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HOUSE OF REPRESENTATIVES
AS FURTHER REVISED BY THE COMMITTEE ON
GENERAL GOVERNMENT APPROPRIATIONS
ANALYSIS

BILL #: HB 683

RELATING TO: Lewd or lascivious exhibition

SPONSOR(S): Committee on Juvenile Justice, Representative Merchant and others

TIED BILL(S):

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

(1) JUVENILE JUSTICE YEAS 12 NAYS 0
(2) JUDICIARY YEAS 8 NAYS 0
(3) GENERAL GOVERNMENT APPROPRIATIONS YEAS 10 NAYS 0
(4)
(5)

I. SUMMARY:

The bill amends section 800.04(7), Florida Statutes, which imposes a criminal penalty against an offender who commits lewd or lascivious exhibition in the presence of a victim who is less than 16 years of age. The bill imposes a criminal penalty against an offender who transmits a lewd or lascivious exhibition live over a computer on-line service, Internet service, or local bulletin board service when the offender knows or should know or has reason to believe that the transmission is viewed on a computer or television monitor by a victim in this state who is less than 16 years of age. Under the bill, it is not a defense that an undercover operative or law enforcement officer was involved in the detection and investigation of the offense so long as the offender has reason to believe that the transmission is viewed by a victim in this state who is less than 16 years of age.

Under the bill, an offender 18 years of age or older who transmits a lewd or lascivious exhibition over a computer on-line service, Internet service, or local bulletin board service commits a felony of the second degree if the offender knows or should know or has reason to believe that the transmission is viewed on a computer or television monitor by a victim in this state who is less than 16 years of age. For an offender less than 18 years of age, the crime is punished as a third degree felony.

An offender can be prosecuted for lewd or lascivious exhibition even if the transmission is actually viewed by an undercover operative or law enforcement officer so long as the offender has reason to believe that the transmission is viewed by a child less than 16 years of age.

The bill may have a fiscal impact associated with the cost of enforcement. However, it may generate revenues through civil forfeiture proceedings and by the imposition of fines against those sentenced for committing lewd or lascivious exhibition. The fiscal impact is indeterminate, but considered to be minimal.

The bill takes effect October 1, 2000.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1. Less Government Yes [] No [X] N/A []

The bill provides a penalty for specified conduct that presently carries no criminal sanction. Some government involvement will be needed to enforce the sanction.

2. Lower Taxes Yes [] No [] N/A [X]

3. Individual Freedom Yes [] No [] N/A [X]

4. Personal Responsibility Yes [] No [] N/A [X]

5. Family Empowerment Yes [] No [] N/A [X]

B. PRESENT SITUATION:

Section 800.04(7)(a), Florida Statutes, provides that a person who:

1. Intentionally masturbates;

2. Intentionally exposes the genitals in a lewd or lascivious manner; or

3. Intentionally commits any other sexual act that does not involve actual physical or sexual contact with the victim, including but not limited to, sadomasochistic abuse, sexual bestiality, or the simulation of any act involving sexual activity

in the presence of a victim who is less than 16 years of age, commits a lewd or lascivious exhibition. See s. 800.04(7)(a), F.S.

An offender 18 years of age or older who commits a lewd or lascivious exhibition commits a felony of the second degree. See s. 800.04(7)(b), F.S. If the offender is less than 18 years of age, the crime is a felony of the third degree. See s. 800.04(7)(c), F.S.

Recent technological advances, such as the Internet, have greatly facilitated communications but have also raised new legal issues. With a phone line, a computer, an inexpensive camera, and some software, it is possible for people to have “virtual” face-to-face communications in “net meetings” even though they may be hundreds of miles away. Although there are obvious benefits to improved communications, such advances may also provide new avenues for offenders who prey upon children to reach their target audience. The present law provides no penalty for an offender who commits what would otherwise be lewd and lascivious exhibition when the offender commits that act in the “virtual” presence of the child (i.e., via a net meeting) rather than in the “real” presence of the child.

