ALASKA LEGISLATURE COMMITTEE FILES 1993-1994 8672
7976 HOUSE LABOR & COMMERCE
241

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February 28, 1994
Ref: SAN/cjt #1612

Mr. Jim Burns
Petro Marine
3111 C Suite 500
Anchorage, Alaska 99503

Dear Jim,

Princess Cruises operates 6 cruise vessels in the Alaska cruise trade from June through September each year. Five of these vessels are based in Vancouver and one in San Francisco. Of the 5 Vancouver based vessels, 3 operate 7 day cruises across the Gulf of Alaska between Vancouver and Seward and 2 operate 7 day cruises round trip from Vancouver through the inside passage of Alaska. That San Francisco based vessel operates 10 day round trip cruises to the inside passage of Alaska. Alaska ports of call include Ketchikan, Juneau, Skagway, Sitka and Seward.

We purchase the fuel oil for our ships based upon quality and price. Fuel oil purchased in Vancouver is essentially the same quality as that available in San Francisco, Seattle and Seward. The price differential, due to the Alaska state motor fuel tax is, however significant. The tax of $0.05 per gallon, which is approximately equal to $13.65 per ton, makes it prohibitive to purchase more than the minimum required in Seward to return to Vancouver. Our total requirements for the 1994 Alaska cruises season will be approximately 57,855 tons (15,680,000 gallons) for the 6 vessels. Of this amount we anticipate purchasing approximately 9,450 tons (2,561,000 gallons) in Seward.

We strongly support the proposal to reduce the Alaska state motor fuel tax to $0.01 per gallon. This would make the cost of fuel oil in Alaska competitive with that in Vancouver. This would encourage greater purchase of fuel oil in Alaska.

Very truly yours,

Stephen A. Nielsen

DIVISION OF LEGAL SERVICES

LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101

130 Seward Street, Suite 409
Juneau, Alaska 99801-2105

MEMORANDUM March 10, 1994

SUBJECT: Draft CSHB 453( ), special rate for residual fuel oil under the state motor fuel tax. (Work Order No. 8-LS1357\O)

TO: Representative Gary Davis
Attn: Darin Morgan

FROM: Jack Chenoweth
Legislative Counsel

In this draft, I have reduced the special tax rate's life to five years. That led me to reformat the bill as uncodified law. There really is no way to "sunset" a tax levy clearly without depending upon effective date provisions, and I have gotten very fearful (based on experience) about making too much depend on effective date clauses that subsequently fail to get a two-thirds vote. That is particularly true with respect to a tax provision that already contains a fair number of separate categories imposing different rates of levy. I suggest to you that this is a better way to handle the matter.

I took your reference to "passenger watercraft--cruise ships" and gave it a definition. The "are principally used for that purpose" language is intended to separate the cruise ships from the passenger-carrying freighters. To the best of my knowledge, the "interstate or international commerce" language fairly targets "cruise ships."

JBC:gc
94-197.glc

Enclosure

8-LS1357\O
Chenoweth
3/9/94

CS FOR HOUSE BILL NO. 453( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

EIGHTEENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVE G. DAVIS

A BILL

FOR AN ACT ENTITLED

"An Act establishing, for purposes of the levy and collection of the motor fuel tax and for a limited period, a different tax levy on residual fuel oil used in and on certain watercraft; and providing for an effective date."

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

* Section 1. (a) For purposes of calculating the tax due under AS 43.40,

(1) notwithstanding AS 43.40.010(a)(2), on and after the effective date of this Act and until January 1, 2000, the rate of the tax that is levied and collected on residual fuel oil sold or transferred in the state and used in and on passenger watercraft is 1.5 cents a gallon;

(2) notwithstanding AS 43.40.010(b)(2), on and after the effective date of this Act and until January 1, 2000, the rate of the tax that is levied and collected on residual fuel oil consumed by a user and used in and on passenger watercraft is 1.5 cents a gallon.

(b) In (a) of this section,

(1) "passenger watercraft" means watercraft that are capable of carrying

passengers for hire and that are principally used for that purpose in interstate or international commerce;

(2) "residual fuel oil" means the heavy refined hydrocarbon that is the residue from crude oil after refined petroleum products have been extracted by the refining process and that may be consumed or used only when sufficient heat is provided to the oil to reduce its viscosity and to give it fluid properties sufficient for pumping and combustion.

* Sec. 2. This Act takes effect immediately under AS 01.10.070(c).

House Bill No. 453
Statement of Legislative Intent
March 8, 1994

H.B. 453 lowers the tax rate on marine bunker fuel from $0.05 to $0.015 per gallon in an effort to establish a new Alaska market. Over 98.5% of bunker fuel produced in Alaska is exported to Japan or the West Coast from Tesoro's Kenai refinery. The $0.05 per gallon tax prevents Alaska from servicing the cruise ship business, as bunker fuel is available at other locations at lower prices.

Total Bunker Sales: Impact on Bill's Financial Neutrality

A critical factor evaluated has been whether or not there will be sufficient sales volume increases to offset the lower tax rate. There were 12 million gallons of taxable bunker fuel sold during 1993 in Alaska. Tesoro accounted for 2/3's this amount, using the product as bunker fuel for its tankers, and for sales to other transport tankers. Alaska's 1993 sales generated approximately $600,000 in marine bunker fuel taxes. A reduction to $0.01 would have reduced the tax income by $480,000 which translates into a need for 50 Million more gallons of product sales to retain revenue neutrality. (Note: The total in-state bunker fuel sales in 1993 represent only 1.47% of the total produced in-state. Source: Tesoro Alaska Petroleum Company).

Opportunity for New Market Development

Petro Marine Services has projected an expanded bunker fuel market from the cruise ship industry if the current tax is lowered to $0.015. The expected volumes are sufficient to offset the lower tax rate provided by this bill making it revenue neutral as it relates to the tourist ship business.

Sale of Bunker to Tanker Ships

During the 5 years (189-1993) years, the average usage was 5.8 MM gallons ranging from as little as 1 MM gallons (1990) to 7.1 MM gallons (1991). Based on the five year average, the lower tax rate of $0.015 would require an additional 15 Million or more gallons of bunker sales per year to remain revenue neutral. Tesoro does not expect to experience such an increase, even if the tax rate is reduced. This would be equivalent to approximately $225,000 in lost taxes from bunkering tankers not in the cruise ship category. This does not take into account the economic benefit from the 12 new seasonal jobs created; sales and property taxes; a major investment in facilities at Seward; and increased freight transportation business in the region. It is unclear whether these benefits will offset the loss in revenue from a reduction in tax rates to the tanker bunkering market.

Legislative Intent

If HB 453 is enacted with a tax reduction applicable only to cruise ships, a bill sunset is expected. It is the intent of the legislature to reexamine this issue prior to the law's sunset to determine if the sales volumes have met those projected, and to evaluate the extension of the lower tax rate to the remaining bunker fuel customers, subject to identification of offsetting tax revenue, and or other tangible benefits, generated by the total bunker fuel sales to tour ships, tankers, and other users.

ALASKA TRUCKING ASSOCIATION, INC.

3443 Minnesota Drive • Anchorage, Alaska 99503 • PHONE (907) 276-1149 • FAX (907) 274-1946

March 9, 1994

ALASKA TRUCKING ASSOCIATION POSITION PAPER

TO: Representative Gary Davis
and
Members of the Legislature

FROM: Frank J. Dillon, Executive Director Alaska Trucking Association, Inc.

RE: SUPPORT OF H.B. 453 AND S.B. 327

On behalf of the 300-member companies of Alaska Trucking Association, Inc. I ask your support for the passage of House Bill 453 and corresponding Senate Bill 327.

H.B. 453 entitled "An Act Amending Motor Fuel Tax To Establish A Different Levee on the Residual Fuel Oil Used In and On Water Craft and Providing For An Effective Date." What this bill basically does is reduce the tax on heavy bunker fuel from 5-cents a gallon to 1-cent a gallon.

The reason this legislation is needed is to bring the bunker fuel price down so that we can compete in selling fuel to cruise ships which visit Alaska ports. Currently, virtually all the fuel burned in Alaska's waters is purchased in British Columbia. Refiners, who as part of the refining process are left with the heavy bunker fuel currently have little or no market in Alaska for that fuel.

ATA feels that this is exactly the sort of business risk and economic endeavor the state of Alaska should be involved in. We recognize there are risks involved in the worse case scenario the state could lose revenue if fuel sales do not increase to offset the reduction in the tax rate. We believe this is a legitimate and reasonable business risk for the state of Alaska to take in order to expand Alaska's job base and economic activity.

In the trucking area alone we believe that the increased sales activity will result in 15-25 new and good paying jobs in Alaska's trucking industry.

Please move this bill. Please support this bill. It's a good piece of legislation.

PETRO MARINE SERVICES
Petroleum Marketing to the Marine Industry

DATE: March 09, 1994

TO: Ray Gillespie

FROM: D.R. Lindsey

SUBJECT: Bunker Fuel Tax Amendment Statement

Good afternoon. My name is Dale Lindsey and I am the President of Harbor Enterprises, Inc., the corporate entity for our trade name affiliates, Petro Marine Services, Alaska Oil Sales and Shoreside Petroleum. We are one of the oldest petroleum marketing and distribution firms in Alaska and are headquartered in Seward.

With specific reference to pending Senate Bill No. 327 which, if enacted, will reduce the state motor fuel tax rate from $0.05 (five cents) to $0.015 (one and one half cents) per gallon on sales of marine residual fuel oil into passenger bearing cruise vessels, this proposed legislation corrects an unforeseen inequity that was created when the current Alaska Motor Fuel Tax Statute became law in 1972. Twenty two years ago there was no market for this heavy viscous black fuel which is a low end by-product derived from refining crude oil to produce diesel fuel, jet fuel, heating fuels and gasolines.

Tesoro Alaska Petroleum Company operates a refinery at Nikiski and is the only in-state producer of this particular product. Tesoro is also the only refinery operating in Alaska that does not benefit from being able to re-inject their left over residual oil back into the Trans-Alaska Pipeline system. Historically Tesoro has been at an economic disadvantage in that they have had to literally "dump" this residual product on primarily foreign markets at a price substantially less than their base crude cost. In addition to the financial hardship this has caused Tesoro one could legitimately assume the Alaskan consumer is subsidizing the disposition of this product through paying a higher price for distillate fuel and gasolines.

In assessing the potential market for 1994 and beyond, Jim Burns our Senior Vice President/Marketing believes that there may well be an opportunity to sell up to 20,000,000 gallons of this product to an increasing number of cruise line vessels that have committed to berthing at the Alaska Railroad Dock in Seward during the 120 day tourist season window.

Post Office Box 389 • Seward, Alaska 99664 Phone (907) 224-3190 • Fax (907) 224-3937

In 1993 our marketing entity Petro Marine Services negotiated a 3-year "pilot" bunker supply agreement with Princess Lines. Of consequence, a significant portion of our capital dollars were allocated to design and construct modifications at the Seward Plant in order to deliver this difficult to handle fuel and to accommodate the Princess vessels. By virtue of our first year's performance, I am pleased to convey that our company has developed a good, mutually beneficial relationship with Princess Lines. And although the 5 cent per gallon state tax made our selling price proportionally higher than that of the competing Canadian Port of Vancouver, our service was deemed excellent and our product quality superior. However, the future of our contract with Princess along with securing commitments from other cruise line companies is subject to the economic requirement of our being reasonably price competitive. Accordingly, for us to further develop and promote this business we need a more realistic tax rate to enable us to compete with Vancouver and other West Coast ports.

I, therefore, respectfully urge you to correct the tax inequity created 22 years ago by reducing the tax applicable only to this low value "gunk" fuel. Your support for this endeavor will enable Petro Marine Services to develop the residual marine bunker business into a win-win situation that will accrue future benefits to the cruise industry, Tesoro, Petro Marine and to the State of Alaska.

I thank you for your time and I sincerely appreciate your consideration of this request.

HB

458

8-LS1440\E
Lauterbach
2/24/94

CS FOR HOUSE BILL NO. 458( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

EIGHTEENTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVE DAVIES

A BILL

FOR AN ACT ENTITLED

"An Act relating to certain licenses and applications for licenses for persons who are not in substantial compliance with support orders or payment schedules for child support."

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

* Section 1. AS 25.27 is amended by adding a new section to read:

Sec. 25.27.229. ADVERSE ACTION AGAINST DELINQUENT OBLIGOR'S OCCUPATIONAL LICENSE. (a) The agency shall compile and maintain a list of obligors who are not in substantial compliance with a support order. The list must include the names, social security numbers, and last known addresses of the obligors. The list shall be updated by the agency on a monthly basis.

(b) The agency shall, on a monthly basis, provide a copy of the list to each licensing entity. A licensing entity subject to this section shall implement procedures to accept and process the list. Notwithstanding any other law to the contrary, a licensing entity may not issue or renew a license for a person on the list except as

provided in this section.

(c) Promptly after receiving the list from the agency and before issuing or renewing a license, a licensing entity shall determine whether the applicant is on the most recent list provided by the agency. If the applicant is on the list, the licensing entity shall immediately serve notice under (e) of this section of the licensing entity's intent to withhold issuance or renewal of the license. The notice shall be made personally or by mail to the applicant's last known mailing address on file with the licensing entity.

(d) A licensing entity shall issue a temporary license valid for a period of 150 days to an applicant whose name is on the list if the applicant is otherwise eligible for a license. The temporary license may not be extended. Only one temporary license may be issued during a regular license term and its validity shall coincide with the first 150 days of that license term. A license for the full or remainder of the license term may be issued or renewed only upon compliance with this section. If a license or application is denied under this section, funds paid by the applicant or licensee may not be refunded by the licensing entity.

(e) Notices for use under (c) of this section shall be developed by each licensing entity under guidelines provided by the agency and are subject to approval by the agency. The notice must include the address and telephone number of the agency and shall emphasize the necessity of obtaining a release from the agency as a condition for the issuance or renewal of a license. The notice must inform the applicant that the licensing entity shall issue a temporary license for 150 calendar days under (d) of this section if the applicant is otherwise eligible and that, upon expiration of that time period, the license will be denied unless the licensing entity has received a release from the agency. The notice must also inform the applicant that, if a license or application is denied under this section, funds paid by the applicant will not be refunded by the licensing entity. The agency shall also develop a form that the applicant may use to request a review by the agency. A copy of this form shall be included with each notice sent under this subsection.

(f) The agency shall establish review procedures consistent with this section to allow an applicant to have the underlying arrearage and relevant defenses

investigated, to provide an applicant information on the process of obtaining a modification of a support order, or to provide an applicant assistance in the establishment of a payment schedule on arrearages if the circumstances warrant.

(g) If the applicant wishes to challenge being included on the list, the applicant shall submit to the agency a written request for review within 30 days after receiving the notice under (c) of this section by using the form developed under (e) of this section. The agency shall inform the applicant in writing of findings made upon completion of the review. The agency shall immediately send a release to the appropriate licensing entity and the applicant if any of the following conditions is met:

(1) the applicant is found to be in substantial compliance with each support order applicable to the applicant or has negotiated an agreement with the agency for a payment schedule on arrearages and is in substantial compliance with the negotiated agreement; if the applicant fails to be in substantial compliance with an agreement negotiated under this paragraph, the agency shall send to the appropriate licensing entity a revocation of any release previously sent to the entity for that applicant;

(2) the applicant has submitted a timely request for review to the agency, but the agency will be unable to complete the review and send notice of findings to the applicant in sufficient time for the applicant to file a timely request for judicial relief within the 150-day period during which the applicant's temporary license is valid; this paragraph applies only if the delay in completing the review process is not the result of the applicant's failure to act in a reasonable, timely, and diligent manner upon receiving notice from the licensing entity that the applicant's name is on the list;

(3) the applicant has, within 30 days after receiving the agency's findings following a request for review under (2) of this section, filed and served a request for judicial relief under this section, but a resolution of that relief will not be made within the 150-day period of the temporary license; this paragraph applies only if the delay in completing the judicial relief process is not the result of the applicant's failure to act in a reasonable, timely, and diligent manner upon receiving the agency's notice of findings;

(4) the applicant has obtained a judicial finding of substantial compliance.

(h) An applicant is required to act with diligence in responding to notices from the licensing entity and the agency with the recognition that the temporary license will lapse after 150 days and that the agency and, where appropriate, the court must have time to act within that period. An applicant's delay in acting without good cause, that directly results in the inability of the agency to complete a review of the applicant's request or the court to hear the request for judicial relief within the 150-day period does not constitute the diligence required under this section that would justify the issuance of a release.

(i) Except as otherwise provided in this section, the agency may not issue a release if the applicant is not in substantial compliance with the order for support or is not in substantial compliance with an agreement negotiated under (g)(1) of this section. The agency shall notify the applicant in writing that the applicant may request any or all of the following: (1) judicial relief from the agency's decision not to issue a release or the agency's decision to revoke a release under (g)(1) of this section; (2) a judicial determination of substantial compliance; (3) a modification of the support order. The notice must also contain the name and address of the court in which the applicant may file the request for relief and inform the applicant that the applicant's name shall remain on the list if the applicant does not request judicial relief within 30 days after receiving the notice. The applicant shall comply with all statutes and rules of court implementing this section. This section does not limit an applicant's authority under other law to file an order to show cause or notice of motion to modify a support order or to fix a payment schedule on arrearages accruing under a support order or to obtain a court finding of substantial compliance with a support order.

(j) A request for judicial relief from the agency's decision must state the grounds or which relief is requested and the judicial action shall be limited to those stated grounds. The court shall hold an evidentiary hearing within 20 calendar days of the filing of the request for relief. The court's decision shall be limited to a determination of each of the following issues:

(1) whether there is a support order or a payment schedule on

arrearages;

(2) whether the petitioner is the obligor covered by the support order; and

(3) whether the obligor is in substantial compliance with the support order or payment schedule.

