statutes: one protecting physicians who serve on, and individuals who provide information to, [illegible] committees; the other providing immunity to those who supply information *to any* in-hospital staff committee whose purpose is the evaluation and improvement of the quality of care.[20]

Since the states that enacted these limited statutes (in response to the utilization review requirements of the federal Medicare/Medicaid legislation) have already demonstrated a willingness to limit hospital reviewer's liability, it is reasonable to suppose that they will now be willing, if asked, to clothe with immunity review activities concerned with quality as well as economy.

The immunity offered by the remaining 25 of these 36 statutes is relatively more inclusive, but even these laws vary with regard to the specific persons and activities covered. In some, coverage is directed specifically to "members" of "medical staff" review committees;[21] while others include members of the hospital's board as well.[22]

Several statutes specifically extend immunity to third parties providing information to medical review committees,[23] and others also protect committee agents, employees, consultants, and advisors.[24] A few contain provisions broad enough in scope to cover nursing and other health professional evaluation committees.[25]

In addition, the language in most of the statutes is broad enough to include any quality maintenance activity. They speak in terms of "evaluation and improvement of the quality of care" or "evaluation of credentials and qualifications of physicians for performance of their duties."

But a few are more restrictive; one, for example, mentions only "retrospective" medical reviews.[26] Another has been construed to cover only "actions taken by a medical committee (i.e., refusing, suspending or revoking hospital privileges to any doctor) and [not] possible defamatory publications made by such a committee."[27]

* The desirability of relieving the fears of liability of persons engaged in quality maintenance activities has also been recognized by Congress. The Professional Standards Review Organization (PSRO) section of Public Law 92-603 contains a provision limiting the liability of members and employees of a PSRO and of those providing professional

consultation and services or other information to a PSRO.[23]

And the *Report of the Secretary's Commission on Medical Malpractice* supports the principle of immunity with this recommendation:

> The Commission RECOMMENDS that the states enact legislation to authorize, with due process, the appropriate committee of a hospital medical staff to suspend, revoke or curtail the privileges of a physician for good cause shown. The committee members and the hospital should have qualified immunity from suit for their acts.[25]

In the end, however, an immunity statute will not enhance a hospital's internal review programs if the medical staff is unaware of its existence and coverage. One way of disseminating this essential information to all staff members and applicants is to attach to the medical staff bylaws an analysis detailing the persons and activities protected by applicable state and federal law. Where there is no statute or where the coverage is too limited, lobbying activities through state hospital and medical associations are appropriate and needed.

These statutes may add little or nothing to the protection already available through common law, but they do serve to lower medical staff anxiety, thus increasing meaningful participation in quality maintenance activities. (For an analysis of the state immunity and nondiscovery statutes, see the chart on page MYTH/21).

E. INSURANCE COVERAGE

Every physician knows that people seek medical treatment for relief of problems which have no medical cure. The same is true of legal "treatment." Despite the very substantial barriers to obtaining legal relief, on occasion a staff member or applicant who feels aggrieved by the application to him of hospital quality programs may nevertheless start a lawsuit. Assuring staff members of their freedom from liability for participation in hospital review may not be convincing: the burden of defending a lawsuit is potentially as onerous as is the question of ultimate liability. Therefore, this issue must also be addressed.

The essence of the defamation lawsuit is "personal harm," as distinct from the notion of "bodily harm" which underlies

the malpractice action. Both are insurable risks, but unless the ordinary malpractice policy bears a specific endorsement, it will not cover personal harm. In some parts of the country, this personal harm coverage is now included in physician malpractice insurance policies through prior negotiation with the insurance carrier. Where physicians are not so covered, the hospital, by rider to its own insurance, can cover its medical staff members against this liability risk.

This is similar to the insurance protection that hospitals often afford their trustees. Premiums are generally not costly. That many hospitals already provide this protection to medical staffs is all too often unknown to the physicians covered.

V. MALPRACTICE

The fear that the proceedings or reports of hospital review committees or that statements made by committee members in the course of deliberations can find their way into malpractice actions has an even greater negative effect on physician participation in these activities than does fear of defamation actions. However, the malpractice fears have no better foundation than the defamation worries; not only is this fear largely speculative, but the clear direction of both reported case law and state legislation is to the contrary.

Confusion between quality documents and patient medical records, and between the "discoverability" and "admissibility" of documentary evidence, is probably responsible for the fear. However, these two types of documents are markedly dissimilar, as are the rules relating to the discovery and admission in evidence of each.

Discovery is intended to aid a litigant in preparing for trial. It provides him with advance access to witnesses or documents, thus helping him to learn facts in support of his complaint or defense. The information obtained is then used to determine what witnesses to subpoena, what other records to look for, what line of questioning to pursue, and so forth. And even if the discovered materials are not admissible as evidence, they can sometimes be used in cross examination at trial to cast doubt on, that is, to "impeach," a witness' testimony.

Generally, liberal discovery is favored; when both sides know all of the material facts, the time required to

complete the trial is shortened and the results are likely to be more equitable. Thus, the law provides every litigant with wide latitude in establishing his complaint or defense through the use of subpoenas and other pretrial procedures.

Accordingly, patient medical records are generally discoverable. And one would suspect that these same policy considerations would subject the proceedings and reports of hospital review committees to discovery. However, that has not been the case; an overriding public interest in quality medical care forces this contrary result.

A. DISCOVERY CASES

Attempts to subpoena hospital quality documents fail more often than they succeed. As Bernstein states, "Hospital records and reports that reflect upon the quality of a physician's professional performance are tempting morsels for opposition attorneys. Few have succeeded in seeing this confidential material."[30]

Prior to passage of their respective nondiscovery statutes, a New York court refused discovery of medical staff committee records for use in a malpractice action, whereas a California court permitted discovery of the records of hospital disciplinary proceedings relating to a physician's removal from the staff.[31]

In 1970, a New Jersey trial court allowed discovery of a hospital's perinatal mortality committee minutes, but that same year, a federal district court denied discovery of "minutes and reports of any Board or Committee of Doctors Hospital or its staff concerning the death" of the plaintiff's husband.[32]

This federal court decision, which was recently affirmed by the United States Court of Appeals for the District of Columbia, fully articulates the public policy considerations against discovery:

> The minutes and reports of the boards or committees of the Hospital are records of medical staff reviews by committees of doctors acting pursuant to the requirements of the Joint Commission on Accreditation of Hospitals.

* * *

> Confidentiality is essential to effective functioning of these staff meetings; and these meetings are essential to the continued improvement in the care and treatment of patients....To subject these discussions and deliberations to the discovery process, without a showing of exceptional necessity, would result in terminating such deliberations. Constructive professional criticism cannot occur in an atmosphere of apprehension that one doctor's suggestion will be used as a denunciation of a colleague's conduct in a malpractice suit.
>
> * * *
>
> There is an overwhelming public interest in having those staff meetings held on a confidential basis so that the flow of ideas and advice can continue unimpeded. Absent evidence of extraordinary circumstances, there is no good cause shown requiring disclosure of the minutes of these meetings....[They] are entitled to a qualified privilege on the basis of this overwhelming public interest.[33]

In a second ruling on the plaintiff's renewed request for the same discovery before a different judge, the court stated that the earlier decision

> ...analyzed the considerations of public policy supporting the extension of qualified privilege of confidentiality concerning the subject matter of the meetings of the hospital staff review committees, and this Court now adheres to [the] ruling that the proceedings at such meetings are entitled to a qualified privilege on the basis of the overwhelming public interest found to exist....[34]

Here the resolution of two conflicting public interests is involved: promoting equitable results for the plaintiff in a malpractice suit through liberal discovery rules, and promoting the improvement and maintenance of quality in hospitals through the nondiscovery of documents and testimony arising from the review activity. It is clear why the "overwhelming public interest" in controls to assure quality medical care is held to take precedence over the individual malpractice plaintiff's interest.

While the plaintiff permitted such discovery may be in an improved litigating position, denying discovery usually does

not worsen his position: he can still prove his case by the traditional route--the patient medical record, the factual testimony of those present at the care transaction that allegedly caused the harm, and the opinion testimony of expert witnesses. The alternative, allowing discovery, would destroy the effective conduct of the very activity in which the public has an overwhelming interest.

Perhaps when the quality material for which discovery is sought is the only avenue open to the plaintiff because of truly exceptional circumstances, such as the death of all witnesses or the loss or destruction of relevant medical records, limited discovery may be justified. And even the District of Columbia decision recognizes this possibility. But "absent evidence of [such] extraordinary circumstances," nondiscovery is equitable and is required by the public interest.

The "public interest" impetus for nondiscovery is reflected in statutory law as well as in court decisions. As of September, 1974, 21 states provided some degree of protection from discovery of the information and data generated or received by hospital evaluation committees.

This nondiscovery principle, as a common law doctrine rather than a statutory provision, has also been considered in two other hospital cases. In one, the widow of a patient who committed suicide in a federally-operated institution attempted to discover the report of a board of inquiry specially convened pursuant to federal regulations to investigate the suicide. A federal court in New York held that both the report of the board of inquiry and the hospital director's review of the board's findings were not subject to discovery. The *only* portion of the report to which the plaintiff acquired access was *factual testimony* by hospital employees describing the actual circumstances surrounding the suicide.[36] In other words, the evaluative portions were deemed nondiscoverable.

A Kentucky hospital's liability to a patient for permitting an allegedly incompetent physician to continue at the hospital was at issue in the second case. There, the court permitted discovery of written statements by members of the medical staff who had personally observed this physician's performance and were critical of his professional ability. These statements had been solicited by the hospital in anticipation that a hearing might be requested when the hospital notified the physician of its intent to deny him permanent staff status.[37]

The Kentucky court rejected the public policy consideration underlying the nondiscovery case law precedents

and legislative enactments in other states. But, the court's argument that the New York suicide case undermines the nondiscovery doctrine is most unpersuasive. And its decision is further compromised by almost sole reliance on an earlier California case[38] which was *subsequently overturned* by enactment of the California "nondiscovery" statute the very next year.[39]

The court did, however, suggest the availability of some measure of protection in future cases alluding to the possibility that portions of this subpoenaed material might have been legitimately withheld or deleted through the use of a "protective order," if one had been sought.

B. NONDISCOVERY STATUTES

Of the 21 states that protect hospital review activities from discovery, 17 specifically provide for nondiscoverability of the review committee's proceedings and reports: 13 declare them generally not subject to subpoena, discovery or disclosure,[40] and four speak in terms of confidentiality and/or privilege.[41] (Four other states have laws that are substantially less protective.)[42]

Some statutes also provide, probably gratuitously, that committee members may not be required to testify as to what transpired during committee deliberations[43] or that the results of committee activities may not be admitted into evidence.[44]

* The California statute is typical:

> Neither the proceedings nor the records of organized committees of medical staffs in hospitals having the responsibility of evaluation and improvement of the quality of care rendered in the hospital...shall be subject to discovery ...[and] no person in attendance at a meeting of any such committee shall be required to testify as to what transpired thereat.[45]

* * The Minnesota statute is one of the broadest in coverage:

> All data and information acquired by a review organization, in the exercise of its duties and functions, shall...not be subject to subpoena or discovery. No person...shall disclose what transpired at a meeting of a review organization except to the extent necessary to carry out...[its] purposes. The proceedings and records of a review organization shall not be

> subject to discovery or introduction into evidence in any civil action against a professional arising out of the...matters which are the subject of consideration...."[5]

In this provision, a "review organization" is defined as:

> ...a committee whose membership is limited to professionals and administrative staff...and which is established by a hospital, by a clinic, by...state or local associations of professionals, by an organization of professionals from a particular area or medical institution, by a health maintenance organization ..., by a nonprofit health service plan corporation...or by a professional standards review organization...to gather and review information relating to the care and treatment of patients....

Congress included a nondisclosure provision in the Professional Standards Review Organization legislation covering the data and reports that health care providers and professionals submit to PSRO organizations.

Of course, if a participant in a medical staff review activity has personal knowledge of the underlying facts of a case, then merely because he discussed those facts at a hospital meeting will not grant him immunity from testifying as to these facts either during discovery proceedings or at trial. While he cannot be asked what he or others said, saw, or heard at the committee meeting, he can be asked about his independent personal knowledge of the underlying transaction. If the rule were otherwise, hospital-based review activities could be used as a subterfuge for withholding material evidence.

Similarly, if a participant in a hospital review activity, as a witness or a member of a committee, is himself later sued for malpractice for the same incident that was the subject of the hospital review, he can be made to testify as to what he knows about the incident but not about what transpired during the review activity.

These commonsense exceptions are stated as follows:

- In the California statute:

  > The prohibition relating to discovery or testimony shall not apply to the statements made

to any person in attendance at such a meeting who is later a party to an action or proceeding the subject matter of which was reviewed at such meeting....

- In the Minnesota statute:

  [A]ny person who testified before a review organization or who is a member of it [shall not] be prevented from testifying as to matters within his knowledge, but a witness cannot be asked about his testimony before a review organization or opinions formed by him as a result of its hearings.

C. APPLICATION OF NONDISCOVERY STATUTES

At least four of these nondiscovery statutes have been tested in litigation. In Hawaii, application of the statute prevented discovery of medical association investigatory records relating to a physician.[48]

Nebraska's statute proved an effective barrier to a malpractice plaintiff's attempted use of a medical staff committee's records concerning suspension of a physician's privileges. The court explained the rationale behind the legislative action in this way:

> The basis for the privilege...is the public interest in the improvement of the care and treatment of patients. The Joint Commission...requires there be constant analysis and review of the clinical work done in the hospital. The importance of communication of information to...and full and open discussion in the committees during the review of clinical work can be easily seen.[49]

In New York, the nondisclosure statute did not prohibit discovery *from the defendant physician* of facts underlying the action merely because he had disclosed these facts in a presentation and report at a joint meeting of the local medical society and hospital staff. This result is in accord with an express provision in the New York statute, similar to the California and Minnesota provisions, that statements of the underlying facts made by a person who is a party to an action involving the same subject matter are not protected from discovery merely because the statements were made at the meeting.[50]

In the fourth case, a malpractice plaintiff requested the hospital's "personnel and/or staff files" as well as the files of various medical staff committees concerning a physician's staff membership. In holding that California Evidence Code section 1157 (see page MTH/14) barred access to the medical staff files, the court underscored the public policy issues that the nondiscovery statute seeks to resolve:

> ...[T]he quality of in-hospital medical care depends heavily upon the committee members' frankness in evaluating their associates' medical skills and their objectivity in regulating staff privileges....
>
> Section 1157 was enacted upon the theory that external access to peer investigations conducted by staff committees stifles candor and inhibits objectivity. It evinces a legislative judgment that the quality of in-hospital medical practice will be elevated by armoring staff inquiries with a measure of confidentiality.
>
> This confidentiality exacts a social cost, because it impairs malpractice plaintiffs' access to evidence...[and] might seriously jeopardize or even prevent the plaintiff's recovery. Section 1157 represents a legislative choice between competing public concerns. It embraces the goal of medical staff candor at the cost of impairing plaintiffs' access to evidence.[51]

And, although section 1157 speaks only to "organized committees of medical staffs," this court held that insofar as hospital administration files reflect "the proceedings of staff committees...conforming to the statute," such administration files are also nondiscoverable.

