

[As Amended by House Committee of the Whole]

As Amended by House Committee

Session of 2007

HOUSE BILL No. 2200

By Committee on Federal and State Affairs

1-25

12 AN ACT concerning crimes, punishment and criminal procedure; relat-
13 ing to obscenity; amending K.S.A. 21-4301a and 21-4301c and K.S.A.
14 2006 Supp. 21-4301 and repealing the existing sections.

15
16 *Be it enacted by the Legislature of the State of Kansas:*

17 Section 1. K.S.A. 2006 Supp. 21-4301 is hereby amended to read as
18 follows: 21-4301. (a) Promoting obscenity is knowingly or recklessly:

19 (1) Manufacturing, issuing, selling, giving, providing, lending, mail-
20 ing, delivering, transmitting, publishing, distributing, circulating, dissem-
21 inating, presenting, exhibiting or advertising any obscene material or ob-
22 scene device;

23 (2) possessing any obscene material or obscene device with intent to
24 issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish,
25 distribute, circulate, disseminate, present, exhibit or advertise such ma-
26 terial or device;

27 (3) offering or agreeing to manufacture, issue, sell, give, provide,
28 lend, mail, deliver, transmit, publish, distribute, circulate, disseminate,
29 present, exhibit or advertise any obscene material or obscene device; or

30 (4) producing, presenting or directing an obscene performance or
31 participating in a portion thereof which is obscene or which contributes
32 to its obscenity.

33 (b) Evidence that materials or devices were promoted to emphasize
34 their prurient appeal shall be relevant in determining the question of the
35 obscenity of such materials or devices. There shall be a presumption that
36 a person promoting obscene materials or obscene devices did so know-
37 ingly or recklessly if:

38 (1) The materials or devices were promoted to emphasize their pru-
39 rient appeal; or

40 (2) the person is not a wholesaler and promotes the materials or de-
41 vices in the course of the person's business.

42 (c) (1) Any material or performance is "obscene" if:

43 (A) The average person applying contemporary community standards

1 would find that the material or performance, taken as a whole, appeals
2 to the prurient interest;

3 (B) the average person applying contemporary community standards
4 would find that the material or performance has patently offensive rep-
5 resentations or descriptions of (i) ultimate sexual acts, normal or per-
6 verted, actual or simulated, including sexual intercourse or sodomy, or
7 (ii) masturbation, excretory functions, sadomasochistic abuse or lewd ex-
8 hibition of the genitals; and

9 (C) taken as a whole, a reasonable person would find that the material
10 or performance lacks serious literary, educational, artistic, political or sci-
11 entific value.

12 **(D) To the extent the allegedly obscene material or device is**
13 **disseminated or displayed by any employee or volunteer of a pub-**
14 **lic or private K-12 school, it shall not constitute promoting ob-**
15 **scenity to disseminate or display such material or device unless**
16 **done knowingly, intentionally, willfully or recklessly and not by**
17 **mistake.**

18 (2) “Material” means any tangible thing which is capable of being
19 used or adapted to arouse interest, whether through the medium of read-
20 ing, observation, sound or other manner.

21 (3) “Obscene device” means a device, including a dildo or artificial
22 vagina, designed or marketed as useful primarily for the stimulation of
23 human genital organs, except such devices disseminated or promoted for
24 the purpose of medical or psychological therapy.

25 (4) “Performance” means any play, motion picture, dance or other
26 exhibition performed before an audience.

27 (5) “Sexual intercourse” and “sodomy” have the meanings provided
28 by K.S.A. 21-3501 and amendments thereto.

29 (6) “Wholesaler” means a person who sells, distributes or offers for
30 sale or distribution obscene materials or devices only for resale and not
31 to the consumer and who does not manufacture, publish or produce such
32 materials or devices.

33 (d) It is a defense to a prosecution for obscenity that:

34 (1) The persons to whom the allegedly obscene material was dissem-
35 inated, or the audience to an allegedly obscene performance, consisted
36 of persons or institutions having scientific, educational or governmental
37 justification for possessing or viewing the same. ~~To assert this defense,~~
38 ~~such educational justification shall be at the post-secondary education~~
39 ~~level;~~

40 (2) the defendant is an officer, director, trustee or employee of a
41 public library and the allegedly obscene material was acquired by such
42 library and was disseminated in accordance with regular library policies
43 approved by its governing body; or

1 (3) the allegedly obscene material or obscene device was purchased,
2 leased or otherwise acquired by a public; ~~or private or parochial school,~~
3 **[school,]** college or university, and that such material was either sold,
4 leased, distributed or disseminated by a teacher, instructor, professor or
5 other faculty member or administrator of such ~~school college or university~~
6 **[school]** as part of or incident to an approved course or program of in-
7 struction at such ~~school college or university~~ **[school]**.

