

1976

Juvenile Obscenity Statutes: A Proposal and Analysis

Jerold H. Israel

University of Michigan Law School, israelj@umich.edu

Rita Ann Burns

Available at: <https://repository.law.umich.edu/articles/1454>

Follow this and additional works at: <https://repository.law.umich.edu/articles>

Part of the [Criminal Law Commons](#), [Juvenile Law Commons](#), [Legislation Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Israel, Jerold H. "Juvenile Obscenity Statutes: A Proposal and Analysis." R. Burns, co-author. U. Mich. J. L. Reform 9, no. 3 (1976): 413-527.

This Article is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

JUVENILE OBSCENITY STATUTES: A PROPOSAL AND ANALYSIS

PROPOSED STATUTE ON DISSEMINATION OF OBSCENE MATTER TO MINORS	415
ANALYSIS OF THE PROPOSED STATUTE	418
I. BASIC OBJECTIVES	420
II. DEFINING OBSCENITY: THE TRIPARTITE TEST	426
A. <i>Basic Functions</i>	426
B. <i>Application to Minors</i>	428
C. <i>Inclusion in Statute</i>	431
D. <i>Nature of the Definition</i>	435
E. <i>Defining the Prurient Interest Element</i>	437
1. <i>The Nature of Prurient Appeal</i>	437
2. <i>Special Audience</i>	441
F. <i>Defining the Patent Offensiveness Element</i>	442
G. <i>Defining the Social Value Element</i>	446
H. <i>Adaptation to Minors</i>	449
1. <i>Age Variation</i>	449
2. <i>Adult Viewpoint</i>	454
I. <i>Community Standards</i>	457
1. <i>Application</i>	457
2. <i>Geographic Scope</i>	458
J. <i>"Considered as a Whole"</i>	467
K. <i>The Role of Pandering</i>	467
III. DEFINING OBSCENITY: SPECIFIC SEXUAL CONTENT	472
A. <i>Introduction</i>	472
B. <i>Sexual Intercourse</i>	475
C. <i>Sado-Masochistic Abuse</i>	477
D. <i>Depiction of Masturbation</i>	478
E. <i>Sexual Touching</i>	480
F. <i>Sexual Excitement</i>	482
G. <i>Nudity</i>	484
1. <i>Inclusion of a Nudity Category</i>	484
2. <i>Definition of Nudity</i>	489
IV. DEFINING OBSCENITY: MISCELLANEOUS MATTERS	491
A. <i>Inclusion of Verbal Material</i>	491
B. <i>Age</i>	494

V.	DISTRIBUTION	498
	<i>A. Inclusion of Noncommercial Dissemination</i>	498
	<i>B. Display</i>	503
	<i>C. Performances</i>	505
VI.	EXEMPTIONS	505
	<i>A. Parental Exemption</i>	505
	<i>B. Other Exemptions</i>	508
VII.	SCIENTER	509
	<i>A. Nature of the Material</i>	510
	<i>B. Reckless Disregard</i>	517
	<i>C. Age</i>	521
	<i>D. Mail Distributions</i>	524
VIII.	CRIMINAL PENALTY	525
IX.	FACILITATIVE MISREPRESENTATION	526

JUVENILE OBSCENITY STATUTES: A PROPOSAL AND ANALYSIS

Jerold H. Israel*
Rita Ann Burns**

PROPOSED STATUTE ON DISSEMINATION OF OBSCENE MATTER TO MINOR†

Section 1. The following definitions apply in this Act:

(a) "Disseminate" means to (sell, lend, give, exhibit, or show) (sell, lend, exhibit, or show for monetary consideration) or to offer or agree to do the same.

(b) "Erotic fondling" means touching a male's or female's [clothed or] unclothed genitals, pubic area, [or buttocks,] or a female's breast, for the purpose of sexual stimulation.

(c) "Exhibit" means to do any of the following:

(i) (Present a performance) (Present a performance for monetary consideration).

(ii) (Sell, give, or offer or agree to sell or give) (Sell or offer or agree to sell) a ticket to a performance.

(iii) Admit a minor to premises where a performance (is being presented or is about to be presented) (is being presented or is about to be presented for monetary consideration).

(d) "Knowingly." A person knowingly disseminates sexually explicit matter to a minor when the person knows both the nature of the matter and the status of the minor to whom the matter is disseminated.

A person knows the nature of matter when either of the following circumstances exists:

[Alternative A of subparagraph (d)(i)]

(i) The person is aware of the character and content of the matter.

[Alternative B of subparagraph (d)(i)]

*Professor of Law, University of Michigan. B.B.A., 1956, Western Reserve University; J.D., 1959, Yale University.

**B.S., 1973, Iowa State University; J.D., 1976, University of Michigan.

†We have placed in brackets material covering areas that arguably should not be included in the statute. Where some coverage of the general area clearly is needed, but a choice is presented between alternative provisions, the alternatives are placed in parentheses alongside each other. See, e.g., lines 1 and 2 of paragraph 1(a). An exception is paragraph 1(d), where the alternatives are so lengthy that they could not be accommodated by use of parentheses. The alternatives there have been stated in separate paragraphs designated as alternatives A, B, and C.

(i) The person is aware of both the sexually explicit content of the matter and the fact that the matter will appeal to the prurient interest of minors.

[Alternative C of subparagraph (d)(i)]

(i) The person is aware of both the sexually explicit content of the matter and the fact that the matter appeals to the prurient interest, is patently offensive, and lacks serious literary, artistic, political, and scientific value for minors.

[Alternative A of subparagraph (d)(ii)]

(ii) The person recklessly disregards circumstances suggesting the character and content of the matter.

[Alternative B of subparagraph (d)(ii)]

(ii) The person recklessly disregards a substantial risk both that the matter contains sexually explicit material and that the matter appeals to the prurient interest of minors.

[Alternative C of subparagraph (d)(ii)]

(ii) The person recklessly disregards a substantial risk both that the matter contains sexually explicit material and that the matter appeals to the prurient interest, is patently offensive, and lacks serious literary, artistic, political, and scientific value for minors.

A person knows the status of a minor when either of the following circumstances exists:

(i) The person is aware that the minor is under (16) (17) years of age.

(ii) The person recklessly disregards a substantial risk that the minor is under (16) (17) years of age.

A person knowingly makes a false representation as to the age of a minor or as to the status of being a parent or guardian of a minor when that person either is aware that the representation is false or recklessly disregards a substantial risk that the representation is false.

(e) "Masturbation" means manipulation, by hand or instrument, of the human genitals, whether one's own or another's, for the purpose of sexual stimulation.

(f) "Minor" means any person under (16) (17) years of age.

(g) "Nudity" means the lewd showing of the genitals or pubic area of a person of the age of puberty or older.

(h) "Obscene for minors." Sexually explicit matter is "obscene for minors" when the matter meets all of the following criteria:

(i) Considered as a whole, it appeals to the prurient interest of minors as determined by the experience of minors in the contemporary (local) (statewide) community.

(ii) It affronts contemporary (local) (statewide) community standards of adults as to what is suitable matter for minors.

(iii) Considered as a whole, it lacks serious literary, artistic, political, and scientific value for minors.

In determining whether sexually explicit matter appeals to the prurient interest of minors, affronts community standards as to suitable matter

for minors; and lacks serious literary, artistic, political, and scientific value for minors, the matter shall be judged with reference to the average minor of ((15) (16) years of age) (the general age of the minor to whom the matter was disseminated). [Where the circumstances of presentation, sale, distribution, or publicity indicate that sexually explicit matter is being commercially exploited by the defendant for the sake of its prurient appeal, such evidence may be probative in determining whether the matter appeals to the prurient interest of minors, affronts community standards as to suitable matter for minors, and lacks serious literary, artistic, political, and scientific value for minors.]

(i) "Prurient interest." Sexually explicit matter appeals to the prurient interest if it has a tendency to cause intense sexual stimulation. In determining whether sexually explicit matter appeals to the "prurient interest," the matter shall be judged with reference to average minors with ordinary sexual interests unless it appears from the character of the matter that it is designed to appeal to persons with deviant sexual interests, including, but not limited to, homosexuals, or sado-masochists. In that case, the matter shall be judged with reference to average minors within the particular group for which it appears to be designed.

(j) "Sado-masochistic abuse" means either of the following:

(i) Flagellation or torture, for the purpose of sexual stimulation, by or upon a person who is nude or clad in undergarments or in a revealing or bizarre costume.

(ii) The condition of being fettered, bound or otherwise physically restrained, for the purpose of sexual stimulation, of a person who is nude or clad in undergarments or in a revealing or bizarre costume.

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

(l) "Sexual intercourse" means intercourse, real or simulated, whether genital-genital, oral-genital, anal-genital, or oral-anal, whether between persons of the same or opposite sex or between a human and an animal.

(m) "Sexually explicit matter" means any sexually explicit visual material [, sexually explicit verbal material,] or sexually explicit performance.

(n) "Sexually explicit performance" means a motion picture, exhibition, show, representation, or other presentation, which, in whole or in part, depicts [nudity,] [sexual excitement,] erotic fondling, sexual intercourse, or sado-masochistic abuse.

(o) ["Sexually explicit verbal material" means a book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains an explicit and detailed verbal description or narrative account of [sexual excitement,] [erotic fondling,] masturbation, sexual intercourse, or sado-masochistic abuse.]

(p) "Sexually explicit visual material" means a picture, photograph, drawing, sculpture, film, or similar visual representation which depicts [nudity,] [sexual excitement,] [erotic fondling,] masturbation, sexual intercourse, or sado-masochistic abuse, or a book, magazine, or pamphlet which contains such a visual representation. Undeveloped photographs,

molds, and similar visual material may be sexually explicit material notwithstanding that processing or other acts may be required to make its sexually explicit content apparent.

Section 2(1). A person is guilty of distributing obscene matter to a minor if that person does either of the following:

(a) Knowingly disseminates to a minor any sexually explicit visual or verbal material that is obscene for minors.

(b) Knowingly exhibits to a minor, unaccompanied by a parent or guardian, a sexually explicit performance that is obscene for minors.

(2) This section does not apply to the dissemination of sexually explicit matter to a minor by any of the following persons:

(a) A parent or guardian who disseminates sexually explicit matter to his child or ward.

(b) A teacher or administrator at any accredited school who disseminates sexually explicit matter to students as part of a school program.

(c) A licensed physician or certified psychologist who disseminates sexually explicit matter in the treatment of a patient.

(d) A librarian employed by a library of an accredited school or a public library who disseminates sexually explicit matter in the course of his employment.

(e) Any other person who disseminates sexually explicit matter for a legitimate medical, scientific, educational, governmental, or judicial purpose.

(3) Distributing obscene matter to a minor is a misdemeanor, punishable by imprisonment for not more than 1 year or by a fine of not more than \$10,000.00, or both. In imposing the fine authorized for this offense, the court shall consider the scope of the defendant's commercial activity in distributing obscene matter to minors.

Section 3(1). A person is guilty of facilitative misrepresentation when that person knowingly makes a false representation that he is the parent or guardian of a minor, or that a minor is (16) (17) years of age or older, with the intent to facilitate the dissemination to the minor of sexually explicit matter that is obscene for minors.

(2) Facilitative misrepresentation is a misdemeanor.

ANALYSIS OF THE PROPOSED STATUTE

The article that follows is based largely upon a *Study Report* on juvenile obscenity statutes prepared for the Michigan Law Revision Commission.¹ The objectives of the Report were (1) to analyze the various issues presented in drafting a juvenile obscenity provision, (2) to survey the treat-

¹ Israel & Burns, *Study Report on Juvenile Obscenity Laws*, MICHIGAN LAW REVISION COMMISSION, 10TH ANNUAL REPORT 133-297 (1975) [hereinafter cited as *Study Report*]. The *Study Report* was prepared at the request of a subcommittee of the Michigan House Judiciary Committee studying obscenity provisions.

ment of those issues in statutes adopted by various states² and statutes proposed by several distinguished commissions,³ and (3) to propose a comprehensive model statute that offers a choice of alternative provisions on key areas of controversy. Certain limitations placed upon the scope of the Report (and this article) should be noted. First, we were not asked to discuss whether the state should adopt a provision regulating the dissemination of sexually oriented material to juveniles. The Report assumed that a juvenile obscenity provision would be adopted and the issue before us was what should be included in that statute.⁴ Second, the Report assumed that the provision would be in the form of a criminal statute. We

² The current juvenile obscenity statutes given special consideration were those from California (CAL. PENAL CODE § 313 (West Supp. 1976)); Colorado (COLO. REV. STAT. ANN. §§ 18-7-101 to -105 (1973)); Florida (FLA. STAT. ANN. §§ 847.011-.013 (Supp. 1975)); Hawaii (HAWAII REV. STAT. tit. 37, §§ 712-1210 to -1217 (Special Supp. 1972)); Illinois (ILL. ANN. STAT. ch. 38, §§ 11-20 to -22 (Smith-Hurd Supp. 1975)); Iowa (IOWA CODE ANN. §§ 725.1-.10 (Supp. 1975)); Kentucky (KY. REV. STAT. ANN. §§ 531.010-.080 (Cum. Supp. 1974)); Michigan (MICH. COMP. LAWS ANN. §§ 750.142, .143, .343e, .344, .345 (1968), *as amended*, (Supp. 1975)); Nevada (NEV. REV. STAT. §§ 201.256-.265 (1973)); New Jersey (N.J. STAT. ANN. §§ 2A:115-1.1-.11 (Supp. 1975)); New York (N.Y. PENAL LAW §§ 235.20-.21 (McKinney Supp. 1975)); North Dakota (N.D. CENT. CODE §§ 12.1-27.1-01 to -02 (Special Supp. 1975)); Ohio (OHIO REV. CODE ANN. §§ 2907.01, .31, .37 (Page 1975)); Oregon (ORE. REV. STAT. §§ 167.060-.100 (1974)); Rhode Island (R.I. GEN. LAWS ANN. § 11-31-10 (Supp. 1974)); Utah (UTAH CODE ANN. §§ 76-10-1201 to -1211 (Supp. 1975)); Virginia (VA. CODE ANN. §§ 18.2-390 to -391 (1975)); Washington (WASH. REV. CODE §§ 9.68.010-.120 (Supp. 1974)); West Virginia (W. VA. CODE ANN. §§ 61-8A-1 to -7 (Supp. 1974)); and Wisconsin (WIS. STAT. ANN. § 944.25 (Supp. 1975)). These twenty statutes were selected for various reasons. Several are from states Michigan traditionally looks to for models in drafting legislation. Others contain somewhat unusual responses to basic issues presented in juvenile obscenity provisions. All of the statutes examined were adopted or amended after *Ginsberg v. New York*, 390 U.S. 629 (1968). See note 347 *infra*. As a group, they include examples of almost every type of juvenile provision currently found in this country. See notes 54, 347 *infra*. Because of its special significance in Michigan, the Detroit obscenity ordinance, DETROIT, MICH., CODE § 39-1-18 (1974), also was given special attention.

³ The proposals given special consideration were: the PROPOSED REVISION OF THE MICHIGAN CRIMINAL CODE § 6310 (Mich. State Bar 1967); the PROPOSED ARIZONA REVISED CRIMINAL CODE § 3504 (Ariz. Crim. Code Comm'n 1975); a model statute recommended by fourteen members of the Commission on Obscenity and Pornography [hereinafter cited as OBSCENITY COMMISSION MODEL STATUTE], see REPORT OF THE COMMISSION ON OBSCENITY AND PORNOGRAPHY 56, 66 (1970) [hereinafter cited as OBSCENITY COMMISSION REPORT]; and a model statute proposed by dissenting Commission members Hill and Link, concurred in by Commissioner Keating [hereinafter cited as HILL-LINK MODEL STATUTE]. See OBSCENITY COMMISSION REPORT, *supra*, at 463.

⁴ At the same time, we were to assume that Michigan might not adopt a general obscenity provision barring distribution of obscene material to consenting adults. In *People v. Bloss*, 394 Mich. 79, 228 N.W.2d 384 (1975), the Michigan Supreme Court reversed the defendant's conviction for selling obscene matter to adults on the ground that the Michigan statute had not been construed in compliance with federal constitutional standards announced after *Bloss*' trial in *Miller v. California*, 413 U.S. 15 (1973). The court also added the following comment on the current validity of the Michigan obscenity provisions:

We are unanimously of the opinion that the Michigan statutes regulating the dissemination of "obscene" materials as applied to juveniles and unconsenting adults are valid and enforceable.

did not consider the possibility of utilizing a civil proceeding as the basic means of regulation.⁵ Third, it was assumed that the statute would be based upon essentially the same premises as supported the New York juvenile obscenity statute upheld in *Ginsberg v. New York*.⁶ Those premises are discussed in part I below.

I. BASIC OBJECTIVES

In *Ginsberg v. New York*, the Supreme Court upheld a New York criminal statute that barred commercial dissemination to minors of material found obscene for minors.⁷ The defendant in *Ginsberg* contended

We are divided as to whether such statutes can properly be construed by us without further legislative expression as proscribing the dissemination of "obscene" material to consenting adults. See Const. 1963, art. 1, § 5.

394 Mich. at 81, 228 N.W.2d at 385. The *Bloss* reference to art. 1, § 5 of the Michigan constitution, which prohibits enactment of any law "to restrain or abridge the liberty of speech," suggests that the division among the justices may relate to the legislature's constitutional authority to prohibit dissemination to consenting adults, rather than the court's authority to substantially reconstruct the broad language of the current statutes to render these provisions acceptable under the first amendment. *Cf. Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 73 (1973) (Brennan, J., dissenting); *McKinney v. Birmingham*, 292 Ala. 726, 727, 296 So. 2d 236, 237 (1974) (Jones, J., dissenting).

Aside from state constitutional limitations, a general obscenity statute may be rejected as a matter of legislative policy, as recommended in OBSCENITY COMMISSION REPORT, *supra* note 3, at 51-56. Several states have decided against adopting a general obscenity statute. See Lockhart, *Escape from the Chill of Uncertainty: Explicit Sex and the First Amendment*, 9 GA. L. REV. 533, 535 (1975) (noting that Montana, New Mexico, South Dakota, Vermont, and West Virginia now have obscenity statutes governing dissemination only to juveniles).

⁵ Several states prohibit institution of a criminal proceeding unless the material disseminated has been adjudged obscene in a civil proceeding and the disseminator has been so notified by the prosecuting attorney prior to the dissemination that serves as the basis of the prosecution. See DEL. CODE ANN. tit. 11, § 1365(j) (1974); N.D. CENT. CODE § 12.1-27.1-05 (Special Supp. 1975); WASH. REV. CODE § 9.68.060 (d) (Supp. 1974); WIS. STAT. ANN. § 944.25(10)(b) (Supp. 1975). See also LA. REV. STAT. ANN. tit. 14, § 106(F) (1974) (prior civil adjudication required except for materials showing actual ultimate sexual acts and certain simulations of such acts); VT. STAT. ANN. tit. 13, § 2809 (Cum. Supp. 1975) (prior civil proceeding required for verbal matter).

While Michigan has long provided for injunctive proceedings, it has not made a prior civil adjudication a prerequisite for criminal prosecution, and the *Study Report* proceeded on the assumption that this policy would be continued. See MICH. COMP. LAWS ANN. § 600.2938 (1968). For the arguments for and against requiring a prior civil adjudication, see Lockhart, *supra* note 4, at 569-86; Note, *The Scierter Requirement in Criminal Obscenity Prosecutions*, 41 N.Y.U.L. REV. 791, 810-19 (1966). See also *Study Report*, *supra* note 1, at 289.

⁶ 390 U.S. 629 (1968). Justices Douglas and Black dissented on the ground that obscene material is protected by the first amendment. Justice Fortas, in a separate dissent, accepted the premises that a state could regulate the dissemination of obscenity and could distinguish between adults and children in defining obscenity, but contended that the majority could not uphold defendant's conviction without "inquiry as to whether the material [distributed] is 'obscene' and without any evidence of pushing or pandering." *Id.* at 674. See note 308 *infra*.

⁷ Law of June 7, 1965, ch. 327, § 484-h, [1965] N.Y. Laws 480, as amended N.Y. PENAL LAW § 235.20 (McKinney Supp. 1975). See 390 U.S. at 37.

that the state statute violated the first amendment. In response, the Court stressed that the statute applied only to sexually oriented material that was found obscene under a constitutionally acceptable definition of obscenity. There was no first amendment violation since, as the Court had noted in prior decisions involving "general" (adult) obscenity statutes, obscene material is not protected speech under the first amendment. The *Ginsberg* opinion also noted that the state had ample justification to sustain its regulation of an activity that was not protected by the first amendment. The Court noted two state interests that combined to support the New York prohibition against the commercial dissemination of obscene material to minors. First, the legislature could "rationally conclude" that the exposure of minors to obscene material was "harmful" to the youths' "ethical and moral development," although there were no decisive scientific studies supporting that conclusion.⁸ Second, the state could appropriately seek to support the interest of parents in controlling their children's access to obscene material.

As noted above, our Report assumed that any juvenile obscenity provision adopted in Michigan would be based on the dual state interests noted in *Ginsberg*. Both interests are well established in Michigan legislative precedent. Michigan has long regulated the flow of sexually oriented material to minors on the ground that at least certain types of sexually oriented material may be "harmful" to the minors.⁹ Other Michigan legislation

⁸ Available scientific evidence remains inconclusive. The OBSCENITY COMMISSION REPORT, *supra* note 3, at 27, concluded that

empirical research designed to clarify the question has found no evidence to date that exposure to explicit sexual materials plays a significant role in the causation of delinquent . . . behavior among youth. . . .

See also M. GOLDSTEIN & H. KANT, *PORNOGRAPHY AND SEXUAL DEVIANCE* (1973). A contrary view apparently is held by many persons who work with delinquents. See OBSCENITY COMMISSION REPORT, *supra* note 3, at 160-63 (noting opinion polls of police chiefs, social workers, and others). It should be emphasized, moreover, that the state's interest in the behavior of youth extends beyond controlling acts formally classified as "delinquent." The state also may be concerned with various aspects of juvenile sexual behavior that are viewed as "socially deleterious." *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58 n.8 (1973). See also Gaylin, Book Review, 77 YALE L.J. 579, 595 (1968) (noting the need to "keep the lid on" the sexual drive of adolescents to limit neuroses "built on frustration of sexual drive"). There is substantial evidence that significant exposure to obscenity may have an impact upon other juvenile sexual behavior that is not classified as delinquency. See OBSCENITY COMMISSION REPORT, *supra* note 3, at 182-94 and the studies cited therein. But the large number of factors that contribute to such behavior, and the limited range of the currently available studies, preclude any firm conclusions. See *id.* at 381 (statement of Commissioners Lipton and Greenwood that "a significant deficiency in the work of the Commission was the failure to comprehensively study the effects of erotica in children and juveniles whose sexual behavior is not yet fixed"). See also Waaben, *Denmark, Sweden and Norway*, in II COMMISSION ON OBSCENITY AND PORNOGRAPHY, TECHNICAL REPORT 127-28 (1971) (noting that foreign jurisdictions that have decriminalized obscenity have nevertheless retained certain prohibitions against commercial dissemination to minors).

⁹ See MICH. COMP. LAWS ANN. §§ 750.142, .143, .343e (Supp. 1975) (prohibiting dissemination of obscene materials as matter "tending to corrupt the morals of youth").

has recognized the importance of supplementing parental control over the exposure of children to sex-related material.¹⁰ Similar legislative precedent is found in many jurisdictions.¹¹

Of course, the two state interests noted in *Ginsberg* may sometimes conflict. As between the two, we assume that, as in the New York provision upheld in *Ginsberg*, the parental interest in controlling a child's access to sexually oriented materials should prevail over the public's more general interest in restricting the flow of potentially harmful materials to minors. Thus, even though the state provision extends only to obscene materials, it should not prohibit parents from showing such materials to their children. The interest of parents should prevail, notwithstanding the potentially harmful impact of obscene materials, because, *inter alia*, (1) the harmful impact is not so well established as to overcome the usual presumption that the care and development of the minor should be left to the discretion of the parent, and (2) the harmful impact, even if accepted as almost inevitable under certain circumstances, can be neutralized or even reversed in an appropriate context, such as that likely to be created with careful parental guidance.¹² Similar factors also justify recog-

¹⁰ See MICH. COMP. LAWS ANN. § 340.789c (Supp. 1975) (recognizing parental control over sex education in the schools).

¹¹ See the state statutes cited in note 2 *supra*. The *Ginsberg* opinion listed thirty-six states that had separate obscenity provisions applicable to distributions to juveniles. See 390 U.S. at 647-48. After *Ginsberg*, several additional states adopted juvenile obscenity provisions, and more than forty states currently have such provisions. See Friedman, *State Obscenity Statutes*, in II COMMISSION ON OBSCENITY AND PORNOGRAPHY, TECHNICAL REPORT 37, 45 (1971).

¹² Consider in this connection the potential value of "gradual and age-appropriate exposure" as suggested in OBSCENITY COMMISSION REPORT, *supra* note 3, at 381-82 (separate statements of Commissioners Lipton and Greenwood):

It appears well-established that sexual interests are instinctually derived and that they are present from infancy through old age with different degrees of intensity. Consequently, it is impossible to fully protect children from exposure to sexual stimuli. . . . One may, therefore, ask whether such an exposure may not be an inevitable part of growing up in any culture and whether it may even serve a purpose. Gradual and age-appropriate exposure to erotic stimuli may lead to the development of socially appropriate defense mechanisms like sublimation, repression, postponement and self-control. Although the analogy may be somewhat far-fetched, it seems possible that graded exposure may immunize in somewhat the same fashion that exposure to bacteria and viruses builds resistance. If this analogy has merit, total lack of exposure would render the child who is totally unexposed as helpless as the animal raised in a totally sterile environment who later encounters the invariably contaminated real world. The finding that sex offenders tend to come from highly restricted families and have had less than the usual exposure to erotica suggests that they may not have had the opportunity to develop appropriate self-control.

To continue the analogy, overwhelming exposure might cause illness rather than immunization. An especially vulnerable period is likely following puberty when sexual impulses of increasing intensity emerge. A major problem of adolescence is that of impulse control, and in our troubled and rapidly changing world youngsters are already hyper-stimulated. To add to this stimulation by a completely permissive attitude with respect to the availability of sexual materials appears imprudent. For this reason, we have voted for the juvenile legislation.

dition of the interest of various professionals (such as physicians and teachers) in using obscene materials with minors for educational or scientific purposes. The training and professional standards of such persons provides considerable assurance that their use of obscene material in a controlled context will be designed to benefit rather than harm the child. Moreover, their work with the children ordinarily is subject to parental control.

While acceptance of the dual interests noted in *Ginsberg* provides a foundation for drafting a juvenile obscenity statute, it does not automatically determine the appropriate scope of such a statute. This article seeks primarily to explore the various issues presented in determining that scope. Of course, those issues must be analyzed in light of the legislation's basic objective of supporting the parents' interest in controlling their children's access to potentially harmful sex-related material. However, several other objectives should be considered along with the most efficient achievement of that basic function.

First, consideration should be given to limiting the administrative burden placed upon commercial disseminators of sexually oriented material. Limiting that burden is not simply for the benefit of the disseminators. If disseminators find it too difficult to identify what the law permits minors to purchase, they may simply refuse to sell any sex-related material, including clearly beneficial material, to minors. Similarly, if the disseminators find that the burden of identifying customers as minors is too great, they may simply refuse to carry sex-related materials prohibited for minors, thereby restricting the availability of such materials to adults as well as minors.

Second, the legislation should seek to avoid placing restrictions on the dissemination of non-obscene, sexually oriented materials which, far from being potentially harmful, are legitimate and helpful for minors. Overbreadth has been a constitutional hurdle upon which numerous obscenity statutes have fallen. Potential overbreadth also has been the source of much of the opposition to adoption of obscenity provisions relating to minors. Very few people have argued that young persons should be permitted, without parental approval, to see X-rated films. The primary concern has been that statutes not be drafted so broadly that one can legitimately question the legality of disseminating to a minor a novel like *The Catcher in the Rye* or a copy of *Time* magazine that contains a picture of a nude. Although there may be little likelihood that a prosecutor would utilize an overly broad statute to reach such publications, the mere existence of such a statute has been challenged as having a pernicious impact upon the exercise of free speech.

Third, the legislation should seek to avoid placing unnecessary burdens upon parents (and assisting professionals) who seek to expose their children to material which might be viewed as obscene. Of course, the prohibition of commercial dissemination directly to minors naturally inhibits, to some extent, the parents' and assisting professionals' capacity to expose children to the regulated material. The existence of a criminal prohibition, even though it exempts parental distribution, necessarily

reinforces public opposition to such material and strengthens community pressures against parents who desire to expose their children to such material. Also, the prohibition against sales directly to minors places upon the parent the burden of distribution, since the parent must purchase the book and then give it to his child, or, in the case of performances, accompany the child to the performance. These burdens cannot readily be eliminated if the statute is to remain supportive of those parents who desire state aid in keeping obscene material from their children. However, the statute can establish the legality of dissemination by parents and assisting professionals in a manner sufficiently clear to relieve them of any fear of criminal prosecution. It can clearly indicate, for example, that the legislative objective of supporting parental control permits parents and professionals to utilize obscene material with children and that no justification for such use is required beyond a showing of the parent's or professional's relationship to the child.

Consideration of the three objectives noted above suggests that two principles should be particularly stressed in drafting a juvenile obscenity statute. First, the statute should be as specific in coverage as possible. The matter encompassed by the statute, the degree of *mens rea* required, and the exemptions from coverage should be stated as clearly as possible. Reference to specific examples should not be avoided where they can supplement a general characterization. Second, where any significant legislative doubt exists as to statutory coverage of a particular category of sexually oriented material, whether because the harmful quality of the material is doubtful or because the category creates a significant potential for over-application of the statute to bar dissemination of beneficial materials, dissemination of that material should not be regulated under the statute.

In determining the scope of the statute, consideration also should be given to the fact that the range of sexually oriented materials available to minors will be limited by the structure of the market as well as by the coverage of a particular state statute.¹³ Publishers and producers of material exploiting prurient appeal operate largely within a national market. Moreover, it is a market that looks primarily to adult customers rather than to juvenile customers. In light of this market structure, a juvenile obscenity statute that prohibits a somewhat narrower range of materials may be just as effective in restricting the flow of potentially harmful

¹³ Statements in this article relating to the marketing of sexually oriented material are based primarily on studies cited in OBSCENITY COMMISSION REPORT, *supra* note 3, at 7-22, 72-137. Consideration was given, however, to certain obvious changes in marketing that have occurred since those studies were published. Today there is considerably more sexual explicitness in material available to most adults and many minors. Consider, for example, the OBSCENITY COMMISSION REPORT, *supra* note 3, at 14, describing *Playboy* magazine as of 1970 ("[i]n most cases, there is only breast and buttock exposure, although on occasion very discrete photographs of feminine public hair have been printed"). We have also noted what appears to be a significant increase in "adult-only" bookstores and movies. We have not been able to consider other possible marketing changes that would not be as apparent to the casual observer (such as any change in the percentage of material being distributed by mail).

material as a broader statute that would more readily be subject to overly broad application. The producer ordinarily is not in a position to carefully tailor his publication so that it retains its prurient appeal but nevertheless has a sexual content that is permissible under the statute with somewhat narrower coverage. If a Michigan provision, for example, did not prohibit the lewd portrayal of nudity, but did prohibit the depiction of sexual acts, producers of publications exploiting prurient appeal could not readily seek to avoid the statute's impact by limiting their material to depictions of nudity. To be commercially successful, prurient material designed for the adult market generally must portray far more than nudity alone.¹⁴ Even if the juvenile market were viewed as sufficiently significant to support publications aimed primarily at juveniles, that market, for most forms of publications, would have to encompass a multistate area. Accordingly, the producer could not tailor the content to take advantage of the narrower range of restrictions in a particular state statute. If the Michigan Legislature concluded, for example, that the state's juvenile statute need not encompass the portrayal of nudity, that determination would not significantly encourage publication of a magazine aimed at juveniles and composed largely of nude pin-ups. Such a magazine still could not be sold to minors in Ohio, Illinois, and other Midwest States since those states all have youth provisions that reach depictions of nudity. Thus, carefully restricting coverage not only will serve the subsidiary objectives noted above, but it may do so without any significant loss, as compared to a broader provision, in the statute's effectiveness in restricting dissemination of material exploiting prurient appeal.

A final factor to consider in establishing the range of the statute is the inherent limitation upon the effectiveness of any statute in restricting dissemination to minors of material that is freely available to adults. No matter how extensive its coverage, a juvenile statute is unlikely to keep from minors all of even the most clearly pornographic material. While the threat of criminal sanctions should constitute a substantial deterrent to direct commercial distribution to juveniles, it is not likely to have nearly as significant an impact upon noncommercial, "second-hand" distribution of materials originally purchased by adults for their own consumption.¹⁵ The most that can be expected of a juvenile provision, given the wide range of material legally disseminated to adults,¹⁶ is that it assist parents opposed to such material by restricting the variety of sources available to juveniles. An effective statute is likely to do no more than keep the flow of materials from becoming a tidal wave, and its capacity to serve this function may actually be strengthened by narrower coverage that ensures strong public support for its enforcement.

¹⁴ See generally *Skin Trouble*, TIME, Sept. 22, 1975, at 50. But consider the "nudity" magazines described in *People v. Berger*, — Colo. —, 521 P.2d 1244 (1974).

¹⁵ See notes 364-66 and accompanying text *infra* for a discussion of the impact of dissemination by peers.

¹⁶ See notes 4 *supra*, 363 *infra*.

II. DEFINING OBSCENITY: THE TRIPARTITE TEST

In determining the appropriate scope of a juvenile obscenity statute, a good starting point is the definition of the material subject to regulation by the statute.¹⁷ The New York statute¹⁸ upheld in *Ginsberg* utilized a two-part definition of such material. First, the encompassed material was limited to matter depicting nudity or specified sexual activity. Even if the material had such content, it was not subject to regulation unless it also fell within the second segment of the definition, a tripartite constitutional standard for defining obscenity. Most of the more recently adopted state juvenile obscenity provisions have followed the two-step approach of the *Ginsberg* statute. The next two sections of this article will consider the desirability of including each segment of the two-part definition and the contents of the segments if included. For more convenient analysis, we will consider initially various issues relating to the second segment of the definition, the modified tripartite test, and then will treat the first segment.

A. Basic Functions

The tripartite test utilized in the *Ginsberg* statute was derived from a series of Supreme Court decisions involving the dissemination of sexually oriented materials to adults. Those decisions hold that a state has authority to prohibit the dissemination of sexually oriented material to consenting adults only if the material involved can be classified constitutionally as "obscene."¹⁹ If the material is not obscene, the first amendment prohibits its regulation. The state's interests in prohibiting the dissemination of sexually oriented materials is not sufficient to meet the standard of overwhelming justification (such as the need to respond to a clear and present danger of violence) required to uphold state regulation of protected speech.²⁰ Sexually oriented material which is

¹⁷ Statutes commonly describe such material as matter "harmful to minors," in order to avoid any confusion with the category of "obscene" materials proscribed under general statutes dealing with dissemination to adults. Our proposed provision uses the phrase "obscene for minors" because it more readily conveys the emphasis upon sexual depictions. Compare OHIO REV. CODE ANN. § 2907.01(E)(3) (Page 1975) which also encompasses depictions of "extreme or bizarre violence, cruelty, or brutality."

¹⁸ Law of June 7, 1965, ch. 327, § 484-h, [1965] N.Y. Laws 480, as amended N.Y. PENAL LAW § 235.20 (McKinney Supp. 1975).

¹⁹ See, e.g., *Roth v. United States*, 354 U.S. 476 (1957); *Mishkin v. New York*, 383 U.S. 502 (1966); *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts*, 383 U.S. 413 (1966). (When the citation order departs from the ordering system suggested by *A Uniform System of Citation* (11th ed. 1967), the cases are listed in the order of interest or in the order of chronological development.) See also *Miller v. California*, 413 U.S. 15 (1973), decided after *Ginsberg*. The Court has been divided on this point, with as many as four Justices, in dissent, contending that state provisions barring dissemination of obscene material to consenting adults violate the first amendment. See *Miller*, 413 U.S. at 37 (Douglas, J., dissenting); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 73 (1973) (Brennan, J., dissenting).

²⁰ The fact that speech falls within the protection of the first amendment does not necessarily prohibit its regulation. The state may still impose certain restrictions if supported by an extraordinarily strong showing of need. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *New York Times v. Sullivan*, 376 U.S. 254 (1964).

"obscene," however, does not fall within the protection of the first amendment.²¹ Obscene material, the Court has noted, does not serve the expository function that the first amendment is designed to protect. Obscene material constitutes "*no essential part of any exposition of ideas.*"²² Obscenity is of "*such slight social value as a step to truth*" that its distribution may be prohibited even though the potential harm flowing from such distribution falls far short of the overwhelming state interest needed to regulate protected speech.²³

While a majority of the Supreme Court has consistently accepted the state's authority to prohibit the dissemination of obscenity to adults, the Justices were unable to agree, for a substantial period of time, on a test for distinguishing obscene material from other sexually oriented material that is protected under the first amendment.²⁴ In *Miller v. California*,²⁵ the majority finally agreed upon a tripartite test as the constitutionally required definition of obscenity. *Miller* described that test as follows:

The basic guidelines for the trier of fact must be: (a) whether "the average person applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest [*Roth v. United States*, 354 U.S. 476, 489 (1957)]; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.²⁶

The three elements of the tripartite test are commonly characterized as the "prurient interest," "patent offensiveness" and "social value" standards.²⁷ Each of these elements is designed to ensure that sexually

²¹ The majority's classification of "obscenity" as unprotected speech has been the topic of considerable debate both among the Justices and commentators, but it is generally recognized as the foundation for the majority's position. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 78-79 (1973) (Brennan, J., dissenting); Monaghan, *Obscenity, 1966: The Marriage of Obscenity Per Se and Obscenity Per Quod*, 76 YALE L.J. 127, 131-34 (1966).

²² *Miller v. California*, 413 U.S. 15, 20 (1973) (quoting *Roth v. United States*, 354 U.S. 476, 485 (1957)) (emphasis by Court in both *Miller* and *Roth*).

²³ *Miller v. California*, 413 U.S. 15, 20-21 (1973) (quoting *Roth v. United States*, 354 U.S. 476, 485 (1957)) (emphasis by Court in both *Miller* and *Roth*); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973). See also note 145 and accompanying text *infra* (describing the state interest in prohibiting the dissemination of obscenity to consenting adults).

²⁴ In *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), three dissenting Justices concluded that no standard could "separate obscenity from other sexually oriented but constitutionally protected speech," without creating a constitutionally unacceptable "risk to encroachment upon the guarantees of the due process clause and the first amendment." *Id.* at 79-80, 84-85. See also *id.* at 103, 112-13. The dissenters accordingly rejected the constitutionality of prohibiting dissemination of obscene material to consenting adults, but also found it unnecessary "to consider the extent of state power to regulate the distribution of sexually oriented materials to juveniles. . . ." *Id.* at 78.

²⁵ 413 U.S. 15 (1973).

²⁶ *Id.* at 24.

²⁷ The phrase "social value" is merely a shorthand reference to lack of literary, artistic, political, or scientific value. It does not refer to a general concept of having "social importance," which the Court specifically rejected in *Miller*, 413 U.S. at 25 n.7.

oriented material which meets the tripartite standard lacks the expository quality of protected speech. The elements of prurient appeal and patent offensiveness describe the major characteristics of pornography. As the Court has noted, material classified as "obscene" under the tripartite test is more accurately described as "obscene, pornographic" material or "hard-core pornography."²⁸ Pornographic material, by its very nature, almost invariably fails to make a contribution to the exposition of ideas. Where material depicts "hard-core" sexual conduct, appeals to the prurient interest, and has the allure of "forbidden fruit" associated with that which patently offends community standards, those qualities strongly indicate that the material represents an effort simply to arouse sexual stimulation, rather than to contribute to the communication of ideas or artistic value. Moreover, those qualities also suggest that the average viewer will utilize such material for the purpose of titillation and not as a source of ideas or artistic value.²⁹ Finally, even though the prurient appeal and patent offensiveness elements establish the pornographic quality of the material being challenged, the social value element of the tripartite test is applied to ensure that the material does indeed fail to serve the expository function of protected speech. That element requires a specific finding that the material does not seriously advance the exposition of literary, artistic, political, or scientific ideas or values.³⁰

B. Application to Minors

The juvenile provisions proposed by the Commission on Obscenity and Pornography³¹ and the Arizona Criminal Code Commission³² both

²⁸ The Court noted in *Miller*, 413 U.S. at 18 n.2, that its use of the term "obscene" to describe material not protected under the first amendment "does not reflect the precise meaning of 'obscene' as traditionally used in the English language." The material in question, the Court noted, is more accurately described as "pornographic" in its portrayal of sex and "obscene" in being "grossly repugnant to the generally accepted notions of what is appropriate" (quoting from Webster's dictionary). Thus, the better reference is to "obscene, pornographic material," *id.* at 22, or, as *Miller* also describes it, "'hard-core' pornography," *id.* at 28. *But see* Lockhart, *supra* note 4, arguing that the illustrations of "obscenity" offered in *Miller* are not limited to what would be commonly described as "hard-core pornography." *See also* notes 302-06 and accompanying text *infra*.

²⁹ For a discussion of the function and impact of pornography, see the materials collected in Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 62-67 (1960) and I COMMISSION ON OBSCENITY AND PORNOGRAPHY, TECHNICAL REPORT 5-101 (1971).

³⁰ Compare this explanation of the tripartite test with Note, *Community Standards, Class Actions, and Obscenity Under Miller v. California*, 88 HARV. L. REV. 1838, 1840 (1975) ("the standard of obscenity relates in no predetermined way to any particular view of the first amendment").

³¹ The juvenile statute proposed by the Commission majority, *see* note 3 *supra*, prohibits the commercial dissemination of materials depicting specified sexual conduct or emphasizing the depiction of unclothed genitals, except where such materials constitute "works of art or of anthropological significance." *See* OBSCENITY COMMISSION REPORT, *supra* note 3, at 66. The statute does not refer to the tripartite standard, and this omission apparently was based on the assumption that the tripartite test was not an essential element of the governing constitutional standard. Thus, the commentary in the OBSCENITY COMMISSION REPORT, written before *Miller*,

apparently assume that a state need not apply the tripartite test in barring dissemination to minors of at least material depicting sexual conduct. The constitutionality of this assumption is doubtful. While there is no Supreme Court holding directly on point,³³ the basic rationale of both

took the following view of the *Ginsberg* ruling.

The definition used in the statute approved in the *Ginsberg* case is a complex one. Essentially, to be prohibited for distribution to minors, material must fall within one or more objectively defined categories of explicit sexual material, and must also be "harmful to minors," a term defined through the use of a three-part test similar to that used under the *Roth* case, but modified to require appeal to the prurient interest of minors, patent offensiveness in light of prevailing standards in the adult community with respect to what is suitable for minors, and utter lack of redeeming social importance for minors. The *Ginsberg* case, however, does not appear to require that minors statutes conform in their application to this particular definition. Rather, the Court's opinion states that definitions in minors statutes may be constitutionally applied so long as it is "not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors."

OBSCENITY COMMISSION REPORT, *supra* note 3, at 322-23 (footnotes omitted). At other points, where the Commission viewed application of portions of the tripartite standard as constitutionally required or desirable as a matter of policy, those portions were included in the statute. See OBSCENITY COMMISSION REPORT, *supra* note 3, at 42 (using an element of the tripartite standard in a draft of a provision applicable to dissemination to adults), at 58 (suggesting application of a "social value" test if verbal material were included in a juvenile obscenity provision), at 463 (juvenile statute proposed by dissenting Commission members, including a pre-*Miller* version of the tripartite standard). See also *id.* at 40 (criticizing the subjectivity and vagueness of the tripartite standard).

Other statutory proposals that do not rely upon the tripartite standard are advanced in Hunsaker, *The 1973 Obscenity-Pornography Decisions: Analysis, Impact, and Legislative Alternatives*, 11 SAN DIEGO L. REV. 906, 941 (1974); Dibble, *Obscenity: A State Quarantine to Protect Children*, 39 S. CAL. L. REV. 345, 354-55 (1966).

