MICHIGAN
LAW REVISION COMMISSION

TENTH ANNUAL REPORT

1975

MICHIGAN LAW REVISION COMMISSION

Term Members:

Jason L. Honigman, Chairman
Tom Downs, Vice Chairman
David Lebenbom
Harold S. Sawyer

Ex-Officio Members:

Senators:

Basil W. Brown
Donald E. Bishop

Representatives:

Paul A. Rosenbaum
Dennis O. Cawthorne

Director, Legislative Service Bureau

Allan E. Reyhons, Secretary
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MICHIGAN LAW REVISION COMMISSION
Tenth Annual Report to the Legislature

To the Members of the Michigan Legislature:

The Law Revision Commission hereby presents its tenth annual report pursuant to Section 14 (e) of Act No. 412 of the Public Acts of 1965.

The Commission, created by Section 12 of that Act, consists of the chairman and ranking minority members of the Committees on Judiciary of the Senate and House of Representatives, the Director of the Legislative Service Bureau, being the five ex-officio members, and four members appointed by the Legislative Council. Terms of appointed Commissioners are staggered. The Legislative Council designates the Chairman of the Commission.

The members of the Commission during 1975 were Senator Basil W. Brown of Highland Park, Senator Donald E. Bishop of Rochester, Representative Paul A. Rosenbaum of Battle Creek, Representative Dennis O. Cawthorne of Manistee, A.E. Reyhons, Director of the Legislative Service Bureau, as ex-officio members; Tom Downs, Jason L. Honigman, David Lebenbom, and Harold S. Sawyer, as appointed members. The Legislative Council appointed Jason L. Honigman Chairman and Tom Downs Vice Chairman of the Commission. Professor Jerold Israel of the University of Michigan Law School served as Executive Secretary.

The Commission is charged by statute with the following duties:

1. To examine the common law and statutes of the state and current judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reform.

2. To receive and consider proposed changes in law recommended by the American Law Institute, the National Conference of Commissioners on Uniform State Laws, any bar association or other learned bodies.

3. To receive and consider suggestions from justices, judges, legislators and other public officials, lawyers and the public generally as to defects and anachronisms in the law.

4. To recommend, from time to time, such changes in the law as it deems necessary in order to modify or eliminate antiquated and inequitable rules of law, and to bring the law of this state, civil and criminal, into harmony with modern conditions.

The problems to which the Commission directs it studies are largely identified by a study of statute and case law of Michigan and legal literature by the Commissioners and Executive Secretary. Other subjects are brought to the attention of the Commission by various organizations and individuals, including members of the Legislature.

While the commissions efforts ordinarily have been directed at developing specific legislative proposals, it also may assist legislative efforts through the preparation of a Study Report that provides a legal analysis of areas of particular interest to the legislature. Thus, this year, at the request of a House Judiciary Subcommittee on obscenity legislation, the Executive Secretary prepared a report analyzing Michigan juvenile obscenity provisions, juvenile obscenity provisions recently adopted in various states, and issues presented in drafting such provisions. The report also included a draft that could be used as the basis for any legislation to be proposed by the Subcommittee or individual legislator after resolving the various policy issues raised in the Commission's Report.

The Commission's efforts during the past year have been devoted primarily to three areas. First, the Commission met with legislative committees to secure disposition of some 13 bills under Committee consideration upon recommendation of the Commission. Five of these bills were enacted into law. Second, the Commission examined various recent proposals for suggested legislation advanced by the National Conference of Commissioners on Uniform State Laws and the Council of State

Governments. Most did not appear appropriate for Commission recommendation, but a few remain under study. Finally, the Commission considered various problems relating to special aspects of current Michigan law. From this group, the Commission selected the following topics for immediate study and report:

(1) Amendments of the Uniform Comercial Code--Article Nine.

(2) Amendment of Administrative Procedures Act--Selection of Hearing Officers in Contested Cases.

(3) Durable Family Power of Attorney Act.

(4) Amendment of Venue Provisions of the Revised Judicature Act.

(5) Technical Amendments of the Code of Criminal Procedure--Eliminating References to Abolished Courts.

(6) Deferred Damage Payments for Injuries to the Person.

(7) Juvenile Obscenity Law.

Recommendations and proposed statutes have been prepared on the above subjects and accompany this report.

In addition to the new recommendations contained in this report, the Commission recommends favorable consideration of the following recommendations of past years upon which no final action was taken in 1975:

(1) Due Process in Seizure of Debtor's Property -- H.B. 4924, before House Committee on Judiciary; S.B. 659, passed Senate and now before the House Committee on Judiciary. This recommendation passed the House in 1974 as part of due process bill relating to garnishment and replevin. Passage of the garnishment portion was viewed as more urgent and that portion was adopted in 1974. The replevin portion remains. See Recommendations of 1972 Annual Report, p. 7.

(2) Elimination of Appointment of Appraiser's in Probate Court -- H.B. 4863, before House Committee on Judiciary; S.B. 1111, before Senate Committee on Judiciary. See Recommendations of 1972 Annual Report, p. 65.

(3) Waiver of Medical Privilege -- H.B. 5011, before House Committee on Judiciary; S.B. 1112, before Senate Committee on Judiciary. See Recommendations of 1971 Annual Report, p. 59.

(4) Condemnation Procedures Act -- H.B. 4867, before House Committee on Judiciary; S.B. 1108, before Senate Committee on Judiciary. During a previous legislative session this bill passed the Senate. A substitute bill, with substantial revisions, was proposed before the House Committee after extensive hearings. The Commission cooperated with various objecting groups in drafting the substitute bill. See Recommendations of 1968 Annual Report, p. 11.

(5) Qualification of Fiduciaries Act -- H.B. 4866 (an amended version of the Commission proposal), passed House and is now before Senate Committee on Judiciary; H.B. 1106, passed Senate and is now before House Committee on Judiciary. See Recommendations of 1966 Annual Report, p. 32.

(6) Amendments to Telephone and Messenger Service Company Act -- H.B. 4989, before the House Committee on Public Utilities; S.B. 1113, before Senate Economic Development Committee on Corporations. See Recommendations of 1973 Annual Report, p. 48.

(7) Trial of Divorce Actions -- H.B. 4902, before the House Committee on Judiciary; S.B. 1107, before Senate Committee on Judiciary. See Recommendations of 1974 Annual Report, p. 8.

(8) Foreclosure of Mortgage By Summary Proceedings in Lieu of Advertisement -- H.B. 5423, before House Committee on Judiciary; S.B. 1104, before Senate Committee on Judiciary. See Recommendations of 1974 Annual Report, p. 18.

Topics on the current study agenda of the Commission are:

(1) Mechanics Lien Laws
(2) Commercial Real Estate Leasing
(3) Eliminating Statutory References to Justice of the Peace and Other Courts No Longer Existing
(4) Court Costs
(5) Non-Profit Corporation Act
(6) Special Property Assessments

(7) Battered Child Legislation
(8) Class Action Suits
(9) Contemplation of Divorce in Antenuptial Agreements
(10) Debtor Exemption Provisions
(11) Enforcement of Administrative Agency Subpoenas
(12) Jurisdiction of Tax Tribunal

The Commission continues to operate with its sole staff members, the part time Executive Secretary, whose offices are in the University of Michigan Law School, Ann Arbor, Michigan 48104. The use of consultants has made it possible to expedite a large volume of work and at the same time give the Commission the advantage of expert assistance at relatively low costs. Faculty members of several law schools in Michigan continue to cooperate with the Commission in accepting specific research assignments.

The Legislative Service Bureau has generously assisted the Commission in the development of its legislative program. The Director of the Legislative Service Bureau, who acts as Secretary of the Commission, continues to handle the fiscal operations of the Commission under procedures established by the Legislative Council.

The Commission submits progress reports to the Legislative Council and members of the Commission have met with the Council and other legislative committees to discuss recommendations and subjects under study by the Commission.

The following Acts have been adopted to date pursuant to recommendations of the Commission and in some case amendments thereto by the Legislature:

1967 Legislative Session

Subject	Commission Report	Act No.
Powers of Appointment	1966, p. 11	224
Interstate and International Judicial Procedures	1966, p. 25	178
Dead Man's Statute	1966, p. 29	263

Corporation Use of Assumed Names	1966, p. 36	138
Stockholder Action Without Meeting	1966, p. 41	201
Original Jurisdiction of Court of Appeals	1966, p. 43	65

1968 Legislative Session

Jury Selection	1967, p. 23	326
Emancipation of Minors	1967, p. 50	293
Guardian ad Litem	1967, p. 53	292
Possibilities of Reverter and Right of Entry	1966, p. 22	13
Corporations as Partners	1966, p. 34	288
Stockholder Approval of Mortgaging Assets	1966, p. 39	287

1969 Legislative Session

Administrative Procedures Act	1967, p. 11	306
Access to Adjoining Property	1968, p. 21	55
Antenuptial Agreements	1968, p. 27	139
Notice of Tax Assessment	1968, p. 30	115
Anatomical Gifts	1968, p. 39	189
Recognition of Acknowledgments	1968, p. 61	57
Dead Man's Statute Amendment	1968, p. 29	63
Venue Act	1968, p. 19	333

1970 Legislative Session

Appeals from Probate Court Act	1968, p. 32	143
Land Contract Foreclosures	1967, p. 55	86
Artist-Art Dealer Relationships Act	1969, p. 44	90
Warranties in Sales of Art Act	1969, p. 47	121
Minor Students Capacity to Borrow Act	1969, p. 51	107
Circuit Court Commission Power of Magistrates Act	1969, p. 62	238

1971 Legislative Session

Revision of Grounds for Divorce	1970, p. 7	75
Civil Verdicts by 5 of 6 Jurors in Retained Municipal Courts	1970, p. 40	158
Amendment of Uniform Anatomical Gift Act	1970, p. 45	186

1972 Legislative Session

Business Corporation Act	1970, Supp.	284
Summary Proceedings for Possession of Premises	1970, p. 16	120
Interest on Judgments Act	1969, p. 64	135
Constitutional Amendment re Juries of 12	1969, p. 65	HJR "M"

1973 Legislative Session

Technical Amendments to Business Corporation Act	1973, p. 8	98
Execution and Levy in Proceedings Supplementary to Judgment	1970, p. 51	96

1974 Legislative Session

Venue in Civil Actions Against Non-Resident Corporations	1971, p. 63	52
Model Choice of Forum Act	1972, p. 60	88
Extension of Personal Jurisdiction in Domestic Relations Cases	1972, p. 53	90
Technical Amendments to the General Corporations Act	1973, p. 38	140
Technical Amendments to the Revised Judicature Act	1971, p. 7	297
1974 Technical Amendments to the Business Corporation Act	1974, p. 30	303
Attachment Fees Act	1968, p. 23	306
Amendment of "Dead Man's" Statute	1972, p. 70	305
Contribution Among Joint Tort-feasors Act	1968, p. 57	318
District Court Venue in Civil Actions	1970, p. 42	319
Elimination of Pre-judgment Garnishment	1972, p. 7	371

1975 Legislative Session

Amendment of Hit-Run Provisions to Provide Specific Penalty	1973, p. 54	170
Uniform Child Custody Jurisdiction Act	1969, p. 22	297
Insurance Policy in Lieu of Bond Act	1972, p. 59	290
Uniform Disposition of Community Property Rights At Death Act	1973, p. 50	289
Equalization of Income Rights of Husband and Wife in Entirety Property	1974, p. 30	288

The Commission continues to welcome suggestions for improvement of its program and proposals.

Respectfully submitted,

Jason L. Honigman, Chairman
Tom Downs, Vice Chairman
David Lebenbom
Harold S. Sawyer

Ex-Officio Members
Sen. Basil W. Brown
Sen. Donald E. Bishop
Rep. Paul A. Rosenbaum
Rep. Dennis O. Cawthorne
A.E. Reyhons, Secretary

Date: December 22, 1975

RECOMMENDATION RE AMENDMENT OF THE ADMINISTRATIVE PROCEDURES ACT -- SELECTION OF HEARING OFFICERS IN CONTESTED CASES

Section 79 (M.C.L. §24.279) of the Administrative Procedure Act deals with procedure in contested cases.[1] Although, the section permits members of the agency to sit as presiding officers, agencies ordinarily use hearing officers. The position of hearing officer is extremely important because, while agency review of the officer's decision exists, agencies tend to give great weight to the hearing officer's findings of fact. Courts also give considerable weight to the hearing officer's finding. See, e.g., Mich. Employment Relations Commission v. Detroit Symphony, 393 Mich. 116 (1974).

Section 79 does not prescribe any qualifications for hearing officers.[2] Several agencies utilize employees who regularly serve as hearing officers and largely perform no other duties.

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1 Section 79 provides: "An agency, 1 or more members of the agency, a person designated by statute or 1 or more hearing officers designated and authorized by the agency to handle contested cases, shall be presiding officers in contested cases. Hearings shall be conducted in an impartial manner. On the filing in good faith by a party of a timely and sufficient affidavit of personal bias or disqualification of a presiding officer, the agency shall determine the matter as a part of the record in the case, and its determination shall be subject to judicial review at the conclusion of the proceeding. When a presiding officer is disqualified or it is impracticable for him to continue the hearing, another presiding officer may be assigned to continue with the case unless it is shown that substantial prejudice to the party will result therefrom."

2 In particular areas, as indicated by section 79's reference to persons "designated by statute," special qualifications may be established elsewhere. See, e.g., M.C.L. §418.211 (workmen's compensation hearing referees).

These employees are viewed as "full time" hearing officers and fit within that civil service job classification. The proposed amendment of section 79 would not require any alteration in the practice of these agencies. Other agencies do not utilize full time hearing officers. Instead, they temporarily assign an agency employee to hear a particular case, or select some person outside the agency to hear the case. Both of these procedures are troublesome and would be modified by the proposed amendment.

Use of agency employees to serve as part-time hearing officers creates a significant potential for undermining the independence and impartiality of the hearing officer's position. Of course, section 79 currently permits a hearing officer to be challenged for bias. If the hearing officer was involved in the prosecution or investigation of the particular case, he may be removed. Glass v. State Highway Comm'r, 370 Mich. 482 (1963). But if the agency employee is engaged in activities that relate to the agency's investigative functions in a general way, and are not related specifically to the particular case, he presumably is not subject to removal under section 79. See Lookholder v. State Highway Comm'n, 354 Mich. 28 (1958).[3] Of course,

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3 In Glass v. State Highway Commissioner, supra, the Court held that due process was violated by appointment of an employee of the state highway department to conduct a hearing on the necessity of taking property for state highway purposes. The Court noted that the employee was an "interested party * * * to the extent of keeping his job by carrying into effect the highway planning of his appointing superior, a part of which planning was the taking of appellant's property." 370 Mich. at 486. In re Schlossberg, 388 Mich. 389 (1972), held that a conflict of interest existed when an attorney, who was associated with a firm that represented the wholly owned subsidiary of a corporation, participated in consideration of claims against that corporation brought before the MESC Appeal Board. While both Glass and Schlossberg emphasize that there should be "no appearance" of economic interest, neither has been viewed as automatically disqualifying under section 79 a hearing examiner who is an employee of the agency involved. See Cramton, The New Michigan Administrative Procedures: "it is quite common for an agency to be interested in promoting a policy which

employees with only an investigative interest may not in fact be biased in a particular case. But, as the Michigan Supreme Court has noted, the administrative system should seek not only to provide justice but also to "satisfy the appearance of justice." Glass v. State Highway Commissioner, supra at 487, quoting from In re Murchison, 349 U.S. 133, 136 (1955). See also In re Schlossberg, 388 Mich. 389 (1972). Where agency employees are utilized as hearing officers, the appearance of justice can only be achieved by carefully restricting the employees' duties so that employees are essentially full-time examiners, protected by civil service, who have no responsibilities suggesting a possible interest in a particular outcome. Such independence is provided currently for hearing referees in workmen's compensation cases.[4]

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footnote 3 continued

may be affected by the outcome of the case; indeed, agency officials may serve both to prosecute and decide. This is quite permissible, as long as there is no line of command between the prosecutor and the presiding officer. In Glass v. State Highway Commissioner, it was held that the prosecuting and presiding functions were too closely connected in the same officer. It is not a disqualification that the presiding officer has served as a prosecutor in similar cases. But participation as counsel in the particular case is disqualifying." (Emphasis added). Cf. Withrow v. Larkin, 95 S.Ct. 1456 (1975) (members of state board were not constitutionally precluded from holding an adversary hearing on the possible suspension of a physician's license simply because the charges involved were based on the Board's own investigation of the physician).

4 M.C.L. §418.211 provides: "Hearing referees shall be appointed by the director, shall devote their entire time to the duties of their office and shall engage in no other business or professional activity. They shall be attorneys at law licensed to practice in the courts of this state, except for hearing referees who immediately prior to the effective date of this act were acting as such."

Agency appointment of part-time, outside examiners presents similar difficulties relating to the appearance of justice. The agency's ability to select a particular outside examiner for a particular case creates an appearance of potential prosecutorial control over the fact-finding process. To a lesser extent, similar difficulties would be presented even if outside examiners were assigned by rotation; the agency would still have the ability to determine those persons (of many with similar qualifications) whose names would be placed on the list of outside examiners.

The proposed amendment of section 79 would divide examiners into two classes. One class would be agency employees. Under proposed subsection [3], they could be examiners only if they (1) are full-time employees, (2) are assigned primarily to serve as hearing officers, (3) are not assigned to duties inconsistent with those of a hearing officer. The requirement of full-time employment is designed to avoid evasion of subsection [4] through agency employment of part-time examiners other than those from the Civil Service Commission's panel. Proposed subsection [3] also requires that full-time employees utilized as hearing officers be assigned primarily to duty as hearing officers. In light of current practice, it was not considered practical to require that agency hearing officers be strictly limited to such duty (although such a requirement is imposed in other jurisdictions, see, e.g., Fla. Rev. Stat. §120.65; Cal. Gov't Code §11502; and in this state with respect to workmen's compensation referees, see fn. 4 supra). However, it is important that they perform primarily as hearing officers (as is currently the case with "full time" hearing officers employed in several agencies) and that they not be assigned to "duties inconsistent with those of a hearing officer." The latter qualification is derived from the current federal law, 5 U.S.C. §3105. The Administrative Procedure Act, 5 U.S.C. §554 also contains provisions specifically separating the hearing officer from prosecutorial or administrative functions.[5] Including similar provisions in section 79 was viewed as unnecessary in light of the "inconsistent duties" provision.

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5 5 U.S.C. §554 provides: "The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes un-

Under subsection [4], any non-employee examiners must be assigned from a list prepared by the Civil Service Commission. The Commission is given authority to establish qualifications for such hearing officers. Persons may be qualified, in light of expertise, to hold hearings for particular agencies. Among those qualified, assignment must be made on a rotating basis "to the extent practicable." See 5 U.S.C. §3105 (containing similar language). This provision gives the Commission the necessary flexibility to depart from strict rotation where desirable in light of such factors as the residence of the individual and the location of the hearing. Similar provisions for independent designation of a panel of qualified examiners are found in California[6] and Florida.[7] See also 2 Cooper, State Administrative Law, 331-336 (1965).

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footnote 5 continued

available to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not: * * * (2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency. An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings."

6 Cal. Gov't Code §11502 provides: "All hearings of state agencies required to be conducted under this chapter shall be conducted by hearing officers on the staff of the Office of Administrative Procedure. The presiding officer of the Office of Administrative Procedure has power to appoint a staff of hearing officers for the office as provided in section 11370.3 of the Government Code. Each hearing officer shall have been admitted to practice law in this State for at least five years immediately preceding his appointment and shall possess any additional qualifications established by the State Personnel Board for the particular class of position involved."

7 Fla. Stat. §120.65 provides: "(1) There is hereby created the division of administrative hearings within the department of administration to be headed by a director who shall

footnote 7 continued

be appointed by the administration commission and confirmed by the senate. The division shall be exempt from the provisions of chapter 216. (2) The division shall employ, or contract for, hearing officers to conduct hearings required by chapter 120 or other law. No person may be employed by the division as a full time hearing officer unless he has been a member of The Florida Bar in good standing for the preceding three years. (3) By rule, the division may establish further qualifications for hearing officers and shall establish procedures by which candidates will be considered for employment or contract, the manner in which public notice will be given of vacancies in the staff of hearing officers, and procedures for the assignment of hearing officers. (4) Beginning July 1, 1975, all costs of administering the division shall be paid to the division trust fund on a pro rata basis by the agencies using its services. The division shall submit statements to the agencies at least quarterly. (5) There is hereby created in the state treasury a revolving trust fund. All fees and other moneys collected by the division for services rendered under this act shall be deposited in the revolving trust fund and expenses of the division shall be paid from the fund. (6) The division is authorized to provide hearing officers on a contract basis to any governmental entity to conduct any hearing not covered by this section. (7) The division shall have the authority to adopt reasonable rules to carry out the provisions of this act."

The proposed bill follows:

SELECTION OF HEARING OFFICERS IN CONTESTED CASES

AN ACT to amend section 79 of Act No. 306 of the Public Acts of 1961, entitled "The Administrative Procedures Act of 1969," as amended, being section 24.279 of the Compiled Laws of 1970.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. Section 79 of Act No. 306 of the Public Acts of 1961, as amended, being section 24.279 of the Compiled Laws of 1970, is amended as follows:

Section 79(1) An agency, one or more members of the agency, a person designated by statute or one or more hearing officers designated and authorized by the agency to handle contested cases, shall be presiding officers in contested cases.

(2) THE AGENCY MAY DESIGNATE AS HEARING OFFICERS EITHER AGENCY EMPLOYEES QUALIFIED AND ASSIGNED AS PROVIDED IN SUBSECTION [3] OR NON-EMPLOYEES QUALIFIED AND ASSIGNED AS PROVIDED IN SUBSECTION [4].

(3) AGENCY EMPLOYEES DESIGNATED AS HEARING OFFICERS SHALL BE FULL TIME EMPLOYEES ASSIGNED PRIMARILY TO DUTIES AS HEARING OFFICERS. SUCH EMPLOYEES MAY NOT BE ASSIGNED

TO DUTIES INCONSISTENT WITH THOSE OF A HEARING OFFICER, AND TO THE EXTENT PRACTICABLE, SHALL BE ASSIGNED TO CASES ON A ROTATING BASIS.

(4) THE CIVIL SERVICE COMMISSION SHALL MAINTAIN A LIST OF INDIVIDUALS, NOT EMPLOYEES OF THE STATE, WHO, IN ACCORDANCE WITH REGULATIONS PROMULGATED BY THE COMMISSION, ARE QUALIFIED TO SERVE AS HEARING OFFICERS IN CONTESTED CASES OF ONE OR MORE AGENCIES. IN THE EVENT THAT AN AGENCY ELECTS TO HAVE A NON-EMPLOYEE HEARING OFFICER IN A PARTICULAR CASE, THAT PERSON SHALL BE ASSIGNED BY THE CIVIL SERVICE COMMISSION FROM ITS LIST OF INDIVIDUALS QUALIFIED TO SERVE AS HEARING OFFICERS IN CONTESTED CASES OF THE PARTICULAR AGENCY. TO THE EXTENT PRACTICABLE, IN ACCORDANCE WITH REGULATIONS PROMULGATED BY THE CIVIL SERVICE COMMISSION, QUALIFIED INDIVIDUALS ON THE LIST SHALL BE ASSIGNED AS HEARING OFFICERS ON A ROTATING BASIS.

