psychiatric material even to become conversant with these subjects. Appellate briefs are of much less value here than in the resolution of more usual questions.[2] Surely this would not be the first time that this court decided a case on grounds or under a doctrine not fully presented in the briefs.[3]

There is another reason why we should decide these questions now, not later. In my opinion the test currently obtaining under Chase v. State, supra, is so inherently unfair as to dissuade either defendants or their counsel from raising the defense of insanity, or adducing evidence in support of it. Thus it is difficult to get the insanity question before us on appeal.

The insanity defense is much like a confession and avoidance. One virtually admits all factual elements of the crime but claims insanity as a special ground of exoneration. One claiming that he did not commit the offense, but who alternatively claims that he was insane when he did commit it, has little hope of success. While such an approach is procedurally permissible, as a practical matter it is a foolhardy strategy.

2/ The question of the test of insanity as a criminal defense has already been briefed in Chase v. State, 369 P.2d 997 (Alaska 1962). There the state urged that if the M'Naghten test was not employed, the American Law Institute test (discussed later herein) would be the most suitable.

3/ One such case was Grossman v. State, 457 P.2d 226 (Alaska 1969), adopting an objective standard of entrapment, though neither party directly briefed that doctrine. Surely others could be found by searching the briefs and comparing them with the opinions rendered by this court during the last ten years.

A person invoking the Alaska rule on insanity, even in a strong case, has almost precluded himself from an acquittal. The current test thus exerts a chilling effect upon one who might seek a change in the law through the appellate process. This is true even though he may have suffered from serious mental illness, of a psychotic type, at the time he committed the act with which he is charged. Because of the in terrorem effect of the current Alaska test, I see no reason to postpone corrective measures, especially if we believe that the test can be improved.

I

All discussion of the tests of criminal responsibility inevitably must refer to M'Naghten's Case, 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (1843), which is regarded as the English source of the rule followed in most American jurisdictions for over a century. In that case Daniel M'Naghten attempted to assassinate Robert Peel, the Prime Minister. Because Peel, on the fatal day, happened to ride in Queen Victoria's carriage instead of his own, M'Naghten shot into the wrong carriage and killed Drummond, Peel's secretary. From all of the available information it seems quite plain that M'Naghten was suffering from psychotic delusions of persecution. At his trial Lord Chief Justice Tindal virtually directed a verdict in his favor.[4/] At the trial the medical witnesses and the court had been influenced by the writings and

4/ Guttmacher & Weihofen, Psychiatry and the Law, 403 (1952); Roche, "Criminality and Mental Illness - Two Faces on the Same Coin," 22 U. Chi. L. Rev. 320, 324 (1955); Biggs, The Guilty Mind, 95-97, 102 (1955).

theories of such advanced thinkers as Dr. Isaac Ray, the first great forensic psychiatrist in America. It was Dr. Ray's thesis that insanity must be measured by evaluating the entire personality structure of an individual, and not by tests such as merely the ability to know right from wrong.[5/] At any rate, M'Naghten was acquitted. Unfortunately for the development of law, the case did not end there.

Despite commitment of the hapless M'Naghten to an insane asylum, Queen Victoria was outraged by the acquittal, probably because there had already been three attempts on her life and one on that of the Prince Consort. In a letter to Sir Robert Peel, the Queen deplored the action of the judges in allowing verdicts of not guilty by reason of insanity in cases of this kind because she was convinced that such malefactors "were perfectly conscious and aware of what they did." She pressed for legislation to require judges "to interpret the law in this and no other sense in their charges to the Juries."[6/] The House of Lords was convened, and the fifteen judges of the common law courts were called upon, in an atmosphere of political pressure, to answer five rather vacuous questions about criminal responsibility in English law. Interestingly enough, it was Lord Chief Justice Tindal who

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5/ Dr. Ray's views have a modern ring. "[T]he insane mind is not entirely deprived of ... power of moral discernment, but on many subjects is perfectly rational and displays the exercise of a sound and well balanced mind." Ray, Medical Jurisprudence of Insanity 13 (3d ed. 1853).

6/ Biggs, supra n. 4, 103.

responded with a test more rigid than that which he had used when M'Naghten was tried before him. The M'Naghten rule in essence is:

> "[T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing: or, if he did know it, that he did not know he was doing what was wrong." 10 Cl. & Fin., at 210, 8 Eng. Rep., at 722.

Thus, in a case which was no longer a case, in response to hypothetical questions based on notions of phrenology and monomania which were then in vogue, the judges, in a dramatic departure from common law decisional technique, acting more as a governmental committee than a court, pronounced a rule which has been followed unthinkingly by many courts ever since. Of little avail was the restrained observation of Sir James Stephen that "every judgment delivered since the year 1843 has been founded upon an authority which deserves to be described as in many ways doubtful."[7/] The test could at least have been limited to cases of paranoia like that suffered by M'Naghten, but instead it was applied by many courts as a rule of universal and implacable validity, appropriate for all types of mental and emotional derangement.

The M'Naghten test has been supplemented in many jurisdictions by the "irresistible impulse" test, under which one suffering from a mental disease, of such severity that the

7/ II Stephen, History of the Criminal Law of England 153 (1883).

freedom of will is destroyed, may be excused from culpability.[8]

In Alaska, before statehood, the right-and-wrong test, supplemented by the irresistible impulse test, was considered the applicable rule.[9] In Chase v. State, 369 P.2d 997 (Alaska 1962), however, this court adopted a particular version of what it regarded as the M'Naghten rule. The test laid down there was that in order to exculpate the defendant he must be laboring under such mental disease or derangement at the time of the act "as to render him incapable of knowing the nature and quality of his act and of distinguishing between right and wrcng in relation to the act with which he is charged." 369 P.2d, at 998. (Emphasis supplied.) This results in a formulation more rigid than the M'Naghten test, and without the irresistible impulse supplement which had previously obtained in Alaska.[10] In that sense the Chase case is a retrograde decision in a time of

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8/ As of 1955, about 14 states, and the federal judiciary, had adopted the irresistible impulse addition to the test.

Mod. Penal Code, Tent. Dr. No. 4,161 (1955).

9/ Matheson v. United States, 227 U.S. 540 (1913); Davis v. United States, 165 U.S. 373 (1897); Sauer v. United States, 241 F.2d 640 (1957), cert. denied 354 U.S. 940; Rivers v. United States, 270 F.2d 435 (1959).

10/ That the Alaska test is more restrictive than M'Naghten is apparent from the following example. One laboring under a psychotic delusion, such as that he is being persecuted or that God has ordained that he must kill, may well know the nature of the act committed, yet not be able to appreciate its wrongfulness. Under M'Naghten he would not be culpable, but under Chase he could not be acquitted. Cf. People v. Schmidt, 110 N.E. 945 (N.Y. 1915), per Cardozo, J.

generally forward legal progress.[11/]

The court in Chase relied on three cases: Jessner v. State, 202 Wis. 184, 231 N.W. 634, 71 A.L.R. 1005 (1930); Maas v. Territory, 10 Okla. 714, 63 P. 960 (1901); and Montgomery v. State, 68 Tex. Crim. 78, 151 S.W. 813 (1912). As the Note, "Criminal Insanity," UCLA-Alaska L. Rev., 8 Alaska L.J. 152, 153-54 (Aug. 1970), points out, these cases were decided before many of the modern advances in psychiatry had been widely disseminated. Moreover, the instructions given in these cases lacked clarity and therefore were extremely confusing. Jessner and Montgomery indeed held that the phrases "the nature and quality of the act" and "the difference between right and wrong" were synonymous; if the defendant could not understand the one, he could not distinguish the other. However, as the Note, supra, indicates, these phrases are not at all synonymous in ordinary speech.

To torture English into performing such a linguistic cakewalk requires unusual skill. Since juries are composed of but ordinary reasonable laymen, additional complicated instructions would have to be given to insure that the jury does not consider the terms according to their usage in common everyday

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11/ Speculation persists in Alaska legal circles that the use of the conjunctive "and" in the instructions which were validated in Chase possibly came about through a typographical error by the secretary to the trial court judge. If this is so, then Chase is no less an historical accident than M'Naghten's Case.

speech and thereby misapply the law. Such verbal gymnastics should not be employed in jury instructions. The purpose of jury instructions is to instruct and enlighten the jury on the law, not to confuse them.[12/]

It also appears that the instructions in Jessner focused solely on the defendant's ability to distinguish between right and wrong, ignoring completely his ability to understand the nature and quality of his act.[13/] In Maas, the actual instruction did follow the disjunctive form of the M'Naghten test.[14/] If anything, this case stands for an adoption of the true M'Naghten rule, not the rule of Chase. In sum, I do not find any of these cases of sufficient precedential value to warrant an adherence by this court to what is little more than a modified "wild beast" test.[15/]

Since the M'Naghten case, and even in the eight years since Chase v. State was decided, a great deal of critical

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12/ "But 'glory' doesn't mean 'a nice knockdown argument,'" Alice objected.

"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean--neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master--that's all."

L. CARROLL, Through the Looking Glass, in THE ANNOTATED ALICE 269 (1960).

This nonsensical repartee brings sharply into focus a problem which has plagued logicians since at least the time of William of Occam. A lack of awareness of this problem has led to much mischief in legal interpretation.

13/ 202 Wis. at 196, 231 N.W. at 639.

14/ 10 C[illegible], at 717, 63 P. at 961.

15/ Re[illegible]old, 16 How. St. Tr. 695, 764 (1724).

evaluation and development has occurred, in an effort to achieve more advanced and just techniques for handling this serious problem.

The torrent of legal writing is so vast that it is nearly impossible for all but a few to read or comprehend everything which has been said on this basic issue of criminal responsibility. Still, certain broad outlines can be stated. There is nearly universal dissatisfaction with the M'Naghten rule on the part of scholars, jurists, and psychiatrists who have seriously inquired into the subject. The main difficulty with the M'Naghten rule is that it focuses exclusively on the cognitive element in mental life, that is, the knowledge of right and wrong or of the nature of one's act. One of its underlying assumptions is that mental illness is a failure of intellectual function. This reflects an artificial dualism of mind and emotions which ignores the affective aspects of the human personality. While there are many schools of psychiatric thought, there is broad agreement that mental illness can be understood only by looking at man as an integrated, psychobiological whole.[16/] Because the M'Naghten

16/ "Psychiatry may be defined as that branch of medicine which deals with the genesis, dynamics, manifestations and treatment of such disordered and undesirable functionings of the personality as disturb either the subjective life of the individual or his relations with other persons or with society.... Viewed a little differently, psychiatry may be regarded as the science which deals with the psychopathological aspect of human biology. The latter considers man not only as a living organism but also as a thinking, feeling and striving one." Noyes & Kolb, Modern Clinical Psychiatry (5th Ed. 1958), 1.

rule views man within the artificial strictures of cognition, courts and juries are deprived of much of the benefit to be gained from the modern science of psychiatry.[17]

Other criticisms of the M'Naghten rule would probably be applicable to any verbal formulation.[18] The difficulty stems from the different functions and purposes of law and psyciatry. The aim of psychiatry is to examine human behavior and mental disease in a scientific manner and to develop therapeutic methods of dealing with the emotional problems of mankind. On the other hand, it is the task of the law to develop normative rules to control human behavior. It has always been recognized that certain persons must be regarded as not the proper subjects of criminal conviction, and that because of their mental aberrations it would be unjust to hold them responsible for their conduct.[19] Ultimately this is an ethical and social judgment and not a medical determination.

Scholars and jurists have expended great effort over the years to achieve a standard reflecting both society's need for criminal accountability and the converse demand for a rule flexible enough to cover the varieties and combinations of serious emotional and mental illness which destroy the capacity to commit a crime, in any just conception of the term.

17/ P. Roche, The Criminal Mind (1957), 168-195, 244-274.

18/ F. Allen, The Borderland of Criminal Justice (1964), 111.

19/ A. Platt & B. Diamond, "The Origins of the 'Right and Wrong' Test of Criminal Responsibility and Its Subsequent Development in the United States: An Historical Survey," 54 Calif. L. Rev. 1227 (1966). In early law the "insane" were considered homologous to children.

One great developmental breakthrough occurred with the famous decision in Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954). There Judge Bazelon laid down a test under which a defendant was to be held not responsible "if his unlawful act was the product of mental disease or mental defect." 214 F.2d at 874. This was an adaptation of a rule which had previously existed solely in New Hampshire, and which had developed under the influential work of Dr. Ray. State v. Pike, 49 N.H. 399 (1870). While Durham represents a courageous attempt to state a modern standard of responsibility, certain deficiencies were encountered in its administration. For example, the use of the term "product" created difficult problems of causation.[20/] And as Judge (now Chief Justice) Burger complained, concurring in Blocker v. United States, 288 F.2d 853, 860 (D.C. Cir. 1960), the test in many cases put the legal determination in the hands of psychiatric witnesses rather than judge and jury. Finally, in Washington v. United States, 390 F.2d 444 (D.C. Cir. 1967), Judge Bazelon noted certain shortcomings of the Durham test, in that it allowed the psychiatrist to make too many legal and moral judgments which should be within the province of the jury. In substance, he appears to have acceded at least partially to the view of Judge Burger that psychiatrists should no longer be permitted to render an opinion on whether the act was a "product" of mental disease. A lengthy form of instruction was adopted to clarify the respective functions of expert

20/ Weihofen, "The Flowering of New Hampshire," 22 U. of Chi. L. Rev. 356, 360 (1955).

witness and jury.

Shortly after the Durham rule was announced, the American Law Institute promulgated a draft rule on this subject. This rule represents the collective efforts of some of the leading thinkers in this field. After nine years of research and consideration, the proposed rule was stated as follows:

> "(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.
>
> "(2) The terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct."
>
> A.L.I. Mod. P. Code §4.01 (final draft) (1962).

Since then this test, or some variant of it, has met with increasing judicial acceptance, particularly in the federal courts. In a luminous opinion by Judge Kaufman, the Second Circuit adopted the test in United States v. Freeman, 357 F.2d 606 (2nd Cir. 1966). Chief Judge Haynsworth adopted it for the Fourth Circuit in United States v. Chandler, 393 F.2d 920 (4th Cir. 1968) (en banc), and the Ninth Circuit has now embraced it in Wade v. United States, 426 F.2d 64 (9th Cir. March, 1970)(en banc). The M'Naghten test has now been overthrown in all but the First Circuit.[21] These

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21/ In addition to the above cited cases, see United States v. Currens, 290 F.2d 751 (3rd Cir. 1961); Blake v. United States, 407 F.2d 908 (5th Cir. 1969) (en banc); United States v. Smith, 404 F.2d 720 (6th Cir. 1968); United States v. Shapiro, 393 F.2d 680 (7th Cir. 1967) (en banc); Pope v. United States, 372 F.2d 710 (8th Cir. 1967) (en banc), vacated on other grounds, 392 U.S. 651 (1968); Wion v. United States, 325 F.2d 420 (10th Cir. 1963) (en banc), cert. denied, 377 U.S. 946 (1964). While not all of these cases embrace the A.L.I. test totally, they reject the

cases contain excellent disquisitions on the M'Naghten rule, its deficiencies, and the legal and psychiatric framework underlying the A.L.I. test. As Chief Judge Haynsworth said of the A.L.I. test:

> "With appropriate balance between cognition and volition, it demands an unrestricted inquiry into the whole personality of a defendant who surmounts the threshold question of doubt of his responsibility. Its verbiage is understandable by psychiatrists; it imposes no limitation upon their testimony, and yet, to a substantial extent, it avoids a diagnostic approach and leaves the jury free to make its findings in terms of a standard which society prescribes and juries may apply. [Footnotes omitted.]" United States v. Chandler, supra, at 926.

This wide acceptance of the American Law Institute test is significant. I believe that this formulation affords a workable standard, permitting realistic expert testimony about the personality and characteristics of the defendant as a whole man, but leaving to the court and jury the ultimate legal pronouncement. It avoids many of the problems encountered under the Durham rule.

