

**STATE LEGISLATURE**  
**HOUSE JUDICIARY STANDING COMMITTEE**  
**SENATE JUDICIARY STANDING COMMITTEE**  
February 25, 1977  
JOINT PUBLIC HEARING  
From tape b32r09-04-JJUD-770225

**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**

BARRY JEFFREY STERN, Staff Counsel  
Criminal Law Revision Subcommittee  
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.

EBEN H. LEWIS, Judge  
Alaska Superior Court  
3rd Judicial District  
Alaska Court System  
Kodiak, Alaska

**POSITION STATEMENT:** Commented on the draft criminal code revision.

CAROLYN BIRD  
Juneau, Alaska

**POSITION STATEMENT:** Commented on the draft criminal code revision.

KAREN DAVIS  
Juneau Committee on Assaults against Women  
Juneau, Alaska

**POSITION STATEMENT:** Commented on the draft criminal code revision.

ROBERT BUNDY, District Attorney  
2nd Judicial District  
Department of Law  
Nome, Alaska

**POSITION STATEMENT:** Commented on the draft criminal code revision.

ANNE CARPENETI, Assistant Attorney General  
Legal Services Section  
Criminal Division  
Department of Law (DOL)  
Juneau, Alaska

**POSITION STATEMENT:** Reported on a conference she had attended called "Rape and its Victims."

^Criminal Code Revision Review

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BARRY JEFFREY STERN, Staff Counsel, Criminal Law Revision Subcommittee, Alaska State Legislature, Juneau, Alaska, pointed out that he previously discussed how Alaska's existing law is based on 100-year-old laws from Oregon and New York. With the rape laws, "we went back as far as 1750 for the existing rape statute." [In 18th century England, Sir William] Blackstone described rape as carnal knowledge of a woman forcibly and against her will, which is identical to Alaska's existing definition of rape, except that it is not limited to women, he

explained. In reviewing the existing provisions on sexual offenses, the Subcommittee concluded that they were totally inadequate. He said that the Subcommittee created four degrees of sexual assault, and the main distinction between the offenses is whether sexual penetration or sexual contact occurred. Penetration is defined to include penetration by any part of the body or any object into the genital opening or the anus.

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MR. STERN defined sexual contact as including touching of the anus, breast, and genital area. First and third degree offenses involve sexual penetration. The offenses range from a class A felony to a class A misdemeanor. First degree sexual assault include three offenses. The first is "without consent," which replaces "forcibly and against her will," and he emphasized that resistance was not necessary for this offense to occur. All that is necessary is that the victim is coerced by the use of force or the threat of force. In reviewing cases from other states, he found some instances where the victim was required to physically resist the offender "until the act had been completed." He relayed one case where resistance was questioned even though the victim had been kidnapped by six men. The next category of first degree sexual assault is when the victim is under 13 years of age. Existing law recognizes one form of statutory rape depending on whether the victim was under 16 years of age. The Subcommittee concluded that a clearer distinction could be made between victims who are under 13 and victims who are under 16, so when someone engages in sexual penetration with a person under 13 years, with or without consent, it is first degree sexual assault.

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MR. STERN noted that the entire code is gender neutral. He said that the third category of first degree sexual assault is when the defendant and the victim are related and the defendant is over 18 and the victim is under 18 years of age. He explained that incest is an aggravating factor. When the victim is over 13 but under 16, it is not as serious, he stated. The Subcommittee concluded that when the victim is over 13 and under 18, it should be first degree sexual assault. Second degree sexual assault is identical to the first degree offense, except there is no sexual penetration, just sexual contact. In cases where penetration is difficult to prove, there will be this lesser included crime. It is a class B felony, he added. Third degree assault occurs when the defendant is 18 years or

older and the victim is under 16. "The victim is young but it isn't that young," he said, and it is a class C felony.

