The Fifth Amendment provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process, of law; *nor shall private property be taken for public use, without just compensation*." (Emphasis added.)

It is the last of these liberties, the Takings Clause, that is at issue in this case. In my view, it is "imperative that the Court maintain absolute fidelity to" the Clause's express limit on the power of the government over the individual, no less than with every other liberty expressly enumerated in the Fifth Amendment or the Bill of Rights more generally. *Shepard v. United States*, 544 U.S. ----, ----, 125 S.Ct. 1254, 1264, 161 L.Ed.2d 205 (2005) (THOMAS, J., concurring in part and concurring in judgment) (internal quotation marks omitted).

Though one component of the protection provided by the Takings Clause is that the government can take private property only if it provides "just compensation" for the taking, the Takings Clause also prohibits the government from taking property except "for public use." Were it otherwise, the Takings Clause would either be meaningless or empty. If the Public Use Clause served no function other than to state that the government may take property through its eminent domain power--for public or private uses--then it would be surplusage. See *ante*, at 2672 (O'CONNOR, J., dissenting); see also *Marbury v. Madison*, 1 Cranch 137, 174, 2 L.Ed. 60 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect"); *Myers v. United States*, 272 U.S. 52, 151, 47 S.Ct. 21, 71 L.Ed. 160 (1926). Alternatively, the Clause could distinguish those takings that require compensation from those that do not. That interpretation, however, "would permit private property to be taken or appropriated for private use without any compensation whatever." *Cole v. La Grange*, 113 U.S. 1, 8, 5 S.Ct. 416, 28 L.Ed. 896 (1885) (interpreting same language in the Missouri Public Use Clause). In other words, the Clause would require the government to compensate for takings done "for public use," leaving it free to take property for purely private uses without the payment of **2679** compensation. This would contradict a bedrock principle well established by the time of the founding: that all takings required the payment of compensation. 1 Blackstone 135; 2 J. Kent, Commentaries on American Law 275 (1827) (hereinafter Kent); J. Madison, for the National Property Gazette, (Mar. 27, 1792), in 14 Papers of James Madison 266, 267 (R. Rutland et al. eds.1983) (arguing that no property "shall be taken *directly* even for public use without indemnification to the owner"). [FN1] The Public Use Clause, like the Just Compensation Clause, is therefore an express limit on the government's power of eminent domain.

> FN1. Some state constitutions at the time of the founding lacked just compensation clauses and took property even without providing compensation. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1056-1057, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992) (Blackmun, J., dissenting). The Framers of the Fifth Amendment apparently disagreed, for they expressly prohibited uncompensated takings, and the Fifth Amendment was not incorporated against the States until much later. See *id.*, at 1028, n. 15, 112 S.Ct. 2886.

The most natural reading of the Clause is that it allows the government to take property only if the government owns, or the public has a legal right to use, the property, as opposed to taking it for any public purpose or necessity whatsoever. At the time of the founding, dictionaries primarily defined the noun "use" as "[t]he act of employing any thing to any purpose." 2 S. Johnson, A Dictionary of the English Language 2194 (4th ed. 1773) (hereinafter Johnson). The term "use," moreover, "is from the

Latin *utor*, which means 'to use, make use of, avail one's self of, employ, apply, enjoy, etc." J. Lewis, Law of Eminent Domain § 165, p. 224, n. 4 (1888) (hereinafter Lewis). When the government takes property and gives it to a private individual, and the public has no right to use the property, it strains language to say that the public is "employing" the property, regardless of the incidental benefits that might accrue to the public from the private use. The term "public use," then, means that either the government or its citizens as a whole must actually "employ" the taken property. See *id.*, at 223 (reviewing founding-era dictionaries).

Granted, another sense of the word "use" was broader in meaning, extending to "[c]onvenience" or "help," or "[q]ualities that make a thing proper for any purpose." 2 Johnson 2194. Nevertheless, read in context, the term "public use" possesses the narrower meaning. Elsewhere, the Constitution twice employs the word "use," both times in its narrower sense. Claeys, Public-Use Limitations and Natural Property Rights, 2004 Mich. St. L.Rev. 877, 897 (hereinafter Public Use Limitations). Article 1, § 10 provides that "the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States," meaning the Treasury itself will control the taxes, not use it to any beneficial end. And Article I, § 8 grants Congress power "[t]o raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years." Here again, "use" means "employed to raise and support Armies," not anything directed to achieving any military end. The same word in the Public Use Clause should be interpreted to have the same meaning.

Tellingly, the phrase "public use" contrasts with the very different phrase "general Welfare" used elsewhere in the Constitution. See *ibid.* ("Congress shall have Power To ... provide for the common Defence and general Welfare of the United States"); preamble (Constitution established "to promote the general Welfare"). ***2680** The Framers would have used some such broader term if they had meant the Public Use Clause to have a similarly sweeping scope. Other founding-era documents made the contrast between these two usages still more explicit. See Sales, Classical Republicanism and the Fifth Amendment's "Public Use" Requirement, 49 Duke L.J. 339, 368 (2000) (hereinafter Sales) (noting contrast between, on the one hand, the term "public use" used by 6 of the first 13 States and, on the other, the terms "public exigencies" employed in the Massachusetts Bill of Rights and the Northwest Ordinance, and the term "public necessity" used in the Vermont Constitution of 1786). The Constitution's text, in short, suggests that the Takings Clause authorizes the taking of property only if the public has a right to employ it, not if the public realizes any conceivable benefit from the taking.

The Constitution's common-law background reinforces this understanding. The common law provided an express method of eliminating uses of land that adversely impacted the public welfare: nuisance law. Blackstone and Kent, for instance, both carefully distinguished the law of nuisance from the power of eminent domain. Compare 1 Blackstone 135 (noting government's power to take private property with compensation) with 3 *id.*, at 216 (noting action to remedy "*public* ...nuisances, which affect the public and are an annoyance to *all* the king's subjects"); see also 2 Kent 274-276 (distinguishing the two). Blackstone rejected the idea that private property could be taken solely for purposes of any public benefit. "So great ... is the regard of the law for private property," he explained, "that it will not authorize the least violation of it; no, not even for the general good of the whole community." 1 Blackstone 135. He continued: "If a new road ... were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without the consent of the owner of the land." *Ibid.* Only "by giving [the landowner] full indemnification" could the government take property, and even then "[t]he public [was] now considered as an individual, treating with an individual for an exchange." *Ibid.* When the public took property, in other words, it took it as an

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individual buying property from another typically would: for one's own use. The Public Use Clause, in short, embodied the Framers' understanding that property is a natural, fundamental right, prohibiting the government from "tak[ing] *property* from A. and giv[ing] it to B." *Calder v. Bull*, 3 Dall. 386, 388, 1 L.Ed. 648 (1798); see also *Wilkinson v. Leland*, 2 Pet. 627, 658, 7 L.Ed. 542 (1829); *Vanhorne's Lessee v. Dorrance*, 2 Dall. 304, 311, 1 L.Ed. 391 (C.C.D.Pa.1795).

The public purpose interpretation of the Public Use Clause also unnecessarily duplicates a similar inquiry required by the Necessary and Proper Clause. The Takings Clause is a prohibition, not a grant of power: The Constitution does not expressly grant the Federal Government the power to take property for any public purpose whatsoever. Instead, the Government may take property only when necessary and proper to the exercise of an expressly enumerated power. See *Kohl v. United States*, 91 U.S. 367, 371-372, 23 L.Ed. 449 (1876) (noting Federal Government's power under the Necessary and Proper Clause to take property "needed for forts, armories, and arsenals, for navy-yards and light-houses, for custom-houses, post-offices, and court-houses, and for other public uses"). For a law to be within the Necessary and Proper Clause, as I have elsewhere explained, it must bear an "obvious, simple, and direct relation" to an exercise ***2681** of Congress' enumerated powers, *Sabri v. United States*, 541 U.S. 600, 613, 124 S.Ct. 1941, 158 L.Ed.2d 891 (2004) (THOMAS, J., concurring in judgment), and it must not "subvert basic principles of" constitutional design, *Gonzales v. Raich*, --- U.S. ----, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005) (THOMAS, J., dissenting). In other words, a taking is permissible under the Necessary and Proper Clause only if it serves a valid public purpose. Interpreting the Public Use Clause likewise to limit the government to take property only for sufficiently public purposes replicates this inquiry. If this is all the Clause means, it is, once again, surplusage. See *supra*, at 2678. The Clause is thus most naturally read to concern whether the property is used by the public or the government, not whether the purpose of the taking is legitimately public.

II

Early American eminent domain practice largely bears out this understanding of the Public Use Clause. This practice concerns state limits on eminent domain power, not the Fifth Amendment, since it was not until the late 19th century that the Federal Government began to use the power of eminent domain, and since the Takings Clause did not even arguably limit state power until after the passage of the Fourteenth Amendment. See Note, The Public Use Limitation on Eminent Domain: An Advance Requiem, 58 Yale L.J. 599, 599- 600, and nn. 3-4 (1949); *Barron ex rel. Tiernan v. Mayor of Baltimore*, 7 Pet. 243, 250-251, 8 L.Ed. 672 (1833) (holding the Takings Clause inapplicable to the States of its own force). Nevertheless, several early state constitutions at the time of the founding likewise limited the power of eminent domain to "public uses." See Sales 367-369, and n. 137 (emphasis deleted). Their practices therefore shed light on the original meaning of the same words contained in the Public Use Clause.

States employed the eminent domain power to provide quintessentially public goods, such as public roads, toll roads, ferries, canals, railroads, and public parks. Lewis §§ 166, 168-171, 175, at 227-228, 234-241, 243. Though use of the eminent domain power was sparse at the time of the founding, many States did have so-called Mill Acts, which authorized the owners of grist mills operated by water power to flood upstream lands with the payment of compensation to the upstream landowner. See, *e.g.*, *id.*, § 178, at 245-246; *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9, 16-19, and n. 2, 5 S.Ct. 441, 28 L.Ed. 889 (1885). Those early grist mills "were regulated by law and compelled to serve the public for a stipulated toll and in regular order," and therefore were actually used by the public. Lewis § 178, at 246, and n. 3; see also *Head*, *supra*, at 18-19, 5 S.Ct. 441. They were common carriers--quasi-public entities. These were "public uses" in the fullest sense of the word, because the public could legally use and benefit from them equally. See Public Use Limitations 903

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(common-carrier status traditionally afforded to "private beneficiaries of a state franchise or another form of state monopoly, or to companies that operated in conditions of natural monopoly").

To be sure, some early state legislatures tested the limits of their state-law eminent domain power. Some States enacted statutes allowing the taking of property for the purpose of building private roads. See Lewis § 167, at 230. These statutes were mixed; some required the private landowner to keep the road open to the public, and others did not. See *id.*, § 167, at 230-234. Later in the 19th century, moreover, the Mill Acts were employed to grant rights to private manufacturing plants, in addition to grist mills that had common-***2682** carrier duties. See, *e.g.*, M. Horwitz, The Transformation of American Law 1780-1860, pp. 51-52 (1977).

These early uses of the eminent domain power are often cited as evidence for the broad "public purpose" interpretation of the Public Use Clause, see *e.g.*, *ante*, at 2662, n. 8 (majority opinion); Brief for Respondents 30; Brief for American Planning Assn. et al. as *Amici Curiae* at 6-7, but in fact the constitutionality of these exercises of eminent domain power under state public use restrictions was a hotly contested question in state courts throughout the 19th and into the 20th century. Some courts construed those clauses to authorize takings for public purposes, but others adhered to the natural meaning of "public use." [FN2] As noted above, the earliest Mill Acts were applied to entities with duties to remain open to the public, and their later extension is not deeply probative of whether that subsequent practice is consistent with the original meaning of the Public Use Clause. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 370, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995) (THOMAS, J., concurring in judgment). At the time of the founding, "[b]usiness corporations were only beginning to upset the old corporate model, in which the raison d'etre of chartered associations was their service to the public," Horwitz, *supra*, at 49-50, so it was natural to those who framed the first Public Use Clauses to think of mills as inherently public entities. The disagreement among state courts, and state legislatures' attempts to circumvent public use limits on their eminent domain power, cannot obscure that the Public Use Clause is most naturally read to authorize takings for public use only if the government or the public actually uses the taken property.

FN2. Compare *ante*, at 2662, and n. 8 (majority opinion) (noting that some state courts upheld the validity of applying the Mill Acts to private purposes and arguing that the " 'use by the public' test" "eroded over time"), with, *e.g.*, *Ryerson v. Brown*, 35 Mich. 333, 338-339 (1877) (holding it "essential" to the constitutionality of a Mill Act "that the statute should require the use to be public in fact; in other words, that it should contain provisions entitling the public to accommodations"); *Gaylord v. Sanitary Dist. of Chicago*, 204 Ill. 576, 581-584, 68 N.E. 522, 524 (1903) (same); *Tyler v. Beacher*, 44 Vt. 648, 652-656 (1871) (same); *Sadler v. Langham*, 34 Ala. 311, 332-334 (1859) (striking down taking for purely private road and grist mill); *Varner v. Martin*, 21 W.Va. 534, 546-548, 556-557, 566-567 (1883) (grist mill and private road had to be open to public for them to constitute public use); *Harding v. Goodlett*, 11 Tenn. 41, 3 Yerg. 41, 53 (1832); *Jacobs v. Clearview Water Supply Co.*, 220 Pa. 388, 393-395, 69 A. 870, 872 (1908) (endorsing actual public use standard); *Minnesota Canal & Power Co. v. Koochiching Co.*, 97 Minn. 429, 449-451, 107 N.W. 405, 413 (1906) (same); *Chesapeake Stone Co. v. Moreland*, 126 Ky. 656, 663-667, 104 S.W. 762, 765 (1907) (same); Note, Public Use in Eminent Domain, 21 N.Y.U.L.Q. Rev. 285, 286, and n. 11 (1946) (calling the actual public use standard the "majority view" and citing other cases).

III

Our current Public Use Clause jurisprudence, as the Court notes, has rejected this natural reading of the Clause. *Ante*, at 2662-2663. The Court adopted its modern reading blindly, with little discussion of the Clause's history and original meaning, in two distinct lines of cases: first, in cases adopting the "public purpose" interpretation of the Clause, and second, in cases deferring to legislatures' judgments regarding what constitutes a valid public purpose. Those questionable cases converged in the boundlessly broad and deferential conception of "public use" adopted by this Court in *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954), and ***2683***Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984), cases that take center stage in the Court's opinion. See *ante*, 2663-2664. The weakness of those two lines of cases, and consequently *Berman* and *Midkiff*, fatally undermines the doctrinal foundations of the Court's decision. Today's questionable application of these cases is further proof that the "public purpose" standard is not susceptible of principled application. This Court's reliance by rote on this standard is ill advised and should be reconsidered.

A

As the Court notes, the "public purpose" interpretation of the Public Use Clause stems from *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 161-162, 17 S.Ct. 56, 41 L.Ed. 369 (1896). *Ante*, at 2663. The issue in *Bradley* was whether a condemnation for purposes of constructing an irrigation ditch was for a public use. 164 U.S., at 161, 17 S.Ct. 56. This was a public use, Justice Peckham declared for the Court, because "[t]o irrigate and thus to bring into possible cultivation these large masses of otherwise worthless lands would seem to be a public purpose and a matter of public interest, not confined to landowners, or even to any one section of the State." *Ibid.* That broad statement was dictum, for the law under review also provided that "[a]ll landowners in the district have the right to a proportionate share of the water." *Id.*, at 162, 17 S.Ct. 56. Thus, the "public" did have the right to use the irrigation ditch because all similarly situated members of the public--those who owned lands irrigated by the ditch-had a right to use it. The Court cited no authority for its dictum, and did not discuss either the Public Use Clause's original meaning or the numerous authorities that had adopted the "actual use" test (though it at least acknowledged the conflict of authority in state courts, see *id.*, at 158, 17 S.Ct. 56; *supra*, at 2682, and n. 2). Instead, the Court reasoned that "[t]he use must be regarded as a public use, or else it would seem to follow that no general scheme of irrigation can be formed or carried into effect." *Bradley, supra*, at 160-161, 17 S.Ct. 56. This is no statement of constitutional principle: Whatever the utility of irrigation districts or the merits of the Court's view that another rule would be "impractical given the diverse and always evolving needs of society," *ante*, at 2662, the Constitution does not embody those policy preferences any more than it "enact [s] Mr. Herbert Spencer's Social Statics." *Lochner v. New York*, 198 U.S. 45, 75, 25 S.Ct. 539, 49 L.Ed. 937 (1905) (Holmes, J., dissenting); but see *id.*, at 58-62, 25 S.Ct. 539 (Peckham, J., for the Court).