No verbal formulation of this standard can achieve perfection, as there may always be doubt about the application of general terms to marginal situations. Yet the American Law Institute standard, in the view of many, does represent the best in current thinking on this subject. It is the standard

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21/ [cont'd] M'Naghten rule and include a test whereby the effect of mental illness on one's capacity to conform his conduct to law is stressed. Judge (now Chief Justice) Burger, in his separate concurring opinion in Blocker v. United States, 288 F.2d 853 (D.C. Cir. 1960), laid great emphasis on a test which would focus on the relationship between mental illness and one's capacity to refrain from wrongdoing.

which should be employed in Alaska.[22] I regard it unfortunate that we are not taking this step today.

II

Appellant has raised the question of where the burden of proof should be placed in these cases. In Chase v. State, supra, this court adopted the rule that the burden was on the defendant to establish his insanity by a preponderance of the evidence. Approximately one-half of the states follow this rule.[23] But in the rest of the states, and in the federal

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22/ The standard need not be frozen entirely within only one rigid form of words. In appropriate cases the testimony might require some amplification of the test in the instructions to the jury. Nor is this an occasion to consider the undue resort to diagnostic labels and conclusionary medical terms which plagued the court under the Durham rule and which the court sought to limit in Washington v. United States, 390 F.2d 444 (D.C. Cir. 1967). Hopefully, care would be taken to see that experts explain such labels and terms in language understandable to the jury.

23/ Alabama, Knight v. State, 142 So.2d 899 (Ala. 1962); Alaska, Chase v. State, 369 P.2d 997 (Alas. 1962); Arkansas, Kelley v. State, 242 S.W. 572 (Ark. 1922); California, People v. Monk, 363 P.2d 865 (Calif. 1961); Delaware, Longoria v. State, 168 A.2d 695 (Del. 1961); Georgia, Ross v. State, 124 S.E.2d 280 (Ga. 1962); Iowa, State v. Drosos, 114 N.W. 2d 526 (Iowa 1962); Kentucky, Tungent v. Commonwealth, 198 S.W.2d 785 (Ky. 1947); Maine, State v. Park, 193 A.2d 1 (Me. 1963); Minnesota, State v. Finn, 100 N.W.2d 508 (Minn. 1960); Missouri, State v. King, 375 S.W.2d 34 (Mo. 1964); Montana, State v. DeHann, 292 P. 1109 (Mont. 1930); Nevada, State v. Behiter, 29 P.2d 1000 (Nev. 1934); New Jersey, State v. Kudzinowski, 147 A. 453 (N.J. 1929); North Carolina, State v. Swink, 47 S.E.2d 852 (N.C. 1948); Ohio, State v. Stewart, 198 N.E.2d 439 (Ohio 1964); Oregon, 14 Ore. Rev. Stat. 136.390 (1960); Pennsylvania, Commonwealth v. Updegrove, 198 A.2d 534 (Pa. 1964); Rhode Island, State v. Gunnites, 161 A.2d 818 (R.I. 1960); South Carolina, State v. Tidwell, 84 S.E. 778 (S.C. 1915); Texas, Carrell v. State, 283 S.W.2d 793 (Tex. 1951); Virginia, Christian v. Commonwealth, 117 S.E.2d 72 (Va. 1960); Washington, State v. Mays, 395 P.2d 758 (Wash. 1965); West Virginia, State v. McCauley, 43 S.E.2d 454 (W. Va. 1947). See 17 A.L.R.3d 146 (1968).

courts, the accused need only show some evidence of insanity. The prosecution must then prove his sanity beyond a reasonable doubt.[24/]

Those who place the burder of establishing sanity on the defendant usually argue that this accords with the presumption of sanity. Because there is a presumption, it is said that the prosecution should not be put to proving that which normally is not imposed upon it. But under the federal rule, the presumption of sanity is still employed. It is operative until some evidence is produced which adequately brings into issue the sanity of the defendant. The presumption then disappears and the mental capacity of the defendant to commit the crime becomes an essential element, to be proved beyond a reasonable

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24/ Those states following the federal rule are: Arizona, State v. Schantz, 403 P.2d 521 (Ariz. 1965); Colorado, Castro v. People, 346 P.2d 1020 (Colo. 1959); Connecticut, State v. Joseph, 115 A. 85 (Conn. 1921); Florida, Farrell v. State, 101 So.2d 130 (Fla. 1958); Hawaii, State v. Moeller, 433 P.2d 136 (Hawaii 1967); Idaho, State v. Clokey, 364 P.2d 159 (Idaho 1961); Illinois, People v. Robinson, 174 N.E.2d 820 (Ill. 1961); Indiana, Whitaker v. State, 168 N.E.2d 212 (Ind. 1960); Kansas, State v. Penry, 368 P.2d 60 (Kan. 1962); Maryland, Jenkins v. State, 209 P.2d 616 (Md. 1965); Massachusetts, Commonwealth v. McHoul, 226 N.E.2d 556 (Mass. 1967); Michigan, People v. Eggleston, 152 N.W. 944 (Mich. 1915); Mississippi, McGarrh v. State, 148 So.2d 494 (Miss. 1963); Nebraska, Thompson v. State, 68 N.W.2d 267 (Nebr. 1955); North Dakota, State v. Barry, 92 N.W. 809 (N.D. 1902); New Hampshire, State v. Bartlett, 43 N.H. 224 (N.H. 1861); New Mexico, State v. Roy, 60 P.2d 646 (N.M. 1936); New York, People v. Kelley, 99 N.E. 2d 552 (N.Y. 1951); Oklahoma, Whisenhunt v. State, 279 P.2d 366 (Okla. 1954); South Dakota, State v. Waugh, 127 N.W.2d 429 (S.D. 1964); Tennessee, Jordan v. State, 135 S.W. 327 (Tenn. 1911); Utah, State v. Green, 40 P.2d 961 (Utah 1935); Wisconsin, State v. Esser, 115 N.W.2d 505 (Wis. 1962); Wyoming, State v. Pressler, 92 P. 806 (Wyo. 1907). The District of Columbia also follows this rule: Jones v. United States, 284 F.2d 245 (D.C. Cir. 1960). See 17 A.L.R.3d 146 (1968).

doubt, like any other.[25/]

It has been said that the burden of establishing insanity should be placed on the accused because sanity is not an element of the offense but a quality of the one who commits it. Chase v. State, supra, at 1003. But this overlooks the important consideration that once sanity is in issue it is a fact to be established like any other ultimate fact essential to culpability. The United States Supreme Court made this plain in Davis v. United States, 160 U.S. 469 (1895), when it said:

> "No man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them, by whomsoever adduced, is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged." (Emphasis supplied.) 160 U.S. at 493.

Realistically speaking, when sanity is an issue, it is not only a major element of the criminal proof, it may be the central factual issue in the case. For that matter, it may be the only issue. Logically, sanity is an essential element of a crime because mens rea is a necessary primary factor. If insanity exists at the time of the criminal act, mens rea fails, there is

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25/ Fitts v. United States, 284 F.2d 108 (10th Cir. 1960). There the court said:

> "When, however, evidence of insanity is produced, from whatever source, the presumption of sanity disappears, and the mental capacity of the accused to commit the crime becomes an essential element to be proved by competent evidence beyond a reasonable doubt." 284 F.2d at 112.

This is the general rule which is followed in approximately one-half or more of the jurisdictions of the United States.

no jointure of act and intent, and under the traditional analysis no crime has been committed. As Mr. Justice Frankfurter noted, dissenting in Leland v. Oregon, 343 U.S. 790, 803 (1952):

> "Even though a person be the immediate occasion of another's death, he is not a deodand to be forfeited like a thing in the medieval law. Behind a muscular contraction resulting in another's death there must be culpability to turn homicide into murder."

Placing the burden on the prosecution has substantial advantages. First, it accords with the presumption of innocence and the thesis that the accused need not undertake to prove anything in a criminal case.[26/]

An additional advantage is that the jury is not given the confusing task of juggling two different burdens, each of which carries a different standard. This anomaly is pointed out by Professor McCormick:

> "Thus it seems inconsistent to demand as to some elements of guilt, such as an act of killing, that the jury be convinced beyond a reasonable doubt, and as to others, such as duress or capacity to know right from wrong, the jury may convict though they have such doubt. Accordingly, the recent trend both in English and American decisions is to treat these so-called matters of defense as situations wherein the accused will usually have the first burden of producing evidence in order that the issue be raised and submitted to the jury, but at the close of the evidence the jury must be told that if they have a reasonable doubt of the fact on which the justification is based they must acquit." McCormick, Evidence § 321, p. 684 (1954). (Footnote omitted.)

26/ As a practical matter the accused often must undertake to adduce proof of insanity if he is to prevail in creating a reasonable doubt on the whole evidence.

There are also important aspects of constitutional policy to be weighed in the balance. It has been held unconstitutional to shift the burden of persuasion on the defense of alibi to the accused. Stump v. Bennett, 398 F.2d 111 (8th Cir. 1968) (en banc), and cases cited therein. This may or may not represent some future trend. But when it comes to shifting burdens, there is not much difference between proof that a defendant was physically present, and not elsewhere, at the commission of a crime, and that he was "mentally present," in the sense that he was sane.

Lastly, the experience of the federal courts, in their treatment of the burden of persuasion, is of value. The federal courts have worked under the rule of Davis v. United States, supra, since 1895, and have not found it a handicap in effecting criminal justice. In my view, when sanity is in issue, the burden of persuasion should be upon the prosecution to establish the sanity of the accused beyond a reasonable doubt.

III

In fairness, to avoid surprise, the prosecution should be entitled to notice that it must adduce evidence of the defendant's sanity. Because the mental status of an accused, in terms of sanity, is usually not in issue in a criminal prosecution, it would be an unfair burden to require the state invariably to guess at whether this issue might be raised at trial, and possibly to prepare on this issue, only to have it not raised at all. Nor is it fair for defendants to wait in

ambush until trial to inject the sanity issue as a surprise tactic.

Therefore, if we were to alter our insanity rules, we should also change our procedural rules to require that at the time of plea, or within a certain number of days thereafter, one intending to raise the issue of insanity at his trial must specially plead that he was insane at the time he committed the act charged.

For the reasons given I would reverse and remand for a new trial.

STATE OF ALASKA
THE LEGISLATURE
LEGISLATIVE AFFAIRS AGENCY

POUCH Y - STATE CAPITOL
JUNEAU, ALASKA 99801

January 27, 1971

MEMORANDUM

TO: Rep. William J. Moran, Chairman
House Judiciary Committee

FROM: Arthur H. Peterson AHP
Revisor of Statutes

SUBJECT: HB-47, felony-murder, insanity and mens rea

I.

You will find attached as Appendix A a draft of a committee substitute for HB-47, adopting an "aggravated offense" approach as an alternative to the broad, common law felony-murder doctrine, as requested by the committee. (Regarding the present Alaska law, see Gray v. Alaska, 463 P 2d 897 (Alaska, 1970).) Concerning four basic purposes of the criminal law -- deterrence, punishment ("an eye for an eye"), rehabilitation, and isolation -- the felony-murder doctrine appears quite inadequate with regard to the first (because, even if the gas station robber, for example, knowsthe law, it is usually not his intent that anybody be killed in connection with the robbery), it is unnecessary and frequently results in great injustice with regard to the second (as illustrated during earlier committee discussions), it appears to be irrelevant to the third, and while it results in isolating the defendant from the community it often does so without benefit to the community and without justice to the defendant.

In 1968 the legislature provided for an additional penalty if a firearm is used or carried during the commission of specified offenses. As a further deterrent to the use of weapons in the commission of these offenses, sec. 3 of the committee substitute changes "firearm" to read "dangerous weapon". (Regarding the latter, see Berfield v. Alaska, 458 P 2d 1008 (Alaska, 1969) and Ransom v. Alaska, 460 P 2d 170 (Alaska, 1969).)

Note that sec. 3 goes so far as to impose the additional penalty for merely carrying the weapon. In light of the Berfield and Ransom cases, supra, holding that boots on a person's feet may be considered dangerous weapons, the committee may wish to consider again whether it wants to make this change in AS 11.15.295.

HB-47

Also, see Whitton v. Alaska, 479 P 2d 302 (Ak. 1970)

Sec. 1 of the committee substitute deals specifically with the case of a reasonably foreseeable death occurring during the commission of or attempt to commit specified offenses and in which situation the offender is not guilty under the provisions on first degree murder, second degree murder, manslaughter or negligent homicide. (See Appendix B, which sets out the text of those provisions, along with various assault provisions and the section on carrying or using a firearm during the commission of certain crimes.)

Sec. 2 deletes the felony-murder concept from the first degree murder provision. It also deletes the specific reference to poison, on the understanding that it is not necessary to enumerate the means of effecting the killing and that use of poison is just one means. And it deletes the somewhat anomolous reference to "sound memory and discretion" appearing in the present wording of the provision. (See Item 7 on page 3 of the attached Appendix C, which is a memorandum from Don Craddick, the Assistant Public Defender for Juneau, to Herbert Soll, the Alaska Public Defender.) However, this section does not delete the word "deliberate", as the committee had requested. Upon reading the annotations under AS 11.15.010 and the definition of the word in Black's Law Dictionary (4th Edition, 1957), it appears to have some merit in that section, being something more than simply a repetition of the concepts embodied in "purposely" and "premeditated malice". Appendix C presents a summary of Mr. Craddick's January 16 testimony before the committee, and is helpful in understanding felony-murder and the attached committee substitute.

II.

Black's Law Dictionary (4th Edition, 1957) defines "mens rea" simply as "A guilty mind; a guilty or wrongful purpose. Guilty knowledge and wilfulness. United States v. Greenbaum, C.C.A.N.J., 138 F. 2d 437, 438." Related to the idea of the "guilty mind" is insanity -- a condition usually thought to preclude formation of the guilty mind and, when made an issue in a criminal proceeding, is usually raised as a defense to the charge. Thus the legal system is faced with the task of establishing criteria for determining insanity. The 1962 Annual Survey of American Law (at page 72) describes the Alaska Supreme Court's efforts in establishing the criteria in Chase v. Alaska, 369 P 2d 997 (Alaska, 1962): "Our next to newest state, Alaska, had the opportunity to choose any test it desired, without the fetters of case precedent. It chose a test no one could have foreseen. M'Naghten plainly exculpates a defendant who does not know the nature and quality of his act or the wrongfulness of his act. Alaska's highest court ... concluded that the defendant cannot be exculpated unless both his knowledge of the nature and quality of the act and his knowledge of the wrongfulness of the act are obliterated." (Emphasis in original.)

The dissenting opinion of Justice Connor in Pope v. Alaska, Ak. Sup. Ct. Opin. No. 660 (Dec. 21, 1970), presents a good explanation and historical review of mens rea and the defense of insanity, and

there is no need for a repetition of that here. (And since you distributed copies of the case to all committee members it is not attached to this memorandum.) At page 13 of his dissent, Justice Connor indicates his preference for the American Law Institute's Model Penal Code insanity-defense formulation because it "affords a workable standard, permitting realistic expert testimony about the personality and characteristics of the defendant as a whole man, but leaving to the court and jury the ultimate legal pronouncement." See Mod. P. Code, sec. 4.01, quoted at page 12 of the dissent.

Norval Morris and Gordon Hawkins, in their The Honest Politician's Guide to Crime Control (Univ. of Chicago Press, 1970), rather persuasively offer a different approach -- abolish the insanity defense altogether. Pages 174 -- 185 of their book are attached as Appendix D. Their point calls to mind the comments of Justice Connor at page 16 of his dissent, where he discusses the question of who has the burden of proof on the sanity issue. He states "... once sanity is in issue it is a fact to be established like any other ultimate fact essential to culpability. *** Logically, sanity is an essential element of a crime because mens rea is a necessary primary factor. If insanity exists at the time of the criminal act, mens rea fails, there is no jointure of act and intent, and under the traditional analysis no crime has been committed." However, whereas Justice Connor, agreeing with Justice Frankfurter's statement that "Behind a muscular contraction resulting in another's death there must be culpability to turn homicide into murder.", apparently would view a successful insanity defense as exculpating the defendant, Prof. Morris and Mr. Hawkins introduce the term "insane mens rea" (at page 180, stating that it is not a contradiction in terms) and argue for the greater justice (practically and morally) of their approach. A summary here could not do justice to their theory, and a close, critical reading of Appendix D is suggested.

