MINUTES

MONTANA HOUSE OF REPRESENTATIVES
54th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN BOB CLARK**, on January 12, 1995, at 8:00 AM.

ROLL CALL

Members Present:
Rep. Robert C. Clark, Chairman (R)
Rep. Shiell Anderson, Vice Chairman (Majority) (R)
Rep. Diana E. Wyatt, Vice Chairman (Minority) (D)
Rep. Chris Ahner (R)
Rep. Ellen Bergman (R)
Rep. William E. Boharski (R)
Rep. Bill Carey (D)
Rep. Aubyn A. Curtiss (R)
Rep. Duane Grimes (R)
Rep. Joan Hurdle (D)
Rep. Deb Kottel (D)
Rep. Linda McCulloch (D)
Rep. Daniel W. McGee (R)
Rep. Brad Molnar (R)
Rep. Debbie Shea (D)
Rep. Liz Smith (R)
Rep. Loren L. Soft (R)
Rep. Bill Tash (R)
Rep. Cliff Trexler (R)

Patti + Betty
These minutes were done before I received the info about roll call votes. I respectfully request you receive them as is.

Members Excused: NONE

Members Absent: NONE

Staff Present: John MacMaster, Legislative Council
Joanne Gunderson, Committee Secretary

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

Committee Business Summary:
Hearing: NONE
Executive Action: HB 82 TABLED
HB 83 DO PASS AS AMENDED
HB 26 DO PASS AS AMENDED
HB 108 DO PASS

EXECUTIVE ACTION ON HB 83

Motion: **REP. DANIEL MC GEE MOVED HB 83 DO PASS.**

Discussion: **REP. DEB KOTTEL** stated that though she feels strongly on both sides of the bill, after weighing the testimony and examining the current statue passed into law in 1989, she does not believe a new statute dealing with obscenity would change what is happening here in Montana. She believes that essential to what it means to be a Montanan is the freedom for adults to read and think what they choose in privacy and that this must be preserved. She believes decisions in these issues should be reserved to the county level and not set as standards at the state level.

REP. LOREN SOFT called for the committee's focus on the intended purpose of HB 83. He believes that focus is in agreement with the Governor's call for Montana to get tough on crime. He cited the flow of money as a result of the hard core pornography industry and that this is controlled by organized crime as the basis for his support of the passage of this bill. Additionally, the evidence shows that this material, if made available to adults, eventually gets into the hands of children. He said that these children are vulnerable and find it more accessible through the breakdown of the family leaving many in situations of neglect and in unstructured single parent families.

REP. MC GEE agreed with **REP. SOFT** in looking at the passage of this bill from a criminal aspect rather than as a morality issue. He introduced a Supreme Court of Montana decision as background for his opinion. He also presented information from *U. S. SUPREME COURT REPORTS*, a letter from **Michael J. Scolatti, PH.L** (paragraph 2 on page 2) and two paragraphs from the first page of a letter from **Larry Weatherman, Undersheriff in Missoula. EXHIBITS 1-4**

REP. MC GEE further stated that he believes that condoning this material by not legislating against it will permeate the idea that that kind of material is acceptable. He said that this material is the basis of some of the most heinous crimes he can think of and if it is continued in our society, acts of crime may be committed against our children that we must not allow.

REP. LIZ SMITH said she also looked at the issue from the standpoint of leaving the decision for its adoption at the local level but that from a holistic environmental approach, this must be looked at as a clean-up bill for a constructive and healthy environment. She is supporting it in concern for our youth because she believes they are asking for direction and role models they can follow. Also, she believes that if it is brought to passage at the state level, it will give the law enforcers a more supportive and less conflicting direction.

REP. KOTTEL commented that the effect of enacting this statute would not stop the industry from flourishing but rather push the industry underground. She also commented on her background in clinical psychology as well as the law and her experience in support of her position and pointed out the role of alcohol and drugs in these cases. She felt that passage of this bill would only provide a false sense that they are doing something about deviant sexual conduct in the state and that it would be done at the expense of local control.

REP. BILL CAREY said that although pornography is abhorrent, he believed this legislation would have a chilling effect on free expression, libraries, and businesses involving entertainment.

REP. BRAD MOLNAR said that he did not believe that they would be banning what is considered pornography with this bill. He said that by passing this bill, they would only be saying that they support federal law which is already in effect. It would give state enforcement agencies which want to use this law to pursue obscenity, not pornography, the ability to do so. However, he said who this bill will stop, and provide the tool to help stop, are the perverse who show child abuse and torture as a form of sexual gratification. Though there are links between alcohol and drugs and child abuse, and this bill will not end the problem, it will help. He sees it primarily as a mental illness issue and a child abuse suppression measure.

{Tape: 1; Side: A; Approx. Counter: 26.8}

REP. ELLEN BERGMAN echoed the comments by **REP. MOLNAR**. Further, she discussed the involvement of drugs and alcohol in the issue of pornography. She said that if this legislation is passed, no one will be harmed; but if the legislation is not passed, she sees a lot of harm that could come.

REP. DUANE GRIMES commented on the chilling effect on the artists in the state. He did not see from the testimony and his own investigation that there is any demonstrable evidence that there would be much of a change. He felt the same was true of the effect on libraries. But he did feel that it would have an effect on the extreme nature of things mentioned in **REP. MOLNAR'S** comments. He felt that the benefits far outweigh any minute effect on the artistic expression and libraries in the state.

REP. AUBYN CURTISS said that the distributors of this kind of material readily acknowledge that a great percentage of their customers are children. Other studies indicate that children between the ages of 12 and 17 are the greatest consumers of it. She asked the committee to look at the words on page 1, lines 10 and 11, which deal with the person "knowingly and purposely" distributing this material. Even though this bill may not be the answer, it is a beginning to deter this activity.

REP. LINDA MC CULLOCH said that the people of her district want local control as well as less government interference. She discussed her concern regarding the question of who would set the standards and also the possibility of abuse in the use of this law. She believes there is confusion in the terms, "average person," "community standards" and "reasonable persons." She did not feel these were adequately defined in previous consideration of this bill.

REP. BILL TASH also has considered this bill in terms of local control. He represents a district that has demonstrated their belief in local control and have insisted upon it. However, he supports the bill because he believes it reinforces local control. He called the committee's attention to page 3, lines 16 and 17 to support this point of view.

REP. CHRIS AHNER went on record as being for the bill in representing her constituents. She also went on record as agreeing with **REP. MOLNAR'S** assessment that this bill will deal with the hard core pornographers and dealing with crime in making an effort to protect our children and people who want their rights protected.

Motion: REP. SHIELL ANDERSON MOVED TO AMEND THE BILL BY STRIKING THE LANGUAGE ON LINE 19, PAGE 3. EXHIBIT 5

Discussion: REP. ANDERSON explained his reason for this amendment is to avert a situation where an 18- or 19-year-old working in a theater which is showing R-rated movies and his boss would show something that the community deems to be obscene. The language of the bill is broad enough that this young person may not be able to determine whether or not it is obscene. Voting for his amendment will absolve those employees in theaters who are there simply as functionaries from liability.

REP. MC GEE asked for clarification as to the section being amended.

REP. ANDERSON confirmed the section.

REP. SOFT asked for comments by a member of the audience.

CHAIRMAN CLARK there being no objection by the committee, **Dallas Erickson** was called to answer the question.

REP. SOFT asked for **Mr. Erickson's** comment on the amendment.

REP. ANDERSON said he objected if **Mr. Erickson's** personal feelings on the repealer were being solicited. He wanted to have a comment from both sides.

CHAIRMAN CLARK said that there could be comment by both proponents and opponents.

Mr. Erickson said that an R-rated movie has never been found to be obscene or challenged as being obscene in the United States. He stated that the distance between an R-rated movie and what this bill covers is immense. He said that if someone is showing these movies, they know what they are--there is no question about it. Prosecutors who work with these issues would verify that.

Dan Erving, Montana Association of Theater Owners, said that under the current law, owners of the theater and management are held liable if an obscene picture is shown. This particular repealer would also include for liability people who are taking tickets, projection operators, janitors, and concession salespersons. They believe it would be unfair to extend liability to them, therefore, they would support line 19 being struck from HB 83.

REP. MC GEE asked for a reading of 45-8-203, MCA.

REP. ANDERSON read this section.

Vote: The amendment carried by a voice vote.

CHAIRMAN CLARK proposed an amendment and asked, without objection from the committee, for members of the audience to respond to his proposed amendment.

{Tape: 1; Side: A; Approx. Counter: 47.4}

CHAIRMAN CLARK addressed page 1, lines 10 and 11. He wanted to know what affect that would have if the lines stricken be put back in the bill.

Mr. Erickson said that it would change the bill drastically. Those words are not in the federal law and if they are put back in, it could bring the constitutionality of the statute into question thus causing it to be subject to appeal.