But does this distinction mean that the records and proceedings of nursing, pharmacy and other professional audit activities will be considered "administration" files and hence discoverable? The courts have not adhered to such a rigid line in the past.

For example, without the benefit of statutory nondiscovery, a federal court in New York refused discovery of the report of a board of inquiry convened to investigate a suicide in a government hospital.[52] Similarly, another federal court in Georgia denied discovery of an aircraft manufacturer's

internal study of compliance with equal opportunity laws, because "...it would be contrary to [public] policy to discourage frank self-criticism and evaluation in the development of affirmative action programs of this kind."[53]

These decisions both demonstrate that the determinative factor is not who conducts the review but is rather the intrinsic nature of the documentation and activity sought to be protected and encouraged.

Since nonphysician quality review serves the same purposes as the medical review function--namely, the assurance of optimal quality patient care, the competent performance of the health practitioner, and professional self-discipline, it is clear that nonphysician quality review should receive equal protection. Today, the public has no less an interest in candid, objective nursing care evaluation than in medical care evaluation, especially since states are beginning to liberalize the nurses' role in health care by permitting them to perform acts heretofore exclusively limited to physicians.[54]

VI. ADMISSIBILITY

The nonadmissibility of hospital quality program documents is more easily demonstrated and would present no problem if it weren't for the confusion of this documentation with patient medical records. When courts consider the admissibility of documentary evidence, they want to make certain that the proffered documents contain reliable and valid information and were not prepared especially for the purposes of trial.

Among their other disabilities, documents cannot be subjected to cross-examination. Accordingly, the hearsay rule has severely limited the extent to which written materials may be admitted into evidence. It is only through a specific exception to the hearsay rule that patient medical records are introduced into evidence. This exception, from commercial law, originally related to "business" records.

For admission into evidence under the business record exception, a record must (1) be made in the ordinary course of business where it is integral to the business to maintain such a record, (2) be made at the time of or close enough in time to the transaction that is the subject of the lawsuit to provide reasonable assurance that the transaction is accurately reported, (3) be made by a party to

the transaction, and (4) be made to record an act, condition, or event, as distinguished from conclusions, judgments, and opinions. Of course, the exact formulation of the hearsay rule and of its exceptions varies in different jurisdictions, but this statement is generally accurate.

Patients' medical records are usually admissible under the business records exception when the hospital medical record administrator or other "custodian" of the records testifies that they were made in the regular course of the hospital's business, that it is the business of the hospital to keep such records, and that they were made at or close to the time of the patient care events they document. Even so, those portions of the medical record reflecting conclusions, judgments, or opinions, rather than facts, may not be admissible except under special circumstances.

Although made in the course of the hospital's business, the proceedings and reports of review committees cannot meet the other conditions of the business record test for admissibility:

- They are prospective (credentials) or retrospective (audit) and are not made at the right time.
- They are second-hand evidence of the patient care acts, conditions, or events described in the actual patient medical record.
- They are made by persons who were not present at the events they purport to review and describe.
- They are made for purposes only indirectly related to the medical treatment of any particular patient.
- They contain opinions, professional judgments, and conclusions.
- They are not "integral" to the hospital's business of providing patient care (except, perhaps, where required by law).

For these reasons, no known attempt to admit hospital quality assurance documents into evidence as proof of malpractice has succeeded.

VII. CONCLUSION

The hospital has a professional, legal and social obligation to make every reasonable effort towards assuring that care rendered to its patients meets the highest achievable standards of economy and quality. To satisfy the public mandate for accountability, the hospital must be able always to demonstrate that this obligation is indeed being met by viable, effective internal review programs.

That such programs can be effective only through the active participation of the professionals who provide the patient care services, and that the professionals have based their nonparticipation in part on fears of potential legal liability, are obvious statements of fact.

Upon analysis, however, the fears allegedly deterring such participation--defamation and malpractice liability resulting from adverse use of hospital review findings--are seen to be almost wholly unfounded. The public has recognized these concerns, and, based on its overriding interest in quality medical care, has provided for the professionals who participate in and document these activities both legislative and judicial safeguards.

The excuse of liability being no longer tenable, the public and the Joint Commission are entitled to demand that hospital medical and professional staffs, and hospital boards and administrative officers, will vigorously pursue and faithfully discharge these review responsibilities.

ANALYSIS OF STATE IMMUNITY AND NONDISCOVERY STATUTES

STATUTORY COVERAGE / STATE	UTILIZATION REVIEW ONLY	IMMUNITY	Any Member of Med. Committee	Physician/Dentist Members Only	Hospital Board	Nursing and Other Prof. Committee	Third Parties Who Provide Data	Advisor/Employee Agent/Consultant	NONDISCOVERY	Committee's Own Work Product	Only Data Made Available To	Nursing and Other Prof. Eval. Doc.		TESTIMONY SPECIFICALLY COVERED		NONADMISSIBLE
Alabama				✓						✓						
Arizona				✓			✓	✓		✓				✓		
Arkansas																
California			✓							✓				✓		
Connecticut	✓															
Delaware				✓												
Florida			✓							✓				✓		✓
Hawaii			✓							✓				✓		
Idaho			✓			✓	✓			✓		✓		✓		✓
Illinois				✓												
Indiana			✓													
Kansas			✓		✓											
Kentucky				✓												
Louisiana			✓			✓	✓			✓		✓				
Massachusetts			✓													
Michigan							✓			✓						
Minnesota			✓			✓		✓		✓		✓		✓		✓
Missouri				✓	✓											
Montana										✓						✓
Nebraska										✓						✓
Nevada										✓				✓		
N. Hampshire			✓													
New Jersey	✓										✓					
New Mexico			✓			✓										
New York				✓						✓				✓		
N. Carolina			✓													
N. Dakota	✓										✓					
Ohio	✓										✓					
Oregon										✓						✓
Pennsylvania			✓			✓	✓	✓			✓					
S. Dakota			✓													
Tennessee	✓															
Texas			✓			✓	✓			✓		✓				
Utah	Two provisions--see discussion on pages MYTH/7-8.															
Washington				✓						✓						
Wyoming			✓		✓			✓		✓						

NOTES

1. The most explicit statement of the requirement appears in the Quality of Professional Services Standard, *Accreditation Manual for Hospitals* (Chicago: Joint Commission on Accreditation of Hospitals, 1974):

> ...[T]he Board of Commissioners of the Joint Commission has formally announced this policy: That hospital accreditation shall depend...in particular, on evidence that the hospital medical staff is effectively implementing objective measures leading to assurance of the quality of patient care; that other professional staffs are doing the same in the services they provide; and that the governing body and management support and assist in the implementation thereof. *** The hospital shall demonstrate that the quality of patient care provided is constantly optimal by continuously evaluating it through reliable and valid measures.

2. *See e.g.*, Darling v. Charleston Community Memorial Hospital, 211 N.E.2d 253 (Ill. 1965), *cert. denied* 383 U.S. 946 (1966); Foley v. Bishop Clarkson Memorial Hospital, 173 N.W.2d 881 (Neb. 1970); Fiorentino v. Wenger, 227 N.E.2d 296 (N.Y. 1967); cases cited and discussed notes 3, 4, and 5 *infra*. *Cf.* Moore v. Board of Trustees of Carson-Tahoe Hospital, 495 P.2d 605 (Nev. 1972). The principle has also been enacted into statutory law in several jurisdictions. *See e.g.*, Ind. Ann. Stat. Sec. 42-1605a (Supp. 1972); Mich. Stat. Ann. Sec. 14.1179(2) (Supp. 1974).

3. In *Mitchell County Hospital Authority v. Joiner*, 189 S.E.2d 412, 414 (Ga. 1972), *aff'g* 186 S.E.2d 307 (Ga. App. 1971), the court held that "the delegation of authority to screen applicants for staff membership on the medical staff does not relieve the Authority of its responsibility since the members of such staff [when performing such administrative acts on behalf of the hospital] act as agents for the Authority...."

In *Purcell v. Zimbelman*, 500 P.2d 335, 341 (Ariz. App. 1972), the court held that the fact that the surgery department had considered the surgeon's competence and had failed to recommend corrective action was no defense. "The Department of Surgery was acting for and on behalf of the hospital in fulfilling this duty and if the department was negligent in not taking action against [the surgeon] or recommending to the board of trustees that action be taken, then the hospital would also be negligent."

4. Gonzales v. Nork, No. 225866, at 164, 194 (Super. Ct. Cal., Sacramento County, November 19, 1973). In his Memorandum of Decision, Judge Goldberg approved and expressly adopted the line of authority that establishes hospital corporate responsibility for the quality of patient care. (Cases cited note 2 *supra*.) He distilled from the prior decisions the following rule regarding the hospital's duty and held the hospital liable for its failure to meet this standard:

> The hospital has a duty to protect its patients from malpractice by members of its medical staff when it knows or should have known that malpractice was likely to be committed upon them. Mercy Hospital had no actual knowledge of Dr. Nork's propensity to commit malpractice, but it was negligent in not knowing...because it did not have a system for acquiring knowledge; it did not use the knowledge available to it properly; it failed to investigate... [a] case, which would have given it knowledge; and it cannot excuse itself on the ground that its medical staff did not inform it.

Directly on the agency issue, Judge Goldberg said:

> ...[T]he hospital is required to have a medical staff...[that is] "self-governing" or independent....But this does not immunize it from liability, because the medical staff acts for the hospital in the discharge of the hospital's responsibilities to protect its patients.

Although the hospital settled the claim against it prior to entry of the judgment,

the surgeon has appealed the judgment against him. Since he claimed at the trial that the hospital should bear the entire burden, the corporate liability issue may be ruled on by the California appellate court.

5. In *Hull v. North Valley Hospital*, 498 P.2d 136, 144 (Mont. 1972), the court's opinion states that, "the record insofar as the Hospital is concerned, demonstrates an effort to supervise the quality of medical practice within the Hospital," and holds the hospital not liable where, notwithstanding such supervision, a patient suffered harm. However, this opinion can also be interpreted as opposed to the *Joiner-Purcell-Nork* theories on two critical points: first, that the medical staff acts on behalf of the hospital in conducting staff review and evaluation; and second, that "knowledge within [staff] doctors' minds, uncommunicated to the Board, is not a demonstration of knowledge of the Board as a matter of law...."

   The *Nork* court expressly refused to follow this line of reasoning, observing that:

   > Restricting hospital liability to cases of actual knowledge would promote carelessness. If it were so restricted, "the less a hospital knows...the safer it is against charges of negligence." (Citations omitted.) *** [I]t does not seem likely that the higher courts of [California] would follow Hull and put the risk of harm resulting from medical staff inactivity on the patient rather than on the hospital. Gonzales v. Nork, No. 225866, at 153, 164 (Super. Ct. Cal., Sacramento County, November 19, 1973).

   See A. Southwick, *The Hospital As An Institution--Expanding Responsibilities Change Its Relationship With the Staff Physician*, 9 Calif. Western L. Rev. 429 (1973), for a critique of *Hull*.

6. *See e.g.*, Willis v. Santa Ana Community Hospital Association, 26 Cal.Rptr. 640 (1962); Visalli v. Mary's Help Hospital, No. 151707 (Super. Ct. Cal., San Mateo County, March 15, 1974); Hagan v. Osteopathic General Hospital of Rhode Island, 232 A.2d 596 (R.I. 1967). *See also* Ascherman v. San Francisco Medical Society, 114 Cal.Rptr. 691 (Ct. App. 1974); Goodley v. Sullivant, 108 Cal.Rptr. 451 (Ct. App. 1973); Silver v. Castle Memorial Hospital, 497 P.2d 564 (Hawaii 1972), *cert. denied* 409 U.S. 1048 (1972).

7. Schechet v. Kesten, 141 N.W.2d 641 (Mich. 1966); Shapiro v. Health Insurance Plan of Greater New York, 7 N.Y.2d 56 (1959); Mayfield v. Gleichert, 484 S.W.2d 856 (Tex. 1969).

8. Raymond v. Cregar, 185 A.2d 856 (N.J. 1962).

9. *Cf.* Sussman v. Overlook Hospital Association, 222 A.2d 530 (N.J. Super. 1966), for a well-reasoned dictum supportive of the privilege.

10. Ascherman v. Natanson, 100 Cal.Rptr. 656 (Ct. App. 1972); Goodley v. Sullivant, 103 Cal.Rptr. 451 (Ct. App. 1973). The absolute privilege is based on California Civil Code section 47.2, a defamation-privilege statute that protects, in general, all communications made in legislative, judicial, or quasi-judicial proceedings. By the opinions in these cases, absolute privilege is also extended to statements made while preparing for a hearing, as in interviewing prospective witnesses or during committee meetings leading to a hearing.

    Goodley is noteworthy on a third issue. The plaintiff argued that absolute privilege was not available to medical staff committees. California Civil Code section 43.7 provides a "particular" qualified privilege covering "any act or proceeding undertaken or performed" by members of a medical staff committee; whereas, section 47.2 "is a general defamation-privilege that is directed to all executive, legislative, and judicial proceedings." Therefore, said the plaintiff, because "particular statutes control over general statutes," 47.2 was inapplicable and the test of the qualified privilege in 43.7 should have controlled.

