See: Minutes of Commission
4/3/70, p. 1, Vol. IX, Tape #51

Minutes of Subcommittee on Grading & Sentencing
4/5/70, p. 60, Vol. X, Tape #57

CRIMINAL LAW REVISION COMMISSION
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ARTICLE 29. OBSCENITY AND RELATED OFFENSES

Preliminary Draft No. 3; February 1970

Reporter: Donald L. Paillette

Subcommittee No. 1

ARTICLE 29 . OBSCENITY AND RELATED OFFENSES

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Section 1. Definitions. As used in this Article, unless the context requires otherwise:

(1) "Advertising purposes" means purposes of propagandizing in connection with the commercial sale of a product or type of product, the commercial offering of a service, or the commercial exhibition of an entertainment.

(2) "Displays publicly" means the exposing, placing, posting, exhibiting, or in any fashion displaying in any location, whether public or private, an item in such a manner that it may be readily seen and its content or character distinguished by normal unaided vision viewing it from a public thoroughfare, depot or vehicle.

(3) "Furnishes" means to sell, give, rent, loan or otherwise provide.

(4) "Minor" means an unmarried person who has not reached his 18th birthday.

(5) "Nudity" means uncovered, or less than opaquely covered, post-pubertal human genitals, pubic areas, the post-pubertal human female breast below a point immediately above the top of the areola, or the covered human male genitals in a discernibly turgid state. For purposes of this definition, a female breast is considered uncovered if the nipple only or the nipple and the areola only are covered.

(6) "Obscene performance" means a play, motion picture, dance, show or other presentation, whether pictured, animated or live, performed before an audience and which in whole or in part depicts or reveals nudity, sexual conduct, sexual excitement or sado-masochistic abuse, or which includes obscenities or explicit verbal descriptions or narrative accounts of sexual conduct.

(7) "Obscenities" means those slang words currently generally rejected for regular use in mixed society, that are used to refer to genitals, female breasts, sexual conduct or excretory functions or products, either that have no other meaning or that in context are clearly used for their bodily, sexual or excretory meaning.

(8) "Public thoroughfare, depot or vehicle" means any street, highway, park, depot or transportation platform, or other place, whether indoors or out, or any vehicle for public transportation, owned or operated by government, either directly or through a public corporation or authority, or owned or operated by any agency of public transportation that is designed for the use, enjoyment or transportation of the general public.

(9) "Sado-masochistic abuse" means flagellation or torture by or upon a person who is nude or clad in undergarments or in revealing or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(10) "Sexual conduct" means human masturbation, sexual intercourse, or any touching of the genitals, pubic areas or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals in an act of apparent sexual stimulation or gratification.

(11) "Sexual excitement" means the condition of human male or female genitals or the breasts of the female when in a state of sexual stimulation, or the sensual experiences of humans engaging in or witnessing sexual conduct or nudity.

COMMENTARY - DEFINITIONS

This section establishes definitions for key terms that are used in the Obscenity Article. Each definition is discussed in connection with the specific subsequent section in which it is used.

The glossary is derived from definitions appearing in a proposed statute by Richard H. Kuh, noted New York prosecutor, in his book Foolish Figleaves? Pornography in-and-out of court (MacMillan, 1967). Subsections (4), (7), (9) and (10) are very similar to definitions of those terms set forth in Senate Bill 92 (1969). Subsection (3) is new.

In the words of Mr. Kuh:

> "In defining nudity, sexual conduct, and other items taboo for sale to the immature, there is no hedging, no use of weasel words. No haze of subjectivity is imposed by suggestions that the nudes or the sex must be lust-provoking or prurience-inciting." Id. at 257.

This approach to the pornography problem, one straightforward and simply-stated, has a refreshing objectivity about it which permits much clearer statements of the specific offenses that are prohibited by this Article.

Section 2. Furnishing obscene materials to minors. A person commits the crime of furnishing obscene materials to minors if, knowing or having good reason to know the character of the material furnished, he furnishes to a minor:

(1) Any picture, photograph, drawing, sculpture, motion picture, film or other visual representation or image of a person or portion of the human body that depicts nudity, sado-masochistic abuse, sexual conduct or sexual excitement; or

(2) Any book, magazine, paperback, pamphlet or other written or printed matter, however reproduced, or any sound recording which contains matter of the nature described in subsection (1) of this section, or obscenities, or explicit verbal descriptions or narrative accounts of sexual conduct, sexual excitement or sado-masochistic abuse.

COMMENTARY - FURNISHING OBSCENE MATERIALS TO MINORS

See Commentary under section 5, infra.

Section 3. Sending obscene materials to minors. (1) A person commits the crime of sending obscene materials to minors if, within this state, he knowingly arranges for or dispatches for delivery to a minor, whether the delivery is to be made within or outside this state, by mail, delivery service or any other means, any of the materials enumerated in section 2 of this Article.

(2) Unless the defendant knows or has good reason to know that the person to whom the materials are sent is a minor, it is a defense to a prosecution under this section that the defendant caused to be printed on the outer package, wrapper or cover of the materials to be delivered, in words or substance, "This package (wrapper) (publication) contains material that, by Oregon law, cannot be furnished to a minor."

COMMENTARY - SENDING OBSCENE MATERIALS TO MINORS

See Commentary under section 5, infra.

Section 4. Exhibiting an obscene performance to a minor. (1) A person commits the crime of exhibiting an obscene performance to a minor if the minor is unaccompanied by his parent or lawful guardian, and for a monetary consideration or other valuable commodity or service, the person knowingly or recklessly:

(a) Exhibits an obscene performance to the minor; or

(b) Sells an admission ticket or other means to gain entrance to an obscene performance to the minor; or

(c) Permits the admission of the minor to premises whereon there is exhibited an obscene performance.

(2) No employe is liable to prosecution under this section or under any city or home-rule county ordinance for exhibiting or possessing with intent to exhibit any obscene motion picture provided the employe is acting within the scope of his regular employment at a showing open to the public.

(3) As used in this section, "employe" means any person regularly employed by the owner or operator of a motion picture theater if he has no financial interest other than salary or wages in the ownership or operation of the motion picture theater, no financial interest in or control over the selection of the motion pictures shown in the theater, and is working within the motion picture theater where he is regularly employed, but does not include a manager of the motion picture theater.

COMMENTARY - EXHIBITING AN OBSCENE PERFORMANCE TO A MINOR

See Commentary under section 5, infra.

Section 5. Displaying obscene materials to minors. A person commits the crime of displaying obscene materials to minors if, being the owner, operator or manager of a business or acting in a managerial capacity, he knowingly or recklessly permits a minor who is not accompanied by his parent or lawful guardian to enter or remain on the premises, if in that part of the premises where the minor is so permitted to be, there is visibly displayed:

(1) Any picture, photograph, drawing, sculpture or other visual representation or image of a person or portion of the human body that depicts nudity, sexual conduct, sexual excitement or sado-masochistic abuse; or

(2) Any book, magazine, paperback, pamphlet or other written or printed matter, however reproduced, that reveals a person or portion of the human body that depicts nudity, sexual conduct, sexual excitement or sado-masochistic abuse.

COMMENTARY - FURNISHING OBSCENE MATERIALS TO MINORS; SENDING OBSCENE MATERIALS TO MINORS; EXHIBITING AN OBSCENE PERFORMANCE TO A MINOR; DISPLAYING OBSCENE MATERIALS TO MINORS

A. Summary

Sections 2 through 5 comprise the heart of the Obscenity Article which is aimed at prohibiting the dissemination of obscene materials to the young. These sections incorporate several of the critical terms defined in section 1, i.e., "minor," "nudity," "obscenities," "obscene performance," "sado-masochistic abuse," "furnishes," "sexual conduct" and "sexual excitement." By carefully defining these terms we can attempt to achieve a clarity that has not heretofore existed in the obscenity statutes.

