



## 2001 SENATE BILL 26

January 23, 2001 - Introduced by Senators BURKE, GROBSCHMIDT, HUELSMAN, ROSENZWEIG and SCHULTZ, cosponsored by Representatives LASSA, BERCEAU, BOCK, BOYLE, GRONEMUS, HUBER, KESTELL, LA FAVE, OTT, PLALE, POWERS, SERATTI, STASKUNAS, STONE, TURNER, WALKER and WILLIAMS, by request of Attorney General James Doyle.. Referred to Committee on Judiciary, Consumer Affairs, and Campaign Finance Reform.

1     **AN ACT to repeal** 948.11 (1) (bm) and 948.11 (1) (c); **to renumber and amend**  
2             948.11 (2) (a), 948.11 (2) (am) and 948.11 (2) (b); **to amend** 948.11 (2) (c); and  
3             **to create** 948.11 (2) (a) 1. and 2., 948.11 (2) (am) 1. and 2. and 948.11 (2) (b) 1.  
4             and 2. of the statutes; **relating to:** exposing a child to harmful material.

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### *Analysis by the Legislative Reference Bureau*

Current law criminalizes the acts of providing and describing harmful material to a child and criminalizes possession of harmful material with intent to transfer the material to a child. Harmful material includes images of nudity, sexually explicit images, and images of torture and brutality. Current law does not require that the state prove that the defendant knew or should have known that the recipient of the material was a child. The law does, however, establish an affirmative defense under which the defendant may avoid criminal liability by proving that he or she reasonably believed that the recipient was 18 years of age or older. In order to prove that he or she reasonably believed the recipient was 18 years of age or older, the defendant must show that the recipient provided the defendant an official document purporting to establish that the recipient was at least 18 years of age.

The Wisconsin supreme court recently ruled that the statute that prohibits exposure of a child to harmful materials is unconstitutional as applied to a defendant who sent harmful material over the Internet to a 17-year-old, and to other instances in which the defendant does not have face-to-face contact with the recipient. *State v. Weidner*, 235 Wis. 2d 306 (2000). The supreme court found the statute unconstitutional because the statute does not make knowledge of the recipient's age

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an element of the crime, which the state must prove to obtain a conviction. The supreme court distinguished *Weidner* (in which the defendant transmitted harmful material over the Internet) from instances in which the defendant meets the recipient face-to-face. The supreme court did not disturb a lower court ruling that found the statute constitutional as applied to instances in which the defendant meets the recipient face-to-face, because the face-to-face meeting provides the defendant opportunity to assess the recipient's age.

This bill makes knowledge of the recipient's status as a child an element of the crime only if the defendant does not have face-to-face contact with the child. Under the bill, if the defendant does have face-to-face contact with the recipient, the state need not prove that the defendant knew or should have known that the recipient was a child. A defendant who has face-to-face contact with the recipient may avoid criminal liability by proving the affirmative defense as modified by the bill. The modified affirmative defense requires that the defendant prove that he or she had reasonable cause to believe that the recipient was at least 18 years of age, but does not require the defendant to prove that the recipient displayed an official document purporting to establish that the recipient was 18 years of age or older.

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***The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:***

1           **SECTION 1.** 948.11 (1) (bm) of the statutes is repealed.

2           **SECTION 2.** 948.11 (1) (c) of the statutes is repealed.

3           **SECTION 3.** 948.11 (2) (a) of the statutes is renumbered 948.11 (2) (a) (intro.) and  
4 amended to read:

5           948.11 (2) (a) (intro.) Whoever, with knowledge of the nature character and  
6 content of the material, sells, rents, exhibits, transfers or loans to a child any harmful  
7 material, with or without monetary consideration, is guilty of a Class E felony. if any  
8 of the following applies:

9           **SECTION 4.** 948.11 (2) (a) 1. and 2. of the statutes are created to read:

10           948.11 (2) (a) 1. The person knows or reasonably should know that the child  
11 has not attained the age of 18 years.

12           2. The person has face-to-face contact with the child before or during the sale,  
13 rental, exhibit, transfer, or loan.

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1           **SECTION 5.** 948.11 (2) (am) of the statutes is renumbered 948.11 (2) (am) (intro.)  
2 and amended to read:

3           948.11 **(2)** (am) (intro.) Any person who has attained the age of 17 and who, with  
4 knowledge of the nature character and content of the description or narrative  
5 account, verbally communicates, by any means, a harmful description or narrative  
6 account to a child, with or without monetary consideration, is guilty of a Class E  
7 felony: if any of the following applies:

8           **SECTION 6.** 948.11 (2) (am) 1. and 2. of the statutes are created to read:

9           948.11 **(2)** (am) 1. The person knows or reasonably should know that the child  
10 has not attained the age of 18 years.

11           2. The person has face-to-face contact with the child before or during the  
12 communication.

13           **SECTION 7.** 948.11 (2) (b) of the statutes is renumbered 948.11 (2) (b) (intro.) and  
14 amended to read:

15           948.11 **(2)** (b) (intro.) Whoever, with knowledge of the nature character and  
16 content of the material, possesses harmful material with the intent to sell, rent,  
17 exhibit, transfer or loan the material to a child is guilty of a Class A misdemeanor.  
18 if any of the following applies:

19           **SECTION 8.** 948.11 (2) (b) 1. and 2. of the statutes are created to read:

20           948.11 **(2)** (b) 1. The person knows or reasonably should know that the child  
21 has not attained the age of 18 years.

22           2. The person has face-to-face contact with the child.

23           **SECTION 9.** 948.11 (2) (c) of the statutes is amended to read:

24           948.11 **(2)** (c) It is an affirmative defense to a prosecution for a violation of this  
25 ~~section~~ pars. (a) 2., (am) 2., and (b) 2. if the defendant had reasonable cause to believe

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1 that the child had attained the age of 18 years, ~~and the child exhibited to the~~  
2 ~~defendant a draft card, driver's license, birth certificate or other official or~~  
3 ~~apparently official document purporting to establish that the child had attained the~~  
4 ~~age of 18 years.~~ A defendant who raises this affirmative defense has the burden of  
5 proving this defense by a preponderance of the evidence.

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(END)