

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 559 Distribution of Material Harmful to Minors

**SPONSOR(S):** Schenck and others

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 1128

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Committee on Homeland Security &amp; Public Safety</u>	<u>11 Y, 0 N</u>	<u>Cunningham</u>	<u>Kramer</u>
2) <u>Safety &amp; Security Council</u>	<u></u>	<u>Cunningham</u>	<u>Havlicak</u>
3) <u>Policy &amp; Budget Council</u>	<u></u>	<u></u>	<u></u>
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5) <u></u>	<u></u>	<u></u>	<u></u>

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### SUMMARY ANALYSIS

There is currently a three-pronged test to determine whether material is harmful to minors. Specifically, material is harmful to minors if it depicts nudity, sexual conduct, or sexual excitement that:

- (a) Predominantly appeals to the prurient, shameful, or morbid interest of minors;
- (b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
- (c) Taken as a whole, is without serious literary, artistic, political, or scientific value for minors.

HB 559 expands what materials might be determined harmful to minors by amending paragraph (b) to read, "Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material *or conduct* for minors."

The bill also provides that ignorance of a minor's age, a minor's misrepresentation of his or her age, a bona fide belief of a minor's age, or a minor's consent may not be raised as a defense in certain prosecutions relating to using minors in the production of certain materials and distributing obscene materials and materials that are harmful to minors.

HB 559 also increases the penalties related to the distribution of obscene materials when the materials depict a minor engaged in any act or conduct that is harmful to minors, and creates 3<sup>rd</sup> degree felony offenses that provide the following:

- A person may not knowingly use a minor in the production of certain materials that are harmful to minors.
- A person may not knowingly sell, rent, loan, give away, distribute, transmit, or show any material displaying erotic nudity to a minor.
- A person may not knowingly sell, rent, load, give away, distribute, transmit, or show any material displaying erotic fondling to a minor.

On March 14, 2008, the Criminal Justice Impact Conference determined that this bill would have an insignificant prison bed impact.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

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## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

**Promote Personal Responsibility** – This bill increases penalties related to the distribution of obscene materials when the materials depict a minor engaged in any act or conduct that is harmful to minors.

**Safeguard Individual Liberty** - The bill makes it a crime to knowingly use a minor in the production of any material that is harmful to minors and to knowingly sell, rent, loan, give away, distribute, transmit, or show any material displaying erotic nudity or erotic fondling to a minor.

#### B. EFFECT OF PROPOSED CHANGES:

There are a variety of statutes relating to the sexual exploitation of children. Sections 847.012, 847.0125, and 847.013, F.S., criminalize selling, distributing, or exposing minors to materials that are “harmful to minors.” Section 827.071(4) and (5), F.S., criminalize the possession of certain materials that depict a child engaging in sexual conduct<sup>1</sup>. Section 827.071(2) and (3), F.S., make *using* a child in a sexual performance<sup>2</sup> a crime.

#### Definition – “Harmful to Minors”

Section 847.001, F.S., defines “harmful to minors” as:

Any reproduction, imitation, characterization, description, exhibition, presentation, or representation, of whatever kind or form, depicting nudity, sexual conduct, or sexual excitement when it:

- (a) Predominantly appeals to the prurient, shameful, or morbid interest of minors;
- (b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
- (c) Taken as a whole, is without serious literary, artistic, political, or scientific value for minors.

#### *Effect of the Bill*

HB 559 expands what materials might be determined harmful to minors by amending paragraph (b) of the above definition as follows:

- (b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material or conduct for minors; and

#### Obscene Materials

Section 847.001, F.S., defines “obscene” as:

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<sup>1</sup> Section 827.071, F.S., defines “sexual conduct” as “actual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual lewd exhibition of the genitals; actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast, with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed.”

<sup>2</sup> Section 827.071, F.S., defines “sexual performance” as “any performance or part thereof which includes sexual conduct by a child of less than 18 years of age.”

The status of material which:

- (a) The average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest;
- (b) Depicts or describes, in a patently offensive way, sexual conduct; and
- (c) Taken as a whole, lacks serious literary, artistic, political, or scientific value.