The majority of the Alaska Supreme Court in the Pope case refused to decide the insanity issues, and we are left with the rule of the Chase case unless the legislature resolves the matter -- perhaps along the lines of the American Law Institute approach (as suggested by Justice Connor) or perhaps along some other lines. The Morris-Hawkins book and the Model Penal Code, as well as other materials, are available to committee members wishing to study the matter. A bill will be prepared at the committee's request.

APPENDIX A

Original Sponsor: Colletta

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. 47

For an Act entitled: "An Act relating to first degree murder and crimes involving dangerous weapons; and providing for an effective date."

BE IT ENACTED . . .

* Section 1. AS 11.05 is amended by adding a new section to read:

Sec. 11.05.160. ADDITIONAL PENALTY FOR CERTAIN OFFENSES. If a person is killed during the commission of or the attempt to commit arson, burglary, kidnapping, rape, or robbery, and the killing is a reasonably foreseeable consequence of the crime, the person committing or attempting to commit the crime is punishable by imprisonment for not more than five years in addition to the penalty specified for the crime. This provision does not apply if the person committing or attempting to commit a crime listed in this section has violated AS 11.15.010, 11.15.030, 11.15.040, or 11.15.080, and is punishable under one of those sections.

* Sec. 2. AS 11.15.010 is repealed and re-enacted to read:

Sec. 11.15.010. FIRST DEGREE MURDER. A person is guilty of first degree murder if he kills another person purposely, deliberately and with premeditated malice. A person who is convicted of first degree murder shall be sentenced to imprisonment for not less than 20 years to life.

* Sec. 3. AS 11.15.295 is amended to read:

Sec. 11.15.295. USE OF DANGEROUS WEAPON /FIREARM/ DURING THE COMMISSION OF CERTAIN CRIMES. A person who uses or carries a

dangerous weapon /FIREARM/ during the commission of a robbery, assault, murder, rape, burglary, or kidnapping is guilty of a felony and upon conviction for a first offense is punishable by imprisonment for not less than 10 years. Upon conviction for a second or subsequent offense in violation of this section, the offender shall be imprisoned for not less than 25 years.

Sec. 11.15.010. First degree murder. A person who, being of sound memory and discretion, purposely, and either of deliberate and premeditated malice or by means of poison, or in perpetrating or in attempting to perpetrate, rape, arson, robbery, or burglary kills another, is guilty of murder in the first degree, and shall be sentenced to imprisonment for not less than 20 years to life. (§ 65-4-1 ACLA 1949; am § 4 ch 132 SLA 1957; am § 5 ch 43 SLA 1964; am § 4 ch 68 SLA 1965)

Sec. 11.15.030. Second degree murder. Except as provided in §§ 10 and 20 of this chapter, a person who purposely and maliciously kills another is guilty of murder in the second degree, and shall be sentenced to imprisonment for a term of not less than 15 years to life. (§ 65-4-3 ACLA 1949; am § 7 ch 43 SLA 1964; am § 6 ch 68 SLA 1965)

Sec. 11.15.040. Manslaughter. Except as provided in §§ 10—30 of this chapter, a person who unlawfully kills another is guilty of manslaughter, and is punishable by imprisonment in the penitentiary for not less than one year nor more than 20 years. (§ 65-4-4 ACLA 1949; am § 8 ch 43 SLA 1964)

Sec. 11.15.080. Negligent homicide. Every killing of a human being by the culpable negligence of another, when the killing is not murder in the first or second degree, or is not justifiable or excusable, is manslaughter, and is punishable accordingly. (§ 65-4-8 ACLA 1949)

Sec. 11.15.160. Assault with intent to kill or commit rape or robbery. A person who assaults another with intent to kill, or to commit rape or robbery upon the person assaulted, is punishable by imprisonment in the penitentiary for not more than 15 years nor less than one year. (§ 65-4-16 ACLA 1949)

Sec. 11.15.190. Assault while armed. A person who assaults, or assaults and beats another with a cowhide, whip, stick or like thing, having at the time in his possession a pistol, dirk, or other deadly weapon, with intent to intimidate and prevent the other person from resisting or defending himself, is punishable by imprisonment in the penitentiary for not more than 10 years not less than one year. (§ 65-4-19 ACLA 1949)

Sec. 11.15.200. Careless use of firearms. (a) A person who intentionally, and without malice, points or aims a firearm at or toward a person, or discharges a firearm so pointed or aimed at a person, or points and discharges a firearm at or toward a person or object without knowing the identity of the object and maims or injures a human being, is guilty of the careless use of firearms, and upon conviction is punishable by a fine of not more than $1,000, or imprisonment for not more than one year, or by both.

(b) If death ensues from the maiming or injuring, the person discharging the firearm may, in the discretion of the prosecuting officer or grand jury, be charged with the crime of manslaughter.

(c) This section does not apply to a case where firearms are used in self-defense or in the discharge of official duty, or in case of a justifiable homicide. (§ 65-4-20 ACLA 1949)

Sec. 11.15.220. Assault with dangerous weapon. A person armed with a dangerous weapon, who assaults another with the weapon, is punishable by imprisonment in the penitentiary for not more than 10 years nor less than six months, or by imprisonment in jail for not more than one year nor less than one month, or by a fine of not more than $1,000 nor less than $100. (§ 65-4-22 ACLA 1949)

Sec. 11.15.230. Assault and assault and battery. A person not armed with a dangerous weapon, who unlawfully assaults or threatens another in a menacing manner, or unlawfully strikes or wounds another, is punishable by a fine of not more than $500, or by imprisonment in a jail for not more than six months, or by both. (§ 65-4-23 ACLA 1949)

Sec. 11.15.295. Use of firearms during the commission of certain crimes. A person who uses or carries a firearm during the commission of a robbery, assault, murder, rape, burglary, or kidnapping is guilty of a felony and upon conviction for a first offense is punishable by imprisonment for not less than 10 years. Upon conviction for a second or subsequent offense in violation of this section, the offender shall be imprisoned for not less than 25 years. (§ 1 ch 144 SLA 1968)

APPENDIX C

MEMORANDUM State of Alaska

TO: Herbert D. Soll
Public Defender
Anchorage

DATE : January 18, 1971

SUBJECT: House Bill 47
(First Degree murder;
amendment to A.S. 11.15.101)
DD

FROM: Donald L. Craddick
Assistant Public Defender
Juneau

Friday, January 15, I received a call from the secretary of the House Judiciary Committee, Mrs. Mason (586-1303) who advised that the committee was holding a hearing on House Bill 47 Saturday morning at 10:00 a.m. and wished to have someone present from the Public Defender Agency to present the position of that agency with reference to the bill. I tried to reach you on this matter, but my call to the Anchorage office was not returned.

Saturday morning I appeared before the committee, which is chaired by Representative William Morran. I advised the committee that as I had not been able to contact the Anchorage office, I was not presenting an official position of the Public Defender Agency on the bill but would be glad to give my views as an Assistant Public Defender if they were interested. They were, and we then proceeded, for approximately 45 minutes, to discuss the following aspects of the bill:

1. The bill was generated by the Alaska Supreme Court decision in Gray v. Alaska, (Jan. 16, 1970) 463 P. 2d 897 and by strong public opinion as a result of two recent incidents in Anchorage involving shootings during armed robberies. (Mr. Colletta, sponsor of the bill, was present and advised that these were the reasons for the bill being introduced.)

2. The bill removes the "purposeful" killing requirement for there to be a felony murder. I advised that if the felony murder concept is to be retained, then this is a good aspect of the bill as homicides occurring during the commission of felonies are accidental (the felon never having intended any such occurrence); more over, whenever a "purposeful" killing can be shown there is true murder without having to resort to the felony murder concept.

3. This bill removes the requirement that the killing be performed by the person ultimately charged as the felony murderer. I advised that this would be in keeping with the standard felony murder concept.

4. This bill enlarges the category of crimes to be included under the felony murder rule by adding escape and lewd or lascivious acts toward a child. In this regard we discussed the matter of crimes which should be covered: namely, those involving inherently dangerous acts. It was pointed out that an escape from prison could be such an act but hardly so if performed by a person who merely ran away from a police officer who had just made an arrest and where no violence or remote possibility of violence was involved; also, the absurd lewd or lascivious act possibilities were illustrated by committee member Mike Rose who pointed out that a child frightened by an exhibitionist might run out into a street and be killed by a passing car, which could result in a first degree murder charge being brought against the exhibitionist.

5. I argued against retention of the felony murder concept in the State of Alaska on the grounds that it did not serve any salutary purpose and could lead to absurd results. I gave the following illustrations:

   A. The get-away car driver (outside in the street) in an armed robbery situation who could be charged with first degree murder if a store owner shot down his cohort (in the store) in armed robbery. Note: This is an actual case which was handed down by the California Supreme Court in Taylor v. Superior Court (Dec. 1970). (See the Criminal Law Reporter, Volume 8, Pg. 1049, 2216-2217.) I left a copy of this decision with the committee.

   B. The bank robber who could be charged with first degree murder if a bank guard shot at him and killed an innocent bystander.

6. I suggested that if the legislature nonetheless felt it desirable to direly punish a person involved in a crime when the commission of that crime led in a natural dequence of events to the dealth of another person, then they could use an "aggrevated crime" approach---perhpas something as simple as adding additional years on the sentence in such a situation. The precedent for this could be the recently enacted gun laws which add additional penalties when a fire arm is used in

connection with a crime. (For example: see Alaska Statute 11.15.295)

In this regard, however, I advised the committee that they should bear in mind that there is a very strong doubt that any legislation such as the felony murder rule or even an aggrevated crime approach would act as a deterent to homocides during the perpetration of felonies; the reason being that it is one thing to deter an intentional act, such as the carrying of a fire arm, but entirely another to try to deter an event which was never intended to happen in the first place but happened because things got out of hand.

7. The last aspect of the bill considered was the deletion by the bill of the language contained in the present first degree murder statute that the person involved must be of "sound memory and discretion" before he is guility of any kind of first degree murder.

I made the following comments on this:

a. The phrase which is usually used in a civil context, such as the drafting of wills, has no place in the criminal laws dealing with insanity.

b. This language actually makes it possible for a person who is not insane even under the most liberal rule (Durham) to avoid a conviction of first degree murder.

c. Therefore, what is needed is a statute governing criminal responsibility in all cases and denotes the test of insanity to be applied.

You will be pleased to know that the committee appeared to be in agreement with this and is going to undertake to write up such a statute. The committee did not seem to be too taken with the McNaughton test of knowing right and wrong and seemed to be disturbed over Alaska's even more stringent rule as set forth in the Chase v. Alaska case (1962) 369 P 2d 997.

The committee chairman referred the committee to the recent decision in Pope v. Alaska (Dec. 21, 1970) Opinion 660, File 1127, in which Justice Conner, in the dissent, reviews and criticizes the development of Alaska's present law of insanity and emphasizes the desirability of adopting the American Law Institute Model Penal Code Provision, Sec. 4.01 (final draft 1962)....see page 12 of the Pope decision, wherein this test is set out verbatim.

I suggested to the committee that one of the contributing factors which might have led to the Chase decision could be (though it is not discussed in the opinion) the lack of facilities in Alaska to care for the insane should a less stringent rule apply in Alaska and should there be a result in the increase in the number of persons needing institutionalization.

You might consider writing to the committee as Public Defender should you wish to have the agency take a position on this bill. It seems to me it would be very ehlpful if the agency were also to take a position or make recommendations with reference to the legal test of insanity. We need not necessarily go as far as the Durham rule, but it is certainly time to move beyond the almost medieval concept of the McNaughton tests. Of the present alternatives I favor the American Law Institute approach.

Donald L. Craddick

DONALD L. CRADDICK

Norval Morris and Gordon Hawkins

the honest politician's guide to crime control

The University of Chicago Press • Chicago and London

The accused is, we are informed, "psychotic," and should therefore not be convicted of a crime. Further, though "acquitted" because of his mental illness, he is "dangerous" and should therefore be detained until he is both "cured" of his malady and no longer "dangerous." Lewis Carroll, in *Through the Looking-Glass*, offered a fine commentary on the superficialities involved in such a traditional response to the psychologically disturbed offender:

> "What sort of insects do you rejoice in, where *you* come from?" the Gnat inquired.
>
> "I don't *rejoice* in insects at all," Alice explained, "because I'm rather afraid of them – at least the large kinds. But I can tell you the names of some of them."
>
> "Of course they answer to their names?" the Gnat remarked carelessly.
>
> "I never knew them to do it."
>
> "What's the use of their having names," the Gnat said, "if they won't answer to them?"
>
> "No use to *them*," said Alice; "but it's useful to the people that name them, I suppose. If not, why do things have names at all?"

Our program on crime and the psychiatrist is designed both to eliminate our present futile name-calling from the criminal justice system and to engage the psychiatrist in the treatment of certain dangerous criminals, a task he now eschews. We achieve these results by three ukases:

1. The defense of insanity shall be abolished. The accused's mental condition will be relevant to the question of whether he did or did not, at the time of the crime, have the *mens rea* of the crime of which he is charged. His mental condition will, of course, also be highly relevant to his sentence and his correctional treatment if he is convicted.
2. High priority shall be accorded to research aimed at the definition of social dangerousness and the development of prediction tables designed to deal with the "dangerous," psychologically disturbed offender.
3. Special institutions for the treatment of "dangerous" psychologically disturbed offenders, on the lines set out in this chapter, shall be established in all states.

The vast literature dealing with psychiatric or psychoanalytic criminology ranges from detailed studies of particular cases to attempts to explain all criminal behavior in terms of psychopathy. Yet apart from providing a profusion of new labels the practical contribution that psychiatry has made to the problems of defining and treating the offender is very limited. This is in part, but by no means entirely, the fault of psychiatrists themselves. There is no doubt, however, that the leaders in corrections and in criminal law policy accord the psychiatrist a slim role indeed in treating the behavior disorders that come to the courts, the prisons, and other correctional agencies. The slight attention given to the role of the psychiatrist in the report of the President's Crime Commission, *The Challenge of Crime in a Free Society*, and in the same commission's task force report on corrections, is recent testament to this neglect. Let us be clear about this. We are not suggesting that the judges, academic and practicing lawyers, correctional administrators, and criminologists prominent in the criminal justice system are reactionary, or that they fail to keep up with the literature in the social sciences; their attitude to psychiatry is not usually one of ignorance, it is rather a thoughtful rejection. They see psychiatrists, as too frequently psychiatrists see themselves, merely as diagnosticians, classifiers, separating out from the bulk of criminal offenders those whose psychological disturbance is at the level of psychosis. Where, it is asked, are psychiatrists successfully treating criminal offenders? The psychiatrist is useful, it is agreed, in classification and in staff training, but he is not seen as a serious ally in the correctional process.

We do not share this view. We believe there has been gross failure both by leading forensic psychiatrists and by those responsible for the criminal justice system sufficiently to mobilize psychiatric resources for the prevention and treatment of crime. We believe part of the fault lies in our national monomania, our *folie à collective*, concerning criminal responsibility and the defense of insanity. This has distracted us from many important tasks, two of which we shall deal with in this chapter – first, the task of defining the dangerous offender for sentencing and treatment purposes, and second, the task of better mobilizing psychiatric and other clinical resources for the treatment of such criminals. We believe these three themes – the defense of insanity, the definition of dangerousness, and the mobilization of clinical resources for the treatment of criminals who are dangerous and psychologically disturbed – are closely interconnected. The importance of all three issues must be recognized if the psychiatrist is to assist appreciably in efforts to protect the community and to treat the criminal.

