SETON HALL LEGISLATIVE JOURNAL

VOL. 3 FALL 1977 NO. 1

THE INTRACTABLE OBSCENITY PROBLEM† PART II††: PROLOGUE TO SENATE BILL 1247; A MODEL OBSCENITY ACT.

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The first part of this article traced the development of New Jersey obscenity law and analyzed the impact of a bill approved by the New Jersey Legislature. The bill would have conformed New Jersey's statutory definitions of obscenity to the requirements of *Miller v. California,* and, in order to place obscenity prosecutions in municipal courts, would have downgraded general obscenity offenses from misdemeanors to disorderly persons offenses. The second part of this article relates the subsequent history of the bill and proposes a Model Obscenity Act by which states can constitutionally and comprehensively regulate obscenity.

Prologue

Senate Bill 1247 (S. 1247)[1] was pocket vetoed by Governor Brendan T. Byrne when he declined to sign the bill by March 3, 1978.[2] In a statement[3] detailing the reasons for his decision, Governor Byrne explained why

† This phrase originated in Justice Harlan's concurring opinion in Interstate Circuit, Inc. v. Dallas, 390 U.S. 676, 704 (1968).

†† *Part I: The Development of New Jersey Obscenity Law; Senate Bill 1247–The Legislature's Latest Proposal* appeared in 2 SETON HALL LEGIS. J. 179 (1977).

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[1] 197th N.J. Legis., 2d Sess. (2d Official Copy Reprint 1977).

[2] The New Jersey Constitution provides that a bill does not become law if the bill is not signed within a 45 day period, Sundays excepted, following adjournment sine die of a two-year Legislature, provided that the 45th day falls after the last day of the second annual session. N.J. CONST. art. V, § 1, para. 14(b). The 197th New Jersey Legislature adjourned sine die January 10, 1978, the last day of the second annual session. 1977 N.J. SENATE JOURNAL 648.

[3] Gov. Brendan Byrne, Statement on Senate Bill No. 1247 (n.d.) (filed in N.J. VETO MESSAGES (looseleaf supp. 1977) at N.J. State Library, Trenton, N.J.) [hereinafter cited as Gov. Byrne, Statement on S. 1247].

he thought the bill, despite "advantages of promptness and responsiveness to local community sentiment," was "an unsatisfactory solution to . . . [the pornography] problem.":[4]

> Penalties are limited by the jurisdiction of the municipal court, *i.e.*, disorderly person's offenses. Standards of definition and enforcement can vary widely from community to community—a problem which could quickly assume constitutional dimension. Enforcement on a level beyond municipal boundaries can become difficult. Extradition is not available for disorderly person's offenses. The seriousness of the offense does not take account of the involvement of children as victims of the crime.[5]

In light of these problems, Governor Byrne stated that he prefers current law to S. 1247. "Although enforcement of present law yields mixed results," he continued, "it has been used effectively in several areas of the state to close shops and exhibitions. I note that substantial fines far in excess of those here proposed were involved in the successful prosecutions."[6] The Governor indicated to Senator Joseph A. Maressa, S. 1247's sponsor, that he will work with the Senator to develop an approach that is constitutional and effective,[7] and one that reflects existing community standards of decency.[8]

In his S. 1247 veto message, however, Governor Byrne indicated[9] a preference for the passage of a modified penal code over present law. The Governor suggested[10] that the code[11] be amended to include two types of offenses covered by current law—adult obscenity[12] and pornographic exploitation of children.[13] Adult obscenity, the Governor inferred, should be limited to commercial transactions.[14]

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[4] Gov. Byrne, Statement on S. 1247, *supra* note 3, at 1.

[5] *Id.*

[6] *Id.* at 2.

[7] *PORNOGRAPHY: Governor Sees a 'Death Knell' for Judge Measure,* Newark Star-Ledger, Feb. 22, 1978, at 12, col. 1.

[8] *Byrne Won't Sign Smut Bill,* Newark Star-Ledger, Mar. 1, 1978, at 16, col. 5.

[9] Gov. Byrne, Statement on S. 1247, *supra* note 3, at 1.

[10] *Id.*

[11] S. 738, 198th N.J. Legis., 1st Sess. §§ 2C:34-4, -5 (1978). *See* Casiello & Russo, *The Intractable Obscenity Problem Part I: The Development of New Jersey Obscenity Law; Senate Bill 1247—The Legislature's Latest Proposal,* 2 SETON HALL LEGIS. J. 179, 215 (1977) [hereinafter cited as Casiello & Russo].

[12] N.J. STAT. ANN. § 2A:115-2 (West 1969) (general obscenity offense).

[13] N.J. STAT. ANN. §§ 2A:142A-1 to -5 (West Supp. 1978-1979) (punishing any person who films or permits to be filmed, or sells any film depicting children under age 16 performing or simulating certain sexual acts). *See* N.J. STAT. ANN. §§ 34:2-21.58, .59, .64 (West Supp. 1978-1979) (permitting children under age 16 to perform in theatrical productions provided that the children are not required to perform obscene acts). Both of these statutes were signed into law in early 1978.

[14] Gov. Byrne, Statement on S. 1247, *supra* note 3, at 1.

The Legislature revised the penal code in the manner suggested by the Governor.[15] In addition, however, the Legislature amended the penal code in several other ways. First, the Legislature provided for jury trials in adult obscenity prosecutions.[16] The Legislature also imposed a disorderly persons penalty[17]—triable in municipal court[18]—for the adult obscenity offense, as opposed to the present law's misdemeanor penalty.[19] Finally, the Legislature granted municipalities the power to legalize, by zoning ordinances, the sale of obscene material to adults.[20] By virtue of the latter two amendments, the Legislature has authorized municipalities to enforce or legalize adult obscenity offenses. The Governor signed the penal code as amended on August 10, 1978.[21]

A Model Obscenity Act

A Model Obscenity Act which synthesizes Federal Constitutional case law on obscenity and some of the better provisions of the obscenity statutes of the fifty states follows. Source notes indicate the origins of the Model Act's provisions. The comments focus on the differences between the Model Act, S. 1247, and current New Jersey law. The comments also cite relevant provisions of other state statutes. The Model Act assumes that a legislature wishes to regulate obscenity to the greatest extent possible under the federal constitution, but is structured for easy modificiation to suit the policies of different jurisdictions.

Procedural aspects of obscenity regulation, such as civil in rem determinations of obscenity and injunctive remedies, are not dealt with here. Fur-

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[15] S. 738, 198th N.J. Legis., 1st Sess. § 2C:24-4(b) (Assembly Reprint 1978) (pornographic exploitation of children); *id.* § 2C:34-2 (commercial obscenity for adults). Since the latter section makes punishable only *sales* of obscene materials to adults, the penal code legalizes the following transactions punishable under current law: "print," "give away," "publish," "distribute," "import," "loan," and possession with intent to perform the above transactions or possession with intent to "design," "prepare," or "offer for sale." *See* N.J. STAT. ANN. § 2A:115-2 (West 1969); Casiello & Russo, *supra* note 11, at 184 n.32.

[16] S. 738, 198th N.J. Legis., 1st Sess. § 2C:34-2(b) (Assembly Reprint 1978). The Assembly was advised last year that jury trials may constitutionally be required in obscenity prosecutions in order to determine "contemporary community standards." Casiello & Russo, *supra* note 11, at 210-11.

