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9 NY2d 578, 216 NYS2d 369, 175 NE 2d 681.

The same protection applies even if the material challenged as obscene is a form of entertainment, rather than an exposition of ideas, and even if it is lacking in all social value.[17.1] People v Richmond County News, Inc. (1961) 9 NY2d 578, 216 NYS2d 369, 175 NE2d 681 (the court citing from Winters v New York (1948) 333 US 507, 92 L ed 840, 68 S Ct 665, the statement that "[w]hat is one man's amusement, teaches another's doctrine").

Even though there was an explicit albeit fragmentary and fleeting love scene in the last reel of the film, which depicted an unhappy marriage and the wife's falling in love with a young archaeologist, a conviction of possessing and exhibiting an obscene film in violation of a state statute was held in Jacobellis v Ohio (1964) 378 US 184, 12 L ed 2d 793, 84 S Ct 1676, to violate the constitutional guaranties of freedom of speech and press, Mr. Chief Justice Warren and Justices Clark and Harlan, dissenting. However, no majority of the justices could agree on an opinion.

As to Henry Miller's book "Tropic of Cancer," see § 3[a], supra.

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Nudity is not necessarily obscenity. Roth v United States (1957) 354 US 476, 1 L ed 2d 1498, 77 S Ct 1304, reh den 355 US 852, 2 L ed 2d 60, 78 S Ct 8; Excellent Publications, Inc. v United States (1962, CA1 NH) 309 F2d 362.

Magazines aimed at a somewhat "sophisticated" male audience and containing, in the main, innocuous text, but also photographs of nude and partially nude women, usually portrayed in a seductive pose, but none of the photographs exposing the genitalia, were held in Excellent Publications, Inc. v United States (F) supra, not to be obscene so as to subject defendants to criminal prosecution under 18 USC § 1461, prohibiting the mailing of obscene matter. The court applied the Roth test, pointing out that nudity is not necessarily obscene and that while the pictures of the nude and the near nude are titillating and provocative, so are some of the greatest works of pictorial art. The court concluded that the pictures simply were not the kind of "hard-core pornography" within the reach of the statute construed in the light of the constitutional guaranty of freedom of press.

§ 6. — Hard-core pornography

[a] Generally

While there is no doubt that hard-core pornography is obscene in the constitutional sense,[18] the authorities are not in agreement as to whether the Roth test limits the constitutional meaning of obscenity to hard-core pornography, a question which has not yet been decided by the United States Supreme Court.

Some of the cases so limit the meaning of obscenity.

US — Excellent Publications, Inc. v United States (1962, CA1 NH) 309 F 2d 362 (by implication).

Cal—Zeitlin v Arnebergh (1963) 59 Cal 2d 901, 31 Cal Rptr 800, 383 P2d

17.1. But see Atty. Gen. v A Book Named "John Cleland's Memoirs of a Woman of Pleasure" (1965, Mass) 206 NE2d 403, probable jurisdiction noted (US) 15 L ed 2d 154, in which the book commonly known as "Fanny Hill" was held obscene on the ground, among others, that it was "utterly without social importance."

The view that social importance of the material in question is significant in any obscenity case was expressed in People v Sikora (1965) 32 Ill 2d 260, 204 NE2d 768, the court relying upon Roth v United States (1957) 354 US 476, 1 L ed 2d 1498, 77 S Ct 1304, reh den 355 US 852, 2 L ed 2d 60, 78 S Ct 8.

See also the definition of "hard-core" pornography in § 6[b], infra.

18. See, for instance, Ackerman v United States (1961, CA9 Cal) 293 F2d 449, sustaining conviction of mailing obscene matter on the ground that hard-core pornography was involved.

152, cert den 375 US 957, 11 L ed 2d 315, 84 S Ct 445.

Mass — Atty. Gen. v Book Named "Tropic of Cancer" (1962) 345 Mass 11, 184 NE2d 328.

NY — People v Richmond County News, Inc. (1961) 9 NY2d 578, 216 NYS2d 369, 175 NE2d 681 (stating that the New York antiobscenity statute should apply only to what may properly be termed "hard-core pornography").

Mr. Justice Stewart, in his separate opinion in Jacobellis v Ohio (1964) 378 US 184, 12 L ed 2d 793, 84 S Ct 1676, expressed the view that under the First and Fourteenth Amendments criminal laws in the area of obscenity are constitutionally limited to hard-core pornography. However, he did not attempt further to define the kinds of material to be embraced within that shorthand description, and stated that perhaps he could never succeed in intelligibly doing so, but that he knew it when he saw it.

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On the other hand, the view has been taken that the Roth test does not limit the meaning of obscenity to hard-core pornography.

US—Kahm v United States (1962, CA5 Fla) 300 F2d 78, cert den 369 US 859, 8 L ed 2d 18, 82 S Ct 949.

Fla—Rachleff v Mahon (1960, Fla App) 124 So 2d 878.

NJ—State v Hudson County News Co. (1963) 41 NJ 247, 196 A2d 225.

Under a Florida antiobscenity statute, the term "obscene" was held not limited to so-called "hard-core pornography," but to cover any material which is devoted not only to the presentation and exploitation of illicit sex, but also passion, depravity, or immorality. Rachleff v Mahon (1960, Fla App) 124 So 2d 878. It was pointed out, however, that the rule stated above may be subject to doubt under the federal constitutional standards enunciated by the United States Supreme Court, but that "be that as it may," the trier of the facts had found obscenity and there was nothing in the record that would cause the appellate court to disagree.

The view that the concept of obscenity is or may be constitutionally limited to hard-core pornography was rejected in State v Hudson County News Co. (1963) 41 NJ 247, 196 A2d 225, the court pointing out that in the absence of any substantial concurrence as to the meaning of this term, its adoption at this time would not increase clarity or certainty in the law of obscenity, that the label "hard-core" pornography is too vague to be helpful to a court or jury in determining whether particular material is obscene, and that two states which have adopted the "hard-core" test reached opposite results in determining the constitutionality of the suppression of the same book.[19]

[b] Definition of phrase

Under the view that the Roth test limits the meaning of obscenity to "hard-core pornography," it becomes necessary to discuss the meaning of the latter phrase.

It has been said that hard-core pornography is easily recognized because of its repetitive emphasis (usually illustrated) upon purely physical action without character or plot development, and because even if its direct connection with crime or incitement to juvenile or other delinquency is not proved, it cannot arouse sympathy because of its essentially repulsive, as well as fraudulent, character. Grove Press, Inc. v Christenberry (1960, CA2 NY) 276 F2d 433.

19. The court's reference was to People v Fritch (1963) 13 NY2d 119, 243 NYS2d 1, 192 NE2d 713, and Larkin v G. P. Putnam's Sons (1964) 14 NY2d 399, 252 NYS2d 71, 200 NE2d 760, in which the book "Tropic of Cancer" was held "hard-core" pornography, as contrasted with Atty. Gen. v Book Named "Tropic of Cancer" (1962) 345 Mass 11, 184 NE2d 328, in which the opposite result was reached.

Hard-core pornography has been defined as material which is commercial obscenity or salable pornography in the sense that it is utterly without redeeming social importance. Zeitlin v Arnebergh (1963) 59 Cal 2d 901, 31 Cal Rptr 800, 383 P2d 152, cert den 375 US 957, 11 L ed 2d 315, 84 S Ct 445. The court went on to say, however, that if the material has literary value, if it is a serious work of literature or art, then it possesses redeeming social importance and obtains the benefit of the constitutional guaranties of freedom of speech and press.

On the other hand, in Jacobellis v Ohio (1964) 378 US 184, 12 L ed 2d 793, 84 S Ct 1676, Mr. Chief Justice Warren and Mr. Justice Clark expressed the view that "hard-core pornography" cannot be defined with any greater clarity than "obscenity," and that even if the court should retreat to that position, it would soon be faced with the need to define "hard-core pornography," and meanwhile those who profit from the commercial exploitation of obscenity would continue to ply their trade unmolested.

The view that the term "hard-core pornography" is too vague to be helpful was also taken in State v Hudson County News Co. (1963) 41 NJ 247, 196 A2d 225.

Even Mr. Justice Stewart, who, in his separate opinion in Jacobellis v Ohio (1964) 378 US 184, 12 L ed 2d 793, 84 S Ct 1676, expressed the view that the constitutional concept of obscenity is limited to hard-core pornography, admits that a definition of the latter phrase is difficult, if not impossible, but says, "I know it when I see it."

B. Specific elements and factors determining obscenity

§ 7. Judging material "as a whole"

[a] Generally

The earlier standard under which obscenity could be judged by the effect of an isolated excerpt taken from a book or other writing[20] was rejected in the Roth Case, which requires that material challenged as obscene must be judged "as a whole."

This rule, in varying language, is reflected in later cases decided by the lower federal courts. Zenith International Film Corp. v Chicago (1961, CA7 Ill) 291 F2d 785 (dealing primarily with proper procedures for licensing motion pictures, and stating that a publication must be judged as a whole, not merely by plucking isolated scenes or passages from it); Ackerman v United States (1961, CA9 Cal) 293 F2d 449 (stating that the writings of serious authors on subjects of public concern are not to be judged merely by selected words or phrases but as a whole); Haldeman v United States (1965, CA10 Kan) 340 F 2d 59 (stating that the constitutional status of published material dealing with sex is to be determined in the light of the effect it has when taken as a whole, and not by isolated excerpts, upon the average person and not the peculiarly susceptible); Re Louisiana News Co. (1960, DC La) 187 F Supp 241 (stating that it is not sufficient that an "isolated excerpt" is obscene).

An order of the Maryland State Board of Censors deleting from a motion picture showing the lives of the natives of the jungles of Brazil all scenes showing their bodies below the waist was held in Maryland State Board of Motion Picture Censors v Times Film Corp. (1957) 212 Md 454, 129 A2d 833, to have been properly reversed by the court below, since the board's order was predicated on the false legal premise that a scene could be eliminated because its possible obscenity outweighed any of its merits, considering that scene alone, whereas the proper statutory standard for the board was to weigh the scenes it found objectionable in relation to the picture as a whole to determine whether its

20. § 2, supra.

overall worth more than counterbalanced possibly obscene or pornographic bits or sequences.

Similarly, the requirement of considering allegedly obscene material "as a whole" was held violated where a motion-picture censorship statute authorized a censor to condemn a single "view," that is, one or more separate frames of a motion-picture film. William Goldman Theatres, Inc. v Dana (1961) 405 Pa 83, 173 A2d 59, cert den 368 US 897, 7 L ed 2d 93, 82 S Ct 174.

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On the other hand, even though a book such as "Peyton Place" may not be obscene so as to be barred from the mail, a passage lifted from the book, containing a vivid description of the accomplishment of sexual intercourse between a boy and a girl was held obscene in Kahm v United States (1962, CA5 Fla) 300 F2d 78, cert den 369 US 859, 8 L ed 2d 18, 82 S Ct 949, the court applying the Roth test and sustaining a conviction on a charge of using the mail for the delivery of information as to where obscene publications might be obtained and for mailing obscene matter.

[b] Where text is accompanied by illustrations

Whether illustrations challenged as obscene may be considered apart from the accompanying text seems a question which depends upon the circumstances of the individual case. In any event, at the present time there is not sufficient authority on the point to make it possible to state generalized rules.

In determining the nonobscene nature of a magazine containing pictures of models who posed for glamor photography and were portrayed scantily dressed in coarsely offensive postures, the court, in Monfred v State (1961) 226 Md 312, 173 A2d 173, cert den 368 US 953, 7 L ed 2d 386, 82 S Ct 395, gave weight to the fact that the textual matter accompanying the illustrations was in the main innocuous and purported to discuss in detail the technique of using shadows and lights in photographing the nude.

On the other hand, while stating that an instruction which directs that the jury must consider allegedly obscene material only as a whole is appropriate in the case of a single unit, such as a book or other writing, the court, in Flying Eagle Publications, Inc. v United States (1961, CA1 NH) 285 F2d 307 (a prosecution for mailing an obscene magazine), held that a jury is not compelled to regard illustrations as controlled by textual material. It was pointed out that an obscene picture of a Roman orgy would be no less so because accompanied by an account of a Sunday school picnic which omitted the offensive details, and that the principle is not different merely because these details might not be readily apparent to everyone upon a casual inspection.

§ 8. Contemporary community standard; meaning of phrase "average person"

[a] Generally; material distributed to public at large

Dealing with material distributed to the public at large,[1] the Roth test of obscenity refers to "the average person, applying contemporary community standards."[2]

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1. The "average person" test is applicable only to material distributed to the public at large. United States v 31 Photographs (1957, DC NY) 156 F Supp 350.

As to material designed for limited groups, such as scholars or scientists, see § 8[b], infra.

2. Notwithstanding the Roth test, the view has been expressed by at least one state court that community tolerance of obscenity does not establish community standards of morality or make obscenity less obscene. St. Louis v Mikes (1963, Mo App) 372 SW2d 508.

On the other hand, Mr. Justice Harlan, in his separate opinion in Smith v California

The words "average person," as used in a criminal statute embodying the Roth test, were held in State v Jungclaus (1964) 176 Neb 641, 126 NW2d 858, words of common meaning which need not be further defined in the court's instruction. The court pointed out that the opportunity of counsel to discuss the meaning of these words in his argument to the jury affords ample protection against any misuse of the term by the jury in considering the case.

It has also been said that the "average person" is comparable to the "reasonable man" often referred to in tort litigation. State v Nelson (1959) 168 Neb 394, 95 NW2d 678, where the court expressed doubt that the "average person," whether judge or juror, would be able to apply the phrase "appeals to prurient interest" without conjecture or resort to a dictionary.

The community standard of decency, like the standard of ordinary care, must be, in a sense, a rough average. Maryland State Board of Motion Picture Censors v Times Film Corp. (1957) 212 Md 454, 129 A2d 833.

Obscenity is not to be measured by the reactions of any particular class or group of the population, but by the standard of the community as a whole. Cincinnati v King (1958) 107 Ohio App 453, 8 Ohio Ops 2d 82, 159 NE2d 767, app dismd 169 Ohio St 107, 80 Ohio Ops 2d 67, 157 NE2d 431.

The determination of obscenity is for juror or judge, not on the basis of his personal upbringing or restricted reflection or particular experience of life, but on the basis of "contemporary community standards." Separate opinions by Justices Frankfurter and Harlan in Smith v California (1959) 361 US 147, 4 L ed 2d 205, 80 S Ct 215, reh den 361 US 950, 4 L ed 2d 383, 80 S Ct 399.

Mr. Justice Frankfurter, concurring in Smith v California (US) supra (invalidating, for failure to require scienter, a municipal criminal ordinance against possession of obscene books in any place where books are sold or kept for sale, pointed out that there is a great difference in what is to be deemed obscene in 1959 compared with what was deemed obscene in 1859, and that the difference derives from a shift in community feeling regarding what is to be deemed prurient or not prurient by reason of the effects attributable to particular writings; that changes in the intellectual and moral climate of society, in part doubtless due to the views and findings of specialists, affords shifting foundations for the attribution; and that what may well have been consonant with mid-Victorian morals does not answer the understanding and morality of the present time.

The early leading standard of obscenity, which allowed material to be judged merely by the effect of an isolated excerpt upon particularly susceptible persons,[3] was rejected by the United States Supreme Court in the Roth Case, on the ground that this test "might well encompass material legitimately treating with sex."

