House
Legislative
Analysis
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CHILD PORN: FINES, POSSESSION

House Bill 4177 as enrolled
Public Act 444 of 1994
Second Analysis (1-12-95)

Sponsor: Rep. Paul Baade
House Committee: Human Services and Children
Senate Committee: Family Law, Mental Health, and Corrections

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.

--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.

--amend the definition of "child sexually abusive material" to eliminate an exemption for 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." (The deleted language echoes the obscenity test formulated by the United States Supreme Court in Miller v. California [413 U.S. 15 (1973)].) Similar language would be deleted from the definition of "erotic nudity," which would be redefined to mean "the lascivious exhibition of the genital, pubic, or rectal area of any person." "Lascivious" in this context would mean "wanton, lewd, and lustful and tending to produce voluptuous or lewd emotions."

The prohibition against possession of child sexually abusive materials would not apply to: a photoprocessor that followed certain procedures in reporting pornography; an entity exempted from the obscenity law (these entities are also exempted from the prohibition against distributing child pornography; they include universities, libraries, and store employees); a police officer acting within the scope of duty; employees or contractual agents of the Department of Social Services acting within the scope of his or her duties; a judicial officer or judicial employee acting within the scope of his or her duties; a party or witness in a criminal or civil proceeding acting within the scope of that proceeding; certain licensed health professionals acting within the scope of practice; and, a registered social worker acting within the scope of his or her practice.

The bill would take effect April 1, 1995.

MCL 750.145c

FISCAL IMPLICATIONS:

With regard to a Senate version of the bill, the Senate Fiscal Agency said that the bill would have

no impact on state costs and an indeterminate impact on local costs. The new misdemeanor penalty for possessing child pornography could result in additional local costs for apprehending, adjudicating, and incarcerating violators. The increased fines for producing and distributing child pornography also could result in additional revenue depending on the number of convictions and the number of times the increased fined were imposed. According to criminal court disposition data compiled by the Department of Corrections, in 1993 there were 13 convictions of child pornography (MCL 750.145c), of which ten received prison sentences, one probation, one jail, and one a split jail/probation sentence. (12-7-94)

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 questionable photographs 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. 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 does away with protections for 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." This language is essentially the obscenity test formulated by the U.S. Supreme Court in the landmark case of Miller v. California. Under Miller, material is obscene if it meets state statutory descriptions in a patently offensive way, "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." In eliminating the use of the Miller test, the bill would open the way to inappropriate and harassing prosecutions against ordinary people for the possession of innocent snapshots of nude children. Proof that such fears are well-founded can be found in the recent case of a Wayne State University art professor, who endured police raids and faced possible prosecution after a university janitor found photographs in a trash can of a naked little girl touching herself. The pictures were of the professor's three-year-old daughter and were part of a roll of film that included pictures of a birthday party. The professor and many of her colleagues expressed outrage that anyone could perceive innocent photographs of an unselfconscious child as something shameful and obscene. The professor, described as a widely exhibited photographer, escaped prosecution only after her attorney pointed out the language in the child pornography law that protects material that has primary artistic or educational value. Without this language, which the bill would eliminate, there would have been scant protection for this professional artist. If family snapshots taken by a photography professor can have such consequences, there can be little protection for ordinary people who take pictures of their naked babies.

Response:

To retain the elements of the Miller test in the statute would be to weaken the law with unnecessary loopholes. In a 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 does not reflect a state's particular and more compelling interest in prosecuting those 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. Further, 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 of naked children. Problems of overbreadth in the law were thus avoided; and, with Michigan's definitions, the Michigan statute would be sufficiently clear without the use of the Miller test. The paramount concern of the child pornography law must be the protection of children; to adequately protect children, Michigan should do as the bill proposes and purge the law of the unnecessary loopholes created by the Miller test.

Against:

There have been 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 sanction 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. Not to exempt institutions would be to make them vulnerable to overzealous prosecution and other undue political pressure.

Against:

A 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 on active duty. Federal statute contains no such loophole regarding minors; neither should Michigan statute.

Response:

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.