    In rejecting this argument, the opinion construes 43.7 narrowly:

> Section 43.7 is concerned with actions taken by a medical committee...and is not concerned with possible defamatory publications made by such a committee. Since...43.7 is not applicable to defamations [it is] not inconsistent with section [47.2]....

This narrow construction should not cause undue concern in other jurisdictions with similarly worded qualified immunity statutes. The more reasonable view seems to be that these qualified immunity statutes protect committee communications as well as actions. D. Rubsaman, ed., Professional Liability Newsletter, note 4 (May, 1974). And if the *Gooley* interpretation is adopted in other states, committee utterances remain protected by the common law qualified privilege. (See the discussion at page MTM/4.)

11. Franklin v. Blank, ___ P.2d ___ (N. Mex. 1974). The court reasoned that:

> ...appropriate professional societies, by exercising peer review, can and do perform a great public service by exercising control over those persons placed in a position of public trust....It is hardly open to dispute that communications initiating such proceedings are an indispensable part thereof and are to be protected by the privilege.

12. DiMiceli v. Klieger, 206 N.W.2d 184 (Wis. 1973).

13. Guidelines for the Formulation of Medical Staff Bylaws, Rules and Regulations--1971 (Chicago: Joint Commission on Accreditation of Hospitals), Art. V, Sec. 1d [hereinafter cited as Guidelines].

14. In *Cypress v. Newport News General and Non-Sectarian Hospital Association*, 251 F.Supp. 667 (E.D.Va. 1966), the court suggested that such medical staff release provisions should be employed and would be effective.

15. But the purposes served by such medical staff bylaw release provisions--maintenance of quality health care--are so much in the public interest that this may be an overriding consideration if the adhesion concept is ever asserted in litigation. Also, an applicant or staff member who is fully informed of the presence and import of release and immunity provisions and who does not object to them at the outset may be barred from later pleading invalidity because of adhesion.

16. Schechet v. Kesten, 141 N.W.2d 641 (Mich. 1966).

17. Guidelines, note 13 *supra*, Art. VIII, Sec. 2, 3.

18. For convenience, the statutes are grouped in accordance with the protection they offer. Those in the first group provide immunity from defamation liability to committee members and also protection against discovery of committee reports. The statutes in the second group provide immunity but are silent on discovery. The third group lists statutes that are limited to nondiscoverability.

Seventeen states provide both immunity and nondiscovery protection.

Code of Ala. Tit. 46, Sec. 297(a3) (Supp. 1973).
Ariz. Rev. Stat. Sec. 36-441, -445 to -445.03 (Supp. 1973).
Cal. Civil Code Sec. 43.7 (West Supp. 1974), 47.2 (West 1954); Cal. Evid. Code Sec. 1157, 1157.5 (West Supp. 1974).
Fla. Session Laws 1973, Ch. 73-50.
Hawaii Rev. Stat. Sec. 624.25.5, 663-1.7 (Supp. 1973).
Idaho Code Sec. 39-1392 to -1392e (Supp. 1973).
La. Regular Session Laws--1974, Act No. 315.
Mich. Stat. Ann. Sec. 14.57(21-23), 14.1179 (12) (Supp. 1974).
Minn. 68th Legislature--Second Regular Session Laws, 1974, Ch. 295.
N.J. Stat. Ann. Sec. 2A:84A-22.8, -22.9 (Supp. 1974).
N.Y. Education Law Sec. 6527(3) (McKinney Supp. 1973).
N.D. Century Code Sec. 23-01-02.1 (1970).

Ohio Rev. Code Sec. 2305.24, .25 (1971).
Pa. Stat. Tit. 62, Sec. 444.2 (Supp. 1974); Session Laws of 1974, Act No. 193.
Tex. Ann. Civ. Stat. Art. 4447d, Sec. 3 (Supp. 1973).
Rev. Code of Wash. Ann. Sec. 4.24.240, .250, .260 (1973).
Wyo. Stat. Sec. 35-140.1 to -140.4, 35-528 to -530 (Supp. 1973).

Immunity but not nondiscovery protection is provided in 15 states.

Ark. Stat. Sec. 82-357 to -359 (Supp. 1973).
Gen. Stat. of Conn. Sec. 52-557e (1973).
Del. Code Ann. Tit. 24, Sec. 1768 (Supp. 1970).
Ill. Stat. Ch. 91, Sec. 2a (1973).
Ind. Code Sec. 16-10-1-6.5 (1971).
Kan. Stat. Ann. Sec. 65-442 (Supp. 1973).
Ky. Rev. Stat. Ch. 311-377 (Supp. 1972).
Ann. Laws of Mass. Ch. 231, Sec. 85N (Supp. 1973).
Vernon Ann. Mo. Stat. Sec. 537.035 (Supp. 1973).
N.H. Rev. Stat. Ann. Sec. 329:27, :28 (Supp. 1973).
N. Mex. Stat. Ann. Sec. 12-5-16 (Supp. 1973).
N.C. 1973 General Assembly--Second Session Laws, 1974, Ch. 1111.
S.D. Compiled Laws Sec. 36-4-25, -26 (1967).
Tenn. Code Ann. Vol. 11, Sec. 63-623 (Supp. 1974).
Utah Code Ann. Vol. 3, Sec. 26-18-1 (Supp. 1973); Vol. 6A, Sec. 58-12-25 (1974).

Four states have provisions which relate only to nondiscovery of committee minutes and reports.

Rev. Codes of Mont. Sec. 59-6301 to -6304 (1970).
Rev. Stat. of Neb. Sec. 71-2046 to -2048 (1971).
Nev. Rev. Stat. Sec. 49.265 (1973).
Ore. Stat. Sec. 41.675 (1973).

See discussion of the nondiscovery issue beginning at page MYTH/10.

For an earlier compilation of statutes see B. J. Anderson, *Peer Review Manual* (Chicago: American Medical Association, 1971), Vol. II, 1973 Update for Appendix H--Immunity Statutes.

19. The six states whose provisions are limited in coverage to utilization review activities are Arkansas, Connecticut, New Jersey, North Dakota, Ohio and Tennessee.

20. Utah, note 18 *supra*.

21. These statutes, in turn, fall into two classes: (1) those protecting any members of staff committees and (2) those limited by their terms to physician or dentist members of such committees. In class 1 are: California, Florida, Hawaii, Indiana, Kansas, Massachusetts, New Hampshire, North Carolina, South Dakota, Wyoming, note 18 *supra*; and in class 2 are: Alabama, Arizona, Delaware, Illinois, Kentucky, Missouri, New York, Washington, note 18 *supra*.

22. Kansas, Missouri, Wyoming, note 18 *supra*.

23. Arizona, Idaho, Louisiana, Michigan, Pennsylvania, Texas, Utah, note 18 *supra*.

24. Arizona, Minnesota, Pennsylvania, Wyoming, note 18 *supra*.

25. Idaho, Louisiana, Minnesota, New Mexico, Pennsylvania, Texas, note 18 *supra*.

26. Indiana, note 18 *supra*.

27. Goodley v. Sullivant, 108 Cal.Rptr. 451 (Ct. App. 1973), interpreting Cal. Civil Code section 43.7 (West Supp. 1974). See discussion, note 10 *supra*.

28. 42 U.S.C. 1320c-16 (Supp. 1972).

> 1320c-16. (a)...[N]o person providing information to any [PSRO] shall be held, by reason of having provided such information, to have violated any criminal law, or to be civilly liable under any law...unless--
>
> (1) such information is unrelated to the performance of the duties and functions of the [PSRO], or
>
> (2) such information is false and the person providing such information knew, or had reason to believe, that such information was false.
>
> (b)(1) No individual who, as a member or employee of any [PSRO] or who furnishes professional counsel or services to such organization, shall be held by reason of the performance by him of any duty, function, or activity authorized or required of a [PSRO]...to have violated any criminal law, or to be civilly liable under any law...provided he has exercised due care.
>
> (2) The provisions of paragraph (1) shall not apply with respect to any action taken by any individual if such individual, in taking such action, was motivated by malice toward any person affected by such action.

29. Medical Malpractice: Report of the Secretary's Commission on Medical Malpractice (Washington, D.C.: Department of Health, Education, and Welfare, 1973), p. 57.

30. A. H. Bernstein, *Access to physicians' hospital records*, Hospitals, J.A.H.A., 45:148, Sept. 1, 1971.

31. Judd v. Park Avenue Hospital, 235 N.Y.S.2d 843, *aff'd* 235 N.Y.S.2d 1023 (1962); Kenney v. Superior Court, 63 Cal.Rptr. 84 (Ct. App. 1967).

32. Goreghian v. Hackensack Hospital, 262 A.2d 440 (N.J. 1970); Bredice v. Doctors Hospital, Inc., 50 F.R.D. 249 (D.C.D.C. 1970), 51 F.R.D. 187 (D.C.D.C. 1970), *aff'd without opinion* 479 F.2d 920 (D.C.Cir. 1973).

33. Bredice, 50 F.R.D. 249, 250-251

34. Bredice, 51 F.R.D. 187, 188.

35. Notes 40-42 *infra*.

36. Gillman v. United States, 53 F.R.D. 316 (S.D.N.Y. 1971).

37. Nazareth Literary and Benevolent Institution v. Stephenson, 503 S.W.2d 177 (Ky. 1973).

38. Kenney v. Superior Court, note 31 *supra*.

39. In *Matchett v. Petway*, 115 Cal.Rptr. 317, 320 (Ct. App. 1974), the same court that allowed the earlier discovery construed California's nondiscovery statute--Evidence Code section 1157:

> Evidence Code section 1157 expresses a legislative judgment that the public interest in medical staff candor...requires a degree of confidentiality. It was enacted in 1965 in apparent response to this court's decision in Kenney....

40. Arizona, California, Florida, Hawaii, Idaho, Louisiana, Michigan, Minnesota, Nebraska, Nevada, New York, Texas, Washington, note 18 *supra*. Of these thirteen, four--Idaho, Louisiana, Minnesota, Texas--are broad enough in scope to protect the records of nursing and other health professional evaluation committees.

41. Alabama, Montana, Oregon, Wyoming, note 18 *supra*.

42. New Jersey, North Dakota, Ohio, Pennsylvania, note 18 *supra*. By express terms, each of these statutes limits nondiscovery protection to the information and data made

available to a committee. Interpreted literally, they would not protect a committee's own records and proceedings; as a practical matter, however, a committee's work product will be covered because it will consist either of the privileged data submitted to it or its own evaluative, judgmental conclusions concerning that data. More important is that three of these statutes--New Jersey, North Dakota, Ohio--relate only to "utilization review" committees.

43. Arizona, California, Florida, Hawaii, Idaho, Minnesota, Nevada, New York, note 18 *supra*.

44. Florida, Idaho, Minnesota, Montana, Nebraska, Oregon, note 18 *supra*.

45. Cal. Evid. Code Sec. 1157 (West Supp. 1974).

46. Minn. 68th Legislature--Second Regular Session Laws, 1974, Ch. 295.

47. 42 U.S.C. 1320c-15 (Supp. 1970).

PROHIBITION AGAINST DISCLOSURE OF INFORMATION

1320c-15. (a) Any data or information acquired by any [PSRO] in the exercise of its duties and functions, shall be held in confidence and shall not be disclosed to any person except (1) to the extent that may be necessary to carry out the purposes of this part or (2) in such cases and under such circumstances as the Secretary shall by regulations provide to assure adequate protection of the rights and interests of patients, health care practitioners, or providers of health care.

The following section of the law--42 U.S.C. 1320c-14--also raises some confidentiality issues.

CORRELATION OF FUNCTIONS BETWEEN [PSROs] AND ADMINISTRATIVE INSTRUMENTALITIES

1320c-14. The Secretary shall by regulations provide for...such interchange of data and information, and such other cooperation...between and among--

(a)(1) agencies and organizations which are parties to agreements entered into pursuant to section 1816, (2) carriers which are parties to contracts entered into pursuant to section 1842, and (3) any other public or private agency [other than a PSRO] having review or control functions, or proved relevant data-gathering procedures and experience, and

(b) [PSROs], as may be necessary or appropriate for the effective administration of title XVIII, or State plans....

Several commentators have reviewed the possible legal implications of these and other sections of the PSRO legislation. *See e.g.*, E. J. Anderson, *Professional Standards Review Organizations*, Chicago Medicine, 77:745 (Sept. 7, 1974); C. E. Welch, *PSRO's --Pros and Cons*, New England Journal of Medicine, 290:1319 (June 6, 1974); D. E. Willett, *Malpractice claims--will they increase or decrease with PSROs?*, Bulletin of the American College of Surgeons, 59:7 (May 1974).

48. Silver v. Gordon (Cir. Ct., Honolulu, Hawaii, September 21, 1971), interpreting Hawaii Rev. Stat. Sec. 624-25.5 (Supp. 1973), reported in The Citation, 24:59 (Dec. 1971).

49. Oviatt v. Archbishop Bergan Mercy Hospital, 214 N.W.2d 490, 492 (Neb. 1974), interpreting Rev. Stat. of Neb. Sec. 71-2048 (1971).

50. Pindar v. Parke Davis and Company, 337 N.Y.S.2d 452, 453 (Sup. Ct. 1972), interpreting N.Y. Education Law Sec. 6527(3) (McKinney Supp. 1973). It can be inferred that the defendant was resisting discovery of his own testimony about the underlying patient care events, prompting the court to comment that "the facts giving rise to the causes of action are particularly within the knowledge of [this] individual defendant...."

LAW AND ORDER PACKET

Mr. Malone

STATEMENT BEFORE THE HOUSE JUDICIARY COMMITTEE

ON MARCH 27, 1973, ROOM 104, ASSEMBLY BUILDING

JUNEAU, ALASKA

I am Carolyn Burg, a law student. I have been a citizen of the United States all of my life, having been born here, and I have been a resident of the State of Alaska for approximately twenty years.

Sometimes situations arise in the life of men which confront and startle them. Such is the situation I present before you today, as it was envisioned by Alexander Hamilton when he was supporting the Constitution of the United States before it was put into effect. Writing as "Publius" he got out a set of papers now printed in The Federalist from which we are quoting from page 169 of the Wesleyan University Press: .