(k) The request for judicial relief shall be served by the applicant upon the agency within seven calendar days of the filing of the request.

(l) If the court finds that the obligor is in substantial compliance with the support order or payment schedule, the agency shall immediately send a release under (g) of this section to the appropriate licensing entity and the applicant.

(m) When the obligor is in substantial compliance with a support order or payment schedule, the agency shall mail to the applicant and the appropriate licensing entity a release stating that the applicant is in substantial compliance. The receipt of a release shall serve to notify the applicant and the licensing entity that, for the purposes of this section, the applicant is in substantial compliance with the support order or payment schedule unless the agency, under (a) of this section, certifies subsequent to the issuance of a release that the applicant is once again not in substantial compliance with a support order or payment schedule.

(n) The agency may enter into interagency agreements with the state agencies that have responsibility for the administration of licensing entities as necessary to implement this section to the extent that it is cost effective to implement the interagency agreements. The agreements shall provide for the receipt by the other state agencies and licensing entities of federal funds to cover that portion of costs allowable in federal law and regulation and incurred by the state agencies and licensing entities in implementing this section.

(o) Notwithstanding any other provision of law, the licensing entities subject to this section may levy a surcharge on a fee collected to cover the costs of implementing and administering this section.

(p) The process described in (g) of this section is the sole administrative remedy for contesting the issuance to the applicant of a temporary license or the denial of a license under this section. The procedures specified in AS 44.62.330 - 44.62.630

(Administrative Procedure Act) do not apply to the denial or failure to issue or renew a license under this section.

(q) The agency and licensing entities, as appropriate, shall adopt regulations necessary to implement this section.

(r) The release or other use of information received by a licensing entity under this section, except as authorized in this section, is punishable as a misdemeanor.

(s) In this section,

(1) "applicant" means a person applying for issuance or renewal of a license;

(2) "license" means a license, certificate, permit, registration, or other authorization that may be acquired from a state agency to perform an occupation, including the following:

(A) license relating to boxing or wrestling under AS 05.10;

(B) authorization to perform an occupation regulated under AS 08;

(C) teacher certificate under AS 14.20;

(D) commercial fishing license under AS 16.05.480;

(E) vessel license under AS 16.05.490 or 16.05.530;

(F) entry permit or interim use permit under AS 16.43;

(G) authorization under AS 18.08 to perform emergency medical services;

(H) asbestos worker certification under AS 18.31;

(I) boiler operator's license under AS 18.60.395;

(J) certificate of fitness under AS 18.62;

(K) hazardous painting certification under AS 18.63;

(L) security guard license under AS 18.65.400 - 18.65.490;

(M) license relating to insurance under AS 21.27;

(N) employment agency permit under AS 23.15.330 - 23.15.520;

(O) drivers' license or endorsement to operate a commercial motor vehicle or school bus under AS 28.15;

(P) business license under AS 43.70;

(Q) registration as a broker-dealer, agent, or investment adviser under AS 45.55.030;

(R) certification as a pesticide applicator under AS 46.03.320;

(S) certification as a storage tank worker or contractor under AS 46.03.375;

(T) certification as a water and wastewater works operator under AS 46.30; and

(U) license to operate a facility under AS 47.35;

(3) "licensee" means a person holding a license or applying to renew a license;

(4) "licensing entity" means the state agency that issues or renews a license; in the case of a license issued or renewed by the Department of Commerce and Economic Development after an applicant's qualifications are determined by another agency, "licensing entity" means the department;

(5) "list" means the list of obligors compiled and maintained under (a) of this section;

(6) "substantial compliance with a support order or payment schedule" means that, with respect to a support order or a negotiated payment schedule under (g) of this section, the obligor has no more than $2,500 past due and has made at least one payment or partial payment in the past 12 months.

* Sec. 2. REPORT. (a) In furtherance of the public policy of increasing child support enforcement and collections, on or before November 1, 1996, the child support enforcement agency shall make a report to the legislature and the governor based on data collected by the licensing entities and the agency in a format prescribed by the agency. The report must contain

(1) the number of delinquent obligors on the list maintained by the agency under AS 25.27.229;

(2) the number of delinquent obligors who also were applicants or licensees subject to AS 25.27.229;

(3) the number of new licenses and renewals that were delayed and temporary licenses issued subject to AS 25.27.229 and the number of new licenses and renewals granted

following receipt by licensing entities of releases under AS 25.27.229 by May 1, 1996; and

(4) the costs incurred in the implementation and enforcement of AS 25.27.229.

(b) A licensing entity receiving an inquiry from the agency under (a) of this section shall cooperate with the agency. When queried as to the licensed status of an applicant who has had a license denied under AS 25.27.229 or has been granted a temporary license under AS 25.27.229, the licensing entity shall respond only that the license was denied or the temporary license was issued.

Alaska State Legislature

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FAX (907) 465-3787

Representative John Davies
District 29

3/30/94

HB 458: Child Support Nonpayment/Licensing Ban
Sectional Analysis

Section 1

Subsection (a)

Requires agency (CSED) to maintain, on a monthly basis, an updated certified list of obligors who are not in substantial compliance with a support order.

Subsection (b)

Requires agency to compile above lists and provide copies, within 30 days, to each licensing entity. Licensing entities may not issue or renew a license to a person on the list, except as provided by law.

Subsection (c)

Requires agency to compare applicant to most recent list and, if found, immediately notify the applicant of the licensing entity's intent to withhold issuance or renewal of the license.

Subsection (d)

Requires licensing entity to issues a 150-day temporary permit if applicant otherwise qualified. No extensions or additional temporary permits are allowed.

Subsection (e)

Provides notification guidelines.

Subsection (f)

Requires agency to establish review procedures so that an applicant may have his/her case investigated, modify an order, or receive assistance in establishing a payment schedule.

Subsection (g)

Provides guidelines for applicant that challenges being included on the list. Requires district attorney to send a release to licensing entity if:

(1) applicant is found to be in compliance or negotiates an agreement;
(2) agency is too slow, through no fault of the applicant, in responding so that applicant is unable to request judicial reliefbefore expiration of temporary license;
(3) request for judicial relief, through no fault of the applicant, will not be resolved before expiration of the temporary license; or
(4) applicant obtains judicial finding of compliance.

Subsection (h)

Requires applicant to act diligently in responding to notices. Applicant's delay in acting, without good cause, does not justify issuance of a release.

Subsection (i)

Does not allow agency to issue a release except as provided in this section. Requires agency to notify applicant of options.

Subsection (j)

Provides grounds on which judicial relief may be requested.

Subsection (k)

Requires that applicant provide a copy of a request for judicial relief to the agency within seven days of filing the request.

Subsection (l)

Requires agency to issue a release if obligor is found to be in compliance.

Subsection (m)

Provides guidelines for handling a release.

Subsection (n)

Allows agency to delegate its duties where appropriate.

Subsection (o)

Allows licensing entities to levy surcharges to cover costs of this section.

Subsection (p)

Subsection (g) is the only administrative remedy available. Administrative Procedure Act does not apply.

Subsection (q)

Requires appropriate agencies and departments to adopt regulations to implement this section.

Subsection (r)

Establishes unauthorized release of information received under this section as a misdemeanor.

Subsection (s)

Definitions.

Section 2

Requires the agency to submit a report to the legislature by 11/1/96 providing statistics to demonstrate the effectiveness of this measure.

Alaska State Legislature

COMMITTEES
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Representative John Davies
District 29

3/16/94

HB 458: Child Support Nonpayment/Licensing Ban Sponsor Statement

Failure to comply with child support orders can often be dealt with under current law by garnishing the obligor's wages. However, even with the existing collection methods, the Child Support Enforcement Division estimates that there are still $330 million in uncollected back child support.

HB 458 would provide a means to collect some of these old debts from self-employed obligors who currently are not subject to wage withholdings. Self-employed individuals often hold an occupational, trade, or professional license or certificate and usually a business license. HB 458 would provide for denial of issuance or renewal of a license or certificate when an applicant is $2500 or one year behind on payments for a child support order or judgment. A temporary license would be issued to allow the applicant the opportunity to contest the grounds for denial or to achieve compliance. This bill only addresses individuals applying for a new license or certificate or for a renewal. It does not provide for revocation of existing licenses.

The U.S. Commission on Interstate Child Support recommended in a 1992 report to Congress that licensing agencies "not issue a license to anyone who is wanted for failing to appear in a child support or parentage case as a result of indifference to a court order or summons...[or]...is delinquent in his or her support duty..." The report further indicates that just as states often require a clean criminal record before issuing a license, they should expect applicants to comply with other laws and court orders.

Fifteen other states have passed similar legislation in recent years. Early reviews indicate that compliance has increased after implementation and very few licenses or certificates are actually denied.

STATE RESPONSES ON LICENSING RESTRICTIONS/REVOCATIONS

The following information was provided by States and OCSE Regional Offices.

1. When did your State implement the licensing restrictions/revocations for child support purposes?

AZ - AZ implemented licensing restrictions incrementally. Some licenses were covered in 1990 legislation. The scope was widened to include additional licenses in 1993.
CA - November 1, 1992
ME - June 30, 1993
MN - In 1991, 24 occupational licensing boards were covered. In 1993, all boards and State agencies that issue professional licenses were added to the statute.
PA - September 2, 1993
SD - November 1, 1993
VT - October 1, 1990

2. What licenses are covered by this process?

AZ - professional, business, trade, and sporting licenses
CA - commercial drivers, professional, business, trade, and commercial sporting licenses
ME - drivers and occupational licenses
MN - all licenses issued by State agencies and occupational licensing boards
PA - all professional and trade licenses
SD - drivers licenses and any State regulated professional license
VT - any license, certification or registration issued by an agency to conduct a trade or business, including a license to practice a profession or occupation

3. For which child support enforcement functions do you restrict/revoke licenses?

AZ - When taking a noncustodial parent to court for contempt, AZ automatically requests that the court refer the case to the appropriate licensing board for revocation of the license or for placing the licensee on probation.
CA - location of obligors to enforce orders
ME - Revocation is available for nonpayment of current support, failure to make payments on arrearages, and

failure to provide health insurance coverage.
PA - to enforce nonpaying orders
MN - Licenses can only be suspended or revoked by a court order which finds the obligor in arrears.
SD - enforcement when there is an accumulated arrearage of $1,000 or more
VT - location of obligors to enforce orders

4. Please provide any statistics and/or anecdotal information available for each of the functions referenced in #3 above.

AZ - Due to lack of automation, no statistics are kept. AZ did revoke one psychologist's license.
CA - From July to September 1993, 3,004 obligors were identified as holding licenses from participating State boards. During this period, payment agreements were successfully negotiated with 1,067 obligors. CA allows 5 months for payment agreements to be negotiated and the license restriction/revocation to be released.
ME - none
MN - The statute has not been used much except as a threat.
PA - Procedures being developed will focus on enforcement.
SD - none
VT - VT does not track collections attributable to license revocation.

5. What have been the costs associated with implementation of licensing restrictions/revocations?

AZ - No statistics are kept. However, start-up costs were minimal because the process was incorporated into the contempt referral process. The most time was spent revising the pleadings that were filed with the court.
CA - From January 1 through June 30, 1993, operating costs for California's State Licensing Match System were $425,684.
MN - none
ME - No data or estimates are available. However, costs incurred are far less than the total collected to date.
PA - staff time and ADP development
SD - No data available. However, there was considerable computer programming done and a paralegal was hired to negotiate with obligors.
VT - none

6. What child support collections have resulted from the licensing initiative?

AZ - No statistics are available.

CA - Due to the nature of this program, it is not possible to clearly identify the collections that it generates. However, Stanislaus County averages $1,538 in collections per license match. Statewide, CA estimates that collections average $1,000 to $1,200 per match.
ME - Since August 2 1993, over 7,000 absent parents have paid $4.7 million under this new program.
MN - unknown
PA - Although a couple of local PA courts have issued license revocation orders, there's no collection data yet.
SD - In early November, approximately 10,600 notices were sent to obligors with a $1,000 arrearage. Approximately 200 repayment agreements have been arranged and 70 lump sum payments received totaling approximately $200,000.
VT - VT does not track collections based on licensing.

7. What other benefits have resulted from licensing restrictions/revocations?

AZ - IV-D attorneys have indicated that the threat of referral to the professional's licensing board has been a great deterrent and that they have seen a large increase in cooperation from licensed professionals.
CA - The licensing match has provided additional information on absent parents' business licenses and help in location.
ME - IV-D sent notices to delinquent obligors about possible license revocation. Feedback from these notices yielded a tremendous amount of current information on location, income, assets, etc. Many obligors who had never paid or been located responded by calling, appearing at local offices, and sending money.
MN - unknown
PA - Just the news about this technique has caused some obligors to come forward.
SD - This got the obligor's attention. It is a very effective lever and good publicity.
VT - The existence of this law may have provided an incentive for obligors to keep current in their monthly child support obligation.

8. What problems have you encountered in implementing license restrictions/revocations?

AZ - Due to the lack of automation, both at IV-D and at the licensing board level, it is not easy to determine whether or not an individual has a license covered by this provision.

CA - The principal problem has been in retrofitting the system design to accommodate each licensing agency.
ME - The main problem was delays in developing and implementing the programs for the automated system.
MN - none
PA - In PA, the problem is the large number of agencies that issue licenses; there are 27 issuing agencies, boards, and commissions at the State level. Some licenses are also issued by the county government.
SD - One problem was coordination among all affected agencies, especially the courts. (In SD, new payment agreements must be ratified by the court.) A second problem concerned payors who were more than $1,000 in arrears but who were currently paying under an old court order. Under this program, all cases with an arrearage of $1,000 or more are re-reviewed and sometimes updated. This process angered people who were currently paying on their arrearage.
VT - Vermont's system requires that applicants for licenses complete a self-attesting form about whether or not they have a child support obligation. Currently there is no method of verifying this information.

9. Any other comments of general interest or of interest to other States working in this area?

AZ - none
CA - California's State Licensing Match System has been an effective enforcement tool. They recommend their system to other States and are willing to assist other States when requested.
ME - Opponents of the law in the State legislature have introduced a bill to repeal the law. The Governor has publicly stated that he will veto the bill if it passes.
MN - MN recommends that States enact legislation like California's and that the process be administrative rather than require a court order.
PA - PA identified three main issues. First, one must ensure timely reinstatement of a revoked license. Second, one must have due process protections to also ensure that the right person's license is being revoked. Third, keep the process as simple and straight forward as possible.
SD - This is a very effective tool.
VT - none

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. HB 458

Revision Date: _____
Title: An Act relating to certain licenses and applications for licenses.
Sponsor: Representative Davies
Requestor: Representative Davies

Department Affected: Education
BRU: Executive Administration
Component: Teacher Certification

COMPONENT SERIAL NO. 1240

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL SERVICES	31.6	31.6	31.6	31.6	31.6	31.6
TRAVEL	2.0					
CONTRACTUAL	1.0					
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	34.6	31.6	31.6	31.6	31.6	31.6
CAPITAL						
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	34.6	31.6	31.6	31.6	31.6	31.6
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL						

POSITIONS:

FULL-TIME	1					
PART-TIME						
TEMPORARY						

Estimate of current year (FY94) impact: $ _____

ANALYSIS: (Attach a separate page if necessary.)
HB 458 would require the Department of Education, Teacher Certification Office to compare each initial certificate applicant and renewal applicant received daily against a consolidated list of persons in noncompliance provided monthly by the Department of Revenue. The department would need to fill the vacant Clerk II position that processes the Teacher Certification mail as this is the positon that handles each application. Past experience indicates that two lists, a alpha list and a list by social security number would be most accurate. If two lists were provided to the department errors caused by name changes or incorrect social security numbers would be reduced. HB 458 would also require the State Board to adopt regulations and there would be related travel and advertising costs. See attached for further cost breakdown. Teacher Certification staff would be involved in drafting department regulations.

Prepared by: Christine Niemi Christine Niemi Phone: 465-2857
Division: Administrative Services Date: April 7,1994

Approved by Commissioner: _____ Jerry Covey
Agency: Education Date: 4-7-94

FISCAL NOTE for HB 458

	Amount	Description
Personal Services	$31,600	1 FTE Teacher Certification Clerk II.
Travel	$2,000	Costs related to adoption of regulations.
Contractual	$1,000	Costs related to advertising for adoption of regulations.
Total	$34,600	

HB

459

HOUSE COMMITTEE REPORT

(7)

Date Referred: February 9, 1994 FURTHER REFERRALS: State Affairs
Judiciary

Date of Committee Action: 2/22/94

The LABOR AND COMMERCE Committee considered: HB 459

HOUSE BILL NO. 459 DAMAGES & ATTY FEES FOR UNPAID WAGES

"An Act relating to liquidated damages and attorney fees for minimum wage and overtime compensation claims."

RECOMMENDATIONS: [ ] the same title
be repiaced with _____ [ ] a new title

[ ] have attached amendments(s)
[ ] do pass
[ ] do not pass
[ ] no recommendations
[X] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept) APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal impact _____ [ ] fiscal note(s) _____

[X] zero fiscal note LABOR _____ [ ] zero fiscal note(s) _____

SIGNING DO PASS	*DP*	*OTHER RECOMMENDATIONS*	*DNP*	*NR*	*AM*
Brian D. Porter	✓	J. Sutton		✓	
[illegible] DS	✓	W. F. Williams		✓	
[illegible]	✓	[illegible]		✓	
		Bill Hudson		✓	

Bill Hudson
CHAIRMAN'S SIGNATURE

*Sec. 3. AS 23.10.110 is amended by adding new subsections to read:

(d) In an action under (a) of this section to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, if the employee and the employer have signed a written agreement and the Department has issued a certificate approving the agreement as not in violation of AS 23.10.050-23.150, the employer is not subject to an award of liquidated damages under (a) of this section.

