

2001 DRAFTING REQUEST**Bill**Received: **12/05/2000**Received By: **rryan**Wanted: **Soon**

Identical to LRB:

For: **Mark Gundrum (608) 267-5158**By/Representing: **himself**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:

Draft Stevenson fix that is teh same as LRB 01-0228/4, and add language that covers production, possession and distribution of computer images

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>
/1	rryan 12/18/2000	jdyer 12/19/2000	pgreensl 12/20/2000	_____	lrb_docadmin 12/20/2000		
/2	rryan 12/29/2000	jdyer 01/02/2001	martykr 01/03/2001	_____	lrb_docadmin 01/03/2001	lrb_docadmin 01/03/2001	
/3	rryan 01/08/2001	jdyer 01/08/2001	martykr 01/08/2001	_____	lrb_docadmin 01/08/2001	lrb_docadmin 01/08/2001	
/4	rryan 01/11/2001	jdyer 01/12/2001	kfollet 01/24/2001	_____	lrb_docadmin 01/24/2001	lrb_docadmin 01/24/2001	

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* 14 for Assembly*

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/3	rryan 01/08/2001	jdyer 01/08/2001	martykr 01/08/2001	_____	lrb_docadmin 01/08/2001	lrb_docadmin 01/08/2001	

14 1/2 jld

*kyj
1/24*

*kyj/self
1/24*

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/2	rryan 12/29/2000	jdye 01/02/2001	martykr 01/03/2001	_____	lrb_docadmin 01/03/2001	lrb_docadmin 01/03/2001	

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Handwritten notes: 13 1/8 jld, km/c, sh km/c

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1/2 1/2 jld *1/3* *1/3*

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1/?	rryan	1/12/19 jld	12/19 a pe	12/20 P8/RS			

FE Sent For:

<END>

0228/3

12/5 (PM)

Grundrum:

Analyses - 3rd § makes it seem like person who sets up video camera to record while her or she is not present wouldn't be covered by the amended 940.225 ~~not necessarily~~ - might need to clarify the analysis.

takes a photo or makes or causes a - - - - to be made

applies to all modes of making an image

12/6

maybe

add line clarifying that person needn't be there as long as set up equipment

attempt to viol. 944.205 - same as punishment for completed act

- add this material to new request not 0228/ new request

Rep. Gundrum 12/12

Sending over a memo from DOJ
on Stevenson. Argues w/
DOJ comments
except last comment re
redundancy of reproduction depicting
nudity.

I may call Ballistreri re memo.

2001 BILL

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.

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)).

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

BILL

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 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).

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.

CORRESPONDENCE/MEMORANDUM**DEPARTMENT OF JUSTICE**

Date: December 8, 2000

To: Joanna Richard
Alan Lee
Susan CrawfordFrom: Tom Balistreri *TB*

Subject: LRB-0228/3

As a general matter, this proposal to amend the statute which makes it a crime to make pictures of unconsenting nude persons appears to adequately address the overbreadth problems with the present statute identified in *State v. Stevenson*. It limits the application of the statute to those situations where there is an unconsensual invasion of privacy, which in my opinion brings the statute within the range of conduct which may be constitutionally proscribed by the state. It should be remembered, though, that the supreme court never ruled that such a limitation would make the statute constitutional, so there is no guarantee that the amended statute will not be subject to further attack or even invalidation.

There are a couple of specific things in the proposal that I think need to be changed.

First, this statute should be moved out of Chap. 944 dealing with crimes against sexual morality into Chap. 942 dealing with crimes against privacy etc. This would make it more clear that the statute is intended to protect privacy rather than to proscribe expression, as is suggested by its current placement among the provisions dealing with obscenity. Statutes like this one affecting First Amendment rights are presumed to be unconstitutional so we have to do everything we can to meet our burden to rebut that presumption.