> "...Schemes to subvert the liberties of a great community require time to mature them for execution. An army so large as seriously to menace those liberties could only be formed by progressive augmentations; which would suppose, not merely a temporary combination between the legislature and executive but a continued conspiracy for a series of time. Is it probable that it would be persevered in and transmitted al s, through all the successive variations in the representati body, which biannial elections would naturally produce in both houses? Is it presumable, that every man, the instan he took his seat in the national senate, or house of representatives, would commence a traitor to his constituents and to his country?...It is impossible that the people could be long deceived; and the destruction of the project and of the projectors would quickly follow the discovery."

We have today such a case, and we are alleging that the Criminal Justice Information System, better known as the Omnibus Crime Control and Safe Streets Act, as amended (PL 90-351) is unconstitutional nationally

because our tax dollar is being used for expensive computers and a large staff on a nationwide basis to monitor lawful citizens, which is in complete contravention of the Constitution of the United States and the true intent of the original Safe Streets Act as set up and used by President Johnson.

We are not conceding that even under President Johnson's wiretapping law, the law is constitutional, but it was at least kept in check.[1] It may be that all wiretapping is unconstitutional.[2]

The original Safe Streets Act was set up to monitor subversives, Mafia and organized crime, and even this type of wiretapping required a court order by a judge before it was instituted. President Johnson, in fact, warned his Attorney General Ramsey Clark at the time to be very cautious of the wiretapping power even under these conditions and under his administration wiretapping was drastically reduced.[3]

Here in Alaska and all over the nation the Criminal Justice Information Agency is set up to monitor lawful citizens, without probable cause, who have committed no crimes whatever, when just last year by mandate of the people of Alaska, for instance, they voted in by approximately 85% of our populace, an amendment to our own Alaska State Constitution to be left alone. Although this might not be constitutional as set up, in spirit this is what the people wanted, and we are alleging an implied mandate of the citizenry of Alaska that they wish to be brought under the United States Fourth Amendment in their own constitution of the state.

Of course we have run onto some authorites which state that Alaskan inhabitants may have no rights at all in comparison with the other states of the Union. Article III of the Treaty of Cession states the

"people" crowned with such rights are not the inhabitants of Alaska.[4] Perhaps under this authority and others such as U.S. v. Lanza, Essgee Co. v. U.S., Boyd, Weeks and Gouled cases Alaskan citizens may be completely discriminated against from the other inhabitants in our Union regarding their rights. In Abbate v. United States it does not go so far as hol ing that in this state a p rson may be held for punishment under two acts for the same offense, but this may very well be. In Ashworth 7 Alaska, 70, it suggests that Alaska may be a "government by men and not by law." So Alaska may be wide open for any type of wiretapping.

So far, it appears that "citizens of Alaska" in order to be "citizens of the United States" have to resort to be "citizens of Oregon" before they can claim a Fourth Amendment right under the Constitution of the United States. This is a circuituous route, indeed. It might have one advantage to the present "citizen of Alaska" by putting into play the Sherman Act and the Clayton Act, allowing three times the amount in damages, as putting our commercial law into effect, but this would surely not be to the advantage of the State and we are concerned not only for the "citizen of Alaska" but the State.

However, we are implying before this Committee today, as we did before the Governor's Committee for the Criminal Justice Information System on Marc.. 7, 1973 that we are under the protection of the United States Constitution as having been brought under the laws of Oregon and into the

nation as a State. Therefore, our contract with Congress under the Constitution of the United States as a State of the Union is implied in spirit if not in the law.[5] Even though we are just inhabitants of Alaska, we claim diverse citizenship under the laws of Oregon and implied citizenship under the Union by being called "A State of the United States."

As stated in U.S. v. Gordon, Fed Case No. 15,231 (1861) the term "United States" is defined in the Immigration and Nationality Act as follows:

> "The term "United States" except as otherwise specifically herein provided, when used in a geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, and the Virgin Islands of the United States." 66 Stat 165, Sec. 101 (38) Whether the expression is used in the same sense in Amendment XIV may be questionable."

However, we have hopes. We are taking an implied protection of the United States Constitution, under the Fourteenth Amendment, in spirit if not in the law.

Completely Discriminating

PL 90-351 is completely discriminating. Congress does not come under this law, nor the President's Commission or the State Commissions. (under PL 90 351) Incompetent interrogations and incompetent courts are excluded from the computer. The machine lists fishermen but not non-fishermen, hunters but not non hunters, car drivers, but not non car drivers. The bill was drafted to bring power to the President, to strengthen the Executive Branch, weaken the Legislative Branch and completely exclude the Judiciary.[6]

We are arguing this before the Judiciary Committees when it should be the Judiciary Committees who should be deeply concerned about their own branch.

Congress cannot delegate its legislative power to the President.[7] An Act making it unlawful for a person to charge unjust or unreasonable rates, etc. was held unconstitutional under the Sixth Amendment to the U.S. Constitution ....the accused...shall be informed of the nature and cause of the accusation.[8] In tax on grain involved in sales for future delivery was held invalid as an interference with the authority of the State[9]. It is a violation of the Fifth Amendment to the U.S. Constitution under the due process clause to take property without just compensation.[10] The Criminal Justice Information Agency is at best a scheme for purchasing with federal funds submission to Federal Regulations of a subject reserved to the States.[11] though the legislature has no power by a subsequent curative statute, to remedy a jurisdictional defect, or one which obviously goes to the substance of a vested right, it is stated in 12 C.J. 973, Sec. 553 "A vested ground of defense is as fully protected from being cut off or destroyed by an act of the legislature as is a vested cause of action.[12] Although a legislature may, however, deprive a party of technical defenses involving no substantial equities, Mr. Chief Justice Holmes of the Supreme Judicial Court of Massachusetts declared that "a party has no vested right in a defense based upon an informality not affecting his substantial equities...there is no such thing as a vested right to do wrong."[13] (emphasis supplied)

How Much does it Cost?

How much, we ask, is this costing the taxpayer? Billions of dollars have been set aside for the carrying out of this atrocious scheme, when we hear that money is being held back from education, social programs and other beneficial projects. "We have no money," they say, (meaning yours and mine.)

We are coming into our 200th Anniversary of the framing of our government in 1776. Under the title "The Twelve Great Justice of all Time" in the October 1971 issue of "Life" among other greats and near great Chief Justices, the Hon. Chief Justice John Marshall was chosen as No. 1 by a poll of scholars on the quality of individual contributions by all Chief Justices of the United States.

Here are some of the principles he set out regarding our Constitution:

1. The Constitution of the United States is an ordinance of the people of the United States and not a compact of the States, and Congress derives its only powers from the Constitution.

2. Therefore the Constitution is to be interpreted with a view to securing a beneficial use of the powers which it creates, not with the purpose of safeguarding the prerogatives of State sovereignty.

3. The National Government is present within the States, not by the tolerance of the States, but by the supreme authority of the people of the United States.

I am alleging implied protection of the United States Constitution under a completely unconstitutionql public law using my tax dollar against me, the citizen. U.S. Const. Amend 4, 5 and 9 and 14. My tax dollar is my property.

My name is also my property, and no one has a right to trespass over it or physically invade it. I may use my name in any way I wish. I have complete control over it as my personal, individual property. If I despoil it by committing a crime, then forces will be started to withhold certain rights I can expect will be taken away. But as a lawful citizen in the State of Alaska and the United States of America I have complete control over my personal property, my name.

* "Human relationships depend largely on the sense that the participants are free from the observation of others, and that sense is essential to the development of individual points of view and modes of life. Continuing contacts with those looking for damaging information are both highly un--pleasant and deeply disturbing to any sense of security. Moreover, the more wide sweeping the power to gather evidence, the greater the danger that the power will be arbitrarily used to harass those "out of favor" or those against whom particular officials have personal grievances; the greater also the danger that information obtained will fall into in--appropriate hands or be misused...."

The right of privacy is a precious right. It is the

* "right to be free from undesired uses of one's name or picture and from the unjustified publication of private information about oneself.

Wouldn't it be wonderful if before 1976 the "citizens of Alaska" would be made "citizens of the United States" so that they could all be joyous in the celebration of our Declaration of Independence!

Thank you.

Respectfully submitted,
Carolyn Burg
Carolyn Burg

* Taken from "The Right of Privacy" by Kent Greenawalt in "Rights of Americans" p.299

1. Please see Note 10 in U.S. v. U.S. Dist. Ct. for the Estern Dist. o f Michigan, 32 L ed 2d 752, 92 S. Ct.
2. Colbard v. U.S. 92 S. Ct. (Dissenting opinion of Justice Douglas)
3. Please see (1) above
4. Koehler v. Hill, 60 Iowa, 543, 14 NW 738, 15 NW 609, 615
5. Sinking Fund Cases, 99 U.S. 700, 718-719 (1878) 14th Amt. Art. III, V, All Amendments to the U.S. Constitution.
6. Please see (1) above
7. Panama Refining Co. v. Ryan (1935) "Hot Oil Case"
8. U.S. v. V.L. Cohen Grocery Co (1921)
9. Hill v. Wallace (1922)
10. Louisville Joint Stock Land Bank v. Radford (1935)
11. Hoosac Mills, Inc. (1935)
12. Pritchard v. Norton, 106 U.S. 124, 1 S Ct. 102, 27 L ed 104

I'm against this Omnibus Crime Control & Safe Streets Act of 1968, Title III. Wire tapping is the beginning of our loss of freedom under the 4th & 5th Amendment. I have friends who lived behind the Iron Curtain in Europe and wire tapping and snooping into ones' private life are the beginning of the loss of our personal freedom as guaranteed by our forefathers.

My personal knowledge of this came from a close friend and a coworker who finally after 10 years were able to leave Bucharest Rumania. He is a ~~a~~ surgeon and she was a librarian in the Univ. of Bucharest. Even his practice was affected.

Katherine Larkin

3210 La Touche Ct #G-4
Anchorage, Ak. 99504

B. EAVESDROPPING DEVICES

§ 47.4. In general [new]

Electronic eavesdropping, where unauthorized, is illegal. Police are known to use illegal bugging and wiretapping, and defense attorneys should thus be able to detect illegal eavesdropping. We will attempt to describe the various types of electronic eavesdropping devices, their uses, and their usual placement.

Contrary to popular belief, most eavesdropping devices are not intricate and custom-built but are often home-made and constructed very simply with equipment of standard manufacture. This simplicity in structure is inexpensive and it makes it almost impossible to trace the device back to the original installer.

§ 47.5. Wiretapping [new]

Eavesdropping devices usually fall into two categories: wiretapping or bugging. Wiretapping, or the intercepting of telephone conversations, despite advances in the sophistication of bugging devices, is still the principal method of electronic snooping. There are three basic methods of wiretapping: the direct tap, the indirect or induction-coil tap, and the microphone tap.

Direct taps, if skillfully placed, can be detected only by a careful search of the telephone line. The indirect or induction-coil tap has to be placed within the magnetic field caused by the current on the wire; it does not have to be actually connected to the telephone wire. The induction coil can be placed as far away as fifty feet from the telephone line. Access to the telephone is necessary to install the microphone tap. A small microphone with a transmitter is hidden inside the telephone. Commonly, this replaces the device inside the mouthpiece and is difficult to detect.

Several recent advances in electronics have aided the wiretapper. Until the development of the tape recorder, the wiretapper had to transcribe by hand conversations he heard from earphones at the listening post. Now, voice-activated tape recorders are available which record only when a voice is on the line. Also, the development of radio transmitters eliminated wires, increased the speed of installation, and decreased the possibility of finding the tapper.

§ 47.6. Bugging [new]

In addition to the telephone wiretap, other devices available to the snooper are the "bug," the transmitter, and the recorder. A bug is a tiny concealed microphone wired into a room. An improvement on this device is a combination microphone and transmitter. This device eliminates the necessity of wiring and can be easily hidden in a room or carried on the person. The miniature tape recorder with a microphone is another useful device for the snooper. This can be easily concealed in a briefcase or even carried on the body.

If a person has access to the room he wishes to bug, he often can convert the present power systems into eavesdropping devices. The telephone, besides being tapped, can also be adjusted to provide a microphone for listening to room conversations. Always check the telephone thoroughly when snooping is suspected. There are other systems which can be tampered with to

create eavesdropping devices. The Muzak system in a hotel can be adjusted so that the room speaker serves as a microphone. In an apartment building the door signal system can monitor a specific apartment if a microphone has been hidden in the apartment. Schools, offices and other institutions are also vulnerable to eavesdropping, if access to the control board of the intercom system is available.

If no alternative power systems are available, there are several devices which can be planted in a room to "listen." Microphones exist which are smaller than a postage stamp. These can be hidden anywhere in a room where wires can be covered up. Also available, but without wires, is the combination microphone and transmitter which may operate by battery or by being plugged into the house current. Another wireless bugging device is the tiny microcircuit which is 1/1000th of an inch thick. The transmitter in this device draws power from the radio waves in the vicinity. The microcircuit can be hidden inside wallpaper or in any tiny crack.

Because direct access to the room to be "bugged" is rare, many techniques have been developed which require only proximity to the desired location. The "black box" when attached to the telephone line at any terminal box will turn the telephone into a microphone, monitoring all room and phone conversations. This device is very difficult to detect and is not available to the ordinary eavesdropper. To place this or another wiretap, the snooper must find the correct telephone wires. He may pose as a repairman or, if the police are involved, the telephone company may cooperate.

If the room next door is available, several types of microphones can be utilized. A contact mike can be placed on the connecting door. A small mike can be placed under the connecting door. A spike mike can be hammered into one side of the wall until it touches the other side of the wall. This mike causes the other side of the wall to act as a sounding board, and all conversations can be picked up.

If the room above is available, a microphone can be lowered down an air duct or out the window. False ceilings, attics, and basements are also excellent locations for eavesdropping devices.

If the snooper cannot gain entrance to the room, or a nearby room there are several long-range eavesdropping devices which he can utilize. The telescopic, or parabolic, microphone, which is used to cover news events, can pick up conversations up to 500

feet away. This device, aimed at the desired location, blocks out all side conversation. A microphone can be hidden outside the window which is powerful enough to pick up all room conversation.

Even on a busy street, snooping can be effective. A small recorder in a shoulder holster, a transmitter the size of a cigarette pack, and a mike in a tie-clip all would go unnoticed. A telescopic mike also be used in a crowd of people.