Jacqueline Lenmark said that she represents a number of video dealers and librarians who oppose HB 83 but do support the intent of **CHAIRMAN CLARK'S** amendment. They feel that language was important to protect the delivery person from liability.

Motion: **CHAIRMAN CLARK MOVED TO RESTORE THE WORDS OF LINES 10 AND 11 FOUND ON PAGE 1.**

Discussion: **REP. MOLNAR** commented on the fact that this is the law in 45 states and United Parcel Service (UPS) people are not being arrested. He felt our protection lies in following federal law, and the federal law has been overseen substantially by the Supreme Court.

CHAIRMAN CLARK said that during testimony it was said that there are similar laws in 45 other states. "Similar" being different from "exactly," he questioned whether Montana's law would be

similar or exactly the same as this bill. If a UPS person is delivering a package to a store that he knows sells hard core pornography, he can surmise what is in the package and he could be affected by what this committee is trying to do with this legislation.

CHAIRMAN CLARK relinquished the chair for the duration of discussion and action on his amendment to **VICE CHAIR DIANA WYATT.**

REP. CURTISS asked **Mr. Erickson** how many states have identical laws.

Without objection from the committee, **Mr. Erickson** testified he had not researched it personally, but referred to **Mr. Munsil's** previous testimony that this wording is the same as the federal law.

REP. CURTISS asked **John MacMaster, Staff Legal Counsel,** if it is the case that the wording of the bill is the same as the federal law and if Montana would be subjected to a position of undergoing more litigation if this version were separate and different from those of identical wording in other states.

Mr. MacMaster said they would not be because what is being addressed here is the intent or knowing element of this offense. The terminology is different between the states. What is being said is that the persons knew what they were doing. The terminology in the Montana criminal code is the intent-type element of defense as expressed in the law by saying "knowingly" or by saying, "purposely," or by saying, "knowingly and purposely." In some states, they will say the person "intentionally" because the intent element of defense is defined in their code by the word, "intentionally." They are all trying to get at the same thing.

REP. CURTISS said that she was going to vote "No" on this amendment because she believes in strength of uniformity.

REP. WILLIAM BOHARSKI asked **Mr. MacMaster** about the language on lines 10 and 11. In general, his question was to outline the effect of **CHAIRMAN CLARK'S** amendment.

Mr. MacMaster replied that if the committee wants persons to be subject to being charged, prosecuted and even found guilty for knowing that they delivered something, but not knowing the nature of what they delivered, then resist the amendment. But if the committee wants to say, just as a person has to know that he is killing somebody, he also has to know he is delivering something obscene, then vote for the amendment.

REP. BOHARSKI asked for an example of what would happen having the amendment in and having it out.

Mr. MacMaster discussed the example that a UPS man delivering an obscene movie wrapped in brown paper to someone's house would not know what he is delivering. Technically, on the face of the law as it is currently worded, he is guilty of the offense.

REP. MOLNAR asked a parallel question relating to the delivery of parts of an illegal firearm.

Mr. MacMaster said he would have to check the Montana state law on that to see exactly how the intent element of the offense is expressed.

REP. MOLNAR asked what the difference would be in the two examples.

Mr. MacMaster said that, depending on how the law is worded, there may not be a difference. Most criminal offenses are worded, "purposely or knowingly." They don't say, "if a person commits deliberate homicide or deliberate burglary, knowing that he is doing that" because it is understood that if you do something, you know what the result will be. In some cases in the Montana statutes this kind of language has been expressed, but they are not talking about knowingly robbing or knowingly killing. They will use "knowing the nature of" what you are doing to make clear that you had to know exactly the criminal nature of the act.

REP. ELLEN BERGMAN said she would be against the amendment, because it has been established that the UPS man doesn't know what he is delivering and therefore, he is not liable. She said that what is being shown in the adult bookstores is known. She said that theaters are not in question since these materials are not being shown there.

REP. CLARK closed on the amendment. In disagreeing with **REP. BERGMAN**, he cited that Studio One in Billings is a theater. Secondly, he did not think his amendment "guts" the bill, but instead strengthens it.

Vote: Motion to reinsert the language on lines 10 and 11 failed by voice vote.

{Tape: 1; Side: A; Approx. Counter: 68.6}

CHAIRMAN CLARK reassumed the chair for the discussion of the bill.

CHAIRMAN CLARK asked **Mr. Erickson** to clarify some items on the bill without objection from the committee. He asked in reference to page 2, line 21 dealing with the word, "picture," if this referred to art.

Mr. Erickson said it could be if it is obscene. He said that the wording is coming from the Supreme Court decision to define what

can be found to be obscene. Art can be found to be obscene if it does not have artistic value.

CHAIRMAN CLARK asked a similar question about the words, "motion picture film" and whether this just refers to 35mm film.

Mr. Erickson said that there is still some old 8mm and 16mm obscenity film available. Mainstream motion picture films are on 35mm and the underworld doesn't deal with that type of material.

CHAIRMAN CLARK pursued the same line of questioning relating to the word, "statue."

Mr. Erickson said that a statue can be obscene if it has no artistic value and does not meet any other parts of the test for obscenity.

CHAIRMAN CLARK asked about the word, "representation."

Mr. Erickson said that the purpose of this wording is to cover all the areas that would might come up and would include such things as computer transmission.

CHAIRMAN CLARK asked if **Mr. Erickson** would object to taking "motion picture film" out of that definition.

Mr. Erickson said definitely he would object because it would leave a loophole.

{Tape: 1; Side: B}

CHAIRMAN CLARK expressed that even though pornography is not mentioned in the bill, that is what they are dealing with. Using the obscenity wording is an effort to soften what they are trying to do. The bill deals with adults who have the ability to make up their own minds as to what they want to watch. With respect to law enforcement, county attorneys and child laws, he believes they all tie in with current obscenity statutes. He thinks that if county attorneys are prosecuting people under current laws, then this extension of the current statute is not needed. The responsibility to prosecute under the current law lies with the county attorney and if they are not discharging that duty, they can be removed through the vote in the local election or through strengthened recall laws. With this bill, he said that they would give the state more control. He said that federal laws dealing with these issues are prosecuted more strongly than state laws; so he suggested that the federal agencies be involved to bring prosecution when state laws are not deemed to be sufficient.

REP. SHIELL ANDERSON believes there are other issues that need to be discussed. He said that if he believed that this bill would alleviate the problem of sexual offense crimes, he would vote for it. He is unconvinced that this is the case. Adults should be

able to make up their own minds what they do and interference with that right is out of bounds in his opinion. When this results in acting out on others, punishment should be swift and should be significant. By passing this bill, another lawyer relief act would be enacted by leaving it to juries to determine the definition of obscenity. Communities can control this by setting contemporary community standards. He does not believe this law will stop the victimization of women and children. In an effort to have less government interference, less paternalism from the government and allowing people to do what they see fit as long as they don't act out on others, he said he would vote against this bill.

REP. AHNER said that it should be made harder for these people to offend. She felt that allowing it in the hands of adults, makes it available to children. She advocated banning it and letting those communities which want it fight for it. Therefore, she supports the bill.

REP. HURDLE feels that education should be funded. She is concerned about the unregulated and unmonitored care that preschool children receive. To show concern for children, she advocated doing something other than this bill.

REP. SMITH commented that an inmate from the Montana State Prison had written to thank the committee and the representative who has presented this bill because it has given them a sense of hope for the future of the state.

REP. CLIFF TREXLER said that his county had already taken care of this and in that they sent him a message. Although he agrees with **REP. ANDERSON**, and feels that there are some problems with enforcement, he will support the bill because of his constituents.

Vote: The motion that HB 83 **DO PASS** carried on a roll call vote 11 - 8. **EXHIBIT 6**

Upon recognition that the call for the question did not include the amendment, a second roll call vote was taken.

Motion/Vote: **REP. MC GEE MOVED HB 83 DO PASS AS AMENDED.** The motion carried on a roll call vote 11-8. **EXHIBIT 7**

{Tape: 1; Side: B; Approx. Counter: 18.9}

EXECUTIVE ACTION ON HB 82

Discussion: **REP. GRIMES** stated that he felt this bill had serious questions about constitutionality and whether it would bear the scrutiny of the court. He stated that because further language problems requiring amendments as well as questions

relative to the potential of additional burdens placed on law enforcement personnel would take up too much committee time, he would recommend tabling HB 82.

