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extrinsic evidence on a collateral matter. *Moss v. State*, Sup. Ct. Op. No. 2239 (File No. 4389), 620 P.2d 674 (1980).

Corroboration of prosecutrix's testimony. — No corroboration of the prosecutrix's testimony is necessary in statutory rape cases. *Burke v. State*, Sup. Ct. Op. No. 2194 (File No. 3969), 624 P.2d 1240 (1980).

Evidence of prior history of sexual activity with victim. — Whether evidence in a statutory rape prosecution of prior history of sexual activity with the prosecutrix is justified as background or the ongoing nature of the relationship is probative, the nexus of these reasons justifies an exception to the general rule against admissibility of prior bad acts. *Burke v. State*, Sup. Ct. Op. No. 2194 (File No. 3969), 624 P.2d 1240 (1980).

Evidence of prior misconduct. — See *Freeman v. State*, Sup. Ct. Op. No. 703 (File No. 1046), 486 P.2d 967 (1971).

Evidence of prior sexual offenses. — See *Freeman v. State*, Sup. Ct. Op. No. 703 (File No. 1046), 486 P.2d 967 (1971).

Determining age from appearances. — See *Toores v. State*, Sup. Ct. Op. No. 1031 (File No. 1951), 521 P.2d 386 (1974).

Admission of defendant's driver's license into evidence to establish his age was harmless beyond a reasonable doubt. *Torres v. State*, Sup. Ct. Op. No. 1031 (File No. 1951), 521 P.2d 386 (1974).

Psychiatric testimony. — See *Freeman v. State*, Sup. Ct. Op. No. 703 (File No. 1046), 486 P.2d 967 (1971).

Psychiatric evidence showing that an individual accused of sexually deviant misconduct is not a sexual psychopath should properly be regarded to be character evidence. *Freeman v. State*, Sup. Ct. Op. No. 703 (File No. 1046), 486 P.2d 967 (1971).

Hearsay testimony. — It was not error to admit hearsay testimony concerning complaints made by a rape victim to her mother and a school counselor. *Greenway v. State*, Sup. Ct. Op. No. 2206 (File No. 4754), 626 P.2d 1060 (1980).

Failure at preliminary hearing to state all the facts attending a claimed rape in response to an instruction to proceed and tell what happened is not a ground of impeachment. *Tanksley v. United States*, 10 Alaska 443, 145 F.2d 58 (9th Cir. 1944).

Error to admit recording of sodium pentothal interview. — In a prosecution for statutory rape and sodomy, it was error to admit the recording of a

prior consistent statement for the limited purpose of rehabilitating an impeached witness. *Lindsey v. United States*, 16 Alaska 367, 347 F.2d 893 (9th Cir. 1956).

Or to exclude public from trial. — The trial court erred in assuming the power of excluding the public from a trial on the charge of rape of an adult woman. *Tanksley v. United States*, 10 Alaska 443, 145 F.2d 58 (9th Cir. 1944).

It would be denying the defendant his presumption of innocence and a predecision by the court of his guilt to hold that a married woman must be relieved of the embarrassment of a public trial because she is called upon to testify to the story of the defendant's crime and her shame. *Tanksley v. United States*, 10 Alaska 443, 145 F.2d 58 (9th Cir. 1944).

Verdict supported by evidence. — Testimony of complaining witness of her conduct before and after the alleged rape, corroborated and contradicted, and her sole evidence of the rape itself, supports the verdict on the inference that the defendant's defense was untrue, and that she was the unfortunate victim of a brutal outrage. *Tanksley v. United States*, 10 Alaska 443, 145 F.2d 58 (9th Cir. 1944).

Instructions. — The use of the following instruction in a statutory rape case is prohibited: "A charge such as that made against the defendant in this case is one which is easily made and, once made, difficult to defend against, even if the person accused is innocent. Therefore, the law requires that you examine the testimony of the female person named in the indictment with caution." *Burke v. State*, Sup. Ct. Op. No. 2194 (File No. 3969), 624 P.2d 1240 (1980).

Since specific intent is not an element of the offense of rape, giving an instruction that the law assumes that every person intends the natural consequences of his voluntary acts was not error. *Walker v. State*, Sup. Ct. Op. No. 2570 (File No. 4921), 652 P.2d 88 (1982).

Instruction sufficiently covering question of impeachment. — See *Tanksley v. United States*, 10 Alaska 443, 145 F.2d 58 (9th Cir. 1944).

For approved instruction on consent of female under age of consent, see *Rose v. United States*, 240 F. 685 (9th Cir. 1917).

Sentencing. — The recommended five year maximum, except for cases involving particularly serious offenses, dangerous offenders and professional criminals, of *Dudman v. State*, Sup. Ct. Op. No. 1092

not applicable to the crime of rape of a person under 16 years by a person 19 years or older, made punishable by former AS 11.15.130(a) by "any term of years." *Edenshaw v. State*, Ct. App. Op. No. 005 (File No. 5239), 631 P.2d 506 (1981).

What must be reflected in sentence for forcible rape. — Although the perpetrator of such a crime as forcible rape may not be beyond rehabilitation, the crime itself deserves community condemnation; in addition to serving rehabilitative purposes the sentence must reflect such condemnation as well as act as a deterrent to the offender and to others. *Newsom v. State*, Sup. Ct. Op. No. 1136 (File No. 2189), 533 P.2d 904 (1975).

Sentence for rape upheld. — See *Gordon v. State*, Sup. Ct. Op. No. 831 (File No. 1535), 501 P.2d 772 (1972); *Torres v. State*, Sup. Ct. Op. No. 1031 (File No. 1951), 521 P.2d 386 (1974); *Newsom v. State*, Sup. Ct. Op. No. 1136 (File No. 2189), 533 P.2d 904 (1975); *Ames v. State*, Sup. Ct. Op. No. 1137 (File No. 2145), 533 P.2d 246, modified on rehearing, 537 P.2d 1116 (1975); *Coleman v. State*, Sup. Ct. Op. No. 1288 (File No. 2331), 553 P.2d 40 (1976); *Nukapigak v. State*, Sup. Ct. Op. No. 1410 (File No. 2915), 562 P.2d 697 (1977), aff'd on rehearing, 576 P.2d 982 (1978); *Bordewick v. State*, Sup. Ct. Op. No. 1500 (File No. 3341), 565 P.2d 184 (1977); *Morrell v. State*, Sup. Ct. Op. No. 1577 (File No. 2790), 575 P.2d 1200 (1978); *Alexander v. State*, Sup. Ct. Op. No. 1622 (File No. 3505), 578 P.2d 591 (1978); *State v. Wassilie*, Sup. Ct. Op. No. 1630 (File No. 3691), 578 P.2d 971 (1978); *Moore v. State*, Sup. Ct. Op. No. 1880 (File No. 4032), 597 P.2d 975 (1979); *Wagner v. State*, Sup. Ct. Op. No. 1897 (File No. 4381), 598 P.2d 936 (1979); *Wikstrom v. State*, Sup. Ct. Op. No. 1987 (File No. 4535), 603 P.2d 908 (1979); *Tate v. State*, Sup. Ct. Op. No. 2020 (File No. 4550), 606 P.2d 1 (1980); *Mallott v. State*, Sup. Ct. Op. No. 2027 (File No. 3364), 608 P.2d 797 (1980); *Alexander v.*

State, Sup. Ct. Op. No. 2077 (File No. 3522), 611 P.2d 469 (1980); *Cochrane v. State*, Sup. Ct. Op. No. 2086 (File No. 4531), 611 P.2d 61 (1980); *Helmer v. State*, Sup. Ct. Op. No. 2181 (File No. 4383), 616 P.2d 884 (1980); *Tuckfield v. State*, Sup. Ct. Op. No. 2266 (File No. 4569), 621 P.2d 1350 (1981); *Edenshaw v. State*, Ct. App. Op. No. 005 (File No. 5239), 631 P.2d 506 (1981); *Kompkoff v. State*, Ct. App. Op. No. 015 (File No. 5324), 626 P.2d 1091 (1981); *Williams v. State*, Ct. App. Op. No. 139 (File No. 5676), 652 P.2d 478 (1982).

Sentence for rape held excessive. — See *Ahvik v. State*, Sup. Ct. Op. No. 2123 (File No. 4556), 613 P.2d 1252 (1980); *Hintz v. State*, Sup. Ct. Op. No. 2334 (File No. 3541), 627 P.2d 207 (1981); *Qualle v. State*, Ct. App. Op. No. 138 (File No. 6666), 652 P.2d 481 (1982).

Sentences of 15 years for rape of one victim; 10 years concurrent with the 15-year term for burglarizing her residence; 10 years for burglarizing another victim's residence; six months concurrent with the 10-year burglary term for assault on the second victim; 15 years for rape of a third victim; and 10 years concurrent with the 15-year sentence for burglarizing the third victim's residence, for a total of 40 years incarceration, was error. *Nix v. State*, Ct. App. Op. No. 157 (File No. 5481), 653 P.2d 1093 (1982).

Sentence for rape too lenient. — See *State v. Lancaster*, Sup. Ct. Op. No. 1247 (File No. 2571), 550 P.2d 1257 (1976); *State v. Wassilie*, Sup. Ct. Op. No. 1630 (File No. 3691), 578 P.2d 971 (1978); *State v. Jensen*, Ct. App. Op. No. 126 (File No. 5879), 650 P.2d 422 (1982).

Sentence for attempted rape upheld. — See *Shelton v. State*, Sup. Ct. Op. No. 2074 (File No. 3908), 611 P.2d 24 (1980) (decided under former AS 11.15.130).

Sentence for assault with intent to rape upheld. — See *Fomin v. State*, Sup. Ct. Op. No. 2214 (File No. 5913), 619 P.2d 718 (1980).

Sec. 11.41.420. Sexual assault in the second degree. (a) An offender commits the crime of sexual assault in the second degree if the offender engages in

(1) sexual contact with another person without consent of that person; or

(2) sexual penetration with a person who the offender knows (A) is suffering from a mental disorder or defect which renders the person incapable of appraising the nature of the conduct under circumstances in which a person who is capable of appraising the nature of the

(b) is incapacitated.

(b) Sexual assault in the second degree is a class B felony. (§ 3 ch 166 SLA 1978; am § 1 ch 78 SLA 1983)

Effect of amendments. — The 1983 amendment rewrote subsection (a).

NOTES TO DECISIONS

For cases construing former crime of rape, see notes to AS 11-41-410.

Attempted sexual assault in the first degree and sexual assault in the second degree are closely related, since sexual penetration involves sexual contact and both offenses proceed on a theory of coerced assent. *Nicholson v. State*, Ct. App. Op. No. 193 (File No. 6192), 656 P.2d 1209 (1982).

Constitutionality of conviction where original charge was under AS 11-41-410. — Where defendant was charged with attempted sexual assault in the first degree, he was thereby assumed to have notice that he might be convicted of second-degree sexual assault because of the similarities in the elements of the two offenses, and his conviction for the latter offense did not violate due process. *Nicholson v. State*, Ct. App. Op. No. 193 (File No. 6192), 656 P.2d 1209 (1982).

Evidence. — Where victim woke up in the early morning hours to find defendant

in her bed and fondling her breast, and where she testified that she was temporarily in shock and afraid he would hurt her, a jury could find that victim's momentary acquiescence in defendant's fondling her breast constituted second-degree sexual assault. *Nicholson v. State*, Ct. App. Op. No. 193 (File No. 6192), 656 P.2d 1209 (1982).

Instructions. — The trial judge did not err in refusing to instruct on the lesser included offense of attempted sexual contact in the second degree. *Johnson v. State*, Ct. App. Op. No. 267 (File No. 6662), 665 P.2d 566 (1983).

Sentence upheld. — Sentence of eight years with three years suspended for sexual assault in the second degree was not clearly mistaken. *Howard v. State*, Ct. App. Op. No. 260 (File Nos. 6027, 6123), 664 P.2d 603 (1983).

Cited in *Stores v. State*, Sup. Ct. Op. No. 2252 (File No. 3595), 625 P.2d 820 (1980).

Sec. 11-41-430. [Repealed, § 10 ch 78 SLA 1983. For current law, see AS 11-41-120(a)(2).]

Sec. 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; or

(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 who

(A) is entrusted to the offender's care by authority of law; or

(B) is the offender's son or daughter, including an illegitimate or adopted child, or a stepchild.

(b) Sexual abuse of a minor in the first degree is an unclassified felony and is punishable as provided in AS 12-55. (§ 2 ch 78 SLA 1983)

NOTES TO DECISIONS

Editor's notes. — The cases cited in the note below were decided under former AS 11-15-131 and former AS 11-41-410(a)(4).

For cases construing former rape statute, see AS 11-41-410, Notes to Decisions, analysis II.

State's authority to control sexual conduct of juveniles. — Although juveniles may have certain rights to sexual privacy, the state may nevertheless exercise control over the sexual conduct of children beyond the scope of its authority to control adults. *Anderson v. State*, Sup. Ct. Op. No. 1407 (File No. 2641), 562 P.2d 351 (1977).

Where juveniles have certain rights to privacy and to express their own autonomy, the state's interest in the well-being of its children may justify legislation that could not properly be applied to adults. *Anderson v. State*, Sup. Ct. Op. No. 1407 (File No. 2641), 562 P.2d 351 (1977).

As to constitutionality of former statute making lewd and lascivious acts toward children a crime, see *Anderson v. State*, Sup. Ct. Op. No. 1407 (File No. 2641), 562 P.2d 351 (1977).

Physical conduct punished under former statute. — See *Anderson v. State*, Sup. Ct. Op. No. 1407 (File No. 2641), 562 P.2d 351 (1977); *Smiloff v. State*, Sup. Ct. Op. No. 1637 (File No. 3006), 579 P.2d 28 (1978).

Former section prohibited fellatio. — See *Anderson v. State*, Sup. Ct. Op. No. 1407 (File No. 2641), 562 P.2d 351 (1977).

Consent is not at issue. — The state may forbid an adult to have fellatio with a child under the statutorily prescribed age regardless of whether the child consents to the act. *Anderson v. State*, Sup. Ct. Op. No. 1407 (File No. 2641), 562 P.2d 351 (1977).

Mitigating Factors. — In prosecution for first-degree sexual assault, defendant's familiarity with his victim (his 12-year old daughter) was not a mitigating factor. *Hodges v. State*, Ct. App. No. 233 (File No. 7330), 660 P.2d 1203 (1983).

Sentence under former AS 11-15-131 upheld. — See *Noble v. State*, Sup. Ct. Op. No. 1286 (File No. 2468), 552 P.2d 142 (1976); *Buchanan v. State*, Sup. Ct. Op.

No. 1316 (File No. 2553), 554 P.2d 1153 (1976); *Morgan v. State*, Sup. Ct. Op. No. 1908 (File No. 4167), 598 P.2d 952 (1979); *Baker v. State*, Sup. Ct. Op. No. 1968 (File No. 4631), 602 P.2d 797 (1979); *Alvarado v. State*, Sup. Ct. Op. No. 2323 (File No. 5133), 626 P.2d 582 (1981).

Sentence for assault upheld. — In prosecution of defendant with no prior criminal record on two counts of first-degree sexual assault of his 12-year old daughter, sentence of two consecutive eight-year terms with five years suspended was not excessive. *Hodges v. State*, Ct. App. Op. No. 233 (File No. 7330), 660 P.2d 1203 (1983).

In light of the substantial duration of defendant's sexual abuse of his stepdaughter (three years), his failure to learn from the earlier discovery of his prior offenses, his disregard of a court order that he avoid contact with the victim, and his total failure to take any meaningful step toward rehabilitation, 10-year sentence with four years suspended was not excessive for conviction of first-degree sexual assault. *Langton v. State*, Ct. App. Op. No. 236 (File Nos. 7188, 6247, 7114), 662 P.2d 954 (1983).

Sentence under AS 11-15-131 held excessive. — See *Qualle v. State*, Ct. App. Op. No. 138 (File No. 5666), 652 P.2d 481 (1982).

Sentence for assault held excessive. — Sentence of 20 years imprisonment for first-degree sexual assault of two-year old child was excessive and case was remanded for resentencing not to exceed 120 years. *Langton v. State*, Ct. App. Op. No. 236 (File Nos. 7188, 6247, 7114), 662 P.2d 954 (1983).

Sentence for assault held too lenient. — Suspended five-year sentence for first-degree sexual assault of defendant's four-year old son was disapproved as too lenient, with a 90-day to three-year sentence suggested. *Langton v. State*, Ct. App. Op. No. 236 (File Nos. 7188, 6247, 7114), 662 P.2d 954 (1983).

Applied in *Seymore v. State*, Ct. App. Op. No. 196 (File No. 6995), 655 P.2d 780 (1982).

Sec. 11-41-436. Sexual abuse of a minor in the second degree. (a) An offender commits the crime of sexual abuse of a minor in the second degree if

(1) being 16 years of age or older, the offender engages in sexual penetration with a person who is 13, 14, or 15 years of age and at least three years younger than the offender, or aids, induces, causes or encourages a person who is 13, 14, or 15 years of age and at least three years younger than the offender to engage in sexual penetration with another person;

(2) being 16 years of age or older, the offender engages in sexual contact with a person who is under 13 years of age or aids, induces, causes, or encourages a person under 13 years of age to engage in sexual contact with another person;

(3) being 18 years of age or older, the offender engages in sexual contact with a person who is under 18 years of age and who

(A) is entrusted to the offender's care by authority of law; or

(B) is the offender's son or daughter, including an illegitimate or adopted child, or a stepchild; or

(4) being 16 years of age or older, the offender aids, induces, causes, or encourages a person who is under 16 years of age to engage in conduct described in AS 11.41.455(a)(2) — (6).

(b) Sexual abuse of a minor in the second degree is a class B felony. (§ 2 ch 78 SLA 1983)

NOTES TO DECISIONS

Prior law. — For cases decided under prior law, see notes to AS 11.41.434, Notes to Decisions.

Sec. 11.41.438. Sexual abuse of a minor in the third degree. (a) An offender commits the crime of sexual abuse of a minor in the third degree if, being 16 years of age or older, the offender engages in sexual contact with a person who is 13, 14, or 15 years of age and at least three years younger than the offender.

(c) Sexual abuse of a minor in the third degree is a class C felony. (§ 2 ch 78 SLA 1983)

NOTES TO DECISIONS

Prior law. — For cases decided under prior law, see notes to AS 11.41.434, Notes to Decisions.

Sec. 11.41.440. Sexual abuse of a minor in the fourth degree. (a) An offender commits the crime of sexual abuse of a minor in the fourth degree if, being under 16 years of age, the offender engages in sexual penetration or sexual contact with a person who is under 13 years of age and at least three years younger than the offender.

(b) Sexual abuse of a minor in the fourth degree is a class A misdemeanor. (§ 3 ch 166 SLA 1978; am § 9 ch 102 SLA 1980; am § 3 ch 78 SLA 1983)

Effect of amendments. — The 1980 amendment rewrote subsection (a). The 1983 amendment rewrote this section.

Legislative history reports. — For a

report on Chapter 102, SLA 1980 (HCS CSSB 511), see 1980 Senate Journal Supplement, No. 44, May 29, 1980, or 1980 House Journal Supplement, No. 79, May 28, 1980.

NOTES TO DECISIONS

Prior law. — For cases decided under prior law, see notes to AS 11.41.434, Notes to Decisions.

Applied in *Goulden v. State*, Ct. App. Op. No. 201 (File No. 6465), 656 P.2d 1218 (1983).

Cited in *Stores v. State*, Sup. Ct. Op. No. 2252 (File No. 3595), 625 P.2d 820 (1980), *Hodges v. State*, Ct. App. Op. No. 233 (File No. 7330), 660 P.2d 1203 (1983).

Collateral references. — Civil liability for carnal knowledge with actual consent of girl under age of consent, 45 ALR 780; 79 ALR 1229.

Assault with intent to ravish or rape consenting female under age of consent, 81 ALR 599.

Parent or person in loco parentis, liabil-

ity for rape of minor child, 19 ALR2d 460. Assault with intent to commit unnatural sex act upon minor as affected by latter's consent, 65 ALR2d 748.

Applicability of rape statute covering children of a specified age, with respect to a child who has passed the anniversary date of such age, 73 ALR2d 874.

Sec. 11.41.445. General provisions. (a) In a prosecution under AS 11.41.410 — 11.41.440 it is an affirmative defense that, at the time of the alleged offense, the victim was the legal spouse of the defendant unless

(1) the spouses were living apart; or

(2) the defendant caused physical injury to the victim.

(b) In a prosecution under AS 11.41.410 — 11.41.440, whenever a provision of law defining an offense depends upon a victim's being under a certain age, it is an affirmative defense that, at the time of the alleged offense, the defendant reasonably believed the victim to be that age or older, unless the victim was under 13 years of age at the time of the alleged offense. (§ 3 ch 166 SLA 1978)

Sec. 11.41.450. Incest. (a) A person commits the crime of incest if, being 18 years of age or older, that person engages in sexual penetration with another who is related, either legitimately or illegitimately, as

(1) an ancestor or descendant of the whole or half blood;

(2) a brother or sister of the whole or half blood; or

(3) an uncle, aunt, nephew, or niece by blood.

(b) Incest is a class C felony. (§ 3 ch 166 SLA 1978)

NOTES TO DECISIONS

Death of defendant abated prosecution under former section. *Hartwell v. State*, Sup. Ct. Op. No. 391 (File No. 701), 423 P.2d 282 (1967), decided under former AS 11.40.110.

Collateral references. — Aiding and abetting offense of incest by one not related to party, 5 ALR 784; 74 ALR 1110, 131 ALR 1322.

Relationship created by adoption as within statute regarding incest, 151 ALR 1146.

Consent as element of incest, 30 ALR2d 1299.

Sexual intercourse between persons related by half blood, 72 ALR2d 706.

Prosecutrix as accomplice or victim, 74 ALR2d 705.

Rape, incest as included within charge of, 76 ALR2d 484.

Sec. 11.41.455. Unlawful exploitation of a minor. (a) A person commits the crime of unlawful exploitation of a minor if, in the state and with the intent of producing a live performance, film, photograph, negative, slide, book, newspaper, magazine, or other printed material that visually depicts the conduct listed in (1) — (6) of this subsection, the person knowingly induces or employs a child under 18 years of age to engage in, or photographs, films, or televises a child under 18 years of age engaged in, the following actual or simulated conduct:

- (1) sexual penetration;
- (2) the lewd touching of another person's genitals, anus, or breast;
- (3) the lewd touching by another person of the child's genitals, anus, or breast;
- (4) masturbation;
- (5) bestiality; or
- (6) the lewd exhibition of the child's genitals.

(b) A parent, legal guardian, or person having custody or control of a child under 18 years of age commits the crime of unlawful exploitation of a minor if, in the state, the person permits the child to engage in conduct described in (a) of this section knowing that the conduct is intended to be used in producing a live performance, film, photograph, negative, slide, book, newspaper, magazine, or other printed material that visually depicts the conduct.

(c) Unlawful exploitation of a minor is a class B felony. (§ 3 ch 166 SLA 1978; am § 1 ch 57 SLA 1983)

Cross references. — For crime of distribution of child pornography, see AS 11.61.125.

Effect of amendments. — The 1983 amendment, in subsection (a), substituted "magazine, or other printed material that visually depicts the conduct listed in (1) — (6) of this subsection, the person" for "or

magazine that depicts such conduct, the person," substituted "18 years" for "16 years" in two places, and added "the following actual or simulated conduct" to the end, all in the introductory paragraph; substituted "lewd" for "obscene" in paragraphs (2), (3) and (6); and deleted "female" preceding "breast" in paragraph

(3). The amendment also redesignated former subsection (b) as subsection (c) and added present subsection (b).

NOTES TO DECISIONS

Applied in *Qualle v. State*, Ct. App. Op. No. 138 (File No. 5666), 652 P.2d 481 (1982).

Sec. 11.41.460. Indecent exposure. (a) An offender commits the crime of indecent exposure if the offender intentionally exposes the offender's genitals to another person with reckless disregard for the offensive, insulting, or frightening effect the act may have on that person.

(b) Indecent exposure before a person under 16 years of age is a class A misdemeanor. Indecent exposure before a person 16 years of age or older is a class B misdemeanor. (§ 4 ch 78 SLA 1983)

Sec. 11.41.470. Definitions. For purposes of AS 11.41.410 — 11.41.470, unless the context requires otherwise,

(1) "incapacitated" means temporarily incapable of appraising the nature of one's own conduct and physically unable to express unwillingness to act;

(2) "victim" means the person alleged to have been subjected to sexual assault in any degree or sexual abuse of a minor in any degree;

(3) "without consent" means that a person

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

(B) is incapacitated as a result of an act of the defendant. (§ 3 ch 166 SLA 1978; am § 5 ch 78 SLA 1983)

Cross references. — For definition of terms used in this title, see AS 11.81.01.

Effect of amendments. — The 1983 amendment deleted "that a person is" preceding "temporarily incapable" and substituted "one's own conduct and" for "his conduct and is" in paragraph (1) and deleted "imminent" preceding "death" and preceding "kidnapping" in paragraph (3)(A).

NOTES TO DECISIONS

Applied in *Nicholson v. State*, Ct. App. Op. No. 193 (File No. 6192), 656 P.2d 1209 (1982); *Junely v. State*, Ct. App. Op. No. 259 (File No. 5606), 665 P.2d 30 (1983); *Reynolds v. State*, Ct. App. Op. No. 262 (File No. 6890), P.2d (1983).

Quoted in *Woods v. State*, Sup. Ct. Op. No. 2698 (File No. 6180), P.2d (1983).

Cited in *Hartley v. State*, Ct. App. Op. No. 153 (File No. 5737), 653 P.2d 1052 (1982).

Chapter 50. Syndicalism.

[Repealed, § 21, ch. 166, SLA 1978. For Law on terroristic threatening, see AS 11.56.810.]

Chapter 51. Offenses Against the Family.

<p>Section 100. Endangering the welfare of a minor 120. Criminal nonsupport 125. Failure to permit visitation with a minor</p>	<p>Section 130. Contributing to the delinquency of a minor 140. Unlawful marrying</p>
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Collateral references. — 10 Am. Jur. 2d, Bigamy, § 1 et seq.; 42 Am. Jur. 2d, Infants, §§ 16, 17, 55, 65-74; 47 Am. Jur. 2d, Juvenile Courts, Etc., §§ 63-70; 59 Am. Jur. 2d, Parent and Child, §§ 45, 50-57.

10 C. Bigamy, § 1 et seq.; 43 C.J.S., Infants, §§ 10, 24, 98; 67 C.J.S., Parent and Child, §§ 41, 165-178.

SECTION 122

Sec. 11.51.100. Endangering the welfare of a minor. (a) A person commits the crime of endangering the welfare of a minor if, being a parent, guardian, or other person legally charged with the care of a child under 10 years of age, the person intentionally deserts the child in any place under circumstances creating a substantial risk of physical injury to the child.

(b) Endangering the welfare of a minor is a class C felony. (§ 5 ch 166 SLA 1978)

Collateral references. — Liability of parent for injury to unemancipated child caused by parent's negligence — modern cases, 6 ALR4th 1066.

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

(b) As used in this section "support" includes necessary food, care, clothing, shelter, medical attention, and education. There is no failure to provide medical attention to a child if the child is provided treatment solely by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination by an accredited practitioner of the church or denomination.

(c) Criminal nonsupport is a class A misdemeanor. (§ 5 ch 166 SLA 1978)

NOTES TO DECISIONS

Editor's notes. — The cases cited in the notes below were decided under former AS 11.35.010, 11.35.090 and 11.35.100.

A father has a primary and continuing obligation to support his children. *Johansen v. State*, Sup. Ct. Op. No. 746 (File No. 1309), 491 P.2d 759 (1971).

And the inability of a father to engage in his chosen trade may not excuse him from that obligation. *Johansen v. State*, Sup. Ct. Op. No. 746 (File No. 1309), 491 P.2d 759 (1971).

There is no room for professional or occupational pride where the duty of child support is involved. *Johansen v. State*, Sup. Ct. Op. No. 746 (File No. 1309), 491 P.2d 759 (1971).

Former section included person's postdivorce obligation to support. — See *Johansen v. State*, Sup. Ct. Op. No. 746 (File No. 1309), 491 P.2d 759 (1971).

Applicability of former statute to putative fathers of illegitimate children. — See *S.L.W. v. Alaska Workmen's Comp. Bd.*, Sup. Ct. Op. No. 736 (File No. 1333), 490 P.2d 42 (1971).

The purpose of contempt proceedings for nonpayment of child support decrees is to coerce the defendant to pay money. It is not to punish him for his past failure to pay. *Johansen v. State*, Sup. Ct. Op. No. 746 (File No. 1309), 491 P.2d 759 (1971).

Alaska statute classify indirect contempt for nonsupport as a crime. *Johansen v. State*, Sup. Ct. Op. No. 746 (File No. 1309), 491 P.2d 759 (1971).

And a jury trial is available. *Johansen v. State*, Sup. Ct. Op. No. 746 (File No. 1309), 491 P.2d 759 (1971).

If the defendant asserts that he lacks the ability to comply with the court's order of child support, then he is entitled to a trial on that issue. *Johansen v. State*, Sup. Ct. Op. No. 746 (File No. 1309), 491 P.2d 759 (1971).

Procedural aspects of contempt proceedings in nonsupport cases. — For delineation of the procedural aspects of contempt proceedings in nonsupport cases where the purpose is to coerce the defendant's performance of his obligation, see *Johansen v. State*, Sup. Ct. Op. No. 746 (File No. 1309), 491 P.2d 759 (1971).

Changes of venue in nonsupport contempt cases. — It can be expected that courts hearing nonsupport contempt cases in the future may choose in some

cases to make use of the discretionary authority vested in them by AS 22.10.030 and will grant changes of venue. *Johansen v. State*, Sup. Ct. Op. No. 746 (File No. 1309), 491 P.2d 759 (1971).

Inability to comply with a child support order is an affirmative defense. *Johansen v. State*, Sup. Ct. Op. No. 746 (File No. 1309), 491 P.2d 759 (1971).

In a contempt action the father will not be permitted to succeed on the defense of having a legitimate reason or excuse for not complying with an order of child support where he has not made a reasonable effort to employ his earning capacity in directions other than the one he has chosen as his chief means of livelihood. *Johansen v. State*, Sup. Ct. Op. No. 746 (File No. 1309), 491 P.2d 759 (1971).

Burden of proving noncompliance with court order of child support. — At a contempt trial, the burden of proving noncompliance, by a preponderance of the evidence, with the court's order of child support should be on the plaintiff, who initiates the action. *Johansen v. State*, Sup. Ct. Op. No. 746 (File No. 1309), 491 P.2d 759 (1971).

Defendant must prove his inability to comply with a court order of child support. *Johansen v. State*, Sup. Ct. Op. No. 746 (File No. 1309), 491 P.2d 759 (1971).

In almost all child support contempt cases, the crucial issue will concern the defendant's ability to comply. The burden of proof in this respect should remain with the defendant. This is where it presently rests, in this state and in other jurisdictions; such allocation of the burden of proof is appropriate. *Johansen v. State*, Sup. Ct. Op. No. 746 (File No. 1309), 491 P.2d 759 (1971).

The shifting of the burden of proof entails a partial change of the ordinary standard employed in criminal cases. But this is still advantageous to both parties. The defendant's protection increases as the burden of proof is shifted. He needs only to show by a preponderance of the evidence that he is unable to pay. Once he has met this burden, incarceration, as a coercive method, serves no useful purpose. At the same time the interest of the complainants, in receiving money which defendant is able to pay, is protected under this approach. *Johansen v. State*, Sup. Ct. Op. No. 746 (File No. 1309), 491 P.2d 759 (1971).

(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.

(b) As used in this section, "noise" is "unreasonably loud" in considering the nature and purpose of the defendant's conduct at the circumstances known to the defendant, including the nature of the location and the time of day or night, the conduct involves a gross deviation from the standard of conduct that a reasonable person would follow in the same situation. "Noise" does not include speech that is constitutionally protected.

(c) Disorderly conduct is a class B misdemeanor and is punishable as authorized in AS 12.55 except that a sentence of imprisonment, if imposed, shall be for a definite term of not more than 10 days. (§ 7 ch 166 SLA 1978; am § 6 ch 78 SLA 1983)

Effect of amendments. — The 1983 amendment, in paragraph (a)(7), removed personal pronouns and substituted

"buttock or anus" for "genitals, buttock, anus, or female breast."

NOTES TO DECISIONS

Editor's notes. — The cases cited in the notes below were decided under former AS 11.40.080 and 11.45.030.

Constitutionality of former disorderly conduct statute. — See Poole v. State, Sup. Ct. Op. No. 1060 (File No. 2104), 524 P.2d 286 (1974); State v. Martin, Sup. Ct. Op. No. 1122 (File No. 2143), 532 P.2d 316 (1975).

Disorderly conduct statute cannot be applied to behavior which is constitutionally exempt from criminal prohibition. Anniskette v. State, Sup. Ct. Op. No. 732 (File No. 1231), 489 P.2d 1012 (1971).

Policemen presumed least likely to be provoked. — Insofar as the theory of disorderly conduct rests on the tendency of the actor's behavior to provoke violence in others, one must suppose that policemen, employed and trained to maintain order, would be least likely to be provoked to disorderly responses. Anniskette v. State, Sup. Ct. Op. No. 732 (File No. 1231), 489 P.2d 1012 (1971).

It is only in the most limited circumstances that speech may be punished. Anniskette v. State, Sup. Ct. Op. No. 732

(File No. 1231), 489 P.2d 1012 (1971).

For discussion of speech prohibited under former disorderly conduct statute, see Anniskette v. State, Sup. Ct. Op. No. 732 (File No. 1231), 489 P.2d 1012 (1971).

Telephone call criticizing public officer. — There is neither legislative language nor constitutional power to read this section as including within its ambit a single telephone call criticizing a public officer for the performance of his official duties. Anniskette v. State, Sup. Ct. Op. No. 732 (File No. 1231), 489 P.2d 1012 (1971).

That an officer was personally offended by defendant's telephone call did not render the defendant's conduct a crime. Anniskette v. State, Sup. Ct. Op. No. 732 (File No. 1231), 489 P.2d 1012 (1971).

As to application of former AS 11.40.080, prohibiting indecent exposure and exhibition, see E.L.L. v. State, Sup. Ct. Op. No. 1540 (File No. 3374), 572 P.2d 786 (1977).

Collateral references. — 12 Am. Jur. 2d, Breach of Peace, Etc., §§ 18-40.

11 C.J.S., Breach of the Peace, §§ 1-16.

Failure or refusal to obey police officer's order to move on, on street, as disorderly conduct, 65 ALR2d 1152.

Misuse of telephones as disorderly conduct, 97 ALR2d 504.

Vagueness as invalidating statutes or ordinances dealing with disorderly persons or conduct, 12 ALR3d 1448.

Larceny as within disorderly conduct statute or ordinance, 71 ALR3d 1156.

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

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

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

(3) makes repeated telephone calls at extremely inconvenient hours;

(4) makes an anonymous or obscene telephone call or a telephone call that threatens physical injury;

(5) subjects another person to offensive physical contact; or

(6) violates a provision of an order issued under AS 25.35.010(b) or 25.35.020 restraining the respondent from communicating directly or indirectly with the petitioner.

(b) Harassment is a class B misdemeanor. (§ 7 ch 166 SLA 1978; am § 10 ch 61 SLA 1982)

Cross references. — For provisions authorizing arrest without warrant in certain cases where the police officer has reasonable cause to believe that the person has committed a crime under this section,

see AS 12.25.030(b).

Effect of amendments. — The 1982 amendment added paragraph (6) to subsection (a).

NOTES TO DECISIONS

For case construing former AS 11.45.035 relating to illegal use of telephones, see Anniskette v. State, Sup. Ct.

Op. No. 732 (File No. 1231), 489 P.2d 1012 (1971)

Collateral references. — Misuse of telephones as disorderly conduct, 97 ALR2d 504.

Validity, construction, and application

of state criminal statute forbidding use of telephone to annoy or harass, 95 ALR3d 411

§ 11.61.125. Distribution of child pornography. (a) A person commits the crime of distribution of child pornography if the person brings or causes to be brought into the state for sale or distribution, or

SECTION 3

in the state possesses, prepares, publishes, or prints with intent to distribute, sell, or exhibit to others for commercial consideration, any material that visually depicts conduct described under AS 11.41.455(a), knowing that the production of the material involved the use of a child under 18 years of age who engaged in the conduct.

(b) This section does not apply to acts that are an integral part of the exhibition or performance of a motion picture if the acts are performed within the scope of employment by a motion picture operator or projectionist employed by the owner or manager of a theater or other place for the showing of motion pictures, unless the motion picture operator or projectionist

(1) has a financial interest in the theater or place in which employed; or

(2) causes the performance or motion picture to be performed or exhibited without the consent of the manager or owner of the theater or other place of showing.

(c) Distribution of child pornography is a class C felony. (§ 2 ch 57 SLA 1983)

Cross references. — For crime of unlawful exploitation of a minor, AS 11.41.455.

Sec. 11.61.130. Misconduct involving a corpse. (a) A person commits the crime of misconduct involving a corpse if

(1) except as authorized by law or in an emergency, the person intentionally disinters, removes, conceals, or mutilates a corpse;

(2) the person engages in sexual penetration of a corpse; or

(3) the person detains a corpse for a debt or demand or upon a lien or charge.

(b) Misconduct involving a corpse is a class A misdemeanor. (§ 7 ch 166 SLA 1978)

Collateral references. — 22 Am. Jur. 2d, Dead Bodies, §§ 47-50.
25A C.J.S., Dead Bodies, §§ 8(2)-8(4).
Action at law for desecration of grave, 172 ALR 554.
Immunity from liability for unlawful treatment of dead body in operation of hospital by state or governmental unit or agency, 25 ALR2d 244.