[17] S. 738, 198th N.J. Legis., 1st Sess. § 2C:34-2(b) (Assembly Reprint 1978).

[18] N.J. STAT. ANN. §§ 2A:8-21(d), (h) (West 1952); *see id.* § 2A:3-6 (West Supp. 1978-1979); N.J.R. 3:23-8; 4:14-2. Governor Byrne has stated his disapproval of such a reduction in penalty. Gov. Byrne, Statement on S. 1247, *supra* note 3, at 1; *see* Casiello & Russo, *supra* note 11, at 209.

[19] N.J. STAT. ANN. § 2A:115-2 (West 1969).

[20] S. 738, 198th N.J. Legis., 1st Sess. § 2C:34-2(b) (Assembly Reprint 1978).

[21] New Jersey Code of Criminal Justice, ch. 95, 1978 N.J. Adv. Law Serv. (effective Sept. 1, 1979) (to be codified as N.J. STAT. ANN. §§ 2C:1-1 to :98-4 (West)).

thermore, two provisions common in the regulation of obscenity are not included in the Model Act because of their questionable constitutionality. One involves the offense of "public display" [22] or "public communication" [23] of sexual matters. In light of *Erznoznik v. City of Jacksonville*,[24] the public display of nudity cannot be prohibited,[25] and the public display of anything not obscene under *Miller* probably could not be proscribed either.[26] If the offense is limited to that which is obscene under *Miller*,[27] such a provision is, of course, constitutional, but there would be no need for a separate offense of public display, since such conduct would be covered by the definition of "promote" in the Model Act.[28] Several states have statutes which provide that any person possessing a fixed number of copies of an obscene material is presumed either to possess them for purposes of distribution,[29] or to possess them with knowledge of their obscene character.[30] The validity of such statutes is constitutionally uncertain,[31] and thus provisions of this type are not included in the Model Act.

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[22] *E.g.*, ARIZ. REV. STAT. § 13-537(D)(2) (Supp. Pamp. 1957-1977); ARK. STAT. ANN. § 41-3506 (1977); COLO. REV. STAT. § 18-7-401(2) (Cum. Supp. 1976); HAW. REV. STAT. § 712-1211 (1976); IDAHO CODE § 18-4105 (Cum. Supp. 1977); MD. ANN. CODE art. 27, § 416D (1976); MO. ANN. STAT. § 573.010(14) (Vernon Spec. Pamp. 1978) (effective Jan. 1, 1979); MONT. REV. CODES ANN. § 94-8-110.1 (1977); N.C. GEN. STAT. § 14-190.11, .3 (Cum. Supp. 1977); OR. REV. STAT. § 167.060(2) (1977); TEX. PENAL CODE ANN. tit. 9, § 43.22(a) (Vernon 1974); VT. STAT. ANN. tit. 13, § 2801(8) (Cum. Supp. 1977); W. VA. CODE § 61-8A-1(10) (1977).

[23] N.J. STAT. ANN. § 2A:115-2.3 (West Supp. 1978-1979). *See also* N.J. STAT. ANN. § 2A:170-25.18 (West Supp. 1978-1979).

[24] 422 U.S. 205 (1975).

[25] *Id.* at 212-13; Adventures in Cinema, Inc. v. Congdon, 59 App. Div. 2d 52, 397 N.Y.S. 2d 225 (1977); State v. Cardwell, 22 Or. App. 246, 539 P.2d 169 (1975).

[26] Calderon v. Buffalo, 90 Misc. 2d 1033, 397 N.Y.S. 2d 655 (Sup. Ct. 1977); *but cf.* Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (zoning ordinance regulating the location of "adult" theatres held constitutional).

[27] 413 U.S. 15 (1973).

[28] § 3(h) *infra*.

[29] *E.g.*, ALA. CODE tit. 14, § 374(15) (Interim Supp. 1975); ARK. STAT. ANN. § 41-3576 (1977); ILL. ANN. STAT. ch. 38, § 11-20(e) (Smith-Hurd Supp. 1977); MICH. COMP. LAWS ANN. § 750.343a (1968); OHIO REV. CODE ANN. § 2907.35(A)(1) (Page 1975); OKLA. STAT. ANN. tit. 21, § 1040.24 (West Supp. 1977-1978).

[30] *E.g.*, DEL. CODE tit. 11, § 1363 (1975); N.Y. PENAL LAW § 235.10(1) (McKinney Supp. 1977-1978); VT. STAT. ANN. tit. 13, § 2805(a) (Cum. Supp. 1977); W. VA. CODE § 61-8A-4 (1977); WYO. STAT. § 6-105.3 (1957).

[31] Comment, *Proof of Scienter in Criminal Obscenity Prosecutions*, 9 AKRON L. REV. 131, 144-47 (1975).

A MODEL OBSCENITY ACT

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1. **Short Title.** This Act shall be known and may be cited as the "[State] Obscenity Act."

Comment: A short title is an appropriate means to designate the comprehensive and continuing nature of the Model Act and to simplify citation. *See* R. Dickerson, *Legislative Drafting* § 8.4, at 104 (1954).

2. **Purpose.** The purpose of this Act is to regulate obscenity to the greatest extent possible, consistent with the requirements of the United States Constitution, and the Act shall be interpreted to effectuate this purpose.

Comment: In light of the difficulties inherent in obscenity regulation, the purpose of the Model Act should be indicated to aid judicial interpretation. *See* R. Dickerson, *Legislative Drafting* § 9.1, at 107-08 (1954). Obvi-

ously, if a state chooses to substantially amend any of the substantive provisions of the Model Act, or if the particular situation of a state requires, this section should be modified to reflect these factors.

3. Definitions.

(a) **Obscene.** A work is "obscene" if the trier of fact finds that:

(1) the average adult, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest of that adult; and

(2) the average adult, applying contemporary community standards, would find that the work depicts or describes sexual conduct in a manner patently offensive to that adult; and

(3) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Source: *See Miller v. California,* 413 U.S. 15, 24, 30-31 (1973).

Comment: This subsection contains the latest United States Supreme Court definition of obscenity found in *Miller v. California,* 413 U.S. 15 (1973). Under *Pinkus v. United States,* 98 S. Ct. 1808, 1812 (1978), obscenity is measured with reference to the average *adult.* The *Miller* definition is part of New Jersey case law, *State v. De Santis,* 65 N.J. 462, 323 A.2d 489 (1974), but not part of New Jersey statutory law. *See* N.J. Stat. Ann. § 2A:115-1.1 (West Supp. 1978-1979). Although the language "the average adult, applying contemporary community standards" of paragraph 2 of this subsection does not appear in the definition of obscenity set out in *Miller,* 413 U.S. at 24, this language clearly is part of the definition. *Smith v. United States,* 431 U.S. 291, 301 (1977); *Miller* at 30-34; Note, *Community Standards, Class Actions, And Obscenity Under Miller v. California,* 88 Harv. L. Rev. 1838, 1842 n. 30 (1975). The introductory clause of this subsection defines the role of the trier of fact in an obscenity prosecution. The trier of fact, and not the hypothetical average person, must make a finding as to how the average person would judge the material. The average person formulation would also present difficult proof problems for the prosecution. N.Y. Penal Law § 235.00 note, A. Hechtman (McKinney Supp. 1977-1978). Note that the third prong of this definition, set out in paragraph 3 of this subsection, is a constant standard, which does not vary from community to community, *Smith v. United States,* 431 U.S. 291, 301 (1977), and does not depend on an average person standard.