(5) Hearings shall be conducted in an impartial manner. On the filing in good faith by a party of a timely and sufficient affidavit of personal bias or disqualification of a presiding officer, the agency shall determine the matter as a part of the record in the case, and its determination shall be subject to judicial rule at the completion of the proceed-

ing. When a presiding officer is disqualified or it is impracticable for him to continue the hearing, another presiding officer may be assigned to continue the case unless it is shown that substantial prejudice to the party will result therefrom.

RECOMMENDATIONS RE DURABLE FAMILY POWER OF ATTORNEY

In family situations it is often useful to create a power of attorney so that a disabled member of a family, usually because of illness or old age, can have his economic needs met by another member of the family by making available for use the assets of the disabled person. Under present law, a power of attorney ceases to be legally binding when the donor of the power is no longer mentally competent. This leaves open the question of whether a particular exercise of the power of attorney is legally operative since it is always subject to attack on the ground that the donor was in fact incompetent at the time the power was exercised. This often precludes use of the power of attorney where because of increased infirmity or advancing age it is difficult to prove or determine whether in fact the donor is incompetent at the time the power of attorney is exercised.

The proposed bill will largely eliminate this problem. By assuring continuity of validity of the power of attorney until a judicial order of incompetence is entered or a guardian is appointed, the power of attorney becomes a far more useful instrument for meeting the needs of a disabled person. The expense of legal proceedings for the appointment and continuance of a legal guardian can thereby be eliminated where feasible. The basic provisions of the proposed bill were enacted in Florida in 1974 and appear in Section 709.08, Florida Statutes.

The proposed bill follows:

DURABLE FAMILY POWER OF ATTORNEY

AN ACT to create a durable family power of attorney.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. A person, herein designated a principle, may create a family power of attorney designating his spouse, parent or grandparent, child or grandchild, whether natural or adopted, brother or sister, as his attorney in fact by executing a power of attorney. Such power of attorney shall be in writing, shall state the relationship of the parties and shall include the words "This durable family power of attorney shall

not be affected by disability of the principal, except as provided by statute," or similar words clearly showing the intent of the principal that the power conferred upon the attorney in fact shall be exercisable notwithstanding a later disability or incapacity of a principal. All acts of the attorney in fact pursuant to the power shall be binding on the principal despite disability or incompetency of the principal subsequent to execution of the power of attorney, except as herein otherwise provided.

Section 2. A durable family power of attorney shall be non-delegable and shall be valid until such time as the donor shall die, revoke the power, be judicially adjudged incompetent or upon appointment of a guardian, except as herein otherwise provided. Upon filing a petition to determine competency of the donor or to appoint a guardian for the donor, the right to exercise the durable family power of attorney may be temporarily suspended upon order of the court. Notice of the pending petition shall be given to all known donees of the power. If the donor is judicially adjudged incompetent or upon appointment of a guardian for the donor, the power shall be automatically revoked, provided, however, that upon appointment of a guardian the court may initially retain or later reinstate the power upon such terms as it shall direct.

Section 3. To convey, transfer or mortgage an interest in real property, the durable family power of attorney shall be recorded in like manner as other powers of attorney as provided by law.

RECOMMENDATIONS RE AMENDMENT OF VENUE PROVISIONS OF REVISED JUDICATURE ACT

The venue provisions setting forth the county in which to bring a circuit court action are set forth in Chapter 16 of the Revised Judicature Act, Compiled Laws 1970, Sections 600.1601 et seq. By the provisions of Compiled Laws 1970, Section 600.8312, the venue provisions of Chapter 16 are made applicable to the district courts. The specific statutory provisions to which we wish to address ourselves are:

> "Sec. 1621. Except for the actions listed in sections 1605, 1611 and 1615, the county in which any defendant is established, or if no defendant is established in the state, the county in which the plaintiff is established or in which the defendant is located is a proper county in which to commence and try an action.
>
> Sec. 1625. For purposes of all matters pertaining to venue:
>
> (a) A person is established in any county in which he has a dwelling place but not at his transient or temporary lodging.
>
> (b) Both domestic and foreign corporations are established in any county in which the corporation has its principal place of business.
>
> (c) Partnerships, limited partnerships, partnership associations, and unincorporated voluntary associations, composed of residents, nonresidents, or both, are established in any county in which they have their principal place of business.
>
> (d) Fiduciaries appointed by court order, including but not limited to executors, administrators, trustees and receivers, are established in the county of their appointment, as well as the county of their dwelling place.

(e) Persons, domestic and foreign corporations, and partnerships, limited partnerships, partnership associations, and unincorporated voluntary associations, composed of residents, nonresidents or both, are located in any county in which they (i) have a place of business if a plaintiff is established therein or (ii) are doing business if a plaintiff is established therein. Domestic and foreign corporations are also located in a county in which they have a registered office."

Considerable difficulty has been encountered in applying the terms "established" and "located" as words of art for the determination of venue under these sections. Further difficulties arise in determining the proofs necessary to establish the statutory terms "principal place of business" or "doing business." The statutory language is further confused by the cross-references relating the place where defendant is "located" to the place where the plaintiff is "established."

We believe that the present statutory criteria for determination of venue is overly complex and creates unnecessary definitional disputes. We believe that requirements for determination of venue should be simplified so as to be readily determinable. The proposed bill entirely eliminates the concepts of "established" and "located" as contained in the present statute. The proposed bill makes the determination of venue dependent upon the readily ascertainable alternative criteria of the county "where the defendant resides," has a "place of business," or has a "registered office." Nor is there any need for a proliferation of language to deal separately with persons, corporations and partnerships. By reference to "plaintiff" and "defendant," the proposed statutory terms encompass individuals, corporations and partnerships. We believe the proposed bill would eliminate the complexities of the present statutory language and substitute a simply defined basis for determining the proper county in which suit must be brought.

The proposed Bill follows:

AMENDMENT OF VENUE PROVISIONS OF REVISED JUDICATURE ACT

AN ACT to amend section 1621 of Act No. 236 of the Public Acts of 1961, entitled "Revised Judicature Act of 1961," being section 600.1621 of the Compiled Laws of 1970 and to repeal section 1625 of that Act.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. Section 1621 of Act No. 236 of the Public Acts of 1961, being section 600.1621 of the Compiled Laws of 1970, is amended to read as follows:

Sec. 1621. Except for actions listed in sections 1605, 1611 and 1615, the county in which any defendant ~~is established, or if no defendant is established in the state, the county in which the plaintiff is established or in which the defendant is located is a proper county in which to commence and try an action~~ RESIDES, OR HAS A PLACE OF BUSINESS, OR IN WHICH THE REGISTERED OFFICE OF ANY DEFENDANT CORPORATION IS LOCATED, IS A PROPER COUNTY IN WHICH TO COMMENCE AND TRY AN ACTION. A DEFENDANT WHO MEETS NONE OF THESE CRITERIA MAY BE SUED IN THE COUNTY IN WHICH ANY PLAINTIFF MEETS ANY OF THESE CRITERIA. FIDUCIARIES APPOINTED BY COURT ORDER SHALL BE SUED IN THE COUNTY OF THEIR APPOINTMENT.

Section 2. Section 1625 of Act No. 236 of the Public Acts of 1961, being section 600.1625 of the Compiled Laws of 1970, is hereby repealed.

RECOMMENDATION RE AMENDMENTS TO THE CODE OF CRIMINAL PROCEDURE TO ELIMINATE REFERENCES TO ABOLISHED COURTS

The Code of Criminal Procedure currently contains various references to justices of the peace, although the justice court was abolished in 1969 (M.C.L. §600.9921) pursuant to the constitutional mandate of Article VI, Section 26, of the Michigan Constitution.

The references to justices of the peace fall into four categories: (1) provisions describing the authority of justices of the peace; (2) provisions establishing procedures to be followed by justices of the peace; (3) provisions governing inquests to be conducted by justices of the peace; and (4) provisions referring to offenses cognizable before a justice of the peace. The purpose of the proposed bill is to: (1) repeal those provisions relating to justices of the peace which are no longer needed; (2) amend other provisions so that they will refer to the courts now exercising authority formerly exercised by justices of the peace; and (3) to refer directly to the appropriate level of offense (e.g., felony, misdemeanor, or 90 day misdemeanor) where the level currently is described in terms of the offense being "cognizable" or "not cognizable" by a justice of the peace. The proposed bill also eliminates references to other offices that have been abolished, such as circuit court commissioners (M.C.L. §600.9921), coroners (M.C.L. §52.213c), and the Superior Court of Grand Rapids (Public Act No. 262 of 1964).

The commentary that follows describes generally the proposed disposition of the four different categories of provisions referring to justices of the peace. A draft of the proposed statute follows this commentary. That draft includes an individual commentary explaining the purpose of each proposed amendment. An appendix follows the draft of the proposed statute. The appendix contains all of the provisions that would be repealed and an individual commentary explaining why each of these provisions should be repealed. For the sake of brevity, the commentaries occasionally use the initials "J.P." to refer to the justice of the peace.

I. Provisions Relating to J.P. Authority

Various provisions in the current Code refer to the authority of justices of the peace. Some of these provisions note that particular authority may be exercised by a series of courts, including the J.P. court. Other provisions refer only to the authority of the J.P. Those provisions refer, inter alia, to the following authority: (1) "to hear and determine charges for all offenses arising within his county punishable by fine not exceeding $100.00, or punishable by imprisonment in the county jail not exceeding 3 months, or punishable by both said fine and imprisonment,"[1] M.C.L. §774.1; (2) to issue warrants for the arrest of persons accused of offenses cognizable by a justice of the peace, M.C.L. §774.4; (3) to issue subpoenas to compel the attendance of witnesses and to administer oaths, M.C.L. §774.9; (4) to release on bail, or commit to jail, one accused of an offense, M.C.L. §774.11.

Provisions of the type listed above cannot all be eliminated even though the J.P. court has been abolished. Judges of three different courts -- recorder's court of Detroit, the various municipal courts, and the district court -- currently exercise the criminal jurisdiction formerly exercised by justices of the peace. The statutory provisions establishing the jurisdiction of each of these courts includes at least one provision defining their auth-

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1 Besides this general grant of criminal jurisdiction, justices were named in other provisions (outside the Code of Criminal Procedure) governing jurisdiction. They were explicitly given jurisdiction over election offenses, where the penalty was not greater than their usual jurisdiction, M.C.L. §168.943; over violations of a township's ordinances, M.C.L. §41.183 and breaches of township orders and by-laws, M.C.L. §41.5; over violations of village ordinances (where the village, having at least 1 full-time police officer, has provided by ordinance for a part-time salaried justice of the peace), M.C.L. §78.22a. References to justices of the peace in these and other provisions should be eliminated, but are not considered in this proposal, which is limited to the Code of Criminal Procedure.

ority by cross-reference to the authority of justices of the peace. The key cross-reference provisions are: M.C.L. §725.10 (giving recorder's court the "powers, duties, and jurisdiction" formerly possessed by the police court, which, in turn, had been granted the authority of justices of the peace pursuant to Public Act 161 of 1885); M.C.L. §600.9922 (giving district court "all duties and powers which by law may be performed by justices of the peace"); M.C.L. §730.508 (municipal courts under the Uniform Municipal Courts Act shall be "governed by the provisions of existing laws relating to justices of the peace in such cities"); M.C.L. §117.28 (municipal courts under the Home Rule Cities Act have the "same powers, jurisdiction and duties" as are "now conferred upon" justices of the peace); M.C.L. §730.101 and §730.103 (municipal courts under the City Municipal Courts Act have jurisdiction "to the same extent as was had and exercised by the justices of the peace of such city immediately prior to the consolidation of the courts" and shall be "governed by the provisions of existing laws relating to justices of the peace"); M.C.L. §730.351 (justice courts in cities over 80,000 converted to municipal courts and retained authority of justice courts in such cities pursuant to M.C.L. §§730.1-730.30, including general criminal jurisdiction of justices of the peace); and M.C.L. §600.9928 (giving all surviving municipal courts "all duties and powers which by law may be performed by justices of the peace").[2]

The cross-reference provisions listed above are not the only source of criminal jurisdiction of recorder's court, the district court, or the various municipal courts. Each of these courts also is given criminal jurisdiction through other provisions that are not tied by cross-reference to statutes governing justices of the peace. Where the authority granted by these independent provisions is at least as broad as that formerly granted to the J.P., the J.P. pro-

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2 The interrelationship of the various municipal court provisions is uncertain. Municipal courts have been abolished, except in districts of third class where retained pursuant to local resolution. The provision authorizing retention, M.C.L. §600.9928, might prevail over the provisions in the various Municipal Courts Act insofar as those provisions are in conflict.

visions may be repealed without affecting the authority of the current courts.[3] One example of such a provision is M.C.L. §774.1, governing J.P. trial jurisdiction.

Under M.C.L. §774.1, justices had trial jurisdiction over offenses punishable by imprisonment not exceeding 90 days and/or fine not exceeding $100.00. While the district court and municipal courts both receive such jurisdiction pursuant to cross-reference provisions cited supra, they also receive, through separate provisions, far broader jurisdiction. M.C.L. §600.8311 gives the district court jurisdiction over all offenses punishable by fine (with no monetary limits) and/or by imprisonment not exceeding 1 year. M.C.L. §730.551 gives municipal courts the same jurisdiction. Recorder's court has even broader criminal jurisdiction.[4] Thus, M.C.L. §774.1 adds nothing to the

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3 Various cross-reference provisions cited supra also may be repealed on a similar analysis, but these provisions are located outside the Code of Criminal Procedure and therefore are not considered in the proposed bill. A separate Commission recommendation on these provisions will be presented in the future. That recommendation will also consider the significance of repeal of the cross-reference provisions as it relates to the authority of judges of the existing courts as conservators of the peace. See Lincoln Park v. Sigler, 28 Mich. 410 (1970).

4 M.C.L. §726.11 grants recorder's court jurisdiction over all offenses committed in Detroit except for cases cognizable by the police court of Detroit or by the "justices of the peace of said city." The Detroit J.P. court was abolished in 1885 and the police court was abolished in 1919. Arguably, the abolition of these courts rendered inoperative the exception in M.C.L. §726.11 and that provision's reference to "all offenses" committed in Detroit automatically expanded to include so-called "J.P. (90 day) offenses." In any event, M.C.L. §725.10 gave recorder's court jurisdiction over such offenses since it granted recorder's court that jurisdiction formerly exercised by the police court, which in turn, had obtained the jurisdiction formerly exercised by the justices of the peace.

current jurisdiction of recorder's court, municipal courts, and the district court. Repeal of §774.1 would remove any authority granted by those cross-reference provisions that refer to the currently existing J.P. statutory power,[5] but such authority clearly is not necessary to enable the three courts to continue to exercise the trial jurisdiction formerly exercised by justices of the peace.

Other J.P. provisions, unlike M.C.L. §774.1, establish authority of justices of the peace that is not duplicated by separate provisions governing recorder's court, district court, and municipal courts. Here the current J.P. provisions are necessary, since the authority of the current courts comes solely from the cross-reference provisions. The absence of specific authority granted apart from the J.P. provisions is of particular concern with respect to municipal courts. Recorder's court and district court have a more extensive independent statutory foundation. Recorder's court is granted broad authority pursuant to M.C.L. §726.11 which, inter alia, authorizes it to do "all acts" that the circuit court may do in "like cases." Also, most of the sections in the Code of Criminal Procedure that recognizes judicial power to take particular action either refer specifically to recorder's court or refer to "courts of record" having criminal jurisdiction (which includes recorder's court). See, e.g., M.C.L. §§764.1; 765.2. The District Court Act gives the district court broad authority pursuant to M.C.L. §600.8311[6] and §600.8317.[7] Also, since

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5 Other cross-reference provisions refer to the authority of justices of the peace at the time the municipal court was adopted. The repeal of §774.1 would not affect the authority granted by these cross-reference provisions.

6 This section provides: "The district court shall have jurisdiction of: (a) misdemeanors punishable by fine or imprisonment not exceeding 1 year, or both; (b) ordinance and charter violations punishable by a fine or imprisonment or both; (c) arraignments, the fixing of bail and the accepting of bonds; (d) preliminary examinations in all felony cases and misdemeanor cases not cognizable by the district court, but there shall not be a preliminary examination for any misdemeanor to be tried in a district court."

7 For implementation of its criminal and civil jurisdictions, the district court "has the same power to issue warrants, sub-

district courts are now courts of record, M.C.L. §600.8101, they, like the recorder's court, have the authority granted in the various Code provisions to courts of record.

Municipal courts, unlike the recorder's court and the district court, are not granted broad authority in the acts establishing them. Municipal courts may operate under one or more of several acts, depending upon their legislative source. See, e.g., M.C.L. §730.101 (Municipal Court Act); M.C.L. §117.1 (Home Rule Cities Act); M.C.L. §730.501 (Uniform Municipal Court Act). None of these acts contains a broad grant of authority similar to provisions applying to district and recorder's court. Moreover, the acts vary in their grants of specific authority. For example, the authority to set bail is described in only two of the municipal court acts, M.C.L. §§730.146, 730.527.

In expanding municipal court jurisdiction in 1956, the legislature did state that municipal courts[8] "shall have the power to issue all lawful writs and process, and to do all lawful acts which may be necessary and proper to carry into effect the jurisdiction given by this act." M.C.L. §730.551. The exact scope of this grant is uncertain, however. For example, it is not clear whether "necessary" subpoena power is limited to that formerly granted justices of the peace or includes the broader power (extending statewide) granted to the recorder's court and the district court. Thus, even with M.C.L. §730.551, municipal court authority may be limited to that granted justices of the peace unless another provision specifically grants broader authority. While the Code of Criminal Procedure contains various specific grants of broader authority, those grants ordinarily are limited to courts listed in the Code provisions and municipal

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footnote 7 continued

poena witnesses and require the production of books, papers, records, documents and other evidence and to punish for contempt as the circuit court now has or may hereafter have," M.C.L. §600.8317.

8 The 1956 Act extended only to municipal courts in counties having a population of 395,000 or more, but that description encompasses all of the remaining 24 municipal courts.

courts rarely fall within such lists. See, e.g., M.C.L. §765.1(b). Thus, the numerous Code provisions granting authority to "courts of record" do not apply to municipal courts, since those courts are not of record. In sum, notwithstanding the various independent provisions of the municipal court acts, M.C.L. §730.551, and the extensive Code provisions, municipal court authority often is not clearly established aside from the grant to municipal courts of the power formerly held by justices of the peace.

Where there was any doubt as to whether authority granted justices of the peace was independently obtained by the recorder's court, the district court, and all municipal courts, the proposed bill retained the J.P. provision but amended it by substituting a direct reference to those three courts. In most instances, the term "magistrate" was used as a convenient reference to the three courts, since the definition of "magistrate" in the Code of Criminal Procedure, M.C.L. §764.1(f), includes the three courts.[9] Similarly, where Code provisions listed various judges, including justices, as having certain authority, the reference to justices was replaced by a reference to "magistrate." In those instances where the legislation listed various courts, the reference to the J.P. court was replaced by a specific reference to the three courts since the term "magistrate" did not fit the structure of the statute.

In some provisions, references to district court and municipal courts were substituted for references to justices of the peace even though the district court and municipal court possessed independently the authority granted in the

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9 "'Magistrate' includes judges of the Recorder's Court of Detroit and of the traffic and ordinance division of that court who are assigned by the presiding judge of the respective court or division to exercise the powers and duties of magistrate as prescribed in this act; judges of the district court; and judges of municipal courts. The term 'magistrate' does not include district court magistrates except as otherwise explicitly provided by law." M.C.L. §764.1(f).

provision. Such a substitution was made where the Code provision sought to list all of the various courts that may exercise a certain type of authority. Where those provisions did not already refer to recorder's court, a reference to that court also was added.

II. Provisions Relating To Procedure And Administration In J.P. Courts

Chapter XIV of the Code of Criminal Procedure includes provisions governing: (1) the administration of J.P. courts; (2) the procedure to be followed by justices of the peace in various preliminary matters relating to J.P. offenses (e.g., warrant issuance and arraignments); (3) the procedure governing the trial of offenses in J.P. courts;[10] and (4) procedures governing appeals from the J.P. courts. See M.C.L. §§774.1-774.48. Under the proposed bill, all of the appeal provisions and some of the pretrial procedure provisions would be retained. The remaining provisions on pretrial procedures, all of the provisions on trial procedure, and all of the provisions on court administration would be repealed.

The sections governing appeals from justice court to circuit court, M.C.L. §§774.34-774.45, are retained because they provide the procedure for appeals by trial de novo in the circuit court. This form of appeal remains applicable for municipal court decisions. The provisions governing justice appeals in civil cases also were retained in the R.J.A. Technical Amendments Act (see P.A. No. 297 of 1974) so as to govern appeals from municipal courts.

Most of the Chapter XIV provisions on pretrial procedures deal with procedures adequately treated elsewhere in the Code or in separate provisions relating to the currently existing courts. For example, jury selection, covered in M.C.L. §§ 774.12-774.20 of Chapter XIV, is the subject of quite extensive separate provisions relating to municipal courts, the

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10 These procedures, by cross-reference, also govern hearings for peace bonds. M.C.L. §772.4.

district court, and the recorder's court. See M.C.L. §§ 600.1301; 725.101; 730.401; 730.251. Similarly, M.C.L. §774.1 of Chapter XIV provides for the release of the accused on bail, while the more extensive provisions of M.C.L. §765.1 deal with bail generally and M.C.L. §§780. 581-586 is directed specifically at bail and other conditions of release in misdemeanor cases. Arguably as they relate to the existing courts, the Chapter XIV provisions have been preempted by these other provisions dealing with the same topics. In any event, the existence of these other provisions, which are geared to the currently existing court structure, justifies repealing the J.P. provisions.

The proposed bill does retain a few of the pretrial procedure provisions because they deal with subjects not treated elsewhere in the current law. The Chapter XIV provisions on the issuance of warrants and first appearance of the accused fall within this category. These provisions are directed solely at prosecutions for J.P. offenses. The remaining criminal code provisions relating to warrants and first appearance deal with felony prosecutions. The procedure for felony prosecution differs from that for misdemeanors because the magistrate lacks trial jurisdiction as to the felony offense (thus, at first appearance on a felony, the magistrate will not consider a plea, but will arrange for a preliminary hearing). These differences justify continuation of the current format of having separate provisions in Chapter XIV limited to misdemeanor prosecutions. The Chapter XIV provisions are amended, however, to delete references to justices of the peace, and to indicate more directly that the provisions apply to the district court, the municipal courts, and the recorder's court in misdemeanor prosecutions.

The various provisions of the J.P. Chapter dealing with the trial of J.P. offenses also are repealed. These provisions deal with subjects such as the subpoena of witnesses (§774.9), the delivery of a public verdict by the jury (§774.21), the timing of the trial and the granting of continuances (§774.8), the assessment of costs (§774.22) and the imposition of sentence (§774.22). With respect to district courts and the recorder's court, these matters are adequately covered elsewhere, either in statute or court rule. See, e.g., M.C.L. §§600.8317; 600.1455; 725.10; 600.8375; 600.8381; DCR 526, 789; GCR 526, 789. Not all of these statutes or court rules are as detailed as the J.P.

provisions, and some procedures noted in the J.P. provisions are not mentioned at all in the court rules since they are so well established as not to require specific mention (e.g., that the jury will sit together and hear proofs). But the J.P. trial provisions add nothing of substance that need be retained.