A picture is not to be banned as obscene because of its possible effect, not upon the average citizen, but only upon the irresponsible, the immature, or the sensually minded. Maryland State Board of Motion Picture Censors v Times Film Corp. (1957) 212 Md 454, 129 A2d 833.

To condemn material as obscene it is not sufficient that a publication as a whole might have a deleterious effect upon youth or any group of particular susceptibility. Re Louisiana News Co. (1960, DC La) 187 F Supp 241.

If the appeal of allegedly obscene material, taken as a whole, to adults is not predominantly prurient, adults can-

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(1959) 361 US 147, 4 L ed 2d 205, 80 S Ct 215, reh den 361 US 950, 4 L ed 2d 383, 80 S Ct 399, pointed out that the community cannot, where liberty of speech and press are at issue, condemn that which it generally tolerates.

3. § 2, supra.

not be denied the material.[4] Atty. Gen. v Book Named "Tropic of Cancer" (1962) 345 Mass 11, 184 NE2d 328.[4]

While recognizing the legitimate and existent interest of states and localities in preventing the dissemination of material deemed harmful to children, Justices Brennan and Goldberg, in a separate opinion in Jacobellis v Ohio (1964) 378 US 184, 12 L ed 2d 793, 84 S Ct 1676, pointed out that that interest does not justify a total suppression of such material, the effect of which would be to reduce the adult population to reading only what is fit for children.

In Manual Enterprises, Inc. v Day (1962) 370 US 478, 8 L ed 2d 639, 82 S Ct 1432, Justices Harlan and Stewart, discussing in a separate opinion the question of the obscene nature of magazines consisting largely of photographs of nude male models and published to appeal to the male homosexual group, pointed out that divorced from their "prurient interest" appeal to homosexuals the portrayals of the male nude could not fairly be regarded as more objectionable than many portrayals of the female nude that society tolerates.

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It has been said that the resort to community standards seems more relevant to a determination of whether a book or other material is "patently offensive" than to a determination of whether it appeals to prurient interests. McCauley v Tropic of Cancer (1963) 20 Wis 2d 134, 121 NW2d 545, 5 ALR 3d 1140.

[b] Material distributed to scholars and similarly qualified persons

The "average person" test has been held not applicable to material the use of which will be restricted to those in whose hands it will not have a prurient appeal. United States v 31 Photographs (1957, DC NY) 156 F Supp 350; People v Marler (1962) 199 Cal App 2d Supp 889, 18 Cal Rptr 923.

Thus, material sought to be imported by an institute for sex research at a state university for the sole purpose of furthering its study of human sexual behavior as manifested in varying forms of expression and activity and in different national cultures and historical periods, such material not to be available to the members of the general public but held under security conditions for the sole use of the institute staff members or of qualified scholars engaged in bona fide research, was held in United States v 31 Photographs (1957, DC NY) 156 F Supp 350, not obscene within the

4. Children may be denied access to offensive material, even though the material is not obscene insofar as the average adult is concerned. Thus, Warren, Ch. J., and Clark, J., in their separate opinion in Jacobellis v Ohio (1964) 378 US 184, 12 L ed 2d 793, 84 S Ct 1676, pointed out that a technical or legal treatise on pornography may well be inoffensive under most circumstances but at the same time "obscene" in the extreme when sold or displayed to children.

5. See Butler v Michigan (1957) 352 US 380, 1 L ed 2d 412, 77 S Ct 524, where the court, in support of its unanimous holding that a Michigan statute making it an offense to make available for the general reading public a book found to have a potentially deleterious influence upon youth was void as violating the due process clause of the Fourteenth Amendment, pointed out that the main vice of the statute was that it reduced the adult population of Michigan to reading only what is fit for children.

See also Bantam Books, Inc. v Sullivan (1963) 372 US 58, 9 L ed 2d 584, 83 S Ct 631, where the court, in invalidating the Rhode Island procedure concerning obscene material, pointed out that it entailed the complete suppression of publications, adult readers as well as juvenile readers being equally deprived of the opportunity to purchase the publications concerned.

And see Goldstein v Commonwealth (1958) 200 Va 25, 104 SE2d 66, where a statute making it a criminal offense to distribute material containing obscene language manifestly tending to corrupt the morals of youth was held invalid insofar as it undertook to provide a standard of judging obscenity dependent upon the undesirable effect the offensive material may have upon youth.

meaning of a federal statute prohibiting the importation of obscene material. The court recognized that material distributed to the public at large may not be judged by its appeal to the most sophisticated, nor by its appeal to the most susceptible, but distinguished situations in which use of material obscene under the "average person" test was restricted to those in whose hands it will not have a prurient appeal, stating that in the latter situation the material is not to be judged by its appeal to the populace at large.

Although the defendant in a criminal prosecution for "possession," "lending," and "giving" of obscene films admitted that the challenged films were obscene, his conviction was reversed and a new trial ordered in People v Marler (1962) 199 Cal App 2d Supp 889, 18 Cal Rptr 923, where the trial court had refused to instruct the jury to the effect that the giving or lending of obscene material directed to medical personnel for medical and scientific purposes was a justifiable and lawful use, and had given an instruction that if the film was obscene in itself, as admitted by the defendant, its giving or lending with the intent that it be used for experimentation on hospitalized perverts would not be made lawful merely by such intent. The appellate court pointed out that while it was not prepared to approve the actual instruction submitted by the defendant nor to disapprove of the instruction given by the court so far as it went, nevertheless, the jury was left without any proper instruction upon the issue raised by the defense, and under the instruction given might well have believed that if the material was found to be obscene and that the defendant "had given" it they should find the defendant guilty without regard to the purposes for which the films had been given. Noting that the California Penal Code, in provisions dealing with criminal prosecution for distribution of obscene matter, provided, in a section amended after the commission of the acts with which the defendant was charged, that it shall be a defense in any prosecution "that the act charged was committed in aid of legitimate scientific or educational purposes," the court pointed out that the true rule was that material, although admittedly obscene by the "average person" test, may be lawfully "given" when in good faith it is to be used exclusively within a professional group pursuing legitimate professional purposes where the material is germane to such purposes and is not likely to fall into the hands of others, and where it is not probable that the material will appeal to the prurient interests of the average person within the group.

§ 9. — Determinative geographical area

[a] Generally; national standard

The authorities are not in agreement as to the geographical area determining "community standards" of obscenity. The question has not yet been decided by the United States Supreme Court. The answer may depend upon the nature —federal or state—of the statute under which the issue of obscenity arises.

The view has been taken that the question of obscenity must be determined on the basis of a national standard.

In Excellent Publications, Inc. v United States (1962, CA1 NH) 309 F2d 362, the court stated that the "community" in terms of whose standards of decency the issue of obscenity must be decided is not any local community but the national community as a whole.

The view, at least insofar as used to suppress challenged material, that the "contemporary community standards" of obscenity must necessarily be uniform throughout the nation, and that under the New Jersey antiobscenity statute the contemporary community standard is not the standard of a particular individual, group of individuals, or locality, was taken in State v Hudson County News Co. (1963) 41 NJ 247, 196 A2d 225, where, in support of this view, the

court said: "The First Amendment accepts for the nation as a whole the basic idea that freedom of expression is a necessary guarantee in a democratic society. In determining the constitutional limits of obscenity regulation, the issue in the particular case is whether the published material falls within or without that area of expression which it is the purpose of the First Amendment to protect. In resolving this issue, the court or jury must recognize that the balancing of freedom of expression against other social values has already been made in the adoption of the First Amendment and that this basic determination cannot be re-evaluated by a *de novo* balancing of local social interests against that area of constitutional protection which has been established. See Emerson, 'Toward a General Theory of the First Amendment,' 2 Yale L. J. 877 (1963). The First Amendment protects an area of free expression which cannot be diminished by obscenity regulation. Therefore, the standard to be applied under such regulations cannot operate in such a way as to alter the degree of protection from locality to locality. In short, the area of expression entitled to constitutional protection cannot be broad in some parts of the country and narrow in others. If a publication comes within the protected area, it cannot be suppressed any place where the First Amendment guarantee is in effect. If the United States Supreme Court were to hold that a particular publication was entitled to protection under the First Amendment, we doubt that any court, state or federal, could subsequently deny that publication protection on the ground that a higher community standard prevailed in its jurisdiction."

The court also said that the Model Penal Code, Official Draft 1962, which states in § 251.4(d) that in a criminal prosecution for obscenity evidence shall be admissible to show "the degree of public acceptance of the material in the United States," although not expressly discussing community standards, clearly leaves the impression that a national community standard should be applied rather than a state or local one. It was held reversible error for the trial judge to permit the jury in a criminal prosecution for obscenity to consider testimony of the local standards in the county in which the prosecution was had and to instruct them that they could use those standards in determining whether the magazines in question were obscene.

In Haldeman v United States (1965, CA 10 Kan) 340 F2d 59, reversing a conviction of mailing obscene matters, the court in footnote 5, stated that the community standard to be applied is that of the nation as a whole, and not that of a particular locality or area, citing Jacobellis v Ohio (1964) 378 US 184, 12 L ed 2d 793, 84 S Ct 1676, infra, without noting that the statement is supported only by the separate opinion of Justices Brennan and Goldberg.[5.1]

Likewise, the view that the phrase "contemporary community standards" refers to the entire nation and not the geographic boundaries of any state or subdivision thereof, and that to limit the concept to the standards of an area less than the entire nation would conflict with the First Amendment, was expressed in State v Locks (1964) 97 Ariz 148, 397 P2d 949, the court again relying upon Jacobellis v Ohio (US) infra, without stating that that view was not

5.1. In Gent v State (1965, Ark) 393 SW 2d 219, the contention that the Jacobellis Case determined conclusively that the "national community standard" must be applied was rejected by the court on the grounds that it did not appear in the Jacobellis Case that five judges, constituting a majority of the court, agreed upon the "national community" standard; that the case was decided by a six-to-three vote; and that there was no court opinion.

supported by a majority opinion of the United States Supreme Court.

In State v Vollmar (1965, Mo) 389 SW2d 20, the court concluded from later decisions of the Supreme Court of the United States (citing Manual Enterprises, Inc. v Day (1962) 370 US 478, 8 L ed 2d 639, 82 S Ct 1432, and Jacobellis v Ohio (US) infra) that the term "community," as used in determining the standard of decency, does not mean the local area involved, but relates to a national standard.

In their separate opinion in Jacobellis v Ohio (1964) 378 US 184, 12 L ed 2d 793, 84 S Ct 1676, Justices Brennan and Goldberg pointed out that while local communities are in fact diverse and that in determining obscenity the United States Supreme Court is confronted with the task of reconciling the rights of such communities with the rights of individuals, nevertheless communities vary in many respects other than in their toleration of alleged obscenity, and such variances have never been considered to require or justify a varying standard or application of the Federal Constitution.

The view that under 18 USC § 1461, barring obscene matter from the mail, the test for determining the relevant "community" in terms of whose standards of decency the issue of obscenity must be judged is a national standard of decency, was expressed by Justices Harlan and Stewart in Manual Enterprises, Inc. v Day (1962) 370 US 478, 8 L ed 2d 639, 82 S Ct 1432 (wherein a majority of the justices could not agree on an opinion). It was pointed out that the federal statute reaches to all parts of the United States, whose population reflects many different ethnic and cultural backgrounds.

See Flying Eagle Publications, Inc. v United States (1960, CA1 NH) 273 F2d 799, wherein it was stated that in view of the fact that the federal statute making the mailing of obscene matter a criminal offense (18 USC § 1461) has national scope, and community standards reflected by a jury differ rather widely over the country at large, and to give the statute some uniformity in its application and to prevent abridgment of the freedom of the press, courts should very carefully scrutinize material alleged to be obscene before submitting it to a jury.

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On the other hand, the view has been taken that the reference in the Roth test to "community standards" means local community standards, and not a national standard.

Thus, it has been said that whether or not something is obscene depends upon the time and place of the alleged offense. State v Miller (1960) 145 W Va 59, 112 SE2d 472.

In Jacobellis v Ohio (1964) 378 US 184, 12 L ed 2d 793, 84 S Ct 1676, Mr. Chief Justice Warren, and Mr. Justice Clark, in a separate opinion pointed out that there are no provable "national standards," and perhaps there should be none; that in all events the United States Supreme Court has not been able to enunciate one, and it would be unreasonable to expect local courts to divine one; and that while such a "community" approach may well result in material being proscribed as obscene in one community but not in another, communities throughout the nation are in fact diverse, and it is in such situations that the United States Supreme Court is confronted with the task of reconciling conflicting rights of the diverse communities within our society and of individuals.

In Kingsley Books, Inc. v Brown (1957) 354 US 436, 1 L ed 2d 1469, 77 S Ct 1325 (in which the court upheld a New York statute dealing with obscene literature, and Mr. Justice Doug-

las, joined by Mr. Justice Black, dissented, expressing the view that the procedure for restraining by equity decree the distribution of all the condemned literature did violence to the First Amendment), the dissenters, in support of their view, pointed out that the judge or jury which finds the publisher guilty in New York City acts on evidence that might be quite different from evidence before the judge or jury that finds the publisher not guilty in Rochester; that in New York City the publisher may have been selling his tracts to juveniles, while in Rochester he may have sold to professional people; that the nature of the group among whom the tracts are distributed may have an important bearing on the issue of guilt in any obscenity proceeding; that every publication is a separate offense which entitles the accused to a separate trial; that "juries or judges may differ in their opinions, community by community, case by case"; and that the publisher is "entitled to that leeway under our constitutional system."

[b] Statewide or local community standard

The state courts seem not in agreement as to whether under state antiobscenity statutes the question of obscenity must be determined on the basis of a statewide or local community standard.

A statewide standard of obscenity was adopted in McCauley v Tropic of Cancer (1963) 20 Wis 2d 134, 121 NW 2d 545, 5 ALR3d 1140 (a declaratory judgment proceeding involving the question whether the book "Tropic of Cancer" was obscene), where the court pointed out that for the purposes of the Wisconsin statute no distinction ought to be made between the standards of different communities within the state. (However, the court expressed doubt whether standards relevant to the question of obscenity differ significantly from one locality to another in Wisconsin.) The court also pointed out that the Wisconsin statute permitted a judgment of obscenity to be used in a criminal trial of any person who was served with notice of it before the alleged violation, and that this should not be so if the particular matter could be obscene in one area and not in another.

On the other hand, affirming, under the Arkansas antiobscenity statute, an injunction against bringing "girlie" magazines into Jefferson County, the court in Gent v State (1965, Ark) 393 SW2d 219, declined to apply the "national community" standard and rested its decision on the ground that, as clearly established by the evidence, the contents of the magazines in question were not compatible with the contemporary community standards in Pine Bluff, Arkansas.

Similarly, noting that the definition of obscenity, as used in the 1959 Pennsylvania Motion Picture Control Act (declared invalid by the court), was obviously culled from the opinion of the United States Supreme Court in the Roth Case, the court, in William Goldman Theatres, Inc. v Dana (1961) 405 Pa 83, 173 A2d 59, cert den 368 US 897, 7 L ed 2d 93, 82 S Ct 174, pointed out that the word "community" as used in the act's definition of obscenity, meant a regional community, and not a political entity, such as the Commonwealth of Pennsylvania, it being obvious that the moral standards of the average resident of a metropolitan area were not the same as the moral standards of the average resident of a rural county.