(b) **Obscene for minors.** A work is "obscene for minors" if the trier of fact finds that:

(1) the average minor of the same age as the minor to whom the work is promoted, applying contemporary community standards,

would find that the work, taken as a whole, appeals to the prurient interest; and

(2) the average adult, applying contemporary community standards, would find that the work depicts or describes sexual conduct in a manner patently offensive for the average minor of the same age as the minor to whom the work is promoted; and

(3) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Source: *Ginsberg v. New York,* 390 U.S. 629 (1968); see the Source and Comment notes accompanying section 3(a) of the Model Act for the origin of the basic structure of this subsection.

Comment: In *Ginsberg v. New York,* 390 U.S. 629 (1968), the United States Supreme Court upheld the constitutionality of separate obscenity standards for minors. The New York statute approved in *Ginsberg* grafted the concept of "variable obscenity" onto the then prevailing constant definition of obscenity adopted by the Court in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General,* 383 U.S. 413 (1966). *Ginsberg,* 390 U.S. at 635. Variable obscenity allows obscenity to be viewed in terms of a work's appeal to the prurient interest of the recipient group. Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards,* 45 Minn. L. Rev. 5, 68-88 (1960). Although the Court has not had occasion to decide what effect the revised general obscenity standards enunciated in *Miller v. California,* 413 U.S. 22 (1973), will have on the *Ginsberg* juvenile formulation, the Court has suggested that separate standards for juvenile obscenity are still valid. *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 213 & n. 10 (1975); *Miller* at 19; *see Pinkus v. United States,* 98 S. Ct. 1808, 1812 (1978). Logically, however, any juvenile obscenity statute must now be based on the tripartite *Miller* definition and the Model Act is drafted accordingly.

Paragraph 3 of section 3(b) of the Model Act however, differs from the *Ginsberg* approach by not measuring the social value of a work with reference to minors. The social test is a constant, not a variable, portion of the obscenity test. *See Smith v. United States,* 431 U.S. 291, 301, 303 (1977); *cf. Butler v. Michigan,* 352 U.S. 380 (1957) (state obscenity statute judging obscenity solely with reference to juveniles held unconstitutional as "reduc[ing] the adult population . . . to reading only what is fit for minors"). This approach is consistent with that used for the general obscenity provision of the Model Act, section 3(a)(3), in which the social value of a work does not depend upon the average person. Note, however, that the sale to minors of socially valuable works would still be prohibited by section 3(f) of the Model Act if the work is pandered.

The prurient interest and patent offensiveness of a work is judged with reference to the "average minor of the same age as the minor to whom the work is promoted." What appeals to the prurient interest or what is patently offensive for a twelve year old might not be so for a seventeen year old. This phrase thus allows the determination of these two elements to vary depending upon the age of the minor involved in the particular case. *See* Colo. Rev. Stat. § 318-7-101(8)(1973) (repealed 1976); Ill. Ann. Stat. ch. 38, § 11-21(c) (Smith-Hurd Supp. 1977).

The definition of sexual conduct found in section 3(c) of the Model Act remains the same for works obscene and obscene for minors. Although the Supreme Court has hinted that a more expansive definition may be allowed for juveniles than for adults, *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 213 (1975) (nudity not obscene "even for juveniles"), the line between innocuous nudity and obscenity is particularly murky, even as to adults. Both the uncertainty of the scope of sexual conduct and an interest in uniformity in the Model Act suggest a single definition of sexual conduct for adults and juveniles. Furthermore, the impact of the concept of variable obscenity does not depend on adjusting the definition of sexual conduct, but rather on its adaptation of the patent offensiveness test to suit the recipient group. Thus, a work depicting the same sexual conduct may be found to be patently offensive for children, but not for adults.

(c) **Sexual conduct.** "Sexual conduct" is deemed to include the following, whether between humans or humans and animals:

(1) **Sexual intercourse.** "Sexual intercourse" means any act (or pose which indicates imminent performance of an act) of sexually related intercourse, whether normal or perverted, actual or simulated, including genital-genital, anal-genital, oral-genital, and oral-anal intercourse;

(2) **Sado-masochistic abuse.** "Sado-masochistic abuse" means any flagellation or torture, or condition of being fettered, bound or otherwise physically restrained, done for the purpose of sexual stimulation or gratification, by or upon one who is nude or clad in undergarments or in revealing or bizarre costume;

(3) **Masturbation.** "Masturbation" means manipulation, by any means, of one's own genitals or female breasts for the purpose of sexual gratification;

(4) **Erotic fondling.** "Erotic fondling" means any caressing, fondling, or other erotic touching of another's genitals or female breasts, whether clothed or unclothed, for the purpose of sexual stimulation or gratification;

(5) **Lewd exhibition.** "Lewd exhibition" means:
a) any pose which emphasizes or focuses upon the genitals or pubic areas;
b) male genitals in a discernibly turgid state; or
c) explicit exhibitions of excretory acts.

Source: *See* S. 1247, 197th N.J. Legis., 2d Sess. sec. 4(g) (2d Official Copy Reprint 1977).

Comment: In *Miller v. California,* 413 U.S. 15 (1973), the United States Supreme Court required that all obscenity laws, as drafted or authoritatively construed, specifically define which type of sexual conduct may be found "patently offensive." The Court illustrated its mandate with "a few plain examples":

> "(a) representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated;
> (b) representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."

Id. at 25. This list, however, was not intended to be exhaustive. *Hamling v. United States,* 418 U.S. 87, 114 (1974). The general rule is that other sexual acts can be found patently offensive if sufficiently similar to the *Miller* list so as to justify similar treatment. *Jenkins v. Georgia,* 418 U.S. 154, 161 (1975). For example, various deviant sexual practices, such as flagellation, fetishism, and lesbianism—involved in *Mishkin v. New York,* 383 U.S. 502 (1966)—may fall within *Miller. Ward v. Illinois,* 431 U.S. 767 (1977).

Three post-*Miller* cases have held that depictions of touching or fondling of erotic body areas can be found obscene. *Huffman v. United States,* 502 F.2d 419 (D.C. Cir. 1974); *State v. Amato,* 343 So.2d 698 (La. 1977); *Salt Lake City v. Piepenburg,* 571 P.2d 1299 (Utah 1977). *Amato* held that depictions of fondling of female breast nipples are "sufficiently similar" to the plain examples which the United States Supreme Court provided in *Miller. State v. Amato,* 343 So.2d at 704. *Huffman* held that, although portrayals of two nude females undressing, caressing, fondling, and embracing each other are not "hard core pornography," a jury can determine whether there was a depiction of "sexual conduct" to a point of patent offensiveness. *But see Salt Lake City v. Piepenburg,* 571 P.2d at 1307 (Maughan, J., dissenting).