Photo copy of News item in Courier. Jan. 24, 1974

People are Mad

Movement

When asking about the status of certain LAW & ORDER legislation, Earl Westphal, of Soldotna was told by one of the legislators that "We will not get such legislation through until the people get mad and take action." Thus began a movement to enlist the support of honest citizens, through the power of the pen, to combat the deplorable condition of our criminal justice system. Westphal said, "It is time the overwhelming majority of honest citizens were protected from the offending minority."

A meeting of the Law enforcement agencies fo the Kenai Peninsula was called by Westphal, to study legislation already in the hopper and to gain knowledge of possible additional needs. Attending were Judge James Hanson, of the Superior Court; Sgt. George Polillo, who is in charge of State Troopers on the Kenai; Police Chief Doherty, of Homer and Chief Kilmer, of the Soldotna Police dept.

Numerous criminal cases were reviewed and weak spots in the system were pointed out along the way. The first issue, and one receiving considerable attention, was the release on bail of criminals who are a danger to society, pending trial and/or sentencing. Judge Hanson said that different judges interpret the bail law differently and some feel the law prohibits their retention. This question needs to be clarified by the legislature.

Another avenue for improvement was said to be the method of appointing members of the Parole Board. At present there seems to be no qualifications which have to met except " favor of the governor." The legislature needs to establish some qualifications for membership on this board. It is believed that much better decisions would ve rendered by a Parole Board made up of those with expertise in Law Enforcement and Criminology.

Probation should, very definitely, be placed under the Court System for better control. The District Attorney's office is seriously under staffed. The case load is such that an adequate job of preparing the state's case is almost impossible. Plea bargaining seems to be used all too frequently possible because of the over load on D. A.s. Much stiffer sentences should be handed down for murder, rape, use of gun in commission of a crime and other serious offences against society, with the court's recommendations on Parole more closely adhered to.

Rehabilitation efforts are fine in some cases, but where do we draw the line? How many times must a criminal offend society before he is considered a haibitual? How many times should we allow one to commit rape, murder; or armed robbery, before he is considered a menace to society? We MUST get some results from the current session of the Legislature, before the pipeline impact really hits," said Westphal, "or we just as well list CRIME as another major industry for Alaska."

PEOPLE ARE MAD - and that is what Westphal is calling the move for public support of crime legislation. "Watch for more information," he says, " on bills to write to your legislators about." "Let's make Alaska a state where CRIME DOES NOT PAY."

Feb. 10, 1974

TO: Clem Tillion, Chairman, House Judiciary Committee

FROM: Earl W. Westphal, Co-ordinator, People are Mad, A citizen's Movement for Law & Order.

Subject: Written testimony for public hearings on Law & Order Legislation Wednesday and Thursday, Feb. 13 and 14, 1974. (TO BE READ INTO THE RECORD)

Members of the HOUSE JUDICIARY COMMITTEE:

The United States of America, especially since the era of the "Warren Court", has become increasingly Liberal and Permissive toward the Criminal Element. Alaska, the 49th State, seems one of the more Liberal of the 50.

I am unable to identify the element which has led our Criminal Justice system into the deplorable condition it is in today, but whoever they are, tney have been most successful.

The job of the Police Officer and the prosecutor has been made much more difficult because of our undue concern for the rights of the accused; yes, even the convicted.

This committee is respectfully asked to approach their task with sound common sense; with more consideration for the victims of the offenders of society. Those who seek plaesure or material gain through utter disregard for the life, safety or general welfare of their fellow man must suffer their just reward. They must be separated from society unless and until it has been proved, beyond doubt, they are fit to mingle with Honest Citizens.

One who contemplates a crime against society <u>knows</u> what he plans is wrong; he oft'Times even seeks legal advice to weigh the gain against the possible punishment. A responsible society seeks to provide a penalty suitable to the crime.

Some will argue that stiffer penalties are not necessarily a deterent to crime. A simple study in human nature will show otherwise. We are all enclined to weigh the risk against the possible gain. Place a Ten Dollar bill in the middle of a lake frozen over with quite thin ice, watch how few people even think of going after it. On the other hand, increase that amount to a million dollars and you will have mass drownings as the force of greed takes over. Conversely, as the risk becomes greater, the prize becomes less desireable.

I, nor those who follow my recommendations, are not in favor of the "HANGING JUDGE" concept nor do we approve of the "WRIST SLAPPER". We do not believe the average citizen should be subjected to harassment by Law Enforcement officials, yet, I feel sure, the Honest citizen, with nothing to hide, will gladly submit to reasonable investigation by authorities in their attempts to apprehend offenders of society.

We must <u>act now</u> to correct the dangerous trends in criminal justice. We must not allow the pendulum to swing too far in the permissive direction lest the people force it back beyond the point of reason and we find ourselves in a POLICE STATE.

Ones rights should cease at the point where they interfere with the rights of others. When it becomes unsafe for a person to walk down a public street, his rights are being infringed upon. He is being denied EQUAL PROTECTION under the law, if the law is not doing all in it's power to correct the situation.

Let us concentrate, for a spell, on the rights of the overwhelming majority; the good, honest, law-abiding citizens.

In this age of extremeism, there seems to be two main factions pulling in opposite directions. It behooves you, our law-makers, to seek the reasonable, straight forward approach and make Alaska a state where Good, old fashioned Americanism is engendered.

TO TOUCH LIGHTLY ON BILLS CURRENTLY BEFORE YOU:

H.B. 391. Seems quite reasonable. Meets EQUAL PROTECTION standards.

H.B. 451. Should discourage the "Crackpot" as well as the bearer of false witness.

H.B. 452. A common sense approach to criminal use of fire arms. (I am definitely opposed to GUN CONTROL)

H.B. 460. Very good and MUCH NEEDED. These people have suffered much abuse while serving and defending society.

H.B. 511. A step in the right direction. If the offender is such a nice guy and good citizen, he wouldn't have commited the crime in the first place.(One case, known locally, the prisoner was released after a few months and against his own wishes. He felt he was a danger to society) His crime, MURDER.

H.B. 512. Good Judges need this to support their actions and less desireable Judges need to be pushed toward better protection of society.

H.B. 513. Good legislation. Should discourage additional crime with knowledge that sentence will be served consecutively instead of concurrently.

H.B. 515. A jury of six, especially with current selection techniques, seems more than adequate to assure a fair decision. The money saved can very well be used for additional personnel.

H.B. 562. The mandatory wording seems more appropriate and less discriminatory.

H.B. 563. Recommend ammendment: Sec.33.30.185.(a) When a person is sentenced to imprisonment by a court for a criminal offense, COPIES OF all reports etc. Court and corrections should have these records.

H.B. 564. As I understand this bill, it prohibits only those agreements as stated, between defence and prosecutor but not those which also involves the judge. I dislike the practice of plea bargaining as a time saver in some cases. It should be used only when all facts are known. Again, a local case. SALE OF CANNABIS. This was reduced to POSSESSION. The

Judge was not aware of previous conviction on charge of ARMED ROBBERY of drugs. I hate to see criminals granted the privilege of reduced charges when evidence exists which could establish guilt on the charge for which he was arrested.

I have been unable to secure copies of House Bills: 565, 566, 568, 570 and H.J.R. 67. Please apply principles as outlined in narrative.

H.J.R. 66. I heartily support this resolution. Society has not had EQUAL PROTECTION under the law when certain criminals have been released on bail to repeat crimes.

H.J.R. 68. Agree with this along with H.J.R. 66.

H.J.R. 71. I am in full support of this as a more"common sense" approach to criminal justice.

I trust the time and effort spent in the preparation of this testimony will not be without it's reward, better criminal justice in the state of Alaska.

I deeply appreciate your indulgence.

Respectfully submitted,

Earl W Westphal

Earl W. Westphal, Co-ordinator
PEOPLE ARE MAD, A citizen's movement for Law and Order

Dear Clem: Thought this letter would be of interest — Sincerely, Walt + Elsa

STATE OF ALASKA

WILLIAM A. EGAN GOVERNOR

Emery W. Chapple, Jr.
Commissioner

DEPARTMENT OF PUBLIC SAFETY

DIVISION OF STATE TROOPERS

Box 6188 Annex, Anchorage, Alaska 99502

January 30, 1974

Mr. Walt [illegible]
P. O. Box 28
Sterling, Alaska 99672

TIMES (wp)

Dear Walt and Elsa:

I have read your letter of January 1[illegible] concerning the advertisements for massage parlors in our daily paper and I would like to assure you that I am wholeheartedly in agreement with what you said in your letter, and appreciate the fact that some citizens care enough to say so as you did.

Many citizens wonder how organized crime is allowed to flourish and gain a foothold in a community, yet often those who question [illegible] are the very ones who are contributing to its success. A one thousand dollars [illegible] of organized crime for advertising is, in my judgement, an example of how legitimate business [illegible] the [illegible] of those bent on illegal activities.

I strongly agree with you that where the courts are concerned something is wrong. I personally believe that when our judicial system [illegible] and punishment, and established an unrealistic consideration for the rights of the wrong-doer over those of the law abiding citizen, they doomed themselves to [illegible] loss of public confidence and respect.

This loss of confidence in our judicial system concerns me and [illegible] other [illegible] open to the people [illegible] putting the [illegible] of our system back with the people instead of the Alaska Bar Association. This could be accomplished by electing Attorneys General, State Attorneys, and Judges, and [illegible] change in our statutes [illegible] today. I can assure you that I, and [illegible] officers [illegible] working towards this [illegible], and [illegible] appreciate your concern in the matter.

Sincerely yours,

[signature]

Colonel M. L. Dankworth
Director
Alaska State Troopers

MLD:lai

Supreme Court

State of Alaska

941 Fourth Avenue
Anchorage, Alaska 99501

January 30, 1973

Honorable Lowell Thomas
Senator, Alaska State Senate
Pouch V
Juneau, Alaska 99801

Dear Senator Thomas:

I appreciate your invitation to comment on Senate Bill No. 15. While I will be unable personally to appear before your committee, I have nonetheless been authorized to express the views of the Alaska Supreme Court on this proposed legislation.

As you are aware, Senate Bill No. 15 would amend AS 17.10.200 to require mandatory prison terms of five years for possession or control of narcotic drugs for the purpose of sale to another person, and amend AS 17.12.110(b) and (c) to require mandatory five year prison terms for possession or control of depressants, hallucinogencs, or stimulant drugs for the purpose of sale or disposal to another person. Summarily stated, it is the opinion of the Supreme Court of Alaska that mandatory minimum sentences are inappropriate and may result in substantial injustice to individuals convicted of these crimes in particular circumstances.

Significantly different crimes and offenders may fall within the scope of the proposed statutes. The casual exchange of a small quantity of contraband will subject the offender to the same five year minimum sentence as a large sale by seasoned, professional criminals. Under the proposed amendments no inquiry is required to be made as to whether the individual convicted of sale or disposal of contraband will pose any continuing threat to society; whether lengthy confinement will serve to correct the offender's behavior; or whether a minimum period of five years incarceration generally will further the goals of Alaska's Criminal Justice System. In this regard we believe that parole

officials generally have sufficient data to determine when an offender can be released from incarceration without unreasonable risk to society. At best, the confinement of the offender past the time when parole may be prudently granted will inflict unnecessary harm upon the convict; at worst, it will deprive him of the incentive to reform his behavior and might possibly increase the likelihood of repeated antisocial behavior upon release from confinement.

It is also our view that lengthy mandatory minimum sentences are likely to encourage defendants to bargain for pleas of guilty to reduced charges. Another facet of this question is that where enforcement personnel are of the view that imposition of the mandatory minimum sentence will work a hardship in a particular case, imposition of the mandatory sentence can be avoided by reduction of charges. Further, where the imposition of mandatory minimum sentences will cause manifest hardship to defendants, judges and prosecutors are likely to be inclined to consent to the bargained pleas. The danger is that innocent defendants may decide that on balance it is better to accept a short period of confinement for an offense never committed than to risk conviction and a mandatory sentence.

Mandatory minimum sentences are at times appropriate. In our view the sentencing court, when properly informed, can better determine when such sentences are well-advised. We endorse the position on the question of minimum sentences taken by the American Bar Association's Committee on Minimum Standards for Criminal Justice - Sentencing Alternatives and Procedures. The Committee's view is that in the rare situation where a minimum sentence is called for, the sentence should issue only after the court has been adequately informed of the offender's amenability to treatment and after the court has considered making a non-binding recommendation to parole authorities suggesting the earliest time at which the offender can be considered for release.

We concur with the Advisory Committee on the Standards, in stating:

> The Advisory Committee holds no sympathy for the offender who poses a significant public danger and is just as anxious as anyone else to get him off the streets for a period of time sufficient to neutralize the danger. But this position does not and should not lead to the conclusion that offenders who do <u>not</u> pose such a danger should be committed for a substantial period of time because the offense they committed happens to be one that is often committed by dangerous people. The evil of the mandatory term is that it robs the system of the capacity to discriminate between offenders who do and offenders who do not deserve the harsh treatment which the minimum signifies. A far better way to

attack the problem would be to arm the system with the funds and the facilities to enable it to identify the particular offenders from whom society legitimately needs protection.

I note in closing that the views expressed here are only those of the members of the Supreme Court and not of the trial judges within the Alaska Court System. Again, I wish to thank you for the opportunity to express our views concerning Senate Bill No. 15.

Very truly yours,

Jay A. Rabinowitz
Chief Justice

GREATER ANCHORAGE AREA BOROUGH

3500 EAST TUDOR ROAD
ANCHORAGE, ALASKA 99507

DEPARTMENT OF LAW
279-8686

February 20, 1974

Representative Helen Fischer, Chairman
State Affairs Committee
House of Representatives
State Capitol Building
Juneau, Alaska 99801

Dear Helen:

I received your letter addressed to Ms. Sheila Gallagher, Borough Attorney. I know you will want Sheila's personal views on the crime bills but you probably also would like the views of the Borough Attorney.

Before commenting on the bills, I should point out that the Borough Attorney, like other municipal attorneys, does not prosecute felonies and accordingly, does not, by virtue of his office, have any direct familiarity with prosecution of felonies, commission of crimes while on bail, etc. The Borough provides police protection in the Spenard Service Area, an urban area of 30,000 people, and we do prosecute a great volume of traffic offenses, but the bulk of these are relatively minor in nature, the more serious crimes such as drunk driving, reckless driving, and eluding an officer being in the minority. So I will have to speak for myself as a private citizen and not for the Borough on the felony proposals.