Currently, it is a 1<sup>st</sup> degree misdemeanor<sup>3</sup> for a person to distribute, sell, lend, give away, transmit, transmute, or show certain obscene materials.<sup>4</sup> It is a 2<sup>nd</sup> degree misdemeanor<sup>5</sup> for a person to knowingly have certain obscene material in one's possession, custody, or control.<sup>6</sup>

#### *Effect of the Bill*

HB 559 increases the above penalties to a 3<sup>rd</sup> degree felony<sup>7</sup>, ranked in level 6 of the Criminal Punishment Code, offense severity ranking chart, if the violation was based on materials that depict a minor engaged in any act or conduct that is harmful to minors. The bill also provides that ignorance of a minor's age, a minor's misrepresentation of his or her age, a bona fide belief of a minor's age, or a minor's consent may not be raised as a defense in a prosecution for the above-described crimes.

#### **Selling / Distributing Harmful Materials to Minors**

Section 847.012, F.S., makes it a 3<sup>rd</sup> degree felony for a person to knowingly to sell, rent, or loan for monetary consideration to a minor:

- Any picture, photograph, drawing, sculpture, motion picture film, videocassette, or similar visual representation or image of a person or portion of the human body which depicts nudity or sexual conduct, sexual excitement, sexual battery, bestiality, or sadomasochistic abuse and which is harmful to minors; or
- Any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter defined in s. 847.001, explicit and detailed verbal descriptions or narrative accounts of sexual excitement, or sexual conduct and which is harmful to minors.

The term "knowingly" is defined as having the general knowledge of, reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

- The character and content of any material (described above) which is reasonably susceptible of examination by the defendant; and
- The age of the minor; however, an honest mistake shall constitute an excuse from liability if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.<sup>8</sup>

#### *Effect of the Bill*

HB 559 removes language from the definition of "knowingly" relating to the age of the minor. Specifically, the bill removes language providing that "an honest mistake shall constitute an excuse

<sup>3</sup> A first degree misdemeanor is punishable by a term of imprisonment not exceeding 1 year and a \$1,000 fine. *See* ss. 775.082 and 775.083.

<sup>4</sup> *See* s. 847.011(1)(a), F.S.

<sup>5</sup> A second degree misdemeanor is punishable by a term of imprisonment not exceeding 60 days and a \$500 fine. *See* ss. 775.082 and 775.083.

<sup>6</sup> *See* s. 847.011(2), F.S.

<sup>7</sup> A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. ss. 775.082, 775.083, and 775.084, F.S.

<sup>8</sup> s. 847.012, F.S.

from liability if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.” The bill adds a provision stating that “a person’s ignorance of a minor’s age, a minor’s misrepresentation of his or her age, a bona fide belief or a minor’s age, or a minor’s consent may not be raised as a defense in a prosecution” for the above-described crimes.

HB 559 also makes it a 3<sup>rd</sup> degree felony, ranked in level 6 of the Criminal Punishment Code, offense severity ranking chart, for a person to knowingly use a minor in the production of any of the above-described material regardless of whether the material is intended for distribution to minors or is actually distributed to them.

### **Exposing Minors to Harmful Materials**

Section 847.013, F.S., makes it a 1<sup>st</sup> degree misdemeanor for a person to:

- Knowingly exhibit for a monetary consideration to a minor or knowingly to sell or rent a videotape of a motion picture to a minor or knowingly sell to a minor an admission ticket or pass or knowingly admit a minor for a monetary consideration to premises whereon there is exhibited a motion picture, exhibition, show, representation, or other presentation which, in whole or in part, depicts nudity, sexual conduct, sexual excitement, sexual battery, bestiality, or sadomasochistic abuse and which is harmful to minors; or
- Knowingly rent or sell, or loan to a minor for monetary consideration, a videocassette or a videotape of a motion picture, or similar presentation, which, in whole or in part, depicts nudity, sexual conduct, sexual excitement, sexual battery, bestiality, or sadomasochistic abuse and which is harmful to minors.

The term “knowingly” is defined as having general knowledge of, reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both:

- The character and content of any motion picture (described above) which is reasonably susceptible of examination by the defendant, or the character of any exhibition, presentation, representation, or show (described above), other than a motion picture show, which is reasonably susceptible of being ascertained by the defendant; and
- The age of the minor; however, an honest mistake shall constitute an excuse from liability if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.<sup>9</sup>

### *Effect of the Bill*

HB 559 removes language from the definition of “knowingly” relating to the age of the minor. Specifically, the bill removes language providing that “an honest mistake shall constitute an excuse from liability if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.” The bill then adds a provision stating that “a person’s ignorance of a minor’s age, a minor’s misrepresentation of his or her age, a bona fide belief of a minor’s age, or a minor’s consent may not be raised as a defense in a prosecution” for the above-described crimes.