Attention is called to the fact that, as stated in Carter v State (1965, Tex Crim) 388 SW2d 191, a Texas criminal antiobscenity statute sets the area for determination of contemporary community standards at an area not less than the state itself, the court holding that this provision of the statute was valid.

§ 10. What is "prurient interest"

The term "prurient interest," not being self-defining,[6] has been defined by the United States Supreme Court in the Roth Case[7] as relating to "material having a tendency to excite lustful thoughts," the court relying on the dictionary definition of "prurient," and the definition of the term "obscene" as contained in the American Law Institute, Model Penal Code § 207.10(2), tentative Draft No. 6, 1957.[8]

Defining the element of pruriency as tending to corrupt by inciting lascivious thoughts or arousing lustful thoughts, the court, in Eastman Kodak Co. v Hendricks (1958, CA9 Cal) 262 F2d 392, said: "It may be to oversimplify, but it looks (as indicated above) as if 'prurient' is to be the talisman. And out of 'prurient' it would seem that obscenity is shifting from the standard of distasteful to a majority of people to a standard of disgusting, really lewd, shameful, or excites morbid interest in sex. Perhaps, the shift is from 'bad' to 'awful.' . . . In short, there seems to emerge from the cases the proposition that obscenity in the standard of pruriency must really 'smell,' not just be of slight 'odor.'"

The use of obscene words (so-called "four-letter" words) in a literary work does not make the work obscene where such passages are subordinate but highly useful elements to the development of the author's central purpose, and hence are not "prurient." Grove Press, Inc. v Christenberry (1960, CA2 NY) 276 F2d 433.

It has been said[9] that even the Roth definition of "prurient interest" requires further specificity, because it does not answer the question "lust for what," but obviously the answer is lust for sex.

Similarly, in State v Nelson (1959) 168 Neb 394, 95 NW2d 678, the court expressed doubts that the "average person," whether judge or juror, would be able to apply the phrase "appeals to prurient interest" without conjecture or resort to a dictionary.

C. Variability of concept

§ 11. Introductory

This subdivision of the annotation discusses the question whether the concept of obscenity remains the same under all circumstances or may vary according to the media of expression[10] or other factors, such as the nature of the proceedings in which the issue of obscenity arises[11] or the nature and content of the controlling legislative enactments.[12]

The concept of obscenity may vary according to whether the challenged material is distributed to the public at large or only to a limited group of persons, such as scientists, to whom it is of no prurient interest.[13] The question whether the concept may vary according to geographical areas is discussed in § 9, supra.

§ 12. According to media of expression

[a] Generally; motion pictures and stage plays

The United States Supreme Court has held that motion pictures, though within the basic protection of the First

6. Separate opinion by Moore, Circuit Judge, in United States v Darnell (1963, CA2 Conn) 316 F2d 813, cert den 375 US 916, 11 L ed 2d 155, 84 S Ct 205, reh den 375 US 982, 11 L ed 2d 429, 84 S Ct 493.

7. Footnote 20 of opinion in the Roth Case.

8. The full text of § 207.10(2), mentioned above, is stated in § 4[b], supra.

9. Separate opinion by Moore, Circuit Judge in United States v Darnell (1963, CA2 Conn) 316 F2d 813, cert den 375 US 916, 11 L ed 2d 155, 84 S Ct 205, reh den 375 US 982, 11 L ed 2d 429, 84 S Ct 493.

10. § 12, infra.

11. § 13[a], infra.

12. § 13[b], infra.

13. § 8, supra.

and Fourteenth Amendments,[14] are not necessarily subject to the precise rules governing any other particular method of expression. Freedman v Maryland (1965) 380 US 51, 13 L ed 2d 649, 85 S Ct 734, Justices Black and Douglas dissenting on that point.

A distinction, as to the concept of obscenity, between motion pictures and stage plays on the one hand and other modes of expression on the other was made in Trans-Lux Distributing Corp. v Board of Regents (1964) 14 NY2d 88, 248 NYS2d 857, 198 NE2d 242, remittitur amd 14 NY2d 722, 250 NYS 2d 67, 199 NE2d 165, and revd on other grounds 380 US 259, 13 L ed 2d 959, 85 S Ct 952, wherein the New York Court of Appeals—three judges dissenting—upheld an administrative order directing the elimination, on the ground of obscenity because it depicted simulated sexual intercourse, of some scenes from a film "A Stranger Knocks," as a condition for granting a license for the exhibition of the film. Pointing out that films, by their nature, may lie on either side of the division between speech and conduct and that the nature of films is sufficiently different from books to justify the conclusion that the critical difference between advocacy and actual performance of the forbidden act is reached when simulated sexual intercourse is portrayed on the screen, Mr. Justice Burke writing the court's opinion, pointed out that the scenes to be eliminated from the film were obscene, and that the material so assigned was not speech, as opposed to conduct, and hence need not come within the Roth test. The court further pointed out that it makes no sense at all to say that the conduct—sexual intercourse in public—can be forbidden but not the play or film, holding that "this petitioner cannot choose acted-out sexual intercourse as the vehicle for its art." As to all argument predicated on artistic merit as decisive of the constitutional question, the court held it sufficient answer to say that artists are not such favorites of the law that they may ply their craft in the teeth of a declared overriding public policy against pornographic displays, and since no other profession is privileged to bend public morals, policy, and law to its internal craft standards, then neither should producers of films. In reversing, per curiam, the judgment of the New York Court of Appeals, the United States Supreme Court referred solely to Freedman v Maryland (1965) 380 US 51, 13 L ed 2d 649, 85 S Ct 734, wherein a Maryland motion-picture censorship statute was held invalid because of its failure to provide adequate procedural safeguards against undue inhibition of protected expression. Hence, the conclusion seems justified that the United States Supreme Court did not reach the substantive questions discussed above.

In this connection, attention is called to Jacobellis v Ohio (1964) 378 US 184, 12 L ed 2d 793, 84 S Ct 1676, in which a state conviction for possessing and exhibiting an obscene film was reversed, the film being the French motion picture "The Lovers," including in the last reel an explicit, but fragmentary and fleeting, love scene. While the court could not agree upon an opinion, five of the justices—Mr. Justice Brennan, joined by Justices Goldberg and Stewart, in their concurring opinion, and Mr. Chief Justice Warren, joined by Mr. Justice Clark, in their dissenting opinion—referred to the Roth test, and none of the justices expressed any doubt that, as regards motion pictures or plays, the same concept of obscenity is applicable as to other media of expression.

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In determining whether a work of literature is obscene, the courts have given

14. Kingsley International Pictures Corp. v Regents of University of State of N. Y. (1959) 360 US 684, 3 L ed 2d 1512, 79 S Ct 1362.

recognition to the literary setting in which the attacked expression is found, with references made to the intent of the author, the literary merit of the work, and the craft requirements of the style employed. Big Table, Inc. v Schroeder (1960, DC Ill) 186 F Supp 254.

[b] Private correspondence

Material may be obscene, although consisting of an exchange of private correspondence between adults. Ackerman v United States (1961, CA9 Cal) 293 F2d 449.

Defendant's mailing to a married woman of his acquaintance a letter wherein he discussed more frankly than fastidiously his entire personal relations with her husband, including homosexual practices described boldly in three-and-four-letter words, was held in United States v Darnell (1963, CA2 Conn) 316 F2d 813, cert den 375 US 916, 11 L ed 2d 155, 84 S Ct 205, reh den 375 US 982, 11 L ed 2d 429, 84 S Ct 493—Moore, Circuit Judge, dissenting—to support a conviction under 18 USC § 1461, prohibiting the mailing of obscene matter. A majority of the court felt compelled, by the definition of obscenity in the Roth Case, to find the letter obscene, but added that they could not view the result with satisfaction, since a private communication only brought to light by the addressee would hardly seem to merit criminal prosecution, particularly when it involves merely use of coarse language for which the writer could have substituted more refined phraseology.

§ 13. According to other factors

[a] Generally; nature of proceeding

Questions concerning the concept of obscenity may arise in various kinds of proceedings: (1) in criminal proceedings or in civil actions in personam, such as actions for injunctive or declaratory relief instituted either by a governmental agency against the possessor or distributor of allegedly obscene material or by the latter against the governmental agency, or (2) in proceedings in rem seeking the seizure and sometimes destruction of the material. Only a few authorities indicate that the concept may vary according to the kind of proceeding in which the question concerning the nature of material as obscene arises.

The view has been taken that the definition of obscenity enunciated in the Roth Case has never been approved by the United States Supreme Court other than in the context of a criminal proceeding, the reason being that a criminal proceeding ordinarily means a trial by jury of the vicinage, that the members of the jury represent a cross section of the community in which the allegedly obscene utterance was made, and that the jury naturally possesses a special aptitude for reflecting the view of the "average person" of the community. William Goldman Theatres, Inc. v Dana (1961) 405 Pa 83, 173 A2d 59, cert den 368 US 897, 7 L ed 2d 93, 82 S Ct 174.

Mr. Chief Justice Warren, dissenting in Kingsley Books, Inc. v Brown (1957) 354 US 436, 1 L ed 2d 1469, 77 S Ct 1325, in which the court sustained a New York statute dealing with obscene literature, stated that, as regards obscenity, the same object may have a wholly different impact depending upon the setting in which it is placed: that it is the manner of use that should determine obscenity; that it is the conduct of the individual that should be judged, not the quality of art or literature; and that to do otherwise is to impose a prior restraint and hence to violate the Federal Constitution.

Again, in the Roth Case, Mr. Chief Justice Warren, concurring in the result, pointed out that the line dividing the salacious or pornographic from literature or science is not straight and unwavering; that present laws depend largely upon the effect that the materials may have upon those who receive them; that

manifestly the same object may have a different impact, varying according to the part of the community it reaches; that it is not a book that is on trial, but a person; that the conduct of the defendant is the central issue, not the obscenity of a book or picture; that the nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but that the materials are "thus placed in context from which they draw color and character"; and that a wholly different result might be reached in a different setting.

And in Jacobellis v Ohio (1964) 378 US 184, 12 L ed 2d 793, 84 S Ct 1676, a criminal prosecution for possessing and exhibiting an allegedly obscene film, Mr. Chief Justice Warren and Mr. Justice Clark, in their separate opinion, expressed the view that the use to which various materials are put, not just the words and pictures themselves, must be considered in determining whether or not the materials are obscene.

[b] Nature and content of controlling legislation

There is but little authority on the question whether the concept of obscenity may vary according to the nature and contents of the controlling legislative enactments.

While it is desirable that the definition of obscenity be the same for the purpose of determining the application of the federal constitutional guaranty of freedom of speech, and of a similar state constitutional guaranty, and for the purpose of construing a state statute, a state may permit greater freedom of speech and press than the Fourteenth Amendment would require, although it may not permit less. McCauley v Tropic of Cancer (1963) 20 Wis 2d 134, 121 NW2d 545, 5 ALR3d 1140.

Mr. Justice Harlan, in his separate opinion in the Roth Case, pointed out that the opinion of the court failed to discriminate between the different factors which are involved in the constitutional adjudication of state and federal obscenity cases, and ignored relevant distinctions between the obscenity statutes involved in the case. The Justice went on to say that it did not seem to matter to the court that the Roth Case involved a question of balancing the power of the Federal Government against the limitations of the First Amendment, whereas in the companion Alberts Case the question of balancing the power of a state against the restrictions of the Fourteenth Amendment was involved; and that two different statutes were involved containing different definitions of obscenity, upon which the court superimposed its own definition. On this basis, Mr. Justice Harlan concurred in the result reached in the Alberts Case, upholding a state antiobscenity statute, but dissented from the result reached in the Roth Case, upholding a federal statute prohibiting the mailing of obscene matter.

Similarly, Mr. Justice Harlan, in his separate opinion in Jacobellis v Ohio (1964) 378 US 184, 12 L ed 2d 793, 84 S Ct 1676, expressed the view that the states should be permitted wide, but not federally unrestricted, scope in the field of obscenity, but that the Federal Government should be held with a tight rein. The contrary view was taken by Justices Brennan and Goldberg, in footnote 2 of their separate opinion, in which they stated that the line separating obscenity from constitutionally protected expression is no different where a state rather than a federal obscenity statute is involved.

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In view of the fact that the federal statute making the mailing of obscene matter a criminal offense (18 USC § 1461) has national scope, and community standards reflected by a jury differ rather widely over the country at large, the court, in Flying Eagle Publications, Inc. v United States (1960, CA1 NH) 273 F2d 799, ruled that to give the

statute some uniformity in its application and to prevent abridgment of the freedom of the press, courts should very carefully scrutinize material alleged to be obscene before submitting it to a jury.

III. Procedural aspects of concept

§ 14. Introductory

At this point the annotation discusses certain procedural aspects of the concept of obscenity. The discussion is limited to those procedural aspects which reflect the substantive aspects of the concept. In this sense the "average person" test of the Roth standard of obscenity raises the question whether and to what extent in cases requiring a jury trial the determination of obscenity is for the judge or for the jury[15] and, irrespective of whether the trial is with or without jury, whether and to what extent the determination of obscenity or nonobscenity is reviewable by an appellate court.[16] A due process question exists with respect to findings of administrative agencies.[17]

The "average person" test raises the additional question whether evidence, and in particular, expert evidence, as to community standards, is necessary or admissible in obscenity cases.[18]

§ 15. Who determines question of obscenity

[a] Generally; determination in trial court

Most authorities agree[19] that the question whether specific material involved in a case is obscene is not a simple question of fact but a mixed question of fact and constitutional law.[20]

The procedure described in State v Hudson County News Co. (1963) 41 NJ 247, 196 A2d 225, is as follows: The judge is required to make an independent determination of the material in evidence, applying the proper constitutional standards, before submitting the issue of obscenity to the jury. The trial judge must apply the constitutional standards to the specific material in the light of any factual findings supported by the evidence, since if in his judgment the material cannot constitutionally be suppressed, then nothing remains for the jury's consideration.[1] In this connec-

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15. § 15[a], infra.
16. § 15[b], infra.
17. § 15[c], infra.
18. § 16, infra.
19. Some judicial statements deviate more or less from the rule stated in the text.

For instance, the question of obscenity has been characterized as "primarily one of fact." Ackerman v United States (1961, CA9 Cal) 293 F2d 449; People v Williamson (1962) 207 Cal App 2d 839, 24 Cal Rptr 734, cert den 377 US 994, 12 L ed 2d 1047, 84 S Ct 1902, reh den 379 US 871, 13 L ed 2d 77, 85 S Ct 13.

20. Cal—Zeitlin v Arnebergh (1963) 59 Cal 2d 901, 31 Cal Rptr 800, 383 P2d 152, cert den 375 US 957, 11 L ed 2d 315, 84 S Ct 445 (stating that the determination of what is obscene in a statutory or a constitutional sense is not a question of fact, that is, a question of what happened, but rather a question of fact mixed with the determination of law).

NJ—State v Hudson County News Co. (1963) 41 NJ 247, 196 A2d 225 (referring to the separate opinion of Harlan, J., in the Roth Case, and stating that the question of obscenity is not merely one of fact but a question of constitutional judgment of the most sensitive and delicate kind).

