ALASKA CRIMINAL LAW 2022



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Alaska Criminal Law 2022 (Henderson)

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Acknowledgments

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All errors are the author’s alone. For questions about this textbook please contact the author at alaskacriminallaw@gmail.com.

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Preface

Alaska Criminal Law, the 2022 Edition has been adopted for use as a textbook in an undergraduate course on substantive criminal law with an emphasis on Alaska law. Although numerous textbooks discuss criminal law, all discuss the subject from a national perspective. But as you will see shortly, criminal law differs greatly from state to state. The enforcement of criminal law is one of the central aspects of a state's "traditional police powers." Although the U.S. Constitution provides an umbrella of protection to all United States citizens, there is no federal police power; the enactment and enforcement of criminal law is left to the individual states – a basic principle of US federalism. Because of this unique, local perspective, it is difficult to use a single textbook that adequately explores both general principles and local nuances. This textbook makes no attempt to achieve that goal. Instead, this textbook seeks to introduce you to the topic of criminal law through the lens of the Alaska criminal legal system. This text will explore various concepts and principles that apply in *most* jurisdictions, but also introduce the reader to the unique aspects of Alaska criminal law, and how these general principles are applied in Alaska.

This textbook explores the basic elements of a crime, the specific elements of commonly encountered crimes, and most criminal defenses. One must remember that the enforcement of criminal law *always* requires the involvement of the government. Without government action, there is no criminal enforcement (but as we will see, there may be civil enforcement). Throughout this book, you will review the pertinent sections of the United States and Alaska constitutions as they apply to criminal law. By the end of this book, you will be comfortable with the basic legal framework that governs the Alaskan criminal legal system.

A quick note on the citation format found in this edition. The original text, *Criminal Law*, published by the University of Minnesota used the American Psychological Association (APA) citation format. In this edition, the author has attempted to eliminate the APA citation formatting and instead adopted the legal citation style format found in *The Bluebook: A Uniform System of Citation* (Columbia L. Rev. Ass'n et al. eds. 21st ed. 2020). This change is for two main reasons. First, this textbook explores the underpinnings of criminal law relying on "The Case Method" (discussed in more detail in Chapter 1) and requires students to learn the nuances of criminal law by reading legal opinions, several of which have been incorporated herein. Legal opinions are more appropriately cited using formal legal citation methods. The APA citation format does not adequately achieve this purpose. The second reason is frankly one of preference. The author was trained in *The Bluebook* citation format and *The Bluebook* is on the author's bookshelf. The APA citation format, while appropriate for social science scholarly work, is not required for our purposes – that is, to enable the reader (you) to locate the cited original work. For those who are not familiar with *The Bluebook*'s style guide, a quick tutorial can be found at www.legalbluebook.com.

CHAPTER OVERVIEW

1: Introduction and Overview to Criminal Law

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1.2: Not All Crimes are Immoral; Not All Moral Wrongs are Crimes
1.3: Criminal Law and Criminal Procedure
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1.1: Definition of Crime

Let's begin by defining a **crime.** Black's Law Dictionary defines a crime as "a positive or negative act in violation of penal law." *Crime*, Black's Law Dictionary (6th ed. 1990). Alaska law is more explicit. It defines a crime as "an offense for which a sentence of imprisonment is authorized; a crime is either a felony or a misdemeanor." *See* AS 11.81.900(b)(11). We will explore this definition in more depth shortly, but for now remember that a crime is a formal announcement of a wrong against society, punishable by the government.

You will learn about criminal acts and omissions to act in Chapter 4 "The Elements of a Crime." For now, it is important to understand that a voluntary act (or failure to act) and criminal intent (culpable mental state) are elements or parts of every crime. Generally speaking, criminal law may only be enforced by the sovereign. The government must enact a criminal law specifying a crime and its elements before it can punish an individual for criminal behavior. Criminal laws are the primary focus of this book. As you slowly start to build your knowledge and understanding of criminal law, you will notice some unique characteristics of the United States' legal system. For example, private citizens do not have the authority to criminally enforce a state's criminal laws. *See generally Cooper v. District Court*, 133 P.3d 692, 697-700 (Alaska App. 2006). Also, criminal laws are built on the assumption that a reasonable person makes a rational decision about the consequences of their criminal behavior prior to violating it. For this reason, criminal laws must provide *notice* about what is prohibited before the law is enforceable. There are no "secret" criminal laws.

Laws differ significantly from state to state. Throughout the United States, each state and the federal government criminalize different behaviors. Although this plethora of laws makes understanding America's legal systems more complicated, it is a bedrock principle of federalism. The United States is made up of fifty individual states, the federal government, and hundreds of tribal governments, each of which is free to define crimes as it sees fit (within constitutional boundaries). A state's criminal code often reflects its unique history, cultural makeup, and geography. Alaska is no exception. Alaska's criminal code reflects the relative youth of the state, its vast geographical footprint, and its dependence on resource extraction. For example, you will see that Alaskans have borrowed heavily from other jurisdictions and enacted distinct laws that reflect a series of unique value judgments about Alaska.

Although scholars disagree, generally speaking, Indian Tribes derive their police power from Congress and is limited to "Indian Country," a specific term that has been the subject to extensive litigation. Alaska has 256 federally recognized Indian Tribes, more than any other state. But Alaska Native Tribes do not reside on Indian Country, with one notable exception, the Metlakatla Indian Community. Tribal sovereignty, and a tribe's police powers, are complicated subjects and beyond the scope of this book.

Also, remember that *laws are not static*. As society changes, so do the laws that govern behavior. Evolving value systems naturally lead to modifying or deleting laws and regulations to support changing beliefs. Although a certain stability is essential to the enforcement of rules, occasionally the rules must change. Take for example Alaska's decision to implement criminal justice reform in 2016. With the passage of Senate Bill 91 (SB91), Alaska radically changed its criminal code. SB91 greatly reduced the use of cash bail, reduced jail sentences for most criminal offenses, and forced executive branch agencies to rely on alternatives to incarceration. *See* 2016 Alaska Sess. Laws ch. 36; *seealso Alaska Criminal Justice Commission*, Annual Report 2020. SB91 remained in effect for two years before the public demanded tougher enforcement of criminal laws. The Alaska Legislature largely repealed the criminal justice reform embodied in SB91 in 2019. *See* 2019 Alaska Sess. Laws ch. 4. The reasons for SB91 and its repeal are beyond the scope of this text, but it serves as a good reminder of how criminal laws can, and frequently do, change depending on public perception.

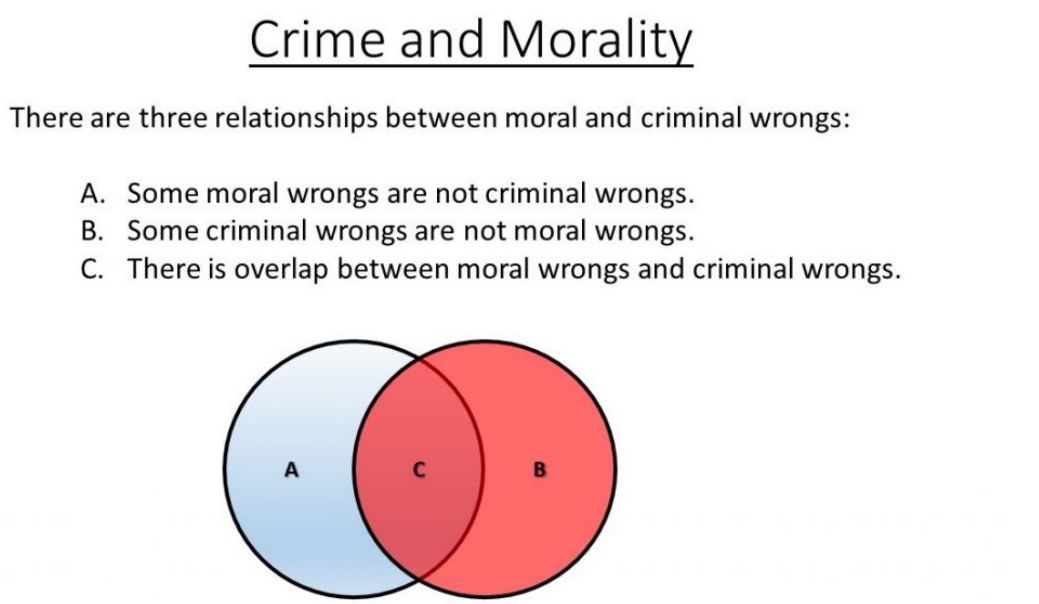
Try to maintain an open mind when reviewing the different and often contradictory laws outlined in this book. Law is not exact like science or math. Also try to become comfortable with the gray area, rather than viewing situations as black or white.

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1.2: Not All Crimes are Immoral; Not All Moral Wrongs are Crimes

Morality and criminal law frequently overlap. It is common to view a violation of criminal law as an immoral act. However, there is no universal moral code. While philosophers will continue to debate the definition of 'morality', we will focus on a more modest task. The criminal law does not punish every moral wrong. Instead, the relationship between crime and morality looks more like a *Venn* diagram.

Figure 1.1 – *Venn* Diagram showing the overlap between moral wrongs and criminal wrongs.



On one hand, we have moral wrongs (represented as "A") that are not necessarily criminal acts. For example, adultery is frequently considered immoral, but few believe such an act should give rise to criminal liability. Likewise, failing to help a small child drowning in a swimming pool may seem morally questionable, but the criminal law generally does not require a person to put themselves in harm's way, even if most of us believe that we should intervene if we can. On the other hand, we have criminal laws that may not, at first blush, implicate our collective morality (represented as "B"). For example, laws that criminally punish wasting big game meat in the field (AS 16.30.010) or criminal laws that mandate jail for driving without a proper license (AS 28.15.291) are generally not considered moral wrongs (beyond the moral failure to follow the law) but they are criminalized nonetheless. Finally, there are activities that society generally considers morally wrong and are also criminal law violations (represented as "C"). These acts include behaviors such as murder, sexual assault, and robbery. A significant portion of criminal laws is also immoral.

Most of us can agree that some acts should always be criminal – *e.g.*, execution murder, forcible rape, or robbery. Universal agreement exists that these acts should be outlawed, and individuals who commit these acts should be punished. People may disagree about the extent or type of punishment, but they generally do not disagree about the underlying conduct. Within the context of criminal law, we refer to these crimes as "*malum in se*." A crime is "*malum in se*" if it is "inherently evil." *See Kinney v. State*, 927 P.2d 1289 (Alaska App. 1996) (*citing* Wayne R. LaFave and Austin W. Scott, Jr., *Substantive Criminal Law* (1986), sec. 1.6(b), Vol. 1, p. 45.). *Mala in se* offenses are criminal behaviors that society universally considers to be wrong and morally unacceptable.

But the law criminalizes much more conduct than just murders, rapes, and robberies. Legislators routinely criminalize less dangerous (or non-dangerous) acts. Alaska, like most states, has criminalized drug possession, prostitution, and driving without a valid license. There is much debate as to whether this type of conduct is immoral. Under the law, these criminal acts are considered "*malum prohibitum*." A crime is "*malum prohibitum*" if the act is criminal because it violates the criminal law. A "*malum prohibitum*" offense is "not inherently evil [but is] wrong only because [it is] prohibited by the legislature." *See id.*

We will revisit the distinction between *malum in se* and *malum prohibita* in Chapter 4, but for now, the below chart helps summarize the difference.

Figure 1.2 – Chart comparing *malum in se* offenses and *malum prohibita* offenses.

Malum in Se	*Malum Prohibitum*
• Theft	• Hunting restrictions
• Murder	• Seat belt laws
• Kidnapping	• Building without a permit
• Arson	• Prohibited alcohol purchases
• Robbery	• Littering
• Sexual Assault	• Draft evasion

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1.3: Criminal Law and Criminal Procedure



UAA University Police Department officers John Chu, foreground, and Kevin Stevenson, background, simulate responding to a call on Cuddy Quad.

This book focuses on substantive criminal law, but it occasionally touches on issues of criminal procedure, so it is important to differentiate between the two. Whereas criminal law focuses on the community, criminal procedure focuses on the government.

Criminal law generally defines the rights and obligations of individuals in society. Some common issues in criminal law are the elements of specific crimes and the elements of various criminal defenses. Criminal law proscribes a citizen's conduct within the community – that is, criminal law regulates (limits) our conduct within society. Criminal law tells us what we cannot do; it does not tell us what we should do.

Criminal procedure generally concerns the enforcement of individuals' rights during the criminal process. Criminal procedure generally addresses the rights of the accused and the process involved in the investigation of crime, detention of individuals suspected of a crime, prosecution of criminal offenses, and the imposition of punishments. Criminal procedure regulates the authority of the government as it seeks to deprive its citizens of liberty. Examples of procedural issues are individuals' rights during police investigation (*Miranda*), arrest, filing of charges, trial, and appeal.

Example of Substantive Criminal Law Issues

Clara and Linda go on a shopping spree. Linda insists that they browse an expensive department store. Moments after they enter the lingerie department, Linda surreptitiously places a bra in her purse. Clara watches, horrified, but does not say anything even though a security guard is standing nearby. This example illustrates two issues of criminal law: (1) Which crime did Linda commit when she put the bra in her purse? (2) Did Clara commit a crime when she failed to alert the security guard to Linda's action? You learn the answers to these issues later in this textbook.

Example of Criminal Procedure Issues

Assume that Linda and Clara attempt to leave the store and an alarm is activated. Linda begins sprinting down the street. Colin, a police officer, just happens to be driving by with the window of his patrol car open. He hears the store alarm, sees Linda running, and begins shooting at Linda from the car. Linda is shot in the leg and collapses. Linda is treated at the hospital for her injury, and when she is released, Colin arrests her and transports her to the police station. He brings her to an isolated room and leaves her there alone. Twelve hours later, he reenters the room and begins questioning Linda. Linda immediately requests an attorney. Colin ignores this request and continues to question Linda about the reason the department store alarm went off. Whether Colin properly arrested and interrogated Linda are criminal procedure issues (the answers to which are beyond the scope of this book). However, this example illustrates one criminal law issue: did Colin commit a crime when he shot Linda in the leg in an effort to effectuate the arrest?

Figure 1.3 – Criminal Law and Criminal Procedure



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1.4: The Difference between Civil and Criminal Law

Law can be classified in a variety of ways. One of the most general classifications divides law into civil and criminal.[1] Civil law deals with private wrongs that are generally, but not always, redressed through monetary damages, for example, a lawsuit seeking damages after an automobile collision, family law, contracts, or wills. As this definition indicates, civil law is generally between individuals, not the government. If individuals need to resolve a civil dispute, this is called civil litigation, or a civil lawsuit. When the type of civil litigation involves an injury, the injury action is called a tort. Criminal law involves the punishment of individual wrongdoing.

Characteristics of Civil Litigation

It is important to distinguish between civil litigation and criminal prosecution. Civil and criminal cases share the same courts, but they have very different goals, purposes, and results. Sometimes, one set of facts gives way to a civil lawsuit *and* a criminal prosecution. This does not violate double jeopardy (the Fifth Amendment protection against multiple punishments for the same offense) and is not uncommon.

Parties in Civil Litigation

In civil litigation, an injured party sues to receive a court-ordered remedy, such as money, property, or some sort of performance. Anyone who is injured—an individual, corporation, or other business entity—can sue civilly. In a civil litigation matter, the injured party that is suing is called the **plaintiff.** A plaintiff must hire and pay for an attorney or represent themselves. While the term plaintiff is normally associated with civil litigation, in a criminal prosecution, the government may also be referred to as the plaintiff. Plaintiff simply refers to the person or entity initiating the lawsuit. The person or entity being sued is called the **defendant.** The defendant can be any person or thing that has caused harm, including an individual, corporation, or other business entity. A defendant in civil litigation matter must hire an attorney or represent themselves. The right to indigent counsel does not apply in civil litigation, so a defendant in civil litigation who cannot afford an attorney must represent themselves. There are significant rules, exceptions, and exclusions to civil law and related litigation. Although there can be some overlap in certain circumstances, civil law is beyond the scope of this book.

Characteristics of a Criminal Prosecution

A criminal prosecution takes place when the government has probable cause to believe a defendant has violated a federal or state criminal statute, or in some jurisdictions, when prosecuting authority has probable cause to believe that a defendant committed a common-law crime, a tribal law violation, or a local ordinance. Statutes and common-law crimes are discussed in Chapter Two, “Sources of Law”. Probable cause is the bare minimum quantum of proof necessary to initiate a criminal prosecution. It is unethical for a prosecutor to file criminal charges against a defendant unless the prosecutor has probable cause to believe the defendant has committed the crime. *See* Alaska Rules of Professional Conduct 3.8(a) (2021). The different burdens of proof are discussed in more detail in the next section.

Parties in a Criminal Prosecution

The government initiates all criminal prosecutions. A private citizen does not have a right to bring a private criminal prosecution. *See Cooper v. District Court*, 133 P.3d 692, 697-700 (Alaska App. 2006). If the defendant commits a federal crime, **the United States of America** pursues criminal prosecution. If the defendant commits a state crime, the state government, often called the **State** pursues the criminal prosecution. If the defendant is accused of violating a local ordinance, the local political subdivision (e.g., county, municipality, borough, etc.) initiates the prosecution. The suspect charged with a crime is called the **defendant** and can be an individual, corporation, or other business entity.

The attorney who represents the government controls the criminal prosecution. In a federal criminal prosecution, this is the **United States Attorney**. The United States Attorney is appointed by the President of the United States and subject to Senate confirmation. In a state criminal prosecution, this is generally a state prosecutor or a **district attorney**. In most jurisdictions, the prosecutor works for an elected official who represents the county where the defendant allegedly committed the crime. In Alaska, all district attorneys are appointed by, and work for, the Alaska Attorney General. The **Alaska Attorney General** is not elected to office but instead appointed by the Governor of Alaska and is subject to confirmation by the Alaska Legislature. Thus, Alaska models the

federal system of appointed prosecutors. Further, unlike most states, Alaska state prosecutors have *exclusive* felony jurisdiction. While several Alaska communities have municipal prosecutors who prosecute violations of city ordinances, only a representative of the Alaska Attorney General may prosecute a felony offense.

Applicability of the Constitution in a Criminal Prosecution

All criminal defendants are protected by several specific provisions of both the federal and Alaska constitutions, most of which implicate criminal procedure, not substantive criminal law. For example, a criminal defendant has the right to remain silent, the right to due process of law, the right to be free from double jeopardy, in addition to several others. A complete list of the rights guaranteed by either constitution is beyond the scope of this book, but it is important to understand that these constitutional protections dramatically impact criminal prosecutions. Although a civil litigant has some constitutional protections, they do not cover the same breadth of protection.

For example, the Sixth Amendment of the U.S. Constitution guarantees a criminal defendant "the assistance of counsel." This guarantee has been interpreted to mean that all criminal defendants, regardless of wealth, are entitled to be represented by an attorney. If a criminal defendant is facing incarceration, the government must provide the defendant with a court-appointed attorney if the defendant is unable to afford one. *See Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963). Generally, attorneys provided by the government are called **public defenders** (18 U.S.C., 2010; AS 18.85.010 *et. seq*.). Although criminal defendants are entitled to hire their own private attorney, the government is constitutionally required to appoint one to indigent defendants if the accused faces jail. *See e.g., Alabama v. Shelton*, 535 U.S. 654, 661-62 (2001). This is a significant difference from a civil litigation matter, where both the plaintiff and the defendant must hire their own private attorneys or represent themselves.

Purpose of a Criminal Prosecution

Another substantial difference between civil litigation and criminal prosecution is their respective purposes. One of the central purposes of civil litigation is to compensate the plaintiff for injuries. In contrast, the purpose of a criminal prosecution is to hold the accused accountable for his or her criminal conduct. Although both seek to achieve justice – the former seeks *private* justice, while the latter seeks *public* justice. The goals of criminal prosecution are explicitly outlined in the Alaska Constitution.

Article 1, section 12 of the Alaska Constitution states, "[The Criminal Justice System] shall be based upon the following: the need for protecting the public, community condemnation of the offender, the rights of the victims of crime, restitution from the offender, and the principles of reformation." These goals form the rationale for **criminal punishment**, which will be discussed shortly.

Notice that injury and a victim are not *necessary* components of a criminal prosecution because punishment is objective; the victim is frequently society in general. Thus, behavior can be criminal even if it is essentially harmless. Society may criminalize conduct even if it does not result in a tangible loss. We will explore this phenomenon in subsequent chapters.

Examples of Victimless and Harmless Crimes

Steven is angry because his friend Bob broke his skateboard. Steven gets his gun, puts a silencer on it, and drives to Bob's house. While Steven is driving, he exceeds the speed limit on three different occasions. Steven arrives at Bob's house and hides in the bushes by the mailbox and waits. After a short while, Bob opens the front door and walks to the mailbox. Bob gets his mail, turns around, and begins walking back to the house. From the shadows of the bushes, Steven shoots at Bob three different times. Each time he misses and the bullets land harmlessly in the dirt. Bob is oblivious to the entire situation. He does not hear the shots because of the silencer.

In this example, Steven has committed several crimes: (1) If Steven does not have a special permit to own a silencer for his gun, he has committed third-degree weapons misconduct (a felony); (2) Steven committed a violation (called an infraction) each time he exceeded the speed limit; (3) Each time Steven shot at Bob he committed the crime of attempted murder. Notice that for all three crimes Steven did not commit any discernible harm, and in fact, the first two did not have an individual victim. Common sense, however, tells us that Steven should be held accountable (punished) for his actions.

Table 1.1 – Comparison of Criminal Prosecution and Civil Litigation

Feature	Criminal Prosecution	Civil Litigation
Initiator of lawsuit	Government	Plaintiff
Attorney for the initiator	Prosecutor	Private attorney
Attorney for the defendant	Private attorney or public defender	Private attorney
Constitutional protections	Yes	Few

Law and Ethics: The O. J. Simpson Case

Two Different Trials—Two Different Results

O. J. Simpson was prosecuted criminally and sued civilly for the murder and wrongful death of victims Ron Goldman and his ex-wife, Nicole Brown Simpson. In the criminal prosecution, which came first, the US Constitution provided O. J. Simpson with the right to a fair trial (due process) and the right to remain silent (privilege against self-incrimination). In addition, the prosecution had the burden of proving him guilty beyond a reasonable doubt. O. J. Simpson did not have to testify. O. J. Simpson was acquitted, or found not guilty (which is not the same as innocent), in the criminal trial (Linder, D., 2010).

In the subsequent civil lawsuit, the plaintiffs had the burden of proving liability by a preponderance of the evidence, which is 51–49 percent, and O. J. Simpson was compelled to testify. O. J. Simpson was found liable in the civil lawsuit. The jury awarded $8.5 million in compensatory damages to Fred Goldman (Ron Goldman's father) and his ex-wife Sharon Rufo. A few days later, the jury awarded punitive damages of $25 million to be shared between Nicole Brown Simpson's children and Fred Goldman (Jones, T. L., 2010).

1. Explain the difference between "not guilty" and "innocent."
2. Do you think it is ethical to give criminal defendants more legal protection than civil defendants? Why or why not?
3. Why do you think the criminal trial of O. J. Simpson took place before the civil trial?

Check your answers to these questions using the answer key at the end of the chapter.

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1. A third classification exists—administrative law, which deals with the enforcement of government regulations, for example, those governing social security, the environment, and mining, to name only three of the multitude of areas in which governments have promulgated regulations. ↵

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1.5: The Burden of Proof

One significant difference between civil litigation and criminal prosecution is the **burden of proof** necessary to hold the defendant responsible for his or her conduct. A *failure* to meet the burden of proof means that the plaintiff or prosecutor loses their case. In this section, you learn the burden of proof for the plaintiff, prosecution, and defendant. We will also explore different types of evidence and evidentiary rules that can change the outcome of a trial.

Definition of the Burden of Proof

The burden of proof is a party's responsibility to prove a disputed charge, allegation, or defense. The burden of proof has two components: the **burden of production** and the **burden of persuasion**. The burden of production is the obligation to present evidence to the judge or jury. The burden of persuasion is the duty to convince the trier of fact, the judge or jury, to a certain standard, such as beyond a "reasonable doubt." This standard is simply a measuring point and is determined by examining the quantity and quality of the evidence presented. "Meeting the burden of proof" means that a party has introduced enough compelling evidence to satisfy the standard defined in the burden of persuasion.

The plaintiff or prosecutor generally has the burden of proving the case, which means they must prove each essential element of a crime. Under some circumstances, the defendant may have the burden of proving the existence of a defense. The trier of fact determines whether a party met the burden of proof at trial. The trier of fact would be a judge in a nonjury or **bench trial**. In a criminal case, the trier of fact is almost always a jury because of the right to a jury trial in the Sixth Amendment. Jurors are not legal experts, so the judge must explain the burden of proof through **jury instructions**.

Burden of Proof in a Civil Case

In most civil lawsuits, a plaintiff must prove the defendant committed the alleged act by a **preponderance of the evidence**. A preponderance of evidence simply means something is more likely true than not true. *See* Alaska Civil Pattern Jury Instruction 02.04. The law refers to something is more likely true than not true if the jury believes that "there is a greater than 50 percent chance that it is true." Thus, if the jury believes that something is 51% likely, then the jury is entitled to find in favor of the plaintiff. A preponderance of evidence is a fairly low standard, but the plaintiff must still produce more and better evidence than the defense. If the plaintiff offers evidence of questionable quality, the judge or jury can find that the burden of proof is not met and the plaintiff loses the case.

The defendant's burden of proof when proving a defense in a civil case is also a preponderance of evidence. For example, in the O. J. Simpson civil case discussed in the previous section, O. J. Simpson failed to meet the burden of proving the defense of *alibi*. The defendant does not always have to prove a defense in a civil case. If the plaintiff does not meet the burden of proof, the defendant is victorious without having to present *any evidence at all*.

Burden of Proof in a Criminal Prosecution

Criminal prosecution requires a much higher burden of proof. In a criminal trial, the government must prove each essential element **beyond a reasonable doubt**. It is impossible to put a mathematical equation on this phrase. What constitutes proof beyond a reasonable doubt is evidence that is sufficiently trustworthy and overcomes "any reasonable doubt about the defendant's guilt." Proof beyond a reasonable doubt is not proof of an absolute certainty. Instead, it is a firm, unwavering belief in the defendant's guilt. Judges have struggled with the phrase for decades. As Chief Judge Mannheimer of the Alaska Court of Appeals recently stated,

The concept of proof "beyond a reasonable doubt" may be familiar to lawyers and judges, but even lawyers and judges would concede that this phrase is not self-explanatory. Because the phrase "beyond a reasonable doubt" does not have a universally understood meaning, the Alaska committee on criminal pattern jury instructions developed Criminal Pattern Jury Instruction 1.06 to explain this concept to jurors.

Roberts v. State, 394, P.3d 639, 643 (Alaska App. 2017). The current pattern jury instruction provides, in relevant part,

What is a reasonable doubt? It is a doubt in your mind about the defendant's guilt that arises from the evidence presented, or from a lack of evidence. A reasonable doubt is based on reason and common sense. A defendant must never be found guilty based on mere suspicion, speculation, or guesswork.

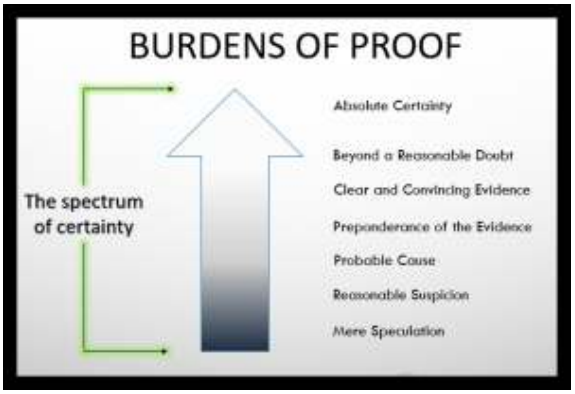
What is proof beyond a reasonable doubt? It is the highest level of proof in our legal system. It is not enough that you believe a defendant is probably or likely guilty or even that the evidence shows a strong probability of guilt; the law requires more. Proof beyond a reasonable doubt is proof that overcomes any reasonable doubt about the defendant's guilt.

The prosecution is not required to prove guilt beyond all possible doubt, for it is rarely possible to prove anything to an absolute certainty. If, after careful and impartial consideration of the evidence and the law, you do not have a reasonable doubt, then you must find the defendant guilty. If, on the other hand, you think the prosecution did not prove every element of the offense charged beyond a reasonable doubt, then you must find the defendant not guilty.

See e.g., Alaska Criminal Pattern Jury Instruction 1.06.

The law uses numerous burdens of proof, depending on the circumstance. For example, a search warrant may only be issued upon a finding of **probable cause** that evidence of a crime will be found in the place to be searched. A person suspected of a crime may only be searched for weapons if police have **reasonable suspicion** that the suspect is armed and dangerous. Finally, before the government may terminate parental rights, the government must demonstrate by **clear and convincing evidence** that the parent is a danger to the child. While we won't spend a significant amount of time exploring these different burdens, it is important to remember that all criminal defendants are **presumed innocent** until the government proves the defendant guilty beyond a reasonable doubt. *See in re Winship*, 397 U.S. 364 (1970). The U.S. Constitution guarantees the presumption of innocence as a central component of due process of law. If even a slight chance exists that the defendant is innocent, the case most likely lacks convincing and credible evidence, and the jury should acquit the defendant.

Figure 1.4 Diagram of the Spectrum of Certainty



Although as a general rule, the burden in a criminal case rests with the prosecution, under some circumstances, the defendant may have the burden when asserting certain criminal defenses. This occurs in two situations. First, when the defendant raises a defense called an **affirmative defense**, the defendant must prove the defense by a preponderance of the evidence. *See e.g.*, Alaska Statute 11.81.900(b)(2). Second, when a defendant raises a **defense**, the defendant must meet the burden of production. For example, Alaska describes this circumstance as requiring the defendant to produce "some evidence" of self-defense before arguing that he was justified in using force against another person. this is a very low threshold. Once the defendant meets his burden of production, the prosecution is then required to meet the burden of persuasion by disproving the defense beyond a reasonable doubt. If the prosecution does not meet its burden of proof, the defendant must be acquitted without having to present any evidence at all. Other states have similar rules, although they may require different burdens of proof under their own rules.

Example of a Failure to Meet the Burden of Proof

Ann is on trial for first-degree murder. The only key piece of evidence in Ann's trial is the murder weapon, which was discovered in Ann's dresser drawer during a law enforcement search. Before Ann's trial, the defense makes a motion to suppress the murder weapon evidence because the search warrant in Ann's case was signed by a judge who was inebriated and mentally incompetent. The defense is successful with this motion, and the judge rules that the murder weapon is inadmissible at trial. The prosecution decides to proceed anyway. If there is no other convincing and credible evidence of Ann's guilt, Ann does not need to put on a defense in this case. The prosecution will fail to meet the burden of proof and Ann will be acquitted. The jury must begin its deliberations with the presumption that Ann is innocent of the murder charge.

Direct and Circumstantial Evidence

Evidence is information that is used to prove or disprove a disputed fact. This is true in all types of law. The purpose of evidence is to ascertain the truth. To this end, the law uses two primary classifications to describe evidence: **direct evidence** and **circumstantial evidence**. Both direct and circumstantial evidence are valid methods of proving a disputed fact. The law does not treat either type of evidence as more powerful than the other.

Direct evidence proves a fact based on personal knowledge or observation. For example, eyewitness testimony is often direct evidence. An eyewitness testifying that he or she saw the defendant commit the crime directly proves that the defendant committed the crime. Common examples of direct evidence are eyewitness testimony, a defendant's confession, or a video or photograph of the defendant committing the crime. Criminal cases relying on direct evidence are easier to prove because the trier-of-fact generally believes direct evidence is more reliable (*i.e.*, accurate). However, direct evidence can be unreliable and is not necessarily preferable to circumstantial evidence. For example, if an eyewitness is mistaken in their identification, the witness's testimony lacks the evidentiary value of reliable circumstantial evidence such as DNA evidence.

Circumstantial evidence, conversely, proves a fact through inference and not on personal knowledge or inference. Fingerprint evidence is usually circumstantial. The defendant's fingerprint at the scene of the crime directly proves that the defendant placed a fingerprint at that location. It indirectly proves that the defendant was present at the scene during the time of the crime. Common examples of circumstantial evidence are fingerprint evidence, DNA evidence, and blood evidence. Criminal cases relying on circumstantial evidence are viewed as more difficult for the prosecution because circumstantial evidence does not directly tie the defendant to the criminal act. However, circumstantial evidence such as DNA evidence can be very powerful and compelling.

Both direct evidence and circumstantial evidence can be true or false – that is, the *believability* of evidence is not determined by its classification. Both direct and circumstantial evidence are valid methods of proving a disputed fact. The law does not treat either type of evidence as more powerful than the other. It is the trier of fact (*e.g.*, the judge or jury) that interprets and weighs the evidence.

Table 1.2 – Comparison of Circumstantial and Direct Evidence in a Burglary Case

Evidence	Circumstantial	Direct
Fiber from the defendant's coat found in a residence that has been burglarized	Yes	No—directly proves **presence at the scene**, not that the defendant committed burglary
GPS evidence indicating the defendant drove to the burglarized residence	Yes	No—same explanation as fiber evidence
Testimony from an eyewitness that she saw the defendant go into the backyard of the burglarized residence	Yes	No—could prove trespassing because it directly proves **presence at the scene**, but it does not directly prove burglary
Surveillance camera footage of the defendant purchasing burglar tools	Yes	No—does not directly prove they were used on the residence
Cell phone video of the defendant burglarizing the residence	No	Yes—directly proves that the defendant committed the crime
Witness testimony that the defendant confessed to burglarizing the residence	No	Yes—directly proves that the defendant confessed to the crime
Pawn shop receipt found in the defendant's pocket for items stolen from the residence	Yes	No—directly proves that the items were pawned, not stolen

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1.6: Classification of Crimes

Crimes can be classified in many ways, as determined by individual legislatures. Crimes can be grouped by subject matter. For example, crimes like assault, robbery, or sexual assault tend to injure another person's body. These crimes tend to be classified as "crimes against the person." If a crime tends to injure a person by depriving him or her of property or by damaging property, it tends to be classified as a "crime against property." These classifications are basically for convenience and are not imperative to the study of substantive criminal law. As you will see in subsequent chapters, individual crimes are classified in broad terms for organizational convenience.

More important and substantive is the classification of crimes according to the severity of punishment. This is called **grading.** Grading is simply another way of describing a crime's seriousness. Legislatures generally classify crimes into three categories: felonies, misdemeanors, and infractions. Often, the culpable mental state or the type of injury affects a crime's grading. *See* Alaska Statute 11.81.250. *Mala in se* crimes, which are inherently evil, like murder are generally graded higher than *malum prohibitum* crimes, which are crimes not inherently evil, but rather represent conduct that is deemed socially unacceptable, for example, prostitution, gambling, and drug crimes.

Felonies

Felonies are the *most serious* crimes. They are either supported by a heinous intent, like the intent to kill, or accompanied by an extremely serious result, such as loss of life, grievous injury, or destruction/loss of property. Felonies are serious, so they are graded the highest, and all sentencing options are available. Depending on the jurisdiction and the crime, the sentence could be capital punishment, prison time, a fine, or alternative sentencing such as probation, community service, or home confinement. Potential consequences of a felony conviction also include the inability to vote, own a firearm, or even participate in certain careers. These are generally referred to as the **collateral consequences** of a felony conviction.

In Alaska, the state legislature has four classifications of felony crimes: Unclassified, Class A, Class B, and Class C. Each felony offense is classified in one of these groups, which dictates the minimum and maximum sentences available to the sentencing judge. *See* AS 11.81.250.

Misdemeanors

Misdemeanors are less serious offenses than felonies, either because the intent requirement is less culpable or because the injury or result is less serious. Misdemeanors are usually punishable by jail time of one year or less, a smaller fine, or alternative sentencing like probation, community service, or home confinement. Similar to felonies, in Alaska, there are two classes of misdemeanors: Class A misdemeanors and Class B Misdemeanors. Generally, Class A misdemeanors carry a maximum term of imprisonment of up to 1 year in jail, whereas Class B misdemeanors carry a maximum term of 90 days in jail.

In most states (but not Alaska), incarceration for a misdemeanor is served in jail rather than in prison. The difference between jail and prison is that cities and counties operate jails, whereas the state or federal government operates prisons, depending on the crime. The restrictive nature of the confinement also differs between jail and prison. Jails are for defendants who have committed less serious offenses, so they are generally less restrictive than prisons. In Alaska, the Department of Corrections, an executive-branch agency, operates all prisons and jails within the state. When a convicted person is ordered to a term of incarceration, the person is ordered to the "care and custody" of the Department of Corrections (DOC). It is up to DOC where the person will be housed, not the judge.

Felony-Misdemeanors

Felony-misdemeanors are crimes that the government can prosecute and punish as either a felony or a misdemeanor, depending on the particular circumstances accompanying the offense. The discretion of whether to prosecute the crime as a felony or misdemeanor usually belongs to the prosecutor, who makes the charging decision. For example, if a person commits the crime of driving under the influence, the crime may be charged as a misdemeanor, unless the person has at least two prior DUI convictions. If the person has multiple prior convictions, the prosecutor may choose to charge the person with felony DUI (a class C felony) instead of a misdemeanor. *See e.g.*, AS 28.35.030(n).

Infractions

Infractions, which can also be called **violations,** are the least serious offenses and include minor offenses such as jaywalking and motor vehicle offenses that result in a simple traffic ticket. Infractions are generally punishable by a fine or alternative sentencing such as traffic school. The law generally does not authorize the imposition of jail as punishment for violations. Infractions are generally not referred to as "crimes," since jail is not authorized.

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1.7: The Purposes of Punishment

"Laws without enforcement are just good advice."

Quote often attributed to Abraham Lincoln

The primary purpose of criminal law is punishment. Through the enforcement of criminal law, society seeks to hold offenders accountable for their individual misdeeds, protect society, and change future behavior. Criminal punishment seeks to balance these competing principles: on one hand, the idea of reformation – the offender should be reformed and rehabilitated. On the other hand, society has a vested responsibility to protect the public. These twin goals are constantly in conflict.

Historically theories of punishment have proposed five purposes for criminal sanctions: deterrence, incapacitation, rehabilitation, restitution, and retribution. Taken collectively, these principles highlight the tension of criminal sanctions: to successfully reduce **recidivism** (that is, reduce the likelihood a particular offender will re-offend) and keep society safe, but also meaningfully reintegrate the offender into society.

Specific and General Deterrence

Deterrence aims to prevent future crime by frightening the defendant or the public. The two types of deterrence are specific and general deterrence. **Specific deterrence** applies to an individual defendant. When the government punishes an individual defendant, he or she is theoretically less likely to commit another crime because of fear of another similar or worse punishment. **General deterrence**, on the other hand, applies to the public at large. When the public learns of an individual defendant's punishment, the public is theoretically less likely to commit a crime because of fear of the punishment the defendant experienced. With general deterrence, the purpose of the sanction is not necessarily to punish the individual defendant, but instead to make an "example" out of the defendant to deter others from committing a similar offense. When the public learns, for instance, that an individual defendant received a life sentence for the crime of murder, this knowledge hopefully inspires a deep fear of criminal prosecution and deters others from committing murder.

Incapacitation

Incapacitation (sometimes referred to as **isolation**) prevents future crime by removing the defendant from society. Incapacitation is society's recognition that some offenders cannot be deterred or rehabilitated. The rationale for incapacitation is an acknowledgment that, at least for the time the person is incarcerated, the person will not harm other members of the community. Incapacitation can include incarceration, house arrest, or capital punishment. Capital punishment (the **death penalty**) is the ultimate form of incapacitation, which is why it is considered the most serious punishment available within criminal law. It cannot be undone. We will explore capital punishment in more detail in subsequent chapters, but to date, the Alaska Legislature has not authorized capital punishment (although it has explored the possibility several times).

Rehabilitation

Rehabilitation seeks to prevent future crime by reforming a defendant's behavior. Examples of rehabilitation can include educational and vocational programs, treatment center placement, and counseling. The court frequently combines rehabilitation with incarceration or with probation or parole. Offenders must participate in rehabilitative programs in combination with probation, and in addition to, or instead of, incarceration. Alaska Therapeutic Court is an example of a criminal sanction that primarily focuses on rehabilitation. Therapeutic courts can operate as an alternative to traditional incarceration and effectively lower recidivism. To learn more about Alaska Therapeutic Courts *see* www.courts.alaska.gov/therapeutic.

Restitution

The goal of **restitution** places the emphasizes repairing the harm caused to the victim. Restitution is meant to make the victim or community "whole." Restitution can include court orders obligating the criminal defendant to pay the victim for any harm suffered. In this vein, restitution may resemble a civil damages award. Restitution can be for physical injuries, loss of property or money, and rarely, emotional distress (in the form of future counseling costs). It can also be a financial reimbursement to cover some of the costs of the criminal prosecution and punishment.

Retribution

The theory of **retribution** seeks to prevent future crime by demanding a sanction against the defendant regardless of its rehabilitative impact. When victims or society discover that the defendant has been adequately punished for a crime, they may achieve a certain satisfaction that our criminal justice system is working effectively. Retributive theories seek to enhance society's overall faith in the criminal justice system by eliminating the desire for personal avengement (in the form of vigilante justice, for example). Retribution seeks to ensure offenders receive a punishment comparable to the seriousness of the underlying crime.

In 1981, the Alaska Supreme Court found that the "use of retribution as a goal of sentencing is inconsistent" with the Alaska Constitution. *See Kelly v. State*, 622 P.2d 432, 435 (Alaska 1981). Thus, at least in Alaska, a judge may not impose a criminal punishment against a defendant to satisfy society's need for revenge.

Instead, Alaska recognizes that some criminal punishments are appropriate, not as retribution, but to reflect the community's condemnation of the behavior and to reaffirm societal norms. Put another way, some circumstances require a substantial punishment (irrespective of how favorable a defendant's background may be) because the criminal behavior itself represents a serious deviation from societal norms. Punishment is necessary to uphold legal and moral standards.

Keep this distinction in mind as we discuss Alaska's statutory sentencing criteria next.

Alaska's Statutory Sentencing Criteria

Once convicted, a defendant faces a criminal **sentencing hearing** by which the court formally punishes a defendant, normally in the form of incarceration, monetary fines, community supervision, or restitution. Sentencing is an inherently discretionary judicial function, and when imposing a criminal sentence, the sentencing court has tremendous discretion in determining the appropriate sentence.

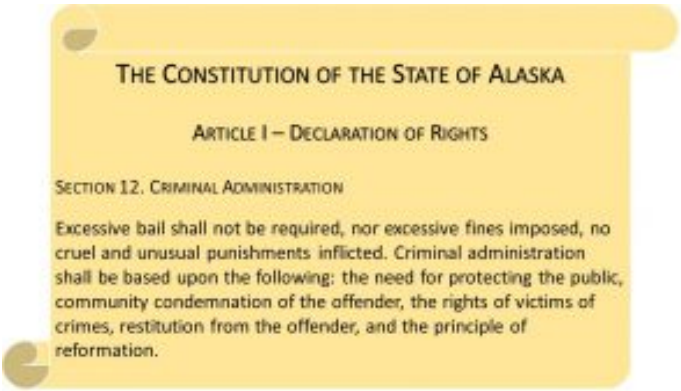
Alaska, like most states, has codified not only the authorized punishments but also the *purposes* of criminal punishment to ensure a rational understanding of the imposed criminal sanctions. In the eyes of the law, understanding *why* punishment is imposed is just as important as understanding what the precise sentence is.

In Alaska, these codified sentencing considerations[1] include:

- The seriousness of the present offense in relation to other offenses
- The defendant's prior criminal history and the likelihood of rehabilitation
- The need for confinement to prevent harm to the public
- The circumstances of the offense and extent of harm to the victim or danger to public safety or public order
- Deterrence of the offender and others
- Community condemnation and reaffirmation of societal norms
- Restoration of the victim and the community.

These sentencing goals are of constitutional dimension. These principles are included within the Alaska Constitution Declaration of Rights. *See* Alaska Const. art. I., § 12.

Figure 1.5 Alaska Constitution – Article I, Section 12.



THE CONSTITUTION OF THE STATE OF ALASKA

ARTICLE I – DECLARATION OF RIGHTS

SECTION 12. CRIMINAL ADMINISTRATION

Excessive bail shall not be required, nor excessive fines imposed, no cruel and unusual punishments inflicted. Criminal administration shall be based upon the following: the need for protecting the public, community condemnation of the offender, the rights of victims of crimes, restitution from the offender, and the principle of reformation.

The court is obligated to consider each sentencing factor independently but is free to prioritize factors differently. Notice how these factors highlight a tension between the rights of a criminal defendant and the rights of a crime victim.

The More You Know…

At the time the Alaska Constitution was adopted, Article 1, section 12 read,

Section 12 Excessive Punishment. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Penal administration shall be based on the principle of reformation and the need for protecting the public.

In 1994, in an effort to strengthen crime victims' rights within the criminal justice system, the Alaska Legislature proposed two constitutional amendments, both surrounding victims' rights. First, the legislature sought to broaden the principles of criminal administration by amending Art. 1, § 12, to include language regarding victims' rights. *See* Figure 1.5. Second, the legislature sought the adoption of a new provision that specifically enumerated the rights of crime victims within the criminal justice system. *See* Art. 1, § 24.

Both constitutional amendments overwhelmingly passed during the 1994 general election (86% for adoption; 14% against adoption). As a result, sentencing courts ought to prioritize the need for protecting the public and the rights of the victims over the defendant's reformation.

Presumptive Sentencing

General punishment decisions are normally left to the legislative branch. Courts rarely second-guess the legislative decision about *how* to punish. In Alaska, the legislature has adopted a presumptive sentencing scheme in an effort to eliminate unjustified disparity in criminal punishments and attain reasonable uniformity in criminal sentences. AS 12.55.005. Presumptive sentencing, as the name implies, represents the *presumed* penalty for a "typical" offender who commits the "typical" offense. As you can imagine, what constitutes a "typical offender" or a "typical offense" is subject to significant debate.

Presumptive sentencing is a sentencing scheme that creates a statutory maximum sentence and then establishes a presumptive prison range within the statutory maximum based on the offender's criminal history. The presumptive range increases incrementally depending on the offense classification and the offender's prior *felony* convictions. Recall that the Alaska Legislature has broken felony crimes into four classifications: Unclassified, Class A, Class B, and Class C. The legislature has established a maximum penalty for each classification. Figure 1.6, below, sets forth a simplified sentencing chart outlining Alaska's presumptive sentencing scheme. As you can see, an offense being classified as a **felony sex offense** dramatically increases the applicable sentencing range. AS 12.55.155(i).

Figure 1.6 Alaska Presumptive Sentencing Scheme

Presumptive Sentencing for Felony Crimes in Alaska – AS 12.55.125

Felony Classification	First Felony		Second Felony		Third or more Felony		Max
	General	Enhanced[1]	No prior sex felony conviction	One prior sex felony conviction	Less than two prior sex felony convictions	Two prior sex felony convictions	
Class A sex felony	15-30	20-30	25-35	30-40	35-50	Presumptive 99	99
Class A non-sex felony	4-7	7-11	10-14		15-20		20
Class B sex felony	5-15		10-25	15-30	20-35	Presumptive 99	99
Class B non-sex felony	1-3	2-4	3-7		6-10		10
Class C sex felony	2-12		8-15	12-20	15-25	Presumptive 99	99
Class non-sex felony	0-2		2-4		3-5		5

[1] Certain offenders are subject to a higher presumptive range due to the "special circumstances" surrounding the offense, e.g., the offender possessed a firearm, used a dangerous instrument, or caused serious physical injury.

Here is an example: let's assume Sam is convicted of First-Degree Robbery, a Class A felony offense. AS 11.41.500(b). Let's also assume that Sam has two prior felony convictions. Using the sentencing chart in Figure 1.6, you can see that a Class A non-sex felony offense has a maximum sentence of 20 years. Given that Sam has two prior felony convictions and has been convicted of a Class A felony, he faces a presumptive term of 10 to 14 years. Thus, the sentencing judge's discretion is constrained by the presumptive sentencing range – the court must impose a term of imprisonment somewhere between 10 and 14 years absent exceptional circumstances.

At sentencing, the judge must impose a **definite term** of incarceration within the presumptive range unless certain facts – referred to as aggravating and mitigating factors – are established. Sentencing judges may not increase a term of imprisonment above the presumptive range absent an aggravating factor, and likewise, judges may not impose a term of imprisonment below the presumptive range unless a mitigating factor is proven. AS 12.55.155.

Alaska uses a **determinate sentencing** system, that requires the offender to be placed in the custody of the Alaska Department of Corrections for a definite length of time. If authorized, an offender may be eligible for early release from prison due to mandatory or discretionary parole, both of which are determined post-incarceration by the Alaska Parole Board. Unlike some states, Alaska has not adopted an **indeterminate sentencing** scheme – that is, a scheme where the sentencing court imposes a sentencing *range* and the precise term of imprisonment is determined by a separate body, like the parole board, based on its judgment of whether the offender has been rehabilitated or has served an adequate term of imprisonment.

Misdemeanors and unclassified felonies are not subject to presumptive sentencing. Such crimes are generally subject only to a statutory maximum sentence and, if applicable, a statutory mandatory minimum. For these crimes, the sentencing judge may impose any sentence up to the statutory maximum, subject only to any applicable statutory minimum term (or special circumstances) that may apply.

The law treats a "presumptive" sentence much differently than a "mandatory minimum". A **mandatory minimum** term is the least possible sentence that can be imposed and represents the legislative's assessment of how much prison time should be imposed even when the defendant's background is extremely favorable. A presumptive term, on the other hand, represents the legislature's judgment as to the appropriate sentence for a typical (average) felony offender (*i.e.*, an offender with a typical background who commits a typical offense).

Take-Away

Criminal laws do not exist in a vacuum, nor do they exist without purpose. Society criminalizes behavior to justify a criminal sanction. Society wants to hold offenders accountable while simultaneously changing future behavior. An in-depth exploration of the various theories of punishment and whether they are effective are beyond the scope of this text. For example, there is good reason to believe that Alaska's rejection of retribution as a valid sentencing goal is simply a legal fallacy. One central principle of punishment is that sanctions ought to be proportional to the harm caused. Yet, modern retribution theorists argue that society's over-reliance on notions of deterrence, rehabilitation, and incapacitation is producing much more severe harm than if it simply focused more clearly on "just deserts". In general, society continues to impose more punitive criminal sentences *because* it refuses to embrace a deserts theory of punishment, and the concept of proportionality that it assumes. That debate, however, is for a different day.

Likewise, sentencing law is a complex area and its mastery is not attainable based solely on the description contained herein. Even though sentencing is a discretionary function, numerous statutes govern (and limit) individual sentencing decisions. This chapter only highlights its overarching schematic design. As discussed, incarceration is not the only sanction available to a sentencing judge. The court has the authority to impose alternatives, such as monetary fines, community supervision, house arrest, community work service, or asset forfeiture. AS 12.55.015. But a complete discussion of sentencing, incarceration, and possible alternatives are beyond the scope of this text and not essential to a functional understanding of substantive criminal law.

That said, as you explore the various acts that constitute criminal behavior consider several broader questions: *why* does society punish, *what* are the natural tensions that exist, and *what* are the competing roles of the different branches of government in criminal punishments?

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1. In practice, the sentencing factors are routinely referred to as the *Chaney* criteria, which refer to the legal opinion that originally announced the relevant factors a sentencing court may consider when formulating an appropriate punishment. *See State v. Chaney*, 477 P.2d 441, 443 (Alaska 1970). The Alaska Legislature subsequently codified the sentencing goals (and others) in AS 12.55.005. ↵

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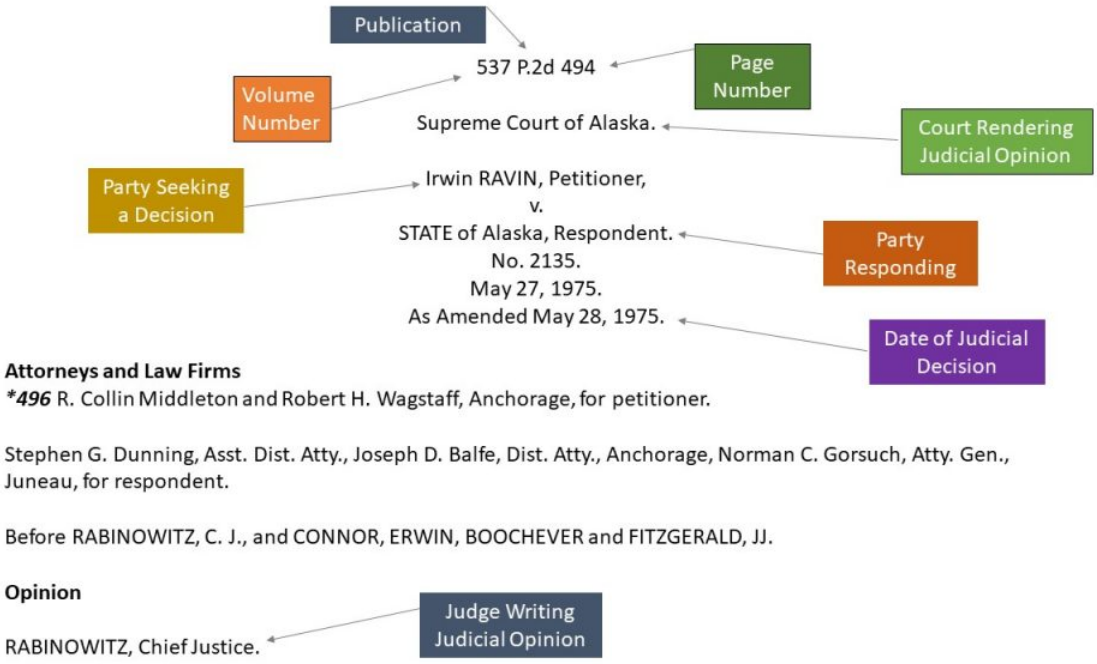
1.8: Case Method (Case Briefing)

Case law is a significant source of criminal law. We will explore Sources of Law shortly, but for now, remember that when a judge rules on the facts of a particular case, they create **case law**. Case law is the application of the law to a particular set of facts.

Case Citation

Cases must be published to become case law. A published case is also called a judicial opinion. This textbook exposes you to several judicial opinions to demonstrate how a principle of law is applied to a specific factual scenario. The case citation is the series of numbers and letters after the title of the case and it denotes the case's published location. For example, let's analyze the case citation for *Ravin v. State*, 537 P.2d 494 (Alaska 1975). *Ravin v. State* is an interesting case from a constitutional law perspective – *Ravin* holds that Alaska's explicit right to privacy, as enumerated in the Alaska Constitution, guarantees an adult's right to possess marijuana in one's own home. *See id*., 537 P.2d at 511.

Figure 1.7 *Ravin* Case Citation



As you can see from the diagram, the number 537 is the volume number of the book that published the *Ravin* case. The name of the book is "P.2d", which is an abbreviation for *Pacific Reports, 2d Series*. The number 494 is the page number of the *Ravin* case. "Alaska" signifies the case was decided by the Alaska Supreme Court. "Alaska App." would mean the Alaska Court of Appeals decided the case. The date (1975) is the year the court issued its ruling on the case. Every court has its own designation, except the United States Supreme Court, which is "U.S." and stands for United States Reports. For example, in the seminal case *Gideon v. Wainwright*, 372 U.S. 335 (1963), the publication is United States Reports, abbreviated as "U.S."

Case Briefing

It is useful to condense judicial opinions into a case brief format. The *Ravin v. State*, 537 P.2d 494 (Alaska 1975) case brief is shown in Figure 1.7.

Figure 1.8 *Ravin* Case Brief

Ravin v. State, 537 P.2d 494 (Alaska 1975)

Facts: Defendant arrested and charged with possession of marijuana. Defendant challenged constitutionality of statute, arguing state violated his right to privacy under federal and state constitutions.

Issue: Does an adult have a constitutional right to the purely personal, non-commercial possession of marijuana in the privacy of one's own home?

Holding: Alaska's constitutional explicit right to privacy protects the possession of marijuana by adults at home for person use.

Analysis (Rationale): Alaskans have a basic right to privacy in their homes under the Alaska Constitution, which the government may not interfere with unless it have a narrowly tailored compelling state interest. Here, although the government has significant interests in regulating the use of marijuana, the government has not shown a compelling basis to determine that the use of marijuana – in the privacy of one's own home – has a present and immediate impact on the state's public heath or welfare. The Court makes clear that its holding is limited to the possession of marijuana by adults at home for personal use. Non-personal marijuana possession outside of one's own home may be regulated by the government.

Conclusion: Motion to dismiss granted.

When briefing a case, your goal is to reduce the information from the case into a format that will provide you with a helpful reference in class and for review. Most importantly, by "briefing" a case, you will grasp the problem the court faced (the issue); the relevant law the court used to solve it (the rule); how the court applied the rule to the facts (the application or "analysis"); and the outcome (the conclusion). You will then be ready to not only discuss the case but to compare and contrast it to other cases involving a similar issue.

The case brief should begin with the **title of the case**, including the citation. The case name usually contains the names of the plaintiff (in criminal law, the plaintiff is normally the "government", "state" or "prosecutor") and the defendant, each of whom are parties to the lawsuit. Be sure that you can identify the applicable stakeholders as you write your brief.

The next component of the case brief should be the **facts**. Briefly summarize the facts of the case. Eliminate facts that are not relevant to the particular issue and the court's analysis of it. Do not merely copy the facts verbatim; not every detail is important. Identify the facts important for the resolution of the issue before the court. The **issue** follows the facts. The issue is the question the court is examining, which is usually the grounds for appeal. The case brief should phrase the issue as a question. Cases usually have more than one issue. The case brief can state all the issues or only the most important issue. The **holding** (sometimes called the **substantive rule of law**) comes after the issue, is the actual case law, and answers the issue question. If more than one issue is presented in the case, the substantive holding should address each issue.

Example of Substantive Holding

"Thus we conclude that no adequate justification for the state's intrusion into the citizen's right to privacy by its prohibition of possession of marijuana by an adult for personal consumption in the home has been shown. The privacy of the individual's home cannot be breached absent a persuasive showing of a close and substantial relationship of the intrusion to a legitimate governmental interest."

See Ravin v. State, 537 P.2d 494, 511 (Alaska 1975)

Last, but still vital to the case brief, is the **rationale**. The rationale discusses the reasoning of the judges when formulating a particular rule. This may be the most important portion of the brief. The court will have examined the facts in light of the rule, and probably considered all "sides" and arguments presented to it. How courts apply the rule to the facts and analyze the case must be understood to properly predict outcomes in future cases involving the same issue. Rationales can *set policy*, which is not technically case law but still sets precedent in certain instances.

For most of the judicial opinions we explore in this book, we will focus on the **majority opinion**. The majority opinion is the *controlling* opinion. Although one judge writes the judicial opinion, to be the lead opinion, it must have received a majority of votes in its favor. Not all cases are unanimous. Occasionally, other judges will want to add to the judicial opinion. If a judge agrees with the judicial opinion's *result*, but disagrees with the majority's *rationale*, the judge could write a **concurring opinion**, which explains why the concurring judge agrees with the result, but not the rationale. If a judge disagrees with the result, the judge could write a **dissenting opinion** explaining why the judge disagrees. With one exception, neither the concurring opinion nor the dissenting opinion are controlling opinions. Neither set precedent. However, a concurring opinion or dissenting opinion may be used as the rationale in a future case to overturn or change the law.

The one exception is when there is no majority of judges who agree on the rule. In that situation, the opinion garnering the most votes is called the **plurality opinion**, and the substantive holding is the position taken by the judge or judges who concurred in the judgment on the *narrowest* grounds. *See Marks v. United States*, 430 U.S. 188, 193 (1977).

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1.9: End-of-Chapter Material

Summary

A crime is an action or inaction in violation of criminal law. Criminal laws vary from jurisdiction to jurisdiction.

The study of criminal law defines crimes and defenses to crimes. The study of criminal procedure focuses on the rights of citizens against government intrusion. Criminal procedure generally governs the rights of the accused and is associated with criminal investigation, arrest, interrogation, trial, and appeal.

A civil lawsuit or civil litigation matter resolves a dispute between individuals, called a plaintiff (the injured party) and defendant (the alleged wrongdoer). Every civil litigation matter includes a plaintiff, which has suffered harm. The goal of the civil litigation matter is to compensate the plaintiff for injury. The court can compensate the plaintiff by awarding money, called damages. Generally, parties in civil litigation are not entitled to court-appointed lawyers and must hire private attorneys (or represent themselves).

The government initiates a criminal prosecution and seeks to deprive the accused of his or her liberty. The government is represented by a prosecutor, who has formally accused the defendant (the alleged wrongdoer) of a crime. Some criminal prosecutions do not include a victim, or harm, because the goal of the criminal prosecution is holding the defendant accountable for his or her conduct, not compensation. Every criminal prosecution involves the government, so the US and state constitutions provide the criminal defendant with extra protections not present in a civil lawsuit, such as court-appointed counsel for the indigent.

Crimes can be classified according to the severity of punishment. The most serious crimes are felonies. Misdemeanors are less serious than felonies and have less severe available sentences. Certain conduct can be either a felony or a misdemeanor depending on the circumstances. Infractions, also called violations, are the least serious offenses and generally do not involve incarceration. The purposes of punishing a criminal defendant are both specific and general deterrence, incapacitation, rehabilitation, and restitution.

Each party in a civil or criminal trial must meet a burden of proof, which consists of a burden of producing evidence and a burden of persuading the trier of fact. The burden of proof for a civil case is a preponderance of the evidence, which means that the trier of fact must be convinced that the dispute is more likely true than not. The burden of proof in a criminal case is beyond a reasonable doubt, which is the highest burden of proof our legal system requires. Proof beyond a reasonable double is a nebulous concept, but it is evidence that is of such a compelling nature that rebuts the defendant's presumption of innocence. The burden of proof for a criminal defense varies. The evidence presented to meet the burden of proof can be circumstantial, which indirectly proves a fact, or direct, which directly proves a fact.

Key Takeaways

- A crime is an act committed in violation of a law prohibiting it or omitted in violation of a law ordering it. In general, the criminal law must be enacted before the crime is committed.
- Criminal law generally defines the rights and obligations of individuals in society. Criminal procedure generally concerns the enforcement of individuals' rights during the criminal process.
- Civil law regulates the private rights of individuals. Criminal law regulates individuals' conduct to protect the public.
- Civil litigation is a legal action between individuals to resolve a civil dispute. Criminal prosecution is when the government prosecutes a defendant to punish illegal conduct.
- The burden of proof is a party's obligation to prove a charge, allegation, or defense.
- The burden of production is the duty to present evidence to the trier of fact. The burden of persuasion is the duty to convince the trier of fact to a certain standard, such as the preponderance of the evidence or beyond a reasonable doubt.
- The civil burden of proof is a preponderance of the evidence, for both the plaintiff and the defendant. The criminal burden of proof for the prosecution is beyond a reasonable doubt.
- The criminal burden of proof for the defense is generally a preponderance of the evidence. States vary on whether they require the criminal defendant to meet both the burden of production and persuasion or just the burden of production. Different defenses also require different burdens of proof.

- In states that require the defendant to meet only the burden of production, the prosecution must disprove the defense depending on the state.
- An inference is a conclusion the trier of fact may make if it chooses to. A presumption is a conclusion the trier of fact must make.
- Circumstantial evidence indirectly proves a fact. A fingerprint at the scene of the crime, for example, indirectly proves that because the defendant was present at the scene, the defendant committed the crime. Direct evidence directly proves a fact. If the defendant confesses to a crime, for example, this is direct evidence that the defendant committed the crime.
- Grading is based on the severity of punishment.
- Felonies are graded the highest. Punishment options for felonies include the following:
  - Capital punishment (if authorized by State)
  - Prison time
  - Momentary Fines
  - Alternative sentencing such as probation, rehabilitation, and home confinement
- Misdemeanors are graded lower than felonies. Punishment options for misdemeanors include the following:
  - Jail time of one year or less per misdemeanor
  - Monetary Fines
  - Alternative sentencing such as probation, rehabilitation, and community service
- Felony-misdemeanors are punished as either a felony or a misdemeanor.
- Infractions, also called violations, are graded lower than misdemeanors and have less severe punishment options:
  - Monetary Fines
  - Alternative sentencing, such as traffic school
  - Incarceration not authorized
- Alaska is different than most states when it comes to jails and prisons. In most states, the difference between jail and prison is that cities and counties operate jails, and the state or federal government operates prisons, depending on the crime. In Alaska, all jails and prisons are operated at the state level. The restrictive nature of the confinement is another difference. Jails are for defendants who have committed less serious offenses, so they are generally less restrictive than prisons.
- Specific deterrence prevents crime by frightening an individual defendant with punishment.
- General deterrence prevents crime by frightening other potential defendants with the punishment of an individual defendant.
- Incapacitation prevents crime by removing a defendant from society.
- Rehabilitation seeks to reform a defendant's behavior to prevent future crime.
- Retribution prevents crime by giving victims or society a feeling of avengement. Retribution is not a valid form of punishment in Alaska.
- Restitution seeks to restore the victim or the community by requiring the defendant to financially repair the damage caused by the criminal behavior.
- The components of a case brief are the following:
  - The title, plus citation. The citation indicates where to find the case.
  - The substantive facts. The substantive facts discuss what happened to instigate the case.
  - The issue. The issue is the question the court is examining.
  - The rule or substantive holding. The rule answers the issue question and is the case law.
  - The rationale. The rationale is the reason the court held the way it did.

Answer to The Difference Between Civil and Criminal Law – Law and Ethics Question

1. Following a criminal trial, the trial jury may only return one of two verdicts: "guilty" or "not guilty." When a jury renders a not guilty verdict the jury is publicly stating that the government has failed to meet its burden – proof beyond a reasonable doubt. The technical term of a not guilty verdict is an acquittal. Neither "not guilty" nor "acquittal" is synonymous with "innocent." While all factually innocent defendants should be acquitted, not all defendants who are acquitted are factually innocent. In some situations, a defendant is acquitted following a jury trial even though there is evidence of guilt (albeit inadmissible evidence). Take for example a case in which the defendant confesses to a crime. If the confession is suppressed as a result of police

misconduct (and thereby rendered inadmissible at trial), the defendant may be acquitted, even though the inadmissible evidence suggests that the defendant is factually guilty.

2. The reason criminal defendants get special protection in a criminal prosecution, which is not extended to civil litigation defendants is the harshness of the *punishment* and the *inequality* of the criminal prosecution itself. Criminal defendants face the loss of their life and liberty at the hands of the government. The deprivation of one's liberty is significant. Civil litigation defendants, on the other hand, only risk the loss of *money*. Criminal defendants, unlike civil defendants, face the intimidating prospect of fighting the government and its vast resources. Civil litigation defendants are squaring off against *another individual*. As a society, we believe in the Blackstonian principle that there is nothing as unjust as punishing an innocent person. Thus, we afford criminal defendants special protections, not available to a civil litigant.
3. The criminal trial took place first because O.J. Simpson was a criminal defendant and therefore had the benefit of the Fifth and Sixth Amendment rights to *self-incrimination* and *speedy trial*, respectively.

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CHAPTER OVERVIEW

2: The Legal System in the United States

2.1: Sources of Law
2.2: Federalism
2.3: The Branches of Government
2.4: The Court System
2.5: A Brief History of the Alaska Criminal Code Revision
2.6: End-of-Chapter Material

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2.1: Sources of Law

Law comes from three places, the Constitution, a statute, or a case. Collectively, these categories are commonly referred to as the **sources of law**.

Constitutional Law

The first source of law is **constitutional law**. Two constitutions are applicable in every state: the federal or US Constitution, which is in force throughout the United States, and each state's constitution. The US Constitution created our legal system. The federal constitution is "the supreme Law of the Land." *See* U.S. Const. art. VI, § 2. This means that the federal constitution sets the minimum level of constitutional protection. States' constitutions exist concurrently but are analyzed separately. "State courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution." *Arizona v. Evans*, 541 U.S. 1, 8 (1995) (*citing Michigan v. Long*, 463 U.S. 1032 (1983)); *see also Lemon v. State*, 514 P.2d 1151, 1154 n.5 (Alaska 1973). State courts interpreting their own constitutions are free to offer more constitutional protections, and thus define the ceiling. Alaska frequently does. Alaska case law is replete with examples of the courts finding that the Alaska Constitution provides a heightened level of protection to its citizens – above and beyond what is required by the U.S. Constitution. The Alaska Constitution contains protections not found in the US Constitution, like an explicit right to privacy. This right to privacy protects Alaskan's personal right to possess small amounts of marijuana within one's home, a right that does not exist under the US Constitution. *See Ravin v. State*, 537 P.2d 494 (Alaska 1971).

Another important distinction is to remember that one central purpose of constitutional law is to regulate (or limit) *government* action. The constitution protects private individuals from their government; the constitution does not protect private individuals from each other. Private individuals need not follow either the federal or state constitutions.

Example of Government and Private Action

Cora stands on a public sidewalk and criticizes President Obama's healthcare plan. Although other individuals may be annoyed by Cora's words, the government *cannot* arrest or criminally prosecute Cora for her speech because the First Amendment of the US Constitution guarantees each individual the right to speak freely. On the other hand, if Cora walks into a Fred Meyer department store and criticizes the owner of Fred Meyer, Fred Meyer could eject Cora immediately. Fred Meyer and its personnel are *private* actors, not government actors, and as such, they *do not* have to abide by the Constitution.

Exceptions to the Constitution

The federal and state constitutions are written documents that set forth general guiding principles establishing the government's relationship with its citizens. Such principles are subject to interpretation and require the balancing of competing interests. For this reason, it is not uncommon that a particular constitution's protection contains numerous exceptions. For example, we see more exceptions to constitutional protections in *public schools* and *prisons* for safety and security reasons. Public schools and prisons can mandate a certain style of dress to ensure safety. Technically, forcing an individual to dress a specific way could violate the right to self-expression, which the First Amendment guarantees. However, if wearing a uniform can lower gang-related conflicts in school and prevent prisoners from successfully escaping, the government can constitutionally regulate self-expression in these locations.

Superiority of the Constitution

Of the three sources of law, constitutional law is considered the *highest* and cannot be supplanted by either of the other two sources of law. Under principles of federal supremacy, the *federal* or US Constitution is the preeminent source of law, and state constitutions cannot supersede it. Remember that the federal constitution mandates a floor, but a state can always increase the protections granted to its citizens.

Statutory Law

The second source of law is **statutory law**. While the Constitution applies to government action, statutes apply to, and regulate, both government and *individual* or *private* action. A **statute** is a written (and published) law that can be enacted in one of two ways. Most statutes are written and voted into law by the *legislative* branch of government. The US legislative branch is called

Congress, and Congress votes federal statutes into law. Every state has a legislative branch as well, called a state legislature, and a state legislature votes state statutes into law. Often, states codify their *criminal* statutes into a **penal code**.

State citizens can also vote state statutes into law and repeal laws enacted by the legislature. This is referred to as the **initiative** and **referendum** process. AK. Const. art. XI, 1.§ 1. (1959). Although a state legislature adopts *most* state statutes, citizens voting on an initiative can enact some very important statutes. For example, in 2014 a majority of Alaskans voted to legalize the recreational use of marijuana for adults over the age of 21 years old. *See* Ballot Measure No. 2 "An Act to tax and regulate the production, sale, and use of marijuana." (2014). The initiative created the Marijuana Control Board, the taxation structure, and the penalties for violations. The citizen initiative process can be very powerful.

Statutory Law's Inferiority

Statutory law is subordinate to **constitutional law**, which means that a statute cannot conflict with or attempt to supersede constitutional provisions. If a conflict exists between constitutional and statutory law, the courts must resolve the conflict. Courts can invalidate unconstitutional statutes under the power of **judicial review**.

Administrative Laws

Other written and published laws that apply to government and individual action are administrative regulations and municipal ordinances. Regulations and ordinances cannot supersede or conflict with constitutional or statutory law.

Administrative regulations are promulgated by executive-branch agencies, which are governmental agencies designed to regulate specific areas. The executive branch of government (whether federal or state) is responsible for the day-to-day execution, administration, and enforcement of the laws enacted by the legislative branch. In addition to their enforcement powers, executive agencies can also possess a legislative function (rule-making) and judicial (adjudication) functions. The Food and Drug Administration (FDA) is an example of a federal administrative agency. The FDA regulates any food products or drugs produced and marketed in the United States. The Alaska Police Standards Council (APSC) is an example of an Alaskan administrative Agency. Housed within the Department of Public Safety (DPS), the APSC regulates the certification (and de-certification) of Alaska police officers. Numerous executive agencies have administrative law responsibilities.

Ordinances

Ordinances are similar to statutes, except that municipalities, such as cities, counties, or boroughs vote them into law, rather than a state's legislature or a state's citizens. Municipalities generally derive their powers from state constitutions, municipal charters, or statutes. Ordinances usually relate to health, safety, or welfare, and violations of them are typically classified as **infractions** or **misdemeanors,** rather than **felonies.** Anchorage's law prohibiting aggressive panhandling within the city's limits is an example of a criminal ordinance. AMC § 08.30.160. Aggressive Panhandling is a class B misdemeanor subject to six months of incarceration and a $2,000 fine. AMC § 08.05.020(H)(2).

Model Penal Code

State criminal laws differ significantly, so in the early 1960s, a group of legal scholars, lawyers, and judges who were members of the American Law Institute drafted a set of suggested criminal statutes called the Model Penal Code. The Model Penal Code intended to provide a standardized set of criminal statutes that all states could adopt, thus simplifying the diversity effect of the United States' legal system. While the Model Penal Code has not been universally adopted, a majority of the states have incorporated portions of it into their penal codes, and the Model Penal Code survives as a guideline and focal point for discussion when state legislatures modify their criminal statutes. Alaska has adopted portions of the Model Penal Code. A state is free to adopt some, all, or none of the Model Penal Code.

Case Law

The third source of law is **case law**. When judges rule in a particular case, they apply the law (from the constitution, statutes, prior cases, and the common law) to create case law **(precedent).***Federal* case law comes from federal courts, and *state* case law comes from state courts. Case law has its origins in English common law, although, in modern times, it is derived from constitutions, statutes, and precedent.

English Common Law

In Old England, before the settlement of the United States, case law was the most prevalent source of law. This was in contrast to countries that followed the Roman Law system, which primarily relied on written codes of conduct enacted by a legislature. Case law in England was mired in tradition and local customs. Societal principles of law and equity were the guidelines when courts issued their rulings. To be consistent, English judges made it a policy to follow previous judicial decisions, thereby creating a uniform system of laws throughout the country for the first time. Case law was named common law because it was common to the entire nation. *Common Law*, Black's Law Dictionary (6th ed. 1990).

The English system of jurisprudence made its way to the United States with the original colonists. Initially, the thirteen colonies unanimously adopted common law as the law of the land. All crimes were common law crimes, and cases determined criminal elements, defenses, and punishment schemes. Gradually, after the Revolutionary War, hostility toward England and modern reform led to the erosion of common-law crimes and a movement toward codification. States began replacing common law crimes with written statutes enacted by state legislatures. Oxford professor Sir William Blackstone's *Commentaries on the Law of England*, which interpreted and summarized English common law, became an essential reference as the nation began the process of converting common-law principles into written statutes, ordinances, and penal codes. *See id.*

Limitations on Common-Law Crimes

In modern society, judges *cannot* create crimes. *See United States v. Hudson & Goodwin*, 11 U.S. 32 (1812). This violates notions of fairness and the constitutional doctrine of separation of powers. Making up a new crime and punishing the defendant for it does not provide consistency or predictability to our legal system. It also violates the principle of legality, a core concept of American criminal justice embodied in this phrase: "*Nullum crimen sine lege, nulla poena sine crimen*" (No crime without law, no punishment without crime). Further, it violates basic constitutional protections like *ex post facto* and due process.

In states that do not allow common law crimes, **statutes** must define criminal conduct. If no statute exists to criminalize the defendant's behavior, the defendant *cannot be criminally prosecuted*, even if the behavior is abhorrent. Alaska law makes this point explicit, "[n]o conduct constitutes an offense unless it is made an offense by [statute or regulation]." AS 11.81.220.

The common law still plays an important role in criminal lawmaking, even though most crimes are now embodied in statutes. Classification of crimes as felonies and misdemeanors is a reflection of English common law. Legislatures often create statutes out of former common law crimes. Judges look to the common law when defining statutory terms, establishing criminal procedure, and creating defenses to crimes. The United States is considered a common law country. Every state except Louisiana, which is based on the French Civil Code, adopts the common law as the law of the state *except* where a statute provides otherwise.

Example of a Court's Refusal to Create a Common Law Crime

Keeler v. Superior Court, 470 P.2d 617 (Cal. 1970) is a good example of the importance of codified criminal law. In *Keeler*, the defendant attacked his pregnant ex-wife, and her baby was thereafter stillborn. The California Supreme Court disallowed a murder charge against Keeler under California Penal Code § 187 because the statute criminalized only the malicious killing of a "human being." The court reached its decision after examining the common law definition of a human being and determining that the definition did not include a fetus. The court reasoned that it *could not create a new crime* without violating the due process clause, separation of powers, and California Penal Code § 6, which prohibits the creation of common law crimes. After the *Keeler* decision, the California Legislature changed Penal Code § 187 to include a fetus, excepting abortion.

Powerful Nature of Case Law

Courts are frequently called upon to *interpret* constitutional and statutory law, making case law a powerful source of law. A judge can interpret a constitution in a way that adds or creates exceptions to its protections. A judge can also interpret a statute finding it unconstitutional and unenforceable. This is called the power of **judicial review**. *See Marbury v. Madison*, 5 U.S. 137 (1803).

As Chief Justice Marshall famously said,

It is emphatically the province and duty of the [Judiciary] to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

… This is of the very essence of judicial duty.

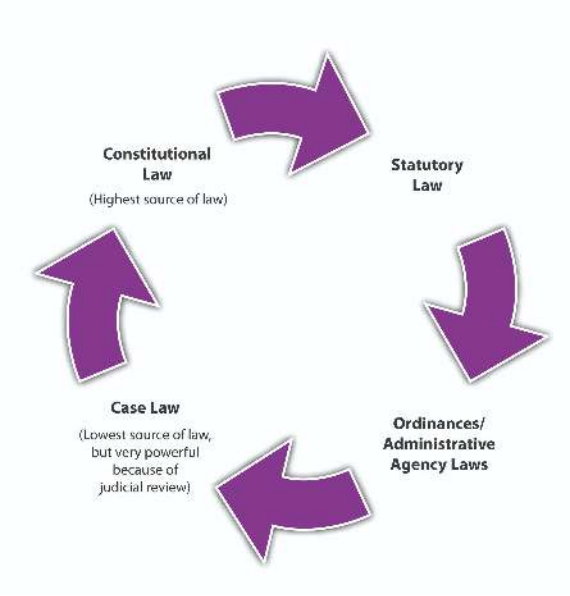
If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

See Marbury, 5 U.S. at 177-78.

Example of Judicial Review

In *Texas v. Johnson*, 491 U.S. 397 (1989), the US Supreme Court ruled that burning a flag is protected self-expression under the First Amendment to the US Constitution. Thus, the Court reversed the defendant's conviction under a Texas statute that criminalized the desecration of a venerated object. *Johnson* not only invalidated a state statute as being inconsistent with the US Constitution but also interpreted the US Constitution by adding flag burning to the First Amendment's protection of speech.

Figure 2.1 Diagram and Hierarchy of the Sources of Law



Stare Decisis and Precedent

Individual cases are incredibly diverse, so there must be a way to ensure the law's *predictability*. Thus, judges adhere to a policy called **stare decisis**. *Stare decisis* is derived from English common law and compels judges to follow rulings in previous cases. A previous case is called precedent. Once judges have issued a ruling on a particular case, the public can be assured that the resulting precedent will continue to be followed by other judges. The idea that the law is predictable and certain is the crux of *stare decisis*. Chief Justice Rehnquist noted,

Stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. Adhering to precedent "is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled then it be settled right."

Payne v. Tennessee, 501 U.S. 808, 827 (1991) (citations omitted).

Although *stare decisis* is important and will normally be followed, it is not absolute; judges deviate from it to update the law or conform to society's modern expectations. For example, in *Brown v. Board of Education*, 347 U.S. 483 (1954), the United States Supreme Court famously overruled the so-called "separate but equal" doctrine announced in *Plessy v. Ferguson*, 163 U.S. 537 (1896). In fact, some judges believe that *stare decisis* is merely an interpretative guideline and not a barrier to revision or rejection of prior judicial decisions. *See e.g.*, *Gamble v. United States*, 587 U.S. ___, ___, 139 S.Ct. 1960, 1984 (2019) (J. Thomas concurring) ("When faced with a demonstrably erroneous precedent, my rule is simple: We should not follow it.").

Rules of *Stare Decisis* and Use of Precedent

Case law and *stare decisis* refer to cases that were decided in an appeal following a trial court's ruling in the case. A trial court generally resolves the factual disputes in a case (often it is a jury that does this in a trial) and then applies the applicable law to those facts. In contrast, an appellate court generally reviews the legal rulings made by the trial court; an appellate court does not resolve factual disputes. There is often more than one level of appeal, so some appeals come from higher courts than others.

Many complex rules govern the use of **precedent**. Lawyers primarily use precedent in their arguments, rather than **statutes** or the **Constitution**, because precedent is much more specific. With proper research, lawyers can usually find precedent that matches or comes very close to matching the facts of any particular case. In the most general sense, judges tend to follow *recent* precedent, from a *high court*, and from the *same court system*, either federal or state.

Example of Stare Decisis and Use of Precedent

Donald is a defense attorney for Conrad, who is on trial for second-degree burglary. The burglary prosecution is taking place in Anchorage. To be guilty of second-degree burglary, a person must burgle a "building." Conrad is accused of entering a metal shed behind an automotive repair shop and stealing car parts. Donald finds precedent from an Oregon Court of Appeals case, dated 1979, indicating that a railway boxcar is not a "building," and thus, Conrad should not be prosecuted. Paul, the prosecuting attorney, finds case precedent from the *Alaska Court of Appeals*, dated 2017, indicating that a woodshed located in a person's yard constitutes a "building" for Alaska's burglary statute. The trial court will probably follow the precedent submitted by Paul because it is more recent, from a higher court, and from the same court system as the trial.

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2.2: Federalism

The United States' system of government is called **federalism**. Federalism, as outlined in the US Constitution, divides governmental power between the *federal government* and each of the *individualstates*. This prevents a concentrated source of governmental power in one individual or small group of individuals. Because of federalism, the United States has a divided sovereign – that is, one federal legal system, and several individual state legal systems. Put another way, in the United States, a plethora of legal systems all operate semi-harmoniously at the same time. Although governmental disputes arise, federalism provides a framework in which such disputes are resolved amicably.

The Scope of Federal Law

The government's power to regulate comes from the US Constitution. The federal government derives its authority to create law from Article I, § 8, which discusses Congress's *exclusive* or **delegated powers**. These include the power to regulate currency and coin, establish a post office, promote science and art by regulating the rights to discoveries and writings (*e.g.*, patents and copyrights), declare war and raise armies, conduct foreign affairs, regulate interstate and foreign commerce, and make laws necessary and proper to execute other powers expressly granted in the Constitution. Courts have interpreted the last two powers mentioned in the **Commerce Clause** and the **Necessary and Proper Clause** to be the *broadest* sources of federal regulatory authority.

To simplify and summarize precedent defining federal regulatory authority, federal laws are meant to regulate two general areas. First, federal laws regulate issues that concern the entire *country*, rather than just one city, county, or state. The federal government exclusively regulates in the area of foreign affairs, for example, because this affects the United States of America, not just one particular region. Second, federal laws regulate interstate commerce, which is economic activity, that *crosses from state to state*. Some common examples are television broadcasts, the Internet, and any form of transportation.

Federal Criminal Laws

The original intent was for the federal government to be a *limited* government, with the bulk of regulatory authority residing in the *states*. The only *crimes* Congress is specifically authorized to punish are piracies and felonies on the high seas, counterfeiting, and treason; however, Supreme Court precedent has expanded the federal government's power to enact criminal laws based on the commerce clause and the necessary and proper clause *See e.g.*, *Gonzales v. Raich*, 545 U.S. 1, 9 (2005); *McCulloch v. Maryland*, 17 U.S. 316 (1918). Still, there must be some connection to an issue of national character and interstate commerce, or the federal government will overstep its authority. In general, federal criminal laws target conduct that occurs on federal property or conduct involving federal employees, currency, coin, treason, national security, rights secured by the Constitution, or commerce that crosses state lines. Currently, over five hundred crimes are listed in Part I, Title 18 of the United States Code, which codifies criminal laws for the federal government. To be fair, much debate surrounds the argument that Congress has exceeded its authority in passing the majority of the U.S. criminal code, and 'typical' criminal offenses that should be left to the States' general criminal jurisdiction. *Gamble v. United States*, _ U.S. _, 139 S. Ct. 1960, 1980 n.1 (2020) (Thomas, J., concurring). But for now the law is clear: Congress has the power to regulate criminal behavior that impacts interstate markets.

Figure 2.2 Diagram of Federal Laws



The Scope of State Law

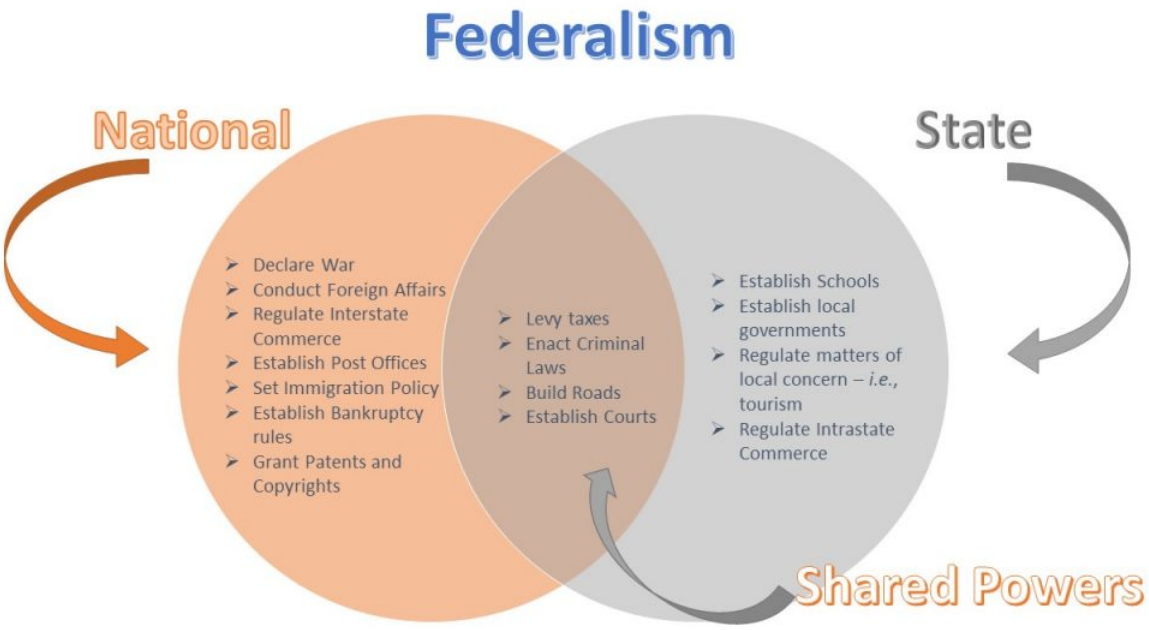
The US Constitution designates the states as the *primary regulatory authority*. This is clarified in the Tenth Amendment, which reads, "The powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, or the people." State laws are also supposed to regulate two areas. First, state laws regulate issues of a *local* character or concern. A state may regulate, for example, its water ownership and use because water can be scarce and is not generally provided to other states. Second, state laws regulate issues or things that remain within a state's border. A state generally regulates, for example, the operation of a small business whose products are only sold locally and not shipped out of the state.

Federal laws are *the same* in every state, but state laws *differ* from state to state. Something legal in one state may be illegal in another state. This inconsistency makes our system of federalism complicated for students (and lawyers). However, the nation's founding fathers believed that with a country as large and varied as the United States, it was sensible to allow each state to choose for itself which laws will be most suitable.

State Criminal Laws

The power to enact criminal laws belongs almost *exclusively* to the states. This is because of the Tenth Amendment, which vests in states a police power to provide for the health, safety, and welfare of state citizens. Approximately 90 percent of all criminal laws are state, rather than federal. Often, federal crimes are also state crimes and can be prosecuted and punished by both the state and federal governments without violating the principle of double jeopardy.

Figure 2.3 Diagram of Federalism and Shared Powers



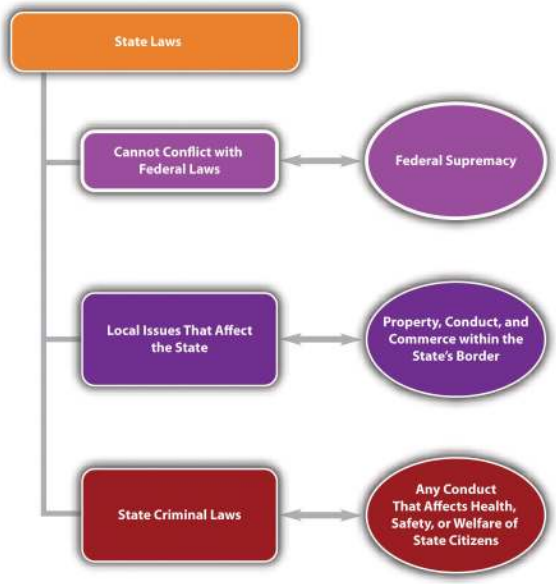
Example of the Diversity of State Laws

In Nevada, prostitution is legal under certain circumstances. Nev. Rev. Stat. §201.354 (2019). An individual who engages in prostitution inside a licensed "house of prostitution" in Nevada is not exposed to criminal liability. However, if the *same individual* engages in prostitution in Alaska, he or she may be subject to criminal prosecution. AS 11.66.100.

Federal Supremacy

Our legal system is divided between the federal and state governments to conform to the principle of federalism, so potential exists for conflict between federal law and state law. For example, a federal law may make something *illegal*; a state law may insist that it is *legal*. Consider the recreational use of marijuana in Alaska: under federal law, selling marijuana is a felony offense; in Alaska, a regulated dispensary may sell marijuana to an adult. *Compare* 21 USC 841(a) and AS 17.38.010. Whenever a conflict occurs between federal and state law, courts must follow federal law. This is called **federal supremacy**. Article VI of the federal Constitution states, "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." This is referred to as the **Supremacy Clause**.

Figure 2.3 Diagram of State Laws



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2.3: The Branches of Government

The federal Constitution was written to ensure that government power is distributed and never concentrated in one or more areas. This philosophy is served by federalism, where the federal government shares power with the states. It is also further served by dividing the government into three branches, each responsible for different government duties and all providing a **check and balance** on each other. The three branches of government are detailed in Articles I, II, and III of the federal Constitution. The **legislative branch**, the **executive branch**, and the **judicial branch** are co-equal, and each can only exercise those powers granted to it in the constitution. This is called the **separation of powers doctrine**. While the federal Constitution identifies only the federal branches of government, the principle of checks and balances applies to the states as well. Most states identify the three state branches of government in their state constitution.

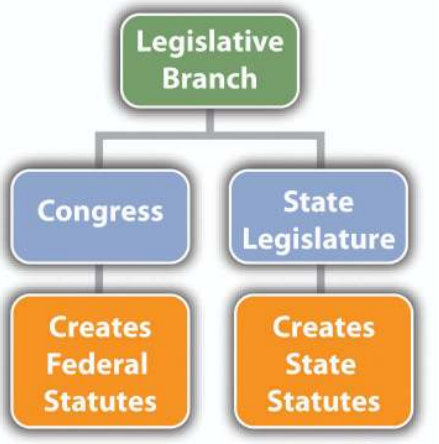
Each branch of government has a distinct authority. When one branch encroaches on the duties of another, it violates the separation of powers doctrine. The *courts* decide whether a particular government branch has overstepped its boundaries because courts interpret the Constitution, which describes each branch's sphere of influence. Thus the judicial branch, which consists of all the courts, retains the balance of power.

The Legislative Branch

Article I of the US Constitution establishes the **federal legislative branch**. The **legislative branch** is responsible for creating statutory laws. Although citizens of a state can vote for some state statutes by ballot (e.g., initiative), the federal legislative branch enacts all federal statutes; there is no federal initiative or referendum power. In the federal government, Congress is the legislative branch. The Alaska State Legislature is Alaska's legislative branch. Both Congress and the Alaska State Legislature are bicameral, which means they each have two houses. In Congress, this system provides equal representation among the several states and by citizens of the United States. States are represented by the Senate. Every state, no matter how large or small, gets two senators. Citizens are represented by the House of Representatives. Membership in the House of Representatives is based on population. A heavily populated state, like California, has more representatives than a sparsely populated state, like Alaska.

Alaska, like most state legislatures, has a similar structure to the federal system.

Figure 2.4 Diagram of the Legislative Branch



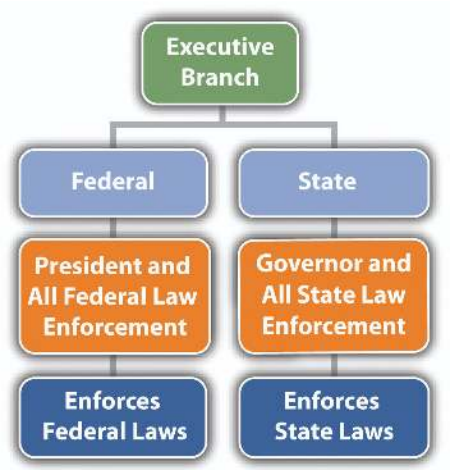
Legislative Branch Checks and Balances

The legislative branch provides both a check and balance to the executive branch *and* the judicial branch. For example, the legislative branch can impeach the chief executive officer of the executive branch (i.e., the President of the United States or the state Governor) and judges. This is the first step toward removing the chief executive officer from office. As we have seen in recent times, although one house (*e.g.*, the House of Representatives) can pass Articles of Impeachment, it is up to the other house (*e.g.*, the Senate) to convict and order removal. Congress can also enact statutes that supersede judicial opinions, provided the judicial opinion is not based on the interpretation of the constitution. Congress can also create and abolish courts other than the Supreme Court.

The Executive Branch

The **executive branch** is responsible for enforcing the statutes enacted by the legislative branch. In the federal government, the executive branch is headed by the president of the United States. States' executive branches are headed by the governor of the state.

Figure 2.5 Diagram of the Executive Branch



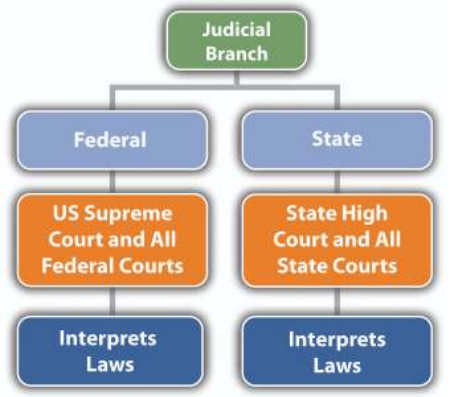
Executive Branch Checks and Balances

The executive branch provides both a check and balance to both the legislative branch *and* the judicial branch. The chief executive officer (*i.e.*, the President of the United States or the state Governor) can veto statutes proposed by the legislative branch. The Chief Executive also has the authority to nominate or appoint justices and judges to the bench. Under the federal system, the president of the United States nominates judges, who must then be confirmed by the Senate. In Alaska, state court justices and judges are nominated by the Alaska Judicial Council and appointed by the Governor. Alaska state court judges serve a specified term before sitting for a retention election.

The **judicial branch** is responsible for interpreting all laws, including statutes, codes, ordinances, and the federal and state constitutions. This power is very broad and is the basis for **judicial review**, referenced earlier in this chapter. It allows the judicial branch to invalidate any law that contravenes the constitution. Judicial review necessary includes the ability to interpret the words and phrases contained within federal and state constitutions. When a court interprets the constitution, it is explaining the meaning of its words and phrases. It is important to recognize that legal interpretation acts independently of public opinion. The court interprets the constitution regardless of whether there is national or state consensus on an issue.

The federal judicial branch is headed by the US Supreme Court. Each state's judicial branch is headed by the highest-level state appellate court. The Alaska judicial branch is headed by the Alaska Supreme Court. Members of the judicial branch include all judges and justices of every federal and state court in the court system.

Figure 2.6 Diagram of the Judicial Branch



Judicial Branch Checks and Balances

The judicial branch provides both a check and balance to both the legislative branch *and* the executive branch. The US Supreme Court can invalidate statutes enacted by Congress if they conflict with the Constitution. The US Supreme Court can also prevent the president from taking action if that action violates separation of powers. The state courts can likewise nullify unconstitutional statutes passed by the state legislature and void other executive branch actions that are unconstitutional.

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2.4: The Court System



Panorama of the west façade of United States Supreme Court Building at dusk in Washington, D.C., USA. (Joe Ravi, CC-BY-SA 3.0)

Every state has two court systems: the *federal* court system, which is the same in all fifty states, and the *state* court system, which varies slightly in each state. Federal courts are fewer in number than state courts. Because of the Tenth Amendment, discussed earlier, most laws are state laws and therefore most legal disputes go through the state court system.

Federal courts are exclusive; they adjudicate only *federal* matters. This means that a case can go through the federal court system only if it is based on a federal statute or the federal Constitution. One exception is called **diversity of citizenship**. *See* 28 U.S.C. § 1332. If citizens from different states are involved in a civil lawsuit and the amount in controversy exceeds $75,000, the lawsuit can take place in federal court. All federal *criminal prosecutions* take place in federal courts.

State courts are nonexclusive; they can adjudicate state or federal matters. Thus an individual who wants to sue civilly for a federal matter has the option of proceeding in state or federal court. In addition, someone involved in a lawsuit based on a federal statute or the federal Constitution can remove a lawsuit filed in state court to federal court. *See* 28 U.S.C. § 1441. All state *criminal prosecutions* take place in state courts.

Jurisdiction

Determining which court is appropriate for a particular lawsuit depends on the concept of **jurisdiction.** Jurisdiction has two meanings. A court's jurisdiction is the power or authority to hear and decide the case. If a court does not have jurisdiction, it cannot hear the case. Jurisdiction can also be a geographic area over which the court's authority extends.

There are two prominent types of court jurisdiction. **Original jurisdiction** means that the court has the power to hear a trial. Usually, only *one* opportunity exists for a trial, although some actions result in both a criminal and a civil trial. During the trial, evidence is presented to a trier of fact, which can be either a judge or a jury. The trier of fact determines the facts of a dispute and decides which party prevails at trial by applying the law to those facts.

Once the trial has concluded, the next step is an appeal. During an appeal, *no evidence is presented*; the appellate court simply reviews what took place at trial and determines whether or not any major errors occurred. The power to hear an appeal is called **appellate jurisdiction**. Courts that have appellate jurisdiction review the **trial record** for error. The trial record includes a court reporter's **transcript**, which is typed notes of the words spoken during the trial and pretrial hearings. In general, with exceptions, appellate courts cannot review a trial record until the trial has ended with a *final judgment*. Once the appellate court has made its review, it has the ability to take three actions. If it finds no compelling or prejudicial errors, it can **affirm** the judgment of the trial court, which means that the judgment remains the same. If it finds a significant error, it can **reverse** the judgment of the trial court, which means that the judgment becomes the opposite (the winner loses, the loser wins). It can also **remand,** which means sending the case back to the trial court, with instructions. After remand, the trial court can take action that the appellate court cannot, such as adjusting a sentence or ordering a new trial.

Some courts have only original jurisdiction, but most courts have a little of both original and appellate jurisdiction. The US Supreme Court, for example, is primarily an appellate court with appellate jurisdiction. However, it also has original jurisdiction in some cases, as stated in the Constitution, Article III, § 2, clause 2: "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate jurisdiction."

Example of Original and Appellate Jurisdiction

Don is prosecuted for the attempted murder of Victoria. Don is represented by public defender Sam. At Don's trial, despite Sam's objections, the judge rules that Don's polygraph examination results are admissible, but prohibits the admission of certain witness testimony. Don is found guilty and appeals, based on the judge's evidentiary rulings. While Sam is writing the appellate brief, he discovers a 2019 Alaska Supreme Court case that bars the admission of polygraph examination results. Sam *can include* the case precedent in his appellate brief. The appellate court has the jurisdiction to hold that the objection was improperly overruled by the trial court, but is limited to reviewing the trial record for error. The appellate court *lacks* the jurisdiction to admit new evidence not included in the trial record.

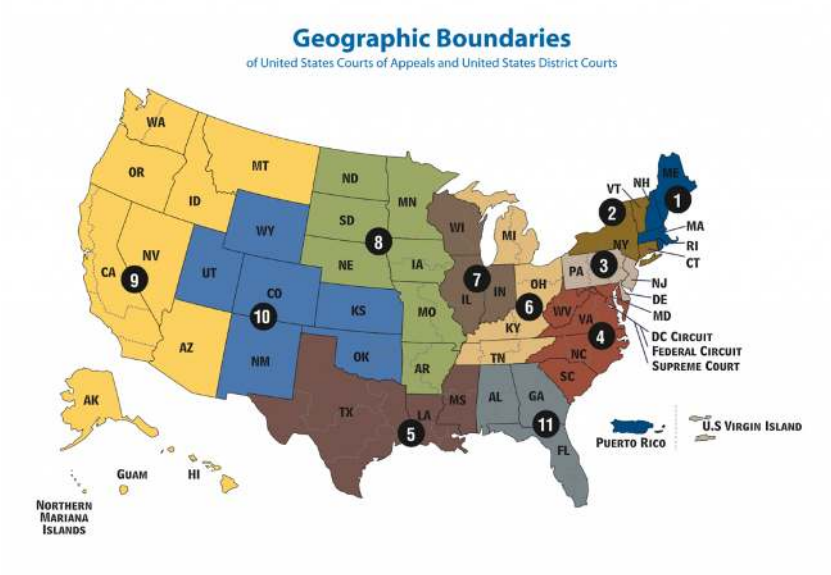
The Federal Courts

For the purpose of this book, the focus is the federal trial court and the intermediate and highest level appellate courts because these courts are most frequently encountered in a criminal prosecution. Other federal specialty courts do exist but are not discussed, such as bankruptcy court, tax court, and the court of military appeals.

The federal trial court is called the **United States District Court**. Large states like California have more than one district court, while smaller states may have only one. Alaska has one district: The District of Alaska. District courts hear all the federal trials, including civil and criminal trials. As stated previously, a dispute that involves only state law, or a state criminal trial, cannot proceed in federal district court. The exception to this rule is the diversity of citizenship exception for civil lawsuits.

After a trial in district court, the loser gets one appeal of right. This means that the intermediate appellate federal court *must* hear an appeal of the district court trial if there are sufficient grounds. The intermediate appellate court in the federal system is the **United States Court of Appeals**. Only thirteen US Courts of Appeals exist for all fifty states. The US Courts of Appeals are spread out over thirteen judicial circuits and are also referred to as Circuit Courts. Alaska is in the Ninth Circuit.

Figure 2.7 – Geographic Boundaries of the United States Courts of Appeals



Geographic Boundaries of United States Courts of Appeals and United States District Courts

Circuit Courts have appellate jurisdiction and can review the district court criminal and civil trials for error. The Circuit Court reviews only trials that are federal in nature, except for civil lawsuits brought to the district court under diversity of citizenship. Also, in general, only a defendant found guilty may appeal a verdict; the government may not appeal an acquittal (also called a "not-guilty" verdict), as this would violate a defendant's double jeopardy protection.

After a Circuit Court appeal, the loser has one more opportunity to appeal to the highest-level federal appellate court, which is the **United States Supreme Court**. The US Supreme Court is the highest court in the country and is located in Washington, DC, the nation's capital. The US Supreme Court has eight associate justices and one chief justice.

The US Supreme Court is a discretionary court, meaning it does not have to hear appeals. Unlike the Circuit Courts, the US Supreme Court can pick and choose which appeals it wants to review. The method of applying for review with the US Supreme Court is called a petition for a writ of certiorari.

The loser in any case from a Circuit Court, or a case *with a federal matter at issue* from a state's highest-level appellate court, can petition for a writ of certiorari. If the writ is granted, the US Supreme Court reviews the case. If the writ is denied, which it is the majority of the time, the ruling of the Circuit Court or state high court is the final ruling. For this reason, the US Supreme Court reverses many cases that are accepted for review. If the US Supreme Court wants to "affirm" the intermediate appellate court ruling, all it has to do is deny the petition and let the lower court ruling stand.

The State Courts

For the purpose of this section, the Alaska state court system is reviewed. Slight variations in this system may occur from state to state.

In Alaska, most criminal matters begin in the Alaska District Court, which is a court of **limited jurisdiction**. Alaska District Court has jurisdiction to hear misdemeanor criminal offenses and hold first appearances and **preliminary hearings** in felony cases. A preliminary hearing is a procedure where the prosecutor must establish that there is probable cause to warrant charging a person with a felony. A preliminary hearing occurs in open court before a judge. The accused is present, and the witnesses are subject to cross-examination. A preliminary hearing is *different* than a grand jury. Alaska District Court cannot adjudicate felony criminal matters or family court matters such as granting a petition for divorce. It also may not hear civil claims that exceed $100,000 in damages. Alaska District Court also hears **small claims matters**, which is a civil court designed to provide state citizens with a low-cost option to resolve disputes where the amount of controversy is minimal. A traditional small claims court only has the jurisdiction to award money damages. The amount in dispute must be less than $10,000. Small claims court, sometimes called "people's court," is intentionally informal, and a person need not hire an attorney to appear in small claims court. It has special rules that make it amenable to the average individual. Small claims court *appeals*are the exception to the general rule and when the appeal is granted, it usually results in a new trial where evidence is accepted.

Alaska's court of general jurisdiction is the **Alaska Superior Court** . Superior Court judges have the authority to hear all civil litigation matters, all state criminal matters, and nonlitigation cases, including family law, wills and probate, foreclosures, and juvenile adjudications. Once a defendant in a felony criminal case is indicted by the **grand jury** , the Superior Court has *exclusive* jurisdiction. A grand jury is a secret hearing held at the request of the prosecutor, that listens to the preliminary evidence against a defendant and decides if there is sufficient evidence to warrant the case going to trial (sometimes referred to as a probable cause finding). *See generally* Alaska Criminal Rule 6. The grand jury is conducted without the presence of the judge, defense attorney, or defendant. Witnesses are not subject to cross-examination. The grand jury is generally made up of 18 citizens, a majority of whom have to agree that the evidence is sufficient to warrant an indictment. An **indictment** is the formal charging document outlining the specific criminal laws the defendant is accused of violating. Remember that an indictment is merely an accusation of criminality. A defendant is presumed innocent until a **petit jury** (*i.e.*, traditional trial jury) finds the accused guilty beyond a reasonable doubt.

The intermediate appellate court for Alaska is called the **Alaska Court of Appeals**. The Alaska Court of Appeals only has jurisdiction over criminal matters. It may not hear any cases involving a civil appeal. The Alaska Court of Appeals provides appellate review as a matter of right, meaning it *must* hear an appeal coming from the state's trial court. Only a defendant found guilty can appeal without violating the protection against double jeopardy. At the appellate level, the Court of Appeals simply reviews the trial court record for error and does not have the **jurisdiction** to hear new trials or accept evidence.

The highest appellate court for the state is the **Alaska Supreme Court**. The supreme court is a mandatory appellate court for civil matters and a discretionary court on criminal matters. In this vein, in criminal cases it gets to select the appeals it hears, very similar to the US Supreme Court. The supreme court generally grants a **petition for hearing** if it decides to hear a criminal case coming out of the Court of Appeals. If review is denied, the Court of Appeals ruling is the final ruling on the case. If review is granted and the supreme court rules on the case, the loser has one more chance to appeal, *if there is a federal matter*, to the US Supreme Court.

Figure 2.8 Diagram of the Court System

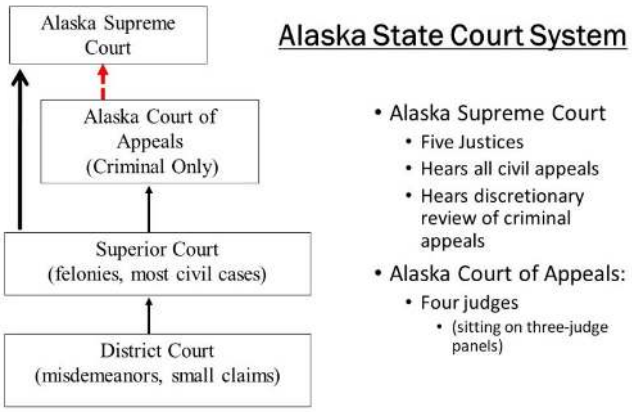
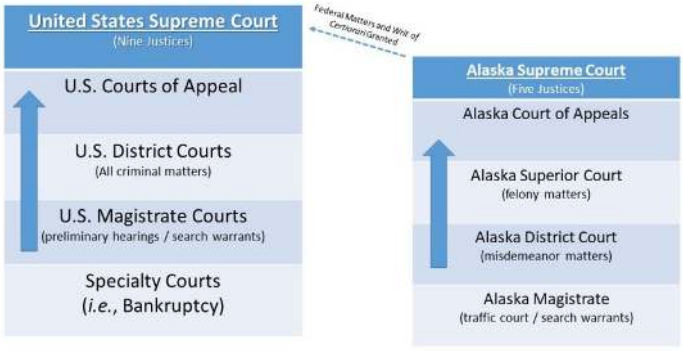


Figure 2.9 Diagram of Federal and State Court System.



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2.5: A Brief History of the Alaska Criminal Code Revision

This textbook analyzes criminal law through the lens of Alaska's *Revised* Criminal Code. Title 11 of the Alaska statutes is dedicated to substantive criminal law; Title 12 is Alaska's code of criminal procedure.[1] The overwhelming majority of citations and examples contained in this text are taken directly from Alaska statutes and case law. Throughout the text, reference will be made to Alaska's Revised Criminal Code, which became effective January 1, 1980, and was a comprehensive criminal code revision. Although subsequent legislative revisions have been made over the years, no legislature has completely revised substantive criminal law as was done in 1980.

A comprehensive criminal code offers significant benefits to practitioners, judges, and the general public. As you will read below, legislative commentary accompanied the passage of the Revised Criminal Code. This commentary provides meaningful insight into legislative intent, the importance of which will become evident as we explore different substantive criminal issues.

The following is an excerpt from the *Revised Criminal Code, Law Enforcement Workbook* (9th ed. 1994). The original *Workbook* was prepared by the Alaska Department of Law with dedicated funding from the Alaska Legislature to train Alaska police officers on the new, revised criminal code.

INTRODUCTION: A BRIEF HISTORY OF THE ALASKA
CRIMINAL CODE REVISION

Alaska's criminal law has for the most part been based on Oregon statutes as they existed at the close of the nineteenth century. Prior to 1899, the Alaska Government Act of 1884 provided that "the general laws of the State of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable and not in conflict with the provisions of this act or the laws in the United States." In 1899, Congress approved a criminal code for Alaska based primarily on Oregon law. Most of these century-old Oregon criminal statutes were still in effect in Alaska in 1975, even though Oregon itself enacted a revised criminal code in 1971.

[During the intervening] seventy years, Alaska territorial and state legislatures … added new statutes and amended old ones according to the inspiration of individual legislators reacting to the atmospheres of different times. The result was inevitable. In 1975, Alaska's criminal law was filled with outdated statutes, imprecise and obsolete terminology, needless distinctions and overly specific and sometimes unconstitutional provisions. The criminal law seemed to deal more adequately with concerns of nineteenth century Oregon than it did with problems of twentieth century Alaska.

The necessity for a comprehensive revision of Alaska's criminal law was acknowledged in 1975, by the first session of the Ninth Alaska Legislature when it requested the Legislative Council and the Attorney General to establish a "blue ribbon" panel to revise Alaska's criminal laws. The Legislative Council subsequently established the Criminal Code Revision Commission with an initial membership of nine.

The commission was charged with the responsibility of presenting a revised criminal code to the second session of the Ninth Legislature. On February 1, 1976, the Commission presented the legislature with a Preliminary Report in which it recommended that it be continued or reconstituted and allowed to complete its work by early 1978. The legislature took no action on the drafts contained in the Preliminary Report but statutorily reestablished the Criminal Code Revision Commission as a Subcommission of the newly formed Code Commission. The Subcommission's mandate was clear; by December 1, 1977, it was to "prepare a comprehensive revision of the State's criminal laws."

The Subcommission's membership was set at 14, with a fifteenth member added during the 1977 legislative session. Several members of the Subcommission originally served on the Commission. The Subcommission included the Commissioner of Public Safety, the Attorney General, legislators, judges and members of the public.

The Subcommission prepared a six-part Tentative Draft of its proposed revisions accompanied by commentary. The Tentative Draft was distributed to all state judges and justices, the state and local bar associations, the state district attorneys and the police chiefs of major cities.

On January 19, 1978, HB 661 "An Act revising the criminal laws of the state; and providing for an effective date" was introduced in the House by the House Judiciary Committee. This bill contained all the recommendations of the Subcommission and was referred to the House Judiciary Committee where daily hearings began immediately.

The House Judiciary Committee devoted nearly three months of public hearings to reviewing the Code. No other bills were considered during this period. Suggestions for amendments were primarily made by the following organizations: The Alaska Bar Association Criminal Law Committee, the Alaska Peace Officers Association, the Alaska Chiefs of Police Association and the criminal division of the Alaska Department of law.

Numerous amendments to the version of the Code recommended by the Subcommission were made by the committee during the three months of hearings. These amendments were incorporated into a committee substitute for HB 661. On April 14, 1978, the House Committee Substitute passed the House by a 32-4-4 vote.

The House Committee Substitute then moved to the Senate where it was referred to the Senate Judiciary Committee. The Senate Judiciary Committee reviewed the House Committee Substitute during nearly two months of public hearings. As was the case in the House, no other bills were considered by the Committee during this period. Public testimony was received primarily from the Alaska Peace Officers Association, Alaska Chiefs of Police Association and the criminal division of the Alaska Department of Law. As a result of the Senate review approximately 150 amendments were made to the House version of the Code.

The Senate Judiciary Committee incorporated its amendments to the Code into a Senate Committee Substitute – SCS CSHB 611. The Senate Committee Substitute, with the addition of three floor amendments adopted on June 13, passed the Senate by a 18-2 vote on June 14, 1973. On notice of reconsideration the amended Senate Committee Substitute, SCS CSHB 661 am S, passed the Senate the next day by a 17-1-2 vote.

The need for a free conference committee to resolve the differences between the House and Senate versions of the Code was avoided on June 16, 1978, when the house concurred in the Senate amendments by a 31-0-9 vote. The revised criminal code became law when it was signed by the governor on July 22, 1978, with an effective date of January 1, 1980.

While the Code was winding its way through the legislature, commentary explaining the Code and expressing legislative intent was also being drafted. On June 12, 1978, the Senate published this commentary as Senate Journal Supplement No. 47. The House subsequently adopted Senate Journal Supplement No. 47 as its letter of intent for the criminal code. An errata sheet to the commentary appears in Senate Journal Supplement No. 48.

The version of the Code that was signed by Governor Hammond in July, 1978, differed in many respects from the bill that was originally introduced in the legislature in January. Nevertheless, the basic structure of the Code did not change during the five months of intensive legislative review. Four important features of the Code remained intact in all versions of the Code.

1. The revision was comprehensive. All of Title 11 was revised and a new sentencing scheme was adopted in Title 12 to accompany the substantive revisions.

2. All crimes, with the exception of murder and kidnapping were classified on the basis of their seriousness as Class A, B or C felonies or as Class A and B misdemeanors. In 1982, Sexual Assault in the First Degree was raised to an unclassified felony subject to a maximum sentence of 30 years. Uniform penalty provisions apply to the five classes of crimes.

3. The sentencing provisions left judicial discretion intact in the sentencing of misdemeanants and most first-time felony offenders. Judicial discretion, however, was substantially restricted by the specification of presumptive sentences for repeat felons.

4. Four culpable mental states “intentionally”, “knowingly”, “recklessly” and “criminal negligence” – were defined and used throughout the Code.

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1. The Alaska Criminal Rules, promulgated by the Alaska Supreme Court, supersede some portions of Title 12. A complete discussion of those deviations is beyond the scope of this text. ↵

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2.6: End-of-Chapter Material

Summary

The United States' system of government is called federalism and consists of one federal government regulating issues of a national concern and separate state governments regulating local issues. The bulk of criminal lawmaking resides with the individual states because of the police power granted to the states by the Tenth Amendment. Ninety percent of all criminal laws are state laws. Many federal crimes are also state crimes, and a defendant can be prosecuted federally and by a state without triggering double jeopardy protection. If a federal statute exists on an issue, a state statute cannot conflict with it because of the Constitution's Supremacy Clause.

The U.S. Constitution establishes three branches of government. The legislative branch consists of Congress and has the authority to create laws. The executive branch is headed by the President of the United States and has the authority to enforce the laws created by the legislative branch. The judicial branch is headed by the US Supreme Court and has the authority to interpret laws and the Constitution. Each branch has checks and balances over the others, and the judicial branch ensures that no branch oversteps its authority and violates separation of powers. State governments mimic the federal branches of government at the state level and set forth authorities in each state's constitution.

The federal court system exclusively adjudicates federal matters and consists primarily of the US District Court, the US Court of Appeals or Circuit Court, and the US Supreme Court. Each state has its own court system consisting primarily of a trial court, intermediate court of appeal, and possibly a high court of appeal. Trial courts have original jurisdiction and can accept evidence. Appellate courts have appellate jurisdiction and are limited to reviewing the trial courts' decisions for error.

Key Takeaways

- The three sources of law are constitutional, statutory, and case law.
- The sources of law are ranked as follows: first, constitutional; second, statutory; and third, case law. Although it is technically ranked the lowest, judicial review makes case law an extremely powerful source of law.
- The purpose of the US and state constitutions is to regulate government action.
- One purpose of statutory law is to regulate individual or private action.
- The purpose of case law is to supplement the law when there is no statute on point and also to interpret statutes and the constitution(s).
- The court's power to invalidate statutes as unconstitutional is called judicial review.
- Law comes from three places, the Constitution, a statute, or a case. Collectively, these categories are commonly referred to as the **sources of law**
- The three branches of government are the legislative branch, the executive branch, and the judicial branch.
- The head of the federal legislative branch of government is Congress. The head of the state legislative branch of government is the state legislature.
- The Senate represents every state equally because each state has two senators. The House of Representatives represents each citizen equally because states are assigned representatives based on their population.
- The head of the federal executive branch of government is the president. The head of each state's executive branch of government is the governor.
- The head of the federal judicial branch of government is the US Supreme Court. The head of each state judicial branch of government is the highest-level state appellate court.
- Federal courts are exclusive and hear only federal matters or cases involving diversity of citizenship. State courts are nonexclusive and can hear state and federal matters. All federal criminal prosecutions take place in federal court, and all state criminal prosecutions take place in state court.
- Jurisdiction is either the court's power to hear a matter or a geographic area over which a court has authority.
- Original jurisdiction is a court's power to hear a trial and accept evidence. Appellate jurisdiction is a court's power to hear an appeal and review the trial for error.
- Three federal courts adjudicate criminal matters: the trial court, which is called the United States District Court; the intermediate court of appeal, which is called the United States Court of Appeals or Circuit Court; and the high court of appeal,

which is called the United States Supreme Court. The district court has original jurisdiction; the Circuit Court and US Supreme Court have primarily appellate jurisdiction.

Websites of Interest

- US Supreme Court: http://www.supremecourt.gov
- Federal courts: http://www.uscourts.gov/
- Civic participation: http://www.congress.org
- Alaska state courts: http://www.courts.alaska.gov

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CHAPTER OVERVIEW

3: Constitutional Protections

3.1: Applicability of the Constitution
3.2: The Due Process and Equal Protection Clauses
3.3: Freedom of Speech
3.4: The Right to Privacy
3.5: The Right to Bear Arms
3.6: Excessive Punishment
3.7: End-of-Chapter Material

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3.1: Applicability of the Constitution

In addition to statutory and common law defenses (to be discussed in subsequent chapters), a criminal defendant has extensive protections under the US and Alaska constitutions. As stated in the previous chapter, the federal constitution is applicable in all criminal cases since the government is prosecuting the offender. Several state constitutions mirror the federal constitution because it sets the *minimum* standard of protection guaranteed to all citizens. However, remember that states can – and often do – provide *more* constitutional protections to criminal defendants than their federal counterpart, so long as those state protections do not violate notions of federal supremacy. In this chapter, both the federal constitution and the Alaska Constitution are analyzed. As you will see shortly, although the federal constitution establishes the floor of constitutional protection, the Alaska Constitution includes greater protection for its citizens.

Constitutional Protections

Generally, two types of constitutional protections exist. First, a defendant can challenge the constitutionality of a criminal statute or ordinance (from this point forward, the term *statute* includes ordinances unless otherwise noted). Recall these codified laws cannot conflict with, or attempt to supersede, the Constitution. An attack on the constitutionality of a statute can be a claim that the statute is **unconstitutional on its face**, is **unconstitutional as applied**, or *both*. A statute is unconstitutional on its face when its wording is unconstitutional. The statute is invalid (and unenforceable) under any circumstance. A statute is unconstitutional as applied when its enforcement is unconstitutional. This is sometimes referred to as a **facial challenge** to the statute. The difference between the two is significant. If a statute is unconstitutional on its face, it is invalid under *any circumstances*. If the statute is unconstitutional as applied, it is only unconstitutional under certain circumstances. As you will see, when faced with finding a statute unconstitutional, courts prefer to decide cases on an as-applied challenge to avoid issuing premature decisions.

Another type of constitutional protection is **procedural.** The defendant can protest an unconstitutional procedure that occurs during prosecution. Criminal procedure includes, but is not limited to, arrest, interrogation, search, filing of charges, trial, and appeal. The defendant can make a motion to dismiss the charges, suppress evidence, or declare a mistrial. The defendant can also appeal and seek to reverse a conviction, among other remedies.

This book concentrates on criminal law rather than criminal procedure, so the bulk of this chapter is devoted to unconstitutional criminal statutes, rather than unconstitutional procedures. The exception is the right to a jury trial, which is discussed shortly.

Example of Constitutional Protections

Bill is on trial for obstructing a public sidewalk. Bill was arrested for standing in front of a restaurant's entrance with a sign stating "will eat any and all leftovers." The city ordinance Bill violated makes it a misdemeanor to "stand or sit on a public sidewalk with a sign." The ordinance mandates jail time for its violation. To save money, the judge presiding over Bill's trial declares that Bill will have a bench trial, rather than a jury trial. In this example, Bill can constitutionally attack the city *ordinance* for violating his freedom of speech because it prohibits holding a sign. The city ordinance appears unconstitutional *on its face* and *as applied* to Bill. Bill can also constitutionally attack *his bench trial* because he has the right to a jury trial under the Sixth Amendment. He could do this by making a motion to declare a mistrial, by petitioning an appellate court to halt the trial, or by appeal after a judgment of conviction.

Judicial Standards of Review

As stated previously in this book, courts review statutes to ensure that they conform to the Constitution pursuant to their power of **judicial review**. Courts generally use different standards of review when constitutional protections are at stake. Typically, a court balances the *government's* interest in regulating conduct against an *individual's* interest in a constitutionally protected right. This balancing of interests varies depending on the right at stake. If the government is infringing upon a fundamental right, the court uses **strict scrutiny** to analyze the statute at issue. A statute that violates or inhibits fundamental constitutional protections is presumptively invalid and can be upheld only if the government can demonstrate that the statute is supported by a compelling government interest and it is narrowly tailored, using the least restrictive means possible to achieve its result.

If a statute is challenged based on discrimination under the equal protection clause and the right being infringed is important, but not fundamental, the court may use a lower standard, called **intermediate scrutiny**. When the law burdens a non-fundamental, but

important right (like gender), the government must demonstrate a close and substantial relationship to the government's conduct. To date, only gender has been found to be an important, but not fundamental, right. There must be a meaningful and persuasive justification for the government's decision to treat a person differently based on their gender.

Finally, if a statute implicates neither a fundamental right nor a suspect class, then the government need only to show a reasonable rationale basis for the governmental action. This test, the **rational basis test**, is the lowest standard of review available. The rational basis test allows a statute to discriminate if the statute is rationally related to a legitimate government interest. Most statutes are reviewed under the rational basis test.

Example of Strict Scrutiny

Review the example regarding Bill, who was arrested for standing and holding a sign. The US Supreme Court has held that freedom of speech is a *fundamental right*. Thus a court reviewing the ordinance in Bill's case will hold the ordinance presumptively invalid, unless the government can demonstrate a compelling interest in enacting it, and that it used the least restrictive means possible. In this example, the ordinance is likely unconstitutional. The ordinance is broadly written to include all signs, and preventing individuals from holding signs does not serve a compelling government interest, so this heightened standard will probably result in the court holding the ordinance *invalid* and *unenforceable*.

The Legislative Branch's Prohibited Powers

The legislative branch cannot punish defendants without a trial or enact retroactive criminal statutes pursuant to the Constitution's prohibition against bill of attainder and ex post facto laws. Article 1, § 9, clause 3 of the US Constitution states, "No Bill of Attainder or ex post facto Law shall be passed." The prohibition on bill of attainder and ex post facto laws are extended to the states in Article 1, § 10, clause 1: "No State shall…pass any Bill of Attainder, ex post facto Law." The Alaska Constitution also prohibits bill of attainder and ex post facto legislative action, mirroring the federal Constitution. *See* Alaska Constitution, Art. 1, §15.

Bill of Attainder

A bill of attainder is a legislative act that punishes an individual without the benefit of a trial. The drafters of the Constitution wanted to ensure that criminal defendants have a full and fair adjudication of their rights before the government imposes punishment. Bill of attainder is usually accomplished by a statute that targets an individual or group of individuals for some type of government sanction. Bill of attainder protection crystalizes the idea of a fair adjudicative process and enforces the *separation of powers* doctrine by eliminating the ability of the legislature to impose criminal punishment without a trial conducted by the judicial branch. *See U.S. v. Brown*, 381 U.S. 437 (1965).

Example of Bill of Attainder

Brianne is an outspoken member of the Communist party. Brianne applies for a job as a teacher at her local elementary school and is refused, based on this statute: "Members of any subversive group, including the Communist party, cannot hold public office nor teach for a public institution." Brianne could attack this statute as a bill of attainder. Its provisions, targeting members of the Communist Party or any other subversive group, *punish* group members by eliminating career opportunities. The members targeted are punished without a trial or any adjudication of their rights. Thus, this statute allows the legislature to impose a sanction without a trial in violation of the Constitution's prohibited powers.

Ex Post Facto

An **ex post facto** law punishes an individual retroactively, and such laws severely encroach upon the notion of fairness. There are three types of ex post facto laws. First, a law is ex post facto if it punishes behavior that occurred before the law was in effect. Second, ex post facto laws increase the punishment for an offense after the crime occurred. Third, a law can be ex post facto if it increases the possibility of conviction after the crime occurred.

Ex post facto laws are not fair since a reasonable person has no way of avoiding criminal conduct since their conduct was not illegal at the time the behavior occurred. Also, there is no way to achieve deterrence – one of the stated goals of sentencing – if individuals did not know what conduct was considered criminal at the time of the conduct. Prohibiting ex post facto laws also

protects against arbitrary and vindictive legislation. Legislators are not allowed to punish behavior that was legal, even if abhorrent, after the fact. All citizens are entitled to a fair warning of the criminal acts.

Example of an Ex Post Facto Law Punishing Behavior Retroactively

A state murder statute defines murder as the killing of a human being, *born alive*. The state legislature amends this statute to include the killing of a fetus, including abortion. The amendment extends the application of the statute to all criminal fetus killings that occurred *before* the statute was changed. This language punishes defendants for behavior that was legal when committed. If the state attempts to enforce this language, a court would invalidate the statute for violating the prohibition against ex post facto laws.

Example of an Ex Post Facto Law Increasing Punishment Retroactively

In the preceding example about amending the murder statute, the state also amends the statute to increase the penalty for murder to the *death penalty*. Before the amendment, the penalty for murder was *life in prison* without the possibility of parole. The state cannot give the death penalty to defendants who committed murder before the statute was amended. This is considered ex post facto because it increases the punishment for the offense after the crime is committed.

Example of an Ex Post Facto Law Increasing the Possibility of Conviction Retroactively

In the preceding example, the state amends the murder statute to remove the statute of limitations, which is the time limit on prosecution. Before the amendment, the statute of limitations was fifty years. Pursuant to this amendment, if the government sought to prosecute an individual for murder who committed murder *more than fifty years ago*, such a prosecution would be considered ex post facto because it increases the chance of conviction after the crime is committed.