As observed by Mr. Kuh:

> "Were the draft to be adopted, simplicity would exist and forecasting would become easy. Personal reactions, the bane of censorship would finally become irrelevant. Were there a sale, were the purchaser a minor (as defined by the statute), were the merchandise to portray nudity (or one of the other carefully described categories that would be taboo for the young), neither police, nor jurors, nor judges would need to question whether the subject matter was prurient or non-prurient, patently offensive or inoffensive, socially redeemed or irredeemable. The absurdity, the annoyance, the expense and the delay entailed in case-by-case appellate review seeking to trace undiscoverable lines ostensibly separating the artistic from the obscene would be avoided." Kuh, supra at 257.

Kuh's proposal deals with children as customers only with the key verb being "sells," which is defined as "giving or loaning for monetary consideration or other valuable commodity or service." The targets of his proposals "are those prime moral lepers, the profiteers who, pushing muck to adolescents, live off pre- and post pubertal curiosity." Kuh, supra at 258.

The draft uses the verb "furnishes" (defined as meaning to sell, give, rent, loan or otherwise provide) and endeavors to get at objectionable materials regardless of the means used to bring them to the attention of minors. Section 2 bans directly furnishing such materials to persons under 18. Sales or deliveries by mail are banned by section 3, while exhibitions and displays are prohibited by sections 4 and 5.

The proposal's term, "minor," is limited to unmarried persons who are under 18 years of age. Obviously there is a certain amount of arbitrariness in fixing an age limit in such laws, and reasonable men may differ on this question; however, settling on this particular age will correspond to the age recommendation made with respect to the Sexual Offenses Article. Eighteen is also the age suggested by Mr. Kuh, who says, "Parental supervision is rapidly attenuated once eighteen has been reached. Were the cutoff lower, hopes for the statute's constitutionality would be bolstered: the arguments would be strengthened of its purpose to safeguard children, not simply those who are technically minors. But, at the same time, many teen-agers would be excluded from its protections." Kuh, supra at 261.

The types of items that cannot be sold, displayed, exhibited, delivered or otherwise furnished to a minor, if "nudity" is involved, are not limited to pictures showing genitalia. "Nudity" is defined as existing not only when pubic areas are revealed, but also when the figure is so thinly veiled or scantily covered as to show exposed female breasts. The draft bars, too, sales of items containing representations by words or pictures of sado-masochistic abuse, of sexual excitement and of sexual conduct, whether hetro- or homosexual, or that engaged in solitarily. Furthermore, "obscenities," defined as "slang words currently generally rejected for regular use in mixed society" and used to refer to sexual parts or excretory functions, is also prohibited. Whether a particular word is "obscene" will depend on its current acceptance by society and will be a question for the trier of fact.

All references to sexual conduct would not be enjoined by the proposal, only "explicit verbal descriptions or narrative accounts of sexual conduct, sexual excitement or sado-masochistic abuse."

The mens rea requirement is"knowing or having good reason to know the character of the material furnished." (Mr. Kuh uses the term, "knowingly" and defines it as "having knowledge of the character of any item described...or having failed to exercise reasonable care to ascertain its content.")

Scienter has been judicially required in obscenity statutes since the decision in Smith v. California, 361 US 147 (1959), wherein the Supreme Court held that enforcement of a statute imposing strict liability on a bookseller who sells obscene material without any notice of the character or contents of the publication is an unconstitutional restriction on the freedom of speech and press. The effect of the case is to impose on the state the burden of establishing beyond a reasonable doubt that the purveyor of the material possesses some degree of scienter sufficient to protect the First Amendment guaranties. The Court explained the rationale of its decision as follows:

> "...our holding in Roth does not recognize any state power to restrict the dissemination of books which are not obscene; and we think this ordinance's strict liability feature would tend seriously to have that effect, by penalizing booksellers, even though they had not the slightest notice of the character of the books they sold...By dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter. For if the bookseller is criminally liable without knowledge of the content, and the ordinance fulfills its purpose, he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature." Id. at 152-153.

Although the Court found it essential that some element of scienter be established, it was careful to say that it was not passing on what sort of mental element was required in such a prosecution to protect the First Amendment guaranties. The Court stated:

> "We need not and most definitely do not pass today on what sort of mental element is requisite to a constitutionally permissible prosecution of a bookseller for carrying an obscene book in stock; whether honest mistake as to whether its contents in fact constituted obscenity need be an excuse; whether there might be circumstances under which the State constitutionally might require that a bookseller investigate further, or might put on him the burden of explaining why he did not, and what such circumstances might be." Id. at 154.

To date the Court has never explicitly ruled on the minimal constitutional requirements of scienter in such a prosecution; however, it has recognized state definitions of that element as adequate. For example, in Mishkin v. New York, 383 US 502 (1966), the Court found New York's judicial definition of this element to be sufficient. Noting the New York Court of Appeals' decision, the Court said:

> "In People v. Finkelstein, 9 NY2d 342, 344-345, 174 NE2d 470, 471 (1961), the New York Court of Appeals authoritatively interpreted § 1141 to require the 'vital element of scienter,' and it defined the required mental element in these terms:

> " 'A reading of the statute [§ 1141] as a whole clearly indicates that only those who are in some manner aware of the character of the material they attempt to distribute should be punished. It is not innocent but calculated purveyance of filth which is exorcised....'
>
> "The Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity. The New York definition of the scienter required by § 1141 amply serves those ends, and therefore fully meets the demands of the Constitution." Mishkin v. New York, supra at 510-511.

The culpability requirement set forth in the draft should meet the standards required by the Smith-Mishkin decisions.

B. Derivation

Sections 3, 4 and 5 are based on the same source as section 1, a proposed statute by Richard H. Kuh in his book, Foolish Figleaves? Pornography in-and-out of court (MacMillan, 1967). Also see New York Revised Penal Law, ss 235.20-235.22. The exemption for employes under subsections (2) and (3) of section 3 is existing law. (Ch. 169 Or Laws 1969). Section 5 is limited to owners, operators, managers or others acting in a managerial capacity in a business.

C. Relationship to Existing Law

The interpretation the United States Supreme Court has given the First Amendment's guaranties of freedom of speech and press in the past decade has molded a new definition of "obscenity." The guideline by which these guaranties are to be measured was struck in Roth v. United States, 354 US 476, 484 (1957): "All ideas having even the slightest redeeming social importance... have the full protection of the guaranties...But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." On this historical interpretation of the Constitution the Court, at 485, ruled: "...obscenity is not within the area of constitutionally protected speech or press."

Subsequently, in Jacobellis v. Ohio, 378 US 184 (1964), the Court reasoned that since only obscenity is excluded from the constitutional protection of the First Amendment's guaranties, the question of whether or not a particular work is obscene necessarily implicates a question of constitutional law, which requires an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected. Logically, such a determination rests upon a definition of "obscenity" and its application to the facts of a particular case.