³² PROPOSED ARIZ. CRIM. CODE § 3504 (Ariz. Crim. Code Comm'n 1975) prohibits dissemination of material depicting specified sexual conduct by persons other than parents, teachers, and the like. The provision does not refer to the tripartite test, although that test is included in the general obscenity provision applicable to adults. See PROPOSED ARIZ. CRIM. CODE §§ 3500(i), 3501 (Ariz. Crim. Code Comm'n 1975).

Oregon also fails to refer to the tripartite test in its juvenile provision, although it includes a tripartite test in the general obscenity provision. ORE. REV. STAT. §§ 167.060-.070 (1974); Ch. 699, § 4(2), [1973] 1 Ore. Laws 1594. The two obscenity provisions were adopted at different times, however, and it may be that the juvenile statute, adopted before *Miller*, was drafted on the assumption that the courts would incorporate the prevailing constitutional standard as part of the offense. See notes 39-41 and accompanying text *infra*. The Oregon juvenile provision was cited in *Miller* as an example of a statute limited in application to material depicting specific sexual conduct, but the Court noted that the citation should "not be understood as approving . . . [that statute] in all other respects." 413 U.S. at 24 n.6. See also the Ohio statute discussed in note 40 *infra*.

The Michigan provision, MICH. COMP. LAWS ANN. § 750.343e (1968), also fails to refer to the tripartite test, but it is a very general provision that invites judicial incorporation of that standard. See note 54 *infra*.

³³ Consider, however, *Erznoznik v. Jacksonville*, 422 U.S. 205, 213 n.10 (1975) (described in note 309 *infra*):

In *Ginsberg* the Court adopted a variation of the adult obscenity standards enunciated in *Roth v. United States* [354 U.S. 476 (1957)] and *Memoirs v. Massachusetts* [383 U.S. 413 (1966)] (plurality opinion).

Miller and *Ginsberg* suggests that the state may only reach sexually oriented material classified as "obscene" under the tripartite test as adapted to minors.

The New York juvenile statute³⁴ upheld in *Ginsberg* utilized a pre-*Miller* version of the tripartite standard, which was modified to fit an audience of minors. Material obscene for minors was identified by applying the prurient interest, patent offensiveness, and social value tests. Each of these tests was applied in light of the experience and capacity of youth; the prurient appeal test, for example, was met if the material appealed to the prurient interest of minors, even if not to the prurient interest of adults. Aside from this adaptation, however, the three tests were identical to the elements of the tripartite standard applied to general obscenity prosecutions.

Although the majority opinion in *Ginsberg* upheld the New York statute, it did not state that a juvenile provision would be constitutional only if it closely followed the New York formula. The primary issue of concern was whether a state could proscribe distribution to minors of material that would not be obscene for adults.³⁵ In holding that the state could distinguish between adults and minors, the Court did not focus upon New York's particular adaptation of the tripartite standard to fit an audience of minors. On the other hand, the opinion did rest upon an analysis that strongly suggests, in light of *Miller*, that the state must use some version of the tripartite test as the core of its definition of proscribed material.

The *Ginsberg* majority noted that a juvenile obscenity provision might well be unconstitutional if tested by the "clear and present danger" standard applied to regulations of other types of speech.³⁶ However, since the New York provision dealt only with material that was "obscene" for minors and obscenity was not "protected expression" under the first amendment, the state could act without scientific proof clearly establishing that the exposure of juveniles to proscribed material created a clear and present danger. While the *Ginsberg* opinion did not discuss the limits of the definition that a state could apply to ensure that its regulation was limited to material "obscene" for minors, the opinion did note that New York's reliance upon the tripartite standard provided such assurance.³⁷ In light of the *Miller* analysis, it is extremely doubtful that any standard other than the tripartite test would provide satisfactory first amendment protection. If each element of the tripartite test is an essen-

In *Miller v. California*, . . . we abandoned the *Roth-Memoirs* test for judging obscenity with respect to adults. We have not had occasion to decide what effect *Miller* will have on the *Ginsberg* formulation.

See also *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 686-87 (1968) (discussed in note 77 *infra*).

³⁴ Law of June 7, 1965, ch. 327, § 484-h, [1965] N.Y. Laws 480, as amended N.Y. PENAL LAW § 235.20 (McKinney Supp. 1975).

³⁵ See *Ginsberg v. New York*, 390 U.S. 629, 636 (1968).

³⁶ *Id.* at 641.

³⁷ *Id.* at 635.

tial tool in ensuring that the material does not make a contribution to the exposition of ideas as applied to a general adult audience, the same elements would appear to be necessary to ensure that there is no significant expository value as applied to a juvenile audience. Of course, as *Ginsberg* clearly indicates, each element of the tripartite test may be measured in terms of the capacity and experience of minors, but the basic characteristics of "obscurity" should not otherwise differ. Thus, the first amendment analysis of the *Ginsberg* opinion constitutes a warning, in light of *Miller*, against attempting to discard any or all elements of the tripartite standard as applied to juveniles—at least while the legislature lacks evidence which would so clearly establish an immediate harm to juveniles that it would sustain a statute regulating material otherwise protected under the first amendment.

C. Inclusion in Statute

Accepting the premise that a state may bar only material that falls within the tripartite test as modified for minors, the issue arises as to who should apply that test. Since the tripartite test is a first amendment standard, the trial court must apply the test as a legal limitation in reviewing a constitutional challenge to a conviction.³⁸ However, if the test is included in the statutory description of the proscribed material, obscenity becomes an element of the offense, and the test also must be applied by the trier of fact, which often will be a jury.

Almost all of the state provisions examined have sought to include the constitutional test for obscenity as part of the statutory description of the proscribed material.³⁹ Several of the provisions adopted prior to *Miller* do not refer to all of the elements of the current tripartite test,⁴⁰ but courts applying obscenity statutes traditionally have incorporated missing ele-

³⁸ See, e.g., *Jenkins v. Georgia*, 418 U.S. 153 (1974); *Jacobellis v. Ohio*, 378 U.S. 184 (1964); *United States v. Groner*, 479 F.2d 577 (5th Cir. 1973).

³⁹ See, e.g., FLA. STAT. ANN. § 847.013(1)(f) (Supp. 1975); NEV. REV. STAT. § 201.257 (1973); UTAH CODE ANN. § 76-10-1201(11) (Supp. 1975). The only exceptions are the Oregon provision, ORE. REV. STAT. §§ 167.060-.075 (1974), and the Michigan provision, MICH. COMP. LAWS ANN. § 750.343e (1968), both discussed in note 32 *supra*.

⁴⁰ See HAWAII REV. STAT. tit. 37, § 712-1210 (Special Supp. 1972) (lacking patently offensive); ILL. ANN. STAT. ch. 38, § 11-21(b)(1) (Smith-Hurd Supp. 1975) (lacking an independent social value element); N.J. STAT. ANN. § 2A:115-1.7 (Supp. 1975) (lacking patently offensive and social value elements); R.I. GEN. LAWS ANN. § 11-31-10 (Supp. 1974) (similar to the New Jersey provision). See also OHIO REV. CODE ANN. § 2907.31 (Page 1975) (prohibiting dissemination of material "harmful to juveniles" and defining such material as being patently offensive and either appealing to the prurient interest or, *inter alia*, depicting "sexual activity, masturbation, sexual excitement, or nudity"); OHIO REV. CODE ANN. § 2907.01(E) (Page 1974). The Ohio obscenity standard for dissemination to adults also treats prurient appeal as an alternative test in determining obscenity. OHIO REV. CODE ANN. § 2907.01(F) (Page 1975). But see *Hollington v. Ricco*, 40 Ohio App. 2d 57, 65-66, 318 N.E.2d 442, 448-49 (1973) (holding that all elements of the *Miller* tripartite standard apply to definition of obscenity under the general provision). See also note 32 *supra*.

ments of the tripartite standard in the course of interpreting these statutes.⁴¹ Indeed, the pattern of including the constitutional standard is so common that exclusion of the standard probably could be ensured only by stating in the statute that the tripartite standard was not a part of the offense and its application should not be submitted to the trier of fact.⁴²

Excluding the tripartite standard from the elements of the offense clearly would risk invalidation of the statute. Such action would not only be unique, but it readily could be viewed as contrary to *Miller* and *Ginsberg*. The *Miller* opinion referred several times to the tripartite test as a standard to be applied by the jury as the trier of fact. Of course, *Miller* did not squarely present this issue, since the state provision there specifically incorporated an earlier version of the tripartite standard. Nevertheless, the Court's references to jury application of the tripartite standard were not directed at the particular statute involved in *Miller*, but at obscenity provisions generally. The Court referred initially to the three elements of the tripartite standard as "the basic guidelines for the trier of fact."⁴³ Further on, the Court noted that "[i]n resolving the inevitable sensitive questions of fact and law [presented under the tripartite standard], we must continue to rely on the jury system."⁴⁴ Finally, in discussing the appropriate scope of the community standard utilized in applying the tripartite test, the Court again assumed that the standard would be applied by the "lay jurors as the usual ultimate fact finders," noting that the test was designed to permit jurors to draw on the practices of their own community.⁴⁵

While *Ginsberg* did not discuss the role of the trier of fact, the first amendment analysis of *Ginsberg* suggests that the *Miller* statements regarding jury responsibility would apply also to a juvenile statute. The variation between a juvenile and an adult audience would not appear to have a significant bearing on the role of the jury in applying the tripartite

⁴¹ See, e.g., *Pierce v. State*, 292 Ala. 473, 476-77, 296 So. 2d 218, 220-21 (1974); *State ex rel. Cahalan v. Diversified Theatrical Corp.*, 59 Mich. App. 223, 232, 229 N.W.2d 389, 394 (1975), *leave to appeal granted*, 394 Mich. 803 (1975); *Hamar Theatre, Inc. v. Cryan*, 365 F. Supp. 1312, 1323 (D.N.J. 1973) (collecting cases); *Hollington v. Ricco*, 40 Ohio App. 2d 57, 318 N.E.2d 442 (1973) (described in note 40 *supra*). Although these decisions involved general obscenity statutes, the opinions offer no basis for assuming that state courts will not be as willing to incorporate missing elements of the tripartite test in a juvenile provision. Courts have been less willing to incorporate the specific definitions of encompassed sexual conduct required by *Miller*, but that task requires a considerably more extensive rewriting of the statute. See *State v. DeSantis*, 65 N.J. 462, 323 A.2d 489 (1974) (collecting cases); note 250 *infra*; *Study Report*, *supra* note 1, at 156.

⁴² Cf. *State v. DeSantis*, 65 N.J. 462, 323 A.2d 489 (1974) (although the New Jersey Legislature in 1969 passed an amendment deleting reference to the social value element, the court interpreted the legislation as incorporating the social value element as stated in *Miller*, since *Miller* established the constitutional necessity of that element).

⁴³ See *Miller v. California*, 413 U.S. 15, 24 (1973), quoted in text accompanying note 26 *supra*.

⁴⁴ *Id.* at 26.

⁴⁵ *Id.* at 30.

test.⁴⁶ It is noteworthy also that the New York juvenile statute upheld in *Ginsberg* specifically incorporated the tripartite test as an element of the offense.⁴⁷

Since the issue was not squarely presented in either *Miller* or *Ginsberg*, and since the Court has not insisted upon a jury adjudication in noncriminal proceedings in which the tripartite test is applied,⁴⁸ the possibility of excluding the tripartite standard from the statutory offense should not be viewed by the legislature as absolutely foreclosed. If excluding the tripartite standard from the province of the trier of fact would provide significant administrative or substantive advantages, it might be worth the risk of directly challenging the *Miller* dictum. But excluding the standard is not likely to be helpful either in fulfilling the substantive objectives of the statute or in reducing the complexity of an obscenity trial.

From the viewpoint of convenience of trial administration, there is little to be gained by excluding jury application of the tripartite standard. Evidence relating to the tripartite standard will have to be introduced in any event since a court will have to apply that standard in response to an almost certain constitutional challenge to any prosecution. Indeed, a portion of that evidence often would be presented before the jury even if the tripartite standard were not an element of the offense. Proof of the requisite mens rea for conviction often requires evidence that the defendant was aware, or should have been aware, of at least some of those characteristics of the material that bring it within the tripartite standard.⁴⁹ Permitting jury application of the standard itself probably serves to eliminate considerable dispute as to whether evidence relating to erotic quality and community standards is "relevant" to mens rea or to other statutory

⁴⁶ One aspect of jury participation is that the jurors can judge the possible prurient appeal and patent offensiveness of the material in terms of community standards as they know them. *Hamling v. United States*, 418 U.S. 87, 104 (1974). Expert testimony, the Court has noted, is not essential to sustain a determination that material is obscene under the tripartite standard. *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 56 n.6 (1973); *Kaplan v. California*, 413 U.S. 115, 121 (1973). *Paris Adult Theatre* did, however,

reserve judgment, . . . [as to] the extreme case . . . where contested materials are directed at such a bizarre deviant group that the experience of the trier of fact would be plainly inadequate to judge whether the material appeals to the prurient interest.

413 U.S. at 56 n.6. The interests and responses of juveniles do not appear to be so far removed from the jurors' experience as to fall within this reservation. In *Hamling*, the Court compared the jury's application of the prurient interest and patent offensiveness standard to the jury's application of the "reasonable person" standard in tort law. 418 U.S. at 104-05. There are several areas of tort law where the jury may determine, without expert witnesses, the proclivities and capacities of those who are young.

⁴⁷ *See* 390 U.S. at 646.

⁴⁸ Juries are not required in declaratory judgment or injunctive proceedings relating to the dissemination of allegedly obscene material. *See Kingsley Books v. Brown*, 354 U.S. 436 (1957); *Alexander v. Virginia*, 413 U.S. 836 (1973). *But see McNary v. Carlton*, 527 S.W.2d 343 (Mo. 1975) (jury determination required in an injunctive proceeding to ensure proper application of community standards).

⁴⁹ *See* notes 416-25, 433-36 and accompanying text *infra*.

issues, such as whether a depiction of nudity meets the statutory standard of "lewdness."

In terms of the legislation's substantive objectives, excluding the tripartite standard from the statute could result in significant disadvantages rather than advantages. Treating the standard as an element of the offense provides an extra safeguard against restricting dissemination of legitimate materials since it means that the jury, as well as the judge, must find that the matter in question falls within the standard.⁵⁰ Moreover, the

⁵⁰ The Supreme Court has not had occasion to describe the scope of the trial court's obligation in applying the tripartite test as a first amendment limitation. Precedent in comparable areas suggests that the trial court's obligation is to make its own independent determination as to the application of the tripartite standard, rather than merely to determine whether there is sufficient evidence to present the issue to the jury. *Cf. Jackson v. Denno*, 378 U.S. 368 (1964); *New York Times v. Sullivan*, 376 U.S. 254, 284-85 (1964). Over the years the Court has divided on whether a similar standard of independent review should apply on appellate review of obscenity convictions, with some Justices suggesting that a determination of obscenity should be treated as a factual finding and upheld if there is significant evidence supporting that finding. *See Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 101-02 (1973) (Brennan, J., dissenting) (collecting opinions on both sides). *Miller* arguably rejected that view when it recognized "the ultimate power of an appellate court to conduct an independent review of constitutional claims when necessary," 413 U.S. at 25, 22 n.3, but *Miller* also stressed the role of the jury as the "ultimate fact-finders" on the issues of prurient appeal and patent offensiveness. *Id.* at 30. Commentators accordingly have suggested that the independent appellate review required by *Miller* is likely to be exercised only as the social value element of the tripartite test. *See* W. LOCKHART, Y. KAMISAR & J. CHOPER, *CONSTITUTIONAL LAW* 1030 (4th ed. 1975); Leventhal, *The 1973 Round of Obscenity-Pornography Decisions*, 59 A.B.A.J. 1261, 1264-65 (1973); Note, *Community Standards, Class Actions, and Obscenity Under Miller v. California*, 88 HARV. L. REV. 1838, 1844 (1975). *See also* authorities cited in note 197 *infra*, discussing the difficulty in obtaining effective appellate review as to prurient appeal and patent offensiveness when a local (as opposed to statewide) community standard is applied. *But cf. Jenkins v. Georgia*, 418 U.S. 153, 161 (1974), in which the Court reversed an obscenity conviction on the ground that the movie in question "could not be found under the *Miller* standard to depict sexual conduct in a patently offensive way." The Court noted that [e]ven though questions of appeal to the "prurient interest" or of patent offensiveness are "essentially questions of fact," it would be a serious misreading of *Miller* to conclude that juries have unbridled discretion in determining what is "patently offensive."

Id. at 60.

Lower courts have divided as to the scope of the independent appellate review required by *Miller*. *See Court v. State*, 63 Wis. 2d 570, 576, 217 N.W.2d 676, 679 (1974) (only the issue of serious social value "may be determined independently by the appellate court"); *State v. Harding*, 114 N.H. 335, 320 A.2d 646 (1974) (whether material meets tripartite test is issue of fact for the jury, with the appellate court determining only whether the material contained the specified sexual content); *State v. American Theatre Corp.*, 194 Neb. 84, —, 230 N.W.2d 209, 213 (1975) ("whether a particular work is obscene is an issue which must be decided by the court as a matter of law, in reviewing such cases").

Even if appellate review does not require an extensive independent determination of prurient appeal and patent offensiveness, the task of the appellate court may be distinguished from that of the trial judge. Unlike the appellate court, the trial judge is in a much more appropriate position to exercise independent judgment on local community standards. *Cf. note 48 supra*. Various appellate court cases have emphasized the trial judge's obligation to make an independent determination of obscenity as a matter of law. *See, e.g., People v. Heller*, 33 N.Y.2d 314, 320 n.1, 307 N.E.2d

jury must be persuaded of the standard's application beyond a reasonable doubt, while the court apparently may apply a less rigorous standard of persuasion in making its first amendment determination.⁵¹ Jury participation is also valuable because (1) the substance of the tripartite test, at least insofar as it is tied to community standards, is particularly appropriate for jury determination,⁵² and (2) in an area likely to be controversial, such as prosecution for dissemination of obscenity, confidence in both the correctness of the law and any resulting convictions is evidenced by our willingness to assign to the jury, with its capacity for nullification, the task of ruling on every element necessary for a conviction.⁵³

D. Nature of the Definition

Assuming that the tripartite test will be included in the statute, various issues arise in determining the appropriate statement of the test. First, should the definition be quite specific or phrased in general terms? Perhaps the most general statement would be one that merely notes that the statutory reference to "obscene matter" does not include "constitutionally protected speech." None of the statutes examined utilize this approach.⁵⁴ Those state provisions incorporating the constitutional definition of

805, 809 n.1, 352 N.Y.S.2d 601, 606 n.1 (1973); *Clicque v. United States*, 514 F.2d 923, 926-27 (5th Cir. 1975); *United States v. Womack*, 509 F.2d 368 (D.C. Cir. 1974). Cf. *McNary v. Carlton*, 527 S.W.2d 343 (Mo. 1975). But see *State v. Thompkins*, 263 S.C. 472, 211 S.E.2d 549 (1975).

⁵¹ Assuming that the trial court applies its own independent judgment, see note 50 *supra*, a question remains as to the appropriate standard of proof. In other constitutional areas, the Court has held that the Constitution does not require that factual issues be resolved in accordance with a standard higher than the preponderance of the evidence standard. See *Lego v. Twomey*, 404 U.S. 477 (1972) (involving a determination as to the voluntariness of a confession).

⁵² See notes 162, 173-77, 189-92 and accompanying text *infra*. See also *McNary v. Carlton*, 527 S.W.2d 343 (Mo. 1975).

⁵³ Compare, in this regard, the classic debate of the 1790's over the role of the jury in the prosecution of seditious libel. 2 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 351 (1883); L. LEVY, LEGACY OF SUPPRESSION (1960). See also Pines, *The Obscenity Quagmire*, 49 CAL. ST. B.J. 509, 514, 561-62 (1974) (jury refusals to find films such as "Deep Throat" obscene suggests juror rejection of statute's application to consenting adults).

⁵⁴ Various jurisdictions, however, have adopted a somewhat similar approach in general obscenity statutes by simply describing the proscribed material as "obscene, lewd, lascivious, indecent, filthy, or vile." 18 U.S.C. § 1461 (1966). See, e.g., ME. REV. STAT. ANN. tit. 17, § 2901 (1965); MO. ANN. STAT. § 563.280 (Vernon, Cum. Supp. 1976). A few juvenile provisions rely solely upon similar descriptions. ME. REV. STAT. ANN. tit. 17, § 2903 (1965); MICH. COMP. LAWS ANN. § 750.343e (1968); MO. ANN. STAT. § 563.310 (Vernon, Cum. Supp. 1976). Such general descriptions of proscribed material traditionally have been interpreted as incorporating the current constitutional definition of obscenity. See, e.g., *Hamling v. United States*, 418 U.S. 87 (1974) (interpreting 18 U.S.C. § 1461 (1966)); *B & A Co. v. State*, 24 Md. App. 367, 330 A.2d 701 (1975); *State ex rel. Calahan v. Diversified Theatrical Corp.*, 59 Mich. App. 223, 232, 229 N.W.2d 389, 394 (1975), leave to appeal granted, 394 Mich. 803 (1975). But see *Kansas City v. O'Connor*, 510 S.W.2d 689 (Mo. 1974) (Seiler, J., dissenting) (arguing that a local ordinance which specifically required that the term "obscenity" be construed as incorporating any majority position adopted by the Supreme Court violated due process because "what is prohibited by the ordinance changes from day to day"). See also notes 41 *supra*, 57 *infra*.

obscenity have sought to provide a full definition derived from the latest Supreme Court decisions.⁵⁵

Utilizing a full definition based upon current precedent appears to be the preferable drafting approach, although it carries with it an obvious risk. With a change in composition, the Court could readily change its view, rendering the definition incorporated in the statute invalid⁵⁶ or more limited in coverage than is constitutionally necessary.⁵⁷ However, the legislature should be able to quickly amend a statute to reflect any such change. Moreover, as to some issues relating to the tripartite standard, such as defining the relevant community standard, the legislature can choose among several options that are constitutionally acceptable. If a very general definition is used, decision on these issues then will be left to the judiciary. This is inappropriate for two reasons. First, the issues relate to the basic policies supporting the statute and therefore should be resolved by the legislature that adopts the statute. Second, the state appellate courts may not resolve these issues for a considerable period of time, resulting in different standards being applied in the various trial courts.⁵⁸ Accordingly, section 1 of our proposed statute contains, primarily in paragraphs (h) and (i), a fairly detailed definition of the tripartite standard, derived initially from *Miller* and then adapted to a youthful audience.

⁵⁵ All of the state provisions cited in note 2 *supra*, except for the Michigan and Oregon provisions, apparently sought to incorporate specifically the prevailing constitutional standard. See note 32 *supra*. See also note 31 *supra*. Several of these provisions, however, failed to incorporate all of the elements of the current standard. See note 40 and accompanying text *supra*.

⁵⁶ But see decisions cited in notes 40 *supra*, 250 *infra*, suggesting a judicial willingness to add elements to quite specific state provisions so as to uphold their constitutionality. Consider, in particular, *Hollington v. Ricco*, 40 Ohio App. 2d 57, 318 N.E.2d 442 (1973) (described in note 40 *supra*). When a criminal obscenity statute is reinterpreted to incorporate the latest judicial ruling, and that ruling narrows the constitutional definition of obscenity, a defendant on appeal will receive the benefit of that narrower definition. See, e.g., *Hamling v. United States*, 418 U.S. 87, 102-03 (1974); *State v. Welke*, 298 Minn. 402, 216 N.W.2d 641 (1974); *State v. DeSantis*, 65 N.J. 462, 323 A.2d 489 (1974).

⁵⁷ Thus, several of the state statutes examined used the tripartite standard as stated in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Massachusetts*, 383 U.S. 413 (1966), which may provide broader first amendment protection in its statement of the social value element than the *Miller* formulation. See, e.g., CAL. PENAL CODE § 313(a) (West Supp. 1976); FLA. STAT. ANN. § 847.013(1)(f) (Supp. 1975); WASH. REV. CODE § 9.68.050(2) (Supp. 1974). It is not clear whether these states have decided to maintain the *Memoirs* standard as a matter of policy or have simply neglected to revise the standard in light of *Miller*. Compare N.Y. PENAL LAW § 235.20(6) (McKinney Supp. 1975); UTAH CODE ANN. § 76-10-1201(11) (Supp. 1975) (amending statement of social value element in light of *Miller*). See also *West v. State*, 514 S.W.2d 433 (Tex. Crim. App. 1974) (holding that when the statute used *Memoirs* standard, the court would not substitute *Miller* social value formulation even though it might have been the legislative intent to reach all material not constitutionally protected); *People v. Tabron*, — Colo. —, 544 P.2d 372 (1976) (legislative redrafting needed in light of "substantial" nature of *Miller* change); *State v. Harding*, 114 N.H. 335, 320 A.2d 646 (1974) (statutory provision incorporating *Memoirs* language will be interpreted in light of *Miller*).

⁵⁸ See, e.g., *Study Report*, *supra* note 1, at 174-216 (discussing the sparse Michigan precedent governing such issues as the appropriate community standard, adaptation of the prurient appeal standard to minors, and the treatment of special audiences).

The remainder of part II will discuss major issues that were considered in drafting these two paragraphs.

E. Defining the Prurient Interest Element

1. *The Nature of Prurient Appeal*—As Judge Moore noted, the phrase “‘prurient interest’ . . . certainly [is] not self-defining.”⁵⁹ After describing “obscene material” as “material which deals with sex in a manner appealing to prurient interest,” the Supreme Court in *Roth v. United States*⁶⁰ added the following footnote:

I.e., material having a tendency to excite lustful thoughts. Webster's New International Dictionary (Unabridged, 2d ed., 1949) defines prurient, in pertinent part, as follows: “. . . Itching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd. . . .”

We perceive no significant difference between the meaning of obscenity developed in the case law and the definition of the A.L.I., Model Penal Code, § 207.10(2) (Tent. Draft No. 6, 1957), viz.: “. . . A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond customary limits of candor in description or representation of such matters. . . .”⁶¹

The various state obscenity statutes we examined either do not define prurient interest,⁶² or use the American Law Institute (ALI) definition quoted in *Roth*.⁶³

Of course, the statute need not define prurient interest. While the term should be defined for the jury, the *Roth* footnote⁶⁴ always can be utilized for that purpose. That footnote, however, cites a variety of definitions, and it would be desirable to have a single statutory standard that could serve as the foundation for a jury charge in all cases.⁶⁵ Proposed paragraph (i) of section 1 seeks to provide such a standard.

⁵⁹ *United States v. Darnell*, 316 F.2d 813, 816 (2d Cir. 1963) (dissenting opinion).

⁶⁰ 354 U.S. 476 (1957).

⁶¹ *Id.* at 487 n.20.

⁶² See, e.g., HAWAII REV. STAT. tit. 37, § 712-1210(6)(a) (Special Supp. 1972); IOWA CODE ANN. § 725.1 (Supp. 1975); OHIO REV. CODE ANN. § 2907.01(E)(1) (Page 1975). The Rhode Island provision does not use the term “prurient interest” but does require that the material be “posed or presented in a manner to provoke or arouse lust or passion or to exploit sex, lust, or perversion . . .” R.I. GEN. LAWS ANN. § 11-31-10 (Supp. 1974).

⁶³ See, e.g., CAL. PENAL CODE § 313(a) (West Supp. 1976); ILL. ANN. STAT. ch. 38, § 11-21(b) (Smith-Hurd Supp. 1975). The New York statute upheld in *Ginsberg* modified the ALI standard by referring to material that appeals to a “prurient, shameful, or morbid” interest. 390 U.S. at 646. See also FLA. STAT. ANN. § 847.012(f) (Supp. 1975).

⁶⁴ See text accompanying note 61 *supra*.

⁶⁵ Lockhart, *supra* note 4, at 540, notes that the Court's failure to settle on a single definition of prurient interest, although creating some “ambiguity,” apparently has caused “no real problem in submitting obscenity to trial courts or juries for decision.” But cf. *Combs v. State*, 536 P.2d 373, 374 (Okla. Crim. 1975); *Ebert v.*

Proposed paragraph (i) does not follow the ALI definition because the wording of that definition may be misleading.⁶⁶ The reference in the ALI definition to a "shameful" or "morbid" interest in sex may suggest to some that the prurient interest must relate to deviant sexual activity. The ALI definition clearly was not intended to impose such a requirement.⁶⁷ The terms "shameful" and "morbid" were used to describe a sexual response that, at the same time, evokes feelings both of "desire and pleasure" and of shamefulness "in gaining such pleasure in a manner that conflicts with social convention."⁶⁸ To some extent, the element of patent offensiveness in pornographic material often does produce a sense of shame in the viewer. Pornographic material also can have a morbid, compelling attraction that produces a combined reaction of revulsion and excitement.⁶⁹ From the viewpoint of the first amendment analysis of *Miller* and *Roth*, however, the element of shamefulness or revulsion in the viewer reaction is not crucial. The key trait of prurient appeal, that trait which contributes to the characterization of obscenity as unprotected speech, is its production of an intense sexual excitement that is largely inconsistent with the communication of ideas.⁷⁰ Such inconsistency exists whether the sexual excitement is accompanied by desire for sexual gratification alone, a sexual desire mixed with shame, or even

Maryland State Board of Censors, 19 Md. App. 300, 317, 313 A.2d 536, 546 (1973); *State v. Little Art Corp.*, 191 Neb. 448, 451-52, 215 N.W.2d 853, 856 (1974) (illustrating varying interpretations of the prurient appeal element).

⁶⁶ We do not suggest that the ALI standard presents constitutional difficulties. See Lockhart, *supra* note 4, at 539-40:

In our 1960 article, Professor McClure and I concluded that the difference [in the definitions cited in *Roth*] was not of constitutional dimensions, and that the Court intended the prurient appeal factor to be satisfied by any one of the current formulations in the obscenity laws and decisions, most of which required some kind of erotic appeal. Since *Roth*, the Court has simply carried this factor forward into its newer reformulations of the standard without modification or further discussion.

⁶⁷ See MODEL PENAL CODE 29-30 (Tent. Draft No. 6, 1957); Schwartz, *Morals Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669, 679 (1963). The Model Code's reference to a prurient interest in "excretion" may contribute to the potential for misinterpretation. Depictions of excretion that do not relate to the genitals ordinarily would appeal only to a deviant sexual interest. See note 280 *infra*.

⁶⁸ See MODEL PENAL CODE (Tent. Draft No. 6, 1957).

The prurient interest is an exacerbated, morbid, or perverted interest growing out of the conflict between the universal sexual drive of the individual and equally universal social controls of sexual activity. The wall of secrecy with which society has surrounded sexual behavior tends to build up in the individual strong feelings of the shamefulness of sexuality other than (and sometimes including) private, heterosexual, marital relations. Literary or graphic material which disregards the social convention evokes "repression-tensions," i.e., mixed feelings of desire and pleasure on one hand, and dirtiness, ugliness, revulsion on the other. . . . Society may legitimately seek to deter the deliberate stimulation and exploitation of emotional tensions arising from the conflict between social convention and the individual's sex drive.

Id. at 20-30.

⁶⁹ See text accompanying note 104 *infra*. See also note 71 *infra*.

⁷⁰ See text accompanying note 28 *supra*. See also the discussion of the element of patent offensiveness accompanying notes 105, 163 *infra*.

a sense of repulsion.⁷¹ Describing the prurient interest as "shameful" or "morbid" suggests a far too narrow range of reactions that may accompany sexual stimulation, and the ALI definition consequently has caused some confusion.⁷² Paragraph (i) seeks to avoid this difficulty by emphasizing the element of sexual excitement without seeking to identify the variety of emotional reactions that may accompany such stimulation. Thus, paragraph (i) simply states that material appeals to the prurient interest if it has a tendency to cause "intense sexual stimulation." The reference to "intense" stimulation is designed to distinguish between material designed to arouse a casual sexual interest and that calling forth the much stronger reaction suggested by *Roth's* reference to promoting "lustful thoughts" or "lascivious longings."⁷³ Paragraph (i) does not seek to suggest this stronger reaction by reference to the promotion of lust or lascivious longings since, as noted above, other emotional responses also may accompany sexual stimulation.⁷⁴

It may be suggested that, with respect to minors, it is inappropriate to define prurient appeal solely in terms of sexual stimulation. The hypothetical is presented, for example, of the distribution of hard-core pornog-

⁷¹ On the variety of psychological responses accompanying sexual stimulation, see OBSCENITY COMMISSION REPORT, *supra* note 3, at 164-82, and the studies cited therein. As these studies note, "exposure to sex stimuli typically produces multiple and often ambivalent emotional reactions. . . . [M]any persons experience, in addition to arousal, feelings of guilt and disgust. . . ." *Id.* at 165-66. See also Gaylin, Book Review, 77 YALE L.J. 579, 583 (1968); Schwartz, *Morals Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669, 679 (1963):

Not recognizing that material may be repellent and appealing at the same time, two distinguished commentators on the Code's obscenity provisions have criticized the "appeal" formula, asserting that "hard-core pornography," . . . has no appeal for "ordinary adults," who instead would be merely repelled by the material. Common experience suggests the contrary. It is well known that policemen, lawyers, and judges involved in obscenity cases not infrequently regale their fellows with viewings of the criminal material.

⁷² See OBSCENITY COMMISSION REPORT, *supra* note 3.

The Court has never explained its rather confusing assertion [in *Roth*] of equivalency between material tending to "excite lust" and material appealing to "shameful" or "morbid" interests in sex. In practice, a tendency to excite sexual arousal has appeared to be the principal ingredient of "prurient" interest.

Id. at 312 n.79. See also Gaylin, Book Review, 77 YALE L.J. 579, 583 (1968):

If the justices insist on considering offensive and disgusting as antithetical to prurient, they ought at least to decide which characterizes obscenity. I think their difficulty lies in the somewhat priggish assumption that something which is "disgusting" cannot be "exciting." It is here that the psychiatrist would consider the jurist "naive."

But see FLA. STAT. ANN. § 847.012(1) (Supp. 1975) (requiring that material appeal to a "prurient, shameful, or morbid interest"); *United States v. Klaw*, 350 F.2d 155, 166-67 (2d Cir. 1965).

⁷³ See *United States v. Stewart*, 336 F. Supp. 299 (E.D. Pa. 1971), noting this distinction.

⁷⁴ "Lust" is viewed most commonly as a reaction consisting solely of an overriding desire for sexual gratification. See WEBSTER'S THIRD INTERNATIONAL DICTIONARY (1968 ed.). Compare *Combs v. State*, 536 P.2d 373 (Okla. Crim. 1975) (statement of expert witness) with *State v. Little Art Corp.*, 191 Neb. 448, 451-52, 215 N.W.2d 853, 856 (1974).

raphy to a ten-year-old girl. Such a child, it is argued, would not be sexually aroused, but, instead, simply would be shocked by the material. Yet, the argument continues, the impact of that shock could be as harmful to this child as the arousal of lustful desires in an older child, and therefore this dissemination also should fall within the statute.⁷⁵ In response to this argument, it should be noted initially that the proposed statute probably would apply to such dissemination without any expansion of the definition of prurient interest. A child who has sufficient interest in pornography to be shocked by what he or she sees is likely to be reflecting intense sexual stimulation rather than a reaction to any otherwise horrifying quality of the act portrayed. As noted above, the definition in paragraph (i) concentrates on the material's capacity to arouse sexual excitement and the fact that such excitement may be partially reflected by revulsion does not detract from its prurient nature. Moreover, even if the shock were totally unrelated to sexual excitement in the particular case, the material would not be measured in terms of the particular recipient, but in terms of the general audience of minors to whom it was made available, including more mature juveniles.⁷⁶

Although the challenge to the emphasis upon sexual stimulation may not be well taken as applied to the distribution of pornography to a ten-year-old, it does raise a significant issue as to the coverage of sexually related material that conceivably could shock a very youthful audience without significant sexual stimulation. If the statute is broadened to apply to dissemination of such material without regard to the material's tendency to cause intense sexual stimulation, there appears to be little ground for failing to encompass also nonsexually oriented material that may be equally shocking and upsetting to immature youth, such as extreme portrayals of violence. While the state may have a legitimate interest in controlling the dissemination of such material, the first amendment protection granted such material may be far more extensive than that granted obscenity. The Supreme Court's ruling that obscenity is not protected speech rests in large part on qualities of material designed to arouse sexual excitement that may or may not be present in other types of material that could be just as harmful to the child's development.⁷⁷ If prurient

⁷⁵ In discussions of a proposed Michigan juvenile provision, this argument of shock without prurient appeal in the case of a ten-year-old has been advanced both by persons urging that the statute be expanded to include reference to a "prurient, shameful, or morbid interest," see note 63 *supra*, and by persons who argue that there is no reason to regulate dissemination of obscenity when the state is willing to leave unregulated the dissemination of materials dealing with violence, the supernatural, and other matters likely to upset children.

⁷⁶ See text accompanying note 136 *infra*.

⁷⁷ See text accompanying notes 27-29 *supra*. See also *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 686-87 n.15 (1968):

Appellants also contend here that, in addition to its vagueness, the ordinance is invalid because it authorizes the restraint of films on constitutionally impermissible grounds, arguing that the limits on regulation of expression are those of obscenity, or at least obscenity as judged for children. In light of our disposition on vagueness grounds, we do not reach that issue.

appeal were not defined in terms of a tendency to produce an intense sexual stimulation, the statute would be extended beyond the basic concept of obscenity and raise issues beyond the scope of our project.

2. *Special Audience*—The proposed definition of prurient interest in paragraph (i) states that if material is designed for a special audience such as a deviant sexual group, then the appeal to the prurient interest is determined in light of the special sexual interest of that group. This concept of a variable prurient interest standard was recognized in *Mishkin v. New York*.⁷⁸ Most of the statutes examined do not include a specific provision which recognizes the special prurient interests of special audiences.⁷⁹ In light of *Mishkin* (where the statute interpreted did not contain such a provision), a court probably would accept the variable prurient interest concept as naturally incorporated in the basic function of the prurient interest standard. Nevertheless, a specific statutory provision is desirable. It would provide specific notice to the distributor of such materials without requiring an examination of the case law. It would also ensure that the variable prurient interest concept is appropriately limited in application by a specific statutory standard as to the discrete nature of the special audience. Finally, a statutory provision can emphasize, as does proposed paragraph (i), that even within that discrete group, the standard must be applied in terms of prurient appeal to the average person and not to the persons who may be most susceptible.⁸⁰

There is some variation among statutory provisions describing the variable prurient interest concept. The Illinois statute speaks in terms of material "designed for specially susceptible groups."⁸¹ This goes beyond *Mishkin*, which spoke of "deviant" sexual groups.⁸² A group may be "deviant" because its members have a different sexual interest than people generally, but this does not necessarily make those members more "susceptible" in the sense that it takes less to arouse their prurient interest. The California provision follows the language of *Mishkin* and refers to "deviant sexual groups."⁸³ The Detroit ordinance avoids any statutory characterization of particular groups as "deviant," but refers by two illustrations (homosexuals and sado-masochists) to groups having special sexual interests.⁸⁴ Proposed paragraph (i) combines the California and Detroit provisions, as it both describes the groups as deviant and offers two illustrations.

In determining whether material is designed for a special audience, paragraph (i) directs the trier of fact to consider the "character" of the

⁷⁸ 383 U.S. 502 (1966).

⁷⁹ See, e.g., FLA. STAT. ANN. § 847.012 (Supp. 1975); IOWA CODE ANN. §§ 725.1-.9 (Supp. 1975); N.Y. PENAL LAW §§ 235.20-.22 (McKinney Supp. 1975).

⁸⁰ See text accompanying note 136 *infra*.

⁸¹ ILL. ANN. STAT. ch. 38, § 11-21(c) (Smith-Hurd Supp. 1975). Cf. N.D. CENT. CODE § 12.1-27.1-01(4) (Special Supp. 1975).

⁸² 383 U.S. at 508-09.

⁸³ CAL. PENAL CODE § 313(a)(1) (West Supp. 1976).

⁸⁴ DETROIT, MICH., CODE § 39-1-18(12) (1974).

material. The California provision, on the other hand, directs attention to both the character of the material and "the circumstances of its dissemination, distribution or exhibition."⁸⁵ The California reference to the circumstances of distribution was viewed as unnecessary in a statute limited to the depiction of specific sexual conduct.⁸⁶ If, as discussed later,⁸⁷ the juvenile provision is limited to the depiction of such advanced sexual activity as coitus, sodomy, sado-masochistic abuse, and masturbation, the nature of the conduct depicted should be sufficient in itself to indicate that the material was aimed at a specific group. The circumstances of distribution are likely to provide needed additional evidence where the material depicts persons engaged in activities that might be innocuous on their face, but have a special meaning for a deviant group (such as posing in a certain costume).⁸⁸ However, a statute limited to the depiction of specified sexual conduct would not encompass the depiction of such potentially innocuous activity even if the depiction did appeal to the prurient interest of a deviant group.

F. Defining the Patent Offensiveness Element

The patent offensiveness element of the tripartite test was first recognized as a distinct aspect of the constitutional definition of obscenity in Justice Harlan's separate opinion in *Manual Enterprises v. Day*.⁸⁹

[W]e find lacking in these magazines an element which, no less than "prurient interest," is essential to a valid determination of obscenity under [18 U.S.C.] § 1461 . . . : These magazines cannot be deemed so offensive on their face as to affront current community standards of decency—a quality that we shall hereafter refer to as "patent offensiveness" or "indecency." Lacking that quality, the magazines cannot be deemed legally "obscene,"⁹⁰

Justice Harlan noted that the element of patent offensiveness had been included in the ALI definition of obscenity, which *Roth* described as not significantly different from the definition adopted in that case.

The thoughtful studies of the American Law Institute reflect the same twofold concept of obscenity. Its earlier draft of a Model Penal Code contains the following definition of "obscene": "A

⁸⁵ CAL. PENAL CODE § 313(a)(1) (West Supp. 1976).

⁸⁶ See part III *A infra*, for a discussion of the *Miller* requirement that the statutory coverage be limited to the depiction of specific sexual conduct. Although *Mishkin* spoke of obscene materials depicting "fetishism," 383 U.S. at 508, that description of encompassed materials must be read in light of the sexual conduct limitation of *Miller*.

⁸⁷ See text accompanying notes 276-80 *infra*.

⁸⁸ Defining sado-masochistic abuse presents considerable problems in this regard. The definition in proposed paragraph (j) is designed to reach only material which, on its face, clearly portrays such abuse. See part III *C infra*.

⁸⁹ 370 U.S. 478 (1962). Justice Harlan's opinion, joined by Justice Stewart, announced the judgment of the Court. Four Justices concurred in the judgment, but not in the opinion.

⁹⁰ *Id.* at 482.

thing is obscene if, considered as a whole, its predominant appeal is to prurient interest . . . and if it goes substantially beyond customary limits of candor in description or representation of such matters." A.L.I., Model Penal Code, Tent. Draft No. 6 (1957), § 207.10(2). (Emphasis added). The same organization's currently proposed definition reads: "Material is obscene if, considered as a whole, its predominant appeal is to prurient interest . . . and if *in addition* it goes substantially beyond customary limits of candor in describing or representing such matters." A.L.I., Model Penal Code, Proposed Official Draft (May 4, 1962), § 251.4(1). (Emphasis added).⁹¹

Opinions of individual Justices in subsequent cases sometimes described the element of patent offensiveness as exceeding customary limits of candor,⁹² and at other times described it as requiring that the material "affront contemporary community standards relating to the description or representation of sexual matters."⁹³ In *Miller v. California*, where the element was first accepted in an opinion of the Court, Chief Justice Burger simply noted that material was not obscene unless it depicted sexual conduct in a "patently offensive way."⁹⁴

The *Miller* opinion did not discuss the concept of patent offensiveness other than noting that patent offensiveness was to be determined by contemporary community standards. The trial court in *Miller* had instructed the jury that material is not obscene unless it "goes substantially beyond customary limits of candor and affronts contemporary community standards of decency" in the "State of California."⁹⁵ The Supreme Court considered at length the acceptability of using a statewide rather than a national community standard, but did not comment upon the remainder of the charge. Presumably, the Court also would have commented upon the trial judge's reference to "customary limits of candor" and "community standards of decency" if either of those aspects of the charge also raised any substantial constitutional questions. Similarly, since the Court in *Miller* discussed at length Justice Brennan's proposed version of the tripartite test in *Memoirs* and rejected one element thereof,⁹⁶ it apparently

⁹¹ *Id.* at 485-86. See also *State v. Hudson County News Co.*, 41 N.J. 247, 256, 196 A.2d 225, 229 (1963) (finding that the requirement of patent offensiveness was "inherent in the *Roth* opinion").

