STATE LEGISLATURE
HOUSE JUDICIARY STANDING COMMITTEE
SENATE JUDICIARY STANDING COMMITTEE
February 24, 1977
JOINT PUBLIC HEARING
From tape b32r08-03-JJUD-770224

MEMBERS

Senate

Senator George Hohman, Chair
Senator Robert Ziegler, Sr., Vice Chair
Senator Patrick Rodey
Senator Mike Colletta
Senator Clem Tillion

House

Representative Terry Gardiner, Chair
Representative Bill Miles, Vice Chair
Representative Fred Brown
Representative Lisa Rudd
Representative Larry Carpenter
Representative Ed Dankworth
Representative Richard Eliason

COMMITTEE CALENDAR

Criminal Code Revision Review

WITNESS REGISTER

JIM BARKLEY, President
Alaska Association of Chiefs of Police
and Chief of the Juneau Police Department
Juneau, Alaska
POSITION STATEMENT: Spoke in favor of the draft criminal code revision, and he made a suggestion.

JOHN HAVELOCK, Project Executive Director
Criminal Law Revision Subcommission
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Answered questions regarding the draft criminal code revision.

BARRY JEFFREY STERN, Staff Counsel
Criminal Law Revision Subcommission
Alaska State Legislature
Juneau, Alaska
POSITION STATEMENT: Presented an overview of Book 1 of the draft criminal code revision.

DANIEL HICKEY, Chief Prosecutor
Office of the Attorney General
Department of Law
Juneau, Alaska
POSITION STATEMENT: Answered questions regarding the draft criminal code revision.

^Criminal Code Revision Review

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CHAIR TERRY GARDINER called the joint meeting of the House Judiciary Standing Committee to order and spoke about who received copies of the draft criminal code revision, book 1.

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CHAIR GARDINER said the committee will begin work on kidnapping on page 52. He noted that Captain Barkley from the Juneau Police Department is present.

JIM BARKLEY, Chief of Police, Juneau, said he is appearing as the President of the Alaska Association of Chiefs of Police. He expressed that the draft revised code is one of the best he has seen. He stated that everyone recognizes that there might be some little area that was missed, but his association is very, very happy with it. It solves a lot of the problems that exist under current law where everybody wonders what to do after someone is arrested. Even district attorneys are not sure, he opined. "Yea, he broke the law, but we don't know exactly which one he broke," he quoted. He expressed his belief that the new criminal code will solve such problems. However, he has found one area that concerns him, and it is within the sexual offenses. It might be wise, under AS 11.41.430 and AS 11.41.440, to specify that these apply to individuals between the ages of 13 and 16 years, he said. With a victim under 13 years of age, there is an either/or situation, so it will be unclear which crime to charge. The crime could be a class A, B, or C felony, or if the defendant is the right age, it could be a misdemeanor. There is too much room for dealing, he added. "If

you're trying to get out the personal opinions and feelings of the individuals involved, I don't think you've done it in this particular instance," he stated. That is the only concern he has. He spoke of criminal code drafts from previous years that were not so good, but this draft makes it easy to see what a person can do and what a person cannot do.

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REPRESENTATIVE BROWN asked if Chief Barkley thought there was too much discretion under the sexual assault provision when the victim is under 13 years of age.

CHIEF BARKLEY said the possibilities run from class A felony to misdemeanor, and it depends on the prosecutor as to what happens, or it can depend on what the police officer arrests the offender for.

REPRESENTATIVE DANKWORTH asked about the statement, "Being any age, he engages in sexual contact with another person under 13 years of age." Representative Dankworth asked about the offender being a 12-year-old boy.

[A discussion ensued about juvenile offenders.]

CHAIR GARDINER said sexual assault will be discussed tomorrow.

MR. STERN said that giving the prosecutor that discretion "was never considered."

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MR. STERN and Chair Gardiner spoke of getting several letters regarding spousal immunity [under sexual offenses].

[Indiscernible discussion]

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UNIDENTIFIED SPEAKER said that this committee has no idea what penalties are being considered.

