

ALASKA LEGISLATURE COMMITTEE FILES

1993-1994

8672

7917

HOUSE JUDICIARY

188

THE
FOLLOWING
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DATE: SUNDAY October 1, 1994

PAGE: 31

SECTION: News

SOURCE: By SAJ. INFORMATIONALLY News reporter

EDITION: FINAL

LENGTH: Short

SUSPECT IN RAPE ARRESTED

Acting on a tip, police arrested Leonard Hoffman and another man early Monday morning at a Wasilla apartment where they were staying.

Police had been looking for Hoffman since Wednesday, when he allegedly assaulted one Anchorage woman and raped another at Knappa Point. Police had asked for the public's help in finding the 36-year-old Hoffman, who they said was dangerous and possibly armed.

Trooper spokesman Steve Wilhelm said a crime scene tip led police to the apartment building at the Seward-Mendenhall Parkway where Hoffman was staying.

When confronted, Hoffman initially gave troopers a fake name, Wilhelm said. But when he admitted who he was and gave up without a struggle.

Another man staying at the apartment also was arrested on an unrelated charge, Wilhelm said. The man, whom Wilhelm would not identify, also had a

RANK 1 OF 1, PAGE 1 OF 1, IN ADD, DOCUMENT 181818
various for

his arrest, he said. Wilhelm did not know the relationship between the men or how Hoffman traveled from Anchorage to Wasilla.

Hoffman is charged with four counts of first-degree sexual assault and one count of third-degree assault. He has a long criminal record, including convictions in California for three rapes and two vehicle thefts. In Alaska, he has been convicted of gambling, fourth-degree assault, carrying a concealed weapon, trespassing and possession of cocaine, according to court records.

In June, he was sentenced to three years in jail for drug possession. He was out on bail appealing that conviction when the latest attacks occurred.

In a court appearance Saturday, his bail was set at \$75,000 with a court-approved third-party custodian.

Leonard Hoffman, birthdate unknown, was found guilty by a jury of fourth-degree misconduct involving a controlled substance, and the following charges were dismissed: two counts of third-degree assault, and one count each of second-degree sexual assault, first-degree sexual assault and kidnapping. Sentenced to three years in prison, with recommendation for substance abuse treatment and counseling. Judge Souder.

FIREBOMBS: Inmate accused of scare tactics

Continued from Page 51

Hoffman began trying to intimidate the women soon after he landed in jail, according to the 13-page marriage document filed this week.

Montiel's wife, Dawn, a police Hoffman called him jail repeatedly and told her to tell one of the men not to testify.

"Go up to her and frighten her," Hoffman said, according to Dawn Montiel's statement to police. She also claimed he threatened her, saying, "If you don't do this I'm going to get people to take care of you. I'll go out and touch you."

A man named Shannon Kennington told police he was at the Montiel's house one day in November when Hoffman called from jail. Hoffman, he said, promised to give him a gram of heroin if he would shoot at a Spen-

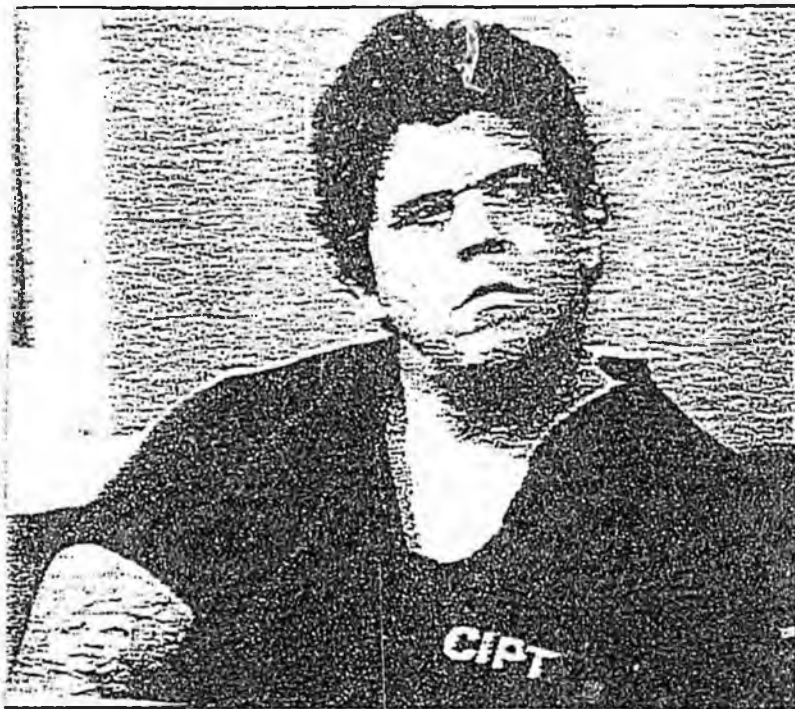
ard trailer to frighten a man out of testifying.

Kennington said he agreed to the terms. Early the next morning he and Gilbert Montiel fired six shots at the trailer Hoffman described. Kennington said.

Hoffman, however, only provided a fraction of the money he promised because he didn't believe they had done the job, Kennington said.

Over the phone from jail, Hoffman let Kennington know he was angry that shooting hadn't been reported in the news.

Hoffman said he wanted to make the newspaper, to get it known that "these things that something was going to happen," the char-



Day News file photo

Leonard Hoffman pleaded innocent to arson, witness tampering and interference with an official proceeding.

ges say. "Hoffman kept making phone calls to Montiel's residence to try to get Montiel and Kennington to go and do some more to these ladies' trailers."

On Dec. 11, a Molotov cocktail was thrown at the Spenard trailer. It landed in the driveway and caused no damage. Two days later, the woman Hoffman is accused of assaulting reported finding another Molotov cocktail — a gasoline-filled bottle with a white rag stuffed in the neck — in front of her trailer. The rag was partially burned, but the bomb did not explode.

On Jan. 6, the woman Hoffman is accused of raping was sleeping in her Mul-

doon trailer when a lit Molotov cocktail was thrown into her living room window. She put out the fire with an extinguisher before it spread.

Kennington told police he heard Montiel and Loper brag about the bombing afterward.

Richard Shoefel, assistant superintendent of Cook Inlet Pre-Trial Facility, said the jail couldn't listen in on Hoffman's phone conversations because it doesn't have phone monitoring equipment. If someone complains about getting threatening or harassing calls from an inmate, jail officers will tell the prisoner not to call that number again. In extreme

cases, they will have different phone numbers for the prisoner. Shoefel said. Police never asked him to restrict Hoffman's calls, he said.

The Department of Corrections is already being sued for allegedly allowing inmates in Cook Inlet Pre-Trial and Spring Creek Correctional Facility to plan and execute the fatal 1991 Eklutna mailbombing from behind bars. The lawsuit, filed by the wife of bombing victim David Kern, alleges the department failed to isolate inmates Doug Gustafson and R.D. Cheely from each other and from people outside the prison who carried out the bombing at the inmates' direction.

Arrest warrants were issued for Montiel and Loper, but only Loper was in jail Wednesday evening, authorities said.

Hoffman's trial on the October rape and assault charges was to begin today. His lawyer, Carmen Gutierrez, asked for more time to prepare in light of the new charges. The trial is now set to begin May 11.

Prosecutor Audrey Renschon said she plans to introduce evidence of Hoffman's scheme to intimidate the witnesses at the assault trial.

No trial date has been set for the charges filed this week.

Hoffman was convicted of raping two women in California and has served hard time in San Quentin, District Attorney Ed McNally said.

LEGISLATIVE ACTION

debated by lawmakers Wednesday

passed and sent to Senate:

SB112, which would update state laws for licensing of child-care centers, child-placement agencies, maternity homes, adult residential care and foster homes. Vote: 33-0.

SB426, which would establish the Chickaloon Flats Critical Habitat Area on the Chickaloon Bay on Kenai Peninsula, a prime bird nesting area. Vote:

passed and returned to Senate for concurrence with changes:

SB151, which would allow the state to pay much of a company's costs for geological exploration on unleased land in return for the resulting geological information. Vote: 37-2.

SB251, which would make fishermen with limited-entry permits eligible

• SB252, which would make possession of child pornography a misdemeanor. Vote: 38-0.

Senate passed and sent to House:

• SB311, which would allow factory workers to receive a tax credit toward the state's new fishery landing tax if they donate to nonprofit groups involved in developing fisheries jobs in coastal villages. Vote: 11-9.

Senate passed and returned to House for concurrence with changes:

• HB294, which would extend the life of the Pharmacy Board through June 1999. Vote: 19-1.

Senate rejected:

• HB49, which would allow absentee ballots to be cast by fax. Vote: 12-8.

• SB195, which would make changes to the state's physical therapy licensing laws. Vote: 10-10.

• HB323, which would allow state officials to

IN THE DISTRICT/SUPERIOR COURT FOR THE STATE OF ALASKA AT ANCHORAGE

WFO

() STATE OF ALASKA)
 () MUNICIPALITY OF ANCHORAGE)
)
 Plaintiff,)
)
 vs.)
)
 Leonard J. Hoffman)
 dob: 4/29/57)
 SSN 574-30-4503) Defendant.)

CASE NO. JAN-593-7782 CR
 ARREST WARRANT

To Any Peace Officer Or Other Authorized Person:

You are commanded to arrest the defendant and bring the defendant before the nearest available judicial officer without unnecessary delay to answer to a complaint ~~information/indictment~~ charging the defendant with violation of
A.S. 11.41.220(a)(1) and four counts 11.41.410(a)(1)
 (statute or ordinance)
 Assault: 3rd and four counts Sexual assault 1st
 (offense)

Bail is set at \$ 75,000- The defendant may not be released until the court approves a third party custodian and/or conditions of release.



[Signature]
 Judge/Deputy Clerk as ordered on the record
 by Judge Wielgowski

Date 10/13/93

Sex: M Race: W Ht: 6' Wt: 230# Hair: BRO Eyes: BRN
 DOB: 4-29-57 OL/ID AK 6058879 SSN 574-30-4503
 Last Known Address: 1414 West 26th. phone: _____
 Place of Employment: _____ phone: _____

RETURN

I received the above warrant on _____ 19____, and executed it by arresting the defendant and serving the defendant with a copy of this warrant in _____, Alaska, on _____, 19____.

Return Date _____ Signature of Peace Officer _____ Type or Print Name _____

IN THE DISTRICT COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT ANCHORAGE

STATE OF ALASKA,)
)
 Plaintiff,)
)
 vs.)
 Leonard J. Hoffman)
)
 DCB: 4/29/57)
 AK ID/OL: 6058879)
 SSN:574-30-4503)
 ATN:)
 Defendant.)

Filed in the Trial Courts
STATE OF ALASKA THIRD DISTRICT
IN ANCHORAGE

OCT 13 1993

by _____ Deputy

Court No. JAN-S93-7782 Cr.

COMPLAINT

COUNT ONE
ASSAULT IN THE THIRD DEGREE
AS 11.41.220(A)(1)

COUNT TWO
SEXUAL ASSAULT IN THE FIRST DEGREE
AS 11.41.410(A)(1)

COUNT THREE
SEXUAL ASSAULT IN THE FIRST DEGREE
AS 11.41.410(A)(1)

COUNT FOUR
SEXUAL ASSAULT IN THE FIRST DEGREE
AS 11.41.410(A)(1)

COUNT FIVE
SEXUAL ASSAULT IN THE FIRST DEGREE
AS 11.41.410(A)(1)

THE COMPLAINANT CHARGES IN COUNT ONE:

that on or about October 13, 1993, at or near Anchorage, in the Third Judicial District, State of Alaska, Leonard J. Hoffman did recklessly place another, M.B., in fear of imminent serious physical injury by means of a dangerous instrument.

All of which is a class C felony offense, being contrary to and in violation of AS 11.41.220(a)(1), and against the peace and dignity of the State of Alaska.

THE COMPLAINANT CHARGES IN COUNT TWO:

that on or about October 13, 1993, at or near Anchorage, in the Third Judicial District, State of Alaska, Leonard J. Hoffman did knowingly and unlawfully engage in sexual penetration with another person, K.V., without K.V.'s consent, by penetrating her anus with his finger.

All of which is an unclassified felony offense, being contrary to and in violation of AS 11.41.410(a)(1), and against the peace and dignity of the State of Alaska.

THE COMPLAINANT CHARGES IN COUNT THREE:

that on or about October 13, 1993, at or near Anchorage, in the Third Judicial District, State of Alaska, Leonard J. Hoffman did knowingly and unlawfully engage in sexual penetration with another person, K.V., without K.V.'s consent, by penetrating her vagina with his finger.

All of which is an unclassified felony offense, being contrary to and in violation of AS 11.41.410(a)(1), and against the peace and dignity of the State of Alaska.

THE COMPLAINANT CHARGES IN COUNT FOUR:

that on or about October 13, 1993, at or near Anchorage, in the Third Judicial District, State of Alaska, Leonard J. Hoffman did knowingly and unlawfully engage in sexual penetration with another person, K.V., without K.V.'s consent, by penetrating her vagina with his penis.

All of which is an unclassified felony offense, being contrary to and in violation of AS 11.41.410(a)(1), and against the peace and dignity of the State of Alaska.

THE COMPLAINANT CHARGES IN COUNT FIVE:

that on or about October 13, 1993, at or near Anchorage, in the Third Judicial District, State of Alaska, Leonard J. Hoffman did knowingly and unlawfully engage in sexual penetration with another person, K.V., without K.V.'s consent, by penetrating her mouth with his penis.

All of which is an unclassified felony offense, being contrary to and in violation of AS 11.41.410(a)(1), and against the peace and dignity of the State of Alaska.

I, Robert M. Gray, state under oath that this complaint is based

on information and belief derived from my investigation in this matter.

M.B. reports that just after midnight, in the early morning hours of October 13, 1993, she was at her home in Anchorage, when the defendant, who she knows as an acquaintance, came to see her. While at her home, the defendant suddenly grabbed her face with his hand, splitting her lip, and pushed her face into the couch. He then ripped her panties off, stuffed them in her mouth, and held up a knife as if he were going to stab her. He told her he had killed two back men already tonight with a baseball bat. M.B. said he suddenly stopped and began to frantically try to make telephone calls. She suggested to him that he could take her car, and he left. M.B. said she struggled with him during the above encounter, and scratched his face and bit his finger.

K.V. reports that around 12:30 a.m. on October 13, 1993, she was at her home in Anchorage, when the defendant, whom she knows as a boyfriend of her sister, came to her home. She said he wanted in, that some black guys had beaten him up. She observed injuries on him and invited him in and tried to bandage up his arm, using an Ace bandage.

K.V. said he smoked what appeared to be marijuana, after he offered her some, and she declined. She said he went back and forth to his car several times. She said one time as he was leaving, he grabbed her, pulling her shirt off, and pulled out a knife, which he used to cut off her bra. He then dragged her into the bedroom. He tied her hands above her head, using the Ace bandage she had given him earlier. He told her, "I have nothing to lose. I'm going to kill you." He told her he had an Uzi in the car. He then forced his finger into her anus. He continued to assault her by forcing his finger into her vagina. He forced his penis into her vagina. He grabbed her hair and forced her mouth onto his penis. During these assaults, he was rubbing the knife around her breasts.

Afterward, K.V. tried to pretend everything was okay, because she was still afraid that the defendant would carry through on his threat to kill her. She offered to make him some food, and managed to escape to call the police when he went to the microwave to get his food. She said he followed her, cursing, but she managed to get away.

BAIL INFORMATION

The defendant is known to me as a convicted sexual assault felon in California. I am also aware that he is currently out on bail pending appeal on a drug conviction.



DATED this 13 day of October, 1993, at Anchorage,
Alaska.

Det Robert M. Smith #0512
Inv.
Anchorage Police Department

SUBSCRIBED AND SWORN to before me this 13th day of
October, 1993, at Anchorage, Alaska.

[Signature]
Judge/Magistrate

January 10, 1994
SB 228

SENATE JOURNAL

p. 2453

(Profile released January 3, 1994)

SENATE BILL NO. 228 by SENATORS SALO, Little, Zharoff, entitled:

"An Act relating to bail after conviction for various felonies if the defendant has certain previous felony convictions."

was read the first time and referred to the Judiciary and Finance Committees.

April 5, 1994
SB 228

SENATE JOURNAL

p. 3444

The Judiciary Committee considered SENATE BILL NO. 228 "An Act relating to bail after conviction for various felonies if the defendant has certain previous felony convictions." Signing do pass: Senator Taylor, Chair, Senators Little, Doniey, Jacko, Halford.

Zero fiscal notes published today from Department of Law, Department of Public Safety, Department of Administration (2), Department of Corrections.

April 5, 1994
SB 228

SENATE JOURNAL

p. 3445

SENATE BILL NO. 228 was referred to the Finance Committee.

April 13, 1994
SB 228

SENATE JOURNAL

p. 3623

The Finance Committee considered SENATE BILL NO. 228 "An Act relating to bail after conviction for various felonies if the defendant has certain previous felony convictions." Signing do pass: Senator Pearce, Cochair, Senators Rieger, Jacko, Kelly, Sharp.

Previous zero fiscal notes.

SENATE BILL NO. 228 was referred to the Rules Committee.

S B

2 3 9

FISCAL NOTE

No. 1

Bill Version: SB 239

(S) Publish Date: 2-4-94

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NC

Revision Date: _____
Title: Financial Requirements: Noncrude
Oil Operations
Sponsor: Senate Special Committee on Oil & Gas
Requestor: Senate Special Committee on Oil & Gas

Department Affected: Environmental
Conservation
BRU: Spill Prevention and Response
Component: Industry Preparedness and Response

COMPONENT SERIAL NO. _____

Expenditures/Revenues:

(Thousands of Dollars)

	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
OPERATING EXPENDITURES						
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						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
----------------------	--	--	--	--	--	--

CHANGE IN REVENUES ()						
------------------------	--	--	--	--	--	--

FUND SOURCE

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipt						
1006 GF/MIITIA						
Other: 1052 Oil/11az "470" Fund	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 any current year (FY94) cost: \$ not applicable

POSITIONS:

FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary.)

No fiscal impact anticipated.

Changes in CS SB 239 (O&G) have no fiscal impact. This fiscal note is appropriate.

2-3-94
date

AK
Comte Aide (initial)

Prepared by: Robert Poe, Director
Division: Information and Administrative Services

Phone: 465-5010

Date: 1/21/94

Approved by Commissioner: John Sandor, Commissioner
Agency: Department of Environmental Conservation

Date: 1/21/94

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SPONSOR STATEMENT

CSSB-239 (O & G)

BY: SENATOR BERT SHARP

THE OIL AND GAS CS FOR SB239 RECOGNIZES THAT EXISTING STATUTES MANDATES LEVELS OF PROOF OF FINANCIAL RESPONSIBILITY LIABILITY THAT ARE SO UNREALISTIC THAT COVERAGE IS NOT AVAILABLE AND NEVER HAS BEEN.

THIS IS TRUE AS MUCH FOR AS 46.04.040(b) ONSHORE OIL AND GAS EXPLORATION ACTIVITY AS IT IS FOR MOVING REFINED PRODUCTS ALONG THE WATERWAYS OF ALASKA.

SECTION 1 ONLY REDUCES THE MANDATORY LIABILITY LIMITS TO MORE REASONABLY AVAILABLE LEVELS. THE REDUCED LEVELS ARE STILL APPROXIMATELY 10 TIMES HIGHER THAN OTHER OIL PRODUCING STATES.

THE 20 MILLION DOLLAR REQUIREMENT FOR ONSHORE PRODUCTION FACILITIES REMAINS INTACT FOR FACILITIES PRODUCING OVER 10,000 BARRELS OF OIL PER DAY. REQUIREMENTS ARE STAIR STEPPED DOWN FROM OVER 10,000 B/P/D/, TO 5,000 - 10,000, 2,500 - 5,000 AND 2,500 AND UNDER. IT SEEMS TO MAKE SENSE THAT PRODUCERS HANDLING LESS DAILY VOLUMNS WOULD CREATE LESS OF A SPILL POTENTIAL.

THIS BILL PROVIDES FOR REDUCTIONS FOR ONSHORE OIL AND GAS EXPLORATION ACTIVITIES THAT IN NINE OUT OF 10 CASES, NEVER INVOLVE AN EXPOSURE TO ON SITE CRUDE OIL. IF THE ACTIVITY IS SUCCESSFUL, THE SAFETY DEVICES AND THEIR OPERATIONS REQUIRED ARE HIGHLY DEVELOPED AND EFFECTIVE.

THERE HAS NEVER BEEN AN ONSHORE CRUDE SPILL IN ALASKA CAUSED BY AN EXPLORATION RIG.

THIS BILL IS AN ATTEMPT TO OPEN THE DOOR OF OPPORTUNITY A LITTLE BIT. THIS WOULD CREATE A MORE REALISTIC ENVIRONMENT FOR SMALL INDEPENDENT EXPLORATION FIRMS TO OPERATE IN ALASKA.

LET ME POINT OUT THAT AS.46.04.040(b) IS NOT THE ONLY PROOF OF FINANCIAL LIABILITY REQUIRED OF ONSHORE EXPLORATION. IT'S ONLY ONE OF MANY.

THE DIVISION OF OIL AND GAS REQUIRES THE POSTING OF A BOND IN PARAGRAPH 23 OF THEIR LEASE CONTRACT AS WELL AS SATISFY REQUIREMENTS IN 11 AAC 83.160.

THE DIVISION OF OIL AND GAS CAN ALSO REQUIRE SUPPLEMENTAL BONDING IF IT BELIEVES THE NATURE OF THE SURFACE AND ITS USES OR THE DEGREE OF RISK JUSTIFIES AN INCREASED BOND.

THE ALASKA OIL AND GAS CONSERVATION COMMISSION ALSO REQUIRES A LESSEE TO POST A SEPARATE BOND OF AT LEAST \$100,000 DOLLARS PRIOR TO ANY DRILLING ACTIVITY.

WITH MANY OF THE MAJOR OIL COMPANIES NOW REDIRECTING THEIR EXPLORATION EFFORTS OVERSEAS, IT WOULD ONLY SEEM PRUDENT TO REMOVE IMPOSSIBLE LIABILITY REQUIREMENTS PRESENTLY REQUIRED WHICH VIRTUALLY SHUTS OUT INDEPENDENT EXPLORATION AND PRODUCERS IN OUR STATE.

I BELIEVE THIS LEGISLATION IS A REASONABLE MOVE TO CORRECT THIS SITUATION.

THIS BILL, ALONG WITH A BALANCED "EXPLORATION LICENSING" BILL, MAY WELL STIMULATE RENEWED EXPLORATION ACTIVITY IN OUR STATE, THEREBY CREATING NOT ONLY NEW JOBS FOR ALASKANS, BUT NEW REVENUE SOURCES TO THE STATE TREASURY.

I ASK FOR YOUR SUPPORT OF THIS BILL.

SECTIONAL ANALYSIS FOR:
CS SB 239(O&G)

"An Act relating to evidence of financial responsibility provided by persons who conduct oil operations; and providing for an effective date."

Section 1.

Subsection (b)(1) The OFFSHORE exploration or production financial responsibility requirement of \$50 million is UNAFFECTED by this amendment.

Subsection (b)(2) The amended language clarifies that financial responsibility should be greater for an onshore facility producing more than 10,000 barrels per day of oil, than for an onshore facility producing 2,500 barrels or less per day.

Subsection (b)(3) Limits the financial responsibility for an onshore exploration facility to \$1,000,000.

Section 2.

Chapter 102, SLA 1992 gives the Department of Environmental Conservation the authority to waive its requirement that financial responsibility instruments provide for a direct action and appointment of an agent for service of process. The direct action provision is NOT AVAILABLE in marine pollution insurance, and has not been available since about 1989.