Liability in damages for withholding corpse from relatives, 48 ALR3d 240.
Validity, construction, and application of statutes making it a criminal offense to mistreat or wrongfully dispose of dead body, 81 ALR3d 1071.

Sec. 11.61.140. Cruelty to animals. (a) A person commits the crime of cruelty to animals if the person

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

(2) recklessly neglects an animal and, as a result of that neglect, causes the death of the animal or causes severe pain or suffering to the animal; or

(3) kills an animal by the use of a decompression chamber.

(b) It is a defense to a prosecution under (a)(1) or (2) of this section that the conduct of the defendant

(1) conformed to accepted veterinary practice;

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

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

(c) In this section, "animal" means a vertebrate living creature not a human being, but does not include fish.

(d) Cruelty to animals is a class A misdemeanor. (§ 7 ch 166 SLA 1978; am § 1 ch 78 SLA 1980; am § 20 ch 59 SLA 1982)

Effect of amendment. — The 1980 amendment rewrote the section.

The 1982 amendment inserted "(a)(1) or (a)(2) of" in the introductory language of subsection (b).

Editor's notes. — The provisions of paragraphs (2) and (3) of subsection (a) as it existed prior to the 1980 amendment

may now be found in AS 11.61.145.

Collateral references. — 4 Am. Jur. 2d, Animals, §§ 27-30.

3A C.J.S., Animals, §§ 99-119.
Cruelty in trapping animals, 79 ALR 1308.

What constitutes statutory offense of cruelty, 82 ALR2d 794.

Sec. 11.61.145. Promoting an exhibition of fighting animals. (a) A person commits the crime of promoting an exhibition of fighting animals if the person

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

(2) instigates, promotes, or has a pecuniary interest in an exhibition of fighting animals; or

(3) attends an exhibition of fighting animals.

(b) The animals, equipment, vehicles, money, and other personal property used by a person in a violation of (a)(1) or (2) of this section shall be forfeited to the state if the person is convicted of an offense under this section.

(c) In this section, "animal" means a vertebrate living creature not a human being, but does not include fish.

(d) Promoting an exhibition of fighting animals

(1) under (a)(1) or (2) of this section is a class C felony;

(2) under (a)(3) of this section is a violation for the first offense and a class B misdemeanor for the second and each subsequent offense. (§ 2 ch 78 SLA 1980)

Sec. 11.61.150. Obstruction of highways. (a) A person commits the crime of obstruction of highways if the person knowingly

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

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

- (b) Criminal possessor of explosives is a
- (1) class A felony if the crime intended is murder in any degree or kidnapping;
 - (2) class B felony if the crime intended is a class A felony;
 - (3) class C felony if the crime intended is a class B felony;
 - (4) class A misdemeanor if the crime intended is a class C felony;
 - (5) class B misdemeanor if the crime intended is a class A or class B misdemeanor. (§ 7 ch 166 SLA 1978)

Collateral references. — 31 Am. Jur. Possession of bomb, molotov cocktail, or 2d, Explosions and Explosives, similar device as criminal offense, 42 §§ 121-130. ALR3d 1230.
35 C.J.S., Explosives, § 12.

Sec. 11.61.250. Unlawful furnishing of explosives. (a) A person commits the crime of unlawful furnishing of explosives if the person furnishes an explosive substance or device to another knowing that the other intends to use the substance or device to commit a crime.
(b) Unlawful furnishing of explosives is a class C felony. (§ 7 ch 166 SLA 1978)

Chapter 65. Offenses Against Public Convenience.

Secs. 11.65.010 — 11.65.020. [Renumbered as AS 30.50.020 and 30.50.010.]

Sec. 11.65.030. Tampering with posted notices. [Repealed, § 21, ch. 166, SLA 1978.]

Chapter 66. Offenses Against Public Health and Decency.

Article

1. Prostitution and Related Offenses (§§ 11.66.100 — 11.66.150)
2. Gambling Offenses (§§ 11.66.200 — 11.66.280)

Article 1. Prostitution and Related Offenses.

Section	Section
100. Prostitution	130. Promoting prostitution in the third degree
110. Promoting prostitution in the first degree	140. Corroboration of certain testimony not required
120. Promoting prostitution in the second degree	150. Definitions

NOTES TO DECISIONS

Municipal ordinances not prohibited. — The enactment of this article does not prohibit municipal ordinances penalizing the solicitation of prostitutes by putative customers. Municipality of Anchorage v. Afualo, Ct. App. Op. No. 213 (File Nos. 7094, 7095), 657 P.2d 407 (1983).
There is nothing in this article which would support an inference that the legislature sought to encourage men to patronize prostitutes nor is there any indication in this article that the legislature sought statewide uniformity in regulating commercial sexual relations. Municipality of Anchorage v. Afualo, Ct. App. Op. No. 213 (File Nos. 7094, 7095), 657 P.2d 407 (1983).

Collateral references. — 63 Am. Jur. 2d, Prostitution, § 1 et seq. Validity and construction of statute or ordinance proscribing solicitation for purposes of prostitution, lewdness, or assignment — modern cases, 77 ALR3d 519.
27 C.J.S., Disorderly Houses, § 1 et seq.; 73 C.J.S., Prostitution, § 1 et seq. Constitutional and construction of pandering acts, 74 ALR 311.

Sec. 11.66.100. Prostitution. (a) A person commits the crime of prostitution if the person engages in or agrees or offers to engage in sexual conduct in return for a fee.
(b) Prostitution is a class B misdemeanor. (§ 8 ch 166 SLA 1978)

NOTES TO DECISIONS

Common law. — The keeping of a bawdyhouse was a misdemeanor at common law, whereas fornication and prostitution were not. Eleazar v. United States, 16 Alaska 561, 241 F.2d 385 (9th Cir. 1956), decided under former AS 11.40.220.
This section is not irreconcilable with a municipal ordinance prohibiting the solicitation of prostitutes by putative customers. Municipality of Anchorage v. Afualo, Ct. App. Op. No. 213 (File Nos. 7094, 7095), 657 P.2d 407 (1983).
Actual payment of a fee is not required; an act of prostitution is complete when an offer is extended or an agreement made to engage in sexual conduct in return for a fee. Garibay v. State, Ct. App. Op. No. 221 (File No. 6246), 658 P.2d 1350 (1983).
Proof. — Customer's testimony that he agreed to purchase sexual favors for sum of \$200, his testimony that he charged the purchase price using his VISA card, and the VISA charge slip itself, were all highly probative of whether an agreement or offer to engage in sexual conduct in return for a fee was in fact made. Garibay v. State, Ct. App. Op. No. 221 (File No. 6246), 658 P.2d 1350 (1983).

Collateral references. — Prostitution immoral purposes, 18 ALR 186; 66 ALR 478; 86 ALR 263.
Entrapment to procure women for

Sec. 11.66.110. Promoting prostitution in the first degree. (a) A person commits the crime of promoting prostitution in the first degree if the person

(1) induces or causes a person to engage in prostitution through the use of force;

(2) as other than a patron of a prostitute, induces or causes a person under 16 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) In a prosecution under (a)(2) of this section, it is not a defense that the defendant reasonably believed that the person induced or caused to engage in prostitution was 16 years of age or older.

(c) Except as provided in (d) of this section, promoting prostitution in the first degree is a class B felony.

(d) A person convicted under (a)(2) of this section is guilty of a class A felony. (§ 8 ch 166 SLA 1978; am §§ 1, 2 ch 50 SLA 1983)

Effect of amendments. — The 1983 amendment added "Except as provided in (d) of this section" to the beginning of subsection (c) and added subsection (d).

NOTES TO DECISIONS

For case construing former statute prohibiting importing or exporting females for immoral purposes, see *State v. Adkerson*, Sup. Ct. Op. No. 294 (File No. 520), 403 P.2d 673 (1965).

For case construing former procurement statute, see *Johnson v. State*, Sup. Ct. Op. No. 832 (File No. 1338), 501 P.2d 762 (1972).

Sentence for procurement upheld. — See *Price v. State*, Sup. Ct. Op. No. 1450 (File No. 2794), 565 P.2d 858 (1977).

For case construing former statute concerning necessary evidence for prostitution or seduction, see *Johnson v. State*, Sup. Ct. Op. No. 832 (File No. 1338), 501 P.2d 762 (1972).

Collateral references. — Transporting female for purpose of prostitution, 74 ALR 330.

Woman conniving or consenting to own transportation, 84 ALR 376.

Sec. 11.66.120. Promoting prostitution in the second degree.
(a) A person commits the crime of promoting prostitution in the second degree if the person

(1) manages, supervises, controls, or owns, either alone or in association with others, a prostitution enterprise other than a place of prostitution; or

(2) procures or solicits a patron for a prostitute.

(b) Promoting prostitution in the second degree is a class C felony. (§ 8 ch 166 SLA 1978)

NOTES TO DECISIONS

For case construing former statute prohibiting soliciting or procuring for purpose of prostitution, see *Plas v. State*, Sup. Ct. Op. No. 1904 (File No. 3529, 3530), 598 P.2d 966 (1979).

Instruction. — Trial court did not err in

refusing to give instruction requiring state to prove that prostitution enterprise involved in case was of an ongoing nature. *Garibay v. State*, Ct. App. Op. No. 221 (File No. 6246), 658 P.2d 1350 (1983).

Collateral references. — Separate acts of taking earnings of or support from pro-

stitute as separate or continuing offenses of pimping, 3 ALR4th 1195.

Sec. 11.66.130. Promoting prostitution in the third degree. (a) A person commits the crime of promoting prostitution in the third degree if, with intent to promote prostitution, the person

(1) manages, supervises, controls, or owns, either alone or in association with others, a place of prostitution;

(2) as other than a patron of a prostitute, induces or causes a person 16 years of age or older to engage in prostitution; or

(3) as other than a prostitute receiving compensation for personally rendered prostitution services, receives or agrees to receive money or other property pursuant to an agreement or understanding that the money or other property is derived from prostitution; or

(4) engages in conduct that institutes, aids, or facilitates a prostitution enterprise.

(b) Promoting prostitution in the third degree is a class A misdemeanor. (§ 8 ch 166 SLA 1978)

NOTES TO DECISIONS

Editor's notes. — The cases cited in the notes below were decided under former AS 11.40.260, 11.40.300, 11.40.330, 11.40.410, and 11.40.420.

Common law. — The keeping of a bawdyhouse was a misdemeanor; at common law. *Eleazar v. United States*, 16 Alaska 561, 241 F.2d 385 (9th Cir. 1956).

Lessor may be guilty as keeper. — If a man leases his house to a woman to be kept as a bawdyhouse for purposes of prostitution, and it is kept for such purposes, with his knowledge, he is guilty as keeper. *Rosenkrantz v. United States*, 155 F. 38 (9th Cir. 1907).

As well as agent of lessor. — The agent of an owner, who rents a house knowing that it is to be used as a house of prostitution, and that it is so used, may be found guilty as a keeper. *Rosenkrantz v.*

United States, 155 F. 38 (9th Cir. 1907).

For case construing former statute prohibiting employment in a house of prostitution or living on the earnings of a prostitute, see *Johnson v. State*, Sup. Ct. Op. No. 832 (File No. 1338), 501 P.2d 762 (1972).

For case construing former statute prohibiting importing or exporting females for immoral purposes, see *State v. Adkerson*, Sup. Ct. Op. No. 294 (File No. 520), 403 P.2d 673 (1965).

For case construing former statute prohibiting pimping, see *Johnson v. United States*, 260 F. 783 (9th Cir. 1919).

For case construing former statute prohibiting a male's living with or on the earnings of a prostitute, see *Dunn v. State*, Sup. Ct. Op. No. 409 (File No. 734), 426 P.2d 993 (1967).

Sec. 12.05.010. Crime commenced outside state but consummated inside. When the commission of a crime commenced outside the state is consummated inside the state, the defendant is liable to punishment in this state even though out of the state at the time of the commission of the crime charged, if the defendant consummated the crime through the intervention of an innocent or guilty agent, or by other means proceeding directly from the defendant. (§ 1.06 ch 34 SLA 1962)

Legislative history reports. — For report on original bill, see 1962 House Journal, pp. 224-231. Collateral references. — 21 Am. Jur. 2d, Criminal Law, § 386.

Chapter 10. Limitations of Actions.

Section	Section
10. General time limitations	30. When period of limitation runs
20. Specific time limitation	40. When period of limitation does not run

Sec. 12.10.010. General time limitations. A prosecution for murder may be commenced at any time. Except as otherwise provided by law, no person shall be prosecuted, tried, or punished for any offense, not murder, unless the indictment is found or the information or complaint is instituted within five years next after such offense shall have been committed. (§ 1.02 ch 34 SLA 1962; am § 1.01 ch 29 SLA 1962)

Cross references. — For limitations on prosecutions under the election laws, see AS 15.13.120(c) and AS 15.56.130.

NOTES TO DECISIONS

The statute of limitations is jurisdictional. *Padie v. State*, Sup. Ct. Op. No. 1359 (File No. 3113), 557 P.2d 1138 (1976), aff'd on other grounds, Sup. Ct. Op. No. 1465, 566 P.2d 1024 (1977).

It is to be construed in favor of the defendant. *Padie v. State*, Sup. Ct. Op. No. 1359 (File No. 3113), 557 P.2d 1138 (1976), aff'd on other grounds, Sup. Ct. Op. No. 1465, 566 P.2d 1024 (1977).

Statute of limitations for manslaughter. — While there is no statute of limitations in Alaska for the offense of murder, the crime of manslaughter is subject to a five-year statute of limitations. *Padie v. State*, Sup. Ct. Op. No. 1843 (File No. 3564), 594 P.2d 50 (1979).

Defendant may not be convicted of time-barred lesser included offense. — Just as a defendant may not be charged with a time-barred offense, he may not be convicted of it, even as a lesser offense

included in one which is not time-barred. *Padie v. State*, Sup. Ct. Op. No. 1359 (File No. 3113), 557 P.2d 1138 (1976), aff'd on other grounds, Sup. Ct. Op. No. 1465, 566 P.2d 1024 (1977).

But jury may be instructed on elements of such offense. — A criminal trial jury may be instructed on the elements of a lesser included offense when the statute of limitations has run on the lesser offense but not the charged offense. *Padie v. State*, Sup. Ct. Op. No. 1359 (File No. 3113), 557 P.2d 1138 (1976), aff'd on other grounds, Sup. Ct. Op. No. 1465, 566 P.2d 1024 (1977).

Where defendant was charged with first degree murder and the statute of limitations had run on the lesser offense of manslaughter, while the jury should not be instructed that they might find defendant guilty of manslaughter, defendant was entitled to an instruction on the

mitigating effects of passion and provocation, requiring the jury to acquit him if he presented such evidence in mitigation and the state did not negate it. *Padie v. State*, Sup. Ct. Op. No. 1359 (File No. 3113), 557 P.2d 1138 (1976), aff'd on other grounds, Sup. Ct. Op. No. 1465, 566 P.2d 1024 (1977).

A statute of limitations can be waived if the trial court determines that the following prerequisites have been met: (1) The waiver is knowing, intelligent, and voluntary; (2) it is made for the defendant's benefit and after consultation with counsel; and (3) the defendant's waiver does not handicap his defense or contravene any other public policy reasons motivating the enactment of the statute. *Padie v. State*, Sup. Ct. Op. No. 1843 (File No. 3564), 594 P.2d 50 (1979).

Since defendant's waiver of the relevant statute of limitations was knowingly, intelligently, and voluntarily entered; it was made for defendant's benefit and after consultation with counsel; and defendant's waiver did not contravene any of the policy reasons underlying criminal statutes of limitations, the superior court possessed jurisdiction to accept defendant's plea of nolo contendere to the charge of manslaughter after the statute of limitations had run. *Padie v. State*, Sup. Ct. Op. No. 1843 (File No. 3564), 594 P.2d 50 (1979).

Case-by-case analysis as to waivability issue. — Although most courts have treated the waivability issue as dependent on whether a statute is treated as jurisdictional or as an affirmative defense, this arbitrary distinction should be abandoned in favor of a case-by-case analysis focusing on the language of the applicable statute of limitations and the public policies behind its enactment. *Padie v. State*, Sup. Ct. Op. No. 1843 (File No. 3564), 594 P.2d 50 (1979).

By seeking an instruction on an offense which is time-barred, defendant does not waive the defense of this section. *Padie v. State*, Sup. Ct. Op. No. 1359 (File No. 3113), 557 P.2d 1138 (1976), aff'd on other grounds, Sup. Ct. Op. No. 1465, 566 P.2d 1024 (1977).

Applied in *Coffey v. State*, Sup. Ct. Op. No. 1732 (File No. 3002), 585 P.2d 514 (1978).

Stated in *Yarbor v. State*, Sup. Ct. Op. No. 1240 (File No. 2397), 546 P.2d 564 (1976); *State v. Brinkley*, Ct. App. Op. No. 361 (File No. A-164), P.2d (1984).

Cited in *Marks v. State*, Sup. Ct. Op. No. 787 (File No. 1414), 496 P.2d 66 (1972); *In re P.H.*, Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

Collateral references. — 21 Am. Jur. 2d, Criminal Law, § 223 et seq. 22 C.J.S., Criminal Law, § 223 et seq.

SECTION 4

Sec. 12.10.020. Specific time limitation. (a) Even if the general time limitation has expired, a prosecution for any offense which includes a material element of fraud or breach of fiduciary obligation may be commenced within one year after the discovery of the offense by an aggrieved party or by a person who has legal capacity to represent an aggrieved party or a legal duty to report the offense and who is not a party to the offense, but in no case shall this provision extend the period of limitation otherwise applicable by more than three years.

(b) Even if the general time limitation has expired, a prosecution for any offense based upon misconduct in office by a public officer or employee may be commenced within one year after discovery of the offense by a person having a duty to report such offense, but in no case shall this provision extend the period of limitation otherwise applicable by more than three years.

(c) Even if the general time limitation has expired, a prosecution under AS 11.41.410 — 11.41.460 for an offense committed against a person under the age of 16 may be commenced within one year after the crime is reported to a peace officer or the person reaches the age of 16, whichever occurs first. This subsection does not extend the period of limitation by more than five years. (§ 1.03 ch 34 SLA 1962; am § 7 ch 78 SLA 1983)

Cross references. — For applicability of (c) of this section, see § 11, ch 78, SLA 1983, in the Temporary and Special Acts. **Effect of amendments.** — The 1983 amendment added subsection (c).

NOTES TO DECISIONS

Stated in *State v. Brinkley*, Ct. App. Op. No. 361 (File No. A-164), P.2d (1984).

Sec. 12.10.030. When period of limitation runs. (a) An offense is committed either when every element occurs, or, if a legislative purpose to prohibit a continuing course of conduct plainly appears, at the time when the course of conduct or the defendant's complicity therein is terminated. Time starts to run on the day after the offense is committed.

(b) A prosecution is commenced either when an indictment is found or when a warrant is issued, provided that such warrant is executed without unreasonable delay. (§ 1.04 ch 34 SLA 1962)

NOTES TO DECISIONS

Warrant requirements. — Subsection (b) and AS 12.10.040(b) do not require that a warrant be based on an indictment, information, or other charging document before the statute of limitations is tolled by its issuance. *Shaw v. State*, Ct. App. Op. No. 50 (File No. 5311), 634 P.2d 381 (1981).

Reasonable delay found. — Where defendant did not appear for sentencing on felony convictions and the trial court issued a bench warrant for his failure to appear, yet not until six years, 10 months,

and four days later was defendant indicted for his failure to appear, the issuance of the warrant constituted a pending prosecution under AS 12.10.040(b) which, when combined with the finding of the trial court that under subsection (b) there was a reasonable basis for delay in executing the warrant to toll the statute of limitations, was sufficient to bring prosecution of the offense within the five-year period allowed by the statute of limitations. *Shaw v. State*, Ct. App. Op. No. 50 (File No. 5311), 634 P.2d 381 (1981).

Collateral references. — 21 Am. Jur. 2d, Criminal Law, § 157.

Sec. 12.10.040. When period of limitation does not run. (a) The period of limitation does not run during any time when the accused, with a purpose to avoid detection, apprehension, or prosecution, is outside the state or is absent from the accused's usual place of abode within the state, but in no case shall this provision extend the period of limitation otherwise applicable by more than three years.

(b) The period of limitation does not run during any time when a prosecution against the accused for the same conduct is pending in this state. (§ 1.05 ch 34 SLA 1962)

NOTES TO DECISIONS

Warrant requirements. — AS 12.10.030(b) and subsection (b) do not require that a warrant be based on an indictment, information, or other charging document before the statute of limitations is tolled by its issuance. *Shaw v. State*, Ct. App. Op. No. 50 (File No. 5311), 634 P.2d 381 (1981).

Pending prosecution found. — Where defendant did not appear for sentencing on felony convictions and the trial court issued a bench warrant for his failure to appear, yet not until six years, 10 months,

and four days later was defendant indicted for his failure to appear, the issuance of the warrant constituted a pending prosecution under subsection (b) which, when combined with the finding of the trial court that under AS 12.10.030(b) there was a reasonable basis for delay in executing the warrant to toll the statute of limitations, was sufficient to bring prosecution of the offense within the five-year period allowed by the statute of limitations. *Shaw v. State*, Ct. App. Op. No. 50 (File No. 5311), 634 P.2d 381 (1981).

Collateral references. — Necessity of alleging in indictment or information limitation-tolling facts, 52 ALR3d 922.

Chapter 15. Parties.

[Repealed, § 21 ch 166 SLA 1978. For present provisions, see AS 11.16.]

Chapter 20. Bars to Actions.

Section	Section
10. Conviction or acquittal elsewhere as bar	46. When conviction or acquittal is a bar to other offenses
20. When acquittal or dismissal is no bar	50. Dismissal as bar
30. When acquittal is a bar	60. Discharge of defendant as bar

Sec. 12.20.010. Conviction or acquittal elsewhere as bar. When an act charged as a crime is within the jurisdiction of the United States, another state, or a territory, as well as of this state, a conviction or acquittal in the former is a bar to the prosecution for it in this state. (§ 1.11 ch 34 SLA 1962)

and amounts on the checks, including those to be uttered, and assisted in running the checks through the check protector, could have been indicted and punished for the offenses of which the defendants were convicted and was an accomplice. *Ing v. United States*, 278 F.2d 362 (9th Cir. 1960).

Facts showing witness was not accomplice. — General statement by witness that he and defendant, "had talked over the fact of burglarizing King Builders" was not enough to show that he conspired in a prearranged plan to commit the particular crimes with which defendant was charged, or that he in any manner aided, abetted, assisted or participated in the criminal acts. *Taylor v. State*, Sup. Ct. Op. No. 216 (File No. 407), 391 P.2d 950 (1964).

That witness later disposed of the stolen goods, knowing they were stolen, did not make him an accomplice. *Taylor v. State*, Sup. Ct. Op. No. 216 (File No. 407), 391 P.2d 950 (1964).

Evidence not connecting defendants with crime. — Where the facts and circumstances relied upon for corroboration did no more than show an opportunity for the defendants to have committed the crimes or connect them with the perpetrators, such evidence did not tend to connect the defendants with the commission of the crimes of which they were convicted. *Ing v. United States*, 278 F.2d 362 (9th Cir. 1960).

Sufficiency of corroborating testimony. — Corroborating testimony is not sufficient if it requires the interpretation and direction of the testimony to be corroborated. *Ing v. United States*, 278 F.2d 362 (9th Cir. 1960).

The statutory requirement of corroboration is satisfied when the corroborating evidence tends to induce in the minds of the jurors a rational belief that the accomplice was speaking the truth when he implicated the defendant in the criminal event. *Dimmick v. State*, Sup. Ct. Op. No. 632 (File No. 1098), 473 P.2d 616 (1970).

The corroborative evidence fulfills the requirement that it tend to connect the defendant with the commission of the crime where it serves as a means of inducing in the minds of the jurors a rational belief that the accomplice was speaking the truth when he implicated the defendant in the criminal event. *Pulakis v. State*, Sup. Ct. Op. No. 649 (File No. 1108), 476 P.2d 474 (1970).

Corroborating evidence need only be sufficient to induce in the minds of the jurors a rational belief that the accomplice was speaking the truth when he implicated the defendant in the criminal event. *Anthony v. State*, Sup. Ct. Op. No. 1025 (File No. 1774), 521 P.2d 486 (1974).

Evidence was sufficient to satisfy the statutory requirement of corroboration. *Thomas v. State*, Sup. Ct. Op. No. 200 (File No. 384), 391 P.2d 18 (1964).

In a prosecution for unnatural carnal copulation, there was ample corroboration of alleged accomplice's testimony. *Christy v. United States*, 17 Alaska 107, 261 F.2d 357 (9th Cir. 1958), cert. denied, 360 U.S. 919, 79 S. Ct. 1438, 3 L. Ed. 2d 1535, rehearing denied, 361 U.S. 857, 80 S. Ct. 47, 4 L. Ed. 2d 96 (1959).

Raising issue of erroneously allowing uncorroborated testimony to go to jury. — That it was error for the court to allow uncorroborated testimony to go to the jury is an issue properly raised by a motion for judgment of acquittal. *Beavers v. State*, Sup. Ct. Op. No. 765 (File No. 1387), 492 P.2d 88 (1971).

Section inapplicable to grand jury proceedings. — This section's evidentiary requirement of corroboration is inapplicable to grand jury proceedings. *Merrill v. State*, Sup. Ct. Op. No. 392 (File No. 688), 423 P.2d 686, cert. denied, 386 U.S. 1040, 87 S. Ct. 1497, 18 L. Ed. 2d 607 (1967).

Hence, indictment may be returned without corroboration of accomplice's testimony. — There is no requirement in either Alaska's Code of Criminal Procedure, or in its Rules of Criminal Procedure, that an accomplice's testimony be corroborated before an indictment can be properly returned. *Merrill v. State*, Sup. Ct. Op. No. 392 (File No. 688), 423 P.2d 686, cert. denied, 386 U.S. 1040, 87 S. Ct. 1497, 18 L. Ed. 2d 607 (1967).

Applied in *Corman v. State*. Sup. Ct. Op. No. 1979 (File No. 3555), 602 P.2d 1255 (1979); *Miller v. State*, Ct. App. Op. No. 24 (File No. 4972), 629 P.2d 546 (1981).

Quoted in *Oksotarak v. State*. Sup. Ct. Op. No. 2089 (File No. 3986), 611 P.2d 621 (1980); *Price v. State*, Ct. App. Op. No. 100 (File No. 5083), 647 P.2d 611 (1982).

Stated in *Daniels v. State*. Sup. Ct. Op. No. 185 (File No. 295), 388 P.2d 813 (1964).

Secs. 12.45.030 — 12.45.040. Evidence required in certain cases.
[Repealed, § 21 ch 166 SLA 1978.]

Sec. 12.45.045. Evidence of past sexual conduct in trials of rape and assault with intent to commit rape. (a)

In prosecutions for the crime of sexual assault in any degree or an attempt to commit sexual assault in any degree, evidence of the complaining witness' previous sexual conduct shall not be admitted nor reference made to it in the presence of the jury except as provided in this section. When the defendant seeks to admit the evidence for any purpose, the defendant may apply for an order of the court at any time before or during the trial or preliminary hearing. After the application is made, the court shall conduct a hearing in camera to determine the admissibility of the evidence. If the court finds that evidence offered by the defendant regarding the sexual conduct of the complaining witness is relevant, and that the probative value of the evidence offered is not outweighed by the probability that its admission will create undue prejudice, confusion of the issues, or unwarranted invasion of the privacy of the complaining witness, the court shall make an order stating what evidence may be introduced and the nature of the questions which shall be permitted. The defendant may then offer evidence under the order of the court.

(b) In the absence of a persuasive showing to the contrary, evidence of the complaining witness' sexual conduct occurring more than one year before the date of the offense charged is presumed to be inadmissible under this section.

(c) In this section "complaining witness" means the alleged victim of the crime charged, the prosecution of which is subject to this section. (§ 1 ch 165 SLA 1975, am § 18 ch 166 SLA 1978)

Cross references. — For similar court rule, see Evid. R. 404(a)(2).

NOTES TO DECISIONS

In camera hearing before presenting evidence. — In prosecution for attempted sexual assault in the first degree, defendant's counsel should have moved for an in camera hearing before presenting any evidence relating to the victim's prior sexual conduct. *Baden v. State*, Ct. App. Op. No.

285 (File No. 6832), 667 P.2d 1275 (1983).
Applied in *Pudgett v. State*. Sup. Ct. Op. No. 1801 (File No. 3317), 590 P.2d 432 (1979); *Moss v. State*, Sup. Ct. Op. No. 2239 (File No. 4389), 620 P.2d 674 (1980); *Kvasnikoff v. State*, Ct. App. Op. No. 314 (File No. 5588), 674 P.2d 302 (1983).

Collateral references. — Modern status of admissibility, in forcible rape prosecution, of complainant's prior sexual acts, 94 ALR3d 257.

Modern status of admissibility, in statutory rape prosecution, of complainant's prior sexual acts or general reputation for chastity, 90 ALR3d 1300.

Effect of amendments. — The 1983 "12.62.035" near the beginning of subsection (a) inserted "and in AS 11.40.130(a)" near the beginning of subsection (a).

SECTION 7
Sec. 12.62.035. Access to certain crime information (a)

Notwithstanding any other provision of law, an interested person as defined in (e) of this section may request from the commission records of all convictions involving contributing to the delinquency of a minor and any sex crimes of a person who holds or applies for a position in which the person has or would have supervisory or disciplinary power over a minor. The commission shall authorize the disclosure of the information to the requesting interested person and shall provide a copy of the information to the person who is the subject of the request.

(b) A request for records under (a) of this section shall include within it the fingerprints of the person who is the subject of the request and any other data specified in regulations adopted by the commission. The request shall be on a form approved by the commission, and the commission may charge a fee to be paid by the requesting interested person for the actual cost of processing the request. The commission shall destroy an application within six months after the requested information is sent to the requesting interested person and the person who is the subject of the request.

(c) The commission shall adopt regulations to implement the provisions of this section.

(d) If an individual is denied employment as a result of the disclosure of inaccurate or incomplete records under this section, an action may be brought against the state. No other action may be brought against the state, or an agency or employee of the state, as a result of disclosing or failing to disclose criminal justice information.

SECTION 8
(e) As used in this section:

(1) "contributing to the delinquency of a minor" means a conviction for a violation or attempted violation of AS 11.51.130(a)(1), (3), or (5); former AS 11.40.130; or the laws of another jurisdiction if the offense would have been a crime in this state under AS 11.51.130(a)(1), (3), or (5) or former AS 11.40.130 if committed in the state;

(2) "interested person" means a corporation, company, partnership, firm, association, organization, business trust, or society, as well as a natural person, that employs or solicits the employment of a person to serve with or without compensation in a position in which the person has or would have supervisory or disciplinary power over a minor;

(3) "sex crime" means a conviction for a violation or attempted violation of AS 11.41.410 — 11.41.470, AS 11.61.110(a)(7), or AS 11.41.5100 — 11.66.130; former AS 11.15.120, 11.15.134, or 11.15.160; former AS 11.40.080, 11.40.110, 11.40.130, or 11.40.200 — 11.40.420; or the laws of another jurisdiction if the offense would have been a crime in this state under one of the sections listed in this paragraph if committed in the state. (§ 2 ch 66 SLA 1983; am § 44 ch 6 SLA 1984)

Effect of amendments. — The 1984 amendment, in subsection (e), in paragraph (1), substituted "former AS 11.40.130; or the laws of another jurisdiction" for "or for a violation or attempted violation of an offense committed outside the state" and inserted "or former AS 11.40.130," and in paragraph (3) substituted "former AS 11.15.120, 11.15.134, or 11.15.160, former 11.40.080, 11.40.110, 11.40.130, or 11.40.200 — 11.40.420, or the laws of another jurisdiction" for "or for a violation or attempted violation of an offense committed outside the state" and "sections listed in this paragraph" for "above sections."

Sec. 12.62.040. Security, updating, and purging. (a) Criminal justice information systems shall

(1) be dedicated to law enforcement purposes and be under the management and control of law enforcement agencies unless exempted under regulations adopted under AS 12.62.010;

(2) include operating procedures approved by the commission which are reasonably designed to assure the security of the information contained in the system from unauthorized disclosure, and reasonably designed to assure that criminal offender record information in the system is regularly and accurately revised to include subsequently furnished information;

(3) include operating procedures approved by the commission which are designed to assure that information concerning an individual shall be removed from the records, based on considerations of age, nature of record, and reasonable interval following the last entry of information indicating that the individual is still under the jurisdiction of a law enforcement agency.

(b) Notwithstanding any provision of this section, any criminal justice information relating to minors which is maintained as part of a criminal justice information system must be afforded at least the same protection and is subject to the same procedural safeguards for the benefit of the individual with respect to whom the information is maintained, in matters relating to access, use and security as it would be under AS 47.10.090. (§ 1 ch 161 SLA 1972)

Sec. 12.62.050. Interstate systems for the exchange of criminal justice information. (a) The commission shall regulate the participation by all state and local criminal justice agencies in an interstate system for the exchange of criminal justice information, and shall be responsible to assure the consistency of the participation with the provisions and purposes of this chapter. The commission may not compel any criminal justice agency to participate in an interstate system.

(b) Direct access to an interstate system for the exchange of criminal justice information shall be limited to those criminal justice agencies that are expressly designated for that purpose by the commission. When the system employs telecommunications access terminals, the commission shall limit the number and placement of the terminals to those for which adequate security measures may be taken and as to which the commission may impose appropriate supervisory regulations. (§ 1 ch 161 SLA 1972)

SECTION 9

(b) If more than one power is proposed, each appears separately on the ballot.

(c) The borough mayor shall certify the election results to the Department of Community and Regional Affairs. If the majority of the votes cast on the question is favorable, the borough shall assume the added power within 30 days of certification of election results. (§ 2 ch 118 SLA 1972; am § 9 ch 200 SLA 1972)

Chapter 41. Powers of Third Class Boroughs.

Section

- 10 Powers of third class boroughs
- 20 Assembly to serve as school board

Sec. 29.41.010. Powers of third class boroughs. (a) A third class borough shall exercise the areawide powers of education and tax assessment and collection in the manner provided for second class boroughs. Areawide exercise of powers other than education and tax assessment and collection is not authorized.

(b) A third class borough may by a majority vote of the voters in a general or special election provide for planning, platting and zoning in accordance with AS 29.33.070 — 29.33.245 for boroughs and may exercise any general law municipal power which a second class borough is authorized to assume by this title. Powers assumed by a third class borough under this section may be exercised only within service areas. A third class borough may establish, operate, alter or abolish service areas in the manner provided by AS 29.63.090 for second class boroughs. The acquisition of additional powers on a service area basis may be initiated in either of two ways:

(1) a number of voters equal to 15 per cent of the number of votes cast in the proposed service area at the preceding regular election may file a petition with the assembly; or

(2) the assembly may place the question on the ballot.

(c) A third class borough may borrow money and issue negotiable general obligation, revenue or refunding bonds and other evidences of indebtedness as provided for first and second class boroughs in AS 29.58.150 — 29.58.340.

(d) A military reservation within a third class borough is not part of the borough school district until the military mission is terminated or until inclusion in the borough school district is approved by the Department of Education. However, operation of the military reservation schools by the borough school district may be required by the Department of Education under AS 14.14.110. If the military mission of a military reservation terminates or continued management and control by a regional educational attendance area is disapproved by the Department of Education, operation, management and control of

district in which the military reservation is located. (§ 2 ch 118 SLA 1972; am § 4 ch 32 SLA 1973; am § 7 ch 72 SLA 1974; am § 7 ch 13 SLA 1975; am § 35 ch 124 SLA 1975; am §§ 1, 2 ch 93 SLA 1977)

Legislative history reports. — For report on ch. 72, SLA 1974 (HCS CSSB 122 [Finance] am H), see 1974 House Journal, p. 519.

NOTES TO DECISIONS

Operation of military reservation schools. — Nothing in the legislature's 1975 amendments requires local school districts that take over operation of military reservation schools to assume any risk of loss or duty to insure school buildings. *State v. Fairbanks N. Star Borough School Dist.*, Sup. Ct. Op. No. 2257 (File No. 4477), 621 P.2d 1329 (1981).

The state must bear the loss resulting from the fire destruction of a military reservation school operated by a local school district in the absence of provisions to the contrary. *State v. Fairbanks N. Star Borough School Dist.*, Sup. Ct. Op. No. 2257 (File No. 4477), 621 P.2d 1329 (1981).

Sec. 29.41.020. Assembly to serve as school board. The borough assembly is the borough school board for third class boroughs. The borough executive is the presiding officer of the borough assembly and president of the school board. The borough executive has all powers of a borough executive except for the veto power. (§ 2 ch 118 SLA 1972; am § 30 ch 94 SLA 1980)

Effect of amendments. — The 1980 amendment deleted the former second sentence, which read: "Where applicable, weighted voting shall apply to board decisions."

Chapter 43. Powers of Cities Outside Boroughs.

Section

- 10. Additional powers
- 20. Assessment and tax collection
- 30. Education
- 40. Planning and zoning

Section

- 100. Extension of curfews outside cities
- 105. Enforcement of curfews
- 110. Penalty for violation of curfew

Sec. 29.43.010. Additional powers. In addition to the powers granted by AS 29.48, cities outside boroughs are granted the powers specified in this chapter. Powers of this chapter which are incorporated by reference to laws governing boroughs apply to home rule cities outside boroughs only in those cases in which they are made applicable to home rule boroughs in the provisions incorporated. (§ 2 ch 118 SLA 1972)

Sec. 29.43.020. Assessment and tax collection. Home rule and first class cities outside boroughs may assess, levy and collect a general property tax. A property tax if levied must be assessed, levied and collected as provided by AS 29.53 for boroughs. Cities outside boroughs

NOTES TO DECISIONS

Applied in City of Yakutat v. Ryman, Sup. Ct. Op. No. 2581 (File Nos. 6033, 6099), 654 P.2d 785 (1982).