Abolition of the Defense of Insanity

Rivers of ink, mountains of printers' lead, and forests of paper have been expended on an issue that is surely marginal to the chaotic problems of the effective, rational, and humane prevention and treatment of crime. We determinedly insulate ourselves from the realities we are facing – the role of psychological disturbance in criminality and the measures we might effectively and fairly use to deal with psychologically disturbed and dangerous criminals. We do not propose here to contribute to the wastage or to pursue the traditional minutiae. Our view is that the defense of insanity itself is moribund and should be interred. We are not suggesting amendments to the rules concerning fitness to plead; that issue is relevant to our present topic, but it is not one we now wish to consider.

The suggestion that the defense of insanity should be abolished is not original. Many authorities including Lady Barbara Wootton, Professor H. L. A. Hart, and Chief Justice Joseph Weintraub of New Jersey among others have advocated its abolition, though for diverse reasons and with diverse substitutes for it. We do not propose to marshal and analyze their reasons and their suggestions. We have put forward a ukase on this topic and we shall here advance some of the reasons underlying it, a few of which are not to be found in the writings of the authorities on this subject.

Why should there be a defense of insanity?

The question strikes deep into the social function of the criminal law. Over the years, we have found the traditional answers less and less convincing – such as the uncritical acceptance of what is by the Royal Commission on Capital Punishment:

> It has for centuries been recognized that, if a person was, at the time of his unlawful act, mentally so disordered that it would be unreasonable to impute guilt to him, he ought not to be held liable to conviction and punishment under the criminal law. Views have changed and opinions have differed, as they differ now, about the standards to be applied in deciding whether an individual should be exempted from criminal responsibility for this reason; but the principle has been accepted without question.

Or the answer in the American Law Institute's Model Penal Code:

> What is involved specifically is the drawing of a line between the use of public agencies and public force to condemn the offender by conviction, with resultant sanctions in which there is inescapably a punitive ingredient (however constructive we may attempt to make the process of correction) and modes of disposition in which that ingredient is absent, even though restraint may be involved. To put the matter differently, the problem is to discriminate between the cases where a punitive-correctional disposition is appropriate and those in which a medical-custodial disposition is the only kind that the law should allow.

Or that offered by Sir Owen Dixon:

> Now it is perfectly useless for the law to attempt, by threatening punishment, to deter people from committing crimes if their mental condition is such that they cannot be in the least influenced by the possibility or probability of subsequent punishment; if they cannot understand what they are doing or cannot understand the ground upon which the law proceeds.

Or that in the Durham case:

> Our collective conscience does not allow punishment when it cannot impose blame.

Our position, putting aside the difficult and important issue of fitness to plead – competency to be tried – is very simple. The accused's mental condition should be relevant to the question of whether he did or did not, at the time of the crime, have the *mens rea* of the crime of which he is charged. There should be no special rules of the M'Naughten or Durham types. The defense of insanity being abrogated, evidence of mental illness would be admissible on the *mens rea* issue to the same limited extent that deafness, blindness, a heart condition, stomach cramps, illiteracy, stupidity, lack of education, "foreignness," drunkenness, and drug addiction are admissible. In practice, such cases are rare, and they would remain rare were mental illness added to the list. There would not merely be a shifting of psychiatric testimony to the *mens rea* issue with the same problems as beset the courts which hear it in the defense of insanity. A quite different issue would be raised, and one traditionally within the competence of the

finder of fact. The convicted person's mental condition would, of course, be highly relevant to his sentence and to his correctional treatment if he were convicted.

Historically the defense of insanity made good sense. The executioner infused it with meaning. And in a larger sense, all criminal sanctions did so too, since they made no pretense of being rehabilitative. In the present context of the expressed purposes and developing realities of both the criminal justice system and the mental health system this defense is an anachronism. In the future, this defense would be not only anachronistic, it would be manifestly inefficient as well.

Let us offer a small statistical point before turning to the moral issue. In this country the defense of insanity is pleaded in about 2 percent of the criminal cases which come to jury trial. Overwhelmingly, of course, criminal matters are disposed of by pleas of guilty and trials by a judge sitting without a jury. Only the exceptional case goes to trial by jury. And of these exceptional cases, in only two of every hundred is this defense raised. In the United Kingdom, for the period on which the Royal Commission on Capital Punishment reported, the situation was very similar. The verdict of "guilty but insane" was returned, over a five-year period, in 19.8 percent of murder trials, whereas over the same period it was returned in only 0.1 percent of trials for other offenses. Does anyone believe that this measures the significance of gross psychopathology to crime? Let him visit the nearest criminal court or penitentiary if he does. Is not this defense clearly a sop to our conscience, a comfort for our failure to address the difficult arena of psychopathology and crime?

The practical difference between traditional tests of insanity and modern revisions was recently empirically tested. Various juries were given instructions based on the M'Naughten rules, the Durham test, and the following simple and uncluttered formula: "If you believe the defendant was insane at the time he committed the act of which he is accused, then you must find the defendant not guilty by reason of insanity." The juries failed to see any operative differences in the three instructions. Do we need to labor another century and a half to produce a mouse of such inconsequence?

Yet the moral issue remains central. Should we exculpate from criminal responsibility, or from "accountability" to use the preferable European concept, those whose freedom to choose between criminal and

lawful behavior has been curtailed by mental illness? It is too often overlooked that the exculpation of one group of "criminal actors" confirms the inculpation of others. Why not a defense of "dwelling in a Negro ghetto"? This defense would not be morally indefensible. Such an adverse social and subcultural background is statistically *more* criminogenic than is psychosis, and it also severely circumscribes the freedom of choice which a nondeterministic criminal law (and that describes all present criminal law systems) attributes to accused persons.

True, a defense of social adversity would be politically intolerable; but that does not vitiate the analogy for our purposes. Insanity, it is said, destroys, undermines, or diminishes man's capacity to reject the wrong and adhere to the right. So does the ghetto – more so. But surely, you might ask, you would not have us punish the sick? Indeed we would, if you insist on punishing the grossly deprived. To the extent that criminal sanctions serve punitive purposes we fail to see the difference between these two defenses; to the extent that they serve rehabilitative, treatment, and curative purposes, we fail to see the need for the difference. Some reply: it is not a question of freedom or morality, it is a question of stigmatization, and to this we shall return; but let us not brush aside the moral issue so lightly.

In Shavian terms: Vengeance is mine, saith the Lord – which means that it is not the Lord Chief Justice's! It seems to us clear that there *are* different degrees of moral turpitude in criminal conduct and that the mental health or illness of an actor is relevant to an assessment of that degree – as are many other factors in the social setting and historical antecedents of a crime. This does not mean, however, that society is obliged to measure any or all of these pressures for purposes of a moral assessment which will lead to conclusions concerning criminal responsibility.

In a few cases the question of moral irresponsibility is so clear that there is no purpose in invoking the criminal process. The example of accident, in its purest and least subconscious accident-prone form, is a situation where there is little utility in invoking the criminal process. The same is true of a person who did not know what he was doing at the time of the alleged crime. But to exculpate him there is no need for the M'Naughten or Durham rules for he falls clearly within general criminal law exculpatory rules. He simply lacks the *mens rea* of the crime. Thus, it seems to us that all we need to achieve within the

area of criminal responsibility and psychological disturbance is already achieved by existing and long-established rules of mental intent and crime, and we would allow a sane or insane *mens rea* to suffice for guilt.

Perhaps an example of this principle may help. The *Hadfield* case will serve our purpose admirably. Hadfield had been severely wounded in the head in the Napoleonic wars and subsequently decided that it was necessary for the salvation of the world that he kill George III. He equipped himself with a blunderbuss and secreted himself in the Drury Lane Theatre in a position from which he hoped to shoot George III as he waddled into the royal box. Hadfield saw the flabby creature in the royal box and discharged his blunderbuss in the direction of the king, unfortunately missing him.

There was no doubt of Hadfield's brain damage or of his psychosis, his gross psychological disturbance. He did, however, clearly intend to kill the king. He had the insane *mens rea* of murder, and indeed of treason. We do not regard the phrase "insane *mens rea*" as a contradiction in terms. Had his psychological disturbance led him to think that he was discharging the blunderbuss to start the performance on the stage, or to burst a balloon, he would have lacked the *mens rea* of murder and of treason. But he saw himself as sacrificing himself for the good of the world -- and he may not have been far wrong. We do not deplore the fact that Hadfield was held to be not guilty on the grounds of insanity. We do, however, maintain that there would be no greater injustice involved in convicting in such a case and applying the psychological diagnosis to the decision how to treat the offender than in convicting in any of the other thousands of cases that daily flow through our criminal courts.

Clearly the crucial question in this context is: what are the consequences of the defense of insanity? Is there an operative difference between peno-correctional and psychiatric-custodial processes which renders benefit to the accused who is found not guilty on the grounds of insanity? To this important inquiry we offer two replies. First, the differences if they exist are marginal; and second, the defense of insanity is an extraordinarily inefficient mechanism of deciding on the allocation of psychiatric treatment resources.

The American Law Institute's recommended modification of the M'Naughten rules in its Model Penal Code was accompanied by a recommendation requiring the indeterminate commitment of those found not guilty by reason of insanity. Likewise, within a month of the adoption of the Durham rules in the District of Columbia, Congress provided that being found not guilty on the grounds of insanity should be followed, mandatorily, not in the discretion of the court, by indeterminate commitment to Saint Elizabeth's Hospital until such time as the person so committed could meet the requirements that he prove, beyond reasonable doubt, his freedom from "any abnormal condition" and that he is not likely to repeat the act which resulted in his insanity acquittal. Dr. Winfred Overholser, the late superintendent of the mental hospital to which the recipients of this benevolence in the District of Columbia are sent, put the matter precisely: "The notion that a verdict of not guilty by reason of insanity means an easy way out is far from the truth. Indeed the odds favor such a person spending a longer period of confinement in the hospital than if the sentence was being served in jail."

Facilities and practice differ from country to country, and in this country from state to state. The point we wish to stress is that it is error to *assume* benevolence and to assume that there are more psychiatric treatment resources, better physical conditions, and earlier release practices pursuant to a finding of not guilty on the grounds of insanity than pursuant to a conviction. It all depends. We know of systems where there are more facilities per patient for psychiatric treatment in the penitentiary holding psychologically disturbed prisoners than in the nearby state mental hospitals. Frequently the converse is true.

Let us offer a final point on the sometimes assumed benevolence of the defense of insanity. It is more than a straw in the wind, more than a suggestion that this is not a liberal, benevolent, humanely exculpating defense, when one finds the prosecution alleging at trial the insanity of the accused at the time of the crime while the defense urges his sanity; but this has occurred in both the United Kingdom and this country. Lady Barbara Wootton has discussed at least six cases in which "the witness called by the Crown to rebut evidence of diminished responsibility sought to establish that the accused was in fact insane." And in a judgment in the House of Lords, Lord Denning said: "The old notion that only the defense can raise a defense of insanity is now gone. The prosecution are entitled to raise it and it is their duty to do so rather than allow a dangerous person to be at large."

It might be suggested that our attack on the defense of insanity mis-

conceives the problem. The task of the law, it might be suggested, is mainly to protect the community, and the defense of insanity will indeed permit better psychiatric treatment and, if necessary, longer custodial supervision of the disturbed and dangerous criminal. Later in this chapter we shall deal with the definition and prediction of social dangerousness; in the meantime, it suffices to note that the defense of insanity started on moral premises different from this, and that the defense is both unnecessary and inefficient to achieve this protective purpose.

A more sophisticated critic might suggest that we are missing the point in a different way. Criminal processes are, he might say, public morality plays. They have deterrent purposes, perhaps, but they certainly aim dramatically to affirm the minimum standards of conduct society will tolerate. By public ceremonial and defined liturgy, criminal trials stigmatize those who fail to conform to society's standards. In short, the criminal justice system is a name-calling, stigmatizing, community superego reinforcing system. And, it could be urged, we should not stigmatize the mentally ill. They are mad not bad, sick not wicked; it is important that we not misclassify them. Is there a rebuttal to this defense of the defense of insanity? We believe there is – the fact of "double stigmatization."

Consider the question, Are psychologically disturbed criminals seen by prison authorities only as "criminal," and are the mentally ill who have committed or have been charged with crime seen only as "mentally ill" by the hospital authorities? Or are the former seen as "mentally ill criminals" and the latter as "criminal and mentally ill"? Are the systems separate or confused in the minds of the staff and of the "patients"? It is clear that some belief in the separateness and purity of the two systems infects the position of those who advocate retention of the defense of insanity. Yet the fact is that the prison authorities regard their inmates in the facilities for the psychologically disturbed as both criminal and insane, bad and mad; and the mental hospital authorities regard their inmates who have been convicted of crime or even arrested and charged with crime as both insane and criminal, mad and bad.

In mental hospitals the fact that an inmate was arrested for a crime seriously influences the date of his likely discharge. Note, it is an arrest without a conviction that has this effect. Likewise the conditions of incarceration in the psychiatric divisions of correctional systems are

frequently less desirable than elsewhere in the system and the chances of obtaining parole are substantially lower. The truth is that our present intellectually loose approach to this problem inflicts gratuitous extra suffering both on those who are categorized as criminal and mentally disturbed and those who are categorized as mentally disturbed and criminal. The police power of the state and the mental health power of the state are surely sufficient unto themselves, separately, to control questions of dangerousness and the upper limits of power over individual citizens. It is mutually corruptive and a potent source of injustice loosely and thoughtlessly to blend these two powers, and thus to gloss over in each the proper balance between state power and the freedom of the individual.

There is one concept common to both, the concept of social dangerousness. The problem for both the prison authorities and the mental health authorities is reasonably and effectively to make assessments of social dangerousness and to design a process by which that assessment can be fed into the releasing procedure. We do not facilitate this difficult task by making a porridge, a farrago, out of the two powers – the mental health power and the police power – and using this mess to avoid facing and trying to dispose of a genuinely difficult problem.

Thus, in terms neither of the morality of punishment nor of stigmatization is the defense of insanity now essential or operative. Similarly, it is neither a necessary nor effective principle around which to mobilize clinical resources for the rational treatment of the psychologically disturbed criminal actor. It is, however, in our view, a political issue of some difficulty and the politics are concerned with the stigmatizing role of the criminal law.

While the hangman, or in this country the fryman, and the capital punishment controversy lurk in the background, the issue of criminal irresponsibility in relation to homicide is intractable. Yet, in the five years 1964, 1965, 1966, 1967, and 1968, the number of executions in this country was, respectively, 15, 7, 1, 2, and 0. Our ukase on this matter does no more than hasten the inevitable. Moreover, when one looks at the pattern of capital punishment for murder in the world, it becomes clear that this is a rapidly declining sanction. We can reasonably exclude it from our consideration of the future. What remains then is the question of stigmatization of conduct as either wicked or the product of sickness, as either bad or mad. This difference in stigmatization may result in different treatments but the differences are neither

essential to our system of criminal justice nor necessarily involved in either our correctional or mental health systems. The essential difference is the difference of nomenclature, of overt public stigmatization.

For our part, we look toward a future in which moral outrage and name-calling will not so significantly influence our reaction to the behavior of others. This is a generation that despoils our natural resources and prepares to terminate human life on this planet; but if the ruination of our environment and the eliminating of our species are avoided, if aggressions are controlled in favor of decency and creativity, we do not believe that systems of justice in which name-calling and vengeance figure so prominently can long survive. If this be so, then the issue becomes one of how we can, as rapidly as the traffic will allow, destigmatize our criminal law processes.

