MINUTES

MONTANA SENATE
52nd LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By Chairman Dick Pinsoneault, on March 8, 1991, at 10:17 a.m.

ROLL CALL

Members Present:
Dick Pinsoneault, Chairman (D)
Bill Yellowtail, Vice Chairman (D)
Robert Brown (R)
Bruce Crippen (R)
Steve Doherty (D)
Lorents Grosfield (R)
Mike Halligan (D)
John Harp (R)
Joseph Mazurek (D)
David Rye (R)
Paul Svrcek (D)
Thomas Towe (D)

Members Excused: none

Staff Present: Valencia Lane (Legislative Council).

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Announcements/Discussion:

HEARING ON SENATE RESOLUTION 6

Presentation and Opening Statement by Sponsor:

Senator Bruce Crippen, District 45, told the Committee he was both pleased and honored to bring Senate Resolution 6 before them, confirming the nomination and appointment of Karla Gray as a Justice of the Supreme Court. He stated he has known Justice Gray well from her past years as a representative of the Montana Pilots Association and the Montana Power Company. Senator Crippen said her honesty and integrity in dealing with legislative issues is outstanding, and that he believed the Governor made an excellent choice.

Proponents' Testimony:

Rick Bartos, Chief Legal Counsel for Governor Stan Stephens, echoed Senator Crippen's remarks on behalf of the Governor. He informed the Committee that Justice Gray was born in Michigan, received her B.S. from Western Michigan University in 1969 in English and History, and went on to earn her M.A. in African History. Rick Bartos said she received her J.D. from the Hartford College of Law in San Francisco in 1976.

Rick Bartos reported that Justice Gray was admitted to practice law in Montana in 1976 and in the Supreme Court of California and U.S. District Court of Montana in 1977. He said she served as law clerk for Judge William Murray in 1976, and later on as staff attorney for the Atlantic Richfield Company. Rick Bartos further stated that Justice Gray entered private law practice in Butte for a brief period in 1984, and became a staff attorney for the Montana Power Company in Butte later that same year.

Rick Bartos advised the Committee that Justice Gray has practiced a wide range of law, including corporate law. He said she represented the Montana Power Company before the Public Service Commission, and OSHA (Occupational Safety and Hazard Agency) on environmental concerns.

Rick Bartos explained that Justice Gray has written several legal treatises and narratives, one of which was on the 14th Amendment and prisons, which was published in the Hastings Law Journal. He said she also wrote Legal Aspects on Confinement, and has been active in both the community and the State Bar Association. Rick Bartos went on to state that Justice Gray served as editor for a state legal magazine; on the Task Force for Gender Fairness Committee; and the Corporate Law Committee.

Rick Bartos told the Committee Justice Gray is a past president of the Butte/Silverbow Bar, is a member of the American Bar Association, and is a distinguished board member of the Montana Trial Lawyers Association. He stated that Justice Gray possesses the necessary legal curiosity, objectivity, and independence to serve as a Montana high appellate court judge. He urged confirmation of her appointment.

Chief Justice Gene Turnage, said he was pleased to ask the Judicial Nominating Commission to approve and to favorably consider the appointment of Karla M. Gray to the Montana Supreme Court. He said she is a real asset, bringing her extensive ability in the law, and that she has been a very active member of the Bar, as well as many facets of Montana law.

Chief Justice Turnage advised the Committee that Justice Gray is presently serving as editor of the Montana Lawyer publication of the State Bar. He said her statement to the Judicial Nominating Commission tells her attitude toward the law, and that he believes it is very appropriate. The Chief Justice quoted Justice Gray as

saying, "I believe the law as we know it is the basic underpinning of democracy...". He told the Committee he was honored to be present today on her behalf.

Steven C. Bahls, Professor, University of Montana School of Law and Chairman, State Bar Corporate Law Revision Committee, told committee members that Justice Gray also served on the Revision Committee, and was instrumental in drafting HB 552 and HB 744. He said Justice Gray has the ability to focus on important details, yet not lose sight of the big picture. Mr. Bahls went on to state that she is a well-balanced individual in her approach to legal issues, consistently showing interest in the balance of all Montanans.

Bill Leaphart, Secretary, Judicial Nominating Commission, told the Committee he has known Justice Gray since she worked for ARCO, and said she is an independent-minded person. He commented that the Commission received 90 letters, most of which were in support of her nomination, and said he believes she will be an excellent justice.

Helena S. Maclay, private practice attorney in Missoula, told the Committee that Karla Gray became a member of the "Non-Butte Natives Association" shortly after her arrival there. She said Justice Gray is dedicated to work, career and social activities to the betterment of Montana. Ms. Maclay said there were very few women practicing law in Montana in 1976, and commented that Montana Power Company was an Equal Employment Opportunity employer. She advised the Committee she believes Justice Gray has a sense of humility and of humor, and that these are great assets. Ms. Maclay went on to state that Justice Gray is very unselfish, highly organized, intelligent, warm, out-going, open and accepting. She commented that she believes Justice Gray can work well on a multi-member board where communication is vital.

George Oshensky, representing himself, told the Committee that Justice Gray was a tenacious opponent as a lobbyist, and said she possesses honor, humor and compassion. He urged the Committee to support her nomination.

John Alke, Montana Defense Trial Lawyers Association, said his Association is committed to ensuring that clear thinkers with a broad spectrum serve on the Supreme Court. He told the Committee he was certain Justice Gray meets these requirements, and said she was Director of the Board of the Defense Trial Lawyers Association prior to her nomination.

Justice Karla Gray told the Committee she was appearing seeking appointment as a Supreme Court Justice. She said she tried to structure her remarks to answer questions the Committee might have concerning her nomination, but decided that would be counter-productive. Justice Gray stated she then tried to structure her remarks to flow nicely and eloquently, but decided that what she had to say didn't bridge that very well.

Justice Gray advised the Committee she would talk about what is important about her. She said the last four weeks have been the most amazing experience of her life and are likely to remain so. She added that it has also been a most humbling experience.

Justice Gray said that when she came to Montana 15 years ago, she would not have dreamed then of being nominated to the Supreme Court. She stated that the people of Montana have taught, supported and encouraged her and have allowed her to grow. She commented that the best way to return that kindness is to maintain it in the judicial system.

Justice Gray told the Committee she would offer impartiality and objectivity on the bench, without regard as to who or position or personal bias. She reported that she has already begun to do so, as the people of Montana deserve nothing less. Justice Gray went on to state that she is a very hard-working person, and has represented her clients to the best of her ability, in her practice and as a lobbyist. She said she believes the legal profession requires dedication and hard work.

Justice Gray advised the Committee she would pledge again this date to give the best she has to the people of the State of Montana, as they are all now her clients and employer. She said the Montana Constitution is a very specific document, and begins be declaring the rights of the people of Montana. Justice Gray reported that the sessions during which she lobbied were huge learning and growth periods in working with people of varied interests to achieve the best possible result. She added that this was so even during times of high-tension and widely divergent views.

Justice Gray advised the Committee she has an understanding of and is sensitive to the nature of the three separate branches of government, and that while tension among these branches may be inevitable from time to time, this experience will go with her in her heart in her performance of the work of the Supreme Court.

Justice Gray reported that the few short days she has been in office have gone by very rapidly. She stated the workload is huge, rigorous and challenging, and the responsibility is enormous. She said the other justices and members of the staff are warm and caring. Justice Gray then offered to answer any questions from the Committee.

Opponents' Testimony:

There were no opponents of SR 6.

Questions From Committee Members:

Chairman Pinsoneault advised Justice Gray of the respect she has generated among legislators, as well as her credibility and confidence. He asked how she would advise a young lawyer just

starting out in practice in Montana with regard to improving the image of attorneys that has, somehow, become tarnished. Justice Gray replied she would advised a young lawyer not be become caught up to an unreasonable extent in what seems to have become the very commercial profession of the practice of law and to remain a balanced human through family and friends.

Senator Svrcek commented that it recently came to his attention that lobbying has been undertaken by the Supreme Court on significantly substantive issues in this legislature, and more especially toward lawyers in the Legislature. He asked for Justice Gray's comments. Justice Gray replied she was too new to have much of a background as to what kind of lobbying was being done by the Court. She said she was aware of the judicial salary bill. Justice Gray further responded that while the branches are separate, it is not uncommon for the executive branch to lobby. She stated she did not know if she would find it either more or less appropriate for members of the judiciary to make their thoughts and interests known to this body. Justice Gray added that it could be overdone, but the separation of branches does not preclude the legislative process.

Senator Svrcek commented that he represents an area affected by the Bonneville Power Use Tax, to which the Montana Power Company has been a party in legislative proceedings. He asked Justice Gray what role she would take should that issue come before the Supreme Court. Justice Gray replied that the Montana Power Company is, indeed, a party to that litigation, and said she would disqualify herself from involvement if it should come to the Supreme Court. She added that she would do so with every case concerning the Montana Power Company or any of its subsidiaries from the time of her employment by the Company.

Senator Doherty thanked Justice Gray for her eloquent remarks on the State Constitution. He explained that he went to law school in Oregon where it was viewed that the peoples' rights were with state constitutions, and should guarantee further protection from the U.S. Constitution. He asked Justice Gray where she sees the Montana Constitution breathing life into those rights. Justice Gray replied she hoped she understood Senator Doherty's question sufficiently to answer. She stated she believes the Montana Constitution declares and delineates specifically, rights of overriding importance to the people of Montana which are not spelled out in the U.S. Constitution.

