

BILL ANALYSIS

H.B. 236
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Criminal Jurisprudence
Committee Report (Unamended)

BACKGROUND AND PURPOSE

Section 43.21 of the Penal Code defines obscenity 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 of ultimate sex acts or other lewd exhibitions, and taken as a whole, lacks serious literary, artistic, political, and scientific value. Under current Texas law, there is no enhancement for promotion or wholesale promotion of obscene material depicting a child.

House Bill 236 is aimed at strengthening Texas' obscenity law in regard to material that depicts images of children. This legislation is needed due to the United States Supreme Court's decision in *Ashcroft v. Free Speech Coalition* in the spring of 2002, which stated that the U.S. Child Pornography Prevention Act of 1996's banning of "virtual child porn" violates free speech and is unconstitutional. "Virtual" images cannot be deemed illegal as child pornography, the Court said, because an actual child was not exploited in the process. However, so-called "virtual" images can indeed be deemed *obscene* if they offend contemporary community standards and other definitions put forth in statute. H.B. 236 provides enhancements to Texas' obscenity statutes which will provide clear alternatives to prosecution of "virtual" child pornography.

Further, Texas law does not currently address the issue of "morphing," that is cutting and pasting or otherwise altering, via traditional or computer methods, an innocent picture of a child to make it appear that the child is engaged in sexual activity. (One example is pasting a child's head onto an adult's body or vice versa.) Morphing is prohibited in the U.S. Child Pornography Prevention Act, and because it implicates the interests of real children, it was not challenged by the Free Speech Coalition and the Supreme Court did not consider it. Because of these facts, H.B. 236 also enhances penalties for wholesale promotion or promotion of an obscene image created, adapted, or modified to be the image of an identifiable child.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

House Bill 236 enhances the penalties one degree for promotion or wholesale promotion of obscene material that depicts a real child under the age of 18 or is an image that to a reasonable person would be virtually indistinguishable from the image of a child younger than 18 years of age. H.B. 236 also enhances penalties for wholesale promotion or promotion of an obscene image created, adapted, or modified to be the image of an identifiable child ("morphed" from an image of a real child).

Wholesale promotion of this material is a third degree felony, while simple promotion is a state jail felony. H.B. 236 also makes these offenses applicable under the habitual offender enhancements in Section 12.42 of the Penal Code, and under the list of sex offenses that require sex offender registration for life.

EFFECTIVE DATE

September 1, 2003.