

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-1325/4dn
RLR:jld:kjf

January 24, 2001

Representative Gundrum:

I changed the bill to require that the subject of an depiction be “in circumstances” in which he or she may reasonably expect privacy, rather than both “in a place and circumstance” in which he or she may reasonably expect privacy when the depiction is made.

The language suggested by the state, as quoted in the Supreme Court opinion, is:

“Takes a photograph...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...”

In reviewing the effect of the state’s language, the court suggested that, if adopted, the language would add two elements to the prohibition: 1) that the person depicted nude have a reasonable expectation of privacy in the place or circumstances [emphasis added] in which the person is depicted; and 2) that the person depicted be contemporaneously present at the time of the depiction. The court’s explanation indicates that place is an element of the circumstances. Therefore, removing “place” from the bill does not necessarily eliminate place from the consideration as to whether the person may reasonably expect privacy. To the contrary, requiring consideration of place is important to the constitutionality of the the statute. If place is not considered, publishing the newsworthy photograph that depicts a Vietnamese girl running nude following a napalm attack that the court cited in its opinion might be prohibited by the statute, again rendering it overbroad.

I do not believe that deleting “place” will render the bill unconstitutionally overbroad, but only because courts will consider the place where a person is nude as one of the circumstances. Including “place” simply clarifies that consideration of whether a person is in a place in which he or she can reasonably expect privacy is required.

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