Section 6 of Ch. 102, SLA 1992 repealed this temporary law effective June 1, 1994. Rather than grant another two-year exemption, the Committee Substitute repeals the repealer and allows DEC to grant waivers until direct action again becomes available.

Section 3.

Makes certain there is no gap between the effective date and the date of the repeal of the former temporary waiver.

Section 4.

Immediate effective date.

SECTIONAL ANALYSIS

CSSB-239 (OIL & GAS)

"An Act relating to evidence of financial responsibility provided by persons who conduct oil operations; and providing for an effective date."

Section 1. (b)(2)(A) Keeps the financial responsibility amount of \$20 million if a facility produces over 10,000 barrels of oil per day.

(b)(2)(B) Financial responsibility is \$10 million per incident if facility produces over 5,000 barrels of oil per day, but not more than 10,000 barrels per day.

(b)(2)(C) Financial responsibility is \$5 million per incident if a facility produces over 2,500 barrels of oil per day, but not more than 5,000 barrels per day.

(b)(2)(D) Financial responsibility is \$1 million per incident if a facility produces 2,500 barrels of oil per day or less.

(b)(3) Reduces the financial responsibility requirement for an onshore exploration facility from \$5 million per incident to \$1 million per incident.

Section 2. Makes permanent temporary total waiver for non crude transport and storage companies to meet the statutory financial responsibility liability which ranges from \$1 million up to \$35 million as long as there is no third party insurance available.

Section 3. Makes certain there is no gap in the law for Section 2..

Section 4. Makes this Act effective immediately under AS 01.10.070(c).

(b) A person may not cause or permit the operation of a pipeline or an exploration or production facility in the state unless the person has furnished to the department, and the department has approved, proof of financial ability to respond in damages. Proof of financial responsibility required for a pipeline or an offshore exploration or production facility is \$50,000,000 per incident. Proof of financial responsibility required for an onshore production facility is \$20,000,000 per incident. Proof of financial responsibility required for an onshore exploration facility is \$5,000,000 per incident.

(c) Except as provided in (m) of this section, a person may not operate a tank vessel or an oil barge within the waters of the state, or cause or permit the transfer of oil to or from a tank vessel or an oil barge, unless the person operating the tank vessel or oil barge has furnished to the department, and the department has approved, proof of financial ability to respond in damages. Proof of financial responsibility required under this subsection is

(1) \$300, per incident, for each barrel of storage capacity or \$100,000,000, whichever is greater, for a tank vessel or barge carrying crude oil;

(2) \$100, per incident, for each barrel of storage capacity or \$1,000,000, whichever is greater, subject to a maximum of \$35,000,000, for a tank vessel or barge carrying noncrude oil.

(d) Except as provided in (k) of this section, it is not a defense to an action brought for violation of (a) — (c) of this section that the person charged believed in good faith that proof of financial ability to respond in damages had been furnished to, and approved by, the department.

(e) Financial responsibility may be demonstrated by (1) self-insurance, (2) insurance, (3) surety, (4) guarantee, (5) letter of credit approved by the department, or (6) other proof of financial responsibility approved by the department, including proof of financial responsibility provided by a group of insureds who have agreed to cover pollution risks of members of the group under terms the department may prescribe. An action brought under AS 46.03.758, 46.03.759, 46.03.760(a) or (e), 46.03.822, or AS 46.04.030(g) may be brought in a state court directly against the insurer, the group, or another person providing evidence of financial responsibility. The applicant, and an insurer, surety, guarantor, person furnishing an approved letter of credit, or other group or person providing proof of financial responsibility approved by the department shall appoint an agent for service of process in the state. For purposes of this subsection, an insurer, other than a group of insureds whose agreement has been approved by the department, must either be authorized by the Department of Commerce and Economic Development to sell insurance in the state or be an unauthorized insurer listed by the Department of Commerce and Economic Development as not disapproved for use in the state.

(f) Acceptance of proof of financial responsibility expires

SB 239 (O&G)

By: Senator Bert Sharp

State Comparisons of Financial Responsibility for Onshore
Exploration:

CALIFORNIA

\$1 million dollars requirement only within 30 miles of coastline. No requirement beyond 30 miles of coastline.

COLORADO

\$75 dollars permit fee per well. \$5,000 dollars per well for P & A (Plugging & Abandonment).

WASHINGTON

The state does not currently require onshore financial responsibility.

TEXAS

There is no financial responsibility required in Texas.

LOUISIANA

Louisiana is currently withholding oil spill regulations.

FLORIDA

No state drilling is allowed on state onshore lands in Florida.

WYOMING

There are no requirements beyond P & A (Plugging and Abandonment).

MONTANA

Montana has P & A (Plugging & Abandonment) requirements only.

MEMORANDUM
DEPARTMENT OF NATURAL RESOURCESState of Alaska
DIVISION OF OIL AND GASTO: Jerry Gallagher
Legislative Liaison

DATE: February 7, 1994

THRU: *[Signature]*
James E. Eason
Director

FILE NO: Legislation

TELEPHONE: 762-2580

FROM: Kristina M. O'Connor, *[Signature]*
CPL
DNR Coordinator for Oil Spill
Plans & Regulations

SUBJECT: Bonding Information

In response to your request for information regarding oil and gas bonding requirements, I have excerpted the following from the Final Best Interest Determination for Oil and Gas Lease Sale 78 (Cook Inlet). I have also attached copies of the lease provision and pertinent regulations. In summary, the primary purpose of the DO&G bond is not oil spill cleanup but rehabilitation of abandoned sites, and the bond amounts do not cover the entire cost of rehabilitation.

Paragraph 23 of the lease contract and 11 AAC 83.160 require the oil and gas lessee to post a performance bond with the Division of Oil and Gas (DO&G) before operations can commence on an oil and gas lease. The minimum bond required is \$10,000. However, a bond of \$100,000 or greater is typically required by DO&G, depending on the type of activity. A statewide bond of \$500,000 is also acceptable. Under the lease terms, DO&G can also require a supplemental bond if it believes that the nature of the surface and its uses or the degree of risk justifies the increase. Alaska Oil and Gas Conservation Commission (AOGCC) also requires a lessee to post a separate bond of at least \$100,000 prior to any drilling activity. ADEC, in its Oil Discharge Contingency Plan permitting process, requires proof of financial assurance of \$50 million for a pipeline or offshore exploration or production facility, \$20 million for an onshore production facility, and \$5 million for an onshore exploration facility.

The bonds required by DO&G and AOGCC are not intended to provide full coverage for cleanup and rehabilitation expenses resulting from a catastrophic accident or very large-volume oil spill. That cost cannot be determined in advance of a specific event at a specific location. Regardless of the required bond amount, and the bond amounts required by other state agencies, the lessee is still fully liable for the cleanup and rehabilitation of all disturbed areas. The bond required by DO&G is used as a demonstration that the lessee is solvent and in good corporate standing. The bond monies could be used to provide for cleanup or rehabilitation of the lease area but probably would not be adequate for the most catastrophic situations which could be encountered. The lessee remains fully liable for its actions and those of its subcontractors.

Attachments:

cc: Steve Schmitz, DO&G Permitting

CHAPTER 102

AN ACT RELATING TO EVIDENCE OF FINANCIAL RESPONSIBILITY PROVIDED BY PERSONS WHO CONDUCT OIL OPERATIONS; AND PROVIDING FOR AN EFFECTIVE DATE.

(CSSB 405(O&G))

Be it enacted by the Legislature of the State of Alaska:

Sec. 1. Permanent law. See Table of Disposition of Acts.

Sec. 2. TEMPORARY LAW APPLICABLE TO NONCRUDE OIL OPERATIONS. Notwithstanding AS 46.04.040, the Department of Environmental Conservation may, with respect to noncrude oil operations, approve proof of financial responsibility by a person, other than the applicant, who does not agree to be subject to a direct action in the state or to appoint an agent for service of process if the applicant

(1) provides proof of financial responsibility in the form and amounts otherwise required under AS 46.04.040;

(2) provides a sworn statement that

(A) is acceptable to the department;

(B) attests that the applicant has diligently attempted to obtain a form of proof of financial responsibility that would provide for a direct action and appointment of an agent for service of process;

(C) describes the steps the applicant has taken to obtain a form of proof of financial responsibility that would provide for a direct action and appointment of an agent for service of process;

(D) states that a form of proof of financial responsibility that would provide for a direct action and appointment of an agent for service of process is unavailable to the applicant;

(3) continues diligent efforts to obtain a form or proof of financial responsibility that would provide for a direct action and appointment of an agent for service of process and provides a sworn statement every six months that is acceptable to the department, containing the information required in (2) of this section.

Sec. 3. RATIFICATION OF PREVIOUS EXEMPTIONS GIVEN BY DEPARTMENT OF ENVIRONMENTAL CONSERVATION TO NONCRUDE OIL OPERATIONS. Notwithstanding AS 46.04.040, the Department of Environmental Conservation may, with respect to noncrude oil operations, approve proof of financial responsibility by a person, other than the applicant, who does not agree to be subject to a direct action in the state or to appoint an agent for service of process if the applicant, before June 1, 1992,

(1) provides proof of financial responsibility in the form and amounts otherwise required under AS 46.04.040;

(2) attests in a statement to the department that the applicant has diligently attempted to obtain a form of proof of financial responsibility that would provide for a direct action and appointment of an agent for service of process and that this form of proof is unavailable to the applicant; and

(3) agrees to continue diligent efforts to obtain a form of proof of financial responsibility that would provide for a direct action and appointment of an agent for service of process.

Sec. 4. Section 3 of this Act is retroactive to June 1, 1991.

Sec. 5. If this Act takes effect after June 1, 1992, sec. 2 of this Act is retroactive to June 1, 1992.

Sec. 6. Section 2 of this Act is repealed June 1, 1994.

Sec. 7. This Act takes effect immediately under AS 01.10.070(c).

Approved: June 20, 1992
Effective June 21, 1992;
section 2 is retroactive to
June 1, 1992, section 3 is
retroactive to June 1, 1991

CHAPTER 111

AN ACT MAKING APPROPRIATIONS TO THE DEPARTMENT OF LAW FOR PAYMENT TO MUNICIPALITIES FOR LOSSES OF FISHERIES TAX REVENUE SUFFERED AS A RESULT OF THE EXXON VALDEZ OIL SPILL; AND PROVIDING FOR AN EFFECTIVE DATE.

(HCS CSSB 240(FIN) am H)

Be it enacted by the Legislature of the State of Alaska:

Section 1. PURPOSE. To provide relief to municipalities whose tax receipts were affected by reduction of payments of the fisheries business tax, it is the purpose of this Act to provide additional refunds payable to municipalities so that the municipalities are compensated for the decrease in the proceeds of the fisheries business tax during fiscal year 1990 caused by the Exxon Valdez oil discharge disaster.

FAX TO 463-5522

Letter of intent to SB 405:

The Department of Environmental Conservation and the Legislative Research Agency shall research the possibility of group pooling for the purposes of meeting the state's financial responsibility requirements for oil spill pollution coverage for non-crude operators, and shall report back to the Legislature with their findings and recommendations by February 1, 1993.

IGNORE
HANDWRITTEN
NOTES.
AK

[Faint handwritten notes, possibly including "to be..." and "to be..."]

[Faint handwritten notes, possibly including "to be..." and "to be..."]

MARY HILL
pres + left mag.
3/19/93

SIGNED INTO LAW
6/20/92
EFFECTIVE
6/21/92

CS FOR SENATE BILL NO. 405 (O&G)
IN THE LEGISLATURE OF THE STATE OF ALASKA
SEVENTEENTH LEGISLATURE - SECOND SESSION

BY THE SENATE SPECIAL COMMITTEE ON OIL AND GAS

Offered: 4/15/92
Referred: Judiciary

Sponsor(s): SENATOR HOFFMAN

A BILL

FOR AN ACT ENTITLED

1 "An Act relating to evidence of financial responsibility provided by persons who conduct
2 oil operations; and providing for an effective date."

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

4 * Section 1. AS 46.04.040(e) is amended to read:

5 (e) Financial responsibility may be demonstrated by (1) self-insurance, (2) insurance, (3)
6 surety, (4) guarantee, (5) letter of credit approved by the department, or (6) other proof of
7 financial responsibility approved by the department, including proof of financial responsibility
8 provided by a group of insureds who have agreed to cover pollution risks of members of the
9 group under terms the department may prescribe. An action brought under AS 46.03.758
10 46.03.759, 46.03.760(a) or (e), 46.03.822, or as 46.04.030(g) may be brought in a state court
11 directly against the insurer, the group, or another person providing evidence of financial
12 responsibility; however, the liability under this section of a third-party insurer is limited to
13 the type of risk assumed and the amount of coverage specified in the proof of financial
14 responsibility furnished to and approved by the department. The applicant, and an insurer

1 surety, guarantor, person furnishing an approved letter of credit, or other group or person
2 providing proof of financial responsibility approved by the department shall appoint an agent for
3 service of process in the state. For purposes of this subsection, an insurer, other than a group
4 of insureds whose agreement has been approved by the department, must either be authorized by
5 the Department of Commerce and Economic Development to sell insurance in the state or be an
6 unauthorized insurer listed by the Department of Commerce and Economic Development as not
7 disapproved for use in the state. In this subsection, "third-party insurer" means a third-party
8 insurer, surety, guarantor, person furnishing a letter of credit, or other group or person
9 providing proof of financial responsibility on behalf of an applicant under this section;
10 "third-party insurer" does not include the applicant.

11 * Sec. 2. TEMPORARY LAW APPLICABLE TO NONCRUDE OIL OPERATIONS.

12 Notwithstanding AS 46.04.040, the Department of Environmental Conservation may, with respect to
13 noncrude oil operations, approve proof of financial responsibility by a person, other than the applicant,
14 who does not agree to be subject to a direct action in the state or to appoint an agent for service of
15 process if the applicant

16 (1) provides proof of financial responsibility in the form and amounts otherwise required
17 under AS 46.04.040;

18 (2) provides a sworn statement that

19 (A) is acceptable to the department;

20 (B) attests that the applicant has diligently attempted to obtain a form of proof
21 of financial responsibility that would provide for a direct action and appointment of an agent for
22 service of process;

23 (C) describes the steps the applicant has taken to obtain a form of proof of
24 financial responsibility that would provide for a direct action and appointment of an agent for
25 service of process;

26 (D) states that a form of proof of financial responsibility that would provide for
27 a direct action and appointment of an agent for service of process is unavailable to the applicant;

28 (3) continues diligent efforts to obtain a form of proof of financial responsibility that
29 would provide for a direct action and appointment of an agent for service of process and provides a
30 sworn statement every six months that is acceptable to the department, containing the information
31 required in (2) of this section.

1 * Sec. 3. RATIFICATION OF PREVIOUS EXEMPTIONS GIVEN BY DEPARTMENT OF
2 ENVIRONMENTAL CONSERVATION TO NONCRUDE OIL OPERATIONS. Notwithstanding
3 AS 46.04.040, the Department of Environmental Conservation may, with respect to noncrude oil
4 operations, approve proof of financial responsibility by a person, other than the applicant, who does not
5 agree to be subject to a direct action in the state or to appoint an agent for service of process if the
6 applicant, before June 1, 1992,

7 (1) provides proof of financial responsibility in the form and amounts otherwise required
8 under AS 46.04.040;

9 (2) attests in a statement to the department that the applicant has diligently attempted to
10 obtain a form of proof of financial responsibility that would provide for a direct action and appointment
11 of an agent for service of process and that this form of proof is unavailable to the applicant; and

12 (3) agrees to continue diligent efforts to obtain a form of proof of financial responsibility
13 that would provide for a direct action and appointment of an agent for service of process.

14 * Sec. 4. Section 3 of this Act is retroactive to June 1, 1991.

15 * Sec. 5. If this Act takes effect after June 1, 1992, sec. 2 of this Act is retroactive to June 1, 1992.

16 * Sec. 6. Section 2 of this Act is repealed June 1, 1994.

17 * Sec. 7. This Act takes effect immediately under AS 01.10.070(c).

S B

2 5 2

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. SB 252

Revision Date: _____
Title: "An Act prohibiting the possession of child pornography."
Sponsor: Senator Miller
Requestor: Senate Judiciary

Department Affected: Administration
BRU: Office of Public Advocacy
Component: Office of Public Advocacy
COMPONENT SERIAL NO. 43

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
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
------------------------	---	---	---	---	---	---

FUNDING SOURCE: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
OTHER						
TOTAL	0	0	0	0	0	0

Estimate of any 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.)

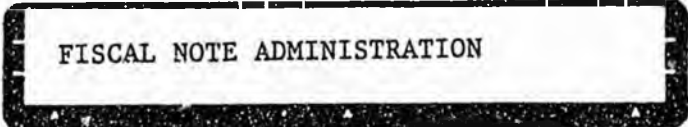
Prepared by: Brant McGee
Division: Office of Public Advocacy

Phone: 274 1684
Date: _____

Approved by Commissioner: Nancy Bear Usual
Agency: Department of Administration

Date: 1/24/94

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FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. SB 252

Revision Date: _____ Dept. Affected: Administration
 Title: "An Act prohibiting possession of child
pornography...." BRU: Public Defender Agency
 Component: Public Defender Agency
 Sponsor: Miller
 Requestor: (S) Jud COMPONENT SERIAL NO. 1631

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
Other	0.0	0.0	0.0		0.0	0.0
Total	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: John Salemi, Director Phone: 264-4400
 Division: Public Defender Agency Date: _____

Approved by Commissioner: Nancy Bear Usera Date: 1/24/94
 Agency: Administration

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FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. SB 252

Revision Date: _____ Dept. Affected: Corrections
 Title: AN act prohibiting possession BRU: None
of child pornography Component: None
 Sponsor: Senator Miller
 Requestor: Senate Judiciary COMPONENT SERIAL NO. N/A

Expenditures/Revenues	(Thousands of Dollars)					
OPERATING EXPENDITURES	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
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	(Thousands of Dollars)					
1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0	0	0	0	0	0

Estimate of any current year (FY94) cost: \$ 0

POSITIONS						
FULL-TIME						
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

According to the Department of Law, it is unlikely that prosecutions for this offense would occur except in conjunction with other more serious offenses.

Prepared by: Diane Schenker, Special Assistant Phone: 465-4643/786-2147
 Division: Office of the Commissioner Date: 1/24/94

Approved by Commissioner: [Signature] Date: 1/24/94

Agency: FISCAL NOTE CORRECTIONS

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO: SB 252

Revision Date: _____ Dept. Affected: Public Safety
 Title: " An act prohibiting the possession of BRU: Alaska State Troopers
child pornography." Component: Detachments
 Sponsor: Senator Miller
 Requestor: Senate Judiciary COMPONENT SERIAL NO. 799

EXPENDITURES/REVENUES: (Thousands of Dollars) (inflation not included)

OPERATING	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0
CAPITAL						
REVENUE FUND SOURCE:						

FUNDING: (Thousands of Dollars)

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

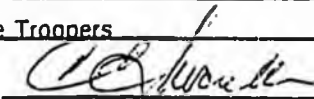
Estimate of current year (FY 94) impact: \$ _____

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

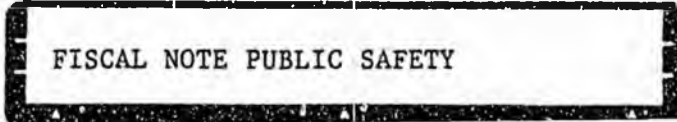
ANALYSIS: (Attach a separate page if necessary.)

No fiscal impact upon the Alaska State Troopers is anticipated.

Prepared By: Francis C. Allan Phone: (907) 269-5691
 Division: Alaska State Troopers Date: 01/20/93
 Approved by Commissioner:  Date: 01/24/94
 Agency: Richard L. Burton, Dept. of Public Safety

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FISCAL NOTE

BILL NO. SB 252

STATE OF ALASKA
1994 LEGISLATIVE SESSION

Revision Date: January 21, 1994
Title: "An Act prohibiting the possession of child pornography."
Sponsor: Senator Miller
Requestor: Senator Miller

Department Affected: Department of Law
BRU: Prosecution
Component: All
COMPONENT SERIAL NO. 0085 through 0090

EXPENDITURES/REVENUES:

OPERATING	FY 95	FY 96	FY 97	FY 98	FY 99	FY 00
PERSONAL						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND &						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	-0-	-0-	-0-	-0-	-0-	-0-

CAPITAL						
---------	--	--	--	--	--	--

REVENUE						
---------	--	--	--	--	--	--

FUNDING:

1002 Federal						
1003 GF Match						
1004 GF						
1005 GF/Program						
1006 GF/MHTIA						
OTHER						
TOTAL	-0-	-0-	-0-	-0-	-0-	-0-

POSITIONS:

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

Estimate of current year (FY94) impact: -0-

ANALYSIS: (Attach a separate page if necessary.)
Please see the attached analysis.

Prepared by: Richard I. Pegues, Director

Phone: 465-3672

Division: Administrative Services Division

Date: January 21, 1994

Approved by Commissioner: Bruce M. Botelho, Attorney General

Agency: Department of Law

Date: January 21, 1994

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FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. SB 252

ANALYSIS CONTINUATION:

This bill amends AS 11.61 to establish the crime of possession of child pornography punishable as a class B misdemeanor. The department does not anticipate a fiscal impact because, in most cases, evidence to support a prosecution would probably only come to light in conjunction with the investigation of more serious offenses, such as child sexual abuse or drug possession.

Any adult who sexually violates a child is, by definition, a child molester. Professional study of this activity establishes collection of child porn as a "given" in the life of virtually every identified child molester.

Studies summarized in the final report of the latest Attorney General's Commission on Pornography indicate those who sexually exploit children do so for a wide range of reasons, and come from a wide array of backgrounds, and occupations, but it seems helpful to group them into two categories: "situational" and "preferential" molesters. The former are people who act out of some serious sexual or psychological need but choose children as victims only when they are readily and safely accessible. "Preferential" molesters, on the other hand, are those with a clear sexual preference for children ("pedophiles" in common usage) who can only satisfy the demands of that preference through child victims. "Preferential" abusers collect child pornography and/or erotica almost as a matter of course. It is unclear how large each of these respective categories is, but it does seem apparent that "preferential" child molesters over the long term victimize far more children than do "situational" abusers. (pg 134-35)

Also shown in one of the studies summarized is the 6-step "life cycle" of child pornography. Typically, step one is the display of existing child pornography to a potential victim, ostensibly for "sex education". Step 2, attempt to convince child explicit sex is acceptable, even desirable. Step 3, child porn used to convince children are sexually active - it's ok. Step 4, child pornography desensitizes - lowers child's inhibitions. Step 5, some of these sessions progress to sexual activity. Step 6, photographs or movies are taken of the sexual activity (subsequently used as Step 1 with the next victim, thus perpetuating the cycle).

The pain suffered by children used in pornography is often devastating, and always significant. In the short term the effects of such involvement include depression, suicidal thoughts, feelings of shame, guilt, alienation from family

and peers, and massive acute anxiety. Victims in the long term may successfully "integrate" the event, particularly with psychiatric help, but many will likely suffer a repetition of the abuse cycle (this time as the abuser), chronic low self esteem, depression, anxiety regarding sexuality, role confusion, a fragmented sense of self, and possible entry into delinquency or prostitution. All, of course, will suffer the agony of knowing the record of their sexual abuse is in circulation, its effects on their future lives unknowable and beyond their control. That may well be their most unhealable wound. (pg. 136)

The commission also notes some states have made possession (of kiddie porn) illegal, and considers this action an "extremely effective" weapon against child molesters. (pg 134)

Several states currently have statutes which classify sexual exploitation of children as a felony, including possession of child pornography. Some of these states also mandate registration of sex-crime felons; a brief list of citations accompanies this statement.