I agree with House Joint Resolution 66 providing that the court may deny bail if there is substantial evidence that, if released, the accused would pose a danger to other persons and to the community. The need for this change would be much less if there were speedier trials and certainly, defendants denied bail should receive a speedy trial.

I disagree with House Bill 511, House Bill 512, and House Bill 513 because I believe that if these bills were enacted, the Legislature would be invading an area in which the court system is best prepared to act. It may be that the court system should be nudged into acting in these areas, and I think that the State Affairs Committee, in the course of holding its hearings, may accomplish such a result.

I am sure that the reasons for House Bill 511 is the feeling among that some criminals are paroled too soon, that the reason for House Bill 512 is the feeling that some sentences for serious crimes are too short, and that the reason for House Bill 513 is the belief that the punishment for committing a felony while on bail is too lenient. In other words, there is a feeling that judges are abusing their discretion in administering the laws. I do not know if there is also a belief that sentencing and punishment are unequal for similarly situated criminal defendants, but I suspect that that is a major concern too.

These are all legitimate concerns.

Certainly you are entitled to know, and the justices and judges should know:

> What sentences are pronounced for a given category of crime? For a first offender? For a frequent offender? Are similarly situated criminal defendants charged with similar crimes sentenced the same? Does it make a difference if a criminal defendant is prosecuted by one prosecutor rather than another, if sentence is pronounced by one judge instead of another, if the criminal defendant pleads to a lesser crime and so on.
>
> What bail is required for different categories of crime? Again are similarly situated criminal defendants treated the same?
>
> When is bail set so high as to be, in effect, a denial of bail? Is policy on high bail uniform for similarly situated criminal defendants?
>
> What sanctions are employed when a person on bail for a felony commits a felony? Are the sanctions uniformly applied and are they effective? I understand that about 4% of criminal defendants on bail for a felony are charged with an additional felony committed while on bail.
>
> What part of a sentence is actually served? Again are similarly situated criminal defendants convicted of similar crimes treated the same with respect to parole?

I do not think that rational decisions on legislation affecting sentencing and parole can be made until reliable hard information on these subjects are available. And similarly, I doubt if the justices and judges can do the job they ought to be doing without this information.

I am saying this knowing that this type of information is probably not available here or in any other jurisdiction. I have heard that the Alaska Judicial Council has obtained a Law Enforcement Assistance Agency (LEAA) grant to develop some of this information but I do not know what the particulars of this effort are.

I also understand that the Chief Justice of the U. S. Supreme Court, Chief Justice Warren Burger, has made a special effort to determine whether criminal justice is being fairly and uniformly achieved in federal courts. I believe this includes the amount of bail being required of first offenders for different categories of an offense, second offenders, etc., the time not served on various sentences for various types of offenders for various types of offenses due to parole, and so on.

I would hope that development of this type of information will be one result achieved as a result of this legislative session. For my part, I would prefer to see the Alaska Court System develop this information between now and the next legislative session. This would probably require an appropriation for that purpose.

I think House Bill No. 512 may backfire if enacted. First, I am convinced that the judge must have discretion in imposing sentences for any type of crime and that this discretion should not be taken away by legislative act. The Legislature simply cannot forsee and anticipate every circumstance that might come up. If a judge is out of line in sentencing, this should be made apparent by the process of systematically comparing sentences and procedures for appellate review of sentences that the prosecution believes are too lenient.

House Bill 512 requires imposition of the statutory minimum penalty for not only murder or rape, but also the minimum statutory penalty for possession of narcotic drugs. For example, if a high school or college kid should experiment on a one time basis with a hard drug, the judge would be required to sentence the student to imprisonment for not less than two years. I think it is a mistake to handle an offense of that type as if it were of the same gravity as,

say, murder or rape, offenses for which courts must, under existing law, pronounce at least the minimum sentence. I also think that a result of removing the power to exercise discretion in a case of this kind means that certain persons will wind up serving sentences of two years while others convicted of far more serious crimes involving possibly injury to a life or the physical person receive a much lesser sentence. This is not equal justice and it is a step backwards.

This raises an issue relating to law and order attitudes generally. I have seen polls showing a relatively high level of coolness towards law enforcement personnel among persons under the age of 25 and among members of minority groups. It is important that the great majority of every segment of our society have confidence in and support law enforcement, that they cooperate whenever they can in preventing crimes and that the police have the wholehearted cooperation and support of every population group. I think that one reason for disenchantment with law enforcement among some young people and some members of minority groups is the feeling that they are being singled out for punishment for activities which are either not, in their opinion, criminal at all, as in the case of marijuana smoking, or are of relative low priority among criminal offenses, while those who do much more substantial damage to the lives and properties of others do not bear the full brunt of the law. There is probably general agreement among all groups that acts which are dangerous to life and the physical well-being of others, such as assault with dangerous weapons, robbery, murder, burglary and other crimes which pose an immediate threat to life of others should be severely dealt with. The whole matter becomes confused when other categories of crime are brought in.

The Alaska judiciary, judges and justices alike, are exceptionally qualified to handle criminal matters. Each member of the Alaska Supreme Court has long experience with criminal prosecutions and, in some cases, criminal defense. All except one have lived in Alaska since, at least, 1951 and the one exception has lived here since 1956 or 1957. All have prosecuted as Assistant U. S. or Assistant State District Attorneys or as a State District Attorney in a variety of places including Ketchikan, Juneau, Anchorage, Fairbanks and Nome. They are experienced men with both a sense of justice and a down to earth sense of practicality. The State judges I know best are all ex-legislators and you probably know them as well as I do. None of them are soft on criminals. I am sure that they will use any hard information

on sentencing for purposes of achieving equal treatment under the law.

I recognize that under Article IV, Section 15 of the Alaska Constitution the Legislature may by a two-thirds vote change rules promulgated by the State Supreme Court governing practice and procedure in civil and criminal cases. I hope that the Legislature will refrain from any such action. The newly adopted Rules of Criminal Procedure are fair, are practical and reflect, not only the experience of the Alaska courts, but also the experience of courts throughout the United States. If problems do develop in the course of time, the Alaska Supreme Court is best equipped to handle them.

On plea bargaining, it is essential that the District Attorney have the discretion to reduce charges where the original charge is too high. However, lesser pleas should not be accepted for the convenience of the prosecutor or the court. Lesser pleas should not be accepted because the prosecutor or the court is short of manpower, is confronted with a heavy backlog or the press of time. Consider, for example, the effects of making an unusual number of felony arrests due to a drive against hard drugs. Although the evidence obtained may be solid, the prosecutor and the court may feel under some pressure to accept reduced pleas just to be able to handle the cases within the limitations of manpower and time available. This would be wrong. It would not only be demoralizing to those who developed the cases, but it would mean that criminal defendants would not be treated equally due to the exigencies of time and budget. Any pressures to engage in plea bargaining for economic reasons or because of time pressures should be resisted.

Your review of the effectiveness of Alaska law enforcement is timely because we have had a sharp increase in major crime in the Anchorage area in 1973. We will have a much higher level of criminal activity in 1974 as we begin to bear the full brunt of pipeline construction. I will be looking forward to receiving a copy of your report.

Sincerely yours,

Gary Thurlow

Gary Thurlow
Borough Attorney

GT/sj

cc: Sheila Gallagher
Anchorage Borough School District

JUNEAU BAR ASSOCIATION
JUNEAU, ALASKA 99801

OFFICE OF THE President

201 Franklin St.

Honorable Clem V. Tillion
Chairman, House Judiciary Committee
Alaska State House of Representatives
Alaska State Capitol Building
Juneau, Alaska 99801

RE: Law and Order Package

Dear Mr. Chairman:

I appreciated Mrs. Mason's call advising me of the scheduling of the hearings on various law and order proposals that were being reviewed by your committee. I regret that I was unable to sit through the entire two days of testimony in order that I might speak personally, although I think much of what I would have said would have been redundant.

The Legislative Committee of the Juneau Bar Association reviewed a number of the proposals, though not all. I do not think it necessary to detail the committee's criticism of individual bills. It is my very distinct impression that the committee's thoughts in general closely parallel the thoughts expressed by Chief Justice Jay Rabinowtiz' letter to the committee and to Senator Lowell Thomas.

The feeling of the committee seems to be that of concern over the tenor of the package as a whole. The committee seems to feel strongly that piecemeal tampering with the present system would not serve the purpose intended, but would rather create significant imbalances and inequities. There have been recent attempts to revise the Criminal Code in its entirety, which might be a better approach. I am personally aware of the efforts that the State of Colorado went through several years ago in totally revising the Colorado criminal laws. That was accomplished by a substantial fund to set up the mechanism for revising the criminal laws. Retired Chief Justice O. Otto Moore headed a committee, which spent roughly two years in the process.

Lengthy dialogues between the committee, representatives of the State Attorney General's Office and various District Attorney offices, Public Defender agencies and the Bar Association were held. It is my understanding that the results were gratifying.

If recidivism is the major problem, then it would strike me that a deeper probe into the reasons for the recidivism would be indicated rather than simply trying to keep more people in jail where they are doubtless an enormous cost to the taxpayer. Furthermore, if the proposals were adopted in toto, the result would be the greatest economic blessing to the criminal defense bar that ever came down the pike. If the rate of recidivism among people on probation or parole is significantly less than the national average, which it apparently is, something must be working right. Furthermore, I am informed that reasonably reliable statistics indicate a rate of criminal activity among people out on bail that is again lower than the national average. Certainly no system will ever be perfect.

I was personally troubled by some of the statistics presented at the hearing. The statistics which presumably show a significant increase in criminal activity in Anchorage cannot be taken at face value. What they show is that there has been a greater reporting of criminal activity, and presumably it can be assumed that this is indicative of some increase in criminal activity. However, the figures simply are not absolutes. Chief Hibpshman stated that over a period of approximately four and one-half months, 84 persons were arrested for burglaries or burglary-related offenses. He further stated that of those, 36 were repeat offenders. What I do not recall his ever having said is how many of those 36, of even of the 84, were formally charged after their arrest and were subsequently either convicted or entered guilty pleas. That is something that one would want to know.

If you believe it would serve a useful purpose for me to either personally confer with you or appear before the committee at some time when the committee is not totally occupied with other matters, I will be more than happy to do so. Furthermore, the Juneau Bar Association

would be pleased to give you thoughts on any other matters you deem necessary.

Thank you for your attention.

Respectfully,

Allen T. Compton

ATC/wlp

The Citizen's Legislative Committee have recently drawn up a list of recommendations for legislative and judical action against crime problems facing the people of Alaska.

The list indludes:

1. More trained state troppers.

2. Stricter enforcement of existing laws.

3. Enforcement of the state's habitual criminal law and removal of discretionary powers of judges.

4. Stricter enforcement of drug laws.

5. A parole violator, if found guility, should complete his original sentence.

6. Improvement of parole system.

7. Make the attorney general's office elective rather than an appointive one.

8. Election of judges.

9. Election of the district attorney.

10. Restrict the use of plea-bargaining.

In recommending that judges, district attorney's and the attorney general be elected, the committee feels that such action would make these positions more receptive to the wants and needs of the people.

Also the Committee is urging that the legislature NOT pass laws legalizing or decriminalizing marijuana. This matter should be placed before the voters, and the choice be made by the majority after more study and information is available. A group of Columbia University researchers reported that marijuana may weaken the body's defenses against disease by inhibiting division of the white blood cells that fight viruses. As a result of the study, Dr. Gabriel Nahas of the team of researchers called for a re-examinstion of the findings of the National Commission on Marijuana, which recommended decriminalization of marijuana use. A fall account of the research team's studies will appear in the Feb. 1. issue of "Science" magazine.

The Citizen's Legislative Committee has been formed as a study group to study all bills originating from Juneau, and will take action on such ones as they deem necessary. Anyone interested in more information may contact State Chairman, Mrs. R. H. Frank, St. Rt. B, Box 516, Palmer, Alaska, 99645 or by phone 745-4128.

State Chairman Mrs Kay Frank

Kay Frank

DIVISION OF CORRECTIONS

1971 - 1972

RECIDIVISM DATA

Prepared by the
Systems and Research Unit
Division of Corrections
Charles G. Adams, Jr., Director
Department of Health & Social Services
State of Alaska

1 March 1974

1971 - 1972 RECIDIVISM

Introduction

This report is a brief preliminary version of a more extensive report which is currently in preparation. It includes data from a review of Division of Corrections releases from custody during 1971 and 1972.

National standards for recidivism, published in 1973 by the National Advisory Commission on Criminal Justice Standards and Goals, are as follows:

> Recidivism is measured by (1) criminal acts that resulted in conviction by a court, when committed by individuals who are under correctional supervision or who have been released from correctional supervision within the previous three years, and by (2) technical violations of probation or parole in which a sentencing or paroling authority took action that resulted in an adverse change in the offender's legal status.

Our data departs from these standards in several respects, and suffers from the following limitations:

(1) Release data is available only for 1971 and 1972. Radical changes in record storage took place during 1969 and 1970, and release data prior to 1971 is not reliable. The present information must therefore be regarded as establishing a baseline, upon which the recommended three-year follow-up can be constructed.

(2) No data is available for adult offenders who received sentences of ten days or less. Again, the record-storage system precludes retrieval of this information.

(3) Having access only to Division of Corrections data, we can provide only Corrections-to-Corrections information. Thus recidivism

is measured from time of release (from institution, parole or probation) to time of re-sentencing to Corrections. Suspended sentences, fines and court probation are therefore not included.

Methodology

Two research assistants, under the supervision of the Division's programmer, were hired to review all active and closed files. This task was accomplished during the period from October, 1973, through January, 1974. Active file review was terminated in November, 1973; at a minimum, 95% of 1973 files were included.

Records consisted of three types of material: files which had been closed and microfiched, closed paper files, and active files. The data collectors visited major field locations to review active files; supervisors of small district offices either mailed or hand-carried their active files to the regional offices for review. Closed files were reviewed in Juneau, in the Central Office of the Division.

Of files containing 1971 and 1972 releases, distribution by type of file was as follows:

Microfiche:	80%
Closed paper files:	7%
Active files:	13%

The general procedure in approaching a file was first to determine whether there had been any correctional activity after the date of 1/1/71. Approximately half of the files reviewed contained relevant data. If an admission or release had taken place in 1971 or thereafter, it was recorded. (Admission data will be reported in a separate study). For each release, the most recent preceding release

during the past three years and all subsequent admissions were recorded.

