragraph, line 3: after "in" add "§".

19. Page 119, last line: change i.e., to e.g.,.

20. Page 124, third paragraph, line 8: "misdemenaor" should be spelled misdemeanor.

21. Page 125, third paragraph, line 12: "burglarer" should be spelled burglar.

22. Page 130, third paragraph, line 6: after felony, "had" should read has.

23. Page 133, paragraph 3, last line: add: "In allowing the citizen to use nondeadly force under these circumstances, the Code provision is contrary to the rule formulated in Miller v. State, 462 P.2d 421 (Alaska 1969)".

24. Page 135, paragraph 2, last line: "assistnace" should be spelled assistance.

25. Page 141, paragraph 2, line 4: after "exist." add: "It is not required that the defendant know that his conduct is prohibited by law. See § V, infra."

26. Page 145, paragraph 2, line 3: after "v. U.S." add 212.

27. Page 151, paragraph 1, line 3: after "See" replace "AS" with §.

28. Page 151, paragraph 2, line 7: after "Assess", add -.

29. Page 154, line 3: "provision" should be changed to term.

30. Page 155, line 1: change "six" to five. Paragraph 1, line 8, after "imprisonment." See should be underlined.

31. Page 159, paragraph 4, line 3: after "term" add: for factors in mitigation.

32. Page 160, second to the last line: "consicered" should be spelled considered.