Besides, Chap. 942 already contains a statute, § 942.08, which makes it a crime to install or use a surveillance device to observe persons while they are nude without their consent. The present § 944.205 deals with a very analogous subject, making pictures of persons while they are nude without their consent, so it makes sense for organizational reasons to place them together in the same chapter.

Second, the commentary indicates that this proposal applies only to pictures made while the subject is contemporaneously nude. I agree that in order to be a constitutionally sound privacy statute instead of an unconstitutional obscenity statute the provision should be limited to those situations where the person depicted is actually nude at the time of the depiction because those are the situations where there is a clearly legitimate concern about privacy. The problem is that this proposal is not limited in this way as presently written.

The proposal states that it is unlawful to make a picture of a person who is depicted nude "while the person depicted *nude is in* a place or circumstances in which he or she has a

reasonable expectation of privacy." Thus, the victim need only be depicted nude while in a private place. The victim does not actually have to be nude in a private place when they are depicted in that place. So it would be unlawful to take a picture of a person who is fully clothed in their bedroom, and then use computer technology to superimpose the image of a nude torso on that picture.

This problem is easy to solve simply by reversing the order of two words. Instead of "nude is in" the statute should read "is nude in" a private place. This would make it clear that there must be contemporaneously depicted nudity which plainly implicates privacy concerns.

Finally, the provisions for reproducing and possessing unconsensual nude pictures in §§ 2&3 of the proposal should not strictly prohibit these acts merely because the original pictures were made without consent. The evil to be addressed with reproducing and possessing unconsensual nude pictures is different from the evil involved in taking the pictures in the first place. There is a different kind of invasion of privacy. It is indirect rather than direct. The lack of consent to the reproduction or possession of the pictures should be an element of these offenses. Otherwise, these provisions could have absurd results which could result in a finding that they are unconstitutionally overbroad.

For example, suppose a photographer surreptitiously takes nude pictures of a porn star in her bathroom without her knowledge and consent, thereby committing a crime under § 1, but a magazine gets the pictures and is willing to pay the porn star big money for the right to reproduce them. The porn star would like nothing better, but she cannot agree to this because it would be a crime to reproduce the pictures simply because they were taken without her consent even though she now enthusiastically consents to their reproduction. It could be seriously argued that this application of the statute would violate the First Amendment rights of both the porn star and the magazine.

Or consider a situation where the porn star gets the nude pictures and would like to give one to her husband. She cannot do that because it would be a crime for him to possess the picture even though the person depicted wants him to have it. Again, it could be argued that the First Amendment rights of both the porn star and her husband would be violated.

I suggest, therefore, that both §§ 2&3 should have a section added which says that "the person depicted nude does not consent to the (reproduction)(possession)."

Also, as a minor stylistic matter, the phrase "that depicts nudity" at the end of § 2 is redundant and should be deleted. Material is not in violation of § 1 unless it depicts nudity.

Rep. Gundrum requests inclusion of all but the point regarding redundancy

Ryan, Robin

From: Balistreri, Thomas J.
Sent: December 14, 2000 3:17 PM
To: Ryan, Robin
Subject: RE: Bill draft for Stevenson fix

I don't think an affirmative defense would survive either an equal protection or a First Amendment challenge. As far as equal protection, we would have to come up with a good reason for making lack of consent an element when the picture is originally made, but not an element when it is reproduced. I can't think of any. In fact, in light of some other recent cases, e.g., *State v. Weidner*, there would be more justification for dispensing with an element of consent when the defendant is in a position to confront the victim personally so he can ask for consent than when the defendant is just dealing with the reproduction of the picture where he may not have any opportunity to confront the victim and ask for permission. As far as the First Amendment, we would prohibit a defendant from exercising his right to expression by disseminating a copy of a picture because it would be impossible for him to ask for consent if he does not know the name of the person portrayed or how to get ahold of her. On the other side of the balance, it is usually pretty easy to show lack of consent just by getting the victim to testify. If there is no complaining victim to testify, we usually would not have any reason to bring a prosecution.