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MR. STERN said that when the victim is incapacitated, regardless of consent, the crime will be a class C felony. That covers situations where the victim might be mentally incapable of giving consent or would be physically incapacitated, for example, the victim may be intoxicated. Fourth degree sexual assault is similar conduct as third degree except it does not involve sexual penetration, he noted. In this case, the defendant must be 19 years of age or older, because the Subcommittee was concerned about including high school petting, he said. The Subcommittee also considered three statutes that apply to consensual activities between adults in private, and the Subcommittee concluded that such activity should not be included in the criminal code. They include adultery, cohabitation, and sodomy. He expressed his belief that sodomy would have the most public interest.

MR. STERN said that there is an existing sodomy statute that provides for up to ten years imprisonment, and, based on recent amendments over the past two years, the statute only covers two people engaged in anal penetration. It is not just homosexuality, but it covers consenting married adults. He said there may be large groups of people concerned with the immorality of some of this conduct; however, there is no history of enforcement. Under the guidelines set forth in the Supreme Court decision on [Ravin v. State], such laws may be unconstitutional, he surmised. He said the statute could be used capriciously against someone "who you can't get under any other type of crime." It was felt that it should not be included in the criminal code, he stated. "We are not saying that sodomy is legal, but we're saying consensual sodomy is legal if it is between adults."

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MR. STERN noted that there have been several letters of concern about the spousal immunity section of the code, which says that a person does not commit the crime of sexual assault if the victim is the rapist's legal spouse, unless the spouses are living apart and one of them has filed for divorce. He said that the Subcommittee changed existing law by providing that the immunity does not apply if the couple is living apart. Under common law, there was no rape when sex was forced on a

spouse. There is no explicit provision in existing statute that excludes this type of assault; however, in 1975 an amendment was added to the rape statute which deals with "this tricky subject of accomplice liability." For example, a man could hire someone to rape his wife, and the man would be guilty of rape as an accomplice, he said. The legislature apparently thought it necessary to deal with that situation specifically in a section of the rape statute. He surmised that the legislature had to deal with it because the term, rape, "is always excluded in spousal situations."

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MR. STERN said, "One very strong point about this code is the fact that in defining sexual contact as an offense, a very serious offense, we're closing a very big gap in existing Alaska law." Today, the statute prohibits lewd and lascivious acts with a child. There is no statute covering sexual assault with an adult that does not amount to rape or attempted rape. Currently, "whatever lewd and lascivious means, if it occurs with someone over 16, it's not considered lewd and lascivious." He pointed out that assault and battery has only a six-month maximum sentence. The new code defines lewd and lascivious with its definition of sexual contact. He noted that the new code also has an indecent expose statute. Current statute refers to exposure of "private parts" and taking part in a model artist exhibition, he said. The revised code specifies what parts of the body would be exposed and the person's culpable mental state.

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MR. STERN said the revised code also considers reasonably mistaking someone's age with regard to statutory rape. If a person is accused of sexual assault and argued that the victim appeared to be over the age of consent, it would be a defense if the offender could prove that there was reason to believe that the victim was over the age of 16. The Subcommittee also decided that when the victim was under the age of 13 years, there is no defense. He expressed his belief that the sexual offenses are the most important part of the revised code and that the Subcommittee substantially improved existing law.

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DANIEL HICKEY, Chief Prosecutor, Office of the Attorney General, Department of Law, Juneau, Alaska, introduced two attorneys in

the audience. One of them, Anne Carpeneti, Assistant Attorney General, just participated in a seminar on rape, and he suggested that Ms. Carpeneti speak about how Alaska's new sexual offense statutes fit into the discussion that is taking place at the national level.

REPRESENTATIVE RUDD told Mr. Stern that he has done a wonderful job, and the revised code is a great improvement. She asked if there is a law against fornication.

MR. STERN said the current cohabitation statute refers to "a person who cohabits with another in a state of adultery or fornication."

REPRESENTATIVE RUDD noted that the only reason Mr. Stern gave for retaining spousal immunity in statute was that it has always been that way. "That is the worst possible reason," she stated. There is no justification for physical violence by anyone against anyone whether they are married or not.