The Oregon Supreme Court, in State v. Jackson, 224 Or 337, 356 P2d 495 (1960), traces in detail the history of judicial definitions of "obscenity" up to the Roth decision, stating:

> "In the past, obscenity has most often been defined by the courts in terms of its 'tendency' to arouse sexual thoughts or to corrupt the morals of its readers...The test most widely used in this country in a former day was that which Lord Cockburn announced in Regina v. Hicklin, LR 2 QB 360 (1868):
>
> > " '...I think the test of obscenity is this: whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.'
>
> "The test was a failure since a book might be condemned for the chance effect of isolated passages upon the most susceptible, and thus applied would, in the words of Judge Learned Hand, 'reduce our treatment of sex to the standard of a child's library in the supposed interest of a salacious few.' United States v. Kennerly, 209 F 119 (DCSDNY 1913)...following the decision in United States v. One Book Entitled Ulysses, 72 F2d 705 (2d cir 1934)...the court adopted a somewhat vague test based on the 'dominant effect' of the book considered as a whole...The Hicklin rule may fairly be said to have been laid to rest by the decision of the United States Supreme Court in Butler v. Michigan, 352 US 380, 77 S Ct 524, 1 L Ed 2d 412 (1957). A Michigan statute under which Butler was convicted made it a misdemeanor to sell any book 'containing obscene, immoral, lewd or lascivious language...tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth.' The court held that the statute violated due process, in that: 'The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children.' If any doubt remained about the Hicklin rule, it was laid to rest a few months later when Roth v. United States, supra, expressly held it to be unconstitutional." State v. Jackson, supra at 356-358.

As noted by the Oregon Court, Roth rejected the Hicklin formulation as a proper guide for judging material as obscene. In place of the early standard, Roth substituted this test: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." Roth v. United States, supra at 489.

In Memoirs v. Massachusetts, 383 US 413 (1966), the Court summarized the three elements of the Roth test as follows:

> "We defined obscenity in Roth...Under this definition...three elements must coalesce; it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value...Each of the three federal constitutional criteria is to be applied independently; the social value of the book can neither be weighed against nor cancelled by its prurient appeal or patent offensiveness." Id. at 418-419.

Cases subsequent to Roth have illuminated and expanded upon each of the elements of this definition. Regarding the requirement that the material appeal "to a prurient interest in sex," the Roth Court itself noted that "sex and obscenity are not synonymous." Roth v. United States, supra at 487. Reiterating the absence of an equality between sex and obscenity, Jacobellis v. Ohio, supra, stressed Roth's recognition that obscenity is excluded from constitutional protection only because it is "utterly without redeeming social importance," and that "the portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press." Jacobellis v. Ohio, supra at 191. Expanding on the Roth commentary, Jacobellis states:

> "It follows that material dealing with sex in a manner that advocates ideas, Kingsley Int'l Pictures Corp. v. Regents, 360 US 684, or that has literary or scientific or artistic value or any other form of social importance, may not be branded as obscenity and denied the constitutional protection. Nor may the constitutional status of the material be made to turn on a

'weighing' of its social importance against its prurient appeal, for a work cannot be proscribed unless it is 'utterly' without social importance." Id.

In Mishkin v. New York, 383 US 502 (1966), the Court had occasion to "adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group." Id. at 509. The Court held:

> "Where the material is designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large, the prurient-appeal requirement of the Roth test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group." Id. at 508.

Concerning the second federal constitutional criterion, Jacobellis is again instructive. First, the Court recognized that "the Roth standard requires in the first instance a finding that the material 'goes substantially beyond customary limits of candor in description or representation of such matters.' " This is a requirement of the Model Penal Code approved by the Roth Court in a footnote, stating that it perceived "no significant difference between the meaning of obscenity developed in the case law and the definition of the ALI Model Penal Code." Second, Jacobellis clarified the meaning of the "contemporary community standards" aspect of the Roth test, taking the position that "the constitutional status of an allegedly obscene work must be determined on the basis of a national standard." Id. at 195

The third federal constitutional criterion of the Roth standard, that the material be "utterly without redeeming social value," was discussed incidentally in both Roth and Jacobellis in the explanation of the distinction between sex and obscenity. Memoirs indicated the independent application this standard was to receive: "A book cannot be proscribed unless it is found to be utterly without redeeming social value. This is so even though the book is found to possess the requisite prurient appeal and to be patently offensive." Memoirs v. Massachusetts, supra at 419.

However, although the Court was not faced with the issue in Memoirs, by dictum it indicated that where the requisite prurient appeal and patent offensiveness is present and the book has only minimum social value, the circumstances of production, sale and publicity are relevant in determining whether or not the publication or distribution of the book is constitutionally protected.

Relying on its holding in Ginzburg v. United States, 383 US 463 (1966), the Court noted that evidence that the book was commercially exploited for the sake of prurient appeal, to the exclusion of all other values, might justify the conclusion that the book was utterly without redeeming social importance. The basis of such a conclusion was supported by the proposition that where the purveyor's sole emphasis is on the sexually provocative aspects of his publications, a court could accept his evaluation at its face value. In Ginzburg v. United States, supra, where the Court assumed that the publications involved could not be adjudged obscene in the abstract, the Court held that even though the mere fact of profit from the sale of the publication could not be considered, in a close case, a showing of exploitation of interests in titillation by pornography with respect to material that lends itself to such exploitation by pervasive treatment or description of sexual matters would be admissible and would support a determination that the material was obscene.

These three federal criteria, either expressly by statute, or by judicial construction, have been considered necessary to protect any restriction a state may wish to impose on obscene or indecent material. Roth v. United States, supra at 491, realized that although these terms, "obscene" and "indecent," were not precise, the lack of precision itself was not offensive to the requirement of due process if they were applied according to the standards for judging obscenity that the Court therein prescribed.

Oregon Law:

Oregon has two statutes dealing directly with the dissemination of obscene material: ORS 167.151, Disseminating obscene matter; and ORS 167.152, Tie-in sales of indecent or obscene publications. The draft would repeal both of these statutes. The most recent examination of the central obscenity statute, ORS 167.151, by the Oregon Supreme Court can be found in State v. Childs, 87 Adv Sh 495, 447 P2d 304 (1968). The Childs court recognized that before material may be classified as obscene it must meet each and every one of three requirements, listing the three federal criteria laid out in Memoirs v. Massachusetts, supra. See also, State v. Watson, 243 Or 454, 414 P2d 337 (1966).

The defendant attacked the statute as unconstitutional because it permitted conviction without proof that obscene material will perceptibly create a clear and present danger of anti-social conduct. Rejecting this contention, the court cited Roth

v. United States, supra, as well as its earlier holding in State v. Jackson, supra at 363, which stated that "it it not necessary to prove that allegedly obscene matter has an effect upon the reader if its appeal is to prurient interest."

Second, the defendant argued the statute was unconstitutional because it did not require either a "national" community standard or that the material is utterly without redeeming social importance. Responding to this, the court noted the difficulty the legislature has had in keeping abreast of the rapidly changing constitutional requirements in the field. Tracing the legislative efforts to remain abreast, the court said:

> "It is obvious that the legislature has experienced some difficulty in keeping up with the rapidly changing United States constitutional concept of what constitutes obscenity. The present statute was enacted in 1961 and amended in 1963. A prior statute was simultaneously repealed. Legislative history and the statutory language used indicates that the 1961 enactment was for the purpose of making Oregon's statute comply with Roth and the 1963 amendment was to bring it up to date because of the decision in Manual Enterprises v. Day, 370 US 478, 82 S Ct 1432, 8 L Ed2d 639 (1962)." State v. Childs, supra at 502.

Recognizing these legislative difficulties the court judicially construed the statute as requiring the application of a "national" standard as well as interpreting the definition of obscenity in the statute "to require implicitly that the material be utterly without redeeming social value," Ibid.

