

Department of Legislative Services  
Maryland General Assembly  
2009 Session

FISCAL AND POLICY NOTE

House Bill 534  
Judiciary

(Delegate Simmons)

Judicial Proceedings

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Child Pornography - Matter Reflecting Belief That a Minor Is Depicted in a  
Certain Manner

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This bill expands the State's prohibition against child pornography by prohibiting a person from knowingly promoting, advertising, presenting, soliciting, distributing, or possessing with the intent to distribute any matter or purported matter, visual representation, or performance in a manner that reflects the belief, or that is intended to cause another to believe, that it depicts a minor engaged as a subject of sadomasochistic abuse or sexual conduct.

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Fiscal Summary

**State Effect:** Potential minimal increase in general fund correctional expenditures due to the bill's expanded scope of child pornography offenses.

**Local Effect:** Potential minimal increase in local revenues from criminal fines due to the bill's expanded scope of child pornography offenses.

**Small Business Effect:** None.

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Analysis

**Current Law:** Among other prohibitions, a person may not knowingly promote, distribute, or possess with the intent to distribute any matter, visual representation, or performance that depicts a minor engaged as a subject in sadomasochistic abuse or sexual conduct. A violator is guilty of a felony and subject to maximum penalties of 10 years imprisonment and/or a \$25,000 fine for a first violation, and 20 years imprisonment and/or a \$50,000 fine for each subsequent violation.

If the minor's identity is unknown or the minor is outside the jurisdiction of the State, the State is not required to identify or produce testimony from the depicted minor in a criminal action. The trier of fact may determine whether a depicted individual was a minor by observation, specified oral testimony by a witness, expert medical testimony, or other authorized and applicable methods.

In addition, under the State's prohibition against possession of a visual representation of a child under 16 engaged in certain visual acts, a person may not knowingly possess a film, videotape, photograph, or other visual representation depicting an actual child under age 16: (1) engaged in sadomasochistic abuse; (2) engaged in sexual conduct; or (3) in a state of sexual excitement. A violator is guilty of a misdemeanor and subject to maximum penalties of two years imprisonment and/or a \$2,500 fine for a first violation and five years imprisonment and/or a \$10,000 fine for a subsequent violation. An affirmative defense to a charge under this offense may be made if the person charged received a visual representation without soliciting it and acted promptly and in good faith to destroy each visual representation or reported the matter to a law enforcement agency.

**Background:** In May 2008, the U.S. Supreme Court upheld a provision of the federal PROTECT (Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today) Act that targets the person who "advertises, promotes, presents, distributes, or solicits... any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe" that it depicts children engaged in sexual activity. The law bars not only the exchange of sexually explicit images of children but also any attempt to convince another person that child pornography is available. The law covers offers of material that do not contain an actual child and even offers in which no pictures exist. An Internet user who solicits child pornography from an undercover agent violates the statute, even if the agent possesses no child pornography. Likewise, a person who advertises virtual child pornography as depicting actual children also falls within the reach of the statute. A crime is only committed, however, when the speaker believes or intends the listener to believe that the subject of the proposed transaction depicts actual children. According to authorities, the provision is needed because it is often difficult to prove that pornography on the Internet involves real children. See *U.S. v. Williams*, 128 S.Ct. 1830 (2008).

**State Expenditures:** General fund expenditures may increase minimally as a result of the bill's expanded scope due to more people being committed to Division of Correction (DOC) facilities. The number of people convicted of these crimes is expected to be minimal.

Persons serving a sentence longer than 18 months are incarcerated in DOC facilities. Currently, the average total cost per inmate, including overhead, is estimated at

\$2,600 per month. This bill alone, however, should not create the need for additional beds, personnel, or facilities. Excluding overhead, the average cost of housing a new DOC inmate (including variable medical care and variable operating costs) is \$342 per month. Excluding all medical care, the average variable costs total \$164 per month.

**Local Revenues:** Revenues may increase minimally as a result of the bill's expanded scope from cases heard in the circuit courts.

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### **Additional Information**

**Prior Introductions:** None.

**Cross File:** None.

**Information Source(s):** Commission on Criminal Sentencing Policy, Judiciary (Administrative Office of the Courts), Department of State Police, Office of the Public Defender, Department of Public Safety and Correctional Services, State's Attorneys' Association, Department of Legislative Services

**Fiscal Note History:** First Reader - February 22, 2009  
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