Repeal of the J.P. trial provisions arguably could present some difficulty as to the municipal courts. The statutes and rules governing municipal courts are not nearly as complete as those governing district courts and recorder's court. Thus, the municipal court provisions do not include a specific reference to subpoena authority, or to announcement of judgment. M.C.L. §730.551 provides that municipal courts have the authority to "issue all lawful writs and process and do all lawful acts which may be necessary and proper to carry into effect" their criminal jurisdiction. This provision, however, fails to suggest specific standards as are indicated in the district court provisions or the current J.P. provisions. When the J.P. civil provisions were repealed, the possible creation of a gap in the coverage for municipal courts was avoided by adopting M.C.L. §600.6502[11] which makes

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11 Section 6502 provides: "All matters relating to the organization and financing of courts of limited jurisdiction or to the selection, terms, compensation, and duties of their judges and other officers and personnel and to limitations on jurisdiction shall be governed by the statutes respectively applicable to the courts. In all other matters of civil jurisdiction, including pleadings and motions, forms of action, joinder of claims and parties, issuance, service and enforcement of writs, subpoenas and other process, contempts, taxation of costs, and entry and enforcement of judgments, the municipal and common pleas courts shall also be governed by statutes and supreme court rules applicable to the district court, except where the provisions conflict with the provisions of statutes or supreme court rules specifically applicable to the municipal or common pleas courts. In the statutes specifically applicable to municipal or common pleas courts, all references to the powers or proceedings of justice courts or justices of the peace in matters of civil jurisdiction shall be construed to refer to the powers or proceedings of the district court or district court judges."

district court rules and statutes applicable to municipal courts, except where conflicting provisions refer directly to municipal courts (e.g., in jury selection). A similar provision should be adopted in the criminal area and is recommended as a new provision to be added to Chapter XIV as section 764.1a:

> "In all matters of criminal jurisdiction, including pretrial procedures, issuance, service, and enforcement of writs, subpoenas, and other process, contempts, conduct of trials, taxation of costs, and entry and enforcement of judgments, the municipal courts shall be governed by the statutes and supreme court rules applicable to the district court, except where such provisions conflict with the provisions of statutes or supreme court rules specifically applicable to the municipal courts."

The proposed provision is not as detailed as M.C.L. §600.6502 since the relevant aspects of criminal jurisdiction covered by rules relating to district courts is somewhat narrower than the broad range of the civil rules. Also, the last sentence of M.C.L. §600.6502 was not included in §764.1a since we will recommend in the future that the municipal court provisions be amended specifically to remove references to justice courts. Immediate amendment is not necessary because the provisions in the Municipal Court Acts do not add anything to the provisions in the Code of Criminal Procedure.

The proposed bill also repeals various "housekeeping" sections, which mandate detailed administrative procedures relating to such matters as the keeping of dockets. See, e.g., M.C.L. §774.2. Theoretically, these provisions could apply to municipal courts, which have no provisions dealing with these administrative matters. However, the provisions are not appropriate for use by any existing court, having been designed for the special institutional limitations of the J.P. courts. The comparable J.P. housekeeping provisions for civil cases were repealed without any specific replacement. To the extent that current statutes and rules referring directly to municipal courts are deficient in failing to reach court administration, that deficiency will be remedied by ex-

tending district court provisions to municipal courts pursuant to the proposed criminal cross-reference provision, M.C.L. §764.1a, as discussed supra.

III. Provisions Relating to Inquests

Chapter XIII of the Code of Criminal Procedure treats "Proceedings For The Discovery Of Crime" (i.e., inquests). Originally, the authority to hold inquests was given only to justices of the peace, M.C.L. §773.1. Then, in 1861, that authority also was given to coroners, M.C.L. §773.12. The authority of coroners preempted the authority of justices in cities, but not elsewhere.[12] Subsequently the legislature permitted a county to abolish the office of coroner and transfer his duties to the Health Officer, M.C.L. §52.141, or to a county medical examiner, M.C.L. §52.201. The latter legislation provided that the county medical examiner would have the powers and duties of a coroner "insofar as is consistent with this act," M.C.L. §52.213. The Michigan Supreme Court, in Lipiec v. Zawadzki, 346 Mich. 197 (1956), held that the act did not grant medical examiners the authority to hold inquests. Lipiec suggested also that the legislature had intended to abolish the inquest in counties which chose to abolish the office of coroner and appoint a medical examiner. In 1968 the legislature provided for the holding of an inquest by the medical examiner or a municipal court judge, when requested by the prosecuting attorney or the attorney general, M.C.L. §52.207. At this point, justices of the peace still had inquest authority in those localities where there was no medical examiner and the inquest authority was not preempted by the superior authority of coroners in cities.

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12 Justices could not hold inquests in incorporated cities where a county coroner resided (unless both coroners were absent, etc.), M.C.L. §773.14. This limited the inquest power of justices of the peace only there, Op. Atty. Gen. 1928-30, p. 164.

In 1969 the office of coroner was abolished and each county was required to have a medical examiner (health officers could be designated as medical examiners, M.C.L. §52.213c). The "powers and duties" of coroners were transferred to the county medical examiners. M.C.L. §52.213a. However, M.C.L. §52.207, providing for inquests, was specifically amended to eliminate the authority of medical examiners to hold inquests. Instead, the legislature provided that inquests "shall" be held by a "district court judge or a municipal court judge" upon determination of the prosecuting attorney or the medical examiner.[13] This provision, taken in light of Lipiec, apparently superseded the independent, Chapter XIII authority of justices of the peace to hold inquests. Thus, provisions granting the district court and municipal courts the authority possessed by the J.P. court apparently do not give them any additional inquest authority beyond that granted via M.C.L. §52.207, upon request of the prosecuting attorney or medical examiner.

While the adoption of M.C.L. §52.207 eliminated the independent authority of justices to hold inquests, it did not render irrelevant all of the provisions in Chapter XIII referring to inquests held by justices of the peace. There is no provision in the Medical Examiners Act detailing the procedure to be followed in the inquests authorized under M.C.L. §52.207. Presumably, the procedure prescribed in Chapter XIII would be used in inquests conducted pursuant to M.C.L. §52.207. Accordingly, the procedural provisions of Chapter XIII should be retained (and amended) rather than repealed.

The proposed bill includes four types of changes in the procedural provisions of Chapter XIII. First, references to the abolished offices of justice of the peace and coroner are replaced by references to "magistrates." Second, the inquest procedure is explicitly tied to the Medical Examiner Act so as to make clear that §52.207 is the sole authority for determining when a coroner's inquest is to be held. Third, the requirement that the jurors view the body of the deceased

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13 The reference to "municipal court judge" in §52.207 probably was intended to include recorder's court, which is a municipal court of record.

is eliminated. Chapter XIII currently provides that, in inquests conducted by justices of the peace, the jurors must view the bodies, but in inquests conducted by coroners, the jurors need not view the bodies. This conflict is resolved by retaining only the procedure formerly utilized in coroner's inquests. Fourth, provisions which have been superseded by similar provisions for medical examiners are eliminated. Provisions relating to coroners inquests which duplicate the retained (and amended) provisions on former J.P. inquests also are eliminated.

IV. "Cognizable By A Justice Of The Peace"

Various provisions in the Code of Criminal Procedure are made applicable only to offenses that "are not cognizable by a justice of the peace,"[14] or only to offenses that "are cognizable by a justice of the peace." Such limitations are noted, for example, in the following sections: M.C.L. §§ 763.3 (written waiver of trial by jury); §764.1 (power to issue warrants); 764.4, 764.8, 764.9 (right to be brought before a magistrate in county where arrested); 764.9a, 764.9b, 764.9c (summons); 765.20 (surety-real estate lien); 766.2, 766.3 (examination before issuing arrest warrant); 775.16 (right to counsel in preliminary examination).[15]

An offense was "cognizable by a justice of the peace" if punishable by 90 days imprisonment or $100.00 or both. This included many, but not all, state misdemeanors. Some

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14 For the sake of brevity, offenses cognizable before a justice of the peace will be described in this commentary as "J.P. offenses," and offenses not cognizable by a justice of the peace will be described as "non-J.P. offenses."

15 A few provisions note that they apply to "all offenses whether cognizable by a justice of the peace or otherwise." See, e.g., §780.401 (no presumption of coercion for married woman for crime committed in husband's presence).

misdemeanors were punishable by more severe sentences (e.g., 6 months or 1 year imprisonment), and were tried by the circuit court (and sometimes described, though not in the statutes, as "circuit court misdemeanors").

The legislative purpose in distinguishing between "J.P. offenses" and "non-J.P. offenses" varied with the particular statute. In some instances, the distinction was drawn in order to apply separate procedures to offenses of different levels of seriousness. This was the case, for example, of legislation authorizing an officer to release an arrested person upon issuance of an appearance ticket in lieu of taking the person before the local magistrate. That provision referred originally to offenses cognizable by a justice of the peace. This limitation was imposed because the legislature viewed the appearance ticket procedure as an acceptable practice only for minor offenses. When the provision was later amended, after the abolition of the J.P. court, new language was substituted to describe the level of the offense. The amendment stated that the appearance ticket procedure was applicable only to "violations of state law or local ordinance for which the maximum permissible penalty does not exceed 90 days in jail and a fine of $500.00." See M.C.L. §764.9f. See also M.C.L. §780.581.[16]

Where the current reference to J.P. offense reflects a legislative purpose of distinguishing between offenses of different levels of seriousness, the proposed bill follows the approach taken in the amendment of the appearance ticket provision. It replaces the phrase "cognizable by a justice of the peace" with a phrase describing the same level of offense in terms of maximum punishment now permissible -- "an offense for which the maximum possible penalty does not exceed 90 days in jail and a fine of $500.00."

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16 The use of a $500.00 amount, as opposed to a $100.00 amount, reflected the expanded authority of municipalities to impose $500.00 fines in connection with ordinance violations (see M.C.L. §41.183) and the use of the $500.00 limit for some state offenses bearing an imprisonment maximum of 90 days. The jurisdiction of both district courts and municipal courts now extends to offenses with potential fines exceeding $500.00. See M.C.L. §730.551 (as amended in 1974).

In other provisions, the distinction drawn between J.P. and non-J.P. offenses was tied to the J.P. court having trial jurisdiction over the offense rather than to the seriousness of the offense. For example, the provision on preliminary examinations, M.C.L. §766.4, formerly noted that examinations were required for an offense "not cognizable by a justice of the peace." The legislative concern here, however, was not related to the punishment limit of 90 days imprisonment as such. The line was drawn at J.P. offenses because the legislature did not believe it appropriate to require justices of the peace to hold preliminary hearings in cases which they would eventually try. When municipal court trial jurisdiction was extended to misdemeanors punishable by imprisonment up to 1 year, the M.C.L. §766.4 reference to offenses not cognizable before a justice of the peace no longer reflected this policy. A literal reading of M.C.L. §766.4 would have required that municipal courts hold a preliminary hearing for all non-J.P. misdemeanors (i.e., those misdemeanors punishable by more than 90 days imprisonment) even though the municipal courts had trial jurisdiction for those misdemeanors. Accordingly, the language of M.C.L. §766.4 was amended to bring the preliminary hearing requirement in line with the current jurisdiction of the municipal courts. Since the trial jurisdiction of the municipal courts (and district court) now extended to all offenses punishable by 1 year or less, the amendment required preliminary hearings only for offenses punishable by more than one year imprisonment. This change was achieved by making two changes in the Code. First, a new definitional section was added, M.C.L. §761.1(g), characterizing all offenses punishable by more than 1 year as "felonies." Second, the reference in M.C.L. §766.4 to non-J.P. offenses was replaced by a reference requiring a preliminary hearing for "a felony."[17]

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17 M.C.L. §600.8311 already provided that district courts conduct preliminary hearings in all felony cases and "misdemeanor cases not cognizable by the district court" (i.e., misdemeanors punishable by more than one year). At one point, M.C.L. §766.4 was amended along the same lines. The amended provision required preliminary hearings only for offense "not cognizable by the court before which the individual was brought." This provision, however, failed to properly resolve the recorder's court situation since the misdemeanor magistrates in recorder's court do not try the higher level misdemeanors.

The proposed bill follows the approach of the amendment of M.C.L. §766.4 in amending those provisions where the current distinction between J.P. and non-J.P. offenses relates to the court having jurisdiction rather than the 90 day punishment limit on J.P. offenses. Where such provisions refer to "offenses not cognizable by a justice of the peace," a reference to a "felony" is substituted. Where the provisions refer to offenses "cognizable by a justice of the peace," the term "misdemeanor" is substituted. The term "misdemeanor," in turn, is defined by the addition to M.C.L. §761.1 of a new definitional paragraph (h) which provides: "misdemeanor means any offense which is not a felony." By reference to M.C.L. §761.1(g),[18] this definition includes all "offenses" punishable by one year imprisonment. The proposed definition of misdemeanor varies from the definition in the substantive code, but then the M.C.L. §761.1(g) definition of felony also varies from that in the substantive code. Compare M.C.L. §750.8.[19]

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18 Under M.C.L. §761.1(f), any offense punishable by death or imprisonment for more than 1 year, or an offense expressly designated as a felony by statute, is a "felony." The proposed definition of misdemeanor is tied to this definition, as opposed to referring directly to the one year maximum, so as to avoid any gap in coverage for an offense designated as a felony but punishable by less than one year imprisonment.

19 It would have been possible to replace the phrase "cognizable by a justice of the peace" with the phrase "cognizable before a district court." The use of this phrase, however, would have required that the reader examine the statutes governing district court jurisdiction even though his particular concern happened to be with the application of the statute to recorder's court or to municipal court. It seems preferable to refer to a specific level of offense rather than the jurisdiction of the particular court. A similar approach was taken in the amendment of M.C.L. §766.4.

Under the proposed bill, the phrase "offense cognizable by a justice of the peace" will be replaced, depending upon its current purpose, either by the term "misdemeanor" or by the phrase "offense for which the maximum permissible penalty does not exceed 90 days in jail and a fine of $500.00." Neither of these substitutes clearly indicate coverage of ordinance violations. While justices of the peace had jurisdiction to try ordinance violations,[20] it is not clear whether references in the Criminal Procedure Code to "offenses cognizable by a justice of the peace" included ordinance violations. The terms "offense" and "criminal case" are used interchangeably in the Code of Criminal Procedure. See, e.g., M.C.L. §763.3 and §764.1. Judicial decisions have noted that "prosecutions for violations of city ordinances are not 'criminal cases' within the meaning of the term as used in the general laws of the state." People v. Smith, 146 Mich. 193 (1906). On the other hand, they also have recognized that ordinance prosecutions "partake of the nature of criminal proceedings," Id., and "a person violating [a local ordinance] commits an offense and in one sense a crime." People v. Hanrahan, 75 Mich. 611 (1889). Thus, in People v. Burnett, 55 Mich.App. 649 (1974),[21] the Court of Appeals recently held that Art. 1, §20, providing for a jury trial in every "criminal prosecution," applies to prosecutions for ordinance violations. See also People v. Goldman, 221 Mich. 646 (1923).

Viewing the precedent as a whole, it is arguable that, notwithstanding decisions like People v. Smith, supra,[22]

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20 See, e.g., M.C.L. §§41.183, 41.5.

21 "We, therefore, hold that where, as here, a defendant is charged with violating a municipal ordinance which is in terms identical to a section of the general criminal legislation of the state or where the ordinance authorizes incarceration as a permissible sentencing alternative, said violation of such ordinance is a crime and, . . . defendant . . . is entitled to a jury trial. . . ." People v. Burnett, supra, 654-655. (Emphasis added).

22 See also Village of Vicksburg v. Briggs, 85 Mich. 502, 508 (1891); Mixer v. Supervisors of Manistee County, 26 Mich. 422, 424-425 (1873).

the references in the Code of Criminal Procedure to "criminal cases," "criminal causes," "any case," "offense," "criminal offense" and "criminal prosecution" encompass ordinance violations. Cf. Op. Atty. Gen'l, 4878 (Aug. 13, 1975). However, recent amendments of the Code appear to reflect the position that ordinance violations should be mentioned specifically to be certain that a particular section will apply to the investigation or prosecution of ordinance violations. Thus, M.C.L. §764.9a refers to arrests for "an offense, violation of a city, village or township ordinance." M.C.L. §764.9b similarly refers to warrants issued for any "misdemeanor, violation of a city, village or township ordinance." See also M.C.L. §780.582. M.C.L. §764.9f refers to violations of "state law or local ordinance."

The Code itself should indicate clearly whether or not its various provisions apply to ordinance violations. However, this question can appropriately be resolved only by a general amendment to the Code, and not in the course of eliminating references to justices of the peace. It would be possible to substitute for the phrase "offense cognizable by the justice of the peace" another phrase clearly indicating that ordinance violations are (or are not) encompassed by the amended provisions. But this procedure would leave intact the many ambiguous references to "offense," and "crime" in the various Code provisions that do not refer to justices of the peace (and hence are not being considered here). Any amendment designed to clarify the status of ordinance violation prosecutions should deal with all the provisions of the Code. Indeed, to include references to ordinance violations only in the amended provisions might raise further doubts as to the meaning of the terms "crime" and "offense" as used generally through the Code. The proposed amendments accordingly continue to use the phrase "offense"[23] and leave to the judiciary the task of determining the scope of that term as used in the amended provisions as well as all other provisions in the Code.

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23 The amendments refer either to an "offense" bearing a maximum punishment of 90 days imprisonment or to a "misdemeanor" which, in turn, is defined as an "offense" that is not a felony.

The proposed bill follows:

AMENDMENTS TO THE CODE OF CRIMINAL PROCEDURE TO ELIMINATE REFERENCE TO ABOLISHED COURTS

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. Section 1 of Chapter 1; section 3 of Chapter 3; sections 1, 4, 8, 9, 9a, 9b, 9c, and 28 of Chapter 4; sections 1, 2, 3, 8, 20, and 29 of Chapter 5, sections 2, 3, 11, and 19 of Chapter 6; section 35 of Chapter 7; sections 7 and 12 of Chapter 11; sections 1, 4, 8, 9, 10, 11, 12 and 15 of Chapter 12; sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 15 of Chapter 13; sections 1a, 4, 5, 6, 7, 34, 35, 37, 38, 43, and 44 of Chapter 14; sections 13, 13a, 14, 16, 19 and 19a of Chapter 15 of Act No. 175 of the Public Acts of 1927, being sections 76.1, 763.3, 764.1, 764.4, 764.8, 764.9, 764.9a, 764.9b, 764.9c, 764.28, 765.1, 765.2, 765.3, 765.8, 765.20, 765.29, 766.2, 766.3, 766.11, 766.19, 767.35, 771.7, 771.12, 772.1, 772.4, 772.8, 772.9, 772.10, 772.11, 772.12, 772.15, 773.1, 773.2, 733.3, 773.4, 773.5, 773.6, 773.7, 773.8, 773.9, 773.10, 773.11, 773.15, 774.4, 774.5, 774.6, 774.7, 774.34, 774.35, 774.37, 774.38, 774.43, 774.44, 775.13, 775.13a, 775.14, 775.16, 775.19, and 775.19a of the Compiled Laws are amended, and a new section 1a of Chapter 14 is hereby added, to read as follows:

Chapter I -- Definitions

Section 761.1 Code of Criminal Procedure; definitions

Sec. 1. As used in this act:

(a) - (g) Unchanged

(h) "MISDEMEANOR" MEANS ANY OFFENSE WHICH IS NOT A FELONY.

COMMENT: The need for adoption of this provision is discussed at pp. 39-40 of the Introductory Memo. This proposed definition of "misdemeanor" will be used in various provisions where current references to "offenses cognizable by a justice of the peace" is related to the existence of trial jurisdiction in the J.P. court rather than the 90 day imprisonment limitation of J.P. offenses. The three courts having jurisdiction to try offenses formerly cognizable before a J.P. (i.e., the district court, recorder's court, and municipal court) now have jurisdiction to try all misdemeanors punishable by imprisonment up to 1 year. Under M.C.L. §761.1(g), offenses punishable by more than one year or expressly designated as felonies are "felonies" for the purpose of this Act. Accordingly, the term "misdemeanor" is limited to offenses punishable by imprisonment of no more than one year.

Chapter III -- Rights of Persons Accused

Section 763.3 Waiver of trial by jury; form, time.

Sec. 3. In all criminal cases arising in the courts of this state ~~whether cognizable by justices of the peace or otherwise,~~ the defendant shall have the right to waive a determination of the facts by a jury and may, if he so elect, be tried before the court without a jury. Except in cases OF MISDEMEANORS ~~cognizable by a justice of the peace,~~ such waiver and election by a defendant shall be in writing signed by the defendant and filed in such cause and made a part of the record thereof. It shall be entitled in the court and cause and in substance as follows: "I, ..., defendant in the above cause, hereby voluntarily waive and relinquish my trial to a trial by jury and elect to be tried

by a judge of the court in which said cause may be pending. I fully understand that under the laws of this state I have a constitutional right to a trial by jury."

.....
Signature of defendant.

Such waiver of trial by jury must be made in open court after the said defendant has been arraigned and has had opportunity to consult with counsel.

COMMENT: The phrase referring to cases cognizable by a justice of the peace is deleted since the reference to "all criminal cases" clearly indicates inclusion of J.P. offenses.

The second sentence, providing for an exception to the requirement of a written waiver, is amended to encompass all misdemeanors, not just J.P. offenses. The exception appears to have been tied to the particular court involved as well as the level of the offense. Written waivers were not required in the lower courts, such as the municipal and J.P. courts, for various reasons related to the operation of those courts -- e.g., cases frequently were tried at the time of first appearance; upon immediate waiver of the jury, defendants often appeared pro se; and motions generally were presented orally. Similar characteristics support continued use of oral waivers in the current courts of limited jurisdiction. However, the level of offense specified in the statute must extend beyond offenses formerly triable by the J.P. court to bring the exception in line with the jurisdiction of the current courts. The criminal jurisdiction of the district court and municipal courts extends to all offenses punishable by imprisonment up to one year [i.e., all "misdemeanors" under the definition of M.C.L. §761.1(g)]. See M.C.L. §§ 600.8311, 730.551. Accordingly, the proposed amendment of the second sentence of M.C.L. §763.3 substitutes that term "misdemeanor" for the phrase "cognizable by a justice of the peace."

Section 764.1 Processes for apprehension; warrant; power to issue, allowance by prosecutor.

Sec. 1. For the apprehension of persons charged with ~~offenses, excepting such offenses as are cognizable by justices of the peace,~~ A FELONY, the justices of the supreme court, the several circuit judges, courts of record having jurisdiction of criminal causes ~~and circuit court commissioners, mayors and recorders of cities~~ and all ~~justices of the peace,~~ MAGISTRATES, shall have power to issue processes to carry into effect the provisions of this chapter: Provided, however, That it shall not be lawful for any of the above named public officials to issue warrants in any criminal cases, except where warrants are requested by members of the department of public safety for traffic or motor vehicle violations until an order in writing allowing the same is filed with such public officials and signed by the prosecuting attorney for the county, or unless security for costs shall have been filed with said public officials.

COMMENT: This provision currently applies to the issuance of warrants for all felony offenses and all misdemeanors punishable by more than 90 days. It does not include warrants for offenses punishable by 90 days or less since these were the offenses "cognizable" before a justice of the peace. The issu-

ance of warrants for such offenses is governed by a separate provision in the "Justices Chapter" of the Code, M.C.L. §774.4. The use of separate provisions for J.P. and non-J.P. offenses reflects a general pattern found in the Code of treating separately those offenses triable in circuit courts and those triable in courts of limited jurisdiction. Although the J.P. court has been abolished, that pattern would be retained since, in some areas (e.g. jury size), the procedure employed differs substantially according to the court involved. To continue the pattern of utilizing separate provisions for offenses triable in circuit court and those triable in lower courts, the level of offense must be raised to the current dividing line between district and municipal court jurisdiction and circuit court jurisdiction. That division of authority currently is between felonies and misdemeanors as these terms are defined in M.C.L. §761.1. See M.C.L. §§600.8311, 730.551. Accordingly, under the proposed amendment of M.C.L. §764.1, the phrase excepting charges on a J.P. offense would be replaced by a reference including all felony charges. The use of a direct reference to felony offenses, rather than a phrase excepting misdemeanors, provides a more concise statement of the offenses included than the current statutory formulation which indicates coverage by reference to those offenses not covered.

