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e to liability of any Named Insured for Damages resulting from any act or omission as a violation of any state, ordinance or regulation imposing criminal liability, including punitive damages;

f to liability of any Named Insured for any punitive Damages;

g to liability of any Named Insured arising out of acts or omissions which occur at any time the Named Insured's license to practice medicine has been suspended, revoked or voluntarily surrendered;

h to liability of any Named Insured arising out of acts or omissions of an Employed Physician which occur during any time such Employed Physician's license to practice medicine has been suspended, revoked or voluntarily surrendered;

i to liability of any Named Insured for Damages arising out of the dispensing or prescribing of controlled substances by any Named Insured during any time such Named Insured's controlled substance registration has been suspended, revoked or surrendered;

j to liability of any Named Insured for Damages arising out of the dispensing or prescribing of controlled substances by any Employed Physician during any time such Employed Physician's controlled substance registration has been suspended, revoked or voluntarily surrendered;

k to liability of any Named Insured for Damages with respect to:

(1) any claim made against any Named Insured at any time during any Prior Policy Period, regardless of whether or not such claim has been reported to any applicable liability insurer;

(2) any potential claim against any Named Insured of which any Named Insured is aware, or reasonably should have been aware, as of the date this Policy is issued, regardless of whether or not such claim has yet been made or reported to any applicable liability insurer. For purposes of this section (k)(2), potential claim includes without limitation instances where any Named Insured has received either an oral or written communication from a patient or his legal representative, and/or a request by a patient or his legal representative for copies of medical records under circumstances reasonably indicative of a potential claim;

(3) any claim based, in whole or in part, upon any act or omission of the Named Insured while outside the territorial United States and Canada.

PART II - PROFESSIONAL PREMISES LIABILITY

To pay on behalf of the Named Insured all sums which the Named Insured shall become legally obligated to pay as Damages because of:

BODILY INJURY,
PROPERTY DAMAGE, or
PERSONAL INJURY

caused by an Occurrence and arising out of the ownership, maintenance or use, as a Professional Office, of the Insured Premises and all operations necessary or incidental thereto, and MMIE shall have the right and duty to defend any claim or suit against the Named Insured alleging Damages, even if such suit is groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but MMIE shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of MMIE's liability hereunder has been exhausted by payment of judgments or settlements.

Exclusions:

Part II does not apply:

a to **Bodily Injury** or Property Damage arising out of the ownership, operation, use, loading or unloading of
(1) any automobile, aircraft or other air, sea or land vehicle owned or operated by or rented or loaned to the **Named Insured**, or
(2) any other automobile, aircraft or other air, sea or land vehicle operated by any person in the course of his employment by the **Named Insured**;
(3) this exclusion does not apply to the parking of an automobile on the Named **Insured's professional office premises**, if such automobile is not owned by or rented or loaned to the **Named Insured**;

b) to any obligation for which the **Named Insured** or any carrier as his insurer may be held liable under any worker's compensation, unemployment compensation or disability benefits law, or under any similar law;

c) to **Bodily Injury** to any agent or employee, partner, fellow worker or tenant of the **Named Insured** arising out of and in the course of his engagement or employment by the **Named Insured**;

d) to **property damage** to
(1) property owned or occupied by or rented to the **Named Insured**,
(2) property used by the **Named Insured**, or
(3) property in the care, custody or control of the **Named Insured** or as to which the **Named Insured** is for any purpose exercising physical control;
but part (3) of this exclusion does not apply with respect to **property damage**, other than to elevators, arising out of the use of an elevator at the insured premises;

e) to **Bodily Injury** or **Property Damage** due to nuclear reaction, nuclear radiation or radioactive contamination or escape of pollutants, or to any act or condition incident to any of the foregoing;

f) with respects to **Personal Injury**, to liability assumed by the **Named Insured** under any contract or agreement;

g) to liability of any **Named Insured** for **Personal Injury** resulting from an act or ommission which is a willful violation of a statute, ordinance or regulation imposing criminal penalties (including punitive damages);

h) to **Personal Injury** arising out of any publication or utterance described in Group (2), if the first injurious publication or utterance of the same or similar material by or on behalf of the **Named Insured** was made prior to the effective date of this insurance;

i) to **Personal Injury** arising out of a publication or utterance described in Group (2) of Section IV, a., (2) hereof concerning any organization or business enterprise, or its products or services, made by or at the direction of any **Named Insured** with knowledge of the falsity thereof;

j) to any obligation for which the **Named Insured** may be liable arising out of the **performance of Professional Services.**

k) to **liability** of any **Named Insured** with respect to:
(1) **any claim** made against any **Named Insured** at any time during any **Prior Policy Period**, regardless of whether or not such claim has been reported to any applicable liability insurer;
(2) any potential claim against any **Named Insured** of which any **Named Insured** is aware, or reasonably should have been aware, as of the date this Policy is issued, regardless of whether or not such claim has yet been made or reported to any applicable liability insurer. For purposes of this Section, a., (2), potential claim includes without limitation instances where any **Named Insured** has received either an oral or written communication from a patient or his legal representative, and/or a request by a patient or his legal representative for copies of medical records under circumstances reasonably indicative of a potential claim;

3 arising out of, in whole or in part, upon any act or omission of the Named Insured while the Named Insured is outside the territorial limits of Canada.

SUPPLEMENTARY PAYMENTS

In addition to the applicable limit of liability, MMIE will pay:

a) all expenses incurred by MMIE, all costs taxed against the Named Insured in any suit defended by MMIE and all interest on that part of any judgment which does not exceed the limit of MMIE's liability thereon which accrues after entry of the judgment and before MMIE has paid or tendered or deposited in court such part of the judgment;

b) premiums on appeal bonds required in any suit defended and appealed by MMIE and premiums on bonds to release attachments in any such suit for an amount not in excess of the applicable limit of liability of this Policy, but MMIE shall have no obligation to apply for or furnish any such bonds;

c) expenses incurred by the Named Insured for first aid to others at the time of an accident, for Bodily Injury to which this Policy applies;

d) the reasonable expenses incurred by the Named Insured for each day or part of a day the Named Insured is required to attend the trial of a civil suit against the Named Insured for Damages resulting from causes of action as described under Parts I and II, not in excess of $200.00 per day;

e) if coverage is purchased under Part II, reasonable medical expenses for Bodily Injury sustained by any person which resulted from an Occurrence on the Named Insured's professional office premises, or during any operations necessary or incidental thereto regardless of the Named Insured's liability for such Bodily Injury, and all of which were incurred by the Named Insured within one (1) year from such Occurrence; provided, however, that payments under this provision shall not exceed $1,000 per person and $10,000 per accident, and shall not apply to Bodily Injury:

1 arising out of the ownership, maintenance, operation, use, loading or unloading of

a any automobile, aircraft or other air, sea or land vehicle owned or operated by, or rented or loaned to the Named Insured, or

b any other automobile, aircraft or other air, sea or land vehicle operated by any person in the course of his employment by the Named Insured;

but this exclusion does not apply to the parking of an automobile on the Named Insured's professional office premises, if such automobile is not owned by or rented or loaned to the Named Insured;

2 due to war, whether or not declared, civil war, insurrection, rebellion or revolution or to any act or condition incident to any of the foregoing;

3 to the Named Insured, any agent, employee, fellow worker, partner, tenant or other person regularly residing on the Named Insured's professional office premises, or any employee of any of the foregoing if the Bodily Injury arises out of and in the course of his employment therewith;

4 to any other tenant if the Bodily Injury occurs on that part of the Named Insured's professional office premises rented from the Named Insured or to any agent or employee of such a tenant if the Bodily Injury occurs on the tenant's part of the insured premises and arises out of and in the course of his employment for the tenant;

5 to any person while engaged in maintenance and repair of or alteration, demolition or new construction at the Named Insured's professional office premises;

6 to any person if any benefits for such Bodily Injury are payable or required to be provided under any workers compensation, unemployment compensation or disability benefits law, or under any similar law.

II. DEFINITION OF INSURED

a) The word **Named Insured** shall mean as respects Part II:
   1) under **Individual Professional Liability** each [illegible]
      Page;
   2) under **Partnership, Professional Association, Business Trust** or [illegible]
      Professional Liability the Partnership, Professional [illegible]
      Proprietorship named on the Declarations Page, [illegible]
      respect to [illegible] of others, but [illegible]
      Named Insured with respect to liability for his personal [illegible]
      nature;
   3) any **Paramedical Employee** of the **Named Insured**, while [illegible]
      his employment duties, provided that notice of the employment [illegible]
      Paramedical Employees is given to MMIE when required;
   4) any other employee not a physician or **Paramedical Employee** of the **Named Insured** while acting within the scope of his duties as such.

   The insurance afforded applies separately to each **Named Insured** against [illegible]
   is made or suit is brought except with respect to limits of MMIE's liability [illegible]
   in Article IV, Section b.

b) The word **Named Insured** shall mean as respects Part II:
   the **Named Insured**, and includes any executive officer, director, or [illegible]
   thereof while acting within the scope of his duties as such, and any organization or proprietor with respect to real estate management for the **Named Insured**. If the **Named Insured** is a Partnership, Professional Association, Business Trust or Proprietorship, the unqualified words "**Named Insured**" also include any partner, shareholder, beneficiary or proprietor or member therein but only with respect to his liability as such.

III. POLICY PERIOD - TERRITORY

a) Under Part I the insurance provided hereby only applies to **Professional Services** rendered or which should have been rendered subsequent to the retroactive date stated on the Declarations Page and then only if claim is first made during the **Policy Period** or a **Reporting Period** purchased in accordance with Article IV, Section c.

   A claim shall be considered to be first made when MMIE first receives notice of the claim or of an event which may subsequently give rise to a claim (see Article IV, Section c for **Named Insured's** rights to have extended reporting endorsements issued.

   A claim shall be considered to be "first made during the **Policy Period**" or "first made during a **Reporting Period**" only under the following conditions:
   1) If during the **Policy Period** or a **Reporting Period** if purchased the **Named Insured** shall have knowledge or become aware of any event, arising out of the rendering or failure to render **Professional Services** covered hereby, which may subsequently give rise to a claim and shall, during the **Policy Period** or such **Reporting Period**, give written notice thereof to MMIE in accordance with Article IV, Section [illegible] of this Policy, then such notice shall be considered a claim hereunder;
   2) if any claim is first made during the **Policy Period** or a **Reporting Period** if purchased, alleging injury to an individual that would be covered under this Policy, any additional claims which are made, or suits or proceedings in connection therewith which are brought subsequent to the **Policy Period**

Reporting Period: Damages [illegible] Policy Period [illegible] Reporting Period.

c. Under Part II, the insurance afforded hereby applies to **Bodily Injury**, **Property Damage** or **Personal Injury** which occurs during the **Policy Period** in the territory of United States and Canada.

IV. CONDITIONS

a. **Definitions** - As used in this Policy or Endorsements forming a part hereof:

1. Applicable to Part I:

"Damages" means all Damages, including **Damages** for death, which are payable because of injury to which this insurance applies, including any counter claim made in a suit brought against the **Named Insured** in the process of attempting to collect fees.

"Named Insured" means the person named on the Declarations Page.

"Paramedical Employee" includes medical assistants, technicians including, but not limited to, [illegible] therapy, laboratory and x-ray, nurse anesthetists [illegible] registered nurses, midwives, opticians, [illegible], physical therapists, psychologists, [illegible], nurse practitioners e.g., [illegible] and any other nurse practitioner or nurse employed [illegible] function in the practice of the **Named Insured's** profession.

"Policy Period" means the period of coverage commencing on the date shown on the Declarations Page attached to this Policy as Policy effective date and ending at the effective date of termination, expiration or cancellation of coverage of this Policy, and specifically excludes any **Reporting Period** purchased hereunder.

"Policy Year" means each consecutive annual period of the policy.

"Prior Policy Period" means the period of coverage commencing on the retroactive date shown on the Declarations page attached to this policy and ending upon the date shown as Policy Effective Date.

"Professional Services" means those services performed in the practice of the **Named Insured's** profession as physician including service as 1) a member of any committee of Minnesota Medical Insurance Exchange or Minnesota Medical Management, Inc.; 2) a member of any committee of the American Medical Association or its constituent or component society thereof; 3) a member of any committee of a national medical society recognized by the American Medical Association or its constituent or component society thereof; 4) a member of any committee of any hospital accredited by the Joint Commission on Accreditation of Hospitals or the American Osteopathic Association; 5) a member of any hospital consultation or professional standards review board or committee.

"Reporting Period" [illegible]
[illegible] to be out of Professional Services rendered [illegible] subsequent to the retroactive date and prior to the end of the Policy Period.

"Employed Physician" includes any duly licensed [illegible] employed by the Named Insured.

(2) Applicable to Part II:

"Bodily Injury" means Bodily Injury, sickness or disease or death [illegible] person.

"Damages" means 1 Damages for death and for care and loss [illegible] resulting from Bodily Injury, 2 Damages for loss of use of property [illegible] from Property Damage and 3 Damages which are payable because of Personal Injury.

"Medical Expense" means expenses for necessary medical, surgical, [illegible] dental services, including prosthetic devices, and necessary ambulance, professional nursing and funeral services.

"Named Insured" means the person named on the Declarations Page.

"Occurrence" means an accident, including injurious exposure to conditions, which results, during the Policy Period, in Bodily Injury, Property Damage or Personal Injury neither expected nor intended from the standpoint of the Named Insured.

"Personal Injury" means one or more of the following groups of offenses committed during the Policy Period:

Group 1 false arrest, detention or imprisonment, or malicious prosecution;

Group 2 the publication or utterance of a libel or slander or of other defamatory or disparaging material, or a publication or utterance in violation of an individual's right of privacy, except publications or utterances in the course of or related to advertising, broadcasting or telecasting activities conducted by or on behalf of the Named Insured;

Group 3 wrongful entry or eviction, or other invasion of the right of private occupancy.

"Property Damage" means injury to or destruction of tangible property.

"Professional Office Premises" means (1) the professional office premises designated on the Declarations Page (2) professional office premises alienated by the Named Insured other than premises constructed for sale by the Named Insured, if possession has been relinquished to others, and 3 professional office premises as to which the Named Insured acquires ownership or control and reports his intention to insure such premises under this policy and no other within 30 days after such acquisition and includes the ways immediately adjoining such premises on land.

c. Limits of Liability

1. Under Part I, the limit of liability stated on the Declarations Page as applicable to "each claim" is the limit of MMIE's liability for loss resulting from any claim or suit or claims or suits first made during the Policy Year or Reporting Period because of injury to or death of any one person, subject to the following limits of liability:

If the Named Insured elects for the Reporting Endorsement to apply, the limit of liability stated on the Declarations Page as applicable to "each claim" at the time the Policy or Reporting Period terminates is the limit of MMIE's liability for loss resulting from any one claim or suit or all claims or suits first made during each Reporting Endorsement period or any renewal thereof because of injury to or death of any one person.

Subject to the above provisions respecting "each claim," the limit of liability stated on the Declarations Page as "aggregate" is the total limit of MMIE's liability for all claims or suits first made during the effective Policy Year or during each Reporting Period. If any Reporting Period exceeds one year, the "aggregate" limit of liability applies separately to each consecutive annual period commencing with the effective date of the reporting endorsement.

Regardless of the number of Named Insureds under this Policy the inclusion of more than one Named Insured hereunder shall not operate to increase the limits of MMIE's liability.

2. Under Part II:

The limit of liability stated on the Declarations Page as applicable to "each Occurrence" is the limit of MMIE's liability for all Damages because of Bodily Injury, Property Damage or Personal Injury regardless of the number of 1. Named Insureds under this Policy, 2. persons or organizations who sustain Bodily Injury, Property Damage or Personal Injury, or 3. claims made or suits brought on account of Bodily Injury, Property Damage or Personal Injury. For the purpose of determining the limit of MMIE's liability, all Bodily Injury, Property Damage and Personal Injury arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one Occurrence.

d. Reporting Endorsement

Under Part I, in the event of termination of insurance either by non-renewal or cancellation of this Policy or termination of a Reporting Period, the Named Insured shall have the right upon the payment of an additional premium to be computed in accordance with MMIE's rules, rates, rating plans and premiums applicable on the effective date of the endorsement to have issued an endorsement(s) providing additional Reporting Period(s) in which claims otherwise covered by this Policy may be reported. Such right, however, must be exercised by the Named Insured by written notice to MMIE within thirty (30) days after such termination date.

e. Named Insured's Duties in the Event of an Occurrence, Claim, or Suit

1. As soon as the Named Insured obtains knowledge or becoming aware of any alleged Professional Incident which may give rise to a claim, written notice containing the particulars sufficient to identify the insured with respect to the circumstances out of which it arose, including the time, place and address of the injured, the nature and extent of the Professional Services rendered or which should have been rendered and the nature and extent of the injury or claims anticipated, shall be given by or for the

Named Insured to MMIE or any of its authorized representatives as soon as practicable.

2) If claim is made or suit is brought against the **Named Insured**, the Named Insured **shall** immediately forward to MMIE every demand, notice, summons or other process received by him or his representative.

3) The **Named Insured** shall cooperate with MMIE and, upon MMIE's request, assist in making settlements, in the conduct of suits and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the **Named Insured** because of **Bodily Injury, Property Damage** or Personal Injury with respect to which insurance is afforded under this Policy and the Named **Insured** shall attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses. The **Named Insured** shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for first aid to others at the time of accident.

e. **Action Against MMIE**

No action shall lie against MMIE unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this Policy, nor until the amount of the **Named Insured's** obligation to pay shall have been finally determined either by final judgment after expiration of period for appeal against the **Named Insured** after actual trial or by written agreement of the **Named Insured**, the Claimant and MMIE.

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this Policy to the extent of the insurance afforded by this Policy. No person or organization shall have any right under this Policy to join MMIE as a party to any action against the Named Insured to determine the Named **Insured's** liability, nor shall MMIE be impleaded by the **Named Insured** or his legal representative. Bankruptcy or insolvency of the Named Insured or of the Named Insured's estate shall not relieve MMIE of any of its obligations hereunder.

f. **Other Insurance**

With respect to Part I, if the **Named Insured** has other insurance against a loss covered by this Policy, MMIE shall not be liable under this Policy for a greater proportion of such loss than the limit of liability stated on the Declarations Page bears to the total limit of liability of all valid and collectible insurance against such loss.

With respect to Part II, the insurance afforded by this Policy is primary insurance, **except when stated** to apply in excess of or contingent upon the absence of other **insurance.** When this insurance is primary and the **Named Insured** has other insurance **which is stated** to be applicable to the loss on an excess or contigent basis, the amount of **MMIE's liability** under this Policy shall not be reduced by the existence of such other insurance. When both this insurance and other insurance applies to the loss on the same basis, whether primary, excess or contingent, MMIE shall not be liable under this Policy for a greater proportion of the loss than that stated in the applicable contribution provision below:

(1) **Contribution by Equal Shares**

If all of such other valid and collectible insurance provides for contribution on equal shares, MMIE shall not be liable for a greater proportion of such loss than

applicable if each insurer contributes an equal share until each insurer equals the lowest applicable limit of liability under any one the full amount of the loss is paid and with respect to any amount of loss paid, the remaining insurers continue to contribute equal shares of the remaining amount of the loss until each such insurer has paid its limit in full or the full amount of the loss is paid.

2. Contribution by Limits

If any of such other insurance does not provide for contribution by equal shares, MMIE shall not be liable for a greater proportion of such loss than the applicable limit of liability under this Policy for such loss bears to the total applicable limit of liability of all valid and collectible insurance against such loss.

g. Subrogation

In the event of any payment under this Policy, MMIE shall be subrogated to all the **Named Insured's** rights of recovery therefore against any person or organization excluding, under Part I, employees of the **Named Insured**) and MMIE may require an assignment of such rights from the **Named Insured** to the extent of any payments made under this Policy plus reasonable cost of collection. The **Named Insured** shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The **Named Insured** shall do nothing either before or after loss to prejudice such rights and shall cooperate with MMIE in assisting it to protect its rights under this provision. The **Named Insured** acknowledges that MMIE's rights under this provision shall be considered as the first priority claim against any such person or organization, to be paid before any other claims which may exist. MMIE may, at its option, take such action as may be necessary and appropriate to preserve its rights under this provision, including the right to bring suit in the name of the **Named Insured.** MMIE may, at its option, collect such amounts from the proceeds of any settlement or judgment that may be recovered by the **Named Insured** or his legal representative. Any such proceeds of settlement or judgment shall be held in trust by the **Named Insured** for the benefit of MMIE, and MMIE shall be entitled to recover reasonable attorneys' fees from the **Named Insured** incurred in collecting proceeds held by him.

h. Changes

Notice to any representative or knowledge possessed by any representative or by any other person shall not effect a waiver or a change in any part of this Policy or prevent MMIE from asserting any right under the terms of this Policy; nor shall the terms of this Policy be waived or changed, except by endorsement issued to form a part of this Policy. Failure of MMIE to require performance by the **Named Insured** of any **obligations** under this Policy shall not affect its right to require performance of such **obligation.** Any waiver by MMIE of any breach of any provision of this Policy shall not be construed as a waiver of any continuing or succeeding breach of such provision, a waiver or modification of the provision itself, or a waiver or modification of any right under this Policy.

i. Assignment

Assignment of interest under this Policy shall not bind MMIE until its consent is endorsed hereon; if, however, the **Named Insured** shall die, such insurance as is afforded by this Policy shall apply (1) to the **Named Insured's** legal representative, as the **Named Insured**, but only while acting within the scope of his duties as such, and

with respect to the property of the Named Insured. ... temporary custody thereof, as Named Insured, but only until the ... qualification of the legal representative.

j. **Cancellation**

This Policy may be canceled by the **Named Insured** by surrendering ... any of its authorized representatives or by mailing to MMIE written ... when thereafter the cancellation shall be effective. This Policy may be ... MMIE by mailing to the **Named Insured** at the address shown in this Policy ... notice stating a date not less than ten days thereafter when such cancellation ... effective. The mailing of notice as aforesaid shall be sufficient proof of notice. The time of surrender or the effective date and hour of cancellation stated in the notice shall become the end of the **Policy Period**. Delivery of such written notice either by the **Named Insured** or by MMIE shall be equivalent to mailing.