The defendant's next contention was that subsection (3) of ORS 167.151 makes the merit of the material a subject of affirmative defense rather than something for the state to disprove. The court rejected the argument on the basis that the subsection had been construed to the contrary. In State v. Watson, supra at 456, fn 2, the Oregon Court stated:

> "ORS 167.151 (3) reads as if the presence of literary merit is an affirmative defense, but the United States Supreme Court has held that the protection of the First and Fourteenth Amendments applies to all printing unless the government can prove that it meets the requirements enumerated in Memoirs v. Massachusetts, supra. The burden thus rests on the state to prove all the necessary elements of obscenity."

The defendant next urged that subsection (4) of the statute unconstitutionally permitted a presumption of scienter from the contents of the cover and back of the book; however, subsection (4) relates only to "relevant" evidence; it says nothing about a presumption. The subsection reads:

> "(4) In any prosecution for a violation of this section, it shall be relevant on the issue of knowledge to prove the advertising, publicity, promotion, method of handling or labeling of the matter, including any statement on the cover or back of any book or magazine."

The court answered this argument by saying:

> "The cover and back of a book are parts of the whole. Defendant wishes to treat them as something apart. We see no justification for so considering them. Their usual purpose is to portray in a general way that part of the book between the covers for the benefit of prospective customers. A seller who displays the cover makes a representation to the public of the book's contents. Evidence of what is on the cover is therefore relevant to a seller's knowledge of the contents. His knowledge of the book's contents is relevant to whether he knows the book is obscene. The cover and back are a form of circumstantial evidence which would be relevant even in the absence of a statute." State v. Childs, supra at 504.

In conjunction with this argument, the defendant contended that there was no evidence from which the jury could find that the defendant knew the book was legally obscene. Holding the evidence sufficient to establish the necessary scienter, the court said:

> "In order for one to be found guilty of selling an obscene book it is not necessary to prove that someone saw him read it. The following statement is found in Smith v. California, 361 US 147, 154, 80 S Ct 215, 4 L Ed2d 205 (1959):
>
> > " '...Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element in proving his awareness of its contents. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial.'

> "...While there was no showing that defendant had read the book, evidence of its cover and its display to the public by the defendant...was available to the jury and provides a permissible basis for the jury's finding that the defendant knew the nature of the book's contents." State v. Childs, supra at 507-508.

The next three contentions of the defendant concerned the necessity of expert testimony to establish the federal constitutional criteria defining obscenity.

Regarding the contention that expert testimony was necessary to establish the book's prurient appeal, the court held:

> "The material in question is so patently and exclusively sexual that the average trier of fact is capable of recognizing whether it would have sufficient appeal to arouse lustful desires and lascivious thoughts in the average person." Id. at 505.

Responding to the argument that expert testimony was necessary to show that the work was beyond national contemporary community standards,the court stated its belief that the "background and experience of the average juror would sufficiently reveal the tolerable level of candor in the contemporary national community." Ibid.

On the issue of whether or not expert testimony was necessary on the issue of the redeeming social value of the book, the court stated that although it could "conceive of a case where the court and jury may not be qualified to evaluate the literary value or other redeeming social value of a particular publication, and, that in such cases, expert testimony may be necessary to assist the court and jury in evaluating the material," this was not such a case. Id. at 506.

Lastly, the court held the defendant's contention that a bookseller is immune from prosecution absent a prior determination of a book's obscenity is not and should not be the law. Id. at 508. (See discussion of Senate Bill 92, infra.)

THE MODEL PENAL CODE:

The Oregon Supreme Court has had two occasions to consider the Model Penal Code's treatment of obscenity.

First, in State v. Jackson, supra at 363, the court accepted the ALI's definition of obscenity as a proper standard for the Oregon courts to follow. The court's approval of the Model Penal Code also allowed it to conclude that material alleged to be obscene "may be judged by its appeal to a special audience -- for example, children -- if it clearly is aimed at such an audience." Id at 364; Accord, Mishkin v. New York, supra.

Second, State v. Mesher, 231 Or 436, 373 P2d 410 (1962), dealt with an indictment drawn under subsection (1) of ORS 167.151 arising out of defendant's exhibition of a motion picture entitled "The Lovers." The issue presented to the court was entirely one of statutory construction, i.e., whether the definition of "dissemination" as "sells, delivers or provides" included the "exhibition" of a motion picture.

Tracing the legislative history of the enactment, the court noted that ORS 167.151 was derived from the Model Penal Code, section 207.10 (Tentative Draft No. 6, 1957), and that paragraphs (b) and (c) of the MPC section were deleted from the original bill by the House. The court was of the opinion that the word "provides" used in paragraph (a) of section 207.10(1) did not embrace the idea of publishing or exhibiting. This conclusion was based on the fact that a separately lettered paragraph (paragraph (c) of section 207.10(1)) was employed to prohibit publishing or exhibiting obscene material. In the absence of a contrary indication of legislative intent, the court held that "provide" did not include "exhibition," and that the word " ' provides' was intended to describe the furnishing of obscene materials only in the sense of selling, delivering, lending, giving or other methods of transfer." State v. Mesher, supra at 439. The statute was amended in 1963 to include "exhibit" within the definition of "dissemination."

Section 251.4 of the Model Penal Code defines obscenity. This definition was approved in Jacobellis v. Ohio, supra at 191-192, and is substantively equivalent to the definition approved in State v. Jackson, supra. The definition reads:

> "Material is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest, in nudity, sex or excretion, and if in addition it goes substantially beyond customary limits of candor in describing or representing such matters. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience...."

Subsection (2) states in five paragraphs all intended offenses. Paragraph (a) uses the terms "sells, delivers or provides." The terms "deliver or provide" are broad enough to include "giving" or "lending." See State v. Mesher, supra. Subject to the defenses in subsection (3), these terms are broad enough to allow a case to go to a jury without proving that the defendant received consideration or that title passed. This would allow for conviction of commercial distributors who might promote a non-commercial distribution of obscene material for the purpose of broadening their potential market for commercial sales. Prosecutions are also authorized for acts prior to dissemination by the inclusion in paragraph (a) of the phrase "offers or agrees to sell, deliver or provide."

Paragraph (b) is phrased so that an actor cannot be held liable merely because he has a part in a play that is held obscene, unless he directly participates in that part of the work which is obscene. Persons who "present or direct" the performance as a whole are of course liable; and any one, including an actor, who aids the principal offender will be guilty under the general provisions of accomplice liability.

Paragraph (c) makes publication or exhibition of an obscene play subject to the penalties of the section. Publication may occur by reading it to others or it may be exhibited by performance.

Paragraph (d) makes possession of obscene material punishable if it is coupled with a purpose to disseminate unlawfully. See Stanley v. Georgia, 89 S Ct 1243 (1969).

Paragraph (e) prohibits the commercial dissemination of non-obscene material by representing or suggesting that it is obscene. See Ginzburg v. United States, supra; and Memoirs v. Massachusetts, supra.

The section requires that before criminal liability can attach the activity prohibited must be done "knowingly" or "recklessly."

The flush language at the end of the section provides a presumption that one who disseminates in the course of his business is aware of what is in the book or magazine that he distributes. The presumption would authorize conviction unless the evidence "clearly negatives the presumed fact," but the burden of proof does not shift to the defendant. Although the Supreme Court has never had occasion to rule on the constitutionality of such a presumption, see Ginsberg v. New York, 390 US 629, 632, fn 1 (1968), the Court did incidentally address itself to the problem in Smith v. California, supra at 151, saying:

> "The States generally may regulate the allocation of the burden of proof in their courts...but where we conceived that this device was being applied in a manner tending to cause even a self-imposed restriction on free expression, we struck down its application. Spieser v. Randall, 375 US 513."