This Court's cases followed *Bradley's* test with little analysis. In *Clark v. Nash*, 198 U.S. 361, 25 S.Ct. 676, 49 L.Ed. 1085 (1905) (Peckham, J., for the Court), this Court relied on little more than a citation to *Bradley* in upholding another condemnation for the purpose of laying an irrigation ditch. 198 U.S., at 369-370, 25 S.Ct. 676. As in *Bradley*, use of the "public purpose" test was unnecessary to the result the Court reached. The government condemned the irrigation ditch for the purpose of ensuring access to water in which "[o]ther land owners adjoining the defendant in error ... might share," 198 U.S., at 370, 25 S.Ct. 676, and therefore *Clark* also involved a condemnation for the purpose of ensuring access to a resource to which similarly situated members of the public had a legal right of access. Likewise, in *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527, 26 S.Ct. 301, 50 L.Ed. 581 (1906), the Court upheld a condemnation establishing an aerial right-of-way for a bucket line operated by a mining company, relying on little more than *Clark*, see ***2684** *Strickley, supra*, at 531, 26 S.Ct. 301. This case,

too, could have been disposed of on the narrower ground that "the plaintiff [was] a carrier for itself and others," 200 U.S., at 531-532, 26 S.Ct. 301, and therefore that the bucket line was legally open to the public. Instead, the Court unnecessarily rested its decision on the "inadequacy of use by the general public as a universal test." *Id.*, at 531, 26 S.Ct. 301. This Court's cases quickly incorporated the public purpose standard set forth in *Clark* and *Strickley* by barren citation. See, *e.g.*, *Rindge Co. v. County of Los Angeles*, 262 U.S. 700, 707, 43 S.Ct. 689, 67 L.Ed. 1186 (1923); *Block v. Hirsh*, 256 U.S. 135, 155, 41 S.Ct. 458, 65 L.Ed. 865 (1921); *Mt. Vernon-Woodberry Cotton Duck Co. v. Alabama Interstate Power Co.*, 240 U.S. 30, 32, 36 S.Ct. 234, 60 L.Ed. 507 (1916); *O'Neill v. Leamer*, 239 U.S. 244, 253, 36 S.Ct. 54, 60 L.Ed. 249 (1915).

B

A second line of this Court's cases also deviated from the Public Use Clause's original meaning by allowing legislatures to define the scope of valid "public uses." *United States v. Gettysburg Electric R. Co.*, 160 U.S. 668, 16 S.Ct. 427, 40 L.Ed. 576 (1896), involved the question whether Congress' decision to condemn certain private land for the purpose of building battlefield memorials at Gettysburg, Pennsylvania, was for a public use. *Id.*, at 679-680, 16 S.Ct. 427. Since the Federal Government was to use the lands in question, *id.*, at 682, 16 S.Ct. 427, there is no doubt that it was a public use under any reasonable standard. Nonetheless, the Court, speaking through Justice Peckham, declared that "when the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation." *Id.*, at 680, 16 S.Ct. 427. As it had with the "public purpose" dictum in *Bradley*, *supra*, the Court quickly incorporated this dictum into its Public Use Clause cases with little discussion. See, *e.g.*, *United States ex rel. TVA v. Welch*, 327 U.S. 546, 552, 66 S.Ct. 715, 90 L.Ed. 843 (1946); *Old Dominion Land Co. v. United States*, 269 U.S. 55, 66, 46 S.Ct. 39, 70 L.Ed. 162 (1925).

There is no justification, however, for affording almost insurmountable deference legislative conclusions that a use serves a "public use." To begin with, a court owes no deference to a legislature's judgment concerning the quintessentially legal question of whether the government owns, or the public has a legal right to use, the taken property. Even under the "public purpose" interpretation, moreover, it is most implausible that the Framers intended to defer to legislatures as to what satisfies the Public Use Clause, uniquely among all the express provisions of the Bill of Rights. We would not defer to a legislature's determination of the various circumstances that establish, for example, when a search of a home would be reasonable, see, *e.g.*, *Payton v. New York*, 445 U.S. 573, 589-590, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), or when a convicted double-murderer may be shackled during a sentencing proceeding without on-the-record findings, see *Deck v. Missouri*, 544 U.S. ----, 125 S.Ct. 2007, 161 L.Ed.2d 953 (2005), or when state law creates a property interest protected by the Due Process Clause, see, *e.g.*, *Castle Rock v. Gonzales*, --- U.S. ----, 125 S.Ct. 2796, 162 L.Ed.2d 658, 2005 WL 1499788 (2005); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 576, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Goldberg v. Kelly*, 397 U.S. 254, 262-263, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970).

Still worse, it is backwards to adopt a searching standard of constitutional review for nontraditional property interests, such as welfare benefits, see, *e.g.*, *Goldberg*, *supra*, *2685 while deferring to the legislature's determination as to what constitutes a public use when it exercises the power of eminent domain, and thereby invades individuals' traditional rights in real property. The Court has elsewhere recognized "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic," *Payton*, *supra*, at 601, 100 S.Ct. 1371, when the issue is only whether the government may search a home. Yet today the Court tells us that we are not to "second-guess the City's considered judgments," *ante*, at 2668, when the issue is, instead, whether the government may take the infinitely more

intrusive step of tearing down petitioners' homes. Something has gone seriously awry with this Court's interpretation of the Constitution. Though citizens are safe from the government in their homes, the homes themselves are not. Once one accepts, as the Court at least nominally does, *ante*, at ----6, that the Public Use Clause is a limit on the eminent domain power of the Federal Government and the States, there is no justification for the almost complete deference it grants to legislatures as to what satisfies it.

C

These two misguided lines of precedent converged in *Berman v. Parker*, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954), and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984). Relying on those lines of cases, the Court in *Berman* and *Midkiff* upheld condemnations for the purposes of slum clearance and land redistribution, respectively. "Subject to specific constitutional limitations," *Berman* proclaimed, "when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation." 348 U.S., at 32, 75 S.Ct. 98. That reasoning was question begging, since the question to be decided was whether the "specific constitutional limitation" of the Public Use Clause prevented the taking of the appellant's (concededly "nonblighted") department store. *Id.*, at 31, 34, 75 S.Ct. 98. *Berman* also appeared to reason that any exercise by Congress of an enumerated power (in this case, its plenary power over the District of Columbia) was *per se* a "public use" under the Fifth Amendment. *Id.*, at 33, 75 S.Ct. 98. But the very point of the Public Use Clause is to limit that power. See *supra*, at 2679.

More fundamentally, *Berman* and *Midkiff* erred by equating the eminent domain power with the police power of States. See *Midkiff*, 467 U.S., at 240, 104 S.Ct. 2321 ("The 'public use' requirement is ... coterminous with the scope of a sovereign's police powers"); *Berman*, 348 U.S., at 32, 75 S.Ct. 98. Traditional uses of that regulatory power, such as the power to abate a nuisance, required no compensation whatsoever, see *Mugler v. Kansas*, 123 U.S. 623, 668-669, 8 S.Ct. 273, 31 L.Ed. 205 (1887), in sharp contrast to the takings power, which has always required compensation, see *supra*, at 2679, and n. 1. The question whether the State can take property using the power of eminent domain is therefore distinct from the question whether it can regulate property pursuant to the police power. See, *e.g.*, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992); *Mugler*, *supra*, at 668-669, 8 S.Ct. 273. In *Berman*, for example, if the slums at issue were truly "blighted," then state nuisance law, see, *e.g.*, *supra*, at 2680; *Lucas*, *supra*, at 1029, 112 S.Ct. 2886, not the power of eminent domain, would provide the appropriate remedy. To construe the Public Use ***2686** Clause to overlap with the States' police power conflates these two categories. [FN3]

> FN3. Some States also promoted the alienability of property by abolishing the feudal "quit rent" system, *i.e.*, long-term leases under which the proprietor reserved to himself the right to perpetual payment of rents from his tenant. See Vance, The Quest for Tenure in the United States, 33 Yale L.J. 248, 256-257, 260-263 (1923). In *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984), the Court cited those state policies favoring the alienability of land as evidence that the government's eminent domain power was similarly expansive, see *id.*, at 241-242, and n. 5, 104 S.Ct. 2321. But they were uses of the States' regulatory power, not the takings power, and therefore were irrelevant to the issue in *Midkiff*. This mismatch underscores the error of conflating a State's regulatory power with its taking power.

The "public purpose" test applied by *Berman* and *Midkiff* also cannot be applied in principled manner. "When we depart from the natural import of the term 'public use,' and substitute for the simple idea

of a public possession and occupation, that of public utility, public interest, common benefit, general advantage or convenience ... we are afloat without any certain principle to guide us." *Bloodgood v. Mohawk & Hudson R. Co.*, 18 Wend. 9, 60-61 (N.Y.1837) (opinion of Tracy, Sen.). Once one permits takings for public purposes in addition to public uses, no coherent principle limits what could constitute a valid public use-at least, none beyond Justice O'CONNOR's (entirely proper) appeal to the text of the Constitution itself. See *ante*, at 2671, 2675-2677 (dissenting opinion). I share the Court's skepticism about a public use standard that requires courts to second-guess the policy wisdom of public works projects. *Ante*, at 2666-2668. The "public purpose" standard this Court has adopted, however, demands the use of such judgment, for the Court concedes that the Public Use Clause would forbid a purely private taking. *Ante*, at 2661-2662. It is difficult to imagine how a court could find that a taking was purely private except by determining that the taking did not, in fact, rationally advance the public interest. Cf. *ante*, at 2675 (O'CONNOR, J., dissenting) (noting the complicated inquiry the Court's test requires). The Court is therefore wrong to criticize the "actual use" test as "difficult to administer." *Ante*, at 2662. It is far easier to analyze whether the government owns or the public has a legal right to use the taken property than to ask whether the taking has a "purely private purpose"--unless the Court means to eliminate public use scrutiny of takings entirely. *Ante*, at 2661-2662, 2666-2667. Obliterating a provision of the Constitution, of course, guarantees that it will not be misapplied.

For all these reasons, I would revisit our Public Use Clause cases and consider returning to the original meaning of the Public Use Clause: that the government may take property only if it actually uses or gives the public a legal right to use the property.

IV

The consequences of today's decision are not difficult to predict, and promise to be harmful. So-called "urban renewal" programs provide some compensation for the properties they take, but no compensation is possible for the subjective value of these lands to the individuals displaced and the indignity inflicted by uprooting them from their homes. Allowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor ***2687** communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful. If ever there were justification for intrusive judicial review of constitutional provisions that protect "discrete and insular minorities," *United States v. Carolene Products Co.*, 304 U.S. 144, 152, n. 4, 58 S.Ct. 778, 82 L.Ed. 1234 (1938), surely that principle would apply with great force to the powerless groups and individuals the Public Use Clause protects. The deferential standard this Court has adopted for the Public Use Clause is therefore deeply perverse. It encourages "those citizens with disproportionate influence and power in the political process, including large corporations and development firms" to victimize the weak. *Ante*, at 2676 (O'CONNOR, J., dissenting).

Those incentives have made the legacy of this Court's "public purpose" test an unhappy one. In the 1950's, no doubt emboldened in part by the expansive understanding of "public use" this Court adopted in *Berman*, cities "rushed to draw plans" for downtown development. B. Frieden & L. Sagalayn, Downtown, Inc. How America Rebuilds Cities 17 (1989). "Of all the families displaced by urban renewal from 1949 through 1963, 63 percent of those whose race was known were nonwhite, and of these families, 56 percent of nonwhites and 38 percent of whites had incomes low enough to qualify for public housing, which, however, was seldom available to them." *Id.*, at 28, 75 S.Ct. 98. Public works projects in the 1950's and 1960's destroyed predominantly minority communities in St. Paul, Minnesota, and Baltimore, Maryland. *Id.*, at 28-29, 75 S.Ct. 98. In 1981, urban planners in

125 S.Ct. 2655, 162 L.Ed.2d 439, 73 USLW 4552, 60 ERC 1769, 35 Envtl. L. Rep. 20,134, 05 Cal. Daily Op. Serv. 5466, 2005 Daily Journal D.A.R. 7475, 18 Fla. L. Weekly Fed. S 437

(Cite as: 125 S.Ct. 2655)

Detroit, Michigan, uprooted the largely "lower-income and elderly" Poletown neighborhood for the benefit of the General Motors Corporation. J. Wylie, Poletown: Community Betrayed 58 (1989). Urban renewal projects have long been associated with the displacement of blacks; "[i]n cities across the country, urban renewal came to be known as 'Negro removal.' " Pritchett, The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain, 21 Yale L. & Pol'y Rev. 1, 47 (2003). Over 97 percent of the individuals forcibly removed from their homes by the "slum-clearance" project upheld by this Court in *Berman* were black. 348 U.S., at 30, 75 S.Ct. 98. Regrettably, the predictable consequence of the Court's decision will be to exacerbate these effects.

* * *

The Court relies almost exclusively on this Court's prior cases to derive today's far-reaching, and dangerous, result. See *ante*, at 2662- 2664. But the principles this Court should employ to dispose of this case are found in the Public Use Clause itself, not in Justice Peckham's high opinion of reclamation laws, see *supra*, at 2663. When faced with a clash of constitutional principle and a line of unreasoned cases wholly divorced from the text, history, and structure of our founding document, we should not hesitate to resolve the tension in favor of the Constitution's original meaning. For the reasons I have given, and for the reasons given in Justice O'CONNOR's dissent, the conflict of principle raised by this boundless use of the eminent domain power should be resolved in petitioners' favor. I would reverse the judgment of the Connecticut Supreme Court.

125 S.Ct. 2655, 162 L.Ed.2d 439, 73 USLW 4552, 60 ERC 1769, 35 Envtl. L. Rep. 20,134, 05 Cal. Daily Op. Serv. 5466, 2005 Daily Journal D.A.R. 7475, 18 Fla. L. Weekly Fed. S 437

END OF DOCUMENT

HB

322

SENATE COMMITTEE REPORT

DATE: 5/1/06

FURTHER:

DATE TURNED
IN TO OFFICE:_____

Judiciary Committee considered CS FOR HOUSE BILL NO. 322(JUD) am

HB 322 SAFE SURRENDER OF BABIES

"An Act relating to infants who are safely surrendered by a parent shortly after birth."

and recommends:

[ ] be **replaced** with _____ **CS** _____ (_____)

[ ] adopt **previous** _____ **CS** _____ (_____)

[ ] attached amendment(s)

[ ] adopt Letter of Intent by _____ Committee

[ ] further referral to _____ Committee

CS Senate Bill:
[ ] Same Title
[ ] New Title

SCS House Bill:
[ ] Same Title
[ ] Technical Title Change
[ ] New Title w/ SCR #_____

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#

[ ] **APPROPRIATION - no fiscal note**

SIGNATURES AND RECOMMENDATIONS:	DO PASS	DO NOT PASS	NO REC	AMEND
	X			
	X			
	X			
CHAIR:	✓			

ALASKA STATE LEGISLATURE

SESSION ADDRESS
Alaska State Capitol
Juneau, AK 99801-1182
(907) 465-2487
Fax (907) 465-4956

INTERIM ADDRESS
112 Mill Bay Road
Kodiak, AK 99615
(907) 486-8872
Fax (907) 486-5264

Representative Gabrielle LeDoux

SPONSOR STATEMENT

CSHB 322, Safe Surrender of Infants Act

This is a bill that will allow parents to safely surrender an infant shortly after birth without fear of being criminally prosecuted. The parent may, without expressing an intent to return for the infant, leave the infant in the physical custody of a person who the parent reasonably believes is a peace officer, a physician or hospital employee in a hospital or hospital emergency room, or a volunteer with or employee of a fire station or emergency medical service who is performing activities within the scope of the volunteer's or employee's fire services of emergency medical services duties.