NY—People v Richmond County News, Inc. (1961) 9 NY2d 578, 216 NYS2d 369, 175 NE2d 681.

1. In Kingsley Books, Inc. v Brown (1957) 354 US 436, 1 L ed 2d 1469, 77 S Ct 1325, in which the court upheld a New York statute dealing with obscene literature, Brennan, J., dissented on the ground that the absence in the New York obscenity statute of the right to jury trial was a fatal defect. In support of this view, Brennan, J., pointed out that the jury represents a cross section of the community and has a special aptitude for reflecting the view of the average person; that jury trial of obscenity therefore provides a peculiarly competent application of the standard for judging obscenity which, by its definition, calls for an appraisal of material according to the average person's application of contemporary community standards; and that, as with jury questions generally, the trial judge must initially determine that

tion the court referred to American Law Institute, Model Penal Code § 251.4(4) of the Official Draft 1962, providing that the court shall dismiss a prosecution for obscenity if it is satisfied that the material is not obscene. The court further stated that if the trial judge determines that the material is not constitutionally protected and should be submitted to the jury, he should avoid expressing to them his opinion on the issue of obscenity.

Most authorities agree that the question of what is obscene under the Roth test is primarily for the trier of facts. Volanski v United States (1957, CA6 Ohio) 246 F2d 842 (stating that the question of obscenity is peculiarly one best left for nisi prius determination, preferably by a jury); Ackerman v United States (1961, CA9 Cal) 293 F2d 449; Kahm v United States (1962, CA5 Fla) 300 F2d 78, cert den 369 US 859, 8 L ed 2d 18, 82 S Ct 949 (rejecting defendant's contention that the question of obscenity "can only be adjudged as a matter of law").

A state is not debarred from regarding the trier of fact as the embodiment of community standards. Smith v California (1959) 361 US 147, 4 L ed 2d 205, 80 S Ct 215, reh den 361 US 950, 4 L ed 2d 383, 80 S Ct 399 (separate opinion by Mr. Justice Harlan).

However, while the question of obscenity may be properly submitted to the jury in a case in which a party has a right to a jury trial, it cannot properly be reposed in the jury for final disposition as a question of fact, and must ultimately be resolved by the court. Haldeman v United States (1965, CA10 Kan) 340 F2d 59; Zeitlin v Arnebergh (1963) 59 Cal 2d 901, 31 Cal Rptr 800, 383 P2d 152, cert den 375 US 957, 11 L ed 2d 315, 84 S Ct 445.

But in the absence of evidence relating to contemporary community standards, the triers of fact have been held the exclusive judges of what the common conscience of the community is. Chicago v Kimmel (1964) 31 Ill 2d 202, 201 NE2d 386.

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On the other hand, the view has also been expressed that the question of obscenity must be determined by the judge rather than by the jury.

Whether the question of obscenity, in the context of the constitutional guaranties of freedom of speech and press, is deemed one of fact or of mixed fact and law, it is one for judicial determination on the relevant materials, these materials being available for visual inspection. Excellent Publications, Inc. v United States (1962, CA1 NH) 309 F2d 362.

Courts must themselves judge the pruriency of the material to determine the constitutional issue. Commonwealth v Maniz (1959) 338 Mass 442, 155 NE 2d 762 (criminal prosecution for showing allegedly obscene motion picture).

In a criminal prosecution for the sale of obscene writings or pictures, it was held in State v Locks (1964) 97 Ariz 148, 397 P2d 949, that it is incumbent upon the court to determine whether the material is obscene as a matter of law, the court pointing out that unless the material is obscene as a matter of law, the dissemination thereof is protected by the First Amendment to the Constitution of the United States.

Whether or not the language is obscene is a question of law primarily for the court to decide as a matter of law. Spears v State (1965, Miss) 175 So 2d 158 (a criminal prosecution for using obscene language over the telephone).

[b] Scope of appellate review

All authorities agree upon the proposition that an appellate court has the power to review determinations concerning obscenity, whether made by the jury

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there is a jury question, that is, that reasonable men may differ as to whether the material is obscene.

or the trial judge.[2] However, the authorities do not agree upon the extent and scope of appellate review.

Some authorities hold that the appellate court will make an independent determination of obscenity, irrespective of the findings below.

US—Grove Press, Inc. v Christenberry (1960, CA2 NY) 276 F2d 433 (stating that even factual matters must be reviewed on appeal against a claim of denial of a constitutional right).

Ill—Chicago v Kimmel (1964) 31 Ill 2d 202, 201 NE2d 386 (stating that an appellate court makes an independent constitutional judgment as to whether material is in fact obscene or constitutionally protected).

Mo—State v Vollmar (1965, Mo) 389 SW2d 20, 28.

NJ — State v Hudson County News Co. (1963) 41 NJ 247, 196 A2d 225 (stating that on appeal each appellate court must make an independent examination of whether the attacked material is suppressible within constitutional standards).

Rejecting the contention that determination of obscenity of a particular motion picture, book, or other work of expression can be treated as a purely factual judgment on which a jury's verdict is all but conclusive, or that in any event the decision can be left essentially to state and lower federal courts, with the United States Supreme Court exercising only a limited review, such as that needed to determine whether the ruling below is supported by sufficient evidence, Mr. Justice Brennan, joined by Mr. Justice Goldberg, pointed out in their separate opinion in Jacobellis v Ohio (1964) 378 US 184, 12 L ed 2d 793, 84 S Ct 1676 (a case in which no majority of the justices could agree on an opinion), that such an abnegation of judicial supervision in this field would be inconsistent with the court's duty to uphold the constitutional guaranties of freedom of speech and press, the question whether a particular work is obscene necessarily implicating an issue of constitutional law, since it is only "obscenity" that is excluded from the constitutional protection. It was further stated that such an issue must ultimately be decided by the United States Supreme Court. The conclusion was that the United States Supreme Court cannot avoid making an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected.

Where the trier of facts has determined the question of obscenity in the context of constitutional guaranties of freedom of speech and press, an appellate court is not bound by the conclusions of the lower courts or of juries but will re-examine the evidential basis on which those conclusions are founded. This rule applies to findings in the lower federal courts as well as to findings of state courts. Kahm v United States (1962, CA5 Fla) 300 F2d 78, cert den 369 US 859, 8 L ed 2d 18, 82 S Ct 949.

While recognizing that in cases in which fact questions are submitted to a jury, appellate review of the fact issues is ordinarily limited to a determination of whether there was substantial evidence from which the jury could reasonably have found the facts in question, the court in State v Vollmar (1965, Mo)

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2. A court of review retains responsibility for rendering the ultimate judgment upon constitutional infringement. Ackerman v United States (1961, CA9 Cal) 293 F2d 449.

The view that the question of obscenity of magazines, and in particular the question whether magazines were offensive on their face so as to be properly barred from the mail under 18 USC § 1461, was, as an issue involving factual matters entangled in a constitutional claim, ultimately one for the United States Supreme Court was expressed by Harlan and Stewart, JJ., in Manual Enterprises, Inc. v Day (1962) 370 US 478, 8 L ed 2d 639, 82 S Ct 1432, a case in which a majority of the justices could not agree upon an opinion.

389 SW2d 20, 28, accepted "the now prevailing view" that in obscenity cases the issue for determination is subject to constitutional limitations and the courts are faced with an obligation to make an independent determination of the constitutional issue, which cannot be avoided by considering "obscenity" as a fact question only.

The highest court of a state, no less than the United States Supreme Court, cannot escape its responsibility in defining the obscenity of material involved in a case by saying that the trier of the facts, whether a jury or a judge, has labeled the questioned matter as "obscene." People v Richmond County News, Inc. (1961) 9 NY2d 578, 216 NYS2d 369, 175 NE2d 681.

The rule that where the evidence is documentary the appellate court is not bound by the inferences drawn therefrom by the trier of facts has been applied in obscenity cases. Atty. Gen. v Book Named "Tropic of Cancer" (1962) 345 Mass 11, 184 NE2d 328.

In McCauley v Tropic of Cancer (1963) 20 Wis 2d 134, 121 NW2d 545, 5 ALR3d 1140 (a declaratory judgment proceeding in which the issue was whether the book "Tropic of Cancer" is obscene), the court said that although there was no greater conflict in the expert testimony in this case than there appears to have been in the Massachusetts case of Atty. Gen. v Book Named "Tropic of Cancer" (1962) 345 Mass 11, 184 NE2d 328, supra, the court deemed the reading of the book to constitute the most weighty factor in the determination and did not consider itself bound by the decision of the trial court, based on the trial judge's reading of it.

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On the other hand, there are some authorities which would limit the scope of appellate review of findings as to obscenity according to the quantum of evidence supporting the finding made by the trier of facts.

Absent an erroneous definition of obscenity, an appellate court cannot upset the jury's determination unless, upon consideration of the material in its entirety, the jury could not reasonably reach such a conclusion. People v Williamson (1962) 207 Cal App 2d 839, 24 Cal Rptr 734, cert den 377 US 994, 12 L ed 2d 1047, 84 S Ct 1902, reh den 379 US 871, 13 L ed 2d 77, 85 S Ct 13.

Mr. Chief Justice Warren and Mr. Justice Clark, in a dissenting opinion in Jacobellis v Ohio (1964) 378 US 184, 12 L ed 2d 793, 84 S Ct 1676 (a criminal prosecution under an antiobscenity statute), expressed the view that they would accept the judgments of the appropriate state and federal courts made pursuant to the Roth rule, limiting themselves to a consideration only of whether there is sufficient evidence in the record upon which a finding of obscenity could be made, or requiring something more than merely any evidence, but something less than substantial evidence, on the record as a whole.[3]

[c] Review of administrative findings

The courts are not in agreement as to the scope of appellate review of administrative findings of obscenity.[4]

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3. See, however, the concurring opinion of Warren, Ch. J., in the Roth Case, where he pointed out that the constitutional problem in defining obscenity, in the last analysis, becomes one of particularized judgments which appellate courts must make for themselves; and that reviewing courts cannot escape this responsibility by saying that the trier of the facts, whether a jury or a judge, has labeled the questioned matter as "obscene," since if "obscenity" is to be suppressed, the question whether a particular work is of that character involves not really an issue of fact but a question of constitutional judgment of the most sensitive and delicate kind.

4. Apart from findings of the Post Office Department under federal statutes barring obscene matter from the mails, administrative findings of obscenity have been made in the past primarily under motion-picture censorship statutes. However, the United

On the one hand, it has been held that administrative findings of obscenity are not conclusive upon the reviewing court even though they are based upon substantial evidence. Grove Press, Inc. v Christenberry (1960, CA2 NY) 276 F2d 433 (dealing with an order of the Post Office Department excluding from the mail, as obscene, the novel "Lady Chatterley's Lover").

On the other hand, the view has been taken that a court must accept the conclusion reached by an administrative agency which has been properly granted the authority to ascertain the fact of obscenity, such as the Post Office Department, where that conclusion is supported by substantial evidence and not in disregard or violation of the other standards to be applied under a review; and that this rule applies even though a denial of constitutional rights is claimed.[5] Big Table, Inc. v Schroeder (1960, DC Ill) 186 F Supp 254 (where, however, the court, applying this standard, held, contrary to the finding of the Post Office, that the magazine involved was not obscene).

§ 16. Necessity and admissibility of evidence

[a] Generally

It is a denial of due process for the trial court not to allow defendant to prove contemporary community standards on the issue of obscenity. Re Harris (1961) 56 Cal 2d 879, 16 Cal Rptr 889, 366 P2d 305, vacated on other grounds 374 US 499, 10 L ed 1044, 83 S Ct 1876; People v Aday (1964) 226 Cal App 2d 520, 38 Cal Rptr 199, cert den 379 US 931, 13 L ed 2d 343, 85 S Ct 329 (recognizing rule and holding that a determination of obscenity may be made by a grand jury, insofar as the issue of probable cause is concerned, without the necessity of receiving evidence as to such standards). But see State v Vollmar (1965, Mo) 389 SW2d 20, holding that the trial court did not err in excluding defendant's proffered expert testimony to the effect that the allegedly obscene publications would conform to the general community standards and hence were not obscene.

Where the conviction or acquittal of the defendant of a charge of having sold an obscene book (Tropic of Cancer) depended on whether or not the book was in fact obscene, it was held in Yudkin v State (1962) 229 Md 223, 182 A2d 798, that the defendant was prejudiced by the refusal of the trial court to permit him to offer the testimony of expert witnesses, who, had they been allowed to do so, would have testified that the book had literary merit, that it fell within contemporary community standards, and that it would not stimulate lustful thoughts in the average reader. The court relied upon the American Law Institute, Model Penal Code, proposed official draft of May 4, 1962, which in § 251.4(4) stated that expert testimony relating to factors entering into the determination of the issue of obscenity, shall be admissible. It was further held error not to permit introduction of evidence showing that the Post Office Department had determined that "Tropic of Cancer" was mailable. Finally it was held that a "study" or critique of the book made by a novelist and critic was admissible

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States Supreme Court, in Freedman v Maryland (1965) 380 US 51, 13 L ed 2d 649, 85 S Ct 734, required, as a prerequisite to the validity of such a statute, that a censor who wants to disapprove a film on the ground of obscenity obtain a judicial determination of the issue within a specified brief period.

5. See, however, Manual Enterprises, Inc. v Day (1962) 370 US 478, 8 L ed 2d 639, 82 S Ct 1432, a proceeding for injunctive relief against an order of the Postmaster General barring, as obscene, magazines from the mail under 18 USC § 1461, where Brennan, J., joined by Warren, Ch. J., and Douglas, J., expressed the view that the statute does not authorize the Postmaster General to exclude matter from the mails on his own determination that it is obscene.

as evidence of the literary merit of the book, it being error on the part of the trial court to refuse to admit the critique as evidence.

Mr. Justice Frankfurter, in his separate opinion in Smith v California (1959) 361 US 147, 4 L ed 2d 205, 80 S Ct 215, reh den 361 US 950, 4 L ed 2d 383, 80 S Ct 399, expressed the view that the due process clause of the Fourteenth Amendment was violated by exclusion, at the state criminal trial of a bookseller for possession of obscene books in his shop, of evidence through duly qualified witnesses regarding the prevailing contemporary community standards in determining obscenity. It was pointed out that the exclusion of expert testimony regarding the prevailing literary and moral community standards or the psychological or physiological consequences of questioned literature went to the very essence of the defense and therefore to the constitutional safeguards of due process.

While in a criminal prosecution for unlawful possession of obscene books a state is not constitutionally compelled to admit expert testimony as to community standards of obscenity, the due process clause of the Fourteenth Amendment is violated where the trial judge turned aside every attempt by defendant to introduce evidence bearing on such standards. This was pointed out by Mr. Justice Harlan, dissenting in part and concurring in part in Smith v California (US) supra, where the majority of the court did not reach that question. (See footnote 4 of the court's opinion.)

✦

In a criminal prosecution for mailing obscene matter it is not necessary for the government to introduce expert testimony as to the obscene nature of the material mailed, particularly where the defendant was allowed to introduce witnesses on that point. Kahm v United States (1962, CA5 Fla) 300 F2d 78, cert den 369 US 859, 8 L ed 2d 18, 82 S Ct 949.

[b] Admissibility of other literary material

The courts are not in agreement as to whether material other than the material challenged as obscene is admissible to show the prevailing community standard.