Changes That Benefit a Defendant Retroactively

Changes that *benefit* a criminal defendant are not considered ex post facto and may be applied retroactively, provided that the legislature explicitly provides for retroactive application. In the preceding example, if the state amended the murder statute to *shorten* the statute of limitations, this change actually benefits defendants by making it more difficult to convict them. Thus this amendment would be constitutional.

Ex Post Facto Applies Only to Criminal Laws

Ex post facto protection applies only to *criminal* laws. Laws that raise fees or taxes after payment are civil rather than criminal in nature. Thus these retroactive increases do not exceed governmental authority and are constitutional.

Example of Ex Post Facto Under Alaska Constitution

A good example of the heightened protections one has under the Alaska Constitution is Alaska's Sex Offender Registration Act (ASORA) (sometimes referred to as Alaska's "Megan's Law"). In 1994, the Alaska Legislature passed the ASORA, which requires all sex offenders and child kidnappers to register with the Department of Public Safety (DPS). AS 18.65.087. DPS is authorized to maintain a publicly searchable, central registry of all offenders. When the Alaska Legislature enacted this statute, it required all sex offenders, regardless of when they were convicted, to register with DPS. Shortly after it was enacted, a group of convicted sex offenders challenged the enforceability of ASORA, arguing that the statute violated their protection against ex post facto laws under the federal constitution. The US Supreme Court found that the ASORA did not violate the federal constitution's prohibition against ex post facto laws since the registration requirement was nonpunitive (non-criminal); the statute could be enforced retroactively. *Smith v. Doe*, 538 U.S 84 (2003).

Shortly thereafter, the same statute was challenged under the Alaska Constitution, where the convicted sex offenders argued that ASORA violated the ex post facto clause of the *state* constitution. Unlike the US Supreme Court, the Alaska Supreme Court found the ASORA so punitive that it was the equivalent of increasing a person's sentence retroactively. Thus, the ASORA was unconstitutional as applied to convicted sex offenders who were convicted prior to the enactment of ASORA. *Doe v. State*, 189 P.3d 999, 1018 (Alaska 2004).

This example demonstrates the application of several rules just covered. First, the federal constitution establishes minimum constitutional protections. The Alaska Constitution provides greater protection to criminal defendants than the federal constitution. Second, a statute can be found unconstitutional only to a subgroup of individuals. In *Doe*, the Alaska Supreme Court found that

ASORA was only unconstitutional when applied to convicted sex offenders before the enactment of the statute. It remained constitutional for the remaining convicted sex offenders; they must continue to register with DPS. Finally, the statute violated the protection against ex post facto because it increased the punishment retroactively. The convicted sex offenders had no notice that they would be required to register with DPS following their conviction. Such a result was fundamentally unfair.

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3.2: The Due Process and Equal Protection Clauses

Although Article I of the Constitution prohibits certain legislative branch powers, the Bill of Rights contains most of the constitutional protections afforded to criminal defendants. The Bill of Rights is the first ten amendments to the Constitution. In addition, the Fourteenth Amendment, which was added to the Constitution after the Civil War, added additional protections of due process and equal protection.

For much of U.S. history, the constitutional protections found within the Bill of Rights only applied to the federal government. However, beginning in the 1920s, the US Supreme Court adopted the doctrine of **selective incorporation**, in which it held most of the constitutional protections found within the Bills of Rights are implicit to due process's concept of ordered liberty and must be incorporated into the Fourteenth Amendment's protections and applied to the states. *See. e.g.*, *Mapp v. Ohio*, 367 U.S. 643 (1961) and *Gideon v. Wainwright*, 372 U.S. 335 (1963). To be clear, not all of the rights guaranteed by the Bill of Rights have been incorporated and applied to the states. But generally speaking, the overwhelming majority of the constitutional protections in the Bill of Rights apply to the States. Thus although the original focus of the Bill of Rights may have only limited the federal government, modern constitutional jurisprudence extends the Bill of Rights protections to all levels of state and local government.

The due process clause states, "No person shall…be deprived of life, liberty, or property, without due process of law." The due process clause in the Fifth Amendment applies to *federal* crimes and federal criminal prosecutions. The due process clause is repeated in the Fourteenth Amendment, which guarantees due process of law in *state* criminal prosecutions. The Alaska Constitution has a nearly identical provision, as do most states. *See* Alaska Constitution, Art. 1, §7.

Due process is a concept that all persons are entitled to "procedural justice" whenever they are threatened with the loss of life, liberty, or property at the hands of the government. It requires that government provide a mechanism to all persons to ensure that it acts justly, fairly, and reasonably. Due process exists without the need for individual action.

There are two types of due process: substantive and procedural. Substantive due process protects individual liberty and the unreasonable loss of substantive rights, such as the right to speak freely and the right to privacy. **Substantive due process** prohibits government action that shocks our collective conscience or interferes with our basic concept of ordered liberty. **Procedural due process** guarantees a fair process in connection with any deprivation of life, liberty, or property at the hands of the government. Procedural due process also ensures that individuals have notice and an opportunity to be heard. Both substantive and procedural due process ensure that individuals are not denied their life (capital punishment), liberty (incarceration), or property (forfeiture) arbitrarily.

Due process, like all constitutional rights, is not limitless. The government may interfere with a person's individual liberty if the government's actions are necessary for an ordered society. This balancing test requires the court to assess the quality of the right impacted and the importance of the government's conduct.

Chase v. State, 243 P.3d 1014 (Alaska App. 2010)

The following case, *Chase v. State*, demonstrates how courts balance the competing interests involved in government regulation. Although *Chase* discusses the right to personal autonomy as guaranteed by the Alaska Constitution, the Court analyzed the importance of the government's regulation when determining the constitutionality of a particular statute.

243 P.3d 1014
Court of Appeals of Alaska.

Steven L. CHASE, Appellant,
v.
STATE of Alaska, Appellee.
No. A–10433.
Dec. 3, 2010.
Rehearing Denied Dec. 30, 2010.

OPINION

MANNHEIMER, Judge.

Steven L. Chase was driving in Fairbanks when a state trooper pulled him over because Chase was not wearing his seatbelt. During this traffic stop, the officer discovered that Chase should not have been driving at all; Chase's driver's license was canceled. Chase was subsequently convicted of driving with a canceled driver's license and driving without his seatbelt fastened. He appeals his convictions, arguing … why his convictions are unlawful.

Chase … argues that Alaska's seatbelt law is unconstitutional because it is an unjustified infringement of the rights of personal autonomy and liberty guaranteed by Article I, Section 1 of the Alaska Constitution.

…

For the reasons explained here, we conclude that … Chase's claims [have no] merit, and we therefore affirm his convictions.

Whether Alaska's seatbelt law infringes the rights of personal liberty, autonomy, and privacy guaranteed by the Alaska Constitution.

We first address Chase's argument that the seatbelt law is unconstitutional as a general matter. Chase contends that whatever governmental interest there may be in having people wear seatbelts is outweighed by the rights of personal liberty and autonomy guaranteed by Article I, Section 1 of the Alaska Constitution.

Article I, Section 1 of our state constitution declares that "all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry". In *Breese v. Smith*, 501 P.2d 159, 168–172 (Alaska 1972), the Alaska Supreme Court interpreted this provision as guaranteeing a certain level of personal autonomy, and as creating a sphere of personal activities and choices that are presumptively immune from government interference or regulation.

Chase argues that Article I, Section 1 protects his right to travel without police interference, his right to personal privacy, and his right to be free from unreasonable seizure.

We are not convinced that Article I, Section 1, standing alone, should necessarily be interpreted to protect all three of the interests that Chase has identified (right to travel, right to privacy, and right to be free of unreasonable seizure)—since two of these interests (privacy, and the right to be free from unreasonable seizure) are explicitly covered by other provisions of our state constitution. Article I, Section 22 guarantees a right of privacy, while Article I, Section 14 prohibits unreasonable searches and seizures. But in any event, we acknowledge that Chase has identified three constitutionally protected interests.

Chase contends that a person's decision whether to wear a seatbelt is a personal and private choice akin to a person's choice of hairstyle—a choice that the Alaska Supreme Court declared to be protected under Article I, Section 1 in *Breese v. Smith*. Chase further argues that the government has no significant interest in making people wear seatbelts when they drive (or ride in) motor vehicles. Chase contends that the seatbelt law has not made any discernible improvement in public safety, and he further contends that the Alaska Legislature's main motivation for enacting this law was to make sure that Alaska remained eligible for federal highway funds.

However, the record shows that when the legislature first enacted the seatbelt law, the legislature was presented with ample testimony and documentary evidence indicating that the law would increase seatbelt use, would prevent injuries, and would save lives and money. As a general rule, it is not an appellate court's role to strike down legislation simply because one might reasonably argue that the legislation was misguided, or simply because it appears that legislation may not have accomplished all of its intended goals. As this Court explained in *Dancer v. State*:

We may not concern ourselves with the wisdom of legislation. Our role is much more modest. We evaluate the legislation to determine whether it contravenes any prohibitions in the constitution. If it does not, we must uphold the legislation. Policy arguments advocating changes to constitutional legislation must be addressed to the legislature, not the courts.

715 P.2d 1174, 1176 (Alaska App.1986).

This leaves Chase's argument that, whatever legitimate government interest there might be in having people wear seatbelts, that interest is outweighed by the individual's interest in personal autonomy and privacy. But the Alaska Supreme Court rejected a similar "personal privacy" argument in *Kingery v. Chapple*, 504 P.2d 831, 835–37 (Alaska 1972), a case in which the supreme court upheld the constitutionality of Department of Public Safety regulations that required motorcycles to have various types of safety equipment, and which required motorcycle riders to wear a helmet.

In rejecting this privacy claim, the supreme court distinguished its earlier decision in *Breese v. Smith* (dealing with the government's attempted regulation of a student's hairstyle choice). The supreme court declared that the challenged motorcycle regulations did not constitute an "invasion of privacy" because those regulations were supported by "compelling state interests in providing for [the] safety of the traveling public". *Kingery*, 504 P.2d at 835 n. 6.

When the seatbelt law was under consideration by the legislature, several highway safety experts told the legislature that a seatbelt law which authorized police officers to stop motorists for not wearing seatbelts was an effective measure for reducing the number of deaths and serious injuries from highway accidents. Chase has failed to offer a persuasive rebuttal to that testimony.

For these reasons, we reject Chase's argument that Alaska's seatbelt law unlawfully infringes the rights of personal liberty, autonomy, and privacy guaranteed by the Alaska Constitution.

[…]

Conclusion

The judgement of the district court is AFFIRMED.

Notice that the court was obligated to balance the competing interests involved – that is, it had to balance society's interest in saving lives and money against an individual's right to be free from governmental interference. The court was unwilling to question the *wisdom* of a particular law and instead focused on the *reasonableness* of the interference.

Ask yourself if the courts should be providing such deference to the legislature. How would such deference be applied to a "mask mandate" issued via an Emergency Order by a local government's mayor as we saw during the Covid-19 global pandemic? Do you think a court would engage in a different analysis?

Void for Vagueness

A statute is **void for vagueness** if it uses words that are indefinite or ambiguous. A void for vagueness challenge attacks the wording of a statute under the due process clause. Statutes that are not precisely drafted do not provide notice to the public of exactly what kind of behavior is criminal. In addition, and more importantly, they give too much discretion to law enforcement and are unfairly enforced. *See e.g., U.S. v. White*, 882 F.2d 250, 252 (7th Cir. 1989). To violate due process, a statute must be so unclear that "men of common intelligence must guess at its meaning." *See Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). All criminal statutes must give a person of ordinary intelligence fair notice that his or her conduct is forbidden. Note that "person of ordinary intelligence" is measured from the perspective of a reasonable, hypothetical person, not necessarily whether the *accused* understood the particular statute.

Example of a Statute That Is Void for Vagueness

A state legislature enacts a statute that criminalizes "inappropriate attire on public beaches." Larry, a law enforcement officer, arrests Kathy for wearing a two-piece bathing suit at the beach because, in his belief, women should wear one-piece bathing suits. Two days later, Burt, another law enforcement officer, arrests Sarah for wearing a one-piece bathing suit at the beach because, in his belief, women should not be seen in public in bathing suits. Kathy and Sarah can attack the statute as being void for vagueness. The term "inappropriate" is unclear and can mean different things to different people. It gives too much discretion to law enforcement, is subject to uneven application, and does not give Kathy, Sarah, or the public adequate notice of what behavior is criminal.

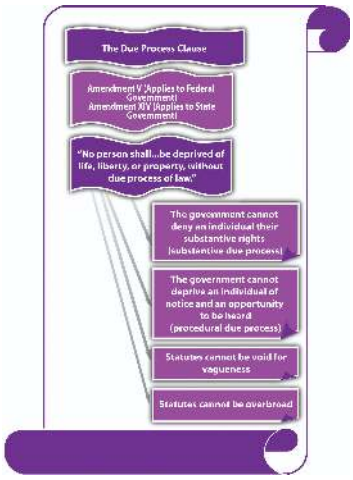
Overbreadth

A statute is **overbroad** if it criminalizes both constitutionally protected and constitutionally unprotected conduct. This challenge is different from void for vagueness, although certain statutes can be attacked on both grounds. An overbroad statute criminalizes *too much* and needs to be revised to target only conduct that is outside the Constitution's parameters.

Example of an Overbroad Statute

A state legislature enacts a statute that makes it criminal to photograph "nude individuals who are under the age of eighteen." This statute is probably overbroad and violates due process. While it prohibits constitutionally *unprotected* conduct, such as taking obscene photographs of minors, it also criminalizes First Amendment *protected* conduct, such as photographing a nude baby.

Figure 3.3 – The Federal Due Process Clause



The Equal Protection Clause

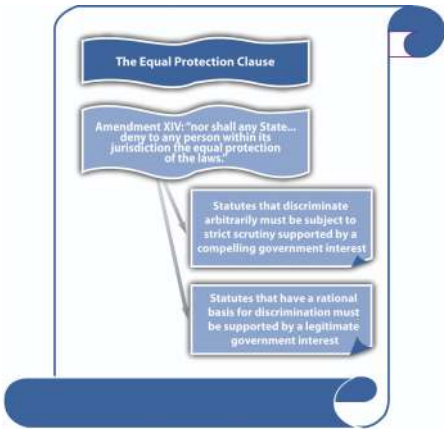
The Fourteenth Amendment states in relevant part, "nor shall any State…deny to any person within its jurisdiction the equal protection of the laws." The equal protection clause applies to *state* government. State constitutions generally have a similar provision. Alaska Constitution, Art. I, § 1. The equal protection clause prevents a state from enacting criminal laws that *discriminate* in an unreasonable and unjustified manner. The Fifth Amendment due process clause prohibits the federal government from discrimination if the discrimination is so unjustifiable that it violates due process of law. *See Bolling v. Sharpe*, 347 U.S. 497, 498-99 (1954).

To be clear: not all governmental discrimination is prohibited; instead, the government may not *impermissibly* discriminate. Whether the government impermissibly discriminated against a person depends on the class of persons targeted for special treatment. In general, court scrutiny is heightened according to a sliding scale when the subject of discrimination is an arbitrary classification. Arbitrary means random and often includes characteristics an individual is born with, such as race or national origin. The most arbitrary classifications demand **strict scrutiny**, which means the criminal statute must be supported by a *compelling* government interest. Statutes containing classifications that are not arbitrary must have a **rational basis** and be supported by a *legitimate* government interest.

Criminal statutes that classify individuals based on their race must be given strict scrutiny because race is an arbitrary classification that cannot be justified. Modern courts do not uphold criminal statutes that classify based on race because there is no government interest in treating citizens of a different race more or less harshly. *See generally, Loving v. Virginia*, 388 U.S. 1 (1967).

Criminal statutes that have a rational basis for discrimination and are supported by a legitimate government interest *can* discriminate, and frequently do. For example, criminal statutes punish felons more severely when they have a history of criminal behavior and are supported by the legitimate government interests of specific and general deterrence and incapacitation. *See e.g.*, *Lapitre v. State*, 233 P.3d 1125, 1128 (Alaska App. 2010). Note that the basis of the discrimination – a criminal defendant's *status as a convicted felon* – is rational, not arbitrary like race. Although these statutes discriminate, they are constitutional pursuant to the equal protection clause.

Figure 3.4 The Federal Equal Protection Clause



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3.3: Freedom of Speech

The First Amendment states, in relevant part, “Congress shall make no law…abridging the freedom of speech.” Although this language specifically targets *Congress*, the First Amendment has been held applicable to the states by virtue of selective incorporation. *See Gitlow v. New York*, 268 U.S. 652 (1925). Most states, like Alaska, have a similar constitutional provision protecting freedom of speech. In fact, the Alaska Constitution recognizes that although all citizens have the right to speak freely, they are equally responsible for the consequences of such speech.

“Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right.”

Alaska Constitution, Art. 1, §5.

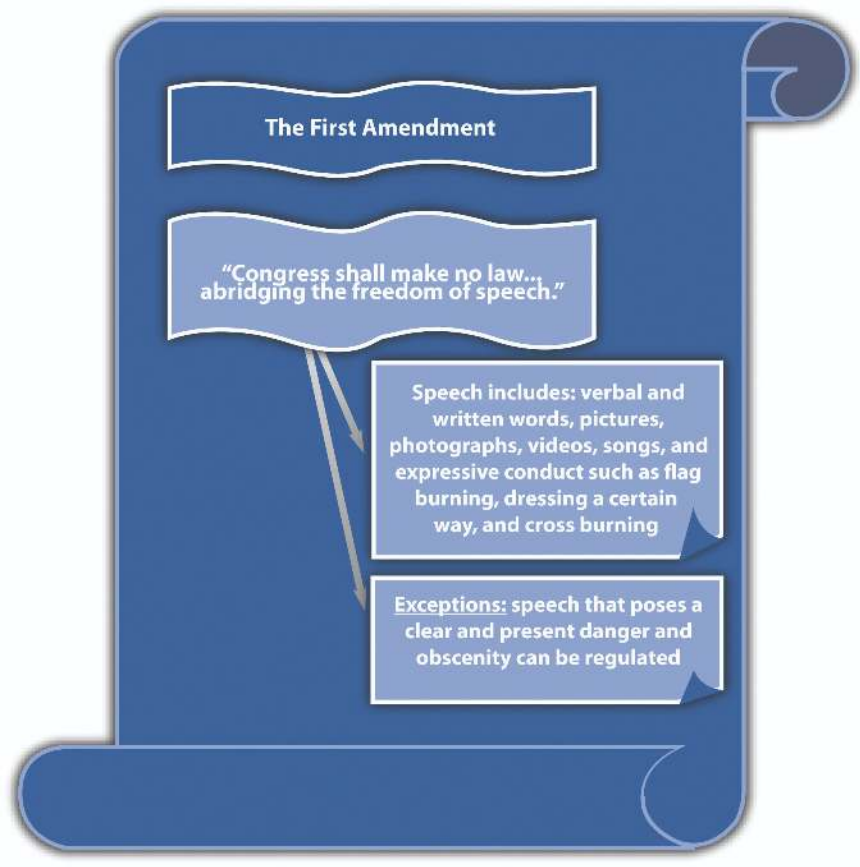
Freedom of speech is frequently referred to as “the bedrock of a democratic society.” Our Founding Fathers believed that a robust, free exchange of ideas was the great shield against tyranny and memorialized this principle in the free speech clause of the First Amendment. The First Amendment prevents the government from restricting (and criminalizing) our expressions, ideas, messages, and content. The word speech has been interpreted to cover virtually any *form* of expression, including verbal and written words, pictures, photographs, videos, and songs. First Amendment speech not only covers words and ideas, but also **symbolic speech**, including expressive conduct such as dressing a certain way (*Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969)), flag burning (*Texas v. Johnson*, 491 U.S. 397 (1989)), and cross burning (*R.A.V. v. St. Paul*, 505 U.S. 377 (1992)).

However, even though our free speech is paramount to a well-functioning democracy, it is not limitless. Not all speech is protected. When limiting a person’s speech, the court conducts a balancing test – the court must weigh an individual’s right to free expression against society’s interest in a safe, secure, and peaceful community.

Exceptions to the First Amendment’s Protection of Free Speech

In general, courts have examined the history of the Constitution and the policy supporting freedom of speech when creating exceptions to its coverage. Modern decisions afford freedom of speech the strictest level of scrutiny; only a compelling government interest can justify an exception, which must use the least restrictive means possible. *See Sable Communis. of California, Inc. v. FCC*, 492 U.S. 115 (1989). For brevity, this book reviews the constitutional exceptions to free speech in statutes criminalizing **fighting words, incitement to riot, true threats, hate crimes,** and **obscenity**.

Figure 3.5 The First Amendment



Fighting Words

Although the First Amendment protects *peaceful* speech and assembly, if speech creates a **clear and present danger** to the public, it can be regulated. *Schenck v. U.S.*, 249 U.S. 47 (1919). This includes **fighting words**, or "those [words] which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *See Chaplinsky v. New Hampshire*, 315 U.S 568, 572 (1942).

Any criminal statute prohibiting fighting words must be narrowly tailored and focus on *imminent* rather than *future* harm. Modern US Supreme Court decisions indicate a tendency to favor freedom of speech over the government's interest in regulating fighting words, and many fighting words statutes have been deemed unconstitutional under the First Amendment or void for vagueness and overbreadth under the Fifth Amendment and Fourteenth Amendment due process clause. The Alaska case, *Anniskette v. State*, 489 P.2d 1012 (Alaska 1971), included below demonstrates the judiciary's concern of governmental overreach when criminalizing "mean" words.

Example of an Unconstitutional Fighting Words Statute

Georgia enacted the following criminal statute: "Any person who shall, without provocation, use to or of another, and in his presence…opprobrious words or abusive language, tending to cause a breach of the peace…shall be guilty of a misdemeanor." *See former* Ga. Code § 26-6303. The US Supreme Court determined that this statute was vague and overbroad, and unconstitutional under the First Amendment. *See Gooding v. Wilson*, 405 U.S. 518 (1972).

The Court noted that "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only within narrow specificity." *See id*. at 522. The Court held that the dictionary definitions of "opprobrious" and "abusive" gave government greater reach than fighting words. Thus the statute was overbroad since it did not restrict its prohibition to *imminent* harm. The terms opprobrious and abusive have various meanings, so the statute is subject to uneven enforcement and is void for vagueness. As the Court stated, this statute "licenses the jury to create its own standard in each case." *See id.* at 528 (*citingHerndon v. Lowry*, 301 U.S. 242, 263 (1937)).

Incitement to Riot

Inciting a riot is not protected speech. Incitement to riot is regulated under the clear and present danger exception. Similar to fighting words, an incitement to riot statute must prohibit *imminent* lawless action. *See Brandenburg v. Ohio*, 395 U.S. 444 (1969). Statutes that prohibit simple advocacy with no imminent threat or harm cannot withstand the First Amendment's heightened scrutiny.

Brandenburg .v Ohio, 395 U.S. 444 (1969)

In *Brandenburg v. Ohio*, the U.S. Supreme Court struck down a statute that criminalized "advocat[ing]…the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and "voluntarily assembl[ing] with any society, group or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism". *See former* Ohio Rev. Code Ann. § 2923.13. An excerpt of the case is included below. Notice how the Court focused on the difference between simple advocacy and incitement to violence.

89 S.Ct. 1827
Supreme Court of the United States

Clarence BRANDENBURG, Appellant,
v.
State of OHIO.
No. 492.
Argued Feb. 27, 1969.
Decided June 9, 1969.

Opinion

PER CURIAM.

The appellant, a leader of a Ku Klux Klan group, was convicted under the Ohio Criminal Syndicalism statute for[:]

'advocat(ing) * * * the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform' and for 'voluntarily assembl(ing) with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.' […]

[*See former* Ohio Rev. Code Ann. § 2923.13.]

He was fined $1,000 and sentenced to one to 10 years' imprisonment. The appellant [Brandenburg] challenged the constitutionality of the criminal syndicalism statute under the First and Fourteenth Amendments to the United States Constitution, but the intermediate appellate court of Ohio affirmed his conviction without opinion. The Supreme Court of Ohio dismissed his appeal … Appeal was taken to this Court, and we noted probable jurisdiction. We reverse.

The record shows that a man, identified at trial as the appellant, telephoned an announcer-reporter on the staff of a Cincinnati television station and invited him to come to a Ku Klux Klan 'rally' to be held at a farm in Hamilton County. With the cooperation of the organizers, the reporter and a cameraman attended the meeting and filmed the events. Portions of the films were later broadcast on the local station and on a national network.

The prosecution's case rested on the films and on testimony identifying the appellant as the person who communicated with the reporter and who spoke at the rally. The State also introduced into evidence several articles appearing in the film, including a pistol, a rifle, a shotgun, ammunition, a Bible, and a red hood worn by the speaker in the films.

One film showed 12 hooded figures, some of whom carried firearms. They were gathered around a large wooden cross, which they burned. No one was present other than the participants and the newsmen who made the film. Most of the words uttered during the scene were incomprehensible when the film was projected, but scattered phrases could be understood that were derogatory of Negroes and, in one instance, of Jews. Another scene on the same film showed the appellant, in Klan regalia, making a speech. The speech, in full, was as follows:

'This is an organizers' meeting. We have had quite a few members here today which are—we have hundreds, hundreds of members throughout the State of Ohio. I can quote from a newspaper clipping from the Columbus, Ohio Dispatch, five weeks ago Sunday

morning. The Klan has more members in the State of Ohio than does any other organization. We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken.
'We are marching on Congress July the Fourth, four hundred thousand strong. From there we are dividing into two groups, one group to march on St. Augustine, Florida, the other group to march into Mississippi. Thank you.'

The second film showed six hooded figures one of whom, later identified as the appellant, repeated a speech very similar to that recorded on the first film. The reference to the possibility of 'revengeance' was omitted, and one sentence was added: 'Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel.' Though some of the figures in the films carried weapons, the speaker did not.[…]

1927, this Court sustained the constitutionality of [a substantially similar law, the] California's Criminal Syndicalism Act. …[U.S. Supreme Court precedent has] fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action. As we said in *Noto v. United States*, 367 U.S. 290 (1961),

'the mere abstract teaching … of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.' A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control.

Measured by this test, Ohio's Criminal Syndicalism Act cannot be sustained. The Act punishes persons who 'advocate or teach the duty, necessity, or propriety' of violence 'as a means of accomplishing industrial or political reform'; or who publish or circulate or display any book or paper containing such advocacy; or who 'justify' the commission of violent acts 'with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism'; or who 'voluntarily assemble' with a group formed 'to teach or advocate the doctrines of criminal syndicalism.' Neither the indictment nor the trial judge's instructions to the jury in any way refined the statute's bald definition of the crime in terms of mere advocacy not distinguished from incitement to imminent lawless action.

Accordingly, we are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action. Such a statute falls within the condemnation of the First and Fourteenth Amendments.
[…]
Reversed.

True Threats

Courts have long recognized that the First Amendment does not prohibit a state from criminalizing "**true threats**"- that is, threats to cause harm to another person. States have a legitimate interest in preventing persons from engaging in speech that unjustifiably creates an objective, reasonable fear. Although a person may have a fundamental right to express abusive, caustic, or offensive views, no one has the right to threaten physical violence. States can, and frequently do, criminalize such conduct. What constitutes a threat, however, must be distinguished from what constitutes constitutionally protected speech.

"True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats "protect[s] individuals from the fear of violence[.]"

See Virginia v. Black, 538 U.S. 434, 359-60 (internal citations omitted).

Although the government need not prove the defendant intended to carry through with the threat, the government bears the burden of proving that the utterance was more than simple hyperbole. This determination requires the court to view the defendant's speech in context, weighing the reaction of the listeners and its conditional nature (if any). *See e.g., Watts v. United States*, 394 U.S. 705, 708 (1969). This is not always an easy task.

Nonetheless, Alaska has enacted several criminal statutes that proscribe threats of physical violence or criminalize conduct that may cause a reasonable person to be afraid. For example, second-degree terroristic threatening criminalizes making a threat that causes an evacuation of a public building (*e.g.*, a bomb threat). AS 11.56.810(a)(1)(b). Stalking, on the other hand, criminalizes a pattern of nonconsensual contact that causes a reasonable person to be placed in fear. AS 11.41.270. We will explore these crimes, and others, in subsequent chapters, but for now recognize that whenever the government seeks to proscribe threatening conduct, the First Amendment may limit the reach of the proposed crime.

Hate Crimes

Many states and the federal government have enacted hate crimes statutes. When hate crime statutes criminalize speech, including expressive conduct, a First Amendment analysis is appropriate. When hate crimes statutes enhance a penalty for criminal conduct that is *not expressive*, the First Amendment is not applicable. *See Wisconsin v. Mitchell*, 508 U.S. 476 (1993). In Alaska, hate crimes are subject to enhanced punishment. AS 12.55.155(c)(22).

Hate crimes statutes punish conduct that targets a specific classifications of people. These classifications are listed in the statute and can include race, ethnicity, gender, sexual orientation, or religion. Hate crimes statutes that criminalize speech may be constitutional under the clear and present danger exception if they are tailored to apply only to speech or expressive conduct that is supported by an *intent to intimidate*. *See Virginia v. Black*, 538 U.S. 343 (2003). This can include speech or expressive conduct such as threats of imminent bodily injury, death, or cross burning. As with all criminal statutes that implicate the First Amendment, hate crimes statutes must be narrowly drafted, and will be struck down if vague or overbroad.

Hate crimes statutes that criminalize the *content* of speech, like a prejudicial *opinion* about a certain race, ethnicity, gender, sexual orientation, or religion, are unconstitutional under the First Amendment. *See R.A.V. v. St. Paul*, 505 U.S. 377 (1992). Statutes that criminalize **content-based speech** have a "chilling effect" on free expression by deterring individuals from expressing unpopular views, which is the essence of free speech protection. Although this type of speech can stir up anger, resentment, and possibly trigger a violent situation, the First Amendment protects content-based speech from governmental regulation unless the government can demonstrate a compelling state interest.

Is Cross Burning Constitutional?

Cross burning has a long and violent history in America, one that is intertwined with the rise of the Ku Klux Klan. Several jurisdictions have sought to criminalize such conduct due to its violent and intimidating nature. Whether such laws withstand First Amendment scrutiny, however, largely depends on whether the law targets the content of speech or the conduct at issue (regardless of the speech's content).

An Unconstitutional Statute Prohibiting Cross Burning

St. Paul, Minnesota, enacted the Bias-Motivated Crime Ordinance, which prohibited the display of a symbol that a person knows or has reason to know "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" See former Ordinance, St. Paul, Minn., Legis. Code § 292.02 (1990). In *R.A.V. v. St. Paul*, the US Supreme Court held that this ordinance was unconstitutional on its face because the regulation was based on the content of speech, with no additional requirement for imminent lawless action. The Court held that the ordinance did not proscribe the use of fighting words (the display of a symbol) toward specific groups of individuals, which would be an equal protection clause challenge. Instead, the Court determined that the statute prohibited the use of specific types of fighting words – that is, words that promote racial hatred. This was impermissible viewpoint-based censorship. As the Court stated, **content-based** regulations "are presumptively invalid." *See id*. at 382 (citations omitted).

Compare the St. Paul ordinance discussed above with the Virginia statute below.

A Constitutional Statute Prohibiting Cross Burning

Virginia enacted a statute that made it criminal "for any person…, with the intent of intimidating any person or group…, to burn…a cross on the property of another, a highway or other public place." *See* Va. Code Ann. § 18.2-423. The US Supreme Court held this statute constitutional under the First Amendment because it did not single out cross-burning *indicating racial hatred*, unlike the Minnesota cross-burning ordinance, but instead required the government to prove that the accused acted with

the *intent to intimidate*. The Court stated, "[u]nlike the statute at issue in *R. A. V.*, the Virginia statute does not single out for opprobrium only that speech directed toward 'one of the specified disfavored topics.'" *See Virginia v. Black*, 538 U.S. 343, 362 (2003) (citations omitted). [Under the Virginia statute] it does not matter whether an individual burns a cross with intent to intimidate because of the victim's race, gender, or religion, or because of the victim's "political affiliation, union membership, or homosexuality." *See id*. According to the Court, this was constitutional since the ordinance was **content-neutral**.

Anniskette v. State, 489 P.2d 1012 (Alaska 1971)

The following Alaska case, *Anniskette v. State* , 489 P.2d 1012 (Alaska 1971), demonstrates how the court analyzes a potential challenge to a criminal statute under the First Amendment. As you read the case, ask yourself whether you believe the court is treating the victim *differently* than other citizens given his profession.

489 P.2d 1012
Supreme Court of Alaska.

Ralph ANNISKETTE, Appellant,
v.
STATE of Alaska, Appellee.
No. 1231.
Oct. 15, 1971.

Before BONEY, C. J., and DIMOND, RABINOWITZ, CONNOR and ERWIN, JJ.

OPINION

CONNOR, Justice.

Appellant was convicted by a district court jury of disorderly conduct and disturbance of the peace under AS 11.45.030. The complaint stated that on or about August 22, 1969, Ralph Anniskette 'did unlawfully conduct himself in a disorderly manner in his home to the disturbance of an Alaska State Trooper, Lorn Campbell, by telephoning Trooper Campbell and berating him with loud and abusive language.'

It seems that appellant regularly telephoned the local resident trooper and complained at length regarding the trooper's qualifications and performance. Repeated calls were often made late at night while appellant was apparently intoxicated. The trooper and his family became increasingly upset with such recurrent harassment, which occurred even while the trooper was out of town.

However, appellant was charged with making but a single telephone call on August 22, 1969. The call was from appellant's home to Trooper Campbell's home. During the course of that conversation, he complained at length regarding the trooper's effectiveness, and even questioned whether the trooper was properly qualified to be a law-enforcement official.[1]

At his trial, appellant moved to dismiss the charge for failure to state an offense under AS 11.45.030. If an offense was stated, it was, he argued, an unconstitutional application of the statute. Alternatively, he asserted that the statute was unconstitutionally vague on its face, and that it constituted an invalid prior restraint on his freedom of speech. His motion was denied. He was convicted in the district court and appealed to the superior court. Upon affirmance of his conviction by that court, this appeal followed.

…

This is not a case in which a comprehensive interpretation of the disorderly conduct statute is required. Whatever the statute means, it cannot be applied to behavior which is constitutionally exempt from criminal prohibition. It must be recognized at the outset that it is communicative utterances which are the subject of prosecution. They constitute the sole form of behavior for which the defendant was prosecuted.

Under the First Amendment to the Constitution, it is only in the most limited circumstances that speech may be punished. Certainly the defendant's conduct does not fall within the unprotected area of 'obscenity'. No claim is made that Anniskette's message was erotically arousing. See *Cohen v. California*, 403 U.S. 15 (1971). The defendant did not use 'profanity' of the type which creates in and of itself a public nuisance. At least no such 'profanity' is charged here.[2] Writing for the court in Cohen, Mr. Justice Harlan

pointed out that coarse words must often be a necessary concomitant to achieving those values which open debate and free speech are designed to serve:

'Against this perception of the constitutional policies involved, we discern certain more particularized considerations that peculiarly call for reversal of this conviction. First, the principle contended for by the State seems inherently boundless. How is one to distinguish this from any other offensive word? Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below. For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.' [citations omitted]

Nor can we find in defendant's telephone call an exhortation to violence by others which creates a clear and present danger that such violence will occur.

We cannot classify the defendant's telephonic communication as falling within the category of 'fighting words', which is recognized as another exception to the freedom of speech guaranteed by the Constitution. The 'fighting words' doctrine covers those face-to-face utterances which ordinarily provoke, in the average, reasonable listener, an immediate violent response. The defendant's conduct in this case did not reach that degree of provocation.

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), is not apposite. It concerns a narrowly construed statute prohibiting 'face-to-face words plainly likely to cause a breach of the peace by the addressee'. An important distinguishing feature of *Chaplinsky* is that the words, 'You are a God damned racketeer' and 'a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists', were uttered at a street intersection where the listening crowd had become unruly, and after a disturbance in the crowd had actually occurred. Because these words, in context, tended to incite an immediate breach of the peace, they were held not to be protected as free speech

But here the situation is quite different. For even if it were assumed for purposes of argument that Anniskette's message contained 'fighting words', constitutional protection would still extend to the particular factual setting presented here. The time necessary for the officer to travel from his residence to that of the defendant should have allowed enough cooling off so that any desire on the part of the officer to inflict violence on the defendant should have been dissipated. We assume that the officer had sufficient self-control that, after such a period of time, he would not have assaulted the defendant for what had been said earlier. As another court has observed,

'A policeman's special powers and training, and his constant exposure to situations where the norms of common speech are not distinguished by unvarying delicacy of expression, leave him less free to react as quickly as the private citizen to a purely verbal assault. In a situation where he is both the victim of the provocative words of abuse and the public official entrusted with a discretion to initiate through arrest the criminal process, the policemen may, ordinarily at least, be under a necessity to preface arrest by a warning. It would appear that there is no First Amendment right to engage in deliberate and continued baiting of policemen by verbal excesses which have no apparent purpose other than to provoke a violent reaction.'

Williams v. District of Columbia, 419 F.2d 638, 646, n. 23 (1969).

That the officer was personally offended by the telephone call does not render the defendant's conduct a crime. That would be to make the terms of the statute and the content of the First Amendment shift with the mentation and emotional status of the recipient of the verbal communication. Under an objective standard it is not permissible to make criminality hinge upon the ideological vicissitudes of the listener. A great deal more is required to place speech outside the pale of First Amendment protection. The point was made forcefully [by the United States Supreme Court] in *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949):

'Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, (citing *Chaplinsky*) is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.'

…

We understand the difficulties encountered by a state trooper in a small community, where village vexations at times can reach a fever pitch. We may even view appellant's conduct with personal disapproval. But we find neither legislative language nor constitutional power to read the statute as including within its ambit a single telephone call criticizing a public officer for the performance of his official duties. [citations omitted]

In the light of these constitutional mandates … [w]e hold that defendant's conduct did not constitute a crime.

We reverse and remand with direction that the complaint be dismissed.

Reversed.

[1] The trooper testified that:

'Mr. Anniskette-he told me I was a no good goddam cop and that he had a call into Juneau right now to find out if I was a State trooper and that when they had their own policeman that they never had the problems that since I'd been over there that they have with their kids drinking, that what was I gonna' do about a subject named Ernie Fawcett (phonetic) who had stabbed a Marvin Milton (phonetic), that the was still running on the street and that if he got to checking that he'll bet that I didn't even report this and make a report concerning this, and he went on and on over the same type of things.'

[2] The expletive, 'no good goddamn cop', merely as a part of a more generalized conversation, would hardly rise to the level of profanity which can constitutionally be reached by the criminal law. […]

Obscenity

Another exception to free speech is **obscenity;** obscene speech is not protected speech. Obscenity is usually conveyed by speech, such as words, pictures, photographs, songs, videos, and live performances. *See generally Roth v. United States*, 354 U.S. 476, 484-86 (1957). "Obscene", however, is not easily defined. As Justice Stewart famously explained, in his view, obscenity may be "indefinable … [b]ut I know it when I see it." *See Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

In *Miller v. California*, 413 U.S. 15 (1973), the US Supreme Court devised a three-part test to ascertain if speech is obscene and subject to government regulation. Generally, speech is obscene if (1) the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest in sex; (2) it depicts sexual conduct specifically defined by the applicable state law in a patently offensive way; and (3) it lacks serious literary, artistic, political, or scientific value. *See id.*

Example of Speech That Is Not Obscene

In *Jenkins v. Georgia*, 418 U.S. 153 (1974), the US Supreme Court viewed the film *Carnal Knowledge* to determine whether the defendant could be constitutionally convicted under an obscenity statute for showing it at a local theater. The Court concluded that most of the film's sexual content was suggestive rather than explicit, and the only direct portrayal of nudity was a woman's bare midriff. Thus although a jury convicted the defendant after viewing the film, the Court reversed the conviction, stating that the film does not constitute the hard-core pornography that the three-part test for obscenity isolates from the First Amendment's protection. The Court stated, "Appellant's showing of the film 'Carnal Knowledge' is simply not the 'public portrayal of hard core sexual conduct for its own sake, and for the ensuing commercial gain' which we said was punishable in Miller." *See Jenkins*, at 161 (internal citations omitted).

Nude Dancing

Statutes that regulate nude dancing have also been challenged under the First Amendment. While the US Supreme Court has found that nude dancing falls within a constitutionally protected expression, it has noted that nude dancing falls only "within the outer ambit of First Amendment protection." *See City of Erie et al v. Pap's A.M.*, 529 U.S. 277, 289 (2000). The US Supreme Court has generally upheld government reasonable regulation of erotic dancing, such as requirements that nude dancers wear pasties and a g-string. *See id.* The Court has noted that the government has a legitimate interest in preventing negative secondary effects (i.e., prostitution, excessive noise, traffic congestion, etc.).

The Alaska Supreme Court, interpreting the Alaska Constitution, has noted that sexually-oriented speech is not less worthy of protection than other types of speech. In the eyes of the Alaska Supreme Court, nude dancing is a form of free expression and any

government regulation must be narrowly tailored to achieve its result (strict scrutiny). *See Club SinRock LLC v. Anchorage*, 445 P.3d 1031, 1037-38 (Alaska 2019).

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3.4: The Right to Privacy

The federal constitution does not contain an explicit right to privacy. However, several of the amendments in the Bill of Rights protect individual decision-making. Other amendments protect personal autonomy from unwarranted governmental intrusion. These amendments – taken together – create a "zone of privacy" within the penumbra of the Bill of Rights. *See Griswold v. Connecticut*, 381 U.S. 479, 484 (1965). Under this modern constitutional interpretation, the US Supreme Court has created a right to privacy. *See id*. This right is considered fundamental and subject to strict scrutiny; only a compelling government interest can justify a statute encroaching on its protections.

Alaska, like many states, includes an **explicit right to privacy** in the Alaska Constitution.

"The right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section."

Alaska Constitution, Art. 1, §22. This explicit right to privacy has been recognized several times by the Alaska Supreme Court and restricts state action beyond what is allowed under the federal constitution. We explore each below in turn.

The Constitutional Amendments Protecting Privacy

Under the federal constitution, the right to privacy is embedded in the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments. The First Amendment protects the right to speak freely, assemble peacefully, and worship according to individual choice. The Third Amendment prohibits the government from forcing individuals to quarter, house, or feed soldiers. The Fourth Amendment prevents the government from unreasonably searching or seizing an individual or an individual's property. The Fifth and Fourteenth Amendments provide due process of law before the government can deprive an individual of life, liberty, or property. The Ninth Amendment states that rights not explicitly set forth in the Constitution may still exist. Taken together, these penumbral rights indicate that the Constitution was written to erect a barrier between individuals and an overly intrusive and regulatory government. The US Supreme Court has relied upon this federal right to privacy to guarantee the right to use birth control and the right to participate in most consensual sexual relations.

The Right to Contraception

The right to privacy was first established in the US Supreme Court case of *Griswold v. Connecticut*, 381 U.S. 479 (1965). In *Griswold*, the defendants, Planned Parenthood employees, were convicted of prescribing birth control as accessories under two Connecticut statutes that criminalized the use of birth control. The Court found the statutes unconstitutional, holding that the First, Third, Fourth, Fifth, and Ninth Amendments created a "penumbra" of unenumerated constitutional rights, including zones of privacy. *See id*. at 484. The Court stated that *marital privacy* deserved the utmost protection from governmental intrusion. The *Griswold* case set the stage for other fundamental privacy rights related to intimacy, including the right to consensual sexual relations.

The Right to Consensual Sexual Relations

In *Bowers v. Hardwick*, 478 U.S. 186 (1986), the US Supreme Court upheld a Georgia statute that made it a crime to engage in consensual sodomy. *See id.* at 195-96. The Court stated that there is no *fundamental* right to engage in sodomy and that the history of protecting marriage and family relationships should not be extended in this fashion. Nearly 20 years later, the Court changed its stance and overruled *Bowers* in *Lawrence v. Texas*, 539 U.S. 558 (2003). In *Lawrence*, a Texas statute criminalizing homosexual sodomy was attacked after two men were convicted for having sex in their private bedroom during a law enforcement search for weapons. The *Lawrence* decision rested on the due process clause of the Fourteenth Amendment. The Court held that intimate choices are a form of liberty protected by the due process clause, whether or not consenting individuals are married. The Court thereafter struck down the Texas sodomy statute because it was not justified by a sufficient government interest. *See id*. at 578.

Example of a Right to Privacy Analysis

States criminalize consensual incest, which is sexual intercourse between family members who cannot legally marry. If an individual challenges a consensual incest statute as unconstitutional under the right to privacy, the court will balance the state's interest in preventing harm to an infant, such as birth defects, with an individual's interest in having consensual sexual intercourse

with a family member, using *strict scrutiny*. If the court finds that the government interest compelling, it can uphold the statute as long as it is not vague or overbroad.

Alaska Right to Privacy

As noted, the right to privacy is an explicitly enumerated right under the Alaska Constitution and thus is considered *fundamental*. Similar to the federal constitution, the Alaska Supreme Court will only uphold a government regulation if the State can articulate a compelling state interest that justifies infringing the right. The state must also demonstrate that no less restrictive means exist that advance the state's interest. This is an extremely high burden by design. But where the US Supreme Court has been vague as to what the right to privacy protects, the Alaska Supreme Court has been clear. The Alaska right to privacy contains two separate protections: (1) the **right to personal autonomy**, and (2) the **right to shield personal information** from public disclosure. *See Doe v. Department of Public Safety*, 444 P.3d 116, 126 (Alaska 2019).

The right to personal autonomy protects the right to make personal choices relating to one's own personal life. For example, the right of adults to use marijuana in the privacy of one's own home implicates the right to personal autonomy. *See Ravinv. State*, 494, 500 (Alaska 1975). Likewise, reproductive rights, including the right to abortion, are fundamental rights, included within Alaska's right to privacy. *See Valley Hosp. Assoc., Inc. v. Mat-Su Coalition for Choice*, 948 P.2d 963, 969 (Alaska 1997). Laws that seek to criminalize such conduct are unconstitutional and unenforceable under the state constitution.

The second privacy protection – the right to shield personal information from public disclosure – protects sensitive personal information which could cause anxiety, humiliation, or harassment if it was disclosed. For example, police officers have a legitimate expectation of privacy in their personnel files. *See Jones v. Jennings*, 788 P.2d 732, 738 (Alaska 1990).

Exercise

Answer the following question. Check your answer using the answer key at the end of the chapter.

1. The Alaska Sex Offender Registration Act (ASORA) requires all sex offenders to register with the Alaska Department of Public Safety (*i.e.*, Alaska State Troopers) when released from jail. A sex offender must continually register for either 15 years or life, depending on their conviction. Based on the information provided by the convicted sex offender, DPS makes the information (including name, address, photograph, date of birth, place of employment, and conviction information) available for public viewing and available on the internet. The purpose of the central registry is to protect the public from the high risk of sex offenders reoffending. Does the ASORA violate a convicted sex offender's right to privacy? You can learn more about the ASORA at www.sor.dps.alaska.gov. Read *Doe v. DPS*, 444 P.3d 116, 126 (Alaska 2019), to see how the Alaska Supreme Court balanced the competing interests involved.

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3.5: The Right to Bear Arms

Although the Second Amendment of the federal constitution specifically references a right to "keep and bear arms," the US Supreme Court provided little guidance as to its meaning until recently. The Second Amendment provides "[a] well regulated Militia, being necessary to the security of a free state, the right of the people to keep and bear Arms, shall not be infringed." The Alaska Constitution contains a similar provision. Alaska Const. Art. 1, §19.

In 2008, the US Supreme Court explored the meaning of the Second Amendment and its effect on the personal possession of firearms and gun control statutes. *See District of Columbia v. Heller*, 554 U.S. 570 (2008). In *Heller*, the US Supreme Court affirmed the lower court's decision of striking down provisions of the Firearms Control Regulations Act of 1975. The Court struck the portions that banned the possession of handguns and mandated that all legal firearms be kept unloaded and disassembled while in the home. *See id*. at 635. Although the District of Columbia argued that the Second Amendment only applies to the militia, the US Supreme Court emphasized that the Second Amendment is an *individual right* and is not subject to complete governmental regulation. The Court grounded its analysis in the inherent right of self-defense, noting that self-defense is a central component of the Second Amendment and a part of the fabric of our nation. *Seeid.* at 628.

Although monumental, the *Heller* ruling is also narrow. The decision specifically recognized that the "right secured by the Second Amendment is not unlimited." *See id*. at 626. The Second Amendment does not prohibit firearms restrictions on *felons*, the *mentally ill*, possession in or near *schools* or government buildings, and the *commercial sale* of firearms. The *Heller* decision also failed to extend the Second Amendment's protections to the *states* (Washington, DC, where the case occurred, is a federal enclave).

Two years later, in *McDonald v. Chicago*, 561 U.S. 742 (2010), the US Supreme Court reviewed the city of Chicago's handgun ban. In *McDonald*, the Court extended the *Heller* ruling to the states, holding that the Second Amendment applies to the states *via* **selective incorporation**. However, *McDonald* reemphasized the *Heller* exceptions of firearms restrictions on felons, the mentally ill, possession in or near schools or government buildings, and the commercial sale of firearms.

Example of an Appropriate Restriction on Firearms

Dirk is a public middle school janitor. Occasionally, with the permission of the principal, Dirk stays overnight in an outbuilding on campus when he works a particularly late shift. Dirk wants to keep a handgun in the outbuilding, for protection. If Dirk's state has a statute prohibiting the possession of a handgun within one mile of any public school, Dirk cannot keep a handgun in the outbuilding, even if he believes it is necessary for self-defense. *Heller* and *McDonald* protect an individual's right to possess a handgun in the home for self-defense. This precedent specifically *exempts* firearm possession near schools. Unless newer precedent expands the ruling to include firearm possession near schools, the statute in Dirk's state is constitutional.

Lapitre v. State, 233 P.3d 1125 (Alaska App. 2010)

In the following case, the Alaska Court of Appeals addresses Alaska's felon-in-possession criminal statute post-*Heller*.

233 P.3d 1125
Court of Appeals of Alaska.
Steve Claudy LAPITRE, Appellant,
v.
STATE of Alaska, Appellee.
No. A–9973.
June 18, 2010.

BOLGER, Judge.

Steve Claudy Lapitre appeals his conviction of misconduct involving weapons, contending that [… Alaska's] felon-in-possession statute is unconstitutional[.]

Background

Anchorage Police Sergeant Christopher Sims observed a vehicle driving erratically and broadcast an alert. Police Captain William Miller pulled the vehicle over, asked Lapitre for his license and registration, and then handed over the stop to the control of Officer

Arthur Anderson. Upon a search of the vehicle, Anderson found a loaded nine-millimeter Glock handgun under some papers on the floor of the front passenger seat.

[…]

The Constitutionality of the Felon–In–Possession Statute

Lapitre was convicted of third-degree misconduct involving a weapon for being a felon in possession of a handgun. He now argues that this statute is unconstitutional under several provisions of the federal and Alaska constitutions because it prohibits all felons from possessing handguns and does not distinguish those likely to reoffend….

Following Lapitre's 2007 conviction, the United States Supreme Court held that the Second Amendment protects an individual's right to bear arms [in *D.C. v. Heller*, 554 U.S. 570 (2008)]. But the Court specifically limited the application of its holding as applied to convicted felons, noting: "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons."

Based on this limitation, the federal circuits considering the issue have held that the federal statute prohibiting a felon from possessing a firearm is consistent with the constitutional right to bear arms. [internal citations omitted]. These cases suggest that even if the Second Amendment restricts inconsistent state laws, it does not invalidate the Alaska felon-in-possession statute.

[…]

An individual's right to bear arms is also protected by a 1994 amendment to the Alaska Constitution. But in *Wilson v. State*, [207 P.3d 565 (Alaska App. 2009)] we held that the felon-in-possession statute is consistent with this individual right to bear arms. [Lapitre also argues that the felon-in-possession statute impermissibly discriminates since it prohibits non-violent felons from possessing firearms.] […] [But], it is not at all obvious that Lapitre may challenge the statute as applied to nonviolent felons. Lapitre has a lengthy history of gun violence. At this point, Lapitre cannot reasonably argue that he should be allowed to possess a handgun: he is a violent felony offender who is likely to commit further violent offenses.

In conclusion, Lapitre … has not shown that the felon-in-possession statute is unconstitutional. We therefore AFFIRM the superior court's judgment.

Figure 3.7 The Second Amendment



Exercises

Answer the following questions. Check your answer using the answer key at the end of the chapter.

1. Anchorage Police Officer Mark Rober made a routine traffic stop of a car driven by Steve Allen in Anchorage. During the traffic stop, Rober discovered that Allen was in possession of a loaded .45 revolver and that Allen had previously been convicted of a felony – theft in the second degree, a non-violent felony. Allen explains that his prior felony was for fraudulently obtaining unemployment benefits. Allen is 67-year-old and lives in a cabin on a homestead. Allen lives a subsistence lifestyle and needs the handgun for personal protection. Nonetheless, Officer Rober charges Allen with being a felon-in-possession (AS 11.61.200(a)(1)). Allen wants to challenge the constitutionality of the statute; Allen wants to assert the statute is unconstitutional under both the U.S. Constitution and Alaska Constitution since the statute does not differentiate between violent and non-violent felons. Will Allen be successful? Explain why or why not?
2. Assume that a state court order forbids the defendant (a certified police officer) from possessing a handgun while on felony probation. The defendant wishes to resume their career as a police officer, but the state court order makes it impossible. Assume the state court order is challenged in federal court. How will the state court order be analyzed under recent US Supreme Court precedent interpreting the Second Amendment?

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3.6: Excessive Punishment

The prohibition against cruel and unusual punishment comes from the Eighth Amendment, which states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Alaska Constitution has a similar provision. Alaska Const. Art. 1, §12. Although the ban on cruel and unusual punishment relates directly to *sentencing*, which is a criminal *procedure* issue, criminal statutes mandating various penalties can be held unconstitutional under the Eighth Amendment just like statutes offending the due process clause, so a brief discussion is relevant to this chapter. Another facet of excessive punishment is a criminal sentencing enhancement that is based on facts not found beyond a reasonable doubt by a jury. This has been held to violate the Sixth Amendment, which states, "In all criminal prosecutions, the accused shall enjoy the right to a…trial, by an impartial jury of the State and district wherein the crime shall have been committed."

In this section, three issues are analyzed and discussed: the infliction of *cruel punishment*, a criminal sentence that is *too severe*, and a criminal sentence that is invalid under the right to a *jury trial*. All three issues, although process-oriented, impact when, and to what extent, criminal liability is implicated.

Infliction of Cruel Punishment

In general, the government must refrain from inflicting cruel or barbaric punishments on criminal defendants in violation of the Eighth Amendment. In particular, cases asserting that a criminal punishment is inhumane often focus on capital punishment, which is the death penalty.

Brief Synopsis of the History of Capital Punishment[1]

The death penalty has been used as a criminal punishment since the eighteenth century B.C. American death penalty law is influenced by the British because the colonists brought English common law principles, including capital punishment, with them to the Americas. The first execution in America took place in 1608, for spying. Methods of execution and capital crimes varied from colony to colony. In the late 1700s, a movement to abolish the death penalty began, and in 1846, Michigan became the first state to eliminate the death penalty for all crimes except treason. Throughout the nineteenth and twentieth centuries, the United States fluctuated in its attitude toward capital punishment. Executions were at an all-time high in the 1930s.

Except for a four-year span between 1972 and 1976, the US Supreme Court consistently upheld the constitutionality of the death penalty. In 1972, in the landmark decision of *Furman v. Georgia*, 408 U.S. 238 (1972), the US Supreme Court held that Georgia's death penalty statute, which gave the jury complete discretion to sentence a criminal defendant to death, was *arbitrary* and therefore *cruel and unusual* punishment in violation of the Eighth Amendment. This decision invalidated death penalty statutes in forty states. Importantly, the US Supreme Court found that the *process* of imposing the death penalty was unconstitutional; the Court did not find the death penalty itself unconstitutional. The Court has been clear that capital punishment is not inherently barbaric or an unacceptable form of punishment. Instead, the Court has repeatedly focused on the specific application (method) of the death penalty.

In 1976, the US Supreme Court revisited the constitutionality of capital punishment statutes in the case of *Gregg v. Georgia*, 428 U.S. 153 (1976), in which it found that capital punishment passed constitutional muster if the government employed a "guided discretion" statute. Specifically, the court established a three-part process to impose the death penalty. First, the trial must be bifurcated – the jury must consider the defendant's guilt separate from the defendant's sentence. Second, the jury's decision to impose the death penalty must be guided by specific, statutory aggravating and mitigating factors. Finally, the jury's decision must include an automatic right of appeal. *See id.* at 205-07.

As of May 2021, 27 states and the federal government authorize the death penalty; 23 states and the District of Columbia do not. Alaska does not authorize the death penalty, although the state has considered it several times throughout its history.

Disproportionate Punishment

Disproportionate punishment may also fall within the ambit of cruel and unusual punishment. Disproportionate punishment asserts that a criminal punishment is *too severe* for the crime. Two criminal punishments garner many disproportionate punishment claims: capital punishment and "three-strikes statutes."

Capital Punishment as Disproportionate

Although the criticisms of the death penalty are well-known, the US Supreme Court has been clear that capital punishment is not inherently barbaric or unacceptable. Instead, the Court has repeatedly focused on whether the *specific application* of the death penalty is barbaric or inhumane. Capital punishment can be disproportionate because it is too severe for the *crime* or because it is too severe for the *particularcriminal defendant*.

Capital Punishment That Is Disproportionate to the *Crime*

Death is the ultimate punishment, so it must be proportional to the crime the defendant committed. Although the states and the federal government have designated many capital crimes that may result in death (for example, treason), the US Supreme Court has confirmed that the death penalty is too severe for most crimes. In *Coker v. Georgia*, 433 U.S. 584 (1977), the Court held that a sentence of death is grossly disproportionate for the crime of raping an adult woman. Many years later, in *Kennedy v. Louisiana*, 554 U.S. 407 (2008), the Court extended this principle and found that "the death penalty is not a proportional punishment for the rape of a child." *See id*. at 446. *Kennedy* maintained the distinction between crimes committed against *individuals* and crimes committed against the *government*, like terrorism or treason. *See id.* at 437. The only crime against an individual that currently merits the death penalty is murder, which is the unlawful killing of another with malice aforethought.

Capital Punishments That Are Disproportionate to the *Criminal Defendant*

Capital punishment is overly severe for certain criminal defendants. Given that all criminal punishments, including capital punishment, must serve a penological purpose, some criminal defendants are ineligible for the death penalty. Specifically, the imposition of the death penalty is cruel and unusual punishment for a criminal defendant who was a *juvenile* at the time of the offense, (*Roper v. Simmons*, 567 U.S 460 (2005), who is *mentally incompetent* at the time of the execution (*Ford v. Wainwright*, 477 U.S. 399 (1986)), or suffers from a *severeintellectual disability* (mental retardation) at the time of the execution (*Atkins v. Virginia*, 536 U.S. 304 (2002)).

US Supreme Court jurisprudence recognizes that juveniles are different, and must be treated differently when imposing severe sentences. This principle is explored in more detail below. Mental competency, on the other hand, can cover a variety of disorders, but the US Supreme Court has held that a criminal defendant has a constitutional right to a determination of "sanity" before execution. *See Ford*, 477 U.S. at 405. Intellectual disability is distinct from mental illness and is defined by the US Supreme Court as a substantial intellectual impairment that impacts everyday life, and was present at the defendant's birth or during childhood. *See Atkins*, 536 U.S. at 317.

Disproportionate Punishment of Juveniles

In *Roper v. Simmons*, the Court invalidated the death penalty for all juvenile offenders under the age of 18 at the time of the offense. In explaining its rationale, the Court noted that punishment must be graduated and proportioned to *both* the offender and the offense. *See id* at 560. Imposing the death penalty on a juvenile, given the physical and mental immaturity, is fundamentally disproportionate. However, the Court has not limited its intervention to capital punishment. In *Graham v. Florida*, 560 U.S. 48 (2010), the Court held that life without parole violated the Eighth Amendment when imposed on juvenile *nonhomicide* offenders. In *Graham*, a sixteen-year-old defendant was convicted of armed burglary and received life without the possibility of parole. The Court found that such a severe sentence was grossly disproportionate to the severity of the offense. *See id* at 82. The Eighth Amendment precludes a juvenile who is not convicted of murder from receiving a life sentence. The possibility of rehabilitation has to be considered.

Miller v. Alabama, 567 U.S. 460 (2012)

Miller v. Alabama was decided two short years after *Graham*. In *Miller,* the US Supreme Court faced the question left unanswered by *Graham* – whether a juvenile could be sentenced to a mandatory term of life without the possibility of parole for *murder.* As you read the case, consider whether it makes sense to treat juveniles differently for such serious crimes.

132 S.Ct. 2455
Supreme Court of the United States
Evan MILLER, Petitioner

v.

ALABAMA.

Decided June 25, 2012.

Opinion

Justice KAGAN delivered the opinion of the Court.

The two 14–year–old offenders in these cases were convicted of murder and sentenced to life imprisonment without the possibility of parole. In neither case did the sentencing authority have any discretion to impose a different punishment. State law mandated that each juvenile die in prison even if a judge or jury would have thought that his youth and its attendant characteristics, along with the nature of his crime, made a lesser sentence (for example, life with the possibility of parole) more appropriate. Such a scheme prevents those meting out punishment from considering a juvenile's "lessened culpability" and greater "capacity for change," … and runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties. We therefore hold that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on "cruel and unusual punishments."

…

I.

In November 1999, petitioner Kuntrell Jackson, then 14 years old, and two other boys decided to rob a video store. En route to the store, Jackson learned that one of the boys, Derrick Shields, was carrying a sawed-off shotgun in his coat sleeve. Jackson decided to stay outside when the two other boys entered the store. Inside, Shields pointed the gun at the store clerk, Laurie Troup, and demanded that she "give up the money." Troup refused. A few moments later, Jackson went into the store to find Shields continuing to demand money. At trial, the parties disputed whether Jackson warned Troup that "[w]e ain't playin'," or instead told his friends, "I thought you all was playin." When Troup threatened to call the police, Shields shot and killed her. The three boys fled empty-handed.

Arkansas law gives prosecutors discretion to charge 14–year-olds as adults when they are alleged to have committed certain serious offenses. The prosecutor here exercised that authority by charging Jackson with capital felony murder and aggravated robbery. Jackson moved to transfer the case to juvenile court, but after considering the alleged facts of the crime, a psychiatrist's examination, and Jackson's juvenile arrest history (shoplifting and several incidents of car theft), the trial court denied the motion, and an appellate court affirmed. A jury later convicted Jackson of both crimes. Noting that "in view of [the] verdict, there's only one possible punishment," the judge sentenced Jackson to life without parole.

…

Like Jackson, petitioner Evan Miller was 14 years old at the time of his crime. Miller had by then been in and out of foster care because his mother suffered from alcoholism and drug addiction and his stepfather abused him. Miller, too, regularly used drugs and alcohol; and he had attempted suicide four times, the first when he was six years old.

One night in 2003, Miller was at home with a friend, Colby Smith, when a neighbor, Cole Cannon, came to make a drug deal with Miller's mother. The two boys followed Cannon back to his trailer, where all three smoked marijuana and played drinking games. When Cannon passed out, Miller stole his wallet, splitting about $300 with Smith. Miller then tried to put the wallet back in Cannon's pocket, but Cannon awoke and grabbed Miller by the throat. Smith hit Cannon with a nearby baseball bat, and once released, Miller grabbed the bat and repeatedly struck Cannon with it. Miller placed a sheet over Cannon's head, told him " 'I am God, I've come to take your life,' " and delivered one more blow. The boys then retreated to Miller's trailer, but soon decided to return to Cannon's to cover up evidence of their crime. Once there, they lit two fires. Cannon eventually died from his injuries and smoke inhalation.

Alabama law required that Miller initially be charged as a juvenile, but allowed the District Attorney to seek removal of the case to adult court. The D.A. did so, and the juvenile court agreed to the transfer after a hearing. The State accordingly charged Miller as an adult with murder in the course of arson. That crime (like capital murder in Arkansas) carries a mandatory minimum punishment of life without parole.

Relying in significant part on testimony from Smith, who had pleaded to a lesser offense, a jury found Miller guilty. He was therefore sentenced to life without the possibility of parole. The Alabama Court of Criminal Appeals affirmed, ruling that life without parole was "not overly harsh when compared to the crime" and that the mandatory nature of the sentencing scheme was permissible under the Eighth Amendment.

We granted certiorari in both cases and now reverse.

II.

The Eighth Amendment's prohibition of cruel and unusual punishment "guarantees individuals the right not to be subjected to excessive sanctions." That right, we have explained, "flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned' " to both the offender and the offense. As we noted the last time we considered life-without-parole sentences imposed on juveniles, "[t]he concept of proportionality is central to the Eighth Amendment." [*citingGraham*]. And we view that concept less through a historical prism than according to the evolving standards of decency that mark the progress of a maturing society.

The cases before us implicate two strands of precedent reflecting our concern with proportionate punishment. The first has adopted categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty. So, for example, we have held that imposing the death penalty for nonhomicide crimes against individuals, or imposing it on mentally retarded defendants, violates the Eighth Amendment. *See Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Atkins v. Virginia*, 536 U.S. 304 (2002). Several of the cases in this group have specially focused on juvenile offenders, because of their lesser culpability. Thus, *Roper* held that the Eighth Amendment bars capital punishment for children, and *Graham* concluded that the Amendment also prohibits a sentence of life without the possibility of parole for a child who committed a nonhomicide offense. *Graham* further likened life without parole for juveniles to the death penalty itself, thereby evoking a second line of our precedents. In those cases, we have prohibited mandatory imposition of capital punishment, requiring that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him to death. Here, the confluence of these two lines of precedent leads to the conclusion that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment.

To start with the first set of cases: *Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, we explained, "they are less deserving of the most severe punishments." [*citing Graham*]. Those cases relied on three significant gaps between juveniles and adults. First, children have a " 'lack of maturity and an underdeveloped sense of responsibility,' " leading to recklessness, impulsivity, and heedless risk-taking. [*citing* Roper]. Second, children "are more vulnerable … to negative influences and outside pressures," including from their family and peers; they have limited "control over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. Ibid. And third, a child's character is not as " well formed" as an adult's; his traits are "less fixed" and his actions less likely to be "evidence of irretrievable depravity." *[citing Roper]*.

Our decisions rested not only on common sense—on what "any parent knows"—but on science and social science as well. In *Roper*, we cited studies showing that [only a relatively small proportion of adolescents who engage in illegal activity develop entrenched patterns of problem behavior. And in *Graham*, we noted that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds"—for example, in "parts of the brain involved in behavior control." We reasoned that those findings—of transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child's "moral culpability" and enhanced the prospect that, as the years go by and neurological development occurs, his "deficiencies will be reformed."

Roper and *Graham* emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes. Because "the heart of the retribution rationale" relates to an offender's blameworthiness, "'the case for retribution is not as strong with a minor as with an adult." Nor can deterrence do the work in this context, because the same characteristics that render juveniles less culpable than adults – their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment. Similarly, incapacitation could not support the life-without-parole sentence in *Graham*: Deciding that a "juvenile offender forever will be a danger to society" would require "making a judgment that he is incorrigible"—but "incorrigibility is inconsistent with youth." And for the same reason, rehabilitation could not justify that sentence. Life without parole "forswears altogether the rehabilitative ideal." It reflects "an irrevocable judgment about an offender's value and place in society," at odds with a child's capacity for change.

…

Most fundamentally, *Graham* insists that youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole. In the circumstances there, juvenile status precluded a life-without-parole sentence, even though an adult could receive it for a similar crime. And in other contexts as well, the characteristics of youth, and the way they weaken rationales for punishment, can render a life-without-parole sentence disproportionate. "An offender's age," we made clear in *Graham*, "is relevant to the Eighth Amendment," and so "criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed."[…]

But the mandatory penalty schemes at issue here prevent the sentencer from taking account of these central considerations. By removing youth from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult—these laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender. That contravenes *Graham* 's (and also *Roper* 's) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children.

In light of *Graham*'s reasoning, [our precedent] show the flaws of imposing mandatory life-without-parole sentences on juvenile homicide offenders. Such mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it. Under these schemes, every juvenile will receive the same sentence as every other—the 17–year–old and the 14–year–old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one. And still worse, each juvenile (including these two 14–year–olds) will receive the same sentence as the vast majority of adults committing similar homicide offenses—but really, as *Graham* noted, a greater sentence than those adults will serve.

So *Graham* and Roper and our individualized sentencing cases alike teach that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult. To recap: Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. […] And finally, this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it.

Both cases before us illustrate the problem. Take Jackson's first. As noted earlier, Jackson did not fire the bullet that killed Laurie Troup; nor did the State argue that he intended her death. […]To be sure, Jackson learned on the way to the video store that his friend Shields was carrying a gun, but his age could well have affected his calculation of the risk that posed, as well as his willingness to walk away at that point. All these circumstances go to Jackson's culpability for the offense. And so too does Jackson's family background and immersion in violence: Both his mother and his grandmother had previously shot other individuals. At the least, a sentencer should look at such facts before depriving a 14–year–old of any prospect of release from prison.

That is true also in Miller's case. No one can doubt that he and Smith committed a vicious murder. But they did it when high on drugs and alcohol consumed with the adult victim. And if ever a pathological background might have contributed to a 14–year–old's commission of a crime, it is here. Miller's stepfather physically abused him; his alcoholic and drug-addicted mother neglected him; he had been in and out of foster care as a result; and he had tried to kill himself four times, the first when he should have been in kindergarten. Nonetheless, Miller's past criminal history was limited—two instances of truancy and one of "second-degree criminal mischief." That Miller deserved severe punishment for killing Cole Cannon is beyond question. But once again, a sentencer needed to examine all these circumstances before concluding that life without any possibility of parole was the appropriate penalty.

We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders. By making youth (and all that accompanies it) irrelevant to imposition of that harshest prison sentence, such a scheme poses too great a risk of disproportionate punishment. Because that holding is sufficient to decide these cases, we do not

consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger. But given all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.

[…]

It is so ordered.

Gray v. State, 267 P.3d 667 (Alaska App. 2011)

The Alaska Court of Appeals decided *Gray v. State* several years before *Miller v. Alabama*. As you read *Gray*, ask yourself whether the decision is inconsistent with – and thus invalid – given the US Supreme Court's decision in *Miller.*

267 P.3d 667
Court of Appeals of Alaska.
Kira GRAY, Appellant,
v.
STATE of Alaska, Appellee.
No. A–10305.
Dec. 9, 2011.

BOLGER, Judge.

Alaska Statute 47.12.030(a) provides that when a sixteen-year-old minor commits certain serious felonies, including murder, the minor "shall be charged, held, released on bail, prosecuted, sentenced, and incarcerated in the same manner as an adult." Kira Gray argues that her sentence for first-degree murder violates the constitutional protections against cruel and unusual punishment … because she was a minor at the time of her offense. But we conclude that this combination of the automatic waiver statute and the adult sentencing statute is consistent with "evolving standards of decency" and [therefore constitutional].

[…]

Background

Gray was sixteen years old and dating Mario Page, an Anchorage drug dealer. While Page was out of state, Gray stole nine ounces of cocaine from Page and gave it to her sister's boyfriend, Terrell Houngues. When Page returned and found out about the theft, he became angry.

Gray concocted a plan to pacify Page. She falsely told Houngues that she had had an argument with Page and that she knew where Page hid money and drugs. She suggested to Houngues that they should steal Page's money and drugs. This plan was simply a ruse to kidnap Houngues.

Gray picked up Houngues and drove him to a remote location in the Mat–Su Valley. Page and three other men then arrived in a separate car and forced Houngues into the trunk. They drove to another spot and removed Houngues from the trunk. Page demanded to know what became of the nine ounces of stolen cocaine. When Houngues denied any knowledge of the drugs, Gray shot him in the knee. Houngues was then screaming in pain, so Page told Gray to "shut him up." Gray and another man, Tommie Patterson, then shot Houngues multiple times, killing him.

Gray was charged and prosecuted as an adult based on the statute that automatically waives juvenile jurisdiction for certain serious crimes. Prior to trial, Gray made a motion for the court to declare the automatic waiver statute unconstitutional, but Superior Court Judge Eric Smith denied the motion. Gray, Page, and Patterson were convicted of murder and kidnapping in separate trials.

At the sentencing hearing, Gray presented testimony from two mental health professionals. Drs. Marty Beyer and Ronald Roesch provided opinions on developmental immaturity in general, along with specific opinions about Gray's mental state. Dr. Beyer testified that Gray "showed a variety of kinds of immature thinking … that led to irrational behavior and poor moral reasoning,

especially when she felt coerced." Dr. Beyer also testified that juvenile sentences should be less punitive than adult sentences and should generally provide more and earlier opportunities for parole or release because most juvenile offenders are very immature and have "a huge amount of developing still to do."

Dr. Roesch testified that Gray was "amenable to rehabilitation and that she does have a high potential for change." Like Dr. Beyer, Dr. Roesch emphasized that, in crafting a juvenile sentence, the court must take developmental differences between juveniles and adults into consideration.

At the conclusion of the sentencing hearing, Judge Smith imposed a sentence of ninety-nine years' imprisonment with forty-four years suspended for Gray's murder conviction and a consecutive sentence of ten years' imprisonment for kidnapping. Gray now appeals.

Discussion

The automatic waiver statute does not constitute cruel and unusual punishment.

As noted above, when a sixteen-year-old minor commits certain serious felonies, the minor is "prosecuted, sentenced, and incarcerated in the same manner as an adult." Under this statute, a minor convicted of first-degree murder is subject to the same sentence as an adult—generally a sentence of twenty to ninety-nine years' imprisonment. Gray argues that this statutory scheme violates the state and federal prohibitions against cruel and unusual punishment because the statutes do not recognize the differences in culpability between juveniles and adults by providing for early eligibility for discretionary parole.

Gray relies mainly on two recent decisions from the United States Supreme Court: *Roper v. Simmons* and *Graham v. Florida*. In *Roper*, the Court concluded that the Eighth Amendment bars the execution of individuals who were juveniles at the time they committed murder. In *Graham*, the Court concluded that the Eighth Amendment forbids a juvenile from being sentenced to life without parole for a nonhomicide crime.

In both cases, the Court applied a test that focuses on the characteristics of the offender, considering whether there is a "national consensus" against the imposition of the sentence in question and whether the sentence is categorically unconstitutional. [Specifically, the *Graham* Court] concluded that

juveniles (as a group) are "less deserving of the most severe punishments" because, compared to adults, they exhibit a "lack of maturity and an underdeveloped sense of responsibility," because they are "more vulnerable or susceptible to negative influences and … peer pressure," and because their characters are "not as well formed."

Under the Alaska Constitution, we have generally applied a different test when we have focused on the characteristics of the penalty imposed. We have asked whether the punishment is so disproportionate to the offense as to be completely arbitrary and shocking to a sense of justice. But in a case where the Alaska Supreme Court focused on the characteristics of the offender, it applied a test similar to the test employed in *Roper* and *Graham*, asking whether the sentence violated "the evolving standards of decency that mark the progress of a maturing society." The present case focuses on Gray's status as a juvenile. We will therefore focus on national standards and categorical considerations to decide whether a juvenile can be sentenced to an adult sentence for first-degree murder.

The Wisconsin Supreme Court recently considered a similar question in *State v. Ninham*. Omer Ninham was sentenced to life in prison without the possibility of parole for first-degree intentional homicide. On appeal, Ninham argued that sentencing a fourteen-year-old to life imprisonment violates the Eighth Amendment.

The Wisconsin court considered whether sentencing a fourteen-year-old to life without parole is inconsistent with evolving standards of decency. It noted that *Graham* only prohibited life without parole for nonhomicide offenses and that *Roper* prohibited capital punishment of juveniles. But neither case directly addressed the constitutionality of a sentence of life imprisonment without parole for an intentional homicide.

The Wisconsin court evaluated whether there is a national consensus against sentencing minors to life without parole for intentional homicides. It found that forty-four states allow life imprisonment without parole for homicide offenses for juveniles. Moreover, although few juveniles age fourteen or younger have ever been sentenced to life without a possibility of parole, the court concluded

that the statistic did not necessarily show there was a consensus against such a penalty. In summary, the court concluded that there is no national consensus against a sentence of life imprisonment without parole for an intentional homicide committed by a minor.

In addition to our review of any national consensus, we also have a responsibility to exercise our independent judgment regarding whether an adult sentence for a minor convicted of murder serves legitimate penological goals. The research that Gray relies on suggests that some minors may have a greater potential for rehabilitation and that there is a lesser need to isolate them to protect the public. This is consistent with our previous recognition that rehabilitation and individual deterrence should be accorded "careful scrutiny and appropriate weight" in cases involving youthful first offenders convicted of first-degree murder.

But a lengthy sentence for the crime of murder promotes other goals. A lengthy sentence affirms the important community norms that protect the value of a human life. And a lengthy sentence can serve as an important deterrent to potential homicide offenders, even when the offenders are juveniles.

Several other courts considering the question have distinguished *Graham* and held that a life sentence can be imposed on a juvenile convicted of murder without violating the ban on cruel and unusual punishment. We conclude that sentencing a minor to an adult sentence for first-degree murder is not categorically unconstitutional.

[Moreover,] Gray did not receive a life sentence; she received a sentence of only sixty-five years' imprisonment. She will be eligible for discretionary parole after serving twenty-five years of her sentence. But Gray argues that this sentencing scheme involves cruel and unusual punishment because it does not allow for early eligibility for discretionary parole.

As noted above, the combination of the automatic waiver statute and the adult sentencing statutes promotes various penological goals, especially the goals of general deterrence and affirmation of societal norms. In view of these legitimate legislative considerations, we conclude that the difficulty in applying the goals of rehabilitation and isolation to a juvenile offender does not render this scheme unconstitutionally cruel. The legislature could reasonably determine that, when a minor is convicted of first-degree murder, general sentencing considerations require a substantial delay before the minor becomes eligible for discretionary parole. This aspect of the operation of the automatic waiver statute does not constitute cruel and unusual punishment.

[…]

Conclusion
We AFFIRM the superior court's judgment and sentence.

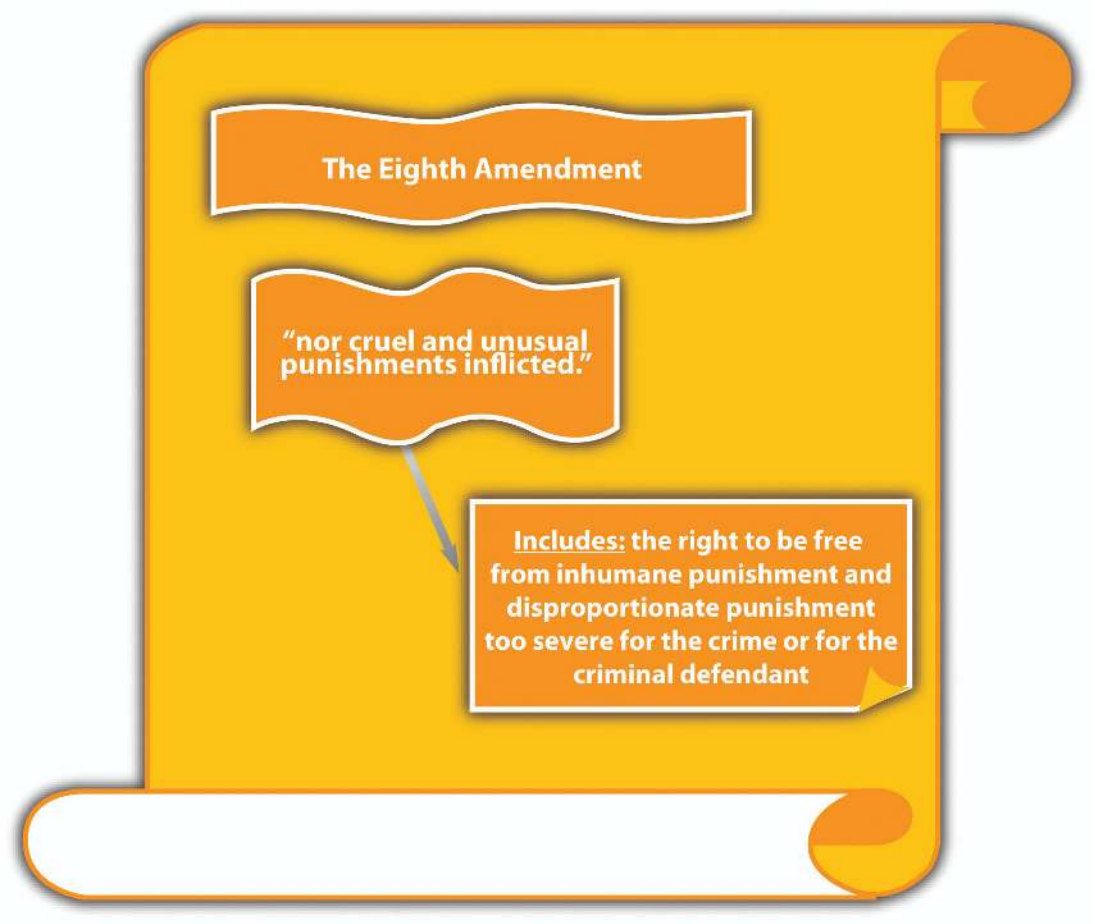
Disproportionate Punishment Under Three-Strikes Laws

Under the Eighth Amendment, the criminal penalties should generally be graded and matched to the severity of the convicted offense. Yet, in an effort to be "tough-on-crime" several states have enacted "three strikes and you're out" statutes. Three-strikes statutes punish habitual offenders more harshly when they commit a second or third felony after an initial serious or violent felony. California was the first state to enact a "three strikes and you're out" law. *See* Cal. Penal Code § 667. And it remains one of the toughest in the nation; it mandates a minimum twenty-five-year to life sentence for felons convicted of a third strike.

Not all three-strikes statutes are created equal. For example, Alaska's three-strikes statute only applies to offenders who are convicted of a very serious felony and have been convicted of two prior very serious felonies. AS 12.55.125(l). If convicted of a third very serious felony, the offender faces a mandatory 99-year prison term; the sentencing judge has no discretion to reduce the term of imprisonment. AS 12.55.125.

Although Alaska's three-strikes statute has not been challenged, other three-strikes statutes have been attacked as disproportionate to the convicted offense. This is especially true when the offender's third felony is a *nonviolent* felony. However, the US Supreme Court has upheld three-strikes statutes even for relatively minor third offenses, holding that they are not cruel and unusual punishment under the Eighth Amendment. *See Ewing v. California*, 538 U.S. 11 (2003).

Figure 3.9 The Eighth Amendment



Sentencing that Violates the Right to a Jury Trial

One final aspect of sentencing is the constitutional role of the criminal jury pursuant to the Sixth Amendment. Although a detailed discussion of sentencing procedure is beyond the scope of this book, a brief overview of sentencing and the roles of the judge and jury is necessary to a fundamental understanding of this important trial right.

The Role of the Judge and Jury in Sentencing Fact-Finding

Recall that before a defendant may be found guilty of a criminal offense, the government must prove all essential elements to the trier of fact **beyond a reasonable doubt**. If the government fails to prove an essential element beyond a reasonable doubt, the Constitution requires that the accused be acquitted. The trier of fact in a criminal prosecution is almost always a *jury* because of the fundamental right to a jury trial guaranteed by the Sixth Amendment. Occasionally, the parties agree to waive a jury trial and the judge, acting as the trier of fact, conducts a bench trial.

Whereas the jury determines guilt, the judge generally determines the appropriate sentence. As discussed above, the death penalty is an exception. In death penalty cases, the jury must decide whether to impose the death penalty during the sentencing phase after the guilt phase has concluded.

Generally speaking, the purpose of criminal sentencing is for the judge to impose a criminal sanction taking into account the unique facts of the crime and the unique circumstances of the offender. Criminal sentencing, by design, is an inclusive process, requiring the sentencing judge to consider multiple different factors. To be fair and just, criminal sentencing must be individualized.

For this reason, until recently, judges have had almost *exclusive* control of sentencing. The judge was entitled to receive new evidence at sentencing if it was relevant. For example, a judge was permitted to determine if the defendant used a weapon when committing an armed robbery even if the jury did not consider the question. The judge was also entitled to determine a defendant's prior criminal history for purposes of sentencing enhancement or a three-strikes statute.

Beginning in 2000, the US Supreme Court began expanding the role of the jury in sentencing, finding that a defendant's Sixth Amendment right to a jury trial limited what a judge could consider unless proven beyond a reasonable doubt to a jury.

Sentencing Enhancement by Judges

Beginning in 2000, in the case of *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the US Supreme Court held that before a judge could exceed a sentence beyond the statutory maximum the jury must determine the disputed facts beyond a reasonable doubt. In *Apprendi*, the trial court enhanced the defendant's sentence beyond the statutory maximum for felon-in-possession under New Jersey's hate crimes statute. Although the jury did not determine that the defendant's crime was a hate crime, the sentencing judge relied upon new evidence introduced at sentencing that indicated the defendant's shooting into a residence was racially motivated. The US Supreme Court reversed the conviction, noting that the defendant had the constitutional right to have the trial jury – not the sentencing judge – determine the operative facts that enhanced a sentence beyond the statutory maximum. The Court held that the one exception to this rule was *evidence of a prior conviction*, which could be determined by a sentencing judge.

Following *Apprendi*, the US Supreme Court struck down the mandatory US Sentencing Guidelines, which permitted judges to enhance an offender's sentence with the statutory guideline using the preponderance of evidence standard. *See U.S. v. Booker*, 543 U.S. 220 (2005). In *Booker*, the Court ruled that the US Sentencing Guidelines are *advisory* only, and never mandatory. *Booker* was based on *Blakely v. Washington*, 542 U.S. 296 (2004), which invalidated a similar Washington State sentencing procedure. The same analysis applies to statutory mandatory minimum sentences. *See Alleyne v. U.S.*, 570 U.S. 99 (2013).

Pursuant to this line of cases, a criminal defendant is entitled to a jury determination on any operative fact that could be used to *enhance* the defendant's sentence beyond the statutory maximum. The only exception to the rule is criminal history – the sentencing judge is entitled to determine an offender's criminal history; the jury need not determine an offender's criminal history.

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1. For more information see generally, Death Penalty Information Center, http://deathpenaltyinfo.org (last visited May 27, 2021). ↵

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3.7: End-of-Chapter Material

Summary

The US Constitution places limits on the acts that the government can criminalize. The Alaska Constitution usually mirrors the federal constitution, but has been interpreted to provide more protection to criminal defendants than the federal constitution. Statutes can be unconstitutional as written or as enforced. All criminal laws must be supported by a sufficient government interest, which is closely examined when it implicates a fundamental right. Statutes that punish without a trial (bills of attainder) or criminal statutes that are applied retroactively (ex post facto) are unconstitutional. Other constitutional protections are in the Bill of Rights, which is the first ten amendments, and the Fourteenth Amendment, which contains the due process clause and the equal protection clause.

The concept of due process guarantees a fair process before the government deprives a person of a liberty interest. Similarly, it prohibits arbitrary and capacious laws. Statutes that are vague or criminalize constitutionally protected conduct violate due process. The Fifth Amendment due process clause applies to the federal government; the Fourteenth Amendment due process clause applies to the states. The Fourteenth Amendment due process clause also selectively incorporates fundamental rights from the Bill of Rights and applies them to the states. Most, but not all, of the rights guaranteed by the Bills of Rights have been incorporated under the doctrine of selective incorporation. The Fourteenth Amendment also contains the equal protection clause, which prevents the government from enacting statutes that discriminate without a sufficient government interest.

The First Amendment protects speech, expression, and expressive conduct from being criminalized without a compelling government interest and a narrowly tailored statute using the least restrictive means possible. Some exceptions to the First Amendment are precise statutes targeting fighting words, incitement to riot, hate crimes, obscenity, and nude dancing.

The First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments also create a federal right to privacy that prevents the government from criminalizing the use of birth control, abortion, or consensual sexual relations. The Alaska Constitution contains an explicit right to privacy.

The Second Amendment protects an individual's right to possess firearms, particularly in the home for self-defense. This right does not extend to convicted felons, the mentally ill, commercial sale of firearms, and firearm possession near schools and government buildings.

The Eighth Amendment protects criminal defendants from inhumane and excessive punishments. The Sixth Amendment ensures that all facts used to extend a criminal defendant's sentencing beyond the statutory maximum must be determined by a jury beyond a reasonable doubt.

Key Takeaways

- The Constitution protects individuals from certain statutes and certain governmental procedures.
- A statute is unconstitutional on its face when its wording is unconstitutional. A statute is unconstitutional as applied when its enforcement is unconstitutional.
- A court reviews a statute for constitutionality using strict scrutiny if the statute inhibits a fundamental constitutional right. Strict scrutiny means that the government must show that it is supported by a compelling government interest and uses the least restrictive means. A statute reviewed under the rational basis test requires the statute to be rationally related to a legitimate government interest.
- A bill of attainder is when the legislative branch punishes a defendant without a trial. Ex post facto laws punish criminal defendants retroactively.
- Ex post facto laws punish defendants for acts that were not criminal when committed, increase the punishment for a crime retroactively, or increase the chance of criminal conviction retroactively.
- The Bill of Rights is the first ten amendments to the Constitution and contains many protections for criminal defendants.
- Selective incorporation applies most of the constitutional protections in the Bill of Rights to the states.
- Substantive due process protects criminal defendants from unreasonable government intrusion on their substantive constitutional rights. Procedural due process provides criminal defendants with notice and an opportunity to be heard before the imposition of a criminal punishment.

- A statute that is void for vagueness is so imprecisely worded that it gives too much discretion to law enforcement, is unevenly applied, and does not provide notice of what is criminal. An overbroad statute includes constitutionally protected conduct and therefore unreasonably encroaches upon individual rights.
- The equal protection clause prevents the state government from enacting criminal laws that arbitrarily discriminate. The Fifth Amendment due process clause extends this prohibition to the federal government if the discrimination violates due process of law.
- Speech under the First Amendment is any form of expression, such as verbal or written words, pictures, videos, and songs. Expressive conduct, such as dressing a certain way, flag burning, and cross burning, is also considered First Amendment speech.
- Five types of speech that can be governmentally regulated are fighting words, incitement to riot, hate speech, obscenity, and nude dancing.
- Statutes that prohibit fighting words and incitement to riot must be narrowly drafted to include only speech that incites imminent unlawful action, not future harm or general advocacy. Statutes that prohibit hate speech must be narrowly drafted to include only speech that is supported by the intent to intimidate. Statutes that prohibit obscenity must target speech that appeals to a prurient interest in sex, depicts sexual conduct in a patently offensive way, and has little or no literary, artistic, political, or scientific value. Nude dancing can be regulated as long as the regulation is reasonable, such as requiring dancers to wear pasties and a g-string.
- The constitutional amendments supporting a federal right to privacy are the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments.
- The federal right to privacy protects an individual's right to use contraceptives, to receive an abortion through the first trimester, and to engage in consensual sexual relations.
- The Alaska Constitution contains an explicit right to privacy.
- Pursuant to recent US Supreme Court precedent, the Second Amendment protects an individual's right to possess a firearm in the home for self-defense. This protection does not cover felons, the mentally ill, firearm possession near schools and government buildings, or the commercial sale of firearms.
- An inhumane procedure punishes a defendant too severely for any crime. A disproportionate punishment punishes a defendant too severely for the crime he or she committed.
- Criminal homicide is the only crime against an individual that merits capital punishment.
- Criminal defendants who were juveniles when the crime was committed, are mentally incompetent, or have an intellectual disability cannot be subjected to capital punishment.
- Juveniles must be treated differently when imposing severe sentences. Youth matters in sentencing.
- Three-strikes laws punish criminal defendants more severely for committing a felony after they have committed one or two serious felonies. Three-strikes laws have been held constitutional under the Eighth Amendment, even when they levy long prison sentences for relatively minor felonies.
- Sentencing enhancements beyond the statutory maximum are unconstitutional unless they are based on facts determined by a jury beyond a reasonable doubt under the Sixth Amendment right to a jury trial.

Answers to Exercises

From "Right to Privacy":

1. The Court noted that convicted sex offenders have a protected right of privacy under the Alaska Constitution, which must be balanced against the government's interest in protecting the public from convicted sex offenders.
2. The Court found that the ASORA was unconstitutional and violated the Alaska Constitution unless the government provides the convicted sex offenders a fair procedure in which they can demonstrate that they are not dangerous. Without this safety valve, the ASORA statutory scheme violated substantive due process.

From "Right to Bear Arms":

1. A reviewing court would likely uphold the constitutionality of the statute. As with all constitutional challenges, a reviewing court must balance a person's individual right against the government's interest in the health and safety of its citizens. Here, the state's interest in public safety outweighs the defendant's right to bear arms. The felon-in-possession law bears a "close and substantial relationship to the state's legitimate interest in protecting the health and safety of its citizens." The

distinction between violent and non-violent is irrelevant. This hypothetical is based on the case of *Wilson v. State*, 207 P.3d 565 (Alaska App. 2009), which provides a fascinating discussion about how an appellate court interprets Alaska's constitutional "right to bear arms." The opinion is available through the Consortium Library at the University of Alaska Anchorage using your student credentials.

2. The court will uphold the order under the Second Amendment if the defendant was convicted of a felony and ordered to felony probation. Recent US Supreme Court precedent (*Heller* and *McDonald)* both expressly *exclude* convicted felons from their holdings. However, if the defendant was only convicted of a *misdemeanor*, then the court would have to determine whether *Heller* and *McDonald* extend the Second Amendment's right to possess a firearm for self-defense to a convicted police officer who wants to resume their career.

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CHAPTER OVERVIEW

4: The Elements of a Crime

4.1: Criminal Elements

4.2: Criminal Act

4.3: Criminal Intent (Culpable Mental State)

4.4: Causation and Harm

4.5: End-of-Chapter Material

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4.1: Criminal Elements

All crimes can be broken down into discrete elements. The prosecution must prove each essential element beyond a reasonable doubt. Criminal elements are set forth in criminal statutes or in case law, depending on the jurisdiction.

With few exceptions, *every* crime has five elements:

1. a criminal **act** or omission, also called *actus reus*;
2. a **culpable mental state**, also called the *mens rea*;
3. the **concurrence** of the two;
4. **causation;** and
5. a resulting **harm.**

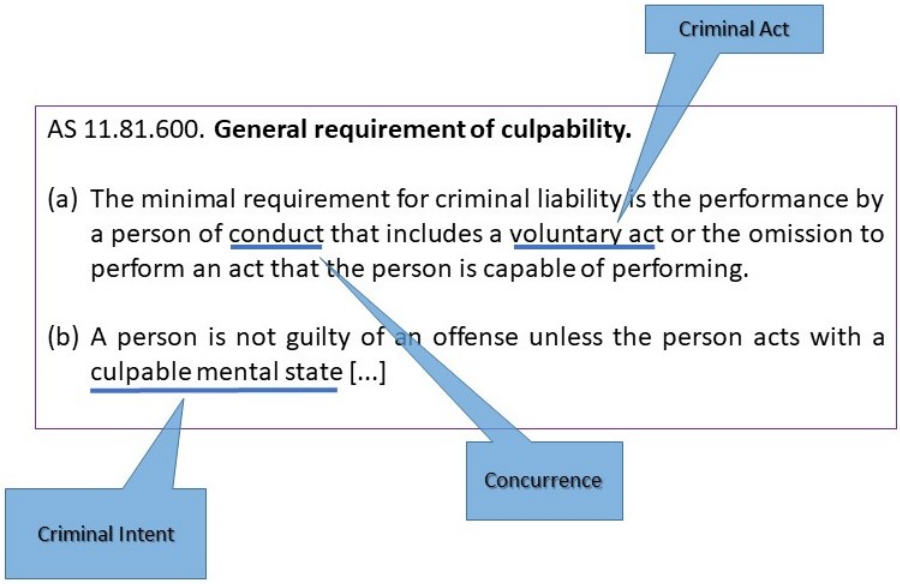
If a person engages in conduct that is lacking one of the above essential elements, the person has not committed a criminal offense. There is one big exception to this general rule: **inchoate offenses**, also known as **anticipatory offenses**. Inchoate offenses do not have causation and harm elements. We will explore anticipatory offenses in more detail in Chapter 6 "Inchoate Offenses."

Example of a Crime That Only Has Three Elements

Janine gets into a fight with her boyfriend Conrad after the senior prom. She grabs Conrad's car keys out of his hand, jumps into his car, and locks all the doors. As Conrad runs towards the car, Janine yells out the window, "I'm going to kill you!" Janine starts the car, puts it into drive, and tries to run Conrad over. It is dark and difficult for Janine to see, so Conrad easily jumps out of the way and is unharmed. Shortly thereafter, Janine is arrested and charged with attempted murder. In this case, the prosecution only has to prove three elements: (1) **criminal act**, (2) **culpable mental state**, and (3) **concurrence**. Attempted murder is an *inchoate* offense and only has three elements. The prosecution does *not* have to prove **causation** or that Conrad was **harmed** because attempt crimes, including attempted murder, do not require a resulting harm. Incomplete crimes, like attempt, are referred to as inchoate crimes.

Nearly every state codifies the minimum requirements of criminal liability. Take a look at Alaska Statute 11.81.600.

Figure 4.1 Alaska Criminal Code



Notice that the statute omits causation and harm from the *minimum* requirements of criminal liability. Also, the term **conduct** is used to reflect concurrence: the combination of the criminal act and criminal intent elements. As the statute explains, "'conduct' means an action or omission *and* its accompanying state of mind." *See* AS 11.81.900(b)(7).

Another requirement of some crimes is the existence or non-existence of an attendant circumstance. **Attendant circumstances** are specific factors that must be present when the crime is committed to constitute the enumerated crime. These circumstances could include the crime's instrumentality, its methodology, location, or victim characteristics. A crime's attendant circumstances will always be included in the criminal statute and is often used as a basis for **grading** a particular family of offenses. An example of grading is Alaska's robbery statutes. Alaska law grades first-degree robbery as a more serious offense than second-degree robbery. *Compare* AS 11.41.500 and 11.41.510. First-degree robbery is a class A felony, whereas second-degree robbery is a class B felony. The applicable punishment range between the two is significant.

Example of a Crime with an Attendant Circumstance

Sally is low on money and decides to rob her local bank. To ensure success, she arms herself with a handgun. Sally walks into the bank, approaches the nearest teller, and points the gun at the teller. Sally demands all of the bank's money. Unbeknownst to Sally, the bank teller activated the silent alarm. Sally is arrested by the police as she walks out. Sally is charged with Robbery in the Frist Degree, which requires the government to prove that she obtained property of another through the threat of force while armed with a deadly weapon. Sally's pistol (a deadly weapon) is an **attendant circumstance** for purposes of the robbery statute. A person who commits a robbery without a deadly weapon is only guilty of Robbery in the Second Degree, a lesser offense.

This chapter analyzes the five essential elements contained within every crime. Subsequent chapters will analyze the elements of specific crimes.

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4.2: Criminal Act

The majority of the time, the **criminalact**, or ***actus reus***, is defined as a voluntary and conscious bodily movement. Remember, the criminal law generally punishes prohibited *acts*. In some circumstances however, the criminal act is defined as an *omission to act*. When the law criminalizes a person's *failure to act*, the law requires the person to be informed of their duty.

The Requirement of Voluntariness

The criminal act must be performed *voluntarily*. Involuntary acts cannot form the basis of criminal liability. Alaska law describes a voluntary act as "[a] bodily movement performed consciously as a result of effort and determination." AS 11.81.900(b)(66). In other words, the defendant must consciously *control* the action. Involuntary acts such as reflexes, convulsions, bodily movements during unconsciousness or sleep, or movements during hypnosis are excluded. *See generally* Model Penal Code § 2.01 (2). Involuntary acts, for purposes of the *actus reus*, do not include compelled or coerced acts. Such "involuntary acts" may excuse a person's criminal behavior, but are "voluntary" for purposes of the criminal act.

Example of an Involuntary Act

Perry is hypnotized at the local county fair. The hypnotist directs Perry to smash a banana cream pie into his girlfriend Shelley's face. Smashing a pie into a person's face without their consent is likely misdemeanor assault. However, since Perry did not commit the act *voluntarily* he should not be convicted of a crime. Punishing Perry for assault serves little societal interest given he was not in control of his behavior. No punishment would change Perry's, or others, behavior in the future.

Purpose of the Criminal Act

Voluntariness serves an important penological purpose. The belief that criminals must be able to avoid criminal punishment is a central purpose of the criminal justice system. Criminalizing involuntary actions fails to achieve this purpose. However, only o*ne voluntary act*is enough to fulfill the *actus reus*. If a *voluntary* act is followed by an *involuntary*one, the law will impose criminal liability.

Example of a Voluntary Act followed by an Involuntary Act

Timothy attends a party at a friend's house and consumes several glasses of red wine. Timothy then drives home. While driving, Timothy passes out at the wheel and hits another vehicle, killing the other driver. Timothy is likely guilty of manslaughter. Timothy's acts of drinking several glasses of wine and then driving were *voluntary*. Even though Timothy caused the collision while unconscious (an involuntary act), his involuntary act was preceded by conscious, controllable, and voluntary action.

Wagner v. State, 390 P.3d 1179 (Alaska App. 2017)

As you will see, recognizing the difference between a voluntary act and one's culpable mental state can be difficult. The following case explores the situation when a person may not know that their voluntary action will lead to an involuntary action. As you read *Wagner,* ask yourself whether it is fair to hold Wagner responsible in such a situation. Does the Court's ruling achieve the penological purpose discussed above?

390 P.3d 1179
Court of Appeals of Alaska.
Richard Laverne WAGNER Jr., Appellant,
v.
STATE of Alaska, Appellee.
Court of Appeals No. A-11682
January 27, 2017

OPINION
Judge MANNHEIMER.

In the early morning of August 23, 2011, Richard Laverne Wagner Jr. came to the end of a street, failed to stop, and drove his van into a tree. When the police arrived, Wagner told the officers that he had recently dropped off some out-of-town relatives at their

hotel, and that he had then taken some medications and started driving home. Wagner told the officers that, when he came to the end of the street, he attempted to apply his brakes, but he mistakenly pressed the accelerator instead.

Later, however, Wagner changed his story: he told the police that all he remembered was being in his home, and then the next thing he remembered was striking the tree.

Because Wagner admitted drinking and smoking marijuana, he was arrested for driving under the influence. His breath test showed a blood alcohol concentration of .066 percent—below the legal limit. Wagner then consented to a blood test. A subsequent chemical analysis of Wagner's blood showed that he had consumed zolpidem—a sedative that was originally sold under the brand name Ambien, and is now available under several brand names.

Wagner was charged with driving under the influence and driving while his license was revoked.

At Wagner's trial, his defense attorney elicited testimony (from the State's expert witness) that one of the potential side effects of zolpidem is "sleep-driving"—i.e., driving a vehicle without being conscious of doing so.

During the defense case, Wagner took the stand and testified that he had been at home watching television, and then he took his medication and fell asleep. According to Wagner, the next thing he remembered was waking up when he hit the tree and his air bag deployed. Wagner asserted that he remembered nothing about getting into a motor vehicle and driving.

Based on this testimony, Wagner's attorney asked the judge to instruct the jury that the State was required to prove that Wagner consciously drove the motor vehicle. More specifically, Wagner's attorney asked the judge to give this instruction:

If you find that [Wagner] was under the effects of a prescription medication, [and] that he was not aware of those effects when he consumed the medication, and that he performed an otherwise criminal act while unconscious as a result of this medication, [then] you must find him not guilty of that criminal act.

The trial judge rejected this proposed instruction because the judge ruled that, if Wagner voluntarily took the medication, then Wagner could be found legally responsible for what ensued, even if he was not consciously driving at the time of the crash.

The jury convicted Wagner of both charges, and Wagner then filed this appeal.

Wagner's primary claim on appeal is that the jury should have been instructed along the lines that Wagner's attorney proposed—i.e., that if Wagner was sleep-driving, he should be acquitted.

The correct categorization of Wagner's claim

Although the attorneys and the judge at Wagner's trial discussed this issue in terms of *mens rea*—i.e., whether Wagner acted "knowingly" when he drove the motor vehicle—Wagner's appellate attorney correctly recognizes that Wagner's proposed defense was actually a claim that Wagner could not be held responsible for the *actus reus* of driving. Wagner does not claim that his act of driving was "unknowing". Rather, he claims that his act of driving was "involuntary".

Normally, a person can not be held criminally responsible for their conduct unless they have engaged in a voluntary act or omission. The term "voluntary act" is defined in AS 11.81.900(b)(66) as "a bodily movement performed consciously as a result of effort and determination". As we explained in *Mooney v. State*, 105 P.3d 149, 154 (Alaska App. 2005), the criminal law defines "voluntary act" as a willed movement (or a willed refraining from action) "in the broadest sense of that term".

But as we are about to explain, a voluntary act is not necessarily a "knowing" act, as that term is used in our criminal code.

Many criminal offenses require proof of a particular type of conduct—e.g., delivering a controlled substance to another person, or warning a fugitive felon of their impending discovery or apprehension. When a crime is defined this way, there will be circumstances when a defendant's willed actions (their "voluntary" acts) will fit the statutory definition of the prohibited conduct, but the defendant will not have been aware that they were engaging in this defined type of conduct.

For instance, a mail carrier or other delivery person may deliver a letter or package without knowing that it contains a controlled substance. Or someone (a neighbor or a news reporter, for example) may unwittingly say or do something that tips off a fugitive felon to their impending discovery or apprehension. In these instances, the person will have performed a "voluntary act", but they will not have "knowingly" engaged in the conduct specified in the statute.

This is not the kind of defense that Wagner wished to raise at his trial. Wagner's attorney did not argue that, even though Wagner knew he was engaging in some form of action, Wagner somehow remained unaware that, by his actions, he was putting a motor

vehicle into operation.

Rather than raising a defense of "unknowing" conduct, the defense attorney argued that Wagner did not engage in any conscious action—that Wagner was essentially asleep, and that he was unaware that he was engaged in activity of any kind. This was a claim of involuntariness.

Why we reverse Wagner's conviction
In *State v. Simpson*, 53 P.3d 165 (Alaska App. 2002), this Court recognized that even though the voluntariness of a defendant's conduct is rarely disputed, the requirement of a voluntary act is "an implicit element of all crimes". Thus, "[i]f voluntariness is actively disputed, the government must prove it." 53 P.3d at 169.

The criminal law's concept of involuntariness includes instances where a defendant is rendered unconscious by conditions or circumstances beyond the defendant's control, if the defendant neither knew nor had reason to anticipate this result. [citations omitted]

Compare *Solomon v. State*, 227 P.3d 461, 467 (Alaska App. 2010), where this Court ruled that defendants charged with driving under the influence can raise a defense of "unwitting intoxication" if the defendant made "a reasonable, non-negligent mistake concerning the intoxicating nature of the beverage or substance that they ingested".

Having considered these authorities, […] we conclude Wagner would have a valid defense to the charges of driving under the influence and driving with a revoked license if (1) he took a prescription dose of zolpidem, (2) he was rendered unconscious by this drug and engaged in sleep-driving, and (3) he neither knew nor had reason to anticipate that the drug would have this effect.

[…]

Conclusion
The judgement of the superior Court REVERSED.

[**NOTE:** Judge Mannheimer, the author of the *Wagner* opinion authored several of the legal opinions reprinted in this this textbook. Judge Mannheimerintentionally uses the English version of the term "judgement" in his opinions. Its use is not a typographical error.]

Status as a Criminal Act

Generally, a defendant's **status** in society is not a criminal act. Status is *who* the defendant is, not what the defendant *does*. Similar to punishment for an involuntary act, when the government punishes an individual for their status, the government is targeting an individual for circumstances that may be outside of his or her control. Punishing a person for their status – as opposed to their conduct – may constitute unconstitutional cruel and unusual punishment under certain circumstances.

In *Robinson v. California*, 370 U.S. 660 (1962), the US Supreme Court held that it is unconstitutional to punish an individual for their *status* of being a drug addict — even if the drugs themselves are *illegal*. The Court compared drug addiction to an illness, such as leprosy or venereal disease. Punishing a person for being sick is not only inhumane, but does not deter future criminal conduct. *See id* at 665-66.

Even though it is unconstitutional to punish a person for their status, the government is entitled to punish a person for their conduct. In *Powell v. Texas*, 392 U.S. 514 (1968), the US Supreme Court upheld the defendant's conviction for being "drunk in public," despite the defendant's status as an alcoholic. The Court reasoned that a defendant may be convicted of "being drunk in public on a particular occasion" regardless of whether a person is an alcoholic. *See id*. at 532. Although it may be difficult for an alcoholic to resist the urge to drink, it is not impossible. Such behavior is voluntary. According to *Powell*, statutes that criminalize *voluntary acts*that *arise*from status are constitutional.

Example of a Constitutional Statute Related to Status

In the previous example, Timothy drove home while intoxicated and killed another person. Assume that Timothy is an alcoholic and claims he cannot stop his drinking. Should Timothy be relieved of liability because he is an alcoholic? Holding Timothy criminally responsible for manslaughter is constitutional, irrespective of his alcoholism. Timothy was not punished for being an alcoholic; he was punished for driving while intoxicated and killing a person – a voluntary act. Timothy's status as an alcoholic may make it more difficult for him to control his drinking, but it does not relieve him from criminal responsibility.

You be the Judge …

Boise, Idaho has a significant and increasing homeless population. Between 2014 and 2106, Boise's homeless population increased by 15%, and by all accounts, continued to grow. The City of Boise has three homeless shelters, all run by private, nonprofit organizations. The shelters are frequently full and turn away individuals when a person suffering homelessness seeks shelter. In an effort to equitably distribute the shelter services, the three shelters limit the number of consecutive nights any single homeless person may stay at the shelter. To combat the persistence of homelessness, the City of Boise passed two ordinances that criminally punished the act of sleeping outside on public property, whether bare or with a blanket or other basic bedding. Both ordinances authorize a court to impose a monetary fine or jail if violated.

Susan is homeless and frequently relied on Boise's shelters for housing. Although she has been staying at one of the local shelters, she was involuntarily discharged since she reached the shelter's 17-day limit for guests. Because she could not go to a shelter, Susan slept in the downtown park. A Boise police officer arrested Susan for sleeping in the park "wrapped in blankets on the ground." The court found Susan guilty and imposed one day in jail and a $25 fine.

Is Susan's conviction based on her status of being homeless or based on her voluntary act of sleeping outside? Check your answer using the answer key at the end of the chapter.

Possession as a Criminal Act

Possession, even though it is passive conduct, is still considered a criminal act. Nearly every jurisdiction criminalizes the possession of illegal contraband. The most common objects that are criminalized include drugs, weapons, or specific criminal tools (*i.e.*, burglary tools). Possession frequently falls within one of several categories: active, constructive, joint, and fleeting possession.

Actual possession means the defendant has direct physical control, care, and management of a physical item. Generally, this means the item is on, or very near, the person. **Constructive possession** means that although the item is not on the defendant's person, it is within the defendant's area of control – that is, the defendant has the right or authority to exercise control or dominion over the item. Consider a person's 'possession' of their house or automobile while the person is at work. Even though the person is not physically present at their home, the person has constructive possession over the items inside the home – that is, the person has the authority to control the item. Possession can also be sole or joint. **Joint possession** is when two or more people have actual or constructive possession over an item. Fleeting possession is generally not criminal. **Fleeting possession** is when a person physically possesses contraband innocently and momentarily, with the intent to turn the item over to the lawful authority (*i.e.*, police). For example, if a person discovers discarded heroin on a sidewalk, the person could pick up the illegal drugs with the intention of delivering the it to law enforcement. If the person's intention was *genuinely* innocent and momentary, the felon's possession would be considered fleeting, and he would not be guilty of a crime. *See e.g., Jordan v. State*, 819 P.2d 39, 42-43 (Alaska App. 1991).

Momentary Possession Must be Truly Innocent

Crabtree and Baker were partners in a woodcutting business near Fairbanks. After Baker unsuccessfully tried to collect the $180 that Crabtree owed him, Baker took Crabtree's handgun. Baker immediately took the handgun to a local pawnshop, where he pawned the gun for $135. While Baker was at the pawnshop, Crabtree called the police. When the police arrived, Baker explained that he was merely collecting on an outstanding debt and he had the gun for thirty minutes – the amount of time it took to drive from the business to the pawnshop. The police discovered Baker was a felon and charged him with one count of being a felon-in-possession of a firearm. AS 11.61.200(a)(1). A jury convicted him.

On appeal, Baker claimed that his possession was "fleeting" and that he only possessed the gun long enough to transport it to the pawnshop. The Court rejected Baker's argument: "We are satisfied that the legislature did not intend to permit felons to possess prohibited weapons as collateral for debt, nor did it intend to immunize knowing possession of a weapon for the time necessary to pawn it. … [Baker] knowingly took [the gun] from Crabtree, pawned it, and retained the pawn ticket until he turned it over to the police. Under these circumstances, a reasonable jury could not find momentary or inadvertent possession of the handgun." *See Baker v. State*, 781 P.2d 1368, 1369 (Alaska App. 1989).

Because possession can be either actual or constructive, both of which can be abstract concepts, courts have struggled to define when a person may be criminally liable for a possessory offense if the person merely has the *ability or power* to exercise control over an item versus whether the person *did* exercise the control over the item. The following case, *Alex v. State*, 127 P.3d 847 (Alaska App. 2006), is a great example of the dilemma surrounding possession.

Alex v. State, 127 P.3d 847 (Alaska App. 2006)

127 P.3d 847
Court of Appeals of Alaska.
Timothy G. ALEX, Appellant,
v.
STATE of Alaska, Appellee.
No. A–8839.
Jan. 13, 2006.
Rehearing Denied Feb. 16, 2006.

OPINION
MANNHEIMER, Judge.
Timothy G. Alex was convicted of weapons offenses after the police recovered a pistol from under the passenger seat of the vehicle in which Alex was riding. At trial, Alex claimed that he had no idea that the pistol was there.

Toward the close of the trial, Alex's trial judge proposed to instruct the jury that a person is in "constructive possession" of an item if the person has "the power to exercise dominion or control" over that item. Alex's defense attorney argued that proof of a person's *power* to exert dominion or control over an object was not enough—that the State was also obliged to prove that the person actually exercised this power, or at least intended to exercise it. After listening to the defense attorney's argument, the trial judge decided not to alter the wording of the jury instruction. In this appeal, Alex renews his contention that the instruction, as given, was an erroneous statement of the law.

It is not clear that this case even raises an issue of constructive possession. As we explain in more detail below, the item in question —a semi-automatic assault pistol—was found underneath the passenger seat of the vehicle in which Alex was riding (as the passenger). It would therefore appear that, if Alex indeed possessed this pistol, he had actual possession of it, not "constructive" possession.

The fact that the parties to this appeal have framed the issue in terms of "constructive possession" may stem from the fact that this concept suffers from a lack of precision. As the United States Supreme Court has noted, the two concepts of "actual" possession and "constructive" possession "often so shade into one another that it is difficult to say where one ends and the other begins". Indeed, some legal commentators have suggested that the words employed in Alex's case to define constructive possession —"dominion" and "control"—do not really provide a workable definition of this concept; rather, these words "are nothing more than labels used by courts to characterize given sets of facts".

There is, in fact, some case law to support Alex's contention that a person should not be convicted of constructively possessing an object merely because the person *could* have exercised dominion or control over the object—that the government must also prove either that the person *did* exercise dominion or control over the object, or at least intended to do so.

However, because of the way Alex's case was litigated, we are convinced that the jury's decision did not turn on this distinction. As we explain here, the jury's verdicts demonstrate that the jurors must have concluded, not only that Alex knew about the pistol under his seat, but also that Alex possessed that pistol[.] Thus, even assuming that the jury instruction on "constructive possession" should have expressly required proof that Alex had already exercised dominion or control over the pistol, or that he intended to do so, this error had no effect on the jury's decision. We accordingly affirm Alex's conviction.

Underlying facts
On the afternoon of December 14, 2002, Anchorage Police Officer Leonard Torres made a traffic stop of a vehicle. When Torres asked to see the vehicle registration, the driver, Darryl Wilson, told the passenger, Timothy Alex, to retrieve the registration from the glove compartment. Torres moved to the passenger side of the vehicle so that he could "see … what [Alex] was reaching for in the glove compartment". When he did so, Torres observed that Alex had an open bottle of beer between his legs.

Wilson, too, had apparently been drinking. Moreover, when Torres ran Wilson's and Alex's names through the computer, he learned that both men were on felony probation. Torres called for backup.

Torres focused his attention on Wilson while two backup officers, Kevin Armstrong and Jeff Carson, asked Alex to step outside the vehicle. During their conversation with Alex, one of the officers asked if there were any firearms in the vehicle. Alex told the officers that there was a firearm under the passenger seat. Carson looked on the floor of the vehicle, underneath where Alex had been sitting, and discovered a "Tec 9" (i.e., an Intratec DC–9, a 9–mm semi-automatic assault pistol).

Because Alex was a convicted felon, he was prohibited from possessing a concealable firearm.
[…]
Based on these events, Alex was indicted for … third-degree weapons misconduct (possession of a concealable firearm by a felon).

Alex did not testify at his trial. However, Alex's attorney elicited testimony (during cross-examination of the police officers) that (1) both Wilson and Alex told the police that the Tec–9 pistol belonged to the owner of the vehicle, a man named Earl Smith, and that (2) when the police spoke to Earl Smith about this weapon, he confirmed that the Tec–9 pistol did, in fact, belong to him. Indeed, Smith declared that he had never told Wilson and Alex that there was a pistol in the vehicle.

[…]

At the end of the trial, during the defense summation, Alex's attorney told the jury that Smith's account was truthful: that the pistol belonged to Smith, and that Alex had not known that the pistol was in the vehicle.

The defense attorney acknowledged that two police officers (Armstrong and Carson) had testified that Alex did know about the pistol—that, in fact, Alex told them that the weapon was present in the vehicle, and that he disclosed the weapon's location under the passenger seat. But the defense attorney told the jurors that the officers were lying—that the officers were saying this only because they knew that the State's "whole case" depended on the argument that Alex must have knowingly possessed the weapon "because he knew it was there".

The defense attorney repeatedly declared that the jurors should disbelieve the officers' testimony on this point. She told the jurors: "Look at the foundation of [Alex's] alleged confession [that there was gun underneath the seat]. Look at the root of that information. It's tainted; it's skewed; it's biased; it's untrustworthy." A few moments later, she told the jurors: "We have the shadiest confession, completely untrustworthy."

A little later in her summation, the defense attorney returned to this theme. She told the jurors that, because Alex was merely a passenger in the car (not the owner of the vehicle, and not the driver), the police must have known that they could not charge and convict Alex of the weapons offenses unless they had a confession—i.e., Alex's admission that he knew that the pistol was under his seat.

Defense Attorney: So they [purportedly] get [the needed confession]. [But] did they? I don't know. Do you know? I would think not.
…
[The police] call[ed] Mr. Earl Smith [to ask him about the gun]. And … what did Mr. Earl Smith say? "That's my gun. [Wilson and Alex] don't know that it's in there."

These arguments proved unavailing; the jury convicted Alex of the [weapon offense].

[…]

The potential problem with the definition of "constructive possession", and why we conclude that any error was harmless
In retrospect (and after briefing), it is easier to see the potential problem caused by including the words "have the power to" in the definition of "constructive possession".

[…]
Alaska cases have never directly addressed [the definition of constructive possession]. In [a prior opinion], the Alaska Supreme Court declared that "possession" was "a common term with a generally accepted meaning: having or holding property in one's power; the exercise of dominion over property." But the supreme court may have been overly optimistic when it declared that "possession" had a common, generally accepted meaning.

There is an ambiguity in the word "power". This word can refer to a person's right or authority to exert control, but it can also refer to anything a person might be physically capable of doing if not impeded by countervailing force. Thus, if "constructive possession" is defined as the "power" to exercise dominion or control over an object, this definition potentially poses problems—because it suggests that a person could be convicted of possessing contraband merely because the person knew of the contraband and had physical access to it, even though the person had no intention or right to exercise control over it.

For example, the children of a household might know that there is beer in the refrigerator or liquor in the cupboard. Assuming that it is within the children's physical power to gain access to these alcoholic beverages, one might argue that the children are in "constructive possession" of these beverages—and thus guilty of a crime [of] minor in possession of alcoholic beverages – because the children have "the power to exercise dominion or control" over the beverages.

To avoid results like this, some courts have worded their definitions of "constructive possession" in terms of a person's "authority" or "right" to exert control over the item in question. … Other courts have worded the test as the defendant's "power and intention " to exert control or dominion over the object.

This same type of problem might have arisen in Alex's case if the case had been litigated differently. For example, given the facts of the case, one can imagine Alex conceding that he was aware of the pistol under his seat, but then asserting that he had no connection to the pistol and that he only became aware of its presence underneath his seat when, during his ride in the vehicle, the pistol bumped against his feet.

But this was not the strategy that Alex's defense attorney adopted at trial. Instead of conceding that Alex knew that there was a pistol under his seat, Alex's attorney denied that Alex knew about the pistol, and further denied that Alex had ever said anything to the police about the weapon. The defense attorney relied on Earl Smith's statement that Alex and Wilson did not know that there was a firearm in the vehicle, and the attorney argued that the police officers had lied when they testified that Alex directed them to the weapon.

[…]

Given this defense, it is unlikely that the claimed ambiguity or error in the jury instruction defining "constructive possession" affected the jury's decision—because the alleged flaw in the jury instruction would make a difference only if Alex conceded that he was aware of the assault pistol under his seat.

[…]

Conclusion

As we have explained here, Alex's brief to this Court identifies a potential problem in the wording of the "constructive possession" instruction that was given at his trial. … But … we conclude that this potential problem in the wording of the jury instruction had no effect on the jury's verdicts. Accordingly, the judgement of the superior court is AFFIRMED.

The More You Know …

In response to the dilemma highlighted in *Alex v. State*, Law Professor Chad Flanders argues that Alaska judges should view actual and constructive possession as separate and distinct concepts and not along a continuum. Actual possession includes both current and *past* physical possession. A person is in actual possession of an item if they have the item on their person or if they had previously possessed the item. Past physical possession is still actual possession (not constructive possession). Constructive possession, on the other hand, should be reserved for those cases where the person has not physically possessed the item but has a legal right (or a functional equivalent) over the item. In the end, Professor Flanders proposes a new "possession" jury instruction to address this problem.

The law recognizes two kinds of possession: actual possession and constructive possession. Actual possession means to have direct physical control, care, or management of a thing. Actual possession does not have to be current possession; it is enough for actual possession to show that the defendant recently had physical control, care, and management over the item.

A person not in actual possession may have constructive possession of an item. Constructive possession means to have ownership of an item, or power and authority over that item or over a place where that item is such that one can without difficulty or opposition reduce it to one's direct physical control.

See id at 21.

Professor Flanders provides several good examples and explanations of these issues in C. Flanders, *"Actual" and "Constructive" Possession in Alaska: Clarifying the Doctrine*, 36 Alaska L. Rev. 1 (2019). The article is available *via* Westlaw Campus Research through the University of Alaska Anchorage Consortium Library using your student UA credentials.

Omission to Act

Generally speaking, the law does not impose criminal liability on a person's failure to act. Under the **American Bystander Rule**, a person has no responsibility to rescue or summon aid for another person who is in danger, even though society may recognize a moral obligation to intervene. "Thus, an Olympic swimmer may be deemed by the community as a shameful coward, or worse, for not rescuing a drowning child in the neighbor's pool, but she is not a criminal." *See State ex. rel. Kuntz v. Montana Thirteenth Judicial District Court*, 995 P.2d 951, 955 (Mont. 2000). Prosecuting individuals for failing to act is rare since the government is reluctant to compel individuals to put themselves in harm's way and such circumstances are difficult to legislate.

The American Bystander Rule is not without exceptions. Criminal liability may be imposed for voluntary *omissions to act* if the law imposes a *duty to act*. This legal duty becomes an **element** of the crime, which the prosecution must prove beyond a reasonable doubt, along with the circumstances of the defendant's inaction. Failure to act is criminal in only four situations: (1) when there is a **statute** that creates a legal duty to act, (2) when there is a **special relationship between the parties** that creates a legal duty to act, (3) when there is a **contract** that creates a legal duty to act, or (4) when a person has **assumed a duty** by voluntarily intervening in a situation to assist another person. *See e.g.*, *Sickel v. State*, 363 P.3d 115 (Alaska App. 2015). Precise legal duties to act vary from jurisdiction to jurisdiction.

Some states have *superseded* the general rule by enacting Good Samaritan statutes that create a duty to assist those involved in an accident or emergency situation. **Good Samaritan statutes** typically contain provisions that insulate the actor from civil liability when providing assistance. *See generally* Minn. Stat. §604A.01 (2001).

Figure 4.2 Minnesota Good Samaritan Law


Read the Minnesota Good Samaritan Law:

604A.01 GOOD SAMARITAN LAW.

Subdivision 1. **Duty to assist.**

A person at the scene of an emergency who knows that another person is exposed to or has suffered grave physical harm shall, to the extent that the person can do so without danger or peril to self or others, give reasonable assistance to the exposed person. Reasonable assistance may include obtaining or attempting to obtain aid from law enforcement or medical personnel. A person who violates this subdivision is guilty of a petty misdemeanor.

Subd. 2. **General immunity from liability.**

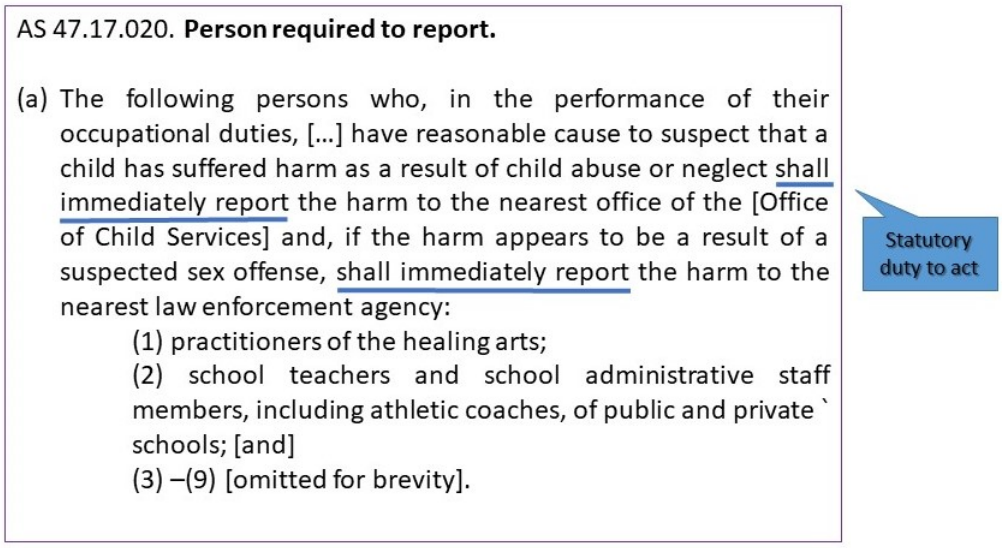
(a) A person who, without compensation or the expectation of compensation, renders emergency care, advice, or assistance at the scene of an emergency or during transit to a location where professional medical care can be rendered, is not liable for any civil damages as a result of acts or omissions by that person in rendering the emergency care, advice, or assistance, unless the person's conduct is willful and wanton or reckless in providing the care, advice, or assistance. This subdivision does not apply to a person rendering emergency care, advice, or assistance during the course of regular employment, and receiving compensation or expecting reasonable compensation for rendering the care, advice, or assistance.

Note: Although the Act appears to encourage citizens to assist others, it does not create a duty. Minn. Stat. Ann. § 604A.01.

Duty to Act Based on a Statute

When a duty to act is statutory, it usually concerns a *paramount* government interest. Some common examples include the duty to file state or federal tax returns, the duty of certain healthcare personnel to report specific injuries, and the duty to report suspected child abuse. For example, Alaska obligates public and private school teachers to report cases of suspected child abuse to the Office of Child Services (OCS) or law enforcement. AS 47.17.020. School teachers who fail to report cases of suspected abuse are guilty of a Class A misdemeanor, punishable by up to one year in jail. AS 47.17.068.

Figure 4.3 Alaska Criminal Code



Duty to Act Based on a Special Relationship

A special relationship may also create a legal duty to act. The most common special relationships are parent-child, spouse-spouse, and employer-employee. Often, the rationale for creating a legal duty to act when people are in a special relationship is the *dependence* of one individual on another. Irrespective of the moral obligation a parent may have towards their child, the criminal law imposes a legal obligation to provide food, clothing, shelter, and medical care since the child is dependent on their parents for their basic needs. Children do not have the ability to protect themselves, and as we will see in *Michael v. State*, 767 P.2d 193 (Alaska App. 1998) *reversed on other grounds* 805 P.2d 371 (Alaska 1991), parents can be held criminally liable for failing to protect their children from harm.