Justice Gray went on to state that the right to participation, the right to know, the right to privacy, and the right to a clean and healthy environment are some of these. She told Senator Doherty she believes they stand as they are. Justice Gray said the Montana Supreme Court is in place and takes, deliberates, and opines only on those cases coming to it. She stated she believes Montana will not lose sight of those rights she listed, in particular, or any other rights. Justice Gray commented that she

is convinced that as those issues reach the Supreme Court, they will be considered seriously and gravely.

Closing by Sponsor:

Senator Crippen responded to the remarks made by Senator Svrcek concerning the judiciary lobbying members of the Legislature. He said that fact demonstrates the beauty and uniqueness of the balance between the three branches of government. Senator Crippen added that, as far as lawyers are concerned and who they represent, it is his understanding that good lawyers represent the law ("the law is their soul-master"), and that this is very consistent. He commented that any law school graduate recognizes that fact.

Senator Crippen advised the Committee that, during the nomination process, a number of people were pleased to write letters to the Governor concerning the person of Justice Gray. He said he was trying to say how fortunate the people of Montana are to have her as a justice, and that she most certainly deserves that honor and the people deserve her.

EXECUTIVE ACTION ON SENATE RESOLUTION 6

Motion:

Senator Crippen made a motion that SR 6 DO PASS.

Discussion:

There was no discussion.

Amendments, Discussion, and Votes:

There were no amendment.

Recommendation and Vote:

The motion made by Senator Crippen carried unanimously.

HEARING ON HOUSE BILL 391

Presentation and Opening Statement by Sponsor:

Representative Paula Darko, District 2, told the Committee HB 391 amends the law to include clergy in the list of persons required to report child abuse and neglect. She stated that, sometimes, this is the only contact outside of the family, but she also did not want to interfere with canon of churches.

Representative Darko explained that her pastor provides family counseling. She stated that Montana law requires that anyone aware of child abuse is required to report it, and cited a situation in Eastern Montana where a boy died as a result of punishment in a church school. She said the pastor was aware of the incident and failed to report it.

Representative Darko advised the Committee, that as a teacher, it is painful to report child abuse or neglect, and that it is taken very seriously. She said she did not want to see government as a big brother, but did not want to see child abuse either.

Representative Darko stated that amendments have been proposed by Representative Rice with her concurrence. She reported that the American Association of Pastoral Counselors is examining ethics in this area now, and is moving toward the obligation of reporting child abuse.

Proponents' Testimony:

Ann Gilkey, Legal Counsel, Department of Family Services (DFS), read from prepared testimony in support of HB 391 (Exhibit #1). She said DFS is aware of the amendment, and believes that it takes care of Departmental concerns.

Opponents' Testimony:

Ken Peterson, Billings attorney representing the Church of Jesus Christ of Latter Day Saints (LDS), told the Committee he is a lay officer (State President of Montana). Mr. Peterson read from prepared testimony in opposition to HB 391 (Exhibit #2). He said the Church has 7.3 million members worldwide and about 34,000 members in Montana, or 4.2 percent of the state's population.

Mr. Peterson read from the Gospel of Matthew, New Testament, concerning the attitude of Jesus toward little children. He said that is also the attitude of the LDS Church. Mr. Peterson stated that the purpose and the desired end of HB 391 is laudable, but he believes requiring the clergy to report child abuse will contribute to the problem. He said people will stop coming to their clergy to address the problem, as many times this information comes from family members other than the perpetrator.

Mr. Peterson stated he believes the child would be better off if the Church helps to change the lives of the people he or she lives with, so the child will not continue to be abused. He further stated that if people won't come to the clergy, these matters will be left to the state.

Mr. Peterson told the Committee he believes that Montana and U.S. Constitutional issues are also involved, guaranteeing free enterprise of religion.

Brian Asay, Montana Biblical Legal Foundation, told the Committee he respectfully opposes this legislation, and finds it difficult to do so when the bill is aimed at preventing child abuse. He explained that the bill appears to be more reasonable now than in its original form, but he still opposes it in principle.

Mr. Asay stated the danger is in the state entangling itself in the affairs of the church. He commented that the church has been around much longer than the State of Montana, and said he believes the church has been protecting families that much longer, too. Mr. Asay asked to whom a penitent would go, and commented that Representative Darko appears to be sensitive to corporal punishment.

Mr. Asay said requiring the clergy to report child abuse would be tantamount to requiring all people about to commit a crime to report it. He said he believes Mr. Peterson shared basic reasons, but also believes the legislation, as it stands, is not useful and is not needed. Mr. Asay commented that if HB 391 passes, the court would then have to determine what is doctrine. He said the Catholic Church is okay, as it has canon, but other churches do not. Mr. Asay respectfully asked that the Committee kill HB 391.

Questions From Committee Members:

Chairman Pinsoneault asked Ken Peterson if he were suggesting that a perpetrator should be protected behind the shroud of the clergy. Mr. Peterson replied he was not saying this, and stated the bill does not address situations other than a Catholic going to a priest to confess a crime. Mr. Peterson further responded that he believes perpetrators should be punished.

Senator Rye commented that there is a problem in defining clergy, as some churches use lay clergy. Representative Darko replied she was not certain, and said that clergy is very well defined in some churches and not in others.

Senator Halligan asked Ken Peterson if he believed clergy should not report an instance where a spouse comes to them to discuss abuse by the father. He cited a case where an LDS member, now in prison, was defended by the LDS Church during the entire time he was being prosecuted. Mr. Peterson replied that the Church believes it is there to assist in raising families and to increase their spirituality.

Senator Towe asked if lay people in the LDS Church would fall within the definition of clergy. Mr. Peterson replied the bill does not define clergy at all, but his position would probably be that of clergy.

Senator Towe asked what the problem would be if confession were made in a spiritual capacity. Mr. Peterson replied his concern is that the role of clergy is to bring a person to

repentance. He commented that if no one comes to their clergy, the clergy can't help anyone.

Senator Towe asked Representative Darko to respond, and said he believes this is a valid point. Representative Darko referred to the amendment on page 3, and said she and Representative Rice discussed it and felt it would cover the situation. She advised Senator Towe that a confidential statement would be exempt.

Senator Towe asked how spirituality would be defined in a professional capacity. Representative Darko replied it would be defined in the biblical realm. She said most pastors trained to counsel are encouraged to state at the outset whether the counseling is of a spiritual nature or not. Representative Darko told Senator Towe she believes the bill sets this out.

Senator Towe stated that, as Clerk of the Billings Friends, he is probably the most senior of the Billings Quakers, who have no clergy. He said people in the Church would probably come to him in such instances. Representative Darko replied the Senator Towe would need to use his own judgment.

Senator Mazurek asked Ken Peterson why he viewed a spouse reporting child abuse as a problem. Mr. Peterson said he was concerned about leaving this up to a court to construe language. He stated there is no private counseling in the LDS Church, so there is no dual role.

Closing by Sponsor:

Representative Darko told the Committee she paraphrased language from Utah for the bill. She commented that the Catholic Church did not oppose the bill, and said she does believe in separation of church and state, but also believes in narrowly defining the issue of child abuse. She asked that Senator Fritz carry the bill.

HEARING ON HOUSE BILL 212

Presentation and Opening Statement by Sponsor:

Representative Ben Cohen, District 3, said HB 212 is a students' freedom of expression bill, but is a misnomer, in a way. He read the First Amendment from the U.S. Constitution and Article 2, Section 7 of the Montana Constitution concerning freedom of speech, and commented that Montana goes beyond the U.S. Constitution in that it pertains to the rights of persons, not adults (Exhibit #3).

Representative Cohen said the 1988 U.S. Supreme Court in Hazelwood, Missouri, overturned a body of case law in which students had rights to express themselves. He commented that the Committee has probably received letters from school administrators

in opposition to the bill, and advised them that the bill was proposed by a Billings West High School teacher.

Proponents' Testimony:

Ben Darrow, Whitefish High School student, told the Committee he is Senior Class President and President of the Student Council. Mr. Darrow read the history of the Hazelwood decision, and said it has directly affected publication of Youth Alive, by a fundamentalist Christian youth group. He explained that the group was also banned from meeting at school, and said he feared the school paper would become the voice of administration and not one of student ideas.

Eileen Sheehy, Billings West High School teacher of journalism, read from a prepared statement in support of HB 212 (Exhibit #4). She said Montana scholastic journalism is nationally honored, and that she believes the situation as it exists now is uncomfortable for student journalists, as it removes their responsibility to get the story right. Ms. Sheehy stated that the Tinker standards were in place for 20 years prior to the Hazelwood ruling.

Ms. Sheehy told the Committee she believes current rules interfere with communication between high school advisors and principals. She stated she supports the bill as part of learning, and said that when students are ready to experience the First Amendment, it is withdrawn. Ms. Sheehy asked the Committee to support the bill.

Jenna Pike, Billings West High School, editor of the Kodiak, read from a prepared statement addressing student rights and responsibilities and the relationship between publishing staff and school authorities. She stated high school news is governed by the same laws as professional newspapers, and that there should be unity (Exhibit #5).

Brian Sharbono, Billings West High School, read from a prepared statement in support of HB 212 (Exhibit #6). He reviewed constitutional restrictions and case history, beginning in 1925. Mr. Sharbono told the Committee that in 1964 a juvenile was sentenced to a detention facility for admitting an incident to a counselor.