(e) The commissioner may supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under AS 23.10.060 or 23.10.065, and the agreement of any employee to accept such payment shall, upon payment in full, constitute a waiver by such employee of any right he or she may have under AS 23.10.060 or 23.10.065 to such unpaid minimum wages of overtime compensation and an additional equal amount as liquidated damages.

nation ignores this distinction between attorney's fees and compensation, in effect creating a new definition of "compensation." Such a construction effectively renders meaningless the statute's distinction between "compensation" and attorney's fees, in violation of the rule that a "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Libby v. City of Dillingham*, 612 P.2d 33, 43 (Alaska 1980) (Rabinowitz, J., concurring), citing 2A Sands, *Sutherland Statutory Construction*, § 46.06, at 63 (4th ed. 1973).

The purpose of AS 23.30.155(j) is to prevent a claimant from retaining funds he is not entitled to, while providing a reimbursement mechanism which softens the financial burden on claimants who have been overpaid. This framework is inapplicable to cases involving an employer's payment of attorney's fees to the employee's attorney during the pendency of a workers' compensation appeal which is ultimately resolved in favor of the employer. The Act's generous legal rate schedule was designed to account for the contingent nature of recovery in workers' compensation cases.[1] The majority's desire to compensate Croft for his efforts in this case is thus misplaced; Croft is overcompensated for the workers' compensation cases which he wins.

If the legislature *had* intended to provide a statutory mechanism for repaying the overpayment of attorney's fees, I am puzzled why it would have chosen the gradual repayment mechanism provided by AS 23.30.155(j). Unlike the injured claimants whom the repayment mechanism is designed to protect, attorneys are not often in such dire financial circumstances that policy dictates gradual repayment of overpayments.

Instead of deviating from the mandates of the Act's language and purpose, I would hold that the overpayments received by an attorney in a workers' compensation case are not "compensation" within the meaning of the Act, and therefore that AS 23.30.155(j) does not limit the recovery by an employer or insurance carrier of overpaid attorney's fees. If this law is to be changed, I believe it is the province of the legislature to do so.

1. *Wien Air Alaska v. Arant*, 592 P.2d 352, 366 (Alaska 1979) ("high awards for successful claims may be necessary for an adequate overall rate of compensation, when counsel's work on unsuccessful claims is considered").

Joseph McKEOWN, Kevin Anderson, Terrance Smith and Robert Boyer, Petitioners,

v.

KINNEY SHOE CORPORATION, d/b/a Kinney Shoes, Footlocker and Lady Footlocker, Respondents.

No. S-4024.

Supreme Court of Alaska.

Nov. 15, 1991.

In class action suit for liquidated damages under State Wage and Hour Act, review was sought of order of the Superior Court, Third Judicial District, Anchorage, Brian C. Shortell, J., refusing to declare employer's private settlement agreements with putative class members void. The Supreme Court, Burke, J., held that: (1) private settlements were void on grounds of public policy, and (2) employees who received settlement payments did not have to tender them back before joining class action.

Order vacated.

1. Labor Relations ⇐1298

Employer's private settlement of claims for unpaid overtime and liquidated damages under State Wage and Hour Act was injurious to interests of public and

thus void on grounds of public policy. AS 23.10.050 et seq.

2. Labor Relations ⇐1298

Employer's private settlement of claims for unpaid overtime and liquidated damages under Fair Labor Standards Act would be void. Fair Labor Standards Act of 1938, §§ 1–19, 29 U.S.C.A. §§ 201–219.

3. Labor Relations ⇐1298

Employees who received payments from employer in purported settlement of claims for liquidated damages under State Wage and Hour Act did not have to tender back those payments before they could join class action; settlements had been found void ab initio as violative of public policy and were not merely being rescinded. AS 23.10.050 et seq.

4. Contracts ⇐258

Rescission is equitable remedy that abrogates, annuls, or unmakes contract entered into through mistake, fraud, or duress.

5. Contracts ⇐98

Void agreement never attains legal effect as contract.

David E. Grashin, David Grashin & Assoc., Anchorage, John E. Casperson, Faulkner, Banfield, Doogan & Holmes, Seattle, for petitioners.

William F. Mede, Scott J. Nordstrand, Owens & Turner, Anchorage, for respondents.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS, COMPTON and MOORE, JJ.

OPINION

BURKE, Justice.

This case requires us to decide whether an employer and an employee may privately settle claims for liquidated damages arising under the Alaska Wage and Hour Act. We conclude that they may not.

I

Four individual plaintiffs brought class action wage and hour claims against Kinney Shoe Corporation. The claims were brought on behalf of six classes of past and present Kinney employees. All of the claims alleged violations of the Alaska Wage and Hour Act (AWHA), AS 23.10.050–.150; four of the classes represented were past and present employees to whom Kinney allegedly had not paid overtime wages required by the AWHA.

On March 1, 1990, the superior court set oral argument on class certification for April 25, 1990. On April 4, 1990, Kinney sent individual settlement offers to putative class members. The offers proposed monetary settlements tailored to compensate each recipient for his or her specific unpaid wages. In return, Kinney demanded waiver of "any rights [the recipient] might have against Kinney ... for all of the claims which were or could have been asserted in the class action lawsuit." Kinney made clear in its settlement offers that the class action lawsuit sought "recovery of, among other things, unpaid overtime, bonuses and certain deductions from paychecks." Some of the solicited employees or ex-employees chose to accept Kinney's offer.

One day before oral argument on certification, petitioners moved to have the superior court declare void the private settlements that some putative class members had entered into with Kinney. The superior court decided to review the private settlement issue in detail before ruling on class certification. Further briefing and oral argument followed. Finally, on June 18, 1990, the superior court both certified the classes and denied petitioners' motion to declare void Kinney's private settlement agreements with putative class members. This court subsequently granted plaintiffs' petition for review on the question whether the superior court erred by not declaring the settlement agreements void.

II

[1] The class action lawsuit underlying the present appellate review involves a va-

riety of statutory claims. Kinney's settlement offers attempted to encompass all of those asserted claims. Consequently, petitioners initially asserted multiple challenges to the validity of the settlements. Both parties, however, focus here upon a single question. We likewise limit the scope of our review to the same narrow issue: whether an employer's private settlement of a claim for unpaid overtime and liquidated damages under the AWHA is injurious to interests of the public and, therefore, void on the grounds of public policy. 14 S. Williston, *A Treatise on the Law of Contracts* § 1629, at 8 (W. Jeager, 3d ed. 1972).

The stated policy behind the AWHA is to protect "the health, efficiency, and general well-being of workers." AS 23.10.050(2). To that end, an employer who fails to pay overtime as required by AS 23.10.060 faces several possible civil and criminal penalties.[1] The civil penalty most pertinent to this case is the provision in the AWHA for liquidated damages in the amount of actual unpaid overtime and "an additional equal amount." AS 23.10.110(a). "Such damages in the act are a type of punitive damages, not, as in other contexts, a substitute for compensatory damages." *Gore v. Schlumberger Ltd.*, 703 P.2d 1165, 1166 (Alaska 1985).

As our opinion in *Gore* indicated, the liquidated damages provision of AWHA is intended to further the policy behind the AWHA by punishing the violating employer. *See id.* Accordingly, when an employer violation is established, "liquidated damages ... must be granted as a matter of law." *Alaska Int'l Indus., Inc. v. Musarra*, 602 P.2d 1240, 1249 (Alaska 1979); *see also* AS 23.10.110(a) (a violating employer "*is liable*" for liquidated damages) (emphasis added). One inherent characteristic of this punitive scheme, of course, is that an employer's violation often must be established by private action. If the employer entices the private actor—the unpaid employee—to settle a legitimate claim, a violating employer may then escape without an adjudication of liability and without punitive sanction. An interpretation of the AWHA that would permit such escape countermands the very purpose of the liquidated damages provision. If the liquidated damages available under the AWHA were meant mainly to compensate the wronged employee, one might reasonably argue that compromise or settlement by the wronged employee might be appropriate. Because the liquidated damages are not compensatory, an employee's capacity to compromise or settle for a lesser amount should be extremely restricted. *Accord* 3 N. Singer, *Sutherland Statutory Construction* § 59.05 (C. Sands 4th ed. 1978) (punitive laws pertaining to public health and safety must be given "substantial effect"—especially "where penalties are recoverable in civil actions prosecuted by private individuals").

[2] We note that further support for prohibiting employee settlement of AWHA claims without judicial approval appears in the federal courts' interpretation of the Fair Labor Standards Act (FLSA).[2] The

1. As we previously have explained:

> The [AWHA] prescribes with comprehensive specificity the remedies available for its violation. An employee may recover his unpaid minimum wages or unpaid overtime compensation, and an identical sum as liquidated damages. Reasonable attorney's fees are afforded. The Commissioner of Labor may obtain injunctive relief and criminal penalties may be imposed of not less than $100 nor more than $2,000, or imprisonment for not less than ten nor more than ninety days, or both. The comprehensiveness of this remedial system implies that the legislature did not intend to allow further unenumerated remedies.

Gore v. Schlumberger Ltd., 703 P.2d 1165, 1165–66 (Alaska 1985) (footnotes omitted).

2. We have recognized that the AWHA is based on the Federal Labor Standards Act of 1938 (codified as amended at 29 U.S.C. §§ 201–219 (1988)). *E.g., Webster v. Bechtel, Inc.*, 621 P.2d 890, 895 (Alaska 1980). The two Acts are not identical, however. *See id.* (AWHA imposes on employers a *higher* standard of overtime pay than does federal law). And, of course, federal court interpretations of the FLSA are not binding on Alaska court interpretations of the AWHA. *See Dresser Indus., Inc. v. Alaska Dep't of Labor*, 633 P.2d 998, 1002 (Alaska 1981), *cert. denied*, 455 U.S. 1019, 102 S.Ct. 1716, 72 L.Ed.2d 137 (1982). However, we have found the federal court interpretations of the FLSA helpful in interpreting consistent aspects of the AWHA. *See, e.g., Gore*, 703 P.2d at 1166.

traditional federal rule prohibits compromise or release of liquidated damages liability under the FLSA on the theory that such agreements "will tend to nullify the deterrent effect which Congress plainly intended [the liquidated damages provision] should have." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 710, 65 S.Ct. 895, 903, 89 L.Ed. 1296 (1945). "To allow contracts for waiver of liquidated damages approximates situations where courts have uniformly held that contracts tending to encourage violation of laws are void as contrary to public policy." *Id.* Having reviewed recent federal precedent on this point, we believe that under federal law the settlements in the present case would be void, for much the same reason that we find them void under Alaska law. *See generally Lynn's Food Stores, Inc. v. United States*, 679 F.2d 1350, 1352–54 (11th Cir. 1982).[3]

In sum, permitting private settlement of liquidated damages claims under the AWHA is contrary to the strong policy behind the AWHA and its liquidated damages provisions. We thus conclude that the superior court erred by not declaring void the settlements in this case, insofar as the settlements purported to compromise AWHA claims for unpaid overtime.

III

[3] Finally, Kinney argues that if the settlements in this case are found to be void, then the employees who have received settlement payments from Kinney must tender back those payments before they may join the class action lawsuit here. Kinney's argument principally relies upon our decision in *Thorstenson v. Arco Alaska, Inc.*, 780 P.2d 371, 375 (Alaska 1989). There we wrote that "[t]ender of the benefits received under an agreement is ordinarily a prerequisite to an action at law for rescission of the agreement." *Id.*

Petitioners' argue in response that *Thorstenson* does not control here. Petitioners' note that they moved the superior court not for rescission of the settlement agreements, but for an order declaring the agreements void *ab initio* as violative of public policy. Thus, according to petitioners, the tender-back requirement recognized in *Thorstenson* has no application on these facts. We agree with petitioners.

[4, 5] An action to have an agreement declared void as violative of a statute or of public policy is an entirely different action than one for rescission. Rescission is an equitable remedy that abrogates, annuls, or unmakes a contract entered into through mistake, fraud, or duress. *Dreiling v. Home State Life Ins. Co.*, 213 Kan. 137, 515 P.2d 757, 767–68 (1973). A void agreement, on the other hand, never attains legal effect as a contract. 1 A. Corbin, *Corbin on Contracts* § 7 (1963); *see also Currington v. Johnson*, 685 P.2d 73, 78 (Alaska 1984). As a result, the tender-back requirement that may arise as a prerequisite to an action for rescission has no relevance in an action to declare an agreement void. Thus, assuming they are otherwise qualified, the potential class members who entered into settlement agreements with Kinney now may join the class action lawsuit without first tendering back any settlement money received.[4]

The superior court order denying petitioners' motion to declare void Kinney's settlement agreements with potential class members is VACATED. The superior court is instructed to enter an order declaring all settlements in this case void, insofar as they purport to compromise claims for unpaid overtime under the Alaska Wage and Hour Act.

3. We recognize that the FLSA permits nonprivate settlements, supervised by the Secretary of Labor or the district court. *See* 29 U.S.C. § 216 (1988); *see also Lynn's Food Stores*, 679 F.2d at 1353–54. We have discovered no federal decisions, however, that have adopted any exceptions to the prohibition against private settlements of an FLSA claim. *See, e.g., Lynn's Food Stores*, 679 F.2d at 1353 n. 9.

4. Of course, Kinney may offset damages ultimately awarded to particular employees by any amount that it has already paid to those employees in its attempt to settle their claims.

SUMMARY ANALYSIS HB 459

This proposed legislation will work a significant change in the wage and hour laws of Alaska. There are four areas of potential impact that should be addressed. They are as follows:

A. Private settlements of wage and hour disputes would be permissible, overruling the Supreme Court's decision in McKeown v. Kinney Shoe Corporation,

B. Liquidated damages would no longer be mandatory in wage and hour cases,

C. Automatic liquidated damages for the commissioner, and

D. The potential effect of the legislation on current litigation.

These issues will be addressed separately.

A. Private settlements of wage and hour disputes would be permissible, overruling the Supreme Court's decision in McKeown v. Kinney Shoe Corporation, 820 P.2d 1068.

It has long been the rule under the federal Fair Labor Standards Act that an employer cannot settle disputes with its employees over wage and hour violations without court or Department of Labor approval. This requirement is imposed because of the very great potential for abuse of the employer's strong bargaining position on this issue with its employees. This is exactly what happened in the Kinney case cited above, where the employer, facing a potential overtime exposure to many of its employees past and present, made individual settlement offers that represented only pennies on the dollar of what the employer's real overtime liability was likely to be. All of the employees who still worked for the company signed the agreement rather than risk the ire of their employer. The employer's offer, of course, put the employees in a very awkward position, as they could not very well assert their rights under the law and still be comfortable about keeping their jobs. Other employees, getting a very brief and biased description of the issue from the employer, and seeing the promise of immediate cash, simply took the employer's offer without a fair opportunity to educate themselves on what the employer actually owed them. When they later learned what they had given up, they discovered that they had made a very one-sided deal.

It was over-reaching of this nature that led to the Supreme Court's decision in the Kinney case, and this remains the law under the Federal Act. The Kinney protection is a very valuable one to

employees who find themselves confronted with an employer who wishes to settle its overtime or minimum wage exposure for a pittance. An employee is in a very difficult position when faced with such an offer, and the Kinney case represents the best response to such undue pressure. As the law now stands, settlements must be reviewed for fairness before approval, making sure the worker is not being taken advantage of. This policy already appears in AS 23.05.180(b), which prohibits an employer from using its leverage to settle wage disputes on terms that are unfavorable to the employee.

The only problem with the Kinney case is that it does not explicitly address the commissioner's authority to approve settlement agreements. Everyone probably agrees that the commissioner should be given the authority to settle cases without court approval. This is allowed at the federal level at 29 U.S.C. §216(c) with an explicit statutory grant of authority to the Secretary of Labor to supervise such payments and settlements. Unfortunately, HB 459 does not track the federal language, but instead goes well beyond it, authorizing settlements directly between the employer and the employee without the protection and safeguard provided by court or Department of Labor supervision. See HB 459 §3(e) and (f). HB 459 goes well beyond what is necessary to correct this very small problem that the commissioner has in getting settlements approved. HB 459 should be revised to track the federal language, authorizing the commissioner to supervise such settlements.

HB 459 should be revised as follows:

> Section 3(e): The commissioner may supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under AS 23.10.060 or 23.10.065, and the agreement of any employee to accept such payment shall, upon payment in full, constitute a waiver by such employee of any right he or she may have under AS 23.10.060 or 23.10.065 to such unpaid minimum wages of overtime compensation and an additional equal amount as liquidated damages.

HB 459 §3(f) should be deleted, as it subverts entirely the protection against overreaching by the employer against the employee. It would be an easy matter for any employer to willfully violate overtime and minimum wage requirements of the law and simply settle those claims with the employees on terms very favorable to the employer if this protection is not retained. This is certainly the most dangerous flaw in HB 459.

B. Liquidated damages would no longer be mandatory in wage and hour cases.

Under current Alaska law, companies who violate Alaska's Wage and Hour Act must pay unpaid wages and an equal amount in liquidated damages. There is no provision in the law as it now stands that allows for any exceptions to the mandatory imposition of liquidated damages. Thus, an employer who makes every effort to comply with the law may still find itself facing a liquidated damages penalty. There is some natural concern for imposing the penalty on an employer who does its best to comply with the law. However, these cases are a very small minority. The more typical scenario involves a large company doing business outside the State of Alaska who decides to enter the market within the state and simply imposes on its Alaska employees the standard corporate method for payment of wages and overtime. These businesses don't bother to check the Alaska Statutes to determine their potential application and simply proceed in the face of Alaska law.