Duty to Act Based on a Contract

A duty to act can be based on a contract between the defendant and another party. The most prevalent examples would be a physician's contractual duty to help a patient or a lifeguard's duty to save someone who is drowning. Keep in mind that *experts* who are *not* contractually bound can ignore an individual's pleas for help without committing a crime, no matter how morally abhorrent that may seem. Remember, an Olympic swimmer can watch someone drown if there is no statute, contract, or special relationship that creates a legal duty to act, but if the Olympic swimmer is employed as a lifeguard, criminal liability may attach.

Duty to Act Based on the Assumption of Duty

Criminal liability may attach if a person fails to continue to provide aid, once assistance has started. Similar to the duty based on a special relationship, the duty to continue to provide aid is rooted in the person's assumption of the victim's care and the victim's continued dependence. It is unlikely that another person will come along to help once the defendant has begun providing assistance. For example, a driver who picks up an injured person on the street, with the intent of taking them to the hospital, may be criminally liable if the driver changes his mind and leaves the person somewhere other than the hospital. *See generally U.S. v. Hataley*, 130 F.3d 1399, 1406 (10th Cir. 1997).

Example of a Failure to Act That Is Noncriminal

Recall the example where Clara and Linda are shopping together and Clara stands by and watches Linda put a bra in her purse without paying for it. In this example, Clara does *not* have a duty to report Linda for shoplifting. Clara does not have a *contractual* duty to report a crime because she is not a store security guard obligated by an employment contract. Nor does she have a *special relationship* with the store mandating such a report. Unless a statute or ordinance exists to force individuals to report crimes committed in their presence, which is extremely unlikely, Clara can legally observe Linda's shoplifting without reporting it. Of

course, if Clara assists Linda with the shoplifting, she is likely criminally accountable for Linda's criminal conduct, but we'll discuss accountability in Chapter 5, "Parties to Crimes."

Example of a Failure to Act That Is Criminal

Penelope stands on the shore at a public beach and watches as a child drowns. If Penelope's state had a Good Samaritan law, she may have a duty to help the child based on a *statute*. If Penelope is the lifeguard, she may have a duty to save the child based on a *contract*. If Penelope is the child's mother, she may have a duty to provide assistance based on their *special relationship*. If Penelope began to rescue the child in the ocean, she may have a duty to continue her rescue. If Penelope is just a bystander, and no Good Samaritan law is in force, she has no duty to act and cannot be criminally prosecuted if the child suffers harm or drowns.

Michael v. State, 767 P.2d 193 (Alaska App. 1998)

As you read the next case, *Michael v. State*, consider that one of the primary purposes of modern criminal statutes is to provide *notice* to individuals as to what is, and is not, criminal. The criminal law does not explain what a person may do, but instead, what a person may *not do* (or in the context of omissions, what a person *must do*). How does a parent know when they must protect their child? The following case begins to address this issue. In the next section you will read, *Willis v. State*, 57 P.3d 688 (Alaska App. 2002), which will address how the government *proves* a parent violated their duty to protect.

767 P.2d 193
Court of Appeals of Alaska.
Steven A. MICHAEL, Appellant,
v.
STATE of Alaska, Appellee.
No. A–2041.
Dec. 23, 1988.

OPINION
COATS, Judge.
Loreli and Steven Michael were each indicted on thirteen counts of assault in the first degree. Each count of the indictment charged that Loreli and Steven Michael had assaulted their daughter D.M. Each count of the indictment represented a bone that had been broken in the body of their daughter.

[…]

Loreli and Steven Michael were tried jointly in October, 1986. Acting Superior Court Judge Alexander O. Bryner presided over the court trial. Judge Bryner found Loreli Michael guilty of three counts of first-degree assault. He concluded that Loreli Michael had personally inflicted D.M.'s injuries. He sentenced her to ten years with three years suspended on each count, placing her on probation for five years following her release from confinement. … Judge Bryner found that Steven Michael had not personally inflicted the injuries on his daughter and had not acted as an accomplice to the infliction of D.M.'s injuries. However, Judge Bryner found that Steven Michael had caused harm to his daughter by failing to prevent his wife from injuring D.M. and by failing to obtain medical aid. He found Steven Michael guilty of two counts of second-degree assault, a lesser-included offense. Judge Bryner sentenced Steven Michael to four years imprisonment with two years suspended, placing Michael on probation for five years following his release from confinement. […] Steven Michael now appeals, arguing that (1) he could not properly be convicted of assault on the theory that he did not act to prevent his daughter's injuries[.] We affirm [Steven Michael's] convictions.

D.M. was born on November 5, 1985, to Loreli and Steven Michael. On January 5, 1986, the Michaels brought D.M. into the emergency room at the Elmendorf Air Force Base hospital because her leg was red and swollen. Dr. Carole Buchholz examined her and ordered x-rays.

Upon examining the x-rays, Dr. Buchholz saw "obvious fractures of all four bones in the lower legs," two bones in each leg. Dr. Buchholz ordered additional x-rays, which showed many more broken bones: both femurs (upper legs), the upper and lower bones of both arms, and at least nine ribs. Dr. Steven Diehl, a radiologist, was brought in to review the x-rays. Dr. Diehl concluded that D.M. had suffered multiple fractures and that her bones were in different stages of recovery.

Drs. Buchholz and Diehl testified that a baby's bones heal quite rapidly if broken. The doctors were able, therefore, to determine the approximate date that each of the fractures was inflicted. Some of the fractures were very recent; others were several weeks old. The left tibia (lower leg) had been fractured twice, at two different times. The rib fractures had been inflicted at different times. Several other bones had been fractured more than once. The nature and number of the fractures and the amount of force required to inflict them excluded accidental causes. D.M. also had a bruise on the back of her left shoulder, and two burns on her left forearm. She also had broken blood vessels on her face and neck.

Loreli Michael had been the baby's primary caretaker. She stayed home with the baby during the day. Steven Michael, who was in the Army, was out of town on field maneuvers for about two weeks beginning December 5. He returned home sometime between December 14 and 20. From his return until January 5, he would on some days spend long hours on duty, but on other days would spend a substantial amount of time at home. Although Loreli Michael did most of the caretaking—diaper changing and the like—when he was home, Steven Michael occasionally performed these duties.

Loreli Michael told Sandra Csaszar, the Division of Family and Youth Services social worker who investigated the case, that D.M. had always been in the presence of one or the other parent from the time she left the hospital after her birth until January 5. She had never been left with a babysitter.

Based upon the foregoing, and other evidence, Judge Bryner concluded that Loreli Michael was guilty of three counts of assault in the first degree. He concluded that Loreli Michael had directly assaulted D.M., personally causing D.M.'s injuries.

[At trial, the state's theory of criminal liability] for Steven Michael was that Michael had breached his legal duty to aid and assist his child because he did not aid his daughter when he knew that she was physically mistreated and abused by his wife. [Judge Bryner found Michael guilty on this] theory [noting,]

Mr. Michael had a legal duty to aid and assist his child if she was under the threat or risk of physical damage or assault—from any person, including his wife. I find that that duty existed both under Alaska statutes as well as under common law. Second, I find that Mr. Michael did not aid and did not help his daughter when she was in fact physically mistreated and abused by his wife. Third, I find that Mr. Michael's failure to act was knowing. In other words, I find that Mr. Michael was capable of rescuing and assisting his daughter. And I find that he knew that he was capable and—could have rescued her. I find specifically that he was aware of a substantial probability that his daughter was being mistreated, or physically abused by his wife. And that he failed to act in the face of … that awareness. As a result, I further find that as a result of his failure to act, that his daughter suffered serious physical injury.
….
Mr. Michael was aware, after December 20th, … of [a] substantial probability that his daughter was … under a risk of physical attack and assault from his wife of some sort. Knowing that risk[,] I find that the failure to render assistance under those circumstances constitutes a gross departure [or] deviation from the standard of conduct that would be expected of … ordinary people in the normal everyday conduct of their affairs under similar circumstances. And for that reason I do find that Mr. Michael, in failing to take any action on behalf of his … daughter, acted recklessly.

Stephen Michael argues that he could not properly be convicted for assault for failing to act to protect his child. The question which he raises is a question of statutory interpretation. … Neither the Alaska Supreme Court nor this court has previously decided this question; this is a case of first impression in this jurisdiction.

[…]

We … turn to the common law and to decisions of other state courts to determine how other courts have resolved similar problems. In general, under the common law a person did not face criminal liability for the failure to aid another person. However, the common law created a clear exception to this general rule where there was a parent-child relationship. A parent had a clear duty to aid his child.

Although there does not seem to be extensive case law directly on point in this area of the law, the case law that is available appears to be unanimous in establishing the duty of a parent to act to protect his child. […] Furthermore, other Alaska statutes establish a duty for a parent to care for a child. AS 11.51.120(a) provides misdemeanor criminal penalties where "a person legally charged with the support of a child under 18 years of age … fails without lawful excuse to provide support for the child." AS 11.51.120(b) defines support to include "necessary food, care, clothing, shelter, medical attention, and education."

We conclude that Steven Michael could properly be convicted of assault in the second degree[.] In interpreting [the law], the critical question before us is whether Steven Michael's failure to take reasonable actions to protect his child from serious physical injury by Loreli Michael can be said to have caused D.M.'s injuries. Although generally a person has no duty to act to protect another, we find that the common law and Alaska statutes establish a clear duty upon a parent to protect his child. It seems clear under the law that where the parent fails to carry out this duty and the child is injured as a result, the parent has caused the child's injuries and may be held criminally liable.

[…]

The conviction is AFFIRMED.

Exercises

Answer the following question. Check your answer using the answer key at the end of the chapter.

1. Jacqueline is diagnosed with epilepsy two years after receiving her driver's license. While driving to a concert, Jacqueline suffers an epileptic seizure and crashes into another vehicle, injuring both of its occupants. Can Jacqueline be convicted of a crime in this situation? Why or why not?

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4.3: Criminal Intent (Culpable Mental State)

All crimes, with a few exceptions to be discussed shortly (*e.g.*, strict liability), include a culpable mental state or ***mens rea***. *Mens rea* refers to the mental state of the accused at the time they committed the offense. Put another way, *mens rea* describes the purposefulness – or lack thereof – of the defendant's conduct. A person's level of criminal intent forms the basis of **grading** a particular offense – that is, the more "evil" a person's intent, the more serious the offense is considered in the eyes of the law.

A culpable mental state is an essential element for most crimes. If the government is unable to prove that the defendant acted with the applicable culpable mental state, the person is not guilty of the offense. AS 11.81.600(b). It is the same as the defendant not committing the act. Mental state is different than criminal *thoughts* or *motive*. Thoughts – no matter how evil – cannot be criminalized. Motive, while potentially helpful in understanding *why* a person committed a crime, is never something the government is required to prove. Let's look at first-degree murder as an example.

Figure 4.4 Alaska Criminal Code – Murder in the First Degree


AS 11.41.100. Murder in the first degree. A person commits the crime of murder in the first degree if With intent to cause the death of another person, the person (a) causes the death of any person[...]

As you can see, first-degree murder must be committed intentionally. The defendant must intend to cause the death of the victim – accidentally causing death is insufficient. Likewise, intending to seriously injure the victim is insufficient. The defendant must have a conscious objective to cause the victim's death.

All jurisdictions vary in their approach to defining a particular culpable mental state. For clarity, this section explores the common law definitions of criminal intent before exploring the different culpable mental states under the Alaska Criminal Code.

Example of Noncriminal Thoughts

Brianna, a housecleaner, fantasizes about killing her elderly client Phoebe and stealing all her jewelry. Brianna writes her thoughts in a diary, documenting how she intends to rig the gas line so that gas is pumped into the house all night while Phoebe is sleeping. Brianna includes the date that she wants to kill Phoebe in her most recent diary entry. As Brianna leaves Phoebe's house, her diary accidentally falls out of her purse. Later, Phoebe finds the diary on the floor and reads it. Phoebe calls the police, gives them Brianna's diary, and insists they arrest Brianna for attempted murder. Although Brianna's murder plot is sinister and is documented in her diary, charging Brianna with attempted murder is inappropriate at this point. Brianna cannot be criminally punished for her *thoughts alone* . If Brianna took a substantial step toward killing Phoebe, an attempted murder charge might be appropriate. However, at this stage, Brianna is only *planning* a crime, not *committing* a crime. You will explore the crime of attempt in Chapter 6, "Inchoate Offenses."

Motive

Remember, intent should not be confused with motive. The criminal law *never* requires the government to prove motive. **Motive**, or the *reason* the defendant commits a criminal act, can help *explain* a defendant's actions or culpable mental state, but motive alone cannot act as a substitute for the applicable *mens rea*. Motive is never an element of a crime.

Common Law Mental States

At common law, all crimes require the criminal act be committed with a "guilty mind." The level of one's "guilty mind" resulted in three culpable mental states ranked in order of culpability: malice aforethought, specific intent, and general intent. Although individual statutes and cases use different words to indicate particular criminal intent, what follows is a basic description of the intent definition adopted by many jurisdictions. Further, even though Alaska has abolished the common law culpable mental states, they are routinely referenced in caselaw. For this reason, a general understanding of common law is necessary for a complete understanding of criminal law.

Malice Aforethought

Malice aforethought is a special common law mental state designated for only one crime: *murder.* Malice aforethought means "intent to kill" without adequate justification. We will explore justifications in subsequent chapters, but for now, recognize that malice aforethought is the specific intent to kill. Society considers acting with a specific intent to kill another human being the most

evil of all intents, so individuals who act with malice aforethought generally receive the most severe punishment. Malice aforethought and criminal homicide are discussed in detail in Chapter 9, “Criminal Homicide.”

Specific Intent

Specific intent is the highest level of culpability other than malice aforethought. Specific intent refers to an intent to accomplish a specific act prohibited by law. Typically, specific intent means that the defendant acts with a more sophisticated level of awareness. The crimes of theft and larceny are historically specific intent crimes. Theft requires the “intent to permanently deprive” another of property. The statute requires more than simply taking the property, the law requires the defendant to *intend to keep* the property permanently. This is the difference between criminal theft and simply borrowing someone’s property without consent. For example, if Pauline borrows Peter’s razor to shave her legs, she has “taken property of another,” but she has not committed the crime of theft for the simple reason that she intends to return the property after use.

General Intent

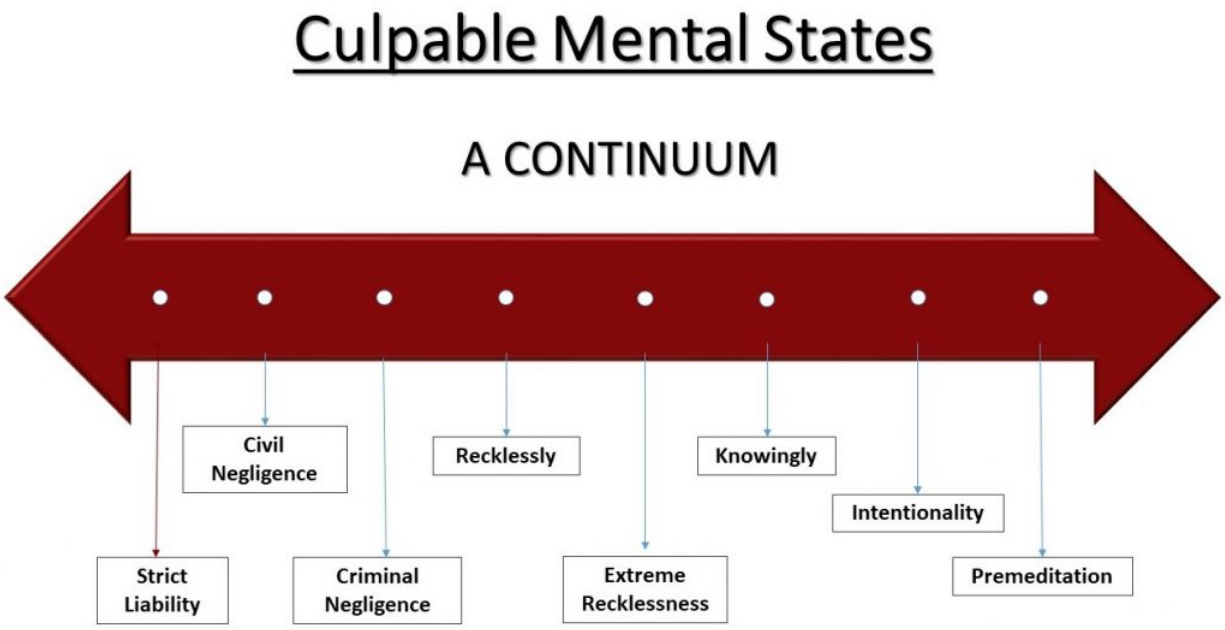
General intent is less sophisticated than specific intent. General intent crimes are easier to prove. A basic definition of general intent is the intent to perform the criminal act or *actus reus* . For example, a person commits the crime of second-degree harassment if the person “subjects another person to offensive physical contact.” AS 11.61.120(a)(5). This statute describes a general intent crime. To be guilty of harassment, the defendant must recklessly cause harmful or offensive contact. The defendant does not have to desire that the contact produces a specific *result* , such as scarring, or death; nor does the defendant need awareness that the physical contact is illegal.

Alaska’s Mental States

Alaska divides criminal intent into five culpable mental states listed in order of culpability: intentionally, knowingly, extreme recklessness, recklessness, and criminally negligence. Although there are *five* culpable mental states under Alaska law, the criminal code only defines *four*. The fifth – extreme recklessness – is defined by caselaw.

It can be helpful to think of criminal intent as a continuum with no intent (*i.e.*, strict liability) on one end and premeditation on the other end.

Figure 4.5 Culpable Mental State Continuum



Intentionally

A defendant acts **intentionally** if he has a conscious objective to cause a particular result. AS 11.81.900(a)(1). Put another way, the defendant intends to engage in conduct of that nature and intends to cause a certain result. Intentionally resembles **specific intent** to cause harm, discussed previously. Although the defendant must intend to cause a particular result, the person's intent need not be the person's only objective. A person can, and frequently does, have multiple intents. For example, consider the person who walks in on their spouse and lover engaged in a sexual act. The person may, in a moment of rage, form an intent to kill their spouse and their spouse's lover. The intent to kill one person (*e.g.*, the spouse), does not mean the person does not also hold an intent to kill another person (*e.g.*, the lover). Also, take note that acting intentionality is not the same as acting deliberately, or premeditatively. Alaska law does not require a person to premediate (*i.e.*, plan) the criminal act. Intentionality can – and frequently does – form in an instant.

Knowingly

Knowingly indicates that the defendant is substantially aware of the nature of the act and its probable consequences. AS 11.81.900(a)(2). Knowingly differs from intentionally in that the defendant is not acting to cause a certain result but is acting with the awareness that the result is *practically certain* to occur. Alaska law describes knowingly as follows: "A person acts 'knowingly' with respect to conduct … when the person is aware that the conduct is of that nature; … knowledge is established if a person is aware of a substantial probability of its existence, unless person actually believes it does not exist[.]" AS 11.81.900(a)(2).

Example of Knowingly

Victor brags to his girlfriend Tanya that he can shoot into a densely packed crowd of people on the subway train without hitting any of them. Tanya dares Victor to try it. Victor takes his pistol to the subway train, aims at a group of people standing with their backs to him, and shoots. As he shoots, Victor tells Tanya, "watch how close I can get without hitting them!" A bullet strikes and kills Monica, who was standing in the group. In this case, Victor did not *intend* to shoot Monica. In fact, Victor's goal was to shoot and miss all the standing subway passengers. However, Victor was *aware* that he was shooting a loaded gun (the nature of the act) and was *substantially certain* that shooting into a crowd would result in somebody getting hurt or killed. Victor acted knowingly under Alaska law. Victor is likely guilty of second-degree murder. AS 11.41.110(a)(1).

Extreme Recklessness

As mentioned before, **extreme recklessness** is not one of the four defined culpable mental states in the code but instead a creature of statutory interpretation (case law). The criminal code refers to extreme recklessness as "conduct manifesting an **extreme indifference to the value of human life**." *See generally Neitzel v. State*, 655 P.2d 325, 337 (Alaska App. 1982).

Very few crimes require the defendant act with extreme recklessness. In fact, Alaska only recognizes three offenses that include this mental state – second-degree murder, first-degree assault, and murder of an unborn child. AS 11.41.110(a)(2), 11.41.200(a)(3), and 11.41.150(a)(4), respectively.

The mental state requires the jury to assess the level of recklessness of the defendant's conduct. The jury must weigh the social utility of the defendant's conduct (if any) against the precaution the defendant took to minimize the apparent risks. For example, playing "Russian Roulette," in which the participant has a 16.7% chance of being killed and an 83.3% chance of not being killed, is incredibly dangerous and completely lacks any social utility. On the other hand, the law recognizes that there may be some social utility in firing a gun at an attacking bear in an attempt to rescue a victim even if the bullet strikes the victim, not the bear. The law recognizes that the social utility of this latter example may outweigh the magnitude of the risk. *See id*. Whether particular acts constitute extreme recklessness is a question of fact for the trier of fact (like all culpable mental states).

We will explore this mental state in more detail in Chapter 9, "Criminal Homicide".

Example of Extreme Recklessness

Victor and his girlfriend Tanya go camping for the weekend with friends. Late one night, Victor, Tanya, and friends are sitting around the campfire playing with their pistols. Unbeknownst to Victor, Tanya crawls into the tent to go to sleep. Victor, mistakenly believing the tent is empty, shoots into the tent to be funny. One of the bullets strikes Tanya, killing her instantly. In this case, Victor did not *intend* to shoot Tanya, nor was Victor *substantially certain* that his errant bullet would kill Tanya. Instead, Victor

likely acted with extreme recklessness since there was little social utility to his conduct (*i.e.*, there was no reason to shoot into a tent not knowing if it was occupied) and Victor took no steps to ensure that it was safe to shoot. Under these circumstances, Victor likely engaged in conduct that caused Tanya's death under circumstances that manifest an extreme indifference to human life – that is, with extreme recklessness. Victor is guilty of second-degree murder. AS 11.41.110(a)(2).

Recklessly

Recklessly is a lower level of culpability than knowingly. The *degree* of risk awareness is key to distinguishing a reckless intent crime from a knowing intent crime. A defendant acts recklessly if they consciously disregard a substantial and unjustifiable risk that the bad result or harm will occur. AS 11.81.900(a)(3). This is different from a knowing intent crime, where the defendant must be "substantially certain" of the bad results. The reckless intent test is two-pronged. First, the defendant must consciously disregard a substantial risk of harm. The first prong is subjective; the *defendant* must know of the substantial risk and consciously disregard it. This risk must be unjustifiable, meaning that there is no valid reason for the risk. The second prong is objective; the defendant's disregard of the risk must be a gross deviation from what a *reasonable person* would be willing to do. Under these circumstances, the defendant's action is **reckless**. As the code states, "the risk must be of such a nature and degree that disregard of it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation." AS 11.81.900(a)(3)

Example of Recklessly

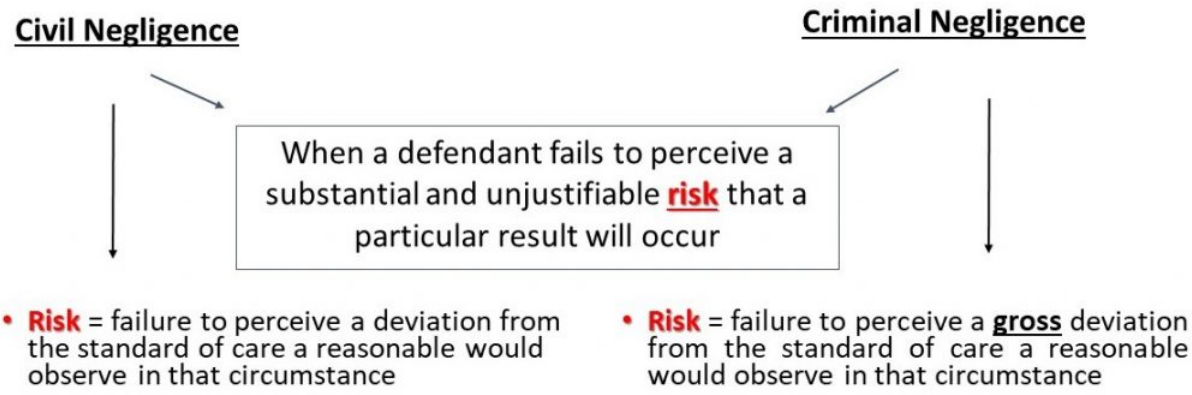
Let's revisit Victor and Tanya. Suppose Victor and Tanya are driving back from their weekend camping trip with friends. As they are driving back Victor is shooting at passing highway signs. Although there is oncoming traffic on the highway, the oncoming cars are few and far between. As they pass an upcoming highway sign Victor shoots. The bullet ricochets off the sign and strikes a passing car, killing a passenger. A jury would likely find that Victor was acting recklessly in this situation. Victor's knowledge and awareness of the *risk* of injury or death when shooting a gun with passing cars is probably *substantial*. A reasonable, law-abiding person would probably *not* take this action under these circumstances. Victor is likely guilty of manslaughter, a lower-level of criminal homicide. AS 11.41.120(a).

Criminal Negligence

The lowest level of criminal culpability is **criminal negligence**. The difference between reckless and criminally negligent culpability is the defendant's *lack of awareness*. The criminally negligent defendant is faced with a **substantial** and **unjustifiable** risk, in which they are *unaware*, whereas the reckless defendant *consciously disregards* the unjustified risk. The criminally negligent defendant "fails to perceive" the risk. AS 11.81.900(a)(4).

It is important to note that criminal negligence is *different* than civil negligence. *See State v. Hazelwood*, 946 P.2d 875, 878 (Alaska 1997). Criminal negligence requires a *gross* deviation from the standard of conduct a reasonable person would observe in a particular situation, whereas civil negligence requires a simple deviation from what a reasonable person would do in the situation. While this distinction may seem minor, remember, criminal liability results in the potential depravation of liberty. Civil liability simply results in the loss of money.

Figure 4.6 Understanding the Difference between Criminal and Civil Negligence



Example of Criminal Negligence

Let us discuss Victor and Tanya one last time. Assume that Victor is driving him and Tanya back home after their long, fun weekend of camping with friends. While driving, Victor continually sends text messages to a friend who missed the camping trip. While Victor is typing out a text message he drives off the roadway, causing the vehicle to roll into the ditch. Tanya dies in the accident. Under these facts, Victor may be *unaware* that texting and driving could result in him driving off the roadway and flipping the vehicle into the ditch. However, the trier of fact may determine that a "reasonable person" would be aware of the dangers of texting and driving, and such behavior could result in injury or death. This would be a finding that Victor acted criminally negligent in causing Tayna's death. Under these circumstances, Victor is likely guilty of criminally negligent homicide. AS 11.41.130(a).

Elements of Different Culpable Mental States

Occasionally, a criminal statute will require *different* culpable mental statutes for different elements. In this scenario, the government must prove each *mens rea* beyond a reasonable doubt for each element.

Example of a Crime that Requires More Than One Criminal Intent

A person commits the crime of burglary in the first degree if the person "knowingly enters a dwelling with the intent to commit a crime therein." AS 11.46.300. The statute contains three elements: (1) entering, (2) a dwelling, and (3) with the intent to commit a crime inside. The defendant must act "knowingly" with respect to entering a dwelling, but the defendant must act intentionally with respect to committing a crime while inside. This statute contains two different culpable mental states the prosecution must prove beyond a reasonable doubt to secure a conviction.

Willis v. State, 57 P.3d 688 (Alaska App. 2002)

The following case, *Willis v. State*, revisits the circumstances surrounding a parent's duty to protect their child. How is a parent supposed to know what circumstances may lead to criminal liability? The answer involves the application of the relevant culpable mental states. As you read the case, pay attention to how the *mens rea* and the failure to act are intertwined.

57 P.3d 688
Court of Appeals of Alaska.
Kevin WILLIS and Barbara Nauska, Appellants,
v.

STATE of Alaska, Appellee.
Nos. A–7587, A–7778.
Oct. 25, 2002.

OPINION

MANNHEIMER, Judge.

Kevin Willis and Barbara Nauska were indicted for seriously injuring their two-month-old child. At six o'clock in the evening on July 17, 1997, Nauska brought the baby to the emergency room at Bartlett Regional Hospital in Juneau. The baby had a fractured skull and broken ribs.

According to medical testimony, these injuries were likely inflicted when someone grasped the infant by its chest and bashed its head against a wall or other hard object. Medical testimony also indicated that the baby sustained these injuries during the two hours preceding his arrival at the hospital. During most of this time, the infant was in the care of Willis and Nauska on their small houseboat. However, Willis and Nauska both claimed that they did not know how the baby was injured.

Following a police investigation, Willis and Nauska were indicted for second-degree assault. The State conceded that it could not prove which of them had assaulted the baby. However, the indictment was based on the theory that one of them had personally assaulted the infant while the other had knowingly stood by and allowed the assault to happen—thus violating their parental duty to protect the child and rendering them criminally liable for the resulting injuries.

At trial, Willis and Nauska asserted that their babysitter, Patrick Prewett, had assaulted the baby before they returned home that afternoon. The jury rejected this defense and convicted Willis and Nauska of second-degree assault[.] Both defendants now appeal their convictions and their resulting sentences.

[…]

The adequacy of the jury instructions concerning criminal responsibility based on a parent's failure to act to protect their child

As explained above, the State could not identify either Willis or Nauska as the person who inflicted the baby's injuries. The State's theory of prosecution was that one of them assaulted their child while the other stood by and allowed the assault to occur. Because the case was litigated this way, the jurors had to be instructed concerning the circumstances under which a parent can be held criminally responsible for failing to protect their child.

Judge Weeks gave the jurors an instruction that combined both theories of criminal responsibility — *i.e.*, responsibility based on personal commission of an assault, and responsibility for failing to act to prevent the assault:

A person commits the crime of assault in the second degree if, either by acting or by failing to act when he or she has a legal duty to act, that person recklessly causes serious physical injury to another person.

In order to establish the crime of assault in the second degree …, it is necessary for the state to prove beyond a reasonable doubt the following:

First, that the event in question occurred at or near Juneau and on or about July 17, 1997;

Second, that the defendant had a duty to protect [the child];

Third, that the defendant performed an act or failed to perform an act which resulted in serious physical injury to [the child];

Fourth, that the defendant acted recklessly.

[…]

On appeal, Willis and Nauska argue that the jury instruction on the elements of assault fails to correctly state the components of criminal responsibility based on dereliction of duty. As we explain below, the defendants are correct. However, … [g]iven the facts of this case and the way it was litigated, we conclude that this jury instruction did not constitute plain error [requiring reversal].

The two culpable mental states that must be proved when a parent is charged with homicide or assault for failing to protect their child

The elements of criminal responsibility based on dereliction of duty are set out in *Michael v. State*, 767 P.2d 193 (Alaska App.1988). The *actus reus* of the offense is the defendant's failure to act when the defendant had a duty to act. The State must show that this failure to act was "knowing".

More specifically, when a defendant is prosecuted for failing to act, the State must show that the defendant was aware of the circumstance that triggered the duty to act and that, being aware of this circumstance, the defendant chose to do nothing—*i.e.*, "knowingly" refrained from acting. In the case of a parent prosecuted for assault or homicide for failing to protect their child, the State must prove that the parent knew of the need to take action to protect the child and knowingly refrained from taking action.

In addition to proving this *actus reus*, the State must additionally prove that the parent acted with the requisite culpable mental state regarding the result specified by the offense. (In a homicide prosecution, the prohibited result is death. In an assault prosecution, the prohibited result is either serious physical injury, physical injury, or apprehension of imminent injury.)

At first blush, it might seem superfluous to require proof of a separate culpable mental state regarding the possibility of the child's injury—for, as we have just explained, the State must prove that the parent knew of the need to protect the child in order to establish that the parent's failure to act was "knowing". But children often engage in sports and other activities that hold some degree of physical peril. Even though a parent understands that their child might be injured while engaging in these activities, the parent's knowing failure to intervene does not constitute a crime unless the government also proves that the parent acted (or, more precisely, failed to act) with a culpable mental state regarding the potential injury—a culpable mental state that will vary according to the crime charged.

For example, even though a child might conceivably suffer serious physical injury while skiing or while driving a motor vehicle, the child's parent could not be convicted of second-degree assault under AS 11.41.210(a)(2) (recklessly causing serious physical injury) for failing to take protective action unless the government proved that the parent acted "recklessly" with regard to this result —i.e., proved that the parent was "aware of and consciously disregard [ed] a substantial and unjustifiable risk" that serious physical injury would occur if the parent failed to intervene. *See* AS 11.81.900(a)(3), the statutory definition of "recklessly".

Under this statutory definition, the government would have to show that the risk of serious physical injury was "of such a nature and degree that [the parent's] disregard of it constitute[d] a gross deviation from the standard of conduct that a reasonable person would observe in the situation". This, in a nutshell, is the difference between letting a toddler play with a firearm and letting an adolescent go on a hunting trip.

[…]

Why we conclude that Judge Weeks did not commit plain error when he gave this jury instruction

We have just explained why, when a defendant is prosecuted for second-degree assault based on dereliction of their parental duty, the government's burden to prove that the defendant knowingly failed to act is distinct from its burden to prove that the defendant was reckless with respect to the possibility that their failure to act might result in serious physical injury. Nevertheless, it is often true that the same facts will prove both elements.

For example, if a parent does nothing even though they are aware that their spouse is assaulting their infant child, this fact will tend to prove both the defendant's knowing failure to act and the defendant's recklessness concerning the possibility of serious physical injury. That was the case in *Michael*, and it was also the State's theory of prosecution against Willis and Nauska.

The State presented evidence that Willis's and Nauska's baby sustained serious physical injury in the late afternoon of July 17, 1997, that this injury was the result of an assault rather than an accident, and that Willis and Nauska were alone with the baby on a small houseboat when the injury occurred. The State alleged that one of the two defendants violently assaulted the baby while the other one looked on and did not intervene.

Faced with this theory of prosecution, Willis and Nauska conceivably might have pursued litigation strategies that highlighted the need to instruct the jury on the element of a knowing failure to act. For instance, either defendant might have contended that they left the houseboat for some reason and that their spouse was alone with the baby when the baby was injured. Alternatively, either defendant might have contended that, although they were present on the houseboat when the baby was injured, they had fallen asleep from fatigue and/or intoxication and thus they were unaware that the baby was being assaulted by their spouse. Or either defendant might have asserted that their spouse assaulted the baby but that the assault occurred in an instant, giving the defendant no time to intervene or do anything other than rush the baby to the hospital.

Likewise, the defendants might have pursued a litigation strategy that highlighted the distinction between a knowing failure to act and recklessness concerning the possibility of serious physical injury. For instance, one of the defendants might have asserted that,

even though they knowingly failed to prevent their spouse from assaulting the child, they had no reason to believe that the assault would be severe enough to inflict serious physical injury on the baby.

But Willis and Nauska did not pursue such litigation strategies. Instead, from beginning to end, Willis and Nauska jointly asserted that no harm had befallen the baby while he was in their presence. Both defendants argued that Prewett [the babysitter] was the culprit—that he assaulted the baby before Willis and Nauska returned to the houseboat in the late afternoon.

Given the way this case was litigated, the jury's crucial task was to determine who injured the baby. If it was either Willis or Nauska, this meant that the remaining spouse witnessed the assault and did nothing. Under these circumstances, the two culpable mental states effectively coalesced. Judge Weeks's jury instruction told the jurors that the State was obliged to prove that the non-assaulting parent acted recklessly—that the non-assaulting parent was aware of and consciously disregarded a substantial and unjustifiable possibility that their spouse would inflict serious physical injury on the baby. Given the defense strategy adopted by Willis and Nauska, such a finding was tantamount to a finding that the non-assaulting parent knowingly failed to protect the baby.

[…]

Conclusion

The judgements of the superior court are AFFIRMED.

Strict Liability

There is one big exception to the rule that every criminal law violation includes a culpable mental state – **strict liability**. Strict liability offenses have *no* intent element. AS 11.81.600(b). Strict liability offenses hold a person criminally responsible for their conduct regardless of their intent. Generally speaking, strict liability offenses are limited to regulatory and public welfare crimes. With a strict liability crime, the prosecution has to prove only the criminal act, causation, and harm, depending on the elements of the offense.

Example of a Strict Liability Offense

The Glenn Highway has a posted speed limit of 65 mph. If Susie is stopped by Anchorage police for driving 75 mph, she is subject to a traffic ticket *regardless of her intent.* Thus, "but officer, I didn't know I was speeding" is not a valid defense. This is a strict liability offense. Susie's *knowledge* of the nature of the act is irrelevant. The prosecution only needs to prove the criminal act to convict Susie because this statute is strict liability.

Kinney v. State, 927 P.2d 1289 (Alaska App. 1996)

Does the government have to prove a person *knew* their conduct was illegal? This is a different situation than strict liability discussed above. In the example above, Susie claimed she did not know she was speeding. But what if the defendant does not know their conduct was *illegal*? **Generally, ignorance of the law is no defense.** But this rule is not absolute. In the following case, *Kinney v. State*, the court faced a defendant claiming the government was required to prove that he *knew* his conduct was illegal. As you read *Kinney* notice how several of the principles discussed throughout the text impact the court's reasoning.

927 P.2d 1289
Court of Appeals of Alaska.
Dean C. KINNEY, Appellant,
v.
STATE of Alaska, Appellee.
No. A–5812.
Nov. 29, 1996.

OPINION

MANNHEIMER, Judge.

Dean C. Kinney was convicted of arranging a sale of liquor in a local-option community—a community where, by local vote, the sale of liquor was banned. Kinney argues that his conviction is invalid because the jury never determined whether Kinney knew that he was breaking the law when he arranged the sale of the liquor. We hold that the State was not required to prove that Kinney knew he was breaking the law.

[…]

Facts of the Case

During January and February of 1994, the state troopers conducted an investigation of bootlegging in Bethel. One of their undercover informants was Rick Wilson. Wilson had arranged to purchase liquor from A.A., a suspected bootlegger, on February 1st, but when Wilson arrived for the transaction, A.A. demurred. Instead, A.A. offered to introduce Wilson to another bootlegger. He then took Wilson to the Hammer Manor Apartments, where he introduced him to the manager, Dean Kinney. Kinney offered to sell liquor to Wilson, but Wilson declined.

The next day, Wilson returned to the Hammer Manor Apartments and attempted to purchase alcohol from Kinney. This time, Kinney told Wilson that he would have to make a telephone call first. Kinney made the call and, soon thereafter, someone knocked at Kinney's door. Kinney went out to speak to the person at his door; when Kinney came back in, he was carrying a bottle of vodka. Kinney gave the bottle to Wilson, and Wilson gave Kinney $50.00 in pre-recorded buy money. Upon leaving Kinney's apartment, Wilson took the bottle to his trooper supervisor and reported this transaction. Based on this sale, the troopers obtained a warrant to record ensuing transactions between Wilson and Kinney.

On February 4th, Wilson returned to Kinney's apartment and asked if he could buy another bottle of liquor. This second transaction occurred in much the same way as the first: Kinney made a telephone call, a bottle was delivered outside Kinney's apartment, and Kinney sold the bottle to Wilson for $50.00. During the negotiation of this sale, Wilson asked Kinney if he could "give [him] a break on the price". Kinney replied that he was only making a profit of $5.00 on each sale and he therefore could not lower the price.

On February 18th, Wilson made a third purchase from Kinney. Wilson went to Kinney's apartment and told Kinney that he wanted to make a purchase. This time, Kinney asked Wilson how many bottles he wished to purchase; Wilson replied that he wanted just one. Again, Wilson offered Kinney $50.00, but this time Kinney told Wilson to return one hour later. Both men left Kinney's apartment. Approximately one hour later, Kinney returned to the apartment, and Wilson arrived soon thereafter. Kinney had a bottle of liquor for Wilson upon his return. During this third transaction, Wilson again asked Kinney to give him a break on the price, but Kinney again refused, adding that he "wasn't making anything".

Kinney was ultimately indicted on three counts of felony bootlegging[.] Following a jury trial in the Bethel superior court, Kinney was convicted for the second and third sales (the ones that had been recorded).

In a prosecution for bootlegging, must the government prove that the defendant knew his conduct was illegal?

At trial, Kinney asked the judge to instruct the jury that Kinney could not be convicted unless the government proved that he was "aware that his conduct was of an illegal nature". The trial judge declined to give this instruction. On appeal, Kinney argues that his proposed instruction was constitutionally required.

Kinney's argument hinges on language taken from *Hentzner v. State*, 613 P.2d 821 (Alaska 1980), a case in which the supreme court interpreted the culpable mental state required for the crime of selling unregistered securities. *Hentzner* was prosecuted under [a statute], which provide[d] criminal penalties for anyone who "willfully" violates the Securities Act. The supreme court had to decide what "willfully" meant.

To interpret this statute, the supreme court relied on the principle that a person may not be convicted of a crime (with the exception of minor violations and public welfare offenses) unless the government proves that the defendant acted with "criminal intent", in the broad sense of "a culpable mental state". Referring to this basic requirement of criminal intent, the court said:

Where the crime involved may be said to be *malum in se*, that is, one which reasoning members of society regard as condemnable, awareness of the commission of the act necessarily carries with it an awareness of wrongdoing. In such a case[,] the requirement of criminal intent is met upon proof of conscious action, and it would be entirely acceptable to define the word "willfully" to mean no more than consciousness of the conduct in question. … However, where the conduct charged is *malum prohibitum*[,] there is no broad societal concurrence that it is inherently bad. Consciousness on the part of the actor that he is doing the act does not carry with it an implication that he is aware that what he is doing is wrong. In such cases, more than mere conscious action is required to satisfy the criminal intent requirement….

The crime of offering to sell or selling unregistered securities is *malum prohibitum*, not *malum in se*. Thus, criminal intent in the sense of consciousness of wrongdoing should be regarded as a separate element of the offense[.]

Hentzner, 613 P.2d at 826.

Kinney contends that the crime of bootlegging, like the crime of selling unregistered securities, is *malum prohibitum*. He therefore argues that, like the defendant in *Hentzner*, he too could not be convicted unless the State proved that he acted with "consciousness of wrongdoing". According to Kinney, this means proving that he understood that his conduct violated the law.

The distinction between crimes that are "*mala prohibita*" and those that are "*mala in se*" has not only shaped but, to a certain extent, also bedeviled the law. Basically, a crime is termed "*malum prohibitum*" if it is "not inherently evil [but is] wrong only because prohibited by the legislature". A crime is "*malum in se*" if it is "wrong in [itself], inherently evil".

However, as [legal scholars] point out, this terminology has never been precise. Generally, common-law crimes are called "*mala in se*" and statutory crimes are called "*mala prohibita*", but courts also say that a crime is "*malum in se*" if it involves "moral turpitude". These criteria sometimes point in different directions. For instance, the offenses of embezzlement and obtaining money by false pretenses are statutory expansions of the common-law crime of larceny, yet few would dispute their classification as crimes of moral turpitude.

[…]

Given criteria like these, there is little wonder that courts reach differing answers when asked to classify the same offense. For instance, the crimes of driving while intoxicated and possession of drugs have been classified by some courts as *mala in se*, while other courts have found them to be *mala prohibita*. [Legal scholars] conclude that "[t]he difficulty of classifying particular crimes as *mala in se* or *mala prohibita* suggests … that the classification should be abandoned[.]"

As an intermediate appellate court, we are loath to abandon a classification that our supreme court has expressly relied on. Rather, our task should be to interpret how that classification applies to the case before us.

Hentzner declares that a crime is *malum prohibitum* if "there is no broad societal concurrence that [the proscribed conduct] is inherently bad". One could argue that even though unlicensed sale of liquor is normally *malum prohibitum*, sale in a local-option community is *malum in se*. If a person sells liquor in a community where sale is legal but restricted to certain license-holders, then the crime is simply a violation of laws regulating commercial transactions. But if a community has seen the need to prohibit all sales of alcohol, then there may be "broad societal concurrence" that the act of selling alcohol is condemnable.

Despite this potential argument, we will assume for purposes of deciding Kinney's appeal that all laws prohibiting the sale or distribution of alcohol create *mala prohibita* crimes. Nevertheless, we reject Kinney's assertion that, under *Hentzner*, the State had to prove that Kinney understood the law and knew that he was breaking it.

As noted above, *Hentzner* involved a prosecution for the crime of offering securities that had not been registered with the Department of Commerce and Economic Development. [In *Hentzer*], the defendant, who was attempting to raise money for a gold-mining venture, offered to sell his to-be-mined gold for the price of $80.00 an ounce (substantially below market value) to anyone who would pay the purchase price immediately. That is, Hentzner was asking people to give him money in exchange for his promise that, in several months, they would be repaid in gold at the extremely favorable rate of one ounce for every $80.00 they advanced him.

The State alleged that Hentzner's fund-raising effort constituted the offering of a "security" (more specifically, an "investment contract"). The State's theory was that, by offering to sell gold that had not yet been mined, Hentzner was in effect asking people to invest money upon the promise that they would share in future gold-mining profits to be derived from Hentzner's entrepreneurial or managerial efforts.

Hentzner represented a collision between the practice of "grubstaking", a traditional way for western miners to raise capital, and Alaska's securities act—in particular, the labyrinth of definitions and exemptions codified in [Alaska securities laws]. Under Alaska's securities laws, the request for a grubstake is the offer of a "security", and a miner who wishes to ask for a grubstake must register this offering.

The definition of a security and the rules governing registration are not matters of common knowledge. Thus, the supreme court faced a situation in which a miner who pursued a traditional capital-raising practice, who engaged in no misrepresentation, and who (at least arguably) acted reasonably in failing to discover the need to register his fund-raising effort, could nevertheless face felony conviction for his failure to register the grubstake offer with the Department of Commerce and Economic Development. Given this

context, it is hardly surprising that the supreme court ruled that "willfully" failing to register the grubstake offer required proof of something more than mere failure to register.

Kinney interprets *Hentzner* as saying that this "something more" must be proof that the defendant understood that his conduct violated the law.
[…]

[However, the] language from *Hentzner* indicates that the supreme court did not think it had imposed the *mens rea* requirement that Kinney argues for in the present appeal—the purported requirement that the government prove that the defendant acted with "knowledge of the law" and awareness "that he was breaking it".

…

[The supreme court's] "primary concern was to avoid application of strict liability in cases where the accused could be subjected to severe criminal penalties". *Hentzner* was charged with a felony, not for offering his investment scheme, but for failing to register it. Thus, Hentzner's crime was one of omission. "The gist of [Hentzner's] crime was … the defendant's failure to perform an act required by law—registering the securities before offering them to the public."

[W]hen a crime is defined in terms of a failure to act, "the prevailing view is that one may not be held liable if one does not know the facts indicating a duty to act". Thus, [under the law] if a person reasonably fails to perceive that his business activities fall within the securities laws, so that his failure to register is an act of reasonable inadvertence, then that person should not be guilty of a felony for failing to register.

Kinney's case is substantially different. Kinney was charged with selling alcohol; his crime was one of commission, not omission. Kinney's sales of alcohol did not arise through inadvertence or neglect. Moreover, it is common knowledge in our society that one is not permitted to sell alcohol without a license, and it is common knowledge in Alaska that various localities have voted themselves dry. Under these circumstances,

[w]hat is essential is not an awareness that a given conduct is a "wrongdoing" in the sense that it is proscribed by law, but rather, an awareness that one is committing the specific acts which are defined by law as a "wrongdoing". It is … no defense that one was not aware his acts were wrong in the sense that they were proscribed by law. So long as one acts intentionally, with cognizance of his behavior, he acts with the requisite awareness of wrongdoing. In the words of Justice Holmes:

> If a man intentionally adopts certain conduct in certain circumstances known to him, and that conduct is forbidden by the law under those circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent.

Ellis v. United States, 206 U.S. 246, 257 (1907).

It was not necessary for the State to prove that Kinney was aware of the bootlegging law and knew that his conduct violated that law. We therefore uphold the trial judge's refusal to give Kinney's proposed jury instruction.

[…]
Conclusion
The judgement of the superior court is AFFIRMED.

Concurrence of the Act and Intent

There must be a "joint operation" between the culpable mental state and prohibited conduct. This 'joint operation' is referred to as **concurrence**. While concurrence almost always occurs at the same moment, they need not be simultaneous. Instead, the two elements must causally relate – that is, the *actus reus* must be attributable to the *mens rea*. *See Jackson v. State*, 85 P.3d 1042 (Alaska App. 2004). This means that an innocent mistake is generally not a crime, or is an evil mind without action. Exceptions exist of course, but the general rule is that there must be a marriage between the voluntary act and the guilty mind.

Example of a Situation Lacking Concurrence

Susan decides she wants to kill her husband using a handgun. As Susan is driving to the local gun shop to purchase the handgun, her husband is distracted and steps in front of her car. Susan slams on the brakes as a reflex, but unfortunately, she is unable to avoid striking and killing her husband. Susan cannot be prosecuted for criminal homicide in this case. Although Susan had

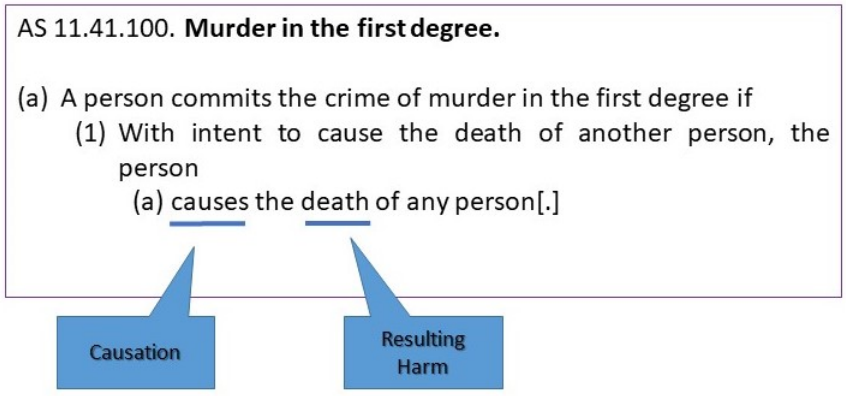
formulated the intent to kill, the intent to kill did not exist at the moment she committed the criminal act of hitting her husband with her vehicle. Susan was trying to *avoid* hitting her husband at the moment he was killed. Thus this case lacks concurrence of act and intent, and Susan is not guilty of criminal homicide.

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4.4: Causation and Harm

The last two elements are **causation** and **harm.** Simply put, the defendant must *cause* the requisite *harm*. If the defendant's actions did not cause the resulting harm, criminal liability will likely not attach. Causation can be a nebulas concept – at its core, everything is causally related. But the law places boundaries around criminal liability. Even though a defendant may initiate a series of events that ultimately results in a particular harm, it may be unjust to hold the defendant criminally responsible. The law surrounding causation has evolved to promote fairness. In this section, we will explore **factual cause** and **legal cause**, as well as situations where the defendant may be insulated from criminal responsibility. Let's revisit first-degree murder to see these elements in statute.

Figure 4.7 Alaska Criminal Code – Murder in the First Degree



Factual Cause

Every causation analysis is twofold. First, the defendant must be the **actual cause**, or the cause-in-fact, of the victim's harm. This is routinely referred to as the "but for" test. Put another way, "but for the defendant's act, the harm would not have occurred." This is a relatively easy analysis – the defendant is the factual cause of the victim's harm if the defendant's actions started the chain of events that led to the eventual harm.

Example of Factual Cause

Henry and Mary get into an argument over their child custody agreement. Henry gives Mary a hard shove. Mary staggers backward, is struck by lightning, and dies instantly. In this example, Henry's act (*i.e.* the shove) forced Mary to fall into the area where the lighting happened to strike. Henry is the cause-in-fact of Mary's death. But for Henry shoving Mary, Mary would have lived. The more difficult question is whether it is *just* to punish Henry for Mary's death. Should Henry be punished when no reasonable person could have imagined that lighting would strike Mary at the moment Henry shoved her?

Legal Cause (Proximate Cause)

The second part of the causation analysis ensures the fair application of criminal liability. In addition to being the cause-in-fact of the victim's harm, the defendant must also be the **legal** or **proximate cause** of the harm. Proximate cause means that the defendant's conduct must be closely related to the harm it engenders. The defendant's conduct need not be the sole factor producing the victim's injury. Rather, the defendant's conduct must have been a "substantial factor" in bringing about the result. As the Model Penal Code states, the actual result cannot be "too remote or accidental in its occurrence to have a [just] bearing on the actor's liability". (Model Penal Code § 2.03 (2)(b)).

The test for proximate cause is reasonable foreseeability. *See e.g.*, *Johnson v. State*, 224 P.3d 105, 111 (Alaska 2010). A defendant is responsible for the *natural consequences* of their acts or their failure to act. Natural consequences are those consequences that are reasonably foreseeable in light of ordinary experience. The trier of fact must be convinced that when the defendant acted, a

reasonable person could have *foreseen* or predicted that the end result would occur. For this reason, Henry from the previous example is not the legal cause of Mary's death. A reasonable person would not have foreseen that lighting would strike Mary immediately after the shove. This is not a natural consequence in light of ordinary experience.

Example of Legal Cause

Imagine that Henry and Mary get into the same argument over their child custody agreement, but this time they are in their garage, which is crowded with furniture. Henry gives Mary a hard shove, even though she is standing directly in front of a large entertainment center filled with books and a large sixty-inch television set. Mary staggers backward into the entertainment center and it crashes down on top of her, killing her. In this situation, Henry is the factual cause of Mary's death since he started the chain of events that led to her death with his push. In addition, it is *reasonablyforeseeable* that Mary might suffer a serious injury or death when shoved directly into a large and heavy piece of furniture. In this example, Henry is likely the factual *and* legal cause of Mary's death. Proximate cause is ordinarily an issue for the jury.

Intervening or Superseding Cause

A related situation is the application of intervening or superseding causes. What happens when someone or something *interrupts* or *exacerbates* the chain of events started by the defendant? The law analyzes this situation through the lens of **intervening or superseding causes**. Typically, an intervening or superseding cause cuts off the defendant's criminal liability. Harm that is linked to the defendant's conduct, but is primarily caused by abnormal, unforeseeable conduct by the victim or third person, severs the casual chain.

Example of an Intervening Superseding Cause

Let's revisit Henry and Mary. Let's assume that Henry pulls out a knife and chases Mary out of the garage (instead of shoving her). Mary escapes and hides in an abandoned shed. Half an hour later, Wes, a homeless man living in the shed, returns from a day of panhandling. When he discovers Mary in the shed, he kills her and steals her jewelry. Although Henry is still the factual cause of Mary's death, (*i.e.*, but for Henry chasing Mary into the shed, Wes would not have found her), Henry is not likely the legal cause of Mary's death. Instead, Wes is probably an intervening cause of Henry's criminal liability – Wes interrupted the chain of events started by Henry. Thus, Wes,*not* Henry, will likely be prosecuted for Mary's death (although Henry may be prosecuted only for assault with a deadly weapon).

Kusmider v. State, 688 P.2d 957 (Alaska App. 1984).

In the above example, Wes interrupted the chain of events, thereby relieving Henry of criminal liability. The following case, *Kusmider v. State*, addresses the situation of when a third person exacerbates the resulting harm. As you read *Kusmider*, ask yourself whether it is fair to hold *Kusmider* accountable for murder in this situation.

688 P.2d 957
Court of Appeals of Alaska.
Thomas KUSMIDER, Appellant,
v.
STATE of Alaska, Appellee.
No. 7845.
Sept. 21, 1984.

OPINION
BRYNER, Chief Judge.

Thomas Kusmider was convicted, after a jury trial, of murder in the second degree. He appeals, contending that Superior Court Judge Karl S. Johnstone erred in excluding evidence relating to the proximate cause of the victim's death. We affirm.

On November 15, 1982, Kusmider's girlfriend told Kusmider that an acquaintance, Arthur Villella, had sexually assaulted her. Kusmider went to Villella's home in Anchorage. A confrontation ensued, and Kusmider shot Villella. The bullet entered Villella's neck above the Adam's apple. Although the wound did not sever any major arteries, it damaged smaller vessels, causing blood to drain down Villella's windpipe.

Villella was unconscious by the time an ambulance arrived. He was attended by paramedics, who inserted a tube in his windpipe to help his breathing. En route to the hospital, however, Villella began flailing his arms and pulled the tube from his throat. Villella died approximately one hour after arriving at the hospital.

At Kusmider's trial, a pathologist testified that Villella's death was caused by the gunshot wound to his throat. However, the pathologist stated that the wound, while life-threatening, might have been survivable. Kusmider then asked the court for permission to present evidence on the issue of proximate cause. He argued that, if allowed to pursue the issue, he might be able to establish that Villella would have survived the gunshot wound if he had not been able to pull the tube from his windpipe. Kusmider maintained that the paramedics who transported Villella might have been negligent in failing to restrain Villella's arms. Kusmider insisted that he was entitled to have the jury consider whether possible negligence by the paramedics constituted an intervening or superseding cause of Villella's death, rendering the gunshot wound too remote to be considered the proximate cause of death.

Judge Johnstone precluded Kusmider from pursuing the issue of proximate cause before the jury. The judge ruled that negligent failure to provide appropriate medical assistance could not, under the circumstances, interrupt the chain of proximate causation and that, therefore, no jury issue of proximate cause had been raised by Kusmider's offer of proof.

On appeal, Kusmider renews his argument, contending that the jury should have been permitted to hear evidence on the issue of proximate cause. We believe that Kusmider's argument is flawed. Kusmider is correct in asserting that proximate cause is ordinarily an issue for the jury. Of course, in every criminal case the state must establish and the jury must find that the defendant's conduct was the actual cause, or cause-in-fact, of the crime charged in the indictment. Here, testimony that Villella actually died from the gunshot wound was undisputed, and the actual cause of death was not in issue. On appeal, Kusmider does not argue that the trial court's exclusion of evidence relating to proximate cause infringed in any way on the jury's ability to determine actual cause.

Case law and commentators agree that, when death is occasioned by negligent medical treatment of an assault victim, the original assailant ordinarily remains criminally liable for the death, even if it can be shown that the injuries inflicted in the assault were survivable; under such circumstances, proximate cause is not interrupted unless the medical treatment given to the injured person was grossly negligent and unforeseeable.

In the present case, Kusmider offered to prove only that the paramedics who treated Villella might have been negligent in failing to restrain Villella's arms. Kusmider did not argue that he could demonstrate gross negligence or recklessness, nor did he contend that the circumstances surrounding Villella's death were unforeseeable. Since, as a matter of law, only grossly negligent and unforeseeable mistreatment would have constituted an intervening cause of death and interrupted the chain of proximate causation, we conclude that Judge Johnstone did not err in excluding evidence relating solely to the issue of negligence by the paramedics who treated Villella.

Even assuming Kusmider had offered to prove that the conduct of the paramedics was both unforeseeable and grossly negligent, we would still conclude that the trial court correctly excluded the evidence relating to proximate cause. In cases involving death from injuries inflicted in an assault, courts have uniformly held that the person who inflicted the injury will be liable for the death despite the failure of third persons to save the victim. One commentator notes:

"The question is not what would have happened, but what did happen," and there can be no break in the legally-recognized chain of causation by reason of a possibility of intervention which did not take place, because a "negative act" is never superseding. Moreover, an injury is the proximate cause of resulting death although the deceased would have recovered had he been treated by the most approved surgical methods, or by more skillful methods, or "with more prudent care," or "with a different diet and better nursing," or "with proper caution and attention." The same is true even if the injured person did not take proper care of himself, or neglected to obtain medical treatment, or delayed too long in doing so, or refused to submit to a surgical operation despite medical advice as to its necessity.

R. Perkins & R. Boyce, Criminal Law § 9 at 799–800 (footnotes omitted).

Here, Kusmider did not claim that the conduct of the paramedics inflicted any new injuries on Villella nor did he even assert that the paramedics aggravated the injuries inflicted by the gunshot wound. Rather, the gist of his claim was that negligence in failing to restrain Villella's arms enabled Villella to disrupt the apparently successful emergency treatment that he had begun to receive. Thus, in support of his argument that proximate cause had been interrupted, Kusmider attempted to rely exclusively on the proof of

a negative act: that the paramedics negligently failed to take adequate precautions to restrain Villella. Since Kusmider never offered to prove that the paramedics engaged in any affirmative conduct that might have aggravated Villella's injuries and hastened his death, he could not, as a matter of law, have established a break in the chain of proximate cause, even if he could have shown that the paramedics committed gross and unforeseeable negligence by their failure to act. In short, no matter how negligent the paramedics may have been in failing to prevent Villella's death, it is manifest that the gunshot fired by Kusmider remained a substantial factor—if not the only substantial factor—in causing Villella's death. No more is required for purposes of establishing proximate cause.

Because the evidence proffered by Kusmider could not, as a matter of law, have established a break in the chain of proximate causation, we hold that Judge Johnstone did not err in excluding this evidence from trial.

The judgment of conviction is AFFIRMED.

Exercises

Answer the following question. Check your answer using the answer key at the end of the chapter.

1. Phillipa sees Fred picking up trash along the highway and decides she wants to frighten him. She drives a quarter of a mile ahead of Fred and parks her car. She then hides in the bushes and waits for Fred to show up. When Fred gets close enough, she jumps out of the bushes screaming. Frightened, Fred drops his trash bag and runs into the middle of the highway where he is struck by a vehicle and killed. Is Phillipa's act the **legal cause** of Fred's death? Why or why not?

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4.5: End-of-Chapter Material

Summary

All criminal offenses are made up of multiple parts, often referred to as elements. The essential criminal elements of the majority of criminal laws are (1) *actus reus* (voluntary act), (2) *mens rea* (culpable mental state), (3) concurrence, (4) causation, and (5) harm. Inchoate offenses, also known as anticipatory crimes, do not contain a causation or harm element.

The criminal act must be voluntary or controllable and cannot consist solely of the defendant's status or thoughts. Just one voluntary act is needed for a crime, so if a voluntary act is followed by an involuntary act, the defendant can still be criminally responsible. A person may be held criminally responsible for failing to act if there is a duty to act based on a statute, contract, special relationship, or assumption of the duty. Possession may be passive, but it is still a criminal act. Possession can be actual, constructive, sole, or joint. Fleeting possession may not be criminal if the possession is momentary and with the intent to surrender.

Culpable mental state is an important element because it is often one factor considered in the grading of criminal offenses. Motive should not be confused with or replace intent. Motive is the reason the defendant develops criminal intent. At common-law, there were three criminal intents: malice aforethought, specific intent, and general intent. Malice aforethought is acting with an intent to kill. Specific intent is the intent to bring about a particular result. General intent is the intent to do the act and can often give rise to an inference of criminal intent from proof of the criminal act. Alaska law describes five criminal states of mind, which are intentionally, knowingly, extreme recklessness, recklessly, and criminal negligence. Intention is having a conscious objective to cause a particular result. Knowingly is the awareness that results are practically certain to occur. Extreme Recklessness is having an extreme indifference to the value of human life. Extreme recklessness is not defined by statute, but instead as a creature of case law. Recklessly is a subjective awareness of a risk of harm and an unjustified disregard of that risk. Criminal negligence is not being aware of a substantial risk of harm when a reasonable person would be. Offense elements, including specified attendant circumstances, may require different mental states. If so, the prosecution must prove each mental state for every element beyond a reasonable doubt.

Strict liability crimes do not require an intent element and are generally regulatory or public welfare offenses, with less severe punishment.

Concurrence is also a criminal element that requires the criminal act and criminal intent exist close in time.

The defendant must cause the resulting harm to be criminally responsible. The defendant must be the factual and legal cause. Factual cause means actual cause – that is, the defendant started the chain of events that leads to the bad result. Legal or proximate cause means that the resulting harm was reasonably foreseeable when the defendant committed the criminal act. The defendant need not be the sole factor in the victim's harm, but must be a substantial factor in the resulting harm. An intervening or superseding cause breaks the chain of events started by the defendant's criminal act and insulates the defendant from criminal liability. A negative act by the victim or third party (e.g. the failure of a third party to save a victim) can never be an intervening cause.

Key Takeaways

- The elements of a crime are *actus reas*, *mens rea*, concurrence, causation, and harm. Some criminal offenses have attendant circumstances. Inchoate offenses do not have the elements of causation and harm.
- The *actus reas* is a criminal act usually involving an unlawful bodily movement that is defined in a statute.
- The criminal act must be voluntary and cannot be based solely on the status of the defendant or the defendant's thoughts.
- An exception to the criminal act element is an omission to act.
- Omission to act could be criminal if there is a statute, contract, assumption of duty, or special relationship that creates a legal duty to act in the defendant's situation.
- Actual possession means that the item is on or very near the defendant's person. Constructive possession means that the item is within the defendant's control, such as inside a house or vehicle with the defendant.
- One important function of intent is the determination of punishment. In general, the more evil the intent, the more severe the punishment.

- The three common-law criminal intents ranked in order of culpability are malice aforethought, specific intent, and general intent.
- Specific intent is the criminal intent to bring about a certain result. General intent is simply the intent to perform the criminal act.
- Motive is the reason the defendant commits the criminal act. Motive standing alone is not enough to prove criminal intent.
- There are five mental states ranked in order of culpability: intentionally, knowingly, extreme recklessness, recklessly, and criminally negligence. Intentionally is similar to specific intent to cause a particular result. Knowingly is the awareness that results are practically certain to occur. Extreme recklessness is the extreme indifference to the value of human life. Recklessly is a subjective awareness of a risk of harm, and an objective and unjustified disregard of that risk. Criminally negligence is not being aware of a substantial risk of harm when a reasonable person would be.
- The exception to the requirement that every crime contain a criminal intent element is strict liability.
- Concurrence requires that act and intent exist close in time.
- Factual cause means that the defendant started the chain of events leading to the harm. Legal cause means that the defendant is held criminally responsible for the harm because the harm is a foreseeable result of the defendant's criminal act.
- An intervening or superseding cause breaks the chain of events started by the defendant's act and cuts the defendant off from criminal responsibility.

You Be the Judge …Answer to Punishing a person for being homeless is the equivalent of punishing someone for being an addict. If a city does not have adequate shelter for the homeless community, sleeping on public property is not voluntary – it is involuntary just like eating or breathing. In *Martin v. City of Boise*, 920 F.3d 584, 615 (9th Cir. 2019), the Ninth Circuit found that the Eighth Amendment prohibited the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter. The City of Boise's criminal ordinances could not be enforced against individuals that had no alternative but to sleep on the street. However, sitting, sleeping, or lying on public property is an act that can be prohibited provided that it is *voluntary*. Read *Martin v. City of Boise*, 920 F.3d at 617 n. 8, for an explanation of *when* a city can prosecute a person for sleeping in public.

Answers to Exercises

From "Criminal Elements"

1. Jacqueline can be convicted of a crime in this situation. Although an epileptic seizure is not a voluntary act, Jacqueline's conduct in driving while aware that she has epilepsy *is*. Only *one* voluntary act is required for a crime, and Jacqueline was able to control her decision making in this instance. Punishing Jacqueline for driving with epilepsy could specifically deter Jacqueline from driving on another occasion and is appropriate under the circumstances. *See e.g., People v. Decina*, 138 N.E.2d 799 (N.Y. 1956) (finding a voluntary act when the defendant, knowing he might, at any time, be subject to epileptic attacks and seizures, drove an automobile with nobody accompanying him, suffered a seizure, and caused a fatal collision). This is sometimes referred to as the defense of "automatism". The automatism defense is a failure-of-proof defense and excludes responsibility where a defendant "acts" during reflexive or convulsive movements, movements during sleep, unconsciousness, hypnosis, or seizures. S*ee e.g., Palmer v. State*, 379 P.3d 981, 989 (Alaska App. 2016) (noting that Alaska courts have yet to define the contours of "automatism" under Alaska law).

From "Causation and Harm"

1. Phillipa's act is the **factual** and **legal cause** of Fred's death. Phillipa's act of jumping out of the bushes and screaming caused Fred to run onto the highway, so Phillipa's act is the factual cause of Fred's death. In addition, a reasonable person could *foresee* that frightening someone next to a major highway might result in them trying to escape onto the highway, where a vehicle traveling at a high rate of speed could hit them. Thus Phillipa's act is *also* the legal cause of Fred's death.

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CHAPTER OVERVIEW

5: Parties to Crime (Accomplice Liability)

5.1: Accomplice Liability

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5.1: Accomplice Liability

It is not uncommon that multiple individuals will come together to commit a single crime. When multiple individuals jointly participate in a single criminal act, an issue arises as to *who* is responsible for *which* crime and to *what degree*. Generally speaking, this is referred to as **accomplice liability**. This chapter explores two situations in which multiple parties may be liable for a crime – complicity and vicarious liability. When individuals work together with a common criminal purpose they act with **complicity.** Individuals who assist in the commission of a crime will be held responsible to the same extent as the primary actor. Unlike complicity, **vicarious liability** imposes criminal liability on a defendant because of a *special relationship* between the principal perpetrator and the defendant.

Accomplice Liability

At early common law, parties to crime were divided into four categories.

1. **Principal in the first degree,** a person who committed the crime – that is, the actual, primary perpetrator of the crime.
2. **Principal in the second degree,** a person who was present at the scene and assisted the primary actor in the *commission* of the crime.
3. **Accessory before the fact,** an individual who was not present at the scene of the crime, but helped the primary perpetrator *prepare* its commission.
4. **Accessory after the fact**, a person who assisted the primary perpetrator after the crime (*i.e.*, comfort, aid, concealment, etc.).

Most jurisdictions have abolished these distinctions and instead divide accomplice liability into two categories: accomplices and accessories. Under modern trends, **principals** and **accomplices** share equally in criminal responsibility; no distinction is made to separate the primary perpetrator and those individuals who assist the principal before or during the crime. AS 11.16.100. **Accessories,** on the other hand, are treated differently. Accessories are individuals who provide assistance after the crime was committed – these individuals are generally criminally liable for a separate, lesser offense.

Accomplice Liability Rationale

Accomplices are held criminally responsible to the same extent as the principal. In Alaska, this concept is referred to as **legal accountability**. AS 11.16.100. For purposes of legal accountability, it is immaterial whether the elements of a crime are satisfied by the defendant's own behavior, by the behavior of another person for which the person is accountable, or both. This is because accomplice liability is **derivative**; when two individuals act in concert to commit a crime, they act as a single criminal in the eyes of the law. The policy for such a broad rule is three-fold: first, an individual who willingly participates in criminal activity should be responsible for the ultimate harm caused. The adage "in for a penny, in for a pound" summarizes the policy well. A criminal offense is more likely to be successful with more confederates. Second, the law presumes there is a deterrent effect from shared criminal liability – if the accomplice knows that she will be held accountable to the same extent as the principal, the accomplice may choose to not participate. Finally, it is believed that society should not bear the burden of determining who is the primary perpetrator and who is an accomplice – for purposes of establishing liability, hypertechnical categories are less important. Everyone agrees a crime was committed.

Although the law treats principals and accomplices equally for purposes of culpability, the law allows judges to treat principals and accomplices differently for purposes of sentencing. *See e.g.*, AS 12.55.155(d)(2). Thus, it is not uncommon that an accomplice will receive a more lenient punishment than that of a principal.

Example of Accomplice Liability

Bob and Sue are close friends, and both are in need of a little extra spending cash. Bob approaches Sue and tells her that the local hardware store has lax security and would be easy to rob. Bob suggests that they both walk into the store before closing and demand all of the money from the cash register. Bob tells Sue that he has been watching the place for several weeks and there are generally few customers in the store around closing time. Further, Bob assures Sue that no one will get hurt; they won't use real guns. Instead, Bob suggests they use plastic lookalike guns. Sue balks, telling Bob that she doesn't want to go into the store. Sue tells Bob that she'll help but only by driving the car. She tells Bob that she will drop him off in front of the door shortly before closing time and keep the car running. Once Bob gets the money, he can jump into the vehicle. The next day, the robbery occurs

exactly as Sue suggested – that is, Bob robs the hardware store and Sue acts as the getaway driver. In this example, both Bob and Susan are guilty of Robbery in the First Degree. The law does not distinguish between principals and accomplices. Susan will not escape criminal liability simply because she was the getaway driver.

Accomplice *Actus Reus*

Although accomplice liability is broad, it is not limitless. One of the central components of accomplice liability is that an accomplice must voluntarily act in some manner to *aid or abet* in the planning or commission of the offense. The term "**aid or abet**" means to help, assist, facilitate, or counsel another person. AS 11.16.110. Examples of actions that qualify as aiding or abetting a criminal act are helping plan the crime, driving a getaway vehicle after the crime's commission, and luring a victim to the scene of the crime.

However, neither **mere presence** at a scene of a crime, nor concealment of one's knowledge about a crime, is sufficient to ground criminal liability. The law requires the accomplice to engage in a voluntary act that demonstrates their assistance.

Example of a Case Lacking Voluntary Act

Remember Clara and Linda from Chapter 1 and their joint shopping trip? In that example, Clara and Linda go on a shopping spree. Linda insists that they browse an expensive department store. After they enter the lingerie department, Linda surreptitiously places a bra into her purse. Clara watches, horrified, but does not say anything, even though a security guard is standing nearby. As Linda and Clara leave the store, an alarm is activated. Linda and Clara run away with the security guard in pursuit. In this case, Clara has probably *not* committed a voluntary act required for accomplice liability. Although Clara was *present at the scene* of the crime (theft) and did not alert the security guard, mere presence at the scene is not sufficient to constitute accomplice criminal liability. Clara fled the scene when the alarm went off, but her presence at the scene of a crime combined with flight is *still not enough* to comprise the accomplice criminal act. Thus, only Linda is subject to criminal prosecution for this offense. Clara should not be prosecuted.

Miller v. State, 866 P.2d 130 (Alaska App. 1994)

In the following case, take notice of how difficult it can be for the government to prove which actor is a principal and which actor is an accomplice. As you will see, the law makes no distinction.

866 P.2d 130
Court of Appeals of Alaska.
George L. MILLER, Appellant,
v.
STATE of Alaska, Appellee.
No. A–3954.
Jan. 7, 1994.

OPINION
BRYNER, Chief Judge.

George L. Miller was convicted, following a jury trial, of first-degree robbery. Superior Court Judge Mark C. Rowland sentenced Miller to fifteen years' imprisonment. Miller appeals, claiming that the trial court … misinstructed the jury on accomplice liability. We affirm.

FACTS
In 1987, David and Mavis McClurg owned and operated a gold mine in northwest Alaska, near Kotzebue. They lived in Anchorage with their fifteen-year-old daughter Jackie and ran a jewelry shop in their house.

On September 21, 1987, Jackie McClurg was staying at the house while her parents were at the mine. In the evening, she got a phone call from a man who said he needed to drop off some papers for her father. Shortly after 10:00 p.m., a car pulled into the McClurgs' driveway, and a man wearing a red hat got out and came to the front door. As Jackie opened it, the man grabbed her, turned her around, and told her that he had a gun and this was a robbery. A second, shorter man followed the first man into the

McClurg home. The men forced Jackie to take them downstairs to the jewelry shop, where they tied her up and began taking jewelry.

Just then, Belinda Nix and Gary Greener, friends of the McClurgs, drove up to the house. As Nix and Greener approached, they saw an unfamiliar car with a man behind the wheel in the driveway; the driver honked the horn and started to drive away.

Nix and Greener went into the house, where they saw the second, shorter man heading out the back entrance near the shop. Then the first, taller man pushed his way past Greener and went out the front door. Nix and Greener heard Jackie call out and found her tied up in the shop. They called the Alaska State Troopers, who eventually determined that more than $50,000 in gold and jewelry had been taken by the robbers.

Jackie McClurg identified the taller man as Dan Finnigan, a former employee at the McClurg mine. Earlier that day, Finnigan had come to the McClurgs' house and had tried unsuccessfully to collect wages for his work at the mine. Finnigan matched descriptions given the troopers by Nix and Greener.

Several days later, on September 24, 1987, the troopers arrested Finnigan for the robbery. They also arrested a friend of Finnigan's, Randy Ringler, whom they suspected as the second, shorter robber. Greener and Nix later identified Finnigan and Ringler as the two men they had seen in the McClurg's house.

In October of 1987, the troopers received word that a woman named Neva Johnson had been seen wearing a watch stolen from the McClurgs' shop. On October 21, 1987, they contacted Johnson, who said that her boyfriend, Michael Casalichhlio had given her the watch. When contacted by the troopers, Casalichhlio denied being involved in the robbery but turned over several stolen items that he admitted receiving from George Miller.

Casalichhlio eventually implicated Miller as the driver of the getaway car in the robbery. Casalichhlio also revealed that, soon after the robbery was committed, he accompanied Miller on an airline trip to Florida, using tickets purchased with robbery proceeds. The troopers also located two other friends of Miller, Aaron and Sue Foltz, to whom Miller had admitted participating in the robbery. Before the robbery, Aaron and Sue Foltz had also heard Miller planning the crime.

Information given to the troopers by Casalichhlio and the Foltzes also indicated that, prior to the robbery, Miller and Casalichhlio had engaged in a joint venture trafficking cocaine that Casalichhlio had obtained through a burglary involving a cocaine dealer. Casalichhlio evidently furnished the drugs to Miller, who was responsible for selling them; he would then share the proceeds with Casalichhlio. Finnigan, and to a lesser extent Ringler, had worked for Miller as runners, delivering cocaine and collecting money. Miller and Casalichhlio had planned to use profits from their cocaine sales to finance a trip to Florida, where they intended to buy two additional kilograms of cocaine for resale in Alaska. Miller, however, had begun to use cocaine heavily himself and had failed to collect enough money in sales to keep current on his payments to Casalichhlio. Prior to the McClurg robbery, he had become indebted to Casalichhlio for between $4,000 and $4,500. Finnigan, in turn owed a substantial sum of money to Miller. When it became apparent that there would be insufficient funds to finance the trip to Florida for additional cocaine, Miller hit upon the idea of the McClurg robbery as an alternative means to finance the Florida trip.

Based on the foregoing information, the state secured indictments charging Miller, Finnigan, and Ringler with the McClurg robbery and Casalichhlio with theft for receiving property stolen in the robbery. When the indictments were issued, Miller, who had never returned to Alaska from his trip to Florida, remained at large. Finnigan, Ringler, and Casalichhlio were tried and convicted.

Soon after the trial ended, however, Ringler wrote Finnigan a letter in which he (Ringler) acknowledged his own participation in the McClurg robbery but proclaimed Finnigan's innocence. Ringler identified himself as the second, shorter man in the robbery and claimed that the first, taller man had been Miller, not Finnigan. According to Ringler's letter, the driver of the getaway car had been someone named "Bill," whose last name he did not know.

As a result of Ringler's letter, Finnigan was awarded a new trial. Before the second trial, Miller, who had been arrested in Texas on a fugitive warrant, was extradited to Alaska. His trial was consolidated with Finnigan's second trial. At trial, the state relied primarily on its original theory of the case—that Finnigan had been the taller of the two robbers who entered the McClurg home and that Miller had been the getaway driver and had masterminded the robbery. Finnigan, relying on Ringler, defended on the theory that Miller had been the taller robber and that another, unknown man had driven the getaway car. Although Miller did not testify or present witnesses, he attempted to establish that none of the state's evidence against him was sufficiently credible to prove his participation in the robbery.

INSTRUCTIONS ON ACCOMPLICE LIABILITY

Miller contends that the trial court's instructions on accomplice liability were deficient. Miller was evidently indicted on the theory that he was the getaway driver in the robbery. At trial, an element of confusion as to Miller's role arose when Ringler testified that Miller and Ringler had entered the McClurg house together, that a third man named "Bill" had driven the getaway car, and that Finnigan was entirely innocent of the alleged crime.

In an attempt to address this problem, the state sought jury instructions allowing Miller to be convicted as either an accomplice (for being the driver) or as a principal (for being one of the two men who had entered the house). The trial court, while initially receptive, ultimately decided that, since Miller had been indicted as an accomplice for driving the getaway car, he could be convicted only on that theory. [This decision was incorrect.]

[…]

Although Miller concedes on appeal that [the] instruction conforms with Alaska Pattern Jury Instruction 16.100–.110(2) … he claims … that the instruction was so vague that it allowed his conviction as a principal.

We find this argument meritless. Miller in effect posits that the jury might have convicted him as an accomplice for being a principal: he reasons that, under the challenged instruction, the jury might have found that he was one of the men who entered the McClurg house, might have concluded that the two robbers aided and abetted each other, and so might have convicted him as an accomplice.

This theory proceeds from a strained interpretation of the evidence and an attenuated reading of the challenged instruction. Moreover, the theory is premised on a fundamentally flawed view of accomplice liability, for it mistakenly assumes that a defendant indicted as an accomplice must be convicted as an accomplice and that it would therefore have been error to allow the jury to convict him as a principal.

However, the legal distinction between principals and accomplices has long been abrogated in Alaska. It is well-settled that a defendant charged as a principal may be convicted as an accomplice; the converse is also true.

Here, the trial court, evidently accepting Miller's argument that a contrary result would be legally impermissible, sought to limit the state to the original theory upon which it indicted Miller: that Miller was guilty of robbery as an accomplice for driving the getaway car. As a matter of law, however, Miller was properly subject to conviction as either a principal or as an accomplice. Hence, even if the jury instructions did not succeed in narrowing the charge to accomplice liability and allowed Miller to be convicted as a principal, plain error could not be found.

CONCLUSION

The conviction and sentence are AFFIRMED.

Accomplice *Mens Rea*

The culpable mental state required for accomplice liability varies, depending on the jurisdiction. In Alaska, accomplice liability is a **dual intent** crime. The accomplice must *intend* to promote or facilitate the commission of the crime, and *act* with the underlying culpable mental state (*i.e.*, intentionally, knowingly, or recklessly) with respect to the harm caused. AS 11.16.110. In other words, the accomplice need not share the principal's criminal purpose, but must intend to promote or facilitate the commission of the principal's conduct. While this may seem like an overly complicated proposition, such a result is necessary given that there is no distinction between principals and accomplices.

Example of Accomplice Culpable Mental State

Riley and another man, Portalla, opened fire on an unsuspecting crowd of young people who were socializing around a bonfire on the Tanana River near Fairbanks. Two of the young people were seriously wounded. The investigators could not determine which firearm fired the wounding shots. The bullet recovered from the body of one victim was so deformed that it could not be matched to either Riley's or Portalla's weapon, and the bullet that wounded the other victim passed through the victim's body and was never recovered. In short, the government could not prove which individual – Riley or Portalla – injured the victims, but the government could conclusively prove that the injuries were inflicted by one of the two. Under this scenario, both Riley and Portalla are guilty of first-degree assault. The prosecution is not required to prove which defendant fired a particular bullet. Instead, the prosecution must prove that (1) Riley solicited, encouraged, or assisted Portalla's act of shooting at the victims, and (2) that Riley did so with the

intent to promote or facilitate the conduct (or vice versa). To learn more about how the court described the dual culpable mental states with regards to accomplice liability, read *Riley v. State*, 60 P.3d 204 (Alaska App. 2002).

You be the Judge…(5.1) Jim and Fred work together in a local warehouse and they have a long-standing hatred toward each other. One day the animosity boils over and Fred challenges Jim to a fight; they start pushing and shoving each other. Several of their co-workers see the pushing and shoving and form a circle around them, enjoying the affray. The co-workers loudly encourage Jim and Fred to fight – yelling suggestions like "punch him!", "kick him!", and "don't stop! Finish him." Jim eventually gets the better of Fred, punching him squarely in the temple. Fred falls to the ground, striking a piece of machinery. Fred dies as a result of blunt force trauma to his head. Jim is charged with manslaughter (for recklessly causing the death of Fred). Are the co-workers accomplices to the manslaughter? Check your answer using the answer key at the end of the chapter.

The Natural and Probable Consequences Doctrine

The crux of accomplice liability is that the principal's blameworthiness is imputed to the accomplice to ensure fair accountability of all criminal actors. Accomplice liability can be far reaching – a person who encourages or facilitates the commission of a crime will be held as an accomplice for the specific crime aided, but also for crimes that are the **natural and probable outcome** of the criminal conduct. An accomplice is responsible for all reasonably foreseeable crimes committed in furtherance of the criminal enterprise. This doctrine is similar to the foreseeability standard discussed with legal causation. Under the natural and probable consequences doctrine, if the defendant assists the principal with the intent to further a specific crime's commission, and the principal commits a *different* but *foreseeable* crime during the defendant's assistance, the defendant could be liable as an accomplice for the new crime. Several jurisdictions have rejected this doctrine as an overly harsh extension of accomplice liability, but as you will see below, Alaska has not.

Belarde v. State, 383 P.3d 655 (Alaska 2016)

As you read the following case consider whether it is fair to hold the defendant responsible for first-degree robbery given his claim that he did not know that his co-defendant was armed with a pistol. Is robbery a foreseeable crime when the original crime was shoplifting? Should a defendant's guilt as an accomplice to one crime act as a *per se* basis for holding him accountable for a related, but unintended crime? Also, it should be noted that although the *Belarde* court discusses the applicability of the natural and probable consequence doctrine, it choose to affirm the defendant's conviction on different grounds, beyond the scope of this section.

383 P.3d 655
Court of Appeals of Alaska.
Jesse Cecil BELARDE, Appellant,
v.
STATE of Alaska, Appellee.
No. A–11321.
May 20, 2016.

OPINION
Judge, MANNHEIMER.

Jesse Cecil Belarde and two friends, Rolando Barlow and Robert Smith, entered an Anchorage Fred Meyer store for the purpose of stealing a battery for Belarde's car.

(Belarde's car had recently broken down, and it was inoperable unless the battery was recharged. After concluding that it would take too long to recharge the battery, Belarde borrowed another car, and he and his friends went looking for a battery to steal.)

Inside the Fred Meyer store, Belarde went to the car battery section and identified the correct battery for his vehicle. His friend Smith then picked up the battery and attempted to carry it out of the store (without paying).

Two of the store's loss-prevention employees intercepted Smith in the arctic entry. Smith dropped the battery and punched one of the employees in the face. Belarde's other friend, Barlow, then hit the other loss-prevention employee in the face. At this point,

Smith pulled a pistol from his waistband, chambered a round, and ordered the loss-prevention employee to back away. Belarde then picked up the battery from the floor, and he and his friends left the store (with the battery).

Based on this incident, Belarde was convicted of both the theft of the battery and first-degree robbery. The robbery charge was based on the theory that Belarde and his accomplices took the battery from the immediate presence of the store employees through the use of force (the basic crime of second-degree robbery as defined in AS 11.41.510(a)), and by threatening the employees with a pistol (thus elevating the crime to first-degree robbery as defined in AS 11.41.500(a)).

In this appeal, Belarde argues that his first-degree robbery conviction must be reversed because his jury was misinstructed regarding the rules for when one accomplice to a crime (in this case, Belarde) can be held legally accountable for the intentions of another accomplice to the crime (in this case, Smith).

[…]

A more detailed look at Belarde's claim on appeal

Belarde acknowledges that he was properly found guilty of stealing the car battery. (In fact, when Belarde's trial attorney delivered his summation to the jury, he conceded that Belarde should be convicted of theft.) But Belarde argues that his robbery conviction should be reversed because of a faulty clause in the jury instruction on the elements of first-degree robbery.

Belarde's attack on the jury instruction is based on the defense that he offered at trial. Belarde testified that, when he picked up the battery and ran out of the store, he was unaware that Smith had used a pistol to threaten the employees.

(Belarde asserted that he had been using his mobile phone as he walked out of the store, and thus his attention was initially distracted away from the fight that occurred between Smith, Barlow, and the two loss-prevention employees. Belarde declared that he remained unaware that Smith had used the pistol until they were driving away from the store, when he listened to Smith and Barlow recounting the events that had just occurred.)

Turning to the jury instruction on the elements of first-degree robbery, paragraph 3 of this instruction told the jurors that the State was required to prove that "[Belarde] *or another participant* intended to prevent or overcome … resistance to the taking of the property [by using force]". (Emphasis added) Pointing to this italicized language, Belarde argues that this jury instruction improperly deprived him of his defense to the first-degree robbery charge—because this instruction told the jurors that, as long as Smith intended to accomplish the taking by armed force (*i.e.*, by threatening the store employees with a pistol), it did not matter whether Belarde personally intended to accomplish the taking by force.

[…]

The "natural and probable consequences" theory of accomplice liability

Belarde's argument ignores the criminal law doctrine that a person who participates in a joint criminal enterprise (such as the theft in this case) is deemed to intend the natural and probable consequences of that enterprise—including any reasonably foreseeable related criminal offenses committed by the person's accomplices.

As the California Supreme Court explained in *People v. Prettyman*, 926 P.2d 1013, 1019–1020 (1996):

At common law, a person encouraging or facilitating the commission of a crime could be held criminally liable not only for that crime, but for any other offense that was a "natural and probable consequence" of the crime aided and abetted.

Although legal commentators have questioned whether it is proper to hold accomplices liable for all reasonably foreseeable crimes committed in pursuance of a criminal enterprise, most courts adhere to the "natural and probable consequences" doctrine. See Wayne R. LaFave, *Substantive Criminal Law* (2nd ed.2003), § 13.3(b), Vol. 2, pp. 360–63 (criticizing the doctrine but describing it as the "established rule"). And under this doctrine, if the jury concluded that it was reasonably foreseeable that Smith would threaten the loss-prevention officer with a firearm, then Belarde could properly be found guilty of first-degree robbery.

There is no Alaska case expressly adopting the "natural and probable consequences" doctrine of accomplice liability. And, in any event, it is a jury question whether an accomplice's crime was "reasonably foreseeable" under the facts of a given case—and Belarde's jury was not asked to resolve this question.

The foregoing discussion of the "natural and probable consequences" doctrine is relevant only because Belarde's attack on the jury instruction is raised as a claim of plain error. That is, Belarde must show that it was obvious error for the trial judge to instruct the jurors that Belarde could be convicted of robbery if any participant in the theft (Belarde or Smith or Barlow) used force or

threatened the use of force to prevent or overcome resistance to the theft of the battery. The "natural and probable consequences" doctrine is the predominant rule in American jurisdictions; and under this doctrine, the challenged jury instruction was not obvious error—indeed, it was not error at all—so long as the jurors found that Belarde's accomplice's use of force was reasonably foreseeable.

But to resolve Belarde's case, we need not decide whether to adopt the "natural and probable consequences" doctrine of accomplice liability—because there is a second, more case-specific reason why we conclude that the challenged jury instruction was not plain error.

[…]

Conclusion
The judgement of the superior court is AFFIRMED.

Prosecution of an Accomplice When the Principal Is Not Prosecuted or Is Acquitted

Although accomplice liability is derivative, ultimate responsibility is not. The principal need not be found guilty (or even prosecuted) for accomplice liability to attach. *See* AS 11.16.110(a)(2); *Vaden v. State*, 768 P.2d 1102, 1106 (Alaska 1989) *cert. denied* 490 U.S. 1109 (1989). The focus is on the accomplice's conduct, rather than the principal's conduct. In *Vaden*, the Alaska Supreme Court found that a professional guide could be convicted as an accomplice to hunting violations when the principal was an undercover government agent. The government agent was immune from prosecution, whereas the hunting guide was not. *See id*. Thus, a defendant can be liable for a crime even though he *did not* commit it and the defendant who *did* was spared prosecution or found *not guilty*.

Example of Prosecution of an Accomplice When the Principal Is Not Prosecuted

Sam shows up drunk at his friend Abel's house and tells Abel he wants to "get retribution" from his ex-girlfriend Maria. Sam wants to break into Maria's house and steal a set of diamond earrings he gave Maria the previous Christmas. Sam asks Abel to drive him to Maria's house, and Abel promptly agrees. Abel drives Sam to Maria's house and waits in the car with the engine running. Sam breaks into Maria's house, sneaks into her jewelry box, and recovers the earrings. Abel drives Sam away from the house. Before they get far, police stop Abel's car and transport both to the police station for questioning. They are taken to separate rooms for interrogation. The police officer who interrogates Sam is a rookie and forgets to read Sam his *Miranda* rights. Abel, in the next room, confesses to the entire plan after being advised of his *Miranda* rights. Maria refuses to cooperate as she fears reprisal from Sam. The district attorney decides not to prosecute Sam because of the tainted interrogation. In this case, Abel could still be prosecuted for burglary and theft as an accomplice even though Sam is not prosecuted.

Accomplice Liability – Renunciation

An accomplice can escape criminal liability if the accomplice "renounces" her criminal conduct before the crime is completed. *See* AS 11.16.110(a)(1) **Renunciation** is an *affirmative* defense to accomplice liability. Criminal defenses will be explored in detail in subsequent chapters, but for now, remember that an accomplice can avoid prosecution if (1) the accomplice terminates her participation before the crime is committed; (2) the termination is a voluntary and complete renunciation, and (3) she timely warns law enforcement or takes reasonable efforts to prevent the crime. A mere "change of heart" is insufficient. Renunciation is not "voluntary and complete" if it is motivated because she thinks the crime has been detected by law enforcement or that she is simply postponing the crime until a future time. *See Hale v.State*, 764 P.2d 313 (Alaska App. 1988).

Exercises

Answer the following question. Check your answer using the answer key at the end of the chapter.

1. Justin asks his girlfriend Penelope, a bank teller, to let him know what time the security guard takes his lunch break so that he can successfully rob the bank. Penelope tells Justin the security guard takes his break at 1:00. The next day, which is Penelope's day off, Justin successfully robs the bank at 1:15. Has Penelope committed robbery? Why or why not?

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5.2: Vicarious Liability

Vicarious liability imposes criminal responsibility on a defendant on the basis of a *special relationship*. Under vicarious liability, the defendant need not commit the criminal conduct. Instead, the defendant simply needs to be involved with the primary criminal actor in a legally defined relationship. Vicarious liability is common in civil law and is generally applied to impute liability to employers for the actions of their employees. Generally speaking, criminal law disfavors **criminal vicarious liability**, the exception being organizational liability. Criminal vicarious liability is available to hold legal organizations (*e.g.*, corporations) criminally accountable for specific criminal acts of their agents. AS 11.16.130.

Vicarious liability should not be confused with accomplice liability. Accomplice liability is based on the defendant's complicity (participation) in a criminal enterprise. Vicarious liability is also different than strict liability. Strict liability requires the defendant to personally engage in the criminal conduct. Vicarious liability *imputes* a defendant's criminal responsibility to a different defendant because of a legal relationship. Similar to accomplice liability, however, the primary defendant remains criminally responsible for his conduct.

At early common law, corporations were not criminally responsible for the unauthorized criminal acts of their employees. Modern criminal codes have moved away from this rule and recognize that businesses entities are private enterprises able to control the actions of its agents. Failure to control an agent's actions can seriously injure other individuals and the economy. The resulting blameworthiness should be shared between corporations and agents, alike. Alaska law holds a corporation criminally liable for the conduct of its agents under two circumstances: (1) the principal was an agent and the criminal offense was within the scope of the agent's employment; or (2) the organization solicits the agent's conduct or subsequently ratifies (adopts) the agent's criminal conduct.

Vicarious criminal liability is not limitless. First, not all business entities are organizations; sole proprietorships are excluded. AS 11.81.900(b)(44). Second, not all corporate employees are "agents." AS 11.16.130(b). Agents only include high managerial employees that are engaged in the active management of a corporation. High managerial employees include directors, officers, or specific employees authorized to act on behalf of the corporation. Low-level employees are normally excluded. Also, a corporation does not ratify or adopt an agent's criminal conduct when it merely tolerates the misconduct. Ratification or adoption requires both an *awareness* of the criminal conduct and some *action* that demonstrates ratification or adoption. *See State v. Greenpeace, Inc.*, 187 P.3d 499, 506 (Alaska App. 2008).

The criminal punishment for a corporation is generally the payment of a fine; a corporation cannot be imprisoned. *See generally* AS 12.55.035.

Example of Corporate Liability

Harry, a vice-president of human resources of Burger King Corporation, shreds corporate documents in his office when Burger King is sued civilly for sexual harassment in a million-dollar lawsuit. Under the theory of criminal vicarious liability, both Harry and Burger King could be criminally prosecuted for Falsifying Business Records, a class C felony. AS 11.46.630. Note that Burger King's liability is **vicarious** and depends on its relationship with Harry as an agent and the fact that Harry is acting within the scope of employment. Vicarious liability is distinguishable from **accomplice liability**, where the accomplice must be complicit with the criminal actor. The owners of Burger King, who are the corporate shareholders, did not actively participate in Harry's conduct, although they will share in the punishment if the corporation is fined.

Exercises

Answer the following questions. Check your answers using the answer key at the end of the chapter.

1. Brad, the president and CEO of ABC Corporation, recklessly hits and kills a pedestrian as he is driving home from work. Could ABC Corporation be held vicariously liable for criminal homicide? Why or why not?
2. Read *AB&M Enterprises, Inc. v. State*, 389 P.3d 863 (Alaska App. 2016). AB&M Enterprise, Inc. formerly owned the Rumrunners Old Towne Bar and Grill, located on 4th Ave and E Street in downtown Anchorage. An unruly patron assaulted a bouncer. The bouncer, along with his co-workers, subdued the patron, handcuffed him, and took him to the basement to await the police's arrival. In the elevator, the bar manager told the bouncer "there are no cameras in here; he's all yours." The bouncer "sucker-punched" the patron, shattering his orbital socket. The patron required surgery. The bouncer, bar manager, and

corporation were all charged with, and ultimately convicted of, felony assault. The corporation appealed the criminal conviction. Did the Court of Appeals uphold the corporation's criminal conviction? Why or why not? The opinion is available via Westlaw Campus Research the online legal research service using your UA credentials.

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5.3: Accessories (Hindering Prosecution)

At common law, a defendant who helped plan the crime but was not present at the scene when the principal committed the crime was an **accessory before the fact**. As you now know, an accessory before the fact is an accomplice under modern criminal codes. The person who helps plan the offense is held criminally liable to the same extent as the principal.

The person who helped the principal avoid detection or escape capture *after* committing the offense was an **accessory after the fact**. The crime of accessory after the fact contained four elements: (1) commission of a completed felony – no liability attached for a failed felony; (2) knowledge – the accessory must have possessed knowledge that the principal had committed a felony; (3) affirmative act – the accessory was required to take an affirmative step to hinder the principal's arrest; and (4) criminal intent – the accessory was required to intend to aid the principal (accidental acts were insufficient).

The law now treats the accessory after the fact as an accessory, which is a separate and distinct offense. In Alaska, the crime is called **hindering prosecution**. AS 11.56.770. Hindering prosecution criminalizes the act of "rendering assistance" to a person who has committed the crime. It is a dual intent crime. First, the defendant must be aware that the perpetrator has committed a crime, and second, the person must intend to hinder the apprehension, prosecution, conviction, or punishment of that person. Rendering assistance covers a large swath of conduct, including concealing a person, warning the person of impending apprehension, destroying evidence, proving aid, money, transportation, weapons, disguises, or hiding proceeds of a crime.

The difference between an accomplice and an accessory is important. An accomplice is responsible for the *same* offense the principal commits. An accessory, on the other hand, is guilty of a *separate crime* that is generally a misdemeanor or a low-level felony.

Noblit v. State, 808 P.2d 280 (Alaska App. 1991)

Alaska distinguishes between first- and second-degree hindering prosecution based on whether the principal's crime was a felony or misdemeanor. If a person assists a perpetrator who has committed a felony, the person is guilty of first-degree hindering prosecution, a class C felony. AS 11.56.770. If the person assists a perpetrator who has committed a misdemeanor, the person is guilty of second-degree hindering prosecution, a class B misdemeanor. AS 11.56.780. But what if the person assisting a perpetrator does not know whether the perpetrator committed a felony or misdemeanor? What crime has been committed, if any? *Noblit* answers this question.

808 P.2d 280
Court of Appeals of Alaska.
Ken NOBLIT, Appellant,
v.
STATE of Alaska, Appellee.
March 29, 1991.

OPINION
BRYNER, Chief Judge.

Ken Noblit was convicted, after a jury trial, of hindering prosecution in the first degree. Superior Court Judge Niesje J. Steinkruger sentenced Noblit to a term of three years with one and one-half years suspended. Noblit appeals, contending that the trial court failed to instruct the jury properly on the culpable mental state for his offense. We affirm.

On August 19, 1988, Noblit's housemate, Phillip Baird stabbed and killed a man—apparently while engaging in sadomasochistic sexual activities. The homicide occurred in the victim's apartment and was not discovered until the following day, August 20. Noblit played no part in the killing and was not present when it happened. During the ensuing weeks, however, he engaged in a variety of acts that hindered police efforts to locate and apprehend Baird. Baird was ultimately arrested on September 15, 1988, at the trailer he shared with Noblit. He was eventually convicted of murder in the second degree.

The state charged Noblit with hindering prosecution in the first degree, in violation of AS 11.56.770(a):

(a) A person commits the crime of hindering prosecution in the first degree if the person renders assistance to a person who has committed a crime punishable as a felony with intent to

(1) hinder the apprehension, prosecution, conviction, or punishment of that person; or

(2) assist that person in profiting or benefiting from the commission of the crime.

At the conclusion of Noblit's trial, the superior court instructed the jury, in relevant part, that the state was required to prove that Noblit "knowingly rendered assistance to a person who had committed a crime punishable as a felony," and that, in doing so, he "intended to hinder the apprehension, prosecution, conviction, or punishment of that person." The court rejected, however, Noblit's request to further instruct the jury that Noblit was required to have acted knowingly or recklessly with respect to the fact that Baird's crime was "punishable as a felony." While specifying that the state was required to prove that Baird's crime had in fact been a felony, the court instructed that "it is not required that the defendant knew the crime was a felony."

On appeal, Noblit challenges the validity of the trial court's instructions on the elements of the offense. In addressing Noblit's argument, we begin by considering Alaska's hindering prosecution statutes.

Under Alaska law, the distinction between hindering prosecution in the first and second degrees hinges on the seriousness of the crime committed by the person whose prosecution is hindered. Hindering prosecution in the first degree, a class C felony, occurs when a "person renders assistance to a person who has committed a crime punishable as a felony….". Hindering prosecution in the second degree, a class B misdemeanor, occurs when a "person renders assistance to another who has committed a crime punishable by imprisonment for more than 90 days…." The first- and second-degree offenses are identical in all respects other than the seriousness of the underlying crime. For both offenses the defendant must engage in conduct that "renders assistance" to a person who has actually committed a crime. Both offenses are specific intent crimes: the state must prove, in relevant part, that the defendant acted "with intent to hinder the apprehension, prosecution, conviction, or punishment of that person; or assist that person in profiting or benefiting from the commission of the crime." This requirement of a specific intent to hinder the prosecution of a person who has committed a crime necessarily presupposes the defendant's knowledge that the underlying crime has been committed.

To prove its charge of hindering prosecution in the first degree in Noblit's case, it was thus incumbent on the state to establish that Phillip Baird had committed a homicide, that his crime was punishable as a felony, and that Noblit rendered assistance to Baird after he had committed a crime. The state was further required to show that Noblit assisted Baird with knowledge of Baird's criminal conduct and with the specific intent to hinder Baird's prosecution.

The jury instructions in this case adequately recited these statutory elements. Noblit nevertheless insists that the instructions were flawed because they omitted a further element. According to Noblit, the trial court should have told the jury that it could not convict for hindering prosecution in the first degree unless it found that Noblit actually knew or recklessly disregarded that Baird's illegal conduct was punishable as a felony. While Noblit concedes that this element does not appear in the statutory definition of hindering prosecution in the first degree, he contends that it should be added by judicial interpretation.

We disagree. In enacting our hindering prosecution statutes, the Alaska legislature unequivocally expressed the intent to dispense with any requirement of awareness as to the legal classification of the crime committed by the assisted person:

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 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.

Commentary on the Alaska Revised Criminal Code, Senate Journal Supp. No. 47 at 86–87, 1978 Senate Journal 1399.

The commentary to Model Penal Code § 242.3 further undercuts Noblit's culpable mental state argument. Section 242.3 is generally similar to Alaska's hindering prosecution statutes. Like the Alaska statutes, it hinges the seriousness of a hindering prosecution charge on the seriousness of the underlying crime. The commentary to Model Penal Code § 242.3 highlights the difference between the defendant's awareness of the conduct constituting the underlying crime and actual knowledge of the legal classification that would apply to that conduct:

Section 242.3 … limits the heavier sanction based on the seriousness of the principal offense to circumstances in which the aider is culpable with respect to that consideration. Of course, it is not necessary that the defendant know the law of the crime for which the other is sought. For this reason the grading provision for this offense requires only that the aider know that the conduct charged or

liable to be charged against the other person is of the sort proscribed by one of the more serious degrees of felony.
Model Penal Code § 242.3, commentary at 239 (1980) (footnote omitted).

At least one other jurisdiction has specifically considered and rejected a culpable mental state argument similar to Noblit's. […] In short, Noblit's culpable mental state argument finds no support in the legislative history of Alaska's hindering prosecution statutes, in the Model Penal Code, or in the decisions of other jurisdictions.

[…]

Under the circumstances, the following passage from the Alaska Supreme Court's decision in *Alex v. State*, 484 P.2d 677, 681–82 (Alaska 1971), is particularly apt:

[A]s applied to crimes generally, what is imperative, is that an accused's act be other than simply inadvertent or neglectful. What is essential is not an awareness that a given conduct is a "wrongdoing" in the sense that it is proscribed by law, but rather, that an awareness that one is committing the specific acts which are defined by law as a "wrongdoing." It is, however, no defense that one was not aware that his acts were wrong in the sense that they were proscribed by law. So long as one acts intentionally, with cognizance of his behavior, he acts with the requisite awareness of wrongdoing.

[…]

The judgment is AFFIRMED.

Compounding

A related but rarely prosecuted crime is compounding. **Compounding** prohibits agreements to *refuse* to assist law enforcement. At common law, someone who committed the crime of compounding was guilty as an accessory. Under modern criminal codes, compounding is a separate and distinct offense.

To be clear, compounding and hindering are close cousins. Whereas hindering prosecution occurs if a person "renders assistance" to a perpetrator, compounding occurs if a person offers or receives a benefit to conceal an offense, withhold evidence of an offense, or refrain from assisting law enforcement. AS 11.56.790. The gravamen of compounding is the *agreement* to avoid law enforcement involvement. The agreement must include **consideration** – that is, it must include a *benefit* offered or accepted in exchange for withholding or concealing information about an offense. *See commentary*, Senate Journal Supp. No. 47, at 87 (June 12, 1978). The crime punishes both the receiver and giver of the consideration equally. Both are guilty of a class A misdemeanor. AS 11.56.790(b).

Although a person is under no obligation to *assist* law enforcement, and may always stand mute about their knowledge of a criminal offense, a person may not enter into an agreement to remain quiet in an effort to secure a benefit. Likewise, a person may not pervert public justice by seeking to buy or bargain their way out of criminal liability.

Not all agreements to settle a criminal case constitute compounding, however. A plea bargain – an agreement between the government and a defendant to resolve a criminal case without a trial – is not compounding. *See e.g., Kansas v. Davis*, 26 P.3d 681 (Kan. 2001). Also, the law specifically allows for a crime victim and a criminal defendant to **civilly compromise** a criminal matter in certain situations.

Civil Compromise

A defendant and a victim may agree to civilly compromise a criminal prosecution in matters where the victim would normally have a civil remedy. AS 12.45.120. This typically occurs in cases of simple (misdemeanor) assaults or vandalism (criminal mischief). In the eyes of the Legislature, such matters are appropriately resolved outside of the criminal justice system given the minor nature of the offense and the existence of a viable civil remedy. Both the crime victim and criminal defendant can adequately protect their respective interests while at the same time adjudicating the minor societal interests involved.

For example, assume Jim and Bob are neighbors and have an argument over who is responsible for damage to their mutually shared fence. In a fit of rage, Jim punches Bob in the nose. Bystanders call the police and Jim is arrested for misdemeanor assault (AS 11.41.230). Even though Jim has been charged criminally, Bob and Jim can agree to *civilly* resolve the case (*e.g.*, Jim can agree to pay for the damaged fence and Bob can agree to not "press charges"). In such a case, Jim would seek dismissal of the criminal charge based on a civil compromise. AS 12.45.130. The court would review the case and individually

decide whether to accept the compromise. (Note that the prosecution is not a party to the compromise.) If the Court approves the compromise, the criminal case is dismissed and further prosecution would be barred. AS 12.45.130.

Note that not all criminal cases are appropriate for a civil compromise. Felonies, thefts, domestic violence offenses, and offenses involving police and judicial officers are not subject to civil compromise. AS 12.45.120. In such cases, the societal interests involved outweigh the crime victim's interest in resolving the criminal case civilly – the crime victim does not have the right to not "press charges."

Exercises

Answer the following question. Check your answer using the answer key at the end of the chapter.

1. Cory watches as her sister Amanda breaks into a parking meter across the street and starts scooping change into her purse. Amanda thereafter runs into a nearby alley and hides behind a dumpster. A police officer arrives on the scene and asks Cory if she witnessed the crime. Cory responds, "No, I didn't notice anything." The police officer does a search, does not find Amanda, and leaves. Has Cory committed a crime? If your answer is yes, which crime has Cory committed, and does Cory have a possible defense?

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5.4: End-of-Chapter Material

Summary

Often more than one criminal defendant participates in the commission of a crime. Defendants working together with a common criminal purpose are acting with complicity and are responsible for the same crimes, to the same degree.

At early common law, there were four parties to a crime. A principal in the first degree actually committed the crime. A principal in the second degree was present at the crime scene and assisted in the crime's commission. An accessory before the fact was not present at the crime scene but helped prepare for the crime's commission. An accessory after the fact helped a party after he or she committed a crime by providing aid in escaping or avoiding arrest and prosecution or conviction. In modern times, there are only two parties to a crime: a principal, who is in the same category as his or her accomplices. Principals actually commit the crime, and they and their accomplices are criminally responsible for it.

The criminal act element required to be an accomplice is aiding or abetting the principal in the commission of a crime. Words are enough to constitute the accomplice's criminal act. Mere presence at the scene, even presence at the scene combined with flight after the crime's commission, is not enough to constitute the *actus reus*.

Accomplice liability in Alaska is a dual intent offense. The accomplice must intend to promote the commission of the crime and act with the underlying culpable mental state with respect to the harm caused.

The natural and probable consequences doctrine holds accomplices criminally responsible for all crimes the principal commits that are reasonably foreseeable. An accomplice can be prosecuted for a crime the principal commits even if the principal is not prosecuted or acquitted.

Vicarious liability transfers criminal responsibility from one party to another because of a special relationship. Vicarious liability is common between employers and employees and is the basis for corporate criminal liability. Under organizational liability, a corporation can be fined for the crimes of a high managerial corporate agent who commits a criminal act during the scope of their employment. The corporate agent or employee also is criminally responsible for his or her conduct. In general, the law disfavors criminal vicarious liability.

In modern times, an accessory is generally prosecuted under the offense of hindering prosecution and not as an accessory after the fact as was the case at common law. The criminal act element required for hindering prosecution is rendering assistance to a principal in escape, avoiding detection, or arrest and prosecution, or conviction for the commission of a felony or misdemeanor. The related crime of compounding criminalizes an agreement, in exchange for a benefit, not to assist law enforcement or withhold evidence.

Key Takeaways

- The four parties to crime at early common law were principals in the first degree, principals in the second degree, accessories before the fact, and accessories after the fact. These designations signified the following:
  - Principals in the first degree committed the crime.
  - Principals in the second degree were present at the crime scene and assisted in the crime's commission.
  - Accessories before the fact were not present at the crime scene, but assisted in preparing for the crime's commission.
  - Accessories after the fact helped a party to the crime avoid detection and escape prosecution or conviction.
- In modern times, the parties to crime are principals and their accomplices, and accessories.
- The criminal act element required for accomplice liability is aiding, abetting, or assisting in the commission of a crime. Words may be enough to constitute the accomplice criminal act element, while mere presence at the scene without a legal duty to act is not enough.
- The natural and probable consequences doctrine holds an accomplice criminally responsible if the crime the principal commits is foreseeable when the accomplice assists the principal.
- The accomplice is criminally responsible for the crimes the principal commits.
- An accomplice can be prosecuted for an offense even if the principal is not prosecuted or is tried and acquitted.
- Accomplice liability holds an accomplice accountable when he or she is complicit with the principal; vicarious liability imposes criminal responsibility on a defendant because of a special relationship with the criminal actor.

- Accomplice liability holds a complicit defendant accountable for the crime the principal commits; accessory (now called hindering prosecution) is a separate crime and is typically a misdemeanor or low-level felony. Compounding is a related, but distinct crime that punishes agreements to withhold or conceal evidence.

You be the Judge Answer to 5.1

Although harsh, if the jury finds that the co-workers acted with the appropriate culpable mental state, they are accomplices. They are guilty of manslaughter to the same extent as Jim. The rule at common law is that when a person purposely assists or encourages another person to engage in conduct that is dangerous to human life or safety, and an unintended injury or death results, it does not matter which person actually caused the injury or death by their personal conduct. As described by one legal scholar, "[t]hose present at an unlawful fist fight [who] encourage continued blows by shouts or gestures … will be guilty of manslaughter if death should ensure." *SeeRiley v. State*, 60 P.3d 204, 211 (Alaska App. 2011) *citing* Rollin M. Perkins & Ronald N. Boyce, Criminal Law 739-40 (3rd ed. 1982).

Answer to Exercises

From "Parties to a Crime"

1. Penelope could be charged with and convicted of robbery as an **accomplice**. Penelope *assisted* Justin by telling him what time the security guard took his break. Although Penelope was not present at the scene, if the trier of fact determines that Penelope had the proper culpable mental state required for accomplice liability then Penelope can be held accountable for this crime. Note that Penelope assisted Justin with words and that words are enough to constitute the criminal act element required for accomplice liability.

From "Vicarious Liability"

1. ABC Corporation probably is not vicariously liable for criminal homicide because Brad's reckless conduct did not occur during the scope of employment; the criminal homicide occurred as Brad was *driving home*. However, if Brad were required to work while driving home (by making work-related phone calls, for example), vicarious liability could be present in this instance.
2. The Court of Appeals reversed the corporation's convictions, finding that the jury had been instructed improperly. The court outlined three theories of criminal corporate liability:
    1. The bouncer was an employee of the corporation and the assault was within the scope of the bouncer's employment and the assault was committed on behalf of the corporation;
    2. The bar manager facilitated the bouncer's assault (the manager was an accomplice) and the facilitation was within the scope of the manager's employment and the assault was committed on behalf of the corporation; or
    3. The manager solicited the bouncer to commit the assault (or subsequently ratified it) and the assault was committed on behalf of the corporation.

From "Accessory"

1. Cory has probably committed the crime of hindering prosecution in the second degree. Cory's response to the police officer's question was false, and it appears to be made with the intent to help Amanda escape detection. Note that Cory renders assistance using words, but words are enough to constitute the criminal act element required for accessory liability. Cory is not an accomplice to Amanda's crime because she did not act to assist Amanda with the parking meter destruction and theft; she only acted *after* the crime was committed. Her failure to report the crime is probably not an "omission to act" because it is extremely unlikely that a statute exists requiring individuals to report theft committed in their presence, creating a legal duty to act.

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CHAPTER OVERVIEW

6: Inchoate Offenses (Anticipatory Crimes)

6.1: Attempt

6.2: Solicitation

6.3: Conspiracy

6.4: End-of-Chapter Material

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6.1: Attempt

Criminal law contains three inchoate crimes – attempt, solicitation, and conspiracy. **Inchoate crimes** are, by definition, incomplete or anticipatory crimes. The law imposes criminal liability on individuals even though the "would-be" criminal was never successful in achieving their intent – a completed crime. All inchoate offenses are **specific intent** crimes – that is, all inchoate crimes require a specific intent to carry out the underlying criminal offense. Although attempt crimes never result in a finished criminal offense, both solicitation and conspiracy may give rise to separate, completed crimes.

We punish individuals who commit inchoate crimes because of the danger they pose. Even though criminal preparation may not result in a tangible, immediate harm, anticipatory criminal behavior increases the likelihood that the ultimate harm will occur. This preparation is dangerous in its own right. Society should not have to wait until harm occurs before intervening. Put another way, waiting until a crime is completed is unnecessarily harmful. Law enforcement should pro-actively investigate criminal behavior and avert injury to victims or property where possible. If a defendant could not be apprehended until a crime was accomplished, law enforcement would be forced to stand by and watch harm occur. Punishing inchoate crimes also prevents future criminal activity. If a criminal is permitted to continue to try to achieve their criminal objective, free from any criminal consequences, criminals would not be deterred. Crime should not be like riding a horse; you should not encourage a criminal to simply get back on if they fall off.

However, there is a fine line between punishing anticipatory criminal activities and punishing criminal thoughts. Remember, criminal thoughts – standing alone – are never criminal. Society does not punish the "guilty mind." Simply dreaming about killing your boss is not unlawful. Action must occur. The difficulty is ascertaining the *level of progress* necessary to impute criminal responsibility. And, although the law requires a specific purpose to commit the target offense, jurisdictions have struggled on defining the difference between thoughts and action.

History of Attempt

The crime of attempt punishes the unsuccessful effort to commit the crime. But the crime of attempt is a relatively recent legal development. At early common law, an attempt was not a crime. *See* Wayne R. LaFave, *Substantive Criminal Law* §11.2(a) (3rd ed. 2018). The law required the resulting harm to occur. It was not until the late 18th century that courts began to recognize the unnecessary danger the law was encouraging. The first documented case of attempt was *Rex v. Scofield*, Cald. 397 (1784), in which a servant was convicted of a misdemeanor for attempting to burn down his master's house with a lighted candle. The doctrine was crystalized in a subsequent case, *Rex v. Higgins*, 2 East. 5 (1801), upholding an indictment for attempted theft even though the perpetrator was unsuccessful in the intended theft. *See* LaFave, at §11.2(a). In modern times, nearly every jurisdiction criminalizes attempt, but as you will see, courts and legislatures continue to struggle as to what precisely constitutes an attempt.

Attempt – Voluntary Act (*Actus Reus)*

It is helpful to think of the *actus reus* of attempt on a continuum. On one hand, a person may have isolated, private criminal thoughts, which, without action, are not criminal. On the opposite side, is the completed crime. Attempt falls somewhere in between. Nearly every jurisdiction recognizes that **mere preparation** is insufficient to establish the *actus reus* of attempt. A defendant does not commit attempt by merely plotting or planning an offense. The crux of attempt is *how close* to completing the offense the defendant must get to fulfill the voluntary act requirement. To identify when the crime of attempt is consummated on the continuum, most jurisdictions have relied on one of four tests: (1) the dangerous proximity test, (2) the probable desistance test, (3) the *res ipsa loquitur* test, and (4) the substantial step test.

Dangerous Proximity Test

The **dangerousproximity test** measures the defendant's progress by examining how close the defendant is to completing the offense. The distance measured is the distance between preparation for the offense and successful completion. It is the amount *left to be done*, not what has *already been done*, that is analyzed. *See generally People v. Rizzo*, 246 N.Y. 334 (N.Y. 1927). Generally, the defendant does not have to reach the last step before completion, although many defendants do.

Probable Desistance Test

The **probable desistance test** examines *how far* the defendant has progressed toward the commission of the crime, rather than analyzing *how much* the defendant has left to accomplish. Under this test, the trier of fact must determine whether the defendant's conduct reached a point where he is unlikely to voluntarily abandon his efforts to complete the crime. Put another way, the conduct constitutes an attempt if, in the ordinary and natural course of events, without interruption from an outside event (like law enforcement), it will result in the crime being completed. *See United States v. Manjujano*, 499 F.2d 370, 374 (5th Cir. 1974).

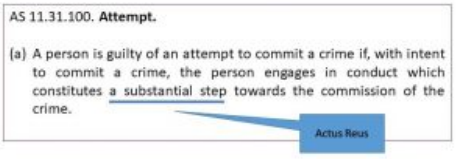
Res Ipsa Loquitur Test

Res ipsa loquitur means "the thing speaks for itself." *See e.g.*, Black's Law Dictionary (6th ed. 1990). Under the *res ipsa loquitur* test, also called the unequivocal test, an attempt is committed when the defendant's conduct manifests a clear intent to commit the crime. The trier of fact must focus on the moment the defendant *stopped* progressing toward completion of the offense, and determine whether it was clear that the defendant had *no other purpose* than completing the specific crime. *See Hamiel v. Wisconsin*, 285 N.E. 2d 639, 665-66 (Wis. 1979).

The Substantial Step Test

Alaska has adopted the test developed by the Model Penal Code – the **substantial step** test. This test was developed in response to the large variance between jurisdictions in evaluating the conduct required for attempt. It is intended to clarify and simplify the analysis – simply put, the test asks the trier of fact to determine if the defendant took a "substantial step" towards to completion of the target offense. Take a look at Alaska Statute 11.31.100(a).

Figure 6.1 Alaska Criminal Code – Attempt



To be guilty of attempt, one must engage in conduct that demonstrates a clear, definitive intent to complete the crime. The language recognizes that mere preparation is insufficient. Minimal or preliminary steps, which may be suspicious, are insufficient. The Model Penal Code provides seven examples of actions that constitute a substantial step, as long as they are corroborative of the defendant's intent: lying in wait; enticing the victim to go to the scene of the crime; investigating the potential scene of the crime; unlawfully entering a structure or vehicle where the crime is to be committed; possessing materials that are specially designed for unlawful use; possessing, collecting, or fabricating materials to be used in the crime's commission; and soliciting an innocent agent to commit the crime (Model Penal Code § 5.01(2)). To be clear, neither the Model Penal Code, nor Alaska law define a "substantial step". Instead, the law requires the defendant's act(s) are "strongly corroborative of the [defendant's] criminal purpose" – that is, the totality of the circumstances must convincingly demonstrate the defendant's willingness to commit the crime. *See e.g.*, *Avila v. State*, 22 P.3d 890, 893-94 (Alaska App. 2001).

The substantial step test is a close cousin to the *res ipsa loquitur* test. And, unlike the Dangerous Proximity or the Probable Desistence Tests, there is no requirement that the offender be in physical proximity or close to the offense to be held accountable, instead the focus is on whether the person's intent is clear.

Example of the Substantial Step Test

Kevin wants to rob an armored car that delivers cash to the local bank. After casing the bank for two months and determining the date and time that the car makes its delivery, Kevin devises a plan that he types out on his computer. On the date of the next delivery, Kevin hides a pistol in his jacket pocket and makes his way on foot to the bank. Thereafter, he hides in an alley and waits for the truck to arrive. The truck never arrives. Unbeknownst to Kevin, the delivery was canceled the night before. In the interim, his wife discovered his plan on his computer and called the police. The police arrest Kevin after they observe him enter the alley and begin to wait. In this case, Kevin has committed the criminal act required for attempted robbery. Kevin cased the bank, planned the robbery, showed up on the appointed date and time with a concealed pistol, and hid in an alley to wait for the truck to appear. Kevin's intent was clear.

Although Kevin is guilty of attempt under the substantial step test, he is probably *not guilty* under the dangerous proximity test. Given that the armored truck never arrived and would not have arrived (since the delivery was canceled), Kevin was not within proximity to a completed, successful robbery. *See generally People v. Rizzo*, 246 N.Y. 334 (N.Y. 1927).

Example of Mere Preparation

Remember that merely preparing to commit a criminal offense will not establish the *actus reus* of attempt. Read the following case, *Sullivan v. State*, 766 P.2d 51 (Alaska App. 1998) and ask yourself whether there was any real dispute as to what the defendant's intent was regarding his victims? Why did the court find these actions insufficient to rise to the level of substantial steps?

766 P.2d 51
Court of Appeals of Alaska.
Rodney G. SULLIVAN, Appellant,
v.
STATE of Alaska, Appellee.
No. A–2229.
Dec. 23, 1988.

OPINION
BRYNER, Chief Judge.

Rodney G. Sullivan was convicted, after a bench trial, of attempted sexual abuse of a minor in the second degree, a class C felony. AS 11.41.436(a)(2).

Sullivan … appeals, challenging his conviction for attempted sexual abuse[.] We conclude that there was insufficient evidence to convict Sullivan of attempted sexual abuse[.]

FACTS
In September of 1984, Sullivan was staying in Ketchikan at the house of a friend, who had asked Sullivan to help keep an eye on her three children while she was on vacation for two weeks. During this period, various neighborhood children had been given permission to enter the house and to play with the family dog.

One day while several children were at the house, Sullivan approached D.T., an eight-year-old girl, and offered to "give [her] some money if [she] would be his girlfriend." She replied, "No." That same day, Sullivan gave D.T. and another girl, K.W., a note. According to D.T., the note read: "Will you be my girlfriend? Will you kiss me? Will you take off your clothes? Will you get another girlfriend for me?" The note also included boxes for "yes" and "no" responses. Sullivan paid D.T.'s seven-year-old brother, J.T., two dollars to deliver the note. At some point during that day, Sullivan locked J.T. into a room because, according to J.T., Sullivan "wanted to tell [D.T.] a nasty letter." Sullivan also told J.T. that he wanted to invite D.T. "and a whole bunch of other people" to a party, and that "the only parties he had is bad parties" with girls. D.T. received at least ten or twelve other notes from Sullivan while she was at his house that day. She did not remember what the other notes said.

K.W. remembered that D.T. read her a note that Sullivan had given them. The note asked, "Do you want to be my girlfriend?" and stated, "I'll give you a thousand dollars if you do." K.W. also remembered that Sullivan asked the girls if they would take off their clothes in front of him.

H.T., a nine-year-old girl, was also at Sullivan's house with D.T., K.W., and J.T. She read the note Sullivan gave to D.T. and K.W. H.T. recalled the four questions that D.T. described, although she added that there was a fifth question, which she could not recall. H.T. heard Sullivan ask K.W. and D.T. to take off their clothes "a lot of times." She recalled that Sullivan showed the children pictures of "naked ladies" in Playboy magazine and that he gave the three girls "tests" with such questions as, "Will you go to bed with me?" and, "Will you marry me?"

On a later day, D.T. received another note from Sullivan, this time delivered to her by J.T. at home. The note said that if D.T. agreed to answer "a lot of questions, [Sullivan] would have a party." D.T. destroyed the note.

D.T. subsequently reported the notes to her mother, who notified the Ketchikan police. During police questioning, Sullivan acknowledged the incidents and attempted to reconstruct his original note to D.T. The reconstructed note read:

I really like you a lot. I would be proud to have you as my girlfriend. So I'm going to ask you some questions. Will you go with me? Will you kiss me? Will you let me feel private parts of your body? Will you take off all of your clothes in front of me? And will you let me kiss the private parts of your body? I really hope you do some of these thing in the questions.

Sullivan was subsequently indicted on one count of attempted sexual abuse in the second degree.

[…]

SUFFICIENCY OF EVIDENCE TO SHOW ATTEMPTED SEXUAL ABUSE OF A MINOR IN THE SECOND DEGREE
Sullivan argues that there is insufficient evidence to support his conviction for attempted sexual abuse.

[…]
Alaska Statute 11.31.100(a) sets out the elements of an attempt:

[A] person is guilty of an attempt to commit a crime if, with intent to commit a crime, the person engages in conduct which constitutes a substantial step toward the commission of that crime.

In order to constitute a "substantial step," conduct must go beyond mere preparation. Whether an act is merely preparatory or is sufficiently close to the consummation of the crime to amount to attempt, is a question of degree and depends upon the facts and circumstances of a particular case.
[…]
Sullivan claims that the state failed to produce evidence that he had taken a "substantial step" toward having sexual contact with a minor.

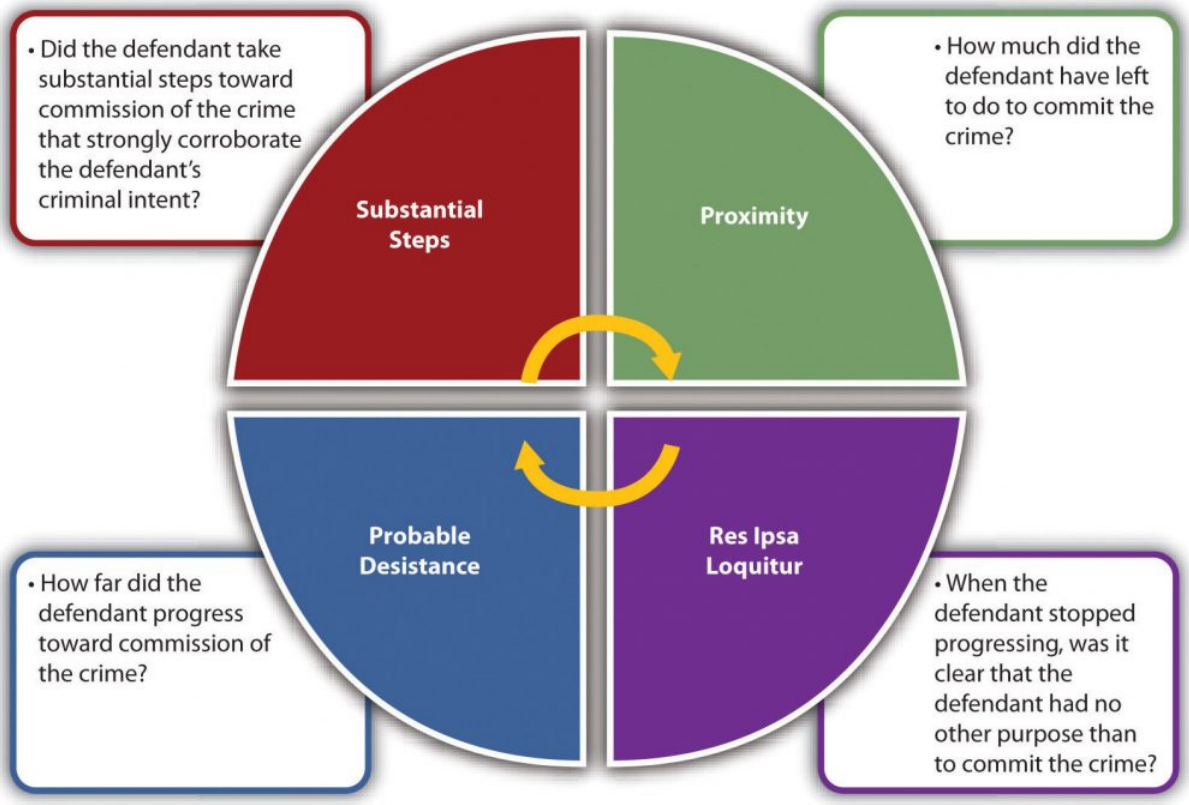
[…]

The state … argues that Sullivan's acts, when viewed together, constitute a substantial step toward engaging in sexual contact with D.T. However, according to the state's own account, Sullivan engaged in these acts in preparation for the solicitation itself. For example, at trial the state claimed that Sullivan had written his notes in test format, in order to convince the children that "what he was doing was good" so that they would want to "pass [the] test." Likewise, the state argued at trial that Sullivan showed the children pictures of naked women "so that they would be in the mood where he could have sexual contact with them once he persuaded them to get their clothes off." Although these acts may support an inference that Sullivan had a plan to seduce young girls, they amount to no more than preparatory conduct[.] The fact that Sullivan took steps to ensure that his solicitation would be successful does not convert the solicitation into a substantial step.

