

ASSEMBLY JUDICIARY COMMITTEE  
58th NEVADA ASSEMBLY SESSION

MINUTES

April 25, 1975

This meeting of the Assembly Judiciary Committee on Friday, April 25, 1975 was called to order by its Chairman, Robert R. Barengo.

MEMBERS PRESENT: BARENGO, BANNER, HEANEY, HICKEY,  
LOWMAN, POLISH, SENA, Mrs.  
HAYES and Mrs. WAGNER.

MEMBERS ABSENT: NONE.

A Guest Register from this meeting is attached to these Minutes.

A representative from the Public Service Commission (Heber Hardy) testified on A.B.559, saying that the Commission had jurisdiction on existing law, but not quite as much in depth as what is proposed by A.B.559. They believe the agency who should have this responsibility should be the Nevada Crime Commission, and that agency has no objection.

Mr. Hardy testified on A.B.634, saying that this bill basically cleans up the statutes as to penalty provisions. There are about 5 penalty provisions, some of which may be in conflict, and all dealing with public utility companies. He explained some of these provisions to this Committee. He understands that Mr. McCrea previously attacked this bill on its constitutionality. He says that it is constitutional. There are adequate remedies in the court. He feels the courts are quite capable of determining whether the penalty should be imposed or not. This bill goes to the officers and directors of the utility companies. The Commission believes that it gives the consumer some comfort that there are penalties for the public utility companies if they fail to obey the law. They have no intention to pass or recommend passage of any law which will work to the detriment of the consumer. This is not the Commission's bill, but they highly recommend that this Committee pass it out. Mr. Hardy feels that if a public utility company errs, it should be chastized. This Committee questioned Mr. Hardy on A.B.634.

Assemblyman Lloyd Mann testified on A.B.575 and A.B.576. He asked people to come in from Clark County to testify on this and he would like them to present the basic concepts of these bills.

Carl Lovell, Las Vegas City Attorney, was the first one to testify and he passed out Exhibits to this Committee of which copies are attached to these Minutes. He presented a proposed amendment to this Committee, and this is also attached hereto. This proposal was adopted last October by the Nevada League of Cities; therefore, Mr. Lovell commented that, in essence, he represents all of the cities in the State of Nevada with the resolution. He stated that

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he also spoke on behalf of the Board of City Commissioners of Las Vegas, and they adopted a resolution to pass A.B.576. Mr. Lovell referred to a United States Supreme Court decision on obscenity. The statute as it now exists is outdated and outmoded. Some states are reaffirming and confirming their statutes, and some states are completely revising them. Mr. Lovell says they have had approximately 33 law suits during the past year in Las Vegas. He gave a further breakdown of these cases. Now they are arguing on the aspects of the old state statute, whether it is valid or invalid, and whether cities have the right to pass an ordinance defining obscenity. The past 4 ordinances, and other ordinances, of the City of Las Vegas were taken to the federal court in Clark County, and three were held invalid. The 4th ordinance was not ruled on but may be in the future. The problem is that no matter what type of case and what court you are in, you get back to the state statute. He thinks that the state statute is out dated and needs to be completely revised.

Mr. Lovell mentioned that there are defense lawyers in the audience today from other parts of the country. Mr. Lovell said it is impossible to define obscenity because of the United States Supreme Court decision--although, the citizens are still concerned about it. 13 questions were put on the ballot in Las Vegas, which referred to adult operated businesses, book stores, theatres, etc. The majority of those who voted in the community rejected these types of businesses. He expanded on these questions and previous questions on the ballots. The League of Cities wants the Legislature to put out a clear definition of obscenity. If the Legislature is inclined to feel that the people of the state are concerned about the control of obscenity, then he urges it to set out a good, solid definition and standard of exactly what obscenity is. Mr. Lovell said the area of obscenity is, without a doubt, the most difficult area of law today, because the problem involves morals, and also, because it involves other having to tell its constituents what they can and cannot do as adults. Unless a clear and well-defined statute is presented, they have to go to court with each case and have the judge decide.

Mr. Lovell testified now on A.B.576, saying that there is one thing missing which is in the resolution, and that is to the effect that any city or county may adopt further restrictive standards and guidelines which it feels appropriate to deal with obscenity in the community. If the Legislature feels that a law should be passed which is more restrictive, then it should be very restrictive and go beyond the minimum standards. Either the Legislature should decide whether Nevada will be a consenting adult state, or it will have to decide whether restrictive measures should be necessary. With this new state statute you save the taxpayers' money, time, number of trials cost of litigation, and the cost of expert witnesses. He believes, therefore, that it is incumbent upon this Legislature to pass some good, definitive language for obscenity.

This Committee questioned Mr. Lovell extensively.

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Mr. Lovell further stated after questioning that A.B.576, Page 2, Paragraphs 4 and 5 should come out of the bill. He feels that they are subject to valid constitutional attack.

Robert Strong, President of Las Vegas News Agency, testified on A.B.575, A.B.576 and A.B.722. He is a lawyer by trade, and a tax payer. He found this particular area of great interest. His company distributes to various outlets which sell magazines, paper back books, etc. Some of the outlets would be supermarkets, drug stores and news stands. The materials they furnish range in variety greatly. The question is how to devise a system, or in this case a definition of obscenity, which allows First Amendment Constitutional rights and yet which comes down on hard core pornography. The Legislature must decide this and consider whether it threatens protection by the First Amendment. Mr. Strong said his only purpose at this time was to show how the proposed legislation will "chill" distribution of some magazines, books and periodicals. The Supreme Court in the case of Miller held that these materials could be distributed. Mr. Strong then cited some other Supreme Court decisions.

Mr. Strong then spoke about A.B.576, and commented on Section 8, which sets out sexual conduct which is patently offensive.