On the one hand, it was held error in Yudkin v State (1962) 229 Md 223, 182 A2d 798, supra § 16[a], for the trial court to refuse to admit evidence of other books on sale in the community, since, as stated by Mr. Justice Harlan in his separate opinion in Smith v California (1959) 361 US 147, 4 L ed 2d 205, 80 S Ct 215, reh den 361 US 950, 4 L ed 2d 383, 80 S Ct 399, the community cannot, where liberty of speech and press are at issue, condemn that which it generally tolerates.

On the other hand, evidence of literary material other than that alleged to be obscene was held inadmissible to show contemporary community standards, in People v Finkelstein (1962) 11 NY2d 300, 229 NYS2d 367, 183 NE2d 661, cert den 371 US 863, 9 L ed 2d 100, 83 S Ct 116, a criminal prosecution for the sale of obscene books, where the court pointed out that the proffered evidence was irrelevant to the issue of whether or not the two books sold by defendants were obscene, since the fact that certain other and different publications were seen in bookstores and on magazine stands was no indication that they were sold or read, or that to the average person applying contemporary community standards they were not obscene.

E. H. SCHOPLER.

HB
140

Alaska State Legislature

HOUSE OF REPRESENTATIVES

Official Business

P.O. Box V
State Capitol
Juneau, Alaska 99811

March 1, 1989

M E M O R A N D U M

TO: House Judiciary Committee

FR: House State Affairs Committee

RE: Proposed Amendents to HB 140

The intent of the House State Affairs committee in introducing HB 140 is to provide candidates protection from political lawsuits charging them with violation of the Open Meetings Act.

We are referring to malicious, not frivolous, lawsuits. Suits brought with the sole intention of creating harm and slandering a candidate's character, particularly during the campaign season.

Our intent is to provide a reasonable balance between the public's right to know and an individual's right to be protected from malicious acts.

Unfortunately, Alaska's Open Meetings Act presents the opportunity for individuals or political organizations to pervert good public policy into political gamesmanship.

Imagine a scenario whereby a candidate in a hotly contested race is suddenly faced with a barrage of lawsuits days before an election. The painful facts are that lawsuits charging legislators with violating the Open Meetings Act is front page headline news. A story explaining that the courts found the suit to be without merit gets buried on the back page, after the election, when the harm has already been done.

Both candidates and the public need to have some protection from this kind of action. HB 140 seeks to provide that protection.

The exact language of HB 140 is less important than making sure that: 1) legislators are protected from malicious acts and 2) the public is protected against false accusations which deprive them of the ability to choose their representatives with the full facts before them.

However, the committee feels there may be other ways to provide this protection and asks that the House Judiciary committee carefully consider alternatives to prevent Alaska's Open Meetings Act from being potentially used as a political tool.

You should note that HB 140 passed the House State Affairs committee with 5 do pass - those members absent support the Bill as written.

ALASKA STATE LEGISLATURE
HOUSE OF REPRESENTATIVES
RESEARCH AGENCY

P.O. Box Y, State Capitol
Juneau, Alaska 99811-3100
Mail Stop 3400
(907) 465-3991

March 28, 1989

MEMORANDUM

TO: Representative Dave Donley

ATTN: Veronica Slajer

FROM: Maria Gladziszewski
Legislative Analyst

RE: Defending Public Officials Charged with Violating Open Meeting Laws
Research Request 89.325

You asked us to find out what other states do to defend public officials charged with violating open meeting laws. In each of five states, I spoke with the assistant attorney general that handles open meetings issues. In general, absent some gross violation, the public agency that employs the official charged with violating the open meeting law pays for the defense of the official. Arizona is the only state contacted that did not pay for the defense of officials charged with violating open meetings law. Detailed comments follow.

Arizona The open meeting law in Arizona states that a public body may not use state funds to defend an official charged with violating the law. The Office of the Attorney General enforces the open meeting law in Arizona and so would be in charge of prosecuting the official, not defending the official. The attorney general's office takes complaints regarding possible violations of the open meetings law and tells those charged with violating the law that they have 30 days from the violation to conduct in public the business allegedly conducted in private. The attorney general with whom I spoke knew of no open meetings cases that have gone to court in Arizona.

Colorado No provision in Colorado's open meetings law addresses the issue of payment for defense or payment to plaintiffs in court cases. The Colorado attorney general's office has not yet faced a case of having to defend an official charged with violation of their open meetings law; the attorney general's office would decide on each case, considering whether the official's actions were willful and wanton. In general, however, the Office of the Attorney General is responsible for defending public officials. The assistant attorney general with whom I spoke did not know of a case where the attorney general's office refused representation to an official charged with violating a law.

Oregon The attorney general with whom I spoke could not recall defending an official charged with an open meetings law violation. No specific provisions on payment for defense are in Oregon's open meetings statutes; the Office of the Attorney General would likely defend the official. In Oregon, however, defendants are personally liable to the governing body for attorney fees awarded to successful plaintiffs (i.e., if the court awards attorney fees to a plaintiff then the official must personally pay the fees).

Texas The Office of the Attorney General would be required to defend a state official charged with violating the open meetings law. A local governing body (school district, city counsel, etc.) would be responsible for defending its officials charged with violations. If the court awarded attorney fees to a plaintiff, the public agency would pay the fees absent flagrant disregard of duties by the official. The attorney general with whom I spoke said, however, that virtually no prosecution of the open meetings act has occurred in Texas (the one case of an alleged violation in recent years was settled with a promise not to violate the law again).

Washington The open meetings law in this state requires that if the public official charged with violating law is convicted, the state agency pays for the attorney fees and costs of the plaintiff. The open meetings law in Washington also requires that the individual convicted of violating the law pay a $100 personal penalty if the court considered the violation intentional.

I hope this information is useful. Please call this office if you have further questions.

March 30, 1989

M E M O R A N D U M

TO: Representative Dave Donley

FROM: Diana Rhoades

RE: **Defending public officials charged with violating open meeting laws**

Georgia There is no open meetings law in Georgia that applies to the General Assembly. The Office of the Attorney General is responsible for defending all state agencies except the General Assembly because a court ruling determined open meetings did not apply to them. All legislation that has been initiated to require the Assembly to have open meetings has failed. If this legislation were to pass, the assistant attorney general with whom I spoke said that the Office of Legislative Counsel would defend the Assembly.

Idaho No provision in Idaho's open meetings law addresses the issue of payment for defense or payment to plaintiffs in court cases. The Idaho attorney general's office has not yet faced a case of having to defend a state official charged with violation of their open meetings law. They operate with the theory that you can correct closed meetings by later having the meeting in open.

Alabama There is no open meetings law for the Alabama State Legislature. The Office of the Attorney General in Alabama enforces the open meetings law as it applies to boards, bodies, and commissions, and so would be in charge of prosecuting those officials, not defending. Legislators can conduct closed meetings in Alabama and those meetings have never been questioned.

California The Legislative Council of the California State Legislature is responsible for defending members of the legislature. However, the assistant attorney general with whom I spoke said there has never been a case against a public official up until a few weeks ago. They are currently investigating an executive session that was held without notice.

Massachusetts Massachusetts has three open meetings laws; one each for local, county, and state public bodies. These laws are enforced by a committee made up of three registered voters, the Attorney General, and the District Attorney. The public agency that employs the official charged with violating the open meetings law pays for the defense of the official. However, the

Massachusetts legislature is exempt from the open meetings law.

New York No provision in New York's open meetings law addresses the issue of payment for defense or payment to plaintiffs in court cases. The Office of the Attorney General in New York referred my questions to New York's Committee on Open Government. The executive director with whom I spoke knew of no open meetings cases that have gone to court in New York. Furthermore, there would have to be a quorum of the committee or the Assembly to constitute a violation, in which case the entire committee or entire Assembly would be held responsible and the Assembly would cover the costs. If, in fact, an individual official were sued they would cover their own court costs.

Florida There is no open meetings law for the Florida State Legislature.

1022

February 22, 1989

Representative Ron Larson
P.O. Box V (MS 3100)
Juneau, Alaska 99811

Dear Representative Larson:

HB 140 as it stands seems to try to price the common man out of interest in government to the benefit of the judicial system by giving the judicial system free rein in possibly playing maliciously or frivolously itself in assessing court costs, attorneys fees, etc., to a plaintiff.

Really, HB 140 should be thrown out and substitute that the AG defend legislators at no cost to the legislator and the maximum fine should be $200 paid by the legislator.

Sec. 24.40.050 - If the Legislative Council is capable of determining reasonable attorney fees, then the bill should state what the maximum reasonable attorney fees should be that the Council will bear or pay.

Sec. 24.40.060 - In the first line the word "court" should be changed to jury. Again, maximums for court costs, attorneys fees and other costs should be established in the bill.

Sec. 24.40.070 - Legislators should inform potential defense attorneys what the maximum attorney fees that the Council will pay for, then get an attorney that can do the job for the price or a public defender or the A.G.

If it appears that attorneys fees and cost would approximate the maximum fine, then sound business would have the charged legislator plead nolo contendre and the Legislative Council pay his fine in lieu of attorney fees.

If a jury decides that a suit was either malicious or frivolous then that attorney should not charge the plaintiff and the attorney should pay court costs and other attorney fees.

Gary Smart

Gary Smart, President
Alaska Tea Party, Mat-Su Branch
Box 2341, Palmer, AK 99645
745-2055

Sent to:
Governor Cowper
Senators Kerttula & Szymanski
Reps. Menard and Larson

Please copy for and pass to appropriate legislators if helpful.

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION HB 140
PUBLISH DATE

FISCAL NOTE

REQUEST:
Revision Date:
Title: An Act relating to violations of the open meetings section of the Constitution...
Sponsor: House State Affairs
Requestor: House Judiciary

Affect Agency Legislative Affairs Agency
BRU: Legislative Council
Components Legal Services

EXPENDITURES/REVENUES: (THOUSANDS OF DOLLARS)

OPERATING	FY91	FY92	FY93	FY94	FY95	FY96
Personal Services	0	0	0	0	0	0
Travel	0	0	0	0	0	0
Contractual	61.0	61.0	61.0	61.0	61.0	61.0
Supplies	0	0	0	0	0	0
Equipment	0	0	0	0	0	0
Land & Structures						
Grants, Claims						
Miscellaneous						
TOTAL OPERATING	61.0	61.0	61.0	61.0	61.0	61.0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (THOUSANDS OF DOLLARS)

General Fund	61.0	61.0	61.0	61.0	61.0	61.0
Federal Fund						
Other						
TOTAL	61.0	61.0	61.0	61.0	61.0	61.0

POSITIONS.

Full-Time	0	0	0	0	0	0
Part-Time	0	0	0	0	0	0
Temporary	0	0	0	0	0	0

ANALYSIS: (ATTACH A SEPARATE PAGE IF NECESSARY)
It is difficult to estimate how many cases will be litigated against members of the Legislature each year. The contractual amount requested is for hiring a private attorney for a member of the Legislature. This amount does not assume there are any costs for appeal. It is based on the amount expended in defending the Legislative Affairs Agency in the Behrends lawsuit - $61.0.

Prepared By Pamela A. Stoops, Director — Phone: 465-3850
Division: Administrative Services — Date: 1/17/90

Approved By: Warren Endicott, Executive Director
Agency: Legislative Affairs Agency — Date: 1/17/90

DISTRIBUTION (BY PREPARER)
LEGISLATIVE FINANCE
LEGISLATIVE SPONSOR

REQUESTOR
OFFICE OF MANAGEMENT & BUDGET
AGENCY (IES)

CORRECTION

THIS DOCUMENT
HAS BEEN REPHOTOGRAPHED
TO ASSURE LEGIBILITY

STATE OF ALASKA
1990 LEGISLATIVE SESSION

BILL VERSION HB 140
PUBLISH DATE

FISCAL NOTE

REQUEST:
Revision Date:
Affect Agency Legislative Affairs Agency
Title: An Act relating to violations of the open meetings section of the Constitution...
BRU: Legislative Council
Sponsor: House State Affairs
Components Legal Services
Requestor: House Judiciary

EXPENDITURES/REVENUES: (THOUSANDS OF DOLLARS)

OPERATING	FY91	FY92	FY93	FY94	FY95	FY96
Personal Services	0	0	0	0	0	0
Travel	0	0	0	0	0	0
Contractual	61.0	61.0	61.0	61.0	61.0	61.0
Supplies	0	0	0	0	0	0
Equipment	0	0	0	0	0	0
Land & Structures						
Grants, Claims						
Miscellaneous						
TOTAL OPERATING	61.0	61.0	61.0	61.0	61.0	61.0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (THOUSANDS OF DOLLARS)

General Fund	61.0	61.0	61.0	61.0	61.0	61.0
Federal Fund						
Other						
TOTAL	61.0	61.0	61.0	61.0	61.0	61.0

POSITIONS:

Full-Time	0	0	0	0	0	0
Part-Time	0	0	0	0	0	0
Temporary	0	0	0	0	0	0

ANALYSIS: (ATTACH A SEPARATE PAGE IF NECESSARY)
It is difficult to estimate how many cases will be litigated against members of the Legislature each year. The contractual amount requested is for hiring a private attorney for a member of the Legislature. This amount does not assume there are any costs for appeal. It is based on the a[illegible]nt expended in defending the Legislative Affairs Agency in the Behrends lawsuit - $61

Prepared By Pamela A. Stoops, Director Phone: 465-3850
Division: Administrative Services Date: 1/17/90

Approved By: Warren Endicott, Executive Director
Agency: Legislative Affairs Agency Date: 1/17/90

DISTRIBUTION (BY PREPARER)
LEGISLATIVE FINANCE
LEGISLATIVE SPONSOR

REQUESTOR
OFFICE OF MANAGEMENT & BUDGET
AGENCY (IES)

HOUSE COMMITTEE REPORT

(7)
Date Referred: February 3, 1989 FURTHER REFERRALS: JUDICIARY

Date of Committee Action: _____

The STATE AFFAIRS Committee recommends that:

HOUSE BILL NO. 140 [OPEN MEETING VIOLATIONS]
"An Act relating to violations of the open meetings section of the Constitution of the State of Alaska; and amending Alaska Rule of Civil Procedure 82 and Alaska Rule of Appellate Procedure 508; and providing for an effective date.

[ ] be replaced with _____ [ ] the same title
[ ] a new title

[ ] have attached amendment(s)

[X] do pass
[ ] do not pass
[ ] no recommendation
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(s):

[ ] fiscal impact
[ ] zero fiscal note
[X] zero with analysis

APPROVES PREVIOUS:

[ ] fiscal note(s) published:
_____
[ ] zero fiscal notes(s) published:
_____

SIGNING DO PASS:

SIGNING OTHER THAN DO PASS:
(Do Not Pass, No Recommendation, Amend)

_____
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_____
Chairman's signature

Item 2

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION HB 140
PUBLISH DATE

FISCAL NOTE

REQUEST:
Revision Date:
Title: An Act relating to violations of the open meetings section of the Constitution...
Sponsor: House State Affairs
Requestor: House State Affairs

Affected Agency: Legislative Affairs Agency
BRU: Legislative Council
Components: Legal Services

EXPENDITURES/REVENUES: (THOUSANDS OF DOLLARS)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
Personal Services	0	0	0	0	0	0
Travel	0	0	0	0	0	0
Contractual	0	61.0	61.0	61.0	61.0	61.0
Supplies	0	0	0	0	0	0
Equipment	0	0	0	0	0	0
Land & Structures						
Grants, Claims						
Miscellaneous						
TOTAL OPERATING	0	61.0	61.0	61.0	61.0	61.0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (THOUSANDS OF DOLLARS)

General Fund	0	61.0	61.0	61.0	61.0	61.0
Federal Fund						
Other						
TOTAL	0	61.0	61.0	61.0	61.0	61.0

POSITIONS:

Full-Time	0	0	0	0	0	0
Part-Time	0	0	0	0	0	0
Temporary	0	0	0	0	0	0

ANALYSIS: (ATTACH A SEPARATE PAGE IF NECESSARY)
It is difficult to estimate how many cases will be litigated against members of the legislature each year. The contractual amount requested is for hiring a private attorney for a member of the legislature. It is based on the amount expended in defending the the Legislative Affairs Agency in the Behrends lawsuit - $61.0.