Scott Chrichton, Montana Director American Civil Liberties Union (ACLU), said he represented more than 800 Montana families. He commented that wearing a badge or a button or a yellow ribbon is easier than the written word as far as freedom of speech is concerned (Exhibit #7).

Kasey Harbine, Missoula Hellgate High School, said she published two questionable articles in the Lance which she did not consider to be libelous. She told the Committee that editorial and advisory staff are working with writers to make sure the points of

future articles are more clear. Ms. Harbine stated she believes students will act responsibly with freedom of expression.

Darin Grossman, Hellgate High School Lance, referred to the same articles discussed by Ms. Harbine (Exhibits #8 and #9), and said any value system can be implemented when censorship is left to school administrators.

Jan Wright, representing the Montana Education Association, stated her support of HB 212.

Chester Kinsey, Montana Senior Citizens Association, stated his support of HB 212, and said the Association believes freedom of speech should start in the classroom.

Mike Males, Bozeman, told the Committee he is no longer a journalist. He said he was kicked off his school newspaper in 1963 for writing an article advocating integration. Mr. Males stated that in his 10 years with the Bozeman Chronicle he was never censored by his publisher.

Mary Moe, journalism teacher and Vice President, Montana Association of Teachers of English and Language Arts, stated her support of the bill.

Kristen Page, Montana PIRG, stated her support of HB 212.

Todd Diesen, Associated Students of the University of Montana in Missoula, stated his support of the bill.

Judy Woodhouse, Polson High School newspaper advisor, stated her support of HB 212.

Opponents' Testimony:

Bruce Moerer, Montana School Boards Association, read from prepared testimony in opposition to HB 212 (Exhibit #10). He stated it sounds as if the object is to overturn the Hazelwood case, and said he believes that case is different from what was expressed by the proponents (Exhibit #10).

Mr. Moerer stated his concern over making schools responsible for something they have no control over. He asked if schools were going to teach students financial responsibility and say parents aren't responsible. Mr. Moerer said some trustees feel a school is not a public forum, but a closed forum, but he does not believe school administrators have the right to limit viewpoints.

Mr. Moerer advised the Committee that HB 212 confuses the protection dealt within Tinker. He said that in looking at language on page 2, lines 10-20, there is nothing to prohibit violation or the right to privacy or obscenity. Mr. Moerer commented that obscenity is a very vague area and will be difficult

to enforce. He read from an editorial in the Billings Gazette, and from an excerpt in MSBA School Law Review (Exhibits #13a and #13b).

Dennis Kraft, Superintendent of Schools, Missoula, told the Committee that schools are required by law to set curriculums. He said journalism is a part of those curriculums, and that the bill affects three high school papers in Missoula. Mr. Kraft stated that if advisors turn over the selection of material used in issues published, the schools are liable. He commented that he believes passage of the bill will set up a battlefield over what is obscene and what is not. Mr. Kraft urged the Committee to give the bill a do not pass recommendation.

Greg Fine, Missoula County High School Board of Trustees, explained to the Committee that he was elected to the Board at age 18. He said he believes the bill will adversely affect the control of school trustees, and asked that the Committee not pass the bill.

Loran Frazier, School District Administrators of Montana, told the Committee he believes the present ruling is working in 99 percent of high schools. He commented that where the ruling is not working there are avenues of resolution in each district. Mr. Frazier said he believes a school newspaper is an extension of the school curriculum, and is a supervised learning experience. He encouraged the Committee not to get involved in curriculum matters.

Mr. Frazier stated many school papers are Kindergarten through twelfth grade, and said each community has its individual tolerance level. He advised the Committee he believes the bill might do away with student freedom of expression because of curriculum changes (Exhibit #12).

Deborah Care, Vice Chairman, Helena School Board, said she concurred with Section 1 (d)(e). She told the Committee that the Board does not have things in Helena high schools which are not deemed to be learning experiences.

Richard Shafer, Superintendent of Schools, Big Sandy, said he was also representing the Board of Trustees this date. He asked the Committee to consider the fact that they were "seeing the cream of the crop today" (high school students). Mr. Shafer commented that other students may need more guidelines and control, and said the bill would legislate away adult responsibility.

Conrad Stoebe, Billings High Schools Rural Trustee, said he was not speaking against freedom of expression, and commented that issues in Billings had been resolved without HB 212. He told the Committee he believes the bill takes away from administration and trustees the right to review publications, but causes them to be there to correct any problems.

Chip Erdmann, Montana Rural Education Association, said he opposes what is not good legislation. He asked if the bill would also address bulletin boards, musical productions, and publications

handed out at school. Mr. Erdmann told the Committee that there are obscenity standards in Title 45, MCA, and that the bill would cause suits over what is libelous and slanderous. He said that clear and present danger is a high standard, and commented that he knows many editors and publishers consult with attorneys before going to print. Mr. Erdmann advised the Committee that HB 212 puts this same responsibility on administrators and advisors.

Chip Erdmann stated that when SB 212 was drafted there was no need for immunity, but now the Montana Supreme Court says school districts are liable for torts up to their amount of coverage. He explained that Article 2, Section 18 requires a two-thirds vote of each house, and asked the Committee to take a look at student publications and liability.

Jim Smith, Blue Sky Schools in Rudyard-Hingham, seconded the statements made by Chip Erdmann in opposition to the bill.

Questions From Committee Members:

Chairman Pinsoneault, commenting as a former school board trustee, said he defied either Mr. Erdmann or Mr. Smith to define obscenity. He also wished the students luck in their endeavor, and said he believes they are asking for more responsibility than they really want.

Senator Rye asked who finances the Whitefish student newspaper. Ben Darrow replied it is financed out of the pockets of the students. Kasey Harbine, Hellgate High School, replied that the Lance is financed by advertising sold. She commented that they have never had a sponsor withdraw advertising because of subject matter in the paper.

Senator Doherty asked Bruce Moerer if the Montana Constitution could be interpreted differently from the U.S. Constitution. Mr. Moerer replied that is a matter of law.

Closing by Sponsor:

Representative Cohen told the Committee he had letters from Professor Carol VanValkenburg, University of Montana, concerning HB 212. He said the Columgia Journalism Review has been tracking this issue since the Hazelwood decision, and has found an impact since that decision.

Representative Cohen commented that Missoula Sentinel, Billings Senior, Butte Central, and Great Falls Senior High Schools were not present today. He said he hoped the Committee would realize the bill is asking for guidelines for students to express themselves.

HEARING ON HOUSE BILL 109

Presentation and Opening Statement by Sponsor:

Representative Vivian Brooke, District 56, said HB 109 clarifies that victims and witnesses in juvenile felony offenses are entitled to compensation.

Proponents' Testimony:

Candy Wimmer, Board of Crime Control and Youth Services Advisory Council, said juveniles should be responsible for harm caused, and that it will benefit the victim to have input to the justice system, as well as causing the offender to be aware of the pain he or she has caused the victim.

Opponents' Testimony:

There were no opponents of the bill.

Questions From Committee Members:

Senator Towe asked how juvenile confidentiality would be affected by the bill. Candy Wimmer replied that once a juvenile is charged confidentiality is not affected.

Closing by Sponsor:

Representative Brooke made no closing comments, but asked the Committee to assign someone to carry the bill.

EXECUTIVE ACTION ON HOUSE BILL 109

Motion:

Senator Towe made a motion that HB 109 BE CONCURRED IN.

Discussion:

There was no discussion.

Amendments, Discussion, and Votes:

There were no amendments.

Recommendation and Vote:

The motion made by Senator Towe carried unanimously. Senator Towe was asked to carry the bill.

ADJOURNMENT

Adjournment At: 12:47 p.m.

Senator Dick Pinsoneault, Chairman

Joann T. Bird, Secretary

DP/jtb

ROLL CALL

SENATE JUDICIARY COMMITTEE

52nd LEGISLATIVE SESSION -- 1991 Date 8 Mar 91

NAME	PRESENT	ABSENT	EXCUSED
Sen. Pinsoneault	✓		
Sen. Yellowtail	✓		
Sen. Brown	✓		
Sen. Crippen	✓		
Sen. Doherty	✓		
Sen. Grosfield	✓		
Sen. Halligan	✓		
Sen. Harp	✓		
Sen. Mazurek	✓		
Sen. Rye	✓		
Sen. Svrcek	✓		
Sen. Towe	✓		

Each day attach to minutes.

PRELIMINARY

SENATE STANDING COMMITTEE REPORT

March 8, 1991

MR. PRESIDENT:

We, your committee on Judiciary having had under consideration Senate Resolution No. 6 (first reading copy -- white), respectfully report that Senate Resolution No. 6 be adopted.

Signed: _____
Richard Pinsoneault, Chairman

3-8-91
Amd. Coord.

1:45
Sec. of Senate

SENATE STANDING COMMITTEE REPORT

March 8, 1991

MR. PRESIDENT:

We, your committee on Judiciary having had under consideration House Bill No. 109 (third reading copy -- blue), respectfully report that House Bill No. 109 be concurred in.

Signed: _____
Richard Pinsoneault, Chairman

3-8-91
Amd. Coord.