There are similar laws in 46 other states and this is a way of encouraging people to not abandon infants in a way that could lead to injury or death. A record regarding the surrender of an infant is confidential and not subject to public inspection.

Representative_Gabrielle_LeDoux@legis.state.ak.us

CS FOR HOUSE BILL NO. 322(JUD) am

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FOURTH LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Amended: 4/28/06
Offered: 4/27/06

Sponsor(s): REPRESENTATIVES LEDOUX AND GRUENBERG, Kerttula, McGuire, Dahlstrom, Neuman, Anderson, Kapsner, Thomas, Lynn, Crawford, Croft, Kott, Wilson, Seaton

15

A BILL

FOR AN ACT ENTITLED

"An Act relating to infants who are safely surrendered by a parent shortly after birth."

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

*** Section 1.** The uncodified law of the State of Alaska is amended by adding a new section to read:

SHORT TITLE. This Act may be known as the Safe Surrender of Infants Act.

*** Sec. 2.** AS 11.81 is amended by adding a new section to read:

Article 4A. Prohibition on Prosecution.

Sec. 11.81.500. No prosecution for safe surrender of infant. A parent may not be criminally prosecuted for surrendering a child of the parent if the child

(1) is an infant who is less than 21 days of age;

(2) is surrendered in the manner described in AS 47.10.013(c); and

(3) is not the subject of a court order affecting custody of the child.

*** Sec. 3.** AS 47.10.013 is amended by adding new subsections to read:

(c) A parent who is immune from prosecution under AS 11.81.500 and chooses to surrender an infant shall surrender the infant in the manner described in this

subsection. Surrendering the infant in the manner described in this subsection constitutes abandonment for purposes of this chapter. An infant's parent is considered to have abandoned the infant safely, and, notwithstanding AS 25.20.030 and AS 47.10.120, the parent's legal duty to support the infant is extinguished if

(1) the parent, without expressing an intent to return for the infant, leaves the infant in the physical custody of a person who the parent reasonably believes is a peace officer, a physician or hospital employee in a hospital or hospital emergency room, or a volunteer with or employee of a fire station or emergency medical service who is performing activities within the scope of the volunteer's or employee's fire services or emergency medical services duties; and

(2) there is no evidence the infant has been physically injured prior to abandonment.

(d) A person to whom an infant is abandoned safely within the meaning of (c) of this section shall

(1) act appropriately to care for the infant;

(2) inform the parent that the parent may, but is not required to, answer any questions regarding the name or identity of the infant or the parents of the infant unless the parent chooses to contact the department under (3) of this subsection;

(3) ask the parent if the parent wishes to relinquish the parent's parental rights and release the infant for adoption; if the answer is affirmative, the person shall contact the department so that the parent can discuss that option with the department.

(e) An individual, agency facility, or entity that receives an infant abandoned safely under (c) of this section is not liable for civil damages for failure to discharge the duties listed in (d) of this section.

(f) A record regarding the surrender of an infant under (c) of this section is confidential and not subject to public inspection or copying under AS 40.25.100 - 40.25.220.

*** Sec. 4.** AS 47.10.086(a) is amended to read:

(a) Except as provided in **(b), (c), and (g)** [(b) AND (c)] of this section, the department shall make timely, reasonable efforts to provide family support services to

the child and to the parents or guardian of the child that are designed to prevent out-of-home placement of the child or to enable the safe return of the child to the family home, when appropriate, if the child is in an out-of-home placement. The department's duty to make reasonable efforts under this subsection includes the duty to

(1) identify family support services that will assist the parent or guardian in remedying the conduct or conditions in the home that made the child a child in need of aid;

(2) actively offer the parent or guardian, and refer the parent or guardian to, the services identified under (1) of this subsection; the department shall refer the parent or guardian to community-based family support services whenever community-based services are available and desired by the parent or guardian; and

(3) document the department's actions that are taken under (1) and (2) of this subsection.

*** Sec. 5.** AS 47.10.086 is amended by adding a new subsection to read:

(g) The department is not required to make reasonable efforts of the type described in (a) of this section if the department took emergency custody of an infant under AS 47.10.142 after the infant was abandoned safely within the meaning of AS 47.10.013(c).

*** Sec. 6.** AS 47.10.990 is amended by adding a new paragraph to read:

(32) "infant" means a child who is less than 21 days of age.

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: CSHB 322(HES)
(H) Publish Date: 4/26/06
Dept. Affected: Health & Social Services

Revision Date/Time (Note if correction):

Title: INFANTS SAFELY SURRENDERED BY A PARENT SHORTLY AFTER BIRTH

RDU: Children's Services

Component: Family Preservation

Sponsor: LEDOUX

Requester: HOUSE (HES)

Component No.: 1628

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
Personal Services						
Travel						
Contractual	100.0	100.0	100.0	100.0	100.0	100.0
Supplies						
Equipment						
Land & Structures						
Grants & Claims						
Miscellaneous						
TOTAL OPERATING	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**
CAPITAL EXPENDITURES						
CHANGE IN REVENUES (0)						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF	100.0	100.0	100.0	100.0	100.0	100.0
1037 GF/Mental Health						
Other(Specify Type-do not abbreviate)						
Other(Specify Type-do not abbreviate)						
TOTAL	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**

Estimate of any current year (FY2006) cost:
Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill provides for the safe surrender of infants whereby the parent may not be criminally prosecuted for surrendering an infant in the manner described.

Drawing on other states' experience with similar laws, the OCS believes that adequate public education is key to success. If the desired effect of this bill is to stop abandonment of babies, the public needs to be made aware of their options. This fiscal note would cover estimated costs for a campaign that provides for media advertising, brochures, posters, etc., to be distributed in hospitals, clinics, doctors' offices, public assistance offices, and other public areas. Estimated costs are based on similar campaigns and promotions managed within OCS.

Prepared by: Tammy Sandoval, Deputy Commissioner — Phone 465-3191
Division: Office of Children's Services — Date/Time 04/21/2006
Approved by: Karleen Jackson, Commissioner — Date 04/24/2006
Agency: Department of Health and Social Services

(Revised 9/7/2005 OMB)

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: CSHB 322(JUD)
(H) Publish Date: 4/27/2006

Revision Date/Time (Note if correction):
Dept. Affected: HSS
Title: Infants Safety Surrendered by Parent Shortly After Birth
RDU
Component
Sponsor: LeDoux
Requester: HJUD
Component No.

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
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						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2006) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

Prepared by: Shalon Szymanski
Phone 907-465-6841
Division: House Judiciary Committee
Date/Time 04/26/06 3:45 p.m.
Approved by: Rep. Lesil McGuire, Chair
Date 4/26/2006
Agency: House Judiciary Committee

(Revised 9/7/2005 OMB)

Christine Marasigan

From: Suzanne Hancock
Sent: Monday, May 01, 2006 8:10 AM
To: Christine Marasigan
Subject: FW: House Bill 322 - Baby Safe Haven

fyi

Suzanne Hancock, Chief of Staff
Representative Gabrielle LeDoux
State Capitol
District 36
Juneau, AK 99801-1121
phone: (907) 465-2487 (office)
(907) 465-4230 (direct)
fax: (907) 465-4956

From: BabySafeHaven@aol.com [mailto:BabySafeHaven@aol.com]
Sent: Monday, May 01, 2006 2:23 AM
To: Suzanne Hancock
Subject: House Bill 322 - Baby Safe Haven

Please let Representative LeDoux know that there are many people and organizations across the country that are very grateful for her work in forwarding the Alaska Baby Safe Haven legislation.

Just to let you know, on May 2, at 11:30 am, Governor Jim Douglas (R), of Vermont, will be signing Senate Bill 27, the VT Baby Safe Haven bill, into law in a ceremony at his office at the Vermont Capitol.

This will make Vermont the 47th state to pass and enact a Baby Safe Haven law. Massachusetts was the 46th state to pass a Baby Safe Haven law, sign by Lt. Governor Kerry Healey (R), for Governor Mitt Romney (R). Lt. Governor Healey is our biggest advocate for our MA Baby Safe Haven law, and we're sure her office would be of assistance in any support you may need

Thank you again for all of your work.

Sincerely,

Jean & Mike Morrisey
Baby Safe Haven New England Foundation
15 Clelland Road
Lexington, MA 02421
(781) 74-0071

National Council For Adoption

May 1, 2006

Senator Fred Dyson
Chair, Senate Health, Education, and Social Services Committee
Alaska State Capitol, Room 121
Juneau, AK 99801

Dear Chairman Dyson:

On behalf of the National Council For Adoption (NCFA), I am writing to express our support for the safe haven policy established in Alaska HB 322, which passed the unanimously in the House on April 8, 2006 and will now be considered by the Senate Health, Education, and Social Services Committee. Thank you for your support of this legislation.

If enacted, HB 322 would protect newborns' lives and health by allowing desperate young mothers and fathers, when they are at risk of harming or abandoning their newborns, to place their babies in safe havens without fear of prosecution or loss of confidentiality. By offering safe havens to desperate parents, HB 322 provides a non-threatening alternative to newborn abandonment or infanticide, and the outcome for the children is adoption into loving, permanent families.

Since 1999, this compassionate policy has swept the nation, with 47 states enacting it. More than 600 newborns have been placed safely under these laws, and this number includes only the documented cases in 33 states. Lives are being saved!

We ask that this letter of support for HB 322 be added to the record prior to the committee's consideration. Please contact the National Council For Adoption with any additional questions about our position on infant safe haven laws. Thank you for your consideration of NCFA's comments and for Alaska's attention to this important child welfare safeguard.

Sincerely,

Thomas C. Atwood

Thomas C. Atwood
President and CEO

National Council For Adoption
225 N. Washington Street, Alexandria, VA 22314-2520
Telephone 703-299-6633, Fax 703-299-6004
www.adoptioncouncil.org

STATE OF ALASKA

DEPARTMENT OF HEALTH AND SOCIAL SERVICES

OFFICE OF CHILDREN'S SERVICES

FRANK H. MURKOWSKI, GOVERNOR

P.O. BOX 110630
JUNEAU, ALASKA 99811-0630
PHONE: (907) 465-3170

April 24, 2006

Honorable Representative Gabrielle LeDoux
Alaska State Legislature
State Capitol, Room 412
Juneau, AK 99801-1182

Dear Representative LeDoux:

Thank you for your work this legislative session on House Bill 322. Passage of this bill may prevent harm to some infants as it allows a parent to safely surrender their child without fear of criminal prosecution.

The Office of Children's Services supports HB 322 and is interested in collaborating with you on new state law that would provide an infant who may otherwise be abused or neglected with the opportunity for a stable and loving home.

Thank you for your commitment to Alaska's children and their families.

Sincerely,

Tammy Sandoval
Deputy Commissioner

Planned Parenthood of Alaska

Testimony
House Bill 322

Planned Parenthood of Alaska applauds Representatives LeDoux and Representative Gruenberg for introducing the "Safe Surrender" bill. House Bill 322 allows a parent to surrender a newborn at a designated safe place where someone can attend to the infant's needs. Any parent who relinquishes an unharmed infant under this bill will have total anonymity. Sixteen states have already passed similar laws. President Bush signed the first Safe Surrender bill into law while he was governor of Texas.

The decriminalization of infant abandonment is an important step to help young women deal with an unwanted pregnancy. Alaska's open adoption law, while securing adoptee rights, may deter women from adoption and push them toward abortion. Many of these women do not want their families to know about their pregnancy. There is no guarantee of privacy in open adoption; furthermore, adoption is a complicated and intrusive process. It requires permission from the father, questioning, paper work, etc. Safe Surrender is an offer of assistance to women who might otherwise abandon a newborn. Under existing law the police track down a woman who abandons an infant. Illegal abandonment can lead to a baby's death and the mother's prosecution.

This is a first step. Safe Surrender does not address the societal ills that lead to unintended pregnancy and the drastic acts of infanticide and abandonment. Teens need to know if they make a mistake their family and society will treat them compassionately Young people need to have honest and medically accurate sex education. We need enhanced out-reach and support for at-risk parents. Greater access to birth control, including insurance coverage of all FDA approved contraception, should be made available.

Therefore, Planned Parenthood of Alaska supports this bill.

Sincerely,

Clover Simon, MSW
Planned Parenthood of Alaska
4001 Lake Otis Pkwy
Anchorage, AK 99503
907.770.9705

ALASKA WOMEN'S LOBBY

AWL Mission: To defend and advance the rights and needs of Women, Children and Families in Alaska

P.O. Box 20891
Juneau, Alaska 99802-0891
www.akwomenslobby.org

Position Paper
HB 322, SAFE SURRENDER OF BABIES
April 2006

The Alaska Women's Lobby supports HB 322. The bill is an important safety measure to increase the likelihood that troubled parents will turn over their newborns to medical or other emergency personnel instead of leaving them in potentially dangerous situations.

Beginning in Texas in 1999, "Baby Moses laws" or infant safe haven legislation has been enacted as an incentive for mothers in crisis to safely relinquish their babies to a safe haven where the baby will be protected and provided with medical care until a permanent home can be found. Safe haven laws generally allow the parent, or an agent of the parent, to remain anonymous and to be shielded from prosecution for abandonment or neglect in exchange for safely surrendering the baby to a safe haven. According to a report of the Alan Gattmacher Institute, as of June 2005, these laws exist in 45 states. It is time for Alaska to join these other states.

Variations by state include limits on the infant's age at time of relinquishment (72 hours to 1 year) and the people and places authorized to accept the infants (e.g., Emergency Medical Services, hospitals, fire stations, and police stations). Most state policies adopt a "no questions asked" approach, but some states require that a person accepting the infant ask for a medical history. We support the one year time length this bill suggests.

One important issue to consider as the bill moves through the committee process is public education about the bill when it becomes law. In 2003, 15 states had mandated public information campaigns to increase public awareness of safe haven legislation. Several common elements of such campaigns include toll-free hotlines, pamphlets and written material, and public service messages. Funding should be provided so that once the service is available, those who are eligible to receive the infants can be trained and the public can be made aware of the service throughout the state.

Thank you for hearing this piece of legislation. Creating avenues for parents to relinquish newborns in a way that protects both the parents and the newborns should lessen the odds of finding babies abandoned in dumpsters or empty parking lots.

Legislative Research Services

Alaska State Legislature
Legislative Affairs Agency
Division of Legal and Research Services

State Capitol, Juneau, AK 99801
Phone: 907-465-3991
Fax: 907-465-3908

January 27, 2006

Memorandum

TO: Representative Gabrielle LeDoux
FROM: Becky Taylor
Legislative Analyst
RE: Safe Haven Laws In Other States
LRS Report 06.118

You asked for an overview of safe haven laws. Specifically, you were interested in which states have such laws, when these laws were enacted, where and up until what age infants can be dropped off in different states, and how these laws address the issue of parental rights.

Safe Haven laws are intended to reduce infant abandonment and abuse by providing mothers in crisis with designated locations where they can leave an infant and know that the child will be safe and cared for. Hospitals, police and fire stations, and emergency medical service agencies are often used as safe haven locations. Age limits of 72 hours or 30 days are most common, although North Dakota's safe havens will accept children up to a year old. A few states require a check of the putative father registry, and include provisions to contact the putative father, but most do not require notification of fathers who may not be aware of the child's birth.

At least forty-six states have enacted safe haven laws. According to the Child Welfare League of America, forty-one of these states passed safe haven legislation between 1999 and August 2002. Currently, Alaska, Hawaii, Nebraska, and Vermont appear to be the only states that do not have safe haven laws. Massachusetts was the most recent state to enact this type of legislation with the 2004 Safe Haven Act of Massachusetts. A number of organizations have compiled information about these laws. We have attached the following publications that address your specific questions in more detail:

- "Infant Safe Haven Laws," *State Statute Series 2004*, National Adoption Information Clearinghouse, U.S. Department of Health and Human Services, current through November 2004.
- "Update: Safe Havens for Abandoned Infants," National Conference of State Legislatures, October 21, 2003.
- Williams-Mbengue, Nina, "Safe Havens for Abandoned Infants," *NCSL State Legislative Report*, Volume 26, Number 8, National Conference of State Legislatures, September 2001.
- "Baby Abandonment Project," Child Welfare League of America, August 2002. As you will see, this document provides brief summaries of the various laws current as of 2002, including information, in many cases, specific to your questions. The on-line version of this compilation of state laws includes links to the text of each state's bill, and is available at *http://www.cwla.org/programs/pregprev/flocrittsafehaven.htm*.