CHAIR GARDINER said he could offer examples of what other states have done regarding penalties or provide some of the penalty proposals that were offered. He added that a class C felony will have a sentence of over one year. A class A misdemeanor may be close to 30 days to one year, and a class B misdemeanor

may be up to 90 days, he surmised. Without presumptive sentencing, a class A felony would be a 15-year maximum. "It would be like 15-10-5." He noted that all the states varied quite a bit in terms of maximum and minimum sentences.

MR. STERN explained that there are three offenses under kidnapping that involve the interference with someone's liberty: kidnapping, custodial interference, and unlawful imprisonment. The offenses range from a class A felony to a class B misdemeanor, and each is broken down into two degrees, he said. The basic offense is described in the second degree category and certain aggravating factors move the offense to a first degree category. He added, "As far as I can determine, virtually every kidnapping will be an A felony." A class B felony will cover the situation where a specific intent is not listed, he stated. Kidnapping is defined as "the abduction of a person with intent to", followed by six different intents. The key word is abduction, which is defined as restraint plus an intent to prevent the victim's liberation by secreting or holding him in a place where he is not likely to be found or using or threatening to use deadly physical force. He explained that restraint is to restrict a person's movements unlawfully and without consent, so as to interfere substantially with his or her liberty. If there was only restraint so that a person's movement was restricted unlawfully and without consent, and there was no aggravating factor of secreting or holding the person in a place not likely to be found or using or threatening to use physical force, it will not be kidnapping. It is unlawful interference. The two key words are abduct and restraint, he noted.

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MR. STERN said that the revised code also has the offense of custodial interference, "because it was felt that when a relative interferes with the custody of a person that's related to him, it should not be viewed as either kidnapping or unlawful imprisonment, unless there is something very wrong." He said that the code recognizes that it is possible to kidnap a relative, but the conduct would have to include one of the following intents: hold for ransom; use as a shield or hostage; sexually assault; or interfere with the performance of a governmental function. This will not be the typical custodial interference, he said. Interference with custody rights can include custody of mentally incapacitated persons [as well as children]. It only applies if the offender is a relative. "For example, I could not go in and try to take from custody a child that is not related to me. That would be considered kidnapping

or unlawful imprisonment. But if I am related to the victim, I could make the case that it's custodial interference," he stated.

MR. STERN noted that in existing statute, custodial interference is called "child stealing," and it only covers interference with custody of children under 12 years of age. The kidnapping statute specifically exempts, from its prohibition, the interference of custody of a minor, so based on Mr. Stern's reading of the statute, there is a significant loophole for offenses involving children ages 12 to 18 years. He said that the Subcommission established an affirmative defense to the crime of kidnapping, which recognizes that if a defendant voluntarily releases the victim without having caused serious injury or having sexually assaulted the victim, the crime will be a class B felony or kidnapping in the second degree. This is to discourage the kidnapper from killing or assaulting the victim. Second degree kidnapping just includes the abduction of a person, and it does not include any of the intents listed under first degree kidnapping, he added. Mr. Stern pointed out that the offender has to only intend to commit the acts listed, and not actually do them.

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MR. STERN said that the provision on kidnapping in the second degree states that it is an affirmative defense if the defendant is a relative of the person abducted, the sole intent is to assume control of the person, and the abduction is not coupled with the intent to use or threaten to use deadly physical force or to sexually assault the child. "What this is doing is getting custodial interference outside of the kidnapping statute and into the custody statute," he said. The basic crime of custodial interference is a class A misdemeanor. "A person commits the crime of custodial interference in the second degree if, knowing that he has no legal right to do so, he takes, entices, or keeps a person from his lawful custodian with intent to hold him permanently or for a protracted period," he stated. He explained that a "protracted period" would not mean that a person kept a child for "a day or two longer than is outlined in the custody decree." He said that it will be a jury question. The term "lawful custodian" is defined to include a parent, guardian, or other person responsible by authority of law for the care, custody, or control of another. This definition includes institutions and organizations, he clarified.