Motion/Vote: **REP. GRIMES MOVED TO TABLE HB 82.** The motion carried on roll call vote, 11-8. **EXHIBIT 7**

CHAIRMAN CLARK appointed a subcommittee to review all the mental health bills which have been referred to the House Judiciary Committee. The subcommittee will consist of **REP. SOFT**, as chairman, **REP. BERGMAN** and **REP. CAREY.**

EXECUTIVE ACTION ON HB 26

Motion: **REP. WYATT MOVED DO PASS HB 26.**

Discussion: **REP. WYATT** said this bill is a byproduct of the Subcommittee on Insurance's year-long investigation. It is a consensus bill and is supported by the American Medical Association (AMA), supported by most of the insurance companies doing business in Montana and also supported by the trial lawyers. She cited a situation where a patient was unquestionably injured and the doctor was unquestionably at fault. Both parties wanted to settle. The insurance company did not want to settle which caused the case to go through the medical practice panel and to trial. The time factor hurt both parties, neither received justice and both had wanted to avoid publicity. Further, she gave examples of the projected cost savings through avoidance of court processes.

REP. GRIMES said that the courts already have the authority to go to mediation or arbitration. In trying to solve a small portion of cases through the passage of this bill, all courts would be forced into this mediation process. He did not agree that the time in settling these cases would be shortened by this process. He felt this would fall under the category of passing on more mandates to the local levels of government.

Motion: **REP. GRIMES MOVED TO AMEND HB 26 BY STRIKING SECTION 2.**

REP. WYATT opposed the amendment because the purpose of the binding arbitration is to defray the inevitable costs in the court of the county where they would be no matter what the process might be. She said that actually the committee's decision comes down to determining the amount of the county's expense.

REP. BOHARSKI suggested an alternate to the proposed amendment on line 26 after the word, "shall," insert "may at the request of the third party."

REP. GRIMES asked **REP. BOHARSKI** to read his proposed amended version of the amendment.

REP. BOHARSKI said that subsection (3) would read, "If the panel decides both questions required by 27-6-602, MCA, in the affirmative, the court in which the complaint is filed shall, upon the request of either party, require the parties to participate in court-supervised, nonbinding mediation prior to proceeding."

REP. GRIMES said that improves the proposed language of this bill. He asked if that isn't the way it is done now. He asked then how this would be compared to current law.

John MacMaster gave the opinion that currently the court may, but is not required to, require arbitration if one or both parties requests it. Under the bill, if it is amended as proposed by **REP. BOHARSKI**, the court would be mandated to require arbitration.

REP. GRIMES commented that the intention of his amendment is to prevent the mandate. In his mind, it is different from the proposed language change by **REP. BOHARSKI**. In follow-up to a comment by **REP. WYATT**, he wondered why the mediation is not binding if the intent is to save costs.

REP. WYATT said she probably would support binding arbitration though she is trying to be more general and less invasive in terms of the what the demands are on the parties involved. She would support **REP. BOHARSKI'S** amendment to **REP. GRIMES'S** amendment. Her point in mediation is for the physician and patient to have some control over their own lives in their willingness to settle rather than leaving control in the hands of attorneys and/or insurance companies who do not allow them to settle.

REP. BERGMAN asked if the idea is to keep these cases out of court.

REP. WYATT said that was correct.

REP. BERGMAN asked if it would really work since it is not binding. Further, she asked about any recourse for a party who was not satisfied with the result.

REP. WYATT said that recourse would be to continue on to court. This bill would address those cases where the parties want to settle out of court.

REP. MOLNAR asked how this change in the law would help reach settlement when the amount asked for by the injured party is above what can be taken out of pocket and the insurance company refuses to pay.

REP. WYATT said it brings to the table a range of numbers the insurance company and patient are willing to settle for. This

meeting would be the first time money is discussed. She asked for an attorney in the audience to address the question.

REP. GRIMES objected.

REP. KOTTEL responded that when there is a court-supervised mediation, the parties begin to see each other's side. Mediation puts real facts on the table which bring aspects of reality to each side's case. When insurance companies refuse to accept a settlement which has been agreed to in mediation by both sides, the case goes to trial. If the jury awards an amount over the amount of the company policy limits, the defendant can sue the insurance company for their failure to accept the settlement. Then the insurance company is in the position of having to pay the overage. This possibility induces most insurance companies to accept the settlement offer in the mediation process.

REP. AHNER asked if the parties would have more leverage if it were binding.

REP. KOTTEL said that would be another bill and is not what is before the committee today.

{Tape: 1; Side: B; Approx. Counter: 54.7}

REP. SOFT wants to know how many cases like the one **REP. WYATT** cited have occurred in the past few years.

REP. WYATT said she could not give the numbers. But the point, she felt, is that in those cases, the parties would have received the same fair treatment as those in cases where arbitration has taken place.

REP. BOHARSKI asked if the insurance company has the authority to override the decision of the insured party who wants to settle.

REP. GRIMES removed his objection to testimony from a member of the audience.

Jacqueline Lenmark, representing the American Insurance Association, responded that in the typical malpractice case when the insurance company retains defense counsel, the defense counsel is working for the client, (in this case, the doctor) so the insurance company is not the client. In a typical case, the client is informed who his counsel is, what his policy limits are and that if he fears there is an exposure greater than policy limits, he may retain additional counsel. It is possible that a client will not only have a lawyer compensated and retained by the insurance company but may retain his own lawyer as well. Typically, settlement is discussed somewhere along the way and if the client directs the insurance company to settle, the company is under an obligation to look at settlement and is at risk for a bad faith action if the company does not settle within policy limits. In terms of the proposed amendment, she thought it would

be accurate to say that insurance companies generally do not want to have the defense of a lawsuit directed by statute, but would rather have the freedom to come to that decision with the client they are representing. **REP. GRIMES'** amendment to the bill would help. **REP. BOHARSKI'S** amendment would also help that happen.

Russell Hill, Montana Trial Lawyers Association (MTLA), said that **Ms. Lenmark** accurately described the duties of an insurance company to its insured in the course of nonbinding mediation. He added that MTLA understood that this was a consensus bill and the best part of the bill is the articulation of the decision.

REP. WYATT said that a club that insurance companies have over a physician is that they can cancel coverage of malpractice insurance. This will influence the physician's decision and is an additional argument for nonbinding arbitration.

{Tape: 2; Side: A}

Motion/Vote: **REP. BOHARSKI MOVED FOR A SUBSTITUTE AMENDMENT FOLLOWING THE WORD, "SHALL" INSERT: "AT THE REQUEST OF ANY PARTY ....."** carried unanimously by a voice vote.

Motion: **REP. BOHARSKI MOVED DO PASS AS AMENDED.**

Motion/Vote: **REP. MOLNAR MOVED TO AMEND SECTION 1, 27-6-604, MCA, FOLLOWING THE LAST SENTENCE ON LINE 17 TO INSERT A NEW SENTENCE, "ALL PARTIES SHALL BE INFORMED OF THEIR RIGHT TO NONBINDING MEDIATION."** The motion carried with a unanimous voice vote.

Motion: **REP. GRIMES MOVED TO STRIKE AMENDED SECTION 2 IN ITS ENTIRETY.**

Discussion: **REP. ANDERSON** said that he would vote in favor of this amendment. He planned to vote against the bill, but with this amendment the effect would be to delay one month on average that would be added to the time it takes to go through one of these if you have mandatory mediation. He thinks that there may be a case of clear negligence in a particular case and the injured party should have the right to take this case to court rather than have a delay in the legal process which may be to the advantage of the doctor or the insurance company. You may have a case that will clearly end up in court anyway and I don't think you should have a mandatory mediation process in that situation.

REP. WYATT opposed the amendment. The delays that exist in the court now continue to exist. To bring this to mediation will take from two hours to two days and will cost from $600-$2,500 versus $30,000-$50,000. Delays that are built into the system have nothing to do with this bill. She felt the amendment would defeat the purpose of the bill.

Vote: Motion to amend by striking section 2 failed by roll call vote. **EXHIBIT 9**

Mr. MacMaster said that amendments are often proposed without a request from the proposer for a corresponding amendment in the title. He asked to amend the title accordingly when necessary without the proposer having to stipulate. The committee agreed to this stipulation.

Motion/Vote: **REP. WYATT MOVED DO PASS AS AMENDED.** The motion carried with **REPS. GRIMES, SOFT AND ANDERSON** voting no.

{Tape: 2; Side: A; Approx. Counter: 12.9}

EXECUTIVE ACTION ON HB 108

Motion: **REP. MC GEE MOVED DO PASS.**

Discussion: **REP. BOHARSKI** asked who would pay for this.

REP. MC GEE said that it is his understanding that this is supported by the fines and there would be no fiscal impact.

REP. BOHARSKI discussed the potential problems with passing this bill with no fiscal note even if this is the case.

REP. CLARK read a response that satisfied the requirement for a fiscal note. **EXHIBIT 10**

REP. HURDLE said that the response given to the question about what will happen when someone cannot pay the bill was that the program itself would absorb the cost.

CHAIRMAN CLARK said that **REP. COBB** had informed him that there were 279 cases last year which would apply under this bill. **EXHIBIT 11**

Vote: The motion passed unanimously by voice vote.