3-8 1:45
Sec. of Senate

DEPARTMENT OF FAMILY SERVICES

STAN STEPHENS, GOVERNOR

(406) 444-5900

STATE OF MONTANA

P.O. BOX 8005
HELENA, MONTANA 59604

March 8, 1991

TESTIMONY IN SUPPORT OF HB 391
AN ACT TO INCLUDE CLERGY
AS MANDATORY REPORTERS OF CHILD ABUSE OR NEGLECT

Submitted by Ann Gilkey, Legal Counsel
Department of Family Services

The Department of Family Services supports HB 391. Child abuse and neglect is a harsh reality for many young Montanans. As concerned citizens, we must all do what we can to stop the abuse of children. Montana law provides that certain professional persons are required to report child abuse if they know or have reasonable cause to suspect that a child is abused or neglected. This requirement extends to medical personnel, school personnel, peace officers, social workers, day care providers and foster parents.

Mental health professionals, such as counselors, are specifically named as persons who must report. When clergy learn of, or come to suspect child abuse, it is typically through counseling. There is no reason to exclude clergy from the mandatory reporting requirement. Like other professionals involved in counselor-client relationships, the clergy should be called upon to report.

The Department of Family Services urges your support of HB 391.

Exhibit 2
3/8/91
HB 391

WITNESS STATEMENT

To be completed by a person testifying or a person who wants their testimony entered into the record.

Dated this 8th day of March, 1991.

Name: Ken Peterson

Address: 2906 3rd Ave North
Billings, Montana

Telephone Number: 252-6679

Representing whom?
The Church of Jesus Christ of Latter-day Saints

Appearing on which proposal?
HB 391

Do you: Support?____ Amend?____ Oppose? X

Comments:
See written material provided

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY

EXHIBIT #2
8 MAR 91
HB 391

CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS PRESENTATION TO THE SENATE JUDICIARY COMMITTEE ON HB 391

The representations made in this paper are made for and on behalf of the members of the Church of Jesus Christ of Latter Day Saints who live in the State of Montana. In 1991 there are 34,000 members. 4.2% of the Montana voting population are members of the Church of jesus Christ of Latter Day Saints.

WE OPPOSE HB 391.

A consideration of the background of our position is probably important for a complete understanding of why we oppose HB 391.

In Matthew 18:1-6, the Lord Jesus Christ stated the following:

1. . . . who is the greatest in the kingdom of heaven?

2. And Jesus called a little child unto him, and set him in the midst of them,

3. And said, Verily I say unto you, Except ye be converted, and become as little children, ye shall not enter into the kingdom of heaven.

4. Whosoever therefore shall humble himself as this little child, the same is greatest in the kingdom of heaven.

5. And whoso shall receive one such little child in my name receiveth me.

6. But whoso shall offend one of these little ones which believe in me, it were better for him that a milstone were hanged about his neck, and that he were drowned in the depth of the sea.

Those verses set forth hereinabove illustrate the position in which we hold little children in our religion.

However, in the long run, we believe that our clergy leaders can be of greatest assistance to those little children if they are able to help change the lives of those persons who are responsible to raise and nurture them.

Exhibit 2
3/8/91
HB 391

Elder David B. Haight, a member of the Council of the Twelve Apostles which is one of the presiding Councils of the 7.3+ million world wide church, quoting from President Joseph F. Smith, the Fifth President of the Church, stated the following:

> Our mission is to save men, wrote Joseph F. Smith. We have been laboring all these . . . years . . . to bring men to a knowledge of the gospel of Jesus Christ, to bring them to repentance, to obedience to . . . God's law . . . to save them from error, . . . to turn away from evil and to learn to do good.

HB 391 is in direct conflict and interferes with that mission. In addition, it interferes with the exercise of religion guaranteed by the First Amendment of the United States Constitution and Article II, Section 5 of the Montana Constitution.

The Bill in its present amended form makes certain exceptions but only exceptions for the suspected perpetrator and only if the clergy person or priest comes to a knowledge of the situation from a statement or confession being directed to the clergy person. It appears that the language does not include an exception for the wife or husband of the suspected perpetrator, sibling or a grandparent who comes to the clergy person or priest to inform him or her with the purpose of requesting intervention or initiation of the repentance process.

If the information comes from some other source and if, under the law, the clergyman has to report that information, then there are going to be no persons coming to that clergy person and we will not be able to fulfill our religious mission of making bad men and women good and good men and women better and to help and assist them to turn away from evil and to learn to do good.

It would be better for the legislature to stay out of the religion area completely and not encroach on our religious mission

HB 212
8 Mar 91

- **Myth: This bill strips school boards of local control.**

Reality: If HB 212 passes, school boards retain local control of their school programs. They can still decide whether their schools want to offer journalism and other expressive activities.

Reality: Local control has never before been construed to extend to control over what students write and say. How sad is the day when those who manage education would seek to exert such control!

- **Myth: Administrators and school boards should view themselves as publishers, with all the rights to "kill" a story that publishers have.**

Reality: Administrators and school boards are not in the publishing business. They are in the business of education. When school boards and administrators act as publishers and "kill" stories which spark controversy or question the Powers that Be, they forsake their roles as educators.

- **Myth: Students can still have quality education in journalism without the guarantees in this bill.**

Reality: One might as easily state that football players can have a quality season even if they are not allowed to tackle. Tackling tough issues is as critical to a quality education in journalism as tackling a tough opponent is in football.

When students are restricted in their coverage to tame topics and bound by the philosophy "don't make waves," they lose access to that most important ingredient of quality education in journalism: the challenge of responsible coverage of real issues.

When the Emperor Has No Clothes

In the old children's story, an emperor parades through the streets of his empire, clothed only in the false belief that he has a fine new set of clothes. His people, fearing his wrath, ooh and ahh over the splendor of his "garments." Only a child has the frankness to point out that the emperor has no clothes.

Opponents of this bill say that prior restraint is necessary when you're dealing with children. They insist that schools need to be protected from the risks student expression brings and imply that HB 212 leads us into dangerous new ground where "anything goes."

It's just not true. HB 212 takes us back to the old guidlelines applied in Montana before 1988. It was moderate ground: students could speak and write about topics of their choice, but they were bound by laws against slander, libel and obscenity and taught about balance, depth, and objectivity by qualified professionals.

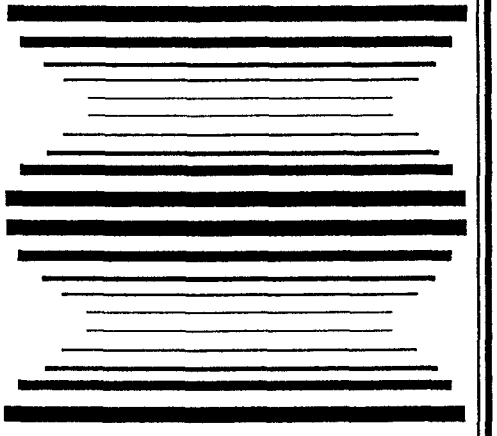
It is the squelching climate of the last two years that has produced HB 212. Students testified before this legislature about a number of articles their administrators declared "unsuitable." The articles have one of two ingredients in common: they either question authority or explore controversial issues.

It is true that sometimes student expression makes us adults uncomfortable, even angry. But it is beneath our dignity and against our ideals to restrain their voices beyond the restrictions of HB 212. Who knows? They may point out that the emperor has no clothes.

Colorado, Iowa, California and Massachusetts have seen the wisdom of allowing students to say what they see.

Make Montana next.

The Freedom of Expression Bill



Dispelling the Myths

HB 212: The "Freedom of Expression" Bill

This pamphlet was prepared and printed by
Mary Sheehy Moe

In a Nutshell . . .

What the Bill Does

HB 212, popularly known as "the freedom of expression bill," reinstates the guidelines for student expression applied in Montana until 1988.

HB 212 guarantees students the right to explore the issues of their world in school courses and activities which encourage expression.

HB 212 allows students to wield the two-edged sword of public expression. It reinstates an environment in which they can discover the heady power of words to reveal truth--and the serious responsibilities such a power imposes on those who would use it.

What HB 212 Doesn't Do

A flurry of correspondence and phone calls has besieged the Montana legislature since HB 212 passed the House in February. Opponents of the bill are filling the ears of lawmakers with predictions of impending doom should HB 212 become law.

But the opponents' fears are grounded more in myth than in reality. Take a look:

- **Myth: If the freedom of expression bill passes, school districts will be exposed to great liability risks.**

Reality: HB 212 prohibits publication of material which is lawfully obscene, libelous or slanderous or which would so incite students as to create danger of their violating the law or a school regulation. Operating within these guidelines, students cannot create a liability risk for a district.

Reality: The environment created by HB 212 is not uncharted territory. Those guidelines were in effect in Montana until 1988. The record of school newspapers is there. It is not a record of liability problems. It is a record of achievement.

In regional and national competitions, Montana school newspapers consistently walked away with top awards. Their stories were evaluated by national experts and were found to be accurate, balanced, and courageous. Montana's student journalists have a proud record of tackling tough issues in a mature manner. It is a slur on them to suggest otherwise.

- **Myth: Students will have no adult supervision. They'll print whatever they feel like printing.**

Reality: HB 212 stipulates that a journalism adviser or adviser of student publications will supervise production and teach professional standards.

Reality: The adviser may well be the only person in the school district qualified through his or her education to undertake that supervision.

Montana certification standards require that such advisers have special training in journalism. Few principals, superintendents or school board members meet these requirements. Yet opponents of this bill argue that these people are the ones who should determine whether professional standards have been met.

