

2001 DRAFTING REQUEST

Bill

Received: 12/07/2000

Received By: rryan

Wanted: As time permits

Identical to LRB:

For: Julie Lassa (608) 267-9649

By/Representing: Dan Kursevski

This file may be shown to any legislator: NO

Drafter: rryan

May Contact:

Alt. Drafters:

Subject: Criminal Law - miscellaneous

Extra Copies: MGD

Pre Topic:

No specific pre topic given

Topic:

Depiction of nudity without the subject's consent

Instructions:

See Attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	rryan 01/03/2001	hhagen 01/04/2001		_____			
/1			kfollet 01/10/2001	_____	lrb_docadmin 01/10/2001	lrb_docadmin 01/11/2001	

FE Sent For:

<END>

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1?	rryan	11 hmk 1/4/01	Kj 1/10	Kj/jf 1/10			

FE Sent For:

<END>

Dsida, Michael

From: Kursevski, Dan
Sent: Friday, December 01, 2000 9:22 AM
To: Dsida, Michael
Subject: FW: Proposed changes to Wis. Stat. § 944.205(2)(a)

7-9649

-----Original Message-----

From: Tom Eagon [mailto:eagont@co.portage.wi.us]
Sent: Thursday, November 30, 2000 10:49 AM
To: Rep. Julie Lassa
Cc: Dan.Kursevski@legis.state.wi.us
Subject: Proposed changes to Wis. Stat. § 944.205(2)(a)

Julie,

Thank you for calling me regarding the proposed changes to the statute ruled unconstitutional in the Prof. Miller matter.

Below are some proposed changes. I got them out of the Supreme Court case that stuck the statute down, State of Wisconsin v. Scott L. Stevenson, 2000 WI 71, No. 98-2110-CR <mhtml:mid://00000017/#P63_960>:

In accordance with the State's recommendation I would propose

Adding the underlined language to Wis. Stat. § 944.205(2)(a), the statute should apply when a person:

Takes a photograph or makes a motion picture, videotape or other visual representation or reproduction that depicts nudity without the knowledge and consent of the person who is depicted nude while that person is nude in circumstances where they have a reasonable expectation of privacy, if the person knows or has reason to know that the person who is depicted nude does not know of and consent to the taking or making of the photograph, motion picture, videotape or other visual representation or reproduction (emphasis denotes additional language advanced by the State).

[see Paragraph 24 in Stevenson]

The term "reproduction" in this section refers only to reproduction of images that were procured without the victim's "knowledge" or "consent."

[see paragraph 56 dissenting opinion in Stevenson]

The LRB may also be interested in similar statutes from other states referenced in footnote 6 of the opinion:

6 Apparently, three states have enacted privacy statutes that contain similar language to Wis. Stat. § 944.205(2)(a).

The Missouri invasion of privacy statute, Mo. Ann. Stat. § 565.253 (West 1999), provides in relevant part:

(1) A person commits the crime of invasion of privacy if he knowingly views, photographs or films another person, without that person's knowledge and consent, while the person being viewed, photographed or filmed is in a state of full or partial nudity and is in a place where he would have a reasonable expectation of privacy.

Oregon's privacy statute, Or. Rev. Stat. § 163.700 (1997) reads in pertinent part:

(1) Except as provided in ORS 163.702 [enumerated exceptions], a person commits the crime of invasion of personal privacy if:

(a) The person knowingly makes or records a photograph, motion picture, videotape or other visual recording of another person in a state of nudity without the consent of the person being recorded; and

(b) At the time the visual recording is made or recorded the person being recorded is in a place and circumstances where the person has a reasonable expectation of personal privacy.

The North Dakota statute addressing the possession or distribution of certain photographs or other visual representations, N.D. Cent. Code § 12.1-31-08 (Michic 1997), states in relevant part:

A person is guilty of a class A misdemeanor if, knowing of its character and content, a person surreptitiously acquires and knowingly possesses or distributes any photograph or other visual representation that exhibits a nude or partially denuded human figure . . . without the individual's written consent This section does not apply to any book, . . . photograph, video recording, motion picture film, or other visual representation sold in the normal course of business through wholesale or retail outlets that possess a valid sales tax permit or used by a licensed attorney, attorney's agent, or any other person obtaining evidence for a criminal investigation or pending civil action, or by a medical professional or a peace officer acting within that person's scope of employment.

Thank you for your continued interest in this matter and protecting the people of our state.

If you have any questions, or would like to discuss this further, please feel free to contact me.