Because most wage and hour violations go unnoticed, the Outside business enjoys an extreme competitive advantage over Alaska businesses who know the law and comply with it. Weakening the law by weakening the liquidated damages provision will substantially diminish the incentives for these out-of-state businesses to comply with Alaska law. This would not be a desirable result and would only further exacerbate the competitive advantage out-of-state companies enjoy who continue to operate in violation of current state law.

All of this, of course, does not address the real problem, which is the business that is aware of the law and takes steps to comply, only to find that a judge somewhere disagrees and imposes the liquidated damages penalty. As currently proposed, HB 459 would allow the employer to escape liquidated damages if it demonstrates that their action was in good faith and based on reasonable grounds. This language will be the inevitable source of further litigation, introducing another element of uncertainty and another point of controversy into wage and hour cases.

Some proponents of HB 459 argue that Alaska is "out of step" with other states in the way they handle liquidated damages questions. Because liquidated damages are not mandatory in some jurisdictions, so the argument goes, they should not be in Alaska.

Mandatory liquidated damages in Alaska are no accident. This state has a long history of protecting its working men and women from abusive employment practices. A stiff penalty for those who violate wage and hour laws with impunity will do more to ensure compliance than an army of state compliance officers. It is a cost-effective way to ensure that employers follow the law. Workers in Alaska, with its many remote work sites, are especially vulnerable to employment practices that demand long hours at low pay. An employer is much more likely to ask too much of its workers in this state than anywhere else. This is a particular problem in Alaska because so many of the employers are based

Outside, having no interest in the state except profits and no stake in the community. It is the working people in the state, who stay here and raise their families here, who deserve the protection current law offers. Any weakening of the law will only work to the advantage of Outside interests and to the prejudice of Alaska residents.

A better approach would be to develop a simple mechanism to protect employers who make an honest effort to comply with the law from liquidated damages. A better solution than that proposed in HB 459 is suggested by the way the Department of Labor currently handles some pay plans. Under AS 23.10.060(15), employers can implement flexible work hour plans if certified by the Department. A similar certification procedure could easily be adopted for employers allowing them to apply to the Department for a written determination of the appropriateness of what the employer proposes. If the commissioner agrees that the employer's action is legal, certification is given. The certification then gives the employer an absolute defense to liquidated damages, if a judge at some point in the future disagrees with the certification given by the Department. Otherwise, the employer acts at its own risk in ignoring the statutory requirements for minimum wages and overtime compensation. Therefore, Section 3 of HB 459 should be rewritten to state as follows:

AS 23.10.110 is amended by adding a new subsection to read:

(d) in an action under (a) of this section to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, if the employee and the employer have signed a written agreement and the Department has issued a certificate approving the agreement as not in violation of AS 23.10.050-23.150, the employer is not subject to an award of liquidated damages under (a) of this section.

The virtue of this proposed language is that it removes all uncertainty and doubt over whether liquidated damages may be awarded. If the employer has an honest question about whether the employee is entitled to minimum wage or overtime, this can be addressed by the Department on a case-by-case basis and the employer can proceed without fear of having a liquidated damages penalty applied against it.

Such a mechanism would have the advantage of avoiding further costly legal battles between the employer and the employee over whether the employer's conduct was in "good faith" and based upon "reasonable grounds". Those phrases are broad enough and vague enough to create only further legal uncertainties for the parties.

As a practical matter, there are only very few cases where this is a serious concern, as the more common practice is that out-of-state employers simply adopt the pay practice they think is

appropriate and act in accordance therewith. It is a very rare case where the employer takes the time to determine what Alaska law requires, and then acts in accordance with it. The real problem with HB 459 is that it is overbroad, undermining the employee's protections in all cases simply because there have been a few reported instances where the employer has tried to comply with the law but still had to pay liquidated damages.

C. Automatic liquidated damages for the commissioner.

HB 459 would require that employers whose wage and hour violations are prosecuted by the commissioner remain subject to mandatory liquidated damages, apparently on the theory that the commissioner needs more "clout" when dealing with recalcitrant employers. On the other hand, HB 459 would make liquidated damages discretionary for private actions. This raises obvious constitutional problems with equal protection. If all persons are to be treated the same under the law, their remedy should not be different if they pursue their claim through the commissioner or in an independent action. Free access to the courts for redress of wrongs is a fundamental principle that would be inhibited through the creation of such a two-tier structure.

The preference HB 459 gives the commissioner would probably not survive a court challenge and the commissioner would also be deprived of the leverage of mandatory liquidated damages.

As noted above, HB 459 would make liquidated damages discretionary in many instances. The commissioner seeks to except the state from this statutory change. There is no apparent reason why the commissioner should be treated any differently than other litigants. The problems of an employer who seeks to comply with the law are no different when he faces a legal challenge from the commissioner or a private party. Both circumstances should be handled the same.

D. The potential effect of the legislation on current litigation.

HB 459 in its present form has gone through several versions. An early version proposed that it would apply only to work performed after the effective date of the legislation. Now it is designed to reach any litigation or agreements that have not yet been concluded as of the effective date of the Act. This is certain to generate a lot of controversy over the legality of applying laws retroactively to work already performed. There is no legitimate justification for taking this position, except perhaps to bail out employers who are attempting to save through legislation what they are likely to lose in pending litigation. It is simply poor policy to resolve court battles through legislation. Making any enactment that is finally adopted by the legislature applicable only to work performed after that date will not alter

the expectations of the parties, which they are entitled to rely upon at the time they perform services under Alaska's wage and hour law. This legislation should be revised to apply only to work performed after its effective date, avoiding another constitutional challenge to Alaska's wage and hour laws.

HB

476

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. HB 476

Revision Date:
Dept. Affected: Administration
Title: "An Act relating to insurance for services performed by a dentist..."
BRU: Retirement and Benefits
Component: Retirement and Benefits
Sponsor: Davis, G.
Requestor: (H) L&C
COMPONENT SERIAL NO. 64

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY95	FY96	FY97	FY98	FY99	FY00
PERSONAL SERVICES	0.0	0.0	0.0	0.0	0.0	0.0
TRAVEL	0.0	0.0	0.0	0.0	0.0	0.0
CONTRACTUAL	0.0	0.0	0.0	0.0	0.0	0.0
SUPPLIES	0.0	0.0	0.0	0.0	0.0	0.0
EQUIPMENT	0.0	0.0	0.0	0.0	0.0	0.0
LAND & STRUCTURES	0.0	0.0	0.0	0.0	0.0	0.0
GRANTS, CLAIMS	0.0	0.0	0.0	0.0	0.0	0.0
MISCELLANEOUS	0.0	0.0	0.0	0.0	0.0	0.0
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES	0.0	0.0	0.0	0.0	0.0	0.0
CHANGE IN REVENUES ( )	0.0	0.0	0.0	0.0	0.0	0.0

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1003 GF Match	0.0	0.0	0.0	0.0	0.0	0.0
1004 GF	0.0	0.0	0.0	0.0	0.0	0.0
1005 GF/Program Receipts	0.0	0.0	0.0	0.0	0.0	0.0
1006 GF/MHTIA	0.0	0.0	0.0	0.0	0.0	0.0
Other	0.0	0.0	0.0	0.0	0.0	0.0
Total	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of current year (FY94) cost: none

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: Robert Stalnaker, Director
Phone: 465-4460
Division: Retirement and Benefits
Date:

Approved by Commissioner: Nancy Bear Usera
Date: 2/28/94
Agency: Administration

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DIVISION OF LEGAL SERVICES

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Juneau, Alaska 99801-2105

MEMORANDUM February 24, 1994

SUBJECT: Sectional Summary of HB 476

TO: Representative Gary Davis

FROM: Michael F. Ford
Legislative Counsel

You have requested a sectional summary of the above-described bill.

As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents. If you would like an interpretation of the bill as it may apply to a particular set of circumstances, please advise.

Section 1. Provides that individual and group disability insurers

(1) may not prohibit a policyholder from selecting the dentist of the policyholder's choice, if the dentist is licensed; may not deny a licensed dentist the right to participate as a contract provider; may not authorize a person to interfere with a dentist's diagnosis; and may not require a dentist to obtain x-rays; and

(2) shall disclose applicable provisions on cost of treatment; define reimbursement standards; and provide equal coverage for contracting and noncontracting dentists.

Allows a dentist to contract directly with a person for dental care services, and an insurer to provide certain information relating to dental care, fees, and services. Prohibits enforcement of an insurance policy in violation of AS 21.42.390. Defines "dental care services".

Section 2. Applicability section.

Section 3. Effective date.

MFF:lmb
94-065.lmb

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. HB 476

Revision Date
Title: Dental Insurance Coverage

Sponsor: Rep. G. Davis
Requestor:

Department Affected: Commerce and Economic Development
BRU: Insurance
Component: Operations

COMPONENT SERIAL NO. 354

Expenditures/Revenues:

OPERATING EXPENDITURES	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
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
LAND & 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 EXPENDITURES	0	0	0	0	0	0
CHANGE IN REVENUES ( )	0	0	0	0	0	0
FUND SOURCE						
1002 Federal Receipts	0	0	0	0	0	0
1003 GF Match	0	0	0	0	0	0
1004 GF	0	0	0	0	0	0
1005 GF/Program Receipts	0	0	0	0	0	0
1006 GF/MHTIA	0	0	0	0	0	0
Other	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

Estimate of current year (FY 94) cost: $ 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.)

No fiscal impact.

Prepared by: Joan Brown, Administrative Officer
Division: Insurance
Phone: 465-2597
Date: 2/15/94

Approved by Commissioner: Paul Fuhs
Agency: Commerce and Economic Development
Date: 2-15-94

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Rev 11/93

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Anchorage, Alaska 99503
(907) 277- 4675 • FAX: 274-2960

Wednesday, February 23, 1994

Representative Gary Davis
Alaska State Legislature
State Capitol (MS 3100)
Juneau, Alaska 99801-1182

Dear Representative Davis:

The Alaska Dental Society is pleased to provide you with the attached information sheet relative to the following House and Senate Bills currently under review:

Senate Bill 201 - *COORDINATING INSURANCE BENEFITS*

House Bill 324 - *KEEPING THE BOARD OF DENTAL EXAMINERS*

House Bill 476 - *ANY WILLING PROVIDER (Freedom of Choice for Dental Patients)*

House Bill 472 - *DENTAL REFERRAL SERVICES (Disclosure of fees paid)*

The information sheet provides you with a comparison of the various types of dental reimbursement plans currently being offered to employees as well as a glossary of dental benefits terminology. We have devised this chart as a means of educating people about the differences between the various programs.

The Alaska Dental Society supports all of the above legislation because it helps protect the interests and freedoms of our patients. If you have any questions with regards to the information contained herein, please contact the Alaska Dental Society at (907) 277-4875.

Sincerely,

The Alaska Dental Society

Dental Benefits Education Committee

Mission Statement

The mission of the Dental Benefits Education Committee is to educate the public and all health care providers about the advantages of freedom of choice. The purpose is first, to preserve the basic freedom for patients to choose any willing provider they wish and second, to preserve the freedom for qualified health care providers to compete for any willing patients. The advantage for patients is, with the support of their provider, the freedom to select treatment which is most appropriate to their needs.

A Comparison of Various Reimbursement Systems*

Least Restrictive.....Most Restrictive

	Direct Reimbursement	*Indemnity – No Predetermination*	*Indemnity - with Predetermination*	*PPO*	*Capitation Plan*	*HMO*
Are patients free to choose any qualified dentist?	Yes	Yes	Yes	No	No	No
May any qualified dentist compete for any willing patient?	Yes	Yes	Yes	No	No	No
Are patients free to choose treatment appropriate to their needs?	Yes	varies	varies	varies	varies	varies
Is predetermination required?	No	No	varies	varies	varies	varies
May patients be referred to any qualified specialist without prior approval for non-emergency situations?	Yes	Yes	Yes	varies	varies	varies
Do administrative costs generally exceed 15% of the premium?	No	Yes	Yes	Yes	Yes	Yes
Do patients forfeit secondary insurance coverage (coordination of benefits)?	No	No	No	varies	Yes	Yes
Is there a waiting period between enrollment and eligibility for treatment?	No	varies	varies	varies	varies	varies
Are there complicated benefits schedules/forms?	No	Yes	Yes	Yes	Yes	Yes
Are pre-existing conditions covered?	Yes	varies	varies	varies	varies	varies
Do small groups have access to coverage?	Yes	varies	varies	varies	varies	varies
Is policy renewal guaranteed?	Yes	varies	varies	varies	varies	varies
Does the policy restrict qualified providers from participating?	No	No	No	Yes	Yes	Yes
Is comprehensive care covered, including cosmetics, orthodontics and TMJ?	Yes	varies	varies	varies	varies	varies
Are patients' treatment options restricted?	No	varies	varies	varies	varies	varies

*This is a general comparison of plan types and how they operate. Each benefit contract within a plan type is unique and each can exhibit a high degree of variability in benefit coverage. If it is felt the answer to the question is generally "yes" or generally "no," it is so stated, otherwise the term "varies" is used.

Glossary of Dental Benefit Terminology

Capitation Plan – A dentist or dentists contract with the programs' sponsor or administrator to provide all or most of the dental services covered under the program to subscribers in return for payment on a per-capita basis. Dentists receive the same fee each month, per patient, regardless of whether the patient was seen or the type of treatment provided.

Closed Panel – A closed panel dental benefits plan exists when patients eligible for benefits can receive them only if services are provided by dentists who signed an agreement with the benefits plan to provide treatment to patients enrolled in a specific policy. As a result of these reimbursement methods, only a small percentage of practicing dentists in a given geographical area are typically contracted to provide services.

Coordination of Benefits – The mutual payment of benefits when an individual is covered by two separate benefit plans.

Direct Reimbursement – A self-funded program in which the individual is reimbursed based on a percentage of dollars spent for dental care provided, and which allows beneficiaries to seek treatment from the dentist of their choice.

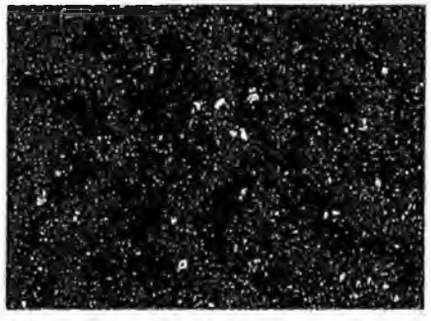
Fee-for-Service – A method of paying practitioners on a service-by-service, rather than a salaried or capitated, basis.

Health Maintenance Organization (HMO) – A legal entity that accepts responsibility and financial risk for providing specified services to a defined population during a defined period of time at a fixed price. Provides comprehensive care to enrollees through designated providers. Enrollees are generally assessed a monthly payment for health care services and may be required to remain in the program for a specified amount of time.

Indemnity Plan with Predetermination – A dental plan where a third party provides payment of an amount for specific services, regardless of the actual charges made by the provider. Payment may be made either to enrollees or, by assignment, directly to dentists. Schedule of Allowances, table of allowances, or reasonable and customary plans are examples of indemnity plans.

Indemnity Plan without Predetermination -- The same as a standard Indemnity Plan except no predetermination of benefits is required.

Least Expensive Alternative Treatment (LEAT) – A limitation in a dental benefits plan that only allows benefits for the least expensive treatment.



Open Panel – A dental benefit plan characterized by three features: 1) Any licensed dentist may elect to participate: 2) The beneficiary may receive dental treatment from among all licensed dentists, with the corresponding benefits being payable to either the beneficiary or the dentist; 3) The dentist may accept or refuse any beneficiary.

Predetermination -- An administrative procedure that may require submission of a treatment plan to a third party before treatment is begun. The third party usually returns the treatment plan indicating one or more of the following: patient's eligibility, guarantee of eligibility period, covered services, benefit amounts payable, application of appropriate deductible, co-payment and/or maximum limitation. Under some programs, predetermination is required when covered charges are expected to exceed a certain amount, such as $200.

Preferred Provider Organization (PPO) – A formal agreement between a purchaser of a dental benefits program and a defined group of dentists for the delivery of services to a specific population, as an adjunct to a traditional plan, using discounted fees for cost savings.

Qualified Provider -- A dentist or dental hygienist currently licensed to practice dentistry or dental hygiene in the state of Alaska and, in the case of dentists, one who maintains current state and local business licenses to practice in Alaska.

Source: Excerpts from *Policies on Dental Care Programs 1993* by the American Dental Association Council on Dental Care Programs

PATIENTS' FREEDOM OF CHOICE

Nineteen states protect the right of patients to receive care from the dentist of their choice. Provisions of state laws are summarized below.

	AL	CT	DE	FL	IL	LA	MA	MS	MT	NV	NJ	NC	OH	OK	RI	TN	TX	VA	WA
Year enacted	1984	1983	1987	1984	1985	1985	1985	1985	1989	1983	1983	1913	1982	1983	1986	1983	1983	1986	1988
Employers that offer closed-panel plans must also offer fee choice option		X	X	X	X		X			X	X				X	X			X
Employer contribution must be equal or comparable			X	X	X						X				X	X			X
Insurers must inform employers of their obligation to offer dual choice				X	X														
Policies and plans must allow covered individuals to select the dentist of their choice	X					X		X	X[1]			X	X	X			X		X
Payments must be equal to participating and non-participating dentists	X					X		X	X						X				X
Interference with diagnosis and treatment prohibited	X					X		X									X		
Policies and plans must open participation to all eligible dentists	X					X		X	X[2]				X				X	X[3]	
Advisory committee created to aid implementation			X																

[1]Applies to prepaid dental plans
[2]Applies to HMOs only
[3]Applies to PPOs

HB 476

HB

487

HOUSE COMMITTEE REPORT

(7)

Date Referred: February 24, 1994 FURTHER REFERRALS: Judiciary
Finance

Date of Committee Action: 3/22

The LABOR AND COMMERCE Committee considered: SSHB 487

SPONSOR SUBSTITUTE FOR HOUSE BILL NO. 487

SALE/DISPLAY OF MATERIAL HARMFUL TO MINOR

"An Act relating to the sale, display, or distribution of material harmful to minors at places where minors are present or allowed to be present and where minors are able to view such material; and prohibiting the sale or display of certain audio recordings, phonograph records, magnetic tapes, compact discs, or videotapes, without warning labels and opaque wrappings."