The listing of those officials who have the authority to issue warrants also would be amended to conform to the current judicial system. The reference to justices of the peace is replaced by a reference to "magistrates," a term defined in M.C.L. §761.1(f) as including judges of the district and municipal courts, and specified judges of the recorder's court. Judges of all three of these courts currently fall within M.C.L. §764.1 by virtue of the fact that each court possesses the authority formerly exercised by the J.P. court. Judges of the district court and the recorder's court also are included as judges of "courts of record having jurisdiction of criminal causes." The authority of the municipal courts, however, is dependant upon that of the justices of the peace, and the replacement of the references to justices of the peace with the reference to magistrates is needed to preserve the current authority of the municipal courts.

The proposed amendment also deletes the reference to circuit court commissioners in the list of officials with

authority to issue warrants. See M.C.L. §600.9921 (abolishing the office of circuit court commissioners). The reference to mayors of cities is eliminated on other grounds. In practice, mayors no longer exercise such authority. Moreover, dicta in Shadwick v. City of Tampa, 407 U.S. 345 (1971), raises significant constitutional questions about the validity of vesting warrant authority in mayors. Since the only remaining "recorder," that of Detroit, is already included in the listing, the reference to recorders of cities also is deleted.

Section 764.4 FELONY offenseS not punishable by ~~death or not cognizable by justice~~ MANDATORY IMPRISONMENT; prisoner's right to be brought before magistrate of county where arrested.

Sec. 4. In all cases where the offense charged in the warrant is A FELONY not punishable with ~~death, or~~ MANDATORY imprisonment in the state prison, ~~and not cognizable by a justice of the peace,~~ if the arrest shall be made in any other county than that where the offense is charged to have been committed, and if the person arrested shall request that he be brought before a magistrate of the county in which the arrest was made, it shall be the duty of the officer or person arresting him to bring such prisoner before a magistrate of that county.

COMMENT: This provision is the first in a series dealing with the disposition of a person arrested outside of the county in which the offense was committed. Initially, the proposed amendment would clarify the provision describing those

instances in which such a person need not be brought before a magistrate in the county of arrest. The reference to offenses punishable by the death penalty is deleted, as the death penalty is prohibited by Const. 1963, Art. 4 §46. The word "mandatory" is added to the phrase "imprisonment in the state prison." Although the current wording is unclear, the context clearly indicates that the legislature intended to exclude presentation before a local magistrate only when the offense charged was punishable with mandatory imprisonment. Thus, the next section in the series, M.C.L. §764.5, in describing what the local magistrate may do when the person is brought before that magistrate, notes a special limitation for persons charged with offenses bearing a maximum punishment of "imprisonment for 5 years or more, or for life." If M.C.L. §764.4 were intended to exclude all persons arrested for felonies punishable by possible imprisonment, M.C.L. §764.5 would not need to make reference to those persons arrested for offenses punishable by imprisonment exceeding 5 years. Indeed, if the reference to imprisonment were not limited to mandatory imprisonment, M.C.L. §764.4 would exclude all persons arrested on felony charges since all felonies are punishable by possible confinement in state prison. See M.C.L. §750.7.

The proposed amendment also would replace the phrase "not cognizable by a justice of the peace" with the term "felony." This amendment makes a substantive change in the designated level of offense similar to the change made by the amendment recommended for M.C.L. §764.1. Currently, two separate sets of provisions deal with the disposition of a person arrested pursuant to a warrant where the arrest was made outside the county in which the offense was committed. The first set, which includes §764.4, deals with arrest for offenses not cognizable by a justice of the peace, §§764.4-764.7. The second set deals with offenses cognizable by a justice, §§764.9-764.12. The two sets of provisions provide for essentially the same procedures for disposition of persons arrested on J.P. and non-J.P. misdemeanor charges. The only significant distinction relates to the presentation of the warrant and any recognizance in the county of the offense. When the person is arrested for a non-J.P. offense, M.C.L. §764.7 requires that the warrant and recognizance be delivered to the J.P. who issued the warrant. When the person is arrested for a J.P. offense,

the warrant and recognizance is to be brought directly to a justice "having cognizance of the offense" (M.C.L. §764.10), even if that justice did not issue the warrant. The distinction between the two sets of provisions thus relates to the authority of the justice to try the case rather than the particular punishment level of former J.P. offenses. To maintain the distinction, the reference to the offenses covered by each set of provisions must reflect the current dividing line between district and municipal court trial jurisdiction and circuit court jurisdiction. In the set of provisions dealing with circuit court offenses, the dividing line is reflected by replacing the phrase "not cognizable by a justice of the peace" with a reference to "felony" offenses. In the set dealing with J.P. offenses, the distinction is reflected by replacing the phrase "cognizable by a justice of the peace" with a reference to "misdemeanor" offenses. See also the commentary on the amendment of section 764.1.

Section 764.8 Other FELONY offenseS ~~not cognizable by justice~~; prisoner before magistrate issuing warrant; absence or inability to attend.

Sec. 8. Persons arrested under ~~any~~ A warrant issued for ~~any~~ A FELONY offense ~~not cognizable by a justice of the peace,~~ shall, where no provision is otherwise made be brought before the magistrate who issued the warrant; or if he be absent or unable to attend, before some other magistrate of the same county; and the warrant, with a proper return thereon, signed by the person who made the arrest, shall be delivered to the magistrate.

COMMENT: As currently drafted, §764.8 compliments M.C.L. §764.1, which authorizes issuance of a warrant for non-J.P. offenses. Section 764.8 provides that, after

execution of the warrant, the arrested person is to be taken to the magistrate who issued the warrant, unless "provision is otherwise made," as in M.C.L. §764.4 (providing that an accused arrested in another county, upon request, shall be brought before a magistrate of that county).

The only proposed change in M.C.L. §764.8 is the replacement of the phrase "offense not cognizable by a justice of the peace" by a reference to felony offenses. This change is consistent with that to be made in M.C.L. §764.1 and is based on a similar analysis of the current reference in both provisions to non-J.P. offenses. See the commentary on the amendment of M.C.L. §764.1.

It should be noted that there is no precise counterpart for M.C.L. §764.8 governing lesser offenses. However, M.C.L. §774.4 serves a similar function. It provides that the warrant for a J.P. offense direct the arresting officer to bring the arrested person before the justice who issued the warrant or "some other justice of the same county." M.C.L. §764.4. Under the proposed bill, M.C.L. §764.8 will be limited to reach only arrest felons, and M.C.L. §774.4 will be expanded to cover persons arrested on all misdemeanor charges. The expansion of M.C.L. §774.4 to cover persons arrested on warrants charging one year misdemeanors (formerly within M.C.L. §764.8) will not alter current practice. M.C.L. §774.4 does differ from M.C.L. §764.8 in that M.C.L. §774.4 does not condition presentment before some other magistrate in the same county on the unavailability of the issuing magistrate. But this distinction is not important in practice since officers are usually directed to take all arrested persons before a specific magistrate in the district, and all others are viewed as "unavailable." See also Op. Atty. Gen. 1961-62, No. 3624 (p. 305).

Section 764.9 MISDEMEANORS ~~Offense cognizable by justice~~; prisoner's right to be brought before magistrate in county where arrested.

Sec. 9. In all cases where the offense charged in the warrant is A MISDEMEANOR ~~cognizable by a justice of the~~

~~peace~~, if the arrest shall be made in another county than where the offense is charged to have been committed and if the person arrested shall request that he be brought before a magistrate of the county in which the arrest was made, it shall be the duty of the person or officer arresting him, to carry such prisoner before a magistrate of that county.

COMMENT: See commentary on the amendment of M.C.L. §764.4.

Section 764.9a Offenses PUNISHABLE BY IMPRISONMENT NOT EXCEEDING 90 DAYS ~~cognizable by justice~~; summons in lieu of warrant; content; service.

Sec. 9a. (1) As an alternative to filing an order allowing a warrant as provided in section 1 if the arrest is to be for ~~an offense, violation of a city, village or township ordinance cognizable by a justice of the peace or a municipal judge,~~ AN OFFENSE FOR WHICH THE MAXIMUM PERMISSIBLE PENALTY DOES NOT EXCEED 90 DAYS IN JAIL AND A FINE OF $500.00, the prosecuting attorney for the county may issue a written order for a summons addressed to a defendant, directing the defendant to appear before a

magistrate or other judicial officer at a designated future time for proceedings as are hereinafter set forth.

(2) A summons shall designate the name of the issuing court, the offense charged in the underlying complaint, the name of the defendant to whom it is addressed, and be subscribed by the issuing judicial officer.

(3) A summons may be served in the same manner as a warrant.

COMMENT: This provision, and those immediately following, authorize use of the summons and appearance ticket as alternatives to arrests with and without warrants. The final provision in the series, M.C.L. §764.9f was added after the abolition of the J.P. courts. It applies to all offenses for which the maximum possible penalty does not exceed 90 days in jail and a fine of $500.00. This standard suggests that the limitation of §764.9a to offenses "cognizable by a justice of the peace or a municipal judge" was based upon the seriousness of the offense rather than the jurisdictional limit of the particular court in which the offense would be tried. Accordingly, the "cognizable by" phrase is replaced with the same standard used in M.C.L. §764.9f. No reference is made to ordinances.

Section 764.9b Offenses PUNISHABLE BY IMPRISONMENT NOT EXCEEDING 90 DAYS ~~cognizable by justice~~; arrest without warrant; appearance ticket; issuance, service; release from custody.

Sec. 9b. When any person is arrested without a warrant for ~~any misdemeanor, violation of a city, village or township~~

~~ordinance cognizable by a justice of the peace or a municipal judge,~~ AN OFFENSE FOR WHICH THE MAXIMUM PERMISSIBLE PENALTY DOES NOT EXCEED 90 DAYS IN JAIL AND A FINE OF $500.00, the defendant need not be taken to a magistrate as provided in section 9, but in the alternative a police officer may issue and serve an appearance ticket upon the defendant and release him from custody as prescribed in section 9c.

COMMENT: See commentary on amendment of §764.9a.

Section 764.9c Offenses PUNISHABLE BY IMPRISONMENT NOT EXCEEDING 90 DAYS ~~cognizable by justice~~; arrest without warrant; appearance ticket; who may issue.

Sec. 9c. (1) Whenever a police officer has arrested a person without a warrant for ~~any misdemeanor, violation of a city, village or township ordinance cognizable by a justice of the peace or a municipal judge~~ AN OFFENSE FOR WHICH THE MAXIMUM PERMISSIBLE PENALTY DOES NOT EXCEED 90 DAYS IN JAIL AND A FINE OF $500.00, pursuant to section 15, in lieu of taking such person to a local criminal court and promptly filing a complaint therewith, he may issue to and serve upon such person an appearance ticket as defined in section 9f.

(2) A public servant other than a police officer, who is specially authorized by law to issue and serve appearance tickets with respect to a particular class of offense of less than felony grade, may issue and serve upon a person an appearance ticket when he has reasonable cause to believe that the person has committed such an offense.

COMMENT: See commentary on amendment of §764.9a.

Section 764.28 Arrest; person who defaults on appeal from ~~justice court~~ MUNICIPAL COURT.

Sec. 28. When any person under recognizance on an appeal in a criminal proceeding from a conviction and judgment of a ~~justice of the peace;~~ MUNICIPAL COURT shall not appear according to the condition of such recognizance, and the said recognizance shall have become forfeited by reason of the breach of the condition thereof, and such forfeiture shall have been entered on record by order of the circuit court, it shall be lawful for said court to issue a capias for the arrest of the appellant or defendant named in such recognizance, to bring him before the court to answer to the complaint or prosecution against him in the proceedings in which appeal was taken.

COMMENT: This provision authorizes issuance of a bench warrant where a person has failed to appear for a trial de novo pursuant to an appeal from the justice court. Trial de novo on appeal is now limited to municipal courts (see commentary to M.C.L. §774.34) and the provision is accordingly amended to refer to municipal courts.

Chapter V -- Bail

Section 765.1 Admission to bail; persons having power; ~~clerk in municipal court.~~

Sec. 1. Officers before whom persons charged with crime shall be brought, shall have power to let them to bail as follows:

(a) Any justice of the supreme court, judge of a circuit court, JUDGE OF THE RECORDER'S COURT OF THE CITY OF DETROIT, JUDGE OF THE DISTRICT COURT, judge of any court of record having jurisdiction of criminal causes, ~~circuit court commissioners,~~ in all cases except for offenses enumerated in section 5 of this chapter;

(b) Any ~~justice of the peace,~~ judge of a ~~police or~~ municipal court, ~~mayor of a city,~~ in all cases where the punishment for the offense charged shall be less than imprisonment for life in the state prison: Provided, That in MUNICIPAL courts ~~in cities, in which the justice or judge, or justices or judges, as the case may be, have the criminal~~

~~jurisdiction of a justice of the peace, or the jurisdiction to try and sentence for violations of city ordinances, or both, and having a clerk,~~ recognizances for the appearance of persons charged with a criminal offense, may be taken and entered into by and before the clerks of such courts, subject to the direction of the court, when the amount of bail has been set by the ~~justice or~~ judge.

COMMENT: This is the first of a series of provisions on bail. The section distinguishes between the authority of courts of record [covered in subsection (a)] and the authority of various minor courts which may grant bail in a limited class of cases [covered in subsection (b)].

The proposed amendment adds a reference to judges of the district court in subsection (a). The district court already is included in subsection (a) because it is a court of record, M.C.L. §600.8101, having jurisdiction of criminal causes. See also M.C.L. §600.8311 (noting district court bail authority). The specific reference to the district court thus is added simply to provide greater specificity. Since the legislation already refers to some of the existing courts by name, it should include a complete list of all of the major courts, rather than require the reader to refer to provisions establishing particular courts as courts of "record," etc. A reference to recorder's court is also added for the same reason. Cf. M.C.L. §765.2. Recorder's court judges currently fall within subsection (a) as judges of a court of record having jurisdiction of criminal causes. They also have authority to set bail independent of this section, M.C.L. §726.14.

The references to police court judges and justices of the peace are removed from subsection (b) as these courts have been abolished, M.C.L. §600.9921. The reference to mayors is removed since mayors no longer perform this

function. Since courts are available throughout the state, it is no longer necessary to give the power to set bail to nonjudicial officers.*

The municipal court is the only current court that is specified in subsection (b), and this reference is retained. Since all remaining municipal courts have at least J.P. criminal jurisdiction and clerks, the reference to courts meeting those conditions is deleted from subsection (b).

Section 765.2 Admission to bail; courts of record having power.

Sec. 2. The several circuit courts, the recorder's court of the city of Detroit, ~~the superior court of the city of Grand Rapids,~~ THE DISTRICT COURT, and all courts of record having jurisdiction over criminal causes, shall have the power to let to bail any person committed, in all cases in which a justice of the supreme court is authorized to let such person to bail.

COMMENT: The district court, as a court of record (M.C.L. §600.8101) having jurisdiction over "criminal causes," already falls within this provision; a reference to that court is added to make the listing of specific courts complete. See commentary to M.C.L. §765.1. The

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* The deletion of the reference to mayors will not eliminate totally the mayor's power to set bail. Mayors are conservators of the peace, M.C.L. §87.2, and the setting of bail traditionally was included within that authority. See Averill v. Perrott, 74 Mich. 296 (1889).

reference to the superior court of Grand Rapids is deleted since that court has been abolished. See P.A. 1964, No. 262, §§ 3, 4. Municipal courts are not listed in this provision since the provision applies only to courts of record. See also M.C.L. §765.1(b).

Section 765.3 Admission to bail; application, notice to prosecutor.

Sec. 3. Any justice of the supreme court, ~~circuit court commissioner~~ or any judge of any circuit court for any county, or of the recorder's court of the city of Detroit or OF the ~~superior court of the city of Grand Rapids~~ DISTRICT COURT or of any court of record having jurisdiction of criminal causes, on application of any prisoner committed to any bailable offense, and after due notice to the prosecuting attorney for the county, may inquire into the case and admit such prisoner to bail; and any person committed for not finding such sureties to recognize for him, may be admitted to bail by any of the said officers.

COMMENT: The first portion of this section supplements M.C.L. §§765.1(a) and 765.2 by prescribing the procedure to be employed in exercising the authority noted in these provisions. The second portion of the section apparently is designed to establish the courts' authority to admit to bail material witnesses who failed to provide security as required for their release. At one point, this section followed the section giving these courts the power to require material witnesses to post bond. See M.C.L., 1857,

§§5995-5999. A modified material witness provision is now located at M.C.L. §767.3. The second portion of M.C.L. §765.3 might also refer to release of persons who are committed for failing to find sureties as required under a peace bond. See M.C.L. §772.12.

As in M.C.L. §§765, 765.1(a) and 765.2, a reference to the district court is added to this section to complete the listing of specific courts. The reference to circuit court commissioner is deleted since that office is abolished, M.C.L. §600.9921(b); the reference to the superior court of Grand Rapids also is deleted since that court is abolished, P.A. 1964, No. 262, §§ 3, 4.

Again, municipal judges are not included since the section apparently was intended to apply only to courts of record, which have authority to set bail for all "bailable offenses" and authority to set bail for material witnesses. Municipal courts lack that authority under M.C.L. §§765.1(b), 765.29, and 767.3.

Section 765.8 Surety; practicing attorney.

Sec. 8. No practicing attorney or counselor shall become security or bail for the appearance of any person charged with a felony or a misdemeanor in any criminal action and any such surety or bail for appearance taken by a judge~~, circuit court commissioner, justice of the peace~~ or other officer authorized by law to take security or bail, shall be void.

COMMENT: The offices of justice of the peace and circuit court commissioner are abolished, M.C.L. §600.9921. The reference to "other officer" is retained since, under M.C.L. §600.8511, district court magistrates have the authority to fix bond.

Section 765.20 Surety on recognizance; oath to ascertain financial condition, pledge of realty, justification, lien in case offense cognizable by justice.

Sec. 20. In every court in this state having criminal jurisdiction, each judge thereof shall have power in his discretion to administer an oath to any proposed surety upon any recognizance given for the release of a person accused of any crime, offense, misdemeanor or violation of any city or village ordinance, to ascertain his financial condition. Each of the judges of any such court shall have power in his discretion to require any surety upon any criminal recognizance taken before him, to pledge to the people of the state of Michigan, real estate owned by said surety and located in the county in which such court is established, the value of the interest of said surety in said real estate being at least equal to the penal amount of the said recognizance. Whenever such a pledge of real estate shall be required by any such court or by any of the judges thereof, of any proposed surety, there shall be executed by said surety the usual form of recognizance and in addition there shall be included in said recognizance, as a part thereof, an affidavit

of justification in substantially the following form. Such affidavit shall be executed by the proposed surety under an oath administered by the clerk or any judge of said court.

STATE OF MICHIGAN)
COUNTY OF) ss.

.....residing at.....who offers himself as surety for .....being first duly sworn, deposes and says that he owns in his own right real estate subject to levy of execution located in the county of ..... state of Michigan, consisting of ..... and described as follows, to-wit:.....; that the title to the same is in his name only; that the value of the same is not less than $..... and is subject to no encumbrances whatever except ..... mortgage of $.....; that he is not surety upon any unpaid or forfeited recognizance and that he is not party to any unsatisfied judgment upon any recognizance; that he is worth in good property no less than $..... over and above all debts, liabilities and lawful claims against

him and all liens, encumbrances and lawful claims against his property.

.....

Subscribed and sworn to before me this

.....day of .....19..

.....

Judge of the court of the city of .....

county

Each of the judges of any such court may, in his discretion and in addition to the above affidavit, require the proposed surety to depose under oath that he is not at the time of executing said recognizance and affidavit surety upon any other recognizance and that there are no unsatisfied judgments or executions against him. Each of the judges of any such court may, in his discretion, require such proposed surety to depose to any other fact which is relevant and material to a correct determination of the proposed surety's sufficiency to act as bail: Provided, That no lien upon real estate shall be required for any offense ~~cognizable by a justice of the peace~~ FOR WHICH THE MAXIMUM PERMISSIBLE PENALTY DOES NOT EXCEED 90 DAYS IN JAIL AND A FINE OF $500.00.

COMMENT: The policy of not utilizing a lien on real estate relates to the level of the offense. Therefore, "cognizable by a justice" is replaced with a phrase which describes the same level of offense -- those punishable by no more than 90 days and $500.00. Cf. the commentary on the amendment to M.C.L. §764.9a.

Section 765.29 Bail for appearance of witness; necessity; repeal.

Sec. 29. It shall not be necessary in any criminal case for any witness to give bail for his appearance as a witness in such cause unless required to do so by the order of a judge of a court of record ~~or a circuit court commissioner~~; all laws contravening this section are hereby repealed.

COMMENT: The office of circuit court commissioner is abolished, M.C.L. §600.9921(b).

Chapter VI -- Examination of Offenders

Section 766.2 Complaint of certain offense; examination.

Sec. 2. Whenever complaint shall be made to any magistrate named in section 1, chapter 4, of this act, that a ~~criminal offense not cognizable by a justice of peace~~ FELONY has been committed, he shall examine on oath the complainant and any witnesses who may be produced by him.

COMMENT: Both this section and M.C.L. §766.3 deal with the procedure to be followed by judges issuing a warrant pursuant to the authority granted under M.C.L. §764.1 et seq. Accordingly, both sections are amended to conform to the offense level specified in the proposed amendment of M.C.L. §764.1.

Section 766.3 Warrant; issuance, contents.

Sec. 3. If it appears from such examination that ~~any criminal offense not cognizable by a justice of the peace~~ A FELONY has been committed, the magistrate shall issue a warrant directed to the sheriff, chief of police, constable or any peace officer of the county, reciting the substance of the accusation and commanding him forthwith to take the person accused of having committed the offense and bring him before the appropriate court to be dealt with according to law, and in the same warrant may require the officer to summon such witnesses as are named therein.

COMMENT: See commentary on the proposed amendment of M.C.L. §766.2.

Section 766.11 Subpoena of witness; taking of evidence, procedure, stenographer's oath and fees.

Sec. 11. Witnesses may be compelled to appear before such magistrate by subpoenas issued by him, or by any officer or court authorized to issue subpoenas, in the same

manner and with the like effect and subject to the same penalties for disobedience, or for refusing to be sworn or to testify, as in cases of trials before ~~justices of the peace;~~ THE DISTRICT COURT and the evidence given by the witnesses examined shall be reduced to writing by such magistrate, or under his direction and shall be signed by the witnesses respectively: Provided, That unless otherwise provided by law, the evidence so given shall be taken down in shorthand by a county stenographer where one has been appointed under the provision of any local act of the legislature or by the board of supervisors of the county wherein such examination is held, or the magistrate for cause shown may appoint some other suitable stenographer at the request of the prosecuting attorney of said county with the consent of the respondent or his attorney to act as official stenographer pro tem, for the court of such magistrate to take down in shorthand the testimony of any such examination, and any stenographer so appointed shall take the constitutional oath as such official stenographer and shall be entitled to the following fees: $6.00 for each day and $3.00 for each half day while so employed in taking down such testimony and 10 cents

per folio for typewriting such testimony so taken down in shorthand, or such other compensation and fees as shall be fixed by the board of supervisors appointing such stenographer, and the same may be allowed and paid out of the treasury of the county in which such testimony is taken: Provided further, That it shall not be necessary for a witness or witnesses whose testimony is taken in shorthand by such stenographer above provided, to sign such testimony, but any witness or witnesses shall have the right to have such testimony read to them upon their request. Such testimony, after being typewritten. shall be received and filed in the court to which the accused is held for trial without the signature of such witness or witnesses for the same purpose and with like effect as the testimony of witnesses hereinabove provided, which is signed by such witness or witnesses and such testimony so taken shall be considered prima facie evidence of the testimony of such witness or witnesses at such examination.

