ALASKA LEGISLATURE COMMITTEE FILES 1993-1994 8672

8314 SENATE JUDICIARY

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

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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 overbroad, 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 question 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.

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 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 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 question, 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 applying 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 unpersuasive.

(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, 15 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.

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 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

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 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).

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,

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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

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 Ct 1243. We found a lack of empirical evidence supporting the latter claim and stated that "'[a]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.[5]

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.[6]

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]

5. 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.

6. Ala Code § 13A-12-192 (1988); Ariz Rev Stat Ann § 13-3553 (1989); Colo Rev Stat § 18-6-403 (Supp 1989); Fla Stat § 827.071 (1989); Ga Code Ann § 16-12-100 (1989); Idaho Code § 18-1507 (1987); Ill Rev Stat, ch 38, ¶ 11-20.1 (1987); Kans 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 § 76-5a-3(1)(a) (Supp 1989); Wash Rev Code § 9.68A.070 (1989); W Va Code § 61-8C-3 (1989).

7. The Attorney General's Commission on 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. Campagna and D. Poffenberger, Sexual Trafficking 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." Broadrick v Oklahoma, 413 US 601, 615, 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 possession 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 parents, 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. Oakes, supra, at 589-590, 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).

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

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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 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."

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[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 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 defendan[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,

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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 § 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

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 artistic 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 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 1363, 1373 (1988).

We do not concede, as the dissent suggests, see post, at 131, n 5, 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.

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 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.

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,

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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 unforseeable 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 Washington 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.

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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 reversed 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

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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 policeman'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.[14] 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 incentive 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.

[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-

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, 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 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 vagueness, 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 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 defeated 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

17. [9b] "[T]he 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." In re Winship, 397 US 358, 364, 25 L Ed 2d 368, 90 S Ct 1068 (1970).

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 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

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for a new trial in order to ensure that Osborne'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.

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
>
> [495 US 127]
>
> 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 Ct 2750 (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); Southeastern 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]

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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]

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 §§ 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).

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 artistic, medical, scientific, educational . . . or other proper purpose") are simultaneously too vague and too narrow. What is an acceptable "artistic" 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., Faloona 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, 500-501, 95 L Ed 2d 439, 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 1756 (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 975 (1966) (plurality opinion); Roth v United States, 354 US 476, 484-485, 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]atently offensive representations or descriptions," ibid., and included in a list with other types of sexual conduct that served to limit its scope.

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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, 10[illegible] S Ct 3348 (quoting N Y Penal Law § [illegible].00(1) (McKinney 1980)). "'"*Sexual conduct*"'" was in turn defined as "'actual or simulated sexual intercourse [illegible]te sexual intercourse, sexual be[illegible]ty, masturbation, sado-masochis[illegible] abuse, or lewd exhibition of the ge[illegible]itals.'" 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]

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Ohio law defines "nudity" to 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 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]

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, 268, 525 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 [a]s a necessary element of *nudity* under R C 2907.323(A)(3)." 37 Ohio St 3d, at 268, 525 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, 525 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, 525 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-

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 suntanned 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 included nude or partially clad minors." Massachusetts v Oakes, 491 US 576, 593, 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 598, 105 L Ed 2d 493, 109 S Ct 2633 (Brennan, J., dissenting); see also State v Schmakel, 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.

Furthermore,

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the Ohio law forbids not only depictions of nudity *per se*, but also depictions of the buttocks, breast, or pubic area with less than a "full, opaque covering." Thus, pictures of fashion models wearing semi-transparent clothing might be illegal,[6] as might a photograph depicting a fully clad male that nevertheless captured his genitals "in a discernibly turgid state." The Ohio statute thus sweeps in many types of materials that are not "child pornography," as we used that term in Ferber, but rather that enjoy full First Amendment protection.

It might be objected that many of these depictions of nudity do not amount to "lewd exhibitions." But in the absence of *any* authoritative definition of that phrase by the Ohio Supreme Court, we cannot predict which ones. Many would characterize a photograph of a seductive fashion model or alluringly posed adolescent on a topless European beach as "lewd," although such pictures indisputably enjoy constitutional protection. Indeed, some might think that *any* nudity, especially that involving a minor, is by definition "lewd," yet this Court has clearly established that nudity is not excluded

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automatically from the scope of the First Amendment. The Court today is unable even to hazard a guess as to what a "lewd exhibition" might mean; it is forced to rely entirely on an inapposite case—Ferber—that simply did not discuss, let alone decide, the central issue here.

The Ohio Supreme Court provided few clues as to the meaning of the phrase "lewd exhibition of nudity." The court distinguished "child pornography" from "obscenity," see 37 Ohio St 3d, at 257, 525 NE2d, at 1372, thereby implying that it did not believe that an exhibition was required to be "obscene" in order to qualify as "lewd."[7] But it supplied no

6. Cf. Steffens v State, 343 So 2d 90, 91 (Fla App 1977) (invalidating as impermissibly vague ordinance that prohibited "female waitresses, entertainers or other employees of a public business" from appearing with their breasts "thinly covered by mesh, transparent net or lawn skin tight materials which are flesh colored and worn skin tight, so as to appear uncovered," on the ground that "[i]n view of the scanty female apparel which is now socially acceptable in public particularly on beaches, the description of the type of clothing forbidden by this ordinance is extremely unclear").

7. Other courts have found it necessary to equate "lewd" with "obscene" in order to avoid overbreadth and vagueness problems. See, e.g., United States v 12 200—ft. Reels of Film, 413 US 123, 130, n 7, 37 L Ed 2d 500, 93 S Ct 2665 (1973); Donnenberg v State, 1 Md App 691, 697, 232 A2d 264, 267 (1967) ("lewd" and "indecent" equivalent to "obscene"; "[o]therwise the words would be too vague to constitute a permissible standard in a criminal statute"); State ex rel. Cahalan v Diversified Theatrical Corp. 59 Mich App 223, 232-233, 229 NW2d 389, 393 (1975); Seattle v Marshall, 83 Wash 2d 665, 672, 521 P2d 693, 697 (1974); State v Voshart, 39 Wis 2d 419, 429-431, 159 NW2d 1, 6-7 (1968). But the Ohio Supreme Court specifically rejected this path.

In my judgment, even equating "lewd" with "obscene" would not adequately clarify matters because "the concept of 'obscenity' cannot be defined with sufficient specificity and clarity to provide fair notice to persons who create and distribute sexually oriented materials, to prevent substantial erosion of protected speech as a byproduct of the attempt to suppress unprotected speech, and to avoid very costly institutional harms." Paris Adult Theatre I v Slaton, 413 US, at 103, 37 L Ed 2d 446, 93 S Ct 2628 (Brennan, J., dissenting); see also Sable Communications of California, Inc. v FCC, 492 US 115, 133-134, 106 L Ed 2d 93, 109 S Ct 2829 (1989) (Brennan, J., concurring in part and dissenting in part); Pope v Illinois, 481 US 497, 507, 95 L Ed 2d 439, 107 S Ct 1918 (1987) (Brennan, J., dissenting); id., at 513-518, 95 L Ed 2d 439, 107 S Ct 1918 (Stevens, J., dissenting.)

authoritative definition—a disturbing omission in light of the absence of the phrase "lewd exhibition" from the statutory definition section of the Sex Offenses chapter of the Ohio Revised Code. See § 2907.01.[8] In fact, the word

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"lewd" does *not* appear in the statutory definition of *any* crime involving obscenity or other sexually oriented materials in the Ohio Revised Code. See §§ 2907.31-2907.35.

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Thus, when the Ohio Supreme Court grafted the "lewd exhibition" test onto the definition of nudity, it was venturing into uncharted territory.[9]

tions of *nudity*" and in another to "lewd exhibitions of *the genitals*," would create a great deal of uncertainty regarding the scope of § 2907.323(A)(3) and likely would render that

8. Revised Code § 2905.26(B), which was repealed in 1974, defined "lewdness" somewhat unhelpfully as "any indecent or obscene act." As it now reads, the Sex Offenses chapter of the Ohio Revised Code is remarkably *devoid* of any use of the term "lewd." The crime of "importuning," for example, is defined as the solicitation to engage in "sexual activity" or "sexual conduct." Ohio Rev Code Ann § 2907.07 (1976). "Public indecency" comprises "expos[ing one's] private parts," "engag[ing] in masturbation," "engag[ing] in sexual conduct," or "engag[ing] in conduct which to an ordinary observer would appear to be sexual conduct or masturbation." § 2907.09. "Prostitution" is described as engaging in "sexual activity for hire." Ohio Rev Code Ann §§ 2907.21-2907.26 (1975 and Supp 1989).

Currently, several sections of the Ohio Revised Code outside the Sex Offenses chapter contain the term "lewd." See Ohio Rev Code Ann § 715.52 (1976) ("Any municipal corporation may . . . [p]rovide for the punishment of all lewd and lascivious behavior in the streets and other public places"); Ohio Rev Code Ann § 3767.01(C) (1988) (defining public "nuisance" as "that which is defined and declared by statutes to be such and . . . any place in or upon which lewdness, assignation, or prostitution is conducted, permitted, continued, or exists, or any place, in or upon which lewd, indecent, lascivious, or obscene films or plate negatives [and so on, are exhibited]"); Ohio Rev Code Ann § 4715.30(A) (Supp 1989) (providing that "[t]he holder of a certificate or license issued under this chapter is subject to disciplinary action by the state dental board for . . . [e]ngaging in lewd or immoral conduct in connection with the provision of dental services"); Ohio Rev Code Ann § 4931.31 (1977) ("No person shall, while communicating with any other person over a telephone, . . . use or address to such other person any words or language of a lewd, lascivious, or indecent character, nature, or connotation for the sole purpose of annoying such other person").

The Ohio Supreme Court did not refer to any of these provisions in articulating its "lewd exhibition" standard, and they provide little guidance in deciphering the "lewd exhibition of nudity" test. Indeed, although the Ohio public nuisance statute, § 3767.01(C), contains the phrase "lewdness, assignation, or prostitution," it has been interpreted to refer only to conduct or behavior and not to photographs and other printed materials. See Ohio v Pizza, No. L-88-045, 18 (Ohio Ct App, Mar. 10, 1989), p 18. Thus, Ohio has followed those States that have determined that "the term 'lewdness' does *not* apply to persons who sell pornography." Chicago v Geraci, 30 Ill App 3d 699, 704, 332 NE2d 487, 492 (1975) (emphasis added); see also Chicago v Festival Theatre Corp. 91 Ill 2d 295, 302, 438 NE2d 159, 161-162 (1982) (noting that various courts have held that "'lewdness, assignation, or prostitution'" abatement statutes are not applicable to obscene films or books).

9. Indeed, in other contexts the Ohio Supreme Court has recognized the difficulty of defining the term "lewd." See, e.g., Columbus v Rogers, 41 Ohio St 2d 161, 163-165, 324 NE2d 563, 565-566 (1975) (holding void for vagueness city ordinance providing that "'[n]o person shall appear on any public street or other public place in a state of nudity or in a dress not belonging to his or her sex, or in an indecent or lewd dress'"); Columbus v Schwarzwalder, 39 Ohio St 2d 61, 62-63, 313 NE2d 798, 800 (1974) (per curiam) (reversing, on grounds of overbreadth, convictions under disorderly conduct ordinance that prohibited "'disturb[ing] the good order and quiet of the city'" and "'otherwise violat[ing] the public peace by indecent and disorderly conduct or by lewd or lascivious behavior'"); see also South Euclid v Richardson, Nos. 54247, 54248, (Ohio Ct App, Aug. 18, 1988), pp 1-2 (invalidating as vague and overbroad municipal ordinance stating that "'no person, organization, club or association shall own, operate, maintain or manage a brothel or solicit, invite or entice another to patronize a brothel or to engage in acts of lewdness or sexual conduct,'" and that defined "'lewdness'" as "'sexual conduct or relations of such gross indecency and so notorious as to corrupt community morals'").

Moreover, there is no longstanding, commonly understood definition of "lewd" upon which the Ohio Supreme Court's construction might be said to draw that can save the "lewd exhibition" standard from impermissible vagueness.[10] At

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common law, the term "lewd" included "any gross indecency so notorious as to tend to corrupt community morals," Collins v State, 160 Ga App 680, 682, 288 SE2d 43, 45 (1981), an approach that was "subjective" and dependent entirely on a speaker's "social, moral, and cultural bias." Morgan v Detroit, 389 F Supp 922, 930 (ED Mich 1975).[11] Not surprisingly, States with long experience in applying indecency laws have learned that the word "lewd" is "too indefinite and uncertain to be enforceable." Courtemanche v State, 507 SW2d 545, 546 (Tex Cr App 1974). See also Attwood v Purcell, 402 F Supp 231, 235 (Ariz 1975); District of Columbia v Walters, 319 A2d 332, 335-336 (DC 1974). The term is often defined by reference to such pejorative synonyms as " 'lustful, lascivious, unchaste, wanton, or loose in morals and conduct.' " People v Williams, 59 Cal App 3d 225, 229, 130 Cal Rptr 460, 462 (1976). But "the very phrases and synonyms through which meaning is purportedly ascribed serve to obscure rather than clarify." State v Kueny, 215 NW2d 215, 217 (Iowa 1974). "To instruct the jury that a 'lewd or dissolute' act is one which is morally 'loose,' or 'lawless,' or 'foul' piles additional uncertainty

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upon the already vague words of the statute. In short, vague statutory language is not rendered

10. Historically, prohibitions on "lewd" acts grew out of "the archaic vagrancy statutes which were designedly drafted to grant police and prosecutors a vague and standardless discretion." Pryor v Municipal Court for Los Angeles, 25 Cal 3d 238, 248, 599 P2d 636, 641 (1979). We held such vagrancy laws unconstitutionally vague in Papachristou v City of Jacksonville, 405 US 156, 31 L Ed 2d 110, 92 S Ct 839 (1972). Cf. Ohio Rev Code § 715.55 (1976) ("Any municipal corporation may provide for: (A) The punishment of persons disturbing the good order and quiet of the municipal corporation by clamors and noises in the night season, by intoxication, drunkenness, fighting, committing assault, assault and battery, using obscene or profane language in the streets and other public places to the annoyance of the citizens, or otherwise violating the public peace by indecent and disorderly conduct, or by *lewd* or lascivious behavior. (B) The punishment of any vagrant, common street beggar, common prostitute, habitual disturber of the peace, known pickpocket, gambler, burglar, thief, watch stuffer, ball game player, a person who practices any trick, game, or device with intent to swindle, a person who abuses his family, and any suspicious person who cannot give a reasonable account of himself") (emphasis added).

