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Senate Bill 946 (Substitute S-1 as passed by the Senate)

Sponsor: Senator Harmon Cropsey

Committee: Local Government and Veterans

Date Completed: 5-14-90

RATIONALE

The Michigan Penal Code currently makes it a felony to produce or distribute "child sexually abusive material" (generally, a picture, film, or recording that depicts a child engaged in a sexual act) or "child sexually abusive activity", or to cause or allow a child to engage in that type of activity. This law, similar to the 1977 version of the Federal Child Protection Act, originally was passed in 1977 in response to reports of dramatic increases in the use of children in pornographic movies and photographs. In 1988, the Legislature deleted the requirement that the prohibited activities be done for commercial gain and increased the penalties for violations. It has been suggested now that the law could be strengthened further in response to an April 18, 1990, decision of the United States Supreme Court upholding an Ohio law that prohibits the possession of child pornography (Osborne v Ohio). Some have further suggested amending the definition of "child sexually abusive material" to eliminate the Miller standard--a test articulated by the U.S. Supreme Court for determining whether material is obscene--since the Ohio law upheld in Osborne did not contain that test. (For more information about the Osborne opinion and the Miller standard, see BACKGROUND.)

CONTENT

The bill would amend the Michigan Penal Code to make it a felony for a person knowingly to possess, control, or receive any child sexually abusive material, if the person knows, has reason to know, or should reasonably be expected to know "that the child is a child"; and to revise the definition of "child sexually abusive

material". The offense would be punishable by imprisonment for up to three years, a maximum fine of \$5,000, or both. The bill would not apply to the following:

- An individual who disseminates material in the course of his or her employment and is employed by a public or private college, university, or vocational school; or by a library that is established by the State, a county, city, township, village, or other local unit of government, or a community college district.
- An individual who disseminates material in the course of his or her employment and does not have discretion with regard to that dissemination or is not involved in the management of the employer.
- A commercial film or photographic print processor who is reporting to the local prosecuting attorney his or her professional knowledge or observation of a film, photograph, videotape, negative, or slide depicting a person whom the processor has reason to believe is a child engaged in a sexual act.

The Code defines "child sexually abusive material" as a 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 an item; or any reproduction, copy, or print of such an item. The term 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

in this provision, "community" means the State of Michigan. The bill would delete that exclusion and the definition of "community".

MCL 750.145c

BACKGROUND

Osborne v Ohio

The Ohio law upheld by the U.S. Supreme Court makes it illegal for a person to possess or view any material or performance that shows a minor who is not the person's child or ward in the nude, unless the material or performance is sold, distributed, or possessed for a bona fide artistic, medical, scientific, educational, religious, governmental, sociological, or other proper purpose, or the person knows that the parents, guardian, or custodian has consented to the photographing or use of the child in the nude and to the manner in which the material or performance is used or transferred. In upholding this law, the Court compared it to an unconstitutional Georgia statute that attempted to proscribe the possession of obscenity out of a concern that "obscenity would poison the minds of its viewers". The Court stated:

The difference here is obvious: the State does not rely on a paternalistic interest in regulating Osborne's mind. Rather, Ohio has enacted [the law] in order to protect the victims of child pornography; it hopes to destroy a market for the exploitative use of children.

It is evident beyond the need for elaboration that a State's interest in safeguarding the physical and psychological wellbeing of a minor is compelling... The legislative judgment, as well as the judgment found in relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. That judgment, we think, easily passes muster under the First Amendment.

Miller v California

In this 1973 decision, the U.S. Supreme Court held that the proper First Amendment standards to be applied by the states in

determining whether particular material is obscene and subject to regulation are:

- "whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest";
- "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law"; and
- "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value" (413 U.S. 15).

These standards are contained in Michigan's obscenity law, Public Act 343 of 1984.

FISCAL IMPACT

The bill would have an indeterminate fiscal impact on the State and local units of government. Costs to the courts would depend on the level of enforcement and number of convictions related to the possession, control, or receipt of child sexually abusive material as defined under the bill.