The inclusion of the presumption that a disseminator has knowledge of the character or content of the material approximates the effect of a strict liability statute such as was condemned in Smith v. California, supra. The argument for the inclusion of such a presumption in the statute is based on the difficulty of proving such knowledge. However, the United States Supreme Court has not allowed such difficulties to justify the infringement of the First Amendment's guaranties. The restriction of rights so fundamental to individual liberty "may not be justified by the need to ease the administration of otherwise valid criminal laws." Stanley v. Georgia, supra; Smith v. California, supra.

Subsection (3) allows for an affirmative defense to prosecutions brought under subsection (2) if the actor can establish the dissemination was restricted to non-commercial purposes or to professional persons. Subparagraph (a) recognizes that universities, law enforcement authorities, anthropologists, and others may have legitimate reasons to procure obscene materials. If so, it should not be criminal to furnish them. Subparagraph (b) exempts private circulation of obscenity from criminal penalties if it is "non-commercial dissemination to personal associates of the actor."

Subsection (4) lists several paragraphs which are designed to assure reception of expert testimony as well as all other information bearing on the issue of obscenity. Most of the clauses are self-explanatory. The last part of clause (b)

relating to probable effect keeps open the opportunity to show that the alleged obscenity tends to produce illegal behavior, if it becomes possible to make such a showing as social science advances. Clause (d) admits evidence, relevant under the definition of obscenity, to show that the material went beyond "customary limits of candor." Clause (f) allows for a showing of the "good repute" of the author. The commentary notes that judicial opinions sometimes refer to purpose or sincerity of the author or artist, in the sense of scientific purpose or artistic sincerity. At other times the inquiry seems to be directed at whether the conscious object of the creator or disseminator was to arouse erotic feelings. The clause eliminates "purpose" of the author and restricts the repute issue to "good repute" to prevent evidence of the general bad repute of an author or publisher from being made part of the state's case in prosecuting a bookseller.

The last sentence of subsection (4), relating to an independent determination by the court on the issue of obscenity, preserves the independent judgment of the court on the question of obscenity without impairing the defendant's right to a jury trial.

THE NEW YORK LAW - THE "VARIABLE OBSCENITY" CONCEPT:

The dissemination of indecent material to minors is covered by New York Revised Penal Law sections 235.20 to 235.22. The statute upon which these sections are based was recently under examination by the United States Supreme Court in Ginsberg v. New York, 390 US 629 (1968). That opinion describes the content of the present New York provisions. The case discusses the constitutionality of the defendant's conviction for selling to minors material defined to be obscene on the basis of its appeal to them, whether or not it would be obscene to adults.

The Court traces the history of the statute in a footnote:

> "...section 484-h...was enacted in L. 1965, c. 327, to replace an earlier version held invalid by the New York Court of Appeals in People v. Kahan, 15 N.Y.2d 311, 206 N.E.2d 333, and People v. Bookcase, Inc., 14 N.Y.2d 409, 201 N.E.2d 14. Section 484-h in turn was replaced by L. 1967, c. 791, now sections 235.20 - 235.22 of the Penal Law. The major changes under the 1967 law added a provision that the one charged with a violation 'is presumed to [sell] with knowledge of the character and content of the material sold...' and the provision that 'it is an affirmative defense that: (a) The defendant had reasonable cause to believe that the minor involved

> was seventeen years old or more; and (b) Such minor exhibited to the defendant a draft card, driver's license, birth certificate or other official or apparently official document purporting to establish that such minor was seventeen years old or more.' Neither addition is involved in this case. We intimate no view whatever upon the constitutional validity of the presumption. See in general Smith v. California, 361 .S. 147; Speiser v. Randall, 357 U.S. 513; 41 N.Y.U.L.Rev. 791 (1966); 30 Albany L. Rev. (1966). Ginsberg v. New York, supra at 632, fn 1."

Ginsberg was charged with selling a 16 year old boy two "girlie" magazines. The trial court found (1) that the magazines contained pictures which depicted female "nudity" in a manner defined by section 235.20 (2) as a "showing of...female... buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple..."; and (2) that the pictures were "harmful to minors" in that they had, within the meaning of section 235.20 (6) "that quality of... representation...of nudity...[which]...(a) predominantly appeals to the prurient, shameful or morbid interest of minors, and (b) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (c) is utterly without redeeming social importance for minors."

The Court affirmed the conviction.

The New York statute's three-pronged test for judging the obscenity of material sold to minors is a variation on the formula laid out in Memoirs v. Massachusetts, supra, for determining the question of obscenity. Appellant attacked the state's power to adapt this Memoirs' formulation to define the material's obscenity on the basis of its appeal to minors. He based his attack on the broad proposition that the scope of the constitutional freedom of expression secured to a citizen to read or see material concerned with sex cannot be made to depend upon whether the citizen is an adult or a minor. However, the Court was unable to say"that the statute invades the area of freedom of expression constitutionally secured to minors." Ginsberg v. New York, supra at 637. The Court was

of the opinion that the statute in question simply adjusted the definition of obscenity " 'to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests...' of such minors. Mishkin v. New York, 383 U.S. 502, 509." Ginsberg v. New York, supra at 638. In relation to this adjustment of the definition of obscenity, the Supreme Court took note of this development of the concept of variable obscenity:

> "...The concept of variable obscenity is developed in Lockhart & McClure, Censorship of Obscenity: The Developing Constitutional Standards, 45 Minn. L. Rev. 5 (1960). At 85 the authors state:
>
> > " 'Variable obscenity...furnishes a useful tool for dealing with the problem of denying adolescents access to material aimed at a primary audience of sexually mature adults. For a variable obscenity focuses attention upon the make-up of primary and peripheral audiences in varying circumstances, and provides a reasonably satisfactory means for delineating the obscene in each circumstance.' " Ginsberg v. New York, supra at 635, fn 4.

Impliedly approving this concept, the Court recognized that "even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults...' Prince v. Massachusetts, 321 U.S. 158, 170." Ginsberg v. New York, supra at 638. The Court justified this view on the basis of two state interests. The Court enumerated these interests as follows:

> "First of all, constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for abligations the state can neither supply nor hinder.'...The legislature could properly conclude that parents and others, teachers for example, who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility. Indeed,[section 235.20 (6)] expressly recognizes the

parental role in assessing sex-related material harmful to minors according 'to prevailing standards in the adult community as a whole with respect to what is suitable material for minors.' Moreover, the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children.

"The State also has an independent interest in the well-being of its youth. The New York Court of Appeals sqaurely bottomed its decision on that interest in Bookcase, Inc. v. Broderick, supra...Judge Fuld... also emphasized its significance in the earlier case of People v. Kahan...In his concurring opinion...he said:

> " 'While the supervision of the children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them. It is, therefore, altogether fitting and proper for a state to include in a statute desgined to regulate the sale of pornography to children special standards, broader than those embodied in legislation aimed at controlling dissemination of such material to adults.'

"In Prince v. Massachusetts, supra, at 165, this Court, too, recognized that the State has an interest 'to protect the welfare of children' and to see that they are 'safeguarded from abuses...' " Ginsberg v. New York, supra at 639-640.

The Court concluded by holding that it could not say that there was no rational relation between the objective of safeguarding minors from harm and the definition of obscene material on the basis of its appeal to minors under 17.

Section 235.21 of the New York Revised Penal Law states the substantive offense of "Disseminating indecent material to minors." Subsection (1) is the counterpart provision of section 484-h which was under discussion in Ginsberg. Subsection (2) specifically relates to motion picture exhibitors admitting minors to pictures which "in whole or in part, depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to

minors." Knowledge of the age of the minor is not an element of the crime; however, section 235.22 provides an affirmative defense under certain circumstances when the defendant had no reasonable cause to believe that the minor was less than seventeen years old.