RECOMMENDATIONS: be replaced with CS SS HB 487(L+C)

[X] the same title
[ ] a new title

[ ] have attached amendments(s)

[ ] do pass

[ ] do not pass

[X] no recommendations

[ ] individual recommendations

[ ] additional referral to the _____ Committee

ADOPTS: _____ letter of Intent

ATTACHES NEW FISCAL NOTE(s): (Dept)

[ ] fiscal impact _____

[X] zero fiscal note Law

APPROVES PREVIOUS: (Dept/Date)

[ ] fiscal note(s) _____

[ ] zero fiscal note(s) _____

SIGNING DO PASS	DP	OTHER RECOMMENDATIONS	DNP	NR	AM
		Sutton	X		
				✓	
		Brian Porter		—	
				✓	
			X		✓
		Bill Hudson		✓	

Bill Hudson
CHAIRMAN'S SIGNATURE

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March 14, 1994

VIA FACSIMILE

David E. Leibowitz, Esq.
Executive Vice-President and General Counsel
Recording Industry Association of America, Inc.
1020 Nineteenth Street, N.W.
Suite 200
Washington, D.C. 20036

Re: Constitutionality of Alaska Proposed Substitute for House Bill No. 487

Dear Mr. Leibowitz:

You have asked us to review the text of Alaska Proposed Substitute for House Bill 487 ("PSHB 487"), an Act relating to the sale, display or distribution of sound recordings and related materials, in order to analyze its constitutionality. PSHB 487 requires mandatory labeling, places restrictions on display, and criminally penalizes the sale of musical sound recordings deemed "harmful to minors." Because PSHB 487's provisions are in direct contradiction to both the history and principles of the First Amendment and the separate and distinct guarantees of Article I, Section 5 of the Alaska State Constitution, as more fully explained below, it is our opinion that PSHB 487 is unconstitutional.

I. PSHB 487 Abridges the Right of Free Speech and Expression.

"Music, as a form of expression and communication, is protected under the First Amendment." Ward v. Rock Against Racism, 491 U.S. 781, 790, reh'g denied, 492 U.S. 937 (1989). See also Schad v. Mount Ephriam, 452 U.S. 61, 65 (1982); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557-58 (1976). While the constitutional protections afforded to music under the First Amendment are broad, those protections are even greater in Alaska under Article 1, Section 5 of the Alaska Constitution which, "protects speech in a more explicit and

direct manner than the federal constitution." Messerli v. State, 626 P.2d 81 (Alaska 1980).

The United States Supreme Court has emphasized the special role music serves in our society and the importance of protecting music against government censorship:

> Music is one of the oldest forms of human expression. From Plato's discourse in the Republic to the totalitarian state in our own times, rulers have known its capacity to appeal to the intellect and to the emotions, and have censored musical compositions to serve the needs of the state. The Constitution prohibits any like attempts in our own legal order.

Ward, 491 U.S. at 790. Particularly invidious is censorship of expression based on its content, R.A.V. v. City of St. Paul, 112 S. Ct. 2538, 2542 (1992), or "simply because society finds the idea offensive or disagreeable." Texas v. Johnson, 491 U.S. 397 (1989).

Alaska's consideration of PSHB 487 seems to assume that it does not run afoul of either the United States or Alaska Constitutions because it purportedly regulates only "obscene" or "violent" speech. This position suffers from several significant flaws. First, expression having social and/or artistic value enjoys and always has enjoyed full constitutional protection. As the U.S. Court of Appeals for the Eleventh Circuit stated in the leading case to subject music to the Miller test, "we tend to agree with appellants' contention that because music possesses inherent artistic value, no work of music alone may be declared obscene." Luke Records, Inc. v. Navarro, 960 F.2d 134, 135 (11th Cir. 1992).

The inherently subjective nature of a piece of music, i.e., the various meanings understood by different listeners, makes it especially intolerable to regulate music. Constitutional speech protections cannot depend upon determinations whose inherent subjectivity "would allow a jury to impose liability on the basis of the juror's tastes or views." Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988). Indeed, "it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of

taste and style so largely to the individual." Cohen v. California, 403 U.S. 15, 25 (1971). As the Supreme Court recently reaffirmed in the context of rap music:

> [i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke.

Campbell v. Acuff-Rose Music, Inc., ___ U.S. ___, 1994 WL 64738 at 6 (March 7, 1994), citing, Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

Further, music does not lose its constitutional protection by virtue of sexually explicit lyrics any more than movies and books lose protection simply because they contain some scenes of nudity. See Erznoznik v. City of Jacksonville, 422 U.S. 205, 211 n.7 (1975). The inclusion of a human voice in a piece of music enhances the piece's value and constitutional protection, both as a musical instrument and as a conduit for words which contribute additional social, literary, artistic, and/or political value to the work. These words are an integral part of the music in which they are sung, a critical point ignored by those who would justify music censorship by waiving around a sheet of lyrics.

Similarly, music does not lose its constitutional protection merely because it contains content characterized as "violent." See Winters v. New York, 333 U.S. 507, 514 (1947) (state statute aimed at prohibiting publication of "stories of bloodshed and lust in such a way as to incite to crime against the person" held unconstitutional); American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 329-30 (7th Cir. 1985), summarily aff'd, 475 U.S. 1001 (1986) (violent speech, "however insidious," is protected speech). Indeed, regardless of the State's alleged ability to regulate obscenity, there is absolutely no authority for the State to regulate "violent" speech. See R.A.V., 112 S. Ct. 2538 (1992).

Second, even if some musical expression could in theory be "obscene" or "violent," simply because the State purportedly aims

to regulate obscene or violent speech does not vitiate the First Amendment and Article I, Section 5. The State's efforts must be clearly, carefully, narrowly and fairly drawn so as not to infringe on protected expression. PSHB 487 is not so drawn, and it therefore substantially and unconstitutionally infringes on protected musical expression. See R.A.V., 112 S. Ct. 2538 (1992) (finding that even "hate speech" cannot be regulated).

Also unavailing is any reliance the State may place on Ginsberg v. New York, 390 U.S. 629 (1968), to argue that PSHB 487 affects only speech that is obscene as to minors and is, therefore, constitutionally permissible. In Ginsberg, the Court did not consider the statute's effects on adults' access to expression that is not obscene as to them or the indirect chilling effect on expression that is not obscene as to anyone. As the Eleventh Circuit has recognized, the Court in Ginsberg "did not address the difficulties which arise when the government's protection of minors burdens (even indirectly) adults' access to material protected as to them." American Booksellers v. Webb, 919 F.2d 1493, 1502 (11th Cir. 1990), cert. denied 111 S. Ct. 2237 (1991).

Alaska cannot, by enacting a law for the protection of minors, "prohibit an adult's access to material that is obscene for minors but not for adults." Id.; see also Butler v. Michigan, 352 U.S. 380, 383 (1957) (legislation must not "reduce the adult population ... to reading only what is fit for children"). A statute that prohibits such access or deters protected expression, directly or indirectly, is unconstitutionally overbroad: it restricts more speech that the Constitution permits. See R.A.V., 120 L. Ed. 2d at 316-17 n.3. An overbroad statute must be struck down on its face and held incapable of any constitutional application.[1] See Osborne v. Ohio, 495 U.S. 103, 112 & n.8 (1990); Erznoznik, 422 U.S. at 215-17.

---

[1] The overbreadth doctrine is predicated on the danger that "persons whose expression is constitutionally protected may well refrain form exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression." New York v. Ferber, 458 U.S. at 769-73 (quoting Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 634 (1980)).

The statute by definition regulates material that "appeals to the prurient interest of minors in sex." AS 11.61.127(c)(1)(A) (emphasis added). Because this definition of obscenity under Miller -- and because the category of materials that appeals to the prurient interest of minors is larger than that which appeals to the prurient interest of adults -- PSHB 487 necessarily reaches expression that is not obscene in constitutional terms. Thus, the statute's prohibitions on sale, distribution, and exhibition of erotic material directly apply to some material that is not obscene. The clearest example of this direct application is the statute's display restriction, which prohibits all distributors and dealers from displaying a sound recording found "harmful to minors" "in any place where minors are present or are allowed to be present and where minors are able to view such material." AS 11.61.127(a). This prohibition directly affects the access of everyone, including adults, to such sound recordings simply because they have been found "harmful" with respect to minors.

Third, regulations designed for the protection of minors must embody the least restrictive means of furthering the government's interest in protecting minors. Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126 (1989). The display restriction is not the least restrictive means of furthering the government's interest in keeping the contents of sound recordings away from minors. Indeed, it is wholly unrelated to furthering that interest. The prohibition on displays might make sense for a magazine with a naked body on the front cover. As applied to a compact disc, whose contents can only be heard and not seen, the requirement is absurd. This aspect of PSHB 487 is unquestionably overbroad and unconstitutional.[2]

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[2] This chilling of free speech is patently the product of state action, which exists if "the conduct allegedly causing the deprivation of a federal right [is] fairly attributable to the State." Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982); see also Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963) (self-censorship under threat of even informal government sanctions deemed state action). "When the state acts directly or even indirectly and its influence is significant, then constitutional restraints must be observed." Ginn v. Mathews, 533 F.2d 477, 479 (9th Cir. 1976).

II. PSHB 487 Constitutes an Invalid Prior Restraint.

PSHB 487 explicitly authorizes suppression before the sound recording is played. AS 11.61.128(a) and (b) empower prosecutors to institute a criminal action when someone merely displays or "sells or offers to sell [to anyone] an audio recording, phonograph record, magnetic tape, compact disc, or music video recording that contains lyrics that include or are descriptive of material harmful to minors." A sound recording need not have become available to minors in order for prosecutors to initiate the process; it is enough, for example, that a sound recording has been sold or distributed by a record company to a particular store. As the statute authorizes censorship before the sound recording at issue is heard, it constitutes an unconstitutional prior restraint.

Just as clearly, PSHB 487 operates as a prior restraint as to all affected individuals not provided notice that the sounding recording is considered "harmful to minors" under PSHB 487. For example, the risk of denied access to an entire market of consumers -- which accounts for a significant percentage of sales of popular music -- carries serious enough consequences for record producers and musical artists that artistic decisions may be compromised to avoid even approaching the ambit of PSHB 487. Record store owners and distributors will be restrained from distributing potentially erotic sound recordings for fear of incurring the substantial costs of defending an erotic determination hearing or facing the substantial penalties for violating an erotic music recording determination -- which they may not even have knowledge of. The effect of the prior restraint is thus a dramatic curtailment of protected expression.

Finally, PSHB 487 provides that music deemed "harmful to minors" but never found to be obscene -- i.e., speech and expression fully protected by the United States Constitution -- cannot be distributed to its adult audience without meeting specific preconditions. It enforces these conditions through the threat of criminal proceedings that leave the speaker two choices: comply or be silent. This is precisely the sort of prior restraint[3] the Supreme Court of the United States struck

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[3] Prior restraints include "injunctions and related judicial processes enforced through contempt proceedings." J. Jeffries, Jr., Rethinking Prior Restraint, 92 Yale L.J. 409, 421

down in its landmark decision of Near v. Minnesota, 283 U.S. 697 (1931). The laws struck down in Near threatened the publisher with contempt proceedings for resuming distribution of speech that failed to meet certain preconditions. Id. at 712-13. Such a prior restraint, the Court declared, is "the essence of censorship," id. at 713, and is "the most serious and the least tolerable infringement on First Amendment rights." Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

III. PSHB 487 Unlawfully Compels Speech as Part of the System of Prior Restraint.

Under PSHB 487, without the benefit of judicial guidance on what is considered "harmful to minors," all copies of sound recordings deemed "harmful to minors" by prosecuting attorneys, sold in any community in the State, must be labeled on the front cover with a **PARENTAL ADVISORY**. AS 11.61.128(c). PSHB 487 thus compels artists, producers, distributors, and retailers to carry a state-mandated message, upon threat of criminal penalties. AS 11.61.128(c), (g) & (h). This message should not be confused with the voluntary labeling system that has been developed by the recording industry. First, the label applied is different, and, second, and far more fundamentally, it is compelled by the government.

Compelling speech violates the constitutional guarantees of free speech just as surely as does censoring speech. In Wooley v. Maynard, 430 U.S. 705 (1977), the Court heard a First Amendment challenge to a New Hampshire law requiring all automobile license plates to carry the state motto "Live Free or Die." The court held it unconstitutional, stating: "[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." 430 U.S. at 714.; see also Pacific Gas & Elec. v. California P.U.C., 475 U.S. 1, 9-18 (1986).

PSHB 487 infringes even more deeply on Alaska residents' free speech rights than did the statute in Wooley. By imposing its message on particular speakers, rather than all citizens of the state, PSHB 487 makes it more probable that the speaker will

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(1983). See also Alexander v. United States, 113 S. Ct. 2766 (1993).

be understood to endorse that message. It also will stigmatize the artists and distributors associated with the work. PSHB 487 thus not only compels speech, but interferes with artists' rights to communicate freely with their audiences. The labeling scheme imposed by the statute abridges the right of free expression, wholly apart from the other constitutional flaws in the statute's scope and procedures.[4]

IV. PSHB 487 is Underinclusive.

The United State Supreme Court has made clear that a State's interest in regulating speech is suspect if the State ignores other potential sources of an alleged harm. See United States v. Edge Broadcasting Co., 113 S. Ct. 2696 (1993). Here, the State does not even attempt to address the many other avenues, such as books and movies, on which similar allegedly harmful words are spoken. This suggests the lack of seriousness in the State's purpose as well as discrimination among media.

V. PSHB 487 Violates Due Process Under The Federal and State Constitutions.

The essence of due process is notice and an opportunity to be heard. See Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974). Due process protections are even more critical when First Amendment freedoms are threatened under a law that attempts to curtail speech the State deems indecent or obscene. Smith v. California, 361 U.S. 147, 149-50 (1959). Indeed, the Supreme Court has maintained a special "insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards ..." Id. (emphasis added; citations omitted); see also Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 561 (1975) ("rigorous procedural safeguards" required).

Of the numerous constitutional infirmities of PSHB 487, the bill's failure to provide minimal due process protections for free speech is the most blatant. Notably, PSHB 487 does not require that a prosecutor prove the central element of its criminal provisions -- that the sound recording is "harmful to minors" -- before a criminal action is undertaken. AS 11.61.127.

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[4] It acts as a disincentive for compliance with the voluntary labeling schemes already in place by the recording industry.

Without such a requirement, there is no way a person of "common intelligence" can determine, without guessing, whether or not a particular sound recording is "harmful to minors." This is due, in part, to the legal definition of "obscene" and the state's ability to regulate this area of speech. Indeed, for this reason any reliance on Ginsberg v. New York, 390 U.S. 629 (1968), as support for the constitutionality of PSHB 487's definition of prohibited materials, is misplaced. Ginsberg's finding was based on the fact that the state statute regulating obscenity as to minors at issue was "virtually identical to the Supreme Court's most recent statement of the elements of obscenity." Id., 390 U.S. at 643. In this case, however, PSHB 487's definition of prohibited materials is not of "obscene" materials, but rather of "harmful to minor" materials. As such, the statute's definition of prohibited materials does not conform to the Supreme Court's "most recent statement of the elements of obscenity" and is unconstitutionally vague.

PSHB 487 also fails to define prohibited conduct with sufficient specificity to put citizens on notice of what conduct they must avoid. Without such guidance, classic words such as "To be or not to be, that is the question?" (a potentially "violent" message), or the sexual context of Shakespeare's Romeo and Juliet, read aloud or captured on a sound recording, could be criminalized and, therefore, banned in Alaska. Thus, PSHB 487's failure to list or provide specific subjects that are prohibited violates Alaska citizens' right to due process under both the Alaska and United States Constitutions. See McKinney v. Alabama, 424 U.S. 669 (1976).

Further, PSHB 487 fails to provide notice to all those who may be subject to criminal prosecution under AS 11.61.127 and 11.61.128. On its face, this provision imposes criminal penalties on those who sell sound recordings deemed harmful to minors even if they were never notified of a judicial determination that the sound recording was "harmful to minors." This constitutes a violation of the right to due process. To prosecute someone for selling a sound recording that the accused does not know has been declared "harmful to minors" is fundamentally unfair.