COMMENT: This section is one of a series of sections dealing with the preliminary examination. The section currently describes the authority to subpoena, and to impose penalties for disobedience, as being the same as in "trials before justices of the peace." This standard, in effect, refers to provisions that no longer exist. The current provision governing subpoena authority in criminal trials before justices of the peace, M.C.L. §774.10, ties

that authority to the authority of justices in civil trials, but the provisions governing subpoena authority in J.P. civil trials, former §§600.7001-.7013, have been repealed. See P.A. 1974, No. 297, §2.

The subpoena authority of justices was limited under former §600.7001 to witnesses within the same county or within 30 miles of trial if in another county. By tieing subpoena authority in preliminary examinations to the subpoena authority of the district court, the proposed amendment grants broader authority than that currently granted under M.C.L. §766.11. The amendment would give the judge conducting the preliminary examination subpoena authority that extends throughout the state, since the district court subpoena authority is the same as that of courts of record generally. See M.C.L. §§600.8317, 600.1455.

It is not clear that the proposed amendment actually expands current subpoena authority in preliminary examinations even though it provides for broader authority than that currently provided in M.C.L. §766.11. The district court subpoena provision, M.C.L. §600.8317, presumably gives that court broad subpoena authority in the exercise of all of its jurisdiction, including preliminary examinations. This suggests that, for district courts, M.C.L. §600.8317 prevails over M.C.L. §766.11. Recorder's court also has an independent source of subpoena power, which is the same as that of other courts of record. See M.C.L. §§725.10, 726.11. On the other hand, the municipal courts' subpoena authority in preliminary examinations may be based solely upon M.C.L. §766.11. However, M.C.L. §600.6502 provides that in civil matters, statutes governing district court authority (including subpoena power) apply to municipal courts.* Since the policy of M.C.L. §766.11, read in light of M.C.L. §774.10, was to grant the justice court in preliminary examinations the same authority that would be possessed in civil trials, perhaps

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* This provision states that "in statutes specifically applicable to municipal courts, all references to the powers or proceedings of justice courts . . . in matters of civil jurisdiction shall be construed to refer to the powers or proceedings of the district court."

municipal courts might be viewed as currently having the same extensive subpoena power in preliminary examinations as they have in civil cases via M.C.L. §§600.6502 and 600.8317. In any event, there is no basis for providing municipal courts less authority in conducting preliminary examinations, and the amendment of M.C.L. §766.11 will clearly grant municipal courts that extensive authority by reference to the subpoena power of the district court.

Section 766.19 Discharge of accused and recognizance in misdemeanor cases where injured party has received satisfaction; order.

Sec. 19. When any person brought before a ~~justice of the peace~~ MAGISTRATE shall be committed to jail, or shall be under recognizance to answer to any charge of assault and battery or other misdemeanor for which the injured party shall have a remedy by civil action, if the injured party shall appear before the magistrate having cognizance of the offense, who made the commitment or took the recognizance, and acknowledge in writing that he has received satisfaction for the injury, the magistrate may in his discretion, on payment of the costs which have accrued, discharge the accused and the recognizance, or supersede the commitment by an order under his hand.

COMMENT: The definition of "magistrate," M.C.L. §761.1(f), includes all judges who exercise jurisdiction in misdemeanor cases formerly within the jurisdiction of the J.P. court -- i.e., district court judges, municipal court judges, and recorder's court judges assigned to the duties of magistrates.

Section 767.35 Witness; danger of loss of testimony; admission to bail or commitment.

Sec. 35. Whenever it shall appear to any court of record that any person is a material witness in any criminal case pending in any court in the county and that there is danger of the loss of testimony of such witness unless he be required to furnish bail or be committed in the event that he fails to furnish such bail, said court~~, or a circuit court commissioner in the absence of a judge of any court of record~~, shall require such witness to be brought before him and after giving him an opportunity to be heard, if it shall appear that such witness is a material witness and that there is danger of the loss of his testimony unless he furnish bail or be committed, said court may require such witness to enter into a recognizance with such sureties and in such amount as the court may determine for his appearance at any examination or trial of said cause. All witnesses who fail to so recognize, shall be committed to jail by said court, there to remain until they comply with such order or are discharged by future order of said court.

COMMENT: The office of circuit court commissioner has been abolished, M.C.L. §600.9921(b).

Chapter XI -- Probation

Section 771.7 Probation officers; appointment; duties; recommendation; compensation; term.

Sec. 7. The circuit court of each of the several judicial circuits may recommend a chief probation officer, may also recommend assistant probation officers who may be appointed by the Michigan corrections commission, each of whom shall act as such probation officer in the judicial circuit in which or the probation district to which he shall have been appointed, and who shall receive such compensation as the boards of supervisors of the several counties shall provide. In cities having a municipal court, OR recorder's court ~~or police court,~~ the judge or judges of said courts may recommend a chief probation officer and may also recommend assistant probation officers, each of whom may be appointed by the Michigan corrections commission, and shall act as such probation officer within the limits of the territorial jurisdiction of such courts, or in the probation district to which he shall have been appointed, and who shall receive such compensation as the board of supervisors of the several counties or the common councils of the several

counties or the common councils of the several cities may provide. In cities where there are 2 or more courts each having different jurisdiction the judge of each court may recommend the probation officer or officers for his own court, and where there are 2 or more judges of any such court, they shall jointly recommend the probation officer or officers for their own court. In counties where the provisions of Act No. 370 of the Public Acts of 1941, as amended, being sections 38.401 to 38.427 of the Compiled Laws of 1948, are in force, the probation officers of the recorder's court and of the circuit court, after appointment, shall be subject to such rules as now apply or may be adopted respecting vacations and sick leave of classified employees; such probation officers shall neither be considered in the classified or unclassified civil service but shall be exempt from Act No. 370 of the Public Acts of 1941, as amended, being sections 38.401 to 38.427 of the Compiled Laws of 1948, except for the purposes of this act. In counties adopting the provisions of Act No. 370 of the Public Acts of 1941, as amended, being sections 38.401 to 38.427 of the Compiled Laws of 1948, each probation officer of the recorder's and of the circuit courts shall be credited with an accumulated

sick leave reserve in the same manner as the classified employees of the county, based on the date of original appointment subsequent to December 1, 1937, if there is no break in service; probation officers with a break in service shall be credited with accumulated sick leave reserve from date of appointment following their last break in serve. The term of office of probation officers presently serving or appointed in accordance with the provisions of this section shall be until removed for cause by the appointing judges after a hearing.

COMMENT: Police courts are abolished, M.C.L. §600.9921. M.C.L. §600.8314 governs District Court probation departments so no reference to district courts need be added to this section.

Section 771.12 Probation officers; payment of salary and expenses; time, source, method.

Sec. 12. The salary and necessary expenses of the chief probation officer and each assist probation officer shall be paid monthly out of the treasury or treasuries of the county or counties composing the circuit within which such probation officer or officers shall act, where provision has been made by the board of supervisors of such county or counties for their payment; if such probation officer is appointed by a

criminal court of record of general jurisdiction of any city, out of the treasury of the county in which said city is located, where provision for their payment has been made by the board of supervisors of the county in which said city is located; if said probation officer is appointed by a municipal ~~or police~~ court out of the treasury of the city in which such municipal ~~or police~~ court is located, where provision for payment has been made by the commission or common council of such city. Said salary and expense shall be paid by the city or county treasurer upon an order of the clerk of the court, properly audited by the officer or board of the city or county in whom the power or duty of auditing accounts is vested.

COMMENT: Police courts are abolished, M.C.L. §600.9921.

Chapter XII -- Proceedings To Prevent Crime

Section 772.1 Preservation of public peace; laws, powers to execute.

Sec. 1. The justices of the supreme court, the several circuit judges, judges of courts of record having jurisdiction of criminal causes, ~~circuit court commissioners, all mayors and recorders of cities, and all justices of the peace,~~ JUDGES OF

THE RECORDER'S COURT OF THE CITY OF DETROIT, JUDGES OF THE DISTRICT COURT AND JUDGES OF MUNICIPAL COURTS shall have power to cause all the laws made for the preservation of the public peace to be kept and in the execution of this power may require persons to give security to keep the peace in the manner provided in this chapter.

COMMENT: This provision is the first in a series dealing with peace bonds. The amendment does not alter the powers of judges of currently existing courts, but simply completes the listing of specific courts. Municipal courts, since they have the authority of justices of the peace, presently have authority to issue peace bonds pursuant to M.C.L. §772.1. District and recorder's court judges have authority under M.C.L. §772.1 both through the justice court reference and the reference to "courts of record having jurisdiction of criminal causes." In M.C.L. §772.1, unlike other sections of the Code, a reference to "magistrate" could not be substituted for the current reference to justices of the peace. Under the general definition in M.C.L. §761.1 (f), the term "magistrate" ordinarily includes only judges of the district court, municipal courts and recorder's court, but subsequent provisions in this series on peace bonds use the term "magistrate" to refer to all of the officials named in M.C.L. §772.1 (i.e., as including circuit judges and justices of the supreme court). See M.C.L. §772.4.

The reference in M.C.L. §772.1 to the circuit court commissioner is eliminated, since that office is abolished, M.C.L. §600.9921(b). The reference to mayors is also eliminated since courts are available. See also the commentary on the amendment of M.C.L. §765.1.*

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* The deletion of the reference to mayors may not eliminate their authority to grant peace bonds since mayors remain conservators of the peace, M.C.L. §87.2, who traditionally had such authority. See In re Sanderson, 289 Mich. 165 (1939).

Section 772.4 Trial; recognizance to keep peace.

Sec. 4. When the party complained of is brought before the magistrate, he may demand that the truth of the accusation shall be determined either by a trial before such magistrate, or a jury; and the trial thereof, and the selection of a jury shall be as in ~~criminal cases, which justices of the peace~~ MISDEMEANOR PROSECUTIONS. ~~are authorized to try, and~~ If the magistrate or jury upon such trial shall find the accused guilty, the magistrate may require the accused to enter into a recognizance, with sufficient sureties, to be approved by such magistrate, in such sum as he shall direct, to keep the peace towards all the people of this state, and especially towards the person requiring such sureties, for such term as he may order not exceeding 2 years; and it shall be competent for the magistrate or the jury to find and return a special verdict that the complaint and accusation are goundless or malicious, and if they shall so find, it shall be the duty of the magistrate to enter such finding or verdict upon his docket.

COMMENT: This is another in the series of provisions governing peace bonds. Although the provision refers to "magistrates," that reference apparently includes all the judges of the courts referred to in M.C.L. §772.1, rather

than just those courts of limited jurisdiction.* To provide some point of reference for determining the appropriate procedure, without regard to the level of court involved, section 772.4 currently provides that the procedure in peace bond cases will be the same as that in "criminal cases which justices of the peace are authorized to try. The proposed amendment would substitute a reference to "misdemeanor prosecutions" for this current reference to cases triable by a J.P.. The substitute does not refer solely to prosecutions for J.P. offenses (i.e., 90 day misdemeanors) because the procedure utilized in the trial of J.P. misdemeanors no longer differs from that utilized for non-J.P. misdemeanors (i.e., those punishable by more than 90 days but no more than one year). Both levels of misdemeanor are now tried in municipal courts and district court. Recorder's court does place the more serious misdemeanors on a separate docket, but the recorder's court trial procedure and jury selection procedure, as controlled by statute, should not differ for the two types of misdemeanors.

It should be noted that the reference in §772.4 to employing the same procedures as that in J.P. offenses does not provide absolute uniformity since it apparently refers to the procedures employed in the particular local court which would be trying J.P. offenses. The method of jury selection accordingly would vary depending upon whether the case arose in a district in which 90 day offenses were tried before recorder's court, a municipal court, or a J.P. court. The proposed amendment does not change this requirement, except that the reference will now be to the district court, municipal court, or recorder's court, each of which continues to have a separate jury selection system. See commentary on the repeal of M.C.L. §§774.12-774.18.

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* M.C.L. §761.1(g) provides that "magistrate" shall include judges of the district court, municipal courts, and judges of recorder's court so designated, and ordinarily the term is used in the Code only to refer to those judges. There are a few places, however, where the term is used to cover a broader range of judges. In M.C.L. §766.2, this broader reference is noted specifically. In the peace bond provisions, it is suggested by the structure of the provisions.

Section 772.8 Payment of costs when no order made; bond to keep peace.

Sec. 8. When no order respecting the costs is made by the magistrate, they shall be allowed and paid in the same manner as courts ~~before justices~~ in ~~criminal~~ MISDEMEANOR prosecutions; but in all cases where a person is required to give security to keep the peace, the court or magistrate may further order that the costs of prosecution, or any part thereof, shall be paid by such person, who stand committed until such costs are paid or he is otherwise legally discharged.

COMMENT: This is another in the series of peace bond provisions. Like M.C.L. §772.4, the procedure regarding costs is tied to that for prosecutions of offenses formerly tried before justices and the proposed amendment is similar to that suggested for M.C.L. §772.4.

Section 772.9 Appeal to circuit court; right.

Sec. 9. Any person aggrieved by the order of any ~~justice of the peace~~ MUNICIPAL COURT requiring him to recognize as aforesaid may, on giving the recognizance to keep the peace required by such order, appeal to the circuit court for the same county.

COMMENT: This provision apparently authorizes appeal by trial de novo from a peace bond order. Cf. M.C.L. §§774.34,

600.7701. The appeal by trial de novo has been retained only for municipal courts, M.C.L. §§774.34-.45. Accordingly, the phrase "justice of the peace" is replaced by a reference only to municipal courts.

Section 772.10 Appeal to circuit court; disposal of case.

Sec. 10. The court before which such appeal is prosecuted may affirm the order of the ~~justice~~ JUDGE or discharge the appellant or may require the appellant to enter into a new recognizance with sufficient sureties, in such sum and for such time, not exceeding 2 years, as the court shall think proper and may also make such order in relation to the costs of the prosecution as may be deemed just.

COMMENT: See comment on the amendment of M.C.L. §772.9.

Section 772.11 Appeal to circuit court; effect of failure to prosecute.

Sec. 11. If any party appealing shall fail to prosecute his appeal, his recognizance shall remain in full force and effect, as to any breach of the condition, without an affirmation of the judgment or order of the ~~justice,~~ JUDGE, and shall also stand as a security for any costs which shall be ordered by the court appealed to, to be paid by the appellant, a condition to that effect to be incorporated in all recognizances given under section 8 of this chapter.

COMMENT: See commentary on the amendment of M.C.L. §772.9.

Section 772.12 Discharge of person committed upon giving recognizance.

Sec. 12. Any person committed for not finding sureties, or refusing to recognize, as required by the court or magistrate, may be discharged by any judge~~, circuit court commissioner or justice of the peace~~ on giving such security as was required.

COMMENT: This is another in the series of provisions on peace bonds. The offices of circuit court commissioner and justice of the peace are abolished, M.C.L. §600.9921. Since the judges of recorder's court, municipal court, and district court are appropriately described as "judges," no additional language is needed to substitute for deletion of the reference to justices of the peace.

Section 772.15 Surrender of principal by surety; effect.

Sec. 15. Any surety in a recognizance to keep the peace, shall have the same authority and right to take and surrender his principal as in other criminal cases, and upon such surrender shall be discharged and exempt from all liability for any act of the principal subsequent to such surrender (except as to costs on any appeal taken by the principal in the recognizance) which would be a breach of the condition of the recognizance; and the person so surrendered may recognize anew

with sufficient sureties, before any ~~justice of the peace or circuit court commissioner~~ JUDGE OF THE DISTRICT COURT, A MUNICIPAL COURT OR THE RECORDER'S COURT OF DETROIT for the residue of the term, and shall thereupon be discharged.

COMMENT: This is another of the peace bond provisions. References to circuit court commissioner and justice of the peace are deleted since those offices are abolished, M.C.L. §600.9921. As in M.C.L. §772.1, the reference to justices of the peace is replaced by reference to the three courts exercising jurisdiction formerly exercised by justices of the peace. In recorder's court, peace bond authority presumably would be exercised by those judges designated to sit as magistrates, but a special reference to that assignment would unnecessarily complicate the provision. The term "magistrate" is not used because the peace bond provisions use that term to refer to a broader range of the judiciary then M.C.L. §761.1(f). See the commentary on the amendment of M.C.L. §772.4.

Chapter XIII -- Proceedings For The Discovery Of Crime

Section 773.1 Inquest by ~~justice of the peace~~; certain death cases.

Sec. 1. ~~Justices of the peace shall, subject to the provisions of this chapter, take inquests upon the view of the dead bodies of such persons as shall have come to their death suddenly, or by violence, and of such persons as shall have died in prison.~~ A MAGISTRATE HOLDING AN INQUEST IN ACCORDANCE WITH THE PROVISIONS OF ACT NO. 181 OF THE PUBLIC

ACTS OF 1953, AS AMENDED, BEING SECTIONS 52.201 to 52.216 OF THE COMPILED LAWS OF 1970, SHALL ADHERE TO PROCEDURES PROVIDED IN THIS CHAPTER.

COMMENT: This is the first provision in Chapter XIII on inquests. Notwithstanding M.C.L. §773.1, M.C.L. §52.207 provides the only current authority to conduct inquests. See Introductory Memo at pp. 35-36. The amendments proposed for this Chapter are designed to accomodate the procedural provisions of the chapter to inquests conducted under the authority of M.C.L. §52.207. Initially, M.C.L. §773.1 is rewritten to clearly tie the chapter to M.C.L. §52.207.

M.C.L. §52.207 permits inquests to be conducted "by a district court judge or municipal court judge." The reference to "municipal court" apparently includes recorder's court, which is a municipal court of record. Accordingly the proposed amendment refers to inquests conducted by magistrates. Under M.C.L. §761.1(f), the term "magistrate" includes judges of the district court, municipal courts, and designated judges of recorder's court.

Section 773.2 Inquest by ~~justice of the peace~~; petition and summons for jury.

Sec. 2. ~~As soon as any justice of the peace shall have notice of the dead body of any person found or lying within the county, who is supposed to have come to his death in any manner described in the preceding section and the petition of not less than 5 citizens, none of whom shall be a constable or deputy sheriff of the township, city or village, in which the dead body may be lying, shall have been filed with said justice praying that an inquest be made in such case or on~~

~~the written request of the prosecuting attorney of the county, or the attorney general,~~ ON DETERMINATION THAT AN INQUEST SHALL BE HELD, THE MAGISTRATE ~~he~~ shall forthwith summon 6 good and lawful ~~men~~ PERSONS, electors of the county, to appear before him, at such place as he shall appoint within said county.

COMMENT: The prerequisites for holding an inquest are now established solely by M.C.L. §52.207 (requiring a "determination" of the prosecuting attorney or medical examiner). Accordingly, those provisions of M.C.L. §773.2 describing the former procedures for initiating an inquest are replaced by a general reference to a "determination that an inquest shall be held." The remaining provision on summoning the jury has been retained. See Introductory Memo at p. 36. The requirement of a six person jury was imposed both for inquests held by coroners and by justices. The description of the jurors' qualifications in §773.2 is selected over the description for the jurors summoned by a coroner, M.C.L. §773.31, as the former description is more concise without sacrificing clarity.

Section 773.3 Inquest ~~by justice of the peace~~; jurors, oath.

Sec. 3. When the jurors thus summoned have appeared, the ~~justice of the peace~~ MAGISTRATE shall call over their names and ~~there, in view of the dead body,~~ shall administer to them an oath or affirmation in substance as follows: "You do solemnly swear (or affirm as the case may be), that you will diligently inquire in behalf of the people of this state, when, in what manner and by what means, the ~~person whose body~~

~~lies here dead;~~ DECEASED came to his death and that you will make a true inquest thereof according to your knowledge and such evidence as shall be laid before you." THE JURORS NEED NOT VIEW THE BODY OF THE DECEASED.

COMMENT: Since inquests are now conducted by judges of recorder's court, the district court, or municipal courts, the term "magistrate" has been substituted for "justice of the peace."

Under M.C.L. §773.3, jurors in J.P. inquests were required to view the body of the deceased, but M.C.L. §773.21; governing coroner's inquests, specifically provided that the jurors "need not view the body of the deceased." The proposed amendment would adopt the latter procedure.

Section 773.4 Inquest ~~by justice of the peace~~; issuance of subpoena for witness or surgeon; chemist employed, compensation.

Sec. 4. The ~~justice of the peace~~ MAGISTRATE may issue subpoenas for witnesses returnable forthwith or at such time and place as he shall therein direct; and the attendance of the persons served with such subpoenas may be enforced in the same manner and they shall be subject to the same penalties as if they had been served with a subpoena in behalf of the people of this state, to attend ~~a justice's court~~ A TRIAL BEFORE THAT MAGISTRATE. Provided, That in all such cases it shall be lawful for the magistrate holding any such inquest,

to require by subpoena the attendance of a competent physician or surgeon for the purpose of making a post-mortem examination and of testifying as to the result of the same; and he may also employ a chemist in cases affording reasonable ground of suspicion that death has been produced by poison and the amount of compensation for the attendance and services of such physician, surgeon or chemist shall be audited and allowed by the board of supervisors of the proper county, or board of county auditors in counties having such board.

COMMENT: Again the term "magistrate" has been substituted for "justice of the peace," in describing the official conducting the inquest.

The current provision ties the J.P.'s subpoena authority at the inquest to the general subpoena authority of the J.P. court. The amendment would tie the inquest subpoena authority to the general subpoena authority of the particular magistrate conducting the inquest. It directs the magistrate, whether district judge, municipal judge, or recorder's court judge, to look to the provisions governing the authority of his own court. With adoption of the proposed cross-reference provision, the subpoena power of all three courts will be the same. See the commentary on the repeal of M.C.L. §774.9.

The proposed alteration of the subpoena power provision may provide broader authority than exists under the current law. Subpoena authority for justices in a criminal proceeding was the same as that for justices in a civil proceeding, M.C.L. §774.10. That civil authority was limited to witnesses within the same county or within 30 miles of trial if in another county. See M.C.L. §600.7001, repealed by P.A. 1974, No. 297, §2. The current subpoena authority of the district court and the recorder's court, on the other hand, extends throughout the state. See the commentary on the amendment of M.C.L. §766.11. It seems likely that, with the adoption of

M.C.L. §52.201, granting these courts authority to hold inquests, the legislature did not intend to limit their inquest subpoena power to that formerly held by justices of the peace. The basic policy of M.C.L. §773.4 was to give the court holding the inquest the same subpoena power it normally possesses for criminal trials. The proposed amendment provides broader subpoena authority only through the application of that policy.

Section 773.5 Inquest ~~by justice of the peace~~; witnesses oath.

Sec. 5. An oath or affirmation to the following effect shall be administered to each witness by the ~~justice of the peace~~: MAGISTRATE: "You do solemnly swear (or affirm) that the evidence you shall give at this inquest, concerning the death of the ~~person here lying dead~~; DECEASED shall be the truth, the whole truth and nothing but the truth."

COMMENT: Again "magistrate" is substituted for "justice of the peace." Also, since jurors would no longer be required to view the body of the deceased (see commentary to §773.3), the reference to the presence of the body is deleted.