Nudity per se is not obscene, *Jenkins v. Georgia,* 418 U.S. 154, 161 (1975), even for minors. *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 213 (1975). To be obscene, expression must be, in some significant way, erotic. *Id.* at 213 n. 10. Nudity, therefore, to be obscene, must have the purpose or effect of sexual arousal, gratification, or affront. *Carl v. City of Los Angeles,* 61 Cal.App. 3d 265, 132 Cal.Rptr. 365 (1976). For example, materials which focus on the genitals are obscene only if the purpose or effect is to appeal to the prurient interest. *See Miller v. California,* 413 U.S.

at 25 (*lewd* exhibition of the genitals); *Miller v. United States,* 431 F.2d 655, 658 (9th Cir. 1970), *cert. granted, vacated and remanded,* 413 U.S. 913 (1973), *aff'd,* 507 F.2d 1100 (9th Cir. 1974), *cert. denied,* 422 U.S. 1025 (1975); *United States v. A Shipment of 25,000 Magazines,* 254 F. Supp. 1014, 1017 (D. Md. 1966), *aff'd sub nom., United States v. Central Magazines Sales, Ltd.,* 381 F.2d 821 (4th Cir. 1967) (factors which render photographs which focus on female breasts or pubic areas obscene). Similarly, nudes in "various poses" are not obscene, *People v. Berger,* 185 Colo. 85, 87, 521 P.2d 1244, 1245 (1974), unless there are indications of imminent and impending sexual activity. *Weissbaum v. Hannon,* 439 F. Supp. 873, 881 (N.D. Ill. 1977). Nudity which suggests that sexual activity is taking place, however, is not obscene. *Jenkins v. Georgia,* 418 U.S. at 161.

(d) **Community.** "Community" means the state.

Comment: A separate subsection is used to define "community." If a different standard is desired, the Model Act can be easily modified by simply deleting "state" from the above subsection and inserting the alternative standard. *See* S.D. Compiled Laws Ann. § 22-24-27(1) (Spec. Supp. 1977) (state); Tenn. Code Ann. § 39-3010(G) (1975) (state); Utah Code Ann. § 76-10-1201(12) (1977) (vicinage). Alternatively, the appropriate standard could be inserted directly into the definition of "obscene" in section 3(a) of the Model Act. *See, e.g.,* Ariz. Rev. Stat. § 13-531.01(2)(a) (Supp. Pamp. 1957-1977) (state); Colo. Rev. Stat. § 18-7-102(3), (6), (7) (Cum. Supp. 1976) (state); Mass. Ann. Laws ch. 272, § 31 (Michie/Law. Co-op. Supp. 1977) (state); Mont. Rev. Codes Ann. § 94-8-110- (2)(d)(i) (1977) (state); N.H. Rev. Stat. Ann. § 650:1 (IV)(a) (Pamp. 1976) (county); N.C. Gen. Stat. § 14-190.1(b)(2) (Cum. Supp. 1977) (state); N.D. Cent. Code § 12.1-27.1-01(4)(a) (1976) (state); Vt. Stat. Ann. tit. 13, § 2801(6)(B) (Cum. Supp. 1977) (state); W. Va. Code § 61-8A-1(2) (1977) (state). The "community standard" applicable in New Jersey is not set out in the statutory law of the state, and the case law is unclear. A statewide standard was adopted by a panel of the Appellate Division of the Superior Court in *State v. Napriavnik,* 147 N.J. Super. 36, 43, 370 A.2d 525, 529 (App. Div.), *certif. denied,* 74 N.J. 264, 377 A.2d 669 (1977). Another panel of the appellate division, however, appears to have approved the use of a countywide standard. *State v. De Piano,* 150 N.J. Super. 309, 318-19, 375 A.2d 1169, 1174-75 (App. Div. 1977).

(e) **Prurient interest.** When a work is designed for and primarily promoted to a clearly defined deviant sexual group, the appeal to the prurient interest shall be judged with reference to that group.

Source: *Mishkin v. New York,* 383 U.S. 502, 508 (1965).

Comment: Several states have provisions allowing the adjustment of the prurient interest test for "clearly defined deviant sexual groups." *E.g.,* Cal. Penal Code § 311(a)(1) (West Supp. 1977); S.D. Compiled Laws Ann. § 22-24-27(13) (Spec. Supp. 1977). Many states provide for adjustment of the prurient interest test whenever a "specially susceptible audience" is involved. *E.g.,* Conn. Gen. Stat. Ann. § 53-a-193(a)(3) (West Supp. 1978); Ill. Ann. Stat. ch. 38, § 11-20(c) (Smith-Hurd Supp. 1977); Nev. Rev. Stat. § 201.250(1)(c) (1973); N.H. Rev. Stat. Ann. § 650:1(v) (Pamp. 1976); N.Y. Penal Law § 235.00(1) (McKinney Supp. 1977-1978); N.C. Gen. Stat. § 14-190.1(d) (Cum. Supp. 1977); N.D. Cent. Code § 12.1-27.1-01(4) (1976); Tex. Penal Code Ann. tit. 9, § 43.21(3) (Vernon Supp. 1978). The latter phrase is much broader than the former, and is not authorized by *Mishkin.* 383 U.S. at 509; *see United States v. Treatman,* 524 F.2d 320, 323 (8th Cir. 1975). The New Jersey statutes have never contained a provision providing for the *Mishkin* modification of the prurient interest test. See N.J. Stat. Ann. § 2A:115 (West 1969 & Supp. 1978-1979).

(f) **Pandering.** A work, not otherwise obscene or obscene for minors, may be deemed obscene or obscene for minors if the work is promoted in a manner which exploits its appeal to the prurient interest.

Source: Ginzburg v. United States, 383 U.S. 463 (1966); *see* Fla. Stat. Ann. § 847.07(3) (West 1976).

Comment: New Jersey enacted a "pandering" statute in 1966, but repealed it in 1971. An act to amend and supplement, "An act concerning crimes and supplementing chapter 115 of Title 2A of the New Jersey Statutes," approved October 18, 1962 (P.L. 1962, c. 165), ch. 199, sec. 2, 1966 N.J. Laws 989 (repealed 1971). S. 1247 would have enacted a similar pandering provision. 197th N.J. Legis., 2d Sess., sec. 3 (2d Official Copy Reprint 1977).

(g) **Work.** "Work" means any material or performance.

(1) **Material.** "Material" means any tangible object capable of being used or adapted to arouse interest, including, but not limited to, any type of publication, sound recording, film, or picture.

(2) **Performance.** "Performance" means any play, dance, or other exhibition performed before an audience.

Source: S. 1247, 197th in N.J. Legis., 2d Sess., sec. 4(a) to (c) (2d Official Copy Reprint 1977). The main clause of paragraph 1 is derived from S. 1247, 197th N.J. Legis., 2d. Sess., sec. 4(b) (2d Official Copy Reprint 1977). The remainder of paragraph 1 is traced from N.D. Cent. Code § 12.1-27.1-01(6) (1976).