[…]
Drawing all inferences in favor of the state in the present case, the evidence presented at trial establishes only that Sullivan engaged in preparatory conduct and not that he took a substantial step toward sexual contact with D.T. We therefore reverse Sullivan's conviction of attempted sexual abuse of a minor in the second degree.

The judgment of conviction for sexual assault in the second degree is VACATED.

Figure 6.2 Various Tests for Attempt Act



Preparatory Crimes

In addition to the criminal offense of attempt, Alaska, similar to other jurisdictions, criminalizes specific *preparatory* behaviors. For example, Alaska prohibits the mere *possession* of burglar's tools. AS 11.46.315. Thus, a defendant could be convicted of a preparatory crime *and attempt* if the the defendant took a substantial step towards the completion of a burglary while in possession of burglary tools.

Example of a Preparatory Crime and Attempt

Hal manufactures a lock pick and takes it to the local coin shop, which is closed. Hal takes the lock pick out and begins to insert it into the coin shop doorknob. A security guard apprehends Hal before he is able to pick the lock. Hal could likely be convicted of possession of burglary tools and attempted burglary because he has committed the essential elements required for both offenses.

Attempt – Culpable Mental State

The culpable mental state required for attempt is having a **specific intent** to commit the target crime. Generally, *reckless* or *negligent* attempts do not exist. Thus, if the prosecution fails to prove beyond a reasonable doubt that the defendant acted purposefully with intent to commit the target crime, the defendant will be acquitted of the crime.

Example of a Case Lacking Attempt Intent

Eric is hiking and pauses in front of a sign that states "Only you can prevent forest fires." Eric reads the sign, pulls out a cigarette, lights it, and throws the lit match into some dry brush near the sign. He starts hiking and when he finishes his cigarette, he tosses the lit cigarette butt into some arid grass. Neither the brush nor the grass burns. Eric probably does *not* have the requisite criminal intent for attempted criminally negligent burning. Attempt requires **intentional** conduct. Eric's conduct is likely **criminally negligent** because he – as a reasonable person – would have been aware of the risk. If Eric takes the match and tries to ignite a fire, then it is likely that he has committed attempted arson in the third degree. However, in this example, Eric's actions demonstrate careless behavior that probably is not sufficient for the crime of attempt.

Defenses to Attempt – Renunciation and Impossibility

Two primary defenses exist for attempt: voluntary renunciation and impossibility.

Voluntary Renunciation (Abandonment)

Renunciation means giving up, refusing, or abandoning one's criminal objective. Similar to accomplice liability, a defendant who freely and voluntarily renounces their criminal intent can avoid criminal liability for attempt. AS 11.31.100(c). Renunciation is difficult to prove. First, the defendant's abandonment must be voluntary, complete, and not influenced by an extraneous fact. The defendant must have a change of heart that is *not motivated* by an increased possibility of detection, or a change in circumstances that make the crime's commission more difficult. In other words, a defendant cannot "renounce" her attempted crime as the police are arresting her, nor simply postpone the crime until a more advantageous time. The abandonment must be complete. *See* Alaska Criminal Pattern Jury Instructions, 11.31.100(c).

Second, the defendant must prevent the commission of the attempted crime. If the offender has put events in motion that will result in the complete crime, the defendant must successfully terminate the criminal process *before* the crime is completed. Although difficult to prove, voluntary renunciation gives defendants an incentive to stop progressing towards the consummation of a criminal offense and prevents the crime from occurring without the need for law enforcement intervention. Finally, renunciation is an affirmative defense. The defendant must prove it applies, not the government. Affirmative defenses will be explored shortly.

Example of Voluntary Renunciation

Matthew and Melissa decide they want to poison their neighbor's dog because it barks loudly and constantly wakes them up every night. The two hatched a plan to rid the world of the pesky dog. Melissa purchases some rat poison at the local hardware store with the idea that Matthew will coat a raw filet mignon with the poison and throw it over the fence. The plan is the dog will eat the filet, become ill, and die. After Matthew throws the filet over the fence, Melissa changes her mind. She climbs over the fence, picks up the filet, and takes it back to her house for disposal. She also talks Matthew out of poisoning the neighbor's dog. Melissa has likely voluntarily abandoned the crime and cannot be charged with attempted animal cruelty.

Impossibility as a Defense to Attempt

What if you attempt to commit an impossible crime? For example, what if you try to kill a non-existent person? Is such conduct criminal? It seems unfair to impose criminal liability on an action that would *never* have been successful and would *never* have caused actual harm.

Such circumstances raise the issue of **impossibility**. Two types of impossibility exist: legal impossibility and factual impossibility. **Legal impossibility** means that the defendant believes what he or she is attempting to do is *illegal*, when it is in fact not. Conversely, **factual impossibility** means that the defendant could not complete the target crime because an extraneous factor prevented the criminal act. Some jurisdictions allow legal impossibility as a defense, but none allow factual impossibility.

Alaska makes no such distinction; neither legal impossibility, nor factual impossibility, is a defense against an attempt crime. AS 11.31.100(b). The reason is simple – it is difficult to tell the difference and under both scenarios the offender has committed a voluntary act and concomitantly a criminal culpable mental state. The basic elements of a criminal offense have been met.

Example of Legal Impossibility

Matthew and Melissa are still planning to kill the neighbor's dog. Assume that Melissa is eighteen. Melissa believes that an individual must be twenty-one to purchase rat poison because that is the law in Montana (where she lived five years ago). In actuality, Alaska allows anyone over the age of eighteen to buy rat poison. When she tries to pay for the rat poison, the store asks for identification. Melissa believes she's committing a crime, makes an excuse, and leaves. Melissa regains her composure and goes to a second store. The second store does not ask for identification, and Melissa successfully purchases rat poison. Since Alaska does not recognize the defense of legal impossibility, Melissa's mistaken belief that she is committed a crime transforms her legal act into an *illegal* one.

Example of Factual Impossibility

Now let's change the hypothetical. Assume Matthew throws a coated filet over the fence with the intent to poison the dog. Unbeknownst to Melissa and Matthew, the dog is on an overnight camping trip with its owners. Both Melissa and Matthew are under the *mistaken* belief that the dog is present and will eat the filet. This mistake of fact will *not* excuse Melissa and Matthew's attempted animal cruelty. Melissa and Matthew intentionally engaged in conduct that would result in the poisoning of the dog if the facts were as Melissa and Matthew believed them to be. Thus, Melissa and Matthew have likely committed attempted animal cruelty regardless of the fact that their plan *could not succeed* under the circumstances. Factual impossibility is not a defense under Alaska law.

Merger Doctrine

The crime of attempt merges into the completed crime. AS 11.31.140(c). Double jeopardy precludes a defendant from being punished for attempt *and* the completed crime. *See Starkweather v. State*, 244 P.3d 522, 530 (Alaska App. 2010). If a defendant is charged and convicted of both an attempt crime and the target crime, the attempt **merges** into the completed crime at sentencing. This rule makes sense given that every complete crime *necessarily* includes an attempt to commit the crime. It would be unfair to punish an offender for both a completed crime and the attempted crime.

Example of Merger

Let's assume that Melissa and Matthew were successful. The neighbor's dog eats the poisoned filet and dies. Melissa and Matthew may not be punished for both attempted animal cruelty and animal cruelty. Once the crime is complete, the attempt crime merges into the consummated offense, and Melissa and Matthew may only be punished for the completed animal cruelty.

Attempt Grading

Most jurisdictions, including Alaska, classify an attempt as a lower-level offense than the completed offense. Generally speaking, the crime of attempt is classified one level below the completed crime. AS 11.31.100(d). For example, killing your neighbor's noisy dog constitutes animal cruelty, a class C felony. AS 11.61.140(a)(3). If a person attempts to commit animal cruelty, the person is guilty of a class A misdemeanor, a lower-level offense with a lower penalty provision. This lower classification frequently reduces the potential punishment.

There is one notable exception to this rule – attempted murder. Attempted murder remains an unclassified felony, just like the completed offense: first-degree murder. Both crimes provide for the same maximum punishment – 99 years imprisonment. Although both are unclassified offenses, case law requires the sentencing court to recognize that attempted murder is not as serious as a completed murder, and the ultimate sentence should reflect this difference. *See e.g., Rudden v. State*, 881 P.3d 328 (Alaska App. 1994).

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6.2: Solicitation

Solicitation criminalizes the act of requesting someone to engage in illegal conduct. *See* Black's Law Dictionary (6th ed. 1990). Alaska defines solicitation as acting "with the intent to cause another to engage in conduct constituting a crime, the person solicits [another] to engage in that conduct." AS 11.31.110(a). Solicitation frequently is a precursor to conspiracy since it criminalizes the *instigation* of an agreement to commit a criminal offense. Solicitation is an independent crime, however, since it is possible that the conspiracy will *never be formed*, and the target crime may *not be committed*. Many of the rules that apply to attempt also apply to solicitation.

Solicitation – Voluntary Act

The *actus reus* of solicitation is generally words that seek to **induce** another to commit a crime. The term "solicits" is largely undefined, but generally includes such words like asking, inducing, or commanding. Alaska law specifically includes "commands" in the definition. AS 11.81.900(b)(61). However, the Model Penal Code does not require direct *communication*. It is sufficient if "conduct was designed to effect such communication." *See* Model Penal Code § 5.02(2).

Solicitation – Culpable Mental State

Solicitation, like all inchoate offenses, is a **specific intent** crime. To be responsible, the person must intend to cause another person to engage in conduct constituting a crime. For this reason, solicitation is sometimes referred to as a "double inchoate" crime or an "attempted conspiracy."

Example of Solicitation

Jimmy believes his friend Troy is a "fence" (*i.e.*, a person who sells stolen property). Jimmy calls Troy and asks him to help him sell some stolen designer shoes. Jimmy is likely guilty of the crime of solicitation to commit theft. Jimmy's act of "asking" Troy to sell stolen shoes is likely sufficient to establish the voluntary act of solicitation. Further, Jimmy's desire for Troy to commit the crime of knowingly selling stolen property likely demonstrates Jimmy's intentional mental state.

Sullivan v. State Revisiting

Recall in the last section you read *Sullivan v. State*, 766 P.2d 51 (Alaska App. 1988) where the Alaska Court of Appeals found that Sullivan's act of sending a note to D.T., in which Sullivan asked D.T. to let him touch her "private parts" did not constitute *attempted* sexual abuse of a minor. Sullivan's conduct, while repugnant, did not demonstrate a "substantial step" towards the completion of the completed step. In the eyes of the court, Sullivan's actions were merely preparatory and suspicious; they did not demonstrate a clear, definitive intent to complete the crime.

But most would agree that Sullivan's conduct is much too dangerous to go unpunished, which the court recognized. Although Sullivan may not have committed *attempted* sexual abuse of a minor, Sullivan likely committed the crime of *solicitation* to commit sexual abuse of a minor. As described by the court,

Although Sullivan's conduct did not qualify as an attempt, it seems to us that his solicitation of D.T. may well have constituted a violation of [solicitation], which provides:

A person commits the crime of solicitation if, with intent to cause another to engage in conduct constituting a crime, the person solicits the other to engage in that conduct.

Alaska [law] expressly provides that, in a prosecution for solicitation, it is not a defense "that a person whom the defendant solicits could not be guilty of the crime that is the object of the solicitation." … [S]oliciting a person to commit the offense of sexual abuse of a child in the second degree would, like attempt, be punishable as a class C felony. While it is conceivable that Sullivan could have been convicted of solicitation, the state did not charge him [with solicitation]. Solicitation [is] not a lesser-included offense of attempt.

Sullivan, 766 P.2d at 56, n.5. For a more in-depth discussion of this issue see *Braun v. State*, 911 P.2d 1075, 1083 (Alaska App. 1996).

Solicitation Grading

Solicitation is graded in the same manner as attempt. Solicitation to commit an offense is graded lower than the completed crime, except for solicitation to commit murder. AS 11.31.110(c). Solicitation to commit murder, like attempted murder, is an unclassified offense. AS 11.31.110(c)(1).

Defense to Solicitation – Renunciation

Solicitation contains one primary defense – renunciation. Similar to attempt, a defendant may avoid criminal liability if the defendant voluntarily and completely renounces the criminal act. Also, like attempt, renunciation requires the defendant to thwart the crime solicited. AS 11.31.110(b). Renunciation is an affirmative defense.

It is *not* a defense to solicitation that the person solicited could not be guilty of the target crime. AS 11.31.110(b)(1)(B). For example, it is not a defense to the crime of unlawful solicitation of a minor that the victims could not commit the target crime (*e.g.*, sexual abuse). *See Braun v. State*, 911 P.2d 1075 (Alaska App. 1996).

Exercises

Answer the following questions. Check your answers using the answer key at the end of the chapter.

1. Nancy asks Jennifer to help her counterfeit twenty-dollar bills. Jennifer refuses. Has a crime been committed in this situation?
2. Several years ago, Bob was charged with first-degree murder and determined to be incompetent to stand trial due to his mental illness. At a commitment hearing, experts testified that Bob's mental illness would last the remainder of his life and he would never be restored to competency. Last week, Bob escaped from the mental institution in which he was being treated. Today, while walking down the street, John (an "up-and-coming" criminal) approached Bob. John said to Bob, "Take this gun; walk into the bank across the street; point the gun at the teller; demand money; and return the money to me." Bob shrugs and starts to walk across the street. As John watched Bob cross the street, John changes his mind and decides to stop the robbery. He shouts at Bob, but Bob cannot hear him because of the traffic. He tries to tackle Bob, but he falls into an open manhole. Bob successfully robs the bank and comes out with the money just as John is emerging from the manhole and the police are exiting their patrol vehicles. What crimes, if any, has *John* committed? Why or why not?

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6.3: Conspiracy

The last inchoate offense to explore is conspiracy. Frequently referred to as one of the most powerful tools in the prosecutor's arsenal, **conspiracy** criminalizes an **agreement** to commit a crime. A person is guilty of conspiracy if the person intentionally agrees to participate in a "serious felony offense" with one or more individuals. AS 11.31.120. Similar to other inchoate crimes, conspiracy does not require the target crime to be successful. The defendants may never commit the planned offense, and a co-conspirator need not personally know the other co-conspirators. AS 11.31.120(b). Conspiracy is also the only inchoate offense that *does not* merge with the target crime. Conspiracy is a separate criminal offense. If the defendants commit the crime that is the object of the conspiracy, they are responsible for both the conspiracy *and* the completed crime.

A conspiracy is complete as soon as the defendants become **complicit** and commit an **overt act** with the **conspiracy intent**. Conspiracy punishes defendants for *planning* criminal activity – including activity that would be merely preparatory under attempt or solicitation.

Take note that the law of conspiracy intentionally targets *groups*. This behavior is criminalized due to the dangerousness that surrounds anti-social group activity. *Seee.g.*, Wayne R. LaFave, *Substantive Criminal Law,* §12 (3rd ed. 2018). When individuals collectively engage in unlawful activity, it is more likely that they will be successful. Such activity is also more difficult to stop once set in motion.

Conspiracy – Voluntary Act (*Actus Reus*)

Conspiracy requires the conspirators to engage in a minimum of two actions: an agreement and an overt act. First, conspirators must agree to commit the target criminal offense. The agreement need not be formal or in writing; in fact, most conspiracies involve *informal* agreements – that is, individuals engage in tacit, non-spoken alliances to engage in criminal activity, which may be sufficient to establish complicity. Although the agreement need not be formal, it must occur. Merely being present when an agreement is discussed, knowing about the agreement, or even hoping that the target crime will be accomplished cannot establish an agreement. *See* Use Note, Alaska Criminal Pattern Jury Instruction, 11.31.120(a).

Second, one of the co-conspirators must commit an **overt act in furtherance of the conspiracy**. The overt act operates as proof that the conspiracy is alive and functioning, as opposed to simple criminal conversations about crime. Take note that only *one* of the co-conspirators need to commit the overt act; the other co-conspirators need not even be aware the overt act occurred. AS 11.31.120. Make no mistake: a defendant can be held criminally liable for conspiracy if *another* person commits an overt act in furtherance of the conspiracy unbeknownst to the defendant.

Equally importantly is the overt act need not be *criminal* – planning or preparatory activity are sufficient. The overt act must be an "act of such character that it manifests a purpose on the part of the actor that the object of the conspiracy be completed." AS 11.31.120(h)(1). Lawful activities, such as purchasing a getaway car, mailing a letter, or attending a meeting may be sufficient to establish an overt act.

One significant limitation with conspiracy is what may be conspired to – that is, what is the conspiratorial objective (*i.e.*, the target offense). Whereas a person may attempt or solicit any crime, conspiracy is limited to a subset of the most serious felonies. A person may only conspire to commit **serious felony offenses**. AS 11.31.120(a). "Serious felony offense" includes:

1. Murder
2. Kidnapping
3. First-degree assault (e.g., assault with a deadly weapon)
4. First-degree robbery (e.g., armed robbery)
5. Sexual assault (e.g., rape)
6. Sexual abuse of a minor (e.g., child sexual abuse)
7. Drug-trafficking
8. First-degree criminal mischief (e.g., blowing up the pipeline)
9. First-degree terroristic threatening (e.g., biological attack/terrorism)
10. First-degree human trafficking (e.g., slavery)
11. First-degree sex trafficking; and

12. First- and second-degree arson.

Conspiracy – Culpable Mental State (*mens rea*)

An agreement to conspire does not happen by accident. Conspiracy is a specific intent crime, and requires a conspirator to act with an "intent to promote or facilitate" the target offense. AS 11.31.120(a). This mental state consists of two components. First, the government must prove that the conspirator intended to agree with their co-conspirator, and (2) intended to commit the target offense.

But remember, conspiracy, by definition, requires more than one active participant; one cannot conspire with oneself. That is not to say both conspirators must have an intent to achieve the conspiratorial objective – the modern trend is that a conspiracy may be formed as long as one of the parties has the requisite intent. Pursuant to this **unilateral view** of conspiracy, a conspiracy may exist between a defendant and a law enforcement decoy who is *pretending* to agree. AS 11.31.120(d). Put another way, when analyzing the culpable mental state elements of conspiracy, the focus is on the individual defendant *in relation* to the larger group. Defenses that may apply to one conspirator are not necessarily available to all of the conspirators.

Example of Conspiracy

Shelley and Sam meet while drinking at their local bar. Both are down on their luck and begin fantasizing about what they would do if they had money. Shelley mentions that she works at a local gas station, which tends to have several hundreds of dollars in cash at closing time. Shelley also tells Sam that the surveillance camera system is broken and her co-worker, Valerie, normally closes the gas station alone. Valerie is extremely meek and fearful and will readily hand over the cash if robbed. Sam asks Shelley if she would like to help him rob the store when Valerie is working. Shelley agrees. The two plan the robbery – Shelley agrees to borrow her roommate's car and agrees to drive the getaway car during the robbery. Sam agrees to find a handgun to use. Sam and Shelley leave the bar with a plan to meet the following day to commit the robbery. Unbeknownst to Shelley, after the meeting, Sam met an old friend in an alley and bought a gun for the robbery. Shelley and Sam have probably committed conspiracy to commit first-degree robbery. Shelley and Sam have both demonstrated an intent to *agree to work together* and both have demonstrated an intent to *successfully commit the robbery.* Finally, Sam has committed an overt act in furtherance of the conspiracy (*e.g.*, purchasing a gun).

Structures of Conspiracies

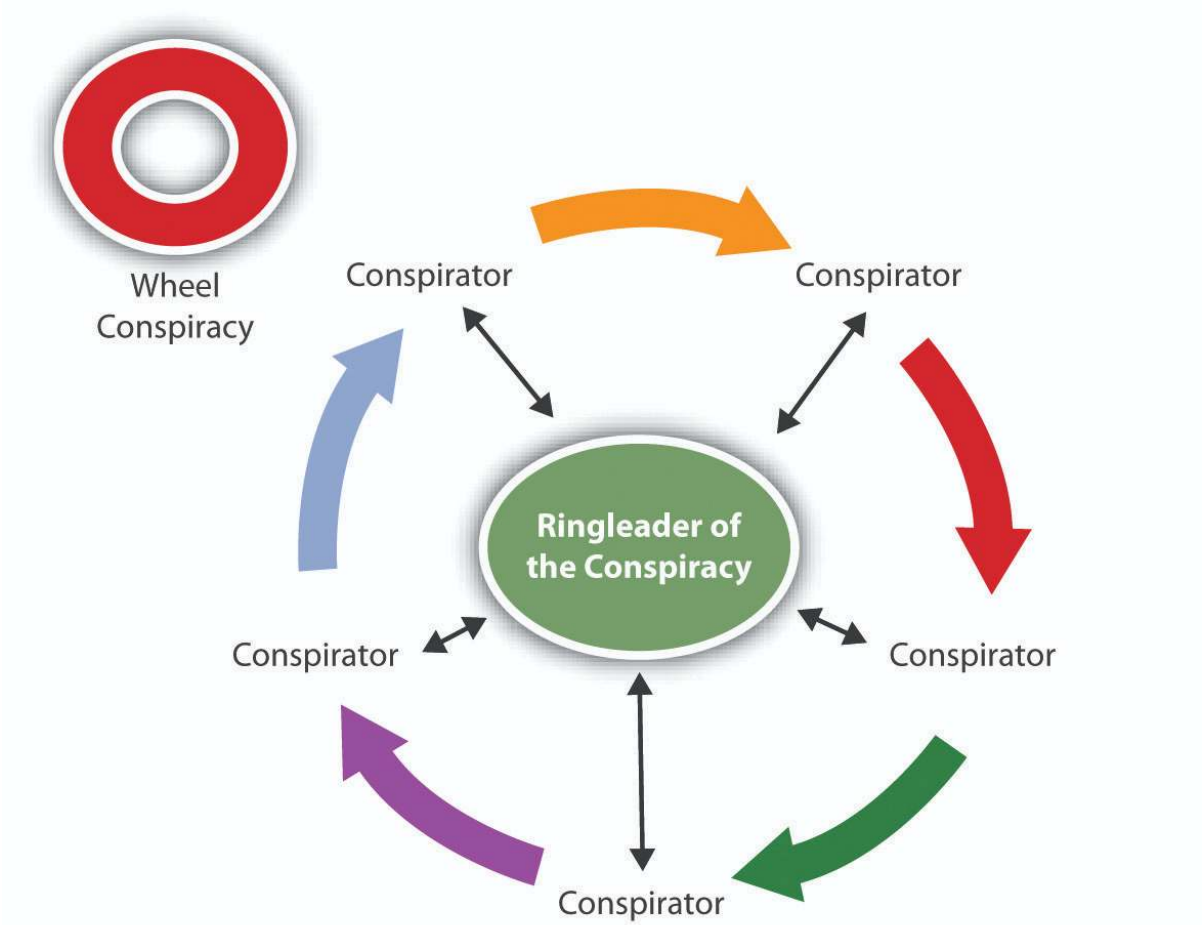
A conspirator need not know his co-conspirators' identities. AS 11.31.120(b). As long the conspirator has consciously entered into the conspiracy, "the offender is guilty of conspiring with that other person or persons to commit [the target] crime whether or not the offender knows their identities." *Id*. This caveat is important given the structure of many sophisticated, large-scale conspiracies. Sophisticated conspiracies may organize to intentionally *defuse individual knowledge* about the criminal participants and activity. For example, a criminal organization illegally distributing narcotics in the state may intentionally refuse to share participant identities within the organization. Such security protocols are designed to thwart law enforcement. Although such actions may be effective in limiting criminal investigations, they will not act as a defense to a prosecution of conspiracy.

There are two basic large-scale conspiracy organizational formats: wheel and chain conspiracies. A **chain conspiracy** refers to a group of people who each have a role in carrying out specific actions that lead to a successful criminal outcome. Chain conspiracies operate linearly, like links in a chain but without a central ringleader. An example of a chain conspiracy is a conspiracy to manufacture and distribute heroin, with the manufacturer linked to the transporter, who is linked to the large-quantity dealer, who thereafter sells to a smaller-quantity dealer, who sells to a customer. None of the conspirators may know the identity of the person above (or below) their contact.

A **wheel conspiracy** has a key person at its center (a ringleader), known as the "hub" who has contact with other members of the conspiracy, known as the "spokes." The ringleader is interconnected to every other coconspirator. An example of a wheel conspiracy would be a mob boss linked to individual members of the mob following specific commands, all for the benefit of the larger criminal organization.

Whether the conspiracy is wheel, chain, or more informal, individual conspirators need not personally know other members of the conspiracy, and as a result, may be criminally responsible for the conspiracy and the target crimes. Similar to accomplice liability, the failure to prosecute one party to the conspiracy does not relieve a coconspirator from criminal responsibility.

Figure 6.3 Comparison of Wheel and Chain Conspiracies



Merger Doctrine

Unlike the law of attempt and solicitation, conspiracy *does not* merge with the substantive offense if completed. This is a significant departure from other inchoate offenses. An offender may be prosecuted, convicted, and sentenced for *both* conspiracy *and* the completed target crime. *See Lythgoe v. State*, 626 P.2d 1082 (Alaska 1980)

Defense to Conspiracy – Renunciation

Conspiracy has a long reach – the conspirator need not know their co-conspirators, and if successful in their criminal objective, an offender will be punished for both the conspiracy and the completed crime. But the law of conspiracy is not without its limits. As with other inchoate offenses, a defendant can avoid criminal liability if they freely and completely renounce their criminal intent. AS 11.31.120(f). Similar to other inchoate crimes, renunciation means giving up, refusing, or abandoning the criminal objective.

Renunciation is an affirmative defense to a conspiracy if the defendant manifests "a voluntary and complete renunciation of the defendant's criminal intent" and prevents the target crime from occurring. AS 11.31.120(f). The defendant needs to take affirmative steps to prevent the target crime. The code requires the defendant to either (1) give a timely warning to law enforcement, or (2) make proper efforts "that prevented the commission of the crime." In other words, it is not enough that the conspirator attempted to prevent the conspiracy; to relieve oneself of criminal liability, the conspirator must successfully prevent the target crime.

Also, other co-conspirators do not receive the benefit of one's renunciation. A complete renunciation of one conspirator does not relieve other conspirators of criminal liability.

Example of Renunciation

Remember Shelley and Sam? Let's assume that after Shelley and Sam agree to rob Valerie at the gas station, Shelley has a change of heart. Before she returns to the bar to meet Sam, she contacts law enforcement and tells them about their plan. Detectives ask Shelley to help them apprehend Sam, and she agrees. Shelley drives to the bar to pick up Sam, and then drives them both to the gas station. Unbeknownst to Sam, the detectives have replaced Valerie with an undercover officer. As soon as Sam pulls out his gun he is arrested. The robbery is unsuccessful. Shelley has likely renounced her participation in the conspiracy – she is likely not guilty of conspiracy (or the completed robbery). Sam, on the other hand, is likely guilty of both conspiracy to commit first-degree robbery and first-degree robbery. Shelley's voluntary and complete renunciation does not relieve Sam of his criminal liability.

Grading

Similar to both attempt and solicitation, conspiracy is typically graded lower than the target offense. AS 11.31.120(i). If the target offense is classified as an unclassified offense, then conspiracy is a class A offense. If the target offense is a class A felony, then conspiracy is a class B felony offense. Class B and C felony offenses are reduced respectively. The one exception is conspiracy to commit first-degree murder. A person convicted of conspiring to commit first-degree murder remains convicted of an unclassified felony offense.

Conspiracy versus Accomplice Liability

It is important to distinguish the law of conspiracy from the law of legal accountability (accomplice liability). While there can be significant overlap, they are separate and distinct legal concepts. First, the *actus reus* is different. Under legal accountability, an accomplice is criminally liable to the same extent as the principal so long as the accomplice "aids, abets, or assists" the principal. AS 11.16.110. With conspiracy, the conspirators must agree to the conspiracy and one of the co-conspirators must take an overt act in furtherance of the conspiracy. (Accomplices need not agree to the conspiracy; instead, they simply must aid, abet, or assist the target crime.) Second, the resulting harm is different. Although accomplice liability is broad, the principal must be successful in the target crime. Conspiracy, on the other hand, is an inchoate offense. The object of the conspiracy need not occur. Finally, conspiracy is limited in scope. Conspiracy only applies to serious felony offenses. Accomplice liability is applicable to all criminal offenses.

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6.4: End-of-Chapter Material

Summary

All inchoate crimes are incomplete and anticipatory. By their very definition, inchoate crimes might never be completed. The rationale for punishing a defendant for an inchoate crime is prevention and deterrence. The three inchoate crimes are attempt, solicitation, and conspiracy. All inchoate crimes are specific intent or purpose crimes – the defendant must intend to accomplish the underlying criminal objective.

Attempt punishes an unsuccessful effort to commit a crime, solicitation punishes an effort to persuade another individual to commit a crime, and conspiracy punishes an agreement to commit a crime when combined with an overt act in furtherance of the agreement.

The *actus reus* of attempt requires more than criminal thoughts or mere preparation. Modern US jurisdictions have adopted one of four tests: (1) the dangerous proximity test, (2) the probable desistance test, (3) the *res ipsa loquitur* test, or (4) the substantial step test (as developed by the Model Penal Code). Alaska has adopted the substantial step test. The substantial step test requires the defendant to engage in such conduct that demonstrates a clear and definitive intent to complete the crime. Examples of a substantial step include lying in wait, casing the potential crime scene, or gathering the instrumentalities needed for the crime.

Alaska has specifically criminalized certain preparatory behaviors, including the possession of burglar's tools. Preparatory crimes may be combined with attempt under appropriate circumstances.

There are two types of impossibility – legal and factual. Neither is a defense to attempt in Alaska. Legal impossibility occurs if the defendant mistakenly believes that the act attempted is illegal, when in fact, it is legal. Factual impossibility occurs if the crime cannot be completed because the facts are not as the defendant believed them to be.

Solicitation is asking another person to commit a crime. The voluntary act requires the person to request through words or conduct the other person commit a crime. Solicitation is sometimes referred to as a "double inchoate" crime or "attempted conspiracy".

Conspiracy is an agreement between two or more individuals to commit a serious felony offense. A serious felony offense is a small, limited number of serious crimes. Conspiracy requires the conspirators to agree to commit the target criminal offense and commit an overt act in furtherance of the conspiracy. Unlike attempt, the overt act in furtherance of the conspiracy may be planning or preparatory activity. The overt act must simply be enough to demonstrate that conspirator intends to complete the target crime.

Conspiracies need not be formal, sophisticated arrangements. Informal agreements may suffice. There are two types of large-scale conspiracies. Chain conspiracies are linear in progression. Wheel conspiracies consist of a ringleader in the hub and other members of the conspiracy as the spokes. A conspirator need not know the identities of their co-conspirators. Conspiracy, unlike attempt and solicitation, does not merge with the completed offense.

Voluntary renunciation is a defense to all inchoate crimes. Renunciation means giving up, refusing, or abandoning one's criminal objective. The renunciation must be voluntary and complete. A renunciation is not voluntary and complete if it is motivated by the belief of detection or apprehension or a decision to postpone the criminal conduct until a different time.

Most inchoate crimes are graded lower than the completed crime. The exception tends to be murder – attempted murder, solicitation to commit murder, and conspiracy to commit murder are not graded lower than the completed crime. Nonetheless, most sentencing courts recognize that an incomplete murder is less serious than a completed murder.

Key Takeaways

- An inchoate crime is a crime that might not be completed.
- All inchoate crimes are specific intent crimes.
- The four tests jurisdictions use to ascertain the criminal act element required for attempt are proximity, *res ipsa loquitur*, probable desistance, and substantial step.
- The proximity test determines how close the defendant is to committing the crime by analyzing how much is left to accomplish after preparation for the offense.
- The *res ipsa loquitur* test, also called the unequivocally test, examines the defendant's actions at a moment in time to determine whether the defendant has no other purpose than committing the crime at issue.

- The probable desistance test analyzes whether the defendant has progressed so far that it is probable he or she will not desist without interruption from law enforcement or other intervening circumstances.
- The substantial step test is the Alaska test and ascertains whether the defendant has completed sufficient steps toward the commission of the crime that are corroborative of the defendant's criminal intent.
- Preparatory crimes criminalize preparing to commit a crime, which would be a stage that is too premature to constitute the criminal act element required for attempt.
- Impossibility is not a defense to attempt. Neither legal impossibility nor factual impossibility is a defense.
- Factual impossibility means the defendant cannot complete the crime because the facts are not as the defendant believes them to be. Legal impossibility means the defendant believes he or she is attempting to commit a crime, but the defendant's actions are actually legal.
- Voluntary renunciation is similar to voluntary abandonment and occurs when the defendant voluntarily and completely withdraws from the commission of the offense before it is consummated.
- Attempt merges into the completed offense, which means that a defendant cannot be punished with attempt and the completed crime.
- Alaska grades attempt lower than the completed offense, with the exception of attempted murder.
- Solicitation is an inchoate crime because the crime that is solicited may not be completed.
- The voluntary act required for solicitation is words or conduct that encourages another to commit a crime.
- Voluntary renunciation is an affirmative defense to solicitation if the defendant voluntarily and completely renounces his or her criminal purpose and thwarts the commission of the solicited crime.
- Solicitation is graded lower than the completed offense with the exception of solicitation to commit murder.
- Conspiracy is an agreement to commit a serious felony offense. Conspiracy is the most serious inchoate offense.
- The voluntary act required for conspiracy is an agreement to commit the serious felony offense
- One of the conspirators must commit an overt act in furtherance of the conspiracy. The overt act can be preparatory activity
- Failure to prosecute one coconspirator does not prohibit the prosecution of other coconspirators in some jurisdictions.
- A coconspirator does not need to know every other coconspirator; as long as a coconspirator is aware that there are other members, he or she can be criminally responsible for conspiracy.
- A wheel conspiracy connects all members to one central member. A chain conspiracy interconnects the members in a linear fashion.
- Renunciation is an affirmative defense to conspiracy if the defendant voluntarily and completely renounces the conspiracy and thwarts the crime that is its object.
- Conspiracy does not merge like attempt; a defendant may be convicted of conspiracy and the crime conspired.
- Conspiracy is generally graded lower than the conspired offense. Conspiracy to commit murder is the exception.

Answers to Exercises

From Solicitation

1. Nancy has committed **solicitation** to commit counterfeiting, which in Alaska is a first-degree forgery. AS 14.46.500(a)(1). It is of no import that Jennifer refuses Nancy's request because the criminal act element of solicitation is requesting another to commit a crime, not a mutual understanding or agreement (like conspiracy).
2. John has likely committed **solicitation** to commit robbery. John had the intent to cause another to engage in conduct constituting a crime and he solicited another person, Bob, to engage in that conduct.

   John has also committed the completed crime of robbery since he was an accomplice to the crime as a result of the solicitation. Note that the crime of solicitation *merges* with the completed crime if successful. Thus, John will only stand convicted of the completed crime of robbery under an accomplice theory.

   It is not a defense that a person whom the defendant solicits could not be guilty of the crime that is the object of the solicitation. As we will discuss in a subsequent chapter, while Bob might be charged with a crime, Bob likely remains incompetent, and thus, could not be prosecuted for the robbery. But Bob's incompetency is not a defense against John's criminal liability.

> Finally, John cannot claim the affirmative defense of renunciation since that defense requires that the solicited crime be prevented, something that John did not do, despite his best efforts.

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CHAPTER OVERVIEW

7: Criminal Defenses (Justification)

7.1: Criminal Defenses – General Principles

7.2: Self-Defense

7.3: Other Use-of-Force Justification Defenses

7.4: Necessity and Duress

7.5: Consent

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7.1: Criminal Defenses – General Principles

Our collective human experience recognizes that most individuals engage in criminal behavior for a reason, be it anger, survival, greed, mental illness, desire, or fear. Some reasons are acceptable, some are not. Over the next two chapters, we will explore when a reason legally excuses or legally justifies criminal behavior.

Recall that the American criminal legal system is based on the presumption of innocence. All criminal defendants are presumed innocent of the crime charged. The presumption remains unless the government can prove the defendant guilty beyond a reasonable doubt. *See In re Winship*, 397 U.2. 364 (1970). This burden applies to every essential element of the crime. If the government fails to establish the defendant's guilt beyond a reasonable doubt, the trier of fact *must* acquit the defendant. Due process demands the government carry this burden through the entire trial; the burden of proof never shifts to the defendant.

Since a criminal defendant is never required to prove their innocence, a defendant is permitted to simply sit back and wait for the prosecution to meet its burden of proof. The government's failure to meet its burden of proof is sometimes referred to as a **failure of proof** defense. The next two chapters focus on a different type of defense – those criminal defenses in which the defendant affirmatively denies the charge due to the existence of a non-constitutional, **statutorydefense**.[1] In fact, most criminal defenses are statutory, and because of this there is little overlap between jurisdictions. Although most states authorize similar defenses to criminal conduct, individual legislatures frequently limit or expand the availability of a particular defense depending on the desires of the electorate. The next two chapters explore criminal defenses applicable in Alaska.

Some Evidence

Although a defendant is always permitted to sit back and force the government to prove its case beyond a reasonable doubt, a defendant may only raise a defense if there is a factual basis to do so. The law requires a defendant to present "**some evidence**" of a defense (affirmative or otherwise) before the jury may consider it. "Some evidence" is a term of art, and typically means "there is evidence from which a reasonable juror could entertain a reasonable doubt as to the defendant's guilt." *See Weston v. State*, 682 P.2d 1119, 1121 (Alaska 1984). It is not a high burden; it is designed to ensure that the jury focuses on the *relevant* facts during trial, and not waste its time on interesting but largely irrelevant factual disputes.

Example of Not Establishing Some Evidence

Jim is on trial for the murder of Fred. According to the government, Jim and Fred have a long-standing hatred toward each other. On the night of the homicide, the government alleges that Jim walked up to Fred's house, rang the doorbell, and waited for Fred to answer the door. As the door swung open, Jim shot Fred in the chest at point-blank range, killing him instantly. The government alleges that the murder was recorded on Fred's home surveillance camera system. Jim claims he did not kill Fred and argues that the video recording of the murder is too pixelated to clearly make out who shot Fred. Jim intends to rely on the government's inability to prove his identity beyond a reasonable doubt. Under this scenario, Jim would *not* be entitled to argue he shot Fred in self-defense. There is no evidence, nor is there any reasonable interpretation of the evidence, that would justify a reasonable juror to believe Jim was justified in killing Fred.

Categorization of Criminal Defenses

Not all criminal defenses operate in the same manner. Some must be *disproven* by the government (a defense), while others must be proven by the defendant (an affirmative defense). Some completely *exonerate* the defendant of criminal wrongdoing (*e.g.*, perfect defense), while others simply *reduce the severity* of the offense (*e.g.*, imperfect defense). Some defenses are questions of law (a legal defense), while others are issues of fact (a factual defense).

Defense versus Affirmative Defense

Most legislatures classify criminal defenses as either a "defense" or "affirmative defense." The law treats **defenses** as the equivalent of an element of the crime, requiring the government to disprove the defense beyond a reasonable doubt. AS 11.81.900(19). **An affirmative defense**, on the other hand, operates *independently* of the government's burden of proof. Unlike a defense, an affirmative defense must be proven by the *defendant* by a preponderance of the evidence. AS 11.81.900(b)(2). It is the defendant's burden to prove an affirmative defense.

Example of an Affirmative Defense

Remember Matthew, Melissa, and the neighbor's pesky dog from the last chapter? Melissa purchased rat poison and Matthew covered a filet mignon with it, with the intent to kill the neighbor's pesky pet. After Matthew threw the filet over the fence, Melissa changed her mind. She climbed over the fence, picked up the filet, and took it back to her house for disposal. Melissa sought to avoid criminal liability for attempted animal cruelty using the affirmative defense of renunciation. Because renunciation is an affirmative defense, Melissa bears the burden of proving its existence – that is, Melissa must prove, by a preponderance of the evidence, that she freely and voluntarily abandoned her intent to harm the dog and that she took steps to prevent the crime. The government need not prove any of the elements of renunciation.

Justification and Excuse

Most criminal defenses are categorized as either a justification defense or an excuse defense. A defendant who relies on a **justification defense** is asserting that his behavior was legally justified. The underlying principle is that the harm *avoided* by the defendant's conduct far outweighs the harm *caused* by the defendant's conduct. Put another way, with a justification defense, society is affirmatively condoning the defendant's conduct. A defendant who relies on an **excuse defense** is *not* claiming they were justified in their actions, but claiming that they should not be held responsible for their actions because of a circumstance that prevented them from acting lawfully. In other words, with an excuse defense, the defendant is asking the trier of fact to *excuse* their criminal conduct based on a unique condition that prevented them from acting lawfully. Common criminal defenses are categorized as either justification or excuse below:

Justification Defenses	Excuse Defenses
Self-defense / Defense of others	Insanity
Defense of property	Infancy
Duress	Voluntary intoxication
Necessity	Heat of passion

Perfect versus Imperfect Defenses

A closely related concept is the difference between perfect and imperfect defenses. A criminal defense that completely exonerates a defendant of a crime is referred to as a **perfect defense**. Self-defense is a common perfect defense. A criminal defendant who successfully proves they acted in self-defense is relieved of all criminal liability surrounding the original criminal conduct. Conversely, an **imperfect defense** simply reduces the severity of the defendant's criminal conduct. Heat-of-passion is an imperfect defense in Alaska. A defendant who successfully proves they killed under a heat of passion still stands convicted of homicide, albeit a lower classification, manslaughter. The difference between the two is significant – a perfect defense results in an acquittal, whereas an imperfect defense results in a conviction for a less serious offense.

Definition of Factual and Legal Defenses

A defense must be based on specific *grounds*. If a defense is based on an issue of fact, it is a factual defense. If a defense is based on an issue of law, it is a legal defense.

Example of Factual and Legal Defenses

Armando is charged with the burglary of Roman's residence. Armando decides to pursue two defenses. First, Armando claims that it was 35 degrees below zero on the night of the burglary and he broke into Roman's residence to avoid freezing to death. This is called the defense of necessity and is a factual defense; it is based on the *fact* that Armando faced a *bona fide* emergency and committed the burglary to avoid a greater harm. Second, Armando claims that the government is prohibited from prosecuting him for burglary because the statute of limitations has expired. A statute of limitations defense is a legal defense because it is based on a *statute* that requires the government to bring all criminal prosecutions within a specified timeframe.

1. We have previously explored various constitutional defenses to criminal law enforcement. For example, both the U.S. and Alaska constitution prohibits criminal punishment from being applied retroactively. If a law attempts to punish conduct that was not criminal at the time it was committed, the *ex post facto* clause would operate as a constitutional defense to any criminal charge. We will now focus on statutorily created defenses, which normally exist independent of the constitution. ↵

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7.2: Self-Defense

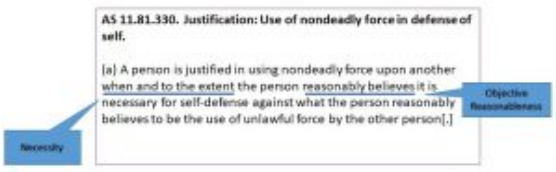
Self-defense is one of the most litigated justification defenses. Self-defense (*i.e.*, the need to defend oneself from physical harm) is frequently misunderstood and misapplied in everyday nomenclature. To understand self-defense (formally referred to as the "use of force justification"), one must first understand the underpinnings of the defense.

Self-defense is an inherent right grounded in **natural law**. Everyone has a fundamental right to be free from harm or the threat of harm. It is part of our primal instinct of self-preservation – *i.e.*, when confronted with a perceived or real threat of harm, our body naturally engages in a "fight or flight" physiological response. We seek to repel harm directed at us. This natural reaction informs the law. Recall that in *District of Columbia v. Heller*, 554 U.S. 570, 628 (2008), the US Supreme Court held that the Second Amendment prohibited government regulation of a handgun in the privacy of one's own home *because* of our inherent right to protect ourselves. Our fundamental right to bear arms exists *because* of our fundamental right of self-defense. *See id*. Thus, while individual states have the right to expand or restrict a citizen's right to claim self-defense for otherwise criminal behavior, an outright elimination of the right to self-defense is likely unconstitutional.

But remember that no right is absolute. Every jurisdiction has authorized the use of force under certain circumstances, but such laws vary greatly. Some states have an expansive view of self-defense while others have a narrow view. At its core, self-defense laws are a series of legislative value judgments about the need (and right) to use physical violence to prevent harm. This chapter focuses on the use of force justification as authorized under Alaska law. Alaska treats self-defense as a "defense," meaning the government must *disprove* its existence beyond a reasonable doubt. The defendant need not prove he was justified in using force, but instead, the government must prove that self-defense was not applicable. Not all jurisdictions follow this model. Some states treat self-defense as an imperfect defense or an affirmative defense.

While each state is free to establish the parameters of self-defense, most self-defense statutes contain two basic principles: necessity and proportionality. These two interrelated concepts form the basis of all self-defense laws – the degree of force must be **necessary** to protect the person against future harm, and the degree of force must be **proportional** and **reasonably related** to the harm threatened. Alaska law largely focuses on the first element and less on the second. In Alaska, the central question in any self-defense case is: was the defendant's use of force *necessary* under the circumstances? As you will see, this question is sometimes difficult to answer.

Figure 7.1 Justification: Use of Nondeadly Force Diagram.



Alaska treats self-defense as a *perfect* defense. If the defendant's use of force was objectively necessary, the defendant is exonerated of any criminal wrongdoing; the defendant was *legally justified* in the use of force. Alaska authorizes a person to use force "when and to the extent the person reasonably believes it is necessary for self-defense against what the person reasonably believes to be the use of unlawful force by the person." AS 11.81.330(a). As you can see, Alaska self-defense is relatively expansive, but limitations do exist.

Self-Defense is the Use of Force

Self-defense justifies the use of "force" to repel harm. Therefore, self-defense is not a defense to any crime that does not criminalize the use of force. Put another way, self-defense applies to crimes like assault, sexual assault, homicide, or robbery. It does not apply to crimes that do not involve force like drug-trafficking or DUI. That is not to say that a *different* justification or excuse may apply, but self-defense only applies when seeking to repel violence or the threat of violence. Further, the force being used against the defendant must be unlawful. A person may not use force to repeal lawful force. For example, a person may not claim self-defense when they are being lawfully arrested. AS 11.81.370.

Necessity – Imminency Requirement

A defendant cannot use force unless such force is *necessary* to prevent a *future* harm. The threat of harm must be *imminent*. AS 11.81.900(b)(27). The law does not allow retaliatory or preemptive strikes. If a person is not faced with an *immediate* threat of harm, a person is not justified in using self-defense. In the eyes of the law, the appropriate response is to seek lawful intervention (*i.e.*, notify law enforcement, seek judicial intervention, and the like). The law does not permit "self-help" remedies. Similarly, the law does not allow the use of force to remedy a past or previous attack. Retaliatory attacks – attacks that are motivated by anger or malice – are not permitted.

Ha v.*State*, 892 P.2d 184 (Alaska App. 1995)

Ha v. State is an example of when, and to what extent, a person may use force when confronted by an attacker. As you read *Ha*, ask yourself if you found the defendant's fear *reasonable* under the circumstances. If not, why not?

892 P.2d 184
Court of Appeals of Alaska.
Xi Van HA, Appellant,
v.
STATE of Alaska, Appellee.
March 31, 1995.

OPINION

MANNHEIMER, Judge.

Xi Van Ha appeals his conviction for second-degree murder, AS 11.41.110(a)(1). As explained in more detail below, the superior court refused to allow Ha to argue self-defense to the jury. … On appeal, Ha contends that the superior court should have instructed the jury on self-defense[.] We conclude that the superior court correctly resolved [this] issue, and thus we affirm Ha's conviction.

Ha came to the United States from Vietnam in 1980. He lived in California for ten years and then, in 1990, he moved to Dillingham, where he worked as a fisherman, a trade he had pursued both in his native country and in Malaysia. Despite his years in the United States, Ha's English remained rudimentary.

On June 7, 1991, Ha was employed to fish aboard the F/V (fishing vessel) Ultimate. After work on June 7th, Ha and his long-time friend Tran Gioi were socializing in the Willow Tree Bar in Dillingham. Later that evening they were joined by other Vietnamese fishermen. Among the new arrivals were Ly Van Hop and Buu Van Truong. Ha knew Buu and his family from the Vietnamese community in California, and he was also aware that Buu and Ly were roommates in Dillingham.

The men shared drinks in the Willow Tree; Ha later testified that he thought Buu was drunk by the time they left the bar. Ha, Tran, Ly, and Buu returned together to the Ultimate after Ha volunteered to reheat some leftover food. Ha later testified that his invitation to cook food was directed only to Tran and Ly. Ha did not wish to socialize with Buu because Buu was known as a violent person. According to Ha, Buu's family in California had a reputation for violence; Ha testified that, in California, Buu and his brothers (as well as other family members) had been known to threaten and beat people who crossed them. Knowing that Buu had been drinking, Ha suspected that Buu would be even more prone to violence.

The four men reached the boat and went aboard; Ha started the generator to heat the stove. While they waited for the stove to heat up, Ha's friend Tran lay down on a bunk, while Buu's friend Ly went out on deck. After about fifteen minutes, Buu began to get impatient that the food was not yet heated. He began to harass Ha, swearing at Ha and making comments such as "fuck your mother". Ha started swearing at Buu and told him to get off the boat. In response, Buu began to beat Ha. Ly ran in from the deck to assist Buu. Ly held Ha's arms to his side while Buu continued to beat him. Buu seized Ha by the hair and struck his face and head repeatedly with his fists.

As the beating continued, Ha began shouting for help. He yelled to his friend Tran, "Gioi, come out and … fight: Buu is hitting me and killing me!" At one point, Ha yelled, "I'm dying!" When Tran heard Ha's cries for help, he rose from his bunk and came to Ha's aid. Tran physically separated Buu from Ha, but Buu was able to strike Ha four or five more times before he was pulled away. Ha testified that, at times during the beating, Buu hit him so hard that he fell down. Ha also testified that the attack left him with blurred vision.

Buu and Ly left the Ultimate, but they returned a few minutes later. This time, Buu was armed with a hammer. Buu came at Ha, screaming, “I’m going to kill you, and I will strike you until you die!” Buu swung the hammer at Ha’s head, but Ha jumped from the Ultimate to the F/V Misty, which was berthed alongside. When Buu followed Ha onto the Misty, Ha ran into the cabin and held the door closed. Buu stood outside the cabin and, through the glass in the door, he shouted, “Fuck your mother! I will strike you and I will kill you!”

Buu continued his tirade for four or five minutes until Ha’s friend Tran ran aboard the Misty and grabbed the hammer from Buu’s hand. Ly came aboard too and escorted Buu away. Ha remained on the Misty for several minutes before returning to the Ultimate.

That night, Ha could not sleep. He feared that Buu was bound to return and kill him as he had promised. Tran attempted to reassure Ha, but Ha remained awake after his friend fell asleep. Ha’s head was throbbing in pain. He paced throughout the boat.

As he paced, Ha remembered that there was a rifle aboard the Misty; Ha had previously used this weapon to shoot at birds while he was fishing. Ha went back to the Misty, retrieved the weapon, and loaded it.

Ha later testified that he was “very frightened”. He lay awake on his bunk throughout the night, with the rifle at his side, “the voice of Mr. Buu … resounding in [his] ears”. Tran awoke and left the boat around 7:00 or 8:00 the next morning. Ha continued to lie awake on his bunk, thinking about Buu, the rifle still underneath his blanket. Several hours later (around 8:00 in the morning), Victor Sifsof, the owner of the boat, came aboard.

Ha was still lying on his bunk when Sifsof arrived. Sifsof spoke to Ha about mending nets that day, but Ha’s head was still giving him great pain. Ha told Sifsof about the beating he had received from Buu and Ly the night before—that his head still hurt and his vision was still blurred. Sifsof saw that Ha was still very upset, even though he was acting sluggish. Ha told Sifsof that the two men who had attacked him worked on a boat owned by Billy Johnson, another local fisherman. Sifsof told Ha that he would speak to Johnson about his employees.

Around 10:00 that morning, Ha and Sifsof moved the Ultimate to a different location in preparation for the upcoming fishing opening. While the men were working, Ha left the rifle in his bunk. The Ultimate’s new location happened to be closer to Johnson’s boat, the boat on which Buu worked. Sifsof then left Ha alone on the Ultimate. The pain in Ha’s head grew worse, and Ha became more frightened, realizing that he was closer to Buu. In his head, Ha heard Buu’s voice becoming stronger and stronger, and he became more and more frightened. He lay down to try to sleep, but he found he could not. Ha tried to think of someone who could help him, but he was unable to think of anyone who could. Ha testified that Buu’s voice remained in his head; he stated, “I [did] not think that I should call the police to help me—[b]ecause [Buu’s] voice was just so ferocious and it stayed in my ears.”

Finally, Ha retrieved the rifle from his bunk, left the Ultimate, and went in search of Buu. He kept the rifle hidden underneath his jacket. Ha later testified, “[M]y head was controlling my actions, and it was commanding me to go kill [Buu].”

Shortly after noon, Ha went to where he believed Buu was working. When he discovered that Buu was not there, Ha sat down for a while to wait for him. Ha then loitered in the vicinity of Buu’s boat, where he was observed by other Vietnamese fishermen, including Buu’s friend Ly. Ly saw Ha carrying a long object concealed under his jacket. Although Ha apparently did not remember speaking to anyone at the boat, Ly testified that he approached Ha and spoke to him. After learning that Ha was searching for Buu, Ly begged Ha to go back home. Ha refused.

A little later, Ha encountered his friend Charlie Tran. Tran observed that Ha was trembling and pale. Tran asked what was wrong and Ha responded, with seeming difficulty, that Buu had assaulted him and threatened to kill him. When Tran asked Ha what he was carrying under his coat, Ha told him, “This is none of your business.” Tran urged Ha to let the incident pass, but Ha replied, “How can I let it go? Last night he beat me up and told me he was going to kill me; he already threatened to kill me. If he doesn’t kill me today, he’ll kill me tomorrow.”

At 1:30 in the afternoon, Ha spotted Buu returning from a grocery store, carrying a bag of groceries. With Buu’s voice still speaking in his head, Ha pulled out his rifle and ran towards Buu from behind. Ha repeatedly shot Buu in the back, firing the rifle thirteen times until he had emptied the weapon of ammunition. Buu was struck by seven of these rounds; he died immediately.

At trial, Ha testified that, after shooting Buu, he simply turned around and went back to the Ultimate. In contrast, another witness to the shooting testified that Ha walked up to Buu’s body, kicked dirt on it, and then, in English, swore at Buu and said to the corpse, “I told you I was going to kill you.”

Upon his return to the Ultimate, Ha changed his shirt, replaced the rifle in his bed, and hid. The police arrived and searched the boat, but they did not find Ha. Later, Ha heard Victor Sifsof's voice. Ha emerged, holding his head, and explained to Sifsof that he might have to go to jail. Sifsof advised Ha to obtain an interpreter and go to the police, but Ha was reluctant to do this. Eventually, the police returned to the boat, found Ha, and arrested him.

Ha was indicted and tried for first-degree murder. The jury was instructed on the lesser included offenses of second-degree murder and manslaughter (under a heat of passion theory). The jury ultimately acquitted Ha of first-degree murder but found him guilty of second-degree murder.

Should the Trial Court Have Instructed the Jury on Self–Defense?

From the beginning of trial, Ha argued that he had acted in self-defense. In the defense opening statement to the jury (which was delivered immediately after the prosecutor's opening statement), Ha's attorney described how Buu had attacked Ha and threatened him with death; the attorney then continued:

DEFENSE ATTORNEY: [V]iolence was not uncommon for Buu. You will hear about this man and his dark, brooding, combative nature…. And I invite your close scrutiny and attention as the evidence comes in regarding [Buu's] character, because you will come to understand and appreciate not only the dark, dangerous, deadly side of this man, but also the significance of his threats. For anyone who knew Buu did not take his threats lightly. A threat from Buu that he would kill you was as good, had as much weight, as a kiss on [the] cheek by a … Mafia godfather. That's how deadly Buu's threats were.
….
From knowing Buu, [Ha] knew that there was no escape. You see, Buu comes from … a family of thugs who have a reputation for violence and extortion. You will hear that…. [Ha knew that] he would have to deal with the family, or with Buu himself. Today, tomorrow, they would stalk him down.

At the close of the evidence, Ha submitted proposed instructions on self-defense, but Superior Court Judge Milton M. Souter questioned whether the evidence supported all the elements of self-defense. Specifically, Judge Souter questioned whether there was any evidence that Ha faced imminent harm when he shot Buu.

THE COURT: There's something missing from the [proposed] self-defense instructions that I've already read, and that is the requirement of imminency of harm coming from the aggressor…. [AS] 11.81.330 states, [in] part (a), [that] "a person may use … force upon another when and to the extent that person reasonably believes it is necessary for self-defense against what the person reasonably believes to be the use of unlawful force by the other"…. And [if] you look to [AS] 11.81.900[(b)], subpart [(23)], … " 'force' means any bodily impact, restraint, or confinement, or the threat of imminent bodily impact, restraint, or confinement"…. So it's clear to me [that] … the definition of "force" … includes the requirement of imminency of threat of use of force as part of the definition…. It's not included in any of these self-defense instructions that I've seen.

And I don't even know if self-defense is appropriate … in this case, because I'm not aware of any evidence that shows any imminency of [harm]…. Bearing in mind that the altercation … between these two men took place a good twelve hours before the killing[,] given the fact that it's uncontradicted that the defendant stalked this man for over an hour before he killed him [, and] [g]iven the fact [that] there's absolutely no evidence that the victim approached the defendant in the hour or hour and a half before the shooting, there was no imminency here at all…. I don't see it. And I'm going to want to be hearing argument on that.

Ha's attorney responded:

DEFENSE ATTORNEY: I think "imminency" [is viewed through] the eyes of the person asserting justifiable force. Not whether … an independent person such as the judge looking at the evidence would see … imminency under the facts, but whether in [the] defendant's mind he felt that he was in imminent danger. I think there's been overwhelming evidence … that he was in imminent fear.

Ha's attorney then analogized Ha's case to cases involving the "battered woman syndrome". The defense attorney claimed that, in cases where battered women shot their husbands while they slept, courts had ruled that the trial juries should receive instructions on self-defense. The defense attorney told Judge Souter:

DEFENSE ATTORNEY: [T]he fact that Buu was shot from behind is irrelevant, just like the fact that a husband is shot while he's asleep. I think what the court has to [ask], and what the jury has to [ask], is, did the defendant feel that he was in imminent fear for his own safety? That's the first prong of self-defense. And then, on the second prong, … would a reasonable person under like

circumstances, another person who was in the situation of the defendant, given [the defendant's] background, experience, and what have you—how would that person feel? … The jury may find that [Ha] was in imminent fear, but they may find that the reasonable person would not have been…. [Nonetheless], I think we meet the "some evidence" test…. [This is] an issue for the jury to decide.

Despite the defense attorney's argument, Judge Souter ruled that he would not instruct the jury on self-defense. He found that there was not a "single shred of evidence [to indicate] any imminency of harm or threat of harm facing [the defendant] at the time that he stalked [the victim] for an hour to an hour and a half, and shot him in the back and killed him…. It's absolutely, abundantly clear to me that an essential element of the self-defense justification [is] totally missing in this case."

The next morning, Ha's attorney renewed his argument for self-defense. He pointed to the evidence tending to prove that Ha had been in fear for his life and that a reasonable person in Ha's position would also have been afraid. The defense attorney argued,

DEFENSE ATTORNEY: You'd have to [ask] how would another Vietnamese, knowing how Vietnamese behave, knowing how, when Vietnamese make a public threat, that they carry it out and that you should take those threats seriously, knowing that this person making the threat has a violent temper [and] usually carries out his [threats]. You've got to take all of those circumstances into consideration and then ask yourself, would another person under those circumstances act the same way?

However, Judge Souter again concluded that the evidence did not justify an instruction on self-defense.

THE COURT: The evidence in this case is absolutely devoid of any evidence that there was … any threat of imminent harm from Mr. Buu to this defendant. The evidence is absolutely clear … that this defendant, even according to his own testimony, stalked the victim, looking for him for better than an hour before he … shot him in the back, gunned him down…. The victim was unarmed. Any threat of harm … had been made twelve to thirteen hours earlier. This is the uncontradicted state of this record. To an objective third-party observer, that could not possibly amount to imminency of threat of harm…. [I]f somebody beats you up and threatens to hurt you some more, the next day you can stalk them down and kill them? That's not the law of this state[.]

[…]

In Alaska, all use of force in self-defense is governed by AS 11.81.330(a). If the force used in self-defense rises to the level of deadly force as defined in AS 11.81.900(b)(12), then a claim of self-defense must additionally satisfy the requirements of AS 11.81.335. Section 335(a) limits deadly force to situations in which (1) the force is justified under AS 11.81.330 and (2) the actor "reasonably believes [that] the use of deadly force is necessary for self defense against death, serious physical injury", or one of the serious felonies listed in the statute. Section 335(b) declares that, even when the use of deadly force would be justified under section 335(a), a person must still refrain from using deadly force "if the person knows that, with complete … safety …, the person can avoid the necessity of using deadly force by retreating".

Under Alaska law, a trial judge's obligation to instruct the jury on self-defense arises only if there is some evidence tending to prove each element of the defense. AS 11.81.900(b)(15)(A).
[…]

While the "some evidence" test may not be exacting in terms of the amount of evidence needed, the defendant's evidence must address all the legal elements of self-defense.
[…]

In this case, Judge Souter ruled that Ha failed to meet the requirements of the general statute, AS 11.81.330, because there was no evidence that Ha faced imminent peril. On appeal, Ha claims that Judge Souter misconstrued the requirement of "imminency".

Both at common law and under modern statutes, a person claiming self-defense as a justification for assaulting someone else has to show, not only that he or she reasonably feared harm at the hands of the other person, but also that he or she reasonably feared that the threatened harm was imminent.

Case law and legislation concerning self-defense require that the defendant reasonably believe his adversary's violence to be almost immediately forthcoming. Most of the modern codes require that the defendant reasonably perceive an "imminent" use of force, although other language making the same point is sometimes found.

Wayne R. LaFave and Austin W. Scott, *Substantive Criminal Law* (1986), § 5.7(d), "Imminence of Attack", Vol. 1, pp. 655–56. *See also* Rollin M. Perkins and Ronald N. Boyce, *Criminal Law* (3rd ed. 1982), Ch. 10, Sec. 4, "Self–Defense", p. 1114. ("The danger must be, or appear to be, pressing and urgent. A fear of danger at some future time is not sufficient.")

[…]

Ha argues that the imminency of a defendant's peril must be judged from the standpoint of the defendant. Ha contends that a reasonable person in Ha's position—a person who had heard Buu threaten his life and who knew the vicious propensities of Buu and his criminal family—would reasonably fear that Buu or one of his relatives would inevitably come some day to carry out Buu's threat to kill Ha.

Viewing the evidence in the light most favorable to Ha, we agree that there was sufficient evidence that a reasonable person in Ha's position would have feared death or serious physical injury from Buu. Buu had threatened Ha with death. Buu was a violent man who nursed grudges and who was likely to carry out his threat someday. Moreover, the evidence suggested that Buu came from a violent, criminal clan, and that Buu's relatives might very well help Buu carry out the threat—or might carry it out themselves if Buu was unable.

[…]

However, "inevitable" harm is not the same as "imminent" harm. Even though Ha may have reasonably feared that Buu (or one of Buu's relatives) would someday kill him, a reasonable fear of future harm does not authorize a person to hunt down and kill an enemy.

[…]

Consistent with [court opinions from other states] and in accord with the wording of AS 11.81.330 and AS 11.81.900(b)(23), we hold that a defendant claiming self-defense as justification for the use of force must prove that he or she acted to avoid what he or she reasonably perceived to be a threat of imminent harm. A defendant's reasonable belief that harm will come at some future time is not sufficient to support a claim of self-defense or defense of others.

Ha's evidence supported the conclusion that he reasonably believed that Buu would someday harm him. But the requirement of imminency limits the scope of authorized self-defense. A defendant may actually and reasonably believe that, sooner or later, his enemy will choose an opportune moment to attack and kill him. Nevertheless, as Judge Souter noted, the law does not allow a defendant to seek out and kill his enemy so that he no longer has to live in fear. The defendant's use of force against his enemy is authorized only when the defendant actually and reasonably believes that the enemy's threatened attack is imminent.

Ha argues that, when determining whether a defendant reasonably believed that harm was imminent, the trial judge and the jury must consider the circumstances as they appeared to the defendant. Ha contends that, in his case, these circumstances include "[Ha's] past experiences, his knowledge of [Buu], as well as [Ha's] physical and mental condition". We agree with Ha up to a point.

A defendant's knowledge of the deceased's violent nature must be considered when judging the reasonableness of the defendant's actions and perceptions. And we agree with Ha that the reasonableness of his perception of imminent harm must be evaluated, not just based on Buu's words and actions on the specific occasion when Ha killed him, but also based on Ha's knowledge of Buu's propensities and past conduct.

[T]he determination of reasonableness must be based on the "circumstances" facing a defendant or his "situation"[.] Such terms encompass more than the physical movements of the potential assailant…. [T]hese terms include any relevant knowledge the defendant had about the person. They also necessarily bring in the physical attributes of all persons involved, including the defendant. Furthermore, the defendant's circumstances encompass any prior experiences he had which could provide a reasonable basis for a belief that another person's intentions were to injure [or commit a crime upon] him or that the use of deadly force was necessary under the circumstances.

People v. Goetz, 68 N.Y.2d 96, 506 N.Y.S.2d 18, 29, 497 N.E.2d 41, 52 (1986) (citations omitted).

Thus, Ha is correct when he asserts that the reasonableness of his belief that he faced imminent harm must be analyzed in light of the severe beating that Ha had sustained at Buu's hands twelve hours before, in light of Buu's earlier repeated threats to kill Ha, and in light of Ha's knowledge of Buu and his family, whose criminal history indicated that Buu's threats should be taken seriously. And, to the extent that an understanding of Vietnamese culture was relevant to evaluating Buu's motivation or readiness to kill Ha, this too was a proper matter to be considered.

However, Ha argues that, because of his cultural background and his poor command of English, he felt that it would be useless to go to the police for help and that he had “no viable alternatives” to killing Buu. The evidence at Ha’s trial shows that Ha had ample opportunity to inform others of his conflict with Buu and to seek their assistance. During the twelve or thirteen hours between the fight on board the Ultimate and the shooting, Buu left Ha completely alone. During this period, Ha had conversations with the skipper of his fishing boat and with various acquaintances in the Vietnamese community. Moreover, even assuming that Ha believed it would be pointless to speak with any of these people about Buu’s threats, this does nothing to establish that Buu posed an imminent danger to Ha or that Ha could have reasonably believed that Buu posed such a danger. Ha’s argument is simply another way of saying that Ha believed Buu would inevitably kill him if Ha did not act first. As we have said, a reasonable fear of future harm does not justify killing one’s enemy.

Ha also appears to argue that Vietnamese culture teaches that all police are corrupt, that one can expect no help from the authorities, and that people must take the law into their own hands to resolve personal disputes. Assuming for purposes of argument that Ha’s characterization of Vietnamese culture is accurate, and further assuming that Ha believed all these things, this still does not establish that Ha reasonably believed that Buu posed an imminent danger to him. To the extent that Ha might be arguing that the law of self-defense should make exceptions for people whose culture encourages vendettas, killings to assuage personal honor, or preemptive killings to forestall future harm, we reject Ha’s argument.

Ha next contends that Judge Souter (and ultimately the jury) should have evaluated the imminency of harm from the point of view of someone who was not thinking clearly. Ha argues that, because of his extreme fear and because he had possibly sustained brain injury during Buu’s earlier attack, he was subjectively convinced that Buu was about to kill him at any moment. Assuming this is true, this would not establish the reasonableness of Ha’s subjective perception. (In fact, if Ha is arguing that he would not have perceived an imminent danger were it not for his mental abnormality, his argument establishes that he was acting unreasonably.)

When the law says that the reasonableness of self-defense must be evaluated from the point of view of the defendant, this does not mean from the point of view of a mentally ill defendant. The reasonableness of a defendant’s perceptions and actions must be evaluated from the point of view of a reasonable person in the defendant’s situation, not a person suffering mental dysfunction.

[…]

Thus, the reasonableness of Ha’s belief in the imminence of danger must be evaluated from the point of view of a reasonable person in his situation—someone with Ha’s pertinent knowledge of and experience with Buu, but someone whose perceptions were clear and rational. If the rule were otherwise, judges and juries would be obliged to acquit defendants who killed under a psychotic delusion that they were about to suffer serious harm.

In this case, despite the evidence suggesting that Ha had good reason to fear future harm from Buu, there was no evidence that Ha was in imminent danger, or could have reasonably believed himself to be in imminent danger, when he hunted Buu through the streets of Dillingham and then shot him from behind while Buu was carrying groceries. Judge Souter therefore correctly declined to instruct the jury on self-defense.

[…]

Conclusion

For the reasons explained above, we uphold Judge Souter’s refusal to instruct the jury on self-defense[.]

North Carolina v. Norman, 378 S.E.2d 8 (N.C. 1998) (**Battered Spouse Defense**)

Throughout the years, there have been several cases addressing domestic violence situations where an intimate partner is physically or sexually abused for years until the abused partner kills or seriously injurers the abusive partner. These cases may involve a battered wife who kills her husband in his sleep. The following case, *North Carolinav. Norman*, 378 S.E.2d 8 (N.C. 1998), is demonstrative of the issue. As you read *Norman*, compare how the majority opinion articulates the imminency requirement *different* than the dissenting opinion. Also, ask yourself if *Norman* is consistent with, or inconsistent with, *Ha v. State*?

324 N.C. 253

Supreme Court of North Carolina.

STATE of North Carolina

v.

Judy Ann Laws NORMAN.
April 5, 1989.

Opinion

MITCHELL, Justice.

The defendant was [charged] with the first degree murder of her husband. The jury found the defendant guilty of voluntary manslaughter. The defendant appealed[.] [The North Carolina Court of Appeals found that the trial court erred in declining to instruct on self-defense and granted the defendant a new trial. This appeal followed.]

[…]

At trial, the State presented the testimony of Deputy Sheriff R.H. Epley of the Rutherford County Sheriff's Department, who was called to the Norman residence on the night of 12 June 1985. Inside the home, Epley found the defendant's husband, John Thomas Norman, lying on a bed in a rear bedroom with his face toward the wall and his back toward the middle of the room. He was dead, but blood was still coming from wounds to the back of his head. A later autopsy revealed three gunshot wounds to the head, two of which caused fatal brain injury. The autopsy also revealed a .12 percent blood alcohol level in the victim's body.

Later that night, the defendant related an account of the events leading to the killing, after Epley had advised her of her constitutional rights and she had waived her right to remain silent. The defendant told Epley that her husband had been beating her all day and had made her lie down on the floor while he slept on the bed. After her husband fell asleep, the defendant carried her grandchild to the defendant's mother's house. The defendant took a pistol from her mother's purse and walked the short distance back to her home. She pointed the pistol at the back of her sleeping husband's head, but it jammed the first time she tried to shoot him. She fixed the gun and then shot her husband in the back of the head as he lay sleeping. After one shot, she felt her husband's chest and determined that he was still breathing and making sounds. She then shot him twice more in the back of the head. The defendant told Epley that she killed her husband because "she took all she was going to take from him so she shot him."

The defendant presented evidence tending to show a long history of physical and mental abuse by her husband due to his alcoholism. At the time of the killing, the thirty-nine-year-old defendant and her husband had been married almost twenty-five years and had several children. The defendant testified that her husband had started drinking and abusing her about five years after they were married. His physical abuse of her consisted of frequent assaults that included slapping, punching and kicking her, striking her with various objects, and throwing glasses, beer bottles and other objects at her. The defendant described other specific incidents of abuse, such as her husband putting her cigarettes out on her, throwing hot coffee on her, breaking glass against her face and crushing food on her face. Although the defendant did not present evidence of ever having received medical treatment for any physical injuries inflicted by her husband, she displayed several scars about her face which she attributed to her husband's assaults.

The defendant's evidence also tended to show other indignities inflicted upon her by her husband. Her evidence tended to show that her husband did not work and forced her to make money by prostitution, and that he made humor of that fact to family and friends. He would beat her if she resisted going out to prostitute herself or if he was unsatisfied with the amounts of money she made. He routinely called the defendant "dog," "bitch" and "whore," and on a few occasions made her eat pet food out of the pets' bowls and bark like a dog. He often made her sleep on the floor. At times, he deprived her of food and refused to let her get food for the family. During those years of abuse, the defendant's husband threatened numerous times to kill her and to maim her in various ways.

The defendant said her husband's abuse occurred only when he was intoxicated, but that he would not give up drinking. She said she and her husband "got along very well when he was sober," and that he was "a good guy" when he was not drunk. She had accompanied her husband to the local mental health center for sporadic counseling sessions for his problem, but he continued to drink.

In the early morning hours on the day before his death, the defendant's husband, who was intoxicated, went to a rest area off I-85 near Kings Mountain where the defendant was engaging in prostitution and assaulted her. While driving home, he was stopped by a patrolman and jailed on a charge of driving while impaired. After the defendant's mother got him out of jail at the defendant's request later that morning, he resumed his drinking and abuse of the defendant.

The defendant's evidence also tended to show that her husband seemed angrier than ever after he was released from jail and that his abuse of the defendant was more frequent. That evening, sheriff's deputies were called to the Norman residence, and the defendant

complained that her husband had been beating her all day and she could not take it anymore. The defendant was advised to file a complaint, but she said she was afraid her husband would kill her if she had him arrested. The deputies told her they needed a warrant before they could arrest her husband, and they left the scene.

The deputies were called back less than an hour later after the defendant had taken a bottle of pills. The defendant's husband cursed her and called her names as she was attended by paramedics, and he told them to let her die. A sheriff's deputy finally chased him back into his house as the defendant was put into an ambulance. The defendant's stomach was pumped at the local hospital, and she was sent home with her mother.

While in the hospital, the defendant was visited by a therapist with whom she discussed filing charges against her husband and having him committed for treatment. Before the therapist left, the defendant agreed to go to the mental health center the next day to discuss those possibilities. The therapist testified at trial that the defendant seemed depressed in the hospital, and that she expressed considerable anger toward her husband. He testified that the defendant threatened a number of times that night to kill her husband and that she said she should kill him "because of the things he had done to her."

The next day, the day she shot her husband, the defendant went to the mental health center to talk about charges and possible commitment, and she confronted her husband with that possibility. She testified that she told her husband later that day: "J.T., straighten up. Quit drinking. I'm going to have you committed to help you." She said her husband then told her he would "see them coming" and would cut her throat before they got to him.

The defendant also went to the social services office that day to seek welfare benefits, but her husband followed her there, interrupted her interview and made her go home with him. He continued his abuse of her, threatening to kill and to maim her, slapping her, kicking her, and throwing objects at her. At one point, he took her cigarette and put it out on her, causing a small burn on her upper torso. He would not let her eat or bring food into the house for their children.

That evening, the defendant and her husband went into their bedroom to lie down, and he called her a "dog" and made her lie on the floor when he lay down on the bed. Their daughter brought in her baby to leave with the defendant, and the defendant's husband agreed to let her baby-sit. After the defendant's husband fell asleep, the baby started crying and the defendant took it to her mother's house so it would not wake up her husband. She returned shortly with the pistol and killed her husband.

The defendant testified at trial that she was too afraid of her husband to press charges against him or to leave him. She said that she had temporarily left their home on several previous occasions, but he had always found her, brought her home and beaten her. Asked why she killed her husband, the defendant replied: "Because I was scared of him and I knowed when he woke up, it was going to be the same thing, and I was scared when he took me to the truck stop that night it was going to be worse than he had ever been. I just couldn't take it no more. There ain't no way, even if it means going to prison. It's better than living in that. That's worse hell than anything."

The defendant and other witnesses testified that for years her husband had frequently threatened to kill her and to maim her. When asked if she believed those threats, the defendant replied: "Yes. I believed him; he would, he would kill me if he got a chance. If he thought he wouldn't a had to went to jail, he would a done it."

Two expert witnesses in forensic psychology and psychiatry who examined the defendant after the shooting, Dr. William Tyson and Dr. Robert Rollins, testified that the defendant fit the profile of battered wife syndrome. This condition, they testified, is characterized by such abuse and degradation that the battered wife comes to believe she is unable to help herself and cannot expect help from anyone else. She believes that she cannot escape the complete control of her husband and that he is invulnerable to law enforcement and other sources of help.

Dr. Tyson, a psychologist, was asked his opinion as to whether, on 12 June 1985, "it appeared reasonably necessary for Judy Norman to shoot J.T. Norman?" He replied: "I believe that … Mrs. Norman believed herself to be doomed … to a life of the worst kind of torture and abuse, degradation that she had experienced over the years in a progressive way; that it would only get worse, and that death was inevitable…." Dr. Tyson later added: "I think Judy Norman felt that she had no choice, both in the protection of herself and her family, but to engage, exhibit deadly force against Mr. Norman, and that in so doing, she was sacrificing herself, both for herself and for her family."

Dr. Rollins, who was the defendant's attending physician at Dorothea Dix Hospital when she was sent there for evaluation, testified that in his opinion the defendant was a typical abused spouse and that "[s]he saw herself as powerless to deal with the situation, that

there was no alternative, no way she could escape it." Dr. Rollins was asked his opinion as to whether "on June 12th, 1985, it appeared reasonably necessary that Judy Norman would take the life of J.T. Norman?" Dr. Rollins replied that in his opinion, "that course of action did appear necessary to Mrs. Norman."

Based on the evidence that the defendant exhibited battered wife syndrome, that she believed she could not escape her husband nor expect help from others, that her husband had threatened her, and that her husband's abuse of her had worsened in the two days preceding his death, the Court of Appeals concluded that a jury reasonably could have found that her killing of her husband was justified as an act of perfect self-defense. The Court of Appeals reasoned that the nature of battered wife syndrome is such that a jury could not be precluded from finding the defendant killed her husband lawfully in perfect self-defense, even though he was asleep when she killed him. We disagree.

The right to kill in self-defense is based on the necessity, real or reasonably apparent, of killing an unlawful aggressor to save oneself from imminent death or great bodily harm at his hands. Our law has recognized that self-preservation under such circumstances springs from a primal impulse and is an inherent right of natural law.

In North Carolina, a defendant is entitled to have the jury consider acquittal by reason of *perfect* self-defense when the evidence, viewed in the light most favorable to the defendant, tends to show that at the time of the killing it appeared to the defendant and she believed it to be necessary to kill the decedent to save herself from imminent death or great bodily harm. That belief must be reasonable, however, in that the circumstances as they appeared to the defendant would create such a belief in the mind of a person of ordinary firmness. Further, the defendant must not have been the initial aggressor provoking the fatal confrontation. A killing in the proper exercise of the right of *perfect* self-defense is always completely justified in law and constitutes no legal wrong.

Our law also recognizes an *imperfect* right of self-defense in certain circumstances, including, for example, when the defendant is the initial aggressor, but without intent to kill or to seriously injure the decedent, and the decedent escalates the confrontation to a point where it reasonably appears to the defendant to be necessary to kill the decedent to save herself from imminent death or great bodily harm. Although the culpability of a defendant who kills in the exercise of *imperfect* self-defense is reduced, such a defendant is *not justified* in the killing so as to be entitled to acquittal, but is guilty at least of voluntary manslaughter

The defendant in the present case was not entitled to a jury instruction on either perfect or imperfect self-defense. The trial court was not required to instruct on either form of self-defense unless evidence was introduced tending to show that at the time of the killing the defendant reasonably believed herself to be confronted by circumstances which necessitated her killing her husband to save herself from *imminent* death or great bodily harm. No such evidence was introduced in this case, and it would have been error for the trial court to instruct the jury on either perfect or imperfect self-defense.

[…]

The killing of another human being is the most extreme recourse to our inherent right of self-preservation and can be justified in law only by the utmost real or apparent necessity brought about by the decedent. For that reason, our law of self-defense has required that a defendant claiming that a homicide was justified and, as a result, inherently lawful by reason of perfect self-defense must establish that she reasonably believed at the time of the killing she otherwise would have immediately suffered death or great bodily harm. Only if defendants are required to show that they killed due to a reasonable belief that death or great bodily harm was imminent can the justification for homicide remain clearly and firmly rooted in necessity. The imminence requirement ensures that deadly force will be used only where it is necessary as a last resort in the exercise of the inherent right of self-preservation. It also ensures that before a homicide is justified and, as a result, not a legal wrong, it will be reliably determined that the defendant reasonably believed that absent the use of deadly force, not only would an unlawful attack have occurred, but also that the attack would have caused death or great bodily harm. The law does not sanction the use of deadly force to repel simple assaults.

The term "imminent," as used to describe such perceived threats of death or great bodily harm as will justify a homicide by reason of perfect self-defense, has been defined as "immediate danger, such as must be instantly met, such as cannot be guarded against by calling for the assistance of others or the protection of the law." Black's Law Dictionary 676 (5th ed. 1979). Our cases have sometimes used the phrase "about to suffer" interchangeably with "imminent" to describe the immediacy of threat that is required to justify killing in self-defense.

The evidence in this case did not tend to show that the defendant reasonably believed that she was confronted by a threat of imminent death or great bodily harm. The evidence tended to show that no harm was "imminent" or about to happen to the

defendant when she shot her husband. The uncontroverted evidence was that her husband had been asleep for some time when she walked to her mother's house, returned with the pistol, fixed the pistol after it jammed and then shot her husband three times in the back of the head. The defendant was not faced with an instantaneous choice between killing her husband or being killed or seriously injured. Instead, *all* of the evidence tended to show that the defendant had ample time and opportunity to resort to other means of preventing further abuse by her husband. There was no action underway by the decedent from which the jury could have found that the defendant had reasonable grounds to believe either that a felonious assault was imminent or that it might result in her death or great bodily injury. Additionally, no such action by the decedent had been underway immediately prior to his falling asleep.

[…]

Additionally, the lack of any belief by the defendant-reasonable or otherwise-that she faced a threat of imminent death or great bodily harm from the drunk and sleeping victim in the present case was illustrated by the defendant and her own expert witnesses when testifying about her subjective assessment of her situation at the time of the killing. The psychologist and psychiatrist replied affirmatively when asked their opinions of whether killing her husband "appeared reasonably necessary" to the defendant at the time of the homicide. That testimony spoke of no imminent threat nor of any fear by the defendant of death or great bodily harm, imminent or otherwise. Testimony in the form of a conclusion that a killing "appeared reasonably necessary" to a defendant does not tend to show all that must be shown to establish self-defense. More specifically, for a killing to be in self-defense, the perceived necessity must arise from a reasonable fear of imminent death or great bodily harm.

Dr. Tyson additionally testified that the defendant "believed herself to be doomed … to a life of the worst kind of torture and abuse, degradation that she had experienced over the years in a progressive way; that it would only get worse, and that death was inevitable." Such evidence of the defendant's speculative beliefs concerning her remote and indefinite future, while indicating she had felt generally threatened, did not tend to show that she killed in the belief-reasonable or otherwise-that her husband presented a threat of *imminent* death or great bodily harm. Under our law of self-defense, a defendant's subjective belief of what might be "inevitable" at some indefinite point in the future does not equate to what she believes to be "imminent." Dr. Tyson's opinion that the defendant believed it was necessary to kill her husband for "the protection of herself and her family" was similarly indefinite and devoid of time frame and did not tend to show a threat or fear of imminent harm.

The defendant testified that, "I knowed when he woke up, it was going to be the same thing, and I was scared when he took me to the truck stop that night it was going to be worse than he had ever been." She also testified, when asked if she believed her husband's threats: "Yes…. [H]e would kill me if he got a chance. If he thought he wouldn't a had to went to jail, he would a done it." Testimony about such indefinite fears concerning what her sleeping husband might do at some time in the future did not tend to establish a fear-reasonable or otherwise-of imminent death or great bodily harm at the time of the killing.

[…]

As we have stated, stretching the law of self-defense to fit the facts of this case would require changing the "imminent death or great bodily harm" requirement to something substantially more indefinite than previously required and would weaken our assurances that justification for the taking of human life remains firmly rooted in real or apparent necessity. That result in principle could not be limited to a few cases decided on evidence as poignant as this. The relaxed requirements for perfect self-defense proposed … would tend to categorically legalize the opportune killing of abusive husbands by their wives solely on the basis of the wives' testimony concerning their subjective speculation as to the probability of future felonious assaults by their husbands. Homicidal self-help would then become a lawful solution, and perhaps the easiest and most effective solution, to this problem. It has even been suggested that the relaxed requirements of self-defense found in what is often called the "battered woman's defense" could be extended in principle to any type of case in which a defendant testified that he or she subjectively believed that killing was necessary and proportionate to any perceived threat.

In conclusion, we decline to expand our law of self-defense beyond the limits of immediacy and necessity which have heretofore provided an appropriately narrow but firm basis upon which homicide may be justified and, thus, lawful by reason of perfect self-defense or upon which a defendant's culpability may be reduced by reason of imperfect self-defense. As we have shown, the evidence in this case did not entitle the defendant to jury instructions on either perfect or imperfect self-defense.

For the foregoing reasons, we conclude that the defendant's conviction for voluntary manslaughter and the trial court's judgment sentencing her to a six-year term of imprisonment were without error.

[The North Carolina Court of Appeals is REVERSED and the trial court's judgment is affirmed].

MARTIN, Justice, dissenting.

At the outset it is to be noted that the peril of fabricated evidence is not unique to the trials of battered wives who kill. The possibility of invented evidence arises in all cases in which a party is seeking the benefit of self-defense. Moreover, in this case there were a number of witnesses other than defendant who testified as to the actual presence of circumstances supporting a claim of self-defense. This record contains no reasonable basis to attack the credibility of evidence for the defendant.

Likewise, the difficulty of rebutting defendant's evidence because the only other witness to many of the events is deceased is not unique to this type of case. This situation is also commonplace in cases in which self-defense is raised, although, again, in the case *sub judice* there was more than one surviving witness to such events. In considering the argument that the state is faced with a difficult burden in attempting to rebut evidence of which defendant is the only surviving witness, one must not overlook the law: the burden is always on the state to prove that the killing was intentional beyond a reasonable doubt. "Defendant may always rest ultimately on the weakness of the state's case and the state's failure to carry its burden of proof."

At the heart of the majority's reasoning is its unsubstantiated concern that to find that the evidence presented by defendant would support an instruction on self-defense would "expand our law of self-defense beyond the limits of immediacy and necessity." Defendant does not seek to expand or relax the requirements of self-defense and thereby "legalize the opportune killing of allegedly abusive husbands by their wives," as the majority overstates. Rather, defendant contends that the evidence as gauged by the existing laws of self-defense is sufficient to require the submission of a self-defense instruction to the jury. The proper issue for this Court is to determine whether the evidence, viewed in the light most favorable to the defendant, was sufficient to require the trial court to instruct on the law of self-defense. I conclude that it was.

In every jury trial, it is the duty of the court to charge the jury on all substantial features of the case arising on the evidence, whether or not such instructions have been requested. All defenses presented by the defendant's evidence are substantial features of the case, even if that evidence contains discrepancies or is contradicted by evidence from the state. This rule reflects the principle in our jurisprudence that it is the jury, not the judge, that weighs the evidence.

[…]

Evidence presented by defendant described a twenty-year history of beatings and other dehumanizing and degrading treatment by her husband. In his expert testimony a clinical psychologist concluded that defendant fit "and exceed[ed]" the profile of an abused or battered spouse, analogizing this treatment to the dehumanization process suffered by prisoners of war under the Nazis during the Second World War and the brainwashing techniques of the Korean War. The psychologist described the defendant as a woman incarcerated by abuse, by fear, and by her conviction that her husband was invincible and inescapable:

Mrs. Norman didn't leave because she believed, fully believed that escape was totally impossible. There was no place to go. He, she had left before; he had come and gotten her. She had gone to the Department of Social Services. He had come and gotten her. The law, she believed the law could not protect her; no one could protect her, and I must admit, looking over the records, that there was nothing done that would contradict that belief. She fully believed that he was invulnerable to the law and to all social agencies that were available; that nobody could withstand his power. As a result, there was no such thing as escape.

When asked if he had an opinion whether it appeared reasonably necessary for Judy Norman to shoot her husband, this witness responded:

Yes…. I believe that in examining the facts of this case and examining the psychological data, that Mrs. Norman believed herself to be doomed … to a life of the worst kind of torture and abuse, degradation that she had experienced over the years in a progressive way; that it would only get worse, and that death was inevitable; death of herself, which was not such, I don't think was such an issue for her, as she had attempted to commit suicide, and in her continuing conviction of J.T. Norman's power over her, and even failed at that form of escape. I believe she also came to the point of beginning to fear for family members and her children, that were she to commit suicide that the abuse and the treatment that was heaped on her would be transferred onto them.

This testimony describes defendant's perception of circumstances in which she was held hostage to her husband's abuse for two decades and which ultimately compelled her to kill him. This testimony alone is evidence amply indicating the first two elements required for entitlement to an instruction on self-defense.

In addition to the testimony of the clinical psychologist, defendant presented the testimony of witnesses who had actually seen defendant's husband abuse her. These witnesses described circumstances that caused not only defendant to believe escape was impossible, but that also convinced them of its impossibility. Defendant's isolation and helplessness were evident in testimony that her family was intimidated by her husband into acquiescing in his torture of her. Witnesses also described defendant's experience with social service agencies and the law, which had contributed to her sense of futility and abandonment through the inefficacy of their protection and the strength of her husband's wrath when they failed. Where torture appears interminable and escape impossible, the belief that only the death of the oppressor can provide relief is reasonable in the mind of a person of ordinary firmness, let alone in the mind of the defendant, who, like a prisoner of war of some years, has been deprived of her humanity and is held hostage by fear.

In [a prior decision], this Court noted that if the defendant was in "no imminent danger" at the time of the killing, then his belief that it was necessary to kill the man who had pursued him eight hours before was unreasonable. The second element of self-defense was therefore not satisfied. In the context of the doctrine of self-defense, the definition of "imminent" must be informed by the defendant's perceptions. It is not bounded merely by measurable time, but by all of the facts and circumstances. Its meaning depends upon the assessment of the facts by one of "ordinary firmness" with regard to whether the defendant's perception of impending death or injury was so pressing as to render reasonable her belief that it was necessary to kill.

Evidence presented in the case revealed no letup of tension or fear, no moment in which the defendant felt released from impending serious harm, even while the decedent slept. This, in fact, is a state of mind common to the battered spouse[.] Psychologists have observed and commentators have described a "constant state of fear" brought on by the cyclical nature of battering as well as the battered spouse's perception that her abuser is both "omnipotent and unstoppable." Constant fear means a perpetual anticipation of the next blow, a perpetual expectation that the next blow will kill. "[T]he battered wife is constantly in a heightened state of terror because she is certain that one day her husband will kill her during the course of a beating…. Thus from the perspective of the battered wife, the danger is constantly 'immediate.' " [citations omitted] For the battered wife, if there is no escape, if there is no window of relief or momentary sense of safety, then the next attack, which could be the fatal one, is imminent. In the context of the doctrine of self-defense, "imminent" is a term the meaning of which must be grasped from the defendant's point of view. Properly stated, the second prong of the question is not whether the threat was in fact imminent, but whether defendant's belief in the impending nature of the threat, given the circumstances as she saw them, was reasonable in the mind of a person of ordinary firmness.

Defendant's intense fear, based on her belief that her husband intended not only to maim or deface her, as he had in the past, but to kill her, was evident in the testimony of witnesses who recounted events of the last three days of the decedent's life. This testimony could have led a juror to conclude that defendant reasonably perceived a threat to her life as "imminent," even while her husband slept. Over these three days, her husband's anger was exhibited in an unprecedented crescendo of violence. The evidence showed defendant's fear and sense of hopelessness similarly intensifying, leading to an unsuccessful attempt to escape through suicide and culminating in her belief that escape would be possible only through her husband's death.

Defendant testified that on 10 June, two days before her husband's death, he had again forced her to go to a rest-stop near Kings Mountain to make money by prostitution. Her daughter Phyllis and Phyllis's boyfriend Mark Navarra accompanied her on this occasion because, defendant said, whenever her husband took her there, he would beat her. Phyllis corroborated this account. She testified that her father had arrived some time later and had begun beating her mother, asking how much money she had. Defendant said they all then drove off. Shortly afterwards an officer arrested defendant's husband for driving under the influence. He spent the night in jail and was released the next morning on bond paid by defendant's mother.

Defendant testified that her husband was argumentative and abusive all through the next day, 11 June. Mark Navarra testified that at one point defendant's husband threw a sandwich that defendant had made for him on the floor. She made another; he threw it on the floor, as well, then insisted she prepare one without touching it. Defendant's husband had then taken the third sandwich, which defendant had wrapped in paper towels, and smeared it on her face. Both Navarra and Phyllis testified that they had later watched defendant's husband seize defendant's cigarette and put it out on her neck, the scars from which defendant displayed to the jury.

A police officer testified that he arrived at defendant's home at 8:00 that evening in response to a call reporting a domestic quarrel. Defendant, whose face was bruised, was crying, and she told the officer that her husband had beaten her all day long and that she could not take it any longer. The officer told her that he could do nothing for her unless she took out a warrant on her husband. She responded that if she did, her husband would kill her. The officer left but was soon radioed to return because defendant had taken

an overdose of pills. The officer testified that defendant's husband was interfering with ambulance attendants, saying "Let the bitch die." When he refused to respond to the officer's warning that if he continued to hinder the attendants, he would be arrested, the officer was compelled to chase him into the house.

Defendant's mother testified that her son-in-law had reacted to the discovery that her daughter had taken the pills with cursing and obscenities and threats such as, "Now, you're going to pay for taking those pills," and "I'll kill you, your mother and your grandmother." His rage was such that defendant's mother feared he might kill the whole family, and knowing defendant's sister had a gun in her purse, she took the gun and placed it in her own.

Defendant was taken to the hospital, treated, and released at 2:30 a.m. She spent the remainder of the night at her grandmother's house. Defendant testified that the next day, 12 June, she felt dazed all day long. She went in the morning to the county mental health center for guidance on domestic abuse. When she returned home, she tried to talk to her husband, telling him to "straighten up. Quit drinking…. I'm going to have you committed to help you." Her husband responded, "If you do, I'll see them coming and before they get here, I'll cut your throat."

Later, her husband made her drive him and his friend to Spartanburg to pick up the friend's paycheck. On the way, the friend testified, defendant's husband "started slapping on her" when she was following a truck too closely, and he periodically poured his beer into a glass, then reached over and poured it on defendant's head. At one point defendant's husband lay down on the front seat with his head on the arm rest, "like he was going to go to sleep," and kicked defendant, who was still driving, in the side of the head.

Mark Navarra testified that in the year and a half he had lived with the Normans, he had never seen defendant's husband madder than he was on 12 June, opining that it was the DUI arrest two days before that had ignited J.T.'s fury. Phyllis testified that her father had beaten her mother "all day long." She testified that this was the third day defendant's husband had forbidden her to eat any food. Phyllis said defendant's family tried to get her to eat, but defendant, fearing a beating, would not. Although Phyllis's grandmother had sent over a bag of groceries that day, defendant's husband had made defendant put them back in the bag and would not let anyone eat them.

Early in the evening of 12 June, defendant's husband told defendant, "Let's go to bed." Phyllis testified that although there were two beds in the room, her father had forbidden defendant from sleeping on either. Instead, he had made her lie down on the concrete floor between the two beds, saying, "Dogs don't lay in the bed. They lay in the floor." Shortly afterward, defendant testified, Phyllis came in and asked her father if defendant could take care of her baby while she went to the store. He assented and eventually went to sleep. Defendant was still on the floor, the baby on the small bed. The baby started to cry and defendant "snuck up and took him out there to [her] mother's [house]." She asked her mother to watch the baby, then asked if her mother had anything for headache, as her head was "busting." Her mother responded that she had some pain pills in her purse. Defendant went in to get the pills, "and the gun was in there, and I don't know, I just seen the gun, and I took it out, and I went back there and shot him."

From this evidence of the exacerbated nature of the last three days of twenty years of provocation, a juror could conclude that defendant believed that her husband's threats to her life were viable, that serious bodily harm was imminent, and that it was necessary to kill her husband to escape that harm. And from this evidence a juror could find defendant's belief in the necessity to kill her husband not merely reasonable but compelling.

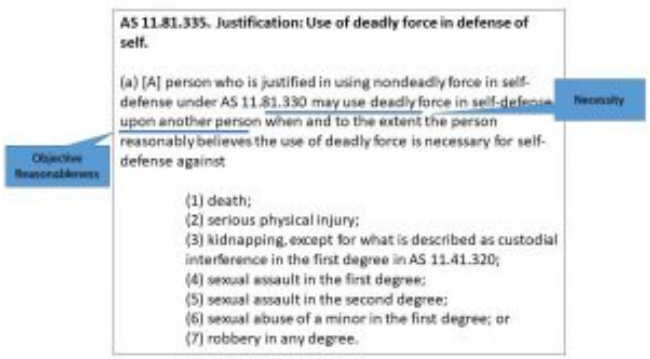
[…]

Deadly Force – Excessive Force

A person may only use force "when and to the extent" necessary to repeal the threatened harm. Thus, the law does not allow a person to use deadly force when non-deadly force would be sufficient. **Non-deadly** force is a force that is unlikely to cause death or serious physical injury. AS 11.81.900(b)(39). **Deadly force** is the opposite – a force that is likely to cause death or serious physical injury. AS 11.81.900(b)(16). Examples of deadly force may include the use of a knife, gun, vehicle, or even bare hands depending on how they were used.

Thus, if a person is faced with a punch, it is unlikely that they would be able to defend themselves with a knife. In other words, a person may not use **excessive force.** A person may only use deadly force if it is necessary to prevent death, serious physical injury, kidnapping, sexual assault, or robbery. AS 11.81.335(a).

Figure 7.2 AS 11.81.335. Justification: Use of deadly Force Diagram.



The force used must be **objectively reasonable** under the circumstances. The defendant must "reasonably believe" that the force is *necessary* to repeal the threatened harm. When the threat ends, the use of force must end. Unnecessary force – that is, excessive force – is never permitted.

But similarly, if the defendant is entitled to use deadly force under the circumstances, the law does not require the defendant to use "minimal deadly force" before using "all-out deadly force." There is no such thing as "almost deadly force". Force, in the context of self-defense, is binary: it is either deadly or non-deadly. For example, a defendant who is facing a deadly attacker is not required to shoot their assailant in the leg before shooting the assailant in the chest. If the defendant is entitled to use deadly force, they are entitled to use sufficient deadly force to stop the threat: no more, no less.

Finally, even though we frequently discuss self-defense in hindsight, the jury must evaluate the defendant's use of force based on the circumstances as they were known to the defendant at the time force was used. Thus, the jury is required to view the events leading up to the force through the eyes of the defendant and ask themselves whether such action was reasonable. They are not permitted to retroactively (that is, in hindsight) assess the reasonableness of the defendant's decision.

Jones-*Nelson v. State*, ___ P.3d ___ (Alaska 2022)

In the following case, the court is faced with the question of objective reasonableness, "excessive" deadly force, and how these terms are defined for the trier of fact.

___ P.3d ___
Supreme Court of Alaska.
Marquinn JONES-NELSON, Appellant,
v.
STATE of Alaska, Appellee.
June 24, 2022

OPINION
Carney, Justice.

INTRODUCTION

A defendant convicted of first-degree murder appealed his conviction to the court of appeals, arguing that the trial court erroneously instructed the jury on the law of self-defense. The court of appeals agreed the instruction was erroneous but concluded that the error was harmless and affirmed the defendant's conviction.

The defendant petitioned us, asking that we reverse the court of appeals' decision and his conviction because the erroneous instruction relieved the State of its burden to disprove self-defense beyond a reasonable doubt. We agree. We therefore reverse the decisions of the superior court and court of appeals and vacate the defendant's conviction because the challenged instruction is legally incorrect and impermissibly lightens the prosecution's burden to disprove self-defense.

FACTS AND PROCEEDINGS

1. Facts[1]

[On the evening of March 23, 2011, Jones-Nelson and two of his friends attended a party at an Anchorage apartment. Jordan and some of his friends attended the same party.

At some point, Jordan confronted Jones-Nelson in a bedroom, accusing him of spreading the rumor that Jordan was a police snitch. During this confrontation, Jordan came within three feet of Jones-Nelson, and he was acting aggressively. However, Jordan ultimately left the room and returned to sit with his friends in the kitchen.

One of Jordan's friends who lived in the apartment, Nikita Sanders, could see that Jordan was angry. She asked him if he was "good," and Jordan replied that he was. But Jordan then asked another friend, Parrish Harris, whether he should "drop" Jones-Nelson. Sanders heard this comment, and she told Jordan, "Not in my apartment."

(Because Jones-Nelson was still in the bedroom, he did not hear Jordan's comment.)

A little later, Jones-Nelson called Harris into the bedroom and told him to fetch Jordan. Harris did so; moments later, Jordan came into the bedroom.

According to the testimony later given by Jones-Nelson and two of his friends (Dorian Topps and Dionte Wren), Jordan approached Jones-Nelson in an aggressive manner. He came within a foot and a half of Jones-Nelson, stood over him, and asked, "What's up?" (Jordan, who was about 6 foot 3 inches tall and weighed 170 pounds, was significantly bigger than Jones-Nelson, who was 5 foot 7 inches tall and weighed about 135 pounds.)

According to the defense witnesses, Jordan looked like he was going to hit Jones-Nelson. In addition, Topps (one of Jones-Nelson's friends) testified that he saw Jordan reaching for a handgun in his waistband as he approached Jones-Nelson. However, Wren (Jones-Nelson's other friend) testified that he did not see Jordan with a firearm, nor did he see Jordan actually try to hit Jones-Nelson.

Regardless of this discrepancy in the testimony, it is undisputed that Jones-Nelson pulled out a handgun and started shooting at Jordan. Jones-Nelson fired two shots in quick succession, at which point Jordan turned and ran toward the kitchen. As Jordan ran away, Jones-Nelson fired four more shots. Jordan died as a result of his wounds.

Following the shooting, Jones-Nelson fled the apartment, accompanied by Wren and Topps. Jones-Nelson's girlfriend was waiting outside in a car, and the four drove away from the apartment. When Jones-Nelson's girlfriend asked him what happened, Jones-Nelson replied that he had just "smoked" Jordan. Jones-Nelson later disposed of the handgun by tossing it over a bridge.

The next day, Jones-Nelson contacted a person to obtain a fake birth certificate and other false documents so that he could leave Alaska under a false identity. The person that Jones-Nelson contacted was secretly a federal informant, and she alerted the authorities to Jones-Nelson's plan. The police arrested Jones-Nelson when he went to retrieve the false documents. When Jones-Nelson was interviewed following his arrest, he denied being at the scene of the shooting.

At trial, there was no dispute that Jones-Nelson shot and killed Jordan. The only question was whether this shooting was justified by self-defense.

[…]

Both Jones-Nelson and his friend Topps testified that Jordan approached Jones-Nelson in an aggressive manner, and that Jordan reached into his waistband for a gun. (As we noted earlier, Jones-Nelson's other friend, Wren, testified that he did not see Jordan reach for a gun.) Jones-Nelson testified that when he saw Jordan reaching for a gun, he was afraid that he would be pistol-whipped or shot, so he grabbed a revolver from the window ledge and started shooting at Jordan. Jones-Nelson conceded that, after the first few shots, Jordan dropped his gun and ran, but Jones-Nelson testified that he kept firing because he was afraid that Jordan's friends might have guns and might come to Jordan's aid.

The prosecutor argued that neither Jones-Nelson nor his friend Topps were credible witnesses, and that their testimony about Jordan reaching for a gun was false. The prosecutor asserted that Jones-Nelson never subjectively believed that he needed to use deadly force to repel an imminent attack.]

1. Trial

Jones-Nelson gave notice before trial that he would claim self-defense. At the end of the four-week-long trial, the trial court gave the jury three instructions on the law of self-defense. The first two, numbered 30 and 31, were pattern instructions that described

the use of nondeadly force and deadly force in self-defense. These instructions correctly stated the relevant law. The deadly force instruction explained that if a person is justified in using nondeadly force in self-defense, the person can also use deadly force "when the person reasonably believes the use of deadly force is necessary for self-defense."

At the prosecution's request and over Jones-Nelson's objection, the court also gave the following instruction, drafted by the prosecutor:

A basic tenet of the doctrine of self-defense is that [the] use of deadly force is unreasonable … if non-deadly force is obviously sufficient to avert the threatened harm. Even in circumstances when a person is permitted to use deadly force in self-defense[,] that person may still not be authorized to employ all-out deadly force because such extreme force is not necessary to avert the danger.

[…]

The jury rejected Jones-Nelson's self-defense claim and convicted him of first-degree murder. [On appeal to the Alaska Court of Appeals, Jones-Nelson argued that the self-defense instruction was legal error. The Court of Appeals agreed that the jury instruction was legally unnecessary, but found the legal error harmless.]

DISCUSSION

Jones-Nelson argues that the court of appeals was wrong to conclude that the incorrect jury instruction was harmless. And he argues that the instruction reduced the State's duty to disprove self-defense beyond a reasonable doubt. The State argues that the jury instruction correctly stated the law and that any imperfections in the jury instruction did not affect the verdict. We agree with Jones-Nelson that the instruction erroneously described the law of self-defense, the error was constitutional in nature, and the error was not harmless beyond a reasonable doubt.

[…]

The Instruction Incorrectly Directed The Jury To Retroactively Assess The Reasonableness Of Jones-Nelson's Use Of Force.

Jones-Nelson argues that the instruction improperly directed the jury to retroactively assess his use of force. Alaska has codified the common law of self-defense. The use of nondeadly force is governed by AS 11.81.330. When a defendant uses deadly force as defined in AS 11.81.900(b)(16), the defendant must show that the additional requirements of AS 11.81.335 are satisfied. A person is entitled to use deadly force in self-defense if nondeadly force is justified under AS 11.81.330 and the person "reasonably believes the use of deadly force is necessary for self-defense against … death[,] … serious physical injury," or one of the crimes listed in the statute.

Whether such force is necessary must be evaluated based on the circumstances as they appeared to the defendant at the time the force was used. We have recognized that "[d]etached reflection cannot be demanded in the presence of an uplifted knife." For that reason, "[e]ven if the defendant's fear turns out to have been mistaken, [self-defense] still may be established if the defendant proves that, under the circumstances, he or she reasonably feared imminent deadly attack at the hand of the victim."

[…]

In this case, the first two self-defense instructions were pattern instructions presenting the jury with the definitions of nondeadly and then deadly force. The pattern instructions closely tracked the statutory language. The third instruction, number 34, was drafted by the prosecutor.

[…]

The court of appeals concluded that the error in Instruction 34 was that "the wording … failed to unambiguously recite the concept of 'reasonableness' that is central to the law of self-defense." The court observed that the question before the jury "is not whether a defendant's use of force, and the level of force used, was necessary in hindsight (or, using the language of the challenged instruction, whether some lesser amount of force can now be seen to be 'obviously sufficient to avert the threatened harm')." We agree. Because the instruction implied that reasonableness could be assessed in hindsight, the instruction was in error.

The Instruction Erroneously Distinguished Between Deadly And "All-Out Deadly" Force.

Jones-Nelson also argues that the instruction improperly distinguished between deadly force and "all-out deadly force" or "extreme force." The second sentence of the instruction directed that "[e]ven in circumstances when a person is permitted to use deadly force in self-defense[,] that person may still not be authorized to employ *all-out deadly force* because such *extreme force* is not necessary

to avert the danger." The instruction is derived from language in *State v. Walker*, 887 P.2d 971, 978 (Alaska App. 1994). Jones-Nelson contends that [the] language was taken out of context and was "quite specific to the facts of that case." The court of appeals rejected this argument, noting that the "instruction correctly captured the concept that the defendant's use of force must be proportionate to the perceived danger."

Alaska law permits the use of deadly force "*when and to the extent* the person reasonably believes the use of deadly force is necessary." The State argues that this "when and to the extent" language requires courts to distinguish not only between deadly and nondeadly force, but also between different degrees of deadly force. In addition to *Walker*, the State bases its argument on the common law principle of proportionality. We have not previously addressed whether the "when and to the extent" language in AS 11.81.335(a) requires a defendant authorized to use deadly force to distinguish between different degrees of deadly force. We hold that it does not.

Alaska's law of self-defense is contained in a pair of interlocking statutes. The first, AS 11.81.330, sets out the general principles authorizing the use of nondeadly force: "A person is justified in using nondeadly force upon another when and to the extent the person reasonably believes it is necessary for self-defense against what the person reasonably believes to be the use of unlawful force by the other person," unless a specified exception applies. Alaska Statute 11.81.335(a) provides for the use of deadly force in self-defense: "[A] person who is justified in using nondeadly force in self-defense under AS 11.81.330 may use deadly force in self-defense … *when and to the extent* the person reasonably believes the use of deadly force is necessary for self-defense against (1) death; [or] (2) serious physical injury …." Both statutes require that the person using force in self-defense reasonably believe that the force is necessary and that the person reasonably believe that the other person is using unlawful force. The plain language of both statutes makes clear that if either of these beliefs is unreasonable at the time the person uses force in self-defense, then the use of force in self-defense is not permitted. Nothing in the plain language of AS 11.85.335(a) even implies an additional reasonable belief about the level of deadly force necessary to defend against death or serious physical injury.

Although the dissent asserts that our decision removes a "proportionality" requirement in Alaska's law of self-defense which implies levels of deadly force, its discussion actually supports the premise that the use of any force in self-defense is justified only when *necessary*.[2] […] Jones-Nelson's case also raises the question of the necessity of firing shots at Jordan after he fled the room, but that issue has nothing to do with the degree of force Jones-Nelson used.

[…]

There is little support for the State's argument that common law principles of proportionality require a distinction between different degrees of deadly force. In *Rowe v. United States*, 164 U.S. 546, 558 (1896), the United States Supreme Court held that a defendant wielding deadly force in self-defense had no duty to "so carefully aim[ ] his pistol as to paralyze the arm of his assailant, without more seriously wounding him." Many courts have applied general principles of proportionality to self-defense without distinguishing between subcategories of deadly force.

We have adopted the United States Supreme Court's view that "[d]etached reflection cannot be demanded in the presence of an uplifted knife." We agree with the [United States Supreme] Court's observation that a person justified in using deadly force need not "consider whether a reasonable man might not think it possible to fly with safety or to disable his assailant rather than to kill him." Legislative history and the common law do not support the State's argument that AS 11.81.335(a) distinguishes between regular and "all-out" deadly force. The State concedes that a defendant "faced with a knife-wielding assailant" need not "analyze each [defensive] option and decide which would best do the defensive job while minimizing the harm to one's assailant, at risk of getting stabbed … while pondering the options." But distinguishing between ordinary deadly force and "all-out deadly force" would require defendants to do just that.

[…]

Alaska law recognizes only two categories of force: nondeadly and deadly. It is a binary choice: either the force used is deadly or it is not. The [challenged instruction, number 34,] implies that there is an additional distinction — that there can be more or less deadly versions of deadly force. This is legal error.

[…]

CONCLUSION

We REVERSE the court of appeals' decision that the erroneous jury instruction was harmless error. Accordingly, we VACATE the conviction and REMAND the case to the superior court for further proceedings consistent with this opinion.

[1] Facts taken from the court of appeals' decision, *Jones-Nelson v. State*, 446 P.3d 797, 798-801 (Alaska App. 2019).

[2] The Court included the following footnote to help explain "necessary" in AS 11.81.335(a): "Our interpretation of the "to the extent necessary" language is temporal — deadly force is not justified after its use for self-defense has ended. The dissent, in contrast, interprets it to mean that only a proportionally necessary amount of deadly force can be justified, using the example of a police officer continuing a choke-hold after subduing a subject. But neither interpretation would allow an officer to continue using deadly force against a subdued subject.

As you can see, the concept of proportionality is largely subsumed into necessity. What may be necessary under the circumstance may also be proportional. The inverse is also true. In the eyes of the Alaska Supreme Court, the proportionality distinction is limited to the *type* of force used – deadly or non-deadly; if the type of force used is necessary, it is also likely proportional. Although the law may discuss the two concepts separately, it may be easier to consider them as a collective whole.

Unreasonable Fear of Injury or Death

As *Jones-Nelson* teaches us, a defendant cannot claim self-defense unless a reasonable person in the defendant's situation would believe that deadly force was necessary to avoid death or serious harm. In some jurisdictions, however, like North Carolina, if the defendant honestly but *unreasonably* believes deadly force is necessary under the circumstances, a claim of *imperfect self-defense* may reduce the severity of the offense. The defendant is still guilty of a crime, albeit a less serious crime, like manslaughter. Alaska has no such exception, and has expressly abolished imperfect self-defense. *See Howell v. State*, 917 P.2d 1202, 1211 n.7 (Alaska App. 1996). Instead, if the defendant honestly, but unreasonably, believes self-defense was necessary, the defendant may seek the application of a **statutory mitigator** that may lessen the punishment imposed. AS 12.55.155(d)(4).

Duty to Retreat – Withdrawal

Is self-defense, especially the use of deadly force, truly necessary if the defendant can avoid the confrontation entirely by running away? This question surrounds the doctrine of **duty to retreat**. Some jurisdictions require the defendant to retreat and avoid the confrontation if possible *before* using deadly force. Alaska has largely rejected this doctrine. Under Alaska's "**stand your ground**" law, a person has no duty to retreat before using deadly force if the person is legally present when deadly force is used. Put another way, Alaska's duty to retreat only applies to trespassers. A person trespassing must retreat prior to using deadly force. AS 11.81.335(b). Others need not retreat.

Self-Defense – Exclusions

Because self-defense is a creature of statute, legislators frequently limit the circumstances in which it is available. Alaska is no different. The Alaska Legislature has carved out several exclusions in which a person may not claim self-defense *as a matter of law*. For example, a person may not claim self-defense if the use of force was part of mutual combat, if the defendant initiated or provoked an attack, or if the defendant is engaging in inherently dangerous criminal conduct. AS 11.81.330(a)(1)-(4).

In essence, these statutory exclusions are based on a legislative decision that individuals who voluntarily engage in certain activities lose the right to claim self-defense. The legislative exclusions are built upon the assumption that individuals can avoid the need to use self-defense by avoiding such dangerous activities.

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7.3: Other Use-of-Force Justification Defenses

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7.4: Necessity and Duress

Is Cannibalism a Crime?

In 1884, the English yacht, the *"Mignonette"* sank during a powerful storm in the South Atlantic, some 1600 miles from shore. Three men and a teenage boy, Richard Parker, made it to a lifeboat where they became adrift on the open ocean. The lifeboat had no freshwater or food. The survivors subsisted on a small turtle for twelve days. For the next eight days, they had no food. They captured rainwater, but very sporadically.

On the eighteenth day the men discussed sacrificing someone to save the rest. One of the men dissented; Richard was not consulted. On the twentieth day, still without food or water, the men killed Richard. By the time of his death, Richard was helpless and extremely weakened. Although the men told him was going to be killed, he never consented to his death. The men fed upon the boy's flesh for four days. On the fourth day, a passing vessel rescued them.

Once back on the mainland, the Crown charged the survivors with murder. The trial received national attention with the survivors being called "heroes" for surviving such an ordeal. In an effort to prosecute the case, the Crown dismissed the charges against the least-culpable survivor. The evidence at trial demonstrated that had the men not killed and eaten the boy they all would have died of famine. Likewise, the evidence demonstrated that Richard, given his weakened state, would have likely died before rescue. Richard was moments from death when he was killed. The men contended that they acted out of pure necessity – but for eating the boy (who was going to die anyway) they all would have died.

Assume you are a juror in this case. Would you vote to convict the survivors of murder? Alternatively, were the men legally justified in their act of murder? Put another way, is killing a dying boy to save your own life a valid justification? Why or why not? Check your answer at the end of the chapter.

Want to learn more about the *Mignonette* and its tragic end? Joseph Simeone's essay entitled, *"Survivors" of the Eternal Sea: A Short True Story*, 45 St. Louis U. L.J. 1123 (2001) is an excellent and riveting description of the events of the survivors and what happened. Simeone's essay is available through the Consortium Library at the University of Alaska Anchorage using your student credentials.

Occasionally, the law protects a would-be defendant from criminal responsibility because the defendant had no reasonable choice but to commit the crime. The defenses of **necessity** and **duress** recognize that occasionally a greater good is achieved by *violating* the law. Both involve an element of compulsion. The defendant committed the criminal act due to a real or perceived need or threat.

Necessity

The defense of necessity sanctions the violation of criminal law if necessary to prevent a significant harm. All jurisdictions authorize a necessity defense (sometimes referred to as a "choice of evils" defense) under some circumstances – roughly one-half of states allow necessity by statute, while one-half rely on the common law defense of necessity.

Alaska has codified its common law. "The law of necessity is one of public policy: the law ought to promote the achievement of higher values at the expense of lesser values, and sometimes the greater good for society will be accomplished by violating the literal language of the criminal law." *See Nelson v. State*, 597 P.2d 977, 979 (Alaska 1979). Necessity is an **affirmative defense**, which requires the defendant to prove the existence of the defense by a *preponderance of the evidence*. AS 11.81.320. Necessity is a perfect justification and results in an acquittal.

To assert the defense of necessity, the defense must establish three elements. First, the criminal act committed must have been done to prevent a significant evil. Second, the defendant must not have an adequate alternative. Finally, the defense must cause less harm than the harm avoided – in other words, the harm caused must not have been disproportionate to the harm avoided. Necessity is only permitted in an actual emergency, not a perceived emergency.

Scharen v. State, 249 P.3d 331 (Alaska App. 2011)

In the next case, *Scharen v. State*, pay close attention to how the court explains what constitutes a real, *bona fide*, emergency to justify the necessity defense. Emergencies of one's own making rarely qualify.

249 P.3d 331
Court of Appeals of Alaska.
David J. SCHAREN, Appellant,
v.
STATE of Alaska, Appellee.
No. A–10550.
March 18, 2011.

OPINION
MANNHEIMER, Judge.

David J. Scharen appeals his conviction for driving under the influence. Scharen argues that the trial judge committed error by refusing to instruct the jury on the defense of "necessity". For the reasons explained in this opinion, we conclude that the trial evidence fails to support a defense of necessity. In particular, the evidence, even when construed in the light most favorable to Scharen, fails to support the conclusion that Scharen had no reasonable alternative but to take control of a motor vehicle while intoxicated. We therefore affirm Scharen's conviction.

Underlying facts
In January 2009, Scharen and his wife attended a Juneau Ski Club fund-raising event that was held at a downtown bar, the Viking Lounge. (Scharen's wife's employer was a member of the ski club, and she was one of the people working at this fund-raiser.)

The Scharens arrived around 6:00 p.m., and over the course of the next hour, Scharen drank alcoholic beverages. Around 7:00 or 7:30, Scharen began to fall asleep, so his wife told him to go outside and wait for her in their minivan until the fund-raiser was over. Scharen's wife gave him the keys so he could get into the vehicle.

Scharen left the Viking Lounge and walked to the minivan. When he arrived at the vehicle, he got into the driver's seat, inserted the keys into the ignition, and started the engine (so that the vehicle would be warm; the outside temperature was 18 degrees). Scharen then deliberately went to sleep.

Around 9:00 p.m., a passerby saw Scharen sitting or lying unconscious in the driver's seat, inside the running vehicle. When the passerby was unable to rouse Scharen, he summoned the police. A police officer arrived and woke Scharen up by knocking on the window and shining a light into Scharen's eyes. Scharen stumbled out of the minivan; he smelled of alcoholic beverages, and he swayed while standing. The officer administered field sobriety tests to Scharen, and then he arrested Scharen for operating a motor vehicle under the influence. Scharen's breath test revealed that he had a blood alcohol level of .13 percent.

At trial, Scharen's lawyer asked the trial judge—District Court Judge Keith B. Levy—to instruct the jury on the defense of necessity. Judge Levy declined to give the proposed instruction[.]

Why we conclude that Scharen failed to present a triable issue as to whether his decision to assume control of the motor vehicle, and his decision to operate this vehicle (by turning on the engine), were justified by necessity

A criminal defendant is entitled to a jury instruction on the defense of necessity if the evidence, viewed in the light most favorable to the proposed defense, is sufficient to allow a reasonable fact-finder to conclude: (1) that the defendant committed the charged offense to prevent a significant evil; (2) that, given the circumstances (as the defendant reasonably perceived them), the defendant had no reasonable alternative—no adequate way to avoid this significant evil except by committing the charged offense; and (3) that the harm threatened or caused by the defendant's crime was not disproportionate to the harm that the defendant sought to avoid by breaking the law.

[…]

The first element is that the defendant committed the charged offense to prevent a significant evil. Scharen argues that he faced a significant evil—injury or death because of the sub-freezing temperatures—if he sat in the unheated vehicle for hours. But AS 11.81.320(a) declares that the defense of necessity is available only "to the extent permitted by common law". And the common law (as generally applied throughout this country) does not allow a defendant to rely on the defense of necessity if the underlying claim is that the defendant was required to break the law in order to avoid, cure, or alleviate a significant evil of their own making.

As [legal scholars explain], the American jurisdictions that recognize a "necessity" or "choice of evils" defense are in general agreement that the defendant's creation of the danger or evil will limit the availability of the defense.

[…]

Turning to the facts of Scharen's case, Judge Levy found that Scharen knowingly created the situation that allegedly required him to turn the vehicle's engine on. As Judge Levy explained in his ruling, the testimony presented at Scharen's trial showed that Scharen was sitting in a warm bar, safe from the elements, and that Scharen then made a conscious decision to leave the bar and go sit in the minivan until his wife finished her work at the ski club fund-raiser.

We further note that Scharen's initial act of taking the keys from his wife and going to wait in the driver's seat of the minivan was itself illegal. Even if Scharen had never started the engine, his act of assuming physical control of the vehicle constituted the offense of "driving while under the influence"—because, for purposes of this offense, "driving" includes the act of assuming actual physical control of an operable motor vehicle, even if one does not operate the vehicle. […]

Thus, Scharen's alleged necessity to turn the engine on (so that he could stay warm) was created by Scharen's own unlawful act of assuming physical control of the vehicle and waiting in the car for his wife.

Because, under Alaska law, the necessity defense is available only to the extent allowed by the common law, and because Scharen made a conscious choice to unlawfully put himself in a position where he would need to start the engine to keep warm, Scharen had no legal right to rely on a defense of necessity.

[…]

Turning to the second element of the necessity defense, we conclude that Scharen likewise failed to present sufficient evidence to justify a verdict in his favor on this element of the defense—the requirement that, given the circumstances (as the defendant reasonably perceived them), the defendant had no reasonable alternative method to avoid the significant evil except by committing the charged offense.

The pertinent circumstances were that Scharen went to sit in the minivan until his wife was done with the ski club fund-raiser, and it was so cold outside that Scharen could not realistically continue to sit in the vehicle unless he turned the engine on and generated heat. But as Judge Levy noted, Scharen had several alternatives to continuing to sit in the minivan.

First, Scharen could have returned to the bar. Scharen's only ostensible reason for leaving the bar in the first place was that he or his wife might potentially be embarrassed because Scharen was visibly falling asleep at the fund-raiser. The bar remained an easily available and adequate alternative solution to the problem of the cold weather.

[…]

[Moreover], even if we assume that Scharen could not lawfully stay in the bar, there were other ways he might have dealt with the situation. It was early in the evening, and other businesses and restaurants were open in downtown Juneau. Alternatively, Scharen might have asked a friend or other member of the ski club to drive him home, or to lend him the money to take a cab. It appears, from Scharen's testimony, that he did not even consider these alternatives. Here is the pertinent excerpt of Scharen's cross-examination by the prosecutor, in which the prosecutor asked Scharen why he had not taken a cab home:

Prosecutor: So, Mr. Scharen, you indicated that you had credit cards on you, but that you didn't have any [credit remaining] on them?
Scharen: No, there [was] nothing on them.
Prosecutor: So, as a matter of personal convenience, you couldn't have called a taxicab to go home?
Scharen: No.
Prosecutor: [You] couldn't have called a friend?
Scharen: Not really. I mean, why would I call a friend when I was waiting for my wife?

Based on this record, we conclude that no reasonable fact-finder could have decided in Scharen's favor on the question of whether Scharen had other adequate methods (apart from breaking the law) to deal with the situation.

Because there was insufficient evidence to support findings in Scharen's favor on the first and second elements of necessity, the third element of the necessity defense is moot. The question presented by this third element—whether the harm threatened or

caused by the defendant's crime was disproportionate to the harm that the defendant sought to avoid by breaking the law—does not arise unless the evidence would support a finding in the defendant's favor on the first two elements of the necessity defense.

For these reasons, we uphold Judge Levy's decision not to instruct the jury on Scharen's proposed necessity defense.

Conclusion
The judgement of the district court is AFFIRMED.

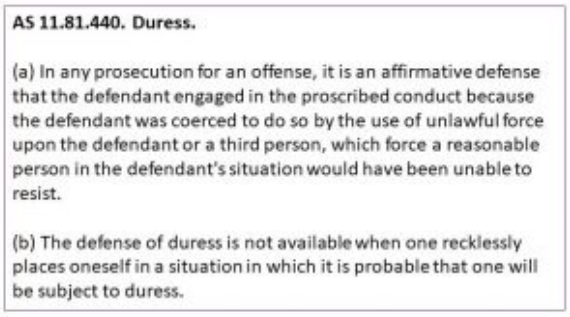
You be in the judge (7.1) …

In August of 2006, Jennifer was drinking at home with her boyfriend, when he turned abusive and threatened to burn down the house. Jennifer fled the house and called 911 asking help. 911 dispatched police to Jennifer's house. Instead of waiting for the police, Jennifer got in her van and drove away fleeing to her mother's house. On the way to her mother's house, Jennifer drove past the police station (who, unbeknownst to the officers, drove *past* Jennifer towards her house), past a well-lit shopping mall, and past several open businesses. An unrelated officer saw Jennifer speeding, pulled her over, and could immediately tell she was severely intoxicated. Jennifer was arrested for felony driving under the influence (Jennifer had two prior DUIs). Do you think Jennifer will be successful in relying on the affirmative defense of necessity? Why or why not? Check your answer at the end of the chapter.

Duress

If a person commits the crime under pressure caused by the *threat of force* from another human being, as opposed to nature, an act of God, or circumstances outside the defendant's control, the defendant may rely on the defense of **duress**. Duress justifies a criminal act when another person is threatening to kill or seriously injure a person unless the defendant commits the crime. AS 11.81.440. Duress, like necessity, is an affirmative defense.

Figure 7.5 AS 11.81.440 – Duress



AS 11.81.440. Duress.

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

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

Duress consists of three elements. First, the injury threatened must be immediate. A hypothetical or future injury will not suffice. Second, the defendant must have a reasonable belief that the threat will be carried out. Third, the injury threatened must be unavoidable. The defendant must not have an opportunity to escape. Duress, like necessity, is not available if the defendant placed himself in the situation.