There is a choice. We could follow the pattern of a gradual extension of the exculpatory and allegedly destigmatizing processes of the defense of insanity, opening it more and more widely to cover larger and larger slices of criminal conduct until most criminal behavior is encompassed. Many of those working in this field, men whom we respect, favor that engulfing process. We do not oppose their purpose; but we think their political judgment wrong. It seems to us that we should not make an artificial and morally unjustifiable exception to a false general rule and allow the exception to swallow the rule. It seems to us better to support the advance that is now taking place, certainly in theory and rhetoric, in the treatment of all criminal conduct, and to a degree in correctional practice. In other words, to put it aggressively, we think society will move faster toward a rational system of criminal justice through honesty than by self-deception; and we think it dishonest to creat an artificial, morally unjustifiable, practically ineffective exception to the general rules of criminal responsibility. We think the English judges went wrong in the nineteenth century and that it is time we got back to earlier and truer principles.

We find it impossible morally to distinguish the insane from others who may be convicted though suffering deficiencies of intelligence, adversities of social circumstances, indeed all the ills to which the flesh and life of man is prey. It seems to us that our approach better accords with the total role of the criminal law in society than does a system which makes a special exculpatory case out of one rare and unusual criminogenic process, while it determinedly denies exculpatory effects to other, more potent processes. In the long run we will better

handle these problems, as well as the whole and more complex problem of criminality in the community, if we will recognize that within crime itself there lies the greatest disparity of human wickedness and the greatest range of human capacities for self-control.

Our perennial perseverations about the defense of insanity impede recognition of this diversity, since they push us to a false dichotomy between the responsible and the irresponsible. They should be abandoned. One occupation for the energies thus released might be suggested, a task in which the psychiatrist has an important role to play: the defining of those categories of psychologically disturbed criminals who are serious threats to the community and to whom special treatment measures should therefore be applied.

On Defining and Predicting Dangerousness

The policeman, the prosecutor, the jury, the judge, the probation officer preparing a presentence report, the clinician in the diagnostic and classification center, the correctional officer planning the inmate's treatment and custody, the parole board and the parole officer — all, like it or not, must make predictions about the possible social dangerousness of the offender they confront. This is frequently a complex and difficult task to which psychiatric insights are often relevant. It involves at least two interacting issues: what kinds of behavior are sufficiently threatening to be called "dangerous" and with what degree of certainty must the prognosis establish the likelihood of recurrence of the kind or kinds of behavior designated "dangerous" and over what period of time?

The task of conceptualizing and providing methodologically sound processes for reaching decisions on these twin aspects of "dangerousness" is of central importance to the development of the criminal law. It is critical at every level of the criminal justice system. The report of the President's Crime Commission stresses the

> necessity for identifying those dangerous or habitual offenders who pose a serious threat to the community's safety. They include those offenders whose personal instability is so gross as to erupt periodically in violent and assaultive behavior, and those individuals whose long-term exposure to criminal influences has produced a thoroughgoing commitment to criminal values that is resistive of superficial efforts to effect change. . . .

HB-47

ALASKA LEGISLATIVE COUNCIL

LEGISLATIVE AFFAIRS AGENCY

LEGISLATIVE OVERSIGHT OF THE

ADMINISTRATION OF STATUTES

Review of

Judicial and Administrative Opinions

and

Administrative Regulations

JANUARY 1972

THE ALASKA LEGISLATIVE COUNCIL

and the

LEGISLATIVE AFFAIRS AGENCY

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John M. Elliott
Executive Director

C O N T E N T S

F O R E W O R D

AS 24.20.065(a) requires the legislative council to examine annually administrative regulations, published opinions of state and federal courts and of the Department of Law that rely on state statutes, and final decisions adopted under the Administrative Procedure Act (AS 44.62) to determine whether or not

1) the courts and agencies are properly implementing legislative purposes;

2) there are court or agency expressions of dissatisfaction with state statutes;

3) the opinions or regulations indicate unclear or ambiguous statutes.

Under AS 24.20.065(b) the council is to make a comprehensive report of its findings and recommendations to the members of the legislature at the start of each regular session. The discussions on the following pages are not intended as in-depth analyses of the cases or issues involved, but merely present matters suggesting legislative action.

JOHN M. ELLIOTT
Executive Director

January 1972

A. ALASKA SUPREME COURT OPINIONS

This report is based on a review of Alaska Supreme Court Opinions Nos. 585, dated November 3, 1969, through 718, dated September 14, 1971, and No. 737, dated November 15, 1971.

(1) Harmon v. North Pacific Union Conference Association of Seventh Day Adventists, 462 P 2d 432 (Opin. No. 591, 12/15/69):

Facts. After its appeal to the Greater Anchorage Area Borough's board of equalization was denied, the appellee, a religious organization, brought an action against officials of the Greater Anchorage Borough and the borough itself, seeking a declaratory judgment that three parcels of residential property owned by the appellee were, under AS 29.-10.336, exempt from real property taxation. Of the three parcels, one was used by a minister of the church who also served as president of the church's statewide operations, another was used by another minister of the church who also served as treasurer of the statewide operations, and the third was used by a non-minister who was the principal of the church's parochial school. The lower court granted the church's motion for summary judgment, declaring the property in question to be exempt from real property taxation. The borough and its officials appealed, arguing (1) that because the church brought an action for declaratory judgment instead of directly appealing the decision of the board of equalization it was barred from litigating the claimed tax exemption, and (2) that the property in question was not exempt from taxation. The substantive aspect of the case turned upon the interpretation of AS 29.10.336, and the supreme court expressly stated, in its footnote 1, that it was not determining the constitutional validity of religious property tax exemptions.

Statute. The pertinent parts of the statute central to the substantive aspect of this case (AS 29.10.336) state:

> "(a) Property . . . used exclusively for nonprofit religious . . . purposes . . . [is] exempt from [property] taxation.
>
> (b) The term 'property used exclusively for religious purposes' includes the following types of property owned by a religious organization:
>
> (1) the residence of the pastor, priest, rabbi, minister, or religious order, which residence is owned by a recognized religious organization;

(2) a structure, and the land it stands on, which is used for public worship, solely charitable purposes, religious education, or a nonprofit hospital;

(3) the furniture and fixtures in a structure used exclusively for religious purposes;

(4) lots adjacent to a structure or residence mentioned in (1) or (2) of this subsection and which are reasonably necessary to the convenient use of the structure;

(5) lots required by local ordinance for parking in connection with the structure as defined in (2) of this subsection.

(c) Property or part of the property described in (a) or (b) of this section from which rentals or income are derived is not exempt from taxation under (a) of this section, unless the rentals or income are derived from the rental of the property by religious or educational groups for classroom space."

Decision. After ruling that the church's terming its action before the superior court an original action for declaratory relief instead of an appeal from the board of equalization did not bar litigation of the exemption issue, a majority of the supreme court held that the three pieces of property involved are not exempt from taxation. The exemption provision was rewritten in 1964, and the majority of the court stated "We view the action of the legislature in deleting the language 'and other property of the organization not used for business, rent, or profit,' as narrowing the type of residence which can be exempt from property taxation under AS 29.10.336(b)(1), as it now reads." The majority further stated, with reference to that provision, "To us the words 'the residence of the pastor,' etc., imply that only those residences may qualify that have some direct relationship to a structure used primarily as a house of worship. If the legislature desires a broader form of exemption, it may amend the statute." (Court's emphasis; footnote omitted.)

One justice concurred with the majority's opinion on the procedural issue but dissented from that opinion on the substantive issue. He stressed the difficulty in determining legislative intent, noting (in his footnote 7) that "Not untypically, the legislature has failed to provide an adequate record of the legislative history of the questioned amendments."

Legislative action. First of all, the legislature should continue its trend toward including more explanatory committee

reports in the legislative journals in order to furnish an interpretative aid to the public, administrative officers, lawyers, and the judiciary. Secondly, if the legislature believes that the court has construed the religious property exemption too narrowly, AS 29.10.336(b)(1) could be amended to read "a residence of a pastor . . ." or "residences of pastors. . ." with the addition of a phrase such as "or other employee or member of the religious organization". It should be noted, however, that the constitutionality of religious property tax exemptions is at least questionable. In Walz v. Tax Comm. of the City of New York, 395 US 957, 23 L ed 2d 744, 89 S Ct 2105 (6/16/69), the United States Supreme Court has granted review to determine this question.

(2) Inglima v. Alaska State Housing Authority, 462 P 2d 1002 (Opin. No. 594, 1/2/70):

Facts. The appellee filed condemnation proceedings to acquire land owned by the appellants in order to carry out an urban renewal project occasioned by the 1964 Alaska earthquake. The master's award exceeded the amount deposited in court by the appellee and the latter appealed to the superior court; the property owner did not appeal to the superior court. After the jury had been selected but before the trial began, the housing authority (appellant in the superior court) filed notice of dismissal of its appeal, to which the property owner objected, arguing that the right to a jury trial vested in both parties to the eminent domain proceeding when either party filed a notice of appeal. The superior court took the question of dismissal under advisement, but ordered the trial to proceed. At the close of trial, the jury awarded an amount greater than the master's award, but the superior court allowed the housing authority's dismissal and entered judgment for the amount awarded by the master. The property owner then appealed to the supreme court.

Statute. The statute which governs generally the rights of the parties upon appeal from a master's award is AS 09.-55.320, which provides:

> "An interested party may appeal the master's award of damages and his valuation of the property, in which case there shall be a trial by jury on the question of the amount of damages and the value of the property, unless the jury is waived by the consent of all parties to the appeal."

Decision. The supreme court reversed and remanded with directions that judgment be entered on the verdict of the jury, stating "We believe that the legislature intended in these circumstances that the owner against whom appeal is

taken is entitled to look forward to a jury trial as a matter of right, even though he may be the passive party. We are persuaded by the argument that the proceedings after the master's report are an appeal in name only and that the right to a jury trial vests by operation of law in all parties to the appeal."

Legislative action. To remove an ambiguity in the statute, the legislature could amend AS 09.55.320 by adding a sentence such as "The appeal may not be dismissed without the consent of all parties to it." if that would effectuate the legislative intent. This would make clear that not only does each party have a right to a jury trial, when there is a trial, but that he has a right to a trial in the first place.

(3) Gray v. Alaska, 463 P 2d 897 (Opin. No. 595, 1/16/70); and Pope v. Alaska, 478 P 2d 801 (Opin. No. 660, 12/21/70), rehearing denied 480 P 2d 697:

Summary. The Gray case involved two brothers who burglarized a liquor store in which a police officer was hiding. One brother, who was not carrying a weapon, was shot in the leg by the officer, and, as he lay on the floor, his brother shot and killed the officer. Both brothers were convicted of first degree murder, and one of the main issues in the case involved application of the felony-murder theory which states, essentially, that a killing occasioned by the commission of a felony is murder, rather than manslaughter, negligent homicide, etc. Formulations of the rule vary, but traditionally it does not require that an intent to kill be present. However, because of the wording of Alaska's first degree murder statute (AS 11.15.010), which includes a felony-murder provision, the court overturned the felony-murder convictions (issues separate from the other, respective murder convictions of the two brothers). Introduction of the Seventh Legislature's House Bill No. 47, substantially rewriting AS 11.15.010, was a response to this ruling.

Related to this bill and the Gray case, with regard to the matter of criminal intent, is the Pope case. In it, the defendant raised the defense of insanity, in response to a murder charge; the dissenting justice presented a good explanation and historical review of mens rea (guilty mind) and the defense of insanity and urged the overruling of Chase v. Alaska, 369 P 2d 997 (Alaska, 1962). He also indicated his preference for the American Law Institute's Model Penal Code insanity-defense formulation.

Material concerning HB 47 and these and related cases is in the files of the House Judiciary Committee, as is a

draft of a proposed committee substitute. The re-revision of the criminal code, to be introduced during the 1972 legislative session at the request of the Alaska Legislative Council, is based on the Model Penal Code and covers the points involved in these cases. Of substantial value to legislators considering a criminal code revision is Norval Morris' and Gordon Hawkins' The Honest Politician's Guide to Crime Control (Univ. of Chicago Press, 1970), which also specifically discusses mens rea.

(4) Thorsheim v. Alaska, 469 P 2d 383 (Opin. No. 611, 5/22/70):

Facts. The plaintiff, as administratrix of her husband's estate, filed a claim for death benefits under the Alaska Workmen's Compensation Act (AS 23.30). Her husband, employed by a flying service which was under contract to the Alaska Department of Administration, was killed while flying an agent of the Department of Fish and Game on a stream survey flight. The flying service did not carry workmen's compensation insurance, and the claimant argued that the State of Alaska, as a prime contractor, was liable under AS 23.30.045(a). The Workmen's Compensation Board and the superior court denied the claim, and the question for the supreme court was whether the state was a "contractor" and the flying service was a "subcontractor" under AS 23.30.-045(a).

Statute. The relevant portion of AS 23.30.045(a), referred to as the "contractor-under" provision, states:

> "If the employer is a subcontractor, the contractor is liable for and shall secure the payment of the compensation to employees of the subcontractor unless the subcontractor secures the payment."

Decision. A majority of the supreme court affirmed the superior court's denial of the claim, holding that the state was not a contractor in the circumstances of this case. The majority stated that the absence of statutory definitions of the terms "contractor" and "subcontractor" posed especial difficulty, and employed the following for the purposes of interpreting AS 23.30.045(a): "contractor" means "a person who undertakes, by contract, the performance of certain work for another, including the furnishing of goods and services", and "subcontractor" means "a person to whom a contractor sublets all or part of his initial contractual undertaking."

One justice dissented, suggesting that "contractor" be defined "in terms of fitness to perform the function envisaged by the legislature, not in terms of the common law meaning of the semantic root of the word 'contractor'." He said it

should be construed to mean "one whose regular occupation is to undertake for others to do jobs by contracting with third persons for all or part of the performance."

Legislative action. The legislature should add a new subsection to AS 23.30.045, defining "contractor" and "subcontractor" for the purposes of that section. The suggestion in the majority opinion or in the dissent could be used.

(5) Glasgow v. Alaska, 469 P 2d 682 (Opin. No. 616, 5/29/70):

Facts. The appellant was convicted of two counts of an indictment charging four counts of larceny in a building. The main issue before the supreme court was the appellant's right to a "speedy trial" under the United States and Alaska Constitutions. Excluding those periods of time that can properly be attributed to the appellant, trial was delayed some 14 months.

Decision. Attempting to maintain a proper balance "between the needs of the accused and the commitments of the judicial process," the court stated "We think 14 months' delay is an improper balance to strike." The conviction was overturned. In its opinion, the court observed that in Alaska there is "no statutory provision by which to measure the definite time within which trial must be held." Footnote 9 states "Virtually all of the leading authorities who have studied the matter, however, agree that the right to speedy trial should be fixed in terms of days or months running from a specified event, excluding certain periods of necessary delay or delays at the instance of the defendant, which should also be identified precisely." Several states were cited as having such provisions, and the court referred to the "Standards Relating to Speedy Trial", sec. 2.1, Approved Draft, A.B.A. Project on Minimum Standards for Criminal Justice (1968).

Legislative action. The legislature should consider specifying, probably somewhere in AS 12.45, a statutory time limit for permissible delay. In most jurisdictions which so specify, the permissible delay ranges between 75 days and six months. (See the court's footnote 12.)

(6) Searfus v. Northern Gas Company, Inc., 472 P 2d 966 (Opin. No. 630, 7/31/70):

Facts. The appellant brought an action for personal injuries against the appellee Northern Gas Company. The gas company denied any negligence on its part, asserted that the appellant was contributorily negligent, and contended that since appellant was its employee at the time of the

injury her sole remedy was under the Alaska Workmen's Compensation Act (AS 23.30). The superior court jury specially found that she was an employee of the gas company, and returned a general verdict in favor of the company. The main issue on appeal involved the definition of the word "employee".

Statute. In the present wording of Alaska's Workmen's Compensation Act, AS 23.30.265(11) defines "employee" as "an employee employed by an employer as defined in paragraph (12)", and AS 23.30.265(12) defines "employer" as "the state or its political subdivision or a person employing one or more persons in connection with a business or industry coming within the scope of this chapter and carried on in this state." These definitions are of little help in resolving the frequent question whether a person is an employee or is a contractor or subcontractor.