Section 773.6 Inquest ~~by justice of the peace~~; supposed murder or manslaughter cases, reduction of testimony in writing.

Sec. 6. In all cases where any murder or manslaughter is supposed to have been committed, the testimony of all witnesses examined before the inquest, shall be reduced to writing by the

~~justice of the peace;~~ MAGISTRATE, or some other person by his direction and subscribed by the witnesses.

COMMENT: "Magistrate" replaces "justice of the peace." This provision may be unnecessary. It may be a product only of the limitation of J.P. courts in transcribing testimony. In that case, it could be repealed since today sound recording presumably would be used for inquests as for trials. But perhaps there is a special value in having the witness read and sign his testimony. Assuming that the legislature may have had that purpose in mind, the provision is retained -- perhaps out of undue caution.

Section 773.7 Inquest ~~by justice of the peace~~; inquisition by jury; certificate, contents.

Sec. 7. The jury, ~~upon the inspection of the dead body, and~~ after hearing the testimony of the witnesses and making all needful inquiries, shall draw up and deliver to the ~~justice of the peace~~ MAGISTRATE their inquisition under their hands, in which they shall find and certify when, in what manner and by what means the deceased came to his death, and his name, if known, together with all the material circumstances attending his death; and if it appears that he came to his death by unlawful means, the jurors shall forthwith state who if known was guilty, either as principal or accessory, or was in any manner the cause of his death.

COMMENT: Again, the reference to the jury viewing the body is deleted. See commentary on the amendment of M.C.L. §773.3. "Magistrate" also replaces "justice of the peace."

Section 773.8 Inquest ~~by justice of the peace~~; form of inquisition.

Sec. 8. Such inquisition, to be called a ~~coroner's~~ AN inquest, may be in substance in the following form:

County of .....,ss.

An inquisition taken at ..... in said county, on the ..... day of ..... before ..... ~~one of the justices of the peace of the said county;~~ (INSERT REFERENCE TO THE APPROPRIATE DISTRICT COURT, MUNICIPAL COURT OR THE RECORDER'S COURT OF DETROIT) ~~upon the view of the body of ..... (or a person); there lying dead;~~ by the oaths of the jurors whose names are hereto subscribed, who being sworn to inquire on behalf of the people of this state, when, in what manner and by what means ~~the said~~ ..... (or a person) came to his death, upon their oaths, say (then insert when, where, in what manner, and by what means, persons, weapons or instruments he was killed or came to his death). In testimony whereof the said ~~justice of the peace~~ JUDGE and the jurors of this inquest, have hereunto set their hands the day and year aforesaid.

COMMENT: The reference to viewing the body is deleted. See the commentary on amending §773.3. "Justice of the peace" is replaced here by reference to the particular court involved.

Section 773.9 Inquest ~~by justice of the peace~~; written evidence and examination returned to circuit court, certain cases.

Sec. 9. If the jury find that any murder, manslaughter or assault had been committed upon the deceased, the ~~justice of the peace~~ MAGISTRATE shall forthwith return to the circuit court of said county, OR THE RECORDER'S COURT OF DETROIT IF THE OFFENSE WAS COMMITTED IN DETROIT, the inquisition, written evidence and examinations ~~by him~~ taken BY THE MAGISTRATE.

COMMENT: "Justice of the peace" is replaced by "magistrate." Where the offense was committed in the city of Detroit, the inquisition presumably should be presented before the recorder's court since it has jurisdiction as to the offense.

Section 773.10 Inquest ~~by justice of the peace~~; issuance of warrant for accused.

Sec. 10. If any person charged by the inquest with having committed any such offense shall not be in custody, the ~~justice of the peace~~ MAGISTRATE shall have power to issue process for his apprehension, and such warrant shall be made returnable before him or any other magistrate or court having cognizance of the case, who shall proceed thereon in the manner that is required of magistrates in like cases.

COMMENT: Magistrates, under M.C.L. §764.1, would have authority to issue arrest warrants without this section. It is not clear whether the authority given by this section is limited by the proviso of §764.1 requiring prosecutorial approval.

Section 773.11 Inquest ~~by justice of the peace; disposal of body;~~ expenses and fees.

Sec. 11. ~~When any justice of the peace shall take an inquest upon the dead body of a stranger, or being called for that purpose shall not think it necessary on view of such body that an inquest should be taken, he shall then notify the county department of social welfare, who shall cause the body to be decently buried as that of an indigent person.~~ All other expenses and fees OF THE INQUEST shall be paid from the general fund of the county in which the inquisition was taken. When an inquest is held on the body of any person who dies in any prison or public reformatory of this state, the expense of such inquest shall be audited and paid by the institution, as other charges against the institution are audited and paid.

COMMENT: The first sentence of this section is not necessary since medical examiners are now directed to take charge of the body. See M.C.L. §52.205.

Section 773.15 Inquest ~~by justice of the peace~~; body once buried; REQUEST, complaint, examination, disinterment, subsequent procedure.

Sec. 15. ~~Whenever~~ UPON PRESENTATION TO A MAGISTRATE OF A WRITTEN REQUEST OF THE PROSECUTING ATTORNEY OR THE MEDICAL EXAMINER AND A WRITTEN complaint ~~in writing and upon oath shall~~ be made to any justice of the peace MADE ON OATH AND STATING that ~~any~~ A person has died and ~~that such person was~~ IS buried WITHin the ~~county where such justice resides~~ MAGISTRATE'S JURISDICTION, and specifying in what township or city said person ~~was~~ IS buried, and ~~containing a further statement~~ STATING that the complainant knows or has good reason to believe that the ~~said~~ deceased person came to his or her death by means of poison or violence, or in consequence of any criminal act ~~committed by any person known or unknown; it shall be the duty of such justice to~~ THE MAGISTRATE SHALL examine the complainant and such witnesses as may be produced by him on oath and reduce the same to writing. ~~and if such justice~~ IF THE MAGISTRATE shall be satisfied from such examination that there is just cause to believe that the deceased person named or described in such complaint came to his or her death by means of poison or

violence, or in consequence of any criminal act, and that a post-mortem examination of the body of ~~such~~ THE deceased person is necessary or will materially aid in the prosecution of any person charged or who may be charged with any criminal act resulting in the death of such deceased person, ~~it shall be the duty of such justice of the peace to~~ THE MAGISTRATE SHALL issue an order under his hand, directed to the sheriff of the county, commanding such sheriff, in the name of the people of the state of Michigan, forthwith to proceed with his under sheriff, or 1 of his deputies, to the place where such body was buried, and to disinter and remove the body to some suitable and convenient place in the ~~township or city~~ MAGISTRATE'S JURISDICTION where ~~such~~ THE body was buried for the purpose of holding an inquest over the same~~;~~. ~~and said justice~~ THE MAGISTRATE shall also proceed at once to summon a jury of inquest in the same manner as is in this act provided and as soon as the sheriff shall have removed such body to a suitable place as above provided, the ~~justice~~ MAGISTRATE as well as the jury so summoned, shall proceed in the same manner and shall have and exercise the same powers and duties as prescribed in this act.

COMMENT: The term "magistrate" is substituted for "justice of the peace." In addition, the procedure for initiating a disinterment is amended to follow the procedure required under M.C.L. §52.201 for initiating an inquest. M.C.L. §773.15 currently does not specify the person who must file a complaint leading to a disinterment. Since M.C.L. §52.201 limits inquest applications to the medical examiner and prosecutor, the same limitation should apply to disinterments, which will be followed by inquests.

The proposed amendment retains the requirement that the magistrate hold an examination to determine whether there is "just cause" for a disinterment. Because of the additional disruptive impact of a disinterment, the determination of the prosecutor or medical examiner alone is not sufficient. An inquest will automatically follow a disinterment ordered by the magistrate.

Chapter XIV: ~~Jurisdiction and~~ Procedure ~~of Justice Courts in Criminal~~ MISDEMEANOR Cases

Section 774.1a MUNICIPAL COURTS

Sec. 1a. IN ALL MATTERS OF CRIMINAL JURISDICTION, INCLUDING PRETRIAL PROCEDURES, ISSUANCE, SERVICE, AND ENFORCEMENT OF WRITS, SUBPOENAS, AND OTHER PROCESS, CONTEMPTS, CONDUCT AT TRIALS, COSTS AND TAXATION OF COSTS, AND ENTRY AND ENFORCEMENT OF JUDGMENTS, THE MUNICIPAL COURTS SHALL BE GOVERNED BY THE STATUTES AND SUPREME COURT RULES APPLICABLE TO THE DISTRICT COURT, EXCEPT WHERE SUCH PROVISIONS CONFLICT

WITH THE PROVISIONS OF STATUTES OR SUPREME COURT RULES SPECIFICALLY APPLICABLE TO THE MUNICIPAL COURTS.

COMMENT: This is a new section. Certain aspects of criminal procedure are governed by provisions in the Criminal Procedure Code. These provisions generally are phrased so as to encompass proceedings in all courts within the state. Other aspects of criminal procedure (e.g., subpoena authority, announcement of verdict) are common to both criminal and civil procedure. On these matters, the district court and recorder's court can look to Supreme Court Rules and various statutes specifically applicable to these courts in both civil and criminal matters. There are few similar provisions relating to municipal courts. The J.P. provisions, which theoretically could be utilized as procedural guidelines for municipal courts, were so geared to the special characteristics of the J.P. court as to be inappropriate for the current municipal courts. Accordingly, these J.P. provisions have either been repealed in the Technical Amendments of the R.J.A. (Act No. 297 of 1974) or will be repealed in this proposed bill. In the civil area, M.C.L. §600.6502, adopted as part of the Technical Amendments Act, ties municipal court procedure to the district court provisions where there are no specific municipal court provisions in the area. Proposed M.C.L. §774.1a takes the same approach for criminal proceedings. See further the Introductory Memo at pp. 32-34.

Section 774.4 MISDEMEANORS; complaint~~;~~, authority of clerk~~;~~, warrant, issuance, request.

Sec. 4. Upon complaint made to any ~~justice of the peace~~ MAGISTRATE by any ~~constable~~ PEACE OFFICER or other person that ~~any offense cognizable by a justice of the peace~~ A MISDEMEANOR has been committed within the county, he shall examine the complainant on oath and witnesses produced by him. He shall reduce the complaint to writing and cause the same to be subscribed by

the complainant, and if it shall appear that such offense has been committed, the ~~justice~~ MAGISTRATE shall issue his warrant reciting the substance of the complaint, and requiring the officer to whom it is directed forthwith to arrest the accused and bring him before such ~~justice~~ MAGISTRATE or some other ~~justice~~ MAGISTRATE of the same county to be dealt with according to law. In the same warrant he may require the officer to summon such witnesses as shall be named therein, to appear and give evidence at the trial. ~~Any justice of the peace~~ A MAGISTRATE ~~who is by law provided with a clerk~~ may issue warrants for ~~offenses cognizable by the justice~~ A MISDEMEANOR based upon a complaint taken and signed before the clerk or any deputy clerk of the court. A clerk or deputy clerk has the same power and authority to take complaints for ~~offenses cognizable by the justice~~ A MISDEMEANOR as is possessed by such ~~justice~~ MAGISTRATE, and upon such a complaint being presented to the ~~justice~~ MAGISTRATE he may in his discretion take the testimony of other witnesses or further testimony of the complaining witness; and the procedure thereafter shall be the same as in other cases.

A ~~justice of the peace~~ MAGISTRATE shall not issue warrants ~~in criminal cases~~ FOR A MISDEMEANOR except where warrants are requested by (a) a sheriff or his deputy, a village marshal, an

officer of the police department of an incorporated city or village or an officer of the Michigan state police for traffic or motor vehicle violations, or (b) agents of the state highway department, a county road commission or of the public service commission for violations of Act No. 300 of the Public Acts of 1949, as amended, being sections 257.1 to 257.923 of the Compiled Laws of 1948; Act No. 254 of the Public Acts of 1933, as amended, being sections 475.1 to 479.20 of the Compiled Laws of 1948, the enforcement of which has been delegated to them, until an order in writing allowing the same is filed with such ~~justice~~ MAGISTRATE and signed by the prosecuting attorney of the county or unless security for costs shall have been filed with the ~~justice~~ MAGISTRATE.

COMMENT: This section, detailing the procedure for issuance of an arrest warrant for "an offense not cognizable by a justice of the peace," is the counterpart of M.C.L. §764.1 and §766.2, which provide for issuance of warrants for felonies. Throughout the provision, the term "magistrate" has been substituted for "justice of the peace." "Offense cognizable by a justice of the peace" has been replaced by "misdemeanor" to conform with the proposed changes in M.C.L. §§764.1, 764.8 and 766.2. "Constable" is replaced by "peace officer" to bring the terminology into conformity with current statutory usage. The reference to these courts having clerks is deleted since the remaining courts all may have clerks.

The second paragraph of M.C.L. §774.4 apparently was not limited to warrants for J.P. offenses, but applied to all warrants issued by justices. The same basic requirement of prosecutor approval is found in M.C.L. §764.1, which applies to felony warrants. M.C.L. §764.1 also includes similar exceptions to that requirement (although the exceptions in

M.C.L. §764.1 are not as extensive since they do not include exceptions relevant only to misdemeanor warrants). Since the second paragraph of M.C.L. §774.4 basically duplicates §764.1, that paragraph is amended to apply only to misdemeanor warrants in keeping with the general coverage of Chapter XIV as amended.

As amended, M.C.L. §774.4 permits a magistrate to issue a warrant for any offense committed in the county. It thereby grants municipal, district, and recorder's court judges warrant authority in misdemeanor cases that will extend beyond the limits of their trial jurisdiction (except where the district includes the entire county). This does not constitute a change in current policy or law. Under M.C.L. §774.4, the justice of the peace exercised similar authority beyond his trial jurisdiction. District, municipal, and recorder's court judges have retained this authority of the J.P. via cross-reference provisions. See Introductory Memo at pp. 25-26. Statutory provisions limiting the jurisdiction of these courts to crimes committed in particular localities apparently refer only to trial jurisdiction. See M.C.L. §600.9928, 600.8312, 726.11. Thus, in dealing with felonies, magistrates have been given the authority to issue warrants for offenses committed anywhere within the state. See M.C.L. §764.1.

Section 774.5 Reading charge to accused; entry of plea.

Sec. 5. The charge made against the accused, as stated in the warrant of arrest, shall be distinctly read to him at the time of his arraignment and he shall be required to plead thereto, which plea the court shall enter in its minutes; if the accused refused to plead, the ~~court~~ MAGISTRATE shall enter the fact with a plea of not guilty in behalf of such accused. ~~in its minutes.~~

COMMENT: This is the first of several provisions dealing with the first appearance of a person arrested for a misde-

meanor and brought before the magistrate who issued the warrant or another magistrate of the same court. Where the arrested person is charged with a misdemeanor, a preliminary examination is not provided, see M.C.L. §766.4, and a procedure somewhat different than that for felony cases is followed. M.C.L. §§774.5-774.8 sets forth that procedure. The proposed amendment of M.C.L. §774.5 is limited to substituting the term "magistrate" for the reference to "court" (see also M.C.L. §774.4) and to eliminate the reference to "minutes," which was based upon J.P. procedure.

Section 774.6 Plea of not guilty; waiver of jury; trial.

Sec. 6. If ~~the plea of~~ the accused ~~be~~ PLEADS not guilty OR REFUSES TO PLEAD TO THE CHARGE, ~~and he waive trial by jury~~ the ~~said court~~ MAGISTRATE shall SET A DATE FOR TRIAL. ~~proceed to try such issue and to determine the same according to the evidence which may be produced against and in behalf of such accused.~~

COMMENT: This is the second in the series of provisions dealing with the first appearance of the accused on presentation before the magistrate. It is one of two provisions that direct the J.P. to conduct a trial following a not guilty plea. This section currently refers only to cases where a jury is waived. The other provision, M.C.L. §774.8, applies to both jury and non-jury trials. The proposed amendment would combine the two provisions. This would permit the repeal of M.C.L. §774.8, which otherwise refers only to procedures that do not apply to current courts. In combining the two provisions, the proposed amendment deletes the reference to jury waiver and adds a reference to the person who stands mute. Under standard practice, a plea of not guilty is entered on the record when the person stands mute. See GCR 785.6. While M.C.L. §774.6 speaks only of a "plea" of not guilty, M.C.L. §774.8, refers specifically to persons who "refuse to plead."

The current M.C.L. §774.6 references to proceeding to trial and to hearing evidence on both sides also are deleted since they relate to the timing and procedure at trial -- matters adequately covered in the general provisions on trial procedure. See the Introductory Memo at pp. 32-34.

Section 774.7 Plea of guilty; rendition of judgment.

Sec. 7. If the accused shall plead guilty to such charge the ~~court~~ MAGISTRATE shall ~~thereupon~~ render judgment thereon.

COMMENT: This is the third section in the series on the first appearance. The provision merely directs the court to render judgment on a guilty plea. The reference to "thereupon" rendering judgment is deleted since sentence need not be imposed immediately.

Section 774.34 Appeal to circuit court, recognizance, discharge of defendant, procedure, return.

Sec. 34. The person charged with and convicted by any ~~justice of the peace~~ MUNICIPAL JUDGE of any offense, may appeal to the circuit court even though the sentence may have been suspended or the fine and costs have been paid. The person shall enter into a recognizance to the people of the state in a sum not less than $50.00 nor more than $500.00 within 10 days after the rendition of the judgment, with 1 or more sureties, conditioned to appear before the court on the first day of the next term thereof to prosecute his appeal to effect and to abide the orders and judgment of the court. The ~~justice~~ JUDGE from whose judgment an appeal is taken shall thereupon discharge

the person so convicted or order his discharge, shall make a special return of the proceedings had before him and shall file the complaint, warrant and the return together with the recognizance and the testimony taken by him in the circuit court on or before the first day of the circuit court next held for the county. If there are any objections to the complaint, warrant or other proceedings and the decision of the ~~justice~~ JUDGE thereon which would not be allowed to be made on the trial of the appeal, the same may be set forth specifically in such recognizance. Such ~~justice~~ JUDGE shall in addition to his return as required by this section, make a full and complete return as to all matters specifically mentioned in such recognizance, and the same shall be deemed issues of law for the determination of such circuit court.

COMMENT: This is the first in a series of provisions governing appeals from justice courts to the circuit court. The appeal is by trial de novo in the circuit court. The provision has no relevance to appeals from the district court and the recorder's court. Appeals from the district court are governed by M.C.L. §§600.8341 and 600.8342. Appeals from recorder's court of Detroit are governed by M.C.L. §726.24. In both instances, appeal is on the record, rather than by trial de novo.

Appeals from municipal courts in criminal cases are to be governed "as is provided by law for appeals in criminal cases from justice courts or as otherwise provided by law," M.C.L. §735.523; M.C.L. §730.136. Since the legislature has not provided otherwise, these sections control and municipal court appeals remain by trial de novo in the circuit court. Accordingly, the J.P. appeals provisions for trial de novo

appeals must be retained for use in municipal court appeals. The provisions are amended, however, to refer to municipal courts.

The J.P. appeals provisions in the R.J.A. also have been retained, since municipal court appeals in civil cases also are tied to J.P. appeals provisions. See M.C.L. §§730.8, 730.9, 730.106, 730.501, 730.528. However, the J.P. appeals provisions in the R.J.A. were not amended to substitute direct references to municipal courts for the references to justices of the peace. See M.C.L. §600.7701 et seq.

Section 774.35 Writ of certiorari; persons to allow, time of application, affidavit.

Sec. 35. A writ of certiorari to remove into the circuit court of the proper county a conviction had before a ~~justice of the peace;~~ MUNICIPAL JUDGE, may be allowed by the circuit judge ~~or the circuit court commissioner~~ on the application of the party convicted. The party desiring such certiorari or someone in his behalf, shall apply for the same within 20 days after such conviction shall have been had and shall make an affidavit specifying the alleged error or errors complained of.

COMMENT: "Justice of the peace" is replaced by a reference to "municipal judge" since the provision now applies only to the municipal court. See commentary to the amendment of M.C.L. §774.34. The reference to the circuit court commissioner also is deleted since that office was abolished, M.C.L. §600.9921.

Section 774.37 Writ of certiorari; service on justice, return by justice.

Sec. 37. The writ of certiorari and affidavit shall be served upon the ~~justice~~ JUDGE before whom such conviction was had within 10 days after said allowance, and the ~~justice~~ JUDGE shall make a return to all the matters specified in such affidavit and shall cause such writ, affidavit and return to be filed in the office of the county clerk of the county within 10 days after the service of such writ.

COMMENT: "Justice of the peace" is replaced by "judge" since the provision now applies only to municipal judges. See commentary to the amendment of M.C.L. §774.34.

Section 774.38 Writ of certiorari; suspension of sentence, release of prisoner, deposit of recognizance.

Sec. 38. After the service of the writ of certiorari as provided in the preceding section, if the party convicted shall enter into recognizance with surety or sureties satisfactory to such ~~justice~~ JUDGE or to the person allowing the certiorari, conditioned that he will appear at the next term of the circuit court to be held in and for said county and abide the order and determination of the court, the ~~justice~~ JUDGE shall order that the sentence be suspended; and if the defendant shall have been committed to jail on such sentence,

the ~~justice~~ JUDGE shall order the jailer to set such prisoner at liberty, who is hereby required to comply with such order. The person receiving such recognizance shall within 20 days thereafter, cause the same to be deposited with the county clerk.

COMMENT: "Justice of the peace" is replaced by "judge" since the provision now applies only to municipal judges. See commentary to the amendment of M.C.L. §774.34.

Section 774.43 Writ of certiorari; judgment; discharge of defendant, execution of sentence.

Sec. 43. If the conviction and judgment of the ~~justice~~ JUDGE be reversed, the circuit court shall discharge the defendant; but if the judgment of such ~~justice~~ JUDGE be affirmed, the said circuit court shall order that such sentence be executed; and if the defendant shall have been let out of prison as hereinbefore provided, he shall be remanded back to such prison for the length of time that remained unexpired of his sentence at the period he was so let out of prison.

COMMENT: "Justice of the peace" is replaced by "judge" since the provision now applies only to municipal judges. See commentary to the amendment of M.C.L. §774.34.

Section 774.44 Writ of certiorari; effect of delay in bringing on cause for argument, order to quash.

Sec. 44. If at any time it shall appear to the said circuit court that the person prosecuting such certiorari has unreasonably delayed bringing on such cause for argument, the court may enter an order to quash such certiorari, and may also direct the sentence of the ~~justice~~ JUDGE to be carried into effect.

COMMENT: "Justice of the peace" is replaced by "judge" since the provision now applies only to municipal judges. See commentary to the amendment of M.C.L. §774.34.

Chapter XV -- Fees

Section 775.13 Witness fees; mileage.

Sec. 13. Whenever any person shall attend any court as a witness in behalf of the people of this state upon request of the public prosecutor, or upon a subpoena, or by virtue of any recognizance for that purpose, he shall be entitled to the following fees: For attending in a court of record, $12.00 for each day and $6.00 for each half day; for attending in a ~~justice court~~ MUNICIPAL COURT or upon an examination, $10.00 for each day and $5.00 for each half day; and for traveling, at the rate of 10 cents per mile in going to and

returning from the place of attendance, to be estimated from the residence of such witness if within the state; if without the state, from the boundary line which witness passed in going to attend the court.

COMMENT: This provision is part of the general chapter on fees in criminal cases. The district court is a court of record, M.C.L. §600.8101, and witness fees for attending it are not dependant upon the reference to the justice court. Recorder's court is also a court of record. Thus, the municipal court is the only court which must be cited in replacing the reference to the justice court.