New York's definition of obscenity [section 235.00 (1)] is based on the Model Penal Code and Supreme Court decision in Roth and Memoirs. However, it expands the type of activity to which the prurient interest is addressed. In addition to the Model Penal Code's inclusion of "nudity, sex or excretion" the New York drafters included "sadism" or "masochism."

Mr. Kuh criticizes the New York statute (section 235.20), saying:

> "Here we really have it: all the words that hardly any two judges seemed to have been able to interpret alike, lifted from the welter of conflicting opinions and peppered liberally with the words 'for minors.'
>
> "Judges who have split bitterly in applying traditional obscenity statutes are certain to find themselves at odds under the new laws as to whether Playboy, with its nudes, its sex, and its sophistication and veneer, is or is not fit for the young. What about Lady Chatterley's Lover or Memoirs of Hecate County? And what about the widely advertised 'how-to-do-it' guidebooks to sexual happiness, written by doctors and by psychologist-marriage counselors? Different judges will be certain to decide differently -- and to rail at each other in the process.
>
> "In legislatively enacting those phrases that have nurtured so much chaos, the lawmakers have assured constitutionality. What can be safer than adulating the highest Justices by molding a new statute in the very words hailed from their special Sinai? But constitutionality is hardly the prime goal of penal legislation. Utility -- uniformity of understanding by police and by courts, by prosecutors, by publishers, and by booksellers, along with hopefully persuasive arguments for constitutionality -- should be the aim.

"Although perpetuating some obscurity, New York's new statutes (and others elsewhere emulating them) are not all bad. Applying them, courts are almost certain to find at least some items to be unsuitable for the young that some judges might deem permissible for their parents. The most tawdry of the striptease nudes, whether in glossy sets or in magazines, and sado-masochistic pamphlets -- worthless smut on the borders of illegality when sold to adults -- would clearly seem taboo for youngsters. To that extent the new statutes are a forward step. However they create another of the obscenity law's paradoxes.

"Not telling booksellers and others precisely what it is they may or may not do discourages the cautious from selling questionable materials: materials that may not in fact be within the laws' proscriptions. 'The bookseller's self-censorship,' Justice Brennan had noted, commenting on this play-it-safe timidity in his Smith case (scienter) opinion, 'would be a censorship affecting the whole public, hardly less virulant for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded: And so the new laws' in terrorem impact is likely to work a censorship on sales to the young broader than the laws intended, a censorship of a type not reviewable in the courts.

"How much better off all would be, the prosecuted, the prosecutors, the public, and the judges, were there to be a return in the obscenity area to the customary requirement of penal statutes: that they be precise; that, in so far as is humanly possible, they put everyone on notice of exactly what is, and what is not, prohibited?

"Such legislation is possible." Kuh, supra at 251-252. (Footnotes omitted.)

SENATE BILL 92 (1969)

Although the Oregon Supreme Court in State v. Childs, supra indicated that a bookseller should not be immune from prosecution absent a prior determination of the book's obscenity and that this should not be the law, the effect of Senate Bill 92 (with proposed amendments) would be to provide a civil remedy by injunction against a distributor prior to his being charged criminally with selling harmful materials to minors. (The bill died in State and Federal Affairs Committee.) The subcommittee voted unanimously against this approach because of the belief that it would be too cumbersome and impractical to be effective, and because of doubts about the constitutionality of such a procedure under the "prior restraint" inhibitions of the Oregon Constitution.

The effect of section 18 of the bill would make a prior determination of the book's character as "harmful to minors" a condition precedent to any criminal prosecution under section 14 of the bill. Sections 6 through 12 of the bill provide the civil procedure for determining whether the material is "harmful to children." Section 13 provides a contempt penalty for violation of any injunction issued by the court pursuant to those provisions.

Section 14 of the bill would make it "unlawful for any person to knowingly: (1)...sell or loan for monetary consideration to a child any material...which...is harmful to children, unless such child is accompanied by" designated individuals; or (2)..."exhibit for a monetary consideration to a child" designated material "which...is harmful to children, or to sell to a child an admission ticket to premises where such" designated material "is exhibited, unless such child is accompanied by" designated individuals.

Oregon has no statute restricting the dissemination to minors of material determined to be harmful to them. Sections 1, 2, and 5 of SB 92 provide the definitions essential to such a determination. Sections 1 and 2 are substantively equivalent to New York Revised Penal Law, section 235.20. Section 5 defines "harmful material." This definition is equivalent to the statement of the substantive offense of "Disseminating indecent materials to minors,' New York Revised Penal Law, section 235.21 (1)(a)(b). The definition of "harmful material" in such terms allows for a more precise statement of the criminal offense in section 14.

Section 3 of the bill defines "knowledge of the nature of the material" as requiring knowledge of the character and content of any material.

Section 4 defines "knowledge of the child's age." Section 15 (1) and (2) provides for an affirmative defense based on the reasonable mistake of fact as to the child's age.

It must be remembered that any civil determination of the nature of the material cannot amount to a prior restraint or it will violate the Oregon Constitution. Article I, s.8 provides:

> "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write or print freely on any subject whatever; but every person shall be responsible for the abuse of this right."

The Oregon Supreme Court states the essence of a "prior restraint" in State v. Jackson, supra at 351.

> "The gravamen of prior restraint is not the mere fact that punishment is imposed prior to distribution of allegedly offensive material. It lies in the attempt to control distribution by means of what might be called a general injunction whereby criminal penalties are assessed for breach of the injunction rather than for the criminality of the subject matter."

Section 6. Defenses. In any prosecution under sections 2 to 5 of this Article it is an affirmative defense for the defendant to prove:

(1) That the defendant was in a parental or guardianship relationship with the minor.

(2) That the defendant was a bona fide school, museum or public library, or was acting in his capacity as an employe of such organization or of a retail outlet affiliated with and serving the educational purpose of such organization.

(3) That the defendant was charged with the sale, showing or display of an item, those portions of which might otherwise be contraband forming merely an incidental part of an otherwise non-offending whole, and serving some legitimate purpose therein other than titillation.

COMMENTARY - DEFENSES

A. Summary

Section 6 articulates three affirmative defenses (burden on the defendant to prove by a preponderance of the evidence). In each instance the facts that would establish the defense would be peculiarly within the knowledge of the defendant.

B. Derivation

Source of the section is the same as previous sections of the draft. See, also, New York Revised Penal Law section 235.22.

C. Relationship to Existing Law

There are no comparable provisions in existing Oregon law. Insofar as the Article would prohibit furnishing certain types of items to "minors" it is analogous to ORS 471.410 which prohibits giving or selling alcoholic liquor to persons under 21 years of age.

Knowledge that the person to whom the liquor is furnished is under 21 is not an element of the crime. State v. Raper, 174 Or 252, 149 P2d 165 (1944), held that the sale of liquor to a minor is a crime irrespective of the seller's motive or knowledge of the buyer's age. State v. Gulley, 41 Or 318, 70 P 385 (1902), held that under a former, similar statute the seller's honest belief, after inquiry, that the purchaser was an adult did not exonerate him from criminal liability for the sale.

Sections 2 to 5, like ORS 471.410, do not require the state to prove knowledge by the defendant of the minor's age; however, it is not the intent of the draft to impose strict liability inasmuch as the Code's provisions on culpability require a person to act intentionally, knowingly or recklessly before criminal liability can be imposed. See, General Principles of Criminal Liability (Tentative Draft No. 1). The effect of the sections is to impose on the actor the burden of making a reasonable effort to determine the person's age.

