



**House
Legislative
Analysis
Section**

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OBSCENITY LAW CHANGES

House Bill 5148 as enrolled
Second Analysis (10-27-92)

Sponsor: Rep. Timothy L. Walberg
House Committee: Towns and Counties
Senate Committee: Family Law, Criminal
Law, and Corrections

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.**

**** Dispense with separate degrees of obscenity, and make obscenity a misdemeanor punishable by imprisonment for up to one year, or by a fine of not more than \$100,000, or both. A second or subsequent offense would be considered a felony, punishable by imprisonment for up to two years, and a fine of not less than \$50,000, and not more than \$5 million. (Language in the current definition of first degree obscenity, specifying that the offense involves dissemination of obscene material as "a predominant and regular part of the person's business" and that obscene materials are "a principal or substantial part of the stock in trade" at the establishment in question, would be deleted.)**

**** Extend protection from prosecution to employees of public or private nonprofit art museums (such protection is already given to library or university employees), businesses regulated by the Federal Communications Commission, cable television operators regulated by federal law, and to the boards of directors of protected institutions.**

**** Incorporate the "reasonable person" standard into the test for determining whether material is**

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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]).

MCL 752.362 and 752.367

FISCAL IMPLICATIONS:

According to the Senate Fiscal Agency, the bill would have an indeterminate fiscal impact on state and local government. If the bill resulted in increased prosecutions and convictions, there could be additional costs for courts, county jails and the Department of Corrections, and there could be additional revenue from the collection of fines. (9-22-92)

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). In addition, the bill would revise the penalty provisions of the act to establish felony (rather than misdemeanor) penalties for repeat offenders, and eliminate 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. Further, the bill 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, cable TV, and other legitimate institutions from overzealous prosecution.

Against:

The bill fails to incorporate several elements that were part of the original bill, and thus misses the opportunity for more effective reform. Most importantly, 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.

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.