Section 775.13a Expert witnesses; payment of sum in excess of ordinary witness fee.

Sec. 13a. Whenever any person shall attend any court, ~~including justice or municipal court,~~ as a witness in a criminal case upon request of the public prosecutor, city attorney, or defendant by virtue of any recognizance or subpoena for that purpose, whether at the trial of the case or any other proceedings in the case, to testify as an expert witness, he may be paid as compensation for his services a sum in excess of the ordinary witness fees provided by law. The sum to be awarded shall be determined by the judge before whom the witness appears.

COMMENT: The initial reference in this provision to "any court" made the reference to the justice and municipal courts unnecessary; that reference apparently was included because of the distinction drawn in M.C.L. §775.14 between procedures in

courts of record and other courts. The proposed amendment of M.C.L. §775.14 would eliminate this distinction and therefore the special reference to justice and municipal courts is deleted.

Section 775.14 Expert witnesses; proof of attendance and travel, ~~certificate;~~ payment of fees.

Sec. 14. ~~In courts of record~~ Such witness shall prove his attendance and travel in open court before the clerk~~; and in justice courts before the justice;~~ on the day of trial, or upon an examination, ~~and a certificate thereof from the justice; countersigned by the prosecuting attorney of the county, shall authorize the county clerk to draw an order upon the county treasurer for the payment of the fees of such witnesses attending such justice court as aforesaid; which order shall be paid by the said county treasurer in like manner as witness fees in courts of record are paid;~~ and an order therefor from the clerk of such court ~~of record~~ shall authorize the county treasurer to pay the fees of witnesses attending such court ~~of record~~ as aforesaid in the same manner as the fees of jurors attending such courts are paid.

COMMENT: This provision is a companion to M.C.L. §775.13a. The different procedures for a court of record and justice court were necessary because the justices at one time did not have clerks. Now all the municipal courts (the only court concerned that is not a court of record) have clerks, so the alternative procedure noted in the statute is unnecessary.

Section 775.16 Accused unable to procure counsel; examination, defense, payment by county.

Sec. 16. Whenever any person charged with having committed any felony ~~or misdemeanor not cognizable by a justice of the peace or magistrate and~~ who appears before ~~such justice of the peace or~~ A magistrate without counsel, and ~~who shall~~ HAS not ~~have~~ waived examination upon the charge upon which he appears, such person shall be advised of his right to have counsel appointed for such examination, and if such person states that he is unable to procure counsel, the ~~justice or~~ magistrate shall notify the presiding judge of the circuit court in the jurisdiction of which the offense is alleged to have occurred, and upon proper showing the presiding judge shall appoint some attorney to conduct the accused's examination before ~~a justice or~~ AN examining magistrate and to conduct the defense, and the attorney so appointed shall be entitled to receive from the county treasurer on the certificate of the presiding judge that such services have been duly rendered, such an amount as the presiding judge shall in his discretion deem reasonable compensation for the services performed.

COMMENT: This section deals with the right to counsel at a preliminary examination and the appointment of counsel for preliminary examinations when the defendant is unable to obtain counsel. As preliminary examinations are held now only for

felonies, see M.C.L. §766.4 et seq., the reference to non-J.P. misdemeanors can be deleted. The reference to "justice of the peace" is also removed. No additional reference is added since the courts currently exercising preliminary examination authority are already included by the reference to "magistrate." See M.C.L. §761.1(f).

Section 775.19 Compensation of interpreter; amount, payment.

Sec. 19. Whenever any person shall attend any court as an interpreter for the purpose of interpreting the testimony of any witness given in behalf of the people of this state, or for the purpose of translating or interpreting any writing or document introduced or used in any court in behalf of the people of this state, either upon request of the prosecuting attorney or by and with the consent of the presiding judge ~~or justice of the peace~~, he shall receive such compensation as shall be ordered by said presiding judge. ~~or justice of the peace. The compensation for such interpreter in the justice court shall not exceed the sum of $25.00 for each day and the sum of $15.00 for each half day actually employed.~~ The certificate of the clerk of a court ~~of record or of a justice of the peace~~ stating the amount ordered to be paid as hereinbefore provided, shall authorize the county treasurer to pay the amount therein stated.

COMMENT: Reference to justices of the peace have been removed. No substitute references are necessary since M.C.L.

§775.16 already refers to "any court." The limitation on interpreter's fees for the justice court is no longer relevant. Witness fees provided in the three courts exercising former J.P. jurisdiction are not otherwise distinguished from those provided in courts of record generally. Recorder's court fees are determined by the general provision governing courts of record, M.C.L. §600.2552. District court fees are governed by that section and by M.C.L. §600.8323, which ties those fees to circuit court fees. M.C.L. §600.6502, ties municipal court fees in civil cases to district court fees where no separate provision is made. The same approach would be adopted in criminal cases via the proposed cross-reference provision, M.C.L. §774.1a. See Introductory Memo at pp. 33-35. Cf. M.C.L. §775.13a (treating expert witness fees alike in all courts).

Section 775.19a Compensation of interpreter; appointment for defendant, compensation.

Sec. 19a. If any person is accused of any crime or misdemeanor and is about to be examined or tried before any ~~justice of the peace~~, magistrate or judge of a court of record and it appears to the magistrate or judge that such person is incapable of adequately understanding the charge or presenting his defense thereto because of a lack of ability to understand or speak the English language or inability adequately to communicate by reason of being deaf and/or mute, or that such person suffers from a speech defect or other physical defect which handicaps such person in maintaining his rights in such cause, the ~~justice of the peace~~, magistrate or judge shall appoint a qualified person to act as an interpreter. The

interpreter so appointed shall be compensated for his services in the same amount and manner as is provided for interpreters in section 19 of this chapter.

COMMENT: Reference to justice of the peace is removed. No substitute reference is necessary since the provision already refers to any "magistrate or judge of a court of record."

Section 2. Section 2 of Chapter 2; section 3 of Chapter 4; section 11 of Chapter 5; sections 12, 13, 14, 17, 19, 20, and 21 of Chapter 13; sections 1, 2, 2a, 2b, 3, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 22a, 22b, 22c, 24, 25, 26, 26a, 26b, 26c, 26d, 27, 28, 47, and 48 of Chapter 14; and section 2 of Chapter 15 of Act No. 175 of the Public Acts of 1927, being sections 762.2, 764.3, 765.11, 773.12, 773.13, 773.14, 773.17, 773.19, 773.20, 773.21, 774.1, 774.2, 774.2a, 774.2b, 774.3, 774.8, 774.9, 774.10, 774.11, 774.12, 774.13, 774.14, 774.15, 774.16, 774.17, 774.18, 774.19, 774.20, 774.21, 774.22, 774.22a, 774.22b, 774.22c, 774.24, 774.25, 774.26, 774.26a, 774.26b, 774.26c, 774.26d, 774.27, 774.28, 774.47, 774.48, and 775.2 of the Compiled Laws of 1970 are repealed.

APPENDIX: PROVISIONS TO BE REPEALED

762.2 Jurisdiction; justice of the peace.

Sec. 2. Any justice of the peace is empowered and authorized to perform all official acts and duties and to exercise jurisdiction in criminal causes in any township or city situate in the county within which the justice of the peace was elected and qualified, with the same rights and powers as though performed and exercised within the city or township in which such justice of the peace was elected and qualified.

COMMENT: The geographical limits upon the jurisdiction of justices of the peace are not relevant to the jurisdiction of any surviving court. See, e.g., M.C.L. §600.9928 (3) (municipal courts); M.C.L. §726.11 (recorder's court); M.C.L. §600.8312 (district courts venue limitations).

764.3 Warrant; return, jurisdiction of justice.

Sec. 3. A warrant for the arrest of an accused person, when issued by any justice of the peace in any township or city other than the township or city in which the justice of the peace was elected and qualified, may be returned to and the accused brought before such justice of the peace in the city or township in which the offense was committed, or at the office of such justice of the peace in the city or township in which such justice of the peace was elected and qualified: Provided, That any such justice of the peace may in such warrant direct that the accused person be brought before another qualified justice of the peace within the same county, and in the absence of the justice of the peace who issued the warrant or in case of his inability to attend, the accused person may be brought before another qualified justice of the peace within the same county, which latter justice of the peace may proceed to hear or try the cause and have full jurisdiction thereof.

COMMENT: This provision relates only to justices of the peace and therefore should be repealed. As amended, M.C.L. §774.4 adequately will provide for the return of a misdemeanor warrant and the presentation of the person arrested pursuant to the warrant. M.C.L. §764.8 sets forth similar requirements for felony warrants and persons arrested under such warrants. See generally the commentary on the amendment of M.C.L. §764.8.

765.11 Cash in lieu of bond; justice court cause; acceptance, forfeiture, discharge.

Sec. 11. When under the laws of this state any bond is required in any cause, in any justice court in this state, it shall be lawful for the party from whom such bond is required to deposit cash in lieu thereof. Such security shall be taken and accepted by the justice of the peace and be forfeited or discharged in the same manner as the bond required.

COMMENT: This section is unnecessary, as the posting of cash is authorized by other sections "in any criminal cause or proceeding where bond or bail of any character is required or permitted for any purpose ...," M.C.L. §765.12, and "in any civil cause . . . before any court . . . where bond or bail of any character is required or permitted for any purpose . . .," M.C.L. §600.2631.

773.12 Inquest by coroner; powers.

Sec. 12. Any coroner shall have power to hold inquests anywhere within the county for which he shall be elected, and all provisions of law relating to the holding of inquests and the disinterment of dead bodies for the purpose of holding inquests thereon by justices of the peace, are hereby made applicable to inquests so held by coroners; and all powers by the general laws of this state conferred upon justices of the peace relative to such inquests are hereby conferred upon such coroners. All powers conferred upon peace officers by the general laws of this state are hereby conferred upon such coroners.

COMMENT: The office of coroner has been abolished, M.C.L. §52.2130, and the authority to hold inquests currently is given solely to district court and municipal court judges. See M.C.L. §52.207; M.C.L. §52.213; Lipiec v. Zawadzki, 346 Mich. 197 (1956). See also the Introductory Memo at pp. 35-36.

773.13 Inquest by coroner; surgeon, chemist; employment, compensation.

Sec. 13. Any coroner or justice of the peace holding such inquest, shall have power to summon the attendance of a competent surgeon, whenever he shall deem such attendance necessary, and a chemist may be employed in cases affording reasonable ground of suspicion that death has been produced by poison. Any chemist or surgeon so employed shall, upon the certificate of the coroner acting in the case, receive such compensation for his or their services as shall be allowed by the county auditors of counties having a board of auditors or the supervisors of other counties, as is otherwise provided by law.

COMMENT: This section was added to Chapter XIII to govern inquests held by coroners. It largely duplicates M.C.L. §773.4 (which governs inquests initiated and conducted by justices of the peace pursuant to M.C.L. §773.1). There is no need to have both provisions, since either, with the proper amendments, will describe adequately procedures to be followed in inquests now conducted pursuant

to the authority granted in M.C.L. §52.201. See Introductory Memo at pp. 35-37. M.C.L. §773.4 has been retained and amended in this fashion, and M.C.L. §773.13 therefore may be repealed.

773.14 Inquest in incorporated city; coroner's jury.

Sec. 14. It shall not be competent for justices of the peace, within the incorporated cities of this state in which a county coroner resides, to hold inquests on the view of dead bodies unless both of the coroners of the county in which they are situate shall be absent, or incapacitated to act from illness or otherwise; but such inquests, within said city, shall be held by one of the coroners elected for the county in which such cities are severally situate, whenever in the judgment of such coroner, an inquest shall be necessary and that the coroners' juries shall consist of 6 persons only.

COMMENT: This provision, dividing authority between the justice of the peace and the coroner, should be repealed since both offices have been abolished. See M.C.L. §600.9921; M.C.L. §52.213a.

773.17 Property of value found on unknown decedent; delivery to county clerk.

Sec. 17. Whenever any money or valuable property shall be found upon the body of an unknown deceased person within this state, it shall be the duty of the coroner or justice holding the inquest over said body, or of any person who shall come into possession of said money or valuable property, to deliver all of said money or valuable property so found to the county clerk of the county where said body shall be found or be at the time of death, within 10 days after said money or property shall have come into his possession.

COMMENT: M.C.L. §52.208 now provides that the police or medical examiner shall care for property found on the unknown deceased person.

773.19 Certain kinds of deaths; notice to coroner, right to remove body.

Sec. 19. It shall be the duty of any physician and of any person in charge of any hospital or institution, or of any person who shall have first knowledge of the death of any person who shall have died suddenly, accidentally, violently or as the result of any suspicious circumstances or without medical attendance up to and including at least 36 hours prior to the hour of death, or in any case of death due to what is commonly known as an abortion, whether self-induced or otherwise, to immediately notify the coroner of the death. It shall be unlawful for any undertaker, embalmer or other person to remove any body from the place where such death occurred, or to prepare same for burial or shipment, without first notifying the coroner and receiving permission to remove the body.

COMMENT: M.C.L. §52.203 now requires that the medical examiner be notified of deaths of the type described in this statute.

773.20 Property found on decedent; delivery to coroner, record, disposal.

Sec. 20. All moneys or effects that shall be upon the person of the deceased at the time of death or prior to the death, shall be turned over to the coroner whose duty it shall be to make a record of the sums and a listing of other effects in the property book and retain the same in the coroner's office until the coroner shall be able to deliver such property and effects to the personal representatives of the deceased or dispose of the same as otherwise provided by law.

COMMENT: M.C.L. §52.208 now provides that the police or medical examiner shall take possession of all property of value (in the absence of next of kin) and shall make proper disposition thereof.

HISTORY: CL 1929, 17422;—CL 1948, 773.20. This section re-enacts Sec. 2 of Act 248 of 1921, omitting word "either" after first "deceased".

ESCHEATS: For provisions relative to disposition of escheated estates in general, see Act 238 of 1897, being Compilers' § 567.11 et seq.

773.21 Coroner's inquest upon order of prosecutor; jury.

Sec. 21. Where, in the discretion of the prosecuting attorney, an inquest is deemed necessary, the coroner upon the written order of the prosecuting attorney, shall summon 6 men all of whom shall be citizens of the United States, residents of the county, and shall administer the oath as provided for by this chapter except that the jurors need not view the body of the deceased.

COMMENT: The initial provision of this section, requiring the coroner to conduct an inquest upon the determination of the prosecutor, has been replaced by M.C.L. §52.207. The provision describing the selection of jurors duplicates M.C.L. §773.2, which has been retained and amended to apply to inquests conducted pursuant to M.C.L. §52.207. The provision that the jurors need not examine the body has been added to M.C.L. §773.2.

774.1 Justice of the peace; powers, jurisdiction; effect of excessive penalty.

Sec. 1. Any justice of the peace shall have power to hold a court subject to the provisions hereinafter contained, to hear and determine charges for all offenses arising within his county punishable by fine not exceeding $100.00, or punishable by imprisonment in the county jail not exceeding 3 months, or punishable by both said fine and imprisonment; and any justice of the peace is empowered and authorized to perform all official acts and duties and to exercise jurisdiction in criminal causes in any township or city situate in the county within which the justice of the peace was elected and qualified, with the same rights and powers as though performed and exercised within the city or township in which such justice of the peace was elected and qualified: Provided, That whenever in any criminal case, tried before any justice of the peace, the defendant shall be adjudged guilty and punishment by fine or imprisonment shall be imposed in excess of that allowed by law, the judgment shall not for that reason alone be adjudged altogether void nor be wholly reversed and annulled, but the same shall be valid and effectual to the extent of the lawful penalty and shall be reversed and an-

nulled only in respect to the unlawful excess: Provided further, That for all offenses arising under the provisions of section 724 of Act No. 300 of the Public Acts of 1949, as amended, being section 257.724 of the Compiled Laws of 1948, any justice of the peace shall have power to impose the several fines therein provided.

COMMENT: The office of justice of the peace is abolished, M.C.L. §600.9921. As noted at pp. 27-28 of the Introductory Memo explaining the proposed revisions, the jurisdiction of municipal courts, the district court, and the recorder's court is not dependent upon this provision since these courts are granted broader trial jurisdiction in separate provisions. See M.C.L. §§726.11, 725.10, 730.551, 600.8311.

774.2 Docket entry; contents.

Sec. 2. (1) Every justice of the peace shall keep a loose-leaf docket made up of printed docket sheets numbered consecutively by the printer, in which he shall enter all completed criminal cases, which shall contain the following information:

(a) Name and address of the defendant.

(b) Operator or chauffeur license and vehicle registration or vessel number, if available for motor vehicle or vessel violations.

(c) Date and place of offense, and offense.

(d) Date of complaint and name of complainant.

(e) Date and warrant returned and by whom, or if voluntary appearance, the date of said voluntary appearance.

(f) Plea of defendant.

(g) If trial, the date, and whether or not by court or jury, and the verdict.

(h) Sentence of the court and the date thereof.

(i) Date of all adjournments and the date adjourned to.

(j) Name of prosecuting attorney or his assistant, and name of attorney who appeared for the defendant in the case, if any.

(k) Names of witnesses sworn for the people and the defendant.

(l) If jury, the names of the jurors.

(m) Date of appeal and date return was made in circuit court, if any.

Copies, filing.

(2) Dockets shall be in such form that exact carbon copies can be made, and a true copy of the docket shall be filed on or before the last day of the month following the month in which the case was completed, with each of the following:

(a) The prosecuting attorney of the county.

(b) The board of auditors, or the board of supervisors of the county if no board of auditors exists.

(c) The secretary of state and the county clerk for all motor vehicle or traffic cases involving moving violations and the director of the department of conservation for all violations involving a vessel. The county clerk, secretary of state and the director of the department of conservation shall receive only copies of dockets where the defendant was convicted. The copy filed with the county clerk shall be a certificate of conviction, and the copy filed with the secretary of state or the director of the department of conservation shall be an abstract of court and record of conviction. The copy for the secretary of state or the director of the department of conservation need contain only the information required by the secretary of state or the director of the department of

conservation and the form shall be approved by the secretary of state except that in cases of violations involving a vessel the form shall be approved by the director of the department of conservation.

Examination, probable cause.

(3) The copies of the docket shall be filed in all cases regardless of the disposition of the case. If examination is held by the justice instead of a trial, the docket shall also contain information pertaining to whether or not probable cause was determined by the justice and the date the return on examination was filed in circuit court. The justice of the peace may enter any other information in the docket that he deems necessary.

COMMENT: This is a "housekeeping provision" relating only to justices of the peace. The record-keeping requirements of the municipal courts, the district court, and recorder's court are established by applicable court rules and occasional statutes. See, e.g., M.C.L. §730.15 (dockets of municipal courts formerly justice courts in cities); Dist. Ct. Rule 510 (relating to juror questionnaires); Dist. Ct. Rule 522 (entry of judgments). Insofar as there is any gap in the provisions governing municipal courts, that deficiency will be remedied by the proposed cross-reference provision, M.C.L. §774.1a, requiring municipal courts to follow the statutes and court rules applicable to the district court, in the absence of contrary provisions. See Introductory Memo at pp. 33-35.

774.2a Docket; binders, index.

Sec. 2a. (1) A suitable cover or binder shall be used to preserve the docket sheets, which shall not exceed 1,000 loose leaf docket sheets for each cover or binder.

(2) An alphabetical index containing the names of all defendants and the number of each case as it appears in the docket shall be maintained by each justice of the peace.

(3) All forms and dockets necessary for the operation of the justice of the peace courts shall be furnished by the county without charge to the justice.

COMMENT: As a "housekeeping" provision relating only to justices of the peace, this section should be repealed. See also the commentary on the repeal of M.C.L. §774.2.

774.2b Criminal cases; file, contents.

Sec. 2b. Every justice of the peace shall have a file for each criminal case. The file shall be in a suitable envelope, jacket or folder, and shall contain the complaint, the warrant when returned, and any other papers filed in the case.

COMMENT: As an internal "housekeeping" provision relating only to justices of the peace, this section should be repealed. See also the commentary on the repeal of M.C.L. §774.2.

774.3 Dockets, files, indexes; public records, inspection, time; delivery of completed dockets, destruction of files.

Sec. 3. The dockets, files and indexes shall be public records and subject to inspection and examination during court hours. When a justice of the peace does not maintain regular hours or where the hours are less than 4 hours during the day, the dockets, files and indexes shall be available for inspection and examination for at least 4 hours each day, Monday through Friday, except legal holidays. Completed dockets shall be delivered to the county clerk along with the indexes when the justice deems it advisable, but not before 1 year and not later than 4 years from the date of the last case in the docket. Files may be destroyed by the justice of the peace when he deems it advisable any time after 6 years from the date the case was completed.

COMMENT: This is a "housekeeping" provision relating only to justices of the peace and therefore should be repealed. See also the commentary on the repeal of M.C.L. §774.2.

774.8 Plea of not guilty; trial; time, continuance.

Sec. 8. On the return of the warrant with the accused, if he shall plead not guilty or refuse to plead to the charge in the warrant, the said justice shall proceed to hear, try and determine the cause within 10 days after the return of the same, unless the absence of witnesses from the county without the fault or connivance of the party seeking such continuance shall render such continuance necessary, or unless the sickness of witnesses or of the accused shall render a continuance of such cause necessary; in which case it shall and may be competent for the justice to adjourn or continue the same for such time as may be necessary to secure the ends of justice: Provided, That in case of the absence of witnesses the party seeking to obtain a continuance for that cause shall further show to the satisfaction of the court that he has used due diligence to obtain the testimony of such witness. Such showing shall be the same as is required in civil cases.

COMMENT: Insofar as this section provides for trial upon entry of a plea of guilty or refusal to plead, it duplicates the proposed amendment of M.C.L. §774.6. The provision for trial within 10 days was geared to justice court practice and jurisdiction. Timing on trials in the district court is governed by DCR 789, restricting delay in criminal cases. By administrative order of January 28, 1974, that court rule is also made applicable to municipal courts. Recorder's court follows a similar rule. See GCR 789.

774.9 Subpoena issued for witnesses; power to administer oath.

Sec. 9. Any justice of the peace may issue subpoenas to compel the attendance of witnesses and may administer all necessary oaths.

COMMENT: Justice of the peace subpoena authority in criminal cases was tied to J.P. authority in civil cases.

See M.C.L. §774.10. That authority was limited to witnesses within the county or outside the county but within 30 miles of the place of trial. See M.C.L. §600.7001, repealed by the R.J.A. Technical Amendments Act (No. 297 of 1974). The district court has broader subpoena authority, as does recorder's court. See M.C.L. §§600.8317, 600.1455, 725.10, 725.11. The subpoena authority of municipal courts in civil cases is tied to district court authority by the civil cross-reference provision, M.C.L. §600.6502. There are no current provisions that clearly define the subpoena authority of municipal courts in criminal cases (see the commentary on the amendment of M.C.L. §766.11); but the proposed criminal cross-reference provision, M.C.L. §774.1a, would tie municipal courts subpoena authority in criminal cases to the district court authority, as is done in the civil area. Thus, M.C.L. §774.9 would not be needed for any of the courts exercising the misdemeanor jurisdiction formerly exercised by the J.P. court, and its repeal is recommended.

774.10 Juror or witness failure to appear or testify; liability.

Sec. 10. In case any person summoned to appear before any court held by a justice of the peace pursuant to the provisions of this chapter, as a juror or witness shall fail to appear, or if any witness appearing shall refuse to be sworn or to testify, he shall be liable to the same penalties and may be proceeded against in the same manner as provided by law in respect to jurors and witnesses in justices' courts in civil proceedings.