11. Virtually any act running afoul of "conventional" morality can be and has been sanctioned under "lewdness" laws. See, e.g., Jelly v Dabney, 581 P2d 622, 626 (Wyo 1978) (describing, as punishable under "lewdness" prohibition, crime of "illicit cohabitation," i.e., a "dwelling or living together by a man and woman, not legally married to each other, in the manner of husband and wife, and indulgence in acts of sexual intercourse") (quotation omitted); Egal v State, 469 So 2d 196, 198 (Fla App 1985) (" '[I]f forty years ago either a man or a woman had donned the apparel popular on our beaches today . . . such person would probably have been . . . branded as a lewd, lascivious, and indecent person' ") (quoting State ex rel. Swanboro v Mayo, 155 Fla 330, 332, 19 So 2d 883, 884 (1944)).

more precise by defining it in terms of synonyms of equal or greater uncertainty." Pryor v Municipal Court for Los Angeles, 25 Cal 3d 238, 249, 599 P2d 636, 642 (1979).

The Ohio Supreme Court, moreover, did not specify the perspective from which "lewdness" is to be determined. A "reasonable" person's view of "lewdness"? A reasonable pedophile's? An "average" person applying contemporary local community standards? Statewide standards? Nationwide standards? Cf. Sable Communications of California, Inc. v FCC, 492 US 115, 133-134, 106 L Ed 2d 93, 109 S Ct 2829 (1989); Pope v Illinois, 481 US 497, 500-501, 95 L Ed 2d 439, 107 S Ct 1918 (1987); Pinkus v United States, 436 US 293, 302-303, 56 L Ed 2d 293, 98 S Ct 1808 (1978); Smith v United States, 431 US 291, 300, n 6, 52 L Ed 2d 324, 97 S Ct 1756 (1977); Miller v California, 413 US 15, 24, 37 L Ed 2d 419, 93 S Ct 2607 (1973); Mishkin v New York, 383 US 502, 508, 16 L Ed 2d 56, 86 S Ct 958 (1966). In sum, the addition of a "lewd exhibition" standard does not narrow adequately the statute's reach. If anything, it creates a new problem of vagueness, affording the public little notice of the statute's ambit and providing an avenue for " 'policemen, prosecutors, and juries to pursue their personal predilections.' " Kolender v Lawson, 461 US 352, 358, 75 L Ed 2d 903, 103 S Ct 1855 (1983) (quoting Smith v Goguen, 415 US 566, 575, 39 L Ed 2d 605, 94 S Ct 1242 (1974)); see also Houston v Hill, 482 US 451, 465, and n 15, 96 L Ed 2d 398, 107 S Ct 2502 (1987).[12] Given the important First Amendment interests

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at issue, the vague, broad sweep of the "lewd exhibition" language means that it cannot cure § 2907.323(A)(3)'s overbreadth.

2

The Ohio Supreme Court also added a "graphic focus" element to the nudity definition. This phrase, a stranger to obscenity regulation, suffers from the same vagueness difficulty as "lewd exhibition." Although the Ohio Supreme Court failed to elaborate what a "graphic focus" might be, the test appears to involve nothing more than a subjective estimation of the centrality or prominence of the genitals in a picture or other representation. Not only is this factor dependent on the perspective and idiosyncrasies of the observer, it also is unconnected to whether the material at issue merits constitutional protection. Simple nu-

12. The danger of discriminatory enforcement assumes particular importance of the context of the instant case, which involves child pornography with male homosexual overtones. Sadly, evidence indicates that the overwhelming majority of arrests for violations of "lewdness" laws involve male homosexuals. See Pryor, supra, at 252, n 599 P2d, at 644, n 8. Cf. Houston v Hill, 482 US 451, 96 L Ed 2d 398, 107 S Ct 2502 (1987) (prosecution of male homosexual for interfering with a police officer in the performance of his duties); Developments in the Law—Sexual Orientation and the Law, 102 Harv L Rev 1509, 1537-1538, 1542 (1989). "Such uneven application of the law is the natural consequence of a statute which as judicially construed measure[s] the criminality of conduct by community or even individual notions of what is distasteful behavior." Pryor, supra, at 252, 599 P2d, at 644. The "lewd exhibition" standard " 'furnishes a convenient tool for "harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure." ' " Kolender v Lawson, 461 US, at 360, 75 L Ed 2d 903, 103 S Ct 1855 (quoting Papachristou, 405 US, at 170, 31 L Ed 2d 110, 92 S Ct 839, in turn quoting Thornhill v Alabama, 310 US 88, 97-98, 84 L Ed 1093, 60 S Ct 736 (1940))

dity, no matter how prominent or "graphic," is within the bounds of the First Amendment. Michelangelo's "David" might be said to have a "graphic focus" on the genitals, for it plainly portrays them in a manner unavoidable to even a casual observer. Similarly, a painting of a partially clad girl could be said to involve a "graphic focus," depending on the picture's lighting and emphasis,[13] as could the depictions of nude children on the friezes that adorn our courtroom. Even a photograph of a child running naked on the beach or playing in the bathtub might run afoul of the law, depending on the focus and camera angle.

In sum, the "lewd exhibition" and "graphic focus" tests are too vague to serve as any workable limit. Because the statute,

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even as construed authoritatively by the Ohio Supreme Court, is impermissibly overbroad, I would hold that appellant cannot be retried under it.[14]

II

Even if the statute was not overbroad, our decision in Stanley v Georgia, 394 US 557, 22 L Ed 2d 542, 89 S Ct 1243 (1969), forbids the criminalization of appellant's private possession in his home of the materials at issue. "If the First Amendment means anything, it means that the State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch." Id., at 565, 22 L Ed 2d 542, 89 S Ct 1243. Appellant was convicted for possessing four photographs of nude minors, seized from a desk drawer in the bedroom of his house during a search executed pursuant to a warrant. Appellant testified that he had been given the pictures in his home by a friend. There was no evidence that the photographs had been produced commercially or distributed. All were kept in an album that appellant had assembled for his personal use and had possessed privately for several years.

In these circumstances, the Court's focus on Ferber rather than Stanley is misplaced. Ferber held only that child pornography is "a category of material the *production* and *distribution* of which is not entitled to First Amendment protection," 458 US, at 765, 73 L Ed 2d 1113, 102 S Ct 3348 (emphasis added); our decision did not extend to private *possession*. The authority of a State to regulate the production and distribution of such materials is

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not dispositive of its power to penalize possession.[15] Indeed, in Stanley

13. Since § 2907.323(A)(3) makes it to crime to "view" as well as to possess depictions of nudity, visitors to an art gallery might find themselves in violation of the law.

14. The scope of § 2907.323(A)(3) is restricted to depictions of "a minor who is not the person's child or ward." This does not cure the overbreadth problem, because many constitutionally protected photographs outlawed by the statute, such as commercial advertisements and works of art, circulate outside of the subject's immediate family. See also ante, at 124, 109 L Ed 2d, at 118 (" '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' ") (quoting Tr 3-4).

15. The distinction drawn in Stanley is not an anomaly in the law; to the contrary, we have often protected expression valued by listeners, whether or not the *source* of the communication was fully entitled to the safeguards of the First Amendment. See, e.g., Pacific Gas & Electric Co. v Public Utilities Comm'n of California, 475 US 1, 8, 89 L Ed 2d 1, 106 S Ct 903 (1986) (plural opinion); Consolidated Edison Co. of New York v Public Service Comm'n of New York, 447 US 530, 533-534, and n 1, 65 L Ed 2d 319, 100 S Ct 2326 (1980); First National Bank of Boston v Bellotti, 435 US 765, 777, and n 13, 55 L Ed 2d 707, 98 S Ct 1407 (1978); Lamont v Postmaster General, 381 US 301, 307-308, 14 L Ed 2d 398, 85 S Ct 1493 (1965) (Brennan, J., concurring). Just as the right of a listener to receive information does not rest on the right of the producer to disseminate it, so the power to ban the production and distribution of child pornography does not imply a concomitant authority to proscribe mere possession.

16. Although we held in Stanley v Georgia, 394 US 557, 22 L Ed 2d 542, 89 S Ct 1243 (1969), that "the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime," id., at 568, 22 L Ed 2d 542, 89 S Ct 1243, we acknowledged that "compelling reasons may exist for overriding the right of the individual to possess" other types of "printed, filmed, or recorded materials." Id., at 568, n 11, 22 L Ed 2d 542, 89 S Ct 1243. The majority's reference to this language as support for its decision today, see ante, at 110, 109 L Ed 2d, at 109-110, ignores the fact that footnote 11 in Stanley cited only to 18 USC § 793(d) [18 USCS § 793(d)], which criminalizes possession of defense information harmful to US national security. To equate child pornography with state secrets is to read the narrow exception carved in footnote 11 of Stanley as swallowing the general rule that the case established. See State v Meadows, No. C-850091 (Ohio Ct App, Dec. 18, 1985) (Doan, J., concurring) ("The reservation [in footnote 11 of Stanley] applies to traitorous or seditious materials, and not to child pornography"), rev'd, 28 Ohio St 3d 43, 503 NE2d 697 (1986), cert denied, 480 US 936, 94 L Ed 2d 771, 107 S Ct 1581 (1987); see also Meadows, 28 Ohio St 3d, at 356-357, 503 NE2d, at 716 (Brown, J., concurring). Although our decisions even in the First Amendment area have taken special note of the paramount importance of national security interests, see, e.g., Near v Minnesota ex rel. Olson, 283 US 697, 716, 75 L Ed 1357, 51 S Ct 625 (1931), we nonetheless have required a strong showing of imminent danger before permitting First Amendment freedoms to be sacrificed. See, e.g., New York Times Co. v United States, 403 US 713, 726-727, 29 L Ed 2d 822, 91 S Ct 2140 (1971) (Brennan, J., concurring).

we assumed that the films at issue were obscene and that their production, sale, and distribution thus could have been prohibited under our decisions. See 394 US, at 565, n 2, 22 L Ed 2d 542, 89 S Ct 1243. Nevertheless, we reasoned that although the States "retain broad power to regulate obscenity"—and child pornography as well—"that power simply does not extend to mere possession by the individual in the privacy of his own home." Id., at 568, 22 L Ed 2d 542, 89 S Ct 1243. Ferber did nothing more than place child pornography on the same level of First Amendment protection as *obscene* adult pornography, meaning that its production and distribution could be proscribed. The distinction established in Stanley between *what* materials may be regulated and *how* they may be regulated still stands. See United States v Miller, 776 F2d 978, 980, n 4 (CA11 1985) (per curiam); People v Keyes, 135 Misc 2d 993, 995, 517 NYS2d 696, 698 (1987). As Justice White remarked in a different context, "[t]he personal constitutional rights of those like Stanley to possess and read obscenity in their homes and their freedom of mind and thought do not depend on whether the materials are obscene or whether obscenity is constitutionally protected. Their rights to have and view that material in private are independently saved by

[495 US 141]

the Constitution." United States v Reidel, 402 US 351, 356, 28 L Ed 2d 813, 91 S Ct 1410 (1971).

The Court today finds Stanley inapposite on the ground that "the interests underlying child pornography prohibitions far exceed the interests justifying the Georgia law at issue in Stanley." Ante, at 108, 109 L Ed 2d, at 108. The majority's analysis does not withstand scrutiny.[16]

While the sexual exploitation of children is undoubtedly a serious problem, Ohio may employ other weapons to combat it. Indeed, the State already has enacted a panoply of laws prohibiting the creation, sale, and distribution of child pornography and obscenity involving minors. See n 1, supra. Ohio has not demonstrated why these laws are inadequate and why the State must forbid mere possession as well.

The Court today speculates that Ohio "will decrease the production of child pornography if it penalizes those who

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possess and view the product, thereby decreasing demand." Ante, at 109-110, 109 L Ed 2d, at 109. Criminalizing possession is thought necessary because "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." Ante, at 110-111, 109 L Ed 2d, at 110. As support, the Court notes that 19 States have "found it necessary" to prohibit simple possession. Ibid. Even were I to accept the Court's empirical assumptions,[17] I would find the Court's

[495 US 143]

approach foreclosed by Stanley, which rejected precisely the same contention Ohio makes today:

> "[W]e are faced with the argument that prohibition of possession of obscene materials is a necessary incident to statutory schemes prohibiting distribution. That argument is based on alleged difficulties of proving an intent to distribute or in producing evidence of actual distribution. We are not convinced that such difficulties exist, but even if they did we do not think that they would justify infringement of the individual's right to read or observe what he pleases. Because that right is so fundamental to our scheme of individual liberty, its restriction may not be justified by the need to ease the administration of otherwise valid criminal laws." 394 US, at 567-568, 22 L Ed 2d 542, 89 S Ct 1243.

At bottom, the Court today is so disquieted by the possible exploitation of children in the *production* of the pornography that it is willing to tolerate the imposition of criminal penalties for simple *possession*.[18]

17. That 19 States have prohibited possession of child pornography hardly proves that such an approach is integral to effective enforcement of production and distribution laws. A restriction on speech cannot be justified by such self-referential reasoning. In fact, the difficulty of enforcing possession laws—for example, the requirements of probable cause and a warrant before a search may be undertaken—means that penalties for possession are dubious complements to curbs on production, sale, and distribution. See Note, Private Possession of Child Pornography: The Tensions Between Stanley v Georgia and New York v Ferber, 29 Wm. & Mary L Rev 187, 212 (1987) ("Statutory prohibition of the private possession of child pornography is an inefficient and ineffective means of preventing the serious problem of child sexual abuse").