Mr. Strong said that what is listed is in conflict with the Supreme Court decision. His main point in being here is to indicate that there can be legislation in this area to assist prosecutors. He offered two approaches. One deals with a model bill which was adopted by the Council for Periodical Distributors, a copy of which is attached to these Minutes. The other was that when constitutional considerations are involved, it seems only fair not to have them determined in criminal proceedings, but rather in civil proceedings. He said that the interest of the state can quite clearly be protected in the use of civil approaches. This second approach does not quite suit him, as it does still have some chilling effect, and that would result in the businessman withholding constitutionally protected merchandise. He was then questioned by this Committee

Next to speak on the 3 obscenity bills was Alan Andrews, an attorney from Las Vegas, who was a former United States Attorney once charged with prosecuting obscenity cases. He introduced Mr. John H. Weston, Attorney from Hollywood, California. His law firm, Fleishman, McDaniel, Brown & Weston, was involved with over 500 obscenity cases throughout the nation. Mr. Andrews said that the bills as presented have serious constitutional defects. They do not give a man of adequate intelligence an idea of what is involved. It is over-broad in a constitutional sense. He referred to Section 8 of A.B.576. The Report of the Commission on Obscenity and Pornography was shown to this Committee.

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Mr. Weston then testified on these obscenity bills, giving his background to the Committee. One of the areas in which he has been almost exclusively involved for some time was the area of distribution of erotic materials. He is from Los Angeles, and then he related some of his experiences and cases for the Committee's benefit. There are two approaches to regulate these types of materials, and the first is through regulation. The second is one he would favor and consists of examination of the material context. He cited the case of Miller v. California, which resulted in a decision being handed down in 1973. This case set down new guidelines. As a result of the case, the court said that no more rigid standards could be utilized than the maximum guidelines set down in the Miller case. It is important to note that the question of local standards was not something which was mandated by the court. In a federal prosecution, a national standard was not required, and in a state prosecution this also applied. The court held that a national standard did not have to be utilized--that a state standard may be used. Mr. Weston noted that there is no provision in the bill for any speedy, rapid appellate review. He discussed Section 6, referring to purient interest. There is no reference to the average person, as well as no reference to whether the standards should be gauged to adults or minors. Section 2 which referred to average persons and contemporary standards is vague. He thinks nothing but confusion will result from this. He said he would simply state that this legislation before the Committee, by virtue of its vagueness, would allow prosecution of virtually every work presently known to us which dealt with sex in almost every fashion.

Mr. Weston then addressed the litigation costs, which result from this type of litigation. In 1975 no adult has the right to order a second adult as to what he can see, buy or think. If material is undesirable to the public and citizens of Nevada, then that material will simply cease to be sold.

Mr. Weston told of a survey taken by an independent polling agency, which was undertaken by his law firm, to determine exactly what community standards were. He told of the resultant investigation into the various states' consenting adults statutes. Iowa, Indiana and Michigan have that type of statute, and North Dakota did until recently. Tennessee had one and it was repealed. They found that most people do not care what adults see or read, and are in favor of the consulting adult idea.

Brief comments were made by Dan Ahlstrom, Las Vegas, on A.B.575, A.B.576 and A.B.722. He stated that something is needed in this state's legislation to give them guidelines in the matter of obscenity. He said that the present statutes provide for civil injunctive proceedings. He read from a transcript some of Judge Goldman's comments. This is attached to these Minutes. What he referred to was Paragraph 4(b) of the present state statute

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The Judge construed the word "of" to mean "or". Mr. Ahlstrom said he could fill the room with briefs that Mr. Andrews has filed attacking the constitutionality of the present statute. He requested that the Committee do something this session to change the statute in some manner. There is a problem and something must be done about the statute. Oregon had a consenting adult statute, but they have since gone to another.

Mr. Ahlstrom told the Committee of the long, complicated legal processes, which tie up too much time and money. City attorneys cannot live with the present state law. If nothing is done this session, the state could be faced with two, possible three, more years where the State of Nevada will have no state statute.

Mr. Hickey requested Mr. Ahlstrom to work out additional amendments to the bill. Mr. Ahlstrom replied that he would be very happy to do so.

Attorney Leslie Mack Fry and Keith Hendrickson, Nevada State Collection Agency, testified on A.B.563. Mr. Fry said he became involved in this after several telephone calls, and he stated that they have no objection to deleting Paragraph 1 of the bill and leaving Paragraph 2. They are trying to grant the right of a collection agency to receive an assignment from creditors and go ahead and sue in their own name on behalf of these agencies to collect money owed the the creditor. Decisions on this have come from New Mexico and Florida, and perhaps other states allowing the collection agency to do this. Mr. Fry said that Paragraph 2 is a direct quote from the California Civil Code. He suggests on Line 13 that "assign or transfer" be inserted. He would like to have additional language put on the end of it to this effect: "said assignee shall have the right by virtue of said assignment or transfer to sue in his own name as a real party in interest."

Fran Breen, representing the Nevada Bankers Association, commented on A.B.575 and A.B.576, saying that he would like to suggest amendment of the bills.

Mr. Breen then testified on A.B.563. The language in Subparagraphs 1(a) and (b) creates a lot of problems. He said that language could be interpreted, and probably would be interpreted, to prohibit any cause which would prohibit transfers without consent of the person having benefit of the contract. He said he called Mr. Fry and he said they wanted to get around the problem which was created by New Mexico. He sees no harm in the bill if we get rid of Subparagraphs 1(a) and (b). He would like to see the following language substituted there: "any creditor may without the consent of the debtor transfer all or part of his rights against the debtor to any third party."

George Flint, representing the Nevada Wedding Association, testified as to S.B.433. This bill is highly supported by their group. They feel it would assist them. They do recommend one amendment. Attached

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to these Minutes is Mr. Flint's hand-written amendment. He represented that Senator Close said he would have made this particular amendment.

