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Bill Analysis

Version: As Introduced

Primary Sponsor: Sen. Schaffer

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SUMMARY

- Expands the offense of endangering children to prohibit a sexually suggestive performance.
- Defines a sexually suggestive performance as all of the following:
 - A performance that occurs at a D liquor permit premises (such as a bar or restaurant);
 - A performance that suggests a minor is participating or engaging in sexual activity, masturbation, or bestiality, or shows a minor simulating sexual activity, masturbation, or bestiality;
 - A performance that, taken as a whole, by the average person applying contemporary community standards, appeals to the prurient interest.
- Specifies that the penalty for a violation of the offense is a second degree felony.
- Requires the revocation of an offender's D liquor permit if the offense occurs at the offender's D liquor permit premises.

DETAILED ANALYSIS

Endangering children

The bill expands the offense of endangering children to prohibit a sexually suggestive performance. The bill prohibits a person from enticing, coercing, permitting, encouraging, compelling, hiring, employing, using, or allowing a child under 18 years old or a mentally or physically handicapped child under 21 years old to act, model, or in any other way participate in, or be photographed for, the production, presentation, dissemination, or advertisement of

any material or performance that the offender knows or reasonably should know is a sexually suggestive performance.¹

A sexually suggestive performance is all of the following:²

- A performance that occurs at a D liquor permit premises (such as a bar or restaurant);
- A performance that suggests a minor is participating or engaging in sexual activity, masturbation, or bestiality or shows a minor simulating sexual activity, masturbation, or bestiality (see “**Comment**,” below);
- A performance that, taken as a whole, by the average person applying contemporary community standards, appeals to the prurient interest.

Under current law, any material or performance that is obscene, sexually oriented, or nudity-oriented is likewise prohibited under the offense of endangering children.³

Penalties

The bill applies the current law penalty for endangering children to its provisions. A violation of the offense is a second degree felony. If the offender also is convicted of or pleads guilty to a human trafficking specification, the court must sentence the offender to a mandatory prison term and order the offender to make restitution.

The bill also adds an administrative penalty for a violation of the offense. If the offender is a D liquor permit holder, and if the violation of the offense occurs at the D liquor permit premises, the court must order the Liquor Control Commission to revoke the offender’s D liquor permit. The Commission is then required to revoke the permit as ordered by the court.⁴

Exemptions

Under current law unchanged by the bill, the offense of endangering children does not apply to any material or performance that is produced, presented, or disseminated for a *bona fide* medical, scientific, educational, religious, governmental, judicial, or other proper purpose, by or to a physician, psychologist, sociologist, scientist, teacher, person pursuing *bona fide* studies or research, librarian, member of the clergy, prosecutor, judge, or other person having a proper interest in the material or performance.⁵

¹ R.C. 2919.22(B)(5).

² R.C. 2919.22(D)(4)(d).

³ R.C. 2919.22(B)(5).

⁴ R.C. 2919.22(E)(4).

⁵ R.C. 2919.22(D)(1).

Definitions under current law

The following current law definitions, which apply to the offense of endangering children, are unchanged by the bill.

Obscene

When considered as a whole, and judged with reference to ordinary adults or, if it is designed for sexual deviates or other specially susceptible group, judged with reference to that group, any material or performance is “obscene” if any of the following apply:⁶

- Its dominant appeal is to the prurient interest;
- Its dominant tendency is to arouse lust by displaying or depicting sexual activity, masturbation, sexual excitement, or nudity in a way that tends to represent human beings as mere objects of sexual appetite;
- Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;
- Its dominant tendency is to appeal to scatological interest by displaying or depicting human bodily functions of elimination in a way that inspires disgust or revulsion in persons with ordinary sensibilities, without serving any genuine scientific, educational, sociological, moral, or artistic purpose;
- It contains a series of displays or descriptions of sexual activity, masturbation, sexual excitement, nudity, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such an interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose.

Sexually oriented matter

“Sexually oriented matter” means any material or performance that shows a minor participating or engaging in sexual activity, masturbation, or bestiality.⁷

Nudity-oriented matter

“Nudity-oriented matter” means any material or performance that shows a minor in a state of nudity and that, taken as a whole by the average person applying contemporary community standards, appeals to the prurient interest.⁸

⁶ R.C. 2907.01(F), not in the bill, and 2919.22(D)(4)(a).