The federal experience illustrates that possession laws are not an essential element of a successful enforcement strategy. In the Protection of Children Against Sexual Exploitation Act of 1977, Pub. L 95-225, 92 Stat 7, Congress prohibited the production, distribution, and sale of material depicting sexually explicit conduct by minors. See 18 USC §§ 2251-2253 (1982 ed) [18 USCS §§ 2251-2253]. Congress also criminalized the mailing, receipt, or trafficking in interstate or foreign commerce of such material for the purpose of sale or distribution for sale. See 18 USC § 2252(a) (1982 ed) [18 USCS § 2252(a)]. But Congress did *not* criminalize mere possession. In the Child Protection Act of 1984, Pub. L 98-292, 98 Stat 204, Congress enacted a broad revision of the 1977 law, removing the requirement that trafficking, receipt, and mailing be for the purposes of sale or distribution for sale. See 18 USC § 2252(a) [18 USCS § 2252(a)]. Further, the 1984 Act eliminated a requirement that material be "obscene" before its production, distribution, sale, mailing, trafficking, and receipt could be found criminal, see § 2252(a); raised the age limit of protection from 16 to 18 years of age, see § 2256(1); and added stiffer penalties, see § 2252(b), criminal and civil forfeiture provisions, see §§ 2253, 2254, and a civil remedy for personal injuries. See § 2255. Even in the 1984 amendments, Congress did not find it necessary to ban simple possession. Nevertheless, the Attorney General's Commission on Pornography determined that "the 1977 Act effectively halted the bulk of the commercial child pornography industry, while the 1984 revisions have enabled federal officials to move against the noncommercial, clandestine mutation of that industry." 1 US Dept of Justice, Attorney General's Commission on Pornography, Final Report 607 (1986).

18. The Court briefly identifies two other interests that it contends justify Ohio's law. First, the majority describes a state interest in destroying the "permanen[t] record" of the victim's abuse. Ante, at 111, 109 L Ed 2d, at 110. I do not believe that the law is narrowly tailored to this end, for there is no requirement that the State show that the child was abused in the production of the material or even that the child knew that a photograph was taken. Even if the State could recover all copies of the offensive picture, which seems highly unlikely, I do not see how a candid shot taken without the minor's knowledge can "haun[t]" him or her in the years to come, ibid., when there is no indication that the child is even aware of its existence. And if the law's purpose is preventing sexual abuse of children, it is underinclusive to the extent that it does not prevent *parents* from photographing their children in a state of nudity, see, e.g., Massachusetts v Oakes, 491 US 576, 105 L Ed 2d 493, 109 S Ct 2633 (1989), or giving others written permission to do so. See, e.g., Faloona v Hustler Magazine, Inc. 607 F Supp 1341 (ND Tex 1985). The only restriction on parents is the nebulous "proper purposes" provision, which is really no restriction at all. See n 2, supra. More fundamentally, even if the State could presume that minors are legally incompetent to consent to sexually explicit photographs, and therefore that all such photographs could be outlawed, it does not follow that the State can prohibit *possession* of such pictures in addition to their *production*. In Ferber, the Court was careful to limit its discussion to the "distribution" and "circulation" of photographs taken without a minor's consent. See 458 US, at 759 and n 10, 73 L Ed 2d 1113, 102 S Ct 3348; cf. Butterworth v Smith, 494 US 624, 635-636, 108 L Ed 2d 572, 110 S Ct 1376 (1990); The Florida Star v B. J. F. 491 US 524, 532-533, 105 L Ed 2d 443, 109 S Ct 2603 (1989); Smith v Daily Mail Publishing Co. 443 US 97, 103, 61 L Ed 2d 399, 99 S Ct 2667 (1979); Cox Broadcasting Corp. v Cohn, 420 US 469, 491, 43 L Ed 2d 328, 95 S Ct 1029 (1975). By analogy, Stanley assuredly protects the private possession of obscene adult pornography, even though an argument could be made that "production of adult pornography can be as harmful to adult actors as the production of child pornography is to child actors." Note, 29 Wm. & Mary L Rev, supra, at 204, n 144; see also Attorney General's Report, supra n 17, at 839-900; Pollard, Regulating Violent Pornography, 43 Vand L Rev 125, 133-134 (1990).

Second, the Court maintains that possession of child pornography may be prohibited "because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity." Ante, at 111, 109 L Ed 2d, at 110 (citing, in a footnote, the Attorney General's Commission on Pornography). The Attorney General's Commission, however, determined that pedophiles are likely to use *adult* as well as *child* pornography to lower the inhibitions of a child victim. See Attorney General's Report, supra n 17, at 686; see also Brief for Covenant House et al. as Amici Curiae 8, n 9 (characterizing the Court's argument on this point as "factual speculation"). Finally, Ohio's solution—prohibiting private possession—ignores fundamental principles of our First Amendment jurisprudence. "Assuming obscene material could be proved to create a . . . danger of illegal behavior, it would not follow that the expression should be suppressed. Rather, the basic principles of a system of freedom of expression would require that society deal directly with the . . . action and leave the expression alone." T. Emerson, The System of Freedom of Expression 494 (1970). See also Paris Adult Theatre I v Slaton, 413 US, at 108-110, 37 L Ed 2d 446, 93 S Ct 2628 (Brennan, J., dissenting). Thus, while acts of sexual abuse themselves may be outlawed, the private possession of photographs, magazines, and other materials may not.

While I share the majority's

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concerns, I do not believe that it has struck the proper balance between the First Amendment and the State's interests, especially in light of the other means available to Ohio to

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protect children from exploitation and the State's failure to demonstrate a causal link between a ban on possession of child pornography and a decrease in its production.[19] "The existence of the State's power to prevent the distribution of obscene matter"—and of child pornography—"does not mean that there can be no constitutional barrier to any form of practical exercise of that power." Smith v California, 361 US 147, 155, 4 L Ed 2d 205, 80 S Ct 215 (1959).

III

Although I agree with the Court's conclusion that appellant's conviction must be reversed because of a violation of due process, I do not subscribe to the Court's reasoning regarding the adequacy of appellant's objections at trial. See ante, at 122-125, 109 L Ed 2d, at 117-119. The majority determines that appellant's due process rights were violated because the jury was not instructed according to the interpretation of § 2907.323(A)(3) adopted by the Ohio Supreme Court on appeal. That is to say, the jury was not told that "the State must prove both scienter and that the defendant possessed material depicting a lewd exhibition or a graphic focus on genitals." Ante, at 123, 109 L Ed 2d, at 118. The Court finds that appellant's challenge to the trial court's failure to charge the "lewd exhibition" and "graphic focus" elements is properly before us, because appellant objected at trial to the overbreadth of § 2907.323(A)(3). See

[495 US 146]

ante, at 123-124, 109 L Ed 2d, at 118. I agree with the Court's conclusion that we may reach the merits of appellant's claim on this point.[20]

19. The notion that possession of pornography may be penalized in order to facilitate a prohibition on its production, whatever the rights of possessors, is not unlike a proposal that newspaper subscribers be held criminally liable for receiving the newspaper if they are aware of the publisher's violations of child labor laws. Cf. L Tribe, American Constitutional Law 915 (2d ed 1988). In both cases, sanctions against possession might increase the effectiveness of concededly permissible regulations on the production process. But although the need to protect children from exploitation may be acute, it cannot override the right to receive the newspaper or to possess sexually explicit materials in the privacy of the home, especially when less restrictive alternatives exist to further the state interests asserted.

20. The Court's opinion should not be taken to mean that appellant's due process claim with respect to the "lewd exhibition" and "graphic focus" elements would be procedurally barred now had he failed to object at trial. If appellant's due process contention were nothing more than a complaint concerning the statute's overbreadth, the suggestion that he would be barred from raising it now if he failed to object at trial might be plausible. But that is not appellant's argument. Rather, he maintains that his due process rights were violated because the Ohio Supreme Court affirmed his conviction after adding the elements of "lewd exhibition" and "graphic focus" on appeal, despite the fact that appellant had had no reason to design a defense strategy or introduce evidence with these tests in mind. The jury, moreover, might have convicted appellant purely on the basis of the "nudity" definition, without deciding whether the materials depicted a "lewd exhibition of nudity" or involved a "graphic focus" on the genitals. Thus, appellant's due process claim is separate from his overbreadth challenge, see Shuttlesworth v Birmingham, 382 US 87, 92, 15 L Ed 2d 176, 86 S Ct 211 (1965), as even the Court appears to recognize at some places in its opinion. See ante, at 121, 109 L Ed 2d, at 117 ("Even if construed to obviate overbreadth, applying the statute to pending cases might be barred by the Due Process Clause"). The due process violation in this case was not complete until the Ohio Supreme Court affirmed appellant's conviction after reinterpreting the statute. Requiring defendants to object *at trial* to an error that does not appear until the appellate stage would advance no legitimate state interest regarding finality or compliance with state procedures.

But the Court does not rest there. Instead, in what is apparently dictum given its decision to reverse appellant's conviction on the basis of the first due process claim, the Court maintains that a separate due process challenge by appellant arising from the Ohio Supreme Court's addition of a scienter element is procedurally barred because appellant failed to object at trial to the absence of a scienter instruction. The Court maintains that § 2907.323(A)(3) must be interpreted in light of § 2901.21(B) of the Ohio Revised Code, which provides that recklessness is the appropriate mens rea where a statute "'neither specifies culpability nor plainly indicates a purpose to impose strict liability.'" Ante, at 113, n 9, and

[495 US 147]

122-123, 109 L Ed 2d, at 111, 117-118. I cannot agree with this gratuitous aspect of the Court's reasoning.

First, the overbreadth contention voiced by appellant must be read as fairly encompassing an objection both to the lack of an intent requirement and to the definition of "nudity." Appellant objected to, inter alia, the criminalization of the "mere possession or viewing of a photograph," without the need for the State to show additional elements. Tr 4. A natural inference from this language is that intent is one of the additional elements that the State should have been required to prove. There is no need to demand any greater precision from a criminal defendant, and in my judgment the overbreadth challenge was sufficient, as a matter of federal law, to preserve the due process claim arising from the addition of a scienter element. As the majority acknowledges, our decision in Ferber mandated that "prohibitions on child pornography include some element of scienter." Ante, at 115, 109 L Ed 2d, at 113 (citing Ferber, 458 US, at 765, 73 L Ed 2d 1113, 102 S Ct 3348). In Ferber we recognized that adding an intent requirement was part of the process of narrowing an otherwise overbroad statute, and appellant's contention that the statute was overbroad should be interpreted in that light. I find the Ohio Supreme Court's logic internally contradictory: In one breath it adopted a scienter requirement of recklessness to narrow the statute in response to appellant's overbreadth challenge, and then, in the next breath, it insisted that appellant had failed to object to the lack of a scienter element.

Second, even if appellant had failed to object at trial to the failure of the jury instructions to include a scienter element, I cannot agree with the reasoning of the Ohio Supreme Court, unquestioned by the majority today, that "the omission of the element of recklessness [did] not constitute plain error." 37 Ohio St 3d, at 254, 525 NE2d, at 1370. To the contrary, a judge's failure to instruct the jury on every element of an offense violates a "'bedrock, "axiomatic and elementary" [constitutional] principle,'" Francis v Franklin, 471 US

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307, 313, 85 L Ed 2d 344, 105 S Ct 1965 (1985) (quoting In re

Winship, 397 US 358, 363, 25 L Ed 2d 368, 90 S Ct 1068 (1970)), and is cognizable on appeal as plain error. Cf. Carella v California, 491 US 263, 268-269, 105 L Ed 2d 218, 109 S Ct 2419 (1989) (Scalia, J., concurring in judgment); Rose v Clark, 478 US 570, 580, n 8, 92 L Ed 2d 460, 106 S Ct 3101 (1986); Connecticut v Johnson, 460 US 73, 85-86, 74 L Ed 2d 823, 103 S Ct 969 (1983) (plurality opinion); Jackson v Virginia, 443 US 307, 320, n 14, 61 L Ed 2d 560, 99 S Ct 2781 (1979). "[W]here the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, . . . it is necessary to take note of it on our own motion." Screws v United States, 325 US 91, 107, 89 L Ed 1495, 65 S Ct 1031, 162 ALR 1330 (1945) (plurality opinion).

Thus, I would find properly before us appellant's due process challenge arising from the addition of the scienter element, as well as his claim stemming from the creation of the "lewd exhibition" and "graphic focus" tests.

IV

When speech is eloquent and the ideas expressed lofty, it is easy to find retrictions on them invalid. But were the First Amendment limited to such discourse, our freedom would be sterile indeed. Mr. Osborne's pictures may be distasteful, but the Constitution guarantees both his right to possess them privately and his right to avoid punishment under an overbroad law. I respectfully dissent.

[495 US 149]

JONAS H. WHITMORE, individually and as next friend of RONALD GENE SIMMONS, Petitioner

v

ARKANSAS et al.

495 US 149, 109 L Ed 2d 135, 110 S Ct 1717

[No. 88-7146]

Argued January 10, 1990. Decided April 24, 1990.

Decision: Death row inmate held not to have standing, either individually or as "next friend," to challenge validity of death sentence imposed on another death row inmate, who had waived right of appeal.

SUMMARY

An individual who had allegedly murdered 14 members of his family, and later killed or wounded 5 other people, was tried separately in an Arkansas Circuit Court on each of the 2 sets of crimes, and in each case was convicted of capital murder and sentenced to death. After each sentence, (1) the individual stated under oath his desire that no action be taken to appeal or in any way change his sentence, and (2) the Circuit Court, after conducting a hearing as to the individual's competence to make such a waiver, concluded that his decision was knowing and intelligent. In denying a priest's petition to appeal one of the sentences on the individual's behalf, the Supreme Court of Arkansas held that (1) the priest did not have standing to proceed (a) as "next friend," because it had not been alleged that he was the individual's spiritual adviser or confidant or, indeed, that the two had ever met, (b) as an aggrieved taxpayer under the state constitution, or (c) as a concerned citizen seeking to prevent an important legal issue from going unresolved at the appellate level; (2) under Arkansas law, a mandatory appeal is not required in all death penalty cases, but capital defendants may forgo direct appeal only if they have been judicially determined to have the capacity to understand the choice between life and death and to knowingly and intelligently waive all rights to appeal; and (3) the Circuit Court, on the basis of the record, correctly upheld the individual's waiver (754 SW2d 839). The Arkansas Supreme Court, while noting that seven possible grounds for reversal had been discussed with the individual by his counsel, subsequently upheld the individual's waiver

Briefs of Counsel, p 810, infra.

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MEMORANDUM February 1, 1994

SUBJECT: Possession of Child Pornography - SB 252 (Work Order No. 8-LS1513\A)

TO: Senator Mike Miller
Attn: Sharon

FROM: Jerry Luckhaupt
Legislative Counsel

You have asked various questions about child pornography.

1. What is the definition of child pornography? Child pornography is defined in SB 252 to be "any material that visually or aurally depicts conduct described in AS 11.41.455(a)" and "the production of that material involved the use of a child under 18 years of age who engaged in the conduct."

