

## OBSCENITY LAW CHANGES

House Bill 5148 (Substitute H-2)  
First Analysis (6-10-92)

Sponsor: Rep. Timothy L. Walberg  
Committee: Towns and Counties

### **THE APPARENT PROBLEM:**

Although Public Act 343 of 1984, the obscenity law, was considered by its proponents to be a comprehensive criminal obscenity statute, many are now calling for it to be strengthened. Prosecutions are said to be hampered by a number of aspects of the law. For example, the law requires that to be prosecuted, a person must have knowledge of the content and character of the material in question; the law says that a person has such knowledge when he or she knows that the material depicts or describes sexual conduct whether or not he or she has precise knowledge of the specific contents of the material. A number of Michigan courts have dismissed cases on the grounds that the existing language impermissibly attempts to shift the burden of proof to the defendant. According to the U.S. Supreme Court, however, "it is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the material he distributed, and that he knew the character and nature of the materials" (Hamling v. U.S., 418 U.S. 87). Prosecutors and others have urged that Michigan statute be amended to more closely echo this language, thus shifting the burden of proof to the prosecutor and enabling prosecutions to go forward.

In a related matter, the law at present provides for a prosecutor or the attorney general to render upon request an advisory opinion as to the legality of material; after an unsuccessful request for an advisory opinion, a person may seek a declaratory judgment on the material. Either an advisory opinion or a declaratory judgment can act as a bar to prosecution under the act. The provisions on advisory opinions have been used little, if at all, and many find them to be incongruous with the rest of the act, which calls for a jury determination of obscenity. It has been proposed that the provisions on advisory opinions be eliminated.

### **THE CONTENT OF THE BILL:**

The bill would amend the obscenity law to do the following:

\*\* redefine "knowledge of content and character" to mean having general knowledge of the nature and character of the material involved. Language explaining when a person has such knowledge would be deleted.

\*\* repeal sections that provide for prosecutorial advisory opinions and judicial declaratory judgments that act as bars to prosecution.

\*\* extend the definition of "material" to include audiotapes, audiodisks, and computer tape.

\*\* extend protection from prosecution to employees of art museums (such protection is already given to library or university employees), and to the boards of directors of protected institutions.

\*\* incorporate the "reasonable person" standard into the test for determining whether material is obscene (this is the three-pronged Miller test, derived from the ruling in the landmark U.S. Supreme Court case of Miller v. California, 413 U.S. 15 [1973]).

The bill could not take effect unless House Bill 4801 also was enacted. That bill would criminalize possession of child pornography and increase maximum fines for its production or distribution.

MCL 752.362 and 752.367

### **FISCAL IMPLICATIONS:**

There is no fiscal information at present. (6-9-92)

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**ARGUMENTS:*****For:***

The bill would remove several barriers to effective enforcement of the obscenity law and improve protections for legitimate art and expression. Primarily, it would refine the definition of "knowledge of content and character" (which is what one must have in order to be prosecuted for distributing obscene material) to shift the burden of proof to the prosecutor, thus enabling prosecutions to go forward. With the current law, a perception that the burden is unconstitutionally assigned to the defendant has caused the dismissal of some cases where the prosecutor would have been able to prove that the defendant had the requisite knowledge (such as when the defendant had placed the order for the material in question). The bill also would eliminate unnecessary, unused, and ill-conceived provisions that can allow advisory opinions from prosecutors or the attorney general to bar prosecutions under the act. Such provisions not only carry the potential to hamper legitimate prosecutions; they also are contrary to the basic premise of the law, which calls for a jury determination of community standards, artistic value, and sexual content. Finally, the bill would clarify a number of provisions of the act, extending the act to various forms of communication, and explicitly protecting art museums from overzealous prosecution.

***Against:***

The bill fails to incorporate a number of elements that were part of the original bill, and thus misses the opportunity for more effective reform. The test for obscenity employs in part a determination of "contemporary community standards," which the statute defines with reference to statewide standards. Prosecutions are impeded because jurors either cannot deduce a statewide standard or believe that residents elsewhere in the state are more liberal. The original bill proposed to remedy this situation by defining contemporary community standards as the standards existing in the vicinity from which the jury was drawn. In addition, the bill originally proposed a revision of the penalty provisions of the act that would have established felony (rather than misdemeanor) penalties for repeat offenders, and would have eliminated the requirement that pornography be a "predominant" part of a person's business before he or she could be prosecuted under the act. Current penalties offer little deterrence for those with the wherewithal

to pay the fines, and prevent prosecution of offenders who may be profiting from hard-core pornography as a part of a larger video rental business.

***Response:***

Allowing contemporary community standards to be determined at the local level would lead to a patchwork of regulation and variable interpretation. What was legal for one store of a bookstore or video chain might be illegal for another.

***Against:***

By removing barriers to prosecution, the bill takes a bad law and makes it worse. Many believe that the state has no business regulating what an adult chooses to view in the privacy of his or her own home, yet the bill would continue to allow legitimate businesses to be harassed by narrow-minded or publicity-seeking prosecutors. At best, the bill perpetuates the flaws of a vague and unenforceable law.

***Response:***

It is within the proper purview of the state to regulate hard-core pornography that offends the public consciousness, demeans women, and may incite a susceptible person to violent or brutal behavior.

**POSITIONS:**

The American Family Association of Michigan supports the bill. (6-9-92)

The Knights of Columbus, Michigan Council, supports strengthening the obscenity law. (6-9-92)

The Michigan Family Forum supports the concept of the bill, but preferred the original bill. (6-9-92)

The Prosecuting Attorneys Association of Michigan supported the original bill, which would have defined "contemporary community standards" with reference to the locality from which the jury was drawn; the association has no position on the substitute at this time. (6-9-92)

The Michigan Decency Action Council supported the original bill, but does not support the substitute. (6-9-92)

The Detroit Annual Conference of the United Methodist Church voted to support the original bill on June 4, 1992. The Division of Church and

Society of the Detroit Conference does not support the changes from the original bill. (6-9-92)

The Video Software Dealers Association opposes the bill. (6-9-92)