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

From: Ryan, Robin
Sent: Thursday, December 14, 2000 2:37 PM
To: Balistreri, Thomas J.
Subject: Bill draft for Stevenson fix

I work at the Legislative Reference Bureau and wrote the bill draft regarding s. 944.205 that Representative Gundrum asked you to review. Rep. Gundrum shared a copy of your Dec. 8th memo with me. Is there any problem with making consent to reproduction of a picture that depicts nudity an affirmative defense rather than making lack of consent to reproduction an element of the crime?

Thanks

12/14/2000



State of Wisconsin
2001 - 2002 LEGISLATURE

LRB-1325/1

RLR:.....

SOON

jld

2001 BILL

In 12/18/00

D-note

Gen

- 1 AN ACT ...; relating to: the prohibition against making, possessing, or
- 2 distributing a representation that depicts nudity. ✓

INSERT A ✓

Analysis by the Legislative Reference Bureau

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.

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

*

BILL

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:

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

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

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

5 942.09 (1) (a) "Captures a representation" means takes a photograph, makes
6 a motion picture, videotape, or other visual representation, or records or stores in any
7 medium data that represents a visual image.

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

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

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

12 942.09 (2) (am) Makes a reproduction of a representation that the person
13 knows or has reason to know was captured in violation of par. (a) and that depicts
14 the nudity depicted in the representation captured in violation of par. (a), if the
15 person depicted nude in the reproduction did not consent to the making of the
16 reproduction.

17 SECTION 4. 944.205 (title) of the statutes is renumbered 942.009 (title) and
18 amended to read:

19 942.009 (title) ~~Photographs, motion pictures, videotapes or other visual~~
20 representations showing Representations depicting nudity.

BILL

1 SECTION 5. 944.205 (1) of the statutes is renumbered 942.209 (1) (intro.) and
2 amended to read:

3 942.209 (1) (intro.) In this section, "nudity" has the meaning given in s. 948.11
4 (1)(d).

History: 1995 a. 249.

5 SECTION 6. 944.205 (2) of the statutes is renumbered 942.09 (2), and 942.09 (2)
6 (a) and (b), as renumbered, are amended to read:

7 942.09 (2) (a) ~~Takes a photograph or makes a motion picture, videotape or~~
8 ~~other visual representation or reproduction~~ Captures a representation that depicts
9 nudity without the knowledge and consent of the person who is depicted nude while
10 that person is nude in a place and circumstance in which he or she has a reasonable
11 expectation of privacy, if the person knows or has reason to know that the person who
12 is depicted nude does not know of and consent to the ~~taking or making of the~~
13 ~~photograph, motion picture, videotape or other visual representation or reproduction~~
14 capture of the representation.

~~NOTE: NOTE- Par. (a) was held to be unconstitutionally overbroad in State v. Stevenson, 2000 WI 71, 246 Wis. 2d 86, 613 N.W.2d 90. NOTE:~~

15 (b) Possesses or distributes a ~~photograph, motion picture, videotape or other~~
16 ~~visual representation~~ representation that was captured in violation of par. (a) or a
17 ~~reproduction that depicts nudity and that was taken or made without the knowledge~~
18 ~~and consent of the person who is depicted nude~~ in violation of par. (a), if the person
19 knows or has reason to know that the ~~photograph, motion picture, videotape or other~~
20 ~~visual representation~~ was captured in violation of par. (a) or the reproduction was
21 ~~taken or made without the knowledge and consent of~~ in violation of par. (a), and
22 if the person who is depicted nude in the representation or reproduction did not
23 consent to the possession or distribution.

History: 1995 a. 249.