C. EFFECT OF PROPOSED CHANGES:

The bill amends section 800.04(7), Florida Statutes, which relates to lewd or lascivious exhibition in the presence of a victim who is less than 16 years of age. Section 800.04(7)(a), Florida Statutes, provides the general intent crime of lewd or lascivious exhibition. Section 1 of the bill adds a new paragraph (b) to section 800.04(7), Florida Statutes, which creates a

specific intent crime of lewd and lascivious exhibition over a computer on-line service, Internet service, or local bulletin board service.

The bill adopts language from section 800.04(7)(a)(1-3) and provides in paragraph (b) that any person who:

1. Intentionally masturbates;

2. Intentionally exposes the genitals in a lewd or lascivious manner; or

3. Intentionally commits any other sexual act that does not involve actual physical or sexual contact with the victim, including but not limited to, sadomasochistic abuse, sexual bestiality, or the simulation of any act involving sexual activity

live over a computer on-line service, Internet service, or local bulletin board service; and who knows or should know or has reason to believe that the transmission is viewed on a computer or television monitor by a victim in this state who is less than 16 years of age commits lewd or lascivious exhibition. The bill makes knowledge of the victim's age and knowledge that the victim is in this state elements of this crime. The bill thereby creates the specific intent crime of lewd or lascivious exhibition, while preserving the general intent crime of lewd or lascivious exhibition in section 800.04(7)(a), Florida Statutes.

The bill also provides that it is not a defense to prosecution that an undercover operative or law enforcement officer was involved in the detection and investigation of the offense. An offender can be prosecuted for lewd or lascivious exhibition even if the transmission is actually viewed by an undercover operative or law enforcement officer so long as the offender has reason to believe that the transmission is viewed by a child less than 16 years of age.

Under the bill, if the offender is 18 years of age or older, the crime is punished as a second degree felony. If the offender is less than 18 years of age, the crime is punished as a third degree felony.

D. SECTION-BY-SECTION ANALYSIS:

Section 1. Amends s. 800.04(7), creating a specific intent crime of lewd and lascivious exhibition over a computer on-line service, Internet service, or local bulletin board service.

Section 2. Amends s. 921.0022(3), the Offense Severity Ranking Chart.

Section 3. For purposes of incorporating the amendment to section 800.04, F.S., section 394.912, 775.082, 775.084, 775.15, 775.21, 787.01, 787.02, 787.025, 914.16, 943.0435, 943.0585, 943.059, 944.606, 944.607, 947.1405, 948.01, 948.03, and 948.06, Florida Statutes, are reenacted.

Section 4. The bill provides an effective date of October 1, 2000.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

Minimal (See Fiscal Comments)

2. Expenditures:

Minimal (See Fiscal Comments)

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

Minimal (See Fiscal Comments)

2. Expenditures:

Minimal (See Fiscal Comments)

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The bill may generate revenues pursuant to the provisions of chapter 775.083, Florida Statutes, which allows for the imposition of fines at sentencing. Additionally, any personal property used as an instrumentality in the commission of a felony is subject to forfeiture under the Florida Contraband Forfeiture Act, sections 932.701 - 932.707, Florida Statutes. Such proceedings may be an additional source of revenues.

The bill may require enforcement-related expenditures.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

The bill does not require counties or municipalities to spend funds or to take action requiring the expenditure of funds. Additionally, the proposed bill is a criminal law and exempt from the mandates provision.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill does not reduce the authority of municipalities or counties to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

The bill would not reduce the percentage of a state tax shared with counties or municipalities. Therefore, it would not contravene the requirements of Article VII, Section 18 of the Florida Constitution.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

The bill will penalize conduct that presently carries no sanction when the conduct is transmitted live over a computer on-line service, Internet service, or local bulletin board service to a victim in this state if the offender knows or should know or has reason to believe the victim is less than 16 years of age. The Internet is currently believed to connect more than 159 countries and over 109 million users. See ACLU v. Johnson, 194 F.3d 1149, 1153 (10th Cir. 1999). Through a connection to the Internet, individuals can have "live" interaction although they may be thousands of miles apart. See Reno v. ACLU, 521 U.S. 844, 851 (1997). This bill will make conduct that is illegal if it occurs "in person" a crime if the same conduct occurs "live" over the Internet.