2. What is the history of attempts to criminalize the possession of child pornography? In Stanley v. Georgia, 394 U.S. 557, 22 L.Ed.2d 542, 89 S.Ct. 1243 (1969) the United States Supreme Court struck down a Georgia law that outlawed the private possession of obscene material, finding that the law impinged on Stanley's right to receive information in his own home. Whether this decision protected the personal possession of child pornography was not considered in that case and was the subject of much discussion. In Ferber v. New York, 458 U.S. 747, 73 L.Ed.2d 1113, 102 S.Ct. 3348 (1982) hints were provided that possession of child pornography would not be permitted under Stanley. In Ferber, the Court upheld a New York law that outlawed the distribution of child pornography and stated that "the value of permitting child pornography has been characterized as 'exceedingly modest, if not de minimis.'" Finally, in Osborne v. Ohio, 495 U.S. 103, 109 L.Ed.2d 98, 110 S.Ct. 1691 (1990) the Court finally upheld a New York statute that banned the possession or viewing of child pornography. The Court found that such a statute protects the victims of child pornography and encourages the destruction of existing child pornography.

3. What federal laws are there on this subject? 18 U.S.C. § 2251 et. seq. (copy attached) prohibits the inducement or employment of a minor for the purpose of producing any visual depiction of sexually explicit conduct (similar to AS 11.41.455),

the buying or selling of minors, and the distribution, mailing, and receipt of sexually explicit material that depicts minors engaged in that conduct. I have also attached copies of some other states' laws on possession of child pornography.

4. Is there anything in our state constitution that could conflict with SB 252? The right to privacy clause, Article I, § 19, of the Alaska Constitution could conceivably be found to protect personal possession of child pornography, although I do not believe that such a finding is likely. The personal possession of child pornography could be analogized to the possession of controlled substances. In this regard, although the Alaska Supreme Court held that the personal possession of small amounts of marijuana in the home is protected under our right to privacy provision (the court found that state's needs to ban its possession, e.g., its dangerousness, did not outweigh the privacy interests) the court did not extend this protection to other drugs, e.g., cocaine, whose dangerousness is proven and not subject to debate to the extent marijuana's was. In this regard I believe the Alaska Supreme Court would find that child pornography is akin to cocaine in that its dangerousness and the harm that it can cause seems to be fairly well accepted and would hold that its possession is not protected under the Alaska Constitution.

5. What difficulties are there with SB 252? Successful prosecutions could be difficult as the bill requires that a person possess the visual or aural matter knowing that the production of the matter involved the use of a child under the age of 18 and that the child engaged in the conduct that is depicted. The knowing requirement could be difficult to prove in certain situations. You may want to discuss this with the Department of Law to determine their feelings on the provision and the need for, and what type of mental state, should be employed. I am also concerned with how this knowing requirement could be applied to aural depictions and am wondering if it could ever be met if the defendant did not witness the recording being made.

GPL:gc:pl
94-075.glc

Enclosure

DIVISION OF LEGAL SERVICES

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MEMORANDUM January 25, 1994

SUBJECT: Sectional Summary of SB 252 (Work Order No. 8-LS1513\A)

TO: Senator Mike Miller
Attn: Sharon

FROM: Jerry Luckhaupt
Legislative Counsel

You have requested a sectional summary of the above described bill. As a preliminary matter, please note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill - the bill itself is the best statement of its contents.

Section 1 of the bill amends AS 11.61 by providing a new section, AS 11.61.127, that makes it a class B misdemeanor[1] to possess any material that visually or aurally depicts conduct that is described in AS 11.41.455(a), unlawful exploitation of a minor,[2] knowing that the production of the material involved the use of a child under 18 years of age who engaged in the conduct.

GPL:lmb
94-024.lmb

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[1] Class B misdemeanors are subject to a term of imprisonment of not more than 90 days, AS 12.55.135(b), and to a fine of not more than $1,000., AS 12.55.035(b).

[2] AS 11.41.455(a) provides:

> A person commits the crime of unlawful exploitation of a minor if, in the state and with the intent of producing a live performance, film, audio recording, photograph, negative, slide, book, newspaper, magazine, or other printed material that visually depicts the conduct listed in (1) - (7) of this subsection, the person knowingly induces or employs a child under 18 years of age to engage in, or photographs, films, records, or televises a child under 18 years of age engaged in, the following actual or simulated conduct:
>
> (1) sexual penetration;
> (2) the lewd touching of another person's genitals, anus, or breast;
> (3) the lewd touching by another person of the child's genitals, anus, or breast;
> (4) masturbation;
> (5) bestiality;
> (6) the lewd exhibition of the child's genitals; or
> (7) sexual masochism or sadism.

Alaska State Legislature

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Senate

SPONSOR STATEMENT
SENATE BILL 252
POSSESSION OF CHILD PORNOGRAPHY

AS 11.41.455 and AS 11.61.125, prohibits the production and distribution of child pornography; current law however does not address the issue of possession.

SB 252 addresses a compelling need to "close the loop" by prohibiting possession of child pornography as well as production and distribution. It is crucial that state statutes address this vital issue. For as long as the supply and demand exist, producers will continue to victimize the children involved.

In Osborne v.Ohio, 495 U.S.103, 109 L.Ed.2d 98, 110 S.Ct. 1691 (1990) the Court finally upheld a New York statute that banned the possession or viewing of child pornography. The Court found that such a statute protects the victims of child pornography and encourages the destruction of existing child pornography.

The physical and psychological trauma inflicted on victims of this sexual exploitation is so devastating some children never heal.

If we regulate when people are old enough to drink, drive and vote in order to protect them, then why would we not also regulate and ban the possession of child pornography to stop this cycle of abuse in which the child is always the victim.

I urge your support of SB 252 .

Sec. 11.41.455. **Unlawful exploitation of a minor.** (a) A person commits the crime of unlawful exploitation of a minor if, in the state and with the intent of producing a live performance, film, photograph, negative, slide, book, newspaper, magazine, or other printed material that visually depicts the conduct listed in (1) — (6) of this subsection, the person knowingly induces or employs a child under 18 years of age to engage in, or photographs, films, or televises a child under 18 years of age engaged in, the following actual or simulated conduct:

(1) sexual penetration;

(2) the lewd touching of another person's genitals, anus, or breast;

(3) the lewd touching by another person of the child's genitals, anus, or breast;

(4) masturbation;

(5) bestiality; or

(6) the lewd exhibition of the child's genitals.

(b) A parent, legal guardian, or person having custody or control of a child under 18 years of age commits the crime of unlawful exploitation of a minor if, in the state, the person permits the child to engage in conduct described in (a) of this section knowing that the conduct is

intended to be used in producing a live performance, film, photograph, negative, slide, book, newspaper, magazine, or other printed material that visually depicts the conduct.

(c) Unlawful exploitation of a minor is a class B felony. (§ 3 ch 166 SLA 1978; am § 1 ch 57 SLA 1983)

Cross references. — For crime of distribution of child pornography, see AS 11.61.125.

NOTES TO DECISIONS

Conviction and sentence upheld. — See Depp v. State, 686 P.2d 712 (Alaska Ct. App. 1984).

Applied in Qualle v. State, 652 P.2d 481 (Alaska Ct. App. 1982).

Cited in Lawrence v. State, 764 P.2d 318 (Alaska Ct. App. 1988).

Sec. 11.61.125. Distribution of child pornography. (a) A person commits the crime of distribution of child pornography if the person brings or causes to be brought into the state for distribution, or in the state distributes, or in the state possesses, prepares, publishes, or prints with intent to distribute, any material that visually depicts conduct described in AS 11.41.455(a), knowing that the production of the material involved the use of a child under 18 years of age who engaged in the conduct.

(b) This section does not apply to acts that are an integral part of the exhibition or performance of a motion picture if the acts are performed within the scope of employment by a motion picture operator or projectionist employed by the owner or manager of a theater or other place for the showing of motion pictures, unless the motion picture operator or projectionist

(1) has a financial interest in the theater or place in which employed; or

(2) causes the performance or motion picture to be performed or exhibited without the consent of the manager or owner of the theater or other place of showing.

(c) Distribution of child pornography is a class C felony.

(d) In this section, "distribution" includes delivering, selling, renting, leasing, lending, giving, circulating, exhibiting, presenting, providing, and exchanging, whether or not for monetary or other consideration. (§ 2 ch 57 SLA 1983; am §§ 1, 2 ch 39 SLA 1985)

Cross references. — For crime of unlawful exploitation of a minor, see AS 11.41.455.

Effect of amendments. — The 1985 amendment in subsection (a) deleted "sale or" preceding "distribution" and "sell, or exhibit to others for commercial consideration" preceding "any material," inserted "in the state distributes, or," and substituted "in" for "under" following "conduct described", and added subsection (d).

Collateral references. — Validity and construction of statutes and ordinances regulating sexual performance by child, 21 ALR4th 239.

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. SB 252

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 DEPT. OF LAW

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.

WALTER J. HICKEL, GOVERNOR

PLEASE REPLY TO:

CRIMINAL DIVISION CENTRAL OFFICE
P.O. BOX 110300 - STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3428
FAX: (907) 465-3043

OFFICE OF SPECIAL PROSECUTIONS AND APPEALS
310 K STREET, SUITE 308
ANCHORAGE, ALASKA 99501-2054
PHONE: (907) 269-6250
FAX: (907) 272-1249

DEPARTMENT OF LAW

CRIMINAL DIVISION

January 24, 1994

RECEIVED JAN 26 1994

The Honorable Mike Miller
Alaska State Senate
State Capitol
Juneau, Alaska 998001-1182

Re: SB 252 ("An Act prohibiting the possession of child pornography")

Dear Senator Miller:

You have asked for our opinion as to the constitutionality of SB 252, "An Act prohibiting the possession of child pornography." In *Osborne v. Ohio*, 495 U.S. 103, 110 S. Ct. 1691, 109 L. Ed. 2d 98 (1990), the United States Supreme Court held that a similar provision did not violate the United States Constitution.

It is possible, but unlikely, that the Alaska Supreme Court would conclude that this type of provision violates the right of privacy protected by the article I, section 22, of the state constitution. *See Ravin v. State*, 537 P.2d 494 (Alaska 1975). Other states that have considered the matter have concluded that the state has a compelling interest in protecting children from exploitation and that destroying the market for child pornography is reasonably related to that purpose. *See, e.g., Washington v. Davis*, 768 P.2d 499 (Wash. App. 1988). We have a partial listing of other jurisdictions that have criminalized the possession of child pornography and would be glad to share that list with you at your request.

I note for your general information that we anticipate prosecutions for this offense arising from the discovery of child pornography by law enforcement officers who are lawfully searching a residence in the course of investigating other crimes, such as drug or sexual abuse offenses.

CONSTITUTIONALITY - DEPT. OF LAW

03-C31LH

If you have any other questions or comments, please do not hesitate to contact us.

Very truly yours,

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: Margot O Knuth
Margot O. Knuth
Assistant Attorney General

MOK\jf

cc: Deborah Behr
Assistant Attorney General

Raga Elim
Legislative Liaison

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 child pornography " BRU: Alaska State Troopers

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						
TOTAL	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: [signature] Date: 01/24/94

Agency: Richard T. Burton, Dept. of Public Safety

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FISCAL NOTE PUBLIC SAFETY

POSITION PAPER - Department of Public Safety

BILL NO: SB 252

DATE: January 25, 1994

TITLE: "An Act prohibiting possession of child pornography"

CONTACT: C.E. Swackhammer
Deputy Commissioner
465-4322

SB 252 addresses the societal problem of possession of child pornography. Alaska does not have a statute currently that prohibits the possession of child pornography. Alaska does have child exploitation laws that include the sales and/or production of child pornography. Production, sales, or delivery of child pornography are felony offenses. The statute would allow the charging of individuals found in possession of child pornography with a B misdemeanor.

Section one of the bill creates the crime of possession of child pornography making it a B misdemeanor. This is the type of crime that is typically secondary to an ongoing and existing investigation for a more serious crime of child exploitation. This would allow items that are normally found usually during the service of a search warrant in a different case. This would allow investigators to charge individual with possession of this material.

It is widely believed that persons involved in the viewing of child pornography will continue to do so unless sanctions, sometimes severe, are imposed. At the very least this creates a market for the exploitation of children.

This statute should have little or no impact on enforcement activities as this is the type of violation that is typically encountered during the investigation of numerous other crimes.

The Department of Public Safety supports this legislation.

Richard L. Burton
Commissioner

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. SB 252

Revision Date:
Dept. Affected: Corrections
Title: An act prohibiting possession of child pornography
BRU: None
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/MH TIA						
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: 465-4643/586-2147
Division: Office of the Commissioner
Date: 1/24/94
Approved by Commissioner: J. Frank Prewitt, Jr.
Date: 1/24/94
Agency:

FISCAL NOTE CORRECTIONS

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	0.0
Other	0.0	0.0	0.0	0.0	0.0	0.0
Total	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of current year (FY94) cost: none

POSITIONS:

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

ANALYSIS: (Attach a separate page if necessary)

Prepared by: 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:
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 Useral
Agency: Department of Administration
Date: 1/24/94

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[INTRO]

Child pornography is vivid, heart-breaking proof of one or more children being sexually violated and exploited and, as evidence, is beyond challenge.

Equally unchallengable is the certainty that an 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 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 pornorgraphy to a potential victim, obstensibly 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 involvment include depression, suicidal thoughts, feelings of shame, guilt, alienation from family and peers, and massive acute anxiety. Victims in the longer 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)

BACK UP TESTIMONY

Bob Wood

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)

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!

May I suggest the first conviction to require registration on an inter-state law enforcement network, and link that registration requirement to life-time probation.

NOTE: Would also like to bring TWO MINUTE "SOUND BITE" FROM ONE OF THE MEMBERS OF THE A.G.'s COMMISSION ON PORN —

Bob H

Rob Wood - Re: SB 252 - DRAFT

SB 256

WALTER J. HICKEL, GOVERNOR

DEPARTMENT OF TRANSPORTATION
AND PUBLIC FACILITIES

OFFICE OF THE COMMISSIONER

3132 CHANNEL DRIVE
JUNEAU, AK 99801-7898
PHONE: (907) 465-3900
FAX: (907) 586-8365
TEXT: (907) 465-3652

December 13, 1993

Senator Bert M. Sharp
119 N. Cushman Street, Suite 201
Fairbanks, AK 99701-2879

Representative Richard Foster
P.O. Box 1630
Nome, AK 99762-1630

Dear Senator Sharp and Representative Foster:

Enclosed are three proposed pieces of legislation which I would appreciate session.