Considering the life-shattering effect on our youth, I would ask in the strongest of terms, that you enact this legislation prohibiting the possession of child pornography in the state of Alaska. I would also ask that you put some REAL TEETH in it! Let's make Alaska's statute among the strongest, not the weakest. Have the first conviction require registration on a state law enforcement network, and link that registration requirement to life-time probation, as recommended by the Federal Commission. (Recommendation #53, pg 157)

Respectfully,

Robert W. Head, Sr.
Chair
Alaska Human Relations Commission

States Having Laws Requiring Registration of Sex Offenders

STATE	STATUTE NUMBER
Alabama	§ 13A-11-200
Arizona	13-3821
Arkansas	12-12-901
California	Penal Code 290
Colorado	18-3-412.5
Idaho	18-8303
Illinois	Chapter 730-150/2
Louisiana	15:542
Maine	34A Sec. 11003
Minnesota	243.166
Nevada	207.151
New Hampshire	632-A:12
Oklahoma	57 stat. § 582
Rhode Island	11-37-16
Utah	77-27-21.5
Washington	9A.44.130
West Virginia	61-8F-2

Citation	Rank(R)	Database	Mode
UT ST s 76-5a-3	R 27 OF 35	UT-ST-ANN	Page
U.C.A. 1953 s 76-5a-3			

UTAH CODE, 1953

TITLE 76. CRIMINAL CODE

CHAPTER 5a. SEXUAL EXPLOITATION OF CHILDREN

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Current through Ch. 17 of the 1993 2nd Sp. Sess. of the 50th Legislature

76-5a-3 Sexual exploitation of a minor.

(1) A person is guilty of sexual exploitation of a minor:

(a) When he knowingly produces, distributes, possesses, or possesses with intent to distribute, material or a live performance depicting a nude or partially nude minor for the purpose of sexual arousal of any person or any person's engagement in sexual conduct with the minor.

(b) If he is a minor's parent or legal guardian and knowingly consents to or permits that minor to be sexually exploited under Subsection (1)(a) above.

(2) Sexual exploitation of a minor is a felony of the second degree.

History: C. 1953, 76-5a-3, enacted by L. 1983, ch. 87, s 1; 1985, ch. 226, s 3.

NOTES, REFERENCES, AND ANNOTATIONS

Amendment Notes. -- The 1985 amendment substituted "minor" for "child" in six places; and inserted "possesses" after "distributes" in Subsection (1)(a).

NOTES TO DECISIONS

ANALYSIS

Intent.

Sexual abuse of child.

Intent.

Evidence insufficient to support inference of intent by defendants to allow photographing of partially nude child. See State v. Workman, 806 P.2d 1198 (Utah Ct. App.), aff'd, 852 P.2d 981 (Utah 1993).

Sexual abuse of child.

Subsection (1)(a) and s 76-5-404.1 (sexual abuse of a child) were not designed to proscribe parallel conduct. State v. Bishop, 753 P.2d 439 (Utah 1988).

U. C. A. 1953 s 76-5a-3

UT ST s 76-5a-3

END OF DOCUMENT

Citation	Rank(R)	Database	Mode
UT ST s 77-27-21.5	R 1 OF 2	UT-ST-ANN	Page
U.C.A. 1953 s 77-27-21.5			

UTAH CODE, 1953

TITLE 77. UTAH CODE OF CRIMINAL PROCEDURE

CHAPTER 27. PARDONS AND PAROLES

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Current through Ch. 17 of the 1993 2nd Sp. Sess. of the 50th Legislature

77-27-21.5 Sex offender registration -- Information system -- Law enforcement and courts to report -- Registration -- Penalty -- Temporary releases -- Effect of expungement.

(1) As used in this section:

(a) "Department" means the Department of Corrections.

(b) "Register" means to comply with the rules of the department made under this section.

(c) "Sex offender" means any person convicted by this state of violating Section 76-7-102 or 76-9-702.5, or of committing or attempting to commit a felony under Title 76, Chapter 5, Part 4, Sexual Offenses and any person convicted by any other state of an offense which if committed or attempted in this state would be punishable as one or more of these offenses. "Sex offender" also means all persons committed to a state mental hospital by reason of their mental incapacity and their commission or alleged commission of one or more offenses listed in this subsection.

(2) The department, to assist in investigating sex-related crimes and in apprehending offenders, shall:

(a) develop and operate a system to collect, analyze, and maintain information on sex offenders and sex offenses;

(b) make information collected and developed under this section available to law enforcement agencies in this state and other states; and

(c) establish security systems to ensure that only authorized personnel may gain access to information gathered under this section.

(3) All law enforcement agencies shall, in the manner prescribed by the department, inform the department of:

(a) the receipt of a report or complaint of an offense listed in Subsection (1)(c), within three working days; and

(b) the arrest of a person suspected of violating any of the offenses listed in Subsection (1)(c), within five working days.

(4) Upon convicting a person of any of the offenses listed in Subsection (1)(c), or any lesser included offense, the convicting court shall within ten working days forward a copy of the judgment and sentence to the department.

(5) All sex offenders in the custody of the department shall be registered by agents of the department upon:

(a) being placed on probation;

(b) commitment to a secure correctional facility operated by or under contract to the department;

(c) release from confinement to parole status, termination or expiration of

sentence, or escape;

(d) entrance to and release from any community-based residential program operated by or under contract to the department; or

(e) termination of probation or parole.

(6) All sex offenders not in the custody of the department who are confined in a correctional facility not operated by or under contract to the department shall, upon release from confinement, be registered with the department by the sheriff of the county in which the offender is confined.

(7) All sex offenders confined in a state mental hospital shall be registered with the department by the hospital before September 1, 1987. All sex offenders committed to a state mental hospital shall be registered with the department by the hospital upon admission and upon discharge.

(8) Any sex offender not registered under Subsection (5), (6), or (7) shall, before September 1, 1987, register with the office of the department nearest to his residence.

(9) All sex offenders shall, for the first five years after termination of sentence, again register within ten days of changing their place of habitation.

(10) An agency that registers a sex offender shall inform him of his duty to comply with the continuing registration requirements of this section.

(11) (a) A sex offender who knowingly fails to register under this section is guilty of a class A misdemeanor and shall be sentenced to serve a term of incarceration for not fewer than 90 days and also at least one year of probation.

(b) Neither the court nor the Board of Pardons may release a person who violates this section from serving a term of at least 90 days and of completing probation of at least one year. This subsection supersedes any other provision of the law contrary to this section.

(12) Information collected under this section is classified as private, controlled, or protected under Title 63, Chapter 2, Government Records Access and Management Act, and is available to the following only in the performance of their duties:

(a) law enforcement agencies;

(b) the State Office of Education; and

(c) the department.

(13) (a) If a sex offender is to be temporarily sent outside a secure facility in which he is confined on any assignment, including, without limitation, firefighting or disaster control, the official who has custody of the offender shall, within a reasonable time prior to removal from the secure facility, notify the local law enforcement agencies where the assignment is to be filled.

(b) This subsection does not apply to any person temporarily released under guard from the institution in which he is confined.

(14) Notwithstanding Section 77-18-2 regarding expungement, a person convicted of any offense listed in Subsection (1)(c) is not relieved from the responsibility to register under this section.

(15) The department may make rules necessary to implement this section.

History: C. 1953, 77-27-21.5, enacted by L. 1987, ch. 156, s 1; 1989, ch. 143, s 3; 1991, ch. 259, s 74; 1992, ch. 280, s 61.

Citation
 OK ST T. 57 s 582
 57 OKL.ST.ANN. s 582

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OKLAHOMA STATUTES ANNOTATED
 TITLE 57. PRISONS AND REFORMATORIES
 CHAPTER 8B. SEX OFFENDERS REGISTRATION ACT
 COPR. (c) WEST 1994 No Claim to Orig. Govt. Works
 Current through Chapter 366, approved 6/11/93

s 582. Persons and crimes to which act applies

The provisions of the Sex Offenders Registration Act [FN1] shall apply to any person who, after November 1, 1989, has been convicted, whether upon a verdict or plea of guilty or upon a plea of nolo contendere, or received a suspended sentence for a crime or an attempt to commit a crime provided for in Sections 885, 888, 1021, except for a crime provided for in paragraph 1 of subsection A of Section 1021, 1021.2, 1021.3, 1087, 1088, 1114 or 1123 of Title 21 of the Oklahoma Statutes or who enters this state after November 1, 1989, and who has been convicted or received a suspended sentence for a crime or attempted crime which, if committed or attempted in this state, would be a crime or an attempt to commit a crime provided for in any of said laws. The provisions of the Sex Offenders Registration Act shall apply to any person who enters this state on or after September 1, 1993, and who has received a deferred judgment for a crime or attempted crime which, if committed or attempted in this state, would be a crime or an attempt to commit a crime provided for in Section 885, 888, 1021, except for a crime provided for in paragraph 1 of subsection A of Section 1021, 1021.2, 1021.3, 1087, 1088, 1114 or 1123 of Title 21 of the Oklahoma Statutes. The provisions of the Sex Offenders Registration Act shall not apply to any such person while the person is incarcerated in a correctional institution of the Department of Corrections.

1991 Main Volume Credit(s)

Laws 1989, c. 212, s 2, eff. Nov. 1, 1989.

1994 Pocket Part Credit(s)

Amended by Laws 1993, c. 166, s 4, eff. Sept. 1, 1993.

[FN1] Section 581 et seq. of this title.

57 OKL. ST. ANN. s 582
 OK ST T. 57 s 582
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21 OKL.ST.ANN. s 1021			

OKLAHOMA STATUTES ANNOTATED
 TITLE 21. CRIMES AND PUNISHMENTS
 PART IV. CRIMES AGAINST PUBLIC DECENCY AND MORALITY
 CHAPTER 39. INDECENT EXPOSURE, OBSCENITY AND DISORDERLY HOUSES
 COPR. (c) WEST 1994 No Claim to Orig. Govt. Works
 Current through Chapter 366, approved 6/11/93

s 1021. Indecent exposure--Indecent exhibitions--Obscene or indecent writings, pictures, etc.--Solicitation of minors

A. Every person who willfully either:

1. lewdly exposes his person or genitals in any public place, or in any place where there are present other persons to be offended or annoyed thereby,
2. procures, counsels, or assists any person to expose such person, or to make any other exhibition of such person to public view or to the view of any number of persons, for the purpose of sexual stimulation of the viewer,
3. writes, composes, stereotypes, prints, photographs, designs, copies, draws, engraves, paints, molds, cuts, or otherwise prepares, publishes, sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, book, picture, photograph, motion picture, figure, or form of any description, or
4. makes, prepares, cuts, sells, gives, loans, distributes, keeps for sale, or exhibits any disc record, metal, plastic, or wax, wire or tape recording, or any other kind of sound recording of any obscene or indecent language, poetry, or songs, or who speaks any words by means of a telephone to any person which are offensive to decency or are calculated to excite vicious or lewd thoughts or acts, or who speaks any other communicable words which are offensive to decency or are adapted to excite vicious or lewd thoughts or acts,

shall be guilty, upon conviction, of a felony and shall be punished by the imposition of a fine of not less than One Hundred Dollars (\$100.00) nor more than Ten Thousand Dollars (\$10,000.00) or by imprisonment for not less than thirty (30) days nor more than ten (10) years, or by both such fine and imprisonment.

B. Every person who:

1. willfully solicits or aids a minor child to perform, or
2. shows, exhibits, loans, or distributes to a minor child any obscene or indecent writing, paper, book, picture, photograph, motion picture, figure, or form of any description for the purpose of inducing said minor to participate in,

any act specified in paragraphs 1, 2, 3 or 4 of subsection A of this section shall be guilty, upon conviction, of a felony and shall be punished by imprisonment in a state correctional institution for not less than ten (10) years nor more than thirty (30) years.

1983 Main Volume Credit(s)

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N.R.S. 200.710			

NEVADA REVISED STATUTES
 TITLE 15. CRIMES AND PUNISHMENTS.
 CHAPTER 200. CRIMES AGAINST THE PERSON.
 Use of Minors in Pornographic Performances
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 Current through Ch. 669, approved 10-1-93

200.710 Using minor in producing pornography unlawful.

A person who knowingly uses, encourages, entices or permits a minor to simulate or engage in or assist others to simulate or engage in sexual conduct to produce a performance shall be punished as provided in NRS 200.750.

(1979, p. 437; 1983, p. 815.)

NOTES, REFERENCES, AND ANNOTATIONS

Cross references. -- As to pornography involving minor, see NRS 217.050.

RESEARCH REFERENCES

Validity, construction, and application of statutes or ordinances regulating sexual performance by child. 21 A.L.R.4th 239.

LEGAL PERIODICALS

Review of Selected Nevada Legislation, Criminal Procedure, 1985 Pac. L.J. Rev. Nev. Legis. 83.

N. R. S. 200.710
 NV ST 200.710
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NEVADA REVISED STATUTES

TITLE 15. CRIMES AND PUNISHMENTS.

CHAPTER 200. CRIMES AGAINST THE PERSON.

Use of Minors in Pornographic Performances

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Current through Ch. 669, approved 10-1-93

200.730 Possession of visual presentation depicting sexual conduct of person under 16 years of age unlawful; penalties.

A person who knowingly and willfully has in his possession any film, photograph or other visual presentation depicting a person under the age of 16 years engaging in or simulating, or assisting others to engage in or simulate, sexual conduct:

1. For the first offense, is guilty of a gross misdemeanor.
2. For any subsequent offense, shall be punished by imprisonment in the state prison for not less than 1 year nor more than 6 years and may be further punished by a fine of not more than \$5,000.

(1983, p. 814; 1985, p. 1412; 1987, ch. 369, s 1, p. 846.)

NOTES, REFERENCES, AND ANNOTATIONS

Cross references. -- As to punishment for gross misdemeanors, see NRS 193.140.

OPINIONS OF ATTORNEY GENERAL

Section constitutional. -- This section, prohibiting possession of child pornography, is constitutional. AGO 87-11 (6-1-1987).

RESEARCH REFERENCES

Validity, construction, and application of statutes or ordinances regulating sexual performance by child. 21 A.L.R.4th 239.

LEGAL PERIODICALS

Review of Selected Nevada Legislation, Crimes, 1985 Pac. L.J. Rev. Nev. Legis. 109.

Review of Selected Nevada Legislation, Crimes, 1987 Pac. L.J. Rev. Nev. Legis. 59.

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IDAHO CODE

TITLE 18. CRIMES AND PUNISHMENTS

CHAPTER 83. SEX OFFENDER REGISTRATION ACT

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Current through Ch. 416 of the 52nd Legislature

18-8303 Application of chapter.

(1) The provisions of this chapter shall apply to any person who:

(a) On or after July 1, 1993, pleads guilty to or is found guilty of the crime, or an attempt, a solicitation, or a conspiracy to commit a crime provided for in section 18-1506 (sexual abuse of a child under sixteen years of age), 18-1506A (ritualized abuse of a child), 18-1507 (sexual exploitation of a child), 18-1507A (possession of sexually exploitative material for other than a commercial purpose), 18-1508 (lewd conduct with a minor child), 18-1508A (sexual battery of a minor child sixteen or seventeen years of age), 18-6101 (rape), 18-6108 (male rape), 18-6605 (crime against nature), or 18-6608, Idaho Code, (forcible sexual penetration by use of a foreign object);

(b) Enters the state on or after July 1, 1993, and who has pled guilty to or has been found guilty of any crime, an attempt, a solicitation or a conspiracy to commit a crime in another state, territory, commonwealth, or other jurisdiction of the United States that is substantially equivalent to the offenses listed in subsection (1)(a) of this section.

(c) Pleads guilty to or has been found guilty of a crime covered in this chapter prior to July 1, 1993, and the person, as a result of the offense, is incarcerated in a county jail facility or a penal facility or is under probation or parole supervision, on or after July 1, 1993.

(2) The provisions of this chapter shall not apply to any such person while the person is incarcerated in a correctional institution of the department of correction or a county jail facility.

[I.C., s 18-8303, as added by 1993, ch. 155, s 1, p. 391.]

HISTORICAL NOTES

Compiler's Notes. The words in parentheses so appeared in the law as enacted.

REFERENCES

This section is referred to in ss 18-8307, 18-8310.

I. C. s 18-8303
ID ST 18-8303
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ID ST 18-1507	R 6 OF 23	ID-ST-ANN	Page
I.C. s 18-1507			

IDAHO CODE

TITLE 18. CRIMES AND PUNISHMENTS

CHAPTER 15. CHILDREN AND LUNATICS

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Current through Ch. 416 of the 52nd Legislature

18-1507 Sexual exploitation of a child.

(1) The legislature hereby finds and declares that the commercial sexual exploitation of children constitutes a wrongful invasion of the child's right of privacy and results in social, developmental, and emotional injury to the child; that a child below the age of eighteen (18) years is incapable of giving informed consent to the use of his or her body for a commercial purpose; and that to protect children from commercial sexual exploitation it is necessary to prohibit the production for trade or commerce of material which involves or is derived from such exploitation and to exclude all such material from the channels of trade and commerce.

(2) As used in this section, unless the context otherwise requires:

(a) "Bestiality" means a sexual connection in any manner between a human being and any animal.

(b) "Child" means a person who is less than eighteen (18) years of age.

(c) "Commercial purpose" means the intention, objective, anticipation, or expectation of monetary gain or other material consideration, compensation, remuneration, or profit.

(d) "Erotic fondling" means touching a person's clothed or unclothed genitals or pubic area, developing or undeveloped genitals or pubic area (if the person is a child), buttocks, breasts (if the person is a female), or developing or undeveloped breast area (if the person is a female child), for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved. "Erotic fondling" shall not be construed to include physical contact, even if affectionate, which is not for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved.

(e) "Erotic nudity" means the display of the human male or female genitals or pubic area, the undeveloped or developing genitals or pubic area of the human male or female child, the human female breasts, or the undeveloped or developing breast area of the human female child, for the purpose of real or simulated overt sexual gratification or stimulation of one or more of the persons involved.

(f) "Explicit sexual conduct" means sexual intercourse, erotic fondling, erotic nudity, masturbation, sadomasochism, sexual excitement, or bestiality.

(g) "Masturbation" means the real or simulated touching, rubbing, or otherwise stimulating of a person's own clothed or unclothed genitals or pubic area, developing or undeveloped genitals or pubic area (if the person is a child), buttocks, breasts (if the person is a female), or developing or undeveloped breast area (if the person is a female child), by manual manipulation or self-induced or with an artificial instrument, for the

purpose of real or simulated overt sexual gratification or arousal of the

person.

(h) "Sadomasochism" means:

1. Real or simulated flagellation or torture for the purpose of real or simulated sexual stimulation or gratification; or
2. The real or simulated condition of being fettered, bound, or otherwise physically restrained for sexual stimulation or gratification of a person.

(i) "Sexual excitement" means the real or simulated condition of human male or female genitals when in a state of real or simulated overt sexual stimulation or arousal.

(j) "Sexual intercourse" means real or simulated intercourse, whether genital-genital, oral-genital, anal-genital, or oralanal, between persons of the same or opposite sex, or between a human and an animal, or with an artificial genital.

(k) "Sexually exploitative material" means any photograph, motion picture, videotape, print, negative, slide, or other mechanically, electronically, or chemically reproduced visual material which depicts a child engaged in, participating in, observing, or being used for explicit sexual conduct.

(3) A person commits sexual exploitation of a child if, for any commercial purpose, he knowingly:

(a) Causes, induces, or permits a child to engage in, or be used for, any explicit sexual conduct; or

(b) Prepares, arranges for, publishes, produces, promotes, makes, sells, finances, offers, exhibits, advertises, deals in, possesses, or distributes any sexually exploitative material.

(4) The possession by any person of three (3) or more identical copies of any sexually exploitative material shall create a presumption that such possession is for a commercial purpose.

(5) The sexual exploitation of a child is a felony and shall be punishable by imprisonment in the state prison for a period not to exceed fifteen (15) years or by a fine not to exceed twenty-five thousand dollars (\$25,000) or by both such fine and imprisonment.

(6) If any provision of this section or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of this section which can be given effect without the invalid provision or application, and to this end the provisions of this section are declared to be severable.

[I.C., s 18-1507, as added by 1983, ch. 256, s 1, p. 678; am. 1987, ch. 177, s 1, p. 352; am. 1992, ch. 145, s 2, p. 438.]

HISTORICAL NOTES

Compiler's Notes. A former s 18-1507 which comprised S.L. 1957, ch. 197, s 2, p. 407; am. 1961, ch. 58, s 1, . 86 was repealed by S.L. 1969, ch. 325, s 11. The words in parentheses so appeared in the law as enacted.

REFERENCES

Cross Ref. Medical examination of victim, cost paid by law enforcement

agency, s [19-5303] 19-5302.

This section is referred to in ss 6-1701, 18-1508A, 18-8303, 19-2604, 19-5307, 33-1208, 39-1113 and 72-1025.

ANNOTATIONS

Sexually Exploitative Material.

Because the statute narrowly and specifically defines sexually exploitative material, and because of the lesser constitutional protections afforded this material, officers involved in the search were not required to make a subjective determination regarding the status of sexually exploitative materials where it was immediately apparent to the officers upon viewing the cover of the book that it contained sexually exploitative material; therefore all three requirements for a valid plain view seizure were met. State v. Claiborne, 120 Idaho 581, 818 P.2d 285 (1991).

It was immediately apparent to the officers searching defendant's home that a book contained sexually exploitative material where the words on the front cover and the words on the back cover alerted officers as to the contents and clearly made it immediately apparent that sexually exploitative material in the form of "Pedophilia Photo Illustrated" would be found inside, and a cursory glance at the inner contents only served to confirm that conviction. State v. Claiborne, 120 Idaho 581, 818 P.2d 285 (1991).

I. C. s 18-1507
ID ST 18-1507
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BACK UP

would grant certiorari and vacate the death sentence in this case.

No. 89-7146. Darryl Eugene Freeman, Petitioner v Alabama

496 US 912, 110 L Ed 2d 284, 110 S Ct 2604, reh den (US) 111 L Ed 2d 823, 111 S Ct 8.

June 4, 1990. Petition for writ of certiorari to the Supreme Court of Alabama denied.

Same case below, 555 So 2d 215.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg v Georgia*, 428 US 153, 227, 231, 49 L Ed 2d 859, 96 S Ct 2909 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89-7423. In Re Kwasi Seltu, Petitioner

496 US 903, 110 L Ed 2d 284, 110 S Ct 2604, reh den (US) 111 L Ed 2d 825, 111 S Ct 10.

June 4, 1990. The petition for writ of habeas corpus is denied.

No. 89-7452. In Re Gareth Wilson, Petitioner

496 US 903, 110 L Ed 2d 284, 110 S Ct 2604.

June 4, 1990. The petition for writ of habeas corpus is denied.

No. 89-7008. In Re Arthur W. Carson, Petitioner

496 US 904, 110 L Ed 2d 284, 110 S Ct 2604.

June 4, 1990. The petition for writ of mandamus is denied.

No. 89-7350. In Re Raymond Swentek, Petitioner

496 US 904, 110 L Ed 2d 284, 110 S Ct 2604, reh den (US) 111 L Ed 2d 833, 111 S Ct 20.

June 4, 1990. The petition for writ of mandamus is denied.

No. 89-6889. In Re Ralph McFadden, Petitioner

496 US 904, 110 L Ed 2d 284, 110 S Ct 2604, reh den (US) 111 L Ed 2d 823, 111 S Ct 7 and reh den (US) 111 L Ed 2d 822, 111 S Ct 7.