Comment: New Jersey does not presently use or define "material" but, rather, lists many types of media in defining the obscenity offense. N.J. Stat. Ann. § 2A:115-2 (West 1969). In defining "material," the statutes of many states use denotative definitions similar to the listing contained in the New Jersey statutes. Ariz. Rev. Stat. § 13-531.01(1) (Supp. Pamp. 1957-1977); Cal. Penal Code § 311(b) (West Supp. 1977); Haw. Rev. Stat. § 712-1210(2) (1976); Idaho Code § 18-4101(C) (Cum. Supp. 1977); Ind. Code Ann. § 35-30-10.1-1(a) (Burns 1975); Iowa Code Ann. § 2801(2) (West Spec. Pamp. 1977); Ky. Rev. Stat. § 531.010(2) (1975); Md. Ann. Code art. 27, § 417(1) (1976); Mass. Ann. Laws ch. 272, § 31 (Michie Law. Co-op Supp. 1977); Mo. Ann. Stat. § 573.010(2) (Vernon Spec. Pamp. 1978) (effective Jan. 1, 1979); Neb. Rev. Stat. § 28-807(6) (Supp. 1977); N.H. Rev. Stat. Ann. § 650:1 (III) (Pamp. 1976); S.C. Code § 16-15-150(b) (1976); Tenn. Code Ann. § 39-3010(C) (1975); Tex. Penal Code Ann. tit. 9, § 43.21(2) (Vernon Supp. 1978); Utah Code Ann. § 76-10-1201(1) (1977); W. Va. Code § 61-8A-1(5) (1977). As it is virtually impossible and unnecessarily verbose to list all possible types of media, the Model Act adopts an all encompassing, but concise, connotative definition of "material" and only lists, as examples, the major categories of communication. Several states currently use similar definitions. Colo. Rev. Stat. § 18-7-102(4) (Cum. Supp. 1976); Conn. Gen. Stat. Ann. § 53a-193(c) (West 1972); Kan. Stat. § 21-4301(2)(b) (Cum. Supp. 1977); Nev. Rev. Stat. § 201.250(1)(b) (1973); N.Y. Penal Law § 235.00(2) (McKinney 1967); S.D. Compiled Laws Ann. § 22-24-27(b) (Spec. Supp. 1977). By using the phrase "capable of being used or adapted," the Model Act is broad enough to emcompass materials, such as printing plates and photographic film, which require further acts or processing in order to manufacture the final product. Several state statutes specifically provide for this contingency. Conn. Gen. Stat. Ann. § 53a-193(c) (West 1972); Mo. Ann. Stat. § 573.010(2) (Vernon Spec. Pamp. 1978) (effective Jan. 1, 1979); N.H. Rev. Stat. Ann. § 650:1 (III) (Pamp. 1976).

The only difference between paragraph 2 and section 4(c) of S. 1247, 197th N.J. Legis., 2d Sess., (2d Official Copy Reprint 1977) is that motion pictures are not included in the former. Motion pictures are already covered by section 3(f)(1) of the Model Act. Several states have provisions similar to section 4(c) of S. 1247. *E.g.,* Haw. Rev. Stat. § 712-1210(4) (1976); Idaho Code § 18-1514(8) (Cum. Supp. 1977); Kan. Stat. § 21-4301(c) (Cum. Supp. 1977); Mo. Ann. Stat. § 573.010(3) (Vernon Spec. Pamp. 1978) (effective Jan. 1, 1979); Neb. Rev. Stat. § 28-807(12) (Supp. 1977); N.Y. Penal Law § 235.00(3) (McKinney 1967); N.D. Cent. Code § 12.1-27.1-01(7) (1976). By including a motion picture as a "material" rather than as a "performance," a state, such as New Jersey, which presently does not regulate live obscene performances, may continue to do so by deleting this para-

graph and the words "or performance" from section 3(f) of the Model Act. Again, as in section 3(f)(1) of the Model Act, a connotative definition is used in this paragraph, rather than a denotative definition. *Accord, e.g.,* Ohio Rev. Code Ann. § 2907.01(K) (Page Supp. 1976). Several states include performances in their definition of "material." *E.g.,* N.H. Rev. Stat. Ann. § 650:1 (III) (Pamp. 1976); Tenn. Code Ann. § 39-3010(C) (1975). This may cause confusion by stetching the word "material" beyond its normal meaning. *See generally,* R. Dickerson, *Legislative Drafting* § 8.1, at 90-91 (1954).

(h) **Promote.** "Promote" means to, or possess with intent to, whether with or without consideration,:
(1) prepare or advertise; or
(2) transfer possession; or
(3) exhibit.

Source: See W. Va. Code § 61-8A-1 (1977), which provides:

(1) "Distribute" means to transfer possession of, whether with or without consideration.

. . . .

(3) "Exhibit" means to display or offer for viewing, whether with or without consideration.

. . . .

(9) "Prepare" means to produce, publish or print.

Comment: New Jersey presently uses a denotative definition to describe the transactions necessary to constitute an offense, and these transactions appear in the actual offense section of the statute rather than being defined in a separate section. N.J. Stat. Ann. § 2A:115-2 (West 1969). "Promote" is used here rather than "disseminate," "furnish," or "distribute," since the normal meaning of "promote" is broad enough to encompass all of these terms as well at to prepare or produce, to advertise, and to exhibit or display. *See* N.Y. Penal Law § 235.00(4) (McKinney 1967); Mo. Ann. Stat. § 573.010(4) (Vernon Spec. Pamp. 1978) (effective Jan. 1, 1979). Several states, however, do use either "disseminate" or "furnish" to include distribute, prepare, advertise, and exhibit. Haw. Rev. Stat. § 712-1210(1) (1976) (disseminate); Mass. Ann. Laws ch. 272, § 31 (Michie/Law. Co-op. Supp. 1977) (disseminate); Mo. Ann. Stat. § 573.010(5) (Vernon Spec. Pamp. 1978) (effective Jan. 1, 1979) (furnish); Neb. Rev. Stat. § 28-807(3) (Supp. 1977) (disseminate); N.H. Rev. Stat. Ann. § 650:1(I) (Pamp. 1976) (disseminate); N.D. Cent. Code § 12.1-27.1-01(5) (1976) (disseminate). Many states use the phrase "transfer possession, whether with or without consideration" to define either "distribute" or "disseminate." Cal. Penal Code § 311(d) (West Supp. 1977) (distribute); Ill. Ann. Stat. ch. 38, § 11-21(b)(3)

(Smith-Hurd Supp. 1977) (distribute); Iowa Code Ann. § 2801(3) (West Spec. Pamp. 1977) (disseminate); Ky. Rev. Stat. § 531.010(1) (1975) (distribute); Md. Ann. Code art. 27, § 417(3) (1976) (distribute); Neb. Rev. Stat. § 28-807(2) (Supp. 1977) (distribute); S.C. Code § 16-15-150(c) (1976) (distribute); S.D. Compiled Laws Ann. § 22-24-27(2) (Spec. Supp. 1977) (distribute); Tex. Penal Code Ann. tit. 9, 43.21(4) (Vernon Supp. 1978) (distribute); Utah Code Ann. § 76-10-1201(3) (1977) (distribute). A few states require that the transfer be for consideration to constitute an offense. Ind. Code Ann. § 35-30-10.1-1(g) (Burns 1975); An Act to amend and reenact section 106 of Title 14 . . ., Act No. 717, sec. 1, 1977 La. Sess. Law Serv. 1453 (West) (to be codified as La. Rev. Stat. Ann. § 14:106(D)).