Sec. 29.43.030. Education. Home rule and first class cities outside boroughs constitute city school districts and establish, maintain, and operate a system of public schools as provided by AS 29.33.050 for boroughs. (§ 2 ch 118 SLA 1972)

Sec. 29.43.040. Planning and zoning. (a) Home rule and first class cities outside first and second class boroughs shall, and second class cities outside first and second class boroughs may, provide for planning, platting and zoning, as provided by AS 29.33.070 — 29.33.245 for boroughs.

(b) Home rule and first class cities within third class boroughs shall, and second class cities within third class boroughs may, provide for planning, platting and zoning, as provided by AS 29.33.070 — 29.33.245 for boroughs. (§ 2 ch 118 SLA 1972; am §§ 8, 9 ch 93 SLA 1977)

Effect of amendments. — The 1977 amendment inserted "first and second class" preceding "boroughs" in two places in subsection (a) and added subsection (b).

Sec. 29.43.100. Extension of curfews outside cities. The provisions of a curfew ordinance enacted by a city of any class concerning minors shall be imposed in the total area within 20 miles of the limits of that city. If a given area lies within 20 miles of two or more cities with conflicting curfew ordinances, the provisions of the curfew ordinance of the city having the largest population prevails as to the overlapping area. (§ 1 ch 86 SLA 1962)

Revisor's notes. — Formerly AS 11.60.250. Renumbered in 1978 under § 22, ch. 166, SLA 1978. Also in 1978, the words "or village" following the word "city" were deleted as the classification of municipalities in this title no longer includes villages. See AS 29.08.

Sec. 29.43.105. Enforcement of curfews. (a) The municipal peace officers shall enforce the provisions of the ordinance inside the city limits. Under AS 29.43.100 — 29.43.110 the state peace officers shall enforce the provisions of the ordinance in the area outside the city limits.

(b) In an area where state peace officers are not available, the municipal peace officer may enforce the provisions of the ordinance in the area outside the city limits if the enforcement responsibilities are delegated by contract between the state and the municipality. (§ 3 ch

Revisor's notes. — Formerly AS 11.60.250. Renumbered in 1978 under § 22, ch. 166, SLA 1978.

Sec. 29.43.110. Penalty for violation of curfew. The penalty for violation of AS 29.43.100 — 29.43.110 is as prescribed by the curfew ordinance of the city, and a fine so paid shall be paid to the city when the violation takes place in the city. Otherwise the fine shall be paid to the state. However, the penalty shall not exceed a fine of \$300, or imprisonment for 30 days, or both. (§ 2 ch 86 SLA 1962)

Revisor's notes. — Formerly AS 11.60.250. Renumbered in 1978 under § 22, ch. 166, SLA 1978.

Chapter 48. Powers Applicable to All Municipalities.

Article

1. General Powers (§§ 29.48.010 — 29.48.020)
2. Facilities, Services and Regulation (§§ 29.48.030 — 29.48.110)
3. Municipal Enactments (§§ 29.48.130 — 29.48.220)
4. Miscellaneous Provisions (§§ 29.48.250 — 29.48.270)
5. Construction of Powers (§§ 29.48.310 — 29.48.330)

Article 1. General Powers.

Section

10. General powers
20. Second class borough powers outside cities

Sec. 29.48.010. General powers. Municipalities have the following general powers, subject to other provisions of law:

- (1) to establish and prescribe the functions of municipal departments, offices or agencies;
- (2) to establish and prescribe salaries for the elected and appointed municipal officers and employees;
- (3) to make investigations of the affairs of the municipality and make inquiries into the conduct of a municipal department;
- (4) to enter into agreements, including those for cooperative or joint administration of any functions or powers with a local government, with the state, or with the United States;
- (5) to require periodic and special reports from a municipal department to be submitted through the municipal executive;
- (6) to sue and be sued;
- (7) to levy taxes and special assessments;
- (8) to enforce ordinances and to prescribe penalties for violations;
- (9) to acquire, manage, control, use and dispose of real and personal

Sec. 47.08.140. Definitions. In AS 47.08.010 — 47.08.140

(1) "applicant" means a person who has suffered a catastrophic illness and is applying for assistance under AS 47.08.010 — 47.08.140 or is the subject of an application for assistance under AS 47.08.010 — 47.08.140;

(2) "applicant's share" means the amount of the total medical expense related to the catastrophic illness which the committee determines the applicant can reasonably be expected to pay based on income, assets, and number of dependents under AS 47.08.060;

(3) "catastrophic illness" means illness or injury which results in medical expenses of over \$1,000 during a period not to exceed 12 months, after all other sources of third-party payment have been exhausted;

(4) "committee" means the Catastrophic Illness Committee, created under AS 47.08.020;

(5) "elective medical or surgical procedures" means treatment which is not essential to the life or health of a person;

(6) "family" means two or more persons related by blood or marriage or adoption living as one economic unit;

(7) "liquid assets" means assets which can be readily converted to cash;

(8) "medical expense" means any financial obligation incurred in the course of treatment of illness as prescribed by a physician, including bills for ancillary services, patient transportation, transportation of a medical or family escort when reasonably necessary, or living expenses while receiving outpatient treatment in a community to which the applicant is not reasonably able to commute from the applicant's permanent place of abode;

(9) "nonliquid assets" means all assets which are not liquid assets;

(10) "permanent place of abode" means a dwelling, or a dwelling unit in a multiple dwelling, including lots and outbuildings or an appropriate portion of these, which are necessary to convenient use of the dwelling unit;

(11) "provider" means a licensed physician, pharmacist, dentist, or other health service worker or a licensed hospital, clinic, skilled nursing home, intermediate care facility or health maintenance organization which has provided services not excluded by AS 47.08.050 to an applicant as a result of a catastrophic illness;

(12) "third-party payments" means payments of medical expenses related to a catastrophic illness by sources other than the applicant or the committee, including but not limited to state and federal medical assistance programs, private health insurance, employment-related health insurance, military health insurance, workers' compensation, violent crimes compensation, Indian Health Service of the United States Department of Health and Human Services, and awards in legal actions. (§ 1 ch 107 SLA 1978)

Chapter 10. Delinquent Minors and Children in Need of Aid.

Article

1. Children's Proceedings (§§ 47.10.010 — 47.10.142)
2. Juvenile Institutions (§§ 47.10.150 — 47.10.220)
3. Care of Children (§§ 47.10.230 — 47.10.260)
- * General Provisions (§§ 47.10.270 — 47.10.290)

NOTES TO DECISIONS

Cited in Flores v. Flores, Sup. Ct. Op.
No. 1875 (File No. 3832), 598 P.2d 893
(1979).

Article 1. Children's Proceedings.

Section	Section
10. Jurisdiction	85. Child in need of aid; religious treatment
20. Investigation and petition	90. Records
30. Summons and custody of minor --	95. Arrest of a minor
40. Release of minor	100. Retention of jurisdiction over minor
50. Appointment of guardian ad litem or attorney	110. Appointment of guardian or custodian
60. Waiver of jurisdiction	120. Support of minor
70. Hearings	130. Detention
75. Young adult advisory panels	140. Temporary detention and detention hearing
80. Judgments and orders	142. Emergency custody and temporary placement hearing
81. Predisposition hearing reports	
82. Best interests of the child	
83. Review hearing information	
84. Legal custody, guardianship, and residual parental rights and responsibilities	

Sec. 47.10.010. Jurisdiction. (a) Proceedings relating to a minor under 18 years of age residing or found in the state are governed by this chapter, except as otherwise provided in this chapter, when the court finds the minor

(1) to be a delinquent minor as a result of violation of a criminal law of the state or of a municipality of the state; or

(2) to be a child in need of aid as a result of

(A) the child being habitually absent from home or refusing to accept available care, or having no parent, guardian, custodian or relative caring or willing to provide care, including physical abandonment by

(i) both parents,

(ii) the surviving parent, or

(iii) one parent if the other parent's rights and responsibilities have been terminated under AS 47.10.080 or voluntarily relinquished;

(B) the child being in need of medical treatment to cure, alleviate, or prevent substantial physical harm, or mental harm as evidenced by failure to thrive, severe anxiety, depression, withdrawal, or untoward aggressive behavior or hostility toward others, and the child's parents are unwilling to provide the medical treatment;

(C) the child having suffered substantial physical harm or if there is an imminent and substantial risk that the child will suffer such harm as a result of the actions done by or conditions created by the child's parent, guardian or custodian or the failure of the parent, guardian or custodian adequately to supervise the child;

(D) the child having been sexually abused either by the child's parent, guardian or custodian, or as a result of conditions created by the parent, guardian or custodian adequately to supervise the child;

(E) the child committing delinquent acts as a result of pressure, guidance, or approval from the child's parents, guardian or custodian;

(F) the child having suffered substantial physical abuse or neglect as a result of conditions created by the child's parent, guardian or custodian.

When a minor is accused of violating a traffic statute or regulation, a traffic ordinance or regulation of an incorporated municipality, a fish and game statute or regulation under AS 16 or a parks and recreational facilities statute or regulation under AS 41.21, excepting a statute the violation of which is a felony, the procedure prescribed in AS 47.10.020 — 47.10.090 may not be followed, except that a parent, guardian or legal custodian shall be present at all proceedings. The minor accused of a traffic offense, a fish and game statute or regulation violation under AS 16 or parks and recreational facilities violation under AS 41.21 shall be charged, prosecuted, and sentenced in the district court in the same manner as an adult.

(c) In a controversy concerning custody of a minor, the court may appoint a guardian of the person and property of a minor and may order support from either or both parents. Custody of a minor may be given to the Department of Health and Social Services, and payment of support money to the department may be ordered. (§ 4 art 1 ch 145 SLA 1957; am § 1 ch 76 SLA 1961; am §§ 1, 2 ch 110 SLA 1967; am § 1 ch 64 SLA 1969; am § 6 ch 104 SLA 1971; am §§ 7, 8 ch 63 SLA 1977; am § 1 ch 104 SLA 1982)

Cross references. — See Rules of Children's Procedure, Alaska Rules of Court Procedure and Administration. For waiver of jurisdiction, see AS 17.10.060. For provisions relating to child protection, see AS 47.17. For provisions establishing office of child advocacy, see AS 47.50.

Effect of amendments. — The 1982

amendment added paragraph (2)(F) to subsection (a).

Editor's notes. — Section 7, ch. 110, SLA 1967, as amended by § 80, ch. 59, SLA 1970, provides: "In exercising its jurisdiction under AS 47.10, the superior court may designate district judges and magistrates as masters under Civil Rule 53."

§ 47.10.010 WELFARE, SOCIAL SERVICES AND INSTITUTIONS § 47.10.010

Section 32, ch. 63, SLA 1977, provides: "Section 7 of this Act has the effect of changing Children's Rule 12 by deleting any references to 'Truant from school,' 'endangering the morals or health,' 'being wayward or habitually disobedient,'

or 'uncontrolled,' and has the effect of substituting the words 'child in need of aid' for the terms 'child in need of supervision' and 'dependent' where those two terms appear in Rules of Children's Procedure."

NOTES TO DECISIONS

Applicability of 1977 amendment. — All cases pending at the time of the enactment of the new children's statute by the 1977 acts are entitled to hearing under the new, rather than the old, standards. In re J.M., Sup. Ct. Op. No. 1548 (File Nos. 3219, 3229), 573 P.2d 1376 (1978).

In order to provide guidance to the superior court for the administration of juvenile justice, children adjudged dependent under the standards of former subsection (a)(5) of this section prior to its repeal in 1977 are entitled, on request, to a dispositional hearing under the standards of the newly-enacted subsection (a)(2)(C) of this section. In re J.M., Sup. Ct. Op. No. 1548 (File Nos. 3219, 3229), 573 P.2d 1376 (1978).

Children adjudged dependent under former (a)(5) of this section are entitled, on request to an adjudicative hearing, under the standards of subsection (a)(2)(C). In re C.L.T., Sup. Ct. Op. No. 1866 (File No. 3607), 597 P.2d 518 (1979).

Rehabilitation, rather than punishment, is the express purpose of juvenile jurisdiction. Mere confinement without treatment does not contribute to the goal of rehabilitation; such confinement constitutes cruel and unusual punishment. *Rust v. State*, Sup. Ct. Op. No. 1668 (File No. 3172), 582 P.2d 134 (1978).

Principal precept behind children's court concept is that a person under 18 years of age does not have mature judgment and may not fully realize the consequences of his acts, and that therefore he should not generally have to bear the stigma of a criminal conviction for the rest of his life. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

A child "in need of aid" appears to be the functional equivalent of a "dependent" child under this section as it existed prior to its 1977 amendment. In re C.L.T., Sup. Ct. Op. No. 1866 (File No. 3607), 597 P.2d 518 (1979).

The phrase "under 18 years of age" refers to the age of the accused person at the time of the alleged offense. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

Jurisdiction dependent upon age of offender at time of act. — Juvenile jurisdiction of the superior court in delinquency proceedings is dependent upon the age of the offender at the time of the delinquent acts. *Henson v. State*, Sup. Ct. Op. No. 1590 (File No. 3024), 576 P.2d 1352 (1978).

Child is exempt from criminal prosecution until children's court waives jurisdiction. — From the moment a child commits an offense he is exempt from criminal prosecution until the children's court properly waives its jurisdiction. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

Deferring action against child until 18th birthday would frustrate purpose of juvenile courts. — To allow officials charged with the execution of the law to prosecute a child offender as a criminal merely by deferring action until the child's 18th birthday would frustrate the purpose of juvenile courts. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

Serious constitutional issues would arise if the nature of the proceedings against a child offender were to depend on the arbitrary decision of law-enforcement officials. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

When person over or under certain age. — With respect to penal statutes, whether a person is over or under a certain age depends upon whether he has reached that particular anniversary of his birthday or not. *State v. Linn*, Sup. Ct. Op. No. 47 (File No. 122), 363 P.2d 361 (1961).

"Delinquent" status depends not upon a criminal conviction but upon proof that the juvenile committed acts which would have been criminal if committed by an adult. *Rust v. State*, Sup. Ct. Op. No. 1668 (File No. 3172), 582 P.2d 134 (1978).

One who committed a crime when 18 years of age could be criminally prosecuted, as an adult, when he had been previously adjudged a delinquent minor and the court had retained supervisory jurisdiction over him until age 19. *Henson v. State*, Sup. Ct. Op. No. 1590 (File No. 3024), 576 P.2d 1352 (1978).

Former AS 17.12.110(d)(4) not in conflict. — Former AS 17.12.110(d)(4), which provided that a person who, while under the age of 18, possesses, controls or uses any amount of marijuana was, upon conviction, guilty of a misdemeanor punishable by a fine of not more than \$1000, was not in conflict with paragraph (a)(1) of this section and AS 47.10.080(b)(1). *M.O.W. v. State*, Ct. App. Op. No. 95 (File No. 4846), 645 P.2d 1229 (1982).

State may interfere with certain conduct of children in need of aid. — Conduct of children alleged to be in need of supervision [see now children alleged to be in need of aid], such as running away from home and foster home placement, may constitutionally be interfered with by the state. *L.A.M. v. State*, Sup. Ct. Op. No. 1249 (File No. 2221), 547 P.2d 827 (1976).

Interests to be protected by legislation regarding children in need of aid. — See *L.A.M. v. State*, Sup. Ct. Op. No. 1249 (File No. 2221), 547 P.2d 827 (1976).

Means chosen by the state to protect children are closely and substantially related to an appropriate government interest. *L.A.M. v. State*, Sup. Ct. Op. No. 1249 (File No. 2221), 547 P.2d 827 (1976).

The purpose of the supervision or treatment contemplated by the creation of the child in need of supervision [see now child in need of aid], and its predecessor noncriminal delinquency was reintegration of the child into her family and resumption of parental custody including parental control. *L.A.M. v. State*, Sup. Ct. Op. No. 1249 (File No. 2221), 547 P.2d 827 (1976).

The discretion allotted a parent in the administration of punishment is not unlimited. Clearly it does not extend to punishment regularly causing the "substantial physical harm" which under subsection (a)(2)(C) determines that a child is in need of aid. *In re D.C.*, Sup. Ct. Op. No. 1862 (File No. 3840), 596 P.2d 22 (1979).

A minor who has been adjudged a child in need of supervision [now child in need of aid] cannot be institutionalized under the Children's Code. *In re A Minor Child*, Sup. Ct. Op. No. 737 (File No. 1524), 490 P.2d 658 (1971).

The Department of Health and Social Services does not possess the authority to institutionalize any minor, including one who has been declared a child in need of supervision [see now child in need of aid], who has been committed to its custody. It is unreasonable to construe Alaska children's statutes in a manner which would

result in the grant to the Department of Health and Social Services of broader powers of commitment than possessed by the trial court. *In re A Minor Child*, Sup. Ct. Op. No. 737 (File No. 1524), 490 P.2d 658 (1971).

Requisites to determination of delinquency. — Before a juvenile can be determined delinquent in a proceeding which could result in commitment to an institution, thus curtailing his freedom, certain requisites must be met. First, written notice of the charges must be given to the juvenile and his parents sufficiently in advance of the proceedings to allow preparation to meet the charges. Second, the child and his parents must be apprised of the right to counsel, including appointed counsel in case of indigency. Third, the child may exercise his privilege against self-incrimination. Lastly, absent a valid confession, the determination of delinquency cannot be sustained in the absence of sworn testimony, which is subject to cross-examination. *E.J. v. State*, Sup. Ct. Op. No. 628 (File No. 1144), 471 P.2d 367 (1970).

Minor properly declared delinquent. — Where the lower court determined that a minor would not abide by any orders it entered regarding her supervision under former subsection (j) of AS 47.10.080, this behavior constituted willful criminal contempt of the court's authority; were she an adult, her actions would be characterized as a "crime" under Alaska statutes. She was, therefore, properly declared a delinquent and subject to those sanctions available for the correction of a delinquent minor's behavior. *L.A.M. v. State*, Sup. Ct. Op. No. 1249 (File No. 2221), 547 P.2d 827 (1976).

Where the parents' interests are hostile to the child's, the parents may not select the child's attorney. *Wagstaff v. Superior Court*, Family Court Div., Sup. Ct. Op. No. 1144 (File No. 2208), 535 P.2d 1220 (1975).

Then the child may retain the attorney of his choice or, in the alternative, ask the court to appoint an attorney for him. *Wagstaff v. Superior Court*, Family Court Div., Sup. Ct. Op. No. 1144 (File No. 2208), 535 P.2d 1220 (1975).

And court must respect choice. — If the child has retained counsel, the court must respect the child's choice. *Wagstaff v. Superior Court*, Family Court Div., Sup. Ct. Op. No. 1144 (File No. 2208), 535 P.2d 1220 (1975).

The required standard of proof has been increased from "a preponderance of

the evidence" to "beyond a reasonable doubt" in the adjudicatory stages of at least those delinquency proceedings in which a child is charged with an act that would be a crime if committed by an adult. *E.J. v. State*, Sup. Ct. Op. No. 628 (File No. 1144), 471 P.2d 367 (1970).

Privilege against self-incrimination. — See *E.L.L. v. State*, Sup. Ct. Op. No. 1540 (File No. 3374), 572 P.2d 786 (1977) (decided prior to the 1977 amendment to this section).

Violation of former law relating to purchase of intoxicating liquors by minors. — See *Purdy v. United States*, 16 Alaska 173, 146 F. Supp. 762 (Alaska 1956).

Prosecution for joyriding. — Subsection (b) of this section and former AS 28.35.010(d) demonstrated a clear legislative intent to exclude from the coverage and requirements of the juvenile code those cases involving alleged misdemeanor violations of Alaska's "joyriding" statute by persons under 18 years of age. *State v. G.L.P.*, Sup. Ct. Op. No. 1786 (File No. 2978), 590 P.2d 65 (1979).

One under 18 years of age could be charged, prosecuted and sentenced in the district court, as an adult, for a misdemeanor violation of Alaska's "joyriding" statute, former AS 28.35.010(a), before there had been an order by the superior court waiving the latter court's juvenile jurisdiction. *State v. G.L.P.*, Sup. Ct. Op. No. 1786 (File No. 2978), 590 P.2d 65 (1979).

Termination of parental rights due to abandonment. — In proceeding to terminate parental rights, although trial judge orally stated that he considered involuntary incarceration to constitute abandonment, where written findings of

fact, submitted by state and signed by court, referred to parent's voluntary absence from October of 1980 to June of 1981 as the relevant conscious disregard of parental obligations, there was no reversible error. *Nada A. v. State*, Sup. Ct. Op. No. 2632 (File Nos. 6546, 6693), 660 P.2d 436 (1983).

There is no statute authorizing awards of attorney's fees in child in need of aid proceedings, nor has any rule or order authorizing such an award been promulgated. *Cooper v. State*, Sup. Ct. Op. No. 2453 (File Nos. 4906, 4970), 638 P.2d 174 (1981).

Appeal after serving sentence. — If there remain collateral legal disabilities apart from the sentence, an appeal is not mooted even though the sentence has been served. *E.J. v. State*, Sup. Ct. Op. No. 628 (File No. 1144), 471 P.2d 367 (1970).

Applied in *In re S.D.*, Sup. Ct. Op. No. 1255 (File No. 2530), 549 P.2d 1190 (1976).

Quoted in *In re P.N.*, Sup. Ct. Op. No. 1127 (File No. 2191), 533 P.2d 13 (1975); *R.D.S.M. v. Intake Officer*, Sup. Ct. Op. No. 1449 (File No. 2821), 565 P.2d 855 (1977); *N.P.A. v. State*, Sup. Ct. Op. No. 2005 (File No. 4618), 604 P.2d 599 (1979); *E.A. v. State*, Sup. Ct. Op. No. 2289 (File Nos. 4687, 4870), 623 P.2d 1210 (1981).

Stated in *D.R.C. v. State*, Ct. App. Op. No. 94 (File No. 4905), 646 P.2d 252 (1982).

Cited in *Granato v. Occhipinti*, Sup. Ct. Op. No. 1962 (File No. 3756), 602 P.2d 442 (1979); *P.S. v. State*, Ct. App. Op. No. 194 (File No. 6870), 655 P.2d 1319 (1982); *State v. R.H.*, Ct. App. Op. No. 375 (File No. 7768), P.2d (1984); *Brower v. State*, Ct. App. Op. No. 381 (File No. 7816), P.2d (1984).

Collateral references. — 27 Am. Jur., Infants, §§ 101 to 112; 31 Am. Jur., Juvenile Courts and Delinquents, Dependent and Neglected Children, §§ 13 to 60.

43 C.J.S., Infants, §§ 6, 93 et seq.
Another court's jurisdiction over a child as affected by assumption of jurisdiction by juvenile court, 11 ALR 147; 78 ALR 317; 146 ALR 1153.

Vagrancy of minors, 14 ALR 1507.
Constitutionality of statute which, for reformatory purposes, deprives parent of custody or control of child, 60 ALR 1342.

Power of juvenile court to exercise continuing jurisdiction over infant delinquent or offender, 76 ALR 657.

Marriage as affecting jurisdiction of juvenile court over delinquents or dependents, 14 ALR2d 336.

Homicide by juvenile as within jurisdiction of juvenile court, 48 ALR2d 662.

Age of child at time of alleged offense or delinquency, or at time legal proceedings are commenced, as criterion of jurisdiction of juvenile court, 89 ALR2d 506.

Sec. 47.10.020. Investigation and petition. (a) Whenever a person informs the court of the facts which bring a minor within this chapter, the court shall appoint a competent person or agency to make a preliminary inquiry and report for the information of the court to determine whether the interests of the public or of the minor require that further action be taken. Upon the receipt of the report, the court may informally adjust or dispose of the matter without a hearing, or it may authorize the person having knowledge of the facts of the case to file with the court a petition setting out the facts. Where the court informally adjusts or disposes of the matter, the minor may not be detained or taken into the custody of the court, and the matter shall be closed by the court upon adjustment or disposition.

(b) The petition and all subsequent pleadings shall be styled as follows: "In the matter of, a minor under 18 years of age." The petition may be executed upon the petitioner's information and belief, and shall be verified. It shall include the following information:

- (1) the name, address and occupation of the petitioner, together with the petitioner's relationship to the minor, and the petitioner's interest in the matter;
- (2) the name, age and address of the minor;
- (3) a brief statement of the facts which bring the minor within this chapter;
- (4) the names and addresses of the minor's parents;
- (5) the name and address of the minor's guardian, or of the person having control or custody of the minor.

(c) If the petitioner does not know a fact required in this section, the petitioner shall so state in the petition. (§ 5 art I ch 145 SLA 1957)

Cross references. — For the preliminary inquiry referred to in (a) of this section, see Children's Rule 4, Alaska Rules of Court. As to the petition, see Children's Rule 8.

NOTES TO DECISIONS

Distinctions between this section and AS 25.21.310. — See Granato v. Occhipinti, Sup. Ct. Op. No. 1962 (File No. 3756), 602 P.2d 442 (1979). Cited in M.O.W. v. State, Ct. App. Op. No. 95 (File No. 4846), 645 P.2d 1229 (1982).

Collateral references. — 42 Am. Jur. 2d, Infants, §§ 14 to 17, 20, 22 et seq.; 47 Am. Jur. 2d, Juvenile Courts and Delinquent and Dependent Children, §§ 13 to 33. 43 C.J.S., Infants, §§ 6, 93 et seq.

Sec. 47.10.030. Summons and custody of minor. (a) After a petition is filed and after further investigation which the court directs, if

the person having custody or control of the minor has not appeared voluntarily, the court shall issue a summons which (1) recites briefly the substance of the petition; (2) clearly states that at the hearing it is possible that parental rights and responsibilities may be terminated forever and that the minor may at the hearing be committed to the Department of Health and Social Services for possible adoption; and (3) directs the person having custody or control of the minor to appear personally in court with the minor at the place and at the time set forth in the summons.

(b) In all cases under this chapter the minor, each parent of the minor and the guardian of the minor shall be given notice adequate to give actual notice of the proceedings and the possibility of termination of parental rights and responsibilities, taking into account education and language differences which are known or reasonably ascertainable by the petitioner or the department. The notice of the hearing shall contain all names by which the minor has been identified. Notice shall be given in the manner appropriate under rules of civil procedure for the service of process in a civil action under Alaska law or in any manner the court by order directs. Proof of the giving of the notice shall be filed with the court before the petition is heard. The court may also subpoena the parent of the minor, or any other person whose testimony may be necessary at the hearing. A subpoena or other process may be served by a person authorized by law to make the service, and where personal service cannot be made, the court may direct that service of process be in a manner appropriate under rules of civil procedure for the service of process in a civil action under Alaska law or in any manner the court directs.

(c) If the minor is in such condition or surroundings that the minor's welfare requires the immediate assumption of custody by the court, the court may order, by endorsement upon the summons, that the officer serving the summons shall at once take the minor into custody and make the temporary placement of the minor which the court directs. (§ 6 art I ch 145 SLA 1957; am § 1 ch 110 SLA 1960; am § 6 ch 104 SLA 1971; am § 9 ch 63 SLA 1977)

NOTES TO DECISIONS

Editor's notes. — RLR v. State, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971) and John Doe v. State, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971), cited below, were decided prior to the 1977 amendment to this section, which rewrote subsection (b). looked to for techniques of service on children. RLR v. State, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971). Personal service upon the child is required. John Doe v. State, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

The child and his parents must receive notice which would be deemed adequate in a civil or criminal proceeding. These requirements suggest that Alaska civil and criminal rules should be Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded. RLR v.

Sec. 47.10.060. Waiver of jurisdiction. (a) If the court finds at a hearing on a petition that there is probable cause for believing that a minor is delinquent and finds that the minor is not amenable to treatment under this chapter, it shall order the case closed. After a case is closed under this subsection, the minor may be prosecuted as an adult.

(b) *[Repealed, § 8 ch 110 SLA 1967.]*

(c) *[Repealed, § 8 ch 110 SLA 1967.]*

(d) A minor is unamenable to treatment under this chapter if the minor probably cannot be rehabilitated by treatment under this chapter before reaching 20 years of age. In determining whether a minor is unamenable to treatment, the court may consider the seriousness of the offense the minor is alleged to have committed, the minor's history of delinquency, the probable cause of the minor's delinquent behavior, and the facilities available to the division of youth and adult authority for treating the minor.

(e) A person who has been tried as an adult under this section, or the Department of Health and Social Services on the person's behalf, may petition the superior court to seal the records of all criminal proceedings, except traffic offenses, initiated against the person, and all punishments assessed against the person, while the person was a minor. A petition under this subsection may not be filed until five years after the completion of the sentence imposed for the offense for which the person was tried as an adult. If the superior court finds that the punishment assessed against the person has had its intended rehabilitative effect, the superior court shall order the record of proceedings and the record of punishments sealed. Sealing the records restores civil rights removed because of a conviction. A person may not use these sealed records for any purpose except that the court may order their use for good cause shown. or may order their use by an officer of the court in making a presentencing report for the court. (§ 9 art 1 ch 145 SLA 1957; am § 1 ch 118 SLA 1962; am §§ 3, 8 ch 110 SLA 1967; am § 6 ch 104 SLA 1971; am § 13 ch 63 SLA 1977)

Cross references. — For hearings before the juvenile court, see AS 47.10.070. See also, Children's Rule 3, Alaska Rules of Court.

NOTES TO DECISIONS

Non-criminal treatment of child offenders is to be rule. — The statutory framework for dealing with child offenders contemplates that non-criminal treatment is to be the rule and adult criminal disposition the exception. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

Section provides means to determine unavailability to treatment available for

Child offenders. — The waiver procedure set out in this section and in Rule of Children's Procedure 3 provides the means by which the children's court judge determines, prior to adjudicating the delinquency petition, that an accused child is not a suitable subject for the treatment available for child offenders. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

The court's authority to impose a penal sentence on a juvenile is limited under the strict procedures of subsections (a) and (d) and Children's Rule 3. B.A.M. v. State, Sup. Ct. Op. No. 1104 (File No. 2144), 528 P.2d 437 (1974).

A minor may move to waive children's court jurisdiction pursuant to subsection (a). M.O.W. v. State, Ct. App. Op. No. 95 (File No. 4246), 645 P.2d 1229 (1982).

A minor under the age of 18 cannot "elect" to be tried as an adult. M.O.W. v. State, Ct. App. Op. No. 95 (File No. 4246), 645 P.2d 1229 (1982).

Where no waiver hearing has been conducted, the court has no authority to sentence a delinquent child as an adult. B.A.M. v. State, Sup. Ct. Op. No. 1104 (File No. 2144), 528 P.2d 437 (1974).

Before treating a juvenile as an adult, the court must first conduct a waiver hearing. B.A.M. v. State, Sup. Ct. Op. No. 1104 (File No. 2144), 528 P.2d 437 (1974).

Option available to prosecution absent waiver. — A proceeding in children's court, which is limited to the dispositions set forth in AS 47.10.080(b), is the only option available to the prosecution absent waiver under subsection (a) of this section, and the standards established in subsection (a) are sufficiently clear to prevent arbitrary enforcement. M.O.W. v. State, Ct. App. Op. No. 95 (File No. 4246), 645 P.2d 1229 (1982).

But hearing is not criminal in nature. — A waiver hearing is not criminal in nature and is dispositional, rather than adjudicatory. N.P.A. v. State, Sup. Ct. Op. No. 2005 (File No. 4618), 604 P.2d 599 (1979).

And right to attend may be waived. — Although a minor had a constitutional right to attend her waiver hearing, she waived that right when she voluntarily failed to appear at the hearing by refusing to waive extradition from another state. J.U.A. v. State, Sup. Ct. Op. No. 2005 (File No. 4618), 604 P.2d 599 (1979).

Findings necessary to justify waiver. — To justify waiver, the children's court judge must find, on sufficient evidence, that probable cause is established at the hearing for believing that the child committed the act with which he was charged in the petition and which if committed by an adult would constitute a crime and the child is not amenable to the treatment provided under this article. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

As a prerequisite to criminal prosecution, the children's court must find not only that the child is properly accused but also that he would not be receptive to the rehabilitative programs available to the court. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

The inability to predicate a plan for a defendant during the short time remaining before his 19th birthday coupled with the obvious need of treatment as disclosed by the record may be sufficient to justify a waiver to adult jurisdiction. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

The court may close out the case as a juvenile matter only upon finding cause to believe that the minor is delinquent and that the minor is not amenable to treatment. B.A.M. v. State, Sup. Ct. Op. No. 1104 (File No. 2144), 528 P.2d 437 (1974).

A court must find that there is probable cause to believe that the minor is delinquent and that the minor is not amenable to treatment before jurisdiction may be waived. In re J.H.B., Sup. Ct. Op. No. 1626 (File No. 2947), 578 P.2d 146 (1978).

Subsection (d) is clear on its face that age 20 is the proper age for determining whether a minor is amenable to treatment. In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

The 1977 amendments of this section and 47.10.080 show that it is the legislature's intent that age 20 is the age to be used in determining the amenability issue. In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

Binding advance consent to treatment. — In order to give effect of the legislature's intent that a court may consider treatment until age 20 in determining waiver of juvenile jurisdiction, it is necessary that the judge be able to evaluate at the time of the waiver hearing whether the juvenile will in fact be available for treatment. It is not possible for the judge to know this unless the child can give binding consent at the time of the hearing. State v. F.L.A., Sup. Ct. Op. No. 2011 (File No. 4333), 608 P.2d 12 (1980).

The portion of the opinion in In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978) that held that a minor in a waiver hearing could not give a binding advance consent to treatment beyond age 19 was mistaken. State v. F.L.A., Sup. Ct. Op. No. 2011 (File No. 4333), 608 P.2d 12 (1980).

Waiver decision without testimony of psychologist or psychiatrist. — A waiver of juvenile jurisdiction decision can be made without the testimony of a psychologist or psychiatrist, since such testimony is germane to at most two of the four factors set out in subsection (d) of this section, and not all four of those facts need be determined adversely to the youth to warrant waiver of juvenile jurisdiction. In re J.R., Sup. Ct. Op. No. 2165 (File No. 5154), 616 P.2d 865 (1980).

There is no conflict between subsection (d) and AS 47.10.090(b)(1). In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

The inconsistency between subsection (d) of this section and 47.10.080(b)(1) that existed prior to the 1977 amendments to these sections has been eliminated in that subsection (d) now provides that the determinative age is 20 and AS 47.10.080(b)(1) provides that the maximum limitation of confinement of minors is to the age of 20. In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

Factors to be considered in judging seriousness of alleged offense. — In judging the seriousness of the alleged offense, the children's court judge may consider not only the type of crime charged but also the circumstances surrounding its commission, the factors leading to delinquency, history of delinquency, and facilities available for rehabilitation. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

The amenability decision rests in the sound discretion of the children's court judge. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972); In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

But the latitude afforded him is not unlimited. The proper exercise of that discretion must be predicated not only upon procedural regularity sufficient to satisfy the basic requirements of due process but also on a full inquiry into the amenability issue. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

The trial court must make an evidentiary record and make written findings of fact, as required by Children's Rule 3(h), as to each of these four factors enunciated in subsection (d). In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

These findings must be supported by substantial evidence. In re F.S., Sup. Ct.

Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

Substantial evidence must be presented before jurisdiction may be waived. D.H. v. State, Sup. Ct. Op. No. 1396 (File No. 2837), 561 P.2d 294 (1977).

Based on these findings, the trial court, within its sound discretion, must make a decision as to the minor's amenability to treatment. In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

Factors to be considered in determining amenability. — Subsection (d) of this section suggests four factors which may be considered by the court when inquiring into the amenability issue: (1) the seriousness of the offense; (2) the delinquency of the minor; (3) the probable cause of the delinquent behavior; and (4) the facilities available for the treating of the minor. J.W.H. v. State, Sup. Ct. Op. No. 1708 (File No. 3812), 583 P.2d 227 (1978).

All four factors listed in subsection (d) need not be resolved against the child to justify waiver. Nor is there value in requiring the children's court to make an arithmetic calculation as to the weight to be given each factor. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

But there must be a thorough examination of the child, his background and alternative strategies of rehabilitation short of adult criminal treatment. Lacking such an examination, the children's court has no evidentiary basis for the decision. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972); D.H. v. State, Sup. Ct. Op. No. 1396 (File No. 2837), 561 P.2d 294 (1977).

Though the standards for determining amenability to treatment through the children's court lack explicit definition it is clear from the statute that the court in most cases must go beyond the circumstances surrounding the alleged delinquent acts and the age of the child. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

Even though the children's court may have independent knowledge concerning children's treatment programs and facilities, it is necessary to make the existence and evaluation of such programs a part of the waiver proceedings to enable proper review by the supreme court. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

At a waiver hearing there must be a thorough examination of (1) the probable

cause for believing that the child committed the act with which he was charged and (2) the amenability of the child to juvenile treatment. R.J.C. v. State, Sup. Ct. Op. No. 1022 (File No. 2038), 520 P.2d 806 (1974).

In the absence of such an examination there is no evidentiary basis for a waiver decision. R.J.C. v. State, Sup. Ct. Op. No. 1022 (File No. 2038), 520 P.2d 806 (1974); J.W.H. v. State, Sup. Ct. Op. No. 1708 (File No. 3812), 583 P.2d 227 (1978).

The record must disclose the existence and evaluation of the available children's treatment programs in all future cases in order to establish the validity of the hearing. R.J.C. v. State, Sup. Ct. Op. No. 1022 (File No. 2038), 520 P.2d 806 (1974).