If the **Named Insured** cancels this Policy, earned premium shall be computed in accordance with the customary short rate table and procedures. If MMIE cancels, earned premium shall be computed pro-rata. Premium adjustment may be made either at the time cancellation is effected or as soon as practicable after cancellation becomes effective, but tender by MMIE of unearned premium is not a condition of cancellation.

This policy may be canceled by MMIE without cause and made retroactive to the inception of the Policy if fraud by the **Named Insured** with regard to the information the **Named Insured** provided MMIE is proved.

k. **Declarations**

By acceptance of this Policy, the **Named Insured** agrees that the statements on the Declarations Page are his agreements and representations, that this Policy is issued in reliance upon the truth of such representations and that this Policy embodies all agreements existing between himself and MMIE or any of its agents relating to this insurance.

l. **Inspection and Audit**

MMIE shall be permitted but not obligated to inspect the **Named Insured's** premises at any time. Neither MMIE's right to make inspections nor the making thereof nor any report thereon shall constitute an undertaking, on behalf of or for the benefit of the **Named Insured** or others, to determine or warrant that such premises are safe or healthful, or are in compliance with any law, rule or regulation.

MMIE may examine and audit the **Named Insured's** books and records at any time during the **Policy Period** and extensions thereof and within three years after the final termination of this policy, as far as they relate to the subject matter of this insurance.

m. **Governing Law**

The validity, construction and enforceability of this Policy shall be governed in all respects by the law of the State of Minnesota or such other states in which the **Named Insured** performs **Professional Services** and MMIE is qualified to sell insurance. Any and all provisions of this Policy which are in conflict with statutes of these states are understood, declared and agreed to be automatically changed to conform to the laws.

n. Assessability

This Policy is non-assessable. The **Named Insured** hereby acknowledges that he has nor other members of MMIE shall be obligated for any debts and liabilities of MMIE.

o. **Severability**

In the event any portion of this Policy shall be held to be invalid, the same shall not affect, in any respect whatsoever, the validity of the remainder of this Policy.

p. **Gender**

Any personal pronoun of the masculine gender used in this Policy shall be deemed to include the feminine gender.

q. **Notices**

Except as otherwise specifically stated in this Policy, all notices or other communications required or contemplated by this Policy shall be addressed:

1) If to MMIE, at its offices;
2) If to the **Named Insured**, at its address stated on the Declarations Page or at such new address as the **Named Insured** may designate by written notice to MMIE.

V. NUCLEAR ENERGY LIABILITY EXCLUSION

A. This Policy does not apply:

1. to injury or death including all forms of radioactive contamination:
   a. with respect to which an **Named Insured** under this Policy is also an **Named Insured** under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters or Nuclear Insurance Association of Canada, or would be an **Named Insured** under any such policy but for its termination upon exhaustion of its limit of liability; or
   b. resulting from the hazardous properties of nuclear material and with respect to which (1) any person or organization is required to maintain financial protection pursuant to the Atomic Energy Act of 1954, or any law amendatory thereof, or 2) **Named Insured** is, or had this Policy not been issued would be, entitled to indemnity from the United States of America, or any agency thereof, under any agreement entered into by the United States of America, or any agency thereof, with any person or organization.

2. to injury or death including all forms of radioactive contamination resulting from the hazardous properties of nuclear material, if
   a. the nuclear material 1) is at any nuclear facility owned by, or operated by or on behalf of, an **Named Insured** or 2) has been discharged or dispersed therefrom;
   b. the nuclear material is contained in spent fuel or waste at any time possessed, handled, used, processed, stored, transported or disposed of by or on behalf of an **Named Insured**; or

... the ... least arises out of the ... material ... material, parts or equipment ... construction, maintenance, operation or use of ...

B. As used in this exclusion:
"hazardous properties" include radioactive, toxic or ...
"nuclear material" means source material, special ... material;
"source material," "special nuclear material," and "byproduct material" ... meanings given them in the Atomic Energy Act of 1954 or in any ... thereof;
"spent fuel" means any fuel element or fuel component, ... been used or exposed to radiation in a nuclear reactor;
"waste" means any waste material (1) containing byproduct material ... resulting from the operation by any person or organization of any ... included within the definition of nuclear facility as set forth ... paragraph (a) or (b);
"nuclear facility" means
(a) any nuclear reactor.
(b) any equipment or device designed or used for (1) separating the ... uranium or plutonium, (2) processing or utilizing spent fuel, or ... processing or packaging waste.
(c) any equipment or device used for the processing fabricating or ... special nuclear material if at any time the total amount of such material in the custody of the insured at the premises where such equipment or device is located consists of or contains more than 25 grams of plutonium or uranium 233 or any combination thereof, or more than 250 grams of uranium 235.

IN WITNESS WHEREOF, the said Minnesota Medical Insurance Exchange has caused this Policy to be signed by its Chairman, and Secretary, but it shall not be valid unless countersigned on the Declarations Page by a duly authorized representative of MMIE.

Secretary
Minnesota Medical Insurance Exchange

Robert S. Flem

Chairman
Minnesota Medical Insurance Exchange

INTRODUCTION

This policy protects against a variety of losses. There are also some restrictions. We've written the policy in plain, easy-to-understand English. We encourage you to read it carefully to determine what is and is not covered, as well as the rights and duties of those protected.

The words you, your and yours mean the insured named here:

Which is a:

- ☐ corporation
- ☐ individual
- ☐ partnership
- ☐ joint venture
- ☐ other
- ☐ condominium

We, us, our and ours mean the **St. Paul Fire and Marine Insurance Company**. We're a capital stock company located in St. Paul, Minnesota.

Your policy is composed of General Rules, an explanation of What To Do If You Have A Loss, one or more Coverage Summaries, and one or more Insuring Agreements explaining your coverage. It may also include one or more endorsements. Endorsements are documents that change your policy. The agreements and endorsements included when this policy begins are listed below. One of our authorized representatives must also countersign the policy before it is valid.

This policy will begin on_____
and continue until_____
Your former policy, number _____
is automatically cancelled on the date this policy begins.

In return for your premium, we'll provide the protection stated in this policy.
Your premium is_____

Forms Included When This Policy Begins

Form number and edition date

Our authorized representative is:

President Secretary

Authorized Representative Date

The St. Paul

Important Note: This is a claims made coverage. Please read it carefully, especially the When a Claim Is Made and Optional Reporting Endorsement sections

Physicians' Professional Liability Protection–Claims Made

Policy issued to	Agreement takes effect	Policy number

How this agreement protects you

This agreement provides protection against professional liability claims which might be brought against you in your practice as a physician or surgeon.

Who's protected under this agreement

Name	Retroactive Date	Name	Retroactive Date
Name of Covered Professional Organization			

Each person and organization named above or in the "Who's protected" section of the Introduction page is covered under this agreement. The words you, your and yours refer to these people or this organization.

Limits of your coverage

Two limits apply to the amount we'll pay for professional claims. These limits are shown below or on the Introduction page. The limits apply separately to each covered person. When an organization is also covered, the limits apply separately to that organization.

$ _____ Each person limit. This is the most we'll pay for all claims resulting from the injury or death of any one person.

$ _____ Total limit. This is the most we'll pay for all claims first made in a policy year. By policy year we mean each consecutive annual period of the policy. If no total limit is shown, the total limit is 3 times the each person limit.

When you're covered

To be covered the professional service must have been performed (or should have been performed) after your retroactive date that applies. The claim must also first be made while this agreement is in effect.

When is a claim made?

A claim is made on the date you first report an incident or injury to us or our agent. You must include the following information:

- Date, time and place of the incident
- What happened and what professional service you performed.
- Type of claim you anticipate.
- Name and address of injured party
- Name and address of any witness.

What this agreement covers

Individual coverage. Your professional liability protection covers you for damages resulting from
1. Your providing or withholding of professional services.

This agreement must be signed only when it's issued after the effective date of the policy.

Authorized Representative

These rules apply to the entire policy unless you're notified otherwise.

Special Rights And Duties Of The First Named Insured

You agree that when more than one insured is named in the introduction, the first named insured has special rights and duties. These rights and duties are explained in the following General Rules:

- Premiums.
- Cancellation.
- Policy Changes.

Your Policy Period

Insuring agreements in this policy begin at 12:01 a.m., standard time, on the effective date. If this policy replaces policies ending at noon, rather than 12:01 a.m., coverage begins at noon when the old policy ends.

Insuring agreements added to this policy after its effective date begin on the effective date of the added agreement.

Coverage ends at 12:01 a.m., standard time, on the expiration date. If all or part of this policy is cancelled for any reason before that date, that coverage will end at 12:01 a.m., standard time, on the cancellation date.

Premiums

We compute the premium you pay for this policy using information available at the time. So, all or part of your premium may be based on estimates. If estimates are used, we'll compute your actual premium when complete information is available at the end of the policy period. If it's more than you've paid, you'll owe us the difference. If it's less, we'll return the difference. But you won't pay less than any minimum annual premium agreed on. The first named insured is responsible for paying all premiums and will be the one to whom we'll pay any return premiums.

You must keep accurate records of the information we'll need to compute your premium. Your agent can explain the type of records we'll need. The first named insured agrees to send copies of these records at the end of each policy period - or any other time we request them.

Our Right To Inspect And Audit

You agree to let us inspect your property and business operations during normal business hours while this policy is in force. We're not, however, required to make inspections. Nor will we guarantee that your property or operations are safe, or that they conform to any laws, codes, standards or regulations. This rule also applies to any organization which makes insurance inspections, surveys, reports or recommendations for us.

You also agree to let us examine and audit your financial books and records that relate to this insurance at any time up to 3 years after this policy ends.

Policy Changes

This policy contains all the agreements between you and us concerning this insurance. The first named insured is authorized to make changes in this policy with our consent. This policy can only be changed by a written form included as part of the policy. This form must be signed by one of our authorized representatives.

We make changes in our standard insurance policy forms from time to time. These changes must conform to state law and are filed with insurance supervisory authorities for approval. While your coverage is in force we can make any change in the form of this policy that broadens or extends your coverage. If we do, and the change can be added to your policy without increasing the premium, you'll automatically receive the benefit of the extended or broadened

Lawsuits Against Us

No one can sue us to recover under this policy unless all of its terms have been lived up to.

If your policy includes property insurance. Any lawsuit to recover on a property claim must begin within 2 years after the date on which the direct physical loss or damage occurred. State law gives you more time for property located in these states:
•North Dakota, North Carolina,
Maryland - 3 years;
•Wyoming - 4 years; and
•Kansas, Nebraska - 5 years.

If your policy includes liability insurance. No one can sue us on a liability claim until the amount of the protected person's liability has been finally decided either by a trial or by a written agreement signed by the protected person, by us and by the party making this claim. Once liability has been determined by judgment or by written agreement, the party making the claim may be able to recover under this policy, up to the limits of coverage that apply. But that party can't sue us directly or join us in a suit against the protected person until liability has been so determined.

If the protected person or his or her estate goes bankrupt or becomes insolvent, we still will be obligated under this policy.

Provision Required By Law

"This policy is issued under and in pursuance of the laws of the State of Minnesota, relating to Guaranty Surplus and Special Reserve Funds, Chapter 437, General Laws of 1909. (This provision applies only if this policy is issued in the St. Paul Fire and Marine Insurance Company.)

Loss Or Damage To Covered Property

If an accident or incident causes a property loss that's covered under this policy you must:

1. Notify the police if a law may have been broken.

2. Tell us or our agent what happened as soon as possible. Include the time and place of the event, a description of the property and the names and addresses of any witnesses.

3. Do what is reasonable and necessary to protect covered property from further damage. Keep a record of your expenses for consideration in your claim.

4. If feasible, separate the damaged property from the undamaged and make an inventory of the damaged items. This doesn't apply to Auto insurance if included in your policy.

5. Cooperate with us in the investigation and settlement of the claim. Show us the damaged property and any records you have to prove your loss at such times as may reasonably be required. Also permit us to take samples of damaged property for inspection, testing, and analysis. If your loss involves a covered auto, permit us to inspect the auto before it is repaired or disposed of.

6. Allow us to question you under oath at such times as may be reasonably required about any matter relating to this insurance or your claim, including your books and records. If we do, you agree to sign a copy of your answers.

7. Send us a signed, sworn statement of loss containing the information we request to investigate the claim. You must do this within 60 days after our request. We'll supply the forms. We'll pay within 30 days after we reach agreement with you.

Someone Is Injured Or Something Happens Which Can Result In A Liability Claim

If an accident or incident occurs that may involve this policy, you or any other protected person involved must:

1. Notify the police if a law may have been broken.

2. Tell us or our agent what happened as soon as possible. Do this even though no claim has been made but you or another protected person is aware of having done something that may later result in a claim. This notice should include:
- The time and place of the event;
- The protected person involved;
- The specific nature of the incident including the type of claim that may result; and
- The names and addresses of any witnesses and injured people.

Important Exception For Hospitals
If Professional Hospital Liability Protection - Claims Made is included in this policy, we won't consider a "Patient Incident Report" or "Variance Report" to be your report of a claim made - even if you send it to us or one of our agents.

3. Send us copies of all demands or legal documents if someone makes a claim or starts a lawsuit.

4. Cooperate and assist us in securing and giving evidence, attending hearings and trials, and obtaining the attendance of witnesses.

5. Not assume any financial obligation or pay out any money without our consent. But this rule doesn't apply to first aid given to others at the time of an accident.

PREJUDGMENT INTEREST ENDORSEMENT

St Paul

This endorsement changes your:

How Your Coverage Is Changed

Your Liability Protection is changed by adding the following to the Additional Benefits section.

Prejudgment Interest. We'll pay the prejudgment interest awarded on that part of any judgment we pay. But if we make an offer to pay the limit of coverage that applies, we won't pay the prejudgment interest that accumulates after the date of our offer.

Other Terms

All other terms of your policy remain the same.

COMBINED COMPANIES
LOSS EXPERIENCE
MINNESOTA

REPORT YEAR	QUANTITY CLAIMS	EARNED PREMIUM	PAID LOSS	PAID LOSS EXPENSE	OUTSTANDING LOSS RESERVE	OUTSTANDING LOSS EXP.	TOTAL LOSSES and RESERVES	LOSS RATIO
1982	595	$17,889,490	$13,579,982	$ 2,566,569	$ 1,840,000	$ 177,822	$ 18,164,373	101.5%
1983	660	21,186,512	6,584,010	1,888,960	2,890,501	458,015	11,821,492	55.8
1984	662	25,677,303	9,324,311	2,267,169	7,850,000	1,266,545	20,708,025	80.6
1985	811	34,469,869	9,170,537	2,756,639	16,608,353	2,311,973	30,847,502	89.5
1986	635	45,306,249	3,280,682	1,282,389	21,075,356	4,123,340	29,761,767	65.7
1987	659	55,612,065	1,157,647	454,174	26,701,391	5,812,193	34,125,405	61.4
TOTALS	4,022	$200,141,488	$43,097,175	$11,215,900	$76,965,601	$14,149,888	$145,428,564	72.7%

COMBINED COMPANIES
LOSS EXPERIENCE
NORTH DAKOTA

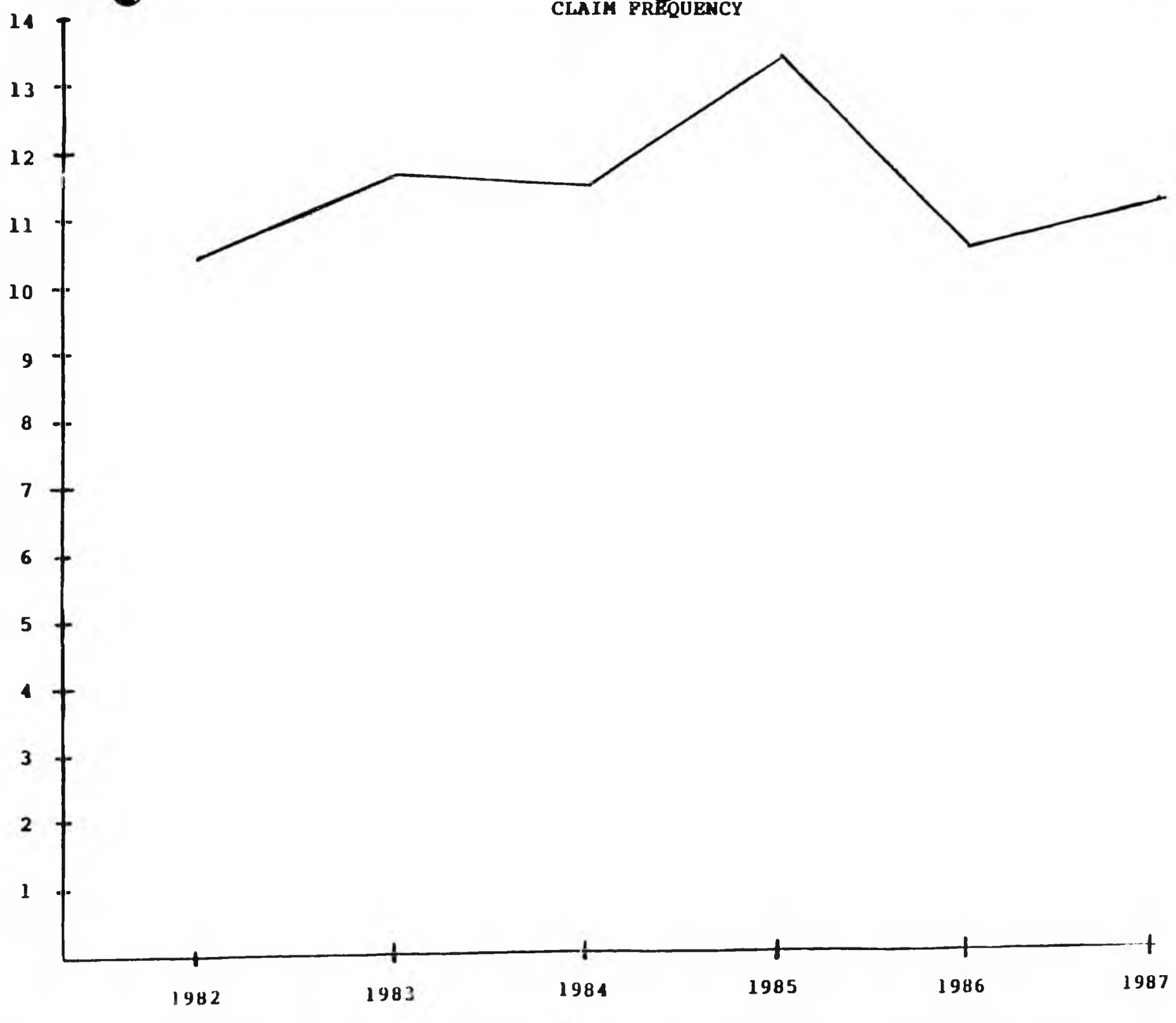
REPORT YEAR	QUANTITY CLAIMS	EARNED PREMIUM	PAID LOSS	PAID LOSS EXPENSE	OUTSTANDING LOSS RESERVE	OUTSTANDING LOSS EXP.	TOTAL LOSSES and RESERVES	LOSS RATIO
1982	77	$ 2,907,823	$1,152,407	$ 921,361	$ 645,000	$ 91,328	$ 2,810,096	96.6%
1983	66	3,298,398	931,254	507,344	125,000	16,718	1,580,316	47.9
1984	58	3,939,474	2,459,148	1,155,779	880,000	144,862	4,639,789	117.8
1985	67	5,116,721	846,894	663,964	2,126,000	211,323	3,848,181	75.2
1986	69	6,569,294	1,399,882	616,777	3,100,000	1,004,435	6,121,094	93.2
1987	76	9,222,907	149,950	195,066	4,958,000	552,172	5,855,188	63.5
TOTALS	413	$31,054,617	$6,939,535	$4,060,291	$11,834,000	$2,020,838	$24,854,664	80.0%