June 4, 1990. The petition for writ of mandamus and/or prohibition is denied.

No. 87-8927. Alexis Hamilton, as Natural Mother and Next Friend of James Edward Smith, Petitioner v Texas

496 US 913, 110 L Ed 2d 284, 110 S Ct 2605.

June 4, 1990. The petition for rehearing is denied.

Former Decision, 495 US 923, 109 L Ed 2d 320, 110 S Ct 1958.

No. 88-1213. Employment Division, Department of Human Resources of Oregon, et al., Petitioners v Alfred L. Smith, et al.

496 US 913, 110 L Ed 2d 285, 110 S Ct 2605.

June 4, 1990. The petition for rehearing is denied.

Former Decision, 494 US 872, 108 L Ed 2d 876, 110 S Ct 1595.

No. 88-5986. Clyde Osborne, Appellant v Ohio

496 US 913, 110 L Ed 2d 285, 110 S Ct 2605.

June 4, 1990. The petition for rehearing is denied.

Former Decision, 495 US 103, 109 L Ed 2d 98, 110 S Ct 1691.

No. 89-1319. Mark Tarka, Petitioner v G. Charles Franklin, et al.

496 US 913, 110 L Ed 2d 285, 110 S Ct 2605.

June 4, 1990. The petition for rehearing is denied.

Former Decision, 494 US 1080, 108 L Ed 2d 940, 110 S Ct 1809.

No. 80-1334. Jerome B. Rosenthal, Petitioner v J. M. Young, et al.

496 US 913, 110 L Ed 2d 285, 110 S Ct 2605.

June 4, 1990. The petition for rehearing is denied.

Former Decision, 494 US 1080, 108 L Ed 2d 941, 110 S Ct 1811.

No. 89-1341. Maria Graciela Ramirez, Petitioner v Transamerican Natural Gas Corp., et al.

496 US 913, 110 L Ed 2d 285, 110 S Ct 2605.

June 4, 1990. The petition for rehearing is denied.

Former Decision, 494 US 1081, 108 L Ed 2d 942, 110 S Ct 1811.

No. 89-1382. In Re James Freed, Petitioner

496 US 913, 110 L Ed 2d 285, 110 S Ct 2606.

June 4, 1990. The petition for rehearing is denied.

Former Decision, 494 US 1077, 108 L Ed 2d 935, 110 S Ct 1839.

No. 89-5737. Charles Troy Coleman, Petitioner v James Saffle, Warden, et al.

496 US 913, 110 L Ed 2d 285, 110 S Ct 2606.

June 4, 1990. The petition for rehearing is denied.

Former Decision, 494 US 1090, 108 L Ed 2d 964, 110 S Ct 1835.

No. 89-6302. Harold G. Williams, Petitioner v Ralph Kemp, Warden

496 US 913, 110 L Ed 2d 285, 110 S Ct 2606.

June 4, 1990. The petition for rehearing is denied.

Former Decision, 494 US 1090, 108 L Ed 2d 965, 110 S Ct 1836.

[495 US 103]
 CLYDE OSBORNE, Appellant

v

OHIO

495 US 103, 109 L. Ed 2d 98, 110 S. Ct. 1691, reh. den. (US) 110 L. Ed 2d 285,
 110 S. Ct. 2605

[No. 88-5986]

Argued December 5, 1989. Decided April 18, 1990.

Decision: Ohio held permitted, under Federal Constitution's First Amendment, to ban possession and viewing of child pornography; remand held necessary to insure proof of each element of offense.

SUMMARY

An Ohio statute which was designed to combat child pornography made it a crime for a person to possess or view any material or performance that shows a minor who is not the person's child or ward in a state of nudity, except under specified circumstances. A person in Ohio was accused of violating the statute after he was found to possess in his home four photographs, each of which depicted a nude male adolescent posed in a sexually explicit position. The accused's counsel, moving to dismiss the case before trial, alleged that the statute was overbroad, in that it criminalized conduct that was protected under the Federal Constitution. The trial court overruled the motion to dismiss and subsequently gave the jury instructions to which the accused's counsel made no objection. The accused was found guilty as charged, and his conviction was affirmed by an Ohio appellate court. The Supreme Court of Ohio, affirming in turn, held that (1) the Federal Constitution's First Amendment does not prohibit states from proscribing the private possession of child pornography; (2) the statute was not overbroad, because it was to be construed as (a) applying to only a depiction of nudity that "constitutes a lewd exhibition or involves a graphic focus on the genitals," and (b) including scienter as an essential element of the offense; (3) the accused, by failing to make a timely objection to the jury instructions as given, waived any claim that the trial court erred in failing to instruct the jury that the term "nudity" referred to a lewd exhibition of the genitals; and (4) the instructions as given were not plainly erroneous (37 Ohio St 3d 249, 525 NE2d 1363). The Ohio Supreme

Briefs of Counsel, p 809, *infra*.

OSBORNE v OHIO

(1990) 495 US 103, 109 L. Ed 2d 98, 110 S. Ct. 1691

Court denied a motion for rehearing and granted a stay pending appeal to the United States Supreme Court.

On appeal, the United States Supreme Court reversed and remanded. In an opinion by WHITE, J., joined by REHNQUIST, Ch. J., and BLACKMUN, O'CONNOR, SCALIA, and KENNEDY, JJ., it was held that (1) Ohio's proscription of the possession and viewing of child pornography was permitted under the First Amendment because (a) Ohio did not rely on a paternalistic interest in regulating a person's mind, but rather sought to serve a compelling state interest in protecting the victims of child pornography, and (b) it was reasonable for the state to conclude that such proscriptions were necessary in order to decrease the production of child pornography; (2) the statute, as construed by the Ohio Supreme Court to include the elements of scienter and lewd exhibition, was not unconstitutionally overbroad; (3) the Ohio Supreme Court properly applied its narrowed construction of the statute to the accused's conduct, since the accused had had notice that his conduct was proscribed; (4) the United States Supreme Court was precluded from reaching a due process claim involving the trial court's failure to instruct the jury as to scienter, because the failure of the accused's counsel to comply with a state procedural rule requiring a timely objection to the jury instructions constituted an independent state-law ground adequate to support the result below; (5) the United States Supreme Court was not precluded from reaching a due process claim involving the trial court's failure to instruct the jury as to the lewdness element of the offense, because counsel had pressed the issue of the prosecution's failure of proof on lewdness before the trial court, and, under the circumstances, nothing would be gained by requiring counsel to object a second time, specifically to the jury instructions; and accordingly (6) it was necessary to remand the case for a new trial in order to insure that the conviction stemmed from a finding that the prosecution had proved each of the elements of the offense.

BLACKMUN, J., concurring, joined the court's opinion and expressed the view that the United States Supreme Court's ability to entertain the accused's due process claim which was premised on the trial court's failure to charge the "lewd exhibition" and "graphic focus" elements of the offense did not depend on the accused's objection to this failure at trial.

BRENNAN, J., joined by MARSHALL and STEVENS, JJ., dissenting, expressed the view that (1) the accused's conviction should be reversed, but Ohio should not be free on remand to retry him under the statute; (2) the statute, even as construed by the Ohio Supreme Court, was fatally overbroad because (a) the construction focused on "lewd exhibitions of nudity" rather than "lewd exhibitions of the genitals" in the context of sexual conduct, and (b) the "graphic focus" test was unduly vague; (3) even if the statute was not overbroad, Ohio could not criminalize the accused's possession of the photographs at issue, and (4) the accused's due process challenges arising from the Ohio Supreme Court's addition of the scienter element, as well as his claim stemming from the creation of the "lewd exhibition" and "graphic focus" tests, were properly before the United States Supreme Court, because

such due process claims were separate from the overbreadth challenge and were based upon an alleged error which did not appear until after the Ohio Supreme Court had reinterpreted the statute.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Constitutional Law § 945 — First Amendment — child pornography — ban on possession and viewing 1. A state may, consistent with the Federal Constitution's First Amendment, proscribe the possession and viewing of child pornography, where

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

5 Am Jur 2d, Appeal and Error § 963; 21 Am Jur 2d, Criminal Law § 17; 42 Am Jur 2d, Infants § 16.5; 50 Am Jur 2d, Lewdness, Indecency, and Obscenity §§ 1, 11, 20, 41

10 Am Jur Trials 1, Obscenity Litigation

USCS, Constitution, Amendment 1

US L Ed Digest, Appeal § 1689; Constitutional Law § 945; Statutes § 18.8

Index to Annotations, Children; Lewdness, Indecency, and Obscenity; Overbreadth; Remand

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

Supreme Court's views as to overbreadth of legislation in connection with First Amendment rights. 45 L Ed 2d 725.

Supreme Court's development, since *Roth v United States*, of standards and principles determining concept of obscenity in context of right of free speech and press. 41 L Ed 2d 1257.

Indefiniteness of language as affecting validity of criminal legislation or judicial definition of common-law crime. 16 L Ed 2d 1231.

Constitutionality of federal and state regulation of obscene literature. 1 L Ed 2d 2211, 4 L Ed 2d 1821.

Validity, construction, and application of statutes or ordinances regulating sexual performance by child. 21 ALR4th 239.

Validity of procedures designed to protect the public against obscenity. 5 ALR3d 1214.

the state does not rely on a paternalistic interest in regulating a person's mind, but rather seeks to protect the victims of child pornography by destroying a market for the exploitative use of children; such prohibitions are valid, even assuming that there is a First Amendment interest in possession and viewing of child pornography, given that (1) a state's interest in safeguarding the physical and psychological well-being of a minor is compelling, (2) the state's legislative judgment, which is found in relevant literature as well and which passes muster under the First Amendment, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of such children, (3) the state asserts that much of the child pornography market has been driven underground, and that, as a result, it is difficult, if not impossible, to solve the child pornography problem by attacking only production and distribution, (4) it is reasonable for the state to conclude that the production of child pornography will decrease if the state decreases the demand for the product by penalizing those who possess and view the product, and (5) the ban on possession and viewing of child pornography materials will encourage the possessors of such materials to destroy them, which result is desirable because (a) the continued existence of such materials causes the child victims continuing harm, and (b) evidence suggests that pedophiles use child pornography to seduce other children into sexual activity. (Brennan, Marshall, and Stevens, JJ., dissented from this holding.)

Constitutional Law §§ 930, 945 — First Amendment — child pornography — overbreadth
2a-2d. A state statute is not over-

broad, so as to violate the Federal Constitution's First Amendment—regardless of whether the statute as written is substantially overbroad—where (1) the statute, on its face, forbids a person to possess photographs that show a minor who is not the person's child or ward in a state of nudity, but (a) the term "nudity" has been construed by the state's highest court as constituting a lewd exhibition or involving a graphic focus on the genitals, (b) the context of the court's opinion indicates that the court believed that the term refers to a lewd exhibition of the genitals, and (c) the statute, as construed, would thus not penalize persons for viewing or possessing innocuous photographs of naked children; and (2) the statute, on its face, lacks a mens rea requirement, but the state's highest court has concluded—based on the state's default statute specifying that recklessness applies when another statutory provision lacks an intent specification—that the state must establish scienter in order to prove a violation of the possession statute. (Brennan, Marshall, and Stevens, JJ., dissented from this holding.)

Constitutional Law § 930; Statutes § 26 — First Amendment — overbreadth challenge

3a-3d. In the context of the Federal Constitution's First Amendment, an individual defendant is permitted to challenge a statute on overbreadth grounds, regardless of whether the individual's conduct is constitutionally protected; the First Amendment doctrine of substantial overbreadth is an exception to the general rule that a person to whom

a statute may be constitutionally applied cannot challenge the statute on the ground that it may be unconstitutionally applied to others; however, once such a statute is authoritatively construed as not applicable to the individual, there is no longer any reason to entertain the individual's challenge to the statute on its face, since there is no longer any danger that protected speech will be deterred.

Constitutional Law § 930 — First Amendment — overbreadth

4. Under the overbreadth doctrine of the Federal Constitution's First Amendment, facial invalidation of a statute is inappropriate, even where the statute at its margins infringes on protected expression, where the remainder of the statute covers a whole range of easily identifiable and constitutionally proscribable conduct.

Constitutional Law §§ 930, 945 — First Amendment — child pornography — vagueness

5a, 5b. A state statute that prohibits the possession or viewing of certain materials or performances that show a minor in a state of nudity is not unconstitutionally vague, for purposes of the Federal Constitution's First Amendment, even though the statute does not define the term "minor," where state law defines a minor as anyone under 18 years of age.

Constitutional Law § 945 — First Amendment — lewd exhibitions

6a, 6b. There is no significant distinction, for purposes of the Federal Constitution's First Amendment, between a statute that proscribes "lewd exhibitions of nudity" and one that proscribes "nude exhibitions of the genitals," because the crucial ques-

tion in either case is whether the depiction is lewd, not whether the depiction happens to focus on specific body parts. (Brennan, Marshall, and Stevens, JJ., dissented from this holding.)

Constitutional Law §§ 930, 945 — First Amendment — child pornography — overbreadth — notice of proscribed conduct

7a-7d. In the case of an accused who was found to be in possession of four sexually explicit photographs of a nude adolescent, and who claims that the state statute under which the accused is prosecuted—which statute prohibits the possession or viewing of certain materials or performances that show a minor in a state of nudity for other than proper purposes—is overbroad so as to violate the Federal Constitution's First Amendment, a narrow construction of the statute, formulated by the state's highest court on appeal of the accused's conviction—under which construction the prohibition pertains to only child pornography—may properly be applied to the accused's conduct, where the accused had notice that his conduct was proscribed, given that (1) it was obvious from the face of the statute that the statute's goal was to eradicate child pornography, (2) the statute, which appeared in the "Sex Offenses" chapter of the state code, was preceded by a provision which proscribed pandering sexually oriented matter involving a minor, and was followed by a provision which proscribed deception to obtain matter harmful to juveniles, and (3) the photographs found in the accused's possession clearly constituted child pornography.

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Constitutional Law § 930; Statutes §§ 18, 108 — enforceability — overbreadth — narrowing construction — due process

8a-8c. A court, when reviewing a criminal conviction under a statute which is potentially overbroad under the Federal Constitution's First Amendment, need not either affirm or strike down the statute on its face, but the court may properly narrow the statute, affirm the conviction on the basis of the narrowing construction, and leave the statute in full force; in terms of applying a ruling to pending cases, there is no difference of federal constitutional import between a court's affirming a conviction after construing a statute to avoid facial invalidation on the ground of overbreadth, and affirming a conviction after rejecting a claim that the conduct at issue is not within the terms of the statute, because, in both situations, the Federal Constitution's due process clause would require fair warning to the defendant that the statutory proscription, as construed, covers the defendant's conduct.

Constitutional Law § 840.3 — due process — proof

9a, 9b. The Federal Constitution's due process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

Appeal § 489 — review of state court decisions — due process — adequate state grounds

10. On appeal to review a decision of a state's highest court which, citing a state procedural rule, held that an accused who asserted a due process challenge to his conviction for possession of child pornography—on the ground that the trial jury had not

been instructed as to scienter—waived his right to assert such a challenge because he failed to object when the jury instructions were given, the United States Supreme Court is precluded from reaching the due process challenge, because the failure of the accused's counsel to comply with the procedural rule constitutes an independent state-law ground adequate to support the result below; this conclusion is supported by considerations that (1) the state's law provides that proof of scienter is required in instances, like the present one, where a criminal statute does not specify the applicable mental state, and (2) the state procedural rule serves the state's important interest in insuring that counsel do their part in preventing trial courts from providing juries with erroneous instructions.

Appeal § 489 — review of state court decisions — due process — adequate state grounds

11. On appeal to review a decision of a state's highest court which, citing a state procedural rule, held that an accused who asserted a due process challenge to his conviction for possession of child pornography—on the ground that the trial jury had not been instructed that it could convict the accused for only possession of material depicting a lewd exhibition or a graphic focus on genitals—waived his right to assert such a challenge because he failed to object when the jury instructions were given, the United States Supreme Court may properly reach the due process claim, and the decision below is not supported by an independent and adequate state ground, where (1) the trial was brief, (2) right before trial, the accused's coun-

sel moved to dismiss the case on the ground that the state statute under which the accused was being prosecuted was unconstitutionally overbroad, (3) the trial court overruled the motion to dismiss, and (4) immediately thereafter, the accused's counsel proposed various jury instructions; given this sequence of events, the Supreme Court may consider the due process claim because (1) counsel pressed the issue of the prosecution's failure of proof on lewdness before the trial court, and (2) under the circumstances, nothing would be gained by requiring counsel to object a second time, specifically to the jury instructions.

Appeal § 1689 — remand for new trial

12. On appeal to review a decision of a state's highest court which upheld an accused's conviction under a state statute for possession of child pornography, the United States Supreme Court will reverse the conviction and remand the case for a new trial in order to insure that the conviction stemmed from a finding that the prosecution had proved each of the elements of the offense in ques-

tion, where (1) the case arose out of the accused's possession of four sexually explicit photographs of a nude adolescent, (2) the statute, on its face, prohibited the possession or viewing of certain materials or performances that show a minor in a state of nudity for other than proper purposes, (3) the accused's counsel moved, before trial, to dismiss the case on the ground that the statute was unconstitutionally overbroad, (4) the trial court overruled the motion to dismiss, (5) the state's highest court, affirming the conviction on appeal, (a) construed the statute as applying to only depictions of nudity that involve a lewd exhibition or a graphic focus on the genitals, and (b) held that the accused, by failing to object when the jury instructions were given, had waived his right to assert a due process claim based on the trial judge's failure to insist that the prosecution prove lewd exhibition as an element of the crime, and (6) the Supreme Court, on appeal, holds that it may properly consider the due process claim despite the accused's failure to object to the jury instructions when given.

SYLLABUS BY REPORTER OF DECISIONS

After Ohio police found photographs in petitioner Osborne's home, each of which depicted a nude male adolescent posed in a sexually explicit position, he was convicted of violating a state statute prohibiting any person from possessing or viewing any material or performance showing a minor who is not his child or ward in a state of nudity, unless (a) the material or performance is presented for a bona fide purpose by or to a person having a proper interest therein, or (b) the possessor knows

that the minor's parents or guardian has consented in writing to such photographing or use of the minor. An intermediate appellate court and the State Supreme Court affirmed the conviction. The latter court rejected Osborne's contention that the First Amendment prohibits the States from proscribing the private possession of child pornography. The court also found that the statute is not unconstitutionally overbroad, since, in light of its specific exceptions, it must be read as only apply-

ing to depictions of nudity involving a lewd exhibition or graphic focus on the minor's genitals, and since scienter is an essential element of the offense. In rejecting Osborne's contention that the trial court erred in not requiring the government to prove lewd exhibition and scienter as elements of his crime, the court emphasized that he had not objected to the jury instructions given at his trial and stated that the failures of proof did not amount to plain error.

Held:

1. Ohio may constitutionally proscribe the possession and viewing of child pornography. Even assuming that Osborne has a valid First Amendment interest in such activities, this case is distinct from *Stanley v Georgia*, 394 US 557, 22 L Ed 2d 542, 89 S Ct 1243, which struck down a Georgia law outlawing the private possession of obscene material on the ground that the State's justifications for the law—primarily, that obscenity would poison the minds of its viewers—were inadequate. In contrast, Ohio does not rely on a paternalistic interest in regulating Osborne's mind, but has enacted its law on the basis of its compelling interests in protecting the physical and psychological well-being of minors and in destroying the market for the exploitative use of children by penalizing those who possess and view the offending materials. See *New York v Ferber*, 458 US 747, 756-758, 761-762, 73 L Ed 2d 1113, 102 S Ct 3348. Moreover, Ohio's ban encourages possessors to destroy such materials, which permanently record the victim's abuse and thus may haunt him for years to come, see *id.*, at 759, 73 L Ed 2d 1113, 102 S Ct 3348, and which, available evidence suggests, may be used by pedophiles to seduce other children.

2. Osborne's First Amendment overbreadth arguments are unavailing.

(a) The Ohio statute is not unconstitutionally overbroad. Although, on its face, the statute purports to prohibit constitutionally protected depictions of nudity, it is doubtful that any overbreadth would be "substantial" under this Court's cases, in light of the statutory exemptions and "proper purposes" provisions. In any event, the statute, as construed by the Ohio Supreme Court, plainly survives overbreadth scrutiny. By limiting the statute's operation to nudity that constitutes lewd exhibition or focuses on genitals, that court avoided penalizing persons for viewing or possessing innocuous photographs of naked children and thereby rendered the "nudity" language permissible. See *Ferber*, *supra*, at 765, 73 L Ed 2d 1113, 102 S Ct 3348. Moreover, the statute's failure, on its face, to provide a mens rea requirement is cured by the court's conclusion that the State must establish scienter under the Ohio default statute specifying that recklessness applies absent a statutory intent provision.

(b) It was not impermissible for the State Supreme Court to rely on its narrowed construction of the statute when evaluating Osborne's overbreadth claim. A statute as construed may be applied to conduct occurring before the construction, provided such application affords fair warning to the defendant. See, e. g., *Dombrowski v Pfister*, 380 US 479, 491, n 7, 14 L Ed 2d 22, 85 S Ct 1116. It is obvious from the face of the child pornography statute, and from its placement within the "Sexual Offenses" chapter of the Ohio

Code, that Osborne had notice that his possession of the photographs at issue was proscribed. *Bouie v City of Columbia*, 378 US 347, 12 L Ed 2d 894, 84 S Ct 1697; *Rabe v Washington*, 405 US 313, 31 L Ed 2d 258, 92 S Ct 993; and *Marks v United States*, 430 US 188, 51 L Ed 2d 260, 97 S Ct 990, distinguished. *Shuttlesworth v Birmingham*, 382 US 87, 16 L Ed 2d 176, 86 S Ct 211—which stands for the proposition that where a State Supreme Court narrows an unconstitutionally overbroad statute, the State must ensure that defendants are convicted under the statute as it is subsequently construed and not as it was originally written—does not conflict with the holding in this case. Nor does *Massachusetts v Oakes*, 491 US 576, 105 L Ed 2d 493, 109 S Ct 2633—in which five Justices agreed in a separate opinion that a state legislature could not cure a potential overbreadth problem through a post-conviction statutory amendment—support Osborne's view that an overbroad statute is void as written, such that a court may not narrow it, affirm a conviction on the basis of the narrowing construction, and leave the statute in full force. Since courts routinely adopt the latter course, acceptance of Osborne's proposition would require a radical reworking of American law. Moreover, the Oakes approach is based on the fear that legislators who know they can cure their own mistakes by amendment without significant cost may not be careful to avoid drafting overbroad laws in the first place. A similar effect will not be likely if a judicial construction of a statute to eliminate overbreadth is allowed to be applied in the case before the Court, since legislatures cannot be sure that the statute, when

examined by a court, will be saved by a narrowing construction rather than invalidated for overbreadth, and since applying even a narrowed statute to pending cases might be barred by the Due Process Clause. Furthermore, requiring that statutes be facially invalidated whenever overbreadth is perceived would very likely invite reconsideration or redefinition of the overbreadth doctrine in a way that would not serve First Amendment interests.

