

- SUBJECT:** Enhancing punishment for obscenity involving images of minors
- 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:** Penal Code, sec. 43.23, makes 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 wholesale promote or possess with intent to wholesale promote any obscene material or device, if the person knows its content and character.
- 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.

Wholesale promote means to manufacture, issue, sell, provide, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit, or advertise, or to offer or agree to do so.

It is a class A misdemeanor (up to one year in jail and/or a maximum fine of \$4,000) for a person, knowing the content and character, to promote or possess with intent to promote any obscene material or obscene device, or to produce, present, or direct an obscene performance or participate in a portion that is obscene or that contributes to its obscenity. Obscene device means a device that is designed or marketed as useful primarily for the stimulation of human genital organs.

Penal Code, sec. 43.26, makes it a third-degree felony (two to 10 years in prison and an optional fine of up to \$10,000) to knowingly or intentionally possess material that visually depicts a child younger than 18 years of age at the time the image of the child was made who is engaging in sexual conduct.

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 236 would enhance penalties for the promotion and wholesale promotion of obscene materials depicting:

- a child younger than 18 years of age at the time the image of the child was made; or
- an image that to a reasonable person would be virtually indistinguishable from the image of a child younger than 18 years of age; or

- an image created, adapted, or modified to be the image of an identifiable child.

An offense for wholesale promotion would rise from a state jail felony to a third-degree felony, and an offense for simple promotion would rise from a class A misdemeanor to a state jail felony.

Identifiable child would be defined as a person recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature, who was younger than 18 years of age at the time the visual depiction was created adapted, or modified, or whose image as a person younger than 18 years of age was used in creating, adapting, or modifying the visual depiction.

The bill would specify that a prosecutor seeking to enhance punishment for an image created, adapted, or modified to be the image of an identifiable child would not have to prove the actual identity of an identifiable child.

HB 235 would amend Penal Code, sec. 12.42, to include a previous conviction for this enhanced obscenity 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 enhanced obscenity offense under the definition of a reportable conviction or adjudication. This bill would reenact and amend Code of Criminal Procedure, art. 62.12(a), to provide that the duty to register for a sex offender would 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 236 would enhance penalties for promotion and wholesale promotion of child pornography while closing a gap in law that harms children. In 2002, the United States Supreme Court, in *Ashcroft v. Free Speech Coalition*, 535 U.S. ___ found unconstitutional portions of the federal Child Pornography Prevention Act of 1996 that banned virtual child pornography. The court held that images created using techniques such as computer-imaging technology but not real minors could not be deemed illegal as child pornography because an actual child was not exploited in the process.

Obscenity that depicts but does not use real minors also is harmful to children and should be harshly punished. After all, pedophiles might use the materials to encourage children to participate in sexual activity, and pedophiles might whet their own sexual appetites with the obscene images. There is a well documented connection between those who possess child pornography and obscenity and those who actually commit sexual offenses. Furthermore, it is well established that sex offenders do not respond well to rehabilitation, so harsher punishment is needed for child pornography offenses involving real and virtual children alike.

HB 236 would not be found unconstitutional because it only would prohibit obscene materials, based on whether they offended contemporary community standards and other definitions contained in statute. The ban under the federal Child Pornography Prevention Act of 1996 was not limited to obscene materials but included any image of a minor engaging in sexually explicit conduct, which the Court found to be an overly broad prohibition.

This bill also is necessary because the existence of computer-generated images can make it harder to prosecute pornographers who do exploit real minors. In a charge of child pornography under sec. 43.26, a defendant could raise as a defense the fact that the state did not prove that the image was of a real child. HB 236 would clarify that virtual images also were prohibited and would eliminate the need for the state to prove that the image was of a real minor.

HB 235 is needed to fill a gap in current Texas law with regard to morphing, which is the cutting and pasting or otherwise altering a picture of a child or a portion of a child to make it appear that the child is engaging in sexual activity. Morphing is prohibited under federal law and was not challenged by

the Free Speech coalition because it harms real children whose images are used. HB 235 would complement the efforts of federal law enforcement by making morphing a state crime as well.

**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 even more nonviolent offenders for increasingly long sentences.

This bill would criminalize virtual images of children that did not harm real children in any way. *Ashcroft v. the Free Speech Coalition* held that the ban on virtual child pornography, which appears to depict minors but is produced using computer-imaging technology or youthful-looking adults, was unconstitutional, and this bill could face a similar constitutional challenge because it would attempt to make similar images illegal.

This bill is unnecessary. Penal Code, sec. 43.26 already makes it a third-degree felony to possess child pornography produced using a real child. Furthermore, morphing already is prohibited by the federal Child Pornography Prevention Act, and that part of the act was not considered by the United States Supreme Court. This bill only would add provisions regarding virtual child pornography, which does not injure children and need not be prohibited.

NOTES:

A similar bill, HB 235 by West, also on today's General State Calendar, would enhance the offense of intentionally or knowingly displaying or distributing obscene material to a child younger than 18 from a class C misdemeanor to a state jail felony. It also would make this new offense applicable for enhancements under the habitual offender statute and would include this offense as one for which the offender must register as a sex offender for life.