Example of No Duress

Scott and Dale conspire to burglarize Harvey's residence because they believe Harvey keeps significant cash inside the home. The two co-conspirators intend to burglarize the residence when Harvey is not home, but when Scott knocked on the door to make sure no one was home, Harvey answered the door. Scott told Harvey that they (Scott and Dale) had car problems and needed to use the telephone. After they entered the house, Dale pulled a gun and held Harvey at gunpoint. Dale ordered Scott to tie up Harvey or Dale would kill both Harvey and Scott. Dale then ransacked the house, stealing Harvey's cash. As they left the house, Dale shot and killed Harvey (to prevent Harvey from calling the police). Days later, Scott was arrested and charged with murder, robbery, burglary, and theft. At trial, Scott claimed that he did not know Dale was going to use a gun and that he went along with the crime out of fear for his own safety. Scott claimed that if he did not participate Dale would have killed him.

In this scenario, Scott is not entitled to claim duress. The situation giving rise to Dale's threat of force against Scott was a situation that Scott created. Had Scott not participated in the burglary, he would not have needed to claim duress. Note, however, that Scott

may be entitled to an affirmative defense to the specific charge of homicide (*i.e.*, felony murder), but we will explore that in a different chapter.

You be in the judge (7.2) …

Juan is a native of Bogota, Colombia and was a taxi driver there. He was approached by one of his passengers, Jorge, and offered a job to swallow cocaine-filled balloons and transport them to the United States. Juan initially agreed, but several days later, changed his mind and told Jorge that he would not transport the drugs. Jorge told Juan that his failure to cooperate would result in the death of his wife and three-year-old child. Juan transported the cocaine to the United States as planned. When Juan arrived at the customs inspection point, he consented to have his stomach x-rayed. The x-rays revealed the cocaine in Juan's stomach. Juan was indicted for drug-trafficking. Do you think Juan will be able to assert the defense of duress? Why or why not? Check your answer at the end of the chapter.

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7.5: Consent

Although **consent** is a defense to certain crimes, it is generally not a *codified* justification like self-defense or necessity. Instead, consent – or the lack thereof – is normally subsumed into the essential elements of a crime. For this reason, consent is akin to the *failure of proof* defense discussed at the beginning of the chapter. For example, a person is not guilty of theft if the person has the consent of the property owner to take the item. A person may not be convicted of vandalism if the owner consented to the property damage. **Consent** most commonly arises in sexual assault cases, in which the defense contends the sexual act was consensual. Consensual sex is generally not a crime. In all sexual assault prosecutions, lack of consent is a criminal **element** that the government must prove beyond a reasonable doubt. AS 11.41.410 *et. seq.* In some sex offenses, a person cannot consent as a matter of law. Sexual abuse of a minor (statutory rape) is an example where the victim cannot consent due to his or her age. We explore sexual assaults and lack of consent in subsequent chapters. In this section, we explore consent to *nonsexual* conduct.

There are some offenses – generally crimes against public welfare – in which consent will not operate as a defense. Thus, even if the prohibited act is consensual, it remains a crime. For example, prostitution criminalizes *consensual* sex between two adults. AS 11.66.100. Notably, consent is not a defense to "fighting." Fighting – a mutual understanding to "trade blows" – is criminalized as Disorderly Conduct. AS 11.61.110(a)(5); *Dawson v. State*, 264 P.3d 851 (Alaska App. 2011). Recall that a person may not claim self-defense if engaging in mutual combat (*e.g.*, fighting). AS 11.81.330(a)(1).

Outside of sexual assaults, consent is a rare defense. Generally, consent can operate only as a defense against some thefts, injury that occurs during a sporting event, and crimes that do not result in serious bodily injury. *See* Wayne R. LaFave, *Substantive Criminal Law* §6.5(a) (3rd ed. 2018). Thus, a hockey player is not guilty of assault when she forcibly checks an opposing player during a hockey game. On the other hand, a person may not consent to be murdered. AS 11.41.120(2).

Regardless of the circumstance, consent must always be *voluntarily* and *knowingly* given. Consent is not **voluntary** if it is induced by force, the threat of force, or trickery. Consent is not considered **knowing** if it is given by an individual who is too young, mentally incompetent, or intoxicated.

Example of Unknowing Consent

Jim and John are roommates and obsessive bodybuilders. During a party, Jim drinks several shots of vodka and challenges John to a test of core strength. Jim tells John that he can sustain more punches to his stomach than John. Jim tells John to hit him in the stomach as hard as he can, not out of anger or malice, but humor. Jim promises not to wince. John cannot likely claim consent as a defense to the assault in the case. Although Jim consented to the assault, he did so while intoxicated and clearly was unable to make a reasoned decision. Jim's consent was not given **knowingly** and was likely invalid.

Example of Involuntary Consent

Let's change the example with Jim and John. Let's assume that neither Jim nor John have consumed any alcohol. Instead, John tells Jim that he will stab him with a kitchen knife unless Jim lets John punch him in the stomach. In this scenario, John is likely guilty of assault. Jim's consent to the assault was in response to John's threat of physical harm. Thus, Jim's consent was not given **voluntarily** and thus invalid.

Example of Legal Consent

We're not done with Jim and John. Let's assume that Jim and John are performing at a local bodybuilding show and want to show the audience their core strength. Jim tells John, in front of a large audience, to punch him in the stomach as hard as he can. Jim brags to the audience that he will not wince. Under this scenario, it appears that Jim's consent was knowing and voluntarily given. Unless Jim suffers serious physical injury from the punch, John can likely rely on Jim's consent to defend again the charge of assault.

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7.6: End-of-Chapter Material

Summary

The bedrock principle of the criminal justice system is the presumption of innocence. All defendants, no matter how strong the evidence may appear, begin a trial with a clean slate. All are presumed innocent of the crime charged. For this reason, a defendant can simply rely on the government to fail to prove the defendant's guilt beyond a reasonable doubt. Such a defense is referred to as a failure of proof defense. Most defenses found within criminal law are statutory. A perfect defense results in the defendant being acquitted of the crime charged. An imperfect defense results in the defendant being convicted of a less serious, but related crime. A criminal defense requires the government to disprove its existence beyond a reasonable doubt, similar to a failure of proof defense. An affirmative defense raises an issue separate from the elements of the offense where the defendant has the burden of persuasion by a preponderance of the evidence. A factual defense is grounded in the facts of the case, while a legal defense depends on a statute or common-law principle. An example of a factual defense is an alibi defense, which asserts that the defendant could not have committed the crime because he was not present at the time the crime occurred. An example of a legal defense is the expiration of the statute of limitations, which means it is too late to prosecute the defendant for the offense.

Defenses are also categorized as either a justification or an excuse. A justification defense focuses on the offense and deems the conduct worthy of protection from criminal responsibility. An excuse defense focuses on the defendant and excuses his or her conduct under the circumstances.

Self-defense justifies the defendant's conduct in using physical force to protect oneself. The government is required to disprove self-defense beyond a reasonable doubt and it is a perfect defense. Self-defense is based on two basic elements – necessity and proportionality. Self-defense is only available if the defendant faces an unprovoked, imminent attack and the degree of force used in response is necessary to avoid the attack and was objectively reasonable under the circumstances. Fear of likely, future harm is insufficient to satisfy the imminency requirement of self-defense. Deadly force is any force that can kill under the circumstances. Deadly force can be used in self-defense only if the defendant is faced with imminent death, serious bodily injury, or the commission of a serious felony. A defendant need not retreat before resorting to deadly force, provided that the defendant is in a place he is legally entitled to be – trespassers must retreat before using deadly force.

A person may defend another to the same extent as the person may defend themselves under the law of self-defense. If a defendant honestly, but reasonably mistakes the need to defend another, the defendant may still claim the defense of others. A defendant may use nondeadly force to prevent the imminent threat of damage, loss, or theft of property. Real property is land and anything permanently attached to it, while personal property is any movable object. A trespasser may be ejected from real property using nondeadly force.

A person may use deadly force to prevent arson or burglary of an occupied dwelling. This expanded use of force is referred to as the castle doctrine. A person may not use deadly force to prevent arson or burglary of an unoccupied building. The defense of habitation focuses on the protection of life within the building, and not on the property itself.

Law enforcement has the right to use force in circumstances beyond that of an ordinary citizen. A law enforcement officer may use reasonable nondeadly force, and threaten the use of deadly force, when arresting a criminal suspect, making a lawful investigatory stop, and when recapturing an escapee. A police officer may use deadly force when the officer reasonably believes deadly force is necessary to arrest a person committing a violent felony, escape from prison while armed, or if the person is engaging in highly dangerous behavior likely to result in death or serious injury. The level and degree of force are considered seizures under the Fourth Amendment and are analyzed under an objectively reasonable standard.

The defense of necessity permits the defendant to commit a crime if the harm caused is less severe than the harm that will occur if the crime is not committed. Necessity is sometimes referred to as the choice of evils defense. Duress, a closely related defense, can justify criminal behavior if the defendant is imminently threatened with serious bodily injury or death.

Consent may also be a defense to criminal liability, but is normally analyzed under a failure of proof defense. The victim may consent to the defendant's conduct provided that the consent was given knowingly and voluntarily. Consent is normally a defense to sex offenses, or conduct occurring during a sporting event, and the conduct does not involve serious bodily injury or death.

Key Takeaways

- A failure of proof defense focuses on the elements of the crime and prevents the prosecution from meeting its burden of proof. An affirmative defense is a defense that raises an issue separate from the elements of the crime. Affirmative defenses require the defendant to prove the defense by a preponderance of the evidence.
- An imperfect defense reduces the severity of the offense; a perfect defense results in an acquittal.
- A justification defense asserts that the defendant's criminal conduct was justified under the circumstances. An excuse defense asserts the defendant should be excused for their conduct.
- If the basis for a defense is an issue of fact, it is called a factual defense. If the basis for a defense is an issue of law, it is called a legal defense.
- Self-defense is a defense based on the justification that allows a defendant to use physical force to protect herself from harm
- Deadly force is any force that can produce death or serious injury. An individual does not have to die for the force to be deemed deadly.
- Self-defense is built upon the assumption that the force used was necessary and proportional to the harm faced. A person may only use self-defense when faced with an imminent threat of harm. Likely, future harm is insufficient to justify self-defense. A defendant may only use an objectively reasonable degree of force in response to an objectively reasonable fear of harm.
- Deadly force is appropriate in self-defense when the attacker threatens death, serious bodily injury, or specific serious felonies.
- The duty to retreat doctrine is a common-law rule requiring a defendant to retreat if it is safe to do so, instead of using deadly force in self-defense. The stand-your-ground doctrine is a rule allowing the defendant to use deadly force if appropriate in self-defense, rather than retreating.
- Defense of others has the same elements as self-defense: the individual defended must be facing an unprovoked, imminent attack, and the defendant must use a reasonable degree of force with a reasonable belief that force is necessary to repel the attack.
- The defendant can use nondeadly force to defend real or personal property if the defendant has an objectively reasonable belief that an imminent threat of damage, destruction, or theft will occur.
- Property owners can use reasonable nondeadly force to eject a trespasser.
- Only nondeadly force may be used to defend property; deadly force may be used to defend against an arson or burglary of an occupied building.
- Use of force by law enforcement is considered a seizure under the Fourth Amendment, so law enforcement cannot use deadly force to apprehend or arrest a criminal suspect unless there is probable cause to believe the suspect will inflict serious physical injury or death upon the officer or others.
- Three elements are required for the defense of necessity: the criminal act must be done to prevent a *significant* evil, there was no adequate *alternative*, *and* the harm caused must not have been *disproportionate* to the harm avoided.
- Choice of evils is often based on nature or an act of God; duress is generally brought on by another individual.
- Two elements are required for the consent defense: the defendant must consent knowingly (cannot be too young, mentally incompetent, or intoxicated) and voluntarily (cannot be forced, threatened, or tricked).
- Three situations where consent can operate as a defense are sexual offenses, situations that do not result in serious bodily injury or death, and sporting events.

Answers to Exercises

From Other Us-of-Force Defenses

1. Melanie *cannot* use the defense of others as a defense to murder. Melanie can defend Colleen only to the same extent she could defend *herself*. Nothing in the fact pattern indicates that Colleen could defend herself using **deadly force.** Thus, Melanie could be successfully prosecuted for criminal homicide in this situation.

*Is Cannibalism a Crime?*Answer to

In *Regina v. Dudley & Stephens*, 14 Q.B.D. 273 (1884) an English court found the shipwreck survivors guilty of murder and sentenced them to death (later commuted to six months in jail). While the men sought to justify their actions based on necessity, the court rejected the defense. Human life, according to the court, is paramount. Human life should be protected if at all possible. Neither probable nor likely death justifies cold-blooded murder. Killing another human being is only allowed when life itself is physically threatened. Otherwise, the law would be required to determine whose life was paramount. The

circumstances that led to the killing of Richards (the teenage boy) was murder, especially when Richards was given no choice in the matter.

Joseph Simeone's essay, *"Survivors" of the Eternal Sea: A Short True Story*, 45 St. Louis U. L.J. 1123 (2001) provides a much more thorough and complete description of the events. Simeone's essay is available through the Consortium Library at the University of Alaska Anchorage using your student credentials.

*You Be the Judge…*Answers to

Answer to *You Be the Judge* … (7.1)

- Jennifer likely has a valid defense of necessity for her *initial* decision to drive away from her boyfriend. Physical harm is a significant evil; Jennifer has the right to avoid injury. Fleeing instead of waiting for police to arrive is an appropriate alternative. Finally, driving intoxicated to prevent immediate physical harm is not disproportionate to the harm caused by driving. However, the necessity likely ended when Jennifer drove past a police station, a shopping mall, and open businesses. To claim necessity, Jennifer must stop violating the law as soon as its danger is averted. Compare *Reeves v. State*, 764 P.2d 324 (Alaska App. 1988) and *Greenwood v. State*, 237 P.3d 1018 (Alaska 2008). Both *Reeves* and *Greenwood* involved substantially similar fact patterns – a victim of domestic violence driving intoxicated to avoid being assaulted. In *Reeves*, the court found the victim *did not* have a necessity defense because she did not stop at the police station, but instead drove past a family member's home. Conversely, in *Greenwood*, the court found the victim *did* have a valid necessity defense in part because she fled the house to a well-lit parking lot and flagged down the oncoming police officer.

Answer to *You Be the Judge* (7.2)

- Juan has demonstrated all of the elements of duress: immediacy, a well-grounded fear, and inescapability. Juan reasonably believed his family would be immediately killed if he did not comply and his alternative was either go to the police or flee, forcing him to leave his family in peril. The law only requires a defendant to act reasonably. Here, Juan presented a triable claim of duress. *See U.S. v. Contento-Pachon*, 723 F.691, 693-94 (9th Cir. 1984).

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CHAPTER OVERVIEW

8: Criminal Defenses (Excuse)

8.1: Competency and Insanity

8.2: Infancy, Intoxication, Ignorance, and Mistake

8.3: Entrapment

8.4: End-of-Chapter Material

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8.1: Competency and Insanity

This chapter provides a brief overview of various criminal defenses based on **excuse**, including defenses related to **mental illness**. Remember that excuse defenses focus on the *defendant*. A defendant is not claiming they were justified in their actions, but that they should not be held responsible for their actions because circumstances prevented them from acting lawfully. Excuse defenses are perfect defenses and are affirmative defenses in many situations.

Mental Illness

It is well known that **mental illness** plays a large role in the criminal justice system. By most accounts, correctional institutions (*i.e.*, prisons and jails) account for the largest percentage of mental health providers in the country. Alaska is no different. On any given day, 65% of Alaska inmates suffer from mental illness or Substance Use Disorder (SUD). *See* Hornby Zeller Associates, Inc., *Trust Beneficiaries in Alaska's Department of Corrections* (May 2014). The law has long recognized that a person who suffers from a serious mental illness may be treated differently in the criminal justice system. A person's mental illness frequently influences how the government proceeds with a criminal prosecution, such as preventing a person from standing trial (**competency**), relieving a person from criminal responsibility (**insanity**), or resulting in punishment despite their mental illness (**GBMI**).

Not all mental illnesses affect culpability. Only a person suffering from a **mental disease or defect** may rely on an excuse defense. AS 12.47.130(5). A mental disease or defect means a disorder of thought or mood that *substantially impairs* a person's ability to cope with the ordinary demands of life. Mental diseases or defects are not limited to psychological disorders, but include mental disabilities caused by traumatic brain injury or other intellectual and developmental disabilities.

Competency

To understand the defense of insanity, one must first understand, and differentiate it from, competency. **Competency** refers to a person's cognitive ability to stand trial. Competency requires a defendant to understand the proceedings against him and be able to assist in his own defense. If a defendant is incompetent as a result of a mental disease or defect, the defendant may not be tried, convicted, or sentenced for a criminal offense. AS 12.47.100. Competency is a constitutional barrier to criminal charges. Competency is **not a defense** to criminal behavior. Instead, a criminal defendant has a constitutional due process right to understand the nature of the proceedings against him. It is fundamentally unfair to punish a person who does not understand the actions being taken against him. A defendant must have a rational and factual understanding of the proceeding against him and have sufficient present ability to communicate with his lawyer with a reasonable degree of rational understanding. *See Dusky v. United States*, 362 U.S. 402 (1960). Note however, the Constitution only requires a minimal level of competency. The defendant need not be able to articulate the nuances of criminal law or the nature of the proceedings against him. The law only requires a basic understanding of the system and the accusations.

Competency refers to the defendant's condition at the time of the court proceeding, not at the time of the offense. Competency is a fluid concept; it is not static. A person's competency can change throughout a court proceeding. Although a person's incompetence must be caused by a mental disease or defect, the question of competency is a legal question, not necessarily a medical question. Although medical opinions inform a judge in determining a person's competency, the ultimate decision rests with the court and not medical professionals. Criminal defendants are presumed competent. The party challenging competency has the burden to prove the defendant's incompetence.

Gamble v. State, 334 P.3d 714 (Alaska App. 2014)

In the following case, the court is faced with the question of how much weight to give a defendant's attorney's opinion about the defendant's competency. Notice how the trial court describes the defendant's understanding of the court process and how this informed its final decision on competency.

334 P.3d 714
Court of Appeals of Alaska.
Johnnie J. GAMBLE, Appellant,
v.
STATE of Alaska, Appellee.

No. A–11042.
Sept. 19, 2014.

OPINION

ALLARD, Judge.

After being charged with three counts of violating a domestic violence protective order, Johnnie J. Gamble was found incompetent to stand trial and committed to the Alaska Psychiatric Institute (API) for 90 days in an effort to restore him to competency. At the end of the 90–day commitment, the trial court concluded that Gamble was competent to proceed to trial, despite his attorney's continuing objections that Gamble could not meaningfully participate in his own defense. Gamble was subsequently convicted of two counts of violating a protective order.

Gamble appeals, arguing that the trial court erred in finding that he was competent to stand trial. For the reasons explained in this opinion, we affirm the trial court's ruling.

Facts and proceedings

The State charged Gamble in two separate cases with three counts of violating a domestic violence protective order. Shortly after Gamble's arraignment, Gamble's attorney requested a competency evaluation of Gamble to determine if he was legally competent to stand trial.

Dr. Lois Michaud, a forensic psychologist at API, conducted a competency evaluation of Gamble on January 19, 2011. Dr. Michaud reported that Gamble was very delusional and would be unable to consult with his attorney in a rational manner or present a rational defense. She observed that Gamble's delusions included his belief that he had already been to trial and that he needed to talk to a physicist because, in his words, "the theory of causality, cause and effect, everything is created by God and every physical thing possibly has already happened and can happen again." Dr. Michaud concluded based on the intensity and intrusiveness of Gamble's delusions that he was not competent to stand trial.

Superior Court Judge [George], found Gamble incompetent to stand trial. Pursuant to AS 12.47.110(a), Judge George then ordered Gamble committed to API for 90 days for further evaluation and possible restoration to competency.

Near the end of the 90 days, Dr. Michaud re-evaluated Gamble and concluded that his mental condition had improved under the structured setting of the psychiatric hospital and that he was now competent to stand trial. At the subsequent competency hearing, Dr. Michaud testified that when she first interviewed Gamble in January, his delusional ramblings and the intrusiveness of his delusional thoughts made him very difficult to interview. Gamble had greatly improved by the time he was re-evaluated, and his delusions were significantly "less intrusive" than before. Dr. Michaud concluded that while Gamble's delusions had not entirely disappeared, they no longer presented the same barrier to coherent and rational communication as before.

However, Dr. Michaud specifically warned the court and the parties that exposure to an unstructured environment (like jail or trial) could cause Gamble's delusions to become more intrusive, and that Gamble's attorney "would be the first to know" if Gamble began to experience the type of active delusions that would render him incompetent.

Gamble's attorney disagreed with Dr. Michaud's conclusion that Gamble was competent to stand trial. The attorney argued that the nature of Gamble's delusions—his belief that everything happens in a loop, and that everything has happened before, including his trial—meant that Gamble was unable to effectively assist in his own defense, and that his case should therefore be dismissed[.]

Judge George concluded that the mere existence of Gamble's delusions, standing alone, did not necessarily prevent him from communicating with a reasonable degree of rational understanding with his attorney or otherwise prevent him from meeting the standard for competency. After observing Gamble's demeanor at the second competency hearing, the court found that Gamble was doing better and that he was not in one of his "more agitated states." The court further found that Gamble "appreciate[d] the nature of the proceedings," understood the role of the parties and court, and was able to speak and convey thoughts to his attorney, including his various disagreements with his attorney's litigation strategy. The court therefore found Gamble competent to stand trial[.]

[…]

The case then went to trial. The jury convicted Gamble of two counts of violating a protective order and acquitted him of the third count.

This appeal followed.

Did the trial court err in finding Gamble competent to stand trial?

Under Alaska law, a defendant is incompetent to stand trial if, as a result of a mental disease or defect, the defendant is "unable to understand the proceedings against the defendant or to assist in the defendant's own defense." This standard necessarily incorporates the federal constitutional standard for competency to stand trial, which requires a defendant to have a rational and factual understanding of the proceedings against him and to have a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding.

A defendant who is incompetent to stand trial may not be tried, convicted, or sentenced for the commission of a crime so long as the incompetency exists. The conviction of a defendant who is not competent to stand trial violates due process of law.

Because the integrity of the judicial proceeding is at stake when the competency of a criminal defendant is in question, a trial court has a duty to order a competency evaluation whenever there is good cause to believe that the defendant may be incompetent to stand trial. Additionally, because a defendant's mental state may deteriorate under the pressures of incarceration or trial, a trial court is required to be responsive to competency concerns throughout the criminal proceeding.

In the current case, Gamble does not dispute the trial court's finding on the first prong of the competency standard. That is, Gamble does not dispute that he understood the proceedings against him. Instead, his challenge is exclusively to the second prong of the competency test—whether he could participate in his own defense and consult with his lawyer with a reasonable degree of rational understanding.

Gamble asserts on appeal, as he did below, that the nature of his delusional beliefs—which made him believe that everything had already happened—prevented him from being able to assist in his defense or communicate with his attorney with a reasonable degree of rational understanding.

But as the Alaska Supreme Court has previously recognized, "[t]he presence of some degree of mental illness is not an invariable barrier to prosecution." A defendant may have some degree of impaired functioning but still be "minimally able to aid in his defense and to understand the nature of the proceedings against him." To a large extent, therefore, "each case must be considered on its particular facts."

Here, the record indicates that the trial court took the competency concerns raised by the defense counsel very seriously. The court held multiple hearings on Gamble's competency, including a full evidentiary hearing at which the forensic psychologist testified and was questioned by the prosecutor, the defense attorney, and the judge. Moreover, the court did not simply defer to the psychologist's opinion. Instead, the court made its own independent findings and continued to make additional findings at later hearings, demonstrating the court's awareness that Gamble's situation was not necessarily stable and that the highly intrusive delusions that previously presented a barrier to his competency could quickly return.

On appeal, Gamble argues that the trial court should have deferred to the defense attorney's assertion that Gamble was unable to assist in his defense because the defense attorney was the only person in a position to make that assessment.

We agree that a defense attorney is in a unique position with regard to assessing a defendant's ability to assist in his own defense and that a defense attorney's assessment of the defendant's functioning is therefore an important factor for the court to consider. But ultimately the question of whether the defendant is competent to stand trial is a determination that the trial court must make independently based on all of the information before it. Thus, just as it would be error for the trial court to defer to the forensic psychologist's assessment of Gamble's competency, so too would it be error for the trial court to simply adopt the defense attorney's perspective of the defendant's incompetency, without making its own independent determination based on all the information before it.

[…]

Given the record before us, we conclude that the trial court did not err in rejecting this argument and in finding that Gamble was competent to stand trial.

Conclusion

We AFFIRM the judgment of the superior court.

In Alaska, if a defendant is found to be incompetent, the court is obligated to commit the defendant to the care of a mental institution for a period of time to achieve **"restoration."** AS 12.47.100(b). Since competency is a question of cognitive ability at the time of the proceeding, a criminal defendant may be restored through treatment and medication. If a defendant is not "restorable," but still dangerous, the defendant may be committed to a mental institution until the person no longer suffers from the mental disability and is no longer dangerous. The government bears the burden of establishing a person is dangerous. If a case is dismissed as a result of incompetence, it is dismissed "**without prejudice**," meaning the government can refile criminal charges if the defendant becomes competent at a later date.

Pieniazek v. State, 394 P.3d 621 (Alaska App. 2017)

In the following case, the court expands on how to determine if a defendant is competent. What does it mean to be able to understand the proceedings against oneself and be able to assist in one's own defense?

394 P.3d 621
Court of Appeals of Alaska.
Stanly PIENIAZEK, Appellant,
v.
STATE of Alaska, Appellee.
February 24, 2017

OPINION
Judge ALLARD.

Stanly Pieniazek was found competent to stand trial following a competency hearing before Fairbanks Superior Court Judge Michael P. McConahy. A jury later found Pieniazek guilty of two counts of third-degree assault for shooting a gun at two state troopers after they responded to a report of a disturbance at Pieniazek's property in Fairbanks.

On appeal, Pieniazek argues that the superior court erred in determining that he was competent to stand trial. For the reasons explained here, we agree with Pieniazek that the superior court misapplied the factors listed in AS 12.47.100(e) and failed to conduct an independent and contemporaneous assessment of Pieniazek's competency. Accordingly, we remand Pieniazek's case to the superior court for reconsideration and, if feasible, a retrospective determination of his competency to stand trial.

Background facts
Pieniazek, a Polish immigrant with limited English proficiency, is eighty years old. The events that gave rise to this case took place in May 2012, when Pieniazek was seventy-five years old. At the time of the shooting, Pieniazek was living in squalor at his property in Fairbanks in a collection of structures connected by self-constructed "tunnels" that witnesses described as dilapidated and unsanitary. Although Pieniazek was appointed a public guardian two years prior, due to his behavior during a separate criminal case, Pieniazek rebuffed his guardian's attempts to place him in assisted living, and he twice left the facility in which he was placed. The record before the trial court indicated that Pieniazek was employed from 1969 to approximately 1991, when he retired. The record also indicated that although Pieniazek possessed a driver's license as late as 2011, he was last observed driving in February 2010.

Prior to trial, Pieniazek's attorney filed a motion for a judicial determination of competency. Pieniazek was then evaluated twice: first by clinical psychologist Dr. Siegfried Fink, who concluded that Pieniazek had dementia and was incompetent to stand trial; and later by state forensic psychologist Dr. Lois Michaud, who rejected Fink's diagnosis of dementia and instead concluded that Pieniazek was malingering, based on his refusal to communicate with her.

Fairbanks Superior Court Judge Michael McConahy subsequently held a hearing in May 2013 at which Dr. Fink and Dr. Michaud elaborated on their respective diagnoses. In addition, three other witnesses testified: Ruth Retynski, Pieniazek's public guardian, as well as Fairbanks Correctional Center (FCC) officers Joanne Murrell and Jerry Watson. Murrell and Watson had both dealt extensively with Pieniazek while he was in custody awaiting trial in this case. In relevant part, Retynski, Murrell, and Watson each described a number of Pieniazek's strange behaviors.

Retynski testified that she struggled to find an assisted living facility for Pieniazek, partly because she could not determine whether his behavior was due to mental illness or dementia. But Retynski also testified that Pieniazek was manipulative, and that there were

times during her conversations with Pieniazek that she felt he was pretending not to understand her when she "didn't give him exactly what he wanted."

The FCC corrections officers testified that Pieniazek's mental condition was extremely poor during his incarceration: Pieniazek hoarded and ate spoiled food, refused to shower unless "tricked" into doing so, struggled to complete all but the most simple tasks, generally did not communicate with staff or other inmates, and was kept in administrative segregation for the sake of both his and others' safety. Officer Murrell testified that Pieniazek had "moments where he knows what he's talking about … [and] moments where he's just babbling." She also testified that Pieniazek would sometimes "in the middle of the night … pack up all his stuff, fold everything up, organize everything, and just bang on the door and [say] open the door, I'm ready to go home." Dr. Fink also noted in his report that the FCC staff members he interviewed "observed a significant decline in [Pieniazek's] level of functioning especially in the last year."

The trial judge found Pieniazek competent to stand trial, crediting Retynski's and Dr. Michaud's testimony that Pieniazek was sometimes "communicative." The trial judge also noted that AS 12.47.100(e) directs a court determining a defendant's competency to take into account "whether the person has obtained a driver's license, is able to maintain employment, or is competent to testify as a witness under the Alaska Rules of Evidence." The trial judge concluded that these conditions had been met in Pieniazek's case because Pieniazek was "able to maintain employment since he got [to the United States] until his retirement [in 1991]" and that, although Pieniazek did not have a current driver's license, he had a "currently registered vehicle on his property" in 2011 and "gets around."

[…] Pieniazek …testified briefly in the current case. In the brief time he was on the stand, he answered his attorney's initial questions in Polish and then answered his attorney's later questions with "I don't know" and silence.

Alaska law regarding competency determinations

Under Alaska law, a criminal defendant is incompetent to stand trial if, "as a result of a mental disease or defect … the defendant is unable to understand the proceedings against the defendant or assist in the defendant's own defense." Alaska Statute 12.47.130(5) defines "mental disease or defect" as "a disorder of thought or mood that substantially impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life." The statutory definition further clarifies that "mental disease or defect" also includes "intellectual and developmental disabilities that result in significantly below average general intellectual functioning that impairs a person's ability to adapt to or cope with the ordinary demands of life."

A defendant who is incompetent may not be tried, convicted, or sentenced so long as his incompetency exists. The conviction of a defendant who is incompetent violates due process of law.

We have previously emphasized that, "[b]ecause the integrity of the judicial proceeding is at stake when the competency of a criminal defendant is in question, a trial court has a duty to order a competency evaluation whenever there is good cause to believe the defendant may be incompetent to stand trial." Moreover, "because a defendant's mental state may deteriorate under the pressures of incarceration or trial, a trial court must be responsive to competency concerns throughout the criminal proceeding."

The standard for determining lack of competency, although originally formulated in judicial decisions, is now codified in AS 12.47.100. This statute provides that "[a] defendant is presumed to be competent" and that "[t]he party raising the issue of competency bears the burden of proving the defendant is incompetent by a preponderance of the evidence." When the court raises the issue of competency, the burden of proving the defendant is incompetent "shall be on the party who elects to advocate for a finding of incompetency."

Alaska Statute 12.47.100(e)-(g) directs the trial court to consider a variety of factors in assessing a defendant's competency to stand trial. Subsection (e) provides a list of factors that the court is required to consider in determining "whether a person has sufficient intellectual functioning to cope with the ordinary demands of life." These factors are:

whether the person has obtained a driver's license, is able to maintain employment, or is competent to testify as a witness under the Alaska Rules of Evidence.

Subsection (f) provides a list of non-exhaustive factors that the court is required to consider in determining "if the defendant is able to understand the proceedings against the defendant." These factors include:

whether the defendant understands that the defendant has been charged with a criminal offense and that penalties can be imposed; whether the defendant understands what criminal conduct is being alleged; whether the defendant understands the roles of the

judge, jury, prosecutor, and defense counsel; whether the defendant understands that the defendant will be expected to tell defense counsel the circumstances, to the best of the defendant's ability, surrounding the defendant's activities at the time of the alleged criminal conduct; and whether the defendant can distinguish between a guilty and not guilty plea.

Lastly, subsection (g) provides a list of non-exhaustive factors that the court is required to consider in determining if the defendant is "unable to assist in the defendant's own defense." These factors include:

whether the defendant's mental disease or defect affects the defendant's ability to recall and relate facts pertaining to the defendant's actions at times relevant to the charges and whether the defendant can respond coherently to counsel's questions.

Subsection (g) also provides:

A defendant is able to assist in the defense even though the defendant's memory may be impaired, the defendant refuses to accept a course of action that counsel or the court believes is in the defendant's best interest, or the defendant is unable to suggest a particular strategy or to choose among alternative defenses.

Why we remand Pieniazek's case for reconsideration
As explained above, AS 12.47.100(e)-(g) directs a trial court to consider a variety of factors in determining whether a defendant is competent to stand trial.

[…]

[W]hen the court evaluated the factors listed in AS 12.47.100(e), it did not evaluate these factors in terms of Pieniazek's current ability to function and cope with the ordinary demands of life. Instead, it evaluated these factors exclusively in terms of Pieniazek's ability to function in the past—including, at times, the distant past. For example, the trial court noted that "I don't think anybody is saying that [Pieniazek] currently has an operator license," but the trial court nevertheless found it significant that "it seems clear that he's driven in the past, and [ ] had a—in 2011 at least, a currently registered vehicle." The trial court also found it significant that Pieniazek "maintain[ed] employment since he got here until his retirement" even though Pieniazek's retirement was in 1991—more than twenty years before the 2013 competency hearing. Lastly, the trial court found it significant that Pieniazek had testified on his own behalf in a prior criminal trial that took place approximately two years earlier. But, as already noted, the prior trial had not included a competency evaluation. Moreover, Pieniazek's testimony at that prior trial was largely incoherent, and his behavior ultimately resulted in the court appointing him a public guardian.

Taken together, the trial court's remarks indicate that the court misapplied the factors under AS 12.47.100(e) and failed to adequately investigate whether Pieniazek was competent at the time of trial, rather than at some point in the past. The record also indicates that the court failed to properly document its consideration of the relevant factors under AS 12.47.100(f)-(g).

As the Alaska Supreme Court has previously cautioned, competency is not a static concept, and the trial court's duty to determine competency is "not one that can be once determined and then ignored." The need to focus on the defendant's current level of functioning was particularly acute in this case, given that there had been a diagnosis of progressive dementia from one expert and witness testimony that Pieniazek's functioning had significantly deteriorated over the last year.

[…]

Conclusion
We REMAND this case to the superior court for reconsideration of the defendant's competency on the current record[.]

Insanity

Insanity is much different than competency. **Insanity** refers to whether a person should be criminally responsible for their crime even though they suffer from a severe mental illness. Unlike competency, insanity focuses on the defendant's culpability at the time of the offense.

Also, unlike competency, there is no constitutional right to an insanity defense. In 2020, the US Supreme Court found that a mentally ill defendant does not have a constitutional right to present an insanity defense at trial. *See Kahler v. Kansas*, __ U.S. __, 140 S. Ct. 1021 (2020). That said, nearly every jurisdiction authorizes some form of an insanity defense. In fact, as of April of 2021, only four jurisdictions – Kansas, Montana, Utah, and Idaho – do not have an affirmative insanity defense. The insanity defense is the subject of much debate and receives significant attention in the media, in part because it excuses even the most evil

and abhorrent conduct, and in many jurisdictions, like Alaska, functions as a perfect defense resulting in an acquittal. But remember, the insanity defense is rarely used, and even more rarely successful. As you will see, it is difficult to prove legal insanity.

The insanity defense is supported by two policies: First, persons who suffer significant and persistent mental disease or defect may not have control over their conduct. This is similar to a defendant who is hypnotized or sleepwalking. Second, severe mental illness may prevent a person from forming the culpable mental state necessary for the crime. Without the ability to control conduct, or the ability to understand that the conduct is morally wrong, there is little moral justification for punishing a legally insane defendant. Treatment, and not punishment, is the appropriate remedy.

Legal insanity differs from *medical* insanity. While the purpose of a medical diagnosis is to eventually cure the defendant's mental illness, the purpose of criminal law is to punish criminal behavior. A defendant's conduct is not excused – even if caused by a mental illness – if the defendant or society can benefit from punishment (through rehabilitation, deterrence, or incapacitation). Most mental diseases or defects do *not* rise to the level of legal insanity.

In all jurisdictions, the defense of insanity is a creature of statute and, as a result, variations exist. Historically, there are four primary variations of the insanity defense: *M'Naghten*, irresistible impulse, substantial capacity, and *Durham*. As you will see, Alaska's insanity framework is an amalgamation of nearly all of them.

Although insanity operates as a perfect defense and relieves the defendant of criminal responsibility for the crime, a person found **not guilty by reason of insanity** (NGI) is not immediately released back into the community. Under normal circumstances, if a defendant is NGI, they are *civilly* committed to a mental institution for treatment. Once the defendant demonstrates that they are not a danger to society due to their mental disease or defect, the defendant is released into the community.

M'Naghten Rule

The *M'Naghten* Rule is derived from the landmark 1843 British case, *M'Naghten*, 8 Eng. Rep. 718 (1843). It is often referred to as the **right-wrong test**. The defendant, Daniel M'Naghten, was under the paranoid delusion that the Prime Minister of England, Sir Robert Peel, was trying to kill him. When he tried to shoot, who he believed to be Sir Peel, he inadvertently shot and killed Sir Peel's secretary, Edward Drummond. M'Naghten was acquitted of Drummond's murder by reason of insanity. As a result of the verdict, the House of Lords developed what later became known as the *M'Naghten* Rule.

The rule contains two prongs. The first prong of the *M'Naghten* test (sometimes referred to as the "cognitive incapacity" prong) asks whether the defendant knew what they were doing — *i.e.*, whether the defendant understood the **nature and quality** of their conduct. A defendant does not know the nature and quality of a criminal act if, as the result of a mental disease or defect, the defendant is completely oblivious to what he or she is doing.

The second prong (sometimes referred to as the "moral incapacity" or "wrongfulness" prong) asks whether the defendant could understand that their conduct was wrong — *i.e.*, whether the defendant **appreciated the wrongfulness** of their actions. A defendant does not appreciate the wrongfulness of their actions when they engage in the criminal act because they are acting under the command of a divine being, caused by their mental disease or defect.

A defendant need only satisfy one of the prongs. As you can see, the *M'Naghten* rule focuses on the defendant's cognitive awareness of his actions, rather than his ability to control his conduct. Since its creation, the *M'Naghten* rule has been the primary test of criminal responsibility in the United States, and the exclusive test in a majority of American jurisdictions, England, and Canada.

Example of Insanity under the *M'Naghten* rule

Susan, a diagnosed schizophrenic, drowns her two young children in the bathtub. Susan's husband finds the deceased children when he returns home from an errand. Susan claims that she was directed to drown her children by Zeus, the greatest of all gods. According to Susan, Zeus told her that her children were not children, but blue squares and that to enter heaven, Susan had to eliminate all blue squares on earth. At the murder trial, Susan pleads not guilty by reason of insanity.

In a *M'Naghten* rule jurisdiction, Susan could successfully claim she was suffering from a mental disease or defect (schizophrenia) and, as a result of her mental illness, she did not know the nature or quality of her conduct (she thought her children were blue squares), nor did she appreciate the wrongfulness of her conduct (Zeus told her to eliminate blue squares). Thus, under the

M'Naghten Rule, Susan is likely not guilty by reason of insanity. Susan would likely be committed to a mental institution until she is no longer a danger to society. Susan would not be punished for her conduct.

Irresistible Impulse Test

Another variation of the insanity defense is the **irresistible impulse test**. The irresistible impulse test focuses on the defendant's cognitive awareness and the defendant's will. The crux of the test is **violation**, or free choice. As a result of the person's "disease of mind" the defendant did not know right from wrong, and the mental illness destroyed the defendant's free will and caused the defendant to commit the criminal act. The challenge with the irresistible impulse test is distinguishing between conduct that can be controlled and conduct that cannot. The irresistible impulse test is rejected by most jurisdictions. In some cases, the irresistible impulse test is easier to prove than the *M'Naghten* rule, resulting in the acquittal of more mentally ill defendants.

Substantial Capacity Test

The substantial capacity test is the insanity test set forth in the Model Penal Code, which considers a defendant legally insane if, as a result of mental disease or defect, they lacked "substantial capacity either to appreciate the wrongfulness of their conduct *or to conform [their] conduct to the requirements of the law*." Model Penal Code §4.01(1). The substantial capacity test combines the cognitive element of *M'Naghten* with the volitional element of the irresistible impulse insanity, thus resulting in an expanding type of mental illness constituting "legal insanity." *See e.g.*,*Lord v. State*, 489 P.3d 374, 381 (Alaska App. 2021) (Allard, J. *concurring*).

It is easier to establish legal insanity under the substantial capacity test because both the cognitive and volitional elements are more flexible. Unlike the *M'Naghten* rule, the substantial capacity test relaxes the requirement for the complete inability to understand or know the difference between right and wrong. Instead, the defendant must lack *substantial*, not total, capacity. The "wrongfulness" in the substantial capacity test is "criminality," which is a legal wrong, not a moral wrong. Further, unlike the irresistible impulse insanity defense, the defendant must lack *substantial*, not total, ability to conform their conduct to the requirement of the law.

The Durham Rule (Product Test)

The final insanity test we will explore is the **Durham rule**, which is currently used in only one jurisdiction – New Hampshire, where it has been used since the late 1800s. The *Durham* rule was also adopted by the Circuit Court of Appeals in *Durham v. U.S.*, 214 F.2d 862, 874-75 (D.D. Cir.1954), and articulated legal insanity as "an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." The *Durham* rule is sometimes referred to as the **product test**. Generally speaking, the *Durham* rule is akin to a proximate causation analysis – that is, did the defendant's mental disease or defect *cause* the criminal conduct.

The Court failed to provide definitions of product, mental disease, or mental defect, resulting in it being very difficult to apply. The test, originally designed to be hyper-flexible and intended to widen the range of relevant expert testimony available to the jury, resulted in inconsistent jury verdicts. *See e.g.*, *Washington v. U.S.*, 390 F.2d 444 (D.D.Cir. 1967). The test was used in the District of Columbia for nearly twenty years before being superseded by federal statute. *See e.g.*, 18 U.S.C. 17 (2022). The federal government has abandoned the *Durham* rule in favor of a *M'Nagthen*-style statutory test.

Alaska's History of Culpability Verdicts

Alaska has a unique approach to legal insanity. From statehood until 1972, Alaska largely followed the *M'Naghten* rule of legal insanity. In 1982, the Alaska legislature revised Alaska's insanity laws in response to several high-profile cases, including the Charles Meach murder trial. Charles Meach killed four teenagers in Russian Jack Park after being released from the Alaska Psychiatric Institute (API) following an *earlier* murder acquittal by reason of insanity. The Alaska legislature eliminated the moral incapacity/wrongfulness prong of the *M'Naghten* test, resulting in a highly restrictive definition of insanity – the single cognitive incapacity prong ("the nature and quality" prong). Alaska also created a GBMI verdict that included the moral culpability prong and the substantial capacity prong. No other jurisdiction has taken this approach to its insanity defense.

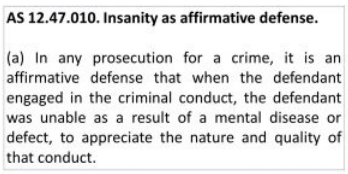
The More You Know…

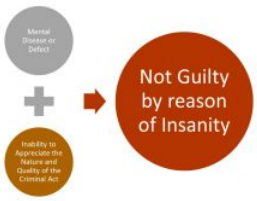
In 1982, Charles Meach was charged with killing four teenagers in Russian Jack Park. Meach pled "not guilty because of mental disease or defect," and shortly thereafter the Alaska legislature substantially revised Alaska's insanity laws. The case received significant notoriety because Meach successfully used the same plea in 1973 after he was acquitted by reason of

insanity of brutally murdering a woman he met at a topless bar. The New York Times covered the story and the resulting change in the law. *See* Wallace Turner, New Law on Insanity Plea Stirs Dispute in Alaska, N.Y. Times, June 22, 1982 at D:27. The article can be accessed through the Consortium Library at the University of Alaska Anchorage, using your student credentials. For additional information, Alaska Court of Appeals Chief Judge Allard outlined the history of Alaska's insanity laws in her concurring opinion of *Lord v. State*, 489 P.3d 374, 381 (Alaska App. 2021) (Allard, J. *concurring*).

In Alaska, insanity is an affirmative defense. The defendant has the burden to prove that they were legally insane at the time the crime was committed. Insanity is a perfect defense, and the defendant who successfully proves insanity must be *acquitted* of criminal wrongdoing.

Figures 8.1 & 8.2 – AS 12.47.010 Insanity Statute and Diagram





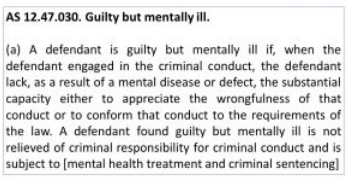
Guilty But Mentally Ill

Alaska's guilty but mentally ill (GBMI) verdict is a novel verdict and one specially created by the legislature. *See State v. Clifton*, 315 P.3d 694 (Alaska App. 2013). When the trier of fact enters a verdict of GBMI, the trier of fact is finding that "because of mental disease or defect, the defendant lacked the substantial capacity either to appreciate the wrongfulness of their conduct or to conform their conduct to the requirements of the law." *See id*. Approximately thirteen states have adopted similar GBMI laws.

Although legal insanity is an affirmative defense that the defendant must prove by a preponderance of the evidence, GBMI is an alternative verdict that can be raised by either the government or the defendant. *See State v. Lewis*, 195 P.3d 622, 639 (Alaska App. 2008).

Alaska's GBMI verdict is uniquely punitive. Unlike a defendant found guilty (but not mentally ill), a GBMI defendant is ineligible for mandatory and discretionary parole while they are receiving mental health treatment for their mental illness. Thus, a GBMI defendant is required to serve the full portion of their sentence in custody while they suffer from a mental illness that causes the defendant to be dangerous to the public. AS 12.47.050(b). This rule causes a perverse result: defendants have an incentive to *deny* the existence of their mental illness during trial to avoid the harsh consequences of GBMI.

Figures 8.3 & 8.4 – AS 12.47.030. Alaska GMBI Statute and Diagram





Lord v. State, 262 P.3d 855 (Alaska App. 2011)

Cynthia Lord, the defendant in the following case, murdered her three sons while unquestionably suffering a severe, persistent mental illness. As you read the opinion, pay close attention to how the Court distinguishes between a legally insane defendant and a guilty but mentally ill defendant.

262 P.3d 855
Court of Appeals of Alaska.
Cynthia LORD, Appellant,
v.

STATE of Alaska, Appellee.
Nov. 4, 2011.

OPINION

COATS, Chief Judge.

Cynthia Lord was charged with three counts of murder in the first degree for killing her three sons, Christopher, Michael, and Joseph. Superior Court Judge Philip R. Volland conducted a non-jury trial. Lord asserted that she was not guilty by reason of insanity. Judge Volland instead found that Lord was guilty but mentally ill.

Lord asserts that Judge Volland erred in reaching this verdict. She contends that she established that she was not guilty by reason of insanity by showing that she did not "appreciate the nature and quality" of her conduct. She also attacks Judge Volland's interpretation of the Alaska statutes defining the defense of insanity, and argues that those statutes are unconstitutional.

In this decision we uphold Judge Volland's verdict that Lord was guilty but mentally ill. We also uphold the constitutionality of the Alaska statutes that define the defense of insanity.

Alaska's insanity defense

Before 1972, Alaska applied a version of the M'Naghten test. Under this test, a defendant could be found not guilty by reason of insanity if she either did not appreciate the nature and quality of her conduct or if she did not understand the wrongfulness of her conduct. In 1972, the Alaska Legislature added the "substantial capacity test," which allowed the defense of insanity when the defendant lacked the substantial capacity to conform her conduct to the requirements of the law.

In 1982, the legislature amended AS 12.47, greatly limiting the defense of insanity. There are now two ways for a defendant to gain an acquittal as a result of insanity. Under AS 12.47.010(a), the defendant can establish insanity as an affirmative defense if the defendant "was unable, as a result of mental disease or defect, to appreciate the nature and quality of [her] conduct." […]

The greatest change in the statutes governing the insanity defense was the creation of the verdict of "guilty but mentally ill." Under AS 12.47.030, a defendant who engages in criminal conduct is guilty but mentally ill if, because of a mental disease or defect, the defendant lacked "the substantial capacity either to appreciate the wrongfulness of that conduct or to conform that conduct to the requirements of the law." Under the law as it existed prior to the 1982 amendments, a defendant would be found not guilty by reason of insanity under this standard.

A defendant found guilty but mentally ill is not relieved of criminal responsibility. […] The statute directs the Department of Corrections to provide mental health treatment to the defendant until the defendant "no longer suffers from a mental disease or defect that causes the defendant to be dangerous to the public peace or safety." During treatment, the defendant may not be released on furlough or on parole. At the successful conclusion of treatment, the defendant must serve the remainder of her sentence.

This disposition for persons found guilty but mentally ill differs from the disposition for persons found not guilty by reason of insanity. Defendants found not guilty by reason of insanity may be released immediately if they prove to the court by clear and convincing evidence that they are "not presently suffering from any mental illness that causes [them] to be dangerous to the public." Until that time, they are committed to the Commissioner of Health and Social Services for treatment for a period not to exceed the maximum term of imprisonment for the crime for which they were found not guilty by reason of insanity. They are entitled to yearly hearings where they have the opportunity to establish that they are "not presently suffering from any mental illness that causes [them] to be dangerous to the public." If they are still in custody at the end of the maximum term of imprisonment for the crime for which they were found not guilty by reason of insanity, the State can file a petition for civil commitment.

Factual and procedural background

Judge Volland issued a written verdict in this case. The following facts are from that verdict:

Cynthia Lord is gravely disabled by mental illness. She suffers from schizoaffective disorder, depressive type. This disorder is characterized by delusions, hallucinations, disordered thought process and disturbed emotional experience. Ms. Lord has been in and out of psychiatric hospitals since age 17, and had been receiving mental health services in Anchorage regularly since 1994. Her condition is not likely to improve although medication may reduce her hallucinations. Since at least 2003, Ms. Lord has had delusions about a force she calls "Evil," delusions about being watched by police and the CIA, and about Satanic labels on food. Although suffering from delusions part of the time, Ms. Lord has been able to secure employment in the past, attend school at

Wayland Baptist University, take care of her children, and undertake daily life care responsibilities such as shopping, cooking, housecleaning, etc.

On March 16, 2004, the Anchorage Police Department received a 911 call from Ms. Lord reporting that she had "killed my three boys." APD had had experiences with Ms. Lord before, and the police response was initially skeptical about her report. However, when officers entered her home, they found the bodies of Ms. Lord's three children: Joseph, age 16, Michael, age 18, and Christopher, age 19. Each boy had been killed by a single shot to the head.

Ms. Lord gave a voluntary statement to police that day. She told APD Detectives Mark Huelskoetter and Glen Klinkhart that she had purchased a gun in October 2003, when she made the decision to kill her sons. Ms. Lord said that on the day before [she killed her sons] she mixed some of her medication with Crystal Light so that her boys would drink it and get sleepy. She set her alarm for early in the morning and woke at approximately 2:30 a.m. It took her about an hour to work up the courage to kill Michael, her eighteen year old, during which time she drank alcohol. She first worried that the gunshot would wake the other boys or her neighbors. She then covered Michael's body with a blanket and waited for her other sons to wake up.

Ms. Lord told police that when Joseph, the youngest, woke up she told him that Michael was sick and would not be going to school. Joseph then left to attend classes at East High. When Christopher woke up around 10:00 a.m., she waited until he was playing video games in front of the entertainment center. She then shot him in the head, pulled his body into another room, and covered it with clothes so that Joseph would not see it when he came home. Christopher had asked about Michael, but Ms. Lord told him that Michael was sick as she had told Joseph. She then locked the door so "that when Joey came home … I would be ready with the gun." When Joseph returned from school at around 2:30 p.m. and walked in the door, Ms. Lord waited until Joseph's face was turned away from her and shot him in the back of the head. She then contemplated killing herself for a couple of hours and eventually called the police around 4:30 p.m. Ms. Lord told detectives she expected punishment for what she did.

Several psychologists testified at the trial. Judge Volland summarized their testimony:

Dr. [David] Sperbeck spent approximately eleven hours interviewing Ms. Lord, exclusive of psychological testing.

Dr. Sperbeck testified that Ms. Lord had good recall of events and described the shootings to him in greater detail than to police. He testified that Ms. Lord told him that she couldn't tell what was real or not and that she didn't want her children to grow up in a world of deception and lies. Ms. Lord told Dr. Sperbeck that she knew the boys were her children but that they acted like robots. Dr. Sperbeck testified that, despite the fact that Ms. Lord's actions were prompted by her hallucinations, she clearly knew that she was killing her children.

He testified that his opinion was that "Lord understood the nature and quality of her conduct" in that she "under[stood] the consequences of [her] act[s]." She "understood that placing a gun to the head of her children would kill them." Dr. Sperbeck was confident from Lord's repeated statements to him that she knew she was killing her boys. Judge Volland found that Dr. Lawrence Maile testified similarly to Dr. Sperbeck:

Based on Ms. Lord's systematic planning to kill her sons, her ability to identify her sons, distinguish them as human beings, and describe the consequences of her direct actions on her sons, Dr. Maile expressed the professional opinion that there [were] no impediments to Ms. Lord being found criminally responsible for the charges she faces.

Dr. Bruce Gage testified for the defense. Judge Volland summarized his testimony as follows:

Dr. Gage concluded that Ms. Lord did "understand that she was killing her boys so, to that extent, she understood the nature of her act." However, Dr. Gage was of the opinion that this did not take into account Ms. Lord's reason for killing her children, i.e., to save them. Dr. Gage was of the opinion that if this motivation and context for her act is considered, Ms. Lord did not understand the nature and quality of her conduct. Dr. Gage opined that if Ms. Lord believed she was saving her children, she did not appreciate the quality of her act because she did not appreciate its true consequences.

Cynthia Lord testified at the trial. Judge Volland summarized her testimony as follows:

During her testimony, [Ms. Lord] spoke with the same flat affect that was characteristic of her interview with police, and apparently characteristic of her discussions with mental health professionals for the last decade. She described her delusions at length. Ms. Lord retold the killing of her children with the same detail she gave to police. On cross-examination, Ms. Lord admitted that she knew she was pointing a gun at Michael and that when she shot the gun it would kill him. She stated that had her daughter been in

the home at the time, she would have killed her also "because she's one of the siblings." Ms. Lord testified that she knew Michael was dead after she shot him. She also admitted that after killing Joseph, she thought: "Oh my god, I killed my son." Regarding Christopher, she admitted on cross-examination that "I got the gun and I shot him in the head" and that she had told [another examining doctor] that she shot him in the back of the head because she did not want the last thing he saw to be his mother shooting him. As to Joseph, she said "I shot him." She acknowledged that when she shot her boys, she intended to pull the trigger and knew that a bullet would go into their heads and they would die. She admitted they were her boys and that they were human. She said she thought about killing herself "because she couldn't live without them."

In reaching his verdict, Judge Volland first addressed whether Lord had the mens rea for murder in the first degree. [Under the diminished capacity doctrine,] a defendant is not guilty by reason of insanity if, "as a result of mental disease or defect, there is a reasonable doubt as to the existence of a culpable mental state that is an element of the crime."

To establish the mens rea for murder in the first degree, the State had to prove beyond a reasonable doubt that Lord intended to cause the death of Michael, Joseph, and Christopher. Alaska law states that a person acts intentionally "when the person's conscious objective is to cause that result; when intentionally causing a particular result is an element of an offense, that intent need not be the person's only objective."

Judge Volland found that "the evidence is overwhelming that Ms. Lord engaged in a deliberate, conscious, and detailed plan to kill her three sons." He then set out Lord's meticulous planning that preceded the murders, and noted the opinions of the psychologists who testified at trial that Lord intended to kill her sons:

According to Dr. Sperbeck and Dr. Maile, Ms. Lord knew her sons were her sons at the time of the shootings. Even Dr. Gage stated in his written report that Lord knew she was killing her sons. Dr. Gage also acknowledged that Ms. Lord had to have the intent to kill her sons to also have the intent to save them.

After finding that Lord had the mens rea to commit murder in the first degree, Judge Volland examined whether Lord had established the affirmative defense of insanity. Under AS 12.47.010(a), a defendant is not guilty by reason of insanity if the defendant establishes by a preponderance of the evidence that, when engaged in the criminal conduct, the defendant was "unable, as a result of mental disease or defect, to appreciate the nature and quality of that conduct."

Judge Volland first discussed … the meaning of AS 12.47.010(a)—in particular, the meaning of "unable, as a result of mental disease or defect, to appreciate the nature and quality of that conduct." The court observed that the legislative history of the statute contained two examples of defendants who could establish that they were unable to appreciate the nature and quality of their acts under this standard: a defendant who is "unable to realize that he is shooting someone with a gun when he pulls the trigger on what he believes to be a water pistol, or a murder defendant who believes he is attacking the ghost of [his] mother rather than a living human being." According to the House Judiciary Committee report on the legislation, the defense of insanity would not apply "to a defendant who contends that he was instructed to kill by a hallucination, since the defendant would still realize the nature and quality of his act, even though he thought it might be justified by a supernatural being."

Turning to the facts of this case, Judge Volland concluded:

[T]o appreciate the nature and quality of murder means that the defendant must have understood the act that he or she engages in will cause the death of another person. Thus, for Ms. Lord to prevail on the defense of insanity under AS 12.47.010(a), she must show, by a preponderance of the evidence, that she was unable, as a result of her mental illness, to recognize that pointing a gun at the head of her sons and pulling the trigger, knowing they were her sons, would kill them.

The court rejects Dr. Gage's reasoning that understanding the "quality" of an act requires inquiry into the context of the act and the defendant's motivation. In the court's view this invites an inquiry into wrongfulness. This is especially true in Ms. Lord's case. Ms. Lord's motivation to save her children is precisely why she did not consider the act to be wrongful. Even Dr. Gage admitted that in Ms. Lord's case, her motivation and belief that her act was not wrong "correspond."

Judge Volland summarized why he concluded that Lord did not establish that she failed to appreciate the nature and quality of her conduct:

There is much evidence that Ms. Lord appreciated that she was killing her children. She stated the same to Dr. Sperbeck and Dr. Maile and admitted in her own testimony that after killing Michael, she recognized that she had just shot one of her children. Ms. Lord had to work up the courage to shoot Michael. She covered her children after she shot them so she would not see them. She

shot her sons in the back of the head or while they were sleeping so they would not see their mother shoot them. She shot each boy in a way that would cause instant death and the least pain. [The court finds that these actions are not consistent with a mother shooting [children] she believes are non-human clones or robots. The evidence at trial that Ms. Lord did not believe her boys were her boys was equivocal at best. The court does not find that Ms. Lord's statement to Dr. Sperbeck that "I was 80% sure I'd never see them again on this earth" evidenced that she did not believe she was killing them. Ms. Lord's admissions on cross-examination convinced the court that she knew she was killing her boys.] Because of this, the court concludes that the defense has not established by a preponderance of the evidence that Ms. Lord failed to appreciate the nature and quality of her conduct as a result of her mental disease.

Judge Volland concluded, by a preponderance of the evidence, that Lord was guilty but mentally ill. He concluded that the "evidence is undisputed that Ms. Lord suffers from a severe, disabling mental illness," and that she "killed her children to save them from 'Evil' and to send them to heaven. She believed that she was doing the right thing and would do it over again; she testified to this belief at trial. The court finds her belief genuine and firmly held."

Why we uphold Judge Volland's verdict that Lord was guilty but mentally ill

Lord argues that Judge Volland interpreted the Alaska statutes setting out the defense of insanity too narrowly. She argues that, in arriving at his verdict, Judge Volland only applied … the diminished capacity statute, which provides that a defendant is not guilty by reason of insanity if, "as a result of mental disease or defect, there is a reasonable doubt as to the existence of a culpable mental state that is an element of the crime." Lord argues that the defense of insanity is broader, because AS 12.47.010(a) also establishes an affirmative defense of not guilty by reason of insanity if the defendant engaged in criminal conduct but "was unable, as a result of mental disease or defect, to appreciate the nature and quality of that conduct."

In rejecting Lord's insanity defense, Judge Volland found that, even though the "evidence [was] undisputed that Ms. Lord suffers from a severe, disabling mental illness," Lord formed the culpable mental state to commit murder in the first degree. He found that "the evidence is overwhelming that Ms. Lord engaged in a deliberate, conscious, and detailed plan to kill her three sons."

Lord agrees that this finding was sufficient for Judge Volland to reject a "diminished capacity" defense[.] But she asserts that Judge Volland erred by using these same findings to reject her affirmative defense of not guilty by reason of insanity under AS 12.47.010. Lord argues that if the legislature intended to restrict the insanity defense to only an inquiry about whether a defendant could form the mens rea to commit the crime, then AS 12.47.010 would be superfluous. She argues that the legislative history of the statutes governing the insanity defense show no intent to limit the defense in this way.

Lord argues that, applying the proper test in AS 12.47.010(a), the evidence at trial established the affirmative defense of insanity because it showed that she had no understanding of the meaning of death, and therefore did not appreciate the nature and quality of her acts. But Judge Volland rejected the factual basis for this argument. He found that Lord knew she was killing her boys and appreciated the nature of death based on her testimony that she "was 80% sure I would never see them again on this earth."

In explaining his verdict, Judge Volland carefully considered the testimony of the psychologists as well as the evidence of Lord's hallucinations and delusions. He concluded that, in spite of these mental defects, Lord understood the nature and quality of her acts. He set out her meticulous reasoning and the steps she took as she planned and carried out the killing of her sons. He concluded that she understood what she was doing and understood the concept of death—she knew with substantial certainty that, by killing her sons, she was removing them from this earth and that she would never see them alive again. We conclude that there is no merit to Lord's claim that Judge Volland failed to make the findings necessary to reject her affirmative defense of insanity.

To find that Lord was guilty but mentally ill, Judge Volland had to find that she lacked "the substantial capacity either to appreciate the wrongfulness of [her] conduct or to conform that conduct to the requirements of the law." Judge Volland concluded that, because of her mental illness, Lord sincerely believed she was doing the right thing by killing her sons "to save them from 'Evil' and send them to heaven." He found that, because of her mental disease or defect, she lacked the substantial capacity to appreciate the wrongfulness of her conduct. Judge Volland's findings are supported by the record, and they support his verdict that Lord was guilty but mentally ill.

[…]

Conclusion

The judgment of the superior court is AFFIRMED.

Diminished Capacity

Diminished capacity differs from legal insanity. Whereas insanity absolves a defendant from criminal responsibility for the charged crime, the **diminished capacity** doctrine only acts to negate specific intent crimes. Diminished capacity allows a defendant to argue that his mental disease or defense precluded him from forming the requisite culpable mental state. AS 12.47.020(a). "The diminished capacity doctrine is based on the theory that while an accused may not have been suffering from a mental disease or defect at the time of his offense, sufficient to absolve him totally of criminal responsibility, the accused's mental capacity may have diminished by intoxication, trauma, or mental disease to such extent that he did not possess the specific mental state or intent essential to the particular offense." *See Johnson v. State*, 511 P.2dd 118, 124 (Alaska 1973). Diminished capacity is a rarely used defense.

Figure 8.5 – Effects of Mental Illness Claims (circular diagram)



Exercise

Answer the following question. Check your answers using the answer key at the end of the chapter.

1. Jeffrey is diagnosed with schizophrenia. For fifteen years, Jeffrey kidnaps, tortures, kills, and eats human victims. Jeffrey avoids detection by hiding his victims' corpses in various locations throughout the city. If the jurisdiction in which Jeffrey commits these crimes recognizes the *M'Naghten* insanity defense, can Jeffrey successfully plead and prove insanity? Why or why not? Would your answer change under Alaska's insanity law?

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8.2: Infancy, Intoxication, Ignorance, and Mistake

Infancy

At common law, infancy was a defense to crime. **Infancy** asserts that the defendant should not be subject to criminal prosecution because he or she is *too young* to appreciate the nature of "crime." Legally, the infancy defense recognizes that certain juveniles are simply too immature to form the culpable mental state necessary to commit a crime. Morally, the infancy defense recognizes that juveniles are simply too immature to be *punished* for a crime.

The common law recognized three age-based categories of increasing criminal responsibility. If an offender was under the age of seven years old, the offender lacked the capacity to form the requisite culpable mental state. The minor could not be criminally prosecuted. If a minor was between seven and fourteen years old, there was a rebuttable presumption that the offender lacked the necessary capacity. The court presumed that the offender lacked capacity, but the government could rebut the presumption with sufficient evidence. Finally, common law held that all offenders over fourteen years old could form the necessary mental state.

All modern American jurisdictions have moved away from the graded presumptions surrounding infancy and instead created juvenile justice systems. All juvenile justice systems include a mechanism to allow the most serious juvenile offenders to be prosecuted in adult court. Alaska is no different.

Juvenile Justice System

In 1899, the Illinois Juvenile Court Act created the first juvenile court. The new juvenile court introduced a special adjudicatory proceeding for delinquent youths, separate from adult court. Several states soon followed suit. The idea behind juvenile courts was to concentrate on the **rehabilitative potential** of minors, emphasizing an informal court structure. Under this model, juveniles were not viewed as criminals, but as troubled youths in need of supervision. A juvenile offender was never convicted of a crime; instead, the youth was *adjudicated a delinquent* in need of rehabilitation.

During the 1950s and 1960s, scholars began to question how juveniles were being treated in juvenile justice systems across the county. Although the philosophy of juvenile courts was still seen as benevolent, the scholars believed that significant arbitrariness existed within the various systems, raising constitutional concerns. Beginning in 1967, the US Supreme Court began providing juveniles with constitutional due process protections.

The seminal juvenile law case, *In re Gault*, 387 U.S. 1 (1987), involved a young boy who was arrested for making crank phone calls to his neighbor. Neither the boy, nor his parents, received notice of the charges, assistance of counsel, or an opportunity to cross-examine witnesses. After being adjudicated a delinquent youth, the trial judge ordered the young boy to Arizona Industrial School for an indeterminate period not to exceed six years. The maximum penalty for an adult convicted of the same offense was two months in jail or a fifty-dollar fine. Because of the inequality between youths and adults, the Court held that juveniles were entitled to adequate notice of charges, the assistance of counsel, the privilege from self-incrimination, and the right to confront witnesses during delinquency proceedings.

Since *Gault*, the US Supreme Court has repeatedly affirmed that juveniles have the right to avail themselves of basic constitutional protections. Today, juveniles are afforded nearly all of the same adult constitutional protections when facing delinquency charges.

Like all states, Alaska's juvenile justice system is a creature of statute. *See* AS 47.12. *et. seq.* With various exceptions, all "minor[s] under 18 years of age" at the time of a criminal offense are handled within the juvenile justice system. AS 47.12.020. The primary purpose of the juvenile system is rehabilitation, not punishment. Juveniles are not "convicted" of crime, but instead are determined to be "delinquent." Delinquent minors are committed to the care of the Department of Health and Social Services, not the Department of Corrections. The Alaska Criminal Rules do not apply to juvenile proceedings. Juvenile matters are governed by the delinquency rules. *See* Alaska Delinquency Rules 1(b).

Yet, Alaska's juvenile justice system, like most states, has significant exclusions. Certain minors, who commit certain offenses, are *excluded* from the juvenile system as a matter of law. In Alaska, this includes most serious felony crimes if the juvenile was 16 or 17 at the time of the offense. Thus, a 16-year-old accused of murder must be prosecuted in adult court, not juvenile court. This is commonly referred to as **automatic waiver**. The term is largely a misnomer in Alaska. The juvenile is never "waived" to adult court; instead, the juvenile justice system never had jurisdiction. Older juveniles (16- or 17-year-olds) who commit serious offenses

are *excluded* from the juvenile system's jurisdiction. Likewise, most misdemeanor traffic, wildlife, and tobacco criminal violations are handled in adult court. Although juveniles have significant constitutional protections within the juvenile system, juveniles have no constitutional right to a juvenile justice *system*. The Alaska legislature is free to determine which minors are prosecuted in adult court, and which minors are adjudicated in juvenile court. *See e.g.*, *Watson v. State*, 487 P.3d 568 (Alaska 2021).

A small class of minors are subject to **discretionary waiver** – that is, minors who commit serious offenses and are "not amenable to treatment" in the juvenile system. These minors may be *waived* (*e.g.*, transferred) to the adult court system at the discretion of the court. AS 47.12.100. Generally, the burden is on the government to demonstrate that the minor is not amenable to treatment within the juvenile system. However, if the minor is accused of a serious felony offense, the minor must demonstrate that he or she should not be waived. Several factors inform the court's decision, including the nature of the offense, the sophistication it requires, the minor's criminal history, and the threat the minor poses to public safety.

Example of the Juvenile Justice System

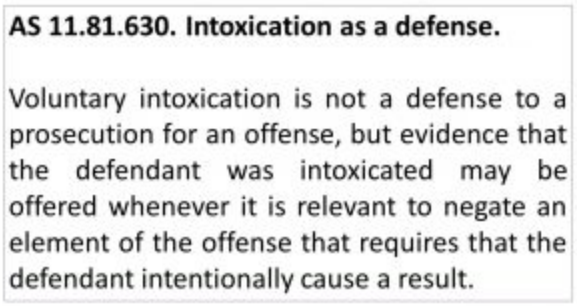
Robbie is fourteen years old. Robbie shoplifts a "hacky sack" to impress his friends. An off-duty police officer sees Robbie steal the Hacky Sack and arrests him when he walks out of the store. Robbie committed the crime of fourth-degree theft. Although the Anchorage District Attorney wants to make an example of Robbie, Alaska statute specifies that the juvenile justice system has jurisdiction over Robbie's delinquent conduct. The Anchorage District Attorney would need to persuade the trial court that Robbie was not amenable to treatment within the juvenile system before Robbie could be prosecuted in adult court.

Intoxication

Intoxication is a defense that focuses on a defendant's inability to form the requisite culpable mental state. Intoxication can be based on the defendant's ingestion of alcohol or drugs, and it can be voluntary or involuntary.

Voluntary intoxication is generally *not* a defense. Conduct that occurs *after* the voluntary intoxication is not excused unless the intoxication prevented the defendant from forming the culpable mental state intentionally. When evaluating the culpable mental states of "knowingly," "recklessly," and "criminal negligence," the jury is instructed to assume the defendant was *sober*. AS 11.81.900(a).

Figure 8.6 – Alaska Statute 11.81.630


AS 11.81.630. Intoxication as a defense.

Voluntary intoxication is not a defense to a prosecution for an offense, but evidence that the defendant was intoxicated may be offered whenever it is relevant to negate an element of the offense that requires that the defendant intentionally cause a result.

Involuntary Intoxication, on the other hand, may be treated as a defense, but recall, it may be analyzed under the voluntary act element requirement of crime. *See Wagner v. State*, 390 P.3d 1179 (Alaska App. 2012). Involuntary intoxication can occur if the defendant injected a drug or alcohol unknowingly or under force, duress, or fraud.

Ignorance and Mistake

Occasionally, a defendant asserts that he did not know his conduct was criminal. **Ignorance** of the law is not a defense. AS 11.81.620.

Mistake of law is slightly different. While ignorance is no defense, under a **mistake of law** defense, the defendant affirmatively asserts that they reasonably believed their criminal conduct was *legal*. A mistake of law is normally not a defense except in the limited situation where a person acts in reasonable reliance on an official pronouncement (or interpretation) of the law issued by the *chief enforcement officer* entrusted with the law's enforcement. *See Stoner v. State*, 421 P.3d 108 (Alaska App. 2018). Under the

mistake of law defense, a defendant is entitled to rely on a *judicial officer*'s interpretation of a law, but not a police officer's interpretation. "The policy behind this rule is to encourage people to learn and know the law; a contrary rule would reward intentional ignorance of the law." *See Ostrosky v. State*, 704 P.2d 786, 791 (Alaska App. 1985). Mistake of law is an affirmative defense that must be proven by a preponderance of the evidence.

Valid Example of Mistake of Law Defense

Jim is a commercial fisherman working out of Bristol Bay. The Board of Fisheries sets the Bristol Bay sockeye salmon run to be open from June 1 until June 15. On the day of the sockeye salmon opener, the Department of Fish and Game (DFG) issues a proclamation extending the fishery by 48 hours; the fishery will close on June 17, not June 15. Jim works the entire fishery, including the extra two days. Shortly after the fishery closes, the Dillingham Superior Court Judge issues an order finding that DFG usurped the authority of the Board of Fisheries to extend the fishery. An Alaska Wildlife Trooper cites Jim for fishing in closed waters. Under this scenario, Jim would be entitled to rely on a mistake of law defense against the prosecution. Jim could reasonably rely on DFG's announcement as they are an entity that is entrusted with the enforcement of fish and game rules and regulations.

Invalid Example of Mistake of Law Defense

Susan is on felony probation for check forgery. Susan lives alone and fears for her safety. Susan asks her felony probation officer if she can get a shotgun for home protection. Her probation officer tells her that the restriction on felons owning firearms does not apply to possession of guns in one's own home if necessary for self-defense. (As you know, this was a legally incorrect statement.) Susan, relying on her probation officer's advice, buys a shotgun for her home. Police execute a search warrant on Susan's house (directed at her roommate), and during the subsequent search, police find the shotgun. Susan admits to owning the gun, but claims her probation officer told her it was okay. As harsh as it may seem, Susan does *not* have a valid mistake of law defense to a felon-in-possession charge. Susan is not entitled to rely on her probation officer's advice. The probation officer's *opinion* as to what the law is does not *excuse* Susan's criminal conduct.

Mistake of fact may also be a defense. If a *reasonable* factual mistake negates the culpable mental state required for the commission of the offense, then the defendant is not criminally responsible. Thus, a person who accidentally picks up another person's jacket, mistakenly believing it is his own, has not acted with the specific intent to steal – that is, the person has not acted with the requisite culpable mental state. Importantly, a mistake of fact may only operate as a defense when it is a *reasonable* mistake. An honest, but *unreasonable* mistake will not absolve a defendant of criminal responsibility. AS 11.81.620(b). A mistake of fact is generally not a defense to strict liability crimes since strict liability crimes have no requisite culpable mental state (mental state is not an essential element of strict liability crimes). *See Clucas v. State*, 815 P.2d 384, 388 (Alaska App. 1991).

Example of Invalid Mistake of Fact Defense

Tina is pulled over for speeding. Tina claims her speedometer is broken, so she was mistaken as to her speed. Tina probably cannot assert the mistake of fact as a defense in this case. Speeding is generally a strict liability offense; it has no culpable mental state. Tina's mistaken belief as to the facts of her speed is not relevant because there is no intent required for this offense.

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8.3: Entrapment

Certain criminal behavior is particularly difficult to investigate. Drug-trafficking, prostitution, and other organized crimes occur privately, between willing participants. To detect, investigate, and disrupt such criminal behavior, police must be proactive. In some circumstances, police use encouragement to ferret out crime. The defense of **entrapment** addresses situations where the government's conduct inappropriately *induces* criminal behavior. At its core, the entrapment defense is based on the government's use of inappropriately persuasive tactics when investigating and apprehending criminals. Entrapment is a perfect affirmative defense.

Entrapment focuses on the origin of criminal intent. If the criminal intent originates with the government or law enforcement, the defendant can claim they were entrapped and can assert the defense. If the criminal intent originates with the defendant, then the defendant is acting independently and may not assert the defense. Two tests of entrapment have emerged: **subjective** entrapment and **objective** entrapment. Alaska has adopted an objective test of entrapment, but to properly understand the scope of the defense, it is important to understand both tests.

Subjective Entrapment

Subjective entrapment occurs when law enforcement pressures the defendant to commit the crime against his or her will. The subjective entrapment test focuses on the *defendant's* individual motivations and characteristics, and not necessarily on law enforcement's behavior. If the facts indicate that the defendant is *predisposed* to commit the crime without law enforcement pressure, the defendant cannot claim entrapment.

The defendant's criminal record is admissible if relevant to prove the defendant's criminal nature and predisposition. Generally, law enforcement can furnish criminal opportunities and use decoys and feigned accomplices without crossing the line into subjective entrapment. However, if it is clear that the requisite intent for the offense originated *with law enforcement*, not the *defendant*, the defendant can assert subjective entrapment as a defense.

Example of Subjective Entrapment

Sally regularly attends Narcotics Anonymous (NA) for her heroin addiction. All the NA attendees know that Sally is a dedicated member who has been clean for ten years. Sally regularly leads the meeting if needed.

Marcus, a law enforcement decoy, meets Sally at the end of one meeting and begs her to "hook him up" with some heroin. Sally refuses. Marcus attends the next meeting, and follows Sally out to her car pleading with her to get him some heroin. After listening to Marcus explain his physical symptoms of withdrawal in detail, Sally feels pity and promises to help Marcus out. She agrees to meet Marcus in two hours with a small amount of heroin. When Sally and Marcus meet up, Marcus arrests Sally for drug trafficking. Sally may be able to assert entrapment as a defense under the **subjective entrapment test**. Sally has not used drugs for ten years, did not initiate contact with law enforcement, and initially refused Marcus' request. It is unlikely that the intent to sell heroin *originated* with Sally. She has been a dedicated member of NA, and she actually met Marcus at an NA meeting while trying to maintain her sobriety. It appears that Marcus *pressured* Sally to sell heroin against her natural *predisposition*, and the entrapment defense may excuse her conduct.

Objective Entrapment

The subjective entrapment test has faced significant criticism, as it is based on hypotheticals and "theoretical riddles." *Grossman v. State*, 457 P.2d 226, 229 (Alaska 1969). Further, the subjective test focuses on a defendant's criminal history and predisposition to commit crimes, thereby likely prejudicing the jury against the defendant for their past conduct.

Instead of focusing on a defendant's predisposition, the **objective entrapment test** focuses on the *police conduct* used to induce criminal behavior. If law enforcement uses tactics that are unreasonable or unconscionable to induce a law-abiding person to commit the crime, the defendant may be able to rely on the defense of entrapment. The objective entrapment defense focuses on conduct that falls below "fair and honorable" police tactics. The question of whether the government's conduct was fair and honorable is a question of law for the court to decide, not a question of fact for the jury.

Figure 8.7 – Alaska Statute 11.81.450

AS 11.81.450. Entrapment

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

Example of Objective Entrapment

Sam has a lengthy criminal record for prostitution. An undercover police officer offers Sam $100,000 to engage in sexual intercourse. Sam promptly accepts. Sam likely has a viable entrapment defense to the criminal charge of prostitution. A reasonable, law-abiding person could be tempted into committing prostitution for $100,000. The objective test focuses on police tactics, rather than the defendant's criminal predisposition. Sam's lengthy criminal record is irrelevant in determining whether law enforcement used an excessive inducement.

State v. Yi, 85 P.3d 469 (Alaska App. 2004)

In the following case, pay attention to how the court applies the objective test to the facts of the case. Was Yi a "ready and willing" participant in the criminal transaction?

85 P.3d 469
Court of Appeals of Alaska.
STATE of Alaska, Petitioner,
v.
Jung Ho YI, Respondent.
No. A–8430.
Feb. 20, 2004.

OPINION
COATS, Chief Judge.

It is a misdemeanor offense to purchase, sell, or barter bear parts. Bethel, Alaska, is a "damp" community where it is legal to possess alcohol for one's personal use, but it is a felony offense to buy, sell, or trade alcohol. The defendant in this case, Jung Ho Yi, traded two bottles of Crown Royal Whiskey for a bear gallbladder which was offered by undercover Alaska State Trooper Gary Pacolt. Approximately three weeks later, Yi engaged in another similar transaction with Trooper Pacolt. When the State charged Yi with these criminal offenses, Yi defended on the ground of entrapment. Yi contended that, although he knew that selling of gallbladders or whiskey was illegal, he reasonably believed, based in part on Trooper Pacolt's representations, that a trade (or exchange of gifts) was lawful. Superior Court Judge Dale O. Curda found that Yi established the defense of entrapment. The State petitioned for review and we granted the petition. We now reverse Judge Curda's ruling.

Factual and procedural background
During January of 2002, Trooper Pacolt was assigned to spend three days in Bethel as part of an undercover operation to apprehend persons engaged in illegal buying and selling of bear gallbladders. The operation was set up in response to information, reported by the Alaska Department of Fish and Wildlife, that at least one restaurant in town had bought or bartered bear gallbladders in violation of the law. During this operation Trooper Pacolt attempted to sell or barter a bear gallbladder in at least six different restaurants in Bethel.

On January 18, Trooper Pacolt and Officer Betty Williams, from the Quinhagak Police Department, entered the Front Street Cafe dressed as civilians. This restaurant was the first that they selected. The two officers were the only patrons in the restaurant at the time. The two officers ordered dinner. Trooper Pacolt then noticed a man, later identified as Yi, who sat down to eat at a nearby table. Yi appeared to be an employee of the restaurant as he frequently went back into the kitchen.

Trooper Pacolt then engaged Yi in some small talk for about five or ten minutes. Most of the conversation revolved around the fact that both men were from Anchorage. At this point Trooper Pacolt removed a bear gallbladder from his shirt pocket and asked Yi if he was interested in buying. Yi responded that he did not want to buy it and that it was illegal. Trooper Pacolt said "no problem," and put the gallbladder back in his pocket. Trooper Pacolt then asked Yi if he knew where he could get some alcohol.

It is only at this point that Trooper Pacolt's and Yi's testimonies differ. According to Trooper Pacolt, Yi then asked to see the gallbladder again. And, after Pacolt handed it to him, Yi asked Pacolt if he was interested in trading the gallbladder for some alcohol. Trooper Pacolt replied that a trade would "be fine." Trooper Pacolt testified that he never indicated to Yi that such a trade was legal. According to Yi, after Pacolt asked where to get alcohol, he only told Pacolt that he had some for his own personal use. Yi testified that Trooper Pacolt first brought up the idea of trading alcohol for the gallbladder. Yi admitted to readily agreeing to this transaction, which he characterized as a gift exchange. Yi also testified that he got the impression from Trooper Pacolt that such an exchange would be legal. Yi does not claim that he knew Trooper Pacolt was a police officer at that time. Officer Williams also testified but her testimony was not helpful in clearing up these conflicting accounts.

From this point on, the facts are uncontested. Yi had an employee of the cafe bring Trooper Pacolt a paper bag containing two bottles of Crown Royal whiskey. Yi then proceeded to staple the bag shut. Yi also said that he would pay for Trooper Pacolt's dinner as part of the deal.

Before Trooper Pacolt left the cafe, he told Yi that he might have more gallbladders in the future and asked if Yi might be interested. Yi said no, but stated that he might know some people who would be.

On February 12, Trooper Pacolt returned to the Front Street Cafe alone, this time wearing a tape-recording device. […] Trooper Pacolt had another bear gallbladder with him at this time. Pacolt sat down to have dinner. Yi came out, talked with him, and took his order. Trooper Pacolt then told Yi that he had another gallbladder and showed it to him. He then asked Yi if he was interested in trading again "like last time." Yi indicated that he was interested, this time trading three bottles of vodka for the gallbladder. Yi again paid for Trooper Pacolt's dinner.

The State indicted Yi on two felony counts of sale of liquor without a license and charged him by information with two misdemeanor counts for purchasing parts of a big game animal.

Yi filed a motion to dismiss the indictment on the ground that he had been entrapped by the police. […] Following the hearing, Judge Curda ruled that Yi had established the defense of entrapment.

[…]

The law of entrapment
Alaska's entrapment statute is codified at AS 11.81.450:

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

Entrapment is a defense to criminal charges, and the purpose of the defense is to deter law enforcement activities that go beyond the bounds of sound public policy. Because AS 11.81.450 defines entrapment as an affirmative defense, a defendant bears the burden of establishing it by a preponderance of the evidence. Entrapment is an issue for the court to decide rather than the jury. Alaska employs an objective test for entrapment. This means that "the court considers the nature of the police activity involved, without reference to the predisposition of the defendant."

We have previously stated:

In order to prevail on [an entrapment] defense, [the defendant is] required to prove that the police employed fundamentally unfair or dishonorable practices calculated to induce someone to commit the crime in question so that he might be arrested and prosecuted for the offense…. And while [the defendant does] not need to negate a predisposition to engage in similar conduct, [the defendant must show] that the dishonorable police practices were a substantial factor in inducing him to commit the charged offenses—that his commission of the offenses was "the direct result of inducement by law enforcement officials." [internal citations omitted]

We conclude that Judge Curda erred in concluding that Yi established the defense of entrapment. […] Looking objectively at Trooper Pacolt's conduct, the evidence does not show that the trooper engaged in fundamentally unfair or dishonorable practices which were calculated to induce someone to commit a crime, other than a person who was willing. […] Even if Trooper Pacolt had suggested the exchange and even if he had suggested that it would be lawful to trade the alcohol for the bear gallbladder, it would be unreasonable for Yi to rely on this representation. As Yi admitted, he had no suspicion that Trooper Pacolt was a police officer or was anyone other than an ordinary visitor to Bethel.

[…]

[W]e conclude that Judge Curda's finding that Yi was entrapped was an abuse of discretion. We accordingly reverse Judge Curda's ruling that Yi established the defense of entrapment.

REVERSED.

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8.4: End-of-Chapter Material

Summary

Mental illness plays a significant role in the criminal justice system and can impact criminal prosecutions in numerous ways. All defendants have a constitutional right to be mentally competent during all criminal proceedings. Competency requires the defendant to understand the nature of the proceedings against him and be able to participate in his own defense. Competency is viewed at the time of the court proceedings and is fluid. Competency is not a defense to criminal conduct; it is a constitutional right. If a person is incompetent, they are committed to a mental institution until their competence is "restored." When a criminal defendant is incompetent and non-restorable, the criminal prosecution is dismissed without prejudice, meaning that the prosecution can re-file criminal charges once the defendant regains competency.

Insanity is a defense to criminal behavior and is static. Insanity is measured at the time the defendant engaged in the criminal act. The federal government and every state except Montana, Utah, Kansas, and Idaho recognize the insanity defense. The policy supporting the insanity defense is the lack of control a defendant has over their conduct; punishing the legally insane has no deterrent effect.

Four insanity defenses are recognized in the United States: *M'Naghten*, irresistible impulse, substantial capacity, and *Durham*. The *M'Naghten* rule is cognitive and excuses criminal conduct when the defendant is suffering from a mental defect or disease that prevents the defendant from knowing the nature or quality of conduct or from knowing that the conduct is wrong. The irresistible impulse test adds a volitional component and excuses conduct the defendant cannot control because of a mental defect or disease. The substantial capacity test (also known as the Model Penal Code test) softens the requirements to substantial, rather than total, capacity to appreciate the criminality of conduct or to conform conduct to the law. Finally, the *Durham* rule is currently recognized only in New Hampshire, and excuses conduct that is the product of a mental disease or defect.

In Alaska, a person is not guilty by reason of insanity if the person, as a result of a mental disease or defect, in unable to appreciate the nature and quality of their criminal act. This is the first prong of the *M'Naghten* rule. Alaska has also adopted a guilty but mentally ill (GBMI) verdict which occurs when, as a result of a mental disease or defect, the person lacks the substantial capacity to appreciate the wrongfulness of their conduct or they are unable to conform their conduct to the law. Alaska GMBI verdict is punitive as it precludes a mentally ill defendant from being released on parole if still suffering from a mental illness.

Insanity is a perfect affirmative defense. The defendant bears the burden of proving its existence. GMBI can be raised by either the defendant or the state. A verdict of "not guilty by reason of insanity" results in an acquittal for the offense. Although the defendant may be committed to a mental institution, the person is not criminally responsible for their conduct. A GBMI verdict requires the person to be committed to a mental institution for treatment of their mental illness, and then to prison to serve the remainder of their term of imprisonment.

Diminished capacity can operate as a defense, but only to specific intent crimes. A person may claim diminished capacity if, because of a mental disease or defect, they were unable to form the requisite mental state of intentionally.

The infancy defense existed at common law and excused conduct when the defendant was too young to form the culpable mental state for the offense. Codified juvenile justice systems have supplanted the infancy defense. The majority of juveniles who commit criminal acts are adjudicated within the juvenile system and not the adult system. Juveniles have nearly all of the procedural rights that are available to adults. Juveniles are not convicted of crimes, but are adjudicated delinquent. For the most serious crimes, or the most dangerous juvenile offenders, the government can seek a discretionary waiver to have the case prosecuted in adult criminal court. The government must prove that the minor is not amenable to treatment to be successful in a discretionary waiver. The criteria for such decisions generally include the nature of the offense, the sophistication it requires, the defendant's prior criminal history, and the threat the defendant poses to public safety. Certain crimes – namely serious felonies committed by older minors – are automatically waived into the adult court.

The law also recognizes the excuse defenses of *involuntary* intoxication and mistake. Voluntary intoxication is not permitted as a defense, but may be relied upon to negate specific intent crimes. Involuntary intoxication, which is intoxication achieved unknowingly, under duress, or through fraud, is normally analyzed under the voluntary act element of the crime. Ignorance of the law is not a defense. Individuals are expected to know the laws of their jurisdiction. Mistake of law, which means the defendant

does not know conduct is illegal, functions as a defense if the mistake is based on a official pronouncement by an authorized public official. Mistake of law is not a defense if the mistake is rooted in incorrect legal advice from an attorney or by a police officer. Mistake of fact is a defense if the facts as the defendant reasonably believes facts that negate the requisite intent.

Entrapment is also an excuse defense. While some jurisdictions recognize an subjective entrapment defense, which focuses on the defendant's predisposition, Alaska has adopted the objective entrapment defense. The objective entrapment approach excuses conduct if the pressure by law enforcement would induce a reasonable, law-abiding person to commit the crime. The defendant's predisposition (*i.e.*, criminal record) is not relevant since the focus is on law enforcement tactics, not the defendant's motivations.

Key Takeaways

- The four states that do not recognize the insanity defense are Montana, Utah, Kansas, and Idaho.
- The four versions of the insanity defense are *M'Naghten*, irresistible impulse, substantial capacity, and Durham.
- The two elements of the *M'Naghten* insanity defense are the following:
  - The defendant must be suffering from a mental defect or disease at the time of the crime.
  - The defendant did not know the nature or quality of the criminal act he or she committed or that the act was wrong because of the mental defect or disease.
- The two elements of the irresistible impulse insanity defense are the following:
  - The defendant must be suffering from a mental defect or disease at the time of the crime.
  - The defendant could not control his or her criminal conduct because of the mental defect or disease.
- The substantial capacity test softens the second element of the *M'Naghten* and irresistible impulse insanity defenses. Under the substantial capacity test, the defendant must lack substantial, not total, capacity to appreciate the criminality of conduct or to control or conform conduct to the law.
- The *Durham* insanity defense excuses criminal conduct when it is caused by a mental disease or defect.
- The criminal defendant pleading not guilty by reason of insanity must produce evidence to rebut the presumption that criminal defendants are sane.
- The insanity defense is generally a perfect affirmative defense.
- The diminished capacity defense that may be used to negate an intentional mental state.
- The insanity defense exonerates the defendant from criminal responsibility. Mental incompetence to stand trial delays the criminal trial until mental competency is regained.
- Infancy is a common law defense to an adult criminal prosecution if the defendant is too young to form the requisite criminal intent for the offense.
- The purpose of an adult criminal prosecution is punishment; the purpose of a juvenile adjudication is rehabilitation of the minor before he or she becomes an adult.
- Voluntary intoxication may provide a defense if the intoxication prevents the defendant from forming the requisite criminal intent for the offense.
- Involuntary intoxication may be a defense analyzed under the voluntary act element of a crime.
- Mistake of law may provide a defense if the defendant believes his or her conduct is legal because of reliance on an official pronouncement by an authorized individual or entity.
- Mistake of law is not a defense when the defendant believes his or her conduct is legal because of reliance on the incorrect advice of an attorney, police officer, or probation officer.
- If the facts as the defendant believes them to be prevent the defendant from forming the requisite intent for the crime, mistake of fact may be a valid defense.
- Mistake of fact is not a defense to strict liability crimes because intent is not an element.
- The subjective entrapment defense focuses on the individual defendant, and provides a defense if law enforcement pressures the defendant to commit the crime against his or her will. If the defendant is predisposed to commit the crime without this pressure, the defendant will not be successful with the defense. Pursuant to the subjective entrapment defense, the defendant's criminal record is admissible to prove the defendant's predisposition.
- The objective entrapment defense focuses on law enforcement behavior, and provides a defense if the tactics law enforcement uses would convince a reasonable, law-abiding person to commit the crime. Under the objective entrapment defense, the defendant's criminal record is irrelevant and inadmissible. Alaska has adopted the objective entrapment excuse defense.

Answer to Exercises

From Culpability (Insanity)

1. Jeffrey will not be successful in a jurisdiction that recognizes the ***M'Naghten*** insanity defense. Although Jeffrey has a mental defect or disease, schizophrenia, Jeffrey's behavior in *hiding* the victims' corpses indicates that he knows his behavior is **wrong**. Thus, Jeffrey cannot produce evidence establishing the second element of *M'Naghten*. For the same reason, in Alaska, Jeffrey would not be successful in arguing insanity *or* guilty but mentally ill.

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CHAPTER OVERVIEW

9: Criminal Homicide

9.1: Homicide

9.2: Murder

9.3: Felony Murder

9.4: Manslaughter and Criminally Negligent Homicide

9.5: End-Of-Chapter Material

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9.1: Homicide

Not all homicides are created equal. In this chapter, we explore *criminal* homicide and its varying degrees of culpability. Murder, manslaughter, and criminally negligent homicide are all criminal homicides. All three require the same physical act – an unlawful killing of a human being. What separates the offenses is the mental state of the perpetrator.

At common law, murder was the unlawful killing of another with malice aforethought. Manslaughter, on the other hand, was the unlawful killing without malice. Modern criminal codes include criminally negligent homicide, which occurs when one's lack of awareness of the risk of death is the direct and proximate cause of another's unlawful death. We will explore how Alaska defines each degree of homicide shortly. Finally, suicide – where one kills oneself – is legal, whereas assisted suicide, including physician-assisted suicide, is generally *illegal*.

Homicide

Homicide is the killing of one human being by another. *See* Black's Law Dictionary (6th ed. 1990). Not all homicide is unlawful. For example, capital punishment is homicide, but not criminal homicide. A homicide becomes criminal if it results from an *unlawful* killing – put another way, unlawful killings are killings that are not "justifiable" or "excusable." This distinction has its roots in common law. At common law, homicide was classified as justifiable, excusable, or felonious. Justifiable homicides were not criminal because they were not committed with "an evil intent," but instead, under circumstances of necessity or duty. Similarly, excusable homicides were not criminal since they were committed with minimal guilt. Felonious homicide is the wrongful killing of another without justification or excuse. Modern criminal codes have largely kept this distinction. Under Alaska's criminal code, all unjustified forms of killing are deemed felonies. This includes both intentional and unintentional killings.

Actus Reus and Homicide

The *actus reus* of criminal homicide, depending on the jurisdiction, is the "unlawful killing of a person" or "causing the death of another person." Two important, interrelated questions surround the *actus reus*: when does life begin and when does life end?

When life begins… when life ends …

The victim of homicide must be a living person. Thus, shooting a dead body is not homicide (but it may be a lesser crime). *See e.g.*, AS 11.61.130(a). Alaska defines a "person" as a human being who has been born and was alive at the time of the criminal act. A person is "alive" if they have either *spontaneous* respiratory or cardiac function, or have *spontaneous* brain function, even though respiratory and cardiac function are maintained by artificial means. AS 11.41.140. In other words, Alaska has adopted the "brain death" test for determining death. Alaska has rejected the alternate test – proof of the irreversible cessation of circulatory and respiratory function – due to medical improvements. With advancements in medical science and technology, a person's heartbeat and respiration may be maintained mechanically even if all brain function is irreversibly lost. To be "alive" a person must be born with spontaneous brain function. This definition necessarily *excludes* legal abortions.

Fetuses receive special protection under Alaska law. Alaska criminalizes the murder, manslaughter, or negligent homicide of an "unborn child." AS 11.41.150-180. An "unborn child" is a fetus, at any stage of development, carried in the womb that is *not* born alive, but excludes legal abortions and other standardized medical procedures. AS 11.41.180; 11.81.900(b)(66). In some jurisdictions this is referred to as feticide. **Feticide** is the intentional destruction of a fetus.

Year-and-a-day rule

The now abolished common law determination of death was the **year-and-a-day** rule. The rule created a timeline for the victim's death to constitute murder. The homicide victim needed to die within a year-and-a-day of the defendant's act for the defendant to be criminally responsible. If the victim did not die within the time limit, the defendant could be charged with *attempted murder*, but not criminal homicide. All jurisdictions have now abolished the rule and have instead adopted traditional causation principles to determine death. *See e.g.*, *Tennessee v. Rogers*, 992 S.W.2d 393 (Tenn. 1999). Death timeline rules should not be confused with the **statute of limitations**, which is the time limit the government has to *prosecute* a criminal defendant. (In Alaska, a criminal homicide prosecution may be commenced at any time; there is no statute of limitations.)

Suicide

At common law, suicide was a crime. Modern criminal codes do not criminalize suicide. However, numerous jurisdictions, including Alaska, criminalize *assisting* suicide. A person commits the crime of manslaughter if a person "intentionally aids another person to commit suicide." AS 11.41.120(a)(2). The crime includes *physician-assisted* suicides; physicians receive no special protection under the criminal law. The Alaska Supreme Court has upheld the constitutionality of the criminal statute even in the face of terminally ill patients seeking to end their lives with the assistance of a physician. *See Sampson v. State*, 31 P.3d 88 (Alaska 2001). A minority of states (*e.g.*, Oregon) allow terminally ill patients to seek the assistance of a physician to commit suicide.

In *Sampson*, the Alaska Supreme Court noted that physician-assisted suicide is *not* a fundamental right under the Alaska Constitution. Instead, the government has significant interests in *prohibiting* physician-assisted suicide, including preserving human life, protecting vulnerable persons, protecting the integrity of the medical profession, and regulating dangerous activities in the state. *See id.* Although a physician must honor a patient's wish to stop life-saving measures, a physician may not intentionally *quicken* a person's death.

Exercises

Answer the following question. Check your answer using the answer key at the end of the chapter.

1. What is the fundamental difference between homicide and suicide?

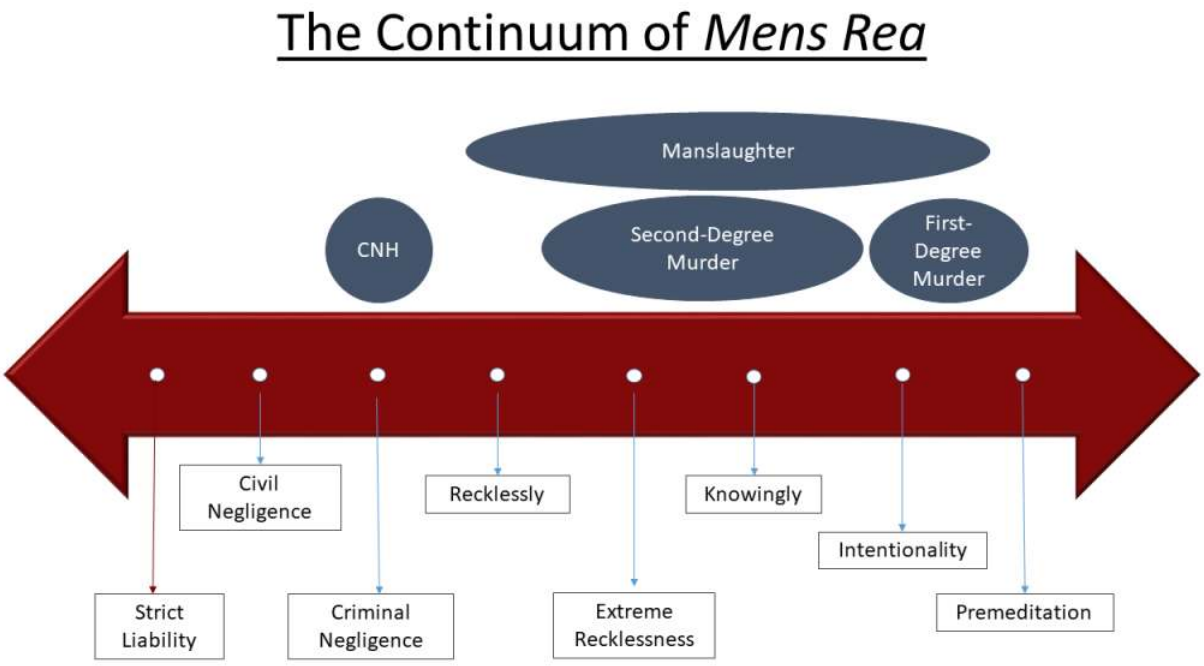
This page titled 9.1: Homicide is shared under a CC BY-NC-SA 4.0 license and was authored, remixed, and/or curated by Rob Henderson via source content that was edited to the style and standards of the LibreTexts platform.

9.2: Murder

Murder is the most serious classification of criminal homicide. At common law, murder was defined as the unlawful killing of a human being with "malice aforethought," either expressed or implied. *See* Black's Law Dictionary (6th ed. 2009). Although the term 'malice aforethought' has a long, and somewhat confused, history, it generally refers to an evil intent or depraved heart. Express malice existed when the defendant had a deliberate intention to take the victim's life; implied malice was found when the defendant had a depraved heart or was indifferent to whether the victim lived or died. *See e.g., Gray v. State*, 463 P.2d 897 (Alaska 1970). Manslaughter, on the other hand, was defined as the unlawful killing *without* malice aforethought.

The Alaska criminal code classifies murder based on varying *degrees*, largely based on the defendant's culpable mental state at the time of the killing. Generally, it is the *mens rea* that separates first-degree murder, second-degree murder, manslaughter, and criminally negligent homicide. One important exception is felony-murder, which will be discussed in the next chapter.

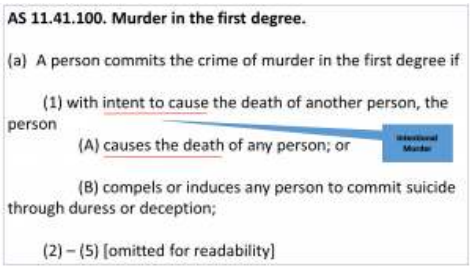
Figure 9.1 The Continuum of Homicide *Mens Rea*



First-Degree Murder

Murder in the first degree is the most serious criminal offense in Alaska. First-degree murder is an unclassified felony with a sentencing range of 30-99 years. AS 12.55.155. While there are multiple different ways to commit first-degree murder, the most frequent is intentional murder. The culpable mental state is intentionally, meaning the defendant must have a *conscious objective* to cause the victim's death. AS 11.41.100(a)(1)(A). The statute lists five additional less common ways to commit first-degree murder, including forced suicide, or deaths resulting from repeated child abuse, child kidnapping, or domestic terrorism. *See e.g.*, AS 11.41.100(a)(2)-(5).

Figure 9.2 Alaska Criminal Code – Murder in the First Degree



As noted, the most common theory of first-degree murder is intentional murder. Although the defendant must act with a specific intent to kill, the defendant's intent to kill need not be deliberate or premeditated. Deliberate is normally defined as calm and methodical, without passion or anger. Premediated generally means reflection and planning. Neither is required under Alaska law. A defendant can form the intent to kill in an instant, without reflection, and with intense anger. If the defendant has a conscious objective to cause the victim's death at the moment he committed the homicidal act, the defendant is guilty of first-degree murder. Although most criminal defendants do not announce their intention before committing a crime, a jury is entitled to presume that a defendant intends the natural and probable consequences of a criminal act he knowingly commits. *See Kangas v. State*, 463 P.3d 189 (Alaska App. 2020). Thus, a defendant who shoots a person in the chest at near point-blank range is likely to be found to have acted with an intent to cause death because a natural and probable consequence of shooting a person in the chest at point-blank range is death.

Example of Intentional Murder

Frank, Dillon's supervisor, calls Dillon into his office and unexpectedly fires him. Enraged, Dillon stands up, grabs a heavy brass letter opener from the top of Frank's desk, yells, "I hope you die!", and plunges the letter opener into Frank's chest. Frank stumbles and dies from a severed aorta. Dillon is likely guilty of first-degree murder. Dillon consciously picked up the letter opener and intentionally stabbed Frank in the chest. A severed artery is a natural and probable consequence of stabbing a person in the chest. In fact, Dillon verbalized his intent when he yelled, "I hope you die!" Note that Dillon acted in anger, not with calm, cool reflection. Further, the act of grabbing the letter opener appears impulsive, not planned. There is little evidence that indicates that Dillon has a strong or calculated desire to kill Frank before going into his office. Nonetheless, a jury could find that Dillion intentionally caused the death of Frank.

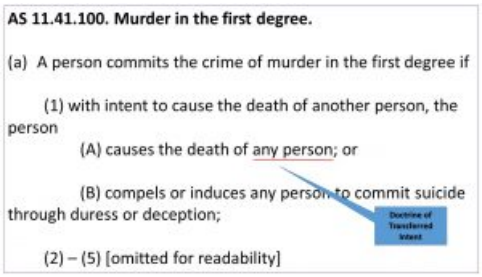
Transferred Intent

Occasionally, a defendant *misses* his intended target. Assume A deliberately shoots at B with the intent to kill B, but is a terrible shot, and hits C, killing her instantly. A had the specific intent to kill B, but *accidentally* killed C. Should A be guilty of first-degree murder (intentional murder), when A *did not intend* to kill C?

Under the common law doctrine of transferred intent, a criminal defendant's "evil intent" is *transferred* from the intended target to the unintended victim.

In recent times, some jurists have noted the doctrine is an "unnecessary fallacy" since at common law, malice aforethought meant the intent to kill *anyone*. *See Ward v. State*, 997 P.2d 528, 533 (Alaska App. 2000) (Mannheimer, J. *concurring*). Thus, when a defendant acted with malice aforethought, the defendant acted with the requisite *mens rea* regardless of who died. Alaska avoided this debate by expressly incorporating the concept directly into the statute; an intent to kill anyone satisfies the *mens rea* of murder. For this reason, transferred intent is rarely discussed in Alaska case law.

Figure 9.3 Murder in the First Degree – Transferred Intent



Even though the concept is easily understood when applied to a completed crime like first-degree murder, the concept is *not* easily understood when applied to an *inchoate* crime like attempted murder. Suppose that A deliberately shoots at B with the intent to kill B, but is a terrible shot, and hits C, severely *injuring* her. Although C survived the attack she will be disfigured for the rest of her life. Is A guilty of *attempted murder*?

Ramsey v. State, 56 P.3d 675 (Alaska App. 2002) answers this question. As you read the opinion, ask yourself whether the court reached the correct and ***just*** result.

Ramsey v. State, 56 P.3d 675 (Alaska App. 2002)

56 P.3d 675
Court of Appeals of Alaska.
Evan E. RAMSEY, Appellant,
v.
STATE of Alaska, Appellee.
No. A–7295.
Oct. 11, 2002.

OPINION

COATS, Chief Judge.

A jury convicted Evan Ramsey of two counts of murder in the first degree, one count of attempted murder in the first degree, and fifteen counts of assault in the third degree. Superior Court Judge Mark Wood sentenced Ramsey to a composite term of 210 years to serve. Ramsey appeals both his conviction and his sentence. We affirm in part and reverse in part.

On Wednesday morning, February 19, 1997, sixteen-year-old Evan Ramsey entered Bethel High School with a .12 gauge shotgun hidden under his jacket. Ramsey immediately walked toward the student common area where several students were sitting. At the nearest table sat Joshua Palacios, a fellow high school student, talking with several of his friends. Palacios began to turn around and stand up when Ramsey pulled out the shotgun and shot Palacios in the stomach. Palacios later died from his wounds. Two students who were sitting across from Palacios, S.M. and R.L., were also hit by pellets from the shotgun blast.

One of the art teachers at the high school, Reyne Athanas, was in the teacher's lounge when she heard the first gunshot. She entered the hallway and observed Ramsey shooting into the ceiling. She saw Palacios lying on the floor with another student. During this episode, Ramsey paced up and down the hall several times in a very threatening manner. She and Robert Morris, another school teacher, attempted to convince Ramsey to put the shotgun down and give up. Ramsey then aimed the gun at them, but did not shoot. Ramsey walked away from Athanas and Morris, heading in the direction of the school's main office where the school's administrative offices were located.

Meanwhile, Ronald Edwards, the school principal, had been walking through the school looking for Ramsey because he had heard that Ramsey was in the school with a gun. Edwards found Ramsey as he was approaching the main office. Ramsey aimed the shotgun at Edwards, and Edwards turned around to run back into the school's office. As Edwards was trying to get back into the office, Ramsey shot him in the back and shoulder. Edwards died in his office from the gunshot wounds.

Minutes after the shooting began, Bethel police officers arrived at the high school. Several officers entered the high school and saw Ramsey standing in the common area with the shotgun. Ramsey saw the officers and fired one round in their direction. After a brief exchange of gunfire, Ramsey put the shotgun down and gave up. According to the officers, as he threw the shotgun down, Ramsey yelled "I don't want to die." Officers were quickly able to detain Ramsey and take him into custody.

A grand jury indicted Ramsey on two counts of first-degree murder, three counts of attempted first-degree murder, and fifteen counts of third-degree assault. The State's theory at trial was that Ramsey sought revenge against both Palacios and Edwards. The State introduced testimony that Ramsey and Palacios got into an argument and fight two years before the shooting. The State also introduced a letter found in Ramsey's bedroom following the shooting that indicated Edwards was one of Ramsey's intended victims. The letter read, in part,

Hi, everybody. I feel rejected. Rejected, not so much alone. But rejected. I feel this way because the day-to-day mental treatment I get usually isn't positive. But the negative is like a cut, it doesn't go away really fast, they kind of stick. I figure by the time you guys are reading this, I'll probably have done what I told everybody I was going to do. Just hope a 12–gauge doesn't kick too hard, but I do hope the shells hit more than one person, because I am angry at more than one person. One of the big assholes is Mr. Ed—Ron Edwards, he should be there. I was told that this would be his last year, but I know it will be his last year. The main reason that I did this is because I am sick and tired of being treated this way everyday. Who gives a fuck about it? Now, I got something to say to all of those people who think I'm strange can suck my dick and like it.

…

Life sucks in its own way, so I killed a little and kill myself. Jail isn't for me ever and wasn't.

Ramsey's major defense at trial was that he was suicidal and did not form the requisite intent to commit first-degree murder or first-degree attempted murder. According to Ramsey, his intent during the shooting was not to kill anyone but merely to scare the people at the school and force the police to go to the high school and kill him. Ramsey's counsel described Ramsey's actions as "suicide-by-cop."

The jury convicted Ramsey of two counts of first-degree murder, one count of first-degree attempted murder, and fifteen counts of third-degree assault. The jury also acquitted him of two counts of attempted first-degree murder and one count of third-degree assault. Judge Wood sentenced Ramsey to a composite term of 210 years' imprisonment.

[…]

Did Judge Wood err in instructing the jury on the charge of attempted murder of S.M.

When Ramsey shot Palacios, S.M. and R.L., two students sitting across from Palacios, were also hit by pellets from the same shotgun blast. The State's theory was that if Ramsey, with intent to kill Palacios, shot and injured S.M., he committed attempted murder in the first degree against S.M. Ramsey objected, contending that he could only be guilty of the attempted murder of S.M. if he had acted with the specific intent to kill S.M. Judge Wood disagreed and instructed the jury that:

In order to establish the crime of Attempted Murder in the First Degree as charged in Count III of the indictment, it is necessary for the state to prove beyond a reasonable doubt the following:

First, that the event in question occurred at or near Bethel … on or about February 19, 1997;

Second, that Evan Ramsey intended to commit the crime of Murder in the First Degree as to Count II [First–Degree Murder of Palacios] and;

Third, that the defendant shot S.M. with a firearm, which constituted a substantial step toward the commission of Murder in the First Degree.

Judge Wood allowed the State to argue in summation that if Ramsey had fired the shotgun at Palacios with the specific intent to kill him and had simultaneously injured S.M. (thereby taking a substantial step), Ramsey was guilty of attempted murder in the first degree of S.M. Judge Wood precluded Ramsey from arguing to the jury that the jury had to find that Ramsey had a specific intent to kill S.M. to find him guilty of the attempted murder of S.M. Ramsey contends that Judge Wood erred. We agree.

The parties point out that other jurisdictions that have addressed this or similar issues have reached entirely different results. Some jurisdictions hold that attempted murder is appropriately charged if the defendant's actions killed the intended victim and also injured an unintended victim as a matter of public policy and deterrence. Other jurisdictions have held that attempted murder is an inappropriate charge under the theory that attempt, as an inchoate offense, requires the specific intent to kill a specific victim.

The doctrine of transferred intent arose in early common law to impute criminal liability to a person who, acting with the intent to harm, caused injury to an unintended victim. To avoid injustice, courts developed the theory of transferred intent, holding the individual responsible for the injury or death to the unintended victim. Most commentators, however, note that transferred intent is

a misleading half-truth because at common law the requisite mental state was “malice aforethought,” which included the intent to kill anyone. These commentators note that the law, even at common law, did not require the ultimate person harmed be the intended victim.

The doctrine of transferred intent is unnecessary to ensure criminal liability under Alaska’s statute defining first-degree murder.

Alaska Statute 11.41.100 defines murder in the first degree as:

(1) with intent to cause the death of another person, the person (A) causes the death of *any* person. (emphasis added).

The plain language of AS 11.41.100 imputes criminal liability to anyone who, with the intent to cause death, causes death. The statute does not require the State to prove that a defendant had a specific intent to cause the death of a particular person to convict the defendant of murder. Therefore, under Alaska law, if a defendant acts with the intent to cause the death of another person, the defendant is guilty of murder for the death of any person whose death is caused by his act.

The question presented in this case is whether a similar rationale can be applied to attempted first-degree murder. To be guilty of attempted first-degree murder in Alaska, a person must (1) intend to cause the death of another, and (2) take a substantial step causing the death of any person. The State argues that Ramsey intended to cause the death of Palacios and that his wounding of Palacios was a substantial step towards causing S.M.’s death.

The problem with the State’s argument is that its logic leads to the conclusion that Ramsey could have been found guilty of the attempted murder of everyone in the school. The jury certainly found that Ramsey intended to cause the death of Palacios. And because his actions would have placed almost any reasonable person in the school in fear of serious physical injury, it is hard to say where the State’s attempted murder theory would stop. A defendant can be found guilty of attempted murder whether or not he actually injures his intended victim. Therefore, the State’s argument, carried to its logical extension, would allow it to convict Ramsey of the attempted murder of everyone in the building.

[…]

The jury found that Ramsey acted with intent to kill Palacios. Thus, his act of firing the shotgun at Palacios would constitute either attempted first-degree murder (if Palacios survived) or completed first-degree murder (if Palacios died). If, at the same time, Ramsey killed or injured one or more bystanders while he was trying to kill Palacios, Ramsey would be guilty of an additional crime for each of these bystanders—not an additional attempted murder, but rather an additional homicide if the bystander died or, if the bystander survived, either an attempted homicide or an assault, depending on Ramsey’s culpable mental state with regard to that bystander.

Here, under the jury instructions that embodied the State’s erroneous theory of attempted murder, the jury was asked to find whether Ramsey wounded S.M. while trying to kill Palacios. The jury so found. But the jury was not asked to decide other pertinent matters.

For instance, if Ramsey had intended to kill S.M. (in addition to Palacios), then Ramsey could properly be convicted of the attempted murder of S.M. (regardless of whether he injured S.M.). Even if Ramsey did not intend to kill S.M., if Ramsey inflicted serious physical injury on S.M., while trying to kill Palacios, he might properly be convicted of first-degree assault on S.M. Alternatively, if Ramsey merely inflicted physical injury on S.M. (while trying to kill Palacios), he might properly be convicted of second-degree assault on S.M.

Accordingly, we conclude that Judge Wood erred in instructing the jury and allowing the State to argue that it could convict Ramsey of attempted murder of S.M. if Ramsey intended to kill Palacios and simultaneously injured S.M. We conclude that the proper instruction would have required the jury to find Ramsey had the specific intent to kill S.M. before it could convict Ramsey of the attempted murder of S.M. Based on this rationale, Ramsey’s conviction for attempted murder in the first degree must be reversed.

[…]

Ramsey’s conviction for attempted murder in the first degree is REVERSED. His other convictions are AFFIRMED.

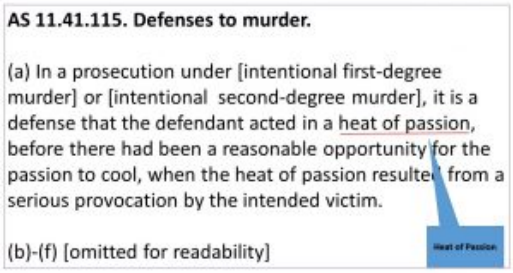
The More You Know . . .

Sadly, the Bethel high school shooting occurred long before similar incidents like Columbine, Sandy Hook, or Parkland. The circumstances surrounding mass shooting incidents (*e.g.*, school shootings) have long been explored by researchers. According to a 2019 U.S. Secret Service analysis, all school shooting attackers between 2008 and 2017 exhibited concerning behaviors (engaged in behavior that caused fear, issued direct threats of violence, or brought weapons to school), most of whom communicated their intent to attack prior to the incident. For more information, see *Protecting America's Schools: A U.S. Secret Service analysis of targeted school violence*. Washington, DC: Department of Homeland Security, U.S. Secret Service. (2019). Numerous states have implemented school safety tiplines in an effort to provide resources to alert authorities of disturbing behaviors before a mass shooting event occurs. *See e.g.*, www.safeoregon.com or www.safeut.med.utah.edu. Some have had great success.

Heat of Passion

The law provides for a unique defense to intentional murder – heat of passion. **Heat of passion** is a killing that occurs during an extreme emotional state before the defendant has a reasonable time to calm down, provoked by the victim's conduct. Historically, the defense was raised in cases involving adulterous murders. A defendant discovered their spouse in bed with a lover, and in an emotional rage, the defendant killed both spouse and lover. The common law recognized that such circumstances were likely isolated, mitigated, and deserving of a lesser punishment. This lesser punishment was referred to as the crime of "voluntary manslaughter" – a purposeful murder resulting from the victim's serious provocation. The law recognized that the killing itself was unreasonable, but understandable.

Figure 9.4 Alaska Criminal Code – Defenses to Murder



Heat of passion defense requires the killing to be in response to the victim's serious provocation. If a victim "seriously provokes" a defendant, and the defendant kills the victim in an intense rage, the intentional murder is reduced to manslaughter. Thus, the heat of passion defense mitigates the seriousness of an intentional murder if the defendant unreasonably kills based on intense emotion. Heat of passion differs markedly from self-defense. Self-defense only justifies objectively reasonable killings, and it is a complete defense to the charge, resulting in an acquittal. Heat of passion mitigates *unreasonable* killings. *See Ha v. State*, 892 P.2d 184, 197 n.6 (Alaska App. 1995). Heat of passion is classified as an **imperfect defense**. A defendant acting under a heat of passion is partially excused of criminal liability. Instead of being guilty of intentional murder, the defendant is guilty of manslaughter.

The modern defense encompasses more than anger or rage; it includes fear, terror, and other intense emotions. This is not to say that a defendant's "passion" is simply a subjective fear or anger. Instead, the defendant's emotional condition – that is, the defendant's response – must be reasonable, even though the killing itself is unreasonable. The trier of fact evaluates the existence (or non-existence) of serious provocation through the eyes of a reasonable (and sober) person standing in the defendant's shoes.

Heat of passion is temporary. A defendant is only entitled to rely on heat of passion if they did not have a reasonable opportunity to cool. The next case, *Luch v. State*, 413 P.3d 1224 (Alaska App. 2018), focuses on the circumstances that may give rise to a valid heat of passion defense. As you read *Luch*, pay close attention to the source of the defendant's belief of adultery.

Luch v. State, 413 P.3d 1224 (Alaska App. 2018).

413 P.3d 1224
Court of Appeals of Alaska.
Robert James LUCH, Appellant,
v.

STATE of Alaska, Appellee.
Court of Appeals No. A-11756
January 19, 2018

OPINION
Judge MANNHEIMER.

Robert James Luch was convicted of first-degree murder for shooting and killing his wife, Jocelyn. In this appeal, Luch argues that the trial judge committed error by failing to instruct the jury on the defense of heat of passion. […] For the reasons explained in this opinion, we conclude that … Luch's [heat of passion] claim[] [has no] merit, and we therefore affirm his conviction.

Underlying facts

In the summer of 2010, Robert Luch and his family—his wife Jocelyn and their four children (Brent, Delia, Letitia, and Marcelyn)—moved back to Anchorage from their winter home in Arizona. One night in June, Luch awakened and noticed that the telephone was in use. When he picked up the receiver, Luch discovered that his wife Jocelyn was speaking with a man—Bryan Fuqua. Luch exchanged words with Fuqua. During their short but heated conversation, Fuqua indicated that his relationship with Jocelyn either was, or would shortly become, sexual. After hearing this, Luch hung up the phone. He woke up the children, and he angrily accused Jocelyn of having an affair.

During the next several months, the family lived in a state of uneasy tension. Luch and Jocelyn spoke little, and Jocelyn began staying out late, sometimes not coming home until the following day. The couple's daughter Marcelyn later told the police that, during this period, Luch repeatedly threatened to kill both Jocelyn and the man he believed she was seeing.

In August, two of the Luchs' children (Delia and Letitia) moved back to Arizona to attend college. This left four people in the Anchorage household: Luch, Jocelyn, and their children Marcelyn and Brent.

On September 17, 2010, Luch purchased a handgun, purportedly for protection at the family cabin near Sutton. Luch did not inform Jocelyn of this purchase; the only other family member who knew about the gun was Luch's son Brent.

Eleven days later, on the morning of September 28, 2010, Luch learned that a car he had loaned to his daughter Delia had been impounded in Arizona. Luch was incensed, and he began yelling at Delia on the telephone. Brent overheard this conversation and tried to calm things down, but Luch turned on Brent, and a fist fight ensued. Luch's daughter Marcelyn eventually intervened and stopped the fight, but Luch was still angry.

Luch then drove to the hotel where his wife Jocelyn worked and tried to see her, purportedly so that he could tell her about the impoundment of Delia's car and his fight with Brent. When Jocelyn could not leave her work station immediately, Luch parked his vehicle behind the hotel and waited for several hours, becoming angrier as time passed. Eventually, Luch drove home without Jocelyn, and Brent and Marcelyn later picked Jocelyn up.

That same night, Marcelyn and Jocelyn were scheduled to run in a race held at Kincaid Park. A friend of Jocelyn's, a runner named Steve Crook, came to pick them up. At the last minute, Marcelyn decided not to go.

When Luch learned that Marcelyn had not accompanied Jocelyn to the race, he insisted that Marcelyn go with him to Kincaid Park to confirm that Jocelyn was actually at the race. At the park, they stood near the finish line and watched as hundreds of racers crossed the finish line, but they did not see Jocelyn.

Once the race was over, Marcelyn called Jocelyn on her cell phone. Jocelyn said that she was at a nearby bunker. (Kincaid Park was built on the site of a former missile installation.) Marcelyn suggested to Luch that he drive to the bunker while she walked over there and found Jocelyn. But as Marcelyn was walking toward the bunker, Jocelyn spoke to her again on the phone: Jocelyn corrected herself and said that she was not at the bunker, but rather at the adjacent Kincaid chalet. Marcelyn was unable to inform Luch of this new information because she (Marcelyn) had his cell phone.

Marcelyn went to the chalet and found her mother, but Luch did not arrive to pick them up. Luch had apparently driven around the Kincaid parking lot, honking repeatedly and becoming increasingly agitated, until finally he drove home alone.

When Jocelyn and Marcelyn realized that Luch was not coming for them, Marcelyn called her brother Brent, who came and picked them up.

When Jocelyn and the children arrived home, Luch was sitting in his recliner in the downstairs living room. He repeatedly accused Jocelyn of not having run the race.

Brent and Marcelyn soon went to their bedrooms upstairs. Jocelyn also went upstairs and began preparing for bed. Luch came upstairs and confronted her—accusing her of lying about participating in the race, and accusing her of seeing another man. Jocelyn assured Luch that she had been at the race, and she denied any wrongdoing, but Luch was not convinced. He went downstairs to the garage, where he retrieved the newly purchased handgun from a locked storage room. He then went back upstairs.

According to Luch's testimony at trial, he did not retrieve the gun with the intent of harming his wife. Rather, Luch told the jury that he intended to use the gun "to posture, to stage." Luch testified that, by simply displaying the gun to Jocelyn, he hoped to convince her that he was willing to shoot any man she was seeing, so that she would then "relay a message" to this man.

By the time Luch returned upstairs, Jocelyn had gone into the bathroom. Luch followed her there. Shortly thereafter, Marcelyn heard Jocelyn say, "Don't push me"—and then she heard two gunshots. Marcelyn and Brent rushed into the hallway, and Marcelyn saw Luch leave the bathroom and go downstairs carrying the handgun. Luch said nothing to his children.

The children had to force their way into the bathroom because Jocelyn's body was blocking the door. Jocelyn was still alive, but she was bleeding from two gunshot wounds. Brent located Jocelyn's cell phone and called 911.

The police arrived within minutes. Anchorage Police Officer Mark Bakken entered the house and stayed with Jocelyn until an ambulance arrived. During that brief conversation, Jocelyn told the officer that Luch had shot her because she wanted to divorce him and she refused to return to Arizona with him.

While this was happening, Luch took the handgun back to the storage room of the garage, and he then left the house. The police found Luch walking down the street. Luch told them, "I'm the one you want."

Jocelyn was taken to the hospital, but she died from her wounds. Luch was indicted for this homicide under alternative theories of first- and second-degree murder.

Luch's claim that he was entitled to a jury instruction on the defense of heat of passion

Luch contends that the trial judge committed error by rejecting his attorney's request for a jury instruction on the defense of "heat of passion". We will first describe the law in Alaska regarding heat of passion, and then we will explain why Luch was not entitled to a jury instruction on this defense.

(a) Explanation of the defense of heat of passion under Alaska law

The defense of heat of passion is defined in AS 11.41.115. This statute declares that heat of passion is a partial defense to two types of murder:

- a homicide charged under AS 11.41.100(a)(1)(A)—i.e., an intentional killing that would otherwise be first-degree murder, or
- a homicide charged under AS 11.41.110(a)(1)—i.e., a killing that would otherwise be second-degree murder because it resulted from an assault where the defendant intended to inflict serious physical injury, or where the defendant knew that the assault was substantially certain to cause death or serious physical injury.

The defense of heat of passion applies to instances where the defendant "acted in a heat of passion … result[ing] from a serious provocation by the intended victim", and where the defendant assaulted the victim "before there [was] a reasonable opportunity for the passion to cool". AS 11.41.115(a).

For purposes of the heat of passion defense, the term "serious provocation" is defined to mean "conduct … sufficient to excite an intense passion in a reasonable [and unintoxicated] person in the defendant's situation, … under the circumstances as the defendant reasonably believed them to be". AS 11.41.115(f)(2). However, the statute limits the scope of "serious provocation" by adding that "insulting words, insulting gestures, or hearsay reports of conduct engaged in by the intended victim do not, alone or in combination with each other, constitute serious provocation." *Ibid.*

Although heat of passion is a defense to first-degree murder charged under AS 11.41.100(a)(1)(A) or second-degree murder charged under AS 11.41.110(a)(1), it is only a partial defense. Heat of passion does not exonerate the defendant; instead, it reduces the crime to manslaughter. See AS 11.41.115(e).

[…]

(b) There was insufficient evidence that Luch was subjected to a "serious provocation" within the meaning of the heat of passion statute

A defendant is entitled to have the jury instructed on a defense if the defendant presents "some evidence" of that defense. In this context, the phrase "some evidence" is a term of art. It means evidence which, if viewed in the light most favorable to the defendant, is sufficient to allow a reasonable juror to find in the defendant's favor on every element of the defense.

As we explained in the preceding section of this opinion, the elements of the defense of heat of passion are (1) that Luch shot his wife "in a heat of passion", (2) that this passion was the result of a "serious provocation" (as that phrase is defined in the statute), and (3) that Luch shot his wife before there was a reasonable opportunity for his passion to cool.

Even when the evidence in this case is viewed in the light most favorable to Luch's proposed defense, there was insufficient evidence that Luch was subjected to a "serious provocation".

The governing statute, AS 11.41.115(f)(2), defines "serious provocation" as "conduct … sufficient to excite an intense passion in a reasonable [and unintoxicated] person in the defendant's situation, … under the circumstances as the defendant reasonably believed them to be". Here, the alleged "serious provocation" was the purported fact that Luch's wife was having an affair.

As we explained earlier in this opinion, there was evidence that, several months before the shooting, Luch learned that his wife might have been having an affair—in particular, the testimony about the overheard phone call, and about Jocelyn's refusal to explain why she was spending several nights a week away from the marital home.

But in Luch's trial testimony, he conceded that his relationship with his wife was significantly better in the two months immediately preceding the shooting. And there was no evidence that Luch knew or even reasonably believed at the time of the shooting that Jocelyn was having an affair. There was plenty of evidence that Luch suspected that his wife was having an affair at that time, but even Luch conceded in his trial testimony that he did not know whether his suspicions were well-founded.