Tom Young, Sierra Pacific Power Co., said that as to A.B.563, they support this bill. If this bill does not pass, they would have to develop and create an additional department in their company to take care of this problem.

Jim Brooke, State Bar, testified that the State Bar of Nevada has no real interest in S.B.433, but some of the judges in Washoe County were interested in the bill and brought it to his attention. As to the provision in the bill about the issuance of marriage licenses to persons under 16, the judges do not feel they can make the determination as to whether this person's best interests would be served if they were issued a marriage license. They cannot determine whether they, or any other older persons, are able to handle the responsibilities of marriage and do not want this burden.

Mr. Brooke suggested possibly taking out Paragraphs (a) and (b). If the children have the consent of the parents, it should be enough. He did not testify on this bill in the Senate, but there is a problem with the district courts. He questions the language "extraordinary circumstances". He agrees with the provisions referring to the pregnancies and the consent.

Mr. Brooke testified next on A.B.563. He would like to see the amendments first before he can comment. He sees no real problem or harm, but he does not feel common law should be put into the statutes.

Mr. Gene Milligan, Nevada Assn. Realtors, introduced Mr. Paul Argeres, a Reno realtor, as well as some other realtors in the audience. Mr. Argeres testified on A.B.662. It has two provisions in it having to do with sale of real property in connection with an estate. It provides that an executor may negotiate an exclusive listing with an agent. They quoted Line 13. They would like to remove the 5% fee on Line 16. (Mr. Argeres explained what consisted of an exclusive listing for the benefit of the Committee.) He spoke about the exclusive right to sell, which is used by most licensees. It places property in the hands of one broker and gives him the responsibility to sell. And, therefore, it takes the ability to sell out of the owner's hands. This bill has many benefits to the real estate industry. The fees, depending upon the individual situation, could be higher than 5%, and this is why they request its removal from Line 16. The real estate people now do not really have much incentive to work with estates. Estates do business with many other groups and the courts do not limit their fees. (He explained the multiple listing service for the benefit of the Committee.) Under the law, they cannot place estate property in the multiple listing service. He feels executors are handicapped when they cannot use a service such as this.

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Mr. Milligan commented briefly on A.B.662, The realtors feel that the law needs to be updated, as it would not only benefit the industry, but also the estate.

The Committee briefly questioned Mr. Alan Andrews on the obscenity bills, and asked if he would be able to prepare a consenting adult statute for the Committee's review. He replied that he would do so.

Mr. Weston commented on the obscenity bills that there is no provision for a stay or for a waiting period. There is no jury provision, and there is a question as to what the geographical range of impact would be.

There being no further business, Chairman Barengo adjourned this meeting of the Committee.

ASSEMBLY JUDICIARY COMMITTEE

GUEST REGISTER

DATE: April 25, 1975

| NAME               | BILL NO.                 | SPEAKING | REPRESENTING                |
|--------------------|--------------------------|----------|-----------------------------|
| ✓ Lloyd W. Mann    | 575 - 576                |          | Assemblyman                 |
| ✓ Stuart Guffey    | 575 - 576                |          | L.V. News Agency            |
| ✓ Robert E. Strong | 575, 576, 722            | ✓        | L.V. News Agency            |
| R.D. Jewell        | SB 433                   |          | NEW CHATEL ASS.             |
| George Flint       | SB 433                   | ✓        | " "                         |
| Gino Del Carlo     | AB 563                   | NO       | NEV. BANKERS ASSOC.         |
| Fran Breen         | AB 563                   | yes      | Nev. Bankers Assoc.         |
| STAN WARREN        | AB 563                   | ?        | NEV BELL                    |
| WAYNE NORRIS       | AB 563                   | No       | CENTRAL TELEPHONE Co.       |
| Tom Young          | AB 563                   | yes.     | S.P.P.C.                    |
| Ref. Barbash       | AB 563                   | maybe    | Nevada Collectors Assn.     |
| Case Young         | AB 563                   |          | Business Bro. Minicoll Serv |
| Jim Broake         | SB 433, AB 563<br>AB 566 | yes      | STATE BAR                   |
| Henry Billings     | AB 575-6                 | No       | Children of Nevada          |

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ASSEMBLY BILL NO. 576 -- ASSEMBLYMEN MANN, MAY, LOWMAN,  
JEFFREY, BENKOVICH AND CHRISTENSEN

April 8, 1975

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Referred to Committee on Judiciary

SUMMARY--Revises laws relating to obscenity.  
Fiscal Note: No. (BDR 16-1592)

AN ACT relating to obscenity; redefining "obscenity" and providing other definitions; prescribing a penalty for the production, publication, sale or possession for certain purposes of obscene works or material; providing for enforcement; and providing other matters properly relating thereto.

The People of the State of Nevada, represented in Senate and Assembly, do enact as follows:

WHEREAS, recent opinions rendered by the Supreme Court of the United States indicate that the state may now determine what is and what is not obscene; and,

WHEREAS, the definition of obscenity contained in N.R.S. 201.250 (c) has now been determined to be unworkable in the prosecution and abatement of obscene material and displays; and,

WHEREAS, the Legislature does now seek to prevent exposure of obscene materials to juveniles and unwilling recipients and to prevent and eliminate any abuse against the public health, safety and morals of the residents of this State.

SECTION 1. Section 201.250 of the Nevada Revised Statutes is hereby amended to read as follows:

The following definitions are applicable to Sections 201.250 (1), (2), (3), (4), 201.253 and 201.254.

1. "Obscene". Any material, item, or performance is "obscene" if it is "an obscene work."