HB 559 also makes it a 1<sup>st</sup> degree misdemeanor for a person to knowingly use a minor in the production of any motion picture, exhibition, show, representation, or other presentation that, in whole or in part, depicts nudity, sexual conduct, sexual excitement, sexual battery, bestiality, or sadomasochistic abuse and that is harmful to minors.

HB 559 also adds to the legislative intent language of s. 847.013, F.S., to specify that it is the intent of the Legislature to preempt the field, to the exclusion of counties and municipalities, insofar as it concerns exposing persons under 17 years of age to harmful motion pictures, exhibitions, shows, representations, presentations, and commercial or sexual exploitation.

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<sup>9</sup> s. 847.013, F.S.

## Showing Obscene Materials to Minors

Section 847.0133, F.S., makes it a 3<sup>rd</sup> degree felony for a person to knowingly sell, rent, loan, give away, distribute, transmit, or show any obscene material<sup>10</sup> to a minor.

HB 559 creates the following 3<sup>rd</sup> degree felony offenses:

- A person may not knowingly sell, rent, loan, give away, distribute, transmit, or show any material displaying erotic nudity to a minor.
- A person may not knowingly sell, rent, loan, give away, distribute, transmit, or show any material displaying erotic fondling to a minor.

The bill defines “erotic nudity” as, “the display of the genitals, pubic area, or breasts of a person, or the undeveloped or developing genitals, breasts, or pubic area of a minor for the purpose of real or simulated overt sexual gratification or stimulation of a minor.” The bill specifies that “displaying erotic nudity” means “its inclusion in any book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing paper, card, picture, drawing, photograph, motion picture film, figure, image, videotape, videocassette, phonograph record, wire, tape, or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of erotic nudity.”

The bill defines “erotic fondling” as “touching the clothed or unclothed genitals, pubic area, buttocks, or breasts of a person, or the developing or undeveloped genitals, pubic area, or breasts of a minor for the purpose of real or simulated overt sexual gratification or stimulation of a minor.” The bill specifies that “displaying erotic fondling” means “its inclusion in any book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing paper, card, picture, drawing, photograph, motion picture film, figure, image, videotape, videocassette, phonograph record, wire, tape, or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of erotic fondling.”

### C. SECTION DIRECTORY:

**Section 1.** Amends s. 847.001, F.S., relating to definitions.

**Section 2.** Amends s. 847.011, F.S., relating to prohibition of certain acts in connection with obscene, lewd, etc., materials; penalty.

**Section 3.** Amends s. 847.012, F.S., relating to prohibition of sale or other distribution of harmful materials to persons under 18 years of age; penalty.

**Section 4.** Amends s. 847.013, F.S., relating to exposing minors to harmful motion pictures, exhibitions, shows, presentations, or representations.

**Section 5.** Amends s. 847.0133, F.S., relating to protection of minors; prohibition of certain acts in connection with obscenity; penalty.

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<sup>10</sup> “Obscene material” is defined as, “any obscene book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing paper, card, picture, drawing, photograph, motion picture film, figure, image, videotape, videocassette, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument for obscene use, or purporting to be for obscene use or purpose.” See s. 847.0133, F.S.

**Section 6.** Amends s. 921.0022, F.S., relating to the Criminal Punishment Code; offense severity ranking chart.

**Section 7.** This bill takes effect July 1, 2008.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See "Fiscal Comments."

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

### D. FISCAL COMMENTS:

On March 14, 2008, the Criminal Justice Impact Conference determined that this bill would have an insignificant prison bed impact.

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill appears to be exempt from the requirements of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

2. Other:

The First Amendment to the United States Constitution and article I, section 4 of the Florida Constitution protect the rights of individuals to express themselves in a variety of ways. The constitutions protect not only speech and the written word, but also conduct intended to communicate. When laws attempt to restrict or burden fundamental and basic rights such as these, they must not only be directed toward a legitimate public purpose, but they must be drawn as narrowly as possible.

When legislation is drafted so that it may be applied to conduct that is protected by the First Amendment, it is said to be unconstitutionally overbroad. This overbreadth doctrine permits an individual whose own speech or conduct may be prohibited to challenge an enactment facially "because it also threatens others not before the court-- those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985).

Florida case law is replete with instances in which the Florida Supreme Court has stricken an obscenity statute because of its overbreadth after considering the hypothetical consequences. For example, in *Schmitt v. State*<sup>11</sup>, the Florida Supreme Court reviewed the definition of "sexual conduct" in the statute as it existed at the time (defined to include "actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast;....") and stated the following:

[T]he statutory definition of sexual conduct as drafted would prohibit possession of a picture of a father bathing his son, two clothed children hugging each other in such a way that their clothed genitals made actual physical contact, or a photograph of a junior high school coach giving a congratulatory smack of the hand to the buttocks of one of his players fully dressed in football uniform.