COMBINED COMPANIES
LOSS EXPERIENCE
SOUTH DAKOTA

REPORT YEAR	QUANTITY CLAIMS	EARNED PREMIUM	PAID LOSS	PAID LOSS EXPENSE	OUTSTANDING LOSS RESERVE	OUTSTANDING LOSS EXP.	TOTAL LOSSES and RESERVES	LOSS RATIO
1982	49	$ 2,572,536	$1,301,980	$ 345,782	$ 70,000	$ 20,855	$ 1,738,617	67.6%
1983	50	2,455,518	214,614	117,394	25,000	73,791	430,799	17.5
1984	48	2,873,114	226,205	123,179	50,000	19,630	419,014	14.6
1985	59	3,864,849	630,623	456,637	940,000	183,685	2,210,945	57.2
1986	54	5,126,260	550,282	172,648	2,944,500	509,662	4,177,092	81.5
1987	52	6,509,527	685,474	111,813	996,500	552,165	2,345,952	36.0
TOTALS	312	$23,401,804	$3,609,178	$1,327,453	$5,026,000	$1,359,788	$11,322,419	48.4%

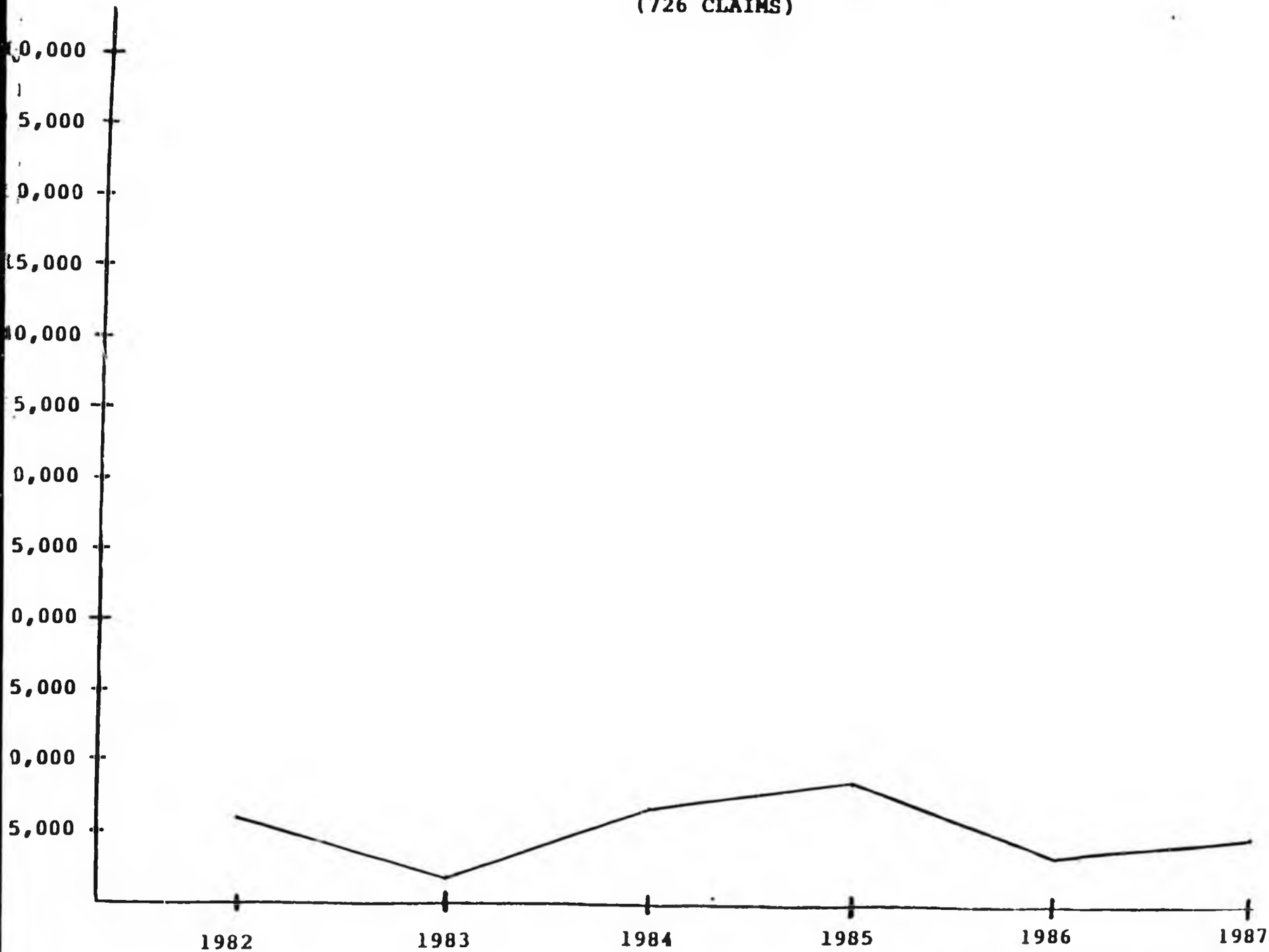
LOSS PAYMENT AND OPEN RESERVE DISTRIBUTION COMPARISON

Payment/Reserve Distribution	Number of Payments (Closed Claims)	Number of Reserves (Open Claims)
$ - 0	2,707	0
1 - 999	82	55
1,000 - 4,999	182	28
5,000 - 14,999	199	165
15,000 - 24,999	111	109
25,000 - 49,999	151	145
50,000 - 99,999	112	179
100,000 - 249,999	97	157
250,000 - 499,999	33	97
500,000 - 999,999	12	26
1,000,000 - Over	3	8
Unknown	0	89
TOTAL	3,689	1,058


CLAIM FREQUENCY
14
13
12
11
10
9
8
7
6
5
4
3
2
1
1982
1983
1984
1985
1986
1987

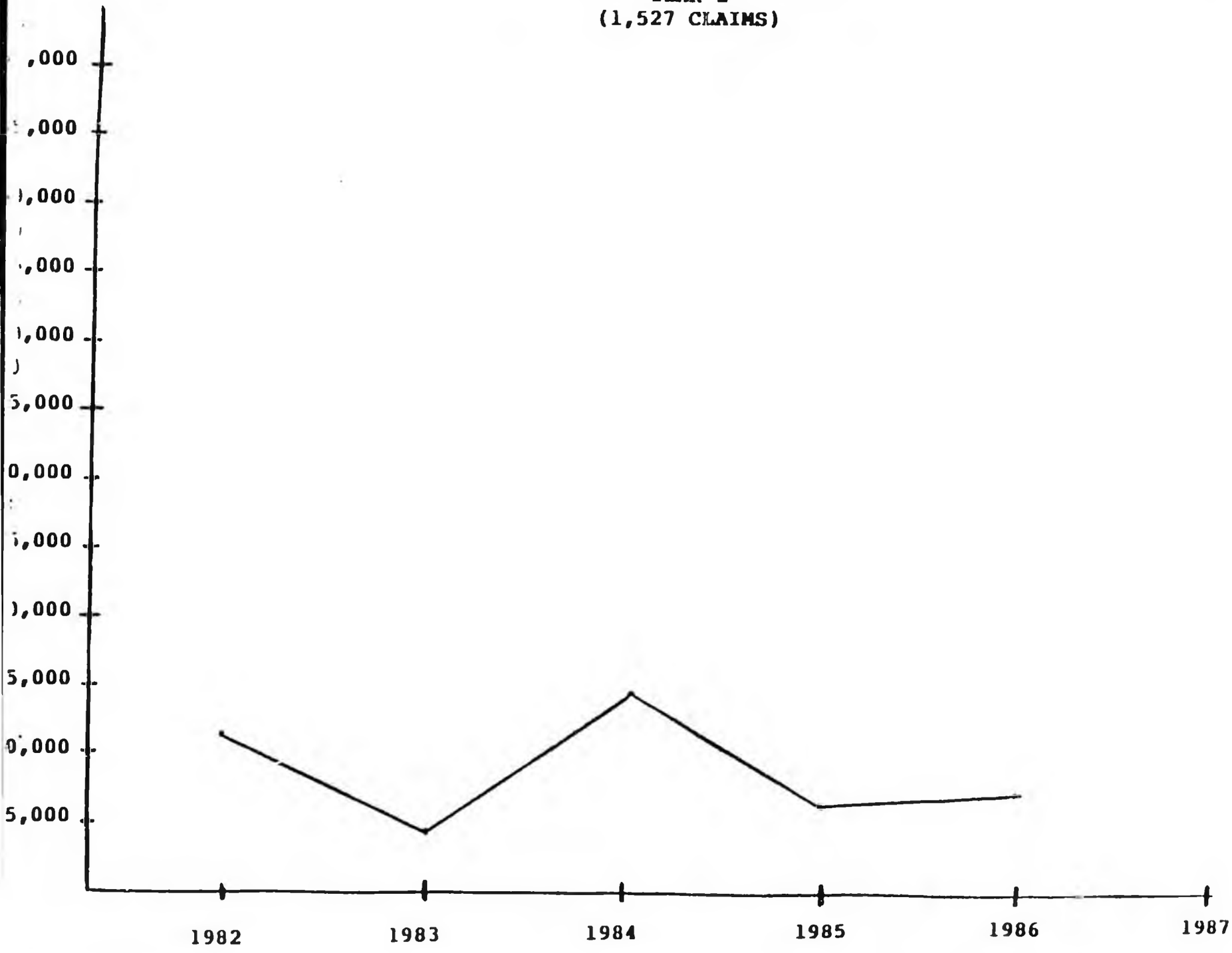
APPENDIX D-1

CLAIM SEVERITY AT
EQUAL LOSS DEVELOPMENT YEARS
YEAR 1
(726 CLAIMS)



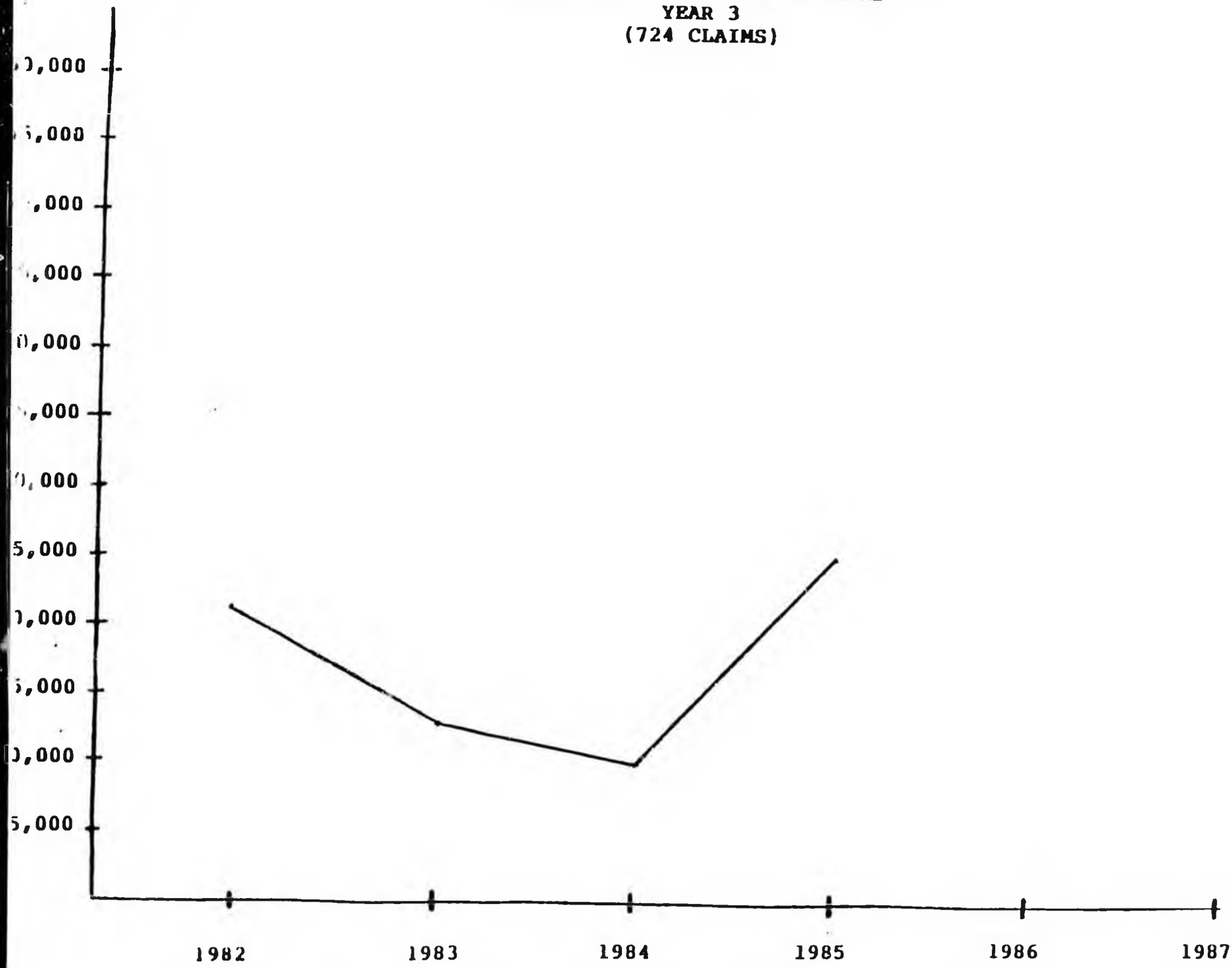
APPENDIX D-2

CLAIM SEVERITY AT
EQUAL LOSS DEVELOPMENT YEARS
YEAR 2
(1,527 CLAIMS)



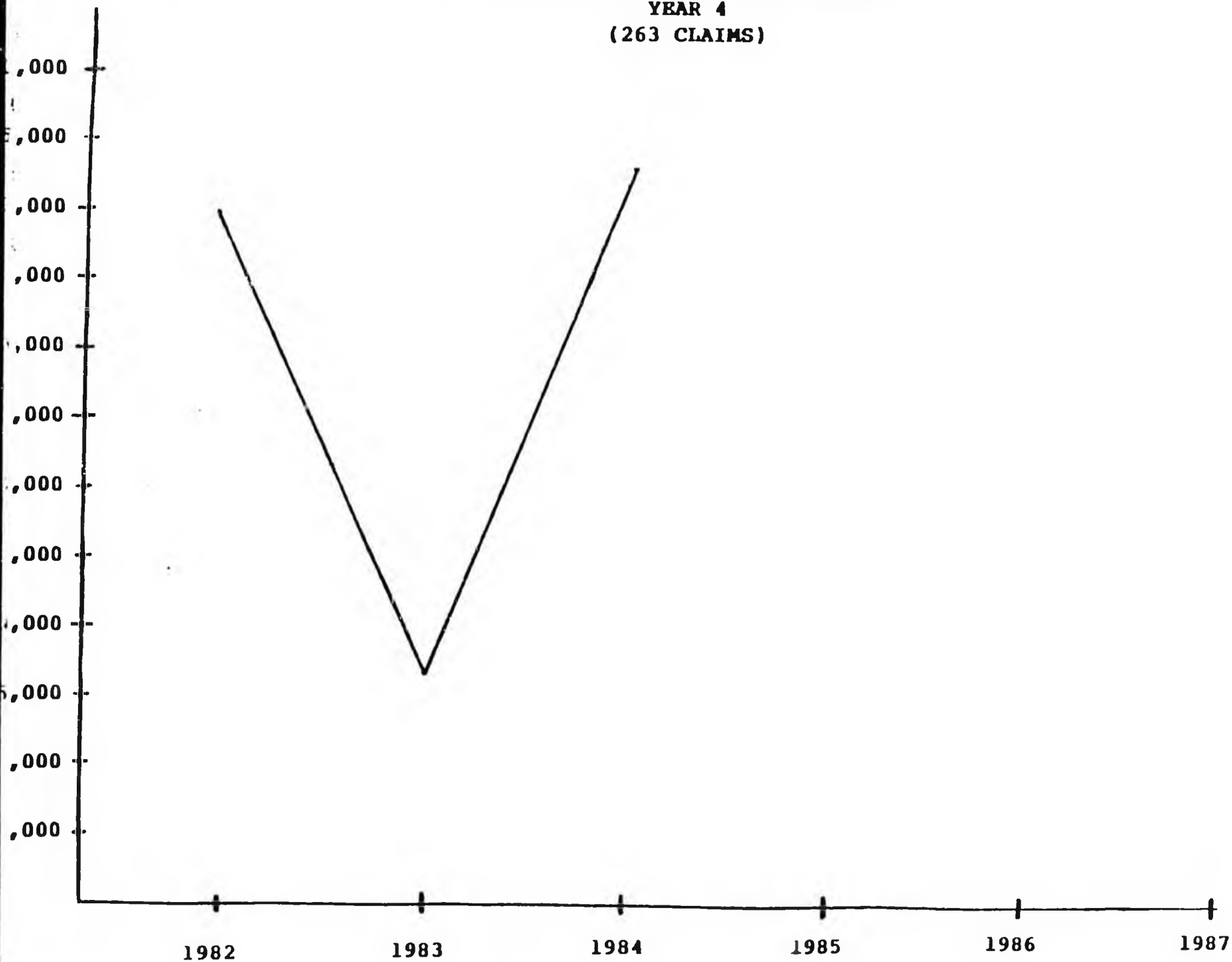
APPENDIX D-3

CLAIM SEVERITY AT
EQUAL LOSS DEVELOPMENT YEARS
YEAR 3
(724 CLAIMS)



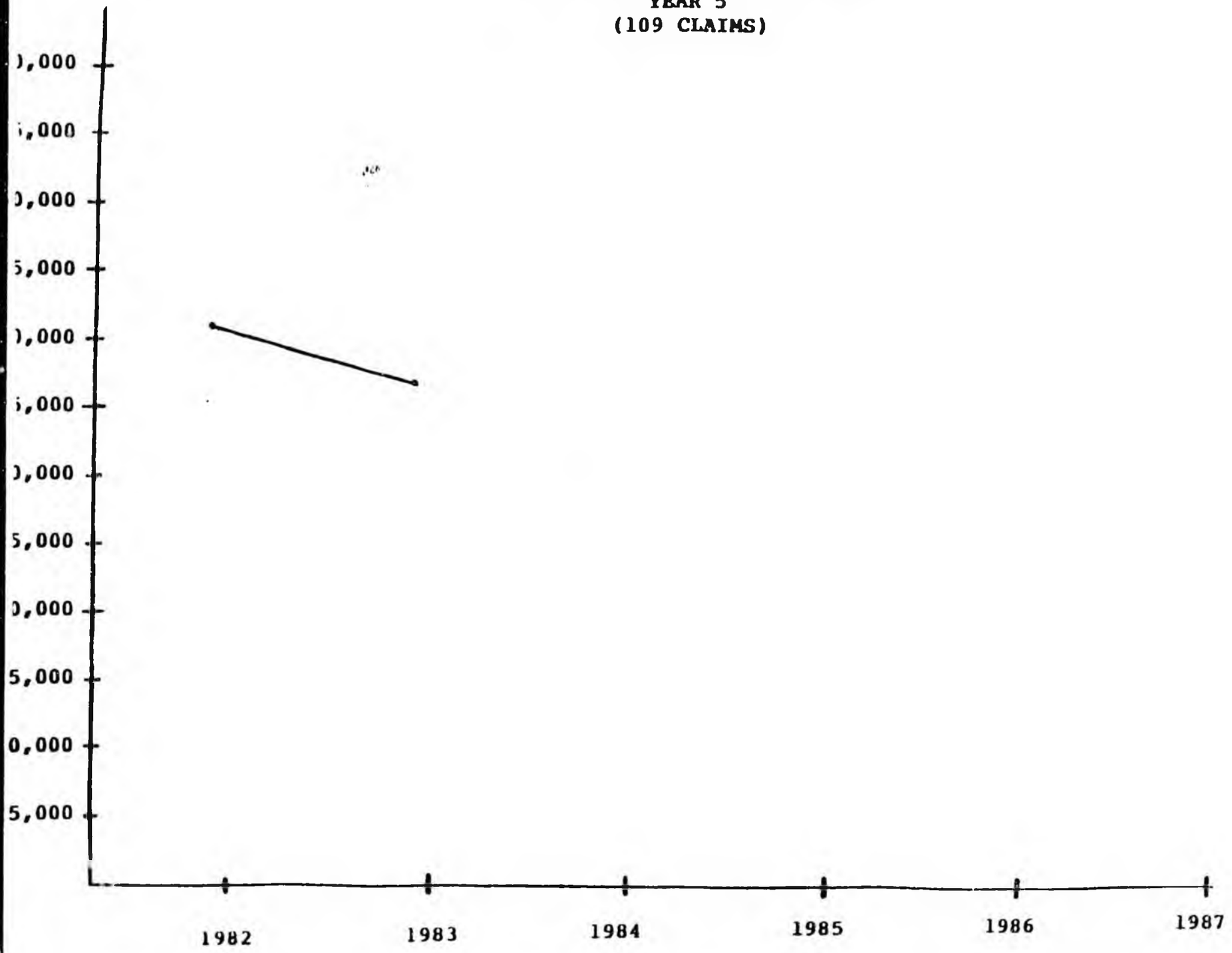
APPENDIX D-4

CLAIM SEVERITY AT
EQUAL LOSS DEVELOPMENT YEARS
YEAR 4
(263 CLAIMS)



APPENDIX D-5

CLAIM SEVERITY AT
EQUAL LOSS DEVELOPMENT YEARS
YEAR 5
(109 CLAIMS)



APPENDIX D-6

HB 350

MIEC

Medical Insurance Exchange of California
Medical Underwriters of California

May 10, 1989

MEMORANDUM TO ALASKA POLICYHOLDERS REGARDING RENEWAL RATES

(Policy Year August 1, 1989 to July 31, 1990)

This is to inform you that effective August 1, 1989, MIEC's basic rates for Alaska will be increased 11.7%. MIEC's recent loss experience in Alaska shows a continuing increase in the frequency and severity of claims, to the point where Alaska's claims now average almost twice the size, and about 35% greater frequency than for the company as a whole. Attached are graphs which compare Alaska's and MIEC's overall claims frequencies, severities and loss ratios for two recent five-year blocks of time.