⁹² See, e.g., *Jacobellis v. Ohio*, 378 U.S. 184, 191 (1964) (separate opinion of Justice Brennan joined by Justice Goldberg).

⁹³ A Book Named "John Cleland's *Memoirs of a Woman of Pleasure*" v. Massachusetts, 383 U.S. 413, 418 (1966) (separate opinion by Justice Brennan joined by Chief Justice Warren and Justice Fortas). But see *Stewart, J.*, dissenting in *Ginzburg v. United States*, 383 U.S. 463, 499 (1966):

The Court there [in *Roth*] characterized obscenity as that which . . . goes substantially beyond customary limits of candor in description or representation . . . [of sex] . . . In *Manual Enterprises v. Day*, I joined Mr. Justice Harlan's opinion adding "patent indecency" as a further essential element. (emphasis added).

⁹⁴ 413 U.S. at 24.

⁹⁵ *Id.* at 31.

⁹⁶ The *Miller* majority rejected Justice Brennan's formulation of the social value element as requiring an affirmative showing that the material is "utterly without redeeming social value." See text accompanying note 111 *infra*.

had no objection to the *Memoirs*' formulation of patent offensiveness as "affront[ing] contemporary community standards relating to the description or representation of sexual matters."⁹⁷ Thus, *Miller* does not seem to prescribe any particular formulation of the patent offensiveness standard. Any formulation is acceptable constitutionally if it clearly requires that obscene material depict sexual conduct in a manner that goes beyond commonly accepted social conventions and thereby contributes to the depiction's presentation as "hard-core pornography."⁹⁸

State obscenity statutes vary in their description of the patent offensiveness element. Some follow the ALI language and require that the matter "goes substantially beyond customary limits of candor in description or representation" of sexual matters.⁹⁹ The Washington juvenile provision contains a *Memoirs* type standard: the material must be "patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters."¹⁰⁰ Several provisions follow *Miller* in simply noting that listed sexual conduct must be described "in a patently offensive way."¹⁰¹ Several juvenile statutes follow the New York provision applied in *Ginsberg*: the material must be "patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors."¹⁰² All of the foregoing provisions are consistent with the basic concept of patent offensiveness as described above, and should be constitutionally acceptable.

Proposed paragraph (h)(ii) is patterned after the definitions of patent offensiveness contained in the New York juvenile obscenity statute and

⁹⁷ 383 U.S. at 418.

⁹⁸ See part II *A supra*, for a discussion of the function of the various elements of the tripartite test. With respect to the flexibility allowed the states in defining patent offensiveness, consider the Court's similar treatment of the element of prurient appeal, discussed in note 65 *supra* and text accompanying notes 59-65 *supra*.

⁹⁹ See, e.g., CAL. PENAL CODE § 313(a) (West Supp. 1976); COLO. REV. STAT. ANN. § 18-7-101(1)(b) (1973) (also including reference to the adult community as to what is suitable for minors, see note 102 *infra*); ILL. ANN. STAT. ch. 38, § 11-21 (Smith-Hurd Supp. 1975).

¹⁰⁰ WASH. REV. STAT. § 968.050 (Supp. 1974).

¹⁰¹ See, e.g., KY. REV. STAT. ANN. § 531.010(3)(b) (Cum. Supp. 1974); W. VA. CODE ANN. § 61-8A-1(7)(b) (Supp. 1974); DETROIT, MICH., CODE § 39-1-18(11) (1974).

¹⁰² FLA. STAT. ANN. § 847.012(f)(2) (Supp. 1975); N.Y. PENAL LAW § 235.20(6)(b) (McKinney Supp. 1975); OHIO REV. CODE ANN. § 2907.01(E) (Page 1975). Hawaii includes a "customary limit of candor" standard in describing obscenity for adults, but does not use such a standard in its juvenile provision. Compare HAWAII REV. STAT. tit. 37, § 712-1210(5)(b) (Special Supp. 1972) with HAWAII REV. STAT. tit. 37, § 712-1210(6)(a) (Special Supp. 1972). The apparent assumption of the Hawaii Legislature is that material which both depicts the sexual conduct specified in its juvenile statute and appeals to the prurient interest of minors inevitably goes beyond the customary limits of candor for presentation to minors. *Miller* proceeded on the assumption that the erotic portrayal even of "ultimate sex acts" was not necessarily patently offensive under community standards for adults. 413 U.S. at 25, 27. While a stronger case may be made that, for minors, the depiction of ultimate sex acts is inevitably patently offensive, exceptions can be noted. See, e.g., text accompanying notes 258-59 *infra*. Moreover, the Hawaii provision, like the other state provisions examined, reaches depictions of nudity, which often will not be patently offensive for minors. See note 309 *infra* and text accompanying note 312 *infra*.

Justice Brennan's *Memoirs* opinion. The proposed paragraph requires that the sexually explicit matter "affront" contemporary community standards "as to what is suitable matter for minors." The ALI definition was rejected on the ground that the phrase "customary limits of candor" emphasizes only the "frankness" or "brazenness" of the presentation. Other characteristics, such as presentation in a salacious or leering manner, also may render the portrayal of sexual conduct so debasing as to be patently offensive under community standards.

We also rejected as potentially misleading the approach taken in several state provisions which simply note that sexually explicit matter must be presented in a "patently offensive way." If the statute fails to note that "offensiveness" is to be judged by the "suitability" or "acceptability" of the material from a community viewpoint, the phrase "patently offensive" might be taken as requiring that the material be repulsive to the average viewer. That view of the offensiveness standard has led some to question the consistency of requiring both offensiveness and prurient appeal.¹⁰³ Prurient appeal requires a tendency to cause sexual excitement, and while such excitement may be accompanied by a feeling of revulsion, many persons view it as primarily pleasurable.¹⁰⁴ A primary reaction of pleasure is hardly inconsistent, however, with a correct interpretation of the patent offensiveness standard. The role of patent offensiveness in characterizing obscenity as unprotected speech does not require that the material produce a strong negative reaction in the viewer. The material need "offend" only in the sense that it creates a quality of illicitness in viewing what one might find alluring, yet knows to be clearly contrary to the accepted mores of society. Indeed, the very tension created by this illicit quality often adds to the material's allure as matter designed primarily to titillate.¹⁰⁵

The proposed draft seeks to ensure that the "offensiveness" standard is viewed only in the narrower sense noted above. The standard is described simply as "affronting" the community standard as to the "suitability" of material for minors.¹⁰⁶ No reference is made to the term "offensive" since the violation of the community standard itself constitutes offensiveness. Similarly, the term "affront" encompasses the "patent" quality of the offensiveness standard since it requires a direct and open defiance of the community standard. The relevant community standard

¹⁰³ See Magrath, *The Obscenity Cases: Grapes of Roth*, 1966 SUP. CT. REV. 7, 15 n.43; Schwartz, *Morals Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669, 679 (1963) (both recognizing the claim of inconsistency by others). A similar claim of inconsistency has been raised against the ALI definition of prurient appeal. See text accompanying notes 67-72 *supra*.

¹⁰⁴ See note 71 and accompanying text *supra*.

¹⁰⁵ This attribute of patent offensiveness is viewed also as contributing to the limited communicative function of pornographic material that places such material outside the protection of the first amendment. See part II *A supra*. See also MODEL PENAL CODE § 207.10, Comment, at 30 (Tent. Draft No. 6, 1957).

¹⁰⁶ If thought desirable, the term "patently offensive" could be included in paragraph (h)(ii) by following the structure of the *Memoirs* statement: material is "patently offensive because it affronts community standards..."

is defined as that of "suitability," rather than "decency,"¹⁰⁷ to avoid any suggestion that the standard is based solely on moral judgments.¹⁰⁸ The community standard as to what materials are suitable for minors may be based upon judgments relating primarily to behavioral factors, such as the need to limit juveniles' sexual frustrations, as readily as upon standards of morality.¹⁰⁹

G. Defining the Social Value Element

In *Miller v. California*,¹¹⁰ a social value standard was first recognized in a majority opinion as an independent element of the tripartite test. *Miller* rejected Justice Brennan's suggestion in *Memoirs* that material must be "utterly without redeeming social value" to be classified as "obscene."¹¹¹ In holding that obscenity was not constitutionally protected speech, *Roth v. United States* characterized obscenity as having "such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the state's interest in order and morality."¹¹² This characterization, the *Miller* opinion noted, does not require that the state prove that a publication is unqualifiedly without any social value; it is sufficient that the publication, "taken as a whole, lacks serious literary, artistic, political or scientific value."¹¹³ If material depicts hardcore sexual conduct, appeals to the prurient interest, is patently offensive, and lacks "serious" social value, then it meets the *Roth* justification for refusing to classify obscenity as protected speech—that is, it performs such an insignificant function, if any, in the exposition of ideas as to be

¹⁰⁷ Compare Justice Harlan's description in *Manual Enterprises v. Day*, 370 U.S. 478, 482 (1962) (quoted in text accompanying note 90 *supra*).

¹⁰⁸ The term "suitability" also emphasizes that the proper test is community acceptance of a publication as appropriate for minors, which is not necessarily established by the publication's availability to minors in the community. See *United States v. Womack*, 509 F.2d 368, 375-80 (D.C. Cir. 1974); *United States v. One Reel of 35 mm Color Motion Picture Film*, 491 F.2d 956 (2d Cir. 1974); *Mathery v. State*, 55 Ala. App. 119, 313 So. 2d 547 (1975). Establishing the availability of similarly candid publications remains, however, a common method used by the defense to show that the challenged publication is not patently offensive. For a discussion of what constitutes a "similar" publication for this purpose, see *United States v. Womack*, *supra*. See also IOWA CODE ANN. § 725.7(2) (Cum. Pamphlet 1975) (specifically authorizing admission of expert testimony pertaining to "the degree of public acceptance" of material "of similar character").

¹⁰⁹ See the authorities cited in note 4 *supra*.

¹¹⁰ 413 U.S. 15 (1973).

¹¹¹ *Id.* at 21-23.

¹¹² 354 U.S. at 484-85 (emphasis added). The *Roth* reference is to a quote from *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942), describing "certain well-defined and narrowly limited classes of speech," including the "lewd and obscene," the "prevention and punishment of which have never been thought to raise any Constitutional problem."

¹¹³ 413 U.S. at 24. Although the Court referred to the lack of serious literary, artistic, political, or scientific value, the opinion makes clear that the material must lack all of these values. If it has serious value in one sphere, but not in another, it is still protected. See *id.* at 23.

"utterly without social importance" for first amendment purposes.¹¹⁴

Proposed paragraph (h) (iii) incorporates the *Miller* social value standard and adapts it to an audience of minors. The proposed paragraph largely quotes the *Miller* description of that standard: "taken as a whole," the matter must lack "serious literary, artistic, political and scientific value." This standard is not without ambiguity. The question has been raised, for example, as to whether the four values mentioned in *Miller*—literary, artistic, political, and scientific—"constitute an exhaustive catalogue."¹¹⁵ Judge Leventhal suggests that the list cannot rationally be viewed as exhaustive. The presence of other values also can establish that the material is not the "portrayal of hard-core sexual conduct *for its own sake*"¹¹⁶ which the tripartite standard seeks to identify. As an illustration of a potential addition to the four listed values, Judge Leventhal points to educational value, which might be found in a serious sex-education book.¹¹⁷ Certainly, the failure of *Miller* to mention educational value does not imply that the communication of ideas for a genuine educational purpose is not protected by the first amendment. It seems likely that education was not mentioned in *Miller* because education was viewed as an aspect of the four listed categories; sex education, for example, could be characterized as having scientific or even political value.¹¹⁸

Perhaps, as an initial matter, a reference to educational value should have been included in the *Miller* listing, but the issue now presented to a draftsman of obscenity legislation is somewhat different. Adding "educational value" to the statutory listing might contribute to an inappropriately narrow reading of the "political" and "scientific" categories. If scientific value does not include sex education, and a special reference to education therefore is required, what significance will be attached to the legislature's failure to add a reference to such subjects as "philosophical" value?¹¹⁹ If the four *Miller* categories are not themselves sufficiently elastic, it would be preferable to add the phrase "or other similar values," rather

¹¹⁴ See *Roth v. United States*, 354 U.S. 476, 484 (1957):

All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guarantees, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the first amendment is the rejection of obscenity as utterly without redeeming social importance.

¹¹⁵ Leventhal, *The 1973 Round of Obscenity-Decisions*, 59 A.B.A.J. 1261, 1264 (1973).

¹¹⁶ 413 U.S. at 35 (emphasis added). See also part II *A supra*.

¹¹⁷ See Leventhal, *supra* note 115, at 1264. See also Lockhart, *Escape from the Chill of Uncertainty: Explicit Sex and the First Amendment*, 9 GA. L. REV. 533, 555 (1975).

¹¹⁸ But see Lockhart, *supra* note 117, at 556 (arguing that such an interpretation "would require distortion of the meaning of the words to achieve the interpretation [of the Court's listing of values as nonexhaustive]").

¹¹⁹ See OBSCENITY COMMISSION REPORT, *supra* note 3, at 316: "As to the values which qualify as social values, presumably political, *philosophical*, literary, artistic, educational, scientific and other similar values are included." (emphasis added).

than add more specific categories.¹²⁰ While *Miller* rejected reliance upon "the ambiguous concept of 'social importance,'" ¹²¹ the addition of a catch-all reference, tied to the *Miller* listing, would not add considerably more ambiguity than is present in that listing already.

The *Miller* reference to a "serious" literary, artistic, political, or scientific value also has been criticized as ambiguous.¹²² While the term "serious" could, in the abstract, be viewed as excluding that which is humorous, any interpretation of the social value element as failing to encompass the comic side of literary or artistic expression would be entirely inconsistent with the underlying first amendment analysis of *Miller*.¹²³

A more significant concern is that a presentation may be viewed as lacking "serious" value because it does not have substantial literary, artistic, political, or scientific merit. Here again, the first amendment analysis of *Miller* should preclude such an interpretation. At the outset, the *Miller* opinion stressed the need to protect against "any infringement on *genuinely serious* literary, artistic, political, or scientific expression."¹²⁴ The opinion also quoted the statement in *Roth* that "all ideas having the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion," are within the protection of the first amendment.¹²⁵ At another point, the opinion noted that regulation of obscenity did not invite exercise of "the harsh hand of censorship of ideas—good or bad, sound or unsound."¹²⁶ These statements and others indicate that the social value element is directed only at determining whether the material presents ideas, and not at evaluation of the ideas presented. Thus, the social value element, unlike the patent offensiveness element, is not judged according to the contemporary community standards. Value exists in the expression of ideas without regard to the community's evaluation of those ideas.¹²⁷ The reference to a "serious" value is necessary only to ensure that the communication of ideas is a basic aspect of the work.¹²⁸ While obscene material seeks essen-

¹²⁰ See Lockhart, *supra* note 117, at 555 (describing *Miller's* failure to include "some general expression such as 'other social value'" as a "critical deficiency in the opinion"). Compare UTAH CODE ANN. § 76-10-1201(11)(iii) (Supp. 1975) ("serious value includes *only* serious literary, artistic, political or scientific value for minors") (emphasis added).

¹²¹ 413 U.S. at 25 n.7.

¹²² See Hunsaker, *The 1973 Obscenity-Pornography Decisions*, 11 SAN DIEGO L. REV. 906, 914 (1974).

¹²³ See Leventhal, *supra* note 115, at 1264-65.

¹²⁴ 413 U.S. at 23 (emphasis added).

¹²⁵ *Id.* at 20 (quoting 354 U.S. at 484).

¹²⁶ *Id.* at 35-36.

¹²⁷ See *id.* at 34; Lockhart, *supra* note 117, at 553. Arguably, the social value element should be stated in terms of literary, artistic, political, or scientific "ideas" rather than "values." See, e.g., the discussion in *Miller*, 413 U.S. at 34-35. However, with reference to artistic presentations, the term "value" might be more appropriate. See *Ginzburg v. United States*, 383 U.S. 463, 499 n.3 (1966) (Stewart, J., dissenting).

¹²⁸ Cf. MODEL PENAL CODE § 207.10, Comment, at 42-43 (Tent. Draft No. 6, 1957) (explaining the "predominant appeal" requirement). The Illinois juvenile provision, ILL. ANN. STAT. ch. 38, § 11-21(b)(1) (Smith-Hurd Supp. 1975), requires

tially to stimulate and exploit the "emotional tensions arising from the conflict between social convention and the individual's sex drive,"¹²⁹ it may be presented in a superficial manner as art, literature, or science. Just as a serious novel should not be judged obscene because it contains an occasional erotic passage, basically pornographic material should not claim first amendment protection because of a veneer portraying some artistic or literary objective.¹³⁰ The requirement of a "serious" value supplements the requirement that the matter be viewed "as a whole" in ensuring that the basic function of the tripartite standard is served. While other terms such as "true" or "meaningful" could be substituted for "serious," they are not likely to be more precise in conveying the thrust of the social value standard.¹³¹ Whatever ambiguity exists in the term "serious" can readily be cured only by an extended discussion that would be inappropriate in a statute. The legislation must rely on the premise that the serious social value element will be read in light of the *Miller* first amendment analysis.

H. Adaptation to Minors

1. *Age Variation*—Once the appropriate definition of each element of the tripartite test is determined, those definitions should be adapted to fit the application of the tripartite test to the dissemination of materials to juveniles. As Chief Justice Warren noted in *Jacobellis v. United States*:¹³²

[T]he use to which various materials are put—not just the words and pictures themselves—must be considered in determining whether or not the materials are obscene. A technical or legal treatise on pornography may well be inoffensive under most circumstances, but, at the same time, "obscene" in the extreme when sold or displayed to children.

A major issue presented in adapting the tripartite test to minors is whether the audience of minors should be treated as a general class or whether distinctions should be drawn between minors of different age

that "the redeeming social importance" of the material be "substantially less than its prurient appeal." *Miller's* use of the term "serious" clearly does not suggest a balancing of social value against prurient appeal and nothing in *Ginsberg* suggests such a balancing approach would be acceptable for minors.

¹²⁹ MODEL PENAL CODE § 207.10, Comment, at 30 (Tent. Draft No. 6, 1957).

¹³⁰ See *Dyke v. State*, 232 Ga. 817, 209 S.E.2d 166 (1974); *People v. Heller*, 33 N.Y.2d 314, 321, 307 N.E.2d 805, 809, 352 N.Y.S.2d 601, 606 (1973); Note, *Community Standards, Class Actions, and Obscenity Under Miller v. California*, 88 HARV. L. REV. 1838, 1855 (1975) ("'genuinely serious' [*Miller*, 413 U.S. at 23] suggests a criterion not of significance but of authenticity").

¹³¹ Compare Clor, *Obscenity and the First Amendment: Round Three*, 7 LOYOLA OF L.A.L. REV. 207, 211-13 (1974) (noting that more precise direction could be provided for distinguishing the "aesthetic experience promoted by works of art from the mere stimulation of elemental sensuality which is the work of pornography") with Lockhart, *supra* note 117, at 556 ("Whatever adjectives might be used for this purpose, whether 'serious' or 'genuine,' 'real,' or 'substantial,' the line that must be drawn calls for a subjective, judgmental decision in each case applied to particular material.").

¹³² 378 U.S. 184, 201 (1964) (Warren, C.J., dissenting).

levels. Most juvenile statutes apparently utilize the former approach. They simply provide that the element of prurient appeal, for example, should be measured in terms of the appeal of the particular material to the prurient interest "of minors."¹³³ The Illinois juvenile statute, on the other hand, provides that prurient appeal shall be judged in terms of the prurient interest of minors "of the same general age of the [minor] to whom such material was offered, distributed, sent or exhibited."¹³⁴ A similar formulation is utilized in the Colorado provision and the model legislation proposed by Obscenity Commission members Hill and Link.¹³⁵

The Illinois formulation raises a fundamental issue as to the extent to which the characteristics of the individual juvenile recipient should be considered in applying the tripartite test. In resolving that issue, it is helpful to consider initially the treatment of the same problem in the context of dissemination of sexually oriented material to adults.

Adult obscenity provisions traditionally do not look to the individual recipient of allegedly obscene material. In part, this approach reflects the constitutional prohibition, established initially in *Butler v. Michigan*,¹³⁶ against restricting general access to sexually oriented materials according to the material's potential impact upon the most susceptible persons in the community. In *Butler*, the Court held that the state could not seek to shield youth from material potentially harmful only to them by barring general distribution of that material, as such legislation would "reduce the adult population . . . to reading only what is fit for children."¹³⁷ The same principle denies the state authority to keep from the adult community as a whole material that appeals to the prurient interest of only the most sensitive adults in the community.¹³⁸ Neither can it appropriately place upon the disseminator the task of determining which of his prospective purchasers, from the otherwise indistinguishable adult community, are most likely to fall within the especially sensitive category.

The refusal of adult obscenity provisions to look at the individual recipient is based on more, however, than the *Butler* prohibition against looking to the impact upon the most susceptible person. The Supreme Court has noted that material must be "judged by its impact on an average person, rather than a particularly susceptible or sensitive person—or in-

¹³³ See, e.g., FLA. STAT. ANN. § 847.012(1)(f)(1) (Supp. 1975); N.Y. PENAL LAW § 235.20(b)(6)(a) (McKinney Supp. 1975); UTAH CODE ANN. § 76-10-1201(11)(i) (Supp. 1975).

¹³⁴ ILL. ANN. STAT. ch. 38, § 11-21(c) (Smith-Hurd Supp. 1975).

¹³⁵ COLO. REV. STAT. ANN. § 318-7-101(8) (1973) provides that material "shall be judged with reference to the average minor in the age group for which the thing appears to be designed or to which it is made available." The Hill-Link proposal, see note 3 *supra*, requires that prurient appeal be judged "with reference to an average person in the community of the actual age of the minor to whom such material is distributed, or exhibited." HILL-LINK MODEL STATUTE, *supra* note 3, § 1(6).

¹³⁶ 352 U.S. 380 (1957).

¹³⁷ *Id.* at 383.

¹³⁸ See *Roth v. United States*, 354 U.S. 476, 489 (1957).

deed a totally insensitive one."¹³⁹ Thus, if the material appeals to the prurient interest of the average adult in the community, the disseminator may not raise as a defense that the only sale established by the prosecution was to an individual who was totally oblivious to the ordinary appeal of the material.¹⁴⁰ The refusal to recognize such a defense follows, in part, from the role of the tripartite standard as a test to determine whether sexually oriented material is protected by the first amendment. That determination does not rest so much on the potential harmful consequences of the material upon the audience as it does upon whether the characteristics of the material are such that it might make a contribution to the exposition of ideas.¹⁴¹ The underlying premise of *Miller* is that "hard-core pornography" does not serve the expository function protected by the first amendment and that the tripartite test will adequately ensure that the state reaches only such "obscene, pornographic material."¹⁴² In determining whether material portraying sexual conduct has the pornographic objective of sexual arousal "for its own sake,"¹⁴³ it is appropriate to judge the material in terms of its appeal to the general population to whom it is offered, as measured by the average person in the audience. If the material does have a pornographic objective, it is not likely to have significant expository value for the average member or any other member of that audience. Even though hard-core pornographic material happens not to appeal to the prurient interest of a particularly nonsusceptible member of the audience, its basic character ensures that it will not have significantly more value in the exposition of ideas for him than for the person with the average prurient interest.¹⁴⁴

The refusal to recognize a defense based upon the insensitivity of the particular recipient also is justified by the state's objective in restricting the dissemination of obscenity. Adult obscenity provisions generally are justified on the ground that obscenity has a harmful impact upon the audience in shaping their attitudes towards sex and thereby encouraging inappropriate (although not necessarily criminal) conduct.¹⁴⁵ Preventing

¹³⁹ *Miller v. California*, 413 U.S. 15, 33 (1973) (emphasis added); *Hamling v. United States*, 418 U.S. 87, 107 (1974).

¹⁴⁰ This assumes that the material was not knowingly distributed to a person for scientific use. See *United States v. 31 Photographs*, 156 F. Supp. 350 (S.D.N.Y. 1957); Gerber, *A Suggested Solution to the Riddle of Obscenity*, 112 U. PA. L. REV. 834, 847-52 (1964).

¹⁴¹ See part II *A supra*.

¹⁴² See 413 U.S. at 19 n.2, 34-35.

¹⁴³ *Id.* at 35.

¹⁴⁴ This again assumes that the material is not distributed for scientific use. See note 140 *supra*.

¹⁴⁵ See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57-63 (1973); *Roth v. United States*, 354 U.S. 476, 501-02 (1957) (Harlan, J., concurring); OBSCENITY COMMISSION REPORT, *supra* note 3, at 390-413. Arguably, the state's interest in prohibiting the public dissemination of obscenity need not be tied to the impact of the obscenity upon the audience but may rest upon a general concern for communal decency and morality, without regard to the influence of obscenity upon audience behavior. See Henkin, *Morals and the Constitution, The Sin of Obscenity*, 63 COLUM. L. REV. 391 (1963). This basis for obscenity legislation appears to have been recognized, in part, in *Paris Adult Theatre I v. Slaton*, *supra*, at 58-59. Juvenile obscenity

that harmful impact may require that a disseminator be held liable even though the distribution in the particular case was to a person who was totally oblivious to the impact of obscene materials. Obscene materials ordinarily are offered to all members of the adult community. The fact that a particular recipient is especially insensitive to such material does not relieve the distributor of his liability for making the material available to other adults also.¹⁴⁶ While dealers may sometimes screen their audience, through advance warning as to content, in order to exclude those persons most likely to be repelled by the material, they certainly do not attempt to screen out persons for whom the material might be most arousing. Aside from dissemination to scientists or educators for professional use, the pornographic nature of the material puts the disseminator on notice that the audience will consist largely of persons for whom the material principally has a prurient appeal.

When material is sold to minors, the above arguments similarly justify a refusal to consider the personal background of the particular juvenile recipient. In determining whether the material is an essential part of the exposition of ideas, the appropriate reference again should be to the average person in the recipient's group, rather than to the particularly sensitive or insensitive recipient. In seeking to preclude the harm resulting from the obscenity, liability again is based upon the disseminator's willingness to distribute to persons in the recipient's group, rather than upon the personal characteristics of the individual recipient.

A special case may be made, however, for considering the recipient's age, as is done in the Illinois statute.¹⁴⁷ In determining whether material falls within the category of protected speech, the general age category of the recipient is a peculiarly relevant factor. Unlike material that falls within the tripartite test as applied to adults, material that meets the test for minors cannot be categorized as generally having no significant value in the exposition of ideas. The variable obscenity concept accepted in *Ginsberg* recognizes that material may not serve the function of protected speech as to the average minor, yet clearly serve that function as to the average adult. Similarly, material that might not have any value in the exposition of ideas for the average twelve-year-old may clearly serve that function for the sixteen-year-old. What appeals to the prurient interest, is patently offensive, or lacks serious social value obviously may vary with the general age grouping of the juveniles involved. The court has recognized that the elements of prurient interest may vary with the ex-

provisions, however, generally have not been supported on grounds of public morality alone, but have been based upon the potential harmful impact of obscenity upon minors receiving such material and the parental interest in controlling access of their children to such potentially harmful materials. See, e.g., Fagan, *Obscenity Controls and Minors*, 10 CATHOLIC LAW. 270, 274-78 (1964); Schwartz, *Morals Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669, 681 (1963).

¹⁴⁶ In utilizing the standards of the average person in the community, the trial court in *Roth* noted that this standard was designed to "test the effect of the book, picture or publication . . . upon all those whom it is likely to reach." 354 U.S. at 490.

¹⁴⁷ See note 134 and accompanying text *supra*.

perience of the general adult population in a particular community or with a particular deviant group in that community which constitutes a special audience. For juveniles, the age grouping may be an equally significant element in defining the appropriate class. Indeed, failure to consider the age of the audience may be contrary to the principle of *Butler*. Just as the state cannot keep material from adults because it is obscene for minors, perhaps it cannot keep from sixteen-year-olds material that would be obscene only for twelve-year-olds.

Consideration of the age group of the recipient also is consistent with achieving the state's objective of preventing the harm that flows from obscenity. If material obscene only for a twelve-year-old is sold to a sixteen-year-old, no harm will flow from that sale.¹⁴⁸ Moreover, unlike the situation presented in the sale to a particularly insensitive adult, we cannot readily assume that the seller here would sell to a more susceptible person. Age is a characteristic of the recipient with which the seller will be familiar. A dealer who sells to an older teenager is not suggesting thereby that he necessarily would sell the same item to a twelve-year-old.

Thus, the Illinois approach,¹⁴⁹ although it looks to one characteristic of the recipient, is not inconsistent with the rationale underlying the usual refusal to look at the recipient's personal characteristics. Indeed, as noted above, there may be situations where failure to judge material in light of the age group of the recipient imposes an unconstitutional burden on the access of minors in the highest age bracket to material protected as to them. The Illinois formulation may not be necessary, however, to avoid this constitutional difficulty while adequately serving the state's enforcement interests. Under the more common formulation, the statute requires that the material in question fall within the tripartite standard as applied "to minors."¹⁵⁰ This reference is to minors as a group and presumably requires a jury determination that the material would have prurient appeal, lack social value, and be considered patently offensive for the typical minor at each level of the age range to which the material is likely to be distributed (that is, excluding the most youthful). Thus, no matter what the age of the particular recipient, under this formulation the prosecution apparently must show that the material falls within the tripartite standard for the typical youth at the highest age level within the definition of "minor." If the prosecution makes such a showing, the defendant is not placed at a disadvantage if the particular recipient was younger since the tripartite test presumably encompasses its narrowest

¹⁴⁸ Consideration is not given to the possibility that the purchaser subsequently might give the material to a more youthful viewer. *But cf.* OBSCENITY COMMISSION REPORT, *supra* note 3, at 401 (Hill-Link minority statement); *Kaplan v. California*, 413 U.S. 115, 120 (1973); *United States v. Orito*, 413 U.S. 139, 143-44 (1973) (general obscenity statute supported, in part, on a similar theory). Determining what constitutes "obscenity" in light of subsequent distributions to younger persons would be inconsistent with the Court's analysis in *Butler v. Michigan*, 352 U.S. 380 (1957). See notes 135-38 and accompanying text *supra*.

¹⁴⁹ See note 134 and accompanying text *supra*.

¹⁵⁰ See note 133 and accompanying text *supra*.

range of material at the highest age level.¹⁵¹ Material that fails to communicate ideas for sixteen-year-olds, who should have a broader range of understanding and greater experience with sexually oriented materials, presumably would also not be entitled to first amendment protection when distributed to a twelve-year-old.

Concentrating on the highest age level may place the prosecution at a disadvantage where the particular distribution is to a twelve-year-old and the state nevertheless must show that the material would have prurient appeal and lack social value for a sixteen-year-old. Such situations would appear to be unusual, however. Most often prosecution is brought where the material would be obscene for a sixteen-year-old as readily as for a twelve-year-old. Providing for the exceptional case might not be worth the complications that would be presented in tying the proof in every case to the age level of the recipient. Proposed paragraph (h) is drafted to offer alternative treatment of the recipient's age. One alternative provides that each element of the tripartite test be determined with reference to the average youth at the highest age level for minors. The other alternative refers to the average youth within the general age grouping of the particular recipient. Both alternatives extend to all elements of the tripartite test. If the Illinois formulation is worth the effort, the reference to the age range of the particular recipient logically should extend to the determination of patent offensiveness and social value as well as prurient interest (the only element of the tripartite test adapted to the recipient's age under the Illinois statute).

2. *Adult Viewpoint*—State juvenile provisions are fairly uniform in their adaptation of the prurient appeal and social value standards to an audience of minors.¹⁵² In each instance, the standard is applied in relation to the experience and capacity of minors.¹⁵³ Proposed paragraph (h) fol-

¹⁵¹ It might be argued that material appealing to a sixteen-year-old would not appeal to the prurient interest of a more youthful recipient, such as one of ten or eleven, since such minors do not yearn for sexual participation. As discussed in text accompanying note 75 *supra*, however, sexual stimulation may take various forms and the interest of such youthful minors in obtaining and examining sexually explicit material may reflect in itself the capacity of such material to sexually stimulate minors of that age.

¹⁵² The West Virginia juvenile obscenity statute refers to the interests of the "average individual," rather than the interests of "minors," in describing the tripartite test. W. VA. CODE ANN. § 61-8A-1(6) (Supp. 1974). However, since the statute applies only to dissemination to minors, the phrase "average individual" may be read as referring to the "average minor." See also VA. CODE ANN. § 18.2-390(6) (1975). But see KY. REV. STAT. ANN. § 531.010(3) (Cum. Supp. 1974), described in note 321 *infra*.

¹⁵³ See, e.g., COLO. REV. STAT. ANN. § 18-7-101(1) (1973); FLA. STAT. ANN. § 847.012 (Supp. 1975); N.Y. PENAL LAW § 235.20(6) (McKinney Supp. 1975). A few of the state provisions examined do not refer to minors in describing both the prurient appeal and social value elements. Thus, WASH. REV. CODE § 96B.050 (Supp. 1974) refers to appeal to "the prurient interest of minors," but does not refer specifically to minors when it describes the social value element as "utterly without redeeming social value" (following *Memoirs*). CAL. PENAL CODE § 313(a) (West Supp. 1976), on the other hand, describes the social value element as "utterly without redeeming social importance for minors" and the prurient appeal element as a "predominant appeal... which to the average person... is to prurient interest." See also IOWA

lows this approach. The prurient appeal element is stated as requiring appeal to the prurient interest "of minors," and the social value standard is stated as requiring a lack of serious literary, artistic, political, and scientific value "for minors."

The states vary in their treatment of the adaptation of the patent offensiveness element to minors. Many jurisdictions follow the New York provision upheld in *Ginsberg*, which judged patent offensiveness according to the "prevailing standard in the adult community . . . [as] to what is suitable material for minors."¹⁵⁴ Other jurisdictions make no reference to the adaptation of the patent offensiveness element.¹⁵⁵ In these jurisdictions, patent offensiveness conceivably could be judged in terms of the standards of the juvenile community itself, although such an interpretation is unlikely.¹⁵⁶ Proposed paragraph (h)(ii) follows the New York approach. Several factors favor looking to the views of the adult community, rather than the juvenile community, in determining whether material is patently offensive for youth. First, it is not clear that a separable standard is likely to exist among minors as to suitable depictions of sex for persons of their age. It might well be that, insofar as minors have reflected on this matter, they have largely absorbed the standards of the adult community.

Second, assuming that a separate standard among youth might exist,

CODE ANN. § 725.1(1) (Cum. Pamphlet 1975) (refers to minors in describing patent offensiveness and prurient appeal, but not social value). The lack of reference to minors in the description of the prurient appeal element, as in the California provision, probably is a product of drafting style, rather than a decision not to adapt that element to the interests of minors. Cf. note 152 *supra*. On the other hand, the Iowa provision, for one, appears to reflect a policy decision against adapting the social value standard to minors. The practical significance of adapting to minors the elements of prurient appeal and patent offensiveness, but not the social value element, is uncertain. Conceivably, this approach could affect the outcome where the material in question contains an oblique message that only an adult could appreciate. Cf. text accompanying note 132 *supra*. The Iowa approach also may give the court greater leeway in rejecting a jury finding of obscenity as to minors. See note 50 *supra*.

¹⁵⁴ Law of June 7, 1965, ch. 327, § 484-h(1)(f)(ii), [1965] N.Y. Laws 481, as amended N.Y. PENAL LAW § 235.20(6)(c) (McKinney Supp. 1975). See, e.g., FLA. STAT. ANN. § 847.012 (Supp. 1975); OHIO REV. CODE ANN. § 2907.01(E) (Page 1975); WIS. STAT. ANN. § 944.25(F) (Supp. 1975).

¹⁵⁵ See, e.g., ILL. ANN. STAT. ch. 38, § 11-21(b) (Smith-Hurd Supp. 1975); WASH. REV. CODE § 9.68.050 (Supp. 1974); DETROIT, MICH., CODE § 39-1-18(11) (1974). See also the provisions cited in note 152 *supra*. The failure to refer to the adaptation of the patent offensiveness element seems to be a product of drafting style rather than a policy decision that the patent offensiveness element should not be adapted to minors. There is no apparent reason why the element of patent offensiveness should not be modified for minors along with the prurient appeal element, especially since the two elements are closely connected. Including a separate reference to minors probably was considered unnecessary on the ground that the standard for judging patent offensiveness—community standards relating to "suitable descriptions"—adjusts automatically to the nature of the audience.

¹⁵⁶ Assuming an adjustment for the age of the audience automatically is made by the jury in applying community standards, see note 155 *supra*, a jury of adults is more likely to judge patent offensiveness in terms of an adult standard as to appropriate matter for youth rather than in terms of any separate standard of the juvenile community itself. See text accompanying notes 157-60 *infra*.

establishing that standard may introduce unnecessary complexity in the trial of obscenity cases. While prurient appeal and lack of social value often would be apparent from the material itself,¹⁵⁷ patent offensiveness might not be so readily established if that element is judged in terms of the separate standards of the juvenile community. Arguably, the standards held by minors themselves cannot be determined solely from the scope of the sexually oriented material that jurors know to be available to minors; the access of minors to sexually oriented materials is largely controlled by adults, and the defense can contend that current juvenile viewing habits do not necessarily reflect the viewpoint of the juvenile community as to what they should be allowed to see. Although the prosecution might not be constitutionally compelled to introduce expert testimony on the youth-standard issue,¹⁵⁸ the defense certainly could use the issue as a justification for introducing expert testimony on that point.¹⁵⁹ Jurors also might have more difficulty in distinguishing the separate roles of the juvenile community's experience in determining prurient appeal and patent offensiveness.¹⁶⁰

Finally, even if requiring proof of a separate youth-standard would not add to the complexity of the proceeding, the standard of adults as to what is suitable for youth is still preferable because it more adequately serves the function of the patent offensiveness test. As already noted, affronts to community standards in the depiction of sexual conduct contribute to pornographic quality by exploiting the allure of the forbidden. The "very fact of social disapproval [is made] a source of added excitement and attraction."¹⁶¹ The contribution of patent offensiveness to pornographic quality thus is likely to be far greater because the material offends the concepts of suitability held in the adult community, which generally sets the standard for youth, than because it violates any separate standards set by youth themselves. Looking to the adult community standard is also consistent with a basic purpose of the proposed statute—to support parental interest in restricting dissemination of potentially harmful matter to their children.

¹⁵⁷ See note 158 *infra*.

¹⁵⁸ The Court has held that, with respect to proof of obscenity for adults, the "prosecution need not as a matter of constitutional law produce 'expert witnesses' to testify as to . . . obscenity." *Hamling v. United States*, 418 U.S. 87, 104 (1974). Having examined the materials disseminated, the jurors may draw on their own knowledge of what appeals to the prurient interest of the average adult in their community, or is patently offensive to the standards of their community. The material itself also may amply illustrate to the jurors the total lack of literary, artistic, political, or social value. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 56 n.6 (1973). Similarly, in a juvenile obscenity prosecution, the jury's general familiarity with youth should permit it to apply the tripartite standard without expert testimony, see note 46 *supra*, although application of a youth-community standard might strain the familiarity.

¹⁵⁹ The Court has noted that "[t]he defense should be free to introduce appropriate expert testimony." *Kaplan v. California*, 413 U.S. 115, 121 (1973).

¹⁶⁰ In determining prurient appeal, jurors would consider the experience of minors in the community with sexually oriented material as that experience is known to the jurors. See note 168 and accompanying text *infra*.

¹⁶¹ MODEL PENAL CODE § 207.10, Comment, at 30 (Tent. Draft No. 6, 1957).

I. Community Standards

1. *Application*—Under *Miller*, two elements of the tripartite test—patent offensiveness and appeal to the prurient interest—are to be judged in terms of “contemporary community standards.”¹⁶² The usefulness of community standards in determining patent offensiveness clearly follows from the function of the patent offensiveness element. The impact of patent offensiveness in contributing to the pornographic quality of material stems from the community judgment that the material goes beyond acceptable social standards governing the depiction of sexual activity. It is because the community has judged the material as “indecent” that it has the special quality of “forbidden fruit.”¹⁶³

The usefulness of community standards in determining prurient appeal is not nearly so self-evident. Indeed, prior to *Miller*, it often was assumed that community standards were to be employed only in judging patent offensiveness. *Roth* referred to contemporary community standards in describing the prurient interest test, but that reference appeared to be aimed at incorporating the element of patent offensiveness within the prurient interest standard.¹⁶⁴ When patent offensiveness was subsequently recognized as a distinct element of the constitutional definition of obscenity, the reference to community standards was dropped from the statement of the prurient interest element. Thus, Justice Brennan’s statement of the tripartite test in *Memoirs* referred to community standards only in describing the element of patent offensiveness.¹⁶⁵ Several state juvenile statutes, following *Memoirs*, did not refer to community standards in describing the element of prurient appeal.¹⁶⁶

Miller returned to the language of *Roth*, including the *Roth* reference to community standards, in describing the prurient interest element. The issue to be decided by the jury, the Court noted, is “whether the ‘average person, applying contemporary community standards,’ would find that

¹⁶² 413 U.S. at 24, 30. In its initial description of the tripartite test, the Court did not refer to community standards in describing the patent offensiveness element. See text accompanying note 26 *supra*. However, in its later discussion of community standards, the Court clearly indicated that patent offensiveness is to be judged according to such standards. See 413 U.S. at 30. See also text accompanying notes 95-96 *supra*.

The *Miller* opinion also clearly indicates that the lack of serious literary, artistic, political, and scientific value is *not* to be determined by local community standards. See Lockhart, *supra* note 117, at 553-54. The social value standard is the ultimate test for the presence of a significant expository function, see part II *A supra*, and accordingly must be judged by universally accepted standards as to what constitutes the communication of ideas, without regard to the community’s evaluation of those ideas. See text accompanying notes 126-28 *supra*; Lockhart, *supra* note 117, at 554-55; Clor, *supra* note 131, at 217-18.

¹⁶³ See part II *A supra* and text accompanying notes 104-05 *supra*.

¹⁶⁴ 354 U.S. at 489. See note 91 *supra* and text accompanying notes 89-91 *supra*.

¹⁶⁵ 383 U.S. at 418.

¹⁶⁶ See, e.g., HAWAII REV. STAT. tit. 37, § 712-1210(5) (Special Supp. 1972); N.D. CENT. CODE § 12.1-27.1-.02(2) (Special Supp. 1975); WASH. REV. STAT. § 9.68.050 (Supp. 1974). The New York statute upheld in *Ginsberg* also referred to community standards only in its statement of the patent offensiveness element. See *Ginsberg v. New York*, 390 U.S. 629, 646 (1968).

the work . . . appeals to the prurient interest."¹⁶⁷ This statement appears to direct the jury to look to some community judgment as to the type of material likely to have strong erotic appeal for the average person. It is not clear, however, how this community judgment contributes to the determination of prurient appeal. Unlike the patent offensiveness element, the ultimate issue here is not how the community views the matter in question, but whether the matter would, in fact, have a certain impact upon the average person. Of course, the reaction of the average person is molded to some extent by community judgments, particularly as they control probable prior experience with sexually oriented material.¹⁶⁸ The Court's specific reference to community standards might suggest some further community role, however, since the basic directive that the material be judged by its impact upon the average person should itself automatically incorporate any community contribution to that person's experiences. Nevertheless, the Court's discussion of community standards, in both *Miller* and the later decision in *Hamling*, indicates that the reference to community standards was not intended to give the community judgment a unique role beyond that which it ordinarily would play in any determination of the average person's reactions. Thus, the Court noted that the primary function of its reference to community standards was to assure that the juror looks to the impact of the material upon the average person, not to the juror's personal reaction.¹⁶⁹ The juror must, in other words, look to the community experience with sexually oriented materials, not to the juror's personal experience. This concept, we believe, can be stated more clearly by substituting for the reference to community standards a directive that prurient appeal be determined in the light of the experience of average minors in the community, and paragraph (h)(i) uses that formulation.

