

SUBJECT: Increasing penalty for displaying obscene material to a child

COMMITTEE: Criminal Jurisprudence — favorable, without amendment

VOTE: 5 ayes — Keel, Riddle, Ellis, Hodge, Talton

0 nays

4 absent — Denny, Dunnam, P. Moreno, Pena

WITNESSES: For — None

Against — Ruth Epstein, ACLU of Texas

On — Grant Sparks, Office of the Attorney General, Internet Bureau

BACKGROUND: Under Penal Code, sec. 43.22, it is a class C misdemeanor (maximum fine of \$500) if a person intentionally or knowingly displays or distributes an obscene photograph, drawing, or similar visual representation or other obscene material and is reckless about whether a person was present who would be offended or alarmed by the display or distribution.

Obscene is defined as material that:

- the average person, applying contemporary community standards, would find that taken as a whole appeals to the prurient interest in sex;
- depicts or describes patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated, including sexual intercourse, sodomy, and sexual bestiality; or patently offensive representations or descriptions of masturbation, excretory functions, sadism, masochism, or lewd exhibition of the genitals in certain ways; and
- taken as a whole, lacks serious literary, artistic, political, and scientific value.

Penal Code, sec. 43.24, makes it a class A misdemeanor (up to one year in jail and/or a maximum fine of \$4,000) to:

- sell, distribute, exhibit, or possess for sale, distribution, or exhibition to a minor harmful material, if the offender knew that the material was harmful and that the person was a minor; or
- display harmful material and be reckless about whether a minor was present who would be offended or alarmed by the display, if the offender knew that the material was harmful.

It is a third-degree felony (two to 10 years in prison and an optional fine of up to \$10,000) if the person hires, employs or uses a minor to do or accomplish or assist in doing any of the acts prohibited above. It is a defense to prosecution that the sale, distribution, or exhibition was by a person having scientific, education, governmental, or other similar justification, or the sale, distribution, or exhibition was to a minor who was accompanied by a consenting parent, guardian, or spouse.

A minor is defined as an individual younger than 18 years, and harmful material is defined as material whose dominant theme appeals to the prurient interest of a minor in sex, nudity, or excretion; is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors; and is utterly without redeeming social value for minors.

Penal Code, sec. 12.42, delineates penalties for repeat and habitual felony offenders. It states that a defendant must be sentenced to life imprisonment if he or she previously was convicted of certain sexual offenses including sexual performance by a child, child pornography, indecency with a child, and sexual assault, and is then convicted of sexual assault or aggravated sexual assault, aggravated kidnaping with the intent to violate or abuse the victim sexually, or first-degree burglary with the intent to commit certain sexual offenses.

Code of Criminal Procedure, art. 62, governs the sex offender registration program.

DIGEST: HB 235 would amend Penal Code, sec. 43.22, to make it a state-jail felony (180 days to two years in a state jail and an optional fine of up to \$10,000) for

a person to intentionally or knowingly display or distribute an obscene photograph, drawing, or similar visual representation or other obscene material knowing that a child younger than 18 years of age was present during the display or distribution. The bill would specify that conduct constituting an offense under this section and Penal Code, sec. 43.24, could be prosecuted under either section.

It would be an affirmative defense to prosecution if, at the time of the offense, the offender was the spouse of the victim, or the victim was 14 years of age or older and the offender at the time of the offense:

- was not more than three years older than the victim and of the opposite sex;
- did not use duress, force, or a threat against the victim; and
- was not required to register for life as a sex offender.

This bill would amend Penal Code, sec. 12.42, to include a previous conviction for this offense among the list of previous convictions that makes a life sentence mandatory for certain habitual offenders.

HB 235 would amend Code of Criminal Procedure, art. 62, which governs sex offender registration, to include a conviction for this offense under the definition of a reportable conviction or adjudication. This bill also would reenact and amend Code of Criminal Procedure, art. 62.12(a), to provide that the duty to register for a sex offender would end when the person died if the person had a reportable conviction or adjudication for this offense, among others.

The bill would take effect on September 1, 2003.

**SUPPORTERS
SAY:**

HB 235 is necessary to prevent harm to children resulting from their exposure to obscene materials. Because the display or distribution of pornography to children often is used as a tool to later victimize them sexually, it is appropriate to raise the penalty level for this serious crime. When children are exposed to pornography, it desensitizes them to the sex acts depicted, lowers their inhibitions, and convinces them that the activity is acceptable. Therefore, sex offenders commonly use pornography to “groom” children, piquing their

interest in sexual activities and making offenders' aggressive sexual solicitations seem more acceptable.

HB 235 would assist in the prosecution of those who prey on children over the Internet and through e-mail by using obscene images to entice them. These images often target children by incorporating cartoon characters with which they are familiar. For example, a cartoon image might depict Snow White being gang raped.

Child pornography is an increasing problem in Texas communities, and this bill would give law enforcement additional tools to combat it. The Odessa chief of police was arrested for viewing and possessing child pornography, and a Dallas business operating under the name Landslide Productions was discovered to be the largest commercial child pornography enterprise ever known.

Texas children are vulnerable to sexual predators, and this bill would help protect families and communities. There is a well documented connection between those who possess child pornography and obscenity and those who actually commit sexual offenses. It is essential to treat the display or distribution of pornography to children as a serious crime and to bring offenders to justice to prevent them from later preying on children.

Current law does not impose sufficient penalties for this crime that harms children. Penal Code, sec. 43.24 only makes it a class A misdemeanor to display harmful material to a minor. Furthermore, it requires the state to prove that the offender was reckless about whether a minor was present who would have been offended or alarmed by the display. Punishing the display or distribution of obscene materials as a class C misdemeanor likewise lets offenders off too lightly. A fine does practically nothing to deter would-be offenders or to punish them for their crimes. Furthermore, it is well established that sex offenders do not respond well to rehabilitation, and harsher punishment is appropriate.

**OPPONENTS
SAY:**

By imposing mandatory enhancements for nonviolent crimes, this bill would be a step in the wrong direction. Texas prisons already are filled to capacity, and the Criminal Justice Policy Council has projected a shortage of prison beds during the next biennium. It would be a misuse of taxpayer dollars to pay

the high costs of incarcerating nonviolent offenders for increasingly long sentences.

HB 235 is unnecessary. Current law appropriately makes the display or distribution of obscene materials a class C misdemeanor, if the offender was reckless about whether a person was present who would be offended or alarmed by it. Similarly, Penal Code, sec. 43.24, addresses the same situation where a minor was present, making it a class A misdemeanor. HB 235 would duplicate sec. 43.24 in many ways and would not give law enforcement any additional tools that they did not already possess.

Not all persons who possess pornography are sexual offenders or pedophiles, and this bill would punish too harshly the mere display of obscene materials. After all, the bill would not require the minor to have been harmed in any way. There is no evidence that obscenity is a precursor to more serious sexual offenses. Finally, there is no evidence that sexual crimes against children have increased recently to justify the harsher penalties under this bill.

Many things other than obscenity can be used to entice a child, such as chocolate milk or candy bars, but the possession or display of those items is not illegal. Items that are not inherently harmful to children should not be criminalized.

NOTES:

A related bill, HB 236 by West, also on today's General State Calendar, would enhance penalties for obscenity if the material depicted a child younger than 18 years at the time the image was made, an image that to a reasonable person would be virtually indistinguishable from the image of a child younger than 18, or an image created, adapted, or modified to be the image of an identifiable child.