8 (e) The provisions of this section and the provisions of ordinances of
9 any city prescribing a criminal penalty for exhibit of any obscene motion
10 picture shown in a commercial showing to the general public shall not
11 apply to a projectionist, or assistant projectionist, if such projectionist or
12 assistant projectionist has no financial interest in the show or in its place
13 of presentation other than regular employment as a projectionist or as-
14 sistant projectionist and no personal knowledge of the contents of the
15 motion picture. The provisions of this section shall not exempt any pro-
16 jectionist or assistant projectionist from criminal liability for any act un-
17 related to projection of motion pictures in commercial showings to the
18 general public.

19 (f) (1) Promoting obscenity is a class A nonperson misdemeanor on
20 conviction of a first offense.

21 (2) Promoting obscenity is a severity level 9, person felony on con-
22 viction of a second or subsequent offense.

23 (3) Conviction of a violation of a municipal ordinance prohibiting acts
24 which constitute promoting obscenity shall be considered a conviction of
25 promoting obscenity for the purpose of determining the number of prior
26 convictions and the classification of the crime under this section.

27 (g) Upon any conviction of promoting obscenity, the court may re-
28 quire, in addition to any fine or imprisonment imposed, that the defend-
29 ant enter into a reasonable recognizance with good and sufficient surety,
30 in such sum as the court may direct, but not to exceed \$50,000, condi-
31 tioned that, in the event the defendant is convicted of a subsequent of-
32 fense of promoting obscenity within two years after such conviction, the
33 defendant shall forfeit the recognizance.

34 Sec. 2. K.S.A. 21-4301a is hereby amended to read as follows: 21-
35 4301a. (a) Promoting obscenity to minors is promoting obscenity, as de-
36 fined by K.S.A. 21-4301 and amendments thereto, where the recipient of
37 the obscene material or obscene device or a member of the audience of
38 an obscene performance is a child under the age of 18 years.

39 (b) Notwithstanding the provisions of K.S.A. 21-3202 and amend-
40 ments thereto to the contrary, it shall be an affirmative defense to any
41 prosecution under this section that:

42 (1) The defendant had reasonable cause to believe that the minor
43 involved was 18 years old or over, and such minor exhibited to the de-

1 defendant a draft card, driver's license, birth certificate or other official or
2 apparently official document purporting to establish that such minor was
3 18 years old or more.

4 (2) The allegedly obscene material was purchased, leased or other-
5 wise acquired by a public, ~~or private or parochial school,~~ **[school,]** college
6 or university, and that such material was either sold, leased, distributed
7 or disseminated by a teacher, instructor, professor or other faculty mem-
8 ber or administrator of such ~~school college or university~~ as part of or
9 incident to an approved course or program of instruction at such ~~school~~
10 ~~college or university~~ **[school]**.

11 (3) The defendant is an officer, director, trustee or employee of a
12 public library and the allegedly obscene material was acquired by a public
13 library and was disseminated in accordance with regular library policies
14 approved by its governing body.

15 (4) An exhibition in a state of nudity is for a bona fide scientific or
16 medical purpose, or for an educational or cultural purpose for a bona fide
17 ~~school college, university,~~ museum or library.

18 (c) (1) Promoting obscenity to minors is a class A nonperson mis-
19 demeanor on conviction of the first offense.

20 (2) Promoting obscenity to minors is a severity level 8, person felony
21 on conviction of a second or subsequent offense.

22 (3) Conviction of a violation of a municipal ordinance prohibiting acts
23 which constitute promoting obscenity to minors shall be considered a
24 conviction of promoting obscenity to minors for the purpose of deter-
25 mining the number of prior convictions and the classification of the crime
26 under this section.

27 (d) Upon any conviction of promoting obscenity to minors, the court
28 may require, in addition to any fine or imprisonment imposed, that the
29 defendant enter into a reasonable recognizance with good and sufficient
30 surety, in such sum as the court may direct, but not to exceed \$50,000,
31 conditioned that, in the event the defendant is convicted of a subsequent
32 offense of promoting obscenity to minors within two years after such
33 conviction, the defendant shall forfeit the recognizance.

34 (e) This section shall be a part of and supplemental to the Kansas
35 criminal code.

36 Sec. 3. K.S.A. 21-4301c is hereby amended to read as follows: 21-
37 4301c. (a) No person having custody, control or supervision of any com-
38 mercial establishment shall knowingly:

39 (1) Display any material which is harmful to minors in such a way
40 that minors, as a part of the invited general public, will be exposed to
41 view such material or device;

42 (2) sell, furnish, present, distribute or disseminate to a minor, or oth-
43 erwise allowing a minor to view, with or without consideration, any ma-

1 terial which is harmful to minors; or

2 (3) present to a minor, or participate in presenting to a minor, with
3 or without consideration, any performance which is harmful to a minor.

4 (b) Violation of subsection (a) is a class B nonperson misdemeanor.