I hope you find this information to be useful. Please do not hesitate to contact us if you have questions or need additional information.

National Clearinghouse on Child Abuse and Neglect Information
National Adoption Information Clearinghouse
NAIC

Gateways to Information: Protecting Children and Strengthening Families

State Statutes Series 2004

Infant Safe Haven Laws

State legislatures have felt the need to address infant abandonment and infanticide in response to a reported increase in the abandonment of infants.

Beginning in Texas in 1999, "Baby Moses laws" or infant safe haven legislation has been enacted as an incentive for mothers in crisis to safely relinquish their babies to a safe haven where the baby will be protected and provided with medical care until a permanent home can be found. Safe haven laws generally allow the parent, or an agent of the parent, to remain anonymous and to be shielded from prosecution for abandonment or neglect in exchange for safely surrendering the baby to a safe haven.

To date, approximately[1] 46[2] States have enacted safe haven legislation to provide a vehicle for the safe relinquishment of unwanted newborns.

Who May Leave a Baby at a Safe Haven

In most States with safe haven laws, a parent may surrender the baby to a safe haven. In four States (Georgia, Maryland, Minnesota, and Tennessee),[3] only the mother may relinquish the infant, while Idaho specifies that only a custodial parent may surrender the infant. Other States allow either parent of the baby, an agent of the parent (someone who has the parent's approval),[4] or another person having custody of the child[5] to take the baby to a safe haven. Five States[6] do not specify the person who may relinquish an infant.

Safe Haven Providers

Safe haven providers include hospitals, emergency medical services, police stations, and fire stations. Generally, anyone on staff at these institutions can receive an infant, and the provider is authorized to provide any care and treatment the infant may require.

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[1] The word *approximately* is used to stress the fact that the States frequently amend their laws, so this information is current only through November 2004.
[2] Alaska, Hawaii, Nebraska, Vermont, the District of Columbia, and the territories of American Samoa, Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands have not yet addressed the issue of abandoned newborns in legislation.
[3] Maryland and Minnesota do allow the mother to approve another person to deliver the infant on her benalf.
[4] In 10 States: Arizona, Arkansas, Connecticut, Iowa, Missouri, North Dakota, Rhode Island, South Carolina, Utah, and Wyoming
[5] In California and Kansas
[6] Delaware, Maine, New Jersey, New Mexico, and New York

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Administration for Children and Families
Administration on Children, Youth and Families
Children's Bureau

In many States, the provider is required to ask the parent for family and medical history information. In some States, the provider is required to attempt to give the parent or parents information about the legal effects of leaving the infant and information about referral services. In all cases, the relinquishing parent may not be compelled either to provide personal information or to accept the information offered.

The focus of these laws is protecting newborns, and in approximately 16 States,[7] infants who are 72 hours old or younger may be relinquished to a designated safe haven. Many other States accept infants up to 1 month old,[8] while North Dakota's safe havens will accept a child as old as 1 year.[9]

Immunity From Liability

Safe haven providers are given protection from liability for anything that might happen to the infant while in their care unless there is evidence of major negligence on the part of the safe haven.

Protections for the Parents

Anonymity for the parent or agent of the parent may be expressly guaranteed in statute,[10] or the statute may state that the safe haven cannot compel the parent or agent of the parent to provide identifying information.[11] Some States provide an assurance of confidentiality for any information that is provided.[12]

In addition to the guarantee of anonymity, many States limit prosecution[13] or provide that safe relinquishment of the infant is an affirmative defense[14] in any prosecution[15] of the parent or his/her agent for any crime against the child, such as abandonment, neglect, or child endangerment.

The privileges of anonymity and immunity will be forfeited in most States if there is evidence of abuse or neglect of the child.

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[7] Alabama, Arizona, California, Colorado, Florida, Illinois, Kentucky, Maryland, Michigan, Minnesota, Mississippi, Ohio, Tennessee, Utah, Washington, and Wisconsin

[8] In 14 States: Arkansas, Connecticut, Idaho, Louisiana, Maine, Missouri, Montana, Nevada, New Jersey, Oregon, Pennsylvania, Rhode Island, South Carolina, and West Virginia

[9] Other States specify varying age limits in their statutes: 5 days (New York); 7 days (Georgia, Massachusetts, New Hampshire, North Carolina, and Oklahoma); 14 days (Delaware, Iowa, Virginia, and Wyoming); 45 days (Indiana and Kansas); 60 days (South Dakota and Texas); and 90 days (New Mexico).

[10] In approximately 13 States: Arizona, Delaware, Florida, Illinois, Kentucky, Ohio, Oklahoma, Texas, Utah, Washington, West Virginia, Wisconsin, and Wyoming

[11] In 26 States: Arizona, California, Connecticut, Delaware, Idaho, Indiana, Iowa, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, West Virginia, and Wyoming.

[12] In 12 States: Connecticut, Delaware, Idaho, Iowa, Kentucky, Maine, Michigan, Montana, New Mexico, Rhode Island, South Carolina, and Tennessee

[13] In approximately 7 States (Arizona, Connecticut, Illinois, Louisiana, Nevada, Pennsylvania, and South Dakota), the statutes state that a safe relinquishment is not considered a violation of the law. In 21 States, the relinquishing parent is provided immunity from prosecution: California, Florida, Georgia, Idaho, Iowa, Kansas, Kentucky, Maryland, Minnesota, Missouri (if the child is 5 days old or younger), Montana, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, Tennessee, Wisconsin, and Washington.

[14] In a State with an affirmative defense provision, a parent or agent of the parent can be charged and prosecuted, but the act of leaving the baby safely at a safe haven can be a defense to an accusation of abandonment, abuse, neglect, or child endangerment.

[15] In 17 States: Alabama, Arkansas, Colorado, Delaware, Indiana, Maine, Michigan, Mississippi, Missouri (if the child is 6 days old or older, but less than 30 days old), New Jersey, New York, Oregon, Texas, Utah, Virginia, West Virginia, and Wyoming

Consequences of Relinquishment

In most States with safe haven laws, custody of the infant who has been relinquished will be transferred to the department that handles child protective or child welfare cases.

The department has responsibility for placing the child, usually in a pre-adoptive home, and for petitioning the court for termination of the birth parent's parental rights. Several States have procedures in place for a parent to reclaim the infant,[16] usually within a specified time period and before any petition to terminate parental rights has been granted. A few States[17] also have provisions for a nonrelinquishing father to petition for custody of the child.

This publication is a product of the State Statutes Series prepared by the National Adoption Information Clearinghouse (NAIC). While every attempt has been made to be as complete as possible, additional information on these topics may be in other sections of a State's code as well as agency regulations, case law, and informal practices and procedures.

Electronic copies of this publication may be downloaded from the Clearinghouse website at http://naic.acf.hhs.gov/general/legal/statutes/safehaven.cfm.

- To find statute information for a particular State, go to http://naic.acf.hhs.gov/general/legal/statutes/search and select the specific State and topic.
- To find information on all of the States and territories, view the complete PDF at http://naic.acf.hhs.gov/general/legal/statutes/safehavenall.pdf or call the Clearinghouse at (888) 251-0075 or (703) 352-3488 to order a copy.

[16] Approximately 16 States have provisions for the relinquishing parent to petition to reclaim the child: California, Connecticut, Delaware, Florida, Idaho, Illinois, Iowa, Kentucky, Louisiana, Michigan, Missouri, Montana, New Mexico, Rhode Island, Tennessee, and Wyoming.
[17] In approximately 4 States: Louisiana, South Dakota, Tennessee, and Utah.

UPDATE: SAFE HAVENS FOR ABANDONED INFANTS
October 21, 2003

Forty-five states now have some type of safe haven legislation. (The following states do not have safe haven legislation: AK, HI (Vetoed 7/2/03), MA, NE and VT.) Most of the laws designate hospitals, emergency medical services, fire stations and police stations as safe locations. One exception is New York, which stipulates that the baby may be left with a suitable person or may be left in a suitable location so long as an appropriate person is promptly notified. Immunity is granted generally to employees who are required to accept and care for relinquished infants. About half of the states will not prosecute parents who relinquish unharmed infants. The remainder allows an affirmative defense to prosecution. State laws vary on the age of infants who may be relinquished. The ages range from 72 hours old or younger up to 5 days old or younger. The most common ages found in the statues are 72 hours and 30 days.

How Effective are the Laws?

The laws continue to have a limited effect. A number of states have begun to report on infants abandoned after the passage of the safe haven legislation. As of September 2001, approximately 33 babies had been legally relinquished including five each in Texas, Michigan and Alabama, six in New Jersey, four in California, two in Connecticut, Minnesota and Ohio and one each in Kansas and South Carolina. The numbers are approximate because officials in several states reported that they are not officially tracking the numbers of infants or that they had unofficial media counts of infants. Officials in New York, West Virginia and Florida reported that they were not sure that any infants had been relinquished because their laws do not require reporting or tracking that information. As of September 2002, state agency officials in California report that they have had 20 infants abandoned through the law since their legislation went into effect. New Jersey reported 10 safe haven infants, a 63% reduction in infant abandonment, since the passage of their law in 2000 (compared to 8 abandonments prior to the passage of the law). Illinois reported 2 safe haven abandonments since their law was enacted in 2001.

Unlawful abandonment continues to be a problem. As of September 2001, Texas reported at least 12 infants had been abandoned illegally since the passage of its law, but the abandonments occurred before the start of a public awareness campaign. None have been abandoned outside safe havens since this publicity. Louisiana reported that five infants had been abandoned illegally since passage of it[illegible]. Three babies died, and the parents were prosecuted. At least five babies were illegally abandoned in California; two more of th[illegible]ere found dead. In Connecticut, one baby was discarded near a highway. Three babies had been abandoned illegally in Colorado. In one case, the mother attempted to regain custody. Michigan reported nine attempts including one in which a judge ruled that the case was not a safe haven surrender because the parents had not been given enough information on their legal rights. As of September 2002, California reported 21 illegal abandonments and 17 infants abandoned found deceased. Illinois reported four infants illegally abandoned and found deceased. Illinois averaged 25 illegal abandonments over the previous four-year period.

Areas of Concerns for Policymakers

Child welfare experts, state agency officials and state lawmakers continue to examine a number of critical issues related to infant safe haven legislation:

Need for Examination of Statewide Services for Women at Risk

Many child welfare experts state that, although safe haven legislation may be a good idea, it needs to be part of a larger effort to examine services for women who are at risk of abandoning their infants. Experts from the fields of child welfare, mental health, youth services, the medical establishment and teen pregnancy will want to work with young parents to examine the existing system of services. Such an examination might provide some answers about why this population of parents is unable -or unwilling- to use these services.

Lack of a Comprehensive Strategy for the Prevention of Infant Abandonment

Critics are concerned that states are not viewing safe haven programs as an integral part of child abuse prevention. Has infant abandonment been considered in the state's child abuse prevention efforts? Does the strategy target young women at risk of abandonment? These are just a few questions policymakers may want to ask as they work with public health, child protection, child abuse prevention, mental health, families and others to develop a comprehensive strategy to prevent infant abandonment.

Anonymity and Termination of Parental Rights

Child welfare experts are apprehensive that the anonymity provided to parents in the safe haven laws conflicts with biological parents' due process rights in termination of parental rights proceedings. As previously mentioned, states have attempted to address this critical issue by providing some type of notice or search for the biological parents of the abandoned infant in an effort to include them in judicial proceedings related to the adoption of the infant. States will want to carefully examine their termination of parental rights statutes to avoid conflicts with safe haven laws.

Relationship to Existing Child Welfare Statutes

Likewise, states may want to examine all their existing statutes related to adoption, paternity, custody and all judicial proceedings associated with child abandonment. It also is important that states clarify their definitions of infant abandonment. For example, several states with new laws exempt safe haven abandonment from the statutory definition of abandonment, child abuse or child neglect. Other states add safe haven abandonment to their existing definition of abandonment.

Father's Rights

Most states require a check of the putative father registry and include provisions to contact the putative father, but most do not contain provisions to address notification of fathers who may not be aware of the child's birth. Critics contend that denying notification unfairly presumes that these fathers do not want to care for their children. Utah's legislation addresses this concern by requiring a search of the confidential registry for unmarried biological parents and requiring that notice be sent to each potential father identified in the registry. The termination of parental rights hearing must be scheduled as soon as possible if no one has identified himself as the father (or if the mother has not identified herself) within two weeks after notice is complete. If a non-relinquishing parent is not identified, the surrender of the newborn shall be considered grounds for termination of parental rights of both parents.

Adoption

Adoption advocates are particularly concerned about the lack of medical and family history. They note that a lack of information about their backgrounds is often troublesome for adopted children and worry about the stability of the child and his or her adopted family later in life. They fear that the lack could be a setback to the trend in adoption policy to provide the adoptee with information about the birth family. Adoption and other child welfare experts also point out that the legislation may not be necessary because most states will not prosecute women who give birth and relinquish their newborns in the hospital. Additionally, every state allows women to voluntarily relinquish their infants for adoption.

Parental Irresponsibility

Many policymakers are concerned that these laws may only encourage parental irresponsibility. Since so little is known about the women who abandon their babies, there is no proof that the legislation will discourage mothers from leaving their infants in unsafe places. For women who might otherwise seek help from family, friends and social service agencies, the enactment of safe haven laws might encourage them to anonymously abandon their newborns rather than take advantage of their traditional network of support.

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	A	B	C	D	E	F
1	**STATE**	**Days to surrender**	**Who can surrender**	**Focus of Law**	**Anonymity for parent or agent of parent may be expressly guaranteed in statute**	**Statute states that the safe haven cannot compel parent or agent of parent to provide identifying info**
2	Alabama	3 days		Protecting newborns		
3	Arizona	3 days	a parent or a parents agent	Protecting newborns	Yes	Yes
4	Arkansas	30 days	a parent or a parents agent			
5	California	3 days	a parent or a parents agent or another person having custody of the child	Protecting newborns		Yes
6	Colorado	3 days		Protecting newborns		
7	Connecticut	30 days	a parent or a parents agent			Yes
8	Delaware	14 days	not specified		Yes	Yes
9	Florida	3 days		Protecting newborns	Yes	
10	Georgia	Less than 1 week	Mother only			
11	Idaho	30 days	Custodial parent			Yes
12	Illinois	3 days		Protecting newborns	Yes	
13	Indiana	45 days				Yes
14	Iowa	14 days	a parent or a parents agent			Yes
15	Kansas	45 days	a parent or a parents agent or another person having custody of the child			

	A	B	C	D	E	F
16	Kentucky	14 days		Protecting newborns	Yes	
17	Louisiana	30 days				Yes
18	Maine	31 days	not specified			Yes
19	Massachusetts	Less than 1 week				Yes
20	Maryland	Less than 3 days	Mother only/or another person approved by the mother to deliver infant on her behalf	Protecting newborns		
21	Michigan	3 days		Protecting newborns		Yes
22	Minnesota	3 days	Mother only/or another person approved by the mother to deliver infant on her behalf	Protecting newborns		Yes
23	Mississippi			Protecting newborns		
24	Missouri	Less than 30 days	a parent or a parents agent			
25	Montana	30 days				Yes
26	Nevada	30 days				Yes
27	New Hampshire					Yes
28	New Jersey	30 days	not specified			Yes
29	New Mexico	90 days	not specified			Yes
30	New York	5 days	not specified			
31	North Carolina	7 days				Yes
32	North Dakota	1 year	a parent or a parents agent			Yes
33	Ohio	3 days		Protecting newborns	Yes	
34	Oklahoma	7 days			Yes	Yes
35	Oregon	30 days				Yes

	A	B	C	D	E	F
36	Pennsylvania					
37	Rhode Island	30 days	a parent or a parents agent			
38	South Carolina	30 days	a parent or a parents agent			Yes
39	South Dakota	60 days				Yes
40	Tennessee	3 days	Mother only	Protecting newborns		Yes
41	Texas	60 days			Yes	
42	Utah	3 days	a parent or a parents agent	Protecting newborns	Yes	
43	Washington	3 days		Protecting newborns	Yes	
44	West Virginia	30 days			Yes	Yes
45	Wisconsin	3 days		Protecting newborns	Yes	
46	Wyoming		a parent or a parents agent		Yes	Yes

From: infoweb@newsbank.com
Sent: Wednesday, October 19, 2005 1:28 PM

Subject: Requested NewsBank Article

Paper: Anchorage Daily News (AK)
Title: INFANT FOUND AT UAA
Author: TRACY BARBOURDaily News reporterStaff
Date: June 13, 1995
Section: Metro
Page: B1

A newborn boy abandoned on the sidewalk in front of a University of Alaska Anchorage building Monday morning was in serious condition by the end of the day.A campus employee found ''Baby Doe'' about 7

a.m. at the University Lake Building, which houses support services, said Nancy Killoran, a university spokeswoman.