BILL

SECTION 7

1 SECTION 7. 944.205 (3) and (4) of the statutes are renumbered 942.09 (3) and
2 (4) and amended to read:

3 ^{20e}944.209 (3) Notwithstanding sub. (2) (a), (am), and (b), if the person depicted
4 nude in a photograph, motion picture, videotape or other visual representation or
5 reproduction is a child and the making capture, possession, or distribution of the
6 photograph, motion picture, videotape or other visual representation, or the making,
7 possession or distribution of the reproduction, does not violate s. 948.05 or 948.12,
8 a parent, ³guardian, or legal custodian of the child may do any of the following:

9 (a) Make Capture and possess the photograph, motion picture, videotape or
10 other visual representation or make and possess the reproduction of depicting the
11 child.

12 (b) Distribute a photograph, motion picture, videotape or other visual
13 representation captured or possessed under par. (a), or distribute a reproduction
14 made or possessed under par. (a), if the distribution is not for commercial purposes.

15 (4) This section does not apply to a person who receives a photograph, motion
16 picture, videotape or other visual representation or reproduction of depicting a child
17 from a parent, guardian or legal custodian of the child under sub. (3) (b), if the
18 possession and distribution are not for commercial purposes.

19 History: 1995 a. 249.

(END)

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-1325/1dn

RLR:.....

Jld

date

Representative Gundrum:

1. I applied the same penalty for attempt as for the committed crime only to the prohibition against capturing an original image, not the prohibitions against making reproductions, or possessing or distributing images. Please let me know if attempt to make a reproduction, or attempt to possess or distribute an image should also be punished as a Class E felony.
2. I believe that the language regarding "capturing a representation" covers the behavior of a person who sets a video recorder to tape the subject even if the person who set up the recorder is not present while the taping occurs. I could add the words "either in person or by means of a remote device" after "means" and before "takes a photograph..." in the definition of "captures a representation." However, I think the addition is unnecessary and just invites additional interpretation regarding what a remote device includes.
3. As we discussed I retained the specific requirement in s. 942.09 (2) (am) that a reproduction must depict nudity in order to exempt from liability a newspaper that publishes a copy of a newsworthy photo with portions of the photo that depict nudity blacked out. I added further language that requires not only that the production depict nudity, but that it include the same depiction of nudity that is contained in the original representation. I am concerned that without the additional requirement the bill will prohibit someone from taking a photo that is made in violation of 942.09 (2) (a) and replacing the portions of the original that depict nudity with portions of a nude image in *Playboy*. The person who makes the reproduction can certainly be convicted of possessing the original unlawfully made photo, but shouldn't be convicted for making a reproduction.

Robin Ryan
Legislative Attorney
Phone: (608) 261-6927
E-mail: robin.ryan@legis.state.wi.us

2001 BILL

depicting their children nude, or who distribute the representations

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.

Insert A

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)).

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

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-1325/1dn
RLR:jld:pg

December 20, 2000

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3. As we discussed I retained the specific requirement in s. 942.09 (2) (am) that a reproduction must depict nudity in order to exempt from liability a newspaper that publishes a copy of a newsworthy photo with portions of the photo that depict nudity blacked out. I added further language that requires not only that the production depict nudity, but that it include the same depiction of nudity that is contained in the original representation. I am concerned that without the additional requirement the bill will prohibit someone from taking a photo that is made in violation of 942.09 (2) (a) and replacing the portions of the original that depict nudity with portions of a nude image in *Playboy*. The person who makes the reproduction can certainly be convicted of possessing the original unlawfully made photo, but shouldn't be convicted for making a reproduction.

Robin Ryan
Legislative Attorney
Phone: (608) 261-6927
E-mail: robin.ryan@legis.state.wi.us

1325//

Purdum 12/27/00

Requests changes per review of
Leg. Counsel

1. mention that enhancing attempt
penalty in analysis
2. Add "providing a penalty" in
relating clause

2001 BILL

RMR

In 12/29/00

Regen

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

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 or possess visual representations depicting their children nude, or who distribute the representations for other than commercial purposes.

Insert 1

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.

BILL

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:

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

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

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

5 942.09 (1) (a) "Captures a representation" means takes a photograph, makes
6 a motion picture, videotape, or other visual representation, or records or stores in any
7 medium data that represents a visual image.