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MR. STERN said he had gone over the topic quickly. Spousal immunity was considered in the Subcommittee meetings in a lot of detail. He recalls that the decision [to include spousal immunity] was unanimous. He stated his belief that the Subcommittee was impressed with the testimony of Beverly Cutler, Assistant Public Defender, who said that this type of [rape] charge is likely to come up when a marriage has fallen apart and a person is seeking grounds for a divorce. Ms. Cutler thought the court system would have a morass of charges, he said. The Subcommittee was also concerned about the privacy aspect, and he posed a question about "bugging the bedroom." He added, "No one is saying that the spouse did not commit a crime, what we're saying is he did not commit sexual assault. He may have committed assault, in fact, he has committed assault the way we've defined it." If there has been physical injury, it is a higher degree of assault. He expressed his belief that the reason why spousal immunity is in the code is not just because it has always been done that way.

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REPRESENTATIVE RUDD asked why a bedroom would need to be bugged any more than any other place where rape takes place.

MR. STERN said that there was concern that the charge would be one person's word against another's. "I think it's necessary to consider this issue in terms of how we define 'without consent'." He said:

I think this is a change from, at least, the law as it is set out in the statute by saying that resistance is not necessary, specifically in the statute; by saying that it can be by threat, express or implied threat, of physical injury. We have the situation where the spouse comes home and forces himself, perhaps, on the other spouse and the next day it's a rape charge, perhaps, a sexual assault charge, and without having this element of forcible resistance, it was felt that there would be a lot more of those charges.

REPRESENTATIVE RUDD agreed. There probably would be a lot more of those charges because there are a lot of cases of rape in marriages. "If a spouse forces himself or herself on the other spouse, isn't that just as forceful as any other type of rape?" she asked. "Don't you have to work just as hard to prove it? Don't you have the same set of circumstances as far as the physical act is concerned?"

MR. STERN suggested that Mr. Hickey respond.

EBEN H. LEWIS, Judge, Alaska Superior Court, 3rd Judicial District, Alaska Court System, Kodiak, Alaska, said he has been a family court judge for the last six months and he has handled a lot of family court cases prior to that. He said [charging rape] would be another useful tool, one that would be frequently employed just to make the situation [worse]. "That's the type of situation—it's probably the only time in litigation—that people don't want to improve. They want to make it worse. The worse they can make it ... they use rape as a vehicle to exacerbate the ill feelings...." He said the charge could be very easily and very seriously abused. It would clutter the court system with needless criminal litigation, he said. Domestic situations are extremely explosive, and Alaska does not need another type of means for couples to beat on each other.

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REPRESENTATIVE RUDD asked if the judge had confidence in his ability to discern what is really happening. That is what judges and juries are supposed to do. She said she agrees that it might be used by people, but she is confident in the judges'

ability to make that discernment. As to the crime causing more work, every crime is more work and to use that argument all crimes should be eliminated.

JUDGE LEWIS said, "We've got so many crimes now we can't ... the whole situation is running away from us. Just don't give us any more crimes."

REPRESENTATIVE RUDD said, "I'll trade you." She said to [make a crime against spousal [sexual assault] and then eliminate the crime of murder. "Then you don't have to worry about any murder cases."

JUDGE LEWIS said murder has severe social impacts. "The domestic cases, we're going to have them anyway, we just don't need another serious vehicle within that context."

MR. HICKEY said that bringing a serious felony charge against any person is a very heavy matter. Subjecting a person to all of the prerogatives available to the state through the process of a felony conviction, regardless of what happens, is a substantial ethical matter, he stated. The kinds of cases that one could expect to arise through the complete removal of the spousal immunity provision are going to arise in vindictiveness, where the marriage has broken up and one spouse wants to initiate a criminal prosecution in order to gain leverage over another proceeding. He said there is a vivid example that occurred in Indiana in 1968. Indiana had a "crimes against nature" statute, which included consensual sodomy between two adults. A wife came to a prosecutor and alleged that her husband had engaged in sodomy with her three months previously, and they had since split up. A criminal charge was brought against the man and he was sentenced to 14 years in the penitentiary.