REP. BOHARSKI objected to putting it on consent calendar.

REP. MC GEE MOVED TO ADJOURN.

ADJOURNMENT

Adjournment: The meeting adjourned at 10:35 AM.

Bob Clark
BOB CLARK, Chairman

Joanne Gunderson
JOANNE GUNDERSON, Secretary

BC/jg

HOUSE OF REPRESENTATIVES

Judiciary

ROLL CALL DATE 1/12/95

NAME	PRESENT	ABSENT	EXCUSED
Rep. Bob Clark, Chairman	✓		
Rep. Shiell Anderson, Vice Chair, Majority	✓		
Rep. Diana Wyatt, Vice Chairman, Minority	✓		
Rep. Chris Ahner	✓ late		~~E~~
Rep. Ellen Bergman	✓		
Rep. Bill Boharski	✓		
Rep. Bill Carey	✓		
Rep. Aubyn Curtiss	✓		
Rep. Duane Grimes	✓		
Rep. Joan Hurdle	✓		
Rep. Deb Kottel	✓		
Rep. Linda McCulloch	✓		
Rep. Daniel McGee	✓		
Rep. Brad Molnar	✓		
Rep. Debbie Shea	✓		
Rep. Liz Smith	✓		
Rep. Loren Soft	✓		
Rep. Bill Tash	✓		
Rep. Cliff Trexler	✓		

HOUSE STANDING COMMITTEE REPORT

January 12, 1995

Mr. Speaker: We, the committee on **Judiciary** report that **House Bill 83** (first reading copy -- white) **do pass as amended**.

Signed: Bob Clark
Bob Clark, Chair

And, that such amendments read:

1. Title, line 4.
Following: "LAW;"
Insert: "AND"

2. Title, line 5.
Strike: "; AND REPEALING SECTION 45-8-203, MCA"

3. Page 3, line 19.
Strike: section 2 of the bill in its entirety

-END-

1/13

Committee Vote:
Yes 11, No 8.

HOUSE STANDING COMMITTEE REPORT

January 12, 1995

Mr. Speaker: We, the committee on **Judiciary** report that **House Bill 26** (first reading copy -- white) **do pass as amended.**

Signed: Bob Clark
Bob Clark, Chair

And, that such amendments read:

1. Title, line 7.
Following: "REQUIRING"
Insert: ", AT THE REQUEST OF A PARTY,"

2. Page 1, line 17.
Following: "disagreement."
Insert: "Each party must be informed by the panel of the right to nonbinding mediation under 27-6-606."

3. Page 1, line 26.
Following: "shall"
Insert: ", at the request of a party,"

-END-

1/13

Committee Vote:
Yes 19, No 0.

101619SC.Hdh

HOUSE STANDING COMMITTEE REPORT

January 12, 1995

Mr. Speaker: We, the committee on **Judiciary** report that **House Bill 108** (first reading copy -- white) **do pass**.

Signed: Bob Clark

Bob Clark, Chair

1-13

Committee Vote:
Yes 19, No 0.

101614SC.Hdh

EXHIBIT 1
DATE 1/12/95
HB 83

CITY OF BILLINGS, Plaintiff and Respondent,

v.

Jimmy Lee LAEDEKE, Defendant and Appellant.

No. 90-264.

Supreme Court of Montana.

Submitted Jan. 18, 1991.

Decided Feb. 5, 1991.

Male revue dancer was found guilty in the District Court of the Thirteenth Judicial District, Yellowstone County, Robert W. Holmstrom, J., of violating city ordinance dealing with nude and seminude dancing at establishments licensed by state to sell alcoholic beverages, and he appealed. The Supreme Court, Turnage, C.J., held that: (1) State Alcoholic Beverage Code did not preempt city's regulation of conduct occurring on licensed premises; (2) ordinance did not violate First Amendment; and (3) State Constitution's "freedom of speech or expression" clause did not provide greater protections than those afforded by First Amendment's "freedom of speech" clause.

Affirmed.

Hunt, J., dissented and filed opinion.

1. Constitutional Law ⇐48(1, 3)

Legislative enactment is presumed to be constitutional and will be upheld on review except when proven to be unconstitutional beyond a reasonable doubt.

2. Intoxicating Liquors ⇐10(2)

State Alcoholic Beverage Code did not preempt city's authority to regulate conduct, such as nude and seminude dancing, occurring at establishments licensed by state to sell alcoholic beverages. MCA 16-1-101 to 16-6-314, 16-1-101(2).

3. Constitutional Law ⇐90.4(5)
Intoxicating Liquors ⇐15

City ordinance regulating nude and seminude dancing at establishments licensed by state to sell liquor did not violate First Amendment; such regulation fell within broad authority conferred on states by Twenty-First Amendment, and, under state law, city was municipality with self-government powers that could exercise any power not prohibited by State Constitution, law, or charter. U.S.C.A. Const.Amends. 1, 21; Const. Art. 11, § 6.

4. Constitutional Law ⇐90.4(5)

State Constitution's "freedom of speech or expression" clause did not provide greater protections for nude and seminude dancing at establishments licensed by state to sell alcoholic beverages than those afforded by First Amendment's "freedom of speech" clause. U.S.C.A. Const.Amend. 1; Const. Art. 2, § 7.

Robert L. Stephens, Stephens Law Firm, Billings, for defendant and appellant.

Russell C. Fagg, City Atty., Billings, Marc Racicot, Atty. Gen., and John Paulson, Asst. Atty. Gen., Helena, for plaintiff and respondent.

TURNAGE, Chief Justice.

Jimmy Lee Laedeke appeals an order of the Thirteenth Judicial District, Yellowstone County, which upheld the constitutionality of §§ 3-304(d) and (e), Billings, Montana City Code (BMCC), an ordinance banning certain forms of nude and seminude dancing. The District Court upheld the constitutionality and found Laedeke guilty of violating the ordinance. We affirm.

Laedeke raises the following issues:

1. Did the District Court err in finding that the City of Billings had authority to adopt regulatory ordinances for state-licensed retail liquor premises?

2. Did the District Court err in concluding that the municipal ordinance did not violate state and federal constitutional provisions relating to freedom of speech, free-

dom of expression, equal protection, due process, and vagueness and over-breadth?

FACTS AND PROCEDURE

In 1987, Jimmy Lee Laedeke worked as a male revue dancer at the Club Carlin, d/b/a Big Daddy's, an establishment licensed by the state to sell alcoholic beverages, in Billings, Montana. As a male revue dancer, Laedeke entertained the Club Carlin patrons by performing burlesque-type dance routines to music. Laedeke designed his own dance costumes, which consisted of various layers of clothing that he would progressively remove as his dance routines unfolded.

Laedeke began one of his dance routines dressed in a raincoat. Underneath his raincoat, Laedeke wore a bikini brief, equivalent to a speedo swimsuit, which was embellished with portrayals of Groucho Marx's nose, mustache and glasses on the front portion of the bikini. Underneath his "Groucho" bikini, Laedeke wore two overlapping G-strings. A G-string, designed for a male, is a garment consisting of a pouch that covers the genital area with a narrow string attached to the pouch which runs up the buttocks and attaches to a narrow belt worn around the waist. Laedeke's top G-string was of slightly larger proportions than the bottom G-string. The arresting police officer testified that the smaller G-string's pouch barely covered Laedeke's genital area and its string was approximately one-eighth inch wide. Laedeke would complete his routine by wearing only the smaller G-string.

On the evening of November 6, 1987, the arresting police officer observed Laedeke while he was performing this particular dance routine. After viewing Laedeke's performance, the police officer left the Club Carlin to review relevant ordinances in connection to this performance. The police officer returned approximately one-half hour later and cited Laedeke with a violation of § 3-304, BMCC, which prohibits certain forms of nude and semi-nude dancing while Laedeke was again performing the same routine. Additionally, the arresting officer cited four other female performers that night, as well as the manager of the Club Carlin, for violating § 3-304, BMCC, and in one instance, § 3-301, BMCC, which requires live entertainment to remain on a platform or within an exclusive area while performing.

Legal proceedings originated in the City Court of Billings. On December 17, 1987, Laedeke and five co-defendants moved to dismiss the case based on the unconstitutionality of §§ 3-301 and -304, BMCC. On February 8, 1988, the defendants were found guilty of violating § 3-304, BMCC, and in one instance, § 3-301, BMCC.

The defendants appealed to District Court. On October 6, 1988, Laedeke consented to the withdrawal of Richard Stephens as his attorney and expressed his interest to represent himself pro se. On October 20, 1988, the District Court, by stipulation, dismissed with prejudice the appeal of the remaining defendants and ordered their respective bonds of $150.00 forfeited. Laedeke, however, continued his case, asserting the unconstitutionality of § 3-304, BMCC.