Section 7. Publicly displaying nudity or sex for advertising purposes. A person commits the crime of publicly displaying nudity or sex for advertising purposes if, for advertising purposes, he knowingly:

(1) Displays publicly or causes to be displayed publicly a picture, photograph, drawing, sculpture or other visual representation or image of a person or portion of the human body that depicts nudity, sado-masochistic abuse, sexual conduct or sexual excitement, or any page, poster or other written or printed matter bearing such representation or a verbal description or narrative account of such items or activities, or any obscenities; or

(2) Permits any display described in subsection (1) of this section on premises owned, rented or operated by him.

COMMENTARY - PUBLICLY DISPLAYING NUDITY OR SEX FOR ADVERTISING PURPOSES

A. Summary

This section attacks the problem of public displays of materials that may offend persons who are unwillingly subjected to them.

The section incorporates most of the terms defined in section 1. "Displays publicly" means the "exposing, placing, posting, exhibiting or in any fashion displaying in any location, whether public or private, an item in such a manner that it may be readily seen and its content or character distinguished by normal unaided vision viewing it from a public thoroughfare, depot or vehicle."

"Public thoroughfare, depot or vehicle" is defined as meaning "any street, highway, park, depot or transportation platform, or other place, whether indoors or out, or any vehicle for public transportation, owned or operated by government, either directly or through a public corporation or authority, or owned or operated by any agency of public transportation that is designed for the use, enjoyment or transportation of the general public.

"Advertising purposes" means "purposes of propagandizing in connection with the commercial sale of a product or type of product, or the commercial offering of a service, or the commercial exhibition of an entertainment."

Other definitions which have been previously discussed are also important to the section.

The thrust of the proposal is well stated by Mr.Kuh:

> "The proposed ban is applied to that nudity and sex that is so displayed commercially for advertising purposes as to be visible by the passing public. By focusing this way on the apparent purpose of the presentation, questions of taste are avoided. The civic monument is given immunity, while items condemned will include pictures found on burlesque billboards, in nudie-movie teaser montages....
>
> "So much for the irritant that is public display. The proposed statute, as drafted, is designed to remove the most blatant aspects without invading the right of private in-the-store displays and of private sales...." Kuh, supra, at 277-278.

He also discusses the potentially salutary effect that such legislation is likely to have:

> "Anti-display statutes might even perform yeoman duty in removing irritants from public view and thus calming advocates of more and more censorship. By driving merchandise, not underground, but into discreet channels the temper-taunting red flags will disappear and pro-censorship pressures should be lessened. Were legislative enactment to suceed in driving objectionable items from public view, while permitting adults privately to buy, to read, to see, or to hear far more objectionable materials, the meaningful rights of all would be reconciled. The majority would be spared the discomfort of being forcibly confronted by the depersonalizing, the embarrasing, the crude; the minority would, as part of the same legislative framework, be freed to enjoy more of what it wished, quietly and without fanfare." Kuh supra at 275.

B. Derivation

The section is based on a proposed statute by Mr. Kuh, supra at 275-276. Also see Michigan Revised Criminal Code section 6320.

C. Relationship to Existing Law

Oregon has no comparable provision in existing law, although the common law "indictable nuisance" statute, ORS 161.310, makes it a misdemeanor to "wilfully and wrongfully commit any act...which openly outrages the public decency and is injurious to public morals...."

The basic premise of the section, that the state has the right to protect its citizens against an "assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid it," was recognized by the U. S. Supreme Court in the case of Redrup v. New York, 386 US 767, 769 (1967).

Section 8. Defenses. In any prosecution for violation of section 7 of this Article it shall be an affirmative defense for the defendant to prove:

(1) That the public display, even though in connection with a commercial venture, was primarily for artistic purposes or as a public service; or

(2) That the public display was of nudity, exhibited by a bona fide art, antique or similar gallery or exhibition, and visible in a normal display setting.

COMMENTARY - DEFENSES

This section would allow the defendant to prove that the public display was primarily for artistic purposes, was a public service or was that of a bona fide art gallery. Certainly legitimate artistic displays should not, and probably would not, be the subject of a criminal prosecution, but should it occur, this section would provide protection for the defendant.

TEXT OF REVISIONS OF OTHER STATES

TEXT OF MODEL PENAL CODE

Section 251.4. Obscenity.

(1) Obscene Defined. Material is obscene if, considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest, in nudity, sex or excretion, and if in addition it goes substantially beyond customary limits of candor in describing or representing such matters. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience. Undeveloped photographs, molds, printing plates, and the like, shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

(2) Offenses. Subject to the affirmative defense provided in Subsection (3), a person commits a misdemeanor if he knowingly or recklessly:

(a) sells, delivers or provides, or offers or agrees to sell, deliver or provide, any obscene writing, picture, record or other representation or embodiment of the obscene; or

(b) presents or directs an obscene play, dance or performance, or participates in that portion thereof which makes it obscene; or

(c) publishes, exhibits or otherwise makes available any obscene material; or

(d) possesses any obscene material for purposes of sale or other commercial dissemination; or

(e) sells, advertises or otherwise commercially disseminates material, whether or not obscene, by representing or suggesting that it is obscene.

A person who disseminates or possesses obscene material in the course of his business is presumed to do so knowingly or recklessly.

(3) Justifiable and Non-Commercial Private Dissemination. It is an affirmative defense to prosecution under this Section that dissemination was restricted to:

(a) institutions or persons having scientific, educational, governmental or other similar justification for possessing obscene material; or

(b) non-commercial dissemination to personal associates of the actor.

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(4) Evidence; Adjudication of Obscenity. In any prosecution under this Section evidence shall be admissible to show:

(a) the character of the audience for which the material was designed or to which it was directed;

(b) what the predominant appeal of the material would be for ordinary adults or any special audience to which it was directed, and what effect, if any, it would probably have on conduct of such people;

(c) artistic, literary, scientific, educational or other merits of the material;

(d) the degree of public acceptance of the material in the United States;

(e) appeal to prurient interest, or absence thereof, in advertising or other promotion of the material; and

(f) the good repute of the author, creator, publisher or other person from whom the material originated.

Expert testimony and testimony of the author, creator, publisher or other person from whom the material originated, relating to factors entering into the determination of the issue of obscenity, shall be admissible. The Court shall dismiss a prosecution for obscenity if it is satisfied that the material is not obscene.

# # #

TEXT OF NEW YORK REVISED PENAL LAW

§ 235.00 Obscenity; definitions of terms

The following definitions are applicable to sections 235.05, 235.10 and 235.15:

1. "Obscene." Any material or performance is "obscene" if (a) considered as a whole, its predominant appeal is to prurient, shameful or morbid interest in nudity, sex, excretion, sadism or masochism, and (b) it goes substantially beyond customary limits of candor in describing or representing such matters, and (c) it is utterly without redeeming social value. Predominant appeal shall be judged with reference to ordinary adults unless it appears from the character of the material or the circumstances of its dissemination to be designed for children or other specially susceptible audience.

2. "Material" means anything tangible which is capable of being used or adapted to arouse interest, whether through the medium of reading, observation, sound or in any other manner.

3. "Performance" means any play, motion picture, dance or other exhibition performed before an audience.

4. "Promote" means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same. L.1965, c. 1030; amended L.1967, c. 791, § 32, eff. Sept. 1, 1967.