(a) "An obscene work" is a work which, taken as a whole, appeals to the prurient interest in sex, which depicts, describes, or portrays sexual conduct as specifically defined by this Act in a patently offensive way, and which, taken as a whole, does not have serious literary, artistic, political, or scientific value. In determining whether or not a work is an obscene work the trier of the fact must find (a) that the average person, applying contemporary community standards would find that the work, taken as a whole appeals to the prurient interest, and (b) that the work taken as a whole, depicts, describes or portrays in a patently offensive way, sexual conduct specifically defined by this Act, or authoritatively construed by the courts of this State as being a portrayal of patently offensive sexual conduct as that phrase is used in the definition of an obscene work and (c) that the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

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

(c) "Item" includes any book, leaflet, pamphlet, magazine, booklet, picture, drawing, photograph, film, negative, slide, motion picture, figure, object, article, novelty device, recording, transcription, phonograph record or tape recording, with or without music, or other similar items.

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

(e) "Community Standards" means the standards of the community from which the jury is drawn or would be drawn if it were the trier of the fact.

(f) "Patently Offensive" means so offensive on its face as to affront current standards of decency.

(g) "Standards of Decency" means Community Standards of Decency.

(h) The phrase "Patently Offensive Sexual Conduct" shall be deemed to include any of the following described sexual conduct if depicted or described in a patently offensive way:

(1) An act of sexual intercourse, normal or perverted, actual or simulated, including genital-genital, anal-genital, or oral-genital intercourse or conduct, whether between human beings or between a human being and an animal.

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

(3) Masturbation, excretory functions and lewd exhibitions of the genitals including any explicit, close-up representation of a human genital organ in a state of sexual stimulation or arousal or spread-eagle exposure of male or female genital organs.

(i) "Promote" means to manufacture, issue, sell, give, provide, lend, mail, deliver, transfer, transmute, publish, distribute, circulate, disseminate, present, exhibit or advertise, or to offer or agree to do the same.

2. A person is guilty of a misdemeanor who knowingly:

(a) Promotes, prints, copies, manufactures, prepares or produces any obscene work, obscene item or obscene material for purposes of sale or distribution commercially.

(b) Publishes, sells, rents, transports in intrastate commerce, distributes commercially or exhibits any obscene item, obscene work or obscene material.

(c) Has in his possession with intent to sell, rent, transport or commercially distribute or commercially exhibit any obscene item, obscene material or obscene work.

3. No person, firm, association or corporation shall, as a condition to any sale, allocation, consignment or delivery for resale of any paper, magazine, book, periodical or publication require that the purchaser or consignee receive for resale any other item, article, book or other publication which is obscene. No person, firm, association, or corporation shall deny or threaten to deny any franchise or impose or threaten to impose any penalty, financial or otherwise, by reason of the failure or refusal of any person to accept such items, articles, books or publications, or by any person to accept such items, articles, books or publications, or by reason of the return thereof. A person, firm, association, or corporation who violates any provision of this subsection is guilty of a misdemeanor.

4. (a) The district court has jurisdiction to enjoin the sale, distribution or exhibition of any obscene work, obscene material or obscene item described in paragraphs 1 (a), (b), (c) and (d) above.

(b) The district attorney of any county or the city attorney of any city in which a person, firm, association or corporation promotes, publishes, sells, distributes or exhibits or is about to promote, publish, sell, distribute or exhibit or has in his possession with intent to promote, publish, sell, distribute or exhibit any obscene work, obscene material or obscene item or any printed or photographed material of an obscene character may maintain an action on behalf of such county or city for an injunction against such person, firm, association or corporation in the district court of the respective county to prevent the sale, publication, promotion, distribution or exhibition or further sale, promotion, publication, distribution or exhibition within the particular city or the State, of any obscene work, obscene item or obscene material described in paragraphs 1

(a), (b), (c) and (d) above.

(c) The person, firm, association or corporation sought to be enjoined shall be entitled to a trial of the issues within 10 days after service of process and a decision shall be rendered by the court within 10 days of the conclusion of the trial.

(d) If a final order or judgment of injunction is entered against the person, firm, association or corporation sought to be enjoined, such final order of judgment shall contain a provision directing the person, firm, association or corporation to surrender to the sheriff of the county in which the action was brought any of the matter described in paragraph (b), and such sheriff shall be directed to seize and destroy such obscene prints and articles .

(e) In any action brought as provided in this subsection, such district attorney or city attorney bringing the action shall not be required to file any undertaking before the issuance of an injunction order.

(f) The sheriff directed to seize and destroy such obscene work , material, or item shall not be liable for damages sustained by reason of the injunction order in cases where judgment is rendered in favor of the person, firm, association or corporation sought to be enjoined.

Leg/Files

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PROPOSAL TO AMEND

N.R.S. 201.250 concerning production, publication, sale and possession of obscene items; coercing acceptance of obscene articles, publications; jurisdiction of district court; injunctions and penalties, and in light of recent United States Supreme Court Decisions:

LEGISLATIVE DECLARATION

It is hereby declared a matter of municipal legislative declaration and belief that the morals of the youth of the State of Nevada may be threatened by the presence of adult motion picture theatres and adult book-stores which are appearing through some of the communities of our state. These establishments and the type and character of the merchandise and paraphernalia sold in them create an aura of mystery and enticement for our youth that is increased by the lascivious and suggestive advertising and display that is often employed to promulgate the availability of these products and services. It is the intent of the Legislature to minimize the exposure of our youth to the influence of these establishments and their advertising and display. It is further the firm belief that the moral values of our youth and, therefore, the mores of our society are in great part influenced and determined by the family, but are affected by the presences of an exposure to these establishments; therefore, it is the firm belief of the Legislature that society has a vital duty and role in the protection of our moral fiber and standards for the well being of us all as a society.