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

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

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

12 942.09 (2) (am) Makes a reproduction of a representation that the person
13 knows or has reason to know was captured in violation of par. (a) and that depicts

BILL

1 the nudity depicted in the representation captured in violation of par. (a), if the
2 person depicted nude in the reproduction did not consent to the making of the
3 reproduction.

4 **SECTION 4.** 944.205 (title) of the statutes is renumbered 942.09 (title) and
5 amended to read:

6 **942.09 (title) ~~Photographs, motion pictures, videotapes or other visual~~**
7 **~~representations showing~~ Representations depicting nudity.**

8 **SECTION 5.** 944.205 (1) of the statutes is renumbered 942.09 (1) (intro.) and
9 amended to read:

10 942.09 (1) (intro.) In this section, “nudity” has the meaning given in s. 948.11
11 (1)(d).:

12 **SECTION 6.** 944.205 (2) of the statutes is renumbered 942.09 (2), and 942.09 (2)
13 (a) and (b), as renumbered, are amended to read:

14 942.09 (2) (a) ~~Takes a photograph or makes a motion picture, videotape or other~~
15 ~~visual representation or reproduction~~ Captures a representation that depicts nudity
16 without the knowledge and consent of the person who is depicted nude while that
17 person is nude in a place and circumstance in which he or she has a reasonable
18 expectation of privacy, if the person knows or has reason to know that the person who
19 is depicted nude does not know of and consent to the ~~taking or making of the~~
20 ~~photograph, motion picture, videotape or other visual representation or reproduction~~
21 capture of the representation.

22 (b) Possesses or distributes a photograph, ~~motion picture, videotape or other~~
23 ~~visual representation~~ representation that was captured in violation of par. (a) or a
24 ~~reproduction that depicts nudity and that was taken or made without the knowledge~~
25 ~~and consent of the person who is depicted nude~~ in violation of par. (am), if the person

BILL

1 knows or has reason to know that the ~~photograph, motion picture, videotape or other~~
2 visual representation was captured in violation of par. (a) or the reproduction was
3 ~~taken or made without the knowledge and consent of~~ in violation of par. (am), and
4 if the person who is depicted nude in the representation or reproduction did not
5 consent to the possession or distribution.

6 SECTION 7. 944.205 (3) and (4) of the statutes are renumbered 942.09 (3) and
7 (4) and amended to read:

8 942.09 (3) Notwithstanding sub. (2) (a), ~~(am)~~, and (b), if the person depicted
9 nude in a photograph, motion picture, videotape or other visual representation or
10 reproduction is a child and the making capture, possession, or distribution of the
11 photograph, motion picture, videotape or other visual representation, or the making,
12 possession, or distribution of the reproduction, does not violate s. 948.05 or 948.12,
13 a parent, guardian, or legal custodian of the child may do any of the following:

14 (a) ~~Make Capture~~ and possess the ~~photograph, motion picture, videotape or~~
15 ~~other visual representation or~~ make and possess the reproduction of depicting the
16 child.

17 (b) Distribute a ~~photograph, motion picture, videotape or other visual~~
18 ~~representation~~ captured or possessed under par. (a), or distribute a reproduction
19 made or possessed under par. (a), if the distribution is not for commercial purposes.

20 (4) This section does not apply to a person who receives a ~~photograph, motion~~
21 ~~picture, videotape or other visual representation or reproduction of depicting~~ a child
22 from a parent, guardian or legal custodian of the child under sub. (3) (b), if the
23 possession and distribution are not for commercial purposes.

24 (END)

2001-2002 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-1325/2ins
RLR.....

1 **Insert 1:**

2 ~~NO~~
3 ~~PP~~ The penalty for violating the prohibition against production, possession and
4 ~~OR~~ distribution of representations depicting nudity is a fine of up to \$10,000,
5 ~~OR~~ imprisonment not to exceed five years, or both. The penalty for attempting to violate
6 the prohibition is a fine of up to \$5,000, ~~OR~~ imprisonment not to exceed two and one-half
7 years, or both.