The constitutional prerequisites for a valid waiver of juvenile court treatment are reflected in Rule of Children's Procedure 3 which guarantees the child a hearing before the children's court judge after adequate notice thereof, counsel at the hearing who has had access to records and reports relevant to issues before the court, and a statement of reasons accompanying the waiver order. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

Compliance with Rule of Children's Procedure 3(h) is essential to insure that the waiver hearing is not a "mere ritual" and to provide a meaningful basis for review. R.J.C. v. State, Sup. Ct. Op. No. 1022 (File No. 2038), 520 P.2d 806 (1974).

The waiver hearing is a critically important stage in criminal proceedings against a child. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

At stake at a child's waiver hearing is the statutory promise of special rehabilitative treatment in lieu of the harsher sanction of criminal conviction. Because the consequences of waiver are great, the hearing must measure up to the essentials of due process and fair treatment. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

The investigation at a waiver hearing cannot be a mere ritual. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

There must be a hearing which measures up to the essential of due process and fair treatment. R.J.C. v. State, Sup. Ct. Op. No. 1022 (File No. 2038), 520 P.2d 806 (1974); J.W.H. v. State, Sup. Ct. Op. No. 1708 (File No. 3812), 583 P.2d 227 (1978).

The right of confrontation applies to children's proceedings in which the child is charged with misconduct for which he may be incarcerated. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

Waiver without hearing is denial of due process. — To waive children's court jurisdiction without a hearing or opportunity for adversary presentation is a denial of fair process. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

As is waiver without substantial evidence of unamenability to treatment. — To waive children's court jurisdiction without substantial evidence having been presented that the child is unamenable to juvenile rehabilitation programs is denial of fair process. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

The proper standard of proof as to the amenability of a minor to treatment is the "preponderance of the evidence" standard. In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

Probable cause determination cannot be based on hearsay testimony. — The probable cause determination of a court at a waiver hearing concerning juveniles cannot be based upon hearsay testimony. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

Exclusion of testimony held proper. — Although proffered testimony was relevant to the amenability issue, the superior court did not abuse its discretion in excluding it because its prejudicial impact outweighed its probative value. In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

Insufficient evidence. — Where the court had little information concerning the probable cause of the minor's delinquent behavior, it was aware only of the nature of the offenses, of the fact that the minor was apparently not in need of funds, and of his statement that he regarded the commission of the crimes as a game, this information was insufficient to satisfy the requirements of this subsection. D.H. v. State, Sup. Ct. Op. No. 1396 (File No. 2837), 561 P.2d 294 (1977).

Waiver hearing did not comply with the standards set forth in this section and Rule of Children's Procedure 3. R.J.C. v. State, Sup. Ct. Op. No. 1022 (File No. 2038), 520 P.2d 806 (1974).

Trial court's conclusion that minor was amenable to treatment was abuse of discretion. — See In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

Prosecution for joyriding. — One under 18 years of age could be charged, prosecuted and sentenced in the district court, as an adult, for a misdemeanor violation of Alaska's "joyriding" statute, former AS 28.35.010(a), before there had been an order by the superior court waiving the latter court's juvenile jurisdiction. *State v. G.I.R.*, Sup. Ct. Op. No. 1786 (File No. 2978), 590 P.2d 65 (1979).
Applied in *State v. Jensen*, Ct. App. Op.

No. 126 (File No. 5879), 650 P.2d 422 (1982).

Quoted in *Henson v. State*, Sup. Ct. Op. No. 1590 (File No. 3024), 576 P.2d 1352 (1978).

Cited in *E.L.L. v. State*, Sup. Ct. Op. No. 1540 (File No. 3374), 572 P.2d 787 (1977); *State v. R.H.*, Ct. App. Op. No. 375 (File No. 7768), P.2d (1984); *Brower v. State*, Ct. App. Op. No. 381 (File No. 7826), P.2d (1984).

Sec. 47.10.070. Hearings. The court may conduct the hearing in an informal manner in the courtroom or in chambers. A hearing may be held before a young adult advisory panel in accordance with AS 47.10.075. The court shall give notice of the hearing to the department and it may send a representative to the hearing. The court shall also transmit a copy of the petition to the department. The representative of the department may also be heard at the hearing. The public shall be excluded from the hearing, but the court, in its discretion, may permit individuals to attend a hearing, if their attendance is compatible with the best interests of the minor. Nothing in this section may be applied in such a way as to deny a child's rights to a public trial and to a trial by jury. (§ 10(1) art I ch 145 SLA 1957; am § 1 ch 49 SLA 1966; am § 53 ch 71 SLA 1972)

Cross references. — For waiver hearings, see AS 47.10.060.

Editor's notes. — *John Doe v. State*, Sup. Ct. Op. No. 707 (File No. 1240), 487

P.2d 47 (1971) and *RLR v. State*, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971), cited below, were decided prior to the 1972 amendment to this section.

NOTES TO DECISIONS

Constitutionality. — See *In re Gault*, 387 U.S. 1, 87 Sup. Ct. 1428, 18 L. Ed. 2d 527 (1967), discussing due process requirements in juvenile delinquency proceedings.

Constitutional requirements apply to children. *RLR v. State*, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

Hence, states must afford juveniles due process of law in delinquency proceedings that might result in the child's incarceration, and accordingly juveniles must be afforded the right to be represented by counsel, must be given proper and timely notice, must be given the right of confrontation and cross-examination of witnesses, and afforded the privilege against self-incrimination. *John Doe v. State*, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

While the U.S. Supreme Court has not

held that children must be afforded due process rights in the pre-adjudication stages of the juvenile process, the Alaska supreme court believes that due process safeguards are necessary not only at the adjudicative hearing, but at any stage which may result in deprivation of the child's liberty. *John Doe v. State*, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

The extension to children of fundamental constitutional rights does not mean a total substitution of the adult criminal model for the present children's court system. *John Doe v. State*, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

The problems of pre-adjudication treatment of juveniles are unique to the juvenile process; hence, what is held with regard to the procedural requirements at

the adjudicatory stage has no necessary applicability to other steps of the juvenile process. *John Doe v. State*, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

Due process standards must be observed at a detention inquiry since it may result in the deprivation of the child's liberty. Due process requires at the very least that detention orders be based on competent, sworn testimony, that the child have the right to be represented by counsel at the detention inquiry, and that the detention order state with particularity the facts supporting it. *John Doe v. State*, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

Incarceration, when applied to children, is a taking of liberty under the 14th amendment, regardless of benevolent-sounding labels. *RLR v. State*, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

The due process clause of the 14th amendment applies when a child is charged with misconduct for which he may be incarcerated in an institution, regardless of the labels of the adjudication and institution, so the child is entitled to notice of charges, counsel, confrontation and cross-examination, and the privilege against self-incrimination. *RLR v. State*, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

The right to grand jury indictment is not so fundamental that due process is offended by alternate methods for instituting children's proceedings where the child is charged with having violated a criminal statute. *John Doe v. State*, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

Children who are charged with acts which would be chargeable only by grand jury indictment, if committed by an adult, need not be indicted by a grand jury. *John Doe v. State*, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

Children are constitutionally entitled to jury trial in the adjudicative stage of a delinquency proceeding. However, due to the uniqueness of some facets of the procedures governing children's court proceedings and the potential damage which may accrue to the child by a public trial, the child should first consult with his counsel and his parents or guardian when appropriate, and then affirmatively assert the right to a trial by jury before it is finally granted. *RLR v. State*, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971). But see *McKiver v.*

Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971), in which it was held that trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement.

Whenever a child in a delinquency proceeding is charged with acts which would be a crime, subject to incarceration if committed by an adult, Alaska Const., art. I, § 11, guarantees him the right to jury trial. To the extent *In re White*, Sup. Ct. Op. No. 507 (File No. 1013), 445 P.2d 813 (1968) [subsequently overruled, in re G.K., Sup. Ct. Op. No. 796 (File Nos. 1627, 1654, 1674), 497 P.2d 914 (1972)] is inconsistent with this opinion, it is overruled. *RLR v. State*, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

The purposes of the right to jury trial, such as protection against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge, apply as much in children's cases as in adults' cases. *RLR v. State*, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

If the child waives jury trial, the state may not require it, but jury trial shall be provided only on demand. *RLR v. State*, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

The *Hammonds* test of waiver [*Hammonds v. State*, Sup. Ct. Op. No. 828 (File No. 828), 442 P.2d 39 (1968)], applies to infants as well as adults. The consequences of application will differ for infants, because some decisions can be "knowingly and intelligently" made only by persons of fuller knowledge and maturity. An infant not advised by an attorney could make few knowledgeable and intelligent decisions about whether to waive rights in judicial proceedings. On the other hand, in areas where an adult ordinarily delegates to his attorney decision-making authority, as in deciding whether to object to introduction of evidence, the competence of the attorney rather than of the client generally determines whether waivers satisfy the *Hammonds* criteria. *RLR v. State*, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

The right to counsel extends to children charged with delinquency. *RLR v. State*, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

A juvenile must be afforded the right to be represented by counsel at the delinquency proceeding, and a denial of that right violates due process. *John Doe v. State*, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

Right to reasonable time to prepare for trial. — It is unquestionable that the right to the assistance of counsel of necessity includes the concomitant right to have a reasonable time in which to prepare for trial. *John Doe v. State*, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

While an adult defendant in a criminal case must be brought to trial within a reasonable time, due process requires that he may not be brought to trial too soon. He must be given a reasonable time to consult with his counsel and to prepare his defense. *John Doe v. State*, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

This section provides for the exclusion of the public from children's hearings. *RLR v. State*, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

But such provision involves only persons whose presence is not desired by child. — The area of discretion in the rule, where the court may refuse to open the hearing, involves persons whose presence is not desired by the child. *RLR v. State*, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

It is an abuse of discretion for the court to refuse admittance to individuals whose presence is favored by the child, except in special circumstances such as the unavailability of a courtroom sufficiently large to hold all the individuals whose presence is sought. *RLR v. State*, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

If the child or his guardian ad litem

Collateral references. — Power of juvenile court to require testimony by children, 151 ALR2d 1229.

Applicability of rules of evidence in

wants the press, friends, or others to be free to attend, then the hearing must be open to them. *RLR v. State*, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

As children are guaranteed the right to a public trial by the Alaska Constitution. *RLR v. State*, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

Due process requires that children have the right to a public trial by jury where they are charged with acts which would be a crime if committed by an adult. *John Doe v. State*, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

The fundamental constitutional right of public trial by jury must be afforded children in delinquency adjudication proceedings, in spite of the possible interference with the benevolent motives of the children's court system which have, in the past, justified denial of those rights. *John Doe v. State*, Sup. Ct. Op. No. 707 (File No. 1240), 487 P.2d 47 (1971).

The reasons for the constitutional guarantees of public trial apply as much to juvenile delinquency proceedings as to adult criminal proceedings. *RLR v. State*, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

Delinquency must be proved beyond a reasonable doubt under the due process clause of the 14th amendment. *RLR v. State*, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

Cited in *In re P.N.*, Sup. Ct. Op. No. 1127 (File No. 2191), 533 P.2d 13 (1975); *M.O.W. v. State*, Ct. App. Op. No. 95 (File No. 4846), 645 P.2d 1229 (1982).

juvenile delinquency proceedings, 43 ALR2d 1128.

Degree of proof in juvenile delinquency proceedings, 43 ALR2d 1138.

Sec. 47.10.075. Young adult advisory panels. (a) Unless the minor objects, the court may select a young adult advisory panel to hear the case and advise the court of a recommended judgment and order. The court may consider any of the panel recommendations in making its judgment and order in the case.

(b) The principal of each high school shall submit annually to the court a list of the students enrolled in grades 10, 11 and 12. The court shall determine the method of selecting the members of each panel.

(c) A student shall be excused from attending school while serving as a panel member. A student may not serve more than once each year on a panel.

(d) A student shall be excused from service as a panel member if the student submits a written request to the court indicating the reason for not wishing to serve. (§ 2 ch 49 SLA 1966)

Legislative history reports. — For report on ch. 49, SLA 1966, see 1966 House Journal, p. 52.

Sec. 47.10.080. Judgments and orders. (a) The court, at the conclusion of the hearing, or thereafter as the circumstances of the case may require, shall find and enter a judgment that the minor is or is not delinquent or a child in need of aid.

(b) If the court finds that the minor is delinquent, it shall

(1) order the minor committed to the Department of Health and Social Services for a period of time not to exceed two years or in any event extend past the day the minor becomes 19, except that the department may petition for and the court may grant in a hearing (A) two-year extensions of commitment which do not extend beyond the child's 19th birthday if the extension is in the best interests of the minor and the public; and (B) an additional one-year period of supervision past age 19 if continued supervision is in the best interests of the person and the person consents to it; the department shall place the minor in the juvenile facility which the department considers appropriate and which may include a juvenile correctional school, detention home, or detention facility; the minor may be released from placement or detention and placed on probation on order of the court and may also be released by the department, in its discretion, under AS 47.10.200;

(2) order the minor placed on probation, to be supervised by the department, and released to the minor's parents, guardian, or a suitable person; if the court orders the minor placed on probation, it may specify the terms and conditions of probation; the probation may be for a period of time, not to exceed two years and in no event extend past the day the minor becomes 19, except that the department may petition for and the court may grant in a hearing

(A) two-year extensions of supervision which do not extend beyond the child's 19th birthday if the extension is in the best interests of the minor and the public; and

(B) an additional one-year period of supervision past age 19 if the continued supervision is in the best interests of the person and the person consents to it;

(3) order the minor committed to the department and placed on probation, to be supervised by the department, and released to the minor's parents, guardian, other suitable person, or suitable nondetention setting such as a family home, group care facility, or child care facility, whichever the department considers appropriate to implement the treatment plan of the predisposition report; if the court orders the minor placed on probation, it may specify the terms and conditions

of probation; the department may transfer the minor, in the minor's best interests, from one of the probationary placement settings listed in this paragraph to another, and the minor, the minor's parents or guardian, and the minor's attorney are entitled to reasonable notice of the transfer; the probation may be for a period of time, not to exceed two years and in no event extend past the day the minor becomes 19, except that the department may petition for and the court may grant in a hearing

(A) two-year extensions of commitment which do not extend beyond the child's 19th birthday if the extension is in the best interests of the minor and the public; and

(B) an additional one-year period of supervision past age 19 if the continued supervision is in the best interests of the person and the person consents to it; or

(4) order the minor to make suitable restitution in lieu of or in addition to the court's order under (1), (2) or (3) of this subsection.

(5) order the minor committed to the Department of Health and Social Services for placement in an adventure-based education program established under AS 47.21.020 with conditions the court considers appropriate concerning release upon satisfactory completion of the program or commitment under (1) of this subsection if the program is not satisfactorily completed.

(c) If the court finds that the minor is a child in need of aid, it shall

(1) order the minor committed to the department for placement in an appropriate setting for a period of time not to exceed two years or in any event past the date the minor becomes 19 years of age, except that the department may petition for and the court may grant in a hearing (A) two-year extensions of commitment which do not extend beyond the minor's 19th birthday if the extension is in the best interests of the minor and the public; and (B) an additional one-year period of supervision past age 19 if the continued supervision is in the best interests of the person and the person consents to it; the department may transfer the minor, in the minor's best interests, from one placement setting to another, and the minor, the minor's parents or guardian and the minor's attorney are entitled to reasonable notice of the transfer;

(2) order the minor released to the minor's parents, guardian, or some other suitable person, and, in appropriate cases, order the parents, guardian, or other person to provide medical or other care and treatment; if the court releases the minor, it shall direct the department to supervise the care and treatment given to the minor, but the court may dispense with the department's supervision if the court finds that the adult to whom the minor is released will adequately care for the minor without supervision; the department's supervision may not exceed two years or in any event extend past the date the minor reaches age 19, except that the department may petition for and the court may grant in a hearing

(A) two-year extensions of supervision which do not extend beyond the minor's 19th birthday if the extension is in the best interests of the minor and the public; and

(B) an additional one-year period of supervision past age 19 if the continued supervision is in the best interests of the person and the person consents to it; or

(3) by order, upon a showing in the adjudication by clear and convincing evidence that there is a child in need of aid under AS 47.10.010(a)(2) as a result of parental conduct and upon a showing in the disposition by clear and convincing evidence that the parental conduct is likely to continue to exist if there is no termination of parental rights, terminate parental rights and responsibilities of one or both parents and commit the child to the department or to a legally appointed guardian of the person of the child, and the department or guardian shall report annually to the court on efforts being made to find a permanent placement for the child.

(d) An order issued under (c) (3) of this section authorizes the commissioner of health and social services or a designee or the guardian of the person of the child to consent to the adoption of the child.

(e) If the court finds that the minor is not delinquent or a child in need of aid, it shall immediately order the minor released from the department's custody and returned to the minor's parents, guardian, or custodian, and dismiss the case.

(f) A minor found to be delinquent or a child in need of aid is a ward of the state while committed to the department or the department has the power to supervise the minor's actions. The court shall review an order made under (b) or (c)(1) or (2) of this section annually, and may review the order more frequently to determine if continued placement, probation, or supervision, as it is being provided, is in the best interest of the minor and the public. The department, the minor, the minor's parents, guardian, or custodian are entitled, when good cause is shown, to a review on application. If the application is granted, the court shall afford these parties and their counsel reasonable notice in advance of the review and hold a hearing where these parties and their counsel shall be afforded an opportunity to be heard. The minor shall be afforded the opportunity to be present at the review.

(g) No adjudication under this chapter upon the status of a child may operate to impose any of the civil disabilities ordinarily imposed by conviction upon a criminal charge, nor may a minor afterward be considered a criminal by the adjudication, nor may the adjudication be afterward deemed a conviction, nor may a minor be charged with or convicted of a crime in a court, except as provided in this chapter. The commitment and placement of a child and evidence given in the court are not admissible as evidence against the minor in a subsequent case or proceedings in any other court, nor does the commitment and placement or evidence operate to disqualify a minor in a future civil service examination or appointment in the state.

(h) The department shall pay all court costs incurred in all proceedings in connection with the adjudication of delinquency under this chapter, including hearings which result in the release of the minor.

(i) A minor, the minor's parents or guardian acting on the minor's behalf, or the department may appeal a judgment or order, or the stay, modification, setting aside, revocation, or enlargement of a judgment or order issued by the court under this chapter.

(j) *(Repealed, § 29 ch 63 SLA 1977.)*

(k) In making its order under (c) of this section, the court shall consider the fact, if it is a fact, that the minor was being provided treatment by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination by an accredited practitioner of the church or denomination. (§ 10(2), art I ch 145 SLA 1957; am § 2 ch 110 SLA 1960; am § 2 ch 118 SLA 1962; am § 1 ch 40 SLA 1967; am §§ 1—4 ch 27 SLA 1970; am §§ 12—15 ch 245 SLA 1970; am § 6 ch 104 SLA 1971; am §§ 6, 7 ch 1 SLA 1972; am §§ 1, 2 ch 125 SLA 1974; am §§ 14—18, 29 ch 63 SLA 1977; am § 6 ch 86 SLA 1979)

Cross references. — For the standard of proof for findings under this section, see Children's Rule 21, Alaska Rules of Court. See also, Children's Rules 22 and 23.

Editor's notes. — Section 31, ch. 63, SLA 1977, provides: "Section 1^o of this Act has the effect of adding to the court's responsibilities when holding a review under Rule 28, Alaska Rules of Children's Procedure, by requiring the court to hold a hearing upon a showing of good cause, give notice, and afford an opportunity to be heard."

Section 34, ch. 63, SLA 1977, in the first sentence provides: "The portions of AS 47.10.080(b) and (c) in secs. 15 and 16 of

this Act which specify the length of commitment to the department or probation or supervision by the department are applicable to those minors affected under former AS 47.10.080(b), (c) and (j) before the effective date of this Act (August 26, 1977) so that the commitment, probation or supervision of minors by the department before the effective date of this Act (August 26, 1977) shall continue, but may not exceed two years from the effective date of this Act (August 26, 1977) unless two-year extensions have been granted by the court under this Act." Subsection (j) of AS 47.10.080 was repealed by § 29, ch. 63, SLA 1977.

NOTES TO DECISIONS

Each category of children mandates differences regarding content of dispositional orders. — Alaska's pertinent statutory provisions and procedural rules distinguish between categories of children for purposes of administering Alaska children's laws. Of controlling significance is that each class or category mandates distinct differences regarding the permissible content of any dispositional order the trial court can enter. In re A Minor Child, Sup. Ct. Op. No. 737 (File No. 1524), 490 P.2d 658 (1971).

Where a delinquent child was sentenced for a fixed time period and ordered to an adult institution, this

amounted to a penal sentence as opposed to the juvenile disposition required under subsection (b)(1). B.A.M. v. State, Sup. Ct. Op. No. 1104 (File No. 2144), 528 P.2d 437 (1974).

Court cannot place child in particular institution. — Under this section as amended, the court no longer has discretion to order the delinquent child placed in a particular institution. The court only has authority to commit the child to the department, which then places the child. B.A.M. v. State, Sup. Ct. Op. No. 1104 (File No. 2144), 528 P.2d 437 (1974); A.A. v. State, Sup. Ct. Op. No. 1181 (File No. 2400), 538 P.2d 1004 (1975).

Authority to order placement of delinquent child. — In enacting paragraph (b)(3), the legislature intended for the department, not the court, to make the decisions concerning placement of the minor. State, Dept. of Health & Social Servs. v. A.C., Ct. App. Op. No. 384 (File No. 7643), P.2d (1984).

Paragraph (b)(3) of this section provides the court authority to order the delinquent minor placed on probation to the Department of Health and Social Services; it is then up to the department to determine whether the minor should be placed with his parents or in another setting. State, Dept. of Health & Social Servs. v. A.C., Ct. App. Op. No. 384 (File No. 7643), P.2d (1984).

Review of placement decision. — The superior court has the authority to review the decision of the department to determine if the placement is in the best interest of the minor, but in reviewing a decision of the department, the superior court may not substitute its judgment for the judgment of the department; since the legislature has committed the decision of placement to the department's discretion, the question for the court is whether the agency abused its discretion. State, Dept. of Health & Social Servs. v. A.C., Ct. App. Op. No. 384 (File No. 7643), P.2d (1984).

Jurisdiction dependent upon age of offender at time of act. — Juvenile jurisdiction of the superior court in delinquency proceedings is dependent upon the age of the offender at the time of the delinquent acts. Henson v. State, Sup. Ct. Op. No. 1590 (File No. 3024), 576 P.2d 1352 (1978).

Where a delinquent child was under the age of 18 at the time the acts of delinquency were committed, he is considered a minor for the purposes of adjudication and disposition. B.A.M. v. State, Sup. Ct. Op. No. 1104 (File No. 2144), 528 P.2d 437 (1974).

Option available to prosecution absent waiver under AS 47.10.060(a). — A proceeding in children's court, which is limited to the dispositions set forth in AS 47.10.080(b), is the only option available to the prosecution absent waiver under AS 47.10.060(a), and the standards established in that section are sufficiently clear to prevent arbitrary enforcement. M.O.W. v. State, Ct. App. Op. No. 95 (File No. 4846), 645 P.2d 1229 (1982).

One who committed a crime when 18 years of age could be criminally prosecuted, as an adult, when he had been

previously adjudged a delinquent minor and the court had retained supervisory jurisdiction over him until age 19. Henson v. State, Sup. Ct. Op. No. 1590 (File No. 3024), 576 P.2d 1352 (1978).

Section is maximum sentencing statute. — Statutes requiring release upon a specified birthday are, in effect, maximum sentencing statutes. Davenport v. McGinnis, Sup. Ct. Op. No. 1049 (File No. 1942), 522 P.2d 1140 (1974).

Sentence reduction to 10 years of age not retroactive. — There was nothing in the amendatory legislation to this section that indicated an intention that the sentence reduction should operate retrospectively. Davenport v. McGinnis, Sup. Ct. Op. No. 1049 (File No. 1942), 522 P.2d 1140 (1974).

There is no conflict between subsection (b)(1) and AS 47.10.060(d). In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

Age 20 is the proper age for determining whether a minor is amenable to treatment. In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

The inconsistency between AS 47.10.060(d) and subsection (b)(1) of this section that existed prior to the 1977 amendments to these sections has been eliminated in that AS 47.10.060(d) now provides that the determinative age is 20 and subsection (b)(1) provides that the maximum limitation of confinement of minors is 20. In re F.S., Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

Binding advance consent to treatment. — In order to give effect to the legislature's intent that a court may consider treatment until age 20 in determining waiver of juvenile jurisdiction, it is necessary that the judge be able to evaluate at the time of the waiver hearing whether the juvenile will in fact be available for treatment. It is not possible for the judge to know this unless the child can give binding consent at the time of the hearing. State v. F.L.A., Sup. Ct. Op. No. 2041 (File No. 4333), 608 P.2d 12 (1980).

A minor may bindingly consent to an additional period of supervision as provided by subsection (b)(1) of this section. In determining the effect to be given to such consent, the court should consider the age and maturity of the juvenile and whether he has the advice of counsel. To protect a minor from making a decision adverse to his own interests, a guardian ad litem may be appointed. State v. F.L.A., Sup. Ct. Op.

No. 2041 (File No. 4333), 608 P.2d 12 (1980).

The portion of the opinion in *In re F.S.*, Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978) that held that a minor in a waiver hearing could not give a binding advance consent to treatment beyond age 19 was mistaken. *State v. F.L.A.*, Sup. Ct. Op. No. 2041 (File No. 4333), 608 P.2d 12 (1980).

While it is true, as indicated in *In re F.S.*, Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978), that the statute contemplates that the determination of the additional period of treatment be made after the initial hearing, such an intent does not mandate that an advance consent to treatment given by the minor may not be regarded as binding. *State v. F.L.A.*, Sup. Ct. Op. No. 2041 (File No. 4333), 608 P.2d 12 (1980).

The lower court erred in considering the purported consent of the minor to an additional year of supervision because: (1) the minor could withhold consent upon reaching majority; (2) even assuming the minor's consent would not be withdrawn, subsection (b)(1) requires that the department petition the court and that additional commitment be in the minor's best interests before the court has jurisdiction to order the additional one-year period. *In re F.S.*, Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

Subsection (b)(1) requires that the department petition for an additional one-year period of supervision and that continued supervision be in the best interests of the minor before the court may order an additional year. Thus, a minor's prospective consent to additional supervision is not a material factor unless the other two conditions of the statute are fulfilled. *In re F.S.*, Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

This statute contemplates that the decision to extend the period of supervision be made after the initial dispositional hearing. To give effect to the minor's advance consent would thus be contrary to the apparent intent of the legislature. *In re F.S.*, Sup. Ct. Op. No. 1756 (File No. 4015), 586 P.2d 607 (1978).

The court must choose between commitment to the Department of Health and Social Services and probation, and may not delegate the choice to the Department of Health and Social Services. This is a correct textual analysis, especially in light of the provision in subsection (b)(1) for subsequent court order for probation following placement or

detention. The legislature has clearly indicated its intent to place this choice in the hands of the court. *R.R. v. State*, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

Court-ordered probation. — Probation cannot be deemed court-ordered under subsection (b) of this section unless it is directly ordered. It cannot be "triggered" by a decision of the department that the juvenile has successfully completed a rehabilitation program, even if the court judgment states that institutionalization will end upon such successful completion. *In re L.C. v. State*, Sup. Ct. Op. No. 2277 (File Nos. 4401, 4411), 625 P.2d 839 (1981).

The hearing judge erred by placing a delinquent child on probation until his 20th birthday. *B.A.M. v. State*, Sup. Ct. Op. No. 1104 (File No. 2144), 528 P.2d 437 (1974).

Petition necessary to extend probation beyond 19th birthday. — The superior court was without authority to extend probation beyond the delinquent child's 19th birthday without a petition from the department to extend the probationary period for an additional year. *B.A.M. v. State*, Sup. Ct. Op. No. 1104 (File No. 2144), 528 P.2d 437 (1974).

A minor who has been adjudged a child in need of supervision (see now child in need of aid) cannot be institutionalized under the Children's Code. *In re A Minor Child*, Sup. Ct. Op. No. 737 (File No. 1524), 490 P.2d 658 (1971).

Where a runaway child is found to be a child in need of supervision (see now child in need of aid), not a delinquent minor, no legal basis exists for his incarceration. *In re A Minor Child*, Sup. Ct. Op. No. 737 (File No. 1524), 490 P.2d 658 (1971).

The only instance under Alaska children's laws authorizing institutionalization or incarceration is when the child has violated the laws of the state, or any of its political subdivisions, and in turn has been adjudged a delinquent minor. *In re A Minor Child*, Sup. Ct. Op. No. 737 (File No. 1524), 490 P.2d 658 (1971).

The legislature has authorized institutionalization only where the child is found to be a delinquent minor. *In re A Minor Child*, Sup. Ct. Op. No. 737 (File No. 1524), 490 P.2d 658 (1971).

Power of court under subsection (c). — Under subsection (c) of this section, the court is empowered to order the minor committed to the Department of Health and Social Services or order the minor placed in the custody of his parents, guardian, or some

other suitable person. *In re A Minor Child*, Sup. Ct. Op. No. 737 (File No. 1524), 490 P.2d 658 (1971).

The Department of Health and Social Services does not possess the authority to institutionalize any minor, including one who has been declared a child in need of supervision (see now child in need of aid), who has been committed to its custody. It is unreasonable to construe Alaska children's statutes in a manner which would result in the grant to the Department of Health and Social Services of broader powers of commitment than possessed by the trial court. *In re A Minor Child*, Sup. Ct. Op. No. 737 (File No. 1524), 490 P.2d 658 (1971).

A child "in need of aid" appears to be the functional equivalent of a "dependent" child under AS 47.10.010 as it existed prior to its 1977 amendment. *In re C.L.T.*, Sup. Ct. Op. No. 1866 (File No. 3607), 597 P.2d 518 (1979).

Parental right to custody and control is not absolute. — While a parent has a right to the care, custody and control of his or her children, this right is not absolute, and "courts have become increasingly aware of the rights of children." The Alaska legislature has struck a balance between these potentially competing rights by requiring the state to prove its allegations by clear and convincing evidence in parental rights termination cases. Once this burden of proof has been met, however, the statute mandates a termination. *In re D.C.*, Sup. Ct. Op. No. 1862 (File No. 3840), 592 P.2d 22 (1979).

The discretion allotted a parent in the administration of punishment is not unlimited. Clearly it does not extend to punishment regularly causing the "substantial physical harm" which under AS 47.10.010(a)(2)(C) determines that a child is in need of aid. *In re D.C.*, Sup. Ct. Op. No. 1862 (File No. 3840), 592 P.2d 22 (1979).

Statutory provisions governing judgments and orders terminating parental rights have been changed. In order to terminate parental rights, the court must now find that the child is in need of aid under AS 47.10.010(a)(2) as the result of parental conduct proved by clear and convincing evidence and that the parental conduct is likely to continue to exist if there is no termination of parental rights, proved again by clear and convincing evidence, AS 47.10.080(c)(3). *In re C.L.T.*, Sup. Ct. Op. No. 1866 (File No. 3607), 597 P.2d 518 (1979).

In order to terminate parental rights under this section, the court must find by clear and convincing evidence (1) that there is a child in need of aid under AS 47.10.010(a)(2) as a result of parental conduct, and (2) that the parental conduct is likely to continue. *E.A. v. State*, Sup. Ct. Op. No. 2289 (File Nos. 4687, 4870), 623 P.2d 1210 (1981).

Under former AS 47.10.010(a)(5) and subsection (a) and former subsection (c)(3)(D) of this section, in order to terminate parental rights, the superior court was required to find (1) that the child was a "dependent minor" and (2) that the parent has demonstrated by her conduct, proved by clear and convincing proof, that she was unfit to continue to exercise her parental rights and responsibilities. *In re C.L.T.*, Sup. Ct. Op. No. 1866 (File No. 3607), 597 P.2d 518 (1979).

Parent's impulsive personality disorder not ground for termination of rights. — Where after finding that child was in need of aid, trial judge found that the parent "is likely to continue to demonstrate a conscious disregard of the obligation owed by a parent to a child even after her release from incarceration because she suffers from an impulsive personality disorder," such finding was insufficient to satisfy requirement of clear and convincing evidence that conduct leading to determination that child is in need of aid is likely since an impulsive personality disorder itself is not conduct and thus, not a ground for termination. *Nada A. v. State*, Sup. Ct. Op. No. 2632 (File Nos. 6546, 6693), 660 P.2d 436 (1983).

Findings. — A finding that the parental conduct is likely to continue must be made expressly on the record prior to ordering the termination of parental rights. *E.A. v. State*, Sup. Ct. Op. No. 2289 (File Nos. 4687, 4870), 623 P.2d 1210 (1981).

Abandonment. — For cases construing former language in subsection (c) providing for termination of parental rights and responsibilities when the child had been abandoned, see *D.M. v. State*, Sup. Ct. Op. No. 962 (File No. 1843), 515 P.2d 1234 (1973); *In re B.J.*, Sup. Ct. Op. No. 1110 (File No. 2161), 530 P.2d 747 (1975); *In re E.J. (T.)*, Sup. Ct. Op. No. 1348 (File No. 2775), 557 P.2d 1128 (1976).

A rehabilitation program is not a common practice in the trial courts absent approval by a representative of the state. *In re E.J. (T.)*, Sup. Ct. Op. No. 1348 (File No. 2775), 557 P.2d 1128 (1976).

Trial court did not abuse discretion in failing to consider possibility of setting up plan for reestablishing family relationship between father and son. — See In re E.J. (T.), Sup. Ct. Op. No. 1348 (File No. 2775), 557 P.2d 1128 (1976).

Role of trial court in proceeding involving termination of parental rights. — See In re E.J. (T.), Sup. Ct. Op. No. 1348 (File No. 2775), 557 P.2d 1128 (1976).

Applicability of burden of proof. — A burden of proof is not applicable to a dispositive hearing other than when termination of parental rights is involved. In re S.D., Sup. Ct. Op. No. 1255 (File No. 2530), 549 P.2d 1190 (1976). See also In re C.L.T., Sup. Ct. Op. No. 1866 (File No. 3607), 597 P.2d 518 (1979).

Determination of the standard to be applied by the court at the dispositive phase of a child hearing was not tantamount to establishing a burden of proof requirement. Such a requirement had been set forth in former subsection (c)(3)(D) [see now subsection (c)(3)]. No such requirement had been set forth in situations such as where termination of parental rights was not involved. In re S.D., Sup. Ct. Op. No. 1255 (File No. 2530), 549 P.2d 1190 (1976).

Standard of proof held constitutional. — Allowing parental rights to be terminated based on a standard of proof less stringent than "beyond a reasonable doubt" does not violate the due process clause of the United States Constitution or the Alaska Constitution. In re C.L.T., Sup. Ct. Op. No. 1866 (File No. 3607), 597 P.2d 518 (1979).

Since in proceedings brought to terminate parental rights, the parent is neither charged with criminal behavior nor subject to incarceration as a direct consequence of the proceeding, there is nothing in the federal constitution that compels adoption of the proof beyond a reasonable doubt standard in termination proceedings. In re C.L.T., Sup. Ct. Op. No. 1866 (File No. 3607), 597 P.2d 518 (1979).

Clear and convincing proof is a more demanding standard than a mere preponderance of the evidence and is adequate to protect the parent's substantial interest in his or her child custody rights. This evidentiary standard balances the competing interests involved in a proceeding brought to terminate parental rights, one of which is the right of a child to an adequate home. In re C.L.T., Sup. Ct.

Op. No. 1866 (File No. 3607), 597 P.2d 518 (1979).

The due process clause did not require a standard of proof greater than clear and convincing evidence when the state sought to terminate parental rights because of unfitness under former subsection (c)(3)(D). In re C.L.T., Sup. Ct. Op. No. 1866 (File No. 3607), 597 P.2d 518 (1979).

Standard of proof under former subsection (c)(3)(D) calling for "clear and convincing" evidence of the natural mother's unfitness for the care and custody of the child was held proper. In re K.S., Sup. Ct. Op. No. 1219 (File No. 2359), 543 P.2d 1191 (1975).

Protection provided by Indian Child Welfare Act. — The Indian Child Welfare Act, 25 U.S.C. §§ 1901 — 1963, enacted in 1978, provides a higher standard of protection to the rights of parents in termination proceedings involving Indians and Native Alaskans than that provided in this section. E.A. v. State, Sup. Ct. Op. No. 2289 (File Nos. 4687, 4870), 623 P.2d 1210 (1981).

Orders terminating parental rights met statutory and rule of court requirements regarding findings of fact. — See In re C.L.T., Sup. Ct. Op. No. 1866 (File No. 3607), 597 P.2d 518 (1979).

Review of orders terminating parental rights. — Orders made under subsection (c)(3) of this section are not entitled to automatic review, inasmuch as subsection (f) of this section specifies which orders are entitled to this review and orders under subsection (c)(3) of this section are not included within the list. Rita T. v. State, Sup. Ct. Op. No. 2294 (File No. 5036), 623 P.2d 344 (1981).

All orders made pursuant to this section, including orders under subsection (c)(3) of this section, are to be reviewed upon application of an interested party if the party establishes good cause for the review, and if the child is still a ward of the court. Rita T. v. State, Sup. Ct. Op. No. 2294 (File No. 5036), 623 P.2d 344 (1981).

As long as a child remains the ward of the court, under subsection (f) of this section his or her natural parents are entitled to a review of the order terminating their parental rights upon a showing of good cause for the hearing. Rita T. v. State, Sup. Ct. Op. No. 2294 (File No. 5036), 623 P.2d 344 (1981).