2. *Geographic Scope*—Prior to *Miller*, considerable uncertainty existed as to the appropriate geographic scope of the community which was to serve as the source of "contemporary community standards." Those Justices who had spoken on the issue were divided as to whether the states had leeway to apply "local" community standards or were required to look to a single national standard.¹⁷⁰ In *Miller* and two later rulings,

¹⁶⁷ 413 U.S. at 24 (quoting in part from *Roth*). See text accompanying note 26 *supra*.

¹⁶⁸ Thus, to some extent, general community acceptance of a certain type of sexually explicit material suggests that the average person might be more familiar with such material and the material therefore might be less likely to arouse intense sexual excitement. Cf. OBSCENITY COMMISSION REPORT, *supra* note 3, at 177-82.

¹⁶⁹ See *Miller v. California*, 413 U.S. 15, 33 (1973); *Hamling v. United States*, 418 U.S. 87, 105-06 (1974), quoted in text accompanying note 176 *infra*. See also note 174 *infra*. Cf. *United States v. Treatman*, 524 F.2d 320, 323 (8th Cir. 1975) ("prurient interest of the average adult must be measured by the synthesis of the entire community," and it is reversible error where the jury directions leave the impression that it is sufficient that the material need appeal to only "some of the average people" in the community).

¹⁷⁰ See 413 U.S. at 32-34 (collecting opinions).

Jenkins v. Georgia,¹⁷¹ and *Hamling v. United States*,¹⁷² the Court settled the question. Those opinions hold that the state is not constitutionally required to apply a national standard. The three opinions do not clearly specify all of the different geographic areas that might appropriately serve as the source of community standards, but at least three geographic areas appear to be constitutionally acceptable: (1) the state as a whole; (2) the vicinage from which the jury is selected;¹⁷³ and (3) a "local" community defined in terms of socio-economic factors.¹⁷⁴ *Miller* upheld jury instructions specifying the relevant community standard as that of the state as a whole.¹⁷⁵ *Hamling* and *Jenkins* both indicate that a jury charge utilizing the judicial district from which the jurors were selected would also be constitutionally acceptable. In *Hamling*, the Court indicated that a vicinage standard should be utilized under the federal obscenity statute:

The result of the *Miller* cases, therefore, as a matter of constitutional law and federal statutory construction, is to permit a juror sitting in obscenity cases to draw on knowledge of the community or vicinage from which he comes in deciding what conclusion "the average person, applying contemporary community standards" would reach in a given case. Since this case was tried in the Southern District of California, and presumably jurors from throughout that judicial district were available to serve on the panel which tried petitioners, it would be the standards of that "community" upon which the jurors would draw.¹⁷⁶

¹⁷¹ 418 U.S. 153 (1974).

¹⁷² 418 U.S. 87 (1974).

¹⁷³ It is assumed that prosecution is brought in the district of dissemination. *See United States v. Elkins*, 396 F. Supp. 314 (C.D. Cal. 1975) (where indictment was filed in Iowa charging conspiracy in Iowa to use the mails in disseminating obscene material, moving the trial to California, on a change of venue, was improper; contemporary community standards of the Northern District of Iowa were applicable and expert testimony on such standards "could not be a substitute for or eliminate the need for the knowledge of each juror which he or she could have drawn from the community of his residence"). *See also United States v. Miscellaneous Pornographic Magazines*, 400 F. Supp. 353 (N.D. Ill. 1975).

¹⁷⁴ Another alternative, use of a single national standard, is of questionable validity. *Hamling* upheld a conviction, under a federal obscenity statute, that was based upon a pre-*Miller* jury instruction including occasional references to a nationwide community standard. The Court noted that the federal obscenity statute, interpreted in light of *Miller*, did not authorize a nationwide standard, but the trial court's error in referring to a national standard did not require reversal since the "principal concern" in requiring reliance upon a community standard—assuring that the jurors look to a community viewpoint rather than their personal opinions—had been satisfied by the instruction below. In rejecting future use of a nationwide standard under the federal statute, the Court did not state that it would be unconstitutional for a state to use such a standard. However, certain comments in the majority opinion did suggest that a national standard might be subject to a successful challenge as unduly vague, at least where the jury charge emphasized the need to utilize a national viewpoint that might differ significantly from a local viewpoint. *See* 418 U.S. at 102-10. *Cf. United States v. Henson*, 513 F.2d 156 (9th Cir. 1975) (finding prejudicial error in instruction to apply a "national standard" where expert testimony indicated that a national standard allowed less sexual candor than a Southern California standard).

¹⁷⁵ 413 U.S. at 30-34.

¹⁷⁶ 418 U.S. at 105-06.

Jenkins relied upon a similar analysis in holding that a state court had not committed constitutional error in leaving the relevant community unspecified in jury instructions. The Court apparently assumed that the jurors, with the community left unspecified, would rely "on the understanding of the community from which they came."¹⁷⁷

In *Jenkins*, unlike *Hamling*, the Court did not identify the district from which the jury was selected. Thus, it did not seem concerned that the vicinage in a state proceeding might be considerably smaller than the federal judicial districts. The Court noted in *Jenkins* that *Miller* granted the states "considerable latitude" in determining the appropriate community.¹⁷⁸ In *Hamling*, it also noted that

a principal concern in requiring that a judgment be made on the basis of "contemporary community standards" is to assure that the material is judged neither on the basis of each juror's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group.¹⁷⁹

These statements, combined with the rulings in *Hamling* and *Jenkins*, suggest that reference to the standard of the vicinage would be acceptable even where the jury was drawn from a small community.

The Court's analysis of the role of the community standard in *Miller*, *Jenkins*, and *Hamling* also supports the constitutionality of using a "local community" standard, with the particular local community defined in each case according to socio-economic factors.¹⁸⁰ In some instances, such a community would be larger than the vicinage and in others smaller. Thus, where a metropolitan area included several cities, or even several counties, the entire area would be considered. On the other hand, where the judicial district included an entire county, a particular city therein, such as a college town in an otherwise rural community, might be sufficiently different from the rest of the county to constitute a separate local community. While the Court did not speak directly to such a "local" community concept, its acceptance of the *Jenkins* charge indicates that a socio-economic definition of the relevant community would be upheld. The jurors in

¹⁷⁷ See 418 U.S. at 157:

Miller held that it was constitutionally permissible to permit juries to rely on the understanding of the community from which they came as to contemporary community standards, and the States have considerable latitude in framing statutes under this element of the *Miller* decision. A State may choose to define an obscenity offense in terms of "contemporary community standards" as defined in *Miller* without further specification, as was done here, or it may choose to define the standards in more precise geographic terms, as was done by California in *Miller*.

See also *People v. Watson*, 26 Ill. App. 3d 1081, 325 N.E.2d 629 (1975), discussed in note 210 *infra*.

¹⁷⁸ 418 U.S. at 157.

¹⁷⁹ 418 U.S. at 107.

¹⁸⁰ This concept is sometimes described as utilizing a "metropolitan area" standard. See *Court v. State*, 63 Wis. 2d 570, 577, 217 N.W.2d 676, 679 (1974) (also referring to "integrated local communities"); *Davison v. State*, 288 So. 2d 483, 487 (Fla. 1973).

Jenkins, with the precise community left unspecified, were more likely to have looked to their local socio-economic community than to the particular governmental unit from which the jury was drawn.¹⁸¹ It also may be significant that the *Miller* opinion referred to particular cities as illustrations of separate communities,¹⁸² rather than to counties, which serve as the vicinage for jury selection in most parts of this country.¹⁸³

Most of the state juvenile provisions examined do not specify what community should be utilized in applying contemporary community standards.¹⁸⁴ These provisions generally were adopted before *Miller*, when there was doubt as to the leeway allowed to the state in designating the relevant community. Judicial decisions interpreting such statutes have utilized either a statewide standard, a "local" standard that is not further defined, or a local standard defined by reference to the vicinage.¹⁸⁵ Several states have statutory provisions defining the relevant community as either the vicinage or the entire state.¹⁸⁶

Proposed paragraph (h) contains two alternative references—one to the "local" community and the other to the "statewide" community. The use of the phrase "local community," in turn, presents three alternatives: (1) leave the term "local" undefined, thereby permitting reference in the individual case to the appropriate socio-economic community; (2) define "local" as the vicinage from which the jurors of the particular court are selected; or (3) define "local" with reference to the county or other district from which jurors are selected in courts of general jurisdiction in the

¹⁸¹ Arguably, the socio-economic definition of the relevant community is the most appropriate definition in light of the role of community standards in determining patent offensiveness. Insofar as patent offensiveness is significant because of the "forbidden" quality of material not accepted in the community, *see* text accompanying notes 104-05 *supra*, the reference of the audience will be to the community with which the audience is most familiar. That community presumably would be the metropolitan area from which the audience comes.

¹⁸² In referring to variations in standards among separate communities, *Miller* mentioned New York City and Las Vegas. 413 U.S. at 32.

¹⁸³ *See, e.g.*, UNIFORM JURY SELECTION AND SERVICE ACT §§ 4-6, 13 UNIF. LAW ANNOT. 328 (1975).

¹⁸⁴ *See, e.g.*, FLA. STAT. ANN. § 847.012(f)(2) (Supp. 1975); N.Y. PENAL LAW § 235.20(6)(b) (McKinney Supp. 1975); WIS. STAT. ANN. § 944.25 (Supp. 1975). The state provisions examined referring to a specific geographic community are cited in note 186 *infra*. *See also* DETROIT, MICH., CODE § 39-10-18(11)(A) (1974) ("contemporary community standards of the city of Detroit").

¹⁸⁵ *See, e.g.*, *Court v. State*, 63 Wis. 2d 570, 217 N.W.2d 676 (1974) (statewide standard); *People v. Heller*, 33 N.Y.2d 314, 307 N.E.2d 805, 352 N.Y.S.2d 601 (1973) (statewide standard); *Davison v. State*, 288 So. 2d 483 (Fla. 1973) (county, which was vicinage, was permissible); *Price v. Commonwealth*, 214 Va. 490, 201 S.E.2d 798 (1974) (local without further definition). *See also* Hunsaker, *supra* note 122, at 931-32; *Pierce v. State*, 292 Ala. 473, 482, 296 So. 2d 218, 226 (1974). Except for *Davison*, the decisions cited above interpret general obscenity statutes, but the courts presumably would adopt the same interpretation for juvenile provisions. In light of *Davison v. State*, *supra*, *see* *Rhodes v. State*, 283 So. 2d 351 (Fla. 1973).

¹⁸⁶ N.D. CENT. CODE § 12.1-27.1-02 (Special Supp. 1975) (statewide); UTAH CODE ANN. § 76-10-1202(12) (Supp. 1975) (vicinage); W. VA. CODE ANN. § 61-8A-1 (Supp. 1974) (statewide). *See also* S.D. COMPILED LAWS ANN. § 22-24-28 (Supp. 1974) (statewide); VT. STAT. ANN. tit. 13, § 2801 (1974) (statewide).

state. Thus, including the possible use of a statewide standard, four options are presented. Each has its own advantages and disadvantages.

In *Miller* the Court criticized use of a national community standard as "hypothetical" and "unascertainable." "[O]ur Nation is simply too big and too diverse," the Court noted, "to reasonably expect that such standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists."¹⁸⁷ A statewide standard would, in many states, not seem to be significantly less hypothetical.¹⁸⁸ Of course, any community standard will be a hypothetical construction to some degree. Yet a local community ordinarily should come much closer to a general consensus than the state as a whole.

The use of a statewide standard arguably also places greater emphasis on the use of expert testimony. As noted previously, the Supreme Court has held that obscenity need not be established by expert testimony.¹⁸⁹ Having examined the publication in issue, a juror "is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination."¹⁹⁰ Although the Court's opinions suggest that application of a statewide standard does not necessarily carry with it a constitutional requirement that expert witnesses be used,¹⁹¹ it is highly questionable that a local jury has the capacity to act as "cross-section of [a statewide community] with knowledge of its standards."¹⁹²

¹⁸⁷ 413 U.S. at 30.

¹⁸⁸ Variation between standards of urban and rural areas has been cited as a primary objection to adopting a statewide standard. See *Davison v. State*, 288 So. 2d 483, 487 (Fla. 1973); *Price v. Commonwealth*, 214 Va. 490, 491, 201 S.E.2d 798, 799 (1974). But see *Pierce v. State*, 292 Ala. 473, 482, 296 So. 2d 218, 226 (1974), concluding that "there is no real reason to believe that there is any great difference in the morals of the average citizen of the state depending upon where he happens to live." The court noted particularly "the mobility of modern society, coupled with the impact of mass media on contemporary thought."

¹⁸⁹ See note 158 and accompanying text *supra*.

¹⁹⁰ *Hamling v. United States*, 418 U.S. 87, 104 (1974).

¹⁹¹ Expert testimony was used in *Miller* (involving a statewide standard) and *Hamling* (involving a national standard). However, the *Hamling* discussion of a juror's capacity to determine obscenity without expert testimony was not tied to the use of a specific local standard. Although noting that the juror could rely on the views of the average person in his home community, the Court analogized the juror's capacity to that of the juror required to apply a "reasonable person" standard in tort law, which ordinarily is not tied to a particular geographic community. In *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), which reaffirmed that use of expert testimony is not a constitutional requirement, the Court did not suggest that its ruling was tied to the particular community standard that might be adopted by the Georgia Supreme Court. On remand, the Georgia court held a statewide standard applicable. *Paris Adult Theatre I v. Slaton*, 231 Ga. 312, 317-18, 201 S.E.2d 456, 460 (1973). *Paris* cited with approval the majority opinion in *United States v. Groner*, 479 F.2d 577 (5th Cir. 1973), which tied its rejection of an expert witness requirement to the application of a local standard. But *Paris* also cited Judge Clark's concurring opinion in *Groner*, which noted that the ruling below was acceptable without expert testimony though based on application of a national standard. 479 F.2d at 588.

¹⁹² Leventhal, *supra* note 115, at 1263. See also *Price v. Commonwealth*, 214 Va. 490, 201 S.E.2d 798 (1974); *Court v. State*, 63 Wis. 2d 570, 582-84, 217 N.W.2d

One advantage of a statewide standard is that it should reduce the burden upon the publisher and wholesale and mail-order distributors. A local standard, it is argued, places an almost intolerable burden upon such disseminators by requiring them to be aware of potentially different community standards throughout the state. The defendants advanced a similar complaint in *Miller* and *Hamling*, arguing that only a national standard was acceptable, but the Court rejected that position. The majority noted that application of diverse community standards throughout the country did not impose an unconstitutional burden on disseminators of sexually oriented material.¹⁹³ In the area of distribution to minors, there is, perhaps, less need to be concerned as to the burden imposed on publishers and wholesale and mail-order distributors. Sexually oriented material ordinarily is not developed for an audience of minors alone and publishers of most material accordingly look primarily to community standards for adults. Similarly, wholesale distributors are not concerned about standards for minors since they do not sell directly to minors and ordinarily would have no responsibility for such sales. While mail-order distributors may deal with some minors, they ordinarily do not sell to persons known to be minors.¹⁹⁴ The persons who sell directly to minors and who therefore are likely to be subject to criminal prosecution are the local distributors, who should be more familiar with local standards.

A statewide standard also may minimize, to some extent, the possibility that two persons distributing the same or similar material in different parts of the state would be treated differently as to criminal liability. Such disparity appears particularly unseemly in applying a state criminal statute.¹⁹⁵

676, 682-83 (1974) (Hanson, J., concurring). But see *Pierce v. State*, 292 Ala. 473, 482, 296 So. 2d 218, 226 (1974) (suggesting that the "homogeneity in the average citizens" of the state readily permits jurors selected from any particular locality to apply a statewide standard).

Pierce also suggests that utilization of a standard requiring greater reliance on expert testimony is preferable since an appellate court cannot effectively review a jury determination that is not based on extrinsic evidence. *Pierce* noted that, if a local standard were applied, with the jury "deemed to be the embodiment of the community, then proof of standards for the jury's sake would be superfluous" and an appellate court "could make no independent determination on the issue of obscenity *vel non*." *Id.* at 480, 296 So. 2d at 224. See also note 197 and accompanying text *infra*.

¹⁹³ 413 U.S. at 30-34; 418 U.S. at 104-09. See also the statement of Chief Justice Warren quoted with approval in *Hamling*, 418 U.S. at 106-07:

It is said that such a "community" approach may well result in material being proscribed as obscene in one community but not in another, and, in all probability, that is true. But communities throughout the Nation are in fact diverse, and it must be remembered that, in cases such as this one, the Court is confronted with the task of reconciling conflicting rights of the diverse communities within our society and of individuals.

Jacobellis v. Ohio, 378 U.S. 184, 200-01 (1964) (dissenting opinion).

¹⁹⁴ See notes 476-77 and accompanying text *infra*.

¹⁹⁵ See *Pierce v. State*, 292 Ala. 473, 480-81, 296 So. 2d 218, 224-25 (1974); *Court v. State*, 63 Wis. 2d 570, 217 N.W.2d 676 (1974); *People v. Nitke*, 45 App. Div. 2d 543, 359 N.Y.S.2d 934 (1974). But see *Miller v. California*, 413 U.S. 15, 26 n.9 (1973):

Arguably, it may be justified on the ground that the two cases are different because of the differences in the communities involved, but this contention, in turn, raises the issue as to whether such local variations should be incorporated in any criminal offense. Reliance upon local standards may be inconsistent with state policy governing local variation in criminal provisions.¹⁹⁶ Of course, even if a statewide standard is adopted, juries may tend to rely heavily on local experience (particularly if expert testimony is not presented). The appellate courts, however, could much more readily make their own independent determination of obscenity *vel non* where a statewide, as opposed to a local, standard governs.¹⁹⁷

As opposed to a statewide standard, the use of a local standard that looks to the vicinage has two major advantages. First, assuming that there is considerable variation in the standards of communities throughout the state,¹⁹⁸ the vicinage standard looks to a "community" that would play a more significant role than the state as a whole in contributing to the impact of material upon the average person in the audience.¹⁹⁹ Second, the vicinage standard permits the jury to operate most effectively by applying the standards of a community with which the jurors should be quite familiar.

On the other hand, like any local standard, a vicinage standard presents disadvantages inherent in diversity, such as an added element of uncertainty that must be borne by distributors. Moreover, use of the vicinage presents special difficulties that are peculiar to that standard as opposed to a more flexible local community standard. The districts from which jurors are selected often do not reflect distinct economic or social entities. In some instances, they do not even constitute very significant political entities. From the distributor's viewpoint, the community in which he sells is not the particular judicial district in which his establishment is located, but the surrounding geographical area from which his

The mere fact juries may reach different conclusions as to the same material does not mean that constitutional rights are abridged. As this Court observed in *Roth v. United States*, 354 U.S. at 492 n.30, "it is common experience that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system."

¹⁹⁶ In *Court v. State*, 63 Wis. 2d 570, 577, 217 N.W.2d 676, 679 (1974), the majority noted:

We find merit in the contention that any criminal statute of less than statewide effect may not be promulgated by the legislature. Such would be the case if less than state standards were applied. Since obscenity and First Amendment rights are matters of statewide concern [see Wis. CONST. art. I, § 3], one community may not deem noncriminal that which is criminal in another community.

See also *Study Report*, *supra* note 1, at 279 n.155. But cf. Note, *Concurrent State and Local Regulation of Marijuana*, 71 MICH. L. REV. 400 (1972).

¹⁹⁷ See authorities cited in note 50 *supra*; *Pierce v. State*, 292 Ala. 473, 296 So. 2d 218 (1974); Lockhart, *supra* note 117, at 551-52 (suggesting that a state appellate court is "in no position to disagree with a local jury's assessment of the 'contemporary community standards . . . except where a statewide standard has been prescribed'").

¹⁹⁸ See note 188 *supra*. But see *Pierce v. State*, 292 Ala. 473, 296 So. 2d 218 (1974), quoted in note 188 *supra*.

¹⁹⁹ See notes 181, 168 *supra* and text accompanying notes 104-05, 163 *supra*.

customers come. Often, as in a major metropolis, that surrounding area extends beyond the line of the judicial district. On the other hand, in counties containing quite distinct cities, the marketing area may not extend throughout the entire judicial district. Admittedly, the prevailing viewpoint of the district in which the dealer is located often will be quite similar to that of the total marketing area,²⁰⁰ and the difference in community standards then would not have a significant impact upon the jury's determination. Also, even though the community is defined as the vicinage, the trial court may let the distributor introduce evidence relating to practices in the surrounding metropolitan area, if such evidence would "assist the jurors."²⁰¹ Nevertheless, one can easily imagine situations in which such evidence would not be admitted, and the distinction between the standards of the vicinage and those of the marketing area conceivably could have some impact upon the jury's conclusion.

In some states, such as Michigan, the complex structure of the local judicial system presents special difficulty in using the vicinage as the relevant community. Thus, in Michigan, the issue of obscenity could be tried in various courts operating under different jury selection acts. Criminal prosecutions could be tried in Recorder's Court of Detroit, district courts, municipal courts, or circuit courts (via trial *de novo* on appeal from municipal courts). Civil actions would be brought in the circuit court. Each of these courts draws its jurors from a different judicial district. Thus, for example, material disseminated in the city of Ann Arbor would be judged by the standards of that city in a criminal prosecution in the district court, but by the standards of the county in a civil proceeding in the circuit court.²⁰² To eliminate such inconsistency, a single standard using the vicinage of the trial court of general jurisdiction could be adopted. In Michigan, this would be the county.²⁰³

We have already noted the advantages of leaving the local community standard undefined to permit reference to the appropriate socio-economic community in the particular case. This approach also presents various disadvantages, however. In each case, a new factual issue is added: a determination must be made as to the appropriate socio-economic community under the circumstances of the dissemination in that case. While under *Hamling* an error in defining the appropriate community is likely to be viewed as harmless error on appeal, the issue still may be hotly contested. Also, since the very concept of a socio-economic community is somewhat nebulous, a careful analysis of various factors would be needed in devel-

²⁰⁰ Cf. *United States v. Marks*, 520 F.2d 913, 918 (6th Cir. 1975) (where the theatre was located in Newport, Kentucky, the Eastern District of Kentucky was an acceptable community although it did not include Cincinnati, a part of the socio-economic community from which the audience came; the trial court did permit, however, testimony relating to community standards in the Cincinnati area).

²⁰¹ *Hamling v. United States*, 418 U.S. 87, 106 (1974). See also *United States v. Marks*, 520 F.2d 913 (6th Cir. 1975) (discussed in note 200 *supra*); *Kaplan v. California*, 413 U.S. 115 (1973).

²⁰² While the civil action would be tried without a jury, the same concept of the community of the vicinage would apply. See, e.g., cases cited in note 48 *supra*.

²⁰³ MICH. COMP. LAWS ANN. § 600.1306 (Supp. 1975).

oping an appropriate standard to be applied in individual cases.²⁰⁴ Judge Leventhal has raised the question whether there may be distinct socio-economic communities within a larger socio-economic community—whether, for example, “a college bookstore [is] governed by the standards of the college community or of the town or county in which the college is located.”²⁰⁵ Certainly, the concept of a community within a community could not be carried to the point where a few city blocks, largely devoted to porno-shops, would be viewed as a separate community.²⁰⁶ Special problems in defining a community also may be presented with respect to minors, who may be more limited in the geographic range of establishments to which they have access.²⁰⁷

If the local community standard is to be left undefined to permit a case-by-case determination, another issue that must be considered is whether that community is to be defined by the judge or the jury. Arguably, the determination of the relevant socio-economic community is as much a jury function as the determination of whether the publication was patently offensive under the standards of that community. Similar issues involving determination of relevant geographical communities are left to juries in analogous fields.²⁰⁸ If the relevant community is to be determined by the jury, it might be tempting for a trial court to simply send the issue to the jury without attempting to define the socio-economic community. *Jenkins* lends support to the constitutionality of such an approach.²⁰⁹ However, where the jury is given a standard that is not self-defining, it should also be given instructions as to the application of that standard. The jury should not be left “at sea” so that each juror could adopt his or her own view as to what the statute means.²¹⁰ We anticipate that, if a local community standard is utilized, appropriate jury instructions will be developed, perhaps as part of the state’s standard jury instructions.

²⁰⁴ Consider, by analogy, the treatment of the “locality rule” in the malpractice area and the “relevant market” requirement in the antitrust area. *See, e.g.*, *Pederson v. Domouchel*, 72 Wash. 2d 73, 431 P.2d 973 (1967); *E. J. Delaney Corp. v. Bonne Bell, Inc.*, [1975-1976 Transfer Binder] TRADE REG. REP. § 60, at 582 (10th Cir. 1975). The malpractice analogy was relied upon in adopting a local standard in *Price v. Commonwealth*, 214 Va. 490, 491-92, 201 S.E.2d 798, 799-800 (1974).

²⁰⁵ Leventhal, *supra* note 115, at 1263.

²⁰⁶ *See, e.g.*, *United States v. 392 Copies of Magazine Entitled “Exclusive,”* 253 F. Supp. 485, 496 (D. Md. 1966), *aff’d*, 373 F.2d 633 (4th Cir. 1967) (“The Block,” a Baltimore area containing various adult bookstores, did not furnish a separate community standard).

²⁰⁷ *See* proposed paragraph (h)(i) (determining prurient interest in light of the experience of minors in the community). *See also* text accompanying notes 167-68 *supra*.

²⁰⁸ *See* note 204 *supra*.

²⁰⁹ *See* text accompanying note 177 *supra*.

²¹⁰ *See* *People v. Watson*, 26 Ill. App. 3d 1081, 1083-84, 325 N.E.2d 629, 632 (1975) (where state had prescribed statewide standard, failure of trial judge to designate geographical area constituted “plain error” since jury should not be given “unbridled discretion to impose any type of standard they desire”).

J. "Considered as a Whole"

Judgments as to appeal to prurient interest and lack of serious literary, artistic, political, and scientific value must be made as to the material "considered as a whole."²¹¹ The "whole publication" standard, incorporated in proposed paragraphs (h)(i) and (h)(ii), follows *Miller*.²¹² The primary issues presented in the application of this standard relate to the integration of pornographic material in a work that largely consists of nonpornographic material. While an integrated publication must be considered as a whole, separate pornographic segments, unrelated to the whole, are not protected by their insertion into an otherwise innocuous publication.²¹³ Determining whether particular matter is or is not part of the whole may be quite difficult, but further statutory explanation of the whole publication standard is unlikely to provide substantial assistance in making that determination. Accordingly, the proposed statute, like those of other jurisdictions, does not go beyond a general statement that the matter be "considered as a whole."

K. The Role of Pandering

Proposed paragraph (h) provides that circumstances showing commercial exploitation of prurient appeal can be relied upon as probative evidence in determining whether challenged material falls within the tripartite test. This provision follows the Supreme Court's holding in *Ginzburg v. United States*.²¹⁴ The defendant in *Ginzburg* was charged with mailing obscene material. The prosecution alleged that the publications in question were obscene "in the context of the circumstances [of their] production, sale, and publicity."²¹⁵ Evidence accordingly was introduced to show that "each of the accused publications was originated or sold as stock in trade of the sordid business of pandering—the business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers."²¹⁶ The Court held that the trial judge properly considered such evidence in concluding that the mailed publications were obscene. The Court noted:

[W]here an exploitation of interests in titillation by pornography [*i.e.*, pandering] is shown with respect to material lending itself to such exploitation . . . such evidence may support the determina-

²¹¹ The "considered as a whole" standard does not apply to the "patent offensiveness" element since that element is directed only at characterizing the depiction of specified sexual conduct that gives the publication, as a whole, its prurient appeal. See *Miller v. California*, 413 U.S. 15, 24-26 (1973).

²¹² See *id.* at 24, quoted in text accompanying note 26 *supra*.

²¹³ See *Kois v. Wisconsin*, 408 U.S. 229, 230-31 (1972); *Ginzburg v. United States*, 383 U.S. 463, 470-71 (1966); *City of Tacoma v. Mushkin*, 12 Wash. App. 56, 527 P.2d 1393, 1395 (1974).

²¹⁴ 383 U.S. 463 (1966).

²¹⁵ *Id.* at 465.

²¹⁶ *Id.* at 467 (quoting in part from Chief Justice Warren's concurring opinion in *Roth v. United States*, 354 U.S. 476, 495-96 (1957)).

tion that the material is obscene even though in other contexts the material would escape such condemnation.²¹⁷

The Court emphasized that this conclusion was consistent with the constitutional definition of obscenity.

This evidence [of pandering] . . . was relevant in determining the ultimate question of obscenity and, in the context of this record, serves to resolve all ambiguity and doubt. The deliberate representation of petitioners' publications as erotically arousing, for example, stimulated the reader to accept them as prurient; he looks for titillation, not for saving intellectual content. . . . Similarly, such representation would tend to force public confrontation with the potentially offensive aspects of the work; the brazenness of such an appeal heightens the offensiveness. . . . And the circumstances of presentation and dissemination . . . are equally relevant to determining whether social importance claimed . . . was, in the circumstances, pretense or reality. . . . [T]he fact that each of these publications was created or exploited entirely on the basis of its appeal to prurient interests strengthens the conclusion that the transactions here were sales of illicit merchandise, not sales of constitutionally protected matter.²¹⁸

Although the Court's opinion at points suggested the relevancy of pandering in judging all sexually oriented material, the *Ginzburg* "holding" was described in a more limited fashion: "[I]n close cases evidence of pandering may be probative of the nature of the material in question and thus satisfy the *Roth* test."²¹⁹ The limited scope of the Court's ruling and the varying arguments it offered in support of that ruling leave uncertain the precise role that may be played by evidence of pandering in establishing obscenity.²²⁰ This uncertainty, in turn, may lead one to question whether a provision incorporating a *Ginzburg* standard should be included in a juvenile obscenity provision.

The *Ginzburg* ruling suggests that pandering is relevant primarily where the material involved has not only a potential prurient appeal, but also a potential serious social value. The *Ginzburg* case involved this type of material, and the Court's discussion frequently was tied to the factual context of that case.²²¹ In such a situation, the Court indicates, the presence of pandering permits the trier of fact to ignore the potential expository

²¹⁷ *Id.* at 475-76.

²¹⁸ *Id.* at 470, 474-75.

²¹⁹ *Id.* at 474 (emphasis added).

²²⁰ See *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 705 n.5 (1968) (Harlan, J., dissenting).

²²¹ See, e.g., 383 U.S. at 247-73:

The decision in *United States v. Rebhuhn*, 109 F.2d 512, is persuasive authority for our conclusion. That was a prosecution under the predecessor to § 1461, brought in the context of pandering of publications assumed useful to scholars and members of learned professions. The books involved were written by authors proved in many instances to have been men of scientific standing, as anthropologists or psychiatrists. The Court of Appeals for the Second Circuit therefore assumed that many of the books were entitled to the protection of the First Amendment, and "could lawfully have passed through the mails, if directed to

content of the material and concentrate on its potential prurient appeal. This focus apparently is permissible because (1) the seller, through his pandering, has presented the material solely as pornography and (2) the audience, responding to the pandering, is likely to view the material solely as pornography.

Insofar as the *Ginzburg* rationale rests on the premise that those who purchase in response to pandering are more likely to view the material solely for its erotic value, it may reflect the same kind of "special audience" analysis as the *Mishkin* case.²²² This aspect of the *Ginzburg* rationale apparently requires, as a factual prerequisite, that the audience is likely to have been aware of the pandering, either because the pandering was part of the material disseminated or because it was directed at those persons who purchased the material.²²³ Both circumstances apparently were present in *Ginzburg*, where the pandering was directed at mail order subscribers.²²⁴ In *Mishkin*, the Court also noted that the material in issue was both "designed for and primarily disseminated to" the special audience.²²⁵ Dissemination to minors might present certain difficulties in this regard since pandering frequently would be aimed at an adult audience and would be contained in advertisements not generally disseminated to minors.²²⁶ While it might be assumed that a minor's decision to purchase was influenced at least indirectly by the pandering, that assumption is not so readily made as in the mail order distribution scheme of *Ginzburg*.

The *Ginzburg* opinion at points also justifies consideration of pandering in close cases on what may be described as an "admissions analysis." Thus, the Court noted that petitioners "proclaimed" the obscenity of their material and the court below accordingly could "tak[e] their own evaluation at its face value"²²⁷ Of course, the defendant's admission is not conclusive, but in a close case it may tip the balance.²²⁸ This admis-

those who would be likely to use them for the purposes for which they were written . . ." 109 F.2d at 514. But the evidence, as here, was that the defendants had not disseminated them for their "proper use, but . . . woefully misused them, and it was that misuse which constituted the gravamen of the crime."

²²² See part II E 2 *supra*.

²²³ See Magrath, *The Obscenity Cases: Grapes of Roth*, 1966 SUP. CT. REV. 7, 61-62.

²²⁴ See 383 U.S. at 464-70.

²²⁵ *Id.* at 508.

²²⁶ It assumed that an advertisement would not be characterized as "pandering" unless, as in *Ginzburg*, it contained material that clearly emphasized the "leer of the sensualist." *Id.* at 468. The circulars distributed there "openly boasted that the publishers would take full advantage of what they regarded as an unrestricted license allowed by law in the expression of sex and sexual matters." *Id.* The concept of pandering cannot be extended substantially beyond the type of advertisements presented in *Ginzburg* without encompassing a broad range of traditional advertising (found in general circulation magazines and even daily newspapers) that emphasizes "sex appeal." See McGrath, *supra* note 223, at 60-61. Cf. *People v. Superior Court*, 14 Cal. 3d 82, 87-88, 534 P.2d 393, 397, 120 Cal. Rptr. 697, 701 (1975).

²²⁷ 383 U.S. at 472. See also *Mishkin v. New York*, 383 U.S. 502, 510 (1966).

²²⁸ Arguably, the person who utilizes pandering should be subject to criminal liability for that act alone, without regard to the nature of the material sold. While the Constitution protects the dissemination of sexually oriented material having

sions analysis would present less difficulty in its application to minors than would the special audience analysis. Although the pandering is directed at adults rather than minors, the acknowledgment that the material appeals to the prurient interest of the adults ordinarily would encompass the prurient interest of minors as well. However, an admissions analysis restricts consideration of pandering to prosecutions brought against the person engaged in the pandering and that person very often is the publisher or wholesale distributor rather than the retailer who sells to the minor.

The proposed provision on pandering in paragraph (h) proceeds on an admissions analysis. It does not require that the pandering have been directed especially at minors or that the pandering knowingly was presented in a form that would reach minors as well as adults. Either requirement would sharply limit the use of pandering evidence, perhaps to such a degree that inclusion of a pandering provision would be of little practical importance. Indeed, even without such restrictions, the pandering provision may have very limited significance. Where material is promoted as pornographic as to adults and presents a close factual case as to its obscene quality for adults, its obscenity for minors ordinarily will be fairly obvious, even without consideration of the pandering.²²⁹ Thus, inclusion of a pandering provision based on either or both analyses of *Ginzburg* may not be advisable, at least until the Supreme Court more fully explains the scope of the *Ginzburg* ruling.

Only three of the juvenile statutes examined provide for consideration of pandering evidence.²³⁰ The wording is similar in all three provisions:

[W]here circumstances of production, presentation, sale, dissemination, distribution or publicity indicate that matter is being exploited by the defendant for the sake of its prurient appeal, such evidence is probative with respect to the nature of the mat-

serious social value, it should not protect advertising designed to exploit that material as pornography. The Model Penal Code, Tentative Draft No. 6, proposed adoption of a provision, replacing the basic dissemination section, that would make pandering a crime in itself, without regard to whether the material sold was actually obscene. See MODEL PENAL CODE § 207.10[1] (Tent. Draft No. 6, 1957); Schwartz, *Morals Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669, 680 (1973). See also HILL-LINK MODEL STATUTE, *supra* note 3, § 9. Since a separate offense of pandering would not be limited to pandering aimed at juveniles, extended consideration of such an offense is outside the scope of this article.

²²⁹ Arguably, pandering evidence might be significant in cases involving substantial "puffing" of the erotic quality of material that is not obscene as to adults but might present a close question as to juveniles. Cf. *People v. Superior Court*, 14 Cal. 3d 82, 87-88, 534 P.2d 393, 397, 120 Cal. Rptr. 699, 701 (1975).

²³⁰ CAL. PENAL CODE § 313(a)(2) (West Supp. 1976); COLO. REV. STAT. § 18-7-104 (1973); ILL. ANN. STAT. ch. 38, § 11-21(c) (Smith-Hurd Supp. 1975). See also IOWA CODE ANN. § 725.7(4) (Cum. Pamphlet 1975) (simply noting that the court may receive into evidence the testimony of experts as to *inter alia*, "[t]he advertising promotion and other circumstances relating to the sale of the materials").

ter and can justify the conclusion that the matter is utterly without redeeming social importance for minors.²³¹

The pandering provision included in proposed paragraph (h) largely tracks these three state provisions. Like the California provision, paragraph (h) is limited to pandering "by the defendant."²³² Like the California and Illinois provisions, it permits evidence of pandering to be considered in the application of all elements of the tripartite test.²³³ *Ginzburg* was decided under *Roth*, which recognized the significance of serious social value and patent offensiveness, but did not treat these factors as separate elements of the constitutional definition of obscenity. However, in discussing the relevancy of pandering evidence under *Roth*, *Ginzburg* specifically refers to its bearing on all three elements of the tripartite test.²³⁴

Paragraph (h) would allow the trier of fact considerable leeway in determining the relevancy of pandering to particular aspects of the tripartite test. Unlike all three state provisions,²³⁵ paragraph (h) states only that the pandering "may be probative" in applying the tripartite test. Thus, evidence of pandering need not be given any weight in a particular case.²³⁶ The "may be probative" phrasing is consistent with *Ginzburg*, where the Court described its ruling as "holding that in close cases evidence of pandering *may be* probative with respect to the nature of the material in question and thus satisfy the *Roth* test."²³⁷ Even aside from the desirability of following the limited language of *Ginzburg*, the trial court always should have some discretion in determining the relevancy of evidence to the various issues presented in the individual case.

²³¹ CAL. PENAL CODE § 313(a)(2) (West Supp. 1976). See also COLO. REV. STAT. § 18-7-104 (1973); ILL. ANN. STAT. ch. 38, § 11-21(c) (Smith-Hurd Supp. 1975). The Colorado and Illinois provisions both omit the phrase "by the defendant." In addition, Illinois includes a reference to its "balancing" formulation of the social value standard, see note 128 *supra*, and Colorado describes evidence of pandering as probative only with respect to the "nature of the material or performance."

²³² See note 231 *supra*. Illinois and Colorado do not include this requirement.

²³³ See note 231 *supra*. Colorado makes the evidence probative only as to the "nature of the material," but the scope of that phrase is unclear. Cf. part VII A *infra*.

²³⁴ See quotation in text accompanying note 218 *supra*. This position arguably may be inconsistent with an "admissions analysis" of the appropriate use of evidence of pandering. While the panderer clearly acknowledges that the material appeals to the prurient interest, not all pandersers will necessarily acknowledge also that the material lacks social value. However, the proposed paragraph (h) gives the trial court sufficient leeway to evaluate the scope of the pandering in determining whether to hold it "probative" as to just the prurient interest element or all three elements of the tripartite test.

²³⁵ The California provision, quoted in text accompanying note 231 *supra*, and the Illinois provision both state that the evidence of pandering "is probative." The Colorado provision states that evidence of pandering "shall be admitted in evidence as bearing upon the nature of the material." COLO. REV. STAT. § 18-7-104 (1973).

²³⁶ See note 234 *supra*.

²³⁷ 383 U.S. at 474 (emphasis added).

III. DEFINING OBSCENITY: SPECIFIC SEXUAL CONTENT

A. Introduction

As noted previously,²³⁸ the proposed statute, like all but four of the juvenile statutes examined,²³⁹ extends only to material that depicts particular sexual conduct specified in the statute. Under proposed paragraph (h) of section 1, material is not subjected to the tripartite test unless it falls within the category of "sexually explicit matter," and under proposed paragraph (m) of section 1, that category is limited to material depicting listed types of sexual conduct, such as sexual intercourse, sado-masochistic abuse, and erotic fondling.²⁴⁰

The paragraph (h) requirement that material initially fall within the "sexually explicit" category is based in part on *Miller v. California*.²⁴¹ The Court there held that "state statutes designed to regulate obscene

²³⁸ See text accompanying notes 18-19 *supra*.

²³⁹ The Michigan obscenity provisions currently refer only to the qualities of the materials encompassed under the statute. See, e.g., MICH. COMP. LAWS ANN. § 750.343e (1973) ("obscene, lewd, lascivious, filthy or indecent"). In our general review of state juvenile statutes, we noted a few similar provisions, see note 54 *supra*, but did not include them in the group of twenty state provisions used as the basis for our study. See note 2 *supra*. Aside from the Michigan provision, that group was limited to more detailed juvenile provisions. Only three of these provisions (California, Illinois, and Washington) failed to describe the required content of the regulated material. The California and Illinois provisions describe the requisite prurient appeal as related to "nudity, sex, or excretion," CAL. PENAL CODE § 313(a) (West Supp. 1976); ILL. ANN. STAT. ch. 38, § 11-21(b)(1) (Smith-Hurd Supp. 1975), and the Washington provision describes the requisite patent offensiveness as related to "sexual matters or sado-masochistic abuse," WASH. REV. CODE § 96B.050(2) (Supp. 1974), but neither reference adequately specifies the particular sexual conduct that must be depicted to bring the material within the statutory coverage. See *Miller v. California*, 413 U.S. 15, 17, 23-25 (1973); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 54 (1973). But note *People v. Enskat*, 33 Cal. App. 3d 900, 109 Cal. Rptr. 433 (1973) (specification added by judicial interpretation). The Colorado provision, although referring to specific sexual conduct, presents some difficulty because it appears also to include a broader category of materials. See COLO. REV. STAT. § 18-7-101(5) (1973) (obscene matter must go substantially beyond customary limits of candor in "describing, portraying, or dealing" with "nudity, sex, sexual conduct, sexual excitement, excretion, sadism, masochism, or sado-masochistic abuse") (emphasis added). In *People v. Tabron*, — Colo. —, 544 P.2d 372, 379 (1976), the court held that an identical definition utilized in the Colorado general obscenity statute was unconstitutional because, *inter alia*, "the words 'nudity, sex, sexual conduct, sexual excitement, . . . sadism, masochism, or sado-masochistic abuse' are not representative of the specificity contemplated by the Supreme Court in *Miller*."

Of the four commission proposals examined, see note 3 *supra*, only the Hill-Link proposal failed to describe the encompassed material by reference to the depiction of specified sexual conduct. See OBSCENITY COMMISSION REPORT, *supra* note 3, at 462-68.

²⁴⁰ Paragraph (m) incorporates the listing of specific categories of sexual conduct found in the separate provisions on "sexually explicit visual material" (paragraph (p)), "sexually explicit verbal material" (paragraph (o)), and "sexually explicit performance" (paragraph (n)). Visual material (e.g., drawings or photographs), verbal material, and performances are treated separately because, *inter alia*, different categories of sexual content may be applied to different media. See part IV A *infra*.