§ 235.05 Obscenity

A person is guilty of obscenity when, knowing its content and character, he:

1. Promotes, or possesses with intent to promote, any obscene material; or

2. Produces, presents or directs an obscene performance or participates in a portion thereof which is obscene or which contributes to its obscenity.

Obscenity is a class A misdemeanor. L.1965, c. 1030, eff. Sept. 1, 1967.

§ 235.10 Obscenity; presumptions

1. A person who promotes obscene material, or possesses the same with intent to promote it, in the course of his business is presumed to do so with knowledge of its content and character.

2. A person who possesses six or more identical or similar obscene articles is presumed to possess them with intent to promote the same. L.1965, c. 1030, eff. Sept. 1, 1967.

§ 235.15 Obscenity; defense

In any prosecution for obscenity, it is an affirmative defense that the persons to whom allegedly obscene material was disseminated, or the audience to an allegedly obscene performance, consisted of persons or institutions having scientific, educational, governmental or other similar justification for possessing or viewing the same. L.1965, c. 1030, eff. Sept. 1, 1967.

§ 235.20 Disseminating indecent material to minors; definitions of terms

The following definitions are applicable to sections 235.21 and 235.22:

1. "Minor" means any person less than seventeen years old.

2. "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernably turgid state.

3. "Sexual conduct" means acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, breast.

4. "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

5. "Sado-masochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

6. "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

(a) Predominantly appeals to the prurient, shameful or morbid interest of minors; and

(b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

(c) Is utterly without redeeming social importance for minors.

Added L.1967, c. 791, § 34, eff. Sept. 1, 1967.

§ 235.21 Disseminating indecent material to minors

A person is guilty of disseminating indecent material to minors when:

1. With knowledge of its character and content, he sells or loans to a minor for monetary consideration:

(a) Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors; or

(b) Any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in paragraph (a) hereof, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse and which, taken as a whole, is harmful to minors; or

2. Knowing the character and content of a motion picture, show or other presentation which, in whole or in part, depicts nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors, he:

(a) Exhibits such motion picture, show or other presentation to a minor for a monetary consideration; or

(b) Sells to a minor an admission ticket or pass to premises whereon there is exhibited or to be exhibited such motion picture, show or other presentation; or

(c) Admits a minor for a monetary consideration to premises whereon there is exhibited or to be exhibited such motion picture, show or other presentation.

Disseminating indecent material to minors is a class A misdemeanor. Added L.1967, c. 791, § 35, eff. Sept. 1, 1967.

§ 235.22 Disseminating indecent material to minors; presumption and defense

1. A person who engages in the conduct proscribed by section 235.21 is presumed to do so with knowledge of the character and content of the material sold or loaned, or the motion picture, show or presentation exhibited or to be exhibited.

2. In any prosecution for disseminating indecent material to minors, it is an affirmative defense that:

(a) The defendant had reasonable cause to believe that the minor involved was seventeen years old or more; and

(b) Such minor exhibited to the defendant a draft card, driver's license, birth certificate or other official or apparently official document purporting to establish that such minor was seventeen years old or more. Added L.1967, c. 791, § 36, eff. Sept. 1, 1967.

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TEXT OF MICHIGAN REVISED CRIMINAL CODE

Sec. 6301. The following definitions apply to this chapter:

(a) To "disseminate" mean to manufacture, issue, publish, sell, lend, distribute, transmute, exhibit or present material or to offer or agree to do the same.

(b) "Lascivious." Any material or performance is "lascivious" if:

(i) It is primarily devoted to detailed descriptions or detailed narrative accounts of sexual excitement, sexual conduct or sado-masochistic abuse; or

(ii) It contains any photograph, drawing or similar visual representation of any person of the age of puberty or over revealing such person with less than a fully opaque covering over his or her genitals and pubic area, or depicting such person in a state of sexual excitement or engaged in acts of sexual conduct or sado-masochistic abuse; and

(iii) It is presented in such a manner as to exploit lust for commercial gain and would appeal to a minor's prurient interest.

This definition shall not apply to the presentation of such descriptions, accounts or visual representations for educational or scientific purposes.

(c) "Material" means any printed matter, visual representation or sound recording, and includes but is not limited to books, magazines, motion pictures, pamphlets, newspapers, pictures, photographs, drawings, sculptures and tape or wire recordings.

(d) "Minor" means any person under the age of 17.

(e) "Performance" means any play, motion picture, dance or other exhibition performed before an audience for monetary consideration.

(f) "Pornographic." Any material or performance is "pornographic" if:

(i) Considered as a whole, its predominant appeal is to prurient interest, that is, a shameful or morbid interest in nudity, sex, excretion, sadism or masochism; and

(ii) It goes substantially beyond customary limits of candor in describing or representing such matters; and

(iii) It is utterly without redeeming social importance.

In determining whether a material or performance is pornographic, it shall be judged with reference to its impact upon ordinary adults, unless it appears from the character of the material or performance and the circumstances of its dissemination that it is designed for an audience composed of a particular, clearly defined segment of the community. In that case, it shall be judged with reference to the specific audience for which it was designed. Undeveloped photographs, molds and similar material may be found to be pornographic notwithstanding that processing or other acts may be required to make the pornography apparent.

(g) "Sexual conduct" means acts of masturbation, homosexuality, sexual intercourse or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or the breast or breasts of a female for the purpose of sexual stimulation, gratification, or perver-

(h) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(i) "Sado-masochistic abuse" means flagellation or torture by or upon a person as an act of sexual stimulation or gratification.

[Promoting Pornographic Material]

Sec. 6305. (1) A person commits the crime of promoting pornographic material if, knowing its content and character, he:

(a) Disseminates for pecuniary gain, or possesses with the intent to disseminate for pecuniary gain, any pornographic material; or

(b) Produces, presents, directs or participates for pecuniary gain in any pornographic performance.

(2) Promoting pornographic material is a Class A misdemeanor except that the court may impose a sentence to pay a fine for this offense not to exceed 10,000 dollars. In imposing the fine authorized for this offense, the court shall consider the scope of the defendant's commercial activity in promoting pornographic material.

[Promoting Lascivious Materials for Minors]

Sec. 6310. (1) A person commits the crime of promoting lascivious materials for minors if, knowing its content and character, he:

(a) Possesses lascivious materials with intent to disseminate it to minors;

(b) Disseminates lascivious material to a minor, either knowing that such person is a minor or acting in reckless disregard of the likelihood that such person is a minor; or

(c) Produces, presents, directs or participates in any lascivious performance before an audience made up primarily of minors, either knowing that the audience is so composed or having reckless disregard of the likelihood that it is so composed.

(2) Promoting lascivious materials for minors is a Class A misdemeanor, except that the court may impose a sentence to pay a fine for this offense not to exceed 10,000 dollars. In imposing the fine authorized for this offense, the court shall consider the scope of the defendant's commercial activity in promoting lascivious materials for minors.

[Intent to Disseminate: Prima Facie Proof]

Sec. 6315. (1) Proof of possession of 6 or more identical copies of any pornographic or lascivious material is prima facie evidence of possession with the intent to disseminate for pecuniary gain.

[Displaying Indecent Material]

Sec. 6320. (1) A person commits the crime of displaying indecent material if he displays on any sign, billboard or other object located on any street or similar public place a photograph, drawing or similar visual representation of any person of the age of puberty or older:

(a) Revealing such person with less than a fully opaque covering over his or her genitals and pubic area, or depicting such person in a state of sexual excitement or engaged in an act of sexual conduct or sadomasochistic abuse; and

(b) Presented in such a manner as to exploit lust.

(2) Displaying indecent material is a Class C misdemeanor.

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