Decision. While holding that the superior court's jury instruction defining "employee" was not prejudicial error, and affirming the judgment, the supreme court rejected the common law definition of "servant" as the definition of "employee" for workmen's compensation purposes and adopted instead the "relative nature of the work" test. The court stated, "Designation of the precise boundaries of, and the relevant factors involved in, the 'nature of the work' test must, absent legislative definition, await further development through judicial decision."

Legislative action. The legislature should consider amending AS 23.30.265(11) to distinguish "employee" from "independent contractor". The court and authorities cited by it discuss factors relevant to evaluating the nature of the work, and in footnote 12 the court quotes AS 23.20.-525(a)(4)(A), (B), and (C), the Alaska Employment Security Act's definition of "employment" at the time the decision was written. All of this, plus the present wording of AS 23.-20.525(a), should provide guidance in selecting language for the amendment.

(7) Dimmick v. Alaska, 473 P 2d 616 (Opin. No. 632, 8/7/70):

Summary. In this appeal from a conviction of robbery, one of the main issues was whether the appellant's accomplice's testimony was inadmissible because the police had obtained a statement from him in violation of the standards for custodial police interrogation set out in Miranda v. Arizona, 384 US 436, 16 L ed 2d 694 (1966). When the appellant was arrested he was with his accomplice who was not arrested (because the victim could not identify him), but both were advised of their right against self-incrimination and their right to have an attorney. The accomplice requested an attorney but

then made a confession without having one. One police officer testified, "the decision was made to go ahead and interview [the accomplice] after he had requested an attorney full-well knowing that then this confession could not be used against him but merely for the value of the confession against Mr. Dimmick."

With one vacancy on the supreme court, two justices favored affirming the superior court's conviction and two favored reversal, the result of which was to affirm the lower court. The affirming opinion reasoned that "The focus of Miranda was upon the right of an individual not to be compelled to incriminate himself," stating that the "constitutional prohibition against compelling any person in a criminal case 'to be a witness against himself'" is personal in nature and that the right "pertains only to the person from whom a statement is obtained." Thus, since the accomplice's illegally obtained confession was to be used against the appellant and not against the accomplice himself, his testimony was held admissible.

This opinion rejected the suggestion, made (in a separate opinion) by one of the two justices favoring reversal, that affirming the conviction would encourage the police to conduct "incommunicado custodial police interrogation, with concomitant violations of the constitutional rights of the persons subjected to questioning." The two affirming justices said that those whose constitutional rights are violated by reason of police activity may seek redress under the federal Civil Rights Act (see 42 U.S.C., sec. 1983), and that "Furthermore, Alaska's legislature is not without the authority, if it chooses to exercise it, to make certain types of police conduct a crime, or even to extend the exclusionary rule of Miranda and provide that statements obtained in violation of that rule are inadmissible against anyone for any purpose."

Each of the two justices favoring reversal wrote a separate opinion, and the final resolution of the main issue on which they disagree with the controlling opinion in this case will have to be achieved in a future decision which avoids the two-to-two split. Whatever the judicial outcome may be, the legislature could "make certain types of police conduct a crime, or. . . extend the exclusionary rule of Miranda."

(8) Delahay v. Alaska, 476 P 2d 908 (Opin. No. 648, 11/2/70):

Summary. The appellant questions the legality of his termination as a district judge of Alaska and the validity of the appointment of his successor. His termination resulted from 1966 and 1967 legislation changing the method of selection

and retention of district judges and terminating the appointments of all district judges sitting on a specified date. See ch. 138 SLA 1966 and ch. 117 SLA 1967.

The main question of legislative intent involved sec. 2 of the latter Act (AS 22.15.170(a)), which provided in part that "The governor shall fill a vacancy in an office of district judge by appointing one of two or more persons nominated by the judicial council." Under this provision, the judicial council nominated four persons for the three district judgeships in the fourth judicial district, interpreting the "two or more persons" requirement as meaning that the governor could select from among all four nominees for the first position, from among three for the second, and between two for the third. Referring to the proceedings of the Constitutional Convention which indicate an intent "to maximize the role of the judicial council in selection of judicial candidates", the supreme court agreed that the judicial council's action in sending the governor only one more nominee than the number of positions to be filled constituted compliance with the statute. The decision of the superior court, rejecting the appellant's position, was affirmed.

The legislature may wish to consider whether this interpretation of that part of AS 22.10.170(a) quoted above does, in fact, implement the legislative intent, especially since that language is virtually identical to that in the Alaska Constitution regarding selection of supreme court justices and superior court judges (art. IV, sec. 5).

(9) Lynch v. McCann et al., 478 P 2d 335 (Opin. No. 659, 12/18/70):

Facts. Paul and June Lynch had been in partnership with Joseph and Margaret Reilly in the ownership and operation of an Anchorage bar, which the latter couple wished to expand by adding a restaurant. The Lynches did not wish to do so, and the Reillys bought them out, borrowing some money from a bank upon the security of a deed of trust and executing a second deed of trust to the Lynches. After the trust deeds had been recorded, the Reillys began construction of an addition to the existing bar building and began refurbishing the old building. The addition was about one-seventh the size of the old building. The appellees furnished labor and materials, and subsequently the Reillys defaulted on their obligations to the Lynches and to the appellees. After the Lynches foreclosed their deed of trust and purchased the property at the foreclosure sale, the appellees instituted foreclosure actions on their respective mechanics' liens. The lower court granted the lienors foreclosure insofar as the new addition was concerned, stating that as to that property their liens were prior and paramount to all other interests of the other parties.

Statutes. The appellants would have priority under AS 34.20.090(b), which provides:

> "The purchaser at a [foreclosure] sale, his heirs and assigns are, after the execution of a deed to him by the trustee, entitled to the possession of the premises described in the deed as against the party executing the deed of trust or any other person claiming, through or under him, after filing the deed of trust for record in the recording district where the property is located."

The appellees would have priority under AS 34.35.-060(c), which provides:

> "A lien created by secs. 50 - 120 of this chapter in favor of a person actually performing labor upon or furnishing material used in a building or other improvement in its original construction is preferred to a prior lien, mortgage, or other incumbrance upon the land on which the building or other improvement is constructed."

Decision. Stating that the basic issue was whether the addition to the old building constituted "original construction" under AS 34.35.060(c), the supreme court held that it was not, and reversed the judgment in favor of the lienors. Observing that "Alaska's use of the phrase 'original construction' appears to be sui generis in the lien laws of this country," the court stated "Analysis of the text of AS 34.35.060(c) discloses a legislative intent to limit the priority granted generally to situations where the construction preceded all other construction in and upon a given area of vacant or cleared land." The court discussed Judge Ritchie's opinion in Wagner v. Shaw, 6 Alaska 647 (1922), as further evidence of legislative intent, but mentioned that "In the absence of a clearer indication as to the legislature's intent, more precise definition of the term must await decisional delineation."

Legislative action. The legislature should consider adding a definition of "original construction" to AS 34.35.-060 or amending AS 34.35.060(c) to delete that phrase and state the priority in terms of its basic purpose. Again, a legislative committee report, explaining the measure and giving some clue to the motivation behind it, would be helpful.

(10) Application of Park, 484 P 2d 690 (Opin. No. 690, 4/30/71):

Summary. The petitioner passed the Alaska bar examination and met all other requirements for admission to the bar,

except that he was not a citizen of the United States as required by AS 08.08.130(a)(1) and Alaska Bar Rule II. The Alaska Supreme Court did not reach the question of the constitutional requirement of equal protection, but held that AS 08.08.130(a)(1) violated the Alaska Constitution's art. IV, sec. 1, which vests the judicial power of the state in a supreme court, superior court and courts established by the legislature. In a consistent line of decisions, the court has ruled that it can not be required to admit attorneys "on standards other than those accepted or established by the court" and that admission requirements must have "a rational connection with one's fitness to practice law in Alaska." In the instant case, the citizenship requirement was held unacceptable to the court, after reviewing several arguments made in its defense. (The court also held the same requirement stated in its own Alaska Bar Rule II to be of no force and effect.) The court went on to suggest, however, that lawful residence and a sincere intent to become a citizen could be required, and Supreme Court Order No. 147, dated November 23, 1971, amended Alaska Bar Rule II to so provide.

AS 08.08.130(a)(1) should be amended to read: "is a citizen of the United States, or is a resident alien in the United States who intends to become a citizen of the United States." A section proposing this amendment will be included in the 1972 general revisor's bill. The legislature should also consider repealing or amending other United States citizenship requirements where they still exist in occupational licensing statutes (e.g., AS 08.62.100(2), 08.80.110(1) and 08.88.211(a)(5) and (b)(4)).

(11) Alvarado v. Alaska, 486 P 2d 891 (Opin. No. 704, 7/6/71):

Facts. The appellant sought reversal of his conviction for rape of his sister-in-law, contending that the jury which found him guilty was improperly constituted because of the long-standing practice in the third judicial district of selecting all prospective jurors from the area within a radius of 15 miles of Anchorage. (Neither did he live within that area nor was the location of the alleged crime in that area.) The result of this practice was the almost total exclusion from jury service of village residents. The appellant asserted that this deprived him of his constitutional rights to an impartial jury and to due process of law.

Statutes. Closely related to the problems involved in this case, but not interpreted in it, are AS 09.20.050 and 22.10.030. The relevant part of the latter is quoted below, in the discussion of the court's decision. In AS 09.20.050, subsection (b) specifies the sources of the names for the jury lists: persons who purchased a resident hunting, fishing or trapping license, persons who filed a state income

tax return showing an Alaskan address, and persons who have registered to vote. AS 09.20.050(a) provides as follows:

> (a) At such times as need may require, but not later than March 15 of each year, the administrative director of courts shall prepare for each judicial district a list of the names of the residents of the district who are qualified by law for jury service. If the superior court is located in different cities in the same judicial district, the administrative director shall prepare for each location of the court a list of the names of the qualified residents of that portion of the district considered by him to be appropriate.

Decision. After reviewing authority and considering pertinent sociological and anthropological factors in some depth, the supreme court reversed and remanded, holding that "an individual should not be forced, against his will, to stand trial before a jury which has been selected in such a manner as to exclude a significant element of the population of the community in which the crime was allegedly committed." The court stated that "in determining whether the source from which a given jury is selected represents a fair cross section of the community, we must adhere to a notion of community which at least encompasses the location of the alleged offense", observing that two alternatives would be selection from among residents of the entire judicial district (see the court's footnote 26) in which the crime is alleged to have occurred or from among residents of the senate district in which the crime is alleged to have occurred.

In connection with this second alternative, the court (in its footnote 40) referred to ch. 126 SLA 1971 (see AS 22.10.030(d)) which requires that the actual place of trial in criminal cases be "in an election district within the judicial district at a location which would best serve the convenience of the parties and witnesses," pointing out that the "administrative and financial impact of selecting jurors from within the [senate] district in which the crime occurred will be considerably diminished given the fact that trial will at any rate have to be held within the district." Affirming the notion that expense does not "justify the perpetuation of a system which denies to a large segment of our citizens the opportunity to participate in our system of justice," the court quoted from its earlier decision in Baker v. City of Fairbanks, 471 P 2d 386 (Alaska, 1970), to the effect that:

> "If an individual right is vested by the Constitution, the overriding demands of governmental efficiency must be of a compelling nature and must be identifiable as flowing from some enumerated constitutional power. To

allow expediency to be the basic principle would place the individual constitutional right in a secondary position, to be effectuated only if it accorded with expediency.

"This would negate our entire theory of constitutional government."

Legislative action. AS 09.20.050(a) could be amended to require the administrative director of courts to prepare jury lists by senate district, which the court seems to prefer to judicial districts or election districts while still meeting constitutional requirements. Also, for the sake of consistency, AS 22.10.030(d) (added by ch. 126 SLA 1971) could be amended to refer to "senate district" rather than "election district". (The Alaska Constitution's distinction between these two terms should be borne in mind. In art. XIV, sec. 1, for example, "election district" means "house of representatives election district", and in art. XIV, sec. 2, senate districts are described in terms of their component election districts. This usage of the terms seems to be consistent in our constitution; see, e.g., art. XV, sec. 10.)

(12) RLR v. Alaska, 487 P 2d 27 (Opin. No. 706, 7/9/71):

Summary. This is one of several recent significant decisions in the long constitutionally neglected area of children's rights. (Also see, e.g., Doe v. Alaska, 487 P 2d 47 [Opin. No. 707, 7/9/71]; In re EMD, 490 P 2d 658 [Opin. No. 737, 11/15/71]; and In re GMB, 483 P 2d 1006 [Opin. No. 687, 4/8/71].) On the main issue in this case -- that of a child's right to a jury trial -- the court stated "We hold that whenever a child in a delinquency proceeding is charged with acts which would be a crime, subject to incarceration if committed by an adult, the Alaska Constitution guarantees him the right to jury trial," and in its footnote 35 added "To the extent In re White, 445 P 2d 813 (Alaska 1968), is inconsistent with this opinion, it is overruled. Implicit in our holding is that AS 47.10.070 is unconstitutional insofar as it denies the right to a jury trial to the child in the adjudicative phase of the delinquency proceeding." The supreme court did not reach the issue whether this unconstitutionality required reversal; it vacated and reversed the superior court's adjudicative and dispositive orders, however, on the grounds that the procedures below were a blatant violation of Children's Rule 12(c)(1) which requires the presence of the child at the child hearing.

The portions of AS 47.10.070 which most clearly require legislative action in light of this case state:

"The court may conduct the hearing in an informal manner in the courtroom or in chambers. All hearings under this chapter are without a jury and the usual rules of evidence do not apply. . . . 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."

The court's footnote 74 contains the statement that "The statute providing for exclusion of the public from juvenile hearings is procedural, so is outside the scope of legislative authority unless two-thirds of each house of the legislature votes to change the rule promulgated by the supreme court in this matter. Alaska Const. art. IV, sec. 15." Since the statutory language was enacted in ch. 145 SLA 1957, before the effective date of the Alaska Constitution and before adoption of the Alaska Rules of Court Procedure and Administration and adoption of the Alaska Statutes, this statement appears to overrule the decision made in the preparation of those two bodies of material; the 1963 foreword to the Court Rules states (on its fourth page) "The objective of this [recodification] program was to separate all procedural law from the existing statutes, recodify the remaining substantive law into new titles and promulgate the procedural provisions as rules of court." Using that approach, what is now AS 47.10.070 was left in the statutes.

The July 1971 decision in this case, then, suggests that the legislature not deal with this point unless it does so as a change of the Court Rules under art. IV, sec. 15 of the Alaska Constitution. That special handling is not required in order to repeal AS 47.10.070 or delete the quoted language in line with the RLR case. However, the legislature may wish to go further than simply delete this language which denies a child the right to a public trial by jury; the entire section could be rewritten and AS 47.10.075, providing for "young adult advisory panels", could be amended to provide for actual jury service by minors (an issue mentioned but not decided by the court). (Cf. AS 09.20.050.)

(13) In re EMD, 490 P 2d 658 (Opin. No. 737, 11/15/71):

Summary. In this case the court was called upon to decide whether a minor who has been adjudged a "child in need of supervision", under AS 47.10.080(j), could be institutionalized. "Child in need of supervision" is a category created in 1970 to lie between "dependent child" and "delinquent child". As defined in AS 47.10.290(7), the term does not describe a child who has committed a crime. (See AS 47.10.010(a)(2), (3) and (6).) Under our statutory arrangement, only a child who violates a law, ordinance or regulation, i.e., a delinquent child, may be institutionalized. (See AS 47.10.080, 47.10.290(2) and 47.10.010(a)(1).)