Reality: Promoters of this myth do a great disservice to the trained and qualified publications adviser. Not only do they demean the proven competence of this teacher. By insisting on prior restraint, they force the teacher to choose between pleasing an employer and adhering to the ethics of the profession.

Exhibit # 4
8 Mar 91
HB 717

Members of the Committee:

I am Eileen Sheehy, journalism teacher and newspaper adviser at Billings West High School. I am an accurate reflection of the kinds of people who teach journalism in this state—highly qualified, dedicated professionals whose products show the teachers' credentials. For the record, Montana scholastic journalism is respected throughout the nation. Our publications are regular winners at the national journalism conventions and win all the prestigious awards available from national scholastic press associations such as the Quill and Scroll, the National Scholastic Press Association, and the Columbia Scholastic Press Association. Montana high school administrators may take these awards for granted because Montana publications win them so regularly, but the awards are considered an honor nationwide.

Better than winning awards, however, is the role a good school publication plays in the school. Good publications are instigators of open debate. Open debate is sometimes a catalyst for change, although only when a majority can be swayed to petition for change. Consequently, good publications, by giving fair voice to student concerns, become a catalyst for healthy change in a school.

True, this process is an uncomfortable one. It causes discomfort for the administrator whose policy is criticized by a student. It causes discomfort for the adviser who has to sweat out the student's research and writing process and then suffer the inevitable complaints about controversial subjects. Believe it or not, it is especially uncomfortable for the student, who must deal with the fallout from people who mean more to him than we adults may care to remember—his audience. The pressure on the student journalist is intense. If his story is not fair or, worse, contains inaccuracies, no one is going to buy his arguments. Allowing students to experience the pain of responsibility teaches them exactly what they need to learn about journalism—GET IT RIGHT. Students protected from themselves, students taught that an administrator is willing to shoulder the responsibility of accuracy, do not learn to get it right; they learn that they are not old enough, responsible enough, or smart enough to be trusted with understanding, researching and commenting on the world around them.

Some people think that giving students the burden of responsibility will lead to lawsuits in the worst extreme and students amok with the power of the press in the most positive extreme. First, it is the student publication that students do not take seriously that members of this committee should worry about. The student who has been taught that freedom and responsibility go hand in hand is much less of a threat than the student whose administration has said "Just don't cover anything controversial." Really "bad" publications never attack a controversial issue, but won't stop short of a lot of "cute" stunts like captioning the picture of the valedictorian with "Caught Cheating Again" or making a lewd suggestion about the Homecoming queen in a gossipy article about the dance. Students rise to the level of expectation you have of them. Unfortunately, they also sink to the level of expectation you have of them.

Exhibit 4
3-8-91
HB 212

Second, this bill would basically restore the standard set by the U.S. Supreme Court with Tinker, except that the bill specifically allows prior review. What this means is that student journalists will not be allowed any more freedom than any other person protected under the First Amendment. Types of speech unprotected for other newspapers remain unprotected for students. Principals would be allowed to review publications, but they could not censor them unless they contained illegal speech. Why should any principal object to that? High school publications cannot get principals in trouble if they are not allowed to print illegal speech—unless there is something going on at the school that the principal would rather was not in the paper.

Third, the Tinker standard produced no libel cases in the state of Montana. The Tinker standard, which was broader than the one proscribed by House Bill 212, was in effect for some 20 years. During that time I am unaware of any Montana high school publication that was sued for libel. Since the advent of Hazelwood in 1988, there are many examples of control of speech by school officials, ranging from the advisory ("I wouldn't word that like that") to censorship (not allowing coverage of open school board meetings, as in Boulder).

I believe that a high school principal should know what is in the high school paper. I have no problem with informing a principal of a potentially controversial story in an upcoming issue of a school paper. However, the principal should not have the right to change a controversial story or keep it from appearing.

Finally, my main reason for supporting this bill has to do with learning. How did you learn about government? Was it during your high school government class that your heart caught fire with the desire to be a part of government, a part of that amazing, huge, semester-long *outline?* Or did some personal issue bring you in, something that involved *you* as a person. I believe the most effective learning occurs this way. This is why it distresses me so much that we will allow students to take copious notes about the First Amendment. On paper we are willing to paint a beautiful picture of this fine idea—a personal freedom that will protect the weak in our society against the strong, the minority against the majority. Then we put students in school, a place where the policy decisions are entirely out of their hands. And we refuse to allow them even the barest of freedoms, the freedom to disagree. In the classroom we tell them that the First Amendment is available to everyone. But while they are personally involved, while they are publishing their thoughts, we tell them the First Amendment is not for them.

I do not want to be the teacher who teaches students that the First Amendment does not mean anything.

EXHIBIT 5
8 Mar 91
HB 212

My name is Jenna Pike. I am a senior at Billings West High and the editor of the West High student newspaper, the Kodiak. I have found a great deal of satisfaction in working on the Kodiak, and have accumulated several awards for my writing and for the paper as a whole. This morning I will address three points: students' rights, students' responsibility, and relations between publication staffs and school administrations,

First of all, as a citizen of the United States, I am guaranteed freedom of expression by the Constitution. The current guidelines for high school publications deny me this right. Whether or not I am responsible enough to be given this right is not the question. The fact is, the First Amendment ~~Constitution~~ gives me this right. You can't allow only responsible individuals to exercise freedom of expression — who is to decide who is responsible? In order to grant **anyone** freedom of expression, **everyone** must be granted this right, and this goes for students as well.

Secondly, I feel that in addition to representing the Kodiak staff, I represent all student newspaper staffs in that most students who are part of a newspaper, like myself, enjoy writing, are committed, creative, and most of all, are responsible. What better way to learn responsibility than to be faced with numerous deadlines every month or to be assigned an important story that requires several accurate interviews? But not only are newspaper staff writers and editors responsible — all high school students are responsible when given an important task from which they can both benefit and learn.

Many opponents of House Bill 212 argue that irresponsible students would take advantage of the rights this bill guarantees by printing obscenity and libel. However, this bill provides no room for the publication or distribution of obscenity or libel. Rather than handing ~~this~~ The responsibility for such actions to the administration, as is the case now, this bill, in Section 1, exception (2), examples (a) and (b) clearly states that "a student may not express, publish, or distribute material that: is obscene to minors" or that is "libelous or slanderous." Thus, student journalists would not be granted any more rights than professional journalists and high school papers would not be allowed to print material under different laws than professional newspapers.

Finally, because administrators currently have the final decision in a question regarding a high school newspaper, high school journalists and

their administrators are forced to opposite sides of many issues, especially controversial ones. If I had the final say in editorial decisions, rather than my principal, I would be more willing to ask for his opinion and his input on issues. If this bill were passed, high school journalists and administrators would be more likely to work together toward a goal, rather than opposing one another. A high school paper need not reflect the opinions or viewpoints of the administration; they should be two separate entities, both working to create an environment of truth and education within a school.

Exhibit 10
HB 712
5 Mar 91

Brian Sharbono

February 3, 1991. On this date, I became a very important member of society. I became an ADULT. I am now entitled to the right to vote. This is the ONLY new right that I gained from my birthday. The Constitution of the United States of America guarantees several rights, such as the freedom of expression, to all citizens of this country.

The First Amendment provides for freedom of religion, assembly, speech, and the press. It does not provide a clause for restricting these or other rights on the basis of sex, race, or AGE. In fact, the 14th Amendment specifically states that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, LIBERTY, or property, without due process of law, nor deny to any person within its jurisdiction the EQUAL protection of the laws." This amendment defines citizens as "All persons born or naturalized in the United States, and subject to the jurisdiction thereof." Therefore, adolescent citizens can not have their basic constitutional rights restricted.

Nowhere in this Amendment, or in the Constitution as a whole, are the rights of citizens under age eighteen restricted in any way. This Amendment actually protects from any such infringement by any institution.

Throughout the history of this country, the Constitutional restrictions regarding the powers of States have been upheld by the

Supreme Court. In 1925, in the landmark case of *Gitlow* v. *New York*, the Supreme Court stated that Freedom of speech and Freedom of the press are "among the fundamental personal rights and liberties protected by the Due Process Clause of the 14th Amendment from impairment from the States."

The Due Process Clause has also been applied to cases involving minors. In 1964, a fifteen year-old boy was brought before juvenile court because he admitted to his probation officer that he had made obscene phone calls. A lawyer was not provided for him, and his accuser did not appear in court. Nevertheless, the judge committed him to a state reform school.

His parents objected, stating that his 5th and 6th Amendment rights had been violated. The lawyers defending the State argued that because he was merely a minor, those rights did not apply.

However, the Supreme Court voted in an 8 to 1 decision that his rights had been violated, and it used the Due Process Clause to extend those rights to minors.

Without House Bill 212, not only are the rights of the MINORS on high school publication staffs being restricted, but MY rights and those of other eighteen-year-olds like myself are also restricted; although we are considered in all other respects to be adults.

The Freedom of Expression for Students Bill must be passed in order to complete our founding fathers' task; the task of providing for a country where ALL people could think, believe, and speak as they choose. The Bill

of Rights was designed by our founders to create a place where people could freely express themselves. Let us not exclude Montana. Let Montana students freely express themselves. Vote for freedom of expression.