Baby Doe, who appears to be white and a couple days old, was left wrapped in a blanket and with a shoestring tied around his umbilical chord, she said.

The university employee called campus security, who alerted the Anchorage Police Department.

Police found the newborn suffering from hypothermia. Otherwise, he appeared to be fine, Anchorage police Sgt. Gary Apperson said.

But by 7 p.m Monday, Baby Doe was listed in serious condition at Providence hospital, a hospital spokeswoman said. She refused to say what the child was suffering from.

Police said they have no idea who deserted the baby and that there was no note or other clues to the identity of the boy's parents.

Whoever abandoned the child faces charges of child abandonment and neglect, police said.

Author: TRACY BARBOURDaily News reporterStaff
Section: Metro
Page: B1

From: infoweb@newsbank.com
Sent: Wednesday, October 19, 2005 1:59 PM

Subject: Requested NewsBank Article

Paper: Anchorage Daily News (AK)
Title: NEWBORN GIRL FOUND IN BATHROOM STALL AT HOSPITAL
Author: PETER S. GOODMANDaily News reporterStaff
Date: December 1, 1994
Section: Nation
Page: A1

A newborn girl was found wrapped in a blanket in a bathroom stall at Alaska Regional Hospital on Wednesday morning.A hospital employee found the infant when she went into the first-floor women's restroom to get a cup of water about 7:30 a.m., police said. A note of explanation was found nearby, but investigators would not reveal what it said. Several people later told investigators they had heard the baby crying as they passed by the bathroom. Hospital staff rushed the newborn to the emergency room, said Mary Hofbauer, a nursing supervisor. Doctors pronounced her in satisfactory shape.

State child welfare authorities took formal custody of the child, who remained at the hospital late Wednesday.

Police spent much of the day trying to locate the baby's mother. Detective Terry Games said witnesses spotted a white woman with long brown hair near where the baby was found. She was described as being in her mid-to-late teens, 5-feet-6 to 5-feet-7-inches tall and wearing a long brown coat. Police "strongly believe" she is the baby's mother, Games said.

Hofbauer said the infant is a "pretty little baby" who appeared to be about 12 hours old at the time she was found. She had apparently been born full term. Police said she weighed nearly 7 pounds and measured about 19 inches long.

The state will likely place the baby in a foster home after doctors clear her to be released from the hospital, said Faye Moore, regional administrator at the Division of Youth and Family Services in Anchorage. What happens after that is uncertain.

Moore wouldn't discuss the particulars of the case, but she predicted there is less than an even chance the mother will be found. If the mother never enters the picture, the state would likely try to get court approval to put the baby up for adoption, she said.

Bob Newell, an intake officer with the youth services agency, said it would be several months before the baby can be adopted because the state is obligated to give the mother a chance to come forward and claim her child.

If the mother does turn up and shows an interest in taking the baby, the state would assess whether she's fit to be a parent, Moore said. She "would have the burden of demonstrating to us (she) can take care of the child."

According to Newell, the state typically does whatever it takes to help mothers become suitable parents. They may undergo drug or alcohol counseling, welfare assistance or job placement, Newell said.

According to Joyce Johnson at the Child Welfare League of America in Washington, D.C., women who abandon babies tend to be young, poor and isolated. They don't know how to cope with being pregnant and they lack the sophistication to get help, she said.

"Maybe they haven't located the father or they haven't told their family that they're pregnant," Johnson said. "It's a trauma. They're not thinking coherently. And there's fear. How are they going to take care of the child? Maybe they don't have any money."

Johnson said there are places for such women to go: social service organizations that counsel women on their options, provide shelter and find them medical care.

Elaine Stoneburner, the adoption coordinator at Catholic Social Services in Anchorage, has a list of two dozen couples waiting to adopt babies. They are likely to wait anywhere from 10 months to three and a half years for a child, she said. For those would-be parents, news of a newborn being left in a bathroom stings, she said.

Johnson said that abandoned children are usually left in public places where the mothers hope they'll be found and cared for. But not always. On New Year's Eve, police found a newborn girl outside a used-clothing store in Peters Creek. She was rushed to Providence Hospital and treated for hypothermia. She was eventually adopted.

If the mother of the hospital baby is found, she could face criminal charges for abandoning her child, police said. Assistant District Attorney Steve Branchflower said the mother's intentions would be weighed in any decision to prosecute.

"Is the baby in a Dumpster or in a hospital?" Branchflower asked. "That says something about a person's intent."

Joan Teel, a private adoption consultant and former state social worker, said that's an important detail.

"There should be no judgment passed," she said. "Let's applaud (the mother) for putting the baby somewhere safe and warm."

Author: PETER S. GOODMANDaily News reporterStaff
Section: Nation
Page: A1

From: infoweb@newsbank.com
Sent: Wednesday, October 19, 2005 2:00 PM

Subject: Requested NewsBank Article

Paper: Anchorage Daily News (AK)
Title: ABANDONED BABY GETS A NEW YEAR'S EVE CHANCE DAY-OLD GIRL LEFT OUTSIDE
Author: S.J. KOMARN[illegible]SKYDaily News reporterStaff
Date: January 1, 19[illegible]
Section: Nation
Page: A1

It was a shocking discovery: a baby girl wrapped only in a blanket outside a used clothing store in Peters Creek in the freezing cold, her umbilical cord still attached and tied off with a piece of twine. The pudgy newborn would have faced a night outdoors in freezing temperatures if not for a woman's anonymous call to police and a quick search by two nurses from a nearby senior center.Instead, she was rushed to Providence Hospital, where she was listed in serious condition with hypothermia late New Year's Eve. A police investigator estimated she was about a day old.

Officers first heard about the baby just before 3 p.m. when a woman called from a pay phone at the Peters Creek Trading Post with an anonymous tip. The woman said there was a cold baby in a container at The Garret, a used-clothing store about a mile from the convenience store. The woman didn't make herself clear and hung up before dispatchers could get her name or ask her any questions.

But they made out enough to know there might be a baby somewhere around the clothing store. Dispatchers were still deciphering the message when they called the Chugiak Senior Center, where Sharon Cloud, 44, and Charlene Beckwith, 50, work as nurse's assistants. The center is just downhill from the store.

Beckwith said they were told a child had bee. dropped off in a container and were asked to take a look around.

So, she and Cloud started working their way up the hill toward the store, looking in Dumpsters along the way. Nothing. Then they started searching around the store, which was closed. Still nothing.

In the meantime, Officer Robert Dutton headed to The Garret to check things out. Dispatchers still weren't sure exactly what the woman had told them and sent Dutton without lights or sirens, he said. But another officer, hearing there might be a baby involved, told Dutton to speed up.

It was just after Dutton arrived that Cloud found the girl.

Beckwith said she and Cloud had already made one search around the building when Dutton showed up. They were about to go back, thinking it was a prank call. That's when Cloud started looking through a pile of donated clothes in plastic bags left on a walkway not in a container in front of the store and found the girl under a lampshade.

"I had just been going through the clothes and I had just seen a doll," Cloud said. "I thought it was another doll. But then she moved."

Dutton told the two women to get the baby into his car, where it was warm. He later said the temperature outside was about 21 degrees.

Beckwith said the girl never cried and it was hard to tell if she was suffering from hypothermia.

[illegible]e had that newborn baby look, kind of bluish-purple," she said.

But, once the two women got in the patrol car, Beckwith could see that the girl's toes and

fingers were "really blue." The baby acted like one of her feet was numb, Beckwith said.

Dutton drove Beckwith back to the senior center and headed for Providence Hospital with Cloud cradling the child in her arms in the back seat.

Arriving at Providence just before 4 p.m., the girl was rushed to an intensive care unit and immediately put under heat lamps.

Beckwith said she's glad they found the baby in time. The clothing store was closed for the day.

"She probably would not have made it through the night," she said.

Temperatures in Anchorage were forecast to be about 20 degrees Friday night.

So far, there are few clues to the mother's identity.

Dianne Hagerty, who works at the Trading Post, said nobody noticed a woman making a call from the store's pay phone around 3 p.m. The phone is around the corner, and the store gets a lot of traffic, she said.

"Usually you don't pay attention to who is on the phone anyway," she said.

Beckwith said a woman was dropping off clothes at The Garret when she and Cloud first came up the hill. But the woman looked to be in her 50s and she said she had just arrived, Beckwith said.

The woman was putting her donation right next to where the baby was. She said she never heard a peep, Beckwith said.

Police investigators are asking for the public's help in locating a woman who was in late pregnancy and now isn't, and who doesn't have a baby to show for it.

Lt. Bill Gaither said the woman could face a number of charges for abandoning the girl, including child abuse, child neglect, reckless endangerment and endangering the welfare of a minor.

That is if the child survives, he said. If she dies, the mother could face murder charges, he said.

Beckwith said that there's already a waiting list of staffers at the center and even one elderly resident who say they'd be happy to adopt the baby.

"She's a very cute little female, kind of pudgy infant," Beckwith said.

Beckwith said the image that stayed in her mind was what Cloud told her later, that, on the ride to the hospital, the girl clung to her finger the whole time.

"We couldn't believe anyone would do such an atrocity," Beckwith said. "It was just such a pathetic thing to see. The fact that she was so naked and outside was kind of devastating."

Author: S.J. KOMARNITSKYDaily News reporterStaff
Section: Nation
Page: A1

From: infoweb@newsbank.com
Sent: Wednesday, October 19, 2005 1:27 PM
Subject: Requested NewsBank Article

Paper: Anchorage Daily News (AK)
Title: INFANT FOUND IN BIN
Author: DON HUNTERDaily News reporterStaff
Date: September 6, 1986
Section: Metro
Page: 1

A newborn baby boy abandoned in a box in a Muldoon alley Thursday night was in good condition Friday at Humana Hospital.The infant was wrapped in a towel and hidden in a cardboard box left on the ground beside a Salvation Army collection bin. He was found by two teen-age boys who heard him crying as they rode by on their bicycles.

"It was crying, real loud," 15-year-old Christian Chain said. Chain was interviewed Friday while walking his dog, Duke, in the neighorhood.

"The box was closed," he said. "There was no lid, but the sides were folded up on top of the baby. We opened it up and, you know, there was a baby . . .

"It was wrapped in a towel, a tan towel," he said.

"It was real young, not that old at all."

Only minutes before Chain and Lamont Williams, 14, found the baby, an anonymous caller told an Anchorage Police dispatcher a baby had been left at the bin.

By the time officers arrived, the boys had picked up the box, climbed back on their bikes, and taken the baby to the Chain home, where they called police.

The boys discovered the baby shortly after 9 p.m., according to police. Officers took him to Humana Hospital about 9:30 p.m. Police Spokesman Joe Young said the infant was "a few hours old, at most."

Salvation Army dispatcher Alice Phillips said donations left at the bin are picked up about 11 a.m. every day. The bin is directly behind a Salvation Army thrift shop at 101 Muldoon Road.

Lynn Whitley, a hospital spokeswoman, said the baby weighed seven pounds, one ounce and was in satisfactory condition in the Humana nursery late Friday afternoon. He was stable, with vital signs within normal limits, she said.

The infant is now in the custody of the state division of family and youth services. Dolly Coke, a social worker supervisor, said in cases where the state assumes custody of children, they are placed in a foster home until a permanent placement is arranged.

Authorities have named the baby John Doe.

Storekeepers and residents of a trailer park across the street from the thrift shop said they had seen no unusual activity Thursday night. But a delivery man for a sandwich shop directly across Muldoon Road said he saw a young couple acting a little strangely.

"I was fixing to go out and make some deliveries, and I was sitting in my car adjusting packages and something caught my eye just across the street at the Goodwill box," said Chuck Argo.

"There was a couple in a late model, foreign pickup, sort of rummaging around in the boxes there. I thought it was unusual to see people with a truck like that looking in the bin . . .

"Then they had a bundle, looked like a bundle of clothes, and just kind of laid it over there in the boxes and took off. I didn't think anything of it until I got back (from making deliveries) and my supervisor said" police had been there.

"It didn't dawn on me it could have been a child," he said.

Young, the police spokesman, said another person called police late Thursday night after seeing reports of the abandonment on television. The caller said he had seen "a very pregnant woman in the area of the bin an hour or two before," Young said.

"That's not very much to go on," he said.

Coke, the social worker, said state law prevents her from discussing Baby Doe's specific case. She did describe procedures used in similar cases, however.

"It's very rare" for a newborn infant to be abandoned, she said. "I've been here five years, and I don't know of another infant I can remember who was abandoned . . .

"Whenever a child is abandoned you can usually assume the mother was under a great deal of stress, and may have assumed she could not provide for the child," she said.

"In these cases, it's my experience the parent will eventually surface," Coke said. "Sometimes, someone who has been pregnant suddenly isn't, and there's no baby, and someone who knows her will call. Or sometimes they have a second thought and the parent will come forth."

If the parent or parents do appear, social workers will counsel them and try to decide the best solution for the child, Coke said.

Author: DON HUNTERDaily News reporterStaff
Section: Metro
Page: 1

ALASKA STATE LEGISLATURE

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Representative Gabrielle LeDoux

MEMO

TO: REPRESENTATIVE GABRIELLE LEDOUX

FROM: CHRISTINE R. MARASIGAN

SUBJECT: SUMMARY OF CHANGES TO HB 322

DATE: 5/3/2006

There were several changes to HB 322, the Safe Surrender of Infants Act. The biggest changes were in consultation with the Office of Children's Services and Department of Law. These changes are listed in chronological order as follows:

Upon consultation with several agencies, a committee substitute was requested with the following changes:

Page 1, Sec. 2, line 10 and Page 3, Sec. 6, line 19	an infant who is less than three days of age replaced [less than 12 months of age]
Page 2, Sec. 3, line 2	extinguished after 28 days if replaced [extinguished, if]
Page 2, Sec. 3(d) (3) lines 16-17	under (4) was replaced with [under (3)] (3) was deleted.

Rationale: The most significant change in SSHB 322 is three days and 28 days. In the original bill, agencies commented that 12 months was too long and that there was a potential for abuse and neglect. "28 days" was inserted as a time compromise between those interested in three days and other interested in one month. (3) was deleted because it was unnecessary and would encumber medical or firefighting volunteers. In (4) the parent would be directed towards counseling and appraised of laws related to relinquishing parental rights.

The **House Health, Education and Social Services Committee** adopted the CS and made the following amendments to 24-LS1110\F resulting in version 24-LS 110\Y.

Page 1, Sec. 2, line 10 and Page 3, Sec. 6, line 19	eight days replaced [three days]

Page 2, Sec. 3, line 3 [after 28 days] was deleted

Rationale: Three days was felt to be too short a time period. Extending a parent's legal duty for support for 28 days once surrender has occurred is unnecessary.

The **House Judiciary Committee** made the following amendments to 24-LS1110\Y resulting in version 24-LS1110\L:

Page 1, Sec. 2, line 10 and Page 3, Sec. 6, line 19 — 21 days of age replaced [eight days]

Rationale: Eight days was felt to be too short a time period.