3. Nevertheless, due process requires that Osborne's conviction be reversed and the case remanded for a new trial, since it is unclear whether the conviction was based on a finding that the State had proved each of the elements of the offense. It is true that this Court is precluded from reaching the due process challenge with respect to the scienter element of the crime because counsel's failure to comply with the state procedural rule requiring an objection to faulty jury instructions constitutes an independent state-law ground adequate to support the result below. However, this Court is not so barred with respect to counsel's failure to object to the failure to instruct on lewdness, since, shortly before the brief trial, counsel moved to dismiss on the ground that the statute was overbroad in its failure to allow the viewing of innocent nude photographs. Nothing would be gained by requiring counsel to object a second time, specifically to the jury instructions. The assertion of federal rights, when plainly and reasonably made, may not be defeated under the name of local practice. Cf. *Douglas v Alabama*, 380 US 415, 421-422, 13 L Ed 2d 934, 85 S Ct 1074.

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37 Ohio St 3d 249, 525 NE2d 1363, reversed and remanded.

White, J., delivered the opinion of the Court, in which Rehnquist, C.J., and Blackmun, O'Connor, Scalia, and

Kennedy, JJ., joined. Blackmun, J., filed a concurring opinion. Brennan, J., filed a dissenting opinion, in which Marshall and Stevens, JJ., joined.

APPEARANCES OF COUNSEL

S. Adele Shank argued the cause for appellant.
Ronald J. O'Brien argued the cause for appellee.
Briefs of Counsel, p 809, *infra*.

OPINION OF THE COURT

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Justice White delivered the opinion of the Court.

In order to combat child pornography, Ohio enacted Rev Code Ann § 2907.323(A)(3) (Supp 1989), which provides in pertinent part:

"(A) No person shall do any of the following:

"(3) Possess or view any material or performance that shows a minor who is not the person's child or ward in a state of nudity, unless one of the following applies:

"(a) The material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a

proper interest in the material or performance.

"(b) The person knows that the parents, guardian, or custodian has consented in writing to the photographing

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or use of the minor in a state of nudity and to the manner in which the material or performance is used or transferred."

Petitioner, Clyde Osborne, was convicted of violating this statute and sentenced to six months in prison, after the Columbus, Ohio, police, pursuant to a valid search, found four photographs in Osborne's home. Each photograph depicts a nude male adolescent posed in a sexually explicit position.¹

The Ohio Supreme Court affirmed Osborne's conviction, after an intermediate appellate court did the same. *State v Young*, 37 Ohio St 3d 249, 525 NE2d 1363 (1988). Relying on one of its earlier decisions, the court first rejected Osborne's conten-

1. Osborne contends that the subject in all of the pictures is the same boy; Osborne testified at trial that he was told that the youth was fourteen at the time that the photographs were taken. App 16. The government maintains that three of the pictures are of one boy and one of the pictures is of another. Three photographs depict the same boy in different positions: sitting with his legs over his head and his anus

exposed; lying down with an erect penis and with an electrical object in his hand; and lying down with a plastic object which appears to be inserted in his anus. The fourth photograph depicts a nude standing boy; it is unclear whether this subject is the same boy photographed in the other pictures because the photograph only depicts the boy's torso.

tion that the First Amendment prohibits the States from proscribing the private possession of child pornography.

Next, the Court found that § 2907.323(A)(3) is not unconstitutionally overbroad. In so doing, the Court, relying on the statutory exceptions, read § 2907.323(A)(3) as only applying to depictions of nudity involving a lewd exhibition or graphic focus on a minor's genitals. The Court also found that scienter is an essential element of a § 2907.323(A)(3) offense. Osborne objected that the trial judge had not insisted that the government prove lewd exhibition and scienter as elements of his crime. The Ohio Supreme Court rejected these contentions because Osborne had failed to object to the

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jury instructions given at his trial and the court did not believe that the failures of proof amounted to plain error.²

The Ohio Supreme Court denied a motion for rehearing, and granted a stay pending appeal to this Court. We noted probable jurisdiction last June. 492 US 904, 106 L Ed 2d 563, 109 S Ct 3212.

I

[1] The threshold question in this case is whether Ohio may constitutionally proscribe the possession and viewing of child pornography or whether, as Osborne argues, our decision in *Stanley v Georgia*, 394 US 557, 22 L Ed 2d 542, 89 S Ct 1243 (1969), compels the contrary result. In *Stanley*, we struck down a Georgia law outlawing the private possession

2. Osborne also unsuccessfully raised a number of other challenges that are not at issue before this Court.

3. We have since indicated that our decision

of obscene material. We recognized that the statute impinged upon Stanley's right to receive information in the privacy of his home, and we found Georgia's justifications for its law inadequate. *Id.*, at 564-568, 22 L Ed 2d 542, 89 S Ct 1243.³

Stanley should not be read too broadly. We have previously noted that *Stanley* was a narrow holding, see *United States v 12 200-ft. Reels of Film*, 413 US 123, 127, 37 L Ed 2d 500, 93 S Ct 2665 (1973), and, since the decision in that case, the value of permitting child pornography has been characterized as "exceedingly modest, if not de minimis." *New York v Ferber*, 458 US 747, 762, 73 L Ed 2d 1113, 102 S Ct 3348 (1982). But assuming, for the sake of argument, that Osborne has a First Amendment interest in viewing and possessing child pornography, we nonetheless find this case distinct from *Stanley* because the interests underlying child pornography prohibitions far exceed the interests justifying the Georgia law at issue in *Stanley*. Every court to address the issue has so concluded. See, e.g., *People v Geever*, 122 Ill 2d 313, 327-328, 522 NE2d 1200, 1206-1207 (1988);

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Felton v State, 526 So 2d 635, 637 (Ala Ct Crim App), *aff'd sub nom Ex parte Felton*, 526 So 2d 638, 641 (Ala 1988); *State v Davis*, 53 Wash App 502, 505, 768 P2d 499, 501 (1989); *Savery v State*, 767 SW2d 242, 245 (Tex App 1989); *United States v Boffardi*, 684 F Supp 1263, 1267 (SDNY 1988).

In *Stanley*, Georgia primarily

in *Stanley* was "firmly grounded in the First Amendment." *Bowers v Hardwick*, 478 US 186, 195, 92 L Ed 2d 140, 106 S Ct 2841 (1986).

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sought to proscribe the private possession of obscenity because it was concerned that obscenity would poison the minds of its viewers. 394 US, at 565, 22 L Ed 2d 542, 89 S Ct 1243.⁴ We responded that "[w]hatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts." *Id.*, at 566, 22 L Ed 2d 542, 89 S Ct 1243. The difference here is obvious: [T]he State does not rely on a paternalistic interest in regulating Osborne's mind. Rather, Ohio has enacted § 2907.323(A)(3) in order to protect the victims of child pornography; it hopes to destroy a market for the exploitative use of children.

"It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling.' . . . The legislative judgment, as well as the judgment found in relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. That judgment, we think, easily passes muster under the First Amendment." *Ferber*, 458 US, at 756-758, 73 L Ed 2d 1113, 102 S Ct 3348 (citations omitted). It is also surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product.

4. Georgia also argued that its ban on possession was a necessary complement to its ban on distribution (see discussion *infra*, at 110, 109 L Ed 2d, at 109-110) and that the possession law benefited the public because, according to the State, exposure to obscene material might lead to deviant sexual behavior or crimes of sexual violence. 394 US, at 566, 22 L Ed 2d 542, 89 S

thereby decreasing demand. In *Ferber*, where we upheld a New York statute outlawing the distribution of child pornography, we found a similar argument persuasive: "The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, an activity illegal throughout the Nation. 'It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute.'" *Id.*, at 761-762, 73 L Ed 2d 1113, 102 S Ct 3348, quoting *Giboney v Empire Storage & Ice Co.* 336 US 490, 498, 93 L Ed 834, 69 S Ct 684 (1949).

Osborne contends that the State should use other measures, besides penalizing possession, to dry up the child pornography market. Osborne points out that in *Stanley* we rejected Georgia's argument that its prohibition on obscenity possession was a necessary incident to its proscription on obscenity distribution. 394 US, at 567-568, 22 L Ed 2d 542, 89 S Ct 1243. This holding, however, must be viewed in light of the weak interests asserted by the State in that case. *Stanley* itself emphasized that we did not "mean to express any opinion on statutes making criminal possession of other types of printed, filmed, or recorded materials. . . . In such cases, compelling

Ct 1243. We found a lack of empirical evidence supporting the latter claim and stated that "[n]mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law. . . ." *Id.*, at 566-567, 22 L Ed 2d 542, 89 S Ct 1243 (citation omitted).

reasons may exist for overriding the right of the individual to possess those materials." *Id.*, at 568, n 11, 22 L. Ed 2d 542, 89 S Ct 1243.⁶

Given the importance of the State's interest in protecting the victims of child pornography, we cannot fault Ohio for attempting to stamp out this vice at all levels in the distribution chain. According to the State, since the time of our decision in *Ferber*, much of the child pornography market has been driven underground; as a result, it is now difficult, if not impossible, to solve the child pornography problem by only attacking production and distribution. Indeed, 19 States

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have found it necessary to proscribe the possession of this material.⁷

Other interests also support the Ohio law. First, as *Ferber* recognized, the materials produced by child pornographers permanently record the victim's abuse. The pornography's continued existence causes the child

victims continuing harm by haunting the children in years to come. 458 US, at 759, 73 L. Ed 2d 1113, 102 S Ct 3348. The State's ban on possession and viewing encourages the possessors of these materials to destroy them. Second, encouraging the destruction of these materials is also desirable because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity.⁷

Given the gravity of the State's interests in this context, we find that Ohio may constitutionally proscribe the possession and viewing of child pornography.

II

[2a, 3a, 4] Osborne next argues that even if the State may constitutionally ban the possession of child pornography, his conviction

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is invalid because § 2907.323(A)(3) is unconstitutionally overbroad in that it criminalizes an intolerable range of constitutionally protected conduct.⁸

Pornography, for example, states that "Child pornography is often used as part of a method of seducing child victims. A child who is reluctant to engage in sexual activity with an adult or to pose for sexually explicit photos can sometimes be convinced by viewing other children having 'fun' participating in the activity." 1 Attorney General's Commission on Pornography, Final Report 649 (1986) (footnotes omitted). See also, D. Campaign and D. Poffenberger, *Sexual Truflicking in Children* 118 (1988); S. O'Brien, *Child Pornography* 89 (1983).

8. [3b] In the First Amendment context, we permit defendants to challenge statutes on overbreadth grounds, regardless of whether the individual defendant's conduct is constitutionally protected. "The First Amendment doctrine of substantial overbreadth is an exception to the general rule that a person to whom a statute may be constitutionally applied cannot challenge the statute on the ground that it may be unconstitutionally applied to others." *Massachusetts v. Oakes*, 491 US 576, 581, 105 L. Ed 2d 493, 109 S Ct 2633 (1989).

In our previous decisions discussing the First Amendment overbreadth doctrine, we have repeatedly emphasized that where a statute regulates expressive conduct, the scope of the statute does not render it unconstitutional unless its overbreadth is not only "real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Brondrick v Oklahoma*, 413 US 601, 616, 37 L. Ed 2d 830, 93 S Ct 2908 (1973). Even where a statute at its margins infringes on protected expression, "facial invalidation is inappropriate if the 'remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct. . . .'" *New York v Ferber*, 458 US, at 770, n 25, 73 L. Ed 2d 1113, 102 S Ct 3348.

[2b, 5a, 6a] The Ohio statute, on its face, purports to prohibit the posses-

sion of "nude" photographs of minors. We have stated that depictions of nudity, without more, constitute protected expression. See *Ferber*, supra, at 765, n 18, 73 L. Ed 2d 1113, 102 S Ct 3348. Relying on this observation, Osborne argues that the statute as written is substantially overbroad. We are skeptical of this claim because, in light of the statute's exemptions and "proper purposes" provisions, the statute may not be substantially overbroad under our cases.⁹ However that may be, Osborne's

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overbreadth challenge, in any event, fails because the statute, as construed by the Ohio Supreme Court on Osborne's direct appeal, plainly survives overbreadth scrutiny. Under the Ohio Supreme Court reading, the statute prohibits "the possession or viewing of material or

9. The statute applies only where an individual possesses or views the depiction of a minor "who is not the person's child or ward." The State, moreover, does not impose criminal liability if either "(t)he material or performance is sold, disseminated, displayed, possessed, controlled, brought or caused to be brought into this state, or presented for a bona fide artistic, medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing bona fide studies or research, librarian, clergyman, prosecutor, judge, or other person having a proper interest in the material or performance," or "(t)he person knows that the parent, guardian, or custodian has consented in writing to the photographing or use of the minor in a state of nudity and to the manner in which the material or performance is used or transferred." It is true that, despite the statutory exceptions, one might imagine circumstances in which the statute, by its terms, criminalizes constitutionally protected conduct. If, for example, a parent gave a family friend a picture of the parent's infant taken while the infant was unclothed, the statute would apply. But,

given the broad statutory exceptions and the prevalence of child pornography, it is far from clear that the instances where the statute applies to constitutionally protected conduct are significant enough to warrant a finding that the statute is overbroad. Cf. *Onkes*, supra, at 589-690, 105 L. Ed 2d 493, 109 S Ct 2633 (opinion of Scalia, J., joined by Blackmun, J., concurring in judgment in part and dissenting in part).

Nor do we find very persuasive Osborne's contention that the statute is unconstitutionally overbroad because it applies in instances where viewers or possessors lack scienter. Although § 2907.323(A)(3) does not specify a mental state, Ohio law provides that recklessness is the appropriate mens rea where a statute "neither specifies culpability nor plainly indicates a purpose to impose strict liability." Ohio Rev. Stat. Ann. § 2901.21(B) (1987).

[5b] We also do not find any merit to Osborne's claim that § 2907.323(A)(3) is unconstitutionally vague because it does not define the term "minor." Under Ohio law, a minor is anyone under eighteen years of age. Ohio Rev. Code Ann. § 3109.01 (1989).

6. As the dissent notes, see post, at 141, n 16, 109 L. Ed 2d, at 129-130, the Stanley Court cited illicit possession of defense information as an example of the type of offense for which compelling state interests might justify a ban on possession. Stanley, however, did not suggest that this crime exhausted the entire category of proscribable offenses.

7. Ala. Code § 13A-12-192 (1988); Ariz. Rev. Stat. Ann. § 13-3563 (1989); Colo. Rev. Stat. § 18-6-403 (Supp. 1989); Fla. Stat. § 827.071 (1989); Ga. Code Ann. § 16-12-100 (1989); Idaho Code § 18-1607 (1987); Ill. Rev. Stat., ch. 38, § 11-20.1 (1987); Kan. Stat. Ann. § 21-3516 (Supp. 1989); Minn. Stat. § 617.247 (1988); Mo. Rev. Stat. § 573.037 (Supp. 1989); Neb. Rev. Stat. § 28-809 (1989); Nev. Rev. Stat. § 200.730 (1987); Ohio Rev. Code Ann. §§ 2907.322 and 2907.323 (Supp. 1989); Okla. Stat., Tit. 21, § 1021.2 (Supp. 1989); S. D. Codified Laws Ann. §§ 22-22-23, 22-22-23.1 (1988); Tex. Penal Code Ann. § 43.26 (1989 and Supp. 1989-1990); Utah Code Ann. § 76-6a-3(1)(a) (Supp. 1989); Wash. Rev. Code § 9A.68A.070 (1989); W. Va. Code § 61-8C-3 (1989).

8. The Attorney General's Commission on

performance of a minor who is in a state of nudity, where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals, and where the person depicted is neither the child nor the ward of the person charged." 37 Ohio St 3d, at 252, 525 NE2d, at 1368.¹⁰ By limiting the statute's operation in

[495 US 114]

this manner, the Ohio Supreme Court avoided penalizing persons for viewing or possessing innocuous photographs of naked children. We have upheld similar language against overbreadth challenges in the past. In *Ferber*, we affirmed a conviction under a New York statute that made

10. The Ohio Court reached this conclusion because "when the 'proper purposes' exceptions set forth in RC 2907.323(A)(3)(a) and (b) are considered, the scope of the prohibited conduct narrows significantly. The clear purpose of these exceptions . . . is to sanction the possession or viewing of material depicting nude minors where that conduct is morally innocent. Thus, the only conduct prohibited by the statute is conduct which is *not* morally innocent, i.e., the possession or viewing of the described material for prurient purposes. So construed, the statute's proscription is not so broad as to outlaw all depictions of minors in a state of nudity, but rather only those depictions which constitute child pornography." 37 Ohio St 3d, at 251-252, 525 NE2d, at 1367-1368 (emphasis in original).

11. The statute upheld against an overbreadth challenge in *Ferber* was, moreover, arguably less narrowly tailored than the statute challenged in this case because, unlike § 2907.323(A)(3), the New York law did not provide a broad range of exceptions to the general prohibition on lewd exhibition of the genitals. Despite this lack of exceptions, we upheld the New York law, reasoning that "[h]ow often, if ever, it may be necessary to employ children to engage in conduct clearly within the reach of [the statute] in order to produce educational, medical, or athletic works cannot be known with certainty. Yet we seriously doubt, and it has not been suggested, that these arguably impermissible applications of the statute amount to more than a tiny fraction of the materials within the statute's

it a crime to promote the "lewd exhibition of [a child's] genitals." 458 US, at 751, 73 L Ed 2d 1113, 102 S Ct 3348. We noted that "[t]he term 'lewd exhibition of the genitals' is not unknown in this area and, indeed, was given in *Miller v California*, 413 US 15 [37 L Ed 2d 419, 93 S Ct 2607] (1973),] as an example of a permissible regulation." *Id.*, at 765, 73 L Ed 2d 1113, 102 S Ct 3348."

[495 US 115]

[2d] The Ohio Supreme Court also concluded that the State had to establish scienter in order to prove a violation of § 2907.323(A)(3) based on the Ohio default statute specifying that recklessness applies when another statutory provision lacks an

reach." 458 US, at 773, 73 L Ed 2d 1113, 102 S Ct 3348.

[2c, 6b] The dissent distinguishes the Ohio statute, as construed, from the statute upheld in *Ferber* on the ground that the Ohio statute proscribes "lewd exhibitions of *nudity*" rather than "lewd exhibitions of *the genitals*." See post, at 129, 109 L Ed 2d, at 122 (emphasis in original). The dissent notes that Ohio defines nudity to include depictions of pubic areas, buttocks, the female breast, and covered male genitals "in a discernibly turgid state." Post, at 130, 109 L Ed 2d, at 123. We do not agree that this distinction between body areas and specific body parts is constitutionally significant. The crucial question is whether the depiction is lewd, not whether the depiction happens to focus on the genitals or the buttocks. In any event, however, Osborne would not be entitled to relief. The context of the opinion indicates that the Ohio Supreme Court believed that "the term 'nudity' as used in RC 2907.323(A)(3) refers to a lewd exhibition of the genitals." *State v Young*, 37 Ohio St 3d 249, 258, 525 NE2d 1361, 1373 (1988).

We do not concede, as the dissent suggests, see post, at 131, n 6, 109 L Ed 2d, at 123, that the statute as construed might proscribe a family friend's possession of an innocuous picture of an unclothed infant. We acknowledge (see n 9, supra) that the statute as written might reach such conduct, but as construed the statute would surely not apply because the photograph would not involve a "lewd exhibition or graphic focus on the genitals" of the child.

intent specification. See n 9, supra. The statute on its face lacks a mens rea requirement, but that omission brings into play and is cured by another law that plainly satisfies the requirement laid down in *Ferber* that prohibitions on child pornography include some element of scienter. 458 US, at 765, 73 L Ed 2d 1113, 102 S Ct 3348.

[3c, 7a] Osborne contends that it was impermissible for the Ohio Supreme Court to apply its construction of § 2907.323(A)(3) to him—i.e., to rely on the narrowed construction of the statute when evaluating his overbreadth claim. Our cases, however, have long held that a statute as construed "may be applied to conduct occurring prior to the construction, provided such application affords fair warning to the defendant(t)." *Dombrowski v Pfister*, 380 US 479, 491, n 7, 14 L Ed 2d 22, 85 S Ct 1116 (1965) (citations omitted).¹² In *Hamling v United States*,

[495 US 110]

418 US 87, 41 L Ed 2d 590, 94 S Ct 2887 (1974), for example, we reviewed the petitioners' convictions for mailing and conspiring to mail an obscene advertising brochure under 18 USC § 1461 [18 USCS § 1461]. That statute makes it a crime to mail an "obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance." In *Hamling*, for the first time, we construed the term "obscenity" as used in

12. [3d] This principle, of course, accords with the rationale underlying overbreadth challenges. We normally do not allow a defendant to challenge a law as it is applied to others. In the First Amendment context, however, we have said that "[b]ecause of the sensitive nature of constitutionally protected expression, we have not required that all those subject to overbroad regulations risk prosecution to test their rights. For free expression—of

§ 1461 "to be limited to the sort of 'patently offensive representations or depictions of that specific 'hard core' sexual conduct given as examples in *Miller v California*.'" In light of this construction, we rejected the petitioners' facial challenge to the statute as written, and we affirmed the petitioners' convictions under the section after finding that the petitioners had fair notice that their conduct was criminal. 418 US, at 114-116, 41 L Ed 2d 590, 94 S Ct 2887.

[7b] Like the *Hamling* petitioners, Osborne had notice that his conduct was proscribed. It is obvious from the face of § 2907.323(A)(3) that the goal of the statute is to eradicate child pornography. The provision criminalizes the viewing and possessing of material depicting children in a state of nudity for other than "proper purposes." The provision appears in the "Sex Offenses" chapter of the Ohio Code. Section 2907.323 is preceded by § 2907.322, which proscribes "[p]andering sexually oriented matter involving a minor," and followed by § 2907.33, which proscribes "[d]eception to obtain matter harmful to juveniles." That Osborne's photographs of adolescent boys in sexually explicit situations constitute child pornography hardly needs elaboration. Therefore, although § 2907.323(A)(3) as written may have been imprecise at its fringes, someone in Osborne's position would not be surprised to learn

transcendent value to all society, and not merely to those exercising their rights—might be the loser." *Dombrowski*, 380 US, at 486, 14 L Ed 2d 22, 85 S Ct 1116. But once a statute is authoritatively construed, there is no longer any danger that protected speech will be deterred and therefore no longer any reason to entertain the defendant's challenge to the statute on its face.

"ENOUGH IS ENOUGH!"

A monthly newsletter to educate, motivate, and activate women to break pornography's chain of abuse

Together, We Can Stomp Out Hard-Core Pornography!

I believe that women united behind a just cause have immeasurable influence and power.

I think of Candi Lightner, a mother whose child was tragically killed one night in a car crash by a drunk driver. Her personal tragedy compelled her to establish Mothers Against Drunk Drivers (MADD).

One woman's passion and justifiable anger united other women, and together they launched a powerful campaign. In only 11 years, they not only strengthened the nation's laws governing drinking and driving, they totally changed the way we view drunk driving.

If women work together, I know the same thing can happen in the campaign against hard-core, illegal pornography.

I believe women speak with a special authority in the battle against pornography. We are its primary victims — we, our children, and our families.

When I speak to women across the country about pornography's harmful effects, I see a groundswell of indignation and outrage rising. Liberal and conservative women, religious and nonreligious women, old and young, businesswomen and homemakers are ready to fight to remove illegal pornography from their neighborhoods. We don't have to agree on a lot of other issues to come together in this common cause.

The shocking images of child pornography, incest, bestiality, rape, and mutilation that pass today as "adult" entertainment are demeaning and harmful to us as women, to our children, and to men as well. As pornography's chief victims, we have the special motivation — we have the urgent obligation — to demand that the degradation and exploitation stop.

That's what "Enough is Enough!" is all about. This secular, nonpartisan campaign encourages and equips women in the battle against illegal pornography. It is directed by women, staffed by women, and most of its financial support comes from women. We are not creating a new organization. We are initiating a movement.