Brian Sharbono,
Billings Senior High
Sports Editor, Bronc Express

Exhibit 1
8 Mar 91
SB 212

ACLU OF MONTANA

AMERICAN CIVIL LIBERTIES UNION

P. O. BOX 3012 • BILLINGS, MONTANA 59103 • (406) 248-1086

442 2265

TESTIMONY FOR HB 212: FREEDOM OF EXPRESSION FOR STUDENTS

March 8, 1991

State Office
335 Stapleton Building
Billings, Montana 59101

BOB ROWE
President

SCOTT CRICHTON
Executive Director

JEFFREY T. RENZ
Litigation Director

Mr. Chairman, Members of the Committee:

For the record, my name is Scott Crichton, Executive Director of the American Civil Liberties Union of Montana. I am here today representing the more than 800 families who are dues paying members to our organization here in Montana to speak in support of HB 212.

This bill gets to the root of what is most fundamental to our system of government. There is good reason why the first amendment of our Bill of Rights protects the central and fundamental principle of free expression. It is altogether fitting and appropriate that of all places it most certainly needs to be addressed in our schools. What better place and what better way to establish the necessary basic understanding of tolerence for difference of opinions than in our learning institutions.

If we find reasons to carve out strong exceptions to free speech in high school, when then will the young and intellectually thirsty learn to appreciate the true meaning of liberty and the responsibility that goes along with good citizenship? If we say "Wait until you are an adult to be grapling with and grasping at the core of free expression", are we being fair? Think of the high school students that go on to the military upon graduation. Will they be freer and more encouraged to express themselves and their beliefs at that stage of their lives? How many will continue to have further formal educational exposure? How many will go straight into the workforce? Perhaps those privileged enough to go on to college will have a better opportunity to really embrace the first amendment. But that should not be a privelege, it should be and is a right.

Understanding the basics of the Bill of Rights is something that to me helps insure the future of this democracy. If we do not make a clear and uncompromised statement by example in our primary and secondary schools, we are being hypocritical; we are doing a disservice to our American heritage, to our current student body, and to the security of our future.

This bill makes good sense and it encourages good citizenship. We urge support for HB 212. Thank you.

Respectfully submitted,

Scott Crichton

Scott Crichton
Executive Director

"Eternal vigilance is the price of liberty"

Exhibit II 8
HB 313
8 Mar 91

Andy Gibb, Ghandi, or however Jesus, you slice it you have to have candles

by **Aron Flanagan**

There I was lying in bed freebasing, bored out of my mind (really, I was out of my mind), when I decided to become a religious man, that's right a freebasing religious maestro. So how does one go about becoming a religious maestro? Well first you have to start by choosing a neat icon. Now this is a very important stage in becoming a religious maestro, especially when you are a freebaser. You have to choose some one that has the same interests as you. It's like finding a lover. So I started thinking of cool druggies that would be good icons, like Don Ho, Sid Vicious, Tate, etc., but finally I decided on Andy Gibb. Andy met all of the qualifications of an icon; he wore polyester, had a medallion, a jumpsuit, he's dead (cocaine overdose no less), cool, outstanding teeth, and hair on his chest. Who could ask for anything more in their God-like icon?

Weeks passed, I wore polyester jumpsuits, medallions, taped pubic hair to my chest, brushed my teeth with Pearl Drops, and every school day at 9:40 I knelt on a velvet painting of Elvis, shot up (heroin), and prayed to Andy in meaningless gibberish for 50 minutes so as to miss third period government, for religious purposes.

So I was kneeling on Elvis in front of Andy's portrait, candles dimly lighting my room, gold medallion in hand, talkin' trash to Andy and freebasing. All of a sudden I felt very foolish. Why did I need Andy? I could freebase on my own and not have to buy candles. Heck! What was I thinking? That disco deity was a crock.

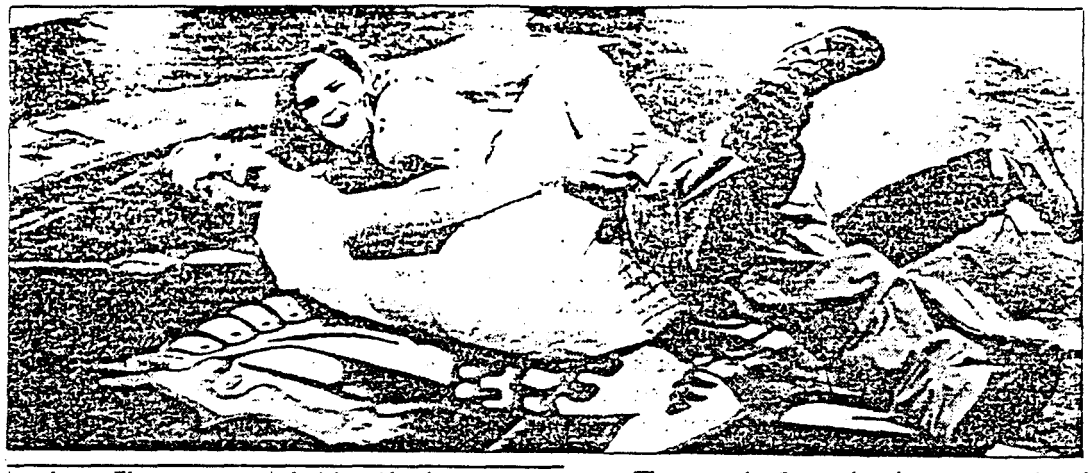
There I was shooting up in bed, bored to death (well close to death, you know, strung out) and trying to think of a really neat icon (someone who I wouldn't have to buy candles for). But then I realized that you need candles for every icon. Then I had a acid flash back from last Tuesday, it had a bald guy on crutches in it (that's all I remember).

So I was kneeling on Andy Gibb's face in front of a portrait of Ghandi, wearing next to nothing, starving, freebasing and shooting up, mumbling meaningless gibberish to Ghandi's bald head when all of a sudden I felt really foolish. Little skinny bald geek (I know that's not really a sentence but who cares).

Nothing seemed to be working, I just couldn't seem to find a whimpy icon, when all of a sudden I remembered this guy named Jesus. I went out to get stocked up on all that Jesus stuff like Bibles, loin cloths, and a crown of thorns. That's when I decided that maybe this religious hocus pocus just was not for me. How could being nailed to a cross be any better than being hooked on cocaine or crowns of thorns?

Exhibit #9
HB 212
8 Mar 91

Teens on their own



by Aron Flanagan and Ashley Kaul

We drove drunk, behind a snowplow, on icy roads, braving the cold, passing cars stuck in the snow, and dead snowmen, through an avalanche, with skis on our car to arrive safely at what was called a "New Year's Eve PartY,"which consists of (for those of you who have never been to one) hats, blowY things, balloons, noise makers, confetti, ribbons, chex partY mix, beer, punch (spiked), cigarettes and Keds.

Upon entering fashionably late, the poorly lit humble abode with icy steps and snow-drifted driveway, we were flabbergasted to be greeted by who we remember as: hardcore, scholarly, brown nosing, Liz Claiborne Ralph Lauren wearing, T.V. evangelist loving, god-fearing men and women who we call friends. To explain the above mentioned "flabbergasted," it was because these so called friends were: drunk, high, passed out, having sex with numerous people (we won't mention names) and X-mas (cause we don't want to be pumping christ into the system)trees, eating chex partY mix, and smoking chocolate ice cream pinball joints and generally acting extremely foolish.

The reason for this fiasco was simply that one year was ending and another was soon to begin, and they had all those neat new X-mas (cause we don't believe in the man) clothes to ruin.

Soon after our arrival we too were: drunk, high, passed out, having sex with numerous people and X-mas (cause we got satan in our pants) trees, eating chex partY mix, smoking chocolate ice cream pinball joints, generally acting extremely foolish, and greeting the flabbergasted new arrivals who were even more fashionably late than us.

As the new year (12:00) drew nearer and we grew more intoxicated we began to divvy up our time with loved ones and cute people that we didn't even know whom we longed to kiss.

The crowd of our drunken compatriots became restless with anticipation of the new year. Sure, the new year was coming, yet we had more important things to get excited about, like kissing all those cuties. That's the paragraph babe.

The Times Square countdown began! 10, 9, 8, who am I going to kiss, 7, 6, all those things previously mentioned are being used like hats, and blowy things, 5, 4, 3, screaming girls scamming on the X-mas (cause Kate's a JEW) trees, 2, 1, smooch, pop, bang, moan, sex kitten, champagne, noise, joy (not to the world that was weeks before New Year's) kissing Bob, Wayne, desks, balloons, smelly tongues, remote controls, car roots, beer, gas, corned beef on Rye, Mr. Ed, beavers, Wally, cleavage, xerox, fax, office supplies, Mike, lying dog, Erin, wax (sex that is), Molly, Jim, Tom, Joven (the good time boy), Carter, Corky, Imogen (not imagine) comma wow what a year.

O.K., now that the first morning of the new year has begun, our job is to make up really stupid stuff to quit doing; you know, resolutions. The most popular of them being, starting the habit of smoking crack. Others on our list were: moving to L.A. to make racial slurs, crossdressing in Butte, camping in the Berkeley Pit and necking, Greyhound traveling in nothing but silk and lace, loving Alice Donut, breaking up with Fred, cutting back on our duct tape intake (too spendy), watching all the Raiders games wearing only bow ties, getting drunk every night, losing weight, getting a swine, quitting smoking chocolate ice cream pinball joints, etc.. None of these resolutions will ever be followed through though because we like to get loaded; you know, drink.