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MR. STERN said the offense is raised a degree and becomes a class C felony if the relative takes the person out of the state or if he or she exposes the person to a substantial risk of illness or physical injury. Mr. Stern turned to unlawful imprisonment, which is defined in terms of restraining another person. It recognizes that it is an affirmative defense if the victim is a related minor and the intent is to assume custody (and the victim is not hurt).

REPRESENTATIVE RUDD asked why the conduct goes to a first degree if the person is taken out of state. She pointed out that taking a child from Juneau to Barrow is a farther distance than taking the child out of state.

MR. STERN said for extradition purposes.

MR. HICKEY spoke of difficulties in extraditing for misdemeanor offenses.

MR. STERN said custodial interference is a class A misdemeanor, but if the person is taken out of the state it becomes a felony.

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MR. HICKEY noted that all governors will extradite for felonies, "but when you get into misdemeanors, it's been my experience that you get into an awful lot of questions of how appropriate the charge is, and what's really involved, and what's going to happen...."

MR. STERN said the other factor is exposing the victim to substantial risk of illness or physical injury. If the child or incapacitated person is without necessary medicine, for example, it can be a more serious offense, he added. He said there is one other crime in this section and it is called coercion. It is similar to the existing blackmail statute, because it covers situations where a person is intimidated to do something when that person has a legal right not to do it. "Or you compel a person not to do something which he has a legal right to do." He said ten threats are listed for compelling a person, and they are identical to the listed threats under "theft by extortion." If a person obtains property from another by threat, it is treated more severely than stealing property, he said. Coercion does not involve obtaining property; it forces a person to do something or to not do something. He said the list is self-

explanatory and the committee can discuss the list when it discusses extortion.

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REPRESENTATIVE BROWN opined that if AS 11.41.360 (a) (1), (6), (8), and (10) were passed, it would make it impossible to carry on the business of the legislature. He said a senator threatened to punch him in the legislative lounge for not signing a free conference committee report.

MR. STERN noted that there is a provision in (c), which recognizes that if a person threatened to charge another with a crime, it is a defense if the person making the threat reasonably believed the charge to be true and his or her sole intent was to compel or induce the victim to take reasonable action to correct the wrong, which is the subject of the threat.... If someone vandalized a house and the homeowner said to fix it or he or she will go to the police—that is legal. The existing blackmail statute is more limited, he stated.

REPRESENTATIVE BROWN said, "The new draft would cover a threat against one's mistress and the old one would not—that's modern code drafting."

MR. STERN said it would cover a threat to any person. "If you're threatening to cause physical injury to any person it's sufficient as a threat," he stated.

REPRESENTATIVE BROWN asked what was wrong with the old blackmail section.

MR. STERN said the existing blackmail statute would be more limited. The extortion statute in existing law lists eight or nine threats, and it seems like there should be some parallel. A threat made to obtain property is just as bad as a threat that causes a person to do something which he or she does not have to do or prevents the person from doing something that he or she has a right to do, he opined.

REPRESENTATIVE DANKWORTH asked about a threat to publicly expose someone.

MR. STERN said it is covered in the existing extortion statute and in the new one. "Everything that is covered here in the coercion statute parallels the extortion statute—it is virtually identical except it does not require that property be obtained."

He said his reading of the existing blackmail statute tells him that it only covers forcing a person to engage in conduct ... it does not cover the situation where a person is forced to not engage in conduct. There is some question regarding penalties for some of these offenses, as he was not at the meeting when this topic was covered.

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MR. HICKEY recollected that the Subcommission never officially decided on the classification "of a couple of these offenses." Coercion being a class A misdemeanor was one classification that was never officially passed by the Subcommission, he surmised. He said it seems to be improperly classified. "I think it ought to be a felony," he added.

MR. STERN noted that he does not believe that kidnapping was ever in the preliminary report, but the commentary indicated that some states classify some threats as felonies and some as misdemeanors. In response to a question, he said there are three degrees of theft depending on the value of the property, "but when theft by extortion is obtained, I believe it's a B felony regardless of how much property."