Prepared By: Pamela Stoops, Director — Pamela Stoops — Phone: 465-3850
Division: Administrative Services — Date: 2/9/89

Approved By: Warren Endicott, Executive Director — Warren Endicott
Agency: Legislative Affairs Agency — Date: 2/9/89

DISTRIBUTION (BY PREPARER)
LEGISLATIVE FINANCE
LEGISLATIVE SPONSOR

REQUESTOR
OFFICE OF MANAGEMENT & BUDGET
AGENCY (IES)

Item 3

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: HB 140
PUBLISH DATE: _____

FISCAL NOTE

REQUEST: _____

Revision Date: _____
Title: Open Meeting Violations

Agency Affected: Leg. Affairs Agency
BRU: Leg. Council

Sponsor: House State Affairs
Requestor: _____

Components: _____

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING		-0-	-0-	-0-	-0-	-0-
CAPITAL		-0-	-0-	-0-	-0-	-0-
REVENUE		-0-	-0-	-0-	-0-	-0-

FUNDING: (Thousands of Dollars)

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

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

The House State Affairs Committee adopted a zero fiscal note dated Feb. 15, 1989. The committee felt the fiscal note dated Feb. 9, 1989, showing operating costs of $61,000, was unrealistic.

Prepared by: House State Affairs
Division: _____

Phone: 465-4963
Date: Feb 15, 1989

Approved by Commissioner: Rep. H.A. "Ped" Boucher
Agency: _____

Date: Feb 15, 1989

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

page ____ of ____

6-0605Ab
Bradley

A M E N D M E N T

OFFERED IN THE HOUSE BY BROWN

TO: HB 140

Page 1, lines 8 - 9:

Delete "and amending Alaska Rule of Civil Procedure 82 and Alaska Rule of Appellate Procedure 508;"

Page 1, lines 19 - 25:

Delete all material.

Page 1, line 26:

Delete "Sec. 24.40.070"

Insert "Sec. 24.40.060"

Page 2, line 7:

Delete "Sec. 24.40.080"

Insert "Sec. 24.40.070"

Page 2, line 11:

Delete "Sec. 24.40.090"

Insert "Sec. 24.40.080"

Page 2, lines 16 - 19:

Delete all material.

3/1/89

Renumber following bill section accordingly.

A M E N D M E N T

OFFERED IN THE HOUSE BY BROWN

TO: HB 140

Page 1, line 6:

Delete "relating to violations of"

Insert "implementing"

Page 2, after line 15:

Insert a new bill section to read:

"* Sec. 2. AS 44.62.310(d) is amended to read:

(d) This section does not apply to

(1) judicial or quasi-judicial bodies when holding a meeting solely to make a decision in an adjudicatory proceeding;

(2) juries;

(3) parole or pardon boards;

(4) meetings of a hospital medical staff; [OR]

(5) meetings of the governing body or any committee of a hospital when holding a meeting solely to act upon matters of professional qualifications, privileges or discipline; or

(6) subcommittees of the legislature."

Renumber following bill sections accordingly.

Prepared by Rep Kay Brown
March 14 1989

PROPOSED AMENDMENTS TO HJR 1, HB 140, and UNIFORM RULE 23

INTRODUCTION: THE NEED FOR AN AMENDMENT TO THE CONSTITUTION

- **Openness is fundamental to good government.**

- In the **League of Women Voters** lawsuit over the **closed budget discussions in caucus** meetings during the **1986** session; the crucial issue concerned the **right of the press and public to know and understand the deliberations of their elected representatives.** Defense lawyers for the legislature did not contest the charges that **the legislature held secret budget meetings** or that **these meetings violated the legislature's Uniform Rule 22.**

- The **SUPERIOR COURT** found an **implied right of access** to proceedings of the legislature under the Constitution, and appeared to hold that **discussion and binding decisions on substantive legislation cannot be made in a private caucus.**

- The **SUPREME COURT** ruled that it had **no jurisdiction in the open meetings dispute** and accordingly could not force the legislature to comply with the Open Meetings Act.

- One legislator characterized the **Supreme Court ruling as giving legislators a "blank check"** in view of the Court's finding that the **legislature's conduct was above the law** that requires other state and local officials to conduct public business openly.

- The only way to **remedy this deficiency** is a constitutional amendment that would **mandate legislative adherence** to the Open Meetings Act and

provide for judicial enforcement in the instance of a violation. It provides the legal framework to protect the public's right to openness in the legislative process.

ISSUES THAT HAVE ARISEN DURING CONSIDERATION OF HJR 1:

1. Subcommittees

- Does "**committee**" imply subcommittee as well? (Under the current statute, subcommittee meetings must be open and noticed.) Is a **quorum** just two people, in the case of a three-person subcommittee?

- There is a need for flexibility by subcommittees appointed to work on legislation. The need for quick resolution of concerns on bills in order to speed action by the full committee requires the flexibility to meet and talk informally, at times, without the notice requirement.

- Budget subcommittees seem to be the area of most concern. The budget process must be open; decisions made in Juneau are of vital interest to all Alaskans as the state comes to terms with declining revenues.

- The appropriate place to address subcommittees is in the Uniform Rules. The current Rule 23 applies to notice requirements of standing, special and joint committees.

Proposed amendment to the Open Meetings statute would exempt all legislative subcommittees except budget subcommittees, and would not affect the existing law regarding subcommittees of all other public bodies.

Proposed amendment to Uniform Rules would require budget subcommittees to meet openly, give notice.

2. Legislative immunity

- A legislator, if sued, might be required to leave Juneau during a legislative session to appear in court.

- Proposed amendment would strengthen the existing immunity in Article 2, Section 6 of the Constitution and make it clear that the open meetings provision does not invalidate legislative immunity during a session.

3. Frivolous or malicious lawsuits

- Only one lawsuit has been brought over closed legislative meetings since statehood, and it wasn t frivolous (League of Women Voters: closed budget meetings in 1986).

- This section is unnecessary and will discourage the public from bringing legitimate complaints.

- Proposed amendment deletes this provision.

Prepared by Rep. Kay Brown
March 14, 1989

PROPOSED AMENDMENTS TO HJR 1, HB 140 AND UNIFORM RULE 23

AMENDMENTS TO HJR 1:

- **silent on subcommittees of a committee of the legislature;**
  (Page 1, Lines 24-25: delete all material)

- **would defer judicial proceedings against a legislator for an open meetings violation until ten days after that session adjourns.**
  (Page 1, after line 25: insert a new subsection (d))

AMENDMENTS TO HB 140:

- **would delete the section relating to frivolous or malicious complaints, and the assessment of attorney fees and costs and a civil fine of $1000 on the plaintiff;**
  (Page 1, lines 19-25: delete all material)

- **would amend the Open Meetings Statute, AS 44.62.310, to exempt subcommittees of the legislature except budget subcommittees from the open meetings requirement;**
  (Page 2, after line 15: insert a new bill section; Sec. 2.(d)(6))

- **would change bill title to reflect first amendment above, and renumber the bill sections.**

AMENDMENT TO UNIFORM RULE 23:

- **draft legislation that would create a new Rule 23A that does not affect the existing Rule 23a regarding standing, special and joint committees.**

  this new rule would require budget subcommittees of the finance committees of the legislature to post written notice and give 24-hour notice of scheduled meetings to the chief clerk or secretary; and would require budget subcommittees to provide written notice to the chief clerk or secretary of a delay, cancellation, or change in a scheduled meeting.

  provides for an immediate effective date.

  (Section 1 amends Uniform Rules by adding a new rule, Rule 23A BUDGET SUBCOMMITTEES; Section 2 adds effective date)

6-0050Ea
Bradley

AMENDMENT

OFFERED IN THE HOUSE BY BROWN

TO: CSHJR 1(State Affairs)

Page 1, lines 24 - 25:

Delete all material.

Reletter the following subsection accordingly.

6-0050Eb
Bradley

A M E N D M E N T

OFFERED IN THE HOUSE BY BROWN

TO: CSHJR 1(State Affairs)

Page 1, after line 25:

Insert a new subsection to read:

"(d) A judicial proceeding brought during a session of the legislature against a member of the legislature for a violation of this section shall be deferred until ten days after the adjournment of that session of the legislature."

Reletter the following subsection accordingly.

6-0605Ab
Bradley

A M E N D M E N T

OFFERED IN THE HOUSE BY BROWN

TO: HB 140

Page 1, lines 8 - 9:

Delete "and amending Alaska Rule of Civil Procedure 82 and Alaska Rule of Appellate Procedure 508;"

Page 1, lines 19 - 25:

Delete all material.

Page 1, line 26:

Delete "Sec. 24.40.070"

Insert "Sec. 24.40.060"

Page 2, line 7:

Delete "Sec. 24.40.080"

Insert "Sec. 24.40.070"

Page 2, line 11:

Delete "Sec. 24.40.090"

Insert "Sec. 24.40.080"

Page 2, lines 16 - 19:

Delete all material.

Renumber following bill section accordingly.

6-0605Ac
Bradley

A M E N D M E N T

OFFERED IN THE HOUSE BY BROWN

TO: HB 140

Page 1, line 6:

Delete "relating to violations of"

Insert "implementing"

Page 2, after line 15:

Insert a new bill section to read:

"* Sec. 2. AS 44.62.310(d) is amended to read:

(d) This section does not apply to

(1) judicial or quasi-judicial bodies when holding a meeting solely to make a decision in an adjudicatory proceeding;

(2) juries;

(3) parole or pardon boards;

(4) meetings of a hospital medical staff; [OR]

(5) meetings of the governing body or any committee of a hospital when holding a meeting solely to act upon matters of professional qualifications, privileges or discipline; or

(6) subcommittees of the legislature except for the budget subcommittees of the finance committees."

Renumber following bill sections accordingly.

6-1008A
Cook
3/9/89

IN THE HOUSE BY BROWN

HOUSE CONCURRENT RESOLUTION NO.

IN THE LEGISLATURE OF THE STATE OF ALASKA

SIXTEENTH LEGISLATURE - FIRST SESSION

Proposing an amendment to the Uniform Rules of the Alaska State Legislature relating to budget subcommittees; and providing for an effective date.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. The Uniform Rules of the Alaska State Legislature are amended by adding a new rule to read:

RULE 23A. BUDGET SUBCOMMITTEES. Written notice of the time, place, and subject matter of a meeting of a subcommittee of a finance committee charged with working on the state budget shall be posted and provided by the person who chairs the subcommittee to the chief clerk or secretary at least 24 hours before the meeting. A scheduled meeting of a budget subcommittee of a finance committee may be delayed or cancelled, or a change in the place or subject matter may be made at any time. Written notice of a delay, cancellation, or change shall be posted and provided to the chief clerk or secretary. If possible, notice of a meeting, delay, cancellation, or change shall be announced by the chief clerk or secretary and published as a notice in the journal of the house.

* Sec. 2. The amendment proposed by this resolution takes effect immediately.

HB

141

Prepared by:
Rep. Kay Brown
March 17, 1989

By: Brown, Menard, Hudson, Koponen, Gruenberg, Ellis and M. Davis

CS HB 141(HESS): "An Act relating to tobacco, and products containing tobacco."

The Committee Substitute would:

- require a business license endorsement for retail sales of cigarettes, cigars, tobacco, or products containing tobacco;
- designate the Department of Commerce as the licensing authority for tobacco retailers;
- require a separate fee of $25 to be issued a license endorsement or to renew the endorsement, which expires at the same time the business license expires;
- require the Court to notify the Department of Commerce of all convictions of violations of AS 11.76.100, selling tobacco to a minor, by persons holding a business license endorsement;
- provide the Department of Revenue authority to suspend or revoke license endorsements if distributors, wholesalers or manufacturers sell tobacco or tobacco products to non-licensed or suspended retailers;
- prohibit the sale of a product for which the license was issued during the period of the suspension or revocation of the license endorsement;
- provide the Department of Commerce authority to suspend or revoke license endorsements for a violation of the provisions of Section 3 of the bill, or of a regulation adopted by the Department; and
- provide for suspension of the license endorsement for a period of one year for convictions of selling tobacco to a minor.

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: CSHB 141 (HESS)
PUBLISH DATE: _____

FISCAL NOTE

REQUEST:

Revision Date: _____
Title: An Act relating to tobacco and products containing tobacco.
Sponsor: House HESS Committee
Requestor: House HESS Committee

Agency Affected: Commerce and Economic Dev.
BRU: Occupational Licensing
Components: Administration

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	32.5	0	32.5	0	32.5

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary)

The bill creates an endorsement requirement to be placed on business licenses for manufacturers and distributors who sell tobacco or products containing tobacco. No additional costs are anticipated to apply the endorsement to a business license. Revenues are based on approximately 1300 licensees paying a $25.00 endorsement fee.

Prepared by: Jennifer Strickler, Administrative Officer
Phone: 465-2144
Division: Occupational Licensing
Date: March 7, 1989

Approved by Commissioner: Larry Merculieff
Date: 3/8/89
Agency: Commerce and Economic Development

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

Anchorage Daily News
March 13, 1989

Government must kick the nicotine habit

ellen goodman

BOSTON — Those who recognize the symptoms of withdrawal watched Bill Bennett closely. Did he fiddle a bit desperately with his pen? Did he seem just a touch cranky? Had he added a pound or two around the middle?

After more than 20 years as a two-pack-a-day smoker, Bennett had gone through a six-day crash program to kick the habit. He'd done the long walks through the woods. He'd done the aerobics. He'd done the meditation. He'd had the ashtray on his desk replaced by a bowl of fruit and some lollipops.

Now in his second drug-free week, he was under the stress of a Senate confirmation hearing. But not to worry. The new drug czar has to be one of the most highly motivated smokers to ever go to a clinic. When he was chosen for the job in January, he swore he'd quit. It's better than even money that he'll stay clean.

Indeed, Bennett's pledge made a contemporary case study of changed attitudes toward cigarettes. It has become obvious, at last, that cigarettes are addictive. No drug czar could head up an anti-drug operation while chained to nicotine.

If that is true for Bennett, it's true for the rest of the government. One of the other sticky questions to be asked about our drug policy is this one: Can the United States credibly pressure countries that export drugs to us while we push cigarettes?

As a nicotine-free Bennett was being approved for his new post, the State Department released a report on international drug trafficking. It cited worldwide increases in marijuana, opium and coca. It listed countries that are and aren't helping us in the effort. The report didn't list our own tobacco cartels or the worldwide increase in the use of nicotine.