²⁴¹ 413 U.S. 15 (1973).

materials" may reach only "works which depict or describe sexual conduct" and "that conduct must be specifically defined by the applicable state law, as written or authoritatively construed."²⁴² In the course of establishing this requirement of "sexual specificity," *Miller* offered "a few plain examples of . . . [sexual conduct that] a state statute could define for regulation:"

- (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated; [and] (b) Patently offensive representations or descriptions of masturbation, excretory functions and lewd exhibitions of the genitals.²⁴³

Although *Miller* dealt with a general obscenity statute, the *Miller* requirement of sexual specificity appears equally applicable to a juvenile obscenity provision. *Miller* offered two justifications for requiring that the state statute apply only to material depicting specified sexual conduct. First, restricting the statutory coverage to the depiction of sexual conduct provides additional assurance that the statute is "carefully limited" in application to material that is not protected under the first amendment.²⁴⁴ Second, precise specification of the materials encompassed by the statute provides "fair notice to a dealer in [such] materials that his . . . commercial activities may bring prosecution."²⁴⁵ Although a juvenile provision may encompass depictions of a broader range of sexual conduct than an adult statute,²⁴⁶ the two justifications noted in *Miller* equally support the imposition of a requirement of sexual specificity for juvenile statutes. Moreover, while *Ginsberg* did not discuss such a requirement, it is noteworthy that the New York statute upheld there contained the type of sexual specificity required by *Miller*.²⁴⁷ Indeed, most of the juvenile statutes we examined, even when enacted before *Miller*, include a specific listing of encompassed material described in terms of the depiction of particular sexual conduct.²⁴⁸ In light of *Miller* and *Ginsberg*,²⁴⁹ it appears that any juvenile obscenity provision lacking such specificity could only be "saved"

²⁴² *Id.* at 23-24.

²⁴³ *Id.* at 25.

²⁴⁴ *Id.* at 24, 25.

²⁴⁵ *Id.* at 27.

²⁴⁶ See text accompanying notes 301-09 *infra*. Cf. parts II H, II I *supra*.

²⁴⁷ *Ginsberg v. New York*, 390 U.S. 629, 645-47 (1968). See also text accompanying note 17 *supra*.

²⁴⁸ See note 239 *supra* for a listing of the four state provisions examined that do not describe the encompassed material in terms of the depiction of specified sexual conduct. The total group of statutes examined are listed at note 2 *supra*. Several of these statutes (e.g., Iowa, North Dakota, and West Virginia) were enacted after *Miller*, but the majority were enacted before *Miller*.

²⁴⁹ See also *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 689-90 (1968) (noting the need for specificity in a juvenile provision). The Court there stated:

Nor is it an answer to an argument that a particular regulation of expression is vague to say that it was adopted for the salutary purpose of protecting children. The permissible extent of vagueness is not directly proportional to, or a function of, the extent of the power to regulate or control expression with respect to children.

See also *Erznozik v. Jacksonville*, 422 U.S. 205 (1975) (discussed in note 309 *infra*).

constitutionally by the incorporation of similar standards through judicial interpretation.²⁵⁰

Leaving aside the constitutional mandate, we believe that a listing of included sexual content should be part of any obscenity provision simply because such a listing is helpful in minimizing the administrative difficulties noted at the outset of this article.²⁵¹ If the listing is carefully limited to the depiction of advanced sexual acts, such as intercourse and masturbation,²⁵² reliance upon the listing alone, without reference to the tripartite test, should relieve disseminators of any doubts as to the legality of distributing the great bulk of sexually oriented materials that is protected under the first amendment, though having some prurient appeal for minors. Indeed, the listing should provide far more protection overall for constitutionally protected speech than the *Miller* tripartite standard. Carefully limiting the content encompassed should be especially effective in preventing the initiation of inappropriate prosecutions and in gaining prompt dismissal of those prosecutions that are brought erroneously. The tripartite standard is sufficiently vague that a prosecutor cannot readily cite it as a clear barrier to a requested prosecution where the material in question is somewhat erotic, even though that material does not portray advanced sexual conduct and is very likely to be protected constitutionally. The nebulous character of the tripartite standard also makes it a somewhat unreliable basis for gain-

²⁵⁰ State courts examining general obscenity statutes have divided on the appropriateness of incorporating by judicial interpretation the *Miller* illustrations of sexual specificity. Some courts have argued that the listing of encompassed material is a task for the legislature, while others have contended that the courts should construe the statute to preserve its constitutionality. See Note, *Community Standards, Class Actions, and Obscenity Under Miller v. California*, 88 HARV. L. REV. 1838, 1847 n.51 (1975) (collecting cases); *Commonwealth v. McDonald*, — Pa. —, 347 A.2d 290 (1975). See also *People v. Enskat*, 33 Cal. App. 3d 900, 109 Cal. Rptr. 433 (1973) (finding that the California general obscenity statute, as construed prior to *Miller*, satisfied the sexual specificity requirement of *Miller*).

²⁵¹ See points (1), (2), and (3), discussed in part I *supra*.

²⁵² As noted in Justice Brennan's dissent in *Miller*, some of the illustrations of sexual specificity in the *Miller* majority opinion incorporate terms that are themselves somewhat vague. Thus, the Court refers to "ultimate sex acts" and the "lewd exhibition of genitals." As will be discussed in part III C *infra*, the use of such phrases can be avoided if the listing of specified conduct is limited to advanced sex acts. See also Lockhart, *Escape from the Chill of Uncertainty: Explicit Sex and the First Amendment*, 9 GA. L. REV. 533, 546-48 (1975). Of course, this does not eliminate all ambiguity. Even though the definition of a particular act may be clear (e.g., coitus), it may not always be clear what constitutes a "depiction" of that act. See note 259 *infra*. However, if the listing is limited to advanced sexual acts, the vagueness inherent in the listing certainly is no greater than that found in standards governing the regulation of other types of speech, such as libel or advocacy of illegal acts.

Clearly, within the framework of current statutes, the use of a carefully limited listing of specified content, along with restriction of the statute to visual material, see part IV A *infra*, and the imposition of an appropriate scienter requirement, see part VII *infra*, offers the greatest hope for eliminating the uncertainty inherent in the tripartite test. For a thorough discussion of the need to eliminate that uncertainty, and suggestions as to other statutory modifications that might be used for that purpose, see Lockhart, *supra*.

ing prompt dismissal of an inappropriate prosecution.²⁵³ On the other hand, the factual issue as to whether material does or does not depict advanced sexual conduct should be capable of resolution with far more dispatch. Of course, where the material does depict such conduct, the disseminator must look to the elements of the tripartite test. But the segment of constitutionally protected material that depicts such conduct should be far narrower than the segment which has been viewed as potentially subject to prosecution under those juvenile obscenity provisions that fail to describe the encompassed material by reference to the conduct depicted.

The discussion that follows considers each category of sex-related content, from sexual intercourse to nudity, that might possibly be subjected to statutory restriction. Those categories are defined in various paragraphs in proposed section 1²⁵⁴ and are brought together in the definitions of different types of sexually explicit material in paragraphs (n), (o) and (p) of section 1.

B. Sexual Intercourse

The least controversial category of sexual content included within the proposed statute is that presented in paragraph (l), the depiction of various acts of "sexual intercourse." This category encompasses the depiction of several activities, such as fellatio and coitus, which *Miller* described as "ultimate sex acts" and specifically cited as an example of constitutionally permissible coverage.²⁵⁵ All of the state statutes describing sexual content include such a category.²⁵⁶

Inclusion of a sexual intercourse category presents few administrative problems of the type discussed at the outset of this article.²⁵⁷ Portrayals of sexual intercourse are rather easily identified by the disseminator. Moreover, combined with the exemption provisions, the sexual intercourse category presents little potential for overly broad coverage which would

²⁵³ See, e.g., *Jenkins v. Georgia*, 418 U.S. 153 (1974) (where exhibition of the movie "Carnal Knowledge" was successfully prosecuted at the trial level under an adult obscenity provision); OBSCENITY COMMISSION REPORT, *supra* note 3, at 40 (noting the uncertainty produced by the "subjectivity and vagueness" of the tripartite standard); Lockhart, *supra* note 252, at 552. Cf. *Huffman v. United States*, 470 F.2d 386 (D.C. Cir. 1971), *rev'd on rehearing*, 502 F.2d 419 (D.C. Cir. 1974) (discussing various cases reversed by the Supreme Court).

²⁵⁴ See paragraphs (b) ("erotic fondling"), (e) ("masturbation"), (g) ("nudity"), (j) ("sado-masochistic abuse"), (k) ("sexual excitement"), (l) ("sexual intercourse").

²⁵⁵ See text accompanying note 243 *supra*.

²⁵⁶ See, e.g., the provisions cited in notes 260, 261, 263 *infra*. The reference is to those statutes that describe the encompassed content in terms of the depiction of specified sexual conduct. Subsequent statements in the text concerning the inclusion of specified categories in "all" or "most" of the statutes examined *exclude* consideration of the four statutes that do not list specific sexual conduct. CAL. PENAL CODE § 313(a) (West Supp. 1976); ILL. ANN. STAT. ch. 38, § 11-21(b)(1) (Smith-Hurd Supp. 1975); MICH. COMP. LAWS ANN. § 750.343e (1973); WASH. REV. CODE § 96B.050(2) (Supp. 1974). See note 239 *supra*.

²⁵⁷ See points (1), (2), and (3), discussed in part I *supra*. See also notes 251-53 and accompanying text *supra*.

require reliance upon the tripartite test as a primary safeguard for constitutionally protected speech. Generally, depictions of sexual intercourse are unlikely to contribute significantly to the exposition of ideas as presented to minors. Of course, true expository uses for depictions of sexual intercourse do exist, as in sex education, but such uses ordinarily would be protected under the proposed statute by the exemption for parents and other educators.²⁵⁸ Some other expository uses might require the protection afforded by the tripartite test, but only a comparatively small group of depictions would fall within this category.²⁵⁹

Although all of the state statutes examined include a sexual intercourse category, descriptions of that category vary. A number of statutes utilize a general category of "sexual conduct," which is defined as including "sexual intercourse," "homosexuality," and in some provisions, "lesbianism" and "bestiality."²⁶⁰ Although constitutionally acceptable, this approach may be unnecessarily vague. It is not clear, for example, whether "sexual intercourse" as used in this type of provision includes only coitus or also fellatio. Terms like "lesbianism" and "homosexuality" are even less precise. A preferable approach is to refer to each of the specific sexual acts. The Ohio provision takes this approach, defining "sexual conduct" as "vaginal intercourse, between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex."²⁶¹ This definition has the virtues of clarity and comprehensiveness. Proposed paragraph (I) utilizes a similar definition but avoids the use of Latin terminology.²⁶²

²⁵⁸ See section 2(2).

²⁵⁹ To a large extent, the quantity of material falling within this category will be dependent upon whether the statute encompasses verbal depictions. See part IV *A infra*. Yet even some visual depictions of sexual conduct, though not presented in an educational setting, nevertheless are likely to be protected by the tripartite test. There are, of course, various levels of "depiction." Consider, for example, the nondetailed cartoon or "line drawing" that shows two persons in the position of sexual intercourse with no showing of genitals, as compared to a film showing the actual act. The term "depiction" may be construed narrowly, in light of the context of the statute as a whole, to exclude less explicit representations of sexual intercourse, yet it still is likely to encompass some abstract representations that are not patently offensive. Moreover, even assuming a very narrow construction of the term "depiction," some materials might clearly constitute depiction of sexual intercourse and yet still be presented in a manner that would prevent them from falling within the tripartite test as adapted to minors (e.g., in artistic works).

²⁶⁰ See, e.g., HAWAII REV. STAT. tit. 37, § 712-1210(7) (Special Supp. 1972); KY. REV. STAT. § 531.010(4) (Cum. Supp. 1974); N.Y. PENAL LAW § 235.20(3) (McKinney Supp. 1975) ("sexual conduct" includes "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").

²⁶¹ OHIO REV. CODE ANN. § 2907.01(A) (Page 1975). Bestiality is included in a separate category of encompassed sexual conduct under the Ohio provision. See OHIO REV. CODE ANN. § 2907.01(E)(3) (Page 1975).

²⁶² A similar approach is taken in two of the state statutes examined. See IOWA CODE ANN. § 725.1(7) (Supp. 1975); N.D. CENT. CODE § 12.1-27.1-01(8) (Special Supp. 1975). See also OBSCENITY COMMISSION MODEL STATUTE, *supra* note 3, § 2(d)(ii); PROPOSED ARIZ. CRIM. CODE § 3500(m) (Ariz. Crim. Code Comm'n 1975); DETROIT, MICH., CODE § 39-1-18(14)(B) (1974) (described in text accompanying note 263 *infra*).

The proposed paragraph (l) definition is based upon the Detroit obscenity ordinance.²⁶³ Sexual intercourse is defined as "genital-genital, oral-genital, oral-anal, and anal-genital" intercourse, "whether between persons of the same or opposite sex or between a human and an animal." By referring directly to act, anatomy, and participant, rather than using the Latin terms, paragraph (l) hopefully suggests a straightforwardness that is particularly valuable in this type of statute.²⁶⁴

The definition of sexual intercourse includes both actual and simulated intercourse. Regulation of the depictions of simulated ultimate sex acts was explicitly authorized by *Miller*.²⁶⁵ Several of the statutes examined did not refer specifically to simulation, but all included a general category that would encompass simulation, such as the definition of erotic fondling contained in proposed paragraph (b).²⁶⁶ The inclusion of simulation presents certain difficulties. On the one hand, the impact and offensiveness of realistic simulation does not differ significantly from depictions of the actual sexual conduct. On the other hand, more abstract simulation of sexual acts is fairly common in certain forms of art which clearly would not fall within the tripartite test. The need for a narrower definition to protect the latter type of simulation is unclear.²⁶⁷ One refinement that would afford such protection would be to limit the simulation provision to depiction of actors whose genitals are unclothed.²⁶⁸

C. Sado-Masochistic Abuse

Almost all of the statutes examined specifically encompass the depiction of "sado-masochistic abuse," as defined in paragraph (j).²⁶⁹ Depictions

²⁶³ DETROIT, MICH., CODE § 39-1-18(14) (1974).

²⁶⁴ Compare, however, the recently adopted Michigan Sexual Conduct Act, MICH. COMP. LAWS ANN. § 750.520(a) (Supp. 1975), using Latin terminology similar to the Ohio statute.

²⁶⁵ See quotation from *Miller* in text accompanying note 243 *supra*.

²⁶⁶ See, e.g., N.J. STAT. ANN. § 2A:115-1.7(c) (Supp. 1975); N.Y. PENAL LAW § 235.20(3) (McKinney Supp. 1975) (quoted in note 260 *supra*); WIS. STAT. ANN. § 944.25(1)(c) (Supp. 1975).

²⁶⁷ Ordinarily, in productions using such simulation (e.g., modern dance), the simulation is a small portion of the total product and that factor alone might be taken to provide ample protection against inappropriate prosecution. *But see* Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546 (1975), where an advisory jury found the musical *Hair* obscene under a general obscenity statute. The district court agreed, relying in part upon instances of simulated sex that were included in the particular production. *See* 420 U.S. at 566-68 (White, J., dissenting). The Supreme Court reversed on procedural grounds and did not reach the issue of obscenity.

²⁶⁸ Consider, in this regard, the simulations described in *Morris v. United States*, 259 A.2d 337 (D.C. Ct. of App. 1969); *People v. Better*, — Ill. App. —, 337 N.E.2d 272 (1975); *Slaton v. Paris Adult Theatre I*, 228 Ga. 343, 185 S.E.2d 768 (1971), *vacated and remanded*, 413 U.S. 49, *rehearing denied*, 414 U.S. 881, *judgment reinstated on remand*, 231 Ga. 312, 201 S.E.2d 456 (1973), *cert. denied*, 418 U.S. 939, *rehearing denied*, 419 U.S. 887 (1974). Compare the definition N.Y. PENAL LAW § 235.00(6) (McKinney Supp. 1975) ("Simulated" means the explicit depiction . . . of any of the types of conduct set forth in clause (b) . . . which creates the appearance of such conduct"). *See also* the discussion of the definition of "erotic fondling" in part III *E infra*.

²⁶⁹ Among the statutes examined that listed specific sexual content, *see* note 256

of sado-masochistic abuse are easily identified, and the constitutionally protected use of materials emphasizing such depictions is minimal, especially for minors.²⁷⁰

The definition proposed in paragraph (j) is based upon the standard terminology used by most state statutes defining sado-masochistic abuse.²⁷¹ A somewhat briefer description is used in a few states.²⁷² The longer form used in paragraph (j) provides greater assurance that the activity depicted is in fact designed for sexual gratification as evidenced by the apparel (or lack thereof) of the participants. It also includes the depiction of a person fettered or bound in a specified fashion that usually appeals to a particular type of deviant audience.²⁷³

D. Depiction of Masturbation

All of the statutes examined specifically include the depiction of "masturbation," although none sought to define that act.²⁷⁴ A proposed definition is included in paragraph (e) but may be unnecessary. Paragraph (e) ensures coverage of the manipulation of the genitals of another. The term "masturbation" is often taken to refer only to self-stimulation, although

supra, only two did not refer explicitly to depictions of sado-masochistic abuse. N.J. STAT. ANN. § 2A:115-1.7 (Supp. 1975); R.I. GEN. LAWS § 11-31-10 (Supp. 1974). Both of these provisions would reach many depictions of sado-masochistic abuse since each contains a broad nudity provision (extending to the exposure of the genitals, pubic area, buttocks, and female breast).

²⁷⁰ Cf. notes 257-59 and accompanying text *supra*.

²⁷¹ See, e.g., NEV. REV. STAT. § 201.262 (1973); N.Y. PENAL LAW § 235.20(5) (McKinney Supp. 1975); UTAH CODE ANN. § 76-10-1201(9) (Supp. 1975).

²⁷² See, e.g., HAWAII REV. STAT. tit. 37, § 712-1210(9) (Special Supp. 1972) ("flagellation or torture by or upon a person as an act of sexual stimulation or gratification"); KY. REV. STAT. § 531.010(4) (Cum. Supp. 1974) ("flagellation... for the purpose of sexual stimulation or gratification"); cf. IOWA CODE ANN. § 725.1(5) (Cum. Pamphlet 1975) ("the infliction of physical or mental pain upon a person or the condition of a person being fettered, bound or otherwise physically restrained").

²⁷³ In its listing of examples of constitutionally permissible coverage, *Miller* did not refer to depictions of sado-masochistic abuse. See text accompanying note 243 *supra*. In light of *Mishkin*, discussed in text accompanying note 78 *supra*, and the Court's repeated statement that the *Miller* listing is not "exhaustive," see text accompanying note 305 *infra*, inclusion of depictions of sado-masochistic abuse should present no constitutional difficulties, at least where the material depicts specific activities, such as flagellation. The depiction of a single person posed in a condition suggesting anticipated abuse (e.g., by costume or bindings) poses some difficulty, but arguably falls within the *Miller* reference to the depiction of "sexual conduct." See notes 301-09 and accompanying text *infra*, discussing similar concerns relating to the "nudity" category. See also note 88 *supra*; *B & A Co. v. State*, 24 Md. App. 367, 330 A.2d 701 (1975).

²⁷⁴ In some provisions, "masturbation" is placed in a separate category. See, e.g., N.D. CENT. CODE § 121-27.1-01(8)(d) (Special Supp. 1975). In others, "masturbation" is one of the acts listed in the general category of "sexual conduct," see, e.g., the provisions cited in note 260 *supra*. The Colorado provision, described in note 239 *supra*, does not refer explicitly to masturbation, but apparently would include that act within the category of "sexual conduct."

²⁷⁵ See, e.g., WEBSTER'S THIRD INTERNATIONAL DICTIONARY (1968 ed.) defining masturbation as

erotic stimulation involving the genital organs commonly resulting in orgasm and achieved by manual or other bodily contact exclusive

the dictionary definition is not so limited.²⁷⁵ Paragraph (e) also ensures coverage of manipulation through the use of instruments other than the human hand. Again, the dictionary definition of "masturbation" includes such activity.

A strong case can be made for limiting the coverage of a juvenile obscenity statute to material depicting sexual intercourse, sado-masochistic abuse, and masturbation. A statute limited to those categories of sexual content would clearly exempt from coverage the vast bulk of sexually oriented pictorial material that is constitutionally protected under the tripartite standard. At the same time, such a statute, combined with industry controls relating to minors, would bar dissemination of much of the obscene material generally viewed as most harmful to minors.²⁷⁶ The categories of sexual intercourse, sado-masochistic abuse, and masturbation would encompass the traditional "hard-core pornography" of the type sold in adult bookstores. It would also reach so-called "girlie" publications (such as *Playboy*) that are sold in many stores catering to the general public.²⁷⁷ The three categories would also encompass most X-rated films, while the movie industry's own code would exclude minors from attending, without parental consent, the much broader group of films subject to an R rating.²⁷⁸ With respect to live performances, an even greater range of sexually explicit performances (such as topless shows) would be off-limits to minors in any event, since such performances commonly are presented in establishments serving liquor.

The states have not been willing, however, to accept legislation that directly regulates such a limited segment of all potentially obscene material and relies so heavily on industry regulation as a supplementary screening device. None of the state statutes examined were limited to material depicting sexual intercourse, sado-masochistic abuse, and masturbation.²⁷⁹ All seek to provide complete or almost complete coverage of sexually oriented material that might be obscene for minors. All extend to sexual touching that falls short of sexual intercourse, sado-masochistic abuse, and masturbation, and all except one reach certain material depicting nudity alone.²⁸⁰

of sexual intercourse, by instrumental manipulation, occas. by sexual fantasies, or by various combinations of these agencies.

The proposed definition would not include the depiction of sexual fantasizing that produced orgasm, although the depiction of the fantasy itself might fall within one of the other categories of included content.

²⁷⁶ The depiction of sexual intercourse and masturbation are among those having the greatest potential for causing sexual arousal, but that grouping also includes certain portrayals of nudity. See studies cited in the OBSCENITY COMMISSION REPORT, *supra* note 3, at 166-67 as to sexual arousal in adults produced by the depiction of different sexual conduct.

²⁷⁷ See text accompanying note 313 *infra*.

²⁷⁸ See notes 314-15 and accompanying text *infra*, discussing also nonrated films.

²⁷⁹ L.A. REV. STAT. tit. 14, § 106(F)(1) (1974), a general obscenity statute, draws a similar line in a somewhat different context. It permits criminal prosecutions without prior civil adjudication of obscenity, see note 5 *supra*, only if the material in question depicts "ultimate sex acts" or contains certain simulated or animated depictions of such acts.

²⁸⁰ See notes 283-86, 322 and accompanying text *infra*. Several states also have

E. Sexual Touching

State obscenity provisions commonly encompass the depiction of any "sexual touching" of the primary erogenous areas of the body—the genitals, pubic area, buttocks, and female breasts.²⁸¹ Significant arguments can be advanced against including such a category even in a juvenile obscenity provision. A major difficulty presented in defining sexual touching is that the physical acts involved may or may not be sexually related. Pictorial representations and verbal descriptions of the touching of erogenous areas frequently are presented in contexts that are non-erotic. Thus, sexual touching cannot be defined solely in terms of the physical contact involved, as can be done with sexual intercourse. The description of the touching must be supplemented by a requirement that the touching be portrayed as undertaken for "the purpose of sexual stimulation." This additional element may add considerable subjectivity, however, to the definition of sexual touching. It is not always clear from the context whether the depicted touching is for the purpose of sexual stimulation, particularly where the medium does not portray movement and the erogenous area is clothed.²⁸² The ultimate judgment as to purpose may depend in large part upon the attitude of the viewer.

Even where the acts portrayed clearly are intended for sexual stimulation, the offensiveness of their portrayal may vary greatly. The hand laid on the clothed buttocks during a kiss may be viewed as innocuous, while a hand

sexual content categories referring to "excretory functions." See N.D. CENT. CODE § 12.1-27.1-01(8)(f) (Special Supp. 1975); OHIO REV. CODE ANN. § 2907.01(E)(4) (Page 1975); W. VA. CODE ANN. § 61-8A-1(7)(b) (Supp. 1974). Insofar as the depiction of excretion relates to nudity or sexual intercourse (e.g., ejaculation), it would be encompassed by the other categories of sexual content commonly included in state obscenity provisions. Depictions of excretion not encompassed by such categories may have prurient appeal for persons with deviant sexual interests, but most states have not viewed such depictions as being of sufficient significance to include a separate category, although *Miller* specifically cited "excretory functions" as a permissible category of coverage. *Miller v. California*, 413 U.S. 15, 25 (1973).

²⁸¹ The reference is to touching aside from "masturbation," which is defined as manipulation of the genitals. In still representations, it ordinarily would be most difficult to distinguish between depictions of manipulation constituting masturbation and the simple touching of the genitals for the purpose of sexual stimulation. If a sexual touching category is not included in the statute, see accompanying text, the paragraph (e) definition of "masturbation" might be expanded to include all touching of the uncovered genitals for the apparent purpose of sexual stimulation. Cf. NEV. REV. STAT. § 201.263 (1973). On the other hand, if a broad definition of sexual touching is adopted, that definition probably would include all forms of masturbation and the separate category of masturbation might be omitted from the statute. In our proposed statute, a reference to "masturbation" is included in the paragraphs (o) and (p) on the assumption that the sexual touching category of paragraph (b) may not be encompassed in those provisions. On the other hand, no reference to "masturbation" is included in paragraph (n), defining sexually explicit performances, since a sexual touching category is likely to apply to performances even if not to other visual material. See note 291 *infra*.

²⁸² While the definitions of "masturbation" and "sado-masochistic abuse" also refer to a purpose of sexual stimulation, that purpose ordinarily is reflected by the very nature of the physical activity involved in masturbation and sado-masochistic abuse. But consider note 281 *supra*, discussing still representations of masturbation.

laid on the unclothed buttocks in the context of foreplay clearly leading to sexual intercourse may be very offensive. In light of this variation in the impact of the portrayal of similar physical acts, the inclusion of a broad sexual touching category necessarily carries with it the danger of encompassing substantial material which society sees as valuable or, at least, as not harmful. Aside from the touching of the unclothed genitals and the unclothed pubic area, the sexually oriented touching of erogenous areas often may be depicted in a manner that does not clearly affront community standards, at least in still representations. Thus, a broad sexual touching category arguably loses one of the major advantages of a specific listing of encompassed content by requiring reliance on the nebulous tripartite test to protect a substantial body of material that is not "obscene for minors."

Notwithstanding this deficiency, most of the statutes examined include a broad sexual touching category.²⁸³ The New York provision, for example, encompasses "physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, breast."²⁸⁴ Some states add "for the purpose of sexual stimulation, gratification, or perversion,"²⁸⁵ or other similar phrases.²⁸⁶

Proposed paragraph (b) is drafted for possible inclusion of a broad sexual touching category.²⁸⁷ The encompassed sexual conduct is characterized as "erotic fondling," a term culled from the Detroit ordinance.²⁸⁸

²⁸³ Five states do not have broad sexual touching categories, but do have categories that would include some forms of sexual touching. *See* IOWA CODE ANN. § 725.1(7) (Supp. 1975) (including depictions of the genitals, with or without the depiction of touching); KY. REV. STAT. § 531.010(4) (Cum. Supp. 1974) (including only "physical contact with the genitals"); NEV. REV. STAT. § 201.263 (1973) (including only "physical contact with a person's unclothed genitals or pubic area"); N.D. CENT. CODE § 12.1-27.1-01(8) (Special Supp. 1975) (including "lewd exhibition" of the genitals, with or without the depiction of touching); W. VA. CODE ANN. § 61-8A-1(7)(b) (Supp. 1974) (same). *See also* PROPOSED ARIZ. CRIM. CODE § 3500 (Ariz. Crim. Code Comm'n 1975) ("direct or indirect touching" of genitals, pubic area, or anus); OBSCENITY COMMISSION MODEL STATUTE, *supra* note 3, § 2(d) ("direct physical stimulation of unclothed genitals").

²⁸⁴ N.Y. PENAL LAW § 235.20(3) (McKinney Supp. 1975). *Accord*, FLA. STAT. ANN. § 847.013(1)(c) (Supp. 1975); N.J. STAT. ANN. § 2A:115-1.7(c)(3) (Supp. 1975); WIS. STAT. ANN. § 944.25(1)(c) (Supp. 1975). *See also* OHIO REV. CODE ANN. § 2907.01(B) (Page 1975) ("any touching of an erogenous zone of another, including without limitation, the thigh . . . , for the purpose of sexually arousing or gratifying either person").

²⁸⁵ HAWAII REV. STAT. tit. 37, § 712-1210(7) (Special Supp. 1972).

²⁸⁶ *See, e.g.*, PROPOSED ARIZ. CRIM. CODE § 3500(m) (Ariz. Crim. Code Comm'n 1975) ("in an act of apparent sexual stimulation or gratification"); OHIO REV. CODE ANN. § 2907.01(B) (Page 1975) (quoted in note 284 *supra*); ORE. REV. STAT. § 167.060(10) (1974) ("in an act of apparent sexual stimulation or gratification"); UTAH CODE ANN. § 76-10-1201(7) (Supp. 1975) (same). The New Jersey and Rhode Island provisions characterize the required touch as "fondling or other erotic touching." N.J. STAT. ANN. § 2A:115-1.7(c)(3) (Supp. 1975); R.I. GEN. LAWS § 11-31-10 (Supp. 1974).

²⁸⁷ While Miller did not list sexual touching among its illustrations of permissible coverage for a general obscenity statute, *see* text accompanying note 243 *supra*, that omission does not indicate that a state could not include a broad sexual touching category in a juvenile statute. *See* note 294 *infra*, and text accompanying notes 301-09 *infra*. *Cf.* note 273 *supra*.

²⁸⁸ DETROIT, MICH., CODE § 39-1-18(14)(C) (1974).

Paragraph (b) initially follows the wording of the New York provision in describing the touching of the four major erogenous areas. It then adds, as in the Hawaiian statute, a requirement that the touching be "for the purpose of sexual stimulation."²⁸⁹ Paragraph (b) is also drafted so as to permit adoption of a much narrower erotic fondling category. Initially, the definition may be limited by deleting the reference to the touching of clothed erogenous zones and, perhaps, excluding entirely the touching of the buttocks.²⁹⁰ Restricting erotic fondling to the touching of unclothed genitals, pubic area, or breast of a female would eliminate much of the potential overly broad coverage of the definition. Second, the reach of the category may be further limited by making the category applicable only to performances, either live or on film.²⁹¹ A substantial difference in impact may exist, due to the added element of movement, between a movie or live performance depicting the touching of unclothed erogenous areas and a photograph capturing a given moment in such action.²⁹² Moreover, the context in performances tends to be much clearer and the purpose of sexual gratification can be more readily determined. It should be noted, however, that much of the material that would be brought under the statute by including the touching of unclothed erogenous areas in performances is already "off-limits" to minors through other regulations. "Topless" and "bottomless" shows involving such touching are usually presented in establishments serving alcoholic beverages. Movies containing such touching are classified as X or R and are effectively barred to minors on that basis.²⁹³

F. Sexual Excitement

The category of "sexual excitement," as defined in paragraph (k), lies on the boundary between sexual activity and nudity. Two years before

²⁸⁹ HAWAII REV. STAT. tit. 37, § 712-1210(7) (Special Supp. 1972). Statutes including a similar requirement usually refer to "sexual stimulation or gratification," see note 286 *supra*, and the Hawaiian statute also refers to "perversion," see text accompanying note 285 *supra*. An element of stimulation is present in the achievement of sexual "gratification" or "perversion" so those terms do not add to the substance of the statute. On the other hand, only "stimulation" is noted in the definition of "prurient interest," see paragraph (i), and including additional terms in paragraph (b) could lead to an inappropriately narrow interpretation of the "prurient interest" definition. See text accompanying notes 70-76 *supra*.

²⁹⁰ See also NEV. REV. STAT. § 201.263 (1973); OBSCENITY COMMISSION MODEL STATUTE, *supra* note 3, § 2(d). These provisions apply to the touching only of the unclothed genitals and pubic area (Nevada) or genitals alone (Commission). Adoption of this limitation could more readily be fitted within the framework of our proposal by eliminating the category of "erotic fondling" and broadening the definition of "masturbation." See note 281 *supra*.

²⁹¹ This could be achieved by including the category of "erotic fondling" only in the definition of "sexually explicit performance." See proposed paragraph (n). If "erotic fondling" is included in that paragraph, a reference to "masturbation" would be unnecessary. See note 281 *supra*.

²⁹² See OBSCENITY COMMISSION REPORT, *supra* note 3, at 169. See also *Richards v. State*, 497 S.W.2d 770, 779 (Tex. Civ. App. 1975); *General Corp. v. State ex rel. Sweeton*, 294 Ala. 657, 663, 320 So. 2d 668, 672 (1975).

²⁹³ See notes 314-15 and accompanying text *infra*, also discussing nonrated films. See also text accompanying note 278 *supra*.

Miller, Judge Leventhal suggested in *Huffman v. United States*,²⁹⁴ that, while nudity alone could not constitute obscenity for adults, a picture showing an erect penis could be obscene, since it shows "the kind of sexual response that typically denotes imminent sexual activity." The constitutionally protected use of materials portraying sexual excitement is quite limited, and it is relatively easy to determine whether visual material depicts sexual excitement, at least with respect to a male.

Most of the statutes examined include a specific category labelled "sexual excitement," and the others, with one exception, would reach depictions of sexual excitement under other categories of included content.²⁹⁵ States with a sexual excitement category commonly employ a definition similar to that in proposed paragraph (k), which refers essentially to depiction of aroused genitals.²⁹⁶

The Detroit ordinance is one of three provisions that uses a broader definition. It defines "sexual excitement" as the

facial expressions, movements, utterances, or other responses of a human . . . whether clothed or not, who is in an apparent state of sexual stimulation or arousal or experiencing the physical or sensual reactions of humans engaging in or witnessing sexual conduct.²⁹⁷

The genital arousal described in proposed paragraph (k) is only one of

²⁹⁴ 470 F.2d 386, 400 (D.C. Cir. 1971), *rev'd on rehearing*, 502 F.2d 419, 423 (D.C. Cir. 1974).

In its listing of examples of constitutionally permissible coverage for a general obscenity statute, *Miller* did not refer specifically to depiction of sexual excitement, but did refer to patently offensive representations of the "lewd exhibition of the genitals." See text accompanying note 243 *supra*. That category arguably could encompass the depiction of clothed, as well as unclothed, genitals in a state of sexual excitement. See note 295 *infra* and text accompanying note 304 *infra*. See also text accompanying notes 301-09 *infra* (discussing the significance of the *Miller* examples as applied to a juvenile obscenity statute).

²⁹⁵ Of the statutes defining specific sexual content, see note 256 *supra*, all but three (Iowa, Kentucky, and West Virginia) include a "sexual excitement" category. Moreover, IOWA CODE ANN. § 725.1(1) (Cum. Pamphlet 1975) (which applies to the depiction of "genitals") and W. VA. CODE ANN. § 61-8A-1(7)(b) (Supp. 1974) (which applies to the "lewd exhibition of the genitals") may both encompass the depiction of clothed, as well as unclothed, genitals in the state of sexual excitement. See also note 325 *infra*. The Kentucky provision, KY. REV. STAT. § 521.010 (Cum. Supp. 1974), (described in note 321 *infra*) would include depictions of sexual excitement only when such depictions also portrayed excretion or touching of the genitals. See also PROPOSED ARIZ. CRIM. CODE § 3504 (Ariz. Crim. Code Comm'n 1975) (described in note 322 *infra*).

²⁹⁶ See, e.g., FLA. STAT. ANN. § 847.012(d) (Supp. 1975); N.J. STAT. ANN. § 2A:115-1.7(c)(1) (Supp. 1975); WIS. STAT. ANN. § 944.25(1)(d) (Supp. 1975). Paragraph (k) refers to genitals in a state of sexual arousal or "stimulation." The reference to a state of "stimulation" may be deleted if verbal material is not included in the statute. See part IV A *infra*. The term "arousal" sufficiently covers possible visual representations.

²⁹⁷ DETROIT, MICH., CODE § 39-1-18(15) (1974). See also ORE. REV. STAT. § 167.060(11) (1974) (defining "sexual excitement" as the condition of the genitals or the breasts of a female "when in a state of sexual stimulation, or the sensual experiences of humans engaging in or witnessing sexual conduct or nudity"); UTAH CODE ANN. § 76-10-1201(8) (Supp. 1975) (same).

various types of "responses" that would be included under the Detroit definition. Most of those other responses would, however, normally be accompanied by the depiction of sexual activities that would fall within other categories in the proposed statute. Thus, a certain variety of nude "go-go dancing" commonly features the types of expressions, movements, and utterances which the Detroit draftsmen apparently had in mind. But such "dancing" also includes "erotic fondling" or even simulated sexual intercourse. Indeed, if the specific content of the juvenile statute includes depictions of "nudity,"²⁹⁸ then the only additional coverage provided by the Detroit definition of sexual excitement would be of material that almost always would be protected under the tripartite test. Taken literally, the Detroit definition could reach almost every portrayal of an embrace or kiss between persons romantically inclined, even though those persons are fully clothed and there is no accompanying depiction of erotic fondling. As noted previously,²⁹⁹ the inclusion of such potentially broad-ranging provisions has given rise to much of the criticism of obscenity provisions. The narrower and more common definition of paragraph (k) provides adequate coverage in the context of the total statute while giving the disseminator far more precise guidelines.³⁰⁰

G. Nudity

1. *Inclusion of a Nudity Category*—The final category of sex-related content is "nudity"—the depiction of unclothed genitals, pubic area, buttocks, or female breasts.³⁰¹ In offering "a few plain examples of what a state statute could define for regulation," *Miller* cited the "patently offensive representations or descriptions of . . . lewd exhibitions of the genitals."³⁰² The scope of the Court's reference to the "lewd exhibition" of the genitals is unclear. *Miller* also noted that the specific sexual content of a general obscenity provision must be limited to the depiction of "sexual conduct." Judge Leventhal contends that the *Miller* reference to "lewd exhibition" of the genitals must be read in light of this "sexual conduct" limitation, and, accordingly, the term "exhibition" should be

²⁹⁸ See part III G 1 *infra*.

²⁹⁹ See point 2 in part I *supra*.

³⁰⁰ On the possible use of a definition similar to that of the Detroit ordinance in connection with a nudity provision, see note 323 *infra*.

³⁰¹ The nudity category discussed in this section is not directed at depictions of nudity that portray sexual intercourse, sado-masochistic abuse, masturbation, erotic fondling, or sexual excitement, but is designed to encompass portrayals of nudity that would not fall within the other content categories discussed above.

Some state statutes include in the definition of "nudity" the depiction of "covered male genitals in a discernably turgid state." See, e.g., FLA. STAT. ANN. § 847.012(1)(b) (Supp. 1975); N.Y. PENAL LAW § 235.020(2) (McKinney Supp. 1975); OHIO REV. CODE ANN. § 2907.01(H) (Page 1975). These states also have "sexual excitement categories" that would include such depictions. See, e.g., FLA. STAT. ANN. § 847.012(1)(d) (Supp. 1975); N.Y. PENAL LAW § 235.020(4) (McKinney Supp. 1975); OHIO REV. CODE ANN. § 2907.01(g) (Page 1975). Since such depictions are more appropriately treated as illustrations of sexual excitement, the definition of nudity under discussion here does not refer to the depiction of clothed genitals.

³⁰² 413 U.S. at 25. See text accompanying note 243 *supra*.

viewed as referring only to "the conduct of exhibiting and not to a passive pose."³⁰³ This interpretation of *Miller*, he notes, would exclude still photographs of a single nude person, unless that person's genitals are depicted in a state of arousal or masturbatory or excretory conduct is shown.³⁰⁴

Even if Judge Leventhal's interpretation reads too much into the Court's use of the term "exhibition," *Miller's* reference to the lewd showing of "genitals" suggests that at least the depiction of nude female breasts or male or female buttocks could not be proscribed under a general obscenity statute. While the Court has noted that the *Miller* examples "were not intended to be exhaustive,"³⁰⁵ the fact that *Miller* referred to depiction only of the genitals takes on potential constitutional significance when viewed in light of the Court's further comment that obscenity encompasses only the depiction of "'hard-core' sexual conduct."³⁰⁶ A nudity category in a general obscenity statute certainly would be of doubtful validity if it encompassed, for example, a nude pin-up that reveals no more than the bare buttocks or breast.

In the case of a juvenile obscenity provision, a nudity category encompassing the showing of buttocks or breasts arguably would be less suspect constitutionally. The New York statute upheld in *Ginsberg* included just such a definition of proscribable nudity: "the showing of the [unclothed] human male or female genitals, pubic area or buttocks . . . or the showing of the female breast . . . below the top of the nipple . . ."³⁰⁷ The *Ginsberg* opinion, however, was primarily concerned with the state's authority to adopt a special standard of obscenity for minors; it did not discuss the range of depictions included within the New York provision, aside from stressing that the statute by its own terms applied only to material that met a modified tripartite test. Moreover, the Court specifically refused to rule on the obscenity of the publications in issue in that case, two so-called "girlie" magazines that portrayed the nude buttocks and breasts of females.³⁰⁸ Thus, *Ginsberg* does not hold that such nude pin-ups are ob-

³⁰³ See Leventhal, *The 1973 Round of Obscenity-Pornography Decisions*, 59 A.B.A.J. 1261, 1263 (1973).

³⁰⁴ Another possible exception would be the portrayal of a nude person in a setting indicating sado-masochistic abuse. See note 273 *supra*.

³⁰⁵ *Hamling v. United States*, 418 U.S. 87, 114 (1974).

³⁰⁶ 413 U.S. at 27. See also *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974), holding that "'Carnal Knowledge' could not be found under the *Miller* standards to depict sexual conduct in a patently offensive way." The Court noted

[w]hile . . . there are scenes in which sexual conduct including "ultimate sex acts" is to be understood to be taking place, the camera does not focus on the bodies of the actors at such times. There is no exhibition whatever of the actors' genitals, lewd or otherwise, during these scenes. There are occasional scenes of nudity, but nudity alone is not enough to make material legally obscene under the *Miller* standards.

Id.

³⁰⁷ Law of June 7, 1965, ch. 327, § 484-h, [1965] N.Y. Laws 480, as amended N.Y. PENAL LAW § 235.20(2) (McKinney Supp. 1975). See 390 U.S. at 645.

³⁰⁸ 390 U.S. at 632, 635. The Court did not rule on the obscenity of this material since the defendant failed to argue that the material was not "harmful to minors" under the statutory definition, or that the statute was unconstitutionally applied. *Id.* at

scene for minors. On the other hand, it also clearly does not foreclose that possibility, and the Court's opinion certainly seems to have assumed that at least some such portrayals of nudity can be obscene for minors.³⁰⁹

Assuming that a juvenile obscenity statute constitutionally can include a broad nudity provision (such as the New York provision in *Ginsberg*), the question remains as to whether adoption of such a provision or even a narrower provision (such as one limited to the depiction of nude genitals) reflects sound legislative policy. The basic argument favoring inclusion of a nudity category is that depictions of nudity alone can be presented in a manner that is at least as erotic as a depiction of masturbation,³¹⁰ and therefore may have an equally adverse impact upon juveniles. Also, while erotic nudity may not be as offensive to community standards as erotic portrayals of sexual intercourse, such nudity still may clearly affront those standards.

On the other side, substantial arguments can be advanced against including either a broad or narrow nudity category. Those arguments, moreover, need not challenge the assumption noted above as to the pornographic quality of certain portrayals of nudity. Instead, they stress that a nudity category (1) undermines a primary function of the sexual specificity requirement by encompassing a substantial body of material that would not be obscene under the tripartite standard,³¹¹ (2) places a substantial administrative burden on disseminators because of its over-coverage, and (3) is largely unnecessary in light of the coverage provided by other categories of sex-related content.

631 n.1, 635. Justice Fortas' dissent was based, in part, on the Court's failure to rule on the obscenity of the individual items, but the dissent also did not determine whether the items were obscene for minors.

Of course, even if *Ginsberg* had held that the portrayal of the nude buttocks or breast could be obscene, that ruling might be subject to review in light of the increased exposure of minors to nudity during the past eight years. *Cf. Jenkins v. United States*, 418 U.S. 153 (1974); *People v. Berger*, — Colo. —, 521 P.2d 1244 (1974).