In addition to this increase in basic rates, those doctors insured less than five years also will receive the step rate increases which occur as claims-made discounts diminish each year until the fifth, when the mature claims-made rate is attained. Some step-rate increases, and the 11.7% basic rate increase, will be modified by the following company-wide specialty classification changes:

- Cardiologists who do not perform catheterization or angioplasty by a 13% reduction. Rates of cardiologists who do perform these procedures will increase by 30.4%, in addition to the 11.7% basic rate increase. Cardiologists who conduct invasive procedures have incurred 90% of claims costs of all cardiologists MIEC insures. Over six years of combined claims experience, cardiology losses have been 39% higher than those of all non-surgical specialties. MIEC continues loss-prevention activities with this specialty through claims analysis, on-site visits, and office consultations.
- Family and general practitioners who do no surgery will receive a 10% rate reduction; those who do limited surgery and assist, a 14.3% reduction; and those who do surgery but no obstetrics, a 30.6% reduction.
- Physical medicine and rehabilitation specialists will receive a 10% rate reduction.
- Industrial medicine specialists will receive a 30.6% rate reduction.

The changes in classification result from MIEC's continuing analysis of loss patterns among specialties and MIEC's long-standing policy to adjust premiums to the relative losses of various specialties.

We are pleased to announce that because of reduced reinsurance costs, MIEC is able to lower the charges for limits of liability in excess of $1,000,000/$3,000,000 in many classifications. If you are interested in obtaining a quotation for either the $2,000,000/$4,000,000 or $5,000,000/$5,000,000 limits options, please call MIEC's Underwriting Department.

MIEC has been insuring Alaska physicians since 1978, and is Alaska's only doctor-owned, medical society-sponsored carrier. Physician ownership means physician direction of policy, physician peer review, active loss prevention, policy control over claims and underwriting, equitable treatment of policyholders, proper investigation, and vigorous, steadfast defense of claims through knowledge and experience in medical professional liability. MIEC is rated A+ by A.M. Best Company, the insurance industry rating service.

MIEC supports Alaska State Medical Association's ongoing efforts to achieve more meaningful tort reform. California's Medical Injury Compensation Reform Act (MICRA), combined with MIEC's loss prevention activities, have moderated rate increases there. The tort reforms which have moderated malpractice claims are MICRA's changes to the collateral source rule, limits on noneconomic damages, periodic payments of awards, and limits on attorneys' contingency fees.

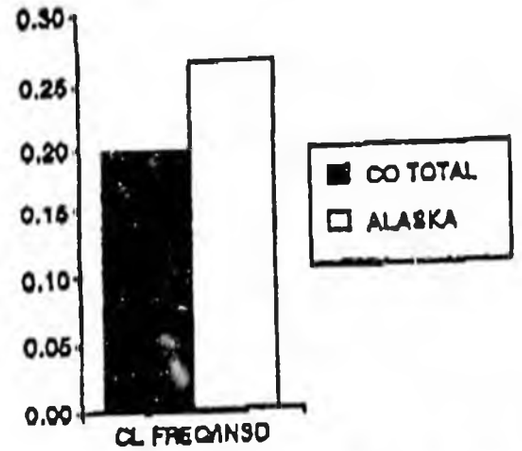
Upon approval of the new rates by the Alaska Insurance Division, premium invoices for renewal will be sent to policyholders in late June. If you have questions about these changes or wish to change your coverage limits or classification, please contact MIEC's Underwriting Department.

Sincerely,

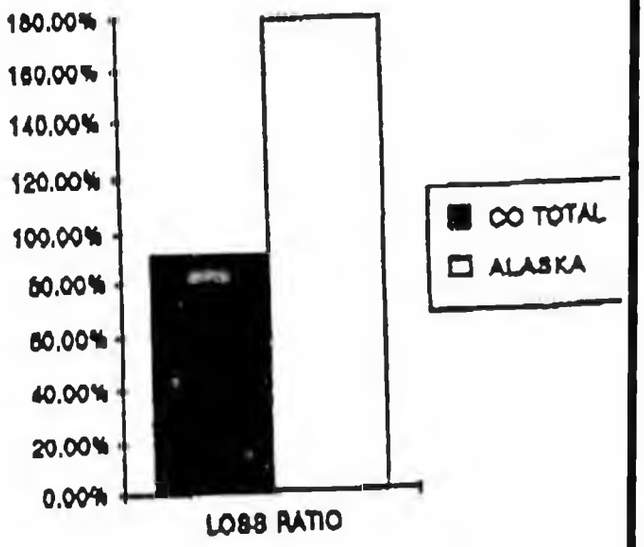
Board of Governors, Medical Insurance Exchange of California
Board of Directors, Medical Underwriters of California

MIEC

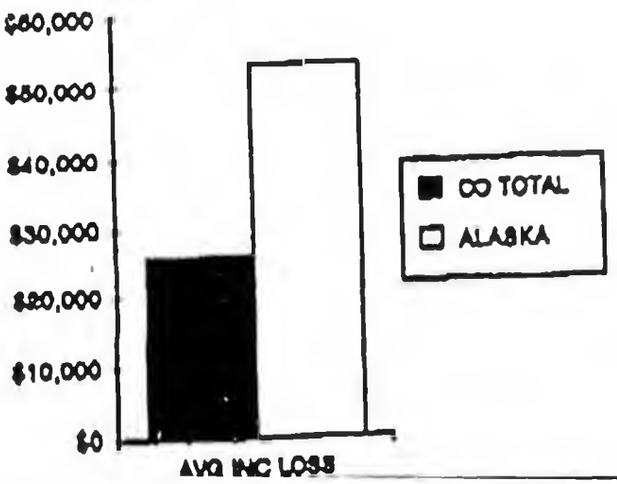
Medical Insurance Exchange of California
Medical Underwriters of California



1982/86 POLICY YEARS COMBINED
CLAIM FREQUENCY PER INSURED PER YEAR:
MIEC TOTAL AND ALASKA COMPARED



1982/86 POLICY YEARS COMBINED
LOSS RATIOS: MIEC TOTAL
AND ALASKA COMPARED



HB 350

MICA Medical Indemnity Corporation of Alaska

ALEUT PLAZA
4000 OLD SEWARD HWY., SUITE 203
ANCHORAGE, ALASKA 99503
(907) 563-3413

December 29, 1989

Representative Max Gruenberg
House Labor and Commerce Committee
House of Representatives
P.O. Box V
Juneau, AK 99811

Dear Representative Gruenberg:

The House Labor and Commerce Committee had hearings on November 30, 1989 at which time I was asked to have an "informal" chat with the committee. Since I wasn't prepared to testify, I gave you some estimated premium figures and promised to follow up with exact rate information.

MICA's 1990 Premium Schedule is enclosed for your information. The committee had asked me questions at the hearings specifically relating to the cost of insurance to physicians delivering babies. I mentioned that the majority of our phsician policyholders have limits $500,000 per claim, $1,000,000 aggregate. Physicians delivering babies are Class 3 on the schedule. Assuming a physician had policy limits of $500,000/1,000,000 and had been insured with MICA for five or more years his premium for 1990 would be $30,162. (This is about $20,000 less than I quoted to you.)

Another question is the difference in premium between a Family Practioner doing obstetries and those who were not. Assuming the same scenerio as above and that the Family Practioner not doing obstetrics was doing minor surgery the difference would be $14,046. In other words, the Family Practioner who delivers babies pay $14,046 to do so (or about 1/2 of the total premium is for obstetrical coverage).

I hope that this letter and the attached premium schedule better answers your questions. If you have any further questions, please feel free to call me.

Sincerely,

Mary A. Pierce
Executive Director

MAP/blb

Enclosure

MICA

Medical Indemnity
Corporation of Alaska

ALEUT PLAZA OFFICE BUILDING
4000 OLD SEWARD HIGHWAY, SUITE 203
ANCHORAGE, ALASKA 99503
TELEPHONE (907) 563-3414

1990

Physician's and Surgeon's
Professional Liability Coverages and Premium Schedules

PROFESSIONAL LIABILITY COVERAGES

Explanation of Policy:

The Claims-Made Policy extends professional liability protection to the physician, clinic or employee for claims reported in a single year, regardless of when service is rendered as long as the incident occurred while continuously insured under Claims-Made with MICA. Thus, claims reported this year are covered by this year's policy; claims reported next year by next year's policy and so on.

MICA's premium rates are derived from the historical pattern of reported claims resulting from the performance of professional services which form a "stair step" with an increasing number of claims being reported each year until the fifth year. In the first year, only about 19 % of the total claims resulting from professional services are reported; the second 39 %; the third 78 %; the fourth 93 %; the fifth and subsequent years, about 100 %.

Cost:

In keeping with the "stair step" development of claims, the rates charged for the Claims-Made policy mature at the fifth year. Subsequent renewal policies are charged at the mature rates. The specific cost of coverage is shown within our table entitiled CLAIMS-MADE PREMIUM SCHEDULE.

All policies issued by MICA are renewed on January 1 of each year. Your first years and renewal rates are pro-rated from the first date of coverage (inception date) of the original policy. For example, if your continuous coverage became effective on July 1, 1986, your annual renewal premium on January 1, 1990 would be pro-rated from January 1 through June 30 on the fourth year rates and from July 1 through December 31 on the fifth year rates.

Limits of Liability:

MICA's professional and optional comprehensive general liability coverages are available with policy limits of:

$200,000 per occurrence/$600,000 aggregate per calendar year.
$500,000 per occurrence/$1,000,000 aggregate per calendar year.
$1,000,000 per occurrence/$2,000,000 aggregate per calendar year.
$1,000,000 per occurrence/$3,000,000 aggregate per calendar year.

Reporting Endorsement (Tail Coverage) *

Should you stop practicing or change to another insurance company, MICA guarantees availability of a limited or Unlimited Reporting Endorsement known as "tail" coverage to cover subsequently reported claims. Tail coverage must be purchased by the insured within 30 days of termination of coverage,(by cancellation or non-renewal) or by termination of employment or association with the physicians insured under a master group policy.

"Tail" coverage must also be recognized when a physician reduces rating classification to offset reduced premium charges while subsequently reported claims from the higher specialty continues to occur. This is currently being accomplishedby charging "tail" premium on a pro-rata basis as between the two speciality classes when the policy is ultimately terminated.

Cost:

The cost of "tail" coverage will depend upon the length of time you have been insured with MICA, limits of liability purchased, physician's rating class and will be subject to the company's rules, rates, and rating plans in effect at the time the Unlimited Reporting Endorsement is requested.

* The policy limits purchased for the Unlimited Reporting endorsement will be applicable just as if the policy had not been cancelled or terminated and all subsequently reported claims had been reported during the last policy year.

The tail premium is quoted as a one time cost but may be paid in installments. Refer to paragraph INSTALLMENTS.

Retirement Benefit:

An Unlimited Reporting Endorsement (tail coverage) will be issued at no extra cost to any physician who has attained the age and years in the MICA program (as per the schedule below) and having completed five consecutive years as a MICA insured just prior to retirement:**

Age	Years as MICA Insured
60	5
59	6
58	7
57	8
56	9
55	10

**** Retirement is defined as totally ceasing the private practice of medicine. A limited or parttime practice is not considered retirement.**

Death or Total and Permanent Disability:

A Reporting Endorsement (tail coverage) will be issued at no extra cost because of death or permanent total disability, i.e., unable to continue the practice of medicine in any limited or modified capacity.

New Doctor Rule:

For physicians entering private practice for the first time following completion of medical school, residency training, military or public health service, premiums will be discounted 25 % for the first year of coverage.

Claims Free Premium Discount:

A 20 % premium discount will be provided to our insured physicians for a five year claims free history. This policyholder benefit will be provided upon renewal following the completion of the fifth year in which a claims free record has been demonstrated.

Claims Experience Premium Surcharges:

Claims experience premium surcharges may be imposed upon insureds with two or more claims in the last three years in which some elements of negligence or other contributing adverse factors are involved.

Employee Coverages:

Unlike many policies, most employees are provided coverage under the MICA policy.

Employee premium charges are limited to: (1) Advanced Nurse Practitioners or Physician's Assistants added to a physician's or clinic's policy subject to 50 % of Class 1 premium (shares policy limits with employer, sponsor or supervising physician); (2) Physician's Assistants or Nurse Practitioners on policies providing separate limits of liability from sponsoring/supervising physician, subject to higher premium based upon specialty and practice situation; (3) employed Nurse Midwives or directly supervised Certified Registered Nurse Anesthetists (CRNAs) are subject to 100 % Class 3 annual premium; (4) unsupervised CRNAs or Nurse Midwives are subject to 100 % of Class 4 and Class 4A premium respectively.

No additional premium charges are incurred for other employees.

Locum Tenens:

MICA provides up to 60 days of coverage annually for a temporary substitute physician - locum tenens - for surgical and non-surgical specialties. Completion of application and *prior approval* of MICA is required.

This coverage is limited to 6 separate periods per year (except for illness or family emergencies of the insured physician) and any additional periods will involve the customary premium charges for short-term practice situations (see next paragraph)

A negative factor in considering the acceptability of a locum tenens physician is the lack of current or recent professional liability insurance coverage on the applicant. This lack precludes verification of prior claims experience and other elements of insurability.

Short Term Practice Situations:

Pro-rated amount of annual premium computed on short rate tables subject to $250 minimum premium.

Part Time Practitioners:

Class 0, 1, 1-A, 2, 2-A and Family practitioners in any class: 35 % of the scheduled annual premiums for 10 hours or less per week practice; 65 % of the scheduled annual premium for 20 hours or less per week practice.

Comprehensive General Liability Coverages:

This optional coverage is available at $50 per physician covered, subject to the same limits of liability carried for professional liability. This coverage extends to bodily injury and property damage liability protection for those injuries accidentally sustained on the office premises by patients or the general public.

This coverage is limited to premises actually occupied by our insured in rendering professional services. For example, if an insured occupied one suite of a building, coverage would be limited to only that suite. An entire building cannot be covered under the Comprehensive General Liability Endorsement unless the insured or the insured's employees occupy the entire building in the rendering of medical services.

Corporate/Partnership/Group Professional Liability:

This optional coverage is available at no additional charge to solo practitioners and group practices, providing each member or employed physician carries coverage through the Company. The only requirement for group limits is that the limits of liability on the group may never be higher than the lowest limit carried by any member of the group. The separate limits of liability for the corporation/partnership/group does not apply to policyholders who are solo practitioners nor does it apply concurrently or on an excess basis to the physician (s) scheduled on the policy or associated with the same medical organization who also allegedly provide neligent patient care for the same occurrence.

This form provides individual limits of liability to each physician named on the policy schedule except these limits shall not be concurrent nor excess to the corporate limits of liability stated in the previous paragraph.

Optional Shared Limits Professional Liability Group Coverage:

This optional coverage is available through the Company for your group at reduced premium levels. (see discount schedule that follows). One master policy is issued with each associated or employed physician covered by endorsement.

Coverages are limited to the course and scope of employment or association with your group. The **combined clinic/group insureds are subject to the single limits of liability per occurrence and annual aggregate limits as procured.**

Completion of the Physician's and Surgeon's Professional Liability Group Application is required, along with completion of individual application for each physician to be insured.

Discounts Per Limits of Liability

# Doctors on Policy	$500,000	$1,000,000
1	0	0
2	9%	7%
3	11%	9%
4	12%	10%
5	13%	11%
6	14%	12%
7	15%	13%
8	16%	14%
9+	17%	15%

Installments - Deferred Payments:

Initial policy issuance subject to deposit of $1,000 or two month's annual premium. Deferred payments are available in quarterly or semi-annual installments payable: 35%, 25 %, 25 % and 15 % quarterly or 60 % and 40 % semi-annually. Premium invoices should be paid upon receipt and the policy is subject to immediate cancellation if payment is not received by the first day of the quarter in which the premium is earned. Carrying charges are computed at 10 % annual simple interest on the unpaid balance.

The full premium for an Unlimited Reporting Endorsement must be received by the company within twelve months following its inception date. The Unlimited Reporting Endorsement will be cancelled at the end of this twelve month perio ' if the full premium has not been received at that time, and only premium earned for this twelve month Reporting Endorsement period will be charged in accordance with rates actuarially determined and filed with the Division of Insurance.

PHYSICIAN'S RATE CLASSIFICATIONS

Class 0
Psychiatry - Excluding ECT
Pathology

Class 1
Neurology
Physicians - no surgery
Applies to general practitioners and physician specialists who do not perform obstetrical procedures or major / minor surgery (other than incision of boils and superficial abscesses, suturing of skin and superficial fascia or neonate circumcision) who do not ordinarily assist in major surgical procedures.

Class 1-A
General Practitioners assisting at surgery (own patients only)
Opthalmology (excluding Radial Karatotomy)

Class 2
Physicians - minor surgery or assisting in major surgery*
Applies to general practitioners and physician specialists who perform minor surgery or assist in major surgery.
Neonatology
Cardiology

Class 2-A
Emergency Medicine
Therapeutic Radiology

Class 2-C
Urology

Class 3
Physicians - major surgery *
Physicians who include obstetrical procedures as any part of their practice.
Proctology
Otorhinolaryngology
Abdominal Surgery
General Surgery
Pediatric Surgery
Thoracic Surgery
Traumatic Surgery
Plastic and Reconstructrive Surgery (excluding cosmetic surgery)
Urology
Gynecology (No Obstetrics)

Class 4
Anesthesiology

Class 4-A
Physicians - major surgery *
Obstetrics - Gynecology
Cardiovascular Surgery
Hand Surgery
Plastic and Reconstructive Surgery (including cosmetic surgery)
Vascular Surgery
Orthopedic Surgery (excluding total joint procedures spinal surgery and insertion of prosthetic devices)

Class 5
Physicians - major surgery*
Neurosurgery
Orthopedic Surgery (including total joint procedures, spinal surgery and insertion of prosthetic devices)

***Major Surgery** -involves operations in or upon any body cavity including but not limited to the cranium, thorax, abdomen or pelvis, or any other operation that presents a distinct hazard to life becasue of the condition of a patient or the length or circumstances of an operation. It also includes removal of tumors (except skin tumors), open bone fractures, amputations, abortions, removal of any gland or organ, plastic surgery and any operations using general anesthesia.

NOTE: IF A PORTION OF THE PHYSICIANS PRACTICE IS IN A SPECIALITY WITH A HIGHER CLASS THAN HIS NORMAL SPECIALTY, HE OR SHE MAY BE PLACED IN THE HIGHER SPECIALTY FOR RATING PURPOSES.