There were two amendments to CSHB 322 during the **House Floor Session**.

Page 2, lines 9-10 — (2) there is no evidence the infant has been physically injured prior to abandonment replaced [(2) there is no evidence at the time of abandonment that the infant has been physically injured.]

Page 1, line 9, following "parent" — (1) is an infant who is less than 21 days of age; (2) is surrendered in the manner described in AS 47.10.013(c); and (3) is not the subject of a court order affecting custody of the child replaced [in the manner described in AS 47.10.013(c) if the child is an infant who is less than 21 days of age]

Page 1, line 12 — who is immune from prosecution under AS 11.81.500 and chooses to surrender an infant shall surrender the [may not be criminally prosecuted for surrendering an]

Page 1, line 13: — Surrendering [although surrendering]

Page 2, lines 21 - 22: — An individual, agency, facility, or entity that receives an infant abandoned safely under (c) of this section is replaces [A hospital, hospital emergency room, fire station, emergency medical service, or employees or volunteers of these entities, are]

Rationale: The first amendment ensures that if there are pre-existing injuries to the infant that become apparent after abandonment, the parent surrendering the infant would be held accountable for the injury. The second amendment was an omnibus amendment offered by the sponsors and crafted upon consultation with the Department of Law and the Office of Children's Services. There are three parts. 1) there needed to be some assurance that the parent surrendering the infant wasn't someone with a court order against them as might be the case in a domestic violence case. 2) this merely cleaned up some language and made the text consistent. 3) this section made the language concerning where and who an infant could be surrendered to consistent with the rest of the bill.

Senate Judiciary considered CSHB 322 version 24-LS1110/L.A. There were no amendments and the bill was passed out of committee to **Senate Rules**.

HB

326

SENATE COMMITTEE REPORT

DATE: 2/23/06

FURTHER: Finance

DATE TURNED
IN TO OFFICE:_____

Judiciary Committee considered CS FOR HOUSE BILL NO. 326(JUD) am

HB 326 POSTING LEWD MATERIAL AS HARASSMENT

"An Act relating to the definition of the crime of harassment."

and recommends:

[ ] be **replaced** with _____ **CS** _____ (_____)

[ ] adopt **previous** _____ **CS** _____ (_____)

[ ] attached amendment(s)

[ ] adopt Letter of Intent by _____ Committee

[ ] further referral to _____ Committee

CS Senate Bill:
[ ] Same Title
[ ] New Title

SCS House Bill:
[ ] Same Title
[ ] Technical Title Change
[ ] New Title w/ SCR #_____

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#

[ ] **APPROPRIATION - no fiscal note**

SIGNATURES AND RECOMMENDATIONS:	DO PASS	DO NOT PASS	NO REC	AMEND
	X			
	X			
	X			
	X			
CHAIR:	✓			

REPRESENTATIVE KEVIN MEYER

HOUSE DISTRICT 30

SPONSOR STATEMENT

HB 326

"An Act relating to harassment."

The rapid evolution of technology often outpaces a statute's ability to protect Alaskans from offensive and criminal behavior. The invention and widespread adoption of digital cameras in all sorts of products ranging from pens to cellular phones has opened new avenues for those bent on harassing others to cause anguish, hurt and humiliation.

House Bill 326 An Act relating to harassment builds on my previous effort in the 23rd Legislature to cover harassment through e-mail and other electronic means. With camera phones and hidden digital cameras, individuals can take lewd and obscene pictures of others and post them electronically.

When this is done as part of a pattern of threats and intimidation it should be considered harassment. HB 326 changes the current statute to include the publishing or posting of lewd or obscene pictures in the definition of harassment.

Email: Representative_Kevin_Meyer@legis.state.ak.us • Toll Free: (866) 465-4945
Session: State Capitol, Juneau, Alaska 99801-1182 • Phone: (907 465-4945 Fax: (907) 465-3476
Interim: 716 W. 4th Ave., Anchorage, Alaska 99501-2133 • Phone: (907) 269-0199 Fax: (907) 269-0197

January 9, 2006

ALASKA STATE LEGISLATURE
House Finance Committee

Sponsor:	Representative Meyer
Current Version:	CS HB 326 (JUD) am 24-LS1223\Y.A
Contact:	Mike Pawlowski 465-2812
Date:	January 30, 2006

Committee Substitute Comparison Sheet for House Bill 326

Short Title:

"Posting lewd material as harassment."

Summary:

- CSHB 326 includes the posting, publishing or distribution of lewd and obscene pictures in the definition of harassment.

House Floor Activity:

Two amendments were added on the House Floor.

Changes:

1.) Deleted "posts" since it is covered under publishes or distributes.
2.) Deleted "depictions" since the definition was unclear and conflicting.

CS FOR HOUSE BILL NO. 326(JUD) am

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FOURTH LEGISLATURE - SECOND SESSION

BY THE HOUSE JUDICIARY COMMITTEE

Amended: 2/22/06
Offered: 1/30/06

Sponsor(s): REPRESENTATIVES MEYER AND LYNN, McGuire, Holm, Dahlstrom, Gatto

A BILL

FOR AN ACT ENTITLED

"An Act relating to the definition of the crime of harassment."

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

*** Section 1.** AS 11.61.120(a) is amended to read:

(a) A person commits the crime of harassment if, with intent to harass or annoy another person, that person

(1) insults, taunts, or challenges another person in a manner likely to provoke an immediate violent response;

(2) telephones another and fails to terminate the connection with intent to impair the ability of that person to place or receive telephone calls;

(3) makes repeated telephone calls at extremely inconvenient hours;

(4) makes an anonymous or obscene telephone call, an obscene electronic communication, or a telephone call or electronic communication that threatens physical injury or sexual contact; [OR]

(5) subjects another person to offensive physical contact; **or**

(6) publishes or distributes electronic or printed photographs,

pictures, or ..lms that show the genita!s, anus, or female breast of the other person or show that person engaged in a sexual act.

activity?

#1 immediate effective

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: 1
Bill Version: CSHB 326(JUD)
(H) Publish Date: 1/30/06

Revision Date/Time (Note if correction):
Dept. Affected:

Title: Posting Lewd Material as Harassment
RDU: Alaska Court System
Component: Trial Courts

Sponsor: Representative Meyer
Requester:
Component No.:

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
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						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2006) cost: 0.0

Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

The court system does not anticipate any fiscal impact from the passage of HB 326.

Prepared by: Doug Wooliver, Administrative Attorney
Phone 463-4750
Division: Alaska Court System
Date/Time 1/13/06 @ 11:00 AM

Approved by: Doug Wooliver for Stephanie Cole, Adminstrative Director
Date 1/13/2006
Agency: Alaska Court System

(Revised 9/7/2005 OMB)

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: 2
Bill Version: CSHB 326(JUD)
(H) Publish Date: 1/30/06

Revision Date/Time (Note if correction):
Dept. Affected: LAW

Title "An Act relating to harassment."
RDU CRIMINAL
Component Criminal Justice Litigation

Sponsor Representatives Meyer and Lynn
Requester House Judciary
Component No.

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
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						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2006) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2007 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

This bill amends AS 11.61.120 (Criminal Law - Offenses Against Public Order) by adding a new way to commit the crime of harassment - by, with intent to harass or annoy another person, publishing or distributing a photo of another person's genitals, etc. or the person engaged in a sex act. Harassment is a class B misdemeanor. Passage of this legislation will not have a fiscal impact on the Department of Law.

Prepared by: Kathryn Daughhetee, Director
Phone 465-3673
Division Administrative Services Division
Date/Time 1/26/06 12:31 PM

Approved by: Kathryn Daughhetee for David Márquez, Attorney General
Date 1/26/2006
Agency Department of Law

(Revised 9/7/2005, OMB)

FISCAL NOTE

STATE OF ALASKA
2006 LEGISLATIVE SESSION

Fiscal Note Number: 3
Bill Version: CSHB 326(JUD)
(H) Publish Date: 1/30/06

Revision Date/Time (Note if correction):
Dept. Affected: Public Safety
Title: An Act relating to harassment.
RDU: Alaska State Troopers
Component: AST Detachments
Sponsor: Representative Meyer
Requester: House Judiciary Committee
Component No.: 2325

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

OPERATING EXPENDITURES	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2012
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						
CHANGE IN REVENUES ( )						

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1037 GF/Mental Health						
Other (Specify Type--Do not abbreviate)						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY2006) cost: 0.0
Mark this box (X) if funding for this bill is included in the Governor's FY 2006 budget proposal:

POSITIONS

Full-time						
Part-time						
Temporary						

ANALYSIS: *(Attach a separate page if necessary)*

Passage of this legislation will have no fiscal impact on the Department of Public Safety. Even though there is a potential increase in the number of arrests for violations, the increase can be absorbed by the current assets of the department.

Prepared by: Lieutenant James Helgoe
Phone 907-269-4532
Division: Alaska State Troopers
Date/Time 1/17/06 10:19 AM
Approved by: Commissioner William Tandeske
Date 1/17/2006
Agency: Department of Public Safety

(Revised 9/23/2004 OMB)

ALASKA STATE LEGISLATURE
House Finance Committee

Sponsor:	Representative Meyer
Current Version:	CS HB 326 (JUD) 24-LS1223\F
Contact:	Mike Pawlowski 465-2812
Date:	January 30, 2006

Committee Substitute Comparison Sheet for House Bill 326

Short Title:

"Posting lewd material as harassment."

Summary:

- CSHB 326 includes the posting, publishing or distribution of lewd and obscene pictures in the definition of harassment.

House Judiciary Committee Activity:

House Judiciary originally adopted three amendments to HB 326. After input from Legislative Legal and the Department of Law, the committee rescinded their action and moved a new CS from committee with the following changes.

Changes:

1.) Inserted "the definition of the crime of" following "relating to" on page 1 line 1 to tighten the title.

24-LS1223\F
Luckhaupt
1/26/06

CS FOR HOUSE BILL NO. 326( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWENTY-FOURTH LEGISLATURE - SECOND SESSION

BY

Offered:
Referred:

Sponsor(s): REPRESENTATIVES MEYER AND LYNN, McGuire

A BILL

FOR AN ACT ENTITLED

"An Act relating to the definition of the crime of harassment."

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

*** Section 1.** AS 11.61.120(a) is amended to read:

(a) A person commits the crime of harassment if, with intent to harass or annoy another person, that person

(1) insults, taunts, or challenges another person in a manner likely to provoke an immediate violent response;

(2) telephones another and fails to terminate the connection with intent to impair the ability of that person to place or receive telephone calls;

(3) makes repeated telephone calls at extremely inconvenient hours;

(4) makes an anonymous or obscene telephone call, an obscene electronic communication, or a telephone call or electronic communication that threatens physical injury or sexual contact; [OR]

(5) subjects another person to offensive physical contact; **or**

(6) publishes, posts, or distributes electronic or printed

photographs, pictures, depictions, or films that show the genitals, anus, or female breast of the other person or show that person engaged in a sexual act.

REPRESENTATIVE KEVIN MEYER

HOUSE DISTRICT 30

MEMORANDUM

DATE: **January 9, 2006**

TO: **Representative Kevin Meyer**

FROM: **Mike Pawlowski**

RE: **Sectional Analysis for HB 326**
(Version No. 24 – LS1223\F)

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

Section 1. Adds the publishing, posting or distribution of lewd pictures of another person to the definition of harassment.

Email: Representative_Kevin_Meyer@legis.state.ak.us • Toll Free: (866) 465-4945
Session: State Capitol, Juneau, Alaska 99801-1182 • Phone: (907) 465-4945 Fax: (907) 465-3476
Interim: 716 W. 4th Ave., Anchorage, Alaska 99501-2133 • Phone: (907) 269-0199 Fax: (907) 269-0197

REPRESENTATIVE KEVIN MEYER

HOUSE DISTRICT 30

MEMORANDUM

January 26, 2006

TO: Representative Lesil McGuire, Chair
House Judiciary Committee

CC: Representative Tom Anderson, Vice-Chair
Representative John Coghill
Representative Pete Kott
Representative Peggy Wilson
Representative Les Gara
Representative Max Gruenberg

FR: Representative Kevin Meyer K. Meyer

RE: HB 326 *Posting Lewd Material as Harassment*

Madam Chair,

Thank you for your consideration of HB 326 *Posting Lewd Material as Harassment* on January 18th in the House Judiciary Committee. During debate, the committee adopted two conceptual amendments that both Legislative Legal services and the Department of Law have described as problematic. The amendments attempted to limit existing statute AS 11.61.120(a)(4) and the bill's proposed addition AS 11.61.120(a)(6) by including the phrase "sole purpose" as a clarification of the intent required in AS 11.61.120(a). The language was proposed conceptually based upon the decision notes for AS 11.61.120 that referenced *Mckillop v. State*. I have attached both the memo from Legislative Legal services and a copy of the Appellate Court opinion in *Mckillop v. State* to this memo.

The opinion of Legislative Legal and the Department of Law is that the effect of the amendments would make prosecuting a person under AS 11.61.120(a) (4) or the proposed (6) next to impossible. Requiring that the State prove the "sole purpose" of a person is to harass or annoy ignores the other potential purposes a person might perform conduct targeted by the current and amended statute. As legislative legal stated: "*If the defendant had any other motivation for the act, including perhaps sexual gratification, monetary requirement, etc., then it would not meet the statutory requirement and the defendant could not be convicted.*"

In light of this the amendment to AS 11.61.120 (a)(4) [current statute] would make it next to impossible to prosecute what the Department of Law asserts is the greater potential problem: i.e. the anonymous or obscene phone calls. Further, a thorough reading of the Appellate Court's opinion in *Mckillop v State* undermines the justification for the amendments.

Email: Representative_Kevin_Meyer@legis.state.ak.us • Toll Free: (866) 465-4945
Session: State Capitol, Juneau, Alaska 99801-1182 • Phone: (907) 465-4945 Fax: (907) 465-3476
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The Appellate Court found that AS 11.61.120 (a)(4) was "*neither vague nor overbroad*" and that "*so limited, the statute is a constitutional exercise of legislative authority to regulate conduct involving speech.*" The limitation cited by the Appellate Court was based on a combination of previous opinions and the logic of the statute. In *Jones v. Anchorage*, 754 P.2d 275 (Alaska App. 1988) the court upheld a similar municipal ordinance:

> "The ordinance challenged in this case...is readily distinguishable from provisions found to be invalid on grounds of vagueness. Cases have condemned statutes as unduly vague when those statutes prohibited conduct or speech resulting in annoyance to others, without ... specifying "upon whose sensitivity a violation does depend - the sensitivity of the judge or jury, the sensitivity of the arresting officer, or the sensitivity of a hypothetical reasonable [person]."
>
> "In contrast, the ordinance challenged here does not purport to hinge the unlawfulness of speech or conduct on the standardless, subjective reactions of unspecified third persons. To the contrary... [and] significantly, ... the lawfulness or unlawfulness of the act turns ... on the specific intent of the accused."

The Court did, however; further limit the interpretation of AS 11.61.120(a)(4) in a similar manner to the Court's interpretation of the municipal ordinance cited in *Jones v. Anchorage*:

> "We conclude that AS 11.61.120 (a)(4) must be interpreted to prohibit telephone calls only when the call has no legitimate communicative purpose – when the caller's speech is devoid of any substantial information and the caller's sole intention is to annoy or harass the recipient."

Since the change proposed by HB 326 is limited to pictures that "*show the genitals, anus, or female breast of the other person or show that person engaged in a sexual act,*" HB 326 prohibits conduct rather than speech; that is, it prohibits the publication or distribution of photographs rather than conduct involving some speech such as that in AS 11.61.120(a)(4), which involves mixed speech and conduct. The conduct prohibited is narrow enough to pass constitutional muster under the standards discussed in McKillop. Additionally, since the Court found 11.61.120 (a) "neither vague nor overbroad" I assert that the clarifying language offered in the conceptual amendments is unnecessary; particularly if it impedes the prosecution of the offenses I am attempting to address.

I ask the committee to reconsider their action on conceptual amendments 2 and 3 and withdraw the amendments to HB 326. Thank you for considering this matter.