The data collection form is shown on page 4. Although only very basic information was sought, availability of data varied widely among files, and some ingenuity was required to reconstruct histories of correctional experience. In general, the following procedure was utilized: The first sources of information were the booking sheet and judgement, which the raters found to be the most reliable documents in the records. Where information was not available from these sources, the probation/parole worksheet (which is often completed by the client) was used, with supplementary or confirming information sought from the presentence report. Individual items were obtained as follows:

1. Name: booking sheet, judgement, worksheet, pre-sentence report.
2. D.O.B.: same
3. Sex: same
4. Race: same
5. AID Number: not used
6. Crime: Booking sheet, judgement
7. Date of crime: same
8. Still serving: not used
9. Institution: booking sheet for admission and release dates
10. Parole: Parole Board Action Sheet. This includes date supervision began, date of parole, and end of parole and probation.
11. Probation: from the judgement, or from chronological

(10-73)

RECIDIVISM DATA

Identification

Name

Date of Birth | Sex | Race

AID Number

Crime | Date of Crime

Sentence Served: Still Serving

INSTITUTION | PAROLE | PROBATION | Date of RELEASE

Category at time of this crime. Inst Par Prob Rel

Crime | Date of Crime

Sentence Served: Still Serving

INSTITUTION | PAROLE | PROBATION | Date of RELEASE

Category at time of this crime. Inst Par Prob Rel

Crime | Date of Crime

Sentence Served: Still Serving

INSTITUTION | PAROLE | PROBATION | Date of RELEASE

Category at time of this crime. Inst Par Prob Rel

Crime | Date of Crime

Sentence Served: Still Serving

INSTITUTION | PAROLE | PROBATION | Date of RELEASE

Category at time of this crime. Inst Par Prob Rel

notes made by the probation officer, when no judgement was available.

A sample of 100 adult cases (50 microfiche and 50 paper files) was drawn and reviewed by both raters, in order to ensure reliability of information. ("Reliability" is the extent to which two raters agree in recording information from the same file). Agreement on major items was as follows:

Number of crimes reported:	92% agreement
D.O.B.:	95%
Race:	94%
Sex:	99%
Institution sentence served:	96%
Time on parole:	97%
Time on probation:	95%
Date of crime:	94%
Date of release:	92%
Crime category:	93%

The average of 95% agreement attained over the ten categories was considered an acceptable level of reliability.

Results:

Data is reported as cases, not individuals. Thus each release is a "case", which may become a case of recidivism. A single individual may account for a number of cases, and no inferences about numbers of people can be made from this data.

Data is reported separately for adult and juvenile offenders. In order to maintain relative simplicity of presentation, and because there are few women offenders, distribution by sex is not shown.

For 1971 releases, recidivism rates are given both for the first year following release from custody, the second year, and a cumulative total for the two-year period. For 1972 releases, rates include recidivism only within a one-year period.

Table 1 shows cumulative recidivism rates for 1971 and 1972.

Table 1

Cumulative Recidivism Rates

	Adult		Juvenile	
	Total Number Releases	% Recidivism	Total Number Releases	% Recidivism
1971 (2 yr. exposure)	1155	31	376	14
1972 (1 yr. exposure)	931	21	318	8

"Percent recidivism" indicates the recidivism rate, and the percent not recidivating is the reciprocal of this figure. Although mere failure to recidivate cannot be considered "success", we can at least say that of adult releases in 1971, 69% had not recidivated within two years following release; this is true of 86% of juvenile releases during that year.

Table 2 shows the number and percentages of adults and juveniles who were released from each of three possible supervision modes: institution only, field services only, and combined institution and field service supervision. Table 3 shows recidivism rates for each of the types of supervision. It is important to remember, in looking at these tables, that they do not include a large and unknown number of cases where individuals served jail sentences of less than ten days.

Table 2

Distribution by
Type of Supervision

Adult Releases

	1971		1972		Total	
	N	%	N	%	N	%
Institutions only	906	78	692	74	1598	77
Field Service only	126	11	114	12	240	11
Institutions and Field Service	112	10	119	13	231	11
Unknown	11	1	6	1	17	1
Total	1155	100	931	100	2086	100

Juvenile Releases

	1971		1972		Total	
	N	%	N	%	N	%
Institutions only	85	23	39	12	124	18
Field Service only	216	57	208	65	424	61
Institutions and Field Services	69	18	65	21	134	19
Unknown	6	2	6	2	12	2
Total	376	100	318	100	694	100

Table 3

Recidivism Rates by
Types of Supervision

	1971 Releases			1972 Releases
	% Recid. 1st year	% Recid. 2nd year	Cumulative Two Year Rate	% Recid. 1st year
ADULT				
Institution only	29	6	35	26
Field Service only	9	3	12	7
Institution & Field Service	14	2	16	7
Total Rate	26	5	31	21
JUVENILE				
Institution only	18	2	20	13
Field Service only	9	4	13	6
Institution & Field Service	3	6	9	11
Total Rate	10	4	14	8

Offenses were coded according to the Uniform Crime Reporting Handbook, and combined according to F. B. I. Part I and Part II categories. The original list of crimes is included at the end of this report.

For reporting purposes, Part I crimes were divided into those involving Personal Harm (murder, negligent, and non-negligent manslaughter, forcible rape, robbery, aggravated assault, and other assaults), and those involving Property theft (burglary, breaking and entering, and auto theft).

Part II crimes were divided into those involving, or probably involving, alcohol use (drunkenness, disorderly conduct, and vagrancy), and All Other.

Table 4 shows the number and percentages of cases falling into each of the four crime categories, and Table 5 shows recidivism rate by crime category.

The term "original crime type" refers to the fact that these tables show the crime upon which the releases was based, and not the crime at time of recidivism.

Table 4

Original Crime Type

	1971 Releases		1972 Releases	
ADULT	N	%	N	%
Part I Crimes				
Personal Harm	140	12	134	14
Property Theft	141	12	390	34
Part II Crimes				
Drunk, Disorderly	390	34	232	25
All other	484	42	394	42
Total	1155	100	931	100
JUVENILES				
Part I Crimes	N	%	N	%
Personal Harm	10	3	6	2
Property Theft	114	30	106	33
Part II Crimes				
Drunk, Disorderly	32	9	18	6
All other	220	58	191	59
Total	376	100	321	100

Table 5

Recidivism by
Original Crime Type

	1971 Releases			1972 Releases
	% Recid. 1st year	% Recid. 2nd year	Cumulative Two Year Rate	% Recid. 1st year
ADULT				
Part I Crimes				
Personal Harm	21	6	27	14
Property Theft	23	8	31	19
Part II Crimes				
Drunk, Disorderly	37	6	43	46
All Other	18	4	22	16
JUVENILE				
Part I Crimes				
Personal Harm	20	10 (*)	30 (**)	0
Property Theft	10	1 (*)	10	9
Part II Crimes				
Drunk, Disorderly	6	0	6	22
All Other	10	5	15	6

(*) = one case

(**) = 3 cases

Detailed discussion of the data will await the more detailed presentation which is underway.

Summarizing the present material briefly, we find an over-all two-year recidivism rate of 31% for adults, and 14% for juveniles. Both adults and juveniles who were in "institutions only" had higher rates of recidivism than those who were supervised by field services. Adults who had been sentenced for offenses involving alcohol had much higher recidivism rates than any other category of offenses; this fact is reflected in the relatively high rates for those with "institution only" supervision.

The relatively small juvenile sample and small number of cases of recidivism precludes any conclusions concerning recidivism by category of offense.

SECTION 11

OFFENSES

11.1 LOCAL & STATE

See the UNIFORM CRIME REPORTING HANDBOOK for further definition of local offenses.

1A	Murder and nonnegligent manslaughter
1B	Manslaughter by negligence
02	Forcible rape
03	Robbery
04	Aggravated assault
05	Burglary - breaking or entering
06	Larceny - theft (except auto theft)
07	Auto theft
08	Other assaults
09	Arson
*10	Forgery
11	Fraud
12	Embezzlement
13	Stolen property; buying, receiving, and possessing
14	Vandalism
15	Weapons; carrying, possessing, etc.
16	Prostitution and commercialized vice
17	Sex offenses (except forcible rape and prostitution)
18	Narcotic drug laws SALE (HB · USE & POSSESSION)
19	Gambling
20	Offenses against family and children
21	Driving under the influence
22	Liquor laws
23	Drunkenness
24	Disorderly conduct
25	Vagrancy
26	All other offenses
27	Suspicion
28	Curfew and loitering law violations
29	Runaways and missing persons
30	Traffic and Motor vehicle laws (except driving under the influence and manslaughter)
31	Obscene material
32	Election laws

35 Probation violator
36 Parole violator
37 Mandatory and conditional release violator
38 Bail violations
39 Escape
40 Blackmail - extortion
41 Juvenile delinquency
42 Abortion
43 Bribery
44 Harboring and obstructing justice
45 Kidnaping
46 Contributing to delinquency of minors
47 Counterfeiting
48 POSSESSION & USE OF NARCOTIC DRUGS

* NOTE: Code #10 as used in the Uniform Crime Reporting Program combines Forgery and Counterfeiting. For NCIC use, Counterfeiting has been assigned a separate code, #47.

11.2 FEDERAL

51 Interstate Transportation of Stolen Motor Vehicles or Aircraft
52 Theft from Interstate Shipment
53 Interstate Transportation of Stolen Property
54 Postal Laws (except Extortion and Counterfeiting)
55 Bank Offenses
56 National Bank and Federal Reserve Act
57 Bankruptcy Laws
58 Tax Laws
59 Liquor Laws
60 Veteran Matters
61 Narcotic Laws
62 National and Federal Firearms Act
63 Immigration Laws
64 Interstate Commerce, (Except thefts from)
65 Theft, Embezzlement, etc., of Government Property
66 Offenses on Government Reservations, Indian Reservations, High Seas, and Territories
67 Smuggling
68 Counterfeiting

THE SUPREME COURT OF THE STATE OF ALASKA

STATE OF ALASKA, Appellant, v. DONALD SCOTT CHANEY, Appellee.	File No. 1249 O P I N I O N [No. 653 - December 7, 1970]

Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Edward V. Davis, Judge.

Appearances: G. Kent Edwards, Attorney General, Harold W. Tobey, District Attorney, Anchorage, and Robert L. Eastaugh, Assistant District Attorney, for Appellant. Herbert D. Soll, Assistant Public Defender, Anchorage, for Appellee.

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

RABINOWITZ, Justice.

Appellee Donald Scott Chaney was indicted on two counts of forcible rape and one count of robbery. After trial by jury, appellee was found guilty on all three counts. The superior court imposed concurrent one-year terms of imprisonment and provided for parole in the discretion of the parole board. The State of Alaska has appealed from the judgment and commitment which was entered by the trial court.

First impression issues concerning Alaska's recently enacted legislation establishing appellate review of criminal sentences are presented in this appeal. In Bear v. State,[1] this court concluded that it lacked "jurisdiction to review and remand or to review and revise a criminal sentence for abuse of discretion."[2] Bear was subsequently followed in Faulkner v.

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[1] 439 P.2d 432 (Alaska 1968).

[2] Id. at 435. In Bear, a majority of the court concluded that:

> It is the view of this court that review of legal criminal sentences should be provided for by statute only after a careful study of the efficacy of reviewing techniques now in force in other jurisdictions has been made, and the need for the procedure determined. Reviewing authority should perhaps include the power to modify a sentence upward as well as downward in order to achieve the full advantage of the procedure and decrease or eliminate disparity in sentences.

Id. at 437 (footnote omitted).

State[3] and Thessen v. State.[4] In 1969, the Alaska legislature enacted legislation providing for appellate review of criminal sentences.[5] The 1969 act, codified as AS 12.55.120, states in part that:

> (a) A sentence of imprisonment lawfully imposed by the superior court for a term or for aggregate terms exceeding one year may be appealed to the supreme court by the defendant on the ground that the sentence is excessive. By appealing a sentence under this section, the defendant waives the right to plead that by a revision of the sentence resulting from the appeal he has been twice placed in jeopardy for the same offense.
>
> (b) A sentence of imprisonment lawfully imposed by the superior court may be appealed to the supreme court by the state on the ground that the sentence is too

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[3] 445 P.2d 815 (Alaska 1968). In Faulkner, Justice Dimond thought the sentence violated both the federal and Alaskan constitutional protections against cruel and unusual punishment. Justice Rabinowitz took the view that the court had jurisdiction to review the sentence and that the sentence was excessive. Chief Justice Nesbett was of the opinion that the court lacked jurisdiction to review the sentence for excessiveness, and further that the sentence did not contravene constitutional protections against cruel and unusual punishment.

[4] 454 P.2d 341, 354 (Alaska 1969). In Berfield v. State, 458 P.2d 1008, 1011 (Alaska 1969), we said:

> A majority of the court as now constituted has not had occasion to express itself on the question presented in Bear of whether this court has jurisdiction to review criminal sentences for abuse of discretion.

[5] SLA 1969, ch. 117. A comprehensive study conducted by the Judicial Council played a significant role in the shaping and enactment of this legislation.

> lenient; however, when a sentence is appealed by the state and the defendant has not appealed the sentence, the court is not authorized to increase the sentence but may express its approval or disapproval of the sentence and its reasons in a written opinion.[6]

In the case at bar, the state has appealed from the sentence imposed. In such circumstances, the provisions of subsection (b) of AS 12.55.120 prohibit any increase in the sentence which was passed by the trial court although this court may express its approval or disapproval of the sentence in a written opinion.

This appeal is the first by the state under the 1969 act. Since this legislation is of great significance to

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[6] Subsection (c) of AS 12.55.120 treats the subject of bail in regard to sentence appeals. Sections 1 and 2 of chapter 117, SLA 1969 amended the statutes which delineate the jurisdiction of both the Supreme and Superior Courts of the State of Alaska. In regard to this court's jurisdiction, it was provided that:

> The supreme court has jurisdiction to hear appeals of sentences of imprisonment lawfully imposed by the superior courts on the grounds that the sentence is excessive or too lenient and, in the exercise of this jurisdiction, may modify the sentence as provided by law and by the constitution of this state. For the purpose of considering appeals of sentences on these grounds, the supreme court may sit in divisions. (SLA 1969, ch. 117, § 1, codified as AS 22.05.010(b)).