At trial, Luch's attorney asked him whether his suspicions intensified on the day of the killing (September 28, 2010), after Luch went to pick up Jocelyn from work and ultimately left without her. Luch's attorney asked him, "At [that] point, are you thinking she's cheating?", Luch responded:

Possibly. I—I don't want to believe that. I want to trust my wife very badly. … I want to believe the best scenario, so I'm trying to resist going that direction in my thought. But there's, of course, there's a, there's some doubts. I'm not sure.

Later that day, after the incident in Kincaid Park where Luch was unable to locate Jocelyn at the race, Luch was waiting at home when Jocelyn and the children (Marcelyn and Brent) arrived home from Kincaid Park. According to Luch, he was "festering" because he strongly suspected that his wife had not run the race at Kincaid Park—that she was "off on another tryst". But Luch added that he was not sure about this. He explained that he was "trying to hold it all together" because "there might be something [he was] not aware of"—for instance, the possibility of "a mechanical breakdown", or a "different finish line" to the race.

When Jocelyn got home, Luch repeatedly accused her of not having run in the race. But Jocelyn did not respond to these accusations; instead, she went upstairs after a few minutes and started preparing for bed. Luch followed her upstairs and confronted her—accusing her of lying about participating in the race, and accusing her of seeing another man. Jocelyn assured Luch that she had been at the race, and she denied any wrongdoing, but Luch was not convinced. At that point, Luch went to the garage, obtained the handgun, and returned to his wife's bathroom.

At common law, one classic example of "serious provocation" was the defendant's discovery of their spouse's adultery. However, the common law required that the defendant find their spouse in flagrante delicto—that is, in the very act of committing adultery. Reflecting this principle, Alaska's statutory definition of "serious provocation", AS 11.41.115(f)(2), expressly declares that a "serious provocation" cannot be based on hearsay reports.

Thus, when a defendant claims that they committed a deadly assault in response to a discovery of adultery, that "discovery" must be based on the defendant's personal knowledge, and not the defendant's suspicions or conclusions based on hearsay accounts (which are expressly excluded by the statute).

The fact that, several months before the shooting, Luch may have had good reason to believe that Jocelyn was having an affair does not mean that Luch was experiencing a "serious provocation" when, on the day of the race, he could not find Jocelyn where he expected her to be. Luch never claimed that he had personal knowledge of his wife's adultery, and there was no evidence that

Jocelyn admitted adultery to him. In fact, the evidence was that Jocelyn denied any wrongdoing when Luch confronted her on the day of the killing.

Nor was there evidence that Luch reasonably believed that Jocelyn was committing adultery. Although Luch repeatedly expressed suspicions that his wife was having an affair, he conceded on the stand that his doubts about his wife's fidelity were unconfirmed, and that he knew there were other potential explanations for his failure to see Jocelyn at the finish line of the race at Kincaid Park.

We therefore hold that Luch failed to present some evidence that he was subjected to a "serious provocation" as that term is defined in AS 11.41.115(f)(2). Because of this, we affirm the trial judge's decision not to instruct the jury on the defense of heat of passion.

[…]

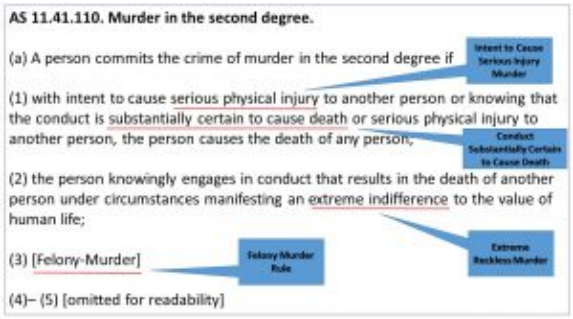
Conclusion
The judgement of the superior court is AFFIRMED.

The trier of fact must assess the circumstances the defendant faced from the perspective of a "reasonable person." A reasonable person means a reasonable, mentally healthy person whose cognitive abilities are not influenced by mental difficulties, such as a head injury, intoxication, or cultural background. Provocation is measured from an ordinary person's perspective, which causes the person to lose their normal self-control. Also, the victim's conduct that gives rise to serious provocation must be based on information that the defendant *knows*. It may not be based on information that the defendant heard or suspects is true.

Second-Degree Murder

Second-degree murder is non-intentional murder. Generally speaking, second-degree murder encompasses implied malice murders, such as murder committed with the intent to inflict serious physical injury or extreme reckless killings. In Alaska, a person can commit second-degree murder in five separate ways, but all *expressly* exclude murder with the intent to kill. Instead, second-degree murder includes circumstances where the defendant intends to cause serious *injury* but causes death, death caused under circumstances manifesting an extreme indifference to human life, or commits felony murder.

Figure 9.5 Alaska Criminal Code – Murder in the Second Degree



Notice that subsection (a)(1) embodies two separate theories of second-degree murder. The first clause – the "serious-physical-injury theory" – requires the defendant to intend to cause serious physical injury to the victim and cause death. We will explore serious physical injury in more detail in the next chapter, but generally, serious physical injury includes any significant injury. "Intent-to-maim" murders fall within this category. For example, a jury could infer that a defendant who stabs their victim eight times in the leg had a conscious objective to cause serious injury to the victim. Should the victim die as a result of the stabbing, the defendant would be guilty of second-degree murder under the "serious-physical-injury theory". AS 11.41.110(a)(1).

The second clause defines second-degree murder as knowingly engaging in conduct that "is substantially certain to cause death or serious physical injury to another person." AS 11.41.110(a)(1). This type of murder requires more than reckless conduct. The defendant must be substantially aware that his conduct would result in the victim's death or serious physical injury. *See e.g.*, *Morrell v. State*, 216 P.3d 574, 577 (Alaska App. 2009). "Shooting into a crowded room without an intent to cause death or serious physical injury" would be an example of the type of conduct that would be punishable under the second clause of subsection (a)(1). *See legislative commentary*, 1978 Senate Journal Supp. No. 47, at 10.

Subsection (a)(2) criminalizes extreme reckless murders. **Extreme recklessness** is a non-codified culpable mental state that requires the jury to determine whether the defendant caused the death under circumstances that created an **extreme indifference to**

the value of human life. This phrase – extreme indifference to the value of human life – is nebulous by design. In answering this question, the trier of fact (*e.g.*, the jury) is obligated to balance four factors:

1. the social utility of the defendant's conduct;
2. the magnitude of the risk the defendant's conduct created, including both the nature of the harm that was foreseeable by the defendant and the likelihood that the defendant's conduct would cause that harm;
3. the defendant's knowledge of the risk; and
4. any precautions the defendant took to minimize the risk.

See generally Neitzel v. State, 655 P.2d 325, 337 (Alaska App. 1982).

The mental state requires the jury to assess the level of recklessness of the defendant's conduct. The jury must weigh the social utility of the defendant's conduct (if any) against the precaution the defendant took to minimize the apparent risks. Recall that playing "Russian Roulette," is incredibly dangerous and completely lacks any social utility, but shooting in the direction of a victim of a bear attack may demonstrate some social utility despite the magnitude of the risk. *See id*. As always, whether a particular act constitutes extreme recklessness is a question of fact for the jury.

Felony murder, given its unique history and application will be discussed separately in the next section.

Even though second-degree murder is not as "serious" as intentional murder, it remains an unclassified felony offense with a sentencing range of 20 to 99 years imprisonment. Although the mandatory minimum sentence for second-degree murder (20 years) is less than first-degree murder (30 years).

Exercises

Answer the following questions. Check your answers using the answer key at the end of the chapter.

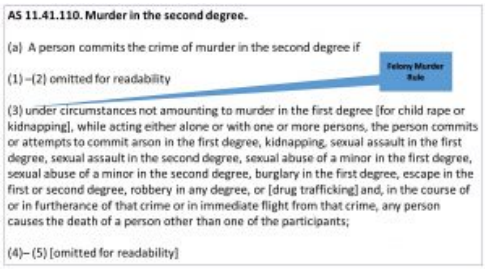
1. Jay is angry about the grade he received on his criminal law midterm. Jay pulls a loaded revolver out of his backpack, aims at a tree and fires in an attempt to release his frustrations. Unfortunately, Jay is an inexperienced marksman and the bullet strikes an innocent bystander in the forehead, killing him. What was Jay's criminal intent when shooting the revolver?
2. Johnnie decides he wants to kill Marcus, the leader of a rival gang. Johnnie knows that Marcus always hangs out in front of the gas station on Friday nights. Johnnie puts his gun in the glove compartment of his car and drives to the gas station on a Friday night. He sees Marcus standing out front. He slowly drives by, takes aim, and shoots Marcus from the car, killing him. Could this be first-degree murder? Explain your answer.

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9.3: Felony Murder

One theory of second-degree murder is felony murder. **Felony murder** is a criminal homicide that occurs during the commission or attempted commission of an inherently dangerous felony. Under Alaska's felony murder rule, a defendant is guilty of second-degree murder if the defendant commits one of the enumerated felonies and during the course of the felony, a person (other than an accomplice) dies. Most states and the federal government include felony murder in their respective penal codes, although it has not been universally adopted.

Figure 9.6 Alaska Criminal Code – Felony Murder Rule



Under Alaska's felony murder rule, the defendant does not have to act with malice or with a "murderous intent." Instead, the defendant's malice is "transferred" or imputed from the malice involved in the commission of the underlying felony. In some ways, the felony murder rule is similar to the Natural and Probable Consequences Doctrine. When a defendant commits an inherently dangerous felony, he or she does so reasonably aware that an innocent victim may die. The defendant's malice is implied in the decision to commit the felonious act. The felonies that create a foreseeable risk of violence or death include arson, kidnapping, sexual assault, sexual abuse of a minor, burglary, escape, robbery, and drug-trafficking. One inherently dangerous felony that is omitted is felony assault. This is because a death that results from an assault is already covered in traditional theories of second-degree murder.

Alaska law also includes an **aggravated felony murder rule**: if a person commits a sexual offense or kidnapping against a minor, first-degree criminal mischief, or first-degree terroristic threatening, and during the course of the offense another person dies (other than a co-participant), the perpetrator is guilty of first-degree murder, not second-degree murder. AS 11.61.100(a)(3)-(a)(5).

Felony murder covers all killings that occur during the course of, in furtherance of, or the immediate flight from, one of the enumerated felonies. Defendants are responsible for any deaths a non-coconspirator that occur throughout the felonious enterprise. Because the purpose of the felony-murder rule is to diminish the risk of unintentional or even accidental killings during the commission of violent felonies, it is a controversial criminal law doctrine. The doctrine authorizes significant penalties for otherwise purely "accidental" deaths. As you explore the felony murder rule below, ask yourself whether the felony murder rule is a fair and just application of criminal liability.

Example of Felony Murder

Jackie, who has just lost her job, decides to burn down her apartment building because she cannot afford to pay the rent. Jackie carefully soaks her apartment with lighter fluid, exits into the hallway, and throws a lit, lighter-fluid-soaked towel into the apartment. She then runs outside to watch the entire building burn down. Jackie forgot that the apartment building is occupied by several other residents. As the apartment burns, several tenants die of smoke inhalation while trapped inside.

In this example, Jackie did not *intend to kill* the tenants. However, she did have the criminal intent necessary for **first-degreearson** (*i.e.*, intentionally setting a fire that recklessly endangers another person). AS 11.46.400. In Alaska, Jackie is guilty of second-degree murder under the felony murder rule for each death. Jackie is also guilty of first-degree arson. Jackie will receive separate punishments for each conviction. Under this scenario, Jackie intentionally engaged in conduct that created a foreseeable risk that other people would be seriously injured or killed.

Co-Felon Liability

It is common for defendants to collaborate on criminal activity. As we have seen, both accomplice liability and conspiracy may place criminal responsibility squarely on a defendant who did not *commit* the offense when defendants cooperate in criminal

activity. The felony murder rule is an extension of this concept. If one defendant kills a person during the commission of a felony, then all accomplices involved in the felony are guilty of murder. AS 11.41.110(a)(3). This is true even if the accomplice did not *intend* or anticipate anyone would be killed or injured.

Example of Co-Felon Liability

Joe and Jane dream up a plan to rob a local bank. They both agree that Joe will be the primary robber and will enter the bank, armed with a pistol, and hand a note to the teller that demands all of the money in the till. Jane's role will be more limited – they agree that Jane will drive the getaway car; Jane will wait outside the front door with the motor running and drive Joe away from the bank after the robbery. On the day of the robbery, Jane drives them to the bank and Joe walks in, armed with a pistol. After Joe passes the note to the teller, the teller frantically summons the security guard. As the security guard approaches, Joe panics and pulls out the gun. Several customers start to scream. In all of the excitement, Joe accidentally shoots an elderly lady standing next to the security guard, killing the customer instantly.

In this case, Joe *and* Jane are both guilty of second-degree murder under the felony-murder rule. As we have previously discussed, Jane is an accomplice to Joe's first-degree robbery under accomplice liability. But Joe and Jane are also both guilty of murder, even though neither had an intent to kill (or seriously injure) anyone during the bank robbery. The felony-murder rule allows both to be held criminally liable for second-degree murder because it is reasonably foreseeable that a person may be killed during a bank robbery.

Exceptions to Co-Felon Liability for Felony Murder

As you can see, the felony-murder rule has broad reach. Two important exceptions exist. First, a person cannot be convicted of felony-murder when the death is to one of the other *participants* in the felony (*i.e.*, accomplice). Alaska's felony-murder statute expressly *excludes* criminal liability if the person killed is one of the participants.

Example of Exception to Co-Felon Liability for Felony Murder

Let's change the hypothetical of Joe and Jane. Assume that instead of Joe shooting the elderly lady, let's assume that the security guard shoots and kills *Joe*. Under this scenario, Jane would *not* be guilty of second-degree murder under the felony murder rule for Joe's death. Although Joe's death occurred during the commission of the robbery, the felony-murder statute expresses excludes the death of a co-participant from the rule.

Jane is still guilty of first-degree robbery, but under traditional accomplice liability principles. And, as you will see next, Jane is also likely guilty of manslaughter for Joe's death.

Pfister v. State, 425 P.3d 183 (Alaska App. 2018)

Alaska's felony murder statute expressly prohibits holding a defendant responsible for second-degree murder if the death is to a co-felon. But does that mean the defendant is excused of *all* criminal liability for the resulting homicide? The next case, *Pfister v. State*, answers that question.

425 P.3d 183
Court of Appeals of Alaska.
Brian Albert PFISTER, Appellant,
v.
STATE of Alaska, Appellee.
Court of Appeals No. A-12019
May 18, 2018

OPINION
Judge MANNHEIMER.

In November 2011, Brian Albert Pfister and two accomplices—Joseph Trantham and Maurice Johnson—decided to break into the home of a marijuana grower and rob him. Pfister waited outside while his two accomplices entered the marijuana grower's home.

Once Trantham and Johnson were inside the home, they pistol-whipped the marijuana grower and demanded his money. The marijuana grower led Trantham and Johnson to his safe—where, unbeknownst to the robbers, he kept a handgun. The grower removed the handgun from the safe and used it to shoot Trantham and Johnson—mortally wounding both of them. Pfister ran away, but he was later arrested.

The State charged Pfister with first-degree burglary, first-degree robbery, and conspiracy to commit robbery. The State also charged Pfister with two counts of manslaughter, for causing the deaths of his two accomplices. Following a jury trial, Pfister was convicted of all these crimes.

In this appeal, Pfister challenges his two manslaughter convictions. He asserts that, under Alaska law, an accomplice to a dangerous felony cannot be convicted of manslaughter when the person who is killed as a result of the felony is another accomplice.

Pfister notes that, under Alaska law, he could not be convicted of felony-murder for the deaths of his accomplices. This is because the portion of the second-degree murder statute that defines felony-murder, AS 11.41.110(a)(3), expressly exempts situations where the person who dies during a violent felony is "one of the participants" in that felony.

Based on the fact that Alaska's felony-murder statute does not cover situations where a felony results in the death of an accomplice to that crime, Pfister argues that the Alaska Legislature also must have intended to exempt accomplices to a felony from any criminal liability for the death of another accomplice. Thus, under Pfister's view of the law, he could not be convicted of manslaughter or any other degree of criminal homicide based on the deaths of his two accomplices to the burglary and robbery in this case.

As we explain in this opinion, Pfister's argument is inconsistent with the common law defining the crime of manslaughter. Based on that common law, and based on the hundred-year history of Alaska's manslaughter statute, we conclude that Pfister's proposed limitation on the crime of manslaughter is inconsistent with the intent of the Alaska Legislature. We therefore uphold Pfister's two manslaughter convictions.

[…]

The common-law definition of manslaughter, and the related doctrines of felony-murder and misdemeanor-manslaughter

At common law, the crime of manslaughter was a residual category of unlawful homicide. Manslaughter was defined as any unlawful homicide committed without malice aforethought—that is, any unlawful homicide that was not murder.

Thus, whenever a person caused the death of another human being, and if that killing was neither justified nor excused, and if the killing did not constitute some form of murder, then the person was guilty of manslaughter.

One of the forms of murder recognized at common law was "felony-murder". In the early days of the common law, this doctrine applied only to homicides that were caused during an attempt to perpetrate a felony—because, in those days, any completed felony was already punishable by death.

Later, when the law allowed lesser penalties for felonies, the felony-murder doctrine was altered to cover any unintended homicide that resulted from the perpetration or attempted perpetration of an inherently dangerous felony, or from any other felony that was perpetrated in a dangerous manner. In such instances, the common law viewed the defendant's intent to commit the felony as "malice aforethought"—thus elevating the homicide to murder—even though the defendant had no intent to kill.

Because the only intent required for felony-murder was the intent to commit the felony, the felony-murder rule applied to deaths that were attributable to the commission of a felony even if those deaths were unforeseen or even quite unexpected:

If [the] intent [to commit the felony] is shown[,] the resulting homicide is murder even if it was quite accidental. … [For example,] if arson results in the death of a fireman who was trying to put out the fire, the arsonist is recognized as having caused this death and is guilty of murder under the felony-murder rule.

Indeed, even the accidental killing of an accomplice during the perpetration of the felony was felony-murder for this same reason.

The common law also recognized a related doctrine that is commonly referred to as the "misdemeanor-manslaughter" rule.

Under this rule, a person was guilty of manslaughter if they engaged in any unlawful act that was not covered by the felony-murder rule and, as a result, another person died.

The misdemeanor-manslaughter rule is sometimes treated as if it were a separate legal doctrine, distinct from (but related to) the felony-murder rule. However, in truth, the misdemeanor-manslaughter rule follows directly from the definition of manslaughter.

As we explained earlier, the common law defined manslaughter as any unlawful homicide that did not constitute murder. Thus, if a person engaged in an unlawful act, and if that act resulted in the unintended death of another human being, and if that death did not constitute felony-murder, then the crime was manslaughter.

[…]

Alaska's current definitions of manslaughter and felony-murder

[U]nder Alaska's pre-1980 criminal law, the crime of murder did not include unintended killings, even when those killings resulted from the perpetration of a felony. Instead, the crime of manslaughter encompassed all unintended killings that resulted from any unlawful act.

The drafters of Alaska's current criminal code made significant changes to this area of the law. They created Alaska's first true felony-murder rule, and they also made two substantive changes to the definition of manslaughter.

Alaska now has a felony-murder provision—AS 11.41.110(a)(3)—that mirrors the common-law doctrine of felony-murder in most respects. Under this statute, an unintended homicide is now murder (second-degree murder) if the homicide occurs during the commission or attempted commission of a specified serious felony:

(a) A person commits the crime of murder in the second degree if …

(3) under circumstances not amounting to murder in the first degree under AS 11.41.100(a)(3), while acting either alone or with one or more persons, the person commits or attempts to commit [one of the enumerated felonies] and, in the course of or in furtherance of that crime or in immediate flight from that crime, any person causes the death of a person other than one of the participants[.]

For purposes of the present appeal, the key aspect of this felony-murder provision is that it departs from the common-law rule with respect to the death of an accomplice. At common law, if an accomplice died during the perpetration of a felony, the surviving accomplices could be convicted of felony-murder. But under Alaska's felony-murder statute, a person cannot be convicted of felony-murder based on the death of one of the other participants in the felony.

The drafters of AS 11.41.110(a)(3) did not explain why they placed this limitation on the scope of the felony-murder doctrine. However, Professor LaFave notes that several other modern criminal codes contain this same limitation on the felony-murder rule. And some modern appellate court decisions have reached this conclusion as a matter of statutory interpretation—although this approach is certainly not unanimous.

Turning to the crime of manslaughter, the drafters of our current criminal code modified the definition of this crime in two substantive ways.

First, negligent homicide became a crime in its own right—defined separately from manslaughter, and punishable by a lesser penalty. See AS 11.41.130.

Second, the drafters of our criminal code decided to abolish the "misdemeanor-manslaughter" rule—the rule that a person was guilty of manslaughter if they unintentionally caused the death of another human being while perpetrating any unlawful act (unless the unlawful act was the kind that would support a conviction for felony-murder).

The drafters abolished the misdemeanor-manslaughter rule by defining manslaughter in a new way. Under the drafters' manslaughter statute, AS 11.41.120(a), it was no longer sufficient for the government to prove that the defendant acted with the intent to commit an unlawful act, and that a death ensued. Instead, the government would have to prove that the defendant acted either intentionally, knowingly, or recklessly with regard to the possibility that their conduct might cause the death of another human being:

(a) A person commits the crime of manslaughter if the person … intentionally, knowingly, or recklessly causes the death of another person under circumstances not amounting to murder in the first or second degree.

Former AS 11.41.120(a) (pre-2006 version).

By requiring proof of one of these three culpable mental states, the manslaughter statute effectively abolishes the misdemeanor-manslaughter rule—a rule that did not require proof of any culpable mental state apart from the intent to perpetrate an unlawful act.

(The manslaughter statute omits "negligence" from the list of culpable mental states because, as we explained earlier, criminally negligent homicide is now independently defined as a lesser crime.)

Why we conclude that, even though Pfister cannot be convicted of felony-murder for the deaths of his accomplices, he can be convicted of manslaughter for these deaths

As we explained at the beginning of this opinion, Pfister was convicted of two counts of manslaughter based on the deaths of his two accomplices in the robbery. Pfister argues that the Alaska Legislature did not intend the manslaughter statute to apply to situations like his.

Pfister notes that AS 11.41.110(a)(3) expressly exempts people in his situation from conviction for second-degree murder under a felony-murder theory. Based on this, Pfister argues that the legislature must also have intended for there to be no lesser criminal liability for people in his situation—and that, therefore, he cannot be convicted of manslaughter based on the deaths of his two accomplices.

We conclude that when an accomplice to a felony is killed by the victim, or by police officers responding to the crime, Alaska law allows the surviving accomplices to be prosecuted for manslaughter (or for the lesser offense of criminally negligent homicide).

We reach this conclusion because the crime of manslaughter requires proof of an element beyond the elements of felony-murder. Unlike the crime of felony-murder, manslaughter requires proof that the defendant acted with a culpable mental state (either intentionally, knowingly, or recklessly) regarding the possibility that their conduct would cause the death of another human being. The crime of felony-murder, on the other hand, only requires proof that the defendant acted with the intent of perpetrating one of the felonies listed in AS 11.41.110(a)(3).

It will often be true that a defendant's intent to commit one of these listed felonies will be strong evidence that the defendant acted at least recklessly regarding the possibility that someone would die. But this is not invariably so. That is why the drafters of our criminal code rejected the misdemeanor-manslaughter doctrine and, instead, insisted on proof that the defendant acted at least recklessly with regard to the possibility that someone would die as a result of their actions.

Moreover, in these situations, we see no inconsistency between a legislative policy to spare defendants the severe penalties of second-degree murder while, at the same time, subjecting these defendants to the lesser penalties of manslaughter or criminally negligent homicide.

We acknowledge that our manslaughter statute does not expressly call for this result. But as we have explained, the crime of manslaughter is—and traditionally has been—a residual category of unlawful homicide, encompassing the various types of unlawful killings that do not constitute some form of murder.

Thus, for example, no provision of Alaska law expressly states that an intentional homicide committed in the heat of passion is manslaughter. Instead, AS 11.41.115(a) simply declares that heat of passion is a defense to murder. But because an unlawful intentional killing in the heat of passion is not murder, it is manslaughter under AS 11.41.120.

The same principle applies to Pfister's case. Under our second-degree murder statute, a homicide that results from the commission of a felony does not constitute felony-murder if the person killed was an accomplice to the felony. But because the killing is not murder, it falls within the residual category of manslaughter if the State can prove (1) that the defendant's conduct was a substantial factor in causing the death, and (2) that the defendant acted at least recklessly with respect to the possibility that someone would die as a result of their actions.

For these reasons, we hold that Pfister could lawfully be convicted of manslaughter for the deaths of his two accomplices.

[…]

Conclusion

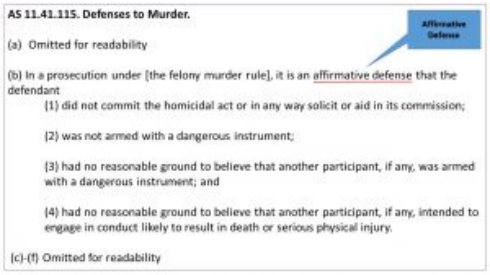
Pfister's two convictions for manslaughter are AFFIRMED[.]

Affirmative Defense to Felony Murder

Defendants also have a limited affirmative defense to felony murder. If the defendant did not actually commit the act that killed the victim, nor had knowledge, or awareness, that the death might occur, the defendant may avoid liability under the felony murder rule. AS 11.41.115(b). As an affirmative defense, the defendant bears the burden of proving each element, including that the

defendant "had no reasonable ground to believe that another participant, if any, intended to engage in conduct likely to result in death or serious physical injury." AS 11.41.115(b)(4).

Figure 9.7 Alaska Criminal Code – Felony Murder Affirmative Defense



Example of Affirmative Defense to Felony Murder

Assume that Sue and Sam dream up a plan to "defraud" a local bank (instead of robbing it like Joe and Jane). Sue works as a teller at the bank. Sam and Sue agree that Sam will come into the bank *unarmed* and act as a customer. Sam will fake that he has a gun in his pocket, and Sue will give Sam the money, pretending to be scared. Sue agrees *not* to activate the bank's silent alarm. Without informing Sue, Sam brings a real gun into the bank, "just in case." The security guard sees Sue handing Sam large amounts of cash. Suspicious, the security guard begins to approach Sam. Sam notices the guard, frantically pulls out the gun, and shoots the guard, killing him instantly.

In this scenario, Sue may have a valid defense to a second-degree murder charge. Although Sue had the intent to participate in the "representation" robbery, the jury could determine that Sue had neither *knowledge* nor *awareness* that Sam had a real gun, or that Sam was likely to engage in conduct likely to result in death or serious physical injury. Thus, it is possible that only Sam would be guilty of second-degree murder under the felony murder rule (because Sam committed first-degree robbery).

Felony Murder Merger Doctrine

The purpose of the felony murder rule is to protect human life and deter defendants from committing dangerous felonies, or failing that, to encourage felons to be extremely careful when committing specific inherently dangerous crimes. *See Todd v. State*, 884 P.2d 668, 671 (Alaska App. 1994). For this reason, the felony murder rule allows a defendant to be punished for *both* the underlying felony *and* the unintentional death. This is true even though it is *impossible* to commit felony murder without committing the underlying felony. Punishment for both crimes – second-degree murder and the underlying felony – does not violate double jeopardy. *See id*. at 684.

The exception to this rule is when a defendant breaks into a house with the intent to kill the occupant. Normally, this conduct would constitute both first-degree burglary and second-degree murder (under the felony murder rule), but under the **felony murder merger doctrine**, the burglary merges with the murder. AS 11.41.115(c). The felony murder rule does not apply. Instead, the defendant may be convicted of *intentional* murder (first-degree murder) and the underlying burglary if the circumstances warrant it. Similarly, if the defendant breaks into a house with the intent to commit a *different* crime (like theft), and another person is killed, the defendant may be convicted of both felony murder and the underlying burglary. The felony murder merger doctrine does not apply.

Lack of Concurrence

Recall that under the felony murder rule, a defendant is guilty of murder if the death occurs "in the course of or in furtherance of that crime or in immediate flight from" the underlying felony. AS 11.41.110(3). Thus, the statute necessarily requires a nexus between the felony and the death. The felony and the death must be part of the same continuous criminal transaction. If the death occurs *before* or *after* the commission of the felony, the defendant is not guilty of felony murder. Likewise, if the felony occurs *after* the death, the felony murder rule does not apply. *See e.g., Hansen v. State*, 845 P.2d 449, 452 (Alaska App. 1993). Under either scenario, there is a **lack of concurrence** between the volitional act (the death during a felony) and the culpable mental state (the intent to commit the underlying felony).

Felony Occurring After Death

Susan decides to confront her long-time drug dealer, Vince, because she believes that Vince has “shorted” her on numerous prior occasions. Susan meets Vince at his apartment to discuss his poor business practices. No drug deal takes place, but nonetheless, an argument ensues, and Susan pushes Vince down a flight of stairs, in a fit of rage. Vince dies instantly. Susan, convinced that she is going to be arrested, lights a large fire inside the apartment and flees.

In this case, it is unlikely that Susan is guilty of felony murder (although she may be guilty of a different classification of criminal homicide). The scenario suggests that Susan started the fire after the homicide, in an effort to cover up evidence of the crime. The death did not occur during, or in furtherance of, the underlying felony (arson).

Death Occurring After Felony

The issue that more commonly arises is when the death occurs after the felony. The defendant may try to avoid criminal liability by arguing that the underlying felony was completed before the death occurred. Such a defense requires the trier of fact to determine *when* the felony ended. Some jurisdictions look to whether a defendant has reached a place of temporary safety. The place need not be a formal location like the defendant’s residence; it could simply be a hiding place. *See e.g.*, *California v. Wilkins*, 295 P.3d 903 (Cal. 2013). Most jurisdictions, however, employ various factors, including the time between the felony and the killing, the distance between the felony and the death, and whether there is evidence of abandonment or renunciation of the underlying felonious objective. *See generally,What Constitutes Termination of Felony for Purpose of Felony-Murder Rule*, 58 A.L.R.3d 851 (1974). In the end, if the felony and killing are part of one continuous transaction, then the felony murder applies. If the felony and killing are separate and distinct, then the felony murder rule is inapplicable. For example, a defendant was guilty of felony murder when the defendant killed the victim immediately following a sexual assault in an effort to conceal his crime. Conversely, a defendant was *not* guilty of felony murder when he killed a sexual assault victim after he learned that the victim was going to alert law enforcement of the sexual assault. *Compare Montana v. Perry*, 505 P.2d 113 (Mont. 1973) with *Minnesota v. Murphy*, 380 N.W.2d 766 (Minn. 1986).

Exercises

Answer the following questions. Check your answers using the answer key at the end of the chapter.

1. Fred, visiting from Seattle, violently stole a vehicle in the Anchorage downtown parking garage. The victim of the carjacking reported that Fred walked up to him while he was getting in his car, pointed a gun at him, and demanded the car keys. The victim turned over the key and Fred drove away without incident. The following day, Fred struck and killed a pedestrian, while driving the stolen vehicle in downtown Wasilla. Is Fred guilty of second-degree murder under the felony murder rule? Why or why not?
2. Kurt robs a convenience store at gunpoint. As the cashier hands him money out of the cash register, Kurt hears a siren and runs outside, stuffing the money in his pockets. He sees a dark alley and dashes into it. While he crouches there waiting for the police to leave, a homeless person living in the alley taps him on the shoulder. Startled, Kurt spins around and shoots and kills the homeless person. Is this felony murder? Explain your answer.

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9.4: Manslaughter and Criminally Negligent Homicide

The last two classifications of criminal homicide to explore are **manslaughter** and **criminally negligent homicide**. What distinguishes manslaughter and criminally negligent homicide is primarily the applicable culpable mental state. Both manslaughter and criminally negligent homicide are graded lower than murder – manslaughter is classified as a class A felony offense and criminally negligent homicide is a class B felony offense. Both crimes result in substantially less punishment than either first- or second-degree murder.

Manslaughter

Recall that at common law, manslaughter was the unlawful killing without malice or without adequate provocation. Traditionally, manslaughter had two classifications: voluntary and involuntary. Alaska has eliminated these classifications.

Voluntary manslaughter was a killing supported by express malice, but because of a heat of passion, the law negated the murderous intent. As previously discussed, Alaska has incorporated the "voluntary manslaughter" principle into the statutory **heat of passion** defense. A defendant who unreasonably kills acting in a heat of passion after being seriously provoked by the victim is guilty of manslaughter – not murder – by operation of law. AS 11.41.115(a).

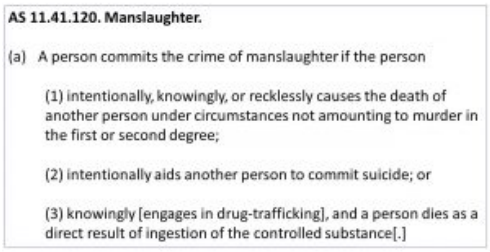
Involuntary manslaughter was considered a *reckless* killing. In Alaska, a person who recklessly causes the death of another is simply guilty of manslaughter.

Alaska's manslaughter statute is actually separated into three theories. First, manslaughter is the *residual* category of criminal homicide. A person is guilty of manslaughter if they intentionally, knowingly, or recklessly cause the death of another person under circumstances not amounting to first- or second-murder. This necessarily means that an unlawful killing that is committed with any of the enumerated culpable mental states will constitute manslaughter, unless the killing is murder. The distinction between voluntary and involuntary manslaughter is unnecessary given this framework.

Second, the crime of manslaughter covers intentional assisted suicide.

Finally, a person is guilty of manslaughter if they engage in drug-trafficking and a person dies as a result of ingesting the purchased drugs.

Figure 9.8 Alaska Criminal Code – Manslaughter



AS 11.41.120. Manslaughter.

(a) A person commits the crime of manslaughter if the person

(1) intentionally, knowingly, or recklessly causes the death of another person under circumstances not amounting to murder in the first or second degree;

(2) intentionally aids another person to commit suicide; or

(3) knowingly [engages in drug-trafficking], and a person dies as a direct result of ingestion of the controlled substance[.]

Criminally Negligent Homicide

The lowest classification of criminal homicide is **criminally negligent homicide**, which is the unlawful killing with criminal negligence. Recall that criminal negligence is a lower culpable mental state than recklessness. The culpable mental states of recklessness and criminal negligence are similar in two respects. Both involve a "substantial and unjustifiable risk that the result will occur" (in the case of 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." *See* AS 11.81.900(a)(3)&(4). Reckless, however, requires a "conscious disregard" of that risk – a defendant must subjectively be aware of the risk. The criminally negligent defendant, on the other hand, is unaware of the risk and disregards it unconsciously.

Example of Criminally Negligent Homicide

Pam, an Olympic skeet-shooter, agrees to store her brother's handgun while he is on vacation. Pam places the handgun in a bottom kitchen cabinet. Pam thinks the gun is unloaded and does not verify or otherwise secure the weapon. Unbeknownst to Pam, the gun

is loaded. Tragically, Pam's 3-year-old daughter finds the handgun, and while manipulating it, shoots and kills herself. Under this scenario, a jury could find that Pam should have checked to ensure that the weapon was unloaded or otherwise secured the weapon out of the reach of a child. If a jury found that Pam's disregard of the risk was a gross deviation from what a reasonable person would have done, it could find her guilty of criminally negligent homicide.

Vehicular Homicide

Unlike most states, Alaska *does not* have specific vehicular homicide statutes addressing deaths resulting from drunk driving. Instead, a defendant's level of intoxication, dangerousness of driving, and criminal history will establish the defendant's culpable mental state – specifically, extreme recklessness, recklessness, or criminal negligence. Assuming the specific harm caused was death, the defendant's culpable mental state then dictates the appropriate criminal homicide offense – second-degree murder, manslaughter, or criminally negligent homicide. Generally, only particularly egregious drunk driving behavior satisfies extreme recklessness for second-degree murder. For example, a drunk-driving second-degree murder conviction was upheld when the defendant was highly intoxicated, driving particularly dangerous, and had a long history of drinking and driving. *See e.g.*, *Jeffries v. State*, 169 P.3d 913 (Alaska 2007). "Typical" drunk-driving homicides are normally classified as manslaughter. The defendant's intoxication demonstrates recklessness. In scenarios where there is limited evidence of intoxication or particularly accidental deaths, the homicide is classified as criminally negligent homicide.

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9.5: End-Of-Chapter Material

Summary

Homicide is the killing of one human being by another. Criminal homicide is the *unlawful* killing of another and is classified as murder, manslaughter, or criminally negligent homicide. Alaska has also criminalized the killing of a fetus. Suicide is usually not criminal, although assisted suicide is manslaughter.

Alaska uses the brain death test for determining death. A person is “alive” if they have either *spontaneous* respiratory or cardiac function, or have *spontaneous* brain function, even though respiratory and cardiac function are maintained by artificial means.

Murder is the most serious degree of criminal homicide. Manslaughter and criminally negligent homicide are less serious degrees of criminal homicide. At common law, murder was the unlawful killing of a human being with malice aforethought. Manslaughter was the unlawful killing without malice.

Alaska has abandoned the common law definitions. Instead, Alaska categorizes homicide largely based on the defendant’s culpable mental state at the time of the killing. Murder in the first degree, the most serious criminal offense in Alaska, includes intentional murder. Murder in the second degree includes extremely reckless murders, killings committed with the intent to cause serious physical injury, and felony murder.

Felony murder is a criminal homicide that occurs during the commission or attempted commission of an inherently dangerous felony. The code enumerates which felonies are considered inherently dangerous, including arson, kidnapping, sexual assault, sexual abuse of a minor, burglary, escape, robbery, and drug-trafficking. Each of the enumerated felonies creates a foreseeable risk of death. Under the felony murder rule, accomplices to the underlying felony are equally culpable for any resulting death that occurs, except for deaths of co-felons. A defendant may be guilty of manslaughter for the death of a co-felon. A limited affirmative defense exists, if the defendant did not actually kill the victim, or had no knowledge or awareness that the death might occur.

At common law, manslaughter was divided into voluntary and involuntary manslaughter. In Alaska, manslaughter is a residual category of criminal homicide. Killings that occur during a heat of passion inspired by adequate provocation from the victim constitute manslaughter by operation of law. Manslaughter also includes reckless killings. Criminally negligent homicides are deaths caused by criminal negligence. Alaska does not have specific vehicle homicide statutes.

Key Takeaways

- Homicide is the killing of one human being by another.
- Homicide is not always criminal. For example, capital punishment is homicide, but it is not criminal homicide.
- Alaska uses the brain death test to determine when life ends.
- Although a “person” must be born with spontaneous brain function to be considered alive, Alaska criminalizes homicide of a fetus (except abortion) as murder, manslaughter, or negligent homicide of an unborn child.
- Suicide is not a crime, but assisted suicide is a crime.
- The Alaska Supreme Court has held that it is constitutional to criminalize assisted suicide. A minority of states allow a physician to legally end the life of a terminally ill patient.
- The criminal intent element of murder is important because it distinguishes the different degrees of murder, manslaughter, and criminally negligent homicide.
- An example of a justifiable homicide is a killing by law enforcement to prevent great bodily injury or death. An example of an excusable homicide is a killing perpetrated by a legally insane defendant.
- Although there are several different ways to commit murder in the first-degree in Alaska, the most common is intentional murder.
- Intentional murder does not require proof of premeditation or deliberation (although premeditation or deliberation may evidence intent).
- Premeditated murder is typically a purposeful killing committed after calm planning and reflection.
- The criminal act can help prove that a murder was premeditated. If the killing is carried out in a manner that indicates a strong and calculated desire to bring about the victim’s death, the trier of fact can conclude that the murder was premeditated.
- First-degree murder is the highest classification of murder with the most severe sentencing options. First-degree murder qualifies the defendant for life in prison (99 years).

- Second-degree murder is often defined as any murder committed under circumstances evidencing extreme indifference to life or as murder with the intent to cause serious physical injury.
- Felony murder is included within second-degree murder.
- Second-degree murder is graded lower than first-degree murder but higher than manslaughter.
- The criminal intent element required for felony murder is the intent required for the underlying felony, not a murderous intent.
- If a felony is inherently dangerous to life, the defendant is considered to act with implied malice when there is a resulting death during the felony.
- If more than one defendant commits or attempts to commit a felony, all defendants are guilty of felony murder if a victim is killed during the commission or attempted commission of the felony.
- Co-felons are not criminally responsible for felony murder when someone other than a co-felon kills a co-felon during the commission or attempted commission of a felony.
- An affirmative defense allows a defendant to avoid criminal liability under the felony murder rule if the co-felon did not commit the act of killing and was unaware that there was a risk of death.
- The felony and the death must be part of the same continuous criminal transaction.
- Manslaughter was the unlawful killing without malice or without adequate provocation at common law.
- At common law, voluntary manslaughter was a killing that occurs during an adequately provoked heat of passion. Involuntary manslaughter lacks murder intent altogether.
- Manslaughter includes reckless homicides.
- Criminally negligent homicides are homicides committed with criminal negligence. Criminally negligent homicide is the lowest form of criminal homicide in Alaska.
- Alaska does not have specific vehicular homicide statutes.

Answers to Exercises

From “Homicide”

1. The fundamental difference between homicide and suicide is the identity of the **victim**. In a homicide, the victim is another human being. In a suicide, the victim is the perpetrator, which is one of the reasons that homicide is often criminal and suicide is not.

From “Murder”

1. Jay has the criminal intent of **extreme recklessness**. Jay’s conduct in shooting at a tree in a public place might cause someone’s death, which indicates that Jay is indifferent to whether he takes a life. This indifference is a form of manifesting extreme indifference to the value of human life.
2. Johnnie demonstrates a clear intent to kill. The facts indicate a willful, deliberate, premeditated killing. Johnnie planned the killing by putting his gun in the glove compartment and driving by the gas station on Friday night where he suspects Marcus will be present. He killed Marcus in a manner calculated to cause death.

From “Felony Murder”

1. Fred is likely not guilty of second-degree murder. The facts demonstrate that the carjacking was likely complete by the time Fred drove away. The killing of the pedestrian the following day is separated by time and distance.
2. Kurt may not have committed felony murder in this case because he had reached a place of *temporary safety*. However, arguably, Kurt hiding in an alley is part of the *same continuous criminal transaction* and was still in the immediate flight thereof when the death occurred.

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CHAPTER OVERVIEW

10: Violent Crimes (Crimes Against the Person)

10.1: Assault (and Battery)
10.2: Stalking
10.3: Robbery, Extortion, and Coercion
10.4: Kidnapping
10.5: Sexual Violence and Sex Offenses
10.6: End-of-Chapter Material

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10.1: Assault (and Battery)

This chapter explores some of the most common **crimes against the person**, sometimes referred to as **violent crimes**. All violent crimes involve some element of bodily harm or the threat of bodily harm. Violent crime is simply a broad umbrella term used to group criminal conduct that involves the use of force, fear, or physical restraint. Violent crimes, as a classification, include homicide, robbery, assault, sexual assault, kidnapping, and others.

Violent crimes are generally graded based on the resulting harm. The more serious the resulting harm, the more serious the resulting punishment. Even though this is true of most criminal offenses, society tends to punish violent crimes more harshly than crimes against property or crimes against morality and social order. Convictions for violent crimes tend to expose defendants to more collateral consequences (*i.e.*, collateral barriers resulting from a conviction) than other types of criminal convictions. This is especially true of lower-level violent crimes like misdemeanor assault. For example, federal law prohibits a person convicted of domestic violence *misdemeanor* assault from possessing firearms or ammunition. *See e.g.*, *Voisine v. United States*, 579 U.S. 686 (2016). Other non-violent misdemeanor offenses generally do not result in such long-lasting, post-conviction consequences.

Assault and Battery

At common law, assault and battery were separate crimes. **Battery** referred to the use of force against another person, normally requiring physical contact that resulted in injury or offensive touching. **Assault**, on the other hand, did not require physical contact. Assault was the *apprehension* of imminent injury. Assault was committed by either (1) attempting to commit a battery, or (2) by intentionally placing another person in fear of a battery.

Both crimes were considered misdemeanors. The crimes were elevated to felonies depending on the defendant's *mens rea* or the instrumentality used. For example, shooting a person in the wrist constituted *aggravated battery*, since the defendant acted with the "intent to maim" and used a "deadly weapon." Likewise, a defendant pointing a loaded gun at the victim with the intent to frighten the victim, constituted *aggravated assault*. *See generally* Wayne R. LaFave, *Substantive Criminal Law* §16.3(b) (3rd ed. 2018). Although some jurisdictions continue to use such distinctions, the modern trend is to consolidate assault and battery into the single offense classification of "assault." Alaska has followed this trend.

Modern Assault

Alaska's assault statutes encompass both the infliction of injury *and* acts that cause the apprehension of injury. Prior to the adoption of Alaska's revised criminal code, Alaska's assault laws included the specific crimes of assault and battery; assault with a dangerous weapon; assault with intent to kill; assault with the intent to rape; assault while armed; aggravated assault; and mayhem. The revised criminal code eliminated these specific assault crimes, and instead grouped assault by degree, based on three factors: (1) the defendant's culpable mental state; (2) the instrumentality of injury; and (3) the result of the assault.

Thus, in every assault, three questions must be considered:

1. What was the **result** of the assault – *e.g.*, was someone placed in fear of injury or injured, and if injured, how seriously?
2. What was the **instrumentality** of the assault – *e.g.*, how was the assault committed? Was the assault committed by words or conduct; was a dangerous instrument used; or was the conduct repeated?
3. What was the **culpable mental state** of the offender – *e.g.*, did the defendant act intentionally, recklessly, or with criminal negligence?

Assault Grading

Using these three questions, the criminal code **grades** assault into four different **degrees** based on severity. Each degree criminalizes a different *combination* of the circumstances discussed above – the extent of injury, the instrumentality used (if any), and the defendant's culpable mental state. For example, assault in the first degree is classified as a class A felony offense and covers the most serious assaults – in terms of resulting harm, instrument used, and culpable mental state (*see* Fig. 10.1 below). Less serious felony assaults are classified as second- and third-degree assaults depending on the circumstances surrounding the offense. Misdemeanor assaults are classified as assault in the fourth degree.

Figure 10.1 Alaska Criminal Code – Assault Statutes

First-Degree Assault (AS 11.41.200)

(a)(1) – recklessly causing serious physical injury by means of a dangerous instrument

(a)(2) – intentionally causing serious physical injury to another

(a)(3) – knowingly engages in conduct that result in serious physical injury to another person under circumstances manifesting extreme indifference to the value of human life.

(a)(4) – recklessly causing serious physical injury to another person by repeated assault

Second-Degree Assault (AS 11.41.210)

(a)(1) – intentionally causing physical injury by means of a dangerous instrument

(a)(2) – recklessly causing serious physical injury to another

(a)(3) –recklessly causing serious physical injury to another person by repeated assaults, even if each assault individually does not cause serious physical injury.

Third-Degree Assault (AS 11.41.220)

(a)(1)(A) – reckless placing another person in fear of imminent serious physical injury by means of a dangerous instrument

(a)(1)(B) – recklessly causing physical injury to another by means of a dangerous instrument

(a)(1)(C) –being 18 years of age or older, recklessly causing physical injury to a person under 12 years old (and the injury is an injury that a reasonable person would seek medical attention).

(a)(2) – intentionally placing another person in fear of death by repeated threats of death.

(a)(4) – with criminal negligence, causes serious physical injury by means of a dangerous instrument.

(a)(5) – recidivist fourth-degree assault

Fourth-Degree Assault (AS 11.41.230)

(a)(1) – recklessly causing physical injury

(a)(2) – with criminal negligence causes physical injury by means of a dangerous instrument

(a)(3) – by words or other conduct the person recklessly places another person in fear of imminent physical injury.

The code also includes the misdemeanor of Reckless Endangerment, which criminalizes recklessly creating a substantial *risk* of serious physical injury to another person. AS 11.41.250(a).

Extent of Injury (Resulting Harm)

The result of the assault partially dictates what degree of assault was committed. **Injury** can be viewed on a continuum, with no injury (but the *apprehension* of injury) at one end, physical injury in the middle, and serious physical injury at the other end.

Physical injury means a physical pain or an impairment of physical condition. AS 11.81.900(b)(48). Put another way, the assaultive act must cause the victim physical suffering or discomfort. The phrase "impairment of physical condition" is undefined in Alaska law, but likely includes minor injuries, like scratches, small cuts, and bruises even if the injury causes no "pain."[1] Thus, a punch in the mouth will, under most circumstances, constitute a physical injury, but a simple offensive shove that produces no pain or injury will not.

Serious physical injury encompasses more significant injuries. **Serious physical injury** includes physical injuries that (1) create a substantial risk of death; (2) cause serious and protracted disfigurement; (3) cause protracted impairment of health; (4) cause protracted impairment of bodily organ; or (5) unlawfully terminates a pregnancy. AS 11.74.900(b)(59).

Figure 10.2 Alaska Criminal Code – Serious Physical Injury

AS 11.81.900. Definitions.

(59) "serious physical injury" means

(A) physical injury caused by an act performed under circumstances that create a substantial risk of death; or

(B) physical injury that causes serious and protracted disfigurement, protracted impairment of health, protracted loss or impairment of the function of a body member or organ, or that unlawfully terminates a pregnancy;

Many injuries qualify as serious physical injury, including a broken jaw, disfiguring cut, a stab or gunshot wound. The key aspect is whether the injury caused *disfigurement* or a *prolonged* recovery. Both are questions of fact for the jury. Thus, a "broken nose" may or may not constitute serious physical injury. It depends on whether the recovery was protracted or whether the victim suffered a disfigurement.

Notice that serious physical injuries also include physical injuries caused "by an act performed under circumstances that create a substantial risk of death." AS 11.41.900(b)(57)(A). This definition focuses on the circumstances surrounding the defendant's actions that caused the physical injury. The victim's death need not be probable, but the risk of death must be real and substantial. Prompt medical treatment or a victim's speedy recovery is not the determining factor. Instead, the focus is on the circumstances that caused the injury.

Borozny v. State, 2012 WL 953200 (Alaska App. 2012)

In the following case, the court faced the situation where the victim, although stabbed in the abdomen, fully recovered *without* significant medical intervention. Does a stab wound to the abdomen constitute "serious physical injury" if the victim was not seriously injured?

2012 WL 953200
Stephen J. BOROZNY, Appellant,
v.
STATE of Alaska, Appellee.
No. A–10634.
March 21, 2012.

MEMORANDUM OPINION AND JUDGMENT

COATS, Chief Judge.

Stephen J. Borozny was convicted by a jury of assault in the first degree for recklessly causing serious physical injury to Francis Katongan by stabbing her with a knife. Borozny argues that the evidence presented at trial was insufficient to show that he caused serious physical injury. He also contends that the State's argument to the jury about the evidence concerning serious physical injury was improper. We affirm.

Factual and procedural background

On the evening of August 18, 2008, a cabdriver drove three people from the Mush Inn to the Spirits of Alaska liquor store near downtown Anchorage. The party included Borozny and Katongan. When they arrived at the liquor store, Borozny gave Katongan $50 and asked her to purchase some alcohol. She returned with an eighteen-pack of Budweiser, which she gave to Borozny in the front seat of the cab.

Katongan gave Borozny only $12 in change from the purchase. This displeased Borozny. He was "shaking and angry."

Borozny left the front seat of the cab and walked around to the back seat, where Katongan was sitting. Words were exchanged. He then stabbed Katongan in the abdomen with a knife, picked up the beer, and ran off. Katongan remained near the vehicle, holding her stomach on her lower left side.

Katongan called the police. The driver called 911. The driver spent some time following Borozny as he traveled through the nearby Fairview neighborhood. Borozny was soon arrested nearby. The knife was never found. Katongan was transported by ambulance to Alaska Native Medical Center.

The State charged Borozny with assault in the first degree for recklessly causing serious physical injury to Katongan by stabbing her with a knife. "[S]erious physical injury" is defined as "physical injury caused by an act performed under circumstances that create a substantial risk of death…."

In a jury trial conducted by Superior Court Judge Michael Spaan, Borozny did not dispute that he stabbed Katongan. He defended on the ground that the injuries that he caused did not constitute serious physical injury. The jury rejected his argument and found Borozny guilty. Borozny raises the same argument on appeal.

Why we conclude that the jury could find that Borozny caused serious physical injury

The critical evidence on the issue of whether Katongan suffered serious physical injury was presented through the testimony of Dr. Kevin Stange, an experienced trauma surgeon at Alaska Native Medical Center who had treated Katongan. Dr. Stange testified that the knife wound was two centimeters wide and roughly ten centimeters deep. He said the knife entered Katongan's left abdominal cavity somewhere between her ninth and tenth ribs. Dr. Stange stated that vital organs in the area of the wound included the stomach, colon, and spleen. Injury to any of these, he testified, had the potential to cause serious harm or death. Fortunately, in

Katongan's case, the knife went up toward her heart and lungs rather than down toward her colon and intestines. Although the knife punctured her chest wall, it did not puncture her lung.

Dr. Stange testified that Katongan was fortunate that the knife went in at an angle that missed her vital organs. Although the wound caused Katongan to lose one-third of her blood volume, this was not sufficient to kill her. Dr. Stange acknowledged that a person who had an injury such as Katongan's had "an appreciable and significant risk of death, absent medical intervention." He also noted that the same wound received by someone else, who was older or was not in as good shape as Katongan, "could easily kill them by heart attack, stroke, etc."

Dr. Stange testified that, although the kind of wound that Katongan received could be dangerous and life-threatening, because she was fortunate and the knife did not strike any vital organs, massive medical intervention turned out to be unnecessary. Ultimately, after taking x-rays and CT scans, Katongan was treated by simply monitoring and observation. Katongan's body was able to heal, and she ultimately made a good recovery.

Borozny argues that because Katongan was able to recover without any substantial medical intervention, he did not cause serious physical injury. But we rejected this view in *James v. State*. In *James*, we stated: "It makes little sense to focus exclusively on the victim's personal ability to tolerate or recover from an injury, without reference to the seriousness of the risk the injury poses at the time of its infliction." Whether a defendant commits serious physical injury under AS 11.81.900(56)(A) is determined by whether the defendant caused physical injury "by an act performed under circumstances that create a substantial risk of death." The question is not the nature of the injury, although that could be relevant to demonstrate the circumstances under which the injury was inflicted, but the circumstances themselves. In the present case, according to Dr. Stange's medical testimony, when Katongan was brought to the hospital after being stabbed, she faced "an appreciable and significant risk of death." It was only after significant observation that Dr. Stange was able to discover that Katongan would survive. But the fact that Katongan (and by extension, Borozny) was lucky does not change the fact that the wound that he inflicted created a substantial risk of death. We conclude that there was sufficient evidence for the jury to find that Borozny caused serious physical injury.

[…]

Conclusion
The judgment of the superior court is AFFIRMED.

Instrumentality of Injury

Generally speaking, a defendant who causes injury to another, or places another in fear of injury, using a **dangerous instrument** is guilty of felony assault. The use of a dangerous instrument elevates an otherwise misdemeanor assault to a felony. Dangerous instrument is broadly defined – it includes anything which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is capable of causing death or serious physical injury. AS 11.81.900(b)(15).

A beer bottle or frying pan could qualify as a dangerous instrument if a person used them in a manner capable of causing serious injury. For example, hitting someone over the head with a frying pan is capable of causing a "protracted impairment of health" (one of the definitions of serious physical injury). But slamming a frying pan down on the stove – even if done in concert with a threat of harm – would not qualify. The focus is on the circumstances surrounding the instrument's use.

Konrad v. State, 763 P.2d 1369 (Alaska App. 1988).

Even though the definition of a dangerous instrument is broad, it is not limitless. In the following case, the court addresses whether bare hands can qualify as a "dangerous instrument" under the law. As you read *Konrad*, notice how the court distinguishes between actual weapons and hypothetical weapons.

763 P.2d 1369
Court of Appeals of Alaska.
George A. KONRAD, Appellant,
v.
STATE of Alaska, Appellee.
No. A–2126.
Nov. 10, 1988.

OPINION

BRYNER, Chief Judge.

George A. Konrad was convicted, following a jury trial, of assault in the third degree [and other felonies]. Konrad appeals, arguing that the trial court erred in failing to dismiss his indictment[.] We affirm Konrad's [other] convictions, but vacate his conviction for third-degree assault.

BACKGROUND

Konrad was indicted for a series of incidents that occurred during the breakup of his marriage to Luann Konrad. The indictment charged Konrad with third-degree assault for recklessly causing physical injury to Luann Konrad by striking her on the head and ribs with his hands[.]

ASSAULT IN THE THIRD DEGREE

On May 9, 1986, following a heated argument, George Konrad struck Luann Konrad twice with his hands: once on the head and once on the ribs. Luann Konrad experienced abdominal pain following the assault. Several days later a physician determined that the blow to Luann's midsection had injured her spleen, causing it to bleed into her abdominal cavity. The injury resolved itself without treatment.

Based on the May 9 incident, the state requested the grand jury to charge Konrad with assault in the third degree. The state proceeded under AS 11.41.220(a)(2), which states that "a person commits the crime of assault in the third degree if that person recklessly … causes physical injury to another person by means of a dangerous instrument." The state's theory was that Konrad's hands were dangerous instruments.

After reading the statutory definition of "dangerous instrument" to the grand jury, the prosecutor stated, in relevant part: "I would instruct you at this time that in the state of Alaska hands or feet can be considered a dangerous instrument under the definition that I have given you of a dangerous instrument." The grand jury returned a true bill.

Prior to trial, Konrad moved to dismiss the third-degree assault charge, challenging the propriety of the prosecutor's instruction to the grand jury. The superior court denied Konrad's motion. At trial, Konrad unsuccessfully moved for a judgment of acquittal on the third-degree assault charge, contending that the evidence was insufficient to establish the use of a dangerous instrument. Konrad now renews these arguments on appeal.

The term "dangerous instrument" is defined in AS 11.81.900(b)(11):

(11) "[D]angerous instrument" means any deadly weapon or anything which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is capable of causing death or serious physical injury.

"Physical injury" and "serious physical injury" are in turn defined in AS 11.81.900(b)(40) and (50):

(40) "[P]hysical injury" means a physical pain or an impairment of physical condition;

(50) "[S]erious physical injury" means
(A) physical injury caused by an act performed under circumstances that create a substantial risk of death; or

(B) physical injury that causes serious and protracted disfigurement, protracted impairment of health, protracted loss or impairment of the function of a body member or organ, or that unlawfully terminates a pregnancy.

This court has never squarely decided whether a bare hand can be a "dangerous instrument" within the meaning of these provisions. In *Wettanen v. State*, we held that a bare foot could qualify as a dangerous instrument under certain circumstances. The evidence there established that Wettanen had kicked another person repeatedly about the face and head, inflicting serious physical injuries. Because the state neglected to establish whether Wettanen was shod when he committed the assault, it was necessary to decide if a bare foot could qualify as a dangerous instrument. We concluded that sufficient evidence had been presented at trial to allow a finding that Wettanen's foot was a dangerous instrument, even if it was unshod. In reaching this conclusion, we expressly declined to decide whether a bare hand could similarly qualify as a dangerous instrument, noting that the cases from other jurisdictions on the issue are in conflict.

Since deciding *Wettanen*, we have had no occasion to resolve this issue. In at least one case, however, we have assumed that a hand might qualify as a dangerous instrument in some situations.

For the purpose of deciding the present case, we may likewise assume that there is no categorical prohibition against a hand being deemed a dangerous instrument under the definition set forth in AS 11.81.900(b)(11). Our prior cases nevertheless firmly establish that the question of whether a hand qualifies as a dangerous instrument in any given case must be answered by examining the precise manner in which the hand is actually used.

The need to focus on the specific circumstances of each case derives from the definition of "dangerous instrument." While the statutory definition encompasses "anything" that is capable of causing death or serious physical injury, the express language of the statute requires that an instrument's potential for causing death or serious physical injury be assessed in light of "the circumstances in which it is used, attempted to be used, or threatened to be used." AS 11.81.900(b)(11). It is the actual use of the instrument in each case that must be considered, not abstract possibilities for use of the instrument in hypothetical cases.

We emphasized this point in *Wettanen*, cautioning that "every … blow, even if it causes serious injury, will not automatically be an assault with a dangerous instrument." We pointed out that the inquiry must focus on the vulnerability of the victim and the specific nature of the assault in each case. In this regard, we emphasized that "the requirement of a dangerous instrument serves to shift the focus of the trier of facts' attention from the result (physical injuries), which in any given case may have been unforeseeable to the defendant at the time the assault was committed, to the manner in which the assault was committed."

We elaborated on *Wettanen* in *Carson v. State*, […], a case involving an analogous situation. In that case, police officers performing a misdemeanor arrest subdued Carson by kicking him in the groin and unleashing a police dog, which bit Carson on the legs and buttocks until he ceased struggling. At issue was whether the officers' actions amounted to "deadly force." The applicable statute defined "deadly force" to include any force used under circumstances that "create a substantial risk of causing death or serious physical injury."

We found that the evidence in *Carson* did not support a finding that deadly force had been used. In reaching this conclusion, we emphasized the need to focus on the actual risk of serious physical injury posed in the specific case, rather than on the abstract possibility of serious physical injury under other, hypothetical circumstances. We said, in relevant part:

Although we can certainly conceive of cases in which specific testimony describing a kick to the groin or an attack by a dog would support the inference that a substantial risk of death or serious physical injury was created, we are unwilling to conclude that testimony establishing no more than the unadorned fact of a kick to the groin or an attack by a police dog is *per se* sufficient to create a jury question as to the use of deadly force. The issue is not one to be resolved in the abstract. There must, at a minimum, be some particularized evidence from which a reasonable juror could conclude that a substantial risk of serious physical injury was actually created in the specific case at bar.

The issue is analogous to one we considered in *Wettanen v. State*. There, we held that, while any object, including an unshod foot, that was capable of inflicting serious physical injury might qualify under the broad statutory definition of "dangerous instrument," the actual determination of whether a dangerous instrument was used must be made on a case-by-case basis, based on the totality of the circumstances surrounding the actual use of the object in question.

When read together, *Wettanen* and *Carson* stand for the proposition that, before a hand may be deemed a "dangerous instrument," the state must present particularized evidence from which reasonable jurors could conclude beyond a reasonable doubt that the manner in which the hand was used in the case at issue posed an actual and substantial risk of causing death or serious physical injury, rather than a risk that was merely hypothetical or abstract.

Obviously, whenever serious physical injury does in fact occur, there will be *prima facie* evidence to support a finding that a dangerous instrument was used. Conversely, when serious physical injury does not occur, other case-specific evidence must be adduced to establish that the risk of such injury was both actual and substantial, even though it did not in fact occur.

The facts of the present case are problematic when viewed in light of this analysis. We consider initially the grand jury proceedings. The state did not contend below, and it does not argue on appeal, that Luann Konrad suffered serious physical injury when Konrad struck her with his hands. In presenting its case to the grand jury, the prosecution instructed that "under Alaska law hands or feet can be considered dangerous instruments."

The ambiguity of this instruction is troublesome. While it might be taken to indicate that the decision as to whether Konrad's hands were dangerous instruments was a factual one to be made by the grand jury, it might as readily be taken to indicate that there was no need at all for the grand jury to consider the issue, since it was settled as a matter of Alaska law. In our view, the giving of this

instruction raises a serious question as to whether the grand jury in Konrad's case ever actually determined, as a factual matter, whether Konrad used his hands in a manner capable of inflicting death or serious physical injury.

In any event, even without the ambiguous instruction, we believe that the circumstances of the present case would have been sufficiently unique to require a specific admonition to the grand jury concerning the manner in which it was required to determine whether a dangerous instrument had been used.

We recognize that the grand jury was appropriately instructed on the statutory definitions of "dangerous instrument," "physical injury," and "serious physical injury." Nevertheless, when, as in the present case, the defendant is alleged to have used a dangerous instrument that was not a "deadly weapon" and that did not actually inflict death or serious physical injury, the possibility that the grand jury might decide the instrument's potential for causing injury as an abstract or hypothetical matter is, in our view, sufficiently great to require that an express instruction be given. The instruction should alert the grand jury to the need for it to find, based on the evidence in the case before it, that the defendant used an instrument in a manner that actually created a substantial risk of death or serious physical injury. In view of the lack of an appropriate clarifying instruction and the ambiguity of the instruction actually given, we conclude that the trial court erred in denying Konrad's pretrial motion to dismiss the count charging him with assault in the third degree.

[…] As we have already indicated, the state does not allege that the evidence established that Konrad inflicted serious physical injury by striking Luann Konrad with his hands. While Luann suffered internal bleeding from the spleen, the condition healed without treatment within a short period of time. No medical evidence was adduced to establish that Luann's condition verged on becoming more serious or that a blow to the ribs similar to that inflicted by Konrad actually posed a risk of inflicting more severe injuries to the spleen or to other internal organs.

Apart from Luann Konrad's testimony that Konrad's hand was in a fist when he struck her, there is nothing in the record to establish that the manner in which Konrad used his hands was inordinately violent or particularly calculated to inflict serious physical injury. No evidence was offered to suggest that Konrad had received martial arts training or that he was otherwise skilled in using his hands to inflict physical injury.

Other than the fact that Konrad had awakened Luann Konrad shortly before he assaulted her, there was no evidence to suggest that she was especially susceptible to incurring a serious physical injury. Although it can be inferred that Luann would have been better able to ward off Konrad's blows and to prevent the injuries that she did receive had she not recently been asleep, nothing in the evidence establishes that she was vulnerable to suffering injury more serious than that actually inflicted merely because she had been sleeping and was caught off guard by Konrad's assault.

In arguing that the evidence was sufficient to support a finding that Konrad's hands were dangerous instruments, the state notes that, after the assault, Konrad offered to take Luann to the doctor when he got back from work. The state contends that this evidence reflects upon the seriousness of Konrad's assault and could legitimately be relied on by the jury.

To the extent that Konrad's offer of assistance betrayed his awareness that he had assaulted Luann Konrad with sufficient force to inflict injuries requiring medical treatment, the state is correct. However, the evidence does nothing to indicate that Konrad believed he had inflicted serious physical injury, as opposed to nonserious physical injury. Consequently, the evidence fails to establish, either directly or inferentially, that his assault created an actual and substantial risk of serious physical injury.

In ruling on the sufficiency of the evidence at trial, we must view the evidence and the inferences arising therefrom in the light most favorable to the state to determine whether reasonable jurors could conclude that the defendant's guilt was established beyond a reasonable doubt. Applying this standard to the present case, we conclude that insufficient evidence was adduced to support Konrad's conviction of third-degree assault. In our view, the evidence cannot justify a finding that Konrad's hands qualified as dangerous instruments. On the record of the present case, a conclusion that Konrad's hands were capable of causing death or serious physical injury under the circumstances in which they were actually used—that is, that they actually created a substantial risk of death or serious physical injury to Luann Konrad—would be wholly speculative.

Were we to find sufficient evidence in this case to support a conclusion that Konrad's hands were dangerous instruments, a similar conclusion would be justified in virtually every case involving blows struck with fists that inflicted some physical injury. We conclude that the trial court erred in denying Konrad's motion for a judgment of acquittal as to the charge of assault in the third degree.

[…]

The conviction for assault in the third degree is VACATED. This case is REMANDED to the superior court, with directions to amend the judgment accordingly.

You be the Judge …

In 2015, Dulier and John Sears got into an argument when they were smoking cigarettes outside the Rendezvous Bar in Juneau. Sears and Dulier had a heated exchange before Sears went back inside.

Later, Sears and another patron went outside again. Dulier, who was still outside, stepped up to Sears, held a flare gun to Sears's neck, and fired it. A bar patron grabbed Sears by the shoulder just as the flare gun went off, causing Sears to move to the left just before the flare hit him. The flare impacted the front of Sears's neck, next to his Adam's apple. The flare ricocheted off Sears's neck, hit the wall of the bar, and then landed on the bar's welcome mat, where it sat burning for a moment before another patron kicked it out toward the street. When the officers arrived at the bar, Sears had a "large bloody powder burn" and welt on his neck. After speaking to the police, Sears went to the hospital for treatment. In addition to a bad burn, Sears had a large bruise and a bloody gouge on his neck. He was prescribed antibiotics and a painkiller. After the incident, Sears had a hard time talking, and the inside of his throat was swollen for four or five days.

The prosecution charged Dulier with felony assault for recklessly causing physical injury to Sears "by means of a dangerous instrument." Based on these facts, do you think there was sufficient evidence that Dulier used a "dangerous instrument" to support an assault conviction? Why or why not? Check your answer at the end of the chapter.

The term dangerous instrument also includes any "deadly weapon." A **deadly weapon** includes any knife, axe, club, or explosive. It also includes *all* firearms, whether *loaded or unloaded*. The firearm need not be functional to constitute a "deadly weapon." AS 11.81.900(b)(27). Thus, pointing an unloaded, non-functional pistol at a person in a threatening manner qualifies as felony assault, even though the weapon – factually – is incapable of causing injury.

Manual Strangulation (Hands as a Dangerous Instrument)

Any object, including hands, used to obstruct a person's airway and breathing, constitutes a *per se* dangerous instrument. AS 11.81.900(b)(15)(B). **Strangulation** – aka "sleeper holds", "chokeholds", or anything that forcibly compresses a person's airway – is particularly dangerous. Strangulation is highly lethal; unconsciousness may occur within seconds and death within minutes. Further, in the context of intimate partner violence, past strangulation is highly predictive of future violence. Victims of non-fatal strangulation are more than 7 times more likely to be the victim of homicide. (Glass et al. 2008[2]).

In 2015, in an effort to make it easier to prosecute perpetrators with felony assault who strangle their victims, the Alaska legislature amended the definition of "dangerous instrument" to include "hands, other body parts, or other objects when used to impede normal breathing or circulation of blood by applying pressure on the throat or neck or obstructing the nose or mouth." AS 11.81.900(b)(15)(B); SLA 2005, ch. 20, §1.

Under this definition, when a perpetrator strangles their victim (most commonly using their hands), the instrumentality used (*e.g.*, hands) will constitute a "dangerous instrument" as *a matter of law*. The government is not required to prove that the defendant's hands (or object used) caused a substantial risk of death. In essence, this alternate definition recognizes that when hands or other objects are used to impede a person's breathing, the perpetrator is effectively using a deadly weapon.

Note that the alternate definition does not change the result of *Konrad v. State*, 763 P.2d 1369 (Alaska App. 1988), excerpted above. This definition of "dangerous instrument", adopted nearly twenty years after *Konrad*, only applies when the defendant uses their hands or other objects to impede the victim's breathing. AS 11.81.900(b)(15)(B).

Imminent Fear (or lack thereof)

When the victim is injured, the law focuses on the extent of the injury and the instrumentality used. However, both third-degree assault and fourth-degree assault criminalize **fear assault** – that is, an act that places a person in "fear of imminent" injury. *Compare* AS 11.41.220(a)(1)(A) and AS 11.41.230(a)(1). If a defendant places a person in fear of immediate physical injury by words or conduct, then the crime is misdemeanor assault. If a defendant places a person in fear of *serious physical injury* using a

dangerous instrument, the crime is elevated to felony assault. This is the difference between threatening to punch someone in the nose and threatening to shoot someone with a gun. The former is a misdemeanor while the latter is a felony.

Two issues arise in fear assault prosecutions. First, the risk of injury must be **imminent**. Future, uncertain, or conditional threats are insufficient. The defendant must engage in some physical gesture or specific conduct that reflects an immediate ability to inflict harm. *See e.g.*, *Lussier v. Alaska*, 2021 WL 2453649 (Alaska App. 2021) *(citing Coleman v. State*, 621 P.2d 869, 876-77 (Alaska 1980)). Second, the defendant must place the victim in **fear**. The term "fear", in this context, means the victim was aware of the threat, not that the victim was scared. This is because not all victims are created equal. Some will cower away, afraid of injury, while others will stand up and fight. The Alaska Court of Appeals describes "fear" as follows:

As used in [the assault statute], the word "fear" does not refer to fright, dread, intimidation, panic, or terror. Rather, a person is "placed in fear" of imminent injury if the person reasonably perceives or understands a threat of imminent injury. The victim's subjective reaction to this perception is irrelevant. It does not matter whether the victim of the assault calmly confronts the danger or quivers in terror. The question is whether the victim perceives the threat.

See Hughes v. State, 56 P.3d 1088, 1090 (Alaska App. 2002).

The victim must *perceive* the threat and their apprehension of danger must be reasonable. If the victim is *unaware* of the defendant's threatening actions or their apprehension was *unreasonable*, then an assault was not committed. *See e.g.*, *Hodge v. State*, 2008 WL 2609662 (Alaska App. 2008). For example, an enraged father is not guilty of assault for throwing a hammer at his infant child since the child cannot be *aware* of the threat. *See e.g.*, *Harrod v. Maryland*, 499 A.2d 959, 962 (Md. Ct. Spec. App. 1985). *See generally* Wayne R. LaFave, 2 *Substantive Criminal Law* § 16.3(b), at 569 ("It is not enough, of course, to intend to scare the other without succeeding; if the other fails to notice the threatened battery, the threatener, not having succeeded in his plan, cannot be held guilty of assault.").

Although the victim must be aware of the defendant's threatening actions, the defendant need not purposely cause apprehension (provided the defendant otherwise acts "recklessly"). If a defendant recklessly places a victim in apprehension of injury, even if the defendant is unaware of their own threatening conduct, the defendant is guilty of assault. For example, a drunk driver who nearly strikes a pedestrian, but fortuitously misses the person, is still guilty of felony assault even if the defendant was unaware of the pedestrian. *See e.g.*, *State v. Watts*, 421 P.2d 124 (Alaska App. 2018).

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1. I say minor injuries, like scratches, "likely" constitute physical injuries under Alaska law because the Alaska Court of Appeals has refused to expressly answer the question. *See Eaklor v. State*, 153 P.3d 367, 370 n.3 (Alaska App. 2007). However, in *Eaklor*, the Court suggested that such minor injuries would qualify. ↵
2. See Non-Fatal Strangulation Is an Important Risk Factor for Homicide of Women, Glass N., Laughon K., Campbell J., Block C.R., Hanson G., Sharps P.W., Taliaferro E. (2008), Journal of Emergency Medicine, 35 (3), pp. 329-335. ↵

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10.2: Stalking

The crime of **stalking** addresses a gap left exposed by modern fear assault statutes. Recall that to be guilty of fear assault, the defendant must place the victim in fear of *imminent* injury. *See e.g.* AS 11.41.220(a)(1)(A). Stalking criminalizes a **pattern of behavior** that places another person in fear. Unlike the crime of assault, stalking requires **repeated conduct** occurring over time. Also, unlike assault, the repeated acts, if viewed in isolation, may appear simply aggravating, annoying, or even harmless. Yet when viewed in context the acts demonstrate a pattern of threatening behavior that places a reasonable person in fear of death or physical injury.

While assault requires evidence of force or the threat of force, stalking contains no such element. Instead, it criminalizes repeated non-consensual contacts that create fear. Since the crime focuses on fear and not injury, law enforcement can intervene early and prevent a future physical attack. In a sense, stalking is an anticipatory crime similar to inchoate offenses.

The crime itself is relatively new; it did not exist at common law. After a series of high-profile stalking homicides in the early 1990s, state legislatures began criminalizing the dangerous conduct associated with obsessive behavior. Today, all 50 states criminalize stalking. Stalking a person across state lines (*e.g.*, interstate stalking) is a federal crime. *See* 18 USC §2261A. Alaska's anti-stalking statutes, enacted in 1993, created two degrees of stalking: Stalking in the First Degree (a class C felony) and Stalking in the Second Degree (a class A misdemeanor).

The basic crime of stalking (**second-degree stalking**) requires a defendant to engage in repeated acts of nonconsensual contact that recklessly places another person in fear for their own physical safety or the safety of a family member. AS 11.41.270. The term **nonconsensual contact** includes traditional methods of stalking such as following, approaching, confronting in public, or appearing at the victim's workplace or residence. It also includes other common methods of instilling fear, such as contacting the person using the telephone, sending mail or electronic communication, or delivering an object to the victim's home. AS 11.41.270(b)(3).

Because the crime of stalking requires the defendant to engage in a course of conduct, the crime necessarily occurs over time. Single, isolated events are insufficient. The defendant must engage in a pattern of behavior. *See Cook v. State*, 36 P.3d 710 (Alaska App. 2001).

Example of Stalking

Joel and Rebecca were married for 10 years. They mutually separated before formally filing for a divorce. Immediately after the separation, Joel made repeated attempts to reconcile with Rebecca, but she remained adamant in her desire to separate from him. During this period, Joel sent many text messages to Rebecca. Joel would text Rebecca at all hours of the day.

When Rebecca would respond, Joel would accuse her of leaving him for another man. In one telephone call, Joel went so far as to threaten to kill one of Rebecca's co-workers (because Joel suspected that Rebecca was dating this co-worker).

Joel's harassment was not limited to telephone calls or text messages. Joel drove by Rebecca's residence twice when Rebecca was entertaining a female friend for dinner one evening. On another occasion, during a period when Joel was repeatedly calling her house, Rebecca saw someone running out of her yard and down the street. When she went out to check, she observed footprints leading up to her window. Rebecca did not know who made the footprints.

Rebecca attempted simply to ignore Joel. This worked for several weeks. But then Rebecca started dating another man. Joel called Rebecca and left angry messages regarding this relationship.

Joel then began driving by Rebecca's residence for no apparent reason. To take a much needed break, Rebecca took a week-long vacation out of town. Shortly after she returned from her vacation, Rebecca invited her new boyfriend over for dinner. As soon as the man arrived at her house, her telephone began ringing "off the hook"; it was Joel. Joel demanded to know what Rebecca was doing with a man in her house. Rebecca hung up, but the calls continued until she turned off her phone. Later, when the man was getting ready to leave Rebecca's home, he discovered that his vehicle had a flat tire.

In this case, Joel is likely guilty of second-degree stalking. Joel engaged in repeated acts of nonconsensual contact. He repeatedly called her, drove by her house, and threatened one of Rebecca's co-workers. Even though Joel made no explicit threats against Rebecca, Joel's conduct – in context – would place a reasonable person in fear.

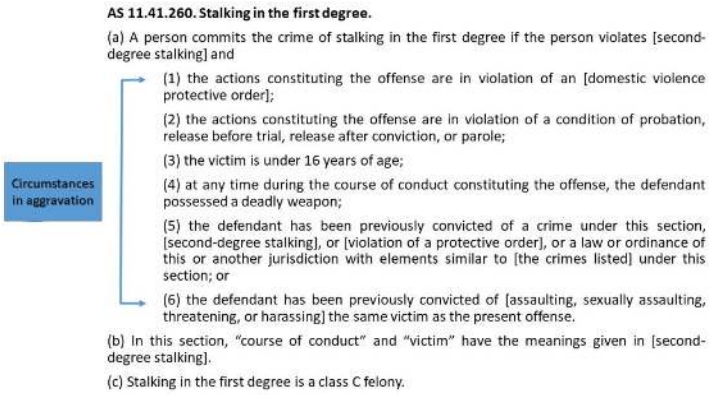
Cyberstalking

Cyberstalking is also criminal. AS 11.41.270(b)(3)(H)-(I). **Cyberstalking** occurs when a stalker uses the internet and social media as the medium to engage in their stalking behavior; similar to a traditional stalker, but instead of physical surveillance, contact, or intimidation, the stalker uses technology to stalk their victim.

Aggravated stalking

First-degree stalking elevates an otherwise misdemeanor stalking to felony stalking if the defendant commits the crime of stalking along with a defined aggravating, or attendant, circumstance. AS 11.41.260(a). The code provides six circumstances that if present, heighten the risk of death or serious injury to the victim, and thus, increase the defendant's blameworthiness. *See* Figure 10.3.

Figure 10.3 Alaska Criminal Code – Stalking in the first degree



Constitutional Challenges

Because stalking criminalizes otherwise blameless activities (if done in isolation), courts narrowly interpret the offense. Stalking is potentially unconstitutional as overbroad (*e.g.*, criminalizing both lawful and unlawful conduct) if expansively interpreted. Recall that the First Amendment protects many forms of speech including uncomfortable speech. A defendant who is expressing ideas in a repeated, offensive, and even scary manner is protected unless such speech falls within one of the narrowly defined exceptions. Individuals also have a constitutional right to travel freely without unnecessary government interference. Conduct normally associated with the crime of stalking may impede that right.

Although individuals have many constitutional protections, the Constitution does not allow individuals to *threaten* other people. It is for this reason that stalking survives constitutional attack. Stalking requires the defendant to engage in repeated nonconsensual contact that places another person in fear of injury or death – this is a form of assaultive conduct. *See Peterson v. State*, 930 P.2d 414 (Alaska App. 1996). Stalking, like assault, criminalizes violent and threatening behavior. Such behavior is not constitutionally protected.

That is not to suggest that all nonconsensual contact constitutes stalking. Inadvertently encountering a person in a public place or merely appearing within the victim's sight is not "contacting" for purposes of the stalking statute even if the person knows the victim will be fearful of the contact. *See Cooper v. Cooper*, 144 P.3d 451 (Alaska 2006). Nonconsensual contact made for legitimate, lawful purposes is not criminal. *SeePeterson*, 930 P.2d at 425-26. Likewise, although the victim must perceive the threat of harm, the victim's fear must be reasonable. *See Kenison v. State*, 107 P.3d 335 (Alaska App. 2005).

You be the Judge …

A group of skinheads routinely ride the municipal bus. Their appearance, their language, and their demeanor frequently cause other regular bus riders to fear for their safety. The skinheads know that the other bus riders are afraid of them, but they continue to ride the bus, day after day. Have the skinheads committed stalking? Check your answer at the end of the chapter.

Dickie v. State, 282 P.3d 382 (Alaska App. 2012)

As with most criminal law, the stalker's motivation is irrelevant. While some stalkers may be motivated by jealousy, resentment, or anger, others may be motivated by infatuation. Although the specific stalking behaviors – repeated contact, semi-surreptitious surveillance, unwanted gifts, or implicit threats – may be similar, the stalker's *motivation* may differ significantly. In the following case, *Dickie v. State*, the defendant was motivated by an obsession with his victim and her family. Notice how the court explains that force or coercion is not an essential element of stalking. The focus is not on the overt threats made (or lack thereof), but on whether the victim was reasonably placed in fear.

282 P.3d 382
Court of Appeals of Alaska.
Bruce DICKIE, Appellant,
v.
STATE of Alaska, Appellee.
July 27, 2012.

OPINION
BOLGER, Judge.

Bruce Dickie appeals his conviction for first-degree stalking of a family in Anchorage. Dickie contends that the State's evidence was legally insufficient to prove that his repeated contacts with the family were "nonconsensual" within the meaning of AS 11.41.270(b)(3)—i.e., that these contacts were "initiated or continued without [the family's] consent, … or … in disregard of [the family's] expressed desire that the contact[s] be avoided or discontinued." In particular, Dickie argues that the State's evidence in this case was insufficient to prove that he knew that his contacts with the family were contrary to their wishes. We conclude that the State's evidence, viewed in the light most favorable to the jury's verdict, was sufficient to establish this element of the offense.

Dickie also argues that the statutory definition of "nonconsensual" is unconstitutionally broad unless we require the State to prove that the unwanted contacts were accompanied by some degree of coercion or force. For the reasons explained in this opinion, we reject this contention.

[…]

Background
The Petersen family resided in a duplex in Anchorage. In May 2009, the Petersens' eighteen-year-old daughter saw Dickie walking around their house at approximately 9:30 p.m., holding a bag of beer. A short time later, Dickie knocked on the door and asked for someone named Sherry Anson. The daughter informed Dickie that Sherry Anson did not live at that residence. Dickie then left.

About two weeks later, the Petersens found a pizza on their front porch. Another week later, someone left two Starbucks coffee drinks and a bag of deli food from Fred Meyer on the porch. At the end of May, the family left town for Memorial Day weekend and returned to find a can of Pringles potato chips on their porch.

On June 1, the Petersens observed Dickie return to the house and leave another bag of Fred Meyer deli food on the porch. Mr. Petersen was able to stop Dickie in the driveway and ask why he was leaving the food. Dickie stated that he thought his friend, Sherry Anson, lived at the house. Dickie said his name was Bruce, but gave a false last name.

Mr. Petersen informed Dickie that he was scaring his family and that he believed Dickie was stalking them. Mr. Petersen said he would call the police if Dickie returned to their home. Mr. Petersen wrote down Dickie's license plate number as he drove away.

On June 8, Ms. Petersen was watching a movie when she saw Dickie enter their yard from the woods behind their duplex. Dickie was swaying and appeared to be drunk. Mr. Petersen herded his family upstairs into a bedroom, while Ms. Petersen called 911 on her cell phone. Dickie was crouched down in the yard and holding "a big, silver gun." He eventually got up and walked out of the yard through a wooded area.

Anchorage police responded to the 911 dispatch and went to Dickie's home, a short distance from the Petersens' duplex. Dickie was slurring his speech and had an odor of alcohol about him. Anchorage Police Officer Jonathan Gould performed a field sobriety test that led him to believe Dickie was intoxicated.

Police found two guns and several magazines of ammunition in Dickie's pants. One of the guns was a Para–Ordnance that had a round of ammunition in the chamber and rounds of ammunition in the magazine. The second gun, a nine-millimeter Beretta, contained rounds in the magazine. Police also found "a very large" loaded Smith and Wesson revolver on Dickie's couch. Police located three other guns—a loaded .44 Ruger handgun, a 30.06 rifle, and a Blissfield shotgun—in Dickie's bedroom.

Dickie was indicted on one count of third-degree misconduct involving weapons, one count of first-degree stalking, and one count of first-degree criminal trespass. After the State presented its case at trial, Dickie moved for a judgment of acquittal on the stalking charge. Dickie argued that the State failed to prove that he engaged in a course of conduct that placed the Petersens in fear of death or physical injury. Superior Court Judge Philip R. Volland denied Dickie's motion. The jury found Dickie guilty of all three charges, and he now appeals.

Discussion

Dickie argues that the court erred in denying his motion for judgment of acquittal because the State failed to show that Dickie made repeated, nonconsensual contacts with the Petersens as necessary to satisfy the stalking statute.

[…]

A person commits the crime of stalking when the person "knowingly engages in a course of conduct that recklessly places another person in fear of death or physical injury, or in fear of the death or physical injury of a family member." The statute defines the phrase "course of conduct" as "repeated acts of nonconsensual contact involving the victim or a family member." "[N]onconsensual contact" is defined as "any contact with another person that is initiated or continued without that person's consent, that is beyond the scope of the consent provided by that person, or that is in disregard of that person's expressed desire that the contact be avoided or discontinued." Such contacts include "appearing within the sight of that person"; "entering onto or remaining on property owned, leased, or occupied by that person"; and "placing an object on, or delivering an object to, property owned, leased, or occupied by that person."

Dickie argues on appeal that his conduct does not fall within the definition of stalking because his conduct does not meet the definition of "nonconsensual contact." Dickie argues that we should require an element of coercion or force as part of the phrase "without that person's consent" to address potential constitutional problems with the stalking statute. Because these claims raise questions of statutory interpretation, our goal is to determine the intent of the legislature and to implement that intent.

In *Petersen v. State*, we noted that the phrase "without that person's consent" appears to cover all contacts that are not expressly authorized beforehand. But we noted that this broad coverage is tempered by the other elements of the statute: "To establish the crime of stalking, the government must prove that the defendant knowingly engaged in repeated acts of nonconsensual contact, the government must prove that these nonconsensual contacts placed another person in fear of injury or death, and the government must prove that the defendant acted with reckless disregard for this result." Because of these elements, we held that the stalking statutes do not criminalize nonconsensual contacts made for "legitimate purposes, even when the defendant knows that the person contacted may (or will) unreasonably perceive the contact as threatening."

Under the facts of this case, we likewise conclude that the requirements of the stalking statute pass constitutional muster even if we do not require the prosecution to show an element of coercion or force as part of the proof that the defendant's course of conduct against the victim was "without that person's consent."

In the stalking statute, the legislature did not provide a statutory definition for the phrase "without that person's consent" or for the word "consent." The word consent is generally defined as "[a]greement, approval, or permission as to some act or purpose." "Without consent" then refers to the lack of agreement, approval, or permission.

[…]

Dickie does not point to any legislative history demonstrating that the legislature intended to require force or coercion where the defendant initiates contact without the victim's consent. Had the legislature intended to require an element of coercion or force, the legislature could have included a statutory definition similar to the statutory definitions in the sexual offense, kidnapping, custodial interference, and human trafficking statutes. The lack of a similar definition in the stalking statute appears to indicate that the legislature did not intend to require force or coercion as part of the definition of nonconsensual contact.

We now turn to the evidence in this case. When we examine the sufficiency of the evidence to support a conviction, we view "the evidence in the light most favorable to the state and [ask] whether reasonable jurors could conclude that the accused's guilt was

established beyond a reasonable doubt." In this case, the evidence indicates that the first time Dickie arrived at the Petersens' residence, Dickie knocked on the door and asked for Sherry Anson. The daughter informed Dickie during that first encounter that "nobody lives here by that name." From that point forward, Dickie was on notice that Sherry Anson was not present at that residence and that his continuing contacts with the Petersens were without their consent.

Dickie then repeatedly stopped by the house and left food without attempting to contact the Petersens. When Mr. Petersen confronted Dickie, he gave a false name. Dickie's conduct suggested that he knew he did not have the Petersens' consent, that he possibly knew his conduct was criminal, and that he felt the need to operate with some degree of secrecy. Then, after Mr. Petersen told Dickie not to come back, Dickie returned to the Petersens' house with a gun. A juror could reasonably conclude that Dickie knew that his contacts with the Petersens were without their consent.

[…]

Conclusion
We AFFIRM the superior court's judgment.

Even though the type of stalking in *Dickie v. State* is markedly different from those situations where the stalker is an estranged lover with a prior history of abuse, neither is less dangerous. Stalking, no matter the motivation, is a serious and dangerous crime.

The more you know …

For more information about stalking, steps victims can take, and available resources, the following resources are available

- The Stalking Prevention, Awareness, and Resource Center (SPARC)
- The Department of Justice Office on Violence Against Women (Stalking | OVW | Department of Justice)
- National Center for Victims of Crime, Stalking Resource Center (Stalking Resource Center – The National Center for Victims of Crime)

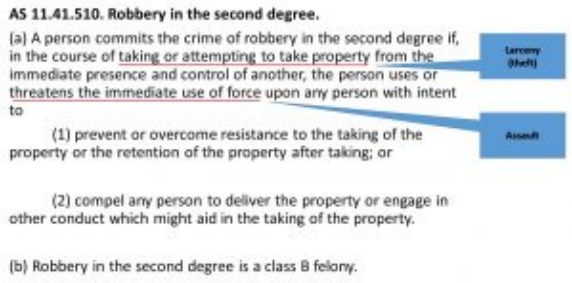
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10.3: Robbery, Extortion, and Coercion

Robbery is the *forcible* taking of property from another. At common law, robbery was considered an aggravated theft crime. Modern criminal codes treat robbery as a crime of violence. Alaska has adopted this view. Robbery is neither a crime against property, nor an aggravated theft. Robbery is a crime of violence. It protects innocent persons from physical harm – the same societal interests as assault. *See Marker v. State*, 692 P.2d 977 (Alaska App. 1984). Recall that robbery is an inherently dangerous felony under the felony murder rule for second-degree murder. AS 11.41.110(a)(2).

In Alaska, robbery is classified as either first- or second-degree robbery. Second-degree robbery contains the basic elements of the crime; the crime is elevated to first-degree robbery if certain **special circumstances** (aggravating factors) are present.

Figure 10.4 Alaska Criminal Code – Second-Degree Robbery



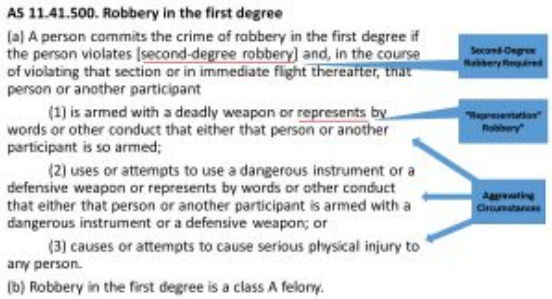
Example of Second-Degree Robbery

Collins decides he needs money, but does not want to hurt anyone. Collins decides to take money from the local tanning salon. Collins enters the tanning salon around 10:00 in the evening, just before the salon's closing time. At that time, there was one employee on duty: a young woman named Tammy. Collins poses as a potential customer and asks Tammy to show him around the facility. She does so, and then Collins leaves. A little later, the salon's last customer leaves. Soon thereafter, Collins re-enters the salon. He immediately walks behind the service counter and stands next to Tammy. Collins forces T.M.'s hands down on the counter. At the same time, Collins calmly asks Tammy where the money is. Tammy opens the cash register. Collins takes the money and leaves.

Under this scenario, Collins has likely committed the crime of second-degree robbery. Collins used force against Tammy when he took control of her hands. *See e.g.*, *Collins v. State*, 2018 WL 2363462 (Alaska App. 2018).

First-degree robbery requires special circumstances to be present – such as the defendant being armed with a weapon or causing serious physical injury during the robbery. Note that the defendant need not actually be armed. First-degree robbery also encompasses the *representation* that the defendant is armed. Thus, all "armed" robberies – regardless of whether the defendant actually possessed a weapon – constitute first-degree robbery. The robbery statute focuses on the dangers associated with the use (or threat) of force during the theft.

Figure 10.5 Alaska Criminal Code – First-Degree Robbery



Unsuccessful Robberies

Although we generally focus on successful robberies, a defendant need not be successful to be guilty of robbery. A defendant can be convicted of robbery even if it turns out that, unbeknownst to the defendant, the victim had an "empty pocket" – that is, the victim did not possess the property being sought. The robbery statutes criminalize unsuccessful attempts to take property to the same extent as successful takings. That is not to say a defendant cannot also commit the crime of attempted robbery, but once the defendant uses force, a completed robbery has occurred, regardless of whether the taking was successful. *See Beatty v. State*, 52 P.3d 752 (Alaska App. 2002). A defendant commits attempted robbery if the defendant takes a substantial step towards the commission of the offense, but prior to the use of force.

Finally, the force used need not be directed at the property owner. A robbery is committed, not only when the defendant uses force upon the person who possesses the property, but whenever a defendant uses force upon *any* person with the intent to accomplish the theft. *See McGrew v. State*, 872 P.2d 625 (Alaska App. 1994). For example, if a couple is "mugged" in a dark alley, the defendant is guilty of robbery if he uses force against one person to cause the other person to surrender the property.

Purse Snatching is Not Robbery

Some thefts may involve incidental or minimal force. It is not uncommon that a thief will use "force" to effectuate a theft. For example, a pickpocket may intentionally bump into a victim in an effort to distract the victim from a surreptitious theft. When the force used is truly incidental, there is no robbery. To constitute a robbery, the struggle must be something beyond a "sudden" theft. Purse-snatching may not be robbery depending on the force (or lack thereof) used.

The line between robbery and [theft] from the person … is not always easy to draw. The "snatching" cases, for instance, have given rise to some disputes. The great weight of authority, however, supports the view that there is not sufficient force to constitute robbery [if] … the thief snatches property from the owner's grasp so suddenly that the owner cannot offer any resistance to the taking. On the other hand, when the owner, aware of an impending snatching, resists it, or when[ ] the thief's first attempt … to separate the owner from his property [is ineffective and] a struggle … is necessary before the thief can get possession [of the property], there is enough force to make the taking robbery.

See Butts v. State, 53 P.3d 609, 612-13 (Alaska App. 2002) *abrogated on other grounds by Timothy v. State*, 90 P.3d 177 (Alaska App. 2004) (*citing* 2 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law*, § 8.11(d)(1), p. 445 (1986) (internal citation omitted)). We explore theft, including **theft from the person**, in more detail in the next chapter.

If a person uses force to *retain* property after a theft, the defendant is guilty of robbery. *See Ward v. State*, 120 P.3d 204 (Alaska App. 2005). A defendant who commits a shoplift and then assaults the security guard in an effort to keep the stolen property commits a robbery. In other words, robbery does not require the force to be used prior to, or while taking the property, but includes force used *after* the theft.

You be the Judge …

In the early morning hours, Kenneth Moto entered Jacob Vesotski's home near downtown Anchorage. Vesotski awoke to find a man fumbling with the computer on his desk, which was ten to twelve feet from his bed.

Moto walked toward where Vesotski lay in bed and told him to go back to sleep, "otherwise he was going to kill [him]." When Vesotski realized he was being robbed, he decided to encourage Moto to take whatever he wanted and leave the house. Vesotski unplugged the computer and carried it out of the bedroom to the front door.

Vesotski handed Moto the computer and pushed him out the door. Moto told Vesotski that Moto would kill him if he reported the incident to the police. Moto then left the house with Vesotski's computer. The police apprehended Moto as he was attempting to enter a neighbor's house. The police recovered Vesotski's computer.

Did Moto commit first-degree robbery, second-degree robbery, or simply an aggravated theft offense? Check your answer at the end of the chapter.

Right to Recapture/Reclaim of Property (Self-Help)

Recall from Chapter 7, a person may be *justified* in using nondeadly force to recapture property if the property is taken from the victim and the victim reacts immediately. Thus, a theft victim may chase someone who stole personal property and take the item back. *See Kone v. State*, 2018 WL 573339 (Alaska App. 2018). However, the use of force to reclaim property must be *immediate*. Any appreciable delay converts the use of force into the crime of robbery even if the person is recovering their own property. Using force to reclaim property is only permitted in limited circumstances. Once the theft has been completed, the law requires the victim to use legal methods to reclaim property. Neither force, nor the threat of force, are permitted.

Whitescarver v. State, 962 P.2d 192 (Alaska App 1998)

In the following case, *Whitescarver v. State*, 962 P.2d 192 (Alaska App 1998), the court explains why a claim-of-right defense is not permitted. As you read *Whitescarver*, ask yourself if the victim of a theft should be *required* to invoke legal process to reclaim their own property.

962 P.2d 192
Court of Appeals of Alaska.
Jeffrey Scott WHITESCARVER, Appellant,
v.
STATE of Alaska, Appellee.
No. A–6428.
June 19, 1998.

OPINION
MANNHEIMER, Judge.
This case requires us to decide whether a person may defeat a charge of robbery by showing (or, more precisely, by establishing a reasonable possibility) that they assaulted the victim in an attempt to recover property that rightfully belonged to them. We hold that the answer is “no”: a defendant’s claim of ownership does not justify or excuse an attempt to recover property by assault.

On November 29, 1995, at around 1:30 in the morning, 18–year–old Jeffrey Scott Whitescarver and four of his friends paid a visit to the home of his 64–year–old grandmother, Thelma Whitescarver. Thelma Whitescarver had adopted Jeffrey, and in her capacity as Jeffrey’s adoptive mother, she had applied for and received his Alaska Permanent Fund dividend check. Jeffrey Whitescarver came to his grandmother’s house in the middle of the night because he wished to take personal possession of this dividend money.

Whitescarver’s teenage cousin, Brian Leigh, answered the door. Whitescarver falsely told Leigh that he had locked himself out of his apartment; he asked if he could come in and warm up. Whitescarver entered the house, followed by his companions. One of these companions was holding a shotgun. After they were inside the house, Whitescarver’s companion cocked the shotgun, and then Whitescarver announced that he wanted his Permanent Fund dividend money. Leigh told Whitescarver that he did not have Whitescarver’s money.

Whitescarver and his friends then accompanied Leigh downstairs, so that Leigh could awaken Whitescarver’s grandmother. When Thelma Whitescarver had been roused, Whitescarver repeated his demand for his Permanent Fund dividend money. During the ensuing argument, Whitescarver’s grandmother told him that she did not have access to his money in the middle of the night; she urged Whitescarver to return the next day, during business hours. Whitescarver would not be put off; he told his grandmother that he had waited long enough for his money, and he wanted the money then and there. During this entire argument, one of Whitescarver’s friends stood watch at the door to the room, holding the shotgun.

Whitescarver broke off arguing with his grandmother and conferred with his friends in the hallway. Following this conference, Whitescarver decided he would look for his money in an unlocked safe in the closet. However, he found only papers in the safe.

Whitescarver and his companions conferred again about whether they should “rip off what they could get” from his grandmother’s house. Whitescarver and his friends also discussed what should be done with Whitescarver’s grandmother and cousin. Eventually, Whitescarver and his friends decided to leave his grandmother’s house. As they backed out of the room, Whitescarver’s friend kept the shotgun pointed at Thelma Whitescarver and Brian Leigh. On their way out of the house, Whitescarver or one of his friends stole Thelma Whitescarver’s purse. The purse was later recovered with nothing missing from it.

Whitescarver was indicted on two counts of first-degree robbery (robbery committed while armed with a deadly weapon), AS 11.41.500(a)(1). One count named Thelma Whitescarver as the victim; the other count named Brian Leigh. At his trial, Whitescarver was convicted as charged on the count involving his grandmother. With regard to the count involving his cousin, the jury convicted Whitescarver of the lesser included offense of third-degree assault, AS 11.41.220(a)(1)(A).

Whitescarver's primary contention on appeal is that the trial judge should have instructed the jury to acquit Whitescarver if they found a reasonable possibility that his act of robbing his grandmother and assaulting his cousin was done for the purpose of recovering property that he honestly believed belonged to him (the money from his Alaska Permanent Fund dividend).

In support of this argument, Whitescarver's opening brief cites various common-law authorities and a few Alaska cases that discuss issues of peripheral relevance. It is obvious that Whitescarver's appellate attorney studiously avoided discussing (or even citing) the Alaska case most directly on point, *Woodward v. State*, 855 P.2d 423 (Alaska App.1993).

[…]

For purposes of analyzing Whitescarver's case, robbery is essentially an aggravated form of the type of extortion discussed in *Woodward* —extortion committed by a threat to inflict physical injury. Both offenses involve an attempt, by threat of injury, to induce another person to part with property. If the defendant's intent is to take property from the victim's immediate presence and control, and if the threat is of imminent injury, then the defendant's conduct will constitute robbery. If these two aggravating factors are not present (for instance, if the threat is to inflict injury at some future time), then the defendant's conduct will constitute extortion.

Viewed in this light, it is evident that there is no "claim of right" defense to robbery—for if, as we recognized in *Woodward*, the legislature affirmatively manifested its intention to prohibit this defense in cases of extortion by threat of future injury, it is inconceivable that the legislature intended to allow the defense in the more aggravated circumstances of robbery.

Whitescarver attempts to avoid this result by arguing that he had a good-faith belief that his Permanent Fund dividend check was not "property of another"—that he should not be deemed guilty of robbery because he honestly believed that he alone was entitled to the check. However, the crime of robbery does not require proof that the property taken from the victim was "property of another". As we noted in *Woodward*, the statutory definition of robbery, AS 11.41.510(a), "[does] not require the taking of 'property of another', but only the taking of 'property'."

The legislature's decision to define robbery in terms of "property" rather than the more restrictive "property of another" appears to stem from an explicit policy decision made by the drafters of the Criminal Code. They rejected the common-law view that robbery was "an aggravated form of theft", and they instead decided to place primary emphasis on "the physical danger to the victim and his difficulty protecting himself from sudden attacks against his person". The drafters of the Code specifically stated that their definition of robbery was intended to "emphasize[ ] the person, rather than the property, aspects of the offense".

In other words, even if Whitescarver honestly believed that his grandmother was unlawfully withholding his dividend check from him, Alaska law would not allow Whitescarver to enter his grandmother's home with a firearm, threaten her with injury unless she surrendered the dividend check, then hold her at bay with the weapon while he examined the contents of her safe and carried off her purse for later inspection. These acts constituted robbery, regardless of who was entitled to possession of the dividend check. Judge Andrews properly refused to instruct the jury on Whitescarver's proposed "claim of right" defense.

[…]

The judgement of the superior court is AFFIRMED.

Extortion

All states and the federal government criminalize **extortion**, sometimes called **blackmail**. A defendant commits the crime of extortion if they obtain the property of another by threatening *future* physical or reputational harm unless the victim surrenders property. AS 11.41.520. If the defendant threatens *immediate* physical harm to obtain property (as opposed to future harm), the defendant is guilty of robbery, not extortion.

Reputational harm includes a broad range of threats to a person's reputation. Specifically, extortion criminalizes threats (1) accusing a person of a criminal offense; (2) exposing confidential information tending to subject any person to hatred, contempt, or ridicule; (3) impairing a person's credit or business repute; (4) withholding action as a public official; (5) bringing about a strike or

boycott; or (6) refusing to testify. To constitute extortion, the motive for the defendant's threat must be to make someone relinquish property. Note that some of these acts could be legal if not connected with the intent to obtain someone else's property. But if the victim performs the acts *because* of the defendant's threat with the intent to obtain property, then the defendant has committed the crime of extortion.

Coercion

The crime of **coercion** is essentially a lesser degree of extortion. Coercion prohibits the threat of force against a person to do or abstain from doing an act the victim has a legal right to do or not do. AS 11.41.530. Coercion differs from extortion and robbery, however, in that the defendant's motive in making the threat is not theft, but rather a more general purpose to compel the victim to engage or abstain in a legal right.

Thus, the crime of coercion applies to a much greater range of motives than either robbery or extortion. For example, a person commits the crime of coercion when the person uses threats to coerce someone into signing a child custody agreement, dropping a lawsuit, or voting for or against a particular candidate or ballot proposition.

Extortion and coercion, like robbery, are crimes of violence. Notice how all three crimes focus on the use, or threat, of force to accomplish the defendant's goal.

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10.4: Kidnapping

Kidnapping criminalizes intentional nonconsensual restraint of another person. At common law, kidnapping was considered a relatively minor offense – it was a misdemeanor. Common law kidnapping was simply the unlawful confinement and carrying away of another person. The *actus reas* was twofold: (1) the defendant had to confine the person; and (2) the defendant had to transport the person, an act called **asportation.***See generally*, Wayne R. LaFave, *Substantive Criminal Law* §18.1(a) (3rd ed. 2018). Common law treated kidnapping as a peripheral or tangential criminal offense – a means to an end. Modern criminal codes have expanded on the common law definition, both in terms of conduct and severity to focus on the dangers inherent in confining or transporting someone against their will. Kidnapping is no longer a peripheral crime.

Alaska defines kidnapping broadly. To be guilty of kidnapping, the defendant must **restrain** the victim with the **specific intent** to achieve a specific purpose. AS 11.41.300. Specifically, the defendant must intend to restrain the person for the purpose of (1) obtaining a ransom or payment; (2) using the person as a shield or hostage; (3) inflicting injury or sexual violence on the person; (4) interfering with an official government action; or (5) facilitating the commission of a felony. Further, Alaska has broadened the term "restraint". Restraint means *either* restricting a person's movement without their consent *or* moving the victim against their will, not both. AS 11.41.370 (3). Notice how at common law both confinement and asportation were required.

Although Alaska's definition of restraint is broad, it is not without limits. To support a kidnapping conviction, the defendant's restraint cannot be **merely incidental** to the target crime. Kidnapping requires substantial restraint. Thus, holding a person at gunpoint during a robbery will not be elevated to kidnapping even though the person's movements are restricted. The defendant's restraint of the victim must exceed what is necessary – either temporally or spatially – to commit the target crime. As described in the commentary to the Alaska criminal code revision,

[A] defendant who forces a victim who is jogging along a bike path into woods a few feet from the bike path in order to commit a sexual assault has not committed kidnapping. The "restraint" of the victim was too closely related to the sexual assault, both in time and the degree of movement, to qualify as a separate crime. However, if the victim was forced into the defendant's car and then driven a block to a nearby deserted house and sexually assaulted, or sexually assaulted while his accomplice was driving the car, kidnapping has occurred.

See Alam *v. State*, 776 P.2d 345, 349 (Alaska App. 1989) (internal citations omitted).

As you can see, the line between "incidental" restraint and sufficient restraint is fuzzy. Courts and juries evaluate several factors in making their determination, including,

1. how long the victim was restrained;
2. if the victim was moved, how far the victim was moved and where the victim was taken;
3. whether, under the facts, the restraint exceeded what was necessary for the commission of the defendant's target crime;
4. whether the restraint significantly increased the risk of harm to the victim beyond the risk of harm inherent in the target crime itself; and
5. whether the restraint had some independent purpose – *i.e.*, whether the restraint made it significantly easier for the defendant to commit the target crime or made it significantly easier for the defendant to escape detection.

See Hurd v. State, 22 P.3d 12 (Alaska 2001).

Example of Incidental Restraint

Joseph breaks into Abby's home and sees Abby sitting on the couch. Due to the layout of the house, the couch is in front of a large picture window, in full view of the street and sidewalk. To avoid detection, Joseph grabs Abby off the living room couch and drags her into the bedroom to sexually assault her. Joseph has probably not committed the crime of kidnapping. Joseph forcibly restrained Abby and moved her into the bedroom without her consent, but her movement from the couch to the bedroom appears to be incidental to the target crime of sexual assault.

Example of Sufficient Restraint

Let's change the example with Joseph and Abby. Assume that after Joseph breaks into Abby's home, he drags her out of the house, stuffs her into the trunk of his car, and then drives 50 miles to a deserted river where he sexually assaults her. Joseph has committed

the crime of kidnapping (in addition to a host of other crimes). The restraint and movement of Abby were beyond what was necessary to commit the target crime. Abby was restrained in the trunk of a car, moved over 50 miles, and the restraint made it substantially easier for Joseph to commit the target crime.

Penalty

Because of the significant dangers associated with kidnapping, modern criminal codes view kidnapping as a very serious offense. All states impose harsh penalties for kidnapping, including life or 99-year sentences. Alaska is no different. In Alaska, kidnapping is an unclassified felony offense (the most serious classification), punishable by up to 99 years in prison.

Custodial Interference

The Legislature has largely removed child custody disputes from the definition of kidnapping. To eliminate kidnapping charges from child custody disputes, the Legislature has enacted the crime of custodial interference. **Custodial interference** is designed to protect the person who has lawful custody and control of a child. The willingness of the child is irrelevant. To commit the crime of custodial interference the defendant must be a relative of the child (or incompetent person) who knows that he or she has no legal right to take or keep the child from the lawful custodian. **Lawful custodian** includes state institutions as well as parents and guardians. If the defendant intends to hold the child for a protracted period of time and causes the child to be taken outside Alaska, the crime is custodial interference in the first degree, a class C felony. If the child is not taken out of state, the crime is custodial interference in the second degree, a class A misdemeanor.

Note that the offense focuses on a *substantial* interruption in the custody arrangement. Custodial interference does not deal with the situation where the non-custodial parent merely fails to comply with a custody order when there is no intent to hold the child for a protracted period.

Exercise

Answer the following question. Check your answer at the end of the chapter.

1. Coby is in the process of robbing a bank. When a security guard threatens to shoot Coby, he grabs a customer in the bank and holds a knife to her throat. Coby thereafter demands a getaway vehicle and fifty thousand dollars in cash in exchange for the hostage's release. Has Coby committed kidnapping? Why or why not?

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10.5: Sexual Violence and Sex Offenses

1

Sexual Violence and Sex Offenses

Robert Henderson

Alaska has a long, significant, and well-documented problem with sexual violence. Alaska frequently has one of the worst rates of sexual assault in the nation. Some simple statistics put the problem in context. According to the 2020 Alaska Victimization Survey, more than one-third of women in Alaska have experienced sexual assault in their lifetime (40.5%), compared to less than one-fifth of women nationwide. Alaska Native women are disproportionately affected by sexual violence. In 2019, among felony-level sex offense cases reported to Alaska law enforcement, Alaska Native women comprised 50.4% of all victims. *See* Lisa Purinton, 2019 Felony Level Sex Offenses: Crime in Alaska Supplemental Report (2019). Given the epidemic nature of sexual violence in Alaska, the Alaska legislature is frequently changing the laws surrounding sex offenses. This chapter is not intended to be a comprehensive explanation of Alaska's sex offenses. Instead, this chapter explores the origins of the crime of rape, subsequent reforms, and the current law. To be clear, the debate surrounding how to appropriately criminalize certain sexual acts – both wanted and unwanted – is far from over. It continues today.

Although Alaska has eliminated antiquated references to the crimes of rape, sodomy, and statutory rape, to fully understand the complexity of the various issues surrounding sex offenses, one must first explore the origins of rape, including what acts were and what acts were not criminalized.

Common Law Rape

For centuries, rape was punishable by death. **Rape** was "the unlawful carnal knowledge of a woman by a man forcibly and against her will." *See Rape*, Black's Law Dictionary (6th ed. 1990). At common law, **carnal knowledge** was the penetration of the female sex organ by the male organ. Thus, rape was limited to sexual penetration. The law did not treat sexual contact – nonconsensual touching – as rape. *See* Wayne R. LaFave, *Substantive Criminal Law*, §17.2 (3rd ed. 2018). Further, a husband could not be convicted of rape by forcing his wife to engage in sexual intercourse. Spousal rape was not a sexual offense. *See id.* at §17.4(d).

These were not the only limitations with common law rape. Only a man could commit rape. Women were incapable of committing the crime. Likewise, a man could not be the victim of rape. Same-sex sexual assault was not rape. The crime of **sodomy** was the penetration of the male anus by another man. But sodomy was condemned and criminalized irrespective of consent because of religious and moral beliefs deeming it a "crime against nature." *See e.g.*, *Harris v. State*, 457 P.2d 638 (Alaska 1969).

Modern Trends – Sexual Assault

During the 1970s, many states began to update their antiquated rape statutes. Alaska followed suit. Before the enactment of Alaska's Revised Criminal Code, Alaska largely tracked the common law definition. The Revised Criminal Code eliminated several outdated terms, concepts, and limitations. The majority of Alaska sex offenses are now categorized as either **sexual assault** or **sexual abuse of a minor**. Sexual assault typically refers to criminal conduct against an adult; sexual abuse of a minor typically refers to criminal conduct against a minor. Although modern sex offenses depart from the common law in important ways, you will see the law's historical roots throughout.

The modern criminal code recognizes that sexual violence need not be sexually motivated. All sex offenses are classified as crimes that violate an individual's personal autonomy. The sexual act – be it genital penetration, fellatio, or cunnilingus – does not require sexual stimulation, sexual satisfaction, or ejaculation. *See Beltz v. State*, 980P.2d 474 (Alaska App. 1997). All sex offenses focus on the unwanted sexual activity, not the defendant's *motive* for engaging in the activity. Remember that motive is never an element of a criminal offense even though it is frequently helpful in *explaining* the defendant's criminal conduct.

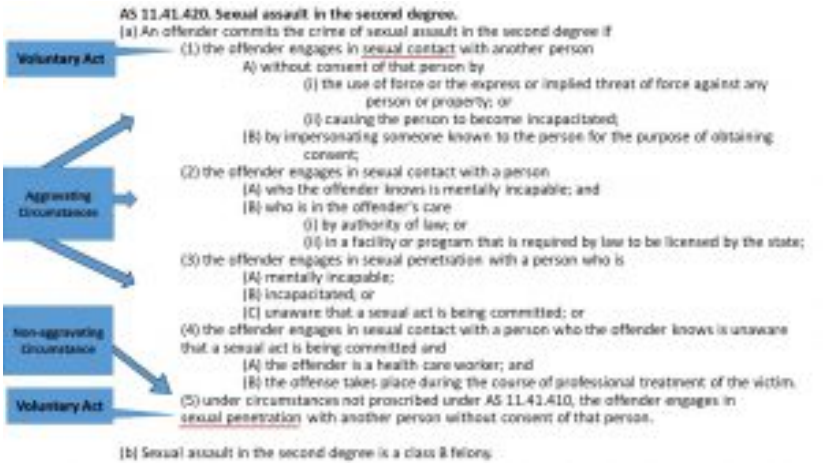
The basic purpose of both Sexual Assault and Sexual Abuse of a Minor statutes is to protect victims from offensive and coerced intimacy. Whether charged as sexual assault or sexual abuse of a minor, each offensive act is a violation of the victim's dignity, personal freedom, and bodily integrity. *See Johnson v. State*, 328 P.3d 77, 89 (Alaska 2014). Each offensive act constitutes a separate offense.

Alaska's two general classifications – sexual assault and sexual abuse of a minor – are separately graded based on severity. The code includes four **degrees** of sexual assault and four **degrees** of sexual abuse of a minor.

Sexual Assault

The keys to understanding the different degrees of sexual assault are to understand the necessary *mens rea* of the offense, the different *actus rei* involved ("without consent," "sexual penetration," and "sexual contact"), and the different aggravating circumstances ("incapacitation," "force," and "mentally incapable"). As a general rule, assaults involving sexual penetration are graded higher than assaults involving sexual contact. Aggravating circumstances tend to elevate the offense. For example, sexual assault in the second degree criminalizes aggravated sexual contact, but also "simple" sexual penetration without consent. *See* Fig 10.6.

Figure 10.6 Alaska Criminal Code – Sexual Assault in the Second Degree (AS 11.41.420)



Mens Rea of Sexual Assault

At common law, rape was a specific intent crime. The government was required to prove that the defendant intentionally engaged in sexual intercourse without the victim's consent. Under current law, the defendant need not act intentionally but instead must *knowingly* engage in the sexual act with *reckless disregard* for the victim's lack of consent. AS 11.81.610(b). The test for recklessness is a subjective one – the defendant must actually be aware of, and consciously disregard, the victim's consent. In the eyes of the Alaska Court of Appeals, this rule protects a "defendant against conviction for first-degree sexual assault where the circumstances regarding consent are ambiguous at the time he has intercourse with the complaining witness." *See Reynolds v. State*, 664 P.2d 621, 625 (1983). Put another way, the question is whether the defendant understood the victim's expression of consent (either by words or action), and if consent was not given, whether the defendant was *reckless* as to the *lack of consent*.

"Without Consent"

Recall that at common law, rape required the sexual act to be "forcibly and against [the woman's] will." The victim had to manifest an *extreme resistance* to the assault to demonstrate a lack of consent. Early legal scholars viewed a sexual encounter without active resistance as consensual. Rape required proof that the sexual act was achieved by the use of force or threat of force *and* that it was non-consensual.

Alaska's criminal code has decoupled force and consent. The law no longer requires the sexual act to be achieved "forcibly and against her will." Instead, the government must prove that the defendant engaged in the sexual act **without the consent** of the victim. Resistance is not required; the victim need not fight back or say "no." Sexual activity may be non-consensual even if the victim acquiesces, freezes, or privately submits. AS 11.41.445(c). Any expression of a lack of consent is sufficient.

Consent is a positive agreement to cooperate in a specific sexual act. It must be **freely given** and demonstrated through expressed words or action. Consent is also temporal. It is specific to the sexual act at issue and reversible. Although the defendant must still act recklessly concerning the lack of consent, consent is based on the surrounding circumstances, including what was said (and not said) before, during, and after the encounter. AS 11.41.470(10).

Figure 10.7 Alaska Criminal Code – Alaska Statute 11.41.470(10)

AS 11.41.470. Definitions.

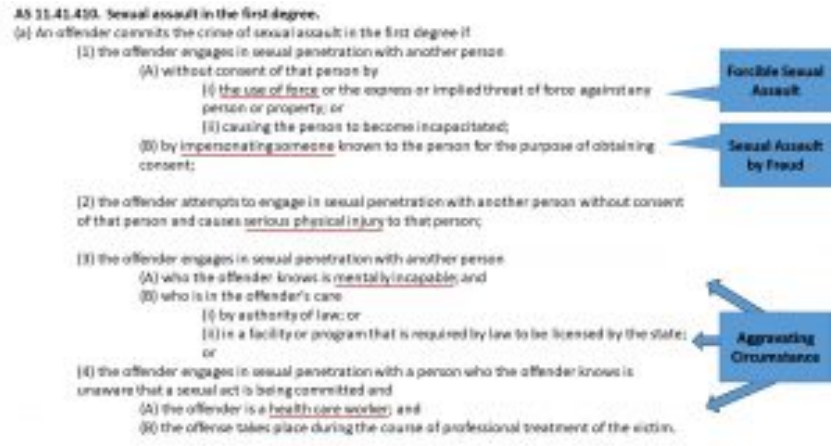
(10) "without consent" means that, under the totality of the circumstances surrounding the offense, there was not a freely given, reversible agreement specific to the conduct at issue; in this paragraph, "freely given" means agreement to cooperate in the act was positively expressed by word or action.

Thus, although a defendant must act recklessly with respect to the victim's lack of consent, in the simplest of terms, unwanted sexual activity is sexual assault. Sexual penetration without consent is a Class B felony sex offense. Sexual contact without consent is a Class C felony sex offense. *Compare* AS 11.41.420(a)(5) and AS 11.41.425(a)(7).

Aggravated Sexual Assault

If a defendant compels sexual activity through force, fraud, or another aggravating circumstance, the crime is elevated to **aggravated sexual assault**. *See e.g.*, Figure 10.8. For example, first-degree sexual assault (aggravated sexual penetration) outlines six separate aggravating circumstances that, if proven, elevate the assault to either an unclassified or class A felony sex offense. AS 11.41.410(b). Non-consensual sex achieved without the use or threatened use of force, fraud, or other aggravating circumstance remains a sex offense, albeit a lower one. *See e.g.* Figure 10.6.

Figure 10.8 Alaska Criminal Code – First-Degree Sexual Assault (AS 11.41.410(a))



Forcible Sexual Assault

A defendant's use of force to commit the sexual act frequently demonstrates that the sexual activity was non-consensual. But this is not always the case. Force does not necessarily prove a lack of consent. For example, "rough sex," provided it is consensual and does not cause serious physical injury, is not a crime.

For aggravated sexual assault, the defendant's use of force must go beyond what is necessary to achieve the charged act (*i.e.*, sexual penetration or sexual contact). But recall, Alaska's definition of "force" is quite broad. Any struggle, resistance, or implicit threat will suffice. *See e.g. Dorsey v. State*, 480 P.3d 1211 (Alaska App. 2021); *Inga v. State*, 440 P.3d 345 (Alaska App. 2019). **Coercion** is evaluated from the perspective of the victim who is subjected to unwanted sexual activity. *See State v. Mayfield*, 442 P.3d 794, 799 (Alaska App. 2019). To be guilty of forcible sexual assault, the evidence must demonstrate that the victim engaged in sexual activity as the result of *coercion* (*i.e.*, force or the threat of force) and not as the result of a non-forcible threat (*e.g.*, threatening a victim with economic harm like job termination). Such conduct is still sexual assault, but not aggravated sexual assault. For example, a situation where a person grabs the victim's genitals spontaneously, and the victim freezes out of shock, but no threats are made, would constitute "simple" sexual assault, not "aggravated" sexual assault.

You be the Judge …

Tim and Mary (Tim's fiancée) were at a crowded bar in downtown Juneau. The bar was packed and Mary had to guide Tim through the crowd holding his hand. It was impossible to walk through the bar without brushing up against people.

Townsend approached Tim and grabbed and squeezed Tim's genitals through his clothing for about three to four seconds. Tim dropped Mary's hand and turned to see who grabbed him. Townsend made eye contact and said, "How are you doing?" Tim and Townsend had never met before. Tim lunged at Townsend but was prevented from reaching him by other people in the bar.

Tim chased Townsend out of the bar and then saw a police officer. Tim reported the incident to the officer. The officer contacted Townsend; Townsend admitted that he grabbed Tim's genitals and explained that he did this to "hit on" Tim.

The prosecutor charged Townsend with then-second-degree sexual assault, which was defined as engaging in "sexual contact with another person without the consent of that person." (Formerly AS 11.41.410(a)(1), now AS 11.41.425(a)(7)). Did Townsend touch Tim's genitals "without consent" as that term is defined in Alaska Law? Check your answer at the end of the chapter.

Sexual Assault by Fraud

A defendant who tricks a victim into having sex by impersonating someone else is guilty of sexual assault. This is a substantial change from common law. Historically, sex by fraud was non-criminal. For example, at common law, a twin who tricked his twin brother's wife into having sex was not guilty of common law rape. *See e.g.*, *People v. Hough*, 607 N.Y.S2d 884 (N.Y. 1994). This conduct is criminal under Alaska law. AS 11.41.410(a)(1)(B). Thus, if a victim falls asleep in bed with their lover and, unbeknownst to the victim, another person gets into bed with them, and the victim has "consensual" sex with the person believing the person to be their lover, the person would be guilty of aggravated sexual assault. The government would still need to prove the person took steps to impersonate someone known to the victim, but sex through impersonation is criminal.

Attendant Circumstances – Inability to Consent

There are circumstances when a person is unable to consent as a matter of law. Notably, individuals who are "mentally incapable," "incapacitated," or under the "age of consent." In the eyes of the law, these individuals are unable to make informed decisions, and thus, are unable to consent to otherwise voluntary sexual activity.

Mentally incapable means that the person is suffering from a **mental disease or defect** that renders the person incapable of understanding the nature or consequence of the sexual act, including the potential for harm the victim may suffer. *See* AS 11.41.470(4). Recall that a mental disease or defect means the person is incapable of coping with the ordinary demands of life. AS 12.47.130(5).

This group – those who are either temporarily or permanently mentally incapable – comprise a very small segment of the larger mentally impaired population. Mental incapacity means more than mental illness. The victim must not have the capacity to understand the full range of ordinary and foreseeable social, medical, and practical consequences of sexual activity. **Profound intellectual disability** (formerly called profound mental retardation) falls within this category of mental incapacity. *See e.g.*, *Jackson v. State*, 890 P.2d 587 (Alaska App. 1995).

Incapacitation, on the other hand, means the victim was temporarily incapable of understanding that they were engaged in sexual activity. Normally, this occurs as the result of extreme intoxication, but may also occur because the victim is unconscious or asleep. If the victim is incapable of understanding that they were engaged in the sexual act – either because of voluntary intoxication or unconsciousness (sleep) – the law treats the victim as incapacitated. *See Ragsdale v. State*, 23 P.3d 653, 658 (Alaska App. 2001). The unaware victim cannot consent to the sexual act.

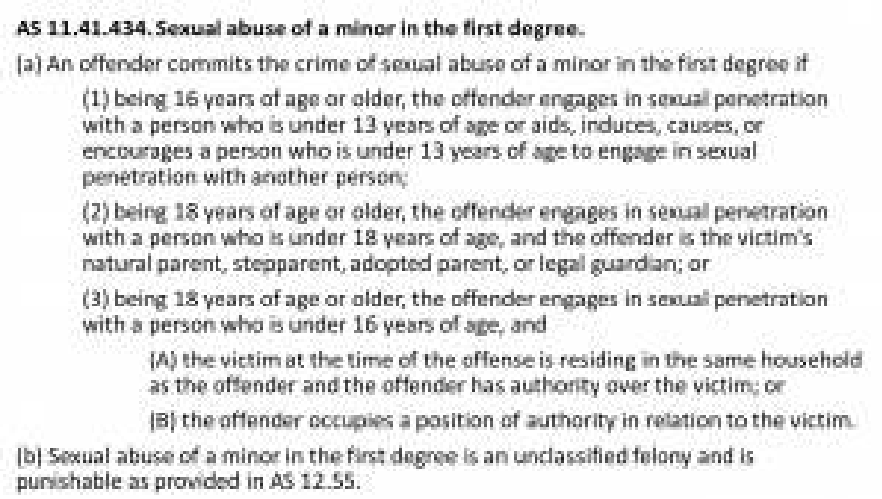
Sexual Abuse of a Minor (Statutory Rape) – Modern Trends

Certain minors, depending on their age, cannot consent to sexual activity. They are incapable of consent as a matter of law. Whereas sexual assault requires affirmative proof of the victim's lack of consent, sexual abuse of minor substitutes the child's age for proof of consent. These statutes punish all acts of sexual activity between adults and minor children, regardless of whether the child consented to the sexual activity or not. Sexual abuse laws protect children from undue, coercive adult influences, and are intended to deter abusers from preying on children.

At common law, **statutory rape** prohibited an adult man from engaging in sexual relations with a child under "the age of consent." *See Statutory Rape*, Black's Law Dictionary (6th ed. 1990). Each state determined the age of consent, typically somewhere between twelve and sixteen years old, as it saw fit. *See* Wayne R. LaFave, *Substantive Criminal Law*, §17.4(c) (3d ed. 2018).

Modern criminal codes, including Alaska's, have largely maintained the overarching policy of statutory rape: children are too socially and emotionally immature to consent to sex with an adult. Generally speaking, a child under the age of 16 years old cannot consent to sexual activity with an older adult. Although sixteen is commonly referred to as "the age of consent," the law is more complicated than the phrase suggests. The criminal code has created a web of laws that prohibit older individuals from engaging in either sexual penetration or sexual contact with younger individuals. The prohibited conduct is dependent on both the age of the victim and the age of the perpetrator. Typically, the law creates a three-year age difference requirement to distinguish young adults and older adults. As an example, look how Alaska's sexual abuse of a minor in the first degree statute outlines the different prohibited conduct and the required ages of both the offender and the victim.

