House
Legislative
Analysis
Section

Olds Plaza Building, 10th Floor
Lansing, Michigan 48909
Phone: 517/373-6466

CHILD PORN: FINES, POSSESSION

House Bill 4177 with committee amendment
First Analysis (1-25-94)

Sponsor: Rep. Paul Baade
Committee: Human Services & Children

THE APPARENT PROBLEM:

The Michigan Penal Code contains special penalties for the production and distribution of child pornography, which, in recognition of the harm done to children, the statute calls "child sexually abusive material." Although the law provides stiff penalties for production or distribution of the material, it does not make possession of it a crime. The United States Supreme Court recently upheld an Ohio statute that makes it a crime to possess child pornography (Osborne v. Ohio, 110 S. Ct. 1691, decided April 18, 1990), and many believe that Michigan, too, should make the possession of child pornography a crime.

THE CONTENT OF THE BILL:

The bill would amend the portion of the Michigan Penal Code that deals with "child sexually abusive materials" (that is, child pornography) to do the following:

--make the knowing possession of child sexually abusive material a misdemeanor punishable by up to one year in jail, a fine of up to $10,000, or both, providing the person knew or should have known the age of the child involved. This provision would not apply to photoprocessors that followed certain procedures in reporting pornography, nor would it apply to entities exempted from the obscenity law (these entities are also exempted from the prohibition against distributing child pornography; they include universities, libraries, and store employees).

--increase fines for producing or distributing child pornography. The maximum fine for producing child pornography (which is a 20-year felony) would be increased from $20,000 to $100,000. The maximum fine for distributing or promoting child pornography (a seven-year felony) would be increased from $10,000 to $50,000.

The bill would take effect October 1, 1994.

MCL 750.145c

BACKGROUND INFORMATION:

The definitions of several terms in the child pornography law have come under criticism. Those terms and several related terms are defined as follows:

** "child" means "a person who is less than 18 years of age and is not emancipated by operation of law" as provided by Public Act 293 of 1968.

** "child sexually abusive material" means "a developed or undeveloped photograph, film, slide, electronic visual image, or sound recording of a child engaging in a listed sexual act; a book, magazine, or other visual or print medium containing such a photograph, film, slide, electronic visual image, or sound recording; or any reproduction, copy, or print of such a photograph, film, slide, electronic visual image, book, magazine, other visual or print medium, or sound recording. Child sexually abusive material does not include material that has primary literary, artistic, educational, political, or scientific value or that the average person applying contemporary community standards would find does not appeal to prurient interests." As used here, "community" means the state of Michigan.

** "child sexually abusive activity" means "a child engaging in a listed sexual act."

** "listed sexual act" means "sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, passive sexual involvement, sexual excitement, or erotic nudity."

** "erotic nudity" means "the display of the human male or female genital or pubic area, or developed or developing female breast, in a manner which lacks primary literary, artistic, educational, political, or scientific value and which the average person applying contemporary community standards would find appeals to prurient interests." As used here, "community" means the state of Michigan.

FISCAL IMPLICATIONS:

With regard to a virtually identical bill of the 1989-90 legislative session (House Bill 5693), the House Fiscal Agency said that the bill could have fiscal implications to local units of government, depending on the number of prosecutions involved. (6-6-90)

ARGUMENTS:

For:

Crimes that harm children are among the most despicable, and child pornography is a form of child sexual abuse that harms children not only by their direct involvement in producing the materials, but also by the distribution of the photographs and films depicting their sexual activity; the materials become a permanent record of a child's participation. By banning possession of the material, the bill would encourage its destruction, thus minimizing the continuing harm to the children involved. That destruction also might help to protect children from molestation, as it appears that pedophiles often use child pornography to seduce children into performing sexual acts. In fact, say law enforcement experts, those who possess child pornography often are those who produce it, but such matters can be difficult to prove in criminal court, especially if the child involved cannot be found or is too young or too traumatized to provide testimony. However, even non-molesters harm children by possessing child pornography; aside from adding to the continuing shame that such material represents for the children involved, those who possess child pornography support the market for it, and thereby support the sexual abuse of the children depicted. In Osborne v. Ohio, the United States Supreme Court said that a state may have a compelling interest in "protecting the physical and psychological well-being of minors and in destroying the market for the exploitative use of children by penalizing those who possess and view the offending materials." Consistent with this reasoning, the bill would help to protect children from molestation by making the possession of child pornography a crime.

Response:

The bill may have unintended consequences regarding film processors. At present, processors are not required to report suspected child pornography, although if they do, and follow certain procedures, they are exempt from liability for making such reports. The bill, however, would exempt a film processor from the prohibition against possession only if he or she followed the voluntary reporting procedures. The bill thus would create a strong incentive for film processors who notice child pornography to report their suspicions to authorities; to fail to do so would be to leave themselves open to prosecution for the knowing possession of child pornography.