I'm convinced that the women of America can make the difference on this issue. We can get the laws against illegal pornography enforced. We can get legislation passed where it is needed. We can change the way America thinks about pornography!

We are working to mobilize hundreds of thousands, eventually millions, of women to stand with us and say, "Enough is Enough!"

I urge you to join us in this important war.

Dee Jepsen



Dee Jepsen
National Campaign
Director

"I believe women speak with a special authority in the battle against pornography. We are its primary victims — we, our children, and our families."

First Lady Encourages “*Enough is Enough!*,” Condemns Hard-Core Pornography

First Lady Hillary Rodham Clinton recently encouraged the “*Enough is Enough!*” campaign.

In a letter sent to director Dee Jepsen, Mrs. Clinton wrote, “I applaud your group’s efforts to eliminate child pornography and illegal pornography and appreciate your willingness to take a stand for the children of the nation.

“I know that you have an enormous and challenging task before you, but this is a pressing issue that must be addressed.”

Former First Lady Barbara Bush has also written a letter giving her support to the campaign. ♦

In an interview conducted by Dotson Rader, published in Parade Magazine on April 11th, Mrs. Clinton came down hard on pornography:

Parade: In homes with cable TV, very young children can turn on channels showing R-rated and even X-rated films containing extremely graphic sex and violence — films that it is illegal for them to pay to see in a theater. How can you defend the culture of a country that allows a child access to hard-core pornography and extreme violence?

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Mrs. Clinton: I *can't* defend it! I wouldn't defend it! It's wrong, and I wish it would go away, because I think it's so destructive to children and adults to have that kind of material shown. I don't think there's anything wrong with parents' groups or other groups calling for people to boycott certain kinds of entertainment. That's advocacy, education, and choice.

Tell the truth about illegal pornography!

- ✓ Over 80 percent of child molesters admit to regularly using pornography, often imitating actual scenes during molestations.
- ✓ There are more hard-core pornography outlets in this country than McDonald's restaurants.
- ✓ The typical serial child molester has from 360 to 380 victims in his lifetime. Both adult and child pornography is often used as an aid during the crime.
- ✓ 1 in 3 girls and 1 in 7 boys will be molested before the time they are 18 years old.

Hard-core pornography. It's not what you think.

The “Enough is Enough!” campaign is another voice of the National Coalition Against Pornography.

Cramps Isn't Craziiness

I am outraged by the recommendation made by a task force of the American Psychiatric Association that severe PMS (premenstrual syndrome) be categorized as a psychiatric disorder ("Is It Sadness or Madness?" *MEDICINE*, March 15). If a man has hyperthyroidism and becomes hyperactive, loses weight and becomes irritable, should he go to a psychiatrist for help? Or should he seek help for his hyperactive thyroid? If severe PMS is recategorized, half the population is in danger of being called mentally ill based on changes that occur in every woman's monthly cycle.

MARY R. HOLLIDAY
Aurora, Colo.

Bosnia's Pain

Naida Zecevic should be commended for her *MY TURN* essay "Will I Ever Go Home Again?" (March 8). Like Naida, members of my husband's immediate family are stranded in Sarajevo. My heart goes out to her. I know how she feels—worrying, wondering if her family will survive, if she will see them again. As an American-born citizen, I'm appalled that the world has allowed this tragedy to occur, mislabeling it an ethnic conflict. Strong steps should have

been taken to stop the aggressor and end the fighting in Bosnia, just as strong steps were taken to stop the aggressor in Kuwait. Peace talks have failed; a beautiful country has been destroyed. Innocent victims have suffered. The world should listen to Naida.

MARGARET E. PRLJACA
Newark, Dela.

Zecevic suggests that the U.S. military could end the bloodshed in Bosnia. What makes her think it is America's responsibility to end her country's war? This is what's wrong with our country: everyone says it's our job to fix other countries' problems and we're naive enough to believe it. We can't even take care of ourselves.

C. A. SMITH
New York, N.Y.

Don't Kill This Cow

We were disappointed in "Spring Those Sacred Cows" (*NATIONAL AFFAIRS*, March 1), your discussion of the Superconducting Super Collider (SSC), in which you state that the "project epitomizes quark-barrel politics." Moreover, your *Conventional Wisdom Watch* (*PERISCOPE*) puts the project on the same footing as "ketchup-measuring bureaucrats." These remarks do a disservice not only to the project but to science

in general. The SSC is directed at science of the most fundamental nature: investigating the structure of the smallest building blocks of matter and the nature of the forces that operate between them. Completing the accelerator and particle detectors will also generate important technical advances. More than 100 research universities across the nation are already working on the project. While there is clearly room for serious discussion about the SSC's place in our national priorities, your remarks do nothing to illuminate this question. Unhappily, they ridicule an area of fundamental science at a time when we are trying to educate young people about the importance of science to the nation.

JEROME I. FRIEDMAN
HENRY W. KENDALL
1990 Nobel Laureates in Physics
Cambridge, Mass.

Doctors in the Cross Hairs

After the murder of Dr. David Gunn by a pro-lifer with a history of violence at a demonstration organized by a Rescue America boss with past ties to the Ku Klux Klan, where are the outraged voices of the "moderate" pro-life movement ("The Death of Doctor Gunn," *NATIONAL AFFAIRS*, March 22)? The president of Feminists for



1 in 3 American girls will be sexually molested by age 18.

Isn't it time we got rid of the instruction manual?

An 8-year-old girl is led into a room and told to undress. As cameras click and flash, two men abuse her sexually. The resulting photos are then printed and distributed throughout America.

Those pictures—actual crime scene photos of grossly illegal activity—then become virtual instruction manuals for thousands of other sex offenders. In fact, over 80% of convicted child molesters admit to regular use of pornography, often imitating the graphic pictures during their crimes.

The Supreme Court ruled in 1990 that states can outlaw the possession of child pornography. Why, then, at a time when sexual harassment of adults understandably causes national outrage, is possession of child pornography still legal in many states—and rarely prosecuted in most?

And how can it be that in America there are far more outlets for

hard-core pornography than there are McDonald's restaurants? Let's be clear about this: We are talking about the graphic depiction of women and children being exploited and degraded through rape, bondage, group sex, torture, incest, and bestiality.

American women say
"Enough is Enough!"

The "Enough is Enough!" Campaign is committed to eliminating child pornography and removing hard-core/illegal pornography from the marketplace. Women from all walks of life—homemakers and businesswomen, liberals and conservatives, Democrats and Republicans—are united on this issue. Already, many governors' wives and other women of influence are stepping forward to support the "Enough is Enough!" Campaign aimed at stopping the abuse.

There's no better time for you to join us than now, during National

Child Abuse Prevention Month. Help eliminate sexual violence. *You can make a difference!*

Hard-core pornography.
It's not what you think.
"Enough is Enough!"

I want to help stop the abuse of children and women. Here's my tax-deductible gift to help end the epidemic of hard-core, illegal pornography.

\$25 \$50 \$100 Other \$ _____

I want to learn more. Please send information.

NAME _____
(Please print)

ADDRESS _____

CITY _____

STATE _____ ZIP _____

Please make checks payable to "Enough is Enough!" and send coupon to "Enough is Enough!" Campaign, P.O. Box 388, Fairfax, VA 22030

The Campaign is a project of the National Coalition Against Pornography. N-CAP is a 501(c)(3) nonprofit organization. Gifts are tax deductible as allowed by law.

taped "interview" with Wanda wearing a new blond hairstyle but the same bone-chilling self-assurance.

Yet the film is more than just a clever satire of media overkill. Ritchie assembles a vivid, sharply drawn gallery of small-town characters: Beau Bridges as Wanda's unwilling co-conspirator, a hardhat burdened with a messy past and a loony wife (Swoosie Kurtz); Elizabeth Ruscio as the rival mom, no less competitive but not as imaginative; and Matt Frewer as Wanda's drudge of a lawyer. All that and a bouncy country score by Lucy Simon too. True or not, it's positively terrific. ■

BOOKS

Medicine Woman

TITLE: *CHARMS FOR THE EASY LIFE*

AUTHOR: KAYE GIBBONS

PUBLISHER: PUTNAM; 254 PAGES; \$19.95

THE BOTTOM LINE: *Three generations of Carolina women, one better than the next, are told by a fourth, the best yet.*

By AMELIA WEISS

SOME PEOPLE MIGHT GIVE UP their second-born to write as well as Kaye Gibbons, so graceful and spirited are her fictional histories of North Carolina women. In her fourth novel, *Charms for the Easy Life*, Gibbons presents Charlie Kate Birch, a midwife and self-proclaimed doctor who meets her ferryman husband as she crosses the Pasquotank River to deliver babies, nurse the sick and lay out the dead. Her granddaughter Margaret, narrator of the book, imagines, "Between my grandmother, her green eyes . . . and the big-cookie moon low over the Pasquotank, it must have been all my grandfather could do to deposit her on the other side of the river."

That's the first and last romantic view of Charlie Kate, a blunt and righteous woman who eats garlic on toast for breakfast, smells of mothballs and ties her "resolute shoes" with 30-year-old laces soaked every Sunday in linseed oil ("My shoestrings," she says, "have lasted years longer than most people can stand each other"). An eccentric who knows as much about Thomas Hardy's novels as she does about cirrhosis of the liver, Charlie Kate is in fact a healing genius who uses herbal cures like evening primrose and Saint-John's-Wort, as well as all the modern medicine she can get.

1 in 3 American girls will be sexually molested by age 18.



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It's not what you think.**

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I want to help stop the abuse of America's children and women. Here's my tax-deductible gift to help end the epidemic of hard-core, illegal pornography.

\$25 \$50 \$100 Other \$ _____

I want to learn more. Please send me information.

NAME (Please print) _____

ADDRESS _____

CITY _____ STATE _____ ZIP _____

Please make checks payable to "Enough is Enough!" and send coupon to "Enough is Enough!" Campaign, P.O. Box 888, Fairfax, VA 22030.

*The Campaign is a project of the National Coalition Against Pornography (N-CAP) is a 501(c)(3) nonprofit organization. Gifts are tax deductible as allowed by law.

Workshops Train Women to Combat Illegal Porn in Their Own Neighborhoods

The "Enough is Enough!" campaign will hold training workshops throughout the country this year to give women and men all the factual, legal, and logistical tools they need to wage successful campaigns against illegal pornography in their neighborhoods.

Workshop attendees learn practical ways to effectively fight illegal pornography at the local level, and they return home fully equipped to take the battle to their own communities.

Designed as basic training courses, the workshops focus on just what constitutes illegal

pornography and on the high price society pays for its existence.

Most Americans are confused about what kind of materials are protected by the Constitution. Illegal pornography is illegal. The Supreme Court clearly prohibits obscenity, child pornography, material that is harmful to minors, and indecent material. The workshops give attendees a clear understanding of the law as it relates specifically to pornography.

Attendees also learn how illegal pornography threatens public health and safety. Studies conducted around the country unmistakably document the deleterious impact that illegal pornography has on society, particularly on women and children.

The studies have revealed alarming facts —

✓ The majority of child molesters in this country are users of hard-core pornography.

✓ The overwhelming majority of convicted rapists admit that they regularly used hard-core pornography.

✓ Hard-core pornography is addictive for some men who ultimately act out the material.

"The workshop gave me hard facts on just how harmful pornography is and showed me how I can fight it in my community and win."

— Gina Zimmerman, Warsaw, Indiana

✓ Hard-core pornography encourages and facilitates the transmission of sexually transmitted diseases.

✓ Because one of the largest consumer groups of pornography is 12 to 17-year-old males, illegal pornography is distorting the values and attitudes of a large portion of our society.

Workshop leaders systematically debunk the myths associated with illegal pornography, particularly the myth that it is a victimless crime.

Each workshop includes time for at least one victim to share her story with attendees, putting a face on the facts and statistics.

Workshops are scheduled during May and June in California, Ohio, and Washington, DC, with others to be announced for later in the year. For information on a seminar near you, call 703-278-8343. ♦

"Enough is Enough!" Training Seminars

May 26th and 27th
Countryside Inn
Newport Beach, CA
Call Monique at 714-435-9056

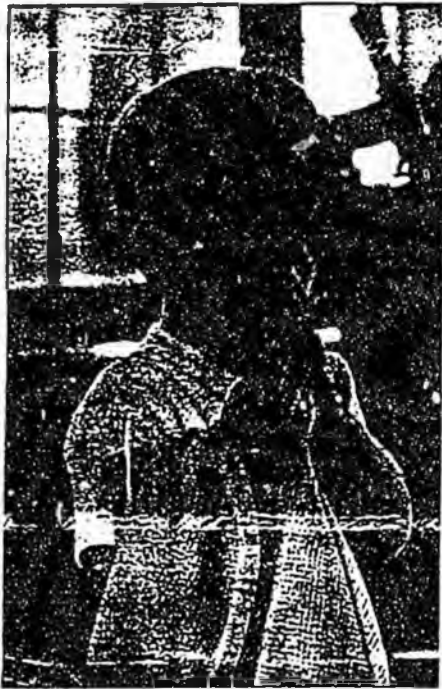
June 12th
Cincinnati Marriott
Cincinnati, OH
Call Barb at 513-521-6227

June 19th
Grand Hyatt, Washington, DC
Call Sonia at 703-278-8343

Registration is \$55 per person. Fee includes registration materials, EIE's "Take Action Manual," "Empty Embrace" video, and meals.

Hard-Core Pornography and Sexual Crimes Against Children

This Insidious, Silent Relationship is Too Often Overlooked



The typical child molester will abuse from 30 to 60 children before he is ever caught, according to an Emory University study. Over his lifetime, a molester is likely to abuse more than 360 children.

Ed Savitz, a wealthy Philadelphia pedophile who died of AIDS just weeks ago, used to invite young boys to his upscale apartment to take sexually explicit pictures of them, to have sex with them, and to buy their dirty underwear and even their excrement. Neighbors in the building said that boys ranging in age from 10 to 16 years would come in and out of Savitz's apartment every day at all hours of the day and night. Over a 20-year period, before he was arrested by the Philadelphia police in March 1992, officials estimate that "Uncle Eddy" sexually molested hundreds of teenage and pre-pubescent boys, knowingly infecting many of them with the HIV virus.

On talk shows in Philadelphia, several of the young victims admitted to being the second generation of boys in their family to pose for sexually explicit pornographic sessions with Uncle Eddy. Ed Savitz was called an "insatiable collector of kiddie porn photos" by Lynne Abraham, district attorney of Philadelphia. Estimates of the size

of his illegal porn collection ranged from 3,500 to 5,000 photos.

Pornography is a common element — often unmentioned, certainly unheralded — in the majority of sexual crimes committed today. In a study done at Kingston Penitentiary in Canada, 77 percent of those who were convicted of molesting boys and 27 percent of those who were convicted of molesting girls admitted that they regularly used hard-core pornography.

Yet the presence of pornography as a consistent factor in sexual crimes is often overlooked in the media coverage of these cases. Most people are completely unaware of the significant role that pornography plays in sexual crimes, particularly in crimes against children.

Judge Gene Malpas, senior attorney with the National Law Center for Children and Families, first became aware of the link between pornography and child molestation when he served as state prosecutor in Florida. Almost every case of child molestation that he

"A molester uses it [pornography] in three ways — to stimulate himself, to lower the inhibitions of the child, and to educate the child about what to do."

— Judge Gene Malpas, senior attorney
National Law Center for Children and Families

mississippi

"Enough is Enough!"



A monthly newsletter to educate, motivate, and activate women to break pornography's chain of abuse

Pornography's Victims Rarely Have a Choice

I recently had someone tell me, "Pornography is simply a matter of choice. If you don't like it, if it bothers you so much, well then, don't buy it."

Is hard-core pornography simply a matter of choice?

Tell *that* to the woman who was sexually abused by her older brother when she was too young and small to fight him off and get away. For years, he used her to act out scenes he saw in pornographic magazines.

What choice did she have?

What about the two girls, aged 7 and 12, who were forced to watch X-rated movies before, during, and after they were horribly sexually abused by a neighbor. The doctor who later examined them said they will never have a normal sexual relationship.

What choice did they have?

What about the young children who were sexually abused by their babysitter after he spent the afternoon watching sexually explicit material with his buddies.

What choice did they have?

Hard-core pornography is just

like pollution in this respect: often the people who do the polluting are not the people who are hurt by it.

Believe me, the victims rarely have a choice.

Every day, the tragic stories of sexual abuse of women, young boys and girls, and small children reach me by letter, by phone, on radio talk shows, and after speaking engagements.

When do we stop looking the other way? How can we continue to silently tolerate an entire class of material that results in the explicit degradation, abuse, and humiliation of women and children?

Fighting hard-core pornography is a dirty and distasteful job, but it is time for women in America to stand up and face the challenge. The "Enough is Enough!" campaign is a call to courage. It is a call to battle.

America's women have the courage to answer the call to battle. They are working tirelessly across the country to protect the innocent.

I'm glad you are part of this team.

Dee Jepsen



Dee Jepsen
National Campaign Director

"Pornography is just like pollution in this respect: often the people who do the polluting are not the people who are hurt by it."

saw involved pornography, he said.

"Pornography is dangerous to children because it is used to facilitate the crime. A molester uses it in three ways — to stimulate himself, to lower the inhibitions of the child, and to educate the child about what to do," Malpas said.

Perhaps the best known study linking pornography and sex crimes against children is one conducted by the Los Angeles Police Department. The study looked at adult arrests for extrafamilial sex crimes against children over a ten-year period. Of the 320 arrests made by the LAPD Sexually Exploited Child Unit from 1980 to 1989, 199 arrests — over 62 percent — involved pornography. This meant that pornography was either used to facilitate the crime or was produced during the victimization of the child. Crimes included child molestation, oral copulation, sodomy, unlawful sex, rape, insertion of a foreign object, and misdemeanor child annoying.

"Pornography is used quite extensively to lower the inhibitions of the children involved and to get them to do what is wanted," said Detective Gary T. Lyon of the LAPD Sexually Exploited Child Unit.

Lt. Jim Wintergerst of the Crimes Against Children Unit in Louisville, Kentucky, corroborated the link between child sexual abuse and pornography. "When we investigate a case," he said, "we will almost always find pornography. It is used to ease the children into sexual activity."

Police officers, social workers,

lawyers, judges, and others who investigate reported instances of child molestation clearly see pornography as an insidious "teaching tool" in the hands of

a correlation."

Many perpetrators admit that pornography plays a key role in the sexual crimes they commit.

"The explicit material put the

"When we investigate a case, we will almost always find pornography."

— Lt. Jim Wintergerst, Louisville Crimes Against Children Unit

those who sexually prey on children.

"When I am dealing with a victim of abuse and I ask them probing questions, I find that pornography was present in the home many, many times," said Deb Hambright, a social worker in Warsaw, Indiana. "My experience shows that there is

thought [of the crime] into my mind. I was around pornography and used it so much that it became an addiction," said a 32-year-old male inmate serving time for molesting an 11-year-old girl. "If I could do it over again, I would never have looked at pornography." ♦

You can help.

Many reporters, and even some law enforcement officials, are unaware of the link between sexual crimes and hard-core pornography. Here's how you can help change that fact:

- 1** Watch your newspapers for stories about sexual crimes in your area, particularly crimes against women and children.
- 2** If a story makes no mention of pornography's involvement, call the main number at the paper and ask for the reporter by name.
- 3** Tell the reporter that you saw the story and that you understand that pornography plays a role in most sex crimes. Ask if the police report indicated that pornography was found in the suspect's possession. You don't need to get into a lengthy discussion, and *please* do not argue with the reporter — you are simply drawing his or her attention to the issue.
- 4** If the reporter wants to know more about hard-core pornography's link to sexual abuse, tell him or her to call us (703-278-8343) for materials.
- 5** Send us articles on sexual crimes in your area, regardless of whether or not they mention pornography. We'll make calls to reporters from our office, too. ♦

Best-Selling Author/Therapist Endorses "Enough is Enough!"



Dr. Barbara De Angelis

Best-selling author and counselling therapist Barbara De Angelis, Ph.D., recently endorsed the "Enough is Enough!" campaign and has added her name to the group's diverse National Committee of Support.

"I strongly support the 'Enough is Enough!' campaign in its efforts to speak out against sexual exploitation in all forms," De Angelis said.

De Angelis is author of three best-selling books — *How to Make Love All the Time*, *Are You the One for Me?*, and *Secrets*

About Men Every Woman Should Know.

"As a professional therapist, I have personally witnessed the damaging effects pornography has on society as a whole and on personal relationships more specifically," De Angelis said. "Sexual compulsion and addiction destroy intimacy because, by definition, they introduce a third element into your relationship I strongly doubt that hard-core pornography creates more intimacy. What it does create is more eroticism, which many couples mistake for intimacy." ♦

Olympic Gold Medalist Joins Campaign

Olympic gold medalist Madeline Manning Mims has joined the "Enough is Enough!" campaign. Mims is the well-known athlete who pioneered the 800-meter run for the United States in 1968. She was (and still is) the only woman to bring back a gold medal in this event, along with the American record. At the time she also set a new Olympic record and the World record.

"I grew up in the ghetto in Cleveland, and I've worked closely with young people for the past 17 years. I see what hard-core pornography is doing to destroy young people, families, and relationships," Mims said.

Now an international speaker



Madeline Manning Mims is featured (third from left) in the "Enough is Enough!" billboard.

and an accomplished recording vocalist, Mims has just released a new album whose title song was inspired by the campaign to fight illegal pornography. The lyrics say in part, "We can't let things go on this way. We've got to stand Enough is enough!" ♦

Watch for our next issue!

We'll update you on "Enough is Enough!" training seminars, feature a story about the educational briefing held in Washington, D.C., for business and professional women, tell you about the fashion show benefit held in Chicago sponsored by Liz Claiborne, Inc., and the Chicago Hilton Hotel, and talk about other "Enough is Enough!" activities.

"Enough is Enough!"

A monthly newsletter to educate, motivate, and activate women to break pornography's chain of abuse

Together, We Can Stomp Out Hard-Core Pornography!

I believe that women united behind a just cause have immeasurable influence and power.

I think of Candi Lighmer, a mother whose child was tragically killed one night in a car crash by a drunk driver. Her personal tragedy compelled her to establish Mothers Against Drunk Drivers (MADD).

One woman's passion and justifiable anger united other women, and together they launched a powerful campaign. In only 11 years, they not only strengthened the nation's laws governing drinking and driving, they totally changed the way we view drunk driving.

If women work together, I know the same thing can happen in the campaign against hard-core, illegal pornography.

I believe women speak with a special authority in the battle against pornography. We are its primary victims — we, our children, and our families.

When I speak to women across the country about pornography's harmful effects, I see a groundswell of indignation and outrage rising. Liberal and conservative women, religious and nonreligious women, old and young, businesswomen and homemakers are ready to fight to remove illegal pornography from their neighborhoods. We don't have to agree on a lot of other issues to come together in this common cause.

The shocking images of child pornography, incest, bestiality, rape, and mutilation that pass today as "adult" entertainment are demeaning and harmful to us as women, to our children, and to men as well. As pornography's chief victims, we have the special motivation — we have the urgent obligation — to demand that the degradation and exploitation stop.

That's what "Enough is Enough!" is all about. This secular, nonpartisan campaign encourages and equips women in the battle against illegal pornography. It is directed by women, staffed by women, and most of its financial support comes from women. We are not creating a new organization. We are initiating a movement.

I'm convinced that the women of America can make the difference on this issue. We can get the laws against illegal pornography enforced. We can get legislation passed where it is needed. We can change the way America thinks about pornography!

We are working to mobilize hundreds of thousands, eventually millions, of women to stand with us and say, "Enough is Enough!"

I urge you to join us in this important war.