In a prosecution for Lewd or Lascivious Exhibition, the State must prove that:

1. An offender intentionally committed an act prohibited by sections 800.04(7)(a)(1-3), Florida Statutes, and

2. A victim less than 16 years of age was present when the prohibited act occurred.

See State v. Werner, 609 So. 2d 431 (Fla. 1992). Traditionally, the victim and offender had to share proximity of both "real" time and "real" vicinity to the prohibited act for the act to be found to have occurred "in the presence of" the victim. See id. The computer on-line services, Internet services, and local bulletin board services now make it possible for individuals to share proximity of time and "virtual vicinity" though they may be physically located miles apart.

The bill addresses the "virtual vicinity" capability of the Internet. The bill provides a penalty when an offender commits an act specified in section 800.04(7)(a)(1-3) and the victim and offender share proximity of "real" time and "virtual vicinity" to the prohibited act. In other words, the bill penalizes lewd and lascivious exhibition whether it occurs "live and in person" or "live over the Internet."

There have been previous attempts by federal and state governments to direct legislation at the Internet. Some of these have failed on constitutional grounds. See, e.g. Reno, Johnson. Constitutional concerns may be raised by the bill. These are addressed below.

First Amendment

The bill restricts specified conduct when it occurs over the Internet. First Amendment protection extends to "expressive conduct" as well as "pure speech." Tinker v. Des Moines School District, 393 U.S. 503 (1969); Stromberg v. California, 283 U.S. 359 (1931). Laws that may silence speakers whose message would be entitled to constitutional protection are deemed to have a "chilling effect" and hold disfavor with the courts. See Reno v. ACLU, 521 U.S. at 874.

Opponents could argue that the bill infringes on an individual's expressive conduct. In Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991), the U.S. Supreme Court held that nude dancing constituted expressive conduct. Traditionally however, expressive conduct has not enjoyed the same level of First Amendment protection as has pure speech. See, e.g., Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984); United States v. O'Brien, 391 U.S. 367 (1968).

If the bill restricts expressive conduct protected by the First Amendment, it may be viewed by the Courts as a content-based limitation. Content-based restrictions of speech are disfavored by the Courts and justify a burden on protected speech only if they serve a compelling state interest and are narrowly drawn to further that interest. See Reno, 521 U.S. at 874. Nonetheless, the Courts have recognized that different standards are appropriate when the state seeks to further its compelling interest in protecting the physical and psychological well-being of minors. See FCC v. Pacifica Foundation, 438 U.S. 726 (1978) (appropriate to restrict radio broadcast in order to shield minors from indecent messages that are not obscene by adult standards); Ginsberg v. New York, 390 U.S. 629 (1968) (upholding statute that prohibited selling to minors under 17 years of age material that was considered obscene as to them even if not obscene as to adults).

If the bill is held to be a restriction of the content of protected "expressive" conduct, the state must show it has a compelling state interest in protecting children under the age of sixteen from such conduct. Section 800.04(7), Florida Statutes, already limits an individual's ability to "express" himself or herself in the manner described in that section.

The state has never been successfully challenged regarding its ability to regulate the conduct described in section 800.04(7), Florida Statutes. See Chesebrough v. State, 255 So. 2d 675 (Fla. 1971)(holding that the phrase "lewd and lascivious" was not unconstitutionally vague). Even if the conduct takes place in the privacy of an individual's own home, the conduct can be punished if it occurs in the presence of a child under 16 years of age. It can be argued that the bill does not silence speakers whose message would be entitled to constitutional protection -- nor does it still any actors whose acts would be entitled to constitutional protection. See Reno, 521 U.S. at 874 (expressing concern that the statute would silence speakers whose speech would be subject to constitutional protection). The bill does not make criminal "on-line" activity that is otherwise protected and legal "off-line." Arguably, the bill protects the Internet and other computer on-line services against providing a venue for otherwise illegal activity.