Figure 10.9 Alaska Criminal Code – Sexual Abuse of a Minor in the First Degree (AS 11.41.434)



AS 11.41.434. Sexual abuse of a minor in the first degree.

(a) An offender commits the crime of sexual abuse of a minor in the first degree if

(1) being 16 years of age or older, the offender engages in sexual penetration with a person who is under 13 years of age or aids, induces, causes, or encourages a person who is under 13 years of age to engage in sexual penetration with another person;

(2) being 18 years of age or older, the offender engages in sexual penetration with a person who is under 18 years of age, and the offender is the victim's natural parent, stepparent, adopted parent, or legal guardian; or

(3) being 18 years of age or older, the offender engages in sexual penetration with a person who is under 16 years of age, and

(A) the victim at the time of the offense is residing in the same household as the offender and the offender has authority over the victim; or

(B) the offender occupies a position of authority in relation to the victim.

(b) Sexual abuse of a minor in the first degree is an unclassified felony and is punishable as provided in AS 12.55.

Mistake of Age Defense

Historically, the defendant was held strictly liable for the age of the victim. The defendant's mistaken belief of the victim's age was no defense. In this sense, statutory rape was considered a strict liability offense. It did not matter whether the defendant honestly and reasonably mistook the victim's age or even if the victim represented they were older. If the defendant engaged in sexual activity with a child under the age of consent, the defendant was guilty of statutory rape regardless of the circumstances. *See e.g.*, *State v. Guest*, 583 P.2d 836 (Alaska 1978).

The harshness of this rule has given way to the affirmative defense of the **mistake of age**. *See* AS 11.41.445(b). Now, a defendant charged with sexual abuse can present evidence that they honestly mistook the victim's age (believing the victim was older), and took reasonable measures to verify the victim's age. As with all affirmative defenses, the defendant bears the burden of proving the existence of the defense. As recognized by the Court of Appeals, "it is fair to expect people to exercise caution when choosing a youthful sexual partner. And, if the defendant claims that a mistake was made, it is fair to expect the defendant to prove the reasonableness of that mistake—to prove that the mistake was not the result of intoxication, lack of concern, or other unreasonable behavior." *Steve v. State*, 875 P.2d 110, 123 (Alaska App. 1994), abrogated on other grounds by *Jeter v. State*, 393 P.3d 438 (Alaska App. 2017).

Position of Authority

In 1990, Satch Carlson, an Anchorage high school teacher, had consensual sex with a seventeen-year-old student. Once authorities discovered the sexual relationship, the government criminally charged Carlson with several counts of sexual abuse of a minor. The statutes in effect at that time prohibited adults from having sex with sixteen- and seventeen-year-old minors entrusted to their care "by authority of law." The charges against Carlson were dismissed after an Anchorage Superior Court Judge determined that the statutes prohibited sex with legal guardians, but not *teachers*.

In response to the *Carlson* decision, the Alaska legislature amended the law to prohibit sexual activity between minors and adults in "positions of authority." The legislature intended this provision to encompass not just teachers, but "substantially similar" adults "who are in positions that enable them to exercise undue influence over children." The term **position of authority** means "employer, youth leader, scout leader, coach, teacher, counselor, school administrator, religious leader, doctor, nurse, psychologist, guardian ad litem, babysitter, or a substantially similar position, and a police officer or probation officer other than when the officer is exercising custodial control over a minor." AS 11.41.470(5). This list is not exclusive. Any authority figure that is substantially similar to the positions listed will constitute a person in a position of authority. *See id*.

Sexual Penetration

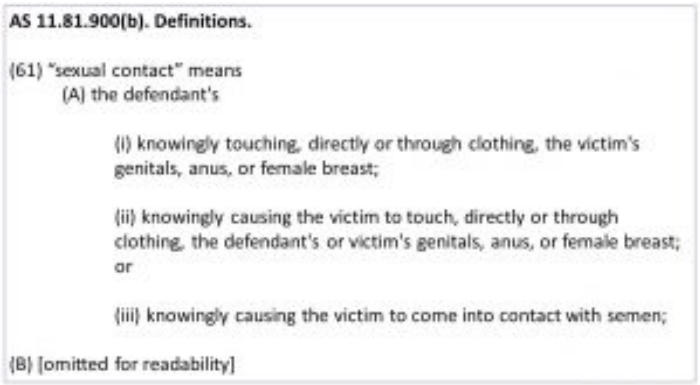
Recall that at common law, rape required "carnal knowledge." Modern criminal codes have eliminated such arcane language and replaced it with sexual penetration (or sexual contact where appropriate). The term **sexual penetration** is very broad, and includes not only genital intercourse, but also cunnilingus, fellatio, and anal intercourse. AS 11.81.900(b)(62). Sexual penetration includes, "*any* intrusion, *however slight*, of an object or any part of a person's body into the genital or anal opening of another person's body."

The definition of sexual penetration is intentionally broad, and not limited to medical interpretation. Thus, any intrusion of the victim's genitals or anus will qualify. For example, the term "vagina" is not a medical term for purposes of sex offenses. Instead, it is used in the broader, colloquial sense. Likewise, "genital" opening is not limited to "vaginal" opening. Female genitalia includes the labia majora, labia minora, and clitoris. In short, the entire female external genital organ. *Mason v. State*, 2004 WL 1418694 (Alaska App. 1994). This distinction is important as most victims, advocates, and criminal justice practitioners use imprecise medical terminology when describing sexual assaults and sexual abuse.

Sexual Contact

Remember that unwanted sexual contact is typically graded lower than sexual penetration. The term **sexual contact** means the touching by the defendant of the victim's genitals, anus, or female breast or the defendant causing the victim to touch the defendant's or victim's genitals, anus, or female breast. AS 11.81.900(b)(61). Sexual contact can occur over or under clothing. The victim need not be undressed for sexual contact to occur. Sexual contact may also occur through the unwanted "contact with semen". *See* Fig 10.10.

Figure 10.10 – Alaska Criminal Code – Sexual Contact (AS 11.81.900(b)(61))


AS 11.81.900(b). Definitions.

(61) "sexual contact" means
(A) the defendant's

(i) knowingly touching, directly or through clothing, the victim's genitals, anus, or female breast;

(ii) knowingly causing the victim to touch, directly or through clothing, the defendant's or victim's genitals, anus, or female breast; or

(iii) knowingly causing the victim to come into contact with semen;

(B) [omitted for readability]

The term "female breast," as contained in the statutory definition of sexual contact, refers to the breasts of all females, including prepubescent girls without developed breasts; therefore, a defendant can be convicted of second-degree sexual abuse of a minor by touching a nine-year-old girl's breasts. *Stephan v. State*, 810 P.2d 564 (Alaska App. 1991). Touching another person's buttocks does not constitute "sexual contact" under Alaska law, but may constitute the crime of harassment. *See* AS 11.41.120; *State v. Mayfield*, 442 P.3d 794 (Alaska App. 2019).

Rape Shield Law

A defendant is not permitted to rely on a victim's promiscuity to prove consent. The idea that since a victim freely consented to have sex with other people, the victim likely consented to sex with the defendant is a long-outdated view of human sexuality. Such

evidence is not admissible. Generally speaking, a victim's *past* sexual conduct has no relevance to a victim's *current* sexual conduct. *Napoka v. State*, 996 P.2d 106 (Alaska App. 2000). This rule is codified as **Alaska's rape shield law.** *See* AS 12.45.045.

The statute is designed to protect the victim from unwarranted invasion into their private life. This includes evidence of the victim's past sexual employment (*e.g.*, adult film star) or sexual orientation. Children are protected from the introduction of their past sexual conduct to the same extent as adults. The rule applies in both sexual assault prosecutions and sexual abuse of a minor prosecutions. If the evidence is built on the inference that the victim freely consented to sex with the defendant because of the victim's sexual past, then the evidence is irrelevant and inadmissible. *See Jager v. State*, 748 P.2d 1172 (Alaska App. 1988). Simply put, a person's prior sexual experience (or lack thereof) is largely irrelevant to whether a person consented to a particular sexual act.

To be clear, the rape shield law only prohibits evidence of a victim's sexual conduct when the purpose of the evidence is to imply the victim willingly engaged in sexual relations with the defendant because the victim willingly engaged in sexual relations with *other* people. It is not an absolute bar to the introduction of the victim's past sexual conduct. If, for example, the victim's past sexual conduct is offered to explain the victim's sexualized behavior, it might be admissible (*e.g.*, to explain why a child knows certain "sexualized" terms) or if offered to show the victim had made a prior false allegation of sexual assault. *See e.g.*, *Worthy v. State*, 999 P.2d 771 (Alaska App. 2000). Likewise, given that consent is based on the "totality of the circumstances surrounding the offense", it is possible that a court would find that a victim's past sexual behavior is relevant in determining whether a particular sexual act was consensual under the circumstances. *See* AS 11.41.470(10).

Example of *Relevant* Past Sexual Conduct of Victim

Amanda and Sam dated for approximately 6 months, during which time, they engaged in consensual sexual intercourse on several occasions. After they break up, Amanda and Sam engage in sexual intercourse. Amanda reports to police that Sam came to Amanda's house and forced her to have sex against her will. Amanda tells the police that she tried to stop Sam from coming into her house, but Sam forced his way in and then forced himself on Amanda. When police interview Sam, Sam admits to having sex with Amanda but contends that the sex was "100% consensual", both before and after their breakup. Sam tells police that he never had non-consensual sex with Amanda. At trial, Sam argues that the entire past sexual relationship between him and Amanda was consensual. Sam wants to tell the jury that Amanda is lying and she is simply mad at him for breaking up with her.

In this case, evidence of Amanda's past sexual conduct with Sam would be admissible. Amanda's past sexual conduct with Sam is not excludable under the rape shield law. Sam is not arguing that Amanda is promiscuous, but instead, he is offering evidence to show that they (Sam and Amanda) had a past, consensual sexual relationship. Sam is properly seeking to use this evidence to show that he reasonably believed that she consented to the sexual encounter at issue given their past relationship. The jury is entitled to know about Sam and Amanda's history of consensual sex in determining whether the sexual encounter at issue was non-consensual. This is not to say that the jury is required to *believe* Sam. Instead, it is simply a recognition that Sam and Amanda's past relationship puts the allegation in context.

Sex Offense Penalties

The penalties for sex offenses are significant. For example, first-degree sexual assault carries a presumptive range of 20 to 30 years for a first felony offender, 30 to 40 years for a second felony offender, and 40 to 60 years for a third felony offender. *See* Figure 1.6. Except for murder, no other crime has such harsh penalties. Even though the legislature enacted significant sentences for sex offenders, the sentences do not constitute cruel and unusual punishment in violation of the Eighth Amendment or the Alaska Constitution. *See Sikeo v. State*, 258 P.3d 906, 908 (Alaska App. 2011). Sex offenders also face severe collateral consequences unseen elsewhere in the criminal justice system.

The reason is two-fold: one, sex offenders, similar to murderers, inflict a nearly unmatched level of harm against victims. Victims of sexual violence suffer long-term trauma, especially when the victims are children. Because of the level of harm caused, punishment tends to focus on incapacitation instead of rehabilitation. Second, many believe sex offenders are more likely to recidivate than other offenders. "[A]s a group, convicted sex offenders are much more likely than other offenders to commit additional sex crimes." *Doe v. Pataki*, 120 F.3d 1263, 1266 (2d Cir. 1997).

Recent research suggests that the recidivism rationale for harsh criminal penalties for sex offenders may be misplaced. Although a detailed discussion is beyond the scope of this book, there is a significant body of research to suggest that sex offenders are actually less likely to recidivate than other sorts of criminals. Data on the recidivism rates for sex offenders released from prison show that

their recidivism rates are relatively low compared to Alaskans convicted of other offenses. *See* Brad A. Myrstol *et. al.*, Alaska Sex Offender Recidivism and Case Processing Study: Final Report, Alaska Justice Statistical Analysis Center (2016); *see also* 2019 Sex Offense Report, Alaska Criminal Justice Commission (2019). To be clear, this is not to suggest that sex offenders should receive less harsh penalties, but simply that the stated rationale that sex offenders are more likely to re-offend may be on shaky ground.

Imprisonment is not the only penalty. A host of direct and collateral consequences flow from a criminal conviction for a sex offense. Certain sex offenders are not eligible for discretionary parole unless the three-judge sentencing panel has expressly made them eligible for parole. AS 12.55.125(i)(1)(F); 33.16.090. Sex offenders also receive a heightened level of treatment, programming, and management by the Department of Corrections, both while in-custody and upon release to community supervision. *See* 2019 Sex Offense Report, Alaska Criminal Justice Commission (2019). Convicted sex offenders are prohibited from holding certain jobs and professional licenses. A complete list of collateral consequences is beyond the scope of this text.

Alaska Sex Offender Registration Act

Sex offenders must also register with the Alaska Department of Public Safety (DPS) under the Alaska Sex Offender Registration Act (ASORA). DPS maintains a publicly searchable, internet-based, central registry of all offenders. The registry provides the offenders' full name, photograph, home address, and type of criminal conviction. ASORA requires sex offenders convicted of a single, non-aggravated sex offense to register as a sex offender for 15 years. AS 12.63.020(a)(2). Lifetime registration is required when a person is convicted of (1) a single aggravated sex offense, or (2) two or more sex offenses. AS 12.63.020(a)(1)(A). The "two or more" sex offenses may be part of the same criminal proceeding. *See Ward v. State*, 288 P.3d 94, 95 (Alaska 2012). Thus, a defendant who commits multiple aggravated sex offenses in one episode will be required to register as a sex offender for life, even if the convictions are the defendant's first criminal convictions.

Although offenders are required to register for significant periods – 15 years or life – depending on the nature of the underlying conviction, an offender is entitled to petition the Superior Court for removal from the registry if the offender can demonstrate that they are no longer a danger to the community. *See Doe v. DPS*, 444 P.3d 116 (Alaska 2019). Offenders who fail to register with DPS are guilty of a new criminal offense: **Failure to Register as a Sex Offender** under AS 11.56.840. The first conviction for failing to register is punishable by up to one year in jail; subsequent convictions are felonies. AS 11.56.835.

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10.6: End-of-Chapter Material

2

End-of-Chapter Material

Robert Henderson

Summary

Assault and battery are often included in the same statute (called assault) but at common law they were separate offenses with distinct elements. Battery was generally a purposeful unlawful harmful or offensive touching without the victim's consent. Assault was an attempted battery. Modern assault includes both assault and battery. Assaults are graded based on the extent of the injury, instrumentality of injury, and the culpable mental state. Misdemeanor assault normally involves minor injury or the reasonable apprehension of minor injury. Assaults are aggravated when a weapon is used or the resulting injury is serious.

Stalking is different from assault as it criminalizes the pattern of behavior that causes fear. Whereas assault requires the victim to be placed in imminent fear, stalking requires a series of repeated nonconsensual contacts that would place a reasonable person in fear of death or serious physical injury. Typical stalking behavior includes following the victim, continually calling or texting the victim, or randomly showing up at the victim's workplace or residence uninvited. Stalking can raise constitutional concerns as it criminalizes conduct that, if conducted in isolation, would be permissible and lawful. Stalking survives constitutional attack, however, because it focuses on the assaultive nature of the defendant's behavior.

Robbery is the purposeful theft of property from the victim's person by force or the threat of imminent physical harm. Robbery is a crime of violence and not a crime against property. Extortion is the purposeful theft of property by a threat of future harm such as bodily injury or exposure of the victim's crime or secret that subjects the victim to hatred, contempt, or ridicule. Extortion is a felony. Coercion is using force (or the threat of force) to compel a person to do (or abstain from doing) a lawful act. Coercion, like robbery and extortion, is a felony.

Kidnapping is the purposeful confinement and asportation (*i.e.*, movement) of a victim for the purpose of obtaining a ransom, taking a hostage, inflicting injury or harm on the victim, interfering with the purpose of government or political function, or committing a separate felony. The defendant's restraint of the victim must be more than merely incidental to the target crime. Courts use a multifactor test to determine if the level of force was incidental.

States vary as to how they categorize and grade sex offenses but all have their origins in common law rape. Common law rape was the unlawful carnal knowledge of a women by a man forcibly and against her will. This definition was very specific and very limited. Alaska categorizes its sex offenses into two separate groups – sexual assault and sexual abuse of a minor (statutory rape). Alaska has eliminated the requirement that the victim resists the sexual act. Alaska has also eliminated the exemption for spousal rape, among others. The modern criminal code recognizes that sexual violence need not be sexually motivated. The crux of sex offenses is that sexual activity occurred without the victim's consent. Without consent requires coercion – the actual use or threatened use of force. Several groups of individuals are incapable of consenting to sexual activity by operation of law, including those who are mentally incapable, incapacitated, and under the age of consent. Sex offenses carry very harsh penalties and numerous collateral consequences. Alaska's rape shield law governs the admissibility of evidence of the victim's past sexual conduct during a sexual assault or a sexual abuse of a minor trial.

Key Takeaways

- At common law, assault and battery were separate and distinct crimes. Battery was the physical contact that resulted in injury or offensive touching. Assault was the attempted battery or intentionally placing another person in fear of a battery. Some jurisdictions still recognize the distinction.
- Alaska has consolidated assault and battery into the single offense classification of "assault."
- Alaska recognizes four degrees of assault, each separated by the extent of injury, the instrumentality of the injury, and the defendant's culpable mental state.
- Physical injury means a physical pain or an impairment of physical condition.

- Serious physical injury means serious and protracted disfigurement or impairment or a physical injury caused under circumstances creating a substantial risk of death.
- Dangerous instrument is an attendant circumstance that generally evaluates a misdemeanor assault to a felony assault.
- Dangerous instrument must create a risk of actual risk of death, not a hypothetical risk of death.
- To constitute assault, the victim must be injured or aware of the imminent threat of harm. The defendant need not purposely threaten a victim, but must at least act recklessly.
- Robbery requires a taking accomplished by force or threat of imminent force. Extortion requires a taking by the threat of future harm and coercion criminalizes a threat of force to compel a person to do (or not do) something they have the legal right to do (or not do). All three are crimes of violence, not crimes of property.
- There are two degrees of robbery. First-degree robbery includes all armed robberies; second-degree robbery includes all robberies in which force is used or threatened to be used. Robbery is an inherently dangerous felony for felony murder.
- Kidnapping is the intentional nonconsensual restraint of another person.
- Kidnapping is the purposeful confinement and asportation (movement) of a victim.
- The defendant's restrain of the victim has to be more the merely incidental to the target crime.
- Common-law rape was a capital offense, did not include rape of a spouse, and required extreme resistance by the victim.
- Alaska has modernized its sexual assault statutes to criminal spousal rape, eliminate the requirement for extreme resistance, and make the statutes gender-neutral.
- Sexual assault requires the sexual activity occur without consent of the victim.
- The culpable mental state of sexual assault is knowingly engaging in sexual conduct with reckless disregard for the victim's consent.
- Several groups are unable to consent by operation of law, including someone who is mentally incapable, someone who is incapacitated, and children.
- Sex offenses have very severe penalties, based on the harm caused to the victim and because of the belief that sex offenders are likely to recidivate. However, research shows that sex offenders are actually less likely to recidivate than other sorts of criminals.

Answers to "You be the Judge" Exercises

From "You be the Judge" in Assault:

1. A reasonable juror could find that Dulier used the flare gun in a manner that created a substantial risk that Sears would suffer serious physical injury, *i.e.*, "physical injury that causes serious and protracted disfigurement, protracted impairment of health, [or] protracted loss or impairment of the function of a body member or organ[.]" Sears testified that if the other patron had not pushed him, the flare would have gone straight into his neck rather than ricocheting off the side of his neck. And even with this last-second intervention, Sears still had significant injuries: a bloody gouge, a burn, a bruise on his neck, a swollen throat, and difficulty speaking for several days. *See Dulier v. State*, 451 P.3d 790, 792 (Alaska Ct. App. 2019).

From "You be the Judge" in Stalking:

1. This hypothetical comes directly from *Peterson v. State*, 930 P.2d 414, 428 (Alaska App. 1996). The court explains that the skinheads would not be guilty of stalking even though,

   "the government could plausibly claim that the defendant, through repeated acts of nonconsensual contact as defined in AS 11.41.270(b)(3), has placed another person in fear of injury or death (either for themselves or for a family member). Further, the government could plausibly claim that the defendant consciously disregarded a substantial and unjustifiable risk that his conduct would have this result. Yet the defendant's conduct was not directed at anyone; that conduct consisted of nothing more than riding the bus or pursuing a livelihood."

From "You be the Judge" in Robbery:

1. In order to prove the crime of second-degree robbery, the State was required to prove that Moto was "taking or attempting to take property from the immediate presence and control of another" person, and that he "use[d] or threaten[ed] the immediate use of force" upon another person with the "intent to … prevent or overcome resistance to the taking … or the retention of the

property." Moto took the computer from Vesotski's "immediate presence or control" because Vesotski was lying in bed and the computer was approximately ten to twelve feet away on his desk. Property is in a victim's 'immediate presence or control' if the property is 'close enough to the victim and sufficiently under his control that, had the victim not been subjected to violence, he could have prevented the taking. Also, Moto used force when he told Vesotski he would kill him if Vesotski did not put his head back on his pillow, or if Vesotski reported the incident to the police. These threats prevented Vesotski from retaining his computer. *Moto v. State*, 2010 WL 4138413 (Alaska App. 2010).

From "You be the Judge" in Sexual Violence:

1. Under the current definition of "without consent" this conduct would qualify as a third-degree sexual assault. AS 11.41.425(a)(7). The law does not require coercion, force, or the threat of force to qualify as "sexual contact with another person without consent of that person." *See id*. This is a recent change to Alaska law. In 2022, the Alaska legislature changed the definition of "without consent". Before the change, this conduct would not constitute a sexual assault. In *State v. Townsend*, 2011 WL 4107008 (Alaska App. 2011), the Court of Appeals explained that the phrase "without consent" under the prior law required the State to prove that the defendant did something more than the simple forcible touching. The State was required to show that the victim was compelled to submit to the sexual touching because the defendant coerced the victim to submit to the sexual assault by the use of force or the imminent threat of force. Thus, under the prior law, Townsend did not touch Tim "without consent" as that term was defined in the criminal code. "The evidence shows that, when Townsend assaulted him, [Tim] was not intimidated but reacted immediately to terminate the assault." You can read the entire opinion online using your UA credentials.

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CHAPTER OVERVIEW

11: Crimes Against Property

11.1: Theft and Related Offenses

11.2: Burglary and Trespass

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11.1: Theft and Related Offenses

Although violent crimes like murder, sexual assault, and robbery are considered particularly heinous, **crimes against property** can cause enormous loss and suffering, and even injuries or death in some extreme situations. This chapter explores different types of common property crimes, including **theft**, crimes that invade property like **burglary** and **trespass**, **arson,** and finally, criminal mischief (**vandalism**).

While this chapter explores crimes against property as a category, not all property is created equal. The law distinguishes crimes depending on the type of property interfered with. Generally, the property falls into one of three categories: real property, personal property, and personal services. **Real property** is land and anything permanently attached to the land, like a building. **Personal property** is any tangible or intangible item, but which is movable. **Tangible property** includes items like money, jewelry, vehicles, clothing, and the like. **Intangible property** means an item that has value, even though it cannot be touched or held, like stocks and bonds. **Personal services** include any activity provided by a provider of services.

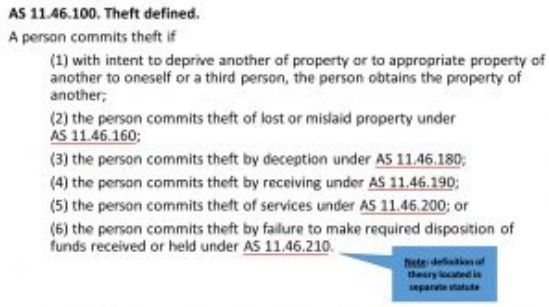
Consolidated Theft Statutes

Common law theft was separated into three categories: larceny, embezzlement, and false pretenses. The categories differed in the type of property stolen and the method of stealing. Modern jurisdictions have largely abolished these common law categories. Instead, modern criminal codes rely on **consolidated theft statutes**, which provide a uniform grading system dependent largely on the value of the stolen property or the type of property stolen. What follows is a discussion of theft as defined under Alaska's modern consolidated theft offenses.

Alaska's Modern Consolidated Theft Offenses

The primary purpose of Alaska's statutory theft scheme is the consolidation of the common law "theft-like" crimes, including larceny, larceny by trick, embezzlement, theft of mislaid property, false pretenses, receiving stolen property, and theft of services. The Alaska Legislature eliminated all of these distinct crimes. Alaska now defines "theft" in six separate ways, but largely codifies the former law. Figure 11.1 (AS 11.46.100) outlines the conduct constituting theft. Note that the statute only defines what "theft" is; a person accused of theft is not charged under AS 11.46.100. Instead, the accused thief is charged under one of the *degrees* of theft (explained below).

Figure 11.1 Alaska Criminal Code – Theft defined



These subsections refer to individual statutes describing how a particular form of theft may be committed. Each particular form is a **theory of theft**. A theory of theft is *how* the theft was committed – the *degree* of the theft is determined by the value or item(s) stolen.

Although theft is defined in one of the above-six ways, it is **graded** into four degrees for purposes of punishment, depending primarily on the value of the property or services that was the subject of the theft. For example, if the property stolen is valued at more than $25,000, the crime is theft in the first degree, a Class B felony. AS 11. 46.120. On the other hand, the crime of second-degree theft, a class C felony, is committed when the property stolen is valued at more than $750 but less than $25,000 or the item stolen is a firearm or explosive, regardless of the value. *Compare* AS 11.46.130(a)(1) and 11.46.130(a)(2). Thefts under $750 are treated as misdemeanors.

As you will see, theft spans a wide range of different behavior. The Legislature specifically defined theft broadly to eliminate the confusing distinctions between historical theft offenses. Common law was frequently plagued with confusing and narrow distinctions between the various forms of larceny. *See e.g. Williams v. State*, 648 P.2d 603 (Alaska App. 1982). The legislature's change makes sense: at the end of the day, a victim has suffered loss at the hands of a thief. The defendant's criminal liability should not be dependent on what the theft is *called*. Legally speaking, a defendant charged with theft is on notice that they may be convicted of theft under any of the different theories. What follows is a summary of the six theories of theft.

Obtains Property of Another with the Intent to Deprive

The first theory of theft is when a suspect obtains the property of another with the intent to either: (a) deprive another of the property, or (b) appropriate property of another. This theory encompasses both common law larceny and common law embezzlement.

This theory, like most theories of theft, is a specific intent crime. The suspect must have a conscious objective to **deprive** the rightful owner of the property. AS 11.46.990(8). Thus, "borrowing" property with the intent to return it later does not constitute theft. Theft requires that the defendant either *permanently* deprive the owner of the property's use or deprive the owner of the property for a period of time whereby the property's economic value is lost.

A person can deprive another of property in several ways, including disposing of the property so that it is highly unlikely that the rightful owner will get it back, not returning it unless the owner pays a reward for its return, or transferring any interest in the property. For example, imagine a thief who uses a stolen generator for several days and then throws it into a lake to hide the evidence of the crime. In this scenario, the thief acts with the "intent to deprive another person of property" since he disposed of the property in a way that it is unlikely that the rightful owner will get it back.

Not only must the thief intend to deprive the owner of the property, but the thief must also **obtain** the property. Obtain simply means that the defendant exercised control over the property. This would include taking, withholding, or appropriating property of another. There is no requirement that the property be carried away as was required under common law larceny (sometimes called "asportation"). In modern times, this means that the property need not be moved to constitute theft. A defendant can **appropriate property** if the defendant controls the property so that the economic benefit goes to the defendant and not to the rightful owner, or the defendant disposes of the property for the benefit of himself. AS 11.46.990(2).

Simon v. State, 349 P.3d 191 (Alaska App. 2015)

In the following case, the Court of Appeals discusses how the legal definition of "obtains" (for purposes of theft) is broader than one may initially think. *Simon v. State* analyzes the *actus reus* of theft in the context of shoplifting. As you read the opinion, notice how the court points out that a shoplifter need not actually deprive a store of their property to be guilty of theft. If a shoplifter exercises unauthorized control over property with the intent to deprive, the essential elements of theft have been satisfied.

349 P.3d 191
Court of Appeals of Alaska.
Harold Evan SIMON, Appellant,
v.
STATE of Alaska, Appellee.
May 8, 2015.

OPINION
MANNHEIMER, Judge.

The earliest, most classic definition of theft is laying hold of property that you know belongs to someone else and carrying it away without permission, with the intent to permanently deprive the owner of the property. The present case requires us to examine how this general notion of theft applies to modern retail stores—stores where customers are allowed to take merchandise from the shelves or display cases, and walk around the store with these items, until they ultimately pay for the items at a checkout station.

The State contends that if a person intends to take the property without paying for it, then the crime of theft occurs at the moment the person removes an article of merchandise from a shelf or display case within the store. The defendant, for his part, contends that the crime of theft is not complete until the person physically leaves the store.

For the reasons explained in this opinion, we conclude that the true answer lies in between the parties' positions: In the context of a retail store where customers are allowed to take possession of merchandise while they shop, the crime of theft is complete when a person, acting with the intent to deprive the store of the merchandise, performs an act that exceeds, or is otherwise inconsistent with, the scope of physical possession granted to customers by the store owner.

In the present case, the parties disagreed as to precisely where the defendant was located when he was stopped by the store employee: whether he had reached the outer door of the store, or whether he was still inside the vestibule leading to that outer door, or whether he was merely approaching that vestibule. But it was undisputed that the defendant had already gone through the check-out line, and that he had paid for a couple of inexpensive items while, at the same time, either hiding or disguising other items of merchandise—items that he then carried toward the exit.

Even viewed in the light most favorable to the defense, this conduct was inconsistent with the scope of physical possession granted to customers by the store owner. This conduct therefore constituted the *actus reus* of theft—the physical component of the crime. This conduct, coupled with the mental component of the crime (intent to deprive the store of the property), made the defendant guilty of theft. We therefore affirm the defendant's conviction.

Underlying facts

The defendant, Harold Evan Simon, went into a Walmart store in Anchorage. Like many other retail merchants, Walmart allows its customers to exert control over its merchandise before making a purchase: customers are allowed to roam the aisles of the store, to handle and examine the items that are offered for sale, and to take these items with them (either in their hands, or in a basket or shopping cart) as they walk through the store, before going to the cash registers or scanning stations to pay for these items.

While Simon was walking through the Walmart store, he took a jacket from a sales rack, put it on, and continued to wear it as he walked through the store. Simon also took a backpack and started carrying it around. At some point, Simon placed several DVDs in the backpack. Simon also picked up a couple of food items. Finally, Simon went to the row of cash registers. He paid for the food items—but he did not pay for the jacket, the backpack, or the DVDs hidden in the backpack.

Simon then left the cash register area and headed for the store exit. Before Simon reached the exit, a Walmart employee approached him and detained him. Simon handed the backpack to the employee, and then he removed the DVDs from the backpack. Simon told the Walmart employee, "There you go; there's your stuff. I'm sorry; I was going to sell it." A short time later, the police arrived, and they noticed that Simon's jacket was also unpaid-for. (It still had the Walmart tags on it.)

Based on this incident, and because of Simon's prior convictions for theft, Simon was indicted for second-degree theft under AS 11.46.130(a)(6) (i.e., theft of property worth $50 or more by someone with two or more prior convictions for theft within the previous five years). Simon ultimately stipulated that he had the requisite prior convictions, so the only issue litigated at Simon's trial was whether he stole property worth $50 or more.

The State presented the evidence we have just described. Simon presented no evidence. In his summation to the jury, Simon's attorney focused on potential weaknesses in the State's proof, and he argued that Simon might have been so intoxicated that he lacked the culpable mental state required for theft (the intent either to deprive Walmart of the property or to appropriate the property for himself). Additionally, toward the end of his summation, Simon's attorney suggested that Simon "didn't deprive anyone of property" because "he didn't even enter the vestibule [leading to the final exit door]".

This latter argument mistakenly conflated the "conduct" component and "culpable mental state" component of the crime of theft. The State was not required to prove that Simon *actually* deprived Walmart of its property. Rather, the State was required to prove that Simon exerted control over the property with the *intent* to deprive Walmart of its property (or to appropriate the property to his own use). See AS–11.46.100(1).

But it appears that the defense attorney's argument struck some of the jurors as potentially important—because, during its deliberations, the jury sent a note to the judge in which they asked about the vestibule. The jury's note read: "At what point does [the] defendant 'exert control over the property of another' [in] reference to the vestibule area … [and] # 20 of [the jury] instructions[?]"

(The jury instructions informed the jurors, in accordance with AS 11.46.100(1) and AS 11.46.990(12), that before Simon could be found guilty of theft, the State had to prove that Simon "exert[ed] control over the property of another".)

After conferring with the parties, and without objection from Simon's attorney, the trial judge responded to the jury's question [by stating,

The issue for you to decide is whether the State proved, beyond a reasonable doubt, that the defendant intended to take the items from Walmart without paying for them, without regard to any particular area where he was confronted by the Walmart employee.]

[…]

Shortly after receiving [this] reply from the judge, the jury found Simon guilty of theft.

Six days later, Simon's attorney filed a motion for a new trial, arguing that the judge had committed reversible error in his answer to the jury's question. Even though Simon's attorney had not objected to the wording of the judge's answer (indeed, Simon's attorney had actually contributed to the wording of the judge's answer), the attorney now contended that there was a flaw, amounting to plain error, in the wording of the first sentence of the second paragraph.

According to the defense attorney, that sentence should have been worded, "*One* issue for you to decide …", rather than "*The* issue for you to decide …", because more than one issue was contested at Simon's trial. The defense attorney pointed out that he had contested the State's evidence regarding Simon's culpable mental state, and that he had also argued that Simon might only be guilty of attempted theft, rather than the completed crime.

[…]

Our call for supplemental briefs on how to define the actus reus of theft in this context, and the parties' positions

Although the judge's answer to the jury was not flawed in the way Simon contended in his opening brief, the judge's answer was potentially flawed in another way—because, depending on how the phrase "exert control over property of another" is defined in the context of a retail store, Simon's location at the time he was apprehended might possibly be the factor that distinguished a completed act of theft from an attempted theft.

We therefore asked the parties to submit supplemental briefs on the issue of what, exactly, is the *actus reus* of theft in the context of a retail store where customers are allowed to take possession of items of merchandise while they shop.

In its supplemental brief, the State argues that if a person intends to take an article of merchandise without paying for it, then the crime of theft is complete at the moment the person first "exerts control" over that merchandise—by which the State means the act of taking the item from its shelf or display case. Simon, on the other hand, argues that even if a person takes an article of merchandise off the shelf with the intent to steal it, the crime of theft is not complete until the person physically leaves the store with the merchandise.

Why we conclude that, in this context, Alaska's definition of theft requires proof that the defendant did something with the merchandise that was outside the scope of, or otherwise inconsistent with, the possession authorized by the store

The general definition of the crime of theft is contained in AS 11.46.100(1). Under this definition, theft occurs if a person "obtains the property of another", acting with the intent "to deprive another of property or to appropriate property of another to oneself or a third person".

For purposes of the issue raised in Simon's case, the key portion of this definition is the word "obtains". This word is defined in AS 11.46.990(12); the relevant portion of that definition is: "to exert control over property of another".

In situations where the accused thief had no right at all to exert control over the other person's property, this definition expresses our traditional notion of theft. It describes what most of us think of when we hear the word "theft"—situations where a thief picks up someone else's property and makes off with it.

The State contends that this definition applies equally to the circumstances of Simon's case. The State argues that a person in a retail store "exerts control" over an item of merchandise when they pick it up and take it from the shelf or display case. Thus, if a person performs this action with an intent to steal the item, the crime of theft is complete—even if the person is apprehended before they ever attempt to leave the store.

It is true that, in common usage, one might say that shoppers "exert control" over the items that they take from the shelves and put in their shopping baskets (or carry in their hands). But the State's proposed interpretation of the statute is inconsistent with the traditional common-law approach to theft.

Our present-day crime of theft covers conduct that, at common law, was viewed as two different offenses: larceny and embezzlement.

The common-law crime of larceny covered classic instances of theft, and it required proof of a "trespassory taking". That is, the government was required to prove that the defendant committed a trespass—violated someone else's property rights—when they exerted physical control over the property.

The English judges were willing to stretch the concept of trespassory taking to cover situations where the defendant acquired possession by fraud—*i.e.*, situations where the owner of the property voluntarily gave possession (but not title) to the defendant because of the defendant's lies. But the common-law crime of larceny did not apply to situations where, in the absence of fraud, the owner voluntarily allowed another person to take possession of the property.

For example, a wealthy person might entrust a butler or maid with daily custody of their silverware, or they might take the silverware to a shop and temporarily leave it with the employees for polishing or cleaning. Or, turning to more modern situations, people who are about to purchase a house or other real estate will ordinarily leave a large sum of money in escrow with a third party (a bank or an escrow company), with instructions that the money be transferred to the seller if the deal is successful. And the owners of businesses ordinarily entrust their bookkeepers with checkbooks or access codes that allow the bookkeepers to pay bills, pay employees' salaries, and otherwise disburse the company's funds for business purposes.

To cover situations where theft occurred after the owner of the property voluntarily allowed one or more people to exert control over the property for a particular purpose (or range of purposes), a new crime was created: "embezzlement".

In these situations, one might reasonably say that the employees or custodians were already "exerting control" over the owner's property (with the owner's permission) before they stole it. Accordingly, one might argue that these employees or custodians became guilty of embezzlement at the very moment they formed the *mens rea* of the crime—the moment they *decided* to deprive the owner of the property—even if they performed no further action toward this goal.

But one of the axioms of the common law was that a person should not be punished for their thoughts alone. Thus, in prosecutions for embezzlement, proof of the defendant's larcenous thoughts was not enough: the common law required proof that the defendant's *conduct* departed in some way from the conduct of someone who was dutifully upholding the property owner's trust (and that this conduct was prompted by an accompanying intent to steal). The government was required to prove that the defendant exerted *unauthorized* control over the property—*i.e.*, engaged in conduct with the property that was inconsistent with the type or scope of control that the property owner had allowed.

When the drafters of the Model Penal Code created the crime of "theft" (a crime that was intended to encompass and modernize the common-law crimes of embezzlement and larceny in its various forms), the drafters expressly included this concept of exerting unauthorized control.

Model Penal Code § 223.2(1), the provision that defines the crime of theft as it relates to movable property, declares that a person is guilty of theft if the person "unlawfully takes, *or exercises unlawful control over*, movable property of another with purpose to deprive him thereof." (Emphasis added) And in Section 2 of the Comment to § 223.2, the drafters emphasized that the crime of theft requires an *unauthorized* taking or an *unauthorized* exercise of control:

The words "unlawfully takes" have been chosen to cover [all] assumption of physical possession or control without consent or authority…. The language "exercises unlawful control" applies at the moment the custodian of property begins to use it in a manner beyond his authority…. The word "unlawful" in each instance implies the [actor's] lack of consent or authority [for the taking or the exertion of control].

American Law Institute, *Model Penal Code and Comments, Official Draft and Revised Commentary* (1962), pp. 165–66.

In *Saathoff v. State*, 991 P.2d 1280, 1284 (Alaska App.1999), this Court recognized that this provision of the Model Penal Code "appears to be the source of the definition of 'obtain' codified in AS 11.46.990[(12)]—'to exert control over property of another'."

But unlike the vast majority of other states that enacted theft statutes based on the Model Penal Code, the drafters of Alaska's criminal code did not include the words "unauthorized" or "unlawful" when they defined the word "obtain". Instead, the drafters defined "obtain" as simply "to exert control over property of another". *See* Tentative Draft 11.46.990(6), Alaska Criminal Code Revision Subcommission, Tentative Draft, Part 3 ("Offenses Against Property"), p. 98.

There is nothing in the Tentative Draft of our criminal code explaining (or even commenting) on the drafters' omission of "unauthorized" or "unlawful". There is only a derivation note, saying that Alaska's definition was based on the Oregon theft statutes—that it came from Oregon Statute 164.005. *Id.* at 104.

This Oregon statute uses the word "appropriate" rather than the word "obtain" to describe the *actus reus* of theft. But, like Alaska's definition of "obtain", the Oregon definition of "appropriate" does not include the words "unauthorized" or "unlawful":

"Appropriate property of another to oneself or a third person" or "appropriate" means to:

(a) Exercise control over property of another, or to aid a third person to exercise control over property of another, permanently or for so extended a period or under such circumstances as to acquire the major portion of the economic value or benefit of such property; or

(b) Dispose of the property of another for the benefit of oneself or a third person.

But even though this statutory language does not expressly include the modifiers "unauthorized" or "unlawfully", the Oregon courts have construed this language to require proof that, when the defendant "appropriated" the property of another, the appropriation was unauthorized or unlawful—in the sense that it constituted a "substantial interference with [another person's] property rights", *State v. Gray*, 543 P.2d 316, 318 (1975), or that it constituted an "unauthorized control of property", *State v. Jim*, 508 P.2d 462, 470 (1973).

The Oregon Court of Appeals' decisions in *State v. Gray* and *State v. Jim* were issued before the Alaska Criminal Code Revision Subcommission drafted our theft provision in 1977. Thus, when the drafters of the Alaska theft statutes composed our definition of "obtain" (based on the Oregon statute), the Oregon courts had already construed their statute to require proof of an *unauthorized* exertion of control (even though the statute did not explicitly mention this requirement).

For these reasons, we hold that Alaska's definition of "obtain", AS 11.46.990(12)(A), includes a requirement that the defendant's exertion of control over the property was unauthorized. This interpretation of the statute is supported by the principles of the common law, it is consistent with the law of Oregon (the state from which our statute was immediately derived), and it brings Alaska's law of theft into conformity with the law of every other jurisdiction (at least, every other jurisdiction we are aware of) that has enacted theft statutes based on the Model Penal Code.

Application of this law to Simon's case

We have just held that the *actus reus* of theft requires proof, not just that the defendant exerted control over someone else's property, but that this exertion of control was unauthorized. […] Depending on the facts of a particular case, it might make a difference where a shoplifter is apprehended—because there might be cases where defendants could plausibly argue that they had not yet taken the merchandise anywhere that was inconsistent with the scope of their implicit authority as customers.

On this point, we wish to point out that even though a defendant's physical location when apprehended may be *relevant* to the issue of whether their exertion of control was unauthorized, physical location is not necessarily determinative. There are other types of conduct that a person can engage in, within the confines of a retail store, that are inconsistent with a customer's scope of authority. See, for example, *State v. T.F.*, 2011 WL 5357814 (Wash.App.2011), where the Washington Court of Appeals upheld the theft conviction of a defendant whose female accomplice hid an item of merchandise under her clothes, even though the defendant and the accomplice never left the store:

T.F. handed the belt to [the accomplice] R.M., [who,] rather than carrying it in the open, … exerted unauthorized control over the belt by placing the belt under her shirt and starting toward the store's exit. Concealing the belt in this way was an act inconsistent with the store's ownership of the item…. On these facts, the trial court could have found that a third degree theft had been committed.

T.F., 2011 WL 5357814 at *2.

Turning to the facts of Simon's case, we conclude that any technical flaw in the judge's response to the jury was harmless beyond a reasonable doubt.

As we have explained, there was a dispute in Simon's case as to precisely where Simon was located when he was stopped by the store employee. But under any version of the evidence, Simon had already gone through the check-out line—where he paid for a

couple of food items while, at the same time, either hiding or disguising the jacket, the backpack, and the DVDs he had taken—and he was headed toward the exit when he was apprehended.

Even viewed in the light most favorable to the defense, Simon's conduct constituted the *actus reus* of theft. His conduct was inconsistent with the scope of possession granted to customers—regardless of whether Simon had reached the outer door, or even the entrance to the vestibule, when he was stopped. Thus, under the specific facts of Simon's case, the judge's response to the jury was correct: any variation in the testimony on this point was irrelevant to Simon's guilt or innocence of theft.

Simon also argues on appeal that the jury instructions on the lesser offense of attempted theft were flawed. Given our resolution of the preceding issue, any error in the jury instructions on attempted theft was harmless.

[…]

Conclusion

The judgement of the superior court is AFFIRMED.

Theft of Marital Property

To commit most forms of theft, the defendant is required to obtain **property ofanother**. Property of another means property that the defendant is not privileged to infringe. AS 11.46.990(6). You cannot steal your own property, but it is no defense that the property stolen was previously stolen (*i.e.*, the victim was himself a thief). Stealing from a thief is still theft.

But what about jointly owned property, like marital assets? Marital assets include all property earned by either spouse during the marriage. The property, even if earned by one spouse, is owned jointly with the other spouse. Under Alaska law, commonly held property of a married couple constitutes "property of another," even as between two spouses. Thus, a spouse can steal property from a co-spouse, if they do so with the intent to permanently deprive the spouse of the property. However, such a case is rare. As the Court of Appeals noted in *LaParle v. State*, 957 P.2d 330 (Alaska App. 1998),

This is not to say that a husband or wife commits theft whenever they spend funds from a joint checking account without the other spouse's knowledge or permission, or whenever they use common funds to make a purchase or an investment that the other spouse does not approve of. Before a husband or wife can be convicted of stealing marital property, [Alaska law] requires the government to prove that the defendant "[was] not privileged to infringe" the other spouse's interest. In most instances, both spouses have equal right to possess, use, or dispose of marital property. Thus, one spouse's unilateral decision to draw funds from a joint checking account or to give away or sell a marital possession normally will not constitute theft, because the actor-spouse will have had a privilege to infringe the other spouse's interest in the property.

See id. at 334.

Property Subject to a Security Interest

With regard to property subject to **a security interest**, the code provides that the person in lawful possession of the property shall have the superior right of possession. This is true even if legal title lies with the holder of the security interest pursuant to a conditional sales contract or security agreement. Although this sounds hyper-technical, in essence, *unless there is an agreement to the contrary*, such as a sales contract, the legal owner of a vehicle (*e.g.*, bank) cannot repossess the vehicle from the registered owner for failure to make payments without first seeking a writ of assistance from the court. Of course, if the sales contract provides for a right of non-judicial repossession, then the legal owner need not seek court intervention.

Theft of Lost or Mislaid Property

The second theory of theft is theft of lost or mislaid property. AS 11.46.160. If a defendant obtains property in a manner knowingly that the property is lost, mislaid, or delivered by mistake, the person is guilty of theft. The defendant must have the specific intent to permanently deprive the rightful owner of the property and fail to make **reasonable efforts** to find the owner. Reasonable efforts include notifying the property owner or law enforcement.

Example of Theft of Lost or Mislaid Property

John receives a check from his friend for $10. John goes to the bank and cashes the check. The teller inadvertently gives John $100 (as opposed to $10). Once John knows of the mistake, he is required to return the $90. If John takes steps to deprive the bank of the

money (by hiding it under his porch), he may be prosecuted for theft.

Theft by Deception

Theft by deception is similar to the common law crime of **false pretenses**. AS 11.46.180. Some states refer to this crime as Larceny by Trick. At common law, a person committed the crime of false pretenses if the person obtained title and possession of property by making a false representation about a material fact with the intent to defraud the property owner. The gravamen of false pretenses was the uttering of a deliberate factual misrepresentation to obtain property. The revised code focuses on deception. **Deception** covers a broad range of conduct designed to create a false impression intended to obtain property. AS 11.81.900(b)(18). For example, a defendant is guilty of theft by deception if they befriend an older adult and tell the person a series of lies in an effort to obtain their money. *See e.g.,Linne v. State*, 674 P.2d 1345 (Alaska App. 1983). Prosecutions of **elder fraud** can be grounded in this theory of theft.

Theft by Receiving

Theft by receiving, the fourth theory of theft, occurs if a person buys, receives, retains, conceals, or otherwise disposes of stolen property with *reckless disregard* that the property was stolen. AS 11.46.190. Within the criminal milieu, this person is commonly referred to as a **fence** – a person who knowingly buys and sells stolen property. But for criminal liability to attach, the defendant need not "know" that the property was stolen. If the defendant consciously disregards an unjustifiable risk that the property is stolen (*i.e.*, recklessness), the defendant is guilty of theft. **Receiving** is broadly defined and includes acquiring possession or title to the property. The *actus reus* of the theory is the retaining of stolen property. A defendant who innocently takes possession of stolen property, unaware that it has been stolen, and later learns the true origins of the property is guilty of theft at the moment they retain the known stolen property. *See Saathoff v. State*, 991 P.2d 1280 (Alaska App. 1999) *affirmed* 29 P.3d 236 (Alaska 2001). In essence, theft by receiving is not a continuing offense. The theft is complete once the defendant decides to keep an item aware that it is stolen.

Example of Theft by Receiving

George needs a new flat screen television for his apartment. George buys a large, 4K ultra-flat screen television from a guy in an alley for $50. (Similar televisions retail at $2000 brand new). The guy won't tell George his name, won't tell him where the television came from, and tells George to ignore the "Property of UAA" sticker that is on the back of the television. In this example, George is guilty of theft by receiving if he decides to buy the television. George acted recklessly when he purchased the television.

Theft of Services

Recall that personal services are different than real or personal property. Personal services include such things as labor, professional services, transportation (such as a taxi ride), telephone service, entertainment, food, and lodging. Theft of services includes obtaining services by deception, force, theft, or other means of avoiding payment for the services. AS 11.46.200. For example, improperly connecting to a video streaming service (*e.g.*, Netflix®) would be theft of services, even if you *never watched* a single Netflix® show. *Cruz-Reyes v. State*, 74 P.3d 219 (Alaska App. 2003). It also includes absconding without paying for a hotel, restaurant, or other similar services, and such conduct is *prima facie* evidence that the services were obtained by deception. Theft of services includes when a person improperly diverts services under their control to their benefit. For instance, the foreman of a painting crew who has his subordinates paint his house on company time. The foreman is guilty of theft of services.

Theft by Failure to Make Required Disposition of Funds Received or Held

The final theory of theft covers the situation where a person receives property by promising to dispose of it in a certain way and fails to fulfill the obligation. Typically, this occurs when an employer withholds specific amounts of money from an employee's paycheck for taxes and fails to pay the necessary taxes, and instead simply keeps the money for the employer's own benefit.

Aggregation of Amounts

Because the value of the property stolen is critical for determining which degree of theft has been committed, and consequently the penalty, Alaska law specifies how to determine value. Value generally means the **market value** of the property, or if that cannot be

ascertained, the **replacement cost** of the property. Further, if a series of thefts are committed "under one course of conduct," the thefts are aggregated (added together) to determine the total value. AS 11.46.980.

Example of Aggregation

A police officer apprehends a fence (an individual who knowingly purchases stolen property and then resells the items to others), and the investigation proves that the fence purchased the stolen items from the same person over a relatively short period of time. If the stolen items have individual values of $100, $200, $500, and $400, the defendant can be charged with felony theft since the total value of the property was $1200 (remember that felony theft is any theft over $750). The property values can be aggregated.

Theft From the Person (Purse Snatching)

Recall that there are circumstances in which the distinction between robbery and theft is fuzzy. Robbery requires more than "incidental or minimal" force. A defendant who intentionally bumps into a person in an effort to distract the victim from a surreptitious theft does not commit the crime of *robbery*. Instead, if the property is taken "from the person of another," the defendant is guilty of second-degree theft. The law treats non-forcible thefts (*i.e.*, pickpocketing) as felony theft, regardless of the value of the stolen property, in part because of the danger associated with using *any* force to accomplish a theft. AS 11.46.130(a)(3). A purse snatching constitutes felony theft, not felony robbery, unless the amount of force used was non-minimal.

Non-Consolidated Theft Offenses

In addition to consolidated theft offenses (discussed above), the code also includes several crimes that appear similar to theft on their face, but are used to prosecute specific circumstances. For example, the code criminalizes issuing a bad check. AS 11.46.280. A person commits the crime of issuing a bad check if the defendant knows that it will not be honored by the bank. This statute does not require the defendant act with the intent to defraud or that the defendant actually obtain the property. A detailed examination of the various non-consolidated theft offense is beyond the scope of this book. Alaska's non-consolidated theft offenses can generally be found in 11.46 *et. seq.*

Vehicle Theft

One non-consolidated theft offense that frequently arises is **vehicle theft**. Alaska has two degrees of vehicle theft due to the unique circumstances that arise with vehicle thefts. *Compare* AS 11.46.360 and 11.46.365. **First-degree vehicle theft** covers those situations we typically think of as "traditional" vehicle theft – that is, a person who takes another person's vehicle without permission. It also covers less common conduct. **Joyriding** – the temporary taking of a vehicle without the owner's consent, but without the intent to permanently deprive the owner of the property – is first-degree vehicle theft. *See Allridge v. State*, 969 P.2d 644 (Alaska App. 1998). The key to first-degree vehicle theft is that the *initial* taking must be trespassory. A person who lawfully "borrows" a car, but fails to return it, is not guilty of first-degree vehicle theft. (Although such conduct may constitute second-degree vehicle theft, discussed below.) *See Eppenger v. State*, 966 P.2d 995 (Alaska App. 1998). First-degree vehicle theft is a felony whereas second-degree vehicle theft is a misdemeanor.

A person who lawfully obtains a vehicle, but retains it beyond the period of time authorized, is guilty of a less serious vehicle theft: second-degree vehicle theft. AS 11.46.365. This occurs most commonly when a person fails to return a car pursuant to a commercial rental agreement, or fails to pay a debt on a rental car.

You be the Judge…

Brockman visited Alaska Pacific Leasing, a company that leases and sells trucks and other heavy equipment. Brockman told the salesperson that he was in the market for a new truck, and he indicated he was interested in a 2004 GMC pickup. Brockman discussed financing terms with the salesperson and asked if he could test drive the truck. The salesperson photocopied Brockman's driver's license and then gave him the keys so he could take it for a test drive. Brockman drove away in the truck.

Eight days later, the truck was found parked outside the locked gate of Alaska Pacific Leasing. The truck was slightly damaged, had trash inside, and had three thousand additional miles on it. Brockman was charged with first-degree vehicle theft. Was Brockman appropriately charged with vehicle theft? Why or why not. Check your answer at the end of the chapter.

Forgery and Related Offenses

Both at common law and under the revised criminal code, the crime of forgery is separate from the crime of theft. **Forgery** is the creation of a false legal document (or a material modification of an existing legal document) with the intent to defraud another person. The key to common law forgery was that the false document, created with the intent to defraud, had legal significance (if the document had been genuine). Common law also recognized the related crime of **uttering** if the false document was presented to the victim as authentic with the intent to defraud.

The revised criminal code divides the crime of forgery into three degrees, which cover different methods of creating, possessing, and passing forged written instruments. The dividing line between the degrees of forgery is not the dollar amount or value impacted, but the *kind* of document involved.

Any written instrument may be the subject of forgery. A **written instrument** includes any written or printed matter used for the purpose of conveying evidence of value, right, privilege, or identification. A driver's license, stock certificate, or deed falls within the definition. AS 11.46.580(b)(3).

Forgery requires the defendant act with an **intent to defraud** culpable mental state. Intent to defraud includes "an intent to injure someone's interest which has value, or an intent to use deception." AS 11.46.990(11)(A). Included within this definition is a forger who 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 intends to pass them as genuine.

Forgery normally requires the person to make, complete, or alter a written instrument. Drawing a check and signing someone else's name would constitute "falsely making" a written instrument. A person who merely signs someone's name to a check that has already been drawn "falsely completes" a written instrument. The person who changes a check made out for five dollars to five hundred dollars by adding the word hundred "falsely alters" the instrument. All three scenarios constitute forgery. The alteration must be a material one, however. Simply adding a person's middle initial to a signature would not ordinarily be forgery absent evidence that such an alteration is significant.

Alaska has incorporated the common law crime of uttering into the modern crime of forgery. AS 11.46.510. Now uttering a forged instrument is included within the definition of third-degree forgery. **Utter** includes all methods of making use of a forged instrument, such as issuing, transferring, circulating, or tendering. Thus, the person creating the forged document and the person using the forged document are both guilty of forgery.

The law elevates forgery to a low-level felony if the forged written instrument is an instrument that conveys a legal right, such as a will, contract, negotiable instrument, or promissory note. If the instrument is a valuable *government* instrument, then the law elevates the forgery to a class B felony offense.

Alaska has also created several specific crimes surrounding a person's intent to defraud a victim. A detailed discussion of the offenses is beyond the scope of this book. Each offense focuses on a different *method* of fraud. For example, **criminal simulation** criminalizes a fraudulent misrepresentation about antique or rare objects. This occurs when someone attempts to sell an object claiming that it is very old or made by a particular person. AS 11.46.530. **Criminal impersonation**, on the other hand, is aimed at a person who, with the intent to defraud, assumes a false identity or falsely claims to be someone else. AS 11.46.565. Both, like all forgery offenses, require the prosecution to prove that the defendant acted with a specific intent to defraud the victim.

White-Collar Crimes

White-collar crimes normally fall within the category of business and commercial offenses. White-collar crimes are frequently complex because of their nature. Criminal investigations usually take months or years, and involve close cooperation between various law enforcement agencies and the prosecutor's office. White-collar criminal investigations are not built quickly. They require significant analysis of documents and the deceptive behavior of suspects. Although such conduct is complex and difficult to investigate, white-collar criminal statutes allow for the prosecution of sophisticated criminal enterprises.

For example, the crime of **scheme to defraud** covers large-scale fraudulent schemes involving five or more victims or large amounts of money. AS 11.46.600. Similar to the **federal mail fraud** statute, the statute is used to prosecute large-scale consumer frauds. Courts interpret s*cheme* broadly. The scheme may include trickery, deceit, half-truths, concealment of information, and affirmative misrepresentations. The fraud must be more than mere **puffery,** but it covers a calculated scheme designed to deceive

people of ordinary prudence and comprehension even though no misrepresentation was made. Victims are not required to suffer a particular dollar loss; any monetary loss is sufficient to invoke the statute provided it involved more than five victims.

Example of Scheme to Defraud

Edward Byford was convicted of scheme to defraud for defrauding nine people over the course of two and half years by promising to build log homes for the victims. Byford would show the unsuspecting victims photographs of beautiful log cabins that he had never built. Byford asked the victims to pay him substantial portions of the money up front (hundreds of thousands of dollars) for buildings that never materialized. In addition to taking the victims' money up front, Byford refused to refund any money to the victims. Byford was convicted of scheme to defraud; his convictions were upheld on appeal. *See Byford v. State*, 352 P.3d 898 (Alaska App. 2015).

Federal Mail Fraud Statute

The federal mail fraud statute has been used to punish a wide variety of schemes, including Ponzi schemes, like the high-profile prosecution of Bernie Madoff. In a **Ponzi scheme**, the defendant informs investors that their investment is being used to purchase fictional real estate, stocks, or bonds, when in reality, the money is appropriated by the defendant to pay earlier investors. Eventually, this leads to the collapse of the enterprise and results in significant losses to the investors.

Other Commercial Fraud Crimes

Criminal statutes also punish misapplication of property (frequently used to prosecute attorneys for stealing from their clients), falsifying business records (the preparatory action in anticipation of fraud), and deceptive business practices (criminal violations of the Consumer Protection Act), among others. In essence, all of the statutes criminalize specific acts of "white collar" fraudulent behavior. *See* 11.46.600 *et. seq.*

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11.2: Burglary and Trespass

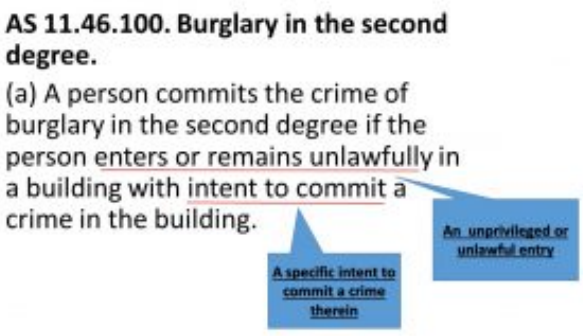
Although we often associate **burglary** with theft, it is actually an enhanced form of **trespass**. At common law, burglary was the "breaking and entering of another's dwelling at night with the intent to commit a felony therein." *See* Burglary *Black's Law Dictionary* (11th ed. 2019). This narrow definition was an effort to protect citizens in their property, and specifically, in their homes. A "man's home [was] his castle," and burglary specifically criminalized the *invasion* of **habitation**. Because burglary required the defendant to intentionally commit a felony once inside, burglary was viewed as a series of steps towards the commission of the target offense (generally theft), but since it was a crime against habitation and frequently instilled fear in the victims, it was severely punished. In this regard, burglary was truly a unique form of attempt. *See generally*, Wayne R. LaFave, *Substantive Criminal Law*, §21.1(g) (3d. ed. 2018).

Although Alaska has significantly revised the crime of burglary since its territorial days, its primary purpose remains: to punish the "breaking into someone's property [that] is likely to instill terror in the occupants of the property." *See Pushruk v. State*, 780 P.2d 1044, 1046 (Alaska App. 1989). Burglary remains a quasi-inchoate crime akin to attempt; the defendant is punished for entering a building with the intent to commit a crime therein. Completion of the target crime is unnecessary. *See State v. Ison*, 744 P.3d 416 (Alaska App. 1987).

All burglary offenses, regardless of jurisdiction, contain two basic principles – (1) an unprivileged or unlawful entry into a structure, with (2) a specific intent to commit a crime therein. *See generally Taylor v. United States*, 495 U.S. 575 (1990) (recognizing that the generic, contemporary meaning of burglary "contains at least the following elements: an unlawful or unprivileged entry into or remaining in a building or other structure with intent to commit a crime.").

Modern burglary statutes tend to *grade* the offense based on the type of structure entered and the seriousness of the surrounding circumstances. Alaska has followed this trend. The general burglary statute (second-degree burglary) provides the basic burglary definition. AS 11.46.310. Second-degree burglary has a maximum punishment of five years. Second-degree burglary is relatively straightforward. *See* Figure 11.2.

Figure 11.2 Alaska Criminal Code – Burglary



First-degree burglary is an *aggravated* burglary and occurs when (1) the defendant was armed with a weapon, (2) the structure burglarized was a dwelling, or (3) the defendant injured an occupant while inside. AS 11.46.300. First-degree burglary is elevated because of the existence of one of the **attendant circumstances** identified above. First-degree burglary is punishable by up to 10 years of imprisonment. Also, recall that first-degree burglary is an inherently dangerous felony for **felony-murder** (provided however, the target crime is not murder). AS 11.41.110(a)(2); 11.41.115(c).

Unauthorized Entry

The *actus reus* of burglary is satisfied upon a "breaking and entering." The crime is complete upon the entry. An entry does not necessarily mean the intruder must place their entire body inside a building. Instead, an **entry** occurs when "an intruder enters by entry of his whole body, part of his body, or by insertion of any instrument that is intended to be used in the commission of a crime." *See Sears v. State*, 713 P.2d 1218, 1220 (Alaska App. 1986). The converse is also true. A person who is *unable to penetrate* a building is only guilty of attempted burglary. *See State v. Ison*, 744 P.2d 416 (Alaska App. 1987).

Example of an Unauthorized Entry

Jed uses a burglar tool to remove the window screen of a residence. The window is open, so once Jed removes the screen, he places both hands on the sill, and begins to launch himself upward. The occupant of the residence, who was watching Jed from inside, slams the window down on Jed's hands. Jed has likely committed the unlawful entry required for burglary. When Jed removed the window screen, he committed a breaking. When Jed placed his hands on the windowsill, his fingers intruded into the residence, which satisfied the entry requirement. Jed will likely be prosecuted for burglary rather than attempted burglary, even though he never managed to gain access to the residence.

Example of No Entry

Let's change the hypothetical above slightly. Instead of using a burglary tool to remove a window screen, let's assume Jed approaches the front door of the residence to gain entry. Jed inserts a credit card into the door jam, between the door and its frame, intending to slip the lock (and thereby unlocking the door). The credit card never protrudes into the residence. The occupant of the residence, who was watching Jed from inside, runs up to the front door and activates the deadbolt lock. In this scenario, Jed did not *penetrate* the building – either with his body or an instrument. Jed is guilty of attempted burglary, not a completed burglary. *See e.g.*,*State v. Ison*, 744 P.2d 416 (Alaska App. 1987).

"Enter or Remain Unlawfully" Under Alaska Law

Although the voluntary act necessary for burglary has not changed, the common law term of "breaking and entering" has been replaced by the broader concept of "enter or remain unlawfully." AS 11.46.310. "Enter or remain unlawfully" is defined to mean not only entering a place where the defendant is not permitted, but also includes staying inside somewhere after the premises has closed. Thus, if a person hides inside a department store until it closes with the intent to commit a theft, the person is guilty of burglary.

Conversely, if a person *lawfully* enters a store – for example, through the front door, during regular business hours and commits a crime– the person is only criminally liable for the crimes they commit thereafter. Put another way, if a defendant commits a theft while inside a store, the defendant is not guilty of burglary, even if the theft occurs in a restricted area. The initial entry was not unlawful. *See Arabie v. State*, 699 P.2d 890 (Alaska 1985).

You be the Judge…

Dan entered a grocery and liquor store in Fairbanks while it was open for business. The store was a single building with a single main entrance into a foyer. The foyer contained separate entrances to the liquor and grocery departments. The back of the store contained an employee work and storage area, which employees could access from either department. Dan entered a beer cooler and back storage room that was posted "employees only." While in the back room, Dan picked up two cases of beer and attempted to run out the back door. A store employee heard Dan and stopped him from leaving. The prosecutor has charged Dan with one count of second-degree burglary for "entering or remaining unlawfully" in a building with the intent to commit a crime therein (*i.e.*, theft). Is Dan correctly charged with second-degree burglary? Check your answer at the end of the chapter.

A Specific Intent to Commit a Crime Therein

Burglary is a dual intent crime. A defendant must *knowingly* enter or remain unlawfully inside a building with the *intent* to commit the target crime. The government must prove that the defendant (1) knew he was trespassing when he entered or remained in the building and (2) at the time of the trespass, he intends to commit an additional crime inside.

Alaska has departed however from the common law doctrine that a defendant must have a specific intent to commit a crime at the time he "breaks and enters." If a defendant has the intent to commit a crime at the time his privilege to be on the premises is terminated, the person is guilty of burglary. Thus, a defendant commits the crime of burglary at the time the defendant's presence becomes unlawful and the defendant has an intent to commit a crime. Recall that if a person hides inside a department store until it closes in an effort to steal merchandise, the person is guilty of burglary.

Building versus Dwelling

Alaska grades burglary differently based on the type of *property* entered. If a defendant burglarizes a "building," the defendant is guilty of simple burglary (second-degree burglary); if a defendant burglarizes a dwelling, the defendant is guilty of an aggravated burglary (first-degree burglary). **Building** is defined broadly to include not only what we ordinarily think of as a building, but also any "propelled vehicle" or any structure large enough for a human to physically enter and occupy. AS 11.81.900(b)(5).

A **dwelling** is any building that "is designed for use or is used as a person's permanent or temporary home or place of lodging." AS 11.81.900(b)(22). Since a camper is a building for use as a person's temporary home, it would be a dwelling for purposes of the burglary statute. Dwelling also includes tents, hotel rooms, and even fishing boats (if equipped for that purpose). *See Shoemaker v. State*, 716 P.2d 391 (Alaska App. 1986) (recognizing that a fishing boat was a "dwelling" if equipped to house fishers). Thus, entering a person's tent who is living on the street, with the intent to steal their belongings once inside, is an aggravated burglary in Alaska.

Coleman v. State, 407 P.3d 502 (Alaska App. 2017)[1]

At first blush, one might assume that classifying a structure as either a building or dwelling is relatively easy. Unfortunately, such an assumption would be wrong. Generally, whether a structure is a building or dwelling is a question of fact for the jury. *See State v. Austin*, 883 P.3d 992 (Alaska App. 1994). However, if a defendant breaks into a structure that is *neither* a building, *nor* a dwelling, the defendant cannot be *charged* with burglary. Such was the issue in the following case. In *Coleman v. State*, the question before the Court of Appeals was whether a bicycle shed constituted a "building" for purposes of the burglary statute. Such a distinction is significant – depending on the definition of building, Coleman is either guilty of two misdemeanors (trespass and theft) or a felony and a misdemeanor (burglary and theft).

407 P.3d 502
Court of Appeals of Alaska.
James Kevin COLEMAN (aka James Kevin Almudarris), Appellant,
v.
STATE of Alaska, Appellee.
October 13, 2017

OPINION
Judge ALLARD.

James Kevin Coleman was convicted, following a jury trial, of second-degree burglary [and other offenses] based on allegations that he broke into a storage shed used by a commercial bike shop and stole two bicycles. …

On appeal, Coleman challenges his conviction for burglary, arguing that the bicycle storage shed was too small to qualify as a "building" for purposes of the burglary statutes.

…

For the reasons explained in this opinion, we conclude that the bicycle storage shed qualified as a "building" as that term is defined in the burglary statutes.

…

Accordingly, we affirm Coleman's convictions for second-degree burglary[.]

Why we conclude that the bicycle storage shed was large enough to qualify as a "building" for purposes of Alaska's burglary statute

Under AS 11.46.310(a), a person commits burglary if the person "enters or remains unlawfully in a building with the intent to commit a crime in the building." Alaska Statute 11.81.900(b)(5) defines "building," in pertinent part, as follows:

"building," in addition to its usual meaning, includes any propelled vehicle or structure adapted for overnight accommodation of persons or for carrying on business[.]

In the current case, Coleman was convicted of second-degree burglary for breaking into a shed that was used to store bicycles for a business. The shed was a permanent wooden structure with four walls, a floor, and a roof; it contained multiple enclosed storage

lockers, secured by individual padlocks. Although the record does not reveal the exact dimensions of the shed, the evidence presented at trial indicated that the shed was approximately chest- to shoulder-high, and the shed could contain 20 to 25 bicycles. To enter the shed to retrieve the bicycles, an average-sized person would need to stoop.

At trial, the general manager of the bicycle shop testified that the shed was used to store bicycles that were brought in for repairs. On an average summer work day, 5 to 6 employees would access the shed to retrieve or store bicycles. The manager testified that employees would typically not need to fully enter the shed to retrieve the bicycles, but that they would sometimes have to crawl all the way into the shed if they were having difficulty getting a bicycle out. The entrance to each storage locker in the shed was kept secured with a padlock and equipped with a break-in alarm.

On appeal, Coleman argues that the shed did not qualify as a "building" for purposes of the burglary statute. Coleman contends that, because the crime of burglary was originally intended to protect dwellings, a structure can only qualify as a "building" for purposes of the burglary statute if it is either designed for human habitation or large enough to "comfortably accommodate people moving around" in it. According to Coleman, because the shed was made to accommodate bicycles and not people, and because an average-sized person would need to stoop to enter the shed, the shed did not qualify as a "building," and his conviction for second-degree burglary must be reversed.

In response, the State argues that the bicycle storage shed was a building both in the "usual meaning" of the word and because the shed was a structure that had been "adapted" for carrying on the bicycle shop's business—specifically, the storing and repairing of bicycles. The State concedes, however, that "at some point, a storage unit [may be] so small that it could not reasonably be considered 'a structure,' " and as such, would not be "a building."

The issue presented here is, therefore, how large a structure must be in order to be considered a "building" for purposes of the burglary statute. Because the statute is ambiguous on this point, we look to the purpose of the legislation and the legislative history for indications of legislative intent.

The definition of "building" codified in AS 11.81.900(b)(5) is derived from Oregon law. Both Alaska and Oregon define "building" broadly, and the two statutory definitions of "building" are essentially the same. As already set out, the Alaska statute defines "building" to include "its usual meaning" as well as "any propelled vehicle or structure adapted for overnight accommodation of persons or for carrying on business." Likewise, under the Oregon statute, "building" is defined "in addition to its ordinary meaning" as also including "any booth, vehicle, boat, aircraft or other structure adapted for overnight accommodation of persons or for carrying on business therein."

The legislative history of these statutory definitions indicates that the Alaska and the Oregon legislatures intended these definitions to be expansive. The commentary to the tentative draft of Alaska's 1978 criminal code revision states that the definition is intended to be "broad enough to include house trailers, mobile field offices, house boats, vessels and even tents used as dwellings." The commentary to the Oregon Criminal Code likewise explains that the definition of "building" was expanded from the "ordinary meaning of the word" so as to also include "those structures and vehicles which typically contain human beings for extended periods of time, in accordance with the original and basic rationale of the crime [of burglary]: protection against invasion of premises likely to terrorize occupants."

Coleman relies heavily on the Oregon commentary for his claim that the Oregon and Alaska legislatures intended to limit the definition of "building" to only those vehicles or structures that "typically contain human beings for extended periods of time." But neither the plain language of the statute nor the legislative history support this claim.

At common law, the crime of burglary required proof that the defendant unlawfully entered a human habitation. Burglary was defined as the breaking and entering of a dwelling at night with the intent to commit a crime therein. The common-law offense of burglary was therefore strictly an offense aimed at protecting the security of habitation rather than property.

But statutory enactments over the past 60 years have changed and expanded the common-law definition of the offense. For most jurisdictions, the requirement that the crime take place at night or that it be directed at a dwelling have disappeared. Instead, most states (including Alaska and Oregon) now define burglary simply as unlawfully entering or remaining in a "building" with the intent to commit a crime therein. The offense is elevated to a higher degree of burglary with increased punishment if the "building" is a "dwelling" or if the defendant's conduct poses a particular danger to people found within the building.

This transformation is evident in the relevant Oregon caselaw, which has upheld burglary convictions involving storage sheds and storage containers, even though they were designed to accommodate property, not people. For example, in *State v. Essig*, the Oregon Court of Appeals held that a large potato storage shed qualified as a building under the burglary statute, describing it as a substantial structure and thus a building within the ordinary meaning of the term. Similarly, in *State v. Handley*, the Oregon Court of Appeals held that a storage locker in an apartment complex's carport qualified as a building. In *State v. Barker*, the court held that "self-contained storage units" within a commercial storage facility qualified as "buildings," and in *State v. Webb*, the court held that a tractor trailer adapted by a business to store goods likewise qualified as a "building."

Coleman points out that these Oregon cases all involve storage containers or sheds that are considerably larger than the bicycle storage shed involved in his case. For example, the potato shed in *Essig* was large enough to "contain several trucks." Likewise, the tractor trailer in *Webb* was twenty-five feet long and eight to nine feet wide (although no height was listed). But not all of the Oregon cases involve such large storage structures. The storage lockers in *Handley* were only four feet wide, nine feet long, and seven feet high. And the dimensions of the storage unit in *Barker* were essentially unknown, although the court noted that it was "large enough for a human being to enter and move about."

[…]

Like the storage units in *Barker*, the storage shed at issue in Coleman's case appears to fit within the dictionary meaning of the term "building." Black's Law Dictionary defines the word "building" as:

[A] structure designed for habitation, shelter, storage, trade, manufacture, religion, business, education, and the like. A structure or edifice inclosing a space within its walls, and usually, but not necessarily, covered with a roof.

Here, the storage shed was a permanent structure with four walls, a roof, a floor, and a fixed entry place through which a person could enter the structure in order to store or retrieve the bicycles placed there by the business.

Coleman contends that, despite these attributes, the storage shed does not qualify as a "building" because the entrance was not high enough for an average-sized person to enter without stooping and it was not big enough for an average-sized person to move around "comfortably."

We agree with Coleman that, as a general matter, a structure that is too small for a human being to physically enter and occupy with their whole body cannot be considered a "building" that can be burglarized. We note that courts in other jurisdictions have reached a similar conclusion with regard to their burglary statutes.

For example, in *Paugh v. State*, the Wyoming Supreme Court held that a three-foot display case in a department store was not a "separately secured or occupied portion" of a building for purposes of Wyoming's burglary statute because the display case was "too small to accommodate a human being." The Washington Court of Appeals similarly held that a police evidence locker that was 10 inches high, 10 inches wide, and 2 feet deep was too small to qualify as a "building" under Washington's burglary statute. Coin boxes at a car wash have likewise been found to be too small to qualify as a "building," as have soft drink vending machines, and a large tool box on wheels.

But these cases all involve containers that are significantly smaller than the storage shed at issue in Coleman's case. Here, the trial testimony indicated that the bicycle shop's storage shed was designed to be wide enough, long enough, and tall enough—approximately chest- to shoulder-high—to allow an average-sized person to enter the shed and move about, albeit not necessarily for an extended period of time and not necessarily entirely comfortably. Indeed, the testimony at trial established that human beings did, at times, fully enter the shed to retrieve the bicycles stored inside.

Given these circumstances, and given that the shed otherwise exhibited all of the attributes associated with the term "building" in the usual meaning of the term, we conclude that the storage shed at issue here qualified as a "building" for purposes of Alaska's second-degree burglary statute. We therefore reject Coleman's claim that the evidence was insufficient to support his conviction for second-degree burglary on this ground.

[…]

Conclusion

… We … AFFIRM the judgment of the superior court.

Criminal Trespass

Criminal trespass is a related, but distant cousin of burglary. **Criminal trespass** criminalizes the unlawful intrusion onto someone else's real property. Like burglary, criminal trespass is *graded* based on perceived severity.

Criminal Trespass in the Second Degree occurs when a person "enters or remains unlawfully" in or upon a premises. AS 11.46.330(a)(1). **Premises** means any real property and any building. A simple trespass onto land or in a building will be second-degree criminal trespass. Criminal Trespass in the Second Degree also occurs when a person enters or remains unlawfully in a propelled vehicle. AS 11.46.330(a)(2). This second theory of trespass covers relatively trivial conduct, such as unlawfully entering a vehicle to take a nap. (If a person unlawfully *takes* a propelled vehicle, the person is not guilty of trespass, but the more serious offense of Vehicle Theft).

Criminal Trespass in the First Degree covers two forms of more serious conduct. AS 11.46.320. The first is entering or remaining upon real property with the intent to commit a crime on the property. For example, if a person enters private land with the intent to take an animal out of season, the person would be guilty of first-degree criminal trespass. Ordinarily, trespass on land would be prosecuted as second-degree criminal trespass, but if the defendant intends to commit a crime on the land, then the trespass is elevated to aggravated criminal trespass (first-degree trespass).

First-degree criminal trespass also occurs when a person enters or remains unlawfully in a dwelling. AS 11.46.330(a)(2). Take note that this conduct would be first-degree burglary if the person entered or remained unlawfully in the dwelling with the intent to commit a crime. But if the person has no intention of committing a crime inside the dwelling, the person is only guilty of aggravated trespass.

For purposes of trespass, "enter or remain unlawfully" means failing to leave the premises after being lawfully directed to do so. AS 11.46.350(a)(2). Thus, a person "remains unlawfully" if the person fails to leave after being informed that they are no longer welcome. Property owners (or their designees) can notify individuals that they are not privileged to enter either through signage (*i.e.*, a "closed" sign) or personal notification (*i.e.*, "you are trespassed"). For unimproved or unfenced land, landowners must post signage in a reasonably conspicuous manner. AS 11.46.350(b). However, if a person enters land with the intent to commit a crime thereon (for example, to commit theft of property on the land), the law does not require that the land be posted. AS 11.46.350(b)(2).

Emergency Use of Premises

The law provides a limited **affirmative defense** to burglary and criminal trespass. If the unlawful entry was due to an emergency "of immediate and dire need" the person is not guilty. AS 11.46.340. To take advantage of the defense, the defendant must notify local law enforcement or the owner of the unlawful entry once able and within a reasonable amount of time. For example, a person being chased by a bear may break into a cabin to avoid being attacked. But once the bear has left the area, the person must notify the homeowner or local law enforcement of their unlawful entry. Otherwise, the person is guilty of trespass; they are not entitled to claim the affirmative defense. As an affirmative defense, the defendant bears (pun intended) the burden of proving the emergency by a preponderance of the evidence.

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1. *Coleman v. Stat*e, 407 P.3d 502 (Alaska App. 2017) was abrogated on different grounds in *Phornsavanh v. State*, 481 P.3d 1145 (Alaska App. 2021)). ↵

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11.3: Arson

Arson has its roots in property law. Like burglary, arson is primarily a crime against **habitation**. Unlike burglary, arson protects property against malicious burning. Common law arson was limited to the malicious burning of a *dwelling* of another. The Alaska legislature expanded this definition beyond dwellings, but continued to criminalize the intentional damage to property by fire or explosion. *See generally Hathaway v. State*, 925 P.2d 1343 (Alaska App. 1996). Since arson is a property crime, and not a crime against the person, setting one fire and damaging one piece of property is just one arson despite the fire causing multiple victims to be placed in danger and each suffering significant property loss. *Id*. The gravamen of the offense is the instrumentality used to damage property – fire or explosion.

All jurisdictions consider arson a serious felony. Alaska classifies first-degree arson (Alaska's most serious arson) as a class A felony offense, punishable by up to 20 years in prison. In fact, several states require convicted arsonists to register with the government, similar to sex offender registration databases. Alaska does not require convicted arsonists to register, but nonetheless, severally punishes the behavior. First-degree arson is an "inherently dangerous felony" under the **felony-murder rule**. AS 11.41.110(a)(2).

Alaska has three degrees of arson. **First-degree arson** criminalizes the intentional starting of a fire or causing an explosion that recklessly places another person in danger of serious physical injury. AS 11.46.400. First-degree arson requires a person to intentionally damage *any* property (their own or someone else's) by fire or explosion. As a result of the defendant's intentional act, another person must be placed in danger of serious physical injury. Emergency first-responders qualify as "another person" for purposes of first-degree arson.

The defendant is not required to intend that the person be placed in danger. The defendant need only to ack recklessly – they must disregard a substantial and unjustifiable risk that someone will be placed in danger of serious physical injury. Of course, if they did intend that a person be placed in danger, the crime has also occurred. Thus, if a person intentionally starts a fire and recklessly disregards the risk that a firefighter will be placed in danger while responding, the person will be guilty of first-degree arson even though the person did not *intend* to harm anyone. Note that there is no requirement that a person actually suffer serious physical injury. Merely placing a person in danger of serious physical injury will suffice. First-degree arson focuses on the danger associated with intentionally set fires – both to innocent victims and first-responders.

Second-degree arson is when a person knowingly damages a building by fire or explosion. AS 11.46.410. Arson uses the same definition of building as burglary. The term building includes all ordinary structures capable of allowing a person to physically enter and occupy it.

Note however, the law recognizes that in some instances, the most economical method of removing a building is to burn it. Such conduct is exempted from second-degree arson if the defendant establishes that no other person had an interest in the property, or if they did, they consented to the burning, and that the burning was for a *lawful purpose*. AS 11.46.410(b). This is an **affirmative defense**.

Recognize, however, burning a building to defraud an insurance company would not be a burning for a lawful purpose. Neither would be the burning of a building by one partner when the other partner had not consented to the burning. A similar affirmative defense does not exist for this type of arson.

The law provides two separate ways to commit **third-degree arson**. First, if a person intentionally starts a fire inside a motor vehicle while the vehicle is on public land, the person is guilty of third-degree arson. This section recognizes the danger associated with vehicle fires on public lands, especially in forested parks and remote areas. Third-degree arson also includes setting *another person*'s vehicle on fire if the vehicle is on private property. Although the statute does not criminalize setting one's *own* vehicle on fire if on private property, the fire, if it spreads and causes additional damage may give rise to criminally negligent burning.

Criminally negligent burning punishes individuals who fail to perceive the danger of starting a fire and the fire damages property. AS 11.46.430. For example, **wildfires** that are started by human negligence (that is, failing to be careful or not taking adequate protections) can be prosecuted as criminally negligent burning. Recall that **criminal negligence** requires the defendant to fail to perceive a substantial and unjustifiable risk of harm. AS 11.81.900(a)(4). Criminally negligent burning is a class A misdemeanor unless the defendant has been previously convicted of similar offenses. If the defendant has two prior convictions, then the defendant is considered a **recidivist** and guilty of a class C felony. AS 11.46.427.

Finally, the law criminalizes a person's **failure to control or report a dangerous fire**. AS 11.46.450. This statute creates an affirmative duty on a person to exercise due care to prevent the uncontrolled spread of a fire when the person knows that a fire exists. If a person knows that a fire is endangering life or substantial property and fails to take steps to control the fire or notify authorities of the fire, the person is guilty of a class A misdemeanor. This statute criminalizes a person's *failure to act*.

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11.4: Criminal Mischief

Criminal mischief, frequently referred to as **vandalism**, prohibits damaging or destroying property of another. As you will see, in some cases, criminal mischief can be classified as **terrorism** – *i.e.*, the use of force to intimidate others for social or political reasons. Criminal mischief is divided into five degrees, ranging from first-degree criminal mischief (a class A felony) to fifth-degree criminal mischief (a class B misdemeanor).

In most cases, criminal mischief is a specific intent crime. The defendant must intend to damage, destroy, or interfere with property of another. But the statutory scheme also requires the government to prove that the defendant did not have the right or any reasonable ground to believe they had a right to damage, destroy, or interfere with the property. *See* AS 11.46.475-486. This absolves the defendant of criminal liability in those situations where the defendant reasonably believed they were entitled to destroy or damage the property.

Criminal Mischief in the First Degree is the most serious form of criminal mischief and covers three forms of destructive conduct. AS 11.46.475. First, if a person intentionally damages an oil or gas pipeline or supporting facility, the person is guilty of first-degree criminal mischief. The law does not require the damage to exceed a certain amount. *Any* intentional damage to a pipeline or supporting facility is covered. Thus, intentional, but minor, damage to the pipeline and acts of terror that disrupt the nation's oil production capacity, are covered.

One Guy, One Rifle and an Oil Pipeline, LA Times, October 21, 2001



Although prosecutions of intentionally damaging an oil pipeline are rare, they do occur. In October of 2001, Daniel Lewis shot a hole in the Trans-Alaska Pipeline. The shot punctured the pipeline and caused oil to spill onto the ground. Lewis was convicted of several offenses for his conduct (both in state and federal court), including first-degree criminal mischief, oil pollution, fourth-degree weapons misconduct (for recklessly discharging a firearm), and felon-in-possession. For a complete factual description of the case and the surrounding legal issues, see *Lewis v. State*, 2007 WL 293079 (Alaska App. 2007).

First-degree criminal mischief also includes a person intentionally causing a substantial interruption of a utility service and a person intentionally damaging property of another by the use of "widely dangerous means," causing over $100,000 in damages. AS 11.46.475(a)(2)-(a)(3). There is no requirement that the defendant intend to cause over $100,000 in damages, only that they intend to damage property of another. **Widely dangerous means** is defined to mean any difficult-to-confine force such as an avalanche, radioactive material, bacteria, or flood used to cause substantial property damage. AS 11.46.495(8). For example, if an eco-terrorism group disables a dam to interfere with a commercial development, the group members would be guilty of first-degree criminal mischief even if they thought their actions would only cause a minor disruption (assuming that the actual damage exceeded $100,000). First-degree criminal mischief is punishable by up to 20 years imprisonment.

Criminal Mischief in the Second Degree criminalizes specific forms of **tampering** with property of another. AS 11.46.482. First, a person is liable if they *tamper* with an oil or gas pipeline, an airplane, or a helicopter with reckless disregard for the risk of harm to, or loss of, property. The statute does not require that the pipeline, airplane, or helicopter be damaged. The defendant need only tamper with the property. **Tamper** is defined as interfering with something improperly, meddling with it, or making unwarranted alternations to its existing condition. AS 11.46.495(5). Second, the crime is committed if a person tampers with food, air, water, or drugs with the intent to harm any person. Second-degree criminal mischief is punishable by up to 10 years imprisonment.

Criminal Mischief in the Third Degree can be recognized as the code's general felony vandalism statute. AS 11.46.482. A defendant who intentionally damages property of another in excess of $750, is guilty of third-degree criminal mischief, a class C felony offense. The statute also criminalizes some less known conduct. The statute also punishes a person who recklessly creates a *risk of damage* exceeding $100,000 to property of another by the use of widely dangerous means. This is similar to first-degree criminal mischief, but does *not* require that the defendant actually cause the damage. The reckless creation of the risk of damage in excess of $100,000 is sufficient to create criminal liability. The statute also criminalizes the knowing desecration of a tomb, grave, or cemetery.

Criminal Mischief in the Fourth Degree is a misdemeanor and covers significant, but less serious destructive conduct. First, if a person intentionally damages property of another in excess of $250 but less than $750, the person is guilty of fourth-degree criminal mischief. This covers serious but not extensive vandalism. The statute also criminalizes tampering with a fire protection device in a public building, knowingly shooting at a traffic sign, and knowingly accessing a computer, computer system, or computer network without authorization. AS 11.46.484(a).

The least serious criminal mischief is **Criminal Mischief in the Fifth Degree**. AS 11.46.486. The statute covers low value vandalism (under $250) and tampering with *any* property of another with reckless disregard for the risk of harm to the property or with the *intent* to cause a substantial inconvenience to another. For example, letting the air out of a person's tires would be covered under this statute if the prosecution could establish that the defendant intended to cause a substantial inconvenience to the owner.

Bergman v. State, 366 P.3d 542 (Alaska App. 2016)

Damage is an essential element of most theories of criminal mischief – if a person intentionally damages property of another, they are guilty of criminal mischief. The value or type of property will determine the degree of criminal mischief. Damage, however, is an undefined term under Alaska law. How is the jury supposed to determine if property was damaged as opposed to *improved*? The following case answers that question for us.

366 P.3d 542
Court of Appeals of Alaska.
Kevin M. BERGMAN, Appellant,
v.
STATE of Alaska, Appellee.
Jan. 29, 2016.

OPINION
Judge MANNHEIMER.

Kevin M. Bergman was convicted of two counts of third-degree criminal mischief—one count for vandalizing mining equipment belonging to another man, and one count for bulldozing three miles of a wilderness trail located on state and borough land near Fairbanks, widening it into a road that was accessible to motor vehicles.

In this appeal, Bergman contends that the evidence presented at his trial was not legally sufficient to support these two convictions.

[…]

With respect to the count involving the bulldozing of the wilderness trail to widen it and facilitate vehicle access, Bergman argues that the evidence failed to establish that he acted with the culpable mental state required by the statute defining the offense.

Bergman was charged under AS 11.46.482(a)(1). At the time of Bergman's offense, this statute declared that a person commits the crime of third-degree criminal mischief if, (1) acting with the intent to damage property of another, and (2) having no right to do so, nor any reasonable ground to believe that they have the right to do so, the person (3) damages the property of another in an amount of $500 or more.

Bergman argues that the evidence at his trial was legally insufficient to establish the first of these elements—i.e., to prove that he acted with the intent to "damage property of another". Bergman asserts that the evidence unequivocally established that his intention in bulldozing the trail was not to damage it, but rather to improve it.

We reject Bergman's claim because we conclude that the word "damage" in our criminal mischief statute must be interpreted so as to protect an owner's interest in using or enjoying the property as the owner sees fit—free from alterations that other people might

wish to perform to make the property “better”.

One analogous case we found is *People v. Misevis*, 155 A.D.2d 729, 547 N.Y.S.2d 439 (1989), where a defendant was convicted of criminal mischief for hiring a contractor to widen a public road without consulting the town government. The contractor removed trees and fences along the roadway and pushed them (as well as other debris) onto adjoining private property.

The defendant was prosecuted under a New York statute that required the government to prove that he acted “with intent to damage property of another person”. The New York appeals court concluded that the jury could reasonably find that this element was proved because the defendant knew that the road belonged to the town, and knew that he had no authority to alter the road.

Similarly, in *People v. Suarez*, unreported, 32 Misc.3d 132(A), 2011 WL 3249266 (N.Y.App.2011), a New York appeals court upheld the conviction of a defendant who, without permission, decided to beautify his neighbor’s Belgian block wall by spray-painting it to alter its color.

[…]

Bergman’s case is analogous to these decisions. Even under Bergman’s version of events, he intentionally altered the trail without the landowners’ permission, and this alteration significantly impaired the landowners’ interests. (According to the testimony at Bergman’s trial, the two landowners—the state and the borough—spent more than $18,000 to restore the trail.) Bergman therefore acted with an intent to “damage” the property for purposes of our criminal mischief statute.

The judgement of the superior court is AFFIRMED.

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11.5: End-of-Chapter Material

Summary

Property crimes frequently result in serious loss and monetary harm to victims, and as a category, include serious offenses like burglary, theft, arson, trespass, and criminal mischief (vandalism). Property is broadly defined to include real property (land), personal property (both tangible and intangible property), and personal services.

Alaska has abandoned the common law categorization of theft crimes (*e.g.*, larceny, embezzlement, and false pretenses) and instead adopted a consolidated theft statute. Theft is now graded into four degrees, largely dependent on the property stolen or its value. Under Alaska's consolidated theft statutes, theft may be committed in one of six ways. Theft is a specific intent crime. Normally, to commit the crime of theft, the perpetrator must obtain "property of another" with the intent to permanently deprive the owner of the property. Thus, borrowing property with the intent to return it later may not constitute theft under the general theft statute. A thief commits theft if they exercise unauthorized control over another person's property (if they also have the intent to permanently deprive). For this reason, a person may be guilty of shoplifting even if they do not leave the store. The code also includes various theft-type offenses that have been separated under the code, including vehicle theft, forgery, and scheme to defraud. Each offense contains unique elements that separate it from general theft.

Burglary, similar to arson, is a crime against habitation and is designed to protect property owners. At common law, burglary was limited to breaking and entering into another's dwelling at nighttime with the intent to commit a felony therein. Alaska has expanded this definition, but some aspects of the common law remain. Burglary always requires an unprivileged entry into a structure and an intent to commit a crime therein. The general burglary statute (second-degree burglary) is the unlawful entry into a building with the intent to commit a crime inside the building. Aggravated burglary (first-degree burglary) occurs when the defendant is armed with a weapon, breaks into a dwelling, or injures an occupant while inside. Aggravated burglary is a class B felony offense punishable by up to 10 years imprisonment. General burglary is a lower-level felony (a class C felony).

Arson is the burning or damaging of property by fire. Alaska grades arson into three degrees. First-degree arson, the most serious, is the intentional setting of a fire or causing an explosion that places someone in danger of serious injury. This includes first-responders like firefighters or police officers. Criminal mischief, more commonly known as vandalism, is damaging, destroying, or interfering with another person's property. Criminal Mischief may also include acts of terrorism if a person intentionally damages property by "widely dangerous means", which means a difficult-to-confide force. All criminal mischief statutes require the defendant to damage another person's property. Damage is measured from the property owner's perspective, not the defendant's perspective.

Answers to "You be the Judge" Exercises

From "You be the Judge" in Vehicle Theft:

1. In this case, Brockman had permission to drive the truck off the lot. To be guilty of first-degree vehicle theft, the initial taking of the vehicle must be trespassory. If a person obtains permission to take property *fraudulently* commits a trespassory taking. Therefore, to prove that Brockman committed vehicle theft in the first degree, the State had to prove that Brockman's initial taking of the vehicle was accomplished by fraud – that is, that Brockman fraudulently obtained the salesperson's permission to take the truck. If the jury believed that Brockman falsely represented to the salesperson that he was going to take the truck for a short test drive when he actually intended to use the truck for a substantially longer period of time he was guilty of first-degree vehicle theft (as opposed to second-degree vehicle theft). For more information see *Brockman v.* State, 2009 WL 692122 (Alaska App. 2009). You can access the opinion using Westlaw Campus Research through the Consortium Library at the University of Alaska Anchorage using your UA credentials.

From "You be the Judge" in Burglary:

1. Dan is not guilty of second-degree burglary. In *See Arabie v. State*, 699 P.2d 890 (Alaska 1985), the court held that a person who enters a building open to the public and then proceeds to an area inside the building which, though restricted, is not a "separate building", is not guilty of second-degree burglary since the person did not "enter or remain unlawfully" inside a building for purposes of the second-degree burglary statute. The purpose of the rule is to bring the clause "open to the public" closer to the common law interpretation of burglary. When a person enters property by lawful means, he is only

criminally liable for the acts he thereafter commits on the property. However, if a person exceeds the privilege to enter – by remaining in a store after it closed with the intent to commit a theft – would be burglary. Here, Dan entered lawfully. Dan committed a criminal trespass and a theft, but not a burglary.

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CHAPTER OVERVIEW

12: Crimes Against Public and Social Order

12.1: Disorderly Conduct, Riot, and Related Offenses

12.2: Weapon Offenses

12.3: Escape and Related Offenses

12.4: End-of-Chapter Material

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12.1: Disorderly Conduct, Riot, and Related Offenses

Crimes against publicorder include offenses that affect a community's positive function, like public nuances, group violence, and vice crimes. These crimes are often based on moral or value judgments. In most situations, these crimes are classified as *mala prohibita* offenses. More than most crimes, these crimes require a balance between citizens' civil liberties and the right to the community to be free from vagrancy, harassment, and fear.

In this chapter, we explore disorderly conduct, riot, and harassment. Disorderly conduct and harassment are recognized as "catch-all" type criminal statutes – they both criminalize a vast range of offensive and disruptive, albeit minor, conduct.

Disorderly Conduct

Disorderly conduct criminalizes conduct that negatively impacts a community's "quality of life". Disorderly conduct is a low-level offense and focuses on relatively minor acts of criminality. Its enforcement, however, is necessary to preserve citizens' ability to live, work, and travel in safety and comfort. Modern disorderly conduct statutes punish behaviors that are violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disturb the public. Criminal laws addressing this sort of behavior are not new: at common law, **breach of peace** criminalized activities that disturbed the tranquility of the citizenry. Disorderly conduct has its origins in the common law crime of **affray**: "[a] noisy fight in a public place … to the terror of onlookers." *See Affray* Black's Law Dictionary (11th ed. 2019). Affray "comes from the same source as the word 'afraid,' and [its] tendency to alarm the community is the very essence of this offense." Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 479 (3d ed. 1982).

The modern definition is broader than a noisy fight in public. Alaska's disorderly conduct statute encompasses a wide range of conduct that disturbs the peace and tranquility of our communities. AS 11.61.110(a).

Figure 12.1 Alaska Criminal Code – Disorderly Conduct

AS 11.61.110. Disorderly Conduct

(a) A person commits the crime of disorderly conduct if,

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

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

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

(4) in a private place, the person refuses to comply with an order of a peace officer to leave premises in which the person has neither a right of possession nor the express invitation to remain of a person having a right of possession;

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

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

(7) the offender intentionally exposes the offender's buttock or anus to another with reckless disregard for the offensive or insulting effect the act may have on that person.

There are seven different ways of committing disorderly conduct. The first two, subparagraphs (1) and (2), prohibit the making of an **unreasonably loud noise**. "Unreasonably loud" is not a fixed term. It is dependent on the nature of the defendant's conduct and the circumstances surrounding the conduct – including the location and time of day. AS 11.61.110(b). The noise must disturb a person's peace and privacy. The legislative commentary notes that this phrase is intended to take into account the circumstances of the noisemaking. The critical question is whether the defendant's conduct in making the noise constitutes a **gross deviation** from "the standard of conduct that a reasonable person would observe in the same situation." AS 11.61.110(b).

For example, signing the national anthem at the top of your lungs using a bullhorn outside a hospital at 2:00 a.m. would likely constitute an unreasonably loud noise, but doing so in a ballpark at noon would not. Likewise, a person attending a sporting event would have a lower expectation of freedom from disturbance than a person attending a poetry reading. A police officer, conducting a bar check, could not claim to be disturbed by noise associated with a bar.

The definition of noise specifically excludes speech that is **constitutionally protected**. AS 11.61.110(b). Although the statute does not define constitutionally protected speech, it includes protected speech discussed in Chapter 3. The exclusion of protected speech ensures that the statute comports with the First Amendment. Unprotected speech, on the other hand, is included within the statute. Fighting words, obscene speech, and hate speech are not protected forms of speech and appropriately form the basis of a disorderly conduct conviction.

The difference between subparagraphs (a)(1) and (a)(2) is the *location* of the noisemaking. Subparagraph (a)(1) prohibits noisemaking that disturbs another person not on the same premises, while subparagraph (a)(2) prohibits noisemaking in a public place or on private property. For example, if an apartment dweller disturbs his neighbor's peace by listening to his music at an unreasonably loud level at 4:00 am, the apartment dweller is guilty of disorderly conduct under (a)(1). On the other hand, if a group of teenagers play loud music in a neighborhood park at 4:00 a.m. and disturb the surrounding homeowners, they are guilty of disorderly conduct under (a)(2).

The next two subsections authorize police to arrest a person for **failing to obey** a lawful police order. First, refusing to disperse from a public place upon the lawful order of a peace officer when a crime has occurred may be prosecuted under (a)(3). AS 11.61.110(a)(3). The citizen's refusal to disperse must **substantially impede** the officer's ability to effectuate an arrest, investigation, or otherwise endanger public safety. *See State v. Martin*, 532 P.2d 316 (Alaska 1975). Likewise, refusing to comply with a police officer's order to leave a private place (a place not open to the public) when the suspect has neither the right of possession nor the express invitation to remain is prohibited under (a)(4). AS 11.61.110(a)(4).

Disorderly conduct includes three final prohibitions. First, the statute prohibits the reckless creation of "a hazardous condition for others by an act which has no legal justification or excuse." AS 11.61.100(a)(6). This criminalizes creating a dangerous situation without cause, like shouting "fire!" in a crowded movie theater. Such conduct gratuitously risks innocent people getting hurt. Second, the crime of disorderly conduct prohibits intentionally exposing one's buttock or anus with reckless disregard for the offensive or insulting effect it may have on another person. This subsection criminalizes age-old high school activity of **mooning**. AS 11.61.100(a)(7).

Finally, disorderly conduct prohibits challenging another person to a fight, or engaging in fighting other than self-defense. AS 11.61.110(a)(5). Fighting, unlike assault, requires a **mutuality of intention** – that is, a voluntary participation to engage in physical combat. In the following case, *Dawson v. State*, the court explains the difference between misdemeanor assault (*i.e.*, recklessly causing physical injury to another person) and disorderly conduct (*i.e.*, engaging in fighting other than self-defense). As you read the next opinion, notice how the court defines "fighting" using the common law crime of "affray."

Dawson v. State, 264 P.3d 851 (Alaska App. 2011)

264 P.3d 851
Court of Appeals of Alaska.
Ginnie DAWSON, Appellant,
v.
STATE of Alaska, Appellee.
No. A–10137.
Oct. 21, 2011.

OPINION
MANNHEIMER, Judge.
This case requires us to construe one clause of our disorderly conduct statute, AS 11.61.110—specifically, subsection (a)(5) of the statute, which declares that a person commits disorderly conduct if the person "engages in fighting other than in self-defense". The precise issue is whether the phrase "engages in fighting" encompasses all instances where one person strikes another—or whether,

instead, this phrase is limited to situations where two or more people share a mutual intent to trade blows (or at least attempt to trade blows).

For the reasons explained in this opinion, we conclude that, for purposes of this subsection of the disorderly conduct statute, "fighting" requires a mutuality of intention, and therefore this subsection of the statute does not cover all situations where one person strikes another.

Underlying facts

The Appellant in this case, Ginnie Dawson, was charged with fourth-degree assault under AS 11.41.220(a)(1) for hitting her domestic partner, Patrick Meyer, with her fists and throwing a baking pan at him. To prove this assault charge, the State had to establish that Dawson "recklessly cause[d] physical injury to [Meyer]".

As used in our criminal code, the term "physical injury" means "physical pain or an impairment of physical condition". The State alleged that Dawson's acts of striking Meyer with her fists and with the baking pan constituted fourth-degree assault because this conduct caused Meyer to suffer physical pain.

At trial, Dawson conceded that she struck Meyer, but she contended that she had not caused him physical pain. Meyer took the stand and agreed that he had not suffered pain (other than emotional pain) during the attack.

Based on this testimony, Dawson's attorney asked the trial judge to instruct the jury on the lesser offense of disorderly conduct as defined in AS 11.61.110(a)(5)—"engag[ing] in fighting other than in self-defense". The defense attorney argued that if the jury believed Meyer's testimony that he had not suffered pain, then the State would have proved only that Dawson fought with Meyer—and, thus, disorderly conduct under subsection (a)(5) would be the proper verdict.

The trial judge refused to instruct the jury on disorderly conduct because (1) the judge concluded that "fighting" meant a mutual physical struggle between two or more people, and (2) there was no evidence that Meyer and Dawson engaged in mutual struggle—i.e., no evidence that Meyer intended to fight Dawson, or that he responded with physical force to Dawson's blows.

The jury convicted Dawson of fourth-degree assault, and Dawson now claims that the trial judge committed error by refusing to instruct the jury on disorderly conduct as a potential lesser included offense.

This Court's decision in Hedgers v. State

As we have just explained, the primary issue raised in this appeal is whether the phrase "engages in fighting" (as used in subsection (a)(5) of the disorderly conduct statute) includes all situations where one person strikes another, even though there is no mutual combat—i.e., even though the second person does not wish to engage in a physical struggle, and does not respond with force. This Court has already directly addressed and answered this question in an unpublished opinion: *Hedgers v. State*, Alaska App. Memorandum Opinion No. 4056 (June 2, 1999), 1999 WL 349062.

The defendant in *Hedgers* was convicted of disorderly conduct under subsection (a)(5) of AS 11.61.110—i.e., for engaging in fighting other than in self-defense—based on evidence that, during a verbal dispute with another woman, she used her knee to kick this other woman in the leg. Hedgers, slip opinion at 1–2, 1999 WL 349062 at *1.

On appeal, Hedgers argued that she was wrongly convicted because "fighting" required mutual combat. This Court rejected Hedgers's argument. We held that the term "fighting" encompassed any "physical struggle"—more specifically, that it included "those fights that are one-sided due to choice, surprise by the aggressor, or simply the superior ability of a participant." *Hedgers*, slip opinion at 2–3, 1999 WL 349062 at *2.

Thus, in *Hedgers*, this Court rejected the interpretation of "fighting" that Dawson's trial judge employed in the present case. Instead, *Hedgers* adopted the interpretation that Dawson proposes: the interpretation that "fighting" includes all instances where one person knowingly strikes another, even though the other person does not wish to fight and does not respond with force.

Given the underlying facts of Dawson's case, and given the fact that the primary dispute between the parties at Dawson's trial was whether Meyer suffered physical pain as a result of Dawson's striking him, it would appear that, under our decision in *Hedgers*, Dawson was indeed entitled to a jury instruction on the lesser offense of disorderly conduct.

However, for the reasons explained in this opinion, we conclude that we were mistaken in Hedgers when we declared that "fighting" does not require any degree of mutuality. We now hold that the phrase "engages in fighting" encompasses only those situations where the participants share a mutual purpose or understanding that they will trade blows or attempt to trade blows.

The origins of subsection (a)(5) of our disorderly conduct statute

The common law provided criminal penalties for direct assaults or batteries upon another person, but it also provided penalties for people who breached the public peace with violent, tumultuous, or otherwise disorderly conduct, even when that conduct did not constitute a punishable assault or battery.

If a group of people assembled *for the purpose* of engaging in violent or tumultuous behavior (and then engaged in that behavior), they were guilty of "riot". This offense (as generally defined) consisted of "planned and deliberate violent or tumultuous behavior involving a confederation of three or more persons". Most American jurisdictions have enacted statutory versions of the offense of riot.

A lesser common-law crime—"affray"—applied to breaches of the peace by people who had come together in a public place by chance or otherwise innocently, and then a quarrel arose which prompted them to engage in violent or tumultuous behavior. In such circumstances, the participants "[were] not guilty of riot, but of sudden affray only", because "[the] breach of the peace happened unexpectedly without any previous intention concerning it." Affray was defined as "a mutual fight in a public place to the terror or alarm of [other] people".

To constitute an "affray", the parties' intention or willingness to fight had to be mutual. If one person unlawfully attacked another, and the other person used force in an effort to defend himself, the instigator was guilty of assault and battery, while the other participant was entirely innocent of crime. In such circumstances, there was no affray.

Moreover, with respect to both of these offenses—riot and affray—the gravamen of the offense was not any injury to persons or property that might ensue, but rather the present breach of the public peace and the attendant risk of terror or alarm that the violent or tumultuous behavior might cause.

As is true with the offense of riot, most American jurisdictions have codified the common-law crime of affray. Sometimes the codified crime is called "affray", but often state legislatures insert this offense into one of the provisions of their disorderly conduct statutes. The Alaska territorial legislature took this latter approach: they enacted a disorderly conduct statute in 1935 which, among other things, prohibited "tumultuous conduct in any public place or private house to the disturbance or annoyance of any person". 1949 Compiled Laws of Alaska, § 65–10–3.

Following statehood, this definition was carried forward in former AS 11.45.030, a statute entitled "Disorderly conduct and disturbance of the peace". As originally enacted (that is, before the 1973 amendments that we describe later), subsection (2) of this statute provided that a person committed disorderly conduct if they:

[were] guilty of tumultuous conduct in a public place or private house to the disturbance or annoyance of another, or [were] otherwise guilty of disorderly conduct to the disturbance or annoyance of another[.]

We note that this statute was broader in scope than the common-law crime of affray, in that it applied to tumultuous or disorderly conduct not only in public places but also in private houses.

During the early days of Alaska statehood, various city governments also enacted disorderly conduct ordinances that covered the type of conduct which would have been an "affray" at common law. For example, the Anchorage disorderly conduct ordinance (in its 1970 version) declared, in pertinent part, that it was unlawful "for any person[,] with purpose and intent[,] to cause public inconvenience, annoyance or alarm, or recklessly create a risk [of these things] by … [e]ngaging in fighting or threatening, or in violent or tumultuous behavior".

But in 1972, in *Marks v. Anchorage*, 500 P.2d 644 (Alaska 1972), the Alaska Supreme Court ruled that this Anchorage ordinance was unconstitutional—and the supreme court's decision led to a complete revision of the state disorderly conduct statute.

In *Marks*, the supreme court concluded that the Anchorage disorderly conduct ordinance was unconstitutionally vague both in its prefatory language ("cause public inconvenience [or] annoyance") and in its use of the phrase "violent or tumultuous behavior". *Id.*, 500 P.2d at 645, 652–53. Although, technically speaking, the *Marks* decision dealt only with the Anchorage ordinance, the Alaska Legislature could see the writing on the wall, so they completely rewrote the state disorderly conduct statute the following year (1973). (The Alaska Supreme Court indeed struck down the pre–1973 version of the state statute in *Poole v. State*, 524 P.2d 286, 289 (Alaska 1974).)

In the 1973 revision of AS 11.45.030, the phrases "tumultuous conduct in a public place or private house to the disturbance or annoyance of another" and "disorderly conduct to the disturbance or annoyance of another" were replaced by a series of more specific provisions. For purposes of the present discussion, the pertinent clause of this revised, post–1973 version of the disorderly conduct statute is subsection (a)(3). This subsection declared that a person was guilty of disorderly conduct if "in a public or private place" [the person] "challenge[d] another to fight, or engage[d] in fighting other than in self-defense[.]"

In other words, subsection (a)(3) of the post–1973 disorderly conduct statute is the source of the language that is now found in subsection (a)(5) of our current disorderly conduct statute, AS 11.61.110—the statute that we must construe in this appeal.

The treatment of fighting and other breaches of the peace under Alaska's current criminal code

The Alaska criminal code was completely rewritten in the late 1970s. The drafters of the new criminal code proposed a series of three statutes (all of them contained in Title 11, chapter 61) to cover the general subject of conduct that threatens the peace. *See* Alaska Criminal Code Revision, Tentative Draft, Part 5 (1978), pp. 78–89. These three statutes were later enacted as AS 11.61.100, AS 11.61.110, and AS 11.61.120.

AS 11.61.100 defines the felony of "riot". Under this statute, a person commits riot "if, while participating with five or more others, the person engages in tumultuous and violent conduct in a public place and thereby causes, or creates a substantial risk of causing, damage to property or physical injury to a person."

Moving down in degree of seriousness, AS 11.61.120 defines the misdemeanor of harassment. The pertinent portions of this statute are subsections (a)(1) and (a)(5), which declare that a person commits harassment if the person "insults, taunts, or challenges another person in a manner likely to provoke an immediate violent response", or if the person "subjects another person to offensive physical contact".

The first clause of the statute is a codification of the common law. At common law, a person was chargeable with a breach of the peace if the person directed opprobrious or abusive language toward another person with the intent to incite the other person to violence, or under circumstances where the language was likely to provoke immediate violence. The second clause of the statute was intended to cover minor shoves, slaps, or kicks that would not qualify as assaults under AS 11.41.200–230 because they do not inflict "physical injury". This latter clause was also intended to cover touchings of a sexual nature that would not qualify as sexual assaults or sexual abuse under AS 11.41.410–440.

Finally, AS 11.61.110 defines the class B misdemeanor of "disorderly conduct". As we have already noted, the pertinent portion of this statute (for purposes of the present appeal) is subsection (a)(5), which declares that a person commits disorderly conduct if, "in a public or private place, the person challenges another to fight or engages in fighting other than in self-defense". This is simply a reiteration of subsection (a)(3) of the prior statute (as it was rewritten in 1973).

Although disorderly conduct is designated a class B misdemeanor (a class of offense which normally carries a maximum penalty of 90 days' imprisonment), the legislature has specified that the sentence of imprisonment for disorderly conduct can be no more than 10 days. See AS 11.61.110(c).

Why we conclude that the phrase "engages in fighting other than in self-defense" requires proof of a mutual intention or willingness among the participants

We now return to the issue of statutory interpretation presented in Dawson's case. Under AS 11.61.110(a)(5), a person commits disorderly conduct if the person "challenges another to fight or engages in fighting other than in self-defense". The question is whether the phrase "engages in fighting" encompasses any instance where one person strikes another—or whether this phrase applies only to situations where the parties share a mutual intention or understanding that they will exchange blows, or at least attempt to exchange blows.

As we have explained, this statutory language was formulated in 1973, when the legislature rewrote the disorderly conduct statute in response to the supreme court's decision in *Marks v. Anchorage*. At that time (i.e., before the enactment of our current criminal code), Alaska law contained a separate statute—former AS 11.15.230—that punished all acts of assault and battery, including all instances where one person unlawfully struck another person.

Former AS 11.15.230 declared that any person who unlawfully assaulted, threatened, or struck another person was guilty of a misdemeanor and subject to imprisonment for up to six months. As our supreme court noted in *Rivett v. Stat*e, 578 P.2d 946, 948

(Alaska 1978), a person could commit assault and battery under this former statute by throwing "a simple punch [to] the nose, by means of a bare fist".

Because the crime of "assault and battery" as defined in former AS 11.15.230 already covered any act of unlawfully striking another person, the legislature must have intended to deal with a different social problem when, in 1973, they rewrote the disorderly conduct statute and included a subsection that prohibited "fighting other than in self-defense".

We believe that the legislature's intention is explained by the statutory history that we recited in the preceding section of this opinion.

As we have already described, prior to the 1973 amendments prompted by *Marks v. Anchorage*, Alaska's disorderly conduct statute prohibited all "tumultuous conduct in a public place or private house to the disturbance or annoyance of another". This prohibition on "tumultuous conduct" was derived from the common-law crime of affray, which covered any sudden or unplanned breach of the peace by fighting or other tumultuous behavior.

But in *Marks*, the Alaska Supreme Court struck down a similarly worded municipal disorderly conduct ordinance—in part, because it employed the phrase "violent or tumultuous behavior". Id., 500 P.2d at 645, 652–53. This prompted the Alaska Legislature to revise the state disorderly conduct statute by deleting the phrase "tumultuous conduct" and substituting more concrete definitions of the prohibited conduct. Among these more concrete definitions were "challeng[ing] another to fight" and "engag[ing] in fighting other than in self-defense".

Given the fact that this prohibition on "fighting" has its origins in the common-law offense of affray (which required a mutual intent or willingness to fight), and given the fact that a separate existing statute prohibited all batteries, one can infer that the legislature was describing situations of mutual fighting, rather than all situations where one person unlawfully strikes another.

This inference is strengthened by the fact that the phrase "engages in fighting" is immediately preceded by the phrase, "challenges another to fight". The act of "challenging" another to fight clearly involves daring or inviting someone else to engage in mutual fighting. And because this first clause of subsection (a)(5) employs the word "fight" in this sense of "mutual fighting", one can infer that the legislature was referring to the same concept—mutual fighting—when they used the phrase "engages in fighting" in the second clause of the statute.

Under the rule of statutory construction known as *noscitur a sociis* (literally, "it is known by its associates"), we … conclude that the phrase "fighting other than in self-defense" refers to the same type of mutual fighting as the phrase "challenges another to fight". That is, both phrases refer to a physical struggle or combat among willing participants.

This conclusion is also bolstered by the disparity in the punishment for assault, and even the punishment for harassment, versus the punishment for disorderly conduct. [Misdemeanor assault is punishable up to one year in jail whereas the maximum punishment for disorderly conduct is 10 days.]

[…]

The fact that a person who is found guilty of disorderly conduct for "engaging in fighting other than in self-defense" faces such a minimal penalty compared to the sentences that can be imposed for assault or even harassment suggests to us that the legislature viewed disorderly conduct as a significantly lesser offense. But this view of disorderly conduct would make little sense if "fighting" included all instances where one person unlawfully strikes or offensively touches another person. The disparity in punishment suggests that the legislature took a narrower view of "fighting"—the view that "fighting" referred to instances of fighting between mutually willing participants.

If the legislature viewed "fighting" in this more limited sense, then it would be reasonable for the legislature to impose greater punishments for assault and for harassment (which includes non-consensual offensive touchings, as well as "insults, taunts, and challenges" that are likely to provoke immediate violence). When an assault leads to combat, it will be a combat where one participant is at fault and the other participant is exercising the right of self-defense. And when harassment leads to combat, it will be a combat where one participant is significantly more at fault than the other. In cases of mutual "fighting", on the other hand, there is no primary offender or victim; this conduct is punished only because the turmoil of the fight could breach or threaten the public peace.

[…]

For these reasons, we conclude that the phrase "engages in fighting other than in self-defense" (as used in subsection (a)(5) of our disorderly conduct statute) does not include one-sided attacks of one person upon another—i.e., acts punishable as assault, or acts punishable as harassment under AS 11.61.120(a)(5) (subjecting another person to offensive physical contact). Rather, the phrase "engages in fighting other than in self-defense" is limited to altercations where the parties share a mutual intent or willingness to fight.

It is possible that in some cases where a defendant is charged with assault, the evidence may give rise to a reasonable possibility that the defendant is not guilty of assault but rather of the lesser crime of disorderly conduct under the "engages in fighting" clause of AS 11.61.110(a)(5). It is also possible that the evidence may give rise to a reasonable possibility that the defendant is guilty of the lesser crime of harassment under either AS 11.61.120(a)(1) (insulting, taunting, or challenging another person in a manner likely to provoke an immediate violent response) or AS 11.61.120(a)(5) (subjecting another person to offensive physical contact).

If the government has not already charged these lesser crimes as alternative offenses, and if the evidence presented at trial is sufficient to support the conclusion that the defendant is not guilty of assault but is instead guilty of one or (conceivably) both of these lesser offenses, then either party may request a jury verdict on these lesser offenses. In such cases, the jurors should be instructed that they cannot return a verdict on a lesser offense unless they have reached unanimous agreement that the defendant should be acquitted of the charged assault.

[…]
Conclusion
The judgement of the district court is AFFIRMED.

Riot

Riot is violent, dangerous *group* behavior. Collective, group action can quickly become out-of-control mobs destroying property and injuring scores of innocent victims. When groups begin to engage in dangerous and violent behavior, the individual members are guilty of riot. Before a person can be convicted of the crime of riot, however, they must participate with five or more people in **tumultuous and violent** conduct in a public place, which creates a substantial risk of causing property damage or personal injury. AS 11.61.100. Riot is a low-level felony.

Riot is a very restrictive statute. The law requires that the rioter's conduct be both tumultuous and violent. It must be more than just a loud noise or a minor disturbance. It must involve ominous threats of physical injury or property damage. Merely tumultuous conduct is insufficient and likely interferes with a person's rights of speech and assembly. *See e.g.*, *Marks v. Anchorage*, 500 P.2d 644, 653-54 (Alaska 1972). The phrase "tumultuous behavior," standing alone, encompasses "conduct ranging from actual violence to speaking in a loud and excited manner." *Id*. Mere tumultuous behavior leaves an officer with unfettered discretion that infringes upon a citizen's rights of speech and assembly. Before a person is guilty of riot the group must engage in violent or destructive behavior.

As a practical matter, in the event of a riot, rioters are frequently arrested for the crimes that are actually committed, or attempted to be committed, and not riot (assuming that they are even arrested). For example, if a rioter throws a firebomb against a building or assaults an innocent bystander, the rioter is likely to be charged with arson and assault, respectively, and not necessarily, riot. Likewise, a mob that overturns a police car in the middle of the street will be prosecuted for criminal mischief, irrespective of whether the mob is also charged with riot. Riot, although an important criminal offense, is difficult to prove and rarely charged.

Harassment

Harassment criminalizes serious, but still somewhat trivial, conduct that interferes with a person's personal autonomy. Harassment, like disorderly conduct, is a "catch-all" type of criminal statute. Harassment, unlike disorderly conduct, focuses on conduct that is intentionally harassing or annoying to another person – usually through a series of specific actions like spitting, taunting, prank phone calls, unwanted sexting, cyberbullying, or offensive touching. Accidental annoyance does not qualify. The crime is broken into two degrees, both of which are misdemeanors. *Compare* AS 11.61.118(a)(b) and 11.61.120(b).

Harassment is a **specific intent** crime – the defendant must act with the "intent to harass or annoy" another person. **First-degree harassment**, the most-serious degree of harassment, covers relatively specific conduct. First, it only occurs if a person subjects another person to offensive physical conduct by throwing **bodily fluids** onto another person. AS 11.61.118(a)(1). Bodily fluids

include human and animal blood, mucus, saliva, semen, urine, vomitus, or feces. As you can see, the statute covers both the person who spits on another person at a baseball game and the inmate who throws feces at correctional officers. Both are guilty of first-degree harassment.

The crime is also committed, however, if a person touches another person's genitals or buttocks, over clothing, without consent. AS 11.61.118(a)(2). This offensive conduct is not "sexual conduct" for purposes of a sex offense. *See State v. Mayfield*, 442 P.3d 784 (Alaska App. 2019). This would include a nonconsensual pinch of a stranger's buttocks in a crowded elevator. Recall Townsend, the individual who grabbed Tim's genitals in the downtown Juneau bar. Townsend was only guilty of first-degree harassment, not sexual assault. *State v. Townsend*, 2011 WL 4107008 (Alaska App. 2011).

Second-degree harassment covers a much broader range of conduct. The statute prohibits insulting, taunting, or challenging another in a manner likely to provoke an immediate and violent response. This subsection criminalizes **fighting words**. Fighting words are more than merely challenging another person to fight (such conduct would constitute disorderly conduct). This subsection focuses on whether a reasonable person would be provoked into an immediate breach of peace. AS 11.61.120(a)(1). Recall it is virtually impossible to prosecute someone for taunting a police officer with fighting words. *See e.g. Anniskette v. State*, 489 P.2d 1012 (Alaska 1971). No reasonable police officer would be provoked by mere words. The average citizen, on the other hand, is not expected to show such restraint.

The communication need not occur face-to-face. The statute includes sending an *electronic communication* that insults, taunts, challenges, or intimidates a minor and places the minor in reasonable fear of physical injury. AS 11.61.120(a)(7). **Cyberbullying** would fall within this subsection.

The statute also criminalizes making annoying, threatening, or obscene phone calls or other electronic communications. A person may not call another person with the intent to impair the ability of the person to place or receive telephone calls. AS 11.61.120(a)(2). A person may not make repeated telephone calls at extremely inconvenient hours. AS 11.61.120(a)(3). And, a person may not make a single *obscene* or *threatening* telephone call. AS 11.61.120(a)(5). All of this conduct is captured by second-degree harassment. These subsections are intended to stop **prank and harassing phone calls**. The advent of call-waiting and cellular phones have largely rendered the statute superfluous, but can still be used to deter repeated and extremely inconvenient phone calls.

Sharing or sending sexually explicit photos or videos without the consent of the victim falls with second-degree harassment. *Compare* AS 11.61.120(a)(6) and (a)(8). Specifically, the statute prohibits sharing images or videos that show "the genitals, anus, or female breast" of another person without the person's consent. AS 11.61.120(a)(6). Put another way, if a person shares otherwise private sexually explicit images or videos, the person is guilty of second-degree harassment. This conduct is sometimes referred to as **revenge porn**. The statute also criminalizes the *sending* of unwanted sexual images or videos. AS 11.61.120(a)(8).

Finally, the statute prohibits subjecting another person to **offensive physical contact**. AS 11.61.120(a)(5). While this is similar to the prohibition set forth in first-degree harassment, the contact *does not* involve another person's genitals, buttocks, or female breast. Instead, the conduct would include minor shoves or slaps that do not qualify as "physical injury" under assault.

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12.2: Weapon Offenses

From drive-by shootings to brass knuckles, Alaska weapon offenses cover a wide array of misconduct. Some are serious and some are relatively minor. One constant is that they all involve a "weapon" under prohibited circumstances. Not all weapons are equal, however: some are inherently deadly (*e.g.*, a firearm), some are only dangerous if used in a particular manner (*e.g.*, bear spray), and some are relatively common (*e.g.*, a steak knife).

Weapon offenses share a second commonality. Under Alaska law, there is no "victim" to a weapon offense. While a person may be seriously injured as a result of a weapon, the harm is punished under other criminal code provisions (namely, assault). Weapon offenses do not penalize the resulting harm, injury, or damage. They penalize the danger created *by the weapon*.

This chapter does not attempt to analyze each different weapon statute. Given the sheer amount of misconduct that is covered it is difficult to summarize beyond simply outlining the individual statutes. Instead, this chapter explores some key categories of the various types of conduct that constitute **Misconduct Involving a Weapon** (the name for weapon offenses). You will notice that offenses are graded into five degrees. The most serious is a class A felony, whereas the least serious is a class B misdemeanor. *Compare* AS 11.61.190 and 11.61.250.

Inherently Dangerous Conduct

In response to the belief that violent gang activity was plaguing Alaskan communities in the 1990s, the Alaska Legislature passed a series of laws designed to increase the penalties associated with the use of firearms. The belief was that criminal street gangs were responsible for significant violence in Alaska's urban communities, and stiffer penalties for gun use would assist police in stopping the violent behavior.

As noted during the 1996 legislative process,

[The proposed changes were] introduced in response to the rapid escalation of violent gang activity throughout Alaska. [The staff member] noted that the amount of gang related violence [in 1996] and previous. In 1995, there were more than four gang-related murders committed in Anchorage, as well as, numerous gang-related hold-ups and drive by shootings, and other criminal activities by gangs. Present intelligence from the Anchorage Police Department notes that there are over 463 gang members active in Anchorage. The central purpose behind this bill [to amend weapon offenses] is to give law enforcement and prosecutors the tools that they desperately need to deal with the increased presence of gangs in Alaska.

See Minutes from House Judiciary Comm., 1995-1996 Leg., 19th Sess. (Alaska March 27, 1996) (statement of S. Ernouf, staff to bill sponsor).

The most significant change was to **Misconduct Involving a Weapon in the First Degree**, which created a class A felony offense for discharging a firearm from a motor vehicle under circumstances creating a substantial and unjustifiable risk of injury to another person or damage to property. 11.61.190(a)(2). The statute targets **drive-by shootings**.

The gravamen of the offense is the danger created by the firearm, not the injury. Drive-by shootings create generalized public danger, regardless of whether a person is struck, injured, or placed in fear. If multiple people are injured or placed in fear by a drive-by shooting, the defendant will likely face punishment for both first-degree weapons misconduct and multiple counts of assault. *See e.g.*, *Young v. State*, 331 P.3d 1276, 1284 (Alaska App. 2014).

Less serious weapon offenses criminalize shooting from a vehicle under circumstances that do not create a risk of injury or property damage. **Misconduct Involving a Weapon in Third Degree**, a class C Felony, prohibits the reckless discharge of a firearm from a motor vehicle under circumstances that do not rise to the level of a drive-by shooting. AS 11.61.200(a)(10). This would cover circumstances where a person randomly shoots a firearm into the air while driving. While such conduct is still extremely dangerous and unnecessary, the shooting is not done to instill fear or injury.

Misconduct Involving a Weapon in the Fourth Degree, a misdemeanor, prohibits shooting from, on, or across a highway. AS 11.61.210(a)(2). It also prohibits a person recklessly discharging a firearm that creates a risk of injury or damage to property. AS 11.61.210(a)(3). The statute is similar to reckless endangerment: it does not require that injury or damage occur. Whereas first-degree weapon misconduct is targeted at particular conduct – *i.e.*, drive-by shootings – these lesser offenses penalize serious, but less dangerous behavior.

To further combat gang violence, the Alaska legislature created a subsection within **Misconduct Involving a Weapon in the Second Degree** that prohibits knowingly discharging a firearm in the direction of a building or dwelling. AS 11.61.195(a)(3). The law intended to ensure punishment for shooting at a house regardless of whether the house was occupied. *See Minutes* from Senate Judiciary Comm., 1997-1998 Leg., 20th Sess. (Alaska March 26, 1997) (sponsor statement). Unlike first-degree weapon misconduct, second-degree weapon misconduct neither requires proof that the shooting created a substantial risk of injury or death nor shooting from a vehicle.