CLAIMS - MADE PREMIUM SCHEDULE

Effective January 1, 1990

LIMITS OF LIABILITY: EACH CLAIM AND ANNUAL AGGREGATE

	1st - 5th Years	$200,000/$600,000	$500,000/$1,000,000	$1,000,000/$2,000,000 $1,000,000/$3,000,000 *
CLASS 0				
1st year rates	Jan. 1, 1990	2,924	3,192	3,601
• 2nd year renewal rates	Jan. 1, 1989	3,467	4,026	4,857
• 3rd year renewal rates	Jan. 1, 1988	4,559	5,607	7,119
• 4th year renewal rates	Jan. 1, 1987	5,026	6,271	8,058
• 5th year renewal rates	Jan. 1, 1986	5,177	6,485	8,361
CLASS 1				
1st year rates	Jan. 1, 1990	3,798	4,305	5,067
• 2nd year renewal rates	Jan. 1, 1989	4,828	5,809	7,230
• 3rd year renewal rates	Jan. 1, 1988	6,724	8,497	11,031
• 4th year renewal rates	Jan. 1, 1987	7,517	9,612	12,599
• 5th year renewal rates	Jan. 1, 1986	7,772	9,970	13,103
CLASS 1-A				
1st year rates	Jan. 1, 1990	4,548	5,270	6,326
• 2nd year renewal rates	Jan. 1, 1989	5,997	7,341	9,268
• 3rd year renewal rates	Jan. 1, 1988	8,584	10,980	14,391
• 4th year renewal rates	Jan. 1, 1987	9,657	12,482	16,499
• 5th year renewal rates	Jan. 1, 1986	10,001	12,964	17,176
CLASS 2				
1st year rates	Jan. 1, 1990	5,33.	6,286	7,651
• 2nd year renewal rates	Jan. 1, 1989	7,228	8,953	11,414
• 3rd year renewal rates	Jan. 1, 1988	10,542	13,593	17,928
• 4th year renewal rates	Jan. 1, 1987	11,909	15,503	20,605
• 5th year renewal rates	Jan. 1, 1986	12,348	16,116	21,464
CLASS 2-A				
1st year rates	Jan. 1, 1990	7,098	8,550	10,605
• 2nd year renewal rates	Jan. 1, 1989	9,971	12,547	16,196
• 3rd year renewal rates	Jan. 1, 1988	14,905	19,417	25,811
• 4th year renewal rates	Jan. 1, 1987	16,928	22,235	29,755
• 5th year renewal rates	Jan. 1, 1986	17,577	23,139	31,020

* PREMIUM COST IS 4% ABOVE $1,000,000/$2,000,000. LIMITS.

Claims-made premium prepared by Milliman & Robertson, Inc., consulting Actuaries for the Medical Indemnity Corporation of Alaska, are based on a five year pricing step for reported claims adjusted annually for claims experience.

•Retroactive dates and renewal premium apply to 2nd through 5th year annual renewal. First year physicians are subject to first year rates.

•All policies are renewed each year on January 1. All 1st and renewal premiums are pro-rated subject to the first day of coverage under the original policy.

CLAIMS - MADE PREMIUM SCHEDULE

Effective January 1, 1990

LIMITS OF LIABILITY: EACH CLAIM AND ANNUAL AGGREGATE

	1st - 5th Years	$200,000/$600,000	$500,000/$1,000,000	$1,000,000/$2,000,000 $1,000,000/$3,000,000 *
CLASS 2-C				
1st year rates	Jan. 1, 1990	8,294	10,089	12,613
• 2nd year renewal rates	Jan. 1, 1989	11,836	14,991	19,448
• 3rd year renewal rates	Jan. 1, 1988	17,872	23,377	31,171
• 4th year renewal rates	Jan. 1, 1987	20,342	26,813	35,976
• 5th year renewal rates	Jan. 1, 1986	21,133	27,915	37,518
CLASS 3				
1st year rates	Jan. 1, 1990	8,857	10,813	13,558
• 2nd year renewal rates	Jan. 1, 1989	12,713	16,140	20,978
• 3rd year renewal rates	Jan. 1, 1988	19,268	25,241	33,693
• 4th year renewal rates	Jan. 1, 1987	21,948	28,967	38,904
• 5th year renewal rates	Jan. 1, 1986	22,807	30,162	40,576
CLASS 4				
1st year rates	Jan. 1, 1990	11,218	13,850	17,520
• 2nd year renewal rates	Jan. 1, 1989	16,392	20,960	27,392
• 3rd year renewal rates	Jan. 1, 1988	25,120	33,052	44,266
• 4th year renewal rates	Jan. 1, 1987	28,680	37,997	51,176
• 5th year renewal rates	Jan. 1, 1986	29,821	39,582	53,393
CLASS 4-A				
1st year rates	Jan. 1, 1990	14,140	17,608	22,422
• 2nd year renewal rates	Jan. 1, 1989	20,944	26,926	35,330
• 3rd year renewal rates	Jan. 1, 1988	32,362	42,720	57,351
• 4th year renewal rates	Jan. 1, 1987	37,012	49,172	66,365
• 5th year renewal rates	Jan. 1, 1986	38,502	51,241	69,255
CLASS 5				
1st year rates	Jan. 1, 1990	19,199	24,116	30,914
• 2nd year renewal rates	Jan. 1, 1989	28,829	37,257	49,079
• 3rd year renewal rates	Jan. 1, 1988	44,906	59,463	80,014
• 4th year renewal rates	Jan. 1, 1987	51,443	68,528	92,670
• 5th year renewal rates	Jan. 1, 1986	53,536	71,433	96,729

* PREMIUM COST IS 4% ABOVE $1,000,000 /$2,000,000 LIMITS.

Claims-made premium prepared by Milliman & Robertson, Inc., consulting Actuaries for the Medical Indemnity Corporation of Alaska, are based on a five year pricing step for reported claims adjusted annually for claims experience.

•Retroactive dates and renewal premium apply to 2nd through 5th year annual renewal. First year physicians are subject to first year rates.

• All policies are renewed each year on January 1. All 1st and renewal premiums are pro-rated subject to the first day of coverage under the original policy

HB

351

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION: HB 351
PUBLISH DATE: May 6, 1989

FISCAL NOTE

REQUEST:

Revision Date:
Title: "An Act relating to the penalty for driving while intoxicated..."
Sponsor: Repr. Ulmer
Requestor: House Judiciary

Agency Affected: Department of Law
BRU: Prosecution
Components: All

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 91	FY 92	FY 93	FY 94	FY 95	FY 96
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-
CAPITAL						
REVENUE						

FUNDING: (Thousands of Dollars)

GENERAL FUND	-0-	-0-	-0-	-0-	-0-	-0-
FEDERAL FUNDS						
OTHER						
TOTAL						

POSITIONS:

FULL-TIME	-0-	-0-	-0-	-0-	-0-	-0-
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

Please see the attached analysis.

Richard L. Pegues

Prepared by: Richard I. Pegues, Director
Phone: 465-3672
Division: Administrative Services
Date: January 11, 1990

Richard L. Pegues /FOR/

Approved by Commissioner: Douglas B. Baily, Attorney General
Date: January 11, 1990
Agency: Department of Law

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

CONTINUATION of FISCAL NOTE ANALYSIS

For Bill/Resolution No. HB 351

This bill amends various sections of AS 28.35 to permit the court to suspend the imposition of sentence for driving while intoxicated violations, in those cases where a convicted defendant has been recommended for and agrees to complete a specified alcoholism or drug treatment program. The amendments proposed in the bill are sentencing provisions, and they will therefore not have a fiscal impact on the Department of Law.

HOUSE COMMITTEE REPORT

(7)
Date Referred: May 6, 1989 FURTHER REFERRALS:

Date of Committee Action: _____

The JUDICIARY Committee considered: HB 351

HOUSE BILL NO. 351 [DEFERRED D.W.I. SENTENCING]
"An Act relating to the penalty for driving while intoxicated and refusal to take a chemical breath test."

RECOMMENDATIONS:
[ ] be replaced with _____ [ ] the same title [ ] a new title
[ ] have attached amendment(s)
[ ] do pass
[ ] do not pass
[ ] no recommendation
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(s): (Dept)
[ ] fiscal impact _____
[ ] zero fiscal note _____
[ ] zero with analysis _____

APPROVES PREVIOUS: (Date/Dept)
[ ] fiscal note(s) _____
[ ] zero fiscal note(s) _____
[ ] zero fn/analysis _____

SIGNING DO PASS:

_____
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_____
_____

SIGNING: (Check approp. column)

	Do Not Pass	No Rec	Amend

_____
Chairman's Signature

Jan 16, 1990

Fully Informed Jury Association (FIJA)
Larry Slone, Chairman
PO Box 379
Homer, Alaska 99603

Rep. Robin Taylor
PO Box V
Juneau, Alaska 99811

Dear Rep. Taylor,

I take great satisfaction in announcing to you the recent (Jan 13th) formation of the Alaska chapter of the Fully Informed Jury Association (FIJA), myself as Chairman. You may be assured that I speak for the thirteen charter members of FIJA Alaska, when I tell you that I am immensely pleased with your effort to introduce a "mercy doctrine" into the state legislature. In fact, we are now encouraged to redouble our efforts to persuade other legislators and the governor to support your proposal.

We will be following the progress of the proposed bill with keen interest and would appreciate continuous updates. Meanwhile we are about to unlease a statewide campaign to gather supporters for the FIJA proposal. We expect that public interest in this issue will build up at an exponential rate and we will do our utmost to channel it in support of your efforts on behalf of all Alaskans.

Once again, our thanks.

for Alaskan Justice,

Larry Slone, Chairman

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH V STATE CAPITOL
JUNEAU ALASKA 998
PHONE 465-3800

MEMORANDUM January 16, 1990

SUBJECT: Jury responsibilities and jurors' oaths (work order 6-1927A)

TO: Representative Robin Taylor, Minority Leader

FROM: Jack Chenoweth
Legislative Counsel

The draft legislation is not without problems.

*

In format, the text of proposed AS 12.45.015 differs substantially from the model provided. Among the principal changes:

I have narrowed the overly grandiose "natural right of every state citizen" into a more workable definition of a duty or responsibility of every jury to "judge both the law and the facts pertaining to the case that is tried before it." I reduced the other verbiage appearing in paragraph 1 of the model provided, but retained, in proposed AS 12.45.015(a), the requirement of court notice to the jurors of their responsibility.

I've converted the oath suggested by paragraph 2 of the model into a "charge to the jury," modifying the language of the oath/charge for clarity.

The initial part of the first sentence of paragraph 3 of the model, the affirmation of understanding, appears, albeit not in so many words, within that portion of the oath (bill section 3) wherein the jurors "try the issue . . . in accordance with . . . the court's explanation of your responsibilities as jurors to determine the law and the facts pertaining to the case . . . ." I opted for this approach for I was hard pressed to understand how a juror could attest under oath that he or she "[understood] the information concerning their rights."

The remainder of the first sentence of paragraph 3 of the model--"no party to the trial may be prevented from encouraging . . ."--is carried forward into proposed AS 12.45.015(c). The remainder of paragraph 3 of the model appears in subsections (d) and (e) of proposed AS 12.45.015.

*

Your proposal to broaden the responsibility assigned to the jury in a criminal proceeding invites an early, and probably successful, constitutional challenge. Four provisions may be cited.

Violation of separation of powers: encroachment on the legislature:

Alaska's courts have recognized the separation of powers doctrine. Bradner v. Hammond, 553 P.2d 1 (Alaska 1976).

In jurisdictions that have recognized the doctrine, courts have likewise determined that the power to define crimes is a legislative prerogative that may not be delegated or assigned to, or assumed by, the judiciary. See Ravin v. State, 537 P.2d 494 (Alaska 1975) (wisdom of statute proscribing possession of marijuana was for the legislature, rather than the judiciary); State v. Campbell, 536 P.2d 105 (Alaska 1975) (court prohibited from substantially redrafting defective statute). Thus, insofar as this measure proposes to assign to a jury plenary responsibility to determine whether a defendant has committed a crime and the dimensions of that criminal conduct and the jury is guided only by its instincts as it exercises a responsibility to interpret and apply state law, the measure surely fails this most fundamental expression of the doctrine of the separation of powers.

Violation of separation of powers: encroachment on the judiciary:

Alternatively, the substantive change made by the measure invites a challenge that it conflicts with that portion of Article IV, section 1 of the Alaska Constitution that assigns "the judicial power of the State" to the various constitutional and statutory courts. Accepting that "the judicial power of the State" incorporates at least the power to declare what the law is, the judicial system is bound to take the law as enacted by the law-making power, save only

where the law is inconsistent with the state constitution. State v. Campbell, 536 P.2d 105 (Alaska 1975). The measure accompanying this memo would take from the judiciary the right to interpret and apply the law according to standards defined by the legislature, substituting in its stead the authority of jurors, collectively, to make that determination and application. Such an expansion of the jury's role relative to the powers and duties of the court compromises the authority of the institutions that constitute the third branch of government by further delegating the duties assigned to judges.

Violation of constitutional provisions guaranteeing trial by jury in certain criminal actions:

The applicable constitutional provisions are the due process clause, and article I, section 11 and the Sixth Amendment to the United States Constitution, guaranteeing a trial by jury in criminal matters.

In a set of early cases, Knudsen v. City of Anchorage, 358 P.2d 375 (Alaska 1960), overruled in part, 471 P.2d 386, and West v. State, 409 P.2d 847 (Alaska 1966), the Supreme Court noted that article I, section 11 of the State Constitution was intended to "be interpreted as securing to an accused such rights as trial by jury as [the defendant] had been found entitled to under applicable Supreme Court interpretations of the Sixth Amendment." Knudsen, at 358. Subsequently, in Baker v. City of Fairbanks, 471 P.2d 386 (Alaska 1970), expounded upon its view of what that right to trial by jury entailed. The court noted, in a reference to Blackstone's Commentaries, the generally accepted role that has traditionally been assigned to juries:

> There is no doubt that the right to jury trial holds a central position in the framework of American justice. Trial by jury is one of the oldest discernible and distinguishing institutions of our Anglo-American system of jurisprudence. Its heritage can be traced in an unbroken line at least from the 14th century forward. . . . The importance of jury trial in the English constitutional tradition was commented upon by Blackstone as follows;
>
> > Our law has therefore wisely placed this strong and two-fold barrier, of a

> presentment and a trial by jury, between the liberties of the people and the prerogative of the crown. It was necessary, for preserving the admirable balance of our constitution, to vest the executive power of the laws in the prince; and yet this power might be dangerous and destructive of that very constitution, if exerted without check or control, by justices of oyer and terminer occasionally named by the crown: who might, then, as in France and Turkey, imprison, dispatch, or exile any man that was obnoxious to government, by an instant declaration that such is their will and pleasure. But the founders of the English law have, with excellent forecast, contrived that . . . the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen and superior to all suspicion." 4 Blackstone Comm. 349, 350 (Cooley ed. 1899).

quoted in Baker v. City of Fairbanks, 396, 397 (Emphasis added).

To the same end, though with admittedly less artful language, the Washington Supreme Court, citing the Sixth Amendment and the equivalent clause of the Washington State Constitution guaranteeing trial by jury in criminal matters, concluded:

> Appellant next contends that he was entitled to a jury trial upon the issue of whether the judgment and sentence should be vacated. We do not agree. In a criminal proceeding, the constitution guarantees to the defendant a jury trial only on the issues of fact which determine his guilt or innocence. U.S. Constitution, Sixth Amendment; [Washington] Constitution, Art. 1, § 22 (amendment 10). Appellant was afforded a jury trial in this respect. A motion to vacate a judgment involves a question of law; it presents no issue of fact. Therefore, appellant was not entitled to a jury trial . . . .

State v. Price, 370 P.2d 979, 981 (Wash. 1962) (Emphasis added).

Violation of due process:

The applicable constitutional provisions are article I, section 7 of the Alaska Constitution and its federal counterpart in the Fourteenth Amendment to the United States Constitution.

Under the state constitutional provision, a statute will be found to violate due process if, among other reasons, the statute is vague. A statute is vague if it confers unbridled discretion to government officials and thereby raises the possibility of uneven and discriminatory enforcement. Brown v. Municipality of Anchorage, 584 P.2d 35 (Alaska 1978). The measure proposed in this work order would assign to the jury unfettered discretion to interpret and apply state law, or to ignore state law if the jurors so determined. Thus, though the statutory law itself may be certain and incapable of alternative meanings, if the measure becomes law, then, in application, there is, in my judgment, virtual certainty that, as juries exercise authority and begin to determine whether or not to apply elements of the law, the body of state criminal statutes would come to be enforced in an uneven, discriminatory manner enforcement of state law. Before that occurs, the courts would likely strike down the source of the inconsistency on an application of the due process provision.

*

In summary, I have no doubt that Alaska's Supreme Court would swiftly find unconstitutional the proposed measure changing jury function contemplated by this legislation as violative of one or more of the constitutional provisions cited.

JC:pl
wkp1/009

December 30, 1989

Larry Slone
John J. (Jack) Polster
Lynn House
Chuck House

P.O. Box 379
Homer, Alaska 99603
Phone # 907-235-6805
907-479-4250

Dear Legislator:

We, the above, request your sponsorship of one or both of our proposals to remedy a small, but vitally important omission within the Alaska Criminal Justice System, concerning juror's rights.

Specifically we request your sponsorship/co-sponsorship and support of an Amendment to the Alaska State Constitution. (Please see below requested wordage for the proposed Amendment, which we refer to informally as the 'mercy doctrine' or 'fully informed jury amendment')

Addditionally we request your sponsorship/co-sponsorship and support of a legislative bill to effect a statutory change asserting the natural and traditional role of the jury to apply the law in accordance with community standards as expressed by their own conscience and moral beliefs.

Although it is undisputable that in a specific criminal case, the jury, in direct opposition to a particularly ill-conceived or onerous law, has the power to return a 'mercy verdict', the real issue is jury's need to be informed of their true right to do so. Public ignorance of this right is a serious inhibitor of contemporary justice and has been exacerbated by a failure of our educational, judicial, and political systems to keep the citizenry informed. We believe it crucial for the maintenance of respect and confidence in our democratic system, by the many and diverse groups who constitute the people of Alaska, that this obscure right, which embodies within itself the ultimate form of human checks and balances, be politically recognized and resurected, to shine within the courtrooms of Alaska.

Only when a 'mercy doctrine' has been incorporated into the Alaska State Constitution and/or Alaska State Statutes, will each and every Alaskan know, that, regardless of his or her political beliefs, cultrual values, or lifestyle, ...justice does indeed prevail throughout the land.

(The obverse of this page contains quotes and cites, part of an overwhelming body of evidence that the juror holds both the rights and power enumerated within the wordage of the proposed Amenndment and Bill which you will find below)

We thank you for your consideration

For Justice

(Larry Slone) (for LS/JP/LH/CH)

* * * * * * * * * * * * *

REQUESTED WORDAGE FOR FULLY INFORMED JURY BILL AND AMENDMENT

(1) It is the natural right of every citizen of this state, when serving on a criminal trial jury, to judge both the law and the facts pertaining to the case before that jury, in order to determine whether justice will be served by applying the law t the defendant. It is mandatory that all jurors be informed of this right.

(2) Before the jury hears a case, and again before jury deliberation begins, the court shall inform the jurors of their rights in these words: "As jurors, your first responsibility is to decide whether the defendant has broken the law. If you decide that he has, but that you cannot in good conscience support a guilty verdict, you are not required to do so. To reach a verdict which you believe is just, each of you has the right to do so. To reach a verdict which you believe is just, each of you has the right to consider to what extent the defendant's actions have actually caused harm or otherwise violated your sense of right and wrong. If you believe justice requires it, you may also judge both the merits of the law under which he has been charged and the wisdom of applying that law to the defendant. Accordingly, for each charge against the defendant, even if review of the evidence strictly in terms of the law would indicate a guilty verdict, you have the right to find him innocent. The court cautions that with the exercise of this right comes full moral responsibility for the verdict you bring in."

(3) As part of their oath, the jurors shall affirm that they understand the information concerning their rights which this section requires the court to give them, and no party to the trial may be prevented from encouraging jurors to exercise this right. For the jurors to be so informed is declared to be part of the defendant's fundamental right to trial by jury, and failure to conduct any criminal trial in accordance with this section shall not constitute harmless error, and shall be grounds for mistrial. No potential juror may be disqualified from serving on a jury because he expresses willingness to judge the law or its application, or to vote according to conscience.

I have been interested in this for a long time. In 1895 court decision By S. Court removed rights of jury to render the application of the law in case [illegible] to individual judges [illegible] determine application of law and instructed the jury that they must follow it. I've always believed that it was appropriate for judges to advise the jury on application of law but jury should not be bound to follow interpretation expressed by the judge.

Rep. Robin Taylor

Rm 601 Court

4 or to protect the jury from exercising their right of nullification is a most ... the most fundamental ch. of Bil. Rights ... incorporation in the Constitution. I have reg. leg. drafting & research to review your proposal with the intent of presenting a bill to accomplish the purpose

Sincerely

*** "It may not be amiss, here, gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law it is the province of the court to decide. But it must be observed that by the same law, which recognizes this reasonable distribution of justiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact controversy. On this, and on every other occasion, however, we have no doubt you will pay that respect which is due to the opinion of the court; for, as on the one hand, it is presumed that juries are the best judges of facts; it is, on the other hand, presumable that the courts are the best judges of law. But still, both objects are lawfully within your power of decision." Statement of Chief Justice John Jay in the first jury trial before the United States Supreme Court in 1794. Georgia v. Brailsford (3Dall. 1). Quoted in dissenting opinion of 156 U.S. 51; emphasis added.