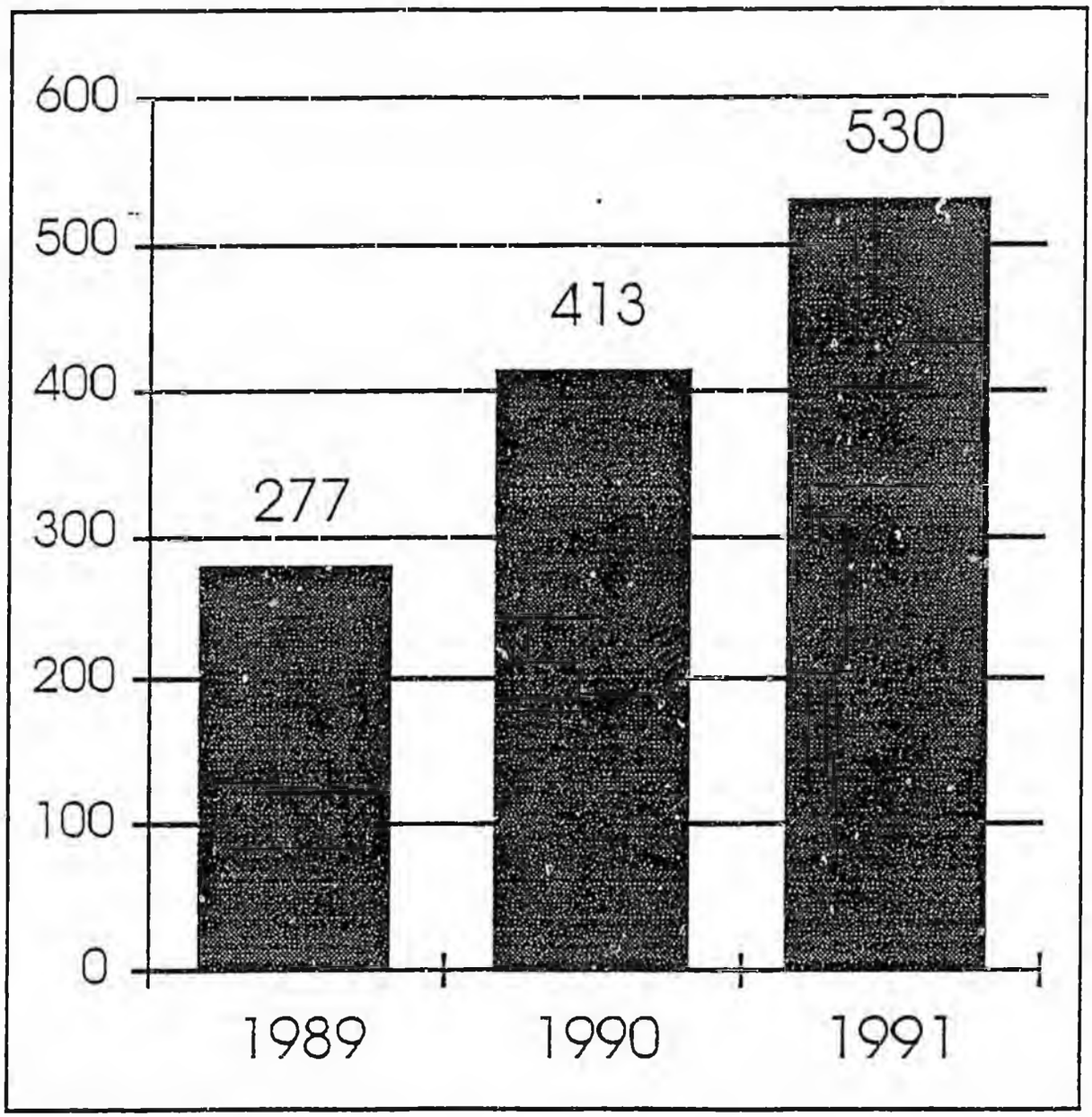
Given the numerous constitutional infirmities of PSHB 487, it is our opinion that PSHB 487 is unconstitutional.

Very truly yours,

DAVIS WRIGHT TREMAINE

Daniel M. Waggoner
Debora K. Kristensen

Reported Rapes in Alaska 1989 through 1991



Provided by The Network on Domestic Violence and Sexual Assault

Source: Department of Public Safety

WARNING !

APPENDIX I

CONTAINS EXPLICIT AND OFFENSIVE LYRICS

APPENDIX I -- SONG LYRICS

I. SEXUAL THEMES

Judas Priest, "Eat Me Alive"

Sounds like an animal panting to the beat
Groan in the pleasure zone, gasping from the heat.
Gut wrenching frenzy that destroys every joint
I'm gonna force you at gunpoint
To eat me alive...squealing in passion
as the rod of steel injects.

2 Live Crew, "C'mon Baby"

(Female voice: "F**k me...Deeper...harder...Oh God, I can't stop....Oh cum on me....F**k me....")

Love is the key to end all your woe
You'll be my bitch, not a dirty 'ho
Together as one we will be
I'll be fuckin' you and you'll be suckin' me
Then lick my ass up and down
Lick it 'til your tongue turns doo-doo brown.

Poison, "I Want Action"

I want action tonight
Satisfaction all night
Long [illegible] and short skirts
These girls hit me where it hurts
I can't wait to get my hands on them
I won't give up 'til they give in
Now I'm not lookin' for love that lasts
I need a shot and I need it fast
If I can't have her, I'll take her and make her

2 Live Crew, "Pop That Puy"**

Freaky bitches with plenty of ass, rollin' to the music and shakin' real fast.
Bend over backwards, make me shout, and work that pu**y in and out.
Movin' their body with plenty of action, bringin' the men more satisfaction.

Rub that ass and play with that clit, you know I like that freaky sh*t.
Girl, you know you look so cute, throwin' that pu**y the way you do.

2 Live Crew, "Me So Horny"

Girls always askin' why I f**k so much
Just say what's wrong, girl, with a quick nut
'Cause you're the one and you shouldn't be mad
I won't tell your momma if you don't tell your dad
I know he'll be disgusted
when he sees your pu**y busted
Won't your momma be so mad
if she knew I got that ass
I'm a freak in heat, a dog without warning
My appetite is sex 'cause me so horny.

Scorpions, "Love on the Run"

My love's a gun that wants to talk tonight
I kiss the lust right from your lips
The way it feels will hit you like a blitz
Love on the run, always loaded like a gun
For love I kiss the pearl right from the shell
Until you'll feel what all these words can's tell

2 Live Crew, "Put Her In the Buck"

I'll break ya down and dick ya long
Bust your pu**y, then break your backbone
I'll go between them legs that's open wide
Pushin' this dick from side to side
Legs to the ceilin' I'm feelin' the feelin'
When I bust a nut your ass'll be screamin'

Motley Crue, "All In the Name Of...."

She's only 15
She's the reason
The reason that I can't sleep
You say illegal
I say legal's never been my scene
I try like hell but I'm out of control
All in the name of Rock 'n' Roll
For sex and sex I'd sell my soul

Mentors, "Golden Showers"

Listen, you little slut, do as you are told,
Come with daddy for me to pour the gold.
Golden showers.
All through my excrement you shall roam.
Bend up and smell my anal vapor,
Your face is my toilet paper.
On your face I leave a sh*t tower.
Golden showers.

2 Live Crew, "We Want Some Pu**y"

Gotta a long hard dick for all the ladies,
You can work this stick in my Mercedes.
If you wanna blow just let me know,
We can go backstage at the end of the show.
I'll look at you and you'll look at me,
With my dick in my hand as you fall to your knees.
And you know what to do 'cause I won't say please,
Just nibble on my dick like a rat does cheese.

Prince, "Sister"

I was only 16, but I guess that's no excuse.
My sister was 32, lovely and loose.
My sister never made love to anyone but me,
She's the reason for my sexuality.
Show me where it's supposed to go,
A blow job doesn't mean blow.
Incest is everything it's said to be.

2 Live Crew, "Dirty Nursery Rhymes"

Little Jack Horner sat in a corner
A-fu*kin' this cutie pie.
Stuck in his thumb, made the bitch cum,
Said "Helluva nigger am I."

2 Live Crew, "A Fu*k Is a Fu*k"

F-U-C-K-I-N-G
I'm Fu*kin' you when you're suckin' me.
Fu*k relationships, motherfu*k love
'Cause makin' money is all I'm thinkin' of.

Bitches know what's up with the one night stand,
Make a nigger wait with his dick in his hand.
But they want to fu*k just like we do,
So ho's, stop frontin', drop your drawers. let's screw.

Guns 'N' Roses, "Anything Goes"

Panties 'round your knees with your ass in debris,
Doin' that grind with a push and squeeze.
Tied up, tied down, up against the wall,
Be my rubbermaid, baby, and we can do it all.
My way, your way -- anything goes tonight.

2 Live Crew, "Dick Almighty"

He'll tear the pu**y open 'cause it's satisfaction
The bitch won't leave, it's fatal attraction
Dick's so powerful, she'll kneel and pray
Awaitin' her time, hopin' soon to slay.
That dick will make a bitch cry,
When fu*kin' a bitch that's tight inside.
That dick has got a spell on you,
Once it gets inside, you will act a fool.
That dick will make a bitch act cute,
Suck my dick, bitch, it will make you puke.

But not the long one, I won't play that sh*t,
Put her ass in the buck and kill the clit.
It's fifteen inches long, eight inches thick,
Last name Almighty, first name Dick.
That dick is a motherfu*ker,
I can't be pu**y whipped by a dick sucker.

Bitch, "Leatherbound"

The whip is my toy, handcuffs are your joy.
You hold me down and I'm screaming for more.
When you tie me up and gag me,
The way you give me pain.
Give me lashes, c'mon and drag me.

Van Halen, "Black and Blue"

Slip 'n' slide, push it in,
Bitch sure got the rhythm.
I'm holding back, yeah, I got control.
Hooked into her system, don't draw the line
Honey, I ain't through with you, the harder the better.
Let's do it 'til we're black and blue.

Nasty Savage, "Dungeon of Pleasure"

Forbidden techniques, it's just what they seek
Fantasy lane, dominance, submission,
handcuffs and chains.
Bondage and pain....
The bitch is bound and helpless,
she's screaming for more,
That sweet and innocent girl is really hardcore.
Her obsession with pain makes me bite my lip,
As she eagerly indulges when I give her the whip.

W.A.S.P. (We Are Sexual Perverts), "I Fu*k Like a Beast"

I got pictures of naked ladies lying on ~~my bed~~,
I whiff the smell of a sweet convulsion.
Thoughts are sweating inside my head,
I'm making artificial love for free.
I start to howl in heat, I fu*k like a beast.

Slayer, "Necrophilia"

Mortuaries, dead of night, my body starts to rise
In my mind the horror lives, to feel death deep inside.

I feel the urge, the growing need,
To fu*k this sinful corpse.
My task's complete, the bitch's soul
Lies raped in demonic lust.

2 Live Crew, "Some Hot Head"

Hot head ho's, some white, some niggeros,
But I like the ones who suck toes and assholes.
With tongues like razors that cut when she licks,
How can I fu*k you with a skinless dick?
You take pride in suckin' a good dick,
And after I nut, bitch, you'd better not spit.
You're a dirt dobbler, a goop gobbler,
You'll fu*k Satan for the righteous dollar.
So give us some hot head.

2 Live Crew, "S & M"

So I pulled a little girlie, this is what I did,
Jumped in the ride and took her to the crib.
Rushed her in the room, sat her on the bed,
Grabbed her by the ears as she gave me head.
Then I turned her over, got it from the back,
The pu**y was sorry so the bitch got slapped.

Thrasher, "She Likes It Rough"

She loves the man who makes her bleed with pleasure,
She'll do it all, she loves to surrender.
All through the night she strains to get away....
She likes it rough, she likes it rough, she likes it hard.
Tie her down, she's knows what's waiting for her.
Nothing too cruel, so beat her 'til she's red and raw,
Crack the whip, it hardly stings the bitch.

2 Live Crew, "The Fu*k Shop"

So as you get the door and the panties drop,
Whole lot a suckin' and fu*kin' at the Fu*k Shop!
~~Please come inside and make yourself at home,~~
I want to fu*k 'cause my dick's on bone.
You little whore, behind closed doors
You would drink my cum and nothing more.
Now spread your wings, open for the flight,
Let me fill you up with somethin' milky and white.

KISS, "Let's Put the X in Sex"

Baby, let's put the X in sex,
Love's like a muscle and you make me wanna flex.
Sometimes you gotta suffer for the
pleasure that you seek.
You're begging for an eyeful but you only get a peek.
The I saw those black lace panties,
And I knew that it was you.

Bytches With Problems, "Teach a Muthafu*ka
How to Eat the Pu**y Right"

Make like Moses and part my pu**y like the Red Sea,
And slide your fat tongue inside of me.
I take my legs, wrap it around ya head,
Suffocating this bastard 'til he's almost dead.
When I looked down he had his hand on his dick,
I could not believe he was masturbating and sh*t.
My pu**y was goopin like cottage cheese,
His mouth was drippin' as he stood to his feet.

II. DESTRUCTIVE THEMES

Rigor Mortis, "Bodily Dismemberment"

Welcome to my home dear, I'll show you a good time
It's too bad that you never heard my fetish is a crime
There's no need to worry, bitch, just lay there and relax
And as you reach your climax I'll be reaching for my axe.

With five easy slices you're in six lovely pieces,
Bodily dismemberment as passion increases.

First I'll slice your tender leg off just above the thigh
Then I remove your sle der arms,
my passion running high.
Last I will decapitate your pretty little head,
A masterpiece of blood and flesh
lies twitching on my bed.

Metallica, "Harvester of Sorrow"

Drink up, shoot in, let the beatings begin
Distributor of pain, your loss becomes my gain.
All have said their prayers, invade their nightmares,
To see into my eyes, you'll find where murder lies.
Infanticide.

Motley Crue, "You're All I Need"

The blade of my knife faced away from your heart,
Those last few nights it turned and sliced you apart.

Mettalica, "Fade to Black"

I have lost the will to live,
Simply nothing more to give.
There is nothing more for me,
Need the end to set me free.

Ozzy Osbourne, "Suicide Solution"

Breaking laws, knocking doors,
But there's no one at home.
Made your bed, rest your head,
But you lie there and moan.
Where to hide, suicide is the only way out,
Don't you know what it's really all about?
Why don't you kill yourself,
'Cause you can't escape the reaper.

Blood Feast, "Kill for Pleasure"

Raise of the sledge, bring it down on her head
Kill for pleasure, satisfy the need
Kill for pleasure, make her bleed.

Bathory, "Sadist (Tormentor)"

I love to see you writhe and throe,
The more you suffer my lust grows.
I slit your throat and tear your flesh,
My desire will be your death.
I welter in blood, I rape and slay,
Stab, lacerate, so much lust to satisfy.
To still my hunger, another must die....Sadist!

Ozzy Osbourne, "Bloodbath in Paradise"

They'll summon you, to wake from the dead as
you lie bleeding, murdered in your bed.
The sweetest dreams are all in your mind,
But no one wakes when Charlie creeps behind.
Execution halts your breath, helter skelter
spiral death, bloodbath in paradise.
But there's nowhere to break out baby, bloodbath
in paradise -- forever sleep in paradise.

Suicidal Tendencies, "Suicide's An Alternative"

Sick of life -- it sucks,
Sick and tired -- no one cares,
Sick of myself -- don't wanna live,
Sick of living -- gonna die!
Suicide's an alternative.

Metallica, "Damage, Inc."

Blood follows blood and we make sure,
Life ain't for you and we're the cure.
Victim is your name and you shall fall.
Damage jackals ripping right through you,
Sight and smell of this, it gets me goin'.

WORDS MASKED BY GUITAR SOLO:

Get the gun and try it!
Shoot...shoot...shoot...shoot...(laughter)

III. OCCULT THEMES

Slayer, "Spill the Blood"

Spill your blood, let it run on to me
Take my hand and let go of your life
Close your eyes and see what is me
Raise the chalice, embrace the evermore
You've spilt the blood, I have your soul.

Rigor Mortis, "Demons"

We force you to kill your brother,
Eat his blood and brain.
Shredding flesh and sucking bone 'til everyone's insane.

We are pestilent and contaminate the world,
Demonic legions prevail.

We are instruments of evil, we come straight out of hell.
We're the legions of the demons. haunting for the kill.
Cathedrals are now cemetaries, doom is all you see.
We have come to take the world, and give you misery.

We are pestilent and contaminate the world,
And make tombs of your cities.
Demons, demons, demons, demons.

Metallica, "Master of Puppets"

Master of puppets, I'm pulling your strings,
Twisting your mind and smashing your dreams.
Blinded by me, you can't see a thing,
Just call my name, 'cause I'll hear you scream.

Hell is worth all that, natural habitat
Just a rhyme without a reason
Neverending haze, drift on numbered days
Now your life is out of season.
I will occupy, I will help you die,
I will run through you, now I will rule you too.

Come crawling faster, obey your master.
Your life burns faster, obey your master.

Slayer, "Kill Again"

Kill the preacher's only son,
Watch the infant die.
Bodily dismemberment,
Drink the purest blood.

Slayer, "Altar of Sacrifice"

Waiting the hour destined to die,
Here on the table of hell.
A figure in white unknown by man,
Approaching the altar of death.
High priest awaiting, dagger in hand,
Spilling the pure virgin blood.
Satan's slaughter, ceremonial death.
Answer his every command.