³⁰⁹ See also *Erznozik v. Jacksonville*, 422 U.S. 205 (1975). The Court there held unconstitutional a local ordinance prohibiting a drive-in movie, with a screen visible from a "public place," from exhibiting any material "in which the human male or female bare buttocks, human female bare breasts, or human bare pubic areas are shown." *Id.* at 207, 217-18. In the course of describing the ordinance's overbreadth, the Court noted that "[c]learly all nudity cannot be deemed obscene even as to minors." *Id.* at 213. The Court also commented, that "under any test of obscenity even as to minors," nudity could not be proscribed unless the portrayal was "in some significant way, erotic." *Id.* at 213 n.10 (quoting from *Cohen v. California*, 403 U.S. 15, 20 (1971)). Of course, in a juvenile obscenity statute, the application of the tripartite test would ensure that the material is erotic. Also, some statutory definitions of encompassed nudity assist in excluding non-erotic portrayals by limiting encompassed depictions to those of persons above the age of puberty. See, e.g., HAWAII REV. STAT. tit. 37, § 712-1210(6)(b) (Special Supp. 1972); ORE. REV. STAT. § 167.060(5) (1974).

³¹⁰ See studies cited in the OBSCENITY COMMISSION REPORT, *supra* note 3, at 172-78 (on the types of depictions most likely to cause sexual arousal).

³¹¹ See text accompanying notes 251-53 *supra*. *Cf. Siegel v. Salisbury*, 379 F. Supp. 317, 321, 325 (W.D. Pa. 1974) (holding unconstitutional a public display ordinance that utilized the *Ginsberg* definition of "nudity," and required a finding of prurient appeal, but rejected the other elements of the tripartite tests).

The problems of over-coverage and administrative burden flow from the pervasiveness of depictions of nudity. The contents of even the weekly news magazines illustrate that rapidly changing sex attitudes have eliminated the nude buttocks and female breasts, as they previously eliminated the well-turned ankle of Victorian days, from the category of items that are viewed as automatically sexually provocative even for minors. Depictions of the nude genitals have not yet reached the weekly news magazines, but they are found occasionally in publications such as photography and art magazines that are not primarily sexually oriented. Almost all such nude portrayals in publications lacking a sexual orientation would fall short of the patently offensive requirement of the tripartite test, even though some might have prurient appeal for minors.³¹²

Those depictions of nudity which may be categorized as offensive and of potential harm to minors are found primarily in "girlie" magazines, sexually oriented films, "peep-show" slides, and certain live performances. But inclusion of a nudity category generally is not necessary to ensure coverage of such publications and productions because they ordinarily also contain depictions of sexual intercourse, masturbation, sado-masochistic abuse, erotic fondling, or sexual excitement. "Girlie" magazines, as can be seen from recent issues of *Playboy* and *Oui*, contain photographs which portray masturbation and sexual excitement, and drawings which depict sexual intercourse.³¹³ "Peep-show" slides contain similar portrayals. Those live performances of primary concern—the typical topless and bottomless show, as opposed to the Las Vegas or "Follies" nude show-girl performance—often contain at least erotic fondling. Movies that contain objectionable nudity often also contain erotic fondling. However, even if portraying nudity alone, the movies would be rated R or X under the industry's own regulations so minors either would not be admitted (X-rated) or would be admitted only if accompanied by a parent (R-rated).³¹⁴ Sexually oriented films not submitted for an industry rating usually are aimed at an

³¹² Moreover, as minors are exposed more frequently to nudity in constitutionally protected material, the potential prurient appeal of nudity in sexually oriented publications may decrease significantly. Cf. note 168 *supra*.

³¹³ See, e.g., *OUI*, July 1975, at 24, 31, 62, 95-96. See also *Skin Trouble*, *TIME*, Sept. 22, 1975, at 50. Such magazines also portray various acts of "erotic fondling." For reasons discussed in the text accompanying notes 291-93 *supra*, it may be desirable to limit inclusion of the "erotic fondling" category to performances.

³¹⁴ Occasional glimpses of the nude breast or buttocks may also be found in PG movies. Extensive nude scenes and all displays of nude genitals and the pubic area should result, however, in an R or X rating. *OBSCENITY COMMISSION REPORT*, *supra* note 3, at 78-80. Of course, the movie rating system is always subject to change. Indeed, the industry agencies involved have never published formal rating criteria. See Friedman, *The Motion Picture Rating System of 1968: A Constitutional Analysis of Self-Regulation by the Film Industry*, 73 *COLUM. L. REV.* 185, 195 (1973) (noting that "whatever standards do exist are almost totally dependent on the *weltanschauung* of whoever happens to be the current CARA director"). However, sexually oriented material that would be patently offensive to even the more conservative communities in the country ordinarily has received at least an R rating, and the pressure of public opinion makes it unlikely that the industry will depart from that pattern. See *OBSCENITY COMMISSION REPORT*, *supra* note 3, at 78-79; Friedman, *supra*, at 205, 210-13.

adult market and shown by theatres that do not admit minors.³¹⁵ Moreover, even if minors were not excluded, most of these films depict sexual activity that would put the films within the reach of a juvenile obscenity statute without regard to the nudity itself. Thus, with respect to magazines, movies, and live performances, a nudity category is not needed to restrict the access of minors to that nudity most likely to be viewed as objectionable.³¹⁶

A nudity category would be needed, however, to reach other less objectionable material that might fall within the tripartite test, such as magazines combining an alleged artistic and sexual emphasis in presenting highly erotic nude portraits.³¹⁷ Such publications are not as likely to go beyond portrayal of the nude genitals, and therefore most would not fall within a statute applicable only to depictions of sexual acts or sexual excitement. Yet, even with a nudity category, a juvenile obscenity statute may not be very successful in restricting the dissemination of these publications to minors. There are a large variety of publications that may contain visual representations of nudes as part of artistic or scientific presentations. Most of these publications clearly would be protected under the tripartite standard, and the disseminator would find it extremely time consuming to separate such publications from others containing nudity that is likely to be obscene for minors.³¹⁸ Many disseminators probably would make little effort to draw distinctions, and simply would continue to sell to minors or adults almost any publication that was assumed to contain no more than nudity.

If, on the other hand, the possibility of prosecution served as a sufficient threat to deter the sale of a wide variety of publications likely to contain nudity, there would be significant offsetting costs for minors. In light

³¹⁵ Friedman, *supra* note 314, at 192, estimates that rated films account for 92 percent of all commercial exhibitions. Nonrated films are given an automatic X rating by any theatre subscribing to the rating program, which includes more than 90 percent of the nation's theatres. *Id.* at 192 n.52. So-called "sexploitation" films may be shown by theatres that do not participate in the rating program, but these theatres impose a minimum age for entry similar to that required for X-rated movies. See Sampson, *Commercial Traffic in Sexually Oriented Materials in the United States (1969-1970)*, in III COMMISSION ON OBSCENITY AND PORNOGRAPHY, TECHNICAL REPORT 3, 36-37 (1971). See also *id.* at 53-57 (discussing 16-millimeter films). Unrated foreign "art films" may pose greater difficulties. Such films, while not of the X variety, do contain material that would warrant an R rating and are not necessarily shown in "adult-only" theatres or theatres that subscribe to the rating program. See *id.* at 24.

³¹⁶ It is unlikely that these materials could be profitably altered to ensure legality of distribution to the minors in a state with a statute that did not encompass nudity alone. See text accompanying notes 13-15 *supra*. Live performances arguably might be more readily tailored to avoid the other statutory categories and yet include nudity. If nudity in live performances is considered an important problem, a nudity category could readily be included for such performances alone, as live performances are treated in the separate section on performances. See proposed section 2(1)(b).

³¹⁷ Cf. *People v. Berger*, — Colo. —, 521 P.2d 1244 (1974).

³¹⁸ The problems presented in identifying objectionable nudity would be even more significant if the "nudity" category included verbal descriptions of nudity as well as visual representations. See notes 334-35 and accompanying text *infra*.

of the burden of inspection and the difficulty of determining precisely what nudity is proscribed, the concerned bookseller might simply adopt a policy of refusing to sell any potentially questionable material to minors.³¹⁹ Thus, dealers might refuse to sell to minors sexually oriented publications that only occasionally include some nudity.³²⁰ Cautious dealers also may refuse to sell various significant works (particularly in the artistic area) that are not primarily sexually oriented but are likely to contain substantial nudity.

Notwithstanding the various difficulties presented by a nudity category, all except one of the state provisions examined reach at least some depictions of nudity that would not be encompassed by the categories of sexual excitement, erotic fondling, masturbation, sado-masochistic abuse, or sexual intercourse.³²¹ Of four proposed statutes examined, three apply to nudity, but one, the Arizona proposal, is limited to the depiction of sexual acts.³²²

2. *Definition of Nudity*—If a nudity category is included in a juvenile statute, the arguments noted above suggest that it should at least be narrowly defined. Proposed paragraph (g) limits nudity to the “lewd showing of the genitals or pubic area of a person of the age of puberty or older.”³²³ This definition largely follows the *Miller* description of nudity

³¹⁹ Cf. Lockhart & McClure, quoted note 389 *infra*.

³²⁰ This would be particularly likely where the publication, like *Cosmopolitan*, has achieved some notoriety due to a past issue containing a photograph revealing male genitals.

³²¹ Various state provisions are cited in notes 325-27 *infra*. The one exception noted above is KY. REV. STAT. §§ 531.010, .030 (Cum. Supp. 1974). The Kentucky obscenity statute uses a single definition of “obscene” material for both its general and juvenile provisions, and that definition applies only to depictions of “sexual conduct” (*i.e.*, “acts of masturbation, homosexuality, lesbianism, bestiality, sexual intercourse, or deviant sexual intercourse; a physical contact with the genitals, flagellation, or excretion for the purpose of sexual stimulation or gratification”). KY. REV. STAT. § 521.010(4) (Cum. Supp. 1974).

³²² The statute proposed by Commissioners Hill and Link, *see* note 3 *supra*, does not contain a listing of specific sexual content, but clearly was intended to apply to depictions of nudity that appeal to the prurient interest of minors. *See* OBSCENITY COMMISSION REPORT, *supra* note 3, at 463, 418-19, 470-73. The statute proposed by the majority of the Commissioners would apply to matter “which emphasizes the depiction of uncovered adult human genitals.” *See* proposed statute § 2(d)(ii), OBSCENITY COMMISSION REPORT, *supra* note 3, at 66. THE PROPOSED MICH. CRIM. CODE §§ 6301(e), 6310 (Mich. State Bar 1967) would apply to the display of the genitals and pubic area. THE PROPOSED ARIZ. CRIM. CODE § 3504 (Ariz. Crim. Code Comm’n 1975) would apply only to the depiction of sexual conduct (masturbation, intercourse, or the “touching of the genitals, pubic area, or other areas” in an “act of apparent sexual stimulation or gratification”) and sado-masochistic abuse (defined as in proposed paragraph (j) of section 1). Of course, since the definition of sado-masochistic abuse encompasses the nude person displayed in a “condition of being fettered,” the Arizona proposal would reach, in this limited context, a depiction of nudity without accompanying conduct by the person depicted.

³²³ Another possible definition would combine the Detroit definition of sexual excitement, *see* text accompanying note 297 *supra*, with the depiction of nude genitals and pubic area. The facial expressions and movements accompanying the showing of genitals are often the key factor contributing to the “lewdness” of the depiction of nudity. This approach might assist in limiting the vagueness inherent in the term “lewd.”

which might be found obscene for adults,³²⁴ five state juvenile obscenity provisions,³²⁵ and the juvenile provisions recommended by the Michigan Bar Committee³²⁶ and the Commission on Obscenity and Pornography.³²⁷ Unlike the *Miller* description, paragraph (g) encompasses the lewd display of the pubic area as well as the genitals. Portrayals of the fully nude female in performances and publications that are clearly designed to appeal to the prurient interest typically reveal the pubic area without showing the genitals.³²⁸ Such portrayals are no less revealing than portrayals of nude males, and are just as obviously presented with a primary emphasis on eroticism. Moreover, including depiction of the pubic area as well as the genitals should not add significantly to the difficulties presented in applying the nudity definition.

Most of the state juvenile obscenity statutes examined have broader definitions of nudity than proposed paragraph (g). These provisions generally are identical to the definition of nudity in the New York statute considered in *Ginsberg*.³²⁹ That definition extends to the depiction of the nude genitals, pubic area, buttocks, and female breast below the top of the nipple.³³⁰ Including depictions of the breast and buttocks raises the most serious problems of unnecessary breadth. Those are the portions of the body most frequently revealed in national magazines, art collections, and other material readily available to minors. Indeed, the nude pin-ups of

³²⁴ See text accompanying note 302 *supra*.

³²⁵ HAWAII REV. STAT. tit. 37, § 712-1210(6) (Special Supp. 1972) (visual representation of "person of the age of puberty or older . . . with less than a fully opaque covering of his or her genitals and pubic area"); IOWA CODE ANN. § 725.1(1) (Supp. 1975) ("depicting . . . the genitals"); NEV. REV. STAT. § 201.261 (1973) (the "showing of the human male or female genitals or pubic area"); N.D. CENT. CODE § 12.1-27.1-01 (8) (Special Supp. 1975) ("lewd exhibition of the male or female genitals"); W. VA. CODE ANN. § 61-8A1(7)(b) (Supp. 1974) ("lewd exhibition of the genitals"). Not all of these provisions are clearly limited to depictions of the unclothed genitals, but they are likely to encompass depictions of the clothed genitals only when the genitals are portrayed in a state of sexual excitement. See note 295 *supra*.

³²⁶ PROPOSED MICH. CRIM. CODE § 6301(b)(ii) (Mich. State Bar 1967) (depiction of "any person of the age of puberty or over revealing such person with a less than fully opaque covering over his or her genitals and pubic area").

³²⁷ Proposed section 2(d)(ii), OBSCENITY COMMISSION REPORT, *supra* note 3, at 66 (applying to material "which emphasizes the depiction of uncovered adult human genitals").

³²⁸ See *BBS Productions, Inc. v. Purcell*, 360 F. Supp. 801, 804 (D. Ariz. 1973) (holding that typical total front female nudity does not depict female "genitalia": "No standard or medical dictionary tells or shows us that the Mount of Venus, revealed by the triangular area of pubic hair, is any component of exterior female genitalia.").

³²⁹ See note 307 and accompanying text *supra*. See, e.g., FLA. STAT. ANN. § 847.012(1)(b) (Supp. 1975); OHIO REV. CODE ANN. § 2907.01(H) (Page 1975).

³³⁰ See N.Y. PENAL LAW § 235.20(2) (McKinney Supp. 1975):

"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 discernibly turgid state.

Oregon modified this provision to exclude depictions of the nude buttocks. ORE. REV. STAT. § 167.060(5) (1974).

the fifties are today published in the national news magazines as memorabilia of that period.³³¹

IV. DEFINING OBSCENITY: MISCELLANEOUS MATTERS

A. Inclusion of Verbal Material

Proposed paragraphs (o) and (p) of section 1 distinguish between visual and verbal matter. This distinction was drawn to raise two issues: (1) whether the statute should encompass any verbal material; and (2) if verbal material is included, whether the sexual content of the encompassed verbal material should be more narrowly confined than the content of visual material.

Separate treatment of verbal material might be justified on two related grounds. First, although *Kaplan v. California*³³² held that verbal material could be obscene for adults, the Court noted that regulating the dissemination of such material was a subject of special concern:

Because of a profound commitment to protecting communication of ideas, any restraint on expression by way of the printed word or in speech stimulates a traditional and emotional response, unlike the response to obscene pictures of flagrant human conduct. A book seems to have a different and preferred place in our hierarchy of values, and so it should be.³³³

Of course, as *Kaplan* held, the "preferred place" of verbal material does not give such material constitutional immunity from state regulation. Neither is that "preferred place" conclusive in determining, as a matter of state policy, whether a juvenile obscenity statute should apply to verbal material. An obscene book may have the same impact upon a minor as an obscene picture.³³⁴ However, the special status of verbal material does

³³¹ See, e.g., TIME, July 21, 1975, at 39.

³³² 413 U.S. 115 (1973).

³³³ *Id.* at 119. At an earlier point in the opinion, the Court noted that it has "always rigorously scrutinized judgments involving books for possible violation of first amendment rights." *Id.* at 118 n.3.

³³⁴ See OBSCENITY COMMISSION REPORT, *supra* note 3, at 167-72 and the authorities cited therein. In *Kaplan*, the Court noted:

A state could reasonably regard "hard-core" conduct described by . . . [a book] as capable of encouraging or causing antisocial behavior, especially in its impact upon young people.

413 U.S. at 120. It should be noted, however, that public expressions of concern relating to the dissemination of obscenity to juveniles appear to center on visual representations, particularly illustrated magazines and movies. *Cf.* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 62 n.4 (1963) (describing the Rhode Island Youth Morality Commission's listing of "objectionable" publications). It is unclear whether this emphasis reflects a belief that the impact of books is less than that of pictures or that minors are less likely to be exposed to obscene verbal material because it takes more effort to read a book than to look at pictures. *But cf.* Wilson, Friedman & Horowitz, *Gravity of the Pornography Situation and Problems of Control: A Survey of Prosecuting Attorneys*, in V COMMISSION ON OBSCENITY AND PORNOGRAPHY, TECHNICAL REPORT 3, 10 (1971) (suggesting that "erotic paperback books," which often are not illustrated, ranked ahead of such magazines as *Playboy* as a cause of community concern relating to the general distribution of obscenity). See also note 340 *infra*.

suggest that a juvenile statute should encompass such material only to the extent that state regulation is justified by an especially strong showing of need.

The second factor supporting separate treatment of verbal material is the added administrative burden imposed by the regulation of such material. Regulating the dissemination of verbal material presents greater difficulties than regulating the dissemination of visual materials. Those additional difficulties are presented primarily in defining the content of potential harmful materials and limiting the burden placed upon the disseminator.

When the verbal form is involved, application of the traditional definitions of proscribed sex-related content is not appropriate. A definition for visual material may simply refer to any "depiction" of sexual intercourse, but a similar definition applied to textual material could encompass a single statement referring to people "making love." For textual material, the definition must consider more carefully the degree of specificity in the description of the sexual activity. A requirement that the description be "explicit and detailed," as proposed in paragraph (o), is helpful in this regard, but still leaves room for considerable variation in application. It fails to ensure that the class of materials described primarily includes only unprotected speech. The definitional problem is analogous to that presented in dealing with visual representations of nudity and, perhaps, erotic fondling, but is even more severe.

Since a workable dividing line cannot as readily be drawn for verbal as for visual material, it is almost impossible to provide the disseminator of verbal material with the same degree of certainty in assessing his potential liability as can be provided the disseminator of visual representations. Moreover, the burden of inspection placed upon the disseminator naturally is greater for verbal material because it is more difficult to check for possible obscenity by reading text than by flipping through pictures or watching a movie.³³⁵

Weighing these administrative difficulties against the need for regulation, the decision whether to include verbal material may rest on the legislative determination of the type of verbal materials that should be kept from minors without parental consent. If the legislative concern relates primarily to the traditional "sex-pulp" novels of the type considered in *Kaplan*, then current marketing practices may render regulation of verbal material unnecessary. Books of this type—described in *Kaplan* as "made up entirely of repetitive descriptions of physical, sexual conduct, 'clinically' explicit and offensive . . . [with] only the most tenuous 'plot'"³³⁶—are sold primarily in adult bookstores.³³⁷ If verbal materials were not

³³⁵ Also, in the case of a movie, if only a portion of the work is patently offensive, it is relatively easy for the distributor to remove the offensive part by editing the film. Similar editing by the distributor of books is not feasible.

³³⁶ 413 U.S. at 116-17.

³³⁷ The reference is to stores that have a restricted access section devoted to "adult" materials as well as to bookstores that sell only to adults. Available studies indicate that adult bookstores do make significant efforts to exclude minors. See

included within the statute, it seems unlikely that those bookstores would initiate a policy of selling to minors since the remainder of their wares would be proscribed for minors.³³⁸ On the other hand, if the legislative concern extends to books that probably are not obscene for adults but contain considerable, quite explicit sexual content (such as *The Happy Hooker*),³³⁹ then the current marketing practices could not as readily be relied upon to keep the books from minors. Such books are available in most bookstores and many drugstores as well.³⁴⁰

While legal sanctions are most clearly needed to restrict the access of minors to books sold outside of adult bookstores, any attempt to reach such material also increases the pernicious potential of self-censorship by booksellers. Many modern novels are concerned, in part, with sex and include at least a few pages containing an "explicit and detailed description" of ultimate sex acts. Consider, for example, the various works of John Updike, which are available to a minor from almost any public library. Books of this type clearly would be protected under the tripartite standard. They reflect serious literary efforts, although often dealing in significant part with sexual relations. While the plot or character development might not be totally within the grasp of most minors, the Updike works can hardly be described as lacking serious literary value for minors. Yet, the characteristics that distinguish *The Happy Hooker* from *Rabbit Redux* are far more difficult to clearly identify than those which distinguish the "sex-pulp" novels discussed in *Kaplan* from either *The Happy Hooker* or *Rabbit Redux*. While the drawing of a reasonable dividing line is difficult for verbal works generally, it becomes almost impossible once the ban extends beyond the "sex-pulp" novel. Moreover, even if a line could be drawn that would separate *The Happy Hooker* from *Rabbit Redux*, its application would surely require a fairly thorough examination of the

OBSCENITY COMMISSION REPORT, *supra* note 3, at 128-30 and authorities cited therein; Winick, *Some Observations on Characteristics of Patrons of Adult Theatres and Bookstores*, in IV COMMISSION ON OBSCENITY AND PORNOGRAPHY, TECHNICAL REPORT 225, 231, 242 (1971).

Sex-pulp novels can also be found in various conventional bookstores that have substantial sections devoted to sexually oriented materials. Such bookstores are often found in train stations, airports, and certain downtown areas which are not likely to be frequented by a substantial number of unaccompanied youth under the age of sixteen. Moreover, sex-pulp novels carried in such stores frequently are marked "for adult readers," although the sales clerks may not abide by this direction.

³³⁸ Cf. Winick, *supra* note 337 (noting that adult bookstores commonly set minimum ages above those required by state juvenile obscenity statutes as a precaution against possible misjudgment of a customer's age).

³³⁹ But see *McNary v. Carlton*, 527 S.W.2d 343 (Mo. 1975) (majority concluded that *The Happy Hooker* could be found obscene under *Miller*, while the dissent concluded that the book "does have some 'serious literary, artistic, political, or scientific value'"). The survey cited in Wilson, Friedman & Horowitz, *supra* note 334, revealed comparatively little public concern as to the general distribution of "erotic literary novels" as opposed to "erotic paperback books" (presumably "sex-pulp" novels). See also note 340 *infra*.

³⁴⁰ Such stores also may carry the "classic" erotic literature (e.g., *Fanny Hill*) which frequently has been challenged as obscene even for adults. The "pseudo-medical" books, containing alleged case studies of sexual activity, also may be found in stores that are not in the "adult bookstore" category.

works involved. Conventional bookstores handling nonpornographic stock obviously lack the resources or the commercial incentive to undertake such an extensive examination. Many are likely to cut off sales to minors³⁴¹ of any book thought to have significant sexual content and thereby restrict the access of minors to a wide range of potentially beneficial writings.

Concerns such as those noted above led the Commission on Obscenity and Pornography to suggest that juvenile obscenity statutes should apply only to visual representations.³⁴² None of the state statutes examined, however, were so limited.

Assuming the decision is made to include verbal material, consideration should be given to reaching a narrower range of sex-related content for verbal material than for visual material. For example, even if a nudity category is included for visual materials, it might not be included for verbal materials. Depiction of nudity arguably is less offensive in texts and certainly is even more pervasive in contemporary literature than in the visual arts. The risk of harm to minors is speculative, and the possible costs of restricting books with value for minors is great.

Although several of the statutes examined do not separate verbal material from visual material in terms of encompassed content,³⁴³ a number do draw that distinction.³⁴⁴ Those states making the distinction do not include a nudity category for verbal material and their definitional sections impose special requirements of "explicitness" in describing the sexual content of covered verbal material.³⁴⁵ The definition of encompassed verbal material in proposed paragraph (o) follows the pattern of these states. It does not include nudity and limits prohibited content to "explicit and detailed verbal descriptions or narrative accounts" of sexual intercourse, sado-masochistic abuse, and masturbation. Alternative formulations could also include sexual excitement and erotic fondling.

B. Age

Juvenile obscenity statutes restrict dissemination of "obscene" material only as to youth under a certain age. The state statutes examined

³⁴¹ This policy might be extended to all persons who could conceivably be minors. See part VII C *infra*; note 388 *supra*. Cf. text accompanying notes 318-20 *supra*.

³⁴² See OBSCENITY COMMISSION REPORT, *supra* note 3, at 58. Several commissioners disagreed with this recommendation, favoring inclusion of verbal materials along with a broad exception for "such textual materials when they bear literary, historical, scientific, educational, or other similar social value for young persons." *Id.*

³⁴³ See, e.g., COLO. REV. STAT. §§ 18-7-103(1), -101(3) (1973); IOWA CODE ANN. §§ 725.1(2), .2 (Supp. 1975); W. VA. CODE ANN. §§ 61-8A-1(5), -2 (Supp. 1974).

³⁴⁴ See, e.g., FLA. STAT. ANN. § 847.012(2)(b) (Supp. 1975); VA. CODE ANN. § 18.2-391(a)(2) (1975); WIS. STAT. ANN. § 944.25(j)(2) (Supp. 1975). See also statutes cited in note 345 *infra*.

³⁴⁵ See, e.g., HAWAII REV. STAT. tit. 37, § 712-1210(6)(a) (Special Supp. 1972) ("primarily devoted to explicit and detailed narrative accounts"); N.Y. PENAL LAW § 235.21(1)(b) (McKinney Supp. 1975) ("explicit and detailed verbal descriptions or narrative accounts"); ORE. REV. STAT. § 67.065(1)(b) (1974) ("explicit verbal descriptions or narrative accounts of sexual conduct, sexual excitement, or sado-masochistic abuse").

vary somewhat in setting that maximum age limit. Most of the provisions examined apply to distributions to youths under the age of eighteen.³⁴⁶ Two states, however, utilize an age limitation of "under seventeen"³⁴⁷ and one utilizes "under sixteen."³⁴⁸ In determining the appropriate age limit, a legislature should give primary consideration to two factors relating to the typical maturity of youth at a particular age. The first is the special susceptibility of youth to the deleterious influence of erotic publications, and the second is the effectiveness of parental control as reinforced by the juvenile provision.

In holding that a juvenile obscenity provision could reach a broader range of material than a statute aimed at adults, the *Ginsberg* decision noted that the legislature could reasonably assume that juveniles have a special susceptibility to the harmful impact of erotic publications.³⁴⁹ There is no clear-cut point, however, at which the special susceptibility of juveniles suddenly ceases. The maturing of attitudes toward sex is a gradual process. Thus, any chronological line that is drawn must be in part arbitrary. But similar lines are drawn in other legislation designed to protect juveniles, and they can furnish support for the line that is drawn in this area.

The most helpful analogy for juvenile protective legislation is the age limit drawn in statutes dealing with consensual sexual conduct. While age limitations in statutes dealing with other aspects of social or physical maturity (such as alcohol consumption or betting at tracks) are not irrelevant, they are far less helpful, since activities relating to sex tradition-

³⁴⁶ See, e.g., CAL. PENAL CODE § 313(g) (West Supp. 1976); COLO. REV. STAT. § 18-7-101(4) (1973); N.J. STAT. ANN. § 2A:115-1.8 (Supp. 1975). Some statutes do not refer to any specific age limit, but apparently incorporate the under-eighteen limit as the general dividing line between "minors" and "adults." See, e.g., KY. REV. STAT. § 531.080 (Cum. Supp. 1974); N.D. CENT. CODE §§ 12-27.1-02, 14-10-01 (Special Supp. 1974). A few of the provisions utilizing an under-eighteen standard are specifically limited to "unmarried persons" under eighteen. See OHIO REV. CODE ANN. § 2907.01(I) (Page 1975); ORE. REV. STAT. § 167.060(4) (1974).

The model statute recommended by the Commission on Obscenity and Pornography left the age limit unspecified so that each state could make its own determination. See OBSCENITY COMMISSION MODEL STATUTE, *supra* note 3, § 2(d)(i). The model statute proposed by dissenting Commissioners Hill and Link uses an age limit of "under 18." See HILL-LINK MODEL STATUTE, *supra* note 3, § 7.

³⁴⁷ FLA. STAT. ANN. § 847.012(1)(a) (Supp. 1975); N.Y. PENAL LAW § 235.20(1) (McKinney Supp. 1975). See also PROPOSED MICH. CRIM. CODE §§ 6301(d), 6310 (Mich. State Bar 1967). The New York statute upheld in *Ginsberg* used an age limitation of "under seventeen," and many states adopted quite similar statutes immediately after *Ginsberg*. See Friedman, *State Obscenity Statutes*, in II COMMISSION ON OBSCENITY AND PORNOGRAPHY, TECHNICAL REPORT 37, 46 (1971). Because these statutes are almost identical, we included only a few of these jurisdictions in the twenty state statutes examined in detail. See note 2 *supra*. Thus, it is probable that the "under seventeen" limit has substantially more support than our sample indicates, although "under eighteen" clearly constitutes the majority position. Several states adopting the New York-type statute after *Ginsberg* did make the one change of moving the age limit up to "under eighteen." See Friedman, *supra*, at 47.

³⁴⁸ HAWAII REV. STAT. tit. 37, § 712-1210(3) (Special Supp. 1972).

³⁴⁹ 390 U.S. at 640-41. As to the scientific evidence supporting this assumption, see OBSCENITY COMMISSION REPORT, *supra* note 3, at 182-94, 379-80 (and the studies cited therein).

ally have been given separate treatment by state legislatures.³⁵⁰

Based in large part on the age limitations utilized in Michigan legislation relating to sexual conduct, our *Study Report* suggested that the Michigan juvenile obscenity statute probably should utilize an age limitation of "under sixteen."³⁵¹ The new Michigan Criminal Sexual Conduct Act³⁵² brings together various provisions³⁵³ seeking to protect juveniles against older persons who seek to take sexual advantage of the juvenile's immaturity. Under the Sexual Conduct Act, an older person commits a felony if he or she engages in various acts of "sexual penetration" with a person under sixteen, even though both parties consent. If both participants have reached the age of sixteen, then consensual sexual activity is treated as the activity of "adults," and criminal liability is imposed only where special conditions are present (such as adultery). Criminal statutes in many other jurisdictions also use the age limitation of sixteen in protecting youth against consensual sexual intercourse.³⁵⁴ These statutes appear to reflect a legislative judgment that, at sixteen, juveniles have sufficient capacity to make decisions concerning sexual conduct that they no longer need be distinguished from "adults." Based upon this legislative judgment, one might also assume that at sixteen juveniles have sufficient maturity in handling matters depicting sexual conduct that their capacity to purchase such material need not be distinguished from adults generally.³⁵⁵

³⁵⁰ The Michigan statutory pattern appears to be fairly typical in this regard. Consider, in addition to the consensual sexual conduct provisions cited in note 353 *infra*, such criminal provisions as: MICH. COMP. LAWS ANN. § 750.13 (1968) (enticing away a female under sixteen); MICH. COMP. LAWS ANN. § 750.462 (1968) (employing a female under seventeen in a house of prostitution); MICH. COMP. LAWS ANN. § 750.337 (1968) (obscene language in presence of children).

³⁵¹ See *Study Report*, *supra* note 1, at 241. The current Michigan provisions set the age limit at "under eighteen," MICH. COMP. LAWS ANN. §§ 750.142, .343e (Supp. 1975). The PROPOSED MICH. CRIM. CODE § 6310 (Mich. State Bar 1967) recommended "under seventeen," although the commentary noted some division on this point because, *inter alia*, "proposed [CRIMINAL CODE] § 2312, in treating consensual intercourse as rape in the third degree, adopts a maximum age limit of under sixteen."

³⁵² MICH. COMP. LAWS ANN. § 750.520(a) (Supp. 1975).

³⁵³ This statute replaced offenses commonly characterized as "statutory rape" (formerly MICH. COMP. LAWS ANN. § 750.520 (1968), applying to consensual intercourse with females under sixteen); "debauchery of youth," (formerly MICH. COMP. LAWS ANN. § 750.339 (1968), applying to consensual intercourse with a male under fifteen); "indecent liberties" (formerly MICH. COMP. LAWS ANN. § 750.336 (1968), applying to sexual contact with a child under sixteen); "enticement" (formerly MICH. COMP. LAWS ANN. § 750.145(a) (1968), applying to the solicitation of a child under sixteen to engage in immoral acts); and "carnal knowledge of a female ward" (formerly MICH. COMP. LAWS ANN. § 750.342 (1968), applying to sexual intercourse with a female ward under eighteen).

³⁵⁴ See, e.g., COLO. REV. STAT. § 18-3-401 (1973); CONN. GEN. STAT. ANN. § 53a-66 (1972); ILL. ANN. STAT. ch. 38, § 11-4 (Smith-Hurd Supp. 1975). See also MODEL PENAL CODE 250-51 (Tent. Draft No. 4, 1955) (discussing age limitations commonly used in "statutory rape" provisions).

³⁵⁵ While the age limitation utilized in statutory rape statutes reflects, in part, a judgment as to a youth's maturity in dealing with sexual matters, it may also reflect, in part, concern as to imposing criminal liability upon the "older" participant who fails to resist temptation. (Some statutory rape provisions arguably reflect such concern in requiring a significant age differential between the older participant and the participant who is under sixteen. See, e.g., COLO. REV. STAT. § 18-3-401-1(d) (1973)).

If the age limit is examined in light of the statute's potential effectiveness in reinforcing parental control, a maximum age of "under sixteen," or perhaps, "under seventeen," is suggested. In those areas where parents have specific legal authority to control the decisions of their children, that authority ordinarily exists until the child reaches eighteen.³⁵⁶ But there are various areas where a different age limit is applied,³⁵⁷ and the nature of the activity regulated by a juvenile obscenity statute suggests that it should be among those exceptions. The obscenity statute is not dealing with an activity requiring a government license, such as marriage, where the state can assure that the activity will not be undertaken by minors without parental approval. Once minors have a significant degree of mobility, and greater contacts with adults in a setting where they are treated as adults, a juvenile obscenity statute is likely to be of limited value in reinforcing parental control. With greater mobility and more significant contacts with adults, minors are more likely to obtain obscene material from noncommercial sources. Moreover, even as to commercial distribution, when minors have mobility, limited financial independence, and the cooperation of adult friends, their capacity to make direct purchases in violation of the law is significantly increased. Of course, the acquisition of mobility and adult contacts, as with the loss of any special vulnerability to obscenity, is a gradual process. Here again, however, an age limit of under sixteen or seventeen reflects a more realistic ceiling than under eighteen. It is at sixteen, for example, that a youngster ordinarily may obtain a driver's license and may begin to work in an adult setting.

With respect to the commercial seller of material "obscene" for minors, the concern over imposing liability for failure to resist "temptation" understandably may be lacking, and it therefore may be urged that a higher age limit is appropriate.

³⁵⁶ General "custody and control" provisions commonly extend to the age of eighteen where the minor is unemancipated. *See, e.g.,* MICH. COMP. LAWS ANN. §§ 703.6, 722.3 (Supp. 1975). In addition, various statutes require parental approval for a youth to engage in a specified activity. *See, e.g.,* MICH. COMP. LAWS ANN. § 551.103 (1967) (marriage of females between sixteen and eighteen). In other areas, parental approval is brought into play because the law generally prohibits dissemination of a certain item to minors, but does not prohibit parents from giving such items to the minors. *See, e.g.,* MICH. COMP. LAWS ANN. §§ 722.641, .643 (1968) (cigarettes). *But see* MICH. COMP. LAWS ANN. § 722.651 (1968). The common use of an "under eighteen" age limitation in the various parental control provisions probably explains the use of that age limit in juvenile obscenity statutes. While eighteen now is a commonly accepted age of majority, the "under eighteen" limit was found in many jurisdictions when a person was not legally an "adult" until he reached twenty-one. *See, e.g.,* MICH. COMP. LAWS ANN. § 750.343(e) (1968) (obscenity provision adopted in 1958); MICH. COMP. LAWS ANN. § 722.52 (Supp. 1975) (Age of Majority Act of 1971). *See also* the "New York-type" statutes passed after Ginsberg, listed in Friedman, *supra* note 347, at 47.

³⁵⁷ Thus, in Michigan, minors under seventeen may visit a place where liquor is sold only while accompanied by their parents, but after reaching seventeen, parental approval is no longer needed. *See* MICH. COMP. LAWS ANN. § 750.141 (1968). *See also* MICH. COMP. LAWS ANN. §§ 722.751-752 (1968), *as amended*, (Supp. 1975) (curfew applied to minors not accompanied by parent or appropriate adult limited to minors under sixteen). In some areas, such as attendance at school, parents may have no legal authority since the children will be required to participate up to a certain age and after that have a personal option not legally subject to parental control. *See* MICH. COMP. LAWS ANN. §§ 340.731-732 (1967), *as amended*, (Supp. 1975).

V. DISTRIBUTION

A. Inclusion of Noncommercial Dissemination

The activity prohibited under section 2 of the proposed statute is the "dissemination" of obscene material. Paragraph (a) of section 1, in turn, offers two alternative definitions of "dissemination." Under the first alternative, the statute would apply to both commercial and noncommercial distribution of obscene matter to a minor, while the second would limit its application to commercial distribution alone. Whether the statute encompasses noncommercial dissemination probably is not of great practical significance, but it is an issue viewed as symbolic of the statute's basic range and, accordingly, often is a subject of considerable controversy.

The state apparently has the constitutional authority to regulate non-commercial as well as commercial distribution of obscene materials to minors. *Miller* and two companion cases³⁵⁸ placed considerable stress on the commercial aspect of the dissemination involved in those cases,³⁵⁹ but in *United States v. Orito*,³⁶⁰ decided at the same time, the Court upheld Congress' power to bar interstate transportation of obscene materials without regard to whether the material transported was to be sold commercially or used personally by the transporter. Congress could constitutionally adopt a comprehensive prohibition, encompassing private transportation for private use, as reasonably necessary to keep interstate commerce from being used to extend the harm caused by the ultimate exposure of obscene material to the public.³⁶¹ Similarly, to prevent that same harm, the state may seek to restrict noncommercial dissemination as a necessary supplement to the regulation of commercial distribution.³⁶²

Of course, although constitutional authority exists, the issue remains whether regulation of noncommercial dissemination constitutes sound legislative policy. In deciding this issue, the legislature should determine the extent to which criminal regulation of noncommercial dissemination is needed to implement the statute's basic function of supplementing

³⁵⁸ *Paris Adult Theatre I v. Slaton*, 413 U.S. 491 (1973); *Kaplan v. California*, 413 U.S. 115 (1973).

³⁵⁹ See, e.g., *Miller*, 413 U.S. at 35 (noting the state authority over the "public portrayal of hard-core sexual conduct for its own sake and for the ensuing commercial gain"); *Paris Adult Theatre*, 413 U.S. at 57 (noting the state interest in stemming the tide of "commercialized obscenity"). *Ginsberg* also involved commercial distribution and the New York juvenile obscenity law applied there was specifically limited to such dissemination. See note 7 *supra*.

³⁶⁰ 413 U.S. 139 (1973).

³⁶¹ See *id.* at 143. See also *United States v. 12 200-Ft. Reels of Film*, 413 U.S. 123, 128 (1972) (emphasis added):

We have already indicated that the protected right to possess obscene material in the privacy of one's home [see note 362 *infra*] does not give rise to a correlative right to have someone sell or give it to others.

³⁶² *Stanley v. Georgia*, 394 U.S. 557 (1969), recognized a zone of privacy within the home that protects against prosecution for private possession of obscenity. *Stanley* does not apply, however, where material is taken outside of the home. See, e.g., *United States v. Orito*, 413 U.S. 139, 141-43 (1973).

parents' control of their children's access to potentially obscene matter.³⁶³ Unfortunately, available information fails to provide a clear-cut assessment of that need.

On the one hand, the argument is advanced that the typical parental response to noncommercial distribution suggests the lack of any significant need for criminal regulation of such distribution. The great mass of noncommercial dissemination is between peers.³⁶⁴ The reaction of parents to peer distribution often differs considerably from their reaction to commercial distribution. In either instance, parental control of the child's access to sex-related materials is violated, but the peer engaged in noncommercial distribution is not viewed as equally responsible. Moreover, peer distribution arguably may be controlled by means other than criminal prosecution, such as school or parental discipline. Of course, not all noncommercial distribution is among peers. A somewhat older person may, for one reason or another, show obscene material to a minor. But the *Obscenity Commission Report* suggests that minors receive material in this manner in only a minute fraction of the total instances of distribution.³⁶⁵

On the other hand, the argument is advanced that noncommercial distribution constitutes such a major portion of the total distribution pattern that it must be regulated to assure parental control. Available evidence indicates that peer distribution far exceeds direct commercial sales to minors.³⁶⁶ While alternative controls are often available, there are instances when peers cannot readily be controlled without the threat of criminal prosecution. Moreover, it is argued, use of the criminal law is not unduly harsh. Since the peers will be within the jurisdiction of the juvenile court,

³⁶³ The Model Penal Code commentary, in support of a prohibition directed primarily at suppressing commercial dissemination, noted: "If production and circulation of obscene material for gain could be eliminated, the supply would be cut off at the source." MODEL PENAL CODE § 207.10, Comment, at 13 (Tent. Draft No. 6, 1957). Our model provision is drafted on the premise that the production and circulation of material obscene for minors cannot effectively be cut off "at the source" whether or not the state also adopts a general obscenity provision prohibiting dissemination to consenting adults. See note 4 *supra*. In the absence of a general provision, obscene material certainly will be introduced into commerce in the state, and at least the printed material purchased by adults may eventually find its way to minors (often without the consent of the adults). Moreover, even if a general obscenity provision were adopted, and it effectively deterred distribution to adults of material obscene for adults, youth still might receive materials obscene for minors but not for adults. Such material lawfully could be distributed to adults even under the most rigorous general obscenity provision. See *Butler v. Michigan*, 352 U.S. 380 (1957). Thus, we assume throughout this discussion that noncommercial dissemination cannot be eliminated by preventing commercial dissemination to minors. See also text accompanying notes 15-17 *supra*.

³⁶⁴ See OBSCENITY COMMISSION REPORT, *supra* note 3, at 126-29 and studies cited therein.

³⁶⁵ See OBSCENITY COMMISSION REPORT, *supra* note 3, at 126-29 and the studies cited therein. Our reference is to dissemination by adults other than relatives. In one study noted in the OBSCENITY COMMISSION REPORT, members of the family were cited as the most common source of pictures of sexual intercourse by 5 percent of the respondents.

³⁶⁶ OBSCENITY COMMISSION REPORT, *supra* note 3, at 126-29.

the consequences imposed upon them are less than catastrophic.³⁶⁷ The point is also made that, while noncommercial dissemination by persons who are neither peers nor relatives may not be common, it can cause considerable community concern. Such activity also can best be reached by direct prosecution under a juvenile obscenity provision rather than, for example, use of a "contributing-to-the-delinquency" provision.³⁶⁸ The Michigan State Bar Committee, in supporting total coverage, described such noncommercial distribution to minors as "often present[ing] a very serious problem."³⁶⁹

Assuming that noncommercial dissemination is a matter of serious concern, there are administrative problems which nevertheless might justify limiting coverage of the juvenile statute to commercial transactions. A statute including noncommercial dissemination would present a broad area of coverage in which most transactions would not be appropriate for prosecution. Such overbreadth is likely to subject any enforcement of the statute against noncommercial dissemination to claims of discriminatory prosecution. It also may increase the burden placed upon the prosecutor, who will have to deal with irate parents demanding prosecution in cases that fall within the literal reach of the statute but which are best disposed of outside the criminal process. Finally, the overbreadth will certainly lead to opposition to the statute on the ground that it grants the prosecution and police far too much discretion and it may thereby undermine public support for the statute generally.³⁷⁰

Exclusion of noncommercial dissemination also may be supported on the ground that it bolsters the protection afforded persons who distribute sexually explicit material to minors in connection with legitimate scientific or educational endeavors. Such persons would be protected both by

³⁶⁷ The maximum age for juvenile court delinquency jurisdiction commonly is seventeen or eighteen. See H. KERPER, INTRODUCTION TO THE CRIMINAL JUSTICE SYSTEM 387 (1972). As noted in the text accompanying note 355 *supra*, the recommended age level under the proposed statute is under sixteen or seventeen.