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REPRESENTATIVE RUDD said, "I can't seem to get through to you guys. Isn't it a crime; isn't it something that she has a right to seek redress of?"

MR. HICKEY said it is definitely a crime of assault. There is absolutely no question about that, he added. Given the fact that the requirement of resistance has been eliminated and now all one has to prove is that the sexual penetration was without consent, "I think that you have to read that in conjunction with what you're advocating, in terms of the abolition of spousal

immunity," he stated. The cases will all be one on one situations and where two parties are tremendously antagonistic toward each other. Any reasonable finder of fact is not going to be able to sort out the mess that is there, he said, in terms of finding someone guilty of a serious felony charge.

REPRESENTATIVE RUDD said that in that case, the person will be found not guilty.

MR. HICKEY said that in applying an ethical standard to screening cases, and the standard that Mr. Hickey has imposed on the district attorney's offices throughout the state, is that "we do not file a charge against a person unless, at the time we file it, we conclude that we have legally admissible evidence that would justify a reasonable finder of fact to convict the person of the offense alleged on proof beyond reasonable doubt."

REPRESENTATIVE RUDD said she agrees with that. If you have the evidence do it; if you do not have the evidence, don't do it. To write it out of the law, even the possibility of gaining redress, is just crazy, she added.

[Indiscernible comment]

JUDGE LEWIS said, "Considering the nature of the people involved in the controversy ... a bitter domestic quarrel would be a very easily abused and a very useful tool for somebody who really wanted bring the forces of the law down on the other party." It could very easily be subject to abuse—more so than any other consideration he can think of, he added. Passions run the highest in contested divorce cases; there is nothing more spiteful than the people in those cases. He said that any other type of litigation pales beside them. "The opportunity for a spouse, in one of those situations, to abuse the other by bringing such a charge—there may have been sexual intercourse—but that person will try to convert that sexual intercourse into a sexual offense." The Subcommittee is correct by deciding [to give spousal immunity], he stated.

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REPRESENTATIVE RUDD said there is opportunity to abuse almost any law—that is why there are courts, juries and lawyers. Anyone can file a suit on any basis whatsoever at any time, except that a spouse cannot file for a rape. "It's just plain crazy," she said. She added that she trusts Mr. Hickey and the

judges of Alaska to be able to discern where the truth lies and when cases are being filed spuriously.

MR. HICKEY provided the following scenario:

A woman walked into a district attorney's office or to a police department and gave a very detailed statement of what took place a day or night or 10 minutes before between her and her husband. That they had both been drinking, for example; they had come home from a party. Her husband expressed an interest in engaging in sexual intercourse. She said, "No," and he said, "If you don't, I'm going to beat you up." And she says, "Alright." If that had been outside of the context of the marriage, under this statute, it would clearly be sexual assault under the provisions that are before you. There are no marks on her of any kind. Let's say it is the next day and it is not possible to get the kind of medical tests to prove whether, in fact, they had intercourse. Or let's say it is possible, and that she said, "Well, earlier that evening we did have consensual sexual intercourse and I didn't want to later because he'd been drinking." How would you suggest that a case like that be handled? And, she's outraged. The law says that's rape. "I demand that you prosecute my husband."

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REPRESENTATIVE RUDD said she is not a lawyer, and "I have no idea how you would handle it. I assume you would handle it the same way you handle a [indisc.] rape."

MR. HICKEY asked Representative Rudd what she would do if she was a juror. He added that the husband had testified that they had had intercourse before going out, and when she refused to have intercourse when they came back he slept on the couch.

REPRESENTATIVE RUDD [indisc.]

MR. HICKEY said the experience he has had with adultery cases is that they always involve someone wanting to get even with someone else. Minor assault and battery cases that involve spouses almost always turn into situations where the police officer and prosecutor turn out to be the bad guys in the eyes of both the victim and the defendant, because the victim comes in one day and insists that the spouse be prosecuted and three days later they make up, and "in they come" and insist that the

charges be dropped. He said he has had cases like that and he tells [the individuals] that the charges will not be dropped and they will be forced to testify. It is a very difficult question, he added.