Venom, "Possessed"

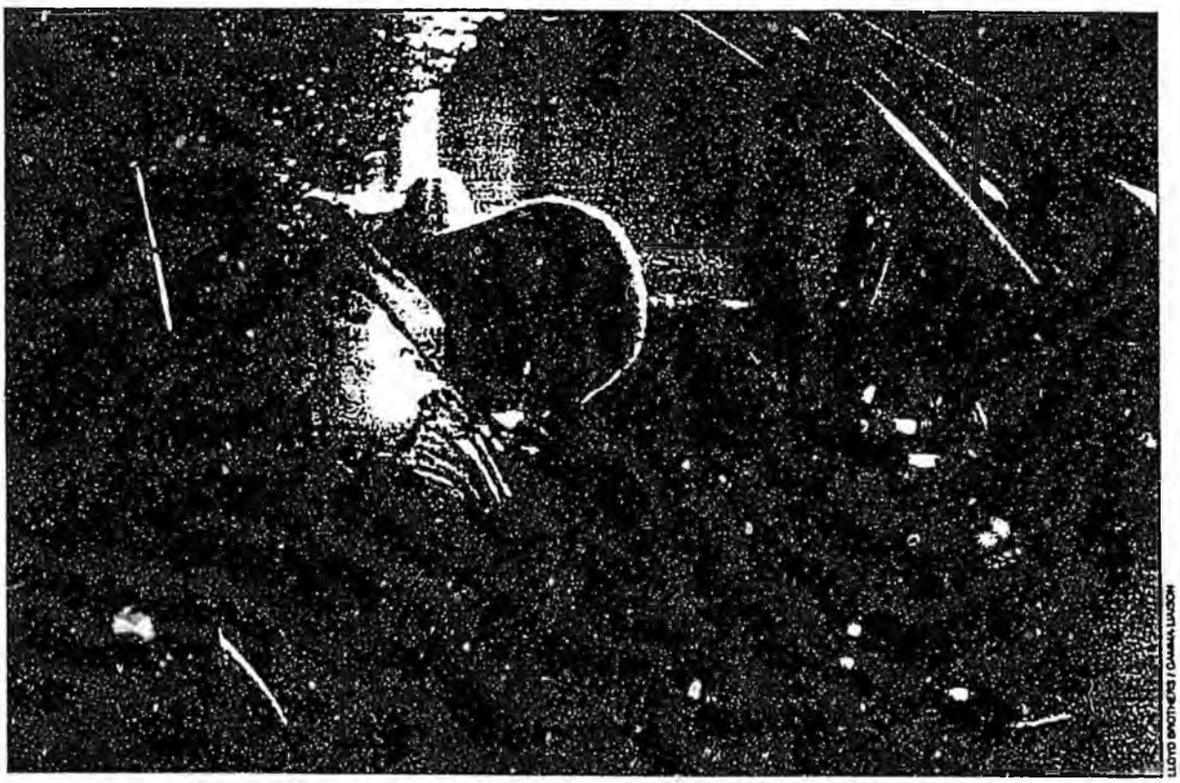
Look at me, Satan's child, born of evil, thus defiled.
Brought to life through Satanic birth,
Come look at me and I'll show you things that will
open your eyes.
Listen to me and I'll tell you things that will
stick in your mind.
I drink the vomit of the priests,
Make love with the dying whore.
Satan, as my master incarnate, hail,
Praise to my unholy host.

Iron Maiden, "The Number of the Beast"

The ritual has begun, Satan's work is done,
Six, six, six, the number of the beast.
Six, six, six, the one for you and me.
I'm coming back, I will return,
And I'll possess yo .r body and I'll make you burn.

A Generation at Risk: What Can be Done?

by Thomas L. Jipping



■ *Too common a sight*: A young murder victim slumps over the wheel of his car in Washington, D.C., which leads the nation in homicides per capita.

Coming to grips with the homicide plague among America's youth is daunting indeed. Stories of dead teenagers are filling America's newspapers.

Just a year ago, the cover of *U.S. News and World Report* decried the "epidemic of teenage murder" that claims more young men every 100 hours than were killed during the Persian Gulf War. According to the U.S. Department of Justice, teenagers are victims of violent crime at a rate three times that of adults. During the 1980s, arrests of minors for murder jumped by

■ ***Faddish firepower:*** **A Los Angeles gang member sports an Uzi. Availability of guns has been blamed for the murder plague, but what inspires the killer behind the gun?**

music as one of the two most powerful influences on young people. These experts echo Aristotle, who believed that music has the power to shape character.

Motley Crue, perhaps the most popular heavy metal rock band today, says that "those who have the youth have the future." Who has them? The average teenager today listens to rock music from four to six hours a day. We should not wonder why. Young people are searching for guidance, meaning, and identity and are not finding it where they should.

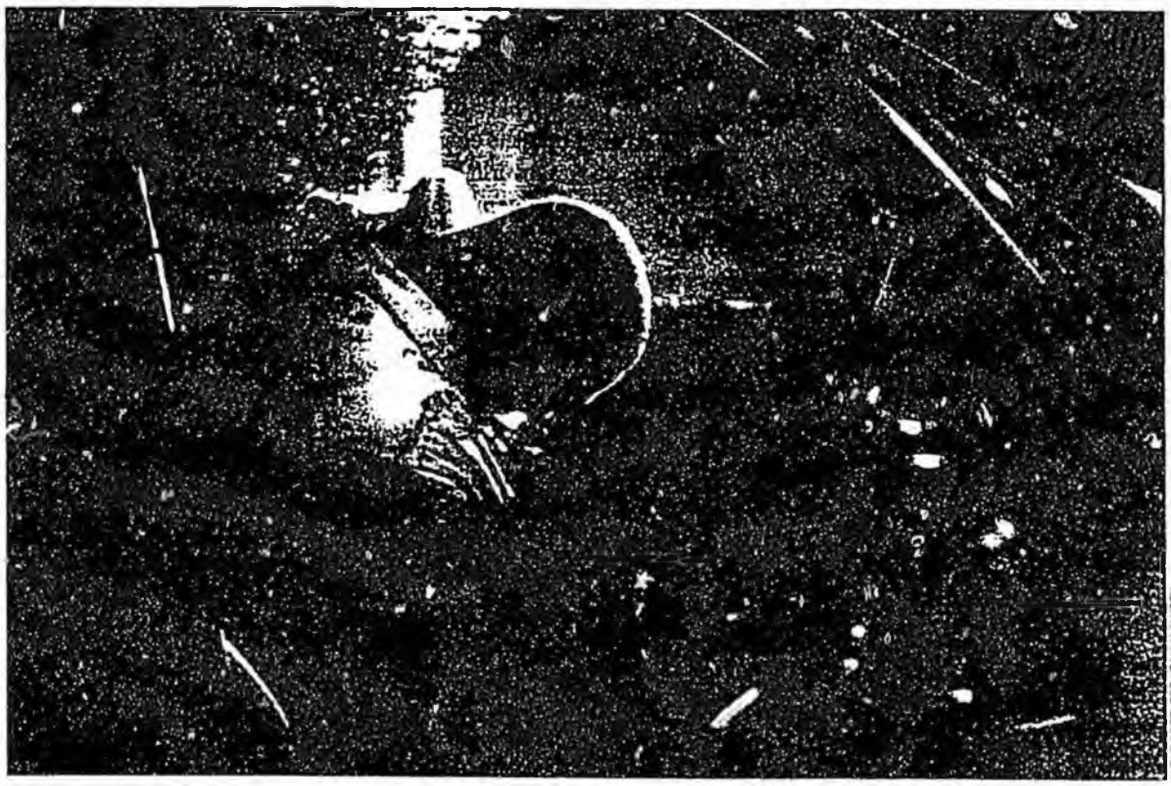
The *Washington Post* recently ran a front-page story about the despair and sheer boredom among affluent northern Virginia teenagers. Columnist Cal Thomas points out that rock stars meet three of children's basic needs: "First, [they] provide unlimited time. They never tell teens to come back when they're not busy. . . . Second . . . [they] offer complete, unqualified acceptance. . . . Third, [they] understand."

What do the rock stars tell America's youth during that unlimited time? *U.S. News* observed rercently that there is an emphasis on "violence and far more explicit sexual descriptions." Even liberal columnist Ellen Goodman writes that "rock lyrics have turned from 'I can't get no satisfaction' to 'I'm going to force you at gunpoint to eat me alive.'" *Time* magazine also noted that "rock music has become a dominant—and potentially destructive—part of teenage culture. Lyrics, album covers and music videos, particularly in the rock genre called heavy metal, romanticize bondage, sexual assaults and murder."

Among the hundreds of heavy metal bands willing to spend unlimited time with America's youth are Annihilator, Atrocity, Blood Feast, The Damned, Death, Deicide, Devastation, Entombed, Guillotine, The Horde of Torment, Infernal Majesty, Legion of Death, Massacre, Megadeth, Morbid Angel, Obituary, Pestilence, Poison, Rigor

A Generation at Risk: What Can be Done?

by Thomas L. Jipping



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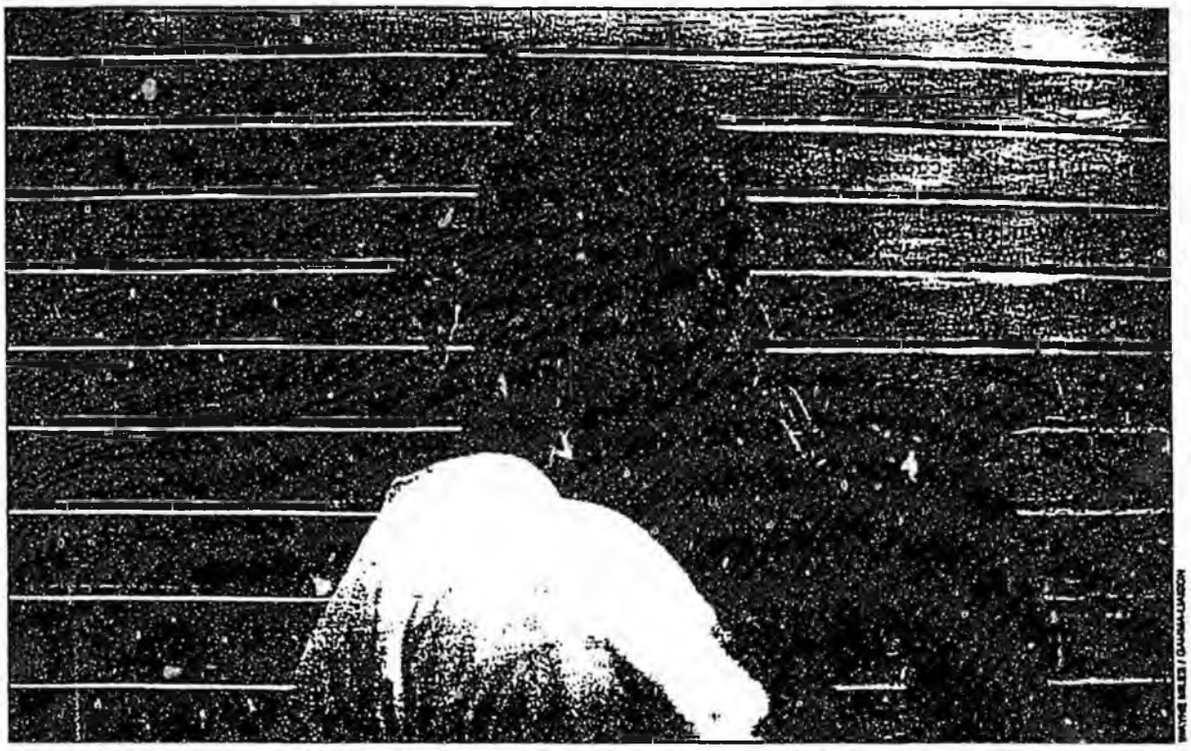

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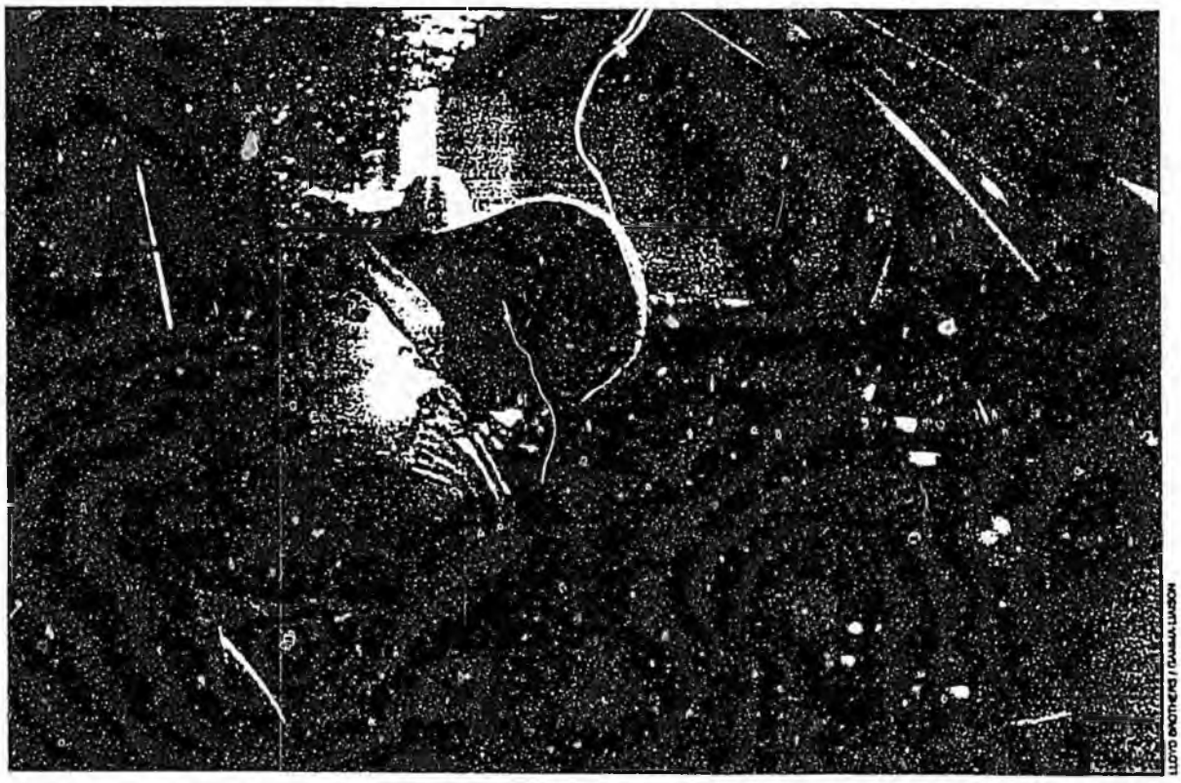
A Generation at Risk: What Can be Done?

by Thomas L. Jipping



■ *Too common a sight*: A young murder victim slumps over the wheel of his car in Washington, D.C., which leads the nation in homicides per capita.

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Just a year ago, the cover of *U.S. News and World Report* decried the "epidemic of teenage murder" that claims more young men every 100 hours than were killed during the Persian Gulf War. According to the U.S. Department of Justice, teenagers are victims of violent crime at a rate three times that of adults. During the 1980s, arrests of minors for murder jumped by

more than 20 percent.

The picture is even more bleak in the black community. Firearm homicides by young black men more than doubled during the 1980s. Columnist Don Feder states that "statistically, a young black man is 10 times more likely to commit a homicide than a young white" man, while a National Center for Health Statistics study found that young blacks are five times as likely as whites to be homicide victims.

As my father used to say, liars figure and figures lie. Is there really a "homicide plague" among America's youth or a new "epidemic of teenage murder"? Ira Schwartz argues in his book *(In)Justice for Juveniles* that "we are not in the midst of a juvenile crime wave" and that "minority youth, particularly black youth, do not account for a substantially disproportionate amount of serious juvenile crime." Indeed, it remains true that the large majority of black youth are not out killing for Reeboks, but are going to school and church, working, and just trying to grow up.

What we do know is that the numbers themselves really cannot tell the whole story. This generation of America's youth is "at risk," to use the currently fashionable buzzphrase, and we all know it. Whether it is suicide, drugs, sexual promiscuity and abortion, or rebellion, many indicators even outside of the homicide statistics establish this loud and clear. And simply telling the grim tale alone permits copping out by wringing hands at the relative size of the problem. Listing stats is the easy part, while going beyond to address the cause and cure is the real job here.

The messages and values that young people learn from the prevailing culture will determine how they live their lives and, in turn, the ultimate nature and character of our society.

In a society of individuals who do not seem to believe in much anymore, who want license rather than ordered liberty, and rights rather than responsibility, people often refuse to either face the obvious or address the important. As such, most attempts to get on with the task of examining cause and cure are left stagnantly tinkering with symptoms and fail entirely to arrive at meaningful solutions.

Typical of the confident, almost cocky, media establishment, *U.S. News* announced last year that the main reason for the homicide epidemic is "the no-problem availability of guns." They miss the boat entirely. Observations about the current weapon of choice tell us absolutely nothing about why that weapon (or any other, for that matter) is used and entirely ignore the fact that, even in America's urban jungles, most young black men commit no crimes at all. If the availability of guns is the cause, everyone who could obtain one (nearly everyone, according to *U.S. News*) would use them. But it just isn't so.

THE CAUSE

The cause is not guns. The cause is culture. Culture, writes Illinois state Rep. Penny Pullen in the foreword to *Heavy Metal, Rap, and America's Youth* (Free Congress Foundation, 1991), is "a major determiner of our values. . . . Not a mere environment but a malleable milieu, subject to manipulation for good or ill." The messages and values that young people learn from the prevailing culture will determine how they live their lives and, in turn, will determine the ultimate nature and character of our society.

One yardstick of the culture is the messages children receive through popular music. Sheila Davis, adjunct professor of lyric writing at New York University, writes that songs "are more than mere 'mirrors of society;' they are a potent force in the shaping of it. . . . Popular songs . . . provide the primary 'equipment for living' for America's youth."

Child and adolescent psychiatrist Robert Demski identifies

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Mortis, Slaughter, Slayer, Sodom, Suicidal Tendencies, Terrorizer, Venom, Wasted Youth, and The Zombies. We have further legitimized this part of youth culture by handing out a Grammy Award and an American Music Award each year to the "best" heavy metal band.

Rap music, popular among white as well as black youth, often pushes the same message of violence, deviance, and exploitation. The rapper Ice Cube recently released an album titled *Death Certificate*. In one song, he calls his former group N.W.A. (Niggers with Attitude) to kill their "white Jew" manager. In another song, "Black Korea," he calls on blacks to loot and burn business establishments operated by Koreans. Music critic Leonard Pitts cites Ice Cube and N.W.A. as examples of "gangsta rap," which he describes as "a sound of unredeemed violence and unrelieved ugliness.... Think ... of a world where the old rules are punk rules, where what's right for you is all that matters."