K. Meyer

Representative Kevin Meyer

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

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

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM January 19, 2006

SUBJECT: Harassment (Work Order No. 24-LS1223\G)

TO: Representative Lesil McGuire
Attn: Shalon Szymanski

FROM: Gerald P. Luckhaupt
Legislative Counsel

Enclosed is the final CS(JUD) you requested.

1. I am unsure of both the meaning and effect of Amendments 1 and 2 reflected in changes to AS 11.61.120(a)(4) and (6). The effect of the amendments when combined with the specific intent seems to be that the state is required to prove that the defendant's sole and only reason for performing these acts was to harass or annoy another. If the defendant had any other motivation for the act, including perhaps sexual gratification, monetary profit, etc., then it would not meet the statutory requirement and the defendant could not be convicted.

Note that we have reworded amendments 2 and 3 somewhat in incorporating them into the bill, since they were designated as conceptual. The wording of amendment 1 was also slightly awkward, but because it was not a conceptual amendment, it has been incorporated as written.

GPL:ljw
06-020.ljw

Enclosure

Mckillop v. State (8/6/93) ap-1307

NOTICE: This opinion is subject to formal correction before publication in the Pacific Reporter. Readers are requested to bring typographical or other formal errors to the attention of the Clerk of the Appellate Courts, 303 K Street, Anchorage, Alaska 99501, in order that corrections may be made prior to permanent publication.

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JON B. MCKILLOP, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-4072 Trial Court No. 3AN-91-197 Cr O P I N I O N [No. 1307 - August 6, 1993]

Appeal from the District Court, Third Judicial District, Anchorage, Martha Beckwith and William H. Fuld, Judges.

Appearances: David R. Weber, Assistant Public Defender, and John B. Salemi, Public Defender, Anchorage, for Appellant. Ethan A. Berkowitz, Assistant District Attorney,

Edward E. McNally, District Attorney, Anchorage, and Charles E. Cole, Attorney General, Juneau, for Appellee.

Before: Bryner, Chief Judge, and Coats and Mannheimer, Judges.

MANNHEIMER, Judge.

A jury found Jon B. McKillop guilty of harassment, AS 11.61.120(a)(4), for making anonymous telephone calls to the Anchorage Abused Women's Aid in Crisis (AWAIC) shelter. McKillop appeals his conviction, asserting that his conviction rests on illegally seized evidence, that the trial judge misinstructed the jury on the meaning of "anonymous", and that the harassment statute is unconstitutional. We hold that the statute is constitutional if construed to require proof that the defendant's sole intent was to annoy or harass the recipient of the telephone call, but we reverse McKillop's conviction because the instructions his trial jury received did not convey the limiting construction we adopt today.

Between 10:00 and 10:30 p.m. on January 8, 1991, the counselors working the AWAIC shelter crisis hotline received approximately six telephone calls from the same male caller. The caller told the female counselors that "there's no such thing as so-called abused women", that "I've been abused by a cunt all my life", that he'd lived with a "cunt" for four years, and that women "ought to go to Baghdad and kill some niggers".

The caller did not give his name. However, at one point he stated, "I'm Elvis Presley", and at another point he told a counselor, "By the way, I'm at 277-0088, Room 225 if you want free coke." The caller also told a counselor that "Elvis was king", not Martin Luther King, Jr., who was dead.

The counselors told the male caller to stop calling the

shelter, and they hung up on him, but he kept calling. The counselors became concerned that the caller might be preventing others from using the crisis hotline; they also heard what sounded like slapping noises in the background, causing them to fear that someone was being abused. For these reasons, the counselors called the police.

Anchorage Police Officer Dan Seely and another officer went to the Budget Motel in Anchorage, after learning from police dispatch that this address corresponded to the telephone number recited by the caller. The two officers arrived at the motel at 11:12 p.m. and proceeded to Room 225. In response to the officers' knock, McKillop opened the door to the room. He was naked and apparently intoxicated.

Seely asked McKillop why he had been calling the AWAIC shelter. McKillop at first denied that he had made the calls, until Seely explained that the caller had disclosed his telephone number and room number. McKillop then admitted that he had made the calls. When Seely again asked why McKillop had made the calls, McKillop answered, "Because Elvis Presley is king, and Martin Luther King is dead." Seely recognized this statement as the same one the anonymous caller had made to the AWAIC shelter counselor. At this point, Seely left to obtain a warrant for McKillop's arrest on a charge of harassment; the other officer stayed until the warrant could be obtained and served.

McKillop asked the district court to suppress his "Elvis is king" statement to Officer Seely. McKillop argued that this statement had been obtained as a result of a warrantless seizure, and he also argued that Seely had been obliged to provide McKillop with Miranda warnings before he questioned him. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694

(1966).

At the evidentiary hearing on this issue, Seely testified that, when he and his fellow officer went to McKillop's hotel room, McKillop had stepped out into the hallway wearing no clothing. Other people in the motel hallway appeared to be offended by McKillop's nakedness, so Seely suggested that McKillop step back into his room. McKillop went along with this suggestion. Seely followed McKillop over the threshold, stepping into the doorway and thus partially into the room, to continue their conversation. Seely testified that McKillop did not specifically ask Seely to leave, but he did ask whether Seely had a search warrant or arrest warrant or any other authority to be there.

District Court Judge William H. Fuld declined to suppress the "Elvis" statement. Judge Fuld concluded that Seely and the officer had been merely investigating a crime and had not placed McKillop in custody during the "fairly brief contact" that began when Seely asked the naked McKillop to go back inside the room and continued while Seely was standing in the threshold of McKillop's room.

The test for whether a person is in "custody" for Miranda purposes is generally framed as whether a reasonable person would have felt free to break off questioning and ask the police to leave. Hunter v. State, 590 P.2d 888, 895 (Alaska 1979); Edwards v. State, 842 P.2d 1281, 1284 (Alaska App. 1992). However, the fact that a defendant lacks immediate freedom to leave is not, by itself, determinative. A police-citizen encounter can constitute a "seizure" for Fourth Amendment purposes and yet not be "custody" for Miranda purposes. For example, the police are not required to give Miranda warnings

during an investigative stop or detention of limited duration even when "considerable force" was used in making the stop. Tagala v. State, 812 P.2d 604, 608 (Alaska App. 1991).1

Here, the police knocked on McKillop's door and asked if he had been making calls to the women's shelter. They made no show of weapons, they did not engage in any search, and their questioning of McKillop was not extensive. Because McKillop was both drunk and naked, it was reasonable for the police to suggest that their conversation be held in some place other than a public hallway.

We recognize that McKillop repeatedly questioned the officers' authority to be there. However, Seely testified that McKillop never actually asked the police to leave, and no one testified that McKillop made a move to close the door or otherwise demonstrated that he wished an immediate end to the conversation. Under these facts, Judge Fuld was not clearly erroneous in finding that McKillop was not in Miranda custody when he made his "Elvis" statement to the officers.

McKillop's next argument concerns the jury instructions at his trial. McKillop was tried for harassment under AS 11.61. 120(a)(4), which reads:

> A person commits the crime of harassment if, with intent to harass or annoy another person, that person
>
> . . .
>
> (4) makes an anonymous or obscene telephone call or a telephone call that threatens physical injury[.]

The State alleged that McKillop had violated this statute because his telephone calls to the AWAIC shelter had been "anonymous".

McKillop asked District Court Judge Martha Beckwith to instruct the jury that a telephone call was "anonymous" only if the caller failed to provide information from which his identity

could reasonably be ascertained. McKillop pointed out that he had given the telephone number of his motel and his motel room number to the AWAIC counselors; he argued that his disclosure of this information meant that his calls had not been anonymous.

Judge Beckwith decided, after referring to a dictionary, that "anonymous" meant "nameless" or "lack[ing identification"; she told the parties that she intended to instruct the jury accordingly. At this point, McKillop's attorney asked the judge to refrain from giving the jury any definition of "anonymous" and let the parties argue their own views of how that term should be defined for purposes of the harassment statute. Judge Beckwith acceded to this request.2 On appeal, however, McKillop renews his primary argument: that his telephone calls to the AWAIC shelter were not anonymous because he disclosed the motel's telephone number and his room number.

The criminal code does not explicitly define the term "anonymous", nor does the commentary to AS 11.61.120 address the meaning of this term. We therefore use the word's common meaning, as disclosed in the dictionary, as our primary aid in determining the legislature's intent. Michael v. State, 767 P.2d 193, 197 (Alaska App. 1988), rev'd on other grounds, 805 P.2d 371 (Alaska 1991).

Webster's New World Dictionary of American English (3rd College Ed. 1988), p. 56, gives two pertinent definitions of "anonymous": (1) "with no name known or acknowledged" and (2) "given, written, etc. by a person whose name is withheld or unknown". Under these definitions, McKillop's telephone calls to the women's shelter were anonymous. Courts in other states have applied these or similar dictionary definitions of "anonymous" when construing similar statutes prohibiting anonymous telephone

calls. See State v. Diede, 319 N.W.2d 818, 821-22 (S.D. 1982) (holding that a defendant who failed to identify himself was guilty of making "anonymous" telephone calls even though the recipients of the calls had had sufficient experience with the defendant to identify his voice); see also Caldwell v. State, 337 A.2d 476, 486 (Md. App. 1975).3

McKillop's proposed definition of "anonymous" would have required the jury to determine, not only that McKillop had failed to disclose his identity, but also that his identity could not have been discovered through inquiry or investigation. McKillop's proposal thus varied significantly from the commonly understood definition of the word. McKillop's brief does not explain or provide authority for his claim that the Alaska legislature intended the word "anonymous" to be construed in the non-standard way he suggests. We conclude that Judge Beckwith did not abuse her discretion when she refused to give McKillop's proposed definitions to the jury.

McKillop's final argument on appeal is that AS 11.61.120(a)(4) is unconstitutionally broad - that it attaches criminal penalties to protected speech.

McKillop argues that a person's wish to remain anonymous cannot, of itself, be punished. He points out that anonymous political speech (advocacy of social causes and attacks on government figures and policies) holds an honored place in our political tradition. See Talley v. California, 362 U.S. 60, 64-65; 80 S.Ct. 536, 538-39; 4 L.Ed.2d 559 (1960). For example, the Federalist Papers authored by Madison, Hamilton, and Jay were published under pseudonyms. Talley, 362 U.S. at 65; 80 S.Ct. at 539. McKillop also argues that a person cannot be punished for engaging in speech that annoys others. He notes that effective

political speech will often cause annoyance, anger, or alarm in unsympathetic listeners. McKillop also points out that a speaker will often not know whether his or her listeners will find the speech annoying.

Here, however, the statute is not aimed at "pure speech" or the content of speech _ the communication of ideas or opinions. Rather, the statute is directed at conduct: the caller's act of intruding upon someone else's privacy. AS 11.61.120(a)(4) prohibits a person from making anonymous telephone calls for the purpose of annoying or harassing another. The court in People v. Smith, 392 N.Y.S.2d 968, 970 (N.Y. App. 1977), cert. denied, 434 U.S. 920, characterized the issue well when it declared that such a statute prohibits "a form of trespass". Accord, State v. Gattis, 730 P.2d 497, 502 (N.M. App. 1986); State v. Elder, 382 So.2d 687, 690-691 (Fla. 1980).4

The conduct prohibited by AS 11.61.120(a)(4) may often involve speech, but it need not. A person could violate the statute by calling another person, listening in silence when that person answered the phone, and then hanging up. Compare Gormley v. Director, Connecticut Dept. of Probation, 632 F.2d 938, 942 (2nd Cir 1980), cert. denied, 449 U.S. 1023; State v. Gattis, 730 P.2d at 502.

The fact that AS 11.61.120(a)(4) prohibits conduct that may involve speech does not invalidate the statute on freedom of speech grounds. A caller may use words as the method of harassing the recipient of the call; this means only that AS 11.61.120(a)(4) deals with an aspect of conduct mixed with speech.

> [Making a course of conduct illegal] has never been deemed an abridgement of freedom of speech or press ... merely because the

> conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.

Cox v. Louisiana, 379 U.S. 559, 563; 85 S.Ct. 476, 480; 13 L.Ed.2d 487 (1965). See State v. Elder, 362 So.2d at 690-691. When a statute is aimed at conduct that involves speech, the governing First Amendment test is stated in Broadrick v. Oklahoma, 413 U.S. 601, 615; 93 S.Ct. 2908, 2918; 37 L.Ed.2d 830 (1973):

> [When] conduct and not merely speech is involved, ... the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.

Thus, we must decide whether McKillop has shown that any possible infringement of the right of free speech wrought by AS 11.61. 120(a)(4) is "real" and "substantial" when compared to the scop of the statute's legitimate regulation of conduct.

The statute does not punish speech simply because it is anonymous. While "the anonymity of the caller is ... itself a circumstance raising discomfort and fear in the receiver of the call", State v. Elder, 382 So.2d at 691, quoting United States v. Darsey, 342 F.Supp. 311, 313 (E.D. Pa. 1972), nevertheless the statute requires proof of an additional element: that the caller's purpose was to annoy or harass the other person. Nor does AS 11.61.120(a)(4) suffer from the defect of punishing speech simply because it may have the effect of annoying the listener. As the court noted in Constantino v. State, 255 S.E.2d 710, 713 (Ga. 1979), cert. denied, 444 U.S. 940,

> [T]he victim's subjective ideas on what is or is not harassing are not in issue. The point is that the defendant telephones intending to harass, and he certainly knows if he is doing that.

This court used the same reasoning in Jones v.

Anchorage, 754 P.2d 275 (Alaska App. 1988), to uphold a municipal ordinance making it illegal "for any person to anonymously or repeatedly telephone another person for the purpose of annoying, molesting, ... abusing ..., or harassing that person or his family." 754 P.2d at 278.5 This court declared:

> The ordinance challenged in this case ... is readily distinguishable from provisions found to be invalid on grounds of vagueness. Cases have condemned statutes as unduly vague when those statutes prohibited conduct or speech resulting in annoyance to others, without ... specifying "upon whose sensitivity a violation does depend - the sensitivity of the judge or jury, the sensitivity of the arresting officer, or the sensitivity of a hypothetical reasonable [person]."
>
> In contrast, the ordinance challenged here does not purport to hinge the unlawfulness of speech or conduct on the standardless, subjective reactions of unspecified third persons. To the contrary ... [and] significantly, ... the lawfulness or unlawfulness of the act turns ... on the specific intent of the accused

Jones, 754 P.2d at 278, quoting Coates v. City of Cincinnati, 402 U.S. 611, 613; 91 S.Ct. 1686, 1688; 29 L.Ed.2d 214 (1971).6

McKillop nevertheless argues that political speakers often intend to "annoy" their listeners; political speech is frequently intended to make people uncomfortable and force them to re-examine their actions or convictions. McKillop therefore concludes that the specific intent element does not save AS 11.61.120(a)(4) from overbreadth.

We agree that a person engaging in advocacy or criticism may legitimately intend to annoy or disturb his or her listeners. Nevertheless, "the right of every person to be le[f]t alone must be [weighed] in the scales [against] the right of others to communicate." Rowan v. United States Post Office Dept., 397 U.S. 728, 736; 90 S.Ct. 1484, 1490; 25 L.Ed.2d 736

(1970) (upholding a federal statute that requires the Post Office, upon request of an addressee, to order businesses to remove the addressee's name from their mailing lists for "pandering advertisements").7

Under the general definition of "intentionally" contained in AS 11.81.900(a)(1), a defendant's intent to cause a prohibited result (here, annoyance or harassment) "need not be the person's only objective". Thus, when AS 11.61.120(a)(4) is read in conjunction with AS 11.81.900(a)(1), the statute is theoretically broad enough to punish political speech or other legitimate communication upon proof that one of the speaker's subsidiary motives was to annoy the listener. Because the scope of the statute is potentially so broad, we conclude that AS 11.61.120(a)(4) must be interpreted to prohibit telephone calls only when the call has no legitimate communicative purpose - when the caller's speech is devoid of any substantive information and the caller's sole intention is to annoy or harass the recipient.