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**The advertising and display done by these establishments is of vital concern to society in regard to their location near areas where our youth may learn, play, pass by, or would be exposed to their advertising, window displays, or the general atmosphere encompassing their operation.**

(A) WHEREAS, recent opinions rendered by the Supreme Court of the United States indicate that the state may now determine what is and what is not obscene; and

WHEREAS, the definition of obscenity contained in N.R.S. 201.250(c)

has now been determined to be unworkable in the prosecution and abatement of obscene material and displays; and

WHEREAS, the Legislature does seek to prevent exposure of obscene materials to juveniles and to prevent and eliminate any abuse against the public health, safety and morals of the residents of this State.

BE IT RESOLVED THAT THE LEGISLATURE ADOPT THE FOLLOWING INTO LAW:  
 (B) "Obscene" means any material which:

1. The average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest in sex, and

2. The work taken as a whole lacks serious literary, artistic, political, or scientific value, and

3. The work depicts or describes patently offensive representations or descriptions of ultimate sex acts, normal or perverted, actual or simulated, or patently offensive representations or descriptions of masturbation, excretory functions or lewd exhibition of the genitals or genital area.

(C) Material depicting or describing any of the following specified sexual acts is hereby declared to be obscene:

1. Sexual intercourse,
2. Anal intercourse,
3. Oral sex,
4. Any lewd exhibition of the male and/or female genital organs or areas,



5. Items 1 through 4 above, by or between male and female, two males or two females, or any combination or number thereof,
6. Any act of masturbation,
7. Any of items 1 through 6 with any animal, with artificial or novelty devices

(D) Any city or county may adopt further restrictive standards by ordinance it feels appropriate for the welfare of its community.

(E) The judicial process of injunction and restraining order shall be available in the case of books, films, theatres and any other obscene material coming within the definition above.

A PROPOSED STATUTE REGULATING THE SALE  
OF HARD CORE PORNOGRAPHY

Prepared and Endorsed by the  
COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, INC.

For Consideration and Enactment  
(After Necessary Conformation with Local Laws and Practice)

By

STATE LEGISLATURES

October, 1973

### Introduction

The Council for Periodical Distributors Associations, Inc. (CPDA) is a trade association representing more than 550 local independent wholesalers of magazines and paperback books in the United States and Canada. Its members distribute all leading magazines (for example, Time, Newsweek, Seventeen, Reader's Digest and Woman's Day) and all leading lines of paperback books (for example, Pocket Books, Bantam Books, Dell and New American Library).

Both as citizens and as local businessmen who are concerned with the image of the publishing industry, the members of CPDA are anxious to prevent the dissemination of obscene material. In the 1960's when many state legislatures were attempting to formulate obscenity statutes which would comply with the requirements enunciated by the United States Supreme Court, CPDA prepared a Model Obscenity Act which met these requirements and enabled law enforcement officers to effectively prevent the sale of obscenity. Several state legislatures enacted the CPDA Model Obscenity Act without substantial change, and several other state legislatures adopted many of the ideas contained in the CPDA Model Obscenity Act.

The recent decision of the United States Supreme Court in Miller v. California, and related cases decided in June 1973,

appears to have modified the Roth/Memoirs test of obscenity and imposed a requirement that the material subject to prohibition under obscenity laws must be specifically defined by state laws. In anticipation that many state legislatures will be forced to conform existing state law to the Miller decision, CPDA has prepared a new model obscenity law for legislative consideration in this most difficult area. It balances First Amendment rights against the legitimate desire of the states to prohibit the sale of hard core pornography, such as proliferated throughout the United States in the late 1960's and 1970's.

It is clear under the decisions of the Supreme Court that obscenity is not speech within the meaning of the First Amendment and is subject to regulation and prohibition by the states. It is equally well established that speech is protected against such regulation or prohibition. The difficulty, which persists to this day even among the members of the Court, lies in determining what is speech and what is obscenity.

The Miller decision's test of obscenity has not solved this problem and, indeed, makes it more difficult by clearly providing that each state may, in defining contemporary community standards, rely upon the standards of its citizens and not national standards or those of other states. As a result, book sellers are faced with the impossible task of determining which among the many hundreds of magazines and thousands of paper backs books they distribute may be deemed obscene.

Chief Justice Burger in Paris Adult Theatre I v. Slayton, one of the companion cases to Miller, himself recognized this problem in upholding a Georgia civil procedure similar to that proposed in the attached model bill.

"This is not be read as disapproval of the Georgia civil procedure employed in this case, assuming the use of a constitutionally acceptable standard for determining what is unprotected by the First Amendment. On the contrary, such a procedure provides an exhibitor or purveyor of materials the best possible notice, prior to any criminal indictments, as to whether the materials are unprotected by the First Amendment and subject to state regulation.

And, in a footnote to this part of the opinion, the Chief Justice noted "This procedure would have even more merit if the exhibitor or purveyor could also test the issue of obscenity in a similar civil action prior to any exposure to criminal penalty."

The members of CPDA support the prohibition of clearly hard core pornographic material having absolutely no value to anyone. However, because of its many years of experience in dealing with problems of obscenity and free speech, CPDA is aware that legislation in this area poses several serious problems.

First, such legislation poses difficult questions under the free speech provisions of the United States Constitution -- particularly as law enforcement officers attempt to apply such legislation to specific written material. Unless such legislation is drafted with the greatest care and precision, and with full knowledge of the applicable case law, it may very well be held invalid.