8 **Insert 2:**

9 ~~NO~~
10 ~~PP~~ The bill also increases the penalty for attempting to make an original
11 representation depicting nudity without the consent of the person depicted nude, if
12 that person is nude in a place and circumstance in which he or she can reasonably
13 expect privacy. The penalty for attempt to make the original representation is the
14 same as the penalty for the completed crime, ^{which is} a fine of up to \$10,000, ~~OR~~ imprisonment
not to exceed five years, or both.

Smith, Irma

From: Ryan, Robln

Sent: Wednesday, January 03, 2001 1:45 PM

To: Smith, Irma

Subject: 1325/2

Could you please jacket 1325/2 when you receive it from typing and send it to Representative Gundrum today. Please also email a copy of the bill to Jolene Churchill in Rep. Gundrum's office. Thanks

01/03/2001

CORRESPONDENCE/MEMORANDUM**DEPARTMENT OF JUSTICE**

Date: January 2, 2001

To: JoAnna Richard
Susan Crawford
Alan Lee

From: Tom Balistreri *76-1523*

Subject: LRB-1425/1dn
12/20/00 revision to statute
prohibiting taking nude pictures
without consent

The provision in the latest revision of present Wis. Stat. § 944.205 (renumbered to 942.09) which makes the penalty for attempting to make an original nude picture the same as the penalty for the completed crime of making an original nude picture creates equal protection problems. Ordinarily, the penalty for an attempt is one-half the penalty for the completed crime. *See Wis. Stat. § 939.32(1)*. If we are going to treat people who attempt to commit violations of § 942.09(2)(a) differently from people who attempt to commit robberies, rapes, homicides and other crimes we have to have a rational basis for doing so, and I am unable to come up with one just off the top of my head. The problem is exacerbated because those who attempt to violate the statute in other ways, i.e. by attempting to make, possess or distribute representations or reproductions of nonconsensual nude pictures, are only subject to one-half the penalty for the completed crime. I am unable to justify that disparity either.

I find the language about "capturing a representation" confusing and unnecessary. Apparently this language was added to deal with the situation in which someone sets up a camera but is not present when the camera actually records the image of a nude person. There is no problem which needs to be solved, however, since the present, easier-to-understand language plainly applies regardless of whether the photographer is physically present. The prohibited act is making a picture, not being present when the picture is made. And actually, this present language could be simplified even more by changing it to "makes or records any visual representation." That language covers any kind of image from paintings to computer data. I am a firm believer in the principle that the more language you add to a statute, the bigger the target you create for those who will attack it.

I also think that the language in 942.09(2)(am) "and that depicts the nudity depicted in the representation captured in violation of par. (a)" is confusing and unnecessary. There is no reproduction unless the copy reproduces the original so this language is essentially redundant.

Gundrum 1/4/00

Please call Balistreri re § 2 - emission keeping def. of representation?

1/4/00 Gundrum:

1325/1

1. make sure taking picture & not developing film covered as prohibited act
make sure computer images covered
2. ok to elim^{higher} penalty, for attempt
3. clarify w/ Balistrieri need for language regarding nudity in reproductions

Balistrieri: (Atty. Gen's office)

Disagrees w/ philosophy behind #3.
no problem enforcing if just say reproduction

reproduction essentially the same image if change & add nudity
if change in way that fails to subtract nudity

doesn't foresee a practical enforcement problem

nude picture w/ superficial changes & retain nudity

* [Thinks should prohib press from publishing picture of Lady Di nude even if cover nudity.

thinks "makes a record a visual representation" does cover data

would get rid of def. of representation

Gundrum 1/4

Just get rid of higher penalty for attempt - no other changes

TODAY
2001 BILL

RMR

In 1/8/00

regen

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, and providing
 5 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 or possess visual representations depicting their children nude, or who distribute the representations for other than commercial purposes. The penalty for violating the prohibition against production, possession, and distribution of representations depicting nudity is a fine of up to \$10,000, or imprisonment not to exceed five years, or both. ~~The penalty for attempting to violate the prohibition is a fine of up to \$5,000 or imprisonment not to exceed two and one-half years, or both.~~

The Wisconsin supreme court recently found the state statute prohibiting nude representations unconstitutional, because it prohibits all depictions of nudity made

BILL

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.