Reno and Johnson discussed First Amendment issues and the Internet. In Reno, the court overturned the "Communications Decency Act of 1996" (the "Act"). The court explained the Act as follows:

> The first [challenged provision], 47 U.S.C.A. § 223(a) (Supp. 1997), prohibits the knowing transmission of obscene or indecent messages to any recipient under 18 years of age. It provides in pertinent part:
>
> "(a) Whoever--
> "(1) in interstate or foreign communications --
>
> ***
>
> "(B) by means of a telecommunications device knowingly--
> "(I) makes, creates, or solicits, and
> "(ii) initiates the transmission of,
> "any comment, request, suggestion, proposal, image or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age, regardless of whether the maker of such communication placed the call or initiated the communication;
>
> ***
>
> "(2) knowingly permits any telecommunications facility under his control to be used for any activity prohibited by paragraph (1) with the intent that it be used for such activity,
>
> "shall be fined under Title 18, or imprisoned not more than two years, or both."

> The second provision, § 223(d), prohibits the knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age. It provides:
>
> "(d) Whoever--
> "(1) in interstate or foreign communications knowingly--
> "(A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or
> "(B) uses any interactive computer service to display in a manner available to a person under 18 years of age,
> "any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or
> "(2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity,
> "shall be fined under Title 18, or imprisoned not more than two years, or both."

Reno, 521 U.S. at 859-860.

The Reno court struck down the statute. The government attempted to narrow the statute by arguing that it only applied to communication with minors and did not diminish communications between adults. The court rejected the government's argument:

> In arguing that the [Act] does not so diminish adult communication, the Government relies on the incorrect factual premise that prohibiting a transmission whenever it is known that one of its recipients is a minor would not interfere with adult-to-adult communication. The findings of the District Court make clear that this premise is untenable. Given the size of the potential audience for most messages, in the absence of a viable age verification process, **the sender must be charged with knowing that one or more minors will likely view it.** Knowledge that, for instance, one or more members of a 100-person chat group will be minor--and therefore that it would be a crime to send the group an indecent message--would surely burden communication among adults.

Reno, 521 U.S. at 876. (emphasis added).

The court further rejected the government's argument that section 223(d)'s provision applying only to specific minors saved the statute:

> The Government also asserts that the "knowledge" requirement of both §§ 223(a) and (d), especially when coupled with the "specific child" element found in § 223(d), saves the [Act] from overbreadth. Because both sections prohibit the dissemination of indecent messages only to persons known to be under 18, the Government argues, it does not require transmitters to "refrain from communicating indecent material to adults; they need only refrain from disseminating such materials to persons they know to be under 18." Brief for Appellants 24.
>
> This argument ignores the fact that most Internet fora--including chat rooms, newsgroups, mail exploders, and the Web--are open to all comers. The Government's assertion that the knowledge requirement somehow protects the communications of adults is therefore untenable. Even the strongest reading of the "specific person" requirement of § 223(d) cannot save the statute. It would confer broad powers of censorship, in the form of a "heckler's veto," upon any opponent of indecent speech who might simply log on and inform the would-be discoursers that his 17-year-old child--a "specific person ... under 18 years of age," 47 U.S.C.A. § 223(d)(1)(A) (Supp.1997)--would be present.

Reno, 521 U.S. at 880.

In a separate opinion, Justice O'Connor, joined by Chief Justice Rehnquist, said that she would have found that the language of section 223(d)(1)(A):

> (d) Whoever--
> (1) in interstate or foreign communications knowingly--
> (A) uses an interactive computer service to send to a specific person or persons under 18 years of age,

required that the sender have specific knowledge that he or she was sending transmissions to a minor. Reno, 521 U.S. at 892 (O'Connor, J., concurring in part and dissenting in part). This requirement, O'Connor argued, would save the Act in cases where one adult was communicating with one or more minors. Reno, 521 U.S. at 891-893. (O'Connor, J., concurring in part and dissenting in part). She would have sustained the Act in cases where one adult knew that he or she was communicating only with minors. Id. at 894-895.

Relying on Reno, in Johnson, the Tenth Circuit upheld the issuance of an injunction against the enforcement of a New Mexico statute that prohibited someone from using a computer to "knowingly and intentionally initiate or engage in communication with a person under eighteen years of age when such communication in whole or in part depicts actual or simulated nudity, sexual intercourse or any other sexual conduct." Johnson, 194 F.3d at 1152. The government argued that the statute should be narrowed to apply to communications when a sender deliberately sends a message which is harmful to minors to a specific individual known to be a minor. Id. at 1158. The court rejected that argument by noting that the statutory language was not conducive to such a narrow interpretation. Id. at 1159. The government also asserted that the phrase "knowingly and intentionally" appropriately narrowed the statute. Id. The court rejected that argument, noting that, under Reno, "virtually all communication on the Internet would meet the statutory definition of 'knowingly'". Id.

