



**House
Legislative
Analysis
Section**

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CHILD PORN: FINES, POSSESSION

House Bill 5693 (Substitute H-1)
First Analysis (6-7-90)

Sponsor: Rep. Debbie Stabenow
Committee: Judiciary

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*, No. 88-5986, 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 Michigan Penal Code to:

- 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 complied with the law's requirement to report child 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 April 1, 1991.

MCL 750.145c

FISCAL IMPLICATIONS:

The House Fiscal Agency says 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.

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 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 would have already 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 kiddie porn.

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*

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(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. With these provisions and an effective date of April 1, 1991, the bill offers clear and adequate notice to those who 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 those who both produce and possess child pornography are to be discouraged from their abhorrent and harmful activities.

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.

POSITIONS:

The Department of Social Services supports the bill. (6-5-90)

The Department of State Police supports the bill. (6-5-90)

The Michigan News and Video Association supports the bill. (6-5-90)

The Prosecuting Attorneys Association of Michigan supports the bill. (6-6-90)

The American Civil Liberties Union of Michigan opposes the bill. (6-5-90)