As you review these statutes notice how they collectively punish the danger associated with the intentional or reckless discharge of firearms. Whenever a firearm is used there is a risk of an errant bullet causing injury, damage, or even death. It is a fundamental rule of gun safety. It is all inherently dangerous, but punishment is graded based on the level of risk the defendant's conduct creates.

Drugs and Guns

Illegal drug trafficking, and the underworld in which it thrives, functions on fear and the threat of violence, at least in the eyes of the Alaska Legislature. Firearms are the drug dealer's tool of choice, and firearms are necessary to protect both product and profit. The legislature has created a specific statutory scheme that severely punishes individuals who use or possess a firearm during a felony drug offense. These so-called **drug and gunlaws** target the dangerous relationship between firearms and drug trafficking. Using or possessing a gun during a felony drug offense substantially increases the risk of death or serious physical injury for already dangerous conduct.

The first-degree weapon misconduct statute penalizes the *use* of a firearm during a felony drug offense. Possession of a firearm during a felony drug offense constitutes Misconduct Involving a Weapon in the Second Degree. *Compare* AS 11.61.190(a)(1) and 11.61.195(a)(1). This distinction is significant. First-degree weapons misconduct is a Class A felony, punishable up to 20 years imprisonment, whereas second-degree weapon misconduct is a Class B felony, punishable up to 10 years imprisonment.

Misconduct Involving a Weapon in the Second Degree contains two important limitations before authorizing punishment for "simple gun possession" during a drug offense. First, the code only criminalizes firearm possession during a *felony* drug offense. Misdemeanor drug offenses are excluded from the statute. Thus, it is generally not illegal for a defendant to possess a firearm while at the same time possessing personal use amounts of drugs. *See e.g.*, AS 11.71.050(a)(4)

Second, the law requires a **nexus** between the firearm possession and the felony drug offense. The "mere" possession of a firearm during a drug offense is insufficient. *Collins v. State*, 977 P.2d 741 (Alaska App. 1999). Firearms are particularly common in Alaska, and many Alaskans possess firearms to protect their homes and provide for their families. The Legislature did not intend to criminalize personal home protection firearms simply because a person may also be engaged in a felony drug offense. *Murray v. State*, 54 P.3d 821, 825 (Alaska App. 2002).

To prove a nexus between the firearm possession and the felony drug offense, the government must establish the defendant's possession of the firearm *furthered* the felony drug offense in some manner. *See Collins*, 977 P.2d at 753. The defendant's possession of the gun must somehow aid, advance, or facilitate the defendant's overall criminal drug trafficking objective. Multiple factors may be considered, including (1) the type of drug activity conducted, (2) the accessibility of the firearm, (3) the type of firearm, (4) whether the firearm was stolen, (5) the status of the defendant's possession (legitimate or illegal), (6) whether the firearm was loaded, (7) the proximity of the firearm to drugs or drug profits, and (8) the time and circumstances under which the gun was found. *See Murray*, 54 P.3d at 824.

The jury is asked to weigh all of these factors, and any additional information, in determining whether the defendant's possession furthered the drug enterprise or whether the defendant simply possessed a gun *in addition* to drug trafficking. This determination is fact specific. No one factor is determinative.

Prohibited and Untraceable Weapons

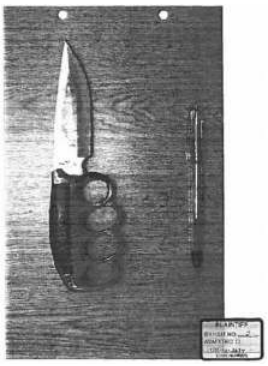
Certain weapons, fully automatic weapons for example, are illegal under both federal and state law. Alaska law classifies such weapons as **prohibited weapons.** Alaska's law is patterned after the National Firearms Act. The statute prohibits the manufacture, possession, transportation, sale, or transfer of a prohibited weapon. AS 11.61.200(a)(3). Prohibited weapons include rockets, bombs, silencers/suppressors, automatic weapons, sawed-off shotguns, or grenades. AS 11.61.200(h)(1). In the eyes of the Alaska

legislature, "[s]uch weapons have little or no legitimate function, are unnecessary for protection, and are not commonly used for commercial or recreational purposes." *See* commentary from Senate Journal Supp. No. 47 at 100-122. Prohibited weapons are used in furtherance of crime and create a substantial – and unnecessary – risk of harm to others. Two important exceptions exist: first, weapons registered under the National Firearms Act are exempt. AS 11.61.200(c). Second, police officers acting within the scope and authority of their employment are exempt from prosecution. Thus, if a law enforcement agency has authorized an officer to use an otherwise prohibited weapon – *e.g.*, a grenade – the officer is exempt from prosecution. AS 11.61.200(e).

Individuals are also prohibited from removing or destroying a firearm's **serial number** with the "intent to render the firearm untraceable". AS 11.61.200(a)(5). The law does not criminalize the possession of a firearm with an obliterated serial number unless the government can prove that the purpose of the altered serial number was to render it untraceable. AS 11.61.200(a)(6). The government normally proves this culpable mental state through police officer expert testimony. *See e.g., Collins v. State*, 977 P.2d 741, 745 (Alaska App. 1999).

Certain non-firearms are also prohibited, but not at the felony level. Possessing, making, selling, or transferring **metal knuckles** is a misdemeanor offense. AS 11.61.210(a)(4). Sometimes referred to as brass knuckles, metal knuckles mean "a device that consists of finger rings or guards made of a hard substance and designed, made, or adapted for inflicting serious physical injury or death by striking a person." AS 11.81.900(b)(37). See Figure 12.2 below.

Figure 12.2 Metal Knuckles



The above photograph was the subject of an appeal in *Thrift v. State*, 2017 WL 2709732, at *2 (Alaska App. June 21, 2017) where the defendant argued that the above weapon did not constitute "metal knuckles" since a short knife was affixed to the end. Thrift contended that the weapon should be classified as a "knife". The court rejected Thrift's argument. "Under Thrift's interpretation of the statute, the addition of a knife blade to an illegal weapon—a change that makes the illegal weapon even more dangerous—would render the formerly illegal weapon into a legal one. This is illogical." *See id.*

Prohibited Persons

Several statutes prohibit certain classes of individuals from possessing weapons, including those convicted of a felony offense, those who are intoxicated, and those who are the subject of a domestic violence protective order. Each class is discussed in turn below.

Felon-In-Possession

Alaska has a relatively unique **felon-in-possession** law. A convicted felon is only prohibited from possessing a "concealable firearm" or residing in a dwelling where a concealable firearm is stored. AS 11.61.200(a)(1) & (a)(10). At their core, felon-in-possession statutes are anticipatory-type offenses. They seek to prevent harm before it occurs, namely future violent crime. *See Davis v. State*, 499 P.2d 1025, 1038 (Alaska 1972) *reversed on other grounds* 415 U.S. 308 (1974).

Given the definition of a firearm, it is immaterial whether the gun is loaded or unloaded, or even functional. AS 11.81.900(a)(1). The weapon must have been *designed* to discharge a shot by the force of gunpowder; it need not be capable of discharging the shot. A pellet gun, for this reason, is not a firearm, even though it would constitute a "dangerous instrument" for the assault statutes. *See generally Kinnish v. State*, 777 P.2d 1179 (Alaska App. 1989).

Alaska law does not prohibit felons from possessing *all* firearms. Only those firearms that are capable of being concealed on the person are prohibited. This unique definition allows Alaskans who have been previously convicted of a felony to possess long guns (*e.g.*, rifles and shotguns) and not be in violation of Alaska law. While this limits the types of firearms that are prohibited, there is no requirement that the firearm actually be concealed on the person. Mere possession of a concealable firearm or residing in a dwelling knowing that there is a concealable firearm present will sustain a conviction. Given the need for long guns in traditional hunting and trapping activities, the legislature recognized that restricting felons from possessing all firearms would be overly restrictive.

The law punishes selling or transferring a concealable firearm to a felon to the same extent it punishes the felon's possession. AS 11.61.200(a)(2). If a person sells or transfers a firearm capable of being concealed on the person, knowing that the person receiving the firearm is a felon, the transferor is guilty. In the eyes of the law, the person who knowingly transfers a firearm to a felon is "viewed as equally culpable and deserving of identical punishment as the [felon]." *See* commentary from Senate Journal Supp. No. 47 at 100-122.

A felon who possesses a firearm capable of being concealed while on **school grounds** or at a **child care facility** faces an aggravated charge. AS 11.61.195(a)(2). The law elevates the offense to a class B felony (from a class C felony) in this circumstance. This increased punishment is significant, raising the maximum punishment from up to 5 years in jail to 10 years in jail. AS 11.61.195(b).

The Code provides an **affirmative defense** if the felon has received a pardon, the conviction has been set aside, or if the conviction did not result from any violation of AS 11.41 (crimes against a person) and ten years has elapsed from the date of the defendant's unconditional discharge. AS 11.61.200(b). A defendant is **unconditionally discharged** once the defendant is no longer under the care or custody of the Department of Corrections and the defendant has completed any probationary or parole period. AS 12.55.185. As a result, under state law, certain felons are permitted to possess firearms after ten years from their unconditional discharge.

Loss of their right to "bear arms" (as protected under both the federal and Alaska constitutions) is one of the numerous consequences of a felony conviction. *Wilson v.* State, 207 P.3d 565 (Alaska App. 2009). The statutory prohibition begins the moment the individual is convicted of a felony. Since the status of being a "felon" is an attendant circumstance to the crime, it is not a valid defense that the person did not know felons are prohibited from possessing firearms. *See Afcan v. State*, 711 P.2d 1198 (Alaska App. 1986). Ignorance of the law is no defense. However, the defendant must know they are a felon (as opposed to a misdemeanant). *See Hutton v. State*, 305 P.3d 364 *rev'd on other grounds* 350 P.3d 793 (Alaska App. 2013). A defendant's genuine belief that their prior conviction was for a misdemeanor may relieve them of criminal liability. This dispute rarely comes up however, since only felons are placed on felony probation and are required to meet with a felony probation officer.

Federal Felon-In-Possession Law

As you have seen, there are significant differences between Alaska and federal law. Felon-in-possession laws highlights another difference. Under Alaska law, a felon is prohibited from possessing a *concealable* firearm. AS 11.61.200(a)(1). Under federal law, felons are prohibited from possessing any firearm, regardless of type, including ammunition. 18 USC §922(g)(1). This includes long guns and shotguns (which are not considered prohibited weapons under Alaska law). Incidentally, another key significant difference between Alaska and federal law is that federal law prohibits individuals convicted of *misdemeanor* domestic violence from possessing firearms. 18 USC §922(g)(9). Alaska does not have a corollary provision.

Intoxicated Individuals

Guns and alcohol do not mix. It is a misdemeanor for a person to possess a firearm while under the influence of an intoxicating liquor or drug. AS 11.61.210(a)(1). But the person must be *substantially* impaired, not merely intoxicated. The law prohibiting possession of a firearm while under the influence of an intoxicating liquor or controlled substance applies equally to all persons and is akin to the prohibition against driving under the influence. *See Simpson v. State*, 489 P.3d 1181 (Alaska App. 2021).

Although it is a *misdemeanor* to possess a gun while intoxicated, it is a *felony* for a person to sell or transfer a firearm to a person knowing that the person is substantially intoxicated. AS 11.61.200(a)(4). If a person gives a gun to an obviously intoxicated person

they are guilty of a more serious offense than the person who actually receives the firearm. *Compare* AS 11.61.200(a)(4) and AS 11.61.210(a)(1).

Individuals Subjected to Protective Orders

Individuals who are prohibited from contacting another person pursuant to a stalking, sexual assault, or domestic violence protective order face additional limitations surrounding the possession of firearms. First, the law prohibits trespassing into a building or onto land in violation of a **domestic violence protective order** while in possession of "defensive weapon or a deadly weapon, other than an ordinary pocketknife." AS 11.61.200(a)(8). A domestic violence protective order (DVPO) is an order from the court finding that the petitioner has been the victim of a domestic violence offense by a household member. AS 18.66.100. The order can contain various provisions, but generally includes a "no contact" provision. AS 18.66.100(c)(2). Second, the law criminalizes any in-person communication in violation of a stalking, sexual assault, or domestic violence protective order while in possession of "a deadly weapon, other than an ordinary pocketknife." AS 11.61.200(a)(9). Both of these provisions recognize the dangers associated with possession of a deadly weapon while violating a protective order. These provisions criminalize otherwise legal weapon possession.

Recall that federal law, unlike Alaska law, prohibits those convicted of misdemeanor domestic violence assault from possessing a firearm. 18 USC §922(g)(9).

Concealed Weapons

Anyone who is 21 years or older and who is legally permitted to possess a firearm (*i.e.*, not a felon), may carry a weapon concealed. Alaska does not require individuals to obtain a permit before carrying a concealed weapon. Although not required, Alaska law allows a person to obtain a **carry-concealed permit** through the Alaska Department of Public Safety (DPS) if desired. The Alaska Concealed Handgun Permit (ACHP) program allows individuals to carry concealed in sister states that have entered into reciprocity agreements with DPS. AS 18.65.775. This has not always been the law. Previously, Alaska law required all individuals to obtain a carry-concealed permit, the requirement was repealed in 2003. *See* Ch. 62, SLA 2003, §§ 1, 7.

Although individuals may carry concealed weapons without a permit, Alaska law requires any person contacted by a police officer to immediately inform the officer of any concealed deadly weapons in their possession. Failure to do so is a class B misdemeanor. AS 11.61.220(a)(1)(A)(i). Recall that deadly weapon is broadly defined and includes not just firearms, but also knives, clubs, and similar items capable of causing death or serious physical injury. AS 11.81.900(b)(17). For example, an ordinary steak knife qualifies as a deadly weapon. *See Liddicoat v. State*, 268 P.3d 355 (Alaska App. 2011). Anyone possessing a deadly weapon concealed on their person must immediately disclose that information when contacted by law enforcement.

The law is intended to protect law enforcement. *See Simpson v. State*, 489 P.3d 1181 (Alaska App. 2021). Given the dangers associated with police work, requiring individuals to disclose all concealed weapons reduces the likelihood of its surprise use against the officer. The law placed the burden of disclosure on the citizen, not the officer.

The law only requires the person to immediately disclose firearms "concealed on the person". AS 11.61.220(a)(1). "Concealed on the person" does not include a firearm concealed under the seat of a vehicle, or otherwise hidden in the vehicle. *DeNardo v. State*, 819 P.2d 903 (Alaska App. 1991). Thus, a driver who fails to inform an officer that a firearm is concealed in the automobile (*i.e.*, under the driver's seat or in the center console) is not in violation of the law under AS 11.61.220(a)(1). Simply put, "[a] weapon concealed in an automobile is not 'concealed on the person.'" *See DeNardo*, 819 P.2d 907.

Explosives

Explosives present a particular type of danger. When used to commit a crime, they allow a perpetrator to avoid detection by being far away from the explosion at the time of detonation. Explosives can also indiscriminately injure numerous unsuspecting victims with relative ease. *See e.g., Machado v. State*, 797 P.2d 677, 686 (Alaska App. 1990). The law prohibits two forms of conduct involving explosives: criminal possession and unlawful furnishing. AS 11.61.240 and 11.61.250, respectively. The first prohibits the possession of explosives with the intent to commit a crime, whereas the second prohibits the furnishing of explosives to a person knowing that the person to whom they are furnished intends to use the explosives to commit a crime.

Explosives include most chemical compounds, mixtures, and devices that explode, but also include common components used to make explosives and explosive devices, like dynamite, nitroglycerin, and blasting powder. AS. 11.81.900(b)(24). Certain less

dangerous items, including firecrackers and small arms ammunition, are expressly excluded.

Criminal Possession of Explosives

If a person possesses or manufactures an explosive substance or device with intent to use the explosive to commit a crime, the person commits the crime of **Criminal Possession of Explosives**. AS 11.61.240. For example, if a person possesses dynamite with the intent to blow up their neighbor's storage shed, the person is guilty of Criminal Possession of Explosive. Because this crime criminalizes the *possession* of explosives (either actual or constructive), the defendant need not actually use the explosive to be held liable. This is true even if the suspect never actually touches the explosive (assuming that the evidence otherwise is sufficient to establish constructive possession). Nore, however, that the culpable mental state is intentionally – the defendant must specifically intend to use the explosive. Possession without a concomitant culpable mental state is not criminal.

The penalty for Criminal Possession of Explosive is similar to the inchoate offenses of attempt and solicitation: punishment is normally one class lower than the target offense. Thus, possession of explosives with the intent to commit a robbery (a class A felony), would be classified as a class B felony. AS 11.61.240(b). Unlike inchoate offenses, the defendant faces liability (and punishment) for both the target crime *and* criminal possession of explosives. The crimes do not merge. *See Machado*, 797 P.2d at 686 (upholding convictions for both attempted murder and criminal possession of an explosive when the defendant used a car bomb in an attempt to kill the victim).

Unlawful Furnishing of Explosives

The crime of **Unlawful Furnishing of Explosives** criminalizes the furnishing of an explosive substance or device to another knowing that the other person intends to use it to commit a crime. AS 11.61.250. Recall that the culpable mental state of knowing is more nuanced than the term is colloquially used. To prove that the suspect acted knowingly, the government is not required to establish that the suspect "positively knew" that the explosive would be used to commit a crime. Instead, the term is used in its legal sense – that is, whether the suspect was aware of a substantial probability that the explosives would be used to commit a crime. AS 11.81.900(a)(2). Knowingly is a lower culpable mental state than intentionally.

The requirement that the defendant "furnishes" the explosive takes into account the multitude of ways in which an explosive substance or device can be transferred from one person to another. It includes selling, giving, mailing, or any other form of exchange. Remuneration is not required. The transfer is sufficient if it is merely moved from one place to another so long as it ultimately ends up in the hands of the person who intends to use the explosive substance or device to commit a crime.

Finally, there is no requirement that the suspect intends to aid the other person in the commission of the target crime. Even if the supplier of the explosive does not want the crime to be committed, if the supplier was aware that there was a substantial probability that the explosive would be used in a crime, then the supplier is liable. Recognize that if the supplier is charged with the target crime under an **accomplice liability** (AS 11.16.110), then the government must prove that the supplier intended to promote or facilitate the commission of the crime *and* act with the underlying culpable mental state of the target crime. *See e.g.*, *Riley v. State*, 60 P.3d 204 (Alaska App. 2002). As you can see, the crime of unlawful furnishing of explosives is much easier to prove than accomplice liability.

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12.3: Escape and Related Offenses

The unauthorized departure from legal confinement is the crux of escape. We criminalize escape for two primary reasons. First, court-ordered confinement is a *command*, not a suggestion or a request. Refusal to comply with court sanctions must result in a consequence. Rules matter. Second, the law recognizes that when a person voluntarily flees confinement a host of associated dangers arise. Escapes endanger guards, police officers, and the general public, both during and after their escape. As you will see, Alaska has adopted a tough approach to escape-related crimes.

This section explores the crimes associated with **escape**, **unlawful evasion**, and **promoting contraband** (the introduction of contraband into a jail facility). Escape and unlawful evasion apply to defendants in duly-authorized confinement; those confined by the Alaska Department of Corrections ("DOC") or some other lawful authority (*e.g.*, police). Some exceptions exist, but bail violations (*i.e.*, pretrial release) are normally excluded from the crimes of escape. Violations of bail may constitute the criminal offense of **violating conditions of release** or **failure to appear** depending on the circumstance. Finally, this section explores the differences between escape and **resisting arrest**.

Bail refers to a defendant's pretrial release. AS 12.30 *et. seq.* The Alaska Constitution guarantees all persons accused of a crime the right of pretrial release. Art. 1, §11. The purpose of bail is to ensure the appearance of the accused at subsequent hearings while simultaneously protecting the public from future harm. *See e.g.*, *Torgerson v. State*, 444 P.3d 235 (Alaska App. 2019). Bail generally is beyond the scope of this text, but the crimes associated with the violation of bail are discussed briefly to help understand the limits of escape.

Escape

Alaska has *graded* escape based on a series of factors (discussed below), but understanding its statutory scheme requires an understanding of two key terms: **official detention** and **secure correctional facility**.

Official Detention

Official detention is the general term for confinement. It includes confinement to a correctional facility and the incidental conduct leading *up to* confinement in a correctional facility (*e.g.*, arrest, detention, or restraint). Any type of legally authorized confinement or detention is covered, including "custody", "arrest", "surrender in lieu of arrest", or the "constructive restraint under an order of a court". AS 11.81.900(42).

Custody, as used in the escape statutes, is largely synonymous to arrest. *See Beckman v. State*, 689 P.2d 500, 502 n.3 (Alaska App. 1984). It occurs when government officers exercise control and restraint over a person. Custody includes post-arrest restraint, including detention before the prisoner is placed in a correctional facility. For example, if an arrestee jumps out of a police car while being transported to the facility, the arrestee would be guilty of escape even though the arrestee never made it to the jail. The arrestee was in custody for purposes of "official detention".

Like custody, an **arrest** occurs when an officer exercises physical restraint over a person. Even if the officer is ultimately unsuccessful in apprehending the suspect, if the officer *touches* an arrestee, an arrest has occurred. *See Maynard v. State*, 652 P.2d 489, 492 n.6 (Alaska App. 1982). Physical contact with the suspect is the key to an arrest.

[I]f an officer approaches an offender for the purpose of making an arrest, which he is unable to do because the [offender] eludes him by running away, there has been no [escape]…. If an officer having authority to make an arrest actually touches his arrestee, for the manifested purpose of apprehending him, the arrest is complete 'although he does not succeed in stopping or holding him even for an instant'. In such a case there is legal custody of the arrestee for an instant although the imprisonment is constructive rather than effective. Hence there would be an escape, if such an arrestee ran away after being touched by the officer with appropriate words of arrest and lawful authority for this purpose.

See Maynard, 652 P.2d at 492, n..6

Surrender in lieu of arrest occurs when a suspect capitulates to the officer's authority, even though no physical restraint occurred.

Finally, a person is under official detention when the person is under "constructive restraint". **Constructive restraint** occurs when an officer (1) intends to effectuate an arrest, (2) communicates that intent to the arrestee, and (3) the arrestee understands the command, but nonetheless fails to surrender. Constructive restraint does not require *physical* custody. Thus, a defendant who

absconds from a courtroom after being told they are being remanded is guilty of escape, even if no one physically touches the defendant. *See e.g.MacDonald v. State*, 83 P.3d 549, 552 (Alaska App. 2004).

Although official detention is broad, it is not without its limitations. A defendant's correctional status and placement limit what constitutes official detention. Official detention does not include a person released under conditions of bail or a person released on probation or parole. In other words, a person residing at a halfway house as a condition of bail, or while on probation or parole, is not in DOC custody (and thus, not under official detention) for purposes of escape. *See e.g., Williams v. State*, 301 P.3d 196, 198–99 (Alaska App. 2013). On the other hand, when DOC (as opposed to the court) assigns that person to a halfway house under DOC's *authority* to classify and place prisoners, the person remains in DOC custody (and thus, under official detention). *See e.g. Wassillie v. State*, 366 P.3d 549, 551 (Alaska App. 2016).

A Tale of Two Prisoners…

Hakim Ivie was convicted of second-degree assault and sentenced to two years of imprisonment and two years of probation. Ivie served his initial term of imprisonment and was released on probation. Shortly after his release, Ivie was re-arrested on the allegation that he consumed alcohol in violation of his probation conditions. While his probation revocation case was pending, the court ordered that Ivie be held in jail until space came up at a halfway house (so Ivie could attend alcohol treatment). When space came up, Ivie was transferred to the halfway house as ordered. Shortly after arriving, Ivie walked away. Upon Ivie's arrest, he was charged and convicted of second-degree escape.

The Court of Appeals reversed Ivie's escape conviction noting that the trial court *ordered* DOC to transfer Ivie to the halfway house (for purposes of alcohol treatment). The trial court's order was a bail release order and not formal confinement to DOC. Placement at a halfway house as a condition of bail is not included within the definition of official detention. *See Ivie v. State*, 179 P.3d 947, 950-51 (Alaska App. 2008).

Kenneth Lewis was sentenced to a term of imprisonment. DOC placed Lewis at a halfway house in Anchorage based on Lewis's risk-level. The halfway house authorized inmates to leave the facility for approved reasons (e.g., work release, lawyer meetings, etc.). Lewis received an approved release, and returned as required, but was given a breath test upon his return. The breath test revealed that he had consumed alcohol, which was a violation of the conditions of the halfway house. Staff members told Lewis that he was going to be remanded back to the DOC for violating the facility's rules. Lewis then walked away from the halfway house. The next day police arrested Lewis. He was ultimately convicted of second-degree escape.

The Court of Appeals upheld Lewis' escape conviction recognizing that Lewis was still serving his sentence and was in the custody of DOC. DOC made a *discretionary* decision to place Lewis at the halfway house. This decision did not change Lewis's legal status – he remained under official detention. *See e.g. Lewis v. State*, 312 P.3d 856, 857 (Alaska App. 2013).

In the end, a person is not guilty of escape just because he leaves confinement. To be guilty of escape, a court must order DOC to confine the defendant, and the defendant must remove themselves from that confinement. If the order authorizing release is a condition of bail, then the person is not under official dentition for purpose of escape.

Secure Correctional Facility

Secure correctional facility means any premises used for the secure confinement of persons under official detention. It includes facilities that are specifically designed to restrict someone from leaving without permission, like prisons, jails, or holding cells. It also includes facilities where staff have a *duty* to physically prevent inmates from leaving, like minimum security facilities or "work farms". Halfway houses, hospital rooms, or treatment facilities, on the other hand, are excluded. *See Bridge v. State*, 258 P.3d 923 (Alaska App. 2011).

If a prisoner only faces *legal* restraints on their physical liberty (*i.e.*, a residential treatment center), then they are not confined within a secure correctional facility. On the other hand, if a prisoner's residence at a facility is forcibly maintained, then they are confined within a secure correctional facility.

Escape

Alaska's tough approach to escape begins with its four separate degrees of escape, three of which are felonies. The degree of escape is determined based on several factors: (1) whether a firearm or deadly weapon was used or possessed to facilitate the escape, (2)

the place from which the escape occurred, and (3) the seriousness of the defendant's underlying conduct.

Escape in the First Degree (Aggravated Escape)

Escape in the First Degree, a class A felony, is committed when a person removes oneself without lawful authority from official detention by means of a deadly weapon. AS 11.56.300. This would include an armed escape from a secure correctional facility or an armed escape while being transported to jail. The facility escaped from need not be a prison, jail, or holding cell. It includes anyone under official detention. AS 11.56.300(a).

The aggravating circumstance is the **deadly weapon**. Recall that a deadly weapon includes any firearm (loaded or unloaded) or anything that is designed for and capable of causing death or serious physical injury. Knives, axes, clubs, metal knuckles, and explosives are all considered deadly weapons. AS 11.81.900(b)(17).

The crime requires that the prisoner successfully escapes (at least initially). If a prisoner unsuccessfully attempts to escape using a deadly weapon, the prisoner would be guilty of **attempted escape**. Recall that attempt requires the defendant to take a substantial step towards the commission of the target crime. AS 11.31.100.

Escape in the Second Degree

Generally speaking, for purposes of escape classification, the legislature has divided those who escape from official detention into two categories: those who escape while under "official detention for a felony" and those who escape while under "official detention for a misdemeanor." The former is generally more serious than the latter.

Escape in the second degree covers an array of conduct, including escapes from secure facilities, escapes while under "official detention for a felony", prisoners who possess firearms during their recapture, and confined felons who leave house arrest or tamper with an electronic monitoring device to facilitate their escape. AS 11.56.310. Second-degree escape is a class B felony. AS 11.56.310(c).

First, and arguably the most important, is that all escapes from a secure correctional facility are treated as a second-degree escape. AS 11.56.310(a)(1)(A). Thus, a misdemeanant, as well as a felon, who escapes from a secure correctional facility commits the crime of second-degree escape.

Second-degree escape also covers the person who escapes while under official detention for a felony or an extradition. AS 11.56.310(a)(1)(B).This would encompass the person who jumps out of a police car after being arrested for burglary.

Those who evade confinement – either by removing themselves from official detention or by committing unlawful evasion (discussed below) – and possess a firearm while absconding, are guilty of second-degree escape. AS 11.56.310(a)(1)(C);(a)(2). Thus, a misdemeanant who escapes from official detention and possesses a gun before being rearrested is guilty of second-degree escape, as well as the prisoner who fails to return to jail after being granted a temporary release and possesses a gun during their absence.

Finally, those prisoners who are under official detention for a felony and either (a) remove, tamper, or disable electronic monitoring equipment or (b) leave house-arrest without permission are guilty of second-degree escape. AS 11.56.310(a)(3).

Escape in the Third Degree

Escape in the Third Degree is a low-level felony offense and largely deals with misdemeanants who leave official detention by specific means. For example, a person who escapes during any lawful movement incident to confinement while under official detention for a misdemeanor is guilty of third-degree escape. AS 11.56.320(a)(1). This covers the misdemeanant who escapes from a DOC van during transport to the courthouse. It would also cover the incarcerated misdemeanant who escapes during a supervised visit to the dentist's office after being transported there to have a tooth pulled.

Third-degree escape also includes leaving a residence or other place where the person is in custody for a misdemeanor; tampering or disabling an electronic monitoring device while under official detention for a misdemeanor; and tampering with or disabling an electronic monitoring device that has been ordered as a condition of bail release. AS 11.56.320(a)(3), (a)(4). This last provision – tampering with an electronic monitoring device while on bail – is the only provision within the escape statutes that address pretrial release.

Escape in the Fourth Degree

Escape in the Fourth Degree is a class A misdemeanor and encompasses the least serious conduct associated with escapes. Fourth-degree escape largely covers the residual conduct associated with misdemeanants not addressed in the third-degree escape statute. Specifically, the statute criminalizes misdemeanants who leave official detention. AS 11.56.330(a)(1). This would cover the defendant who flees a halfway house while being confined on a misdemeanor or the person who jumps out of a police car after being arrested for disorderly conduct. The statute also covers escapes occurring during pre-arrest investigative stops (temporary stops based on reasonable suspicion). If a person flees *before* the police take them into custody, the person is guilty of fourth-degree (misdemeanor) escape. AS 11.56.330(a)(2).

Unlawful Evasion

The criminal code includes a lesser offense of unlawful evasion. **Unlawful Evasion** occurs when a person **fails to return** to official detention after being granted temporary leave for a specific or limited purpose, such as a work furlough. AS 11.56.335-340. If the person fails to return to official detention while being confined for a felony, the person is guilty of unlawful evasion in the first degree (essentially aggravated unlawful evasion). If the person fails to return to official detention while being confined for a misdemeanor, the person is guilty of unlawful evasion in the second degree.

The crux of unlawful evasion is that the prisoner *fails to return* to the facility after being given authority to temporarily leave the premises. Walking away from a facility while under official detention is an escape. Failing to return to a facility after being permitted to temporarily leave is unlawful evasion. *See e.g., Barrett v. State*, 772 P.2d 559 (Alaska App. 1989).

Permitting An Escape

The Code includes a rarely charged offense called permitting an escape. AS 11.56.370. **Permitting an Escape** occurs when a public servant in charge of prisoners negligently permits a prisoner to evade official detention. The public servant must act with criminal negligence – the disregard of a substantial and unjustifiable risk that the person would escape. This could occur if a jail guard absentmindedly left a prison door unlocked after being told to double-check the door. Permitting an escape is a class C felony. AS 11.56.370(b).

Promoting Contraband

Promoting contraband is the voluntary introduction of contraband into a correctional facility. Promoting contraband is divided into two degrees, and the penalty depends on the type of contraband that is involved.

Contraband is any article or thing that a person confined to a correctional facility is prohibited by law from possessing. The Department of Corrections is responsible for promulgating regulations that define contraband, but generally, it includes money, nicotine, alcohol, and drugs.

If the contraband is a deadly or defensive weapon (*i.e.*, shank), an article that is intended to be used as a means of facilitating an escape (*i.e.*, a passkey), or a controlled substance (*i.e.*, drugs), the crime is evaluated to **Promoting Contraband in the First Degree**, a class C felony. AS 11.56.375. If the prohibited item is anything else, the crime is **Promoting Contraband in the Second Degree**, a class A misdemeanor. AS 11.56.380.

Promoting contraband applies to both incarcerated and non-incarcerated persons. The person who brings contraband into the facility is just as guilty as the person who makes, obtains, or possesses contraband inside the facility. Thus, both the inmate who receives contraband from a visitor and the visitor are guilty of promoting contraband. *See e.g.,Hillman v. State*, 382 P.3d 1198 (Alaska App. 2016).

Finally, recall that all criminal acts must be performed voluntarily for criminal liability to attach. Involuntary acts are not criminal. It is an unresolved question in Alaska whether a defendant is guilty of promoting contraband if the defendant knowingly, but involuntarily, introduces contraband into the correctional facility when the contraband is hidden on their person at the time of their arrest and they are transported to the facility against their will. *Compare Idaho v. Gneiting*, 468 P.3d 263 (Idaho 2020) (holding that a person who knowingly takes drugs into a detention facility that are hidden inside a body cavity does so voluntarily, even though they entered the facility involuntarily) *and Oregon v. Tippetts*, 43 P.3d 455 (Or. 2002) (holding that a defendant did not voluntarily introduce marijuana into county jail since the defendant was brought to jail involuntarily pursuant to an arrest).

Violation of Conditions of Bail Release

A person commits the crime of **violating conditions of release** when that person has been charged with a crime, released on bail, and violates a court-imposed bail condition. AS 11.56.747. Conditions of bail are not typically stand-alone criminal offenses, but instead conditions designed to ensure that the defendant appears at future court hearings and protect the public. Conditions of bail can frequently cover a large array of conduct, including not possessing alcohol, not having contact with a particular person (*e.g.*, the victim), or staying away from a particular location (*e.g.*, the scene of the crime). AS 12.30 *et. seq.*

Violating conditions of release is a class A misdemeanor if the defendant's underlying charge is a felony and a class B misdemeanor if the defendant's underlying charge is a misdemeanor. AS 11.56.757(b).

Failure to Appear

A person commits the crime of **failure to appear** if the person knowingly fails to appear for a hearing in a criminal prosecution. AS 11.56.730. This occurs when a defendant is released on bail and fails to appear before the court at a subsequent court hearing. Failure to appear is a new crime, independent of the underlying charge.

The law provides an affirmative defense if due to unforeseen circumstances outside of the person's control the person fails to appear. AS 11.56.730. For example, if a defendant is involved in a car accident on the way to the court hearing, the defendant could raise the affirmative defense and argue that they should not be held criminally liable for the new crime of failure to appear.

Like violating conditions of release, failure to appear is a class A misdemeanor if the defendant's underlying charge is a felony and a class B misdemeanor if the defendant's underlying charge is a misdemeanor. AS 11.56.730(d).

Resisting Arrest

Resisting arrest prohibits an individual from using force to prevent an arrest. AS 11.56.700. The crime is a specific intent crime – to be guilty of resisting arrest, a person must intend to prevent the officer from making an arrest through the use of force. If the defendant uses force at any point during the process of taking a suspect into custody, the defendant has committed the crime of resisting arrest. *See Fallon v. State*, 221 P.3d 1016, 1020 (Alaska App. 2010).

The crime of resisting arrest requires the use of **force.** Recall that force means "any bodily impact, restraint, or confinement or the threat of imminent bodily impact, restraint or confinement." AS 11.81.900(28). Mere non-submission (passive resistance) during an arrest is not force. *See e.g. Howard v. State*, 101 P.3d 1054 (Alaska App. 2004). For example, "turtling" and yelling are not acts of resisting arrest; there is insufficient force. Conversely, actions *directed at the arresting officer* (*i.e.*, pushing away from the arresting officer or repeatedly trying to get up from the ground during a struggle) are acts of resisting arrest. *See e.g., Bultron v. State*, 2011WL 5627897 (Alaska App. 2011).

A Tale of Two Arrestees…

One evening in Soldotna, two troopers went to the house of Warren Eide to arrest him for vehicle theft. Troopers found Eide on the floor in a sleeping bag. Troopers told Eide several times that he was under arrest. One trooper grabbed Eide by the wrist to pull him up, but Eide jerked away, and told the trooper, "No, leave me alone, I ain't going." Eide rolled onto his stomach with his arms underneath him. Troopers told Eide several times to "stop resisting arrest."

The troopers were concerned that they or Eide would get hurt if they had to wrestle Eide into submission. Accordingly, the trooper deployed an electric shocking device (Taser) on Eide to gain his cooperation. The electric shocking device caused immediate pain to Edie. Eide immediately jumped up and submitted to his arrest.

Eide was convicted of resisting arrest (in addition to the original charge of vehicle theft). The Court of Appeals *reversed* Eide's resisting arrest conviction, noting that Eide's conduct of "turning 'turtle' and announcing that he was not going with the trooper does not rise above 'mere non-submission'" because Eide's conduct did not actively create a danger of physical injury. *See Eide v. State*, 168 P.3d 499 (Alaska App. 2007).

On a different evening in Soldotna, a trooper was patrolling the Sterling Highway when he spotted a vehicle in the ditch. During the trooper's investigation, the trooper determined that the driver, Chris Fallon, was intoxicated. The trooper placed Fallon under arrest for driving under the influence.

When the trooper was arresting Fallon, he directed Fallon to put his arms behind his back. Fallon initially complied, but then tensed his arms and pressed them against his back so the trooper could only handcuff one arm. The trooper told Fallon several times to relax and stop resisting, but Fallon became verbally belligerent and continued to tense his arms. The trooper was concerned that Fallon might assault him, so he pepper sprayed Fallon. It had no effect. Fallon began pushing himself away from the patrol car, so the trooper took Fallon to the ground. During the struggle, the trooper could still not handcuff Fallon because Fallon kept trying to get up and continued to tense his arms. It was not until a passing motorist stopped to assist that the trooper was able to handcuff Fallon and secure him in the patrol car.

Fallon was convicted of resisting arrest (in addition to DUI). The Court of Appeals ***upheld*** the resisting arrest conviction, noting that Fallon's conduct went beyond mere non-submission, and instead, was force directed at the trooper. *See Fallon v. State*, 221 P.3d 1016, 2021 (Alaska App. 2010).

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12.4: End-of-Chapter Material

Summary

Public order crimes generally prohibit offensive, disruptive, or otherwise undesirable behavior. The government is interested in protecting its citizens' quality of life, and therefore prohibits several crimes that harm the general public (and not a particular person). Public order crimes are sometimes referred to as "victimless crimes".

Disorderly Conduct criminalizes making a loud and unreasonable noise, fighting or challenging another person to fight, or creating a hazardous condition in public, with the specific intent or purposely or reckless intent to cause public inconvenience and alarm or a risk thereof. Disorderly conduct statutes frequently target speech, so they are subject to constitutional challenges under the First and Fourteenth Amendments. Disorderly Conduct is a Class B misdemeanor, the lowest possible crime.

Disruptive group conduct tends to enhance the potential for force and violence. Riot criminalizes collective, group acts of violence if done with the intent to engage in tumultuous and violent behavior. Riot requires the group to consist of five or more people. It is a class C felony. Like Disorderly Conduct, Riot is narrowly interpreted to ensure that it does not violate a person's First Amendments rights of free speech and free assembly.

Harassment criminalizes relatively trivial conduct that interferes with a person's personal autonomy. Harassment punishes actions like spitting, taunting, prank phone calls, and cyberbullying, among others.

Weapon offenses criminalize the use or possession of prohibited weapons. Weapon offenses are not "victim crimes", although the offenses can frequently involve a victim. Weapon offenses do not penalize the resulting harm, injury, or damage, but instead, penalize the danger created by the weapon. Weapon offenses cover a wide array of conduct from drive-by shootings to possession of concealed weapons.

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CHAPTER OVERVIEW

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13.1: Drugs and Alcohol

The Alaska code includes several crimes that are often viewed as *victimless* and *harmless* (other than the harm done to the defendant or society in general). Specifically, Alaska has criminalized conduct surrounding drugs, alcohol, prostitution, and gambling. Drug offenses criminalize the manufacture, delivery, sale, and possession of various drugs. Alcohol offenses criminalize conduct involving the sale, possession, and delivery of alcohol. Alaska regulates alcohol to a greater extent than most states. Prostitution, pimping, and pandering (now referred to as sex trafficking) criminalize "consensual" sexual activities. Finally, the code criminalizes specific types of gambling. Each of these crimes violates society's collective morality.

Drug Policy

The American criminal justice system has long punished the use of intoxicating substances deemed harmful to the human body. From Prohibition in the 1920s to the War on Drugs beginning in the 1960s, the criminal justice system has been at the forefront of society's response to the negative consequences of the use of illicit drugs and alcohol. Nearly every community has been impacted. Alaska has been no exception.

A complete discussion of the efforts to combat illicit drug trafficking is beyond the scope of this textbook. Broadly speaking however Alaska's statutory scheme seeks to reduce the availability of drugs through various enforcement and interdiction methods, including the prosecution of both drug traffickers and drug users. While policymakers may face criticism for criminalizing drug use, Alaska is not unique in its efforts. But Alaska does treat traffickers differently than users.

Alaska *grades* drug offenses based on the type of drug involved and the conduct the defendant engaged in. For example, a person who sells heroin to a minor is guilty of an unclassified felony, whereas a person who simply possesses cocaine for personal use is guilty of a misdemeanor. *Compare* AS 11.71.010 and 11.71.050. Alaska's statutory scheme relies on the interplay between these two components.

Drug Schedules

Controlled substances (drugs) are divided into categories, called **schedules**, based on how dangerous the drug is. The schedules contain both illicit drugs (*e.g.*, "street drugs") and non-illicit drugs (*e.g.*, prescription drugs). All controlled substances are classified into one of six schedules, which are labeled schedules IA through VIA. AS 11.71.140 – AS 11.71.190. The scheduling of substances is patterned after the federal drug schedules, which classifies substances into five schedules, labeled I through V. *See* 21 U.S.C. §812. Alaska has adopted the letter "A" after its numbered schedules to clearly distinguish between state and federal schedules.

Although both the federal government and Alaska classify substances based on similar criteria: a substance's potential for abuse, its biomedical hazard, its likelihood of dependence, and its relationship to criminal activity – the jurisdictions weigh the factors very differently. As a result, the schedules are not identical and contain some significant differences. For example, under federal law, schedule I include drugs that have "no currently accepted medical use". 21 U.S.C. §812(b)(1)(B). Alaska has specifically omitted this criterion.

In Alaska, the more dangerous a drug is, regardless of medical use, the higher it is placed on the drug schedules. For example, fentanyl is a powerful painkiller, and doctors frequently prescribed it during childbirth and for end-of-life pain management. Fentanyl is a synthetic opiate and can be lethal if taken in excess. It is also highly addictive. Alaska classifies it as a schedule IA controlled substance along with all opiates and opiate derivatives. AS 11.71.140(c)(29). Methamphetamine, on the other hand, currently has no medical use, and is seen almost exclusively in illegal drug trafficking. Although methamphetamine is dangerous, it does not have the same potential for abuse as opiates. It is classified as a schedule IIA controlled substance. AS 11.71.150(e)(2). Understanding the relevant drug schedules is very important, as it directly ties to the seriousness of the criminal behavior.

One very significant difference between the federal and state schedules is marijuana. The federal government classifies marijuana as a Schedule I controlled substance (the highest and most dangerous level of drug) because of its lack of medical use. Federal law criminalizes the possession of *any amount* of marijuana. 21 USC § 844. Alaska, on the other hand, classifies marijuana as a Schedule VIA controlled substance (the lowest level) because state lawmakers have found it to be the least dangerous drug. Alaska permits a person 21 years or older to lawfully purchase and possess marijuana. AS 17.38.020.

Trafficking versus Possession

A drug's placement on the drug schedules is just one component of understanding Alaska's drug statutory scheme. The second component involves the defendant's conduct. Broadly speaking, the law criminalizes two types of conduct associated with controlled substances: drug possession and drug trafficking. Possessory offenses are generally graded lower; trafficking offenses are generally graded higher.

Possessoryoffenses, as the name implies, criminalize the possession of a controlled substance for personal use. Recall that possession can take several forms, including both actual and constructive possession. **Actual possession** occurs when a controlled substance is found in an individual's physical or immediate presence. **Constructive possession** occurs when an individual is not in physical possession of an item but has the authority (legal or otherwise) to control an item. *See Alex v. State*, 127 P.3d 847 (Alaska App. 2006).

*UsePossession*Is Evidence of Drug Evidence Drug ?

In 1989, police executed a search warrant at a suspected crack house. Police found Earl Thronsen lying face down on a couch in the living room. His hands were concealed beneath him. When officers placed Thronsen in handcuffs, officers found a syringe underneath his arms. The syringe was consistent with intravenous drug use, as were Thronsen's track marks on his arms.

Pursuant to a search warrant, police obtained samples of Thronsen's blood and urine. The urine tested positive for the presence of cocaine and cocaine metabolites. The Grand Jury indicted Thornsen for possession of cocaine "in his body." Thronsen challenged the indictment, arguing that the presence of a controlled substance in a person's body is insufficient evidence to prove the person possessed the drug.

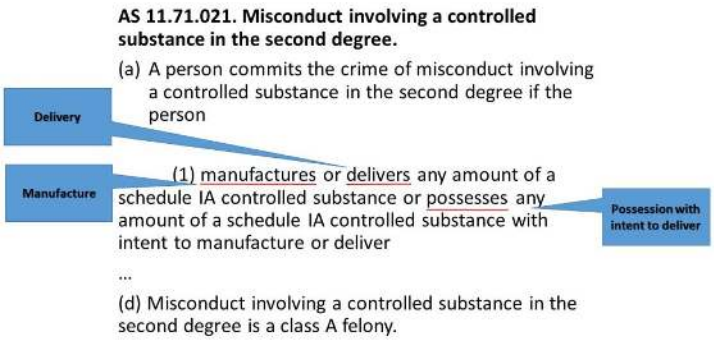
Can a person be convicted of drug possession based on evidence that the person had previously ingested drugs? Why or why not? Check your answer at the end of the chapter.

Although exceptions exist, normally first-time offenders found in possession of controlled substances (other than marijuana) are guilty of a misdemeanor. AS 11.71.050(a)(4). Colloquially this is referred to as **simple possession**. By classifying first-time possession as a misdemeanor, the legislature has emphasized rehabilitation and treatment over other penological goals. At least theoretically, the criminal justice system treats users as individuals with a disease in need of intervention. The legislature has sought to avoid the collateral impacts normally associated with a felony conviction. First-time defendants convicted of simple possession are not hardened criminals in the eyes of the criminal code.

As one can imagine, these sentencing goals change with repeat offenders. A second-time offender is no longer guilty of a misdemeanor. If the defendant has been previously convicted of simple possession in the previous 10 years, the crime is elevated to a felony. AS 11.71.040(a)(12).

Drug trafficking is a much more serious offense. The code criminalizes three separate voluntary acts associated with trafficking: the **manufacture** of a controlled substance, the **delivery** of a controlled substance, and **possession** of a controlled substance with the **intent to distribute**. Each action is a component of a successful drug trafficking operation and the legislature seeks to punish each one. A typical drug trafficking statute, like AS 11.71.021(a)(1), includes all three.

Figure 13.1 – Alaska Criminal Code – AS 11.71.021(a)(1)



Notice that the subsection does not require the defendant to manufacture, deliver, or possess a certain *amount* of the controlled substance. *Any* amount is sufficient to impose criminal liability. Quantity is not an attendant circumstance in this subsection. The statute criminalizes the action, independent of the amount trafficked. You will see momentarily, the quantity trafficked is a sentencing issue, not a liability issue.

Manufacturing a controlled substance includes producing, preparing, converting, growing, or processing a controlled substance. AS 11.71.900(13). Simply put, any change to a drug or its precursors will likely be sufficient to demonstrate manufacturing. Thus, converting cocaine hydrochloride (powder cocaine) into crack cocaine (by neutralizing the hydrochloride so it is no longer water-soluble) constitutes "manufacturing." *See Chamber v. State*, 881 P.2d 318, 321 (Alaska App. 1991). This is true even though the basic cocaine molecule does not change during the process.

Delivery means the actual or constructive transfer of the controlled substance to another person. AS 11.71.900(13). The law does not require remuneration or an established agency relationship (*i.e.*, dealer/user). A defendant is guilty of trafficking even if the defendant gives a controlled substance to another person for benevolent reasons. For example, if a person shares their prescription oxycodone (a powerful painkiller and schedule IA narcotic) with an injured friend during a camping trip, the person is guilty of drug trafficking under AS 11.71.021(a)(1). To avoid criminal liability, the person could assert the affirmative defense of **necessity**, but the person would have to demonstrate that there was no reasonable alternative. AS 11.80.320. In short, the law is not limited to drug *dealers*; any transfer of a controlled substance without a prescription is criminalized. Conversely, a drug *purchaser* (*i.e.*, a user) may not be prosecuted or convicted of trafficking as an accomplice to the delivery. *See e.g.*, *Howard v. State*, 496 P.2d 657, 660 (Alaska 1972). In other words, drug users are not facilitating the delivery of drugs when they purchase the drugs.

Possession with the intent to deliver or manufacture is the most common theory of drug trafficking prosecutions. The theory does not require evidence of actual manufacturing or actual delivery, but instead, focuses on the defendant's intent. If the defendant possessed a controlled substance with the intent to subsequently deliver it, the defendant is guilty of drug trafficking. The line between drug trafficking and simple drug possession is not always clear, however; in fact, it is often blurry. The jury considers the totality of the circumstances in determining whether the defendant possessed the drugs with the intent to deliver, including the quantity, value, and associated drug paraphernalia. Although no one fact is determinative, possession of a large quantity of drugs, especially when the amount is larger than typically used for personal use, frequently demonstrates that the defendant is a dealer and not a user. *See e.g.*, *Stacy v. State*, 500 P.2d 1023 (Alaska App. 2021). The government frequently relies on expert testimony to explain to the jury what constitutes indicia of drug distribution as opposed to personal use. Such experts are typically drug investigators, which may be qualified as **hybrid experts** in court. *See id*.

Alaska law distinguishes between low- and high-level *traffickers* through the application of aggravating and mitigating factors. An aggravating factor applies when a large quantity of a controlled substance is involved, and a mitigating factor applies when a small quantity of a controlled substance is involved. AS 12.55.155(c)(23)-(c)(26); 12.55.155(d)(13)-(d)(15). These factors allow the court to depart upwards or downwards from the felony presumptive-range sentence that would be imposed absent an aggravating or mitigating factor. Whether a quantity is determined to be large or small is fact driven and looks at several variables:

Within any class of controlled substance, what constitutes an unusually small or large quantity may vary from case to case, depending on variables such as the precise nature of the substance and the form in which it is possessed, the relative purity of the substance, its commercial value at the time of the offense, and the relative availability or scarcity of the substance in the

community where the crime is committed. Variations may also occur over time: what amounted to a typical controlled substance transaction ten years ago might be an exceptional one today. These variables do not lend themselves to an inflexible rule of general application, and they render it both undesirable and wholly impractical to treat the question of what constitutes a "large" or "small" quantity . . . as an abstract question of law. The question must instead be resolved by the sentencing court as a factual matter, based on the totality of the evidence in the case and on the court's discretion, as informed by the totality of its experience.

See Knight v. State, 855 P.2d 1347, 1349-50 (Alaska App. 1993).

Marijuana

Marijuana is largely legal under Alaska law and regulated similar to alcohol. Following a 2015 ballot initiative, Alaska legalized the manufacture, distribution, and sale of marijuana by licensed marijuana establishments. The marijuana industry is heavily regulated by the state's **Marijuana Control Board**. The state's criminal statutes surrounding marijuana largely target the marijuana "gray market" – that is, the unlawful cultivation, distribution, and possession of unregulated marijuana.

The legalization of marijuana presents interesting constitutional dilemmas given that federal law continues to list marijuana as a Schedule I drug and does not permit its possession, use, or sale for any person. Thus, Alaska's laws surrounding the recreational and medical use of marijuana potentially violate the **Supremacy Clause** in the federal constitution. That said, the US Supreme Court has not invalidated any state's marijuana statutory scheme on this basis. The Court has upheld Congress's authority to prohibit the possession and use of small quantities of marijuana under the Federal Controlled Substances Act however, and has rejected a medical necessity exception for the possession and use of marijuana. *See Gonzales v. Raich*, 545 U.S. 1 (2005); *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483 (2001).

Alcohol

The debate surrounding the dangerousness of alcohol – and the government's role in a solution – has mutated over the past century. For example, in 1919, and for largely puritan reasons, an overwhelming majority of states ratified the 18th Amendment prohibiting alcohol in the United States. Over the next 14 years, both federal and state law enforcement officers dedicated significant time and resources to its enforcement. Fourteen years later, **prohibition** was repealed through the passage of the 21st Amendment. While a more laissez-faire scheme took hold surrounding the possession of alcohol, the government remained intimately involved in alcohol's manufacture and distribution.

Alcohol remains a heavily regulated activity. At the federal level, both the **Food and Drug Administration** (FDA) and the **Bureau of Alcohol, Tobacco, and Firearms** (ATF) regulate interstate and foreign commerce of alcohol. At the state level, the **Alaska Alcohol Beverage Control Board** (ABC) regulates the manufacture, sale, and possession of alcohol within the state. State law defines the legal drinking age, licensing requirements, and possession limitations. *See e.g.* AS 04. *et.seq.* For example, it is illegal to sell, give, or barter an alcoholic beverage to an intoxicated person. AS 04.16.030(a)(1). Likewise, it is illegal for a person to remain in a bar if they are intoxicated. AS 04.16.040. Although the ABC Board regulates the industry, violation of state law results in criminal liability.

Unique to Alaska, Alaska law allows local municipalities to enact **local option laws** that prohibit the sale, importation, or even possession of alcohol within a community. AS 04.11.499. Violation of a community's local option law is significant – it is a felony to import alcohol into a municipality if the community has prohibited such conduct. AS 04.16.200(b).

What's in a name…

Colloquially, a municipality that has passed an ordinance to ban the importation, sale, or possession of alcoholic beverages is called **dry**; a community that allows limited amounts of alcohol, or under specific circumstances, such as for personal use, is called **damp**. Finally, a community with limited or typical alcohol regulations – like Anchorage – is referred to as **wet**.

Public Intoxication

Recall that it is unconstitutional to punish a person for being *addicted* to drugs or alcohol. *Robinson v. California*, 370 U.S 660 (1962). A person's addiction relates to their **status** in the community. Status is not a criminal act.

While the government may not criminally punish a person for their addiction, police frequently place individuals who are severely intoxicated into **protective custody**. Such police actions are not part of an officer's criminal enforcement function, but instead part of an officer's community caretaker function. Society has determined that severely intoxicated individuals need supervision, and in some circumstances, medical intervention.

When an officer encounters a person who is **intoxicated** – that is, substantially impaired as the result of alcohol or drugs – the law permits the officer to take the person into custody until the person is sober. AS 47.37.170(a). However, if a person is so intoxicated that they are **incapacitated** – that is, incapable of making rational decisions as a result of alcohol or drugs – police *must* take the person into protective custody. AS 47.37.270(7). Police have a *mandatory* duty to take incapacitated persons into protective custody. AS 47.37.170(b).

Example of Protective Custody

Sam recently received fantastic news. He received an "A" on his Criminology final exam. In an effort to celebrate, Sam and a couple of his friends decide to go out after school for drinks and merriment. After a long night of drinking, Sam stumbles out of the bar and begins walking home. Sam doesn't make it far. About three blocks from the bar, Sam finds a park bench and lays down. Sam quickly passes out on the park bench. Sam's friends are nowhere to be found. Sam is alone. About 20 minutes later, an officer happens upon Sam passed out on the bench. The officer rouses Sam and begins asking him questions. Sam is incoherent. He is unable to answer the officer's questions and unable to tell the officer where he lives and how he plans to get home. If the officer determines that Sam is intoxicated, the officer may take Sam into protective custody and transport him to a detention facility (jail) until Sam is sober. On the other hand, if the officer determines that Sam is *incapacitated*, the officer is required to take Sam into protective custody. The officer does not have the discretion to let Sam stay on the park bench.

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13.2: Gambling

The Alaska Code's gambling provisions are intended to heavily penalize gambling businesses, focus on organized crime, and exclude the person who engages in social gambling.

Gambling is broadly defined. It covers almost every activity having an element of chance. Specifically, gambling means a person who risks something of value upon the outcome of a contest of chance or a future contingent event not under their control or influence, with an understanding that they or someone else will receive something of value in the event of a particular outcome. AS 11.66.280(2). As described by the legislature commentary, "[t]he definition includes any activity that brings a profit based on chance and includes ordinary lotteries. Games of pure skill, *e.g.* 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." *See* Senate Journal Supp. No. 47, at 117-18 (June 12, 1978). Legitimate business speculations, such as the stock market, are exempted, as are tickets redeemable for prizes (*e.g.*, Chuck-e-Cheese tickets) and claw machines. State-regulated **charitable gaming** (*e.g.*, Bingo, raffles, Ice Pools, etc.) is also exempted. AS 11.66.280(12). Charitable gaming is a complex array of statutes and regulations and is beyond the scope of this textbook. *See generally* AS 05.15 *et. seq*.

The gambling patron, or bettor, whose only financial interest is in their own winnings, commits the crime of gambling. AS 11.66.200. Gambling is a violation with a maximum fine of $1000. However, the Code contains an affirmative defense for **social games**. AS 11.66.200(b). If a defendant is a player (defined as someone who competes on equal terms with all other participants, and plays in a social game), the player is not guilty of gambling. A social game is defined as one played in a home where there are no "house" advantages, house odds, or house income. Note that "player" includes someone who helps organize a social game so long as they are not paid for their services.

Although home is not specifically defined in the Code, the legislative history indicates that the social game affirmative defense only applies to structures similar to dwellings – structures adapted for and used for overnight accommodation. It includes houses, hotel rooms, motor homes, and tents. It would not include clubs or bars.

Promoting gambling is felony gambling and is focused on organized gambling enterprises. AS 11.66.210. Gambling enterprises must be relatively large gambling businesses. To be an "enterprise" the gambling business must include at least five persons in its ownership or operation, and must either operate on a substantially continuous basis for more than 30 days or take in at least $2,000 in wagers during a single day. AS 11.66.280(5). Certain charitable and fraternal organizations are excluded from the definition. This was included to ensure fraternal organizations, such as the Elks Club or the Moose Lodge, could not be charged with a felony if gambling occurs on their premises. If the gambling business is too small to be an "enterprise", the crime is promoting gambling in the second degree, a misdemeanor. AS 11.66.240. Charitable and fraternal organizations are not excluded from this statute, and may may be charged with misdemeanor gambling if warranted. AS 11.66.240.

Anyone who, for profit, assists a gambling enterprise in any material way (with the exception of merely betting), may be prosecuted for felony promoting gambling. This would include bartenders, waitresses, and bookkeepers employed by the house, as well as persons who financed or managed the operation. AS 11.66.280(9).

The code also criminalizes the **possession of gambling records**. AS 11.66.230-.240. Gambling records include any paper or writing of the type "commonly used" in unlawful gambling, whether or not it is actually used in a particular game. AS. 11.66.280(6). It is an affirmative defense that the defendant did not intend to use the record to operate or promote unlawful gambling or only possessed the records in a social game. AS 11.66.250. A player is relieved of criminal liability through an affirmative defense if the player possesses a record of their own bets in the gambling enterprise.

Possession of a gambling device is also illegal. Gambling devices are defined to include almost everything usable in the game itself. Anyone who possesses or uses a gambling device knowing what it is and that is being used in unlawful gambling is guilty of possession of a gambling device, a misdemeanor. AS 11.66.260. The defendant is relieved of criminal liability if the device was used in a social game. AS 11.66.260(b). This protects those who manufacture or sell ordinary playing cards, those who keep cards and chips at home for friendly poker grams, or have an antique slot machine in their basement.

One powerful aspect of the gambling statutes is **forfeiture**. The code specifically permits money, gambling devices, and gambling records to be forfeited to the government. AS 11.66.270. Money, however, is only subject to forfeiture if it was used as a bet or

stake. Thus, if an underground poker house is broken up, money in the players' pockets is not subject to forfeiture. The money in the promoter's pocket, however, is subject to forfeiture. The law allows money seized from the promoter of a gambling enterprise (the person who "conducts, finances, manages, supervises, directs, or owns the gambling enterprise) to be forfeited to the government. AS 11.66.270(3).

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13.3: Prostitution, Sex Trafficking, and Human Trafficking

The oldest profession. The debate over whether prostitution should be legal or criminal has raged on for centuries. Some argue that it amounts to government interference with one's own body and is based on a puritan view of sexuality. Advocates of legalized prostitution argue that when such conduct is criminal, sex workers are forced to work in the shadows, increasing the likelihood of physical and sexual violence, by pimps and patrons alike. Instead of criminalizing consensual sex work, the government should regulate the profession like alcohol or marijuana.

Others argue that the overwhelming majority of those who engage in prostitution are not engaging in such behavior consensually. Prostitution is inherently exploitive, demeaning, and contributes to the modern slave trade. Advocates of criminalizing prostitution recognize that it is simply the product of sex trafficking, which when perpetrated, violates basic human rights and deprives victims of every shred of personal freedom.

Alaska has taken the latter view. Alaska law recognizes that both sex and human trafficking are forms of modern day slavery and should be punished as such. Prostitution, although illegal, is not the target of significant punishment. Prostitution is a class B misdemeanor, the lowest level crime available, and the law provides prostitutes with **immunity from prosecution** if the prostitute reports a violent crime (including sex trafficking) to law enforcement. AS 11.66.100(c).

Although some enter the prostitution profession voluntarily, Alaska law generally views those who engage in prostitution, especially children, as being trafficked, and as victims of a serious crime. *See* H.B. 359, 2012 Leg., 27th Sess. (Alaska 2012) (Governor's letter of transmittal seeking passage of HB 359).

Prostitution

In the United States, all states prohibit prostitution except for Nevada. In Nevada, legal prostitution must follow specific guidelines and can occur only in a licensed house of prostitution (N.R.S. 201.354, 2011). Of course, Nevada is the exception, not the rule.

In Alaska, a person commits the crime of **prostitution** if they engage in, agree to, offer to engage in, or offer a fee for sexual conduct. AS 11.66.100(a). The gravamen of the offense is the *offer* or *agreement* to exchange sex for a fee. The actual payment of the fee is not required. *See Garibay v. State*, 658 P.2d 1350 (Alaska App. 1983).The act is complete when an offer is extended or an agreement is made. Although the **fee** is typically money, it can be anything that has value. Cash consideration is not required. *See commentary*, Senate Journal Supp. No. 47, at 109. (June 12, 1978); *Muse v. United States*, 522 A.2d 888, 891 (D.C. App. 1987).

Sexual conduct includes all forms of sexual intercourse, as well as cunnilingus, fellatio, and masturbation of one person by another. AS 11.66.150(3). The law is gender-neutral. Although prostitution laws historically criminalized only women who engage in prostitution, and not men, such laws violate equal protection and are unconstitutional. *See Plas v. State*, 598 P.2d 966 (Alaska 1979).

The crime itself is relatively minor. As noted, the crime is a class B misdemeanor. Provided that the prostitute is an adult, the statute punishes both the prostitute and the patron the same – up to 90 days in jail. AS 12.55.135(b). If the prostitute is a minor (under 18 years old), and the patron is at least 21 years old, the patron is guilty of a class C felony offense. AS 11.66.100(e). The law provides for an **affirmative defense** if the patron took reasonable steps to verify the prostitute was over the age of 18. AS 11.66.100(b). Note that this affirmative defense is similar to the affirmative defense available to a defendant charged with sexual abuse of a minor. AS 11.41.445(b).

Sex Trafficking

Although Alaska criminalizes both the act of selling sex and buying sex, the real focus is on commercial sexual activity. Modern criminal statutes recognize that many prostitutes are victims of sex trafficking and not eager, willing participants. Pretty Woman® is a Hollywood story, not real life. Alaska's statutory scheme is designed to interrupt the commercial sex trade with a particular focus on persons who exploit children by inducing them to engage in prostitution. Alaska grades sex trafficking into four degrees, ranging from an unclassified felony for first-degree sex trafficking to a class A misdemeanor for fourth-degree sex trafficking.

The More You Know …

Research surrounding sex trafficking shows that traffickers prey on the most vulnerable in our society – young girls and boys who have experienced physical and sexual abuse, drug abuse, or homelessness. The National Center for Missing and Exploited Children (NCMEC) is a national nonprofit clearinghouse and reporting center that works with law enforcement to investigate childhood abduction, abuse, and exploitation. Identifying the causes of child sex trafficking is a large component of its mission.

Most experts believe that girls are first exploited between the ages of 12 to 14 and boys between 11 and 13. Alaska officials believe the age is slighter higher in Alaska, with girls generally first being exploited between 15 and 17 years old. *See The State of Alaska Task Force on the Crimes of Human Trafficking, Promoting Prostitution and Sex Trafficking*, Final Report and Recommendations (February 15, 2013). Regardless of the precise age that victims are first exploited, children are frequently the target of traffickers. But sex trafficking is not limited to child-victims. Adults are also the victims of sex trafficking. For more information about human and sex trafficking visit the Polaris Project, a non-profit organization dedicated to assisting victims of human and sex trafficking.

Sex Trafficking in Alaska

Those who force others into the sex trade are guilty of a class A felony. Historically, this was referred to as **pandering** – the procuring or forcing another person to engage in prostitution. The **panderer**, the person who uses manipulation, violence, or threats to force another person to engage in prostitution against their will, was frequently referred to as a **pimp**. A pimp can also refer to a person who solicits or procures a prostitute for a patron. *See* Black's Law Dictionary, *Pimp* (7th Ed. 1999). Although the terms may help identify the different actors of sex trafficking, the criminal code does not use them.

Figure 13.2 – Alaska Criminal Code – AS 11.66.110(a)

AS 11.66.110. Sex trafficking in the first degree.

(a) A person commits the crime of sex trafficking in the first degree if the person

(1) induces or causes another person to engage in prostitution through the use of force;

(2) as other than a patron of a prostitute, induces or causes another person who is under 20 years of age to engage in prostitution; or

(3) induces or causes a person in that person's legal custody to engage in prostitution.

(b) – (d) [omitted for readability]

Alaska largely codifies pandering as **sex trafficking in the first degree**. *See* Figure 13.2. First-degree sex trafficking prohibits a person from inducing or causing another person to engage in prostitution through the use of force. AS 11.66.110(a). Recall that **force** requires some sort of violence, coercion, or the threat of violence. AS 11.81.900(28). Thus, a defendant must use violence (physical or sexual), restraint, or confinement, or the threat of violence, restraint, or confinement to be guilty of first-degree sex trafficking. The crime is a class A felony offense, punishable by up to 20 years imprisonment. AS 11.66.120(c).

If the trafficked person is younger than 20 years old, the inducement need not involve force or coercion. If a person causes a person under the age of 20 to engage in prostitution, regardless of force, the person is still guilty of first-degree sex trafficking. AS 11.66.110(a)(2). Sex trafficking under this provision is *aggravated* to an unclassified felony offense. AS 11.66.120(d). Thus, a pimp who causes a 19-year-old to engage in prostitution using drugs, alcohol, or psychological manipulation (as opposed to physical violence) faces up to 99 years imprisonment. AS 12.55.125(i). This section is one of **strict liability**. Unlike the misdemeanor crime of prostitution (where a patron may assert a reasonable mistake of age affirmative defense), there is no reasonable mistake of age defense to first-degree sex trafficking. AS 11.66.110(b); *Bell v. State*, 668 P.2d 829 (Alaska 1983).

Individuals under the legal custody of another person (a ward or an incompetent person) are treated similar to young victims; a person who causes a person in their legal custody to engage in prostitution, irrespective of force, is guilty of first-degree sex trafficking. AS 11.66.110(a)(3). This provision is intended to reach persons who induce legal wards, incompetent persons, or others in their legal custody to engage in prostitution.

Finally, although a sex-trafficker likely forces a victim to engage in prostitution to make money, compensation is not a required element of the offense. The panderer's *motivation* for engaging in sex trafficking is irrelevant for purposes of sex trafficking. The government is not required to prove the defendant received payment, compensation, or something of value from the prostitute.

Prostitution Enterprise

Sex trafficking in the second degree prohibits anyone from owning, managing, or supervising a prostitution enterprise. It also includes the surrounding conduct related to a prostitution enterprise. AS 11.66.120. A **prostitution enterprise** is an arrangement in which two or more persons agree to engage in a prostitution business – that is, a business designed to render sexual conduct in return for a fee. AS 11.66.150(a). The statute targets the organized prostitution apparatus, but does not include a "place of prostitution," which is discussed below. The arrangement need not be formal. It can be simple consensual arrangements between a pimp and a prostitute, an agreement between two prostitutes, or larger-scale activities. *See commentary*, Senate Journal Supp. No. 47, at 108. The enterprise need not be established as an ongoing enterprise. *See Gariby v. State*, 658 P.2d 1350 (Alaska App. 1983). "Start-up" prostitution businesses qualify. *See id*.

The law also punishes those who facilitate the enterprise. Those who directly solicit patrons for a prostitute (*e.g.*, a pimp) are punished to the same extent as those who operate or manage the enterprise. AS 11.66.120(a)(2). Those who facilitate travel for prostitution are equally guilty.[1] AS 11.66.120(a)(3). This last provision is intended to specifically target the **sex tourism industry** in Alaska. *See* S.B. 12, 2006 Leg., 24th Sess. (Alaska 2006).

Those who enable, assist, or facilitate the prostitution enterprise, but who are not involved in the direct solicitation of patrons or sex tourism, are guilty of a low-level felony – sex trafficking in the third degree. AS 11.66.130(a)(4). A person's assistance must be done with the intent to promote prostitution. This protects the cab driver who unwittingly drives a person to a brothel. The cab driver would not be acting with the intent to promote a prostitution enterprise. On the other hand, if the cab driver receives a kickback for each person brought to the brothel, knowing it was a prostitution business, then the cab driver is guilty of sex trafficking. The cab driver acted with the intent to promote prostitution and engaged in conduct that facilitated a prostitution enterprise. *See commentary*, Senate Journal Supp. No. 47, at 108.

A Place of Prostitution

Unlike sex trafficking in the second degree, a person commits the crime of **sex trafficking in the third degree** if the person receives *compensation* for running a **place of prostitution**. AS 11.66.130(a)(2)(A). The legislative commentary indicates the provision is aimed primarily at the "Madam" but applies to any person who maintains a place of prostitution. A place of prostitution means "any place where a person engages in sexual conduct in return for a fee." AS 11.66.150(2). The term includes physical locations like a bawdy house, a brothel, or an apartment, but also includes such places as a boat, trailer, or van. The structure need not be affixed to the land, nor be part of a prostitution enterprise. *See commentary*, Senate Journal Supp. No. 47, at 108.

An essential element of the crime is that the defendant received compensation from a prostitute. The prostitute must pay something of value to the defendant for their service. **Compensation** does not include any payment of reasonably apportioned shared expenses. AS 11.66.145(1). This definition protects prostitutes who may live together and share living expenses. *See* S.B. 54, 2017 Leg., 30th Sess. (Alaska 2017).

The defendant must also act with the specific intent to promote prostitution. Recall, as a specific intent offense, the defendant must have the conscious objective to bring about the result (prostitution). AS 11.81.900(a)(1). This protects the unsuspecting landlord who unwittingly rents an apartment to a prostitute or pimp. Further, even if the landlord knew the tenant was a prostitute, the landlord is only liable if the government can prove that they acted with the intent to facilitate unlawful sexual activity. *See commentary*, Senate Journal Supp. No. 47, at 108.

Third-degree sex trafficking also prohibits a person who causes another person *over* the age of 20 to engage in prostitution. Evidence that the defendant used force to cause the victim to engage in prostitution is not required. AS 11.66.110(a)(2). The statute expressly excludes the patron of the prostitute. (Of course, if the patron causes the prostitute to engage in sexual activity without their consent, the patron is guilty of sexual assault, not sex trafficking.) In essence, this provision covers all non-forcible sex trafficking of adults – when the victim is induced into prostitution through manipulation, not violence or threats.

Those who receive compensation knowing that the money was derived from prostitution are guilty of third-degree sex trafficking if it was received with the intent to promote prostitution. AS 11.66.130(a)(3). This would cover a person who receives money from a prostitute knowing that the money was derived from prostitution. The purpose of the provision is to inhibit the economic, not

sexual, aspects of prostitution. *See e.g.*, *Johnson v. State*, 501 P.2d 762, 767-68 (Alaska App. 1972) (interpreting former statute AS 11.40.300).

Misdemeanor sex trafficking (**sex trafficking in the fourth degree**) prohibits a person from receiving compensation for knowingly aiding or facilitating a *prostitute* (as opposed to a prostitution enterprise). This prohibits a cab driver who knowingly directs patrons to an individual prostitute for compensation or a hotel clerk who assists a guest in finding an individual prostitute. *See generally* S.B. 157, 2007 Leg., 25th Sess. (Alaska 2007) (minutes from May 4, 2007 Senate Judiciary Committee hearing). This statute targets those who assist the prostitute and not the prostitution enterprise. Although still criminal behavior, it is penalized as a misdemeanor, similar to the crime of prostitution. *Compare* AS 11.66.135(b) and AS 11.66.100(b).

Human Trafficking

Human trafficking is a form of modern-day slavery. It involves the exploitation of people through force, coercion, threats, and deception. It not only includes sexual exploitation but also labor exploitation. The Alaska Legislature has enacted two degrees of human trafficking: first- and second-degree.

Human trafficking in the first degree occurs if a person induces or causes another person to engage in sexual conduct, adult entertainment, or labor by force or deception. AS 11.41.360. **Sexual conduct** includes any sexual activity and is largely duplicative of sex trafficking. AS 11.41.360(b)(3). **Adult entertainment** includes sexually explicit performances, such as performing in a strip club or exotic dancing. AS 23.10.350(f)(1)-(3). A person who is forced to engage in exotic dancing against their will is the victim of human trafficking. AS 11.41.360(a). Finally, the law prohibits labor exploitation. **Labor exploitation** includes domestic servitude, restaurant work, janitorial work, sweatshop factory work, and similar menial labor.

Figure 13.2 – Alaska Criminal Code – AS 11.41.360(a)

AS 11.41.360. Human trafficking in the first degree.

(a) A person commits the crime of human trafficking in the first degree if the person compels or induces another person to engage in sexual conduct, adult entertainment, or labor in the state by force or threat of force against any person, or by deception.

(b) – (c) [omitted for readability]

Since human trafficking includes exploitation through **deception**, the statute covers those circumstances in which the trafficked victim is deceived by false promises of a good job or a stable life and then forced into debt bondage – *e.g.*, forced into situations where they are made to work under deplorable condition with little or no pay. Even in those situations where the threat of violence is absent, indentured servitude is a form of human trafficking.

Human trafficking in the second degree occurs when a person receives a benefit from human trafficking with **reckless disregard** that the benefit was derived from human trafficking. AS 11.41.365(a). Second-degree human trafficking is a class B felony. AS 11.41.365(b).

Sex Trafficking vs. Human Trafficking

A victim of sex trafficking is also frequently a victim of human trafficking, although the inverse is not necessarily true. In cases of sexual exploitation, the government is free to prosecute the trafficker under either statute or both. The crimes, although similar, contain some important differences. Sex trafficking focuses on specific acts surrounding the trafficked victim, including aggravating the offense when children are targeted. It also targets prostitution businesses and houses of prostitution. AS 11.66.110 – 11.66.130. Human trafficking, on the other hand, includes sexual exploitation achieved through *deception* – that is, promising a victim a modeling contract and a glamorous lifestyle by engaging in commercial sex acts. AS 11.46.360. Sex trafficking through deception is not included in the sex trafficking statutes.

Although an undecided question under Alaska law, it is likely that a defendant convicted of both sex trafficking and human trafficking for the same conduct would face only one sentence. Legally speaking, double jeopardy would likely require merger of the two convictions at sentencing. The Double Jeopardy Clause of the Fifth Amendment protects persons "against multiple

punishments for the same offense." *See North Carolina v. Pearce*, 395 U.S. (1969); *Whitton v. State*, 479 P.2d 302, 306 (Alaska 1970). The societal interests surrounding sex trafficking and human trafficking are largely the same – both are designed to protect victims from forced exploitation and criminalize a form of modern-day slavery.

1. The statute prohibits a person from offering, selling, advertising, promoting or facilitating "travel that includes commercial sexual conduct as enticement for the travel." AS 11.66.120(a)(3). Commercial sexual conduct is defined as "sexual conduct for which anything of value is given or received by any person." AS 11.66.120(a)(3). Given that the "fee" for purposes of prostitution can be anything of value and need not be cash, the terms "commercial sexual conduct" and "prostitution" are substantially the same. Compare AS 11.66.110(a) and 11.66.120(a)(3). Thus, facilitating travel for someone to engage in prostitution is second-degree sex trafficking in Alaska. ↵

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13.4: Animal Cruelty

The link between violence against people and violence against animals is well-documented. Intimate partner violence frequently includes intentional acts of animal cruelty. And many argue that animal violence is a predictor of future violence against people. Further, animal abuse commonly coexists with other intra-familial crimes, including child abuse, elder abuse, and domestic violence.

According to the National Link Coalition,

- Pet abuse is one of the four most significant risk factors for someone becoming a domestic violence abuser. *(Walton-Moss, Manganello et. al., 2005)*
- 41% of intimate partner violence offenders had histories of animal cruelty. *(Febres et al., 2014)*
- 43% of school shooters have histories of animal cruelty. *(Verlinden et al., 2000)*
- Animal sexual abuse is often linked with child pornography. *(Edwards, 2019)*
- 60% of families under investigation for child abuse, and 88% for physical child abuse, reported animal cruelty. *(DeViney, Dickert & Lockwood, 1983)*
- Sexually abused children are five times more likely to abuse animals. *(Ascione et al., 2003)*
- In one study, 92% of adult protective services caseworkers reported they encountered animal neglect co-existing with their clients' inability to care for themselves. *(Humane Society of the U.S. & State of Wisconsin Department of Health and Family Services, 2003)*

Animal Cruelty

By definition, animal cruelty requires harm to an animal, and in Alaska, the crime is largely separated between felony and misdemeanor based on the defendant's culpable mental state. Put another way, the defendant's purposefulness largely dictates the severity of the crime. **Animal** (as a legal definition) is broad and includes nearly all living creatures, but *excludes* human beings, fish, and invertebrates (*e.g.*, worms, insects, crabs, etc.). AS 11.81.900(b)(3).

Felony animal cruelty – a class C felony – occurs if a person *tortures* or *poisons* an animal or is a *repeat* animal abuser. **Torture** occurs when a person knowingly inflicts "severe or prolonged pain or suffering" on an animal or kills an animal using a decompression chamber. AS 11.61.140(a)(1); (a)(3). Likewise, if the person intentionally kills a pet or livestock by the use of **poison**, the crime is elevated to a felony. AS 11.61.140(a)(4). Finally, a prior animal cruelty conviction within the past 10 years (*e.g.*, **a recidivist animal abuser**) elevates an otherwise misdemeanor animal cruelty to a felony offense. AS 11.61.140(h).

Misdemeanor animal cruelty occurs if a person undertakes responsibility for the care of an animal, and fails to provide the required care, and as a result, the animal dies. AS 11.61.140(a)(2). This provision criminalizes a person's **omission** – their failure to adequately care for the animal. This duty does not arise by accident. The statute requires a person to agree to undertake the responsibility. The responsible party could be the animal's owner, caretaker, or custodian. But once a person accepts this responsibility, they must provide the animal with the necessary care. For example, if a person agrees to kennel a family's dog, but fails to feed the dog, and as a result, the dog dies, the person could be guilty of animal cruelty. *See Sickel v. State*, 363 P.3d 115 (Alaska App. 2015).

Because of the strong link between crimes of violence and animal abuse, the statute also criminalizes the killing or injuring of an animal with the intent to intimidate, threaten, or terrorize another person. AS 11.61.140(a)(5).

Finally, the statute criminalizes **bestiality** – that is, sexual conduct between a person and an animal. The statute prohibits the act of bestiality, the creation of bestiality photographs or videos, and knowingly permitting bestiality to occur on one's premises. AS 11.61.140(a)(6), (7).

Regardless of the precise theory of animal cruelty, the code provides a **defense** to animal cruelty if the conduct conformed to accepted veterinary practices, was part of scientific research governed by accepted standards, constituted the humane destruction of an animal, or conformed with accepted training and discipline standards. AS 11.61.140(c). Likewise, it is a defense if the conduct was *necessarily incidental* to lawful fishing, hunting, or trapping activities. AS 11.61.140(c)(4). This avoids unnecessary overlap and potential conflicts with established regulations by the Boards of Game and Fisheries.

Promoting an Exhibition of Fighting Animals

The code also makes it a felony to intentionally promote, keep, or train **fighting animals** or knowingly promote or organize a **fighting animal exhibition**. AS 11.61.145(a), (d)(1). Merely *attending* a fighting animal exhibition is only a violation (if its the person's first offense) or misdemeanor (if it is a subsequent offense). AS 11.61.145(a)(3), (d)(2).

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13.5: End-of-Chapter Material

Summary

Crimes against morality are often viewed as conduct that occurs between consenting adults and should not be criminalized. Others argue that such crimes are not victimless at all, but instead, crimes that prey on unsuspecting victims. These crimes include drug and alcohol offenses, gambling, and prostitution.

All states and the federal government criminalize specific conduct relating to controlled substances (*i.e.*, drugs). Jurisdictions classify drugs in schedules, based on their harmful or addictive qualities, and punish drug offenses accordingly. Alaska's drug schedules are similar to the federal drug schedules, but significant differences exist. Alaska's drug statutory scheme is largely broken into two groups: possessory offenses and trafficking offenses. Possessory offenses are normally prosecuted at the misdemeanor level, depending on the drug. Trafficking includes the manufacture, delivery, and possession for sale, with the grading ranging from a misdemeanor to a felony, depending on the defendant's conduct and the drug. Alaska has largely legalized the cultivation, distribution, sale, and possession of marijuana, which potentially violates the federal supremacy clause since the federal government does not legalize marijuana for any purpose.

Alaska has relatively restrictive alcohol laws. In addition to laws that criminalize the possession and sale of alcohol to prohibited persons, Alaska also allows local communities to prohibit the importation, sale, and possession of alcohol if approved by a majority of the community's voters. Such laws are frequently referred to as local option laws.

The law also permits police to take an individual into protective custody if they are intoxicated or incapacitated. A person taken into protective custody is held until they are sober and no longer a danger to themselves.

Alaska's gambling laws are intended to criminalize established gambling enterprises and not private social games. A person accused of illegal gambling may assert the affirmative defense of hosting a social game. A social game is when there is no house advantage, house odds, or house income. Gambling enterprises may be prosecuted for promoting gambling, which is a felony. Both gambling proceeds and devices are subject to forfeiture upon conviction. Alaska's gambling statutes exclude charitable gaming, which permits certain charities to host bingo games and raffles for remuneration.

Although some argue that prostitution should not be a crime, and at least one state (Nevada) has legalized prostitution, Alaska has rejected this view. Alaska treats both sex trafficking and human trafficking as forms of modern-day slavery. Although prostitution is a crime, the legislative history suggests that the legislature views those who practice prostitution are victims of sex trafficking. Prostitution is offering, agreeing, or engaging in sexual conduct for something of value (normally money). Prostitution is a misdemeanor with sentencing enhancements for habitual offenders or patronizing a juvenile prostitute.

Unlike prostitution, sex trafficking focuses on larger commercial sexual activity. Sex trafficking is graded into various degrees, with first-degree sex trafficking being the most serious. First-degree sex trafficking prohibits forcing another person to engage in prostitution through violence or the threat of violence. The code also prohibits prostitution enterprises or maintaining a place of prostitution. Human trafficking is similar to sex trafficking but encompasses a larger course of conduct, including sexual conduct, adult entertainment, or forced labor.

Answer to <"Is Evidence of Drug Use Evidence of Drug Possession?"

The Court of Appeals, in *Thronsen v. State*, 809 P.2d 941 (Alaska App. 1991), held that while the presence of a drug in one's body may be considered circumstantial evidence of possession, the presence of drugs in the person's body alone is insufficient for conviction. To convict a defendant of unlawful possession of a controlled substance, the state must prove that the defendant consciously possessed, either physically or constructively, the substance and that the defendant had actual knowledge of the nature of the substance. A defendant who had previously injected drugs no longer possesses the drugs since the defendant has no dominion or control over the drug. "[C]ontrol is an essential element of possession and that because the host body cannot exercise control or dominion over a substance after it is ingested … the mere presence in the body cannot support a criminal conviction for possession." You can read the entire *Thronsen v. State*, 809 P.2d 941 (Alaska App. 1991) online at the University of Alaska Anchorage Consortium Library using your student credentials.

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CHAPTER OVERVIEW

14: Crimes Against Public Administration

14.1: Bribery and Related Offenses

14.2: Abuse of Public Office (Official Misconduct)

14.3: Perjury and Related Offenses

14.4: Obstruction of Justice

14.5: End-of-Chapter Material

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14.1: Bribery and Related Offenses

Public officials accepting bribes can feel like a dagger in the heart of our democracy. Such acts undermine the very essence of "public duty." Individuals, while working in a public capacity should act for the benefit of all, and not for the benefit of a few. Alaska has graded both the crimes of Bribery and Receiving a Bribe as class B felonies. Bribery covers the person who bribes a public servant; receiving a bribe covers the public servant who solicits or accepts a bribe. The central evil within both statutes is the unlawful influences impacting public officials in the course of their public duties.

If a person offers a public servant a benefit with the intent to influence the public servant's exercise of an official action, the person has committed the crime of **bribery**. AS 11.56.100. The statute does not distinguish between the accepted bribe and the offered, but unaccepted, bribe. The crime is completed once the bribe is offered. It is irrelevant if the public servant accepts the bribe. Bribery is similar to the inchoate offense of solicitation in this regard. For example, the driver who offers a police officer money during a traffic stop to persuade the police officer not to issue a ticket is guilty of bribery. The officer need not accept the bribe for criminal liability to attach.

The public servant commits the crime of **receiving a bride** if the public servant (1) solicits a benefit with the intent that they will exercise their official discretion to influence an outcome, or (2) accepts or agrees to accept a benefit with the understanding that the public servant will exercise their discretion to influence an official outcome. AS 11.56.110. The public servant need not act with a "corrupt intent;" it does not matter if the public official does not intend to follow through with the promised action. If the official knowingly accepts a benefit with the understanding that the benefit could influence the official's action, the crime has occurred. *See Bachlet v. State*, 941 P.2d 200 (Alaska App. 1997). Thus, returning to the above example, if the officer accepts money from the driver, even if the officer had already decided *not* to issue the driver a ticket, the officer has committed the crime of receiving a bribe.

The term **public servant** includes any officer or employee of the state, municipality, or political subdivision. AS 11.81.900(b)(56). The public servant need not be a high-level executive or an elected official. The term specifically includes legislators, members of the judiciary, and police officers. It also includes less obvious public servants. Assistant public defenders, for example, fall squarely within its definition even though public defenders work on behalf of their clients, and not the government. Assistant public defenders are state employees and therefore are public servants. *See Bachlet*, 941 P.2d at 205. The definition does not include jurors, witnesses, or private employees working with the state. AS 11.81.900(b)(56). Separate criminal statutes cover the misconduct of jurors and witnesses. *See e.g.*, AS 11.56.520.

You be the Judge …

Christine Mullin was a professional counselor with Fairbanks Treatment Associates (FTA), a private counseling company under contract with the Alaska Department of Corrections. FTA agreed to provide counseling services to inmates enrolled in the Sex Offender Treatment Program at the Fairbanks Correctional Complex. Mullin provided counseling services to inmates in the program and contributed to reports made for the participants in anticipation of parole hearings.

An FCC inmate in the sex offender program was preparing for an upcoming parole hearing. Mullin offered to provide a favorable progress report to the inmate in exchange for $25,000. The solicitation was reported to law enforcement and Mullin was ultimately convicted of receiving unlawful gratuities (discussed below). On appeal, Mullin argued that she was not a "public servant" since she was simply an employee of a private company doing work *for* the State of Alaska. Do you think Mullin is a "public servant" for purpose of the bribery statutes? Check your answer at the end of the chapter.

The Code defines **benefit** to include any "present or future gain or advantage to the beneficiary." AS 11.81.900(b)(4). There is no requirement that the benefit is a pecuniary benefit, nor must the benefit result in an economic gain. Not all benefits are economic. For example, a college could take a favorable action in admitting a public servant's child with the expectation that the public servant would, in return, take some favorable action on behalf of the college.

The statute excludes *de minimis* benefits that merely serve to provide a "climate for discussion" with a public servant (i.e., picking up a dinner tab or golfing fee) since the "benefit" itself is not intended or expected to influence an official decision. Benefit also excludes legitimate campaign contributions, routine lobbying activities, and campaign promises. AS 11.56.130(1),(3). Such

insignificant benefits are better addressed in conflict of interest statutes and ethical conduct regulations. *See commentary*, Senate Journal Supp. No. 47, at 68-70 (June 12, 1978).

Finally, "benefit" does not include customary and normal negotiations that occur during the legislative process (sometimes referred to as legislative "log-rolling"); legitimate compromise between public officials to reach consensus is neither a benefit nor bribery. AS 11.56.130(2).

Unlawful Gratuities

The crime of **receiving unlawful gratuities** is a misdemeanor and similar to the crime of receiving a bribe but does not require that the government establish that the public servant received a benefit with an agreement to influence any official act. AS 11.56.120. The offense addresses gratuities received *after* the public servant has acted. The law focuses on the public servant who solicits or accepts tips, presents, or other unauthorized benefits for simply doing their job.

The law specifically draws a distinction between the act of *soliciting* a benefit and the act of *accepting* a benefit. The crime prohibits a public servant from soliciting *any* benefit, regardless of value. AS 11.56.120(a)(1). The crime also prohibits a public servant from accepting a benefit valued at *more than* $50 for having engaged in an official act, which they were required to perform without special compensation. AS 11.56.120(a)(2). Put another way, if a public servant solicits any benefit, they are guilty of a misdemeanor. But if public servant simply accepts a benefit, without soliciting it, they are only guilty of a crime if the benefit was valued at more than $50.

In the eyes of the legislature, although it is *improper* for a public servant to accept a benefit for performing their job, it is not *criminal* unless the value of the benefit is significant. For example, a public servant would not be criminally liable for accepting a box of candy on Christmas when they did not solicit it. The legislature recognizes that such activity is more properly left to personnel regulations and ethical guidelines rather than criminal law. *See commentary*, Senate Journal Supp. No. 47, at 70-71 (June 12, 1978).

Failure to Report Bribes

Alaska law includes the crime of **failure to report a bribe**. AS 11.56.124. If a public servant witnesses what they reasonably should know to be a bribe or an official receiving a bribe, the public servant has an affirmative obligation to report the conduct to law enforcement. AS 11.56.124(a). Failure to do so is a misdemeanor. AS 11.56.124(b). This statute criminalizes a public servant's *failure to act* and imposes a burden on public servants due to their unique positions of trust within the community. Ignoring or turning a blind eye to ongoing bribery is a crime.

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14.2: Abuse of Public Office (Official Misconduct)

Bribery is only one form of public servant misconduct. Closely related are the crimes of official misconduct and misuse of confidential information. Unlike bribery, neither official misconduct nor misuse of confidential information require the exchange or attempted exchange of a benefit. Also, unlike bribery, both are misdemeanors.

The crime of **official misconduct** occurs when a public servant performs (or fails to perform) an act relating to the public servant's office, knowing that the act constitutes an unauthorized exercise of the public servant's official function. AS 11.56.850. The statute covers both malfeasance and nonfeasance. In other words, a public servant can commit the crime by acting improperly as well as failing to act properly.

Official misconduct is a specific intent crime. To be guilty, the public servant must act or refrain from acting with a *conscious objective* to obtain a benefit or to deprive another person of a benefit. Mere negligent behavior or awareness that a person is being harmed or deprived of a benefit will not establish the requisite culpability.

The act must constitute an unauthorized exercise of the public servant's official functions, and the public servant must know the act is unauthorized. Take "sealed" court records as an example. As a general rule, all court records are open and accessible to the public. *See* Alaska Admin. Rule 37.5(c)(5). All court staff, however, are trained that when a judge "seals" a court pleading, the pleading is only available for inspection by court order. This normally occurs when the pleading contains highly sensitive, private, or confidential material. *See* Alaska Admin. Rule 37.5(c)(5). Neither the public nor the parties to the litigation may review the pleading absent express court authorization. If a court clerk, acting with the intent to advantage someone, shows a "sealed pleading" to a person without court permission, the court clerk has committed the crime of Official Misconduct – the clerk committed an act relating to their office knowing that the act constituted an unauthorized exercise of their official function.

A public servant also commits official misconduct if the public servant knowingly *fails to perform* a duty imposed by law or that is clearly inherent in the nature of their office. Thus, returning to the court clerk example, if the court clerk fails to file a lien against a friend's property in order to prevent the lienholder from perfecting their security interest, the clerk would be guilty of official misconduct.

Failing to Perform a Duty …

Erin Pohland and Skye McRoberts were close friends and roommates. Pohland was also a lawyer within the Attorney General's Office advising the Alaska Labor Relations Agency — the agency within the executive branch that dealt with labor union matters. Pohland's close friend McRoberts worked as a union organizer for the Alaska State Employees Association. The State Employees Association was seeking to unionize the employees of the University of Alaska. In connection with the effort, McRoberts submitted numerous forged employee "interest" cards to the Labor Relations Agency all of which purported to express interest in becoming union members.

The Labor Relations Agency suspected that the interest cards were falsified, so the Agency contacted Pohland for legal advice about how to proceed with an official investigation. Pohland, purportedly acting as the Agency's lawyer, advised the agency to not investigate McRoberts.

In this case, Pohland committed the crime of Official Misconduct. Pohland failed to provide her client – the Labor Relations Agency – with proper legal advice with the specific intent to benefit her friend, McRoberts. This was an unauthorized exercise of her official duties. (Pohland also committed an ethical violation that resulted in her disbarment from the practice of law.)

To learn more about the case read *Pohland v. State*, 436 P.3d 1093 (Alaska App. 2019) and *In Disciplinary Matter Involving Pohland*, 377 P.3d 911 (Alaska 2016).

Misuse of Confidential Information

Misuse of Confidential Information prohibits a public servant from using confidential information learned in public office for their own benefit. AS 11.56.860. Not all information, however, is confidential. The legislature intentionally provides a very strict definition of confidentiality for purposes of criminal liability. **Confidential information** means information that has been classified by law. AS 11.56.860(b). Public officials are routinely privy to an extraordinary amount of private, sensitive, or even secret

information in the regular performance of their job duties. Information deemed "secret", "classified", or "private", is not confidential, unless a *specific statute or regulation* deems the information "confidential". A state employee or bureaucrat may not deem certain records confidential simply by decree or executive order. *See commentary*, Senate Journal Supp. No. 47, at 92 (June 12, 1978). Only the legislature may classify information "confidential".

Example of Misuse of Confidential Information

As part of their official duties, Alaska law enforcement officers have access to a significant amount of **Criminal Justice Information** (CJI). CJI contains highly private and sensitive information gathered by local, state, and federal law enforcement agencies, including a person's criminal history, driver's license information, and court information. All criminal justice information is confidential by law. *See e.g.*, AS 12.62.160(a) (noting that "criminal justice information and the identity of recipients of criminal justice information are confidential[.]"). The Department of Public Safety (DPS) maintains all CJI for the state in the **Alaska Public Safety Information Network** (APSIN).

Law enforcement routinely accesses APSIN when conducting investigations. This can include confirming a person's identity during a simple traffic stop, extensively reviewing a person's arrest and criminal history during a serious criminal investigation, or determining if a person has an outstanding warrant for their arrest. These are all proper uses of APSIN. However, if a law enforcement officer accesses APSIN for personal reasons – like to retrieve a phone number of a person they would like to date – the law enforcement officer would be guilty of Misuse of Confidential Information.

Misconduct Involving Confidential information

Like public officials, private citizens may not misuse confidential information. To do so is criminal. When a *private citizen* obtains another person's confidential information without the other person's consent, they commit the crime of ***Misconduct*** **Involving Confidential Information in the Second Degree**. AS 11.76.115. Unique to this statute, however, "confidential information" includes not only information classified as confidential by law, but also information encoded on an access device, identification card, or driver's license. AS 11.76.115. This information is not necessarily "confidential" but is private. AS 11.76.116(c). Thus, if a person surreptitiously obtains private information encoded on an identification card or credit card without the owner's consent (*e.g.*, "credit card skimming"), the person is guilty of second-degree misconduct involving confidential information. The statute does not require the private information to be used in any nefarious manner. The *actus reus* of the offense is *obtaining* the encoded information (not using the information) and the culpable mental state is knowing. The crime is aggravated to **misconduct involving confidential information in the first degree** if the stolen information is used to commit a crime, obtain a benefit, or unlawfully publish information from a child-victim investigation. AS 11.76.113(A)(1). Both crimes are misdemeanors, similar to the misuse of confidential information discussed above.

Interference with Constitutional Rights

A rarely prosecuted, and distant cousin, to the crimes listed above is the crime of **Interference with Constitutional Rights**. I say distant cousin because, with one exception, the offense does not require the defendant to be a public official or nor does it relate to private or secret information.

The crime of interference with a constitutional right is intended to protect the exercise of a person's state constitutional and statutory rights. AS 11.76.110. The statute is modeled after the criminal counterpart to the Federal Civil Rights Act (18 USC § 241, 242). *See commentary*, Senate Journal No. 47, at 121-22 (June 12, 1978). But even though the statute is modeled after the federal law, the statute excludes violations of federal law. A person who violates a person's federal constitutional rights could be prosecuted under the federal criminal code by the federal government.

Figure 14.1 – Alaska Criminal Code – AS 11.76.110.

AS 11.76.110 Interference with constitutional rights.

(a) A person commits the crime of interference with constitutional rights if

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

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

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

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

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

As you can see, a person can violate the statute in three different ways. The first is by ***injuring*** or ***threatening*** a person with the intent to deprive that person of a right granted by state law or the state constitution. For example, state law guarantees all registered voters the right to vote in a state election. AS 15.07.010. A person who threatens another person with the intent to prevent that person from voting would be guilty of a crime under this statute. AS 11.76.110(a)(1).

The second way the crime may be committed is by ***retaliating*** against someone because they have exercised a right granted by state law or the state constitution. For example, if, after leaving the polling place on election day, a person is assaulted because they voted, the crime of Interference with Constitutional Rights has occurred.

Finally, the crime is committed if a person, acting "under color of law", intentionally deprives another person of a right guaranteed by state law or the state constitution. Thus, if an election official prevents a citizen from voting because the official knows the voter's political affiliation, the election official could be liable under this section. AS 11.76.110(a)(3).

What constitutes a constitutional or statutory right is a question of law. The court, not the jury, determines whether the right interfered with was protected by the constitution or statute. AS 11.76.110(b). Importantly, the perpetrator need not *know* that their interference was impacting a protected right. As noted by the drafters, "while the [statute] 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." *See commentary*, Senate Journal No. 47, at 121-22 (June 12, 1978).

The crime is relatively minor. Like all of the crimes in this section, Interference with a Constitutional Right is a misdemeanor.

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14.3: Perjury and Related Offenses

The legal system is built on an underlying principle that all witnesses will provide truthful information to the decision-maker. This principle defines who may be a witness and when a witness may testify. Individuals who cannot understand the difference between a truth and a lie lack the *capacity* to testify. *See* Alaska Evidence of Rule 601. Witnesses who refuse to promise to tell the truth (by oath or affirmation) are *prohibited* from testifying. *See* Alaska Evidence Rule 603. All witnesses must understand the concept of the truth and affirmatively express a willingness to undertake the duty to tell the truth before testifying. This is one way the legal system ensures that every witness gives accurate and honest testimony.

Perjury

Perjury – a false statement made under oath – is the antitheses of a truth-seeking legal system. Punishing perjurers is necessary to protect the integrity of the legal system. *See Lawson v. Helmer*, 77 P.3d 724 (Alaska 2003).

Perjury occurs if a person makes a **false sworn statement** that they do not believe to be true. AS 11.56.200(a). The false statement need not be material to the outcome of the legal proceeding. Instead, the statement must be objectively false, and the person must know that the statement is false. *See LaParle v. State*, 957 P.2d 330, 335 (Alaska App. 1988). Thus, the statement "I believe the car was red" is a false statement if the defendant believed the car was a different color. The actual color of the car is irrelevant. The falsity of the statement does not depend on the actual color of the car. *See commentary*, Senate Journal Supp. No. 47 at 72 (June 12, 1978).

Perjury encompasses all false sworn statements, not just those statements made in court. *See In re Ivy*, 374 P.2d 374 (Alaska 2016). Thus, lying during a court proceeding, lying in an affidavit, or lying in a formal response to a civil interrogatory, all are acts of perjury. A sworn statement is simply a representation of fact given under oath, affirmation, or "penalty of perjury". AS 11.56.240(2). The forum of the sworn statement is immaterial. All that is required is that the statement was knowingly false when given under oath or affirmation attesting to the truth of what was stated. AS 11.56.240(2).

Unsworn Falsification

A related, and likely lesser-included, offense is the crime of **Unsworn Falsification**. AS 11.56.205-210. Unsworn falsification prohibits making a false statement to a public servant, regardless of whether the statement was made under oath. Alaska has graded unsworn falsification into two degrees: first- and second-degree unsworn fasciation.

A person commits the crime of **second-degree unsworn falsification** if (1) the person makes a false statement, (2) with the intent to mislead a public servant in the performance of their duty, (3) that the person does not believe to be true, and (4) the statement is made in an application for a benefit or is made on a form bearing notice that false statements are punishable as such. AS 11.56.210. For example, if a person falsely states that they have lived in Alaska for 10 years in an effort to obtain a "resident-only" fishing license, the person is guilty of second-degree unsworn falsification, a class A misdemeanor. The person made a statement known to be false with the intent to mislead a public servant in an application for a benefit – the State's resident fishing licensing preference.

Aggravated unsworn falsification (first-degree unsworn falsification) occurs if the false statement was made on an application for the Alaska Permanent Fund Dividend. AS 11.56.205(a). Knowingly providing a false statement on the permanent fund dividend application evaluates the crime from a misdemeanor to a class C felony. AS 11.56.205(c).

Neither perjury nor unsworn falsification requires corroboration. AS 11.56.200. A conviction can properly flow from the uncorroborated testimony of a single witness. This is a significant departure from prior law. The Alaska Supreme Court had previously stated that a perjury conviction must be corroborated by direct or circumstantial evidence; uncorroborated testimony – standing alone – was insufficient. *See Nelson v. State*, 546 P.2d 592 (Alaska 1976) (noting that allowing perjury convictions based on uncorroborated witnesses simply results in prosecutions of "an oath against an oath" and increases the likelihood of "ill-founded retaliatory attacks"). The Alaska Legislature expressly overruled this decision with the passage of the Revised Criminal Code. Now, a perjury conviction need not be based on a particular number of witnesses or a particular amount of documentary evidence. AS 11.56.200. A single witness is sufficient. This rule, of course, does not alter the government's burden of proof. The government is still required to prove the defendant knowingly made a false sworn statement beyond a reasonable doubt. Thus, even though the

law allows a perjury *prosecution* to proceed based solely on the testimony of a single witness, a perjury *conviction* in such cases may be difficult to obtain.

If a person makes two statements under oath or affirmation that are irreconcilably inconsistent, to the degree that one of them is necessarily false, but it impossible to identify *which* statement is false, the person is guilty of **Perjury by Inconsistent Statements**. AS 11.56.220. This crime resolves a potential impediment to a traditional perjury prosecution. Since the crime of perjury requires the defendant to make a specific false statement, the government must be able to prove that the particular statement was false. If the government is unable to identify the false statement, the defendant is not guilty of perjury. The crime of Perjury by Inconsistent Statements resolves this dilemma.

For example, consider a situation where Jones testifies to a grand jury that Brown came into his office and attempted to extort money from him. As a result of Jones's testimony, Brown is indicted for extortion under AS 11.41.520. At Brown's 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's 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's two statements are irreconcilable to the degree that one of them must be necessarily false. Although Jones may not be guilty of perjury, he is guilty of perjury by inconsistent statements. Note that Brown's criminal liability for extortion is separate and distinct from Jones's criminal liability for perjury by inconsistent statements. *See commentary*, Senate Journal Supp. No. 47 at 74-75 (June 12, 1978).

Although perjury by inconsistent statements is a separate offense, the prosecution cannot simply rely on the introduction of the irreconcilable statements; the government must also establish that the defendant did not believe one of the statements to be true at the time the statement was made.

A person charged with perjury or a related offense may raise the affirmative defense of **retraction**. The defense is extremely limited and complex, but allows a person to retract a false statement before its falsity is known and before reliance on the statement has occurred. AS 11.56.235. Specifically, the affirmative defense is only available if the defendant expressly retracts the false statement during the course of the same proceeding and before the case is submitted to the ultimate trier of fact (*e.g.*, grand jury or jury). AS 11.56.235. For example, a defendant may not raise the defense of retraction if, following the grand jury's indictment, they contact the prosecutor in an effort to retract their earlier false grand jury testimony. The retraction did not occur during the same proceeding; the defendant is guilty of perjury. *See e.g.*, *Trinidad v. State*, 1997 WL 688541 *2 (Alaska App 1997).

Exercises

Answer the following questions. Check your answers using the answer key at the end of the chapter.

1. John and Mary moved to Alaska from California on July 1, 2019. Two weeks later, on July 15, they apply for a resident hunting license. John states on his application that he came to Alaska on July 1, 2018. On her application, Mary correctly states that she came to Alaska on July 1, 2019, but puts her birthdate down as November 1, 1970, knowing that her birthdate is actually November 1, 1965. Have any crimes been committed? If so, which ones? Explain why?
2. Don, a real estate agent receives a $1,000.00 check as earnest money on a house he is selling for Tom. Instead of placing the check in an escrow account for Tom, Don keeps the money for himself. Tom sues Don, the real estate agent for the $1,000.00. In a sworn deposition, Don falsely states that the money was put into a trust account. In fact, Don put the money into his own account and used it for his own use. Has Don committed perjury? If so, why?

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14.4: Obstruction of Justice

Obstructing justice is defined as "impeding or obstructing those who seek justice in a court[.]" *See Obstructing Justice*, Black's Law Dictionary (6th ed. 1990). The term applies to a host of activities that obstruct the administration of justice, including preventing witnesses from appearing, assaulting process servers, influencing jurors, or interfering with criminal investigations. "Obstruction of Justice" is not a crime in Alaska, but the actions that encompass it surely are.

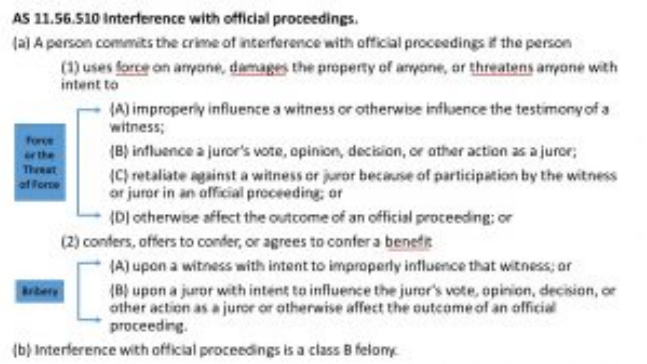
Obstructing justice is simply a broad classification of proscribed conduct that seeks to subvert the legal system. Those who interfere with the legal process through threats, manipulation, or undue influence erode society's faith in the legal process and procedural justice is impossible unless the government can protect the *integrity of the process*. We believe that the ultimate decision-maker (*i.e.*, judge or jury) will make its decision free from influence and witnesses will testify truthfully without external pressure.

Conduct that interferes with these principles is prohibited and offenses that interfere with the administration of justice are largely categorized between conduct that involves violence and bribery and conduct that does not. The former is normally graded higher (and has higher penalties).

Interference with Official Proceedings

Interference with Official Proceedings is the most serious offense within this category. The statute punishes threats and bribery when such conduct is directed at witnesses, jurors, or the proceeding's outcome. *See* Figure 14.1.

Figure 14.2 – Alaska Criminal Code – AS 11.56.510



As you can see, the crime prohibits both the use of force and threaten force against witnesses or jurors. The offense is a **specific intent** crime. The defendant must act with the intent to "improperly influence" the testimony of a witness. This term – improperly influence a witness – means to cause a witness to testify falsely, offer misleading testimony, or unlawfully withhold testimony. AS 11.56.900(1)(A). It also includes causing a witness to avoid the legal process, absent themselves from a hearing, or engage in evidence tampering. AS 11.56.900(1)(B)-(D). In other words, the statute prohibits *any* attempt to influence the testimony of a witness if done with force, threats, or bribery. Motive is irrelevant. An individual who beats up a witness to compel the witness to testify truthfully is just as culpable as the person who threatens a witness to ensure they avoid legal process.

Threats need not be explicit. Veiled threats suffice. If the defendant's words or conduct could reasonably communicate an intention to inflict harm, then the defendant has "threatened" the witness. *See e.g.*, *Baker v. State*, 22 P.3d 493 (Alaska App. 2001). Thus, it is just as criminal to tell a witness that she had "better shut her mouth, or I'll shut it for her", as it is for a person to overtly threaten to kill the witness if she shows up to court. *See id*. at 497.

Violence or threats of violence directed at *jurors*, if done with the intent to influence the juror's vote, opinion, or decision, is equally prohibited. AS 11.56.610(a)(1)(B). Assaultive conduct that interferences with a juror's ability to make its decision is punished to the same level as threats directed at witnesses.

The statute also prohibits a defendant from using force (or threatening the use of force) to **retaliate** against a witness or juror because the person participated in an official proceeding. AS 11.56.510(a)(1)(C). Thus, a defendant who threatens a juror after a trial (because the juror voted to convict) is still guilty of official interference, even though the conduct occurred after the verdict.

Finally, the statute criminalizes any threatening conduct designed to affect the **outcome of the official proceeding**. AS 11.56.510(a)(1)(D). This would include threatening to hurt a juror's family offering a bribe to a witness with the intent to cause a mistrial or general menacing behavior directed at a judicial officer if done to obtain a particular result.

The statute contains a second general prohibition – the prohibition against bribing witnesses or jurors with the intent to improperly influence the witness's testimony or juror's opinion. AS 11.56.10(a)(2). This provision is similar to the code's general **bribery** statute but is specifically tailored to protect witnesses and jurors. Bribery is treated as serious as threats of violence.

The statute protects more than criminal jury trials. **Official proceeding** is defined as a proceeding "heard before a legislative, judicial, administrative, or other government body … authorized to hear evidence under oath." AS 11.81.900(b)(43). Thus, a person who threatens a witness during a legislative hearing is just as guilty as the person who threatens a witness during a criminal jury trial.

The term witness is broadly defined. **Witness** means a person summoned or appearing to testify in an official proceeding or a person who the "*defendantbelieves* may be called as a witness in an official proceeding, present or future". AS 11.56.900(6). The code explicitly defines witness from the perspective of the person charged with interfering with the official proceeding (*i.e.*, the defendant). Thus, if the defendant believes a person may be a witness in an official proceeding, it is immaterial that the person is in fact, not a potential witness. Likewise, it is immaterial whether *the government* knows the person is a witness. So long as the defendant knows the person is a potential witness, the person is a "witness" for criminal liability. This definition avoids confusion as to when an individual actually becomes a witness and instead, focuses on protecting witnesses and the integrity of the system.

The term **juror** includes all members of impaneled juries, including grand juries, as well as persons who have been drawn or summoned to appear as *prospective* jurors. Thus, a person threatened on their way to jury duty is entitled to receive the same protection as the impaneled juror. AS 11.56.900.

Constitutional Challenges

Because these offenses limit a person's speech, the question frequently arises whether such speech is protected under the First Amendment. Recall that doctrine of **free speech** does not protect all speech. Although a person may use caustic, offensive, and even potentially intimidating language in communication, the First Amendment does not protect "true threats." As described by the Alaska Court of Appeals, "a person has no First Amendment right to ask other people to lie under oath or to try to persuade them to do so." *See Baker v. State*, 22 P.3d 493 (Alaska App. 2001). The difficulty is distinguishing between threats and hyperbole. Hyperbole, particularly political hyperbole, is protected speech, and in the eyes of the U.S. Constitution, necessary to ensure a robust, wide-open debate about governmental policy.

You be the Judge …

William, a resident of Valdez, learned that the local telephone company had terminated his cell phone service without his prior knowledge. The dispute progressed until William filed a civil complaint in Valdez Superior Court against the telephone company. Shortly after the telephone company filed its Answer, William went to the courthouse and spoke with a state magistrate. William demanded that his case be set for a jury trial immediately. The magistrate explained to William that setting a trial date was not a simple task and required the involvement of a Superior Court Judge in Anchorage.

William grew angry and began yelling at the magistrate. The magistrate became so frightened that she locked the door to her chambers. William eventually left. Two days later, Williams sent the following letter to the courthouse:

To Whom It May Concern:

I am still waiting for my trial date in the above case. When the telephone company suspended phone service to my business it was for the express purpose of forcing hardships upon my family. I've had enough. I told them when I lost my home if I had not received a fair trial by jury I was going to kill the things. Last week I signed a quitclaim to my home and property. I can stay until I get an honest trial or someone else buys the property. As far as I am concerned the things are living on borrowed time. And this is the last time I am asking for my rights as a human.

After learning of the letter, law enforcement interviewed William. William confirmed that the letter's apparent threat to kill "the things" was directed at the magistrate. William also told officers he wrote the letter in the hopes that he would be arrested so he

could receive a trial date sooner. The government indicted William on one count of interference with official proceedings in violation of AS 11.56.510(a)(1)(D) for sending the threatening letter.

Based on these facts, would William be successful in arguing that the statute impermissibly infringed upon his First Amendment rights? Check your answer at the end of the chapter.

Receiving a Bribe by a Witness or Juror

Just as the law prohibits a person from bribing a witness or juror, the law equally prohibits a witness or juror from receiving a bribe. The crime of **Receiving a Bribe by a Witness or Juror** is committed when a witness or juror solicits, accepts, or agrees to accept, a benefit with the understanding that they will be improperly influenced as a witness or as a juror. AS 11.56.520. Receiving a Bribe is a class B felony offense, similar to Interference with a Official Proceeding and is punishable by up to 10 years imprisonment. Again, this statute is modeled after the code's general bribery statute.

Witness Tampering

Witness tampering criminalizes conduct that unduly influences a witness's participation or testimony in a judicial hearing. Alaska has separated witness tampering into two degrees: first- and second-degree witness tampering. The former is a class C felony, whereas the latter is a class A misdemeanor.

A person commits the crime of **first-degree witness tampering** if the person knowingly induces a witness to testify falsely, offers misleading testimony, unlawfully withholds testimony, or causes the witness to be "absent from a judicial proceeding to which the witness has been summoned". AS 11.56.540.

This is much different than the crime of interference with an official proceeding discussed above. Witness tampering does not involve the use of force, threats, damage to property, or bribery. Merely inducing a witness is not as blameworthy as threatening violence or offering a bribe.

Persuading a witness to avoid legal process (for example, to avoid being served with a subpoena) is *not* a crime, unless the defendant uses forces or the threat of force. This line – the line between witness tampering and lawfully explaining the legal process – is a fine one. It is not unlawful to instruct a witness that they need not appear in court or testify unless subpoenaed. It is not unlawful to tell a witness to refuse to cooperate with law enforcement. It is not unlawful to tell a witness not to elaborate with asked questions. *See e.g., Rantala v. State*, 216 P.3d 550, 555 (Alaska App. 2009). It is unlawful to disobey a court order. Once a subpoena has been served, any persuasion, done with the intent to cause the witness to disobey the subpoena, constitutes witness tampering.

Further, context matters. If a defendant tells a witness to be non-cooperative or avoid process, and in context, the defendant is attempting to pressure the witness to testify falsely or withhold testimony, then the defendant is guilty of witness tampering.

You be the Judge …

Boggess began sexually abusing his eleven-year-old stepdaughter during the summer of 1985. During the police investigation, officers learned that Boggess's wife could corroborate some of her daughter's statements. Immediately before the grand jury presentation, a witness heard Boggess tell his wife to "plead the fifth" or "break down and cry" instead of answering the prosecutor's questions.

Upon hearing this evidence, the grand jury indicted Boggess with first-degree witness tampering for attempting to induce his wife to "unlawfully withhold testimony in an official proceeding."

do you think this conduct is witness tampering or witness preparation? Why or why not? Check your answer at the end of the book.

Second-degree witness tampering occurs if a person knowingly induces a witness to be absent from an official proceeding, *other than a judicial proceeding*, to which the witness has been summoned. AS 11.56.545. Thus, a defendant who causes a person to be absent from a legislative, administrative, or other adjudicative hearing after being summoned, is guilty of *misdemeanor* witness tampering. The offense is only elevated to a felony if the hearing is a "judicial proceeding".

Jury Tampering

The crime of **jury tampering** is committed when a person directly or indirectly communicates with a juror other than as permitted by court rules. AS 11.56.590. The perpetrator must act with the intent to influence the juror's vote. The crime of jury tampering differs from interference with an official proceeding only in one respect – a lack of bribery or force. If the attempt to influence a juror's vote is committed without a bribe and without force (or the threat of force), the tampering is less serious in the eyes of the law – it only constitutes a class C felony. Threatening a juror or bribing a juror, on the other hand, is a much more serious offense.

Misconduct by a Juror

Conversely, **misconduct by a juror** is committed when a juror promises, before submission of the case to the jury, to vote for a particular verdict. AS 11.56.600. This includes conduct that may only cause a mistrial (*i.e.*, refusing to reach unanimity for purpose of a verdict). Note that this crime *supplements* the trial court's general power of contempt of court. **Contempt of court** is the inherent power to punish a person for the willful disobedience of a court order. A court always has the power to hold a juror in contempt should the juror violate a court rule.

Misconduct by a juror is similar to the crime of receiving a bribe by a juror, but unlike receiving a bribe, this crime does not require the consideration of a benefit. Instead, the crime simply requires the juror to agree to a particular verdict outside of the trial process.

Simulating Legal Process

The crime of **simulating legal process** is a relatively new and very rarely charged offense. It protects the legitimacy of government administration by maintaining the public's trust and confidence in genuine governmental documents. The offense prevents a person who is attempting to collect a debt from using a document that has the appearance of being court-issued, such as an attachment, execution, judgment, or lien. AS 11.56.650(2). It also covers the fraudulent use of subpoenas, summons, and similar documents (*i.e.*, warrants) that have the appearance of being court-issued. AS 11.56.650(2).

What is simulating legal process anyhow?

Ed and Paul are in a dispute over the property boundaries on their adjoining land. Ed sued Paul in small claims court. Ed asks the previous owner of the land, Sam, to testify in court. Sam refuses to testify unless ordered to do so by the court. Ed knows it's too late to get the court to issue a subpoena. Ed makes a copy of another subpoena, changes the name to Sam, and sends it to Sam.

In this example, Ed has committed the crime of simulating legal process by issuing and sending a simulated subpoena with the intent to cause Sam to appear at trial. (Note: Ed has also likely committed second-degree forgery under AS 11.46.505(a)(2) for falsely altering a written instrument that is a public record.)

Tampering with Physical Evidence

The crime of **tampering with physical evidence** prohibits tampering with "physical evidence" – a term that refers to any "article, object, document, record, or other thing of physical substance." AS 11.56.900(4). The object need not be *admissible* evidence or evidence admitted in court. It simply needs to an object that is relevant to the investigation.

The code outlines three separate methods of tampering with physical evidence. AS 11.56.610. As you will see, evidence tampering is a **specific intent** crime – the offender must have a conscious objective to achieve the intended result. First, the offense prohibits the intentional destruction, mutilation, alteration, concealment, or removal of physical evidence with the intent to "impair its verity" (i.e., truthfulness) or its "availability in a criminal investigation." AS 11.56.610(a)(1). Second, the crime prohibits the making, presenting, or using evidence known to be false in a proceeding with the intent to mislead a juror or a criminal investigation. AS 11.56.610(a)(2). Third, the offense prohibits the use of force, deception, or threats to prevent the *production* of physical evidence during a criminal investigation. AS 11.56.610(a)(3). Finally, the statute criminalizes conduct identical to the above three paragraphs, but done with the intent to prevent the initiation of an official proceeding. This final paragraph covers those situations where a person tampers with physical evidence, with the intent to prevent the initiation of a non-criminal official proceeding (*i.e.*, a legislative or civil investigation). AS 11.56.610(a)(4).

As a crime, evidence tampering has broad reach. Every act of evidence tampering is a felony regardless of the underlying offense. Thus, it is irrelevant that the underlying offense to which the evidence relates is a misdemeanor or violation. The destruction or alteration of evidence constitutes a felony offense. *See Y.J. v. State*, 130 P.3d 954 (Alaska App. 2006).

You be the Judge …

Officers received a detailed report of a shooting near a residence in Fairview. Although no one was injured in the shooting, several individuals provided officers with a detailed description of the shooter and the vehicle involved. Officers located the suspect's vehicle quickly and attempted to stop it. A chase ensued through the neighborhood. During the chase, the driver, Anderson, tossed several items related to the shooting out of the vehicle, including the handgun, the firearm's magazine, and a box of matching caliber ammunition.

Do you think Anderson has committed the crime of tampering with physical evidence for throwing the items out of the car window under AS 11.56.610(a)(1) (that is, for concealing the evidence with the intent to impair its availability in a criminal investigation under)? Check your answer at the end of the chapter.

Exercises

Answer the following questions. Check your answers at the end of the chapter.

1. Two months after the shooting of Victor, detectives learn that a witness (Bobby) saw the suspect, Homer Frink, shoot Victor. When interviewed, Bobby tells detectives that he did not come forward earlier because Frink threatened to shoot Bobby if he talked to the police. In addition to homicide, what crime has Frink committed? Why or why not?
2. In response to a newspaper ad seeking information about witnesses to a collision between two cars, John Citizen reports that Bobby Bystander was standing at the intersection when the car driven by the defendant ran the red light and was struck broadside by the car driven by Plaintiff. The Plaintiff has hired a private investigator, Rick, to contact witnesses. Investigator Rick contacts Bobby who at first refuses to say anything. Bobby tells Investigator Rick he does not want to be involved. Investigator Rick then offers Bobby $500.00 to tell him what he saw. Bobby accepts the money and tells Rick that he saw the defendant run the red light. Has Investigator Rick committed a crime? Why or why not?

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14.5: End-of-Chapter Material

Summary

Bribery undermines our trust in government. Bribery is offering or agreeing to offer a benefit to a public servant with the intent that the public servant will alter their official decision. A public servant is guilty of Receiving a Bribe if the public servant accepts (or offers to accept) a benefit to alter their official decision. The term "public servant" includes any state government employee but does not include jurors, witnesses, or private employees working with the state. Jurors and witnesses are prohibited from accepting bribes but under a different statute. Just as it is illegal to accept a bribe, it is illegal to fail to report a bribe. Some low-level, *de minimis* gratuities are excluded from the criminal code and are treated under the respective ethics rules instead. A public servant can also commit the crimes of official misconduct and misuse of confidential information. Such crimes do not require the exchange or acceptance of a benefit.

Truthful testimony is essential to our legal system and those who lie under oath erode our belief in that system. Perjury occurs if the person knowingly makes a false sworn statement. The statement must be objectively false, and the person must know that the statement is false. The term "statement" is broadly defined and does not require the statement to be made during a court proceeding. A statement in an affidavit or made on a document under the "penalty of perjury" is sufficient for purposes of perjury. If a person makes two irreconcilably inconsistent statements under oath to the degree that one of the statements must necessarily be false, the person has committed the crime of perjury by inconsistent statements. A person can avoid criminal liability for perjury if the person retracts the false statement during the same proceeding. Retraction is an affirmative defense and is extremely limited in scope. Unsworn falsification is similar to perjury but occurs when a person makes an unsworn false statement to a public servant on an application for a benefit. Unsworn falsification is generally a misdemeanor. If a person makes a knowingly false statement on an application for the Alaska Permanent Fund Dividend, the crime is aggravated to a felony.

Obstruction of justice crimes interfere with the orderly administration of justice. Interference with official proceedings is the more serious offense within this category. It criminalizes threatening a witness or juror and bribing a witness or juror. These statutes can raise constitutional concerns if they target protected speech. Recall, however, that the First Amendment does not protect against "true threats". The code also criminalizes witness tampering. If a person induces a witness to testify falsely, offer misleading testimony, unlawfully withhold testimony, or causes the witness to be absent from the proceeding, the person is guilty of witness tampering. Providing a witness with legal advice about the court process or preparing a witness to testify is not witness tampering.

Finally, tampering with physical evidence is a felony in Alaska. Evidence tampering is a specific intent crime. The crime is committed in one of three ways: first, a person may not destroy, mutilate, conceal, or remove physical evidence with the intent to interfere with a criminal investigation; second, a person may not make, present, or use false evidence with the intent that it will be used in a criminal investigation; finally, a person may not use or threaten the use of force to prevent the production of physical evidence during a criminal investigation. Tampering with physical evidence is always a felony offense regardless of the severity of the underlying offense to which it relates.

Answers to "You be the Judge" Exercises

From "You be the Judge" in Bribery and Related Offenses

- In *State v. Mullin*, 778 P.2d 233 (Alaska App. 1989), the Alaska Court of Appeals ruled that Mullin was not a public servant under the bribery states. Under the Rule of Lenity – that is, ambiguous criminal statutes must be interpreted in favor of the accused – the public servant definition did not include employees of private companies working under a contract with the state. Since the statutory definition of "public servant" was not sufficiently clear, private employees must be excluded. You can access the opinion using Westlaw Campus Research through the Consortium Library at the University of Alaska Anchorage using your UA credentials.

From "You be the Judge: William" in Obstruction of Justice

- In *Melguin v. Hames*, 38 F.3d 1478, 1484 (9th Cir. 1994), the Ninth Circuit Court of Appeals noted that the defendant's threats "to kill things" were directed at a state judicial officer, which squarely falls within the proscribed conduct of AS 11.56.510(a)(1)(D). Such threats were not mere "political hyperbole". Although the court must distinguish between true threats and protected speech, *context* matters. In this case, a threat to "kill the things" made in a private communication to a

state judicial officer with the intent to obtain an immediate jury trial, was a true threat (as opposed to "crackpot communication" that should be disregarded by the Court).

From "You be the Judge: Boggess" in Obstruction of Justice

- In *Boggess v. State*, 783 P.2d 1173 (Alaska App 1989), the Court of Appeals found that Boggess's instruction to his wife for her to plead the Fifth Amendment or break down and cry if asked about incriminating information was sufficient to establish that Boggess was guilty of witness tampering. The jury could have reasonably concluded that Boggess was attempting to persuade his wife that she should testify misleadingly or illegally withhold testimony.

From "You be the Judge: Anderson" in Obstruction of Justice

- In *Anderson v. State*, 123 P.2d 1110 (Alaska App. 2005), the Court of Appeals held that the act of tossing the handgun, the magazine, and the ammunition from the car did not satisfy the *actus reus* of evidence tampering. According to the court, the crucial inquiry is whether the defendant's action disguises the evidentiary value of the article – that is, whether the defendant disposed of the evidence in a manner that destroyed it or that made its recovery substantially more difficult or impossible. Under the facts of *Anderson*, the defendant's act of tossing the handgun, magazine, and ammunition out of the car did nothing to disguise the evidentiary value of the items, especially when the defendant did it in the sight of the police. *See id*. at 1119.

Answers to End of Chapter Exercises

From Perjury and Related Offenses

1. As to John, John has committed unsworn falsification in the second degree. *See* AS 11.56.210(a)(1). He made a false statement in an application for a government benefit, the hunting license at the reduced, resident fee. Because there was a motive for the false statement, it is fair to infer that he acted with the intent to mislead a public servant. As to Mary, she made a false statement but there was no advantage to her to making the false statement (it would not have led to a benefit), so it is unlikely that a jury would infer that she acted with an intent to mislead a public servant. Instead, it is fair to conclude that she acted out of mistake or, more likely, vanity.
2. Don has committed the crime of perjury. *See* AS 11.56.200(a). He made a false sworn statement that he did not believe to be true. There is no requirement that the sworn statement be made in court.

From Obstruction of Justice

1. Frink has committed the crime of interference with official proceedings, under 11.56.510(a)(1)(A) for threatening the witness with intent to influence the witness not to testify – that is, Frink threatened Bobby so he would not show up, testify, or cooperate with the police. As the legislative commentary makes clear, the term "witness" includes anyone the suspect "believes may be called as a witness" in the future. It is irrelevant that the detectives did not know Bobby's identity.
2. Investigator Rick has not committed a crime. Tampering with a witness under AS 11.56.540 prohibits a person from inducing or attempting to induce a witness to testify falsely. Investigator Rick has reason to believe that Bobby will be a witness in the civil action. Under these facts, Investigator Risk did not attempt to induce false or misleading statements or testimony.

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