5 (c) Notwithstanding the provisions of K.S.A. 21-3202 and amend-
6 ments thereto to the contrary, it shall be an affirmative defense to any
7 prosecution under this section that:

8 (1) The allegedly harmful material or device was purchased, leased
9 or otherwise acquired by a public; ~~or private or parochial school,~~ **[school,]**
10 college or university, and that such material or device was either sold,
11 leased, distributed or disseminated by a teacher, instructor, professor or
12 other faculty member or administrator of such ~~school college or university~~
13 **[school]** as part of or incidental to an approved course or program of
14 instruction at such ~~school college or university~~ **[school]**.

15 (2) The defendant is an officer, director, trustee or employee of a
16 public library and the allegedly harmful material or device was acquired
17 by a public library and was disseminated in accordance with regular li-
18 brary policies approved by its governing body.

19 (3) An exhibition in a state of nudity is for a bona fide scientific or
20 medical purpose, or for an educational or cultural purpose for a bona fide
21 ~~school college, university,~~ museum or library.

22 (4) With respect to a prosecution for an act described by subsection
23 (a)(1), the allegedly harmful material was kept behind blinder racks.

24 (5) With respect to a prosecution for an act described by subsection
25 (a)(2) or (3), the defendant had reasonable cause to believe that the minor
26 involved was 18 years old or over, and such minor exhibited to the de-
27 fendant a draft card, driver's license, birth certificate or other official or
28 apparently official document purporting to establish that such minor was
29 18 years old or more.

30 (6) With respect to a prosecution for an act described by subsection
31 (a)(3), the allegedly harmful performance was viewed by the minor in the
32 presence of such minor's parent or parents or such minor's legal guardian.

33 (d) As used in this section:

34 (1) "Blinder rack" means a device in which material is displayed in
35 such a manner that the lower $\frac{2}{3}$ of the material is not exposed to view.

36 (2) "Harmful to minors" means that quality of any description, ex-
37 hibition, presentation or representation, in whatever form, of nudity, sex-
38 ual conduct, sexual excitement or sadomasochistic abuse when the ma-
39 terial or performance, taken as a whole or, with respect to a prosecution
40 for an act described by subsection (a)(1), that portion of the material that
41 was actually exposed to the view of minors, has the following
42 characteristics:

43 (A) The average adult person applying contemporary community

1 standards would find that the material or performance has a predominant
2 tendency to appeal to a prurient interest in sex to minors;

3 (B) the average adult person applying contemporary community stan-
4 dards would find that the material or performance depicts or describes
5 nudity, sexual conduct, sexual excitement or sadomasochistic abuse in a
6 manner that is patently offensive to prevailing standards in the adult com-
7 munity with respect to what is suitable for minors; and

8 (C) a reasonable person would find that the material or performance
9 lacks serious literary, scientific, educational, artistic or political value for
10 minors.

11 (3) “Material” means any book, magazine, newspaper, pamphlet,
12 poster, print, picture, figure, image, description, motion picture film, rec-
13 ord, recording tape or video tape.

14 (4) “Minor” means any unmarried person under 18 years of age.

15 (5) “Nudity” means the showing of the human male or female geni-
16 tals, pubic area or buttocks with less than a full opaque covering; the
17 showing of the female breast with less than a full opaque covering of any
18 portion thereof below the top of the nipple; or the depiction of covered
19 male genitals in a discernible state of sexual excitement.

20 (6) “Performance” means any motion picture, film, video tape, played
21 record, phonograph, tape recording, preview, trailer, play, show, skit,
22 dance or other exhibition performed or presented to or before an audi-
23 ence of one or more, with or without consideration.

24 (7) “Sadomasochistic abuse” means flagellation or torture by or upon
25 a person clad in undergarments, in a mask or bizarre costume or in the
26 condition of being fettered, bound or otherwise physically restrained on
27 the part of one so clothed.

28 (8) “Sexual conduct” means acts of masturbation, homosexuality, sex-
29 ual intercourse or physical contact with a person’s clothed or unclothed
30 genitals or pubic area or buttocks or with a human female’s breast.

31 (9) “Sexual excitement” means the condition of human male or fe-
32 male genitals when in a state of sexual stimulation or arousal.

33 (e) The provisions of this act shall not apply to a retail sales clerk, if
34 such clerk has no financial interest in the materials or performance or in
35 the commercial establishment displaying or selling, furnishing, present-
36 ing, distributing or disseminating such materials or presenting such per-
37 formance other than regular employment as a retail sales clerk. The pro-
38 visions of this section shall not exempt any retail sales clerk from criminal
39 liability for any act unrelated to regular employment as a retail sales clerk.

40 (f) If any provision or clause of this act or application thereof to any
41 person or circumstance is held invalid, such invalidity shall not affect
42 other provisions or applications of the act which can be given effect with-
43 out the invalid provision or application, and to this end the provisions of

1 this act are declared to be severable.

2 (g) This section shall be part of and supplemental to the Kansas crim-
3 inal code.

4 Sec. 4. K.S.A. 21-4301a and 21-4301c and K.S.A. 2006 Supp. 21-
5 4301 are hereby repealed.

6 Sec. 5. This act shall take effect and be in force from and after its
7 publication in the statute book.