AS 43.40.010

The increase in aviation fuel tax in the amount of $.007/gallon is the result of the Legislative request to not assess landing fees on rural airports.

See the Legislative intent language contained in the DOT&PF FY'94 operating budget.

operating budget.

AS 38.05.030

This amendment simply makes airport property disposal consistent with highway property disposal. This is a housekeeping measure which should have been handled when DOT&PF was created -- it wasn't.

All property and right-of-ways are handled in one DOT&PF section and this housekeeping measure makes the operations consistent.

AS 19.05.040

This minor addition to the statutes allows DOT&PF to enter property to determine if hazardous substances exist. This change is needed because DOT&PF has purchased property for right-of-way purposes only to find out that it is contaminated and the cost of cleanup exceeded the cost of moving the facility to avoid the contaminated area had that fact been known.

DOT&PF with this change would be able to know, in advance of purchase, if property is contaminated.

There are two or three more items that are in the mill that will be transmitted later.

Please let me know if you have any questions or I can provide more data.

Sincerely,

B.A. Campbell
Commissioner

Enclosures

Department of Transportation and Public Facilities

POSITION PAPER

BILL NO: SB 256 APPROVED:

TITLE: Increase Aviation Fuel Tax DATE: January 24, 1994

The Department of Transportation and Public Facilities supports the increase in the aviation fuel tax by $0.007 (0.7 cents) per gallon.

This level of increase will offset the loss in state revenue resulting from not reinstating aircraft landing fees at rural airports operated by the state.

Last session, air carriers were contacted and asked if they would prefer reinstatement of the landing fees or collection of an equivalent amount of revenue through another means. While no firm commitment was made, the general feeling expressed was that an increase in the aviation fuel tax to collect an equivalent amount of revenue would be preferable.

The increased tax will be collected by the Department of Revenue in conjunction with the current tax level.

For F[redacted]nson at 465-3904.

FISCAL NOTE

No. 1

Bill Version: SB 256

(S) Publish Date: 1-28-94

STATE OF ALASKA

1994 LEGISLATIVE SESSION

BILL N

Revision Date:

Dept. Affected: Revenue

Title: Increase aviation fuel tax

BRU: Revenue Operations/Shared Taxes

Component: Income and Excise Audit/Aviation Fuel

Sponsor: Senate Transportation

Requestor: Senate Transportation

COMPONENT SERIAL NO. 113/104

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY95	FY96	FY97	FY98	FY99	FY00
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS	20.4	20.4	20.4	20.4	20.4	20.4
MISCELLANEOUS						
TOTAL OPERATING	20.4	20.4	20.4	20.4	20.4	20.4
CAPITAL						
REVENUE FUND SOURCE: General	1,725.7	1,725.7	1,725.7	1,725.7	1,725.7	1,725.7

FUNDING: (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	20.4	20.4	20.4	20.4	20.4	20.4
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	20.4	20.4	20.4	20.4	20.4	20.4

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY94) impact: $ 0

ANALYSIS: (Attach a separate page if necessary.)

(See Attached)

Changes in CS SB 256 (TRA) reflect NO FISCAL CHANGE from the orginal fiscal note. This fiscal note is appropriate.

1/27/94 R.A.S.

(date) Comm. Aide (initial)

Prepared by: Larry E. Meyers Phone: 465-2320

Division: Income and Excise Audit Date: January 20, 1994

Approved by Commissioner: Darrel J. Rexwinkel Date: January 20, 1994

Agency: Department of Revenue

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FISCAL NOTE

This bill increases motor fuel tax rates on aviation fuel by .7¢ per gallon as follows.

	Current Tax Rate	*Draft Bill Tax Rate*	*% Increase*
Aviation Gasoline	4¢ per gallon	4.7¢ per gallon	17.5%
Aviation (Jet) Fuel	2.5¢ per gallon	3.2¢ per gallon	28.0%

In determining the amount of additional revenues generated from this bill, the Department of Revenue used aviation fuel consumption data available from FY 93. The amounts below do not reflect impacts on consumption, if any, due to increased tax rates and other factors.

Under AS 43.40.010(e), 60% of aviation gasoline tax revenues derived from fuel sales at municipally owned airports are shared with those municipalities. The Department shared $116,800 of aviation gasoline tax revenues to municipalities in FY 93. Under this bill, that amount will increase by 17.5% (% increase identified above) or $20,400.

The additional revenue generated from this bill is estimated to be $1,705,300 calculated as follows.

	FY93 Consumption	*FY 93 Revenue*	*Draft Bill Revenue*	*Additional Revenue*
Aviation Gasoline	18,076,200 gallons	$ 723,000	$ 849,600	$ 126,600
Aviation (Jet) Fuel	228,436,300 gallons	5,710,900	7,310,000	1,599,100
Total	246,512,500 gallons	6,433,900	8,159,600	1,725,700
Amount Shared		(116,800)	(137,200)	(20,400)
Total		$6,317,100	$8,022,400	$1,705,300

lpb:SB256fis.att

DIVISION OF LEGAL SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

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

MEMORANDUM January 26, 1994

SUBJECT: Draft CSSB 256 ( ) (Work Order No. 8-LS1509\E)

TO: Senator Bert Sharp, Chair
Senate Transportation Committee
ATTN: Ruth Skidmore

FROM: Jack Chenoweth
Legislative Counsel

In the enclosed draft committee substitute:

Bill section 1, uncodified, sets out a capsule summary of the reason for this Act;

Bill section 2 increases the aviation gasoline tax imposed by AS 43.40.010(a)(1) and (a)(3)--gasoline sales--by seven-tenths cent per gallon.

Bill section 3 reduces that increase to current rates.

Bill section 4 increases the aviation gasoline tax imposed by AS 43.40.010(b)(1) and (b)(3)--gasoline consumed--by seven-tenths cent per gallon.

Bill section 5 reduces that increase to current rates.

Bill section 6 makes the reductions of the respective tax levies made by bill sections 3 and 5 effective only if the commissioner of transportation and facilities increases rural airport landing fees over the amount that they were on January 1, 1994. Because I don't know when that increase may occur--it may not occur until long after you and I are gone from the legislative arena--I thought to set a termination date on when that contingency could occur, and selected December 31, 1999. If, before the end of 1999, the legislature would want to continue this rate reduction contingency for another period of time, it would have to amend this provision to do so. Otherwise, on or after January 1, 2000, the commissioner will be

free to increase rural airport landing fees and the tax rate would not automatically revert to the lower rate.

Without this termination date on the contingency, the possibility of an "automatic" rate reduction would carry on indefinitely. No one here concerned with maintaining the Alaska Statutes thought that was a good idea.

Section 7 provides an effective date for secs. 3 and 5 if the condition in sec. 6 occurs. I gave the rate change a 30 day delay so that the commissioner of transportation and public facilities could raise the landing fee rate, tell the commissioner of revenue, and the commissioner of revenue (who collects the tax) could advise persons liable for payment of the tax of the pending rate reduction and the date of that reduction. Without the delay, purchasers and consumers of aviation gas would pay at the higher rate when they ought to be paying at the reduced rate because the sellers of that gas had not received notification of the rate reduction.

JBC:pl:gc
94-074.plm

Enclosure

COMPONENT DETAIL - OPERATING BUDGET

nt: Interior District - Highways and Aviation
nterior District Maintenance and Operations

Agency: Department of Transportation/Public Facilitie

tions - Line Items	Type	Total	Pers Svc	Travel	Contract	Supplies	Equip	Land/Bld	Grant	Misc	PFT	PPT	Tmp
********** Changes from FY94 Gov Amd to Conference Committee **********													
irport electric contrct	Dec	-20.0	0.0	0.0	-20.0	0.0	0.0	0.0	0.0	0.0	0	0	0

tive Intent: It is the intent of the legislature that Department of Transporation and Public Facilities should continue to provide adequate winter
nce of the Denali Highway between Cantwell and the Valdez Creek Mine access road, with at least 50 percent of the expected service to be paid by industry in
contributions.

Legislative Intent: It is the intent of the legislature that the Department of Transportation and Public Facilities not reinstate the landing fees at the rural airports and that the department submit for legislative consideration a supplemental appropriation next session to fund the resulting shortfall in program receipts.

cation to the Department of Transportation and Public Facilities for Highways and Aviation shall lapse into the general fund on August 31, 1994.

********** Changes from FY94 Gov Amd to Senate **********													
ted reduction	Dec	-39.1	-39.1	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0	0	0
irport electric contrct	Dec	-20.0	0.0	0.0	-20.0	0.0	0.0	0.0	0.0	0.0	0	0	0
trimms PFT to PPT	Dec	-31.3	-31.3	0.0	0.0	0.0	0.0	0.0	0.0	0.0	-1	1	0

tions - Funding Sources	Type	Total	1002	1004	1005	1007	1061
********** Changes from FY94 Gov Amd to Conference Committee **********							
irport electric contrct	Dec	-20.0		-20.0			

********** Changes from FY94 Gov Amd to Senate **********			
ted reduction	Dec	-39.1	-39.1
irport electric contrct	Dec	-20.0	-20.0
trimms PFT to PPT	Dec	-31.3	-31.3

LEGISLATIVE INTENT LANGUAGE
DOT&PF FY 94 OPERATING BUDGET

SB

268

Community Care Licensing: Section by Section Analysis and Commentary

CS SB 268 HES
April 11, 1994

This bill in large part reflects current licensing practice and the thinking of experienced supervisors in the Division of Family and Youth Services (DFYS). It moves detail from quasi-legislative regulations developed over nearly two decades into a cohesive licensing law. Proposed modest improvements to Alaska licensing are emphasized in this analysis and commentary.

Following introduction of the Governor's Community Care Licensing bill, DFYS conducted a teleconference with the heads of organizations and key agencies that would be affected by the bill. The department drafted amendments suggested by those attending the teleconference.

House HES sent the bill to Legislative Counsel, Terry Lauterbach, to incorporate department amendments with changes suggested by a HES committee member. House HES also requested that Ms. Lauterbach review the bill for conformance with legislative drafting requirements. Ms Lauterbach proposed technical improvements along with the amendments. All were adopted by the House HES Committee with the support of the department.

Senate HES adopted a CS for SB 268 that matched the House HES version at the request of the department. They then passed additional amendments. The department had no objection to amendments at the time, but on review of the changes to the definition of child foster care, the department requests an alternative that meets the intent of the HES amendment and that would eliminate other problems in the revised definition. (See Department amendment.) Other than minor wording modifications, changes from the Governor's original bill are noted in this analysis.

Page

1 **<u>Sections 1 through 8</u> (Compatibility with Other Statutes)** make conforming numbering or terminology amendments to other laws including Criminal, Adoption, Office of the Long Term Care Ombudsman, Child Care grant and Day Care Assistance laws. There is no change in substance. Sections [illegible] were added by Ms. Lauterbach.

3 **<u>Section 9</u> (Appeal Hearings)** also sets out conforming amendments. It requires that appeal hearings following all serious enforcement by the department be conducted under the

provisions of the Administrative Procedures Act. DFYS will conduct appeal hearings under their informal grievance procedure for less onerous actions, such as a denial of a request for a variance.

4 **Section 10 (Purpose; Applicability)** adds a purpose statement. DFYS intends to use the purpose in publications to clarify the role of licensing for providers of service and to inform parents that they play a critical role in selecting and monitoring care for their children. Section 10 establishes that the provisions of this statute apply both for programs required to be licensed and for those that voluntarily choose to be licensed. The original version of the bill included changing the title of the Chapter from "Institutions" to "Community Care Licensing." Ms. Lauterbach indicated that the Revisor of Statutes selects chapter titles. She noted that the Department prefers "Community Care Licensing" as the title.

4 **Section 11 (Powers of the Department)** is amended.

- Section 11 reflects updated terminology for facilities and agencies falling under the provisions of the chapter and authorizes the department to adopt fees by regulation. Refer also to the definitions on page 21.

- Section 11 provides authority for the department to enter into agreements with individuals, in addition to organizations, to perform licensing evaluations. DFYS has agreements with about 12 agencies to perform licensing evaluations, primarily foster care. Only three agreements involve state funds, and those three are exempt from the procurement code. Since the procurement code rarely applies, reference to it is removed.

- The material related to delegating powers to a municipality has been revised in collaboration with the Municipality of Anchorage (MOA). The MOA is the only municipality that has adopted an ordinance to license child care centers. The revision reflects the practice of the MOA to adopt additional standards that meet or exceed state standards.

5 **Section 12 (License Required; Exemptions)** states that a child care license is required unless the facility is exempt. Facilities and agencies excluded from the licensure process are listed. These are the same as those under current statute and regulations with exceptions noted below.

6 The exemption from licensure for child care facilities on military bases was amended in House HES to clearly exempt facilities on Coast Guard installations on the advice of Commander Gary Palmer of Legal Services in the US Coast Guard.

The department will continue the exemption on Kodiak Island and the exemptions for the large military bases in Anchorage and Fairbanks, but the department agreed to continue to license family child care homes under voluntary licensure on Coast Guard Installations in communities like Cordova and Sitka. Child care is limited there, and the Coast Guard has no oversight means. Licensure will be on a time available basis.

Licensing statutes are not intended to apply to care from relatives. The original bill had a drafting error that was amended in House HES to clearly exempt relative child care and great grandparents were added to the definition of relatives.

Application of the licensing statute is proposed to be expanded in four areas as sound public policy. They are:

- The exemption for governmental operated programs is removed except where specified. Only one local government, the MOA, has the expertise to license and it does not operate programs.

6/7 • The clause in current statute that allows a foster home or residential facility to operate for 90 days without a license is removed. The primary purpose to reduce risk before persons receive care is lost, if programs begin without licensure. Consider that a person is not allowed to operate an automobile before obtaining a license.

6/7 • The defined age of a child is changed from "under 16 years of age" to "under 18 years of age" for requiring licensure in foster homes and residential child care. No known programs would be affected by this change.

7 • The exemption for the "occasional" placement of a child for adoption without a license was deleted in the Governor's bill. Most, if not all, attorneys now arranging non-relative adoptions, contract with a licensed child placement agency to obtain evaluations and oversight for adoption placements. Senate HES added (e) (5) which exempts a person who arranges child placement on an incidental basis without compensation.

7 Voluntary licensure is retained.

8 **(Application for license)**. Items that must be submitted in an application for licensure are consolidated.

9 **Section 13** describes license issuance, denial and right to appeal, and the content of a license by consolidating material from existing statute and regulations.