Second, such legislation may prove ineffective if the law enforcement agencies have no civil remedy and are compelled to choose between criminal prosecution (with all of its rigorous legal requirements and pitfalls) and inaction. Experience indicates that when a state's only weapon against obscenity is a criminal statute, officials are reluctant to prosecute, and judicial proceedings are few and far between. This is so because: (a) the state prosecutor knows that the average dealer handles a multitude of publications and that it is unfair to hold him criminally accountable for selling a book which he could not possibly have read; (b) the uncertainty in this area precludes even experienced lawyers from determining what is obscene except in extreme or "hard core" cases; and (c) the average dealer is not a criminal in any sense of the term and prosecutors are reluctant to injure the dealer's reputation by making him a defendant in a criminal action.

On the other hand, a prosecutor should have no reluctance in enforcing vigorously a statute which permits him to obtain both (a) a prompt civil injunction against unlawful sales of hard core pornography and (b) criminal conviction of persons deliberately selling such material with knowledge that it has been judicially determined to be hard core pornography.

Furthermore, if this problem is regulated exclusively under the criminal law, there is a serious danger of impairing both the constitutional rights of readers and of sellers who have little

or no opportunity to know whether what they sell is illegal. It is impossible for wholesalers and retailers to review the thousands of titles which they handle and to determine whether each of these titles is within the scope of any statute dealing with obscenity. If a possible violation may mean a criminal prosecution, local wholesalers and retailers, who are anxious to obey the law and who fear prosecution, may simply refuse to handle anything conceivably within the statutory ban. In short, the fear engendered by an exclusively criminal statute will make it difficult for the adult public to obtain literature which they have a constitutional right to read. Such an infringement of the public's right to choose their literature could seriously endanger the foundations upon which our democracy is built.

Wholly apart from the "chilling" effect the threat of criminal prosecution may have, booksellers at both the wholesale and retail levels are entitled to adequate notice, under the due process clause, that certain materials are obscene before commencement of a criminal proceeding.

As Justice Brennan stated in Paris Adult Theatre I v.

Slayton:

The vagueness of the standards in the obscenity area produces a number of separate problems.... First, a vague statute fails to provide adequate notice ... of conduct that the statute could be thought to prescribe. The Due Process Clause ... requires that all criminal statutes provide fair notice of 'what the state commands or forbids' ....

We have repeatedly held that the definition of obscenity must provide adequate notice of exactly what is prohibited from dissemination"

\* \* \*

[Quoting former Chief Justice Warren] 'The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed'.... The resulting level of uncertainty is utterly intolerable, not alone because it makes 'book-selling a hazardous profession'... but as well because it invites arbitrary and erratic enforcement of the law."

The attached statute is designed to prevent the sale of hard core pornography, which can be defined and understood by booksellers, policemen and prosecutors, while avoiding the unfairness and chilling effect inherent in a criminal proceeding. CPDA believes, from the years of practical experience of its members in the distribution of books and magazines, that the following principles of the proposed statute are sound and, if enacted, will effectively control the distribution of improper, hard core pornographic materials.

First, it provides law enforcement officers with a speedy means of obtaining civil determination whether the contents of any publication are hard core pornography subject to prohibition in this state.

Second, it provides as much protection of the public's right to read as is constitutionally possible, while providing in the sections authorizing preliminary injunctions a prompt remedy should the public interest so require.



Third, it permits prosecution of dealers who engage in the sale of hard core pornography after a judicial determination of its character.

Fourth, it eliminates situations in which resident dealers may unfairly be made criminal defendants, when the real issue is the nature of the material and whether it should be distributed. If public prosecutors are not empowered to commence civil injunctive proceedings, such challenge can only be by criminal arrest and trial with its attendant and often unjustified publicity and public condemnation. For, even if an indicted dealer does ultimately prevail, his reputation would be gravely injured by the mere fact that he has been a defendant in a criminal action.

CPDA recognizes that many technical provisions of the proposed statute are subject to change in order to comply with local practice and procedures. But practically, if the four principles listed above are observed, this statute should be an effective step forward in the battle against pornography.

Roger B. Scherer  
President, Council for Periodical  
Distributors Association, Inc.

An Act relating to the sale and exhibition of hard-core pornographic materials.

Sec. I. Title

The State of \_\_\_\_\_ Anti Hard-Core Pornography Law

Section II. Legislative Findings and Purposes

A. Based on Chief Justice Burger's statement in Miller v. California \_\_\_\_\_ U.S. \_\_\_\_\_,

... (that) for the first time since Roth was decided in 1957, a majority of this Court has agreed on concrete guidelines to isolate "hard core" pornography from expression protected by the First Amendment. (Emphasis Added) Slip at p. 14

...(And that) no one will be subject to prosecution for the sale or exposure of obscene materials, unless these materials depict or describe patently offensive "hard core" sexual conduct specifically defined by state law. (Emphasis Added) Slip at p. 12

it is the purpose of this Legislature to prohibit the dissemination in the State of \_\_\_\_\_ of such hard-core pornographic materials in order to protect the public peace, health, safety and welfare of the citizens of this State in a manner consistent with the rights and privileges guaranteed by the Constitution of the United States and the State of \_\_\_\_\_.

B. The Legislature finds that in order to implement the purpose described in paragraph A of Section II of this Act, it must adopt a procedure that provides for the vigorous enforcement of a state-wide prohibition on hard-core pornographic materials that does not interfere with the sale or exhibition of constitutionally protected materials.

Based on Chief Justice Burger's specific endorsement of a civil proceeding prior to criminal prosecution in Paris Adult

Theatre I. v. Slaton \_\_\_\_\_ U.S. \_\_\_\_\_, wherein he 874

noted that,

...such (civil) procedure provides an exhibitor or purveyor of materials the best possible notice, prior to criminal indictment, as to whether the materials are unprotected by the First Amendment and subject to State regulation.

(Emphasis Added) Slip at p. 5.

it is the purpose of the Legislature to enact such a procedure as a prerequisite to any criminal prosecution for the sale or exhibition of hard-core pornographic materials.