The Court held that the definition was overbroad and declared that portion of the statute void.<sup>12</sup>

Section 5 of this bill creates the following 3<sup>rd</sup> degree felony offenses:

- A person may not knowingly sell, rent, loan, give away, distribute, transmit, or show any material displaying erotic nudity to a minor.
- A person may not knowingly sell, rent, load, give away, distribute, transmit, or show any material displaying erotic fondling to a minor.

The bill's definition of the terms "erotic nudity" and "erotic fondling" are broad and could be interpreted to include any movie that revealed a woman's (or girl's) breasts, any television commercial or program that showed one person touching the clothed buttocks of another person, a photograph of a mother holding her naked baby, etc... For the reasons outlined above, this language raises constitutional overbreadth concerns.

#### B. RULE-MAKING AUTHORITY:

None.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

The following comments are applicable to the bill as filed. The strike-all amendment traveling with the bill addresses these issues.

##### Section 1

The definition of "harmful to minors" currently has as one of its requirements that the material "predominantly appeals to the prurient, shameful, or morbid interest of *minors*." If this portion of the definition was intended to require that the material "predominantly appeals to the prurient, shameful, or morbid interest" of the community as a whole, the words "of minors" should be removed.

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<sup>11</sup> 590 So.2d 404 (Fla. 1991)

<sup>12</sup> *Id.*

## Section 2

The bill provides increased penalties for persons who violate s. 847.011(1) or (2), F.S., based on materials that depict a minor engaged in any act or conduct that is harmful to minors. In order to ensure that the increased penalty applies, line 59 should be amended to read:

(1)(a) Except as provided for in paragraph (c), any person who knowingly sells, lends, gives away,

Similarly, line 106 should be amended to read:

(2) Except as provided for in subsection (1)(c), a person who knowingly has in his or her possession,

## Section 3

The bill creates a new crime prohibiting *using* a minor in the production of any material which is harmful to a minor. However, the title of the statute only refers to prohibiting the sale or distribution of harmful materials to minors.

## Section 4

It appears that the language in section 4 that makes it a crime to use a minor in the production of certain materials that are harmful to minors is duplicative of the language in section 3.

## Section 6

The bill ranks the 3<sup>rd</sup> degree felony violation of s. 847.011, F.S., in level 6 of the Criminal Punishment Code, offense severity ranking chart. Line 452 describes the crime as, "distributing, offering to distribute, or possessing with intent to distribute obscene materials *to minors* or depicting minors." The bill increases the penalty for persons who violate s. 847.011(1) or (2), F.S., based on materials that *depict* a minor engaged in any act or conduct that is harmful to minors. The bill does not increase the penalty for distributing obscene materials *to minors*.

Similarly, in s. 847.012, F.S., the bill creates the crime of knowingly using a minor in the production of certain materials that are *harmful to minors*. In the Criminal Punishment Code, offense severity ranking chart, the bill (line 453) appears to inaccurately describe the crime as "knowingly using a minor in the production of *obscene or sexually explicit* materials."

## D. STATEMENT OF THE SPONSOR

Representative Schenck submitted the following statement:

House Bill 559, relating to the distribution of material harmful to minors, has been introduced to help protect innocent minors from being exploited by questionable "teen modeling agencies". There have been cases where our State's Attorney's offices have tried to prosecute such agencies but have been shot down due to an unclear definition of obscene material. House Bill 559, will provide a tool for the State Attorney's offices to prosecute individuals who take provocative photographs of children under the age of 21. This bill will help cease the existence of these suspect modeling agencies. In turn, these provocative photos of our youth, which are sometimes displayed on the internet, will be destroyed. As a father of two, I am devoted to making Florida a better, safer environment for our children, which House Bill 559 does.

## **IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES**

On March 12, 2008, the Homeland Security & Public Safety Committee adopted a strike-all amendment and reported the bill favorably as amended. The strike-all amendment:



- Amends the definition of the term “harmful to minors” to require that the material predominantly appeals to the *prurient, shameful, or morbid interest* rather than the prurient, shameful, or morbid interest *of minors*;
- Removes the provisions in section 5 of the bill that prohibit a person from showing any material displaying erotic nudity or erotic fondling to a minor; and
- Makes technical changes