

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/HB 113 Distribution of Materials Harmful to Minors

**SPONSOR(S):** Justice Appropriations Subcommittee; Criminal Justice Subcommittee; Diaz, M. and others

**TIED BILLS:** None **IDEN./SIM. BILLS:** CS/SB 86

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Criminal Justice Subcommittee	11 Y, 0 N, As CS	Jones	Cunningham
2) Justice Appropriations Subcommittee	11 Y, 0 N, As CS	McAuliffe	Jones Darity
3) Judiciary Committee	15 Y, 0 N	Jones	Havlicak

### SUMMARY ANALYSIS

Section 847.011, 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:

- Predominantly appeals to a prurient, shameful, or morbid interest;
- 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
- Taken as a whole, is without serious literary, artistic, political, or scientific value for minors.

Florida has multiple statutes that prohibit persons from transmitting, selling, or displaying to minors material that is harmful to minors. However, there are currently no statutes prohibiting an adult from displaying or giving minors (without monetary consideration) material that is harmful to minors.

The bill amends s. 847.012, F.S., to create a new offense making it a third degree felony for an adult to knowingly distribute to a minor on school property or post on school property any of the following material:

- 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, F.S., explicit and detailed verbal descriptions or narrative accounts of sexual excitement, or sexual conduct and which is harmful to minors.

The bill provides an exception for the distribution or posting of school-approved instructional materials by specified school personnel.

"School property" is defined as the grounds or facility of any kindergarten, elementary school, middle school, junior high school, or secondary school, whether public or nonpublic.

The Criminal Justice Impact Conference met February 27, 2013, and determined the bill may have an insignificant negative impact on state prison beds.

The bill is effective on October 1, 2013.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES

#### **Regulation of Obscene Materials**

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. However, the Supreme Court of the United States has found that obscene materials are not protected by the First Amendment.<sup>1</sup>

Section 847.001(10), F.S., defines “obscene” as the status of material that:

- The average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest;
- Depicts or describes, in a patently offensive way, sexual conduct;<sup>2</sup> and
- Taken as a whole, lacks serious literary, artistic, political, or scientific value.

Florida has multiple statutes prohibiting the possession, exhibition, and dissemination of obscene materials to adults and children.<sup>3</sup> One specific to children is s. 847.0133, F.S., which makes it a third degree felony<sup>4</sup> to knowingly sell, rent, loan, give away, distribute, transmit, or show any obscene material to a minor.

#### **Regulation of Materials Harmful to Minors**

The definition of materials that are “harmful to minors” is similar to but more inclusive than that of “obscene” materials. Section 847.001(6), F.S., defines “harmful to minors” as any reproduction, imitation, characterization, description, exhibition, presentation, or representation, of whatever kind or form, depicting nudity,<sup>5</sup> sexual conduct,<sup>6</sup> or sexual excitement<sup>7</sup> when it:

- Predominantly appeals to a prurient, shameful, or morbid interest;
- 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
- Taken as a whole, is without serious literary, artistic, political, or scientific value for minors.<sup>8</sup>

Florida has multiple statutes that prohibit persons from transmitting, selling, or displaying to minors material that is harmful to minors. A description of these statutes is below.

#### *Transmission of Materials Harmful to Minors*

Section 847.0138, F.S., makes it a third degree felony for a person to know or believe they are transmitting an image, information, or data that is “harmful to minors” to a specific individual known by the defendant to be a minor.<sup>9</sup>

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<sup>1</sup> *Miller v. California*, 413 U.S. 15 (1973).

<sup>2</sup> Section 847.001, 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 constituted sexual battery or simulates the sexual battery is being or will be committed. A mother’s breastfeeding of her baby does not under any circumstance constitute “sexual conduct.”

<sup>3</sup> *See, e.g.*, s. 847.011, F.S.

<sup>4</sup> A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. Sections 775.082 and 775.083, F.S.

<sup>5</sup> Section 847.001(9), F.S., defines “nudity” as the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering; or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple; or the depiction of covered male genitals in a discernibly turgid state.

<sup>6</sup> *Supra* note 2.

<sup>7</sup> Section 847.001(17), F.S., defines “sexual excitement” as the condition of the human male or female genitals when in a state of sexual stimulation or arousal.

<sup>8</sup> Section 847.001, F.S.

<sup>9</sup> “Known by the defendant to be a minor” means that the defendant had actual knowledge or believed that the recipient of the communication was a minor. Section 847.0138(1)(a), F.S.

*Selling, Renting, or Loaning Materials Harmful to Minors*

Section 847.012(3)(a) and (b), F.S., makes it a third degree felony for a person to knowingly<sup>10</sup> 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, F.S., explicit and detailed verbal descriptions or narrative accounts of sexual excitement, or sexual conduct and which is harmful to minors.<sup>11</sup>

*Exposing Minors to Harmful Motion Pictures, Shows, Etc.*

Section 847.013(3), F.S., makes it a first degree misdemeanor<sup>12</sup> for a person to knowingly<sup>13</sup> exhibit for monetary consideration to a minor; knowingly sell or rent a videotape of a motion picture to a minor; 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.