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 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 bill also increases the penalty for attempting to make an original representation depicting nudity without the consent of the person depicted nude, if that person is nude in a place and circumstance in which he or she can reasonably expect privacy. The penalty for attempt to make the original representation is the same as the penalty for the completed crime, which is a fine of up to \$10,000, or imprisonment not to exceed five years, or both.

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

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

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

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

5 942.09 (1) (a) "Captures a representation" means takes a photograph, makes
6 a motion picture, videotape, or other visual representation, or records or stores in any
7 medium data that represents a visual image.

BILL

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

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

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

5 942.09 (2) (am) Makes a reproduction of a representation that the person
6 knows or has reason to know was captured in violation of par. (a) and that depicts
7 the nudity depicted in the representation captured in violation of par. (a), if the
8 person depicted nude in the reproduction did not consent to the making of the
9 reproduction.

10 **SECTION 4.** 944.205 (title) of the statutes is renumbered 942.09 (title) and
11 amended to read:

12 **942.09 (title) ~~Photographs, motion pictures, videotapes or other visual~~**
13 **~~representations showing~~ Representations depicting nudity.**

14 **SECTION 5.** 944.205 (1) of the statutes is renumbered 942.09 (1) (intro.) and
15 amended to read:

16 942.09 (1) (intro.) In this section, ~~"nudity" has the meaning given in s. 948.11~~
17 ~~(1) (d).~~;

18 **SECTION 6.** 944.205 (2) of the statutes is renumbered 942.09 (2), and 942.09 (2)
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20 942.09 (2) (a) ~~Takes a photograph or makes a motion picture, videotape or other~~
21 ~~visual representation or reproduction~~ Captures a representation that depicts nudity
22 without the knowledge and consent of the person who is depicted nude while that
23 person is nude in a place and circumstance in which he or she has a reasonable
24 expectation of privacy, if the person knows or has reason to know that the person who
25 is depicted nude does not know of and consent to the ~~taking or making of the~~

BILL

1 ~~photograph, motion picture, videotape or other visual representation or reproduction~~
2 capture of the representation.

3 (b) Possesses or distributes a ~~photograph, motion picture, videotape or other~~
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5 ~~reproduction that depicts nudity and that was taken or made without the knowledge~~
6 ~~and consent of the person who is depicted nude in violation of par. (am), if the person~~
7 ~~knows or has reason to know that the photograph, motion picture, videotape or other~~
8 ~~visual representation~~ was captured in violation of par. (a) or the reproduction was
9 ~~taken or made without the knowledge and consent of in violation of par. (am), and~~
10 if the person who is depicted nude in the representation or reproduction did not
11 consent to the possession or distribution.

12 **SECTION 7.** 944.205 (3) and (4) of the statutes are renumbered 942.09 (3) and
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15 nude in a photograph, motion picture, videotape or other visual representation or
16 reproduction is a child and the making capture, possession, or distribution of the
17 photograph, motion picture, videotape or other visual representation, or the making,
18 possession, or distribution of the reproduction, does not violate s. 948.05 or 948.12,
19 a parent, guardian, or legal custodian of the child may do any of the following:

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

23 (b) Distribute a ~~photograph, motion picture, videotape or other visual~~
24 ~~representation~~ captured or possessed under par. (a), or distribute a reproduction
25 made or possessed under par. (a), if the distribution is not for commercial purposes.