This court gave a similar limiting construction to the municipal ordinance in Jones v. Anchorage, 754 P.2d at 279. This limiting construction is consistent with AS 11.81.900(a)(1), because the legislature has declared that the general definition of "intentionally" is to be applied "unless the context requires otherwise". Here, the First Amendment requires a different, narrower definition.8

Applying this limiting construction to AS 11.61.120 (a)(4), we hold that the statute is neither vague nor overbroad. So limited, the statute is a constitutional exercise of legislative authority to regulate conduct involving speech. Having reached this legal conclusion (that is, having given a new, limiting construction to the harassment statute), we must

now examine the record of McKillop's trial to see if he might have been convicted of harassment for engaging in protected speech.

McKillop's main defense at trial was that his telephone calls to the AWAIC shelter had not truly been anonymous. However, McKillop's attorney also asked the jury to consider whether McKillop's real intention had been to harass or annoy, or whether, instead, McKillop had been drunkenly attempting to communicate personal grievances, albeit through intemperate, reprehensible language:

> DEFENSE ATTORNEY: [E]vidence that the defendant was intoxicated may be ... relevant to negate an element of the offense that requires that [he] intentionally caused a result. In this case, the State has to show that he intentionally called to harass or annoy another person. And, for that, you can take into consideration whether or not he was intoxicated. ... You should take that into consideration in deciding whether or not the State's proved beyond a reasonable doubt that, at the time he made these calls, [he] intended really to harass or annoy, or if he was just calling these people, venting ... the feelings that he had, apparently, at that moment, in his [state] of intoxication, that he so heartfelt [sic] wanted to share. Even though they were obnoxious, clearly.

Thus, McKillop asked the jury to consider whether the State had proved the intent element of the crime.

As we have discussed above, this element of the statute must be construed to require proof that McKillop's sole intent was to harass or annoy. If McKillop truly intended to engage in communicative speech when he made the calls to the AWAIC shelter, then even if he also intended to harass or annoy, he should not have been convicted. However, the district court's jury instruc tion on this point tracked the language of AS 11.81.900(a)(1): "A person may act intentionally with respect to causing a particular result even though causing that result was not the person's only

objective." This instruction was erroneous; it told the jury to convict McKillop even if they believed that, in addition to trying to annoy or harass the women at the AWAIC shelter, McKillop had also tried to engage in legitimate communication with them.

From our description of the evidence at McKillop's trial, it might well seem that his telephone calls to the AWAIC shelter lie at the core of the statutory prohibition - anonymous telephone calls intended only to abridge the privacy interests the statute was designed to uphold, without any claim to legitimate communication of ideas or information. However, this was an issue of fact for the jury to decide. The court's instructions on the elements of the offense in effect told the jurors to ignore this crucial issue.

Because the error in the jury instructions lies in the court's definition of the elements of the offense, we must reverse McKillop's conviction and return his case to the district court for a new trial unless we are convinced that the error was harmless beyond a reasonable doubt. St. John v. State, 715 P.2d 1205, 1209-1211 (Alaska App. 1986). Despite the strength of the State's case, we believe there is a reasonable possibility that the jury's verdict would have been different if the jurors had been correctly instructed on the elements of the offense. For this reason, we REVERSE McKillop's harassment conviction and remand his case to the district court for a new trial.

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1 Compare Moss v. State, 823 P.2d 671, 674-75 (Alaska App. 1991), where this court, although declaring that the issue was "close", concluded that a defendant had been in custody (even though the police had told him that he was not formally under arrest) when the police entered the defendant's residence at gunpoint, questioned him extensively, spent two and one-half hours searching the residence, and "deprived [the defendant] of his freedom of action in a significant way".

2 McKillop's attorney argued to the jury (unsuccessfully) that McKillop's phone calls to the shelter had not been anonymous because, by divulging his telephone number and room number (although not the name of his motel), McKillop had invited discovery of his identity.

3 We note that 47 U.S.C. 223(a)(1)(B), the federal counterpart to AS 11.61.120(a)(4), prohibits a person from "mak[ing] a telephone call, whether or not conversation ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number." This federal formulation appears to embody the same concept manifested in the dictionary definition of "anonymous".

4 This aspect of the statute (that it prohibits telephone calls that are intended to be annoying or harassing to the recipient) distinguishes McKillop's case from two of the authorities he cites, Figari v. New York Telephone Co., 303 N.Y.S.2d 245 (N.Y. App. 1969), and Huntley v. Public Utilities Comm'n, 442 P.2d 685 (Cal. 1968).

Figari and Huntley involved telephone company attempts to regulate an anti-communist group which produced pre-recorded messages that people could listen to by calling an advertised telephone number. The telephone companies tried to force the anti-communist group to identify itself on the taped messages, but the New York and California courts struck down the telephone regulations as violative of the group's freedom of speech. McKillop argues that Figari and Huntley stand for the proposition that the government can never force people to identify themselves. However, there is an obvious distinction between, on the one hand, a person or group that offers people the opportunity to call and hear a recorded message (if they wish) and, on the other hand, a person who makes unsolicited calls to other people for the purpose of annoying or harassing them.

5 The defendant in Jones made at least 38 abusive telephone calls to her ex-boyfriend and his new girlfriend; in many of these calls, she identified herself. 754 P.2d at 276-77. Thus, the anonymity provision of the ordinance was not at issue; rather, the question presented in Jones was the constitutionality of the section of the ordinance prohibiting a person from "repeatedly telephon[ing] another".

6 Courts are in virtually unanimous agreement that the requirement of specific intent (that is, requiring the government to prove that the caller's subjective purpose in making the call was to annoy or harass) saves statutes such as AS 11.61.120(a)(4) from vagueness problems. See State v. Elder, 382 So.2d at 691-92, in which the court upheld the constitutionality of a statute forbidding a person from "mak[ing] a telephone call ... without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number".

Indeed, most decisions in this area deal with statutes that simply forbid telephone calls made for the purpose of annoyance or harassment, without the additional element that the caller fail to identify himself. Such statutes are virtually always upheld against vagueness attacks because they include the element

of specific intent. Jones v. Anchorage cites several of these decisions. 754 P.2d at 278-79. Other cases reaching the same conclusion are: United States v. Lampley, 573 F.2d 783, 787 (3rd Cir. 1978); Donley v. City of Mountain Brook, 429 So.2d 603, 606-613 (Ala. Cr. App. 1982), rev'd on other grounds, 429 So.2d 618 (Ala. 1983); State v. Hagen, 558 P.2d 750, 753 (Ariz. App. 1976); People v. Weeks, 591 P.2d 91, 94 & n.1 (Colo. 1979); Kinney v. State, 404 N.E.2d 49, 50-51 (Ind. App. 1980); Caldwell v. State, 337 A.2d 476, 481-82 (Md. App 1975); State v. Gattis, 730 P.2d 497, 502-03 (N.M. App. 1986); and People v. Smith, 392 N.Y.S.2d 968, 970-71 (N.Y. App. 1977), cert. denied, 434 U.S. 920 (1977).

7 We also note that what begins as protected speech may ultimately violate the harassment statute. See, for example, People v. Smith, 392 N.Y.S.2d 968, in which a citizen repeatedly called the police department to make a complaint. The police informed him several times that the matter was civil and that he was tying up police phone lines; he nevertheless continued to call the police 27 times in the following 3« hours. The court held that "the impropriety was not in the complaint made by the defendant but in its repetition." Id. at 971. That is, the caller's actions provided a basis for a fact-finder to conclude that the caller had previously accomplished any legitimate communication and his sole intent had become to annoy or harass.

8 This same limitation is sometimes explicitly written into other states' statutes. See Donley v. City of Mountain Brook, 429 So.2d at 605 ("with intent to harass or alarm [and] with no purpose of legitimate communication"), and Kinney v. State, 404 N.E.2d 49, 50 (Ind. App. 1980) ("with intent to harass, annoy, or alarm another person, but with no intent of legitimate communi cation"). More often, a telephone harassment statute is silent on this point, and the limitation is inferred by courts. State v. Gattis, 730 P.2d at 503; State v. Elder, 382 P.2d at 691; United States v. Lampley, 573 F.2d at 787 (Congress has a "compel ling interest in the protection of innocent individuals from fear, abuse, or annoyance at the hands of persons who employ the telephone, not to communicate, but for other unjustifiable motives."). But compare Gormley v. Director, Connecticut Dept. of Probation, 632 F.2d at 942-43 & n.5 (suggesting that a harassment statute that requires proof of specific intent has so little potential for abridging protected speech that it requires no additional limiting gloss).

Durango Herald

Local man guilty of 26 felonies

Former Fort Lewis College student cited for criminal libel

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January 27, 2006

By Shane Benjamin / *Herald Staff Writer*

After seven days of trial and seven hours of jury deliberations, jurors found Davis Temple Stephenson guilty Thursday of 26 felonies, including criminal libel.

Stephenson

Stephenson, clean-cut in a conservative sports coat and tie, remained stone-faced as the jury foreman announced "guilty" 26 times. He remained silent throughout.

A deputy handcuffed him and escorted him to the La Plata County Jail.

Stephenson's defense attorney, Rae Dreves of Durango, said her client plans to appeal.

Meanwhile, Stephenson, 38, faces up to 1½ years for some felonies and up to three years for others. It added together, he faces up to 52½ years, but some penalties will be served concurrently, reducing the sentence. He also faces up to 10½ years for violating bail.

Sentencing for both cases is set for 1:30 p.m. March 2 in District Court.

Over the course of three years, while a student at Fort Lewis College, Stephenson brought fear to seven victims, jurors learned through prosecution witnesses.

Prosecutors identified his targets as jail guards, a police officer, a landlord, a college newspaper editor and several FLC professors, saying he chipped away at their reputations and sense of safety by spreading lies about their character.

Evidence outlined how Stephenson created Web sites identifying his victims as sexual deviants, guided victims' family and bosses to the sites, created posters identifying victims as sex offenders and even sending a fake obituary to a newspaper falsely stating that a jail guard died of AIDS.

After the verdict, Deputy District Attorney Todd Norvell thanked the jury and Rita Warfield, the Durango Police Department's lead investigator on the case.

Then he declined to comment before Stephenson's sentencing.

During trial, prosecutors portrayed Stephenson as an intellectual who hated feminists and challenged those in power.

"The defendant goes after the reputations of his victims," Assistant District Dondi Osborne told jurors during closing statements.

But Stephenson's lawyer offered a different viewpoint, saying his actions really amounted to only bad manners and opposing political opinion.

Jurors did a good job of paying attention, Dreves said, but some of the guilty verdicts were unfounded.

Stephenson's prosecution involved a Colorado criminal libel statute now under fire in a federal appeals court. A former student at the University of Northern Colorado was charged with criminal libel for posting articles on a satiric online publication that poked fun at a finance professor.

During Stephenson's trial, some 40 witnesses testified and more than 100 pieces of evidence went to the jury.

One FLC professor told jurors of letters sent to her home and on campus. They included compliments from unfamiliar men about a rape-me fantasy Web site started by Stephenson and disclosing her real address.

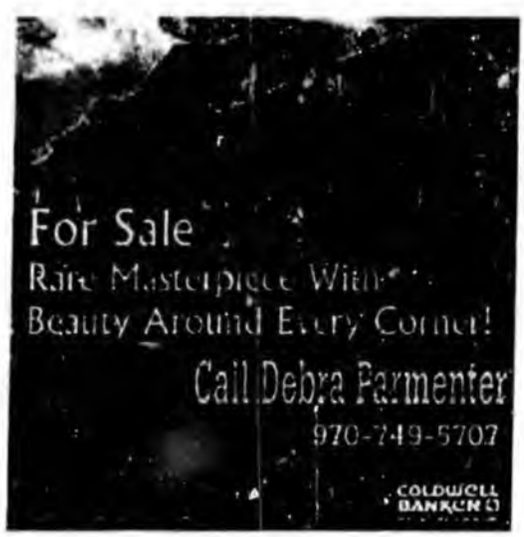
"I didn't want anybody coming into my house raping me," the professor testified.

Scared, she removed her phone number from the public directory. And, she noted, "I began to take a lot more precautions. It has certainly affected my sense of safety."

Each day in court, Stephenson took extensive notes and whispered frequently to his lawyer.

Security was extraordinary during the trial supervised by District Judge David Dickinson.

Stephenson has "somewhat of a volatile personality," said sheriff's Capt. Doug Hanna, and he has a large build. So, La Plata County Sheriff Duke Schirard asked that Stephenson be shackled at the feet during trial - a security precaution not normally taken.



A black cloth covered the prosecution and defense tables so jurors would not see the ankle restraints.

Other security measures included:

- Only a 3-inch pencil for Stephenson to write with.

- Up to three deputies behind him at all times.

- A belt capable of delivering 50,000 volts of electricity, much like a Taser gun, and triggered by a remote control held by a courtroom deputy.

The jury included eight men and four women for deliberations.

After the verdict, Marilyn Wood, Stephenson's former landlord whom he depicted as a sex offender, reflected on a wasted life. As an American Indian, she said, Stephenson received free tuition at FLC. Instead of taking advantage of that, she noted, he became consumed by his anger.

"I look at this man as a person who had the opportunity of a lifetime," Wood said. "He squandered the whole thing."

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Camera Phones In The Workplace: To Ban Or Not To Ban

By Andrea G. Chatfield

It is no secret that workers in the high tech industry love their electronic gadgets. The more advanced and powerful, the better. However, there is one personal technology gadget that can cause tremendous harm to high tech companies if abused. The use of camera phones, and other portable devices with embedded cameras or video capability, in the workplace is spreading like wildfire. The number of people with camera phones was estimated at 8 million last year but a report issued this summer by IT analyst firm iSupply estimated that number would jump to 488 million by 2008.

While incredibly useful (and cool!), camera phones also increase the risk of corporate espionage, employee harassment, invasion of privacy, and a litany of other offenses that can create liability for employers. The litigation over these types of problems is costly and time consuming, but can be minimized with proactive workplace policies.

The best way to address the issue of camera phones in the workplace is proactively rather than reactively. Currently, there are no laws that specifically address the use of camera phones. Employers generally have a wide latitude on regulating behavior in their own workplaces. Given the prevalence of these devices, employers must start to impose workplace policies that address the presence and/or the use of camera phones in the workplace. Such policies should also address personal cell phones. There are a number of ways a company can handle these issues, but basically it comes down to whether or not the use and/or presence of the phones should be banned in all or parts of an employer's place of work. This is becoming an ongoing debate.

Reasons for wanting a ban of some sort are based on the fact that high tech companies, which are embracing camera phones and other types of advanced electronic devices, are ironically, among the most vulnerable to their abuse. Camera phones can be misused to disclose and even broadcast, in an instant, images of trade secrets, research and development processes, proprietary materials, and confidential information about employees, clients, or customers. Ironically, a leading maker of camera phones has banned workers and visitors from bringing camera phones into certain of its factories. Other high tech companies have also banned the presence of camera phones in certain areas of its facilities.

Camera phones can easily become instruments of harassment in the wrong hands. Images of coworkers in private areas such as dressing areas, bathrooms, and locker rooms can be embarrassing and quickly transmitted to countless other people. Taking a picture everyday of a female coworker to show other male workers what she is wearing may seem like a harmless joke to some, but highly offensive and harassing to others.

By tolerating the misuse of camera phones in the workplace, employers put themselves at risk for lawsuits under the Massachusetts privacy statute (M.G.L. ch. 214, §1B) which provides all persons, including employees in the workplace, with a right against unreasonable or serious interference with their privacy. Moreover, if the employee has a video cell phone, which also records sound, they risk being in breach of federal and state wiretap laws if they record others in the workplace without their knowledge or consent.

On the other hand, there are a number of experts who think a ban is too harsh. They cite the difficulty of enforcing a ban given how easy it is to conceal a camera phone on one's person. Many employees rely heavily on the use of such devices to stay in touch with the office and customers, and for some jobs, camera phones may be very effective and useful. A service technician may be able to identify a problem more quickly by sending an image of a customer's piece of equipment to the home office for assessment. A ban on personal property devices may also be considered detrimental to the firm's workplace culture and morale. Further, employers may not like the options for enforcing a ban, such as confiscating a camera phone that is an employee's or visitor's personal property, or terminating an employee for bringing one to work.