Dee Jepsen



Dee Jepsen
National Campaign
Director

"I believe women speak with a special authority in the battle against pornography. We are its primary victims — we, our children, and our families."

First Lady Encourages “*Enough is Enough!*,” Condemns Hard-Core Pornography

First Lady Hillary Rodham Clinton recently encouraged the “*Enough is Enough!*” campaign.

In a letter sent to director Dee Jepsen, Mrs. Clinton wrote, “I applaud your group’s efforts to eliminate child pornography and illegal pornography and appreciate your willingness to take a stand for the children of the nation.

“I know that you have an enormous and challenging task before you, but this is a pressing issue that must be addressed.”

Former First Lady Barbara Bush has also written a letter giving her support to the campaign. ♦

In an interview conducted by Dotson Rader, published in Parade Magazine on April 11th, Mrs. Clinton came down hard on pornography:

Parade: In homes with cable TV, very young children can turn on channels showing R-rated and even X-rated films containing extremely graphic sex and violence — films that it is illegal for them to pay to see in a theater. How can you defend the culture of a country that allows a child access to hard-core pornography and extreme violence?

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Mrs. Clinton: I *can't* defend it! I wouldn't defend it! It's wrong, and I wish it would go away, because I think it's so destructive to children and adults to have that kind of material shown. I don't think there's anything wrong with parents' groups or other groups calling for people to boycott certain kinds of entertainment. That's advocacy, education, and choice.

Tell the truth about illegal pornography!

- ✓ Over 80 percent of child molesters admit to regularly using pornography, often imitating actual scenes during molestations.
- ✓ There are more hard-core pornography outlets in this country than McDonald's restaurants.
- ✓ The typical serial child molester has from 360 to 380 victims in his lifetime. Both adult and child pornography is often used as an aid during the crime.
- ✓ 1 in 3 girls and 1 in 7 boys will be molested before the time they are 18 years old.

Hard-core pornography. It's not what you think.

The “Enough is Enough!” campaign is another voice of the National Coalition Against Pornography.

IMPORTANT MANUAL UPDATE

Child Pornography Laws, State by State

(As of December 1, 1992)

On pages 23-27 of your Take Action Manual, an action item entitled "Strengthen Child Pornography Laws in all 50 States, describes what you need to do to strengthen your state's child pornography law.

Since the initial publication of the Take Action Manual, the "Enough is Enough!" Campaign has received updated information of the status of a number of state child pornography laws. The updated listing of state laws below should be substituted for the listing of states on pages 23-25. State laws in this important area have changed frequently since 1990 and we will continue our attempts to provide the most accurate information available.

The laws regarding the possession of child pornography also vary greatly from state to state. The age in parentheses indicates the age of majority in that state for the purposes of determining what is considered child pornography. For instance, in California it is illegal to possess pornography involving children if they are thirteen years old or younger - however, if the children involved in pornographic scenes are fourteen years or older, the material is not considered child pornography. "F" indicates possession is a felony; "M" indicates possession is a misdemeanor.

States which have no laws dealing with possession of child pornography:

Connecticut
Hawaii
Mississippi

Montana
Rhode Island
Vermont

Wyoming

States in which the the possession of child pornography with the intent to distribute and/or for commercial purposes is illegal:

Alaska	F (18)	Massachusetts	F (18)	New Mexico	F (16)
Maine	F (18)	Nebraska	F (18)	New York	F (16)*
Maryland	F (18)	New Hampshire	F (16)	Virginia	F (16)

The mere possession of child pornography is illegal in the following states:

Alabama	F (17)	Kansas	F (16)	Ohio	M (18)
Arizona	F/M (15/18)	Kentucky	M (16)	Oklahoma	F (18)
Arkansas	F (16)	Louisiana	F (17)	Oregon	F (18)
California	M (14)	Maryland	M (16)	Pennsylvania	F (17)
Colorado	M (18)	Michigan	M (18)	S. Carolina	F (18)
Delaware	M (18)	Minnesota	M (18)	S. Dakota	M (18)
Florida	F (18)	Missouri	M (18)	Tennessee	F (18)
Georgia	M (18)	Nevada	M (16)	Texas	F (17)
Idaho	F (18)	New Hampshire	M (16)	Utah	F (18)
Illinois	F (18)	New Jersey	F (16)	Washington	F (16)
Indiana	M (15)	N. Carolina	F (18)	W. Virginia	F (18)
Iowa	M (18)	N. Dakota	M (18)	Wisconsin	F (18)

**Promote or procure" was interpreted under case law as "receipt, acquisition or to obtain."*

New legal efforts on state child pornography statutes are sorely needed for the well-being of this nation's children. Child pornography laws require five essential components to offer adequate protection for children: 1) prohibition of "mere possession," 2) a uniform age of majority of 18 years, 3) felony status for *all* child pornography offenses, 4) mandatory minimum jail sentences with lengthy probationary periods, and 5) strict enforcement and commitment of significant law enforcement resources. If your state does not possess all five of these components, more work is needed and you can make a big difference.

Important Note: DUE TO THE AVALANCHE OF NEW LEGISLATION SINCE 1990, YOU SHOULD CHECK WITH YOUR STATE ATTORNEY GENERAL FOR THE SPECIFICS OF EACH STATE LAW AND WHETHER IT HAS BEEN UPDATED.

"Based on the information obtained during its investigation, the Subcommittee has reached the following general conclusions:

- Child pornography plays a central role in child molestations by pedophiles, serving to justify their conduct, assist them in seducing their victims, and provide a means to blackmail the children they have molested in order to prevent exposure.
- The vast majority of child pornography in the United States constitutes a small portion of the overall pornography market and is deeply underground. Unlike the adult pornography industry, it is not significantly influenced by organized crime.
- It is extremely difficult, if not impossible in some cities, to purchase true child pornography at adult bookstores. The overwhelming majority of child pornography seized in arrests made in the U.S. has not been produced or distributed for profit.
- The seizure by the U.S. Customs Service of imported child pornography, especially from Denmark and the Netherlands, has declined dramatically since late 1984 due to increased diplomatic and law enforcement pressure, American news media reports and increased caution shown by American child pornography customers.
- The membership of known pedophile-support groups in the United States is probably less than 2,000. While many of the groups' members have been convicted for child sex crimes, the groups themselves are not involved actively in large-scale criminal conspiracies, such as commercial child pornography rings.
- The Child Protection Act of 1984, which made illegal all distribution of sexually explicit material involving children, has been highly successful, leading to a substantial increase in federal prosecutions and the placing of higher priorities on such investigations. Since passage of the law two years ago, the Department of Justice has won 164 convictions on child pornography violations; in the previous six and one-half years, there were only 64.
- While the awareness of many police agencies about child sexual exploitation has improved greatly, many still do not have the training, staff or inclination to recognize promptly and investigate potential leads to crimes involving child pornography or child sexual abuse."

Southern California Child Exploitation Task Force

It is "dangerously inaccurate" to presume that "because there is not widespread *commercial* distribution of child pornography in the U.S.," that therefore "significant law-enforcement effort in the area of child exploitation is not warranted. The threat imposed on our children has little to do with [that] aspect of the child pornography business."

Burgess (1984) (A study in Jefferson County, Kentucky)

"37% of the prostitute group admitted to having been involved in pornography; only 18% of the non-prostitute group reported involvement in pornography. 38% of the runaways were involved in prostitution, and 15% of the runaways were involved in pornography.

"Identifying and tracking missing children is vital to curbing the victimization of children. Over 86% of Jefferson County children involved in child prostitution and pornography were, at the time of those activities, runaways or missing.

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John Rabun, Exploited and Missing Children Unit, Louisville, Kentucky

"The Police/Social work team of the Exploited and Missing Child Unit (EMCU) of Louisville, KY investigated 1,400 cases of children suspected of being victims of sexual exploitation. Over 40 major cases involved the successful prosecution of adults involved with over 12 children each. One case involved 320 children. At the time of the arrest and/or service of search warrants, all 40 of these adult predators were found with various forms of adult pornography, and in most cases child nudes and/or child pornography were also found.

The National Obscenity Enforcement Unit

"It has been most successful in its efforts. Prosecutions for child pornography are up by 80% in the last fiscal year (1987) and obscenity prosecutions are up by 800%."

David Duncan (1968) Southern Illinois University

He did a content analysis of twenty-five years of homosexual pornographic magazines sold in adult bookstores of two major US cities. Dr. Duncan found the frequency with which clearly underage models appeared in such legally available magazines has declined to zero, due to the recent legislation prohibiting child pornography. Suggestions of child pornography remained, however, in the frequent use in porno magazine titles of such words as 'boy,' 'young' and 'teen' although the models were no longer adolescents. Youthful appearing models achieved star billing in what the Attorney General's Commission on Pornography has named 'pseudo-child pornography.'

"The final decline (of child pornography) in the late seventies may have been in response to the pressures building against child pornography which led eventually to that legislation. To a large extent it probably reflects the impact of child abuse programs emerging in the seventies, since most of the child models appearing in such pornography are likely to be incest victims being exploited by their parents or other adults."

BUT THE FACT THAT THERE IS A DEMAND FOR SUCH MATERIAL IS CLEARLY INDICATED BY THE CONTINUED PRESENCE OF THE NEW PSEUDO-CHILD PORNOGRAPHY.

PSEUDO-CHILD PORNOGRAPHY***Judith Reisman (1987)***

"A content analysis of Playboy, Penthouse, and Hustler magazines, December 1953 to December 1984, yielded 6,004 child images. Newsstand available child imagery in the context of erotica/pornography increased nearly 2,600% from 1954-1984. 80% of the children were actively involved in all scenes; and each magazine portrayed children as unharmed and/or benefited by adult-child sex."

David A. Scott (In Pornography: A Human Tragedy, 1987)

"Judith Reisman (1985) found that from the first issue of Playboy in 1954, children in cartoons (or photographs of adults dressed to suggest children) have appeared in sexual contact with adults, and the frequency and intensity of these contacts has increased through the years. The dominant impression was that child/adult sex is glamorous, thereby enhancing the impression that these activities are harmless. Magazines can escape the letter of child pornography laws while still implying that sex with children is desirable and readily available. And these magazines, of course, are sold in the open."

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Don Feder (Boston Herald, 10/27/88)

"The October issue of Playboy contains a five-page rebuttal to the so-called Reisman report. Odd that a publication with a circulation of 3.5 million would devote so much space to answering what it assures us is preposterous stuff. Some experts believe [pseudo-child pornography] encourages sexual abuse, both by exciting perverted passions and fostering the belief that the child actually is an eager participant in the act."

"Pornographers protest their innocence, while facilitating the victimization of our children."

DOES PORNOGRAPHY PROMOTE ABUSE?*The National Obscenity Enforcement Unit*

They now teach their investigators at all of their seminars "to look for pornography at the scene of sexual crimes involving children."

"It is beyond debate that molestation of children is, in part, caused by consumption of pornography."

John Rabun, Exploited and Missing Children Unit

"Over 4 years, the EMCU team learned to expect to always find adult pornography since it was used for

- the offender's own arousal;
- self-validation of their own sex deviations;
- extortion of child victims or other adults; and
- deliberate and planned lowering of inhibitions of child victims."

The Badgley Report (1984)

The report found that almost 60% of both male and female juvenile prostitutes had been asked to be the subject of sexually explicit films or photographs; 12% of the girls and 20% of the boys had actually been used in making pornography; juvenile prostitutes are a high-risk group in regard to being exploited by pornographers.

Two smaller American studies emphatically confirm this finding (Burgess: 75% of youth hustlers had participated in pornography; John Rabun: 37% had participated).

The 1982 URSA Study: concluded that there exists a "slight" relationship between juvenile prostitution and pornography. There, 27% of the young male prostitutes had been photographed by a "john"; of the 54 young male hustlers for whom information was available, 9 had been photographed for commercial pornographic magazines. In the face of that evidence it seems impossible to deny the existence of a significant link between the exploitation of minors in prostitution and in pornography.

Extant studies of juvenile prostitutes showed less incidence of participation in pornography than is the real case because by its very nature one item of pornography can be viewed contemporaneously by many patrons and for repeated sittings. The demand for pornographic performers will always be a tiny fraction of the demand for prostitutes.

Surgeon General's Workshop on Pornography (June 24, 1986)

19 nationally and internationally recognized clinicians and researchers achieved consensus on the statement that "children and adolescents who participate in the production of pornography experience adverse enduring effects."

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Southern California Child Exploitation Task Force (1988)

It is the longest existing task force in the U.S. and has prosecuted all the child pornography and Federal child abuse cases in the Central District of California during the past 10 years.

- "According to the U.S. Customs Service, a conservative estimate of the number of pedophiles in the U.S. is 15,000. It is impossible to determine accurately the number, because pedophiles do everything possible to avoid detection."
- "We have frequently gone into homes with search warrants for child pornography and discovered children living in the home who have been molested by the person who is the target of our child-pornography investigation."
- "We have discovered photographs of the pedophiles molesting children."
- "We have found convicted child molesters as well as individuals who were providing children to molesters."
- "One of the men we prosecuted had 50,000 photographs of noncommercial child pornography in a storage locker. He admitted molesting several hundred children following his release from a state hospital for a child molestation conviction. He even maintained a ledger listing those molestations. He taught swimming and tennis to youngsters, some of whom became his victims."
- "A convicted child molester who was the subject of one of our investigations was found, after he had ordered materials, to have homemade child pornography in his house—including a video tape depicting him molesting a child who was clearly under the influence of drugs or alcohol."
- Some articles written in pornographic magazines call attention to a few cases in which individuals (who claimed neither to be sexually active with children nor to possess child pornography) were the subjects of search warrants after they ordered child pornography from undercover Government agents. While Government operations occasionally identify individuals who are not suitable for prosecution, those cases are the exception, not the rule.

M. Douglas Reed, Ph.D.
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CHILD PORNOGRAPHY

THE PROBLEM

The National Coalition for Children's Justice (Ken Wooden)

Between 1981 and 1985, child sexual abuse (including having pictures taken pornographically) rose by 175%.

The National Obscenity Enforcement Unit

(Testimony before the Senate Judiciary Committee, June, 1988)

"Review of recent law enforcement statistics and studies, as well as scientific research, reveals the devastating effect obscenity and child pornography are having on our nation.

Ann Burgess, Professor at the University of Pennsylvania

(Federal grant to study child pornography).

Pornography depicting children is used by child molesters to convince children that deviant sex acts (which all child sexual abuse is) are normal—thereby breaking down their resistance. Her later study (1987) found that victims of child sexual abuse have symptoms of chronic or delayed posttraumatic stress. It causes multiple psychological problems which may take years to resolve.

Pierce (1984)

Sexually exploited children involved in the pornography industry are usually recruited among run-aways, although some may use neighborhood children or their own children.

THE NATURE AND THE EXTENT OF THE PROBLEM

Report of the U. S. Congress Permanent Subcommittee on Investigations on Child Pornography and Pedophilia (1986)

"No single characteristic of pedophilia is more pervasive than the obsession with child pornography. The fascination of pedophiles with child pornography and child abuse has been documented in many studies and has been established by hundreds of sexually explicit materials involving children.

"Detective William Dworin of the Los Angeles Police Department estimates that of the 700 child molesters in whose arrest he has participated during the last ten years, more than half had child pornography in their possession. About 80% owned either child or adult pornography.

"Each convicted child molester interviewed by the Subcommittee either collected or produced child pornography, or both. Most said they had used the material to lower the inhibitions of children or to coach them into posing for photographs.

"It is not unusual for pedophiles to possess collections containing several thousand photographs, slides, films, videotapes and magazines depicting nude children and children engaged in a variety of sexual activities.

"The maintenance and growth of [the pedophile's] collections [of items related to children] becomes one of the most important things in their life. Child pornography exists primarily for the consumption of pedophiles—adults whose sexual preference and attraction is to prepubescent children. If there were no pedophiles, there would be little child pornography other than that involving adolescent children." (Special Agent Kenneth Lanning, FBI)"

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that his possession of the four photographs at issue in this case constituted a crime.

Because Osborne had notice that his conduct was criminal, his case differs from three cases upon which he relies: *Bouie v City of Columbia*, 378 US 347, 12 L Ed 2d 894, 84 S Ct 1697 (1964), *Rabe v Washington*, 405 US 117

405 US 313, 31 L Ed 2d 258, 92 S Ct 993 (1972), and *Marks v United States*, 430 US 188, 51 L Ed 2d 260, 97 S Ct 990 (1977). In *Bouie*, the petitioners had refused to leave a restaurant after being asked to do so by the restaurant's manager. Although the manager had not objected when the petitioners entered the restaurant, the petitioners were convicted of violating a South Carolina trespass statute proscribing "'entry upon the lands of another . . . after notice from the owner or tenant prohibiting such entry.'" 378 US, at 349, 12 L Ed 2d 894, 84 S Ct 1697. Affirming the convictions, the South Carolina Supreme Court construed the trespass law as also making it a crime for an individual to remain on another's land after being asked to leave. We reversed the convictions on due process grounds because the South Carolina Supreme Court's expansion of the statute was unforeseeable and therefore the petitioners had no reason to suspect that their conduct was criminal. *Id.*, at 350-352, 12 L Ed 2d 894, 84 S Ct 1697.

Likewise, in *Rabe v Washington*, *supra*, the petitioner had been convicted of violating a Washington obscenity statute that, by its terms, did not proscribe the defendant's conduct. On petitioner's appeal, the Washington Supreme Court nevertheless affirmed the petitioner's conviction, after construing the Wash-

ington obscenity statute to reach the petitioner. We overturned the conviction because the Washington Supreme Court's broadening of the statute was unexpected; therefore the petitioner had no warning that his actions were proscribed. *Id.*, at 315, 31 L Ed 2d 258, 92 S Ct 993.

And, in *Marks v United States*, *supra*, we held that the retroactive application of the obscenity standards announced in *Miller v California*, 413 US 15, 37 L Ed 2d 419, 93 S Ct 2607 (1973), to the potential detriment of the petitioner violated the Due Process Clause because, at the time that the defendant committed the challenged conduct, our decision in *Memoirs v Massachusetts*, 383 US 413, 16 L Ed 2d 1, 86 S Ct 975 (1966), provided the governing law. The defendant could not suspect that his actions would later become criminal when we expanded the range of constitutionally proscribable conduct in *Miller*.

[405 US 118]

Osborne suggests that our decision here is inconsistent with *Shuttlesworth v Birmingham*, 382 US 87, 15 L Ed 2d 176, 86 S Ct 211 (1965). We disagree. In *Shuttlesworth*, the defendant had been convicted of violating an Alabama statute that, when read literally, provided that "a person may stand on a public sidewalk in Birmingham only at the whim of any police officer of that city." *Id.*, at 90, 15 L Ed 2d 176, 86 S Ct 211. We stated that "[t]he constitutional vice of so broad a provision needs no demonstration." *Ibid.* As subsequently construed by the Alabama Supreme Court, however, the statute merely made it criminal for "an individual who was blocking free passage along a public street to disobey a police officer's order to move. We noted that "[i]t is our duty, of

course, to accept this state judicial construction of the ordinance. . . . As so construed, we cannot say that the ordinance is unconstitutional, though it requires no great feat of imagination to envisage situations in which such an ordinance might be unconstitutionally applied." *Id.*, at 91, 15 L Ed 2d 176, 86 S Ct 211. We nevertheless reverse the defendant's conviction because it was not clear that the State had convicted the defendant under the statute as construed rather than as written. *Id.*, at 91-92, 15 L Ed 2d 176, 86 S Ct 211.¹³ *Shuttlesworth*, then, stands for the proposition that where a State Supreme Court narrows an unconstitutionally overbroad statute, the State must ensure that defendants are convicted under the statute as it is subsequently construed and not as it was originally written; this proposition in no way conflicts with our holding in this case.

Finally, despite Osborne's contention to the contrary, we do not believe that *Massachusetts v Oakes*, 491 US 576, 105 L Ed 2d 493, 109 S Ct 2633 (1989), supports his theory of this case. In *Oakes*, the petitioner challenged a Massachusetts pornography statute as

[495 US 119]

overbroad; since the time of the defendant's alleged crime, however, the State had substantially narrowed the statute through a subsequent legislative enactment—an amendment to the statute. In a separate opinion, five Justices agreed that the state legislature could not cure the potential overbreadth problem

through the subsequent legislative action; the statute was void as written. *Id.*, at 585-586, 105 L Ed 2d 493, 109 S Ct 2633.

[8a] Osborne contends that *Oakes* stands for a similar but distinct proposition that, when faced with a potentially overinclusive statute, a court may not construe the statute to avoid overbreadth problems and then apply the statute, as construed, to past conduct. The implication of this argument is that if a statute is overbroad as written, then the statute is void and incurable. As a result, when reviewing a conviction under a potentially overbroad statute, a court must either affirm or strike down the statute on its face, but the court may not, as the Ohio Supreme Court did in this case, narrow the statute, affirm on the basis of the narrowing construction, and leave the statute in full force. We disagree.

First, as indicated by our earlier discussion, if we accepted this proposition, it would require a radical reworking of our law. Courts routinely construe statutes so as to avoid the statutes' potentially overbroad reach, apply the statute in that case, and leave the statute in place. In *Roth v United States*, 354 US 476, 1 L Ed 2d 1498, 77 S Ct 1304 (1957), for example, the Court construed the open-ended terms used in 18 USC § 1461 [18 USCS § 1461], which prohibits the mailing of material that is "obscene, lewd, lascivious, indecent, filthy or vile." Justice Harlan characterized *Roth* in this way:

13. In *Shuttlesworth*, we also overturned the defendant's conviction for violating another part of the same Alabama statute because that provision had been interpreted as criminalizing an individual's failure to follow a police-

man's directions when the policeman was directing traffic, and the crime alleged in *Shuttlesworth* had nothing to do with motor traffic. 382 US, at 93-95, 15 L Ed 2d 176, 86 S Ct 211.

"The words of § 1461, 'obscene, lewd, lascivious, indecent, filthy or vile,' connote something that is portrayed in a manner so offensive as to make it unacceptable under current community mores. While in common usage the words have different shades of meaning, the statute since its inception has always been taken as aimed at obnoxiously debasing portrayals of sex. Although the

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statute condemns such material irrespective of the effect it may have upon those into whose hands it falls, the early case of *United States v Bennet*, 24 Fed Cas 1093 (No. 14571), put a limiting gloss upon the statutory language: the statute reaches only indecent material which, as now expressed in *Roth v United States*, supra, at 489 [1 L Ed 2d 1498, 77 S Ct 1304], 'taken as a whole appeals to prurient interest.'" *Manuel Enterprises, Inc. v Day*, 370 US 478, 482-484, 8 L Ed 2d 639, 82 S Ct 1432 (1962) (footnotes omitted; emphasis in original).

See also, *Hamling*, 418 US, at 112, 41 L Ed 2d 590, 94 S Ct 2887 (quoting the above). The petitioner's conviction was affirmed in *Roth*, and federal obscenity law was left in force. 354 US, at 494, 1 L Ed 2d 1498, 77 S Ct 1304. "We, moreover, have long respected the State Supreme Courts' ability to narrow state statutes so as to limit the

statute's scope to unprotected conduct. See, e.g., *Ginsberg v New York*, 390 US 629, 20 L Ed 2d 195, 88 S Ct 1274 (1968).