BILL

1 (4) This section does not apply to a person who receives a ~~photograph, motion~~
2 ~~picture, videotape or other visual~~ representation or reproduction of depicting a child
3 from a parent, guardian or legal custodian of the child under sub. (3) (b), if the
4 possession and distribution are not for commercial purposes.

5 (END)

1325/3 Gundrum 1/9/00
p. 3 line 14

why "place" & circumstance instead
of just circumstance as suggested
by SOS as reflected in dr. opm.

concerned that public lockroom
wouldn't be covered

Reps. Gundrum agreed not to
request change today

I will look at reason we
included "place" & can amend
in committee if need be.





RMR

2001 ASSEMBLY BILL

In 1/11/00

Today or
tomorrow early A.M.W.

D-Note

Regen

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* 942.09 (1) (a) to (c) and 942.09 (2) (am) of the
3 statutes; **relating to:** the prohibition against making, possessing, or
4 distributing a representation that depicts nudity, and providing a penalty.

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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 penalty for violating the prohibition against production, possession, and distribution of representations depicting nudity is a fine of up to \$10,000, or imprisonment not to exceed five years, or both.

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

ASSEMBLY BILL

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.

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.

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3 a motion picture, videotape, or other visual representation, or records or stores in any
4 medium data that represents a visual image.

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

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

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

9 942.09 (2) (am) Makes a reproduction of a representation that the person
10 knows or has reason to know was captured in violation of par. (a) and that depicts
11 the nudity depicted in the representation captured in violation of par. (a), if the
12 person depicted nude in the reproduction did not consent to the making of the
13 reproduction.

ASSEMBLY BILL

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4 **representations showing Representations depicting nudity.**

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7 942.09 (1) (intro.) In this section, "nudity" has the meaning given in s. 948.11
8 (1)(d):

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10 (a) and (b), as renumbered, are amended to read:

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12 ~~visual representation or reproduction~~ Captures a representation that depicts nudity
13 without the knowledge and consent of the person who is depicted nude while that
14 person is nude in a place and circumstance^s in which he or she has a reasonable
15 expectation of privacy, if the person knows or has reason to know that the person who
16 is depicted nude does not know of and consent to the ~~taking or making of the~~
17 ~~photograph, motion picture, videotape or other visual representation or reproduction~~
18 capture of the representation.

19 (b) Possesses or distributes a ~~photograph, motion picture, videotape or other~~
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23 knows or has reason to know that the ~~photograph, motion picture, videotape or other~~
24 ~~visual representation~~ was captured in violation of par. (a) or the reproduction was
25 ~~taken or made without the knowledge and consent of~~ in violation of par. (a), and

ASSEMBLY BILL**SECTION 5**

1 if the person who is depicted nude in the representation or reproduction did not
2 consent to the possession or distribution.

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13 child.

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15 representation captured or possessed under par. (a), or distribute a reproduction
16 made or possessed under par. (a), if the distribution is not for commercial purposes.

17 (4) This section does not apply to a person who receives a ~~photograph, motion~~
18 ~~picture, videotape or other visual~~ representation or reproduction of depicting a child
19 from a parent, guardian or legal custodian of the child under sub. (3) (b), if the
20 possession and distribution are not for commercial purposes.

21 (END)

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-1325/4dn
RLR:jld:km

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.

Robin Ryan
Legislative Attorney
Phone: (608) 261-6927
E-mail: robin.ryan@legis.state.wi.us

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.

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CCC

LRB-1325/4

AB 60

RLR

Page 4, line 15: delete "par.(a)," and substitute "par.(a),".

Page 4, line 16: delete "par.(a)," and substitute "par.(a),".

JLD



State of Wisconsin
2001-2002 LEGISLATURE

CORRECTIONS IN:

2001 ASSEMBLY BILL 60

Prepared by the Legislative Reference Bureau
(February 12, 2001)

1. Page 4, line 15: delete "par. (a)," and substitute "par. (a),".
2. Page 4, line 16: delete "par. (a)," and substitute "par. (a),".