MR. HICKEY said it is conceivable there could be an offense that is much more serious than a small theft by extortion, and the statute needs to be reexamined.

CHAIR GARDINER asked if Mr. Hickey is saying that coercion should be a class C felony.

MR. HICKEY said he believes that "at least some of the types of threats that are covered here should, for sure, be at least a C felony rather than an across-the-board A misdemeanor." From a prosecutorial point of view, the entire section should be a class C felony, but he can recognize arguments in favor of some of them being listed as class A misdemeanors.

CHAIR GARDINER asked if, currently, extortion and blackmail are five years....

MR. HICKEY said the blackmail statute is confusing because it has old language where if someone is placed in the penitentiary, it is up to five years, and if placed in a jail, it is up to a year, "which means it's a mixed bag." It is ridiculous and raises constitutional questions, he opined. He said that in California's penal code, if, for a felony offense, a judge

sentences an individual to county jail time, which means up to one year, then the offense becomes, by definition, a misdemeanor. So if a person commits a burglary that is punishable by one to ten years, the judge can do one of two things in terms of doling out a sentence. The judge can sentence the person to one to ten years [in a penitentiary] or to sixty days in the county jail. If the judge sentences the person to sixty days (or anything up to a year), it becomes, by definition, a misdemeanor, because, by law, a misdemeanor is anything with a sentence of one year or less. "So our present statute is confusing," he stated. His view is that blackmail would always be charged as a felony, punishable by up to five years.

UNIDENTIFIED SPEAKER asked how many blackmail cases come up.

MR. HICKEY said he does not know of one.

CHAIR GARDINER said the objective for the legislature is to review the draft, listen to testimony, and come up with the best possible statute.

MR. HICKEY said the other question is "the whole thing about class A felonies and the fact that there are a couple like kidnapping in the first degree that, depending on what the penalty structure is that's ultimately adopted for a class A felony, we may be substantially changing the present penalty structure and we've got a couple of offences that are particularly egregious such as kidnapping, is a good example. We've got what I guess you could refer to as an aggravated A, a super A."

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REPRESENTATIVE RUDD asked if sentencing will come under the final adoption of the code.

CHAIR GARDINER said it would be part of the code. Whether something is made a class A or class B felony, it would depend on how many years [in the length of a sentence that came with each felony].

REPRESENTATIVE BROWN said there will be qualifiers. For example, a class B felony not involving the use of a gun....

MR. STERN said with this type of code and degree structure, sentencing can just be plugged in.

CHAIR GARDINER asked how coercion would be broken out into felony and misdemeanor conduct.

MR. STERN said he gave examples in the book. The model penal code attempts to measure the gravity of the conduct based on whether the threat is a felony or the actor's purpose is felonious. From a drafting point of view, it is not that difficult, he said, but deciding which threats are aggravated is more difficult.

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CHAIR GARDINER asked for a proposal from Mr. Hickey for the committee to consider.

MR. STERN said he wanted to make a point regarding assault. For purposes of the assault statute, serious physical injury is defined to include conduct which unlawfully terminates a pregnancy, and that is not referring to abortion. It would cover a terminated pregnancy due to a drunken driver hitting a pregnant woman, for example. That would be an aggravated form of assault, he added. In the homicide statute, "we specifically say that abortion is excluded from the homicide provision because the definition of a person requires a person to be born alive." The Subcommission said this provides better protection to the mother, because under existing law, there is a question that if the termination of a pregnancy is the only injury, whether that is an aggravated form of assault. Under the new code it specifically is, he explained.

REPRESENTATIVE RUDD asked about a child being born alive during an abortion.

MR. STERN said the code commentary states that whether an abortion is criminal or not is determined by the existing abortion statute, "and we didn't attempt to change the existing abortion statute."

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MR. STERN said if it were born alive, "I think it's probably an illegal abortion," he said.

REPRESENTATIVE RUDD asked about a time limit.

MR. STERN said, "Not specifically in that statute." The Supreme Court opinion stated that abortion could be prohibited after a certain time, he added.

ADJOURNMENT

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