Tom

LRB - 1373/11
LRB-0228/4
RLR/hmh:km
RLR:kmh

2001 BILL

In 1/3/00

regenerate

1 AN ACT to amend 944.205 (2) (a), 944.205 (2) (b) and 944.205 (3); and to create
2 944.205 (2) (am) of the statutes; relating to: the prohibition against making,
3 possessing, or distributing a visual representation showing nudity

and providing a penalty

Analysis by the Legislative Reference Bureau

Current law prohibits production, possession, and distribution of a photograph, motion picture, videotape, or other visual representation or reproduction that depicts nudity if the person depicted nude did not consent to the representation or reproduction and if the person who makes, possesses, or distributes the representation or reproduction knows or should know that the person depicted nude did not consent to the nude depiction. Current law exempts from criminal liability parents, guardians, and legal custodians who make and possess visual representations or reproductions of their children that show nudity or distribute them for other than commercial purposes.

The Wisconsin supreme court recently found the state statute prohibiting nude representations unconstitutional, because it prohibits all depictions of nudity made without consent, including artistic, political, and newsworthy depictions that are protected by the First Amendment (*State v. Stevenson*, 236 Wis. 2d 86 (2000)).

Insert 1

This bill narrows the scope of the prohibition against making, possessing, or distributing a visual representation that depicts nudity. The bill applies the prohibition against making, possessing, or distributing an original visual representation depicting nudity only to representations made contemporaneously while the subject of the representation is nude. The prohibition does not apply to a

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representation made by a person who does not view the subject nude, nor a representation made by a person who views the subject nude but does not create the representation until a later time. The bill also limits the application of the prohibition to representations made while the subject who is depicted nude is in a place and circumstance in which he or she has a reasonable expectation of privacy.

The bill also changes the scope of the prohibition against making, possessing, or distributing a reproduction of a visual representation that depicts nudity. Current law prohibits making, possessing, or distributing a reproduction if the subject who is depicted nude did not consent to reproduction of the original representation. The bill permits a person to make, possess, or distribute a reproduction that depicts nudity even if the actor has not obtained consent for reproduction from the subject depicted nude. However, the bill prohibits making, possessing, or distributing a reproduction depicting nudity if the actor knows or should know that the original representation was made without the consent of the subject and while the subject was in a place and circumstance in which he or she had a reasonable expectation of privacy.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 944.205 (2) (a) of the statutes is amended to read:

2 944.205 (2) (a) Takes a photograph or makes a motion picture, videotape, or
3 other visual representation ~~or reproduction~~ that depicts nudity without the
4 knowledge and consent of the person who is depicted nude while that person is nude
5 in a place and circumstance in which he or she has a reasonable expectation of
6 privacy, if the person taking the photograph or making the motion picture, videotape,
7 or other visual representation knows or has reason to know that the person who is
8 depicted nude does not know of and consent to the taking ~~or making~~ of the
9 photograph or the making of the motion picture, videotape, or other visual
10 representation ~~or reproduction~~.

11 **SECTION 2.** 944.205 (2) (am) of the statutes is created to read:

BILL

1 944.205 (2) (am) Makes a reproduction of a photograph, motion picture,
2 videotape, or other visual representation that the person knows or has reason to
3 know was made in violation of par. (a) and that depicts ^{the} nudity.

4 **SECTION 3.** 944.205 (2) (b) of the statutes is amended to read:

5 944.205 (2) (b) Possesses or distributes a photograph, motion picture,
6 videotape, or other visual representation or reproduction that depicts nudity and
7 that was taken or made ~~without the knowledge and consent of the person who is~~
8 ~~depicted nude~~ in violation of par. (a) or (am), if the person possessing or distributing
9 the representation or reproduction knows or has reason to know that the photograph,
10 motion picture, videotape, or other visual representation or reproduction was taken
11 or made ~~without the knowledge and consent of the person who is depicted nude in~~
12 violation of par. (a) or (am) *and if the person who is depicted nude in*

13 **SECTION 4.** 944.205 (3) of the statutes is amended to read:

14 944.205 (3) Notwithstanding sub. (2) (a), (am), and (b), if the person in a
15 photograph, motion picture, videotape, or other visual representation or
16 reproduction is a child and the taking of the photograph or the making, possession,
17 or distribution of the photograph, motion picture, videotape, or other visual
18 representation or reproduction does not violate s. 948.05 or 948.12, a parent,
19 guardian, or legal custodian of the child may do any of the following:

20 (a) ~~Make and~~ Take and possess the photograph or make and possess the
21 photograph, motion picture, videotape, or other visual representation reproduction
22 of the child.