This brings us to our point. Why are more teens living on their own, is it a new fad, or do they just want to get loaded? That's all folks, see you next time, same Lance page, same Lance channel.!?&2"$'. Did you enjoy our crafty writing??

LETTERS CONT

HB 212 EXHIBIT # 12
8 Mar 91

MSBA
MONTANA SCHOOL BOARDS ASSOCIATION
One South Montana Ave.
Helena, Montana 59601
Telephone: 406/442-2180
FAX 406/442-2194
Robert L. Anderson, Executive Director

TO: Senate Judiciary Committee

FROM: Bruce W. Moerer, General Counsel

DATE: March 8, 1991

RE: HB 212

The Montana School Boards Association opposes HB 212.

Freedom of expression for public school students has evolved from several areas of First Amendment analysis. The degree of First Amendment protection for free expression on public property, such as a school, differs depending upon the nature of the use to which that public property is put. Currently three doctrinal categories have been generated: 1. the traditional public forum; 2. the designated (or limited) public forum; and 3. the nonpublic (or closed) forum. In the traditional public forum the government generally does not have the power to restrict expression, although content-neutral regulations of the time, place or manner of expression within the forum are permissible so long as they promote orderly free expression and are otherwise compatible with the forum. A traditional public forum includes such areas as streets, parks and other sites generally open to the public for public uses for assembly.

The designated public forum comes into existence when government officials designate an otherwise closed forum as open on a limited basis. Without such a designation, the public property remains closed and is a nonpublic forum. A school is a nonpublic forum.

The U. S. Supreme Court has already treated the school context differently and has taken into account the nature of the student population in crafting the first amendment freedoms in a school that are not fully equal to adult First Amendment rights. Tinker v. DesMoines, Ind. School District, 393 U.S. 503, 89 S. Ct. 733 (1969). Tinker held that student expression could be limited, but only if it materially and substantially interfered with school discipline, school operations or collided with the rights of other students. The Hazelwood decision extends an earlier case, in which the high court held that vulgar and suggestive language in a student assembly could be suppressed or disciplined by the school. Bethel School District No. 403 v. Fraser, 106 S. Ct. 3159 (1986).

A student newspaper is a nonpublic forum. Student expression is allowed but it is school-sponsored and the school can deal with it in ways that are reasonable in light of the purpose to which the property has been dedicated. This is what the U.S. Supreme Court held in Hazelwood School District v. Kuhlmeier, 108 S. Ct. 562 (1988). In Hazelwood, the Court found that in addition to time, place and manner regulations, in a school the school board may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation is reasonable and does not amount to viewpoint discrimination. The students in Hazelwood argued that the paper was a limited or designated open forum. The Court

disagreed and held that the school should have greater control when and only when the speech occurs in school sponsored and school oriented activities that may be fairly characterized as part of the school curriculum. In such cases, the newspaper and theatrical productions are reserved for their intended purpose as supervised learning experiences for students.

The Court preserved Tinker, however, with respect to a student's personal expression that happens to occur on school premises.

One of the problems with HB 212 is that it takes Montana out of the legal analysis currently developed by the U.S. Supreme Court and relied upon by circuit courts for student expression. This will create much more litigation for Montana School Districts as we would be forced to reinvent the legal analysis appropriate for first amendment speech in schools under this bill.

Another problem is that HB 212 lumps those activities where students traditionally receive greater freedom with those where they do not. The standard articulated in Tinker for determining when a school may limit student expression is much looser than the Hazelwood test for school sponsored curriculum related activities. The looser personal expression standard should not apply to activities where a school lends its name and resources to the production or publication.

HB 212 allows expression that violates a person's right to privacy. It also takes away the school's ability to review material that is inappropriate for the school setting, given the age of the student, the intended audience and the school curriculum.

Of particular concern is the immunity provision of this bill. This bill must pass each house by a 2/3 vote pursuant to Article II, Section 18 of the Montana Constitution or the immunity provision may not stand. If this happens, districts would be fully liable, but would have absolutely no control of publications and productions. This would be the worst of all possible worlds.

The most obvious problem with this bill is that school districts in Montana will be responsible for school newspapers that are part of the curriculum which bear the name of the district and are financially supported by the district, but the bill removes all authority from the district to supervise and regulate the school newspaper. The level of maturity and responsibility of each student is not a constant. The administration should be allowed the ability to engage in prior restraint when students act without discretion or illegally. When Montana's Constitution specifically vests the supervision and control of schools in the board of trustees, it is inappropriate to reallocate that control and supervision to the students. The delegation of this control should only come from the board and not the legislature.

A school district is responsible for student publications and productions it sponsors, especially in the eyes of the public. Schools need to be allowed to exercise prior restraint and editorial control consistent with the current guidelines provided by the U.S. Supreme Court.

Exhibit 11
3/8/91
HB 212

WITNESS STATEMENT

To be completed by a person testifying or a person who wants their testimony entered into the record.

Dated this 8 day of MARCH, 1991.

Name: MIKE A. MALES

Address: 1104 S. MONTANA #F-12
BOZEMAN MT 59715

Telephone Number: 577-4728

Representing whom?
SELF

Appearing on which proposal?
HB 212

Do you: Support? X Amend?____ Oppose?____

Comments:

I HAVE CONFIDENCE IN YOUNG PEOPLE AND ADULTS OF MONTANA TO BENEFIT FROM STUDENT FREE EXPRESSION ADVANCED BY HB 212.

PLEASE LEAVE ANY PREPARED STATEMENTS WITH THE COMMITTEE SECRETARY

Exhibit #12
HB 212
8 Mar 91

School Administrators of Montana
515 North Sanders
Helena, MT 59601-4597
(406) 442-2510

March 8, 1991

To: Senate Judiciary Committee Members
From: Loran Frazier
Re: H.B. 212

The School Administrators of Montana feel that the United States Supreme Court has developed guidelines that are workable when schools may engage in restraint of student speech. The court has ruled that school officials were entitled to regulate the contents of the newspaper in a reasonable manner. However, school officials must use reasonable restrictions.

Presently, the court ruling is working in 99% of the schools. In schools where the Supreme Court ruling is in question, there are avenues available in the present school structures to resolve these differences. H.B. 212 is not needed to do this.

The School Administrators strongly feel that the school paper, theatrical performances and musical programs are an extension of the schools' curriculum. These are subject to reasonable restrictions by the school administration. The legislators in the past have not dealt with school curriculum, but have left the curriculum decisions and regulations to the State Board of Education and the local board of trustees. We would encourage your continuance of this practice.

The following quotes are taken from the U.S. Supreme Court decision in the Hazelwood School District vs. Cathy Kuhlmeier case. These quotes support the above request:

> The court noted that students' free speech rights are not parallel with those of adults. "A school need not tolerate students speech that is inconsistent with its basic educational mission."
>
> The determination of what manner of speech in the classroom or school assembly is inappropriate rests with the school board and not with the federal courts. I contend it does not rest with the legislature either.
>
> The Spectrum (Hazelwood High School newspaper) was not a public forum, and therefore was subject to reasonable restrictions imposed by the School Administration.
>
> 1. The school-sponsored publication was developed within the curriculum.
>
> 2. Journalism II was taught by a regular faculty member.

3. The teacher always had the authority to exercise a significant amount of control over the school paper.

4. The teacher had final authority over every aspect of the spectrum and his appraisal was subject to an administration review.

The Forum (student newspaper) was reserved for its intended purpose as a supervised learning experience for journalism students. School officials were entitled to regulate the contents of the newspaper in any reasonable manner.

The court went on to discuss whether or not a school must tolerate or promote student speech under the First Amendment. The distinction arises when the speech is a students' personal expression which happens to occur on school premises, or when it is a part of a school-sponsored activity (publication, theatrical production etc.).

Education may exercise greater control over "student expression" which might reasonably be perceived as having the imprimatur of the school. In other words, plays, student newspapers, assemblies that are part of the curriculum whether or not they occur in the classroom - if they are supervised by faculty and intended to impact particular knowledge or skills to students or audiences are subject to some control.

Educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored, expressive activities. The action taken must be reasonably related to legitimate pedagogical concerns.

In closing, the school administrators see H.B. 212 as presenting the following problems:

1. It is a curriculum issue.

2. School papers and theatrical performances are supervised learning experiences.

3. A school paper advisor is a school faculty member, they should be evaluated as other faculty members.

4. The U.S. Supreme Court has already ruled on the content of H.B. 212 and circuit courts all over the country rely on this ruling as a legal analysis.

5. It prevents school districts from maintaining reasonable control over curriculum related projects.

Exhibit #13a
8 Mar 91
HB 212

THE BILLINGS GAZETTE

Thursday, January 31, 1991

Opini

Freedom of press limited

There is freedom of the press, and then there is freedom of the press.

A bill introduced in the Montana Legislature by Rep. Ben Cohen, D-Whitefish, would give student editors of school-sponsored publications greater latitude and responsibility while restricting the role of administrators in overseeing high school newspapers.

GAZETTE OPINION

The bill has received support from high school newspaper advisers, journalism instructors and others.

Similar bills have been passed in a half-dozen other states, largely as an outgrowth of a U.S. Supreme Court decision in the Hazelwood, Mo. School District vs. Kuhlmeier case. That decision said school officials have the authority to censor school publications containing any sensitive or controversial topics that might damage "emotionally immature students."