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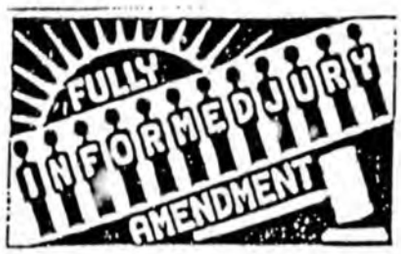

TRUE OR FALSE ?

WHEN YOU ARE ASKED TO SIT ON A JURY, YOU HAVE A RIGHT TO VOTE ACCORDING TO YOUR CONSCIENCE.

December 30, 1989

Larry Slone
John J. (Jack) Polster
Lynn House
Chuck House

P.O. Box 379
Homer, Alaska 99603
Phone # 907-235-6805
907-479-4250

We, the above, request your sponsorship of one or both of our proposals to remedy a small, but vitally important omission within the Alaska Criminal Justice System, concerning juror's rights.

Specifically we request your sponsorship/co-sponsorship and support of an Amendment to the Alaska State Constitution. (Please see below requested wordage for the proposed Amendment, which we refer to informally as the 'mercy doctrine' or 'fully informed jury amendment')

Addditionally we request your sponsorship/co-sponsorship and support of a legislative bill to effect a statutory change asserting the natural and traditional role of the jury to apply the law in accordance with community standards as expressed by their own conscience and moral beliefs.

Although it is undisputable that in a specific criminal case, the jury, in direct opposition to a particularly ill-conceived or onerous law, has the power to return a 'mercy verdict', the real issue is jury's need to be informed of their true right to do so. Public ignorance of this right is a serious inhibitor of contemporary justice and has been exacerbated by a failure of our educational, judicial, and political systems to keep the citizenry informed. We believe it crucial for the maintenance of respect and confidence in our democratic system, by the many and diverse groups who constitute the people of Alaska, that this obscure right, which embodies within itself the ultimate form of human checks and balances, be politically recognized and resurected, to shine within the courtrooms of Alaska.

Only when a 'mercy doctrine' has been incorporated into the Alaska State Constitution and/or Alaska State Statutes, will each and every Alaskan know, that, regardless of his or her political beliefs, cultrual values, or lifestyle, ...justice does indeed prevail throughout the land.

(The obverse of this page contains quotes and cites, part of an overwhelming body of evidence that the juror holds both the rights and power enumerated within the wordage of the proposed Amenndment and Bill which you will find below)

We thank you for your consideration

For Justice

(for LS/JP/LH/CH)

(Larry Slone)

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(1) It is the natural right of every citizen of this state, when serving on a criminal trial jury, to judge both the law and the facts pertaining to the case before that jury, in order to determine whether justice will be served by applying the law to the defendant. It is mandatory that all jurors be informed of this right.
(2) Before the jury hears a case, and again before jury deliberation begins, the court shall inform the jurors of their rights in these words: "As jurors, your first responsibility is to decide whether the defendant has broken the law. If you decide that he has, but that you cannot in good conscience support a guilty verdict, you are not required to do so. To reach a verdict which you believe is just, each of you has the right to do so. To reach a verdict which you believe is just, each of you has the right to consider to what extent the defendant's actions have actually caused harm or otherwise violated your sense of right and wrong. If you believe justice requires it, you may also judge both the merits of the law under which he has been charged and the wisdom of applying that law to the defendant. Accordingly, for each charge against the defendant, even if review of the evidence strictly in terms of the law would indicate a guilty verdict, you have the right to find him innocent. The court cautions that with the exercise of this right comes full moral responsibility for the verdict you bring in."
(3) As part of their oath, the jurors shall affirm that they understand the information concerning their rights which this section requires the court to give them, and no party to the trial may be prevented from encouraging jurors to exercise this right. For the jurors to be so informed is declared to be part of the defendant's fundamental right to trial by jury, and failure to conduct any criminal trial in accordance with this section shall not constitute harmless error, and shall be grounds for mistrial. No potential juror may be disqualified from serving on a jury because he expresses willingness to judge the law or its application, or to vote according to conscience.

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TRUE!

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AT BOX 59, HELMVILLE, MT 59843. (406) 793-5550

CORRECTION

THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY

December 30, 1989

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FIJA—THE FULLY INFORMED JURY AMENDMENT—
AND EDUCATIONAL CAMPAIGN DESIGNED TO EDU
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INFORMED OF THEIR RIGHT AND RESPONSIBILITY TO
WELL AS FACTS IN COURT TRIALS.

. WE WANT EVERY POTENTIAL JUROR IN AMERICA
TRUTH. YOU CAN HELP! JUST CONTACT FIJA NATIONAL
AT BOX 59, HELMVILLE, MT 59843. (406) 793-5550

Can you think of a law which is so morally repugnant to you that it angers you to have to obey it? Have you ever thought about how you might explain yourself to a jury if you were arrested for violating that law? Can you imagine a trial wherein the court does not allow the defendant to argue - while his behavior may have been technically illegal - that it should not be treated as a criminal act, deserving of punishment, because it was not really a dangerous or immoral action?

If you answered yes to any of these questions, the following story about the background and intent of a state-wide effort known as the Fully Informed Jury Alaska (FIJA) may be among the more intriguing reading you've done in quite a while.

Exactly two hundred years ago, Thomas Jefferson sent his friend Thomas Paine a letter in which he said "I consider trial by jury as the only anchor yet imagined by man, by which a government can be held to the principles of its constitution."

It's worth wondering what he could have meant by that. Try to think of any direct connection between the activities of today's juries, either actual or dramatized, which limit government activity to the few tasks allowed it by the people who wrote the United States Constitution.

If no light bulb flashes, do not despair. You're not alone, you're merely uninformed. And for the past 95 years, nearly universally throughout America, the public--from public school children through university law students, to jurors themselves--has been kept in the dark about the role the nation's founding fathers had in mind for the jury, in order to perpetuate their dream of government of, by, and for the people.

The unsung connection is this: in Jefferson's day, and for over five previous centuries (dating from the signing of the Magna Carta in 1215), juries were responsible not only for determining whether a defendant had broken the law, but whether the law itself was just or properly applied to the accused. Their feelings about the law could not and did not change the law, but could and did affect many verdicts, leading to acquitals whenever the jury felt that the defendant had acted morally, even if illegally.

In other words, Mr. Jefferson was saying that the ability of the people to put both law and defendant on trial whenever the law was actually applied was essential if government were going to remain the servant of the people, and not the reverse. The nation's founders so firmly believed in the jury as the ultimate check and balance upon the American system of government that some even argued against adding a Bill of Rights to the Constitution because juries could always be counted upon to veto the application of laws which the people found objectionable.

When underground railroads were operating to free escaped slaves, just a few decades into the 19th century, juries routinely refused to convict people arrested for violations of the Fugitive Slave Act. And in the last years before repeal of Prohibition juries across the country were refusing to convict people for violations of liquor laws (leading directly to repeal).

This is exactly the "anchor" Thomas Jefferson envisioned: Whenever repeated nullification of a law by trial juries renders it not worth trying to enforce, the lawmakers face a meaningful incentive to erase it. Without this mechanism for grounding the actions of the government in public approval, the American system suffers from lack of control by the citizens.

In the later 1800's, when it was illegal for workers to defend the value of their labor by refusing to work (i.e., by going on strike), courts began responding to pressure from business interests by failing to remind juries of their right to judge both law and fact. Finally, in Sparf vs. United States, 1895, the U.S. Supreme Court ruled that judges no longer had to inform jurors of what the first U.S. Supreme Court Chief Justice, John Jay, had declared in 1804, that "the jury has a right to judge both the law as well as the fact in controversy."

Worse yet, the Sparf decision held that defense teams could be cited for contempt of court should they attempt to inform juri of their power to judge the law! So for nearly 100 years, it has been an official secret, guarded by the judicial branch and ignored by the other two; none of them relish the loss of power which would certainly result if the public could "just say no" whenever the government began acting as masters rather than servants of the people.

*** WHAT CAN BE DONE?.....FIJA ! ***

Fully Informed Jury of Alaska (FIJA) is a growing, broad-based group of concerned Alaskans who believe that jury nullification (also referred to as the "Mercy Doctrine") is more than just a price the legal system pays for jury service. Rather, it is a distinct and unique benefit to our system of government that not only brings the community and the law closer together, but also adds a new dimension to the concept of democratic self-rule for all participating in the jury experience. Therefore, it is not merely a practice that should be tolerated, but it is a practice that should be applauded and treated with dignity and honesty.

We believe that the jury, with its power of nullification, is a deliberate attempt to increase citizen participation in government, ameliorate the rigors of laws that may be too harsh when applied in certain cases, prevent government tyranny, bring the law and the community in closer harmony, and allow the people to make the final decision on moral blameworthiness in criminal cases. To achieve these goals, the prospective juror must be informed of his right and power of jury nullification by concerned and informed peers; and instructed appropriately by the judge during criminal trial.

Fully Informed Jury of Alaska is dedicated to informing the residents of Alaska of jury nullification; through newspaper ads, guesting radio talk shows, direct mailings, providing speakers for organization meetings, etc. We are also involved in direct political and legal activities through which the judiciary will hopefully come to recognize the rights of jurors to nullification of of law, and advise of the same during court proceedings (a "Miranda Warning" for jurors). We have also approached each Alaska State legislator requesting their sponsorship of either a legislative bill (which would become law) or an amendment to the Alaska State Constitution, both of which would cause the Alaska State Judiciary to inform jurors, during jury instruction, of all their rights and responsibilities.

In these times of world upheavel in demand of individual freedom and rights, we Americans must remember the roots of our liberty, and that the price of restoring our freedom is both vigelance and action. "...for the saddest epitaph which can be carved in memory of a vanished liberty is that it was lost because its possessors failed to stretch forth a saving hand while yet there was time." 2 Elliots Debates, 94, Bancroft, History of the Constitution, 267, 1788.

Success of the FIJA effort to preserve liberty is dependent, in part, on your help. And how just might you take part? Your assistance with donated time or other resources would be invaluable. Letters to the editor. Discussions with friends. Advising organizations of the availability of FIJA speakers. Contact your local legislator requesting their sponsorship and/or support of the very proposal before him or her, which as law or Constitutional Amendment would facilitate the goal of FIJA. Please feel free to write to your local office of FIJA (stamped below) with your ideas and suggestions or requests for information or additional literature.

If this writing was interesting and important enough to hold your attention until the very end, please consider passing it on to a friend who might find it the same.

(2)

Jan 3, 1990

Larry Slone/Jack Polster
PO Box 379
Homer, AK 99603
235-6805/235-8777

Arthur H. Snowden, Administrative Director
Judicial Branch
303 K Street
Anchorage, Alaska 99501

Dear Mr. Snowden:

On Jan 13 a group of concerned citizens, for whom we speak, will be meeting in Anchorage and we request the presense of yourself, or one of your representatives, to answer any questions that we may have regarding the procedure for changing the Alaska Rules of Court. We trust that 1 pm would be convenient for you.

Also, we would be greatly interested in having you express your viewpoint on how the Justice Depart views the right of a juror, in a criminal case, to judge the merits of the law and his or her right to apply it in a particular case.

I trust that there are paid individuals within the Alaska Court System who would be willing to address this most important question which is of interest to many Alaskan taxpayers.

Please reply before Friday, Jan 12.
Your help would be appreciated.

For Justice

Larry Slone/Jack Polster

(5)

Jan 8, 1990
Larry Slone/Jack Polster
PO Box 379
Homer, AK. 99603
235-6805/235-8777

Governor Steve Cowper
PO Box A
Juneau, AK. 99811-0101

Dear Governor Cowper,

Our concern for the cause of justice in the State of Alaska has prompted us to make an effort to remedy what we consider to be a serious omission of rights within the Alaskan judicial system. We believe that juries in all criminal cases should have, and be instructed in, their traditional right and responsibility to judge the application of a particular law to a particular case as well as having the right to judge the facts.

This "mercy doctrine" would mitigate the injustice and cruelty of poorly-applied, badly-conceived laws and allow the jury to reassume, without deceit, its role as the final arbiter in determining a defendant's guilt or innocence according their own moral values, conscience, and sense of community standards. It is precisely to reflect these qualities that our political structure was originally formed.

We realise that you have direct authority only over the executive branch of state government, however as governor you also have considerable influence over the affairs of the legislative and judicial branches; therefore, we request that you do everything possible, within your proper role as chief executive, to assist the successful passage of our recent request to the legislature seeking a constitutional amendment, and to the judiciary requesting a change in the rules of court, in both cases for the purpose of implementing a "mercy doctrine".

For Justice in Alaska,

Larry Slone/Jack Polster

Attachments: Copy letter to Legislature
Copy letter to Judiciary

P.S. We also request that you submit the attached bill, as an Administrative Bill, to the rules committee of each house (6)

FROM: The Fully Informed Jury of Alaska (FIJA)
P.O. Box 379
Homer, Alaska 99603
907 235 6805

TO: All interested parties.

The success of the Fully Informed Jury of Alaska effort is dependent upon your assistance. It is imperative that all individuals who would be favorably responsive be contacted. And you can help!

If you know of individuals within the state of Alaska who would like to hear from us, please include their names and addresses below. We will see that they are sent an informational packet, including general information on FIJA, a copy of the U.S. Constitution, a copy of the Bill and Amendment which all Alaska State Legislators were recently asked to sponsor, etc..

We are also willing to send packets outside, if you wish, to let someone know what project you are involved with this winter....with notice that you requested the mailing, if you wish.

We do ask that you include one federal reserve note ("paper dollar") for each mailing, which will cover the cost of material and mailing. Your help will prove most valuable in the FIJA effort.

Thank you. For Justice and Freedom.

Larry Slone

Name	Address

(7)

Alaska State Legislature

COMMITTEES:

MEMBER
RULES
COMMITTEE ON COMMITTEES
WESTERN STATES LEGISLATIVE FORESTRY TASK FORCE
FINANCE SUBCOMMITTEE
DEC

P.O. BOX 1441
WRANGELL, ALASKA 99929
(907) 874-2316

While in Juneau
P.O. BOX V
JUNEAU, ALASKA 99811
(907) 465-4905

House of Representatives

ROBIN L. TAYLOR
MINORITY LEADER

January 6,1990

Larry Slone
John J.[Jack] Polster
Lynn House
Chuck House
P.O. Box 379
Homer, Alaska 99603

Dear Mr. Slone,
In regard to your letter of December 30,1989 this is a subject I have been interested in for a long time.

In 1895 a decision by the Supreme Court removed the right of nullification by a jury.

Judges determine the application of law and instruct the jury that they must follow it. I have always believed that it was appropriate for the Judge to advise the jury on application of law,but the jury should not be bound to follow the interpretation expressed by the Judge. For to prevent the jury from exercising the right of nullification you remove one of the most fundamental checks and balances originally incorporated into the constitution.

I have requested legislative drafting and research to review your proposal with the intent of presenting a bill to accomplish this purpose

Sincerely

Representative Robin L. Taylor

RLT/mh

ROBIN TAYLOR

JURY NULLIFICATION: THE CONTOURS OF A CONTROVERSY*

ALAN SCHEFLIN†
AND
JON VAN DYKE‡

CONTENTS

 The authors would like to thank University of Hawaii law students James Williston and Raymond G. Duvauchelle for their assistance in helping to prepare this article for publication.

† Member of the District of Columbia bar. Professor of Law, University of Santa Clara.

‡ Member of the District of Columbia, California, and Hawaii bars. Professor of Law, University of Hawaii.

I
INTRODUCTION

Must a jury always apply the judge's instructions on the law rigorously to the facts of a criminal case and convict whenever the law has been violated? Or should the jurors also be told that they should consider whether it would be *fair* and *just* to apply the full force of the criminal law to an accused person, and that they should refuse to convict if a guilty verdict would be inconsistent with community standards of justice and fair play?

Consider the 1973 trial of twenty-eight religiously-motivated antiwar activists in the federal court in Camden, New Jersey.[1] These individuals were caught red-handed by the Federal Bureau of Investigation (FBI) immediately after they destroyed records of their local selective service of . Evidence later revealed that the FBI had been told of the activists' plan at an early stage, and that the FBI's informant had supplied the activists with the tools and knowledge to carry out their act of civil disobedience.

At the trial, Judge Clarkson S. Fisher permitted the defendants to make statements about their purposes and political feelings, and allowed the jury to hear testimony about the Pentagon Papers and the nature of the Vietnam War. But even more significantly, Judge Fisher allowed defense attorney David Kairys to make an impassioned closing argument to the jury about their right to acquit in these circumstances.[2] The judge had told the jury previously

1. United States v. Anderson, Crim. No. 602-71 (D.N.J. 1973).
2. David Kairy's closing argument included the following statements:

Now, I'd like to move on—and I am almost done now—to the second reason why I think this case is not simple and why I think these defendants should be acquitted. And that's jury nullification.

Now, the term 'nullification' I think is a bad term. It's used to describe the power of a jury to acquit if they believe that a particular law is oppressive, or if they believe that a law is fair, but to apply it in certain circumstances would be oppressive.

that they did not have the power to nullify, but, after argument by counsel, he changed his mind. Judge Fisher told the jury that his earlier comment had been incorrect. He specifically instructed them:

> if you find that the overreaching participation by Government agents or informers in the activities as you have heard them was *so fundamentally unfair to be offensive to the basic standards of decency, and shocking to the universal sense of justice*, then you may acquit any defendant to whom this defense applies. [emphasis added][3]

1973 CRIM
US v ANDERSON

The jury acquitted all twenty-eight defendants.

For contrast, consider the 1969-70 Chicago Conspiracy Trial where eight men were accused of plotting to cause violence at the 1968 Democratic Convention. At the beginning of this trial, Federal District Judge Julius J. Hoffman told the jurors that they must always follow his instructions on matters of law. Defense lawyer Leonard Weinglass immediately objected:

> The defense will contend that the jury is a representative of the moral conscience of the community. If there is a conflict between the judge's instructions and that of conscience, it should obey the latter.[4]

Judge Hoffman overruled the objection and the jury subsequently convicted five of the defendants.[5]

Which approach is preferable? Judge Hoffman's ruling is certainly the more typical judicial attitude. In recent years, most American judges have in-

---

> Now, the second situation might be something like the Boston Tea Party. No one would say that breaking into a ship shouldn't be criminal, shouldn't be a crime. But in those particular circumstances, should people be convicted of doing that? That's the question.
>
> This power that jurors have is the reason why we have you jurors sitting there instead of computers. Because you are supposed to be the conscience of the community. *You are supposed to decide if the law, as the Judge explains it to you, should be applied or if it should not.* Nothing the Judge would say to you is inconsistent with this power.
>
> It's not a request on our part that you show any disrespect for the law. *It's part of the law* . . . . It's as essential as reasonable doubt. It's the same kind of function.
>
> . . . *You decide, considering the circumstances of the case, should you brand the defendants as criminal.* And it's very important in that regard, that you are only required to say guilty or not guilty. That's what people call the general verdict. You don't have to give reasons. You don't have to give specifics. You don't have to justify what you did; and if you say not guilty, it can't be reviewed by any Court.
>
> . . . *Are they deserving of the community's scorn—you being the community—or are they not deserving of the community's scorn? That's what the question is.* [emphasis added]

Transcript at 8386-94, United States v. Anderson, Crim. No. 602-71 (D.N.J. 1973). For a more complete version of Kairys's closing statement, see J. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 239-40 (1977) [hereinafter cited as J. VAN DYKE, JURY SELECTION].

3. Transcript at 8729, United States v. Anderson, Crim. No. 602-71 (D.N.J. 1973), reprinted in J. VAN DYKE, JURY SELECTION, *supra* note 2, at 238-39.

4. N.Y. Times, Sept. 26, 1969, at 25 (city ed.).

5. Judge Hoffman's ruling on this issue was upheld in United States v. Dellinger, 472 F.2d 340, 408 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973); the convictions were, however, reversed on other grounds.

sisted that they alone can articulate and interpret the law and that the role of the jury is simply to evaluate the evidence, decide what happened, and then apply the law—as enunciated by the judge—to the facts.[6] Indeed, this jury instruction is so commonplace that any other advice to the jury is scarcely imaginable in most courts.