REPRESENTATIVE RUDD said it is a difficult question, but that is not a reason to eliminate it from the possibility of being resolved.

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REPRESENTATIVE DANKWORTH said Representative Rudd makes some good points, but sometimes things are not just black and white. When people get married, they are somewhat consenting to sex. "The very fact that you've agreed to have relations with this person over a period of time, it isn't the same to me as if I have no relation or a lady's never made a commitment to me to sleep with me or to have sex with me." He said that he believes that rape is a very serious offense, but once there is marriage or consent, it takes away the seriousness of that crime. From being with the police department he knows that "every family beef you go on, tempers are high and they make a lot of charges of what she and he did--not necessarily sex--but you usually find out most of them are not true anyway." He added, "I think we ought to watch real carefully when two people agree to sleep with each and have sex and generally everything goes fine, but then some night some problem occurs...if we start trying to get that involved in the serious crime of rape, I'm afraid [it will diminish] the importance of rape." He said rape is a very serious crime "and if you don't have a lady's consent, she hasn't agreed to sleep with you and she hasn't agreed to marry you, then that should be viewed as entirely different than once she's consented to all this." If a man forced himself on his wife she should have the right to accuse him of assault, he added.

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CAROLYN BIRD, Juneau, Alaska, said she is inclined to agree with Representative Rudd. She feels that there should be an opening for a spouse to provide facts if something like this happens, because there are some things that do happen once in a while and they are quite aggravated. The law should at least be open enough to listen to some facts, she stated. She said that she doubts that many people would come forward, but it should be left open. Representative Rudd is closer to the people, because people are frustrated with the sentencing by judges. The people

feel that it is just a revolving door, she explained. "The police catch them and the judges let them go." She said she is for stronger sentencing. In Sitka there were two men who were in the Kiksadi Club drinking and they got into an argument and one of them shot the other four times. The one who was shot was Native Alaskan, "and this to me was murder." The offender was brought to Juneau and served nine months and then the judge let him go on a manslaughter charge. She said she looked into the facts a little more and found that the police officer was new and did not pick up the right evidence, and the judge had to bring it down to manslaughter. "And now I understand that this man is going to school in Anchorage at taxpayer expense." This is a travesty, she said; he shot another man. The victim's mother said she could never understand how the offender was let go. She said she went to the Judicial Council, which said there should be stronger sentencing for aggravated assault. "I'm all for it." When she worked in the U.S. attorney's office, manslaughter had a seven-year sentence with four years off for good behavior, and that is reasonable, she opined.

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KAREN DAVIS, Juneau Committee on Assaults against Women, said that her committee endorses the criminal code revision and it has offered some amendments, including one on spousal immunity. Another amendment would limit the evidence of the victim's prior sexual conduct to activities with the defendant [indisc.] evidentiary exclusion to cover other aspects of the victim's private life. The judicial system is perpetuating a double standard where the defendant's past possible rapes cannot be brought into the trial.

JUDGE LEWIS interjected and said there is now a statute that precludes evidence of the victim's past sexual conduct. He noted that there are instances where the conduct may be relevant, but in a normal case, that information cannot be brought in.

MS. DAVIS said that none should be allowed. She turned to assaults, and said, "The main point on assault is that it's not even deemed a crime at this point [indisc.] a special offense and that maybe it could be included in family offenses, and this would give it the importance that this kind of crime does deserve. And also to have the arresting officer not have to see the crime taking place but to be able to arrest, let's say, the husband in the case of battery."

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MR. HICKEY asked if her proposal would include evidence of prior sexual acts between the victim and the defendant. "You would propose to exclude that?"

MS. DAVIS said, "Right, and just relevant to the case."

MR. HICKEY asked if it would exclude a prior charge of rape that was unsubstantiated.

MS. DAVIS said, "If that was to be allowed, and then there could be more of a balance with the victim's past being allowed also."