Section III. Definitions

A. Hard-core pornographic material is that material which, in whatever form judging the material taken as a whole,

- (1) has as its dominant theme in light of contemporary community standards, an appeal to prurient interest in sexual conduct; and
- (2) depicts or describes sexual conduct, as defined in this Act, in a patently offensive manner; and
- (3) lacks serious literary, artistic, educational, political, entertainment, scientific, or other social value.

B. Sexual conduct means:

- (1) Patently offensive representations of actual sexual intercourse, normal or perverted, anal or oral;
- (2) patently offensive representations or descriptions of excretion in the context of sexual activity, or the lewd exhibition of the uncovered genitals in the context of masturbation or other actual sexual activity.

C. In determining whether material, taken as a whole, has as its dominant theme the appeal to prurient interest or is a patently offensive depiction or representation of sexual conduct, contemporary

community standards shall be determined on a state-wide basis. In determining whether material lacks serious literary, artistic, educational, political, entertainment, scientific or other social value, a national standard shall be applied.

D. Disseminate means to sell, lease or exhibit commercially.

E. Disseminator means any person who produces, manufactures, publishes or distributes any material which is disseminated within the State.

F. An appropriate defendant is any party to the prior civil proceeding and any other person given prior notice by the Attorney General of the State or Attorney for the County or Municipality of said person's right to intervene and who is given actual notice in written form of the final judgment.

#### Section IV. Civil Action Prerequisite for Criminal Prosecution

A criminal prosecution may be commenced only against an appropriate defendant who disseminates materials after a final injunction is entered prohibiting the dissemination of said materials.

#### Section V. Commencement of Civil Action

A. Whenever the Attorney General of this State or the County Attorney within this State has cause to believe that any person is engaging in or is about to engage in this State in the dissemination of hard-core pornographic material as herein defined, he shall institute a civil action in the \_\_\_\_\_ Court in the county wherein such act is taking place or is about to take place seeking a declaratory judgment that such matter is in fact hard-core pornography and seeking an injunction against its dissemination by such person.

B. Any disseminator or person about to disseminate the matter challenged in such proceeding may, as a matter of right, intervene in the proceedings and shall thereupon have all of the rights of a party and shall be bound by a determination in the proceeding. . The Attorney General of the State or Attorney for the County or Municipality shall give actual notice in written form of any civil proceeding instituted by him to any disseminator or person about to disseminate such matter so that they may exercise the right of intervention.

C. The provisions of the Civil Practice Act of this State and all existing and future amendments thereto, and the rules of Court now or hereafter applicable to Civil Actions, shall apply to a proceeding hereunder except as otherwise provided or inconsistent with this Act.

D. Upon the issuance of a search warrant pursuant thereto by a judge of the \_\_\_\_\_ Court of this State, the Attorney General of the State or County Attorney General of the State or County Attorney wherein the action is initiated or may be initiated may seize a single copy of the purportedly hard-core pornographic material to secure and preserve evidence for the civil and criminal proceedings under this Act, subject to the procedures set forth in subparagraphs 1 and 2 of this Section.

(1) If only a single copy of such material is available within the jurisdiction, the defendant shall (a) provide a duplicate to or (b) make that copy available for duplication by the Attorney General of the State or County Attorney during such period when the material is not on sale or exhibition.

(2) If only a single copy is available in the jurisdiction and circumstances prevent its duplication as provided for in subsection 1, the Attorney General for the State or County Attorney may, upon

a showing of probable cause that such material will not be available at trial, obtain a special warrant for the sole purpose of duplicating the material to secure and preserve it as evidence. Application for the special warrant shall be on notice to defendant and include a statement setting out the circumstances which make duplication under subsection 1 impossible, the time and date the materials are to be seized and specify the time and date, not to exceed 24 hours after such seizure, when such material is to be returned.

Section VI. Procedure

A. Any party or intervenor shall have the right to trial by jury to determine the hard-core pornographic character of the material. The verdict of the jury shall be unanimous. At the trial, all parties shall have the right to submit evidence, including the expert testimony.

B. Appeals shall be as otherwise provided by law in civil actions, but any party shall have the right of direct appeal to the High Court of the State. A notice of appeal shall be filed with \_\_\_ days of the final judgment of the (Trial) Court and the appeal shall be heard within \_\_\_ days of the filing of such notice of appeal and a final decision shall be rendered within \_\_\_ days after hearing such appeal. No judgment in an action brought pursuant to this Act shall be final for any purpose other than appeal until the decision of the High Court is rendered or until the requisite time to appeal has expired, no notice of appeal having been filed.

C. No ex parte restraining order and, except as provided in Section VIII (B), no preliminary injunction shall be issued restraining the dissemination of any work on the ground that it is hard-core pornography prior to the completion of the civil action required by this Act.

### Section VII. Judgment

A. If the court or jury, as the case may be, finds the material not to be hard-core pornography, the court shall enter said declaration in the judgment and dismiss the suit.

B. If the court or jury, as the case may be, finds the material to be hard-core pornography, the court may in its judgment or in subsequent orders of enforcement thereof enter a permanent injunction against any and all defendants prohibiting them from selling or exhibiting the materials declared to be hard-core pornography.

C. A final declaration obtained pursuant to this Act may be used to form the basis for an injunction or to establish scienter and for no other purposes.

D. Any such judgment or subsequent order of enforcement shall be stayed by the issuing court for a period of two (2) business days to allow any respondent to file notice of appeal therefrom with the (High) Court and to seek from the (High) Court a further stay of enforcement pending disposition of such appeal.

### Section VIII. Injunctions

A. Except as provided in this Section, no preliminary or temporary injunctions shall be issued in cases brought under this Act.