Good cause could be established if the parents showed that it would be in the best interests of the child to resume living with them because they have sufficiently reha-

bilitated themselves so that they can provide proper guidance and care for the child. Rita T. v. State, Sup. Ct. Op. No. 2294 (File No. 5036), 623 P.2d 344 (1981).

Where, when a mother applied for a hearing before the superior court, she indicated that as a result of a 12-month rehabilitation program she had overcome the problems that had led to the termination of her parental rights and also indicated that professional counselors, social workers and others would be able to establish that she was now capable of providing a warm and loving home for the child, this was a sufficient showing of good cause to entitle her to a review of the order terminating her parental rights if the child had not yet been adopted. Rita T. v. State, Sup. Ct. Op. No. 2294 (File No. 5036), 623 P.2d 344 (1981).

Former AS 17.12.110(d)(4) not in conflict. — Former AS 17.12.110(d)(4), which provided that a person who, while under the age of 18, possesses, controls or uses any amount of marijuana was, upon conviction, guilty of a misdemeanor punishable by a fine of not more than \$1000, was not in conflict with AS 47.10.010(a)(1) and paragraph (b)(1) of this section. M.O.W. v. State, Ct. App. Op. No. 95 (File No. 4846), 645 P.2d 1229 (1982).

For reference to apparent conflict between subsection (c)(1) as it read prior to 1977 amendment and Children's Rule 22(f), see footnote 30 in In re S.D., Sup. Ct. Op. No. 1255 (File No. 2530), 549 P.2d 1190 (1976).

Peremptory challenge procedure inapplicable to juvenile proceedings. — While juvenile proceedings have some of the characteristics of both civil and criminal actions, they are basically different from both, and the words "civil or criminal" as used in AS 22.20.022 must be strictly construed. The trial judge was correct in holding that peremptory challenge procedure applied only to civil and criminal actions and not to juvenile proceedings. In re A Minor Child, Sup. Ct. Op. No. 737 (File No. 1524), 490 P.2d 658 (1971).

Notions of benevolent protective policies cannot be used to validate departures from positive law relating to the adjudicative and dispositive phases of children's proceedings. In re A Minor Child, Sup. Ct. Op. No. 737 (File No. 1524), 490 P.2d 658 (1971).

Nor to justify dispensing with constitutional safeguards. — The benevolent social theory supposedly underlying children's court acts does not

furnish justification for dispensing with constitutional safeguards. In re A Minor Child, Sup. Ct. Op. No. 737 (File No. 1524), 490 P.2d 658 (1971).

The right of confrontation is paramount to the state's policy of protecting a juvenile offender. Davis v. State, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974).

But state's interest in secrecy of juvenile adjudications need not always fall before confrontation right. — See Gonzales v. State, Sup. Ct. Op. No. 1030 (File No. 2002), 521 P.2d 512, cert. denied, 419 U.S. 868, 95 S. Ct. 125, 42 L. Ed. 2d 106 (1974).

Prosecution witness impeachable by cross-examination for bias from probationary status as juvenile delinquent. — The confrontation clause requires that a defendant in a criminal case be allowed to impeach the credibility of a prosecution witness by cross-examination directed at possible bias deriving from the witness's probationary status as juvenile delinquent although such an impeachment would conflict with a state's asserted interest in preserving the confidentiality of juvenile adjudications of delinquency. Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974).

Whatever temporary embarrassment might result to a prosecution witness or his family by disclosure of his juvenile record — if the prosecution insisted on requiring him to make its case — is outweighed by petitioner's right to probe into the influence of possible bias on the testimony of a crucial identification witness. Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974).

The state cannot, consistent with right of confrontation, require the defendant to bear the full burden of vindicating the state's interest in the secrecy of juvenile criminal records. Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974).

The United States supreme court has held that the constitutional right of confrontation required that defense counsel be allowed to investigate the potential bias of a crucial prosecution witness, even where that potential bias arose out of a juvenile adjudication and its resultant probationary status. Gonzales v. State, Sup. Ct. Op. No. 1030 (File No. 2002), 521 P.2d 512, cert. denied, 419 U.S. 868, 95 S. Ct. 125, 42 L. Ed. 2d 106 (1974).

The United States supreme court concluded that Alaska's interest in protecting the anonymity of the juvenile offender was outweighed by the more

critical need to afford a criminal defendant reasonable inquiry into the motives of prosecution witnesses. *Gonzales v. State*, Sup. Ct. Op. No. 1030 (File No. 2002), 521 P.2d 512, cert. denied, 419 U.S. 868, 95 S. Ct. 125, 42 L. Ed. 2d 106 (1974).

Conflict between section and decision in *Davis v. Alaska* is superficial. — The conflict between this section and the supreme court's decision in *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974), is only superficial. *Gonzales v. State*, Sup. Ct. Op. No. 1030 (File No. 2002), 521 P.2d 512, cert. denied, 419 U.S. 868, 95 S. Ct. 125, 42 L. Ed. 2d 106 (1974).

Since disclosure required because of probationary status, not juvenile adjudication. — The constitutional requirement of disclosure in the facts in *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974), is created not by the juvenile adjudication itself but by the probationary status of the juvenile at the time of *Davis'* trial, with its potential for motivating false testimony. *Gonzales v. State*, Sup. Ct. Op. No. 1030 (File No. 2002), 521 P.2d 512, cert. denied, 419 U.S. 868, 95 S. Ct. 125, 42 L. Ed. 2d 106 (1974).

Where the witness was not on juvenile probation, it cannot be seriously argued that the fact of previous juvenile convictions, standing alone, provided any inference of potential bias. *Gonzales v. State*, Sup. Ct. Op. No. 1030 (File No. 2002), 521 P.2d 512, cert. denied, 419 U.S. 868, 95 S. Ct. 125, 42 L. Ed. 2d 106 (1974).

State adjudications directed solely at credibility do not conflict with confrontation right. — Juvenile adjudications which are stale by Alaska's standards and directed solely at general credibility rather than bias are generally not sufficiently probative to create a genuine conflict with the defendant's right of confrontation. *Gonzales v. State*, Sup. Ct. Op. No. 1030 (File No. 2002), 521 P.2d 512, cert. denied, 419 U.S. 868, 95 S. Ct. 125, 42 L. Ed. 2d 106 (1974).

Where the attempted impeachment was of general credibility by proof of prior "convictions," the probative value of this type of evidence is considerably less than that which suggests false or distorted testimony because of bias, and the need to confront a witness with such evidence is correspondingly less. *Gonzales v. State*, Sup. Ct. Op. No. 1030 (File No. 2002), 521 P.2d 512, cert. denied, 419 U.S. 868, 95 S. Ct. 125, 42 L. Ed. 2d 106 (1974).

As a general rule, the trial courts could properly refuse evidence of stale con-

victions or juvenile adjudications where these were offered for the purpose of discrediting the witness generally rather than to show some specific potential for bias or prejudice toward the defendant. *Thomas v. State*, Sup. Ct. Op. No. 1040 (File Nos. 1888, 1854), 522 P.2d 528 (1974).

Privilege against self-incrimination. — When a person under the age of 18 years violated former AS 47.10.010(a)(1), he could be adjudged a "delinquent minor," one possible consequence of which adjudication was commitment to a juvenile facility until the age of 19 (now 20). Moreover, if there was probable cause to believe the minor was delinquent and the court found that he was not amenable to treatment as a juvenile, he could be prosecuted as if he were an adult. Thus, there was always some danger of incarceration, or other criminal sanctions, when a child committed an act which would have been a crime if committed by an adult. Under such circumstances a child had a privilege against self-incrimination. *E.L.L. v. State*, Sup. Ct. Op. No. 1540 (File No. 3374), 572 P.2d 786 (1977).

A child adjudicated delinquent for selling LSD may be incarcerated, possibly even in a city jail, until age 19, which may be many years. *R.I.R. v. State*, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

Subsection (g) provides in part that a juvenile offender may not be considered a criminal by reason of the adjudication, nor may the adjudication be afterward deemed a conviction. *Gonzales v. State*, Sup. Ct. Op. No. 1030 (File No. 2002), 521 P.2d 512, cert. denied, 419 U.S. 868, 95 S. Ct. 125, 42 L. Ed. 2d 106 (1974).

A judge cannot consider a juvenile offense as a criminal conviction for the purpose of prescribing a mandatory sentence. *Berfield v. State*, Sup. Ct. Op. No. 581 (File No. 960), 458 P.2d 1008 (1969).

The judge's consideration of factors relating to accused's life, characteristics, background and behavior prior to reaching the age of 18 years did not mean that he considered accused a criminal or that he was using the juvenile offenses as criminal convictions in determining the sentence to impose. *Berfield v. State*, Sup. Ct. Op. No. 581 (File No. 960), 458 P.2d 1008 (1969).

Consideration of the juvenile record is proper by the court imposing a sentence upon an adult offender. *Penn v. State*, Sup. Ct. Op. No. 1774 (File No. 3873), 588 P.2d 288 (1978).

Use of the juvenile history of the offender in sentencing proceedings does not amount to the use of those proceedings as evidence against the offender within the prescription of such a statute as this section. *Penn v. State*, Sup. Ct. Op. No. 1774 (File No. 3873), 588 P.2d 288 (1978).

When sentence determined. — The sentence which may be imposed upon a convicted adult is determined as of the time of the final judgment of conviction, or as of the time of commission of the offense. These rules have been applied to juvenile sentencing. *Davenport v. McGinnis*, Sup. Ct. Op. No. 1049 (File No. 1942), 522 P.2d 1140 (1974).

Review of custody orders. — The new children's law, as a result of the 1977 acts, provides for review of custody orders annually or more often if good cause is shown. *In re J.M.*, Sup. Ct. Op. No. 1548 (File Nos. 3219, 3229), 573 P.2d 1376 (1978).

Appeal of detention order. — Under this section and Children's Rule 29(a), a minor who is detained may appeal his detention order. *A.M. v. State*, Ct. App. Op. No. 150 (File No. 6105), 653 P.2d 346 (1982).

Appellants are authorized to bring juvenile bail appeals under App. R. 207 to ensure that juvenile detention hearings

are not insulated from review. *A.M. v. State*, Ct. App. Op. No. 150 (File No. 6105), 653 P.2d 346 (1982).

Appeal from detention order dismissed as untimely. — See *A.M. v. State*, Ct. App. Op. No. 150 (File No. 6105), 653 P.2d 346 (1982).

Appellate jurisdiction. — AS 22.05.010 places final appellate jurisdiction in all cases in the supreme court. *In re A Minor Child*, Sup. Ct. Op. No. 737 (File No. 1524), 490 P.2d 658 (1971).

Applied in *L.A.M. v. State*, Sup. Ct. Op. No. 1249 (File No. 2221), 547 P.2d 827 (1976); *Adams v. Ross*, Sup. Ct. Op. No. 1281 (File No. 2458), 551 P.2d 948 (1975); *D.H. v. State*, Sup. Ct. Op. No. 1396 (File No. 2837), 561 P.2d 294 (1977).

Quoted in *Davis v. State*, Sup. Ct. Op. No. 816 (File Nos. 1428, 1436), 499 P.2d 1025 (1972).

Stated in *In re G.K.*, Sup. Ct. Op. No. 796 (File Nos. 1627, 1654, 1674), 497 P.2d 914 (1972).

Cited in *Eliason v. State*, Sup. Ct. Op. No. 898 (File No. 1750), 511 P.2d 1066 (1973); *D.L.J. v. W.D.R.*, Sup. Ct. Op. No. 2433 (File No. 5411), 635 P.2d 834 (1981); *S.O. v. W.S.*, Sup. Ct. Op. No. 2491 (File No. 5856), 643 P.2d 997 (1982).

Collateral references. — Right of indigent parent to appointed counsel in proceeding for involuntary termination of parental rights. 80 ALR3d 1141.

Sec. 47.10.081. Predisposition hearing reports. (a) Before the disposition hearing of a delinquent minor the department shall submit a predisposition report with a recommended plan of treatment to aid the court in its selection of a disposition, and any further information which the court may request.

(b) Before the disposition hearing of a child in need of aid the department shall submit a predisposition report to aid the court in its selection of a disposition. This report shall include, but is not limited to, the following:

(1) a statement of changes in the child's or parent's behavior, which will aid the court in determining that supervision of the family or placement is no longer necessary;

(2) if removal from the home is recommended, a description of the reasons the child cannot be protected or rehabilitated adequately in the home, including a description of any previous efforts to work with the parents and the child in the home and the parents' attitude toward placement of the child;

(3) a description of the potential harm to the child which may result from removal from the home and any efforts which can be made to minimize such harm; and

(4) any further information which the court may request.

The court shall inform the child, the child's parents and the attorneys representing the parties and the guardian ad litem that the predisposition report will be available to them not less than 10 days before the disposition hearing.

(d) For purposes of this section "parents" means the natural or adoptive parents, and any legal guardian, relative, or other adult person with whom the child has resided and who has acted as a parent in providing for the child for a continuous period of time before this action. (§ 26 ch 63 SLA 1977)

NOTES TO DECISIONS

Applied in *Granato v. Occhipinti*, Sup. Ct. Op. No. 1962 (File No. 3756), 602 P.2d 442 (1979). Cited in *M.O.W. v. State*, Ct. App. Op. No. 95 (File No. 4846), 645 P.2d 1229 (1982).

Sec. 47.10.082. Best interests of the child. In making its dispositional order under AS 47.10.080(b) the court shall consider the best interests of the child and the public, and in making its dispositional order under AS 47.10.080(c) the court shall consider the best interests of the child; in either case the court shall consider also the ability of the state to take custody and to care for the child to protect the child's best interests under AS 47.10.010 — 47.10.142. (§ 26 ch 63 SLA 1977)

NOTES TO DECISIONS

Showing required to justify termination of parental rights. — While best interests of the child become relevant at some point, there first must be a showing of parental conduct sufficient to justify termination. *Nada A. v. State*, Sup. Ct. Op. No. 2632 (File Nos. 6546, 6693), 660 P.2d 436 (1983). Cited in *Granato v. Occhipinti*, Sup. Ct. Op. No. 1962 (File No. 3756), 602 P.2d 442 (1979); *M.O.W. v. State*, Ct. App. Op. No. 95 (File No. 4846), 645 P.2d 1229 (1982).

Sec. 47.10.083. Review hearing information. In the case of a child in need of aid, the child shall be returned home at the review hearing under AS 47.10.080(f) unless the court finds by a preponderance of the evidence that the basis upon which the child was adjudicated under AS 47.10.010(a)(2) continues to exist. If the child is not returned home, the court shall establish on the record

- (1) why the child was removed from the home;
- (2) what services have been provided to or offered to the parents to facilitate reunion;

- (3) what services were utilized by the parents to facilitate reunion;
- (4) the visitation history between the parents and the child;
- (5) whether additional services are needed to facilitate the return of the child to the child's parents;
- (6) when return of the child can be expected. (§ 26 ch 63 SLA 1977)

NOTES TO DECISIONS

Cited in *M.O.W. v. State*, Ct. App. Op. No. 95 (File No. 4846), 645 P.2d 1229 (1982).

Sec. 47.10.084. Legal custody, guardianship, and residual parental rights and responsibilities. (a) When a child is committed under AS 47.10.080(b)(1) or (c)(1) to the department or released under AS 47.10.080(b)(2) or (3) or (c)(2) to the child's parents, guardian, or other suitable person, a relationship of legal custody exists. This relationship imposes on the department and its authorized agents or the parents, guardian, or other suitable person the responsibility of physical care and control of the child, the determination of where and with whom the child shall live, the right and duty to protect, train and discipline the child, and the duty of providing the child with food, shelter, education, and medical care. These obligations are subject to any residual parental rights and responsibilities and rights and responsibilities of a guardian if one has been appointed. When parental rights have been terminated, or there are no living parents and no guardian has been appointed, the responsibilities of legal custody include those in (b) and (c) of this section. The department or person having legal custody of the child may delegate any of the responsibilities under this section, except authority to consent to marriage, adoption, and military enlistment may not be delegated. For purposes of this chapter a person in charge of a placement setting is an agent of the department.

(b) When a guardian is appointed for the child, the court shall specify in its order the rights and responsibilities of the guardian. The guardian may be removed only by court order. The rights and responsibilities may include, but are not limited to, having the right and responsibility of reasonable visitation, consenting to marriage, consenting to military enlistment, consenting to major medical treatment, obtaining representation for the child in legal actions, and making decisions of legal or financial significance concerning the child.

(c) When there has been transfer of legal custody or appointment of a guardian and parental rights have not been terminated by court decree, the parents shall have residual rights and responsibilities. These residual rights and responsibilities of the parent include, but are not limited to, the right and responsibility of reasonable visitation,

consent to adoption, consent to marriage, consent to military enlistment, consent to major medical treatment except in cases of emergency or cases falling under AS 09.65.100, and the responsibility for support, except if by court order any residual right and responsibility has been delegated to a guardian under (b) of this section. (§ 26 ch 63 SLA 1977)

NOTES TO DECISIONS

Effect of being foster parents on husband-wife evidentiary privilege. — A foster child is a child of the foster parents for purposes of applying the exception to the husband-wife privilege set forth in Alaska Evidence Rule 505(a)(2)(D)(i); one foster parent cannot rely on the husband-wife privilege to refuse to testify

against the other concerning evidence relating to an assault on the foster child. *Daniels v. State*, Ct. App. Op. No. 357 (File No. A-366), P.2d (1984).

Cited in *M.O.W. v. State*, Ct. App. Op. No. 95 (File No. 4846), 645 P.2d 1229 (1982).

Sec. 47.10.085. Child in need of aid; religious treatment. In a case in which the minor's status as a child in need of aid is sought to be based on the need for medical care, the court may, upon consideration of the health of the minor and the fact, if it is a fact, that the minor is being provided treatment by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination by an accredited practitioner of the church or denomination, dismiss the proceedings and thereby close the matter. This may be done, in the interests of justice and religious freedom, on the court's own motion or upon the application of a party to the proceedings, at any stage of the proceedings, after information is given to the court under AS 47.10.020(a). (§ 8 ch 1 SLA 1972; am § 19 ch 63 SLA 1977)

NOTES TO DECISIONS

Cited in *M.O.W. v. State*, Ct. App. Op. No. 95 (File No. 4846), 645 P.2d 1229 (1982).

Sec. 47.10.090. Records. (a) The court shall make and keep records of all cases brought before it. The court's official records may be inspected only with the court's permission and only by persons having a legitimate interest in them. All information and social records pertaining to a minor and prepared by an employee of the court or by a federal, state or city agency in the discharge of the employee's or agency's official duty, are privileged and may not be disclosed directly or indirectly to anyone without the court's permission. However, a state or city law-enforcement agency shall disclose information regarding a case which is needed by the person or agency charged with

making a preliminary investigation for the information of the court. Within 30 days of the date of a minor's 18th birthday or, if the court retains jurisdiction of a minor past the minor's 18th birthday, within 30 days of the date on which the court relinquishes jurisdiction over the minor, the court shall order sealed all the court's official records, information and social records pertaining to that minor, as well as records of all criminal proceedings against the minor and punishments assessed against the minor except for traffic offenses. A person may not use these sealed records for any purpose except that the court may order their use for good cause shown or may order their use by an officer of the court in making a presentencing report for the court.

(b) The name or picture of a minor under the jurisdiction of the court may not be made public in connection with the minor's status as a delinquent child or a child in need of aid unless authorized by order of the court, except that the name of a minor who is found for the second time to have violated a law, which if committed by an adult would be a felony, shall be made public unless the court, for good cause, in certain individual cases, enters an order prohibiting the disclosure.

(c) A person who violates a provision of this section is guilty of a misdemeanor, and upon conviction is punishable by a fine of not more than \$500 or by imprisonment for not more than one year, or by both. (§ 10(3)(4) art I ch 145 SLA 1957; am § 1 ch 124 SLA 1972; am § 1 ch 90 SLA 1975; am § 20 ch 63 SLA 1977)

Cross references. — For explanation of how amendments in 1975 changed Rules of Children's Procedure, see § 2, ch. 90, SLA 1975.

NOTES TO DECISIONS

Purpose for enacting subsection (a). — Reading this section together with other sections of the laws relating to children's proceedings leads one to believe that subsection (a) was enacted principally for the purpose of protecting the child against the possible adverse effects an unauthorized revelation of his social record would have. In re P.N., Sup. Ct. Op. No. 1127 (File No. 2191), 533 P.2d 13 (1975).

There is no indication that subsection (a) was intended to authorize the granting of testimonial use immunity to parents. In re P.N., Sup. Ct. Op. No. 1127 (File No. 2191), 533 P.2d 13 (1975).

The supreme court could not say with certainty that this section would be construed to forbid the use, in a subsequent criminal action against a parent, of testimony that the parent gave at a child's

proceeding. In re P.N., Sup. Ct. Op. No. 1127 (File No. 2191), 533 P.2d 13 (1975).

Waiver of provisions of section. — In the case of use of restraints more severe than placement in adjustment rooms (solitary confinement), the approval of the director of McLaughlin Youth Center must be obtained and a report made to the child's attorney and the family court. The provisions of this section are waived for this purpose. *T.M. v. Director of McLaughlin Youth Center*, Superior Court, No. 72-449 (1973).

Stated in *R.L.R. v. State*, Sup. Ct. Op. No. 706 (File No. 1156), 487 P.2d 27 (1971).

Cited in *M.O.W. v. State*, Ct. App. Op. No. 95 (File No. 4846), 645 P.2d 1229 (1982); *State v. R.H.*, Ct. App. Op. No. 375 (File No. 7768), P.2d (1984).

Sec. 47.10.095. Arrest of a minor. The arrest of a minor other than for a traffic offense is not considered an arrest for any purpose except for the purpose of the disposition of a proceeding arising out of that arrest. (§ 2 ch 124 SLA 1972)

Sec. 47.10.100. Retention of jurisdiction over minor. (a) The court retains jurisdiction over the case and may at any time stay execution, modify, set aside, revoke, or enlarge a judgment or order, or grant a new hearing, in the exercise of its power of protection over the minor and for the minor's best interest, for a period of time not to exceed two years or in any event extend past the day the minor becomes 19, unless sooner discharged by the court, except that the department may apply for and the court may grant an additional one-year period of supervision past age 19 if continued supervision is in the best interests of the person and the person consents to it. An application for any of these purposes may be made by the parent, guardian, or custodian acting in behalf of the minor, or the court may, on its own motion, and after reasonable notice to interested parties and the appropriate department, take action which it considers appropriate.

(b) If the court determines at a rehearing that it is for the best interests of the minor to be released to the care or custody of the minor's parent, guardian, or custodian, it may enter an order to that effect and the minor is discharged from the control of the department.

(c) If a minor is adjudicated a delinquent or a child in need of aid before the minor's 18th birthday, the court may retain jurisdiction over the minor after the minor's 18th birthday for the purpose of supervising the minor's rehabilitation, but the court's jurisdiction over the minor under this chapter never extends beyond the minor's 19th birthday, except that the department may apply for and the court may grant an additional one-year period of supervision past age 19 if continued supervision is in the best interests of the person and the person consents to it. The department may retain jurisdiction over a child between the child's 18th and 19th birthdays for the purpose of supervising the child's rehabilitation, if the child has been placed under the supervision of the department before the child's 18th birthday, except that the department may apply for and the court may grant an additional one-year period of supervision past age 19 if continued supervision is in the best interests of the person and the person consents to it. (§ 11 art I ch 145 SLA 1957; am §§ 16, 17 ch 245 SLA 1970; am § 21 ch 63 SLA 1977)

NOTES TO DECISIONS

When one commits a criminal offense after reaching the age of 18 years, he is no longer entitled to the benefits of the Children's Code. *Henson v.*

State, Sup. Ct. Op. No. 1590 (File No. 3024), 576 P.2d 1352 (1978).

Offenses to which court's jurisdiction not extended. — Neither subsection

(a) nor subsection (c) purports to extend the court's juvenile jurisdiction to newly committed offenses occurring between the offender's 18th and 19th birthdays. *Henson v. State*, Sup. Ct. Op. No. 1590 (File No. 3024), 576 P.2d 1352 (1978).

Jurisdiction defeated only by expressly retroactive statute. — Once

the sentencing court acquires jurisdiction over the individual, only an expressly retroactive statute could defeat its continuing jurisdiction for the duration of the sentence originally imposed. *Davenport v. McGinnis*, Sup. Ct. Op. No. 1049 (File No. 1942), 522 P.2d 1140 (1974).

Sec. 47.10.110. Appointment of guardian or custodian. When, in the course of a proceeding under this chapter, it appears to the court that the welfare of a minor will be promoted by the appointment of a guardian or custodian of the minor's person, the court may make the appointment. The court shall have a summons issued and served upon the parents of the minor, if they can be found, in a manner and within a time before the hearing which the court considers reasonable. The court may determine whether the father, mother, or the Department of Health and Social Services shall have the custody and control of the minor. If the minor is of sufficient age and intelligence to state desires, the court shall consider them. (§ 12 art I ch 145 SLA 1957; am § 6 ch 104 SLA 1971; am § 22 ch 63 SLA 1977)

Collateral references. — 39 Am. Jur. 2d, Guardian and Ward, § 17.
39 C.J.S., Guardian and Ward, §§ 20 to 29.

Right of infant to select his own guardian, 85 ALR2d 921.

Sec. 47.10.120. Support of minor. (a) When a child in need of aid is committed under this chapter, the court may, after giving the parent a reasonable opportunity to be heard, adjudge that the parent shall pay in a manner which the court directs a sum which will cover in full or in part the support of the child in need of aid. When a delinquent minor is committed under this chapter, the court shall order that the parent of the minor pay in a manner which the court directs a sum which will cover in full or in part the support of the delinquent minor.

(b) If a parent wilfully fails or refuses to pay the sum fixed, the parent may be proceeded against as provided by law in cases of family desertion and nonsupport.

(c) The sum collected from a parent under this section shall be directly credited to the general fund of the state. (§ 13 art I ch 145 SLA 1957; am § 1 ch 31 SLA 1959; am § 1 ch 141 SLA 1959; am § 23 ch 63 SLA 1977)

Sec. 47.10.130. Detention. No minor under 18 years of age who is detained pending hearing may be incarcerated in a jail unless assigned to separate quarters so that the minor cannot communicate with or view adult prisoners convicted of, under arrest for, or charged with a crime. When a minor is detained pending hearing, the minor's parent, guardian, or custodian shall be notified immediately. (§ 14 art I ch 145 SLA 1957)

Cross references. — For conditions of detention, see Children's Rule 27, Alaska Rules of Court.

NOTES TO DECISIONS

A detention which was twice continued by the master of the children's court for a total period of six days exemplifies a usurpation of judicial power. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).

Sec. 47.10.140. Temporary detention and detention hearing.

(a) A peace officer may arrest a minor who violates a law or ordinance in the officer's presence, or whom the officer reasonably believes is a fugitive from justice. A peace officer may continue a lawful arrest made by a citizen. The officer may have the minor detained in a juvenile detention facility if in the officer's opinion it is necessary to do so to protect the minor or the community.

(b) A peace officer who has a minor detained under (a) of this section shall immediately, and in no event more than 12 hours later, notify the court, the minor's parents or guardian, and the Department of Health and Social Services of the officer's action. The department may file with the court a petition alleging delinquency before the detention hearing.

(c) The court shall immediately, and in no event more than 48 hours later, hold a hearing at which the minor and the minor's parents or guardian if they can be found shall be present. The court shall determine whether probable cause exists for believing the minor to be delinquent. The court shall inform the minor of the reasons alleged to constitute probable cause and the reasons alleged to authorize the minor's detention. The minor is entitled to counsel and to confrontation of adverse witnesses.

(d) If the court finds that probable cause exists, it shall determine whether the minor should be detained pending the hearing on the petition or released. It may either order the minor held in detention or released to the custody of a suitable person pending the hearing on the petition. If the court finds no probable cause, it shall order the minor released and close the case.

(e) Except for temporary detention pending a detention hearing or temporary detention under (f) of this section, a minor may not be detained except by court order.

(f) A peace officer may detain a minor who is evading the person having the minor's legal custody if the minor is not otherwise subject to arrest or detention under (a) of this section, for the sole purpose of either (1) returning the minor to the person having legal custody or (2) if the minor prefers, taking the minor to an office specified by the Department of Health and Social Services, facility or contract agency of the Department of Health and Social Services where such exists in the community. Immediately upon detaining a minor under this provi-

sion, the peace officer shall advise the minor of the right to social services under AS 47.10.142(b), and, if known, the peace officer shall advise the person having the legal custody of the minor of the detention.

(g) A minor who is detained under (f) of this section may not be detained in a jail or other facility unless kept out of contact with adult persons convicted or accused of a crime. A minor may not be detained in a jail or other detention facility which has not been approved by the Department of Health and Social Services before detention of the minor. (§ 15 art I ch 145 SLA 1957; am § 3 ch 118 SLA 1962; am § 2 ch 100 SLA 1971; am § 6 ch 104 SLA 1971; am §§ 1, 2 ch 128 SLA 1972)

Cross references. — For custody without a court order, see Children's Rules 6 and 7, Alaska Rules of Court.

NOTES TO DECISIONS

Detention orders neither based on competent testimony nor accompanied by the required statement of facts are invalid. In re P.H., Sup. Ct. Op. No. 857 (File No. 1538), 504 P.2d 837 (1972).
Appeal of detention order. — See

notes under this catchline, AS 47.10.080, A.M. v. State, Ct. App. Op. No. 150 (File No. 6105), 653 P.2d 346 (1982).
Cited in State v. R.H., Ct. App. Op. No. 375 (File No. 7768), P.2d (1984).

SECTION 13
~~Sec. 47.10.142. Emergency custody and temporary placement hearing.~~ (f) The Department of Health and Social Services may take emergency custody of a minor upon discovering any of the following circumstances:

(1) the minor has been abandoned;

(2) the minor has been grossly neglected by the minor's parents or guardian as "neglect" is defined in AS 47.17.070(5), so that immediate removal from the minor's surroundings is, in the determination of the department, necessary to protect the minor's life;

(3) the minor has been abused, as "abuse" is defined in AS 47.17.070(1), so that immediate medical attention is necessary, in the determination of the department;

(4) the minor has been sexually abused under circumstances listed in AS 47.10.010(a)(2)(D).

(b) A minor who has left home and is evading the person having legal custody of the minor may obtain the services of the department. The department shall assess the situation and furnish the minor with the social services it considers appropriate to protect the well-being of the minor and to preserve the minor's family life if preserving it is considered desirable under the circumstances. If, after assessing the situation, considering the wishes of the minor, and furnishing appropriate social services, the department considers it necessary, the department may take emergency custody of the minor.

SECTION 14

When a child is taken into custody under (a) or (b) of this section, the department shall immediately, and in no event more than 12 hours later unless prevented by lack of communication facilities, notify the parents or the person or persons having custody of the child and the court of the action and file with the court a petition alleging that the child is a child in need of aid.

(d) The court shall immediately, and in no event more than 48 hours after being notified unless prevented by lack of transportation, hold a hearing at which the minor, if the minor's health permits, and the minor's parents or guardian, if they can be found, shall be permitted to be present. The court shall determine whether probable cause exists for believing the minor to be a child in need of aid, as defined in AS 47.10.290. The court shall inform the minor, and the minor's parents or guardian if they can be found, of the reasons given as constituting probable cause and the reasons given as authorizing the minor's temporary placement.

(e) If the court finds that probable cause exists it shall order the minor committed to the department for temporary placement, or order the minor returned to the custody of the minor's parents or guardian subject to the department's supervision of the minor's care and treatment. If the court finds no probable cause it shall order the minor returned to the custody of the minor's parents or guardian. (§ 3 ch 100 SLA 1971; am § 6 ch 104 SLA 1971; am § 24 ch 63 SLA 1977; am § 2 ch 14 SLA 1982)

NOTES TO DECISIONS

Effect of amendments. — The 1982 amendment added paragraph (4) to subsection (a). Cited in State v. R.H., Ct. App. Op. No. 375 (File No. 7768), P.2d (1984).

Article 2. Juvenile Institutions.

Section	Section
150. General powers of department over juvenile institutions	190. Conditions governing detention
160. Duties of department	200. Releasing juveniles after commitment
170. Power of cities to maintain and operate home or facility	210. Youth counsellors
180. Operation of homes and facilities	220. Grants-in-aid

Sec. 47.10.150. General powers of department over juvenile institutions. The Department of Health and Social Services may

(1) purchase, lease or construct buildings or other facilities for the care, detention, rehabilitation and education of children in need of aid or delinquent minors;

(2) adopt plans for construction of juvenile homes, juvenile detention facilities, and other juvenile institutions;

(3) adopt standards and regulations under this chapter for the design, construction, repair, maintenance and operation of all juvenile detention homes, facilities, and institutions;

(4) inspect periodically each juvenile detention home, facility, or other institution to ensure that the standards and regulations adopted are being maintained;

(5) reimburse cities maintaining and operating juvenile detention homes and facilities;

(6) enter into contracts and arrangements with cities and state and federal agencies to carry out the purposes of this chapter;

(7) do all acts necessary to carry out the purposes of this chapter;

(8) adopt the regulations necessary to carry out this chapter;

(9) accept donations, gifts or bequests of money or other property for use in construction of juvenile homes, institutions or detention facilities;

(10) operate juvenile homes when municipalities are unable to do so;

(11) receive, care for, and place in a juvenile detention home, the minor's own home, a foster home, or correctional school or treatment institution all minors committed to its custody under this chapter. (§ 3 art II ch 145 SLA 1957; am § 1 ch 152 SLA 1959; am § 6 ch 104 SLA 1971; am § 25 ch 63 SLA 1977)

Cross references. — For operation of juvenile detention homes and facilities, see AS 47.10.180. For standards of care for the welfare of children under the care of the department, see AS 47.10.250.

NOTES TO DECISIONS

Department ordered to promulgate standards for operation of juvenile detention homes. — See T.M. v. Director of McLaughlin Youth Center. Superior Court, No. 72-449 (1973).

Collateral references. — 60 Am Jur. 2d, Penal and Correctional Institutions, § 1 et seq.

Sec. 47.10.160. Duties of department. The Department of Health and Social Services shall

(1) accept all minors committed to the custody of the department and all minors who are involved in a written agreement under AS 47.10.230(c), and provide for the welfare, control, care, custody, and placement of these minors in accordance with this chapter;

(2) require and collect statistics on juvenile offenses and offenders in Alaska;

diction the institution is operated, or whose department or agency is charged with performing the service. (§ 3 ch 88 SLA 1960)

Sec. 47.15.040. Financial arrangements. The compact administrator, subject to the approval of the commissioner of administration, may make or arrange for the payments necessary to discharge the financial obligations imposed upon this state by the compact or by a supplementary agreement made under the compact. (§ 4 ch 88 SLA 1960)

Sec. 47.15.050. Appointment of attorney or guardian. Appointment of an attorney or guardian ad litem under the provisions of this compact shall be made in accordance with AS 25.24.310 or AS 44.21.400 — 44.21.440. (§ 5 ch 88 SLA 1960; am § 55 ch 94 SLA 1980; am § 16 ch 55 SLA 1984)

Cross references. — See Admin. R. 13, Alaska Rules of Court.
Effect of amendments. — The 1984 amendment rewrote this section, which formerly read "A council or guardian ad litem appointed under the provisions of this compact may be paid as provided in the Rules Governing the Administration of all Courts."

Sec. 47.15.060. Enforcement. The courts, departments, agencies and officers of this state and its subdivisions shall enforce this compact and shall do all things appropriate to the effectuation of its purposes and intent which are within their respective jurisdiction. (§ 6 ch 88 SLA 1960)

Sec. 47.15.070. Additional procedures not precluded. In addition to the procedures provided in articles IV and VI of the compact for the return of a runaway juvenile, the particular states, the juvenile or the juvenile's parents, the courts, or other legal custodian involved may agree upon and adopt any plan or procedure legally authorized under the laws of this state and the other respective party states for the return of the runaway juvenile. (§ 7 ch 88 SLA 1960)

Sec. 47.15.080. Short title. This chapter may be cited as the Uniform Interstate Compact on Juveniles. (§ 8 ch 88 SLA 1960)

Chapter 17. Child Protection.

Section	Section
10. Purpose	50. Immunity
20. Persons required to report	60. Evidence not privileged
25. Duties of public authorities	64. Photographs and x-rays
30. Action on reports; termination of parental rights	68. Penalty for failure to report
40. Central registry; confidentiality	70. Definitions

Sec. 47.17.010. Purpose. In order to protect children whose health and well-being may be adversely affected through the infliction, by

other than accidental means, of harm through physical abuse or neglect or sexual abuse or sexual exploitation, the legislature requires the reporting of these cases by practitioners of the healing arts and others to the appropriate public authorities. It is the intent of the legislature that, as a result of these reports, protective services will be made available in an effort to prevent further harm to the child, to safeguard and enhance the general well-being of the children in this state, and to preserve family life whenever possible. (§ 1 ch 100 SLA 1971; am § 3 ch 104 SLA 1982)

Effect of amendments. — The 1982 amendment, in the first sentence, substituted "neglect or sexual abuse or sexual exploitation" for "neglect requiring the attention of a practitioner of the healing arts" and inserted "of the healing arts."

NOTES TO DECISIONS

Use of reports. — The reports of child abuse and neglect required by this section are intended for use in child protection proceedings and are not intended for use in criminal proceedings. State v. R.H., Ct. App. Op. No. 375 (File No. 7768), P.2d (1984). See also notes to AS 47.17.060, under catchline "Judicial proceeding."

Collateral references. — 42 Am. Jur. 2d, Infants, §§ 16, 17.
 43 C.J.S., Infants, §§ 36 to 39, 70 to 75, 94.
 Medical attention, criminal neglect by failure to provide, 12 ALR2d 1047.
 Liability of parent for injury to unemancipated child caused by parent's negligence, 41 ALR3d 904.
 Validity and construction of penal statute prohibiting child abuse, 1 ALR4th 38.