(i) **Wholesale promote.** "Wholesale promote" means to promote for purposes of further promotion.

Source: See generally for the concept of "wholesale promote" using denotative definitions: Fla. Stat. Ann. § 847.07(c) (West 1976); Mo. Ann. Stat. § 573.010(6) (Vernon Spec. Pamp. 1978) (effective Jan. 1, 1979); N.Y. Penal Law § 235.00(5) (McKinney Supp. 1977-1978).

Comment: New Jersey does not presently have a separate provision dealing with this concept, *see* N.J. Stat. Ann. § 2A:115 (West 1969 & Supp. 1978-1979), although the conduct defined by this subsection is presently encompassed by the general prohibition of N.J. Stat. Ann. § 2A:115-2 (West 1969). The purpose of a provision of this type is to terminate a retailer's source by providing a greater penalty for wholesaling.

(j) **Knowingly.** "Knowingly" means having knowledge of the character and content of a work described herein, or having failed to exercise reasonable inspection which would disclose its character and content.

Source: N.J. Stat. Ann. §§ 2A:115-1.7(d), -2.2(e), -2.5(d) (West Supp. 1978-1979).

Comment: The United States Supreme Court in *Smith v. California,* 361 U.S. 147 (1959), held that obscenity statutes must contain some element of scienter to be constitutional. An accused need not know that the work was legally obscene to meet the scienter requirement. The scienter requirement is fulfilled by a statute which merely requires "that a defendant [have] knowledge of the contents of the materials he distributed, and that he [knows] the character and nature of the materials." *Hamling v. United States,* 418 U.S. 87, 123 (1974).

Relying on dicta from *Smith v. California,* 361 U.S. 147, 154 (1959), the New Jersey supreme court in *State v. Hudson County News Co.,* 41 N.J. 247, 196 A.2d 225 (1963), held that an accused need not have actually examined

the materials in order to be convicted. Under certain circumstances, such as where defendant distributed materials in the course of his business, defendant could be convicted if he failed to "investigate materials in his control." *Id.* at 258, 196 A.2d at 231. *Accord, State v. Yabe,* 114 Ariz. 89, 92, 559 P.2d 209, 211-12 (Ct. App. 1977); *State v. American Theatre Corp.,* 196 Neb. 467, 471, 244 N.W.2d 59, 62 (1977); *State v. American Theatre Corp.,* 196 Neb. 461, 466-67, 244 N.W.2d 56, 59 (1977); *State v. Thompkins,* 263 S.C. 472, 484-85, 211 S.E.2d 549, 554 (1975); Comment, *Proof of Scienter in Criminal Obscenity Prosecutions,* 9 Akron L. Rev. 131, 137, 143 (1975). *See generally Ginsberg v. New York,* 390 U.S. 629, 644-46 (1967); *Mishkin v. New York,* 383 U.S. 502, 510-11 (1965). The Model Act codifies this case law as it appears in sections 1.7(d), 2.2(e), and 2.5(d) of chapter 115 of title 2A of the New Jersey Statutes (West Supp. 1978-1979), which respectively apply to the offense of "material obscene for persons under 18," "communicate publicly," and "film obscene for persons under 18." This case law obviously also applies to the general obscenity offense, section 2 of chapter 115 of title 2A (West 1969), but presently no provision of the New Jersey statutes defines "knowingly" for this offense.

In addition, when the offense involves works which are obscene for minors, several statutes define "knowingly" to include actual or constructive knowledge of the age of the minor. *E.g.,* Ala. Code tit. 14, § 374(16a)(g) (Interim Supp. 1975); Ark. Stat. Ann. § 41-3581(g) (1977); Conn. Gen. Stat. Ann. § 53a-196(b) (West 1972); Minn. Stat. Ann. § 617.292(8) (West 1978); Va. Code § 18.2-390(7) (Cum. Supp. 1977); Wis. Stat. Ann. § 944.25(1)(h) (West Supp. 1977-1978). The Connecticut statute provides:

> (b) For purposes of this section, "knowingly" means having general knowledge of or reason to know or a belief or ground for belief which warrants further inspection or inquiry as to
> (1) the character and content of any material or performance which is reasonably susceptible of examination by such person and
> (2) the age of the minor.

Conn. Gen. Stat. Ann. § 53a-196(b) (West 1972).

(k) **Minor.** "Minor" means any person under the age of eighteen.

Comment: This subsection defines "minor" for purposes of works obscene for minors, sections 3(b) and 4(c) of the Model Act and for using minors in promoting such works, section 4(d). The present New Jersey statutes dealing with the subject of this subsection use the same age limit. N.J. Stat. Ann. §§ 2A:115-1.8, -2.6 (West Supp. 1978-1979). A state may of course change this age limit to reflect its own policy concerns.

4. Offenses.

(a) **Promoting obscene works.** A person who knowingly promotes an obscene work is guilty of a [penalty].

(b) **Wholesale promoting obscene works.** A person who knowingly wholesale promotes an obscene work is guilty of a [penalty].

(c) **Promoting works obscene for minors.** A person who knowingly promotes a work obscene for minors is guilty of a [penalty].

Comment: The terms applicable to the offenses are defined in section 3 of the Model Act. The determination of penalties, being wholly a policy question, is left up to the individual states. In New Jersey, it is presently a misdemeanor to perform the acts prescribed by subsections (a) and (c) above. N.J. Stat. Ann. §§ 2A:115-1.8 (West Supp. 1978-1979), -2 (West 1969), -2.6 (West Supp. 1978-1979). A misdemeanor is punishable by a maximum of $1,000 fine and three years imprisonment. N.J. Stat. Ann. § 2A:85-7 (West 1969). S. 1247, 197th N.J. Legis., 2d Sess., sec. 1 (2d Official Copy Reprint 1977), would have reduced the penalty for the conduct proscribed by section 4(a) of the Model Act from a misdemeanor to a disorderly persons offense, which is punishable by a maximum of a $500 fine and six months imprisonment. N.J. Stat. Ann. § 2A:169-4 (West 1971). New Jersey does not presently have a wholesale promote offense. *See* N.J. Stat. Ann. § 2A:115 (West 1969). Those states that do have such an offense, provide for a more severe penalty than that imposed under their general obscenity statutes. Fla. Stat. Ann. §§ 775.082 (West 1976), .083 (West Supp. 1978), 847.07(4)(a), .07(4)(c) (West 1976); Mo. Ann. Stat. §§ 558.011(5), 560.011(1), .016(1)(1), .021(1)(1), .021(1)(2), 573.020, .030 (Vernon Spec. Pamp. 1978) (effective Jan. 1, 1979); N.Y. Penal Law §§ 70.00(2)(d), .15(1) (McKinney 1975), 80.00 (McKinney Supp. 1977-1978), .05(1), .10, (McKinney 1975), 235.05, .06 (McKinney Supp. 1977-1978).

(d) **Using minors in obscene works or works obscene for minors.** Any person who uses, or who permits a minor to be used, in the promotion of any work which is obscene or obscene for minors is guilty of a [penalty].