Under Reno and Johnson, the bill may be subject to challenge on the argument that it is impossible to control exactly who sees Internet transmissions and because senders are "charged with knowing" that minors might see their transmission. Accordingly, it could be argued that the bill unconstitutionally restricts speech between adults. The cases did not address "private chat rooms." If portions of "chat rooms" are truly private and the sender knows the person in the private room is a minor, the courts' concerns about a child stumbling upon adult communications may not be valid.

Unlike the statutes in Reno and Johnson, this bill regulates "live" conduct and specifically defines that conduct. Concerns expressed in Reno, such as the criminalization of transmission of information about birth control practices, homosexuality, or the consequences of prison rape, see Reno, 521 U.S. at 871, are not present here. Only specified acts performed before children are affected. Although the U.S. Supreme Court held that nude dancing constituted expressive conduct in the Barnes case, the Court also held that the expressive value of the conduct was "marginal." Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991). In a recent Florida case, the Fourth District Court of Appeals was asked to decide whether nude dancing that involved certain sex acts was protected by the First Amendment as expressive conduct. See State v. Conforti, 668 So. 2d 350 (Fla. 4th DCA 1997), rev. den., 697 So. 2d 509 (Fla. 1997). In holding that the sex acts were not protected as expressive conduct, the court stated, "[i]f the simple nude dancing described in Barnes was only 'marginally' within the outer parameters of the First Amendment,' then the acts of cunnilingus and masturbation here at issue are somewhere on Mars." Conforti, 668 So. 2d at 355.

If an act does not have expressive value, then it does not enjoy the protection of the first amendment. The acts at issue in connection with the bill are:

1. Intentional masturbation;

2. Intentional exposure of the genitals in a lewd or lascivious manner; or

3. Intentional commission of a sexual act that does not involves actual physical or sexual contact with the victim, including but not limited to, sadomasochistic abuse, sexual bestiality, or the simulation of any act involving sexual activity.

Under the Conforti rationale, at least some of these acts do not have expressive value. It follows that acts that do not have expressive value "in person" do not have expressive value simply because they were "expressed" over a computer on-line service, Internet service, or local bulletin board service. If the acts at issue do not have expressive value then they would not be protected as "speech" for purposes of the First Amendment.

Commerce Clause

Arguably, the bill is aimed at any offender located anywhere in the world. In two recent federal cases, courts found "practical difficulties" in exercising criminal jurisdiction over such offenders and held that the statutes which reached these offenders were violative of the Commerce Clause.[1] See ACLU v. Johnson, 194 F.3d 1149, 1162 (10th Cir. 1999). See also American Libraries Ass'n v. Pataki, 969 F.Supp. 160 (S.D.N.Y. 1997).

In Johnson, the court discussed three ways a statute can violate the Commerce Clause. First, a statute may violate the Commerce Clause if it directly regulates conduct outside the state's borders. See Johnson, 194 F.3d at 1160-1161. Second, a statute may violate the Commerce Clause if the burdens on interstate commerce exceed the local benefit of the statute. See Johnson, 194 F.3d at 1161-1162. Finally, statutes that subject individuals to inconsistent regulations where the subject of the regulation has been recognized as requiring national regulation have been held to run afoul of the Commerce Clause. See Johnson, 194 F.3d at 1162.

Johnson held that New Mexico's statute was an impermissible regulation of conduct outside the state. Id. at 1161. Although the state argued that the statute was limited to communications between parties who were each located within the state, the court found the argument untenable because the "reality of Internet communications" is that there is no way to effectively limit Internet communications to intrastate borders. Id. at 1161. The court held that the statute was intended to apply interstate conduct which fit within the statute and over which New Mexico had criminal jurisdiction. Id. The Court found the statute represented an unconstitutional attempt to regulate interstate commerce. Id.

