

STORAGE NAME: h0683.jj
DATE: January 27, 2000

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
JUVENILE JUSTICE
ANALYSIS**

BILL #: HB 683 (PCB JJ 00-02A)
RELATING TO: Lewd or lascivious exhibition
SPONSOR(S): Committee on Juvenile Justice, Representative Merchant and Others
TIED BILL(S): None

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

- (1) JUVENILE JUSTICE YEAS 12 NAYS 0
 - (2)
 - (3)
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 - (5)
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I. SUMMARY:

The bill amends s. 800.04(7), F.S., 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. An offender less than 18 years of age 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 third 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. 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 bill takes effect October 1, 2000.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|---|--|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |

For any principle that received a "no" above, please explain:

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

The bill empowers families and protects child-rearing decisions of parents. The bill aids parents in safely raising their children by preserving parents' authority over child-rearing decisions and over activity occurring within their own households. The bill provides a criminal penalty for offenders who challenge parental authority and jeopardize the well-being of children.

B. PRESENT SITUATION:

Subsection (7)(a) of section 800.04, F.S., provides 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

in the presence of a victim who is less than 16 years of age, commits a lewd or lascivious exhibition.

An offender 18 years of age or older who commits a lewd or lascivious exhibition commits a felony of the second degree. An offender less than 18 years of age who commits a lewd or lascivious exhibition commits a felony of the third degree.

Recent technological advances, which have greatly facilitated communications, have also raised many legal issues. The Internet presently connects over 150 countries and over one million users. 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. Unfortunately, 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 s. 800.04(7), F.S., which relates to lewd or lascivious exhibition in the presence of a victim who is less than 16 years of age. Paragraph (a) of s. 800.04(7), F.S., provides the general intent crime of lewd or lascivious exhibition. Section 1 of the bill adds a new paragraph (b) to s. 800.04(7), F.S., which provides a specific intent crime of lewd and lascivious exhibition.

The bill adopts language from s. 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 thereby creates the specific intent crime of lewd or lascivious exhibition, while preserving the general intent crime of lewd or lascivious exhibition in s. 800.04(7)(a), F.S.

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, 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. An offender less than 18 years of age 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 third 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.

The bill may have a fiscal impact associated with the cost of enforcement. However, pursuant to the bill and the provisions of s. 775.083, F.S., revenues may be generated through the imposition of fines against those sentenced for committing lewd or lascivious exhibition. Additionally, any personal property used as an instrumentality in the commission of a felony is subject to forfeiture under the Florida Contraband Forfeiture Act,

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ss. 932.701 - 932.707, Florida Statutes. Such proceedings may be an additional source of revenues.

For purposes of incorporating the amendment to section 800.04, F.S., ss. 394.912, 775.082, 775.084, 775.15, 775.21, 787.01, 787.02, 787.025, 914.16, 921.0022, 943.0435, 943.059, 944.606, 944.607, 947.1405, 948.01, 948.03, and 948.06, F.S., are reenacted in Section 2 of the bill.

Section 3 of the bill provides an enactment date of October 1, 2000.

D. SECTION-BY-SECTION ANALYSIS:

Please refer to Paragraph II-C (Effect of Proposed Changes) above.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill may generate revenues pursuant to the provisions of s. 775.083, F.S., 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, ss. 932.701 - 932.707, Florida Statutes. Such proceedings may be an additional source of revenues.

2. Expenditures:

The bill may require enforcement-related expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill may generate revenues pursuant to the provisions of s. 775.083, F.S., 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, ss. 932.701 - 932.707, Florida Statutes. Such proceedings may be an additional source of revenues.

2. Expenditures:

The bill may require enforcement-related expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

The Criminal Justice Economic Conference has not yet evaluated the fiscal impact of the bill.

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 who the offender knows or should know or has reason to believe 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, No. 98-2199, 1999 WL 992744, at *2 (10th Cir. (N.M.) Nov. 2, 1999). Through use of an on-line service such as 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). Such technological advances may raise new and unique questions in many areas of the law. The crime of Lewd or Lascivious Exhibition as it presently exists in s. 800.04(7), F.S., represents one such area of the law.

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

1. An offender intentionally committed an act prohibited by s. 800.04(7)(a)(1-3), F.S., 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 s. 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 government to direct legislation at the Internet. Some of these have failed on constitutional grounds. See, e.g. Johnson, No.98-2199; Reno, 521 U.S. 851. 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 government can probably demonstrate a compelling state interest in protecting children under the age of sixteen from such conduct. In fact, the government already limits an individual’s ability to “express” himself or herself in the manner described in s. 800.04(7), F.S., in furtherance of this very interest.