The comparisons are not pure. Tobacco is legal and cocaine is illegal. People are not being mugged by desperate smokers in pursuit of money for their next hit. Nor are there gun battles in the urban streets between corporate executives from RJR and Philip Morris.

But in the scheme of things, tobacco is far more deadly. An estimated 395,000 Americans die annually because of smoking. That's easily 10 times the number who die from illegal drugs, even if you include those addicts who die from AIDS. In foreign policy, we threaten governments that don't inhibit the flow of drugs. We also threaten governments that don't permit the flow of cigarettes. What's wrong with this picture?

American companies made 600 billion cigarettes last year, the highest number on record. Of these, 100 billion went overseas, half to the Far East. It's no longer news that the one trade breakthrough there has been cigarettes.

The tobacco companies are not, to put it mildly, a goodwill ambassador for other American products. "We've created a poisonous environment for trade," says Rep. Chester Atkins (D-Mass.).

Atkins, along with Democratic California congressmen Henry Waxman and Mel Levine and Kansas Republican Bob Whittaker, has introduced a bill that would at least restrain our role as nicotine pushers. American companies would be forbidden from advertising overseas in ways that are prohibited here.

The tobacco leaf is as imbedded in American history and culture as the coca leaf is in Latin America. It is a tangled part of our political life. But if Bill Bennett can break his addiction to the evil weed, so can this government.

☐ **Ellen Goodman is a Boston Globe columnist.**

HOUSE COMMITTEE REPORT

(7)
Date Referred: March 3, 1989 FURTHER REFERRALS: FINANCE

Date of Committee Action: 3/17/89

The JUDICIARY Committee considered: HB 141

HOUSE BILL NO. 141 [LICENSING RETAIL TOBACCO SALES]
"An Act relating to retail sale of tobacco, tobacco products, and devices for smoking tobacco."

RECOMMENDATIONS:
[ ] be replaced with CS HB141 (Judiciary) [X] the same title
[ ] a new title
[ ] have attached amendment(s)
[ ] do pass
[ ] do not pass
[ ] no recommendation
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of intent

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

APPROVES PREVIOUS: (Date/Dept)
[ ] fiscal note(s) _____
[X] zero fiscal note(s) Revenue 3/3/89 Cri Justice 3/16
[ ] zero fn/analysis _____

SIGNING DO PASS:

SIGNING: (Check approp. column)

	Do Not Pass	No Rec	Amend
Terry Mooter		✓	

Chairman's signature

A M E N D M E N T

OFFERED IN THE HOUSE BY GRUENBERG

TO: CSHB 141(HESS)

Page 1, line 21, before "sells":

Insert "negligently"

HOUSE COMMITTEE REPORT 3/3

(7)
Date Referred: February 3, 1989 FURTHER REFERRALS: JUDICIARY / FINANCE

Date of Committee Action: 3/2/89

The HEALTH, EDUCATION, & SOCIAL SERVICES Committee recommends that: HB 141

HOUSE BILL NO. 141 [LICENSING RETAIL TOBACCO SALES]
"An Act relating to retail sale of tobacco, tobacco products, and devices for smoking tobacco."

[X] be replaced with CSHB 141 (HESS) [ ] the same title [X] a new title

[ ] have attached amendment(s)

[ ] do pass
[ ] do not pass
[ ] no recommendation
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of intent

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

APPROVES PREVIOUS:
[ ] fiscal note(s) published:
_____
[ ] zero fiscal notes(s) published:
_____

SIGNING DO PASS:
Ellis ELLIS
JACKO
GOLL

SIGNING OTHER THAN DO PASS:
(Do Not Pass, No Recommendation, Amend)
Mark Boyer no rec BOYER
Cheri Davis No rec C. DAVIS
GRUENBERG
UT-Furnace no rec FURNACE

Ellis
Chairman's signature

STATE OF ALASKA 1989 LEGISLATIVE SESSION
FISCAL NOTE

REQUEST:	Bill Version: CS HB 141 (HESS)
	Publish Date: 3/3/89
Revision Date:	Agency Affected: Alaska Court System
Title: An act relating to tobacco and products containing tobacco	BRU: Trial Courts
Sponsor: Brown, Menard, Hudson...	Components:
Requestor: Judiciary	

EXPENDITURES/REVENUES: (Thousands of Dollars)						
OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
Personal Services	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Travel	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Contractual	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Supplies	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Equipment	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Land & Structures	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Grants & Claims	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
REVENUE	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
FUNDING: (Thousands of Dollars)						
General Funds	0.0	0.0	0.0	0.0	0.0	0.0
Federal Funds	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Other	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0
POSITIONS:						
Full-time	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Part-time	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .
Temporary	. . . .	. . . .	. . . .	. . . .	. . . .	. . . .

ANALYSIS: (Attach a separate page if necessary)

No fiscal impact.

Prepared by: Jan Strandberg, General Counsel — Phone: 264-8228
Division: Alaska Court System — Date: 03/16/89

Approved by: Arthur H. Snowden, II, Administrative Director — Date: 03/16/89
Agency: Alaska Court System

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

No. 1

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: CSHB 141 (HESS)
PUBLISH DATE: HOUSE 3/3/89

FISCAL NOTE

REQUEST:

Revision Date:
Title: An act relating to tobacco and products containing tobacco
Sponsor: Brown
Requestor: H. E & S

Agency Affected: Revenue
BRU: Income & Excise Audit
Components: Operating

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 90	FY 91	FY 92	FY 93	FY 94	FY 95
OPERATING						
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LANDS & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary)

Prepared By: Steven E. Kettel
Division: Income and Excise Audit
Phone: (907) 465-2320
Date: February 27, 1989

Approved by Commissioner: Hugh Malone
Agency: Department of Revenue
Date: February 27, 1989

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

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: HB 141
PUBLISH DATE: 2/3/89

FISCAL NOTE

REQUEST:

Revision Date:
Title: Licensing Retail Sale Tobacco

Sponsor: Brown
Requestor: (H) HESS

Agency Affected: Revenue
BRU: Income & Excise Audit

Components: Operating

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 90	FY 91	FY 92	FY 93	FY 94	FY 95
OPERATING						
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	5.0	5.0	5.0	5.0	5.0	5.0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LANDS & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	5.0	5.0	5.0	5.0	5.0	5.0
CAPITAL	0	0	0	0	0	0
REVENUE	13.0	13.0	13.0	13.0	13.0	13.0

FUNDING: (Thousands of Dollars)

GENERAL FUND	5.0	5.0	5.0	5.0	5.0	5.0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	5.0	5.0	5.0	5.0	5.0	5.0

POSITIONS:

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

ANALYSIS: See attached.

Prepared By: Steven E. Kettel — Steven E. Kettel
Division: Income and Excise Audit
Phone: (907) 465-2320
Date: February 13, 1989

Approved by Commissioner: Hugh Malone — Kaye Wolfe FOR
Date: February 13, 1989
Agency: Department of Revenue

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

Analysis:

Section 1: The Department of Revenue presently licenses businesses engaged in manufacturing, importing or distributing cigarettes and other tobacco products in the state. The Department's primary function is to collect and distribute the various cigarette taxes from these licenses.

The proposed legislation creates a new class of license holder. For a $10 fee, every person who sells at retail any products containing tobacco must obtain a license. This new category of license holder will not generally be required to pay or collect the cigarette tax under AS 43.50, as the tax is collected at the wholesale/importer level. This new license will be issued annually.

Section 3: This section prohibits the department from issuing a license to any person who has been convicted of a crime for selling tobacco products to a person under 19 years of age (AS 11.71.100).

Section 4: Adds a new section which prohibits the department from issuing a license to a person who has not paid the license fee.

Section 5: Adds a $10 license fee for retailers.

Section 6: Amends statutes to prohibits the transfer of licenses.

Section 7: Adds on additional violation for which the Department may suspend or revoke a license. This violation includes the retail sale of cigarettes to a person under the age of 19. It also provides that a person whose license has been revoked may not sell or permit a tobacco product from being sold.

Recommendations

1. The Department of Revenue currently issues about 100 licenses to importers, manufacturers and distributors that are required to collect and pay over the cigarette tax. In 1988 the Department transferred to the Department of Commerce all licensing functions unrelated to the tax programs DOR administers. We recommend that the committee review whether DCED or DOR is the appropriate agency.

2. We recommend that "retailer" as the term is used in the bill be defined as each retail location or establishment so that a retailer with multiple establishments must license each outlet.

3. We recommend that a new subsection be added to Section 1 of the bill which would prohibit the sale of cigarettes and other tobacco products to unlicensed retailers.

4. It is not clear which agency has primary responsibility for the enforcement of those sections related to the sale of tobacco products to minors. We have not estimated the costs which may be necessary to enforce compliance with AS 11.76.100.

Fiscal Impact

We estimate approximately 1300 retail outlets presently sell cigarettes and other tobacco products in the state. Revenues from license sales will be about $13.0.

The design and production of license application forms, licenses, postage and regulation will cost $5.0.

HB

147

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: CSHB 147 (Jud)
PUBLISH DATE:

FISCAL NOTE

REQUEST:
Revision Date:
Agency Affected: Labor
Title: " An Act relating to unemployment insurance..."
BRU: Employment Security
Sponsor: Rules Committee
Components: Unemployment Insurance
Requestor: House Judiciary

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES	0.0	44.0	44.0	44.0	44.0	44.0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND&STRUCTURES						
GRANTS,CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	44.0	44.0	44.0	44.0	44.0
CAPITAL						
REVENUE	0.0	150.0	150.0	150.0	150.0	150.0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0.0	30.8	30.8	30.8	30.8	30.8
FEDERAL FUNDS						
OTHER	0.0	13.2	13.2	13.2	13.2	13.2
TOTAL	0.0	44.0	44.0	44.0	44.0	44.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

See Attached

Prepared by: Judy Knight, Deputy Director
Phone: 465-271[illegible]
Division: Employment Security Division
Date: 3/23/8[illegible]

Approved by Commissioner: Jim Sampson
Date: 3/23/89
Agency: Department of Labor

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

Fiscal Note Analysis
for
"An Act relating to Unemployment Insurance..."

Three sections of this bill carry expenditure impact; one section will generate revenue.

Section 10 requires the department to adopt regulations to follow the notice and publication provisions of the Unclaimed Property Act. The minimal costs associated with this requirement will be paid for out of currently budgeted federal operating funds.

Section 17 would pay unemployment benefits to individuals who attend school if they became laid off while both attending school and working at least thirty hours a week.

There would be a cost to the State if state employees were laid off and qualified under this bill for unemployment benefits. Under existing law, the State reimburses the Unemployment Insurance Trust Fund for benefits paid to its employees. We estimate that 7 employees a year would qualify for benefits. At an average benefit of $2,000 each, this would equate to $14,000 a year.

Section 25 would change the provisions for dependent allowance. Both parents would receive the allowance if they are unemployed at the same time. We estimate this would cost the State $30,000 per year in benefits to unemployed state employees.

The total impact of these two provisions would be $44,000 per year. However, since approximately 70% of the state operating budget is general funds, we estimate that $30,800 (70% of $44,000) of general fund money would be used while $13,200 would be other funds. Other funds include federal, inter-agency, user fees, etc.

Section 21 of this bill provides for a penalty of 50% to be assessed claimants who are disqualified for fraudulent receipt of UI benefits. When collected, this penalty will be deposited in the General Fund as unrestricted revenue. The calculations used to arrive at estimated anticipated revenues are as follows:

1.	Total detected fraudulent payments made per year	$500,000.
2.	50% penalty on detected fraudulent payments	$250,000.
3.	A 60% collection rate on the established penalties	$150,000.

Assumptions:

1. An effective date for the above sections of July 2, 1989.

2. Detected fraudulent overpayments will remain at about $500,000/year through 1994.

3. The fraud penalty must be collected in cash, therefore we have assumed a 60% collection rate on established penalties. A benefit offset cannot be used because of conflict with the federal law.

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: CSHB 147 (Jud)
PUBLISH DATE:

FISCAL NOTE

REQUEST:
Revision Date:
Agency Affected: Labor
Title: " An Act relating to unemployment insurance..."
BRU: Employment Security
Sponsor: Rules Committee
Components: Unemployment Insurance
Requestor: House Judiciary

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES	0.0	44.0	44.0	44.0	44.0	44.0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND&STRUCTURES						
GRANTS,CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	44.0	44.0	44.0	44.0	44.0
CAPITAL						
REVENUE	0.0	150.0	150.0	150.0	150.0	150.0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0.0	30.8	30.8	30.8	30.8	30.8
FEDERAL FUNDS						
OTHER	0.0	13.2	13.2	13.2	13.2	13.2
TOTAL	0.0	44.0	44.0	44.0	44.0	44.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

See Attached

Prepared by: Judy Knight, Deputy Director
Phone: 465-2712
Division: Employment Security Division
Date: 3/29/89

Approved by Commissioner: Jim Sampson
Date: 3/29/89
Agency: Department of Labor

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

Fiscal Note Analysis
for
"An Act relating to Unemployment Insurance..."

Three sections of this bill carry expenditure impact; one section will generate revenue.

Section 11 requires the department to adopt regulations to follow the notice and publication provisions of the Unclaimed Property Act. The minimal costs associated with this requirement will be paid for out of currently budgeted federal operating funds.

Section 18 would pay unemployment benefits to individuals who attend school if they became laid off while both attending school and working at least thirty hours a week.

There would be a cost to the State if state employees were laid off and qualified under this bill for unemployment benefits. Under existing law, the State reimburses the Unemployment Insurance Trust Fund for benefits paid to its employees. We estimate that 7 employees a year would qualify for benefits. At an average benefit of $2,000 each, this would equate to $14,000 a year.

Section 26 would change the provisions for dependent allowance. Both parents would receive the allowance if they are unemployed at the same time. We estimate this would cost the State $30,000 per year in benefits to ex-state employees.

The total impact of these two provisions would be $44,000 per year. However, since approximately 70% of the state operating budget is general funds, we estimate that $30,800 (70% of $44,000) of general fund money would be used while $13,200 would be other funds. Other funds include federal, inter-agency, user fees, etc.

Section 22 of this bill provides for a penalty of 50% to be assessed claimants who are disqualified for fraudulent receipt of UI benefits. When collected, this penalty will be deposited in the General Fund as unrestricted revenue. The calculations used to arrive at estimated anticipated revenues are as follows:

1.	Total detected fraudulent payments made per year	$500,000.
2.	50% penalty on detected fraudulent payments	$250,000.
3.	A 60% collection rate on the established penalties	$150,000.

Assumptions:

1. An effective date for sections 18, 22, and 26 of July 2, 1989.
2. Detected fraudulent overpayments will remain at about $500,000/year through 1994.
3. The fraud penalty must be collected in cash, therefore we have assumed a 60% collection rate on established penalties. The penalty cannot be collected by reducing a claimants future benefit entitlement due to a conflict with federal law.

HOUSE COMMITTEE REPORT

(7)

Date Referred: February 3, 1989 FURTHER REFERRALS: JUDICIARY, FINANCE

Date of Committee Action: _____

The LABOR & COMMERCE Committee recommends that: HB 147

HOUSE BILL NO. 147 [UNEMPLOYMENT INSURANCE]
"An Act relating to unemployment insurance and unemployment insurance contribution overpayments; establishing a priority for payment; and providing for an effective date."