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Sec. 47.17.020. Persons required to report. (a) The following persons who, in the performance of their professional duties, have cause to believe that a child has suffered harm as a result of abuse or neglect shall immediately report the harm to the nearest office of the department:

- (1) practitioners of the healing arts;
- (2) school teachers and school administrative staff members;
- (3) social workers;
- (4) peace officers, and officers of the Department of Corrections;
- (5) administrative officers of institutions;
- (6) licensed day care providers and paid staff;
- (7) licensed foster care providers.

(b) This section does not prohibit the named persons from reporting cases which have come to their attention in their nonprofessional capacities nor does it prohibit any other person from reporting a child's harm which the person has cause to believe is a result of abuse or neglect. These reports shall be made to the nearest office of the department.

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(c) If the person making a report of harm under this section cannot reasonably contact the nearest office of the department and immediate action is necessary for the well-being of the child, the person shall make the report to a peace officer. The peace officer shall take immediate action to protect the child and shall, at the earliest opportunity, notify the nearest office of the department. (§ 1 ch 100 SLA 1971; am §§ 4, 5 ch 104 SLA 1982; am E.O. No. 55, § 42 (1984))

Effect of amendments. — The 1982 amendment, in subsection (a), added "and school administrative staff members" at the end of paragraph (2) and added paragraphs (6) and (7). The 1984 amendment substituted "Department of Corrections" for "division of corrections" in paragraph (4) of subsection (a).

NOTES TO DECISIONS

Cited in State v. R.H., Ct. App. Op. No. 375 (File No. 7768), P.2d (1984).

Collateral references. — Civil liability report of physician for failure to diagnose or report battered child syndrome, 97 ALR3d 338.

Sec. 47.17.025. Duties of public authorities. (a) A law enforcement agency shall immediately notify the department of the receipt of a report of harm to a child from abuse. Upon receipt from any source of a report of harm to a child from abuse, the department shall notify the Department of Law and investigate the report and, within 72 hours of the receipt of the report, shall provide a written report of its investigation of the harm to a child from abuse to the Department of Law for review.

(b) The report of harm to a child from abuse required from the department by this section shall include:

- (1) the names and addresses of the child and the child's parent or other persons responsible for the child's care, if known;
- (2) the age and sex of the child;
- (3) the nature and extent of the harm to the child from abuse;
- (4) the name and age and address of the person known or believed to be responsible for the harm to the child from abuse, if known;
- (5) information that the department believes may be helpful in establishing the identity of the person believed to have caused the harm to the child from abuse. (§ 6 ch 104 SLA 1982)

NOTES TO DECISIONS

Applied in State v. R.H., Ct. App. Op. No. 375 (File No. 7768), P.2d (1984).

Sec. 47.17.030. Action on reports; termination of parental rights. (a) If a child, concerning whom a report of harm is made, is believed to reside within the boundaries of a local government exercising health functions for the area in which the child is believed to reside, the department may, upon receipt of the report, refer the matter to the appropriate health or social services agency of that local government. For cases not referred to an agency of a local government, the department shall, for each report received, investigate and take action, in accordance with law, which may be necessary to prevent further harm to the child or to insure the proper care and protection of the child.

(b) A local government health or social services agency receiving a report of harm shall, for each report received, investigate and take action, in accordance with law, which may be necessary to prevent further harm to the child or to insure the proper care and protection of the child. In addition, the agency receiving a report of harm shall forward a copy of its report of the investigation, including information the department requires by regulation, to the department.

(c) Action shall be taken regardless of whether the identity of the person making the report of harm is known.

(d) Before the department or a local government health or social services agency may seek the termination of parental rights, under AS 47.10.080(c)(3), it shall offer protective social services and pursue all other reasonable means of protecting the child.

(e) In all actions taken by the department or a health and social services agency of a local government under this chapter that result in a judicial proceeding, the child shall be represented by a guardian ad litem in that proceeding. Appointment of a guardian ad litem shall be made in accordance with AS 25.24.310. (§ 1 ch 100 SLA 1971; am § 1 ch 222 SLA 1976; am § 17 ch 55 SLA 1984)

Effect of amendments. — The 1984 amendment added the second sentence in subsection (e).

NOTES TO DECISIONS

Effect of subsection (d). — Subsection (d) of this section is clearly intended to prevent further abuse by providing protective services to the child, and it does not place a mandatory duty on the state to provide counseling and other support services to the family prior to seeking termination of parental rights. E.A. v. State, Sup. Ct. Op. No. 2289 (File Nos. 4687, 4870), 623 P.2d 1210 (1981).

Applied in State v. R.H., Ct. App. Op. No. 375 (File No. 7768), P.2d (1984).

Quoted in Granato v. Occhipinti, Sup. Ct. Op. No. 1962 (File No. 3756), 602 P.2d 442 (1979).

Collateral references. — 43 C.J.S., Infants, §§ 71, 72.

Physical abuse of child by parent as ground for termination of parent's right to child, 53 ALR3d 605.

Sexual abuse of child by parent as

ground for termination of parent's right to child, 58 ALR3d 1074.

Validity of state statute providing for termination of parental rights, 22 ALR4th 774.

Sec. 47.17.040. Central registry; confidentiality. (a) The department shall maintain a central registry of all investigation reports but not of the reports of harm.

(b) Investigation reports and reports of harm filed under this chapter are considered confidential and are not subject to public inspection and copying under AS 09.25.110 and 09.25.120. However, in accordance with department regulations, investigation reports may be used by appropriate governmental agencies with child-protection functions, inside and outside Alaska, in connection with investigations or judicial proceedings involving child abuse, neglect, or custody. A person, not acting in accordance with department regulations, who makes public information contained in confidential reports is guilty of a misdemeanor. (§ 1 ch 100 SLA 1971; am § 2 ch 222 SLA 1976)

NOTES TO DECISIONS

Psychotherapist/patient privilege. — Child abuse reports are not open to the public, and are therefore not within A.R.E.R. 504(d)(5), which provides that there is no physician or psychotherapist/patient privilege "as to information that the physician or

psychotherapist is required to report to a public employee or as to information required to be recorded in a public office, if such report or record is open to public inspection." State v. R.H., Ct. App. Op. No. 375 (File No. 7768), P.2d (1984).

Sec. 47.17.050. Immunity. A person who, in good faith, makes a report under this chapter, or who participates in judicial proceedings related to the submission of reports under this chapter, is immune from any civil or criminal liability which might otherwise be incurred or imposed. (§ 1 ch 100 SLA 1971)

Sec. 47.17.080. Evidence not privileged. Neither the physician-patient nor the husband-wife privilege is a ground for excluding evidence regarding a child's harm, or its cause, in a judicial proceeding related to a report made under this chapter. (§ 1 ch 100 SLA 1971)

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NOTES TO DECISIONS

For discussion of constitutional problems in interpreting this section to abrogate psychotherapist privilege in criminal proceedings, see State v. R.H., Ct. App. Op. No. 375 (File No. 7768), P.2d (1984).

Applicability to psychologists. — The court assumed but did not decide that this section applies to psychologists, who are not physicians. State v. R.H., Ct. App. Op. No. 375 (File No. 7768), P.2d (1984).

"Judicial proceeding". — This section only applies to child protective proceedings instituted under AS 47.10 and not to criminal proceeding for sexual abuse. State v. R.H., Ct. App. Op. No. 375 (File No. 7768), P.2d (1984).

Giving the Department of Health and Social Services primary control of the abused child again indicates a legislative intent that the "judicial proceedings"

referred to in this section occur through the department in relation to protective services, and are civil rather than criminal. State v. R.H., Ct. App. Op. No. 375 (File No. 7768), P.2d (1984).

Since AS 47.17.025 refers to the Department of Law, without reference to the criminal division, AS 47.17.025 does not, standing alone, necessarily resurrect the requirement of former AS 11.67.040 that the district attorney receive child abuse reports; nor does it establish an intent that child abuse reports result in criminal prosecutions; and consequently, the Court of Appeals could not find that a criminal prosecution for child sexual abuse is necessarily "a judicial proceeding related to a report made under this chapter" pursuant to this section. State v. R.H., Ct. App. Op. No. 375 (File No. 7768), P.2d (1984).

Sec. 47.17.064. Photographs and x-rays. The department or a person required under AS 47.17.020(a)(1) to report that a child suffered substantial harm as a result of physical abuse or neglect may without the permission of the parents

(1) take or have taken photographs of the areas of trauma visible on the child; and

(2) if medically indicated, have a radiological examination of the child performed. (§ 7 ch 104 SLA 1982)

Sec. 47.17.068. Penalty for failure to report. A person required to file a report of abuse or neglect under AS 47.17.020 who wilfully or knowingly fails or refuses to report the harm required under AS 47.17.020 is guilty of a class B misdemeanor. (§ 7 ch 104 SLA 1982)

Cross references. — For penalties for misdemeanors, see AS 12.55.135.

Sec. 47.17.070. Definitions. In AS 47.17.010 — 47.17.070

(1) "child abuse or neglect" means the physical injury or neglect, sexual abuse, sexual exploitation, or maltreatment of a child under the age of 18 by a person who is responsible for the child's welfare under circumstances which indicate that the child's health or welfare is harmed or threatened thereby;

(2) "child" means a person under 18 years of age;

(3) "department" means the Department of Health and Social Services;

SECTION 21

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(4) "institution" means a private or public hospital or other facility providing medical diagnosis, treatment, or care;

(5) "neglect" means the failure to provide necessary food, care, clothing, shelter, or medical attention for a child;

(6) "practitioner of the healing arts" includes chiropractors, dentists, health aides, nurses, optometrists, osteopaths, physical therapists, physicians, psychiatrists, psychologists, religious healing practitioners, and surgeons;

(7) "sexual exploitation" means

(A) permission or encouragement to a child for prostitution prohibited by AS 11.66.100 — 11.66.150 by a person responsible for the child's welfare;

(B) permission, encouragement, or activity involved in the unlawful exploitation of a minor prohibited by AS 11.41.455 by a person responsible for the minor's welfare. (§ 1 ch 100 SLA 1971; am § 6 ch 104 SLA 1971; am § 3 ch 222 SLA 1976; am §§ 56, 57 ch 94 SLA 1980; am §§ 8, 9 ch 104 SLA 1982)

Effect of amendments. — The 1980 amendment substituted "18" for "eighteen" near the middle of paragraph (1), and substituted "18" for "16" in paragraph (2).

The 1982 amendment inserted "or neglect" and "sexual exploitation" in paragraph (1) and added paragraph (7).

NOTES TO DECISIONS

Where parents refuse permission for blood transfusion because of religious conviction, the state may intercede and make the child a dependent minor by the parents' failure to provide medical

attention under paragraph (5) of this section, obtaining custody and thereafter consenting to the operation. In re Lausterer, Superior Court, 3rd Jud. Dist., No. CP2720 (1972).

Chapter 20. Exceptional Children.

Section	Section
05. Purpose	20. Standards for assistance
10. Assistance authorized	50. Definitions

Sec. 47.20.005. Purpose. It is the purpose of AS 47.20.005 — 47.20.050 to provide appropriate public education and training for the exceptional children in this state who have not reached the age of three. To the maximum extent possible, the department shall establish a learning program which emphasizes individual needs, is home based, and involves parents in the education and training of their children. (§ 1 ch 77 SLA 1978)

Sec. 47.20.010. Assistance authorized. (a) The department shall provide professional guidance and financial assistance to organized groups of parents, nonprofit corporations, school districts, and regional educational attendance areas according to regulations adopted by the

department for providing special services, evaluation, and special training required by exceptional children.

(b) The program established under (a) of this section shall emphasize individual needs and, where possible, be home based and involve parents in the education and training of their children. (§ 2 ch 118 SLA 1961; am § 6 ch 104 SLA 1971; am § 2 ch 77 SLA 1978)

Sec. 47.20.020. Standards for assistance. The department shall assist organized parental groups, school districts, regional educational attendance areas, and nonprofit corporations which have requested assistance and have arranged for the necessary facilities and equipment for training centers for exceptional children. (§ 3 ch 118 SLA 1961; am § 3 ch 77 SLA 1978)

Secs. 47.20.030 — 47.20.040. Appropriations; purpose. [Repealed, § 6 ch 77 SLA 1978.]

Sec. 47.20.050. Definitions. In this chapter

(1) "department" means the Department of Health and Social Services;

(2) "evaluation" means the physical and mental examinations necessary to determine the extent of the handicap;

(3) "exceptional children" includes those children who have not reached age of three and whose development is significantly delayed due to mental retardation, physical, neurological, or emotional handicaps;

(4) "professional guidance" means the consultative services or other medical and educational specialists developed by the department for the education and training of exceptional children;

(5) "special service" means evaluation and special training;

(6) "special training" means (A) nursery or pre-school training to compensate for the special handicaps of exceptional children in order to prepare them, when possible, for admission to special classes in a regular school at the age determined by law, or (B) training in self-help skills, safety, social and simple occupational skills for trainable mentally retarded children of school age who are incapable of academic subjects. (§ 5 ch 118 SLA 1961; am §§ 4—6 ch 77 SLA 1978)

Revisor's notes. — Reorganized in 1984 to alphabetize the terms defined.

Chapter 21. Adventure-Based Education.

Section
10. Establishment
20. Program

SECTION 24

(C) manifests a current intent to carry out plans of serious harm to that person's self or another;

(11) "mental health professional" means a psychiatrist or physician who is licensed to practice in this state or employed by the federal government; a clinical psychologist licensed by the state Board of Psychologists and Psychological Associate Examiners; a psychological associate trained in clinical psychology and licensed by the Board of Psychologists and Psychological Associate Examiners; a registered nurse with a master's degree in psychiatric nursing, licensed by the State Board of Nursing; and a social worker with a master's degree in social work and substantial experience in the field of mental illness;

(12) "mental illness" means an organic, mental, or emotional impairment that has substantial adverse effects on an individual's ability to exercise conscious control of the individual's actions or ability to perceive reality or to reason or understand; mental retardation, epilepsy, drug addiction, and alcoholism do not per se constitute mental illness, although persons suffering from these conditions may also be suffering from mental illness;

(13) "peace officer" includes a state police officer, municipal or other local police officer, state, municipal, or other local health officer, public health nurse, United States marshal or deputy United States marshal, or a person authorized by the court;

(14) "professional person in charge" means the senior mental health professional at a facility or that person's designee; in the absence of a mental health professional it means the chief of staff or a physician designated by the chief of staff;

(15) "provider of outpatient care" means a mental health professional or hospital, clinic, institution, center, or other health care facility designated by the department to accept for treatment patients who are ordered to undergo involuntary outpatient treatment by the court or who are released early from inpatient commitments on condition that they undergo outpatient treatment;

(16) "screening investigation" means the investigation and review of facts which have been alleged to warrant emergency examination or treatment, including interviews with the persons making the allegations, any other significant witnesses who can readily be contacted for interviews, and, if possible, the respondent, and an investigation and evaluation of the reliability and credibility of persons providing information or making allegations;

(17) "state" means a state of the United States, the District of Columbia, the territories and possessions of the United States, and the Commonwealth of Puerto Rico, and, with the approval of the United States Congress, Canada. (§ 1 ch 84 SLA 1981; am §§ 26-30 ch 142 SLA 1984)

Effect of amendments. — The 1984 amendment inserted "or operated by the federal government" in paragraph (5); added the subparagraph (A) designation in paragraph (7), added "or" to the end of that subparagraph, and added subparagraph (B); reworded subparagraphs (10)(A) and (C) and paragraph (12) to remove personal pronouns; deleted "imminent and substantial" preceding "bodily harm" and substituted "behavior causing, attempting or threatening that harm" for "attempts at suicide or bodily harm" in paragraph (10)(A); substituted "harm to others" for "imminent and substantial bodily harm to one or more other persons" and the language beginning "recent behavior causing, attempting" or "behavior causing or attempting harm, including, in regard to evaluations, at least one incident within 30 days before the filing of a petition for emergency hospitalization" in paragraph (10)(B); substituted "manifests" for "demonstrates" in paragraph (10)(C); substituted "trained in clinical psychology and licensed" for "with a clinical psychology or counseling specialty licensed" near the middle of paragraph (11); and inserted "substantial" preceding "experience" near the end of paragraph (11).

Chapter 35. Private Institutions.

Section	Section
10. Powers of department	75. Licensure of providers of care for dependent adults by municipalities
20. License or permit required	90. Licensing and supervision of maternity homes
30. Authority to issue regulations	100. License required
40. Licensing	900. Definitions
55. Provisional license	
60. Records required	
70. Violations	

Sec. 47.35.010. Powers of department. (a) The department may

(1) license and supervise boarding homes, foster homes, group homes, nurseries, institutions caring for children and foster homes, group homes and institutions caring for dependent adults;

(2) investigate and supervise licensees;

(3) enforce the standards established by it;

(4) contract with private or municipal agencies to investigate and make recommendations to the department for the licensing and supervision of boarding homes, foster homes, group homes, nurseries, institutions caring for children and foster homes, group homes and institutions caring for dependent adults under procedures and standards of operation established by the department.

(b) The department shall, within 90 days after receiving a written request that it do so, delegate its powers relating to nurseries under this section and under AS 47.35.040 — 47.35.060 to a municipality which has adopted an ordinance providing for day care licensing under home rule powers or as authorized under AS 29.48.035(a)(20). A municipality to which these powers have been delegated may waive or modify any regulation or standard established by the department under the authority of AS 47.35.010 — 47.35.080 as it applies to nurseries or the application of any such regulation or standard as it applies to a particular day care licensee but must notify the department of any waiver. (§ 2 ch 17 SLA 1951; am §§ 1, 2 ch 42 SLA 1973; am §§ 1, 2 ch 253 SLA 1976; am § 1 ch 45 SLA 1977; am § 1 ch 98 SLA 1977; am § 135 ch 6 SLA 1984)

Revisor's notes. — In 1984 "former" was inserted before the reference to AS 47.35.050. That section was repealed by sec. 5, ch. 97, SLA 1982.

Effect of amendments. — The 1984 amendment changed an internal reference in subsection (b).

NOTES TO DECISIONS

Cited in *J.M.A. v. State*, Sup. Ct. Op. No. 1201 (File No. 2391), 542 P.2d 170 (1975).

Sec. 47.35.020. License or permit required. A person may not, without a license or permit to do so,

(1) maintain or conduct, for more than 90 days, a boarding home, foster home, group home, institution, or other place for the regular reception or care of children under 16 years of age, or a foster home, group home, or institution for the care of dependent adults; or

(2) engage in the business of receiving or caring for children under 14 years of age, with or without compensation, in a nursery in which five or more children not related by blood or marriage, or legal adoption, to the owner, operator or manager of the business are lodged. (§ 3 ch 17 SLA 1951; am § 3 ch 42 SLA 1973; am § 3 ch 253 SLA 1976; am § 2 ch 45 SLA 1977; am § 1 ch 97 SLA 1982)

Effect of amendments. — The 1982 amendment inserted "for more than 90 days" near the beginning of paragraph (1) and made minor changes in style.

Sec. 47.35.030. Authority to issue regulations. The department may adopt regulations and standards consistent with other requirements of law. This authority does not deny a religious group from establishing and operating an institution solely because of the prior installation or operation of another religious group in the same area. The authority to adopt regulations and standards shall be exercised to insure compliance with the intents and purpose of AS 47.35.010 — 47.35.100. The department may inspect and examine an institution, home or place, or the performance of a service. (§ 4 ch 17 SLA 1951; am § 1 ch 77 SLA 1967)

Sec. 47.35.040. Licensing. (a) The department shall issue a license to a facility if it determines that the facility has met the standards for operation set out in AS 47.35.010 — 47.35.080 and the regulations adopted under AS 47.35.010 — 47.35.080.

(b) A license is valid for two years after the date of issuance unless it is revoked or modified. The department may revoke a license or modify a license to provisional status if it determines that a facility is not in compliance with AS 47.35.010 — 47.35.080 or the regulations adopted under AS 47.35.010 — 47.35.080.

(c) The department may waive compliance with a standard set out in regulations adopted under AS 47.35.010 — 47.35.080 if an accept-

able alternative is established that meets the purpose of the provision and reasonably assures the well-being of persons in care.

(d) A license may not be transferred to a different facility or owner.

(e) The department shall give written notice of revocation or modification under (b) of this section 30 days before the effective date of the action. However, if the health or well-being of children or dependent adults is in jeopardy, the revocation or modification action is effective immediately upon the issuance of written notice by the department. (§§ 5, 8 ch 17 SLA 1951; am § 4 ch 42 SLA 1973; am § 2 ch 97 SLA 1982)

Effect of amendments. — The 1982 amendment rewrote this section.

Sec. 47.35.050. Duration of license or permit. [Repealed, § 5 ch 97 SLA 1982. For current law see AS 47.35.040(b) and (e).]

Sec. 47.35.055. Provisional license. (a) The department shall issue a provisional license to a new facility if the facility submits to the department an acceptable plan for operation that is in conformity with the provisions of AS 47.35.010 — 47.35.080 and the regulations adopted under AS 47.35.010 — 47.35.080. After the department determines that the new facility is operating in conformity with the provisions of AS 47.35.010 — 47.35.080 and the regulations adopted under AS 47.35.010 — 47.35.080, the department shall issue a license under AS 47.35.040 to the facility.

(b) The department may issue a provisional license to a facility that is licensed under AS 47.35.040 but is temporarily unable to conform to the provisions of AS 47.35.010 — 47.35.080 or the regulations adopted under AS 47.35.010 — 47.35.080.

(c) The department may issue a provisional license under (b) of this section only if the facility submits to the department an acceptable plan to bring the facility into conformity with the provisions of AS 47.35.010 — 47.35.080 and the regulations adopted under AS 47.35.010 — 47.35.080 within the time specified in the provisional license.

(d) A provisional license is valid for a period not exceeding one year from the date of issuance. The department may renew a provisional license for an additional period not to exceed one year. (§ 3 ch 97 SLA 1982)

Sec. 47.35.060. Records required. Each licensee or permit holder shall keep records regarding each child or adult in its control and care, or placed by it, which the department prescribes, and shall report to the department the facts which the department requires with reference to the children or adults. All records regarding individuals placed for care in an institution or home under this chapter are confidential and shall be safeguarded from improper disclosure by the agency or department. (§ 9 ch 17 SLA 1951; am § 4 ch 45 SLA 1977)

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Sec. 47.35.070. Violation. A person who violates a provision of AS 47.35.010 — 47.35.100 or a regulation adopted under AS 47.35.010 — 47.35.100 is guilty of a misdemeanor, and upon conviction is punishable by a fine of not more than \$200. (§ 11 ch 17 SLA 1951; am § 2 ch 77 SLA 1967)

Sec. 47.35.075. Licensure of providers of care for dependent adults by municipalities. A first or second class borough or a first or second class city outside a first or second class borough may license and supervise institutions caring for dependent adults. If a borough or city chooses not to license care providers for dependent adults, the department shall be the licensing authority; if a borough or city chooses to license care providers for dependent adults, the borough or city may exercise any power or responsibility granted to the department under this chapter and shall enforce regulations adopted by the department under AS 47.35.030. (§ 5 ch 45 SLA 1977)

Sec. 47.35.080. [Renumbered as AS 47.35.900.]

Sec. 47.35.090. Licensing and supervision of maternity homes. Maternity homes shall be licensed and supervised in the same manner as boarding homes or foster homes, nurseries and other institutions caring for children as provided in AS 47.35.010 — 47.35.080. In this section "maternity home" means an institution or place of residence whose primary function is to give care to pregnant girls or women, regardless of age, before or during confinement, or which provides care, as needed, to mothers and their infants after confinement, with or without compensation. (§ 1 ch 108 SLA 1960)

Sec. 47.35.100. License required. (a) Without a license issued by the department in accordance with its regulations a person may not operate an agency providing any of the following services:

- (1) the placement of children for foster home care;
- (2) the placement of children for adoption; or
- (3) individual and family counseling.

(b) The license shall remain in effect until revoked for cause. The department shall give written notice of revocation at least 90 days before the effective date of the revocation.

(c) In this section "agency" does not include an individual who occasionally provides the services set out in (a) of this section. (§ 4 ch 77 SLA 1967)

Sec. 47.35.900. Definitions. In this chapter

(1) "boarding home or foster home" means an establishment providing regular care for less than six children not related by blood or marriage to the foster parent;

(2) "department" means the Department of Health and Social Services;

(3) "facility" means the administration, program, and physical plant of a nursery caring for children, or a foster home, group home, or institution caring for children or dependent adults;

(4) "group home" means a small establishment providing care and services for 10 or fewer children not related by blood, marriage or legal adoption to the foster parent and which is

- (A) noncontiguous to another institution; and
- (B) stresses normal family living.

(5) "institution" means an establishment providing regular care and services for 11 or more children not related by blood or marriage to the owner or operator;

(6) "nursery" means an establishment providing care and services for any part of the 24-hour day for a child not related by blood or marriage to the owner or operator, but does not include any establishment whose primary purpose is educational. (§ 1 ch 17 SLA 1951; am § 3 ch 77 SLA 1967; am § 1 ch 69 SLA 1971; am § 6 ch 104 SLA 1971; am §§ 6, 7 ch 42 SLA 1973; am § 4 ch 97 SLA 1982)

Revisor's notes. — Formerly AS 47.35.080. Renumbered in 1984. Reorganized in 1984 to alphabetize the terms defined.

Effect of amendments. — The 1982 amendment added paragraph (3).

Chapter 37. Uniform Alcoholism and Intoxication Treatment Act.

Section	Section
10. Declaration of policy	cuted persons and persons incapacitated by alcohol
20. Office of alcoholism and drug abuse	180. Emergency commitment
30. Powers of office	190. Involuntary commitment of alcoholics
40. Duties of office	200. Hearing on petition for involuntary commitment of alcoholics
50. Interdepartmental coordinating committee	210. Records of alcoholics and intoxicated persons
60. Review board on alcoholism	220. Visitation and communication of patients
70. Composition	230. Establishment of emergency service patrol
80. Qualifications of board members	240. Payment for treatment
90. Term of office and vacancies	245. Wages of patients
100. Compensation, per diem, or expenses	250. Nonapplicability
110. Duties	260. Application of Administrative Procedure Act
120. Alcoholism program coordinator	270. Definitions
130. Comprehensive program for treatment; regional facilities	
140. Public and private treatment facilities	
150. Acceptance for treatment	
160. Voluntary treatment of alcoholics	
170. Treatment and services for intoxi-	

Revisor's notes. — AS 47.37.070 — 47.37.270 were enacted as AS 47.37.062 — 47.37.210. Renumbered in 1972

Collateral references. — 41 Am. Jur. 2d, Incompetent Persons, § 7. 28 C.J.S., Drunkards, § 1 et seq

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RAPE IN MARRIAGE
by Diana E.H. Russell

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Clearinghouse Review

National Clearinghouse for Legal Services

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Massachusetts husbands have been convicted of rape of their estranged wives.² There are no reported cases regarding marital rape in Mississippi, Virginia and the District of Columbia.

Lobbying efforts to end this archaic and sexist "marital right" or protection afforded husbands have been hard fought and, to a large extent, unsuccessful. Opposition to legislative efforts is being met with the following typical arguments:

...the state of Florida has absolutely no business intervening into the sexual relationship between a husband and a wife.... We don't need Florida invading the sanctity and the intimacy of a husband and wife's sexual relationship. [Rep. Tom Bush, Ft. Lauderdale, Fla., Transcript of Floor Debate on House Bill 680, at 3-4, May 29, 1980];

...the Bible doesn't give the state permission anywhere in that Book for the state to be in your bedroom, and that is just exactly what this bill has gone to, its meddling in your bedroom, the State of Florida, as an entity, deciding what you can do and what you can't do. [Rep. John Mica, Winter Park, Fla., Transcript of Floor Debate on House Bill 680, at 6, May 29, 1980];

...But if you can't rape your wife, who can you rape? [California State Senator Bob Wilson, addressing a group of women lobbyists regarding California's Marital Rape Bill AB 546, Spring 1979].

To date, only three states have totally abolished the marital rape exemption. The express exemptions in Oregon and Nebraska statutes were stricken (Neb. Rev. Stat. §§28-319, 28-320, effective 1976, repealing and replacing §§28-403.03 and §28-403.04; Or. Rev. Stat. §163.305, amended by 1977 c. 644). New Jersey legislators went one step further in abrogating the marital rape exemption by including an express statutory provision that "no actor shall be presumed to be incapable of committing [sexual offense] because of . . . marriage to the victim." (N.J. Stat. Ann. §2C:14-5(b), effective Sept. 1, 1979). Additionally, the exemption has been deleted in most, but not all, cases in California (Cal. Penal §262, effective Jan. 1, 1980, establishing a separate crime of spousal rape), Minnesota (Minn. Stat. Ann. §609.349, amended in 1980, deletes the exemption in most cases), and Iowa (Iowa Code Ann. §709.2-709.4, exemption deleted from first and second degree sexual abuse; exemption retained in third degree).

Delaware and Hawaii have amended their rape statutes by deleting the marital rape exemption on one hand, but then granting an exemption to a previously unprotected class of defendants. In Delaware the marital exemption was deleted from first and second degree rape (Del. Code Ann. §§763, 764). However, in first degree rape the marital exemption was replaced with an exemption for "voluntary social companions" (*sec infra*). The Hawaii legislature amended its rape

statutes to provide for gender neutral terms, and in so doing deleted the marital rape exemption. However, like Delaware, a "voluntary social companion" exemption was included in first degree rape (Hawaii Rev. Stat. §707-730).

Expansion of the Marital Rape Exemption

The marital rape exemption has traditionally only applied to, and protected, husbands in legally valid marriages. Various theories, in addition to Hale's "matrimonial consent," have been subsequently offered as the basis for this marital right or privilege of rape: the "unity of person" common-law doctrine, whereby the legal identity of a woman merged upon marriage into that of her husband and made rape by her husband legally impossible since he could not rape himself; or the position of women as property or chattel of their husbands meant that a husband's rape of his wife was merely making use of his own property. All of these "rationales" underlying the marital rape exemption depended upon and required a valid marriage contract.

Exemption for Unmarried Cohabitants

While efforts to abolish the marital rape exemption are meeting strong resistance, legislators in 13 states (Alabama, Connecticut, Delaware, Hawaii, Iowa, Kentucky, Maine, Minnesota, Montana, North Dakota, Pennsylvania, Texas, West Virginia) have extended this "privilege of marriage" to unmarried persons. Eleven of these states extend the marital rape exemption to persons living together who are not married to each other (*i.e.*, cohabitation relationships). For example, Montana provides that "...the exclusion shall be deemed to extend to persons living as man and wife, regardless of the legal status of their relationship." Mont. Rev. Codes Ann. §45-5-506(2). *See also* Alabama (Crim. Code §13A-6-60(4)); Delaware (Code Ann. §772(b); Iowa (Code Ann. §709.4, exemption only for third-degree sexual abuse); Minnesota (Stat. Ann. §609.342, exemption only for statutory rape and specified cases involving handicapped couples); Pennsylvania (Stat. Ann. Title 18 §3103); Texas (Penal Code §21.12). In West Virginia (Code §61-8B-1(2)) and Kentucky (R.S.A. §510.010(3)) "marriage" is defined in the criminal statute to include unmarried cohabiting persons. Connecticut (Penal Code §53a-67(6)) and Maine (R.S.A. Title 17-A §252.2) expressly provide that cohabitation shall be an affirmative defense to rape.

The expansion of the marital rape exemption to cover unmarried cohabitants is "justified" in the Practice Commentary following Texas Penal Code §21.12:

Adults cohabiting may terminate their relationship if one dislikes the other's sexual conduct, and there is no justification for the criminal law's intrusion into the relationship. This section restates and expands the prior law's recognition of this commonsense notion, which was reflected in [Texas] Penal Code art. 1183's definition of rape to exclude sexual intercourse between husband and wife.

While men in these unmarried cohabiting relationships are increasingly being granted the "marital privilege" of rape, women in these relationships have fared far worse in their attempts to obtain privileges of marriage such as spousal sup-

2. Commonwealth v. Chretien, No. 99983-84, 85 (Essex County Superior Court, Mass.; Sept. 1979); People v. Finley, No. CRC 80-877 (Criminal Division, Pinellas County Circuit Court, Florida; Apr. 1980).

The Marital Rape Exemption In the Criminal Law

The battered women's movement has brought to public light the abuse and violence women suffer from their husbands, ex-husbands, male mates and ex-mates. Researchers and advocates on behalf of battered women have realized that this violence includes severe physical abuse as well as non-physical violence such as threats of severe harm or degradation. Until recently, however, rape of women by their husbands and male mates has remained a silent and hidden crime. Men's right to rape their wives is in fact not a crime in most states. The legal right of marital rape is known as the "marital rape exemption" and is embodied in state criminal statutes as well as the Model Penal Code (sections 213 *et seq.*). There has been limited progress towards the erosion of the marital rape exemption, but this has been more than offset by the significant extension of the exemption to additional classes of defendants.

The legal system has been and continues to be a not-so-silent partner to this "marital right" of violence. Historically, battering and rape of wives has been recognized as a husband's legal right. The legal system's condonation of wife-beating was expressed in 1824 by the Mississippi Supreme Court which held that a "husband should be permitted to chastise his wife moderately in cases of great emergency 'without subjecting himself to vexatious prosecution for assault and battery, resulting in the discredit and shame of all parties concerned.'" *Bradley v. State*, 2 Miss. (Walker), 156, 158. Other states limited the husband's common law right to beat his wife by the "Rule of Thumb": He was allowed to beat her as long as the stick was "no thicker than his thumb." Prosser, *Handbook of the Law of Torts*, 136 (4th ed. 1971). Since the mid-1800's, wife-beating has been a crime in every state, yet these laws have not been enforced against battering husbands or boyfriends. Today, this "marital right" is upheld in the policies of noninvolvement by the courts, nonarrest by police, and nonprosecution by district attorneys.

The principle that a husband cannot, as a matter of law, rape his wife first appeared in written English Law in the 18th century and was stated in the following manner:

But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given herself in this kind unto her husband which she cannot retract. 1 Hale, *History of the Pleas of the Common Crown* 629 (1736 ed.).

Lord Matthew Hale authored this alleged common-law rule with absolutely no supporting authority. Lord Hale's misogyny was not, unfortunately, restricted to the area of marriage. His infamous statement that rape is a charge "easily to be made and hard to be proved, and harder to be

defended" (1 Hale, *The History of the Pleas of the Crown*, 635 (1978)) is preserved in state jury instructions (see 61 Cal. L.R. 919, 931-932 (1973)). Additionally, Hale played a significant role in the persecution of witches in England. For a thorough analysis and discussion of the lack of support for this alleged common-law rule see Drucker, *The Common Law Does Not Support A Marital Exception for Forcible Rape*, 5 Women's Rights L. Rep. 181 (1979).

Present Status of the Marital Rape Exemption

Today, a husband's "marital right" to rape his wife is expressly recognized in at least 37 states. Husbands are afforded this right through an express statutory exemption provided in state criminal statutes.

(a) A male person of the age of 14 years and upwards who has sexual intercourse with a female, *not his wife*, by force and against her will, commits rape. (Emphasis added). Ill. Ann. Stat., ch. 38, §11-1 (1977).

In 10 states (Alabama, Connecticut, Illinois, Kansas, Oklahoma, South Dakota, Texas, Vermont, West Virginia and Washington)¹ the statutory marital rape exemption is absolute. It applies regardless of whether the parties are living apart voluntarily or by court order; only a final decree of divorce terminates the exemption:

In 27 states certain limitations are placed upon the statutory marital rape exemption. These limitations reflect the varying degrees in which states recognize a wife's intent to extricate herself from the marriage as a basis for limiting the exemption. In 11 states (Kentucky, Louisiana, Maryland, Missouri, New York, North Carolina, North Dakota, Rhode Island, South Carolina, Utah and Wyoming) the statutory exemption is denied to a spouse once a judicial decree or order of separation is entered. The exemption still applies, however, when the spouses are living apart, and/or legal action to terminate the marriage is pending. In six states (Indiana, Michigan, Nevada, Ohio, Tennessee and Wisconsin) the marital exemption ends when the spouses are living apart and a petition for annulment, divorce or separation has been filed. In 10 states (Alaska, Arizona, Colorado, Idaho, Iowa, Maine, Montana, New Hampshire, New Mexico and Pennsylvania) the marital rape exemption ends once the parties are living apart; no court order is required.

Rape statutes in seven jurisdictions (Arkansas, Florida, Georgia, Massachusetts, Mississippi, Virginia and the District of Columbia) contain no express marital exemption. Whether the alleged common-law exemption applies in these states, thereby barring prosecution of husbands for marital rape, remains a matter of judicial decision and legislative intent. Arkansas and Georgia provide express marital exemptions for statutory rape (Ark. Stat. §§41-1804-1806; Ga. Code Ann. §26-2018) but not forcible rape (Ark. Stat. §§41-1801, 1803; Ga. Code Ann. §26-2001). It is therefore arguable that the legislatures of these states did not intend a common-law exemption to apply when the statute is silent. In Florida and

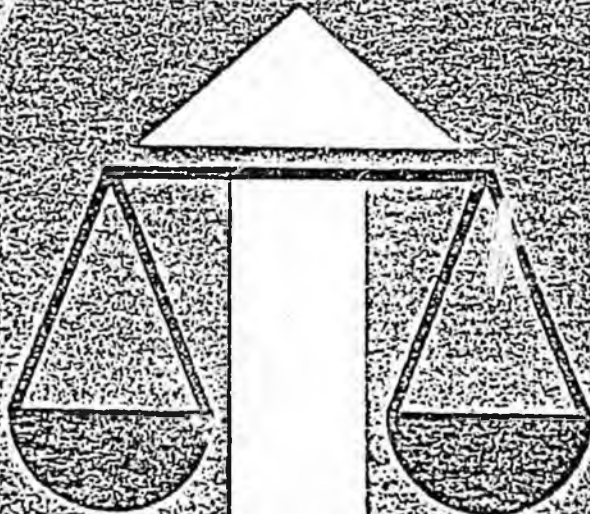
1. Citations to state statutes are available upon request from the National Center on Women and Family Law.