In order to conform with the changes instituted by chapter 117, SLA 1969, Supreme Ct. R. 6 was amended to read in part as follows:

> . . . except that the state shall have a right to appeal in criminal cases . . . on the ground that the sentence is too lenient.

the administration of criminal justice in the State of Alaska, we deem it important to express our approval or disapproval of sentences within this category of sentence appeal.[7] For in our view, the 1969 sentence appeal statute manifests the legislature's awareness of existing deficiencies in sentencing practices throughout Alaska's entire court system and the compelling necessity of developing appropriate sentencing criteria. The primary goal of such legislation is an attempt to implement Alaska's constitutional mandate that "Penal administration shall be based on the principle of reformation and upon the need for protecting the public."[8]

In the case at bar, appellant, the State of Alaska, claims that the one-year concurrent sentences were too lenient in view of the severity of the crimes of forcible rape and robbery, the need to deter others from such brutal behavior, and in view of the presentence recommendations, all of which called for significantly greater sentences than those which were imposed by the superior court.

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[7] The lack of sentence review precedent requires that this court's discretion be exercised in favor of expression of our views in an attempt to articulate and develop sentencing standards. The decision to express our views in appeals by the state on grounds of excessive leniency reflects our awareness of the possibility that distorted criteria could result if review were limited exclusively to claims of excessive harshness.

[8] Alaska Const., art. I, § 12.

At the threshold, we are confronted with the problem of determining the scope of our review of criminal sentences under the 1969 act. As we interpret this legislative enactment, it is our duty to examine the proceedings below to review for excessiveness or leniency the sentence imposed by the trial court, in light of the nature of the crime, the defendant's character, and the need for protecting the public. We are also obliged to consider the manner in which the sentence was imposed, including the sufficiency and accuracy of the information upon which it was based.[9] Sentence review by this court must be carried out with a view to effectuate the purposes of the 1969 act, as well as the goals of sentence review in general. The objectives of sentence review have been said to be:

> (i) to correct the sentence which is excessive in length, having regard to the nature of the offense, the character of the offender, and the protection of the public interest;
>
> (ii) to facilitate the rehabilitation of the offender by affording him an opportunity to assert grievances he may have regarding his sentence;
>
> (iii) to promote respect for law by correcting abuses of the sentencing power and by increasing the fairness of the sentencing process; and

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[9] ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Appellate Reivew of Sentences, Standard 3.2 (Approved Draft, 1968).

(iv) to promote the development and application of criteria for sentencing which are both rational and just.[10]

We think this a fair statement of some of the general objectives of sentencing review.

Sentencing is a discretionary judicial function.[11] When a sentence is appealed, we will make our own examination of the record and will modify the sentence if we are convinced that the sentencing court was clearly mistaken in imposing the

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10 ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Appellate Review of Sentences, Standard 1.2 (Approved Draft, 1968). Under the 1969 act, codified as AS 12.55.120(b), the state was given the right of appeal on the ground that the sentence imposed was too lenient. Thus, one of the objectives of sentence review under our statute is to express our disapproval of the sentence which is too lenient, having regard to the nature of the offense, the character of the offender, and protection of the public. See also the President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 25-26 (1967).

11 G. Mueller, Penology on Appeal: Appellate Review of Legal but Excessive Sentences, 15 Vand. L. Rev. 671, 684 (1962), says regarding the discretionary aspects of sentencing in criminal law,

> [s]entencing is a judicial problem, and as long as the judiciary is vested with a discretionary range of sentences, there must be some guard against a possible abuse of such discretion, just as there is appellate supervision over every other exercise of judicial discretion.

See State v. Pete, 420 P.2d 338 (Alaska 1966); Battese v. State, 425 P.2d 606 (Alaska 1967); Egelak v. State, 438 P.2d 712 (Alaska 1968).

sanction it did.[12] Under Alaska's Constitution, the principles of reformation and necessity of protecting the public constitute the touchstones of penal administration.[13] Multiple goals are encompassed within these broad constitutional standards. Within the ambit of this constitutional phraseology are found the objectives of rehabilitation of the offender into a noncriminal member of society, isolation of the offender from society to prevent criminal conduct during the period of confinement, deterrence of the offender himself after his release from confinement or other penological treatment, as well as deterrence of other members of the community who might possess tendencies toward criminal conduct

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[12] In the ABA's Project on Minimum Standards for Criminal Justice, Standards Relating to Appellate Review of Sentences, Standard 3.1, 49-50 (Approved Draft, 1968), while clear recognition is accorded the difficulty of articulating precisely the proper role of reviewing courts in sentencing appeals, it is suggested that

> respect for the discretion of the trial judge should not prevent the reviewing court from making its own inquiry into the justice of the sentence before it. Having made that inquiry, the reviewing court, to be sure, should not 'tinker' with the sentence. Still, the point remains that an independent examination of the justice of the particular sentence is necessary in order for the review process to properly function.

See also President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 26 (1967); President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 357-58 (Avon 1968).

[13] Alaska Const., art. I, § 12.

similar to that of the offender, and community condemnation of the individual offender, or in other words, reaffirmation of societal norms for the purpose of maintaining respect for the norms themselves.[14]

In Faulkner v. State,[15] it was said,

> determination of an appropriate sentence involves the judicious balancing of many and ofttimes competing factors. . . . [of which] primacy cannot be ascribed to any particular factor.[16]

We now turn to the facts of the case at bar. At the time appellee committed the crimes of forcible rape and robbery, he was an unmarried member of the United States Armed Forces

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[14] Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study, 69 Yale L.J. 1454 (1960).

[15] 445 P.2d 815, 823 (Alaska 1968).

[16] In Bear v. State, 439 P.2d 432, 436 (Alaska 1968) (footnote omitted), we said:

> The determination of the exact period of time that a convicted defendant should serve is basically a sociological problem to be resolved by a careful weighing of the principle of reformation and the need for protecting the public.

In Appellate Review of Primary Sentencing Decisions: A Connecticut Case Study, 69 Yale L.J. 1454 (1960), it is stated in part:

> [T]o determine the appropriate type and degree of sanction to be applied, the sentencing authority must decide which aim is primarily to be implemented and the relative weight to be assigned to secondary aims.

stationed at Fort Richardson, near Anchorage, Alaska.[17] Appellee was born in 1948, the youngest of eight children. His youth was spent on the family's dairy farm in Washington County, Maryland. He played basketball on the Boonsboro High School team, was a member of Future Farmers of America and the Boy Scouts. Appellee did not complete high school, having dropped out one month prior to graduation.[18] After a series of varying types of employment, appellee was drafted into the United States Army in 1968. At sentencing, it was disclosed that appellee did not have any prior criminal record, was not a user of drugs, and was only a social drinker.

From the record that has been furnished, it appears that appellee and a companion picked up the prosecutrix at a downtown location in Anchorage. After driving the victim around in their car, appellee and his companion beat her and forcibly

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[17] Appellee's commanding officer stated, prior to sentencing, that appellee was an excellent soldier, takes orders well, and was on the promotion list before his crimes.

[18] Appellee asserts he was forced to take this action because his father needed his help on the family dairy farm.

raped her four times.[19] During this same period of time, the victim's money was removed from her purse. Upon completion of these events, the prosecutrix was permitted to leave the vehicle to the accompaniment of dire threats of reprisals if she attempted to report the incident to the police.

The presentence report which was furnished to the trial court prior to sentencing contains appellee's version of the rapes. According to appellee, he felt "that it wasn't rape as forcible and against her will on my part." As to his conviction of robbery, appellee states: "I found the money on the floor of the car afterwards and was planning on giving it back, but didn't get to see the girl." At the time of sentencing, appellee told the court that he "didn't direct any violence against the girl."

The Division of Corrections, in its presentence report, recommended appellee be incarcerated and parole be denied. The assistant district attorney who appeared for the state at the time of sentencing recommended that appellee receive concurrent seven-year sentences with two years suspended on the two rape convictions, and that the appellee be sentenced to a consecutive five-year term of imprisonment on the robbery conviction, and that this sentence be suspended and appellee be placed on

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[19] The prosecutrix was also forced to perform an act of fellatio with appellee's companion.

probation during this period of time.[20] At the time of sentencing, a representative of the Division of Corrections recommended that appellee serve two years on each of the rape convictions and that appellee be sentenced to two years suspended with probation as to the robbery conviction. In his opinion, there was "an excellent possibility of . . . early parole." Counsel for appellee concurred in the Division of Corrections' recommendation. As was

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[20] After the state made its recommendation, the following transpired:

> THE COURT: I wish Mr. Tobey were -- were here. I would like to find out . . . why he makes that particular recommendation and I presume you don't know?
>
> MR. FELTON: No, Your Honor, this is what I tried to explain to the Court earlier, why the -- defense counsel may specifically request Mr. Tobey's presence rather than my own.
>
> MR. KERNAN [trial counsel for appellee]: I was not aware, Your Honor, that Mr. Tobey would be unavailable and . . . since this is -- I believe the sentence that's been recommended ... it is a very vindictive sentence. . . . Under the circumstances of this case, I would like to have Mr. Tobey here to explain his reasoning.
>
> . . . .
>
> THE COURT: .... I suppose everybody else being here, we might as well go ahead and pass the sentence. . . .
>
> . . . .
>
> MR. FELTON: I think, Your Honor, that primarily the State was concerned -- or appalled by the -- the apparent violence involved in this thing. I think this is probably the major reason that Mr. Tobey recommended these things that he's indicated to me, Your Honor.

indicated at the outset, the trial court imposed concurrent one-year terms of imprisonment and provided for parole at the discretion of the parole board.[21] The trial judge further recommended that appellee be placed in a minimum security facility.

In imposing this sentence, the trial judge remarked that he was "sorry that the [military] regulations would not permit keeping [appellee] . . . in the service if he wanted to stay because it seems to me that is . . . a better setup for everybody concerned than putting him in the penitentiary."[22] At a later point in his remarks, the trial judge said:

> Now as a matter of fact, I have sentenced you to a minimum on all 3 counts here but there will be no problem as far as I'm concerned for you to be paroled at the first day the Parole Board says that you're eligible for parole. . . . [If] the Parole Board should decide 10 days from now that you're eligible for parole and parole you, it's entirely satisfactory

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[21] These were minimum sentences under the applicable statutes. Rape carries a potential range of imprisonment from 1 to 20 years while a conviction of robbery can result in imprisonment from 1 to 15 years.

[22] Collateral consequences flowing from an accused's conviction may be considered by the trial judge in arriving at an appropriate sentence. In addition to giving weight to the fact that military regulations prohibited appellee's retention in the service, the record further indicates that the trial judge also took into consideration the fact that appellee's conviction would result in his receiving an undesirable discharge from the military service.

with the court.

Exercising the appellate jurisdiction vested in this court by virtue of the provisions of AS 12.55.120(b), we express our disapproval of the sentence which was imposed by the trial court in the case at bar. In our opinion, the sentence was too lenient considering the circumstances surrounding the commission of these crimes. It further appears that several significant goals of our system of penal justice were accorded little or no weight by the sentencing court.

Forcible rape and robbery rank among the most serious

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[23] Supreme Ct. R. 21(f) requires that:

> At the time of imposition of sentence the judge shall make a statement on the record explaining his reasons for imposition of the sentence.

The ABA recommends that when sentence is imposed the court

> normally should state for the record in the presence of the defendant the reasons for selecting the particular sentence to be imposed. In the exceptional cases where the court deems it in the best interests of the defendant not to state fully in his presence the reasons for the sentence, the court should prepare such a statement for inclusion in the record . . . .

The basic reasons for this requirement are that a statement of the reasons by the sentencing judge should greatly increase the rationality of sentences, such a statement can be of therapeutic value to the defendant, and the statement can be of significance to an appellate court faced with the prospect of reviewing the sentence.

ABA Project on Minimum Standards for Criminal Justice, Sentencing Alternatives and Procedures, Standard 5.6 (ii) 269, 270-71 (Approved Draft, 1968).

crimes. In the case at bar, the record reflects that the trial judge explicitly stated, on several occasions, that he disbelieved appellee and believed the prosecutrix's version of what happened after she entered the vehicle which was occupied by appellee and his companion. Considering both the jury's and the trial judge's resolution of this issue of credibility, and the violent circumstances surrounding the commission of these dangerous crimes, we have difficulty in understanding why one-year concurrent sentences were thought appropriate.

Review of the sentencing proceedings leads to the impression that the trial judge was apologetic in regard to his decision to impose a sanction of incarceration. Much was made of appellee's fine military record and his potential eligibility for early parole.[24] On the ~~other~~ one hand, the record is devoid of any trace of remorse on appellee's part. Seemingly all but forgotten in the sentencing proceedings is the victim of appellee's rapes and robbery. On the other hand, the record discloses that the trial judge properly considered the mitigating circumstance that the prosecutrix, who at the time did not know either appellee or his companion, voluntarily entered appellee's

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[24] A military spokesman represented to the sentencing court that:

> An occurrence such as the one concerned is very common and happens many times each night in Anchorage. Needless to say, Donald Chaney was the unlucky 'G.I.' that picked a young lady who told.

car. But the crux of our disapproval of the sentence stems from what we consider to be the trial judge's de-emphasis of several important goals of criminal justice.

In view of the circumstances of this record, we think the sentence imposed is not well calculated to achieve the objective of reformation of the accused. Considering the apologetic tone of the sentencing proceedings, the court's endorsement of an extremely early parole, and the concurrent minimum sentences which were imposed for these three serious felonies, we fail to discern how the objective of reformation was effectuated. At most, appellee was told that he was only technically guilty and minimally blameworthy, all of which minimized the possibility of appellee's comprehending the wrongfulness of his conduct.

We also think that the sentence imposed falls short of effectuating the goal of community condemnation, or the reaffirmation of societal norms for the purpose of maintaining respect for the norms themselves. In short, knowledge of the calculated circumstances involved in the commission of these felonies and the sentence imposed could lead to the conclusion that forcible rape and robbery are not reflective of serious antisocial conduct. Thus, respect for society's condemnation of forcible rape and robbery is eroded and reaffirmation of