9 **(Provisional license; Biennial License).** Retaining on site inspections prior to license issuance has strong community support as indicated in community meetings on the draft.

One amendment in House HES addresses the practical matter that only minimal licensing requirements can be met in the middle of the night in a village under emergency conditions. Alaska Native Grantees recommended a direct approach to licensing under emergency placement conditions. See paragraph (b).

10 **(Denial of License; Right to Appeal)** Current practice is described.

10 The term, **(Variances)**, rather than, waivers, more accurately reflects approved alternatives to meeting the intent of a requirement. The procedure for granting variances is set out. Reasonable variances are widely used.

11 **(Content of the License)** is consolidated from five sets of regulations resulting in reducing the volume by 4/5.

12 House HES amended this section at the request of the department to provide that a variance issued within the period of licensure be posted near the license. This will prevent the need for the extra paperwork of issuing an amended license to display the variance.

12 **Section 14 (Non-transferability)** retains the provision that licenses are not transferrable to a different owner or location.

12 **Section 15 (Orientation and Training)** requires that applicants or licensees complete orientation and training that the department prescribes in regulation. Currently only child foster home training is mentioned in statute, however orientation and training is required in regulations for all types of care.

12 **(Records)** must be kept by the licensee to demonstrate compliance with standards. Since licensing records are open and are frequently reviewed by parents seeking child care and others, specifying which records are not available for public inspection is important. In particular, personal background information provided by foster parents is sensitive and should not be open to inspection by the public.

13 **Section 16 (Monitoring; Investigation)** outlines the process for monitoring and biennial license renewal. An annual self monitoring report is added. The department believes a self monitoring report will motivate the licensee to seek to meet standards and reduce the time necessary in the department's review. In addition the section encourages parents who have

placed children in child care to monitor by requiring that they receive a summary of standards and a telephone number for reporting concerns. A partnership with informed parents will go a long way toward ensuring care is safe for young children.

13 **(Biennial License Renewal)** The process for renewal of a license is specified and procedures that were previously only in the department's licensing manual are included. For example, if there is a vacancy in a one person office and a license expires, it is automatically extended for six months or until a department representative may visit to perform the investigation. If the department finds noncompliance, a plan of correction and verification of compliance is required.

14 **(Notice of Changes)** Required notices are updated and standardized. Senate HES added "conviction" to the changes that must be reported by a licensee.

15 Section 17 **(Complaints, investigation, enforcement and grounds for license revocation or nonrenewal)** are specified. The majority of this material is a consolidation and refinement of existing regulations. Changes:

15 • A requirement to mail a copy of the report of an investigation to the complainant, if requested.

16 • Prohibition of licensee retaliatory action against a complainant. This is especially important to protect employees who are fearful of reporting unsafe practices.

16 • Probable cause is added as the standard for seeking a search warrant when considered necessary.

17 • Suspension of operations in cases of imminent danger is authorized until the department investigation is complete. Suspension is more appropriate than immediate revocation authorized under current statute.

17 • The array of enforcement actions authorized are listed along with the grounds for revocation or nonrenewal. Most appear now only in the department's licensing manual.

18 Senate HES eliminated a sentence from (h) that stated, "If a time period is not set by the department, the revocation or nonrenewal is permanent, and the former licensee may not again apply for licensure under this chapter." The sentence is not needed as the department could specify permanent revocation in its final administrative order.

19 Senate HES created (a) (3) on line 8, as a subsection apart from subsection (2). This change results in sex crimes being exempt from the 10 year time limit that is in subsection (2).

19 **(Licensing Adult Facilities)** outlines procedures for licensing adult residential care facilities, including adult foster homes, in brief. Pioneer Homes, as now, are exempt from licensure. Many provisions in bill sections 11 -17 are incorporated by reference. This article would go into effect only if the companion Assisted Living bill did not pass. It will ensure that currently licensed adult care facilities remain regulated by DFYS in the event that the Assisted Living bill does not pass.

20 **(Administrative Procedure)** complements section 9 in specifying appeals fall under the Administrative Procedures Act for serious enforcement actions under this chapter.

21 **(Immunity from Liability)** is provided for individuals and agencies acting under agreement with the department to perform licensing evaluations. Liability concern is often cited as a deterrent to private agencies interested in performing licensing evaluations. Alaska Native and other nonprofit agencies strongly support this section.

21 **(Penalty)** provisions for violations under the chapter as a class B misdemeanor have not been changed.

21 **Section 18 (Definitions)** are updated. For example, "nursery" is a term now in statute. It becomes a "child care facility. The outdated term, "institution," becomes "residential child care facility".

22 In Senate HES, committee members and the department collaborated to exempt parent-arranged care for up to 45 days by changing the definition of a foster home. Since the change created other problems, the department has proposed an amendment to meet the intent of HES committee members.

23 **Section 19** This is an amendment added by Ms. Lauterbach similar to those at the beginning of the bill. It amends terminology in the department's purchase of service chapter to conform to the bill.

23 **Section 20** repeals several existing sections in Chapter 35.

23 **Sections 21 -- 26** Remaining sections contain provisions for implementation and the timetable that the department will use for an orderly transition from the current system of licensure to the new one. More than 1,900 facilities and agencies with

a capacity for 13,600 individuals now fall under the provisions of this licensing statute. The time line for implementation is a year and a half to allow for the transition. During this period the department will review regulations for seven or more types of facilities and agencies, work with care providers, consumers and others to draft revised standards of operation for each type of care and agency falling under the statute, conduct public review of drafts, promulgate regulations, develop implementation materials and conduct licensing training for both providers and licensors.

WALTER J. HICKEL
GOVERNOR

P. O. Box 110001
Juneau, Alaska 99811-0001
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STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

January 28, 1994

268

The Honorable Rick Halford
President of the Senate
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

Dear Mr. President:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to the licensing, by the Department of Health and Social Services (DHSS), of facilities for the care of children, child placement agencies, maternity homes, and residential facilities and foster homes for adults. The bill reorganizes and clarifies existing licensing statutes and provides much-needed detail in the statutes. The bill's reorganization of the statutes separates licensing of child-related facilities from licensing of adult facilities.

Sections 5 and 7 - 12 of the bill set out new statutory provisions that provide for the licensing and regulation of child foster homes, child care facilities, residential child care facilities, child placement agencies, and maternity homes. Section 7 of the bill clarifies which of these facilities are required to be licensed and which are exempt from licensure. Licensing procedures and requirements, appeal procedures, and operational requirements that apply to all such facilities are set out in secs. 7 - 11. Those sections provide for provisional licenses and biennial licenses, and specify that DHSS must inspect and investigate a facility before either a provisional license or initial biennial license is issued. Renewal procedures for biennial licenses are also provided. Complaint, investigation, and other enforcement provisions are set out in sec. 12 of the bill.

Section 13 of the bill sets out a separate article in AS 47.35 to address licensure and regulation of adult residential care facilities. Many of the provisions in secs. 7 - 12 of the bill are incorporated by reference in the adult residential care facility article. I intend to introduce a bill this session relating to "assisted living homes" for adults; that bill will place licensing and regulation of adult residential facilities in a new chapter in

GOVERNOR'S
TRASMITTAL LETTER

AS 47. If that bill passes the legislature and becomes law, sec. 13 of the attached bill will not take effect. See sec. 21 of the bill.

Sections 14 and 15 of the bill set out general provisions for administrative adjudication procedures, liability immunity, criminal penalty, and definitions for AS 47.35.

Sections 1 - 4 and 6 of the bill make conforming amendments to existing statutes to reflect changes made by secs. 5 and 7 - 15 of the bill. Section 16 of the bill repeals most of the existing statutes in AS 47.35 -- their provisions have been reworded and reorganized in secs. 5 and 7 - 15 of the bill. Section 17 of the bill contains transition provisions that specify how the bill affects existing as well as new facilities.

Section 18 of the bill authorizes DHSS to begin the regulation adoption process so that necessary regulations can take effect on the effective date of the statutory changes made by the bill. Sections 19 - 21 provide an immediate effective date for sec. 18 and a January 1, 1996 effective date for the statutory changes made by the remainder of the bill. Section 21 makes the January 1, 1996 effective date for sec. 13 contingent on another adult residential facility bill not becoming law, as discussed earlier in this letter.

I urge your support of this important legislation.

Sincerely,

Walter J. Hickel
Governor

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL NO. CSSB 268 (HES)

Revision Date: April 13, 1994
Title: Community Care Licensing
Dept. Affected: Health and Social Services
BRU: Family & Youth Services
Component: Central Office
Sponsor: Rules Committee by Request of Governor
Requestor: Senate Judiciary
COMPONENT SERIAL NO. 0259

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY95	FY96	FY97	FY98	FY99	FY00
PERSONAL SERVICES						
TRAVEL	45.0	20.0				
CONTRACTUAL	20.0	15.0				
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	65.0	35.0	0.0	0.0	0.0	0.0
CAPITAL EXPENDITURES						
CHANGES IN REVENUES						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	65.0	35.0				
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	65.0	35.0	0.0	0.0	0.0	0.0

POSITIONS:

FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY94) impact: 0.0

ANALYSIS: (Attach a separate page if necessary)

This bill focuses licensing on children and families; removing two types of care--adult foster homes and adult residential care--from the licensing statute if SB249, Assisted Living Homes also passes this session. It consolidates all the basic licensing procedures into the bill, so that each program regulation will only address the program issues. The existing licensing statute needs to be revised to address significant changes in licensing which have occurred since the statute was first enacted. There is a lot of public interest and support for the licensing of child care facilities.

There will be an 18 month implementation in order to allow the Division time to revise all regulations with appropriate public input. The bill takes full effect on January 1, 1996.

(CONTINUED)

Prepared by: Deborah R. Wing, Director — Phone: 465-3191
Division: Division of Family & Youth Services — Date: 04/13/94

Approved by Commissioner: Margaret R. Lowe, M.Ed., Ed.S. — Date: 4-12-94
Agency: Department of Health & Social Services

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ANALYSIS (cont.):

In FY95, the Division will appoint a task force of providers, licensing staff and others to recommend standards for operation. $65,000 will be needed to begin the implementation of the changes. The $45,000 in the travel line will fund the task force travel, and travel for staff to conduct public hearings. The $20,000 contract line will fund a contractor to draft standards for each program area, and to revise the drafts after public comment.

In FY96, the $35,000 will go toward finalizing the implementation. Contractual money will go for design and publication of forms and guidebooks to implement the standards. $20,000 will fund regional training for licensing staff and providers of different care types.

It is expected that full implementation of this bill will require more funds than the $100,000 built into this fiscal note; however, some of the work required for service improvements will be assumed by existing staff and resources. The impact of all the changes required by this bill at one time cannot, however, be assumed by existing staff. The improvements to the licensing program that this bill will accomplish are very important to the citizens of this state.

The revision of the licensing statute will have a major program impact on the Division of Family and Youth Services. There will be immediate need to work with those affected to propose and draft at least seven sets of licensing regulations, conduct public hearings, revise drafts and promulgate regulations, develop implementation materials including forms and guidebooks for each type of care, revise the licensing procedures manual for staff, train licensees and licensing staff. The Department of Law advises this must be done within 18 months.

Community participation in the revision of standards is important to ensure that the standards developed are clear and viable, and that there is consensus.

Community Care Licensing Bill
Fiscal Note: Working Smart in the 90's

- Advance efficiency and competency by
  - Consolidating licensing procedures
  - Convening a working task force to form standards
  - Publishing guidebooks and conducting training
- Eighteen months needed for transition from the current system.
  - The Act takes full effect on January 1, 1996.
  - More than 1,900 facilities and agencies (at least seven types) w capacity of 13,600 individuals will be affected. (See pie chart.)
  - The division is very committed to this project
    - will devote considerable time of existing staff
    - do not have resources to handle a project of this magnitude w/o the funding in this fiscal note.
    - will with its own resources design purchase of service improvements in foster and residential care to correspond to the revisions in licensing.
- FY 95: $65,000
  - Travel Line $45,000 40 TF 5 hearings
  - Contract line 20,000 contractor
- During FY 95 the department will
  - Obtain standards from selected states and model standards for review to gain from their collective experience.
  - Convene a working task force of citizens and staff(est24)
  - Two face to face statewide meetings and teleconferences.
  - Total group to determine standards that may apply to all types of care and to address the licensing process.
  - Establish five subcommittees to develop initial draft standards for each type of facility or agency.
  - Contract with an attorney and/or skilled professional
    - use task force drafts to place standards of operation for each type of care and agency in correct legal format and ensure consistency between regulations
    - prepare all legal documents needed
    - begin implementation tools and
    - revise the drafts after the department conducts separate public hearings for each type of care.
- FY 96 $35,000
  - Travel line $20,000 Regional training
  - Contract line 15,000 design/publication of forms and guidebooks
- During the first six months of FY 96 the department will
  - contract for development of implementation forms, and guidebooks and a licensing manual for field workers.
  - conduct regional licensing training for both providers and licensors to acquaint them with the new procedures. Training is the final key to successful implementation.

Additional Information: Community involvement

- Community participation in formulating standards may
  - reflect staff knowledge and experience
  - promote a public/private partnership
  - offer a multidisciplinary approach
  - ensure clear, viable standards and build consensus.

- The mission of the task force and contractor will be to draft rules that are
  - reasonable, concise and easy to understand
  - enforceable
  - promote safe appropriate care
  - are minimum, baseline
  - are economically acceptable
  - incorporate latest thinking
  - and that simplify licensing for both licensing staff and providers of service to the degree possible.

Additional information: Implementation

During the 1993 Indian Child Welfare conference recommendations were made to the division to develop carefully planned foster home applications and to publish guidebooks to encourage and assist persons to become licensed foster parents. The division agrees with this recommendation. We believe sound implementation tools remove barriers to persons entering the caregiving community. In FY 96 $15,000 will go toward design and publication of forms and guidebooks to implement the standards.

Finally $20,000 will fund regional training in two rounds, one for child care facilities and one for facilities providing 24 hour care and child placement agencies.

Conclusion

A sound licensing program is a critical piece of the care system for Alaska's vulnerable citizens and their families. Funding this fiscal note will help the division work smart and efficiently. Without the funds, we will not achieve many of the objectives we set out to achieve--that is to make licensing easier for those who do licensing and those applying for a license.

Community Care Licensing Bill

Goals

- Licensing is intended to reduce risk to our most vulnerable citizens
- The legislation will enhance efficiency to accomplish more with the same resources.