[ ] be replaced with _____ [ ] the same title [ ] a new title

[ ] have attached amendment(s)

[ ] do pass
[ ] do not pass
[ ] no recommendation
[X] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of intent

ATTACHES NEW FISCAL NOTE(s):

[ ] fiscal impact
[ ] zero fiscal note
[ ] zero with analysis

APPROVES PREVIOUS:

[✓] fiscal note(s) published: 2/3 Labor

[✓] zero fiscal notes(s) published: 2/3 Rev. Taxation

SIGNING DO PASS:

David Donley DONLEY
SPOHNHOLZ
Mark Boyer BOYER

SIGNING OTHER THAN DO PASS:
(Do Not Pass, No Recommendation, Amend)

COLLINS NO REC
Drew M. Lewis NR-LEMAN
GRUENBERG NO REC.

David Donley
Chairman's signature

HOUSE COMMITTEE REPORT

(7)

Date Referred: March 3, 1989 FURTHER REFERRALS: FINANCE

Date of Committee Action: 3/29/89

The JUDICIARY Committee considered: HB 147

HOUSE BILL NO. 147 [UNEMPLOYMENT INSURANCE]
"An Act relating to unemployment insurance and unemployment insurance contribution overpayments; establishing a priority for payment; and providing for an effective date."

RECOMMENDATIONS:
[✓] be replaced with CS HB147 - (Jud) [ ] the same title [✓] a new title
[ ] have attached amendment(s)
[✓] do pass
[ ] do not pass
[ ] no recommendation
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of intent

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

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

SIGNING DO PASS:

SIGNING: (Check approp. column)

	Do Not Pass	No Rec	Amend

Chairman's signature

#1

go0559hEb
Cramer

A M E N D M E N T

OFFERED IN THE HOUSE

TO: CSHB 147(Judiciary)

Page 2, line 2, before "compensation":

Insert "unemployment"

New #2

go0559hEd
Cramer

A M E N D M E N T

OFFERED IN THE HOUSE

TO: CSHB 147(Judiciary)

Page 3, after line 20:

Insert a new bill section to read:

"* Sec. 6. AS 23.20.2[illegible]3(a) is amended to read:

(a) If the department finds that a contribution including interest or penalty on the contribution is delinquent, the department may issue a notice of assessment specifying the amount due and may serve it on the delinquent employer. The notice shall inform the employer of the department's rights under (c) of this section. A peace officer or an authorized representative of the department may serve the notice personally or the department may mail the notice by certified or registered mail with return receipt requested."

Renumber remaining bill sections accordingly.

Page 12, line 13:

Delete "24"

Insert "25"

Page 12, line 14:

Delete "10, 24, and 26"

Insert "11, 25, and 27"

3/28/90

NEW # 3

NEW # 4

go0559hEc
Cramer

A M E N D M E N T

OFFERED IN THE HOUSE

TO: CSHB 147(Judiciary)

Page 3, line 23:

#3 Delete "[PERSONAL]"

Insert "personal"

Page 3, line 24, after "notice":

#4 Insert "as required by (a) of this section"

Page 12, line 16:

Delete "1 - 9, 11 - 23, and 25"

Insert "1 - 10, 12 - 24, and 26"

go0559hEe
Cramer

#5

A M E N D M E N T

OFFERED IN THE HOUSE

TO: CSHB 147(Judiciary)

Page 1, line 26, through page 2, line 7:

Delete all material and insert:

"(k) If an individual who is applying for or participating in a housing assistance program administered by the United States Department of Housing and Urban Development gives authorization, the department shall disclose, to the United States Department of Housing and Urban Development or to representatives of the housing assistance program operating the program, wage information and unemployment compensation information. The authorization shall be made by the individual on a consent form approved by the department. The form shall state the information authorized to be released and require the signature of the individual. In this subsection,

(1) "unemployment compensation information" means whether the individual is receiving, has received, or has applied for unemployment compensation, and the amount of compensation that the individual is receiving or will receive;

(2) "wage information" means the social security number, or numbers if there are more than one, and quarterly wages of an employee, and the name, address, state, and, if known, federal employer identification number of an employer reporting wages under this chapter."

#6

A M E N D M E N T

OFFERED IN THE HOUSE

TO: CSHB 147(Judiciary)

Page 6, line 10:

Delete "] the state share [AMOUNT] of extended benefits"

Insert "THE AMOUNT OF] extended benefits that are not reimbursable by the federal government"

Page 6, lines 21 - 22:

Delete "the state share [ONE-HALF OF THE AMOUNT] of extended benefits"

Insert "[ONE-HALF OF THE AMOUNT OF] extended benefits not reimbursable by the federal government"

Page 7, lines 11 - 12:

Delete "state share [AMOUNT OF ONE-HALF] of extended benefits paid"

Insert "[AMOUNT OF ONE-HALF OF] extended benefits not reimbursable by the federal government paid to individuals"

#7

go0559hEg
Cramer

AMENDMENT

OFFERED IN THE HOUSE

TO: CSHB 147 (Judiciary)

Page 1, line 7, after "overpayments;":

Insert "relating to disclosure of certain wage and unemployment compensation information;"

A M E N D M E N T

TO: CSHB 147 (Judiciary) - Work Draft By: Gott

(1) Page 2, line 2, before "compensation", insert "unemployment".

Add a new section to read:

(2) Sec. __. AS 23.20.205(a) is amended by adding a sentence to read: "The notice shall inform the delinquent employer of the department's rights under AS 23.20.205(c)."

(3) Page 3, line 23, do not delete "personal".

(4) Page 3, line 24, after "notice", insert "in conformity with AS 23.20.205(a)".

A M E N D M E N T

TO: CSHB 147 (Judiciary) - Work Draft

Section 2 is amended to read as follows:

Section 2. AS 23.20.110 is amended by adding a new subsection to read:

(k) If An individual who is applying for or participating in a housing assistance program administered by the United States Department of Housing and Urban Development ~~may~~ authorizes the department shall disclose to the United States Department of Housing and Urban Development or to representatives of the public housing agency operating the program, (1) wage information, and (2) whether the individual is receiving, has received, or has applied for, unemployment compensation, and the amount of compensation that the individual is receiving or will receive. In this subsection "wage information" means the social security number (or numbers if more than one) and quarterly wages of an employee, and the name, address, state, and (when known) federal employer identification number of an employer reporting wages under this chapter. Authorization shall be made by the individual on a signed consent form approved by the department which states the information to be released.

A M E N D M E N T

OFFERED IN THE HOUSE

TO: HB 147

Page 12, lines 27 - 29:

Delete "Wages earned for services performed, but not paid because the employer has filed for bankruptcy,"

Insert "When an employer has filed for bankruptcy, unpaid wages earned for services performed for the employer"

A M E N D M E N T #5

TO: CSHB 147 (Judiciary) - Work Draft

Section 2 is amended to read as follows:

Section 2. AS 23.20.110 is amended by adding a new subsection to read:

(k) An individual who is applying for or participating in a housing assistance program administered by the United States Department of Housing and Urban Development may authorize the department to disclose to the United States Department of Housing and Urban Development and to representatives of the public housing agency operating the program, (1) wage information, and (2) whether the individual is receiving, has received, or has applied for, unemployment compensation, and the amount of compensation that the individual is receiving or will receive. In this subsection "wage information" means the social security number (or numbers if more than one) and quarterly wages of an employee, and the name, address, state, and (when known) federal employer identification number of an employer reporting wages under this chapter. Authorization shall be made by the individual on a signed consent form approved by the department which states the information to be released.

A M E N D M E N T

OFFERED IN THE HOUSE

TO: HB 147

Page 5, after line 4:

Insert a new bill section to read:

"* Sec. 9. AS 23.20.225 is amended by adding a new subsection to read:

(e) The department shall adopt regulations providing for the disposition of excess contributions paid to the unemployment compensation fund under AS 23.20.130. The regulations must be substantially similar to the provisions of AS 34.45.110 - 34.45.780 (Uniform Unclaimed Property Act)."

Renumber remaining bill sections accordingly.

Page 14, line 11:

Delete "24"

Insert "25"

Page 14, line 12:

Delete "24 and 26"

Insert "9, 25, and 27"

Page 14, line 14:

Delete "This Act takes"

Insert "Sections 1 - 8, 10 - 24, and 26 of this Act take"

STEVE COWPER
GOVERNOR

CC
HB 147

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

February 3, 1989

The Honorable Sam Cotten
Speaker of the House
Alaska State Legislature
P.O. Box V
Juneau, AK 99811

Dear Mr. Speaker:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to unemployment insurance and unemployment insurance contribution overpayments. Passage of the bill will bring Alaska's law into conformity with recent amendments of federal law, as well as improve efficiency in the administration of the unemployment insurance program in the state.

Many of the provisions of the bill were in last session's SCS HB 384(L&C), and one, sec. 12, was in last year's CSHB 287(Fin) am. The attached bill contains nine additional sections for your consideration. These are: required sharing of information with federal public housing programs (sec. 2); extension of the Reed Act authorization (sec. 3); a provision for use of private collection agencies for employer contributions (sec. 9); clarification that redetermination of an initial claim applies only to the monetary determination (sec. 14); correction of current law to allow for eligibility under certain conditions while an individual is in certain training programs (sec. 16); restriction of denial of benefits or waiting-week credit for individuals in certain training programs (sec. 17); correction of current law to allow an immediate disqualification for fraudulent act (sec. 18); exempting employer overpayments of contributions for unemployment insurance from the provisions of the Uniform Unclaimed Property Act (retroactive to September 7, 1986) (secs. 24 and 26); and modification of the dependent's allowance by allowing each unemployed parent in the family unit to claim dependent children (repeal of AS 23.20.350(f)(4) and (5); sec. 25).

Many of these changes are detailed and technical in nature. Department of Labor staff will be available to testify before legislative committees to answer any questions that legislators might have. Due to the extensive review of many of the sections of this bill during last session, I am confident that the bill generally is not controversial in nature. Therefore, I urge your prompt and favorable action on this measure.

Sincerely,

Steve Cowper
Governor

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: HB 147
PUBLISH DATE: HOUSE 2/3/89

FISCAL NOTE

REQUEST:

Revision Date:
Agency Affected: Labor
Title: "An Act relating to unemployment insurance..."
BRU: Employment Security
Sponsor: Rules Committee
Components: Unemployment Insurance
Requester: Governor

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 89	FY 90	FY 91	FY 92	FY 93	FY 94
PERSONAL SERVICES	0.0	44.0	44.0	44.0	44.0	44.0
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND&STRUCTURES						
GRANTS,CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	44.0	44.0	44.0	44.0	44.0
CAPITAL						
REVENUE	0.0	150.0	150.0	150.0	150.0	150.0

FUNDING: (Thousands of Dollars)

GENERAL FUND	0.0	30.8	30.8	30.8	30.8	30.8
FEDERAL FUNDS						
OTHER	0.0	13.2	13.2	13.2	13.2	13.2
TOTAL	0.0	44.0	44.0	44.0	44.0	44.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

See Attached

Prepared by: Judy Knight, Deputy Director
Phone: 465-2712
Division: Employment Security Division
Date: 1/13/89

Approved by: Commissioner: Jim Sampson
Date: 1/13/89
Agency: Department of Labor

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

Fiscal Note Analysis
for
"An Act relating to Unemployment Insurance..."

Two sections of this bill carry expenditure impact; one section will generate revenue.

Section 15 would pay unemployment benefits to individuals who attend school if they became laid off while both attending school and working at least thirty hours a week.

There would be a cost to the State if state employees were laid off and qualified under this bill for unemployment benefits. Under existing law, the State reimburses the Unemployment Insurance Trust Fund for benefits paid to its employees. We estimate that 7 employees a year would qualify for benefits. At an average benefit of $2,000 each, this would equate to $14,000 a year.

Section 25 would change the provisions for dependent allowance. Both parents would receive the allowance if they are unemployed at the same time. We estimate this would cost the State $30,000 per year in benefits to unemployed state employees.

The total impact of these two provisions would be $44,000 per year. However, since approximately 70% of the state operating budget is general funds, we estimate that $30,800 (70% of $44,000) of general fund money would be used while $13,200 would be other funds. Other funds include federal, inter-agency, user fees, etc.

Section 19 of this bill provides for a penalty of 50% to be assessed claimants who are disqualified for fraudulent receipt of UI benefits. When collected, this penalty will be deposited in the General Fund as unrestricted revenue. The calculations used to arrive at estimated anticipated revenues are as follows:

1. Total detected fraudulent payments made per year $500,000.
2. 50% penalty on detected fraudulent payments $250,000.
3. A 60% collection rate on the established penalties $150,000.

Assumptions:

1. An effective date for the above sections of July 2, 1989.
2. Detected fraudulent overpayments will remain at about $500,000/year through 1994.
3. The fraud penalty must be collected in cash, therefore we have assumed a 60% collection rate on established penalties. A benefit offset cannot be used because of conflict with the federal law.

No. 2

STATE OF ALASKA
1989 LEGISLATIVE SESSION

BILL VERSION: HB 147
PUBLISH DATE: HOUSE 2/3/89

FISCAL NOTE

REQUEST:

Revision Date: January 13, 1989
Title: Unemployment Insurance

Agency Affected: Revenue
BRU: Income & Excise Audit

Sponsor: Rules Committee
Requestor: Governor

Components:

EXPENDITURES/REVENUES: (Thousands of Dollars)

	FY 90	FY 91	FY 92	FY 93	FY 94	FY 95
OPERATING						
PERSONAL SERVICES	0	0	0		0	0
TRAVEL	0	0	0		0	0
CONTRACTUAL	0	0	0		0	0
SUPPLIES	0	0	0		0	0
EQUIPMENT	0	0	0		0	0
LANDS & STRUCTURES	0	0	0		0	0
GRANTS, CLAIMS	0	0	0		0	0
MISCELLANEOUS	0	0	0		0	0
TOTAL OPERATING	0	0	0		0	0
CAPITAL	0	0	0		0	0
REVENUE	0	0	0		0	0

FUNDING: (Thousands of Dollars)

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

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary)

Prepared By: Steven E. Kettel
Phone: (907) 465-2320
Division: Income and Excise Audit
Date: January 13, 1989

Approved by Commissioner: Hugh Malone for
Date: January 13, 1989
Agency: Revenue

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

Prepared by: Steven E. Kettel
Income and Excise Audit Division
Department of Revenue
January 13, 1989

Fiscal Note Analysis

The uniform unclaimed property act (AS34.45) requires agencies, such as the Department of Labor(DOL), to report and pay over to the Department of Revenue (DOR), all funds which are represented by a valid claim, but where the claimant cannot be located. DOR then advertises the names of the missing claimants and takes other steps to reunite the owner with the funds. DOR holds the funds in trust for the missing owner forever.

This legislation exempts from the reporting requirements of AS34.45 overpayments of unemployment insurance. Employers occasionally overpay the state unemployment insurance contributions and are sent a refund check. If an employer has changed addresses and not notified DOR or the USPS, the check is returned and held by DOL in the unemployment compensation fund under AS23.20.130. This bill will continue DOL practice and remove these funds from the reporting requirements of AS34.45.