But for much of the seventeenth, eighteenth, and nineteenth centuries, jurors were told frequently that they had the right and power to reject the judge's view of the law.[7] In recent years, many defense lawyers and scholars have tried to keep a portion of this tradition alive by arguing for what they believe to be a more candid, just, and democratic view of the role of the jury.[8] The doctrine of "jury nullification" includes the defendant's right to have the jurors instructed that they have the power to refuse to apply a law (or "nullify" its effect) in situations when the strict application of the law would lead to an unjust or inequitable result. The appropriate jury nullification instruction has been described as follows:

> Jurors should . . . be told that although they are a public body bound to give respectful attention to the laws, they have the final authority to decide whether or not to apply a given law to the acts of the defendant on trial

---

6. *See, e.g.*, Morris v. United States, 156 F.2d 525, 531 (9th Cir. 1946); Berra v. United States, 351 U.S. 131, 134 (1956); United States v. Marchese, 438 F.2d 452, 455 (2d Cir. 1971); United States v. Simpson, 460 F.2d 515, 519 (9th Cir. 1972); United States v. Dougherty, 473 F.2d 1113, 1130-37 (D.C. Cir. 1972); State v. McClanahan, 212 Kan. 208, 510 P.2d 153, 158 (1973); United States v. Moylan, 417 F.2d 1002, 1006 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970); Arshack v. United States, 321 A.2d 845, 850 (D.C. Ct. App. 1974).

7. There was only one judge in the United States who, between 1776 and 1800, was to deny the jury the right to decide law in criminal cases . . . . He was afterwards impeached by the House of Representatives of Pennsylvania and removed by the Pennsylvania Senate, on the grounds of interference with the rights [of] a fellow judge in the charging of grand and petit juries.

LLOYD E. MOORE, THE JURY: TOOL OF KINGS, PALLADIUM OF LIBERTY, at 107 (1973).

> Until nearly forty years after the adoption of the Constitution of the United States, not a single decision of the highest court of any State, or of any judge of a court of the United States, has been found, denying the right of the jury upon the general issue in a criminal case to decide, according to their own judgment and consciences, the law involved in that issue—except the two or three cases . . . concerning the constitutionality of a statute. And it cannot have escaped attention that many of the utterances . . . maintaining the right of the jury, were by some of the most eminent and steadfast supporters of the Constitution of the United States, and of the authority of the national judiciary.

Sparf and Hansen v. United States, 156 U.S. 51, 168 (Gray, J., dissenting.)

8. *See, e.g.*, Howe, *Juries As Judges of Criminal Law*, 52 HARV. L. REV. 582 (1939); Sax, *Conscience and Anarchy: The Prosecution of War Resisters*, 57 YALE REVIEW 481 (1968); Kunstler, *Jury Nullification in Conscience Cases*, 10 VA. J. INT'L L. 71 (1969); Van Dyke, *The Jury As A Political Institution*, 16 CATH. LAW. 224 (1970) and 3 The Center Magazine 17 (No. 2, March-April 1970); Scheflin, *Jury Nullification: The Right To Say No*, 45 So. CAL. L. REV. 168 (1972); Sperlich, *Trial by Jury: It May Have a Future*, 1978 THE SUPREME COURT REVIEW 191, 193 note 10. Jury nullification has been argued by defense lawyers in almost every major political case in the last fifteen years. We will discuss some of these cases and arguments later in this article. An excellent book which discusses the jury from the perspective of defense advocacy is A.F. GINGER, JURY SELECTION IN CRIMINAL TRIALS: NEW TECHNIQUES AND CONCEPTS (1975) (Chapter 15 discusses jury nullification).

> before them. More explicitly, jurors should be told that they represent their communities and that it is appropriate to bring into their deliberations the feelings of the community and their own feelings based on conscience. Finally, they should be told that despite their respect for the law, nothing would bar them from acquitting the defendant if they feel that the law, as applied to the fact situation before them, would produce an inequitable or unjust result.[9]

This instruction allows juries to be merciful toward a defendant in those unusual and rare situations when a strict application of a specific law would lead to a result that is inconsistent with community notions of justice and fairness. It does not permit jurors to "make law" or to convict an accused of some act not covered by a statute and the indictment. Judges would reverse such a conviction if it occurred, as they do now.

Even without such an instruction, in a small but significant number of cases, juries return verdicts of "not guilty" despite strong evidence to the contrary because they feel the application of the law to the defendant would lead to an unjust result.[10] This "dispensing power"[11] is acknowledged by all observers of the jury system, even those who disapprove of the nullification instruction.[12]

The critical issue in recent years has become whether the defendant has the right to have the jury instructed as to its universally-recognized power. In *Arschack v. United States*,[13] the District of Columbia Court of Appeals said that to instruct the jury of its power to nullify "would actually encourage anarchy in the courtroom" that "might in the end harmfully infect organized society."[14] We will attempt to demonstrate that this view misrepresents the nature of the nullification instruction and misstates the likely consequences of giving it. We will argue that giving the nullification instruction allows the jury to operate in a more honest and just fashion. In our opinion, the failure to tell the jury of its power to nullify seriously weakens the concept of "jury," thereby impermissibly diluting the defendant's Sixth Amendment rights.

Historically, three jury-power arguments have been made and the failure to carefully distinguish between them continues to cause unnecessary confusion in the modern literature on jury nullification.

The *first* power a jury might exercise is the power to *interpret and ultimately decide all questions of law*. In many early courts, the judge's interpretation of the law was not binding on the jury and could be challenged by the attorneys

---

9. Van Dyke, *supra* note 8, at 241.
10. *See* H. KALVEN & H. ZEISEL, THE AMERICAN JURY *passim* (1966) [hereinafter cited as H. KALVEN & H. ZEISEL].
11. Brown v. United States, 334 F.2d 488, 500 (9th Cir. 1964).
12. *See, e.g.*, State v. McClanahan, 212 Kan. 208, 214, 510 P.2d 153, 158 (1973); United States v. Dougherty, 473 F.2d 1113, 1130 (D.C. Cir. 1972).
13. 321 A.2d 845 (1974).
14. *Id.* at 851.

in the case.[15] The judge would give instructions on the law, followed by the government's and defense attorney's interpretations of the law. The jury would then retire to decide which interpretation, if any, it favored. Most modern proponents of a jury nullification instruction do *not* believe that the jury has or should have this type of power. Proponents of jury nullification accept the right of the judge to instruct the jury on the law, and they support the instruction that this interpretation is binding.

The *second* power a jury might exercise is that of *declaring a statute unconstitutional*. Jury nullification "has occasionally been argued to include the right of the jury to declare a statute unconstitutional."[16] Although this issue was hotly debated in the nineteenth century, today virtually everyone agrees that it is absurd to think that juries can invalidate statutes. A jury's refusal to convict a defendant might be based on a belief that a statute is unconstitutional, but a jury's decision cannot have direct effect beyond the case at hand; a jury cannot eliminate a statute from the law books. Thus, jury nullification does *not* include the authority to declare statutes unconstitutional.

The *third* power a jury might have is *to acquit the defendant on the basis of conscience* even when the defendant is technically guilty in light of the judge's instructions defining the law and the jury's finding of the facts. *This power constitutes jury nullification*. Of the three powers discussed, this one is clearly the least revolutionary and the most defensible. This power is the focus of our article. In our judgment, jurors should be instructed that they have this important power of nullification.

II
HISTORICAL SUMMARY

A. The Early Period

Juries began asserting their nullification power at the same time that they were asserting their independence in other respects. The history of jury nullification is a rich one. Although it has been reviewed in detail elsewhere,[17] selected highlights will be examined in this Section because the history is essential to understanding the modern debate.

The first clear acceptance of the jury as an independent decision-making body came in the 1670 London trial of William Penn and William Mead.[18]

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15. For a modern version of this argument, *see* J. STEIN, CLOSING ARGUMENT: THE ART AND THE LAW 49-53 (1969).

16. Schetlin, *supra* note 8, at 169 n.2.

17. *See, e.g.*, Howe, *supra* note 8, at 583-96; Schetlin, *supra* note 8, at 169-81; Van Dyke, *supra* note 8, at 225-29; Note, *Jury Nullification in Historical Perspective: Massachusetts as a Case Study*, 12 SUFFOLK U. L. REV. 968, 976-1003 (1978).

18. Penn & Mead's Case, 6 HOWELL'S STATE TRIALS 951 (London 1816) (1st ed. London

The jury refused to follow the judge's instructions on the law ordering them to convict. For this act of disobedience, several jurors were forced to spend months in jail insisting on their right to make the final decision on the guilt or innocence of the accused. The subsequent vindication of their position is commemorated in the Old Bailey courthouse in London—the only trial to be so remembered.[19]

The broader right of the jury to pass on questions of law as well as issues of fact was quickly accepted in England, and spread to the North American colonies where juries periodically refused to convict for violations of the Crown's laws. Colonial juries regularly refused, for instance, to enforce the navigation acts designed by the British Parliament to channel all colonial trade through England. Ships impounded by the British for violations of trade restrictions were released by juries in disregard of law.[20]

The most famous colonial example of jury nullification was the case of John Peter Zenger, the only printer in New York who would publish material without the authorization of the British mayor. Under British law, printing such material was criminal sedition and truth was no defense to the charge. Zenger's lawyer, Andrew Hamilton, told the jurors that they "ha[d] the right beyond all dispute to determine both the law and the fact[s]."[21] The jury followed his advice, acquitted Zenger, and again demonstrated the jury's role as the ultimate arbiter of criminal disputes.

By the end of the eighteenth century, this principle was accepted by the leaders who helped form the colonies into a nation. John Adams, one of the more conservative leaders of this period, wrote in his diary in 1771:

1783). The jury was vindicated in Bushell's Case, *id.* at 999. *See* J. VAN DYKE, JURY SELECTION, *supra* note 2, at 5.

19. The memorial hung in the courthouse reads as follows:

> Near this site William Penn and William Mead were tried in 1670 for preaching to an unlawful assembly in Gracechurch Street.
>
> This tablet commemorates the courage and endurance of the Jury, Thomas Vere, Edward Bushell and ten others, who refused to give a verdict against them although they were locked up without food for two nights and were fined for their final verdict of Not Guilty.
>
> The case of these jurymen was reviewed on a writ of Habeas Corpus and Chief Justice Vaughan delivered the opinion of the court *which establishes the Right of the Juries to give their Verdict according to their conviction.* [emphasis added]

20. Because North American juries refused to follow the law in these cases, the British established courts of vice-admiralty to try maritime cases (including violations of the navigation acts) without a jury, a source of great bitterness among the colonists and one of the many grievances that culminated in the revolution. *See* 4 C. ANDREWS, THE COLONIAL PERIOD OF AMERICAN HISTORY 140ff., 152ff., 222-27, 251ff (1934). One of the grievances listed in the Declaration of Independence is the denial of the right of trial by jury in certain cases, an apparent reference to, among other things, the courts of vice-admiralty. *See id.* at 270, and *see generally*, L. MOORE, *supra* note 7, at 107-13.

21. A BRIEF NARRATION OF THE CASE AND TRIAL OF JOHN PETER ZENGER 78 (J. Alexander ed. 1963).

> Now, should the melancholy case arise that the judges should give their opinions to the jury against one of these fundamental principles, is a juror obliged to find his verdict generally, according to this direction, or even to find the fact specially and submit the law to the court? Every man of any feeling or conscience, will answer no. *It is not only his right, but his duty, in that case to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the directions of the court.* [emphasis added][22]

A 1794 civil case, heard before the U.S. Supreme Court under its original jurisdiction, is another example of the widespread acceptance of this jury power. Chief Justice John Jay, after instructing the jury on the law and advising them that, as a general rule, they should take the law from the court, told the jurors:

> But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, *you have, nevertheless, a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy.* [emphasis added][23]

Justices James Iredell and James Wilson were on the Supreme Court in 1794 and expressed agreement in another case with the doctrine that the jurors can judge the law.[24] Even the politically repressive Sedition Law of 1798 adhered to this principle of jury authority by providing that in prosecutions for seditious libel, "the jury who shall try the cause shall have a right to determine the law and the fact, under the direction of the court, as in other cases."[25]

During this period, English jurors were also insisting on their right to decide questions of law. The Crown repeatedly attempted to prosecute for libel; the Crown's judges tried to control jury verdicts. In one celebrated case, the judge told the jurors that because the defendant did not deny that he published the document in question and because the judge ruled as a matter of law that the document was libelous, the jurors were obliged to return a verdict of guilty.[26] Such high-handed pressure tactics caused an uproar. In 1792, after much debate, Parliament passed Fox's Libel Act,[27] which stated that the judge could explain the law to the jurors, but gave the jurors a choice of how to respond. The jurors could return either a *special verdict*, responding to each factual issue and leaving the law to the judge, or a *general verdict*, simply guilty or not guilty with no explanation of how the result was reached. The jury's right to decide matters of law moved in only one direction: they could decide that the law did not apply to a defendant when a judge thought it did, and

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22. LIFE AND WORKS OF JOHN ADAMS 253-55 (C.F. Adams ed. 1856).
23. Georgia v. Brailsford, 3 U.S. (3 Dall.) 1, 4 (1794).
24. Bingham v. Cabot, 3 U.S. (3 Dall.) 19, 32-33 (1795); 2 Wilson's Works 371-74 (J. Andrews ed. 1895).
25. Ch. 75, 1 Stat. 597 (1798).
26. The Dean of St. Asaph's Case, 21 HOWELL'S STATE TRIALS 847, 869 (London 1816) (1st ed. London 1783).
27. *See* Sparf and Hansen v. United States, 156 U.S. 51, 134-40 (1895) (Gray, J., dissenting).

their decision would be final. But if they decided that the law did apply when the judge thought it did not, the judge could set their decision aside. Because the jury could only mitigate the harshness of the law, and could not impose a harsher view of the law to convict an unsuspecting person, this limited view of the jury's right to consider the law as well as the facts did not raise any due process problems. This approach provides a model for modern jury nullification, which permits the jury to shift the law in *only one direction*—that of *mercy*.

B. The Nineteenth Century Revision

The jury's right to consider the equities of the law was sharply curtailed in the United States during the nineteenth century, in part because some leading judges did not think that a jury could be permitted to mitigate the law without also being able to create harsh and vindictive laws. Supreme Court Justice Joseph Story was the most forceful advocate of limiting the jury's function to fact-finding. In a case involving the transportation of slaves along the coast of Africa, defense attorneys argued that the jurors should be told they can judge the law as well as the facts.[28] As trial judge, Story conceded that the jurors have the "physical power to disregard the law, as laid down to them by the court." Nonetheless, he did not think jurors' decisions should be based simply on their own notions or whims:

> On the contrary, I hold it the most sacred constitutional right of every party accused of a crime, that the jury should respond as to the facts, and the court as to the law. It is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the court. This is the right of every citizen; and it is his only protection. If the jury were at liberty to settle the law for themselves, the effect would be, not only that the law itself would be most uncertain, from the different views, which different juries might take of it; but in case of error, there would be no remedy or redress by the injured party; for the court would not have any right to review the law as it had been settled by the jury . . . . Every person accused as a criminal has a right to be tried according to the law of the land . . . and not by the law as a jury may understand it, or choose, from wantonness, or ignorance, or accidental mistake, to interpret it.[29]

Story's language is strong, but careful analysis of the case indicates that his reasoning does not apply to the current jury nullification debate, i.e., the right of the jury to refuse to apply the law. Justice Story was construing an 1820 statute that provided the dealth penalty for any American citizen who should "seize any negro or mulatto" with the intent of making the person a slave. The defendant had been a sailor on a ship that transported slaves from Portuguese Africa. According to Story, before the statute could be applied to the defendant's acts, two questions of interpretation had to be resolved:

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28. United States v. Battiste, 24 F. Cas. 1042 (C.C.D. Mass. 1835) (No. 14,545).
29. *Id.* at 1043.

(1) whether the statute applied to sailors who gained no title over slaves and no profit from their sale; and (2) whether it applied to the transportation of slaves between two points within a country practicing slavery. Justice Story answered both questions no. Story's concern, in depriving the jurors of the power to interpret the law, was to prevent them from convicting and executing the defendant out of vengeance when he was inclined to be merciful. He was worried that the jury would punish the defendant for an act that the legislature did not intend to criminalize, rather than act mercifully and refuse to punish the violation of a statute.

Although Justice Story did not address specifically the jury's right to act mercifully, he apparently could not accept the seeming inconsistency of allowing a jury to reduce a punishment if it could not also increase it. He felt that if the jury's power to create laws was to be limited, its power to nullify them also had to be limited. Modern proponents of jury nullification would agree with the result reached by Justice Story in his case. A trial judge should decide questions of law, and a judicial ruling that the law does not apply to the accused cannot be reversed by the jury. The jury's power to "nullify" the law is simply a power to be merciful.

Justice Story's successor in the judicial campaign to limit jury freedom was Supreme Court Justice Benjamin R. Curtis. In 1851, Curtis was the trial judge in a slave case[30] involving a violation of the Fugitive Slave Act.[31] This statute was obnoxious to a large part of the population and difficult to enforce because juries habitually acquitted in cases of obvious violation. The defendant's lawyer argued to the jury: "this being a criminal case, the jury were rightfully the judges of the law, as well as the fact."[32] He continued, if any of the jurors believed the statute "to be unconstitutional, they were bound by their oaths to disregard any direction to the contrary which the court might give them."[33]

Justice Curtis interrupted the lawyer's argument and gave a long opinion rejecting his assertion. Unlike Story, Curtis was squarely confronted with the argument that the jury should be allowed to act mercifully to mitigate the effect of an unjust law. Like Justice Story, Curtis refused to consider that proposition alone, but he seemed to view the argument as something more—that the jurors should have total authority to pass on the law, with the power to increase as well as decrease the penalties to be imposed. Justice Curtis cited an 1802 congressional statute that said the decisions of the Supreme Court were final.[34] He argued, if jurors were permitted to decide questions of law, then they could overturn decisions of the Supreme Court, the purpose of the 1802

30. United States v. Morris, 26 F. Cas. 1323 (C.C.D. Mass. 1851) (No. 15,815).
31. Ch. 113, § 4, 3 Stat. 600 (1820).
32. United States v. Morris, 26 F. Cas. at 1331.
33. *Id.*
34. *Id.* at 1334.

statute would be subverted, and uniform interpretations of the law would be impossible.[35] This argument is inapplicable to the contentions of modern proponents of jury nullification. They do not ask that juries be allowed to reverse decisions of the Supreme Court, or even that any jury's decision should have any effect beyond the limits of the specific case. Their contention is that within one courtroom, with regard to one defendant and one set of facts, the impaneled jurors should be told that they have the discretion to mitigate the law's harshness if justice so requires.

The rulings of Justices Story and Curtis were widely examined throughout the country, but they were only decisions of individual judges and hence were only as influential as they were persuasive.

In 1895, the Supreme Court finally considered the question of what jurors should be told about their power. Quoting extensively from Story and Curtis, the Court agreed with their conclusions by a vote of seven-to-two. The case, *Sparf and Hansen v. United States*,[36] involved two sailors accused of throwing a comrade overboard. The sailors were charged with murder; their defense was that what they did constituted the lesser offense of manslaughter. The defendants asked the trial judge to tell the jurors that it was within their power to return a verdict of either murder or manslaughter. The judge refused, saying no evidence had been introduced that would support a verdict of manslaughter. The judge conceded that it was within the power of the jury to return a verdict of manslaughter, but maintained that such a conclusion would not be legally defensible. In response to a request for additional instruction, the trial judge told the jurors:

> In a proper case, a verdict for manslaughter may be rendered, . . . and even in this case you have the physical power to do so; but as one of the tribunals of the country, a jury is expected to be governed by law, and the law it should receive from the court. [emphasis deleted][37]

The convicted defendants appealed to the Supreme Court, arguing that the jury had been improperly instructed. The lengthy majority opinion rejecting the appeal concludes that because jurors cannot be permitted to increase penalties or create laws on their own, they cannot be allowed to reduce such penalties or nullify laws. The reasoning parallels that of Justices Story and Curtis and fails to distinguish between jury vengeance and jury mercy.

Ever though no one argued that the jury should be allowed to create its own crimes or to impose stiffer punishment than permitted by law, the Court was haunted by that specter:

> [I]f a jury may rightfully disregard the direction of the court in matter of law, and determine for themselves what the law is in the particular case before

35. *Id.*
36. 156 U.S. 51 (1895).
37. *Id.* at 62 n.1.

> them, it is difficult to perceive any legal ground upon which a verdict of conviction can be set aside by the court as being against law. If it be the function of the jury to decide the law as well as the facts—if the function of the court be only advisory as to the law—why should the court interfere for the protection of the accused against what it deems an error of the jury in the matter of law.[38]

Thus, the majority opinion contains broad language limiting the jury's power, but it cannot be viewed as a *holding* rejecting the modern concept of jury nullification. First of all, the trial judge in *Sparf* told the jurors they had the "physical power" to return a verdict of manslaughter despite the evidence;[39] the Supreme Court did not criticize that instruction. Second, the majority opinion argues forcefully that juries may not decide questions of law or create crimes. No modern jury nullification proponent would question either of these principles. It does not necessarily follow that juries must be deprived of the power to be merciful.[40] Although the *Sparf* majority clearly did decide that jurors must take the law from the judge and may not substitute their own

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38. *Id.* at 101.