*Retail Display of Materials Harmful to Minors*

Section 847.0125(2)(a), F.S., makes it a first degree misdemeanor for a person who offers for sale in a retail establishment that is open to the general public any book, magazine, or other printed material, *the cover of which depicts material which is harmful to minors*, to knowingly exhibit such book, magazine, or material in such a way that it is on open display to, or within the convenient reach of, minors. The statute requires such items to be displayed, either individually or collectively, behind an opaque covering which conceals the book, magazine, or other printed material.<sup>14</sup>

The statute also makes it a first degree misdemeanor for a person who offers for sale in a retail establishment that is open to the general public any book, magazine, or other printed material, *the content of which exploits, is devoted to, or is principally made up of descriptions or depictions of material which is harmful to minors*, to knowingly exhibit such book, magazine, or material in such establishment in such a way that it is within the convenient reach of minors.<sup>15</sup>

There are currently no statutes prohibiting an adult from displaying or giving minors (without monetary consideration) material that is harmful to minors.<sup>16</sup>

**Effect of the Bill**

The bill amends s. 847.012, F.S., to add a new subsection (5), that makes it a third degree felony for an adult to knowingly distribute to a minor on school property or post on school property any of the following material:

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<sup>10</sup> “Knowingly” means having general knowledge of, reason to know, or a belief or ground for belief which warrants further inspection or inquiry of both: (1) the character and content of any motion picture described herein which is reasonably susceptible of examination by the defendant, or the character of any exhibition, presentation, representation, or show described herein, other than a motion picture show, which is reasonably susceptible of being ascertained by the defendant; and (2) the age of the minor. Section 847.013(1), F.S.

<sup>11</sup> 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 a violation of s. 847.012, F.S.

<sup>12</sup> A first degree misdemeanor is punishable by up to one year in county jail and a \$1,000 fine. Sections 775.082 and 775.083, F.S.

<sup>13</sup> *Supra* note 10.

<sup>14</sup> Section 847.0125(2)(a), F.S.

<sup>15</sup> Section 847.0125(2)(b), F.S.

<sup>16</sup> There may be circumstances under which such activity could be charged as a violation of s. 827.04(1), F.S., contributing to the delinquency of a child, which is a first degree misdemeanor.

- 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, F.S., explicit and detailed verbal descriptions or narrative accounts of sexual excitement, or sexual conduct and which is harmful to minors.

The bill provides an exception for the distribution or posting of school-approved instructional materials that by design serve as a major tool for assisting in the instruction of a subject or course by school officers, instructional personnel, administrative personnel, school volunteers, educational support employees, or managers, as defined in s. 1012.01, F.S.

“School property” is defined as the grounds or facility of any kindergarten, elementary school, middle school, junior high school, or secondary school, whether public or nonpublic.

#### B. SECTION DIRECTORY:

Section 1. Amends s. 847.012, F.S., relating to harmful materials; sale or distribution to minors or using minors in production prohibited; penalty.

Section 2. Provides an effective date of October 1, 2013.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

The bill does not appear to have any impact on state revenues.

##### 2. Expenditures:

The Criminal Justice Impact Conference met February 27, 2013 and determined the bill will have an insignificant negative impact on state prison beds.

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

##### 1. Revenues:

The bill does not appear to have any impact on local government revenues.

##### 2. Expenditures:

The bill does not appear to have any impact on local government expenditures.

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

None.

#### D. FISCAL COMMENTS:

None.

## III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

##### 1. Applicability of Municipality/County Mandates Provision:

The 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 lawmakers attempt to restrict or burden fundamental and basic rights such as these, the laws must not only be directed toward a legitimate public purpose, but they must be drawn as narrowly as possible. As the United States Supreme Court has noted, "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."<sup>17</sup> Put another way, statutes cannot be so broad that they prohibit constitutionally protected conduct as well as unprotected conduct.<sup>18</sup>

The 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."<sup>19</sup> The doctrine contemplates the pragmatic judicial assumption that an overbroad statute will have a chilling effect on protected speech.<sup>20</sup>

In *Miller v. California*, the Supreme Court of the United States found that obscene materials are not protected by the First Amendment.<sup>21</sup> However, because materials that are harmful to minors are not considered to be obscene, they receive First Amendment protections. The Supreme Court of Florida, when reviewing the constitutionality of s. 847.0138, F.S., (prohibiting the transmission of harmful materials to minors) noted the importance of the narrow construction of s. 847.0138, F.S., specifically prohibiting harmful materials given to a person *known or believed to be* minor.<sup>22</sup> If statutes are not narrowly constructed they may be challenged as being overbroad.

The bill makes it a crime to post certain material that is harmful to minors on school property, regardless of whether a minor actually sees the material (e.g. if such material were posted in a teacher's lounge or other "teacher only" areas). To the extent that the bill regulates materials arguably suitable for adults that are protected by the First Amendment, it could be challenged as being overbroad.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

#### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 19, 2013, the Criminal Justice Subcommittee adopted one amendment and reported the bill favorable as a committee substitute. The amendment added an exception for the distribution of instructional materials by specified school personnel.

On March 6, 2013, the Justice Appropriations Subcommittee adopted one amendment and reported the bill as a committee substitute. The amendment clarified that certain instructional materials must be school approved.

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<sup>17</sup> *NAACP v. Button*, 371 U.S. 415, 433 (1963).

<sup>18</sup> *Sult v. State*, 906 So.2d 1013 (Fla. 2005).

<sup>19</sup> *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985).

<sup>20</sup> *Sult v. State*, 906 So.2d 1013 (Fla. 2005).

<sup>21</sup> *Miller v. California*, 413 U.S. 15 (1973).

<sup>22</sup> *Simmons v. State*, 944 So.2d 317 (Fla. 2005).

This analysis is drafted to the committee substitute as passed by the Justice Appropriations Subcommittee.