Following a trial on January 11, 1990, the District Court found that the City of Billings had the authority to enact § 3-304, BMCC, and that this ordinance was constitutional; the court also found Laedeke guilty of violating the ordinance, fined him $130.00, and assessed him a $20.00 court surcharge. From this decision, Laedeke further appeals.

STANDARD OF REVIEW

[1] A "legislative enactment" is presumed to be constitutional and will be upheld on review except when proven to be unconstitutional beyond a reasonable doubt. *Fallon County v. State* (1988), 231 Mont. 443, 445-46, 753 P.2d 338, 339-40 (citations omitted).

ANALYSIS

[2] 1. Did the District Court err in finding that the City of Billings had author-

ity to adopt regulatory ordinances for state-licensed retail liquor premises?

Laedeke argues that §§ 3–304(d) and (e), BMCC, are unconstitutional based on state preemption of regulation of establishments state-licensed to sell alcoholic beverages under the Montana Alcoholic Beverage Code, §§ 16–1–101 to 16–6–314, MCA. We disagree.

The pertinent language of the Montana Alcoholic Beverage Code, found under §§ 16–1–101(2) and –104, MCA, provides:

> It is hereby declared to be the policy of the state of Montana to effectuate and ensure the entire control of the manufacture, sale, and distribution of alcoholic beverages within the state of Montana, as that term is defined in this code, subject to the authority of the state of Montana through the Montana department of revenue.
>
> The purpose and intent of this code are to prohibit transactions in alcoholic beverages which take place wholly within the state of Montana except under state control as specifically provided by this code, and every section and provision of this code shall be construed accordingly.

Sections 3–304(d) and (e), BMCC, provide:

> (d) Any owner, proprietor or person in charge of an establishment in which alcoholic beverages are sold or dispensed, who knowingly permits any person to appear clothed, costumed, unclothed, or uncostumed in such a manner that the lower part of his/her torso, consisting of the private parts, or genitalia, or anal cleft, or cleavage of the buttocks, is not covered by a fully opaque material, or is so thinly covered as to appear uncovered, is guilty of a misdemeanor.
>
> (e) Any person who intentionally appears with private parts uncovered in an establishment as in subsection (d), whether employed by the establishment or not, is guilty of a misdemeanor.

The Montana Alcoholic Beverage Code grants the Department of Revenue Liquor Division the authority to regulate the "*manufacture, sale,* and *distribution* of alcoholic beverages." (Emphasis added.) The Code, however, does not grant the Department the authority to regulate the *conduct* that may occur in establishments state-licensed to sell alcoholic beverages.

Here, Laedeke's place of employment, the Club Carlin, was a Billings establishment state-licensed to sell alcoholic beverages to its patrons. Accordingly, the Montana Alcoholic Beverage Code applies to the regulation of the sale of alcoholic beverages within the Club Carlin. Sections 3–304(d) and (e), BMCC, are ordinances banning certain forms of topless and bottomless dancing which may occur in Billings establishments state-licensed to sell alcoholic beverages. Clearly, these ordinances in no way regulated the Club Carlin's sale of alcoholic beverages to its patrons, but instead, regulated Laedeke's conduct that occurred in the Club Carlin. This is simply not a "liquor-sale" case as found in *State ex rel. City of Libby v. Haswell* (1966), 147 Mont. 492, 414 P.2d 652, where we held that a city ordinance which granted a police court jurisdiction over the offense of selling beer to a minor under twenty-one years of age was invalid and preempted by the state. We therefore hold that the City of Billings had the authority to enact §§ 3–304(d) and (e), BMCC, as the City of Billings was not preempted by the Montana Alcoholic Beverage Code to regulate conduct which may occur in state-licensed liquor establishments.

2. Did the District Court err in concluding that the municipal ordinance did not violate federal and state constitutional provisions relating to freedom of speech, freedom of expression, equal protection, due process, and vagueness and over-breadth?

Laedeke argues that restricting burlesque-type dancing is a violation of the First Amendment of the United States Constitution, as well as Article 2, § 7 of the Montana Constitution, which states that "[n]o law shall be passed impairing the freedom of speech or expression." Lae-

deke asserts that nude dancing, as a visual representation, is a form of protected expression if it is not found to be obscene citing 41 Op. Att'y Gen. 75 (1986), and here, uncontroverted evidence establishes that burlesque-type dancing featured at the Club Carlin was viewed by the performers as a form of artistic self-expression. Furthermore, Laedeke argues that no evidence exists in the record to establish that Laedeke's performance was obscene.

Laedeke additionally argues that the ordinance offends the principles of equal protection and due process in both the federal and state constitutions. Laedeke further argues that the ordinance is vague and overly-broad. Laedeke, however, failed to adequately brief the arguments of equal protection, due process, vagueness, and over-breadth in his brief to this Court, and, as such, this Court will not further address these arguments. We will therefore limit our discussion to whether 1) the ordinance violated the First Amendment of the United States Constitution, and 2) whether Article 2, § 7 of the Montana Constitution provides greater protection for individual expressive activity than the First Amendment of the United States Constitution.

[3] Laedeke's constitutional argument based on a First Amendment violation lacks merit in light of a series of three United States Supreme Court cases. Those cases clearly establish that an ordinance regulating nude and semi-nude dancing is constitutional under the broad language of the Twenty-first Amendment of the United States Constitution, which grants the states the power to regulate the sale of liquor. In *City of Newport v. Iacobucci* (1986), 479 U.S. 92, 107 S.Ct. 383, 93 L.Ed.2d 334, the Court upheld a Kentucky municipal ordinance, quite similar to the Billings ordinance in question, which banned certain forms of nude and semi-nude dancing in bars. The Court stated that the sweeping language of the Twenty-first Amendment confers to states the authority to ban nude and semi-nude dancing in establishments state-licensed to sell liquor " 'as a part of its liquor license control program.' " *Iacobucci*, 479 U.S. at 95, 107 S.Ct. at 385 (citation omitted). Additionally, the Court held that states may delegate this authority "as they see fit." *Iacobucci*, 479 U.S. at 96, 107 S.Ct. at 385. The Court in *Iacobucci* cited *New York State Liquor Authority v. Bellanca* (1981), 452 U.S. 714, 101 S.Ct. 2599, 69 L.Ed.2d 357, where the Court upheld a state statute banning nude dancing in bars. In *Bellanca*, the Court held that the state's interest of upholding order outweighed the interest of free expression under the First Amendment. *Bellanca*, 452 U.S. at 716–17, 101 S.Ct. at 2601. The Court in *Iacobucci* and *Bellanca* cited *California v. LaRue* (1972), 409 U.S. 109, 93 S.Ct. 390, 34 L.Ed.2d 342, as authority, which upheld a state regulation banning nude dancing in bars holding that the Twenty-first Amendment confers broad powers "over public health, welfare, and morals." *LaRue*, 409 U.S. at 114, 93 S.Ct. at 395.

Therefore, a municipality may enact an ordinance regulating nude and semi-nude dancing if the state has delegated its regulatory authority under the Twenty-first Amendment to the municipality. Here, the City of Billings is a municipality with self-government powers. In Montana, a municipality with self-government powers "may exercise any power not prohibited by this constitution, law, or charter." Mont. Const. Art. XI, § 6. A Montana municipality with self-government powers is not expressly prohibited from regulating nude and semi-nude dancing in establishments state-licensed to sell liquor. Therefore, the City of Billings, a municipality with self-government powers, may enact an ordinance that regulates nude and semi-nude dancing under the broad regulatory powers of the Twenty-first Amendment.

[4] Laedeke further argues that Article II, § 7 of the Montana Constitution, the "freedom of speech or expression" clause, provides greater protection for individual expressive activity than the First Amendment's "freedom of speech" clause of the

United States Constitution. In the past, this Court has discussed the First Amendment and its state counterpart without distinguishing between the two provisions. *See Dorn v. Board of Trustees of Billings School District # 2* (1983), 203 Mont. 136, 144–45, 661 P.2d 426, 430–31. Several state courts, however, have developed state constitutional protections which limit state authority over nude entertainment apart from the Twenty-first Amendment. Some of these courts have held that the state's police power, though possibly not limited under the United States Constitution, is limited by the state constitution's free expression protections. *See Mickens v. City of Kodiak* (Alaska 1982), 640 P.2d 818, 821; *Bellanca v. New York State Liquor Authority* (1981), 54 N.Y.2d 228, 445 N.Y.S.2d 87, 88, 429 N.E.2d 765, 766; *Harris v. Entertainment Sys. Inc.* (1989), 259 Ga. 701, 386 S.E.2d 140, 142.