Comment: State statutes punishing the employment or use of minors in promoting obscene works fall into three categories. The first type of statute simply punishes any person who employs or uses a minor to disseminate any obscene work. *E.g.,* Ky. Rev. Stat. § 531.040 (1975); Mich. Comp. Laws Ann. § 750.345 (1968) (custodian's consent forbidden); Neb. Rev. Stat. § 28-926.15(3) (1975) (parental consent permitted). A second type accomplishes a broader prohibition by punishing any person who employs, uses, or permits a minor to do any act constituting an offense under that state's obscenity code. *E.g.,* N.C. Gen. Stat. § 14-190.6 (Cum. Supp.

1977); S.C. Code § 16-15-180 (1976); Tenn. Code Ann. § 39-3013(c) (Supp. 1977); Va. Code § 18.2-379 (1975); W. Va. Code § 61-8A-6 (1977). A third, and most recent, type of statute expands upon the first type of statute by including penalties for the depiction of minors themselves as performers in obscene works, colloquially dubbed "kiddie porn." *E.g.*, Minn. Stat. Ann. § 617.246 (West Supp. 1978); N.J. Stat. Ann. § 34:2-2.63a (West Supp. 1978-1979); *id.* §§ 2A:142A-1 to -5; New Jersey Code of Criminal Justice, ch. 95, § 2C:24-4(b), 1978 N.J. Adv. Law Serv. (effective Sept. 1, 1979) (to be codified at N.J. Stat. Ann. § 2C:24-4(b) (West)); An act to add Sections 1309.5 and 1309.6 to the Labor Code and to amend Section 311.4 of the Penal Code, relating to the employment of minors, and declaring the urgency thereof, to take effect immediately, ch. 1148, 1977 Cal. Legis. Serv. 3743 (West); An Act relating to pornography; creating S. 847.014, Florida Statutes; providing definitions, prohibiting certain activities involving minors participating in harmful motion pictures, exhibitions, shows, presentations or representations; providing penalties; providing for injunctive proceedings providing an effective date, ch. 77-103, 1977 Fla. Sess. Law Serv. 277.

(e) **Conditional transactions.** Any person who conditions, or threatens to condition, the promotion of any work or the grant of any franchise or benefit upon acceptance of a work which the receiver reasonably believes is obscene or obscene for minors is guilty of a [penalty].

Comment: Nineteen states have statutes punishing "tie-in sales" of obscene works, *i.e.*, a wholesaler conditioning the sale or consignment of media products upon the retailer's acceptance of obscene works. Five states limit the ban on conditional transactions to sales and consignments. *E.g.*, Ill. Ann. Stat. ch. 38, § 11-22 (Smith-Hurd Supp. 1977); Minn. Stat. Ann. § 617.243 (West 1964); N.J. Stat. Ann. § 2A:115-3.1 (West 1969); Ohio Rev. Code Ann. § 2907.34 (Page 1975) (over retailers objection only); 18 Pa. Cons. Stat. Ann. § 5903(g) (Purdon 1973); Tenn. Code Ann. § 39-3015 (1975). In general, the tie-in obscenity statutes of other states are more comprehensive in that they also make it unlawful to deny any franchise or to impose any penalty (or to threaten to do so) for failing to accept obscene works. *E.g.*, Ariz. Rev. Stat. § 13-534 (Supp. Pamp. 1957-1977); Cal. Penal Code § 311.7 (West 1976); Fla. Stat. Ann. § 847.011(3), .07(5) (West 1976); Idaho Code § 18-4105A (Cum. Supp. 1977); Ky. Rev. Stat. § 531.060 (1975); Md. Ann. Code. art. 27, § 422 (1976); Mich. Comp. Laws Ann. § 750.343d (1968); Nev. Rev. Stat. § 201.250(3) (1973); N.C. Gen. Stat. § 14-190.4 (Cum. Supp. 1977); R.I. Gen Laws § 11-31-12 (1969); S.C. Code § 16-15-200 (1976); Va. Code § 18.2-378 (1975); Wash. Rev. Code Ann. § 9.68.090 (1977) (not a crime, but civil liability for treble damages). Five of the states take a subjective approach, allowing the

receiver to reject the tie-in transaction if he reasonably believes that the material is obscene. Fla. Stat. Ann. § 847.011(3), .07(5) (West 1976); Idaho Code § 18-4105A (Cum. Supp. 1977); Ky. Rev. Stat.§ 531.060 (1975); Minn. Stat. Ann. § 617.243 (West 1964); Ohio Rev. Code Ann. § 2907.34 (Page 1975).

The Model Act follows the comprehensive approach of the majority. The Model Act also adopts the "reasonable belief" test of the minority so that a retailer need not run the risk of accepting materials later adjudged obscene. Note that tie-in transactions statutes for obscene materials are unnecessary if a state has a tie-in transactions statute covering all types of media or other goods. *Compare, e.g.,* N.J. Stat. Ann. § 2A:115-3.1 (West 1969) *with* N.J. Stat. Ann. §§ 2A:170-77.2, .2a, .2b (West 1971).

5. **Defenses.** It is a defense to prosecution under this act that the defendant:

(a) had scientific, religious, educational, governmental, or other similar justification for the conduct;

Source: *See* Cal. Penal Code § 311.8 (West 1970); Conn. Gen. Stat. Ann. § 53a-195 (West 1972); Del. Code tit. 11, § 1362 (1975); Idaho Code § 18-4102 (Cum. Supp. 1977); Ill. Ann. Stat. ch. 38, § 11-20(f) (Smith-Hurd Supp. 1977); Ind. Code Ann. § 35-30-10.1-4(a) (Burns 1975); Kan. Stat. § 21-4301(3) (Cum. Supp. 1977); Neb. Rev. Stat. § 28-926.19 (1975); N.H. Rev. Stat. Ann. § 650:4 (1974); N.Y. Penal Law § 235.15 (McKinney Supp. 1977-1978); Utah Code Ann. § 76-10-1208(1) (1977).

Comment: In essence, this provision exempts hospitals, churches, schools, libraries, museums, art galleries, law enforcement agencies, and judicial authorites, their employees, and persons dealing with them, from the provisions of the Model Act. Several states specifically exempt these institutions from their obscenity laws. *E.g.,* Ind. Code Ann. § 35-30-10.1-4(b) (Burns 1975); An Act to amend and reenact section 106 of Title 14 . . . , Act No. 717, sec. 1, 1977 La. Sess. Law Serv. 1453 (West) (to be codified at La. Rev. Stat. Ann. § 14:106 (D)); Minn. Stat. Ann. § 617.295(a) (West Supp. 1978). Other states treat the subject of this subsection as an "exception" or "exemption." Ky. Rev. Stat. Ann. § 531.070 (Baldwin 1975); Md. Ann. Code art. 27, § 423 (1976); N.D. Cent. Code § 12.1-27.1-11 (1976); Okla. Stat. Ann. tit. 21, § 1021.1 (West Supp. 1977-1978); Utah Code Ann. § 76-10-1226 (1977). As there is no relevant practical difference between a defense and an exception either term may be used. III Wharton, *Wharton's Criminal Evidence* §§ 19-20 (13th ed. 1973); II Wharton, *Wharton's Criminal Procedure* §§ 264, 293 (12th ed. 1975). As construed by the New Jersey supreme court in *State v. Hudson County News Co.,* 35 N.J. 284, 297, 173 A.2d 20, 27 (1961), the "without just cause" phrase of New

Jersey's general obscenity statute, N.J. Stat. Ann. § 2A:115-2 (West 1969), embodies an exemption similar to the defense contained in the Model Act. The Model Act, however, changes present New Jersey law by extending the application of this defense to all obscenity offenses.