³⁶⁸ Some of the difficulties presented in utilizing a "contributing-to-the-delinquency" provision against the disseminator of obscene materials to minors are suggested by the authorities cited in note 487 *infra*.

³⁶⁹ PROPOSED MICH. CRIM. CODE, Comment, at 485 (Mich. State Bar 1967). The proposed Michigan code encompasses noncommercial distribution, but the commentary notes that "the Committee was sharply divided on this point." *Id.* Although the commentary does not clearly indicate what constituted the committee's primary concern about noncommercial distribution, the notes of the reporter who wrote the commentary (and who is one of the co-authors of this article) indicate that members were concerned almost exclusively with noncommercial distribution by adults rather than peers. One method of reaching noncommercial distributions by adults, yet still exempting peers, would be to limit liability for noncommercial dissemination to disseminators over the age of eighteen. See, e.g., N.C. GEN. STAT. § 14-190.7 (Supp. 1975). Cf. the "statutory rape" provisions discussed in note 355 *supra*.

³⁷⁰ The difficulties presented by over-coverage are accentuated in this area, where the activity involved often occurs within the home and therefore poses added concern relating to invasion of privacy. See *Stanley v. Georgia*, 394 U.S. 557, 569 (1969) (Stewart, J., concurring). See also *Poe v. Ullman*, 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

statutory exemptions³⁷¹ and by the tripartite standard. However, for those who believe that scientific and educational activities should be given absolute protection, these safeguards may be inadequate. As noted previously,³⁷² the tripartite standard is too uncertain to be relied upon by itself to preclude inappropriate prosecutions. The exemptions provide more certainty, but they necessarily are built on standards that leave room for disagreement at points. For example, a scientist who is not acting within a doctor-patient relationship is only exempt if his use of obscenity with children is for a "legitimate scientific . . . purpose."³⁷³ Very frequently, educators and scientists who use sexually explicit material with minors do so as part of a noncommercial venture. Limiting the statute to commercial dissemination would provide such educators and scientists with an additional layer of protection that should relieve them of any concern as to the protection afforded by the exemption provisions.³⁷⁴

States are divided as to the inclusion of noncommercial dissemination, although a majority of the statutes examined did include such dissemination.³⁷⁵ Some of these jurisdictions define "distribute" as "transferring possession whether with or without consideration."³⁷⁶ Other statutes simply apply to persons who "sell, give, rent, loan or otherwise provide,"³⁷⁷ or similarly, "lend, distribute, transmit, exhibit, or present."³⁷⁸ A substantial minority of the provisions examined apply only to commercial distribution.³⁷⁹ The Commission on Obscenity and Pornography also took the

³⁷¹ See proposed section 2(2) and part VI *infra*.

³⁷² See text accompanying note 253 *supra*.

³⁷³ See proposed section 2(2)(e).

³⁷⁴ Limiting the statutory coverage to commercial transactions would not afford protection where the individual sells a scientific or educational service that includes the showing of sexually explicit material. Here the individual would have to rely upon the exemptions and the tripartite test. In referring to the "showing" of sexually explicit material for monetary consideration, proposed paragraph (a) seeks to prevent evasion of the statutory purpose by persons attempting to disguise the commercial distribution of obscene material as an aspect of the delivery of a service. *Cf. Locke v. State*, 516 S.W.2d 949 (Tex. 1974).

³⁷⁵ See, e.g., the provisions cited in notes 376-78 *infra*. Two of the statutes examined are ambiguous as to the extent of their coverage of noncommercial dissemination. WASH. REV. CODE § 9.68.060 (Supp. 1974) is applicable to any person who "sells, distributes, or exhibits" erotic material to a minor. Since the Washington criminal provision is applicable only upon a prior civil adjudication, see note 5 *supra*, it seems likely that the provision was designed to reach primarily, if not solely, commercial transactions. VA. CODE ANN. § 18.2-391 (1975) uses the phrase "sell or loan," which presumably excludes coverage of noncommercial dissemination when the obscene matter is given to the minor and a "loan" clearly is not involved. See Note, *Proposed Changes in Statutory Regulation of Obscenity in Virginia*, 57 VA. L. REV. 1636, 1649 (1971).

³⁷⁶ ILL. ANN. STAT. ch. 38, § 11-21(b)(3) (Smith-Hurd Supp. 1975). See also CAL. PENAL CODE § 313(d) (West Supp. 1976); IOWA CODE ANN. § 725.1(3) (Supp. 1975); UTAH CODE ANN. § 76-10-1201(3) (Supp. 1975).

³⁷⁷ ORE. REV. STAT. § 167.075(3) (1974).

³⁷⁸ HAWAII REV. STAT. tit. 37, § 712-1210(1) (Special Supp. 1972). See also PROPOSED MICH. CRIM. CODE § 6301(a) (Mich. State Bar 1967).

³⁷⁹ Seven of the provisions cited in note 2 *supra* (Colorado, Florida, Nevada, New Jersey, New York, Rhode Island, and Wisconsin) apply only to commercial dissemination. This proportion appears to be fairly representative of the nation as a

position that juvenile statutes should apply only to commercial dissemination.³⁸⁰

Assuming that the statute is limited to commercial dissemination, describing that limitation presents some problems. State statutes commonly use the phrase "sell or lend for monetary consideration."³⁸¹ This phrasing may not be adequate to reach commercial establishments that charge customers for the privilege of examining pornographic pictures or books but do not give up possession of such materials. The term "exhibit" would encompass such activity but that term is commonly used only with regard to performances.³⁸² Accordingly, proposed paragraph (a) adds the term "show," so that the alternative draft limited to commercial distribution defines "disseminate" as to "sell, lend, exhibit, or show for monetary consideration."

A more significant difficulty might be presented by advertisements which are themselves obscene. Since the advertisements are not sold, they could not be reached under the "monetary consideration" language of paragraph (a). One possible answer might be the use of a broader definition of commercial dissemination. Thus, the Colorado juvenile provision extends to any dissemination "for pecuniary gain."³⁸³ This provision, however, is not quite as precise as the standard phrasing quoted above. Another possibility is simply to ignore the problem of advertisements on

whole. While the New York statute upheld in *Ginsberg* was limited to commercial distributions, and the twenty state statutes listed in note 2 include only a few examples of approximately seventeen state provisions that largely copied the "*Ginsberg* statute," see note 347 *supra*, most of those provisions departed from the *Ginsberg* provision and included noncommercial dissemination. See, e.g., ALA. CODE tit. 14, §§ 374(16b), (16c) (Supp. 1974); IDAHO CODE § 18-1515 (Supp. 1974); TENN. CODE § 39-1013 (Supp. 1974). Compare MINN. STAT. ANN. §§ 617.293, .294 (Supp. 1976); MISS. CODE §§ 97-5-15, -17 (1973); N.H. REV. STAT. ANN. § 571-B:2 (1973) (all limited to commercial dissemination).

³⁸⁰ See OBSCENITY COMMISSION REPORT, *supra* note 3, at 56-57; OBSCENITY COMMISSION MODEL STATUTE, *supra* note 3, § 2(a). The other commission proposals examined, see note 3 *supra*, all extend to noncommercial dissemination. See HILL-LINK MODEL STATUTE, *supra* note 3, § 7; PROPOSED ARIZ. CRIM. CODE § 3500(d) (Ariz. Crim. Code Comm'n 1975); PROPOSED MICH. CRIM. CODE § 6301(a) (Mich. State Bar 1967).

³⁸¹ FLA. STAT. ANN. § 847.012(2) (Supp. 1975); N.Y. PENAL LAW § 235.21(1) (McKinney Supp. 1975). See also WIS. STAT. ANN. § 944.25(10) (Supp. 1975) (including the term "exhibit," which other jurisdictions, such as Florida and New York, use only in the statutory provision on performances).

³⁸² See, e.g., provisions cited in notes 381 *supra* and 391 *infra*. Several jurisdictions include the term "distribute" and "publish" in the definition of disseminate. HAWAII REV. STAT. tit. 37, § 712-1210(1) (Special Supp. 1972); N.D. CENT. CODE § 12.1-27.1-02(1) (Special Supp. 1975); DETROIT, MICH., CODE § 39-1-18(3) (1974). A publisher or wholesale distributor could be liable as an accomplice or co-conspirator if he knows that the particular retailer with whom he is dealing will sell the material to minors. See W. LAFAVE & A. SCOTT, CRIMINAL LAW 507-09, 466-68 (1972). On the other hand, if the publisher or distributor is not aware of the retailer's practices, he would lack the mens rea required for liability under proposed section 2. See notes 463-73 and accompanying text *infra*. Accordingly, the proposed statute does not include any special provisions on the liability of publishers and wholesale distributors. See also notes 477, 480 *infra*.

³⁸³ COLO. REV. STAT. § 18-7-101(9) (1973). See also PROPOSED MICH. CRIM. CODE § 6305 (Mich. State Bar 1967).

the ground that federal legislation currently provides parents with adequate protection against the mailing of unwanted sexually oriented advertisements to their homes.³⁸⁴

B. Display

Another issue relating to the definition of dissemination is whether the statute should reach the commercial establishment that fails to prevent minors from perusing prohibited material placed upon open shelves. Such conduct is not covered by the usual definition of dissemination, whether or not that definition is limited to dissemination "for monetary consideration." Placement of material in a location where it may be examined by a minor obviously is not "selling," "giving," or "lending." Neither is it likely to be viewed as "showing" the material unless the particular material is clearly presented as available for perusal by minors.³⁸⁵ The term "show" suggests that the particular depiction is purposely presented to the minor for him to view. The owner often can claim that, although the possibility existed that the minor might peruse the material on display, the owner intentionally "showed" (that is presented for examination) no more than the cover of the book or magazine.³⁸⁶

³⁸⁴ Under 39 U.S.C. § 3010 (1970), parents may file a form with the post office noting that they do not desire to receive any sexually oriented advertisements. The post office list of persons filing such forms is available to mail order distributors, and they are barred from mailing sexually oriented advertisements to any persons whose name and address has been on the list for more than thirty days. See also 18 U.S.C. § 1735 (1970) (providing for criminal penalties). An advertisement is "sexually oriented" under 39 U.S.C. § 3010(d) (1970) if it

depicts in actual or simulated form, or explicitly describes, in a predominantly sexual context, human genitalia, any act of natural or unnatural sexual intercourse, any act of sadism or masochism, or any other erotic subject directly relating to the foregoing.

See also OBSCENITY COMMISSION REPORT, *supra* note 3, at 126-27 (studies indicating that mails are a comparatively insignificant source of obscenity obtained by minors).

³⁸⁵ If the minor is invited to peruse the material, but no charge is made for perusal, see text accompanying notes 381-82 *supra*, the "showing" would not be encompassed if the statute were limited to commercial transactions. This potential gap in coverage does not, in itself, furnish a substantial basis for extending the statute to noncommercial transactions. Ordinarily, a storeowner who invited a minor to peruse prohibited material would also be willing to sell that material to the minor and could be prosecuted for the eventual sale. See also note 386 *infra*.

³⁸⁶ The mens rea required for the act of "showing" must be distinguished from the required mens rea as to the nature of the item shown. See note 412 *infra*. While reckless disregard is sufficient mens rea as to the character of the matter, see text accompanying note 441 *infra*, it would not be sufficient for the act of "showing." The term "show" suggests an intent to present the particular depiction for viewing by another. See note 412 *infra*. A person does not "show" a picture within a closed book if he placed the book in a location where another may or may not examine its contents. Thus, the operator of a store that displays a large variety of publications, including some obscene for minors, does not "show" the contents of the publication if he recklessly disregards the possibility that a minor will open the publication and examine its contents. Only reckless disregard would be involved, for example, if the store had a policy against perusal of obscene material by minors, but failed to assign personnel to ensure that minors did not violate that policy. Jurisdictions seeking to extend their juvenile obscenity statutes to such recklessness have adopted special provisions applicable to the display of the publication itself. See note 387 *infra*. Oregon

Only a few of the provisions examined clearly apply to the proprietor who fails to keep minors from perusing obscene material offered for sale to adults.³⁸⁷ The Oregon statute is typical of these provisions. Oregon reaches the "perusal situation" through a separate offense of "displaying obscene materials to minors." That offense makes it a misdemeanor if an

owner, operator, or manager of a business . . . 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 . . . [a]ny book, magazine, paperback, pamphlet or other written or printed matter . . . [which] depicts nudity, sexual conduct, sexual excitement or sado-masochistic abuse.³⁸⁸

The Oregon provision obviously places a great administrative burden upon storeowners. It would require, for example, that magazines such as *Playboy* and *Penthouse* be placed in separate portions of a store. Some retailers might refuse to sell such items, thereby making them less readily available to adults. Other retailers might find it necessary to place all but the most innocuous magazines in a special section not open to minors.³⁸⁹

does so, for example, although its basic provision prohibits the "sell[ing], giv[ing], rent[ing], loan[ing] or otherwise provid[ing]" obscene matter to a minor. ORE. REV. STAT. §§ 167.060(3), .065 (1974). See also R.I. GEN. LAWS § 11-31-10 (Supp. 1974) (prohibiting the "showing" of obscene matter, but also adding the "display" provision quoted in note 387 *infra*).

³⁸⁷ See NEV. REV. STAT. §§ 201.265(1)-(2) (1973) ("[e]xhibits for sale . . . in such a manner or location as to allow a minor to view, read, hear or examine any . . . printed matter . . . or sound recording . . . which contains any matter" that depicts "nudity, sexual conduct, or sado-masochistic abuse and is harmful to minors"); ORE. REV. STAT. § 167.080 (1974) (quoted in the text accompanying note 388 *infra*); R.I. GEN. LAWS § 11-31-10 (Supp. 1974) ("display at newsstands or any other business establishment frequented by minors . . . or where said minors are or may be invited as a part of the general public any pornographic motion picture, or . . . [other material] the cover or content of which exploits, is devoted to, or is principally made up of descriptions or depictions" of sexual excitement, masturbation, intercourse, erotic fondling, and nudity). See also PROPOSED ARIZ. CRIM. CODE § 3507 (Ariz. Crim. Code Comm'n 1975) (similar to the Oregon provision); OBSCENITY COMMISSION MODEL STATUTE, *supra* note 3, § 2(d)(iv) ("display for sale so that young persons may see portions of the material constituting explicit sexual pictorial material"). An older Michigan provision is considerably broader than the statutes cited above. See MICH. COMP. LAWS ANN. § 750.143 (Supp. 1973) (misdemeanor to "exhibit upon any public street . . . or in any other place within the view of children passing on any public street . . . any book, pamphlet or other . . . thing containing . . . obscene prints, figures, or descriptions, tending to the corruption of the morals of youth").

³⁸⁸ ORE. REV. STAT. § 167.080 (1974).

³⁸⁹ See also Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5, 86 (1960) (footnotes omitted):

To prohibit dealers from exhibiting within the view of adolescents books and magazines that can be sold only to adults would raise the additional problem of undue interference with the material's primary audience. Beyond these obstacles is the disrupting effect of "adult only" counters or shelves in bookstores and at newsstands, for the "adult only" label would serve only to attract adolescents eager for a look at the forbidden fruit and would make it difficult for the dealer to prevent adolescent shoplifting of the books and magazines. To avoid these diffi-

C. Performances

The proposed statute deals separately with performances in paragraph (b) of section 2(1) and paragraph (n) of section 1. The special definition of "exhibit" in section 1(c), which includes persons who sell tickets to a performance, is needed to indicate clearly the range of persons involved in the dissemination of a performance who may be held liable. The proposed language follows provisions adopted in several states.³⁹⁰ Still other states apparently assume that terms like "exhibit" will be broadly construed to reach such persons as ticket sellers.³⁹¹ This approach, however, is particularly risky in a criminal statute, even if there is a criminal code provision rejecting the so-called "strict construction rule."³⁹²

Two of the state statutes examined specifically exempt film projectionists.³⁹³ Projectionists are not likely to be held liable under a statute applicable to minors since they ordinarily would lack the requisite scienter as to age of the audience.³⁹⁴ Aside from that factor, there is no reason to treat the projectionist differently from the clerk in the bookstore or the ticket seller.³⁹⁵

VI. EXEMPTIONS

A. Parental Exemption

As discussed previously,³⁹⁶ the major objective of the juvenile obscenity statute is to aid parents in controlling their children's access to sexually oriented materials. While the state also has an independent interest in the well-being of its youth, the generally accepted legislative position has been

culties, cautious dealers might well decide to abandon all books and magazines claimed by any one to be unsuitable for adolescents.

Two members of the Obscenity Commission, who joined the general recommendation as to adoption of a juvenile provision, dissented as to the juvenile display provision, *see* note 387 *supra*, on the ground that "segregating that material prohibited for sale to juveniles from that which is available to all would only enhance its appeal." OBSCENITY COMMISSION REPORT, *supra* note 3, at 57 n.14.

³⁹⁰ *See* FLA. STAT. ANN. § 847.013 (Supp. 1975); HAWAII REV. STAT. tit. 37, § 712-1215(1)(b); N.Y. PENAL LAW § 235.21(2) (McKinney Supp. 1975); ORE. REV. STAT. § 167.075 (1974).

³⁹¹ *See, e.g.*, CAL. PENAL CODE § 313.1(a) (West Supp. 1976); KY. REV. STAT. § 531.030(1)(b) (Cum. Supp. 1975); N.J. STAT. ANN. § 2A:115-1.8 (Supp. 1975) (using only the term "sells").

³⁹² *See, e.g.*, CAL. PENAL CODE § 4 (West Supp. 1976); MICH. COMP. LAWS ANN. § 750.2 (Supp. 1975); N.Y. PENAL LAW § 5.00 (McKinney Supp. 1975); *People v. Hall*, 391 Mich. 175, 189, 215 N.W.2d 166, 174 (1974).

³⁹³ *See* UTAH CODE ANN. § 76-10-1208(2) (Supp. 1975); W. VA. CODE ANN. § 61-8A-3 (Supp. 1974) (exempting the "projectionist, ticket taker, usher" or other employee "when [he] distributes, prepares or exhibits obscene matter while acting within the scope of his regular employment").

³⁹⁴ *See* part VII C *supra*.

³⁹⁵ Consider in this connection the West Virginia provision quoted in note 393 *supra*. *But cf.* *State v. J-R Distributors, Inc.*, 82 Wash. 2d 584, 512 P.2d 1049 (1973) (finding sufficient rational basis to support the constitutionality of a statutory distinction between a projectionist and a clerk in a bookstore).

³⁹⁶ *See* part I *supra*.

that, with respect to obscenity, the state's interest is best served by parental discretion. That position is based on the view that material classified as "obscene for minors" is not equally, or even necessarily, harmful in all circumstances. Different children react differently to the same materials. Some children mature more quickly than others. Their parents may decide that they would not be harmed by exposure to material which might adversely affect another child of the same age. A picture seen in the context of a discussion between parent and child may have a different impact than the same picture purchased in response to whispered hints of forbidden fruit. A movie with explicit sex scenes viewed after a parental explanation and discussion is far less likely to harm than when seen without parental knowledge. The possible usefulness of otherwise harmful materials under such circumstances, and the importance of the parental right to raise their children as they see fit,³⁹⁷ justifies a parental exemption. It is possible, of course, that a parent might abuse such a right. The danger is no greater here, however, than in other areas involving the raising of children.

If the juvenile obscenity statute extends only to commercial transactions, a special parental exemption provision need not be included in the statute. Those states that bar only commercial dissemination have not adopted such exemption provisions since distributions by parents to their children presumably would not constitute dissemination for "monetary consideration."³⁹⁸ However, even if the statute is so limited, there might be value in adding an exemption provision to emphasize the basic thrust of the provision and to provide a safeguard against a broad construction of dissemination for "monetary consideration" that might extend to parents under unusual circumstances.³⁹⁹

Statutes applicable to noncommercial transactions generally contain some form of exception that relieves parents of liability.⁴⁰⁰ The exception

³⁹⁷ For a review of legal precedent recognizing this right, see Friedman, *The Motion Picture Rating System of 1968: A Constitutional Analysis of Self-Regulation by the Film Industry*, 73 COLUM. L. REV. 185, 213-16 (1973).

³⁹⁸ See note 379 *supra* and text accompanying note 381 *supra*. The reference is to a provision exempting parents themselves, as opposed to a provision exempting the person who "exhibits" an obscene performance to a minor when that minor is accompanied by a parent. The "monetary consideration" limitation would not, in itself, relieve the commercial exhibitor of liability in that situation. See notes 404-06 and accompanying text *infra*. Several of the statutes limited to commercial dissemination contain provisions specifically noting that an exhibitor is not liable when the minor is accompanied by a parent. See FLA. STAT. ANN. § 847.013(2)(b) (Supp. 1975); NEV. REV. STAT. § 201.265(3) (1973) (accompanied by "parent, guardian, or spouse"); WIS. STAT. ANN. § 944.25(11)(b) (Supp. 1975) ("parent or guardian"). But see COLO. REV. STAT. § 18-7-103(1)(b) (1973); N.Y. PENAL LAW § 235.21(2) (McKinney Supp. 1975) (applicable to any person who "exhibits" a performance, sells a ticket to the performance, or "admits" the minor to the performance, with no reference made to the presence of a parent).

³⁹⁹ Thus, where a parent or guardian purchases material for a child but insists upon reimbursement, the transaction should not be viewed as a "sale" by the parent, *cf.* *Lewis v. United States*, 337 F.2d 541 (D.C. Cir. 1964), but a parental exemption would avoid any necessity of even examining that issue.

⁴⁰⁰ Of those statutes examined that clearly apply to noncommercial transactions,

is sometimes stated as an exemption.⁴⁰¹ Other jurisdictions make it a defense.⁴⁰² The parental exception of the proposed statute, found in section 2(2)(a), is stated as an exemption rather than a defense.⁴⁰³ This formulation would not prevent the court from requiring that the defendant initially raise the exemption issue, but the burden of proof would remain with the prosecutor, which is consistent with the general pattern of substantive criminal law.⁴⁰⁴

Where the material involved is a magazine or book, the parent simply may purchase the item and give it to the child. A similar procedure cannot be utilized with respect to performances. The performance is still disseminated directly to the minor by admitting him to the theatre, but the approval signified by the parent accompanying the child should give the disseminator the same protection as one who sells to a parent a book which is then given to the child. Accordingly, a special provision is needed to extend the policy of the parental exemption to those who exhibit a performance to a minor accompanied by his or her parent.⁴⁰⁵ That provision

see notes 375-78 supra, four make no reference to exempting parents. *See* KY. REV. STAT. § 531.030 (Cum. Supp. 1974) (described in note 321 *supra*); MICH. COMP. LAWS ANN. § 750.343e (Supp. 1973); N.D. CENT. CODE § 12.1-27.1-03 (Special Supp. 1975) (but requiring prior civil adjudication, *see* note 5 *supra*); W. VA. CODE ANN. § 61-8A-2 (Supp. 1974). *See also* OHIO REV. CODE ANN. § 2907.31(B) (Page 1975) (parental status is an affirmative defense to giving a child material "harmful" (*i.e.*, obscene) for minors, but not to giving a child material that is obscene for adults). *See also* VA. CODE ANN. § 18.2-391(d) (1975) (no specific exemption, but exemption suggested by reference to misrepresentation of parental status). *See Note, Proposed Changes in Statutory Regulation of Obscenity in Virginia*, 57 VA. L. REV. 1636, 1650 n.58 (1971).

⁴⁰¹ *See, e.g.*, CAL. PENAL CODE § 313.2(a) (West Supp. 1976) ("Nothing in this chapter shall prohibit any parent or guardian from distributing any harmful matter to his child or ward or permitting his child or ward to attend an exhibition of any harmful matter if the child or ward is accompanied by him."); HAWAII REV. STAT. tit. 37, § 712-1215(2) (Special Supp. 1972) ("does not apply to a parent, guardian, or other person in loco parentis to the minor"); IOWA CODE ANN. § 725.2 (Supp. 1975) (statute applicable to "[a]ny person, other than the parent or guardian of the minor").

⁴⁰² *See* OHIO REV. CODE ANN. § 2907.31(B)(1) (Page 1975); ORE. REV. STAT. § 167.085(1) (1974).

⁴⁰³ Whether the protective provision is in the form of an exemption or an affirmative defense is not a matter of major importance. Only rarely is a person's status as a parent or guardian likely to be the subject of litigation. Our proposal utilizes an exemption provision largely because the proposal is geared to Michigan substantive law and Michigan traditionally does not use affirmative defenses. *See* note 404 *infra*. Other jurisdictions commonly treat various "justifications" or "excuses" as affirmative defenses, *see* W. LAFAYE & A. SCOTT, CRIMINAL LAW § 8 (1972), although that policy may be subject to reconsideration in light of *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

⁴⁰⁴ Under Michigan law, for example, once the existence of a possible excuse is presented in the case, the prosecution bears the burden of showing that excuse is not applicable. *See* G. GILLESPIE, MICHIGAN CRIMINAL LAW AND PROCEDURE § 389 (1953). *Cf.* PROPOSED MICH. CRIM. CODE § 2005(3) (Mich. State Bar 1967).

⁴⁰⁵ Arguably, this exception is too narrow, since the parent should not be required to accompany the child, but only to grant permission (such as by purchasing the ticket). Where a parent gives an obscene book to a minor, the parent need not be present when the minor examines the book. On the other hand, as noted in the text accompanying note 292 *supra*, the element of movement may give performances a

is placed in paragraph (b) of subsection 2(1) since the matter relates only to performances.⁴⁰⁶

B. Other Exemptions

Many of the factors justifying a parental exemption also support an exemption of professionals who disseminate obscene material to minors in the course of educational or scientific projects. Such persons use obscene material in a controlled setting designed to benefit rather than harm the child. Moreover, institutional checks, including parental control, should ensure that an exemption for educational and scientific use will not be abused within that controlled setting. Of course, these same considerations suggest that the dissemination would be protected under the tripartite test,⁴⁰⁷ but, as noted previously, the general thrust of the statute should be clearly to exclude protected dissemination without relying upon the protection of the nebulous tripartite standard.⁴⁰⁸

Most of the statutes encompassing nonmonetary transactions have some form of scientific and educational exception. The scope and specificity of these provisions vary widely. There are three major approaches. One is to list legitimate disseminators.⁴⁰⁹ The second approach is to describe

special impact not present in other visual materials. Performances, unlike books, also are viewed in the presence of others, but it is questionable whether the statute should take into account the possible concern of others in the audience that unescorted minors are watching the same performance. See note 145 *supra*.

⁴⁰⁶ Similar provisions in other states are sometimes stated as exemptions, e.g., CAL. PENAL CODE § 313.2(10) (West Supp. 1976), or as a defense, e.g., OHIO REV. CODE ANN. § 2907.31(B)(2) (Page 1975). Other statutes contain a special provision similar to proposed paragraph (b) in the basic description of the offense. See, e.g., the provisions cited in note 398 *supra*.

⁴⁰⁷ While the context of the dissemination may have a significant bearing on the application of all three elements of the tripartite test, a true educational or scientific setting would strongly suggest that, at the least, the material was presented for its serious literary, artistic, political, or scientific value. Cf. *Ginzburg v. United States*, 383 U.S. 463 (1966), discussed in part II *K supra*; note 140 *supra*. But cf. Schwartz, *infra* note 408, at 679-80.

⁴⁰⁸ See notes 251-53 and accompanying text *supra*. On the desirability of specific exemptions, consider Schwartz, *Morals Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669, 679-80 (1963); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 72 (1973) (Douglas, J., dissenting) (commenting upon the need for specific exemption of librarians).

⁴⁰⁹ See, e.g., ORE. REV. STAT. § 167.085(2) (1974) ("a bona fide school, museum or public library, or [person] acting in the course of his employment as an employee of such organization or of a retail outlet affiliated with and serving the educational purpose of such organization"); WASH. REV. CODE § 9.68.100 (Supp. 1974) ("by any recognized historical society or museum, the state law library, any county law library, the state library, the public library, any library of any college or university, or to any archive or library under the supervision and control of the state, county, municipality, or other political subdivision"); WIS. STAT. ANN. § 944.25(11)(c) (Supp. 1975) (same wording as the Oregon statute); DETROIT, MICH., CODE § 39-1-18.3 (1974) ("(1) A teacher of an accredited course of study related to pornography at a State approved educational institution; or (2) [a] licensed medical practitioner or psychologist in the treatment of a patient; or (3) [a] participant in the criminal justice system, such as legislator, judge, prosecutor, law enforcement official or other similar or related position; or (4) [a] supplier to any person described in (1) through (3) above").

generally the appropriate purposes that require exemption.⁴¹⁰ The third approach is to both specify the primary legitimate disseminators and include a general description of the exempt purposes.⁴¹¹ The proposed statute, in section 2(2), uses this third approach, listing specific exempted professionals and then adding a "catch-all" provision encompassing any person acting for a "legitimate medical, scientific, educational, governmental, or judicial purpose."

VII. SCIENTER

Under proposed section 2(1) a person who disseminates obscene material to a minor is criminally liable only if he acts "knowingly." The term "knowingly" is defined in paragraph (d) of section 1. That paragraph provides that a person acts "knowingly" with respect to a particular circumstance if he is aware of the circumstance or recklessly disregards a substantial risk of the existence of that circumstance. Paragraph (d) also provides that this level of mens rea must be established with respect to both the "nature" of the material disseminated and the status of the recipient as a minor.⁴¹² Paragraph (d) thus sets standards for two different elements of the required mens rea—the necessary level of the mens rea and the scope of circumstances to which that mens rea level applies. In both areas, any legislative standard is subject to constitutional limitations, as set forth primarily in *Smith v. California*.⁴¹³

Smith held unconstitutional a state statute rendering a bookseller liable for selling an obscene book without regard to whether the seller had been aware or reasonably should have been aware of the contents of the book.⁴¹⁴ The Court reasoned that the imposition of such strict liability would lead a bookseller to "tend to restrict the books he sells to those he has inspected." Since the bookseller obviously could not inspect all the ma-

⁴¹⁰ See, e.g., N.D. CENT. CODE § 12.1-27.1-11 (Special Supp. 1975) ("in the course of law enforcement, judicial, or legislative activities"); PROPOSED MICH. CRIM. CODE § 6301(b) (Mich. State Bar 1967) ("for educational or scientific purposes").

⁴¹¹ See, e.g., OHIO REV. CODE ANN. § 2907.31(C) (Page 1975) ("for a bona fide medical, scientific, educational, governmental, judicial or other proper purpose, by a physician, psychologist, sociologist, scientist, teacher, librarian, clergyman, prosecutor, judge, or other proper person"). Cf. ILL. ANN. STAT. ch. 38, § 11-21(e)(1) (Smith-Hurd Supp. 1975) ("any public library or any library operated by an accredited institution of higher education . . . in aid of a legitimate scientific or educational purpose").

⁴¹² The discussion above refers to the requisite mens rea as to surrounding circumstances rather than to the *actus reus* of dissemination. To disseminate, the individual must "sell, lend, give, exhibit, or show." These terms carry with them a requirement of intent as to the conduct of distributing and therefore no explicit mens rea requirement as to the *actus reus* is set forth in section 1(d) or 1(a). See also note 386 *supra*. But see PROPOSED ARIZ. CRIM. CODE § 3504 (Ariz. Crim. Code Comm'n 1975) (describing the conduct of "furnishing" material as "intentionally or knowingly furnish[ing]").

⁴¹³ 361 U.S. 147 (1959).

⁴¹⁴ While *Smith* involved a general obscenity statute, the principle announced there was later viewed in *Ginsberg* as equally applicable to a juvenile statute. See note 420 *infra*; *Commonwealth v. Corey*, 351 Mass. 331, 334, 221 N.E.2d 222, 224 (1966).

terials that he might otherwise desire to sell, the quantity of material made available for sale would be limited, and the public inevitably would be denied access to some uninspected material that might very well be constitutionally protected. Thus, by forcing booksellers to adopt a scheme of self-censorship, the statute had violated the first amendment; it had indirectly imposed a restriction upon the distribution of protected material that it could not directly impose. The first amendment demands, to minimize the impact of self-censorship, that the state not impose liability without requiring some element of scienter.⁴¹⁵

While *Smith* held that the state may not impose strict liability, it did not specify what level of mental element is constitutionally required or what aspects of the contents of the material must be encompassed by that mens rea.⁴¹⁶ Later cases⁴¹⁷ held that reckless disregard was a constitutionally sufficient level of mens rea, but none clearly went beyond *Smith* in identifying those aspects of the content of the material to which reckless disregard applied. We will consider initially the appropriate definition of this element of the mens rea requirement.⁴¹⁸

A. Nature of the Material

The *Smith* opinion spoke in terms of a constitutional mens rea requirement as to the "contents" and the "character" of the book being sold.⁴¹⁹ Later cases have used the same terminology.⁴²⁰ In its latest state-

⁴¹⁵ In *Mishkin v. New York*, 383 U.S. 502, 511 (1966), the Court noted that an element of scienter also was required to "compensate for the ambiguities inherent in the definition of obscenity." See also note 431 *infra*. But see Note, *The Scienter Requirement in Criminal Obscenity Prosecutions*, 41 N.Y.U.L. REV. 791, 798 (1966).

⁴¹⁶ The Court noted:

We need not and most definitely do not pass today on what sort of mental element is requisite . . . 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. Doubtless any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibiting effect . . . but we consider today only one which goes to the extent of eliminating all mental elements for the crime.

361 U.S. at 154-55.

⁴¹⁷ See notes 447-48 and accompanying text *infra*.

⁴¹⁸ The subsequent discussion of the requisite mens rea is based on the assumption that the state does not require a prior civil adjudication of obscenity as a prerequisite to criminal prosecution. See note 5 *supra*. In jurisdictions requiring a prior civil adjudication, the disseminator must have been a party to the proceeding or have received notice of the finding of obscenity before he can be prosecuted for subsequent dissemination. Thus, the prosecution readily can establish reckless disregard as to the content and legal status of the material. See also *McKinney v. Alabama*, 44 U.S.L.W. 4330 (U.S. March 23, 1976), as to the disseminator's right to challenge a finding of obscenity made in a proceeding to which he was not a party.

⁴¹⁹ 361 U.S. at 152-53.

⁴²⁰ In *Mishkin v. New York*, 383 U.S. 502 (1966), the Court held that a constitutional challenge based upon *Smith* was "foreclosed" where the state statute had been construed as imposing the following scienter requirement:

ment on this aspect of the constitutionally required mens rea, in *Hamling v. United States*,⁴²¹ the Court noted that the state need not require proof that the disseminator knew that the materials were legally classified as "obscene," but beyond that, added little to what was said in *Smith*. *Hamling* stated:

It is constitutionally sufficient that the prosecution show that a defendant had knowledge of the contents of the materials he distributed, and that he knew the *character* and *nature* of the materials.⁴²²

Neither *Smith* nor subsequent cases clearly indicate whether the constitutionally required mens rea encompasses the particular content of the disseminated material. Is it sufficient that the seller was aware (or should have been aware) that the material placed a heavy emphasis on sex or is it essential that the mens rea also extend to the portrayal of particular types of sexual conduct?⁴²³ Similarly, the cases are not very helpful in determining the extent to which the mens rea must encompass the pornographic quality of the material. Assuming the seller was aware (or should have been aware) that the material depicted sexual intercourse, must the prosecution show he also was aware (or should have been aware) that the portrayal was presented in a manner emphasizing prurient appeal? Does the constitutional principle of *Smith* also require proof that the seller was aware (or should have been aware) that the material made no significant effort to convey artistic, literary, political, or scientific ideas? Proposed paragraph (d) is presented in three alternative drafts, each varying in its answer to these questions.

Alternative A follows the wording of *Smith* and simply describes the mens rea requirement as extending to the "character and content" of the matter distributed. The use of this phrase largely leaves to judicial interpretation the determination of the precise scope of the required mens rea. The state statutes examined generally follow a similar approach. Some

[O]nly 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 . . .

Id. at 510 (emphasis by the Court). In *Ginsberg v. New York*, 390 U.S. 629 (1968), the Court upheld the scienter provision of a juvenile obscenity statute. The provision required, *inter alia*, "reason to know" the "character and content" of the material in question. The Court rejected petitioner's contention that the statutory reference to the "character" of the material was inadequate, noting that the legislative history indicated the term "character" would be given the same gloss in this statute as the statute upheld in *Mishkin*. *Id.* at 643-44.

⁴²¹ 418 U.S. 87, 121 (1974).

⁴²² *Id.* at 123 (emphasis added).

⁴²³ Lower federal courts, interpreting 18 U.S.C. § 1465 (1966), have described the scienter requirement of that statute as relating to "general knowledge that the material is sexually oriented," not to "[s]cienter as to the exact content of the material transported." *United States v. New Orleans Book Mart, Inc.*, 490 F.2d 73, 75 (5th Cir. 1974). See also *United States v. Hill*, 500 F.2d 733, 740 (5th Cir. 1974). When *Smith* referred to the "contents" of the material, the Court had not yet held that obscenity included only material depicting "sexual conduct specifically defined by state law." See *Miller v. California*, 413 U.S. 15 (1973), discussed in text accompanying notes 241-50 *supra*.

make no reference to the scope of the mens rea requirement,⁴²⁴ and others simply note that it must extend to the "character" or the "character and content" of the material sold.⁴²⁵

If the legislative policy is to limit the mens rea requirement to the minimum required by the Constitution, then Alternative A presents a distinct advantage over Alternatives B and C. Either or both of these alternatives may go beyond the constitutional minimum. Under Alternative A, the scope of the required mens rea can readily be adjusted in accordance with future Supreme Court decisions.⁴²⁶ While the alternative does not state in so many words that its objective is to extend the mens rea requirement only so far as the Constitution requires, the terms "character" and "content," having been taken from *Smith*, should be interpreted in light of subsequent constitutional interpretations of *Smith*.⁴²⁷

While permitting adjustment to future decisions, the broad language of Alternative A also provides the disseminator with far less precise guidelines as to his duty to inspect than do Alternatives B and C. Assume, for example, that the disseminator is aware that a magazine portrays nudes, but knows from previous issues that the portrayals are not of the type encompassed by the statute since they do not depict the genitals or persons engaged in sexual activities. If the disseminator fails to inspect the current issue, and the magazine has shifted its editorial policy and now depicts full nudes and sexual acts, is the disseminator subject to criminal liability for selling that publication to a known minor? Is he liable because he knew that the magazine had a substantial sexual orientation, or does reckless disregard as to "character and content" also require a reasonable basis for assuming the magazine contained the particular type of depictions specified in the statute? Alternative A, unlike Alternatives B and C, offers little direction on such an issue. While judicial decisions interpreting Alternative A could eventually provide the answer, it may be months or years before such an issue would be resolved by the appellate courts.

⁴²⁴ See LA. REV. STAT. tit. 14, § 106(3) (1974); N.D. CENT. CODE § 12.1-27.1-03 (Special Supp. 1975). But compare N.D. CENT. CODE § 12.1-27.1-01 (Special Supp. 1975) (general obscenity statute).

⁴²⁵ See, e.g., CAL. PENAL CODE § 313(e) (West Supp. 1976); N.Y. PENAL LAW § 235.21 (McKinney Supp. 1975); VA. CODE ANN. § 18.2-390(7) (1975). See also ILL. ANN. STAT. ch. 38, § 11-20(a) (Smith-Hurd Supp. 1975) ("nature or content") (general obscenity statute); W. VA. CODE ANN. § 61-8A-1(4) (Supp. 1974) ("content or character").

⁴²⁶ This flexibility may be limited somewhat by employing both the terms "character" and "content." Used in conjunction with the term "content," the term "character" suggests that the mens rea extends to at least the erotic quality of the material as well as its devotion to the subject of sex. See also Lockhart, *infra* note 431, at 568 (arguing that *Mishkin's* emphasis, see note 420 *supra*, on the previous construction of the state statute as referring to the "character" of the material and the "calculated purveyance of filth" clearly indicates "that something beyond mere knowledge of contents is needed to satisfy the scienter requirement").

⁴²⁷ In dealing with this and other aspects of obscenity provisions, courts have tended to interpret the statutes as imposing no more than the minimum constitutional standards unless the statute specifically provides otherwise. See, e.g., *United States v. New Orleans Book Mart, Inc.*, 490 F.2d 73 (5th Cir. 1974); *State v. Welke*, 298 Minn. 402, 216 N.W.2d 641 (1974).

Alternatives B and C both attempt to define the scope of the necessary mens rea with some degree of specificity. With respect to the sexual content, they require at least reckless disregard that the material depicts the sexual conduct described in the proposed definition of "sexually explicit matter."⁴²⁸ Thus, the requisite level of mens rea must be established for the specific type of activity portrayed rather than just for the material's general sexual orientation. This requirement follows from the same rationale that supports the inclusion of a statutory listing of specific sexual content.⁴²⁹ A major purpose of listing the encompassed content is to automatically exclude any general category of sexual content that is likely to be protected by the tripartite test. If the matter to be disseminated does not depict the particular sexual conduct specified in the listing, then the disseminator need not be concerned with the uncertain protection afforded by the tripartite test. The requirement of mens rea as to particular content provides a similar protection. If the disseminator has good reason to believe that the matter has some sexual content, but does not depict the particular conduct specified in the listing, he should not be subjected to liability if his reasonable belief is inaccurate. Imposing liability under such circumstances would, in effect, place upon the disseminator the burden of inspecting almost all sexually related material to ensure that it did not contain "sexually explicit matter" as defined by the statute. As suggested by the *Smith* analysis, the practical consequence of imposing such a burden could be to inhibit distribution of the very categories of sexually oriented material that the narrowness of the listing is designed to protect.

Alternatives B and C also specify the extent to which the mens rea requirement applies to the presence in the material of those qualities tested by the tripartite standard. Alternative B of paragraph (d)(ii) requires "reckless disregard" of a "substantial risk" that the matter appeals to the prurient interest. Alternative C of paragraph (d)(ii) requires "reckless disregard" of a "substantial risk" that the matter has all of the qualities described in the tripartite standard.

Requiring a mental element as to part or all of the tripartite standard is not inconsistent with the *Hamling* ruling that the disseminator need not know that the material is legally classified as obscene. While the tripartite standard is a legal standard determining the scope of first amendment protection, it also is included as a factual element in criminal obscenity statutes.⁴³⁰ No crime has been committed unless the factfinder determines beyond a reasonable doubt that the matter distributed appeals to the prurient interest, is patently offensive, and lacks serious social value. In requiring at least recklessness as to the presence of these elements, Alternatives A and B would not require proof that the disseminator was aware of the tripartite test as a legal standard. It would be sufficient that the

⁴²⁸ See section 1, paragraph (m).

⁴²⁹ See part III A *supra*.

⁴³⁰ See text accompanying note 38 *supra*.

disseminator should have been aware of those characteristics of the material described in the tripartite standard, even though he may have mistakenly believed that the material was not legally obscene.⁴³¹ Criminal statutes often require some level of mens rea with respect to factual characteristics of legal standards when those facts are also part of the elements of the offense to be determined by the trier of fact.⁴³²

Although the Supreme Court decisions do not speak directly to the issue, various statements in *Smith* and later cases suggest that, at least as to the prurient interest element, some mens rea may be constitutionally required.⁴³³ Such a requirement arguably is needed to avoid inhibiting distribution of various non-erotic books or films that contain sexually explicit matter. Consider, for example, the bookseller who reasonably believes that a book is a legitimate scientific text containing sexually explicit pictures and therefore fails to conduct an inspection that would have revealed that the book, in fact, only utilized a scientific veneer to convey pornography.⁴³⁴ Under the rationale of *Smith*, imposing criminal liability in such a situation might place booksellers in an improperly inhibiting position; to avoid possible criminal liability, they would be required to examine all scientific texts on sex to ensure the legitimacy of such texts, even though the vast majority would be legitimate and constitutionally protected. Of course, as a practical matter, the circumstances surrounding distribution ordinarily will indicate to even the inexperienced bookseller that a particular text is more likely to be pornographic than legitimately scientific.⁴³⁵ Nevertheless, the theoretical potential for inhibiting the sale of a significant body of protected material suggests that the Court might require that the prosecution prove at least negligence with respect to the erotic quality of the material.