We, however, concur with the Florida Supreme Court's analysis in *City of Daytona Beach v. Del Percio* (Fla.1985), 476 So.2d 197, 203–04, where, in upholding a municipal ordinance banning certain forms of nude and semi-nude dancing, the court stated:

> Assuming that Florida's constitutional protection of nude barroom dancing is coextensive with the federal protections (and we are not inclined to find a greater state protection in this instance), a municipality's inherent police power, exercised for the public health and welfare, may outweigh the minimal speech protection at stake here. "The regulation of activity which has demonstrated a capacity to induce breaches of the peace is a traditional and legitimate subject for the exercise of a municipality's police power." [citations omitted.] ... While some may question the wisdom of regulating crime such as this, which said detractors might term victimless, the decision lies with the legislative body, not the courts.

Here, we are also inclined not to find a greater state protection of nude and semi-nude dancing in establishments state-licensed to sell alcoholic beverages than what is afforded by the United States Constitution. Accordingly, we hold that the municipal ordinance in question is constitutionally sound under the Montana Constitution.

Affirmed.

HARRISON, McDONOUGH, BARZ, SHEEHY and WEBER, JJ., concur.

HUNT, Justice, dissenting:

I dissent. There are many ways to express an opinion. Some people wrap themselves in the flag. Others burn it. But the majority of us silently regard it as an emblem of the freedom to express ourselves as we see fit. In dancing, there are many ways to express oneself, ways that the rest of us do not always regard as "our way." Some put on a pair of tights and perform classical ballet. Others attire themselves in fancy dress and promenade on a ballroom floor. Jimmy Lee Laedeke dons a Groucho Marx bikini and two G-strings and prances before the patrons of The Club Carlin.

The Majority has danced the wild fandango in its zeal to ensure that Laedeke's routine shall never again see the footlights of Billings. First, it holds that the City is not preempted by state liquor-control law from enacting an ordinance forbidding nude and semi-nude dancing in establishments that serve alcohol because the ordinance restrains *conduct* rather than the *manufacture, sale* and *distribution* of alcohol. In the next breath, it holds that the ordinance is constitutional under the Twenty-First Amendment because it is part of a liquor-control program.

The City cannot have it both ways. Either the ordinance was enacted as a part of a liquor-control program or it wasn't. If it was part of a liquor-licensing scheme, the City could not enact the ordinance because the area of alcohol sales has been affirmatively subjected to state control. If it wasn't part of a liquor-control program,

and instead was enacted solely to regulate conduct, the ordinance does not fit under the broad base of power granted to the states under the Twenty-First Amendment.

A state's authority to regulate conduct under the Twenty-First Amendment is inextricably coupled with its authority to regulate the sale of alcohol. The amendment grants the State the ability to proscribe conduct because "[t]he [s]tate's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs." *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714, 717, 101 S.Ct. 2599, 2601, 69 L.Ed.2d 357, 361 (1981). Strip away the alcohol sales, as the Majority does in the first part of the Opinion, and you have an ordinance that no longer fits under the lesser protection of the Twenty-First Amendment. The ordinance instead becomes a conduct-restricting regulation subject to the greater degree of scrutiny given to all laws implicating the First Amendment.

Thus, once the Majority determined that the City's ordinance was not preempted by the State because it regulated conduct rather than alcohol sales, it was required to review the constitutionality of the law under the standards pertaining to regulations that, on their face, restrict conduct for its communicative element. As Justice Marshall pointed out in his dissent to *California v. LaRue*, 409 U.S. 109, 131, 138, 93 S.Ct. 390, 403, 407, 34 L.Ed.2d 342, 359, 363 (1972), a case concerning California laws banning sexual conduct in bars and night clubs:

> [I]n order to restrict speech, the State must show that the speech is "used in such circumstances and [is] of such a nature as to create a clear and present danger that [it] will bring about the substantive evils that [the State] has a right to prevent." (Citations omitted.)
>
> . . . . . .
>
> Classifications that discriminate against the exercise of constitutional rights per se . . . must be supported by a "compelling" governmental purpose and must be carefully examined to insure that the purpose is unrelated to mere hostility to the right being asserted.

The ordinance could not pass scrutiny under this test because, as the City acknowledged in its brief, it has failed to make a showing of *any* governmental interest furthered by the law.

What I find most disturbing about the Majority's thinly veiled attempt to uphold this ordinance at any price is its failure to take this opportunity to put some teeth into our state constitutional guarantee of freedom of expression. 1972 Mont. Const. Art. II, § 7. In voting unanimously to include a specific provision for the freedom of expression in the Montana Constitution, the Bill of Rights Committee stated:

> Hopefully, this extension [of freedom of expression] will provide impetus to the courts in Montana to rule on various forms of expression similar to the spoken word and the ways in which one expresses his unique personality *in an effort to re-balance the general backseat status of states in the safeguarding of civil liberties. The committee wishes to stress the primacy of these guarantees in the hope that their enforcement will not continue merely in the wake of the federal case law.* (Emphasis added.)

Bill of Rights Committee Proposal, II Mont. Const. Convention 630 (Feb. 23, 1972).

Although the committee expressed the hope that the Montana Constitution's freedom of expression would give broader guarantees than the U.S. Supreme Court had accorded the right, this Court has refused to listen to this desire. Instead, the Majority today bestows lesser protection to the freedom of expression than that accorded by the federal court. The Majority has not required the City to demonstrate any governmental interest forwarded by this ordinance. Instead, it has placed the burden of proving unconstitutionality on Lae-

deke. And the standard the majority has demanded that he use, that of a reasonable doubt, is the most stringent standard of all. What a sad day it is when we allow a law that on its face constricts so fundamental a right to pass muster under the lowest possible scrutiny available.

The fact that Laedeke dances to a different choreographer should not be a reason to deny him, and inferentially all of us, the basic constitutional right to express our feelings whether they are about the flag, dancing or Groucho Marx.

I would reverse.

Thomas P. DOOHAN, Plaintiff and Respondent.

v.

BIGFORK SCHOOL DISTRICT NO. 38, BIGFORK, MT., Dr. Robert W. Bowman, Robert Chrysler, Albert Cochrane, Robert Boese, Lloyd Magnall, Joseph Potoczny, Ronald Martin, Edwin Anderson, and Charles Mason, Trustees thereof, the following Bigfork School District No. 38 Board Members in their individual capacity; Robert Chrysler and Albert Cochrane, Defendants and Appellants.

No. 89-207.

Supreme Court of Montana.

Heard Nov. 1, 1989.

Submitted Oct. 18, 1990.

Decided Feb. 5, 1991.

Rehearing Denied March 14, 1991.

Former school district superintendent brought action against school district and school district trustees for deprivation of due process in relation to constructive discharge and for intentional infliction of emotional distress. The District Court, Eleventh Judicial District, County of Flathead, Gordon R. Bennett, J., entered judgment on jury verdict in favor of superintendent, and school district and trustees appealed. The Supreme Court, McDonough, J., held that: (1) valid procedural due process claim based on constructive discharge requires employer conduct motivated by desire to avoid subjecting its actions to scrutiny of termination related hearing; (2) school district was not immune from damages; and (3) charged conduct of trustees was not sufficiently outrageous to establish prima facie case of intentional infliction of emotional distress.

Reversed and remanded.

Weber, J., filed dissenting opinion, in which Sheehy and Hunt, JJ., concurred.

1. Constitutional Law ⇐278.4(5)

Valid procedural due process claim based on constructive discharge of public employee requires employer conduct motivated by desire to avoid subjecting its actions to scrutiny of termination related hearing. 42 U.S.C.A. § 1983; U.S.C.A. Const.Amend. 14.

2. Appeal and Error ⇐1067

Trial court's error in failing to charge jury that school district superintendent, asserting due process claim based on constructive discharge, had to prove, in addition to fact that school district constructively discharged him, that such discharge was intentionally carried out with purpose of depriving superintendent of his right to notice and hearing, was reversible error, particularly inasmuch as instruction given permitted jury to find deprivation of due process upon merely finding constructive discharge under traditional objective test. 42 U.S.C.A. § 1983; U.S.C.A. Const. Amend. 14.

3. Appeal and Error ⇐843(2)

Supreme Court would decline to rule on school district's challenge to sufficiency

EXHIBIT 2
DATE 1/12/95
HB 83

This is not remarkable, for in the area

[413 US 23]

of freedom of speech and press the courts must always remain sensitive to any infringement of genuinely serious, literary, artistic, political or scientific expression. This is an area in which there are few eternal verities.

The case we now review was tried on the theory that the California Penal Code § 311 approximately incorporates the three-stage Memoirs test, supra. But now the Memoirs test has been abandoned as unworkable by its author,[4] and no Member of the Court today supports the Memoirs formulation.