The Johnson court acknowledged the state's compelling interest in protecting minors from harmful, sexually oriented materials. Id. at 1161-1162. However, the court held that the statute excessively burdened interstate commerce compared to the local benefits that the statute actually conferred. Id. The court expressed doubt over the state's ability to exercise criminal jurisdiction over out-of-state offenders. Id. The court also stated that as between in-state victims and in-state offender's, the benefit conferred by the statute is "extremely small."

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[1] Art. I, § 8, U.S. Const. ("The Congress shall have Power ... To regulate Commerce ... among the several States").

Id. Finally, the court held that the statute violated the Commerce Clause because it subjected the use of the Internet to inconsistent regulation. Id. at 1162.

The Johnson Court relied heavily on the Commerce Clause analysis contained in American Libraries Ass'n v. Pataki, 969 F.Supp. 160 (S.D.N.Y. 1997). In Pataki, the court enjoined New York from enforcing a statute which prevented communications with minors over the Internet "which, in whole or in part, depicts actual or simulated nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors." Pataki, 969 F.Supp. at 163. The court found that the statute violated the Commerce Clause for three reasons:

> First, the practical impact of the New York Act results in the extraterritorial application of New York law to transactions involving citizens of other states and is therefore per se violative of the Commerce Clause. Second, the benefits derived from the Act are inconsequential in relation to the severe burdens it imposes on interstate commerce. Finally, the unique nature of cyberspace necessitates uniform national treatment and bars the states from enacting inconsistent regulatory schemes.
>
> Pataki, 969 F.Supp. at 183-184.

Taken together, these two cases could be viewed to stand for the following propositions:

1. All legislation that effects the use of the Internet is a direct regulation on interstate commerce because there is no way to effectively limit Internet communications to within state borders.

2. Even where the state has a compelling interest, the local benefits do not outweigh the international and interstate burdens imposed by any regulation that effects the use of Internet.

3. The use of the Internet is recognized as a subject requiring national regulation.

The bill is clearly legislation which is aimed at the use of the Internet. Neither the United States Supreme Court, the 11th Circuit, nor Florida courts have addressed the impact of the Commerce Clause on the Internet. Moreover, while the bill is clearly aimed at the use of the Internet, it is less clear that the "use" described in the bill amounts to commerce.

"The dormant implication of the Commerce Clause prohibits state regulation that discriminates or unduly burdens interstate commerce and thereby impedes free private trade in the national marketplace. Johnson, 194 F.3d at 1160. Regardless of the offender's location or the transmission's point of origin, the bill is aimed at acts of lewd or lascivious exhibition transmitted live over a computer on-line service, Internet service, or local bulletin board service when the offender knows or should know or has reason to believe the transmission is viewed by a victim in this state who is less than sixteen years of age. The bill does not address any activity that has historically been viewed as commerce or as trade in the national marketplace. Under the language of the New Mexico and New York statutes, it was arguable that activity which was legal "off-line" became criminal simply because it occurred "on-line." By contrast, this bill ensures that activity already defined as criminal remains criminal, whether "off-line" or "on-line."
Even subject areas like highway traffic, which have been said to require "a cohesive national scheme of regulations so that users are reasonably able to determine their obligations," see Pataki, 969 F.Supp. at 182, are not totally free of state regulation. In matters of criminal law, concurrent state regulation is common. For example, individual states may set breath-alcohol content levels for purposes of Driving Under the Influence statutes. These levels may vary from state to state without being an undue burden on interstate travelers. Although interstate

highway travel may amount to commerce, it is a matter of state criminal law when that travel occurs by a person whose breath-alcohol content level rises to a level specified by the state. Similarly, one would not expect the Commerce Clause to protect the interstate transportation of illegal drugs. It is arguable that the Commerce Clause only applies to conduct that is otherwise lawful. Proponents could argue that criminal activity should not become commerce simply because the Internet is used as an instrumentality of the crime. However, given the reading of the Commerce Clause in Johnson and Pataki, this bill may be subject to a Commerce Clause challenge.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

The American Civil Liberties Union opposes this bill.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON JUVENILE JUSTICE:

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