The state argued that since AS 47.10.080(j)(1) allows any order for a child in need of supervision which is authorized for a dependent child (see AS 47.10.080(c)) and since one of those authorized orders is commitment to the Department of Health and Social Services, the department may institutionalize a child in need of supervision under AS 47.10.190 which provides:

> "When the court commits a minor to the custody of the department, the department shall arrange to place the juvenile in a detention home, facility or another suitable place which the department designates for that purpose. A juvenile detained in a jail or similar institution at the request of the department shall be held in custody in a room or other place apart and separate from adults."

The supreme court held that the department does not possess broader powers of commitment than does the trial court. In the supreme court's view, AS 47.10.190 "prescribes conditions of confinement after the court has lawfully determined that a child should be confined in an institution." (Footnote omitted.) The legislature could amend that section to reflect more clearly that interpretation.

B. ALASKA SUPERIOR COURT OPINIONS

All superior court opinions published in the Alaska Law Journal in 1970 and through May 1971 have been reviewed. However, none of those reported has been found to be relevant to this report. The last Alaska Law Journal was issued in May 1971, but will again be published in 1972. Therefore, any relevant opinions handed down between May and December 1971 will be included in the oversight report covering 1972. One unpublished superior court opinion which is a matter of special interest to the legislature is the March 15, 1971 opinion in the case of Bozanich v. Noerenberg, (No. 70 - 389 Civil).

The plaintiffs, Bozanich, et al., challenged the constitutionality of ch. 186 SLA 1968 (relating to persons eligible to obtain fishing gear licenses) in an action for a declaratory judgment and for a permanent injunction against the enforcement of the law (see AS 16.05.536, 16.05.540 and 16.05.250(12)). The plaintiffs based their challenge to the law on art. I, secs. 1 and 7, and art. VIII, secs. 3, 15 and 17, Constitution of Alaska.

Some of the plaintiffs had earlier challenged the same law in the U. S. District Court and a three-judge panel ruled the act was unconstitutional as being in violation of the United States Constitution and the Alaska Constitution. Bozanich v.

Reetz, 297 F. Supp. 300 (D. Alaska 1969). The three-judge U. S. District Court decision was set aside by the United States Supreme Court as violating the doctrine of abstention. Reetz v. Bozanich, 397 U.S. 82, 25 L.Ed. 2d 68 (1970). The supreme court did not consider the merits of the case but remanded it to the district court, staying proceedings in order for the parties to litigate the Alaska Constitutional questions in the Alaska courts.

The plaintiffs' motion for summary judgment in the subsequent state court action was granted by Judge Victor Carlson and the law was held unconstitutional. The court found that the statute violated the equal protection guarantee of art. I, sec. 1, the common use provision of art. VIII, sec. 3, and the prohibition of an exclusive right of special privilege of the fishery provision of art. VIII, sec. 15, Constitution of Alaska. The court stated that the "general meaning of the words of the constitutional provision require that no distinction between persons equally situated is to be made with regard to fish in their natural state." The case has not been appealed to the Alaska Supreme Court and it is anticipated that the invalid language will be removed by the 1972 general revisor's bill.

Another unpublished superior court opinion, also by Judge Carlson, which is of interest to the legislature is that in the case of Bomhoff v. Boucher, (No. 70-359 Civil).

The plaintiffs, Bomhoff, et al., brought suit to enjoin the lieutenant governor from issuing a call for a constitutional convention based on the results of the referendum proposition approved by the Alaska electorate on November 3, 1970, and to have the following proposition placed on the ballot in the next general or special election: "Shall there be a Constitutional Convention?" with appropriate boxes for marking "yes" or "no".

The challenged referendum proposition on the November 3, 1970, general election ballot was set out, punctuated but not spaced or set in the following type:

Referendum
As required by the
Constitution of the State of Alaska
Art. XIII, Sec. 3
Shall there be a constitutional
convention?

YES [ ]
NO [ ]

The court, in finding for the plaintiffs, held that the language of art. XIII, sec. 3, is mandatory and specific in the form of the question that is to be submitted to the voters when it says: "If during any ten-year period a constitutional convention has not been held, the secretary of state shall place on the ballot for the next general election the question: 'Shall there

be a Constitutional Convention?'" Since the proposition required by the constitution was not presented to the voters, the lieutenant governor was held to have no election results on which to base a call for a constitutional convention, and was therefore enjoined from doing so.

The court further found that the unauthorized introductory words in the proposition were misleading and confusing and held that "the election process is to be kept free from taint and the suggestion of impropriety, however unintentional. . . . The electorate should be given the opportunity to cast their ballots free from confusing, extraneous, or superfluous verbiage in the proposition."

A new election was ordered to be held at the next general election in 1972.

C. OPINIONS OF UNITED STATES DISTRICT COURT, DISTRICT OF ALASKA

First National Bank of Fairbanks v. Camp, 326 F. Supp. 541 (1971):

Facts. Plaintiff, First National Bank of Fairbanks, filed suit for declaratory judgment and injunctive relief with respect to approval by the defendant, Camp (Comptroller of the Currency), of an application of the First National Bank of Anchorage to open a branch in Fairbanks. On cross motions for summary judgment, the district court held that the defendant was not required to follow interpretive declarations by the state banking director with respect to an Alaska statute governing approval of branch banks, that the approval had rational basis in light of the state statutory requirements and that the plaintiff was not denied administrative due process by failure of the defendant to state reasons for his approval. Summary judgment for defendant.

Statute. Congress has authorized the Comptroller of the Currency to approve the establishment and operation of branch offices by national banks "if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks." (12 U.S.C. 36(c)(2)).

The director of the division of banking and securities of Alaska is, in authorizing state banks to operate a branch, subject to the provisions of AS 06.05.415, which provides in pertinent part that

> "The department shall issue a certificate of authority to operate a branch bank ... if (1) the department determines

that the addition of the proposed facilities in the community is not detrimental to a sound banking system;"

Decision. The part of the court's decision relevant to this oversight report is that in which the court, in deciding the issue of whether the defendant's decision to allow the establishment of a branch bank had rational basis in the light of state statutory requirements, stated:

> "No Alaska statute or cases have been found which define what is meant by 'a sound banking system' or which suggest factors, proof of which would show that a proposed branch was or was not 'detrimental to a sound banking system.' In the absence of any binding State standard and because the Comptroller had sufficient evidence from which to determine whether or not the new branch would be detrimental to the soundness of Fairbanks' banking system, his construction of that criterion cannot be upset."

Legislative Action. The legislature may wish to remove the ambiguity in AS 06.05.415(1) which allowed the Comptroller of the Currency to substitute his own standards of what is meant by a "sound banking system" for those of the state. This action should be in the nature of legislatively prescribed standards of what constitutes a "sound banking system."

D. ATTORNEY GENERAL OPINIONS

There have been no numbered, formal opinions issued by the Office of the Attorney General since 1969. It is the understanding of the Legislative Affairs Agency that formal opinions of the attorney general will again be issued and numbered beginning in 1972 and that certain informal opinions issued in 1970 and 1971 will be given numbers and published as formal opinions. All of these opinions will be reviewed for the oversight report covering 1972.

E. ADMINISTRATIVE REGULATIONS

(1) Revision of Alaska Administrative Code:

Again, this year's report does not contain a review of administrative regulations because in prior years the staff has reviewed the regulations of all administrative agencies of the state and because the revision of the Alaska Administrative Code, under 1967 Senate Concurrent Resolution No. 15 and sec. 2, ch. 70 SLA 1966, is still in progress. As part of this project, the Drafting Manual for Administrative Regulations has been revised; this fourth edition is dated August 1971.

In actions related to this project, the attorney general recently designated a "regulations attorney" under AS 44.62.125, and a member of the lieutenant governor's staff is now working on coordinating the regulation-adopting efforts of the various state agencies and encouraging adoption of revisions of their respective regulations. In addition, information is being gathered and bid specifications being prepared for eventual professional publication of the Alaska Administrative Code and Alaska Administrative Register (the quarterly supplement to the code). The following indicates the present status of the revision project:

Preface -- revised at least twice and presently in good shape.

Title 1 (General Provisions) -- old title repealed and a new title prepared but not yet adopted.

Title 2 (Department of Administration) -- no regulations ever filed for publication in the AAC. However, the department is completing preparation of the state personnel rules for voluntary filing under AS 44.62.-120. In addition, the department's Division of Supply is drafting some regulations to be included in the AAC.

Title 3 (Department of Commerce) -- revision almost completed, with a couple of batches yet to go.

Title 4 (Department of Education) -- revision completed.

Title 5 (Department of Fish and Game) -- revision completed, and revised again.

Title 6 (Governor's Office) -- revision virtually complete.

Title 7 (Department of Health & Social Services) -- a large, unrevised title with little spots of revision.

Title 8 (Department of Labor) -- a relatively large, unrevised title.

Title 9 (Department of Law) -- no regulations ever filed for publication in the AAC.

Title 10 (Department of Military Affairs) -- four pages of old regulations were recently repealed and have not been replaced.

Title 11 (Department of Natural Resources) -- a large, unrevised title with little spots of revision.

Title 12 (Professional and Vocational Boards and Commissions) -- partially revised. There are 17 of these licensing

agencies, not counting the Alaska Bar Association (which is not required to file its regulations under the Administrative Procedure Act [AS 44.62] for publication in the Alaska Administrative Code. In 1963, however, the bar association's regulations were published in the AAC as chapter 2 of Title 12 [12 AAC 2], where they remain, unrevised. The relationship between these regulations and the association's bylaws and the supreme court's Alaska Bar Rules is not entirely clear.) Of the 17, regulations of only the Collection Agencies Board and the Board of Nursing have been neither revised nor reviewed. During the past three-and-a-half years, regulations of the remaining 15 have been revised by or revisions of them have been reviewed by the staff of the Legislative Affairs Agency; these are: Board of Public Accountancy, Board of Barber Examiners, Board of Chiropractic Examiners, Board of Hairdressing and Beauty Culture Examiners, Board of Dental Examiners, Board of Electrical Examiners, Board of Engineers and Architects Examiners, State Medical Board, Board of Examiners in Optometry, Board of Pharmacy, Board of Marine Pilots, Board of Psychologist Examiners, Real Estate Commission, Board of Veterinary Examiners, Board of Welding Examiners. Of these 15, revised regulations of only six have actually been adopted; these are for the chiropractors, dentists, doctors, optometrists, marine pilots, and veterinarians. Adoption of the regulations is, of course, the responsibility of these individual agencies.

Title 13 (Department of Public Safety) -- revision completed.

Title 14 (Department of Public Works) -- a relatively small, unrevised title.

Title 15 (Department of Revenue) -- a relatively small, unrevised title.

Title 16 (Department of Economic Development) -- revision completed. Before the October 1971 register, there were no regulations in this title. The few pages of new ones are in the new format.

Title 17 (Department of Highways) -- revision apparently completed.

Title 18 (Department of Environmental Conservation) -- a new title with new regulations in the new format.

This summary does not take into account corrections that should be made in various revised titles, nor does it consider the absence of required regulations.

(2) A special regulation:

A regulation handled somewhat differently from those discussed above is the one adopted April 13, 1971 by the commissioner of highways in his Order No. 71-1. This document prohibits the operation of a motor vehicle equipped with studded snow tires upon a paved portion of the state highway system between May 1 and September 15 of each year. AS 19.-05.010, 19.05.020, 19.10.060 and 28.05.020 were cited as authority for the regulation.

The order also stated that the regulation was adopted in accordance with AS 44.62.040 and 44.62.290 (sections in the Administrative Procedure Act). The latter is the provision exempting from the effective date, notice, hearing, etc., requirements regulations which are not required to be submitted to the lieutenant governor under the Administrative Procedure Act. The former section, in its (a)(2), states that submission under the APA is not required for a regulation which "relates to the use of public works, including streets and highways, under the jurisdiction of a state agency if the effect of the order is indicated to the public by means of signs or signals." The seasonal ban on studded snow tires has been indicated on large signs posted on the edge of highways throughout the state.

This regulation has been treated as exempt from the APA, and therefore the APA requirements of notice and public hearing have not been followed. The legislature should consider whether this properly implements the legislative intent in enacting AS 44.62.040(a)(2). It should be noted that under the Department of Highways' interpretation of this provision, virtually every regulation pertaining to use of highways could be adopted without notice or a public hearing, so long as the regulation was proclaimed by means of a sign or signal. Two consequences of this would be the circumvention of the Administrative Procedure Act and the cluttering of the roadside with hundreds or thousands of signs. Perhaps the original intent of AS 44.62.040(a)(2) covered only such things as stop signs and lights, and indication of no-passing zones, one-way streets and speed limits.

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HB 52

MARCH 23, 1971

MEMO TO THE MEMBERS OF THE HOUSE

RE: ATTACHED LETTER

THE ATTACHED LETTER IS ONE THAT MR. R[illegible]
TOOK FROM THE ANCHORAGE TIMES, DATED FEBRUARY
3, 1971, AND HAD PLACED ON YOUR DESK.

Anch Times 2/3/71

LETTERS

'M' Stands For Methodist

Dear Editor:

I was dismayed by the interview with Lewi
Simpson as reported in Thursday's Times. Simp
son, head of Alaska Methodist University's presi
dential search committee, said some things tha
could not help but disturb anyone interested in th
survival of the only avowedly Christian universit
in the State of Alaska. In such a choice positio
AMU should be able to give moral and spiritua
leadership, not only to its students, but also to th
state. In a day and age when young and old alik
are grasping for firm belief and solid foundations
AMU should be free, as the only sectarian school i
the state, to take the lead boldly and creatively

Simpson said the new president must b
supreme in being a politician, a fund raiser, an
administrator. He said nothing about the new pres
ident's concern for students or about his integrit
and honesty or about his moral leadership qualitie
or about his vision or about his personal achieve
ments. It would seem to me that if AMU could b
creatively sectarian it could challenge and inspir
the students so that its life would not have to rel
upon a politician-fund raiser-administrator for it
continuance.

Simpson said that AMU places no emphasi
upon religion courses and is attempting to be trul
non-sectarian. Why is there no emphasis upo
good, creative, challenging religion courses tha
cause people to think and grow? AMU is the onl
university so far in this state that ha
the freedom to be openly and unapologetically
sectarian. Why shouldn't it be? Is someone afra
religion might be offensive to some sensitive ath
ist? A church-related university without an em
phasis upon the faith which founded it is an oc
kind of animal to say the least.

As for being non-sectarian — that is ridiculous
The University carries Methodist in its name.
has a Methodist instructor of religion and philos
phy. It was built at the behest of the United Met
odist General Conference — a national body of th
United Methodist Church. It was admitted in th
article that $1 million is being sought from Unite
Methodist people in the Southeastern Jurisdictio
of the United Methodist Church. It is on the ad
anced special giving list of every church and co
ference in United Methodism. Whether Simpso
likes it or not, sectarian interests provide a gre
deal of the bread and butter for AMU.

In a day and age when the drug culture is bein
dropped by great numbers of kids because the
find more offered them in the Christian faith or,
least, in some form of belief, the position of Sim
son seems to be especially cowardly and unenlig
tened. Personally, I hope they go for someone wi
is less interested in success than he is in goo
honest, creative, sectarian leadership in high
education.

It is interesting to note that Simpson's two so
attend Pacific Lutheran -- an avowedly sectaria
school operated unashamedly by the America
Lutheran Church. I wonder why?

Robert D. Bowers, Pastor
Church of the New
Covenant (United Methodist)
Kenai

HB-52

March 23, 1971

Dear Bill Moran

Admittedly, my concern for the financial condition of Alaska Methodist University has prompted me to write this letter, but there are other, more important reasons that I urge you to ensure the passage of the legislation known as the "Tuition Remission Bill" and the "Contractual Services Bill", House Bill 52.

I am a graduating senior in Business Administration at AMU and I am also a second-generation Alaskan. Because I am concerned for the welfare of all Alaskans, I am shocked at the unwillingness of the members of the legislature to favor the program I have mentioned.