⁷ R.C. 2919.22(D)(4)(c).

⁸ R.C. 2919.22(D)(4)(b).

Performance

“Performance” means any motion picture, preview, trailer, play, show, skit, dance, or other exhibition performed before an audience.⁹

Material

“Material” means any book, magazine, newspaper, pamphlet, poster, print, picture, figure, image, description, motion picture film, phonographic record, or tape, or other tangible thing capable of arousing interest through sight, sound, or touch and includes an image or text appearing on a computer monitor, television screen, liquid crystal display, or similar display device or an image or text recorded on a computer hard disk, computer floppy disk, compact disk, magnetic tape, or similar data storage device.¹⁰

Sexual activity

“Sexual activity” means sexual conduct or sexual contact or both. “Sexual conduct” means vaginal intercourse between a male and female, anal intercourse, fellatio, and cunnilingus between persons regardless of sex; and without privilege to do so, the insertion, however slight, of any body part or any instrument, apparatus, other object into the vaginal or anal opening of another. Penetration, however slight, is sufficient to complete vaginal or anal intercourse. “Sexual contact” means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is a female, a breast for the purpose of sexually arousing or gratifying the other person.¹¹

COMMENT

The bill’s provisions that relate to the “suggestion” or “simulation” of sexual activity, masturbation, or bestiality may raise constitutional issues. Some courts have held that similar regulations are unconstitutionally overbroad or an unconstitutional content based regulation. However, the bill may be distinguishable from these cases as the provisions apply to obscenity and minors engaging in the prohibited activities.

Overbreadth

A government regulation is facially overbroad when there exists a realistic danger that the statute will significantly compromise recognized First Amendment protections of parties not before the court. To be constitutionally overbroad, a regulation’s overbreadth must not only be real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep. Similarly to the bill, former Ohio Administrative Code 4301:1-1-52 prohibited acts that simulated sexual intercourse, masturbation, sodomy, bestiality, or oral copulation and that occurred in a liquor permit premises. For the following reasons, several Ohio courts have held

⁹ R.C. 2907.01(K), not in the bill, and 2919.22(D)(4)(a).

¹⁰ R.C. 2907.01(J), not in the bill, and 2919.22(D)(4)(a).

¹¹ R. C. 2907.01(A) to (C), not in the bill, and 2919.22(D)(4)(a).

that the prohibition was unconstitutionally overbroad: (1) the ban applied to individuals who were fully clothed, and (2) the ban swept in any artistic performance containing simulated sexual behavior, including such mainstream hits as “Miss Saigon” and “Rent” that occur in a theater, comedy club, supper club, musical venue, or other forum with a liquor license.¹²

Content based speech

If the regulation is a content based restriction, the court must apply strict scrutiny, and the regulation is presumptively invalid. To survive strict scrutiny, the provision must be necessary to serve a compelling interest and be narrowly drawn to achieve that end. Similarly to the bill, a Michigan ordinance prohibited the performance of acts, or simulated acts, of sexual intercourse, masturbation, sodomy, bestiality, oral copulation, or flagellation that occurred in a cabaret. A Michigan court held that the prohibition was not unconstitutionally overbroad, but that the prohibition was an unconstitutional regulation of content based speech. The court held that the restrictions on actual and simulated sex acts did not survive strict scrutiny review because the ordinance deprived the performer of a repertoire of expressive elements with which to craft an exotic, sensual performance, and thereby interfered substantially with the dancer’s ability to communicate an erotic message. Unlike a simple prohibition on full nudity, the ordinance did much more than inhibit that portion of the expression that occurred when the last stitch dropped.¹³

HISTORY

Action	Date
Introduced	08-28-19

S0187-I-133/ts

¹² Former O.A.C. 4301:1-1-52(A)(1) and (B)(1); *J.L. Spoons, Inc. v. O’Connor*, 190 F.R.D. 433, 1999 U.S. Dist. LEXIS 20288; *J.L. Spoons, Inc. v. O’Connor*, 194 F.R.D. 589, 2000 U.S. Dist. LEXIS 9859; *161 Dublin, Inc. v. Ohio State Liquor Control Commission*, 2001 Ohio App. LEXIS 5905, 2001-Ohio-8863; and *Top Flight, Inc. v. City of Inkster*, 2007 U.S. Dist. LEXIS 12892.

¹³ *Top Flight*, 2007 U.S. Dist. LEXIS 12892.