Background

- DFYS licenses nearly 2,000 facilities and agencies.
- The public demands more licensed care settings.

- Workers now license up to nine kinds of care.
- Workload standards: exceeded by 50% in some places.
- Many workers also have protective services duties.
- Workers must know 40 pages of licensing procedures.

Passing Community Care Licensing & Assisted Living will

- Focus DFYS on children and families.
- Transfer regulation of care for elders or adults with a disability to divisions in those fields.

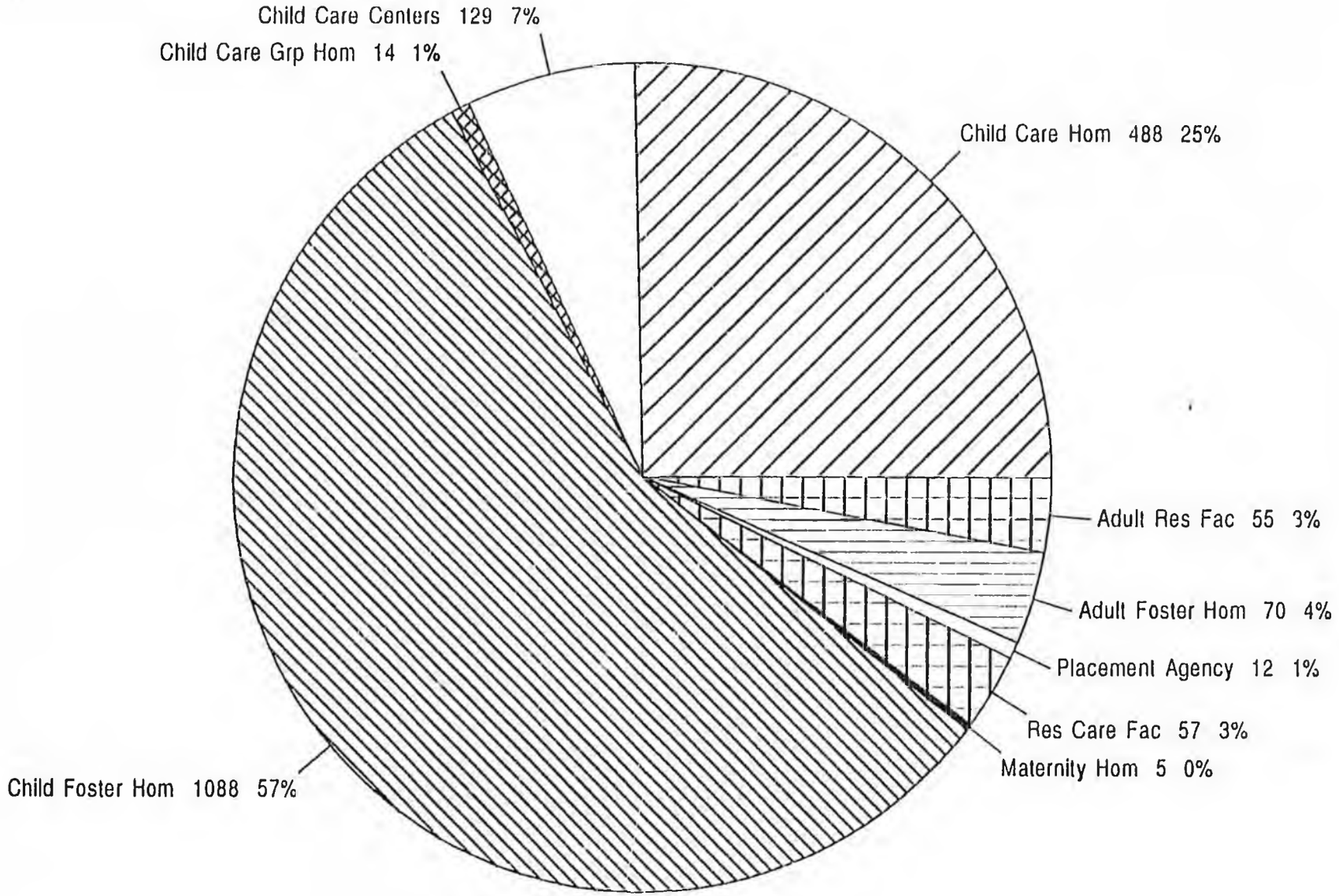
- Advance efficiency and competency by
  - Consolidating licensing procedures
  - Convening a task force to form standards
  - Publishing guidebooks and conducting training

- Clarify the shared role with parents to ensure their child's safety and development in licensed care.
  - Yet, the state retains duty for oversight.

- Expand partnerships with private agencies
  - Include liability protection.
  - Encourage partners to increase the number of regulated homes in additional communities.

COMMUNITY CARE LICENSED FACILITIES

MARCH 1994



Total = 1918

DFYS - 3/3/94

SB 275

Department of Transportation and Public Facilities

POSITION PAPER

BILL NO: SB 275

APPROVED:

TITLE: Disposal of Real Property by DOT&PF

DATE: February 7, 1994

DOT&PF is in favor of the proposed legislation. The provisions of AS 3805.030 are ambiguous and contradictory with respect to DOT&PF. The AG's opinion is that since the statute expressly states that the DOT&PF has the authority to dispose of highway lands and does not so specify for airport or facilities lands, then DOT&PF's authority to dispose of airport or facilities lands, either by sale or exchange, is repealed by implication (failure to list Title 2 and Title 35 when Title 19 is mentioned). DOT&PF's right to dispose or exchange airport (Title 2) or public facilities (Title 35) lands has been a problem for several years.

The clarification of DOT&PF's authority to dispose of airport or facilities lands will benefit both DOT&PF and DNR. It will allow DOT&PF to correct trespass problems it has at several airports across the state. It will also allow DOT&PF to exchange old airport or facilities sites for new sites without tying up DNR staff and resources resulting from DNR being used as a middleman to accomplish these exchanges.

TRANS CS INCLUDES BOTH HANGES

DOT&PF requests the following language be added to SB 275 to also clarify DOT&PF's authority to dispose of facilities lands: AS 35.05.040(1) and (2) and AS 35.20.010 - 35.20.050.

DNR has indicated to DOT&PF that it does not oppose the proposed changes, but would like language added to ensure that any land transferred from state ownership to municipal ownership is charged against any outstanding entitlement the municipal government may have pursuant to Title 29. DOT&PF has no objection to the following language being added to the legislation. "Land conveyed under this section to a municipality of the state shall be credited against a municipality's remaining entitlement under AS 29.65, unless this land conveyance is in consideration for other lands required for state purposes.

STATE OF ALASKA
1994 LEGISLATIVE SESSION

BILL No.: SB 275

FISCAL NOTE

Revision Date:
Title: Disposal of Real Property by DOT&PF

Department Affected: DOT&PF
BRU:

Sponsor: Senate Transportation
Requestor:

Component:
Component Serial Number:

EXPENDITURES/REVENUES: (Thousands of Dollars)

OPERATING	FY95	FY96	FY97	FY98	FY99	FY00
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTUAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING:	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE FUND SOURCE	0	0	0	0	0	0

FUNDING: (Thousands of Dollars)

1002 FEDERAL RECEIPTS	0	0	0	0	0	0
1003 GF MATCH	0	0	0	0	0	0
1004 GF	0	0	0	0	0	0
1005 GF/PROGRAM RECEIPTS	0	0	0	0	0	0
1006 GF/MHTIA	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL FUNDING:	0	0	0	0	0	0

POSITIONS

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

Estimate of current year (FY94) impact: $0

ANALYSIS: (Attach a separate page if necessary)

Prepared by: Jonathan A. Widdis, Director — Phone: 266-1460

Division: Statewide Aviation — Date: February 7, 1994

Approved by Commissioner: R.A. Campbell — Phone: 465-3901

Agency: Department of Transportation and Public Facilities — Date: February 7, 1994

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FISCAL NOTE

STATE OF ALASKA BILL NO. SB275

1994 LEGISLATIVE SESSION

Revision Date: Original Dept Affected: Natural Resources

Title: "An Act relating to the disposal of real property by the Department of Transportation and Public Facilities." BRU: Resource Development

Component: Land Development

Sponsor: Senate Transportation Committee

Requestor: Senate Transportation Committee Component Serial No. 431

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY95	FY96	FY97	FY98	FY99	FY00
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 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						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any 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)

The Department of Natural Resources supports this bill. We suggest an amendment that if land is conveyed to a municipality that has an acreage entitlement under AS 29.65, that the land conveyed would be charged against that entitlement.

Prepared by: Ron Swanson, Director Phone : 762-2692

Division: Land Date : 9-Feb-94

Approved by Commissioner:

Harry A. Noah Date: 9-Feb-94

Agency: Natural Resources

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WALTER J. HICKEL, GOVERNOR

DEPARTMENT OF TRANSPORTATION
AND PUBLIC FACILITIES

OFFICE OF THE COMMISSIONER

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December 13, 1993

Senator Bert M. Sharp
119 N. Cushman Street, Suite 201
Fairbanks, AK 99701-2879

Representative Richard Foster
P.O. Box 1630
Nome, AK 99762-1630

Dear Senator Sharp and Representative Foster:

Enclosed are three proposed pieces of legislation which I would appreciate being introduced through the Transportation Committees in the next session:

AS 43.40.010

The increase in aviation fuel tax in the amount of $.007/gallon is the result of the Legislative request to not assess landing fees on rural airports.

See the Legislative intent language contained in the DOT&PF FY'94 operating budget.

AS 38.05.030

This amendment simply makes airport property disposal consistent with highway property disposal. This is a housekeeping measure which should have been handled when DOT&PF was created -- it wasn't.

All property and right-of-ways are handled in one DOT&PF section and this housekeeping measure makes the operations consistent.

AS 19.05.040

This minor addition to the statutes allows DOT&PF to enter property to determine if hazardous substances exist. This change is needed because DOT&PF has purchased property for right-of-way purposes only to find out that it is contaminated and the cost of cleanup exceeded the cost of moving the facility to avoid the contaminated area had that fact been known.

LETTER FROM D.O.T.
COMMISSIONER
BRUCE CAMPBELL

25A-T1LH

DOT&PF with this change would be able to know, in advance of purchase, if property is contaminated.

There are two or three more items that are in the mill that will be transmitted later.

Please let me know if you have any questions or I can provide more data.

Sincerely,

B.A. Campbell
Commissioner

Enclosures

SB

276

IMPACT UPON LOCAL POLICE

IN GENERAL: This legislation establishes a statutory framework which formalizes existing criminal justice information processing procedures. Mandatory provisions have been minimized and sections generally do not take effect until regulations are adopted. To implement the full scope of this legislation, a series of implementation discussions with local law enforcement are required. Full implementation will be achieved through negotiation and concurrence. The bill provides for an effective date of July 1, 1994 but the substantive sections of the bill do not apply to misdemeanants until July 1, 1995. This delay is intended to hold down the initial costs of this legislation and to enable justice agencies to streamline procedures.

The information depicted below addresses those provisions that may increase the work load of local police. Other provisions of the bill, not mentioned here, are either already performed by local police or the performance requirement is placed on other organizations in the criminal justice community. The accompanying materials fully explain the provisions of the legislation.

IMPACT ON LAW ENFORCEMENT AGEN

PROVISION	EXPECTED IMPACT	EXPECTED BENEFIT
·iminal Justice Information Board 2.62.100)	A municipal police chief serves as a Board member	Direct local police representation on policy and implementation issues. Travel and per diem expenses are paid by the State.
andatory fingerprinting 2.62.120) Current practice is to obtain fingerints for all felonies and serious misdemoanors.	All accused misdemeanants and felons must be fingerprinted. If the arresting agency normally books prisoners at a Correctional facility, there is no impact. If the local police department operates a jail, there will likely be an increase in the number of people it fingerprints.	Fingerprints are the only acceptable, cost effective way to guarantee the identity of the individual and the accuracy of the criminal history record. Additionally, these fingerprints are included in AAFIS and the FBI system for latent matching and national retrieval of criminal records.
.ime limit for forwarding fingerprints to the central repository (12.62.120)	Fingerprint cards must be forwarded to AAFIS within five working days. Local police may have to mail cards to the central repository more frequently.	A more timely delivery to AAFIS will result in quicker positive identification of criminals and a more timely updating of APSIN in "merge person" situations.
Reporting of criminal justice information (12.62.130) - An Arrest, issuance or withdrawal of an arrest warrant - all currently done. Release of a person after arrest without filing of a charge - not currently done	Reporting requirements have been extended to every significant event in the criminal justice process. If the local police department operates a jail, there will likely be some increase in data entry. Law's commentary clearly states that the form, content and timing of reports may be specified without regulation. The intent is to work with local criminal justice agencies in adopting policies that are efficient, workable and cost effective.	A significant increase in the content, integrity, timeliness, completeness, and usability of APSIN information.
Reporting of Uniform Crime Information (12.62.140) Approximately 25 police agencies currently submit UCR based information to Public Safety comprising approximately 85% of statewide crime statistics.	A requirement placed on criminal justice agencies to submit uniform crime reporting information to DPS continues. The intent is to work with local police agencies prior to adopting changes from current practice. This legislation does not mandate NIBRS nor UCR reporting formats - law enforcement will be consulted prior to change in current practices.	Availability of true statewide crime statistics and crime trending. Accurate information is useful to law enforcement in operations planning, budget submissions, grant applications

DATE 1/14/94

CRIMINAL HISTORY RECORD

CRIMINAL HISTORY DATABASE

The importance of complete and accurate criminal history records cannot be over-emphasized at this time. Within the criminal justice system, criminal history records are needed for decisions relating to pretrial release, offense charging, prosecution priorities, sentencing and correctional assignments. Similarly, such data are increasingly necessary for noncriminal justice purposes to meet requirements relating to licensing, security clearances and employment of individuals in sensitive positions. A Bureau of Justice Statistics (BJS) survey found that, as of October 1990, almost all states had enacted some legislation which required that criminal history record information be considered in connection with criminal justice decisions. (Source: Report of the National Task force on Criminal History Record disposition Reporting)

ALASKA'S CRIMINAL HISTORY REPOSITORY

Alaska's criminal history database contains approximately 500,000 criminal record entries representing approximately 300,000 persons;

Alaska's fingerprint database contains approximately 170,000 sets of ten print records;

Alaska's fingerprint database contains approximately 2,500 latent fingerprints from crime scenes;

Alaska's criminal history database is updated or queried approximately 50,000 times per month by courts, police, corrections, prosecutors and on behalf of employers;

Alaska's criminal history database is accessed through 900 terminals and 2,000 users in state and nationally via the Law Enforcement Telecommunications System (NLETS);

Preliminary results of a sample of 300 FY 91 arrests disclosed that approximately one third were supported by fingerprints and one third had dispositions reported. Currently, State Correctional facilities are fingerprinting approximately 40% of people accused of committing crimes; Contract Jails fingerprint approximately 50% and smaller facilities approximately 30%.