Second, we do not believe that *Oakes* compels the proposition that Osborne urges us to accept. In *Oakes*, Justice Scalia, writing for himself and four others, reasoned that

"The overbreadth doctrine serves to protect constitutionally legitimate speech not merely ex post, that is, after the offending statute is enacted, but also ex ante, that is, when the legislature is contemplating what sort of statute to enact. If the promulgation of overbroad laws affecting speech was cost free . . . that is, if no conviction of constitutionally proscribable conduct would be

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lost, so long as the offending statute was narrowed before the final appeal . . . then legislatures would have significantly reduced incentives to stay within constitutional bounds in the first place. When one takes account of those overbroad statutes that are never challenged, and of the time that elapses before the ones that are challenged are amended to come within constitutional bounds, a substantial amount of legitimate speech would be 'chilled' . . ." 491 US, at 586, 105 L Ed 2d 493, 109 S Ct 2633 (emphasis in original).

14. *Buckley v Valeo*, 424 US 1, 76-80, 46 L Ed 2d 659, 96 S Ct 612 (1976), is another landmark case where a law was construed to avoid potential overbreadth problems and left in place. Section 304(e) of the Federal Election Campaign Act, 2 USC § 434(e) (1976 ed) [2 USCS § 434(e)], imposed certain reporting requirements on "[e]very person . . . who makes contributions or independent expenditures" exceeding \$100 "other than by contribution to a

political committee or candidate." We stated that "[t]o insure that the reach of § 434(e) is not impermissibly broad, we construe 'expenditure' for purposes of that section . . . to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." The section was upheld as construed. 424 US, at 80, 46 L Ed 2d 659, 96 S Ct 612 (footnote omitted).

In other words, five of the *Oakes* Justices feared that if we allowed a legislature to correct its mistakes without paying for them (beyond the inconvenience of passing a new law), we would decrease the legislature's incentive to draft a narrowly tailored law in the first place.

Legislators who know they can cure their own mistakes by amendment without significant cost may not be as careful to avoid drafting overbroad statutes as they might otherwise be. But a similar effect will not be likely if a judicial construction of a statute to eliminate overbreadth is allowed to be applied in the case before the court. This is so primarily because the legislatures cannot be sure that the statute, when examined by a court, will be saved by a narrowing construction rather than invalidated for overbreadth. In the latter event, there could be no convictions under that law even of those whose own conduct is unprotected by the First Amendment. Even if construed to obviate overbreadth, applying the statute to pending cases might be barred by the Due Process Clause. Thus, careless drafting cannot be considered to be cost free based on the power of the courts to eliminate overbreadth by statutory construction.

15. Under Osborne's submission, even where the construction eliminating overbreadth occurs in a civil case, the statute could not be applied to conduct occurring prior to the decision; for although plainly within reach of the terms of the statute and plainly not otherwise protected by the First Amendment, until the statute was narrowed to comply with the Amendment, the conduct was not illegal.

16. [7d, 8c] In terms of applying a ruling to pending cases, we see no difference of constitutional import between a court affirming a conviction after construing a statute to avoid facial invalidation on the ground of overbreadth,

[7c, 8b] There are also other considerations. Osborne contends that when courts construe statutes so as to eliminate overbreadth, convictions of those found guilty of unprotected conduct covered by the statute must be reversed and any further

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convictions for prior reprehensible conduct are barred.¹⁵ Furthermore, because he contends that overbroad laws implicating First Amendment interests are nullities and incapable of valid application from the outset, this would mean that judicial construction could not save the statute even as applied to subsequent conduct unprotected by the First Amendment. The overbreadth doctrine, as we have recognized, is indeed "strong medicine," *Broadrick v Oklahoma*, 413 US, at 613, 37 L Ed 2d 830, 93 S Ct 2908, and requiring that statutes be facially invalidated whenever overbreadth is perceived would very likely invite reconsideration or redefinition of the doctrine in a way that would not serve First Amendment interests.¹⁶

III

[9a] Having rejected Osborne's Stanley and overbreadth arguments, we now reach Osborne's final objec-

and affirming a conviction after rejecting a claim that the conduct at issue is not within the terms of the statute. In both situations, the Due Process Clause would require fair warning to the defendant that the statutory proscription, as construed, covers his conduct. But even with the due process limitation, courts repeatedly affirm convictions after rejecting nonfrivolous claims that the conduct at issue is not forbidden by the terms of the statute. As argued earlier, there is no doubt whatsoever that Osborne's conduct is proscribed by the terms of the child pornography statute involved here.

tion to his conviction: his contention that he was denied due process because it is unclear that his conviction was based on a finding that each of the elements of § 2907.323(A)(3) was present.¹⁷ According

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to the Ohio Supreme Court, in order to secure a conviction under § 2907.323(A)(3), the State must prove both scienter and that the defendant possessed material depicting a lewd exhibition or a graphic focus on genitals. The jury in this case was not instructed that it could convict Osborne only for conduct that satisfied these requirements.

[10] The State concedes the omissions in the jury instructions, but argues that Osborne waived his right to assert this due process challenge because he failed to object when the instructions were given at his trial. The Ohio Supreme Court so held, citing Ohio law. The question before us now, therefore, is whether we are precluded from reaching Osborne's due process challenge because counsel's failure to comply with the procedural rule constitutes an independent state-law ground adequate to support the result below. We have no difficulty agreeing with the State that Osborne's counsel's failure to urge that the court instruct the jury on scienter constitutes an independent and adequate state-law ground preventing us from reaching Osborne's due process contention on that point. Ohio law states that proof of scienter is required in instances, like the present one, where a criminal statute does not specify the applicable mental state. See n 9, *supra*. The state procedural rule, moreover, serves the

17. [9b] "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact

State's important interest in ensuring that counsel do their part in preventing trial courts from providing juries with erroneous instructions.

[11] With respect to the trial court's failure to instruct on lewdness, however, we reach a different conclusion: Based upon our review of the record, we believe that counsel's failure to object on this point does not prevent us from considering Osborne's constitutional claim. Osborne's trial was brief: The State called only the two arresting officers to the stand; the defense summoned only Osborne himself. Right before trial, Osborne's counsel moved to dismiss the case, contending

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that § 2907.323(A)(3) is unconstitutionally overbroad. Counsel stated:

"I'm filing a motion to dismiss based on the fact that [the] statute is void for vngueness, overbroad . . . The statute's overbroad because . . . a person couldn't have pictures of his own grandchildren; probably couldn't even have nude photographs of himself.

"Judge, if you had some nude photos of yourself when you were a child, you would probably be violating the law. . . .

"So grandparents, neighbors, or other people who happen to view the photograph are criminally liable under the statute. And on that basis I'm going to ask the Court to dismiss the case." Tr 3-4.

The prosecutor informed the trial judge that a number of Ohio state

necessary to constitute the crime with which he is charged." In re Winship, 397 US 353, 364, 26 L Ed 2d 368, 90 S Ct 1068 (1970).

courts had recently rejected identical motions challenging § 2907.323(A)(3). Tr 5-6. The court then overruled the motion. *Id.*, at 7. Immediately thereafter, Osborne's counsel proposed various jury instructions. *Ibid.*

Given this sequence of events, we believe that we may reach Osborne's due process claim because we are convinced that Osborne's attorney pressed the issue of the State's failure of proof on lewdness before the trial court and, under the circumstances, nothing would be gained by requiring Osborne's lawyer to object a second time, specifically to the jury instructions. The trial judge, in no uncertain terms, rejected counsel's argument that the statute as written was overbroad. The State contends that counsel should then have insisted that the court instruct the jury on lewdness because, absent a finding that this element existed, a conviction would be unconstitutional. Were we to accept this position, we would "force resort to an arid ritual of meaningless form," . . . and would further no perceivable state interest." James v Kentucky, 466 US 341, 349, 80 L Ed 2d 346, 104 S Ct 1830 (1984), quoting *Staub v City of Baxley*, 355 US 313, 320, 2 L Ed 2d 302, 78 S Ct 277 (1958), and citing *Henry*

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v Mississippi, 379 US 443, 448-449, 13 L Ed 2d 408, 85 S Ct 564 (1965). As Justice Holmes warned us years ago, "[w]hatever springs the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be de-

18. The Alabama court had stated: "There must be a ruling sought and acted on before the trial judge can be put in error. Here there was no ruling asked or invoked as to the

fented under the name of local practice." *Davis v Wechsler*, 263 US 22, 24, 68 L Ed 143, 44 S Ct 13 (1923).

Our decision here is analogous to our decision in *Douglas v Alabama*, 380 US 415, 13 L Ed 2d 934, 85 S Ct 1074 (1965). In that case, the Alabama Supreme Court had held that a defendant had waived his confrontation clause objection to the reading into evidence of a confession that he had given. Although not following the precise procedure required by Alabama law,¹⁸ the defendant had unsuccessfully objected to the prosecution's use of the confession. We followed "our consistent holdings that the adequacy of state procedural bars to the assertion of federal questions is itself a federal question" and stated that "[i]n determining the sufficiency of objections we have applied the general principle that an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interest, and therefore sufficient to preserve the claim for review here." *Id.*, at 422, 13 L Ed 2d 934, 85 S Ct 1074. Concluding that "[n]o legitimate state interest would have been served by requiring repetition of a patently futile objection," we held that the Alabama procedural ruling did not preclude our consideration of the defendant's constitutional claim. *Id.*, at 421-422, 13 L Ed 2d 934, 85 S Ct 1074. We reach a similar conclusion in this case.

IV

[12] To conclude, although we find

questions embracing the alleged confession." 380 US, at 421, 13 L Ed 2d 934, 85 S Ct 1074 (citation omitted).

Osborne's First Amendment arguments unpersuasive, we reverse his conviction and remand

(406 US 120)

for a new trial in order to ensure that Os-

borne's conviction stemmed from a finding that the State had proved each of the elements of § 2907.323(A)(3).

So ordered.

SEPARATE OPINIONS

Justice Blackmun, concurring.

I join the Court's opinion. I write separately only to express my agreement with Justice Brennan, see post, at 146, n 20, 109 L Ed 2d, at 132-133, that this Court's ability to entertain Osborne's due process claim premised on the failure of the trial court to charge the "lewd exhibition" and "graphic focus" elements does not depend upon his objection to this failure at trial.

Justice Brennan, with whom Justice Marshall and Justice Stevens join, dissenting.

I agree with the Court that appellant's conviction must be reversed. I do not agree, however, that Ohio is free on remand to retry him under Ohio Rev Code Ann § 2907.323(A)(3) (Supp 1989) as it currently exists. In my view, the state law, even as construed authoritatively by the Ohio Supreme Court, is still fatally overbroad, and our decision in *Stanley v Georgia*, 394 US 557, 22 L Ed 2d 542, 89 S Ct 1243 (1969), prevents the State from criminalizing appellant's possession of the photographs at issue in this case. I therefore respectfully dissent.

1. Other provisions of Ohio law relating to child pornography are not phrased in terms of "nudity." For example, Ohio Rev Code Ann § 2907.321 (Supp 1989) prohibits the knowing creation, sale, distribution, or possession of "obscenity involving a minor." Section 2907.322 prohibits the knowing creation, sale, distribution, or possession of materials depicting a minor engaging in "sexual activity" (defined as "sexual conduct or sexual contact," see

borne's conviction stemmed from a finding that the State had proved each of the elements of § 2907.323(A)(3).

So ordered.

I

A

As written, the Ohio statute is plainly overbroad. Section 2907.323(A)(3) makes it a crime to "[p]ossess or view any material or performance that shows a minor who is not the person's child or ward in a state of nudity." Another section defines "nudity" as

"the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full opaque covering of any portion thereof

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below the top of

the nipple, or of covered male genitals in a discernibly turgid state." § 2907.01(H).

In short, §§ 2907.323 and 2907.01(H) use simple nudity, without more, as a way of defining child pornography.¹ But as our prior decisions have made clear, "'nudity alone' does not place otherwise protected material outside the mantle of the First Amendment." *Schad v Mount Ephraim*, 452 US 61, 66, 68 L Ed 2d 671, 101 S Ct 2176 (1981) (quoting *Jenkins v Georgia*, 418 US 153, 161, 41 L Ed 2d 642, 94 S

§§ 2907.01(A), (B), (C)), masturbation, or bestiality. The documented harm from child pornography arises chiefly from the type of obscene materials that would be punished under these provisions, rather than from the depictions of mere "nudity" that are criminalized in § 2907.323. See *New York v Ferber*, 458 US 747, 779, n 4, 73 L Ed 2d 1113, 102 S Ct 3348 (1982) (Stevens, J., concurring in judgment).

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Ct 2760 (1974)); see also *FW/PBS, Inc. v Dallas*, 493 US 215, 224, 102 L Ed 2d 56, 109 S Ct 80 (1990) (plurality opinion); id., at 238, n 1, 102 L Ed 2d 56, 109 S Ct 80 (Brennan, J., concurring in judgment); *Doran v Salem Inn, Inc.*, 422 US 922, 932-933, 45 L Ed 2d 648, 95 S Ct 2561 (1975); *South-eastern Promotions, Ltd. v Conrad*, 420 US 546, 557-558, 43 L Ed 2d 448, 95 S Ct 1239 (1975); *California v LaRue*, 409 US 109, 118, 34 L Ed 2d 342, 93 S Ct 390 (1972). In *Erznoznik v City of Jacksonville*, 422 US 205, 213, 45 L Ed 2d 125, 95 S Ct 2268 (1975), for example, we invalidated a statute that "would [have] bar[red] a film containing a picture of a baby's buttocks, the nude body of a war victim, or scenes from a culture in which nudity is indigenous. The ordinance also might [have] prohibit[ed] newsreel scenes of the opening of an art exhibit as well as shots of bathers on a beach." The Ohio law as written

has the same broad coverage and is similarly unconstitutional.²

(405 US 128)

B

Wary of the statute's use of the "nudity" standard, the Ohio Supreme Court construed § 2907.323(A)(3) to apply only "where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals." *State v Young*, 37 Ohio St 3d 249, 252, 525 NE2d 1363, 1368 (1988). The "lewd exhibition" and "graphic focus" tests not only fail to cure the overbreadth of the statute, but they also create a new problem of vagueness.

1

The Court dismisses appellant's overbreadth contention in a single cursory paragraph. Relying exclusively on our previous decision in *New York v Ferber*, 458 US 747, 73 L Ed 2d 1113, 102 S Ct 3348 (1982),³

2. The Court hints that § 2907.323's exemptions and "proper purposes" provisions might save it from being overbroad. See ante, at 112, 109 L Ed 2d, at 111. I disagree. The enumerated "proper purposes" (e.g., a "bona fide athletic, medical, scientific, educational . . . or other proper purpose") are simultaneously too vague and too narrow. What is an acceptable "athletic" purpose? Would erotic art along the lines of Robert Mapplethorpe's qualify? What is a valid "scientific" or "educational" purpose? What about sex manuals? See, e.g., *Falson v Hustler Magazine, Inc.* 607 F Supp 1341 (ND Tex 1985), aff'd, 799 F2d 1000 (CA5 1986). What is a permissible "other proper purpose"? What about photos taken for one purpose and recirculated for other, more prurient purposes? The "proper purposes" standard appears to create problems analogous to those this Court has encountered in describing the "redeeming social importance" of obscenity. See *Pope v Illinois*, 481 US 497, 600-501, 95 L Ed 2d 435, 107 S Ct 1918 (1987); id., at 513-519, 95 L Ed 2d 439, 107 S Ct 1918 (Stevens, J., dissenting); *Smith v United States*, 431 US 291, 319-321, 52 L Ed 2d 324, 97 S Ct 1766 (1977) (Stevens, J., dissenting); *Paris Adult Theatre I v Slaton*, 413

US 49, 84-85, 37 L Ed 2d 446, 93 S Ct 2628 (1973) (Brennan, J., dissenting); *Miller v California*, 413 US 15, 24, 37 L Ed 2d 419, 93 S Ct 2607 (1973); *Memoirs v Attorney General of Massachusetts*, 383 US 413, 418, 16 L Ed 2d 1, 86 S Ct 976 (1966) (plurality opinion); *Roth v United States*, 354 US 476, 484-486, 1 L Ed 2d 1498, 77 S Ct 1304 (1957).

At the same time, however, Ohio's list of "proper purposes" is too limited; it excludes such obviously permissible uses as the commercial distribution of fashion photographs or the simple exchange of pictures among family and friends. Thus, a neighbor or grandparent who receives a photograph of an unclothed toddler might be subject to criminal sanctions.

3. Although the phrase "lewd exhibition of the genitals" was offered as an example of a permissible regulation in *Miller v California*, 413 US, at 25, 37 L Ed 2d 419, 93 S Ct 2607, it was mentioned in the Court's treatment of a vagueness question. Even then the phrase was prefaced with the words "[p]rohibited offensive representations or descriptions." *Ibid.*, and included in a list with other types of sexual conduct that served to limit its scope.

[405 US 120]

the majority reasons that the "lewd exhibition" standard adequately narrows the statute's ambit because "[w]e have upheld similar language against overbreadth challenges in the past." Ante, at 114, 109 L Ed 2d, at 112. The Court's terse explanation is unsatisfactory, since Ferber involved a law that differs in crucial respects from the one here.

The New York law at issue in Ferber criminalized the use of a child in a "[s]exual performance," defined as "any performance or part thereof which includes sexual conduct by a child less than sixteen years of age." 458 US, at 751, 73 L Ed 2d 1113, 102 S Ct 3348 (quoting NY Penal Law § 263.00(1) (McKinney 1980)). "'Sexual conduct'" was in turn defined as "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals." 458 US, at 751, 73 L Ed 2d 1113, 102 S Ct 3348 (quoting § 263.00(3)). Although we acknowledged that "nudity, without more[,] is protected expression," id., at 765, n 18, 73 L Ed 2d 1113, 102

S Ct 3348, we found that the statute was not overbroad because only "a tiny fraction of materials within the statute's reach" was constitutionally protected. Id., at 773, 73 L Ed 2d 1113, 102 S Ct 3348; see also id., at 776, 73 L Ed 2d 1113, 102 S Ct 3348 (Brennan, J., concurring in judgment). We therefore upheld the conviction of a bookstore proprietor who sold films depicting young boys masturbating.

The Ohio law is distinguishable for several reasons. First, the New York statute did not criminalize materials with a "graphic focus" on the genitals, and, as discussed further below, Ohio's "graphic focus" test is impermissibly capacious. Even setting aside the "graphic focus" element, the Ohio Supreme Court's narrowing construction is still overbroad because it focuses on "lewd exhibitions of nudity" rather than "lewd exhibitions of the genitals" in the context of sexual conduct, as in the New York statute at issue in Ferber.⁴

[405 US 130]

Ohio law defines "nudity" to

4. The Court maintains that "[t]he context of the opinion indicates that the Ohio Supreme Court believed that 'the term "nudity" as used in R C 2907.323(A)(3) refers to a lewd exhibition of the genitals.' State v Young, 37 Ohio St 3d 249, 258, 625 NE2d 1363, 1373 (1988)." Ante, at 115, n 11, 109 L Ed 2d, at 112. The passage cited (and quoted in part) by the Court, however, is a description of appellant's objections at trial and his argument on appeal, not a precise formulation by the Ohio Supreme Court of the "lewd exhibition" test. Indeed, only two sentences after the quotation cited by the majority, the Ohio court referred to "lewdness (as) a necessary element of nudity under R C 2907.323(A)(3)." 37 Ohio St 3d, at 258, 625 NE2d, at 1373 (emphasis added). Earlier in its opinion, the Ohio Supreme Court more carefully articulated its construction of the statute and stated that § 2907.323(A)(3) criminalizes depictions of nudity "where such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals." Id., at 252, 625 NE2d, at

1368. It is on this portion of the opinion that I rely.

The Ohio Supreme Court did not say, "[W]here such nudity constitutes a lewd exhibition of or involves a graphic focus on the genitals." The noun "exhibition" does not take as a modifier the preposition "on," and the court's repeated reference to the "prohibited state of nudity" as "a lewd exhibition or a graphic focus on the genitals," id., at 251, 625 NE2d, at 1367, leaves no doubt that its choice of words was deliberate. The Ohio court clearly meant the "lewd exhibition" standard to pertain only to nudity and not to displays of the genitals. See also *ibid.* (referring to "morally innocent states of nudity as well as lewd exhibitions").

But were the Court today correct that the Ohio Supreme Court intended to create a "'lewd exhibition' of the genitals" test, I would hardly be reassured. Indeed, such a confused approach by the Ohio Supreme Court, referring in one part of its opinion to "lewd exhibi-

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include depictions of pubic areas, buttocks, the female breast, and covered male genitals "in a discernibly turgid state," as well as depictions of the genitals. On its face, then, the Ohio law is much broader than New York's.

In addition, whereas the Ohio Supreme Court's interpretation uses the "lewd exhibition of nudity" test standing alone, the New York law employed the phrase "'lewd exhibition of

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the genitals'" in the context of a longer list of examples of sexual conduct: "actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, [and] sado-masochistic abuse." 458 US, at 751, 73 L Ed 2d 1113, 102 S Ct 3348. This syntax was important to our decision in Ferber. We recognized the potential for impermissible applications of the New York statute, see id., at 773, 73 L Ed 2d 1113, 102 S Ct 3348, but in view of the examples of "sexual conduct" provided by the statute, we were willing to assume

statute void for vagueness. We, of course, are powerless to clarify or elaborate on the interpretation of Ohio law provided by the state court. See *Freedman v Maryland*, 380 US 51, 60-61, 13 L Ed 2d 649, 85 S Ct 734 (1965).

5. The majority concedes that "[i]f, for example, a parent gave a family friend a picture of the parent's infant taken while the infant was unclothed, the statute would apply." Ante, at 113, n 9, 109 L Ed 2d, at 111. To provide another disturbing illustration: A well-known commercial advertisement for a suntan lotion shows a dog pulling down the bottom half of a young girl's bikini, revealing a stark contrast between her sunbanned back and pale buttocks. That this advertisement might be illegal in Ohio is an absurd, yet altogether too conceivable, conclusion under the language of the statute. "Many of the world's great artists—Degas, Renoir, Donatello, to name a few—have worked from models under 18 years of age, and many acclaimed photographs and films have

that the New York courts would not "widen the possibly invalid reach of the statute by giving an expansive construction to the proscription on 'lewd exhibition[s] of the genitals.'" *Ibid.* (emphasis added). In the Ohio statute, of course, there is no analog to the elaborate definition of "sexual conduct" to serve as a similar limit. Hence, while the New York law could be saved at least in part by the notion of *ejusdem generis*, see 2A C. Sands, *Sutherland on Statutory Construction* § 47.17, p 166 (4th ed 1984), the Ohio Supreme Court's construction of its law cannot.

Indeed, the broad definition of nudity in the Ohio statutory scheme means that "child pornography" could include any photograph depicting a "lewd exhibition" of even a small portion of a minor's buttocks or any part of the female breast below the nipple. Pictures of topless bathers at a Mediterranean beach, of teenagers in revealing dresses, and even of toddlers romping unclothed, all might be prohibited.⁵

included nude or partially clad minors." *Massachusetts v Onkes*, 491 US 676, 693, 105 L Ed 2d 493, 109 S Ct 2633 (1989) (Brennan, J., dissenting) (footnote omitted). In addition, there is an "abundance of baby and child photographs taken every day without full frontal covering, not to mention the work of artists and filmmakers and nudist family snapshots." Id., at 698, 105 L Ed 2d 493, 109 S Ct 2633 (Brennan, J., dissenting); see also *State v Schmackel*, No. L-88-300, (Ohio Ct App, Oct. 13, 1989), pp 10-11 ("[A] parent photographing his naked toddler on a bear rug would be threatened with a prison term . . . even though parents ostensibly have the same interests in taking those pictures as they do in keeping a journal or gloating about their children's accomplishments"). None of these examples involves "sexual conduct," Ferber, 458 US, at 765, 73 L Ed 2d 1113, 102 S Ct 3348, yet all might be unlawful under the Ohio statute.