If the purpose of state government is to benefit the citizens of the state, then one wonders why the elected officials refuse to assist in implementing the financial aids program. One part, as I understand it, will provide supplimentary funds to ALASKA RESIDENTS in order to assist them to earn a college degree In The State Of Alaska. If one can assume that most, if not all of those given assistance will remain in Alaska, then can it not be said that their education will benefit the entire population of the state? I feel that the financial aids proposition can only help the state. Why then, are the legislators so hesitant?

I feel I can say without fear of contradiction that Alaska Methodist University is a beneficial entity in the Anchorage (and for that matter, Alaskan) environment. If it is also true that the cost (not the income from students)

of educating a resident for one year at the University of Alaska is nearly $3,600.00 , and the program provides for something less than $1,200.00 in aid to AMU and Sheldon Jackson, then it is evident that the state will spend less to educate a student because private institutions are willing to charge the state less for furnishing the same services. The State Government spends less money, and thus saves money, does it not?

I have heard no valid reasons for opposing the program to provide financial aid to the private sector of Education in Alaska, while I have heard many impressive arguments favoring the program. I have stated only a few of my own observations. I hope that the elected officials of the state will see fit to hasten the passage of this legislation for the benefit of all Alaskans.

Respectfully,

Don Karabelnikoff

Don Karabelnikoff
7603 Old Harbor Avenue
Anchorage, Alaska 99504

WESLEY DRIVE, ANCHORAGE, ALASKA 99504

ALASKA METHODIST UNIVERSITY

23 March 1971

HB 52

THE SEVENTH LEGISLATURE, FIRST SESSION
State of Alaska
Pouch V, State Capitol
Juneau, Alaska 99801

Dear Bill —

Please forgive this format. However, we wish to address each member of the Seventh Legislature and believe this the most expeditious means of communication open to us.

In 1960 (RAF) and 1962 (SAF) we came to Alaska from the Midwest and Europe to serve on the Faculty of Alaska Methodist University. We have taught in the fields of history, art and speech to Alaskans (young and old) and students from other states and foreign countries. We have now seen ten graduating classes many of whose members have remained in the Great Land to serve the growing edge of civilization in the North. Along the way, each of us have given something of our talents and time to Alaska-at-Large. We have come to love AMU and Alaska. If at all possible, we wish to continue our work in this State.

As members of the teaching profession and as citizens, each of us believes that higher education in our new State should provide for a variety of institutions and curricula. This is why, after conferences with Dr. Patty, then President of the University of Alaska, officials of our state university encouraged the Board of National Missions to found AMU. In the years since, Alaskan and non-Alaskan private citizens and the Methodist Church have contributed millions of dollars of non-tax monies for Alaskan higher education. Such monies would not otherwise be contributed for these purposes if AMU and Sheldon Jackson College did not exist. For the record it should be remembered that Sheldon Jackson was the first educational institution in Alaska's American period.

As long as Sheldon Jackson College and AMU continue to live, private monies will continue to be invested in Alaskan higher education. The Tuition Equalization Act of the last session and HB52 now before this Legislature would make the State of Alaska a partner in the lives of these two important educational endeavors. It should be remembered that the physical plants and operating costs heretofore have not been financed with State funds nor would the State's share ever amount to the full amount necessary for year-to-year operation. Each of us is optimistic that the passage of HB52 and new leadership will assure a successful partnership in the years ahead. It is our opinion that HB314 should not be passed without a full hearing or prior to a Legislative study of higher educational institutions in Alaska. We urge the passage of HB52 in this Session.

Respectfully,

Robert A. Frederick
Professor of History

Respectfully,

Saradell A. Frederick
Professor of Art and Speech

WESLEY DRIVE, ANCHORAGE, ALASKA 99504

ALASKA METHODIST UNIVERSITY

March 23, 1971

HB #52

Representative William J. Moran
Pouch V
Juneau, Alaska 99801

Dear Representative Moran:

It is with surprise and dismay that I learn that (1) CSHB 52 has been returned to the House Finance Committee, and (2) HB 314 has been written. The former is a model of progressive legislation which will be of great benefit, not only to the people of Alaska, but because of its national significance, to the people of our nation. HB 314, relatively, is retrogressive legislation and effectively maintains the status quo. Maintenance of the status quo is sometimes good, but in the case of higher education such a position cannot be justified in light of the volumes of material available which collectively call for substantial changes in our approach to higher education.

Let me explain why I conclude that CSHB 52 should be acted on positively by you and your colleagues. In doing so, I will only mention its relationship to AMU, Sheldon Jackson and the University of Alaska. These are cogent and valid arguments to be sure, but I am sure that you are familiar with them. Instead, I should like to concentrate my remarks on what I think is the most important facet of the bill and one which has not been mentioned very often.

If we agree that higher education, public or private, is of fundamental importance to a democratic style of governing ourselves and, therefore, of intrinsic value to our society, it follows that the citizens of that society have a right to choose a form of education best suited to their needs and aspirations. This, of course, is the constitutional basis for taxation of peoples for a purpose which is not required of nor available to the whole. The important word, to me, is choice. For the first time in the history of Alaska, HB 52 will allow, within the limits of institutional accommodation and public funds, an honest choice to Alaska citizenry, not only between public and private higher education, but more important between styles of education. The present system of public support for higher education is grossly unfair not only to the taxpayer, but to the student, an unfairness which HB 314 will maintain and CSHB 52 eliminates.

To a graduating high school senior, the present system says the following: "You have the credentials to enter an institution of higher learning; we, therefore, through taxation, offer you a $7,000 scholarship for each year you attend." (I am unsure as to the cost/year/student at the University of Alaska.) "However, if the University of Alaska does not offer a program or the caliber of program to your choosing, we will not give you a scholarship."

Although we commonly do not use the term scholarship as synonymous with free tuition, they are the same in this case.

Thus the student who qualifies for Harvard, Princeton, Stanford, etc. is patently dismissed from financial aid from the state because he does not choose the University of Alaska.

This stance, I maintain, is unfair to the taxpayer, the student (who may be a taxpayer), prohibits the important element of choosing a personally compatible program of study, and can lead to empire building by state universities because a monopoly on higher education aspirants.

Other states have recognized the value of private higher education to their citizens. Recently the United States Congress recognized the value of choice when they ruled that private schools of higher education should be included in the educational support for the Native student (in effect, HB 52 gives the non-native student the same choice as the native student). By doing so they have recognized the intrinsic value of choice as a fundamental aspect of our society. I ask you to give Alaskans that choice by passing CSHB 52 and rejecting HB 314.

Cordially yours,

Ross G. Schaff

Ross G. Schaff
Professor of Geology

RGS/dkr

HB-54

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ANCHORAGE ALASKA 27
HONORABLE MIKE ROSE
HOUSE OF REPRESENTATIVES JUN
RE HOUSE BILL 54. THANK YOU FOR SENDING ME COPY OF
BILL. THIS BILL ATTEMPTS TO NULLIFY THE LAW AS LAID
DOWN BY OUR SUPREME COURT IN PHILLIPS VERSUS STATE.
NOT ONLY IS THIS UNFAIR TO THE MOTORISTS OF THE
STATE AND ENCOURAGES NEGLIGENCE ON THE PART OF EMPLOYEES
OF THE STATE HIGHWAY DEPT BUT IT IS PROBABLY BEYOND THE
POWER OF THE LEGISLATURE, WHICH CAN ONLY LEGISLATE WITH
RESPECT TO PROCEDURE IN SUITS AGAINST THE STATE,
UNDER ARTICLE 2 SECTION 21 OF THE ALASKA CONSTITUTION.
ACCORDINGLY THIS BILL AND THE PRESENT RESTRICTIONS IN THE
LAW ARE FAR TOO RESTRICTIVE AND PROBABLY
UNCONSTITUTIONAL BECAUSE THEY VIOLATE THE SECTION OF THE
CONSTITUTION JUST CITED. SUGGEST PRESENT STATUTE BE REPLACED
BY A SIMPLE LAW PROVIDING THAT THE STATE OF ALASKA MAY BE
SUED IN THE SAME MANNER AND FOR THE SAME CAUSES AS ANY
PRIVATE PERSON. THIS WAS THE LAW IN EFFECT WITH RESPECT
TO THE TERRITORY OF ALASKA WHEN THE CONSTITUTIONAL
PROVISION REFERRED TO ABOVE WAS ADOPTED AND WAS UNDOUBTLY
WHAT THE FFRAMERS OF THE CONSTITUTION HAD IN MIND.
ALSO, DISCRIMINATORY REQUIREMENT OF COST BONDS SHOULD BE
ELIMINATED ENTIRELY AS IT IS REGULARLY USED TO DEFEAT
OR IMPEDE MERITORICUS CLAIMS BY POOR PERSONS AGAINST
THE STATE. ALSO SUGGEST ENACTMENT OF A GENERAL LAW PERMITTING
POOR PERSONS TO SUE OR PROCEED IN ANY COURT OF THE STATE
WITHOUT PRE-PAYMENT OF OR SECURITY FOR FILING FEES OR
COSTS OF ANY KIND. RESPECTFULLY,
EDGAR PAUL BOYKO

54 2 21.

HB 113

THE SUPREME COURT OF THE STATE OF ALASKA

In the Matter of)	
)	File No. 1524
E.M.D.)	
)	O P I N I O N
A Minor Child.)	
)	[No. 737 - November 15, 1971]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Harold J. Butcher, Superior Court Judge.

Appearances: Herbert D. Soll, Public Defender, and Bruce A. Bookman, Assistant Public Defender, Anchorage, for the minor child. John E. Havelock, Attorney General, Juneau, Seaborn J. Buckalew, Jr., District Attorney, and Robert L. Eastaugh, Assistant District Attorney, Anchorage, for the State of Alaska.

Before: Boney, Chief Justice, Dimond, Rabinowitz, Connor, and Erwin, Justices.

RABINOWITZ, Justice.

In this appeal we are called upon to decide whether a minor who has beer adjudged a child in need of supervision can be institutionalized under our children's code.

Both Alaska's statutes relating to children's proceedings and the rules of procedure governing such proceedings establish three distinct categories of children. Thus, a child can be declared a dependent minor, a child in need of supervision, or a delinquent minor. AS 47.10.290(7) defines a "child in need

of supervision" as a minor whom the court determines is within the provisions of AS 47.10.010(a)(2), (3), or (6). Those provisions include a minor who:

> (2) by reason of being wayward or habitually disobedient is uncontrolled by his parent, guardian, or custodian;
>
> (3) is habitually truant from school or home, or habitually so conducts himself as to injure or endanger the morals or health of himself or others;
>
> . . . .
>
> (6) associates with vagrant, vicious or immoral people, or engages in an occupation or is in a situation dangerous to life or limb or injurious to the health, morals, or welfare of himself or others.[1]

Regarding the dispositive phase of children's proceedings, Alaska's children's code provides that if the court determines the minor is a child in need of supervision, it shall make any of the following orders of disposition regarding the minor's supervision, care, and rehabilitation:

> (1) any order which is authorized under (c) of this section; or
>
> (2) order the minor placed on probation under those conditions and limitations that the court may prescribe.[2]

Under section (c) of AS 47.10.080, the court is

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[1] Compare R. 12(b), Rules of Children's Procedure.

[2] AS 47.10.080(j).

empowered to order the minor committed to the Department of Health and Welfare or order the minor released to his parents, guardian, or some other suitable person.[3]

In the case at bar, the superior court found that E.M.D., a 14-year-old-runaway girl, was a child in need of supervision. The court's findings were made after several hearings before a master and the superior court, and were based largely upon the master's findings of fact and recommendations. In the dispositive portion of the trial court's judgment, it was ordered that E.M.D. be

> committed to the custody of the Department of Health and Welfare for an indeterminate period . . . .

The court further ordered that E.M.D.

> be placed by the Department in a correctional or detention facility

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[3] AS 47.10.080(c) reads in part as follows:

> (1) order the minor committed to the department for an indeterminate period of time not to exceed the date the minor becomes 19 years of age, except that the department may petition the court for continued supervision for an additional one-year period for minors who have not responded to treatment;
>
> (2) order the minor released to his parents, guardian, or some other suitable person; if the court releases the minor, it shall direct the department to supervise the care and treatment given to the minor; the department's supervision may not extend past the date the minor becomes 19 years of age, except that the department may petition the court for continued supervision for an additional one-year period for minors who have not responded to treatment . . . .

> as defined in AS 47.10.080(b)(1), to be held in that facility until released therefrom upon a showing by an officer of the Division of Corrections that the minor has completed a program of rehabilitation and has been amenable thereto, and that the Court has been advised in writing that such release is contemplated.

In this appeal it is argued that the superior court exceeded its authority in ordering the institutionalization of E.M.D. who was found to be a child in need of supervision. We are in agreement with the minor's contentions. As mentioned at the outset, Alaska's pertinent statutory provisions and procedural rules distinguish between categories of children for purposes of administering our children's laws. Of controlling significance here is that each class or category mandates distinct differences regarding the permissible content of any dispositional order the trial court can enter.

Study of our childrer's laws leads to the conclusion that the legislature has authorized institutionalization only where the child is found to be a delinquent minor. The term "delinquent minor" is defined as a child who has violated a law of the state, or an ordinance or regulation of a political subdivision of the state.[4] As to the appropriate disposition once the child has been determined to be a delinquent minor, the

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[4] AS 47.10.290(2).

legislature has in part provided that the court shall order the minor committed to the Department of Health and Welfare for an indeterminate period and

> may direct the minor's placement in a juvenile correctional school, detention home, or detention facility designated by the department. . . . .[5]

Thus the only instance under our children's laws authorizing institutionalization or incarceration is when the child has violated the laws of the state, or any of its political subdivsions, and in turn has been adjudged a delinquent minor. Since the runaway child in the case at bar was found to be a child in need of supervision, not a delinquent minor, no legal basis existed for her incarceration.[6]

In reaching this conclusion, we have rejected the state's contention that the trial court's order of incarceration is sustainable in light of the legislature's broad policy declaration to the effect that protection of children is the paramount purpose governing its enactment of laws pertaining

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[5] AS 47.10.080(b)(1).

[6] Cf. Fish v. Horn, 14 N.Y.2d 905, 200 N.E.2d 857 (1964).

to children's courts and institutions.[7] In another context we recently held that the benevolent social theory supposedly underlying children's court acts does not furnish justification for dispensing with constitutional safeguards.[8] As to the case at bar, it is equally appropriate to note that 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.

We also reject the suggestion that the Department of Health and Welfare possesses the authority to institutionalize any minor, including one who has been declared a child in need of supervision, who has been committed to its custody. We find it unreasonable to construe our children's statutes in a manner which would result in the grant to the Department

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[7] AS 47.10.280 provides:

> The purpose of this chapter is to secure for each minor the care and guidance which is as nearly as possible equivalent to that which should be given him by his parents. The principle is recognized that minors under the jurisdiction of the court are wards of the state, subject to its discipline and entitled to its protection, and that the state may act to safeguard them from neglect or injury and to enforce the legal obligation due to them and from them.

[8] RLR v. State, 487 P.2d 27, 30-31 (Alaska 1971).

of Health and Welfare of broader powers of commitment than possessed by the trial court.[9] In our view the statute relied upon by the state for this construction prescribes conditions of confinement after the court has lawfully determined that a

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[9] The state argues that even if the trial court lacks power to institutionalize a child in need of supervision, it can order the child committed to the Department of Health and Welfare which in turn can place the child in a detention facility. The argument is that under AS 47.10.080(c)(1) a minor can be committed to the Department of Health and Welfare. The state argues that AS 47.10.190 permits the department to institutionalize any minor committed to them. AS 47.10.190 reads as follows:

> When the court commits a minor to the custody of the department, the department shall arrange to place the juvenile in a detention home, facility or another suitsuitable place which the department designates for that purpose. A juvenile detained in a jail or similar institution at the request of the department shall be held in custody in a room or other place apart and separate from adults.