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change it. The Appellate Division affirmed the dismissal. As a result of these actions, the New Jersey Legislature amended its rape statute in 1979 to provide expressly that marriage to the victim was not a defense to the charge of rape. N.J. Stat. Ann. 2C: 14-5(b).

On February 10, 1981, the Supreme Court of New Jersey reversed the trial court's dismissal and reinstated the rape count against the defendant. (The decision should be useful in those states that do not have express spousal provisions in their rape statutes.)³

The New Jersey court first examined the history of Hale's Doctrine, concluding that:

Without deciding whether an exemption existed in any situations at all, we think that it was not meant to exist during the entire legal duration of a marriage. Therefore, we decline to apply mechanically a rule whose existence is in some doubt and which may never have been intended to apply to the factual situation presented by this case. (Emphasis added.)

The court went on to discuss the three major justifications for a common law marital exemption: Women as the property of their husband or father; the "unity concept" whereby husband and wife became one person upon marriage, and a husband could therefore not be charged with rape of himself; and the contractual consent rationale, whereby a woman upon entering a marriage contract consented to sexual intercourse with her husband. The court held that none of these justifications were viable today given the enactment of laws which recognized married women as independent citizens (e.g. Married Women's Property Acts; abolition of spousal tort immunity; women's right to make their own choices regarding reproduction). The court held that New Jersey's no-fault divorce law made Hale's contractual consent rationale (see discussion below) inapplicable:

By separating from her husband and living apart for 18 months, a wife is entitled to a divorce without further proof of proper grounds. The corollary of this right is that a wife can refuse sexual intercourse with her husband during the period of separation. If a wife has a right to refuse intercourse, or deny consent, then a husband's forcible carnal knowledge of his wife clearly includes all three essential elements of the crime of rape.

The court held that, given the separation of the parties, the defendant could not claim that his wife consented to have sexual intercourse with him. "Whether or not any other husband could have based a defense on such implied consent — a proposition that we doubt seriously but do not decide — this husband could not."

The New Jersey court limited its decision to the facts of the *Smith* case. Because of the 1979 revision of the rape statute, the court did not need to go beyond the *Smith* facts.

3. ARK. STAT. ANN. § 41-1801, -1803 (1976); FLA. STAT. ANN. § 794.011 (1979); GA. CODE ANN. § 26.2001 (1978); MASS. ANN. LAWS ch.265, § 22, ch. 277, § 39 (1979) (Michie/Law Co-op); MISS. CODE ANN. § 97-3-65(2) (1979); VA. CODE § 18.2-61 (1979 Supp.); D.C. CODE ANN. § 22-2801 (1967).

Yet the court made clear its distaste for the alleged common law exemption:⁴

The enactment of the new Criminal Code has made it unnecessary for this court to discuss at length all the inequities of a medieval rule that denies some women protection against sexual attack and treats them as sexual property of their husbands....

But neither was the law of this State under the former rape statute as blind to personal liberty and privacy as defendant would have this court believe. A man separated from his wife — and perhaps one not separated — could not invoke an outdated and doubtful rule to avoid prosecution for rape simply because he was still legally married to his victim.

Commonwealth v. James K. Chretien

On September 21, 1979, defendant-husband was convicted by a jury of raping his wife and breaking and entering her home. Defendant received a three- to five-year prison sentence and three years' probation after release. At the time of the incident, defendant and victim were separated pursuant to a preliminary divorce decree that had not yet become final. At trial, defendant claimed that he could not be prosecuted for the rape of his wife because of the common law spousal exemption which, he asserted, still applied despite the preliminary divorce decree. The trial court denied his motion for dismissal. The Supreme Judicial Court, on March 9, 1981, unanimously affirmed the conviction.

In its opinion, the court first analyzed the history of the common law exemption. It examined various Massachusetts rape statutes, beginning with the colonial laws of 1649. The court held that the legislature's comprehensive revision of the rape laws in 1974 was intended to criminalize marital rape and eliminate any spousal exemption.

In examining the 1974 revisions, the court noted that "the rape statutes themselves contain no statement of legislative intent or policy concerning the spousal exclusion." However, the court found that the legislature's enactment of domestic violence legislation in 1978 expressed the legislature's intent to criminalize marital rape:

This act [Domestic Violence Act] provides a wide range of remedies for "abuse" and expressly defines "abuse" to cover involuntary sexual relations engaged in by spouses when one spouse is made to submit by force, threat of force or duress.... We think that G.L.C.209A [Domestic Violence Act] provides us with a clear legislative statement of public policy which...reflects the intent of the Legislature to criminalize such conduct.

4. NCOWFL filed an amicus brief arguing that Hale's Doctrine, by its terms, constituted sex discrimination because it excluded one class of women victims (those married to the rapist) from the protection of the criminal laws. *New Jersey v. Smith*, *supra* note 1 (Amicus brief, filed by NCOWFL on behalf of New Jersey). Clearinghouse No. 30,489A. If Hale's Doctrine were read into the statute by the court, the otherwise constitutional statute would violate the equal protection clause. Although the court in *Smith* discussed this theory during oral argument and alluded to it in its opinion, the case was decided on other grounds.

AFDC and SSI recipients on emergency room and hospital outpatient services whenever it would promote "more cost-efficient utilization." The Secretary could also permit states to share the cost-savings generated by the Medicaid recipients' enrollment in a more cost-effective system of medical care as long as "the waiver is not inconsistent with the purposes of the Medicaid Act."

G. Conclusion

As we have discussed in previous columns, state Medicaid agencies were experiencing large deficits and cutting back on benefits and services before the Reagan administration proposal to cap Medicaid. This \$1.2 billion cut in available federal matching will compound the problems facing state Medicaid administrators.

The prime villain in rising Medicaid costs has been generalized inflation in the health care industry. Because of federal reimbursement policies for hospitals and nursing homes, which account for 80 percent of Medicaid expenditures, the national phenomenon of health care inflation has been passed through to the Medicaid program. Many state agencies have found it easier to cut eligibles and services than to control hospital and nursing home rates.

The Administration's flexibility proposals would give the National Governor's Association and the State Medicaid Directors virtually every mechanism which they have asked for to control the rate of increases for nursing home and hospital costs. It also proposes to give them vast and potentially very dangerous authority to rewrite their Medicaid programs. This new authority may set off a new fight in the states as state administrators seek to redistribute Medicaid funds to meet the states' needs for fiscal relief, as the hospital and nursing home lobbies seek to preserve their rate structures, and as recipients seek to preserve their services and eligibility. Moreover, because Medicaid programs could now be designed which maximize services to the elderly while minimizing eligibility and services for children and the disabled, fights among the poor over the allocation of Medicaid dollars would become a real possibility. It is vital that advocates begin to evaluate the problems posed by the new "flexibility," and address them together, equitably and fairly.¹⁵

15. For further information about these developments, please contact Michael Parks and Lucien Wulsin, Jr., in NHeLP's West Coast office, or David Cnavkin and Judith Waxman at NHeLP East.

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Battered Women Score Major Victories in New Jersey and Massachusetts Marital Rape Cases

The highest courts of New Jersey and Massachusetts recently declared that no common law marital rape exemption exists in their states' rape statutes and husbands thus can be prosecuted for rape of their wives. These landmark decisions establish that a married woman's right to be a separate person under the law extends to her personal, sexual self-determination; she cannot legally be compelled to have sexual relations with her husband against her will. The effect of these holdings is to extend the equal protection of the criminal law to battered wives.

*State of New Jersey v. Smith*¹ (hereinafter *Smith*) and *Commonwealth v. Chretien*² (hereinafter *Chretien*) both involved interpretations of rape statutes that did not contain an express spousal exemption. Defendant-husbands claimed that, although the statutes were silent as to spousal exclusion, a "common law marital exemption" was incorporated by impli-

cation into the statutes and the husbands therefore could not be prosecuted for rape of their wives. Prosecutors for the states argued that a common law exemption never existed, and even if it did, the exemption would not apply to the current revised rape statutes. The New Jersey and Massachusetts courts, while analyzing the history and doubtful validity and existence of the alleged common law exemption, based their holdings on narrower grounds. Both courts held that, even if an exemption existed at common law, it was not now a part of the rape statutes so as to exempt defendant-husbands from prosecution and conviction for rape of their spouses.

State of New Jersey v. Albert Smith

On January 5, 1976, defendant-husband was charged with rape of his wife, atrocious assault and battery, private lewdness and impairing the morals of a minor (his son). Defendant moved to dismiss the rape charge on the ground that he was legally married to the victim at the time of the incident.

At the time of the alleged rape, defendant and victim had been living apart in different cities. Court proceedings for divorce or separation had not been initiated, nor had the parties entered into a formal separation agreement.

The trial court reluctantly granted defendant's motion to dismiss, 148 N.J. Super. 219 (Law Div. 1977), believing that a common law marital exemption was incorporated into the state's rape statute. Although the trial judge expressed unequivocal disapproval of such an anachronistic rule of law, he considered it the prerogative of the legislature to

1. *New Jersey v. Smith*, No. 16246 (N.J. Sup. Ct., Feb. 10, 1981). Clearinghouse No. 30,489B.

2. *Commonwealth v. Chretien*, No. E-2276 (Mass. Sup. Jud. Ct., Mar. 9, 1981). Clearinghouse No. 31,388.

In reality, marital rape is often *more traumatic* than stranger rape. When you have been intimately violated by a person who is supposed to love and protect you, it can destroy your capacity for intimacy with anyone else. Moreover, many wife victims are trapped in a reign of terror and experience repeated sexual assaults over a period of years. When you are raped by a stranger you have to live with a frightening memory. *When you are raped by your husband, you have to live with your rapist.*

(Testimony and Statement to the Judiciary Committee, New Hampshire State Legislature on March 25, 1981, in support of HB 516, bill to remove spousal exception to sexual assault offenses.)

Until recently legislators and the legal system in general have refused to consider marital rape as a crime rather than a "right" of marriage. Thirty-seven states continue to recognize a husband's "marital right" to rape his wife through an express statutory exemption provided in state rape statutes.¹⁰ Since 1976, legislatures in California, Connecticut, Minnesota, Nebraska, New Jersey, and Oregon have removed the marital rape exemption from their criminal statutes so as to permit rape prosecution of spouses in all or most circumstances.¹¹ Similar legislation in New Hampshire is awaiting signature by the Governor. By their decisions, New Jersey and Massachusetts now join this small but growing number of states that have criminalized rape of a woman by her husband.

Criminalization of marital rape, either by court decision, as in New Jersey and Massachusetts, or by legislation, has

significant legal and social ramifications. Criminalization notifies the victim that rape is not a part of her marriage contract, nor is it her "wifely duty" to submit to such violence. Criminalization serves as a deterrent to domestic violence by notifying otherwise law-abiding husbands that their acts are crimes, not "rights." Criminalization will allow poor women to obtain publicly funded abortions which, in many states, are only available when the pregnancy is caused by legally recognized rape or incest. Criminalization of marital rape will allow a woman to get out of a violent marriage by permitting the rape to serve as grounds for divorce.¹² Criminalization will protect children by requiring courts hearing custody trials to consider the criminal rape as evidence of parental unfitness.¹³ Finally, criminalization will permit battered women, who have been forced to kill their abusive husbands, to use the rape as a basis for a self-defense claim in a prosecution for murder.¹⁴

The role of criminal law in our society is to label those behaviors which are so reprehensible that a civilized society will not tolerate them. Rape of a woman is such behavior and should be so labeled in all cases, even if the victim happens to be married to the rapist.

Joanne Schulman,
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10. See *The Marital Rape Exemption in the Criminal Law*, 14 CLEARINGHOUSE REV. 538 (Oct. 1980); State-by-State Summary of Marital Rape Exemption and Resource Packet, available from NCOWFL.

11. Information on legislation to repeal the marital rape exemption is available from the National Clearinghouse for Marital Rape, 2325 Oak St., Berkeley, CA 94708, (415) 548-1770. This is a nonprofit, membership organization. Requests for information or assistance must be accompanied by a self-addressed, stamped envelope and tax-deductible membership fee.

12. The *New York Times* recently reported an incident where a woman seeking an order of protection in New York's Family Court was told by the judge, when she attempted to bring up the rape by her husband, that "I don't want to hear about these things. You're a married woman." Barden, *Confronting the Moral and Legal Issue of Marital Rape*, N.Y. Times, June 1, 1981, §B, at 5.

13. See, e.g., *Jarrett v. Jarrett*, 78 Ill.2d 337, 400 N.E.2d 421 (1979), cert. denied, 49 U.S.L.W. 3286 (Oct. 21, 1980). In *Jarrett*, the court considered the parent's violation of a criminal fornication statute as evidence in a custody battle.

14. See, e.g. Priem, *Marital Rape: What Happens When Women Fight Back?*, 3 NEW WOMEN'S TIMES (May 1981); Schneider and Jordan, *Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault*, pamphlet available from the Center for Constitutional Rights, 853 Broadway, New York, NY 10003, (212) 674-3303.

For battered women's advocates, the impact of this finding is extremely important. By expressly including sexual abuse in domestic violence legislation, a foundation is laid for the elimination of the marital rape exemption.

The Massachusetts decision went further than that of the New Jersey court. It did not limit the opinion to only those rapes occurring after the entry of a preliminary divorce decree or occurring after the spouses had separated. By holding that the 1974 revisions eliminated the spousal exemption altogether, spouses in ongoing marriages, even while living together, are subject to prosecution under the 1974 revised Massachusetts rape statute.

Hale's Doctrine: Common Law or One Man's Opinion?

At issue in *Smith* and *Chretien* was whether a rape statute that did not include an express provision exempting spouses (i.e., a "silent statute") incorporated an alleged common law principle that:

[T]he husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract....[I]n marriage she hath given up her body to her husband....⁵

This statement, known as Hale's Doctrine, first appeared in a treatise (not a case) written by Lord Matthew Hale, a 17th century English jurist. Lord Hale provided no supporting authority for his statement, and this lack of authority was subsequently criticized by several English justices.⁶

Prior to *Smith* and *Chretien*, Hale's unsupported statement was accepted as part of the common law without question by American legislatures, courts and criminal law authorities. The New Jersey court in *Smith*, pointed out that:

[t]he marital exemption rule expressly adopted by many of our sister states has its source in a bare, extra-judicial declaration made some 300 years ago. Such a declaration cannot itself be considered a definitive and binding statement of the common law, although legal commentators have often reserved the rule since the time of Hale without evaluating its merits, (citations omitted). (*Smith*, slip op. at 9.)

Prior to *Smith* and *Chretien*, Hale's Doctrine had only been raised in the United States in two Texas cases, and went unchallenged.⁷ In *Frazier v. State*, 48 Tex. Crim. 142, 86 S.W. 754 (1905), the court simply held that "so far as we are aware all of the authorities hold that a man cannot himself be guilty of actual rape upon his wife." (at 143). *Frazier* was the basis for the holding in the second case, 41 years later. *State v. Duckett*, 149 Tex. Crim. 100, 191 S.W. 2d 879 (1946). Thus, the Massachusetts court, in *Chretien*, accurately stated that:

[W]e have never been directly presented with the question of whether any rape statute preceding that enacted in 1974 encompassed the common law exception.... (*Chretien*, slip op. at 7).

Unfortunately, both the New Jersey and Massachusetts courts refused to decide the threshold question of whether Hale's Doctrine constituted part of the common law. While both courts severely criticized the validity and existence of the doctrine, they based their holdings on the assumption that an exemption was part of the common law. As the Massachusetts court explained in the beginning of its decision, "To assume otherwise would terminate our discussion by resolving the question against the defendant." (*Chretien*, slip op. p. 8, fn. 5).

However, in future cases challenging the existence of a common law marital rape exemption, the *Smith* and *Chretien* decisions will prove invaluable. These two decisions now stand as the leading case law on the issue in the United States. Neither court found or held that a marital rape exemption exists under common law. Instead, both courts, and especially the New Jersey court, severely criticized and questioned its existence.

These two decisions make clear that regardless of whether such an exemption existed at common law, there is no place in today's society, given today's laws, for such a concept.

The personal liberty of women and the recognition of them as independent citizens under the law had developed beyond question through legislative and judicial actions over more than a century....No person in this State in 1975 could justifiably claim that a man had a legal right to impose his sexual will forcefully and violently on a woman, even if it was his wife, over her unmistakable objection. (*Smith*, slip op. at 25-26).

Conclusion

Rape of a woman by her husband is not a bizarre, unusual or isolated act. Rather, marital rape is a problem of serious magnitude and consequence. Professor Richard Gelles, sociologist at Rhode Island University who has done extensive research on battered women, has estimated that the number of women in the United States who are raped by their husbands, as part of a beating or as a sequel to it, could be well over two million.⁸ Over one third of the women who appear at battered women's shelters report having been sexually assaulted by their husbands.

Studies of marital rape victims⁹ show that these women suffer severe and long-lasting psychological harm as a result of these rapes. Dr. David Finkelhor, Assistant Director of the Family Violence Research Program at the University of New Hampshire and author of *Forced Sex in Marriage: A Preliminary Research Report* (March 1980), explained the devastating effects of marital rape on victims when he testified before the New Hampshire Legislature:

5. 1 HALE, PLEAS OF THE COMMON CROWN 628-29 (1736).

6. See, e.g., *New Jersey v. Smith*, *supra* note 1, at 12n.3; *Commonwealth v. Chretien*, *supra* note 2, at 5n.1.

7. *Duckett*, *The Common Law Does Not Support a Marital Exception for Forcible Rape*, 5 WOMEN'S RIGHTS L. REP. 181,182 (1979).

8. Hershey, Jan. 1, 1979, at 2.

9. For a survey and discussion of marital rape studies see *New Jersey v. Smith*, *supra* note 4 (amicus brief by NCOFWL).

it is a landmark case that lays the groundwork for future constitutional challenges to the marital rape exemption. In reaching its decision that New York's marital rape exemption violates the rights of married women under the equal protection clause, the court examined and rejected the traditional justifications for the exemption. In clear and powerful language, the court went further than any previous tribunal in pointing out the absurdity and inherent sexism of the exemption and the arguments used to defend it.

The couple in *De Stefano* were separated after 14 years of marriage. Defendant husband had moved out of the marital home in June 1982. On November 3, 1982, the wife obtained a temporary order of protection requiring defendant to remain away from the marital home at all times and to refrain from acts or threats of physical violence towards her. On November 27, 1982, defendant allegedly entered the family residence in violation of the order of protection and raped his wife at knifepoint. Defendant, who was charged with first degree rape and first degree burglary, moved to dismiss the rape indictment.

Defendant husband challenged the constitutionality of New York's rape statute. Because the spouses were living apart at the time of the attack and the victim-wife had obtained an order of protection, the husband was considered "not married" under New York's spousal exemption.¹³ Defendant claimed that his equal protection rights were violated because New York law deprived him of the right to nonconsensual sexual intercourse with his wife, a right the law granted to other husbands. Defendant also claimed that New York's rape law violated his due process rights by failing to notify him that he was not allowed to engage in nonconsensual sexual intercourse with his estranged wife and that such action could result in a rape charge. Defendant "thus presented the court with a rare opportunity to examine the validity of the exemption" and to determine whether it violated the equal protection rights of married women.¹⁴

The court's opinion began with a quote from John Stuart Mill: "Marriage is the only actual bondage known to our law. There remains no legal slaves, except the mistress of every house."¹⁵ The court then examined the traditional justifications for the marital rape exemption and concluded that none of them constituted a governmental interest sufficient to meet any of the three tests associated with equal protection analysis. The court began with an examination of the origins of the marital rape exemption, Hale's Doctrine.¹⁶ The court found that the doctrine

was not judicial authority and thus "should not have been considered a binding and definitive statement of the common law."¹⁷

The court then reviewed the arguments used to sustain the marital rape exemption, focusing on the central rationale of "implied consent" whereby upon marriage a woman irrevocably consents to sexual intercourse with her husband and relinquishes the right to say "no" in any and all situations. The court held the "implied consent" theory invalid because of the recognized constitutional right of a woman to have an abortion and use birth control without her husband's approval. The court concluded that the "logical extension" of those rights is that a woman has the right to refuse the physical act that leads to pregnancy and that a woman's right "to individual autonomy and to control procreation are but part of the more comprehensive right to bodily integrity."¹⁸

In examining the other justifications offered for the marital rape exemption, the court dismissed the theory that a wife is the property of her husband as having "no validity" in the United States.¹⁹ The court rejected the related theory that, upon marriage, husband and wife become one legal entity and that a man cannot therefore be guilty of raping himself. In so ruling, the court noted that a wife's separate legal identity was established as long ago as 1848 by the "Married Women's Act."

The court also addressed defendant's argument that the abandonment of the marital rape exemption would cause insurmountable evidentiary problems and invite fabricated complaints of marital rape. The court noted that lack of consent is the most difficult element to prove in all rape cases, not merely interspousal rape cases, and that fabricated complaints of marital rape would be unlikely because of the stigma society attaches to rape victims. The court also pointed out that false reports of other crimes occur, but "[o]nly in marital rape do we remove an entire class of potential victims from the protection of the law in order to protect some abstract possibility of a false claim that the criminal justice system is unable to deal with appropriately."²⁰

The court also dismissed as "ludicrous" the argument that the prosecution of husbands for raping their wives would impede reconciliation of marriages.²¹ The court rejected the argument that other remedies are available to victims of interspousal rape, since the victim had already obtained an order of protection before being raped at knifepoint.

Finding that there was no governmental interest or basis for the marital rape exemption the court struck down New

12. *Cont'd from p. 745*

who are living apart pursuant to "(i) order issued by a court of competent jurisdiction which by its terms or in its effect requires such living apart, or (ii) decree or judgment of separation, or (iii) written agreement of separation... which contains provisions specifically indicating that the actor may be guilty of the commission of a crime for engaging in conduct which constitutes an offense prescribed by this article against and without the consent of the female."

13. N.Y. Penal Law § 130.00(4) (b) (i); see *supra* note 12.

14. *De Stefano*, 467 N.Y.S.2d at 509.

15. J.S. Mill, *The Subjection of Women* (1869).

16. "[T]he husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract... [I]n marriage she hath given

16. *Cont'd*

up her body to her husband..." 1 HALE, PLEAS OF THE CROWN 628-29 (1736). This statement, known as Hale's Doctrine, first appeared in a treatise (not a case) written by Lord Matthew Hale, a 17th century English jurist. Lord Hale provided no supporting authority for his statement; this lack of authority was subsequently criticized by several English justices.

17. *De Stefano*, 467 N.Y.S.2d at 510.

18. *Id.* at 513-14.

19. *Id.* at 512.

20. *Id.* at 515.

21. *Id.*

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Florida, New York, and Virginia Courts Declare Marital Rape a Crime

Introduction

Rape is a serious felony; in most states, it is second in seriousness only to homicide. In the last decade, battery of a wife has been recognized as a serious and widespread crime that leaves millions of women and children in this country physically and emotionally scarred. Consequently, it may seem surprising that marital rape has not received serious attention. Many people do not consider a husband's forced sexual intercourse with his wife rape. In most states, this behavior is legally protected.

In fact, marital rape is a form of rape. It has the "brutality and terror and violence and humiliation to rival the most graphic stranger rape."¹ It is a traumatic experience; in many cases, more traumatic than stranger rape.

When you have been intimately violated by a person who is supposed to love and protect you, it can destroy your capacity for intimacy with anyone else. Moreover, many wife victims are trapped in a reign of terror and experience repeated sexual assaults over a period of years. When you are raped by a stranger you have to live with a frightening memory. When you are raped by your husband, you have to live with your rapist.²

Like battery of a wife, marital rape is not uncommon. While statistics are few,³ Diane Russell's study, published in

*Rape and Marriage*⁴ found that 14 percent of the women surveyed were victims of rape or attempted rape by their husbands or ex-husbands.⁵ Indeed, "[s]exual assaults by husbands were the most common kinds of sexual assault reported, occurring over twice as often as sexual assault by a stranger."⁶

Legislatures have been slow to recognize the problem. As of January 1984, the rape laws of 28 states still provide an express marital rape exemption; only 8 states have entirely abandoned the exemption.⁷ The courts, however, have been more responsive. In 1981, courts in New Jersey,⁸ Massachusetts⁹ and Florida¹⁰ refused to apply the alleged "common-law" marital rape exemption to their rape laws and held that husbands were not immune from prosecution for the rape of their wives. In 1983 and 1984, three more courts rejected the exemption.¹¹ These cases form a substantial and unanimous body of case law recognizing that a husband's forced sexual intercourse with his wife is rape. This column examines the reasoning and implication of the three recent cases and reports on statutory development of the past three years.

People v. De Stefano

People v. De Stefano was the first case in this country to examine the constitutionality of an express statutory marital rape exemption.¹² Although *De Stefano* is a lower court decision,

1. Address by David Finkelhor, *Marital Rape: The Misunderstood Crime*, New York County Lawyers Association (May 3, 1984). (Available from National Center on Women and Family Law, Inc. (NCOWFL).)

2. Testimony and Statement in Support of H.B. 51, to remove spousal exemption to sexual assault offenses by Dr. David Finkelhor to the Judiciary Committee, New Hampshire State Legislature (Mar. 25, 1981).

3. Because marital rape is not a crime in most states, there are few statistics reporting the incidence of marital rape. In addition to Russell's statistics, Professor R.J. Gelles reports that the number of wives raped as part of or sequel to a hearing could be well over two million. Other studies and surveys report that 10-14 percent of all married women are victims of marital rape, and that 36-37 percent of battered women have been marital rape victims. See Finkelhor & Yllo, *Rape in Marriage: A Sociological View*, in *THE DARK SIDE OF FAMILIES: CURRENT FAMILY VIOLENCE RESEARCH* 119-20 (1983).

4. D. RUSSELL, *RAPE AND MARRIAGE* (1982). The author received funding in 1977 from the National Institute of Mental Health to do a large scale study of women in San Francisco upon the prevalence of marital rape.

5. Russell, *supra* note 4, at 57.

6. Finkelhor & Yllo, *supra* note 3, at 120.

7. See NCOWFL's Marital Rape Exemption Packet, which includes a state-by-state summary of the exemption in criminal statutes. (Price: \$9.00.) See also *Statutory Update*, *infra* p. 749.

8. *New Jersey v. Smith*, 426 A.2d 38 (N.J. 1981); *New Jersey v. Morrison*, 426 A.2d 47 (N.J. 1981).

9. *Massachusetts v. Chretien*, 417 N.E.2d 1203 (Mass. 1981).

10. *Florida v. Smith*, 401 So. 2d 1126 (Fla. Dist. Ct. App. 1981).

11. *People v. De Stefano*, 467 N.Y.S.2d 506, 121 Misc. 2d 113 (1983). Available from the Clearinghouse, No. 36,888; *State v. Rider*, 9 Fla. Law Weekly 887 (No. 83-821, Fla. Ct. App., 3d Dist., Apr. 17, 1984) [Editor's Note: the official cite is 449 So. 2d 903 (Fla. Dist. Ct. App. 1984)]. Available from the Clearinghouse, No. 36,890; *Weishaup v. Virginia*, No. 830616 (Va. Sup. Ct. Apr. 27, 1984) [Editor's Note: the official cite is 315 S.E.2d 847 (Va. 1984)]. Available from the Clearinghouse, No. 36,889.

12. N.Y. PENAL LAW § 130.00(4). New York's marital rape exemption is "partial." Under certain circumstances spouses are defined as "not married" for purposes of the exemption and therefore certain husbands are not granted immunity for the rape of their wives. N.Y. PENAL LAW § 130.00(2) defines "not married" as spouses

In *Weishaaupt*, the victim-wife had been living apart from her husband and had not engaged in sexual intercourse with him for almost a year prior to the attack. Although she had not filed for or obtained a divorce, order of protection or separation agreement, she had consulted an attorney regarding a divorce and had been advised to wait until she had been separated for one year before initiating divorce proceedings. Defendant husband's motion to dismiss the rape indictment on the basis of a common-law marital rape exemption was rejected by the trial court. Defendant was tried before a jury and convicted of attempted rape. He received a two-year prison sentence, which was suspended pending outcome of the appeal. The Virginia Supreme Court affirmed the conviction, holding that a common-law exemption did not apply when the victim-wife had clearly manifested her intent to end the marriage.

The *Weishaaupt* court examined the history of the common-law exemption and determined that Hale's "absolute" exemption is not and never was English common law. The court found that under English common law a wife could revoke her implied consent to sexual intercourse with her husband. According to the court's interpretation of English common law, obtaining a court order of separation or a written separation agreement entered into by both parties constituted a revocation of the wife's "implied consent," although living apart from the husband and filing for, but not obtaining, a divorce did not.

Thus, the *Weishaaupt* court found that under a direct application of the English common law, the defendant in the instant case could not be guilty of raping his wife. However, the court held that both Virginia statutory law and case law empower courts "to adopt from English common law those principles that fit our way of life and reject those which do not."²⁸

The court noted that during Hale's lifetime women were considered the property of their fathers and husbands, but that that is not the case today. The court relied upon a line of Virginia cases illustrating wives' growing autonomy over their property and financial affairs. In these cases, Virginia courts have rejected the argument that the so-called legal unity of husband and wife permits a husband to steal his wife's property, and have held that a husband's right of access to his wife does not give him the right to break into his wife's separate home with intent to commit assault and battery. These cases "suggest that if a woman's independent control over her property is protected by law, then her independent control over her physical person should likewise be protected."²⁹

The *Weishaaupt* court also reviewed cases from other states that have abolished the marital exemption. The court found that the trend in these marital rape cases is in accord with the Virginia cases granting wives autonomy and independence with respect to property rights. "Both sets of cases point to an increasingly recognized role of the autonomy and independence of women [and] . . . suggest a break with the ancient rules that cast women in a subservient position."³⁰ The court also found

that an absolute marital rape exemption is inconsistent with Virginia's no-fault divorce law which requires spouses to live apart for a specified time without cohabitation before obtaining a no-fault divorce. Since the law contemplates a voluntary withdrawal by either spouse from the marital relationship, the court stated that it "embodies a legislative endorsement of a woman's universal right to withdraw an implied consent to marital sex." Like the Florida court in *Rider*, the *Weishaaupt* court found that since a wife has a statutory right to make a de facto withdrawal from the marriage contract, it would be irrational to forbid her from revoking a "term" of the contract.

The court also termed "absurd" defendant husband's contention that abandonment of the marital rape exemption would be disruptive to marriages. "[I]t is hard to imagine how charging a husband with the violent crime of rape can be more disruptive of marriages than the violent act itself."³¹ The *Weishaaupt* court refused to address the argument that a marital rape exemption should be abandoned altogether. Thus the question of whether an exemption would apply if the spouses were cohabiting at the time of the rape is left open. In the concurring opinion, however, three of the justices expressed their "understanding that the court's decision is specifically limited to the precise facts of this case . . . that the decision today does not violate or furnish any support for prosecution of husbands when there is a cry of 'Rape!' by wives who have not demonstrated over a prolonged period of time a clear intention permanently to separate from the husband and such complete separation has, in fact, occurred."³² Such a distinction actually encourages violence by husbands since in order to avoid losing his immunity for prosecution for wife rape, a husband would be best served by regular and forcible rape of his wife. This would guarantee that she would not be able to meet the requirements of prolonged and in fact separation, which were set out in the concurring opinion.

The concurrence further states that "[W]hile we have recognized in our case the independence of women in this state, this recognition should not operate to discriminate against men."³³ These justices seem to believe that a husband has the right to forcible rape of his wife absent her affirmative and demonstrated action to terminate the marriage, and that this right prevails over a wife's legally recognized rights of independence and autonomy. The *Weishaaupt* concurrence is a sad and distressing note to an otherwise formidable and unanimous body of marital rape cases over the last four years. It should serve as a warning to battered women's advocates that a wife's right to live free of violence in her home is not yet universally accepted. Fortunately, the majority decision does not uphold an exemption as applied to cohabiting spouses. It expressly limits its holding to the facts of the case before it. While the *Weishaaupt* decision does not go as far as *De Stefano* or *Rider*, the majority opinion does reject the application of the exemption where there has been a de facto end to the marriage; it does not

28. *Weishaaupt*, No. 830616 at 12.

29. *Id.* at 14.

30. *Id.* at 16.

31. *Id.*

32. *Id.* at 19.

33. *Id.* at 22.

34. *Id.* at 21.

York's statutory marital rape exemption as violative of the equal protection clauses of the state and federal constitutions. In disposing of defendant husband's other constitutional claims, the court held that the order of protection directing defendant husband to stay away from his estranged wife and to refrain from violence toward her constituted sufficient notice so that he could be charged with rape. Furthermore, the court held that no specific notice was necessary since defendant never had a right to engage in forced sexual intercourse with his wife.

State v. Rider

On April 17, 1984, the Florida Court of Appeals held that Florida's sexual battery statute, which contains no express spousal exemption, does not incorporate a common-law exemption.

In the *Rider* case, the spouses were living together as husband and wife at the time of the rape. No divorce or separation proceedings had been initiated, and no temporary restraining order or separation agreement existed. The wife testified that her husband had never physically abused her prior to the sexual battery. Defendant was charged with two counts of sexual battery after striking his wife on the head with a piece of metal, disrobing her, and tying her to the bed with "duct tape" in a spread-eagle position. Defendant moved to dismiss the sexual battery charges on the basis of a common-law interspousal rape exemption. The trial court granted defendant's motion on the basis that no objective manifestation of the wife's withdrawn consent to sexual intercourse with her husband existed, such as legal or physical separation of the parties. The state appealed the dismissal; the Court of Appeals reversed and remanded for prosecution. On August 30, 1984, after two hours of deliberation, a four-woman, two-man jury found defendant guilty on both counts of sexual battery. On September 19, 1984, defendant husband was sentenced to 14 years in prison.²²

Rider is the second Florida case to address the marital rape exemption. In the 1981 case of *Florida v. Smith*,²³ the Florida Court of Appeals for the Fifth District held that no common-law exemption exists in Florida. *Smith* involved spouses who were living apart at the time of the alleged attack. Although the *Smith* court explicitly stated that its ruling was based on a finding that no common-law spousal exemption exists in Florida, instead of a finding that the victim-wife had revoked her "implied consent" by obtaining a restraining order and filing for a divorce, it was nevertheless unclear whether future courts would limit *Smith* only to separated spouses, as did the trial court in *Rider*. The Court of Appeals in *Rider* adopted a broad interpretation of *Smith* and refused to distinguish between spouses living together and those living apart for purposes of eliminating the marital rape exemption. The *Rider* decision, like the 1981 Massachusetts case of *Commonwealth v. Chretien*, expressly held that no common-law marital exemption exists even in the case of cohabitating spouses.

As in *De Stefano*, the *Rider* court found that the origin of the marital rape exemption, Sir Matthew Hale's "single

statement, which stands alone, naked of citation to any authority judicial or otherwise," provides no reasonable basis for the exemption.²⁴ The court held that no common-law spousal exemption had ever been adopted in Florida. The court hypothesized that even if such an exemption had at one time existed in Florida, the repeal of Florida's rape law and its replacement with a "sexual battery" statute would have abolished the exemption by "abrogat[ing] any common-law assumptions concerning the crime of rape."²⁵

The *Rider* court also stated that "even if we were to assume that a common law implied consent interspousal exception once existed and still exists . . . it does not follow . . . that such consent can never be withdrawn . . ."²⁶ The court stated that since a spouse may terminate the marriage contract, she may terminate a "term" of the contract, or withdraw consent to sexual intercourse. The court noted that the husband's remedy for this "breach of contract" is through the courts, not through violence against his wife. Finally, in refusing to adopt a common-law exemption, the court noted that when the validity of a common-law doctrine is extremely dubious a court can take into account societal changes in determining whether to apply the doctrine.

These two Florida cases are the first in the country to expressly find that a common-law spousal exemption had never been adopted in their state. While the landmark cases, *Commonwealth v. Chretien* and *New Jersey v. Smith*, severely criticized the Hale Doctrine, they assumed that it was part of the common law. Although the marital exemption is often referred to as if it were an established common-law rule, in fact, prior to the recent cases discussed in this article, Hale's Doctrine had only been raised in the United States in two early Texas cases and had gone unchallenged.²⁷ Thus, the Florida cases are extremely significant in states that have no express statutory exemption, for they suggest that when courts in those states adjudicate marital rape cases they are not confronted with a choice of *applying* or *abolishing* a legitimate common-law doctrine, but with *adopting* an antiquated doctrine of dubious origins that is incompatible with 20th century legal and societal concepts of marriage and women's autonomy.

Weishaupt v. Virginia

Weishaupt v. Virginia involves a rape statute that also contains no express spousal exemption. The Virginia Supreme Court held that a common-law marital rape exemption does not apply when there has been a "de facto" end to the marriage. The court refused to decide whether a common-law exemption should be abandoned altogether, limiting its holding to the particular facts of the case.

22. N.Y. Times, Sept. 2, 1984, § 1, at 32; Chicago Tribune, Sept. 19, 1984, § 1, at 16.

23. *Florida v. Smith*, 401 So. 2d 1126 (1981).

24. *Rider*, 9 Fla. Law Weekly at 887.

25. *Id.* at 888.