B. The Attorney General of the State or the County Attorney may seek a preliminary injunction on notice to defendant and upon a showing of compelling facts which demonstrate that an irreparable harm will be inflicted on the community if the materials are disseminated until such time as a permanent injunction, if warranted, can be obtained. In such cases, the Plaintiff shall file an undertaking in an amount to be fixed by the Court to pay damages and costs incurred by the defendant in cases where preliminary injunction was wrongfully obtained.

C. When a preliminary injunction is granted by the Court, the defendant shall have the right to a 48 hour stay of enforcement as provided for permanent injunctions in Section VII (D) and the right to an expedited appeal as provided in Section VI (B).

D. Every order granting an injunction, either preliminary or permanent, shall set forth the reasons for its issuance, shall be specific in terms, shall describe in reasonable detail and not by reference to the complaint or other documents, the act or acts sought to be restrained.

Section IX. Criminal Prosecution

A. It shall be unlawful for any appropriate defendant to disseminate materials after a final injunction has been entered prohibiting the dissemination of such materials.

B. Proof of Scierter: In a criminal prosecution against an appropriate defendant the finding of the declaratory judgment that the materials are hard-core pornography shall be admissible against said defendants as proof of scierter.

C. Penalties: Upon conviction for subsequent dissemination of materials previously declared to be hard-core pornography, the defendant shall be liable for imprisonment for a term not to exceed \_\_\_\_\_ days and a fine not to exceed \_\_\_\_\_ dollars, or both.

Section X. Uniform Law

In order to provide for the uniform regulation of the dissemination of pornographic material within the State, the sole and only regulation of the sale or distribution of any hard-core pornographic material or admission to, or exhibition of, any hard-core pornographic performance shall be in accordance with the terms of this Act. No municipality, county or other governmental unit within this State shall make any law, ordinance or regulation relating to the sale, exhibition, display, distribution or provision of any such material including but not limited to criminal offenses, nuisances, display for resale,



licenses or taxes respecting the sale, distribution, exhibition or provision of the matter regulated under this Act. All such laws, ordinances, regulations, taxes or licenses, whether enacted before or after this Act, shall be void, unenforceable and of no effect upon the effective date of this Act.

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1 error and should have read "or" to make sense.

2 NRS is, of course, prima facie evidence of  
3 the wording of the statute. The Court finds from examination  
4 of the Statute of Nevada, both 1964, '65 and 1971 volumes  
5 thereof, that the word "of" appears throughout, parenthetically  
6 that is the word in the statute, although it seems nonsensical  
7 in that regard, it is nevertheless the wording in the statute.

8 The Motion to dismiss filed on behalf of  
9 the defendant cites, among other things, vagueness of the  
10 statute prohibiting the dissemination in broad form of porno-  
11 graphic materials.

12 The most serious attack on the Court's  
13 jurisdiction was that restricting the Court under 4(a):

14 "The District Court has jurisdiction  
15 to enjoin the sale or distribution of the obscene  
16 prints and articles as described in paragraph (b)."

17 (The Motion to dismiss is not well taken,  
18 however, for in parageaph 4(b) of 201.150, the following  
19 language appears:

OVER

20 ". . any book, magazine, pamphlet  
21 comic book, story paper, writing, paper, picture,  
22 drawing, photographed figure or image"--and I emphasize  
23 the word "image"--"or any written or printed matter of an  
24 obscene character."

25 It's going to be the Court's position with  
26 regard to the Court's jurisdiction is that what the defendants  
27 are selling is the image of the movie. The Court is going  
28 to adopt that position.

29 In support thereof, the Court cites to  
30 counsel the case of Jullian d/b/a Book Bar and Mini Movies, Inc.  
31 d/b/a Fun City versus City of Las Vegas, Nevada, 88 Nevada,  
32 page 68; 1972 case, in which hand-operated movies and books

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THE COURT: Case No. A132930, City of Las Vegas, Nevada, a Municipal corporation versus Mini-Revue, Inc., et al; et seq.

This is the defendants' Motion to dismiss and plaintiff's Motion for preliminary injunction.

I will advise counsel I'm fully familiar with the Points and Authorities filed on behalf of the City and on behalf of the defendants and including those filed this morning.

MR. AHLSTROM: That is our response to their Motion to dismiss, Your Honor?

THE COURT: Yes. As well as the Motion to dismiss in support of Points and Authorities.

For counsel's guidance, the Court has read with great care NRS 201.250, with emphasis on paragraph 4 thereof, and with further emphasis thereof in paragraphs (a) and (b) and paragraph 4.

Over

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The Court's first reading of paragraph 4 ( ) indicated to the Court an ostensible typographical error in the NRS, namely where the paragraph provides as follows:

"May maintain an action on behalf of such county or city for an injunction against such person, firm, association or corporation in the District Court to prevent the sale or further sale or the distribution or further distribution of" --and I emphasize the word "of"--the acquisition, publication or possession," and so on.

The Court was of the mind the word "of" following the phrase "or further distribution" is a typograph

NEVADA 89102  
(702) 870-5947

Page 1 line 22 Page 2 line 1, 2, 3

Replace line 22, line 1, 2, 3 with

(A.) AT LEAST ONE NATURAL  
PARENT UNLESS ONE SPECIFIC  
PARENT HOLDS APPOINTED  
LEGAL CUSTODY AND THEN  
BY THAT PARENT (OR)

(B.) SUCH PERSONS LEGAL GUARDIAN

PAGE 2 LINES 11, 12, 13 amend to read

(A.) AT LEAST ONE NATURAL  
PARENT UNLESS ONE SPECIFIC  
PARENT HOLDS APPOINTED  
LEGAL CUSTODY AND THEN  
BY THAT PARENT (OR)

(B.) SUCH PERSONS legal guardian,  
(continue with line 15 HERE)