II

[4–7] This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment. Kois v Wisconsin, 408 US 229, 33 L Ed 2d 312, 92 S Ct 2245 (1972); United States v Reidel, 402 US, at 354, 28 L Ed 2d 813; Roth v United States, supra, at 485, 1 L Ed 2d 1498.[5] "The First and Fourteenth Amendments have never been treated as absolutes [footnote omitted]." Breard v Alexandria, 341 US, at 642, 95 L Ed 1233, 35 ALR2d 353 and cases cited. See Times Film Corp. v Chicago, 365 US 43, 47–50, 5 L Ed 2d 403, 81 S Ct 391 (1961); Joseph Burstyn, Inc. v Wilson, 343 US, at 502, 96 L Ed 1098. We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be

[413 US 24]

carefully limited. See Interstate Circuit, Inc. v Dallas, supra, at 682–685, 20 L Ed 2d 225. As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed.[6] A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a

26 L Ed 2d 385, 90 S Ct 1884 (1970) (dissenting opinions of Burger, C. J., and Harlan, J.) The Redrup procedure has cast us in the role of an unreviewable board of censorship for the 50 States, subjectively judging each piece of material brought before us.

4. See the dissenting opinion of Mr. Justice Brennan in Paris Adult Theatre I v Slaton, 413 US, p 73, 37 L Ed 2d p 467.

5. As Mr. Chief Justice Warren stated, dissenting, in Jacobellis v Ohio, 378 US 184, 200, 12 L Ed 2d 793, 84 S Ct 1676 (1964):

"For all the sound and fury that the Roth test has generated, it has not been proved unsound, and I believe that we should try to live with it—at least until a more satisfactory definition is evolved. No government—be it federal, state, or local—should be forced to choose between repressing all material, including that within the realm of decency, and allowing unrestrained license to publish any material, no matter how vile. There must be a rule of reason in this as in other areas of the law, and we have attempted in the Roth case to provide such a rule."

6. See, e. g., Oregon Laws 1971, c 743, Art 29, §§ 255–262, and Hawaii Penal Code, Tit 37, §§ 1210–1216, 1972 Hawaii Session laws, Art 9, c 12, pt II, pp 126–129, as examples of state laws directed at depiction of defined physical conduct, as opposed to expression. Other state formulations could be equally valid in this respect. In giving the Oregon and Hawaii statutes as examples, we do not wish to be understood as approving of them in all other respects nor as establishing their limits as the extent of state power.

We do not hold, as Mr. Justice Brennan intimates, that all States other than Oregon must now enact new obscenity statutes. Other existing state statutes, as construed heretofore or hereafter, may well be adequate. See United States v 12 200-Ft. Reels of Film, 413 US, p 130 n 7, 37 L Ed 2d p 507.

patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

[8, 9] The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, Kois v Wisconsin, supra, at 230, 33 L Ed 2d 312, quoting Roth v United States, supra, at 489, 1 L Ed 2d 1498; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. We do not adopt as a constitutional standard the "*utterly* without redeeming social value" test of Memoirs v Massachusetts, 383 US, at 419, 16 L Ed 2d 1;

[413 US 25]

that concept has never commanded the adherence of more than three Justices at one time.[7] See supra, at 21, 37 L Ed 2d at 429. If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary. See Kois v Wisconsin, supra, at 232, 33 L Ed 2d 312; Memoirs v Massachusetts, supra, at 459–460, 16 L Ed 2d 1 (Harlan, J., dissenting); Jacobellis v Ohio, 378 US, at 204, 12 L Ed 2d 793 (Harlan, J., dissenting); New York Times Co. v Sullivan, 376 US 254, 284–285, 11 L Ed 2d 686, 84 S Ct 710, 95 ALR2d 1412 (1964); Roth v United States, supra, at 497–498, 1 L Ed 2d 1498 (Harlan, J., concurring and dissenting).

[10, 11] We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, supra:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

[12–15] Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can

[413 US 26]

be exhibited or sold without limit in such public places.[8] At a mini-

[9] 7. "A quotation from Voltaire in the flyleaf of a book will not constitutionally redeem in otherwise obscene publication . . . ." Kois v Wisconsin, 408 US 229, 231, 33 L Ed 2d 312, 92 S Ct 2245 (1972). See Memoirs v Massachusetts, 383 US 413, 461, 16 L Ed 2d 1, 86 S Ct 975 (1966) (White, J., dissenting). We also reject, as a constitutional standard, the ambiguous concept of "social importance." See id., at 462, 16 L Ed 2d 1 (White, J., dissenting).

[12] 8. Although we are not presented here with the problem of regulating lewd public conduct itself, the States have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior. In United States v O'Brien, 391 US 367,

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EXHIBIT 3
DATE 1/12/95
HB 83

December 3, 1991

Missoula City Council
Judicial Subcommittee
Jack Reidy
Al Sampson
Mike Cregg
Bob Luceno
Don Shaffer

Dear Committee Members,

By way of introduction, my name is Michael Scolatti and I am a Licensed Clinical Psychologist, in private practice. I specialize in the assessment and treatment of sexual offenders and victims of sexual abuse. In addition, I am a consultant to the National Corrections Association, and I developed the Sex Offender Treatment Program currently used to treat sexual offenders at Montana State Prison. I have been working in this area for the past 11 years, and I have lectured in the United States and Canada. I have evaluated and/or treated approximately 500 adult and adolescent sexual offenders over the past 6 years in Western Montana.

I am writing to you in support of a City Ordinance to ban nude dancing. I feel that there is no merit to nude dancing and it does not serve any "artistic" purpose. Aside from my personal feelings that nude dancing is degrading and harmful to the moral fabric of our community I would like to inform the committee of some research findings concerning pornography in general, statistics from my outpatient sex offender treatment program, and some of my direct clinical observations regarding nude dancing and sexual offenders in our community.

Research has been somewhat equivocal in the area of the relationship of sexual offending and the use of pornography. There have never been any direct studies of nude dancing and sexual crimes, however, given the voyeuristic quality of nude dancing and its similarities to viewing pornographic materials I feel it is logical to assume the data regarding pornographic material could be extrapolated to nude dancing.

The most consistent finding is that violent pornography involving sadomasochist themes was significantly related to sexual crimes, especially rape. A 1984 study by Baron and Strauss found a significant correlation between the consumption of pornography (in this case soft-core) and the incidence of reported rape using the 50 U.S. states as cases. In this study it was found that the incidence of rape increased by 7 per 100,000 population, for an

increase of 1 standard deviation in pornographic magazine consumption.

A finding closer to my work with sex offenders indicates that 46% of rapists, 59% of homosexual pedophiles, and 50% of heterosexual pedophiles reported a desire to own some pornograph while only 29% of the non-offending men in a control reported similar desire (Goldstein et al., 1974). Of those men reporting a desire to own pornography, 100% of the rapists, 80% of th homosexual pedophiles, and 83% of the heterosexual pedophile actually owned some type of pornographic material. Only 50% of the non-offending men in the control group actually owned some type of pornographic material. Therefore, the men in the sex-offende groups were about three times more likely to own pornography tha non-offending men.

In my experience, approximately 75% of the sexual offenders I have worked with in my outpatient program have used some type of pornographic material on a regular basis. In addition, approximately 15 to 20 percent have indicated they are "addicted" to pornography. For the most part, the sex offenders use pornography to stimulate their sexual appetite, unfortunately their outlet for their sexuality could be a child. In my work with sexual offenders pornography is never the "cause" of sexual offending, however it is often the "trigger" that will set an offender's cycle of abuse into motion...

Whenever I do a sex offender evaluation I ask several questions regarding all aspects of their sexuality. This includes asking each man or woman their fantasies or participation in 30 atypical sexual behaviors ranging from the use of pornography to zoophilia. One specifically addresses nude dancing. An estimated 95% of the sex offenders I have worked with have gone to some type of "strip show". In addition, approximately 5 to 10% of those offenders have frequented such establishments on a regular basis (once a week).

What does nude dancing do for a sex offender? Besides the obvious answer of sexual arousal, nude dancing has a much more pernicious effect. Nude dancing objectifies, and depersonalizes women. This allows the offender (and most men in general), to see the dancer as an object, a commodity, a "life support system for a pussy" as one offender told me. Interestingly, approximately 80% of all nude dancers have been victims of childhood sexual abuse.

In conclusion, I would like to see the Council pass an ordinance to ban this form of "entertainment". It does not have any positive or redeeming social qualities, in my opinion it only serves to depreciate the quality of life in our city.

Respectfully,

Michael J. Scolatti

Michael J. Scolatti, Ph.D.

MISSOULA COUNTY

SHERIFF'S DEPARTMENT
200 W BROADWAY ST
MISSOULA MT 59802-4292

EXHIBIT 4
DATE 1/13/95
HB 83

DOUG CHASE
Sheriff
LARRY HEATHERMAN
Undersheriff

January 6, 1995

Chairman
Senate Judiciary Committee
Capitol Station
Helena, MT 59624

Dear Mr. Chairman:

As a law enforcement officer with Missoula County for the past 24 years, I am writing this letter to you and the committee in order to advise you that I strongly support House Bill 82 and Senate Bill 83 for the following reasons.