26. *Id.*

27. Drucker, *The Common Law Does Not Support a Marital Exemption for Forceful Rape*, 5 *WOMEN'S RTS. L. REP.* 181, 182 (1979); Schulman, *Battered Women Score Major Victories in New Jersey and Massachusetts Marital Rape Cases*, 15 *CLEARINGHOUSE REV.* 342, 344 (1981).

be prosecuted for rape of his wife, even when the parties were separated pursuant to court order.

Texas

Like Oklahoma, Texas amended its absolute exemption in 1983 to permit prosecution of a husband for rape of his wife once the parties are living apart, or when one spouse has initiated legal proceedings to terminate the marriage. TEX. PENAL CODE § 22.011(c). The Texas 1983 amendment also abolished the prior law's expanded "cohabitor exemption" that barred prosecution of a man for rape of the woman with whom he was living but to whom he was not legally married. Texas will no longer extend the marital "right" or privilege of wife rape absent a legally valid marriage.

Wisconsin

In 1982, Wisconsin abolished the marital rape exemption in its entirety. Wis. Stat. Ann. 940.225(6) (effective May 1, 1982). Like New Jersey's, Wisconsin's law now expressly and affirmatively provides "MARRIAGE NOT A BAR TO PROSECUTION. A defendant shall not be presumed to be incapable of violating this section because of marriage to the complainant." Wis. STAT. ANN. 940.225(6). This express and affirmative elimination of the marital rape exemption is preferable to merely deleting the exemption from the statute. The New Jersey-Wisconsin method does not leave open to question (or litigation) whether the alleged common-law exemption, Hale's Doctrine, applies once the statute becomes silent as to a spousal exemption.

Wyoming

In 1983, Wyoming amended its law and eliminated the marital rape exemption from first and second degree sexual assault. WYO. STAT. §§ 6-2-301, 302, 307. Unfortunately, the exemption was left intact in Wyoming's third and fourth degree sexual assault statutes. WYO. STAT. §§ 6-2-304, 305.

Conclusion

There has been significant progress in the courts and, to a lesser extent, the legislatures in abolishing the marital rape exemption. However, since 1982 only the Wisconsin state legislature has entirely rid its laws of the marital rape exemption.

Analysis of the types of legislative changes made over the last few years shows that few legislatures are willing to accept a wife's *absolute* right to control her bodily integrity and to live free from her husband's violence.

De Stefano, *Rider* and *Weishaupt* offer hope that courts will no longer tolerate marital rape. The abandonment of the exemption in these cases recognizes that marital rape is "a crime of violence, not a crime of sex,"³⁶ and that the gravity of injury to the raped wife is the violent "assault on freedom . . . injury to autonomy, to self-esteem . . ."³⁷ Both the *De Stefano* and *Weishaupt* courts scornfully reject the argument that marital rape prosecutions will injure marriages by preventing reconciliation. This view is a significant departure from the attitude that it is the woman's job to keep the family together, regardless of the cost. As the *Weishaupt* court pointed out, it is the husband's violence, not society's recognition and punishment of that violence, which is destructive to marriage.³⁸

De Stefano, *Weishaupt* and *Rider* recognize that it is time that rape laws be employed to protect a woman's autonomy, not a husband's proprietary interests in his wife. ☐

Monica Rickenberg
Joanne Schulman

36. *Rider*, 9 Fla. Law Weekly at 887.
37. *De Stefano*, 467 N.Y.S.2d at 512.
38. *Weishaupt*, No. 830616 at 19.

SEE Computer and Research News section for results of computer research based on this article, page 816.

require that the victim have obtained or filed for a divorce, separation or order of protection. Thus, *Weishaup* is an important step in the right direction.

The *Weishaup* case is also significant for drawing an analogy between a woman's right to control her property and a woman's right to control her body, thereby suggesting a connection between a woman's economic position in society and male violence against women. As a practical matter the legal gains women have made in the economic sphere mean little if a woman cannot control such a basic aspect of her life as freedom from physical violence in her own home. A woman cannot exercise her legal right to maintain property separately from her husband if her actions are controlled by her husband's use or threat of physical violence. Conversely, a woman has no power to eradicate the violence in her life if she is economically oppressed. A woman's ability to escape a violent domestic situation is constrained by lack of employment opportunities, the threat of losing custody of her children because of poverty, and the inadequacy of child care and child support.

Statutory Update

As of January 1984, 28 states still expressly prohibit prosecution of a husband for rape of his wife if the parties are living together at the time of the rape. In addition, 12 states still expand the marital rape exemption to cover unmarriages; these states bar or limit prosecution of a man who rapes the woman he is living with, but to whom he is not legally married. Eighteen states have abolished the marital rape exemption and permit prosecution of a husband for wife rape in all or most cases.³⁵

These numbers do not reveal the progress that has been made over the last two years in eliminating the marital rape exemption from criminal rape and sexual assault laws. While state legislatures have been slower than courts in rectifying these discriminatory laws, legislatures have been responding to the public's demand for change. The following is a review of the legislative changes in 1982, 1983 and the first half of 1984.

California

California established a separate crime of spousal rape in 1980. CAL. PENAL CODE 262. This spousal rape law originally required that the victim-wife report the rape to a law enforcement agency within 30 days. In 1983, this reporting time period was extended to 90 days. However, there is no reporting requirement under the "stranger rape" statute, CAL. PENAL CODE 261. Thus, wives are still not receiving the same treatment and protection afforded other rape victims.

Illinois

In 1983, Illinois abolished the marital rape exemption in "aggravated criminal assault" provided the assault is reported to law enforcement within 30 days. ILL. REV. STAT. ch. 38, §§ 12-18(c), 12-14 (1983). This is a very minor improvement since the exemption is only abolished with respect to the most severe form of rape. The exemption remains applicable to all

other sexual offenses even if the parties are separated or have initiated divorce proceedings. It is an "absolute bar" to prosecution of a husband for rape of his wife.

Indiana

Indiana law provides that a husband can be prosecuted for the rape of his wife if the parties are living apart at the time of the rape and a petition for annulment, divorce or separation has been filed. In 1983, Indiana amended its law to terminate the spousal exemption upon the filing of a petition for an order of protection. While this does not constitute major progress in abolishing the marital rape exemption, it does provide some much-needed protection for battered wives who often do not have the funds to hire an attorney in order to file for divorce or cannot obtain legal services assistance because of funding cutbacks.

Kansas

Kansas provided battered and raped wives with a major victory in 1983. The marital rape exemption was entirely eliminated for the crime of rape. KAN. STAT. ANN. §§ 21-501, 3502. However, a limited spousal exemption still remains for the crime of "indecent liberties with a child under sixteen years of age," though the exemption ends if the underage spouses are living apart or have initiated some form of legal action to end the marriage, including seeking an order of protection. KAN. STAT. ANN. § 21-3503.

Louisiana

In 1984, Louisiana took a small step by eliminating the marital rape exemption from their most severe rape offense, "aggravated sexual battery." La. Rev. Stat. Ann. 14:43.2. However, a marital exemption remains applicable in all other sexual offenses and only becomes ineffective when the parties are separated pursuant to court order.

North Dakota

In 1983, North Dakota, like Illinois and Louisiana, abolished its marital rape exemption for first degree rape ("Gross Sexual Imposition"), but left the exemption intact for all other sexual offenses. N.D. CENT. ANN. §§ 12.01-20-01, 02, 12.01-03-12. However, unlike Illinois and Louisiana, the North Dakota statute includes a "voluntary social companion" exemption, which applies if defendant and victim were "voluntary social companions" at the time of the rape and the victim "at any time previously" permitted defendant "sexual liberties." N.D. CENT. ANN. § 12.01-20-02:3. The voluntary social companion exemption, also adopted by the Model Penal Code, is broader than the traditional marital rape exemption because it does not require a legally valid marriage. Instead, the exemption may apply to marital rape, cohabitant rape, and date rape. Thus, because the voluntary social companion exemption was retained, North Dakota's deletion of the spousal exemption may amount to no change at all.

Oklahoma

Oklahoma amended its statute so that, effective November 1, 1984, the marital rape exemption will terminate once the parties are living apart, or one spouse has initiated legal proceedings to end the marriage, including petitions for orders of protection. Thus, it will be possible to prosecute a husband for rape of his wife even if the parties are living together at the time of the rape, provided a legal action has been initiated. Okla. Stat. Ann. tit. 21 § 1111(B), amended by 1983 Okla. Sess. Laws I, ch. 41. These amendments constitute a major change in Oklahoma law. Prior to the amendments, Oklahoma's marital rape exemption was "absolute": a husband could never

35. For a state-by-state analysis, see NCOWPL's Marital Rape Exemption Packet (Price: \$9.00).

These three -- battering, non-battering and obsessive -- were the types of rape we identified from our interviews with marital rape victims. There may be other types; we may need to refine our conceptions. The important point is that marital rape happens in a wide variety of contexts. We need an imagery that encompasses this variety, and we can only get it by listening to the stories of the women it happens to.

The absence of these stories from the conscience of the community results in another misunderstanding about marital rape -- this one concerning its impact. People do not believe that marital rape hurts. In 1979, a nationally syndicated columnist invented some experts to bolster his own prejudices and wrote that "many U.S. jurists agree that when a husband compels his wife to engage in sex relations, she suffers relatively little of the psychological trauma incurred in rape by a stranger" (Lloyd Shearer, Parade Magazine, April 22, 1979).

(Notice how the husband only "compels his wife" while what the stranger does is rape.)

"This isn't like he's grabbing some lady off the street", argued John Rideout's defense attorney Charles Burt. "This is a woman he may have made love to hundreds of times before." In other words, if he had made love to her hundreds of times before, how traumatic could one more time be?

Opinions like this betray a fundamental misunderstanding of the trauma of rape in general as well as the trauma of marital rape in particular. Rape is traumatic not because it is with someone you don't know, but because it is with someone you don't want -- whether stranger, friend or husband.

Burt's idea is akin to saying that if your business partner empties your joint account and runs off to Venezuela, it shouldn't hurt, because after all, you'd written him hundreds of checks before.

Rape is the intimate violation of a person's trust and autonomy. Prior intimate contact only makes the violation that much more so.

In fact the studies that have looked at this question empirically have indeed found that the victims of marital rape do suffer greater and longer term trauma than other rape victims. This finding is not surprising to those who have talked to marital rape victims and have come to recognize the three special injuries of marital rape: the betrayal, the entrapment and the isolation.

More so than victims of any other kind of rape, the victims of marital rape suffer a profound betrayal. Among the women we interviewed, the fact that someone whom they had loved and needed could violate them in such an intimate way destroyed their ability to trust others. "I thought so highly of him and he turned out to be a rapist," said one woman. The experience also sapped their confidence in themselves and their faith that they had the capacity to choose trustworthy companions. Years later, many of those women found it impossible to contemplate intimacy with a man. This is a component to marital rape that has no parallel in stranger rape.

A second component that makes marital rape different and more traumatic than other forms of rape is the entrapment. Most marital rape victims are raped not just once but many times. Half of our interviewees had been sexually

assaulted twenty times or more by their husbands. They lived for months, sometimes years, with ongoing violation. Many grappled with never-ending anxiety about when the next forced sex episode might occur. This took its toll in the form of chronic terror, emotional numbing, involuntary panics, and repetitive nightmares that often lasted for years after the relationship had ended and the threat of rape had gone. In the sexual sphere, victims suffered from flashbacks and inability to engage in sex. The corrosive impact of marital rape could be summed up thus: when you are raped by a stranger you have to live with a frightening memory. When you are raped by your husband you have to live with your rapist.

Finally, while all rape victims suffer shame and stigma, few suffer the total isolation of marital rape. No relatives or friends commiserated with those women about the pain. No police or court confirmed the judgement that they had been wronged. In their isolation they usually blamed themselves, and saw themselves as inadequate and different. It was a profound psychological scar that was difficult to erase.

It is to erase this soar of isolation that I think we owe our first priority. The debate about criminalizing marital rape speaks to many issues: justice, fairness, equality, deterrence of crime, and retribution against offenders. Yet the issue that is paramount for me is compassion for victims.

We must reach out to the victim of marital rape and extend legitimacy to and compassion for what they have suffered. Doctors need to be aware, for example, that it is not a simple matter for some women to avoid sex post-operatively, even though their recovery urgently requires it. Family planning agencies need to take into account that in some women's marriages, contraceptives like a diaphragm will not be adequate protection.

Attorneys need to recognize and alert divorcing women to the particular vulnerability they face from embittered husbands during the period following a separation. Marriage counselors need to know that the unspoken and unacknowledged grievance plaguing many wives is that their husband sexually assaults them.

(Incidentally, it is interesting to note that in the whole 25 year literature on sex therapy and marital sex, one can search in vain for any reference to the problem of marital rape, an experience that may be occurring to one in ten wives.)

Marital rape has been a non-problem for too long. Unfortunately, when people suffer from non-problems, they tend to become non-persons, both in their own eyes and in the eyes of others. Making marital rape a crime will put a few offenders out of our community, but it will bring a whole lot of victims back in. The invitation is long overdue.

May, 1984

MARITAL RAPE: THE MISUNDERSTOOD CRIME

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Marital rape is a crime with a name, but without a reality. Even where it exists in our legislation, it does not exist in our imagination. Despite debates in the congress and in the courts, people have only the vaguest and most misleading picture of what it is. The stories of the victims of this crime -- victims humiliated by their assailants, ashamed among their closest friends, deprived of the protection of the law, and ignored by the professionals -- these stories have not yet touched the conscience of the community.

It was to hasten this process that my colleague Kersti Yllo and I recruited and interviewed fifty women who had been sexually assaulted by their husbands. The women were ordinary women, most of them clients at family planning agencies who were asked as part of their regular medical history if they had ever been sexually assaulted by their partner. Many were telling their stories for the first time.

The depth of popular ignorance about the problem of marital rape runs deep. When we asked groups of students, for example, to invent vignettes of marital rape, one wrote, "He wants to. She doesn't. He wins". Can you imagine a stranger rape so described: "He wants to. She doesn't. He wins." No; the imagery of stranger rape has knives and dark alleys and terror and violence and degradation.

So does marital rape! People are apt to think of marital rape, if they think of anything at all, as a bedroom squabble over whether to have sex tonight. No wonder they rate it in surveys as being about as serious an offense as driving while drunk. But marital rape does have brutality and terror and violence and humiliation to rival the most graphic stranger rape.

Among the fifty women we interviewed:

--one had been raped at knifepoint by a husband who held her up against the wall and threatened to kill her.

--one was jumped in the dark by her husband and raped in the anus while slumped over a woodpile.

--one was gang raped by her husband and his friend holding blackjack after they surprised her alone in a vacant apartment.

--one had her baby kidnapped by an estranged husband who compelled her to have sex as a condition for returning the child.

--one had a 6 centimeter gash ripped in her vagina by a husband who was trying "to pull her vagina out".

None of these atrocities (and there were others of equal brutality) were ever reported to the police or to a newspaper. Some were never reported to anybody.

And these were marital rapes. If other people had these images inscribed in their memories when they thought of marital rape in the same indelible way that my colleague and I do, I do not think we would hear nearly so much nonsense about this problem.

However, this imagery of marital rape is not the whole reality either. From a survey we did of 521 women in Boston and from one Diana Russell did of 930 women in San Francisco, we estimate that marital rape is amazingly frequent -- occurring to as many as 10 to 14% of all married women. When talking about a problem of these dimensions, it is no more fair to say that marital rape is always a savage attack than it is to say that it is always a bedroom squabble. We are talking about a spectrum of which both of these are a part.

To make some sense of this spectrum, my colleague and I, after carefully analyzing the cases of the women we interviewed, found that it was useful to divide them into three broad categories. We decided to call these three categories battering rapes, non-battering rapes and obsessive rapes.

Battering rapes were the most brutal and included most of the incidents I listed earlier. They occurred in relationships where, in addition to the sexual abuse, there was a large amount of physical abuse. These husbands tended to have problems with alcohol and drugs. They had enormous reservoirs of anger which they vented on their wives and often other people in their environment. The rapes tended to take place in capricious and unpredictable circumstances, much like the other violence. They seemed to have little to do with sexual issues per se. In fact, many of these women said they made themselves sexually available whenever their husband wanted them. Rather, these men seemed to be motivated by an intense desire to punish, humiliate, degrade, and retaliate against their wives using rape as the vehicle. (About forty-five percent of the women we interviewed suffered from battering rapes.)

The non-battering rapes were substantially different. They occurred in more middle class marriages where there was much less of a history of violence and abuse. The immediate precipitant of these rapes was more likely to be a specifically sexual grievance, for example, over how often to have sex or what kinds of sex. The force involved was often more restrained, enough to gain sexual access, but not enough to cause severe injury. These rapes seemed to be motivated less by anger than by a desire to assert power, establish control, teach a lesson, show who was boss. (Another forty-five percent of the rapes were of this sort.)

Finally, there was a third kind of marital rape we uncovered in about 10% of the situations that we called obsessive rapes. In these relationships, the husbands had unusual sexual preoccupations. Most were obsessed with pornography; they wanted their wives to help them make it. Most were obsessed with their sexual problems; they were afraid of being impotent or homosexual. Often they had highly structured rituals about sex. They could only get aroused if their wives were in a certain position, or if they touched them in a certain way, or if they "staged" a rape. There was a sense that many of these men needed violence or struggle in order to have sex. They found the humiliation very stimulating. The women felt as though they were being used as masturbatory objects. There was a definite sadistic component to some.

3. Fact or Fiction? "MARITAL RAPE IS A BIZARRE AND UNUSUAL ACT AND DOESN'T NEED LEGISLATIVE ACTION."

As a matter of fact, most experts consider rape to be the most underreported of all crimes and marital rape even more so. Over a third of women who appear at battered women's shelters report being sexually assaulted by their husbands. It is seldom discussed. Humiliated and ashamed, marital rape victims don't talk about it. They don't report it because the law does not help them.

4. Fact or Fiction? "WHEN A WOMAN MARRIES, SHE CONSENTS TO SEXUAL INTERCOURSE WITH HER HUSBAND."

As a matter of fact, sexual expression in love is one thing. Forced, brutalized sex is another. No one consents to violence by marrying. Under current law prosecution is impossible for even the most brutal rapes in marriage.

5. Fact or Fiction? "IF PROSECUTIONS ARE ALLOWED FOR MARITAL RAPE, A LOT OF INNOCENT HUSBANDS WILL HAVE RAPE CHARGES FILED AGAINST THEM BY ANGRY, VENGEFUL WIVES WHO HOPE TO BARGAIN FOR A BETTER PROPERTY SETTLEMENT IN A DIVORCE ACTION."

As a matter of fact, this myth is built on the ill-founded belief that women are innately vengeful and willing to go through the tortures of a courtroom trial in order to "get back" at a man, and that somehow women should be treated as less credible victims of crime than others. Actually, there are many other types of complaints which a woman could file for retaliation that would require less public self-exposure and trauma. Further, our legal system has built in mechanisms to determine the merits of a complaint. Police investigations, prosecutor discretion, and jury deliberations are employed to determine the truth or falsity of other allegations. Why should marital rape be treated any differently? Finally, no such misuse has been documented by the states that have eliminated immunity of spouses from prosecution for rape. Only the most extremely brutal and horrifying incidents of marital rape have been reported.

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MARITAL RAPE FACT SHEET*

1. Fact or Fiction? "MARITAL RAPE ISN'T AS SERIOUS AS RAPE BY A STRANGER--IT'S JUST A WOMAN NOT BEING IN THE MOOD AND HER HUSBAND INSISTING."

As a matter of fact, marital rape is often just as violent, just as degrading, and oftentimes more traumatic than rape by a stranger. It is perpetrated with knives, at gunpoint, repeatedly, brutally, in front of others, and most often is the final violent act culminating a series of physical abuses. One woman has reported being beaten and raped by her husband virtually every day for six months, anally raped 9 or 10 times. He told her that, if she ever tried to leave, he would kill her. In terror she fled to another state, changed her name, and lived there for a year in cognito.

2. Fact or Fiction? "MARITAL RAPE ISN'T OFFENSIVE--AFTER ALL, A WIFE HAS HAD SEX WITH HER HUSBAND BEFORE, WHAT'S ONE MORE TIME?"

As a matter of fact, a woman raped by a stranger has to live with the memory of that experience. A woman raped by her husband has to live with her rapist. Many wife victims, trapped in a reign of terror, experience repeated sexual assaults over a number of years. What happens to a capacity for intimacy when the person who has promised to love and protect, and on whom one may be economically dependent, commits such a brutal and violent violation?

* Prepared and distributed by the Pennsylvania Commission on the Status of Women.

9. Fact or Fiction? "MARITAL RAPE LAWS WILL DESTROY MARRIAGES BY PREVENTING ANY POSSIBLE RECONCILIATION."

As a matter of fact, isn't a marriage in which a husband rapes his wife and she presses charges already destroyed? Withholding justice and equal protection to try to hold together such a marriage is an unrealistic and improper goal for the criminal law. The law now protects a raping husband rather than a victim wife, and women can be coerced into staying in violent marriages. Should the law encourage such forced cohabitation?

10. Fact or Fiction? "SINCE SO FEW CASES ARE BROUGHT TO TRIAL, WHY BOTHER WITH A MARITAL RAPE LAW?"

As a matter of fact, the law protects either the victim or the rapist. Husbands who commit acts of violence against wives now receive special protection from the law in Pennsylvania. Should such special protection more rightly belong with the victim? Passage of H.B. 1122 would call attention to the problem, let the victims know there can be help, and, by removing society's sanction for such behavior, work to deter it.

6. Fact or Fiction? "MARITAL RAPE IS SIMPLY ONE SPOUSE'S WORD AGAINST THE OTHER, HENCE IT WILL BE DIFFICULT TO PROSECUTE."

As a matter of fact, when has difficulty to prosecute determined what a crime is? Treason, conspiracy, child abuse, and incest are difficult to prove, but there is no outcry to decriminalize them.

7. Fact or Fiction? "THERE ALREADY EXIST REMEDIES FOR MARITAL RAPE--A WOMAN CAN FILE ASSAULT CHARGES OR GET A DIVORCE."

As a matter of fact, all rapists assault their victims. Rape is a crime different from assault. That is why special rape laws exist. Rape involves a special humiliation and special violation. Assault is a less serious crime, its penalty less a deterrent. Even though a woman might escape as a victim by filing for divorce, should the committer of the criminal acts escape punishment for them? An appropriate deterrent to this type of violent behavior is not now available.

8. Fact or Fiction? "MARITAL RAPE LAWS WOULD HAVE THE STATE MEDDLING IN PEOPLE'S BEDROOM AFFAIRS."

As a matter of fact, the state is meddling in the bedroom whether there is a marital rape law or not. In one case the state allows husbands to rape their wives. In the other, the state protects wives from this type of violence. Should murder and assault between spouses be decriminalized just because it's a family affair? A husband should no more fear criminalization of marital rape than a parent fears laws on incest or child abuse. The law should condemn a brutal, hostile, revengeful, hateful, and anti-social act whether it happens within a marriage or without.

MA4

June, 1984

THE PROSECUTION OF MARITAL RAPE:
THE CALIFORNIA EXPERIENCE #1

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Kersti Yllo
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Carol Richards
brought these
articles back
from a conference
she attended.
I thought these
were the best of the
lot

Barbara
Finkelhor

In the debate over removing the spousal exemption to rape, much concern has been expressed over how or even whether a law criminalizing rape would work. (*2) Opponents of the change have raised several different spectors of insidious consequences that would ensue if marital rape is criminalized. For example, they have warned that deleting the spousal exemption would risk flooding the criminal justice system with frivolous complaints brought by "vindictive" wives. (*3) They have also raised the fear that cases brought under such a law would be impossible to prosecute, either because wives would be unreliable witnesses or because the cases would boil down to her word against his. (*4) In short, they have predicted that marital assault prosecutions would bog down and frustrate the criminal justice system.

Until recently, arguments over these claims have been mostly hypothetical. There has been little empirical evidence against which to judge them. However, now that several states have eliminated the spousal exemption, and have gained experience about what happens once the exemption is removed, it is possible to see how a spousal rape law works in actuality.

A state well situated for a study of the effects of criminalizing marital rape is California. California changed its law as early as January, 1980, and has had a total of more than four years experience without the spousal exemption. As the most populous state in the country, California has also generated a large number and variety of spousal rape cases. Moreover, since the change of the law was hotly debated and widely publicized in California, public attention to marital rape cases has been relatively high there, making information on the subject easier to collect.

On the other hand, using California to study the operation of marital rape prosecutions has some drawbacks. California's legal situation with regard to marital rape is not entirely parallel to that of other states which have criminalized rape between a husband and a wife who are still living together. When California changed the law on spousal rape, the legislators did not merely delete the spousal exemption. Instead, they drafted a totally new section of the criminal code on the matter of spousal rape. One important special condition attached to the California spousal rape law is that victims were limited (until recently) to bringing such charges within 30 days of their occurrence. Another is that marital rape, unlike non-marital rape, can be a misdemeanor rather than a felony. Nonetheless, a great deal of valuable insight into the question of whether marital rape is a viable legal concept can be gleaned by looking at the situation in California.

GATHERING DATA

Gathering the needed data on the operation of the marital rape law in California has not been a simple task. Unfortunately, the state Bureau of Criminal Statistics does not keep very thorough or very detailed information on marital rape prosecutions in spite of the fact that an important public policy issue is at stake. (*5)

So the staff of the National Clearinghouse on Marital Rape (NCHR) has been forced to compile data on its own -- a frustrating and cumbersome task. Marital rape cases have been identified in a variety of ways -- but primarily through a newspaper clipping service. The staff of the Clearinghouse, after hearing about a marital rape prosecution, made contacts with the journalists, attorneys, prosecutors, court officials, probation officers and sometimes rape crisis

workers familiar with the case, in an effort to get as much detail as possible about the events of the case, the backgrounds of the offender and the victim, and the disposition of the case within the legal system. District attorneys were generally the best and most reliable sources of information. Occasionally, these officials referred NCMR staff to other cases which had not been identified through the news clipping service.

Altogether, NCMR staff identified 39 cases of marital rape which came to the attention of the police or courts from January, 1980 through December, 1981. This is not necessarily a complete inventory of all such cases, however.

One piece of evidence suggests it is fairly thorough, though. The state Bureau of Criminal Statistics did compile what it believed to be a complete tally of all arrests for marital rape in 1980. This official tally showed 11 arrests. For the comparable time period, the NCMR inventory showed 17 cases that even the official reporting statistics did not pick up.

Nonetheless, it must be said that although NCMR believes it to be fairly complete, there is no way of knowing how totally complete the NCMR inventory of rape cases is. Moreover, without the information about its completeness, we cannot vouch for its representativeness either. There is every reason to believe that the cases not identified, if there were any, would be less sensational cases that did not proceed as far in the criminal justice system.

In other words, the cases that were identified would be more brutal, contain more evidence, and be more likely to result in a hearing or trial that would bring it to greater public attention than other cases. Whether this group of cases is biased in this way, we do not know.

With these possible caveats in mind, we present the information on the California cases. One advantage of generating data through calls to District Attorneys, newspapers and so forth, rather than through the state reporting system, was that a great deal more information could be gathered. The NCMR, by diligent sleuthing, was able to inform itself about age, race, occupations of the husband and wife, and the nature of the incident in addition to all the data about the court disposition.

NATURE OF THE CASES

A first thing to note about the cases is that they were, on the whole, extremely brutal. Especially brutal cases are probably more apt to end up on the police blotter and in the newspaper, and that may account in part for the array of incredible violence illustrated in the chart. The cases include one where a woman was raped with a crowbar and a sixteen inch tire iron and then had her breasts slashed with the same instruments. In another, a woman complained that her husband forced her to have sex with other men and dogs. In still another, the fugitive husband murdered the victim before he could be apprehended for her rape. The use of knives and guns was a common feature among these cases and several included very severe beatings.

A second important feature of the cases was that a majority of the rapes occurred between spouses who were separated, sometimes very recently so. In only 18 percent of the cases were the couple still living together (See Table 1). It is not surprising that cohabiting couples constitute a minority of cases. Wives who are still living with their husbands no doubt have a much more

difficult time seeing what happened to them as a rape and choosing to present such charges to the police. Also, a woman who is living in a separate household would expect less skepticism and ridicule on the part of police when she made such a charge. And it may be easier for such women to establish evidence of force and non-consent. As time goes on, normative standards change, and women become more aware of their rights, the proportion of cases involving cohabiting spouses may increase.

The deletion of the exemption for cohabiting spouses also has a "multiplier" effect, we suspect, on the prosecution of estranged husbands. When the exemption for cohabiting spouses is removed, there is generally a great deal of publicity about the problem. Prosecutors, police officers and women in general learn about the possibility of charging spouses with rape. This no doubt leads to an increased number of cases involving estranged husbands as well as cohabiting husbands.

Incidentally, there are some interesting similarities among the cases of women raped by estranged husbands. A number of them were kidnapped before they were raped, driven somewhere in a car against their will or taken somewhere at gunpoint. Others were deceived by husbands who told them they wanted to see them in order to talk with them about their children or about their finances.

THE OFFENDERS

The NCMR researchers were able to gather some valuable information about the offenders as well as about the court disposition (See Table 1). The offenders were, by and large, young. Sixty-four percent were under 30 and 33 percent under 25. This corresponds to what we found in our interview population of marital rape victims.⁽²⁵⁾ Marital rape coming to public attention is predominantly a younger man's crime.

Occupationally, the offenders whose marital rapes come to public attention were also a lower status group. Large numbers, 31 percent, were unemployed, and another 31 percent were blue-collar workers. This may not tell us anything about marital rape in general, however. We have to remember that it is typically men from lower social classes who are the clientele of the criminal justice system. Well-to-do criminals tend to be more successful at evading detection and prosecution. Nonetheless, this inventory of cases shows that some middle-class marital rapists are being prosecuted. The law is being applied to a spectrum of husbands, not just one class.

The racial and ethnic breakdown of the offenders shows a distribution roughly typical of the California population as a whole. Of those whose race we could ascertain, about two-thirds were white and the remaining third divided between Black and Hispanic.

DISPOSITION OF CASES

The most interesting information we can glean from these cases is not so much about the phenomenon of marital rape itself but rather about how the phenomenon is handled in the criminal justice system. The cases are certainly not a representative set of marital rapes, the vast majority of which we know are never reported. But they are in all likelihood a representative sample of cases that make their way into the legal system. What happens to marital rape

cases once they arrive there? (See Table 2)

First of all, a substantial number of cases get dropped before they go very far, often before trial, and sometimes before arraignment. In 28 percent of the cases in this sample the charges were dropped.

Unfortunately, the information on why the charges were dropped is not among the most reliable in the chart. Many times the reason given depends on the perspective of the person giving the information. District attorneys often choose to drop charges because they think they do not have a good case but then blame it on lack of cooperation by the wife. From the wife's perspective, she may see the dropping of charges as the decision of the D.A. The real state of affairs is difficult to determine.

It is certain that in some cases charges are dropped at the request of the wife. Where NCMR researchers could ascertain the reasons the wife gave for such requests they included such things as: 1) the wife was pressured by relatives of the offender to drop the charge, 2) the wife did not want to face the embarrassment of a trial, 3) the wife forgave her husband and wanted him back or 4) the wife got what she most wanted (divorce and protection) in other ways.

Of course, another common reason for wives dropping charges, especially in wife abuse cases, is fear of further retaliation by the husband.

It does not appear from the available information that the cases where the charges were dropped were frivolous or fraudulent. Some of these dropped charges involved severe assaults, replete with injuries and witnesses. In fact, one involved the woman who was raped and battered with the tire iron.

The remaining cases (72 percent) went on for prosecution, and of these a remarkable 89 percent (25 out of 28) resulted in a conviction. There were several routes to a conviction. The most common was a simple guilty plea on the part of the offender: 60 percent (17 of 28) of the offenders pleaded guilty, usually to the charge of spousal rape itself. In a little less than a third of such pleas, though, the charge was bargained down to another charge, usually the less onerous one of assault or battery.

In 11 cases the offender pleaded not guilty and went to trial. Of these, eight resulted in a guilty verdict -- seven by a jury and one by a judge. There were three non-guilty verdicts handed down to marital rape charges, two by a jury and one by a judge. (Actually in the one jury acquittal, there were two jury trials: one ended in a deadlock, the other in an acquittal.)

SENTENCING

All together, 25 of the 28 cases brought to trial in the two year period resulted in a guilty finding, and all offenders received sentences of some sort. The sentences were not particularly severe. Ten of the convicted men received no jail term whatsoever. Most of these got off with suspended sentences and fines. Some were remanded to counseling and one was ordered to do community service.

Fifteen of the 25 did go to jail or prison, however, with sentences ranging from 30 days to 16 years. The severe sentences tended to be meted out only when other crimes had been committed in tandem with the marital rape. In the case

where one judge imposed a 16 year sentence, the offender had abducted and raped another unrelated woman during the same episode where the spousal rape had occurred. A man who held his son hostage with a sawed off shotgun was sentenced to four years. The longest sentence meted out for a marital rape uncomplicated by other crimes and weapon violations was three years. The maximum possible term for felony spousal rape is eight years.

IMPLICATIONS: NO FLOOD OF CASES

From an analysis of these 39 cases, it is possible to draw some important conclusions about how the criminal justice system deals with the issue of marital rape once it is criminalized. They are conclusions which contribute directly to the debate on policy which for the last few years has been taking place in legislatures and courts.

First, there is little evidence that the courts will be swamped by a large number of marital rape complaints. Thirty, forty or even fifty cases reaching the courts over a two-year period in a state of 20 million people is a miniscule burden on the system. In the case of California, the load works out, as far as we can tell, to be approximately one case per year per million inhabitants. At that rate, most states in the country can probably expect less than a dozen prosecutions per year following the criminalization of spousal rape. If we are talking about states where the exemption only applies to a husband and wife living together, the increase in cases will be even smaller.

As to the matter of these cases being non-serious, the opposite would appear to be true. If California's experience holds true elsewhere, the type of cases that will come to court will tend to be the most blatant, the most brutal and the most heinous.

Of course, these conclusions only apply to cases in the courts. Those opposed to criminalizing marital rape also are concerned about the police being inundated with a large number of frivolous complaints. From the data we have collected, we cannot draw any conclusions about the experience of the police. However, we are skeptical that the police experience in California has been much different.

IMPLICATION: DROPPING OF CHARGES

Clearly a large number of marital rape charges later get dropped. As in the case of wife abuse, where similarly large numbers of cases are dropped, there is controversy about why the attrition rate is so high. Police and prosecutors tend to blame the wives for being fickle. Advocates for battered women tend to blame the criminal justice system for being insensitive.

The key problem, however, is not in determining who is to blame but in improving the level of mutual cooperation between victims and the criminal justice system. Where special victim assistance programs have been set up around the country, for example, and where prosecutors have learned more about the dilemmas facing victims, this level of cooperation has increased.(#7)

If the cases noted here are any indication, women do not drop charges because they were trumped up in the first place. Rather, they retract these charges after having suffered from fear, from embarrassment, or from pressure by

relatives. Sometimes sensitive and on-going personal contact between the prosecutor and the victim is enough to prevent case attrition. As prosecutors recognize marital rape as a legitimate crime and gain more experience with marital rape cases, we expect that their record will improve as they learn how best to work with victims to insure their participation.

IMPLICATION: HIGH CONVICTION RATE

Perhaps the most impressive finding from our analysis of the California experience is that, contrary to what many opponents have claimed, marital rape prosecutions can be very effective indeed.

The number of convictions as a percentage of the number of cases brought in California was actually extraordinarily high. In 64 percent of all cases where a charge was lodged, a conviction was obtained. In fully 89 percent of all cases which reached the prosecution stage a conviction was obtained.

Compare this, for example, to non-marital rape prosecutions. According to statistics for 1980 gathered by the California State Department of Justice, of 3,126 cases of forcible rape where arrests were made, 1,368 or 44 percent resulted in a conviction. Of all forcible rape cases reaching actual prosecution (2,026), the percentage resulting in conviction was 67 percent.⁽²⁸⁾ In short, the prosecution of marital rape cases in California was more likely to result in success than the prosecution of non-marital rape.

This is an extremely important finding since a main concern of prosecutors is that their time will be wasted in pursuing marital rape cases. It is often imagined that the prosecution of such cases will be hampered by lack of evidence, doubt about whether sex was forced or consensual and prejudice among jurors against the idea of convicting a husband on the word of his wife. Based on California cases, these concerns do not seem to be well founded. Marital rape cases, once they get to the stage of prosecution, do not seem to be extraordinarily time consuming. In three-fifths of the cases, the offenders pleaded guilty (this was true of only one-fifth of the ordinary rape cases in Philadelphia), avoiding the necessity of a trial altogether. Hence the system actually worked very efficiently from a prosecutor's point of view.

It is significant that so many offenders pleaded guilty to the spousal rape charge. Defendants and their attorneys did not automatically think that it was an easy charge to beat. Nor did prosecutors. Otherwise, they might have been more likely to bargain away the spousal rape charge. The prosecutors used the charge and they convinced the defendants to plead guilty to it. This shows that the charge of spousal rape can be an effective piece of ammunition in the prosecutor's possession.

The number of guilty pleadings meant that there were rather few jury trials involving marital rape charges, making it harder to tell from the California experience how juries react to marital rape. However, there was a small amount of evidence. Of the nine jury trials, seven ended in convictions, showing that juries are not averse to bringing in a conviction against a husband, as some might have thought. Moreover, the fact that there was at least two acquittals, too, may relieve others of the fear that no man will ever receive a fair hearing in front of a jury on such a charge -- a difficult position for us to believe given the amount of popular skepticism that exists about marital rape.

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Sincerely yours,

Joanne Schuler

Staff of the National Center on Women and Family Law, Inc.

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