MR. HICKEY said his question involved a prior allegation of rape by the victim that resulted in acquittal because it was found to be unsubstantiated. "Would you propose to exclude that from being gone into?"

MS. DAVIS said she is not sure.

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ROBERT BUNDY, District Attorney, Nome, Alaska, said he has lived in Nome for six years. He said he admires what was done with the sexual assault laws; the prior law created a lot of confusion and had quite a few gaps. The prosecution was often difficult, especially with the crime of assault with attempt to rape, he said. It is difficult to prove, especially when there are intoxicated persons. Essentially the proposed revision gives some substance to the criminal law in terms of rational charging. He gives his whole-hearted support, he stated. He added that there is no real analytical reason for having the spousal immunity provision, on the other hand, in practice, there is a tremendous opportunity for abuse. "Because of the opportunity for abuse, all that does is make my job harder. It means that we have to screen more carefully and we have to get more people angry at us." The public defenders feel that they will have to defend more unjustified charges, which may result in convictions of their clients by unreasonable juries, he stated. He added that he does not know how to resolve that, but logically there is no real reason to have spousal immunity. Representative Dankworth touched on the idea that if someone is married, he or she consents somewhat. In an ordinary rape, the person's dignity is absolutely infringed upon, and that is why it is a class A felony, he opined. The way the criminal code revision worked, "we went down with the level of infringements

on persons' dignity, for want of a better word, down from first all the way down to the fourth degree sexual assault."

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MR. BUNDY said there is the thought that [rape] between a husband and wife is not as serious as between strangers, but people have been cohabitating for years who are not married and it is the same problem—it's not as serious. Then the prosecutor and the judge are relied upon to mitigate the offense, he noted, but the person remains convicted of a class A felony. In some states there is corroborative evidence that is required to be brought forth in a rape case. "First you have to be convicted on the uncorroborated word of the victim, and most states, I think wisely so, have eliminated that because that results in injustice when the victim just simply doesn't have anybody else around." He said that when there is an alleged assault taking place in the context of a marital dispute, "maybe this is the time to impose a little bit more, so that if an uncorroborated case comes in where there appears to be some chance of substantial injustice being done, that the corroboration requirement may temper that a little bit." He said that is an idea he just thought of.

REPRESENTATIVE RUDD said that maybe Mr. Bundy found a way out, but a corroboration may be even more unlikely in a marital situation.

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MR. BUNDY said, "Perhaps loosen the standards of what really is corroboration—you could ... specifically allow past instances of assault or other abuse as evidence into the proceeding," which may not be admissible in other cases.

MR. HICKEY said he does not think it would have to be restricted to direct evidence; it could be circumstantial evidence or physical evidence that would corroborate the testimony—it would not have to be a witness. It could be a certain type of injury, he added. He said there is a provision in existing statutes that prevents a conviction on the uncorroborated testimony of an accomplice—it requires some corroboration in order to convict a defendant where there is an accomplice testifying against an admitted accomplice.

ANNE CARPENETI, Assistant Attorney General, Legal Services Section, Criminal Division, Department of Law (DOL), Juneau,

Alaska, said she went to a conference in Seattle entitled "Rape and its Victims." It focused on what happens to a victim of rape, she explained. Maybe only one rape in five is reported to the police, she said, and in the ones that are reported often the prosecuting witness drops out. The conference addressed the reason for that and what can be done. Many victims question why they should report a rape as it would put their reputation and dignity on the line when being cross-examined about their prior sexual life. The main suggestions that came up in the workshops involved community, organization, and cooperation. She spoke of trying to establish crisis counselling for the victims and their families.

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MS. CARPENETI said the victim has to go back into the society and live, and Alaska does not have the resources for that type of counselling, although Anchorage, Juneau, and some other communities are starting voluntary crisis lines. She added that they have counselors that attend court with the victims, as so many victims are confused by the criminal justice system.

MR. STERN noted that [rape can occur] with or without resisting [in the revised code]. He asked if that will encourage....

MS. CARPENETI said yes. "This whole system of bringing the sexual assault statutes into some kind of rationality will certainly, I think, help."