The group Public Enemy recently released a video titled "By the Time I Get to Arizona" protesting the decision by Arizona voters not to establish a public holiday to honor Dr. Martin Luther King, Jr. It depicts members of the group murdering the state's elected officials, including the governor. Black columnist Clarence Page called it "an oddball way to celebrate the legacy of Dr. King, a man who lived and died by a philosophy of non-violence." The *New York Times* recently called bigotry "the new sound in pop music," and Mira Boland of the Anti-Defamation League of B'nai B'rith says that "given the popularity of rap music today, it's hard to think of a more insidious influence on the minds of young people."

American culture today accepts the notion that death is a solution to life. The flipside of that coin is that life just does not mean much.

Another example of a culture that produces violent youth is the breakdown of the family. Marriage today is seen as a temporary arrangement between two individuals rather than the lifelong foundation of a family. The worst thing for children is their parents' divorce. Louis Sullivan, secretary of health and human services, points out that 70 percent of juveniles in long-term correctional facilities grew up without fathers.

My experience on the staff of a long-term youth rehabilitation facility is similar. More than 90 percent of the kids come from broken homes. One analyst, writing in *Policy Review*, concluded that the absence of fathers "is at the root of the epidemics of crime and drugs."

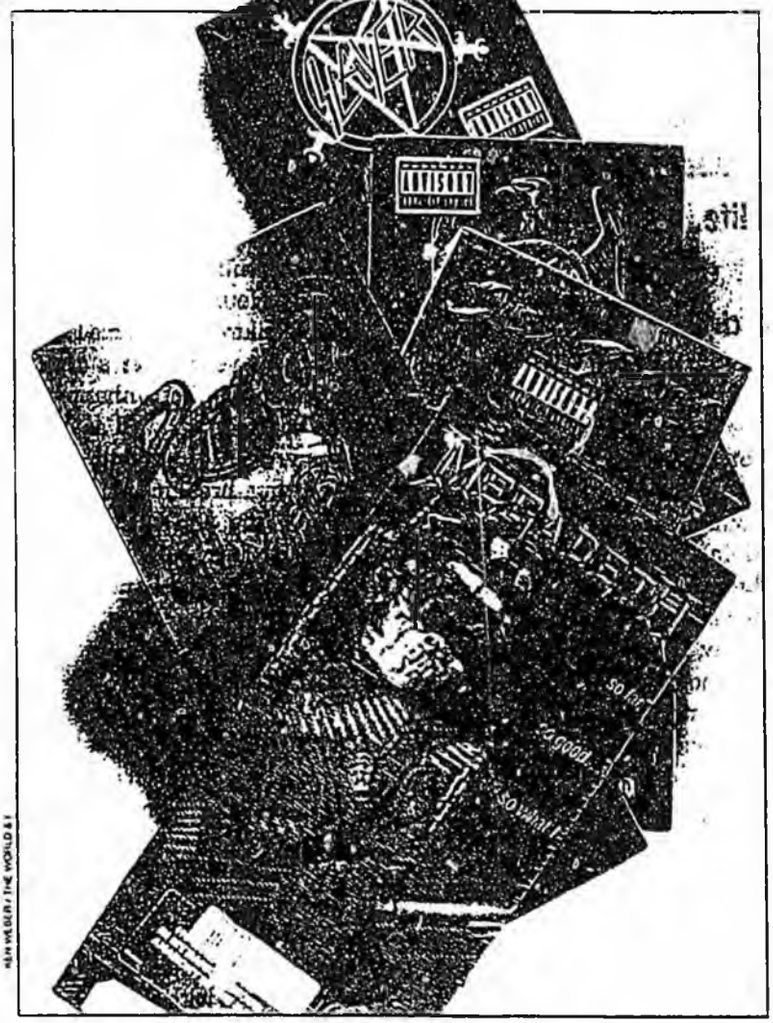
Of course, a warm body around the house does not a good role model make. But no father at all brings the chances down to zero. Peter Weyrich's study *The Human Costs of Divorce: Who Is Paying?* describes how the capacity for parenting diminishes after divorce. He notes how the California Children of Divorce Project found that years after a divorce "anger, apathy, and unhappiness were common, as well as delinquency, including drug abuse, shoplifting, breaking and entering, drinking, and sexual promiscuity. Through it all, it was clear that strong emotional needs were still unmet."

THE SOLUTION

Unless the cure meets the cause, the problem will persist. In general, the solution is to make children a priority. This has two components, one parental and one societal. The bottom line is that parents need to pay attention to their children. This means spending time with them. Penciling in some "quality time" just won't do. The parent who treats the local shopping mall as a babysitter is the same parent who says "I never knew" when drugs are found in the school locker. Parents should know who their children's friends are; most have no clue.

Children want and need attention, to know that they matter to someone, to trust that someone cares about what hap-

A GENERATION AT RISK



■ *Inducements to death*: Heavy metal and rap music, which often use words and imagery full of violence, sexual deviance, and suicide, help mold a culture that devalues life.

pens to them. In his book *Honor Thy Children*, Orley Herron lists among his "21 commandments of good old-fashioned parenting" such things as taking time to be with your children, identifying with them, participating in projects with them, planning family activities, and enjoying them. All these things require attention and keeping children at the top of the priority list. Spouses do not automatically make good parents; marriage should be as much for family and children as for each other.

Paying attention includes monitoring what is being pumped into children's brains through music and television. If someone were to come into your home and encourage your children to murder, rape, and rebel, you would show them not only the door, but a thing or two besides. Any teacher who did the same would be fired. Well, don't forget that someone who is willing to spend unlimited time with your children may be doing just that through those Walkmans attached to their heads. Do you know who has your children's ear?

Paying attention also includes discipline. Adults often talk at and about teenagers, but they do not talk to them or with them. And they do not listen to them. Young people want direction, they want limits, they want meaning, and they want guidance. They will learn what they are taught and they will meet expectations.

When the teaching comes from delinquent peers or rock musicians, when expectations are only negative, it is little wonder why we see the results we do. At the facility where I volunteer, one boy wrote me a note that said: "You are the father I always wanted, who would take the time and show me what's right." That's what he had always looked for in a father but had never found: time and discipline.

Feder writes about exactly the same thing (we did not compare notes): "Our father knew what yuppies never learned, or

quickly forgot. There is no substitute for paternal affection and discipline." Could we be onto something here?

William Raspberry writes that the situation will not improve "until we learn once again to honor, preserve and strengthen the one arrangement that seems to offer the best chance for producing healthy, happy and competent children—the child-centered marriage."

There is also a societal component to making children a priority. First, we must encourage the formation and permanency of marriage. As long as it is deemed an arrangement only for two individuals rather than an institution for the family, children will continue to suffer. No-fault divorce assumes no-commitment marriage: no commitment to the spouse and none to children.

Second, we ease the financial burdens of raising children. Fathers today are actually earning less than their own fathers did. Most families with children now pay even more in payroll taxes than in federal income taxes. While the percentage of income paid in taxes by singles and married childless couples remained the same from the 1960s to the 1980s, it more than doubled for families with children.

This is why President Bush's proposal in his State of the Union address on January 18 to raise the exemption for dependent children by just $500 means virtually nothing. An extra 20 cents per day for families already so far behind just won't make a difference.

It remains true that the large majority of black youth are not out killing for Reeboks, but are going to school and church, working, and just trying to grow up.

Third, we must bring parents directly in touch with, so that they can evaluate, some of the most destructive cultural influences on their children. Several states have considered legislation to prohibit the sale of recordings advocating violence, drug abuse, and the like to minors. Once Johnny has to ask Mom to buy the next release by Dark Throne, Morgoth, or Ultimate Revenge for him, Mom might just get the education she needs.

Finally, we must encourage and advance private efforts to help youth that work. For example, the Endowment for Community Leadership, founded by Spencer Brand, provides funds to support people helping people in community-based projects across the country. The endowment helps fund Colorado Uplift, for example. Of 1,300 delinquent youth in that program, more than 800 now enjoy full-time employment. Focused on developing leadership skills among minorities in major cities, the endowment believes that rebuilding families and teaching responsibility to youth are critical priorities.

My message usually is that rock stars should not be used as examples for anything. If parents give their children the unlimited time, unconditional acceptance, and understanding that rock stars are willing to provide, the homicide statistics would be far different.■

Thomas L. Jipping is director of the Center for Law and Democracy at the Free Congress Foundation, a nonprofit public policy research institute. He also serves as a consultant in the U.S. Department of Justice's Office of Juvenile Justice and Delinquency Prevention.

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MEMORANDUM IN OPPOSITION TO ALASKA HOUSE BILL 487

The Motion Picture Association of America, Inc. (MPAA) submits this memorandum in opposition to Alaska House Bill 487, which prohibits the dissemination of motion pictures on video cassettes that depict or describe sexual conduct "harmful to minors" unless permanent warning labels are affixed in specified type size and are covered by opaque wrappers.

The MPAA and its member companies*, who are the leading distributors of motion pictures for theatrical exhibition and subsequent release on video cassette, believe this bill is both unnecessary and contravenes the First Amendment to the United States Constitution.

HB 487 is unnecessary because the overwhelming majority of video tapes available in retail outlets either display the official MPAA rating and/or contain information for the parent to determine whether the video is appropriate for their children's viewing. For over 25 years, MPAA has administered the Classification and Rating Administration (CARA) which awards the familiar G, PG, PG-13, R and NC-17 to motion pictures. The rating system has been successful in guiding parents' decisions about their movie viewing. In the most recent nationwide survey, over 75% of parents surveyed said they found the rating system fairly helpful to helpful. Moreover, the overwhelming majority of theaters and video stores nationwide enforce the voluntary rules and regulations of the motion picture rating system, restricting access to movies that parents may find inappropriate for their children's viewing.

HB 487 would undermine the voluntary enforcement of the rules and regulation of the MPAA-administered rating system, and would cause severe damage to mainstream businesses, including motion picture distributors.

This bill also has the potential to cause retailers that rent and sell videos to provide only information and entertainment options that are appropriate for children due to the criminal liability associated with this bill if it is enacted.

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* MPAA member companies include: Buena Vista Pictures Distribution, Inc. (Disney); Metro-Goldwyn-Mayer Inc.; Paramount Pictures Corp.; Sony Pictures Entertainment, Inc.; Twentieth Century Fox Film Corp.; Universal City Studios, Inc.; and Warner Bros., a division of Time Warner Entertainment Company, L.P.

Moreover, businesses like MPAA member companies and independent video manufacturers that distribute movies to video stores in Alaska may also simply decide not to do business in the state because they want to avoid the criminal liability associated with this bill. In addition, due to the relatively small size of the Alaska market, the risk may be too great for the volume of business that is generated.

HB 487 IS UNCONSTITUTIONAL, COULD PENALIZE TAXPAYERS

In addition to practical reasons that this legislation is unnecessary, HB 487 raises serious constitutional issues. If this bill is enacted, it could also cost taxpayers hundreds of thousands of dollars in attorneys' fees if a constitutional challenge was successful.

HB 487 makes it a criminal act to sell, rent or distribute video cassettes without warning labels, which contravenes the First Amendment to the United States Constitution. The statutory prohibition constitutes an impermissible prior restraint of expression and bears a heavy presumption against its constitutional validity. Bantam Books v. Sullivan, 372 U.S. 58 (1963). The very concept of prior restraints on speech is repugnant to the First Amendment. Near v. Minnesota, 283 U.S. 697 (1931).

Since warning labels are required, MPAA also submits that this bill is unconstitutional because the courts have long held that the freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. This principle is illustrated by the case of Miami Herald Publishing v. Tornillo, 418 US 241 (1974) where the Supreme Court held unconstitutional a Florida statute placing an affirmative duty upon newspapers to publish the replies of political candidates they had criticized. The court found that the requirement deprived a newspaper of the fundamental right to decide what to print or omit. "For corporations as for individuals, the choice to speak includes within it the choice of what not to say." Tornillo at 258. The First Amendment guarantees freedom of speech a term which necessarily comprises the decision of both what to say and what not to say. See Riley v. National Federation of the Blind, 108 S.Ct 2667 (1988). This proposed bill compels film distributors to affix warning labels and create opaque packaging for certain video cassettes or to cease the distribution of videos in the State of Alaska. Such action corstitutes impermissible forced speech which violates the First Amendment.

MPAA believes that the courts would strike down HB 487 as they did an order that compelled a utility to place a newsletter containing views of a third party in its billing envelopes because in both cases the freedom not to speak publicly does not lose its protection because of the corporate identity of the speaker. See Pacific Gas Electric v. P.V.C. of California, 106 S.Ct 903 (1986).

Since the proposed bill impinges on the First Amendment, plaintiffs who succeed in invalidating the law would be entitled to an award of court costs and attorneys' fees under Title 42 USC Section 1983. Thus, Alaska taxpayers would not only bear the cost of defending an invalid law, but also the cost of successful challenges. For example, as a result of losing a constitutional challenge to a Missouri statute, the State of Missouri was recently ordered to pay nearly $200,000 in attorneys' fees to the MPAA and the Video Software Dealers Association.

Under this bill, filmmakers and video stores would be required to identify motion pictures which contain depictions that are "harmful to minors" in order to determine those on which to place the permanent "warning" label and cover with an opaque wrapper. The existence of such a list would likely lead to self-imposed censorship as motion picture distributors and video stores fear that the list could become public and thus falsely identify them as purveyors of pornography to minors which may result in unwarranted prosecution. In 1969, the United States Supreme Court struck down a Rhode Island law that authorized a commission to maintain a list of objectionable works. See Bantam Books v. Sullivan 372 US 58 (1969). In addition, the bill requires motion picture distributors to incriminate themselves by admitting their films contain depictions that are "harmful to minors" which might be subject to prosecution.

MPAA also believes the amendments to existing state law in HB 487, which would place labeling requirements on materials containing mere sexual conduct that have not been found by a court of law to be either obscene or harmful to minors, are unconstitutional because they infringe upon the First Amendment.

Motion pictures are a form of expression which is protected by the First Amendment to the U.S. Constitution, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952); Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Jenkins v. Georgia, 417 U.S. 153 (1974). The exhibition of a motion picture to an adult may be proscribed only if the motion picture is obscene, which requires a finding that such films "if taken as whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which taken as a whole, do not have serious literary, artistic, political or scientific value...", Miller v. California, 413 U.S. 15,21 (1973). The more recent U.S. Supreme Court ruling in Pope v. Illinois, 481 U.S. 497 (1987), affirmed the Miller test, specifying that the proper inquiry in an obscenity prosecution is whether a "reasonable person," as opposed to the "community," would find that the material possesses serious value.

Regulations pertaining to restricting a minor's access to a motion picture face similar constitutional scrutiny: it may be prohibited only if the motion picture is "harmful to minors," which requires a finding that the motion picture depicts nudity, sexual

contact, sexual excitement, or sadomasochistic abuse in a manner which "predominantly appeals to the prurient, morbid, or shameful interests of minors, which is patently offensive to prevailing standards in the adult community concerning what is suitable for minors and which is utterly without redeeming social importance for minors." Ginsberg v. New York, 390 U.S. 629 (1968). In Interstate Circuit v. City of Dallas, 391 U.S. 53 (1968), decided on the same day as Ginsberg, a Dallas ordinance that prohibited the admission of minors to films defined as not suitable for minors including motion pictures, "describing or portraying brutality, criminal violence, depravity, nudity, sexual promiscuity or abnormal sexual relations", was found unconstitutionally vague and over broad. The Court found that the absence of narrowly drawn, reasonable and definite standards was fatal and that, while the Constitution does not grant absolute freedom, restrictions imposed cannot be so vague as to set the censor "adrift upon a boundless sea."

LABEL REQUIREMENT ON VIOLENT VIDEO MOVIES UNCONSTITUTIONAL

The attempt in HB 487 to require a parental advisory warning label on motion picture videos that contain depictions of violence goes well beyond obscenity guidelines established by U.S. Supreme Court decisions. While the Supreme Court stated in Miller that obscenity was not protected by the First Amendment and could be regulated by the states, it has repeatedly held that virtually all other portrayals of behavior are protected by the First Amendment.

In Interstate Circuit, Inc. v. City of Dallas, 366 F2d 590 (5th Cir. 1966), remanded 391 U.S. 53, 88 S.Ct. 1649, 20 L.Ed.2d 415 (1968), the Fifth Circuit struck down as overbroad and unconstitutional an ordinance which classified as "not suitable for young persons" any film which described or portrayed excessive brutality or criminal violence. The Court found that the restriction on brutality or violence was invalid and held that "the standard for classification must be restricted to the control of obscenity". The Supreme Court in Sovereign News Co. v. Falke, 448 F. Supp. 306 (U.S.DC Ohio 977), remanded 610 F. 2d, 428, cert. denied Warner V. Sovereign News Co., 447 U.S. 923, rehearing denied, 448 U.S. 912, appeal after remand, 674 F. 2d. 484, cert. denied 459 U.S. 864, and 459 U.S. 883 (1982), confirmed a lower court ruling which held that materials containing non-obscene violence, brutality, or cruelty cannot be banned. The Court held that materials involving violence are given the highest degree of constitutional protection and may not be restricted unless they constitute a clear and present danger to society. More recently, the Supreme Court held that an Indianapolis ordinance that prohibited the depiction of non-obscene sexual violence was unconstitutional because the ordinance proscribed speech based on content. American Booksellers Association, Inc., et. al. v. William Hudnut III 771 F. 2d 323 (1985) aff'd, 106 S.Ct. 1172 (1986). The Court reasoned that the First Amendment preserves the right of every speaker in this nation to advocate even unpopular