Cohen's bill would prohibit prior review or restraint of material by school administrators, protect journalism advisers from being fired or removed for refusing to suppress the protected free expression rights of student journalists and shield school officials and school districts from liability resulting from published articles unless the official interfered with or altered the content of a story.

While the intent of the bill is understandable, it overlooks some major points and leaves several questions unanswered.

Would it give high school students greater latitude than that enjoyed by professional journalists working on daily or weekly newspapers?

Professional journalists are responsible to and work at the direction of editors and publishers - the working-world equivalent of school administrators.

Editors and publishers certainly are not prohibited from reviewing or "spiking" stories deemed libelous, slanderous, in bad taste or simply badly written. In fact, that's their job.

If student editors and journalism advisers aren't responsible to school administrators, to whom are they responsible?

If schools officials and school districts cannot be held liable in civil or criminal actions resulting from the publication of material, who would be liable? Would an aggrieved party sue the high school student? Would the high school student, the student's parents or the journalism advisers be able to pay $50,000 or more in legal fees to defend even a frivolous lawsuit? Would they be able to pay even more to appeal a case or pay a mega-bucks judgment?

Has anyone bothered to ask these questions or answer them?

MSBA

SCHOOL LAW REVIEW

LEGAL ASSISTANCE FUND

VOL. 1, NO. 1 • SEPTEMBER 1988

CONTENTS:

COMING IN NEXT ISSUE: Overview of Teacher Termination

New Service Initiated

Beginning this month, and continuing on a quarterly basis thereafter, the Montana School Boards Association will be publishing the *MSBA School Law Review (SLR)* as part of its Legal Assis-tance Fund services. The *Review* will be distributed in September, December, March and June of each year to Legal Assistance Fund members free of charge.

The purpose of the *MSBA School Law Review* is twofold: to help school officials stay up to date on the developing education law in Montana as well as to provide in-depth analyses of topics generally of interest to schools in Montana. Such topics might include student dress codes, teacher terminations, and school use of copyrighted materials.

The *Review* will analyze recent federal and state cases, providing easy-to-read summaries which highlight the practical implications of these decisions and identify changes required to policies or practices. State Attorney General opinions and County and State Superintendent decisions will be covered as well. The *SLR* will also report and analyze state and federal regulation and law changes affecting education. While this issue reviews decisions since January 1, future issues will cover only three-month periods.

In July of each year, a cumulative index of cases and articles will be distributed to Legal Assistance Fund members. The index will reference all Montana education cases from the State Superintendent level up, AG opinions, as well as federal cases and other states' cases reported in the *Review*.

We welcome your comments on this service and encourage Legal Assistance Fund members to contact us with suggestions for future *MSBA School Law Review* articles.

Censorship of School Newspaper Upheld

by Catherine M. Swift

A challenge brought by high school students to the actions of the school principal in censuring the school newspaper has resulted in a U.S. Supreme Court decision limiting students' freedom of expression in school settings. In the case of Hazelwood School Dist. v. Kuhlmeier, 108 S.Ct. 562 (1988), a high school principal deleted two pages of a student-prepared school newspaper which included stories on school pregnancy and divorce. The principal objected to the pregnancy article for two reasons: he believed the school's pregnant students, though not named, might be identified from the text of the article, and he believed the article's reference to sexual activity and birth control to be inappropriate for younger students. He objected to the divorce article because he believed parents of students quoted by name in the article should have been notified. Believing there was no time to amend the articles, he ordered the deletion of the two pages on which they appeared.

The U.S. Supreme Court, in a 5-3 decision, upheld the principal's actions. The case turned on whether the school had created a public forum in the school newspaper. The Court held that if

Ex 13b
3-8-91 HB212

the school had not consciously relinquished control of the school publication to the indiscriminate use of the public (or a segment of the public, such as the student organization), the school newspaper was not a public forum. As such, school officials were free to impose valid educational restrictions on the speech of students and other members of the school community within that forum.

The Hazelwood decision extends an earlier case, in which the high court held that vulgar and suggestive language in a student assembly could be suppressed or disciplined by the school. Bethel School Dist. No. 403 v. Fraser, 106 S.Ct. 3159 (1986). In that case, the Court upheld a school's disciplining of a student for giving an offensively indecent speech at a school assembly. The Court stated that the "work of the schools" included the inculcation of the "fundamental values necessary to the maintenance of a democratic public system," which values encourage different viewpoints but discourage the use of language which is offensive or threatening.

Current law, therefore, allows schools to set high standards for student communications produced under school guidance, where the school has not consciously relinquished such control. Such standards, however, must be educationally-related. Action by a school to suppress student discussion of controversial subjects or unpopular viewpoints is not protected in and of itself since the Court has recognized a school responsibility to foster a debate of ideas. The Hazelwood principal's action to remove articles on divorce and teenage pregnancy, for example, was upheld for valid reasons relative to privacy, age appropriateness and proper journalistic methods. Had he simply attested to a distaste for the subject matter, the case may have been decided differently.

The Supreme Court left intact the standard which has been applied to students' individual expressions, i.e. those which are not made in the context of a school-sponsored activity. Hazelwood makes clear that educators have less authority to control individual expression than to restrict freedom of expression in school-sponsored activities. Schools may restrict individual student expression only when such restriction is "necessary to avoid material and substantial interference with school work or discipline...or the rights of others". Tinker v. Des Moines Independent Community School Dist., 89 S. Ct. 733, 739, 393 U.S. 503, 511 (1969). Individual expression includes personal and political opinions, including, as in Tinker, the wearing of armbands in protest of governments' actions. Neither Tinker nor Hazelwood addressed student dress codes, which are subject to different considerations. A separate article on dress codes is planned for a future issue.

A word of caution about advertising in school publications such as newspapers, yearbooks and sports programs is warranted here. It should be noted that schools have been held to have the power to accept or reject advertising from the general public, provided that such rejection is for proper and reasonable educational purposes. In the case of Planned Parenthood of Southern Nevada v. Clark County School District (D Nev. 1988), a school which refused to allow Planned Parenthood to advertise in school publications was found to be justified. Where a school opens up its advertising section, however, to a certain topic, it may be forced to allow all sides of the issue—even the unpopular ones—space in the publication. In California, a school district allowed the armed forces to advertise for recruits in the school newspaper but denied ad space to an anti-draft, anti-military organization. The Ninth Circuit Court of Appeals held that the school had opened the newspapers up to advertisements on the topic of military service and, absent a compelling governmental interest, could not exclude the presentation of the other side of the issue. In addition, the court held that the rejection of an ad presenting one side of the issue was unconstitutional viewpoint-based discrimination. (See San Diego Committee Against Registration and the Draft v. Governing Board, Grossmont School District, 790 F. 2d 1471 (1986).)

In summary, students do retain their First Amendment rights in the public schools. A school must tolerate students' personal expressions except where such expression substantially interferes with school business or the rights of others. Where school-sponsored student communications are concerned, however, a school need not tolerate student speech which is inconsistent with the fundamental values of public education or with the school's basic educational goals. Because the line between valid restraints on student speech and speculative or viewpoint-related decisions is often very thin, school officials should formulate clear, educationally-related reasons for any censorship of school-sponsored student publications. Valid educational reasons for censorship include any related to curriculum, proper grammar and acceptable usage of language, proper journalistic methods, recognition of the rights of others, age appropriateness and fundamental values taught or supported by the school. Where advertising is concerned, caution is advised for those wishing to keep controversial or inappropriate material out of school publications. It appears that schools can keep age-inappropriate ads as well as politically-controversial ads out, but fairness requires that a neutral school policy treat potential

DATE 3/08/91

COMMITTEE ON JUDICIARY (SENATE)

VISITORS' REGISTER

NAME	REPRESENTING	BILL #	Check One: Support	Check One: Oppos
Aeron Grossman	Missoula Hellgate	212	✓	
Francisca Winston	Missoula Hellgate	212	✓	
Kristy Hartsine	Hellgate	212	✓	
Benji Darrow	Whitefish Student Council and Paper	11	✓	
Eileen Sheehy	Billings West Newspaper	212	✓	
Mary Moe	Teacher	212	✓	
JENNA PIKE	BILLINGS WEST NEWSPAPER	HB 212	✓	
Brian Shatoon	Billings Senior Newspaper	212	✓	
David Spence	Teacher	212	✓	
Judie Woodhouse	Polson High S. Newspaper	212	✓	
Lisa Verzani	Capital High Newspaper	212	✓	
Kristin Page	MontPIRG	HB 212	✓	
Todd Dicsen	~~Private~~ ASUM	HB212	✓	
Joe Mengarin	MT Defense Trial Lawyers	SR6	✓	
Rebecca Rodish	Missoula County High School	HB212		✓
Gregory J. Fine	Missoula County High School	HB212		✓
Debra M. Kehr	Self	HB212		✓
Clint Kinney	MSCA	HB212	✓	
Bruce W Moerer	BSBA	HB 212		✓
GEORGE OCHENSKI	SELF	HB212	✓	
Mary Gilkey	Dept. Family Services	HB391	X	
Dave Fratzke	SAM	HB 212		X
MIKE MALES	self	HB 212	X	
Judy Jacobson	self	conf. Karla Grey	X	
Tom Wright	MEA	HB212	X	
Rebecca Macday	self	K Gray	X	
[illegible]	MSBA/BLC	HB212		