Arguably, requiring mens rea as to the erotic quality alone may not provide sufficient protection for the disseminator under a juvenile obscenity statute. Assuming that minors have a lower threshold for ap-

⁴³¹ But cf. Lockhart, *Escape from the Chill of Uncertainty: Explicit Sex and the First Amendment*, 9 GA. L. REV. 533, 562-69 (1975) (suggesting that recognition of an affirmative defense that the disseminator reasonably believed that the material was constitutionally protected would "substantially narrow" the range of uncertainty inherent in the *Miller* standard).

⁴³² See, e.g., *Screws v. United States*, 325 U.S. 91 (1945); PROPOSED MICH. CRIM. CODE § 3205 (mens rea requirement for receiving stolen property), § 7005 (incest) (Mich. State Bar 1967).

⁴³³ Thus, *Smith* refers to knowledge of the character as well as the contents of the material. Used in conjunction with the term "content," the reference to character suggests some mens rea requirement as to the quality of the sexual content. See note 426 *supra*. See also note 420 *supra* (quoting *Mishkin*). Note that the Court in *Mishkin* also refers to the calculated purveyance of material of a particular quality ("filth") as well as content. See also text accompanying note 422 *supra* (quoting *Hamling*).

⁴³⁴ Cf. *United States v. Stewart*, 336 F. Supp. 299 (E.D. Pa. 1971).

⁴³⁵ See, e.g., the advertising noted in *Hamling v. United States*, 418 U.S. 87 (1974); *United States v. Gundlach*, 345 F. Supp. 709 (M.D. Pa. 1972). Compare *United States v. Stewart*, 336 F. Supp. 299 (E.D. Pa. 1971).

peal to their prurient interest,⁴³⁶ it seems likely that constitutional protection of sexually explicit material distributed to minors will depend more upon the presence of serious social value than upon the absence of an appeal to the prurient interest. Recognizing this, booksellers who do not desire to inspect all sexually explicit materials must rely more heavily upon the likelihood that a particular book has some social value for minors than upon its possible lack of appeal to the minor's prurient interest. Accordingly, the argument concludes, where the seller had a reasonable, though erroneous, basis for assuming that the matter had serious social value, he should not be held liable because he failed to inspect that matter. He should be treated in the same manner as the seller who reasonably failed to inspect for erotic quality. Under this view, some *mens rea* should be required for each element of the tripartite standard because a reasonable reliance as to the absence of any of the three elements should justify a failure to inspect.

On the other side, the argument can be advanced that requiring *mens rea* as to prurient appeal alone relieves the disseminator of any significant burden of self-censorship while avoiding the imposition of unnecessary burdens upon the prosecution. This position rests in part on the premise that, if the statute reaches only a narrow range of sexual content (such as visual depictions of advanced sexual activity), material which is both within this narrow range and appealing to the prurient interest of minors is not likely to be protected under the remaining elements of the tripartite test as applied to minors. Accordingly, the sale of protected material would not be severely inhibited if the seller were required to inspect a book when he has reason to believe it contains material which has an advanced sexual content and is erotic. The burden of inspection would apply only to a narrow class of materials which is likely to be obscene for minors. Moreover, the need for inspection would exist only where the dealer was selling the item to minors.

It should be emphasized that the practical significance of a legislative choice between the positions noted above lies largely in cases involving a failure to inspect. It is primarily in those cases that requiring *mens rea* for each element of the tripartite test may present problems. Where the seller has examined the material and that fact can be shown, proof of *mens rea* is relatively easy under any standard. Even if the jury believes that the seller inspected and honestly concluded that the material did not have the qualities emphasized in the tripartite test, the jury's conclusion that the material is obscene beyond a reasonable doubt suggests that the seller probably was reckless in his evaluation of the material.⁴³⁷ At least,

⁴³⁶ The validity of this assumption has not been fully investigated. See I COMMISSION ON OBSCENITY AND PORNOGRAPHY, TECHNICAL REPORT 16 (1971).

⁴³⁷ But cf. *Jenkins v. Georgia*, 418 U.S. 153 (1974), in which a jury found "Carnal Knowledge" to be obscene as to adults, and Lockhart, *supra* note 431, at 569, suggesting that an affirmative defense of reasonable belief that material was not obscene would provide effective protection to the distributor of "borderline material" and thereby reduce the "chilling effect of the fear of prosecution on the distribution of [such] material."

that is the most likely conclusion of the particular jury which found the material to be obscene.⁴³⁸

Where the seller failed to inspect, requiring mens rea as to each element of the tripartite test may make proof of liability difficult.⁴³⁹ In that situation, the determination of mens rea rests not upon an evaluation of the actual contents of the book, but upon the inference appropriately to be drawn from factors known to the dealer, such as the method of distributing the material and the nature of the advertising. The prosecution would have to show that such factors so clearly required an inspection that failure to inspect constituted the required recklessness as to the material's prurient appeal, patent offensiveness, and lack of social value. Of course,

⁴³⁸ Where the standard is that of recklessness—that is, requiring an awareness of the risk, *see* note 441 *infra*, that the material would have certain qualities—the jury conceivably could find that the individual lacked the mens rea because, though he inspected the material, he was so dense as not to be aware of the risk. This would be a most unusual conclusion, however, especially with an experienced bookseller.

⁴³⁹ If a labeling requirement were imposed upon the publisher or wholesale distributor, the problems of proof discussed in this paragraph would largely be eliminated. Any retailer who failed to examine the contents of material marked "for adults only" would clearly be in a position of reckless disregard as to all factors relating to the characteristics of the material. Arguably, any state attempt to impose such a labeling requirement would constitute an undue burden on interstate commerce. *Cf. Hunsaker, supra* note 122, at 929-30. Aside from the commerce clause limitations, a labeling requirement probably would have more drawbacks than advantages, as noted by the Commission on Pornography and Obscenity:

The Commission considered the possibility of recommending the enactment of uniform federal legislation requiring a notice or label to be affixed to materials by their publishers, importers or manufacturers, when such materials fall within a definitional provision identical to that included within the recommended state or local model juvenile statute. Under such legislation, the required notice might be used by retail dealers and exhibitors, in jurisdictions which adopt the recommended juvenile legislation, as a guide to what material could not be sold or displayed to young persons. The Commission concluded, however, that such a federal notice or labeling provision would be unwise. So long as definitional provisions are drafted to be as specific as possible, and especially if they include only pictorial material, the Commission believes that the establishment of a federal regulatory notice system is probably unnecessary; specific definitions of pictorial material, such as the Commission recommends, should themselves enable retail dealers and exhibitors to make accurate judgments regarding the status of particular magazines and films. The Commission is also extremely reluctant to recommend imposing any federal system for labeling reading or viewing matter on the basis of its quality or content. The precedent of such required labeling would pose a serious potential threat to first amendment liberties in other areas of communication. Labels indicating sexual content might also be used artificially to enhance the appeal of certain materials. Two Commissioners favor federally imposed labeling in order to advise dealers as clearly and accurately as possible about what material is forbidden for sale to young persons, placing the responsibility for judging whether material falls within the statute on the publisher or producer who is completely aware of its contents and who is in a position to examine each item individually.

OBSCENITY COMMISSION REPORT, *supra* note 3, at 59.

Consider also the comments on requiring labeling by mail-order distributors in part VII *D infra*.

the prosecution ordinarily will rely upon such factors even if the required mens rea does not extend to any of these characteristics of the material. To establish the requisite mens rea as to the actual content of the material, the prosecution usually seeks to show that factors known to the dealer so clearly established the probability of sexually explicit content that the dealer's failure to inspect reflected recklessness as to content. It is not clear how much more difficult the prosecution's case would be made if the prosecution were required to establish a similar recklessness as to the factual characteristics reflected in the tripartite standard. Certainly, the evidence offered to establish recklessness as to specific content ordinarily should also show recklessness as to prurient appeal. Arguably, the elements of patent offensiveness and lack of serious social value are more difficult to estimate based upon advertising and other factors, but at least the evidence typically offered in general obscenity prosecutions has tended to establish reckless disregard of the presence of those characteristics as well as prurient appeal.⁴⁴⁰

B. Reckless Disregard

The foregoing analysis assumes, of course, that as to both the sexual content of the material and its quality under the tripartite test, the requisite level of mens rea is not limited to actual knowledge—that is, the prosecution is not required to prove that the disseminator was actually aware of the content and character of the material. Although the proposed statute refers to “knowingly disseminating,” all three alternative drafts of paragraph (d) define “knowingly” as including “reckless disregard.” The “reckless disregard” standard is derived from the mens rea level of “recklessness” utilized in most modern criminal codes.⁴⁴¹ The actor must have been aware

⁴⁴⁰ See *United States v. Hochman*, 175 F. Supp. 881 (E.D. Wis. 1959), *aff'd*, 227 F.2d 631 (7th Cir. 1959) (title, illustration, and prices tending to show knowledge of content); *State v. Ward*, 512 S.W.2d 243 (Mo. App. 1974) (cover depicting genital in state of sexual excitement); *United States v. Mishkin*, 317 F.2d 634 (2d Cir. 1963) (clandestine manner of delivery and defendant's familiarity with the distribution scheme). See also Note, *The Scierter Requirement in Criminal Obscenity Prosecutions*, 41 N.Y.U.L. REV. 791 (1966) (collecting various cases). The same type of evidence may not be as readily available with respect to the wider range of material encompassed by a juvenile statute.

In numerous cases, the prosecution has shown that materials were sold by dealers who were asked by the purchaser for books showing certain sexual activity. See, e.g., *State v. Richardson*, 506 S.W.2d 488 (Mo. App. 1974). See also *Kaplan v. California*, 413 U.S. 115, 116 (1973); Edmiston, *Proof of Scierter in Criminal Obscenity Prosecutions*, 9 AKRON L. REV. 13 (1975). This type of proof presumably would be available in juvenile cases. Similarly, in prosecutions for the exhibition of movies, persons exhibiting X-rated movies could readily be assumed to have recklessly disregarded the possible presence of the characteristics described in the tripartite test as applied to minors. See generally *State v. American Theatre*, 194 Neb. 84, 230 N.W.2d 209 (1975); *Locke v. State*, 516 S.W.2d 949 (Tex. Civ. App. 1974); *Price v. Commonwealth*, 213 Va. 113, 189 S.E.2d 324 (1972).

⁴⁴¹ See PROPOSED MICH. CRIM. CODE § 305(c) (Mich. State Bar 1967):

A person acts recklessly with respect to a circumstance described by a statute defining an offense when he is aware of and consciously dis-

of a substantial risk of the existence of the circumstances for which mens rea is required.

Alternative A of paragraph (d)(ii) provides that the individual must have "recklessly disregard[ed] circumstances suggesting the character and content of the matter." A more specific definition of recklessness is not provided, since it would require greater specificity in identifying those characteristics of the material for which mens rea is required, and Alternative A purposely seeks to avoid specificity in identifying those characteristics by using the general terms "character and content."⁴⁴² Alternatives B and C of paragraph (d)(ii) provide a more detailed definition of the requisite mens rea. They require that the individual disregard "a substantial risk" that the publication depicted specified sexual conduct and had either prurient appeal alone (Alternative B) or all three characteristics reflected in the tripartite standard (Alternative C).⁴⁴³

The standard of reckless disregard clearly meets the level of mens rea constitutionally required under *Smith*. Although *Smith* and later opinions referred to the disseminator's "knowledge" of the content of the material sold,⁴⁴⁴ those references were not intended to suggest that the disseminator must have actual awareness of the content of the material. Thus, as Justice Frankfurter noted in his concurring opinion in *Smith*, the majority was not suggesting that an individual could avoid liability by "purposely insulat[ing] himself against knowledge about an offending book."⁴⁴⁵ Yet a person who purposely shuts his eyes to the existence of a possible circumstance cannot be described as having actual "knowledge" of that circumstance as the concept of "knowledge" is commonly used in

regards a substantial and unjustifiable risk that the... circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

This definition is taken from the MODEL PENAL CODE § 2.02 (Tent. Draft No. 4, 1955). See also N.Y. PENAL LAW § 15.05 (McKinney Supp. 1975).

⁴⁴² See text accompanying notes 425-27 *supra*.

⁴⁴³ Reckless disregard is reflected most commonly in the failure to inspect, but since it is not limited to that situation, see text accompanying notes 437-38 *supra*, the alternatives do not refer to reckless disregard solely in terms of failure to inspect. Compare ILL. ANN. STAT. ch. 38, § 11-21(b) (Smith-Hurd Supp. 1975), described in note 453 *infra*.

⁴⁴⁴ 361 U.S. at 151-52; *Hamling v. United States*, 418 U.S. 87, 123 (1974).

⁴⁴⁵ 361 U.S. at 161.

A bookseller may not shut his eyes to something which he should see, nor shut his mind to something which he should know, for then the claimed lack of knowledge is sham and should not be permitted to defeat the purpose of a statute which seeks to outlaw traffic in obscene literature.

People v. Schenkman, 20 Misc. 2d 1093, 1099, 195 N.Y.S.2d 570, 576 (Ct. of Spec. Sessions City of New York 1960). See also *Movies, Inc. v. Conlisk*, 345 F. Supp. 780, 788 (N.D. Ill. 1971); *State v. Thompkins*, 263 S.C. 472, 211 S.E.2d 549 (1975).

modern criminal codes.⁴⁴⁶ Such a person is more accurately described as acting with reckless disregard of the circumstance.

The constitutional acceptability of reckless disregard was given further recognition in two post-*Smith* decisions, *Mishkin* and *Ginsberg*. In *Mishkin*, the Court accepted a New York scienter requirement that was not restricted to actual knowledge but extended to those who were aware of the likely contents of the material.⁴⁴⁷ In *Ginsberg*, the Court upheld a New York juvenile statute which specifically accepted as sufficient mens rea that the individual had "reason to know" the character of the material.⁴⁴⁸

Almost all of the state provisions examined apparently accept reckless disregard as a sufficient level of mens rea. Several of the state statutes speak of a seller acting "knowingly" and do not include any further definitions of "knowingly" that would encompass reckless disregard.⁴⁴⁹ But some of these provisions apparently require awareness only that the material is sexually oriented,⁴⁵⁰ and a person who purposely closes his eyes would have an "awareness" of that aspect of the material, although he would not be aware of its specific content, erotic quality, patent offensiveness, or likely lack of social value. In other statutes that do not define the term "knowingly," statutory presumptions relating to a bookseller's "knowledge" have, as a practical matter, reduced the effective level of mens rea to reckless disregard or even negligence.⁴⁵¹ Finally, judicial interpretations of the term "knowledge" often have viewed it as including reckless disregard as well as actual awareness.⁴⁵²

⁴⁴⁶ Under PROPOSED MICH. CRIM. CODE § 305(b) (Mich. State Bar 1967) and most modern criminal codes, "knowledge" requires awareness of a fact as actually existing. See MODEL PENAL CODE 125 (Tent. Draft No. 4, 1955):

As we use the term, recklessness involves conscious risk creation. It resembles acting knowingly in that a state of awareness is involved but the awareness is of risk, that is of probability rather than certainty . . .

⁴⁴⁷ The New York provision, N.Y. PENAL CODE § 1141 (McKinney Supp. 1975), had been interpreted by the New York courts as applicable to a seller who was "in some manner aware" of the contents of the material. The New York courts had clearly indicated that this level of mens rea did not require knowledge of the specific content but awareness that the publication probably contained "filth." See *People v. Finklestein*, 9 N.Y.2d 342, 174 N.E.2d 470, 214 N.Y.S.2d 363 (1961).

⁴⁴⁸ See note 420 *supra*. In *Huffman v. United States*, 470 F.2d 386 (D.C. Cir. 1971), *rev'd on rehearing*, 502 F.2d 419 (D.C. Cir. 1974), the court upheld an obscenity statute that defined "knowingly" as "having general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection or inquiry." See also cases cited in note 457 *infra*.

⁴⁴⁹ See, e.g., CAL. PENAL CODE § 313(e) (West Supp. 1976) ("being aware of the character of the matter"); KY. REV. STAT. § 531.030 (Cum. Supp. 1974) ("knowledge of the content and character"); W. VA. CODE ANN. § 61-8A-1 (Supp. 1974) ("to have knowledge or to be aware of the content or character").

⁴⁵⁰ See, e.g., *Volkland v. State*, 510 S.W.2d 585 (Tex. Crim. App. 1974); *People v. Adler*, 25 Cal. App. 3d Supp. 27, 101 Cal. Rptr. 726 (1972). See also federal cases cited in note 423 *supra*.

⁴⁵¹ See, e.g., N.Y. PENAL LAW § 235.22(i) (McKinney Supp. 1975) and *People v. Kirkpatrick*, 32 N.Y.2d 17, 295 N.E.2d 753, 343 N.Y.S.2d 70 (1973); W. VA. CODE ANN. § 61-8A-4 (Supp. 1974).

⁴⁵² See, e.g., cases cited in note 445 *supra*. This broad view of "knowledge" is not

Other state statutes define mens rea as including less than reckless disregard. These statutes apparently would encompass a mere negligent failure to inspect the material disseminated.⁴⁵³ Unlike the "reckless disregard" standard proposed in paragraph (d), some of these provisions only require that good reason to inspect exist.⁴⁵⁴ Under such a standard, the seller need not have been actually aware of the circumstances suggesting that the material contains sexually explicit matter; it is sufficient that he should have been aware of those circumstances. Other statutes apparently require that the seller be aware of the circumstances, but do not require that he appreciate their significance.⁴⁵⁵

Modern criminal codes usually require a higher standard of mens rea than negligence.⁴⁵⁶ Where a particular harm is an element of the offense, they ordinarily require either an intent to cause that harm or reckless disregard of a substantial risk that the harm will result. The same mens rea levels normally also apply to key circumstances that contribute to criminal liability. In view of the first amendment concerns noted in *Smith*, caution suggests that the mens rea level, at least as to sexually explicit content, should not be placed at a level lower than that applied in criminal statutes generally.⁴⁵⁷

limited to obscenity cases. See W. LAFAVE & A. SCOTT, CRIMINAL LAW 198 (1972):

The word "knowledge" . . . has not always been interpreted as having the meaning given in the Model Penal Code . . . Cases have held that one has knowledge of a given fact when he has the means of obtaining such knowledge, when he has notice of facts which would put one on inquiry as to the existence of that fact, when he has information sufficient to generate a reasonable belief as to that fact, or when the circumstances are such that a reasonable man would believe that such a fact existed.

⁴⁵³ Several states refer to a "ground for belief which warrants further inspection of . . . the character and content of any material." See, e.g., COLO. REV. STAT. § 18-7-101(2) (1973); FLA. STAT. ANN. § 847.012(1)(g) (Supp. 1975); VA. CODE ANN. § 18.2-390(7) (1975). See also ORE. REV. STAT. § 167.065 (1974) ("knowing or having a good reason to know the character of the material furnished"). Other states refer to the failure to "exercise reasonable inspection." See ILL. ANN. STAT. ch. 38, § 11-21(b)(4) (Smith-Hurd Supp. 1975) ("recklessly" failing to exercise reasonable inspection); N.J. STAT. ANN. § 2A:115-1.7(d) (Supp. 1975).

⁴⁵⁴ See, e.g., N.J. STAT. ANN. § 2A:115-1.7(d) (Supp. 1975). Compare UTAH CODE ANN. § 76-10-1021(4) (Supp. 1975) (requiring failure to reasonably inspect "for the purpose of avoiding the disclosure").

⁴⁵⁵ See, e.g., FLA. STAT. ANN. § 847.012(1)(g) (Supp. 1975).

⁴⁵⁶ See Hall, *Negligent Behavior Should Be Excluded from Penal Liability*, 63 COLUM. L. REV. 632 (1963).

⁴⁵⁷ It should be noted, however, that in *Ginsberg v. New York*, 390 U.S. 629 (1968), the Court upheld a statute containing what was essentially a negligence standard, although a somewhat higher standard may have been suggested by legislative interpretation. See notes 420, 447 *supra*. The *Ginsberg* statute required a general knowledge of, or reason to know, or a belief or ground for belief which warrants further inspection . . . [of] the character and content of any material described herein which is reasonably susceptible of examination by the defendant.

Law of June 7, 1965, ch. 327, § 484-h, [1965] N.Y. Laws 480, as amended N.Y. PENAL LAW § 235.20 (McKinney Supp. 1975). See also *Huffman v. United States*, 470 F.2d 386 (D.C. Cir. 1971), *rev'd on other grounds*, 502 F.2d 419 (D.C. Cir. 1974); *Newman v. Conover*, 313 F. Supp. 623 (N.D. Tex. 1970) (upholding

Moreover, as a practical matter, requiring proof of reckless disregard, rather than negligence, is likely to impose an additional burden on the prosecution only in the most unusual cases. If the jury can be shown that circumstances were such that a reasonable person would have believed that the disseminated material probably included sexually explicit matter of erotic quality, that evidence would be sufficient for a finding of reckless disregard. The jury may assume, without more, that the defendant was aware of what a reasonable person would have known.⁴⁵⁸ Although a contrary conclusion might be reached upon a showing that the defendant lacked the capacity of a reasonable person, the defense only rarely is likely to make a convincing presentation along these lines.⁴⁵⁹

C. Age

The New York juvenile statute upheld in *Ginsberg* required that the defendant have "general knowledge of, or reason to know, or a belief or ground for belief which warrants further . . . inquiry" as to the age of the person to whom the material was sold.⁴⁶⁰ It also provided that

an honest mistake shall constitute an excuse from liability hereunder if the defendant made a reasonable bona fide attempt to ascertain the true age of such minor.⁴⁶¹

negligence standard in Texas general obscenity statute); *Great Speckled Board of the Atlanta Cooperative News Project v. Stynchcombe*, 298 F. Supp. 1291 (N.D. Ga. 1969) (upholding "negligence" standard in Georgia general obscenity statute).

⁴⁵⁸ To a considerable extent, the jury's willingness to find that the defendant was aware of what a reasonable person would have known may depend upon the scope of the definition of sexually explicit material. If that definition encompasses, for example, books depicting no more than nudity, the statute is more likely to reach disseminators who do not regularly sell sexually oriented materials that are patently offensive for minors and who, therefore, are less likely to be aware of those factors that suggest a particular book should be examined before being sold to a minor. See text accompanying note 318 *supra*. It should be noted, however, that such persons arguably might not be held liable by a jury even under a negligence standard. Though the title, cover, and other factors strongly suggest a duty to inspect, circumstances advanced on defendant's behalf may be considered by the jury in concluding that a reasonable person in defendant's particular situation would not have inspected. See *People v. Engel*, 7 N.Y.2d 1002, 116 N.E.2d 845, 200 N.Y.S.2d 48 (1960), reported in Note, *The Scierter Requirement in Criminal Obscenity Prosecutions*, 41 N.Y.U.L. REV. 791, 798 n.48 (1966), where a presumption of scierter was held to be rebutted by showing defendant worked long hours, seven days a week, and had so many books and magazines in his luncheonette that he never had a chance to look at the materials.

⁴⁵⁹ To some extent, a similar argument might be advanced in favor of requiring actual "knowledge"—that is, where a reasonable person would have been aware of the risk and inspected the material, is not the jury likely to find that the defendant did indeed do so? The defendant should find it easier, however, to make a showing that he was not actually aware of the sexually oriented content (that is, that he only suspected and did not actually inspect), than to show, under a reckless disregard standard, that he did not even suspect a sexually explicit content. The difference is probably most significant with respect to proof of knowledge of the factors reflected in the tripartite test.

⁴⁶⁰ Law of June 7, 1965, ch. 327, § 484-h(1)(g), [1965] N.Y. Laws 480, as amended N.Y. PENAL LAW § 235.20 (McKinney Supp. 1975). See 390 U.S. at 646.

⁴⁶¹ Law of June 7, 1965, ch. 327, § 484-h(1)(g)(ii), [1965] N.Y. Laws 480, as amended N.Y. PENAL LAW § 235.20 (McKinney Supp. 1975). See 390 U.S. at 646.

Since the New York statute contained these provisions, the Court had no reason to determine whether an obscenity statute would be upheld if it failed to require some mens rea as to the age of the recipient.⁴⁶²

In many states, statutes prohibiting dangerous transactions with minors ordinarily do not require any mens rea as to the victim's age.⁴⁶³ The special first amendment considerations noted in *Smith* suggest, however, that a mens rea requirement would be constitutionally required in a juvenile obscenity statute.⁴⁶⁴ Imposition of strict liability as to the recipient's age would place upon the seller the burden of determining whether the material being sold was obscene for minors even when the purchaser appeared to be above the age of a minor. If the state lacked a general obscenity provision,⁴⁶⁵ the burden would extend to all materials sold. If the state had a general obscenity provision, the additional burden would be limited to matter that might be obscene for minors though not for adults. Of course, under either circumstance, the burden would not be as great as that held impermissible in *Smith*,⁴⁶⁶ since the mens rea requirement as to the content of the item sold would afford protection where the seller reasonably believed that the content did not warrant inspection. Also, the dealer could be almost positive that persons who appeared to be a certain age, (such as over twenty-five) were not in fact under the statutory age limit.⁴⁶⁷ Notwithstanding these limitations, the burden still could be sufficiently inhibiting to lead sellers to refuse to sell potentially questionable material to a person even though he reasonably appears to be a few years over the age limit. Moreover, where the seller serves a primarily youthful clientele, strict liability might lead him to refuse even to stock materials that might be obscene for minors, although acceptable for adults.

Arguably, imposing strict liability as to age might not create sufficient potential for restricting the distribution of protected material to adults

⁴⁶² The defendant in *Ginsberg* challenged only the "honest-mistake" exception included in the mens rea requirement. The court rejected as "wholly without merit" his contention that this provision was impermissibly vague. 390 U.S. at 645.

⁴⁶³ See, e.g., MICH. COMP. LAWS ANN. §§ 750.137, .141 (Supp. 1975) and *People v. Doyle*, 16 Mich. App. 242, 167 N.W.2d 907 (1969); N.Y. PENAL LAW § 15.20(3) (McKinney Supp. 1975); WIS. STAT. ANN. § 939.43(2) (Supp. 1975). There has been a movement in recent years to recognize reasonable mistake as to age as a defense in statutory rape cases where the victim was over the age of puberty. S. KADISH & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 144 (1975).

⁴⁶⁴ Though generally taking a broad view of the state's authority to regulate obscenity, Commissioners Hill and Link, in their minority statement, see note 3 *supra*, concluded that it was doubtful whether absolute liability as to the minor's age would be constitutionally acceptable. OBSCENITY COMMISSION REPORT, *supra* note 3, at 472. Compare *People v. Tannenbaum*, 18 N.Y.2d 263, 220 N.E.2d 783, 274 N.Y.S.2d 129 (1966), *rev'd on rehearing*, 23 N.Y.2d 753, 244 N.E.2d 269, 296 N.Y.S.2d 798 (1968) (scienter as to age not constitutionally required) with *People v. Kahan*, 15 N.Y.2d 311, 206 N.E.2d 333, 258 N.Y.S.2d 391 (1965) (suggesting otherwise).

⁴⁶⁵ See note 4 *supra*.

⁴⁶⁶ See text accompanying notes 413-16 *supra*.

⁴⁶⁷ See *People v. Tannenbaum*, 18 N.Y.2d 263, 220 N.E.2d 783, 274 N.Y.S.2d 129 (1966), *rev'd on rehearing*, 23 N.Y.2d 753, 244 N.E.2d 269, 296 N.Y.S.2d 798 (1968) (emphasizing both of these factors in distinguishing *Smith*).

to render such a provision unconstitutional under *Smith*.⁴⁶⁸ Even so, the incremental enforcement value of strict liability should be weighed, as a matter of state policy, against the "chilling" impact of such liability.

The various state statutes examined generally reflect a determination that strict liability as to age is inappropriate. This includes states which ordinarily impose strict liability as to age in criminal statutes.⁴⁶⁹ All but three of the state statutes examined⁴⁷⁰ clearly indicate that a reasonable mistake as to the purchaser's status as a minor would relieve the seller of liability, at least where proper inquiry as to age was made.⁴⁷¹ Many specifically make negligence as to age an element of the required mens rea.⁴⁷² Others relieve the disseminator of liability only where he

had reasonable cause to believe that the [person] involved was [not a minor], and such [person] exhibited . . . a draft card, driver's license, birth certificate or other official or apparently official document purporting to establish [that he was a minor].⁴⁷³

The scienter requirement in proposed paragraph (d) establishes a standard of "reckless disregard" of the status of the minor. This standard is somewhat higher than that applied in other jurisdictions, but, as already noted,⁴⁷⁴ requiring proof of reckless disregard rather than negligence does not impose a substantial additional burden on the prosecution. Moreover, with a reckless disregard standard there is no need for an exception relating to "honest-and-reasonable mistakes" based upon the exhibition of draft cards, driver's licenses, or similar documents. Indeed, under a reckless disregard standard, the mistake need only be honest. If

⁴⁶⁸ See, e.g., note 416 *supra* (quoting from *Smith*). See also *People v. Tannenbaum*, 18 N.Y.2d 263, 220 N.E.2d 783, 274 N.Y.S.2d 129 (1966), *rev'd on rehearing*, 23 N.Y.2d 753, 244 N.E.2d 269, 296 N.Y.S.2d 798 (1968).

⁴⁶⁹ Compare, e.g., N.Y. PENAL LAW § 15.20(3) (McKinney Supp. 1975) with N.Y. PENAL LAW § 235.22(2) (McKinney Supp. 1975); and WIS. STAT. ANN. § 939.43(2) (Supp. 1975) with WIS. STAT. ANN. § 944.25(1)(h) (Supp. 1975).

⁴⁷⁰ See note 2 *supra* for a list of the statutes examined. HAWAII REV. STAT. tit. 37, § 712-1215 (Special Supp. 1972) specifically requires mens rea as to content, but makes no reference to mens rea as to age. N.D. CENT. CODE § 12.1-27.1-03 (Special Supp. 1975) prohibits "knowingly promot[ing] to a minor any material . . . harmful to a minor," but the statute does not clearly indicate whether the required mens rea extends to the age of the minor as well as the character and content of the material. See N.D. CENT. CODE § 12-01-04(5) (Special Supp. 1975). Compare N.D. CENT. CODE § 12.1-27.1-01 (Special Supp. 1975) (general obscenity statute). R.I. GEN. LAW § 11-31-10 (Supp. 1974) prohibits "willfully or knowingly" engaging in the "business" of selling obscene material to minors, and defines the term "knowingly" only with reference to the content and character of the material sold.

⁴⁷¹ See, e.g., KY. REV. STAT. § 531.040 (Cum. Supp. 1974); ORE. REV. STAT. § 167.085(4) (1974); VA. CODE ANN. § 18.2-390(7) (1975).

⁴⁷² See, e.g., CAL. PENAL CODE § 313.1(a) (West Supp. 1976); ILL. ANN. STAT. ch. 38, § 11-21(e)(3) (Smith-Hurd Supp. 1975); UTAH CODE ANN. § 76-10-1206 (Supp. 1975).

⁴⁷³ WIS. STAT. ANN. § 944.25(11)(a) (Supp. 1975) (emphasis added). See also N.Y. PENAL LAW § 235.22(2)(b) (McKinney Supp. 1975); OHIO REV. CODE ANN. § 2907.31(B)(3) (Page 1975). See also N.J. STAT. ANN. § 2A:115-1.10 (Supp. 1975) (requiring reasonable reliance on written statement of recipient that he or she is at least eighteen).

⁴⁷⁴ See notes 457-59 and accompanying text *supra*.

the person honestly believed that the draft card was genuine, or that there was a substantial likelihood that it was genuine, then he obviously did not consciously disregard a substantial risk.⁴⁷⁵

D. Mail Distributions

There is no separate provision in the proposed statute for mail distributions. Sales through the mail would be included under either alternative definition of dissemination.⁴⁷⁶ If a disseminator of obscene material recklessly disregards a substantial risk that the recipient is a minor, he would be liable under section 2. However, the mail-order disseminator ordinarily will not have before him any information suggesting that the prospective purchaser is a minor.⁴⁷⁷

It might be possible to condition mail-order dissemination upon the purchaser's submission of a statement or a formal certification noting that he is not a minor.⁴⁷⁸ Alternatively, the disseminator might be required to place an "adults only" label on each package shipped.⁴⁷⁹ Both alternatives present serious drawbacks. Requiring a statement or certification of age, under penalty for falsification, would place an unrealistic criminal penalty on the minor, which would probably be an ineffective deterrent. Such a requirement also would impose a burden on protected dissemination to adults since, even if checking a box on an application is all that is required, some adults surely would forget to check the appropriate box and thereby delay shipment pending clarification of their status.

Requiring an "adults only" label on books or film sent through the

⁴⁷⁵ If greater protection is needed for the person relying upon such official documents, then a provision could be adopted simply making the exhibition of such a document a defense without requiring a showing as to appropriate reliance thereon. See WASH. REV. CODE § 968.070(2) (Supp. 1974).

⁴⁷⁶ See paragraph (a) of section 1.

⁴⁷⁷ See OBSCENITY COMMISSION REPORT, *supra* note 3, at 59-60, recommending against enactment of federal legislation prohibiting the sale of obscene matter to juveniles through the mail.

Such federal legislation would... be virtually unenforceable since the constitutional requirement of proving the defendant's guilty knowledge means that a prosecution could be successful only if proof were available that the vendor knew the purchaser was a minor. Except in circumstances which have *not* been found to be prevalent, as where a sale might be solicited through a mailing list composed of young persons, mail order purchases are made without any knowledge by the vendor of the purchaser's age.

Id. (emphasis added).

⁴⁷⁸ See, e.g., ILL. ANN. STAT. ch. 38, § 11-21(d)(4) (Smith-Hurd Supp. 1975). Cf. N.J. STAT. ANN. § 2A:115-1.10 (Supp. 1975), described in note 473 *supra*.

⁴⁷⁹ Cf. ORE. REV. STAT. § 167.070(2) (1974):

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... in words or substance, "This package contains material that by Oregon law, cannot be furnished to a minor."

See also PROPOSED ARIZ. CRIM. CODE § 3505(b) (Ariz. Crim. Comm'n 1975) (containing same provision).

mail gives adequate notice to parents that the materials are potentially harmful for minors. But it also announces to the postman and others the nature of the material ordered by adult as well as minor purchasers.⁴⁸⁰ Moreover, it requires the disseminator to make a judgment for every item shipped as to whether it would indeed be obscene for minors. The storeowner, on the other hand, need make that judgment only when the prospective purchaser before him appears to be a minor.

VIII. CRIMINAL PENALTY

The proposed statute makes distributing obscene material to minors a misdemeanor punishable by imprisonment for up to one year and a fine up to \$10,000. This proposal follows the Oregon provision⁴⁸¹ and the proposed Michigan code.⁴⁸² The justification for including a maximum fine of \$10,000 is stated in the Bar Committee commentary to the proposed Michigan code:

Because fines are of central significance in enforcing . . . [obscenity statutes, the proposed statute] provides a basis for extension of the fine beyond \$1,000 . . . in a case, e.g., of a mass manufacturer of pornographic material. Although the provision for extension to a \$10,000 fine is not limited to this situation, the specific reference to the judge's duty to consider the scope of the defendant's commercial activities clearly indicates where the higher fine would most appropriately be employed. The Committee believes that consideration of this factor would rebut any claim that the fine imposes cruel and unusual punishment or is otherwise unconstitutional.⁴⁸³

The proposed penalty is within the general range of the jurisdictions examined as to imprisonment, but provides for a higher fine than most of

⁴⁸⁰ See also comments in the OBSCENITY COMMISSION REPORT, *supra* note 3, quoted in note 439 *supra*, concerning imposition of a labeling requirement upon all publishers.

⁴⁸¹ ORE. REV. STAT. § 167.065(2) (1974). The Oregon offense is a class A misdemeanor, but the statute permits a \$10,000 maximum fine rather than the usual \$1,000 maximum for Class A misdemeanors. See also N.Y. PENAL LAW § 80.00 (McKinney Supp. 1975), discussed in note 483 *infra*.

⁴⁸² See PROPOSED MICH. CRIM. CODE § 6310 (Mich. State Bar 1967). The current Michigan provision permits maximum imprisonment of one year and a maximum fine of \$1,000. See MICH. COMP. LAWS ANN. §§ 750.343a, .343e (1968).

⁴⁸³ PROPOSED MICH. CRIM. CODE § 6305, Comment, at 483 (Mich. State Bar 1967). New York follows a similar approach for all felonies (including dissemination of obscene materials to minors). See N.Y. PENAL LAW § 80.00 (1975) (permitting fine not to exceed "double the amount of the defendant's gain from the commission of the crime"). *People v. Mature Enterprises, Inc.*, 76 Misc. 2d 660, 352 N.Y.S.2d 346 (Sup. Ct. App. T. 1974), *aff'g* 73 Misc. 2d 773, 343 N.Y.S.2d 934 (Crim Ct. City of New York 1973), held that a fine of \$100,000, imposed upon a corporate defendant, was not excessive where properly related to defendant's commercial gain from the promotion of an obscene film.

The proposed \$10,000 maximum would be subject, of course, to any general provision permitting the imposition of higher fines for corporate defendants. See N.Y. PENAL LAW § 80.10 (1975); N.D. CENT. CODE § 12.1-32-01(3) (Special Supp. 1975).

those jurisdictions. Several states permit a one-year maximum for imprisonment, with a \$1,000 maximum on fines.⁴⁸⁴ Others provide for imprisonment for up to six months and a fine up to \$500.⁴⁸⁵ Several treat dissemination to minors as a felony punishable by five years imprisonment and a fine of \$5,000.⁴⁸⁶

IX. FACILITATIVE MISREPRESENTATION

The proposed statute includes a provision, section 3, making it a misdemeanor to falsely represent oneself as a parent or to falsely represent that a minor is over the statutory age limit in order to facilitate dissemination of obscene matter to that minor. This provision supplements the primary criminal provision of section 2, which prohibits illegal dissemination.⁴⁸⁷ It is possible that the person making the false representation could be held responsible under section 2 for the subsequent dissemination.⁴⁸⁸ However, that theory of liability, which is based on the conduct of an innocent agent, is somewhat uncertain and is limited, in any event, to cases where the falsification was successful. A separate provision is needed to prohibit the misrepresentation alone.⁴⁸⁹

Many states have provisions similar to section 3. Some cover misrepresentation of both a minor's age and status as a parent.⁴⁹⁰ Others cover only misrepresentation as to parental status⁴⁹¹ or the prospective recipient's age.⁴⁹²

⁴⁸⁴ See, e.g., HAWAII REV. STAT. tit. 37, § 712-1215(3) (1972); IOWA CODE ANN. § 725.22 (Supp. 1975); MICH. COMP. LAWS ANN. §§ 750.343a, .343e (1968).

⁴⁸⁵ See, e.g., CAL. PENAL CODE § 313.1(a) (West Supp. 1976); WASH. REV. CODE § 9.68.060(3)(d) (Supp. 1974) (first offense); W. VA. CODE ANN. § 61-8A-2 (Supp. 1974).

⁴⁸⁶ See, e.g., FLA. STAT. ANN. § 847.012(3) (Supp. 1975); N.D. CENT. CODE § 12.1-27.1-03 (Special Supp. 1975); UTAH CODE ANN. § 76-10-1206(3) (Supp. 1975) (imposing a minimum fine of \$300 plus \$10 for each article exhibited). Various states impose higher penalties for second offenses. See, e.g., ILL. ANN. STAT. ch. 38, § 11-21 (Smith-Hurd Supp. 1975) (3 years maximum); UTAH CODE ANN. § 76-10-1206(4) (Supp. 1975) (fifteen year maximum, mandatory minimum of one year, and a mandatory fine of \$5,000).

⁴⁸⁷ In some jurisdictions, the offense of contributing to the delinquency of a minor might reach such misrepresentation, but that offense often is "extremely elusive to define." S. Fox, JUVENILE COURTS IN A NUTSHELL 66 (1971). Cf. Hanby v. State, 479 P.2d 486, 497-500 (Alaska 1970); Commonwealth v. Burak, 18 Pa. Commonw. Ct. 330, 335 A.2d 820 (1975).

⁴⁸⁸ See MODEL PENAL CODE 15-18 (Tent. Draft No. 1, 1953); PROPOSED MICH. CRIM. CODE 45 (Mich. State Bar 1967) (discussing liability based on conduct of innocent person).

⁴⁸⁹ Proposed section 3 would apply to misrepresentation by the minor himself as well as misrepresentation by another. In this respect the provision is similar to one making it a misdemeanor for a minor to misrepresent his age to obtain liquor. See, e.g., MICH. COMP. LAWS ANN. § 750.141c (Supp. 1975). A minor violating section 3 would, of course, be subject to juvenile court jurisdiction. See note 367 *supra*.

⁴⁹⁰ See, e.g., FLA. STAT. ANN. §§ 847.013(2)(c), .013(2)(d) (Supp. 1975); OHIO REV. CODE ANN. § 2907.33 (Page 1975); WASH. REV. CODE § 9.68.080 (Supp. 1974).

⁴⁹¹ See, e.g., CAL. PENAL CODE § 313.1(b) (West Supp. 1976); UTAH CODE ANN. § 76-10-1206(1)(c) (Supp. 1975).

⁴⁹² See, e.g., ILL. ANN. STAT. ch. 38, § 11-21(f) (Smith-Hurd Supp. 1975).

The penalty for facilitative misrepresentation would be that of the traditional minor offense in the jurisdiction involved, such as imprisonment up to 90 days or a fine up to \$100 or both. The difference in the penalties imposed for dissemination of obscene matter and for facilitative misrepresentation is similar to the difference in penalties imposed for sale of liquor to a minor and for misrepresenting a minor's age to obtain liquor.⁴⁹³ The higher penalty for the dissemination offense reflects the greater interest in controlling the frequent and often commercial aspect of distribution as opposed to discouraging the occasional misrepresentation.⁴⁹⁴

⁴⁹³ Compare, e.g., MICH. COMP. LAWS ANN. § 750.141a (1968) with MICH. COMP. LAWS ANN. § 750.141c (1968).

⁴⁹⁴ The proposed statute does not treat the liability of a person who permits a minor to participate in a sexually explicit performance. Such activity presents concerns beyond those involved in the dissemination of obscene materials to juveniles and therefore was viewed as outside the scope of this article.

University of Michigan Journal of Law Reform

EDITORIAL BOARD

Editor-in-Chief
Peter R. Spanos

Managing Editor
Thomas D. Johnston

Articles Editor
Stephen L. Jones

Legislative Notes Editor
Roger Alan Petzke

Note and Comment Editors
Donald Daniels
Harvey Freedenberg
Florine R. Gingerich
Ronald K. Henry
Thomas P. Sarb

Administrative Editors
Richard A. Kopek
Patrick E. Mears

SENIOR STAFF

Robert Bunda
Kenneth A. Cobb
Charles M. Cobbe
Nancy M. Cohen

Rudy Engholm
Craig J. Gehring
Mark A. Luscombe
William P. O'Neill

Nancy R. Schauer
Elizabeth L. Snider
Greg Michael White
Michael H. Woolever

JUNIOR STAFF

Russell J. Bruemmer
David R. Case
Sally Gail Cohen
James S. Cuning
Alexander Domanskis
Stephen W. Dunn
Richard L. Epling
Susan D. Falkson
Michael R. Flaherty
Daniel J. Goldberg
Henry M. Grix
Paul M. Hetland

Anne H. Hiemstra
Donald W. Keim
Raymond R. Kepner
Franklyn Davis Kimball
Gary W. Klotz
Michael G. McGee
Jeffrey M. Mandell
Ross Miller
Stephen A. Million
David C. Myers
Ann D. Nachbar
William F. Nessly

Mark H. Penskar
Richard T. Prins
Penny Friedman Rashkin
Stanley J. Reed
Alan V. Reuther
Phyllis Greenwood Rozof
Edward Rubin
Robert Scavone
William David Serwer
William G. Snead
William C. White
Kathleen E. Ziga

FACULTY ADVISORY COMMITTEE
Lawrence W. Waggoner, Chairman
Frank R. Kennedy
Donald H. Regan

BUSINESS MANAGER
Gloria Goldberg