JUDGE LEWIS said he has consistently instructed juries that resistance is not necessary if the woman is put in fear. If the consent was accompanied by fear on her part, no active resistance is required, he stated. "We've never gone the Indiana rule saying that she has to resist all the way throughout the course of the crime," he added. He said he is not sure that that is a major concern under present statutes. The real problem, whether or not the new code is adopted, is the difficulty of prosecution and the reluctance of the victim to come forward and how the criminal justice system treats her. "If the woman is going to be exposed in anyway, I think she's going to be reluctant to come forward in any event, whether or not there's a statute which can, in some part, protect her as it does now." He said he is not sure if the new statute is going to effectuate that. He noted the great reluctance of juries to convict whether the conduct is called rape or sexual assault. "They just don't like to hang a crime, as serious as this is, when they have to weigh the testimony of a victim versus the

testimony of the assailant," he added. Very few of the cases he has tried have ended up with guilty verdicts, despite that fact that he could perceive that the defendant was guilty beyond a reasonable doubt. He said he does not know if the new statute will change that.

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UNIDENTIFIED SPEAKER said he does not see that the statute will ease the emotional burden on women in a way that will encourage more than one in five to come forward. He asked if that was addressed by the Subcommittee, and if so, what the results were.

MR. STERN said, "I assume that you are asking me whether we considered rules of evidence in terms of making the victim come forward, and we did not." He said the Subcommittee did not consider, for example, whether past conduct can be admitted. One of the tasks for the Subcommittee is to revise the Code of Criminal Procedure, and if there is time, that issue will be considered, he added. It is an important concern, but what the Subcommittee wanted to do in the code was to not prevent a conviction because the statute might be determined to require resistance. He said it is probably not likely at all that the Supreme Court would interpret the statute on appeal as requiring forcible resistance to the end of the crime—but the argument is still there. Someone could come into court and make that argument, "and we wanted to eliminate any possibility of that, so it's a beginning in that regard." He added that [in current statute] the sexual assault has to be both "forcibly" and "against her will," although current instructions to juries are more restrictive than that and allow that there could be a threat, and resistance does not have to continue.

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MR. HICKEY said it has not been his experience that all judges are as judicious about their instructions as Judge Lewis. As Mr. Stern has emphasized, the argument is available, and Mr. Hickey is familiar with the occasional case where instructions do get in on the resistance issue. He said that one of the points of the code is to eliminate disparities of instructions, which are a critical element of criminal law. Jury instructions determine the outcome of a case to a large extent, and they vary from one judge to another. The code attempts to refine the law to the point where instructions will be uniform, and the Subcommittee has done that in this case, he added. On the

questions of evidence and rules of evidence, there is a new committee under the auspices of the Supreme Court that involves a cross-section of members to deal with the rules of evidence: to propose a set of uniform rules of evidence for consideration by the Supreme Court, "which we don't have either by statute or by court rule in this state."

UNIDENTIFIED SPEAKER said he may not have made his question clear, but he is asking if there is any legislation that could make it easier for a rape victim to come in and make the complaint.

MR. STERN said yes, by eliminating some of the impediments. He surmised that one of the impediments was that the rape victim would not come in unless she was bruised or showed some kind of physical injury. "We specifically say it's not necessary. You don't have to resist. You don't have to have physical injury. So that is one aspect of it." He added that another important aspect is that after the rape occurs, the victim may decide to read the law on rape. "If the victim does that today, she won't know what the law is, because that term is not defined in the statute." The new revision will spell that out, "and hopefully it's going to prompt her to go to the D.A.'s office," he stated.

MR. HICKEY said the legislature could create programs for victim assistance, particularly in the major urban centers where there is a large number of rapes. It could give the police agencies the resources to devote extra attention to that kind of offence and to develop investigative experts, he said. Additionally, the legislature could give his office resources to develop a specialist in sexual prosecutions and in how to develop the right kind of relationship with the victims. Such things are outside the criminal code, but they are things that can be done.

1:12:27:0

**ADJOURNMENT**