(b) was acting within the scope of his employment, had no financial interest in his place of employment or the work promoted other than wages, and had no managerial responsibility in his place of employment;

Source: See Ark. Stat. Ann. § 41-3508 (1977); Idaho Code § 18-4102(c) (Cum. Supp. 1977) (applicable to motion picture theatre employees only); An Act to amend and reenact Section 106 of title 14 . . ., Act No. 717, sec. 1, 1977 La. Sess. Law Serv. 1453 (West) (to be codified as La. Rev. Stat. Ann. § 14:106(C) (applicable to theatre or bookstore employees); Neb. Rev. Stat. § 28-926.19(3) (1975) (applicable to motion picture theatre employees only); N.Y. Penal Law § 235.15 (McKinney Supp. 1977-1978) (same).

Comment: New Jersey presently has a similar provision, limited to motion picture projectionists, and phrased in terms of being an exemption. N.J. Stat. Ann. § 2A:115-6 (West Supp. 1978-1979). Several other states treat similar provisions as exemptions. *E.g.*, Cal. Penal Code § 311.2(b) (West Supp. 1977); Kan. Stat. § 21-4301(4) (Cum. Supp. 1977); Mass. Ann. Laws ch. 272, § 32 (Michie/Law. Co-op. Supp. 1977); Minn. Stat. Ann. § 617.295(c) (West 1978); Mont. Rev. Codes Ann. § 94-8-110.3 (1977); Ohio Rev. Code Ann. § 2907.35(c) (Page 1975); Okla. Stat. Ann. tit. 21, § 1040.53 (West Supp. 1977-1978); Or. Rev. Stat. § 167.087(4) (1977); R.I. Gen Laws § 11-31-15 (1969); Wash. Rev. Code Ann. § 9.68.010 (1977).

(c) when age is an element of the offense,
  (1) had reasonable cause to believe that the minor involved was 18 years of age or older; or
  (2) had reasonable cause to believe that, or the minor involved was, accompanied by his parent or legal guardian; or
  (3) was the parent or guardian of the minor involved.

Source: See Idaho Code § 18-1517 (Cum. Supp. 1977); Neb. Rev. Stat. § 28-926.14 (1975); N.M. Stat. Ann. § 40-50-5 (Supp. 1975); S.D. Compiled Laws Ann. § 22-24-31 (Spec. Supp. 1977); Vt. Stat. Ann. tit. 13, § 2805 (Cum. Supp. 1977).

Comment: The defense presently applicable in New Jersey is much stricter than the above subsection of the Model Act. The current statute requires proof of three facts: (1) that the minor falsely represented in writing that he

was over eighteen years old; (2) that a reasonable person would believe that the minor was over eighteen years old; and (3) that the defendant in good faith relied on the above facts in distributing the material. N.J. Stat. Ann. §§ 2A:115-1.10, -2.8 (West Supp. 1978-1979). Many states require that the minor have exhibited an apparently official document purporting to establish that such minor was an adult for the defendant to establish a defense. *E.g.,* Conn. Gen. Stat. Ann. § 53a-196(c) (West 1972); Del. Code tit. 11, § 1365(k) (1975); Ind. Code Ann. § 35-30-11.1-3 (Burns 1975); Iowa Code Ann. § 2809 (West Spec. Pamp. 1977); Kan. Stat. § 21-4301a(2)(a) (Cum. Supp. 1977); N.Y. Penal Law § 235.22(2) (McKinney 1967); Wash. Rev. Code Ann. § 9.68.070 (1977).

6. **Preemption.** In order to make the application and enforcement of this act uniform throughout the state, it is the intent of the legislature to preempt, to the exclusion of municipal and county governments, the regulation of obscenity. Therefore, every municipal or county ordinance adopted before the effective date of this act which deals with obscenity shall be abrogated and unenforceable on or after the effective date of this act; and no municipal or county government shall have the power to adopt any ordinance regulating obscenity on or after the effective date of this act.

Source: Idaho Code § 18-4113 (Supp. 1977).

Comment: Many states have provisions either totally or partially preempting the power to regulate obscenity. *E.g.,* Ark. Stat. Ann. § 41-3501 (1977); Colo. Rev. Stat. § 18-7-101 (Cum. Supp. 1976); Del. Code tit. 11, § 1365(1) (1975); Fla. Stat. Ann. §§ 847.013(4), .09 (West 1976); Ind. Code Ann. § 35-30-10.1-8 (Burns 1975); Iowa Code Ann. § 2810 (West Spec. Pamp. 1977); Mo. Ann. Stat. § 573.080 (Vernon Spec. Pamp. 1978) (effective Jan. 1, 1979); Mont. Rev. Codes Ann. § 94-8-110(5) (1977); Neb. Rev. Stat. § 28-829 (Supp. 1977); N.M. Stat. Ann. § 40-50-8 (Supp. 1975); N.D. Cent. Code § 12.1-27.1-12 (1976); Vt. Stat. Ann. tit. 13, § 2808 (Cum. Supp. 1977); Va. Code § 18.2-389 (Cum. Supp. 1977); Wash Rev. Code Ann. § 9.68.120 (1977). A few states specifically provide that there is no preemption. *E.g.,* La. Rev. Stat. Ann. § 14:91.11(c) (West 1974); Utah Code Ann. § 76-10-1210 (1977). In New Jersey, the preemption issue was not decided by the Legislature, but by the courts, and they held that the regulation of obscene materials and films, but not performances, had been preempted by the state. *Wein v. Irvington,* 126 N.J. Super. 410, 315 A.2d 35 (App. Div.), *certif. denied,* 65 N.J. 287, 321 A.2d 248 (1974) (regulation of obscene materials preempted); *Expo, Inc. v. Passaic,* 149 N.J. Super. 416, 373 A.2d 1045 (Law Div. 1977) (regulation of obscene performances not preempted); *Dimor, Inc. v. Passaic,* 122 N.J. Super. 296, 300 A.2d 191 (Law Div. 1973) (regulation of obscene movies preempted).

7. **Severability.** If any part of this act is declared unconstitutional by a court of competent jurisdiction, that decision shall not affect any portion of the act which remains, but the remainder shall be in full force and effect as if the portion declared unconstitutional had never been a part of the act.

Source: 1A Sutherland, *Statutes and Statutory Construction* § 20.27 (4th ed. rev. by C. Dallas Sands 1972).

Comment: A few states have provisions similar to the above section of the Model Act. *E.g.*, Cal. Penal Code § 312.5 (West 1970); Ga. Code Ann. § 26-2106 (1972); Idaho Code § 18-4115 (Cum. Supp. 1977); Kan. Stat. § 21-4301b (1974); R.I. Gen Laws § 11-31-11 (1969); Utah Code Ann. § 76-10-1211 (1972); Vt. Stat. Ann. tit. 13, § 2806 (1974). Such a provision is especially appropriate for a statute regulating an area such as obscenity, which depends so heavily on constitutional standards that have changed dramatically in recent years and that are likely to continue to evolve.