Against:

The bill would create an unwarranted intrusion into private matters; a person should be able to possess offensive materials in the privacy of the home without being subject to imprisonment for doing so. As the United States Supreme Court said in Stanley v. Georgia (394 U.S. 557 [1969]), "If the First Amendment means anything, it means that the state has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch." In addition to issues of privacy and free speech, the bill presents issues of fundamental fairness. Obscenity laws in general are susceptible to problems of overbreadth and vagueness; a bill that proposes to make the possession of pornography a crime should be quite clear in its provisions, so that art and innocent snapshots of nude children are not proscribed. Perhaps more to the point, the bill is wrong to make a direct connection between the possession of child pornography and the abuse of the child depicted; the harm is done by those who create and distribute child pornography, not by those who possess it. Punishing someone who possessed child pornography would be no deterrent to the person who produced it; the harm to the child already would have been done. Rather than risking the erosion of basic rights by criminalizing possession, the legislature should encourage authorities to crack down on the real criminals, the people who make child pornography.

Response:

Attacking the market for child pornography can be an effective way to attack the production of it, but the bill also stiffens penalties for producers and distributors. Moreover, the penal code is clear and specific on what constitutes child pornography: it is material depicting any of several listed sexual acts,

each of which is defined with attention to sexual purpose. In addition, the law echoes the obscenity standards applied by the U.S. Supreme Court in the landmark case of Miller v. California (413 U.S. 15 [1973]): the law does not apply to material that "has primary literary, artistic, educational, political, or scientific value or that the average person applying contemporary community standards would find does not appeal to prurient interests." Further, the bill exempts legitimate institutions and innocent parties and limits its penalties to those who knowingly possess child pornography. The bill offers clear and adequate notice to those who would participate in child pornography by possessing and viewing the material.

***Against*:**
While the bill does well to make the possession of child pornography a crime, the penalties for that offense would be relatively weak. The seriousness of the matter warrants stronger maximum penalties, particularly if someone who both produces and possesses child pornography is to be discouraged from the abhorrent and harmful activity.

***Response*:**
Stronger penalties for mere possession would be inappropriate. The greatest harm, and some might say the only harm, is done by the producers and purveyors of child pornography, and for these people the bill would increase available penalties.

Against:
The bill should do more to close loopholes in the law, thereby doing more to eradicate child pornography and protect children. For one thing, elements of the Miller test for obscenity are retained in the definitions which describe "child sexually abusive material." (For those definitions, see Background Information.) Under Miller v. California, material is obscene if meets state statutory descriptions in a patently offensive way and "lacks serious literary, artistic, political, or scientific value" and if "the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest." However, in the landmark case on the matter of child pornography, New York v. Ferber (102 S.Ct. 3348 [1982]), the U.S. Supreme Court held that states are entitled to greater leeway in the regulation of pornographic depictions of children, in part because the Miller standard "is not a satisfactory solution to the child pornography problem." The court said that the Miller standard does not reflect a state's particular and more compelling interest in prosecuting whose who promote the sexual exploitation of children. Federal law on child pornography was subsequently amended; the current language of the applicable part of the federal code does not include an obscenity test. Michigan should follow the federal example and eliminate the Miller test from its definitions.

Another loophole exists in the law's definition of "child," which excludes minors emancipated by operation of law, meaning minors who are married or on active duty in the military. Thus, a pornographer could evade the law by using minors who were either married or active duty. Federal statute contains no such loophole regarding minors; neither should Michigan statute.

Finally, there are concerns about the bill's exemptions for libraries and other institutions from the general prohibition against possessing child pornography. Child pornography is so damaging, and the state has such a strong interest in eliminating it, that there can be no legitimate reason to possess the material and foster its continued existence.

Response:
If libraries and other institutions were not exempted, the bill would legitimate a form of book-burning. Even offensive materials can be of legitimate archival and scholarly interest, although they may provide a window on a repugnant part of contemporary society. Moreover, not to exempt institutions would be to make them vulnerable to overzealous prosecution and other undue political pressure. With regard to the "loophole" regarding minors who are married or in the military, some may consider there to be little compelling state interest in preventing the exploitation of minors who are living as adults in all other respects. Finally, the use of the Miller test in the definitions may not be required by federal courts, but it does add a measure of protection against prosecutions over material considered by some to be innocent, but considered by others to have sexual content. Further, the act, by exempting material that has "primary" literary, artistic, educational, etc., value, is stricter than the Miller test, under which material apparently need only have some literary, artistic, etc., value.

Rebuttal:
In Osborne, the U.S. Supreme Court said that by limiting the Ohio statute's operation to nudity that constitutes lewd exhibition or focuses on genitals,

the Ohio Supreme Court avoided penalizing people for viewing or possessing innocuous photographs or naked children. Problems of overbreadth in the law were thus avoided. The Michigan statute would be sufficiently clear without the use of the Miller test.

POSITIONS:

The Department of State Police supports the bill. (1-13-94)

The Michigan Family Forum supports the bill. (1-13-94)

The Michigan Decency Action Council supports the bill, but would like the elements of the Miller test removed from the definitions. (1-12-94)

The Prosecuting Attorneys Association of Michigan supports the bill, but would prefer that an amendment be adopted to eliminate the exclusion of certain emancipated minors from the definition of "minor." (1-12-94)

The American Family Association of Michigan has not yet reviewed the bill, and does not have a formal position at this time. (1-21-94)