The state has never been successfully challenged regarding its ability to regulate the conduct described in s. 800.04(7), F.S. 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. Unlike the "chilling effect" problem the Court found with the statute at issue in Reno, 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. The bill does not criminalize "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 and ensures that the Information Superhighway does not become the Expressway to Lewd and Lascivious Exhibition.

Potentially, the bill may avoid First Amendment scrutiny. 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. State v. Conforti, 668 So. 2d 350 (Fla. 4th DCA 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." Id. 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, these acts do not have expressive value. It is unlikely they would be held to have expressive value simply because they were "expressed" over a computer on-line service, Internet service, or local bulletin board service rather than in person. 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

The bill provides 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. Arguably, the bill is aimed at any offender located any where 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. See ACLU v. Johnson, No. 98-2199, 1999 WL 992744, at *10 (10th Cir. (N.M.) Nov. 2, 1999); American Libraries Ass'n v. Pataki, 969 F.Supp. 160 (S.D.N.Y. 1997). It should be noted that neither decision is binding precedent in Florida.

The Pataki and Johnson decisions delineate three ways a statute can run afoul of the Commerce Clause. First, a statute may violate the Commerce Clause if it directly regulates conduct outside the state's borders. Second, a statute may violate the Commerce Clause if the burdens on interstate commerce exceed the local benefit of the statute. This is considered an indirect regulation of interstate commerce. 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.

In the Johnson case, a United States District Court of Appeals held that a New Mexico statute was a per se violation of the United States Constitution, Article I, Section 8, also known as the "Commerce Clause." No. 98-2199 at *10. 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. See id. at *9 - *10. 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 *10. 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." Id.

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 striking a New York statute as violative of the Commerce Clause, the Pataki Court held that "[t]he Internet, like . . . rail and highway traffic . . . requires a cohesive national scheme of regulations so that users are reasonably able to determine their obligations. 969 F.Supp. at 182.

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. However, the Johnson and Pataki decisions have not been reviewed by the United States Supreme Court. 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, No. 98-2199 at *9 (emphasis added). 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.

In this respect, the bill differs from the statutes at issue in Reno, Johnson, and Pataki. The language of those statutes is more like the language found in chapter 847, F.S., than to the language of chapter 800, F.S., or the bill. Compare 47 U.S.C.A. s. 223(a) (Supp. 1997); 47 U.S.C.A. s. 223(d) (Supp. 1997); N.M. Stat. Ann. s. 30-37-3.2(A); N.Y. Penal Law s. 235.21 (McKinney 1999). 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, the bill ensures that activity already defined as criminal remains criminal, whether "off-line" or "on-line."

Florida case law has not addressed this matter, nor has the United States Supreme Court reviewed the impact of the Commerce Clause issue in this context. The Communications Decency Act at issue in Reno presented the Supreme Court with language similar to the language found in the statutes at issue in Johnson and Pataki. See 47 U.S.C.A. s. 223(a) (Supp. 1997); 47 U.S.C.A. s. 223(d) (Supp. 1997); N.M. Stat. Ann. s. 30-37-3.2(A); N.Y. Penal Law s. 235.21 (McKinney 1999). Yet, the Court relied wholly on the First Amendment in holding that the statute at issue in Reno was unconstitutional. Reno, 521 U.S. at 849.

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.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

The bill reenacts several sections of the Florida Statutes for purposes of incorporating the amendment. One of the reenacted sections is s. 394.912(9)(e), F.S., which relates to Involuntary Civil Commitment of Sexually Violent Predators. Subsection (9) of s. 394.912, F.S., has several references to "lewd, lascivious, or indecent assault or act," both with and without specific reference to s. 800.04, F.S. However, ch. 99-201, the Children's Protection Act of 1999, substantially amended s. 800.04, F.S., to create the offenses of "lewd or lascivious battery," "lewd or lascivious molestation," "lewd or lascivious conduct," and "lewd or lascivious exhibition;" and to delete provisions that defined and provided penalties for "lewd, lascivious, or indecent assault or act." It is unclear whether s. 394.912(9) was intentionally not included or simply overlooked by the Children's Protection Act of 1999. Section 394.912(9) may need to be reviewed for the purpose of determining whether there is a need to amend the section for conformity.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None.

VII. SIGNATURES:

COMMITTEE ON JUVENILE JUSTICE:

Prepared by:

Staff Director:

Lori Ager

Lori Ager