PROPOSED CRIMINAL HISTORY RECORD CONTENT

Source: December 1989 Search Report, September 26, 1991 University of Alaska White P

(1) ISSUANCE OR WITHDRAWAL OF AN ARREST WARRANT

(2) AN ARREST

(3) RELEASE OF A PERSON AFTER ARREST WITHOUT FILING OF A CHARGE

(4) DECISION BY A PROSECUTOR NOT TO COMMENCE CRIMINAL PROCEEDINGS OR TO DEFER OR INDEFINITELY POSTPONE PROSECUTION

(5) PRESENTMENT OF AN INDICTMENT OR THE FILING OF A CRIMINAL INFORMATION OR OTHER STATEMENT OF CHARGES AFTER ARREST

(6) A RELEASE PENDING TRIAL OR APPEAL

(7) COMMITMENT TO OR RELEASE FROM A PLACE OF PRETRIAL CONFINEMENT

(8) THE DISMISSAL OF AN INDICTMENT OR CRIMINAL INFORMATION OR ANY OF THE CHARGES SET OUT IN SUCH INDICTMENT OR CRIMINAL INFORMATION

(9) AN ACQUITTAL, CONVICTION OR OTHER DISPOSITION AT OR FOLLOWING TRIAL

(10) IMPOSITION OF A SENTENCE

(11) COMMITMENT TO OR RELEASE FROM A CORRECTIONAL FACILITY, WHETHER STATE OR LOCALLY OPERATED, INCLUDING COMMITMENT TO OR RELEASE FROM A PAROLE OR PROBATION AGENCY

(12) COMMITMENT TO OR RELEASE FROM THE DEPARTMENT OF HEALTH AND SOCIAL SERVICES AS INCOMPETENT TO STAND TRIAL OR AS NOT CRIMINALLY RESPONSIBLE

(13) AN ESCAPE FROM DETENTION OR CONFINEMENT

(14) ENTRY OF AN APPEAL TO AN APPELLATE COURT

(15) JUDGMENT OF AN APPELLATE COURT

(16) A PARDON, REPRIEVE, COMMUTATION OF SENTENCE OR OTHER CHANGE IN SENTENCE LENGTH, INCLUDING A CHANGE ORDERED BY A COURT

(17) REVOCATION OF PROBATION OR CHANGE IN PAROLE STATUS

(18) ANY OTHER EVENT ARISING OUT OF OR OCCURRING DURING THE COURSE OF CRIMINAL JUSTICE PROCEEDINGS DECLARED TO BE REPORTABLE BY REGULATIONS ISSUED BY THE DPS COMMISSIONER

ENTS	CONTRIBUTOR SYSTEM/AGENCY	CURRENTLY PROVIDED	CONDITIONS/RECOMMENDED ACTION
	APSIN - POLICE PROMIS - AG DOL	YES	Passage of legislation addressing the management of criminal justice information is needed. The current proposal includes the following sections and are briefly discussed:
	APSIN - POLICE	YES, BUT NOT TIMELY	
	APSIN-POLICE	NO	1. 12.62.100 - Discontinues the Governor's Commission on Criminal Justice and establishes a criminal justice advisory group to the Commissioner Department of Public Safety;
AL	PROMIS-AG DOL	YES	
GES	PROMIS-AG DOL	YES, BUT NOT ENTERED	2. 12.62.110 - Defines the responsibilities of the Commissioner, Department of Public Safety with respect to criminal justice information systems;
	COURTS OBSCIS-CORRECTIONS	NO NO	3. 12.62.120 - Prescribes mandatory fingerprinting for all serious offenses in order to authenticate entries to a person's criminal history record and to facilitate future person identification;
L	OBSCIS-CORRECTIONS CONTRACT JAIL-DPS	NO NO	
A- ENT	COURTS	YES	4. 12.62.130 - Authorizes the reporting of criminal justice information;
OR	COURTS	YES	5. 12.62.140 - Authorizes the reporting of Uniform Crime Information;
	COURTS	YES	6. 12.62.150 - Authorizes the reporting of wanted persons and stolen property;
LE	OBSCIS-CORRECTIONS CONTRACT JAIL-DPS	NO NO	7. 12.62.160 - Addresses issues of completeness, accuracy and security of criminal justice information;
OF AND	H&SS	NO	8. 12.62.170 - Defines criteria for dissemination of criminal justice information;
	OBSCIS-CORRECTIONS CONTRACT JAIL-DPS	NO NO	9. 12.62.180 - Prescribes the process for correction of criminal history record information;
	COURTS PROMIS-AG DOL COURTS	NO NO NO	10. 12.62.190 - Makes provision for sealing of criminal history record information;
	COURTS GOVERNOR	NO NO	11. 12.62.200 - Makes provision for purging of criminal history record information;
TUS	OBSCIS-CORRECTIONS	NO	12. 12.62.210 - Provides for recourse through civil action and defense;
NG RED	APSIN, OBSCIS PROMIS, H&SS	N/A, CURRENTLY	13. 12.62.900 - Provides definitions of terms used in this legislation.

alaska judicial council

1029 W. Third Avenue, Suite 201, Anchorage, Alaska 99501-1917 (907) 279-2526 FAX (907) 276-5046

November 2, 1993

Honorable Walter Hickel
Governor
State of Alaska
P.O. Box 110001
Juneau, AK 99811-0001

RE: Criminal Justice Working Group Recommendation concerning Criminal History Legislation

Dear Governor Hickel:

I am writing on behalf of the Criminal Justice Working Group which you recently established to, among other reasons, recommend to you policies which would benefit the criminal justice system in Alaska as a whole. The CJWG recently reviewed legislation prepared by the Departments of Public Safety and Law which comprehensively addresses the collection, oversight and dissemination of criminal history information. While the CJWG did not consider all of the specifics in the legislation, and undoubtedly members will have differences of opinion on individual items, the CJWG was unanimous in endorsing the general direction of the legislation. The Group strongly urges you to introduce it and work for its passage next session.

Accurate and complete criminal history information is a necessity for all parts of the criminal justice system. The ability of the police and troopers to apprehend criminals and protect the public depends in many cases on accurate fingerprint identification. Innocent citizens often can be absolved by accurate records while inaccurate information can put them at risk. Sentencing decisions under our laws are dependent on accurately determining prior convictions. Further, accurate and complete information is vital to a wide range of decisions in our society, for example, hiring a day care worker who has not been convicted of sexual abuse of a minor. Current statutes governing criminal records collection, use and dissemination are inadequate. Because of these inadequacies, protection of the public and individuals can be at risk.

The CJWG endorses the following general objectives of the proposed legislation:

1. Establish an advisory group to oversee the collection and use of criminal history information;
2. Establish regulatory authority with Department of Public Safety;
3. Provide for mandatory fingerprinting;
4. Establish mandatory reporting of events in the criminal justice system;
5. Provide for correcting or sealing information;
6. Make recommendations for dissemination of information.

The CJWG did not review individual sections of the legislation. In particular, some members had reservations about the dissemination provisions, although all felt that dissemination of criminal history information is an important topic which must be addressed.

The CJWG believes a need for new, comprehensive legislation governing the collection and use of criminal history information is an important issue. As a whole, the group feels that complete and accurate criminal history records are an integral part of a good criminal justice system and request the Governor endorse and introduce this legislation during the next session.

Very truly yours,

William T. Cotton
Executive Director

WTC:pjs

cc: Criminal Justice Working Group Members

Commissioner Richard L. Burton, Department of Public Safety
Attorney General Charles E. Cole
Commissioner Theodore A. Mala, Department of Health & Social Services
Brant McGee, Director, Office of Public Advocacy
Chief Justice Daniel A. Moore, Jr.
Ron Otte, President, Police Chiefs
Representative Brian Porter, Alaska State Legislature
Commissioner J. Frank Prewitt, Department of Corrections
John Salemi, Public Defender
Arthur H. Snowden, Administrative Director, Alaska Court System
Shelby Stastny, Director, Office of Management & Budget
Senator Robin Taylor, Alaska State Legislature
Duane Udland, Chief Deputy, Anchorage Police Department
Commissioner Nancy Bear Usera, Department of Administration

WALTER J. HICKEL
GOVERNOR

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Juneau, Alaska 99811-0001
(907) 465-3500

STATE OF ALASKA
OFFICE OF THE GOVERNOR
JUNEAU

February 4, 1994

The Honorable Rick Halford
President of the Senate
Alaska State Legislature
State Capitol
Juneau, AK 99801-1182

Dear Mr. President:

Under the authority of art. III, sec. 18, of the Alaska Constitution, I am transmitting a bill relating to criminal justice information.

The need for new Alaska legislation on the subject of criminal justice information and computer information systems has been recognized for a number of years. If accurate and complete, these information systems provide a measure of protection for law enforcement officers on the front line of the battle against crime and provide needed information for all parts of the criminal justice system and the public. At the same time, provisions are needed for the security and privacy of the information contained in these systems. Under the bill, "criminal justice information" does not include records relating to juvenile offenders.

The federal Anti-Drug Abuse Act of 1988 required the United States Department of Justice to develop a system for more immediate and accurate identification of offenders, which resulted in voluntary national standards being developed. The Department of Justice recommended that all states (1) implement mandatory reporting of all criminal justice information, (2) monitor case dispositions and adopt unique case-tracking numbers to improve data accuracy, (3) ensure timely submission of fingerprint records, (4) provide standardized data entry, and (5) provide audits, training, and data security. This bill is a necessary step toward that goal, and it will provide a framework under which the state can comply with appropriate national standards for the collection and use of criminal justice information, to the extent they are practical as applied to Alaska.

This bill also adopts a trend seen in some other states, to give the press and public greater access to criminal history records and to make those records more "open."

For example, under this bill, anyone would be permitted to receive information about a person in the custody or under the supervision of the state, including the location of incarceration of inmates, and the conditions under which such inmates are released into the community on bail, probation, or parole. Currently, much of this information is available only to victims of crimes. AS 33.16.120(f). The public would also be permitted to receive information about past convictions if less than 10 years has elapsed from the date the offender was released from all state supervision. Current law gives past conviction records only to employers of persons who work with children, and only for specified crimes. AS 12.62.035. These provisions in this legislation would give the public a great deal of information about current or past criminal offenders that is either not available under current law, or is only available by expending great effort to search paper or microfilm records in the possession of the court system.

A detailed section-by-section description that describes the need for and the intent behind each provision in the bill is available from the Department of Public Safety.

Sincerely,

Walter J. Hickel
Governo:

GOVERNOR HICKEL'S CRIMINAL HISTORY RECORDS INFORMATION LEGISLATION

(SB 276 & HB 442)

Governor Hickel has introduced legislation which will provide police, prosecutors, courts, corrections, and employers with essential criminal history information via the Alaska Public Safety Information Network (APSIN).

APSIN houses Alaska's criminal history database and provides access to national criminal history and fingerprint networks. APSIN is accessed statewide by all police and criminal justice agencies comprising 2,000 users and 900 computer terminals. Information contained in this database and its companion fingerprint system is used by police to investigate crimes and identify persons and property. Prosecutors depend upon APSIN to determine previous criminal history. Courts, through Corrections presentence reports, use APSIN information in making sentencing, release, probation and parole decisions.

Without accurate, complete and timely criminal history records, police investigations will be impaired. Persons who should be arrested or otherwise held during routine police contact will not be. Repeat offenders will receive lighter sentencing or be inappropriately released from custody. Unsuitable persons will be permitted employment in criminal justice or sensitive civilian capacities. Ineligible persons will be allowed to purchase and carry firearms.

APSIN criminal history information is provided to employers and regulatory authorities to make informed employment and licensing decisions. Certain background checks, such as those for criminal justice employment and school teachers, are provided for by law. Others, such as background checks on foster parents, are voluntary but critical to the public welfare. Further, APSIN is a partner with our sister states and the federal government in developing national systems initiatives to form national criminal justice information networks.

The importance of complete, accurate and timely access to criminal history information continues to increase due to recently enacted federal legislation involving gun control (Brady-National Instant Check System) and protection of children (National Child Protection Act). Other federal initiatives are pending involving the registration of offenders who are convicted of crimes against children (Jacob Wetterling Crimes Against Children Registration Act) and requiring states to establish programs to screen, license and train security officers (Private Security Officers Quality Assurance Act). In addition, the Alaska legislature is considering concealed weapons permit legislation (HB 351), registration of sexual offenders (HB 69), and the Governor's Anti-Crime Package. All of these initiatives are dependent upon the availability of criminal history information in order to implement the provisions of these enacted and pending laws.

FISCAL NOTE

STATE OF ALASKA
1994 LEGISLATIVE SESSION

Bill Version: SB 276
(S) Publish Date: 2-4-94

Revision Date:
Title: Criminal Justice Information
Sponsor: Rules Committee by request of Governor
Requestor:

Dept. Affected: Health and Social Services
BRU: Family & Youth Services
Component: Central Office, SCRO,NRO, SERO

COMPONENT SERIAL NO. 0254,0255 0258,0259

Expenditures/Revenues: (Thousands of Dollars)

OPERATING	FY95	FY96	FY97	FY98	FY99	FY00
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 EXPENDITURES						
CHANGES IN REVENUES						

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	0.0	0.0	0.0
POSITIONS:						
FULL-TIME						
PART-TIME						
TEMPORARY						

Estimate of current year (FY94) impact: 0.0

ANALYSIS: (Attach a separate page if necessary)

This bill pertains to criminal justice information sharing and procedural requirements affecting adult criminals and juveniles waived to adult status. This fiscal note is based on the assumption that mandatory fingerprinting pertains only to adults and those juveniles waived to adult status. Additionally, DFYS assumes the standards for fingerprinting contained in the bill will not apply to the juvenile justice system.

Prepared by: Deborah R. Wing, Director
Division: Division of Family & Youth Services
Phone: 465-3191
Date: 02/02/94

Approved by Commissioner: Margaret R. Lowe, M.Ed., Ed.S.
Agency: Department of Health & Social Services
Date: 2-2-94

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FISCAL NOTES