*depicted in the representation made in violation of par. (a)
if the person depicted nude in the reproduction did not
consent to the making of the reproduction*

2001 BILL

INSERT

1 AN ACT *to renumber and amend* 944.205 (title), 944.205 (1), 944.205 (2) and
 2 944.205 (3) and (4); and *to create* 939.32 (1) (f), 942.09 (1) (a) to (c) and 942.09
 3 (2) (am) of the statutes; **relating to:** the prohibition against making,
 4 possessing, or distributing a representation that depicts nudity.

Analysis by the Legislative Reference Bureau

Current law prohibits production, possession, and distribution of a photograph, motion picture, videotape, or other visual representation or reproduction that depicts nudity if the person depicted nude did not consent to the representation or reproduction and if the person who makes, possesses, or distributes the representation or reproduction knows or should know that the person depicted nude did not consent to the nude depiction. Current law exempts from criminal liability parents, guardians, and legal custodians who make or possess visual representations depicting their children nude, or who distribute the representations for other than commercial purposes.

The Wisconsin supreme court recently found the state statute prohibiting nude representations unconstitutional, because it prohibits all depictions of nudity made without consent, including artistic, political, and newsworthy depictions that are protected by the First Amendment (*State v. Stevenson*, 236 Wis. 2d 86 (2000)).

This bill narrows the scope of the prohibition against making an original representation that depicts nudity by requiring that, at the time the representation is made, the subject of the depiction be both nude and in a place and circumstance in which he or she can reasonably expect privacy.

Insert 1

BILL

^{also}
The bill applies the prohibition against making a reproduction that depicts nudity only to the act of reproducing an original representation that the reproducer knows or should know was made in violation of the prohibition against making an original representation, although the bill exempts a reproducer from criminal liability if the subject of the representation does consent to the reproduction even if he or she did not consent to the original representation. The bill treats the prohibitions against possessing and distributing representations depicting nudity similarly to the prohibition against making reproductions. The bill prohibits possessing or distributing a representation that is unlawfully made, unless the subject of the representation consents to the possession or distribution even if he or she did not consent to the making of the representation.

The bill also expands the categories of representations that a person may not create, reproduce, possess, or distribute by prohibiting creation, reproduction, possession, or distribution of data representations of visual images including computer programs and the stored memory of an image captured with a digital camera.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 939.32 (1) (f) of the statutes is created to read:

939.32 (1) (f) Whoever attempts to commit a crime under s. 942.09 (2) (a) is subject to the penalty provided in that paragraph for the completed crime.

SECTION 2. 942.09 (1) (a) to (c) of the statutes are created to read:

942.09 (1) (a) "Captures a representation" means takes a photograph, makes a motion picture, videotape, or other visual representation, or records or stores in any medium data that represents a visual image.

(b) "Nudity" has the meaning given in s. 948.11 (1) (d).

(c) "Representation" means a photograph, exposed film, motion picture, videotape, other visual representation, or data that represents a visual image.

SECTION 3. 942.09 (2) (am) of the statutes is created to read:

942.09 (2) (am) Makes a reproduction of a representation that the person knows or has reason to know was captured in violation of par. (a) and that depicts



State of Wisconsin

LEGISLATIVE REFERENCE BUREAU

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5TH FLOOR
MADISON, WI 53701-2037

STEPHEN R. MILLER
CHIEF

LEGAL SECTION: (608) 266-3561
LEGAL FAX: (608) 264-6948

January 10, 2001

MEMORANDUM

To: Representative Lassa

From: Robin L. Ryan, Legislative Attorney

Re: LRB-1373 Depiction of nudity without the subject's consent

The attached draft was prepared at your request. Please review it carefully to ensure that it is accurate and satisfies your intent. If it does and you would like it jacketed for introduction, please indicate below for which house you would like the draft jacketed and return this memorandum to our office. If you have any questions about jacketing, please call our program assistants at 266-3561. Please allow one day for jacketing.

JACKET FOR ASSEMBLY JACKET FOR SENATE

If you have any questions concerning the attached draft, or would like to have it redrafted, please contact me at (608) 261-6927 or at the address indicated at the top of this memorandum.

If the last paragraph of the analysis states that a fiscal estimate will be prepared, the LRB will request that it be prepared after the draft is introduced. You may obtain a fiscal estimate on the attached draft before it is introduced by calling our program assistants at 266-3561. Please note that if you have previously requested that a fiscal estimate be prepared on an earlier version of this draft, you will need to call our program assistants in order to obtain a fiscal estimate on this version before it is introduced.

Please call our program assistants at 266-3561 if you have any questions regarding this memorandum.