39. 156 U.S. at 62 n.1, quoted above in the text at note 37.

40. Another aspect of *Sparf* also makes it inapplicable to the contemporary nullification position. From the facts of that case it is clear that the jury was considering a verdict of manslaughter, but evidence for that offense was lacking. The court instructed the jury to that effect. The Supreme Court was therefore simply upholding the principle that a jury cannot convict in the absence of evidence beyond a reasonable doubt. In order for the jury to lessen the penalty in *Sparf*, they would have to convict the defendant of a crime for which the defendant was not indicted. Even though the jury would have acted out of leniency, they would nevertheless be *convicting* against the evidence. *Sparf* concludes that they should be told they should not do this.

Support for this view of *Sparf* may be found in the recent case of United States *ex. rel.* Matthews v. Johnson, 503 F.2d 339 (3rd Cir. 1974), *cert. denied sub nom.* Cuyler v. Matthews, 420 U.S. 952 (1975), which involved the constitutionality of a practice allowing the jury to return a voluntary manslaughter verdict despite the absence of evidence. Pennsylvania case law permitted juries to convict for voluntary manslaughter in murder cases despite the lack of evidence of provocation or heat of passion. This rule was based upon two different considerations: (1) that voluntary manslaughter is a lesser-included offense of murder, and (2) "a realistic appreciation of the fact that factors such as sympathy or extenuating circumstances may lead a jury to find a defendant guilty of the lesser included offense" (503 F.2d at 341) even though the evidence supports the greater verdict. Thus, Pennsylvania permitted a jury to do what *Sparf* had forbidden, *i.e.* convict for a lesser offense even though the evidence taken strictly would not support the conviction. The U.S. Court of Appeals for the Third Circuit upheld this practice in *Matthews*, but struck down as unconstitutional the unfettered discretion of the trial judge to refuse to instruct the jury as to this authority. According to the court, such discretion violates due process because it is arbitrary, it subjects similarly situated defendants to unequal protection of the law, and it removes from the jury the opportunity to consider another legitimate verdict.

Thus, in Pennsylvania, a judge is *required*, upon request of the defendant, to instruct the jury that it may convict for a lesser offense, despite the absence of evidence. The U.S. Court of Appeals for the Third Circuit approved the specific practice that had been disapproved eighty years earlier in *Sparf* and *Hansen*.

This same result has been reached in Indiana, where the court now permits juries to return verdicts of manslaughter when murder is charged, despite technical inadequacies in the evidence. See the text at notes 118-21, *infra*. (*But cf.*, People v. Gottman, 64 Cal. App. 3d 775, 134 Cal. Rptr. 834, 837 (1977)).

beliefs of what the law should be, they did not address the specific question whether jurors should be told they can refuse to enforce the law's harshness when justice so requires.[41] The Supreme Court has yet to address this issue directly, although the Court has recently reaffirmed the jury's lawmaking role in other contexts.[42] Before looking at examples of approved jury lawmaking —and the Supreme Court's opinions supporting this role—we will survey the current views of lower-court judges who have discussed whether jurors should be told of their nullification power.

III

RECENT JUDICIAL ATTITUDES TOWARD JURY NULLIFICATION

For the first half of this century the controversy over jury nullification remained largely dormant.[43] It began anew in the 1960s in criminal cases involving political controversies. As the Department of Justice moved dramatically against antiwar activists, defense lawyers sought a legal means to allow the jurors, as the conscience of the community, to consider the morality of the defendant's actions. Although initially dismissed as historically unsound, functionally unwise, and legally untenable, the jury nullification argument has acquired important judicial and academic support in the last ten years.

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41. Modern commentators do not disagree on the content of these historical precedents, but they do differ on the application of these precedents to the current controversy. Professor Gary J. Simson has argued, for instance, that the power to acquit on the basis of conscience is a broader and more substantial power than the power to interpret the law. Simson, *Jury Nullification in the American System: A Skeptical View*, 54 TEX. L. REV. 488, 506 (1976). The power of interpretation, he says, would be "a right on the jury's part to step into the judge's shoes," (*Id.*) but the power to nullify is analogous to the more substantial role of the legislator:

> Like a legislature, a jury with a right to nullify defines blameworthy conduct according to its own notions of justice. A judge's authority to "make law"—an essentially interstitial or, in the case of common law, incremental operation—pales in comparison.

Id. at 507.

Proponents of jury nullification view the matter differently. Jurors possessing the right to decide what the law is would appear to constitute a much greater threat to liberty than jurors who must take the law from the judge but are also told they may acquit on the basis of conscience in exceptional situations. In the former instance, a consistent body of law could not develop. Appellate courts could not review jury decisions because juries, having the authority to decide the meaning of law, could not erroneously apply it. *See, e.g.*, F. WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 1119 (4th ed. Philadelphia 1857) (1st ed. Philadelphia 1856); United States v. Shive, 27 F. Cas. 1065 (C.C.E.D.Pa. 1832) (No. 16,278). A jury that is considering acquittal even though the facts indicate that the law has been broken is subject to many constraints, which we shall review later (see text at notes 220-32, *infra*).

Jury nullification proponents would argue that a jury that has the power to interpret the law is a jury that has the power to make law, thereby occupying a "legislative" role. On the other hand, a jury that acquits on the basis of conscience occupies a policy-making or prosecutorial role, acting not as a lawmaker but as a discretionary body deciding how to apply law.

Another problem with Professor Simson's analogies is that they appear to be equally applicable to the discretion exercised by prosecutors and police officers, who also occupy what he would term a "legislative" role. See text at notes 152-53, *infra*.

42. See text at notes 90-110, *infra*.

43. *But see* Howe, *supra* note 8.

In 1971, the trial judges in Kansas approved the principle of jury nullification, and printed the following instruction in the official jury instructions as one that could—at the discretion of the judge, but not over the objections of the defendant—be given to juries in criminal cases:

> It is presumed that juries are the best judges of fact. Accordingly, you are the sole judges of the true facts in this case.
>
> I think it requires no explanation, however, that judges are presumed to be the best judges of the law. Accordingly, you must accept my instructions as being correct statements of the generally accepted legal principles that apply in a case of the type you have heard.
>
> The order in which the instructions are given is no indication of their relative importance. You should not single out one or more instructions and disregard others but should construe each one in the light of and in harmony with the others.
>
> These principles are intended to help you in reaching a fair result in this case. . . . You should do just that if, by so doing, you can do justice in this case.
>
> Even so, it is difficult to draft legal statements that are so exact that they are right for all conceivable circumstances. *Accordingly, you are entitled to act upon your conscientious feeling about what is a fair result in this case and acquit the defendant if you believe that justice requires such a result.*
>
> Exercise your judgment without passion or prejudice, but with honesty and understanding. Give respectful regard to my statements of the law for what help they may be in arriving at a conscientious determination of justice in this case. That is your highest duty as a public body and as officers of this court. [emphasis added][44]

In authorizing this instruction, the trial judges included "Notes on Use" as an explanation of its meaning. These Notes describe the instruction as a "more honest statement" of the jury's role than the traditional instruction that orders the jurors to adhere rigidly to the judge's explanation of the law:

> Arguably, the above instruction should bring into play the underlying value of trial by jury: The application of community conscience. *If extenuating circumstances make an otherwise culpable act excusable, a jury should feel empowered to so find.* Community standards are more apt to be applied if the jurors are told they are free to do what, overall, seems right to them. [emphasis added][45]

The Kansas instruction clearly recognized that nullification is a mercy doctrine permitting the jury to acquit despite a defendant's technical guilt. This nullification instruction was used only a few times; the Kansas Supreme Court disapproved it in 1973.[46] Although the court recognized the power of the jury to return any verdict whatsoever, the court said, "power is one thing and

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44. PATTERN INSTRUCTIONS FOR KANSAS 51.03, at 36 (1971); *see* F. WOLESLAGEL, JURY 112-13 (National College of the State Judiciary, Reno, Nev., 1973). This instruction was declared to be inappropriate by the Kansas Supreme Court in the case of State v. McClanahan, 212 Kan. 208, 510 P.2d 153 (1973), see text at notes 46-48, *infra*.

45. 510 P.2d at 157; PATTERN INSTRUCTIONS FOR KANSAS, *supra* note 44, at 37; F. WOLESLAGEL, *supra* note 44, at 113.

46. State v. McClanahan, 212 Kan. 208, 510 P.2d 153 (1973).

proper function and legal duty is another."[47] The crux of the court's opinion appears below:

> The administration of justice cannot be left to community standards or community conscience but must depend upon the protections afforded by the rule of law. The jury must be directed to apply the rules of law to the evidence even though it must do so in the face of public outcry and indignation. Disregard for the principles of established law creates anarchy and destroys the very protections which the law affords an accused.[48]

The court appears to have misunderstood the purposes of the instruction, which does not authorize the jury to proceed lawlessly, but tries to impress upon the jurors, in as careful a fashion as possible, their role as the ultimate decision-makers on whether a general law can be equitably applied to a particular situation. Despite the Kansas Supreme Court's holding, the fact that the trial judges recognized the justice of giving a more honest guide to the jury in its deliberations, and fashioned instructions designed to support mercy and conscience, is a real victory for jury nullification.

Of even greater significance is *United States v. Dougherty*,[49] the first modern case to discuss the jury nullification instruction at length and debate the wisdom of instructing the jurors about their power to nullify. In this case, nine members of the Catholic clergy broke into Dow Chemical Company offices and ransacked the premises to protest Dow's manufacture of napalm. The defendants, the "D.C. Nine," requested a jury nullification instruction at the trial, but the request was refused. On appeal, the U.S. Court of Appeals upheld, by a two-to-one vote, the trial judge's refusal to give the nullification instruction.

Judge Harold Leventhal wrote for the majority and conceded that "[t]he pages of history shine on instances of the jury's exercise of its prerogative to disregard uncontradicted evidence and instructions of the judge,"[50] specifically citing the *Zenger* case[51] and the nineteenth century acquittals in fugitive slave cases. But then, after acknowledging the value of jury nullification, Judge Leventhal said he feared that "[t]he way the jury operates may be radically altered if there is alteration in the way it is told to operate."[52] He asserted that jurors already know of their power to nullify through "informal communication from the total culture," citing literature, television, newspa-

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47. *Id.* at 214, 510 P.2d at 158.
48. *Id.* at 216, 510 P.2d at 159.
49. 473 F.2d 1113 (D.C. Cir. 1972) (the debate on jury nullification in *Dougherty* was not essential to the disposition of the appeal, because the issue of self-representation required the case to be returned to the trial court). This case is discussed in more detail in the text at footnotes 208-42, *infra*.
50. *Id.* at 1130.
51. *Id.*; see text *supra* at note 21.
52. United States v. Dougherty, 473 F.2d at 1135.

pers, conversations and readings of history.[53] These informal sources convey the idea that jurors are free to depart from the judge's instruction in rare cases. But, according to Judge Leventhal's conclusion, what functions as an informal procedure might be unworkable if institutionalized.

Judge Leventhal suggests that we consider the analogy of speed limits. A posted speed limit of 60 mph produces speeds of 10 or 15 mph in excess of that limit. Some of this greater speed is tolerated, as motorists know, even though they are not officially told this. If the speed limit were raised to the speeds now tolerated, motorists would drive at even greater speeds, and the tolerance factor would have to be raised as well. Judge Leventhal then asks, " . . . can it be supposed that the speeds would stay substantially the same if the speed limit were put: Drive as fast as you think appropriate, without the posted limit as an anchor, a point of departure?"[54] Judge Leventhal concludes that, in cases of high conscience, the jury will exercise its strong preference for freedom without being told to do so; but the jury should not be encouraged to deviate from the norm. Any other rule would make the juror feel "that it is he who fashions the rule that condemns."[55]

It is significant that Judge Leventhal does not define his concept of jury nullification. His speed limit analogy reveals that he is focusing on the question whether the jury can decide what the law is, rather than on the more modest question whether the jury can refuse to apply the law in specific situations. Jury nullification proponents would respond to his analogy by saying that speed limit signs should state that "the posted limit is 60 mph, but if emergency conditions exist, persons who drive faster may not be punished." Jury nullification does not ask the jury to make up the law, but permits the jury to recognize that specific departures from the law can be justified.

Chief Judge David Bazelon, in his dissenting opinion, condemns the inconsistent view that glorifies nullification as enhancing the "over-all normative effect of the rule of law,"[56] while requiring that the nullification power be concealed from jurors and perhaps even denounced in their presence—as had been done in the *Dougherty* case.[57] In Judge Bazelon's view, jurors should be told candidly that part of their job is to decide on the equity of applying the law in their particular case:

> . . . The [jury nullification] doctrine permits the jury to bring to bear on the criminal process a sense of fairness and particularized justice. The drafters of legal rules cannot anticipate and take account of every case where a defendant's conduct is "unlawful" but not blameworthy, any more than they can draw a bold line to mark the boundary between an accident and negligence.

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53. *Id.*
54. *Id.* at 1134.
55. *Id.* at 1136.
56. *Id.* at 1143 (Bazelon, C.J., dissenting).
57. *Id.* at 1144.

> It is the jury—as spokesman for the community's sense of values—that must explore that subtle and elusive boundary.
>
> . . . The very essence of the jury's function is its role as spokesman for the community conscience in determining whether or not blame can be imposed.[58]

Both the majority and dissenting opinions in *Dougherty* recognize the value of the jury's power to nullify, but they disagree over whether the jury should be told about its power. Judge Leventhal fears that a specific jury instruction will upset the delicate balance that reserves nullification for cases truly requiring it. On the other hand, Judge Bazelon believes that jurors will not revolt simply because they are told of their nullification power, because many internal restraints keep juries from acting irrationally. Modern debate over jury nullification is shaped by the difference of opinion on this vital issue.

Another important judicial convert on the nullification instruction is U.S. District Judge Frank A. Kaufman of the District of Maryland.[59] He admits that he originally opposed giving the nullification instruction and advised against it in a Vietnam protest case.[60] By the late 1970s, however, his views had changed. Maryland is one of the states that gives a nullification instruction in its state courts,[61] and Judge Kaufman may have been influenced by the smooth operation of the system he saw in nearby courts. The most significant influence, however, was the issue of a defendant's right to self-representation. After the Supreme Court ruled that all defendants have the right to represent themselves,[62] Judge Kaufman felt that candor and honesty required that jurors be told of their power to nullify in appropriate cases. The defendant acting without an attorney will inevitably appeal to the jurors' sense of justice, and the constraints a trial judge has over such defendants will inevitably be less than the power a judge has over an attorney.[63] Judge Kaufman argues that it is preferable to instruct a jury clearly about its power[64] rather

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58. *Id.* at 1142 (Bazelon, C.J., dissenting).

59. Kaufman, *The Right of Self-Representation and the Power of Jury Nullification*, 28 CASE W. RES. L. REV. 269 (1978).

60. *Id.* at 283-84. Judge Kaufman reports that he was consulted regarding U.S. District Judge Roszel C. Thomsen's refusal to give the nullification instruction in the case of *United States v. Moylan*, 417 F.2d 1002 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970).

61. See text at notes 127-45, *infra*.

62. Faretta v. California, 422 U.S. 806 (1975).

63. Kaufman, *supra* note 59, at 281-82.

64. Judge Kaufman recommends that jurors be instructed "along the following lines:"

> . . . (1) in a democracy, the way to change a law is not to violate it, whether by passive, non-violent, or any other means, but instead by expression of views at the polls and otherwise; (2) a juror should never fail to enforce a law as defined in the judge's instructions unless the very roots of his conscience and his very guts will not permit him to do so; (3) a juror should never act out of bias, prejudice or sympathy; (4) a juror should rarely, except in that once in a lifetime type of case when he just cannot permit himself to do otherwise, reject and fail to follow the court's instructions on the law.

Id. at 286.

than force the jury to guess about its role in weighing the justice of enforcing a law. Although not every case warrants the nullification instruction, he concludes, "fairness and candor demand that judges should have the flexibility to provide for a nullification instruction in appropriate cases."[65]

Fairness and candor are thus at the heart of today's debate on jury nullification. Should the jury be told of its nullification power so it can exercise it wisely, or should we keep jurors mystified, hoping they will exercise the power in extreme cases but withholding from them a full explanation of their responsibilities? Before reviewing how jury nullification works in states that use it, we will review the lawmaking power of juries in other contexts.

IV

THE LAWMAKING POWER OF JURIES IN OTHER CONTEXTS

One of the reasons some judges acknowledge the need for a formal jury nullification instruction is their recognition that they instruct jurors in a number of other contexts that the jurors should serve as the community's conscience and determine what conduct is reasonable and appropriate in the situation they are judging. We frequently ask jurors to make law when we ask them to compare the litigants' conduct to that of a "reasonable person." When jurors are asked to determine "malice" or "self-defense," we are asking them to weigh the reasonableness of the accused's activity, and, in that sense, to make law.

In the vast majority of civil and criminal trials, most judges instruct the jury that they are the finders of fact and must take their understanding of the law from the judge. That instruction divides the jury (the fact-finder) from the judge (the law-giver). Although simple to state, this division is, in the words of Sir Patrick Devlin, "quite misleading."[66] Disputes that reach the level of adjudication are rarely so simple that the law/fact dichotomy can be made with ease.[67] The disagreement is usually complex and the product of conflicting sets of understanding and experience. For this reason juries are asked to weigh the evidence, sift the information, judge the credibility of witnesses, and reach a general verdict applying those "facts" to the law. The constitutional requirement that the jury be selected from a representative cross section of the community is essential because segments of the community differ in their perceptions, and because all viewpoints are entitled to be heard.[68] Jurors bring a variety of perspectives to their deliberations that enables them to see beyond the single viewpoint of the judge. The jury verdict may thus act as a social barometer that measures the community response to the legal

65. *Id.* at 269.
66. P. DEVLIN, TRIAL BY JURY 150 (1956).
67. *See generally* Kershen, *Vicinage*, 30 OKLA. L. REV. 1, 79-85 (1977).
68. *See generally id.* and J. VAN DYKE, JURY SELECTION, *supra* note 2, at 45-83.

system. Jury verdicts provide significant information about the harmony, or lack thereof, between the laws and the people. This information, when fed back to the legal system and to the community, can serve to bring the law and its administration in line with popular sentiment and can act as a reliable guide for citizens seeking to order their affairs in accordance with the law.

All of this is old learning. The important point is not simply that jurors have discretion because the law/fact dichotomy is unclear, but that jurors are often expressly authorized by the legal system to engage in lawmaking and policy-deciding.[69] Although jurors are frequently told that their role is to find the facts and apply the law to those facts, in reality the legal system counts on them to do much more.

A. The Civil Jury

A trial judge will send a case to the jury only if reasonable persons could disagree on how the factual issues are to be resolved. If the jury could legitimately decide the case in favor of either party, it is clearly being asked to do more than apply reason to the evidence—it is being asked to use its intuition and instincts to decide which result is the "right" one.[70] In so acting, the jury is in effect making policy or declaring law—at least for the case at hand. Civil jurors, in struggling with the factual issues, must often decide how the parties ought to have acted, or how a reasonable person would have acted, under the circumstances. This judgment requires a policy decision--not just an evaluation of the facts.

Professor Harry Kalven noted that the civil jury is "the 'expert' tribunal for the two great distinctive issues posed by the common law: drawing the profile of negligence and handling the individual pricing of damages."[71] The reason we entrust the calculation of damage to the jury has been explained by federal Judge Charles Wyzanski of Boston: "[T]he estimate of what loss the plaintiff suffered can best be made by men who know different standards of working and living in our society."[72] Judge Hogan has observed on the ques-

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69. The jury historically functioned not only as fact finder but as a tempering element in criminal prosecutions. As Mr. Justice Nix observed in his Opinion in Support of Affirmance in *Commonwealth v. Jones*, [457] Pa. [563, 568-70], 319 A.2d 142, 146 (1974), [*cert. denied* 419 U.S. 1000], the capacity of the jury to find voluntary manslaughter even without evidentiary support derives particularly from its "historically recognized mercy dispensing power." [457 Pa. at 572, 319 A.2d at 148] The absence of a logical basis for a voluntary manslaughter charge is thus not conclusive of the issue.
United States *ex rel.* Matthews v. Johnson, 503 F.2d 339, 350 n.6 (3rd Cir. 1974) (Adams, J., concurring), *cert. denied sub nom.* Cuyler v. Matthews, 420 U.S. 952 (1975).

70. Michael, *The Basic Rules of Pleading*, 5 REC. A.B. CITY N.Y. 199-200 (1950). Professor Michael considered the jury function to be more "emotional" than rational. He did not specifically mention or notice the lawmaking function involved.

71. Kalven, *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1058 (1964). *See also*, P. DEVLIN, *supra* note 66, at 142-43.

72. Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1287 (1952).