ARGUMENTS

Supporting Argument

In Osborne v Ohio, the U.S. Supreme Court recognized the interests of a state in outlawing child pornography, the harm that this activity inflicts upon its child victims, and the difficulty of eradicating the perpetrators. The Court said that, given the importance of the state's interest in protecting the victims of child pornography, it could not fault Ohio for attempting to stamp out this vice at all levels in the distribution chain. "According to the State,... much of the child pornography market has been driven underground; as a result, it is now difficult, if not impossible, to solve the child pornography problem by only attacking the production and distribution. Indeed, 19 States have found it necessary to proscribe the possession of this material." The Court also discussed other interests of the state that support this law: "First,... the materials produced by child pornographers permanently record the victim's abuse. The pornography's continued existence causes the child victims continuing harm by haunting the children in years to come... The State's ban on possession

and viewing encourages the possessors of these materials to destroy them. Second, encouraging the destruction of these materials is desirable because evidence suggests that pedophiles use child pornography to seduce other children into sexual activity."

By prohibiting the production and distribution of child pornography, Michigan already has acknowledged the problem and taken a long step toward addressing it. By outlawing the possession of child pornography, as well, the State would go even further in protecting the victims and facilitating the prosecution of those who prey on them. According to committee testimony, although a perpetrator's home may be full of child pornographic materials, it is impossible to prosecute the person without evidence of the actual activity of producing or selling them. Under the bill, however, the very presence of the materials would subject the person to prosecution.

Supporting Argument

The bill would facilitate the prosecution of all child pornographers by removing elements of the Miller standard from the definition of "child sexually abusive material". That is, it no longer would be necessary to show that an item does not have literary, artistic, educational, political, or scientific value, or that the average person applying contemporary community standards would find that the material appeals to the prurient interest. This standard is appropriate, as well as mandated by the U.S. Supreme Court, for obscenity prosecutions, to ensure that allegedly obscene material is judged by its impact on an average person, rather than a particularly susceptible or sensitive person, or a totally insensitive one. The standard is neither appropriate nor--as Osborne made clear--constitutionally necessary for a child pornography prosecution, in which the state's interest in protecting the victim is much higher.

Opposing Argument

Outlawing the private possession of child pornography would amount to locking the barn door after the horse is gone. The best way to ensure that child pornography does not reach private homes is to crack down hard on its underground network of sleazy purveyors, rather than place further restrictions on free-speech and privacy interests that could affect

other than pedophiles. If prohibiting the possession of child pornography would shift the focus of criminal investigations from big-volume dealers to individual buyers, the effort could prove fragmentary and counterproductive.

Opposing Argument

There is some concern that removing the Miller standard and the definition of "community" from the definition of "child sexually abusive material" could inadvertently affect other parts of the law.

Response: The definition of "child sexually abusive material" is expressly limited by the language of the statute to the section of law in which that definition appears. The section of law that governs obscenity and articulates the Miller standard for obscenity prosecutions is completely separate and contains its own definitions.

Opposing Argument

The definition of "community" as the State should be removed not only from the definition of "child sexually abusive material", but also from the definition of "erotic nudity". ("Erotic nudity" generally means the display of the human male or female genital or pubic area in a manner that lacks primary literary, artistic, educational, political, or scientific value and that the average person applying contemporary community standards would find appeals to prurient interests. Erotic nudity is among the listed sexual acts whose depiction constitutes child sexually abusive material.) Allowing a jury to apply a local, rather than a State, standard could facilitate successful prosecutions.

Response: The term "erotic nudity" is used and defined in the law to ensure that completely innocuous items, such as a photograph of a baby in the bathtub, are not the subject of prosecution. The issue of applying a local, rather than a State, standard is controversial in the context of the obscenity law (which also contains a State standard); removing the State standard from the child pornography law would have no effect on obscenity prosecutions.

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