I have worked numerous sex crime cases involving young children in the Missoula County area and I can advise you that in almost 100 percent of the cases worked, pornography in the form of either magazines, videos or 16mm film is always associated. As the statutes now stand, children are allegedly to be protected from such trash due to constraints placed on the retailers. Law enforcement will tell you that there is certainly no constraints placed on this material once it has left the retailer and it is in the hands of the perverts.

Montana does allow for misdemeanor punishment for providing children with this material; however, this seems ludicrous due to the fact that in all cases this officer has been associated with, a felony perversion has been already committed against the children. The misdemeanor offense is overlooked or never charged in favor of the felony offense.

These sexual perverts are utilizing this pornography material to groom or seduce the young victim. In a case I worked, an elderly male individual invited young teenage boys into his home and would casually mention to them in a joking way, and to call their attention to them, "do not look at those books on the floor" (pornographic magazines). Once the boys looked through the magazines, they were then introduced to pornographic video tapes and 16mm movies. After watching the videos and movies, the boys were talked into acts of fellatio and anal intercourse. This officer could go on with case after case; however, I feel this particular one makes the point.

Missoula County has had nude dancing for the last several years. This officer has noted an increase in the activities of prostitution around these bars that permit nude dancing. Much of this prostitution is carried on by single female individuals with no organized ties; however, this department did arrest a ring of organized Korean prostitutes no more than two blocks from a bar that permits nude dancing.

A former dancer of "Pretty Girls" advised that it was her job to do a strip routine on stage while individuals in separate booths with glass fronts observed her. She advised that many male customers would masturbate while watching her and ejaculate on the glass partition that separates her from the customers. She further advised that it was the responsibility of the dancer to clean the semen off the glass partition. The dancer advised that she had to do dope in order to get through the performance. Intelligence information indicates that some of these strippers or dancers are providing customers with their telephone numbers and addresses in hopes of promoting themselves as prostitutes.

As a law enforcement officer with 24 years experience, I cannot tell you that pornography is the direct cause of perversion; however, I can say emphatically that pornography insights and excites these perverts into acts committed on these children. It is used as a tool or a basis to begin the act.

As a citizen, husband, father and a reasonable person, I find that pornography and nude dancing are of no literary, artistic, political or scientific value. I urge the passing of House Bill 82 and Senate Bill 83.

Sincerely,

Undersheriff Larry C. Weatherman
Missoula County Sheriff's Dept.

LCW:sp

EXHIBIT 6
DATE 1/12/95
HB 83

HOUSE OF REPRESENTATIVES

ROLL CALL VOTE

Judiciary Committee

DATE 1/12/95 BILL NO. 83 NUMBER 1

MOTION: DO PASS HB 83

NAME	AYE	NO
Rep. Bob Clark, Chairman		✓
Rep. Shiell Anderson, Vice Chairman, Majority		✓
Rep. Diana Wyatt, Vice Chairman, Minority		✓
Rep. Chris Ahner	✓	
Rep. Ellen Bergman	✓	
Rep. Bill Boharski	✓	
Rep. Bill Carey		✓
Rep. Aubyn Curtiss	✓	
Rep. Duane Grimes	✓	
Rep. Joan Hurdle		✓
Rep. Deb Kottel		✓
Rep. Linda McCulloch		✓
Rep. Daniel McGee	✓	
Rep. Brad Molnar	✓	
Rep. Debbie Shea		✓
Rep. Liz Smith	✓	
Rep. Loren Soft	✓	
Rep. Bill Tash	✓	
Rep. Cliff Trexler	✓	

EXHIBIT 7
DATE 1/12/95
HB 83

HOUSE OF REPRESENTATIVES

ROLL CALL VOTE

Judiciary Committee

DATE 1/12/95 BILL NO. 83 NUMBER 2 as amended

MOTION: DO PASS HB 83 AS AMENDED

(NOTE: Vote #1 did not specify as to the amendment.)

NAME	AYE	NO
Rep. Bob Clark, Chairman		✓
Rep. Shiell Anderson, Vice Chairman, Majority		✓
Rep. Diana Wyatt, Vice Chairman, Minority		✓
Rep. Chris Ahner	✓	
Rep. Ellen Bergman	✓	
Rep. Bill Boharski	✓	
Rep. Bill Carey		✓
Rep. Aubyn Curtiss	✓	
Rep. Duane Grimes	✓	
Rep. Joan Hurdle		✓
Rep. Deb Kottel		✓
Rep. Linda McCulloch		✓
Rep. Daniel McGee	✓	
Rep. Brad Molnar	✓	
Rep. Debbie Shea		✓
Rep. Liz Smith	✓	
Rep. Loren Soft	✓	
Rep. Bill Tash	✓	
Rep. Cliff Trexler	✓	

EXHIBIT 8
DATE 1/12/95
HB 82

HOUSE OF REPRESENTATIVES

ROLL CALL VOTE

Judiciary Committee

DATE 1/12/95 BILL NO. 82 NUMBER _____

MOTION: TO TABLE HB 82

NAME	AYE	NO
Rep. Bob Clark, Chairman	✓	
Rep. Shiell Anderson, Vice Chairman, Majority	✓	
Rep. Diana Wyatt, Vice Chairman, Minority		✓
Rep. Chris Ahner		✓
Rep. Ellen Bergman		✓
Rep. Bill Boharski	✓	
Rep. Bill Carey	✓	
Rep. Aubyn Curtiss		✓
Rep. Duane Grimes	✓	
Rep. Joan Hurdle		✓
Rep. Deb Kottel	✓	
Rep. Linda McCulloch	✓	
Rep. Daniel McGee		✓
Rep. Brad Molnar	✓	
Rep. Debbie Shea	✓	
Rep. Liz Smith	✓	
Rep. Loren Soft		✓
Rep. Bill Tash	✓	
Rep. Cliff Trexler		✓

EXHIBIT 9
DATE 1/12/95
HB 26

HOUSE OF REPRESENTATIVES

ROLL CALL VOTE

Judiciary Committee

DATE 1/12/95 BILL NO. 26 NUMBER Grimes Amendment

MOTION: AMEND BY STRIKING SECTION 2

NAME	AYE	NO
Rep. Bob Clark, Chairman	✓	
Rep. Shiell Anderson, Vice Chairman, Majority	✓	
Rep. Diana Wyatt, Vice Chairman, Minority		✓
Rep. Chris Ahner	✓	
Rep. Ellen Bergman		✓
Rep. Bill Boharski		✓
Rep. Bill Carey	~~✓~~	✓
Rep. Aubyn Curtiss		✓
Rep. Duane Grimes	✓	
Rep. Joan Hurdle		✓
Rep. Deb Kottel		✓
Rep. Linda McCulloch		✓
Rep. Daniel McGee		✓
Rep. Brad Molnar		✓
Rep. Debbie Shea		✓
Rep. Liz Smith		✓
Rep. Loren Soft	✓	
Rep. Bill Tash	✓	
Rep. Cliff Trexler		✓

EXHIBIT 10
DATE 1/12/95
HB 108

STATE OF MONTANA - FISCAL NOTE

Fiscal Note for HB0108, Introduced

DESCRIPTION OF PROPOSED LEGISLATION:
A bill for an act requiring a person convicted of a dangerous drug misdemeanor to attend a dangerous drug information course and also allowing a judge to require chemical dependency treatment in certain cases.

ASSUMPTIONS:
1. The person convicted of an offense under this bill will be responsible for the cost of the dangerous drug information course and the chemical dependency treatment described in the bill.
2. The Department of Corrections and Human Services (DCHS) will not be responsible for the supervision of dangerous drug misdemeanor convictions.

FISCAL IMPACT:
No Fiscal Impact
Expenditures:

Revenues:

Net Impact:

EFFECT ON COUNTY OR OTHER LOCAL REVENUES OR EXPENDITURES:
N/A

LONG-RANGE EFFECTS OF PROPOSED LEGISLATION:
N/A
TECHNICAL NOTES:
N/A

DAVE LEWIS, BUDGET DIRECTOR DATE
Office of Budget and Program Planning

JOHN COBB, PRIMARY SPONSOR DATE
Fiscal Note for HB0108, as introduced

EXHIBIT 11
DATE 1/12/95
HB 108

John Cobb
P.O. Box 388
Augusta, Montana 59410

Dear Judiciary Committee:

On the mandatory education drug misdemeanor bill the number of offenses for misdemeanors for drug offenses for only juveniles was 279 individuals for fiscal year 1994. That means all those individuals would have to take the course if the bill passes.I do not have the information for adults and the person who I was informed who knows will not be back until next week.