COMMENT: This provision is a companion to M.C.L. §764.9 and should be repealed for essentially the same reasons noted in the commentary on that section. For all courts of record, which includes the district court and the recorder's court, M.C.L. §600.1701 currently governs the power to punish as contempt the failure to comply with a subpoena. Under the proposed cross-reference provision, M.C.L. §774.1a, municipal court authority will be tied to that of the district court, as is done in civil matters. See M.C.L. §600.6502.

774.11 Disposition of accused before trial; bail, commitment.

Sec. 11. From the time of the return of the warrant until the time of the trial the accused may give bail with 1 or more sufficient sureties for his appearance at the time fixed for the trial, or in the event of failure so to do, may be committed to jail for safe keeping by warrant of said justice, or left in custody of the arresting officer.

COMMENT: The general bail provisions (see, e.g., M.C.L. §765.1) adequately cover the same ground as M.C.L. §774.11

with respect to all offenses. In addition, M.C.L. §§780.581-.586 is providing special standards for misdemeanor cases. Other provisions outside the Criminal Procedure Code also establish the authority of the district court, municipal courts, and recorder's court to grant bail. See M.C.L. §600.8311c (district court judges); M.C.L. §600.8511c (district court magistrates); M.C.L. §730.527 (municipal court judges); M.C.L. §730.146 (municipal court judges); and M.C.L. §726.14 (recorder's court).

774.12 Jurors; list; striking out names by complainant or accused; number; qualifications.

Sec. 12. After the joining of issue, and before the court shall proceed to an investigation of the merits of the cause, and the accused shall not have waived his right to a trial by jury, thereupon the court shall direct the sheriff, or any constable of the county, to make a list in writing of the names of 18 inhabitants of the county, qualified to serve as jurors in the courts of record in this state, from which list the complainant and accused may each strike out 6 names: Provided, That no such officer shall make out said list if he be complainant in said cause or in any wise interested, nor shall the jury consist of less than 6 persons.

774.13 Jurors; striking out names by others; venire, issuance.

Sec. 13. In case the complainant or the accused shall neglect to strike out such names, the court shall direct some suitable disinterested person to strike out the names for either or both the parties so neglecting; and upon such names being struck out, the justice shall issue a venire directed to the sheriff, or any constable of the county, requiring him to summon the 6 persons whose names shall remain upon such list to appear before such court, at the time and place to be named therein, to make a jury for the trial of such offense.

774.14 Jurors; summons; certified list; return of venire.

Sec. 14. The officer to whom such venire shall be delivered shall summon such jurors personally, and shall make a list of the persons summoned, which he shall certify and annex to the venire, and return the same with such venire to the court within the time therein specified.

774.15 Jurors; supplying deficiency in number.

Sec. 15. If any of the jurors named in such venire shall fail to attend in pursuance thereof, or if there shall be any legal objection to any that shall appear, the court shall supply the deficiency by directing the sheriff or any constable who may be present and disinterested, to summon any of the bystanders or others who may be competent and against whom no cause of challenge shall appear, to act as jurors in the cause.

774.16 Juror; former service as ground for challenge; time.

Sec. 16. It shall be a good cause of challenge to any juror in any justice or police court in any city, township or village in this state, in addition to the other causes of challenge allowed by law, that such person has served as a juror in any justice or police court in any such city, township or village in this state 2 times within 1 year previous to such challenge.

774.17 Juror; peremptory challenges.

Sec. 17. In all criminal cases the attorney appearing for the people may challenge 5 jurors peremptorily and the defendant may challenge 5 jurors peremptorily; and the attorney appearing for the people may challenge 5 talesmen peremptorily and the defendant may challenge 5 talesmen peremptorily.

774.18 New jury; grounds for selection; procedure.

Sec. 18. If the officer to whom the venire shall have been delivered shall fail to return the same as thereby required, or if the jury shall fail to agree and shall be discharged by the court, a new jury shall be selected and summoned in the same manner and the same proceedings shall thereupon be had, as herein prescribed in respect to the first jury, unless the accused shall consent to be tried by the court, in which case the court shall proceed to the trial of the issue, as if no jury had been demanded.

COMMENT: M.C.L. §§774.12-774.18 provide for the selection of juries in criminal cases in justices' court alone. The comparable sections dealing with selection of jurors in justices' court for civil cases, M.C.L. §600.7025 et seq., were repealed by the R.J.A. Technical Amendments Act (Public Act No. 297 of 1974).

The selection of juries in district court is governed by the Jury Selection Act of 1969, M.C.L. §600.1301 et seq.. Selection of juries in recorder's court is governed by M.C.L. §725.101 et seq. (jury code for municipal court of record). Municipal courts may use M.C.L. §730.401. Municipal courts established pursuant to M.C.L. §730.351 apparently may also utilize M.C.L. §730.251 et seq., providing for jury trials in "justices courts in cities" subsequently designated municipal courts. See also M.C.L. §730.23.

There currently is some ambiguity as to the appropriate number of peremptory challenges permitted in misdemeanor prosecutions involving six person juries. DCR 511.5 provides for 3 peremptory challenges for each side in criminal cases, as does RCR 7.6(c); M.C.L. §730.267 governing justice courts in cities and possibly applicable to some municipal courts, grants the prosecutor 2 challenges and the defendant 4 challenges; M.C.L. §730.416, applicable to municipal courts, provides for 4 preemptory challenges in criminal cases; M.C.L. §768.12 provides for 5 peremptory challenges in prosecutions for "an offense" which is not punishable by death or life imprisonment. Insofar as M.C.L. §774.17 has any significance in resolving any conflict in the application of these provisions, that significance is by historical reference which will not be lost by repeal of the provision. See also M.C.L. §730.23 (justices courts in cities provision authorizing 2 peremptory challenges for each side).

774.19 Jurors; form of oath.

Sec. 19. To each juror shall administer the following oath or affirmation: "You do solemnly swear (or, "You do solemnly and sincerely declare and affirm", as the case may be) that you will well and truly try this cause between the people of the state of Michigan and ....., the accused, and a true verdict give according to law and the evidence given you in court, unless discharged by the court, so help you God."

COMMENT: An oath for "the jurors for the trial of all criminal cases" is provided in M.C.L. §768.14. See also D.C.R. 511.7.

774.20 Jurors; duties, officer in charge.

Sec. 20. After the jury shall have been sworn they shall sit together and hear the proofs and allegations in the case, which shall be delivered in public and in the presence of the accused; and after hearing such proofs and allegations, the jury shall be kept together in some convenient place, until they agree on a verdict, or are discharged by the court, and a sheriff or constable shall be sworn to take charge of the jury, in like manner as upon trials in justices' courts in civil proceedings.

COMMENT: This section describes procedure well established under current practice for both felony and misdemeanor trials, and the section therefore need not be retained. The right to a public trial is established by Art. I, §20 of the Constitution, which applies to "every criminal prosecution." The oath and responsibility of the officers placed in charge of the jury is detailed in M.C.L. §768.16. The obligations of the jury to hear evidence, deliberate, etc., are detailed in the Code chapter on trials and in the General Court Rules and District Court Rules (the Rules apply to both civil and criminal cases except when the procedures noted therein clearly are not applicable to criminal cases or statutes or special court rules provide for a different procedure in criminal cases).

774.21 Jurors; delivery of verdict, fees, certificate.

Sec. 21. When the jurors have agreed on their verdict they shall deliver the same to the court, publicly, who shall enter it in the minutes of its proceedings, and the jurors shall each be entitled to the same fees as are or may be provided by law for jurors sworn in civil cases before justices of the peace, and a certificate thereof from the justice in whose court such jurors served, countersigned by the prosecuting attorney of the county, given to each of said jurors, shall authorize the county clerk of the county to draw an order upon the county treasurer for the payment of the fees of such juror, which order shall be paid in like manner as jurors' fees in courts of record are paid.

COMMENT: This section requires public announcement of jury verdict and prescribes standards for payment of juror fees.

Both provisions are unnecessary. Public delivery of the jury's verdict is a well established part of the right to a public trial. Compensation for jurors in district court is provided for in M.C.L. §600.1344. Compensation for jurors in recorder's court is covered in M.C.L. §725.145. Compensation for jurors in municipal court will be covered by the proposed criminal cross-reference provision (see commentary to proposed §774.1a), as the jury provisions applicable to municipal courts do not refer to juror compensation. Cf. M.C.L. §600.6502.

774.22 Judgment upon conviction; cost of prosecution; conditional sentence.

Sec. 22. Whenever the accused shall be tried and found guilty, either by the court or by a jury, or shall be convicted of the charge made against him upon a plea of guilty, the court shall render judgment thereon and inflict such punishment, either by a fine or imprisonment or both as the nature of the case may require, together with such costs of prosecution and such other reasonable costs and expenses, direct and indirect, as the public has been put to in connection with said offense not to exceed $15.00 in criminal cases, as the justice of the peace shall order; but such punishment shall in no case exceed the limit fixed by law for the offense charged, and in rendering such judgment and inflicting such punishment the court may award against such offender a conditional sentence and order him to pay a fine with or without the costs of prosecution, within a limited time of not more than 6 months, to be expressed in the sentence, and in default thereof to suffer such imprisonment as is provided by law and awarded by the court in all cases where the offender shall be convicted of an offense punishable at the discretion of the court, either by fine or imprisonment or both.

COMMENT: That portion of M.C.L. §774.22 authorizing the court to impose sentence is not needed for the exercise of such authority. Chapter IX of the Code of Criminal Procedure provides standards for sentencing in both misdemeanor and felony convictions. M.C.L. §769.1, which grants judges of a court of record authority to sentence as provided by law, applies to both recorder's court and the district court. Under the proposed cross-reference provision, M.C.L. §774.1a, M.C.L. §769.1 (and other sentencing provisions applicable to the district court) will also govern sentencing in misdemeanor cases by municipal courts. M.C.L. §769.3 provides for imposing conditional sentences in all courts.

The provisions of M.C.L. §774.22 relating to assessment of costs are specifically designed for the J.P. court and also should be repealed. District court costs are controlled by statute and court rule. See M.C.L. §§600.8375; 600.8379;

600.8381. See also D.C.R. 526. Recorder's court costs also are regulated by statute and court rule. See M.C.L. §600.2455; 600.2461. See also GCR 526.

There is no general authorization of costs for criminal cases in the Municipal Courts Act. However, the proposed cross-reference provision, M.C.L. §774.1a would authorize taxation of costs according to provisions applicable to district courts, as is permitted in civil cases under the civil cross-reference provision. See M.C.L. §600.6502.

774.22a Persons convicted of disorderly conduct involving sex offenses; justice of the peace; courts' duties, procedure; state institution.

Sec. 22a. In any trial before a justice of the peace, when a person who has been convicted of any disorderly conduct involving a sex offense or has pleaded guilty thereto, shall, though not insane, appear to be a sex degenerate, or a sex pervert, or appear to be suffering from a mental disorder with marked sex deviation and with tendencies dangerous to public safety, the trial court shall certify the cause to the circuit court of the county in which the offense was committed for further proceedings, and the said court shall thereupon proceed in accordance with the provisions of sections 1-a and 1-b of chapter 9 of this act. In the event such person shall not be adjudged to be a sex degenerate or a sex pervert or to be suffering from a mental disorder with marked sex deviation and with tendencies dangerous to the public safety, or it shall later be found upon application and hearing that such person has ceased to be a menace to the public safety because of such tendencies and mental condition, such person shall be remanded by the circuit court to the justice of the peace for sentence and/or further detention in accordance with his previous conviction, allowance to be made in the latter case for any time spent in confinement in a state hospital or other institution to which such person may previously have been committed hereunder.

774.22b Sex degenerates in penal institutions; petition, procedure.

Sec. 22b. If any such person shall have been sentenced and committed after conviction before a justice of the peace to any jail or penal institution, and prior to the expiration of such sentence or the discharge, pardon or parole of such person, he shall appear, though not insane, to be a sex degenerate or sex pervert, or appear to be suffering from a mental disorder with marked sex deviation, with tendencies dangerous to public safety, upon petition of the sheriff, warden, or other officer in charge of such jail or other penal institution, setting forth the facts relative to said conviction and said prisoner, the circuit court of the county where such person may be confined shall institute and conduct an examination, investigation and hearing and shall otherwise proceed in the manner provided in section 1-b of chapter 9 of this act.

774.22c Psychiatrists and expenses of confinement; reference.

Sec. 22c. The provisions of sections 1-c and 1-d of chapter 9, relative to psychiatrists and expenses of confinement shall be applicable to proceedings taken under this chapter.

COMMENT: Although added in 1935, these provisions are part of Public Act No. 175 of 1927. The repeal in 1939 of sections 1a and 1b of the 1927 Act also rendered ineffective

these provisions. Op. Atty. Gen. 1941-42, No. 23908, p. 623. Indeed, the 1939 replacement, the Sexual Psychothic Act of 1939, was in turn repealed by Public Act No. 143 of 1968.

774.24 Complainant failure to pay costs; judgment, execution.

Sec. 24. If the complainant shall refuse or neglect to pay such cost or to give such security, the court may forthwith enter judgment against him for the amount of such costs and forthwith issue execution thereon, in the same manner and with the like effect as in case of an execution issued by a justice of the peace on a judgment in an action for a trespass or other wrong; and such moneys when collected shall be paid over to such court and be applied to the payment of the costs for which the judgment was rendered.

COMMENT: Entry and enforcement of judgments in recorder's court and the district court are governed by the general provisions on execution of judgments, M.C.L. §600.6001 et seq., which apply to all courts of record. Pursuant to the proposed cross-reference provision, M.C.L. §774.1a, the provisions applicable to the district court will also apply to the municipal courts, as in civil cases. See M.C.L. §600.6502.

774.25 Judgment; execution, warrant.

Sec. 25. The judgment of every such court shall be executed by the sheriff or any constable of the county where the conviction shall be had, by virtue of a warrant under the hand of the justice who held the court, to be directed to such officers and specifying the particulars of such judgment.

COMMENT: This provision supplements M.C.L. §774.24, and the discussion of the repeal of that section also is applicable to this section.

774.26 Fines; payment before commitment, disposition.

Sec. 26. All fines and costs imposed by any such court, if paid before the accused is committed, shall be received by the magistrate who constituted the court before which the accused was convicted, and by such magistrate paid over to the county treasurer, on or before the last day of the month following receipt thereof, the county treasurer to reimburse said court for his lawful fees within 15 days after auditing pursuant to law, and such fines shall be distributed according to law.

774.26a Fines; forms furnished by county treasurer, contents.

Sec. 26a. The county treasurers shall provide all justices of the peace within their respective counties with blank forms which have been approved by the auditor general. The forms shall provide space for recording the following information with respect to all sums of money which the justices shall receive in criminal cases on account of any forfeiture of bail bond, recognizance, fine, penalty, or taxation of costs: (1) receipt number, (2) docket number, (3) nature of offense, (4) amount of the fine, (5) amount of justice fees, (6) officers' fees, (7) other receipts such as forfeited bond, (8) total receipts, (9) disposition of the case, (10) name of defendant, (11) the name of the justice, and (12) the name of the township or city in which he is elected. Each justice shall complete the forms and shall furnish 1 copy to the county treasurer, 1 to the county clerk or controller or board of auditors in counties having a controller or board of auditors and he shall retain 1 completed form.

774.26b Fines; receipt forms, use, contents.

Sec. 26b. The county treasurer shall also provide to each justice of the peace blank serially numbered receipt forms in triplicate to be used whenever the justice receives any moneys on account of any cash bail bond, fine, penalty, or taxation of costs. The receipt forms shall provide space for recording the following information: (1) the name of the defendant and payor, (2) the name of the justice, (3) the docket number, (4) the date, (5) the amount of any fine received, (6) the amount of costs received, (7) amount and nature of any other sum received, and (8) total amount received. One copy of the receipt form shall be for the payor, 1 for the justice and 1 for the county treasurer. The justice shall retain his copies as long as he serves and shall deliver them to his successor as provided in section 3 of this chapter.

774.26c Fines; criminal case receipts; separate bank account, deposits, withdrawals.

Sec. 26c. Every justice of the peace shall maintain a separate bank account for criminal case receipts at a bank of his selection. All criminal case receipts shall be deposited in this account daily if such receipts exceed $500.00 or whenever such receipts exceed $500.00. Withdrawals from this account shall be made only by check and only for the purposes of making deposits with the county treasurer, making refunds or transfers of cash bail bonds, making payments for restitution or for making refunds to defendants in case of an error: Provided, however, That a bank account need not be maintained where receipts are less than $500.00 per month.

774.26d Violation of sections; misdemeanor.

Sec. 26d. Any person who fails to comply with sections 26, 26a, 26b and 26c of this chapter shall be guilty of a misdemeanor.

774.27 Fines and costs; payment after commitment; sheriff; disposition.

Sec. 27. If the accused be committed, payment of any fine or costs imposed on him shall be made to the sheriff of the county who shall, within 30 days after the receipt thereof, pay over the same to the county treasurer for the purpose aforesaid.

774.28 Fines and costs; failure to pay over receipts; civil suit; misdemeanor, penalty; failure of justice to keep record, penalty.

Sec. 28. If any person who shall have received any such fine or costs or any part thereof, shall neglect to pay over the same pursuant to the foregoing provisions, it shall be the duty of the county treasurer immediately to commence a suit therefor, in the name of the people of the state of Michigan, and to prosecute the same diligently to effect. Any person neglecting to pay over such fine to the county treasurer within 60 days after receiving the same, shall be deemed guilty of a misdemeanor and on conviction thereof shall pay a fine of not less than 50 nor more than 100 dollars or be imprisoned in the county jail of such county not less than 30 nor more than 90 days, or both, in the discretion of the court: Provided, That all justices of the peace shall keep an exact record of all proceedings had before them, and failing to do so, shall be liable to the same penalties as above.

COMMENT: M.C.L. §§774.26-.28 govern the collection and disposition of fines and costs in justice court proceedings. Separate provisions now govern the collection and disposition of fines and costs in recorder's court, the district court, and the municipal courts. See M.C.L. §§600.8379 (district court); 726.25 (recorder's court); 730.10 (municipal court), 117.31 (municipal court). With the abolition of the J.P. court, M.C.L. §§774.26-.28 have no current function.

774.46 Process in criminal cases; issuance.

Sec. 46. Justices of the peace shall have power to issue such writs and process as may be necessary in criminal cases to carry into effect their orders and sentences: Provided, however, That the provisions of this section shall not be construed to eliminate the requirements of the statutes relative to the approval of the prosecuting attorney prerequisite to the issuance of a warrant in criminal cases.

COMMENT: Other provisions establish the authority of the district court, recorder's court and municipal courts to issue such writs as is necessary to carry into effect their sentences and orders. See, e.g., M.C.L. §600.8317 (district courts); M.C.L. §726.11 (recorder's court); M.C.L. §730.551 (municipal courts).

774.47 Jurisdiction of justices of city in case warrant issued by another justice.

Sec. 47. In any city having more than 1 justice of the peace, or other judicial officer having the criminal jurisdiction of a justice of the peace, whenever a warrant shall be issued for the arrest of any person charged with any offense against the laws of the state, or for the violation of a city ordinance, any justice or other judicial officer of said city shall have jurisdiction to arraign, set bail, adjourn, try, take testimony in, conduct a preliminary examination, dismiss, hold for trial in circuit court, and to do any act or acts in connection with the trial and disposition of any such case brought before any such justices of the peace: Provided, however, That this shall apply only to the court or courts of justices of the peace in cities where said justices are paid a salary in lieu of fees.

COMMENT: This provision has no current function. Separate provisions give judges of the district court, recorder's court, and municipal courts similar authority within their respective courts to dispose of cases initiated on warrants issued by other judges. See the commentary on repeal of M.C.L. §764.3.

774.48 Files, indexes, dockets; delivery to successor in office; audit of records, time, certificate, fraud.

Sec. 48. Every justice of the peace shall deliver to his successor in office all files, indexes and dockets. Upon the death of any justice of the peace, or when for any other reason his office becomes vacant, and also at the end of each term, the board of auditors of the county or the board of supervisors of the county shall cause the records of the justice of the peace to be audited immediately. The audit shall be completed within 30 days from the date of vacancy or end of the term. Where a justice of the peace has been reelected to office, the audit shall be completed within 6 months from the date of expiration of office of his previous term. The audit report shall set forth the amount due the justice of the peace, his executor or administrator, as well as the amount due the county for fines and costs collected by the justice. The board of auditors or board of supervisors shall issue to the justice of the peace, his executor or administrator, a certificate stating that all amounts required to be paid to the county during his term of office have been so paid, if the audit so determines. This certificate shall be of no effect if it is later determined that there was fraud, embezzlement or other criminal concealment or acts involved in the funds collected by the justice of the peace.

COMMENT: This is a "housekeeping" provision applicable only to justices of the peace. See also the commentary on the repeal of M.C.L. §774.2.

775.2 Fees; services of justice of the peace.

Sec. 2. A justice of the peace shall be allowed for taking a complaint on oath, 60 cents; a warrant, 60 cents; for entering any cause upon the docket, 60 cents; a bond or recognizance, 60 cents; for approving the same, 25 cents; issuing a subpoena, not exceeding 10 in any 1 case, 25 cents; for certifying cause to other magistrates or court, 40 cents; for commitment or mittimus, 60 cents; for an adjournment, 25 cents; for making and filing return on appeal, or where a party is bound over to the circuit court, or any other court having concurrent jurisdiction, $2.00; for making and filing report in a criminal case to the prosecuting attorney, 40 cents; for making and filing a copy of the docket to the board of auditors or the board of supervisors of the county, 60 cents; for making and filing a copy of the abstract of court record to the secretary of state for all motor vehicle or traffic cases involving moving violations, 60 cents; for notifying county agent for the care of juvenile offenders of the pendency of the case against any juvenile offender, 40 cents; for each arraignment and receiving a plea of guilty, in case such plea is entered, $1.50; for each arraignment where the plea of not guilty is entered, or where examination is waived or demanded, $1.50; for holding examinations, including the taking of testimony and swearing of witnesses, and for the trial of any cause which shall include the swearing of all witnesses, the constable and jury, if one be called, also the judgment and record of any exceptions or motions made during the trial, $10.00 per day for each day and $5.00 for each half day while actually engaged in such examination or trial, or while engaged in hearing any motion relative to such trial or examination, or final disposition of any cause, but such per diem shall not be allowed until such examination or trial shall have been actually begun, and no justices of the peace shall receive any other fee or compensation for any services rendered in any criminal case than such as are hereinbefore provided.

COMMENT: This provision should be repealed since it applies only to justices of the peace. The section providing for fees for justices in civil cases, M.C.L. §600.7651, has been repealed. Judges of all the courts exercising jurisdiction formerly exercised by the justices of the peace are salaried.

RECOMMENDATION RE DEFERRED DAMAGE PAYMENTS

It is a common occurrence to note newspaper reports of large recoveries awarded as damages in personal injury cases. Where the damage is of such serious nature as to cause permanent injury and there is a basis for recovery, the amount of the awards can be very substantial, involving hundreds of thousands of dollars and on occasion even a million dollars or more. In such cases, the damage award is paid to the plaintiff who very frequently has little capacity for exercising sound judgment as to the making of investments with his new found riches. Often too, the plaintiff lacks the discipline to conserve those assets to meet his lifetime needs, particularly where as a result of those injuries he is unable to support himself by normal employment.

This problem also holds true in situations of recovery for wrongful death as a result of unlawful injury. The family of a deceased person may need to conserve its assets for future maintenance. Yet this recovery may be dissipated when put in the hands of people not accustomed to the investment or preservation of such large funds.

Such plaintiffs often find themselves a few years later without adequate means for their support after having expended or dissipated the sums which they recovered. Such persons frequently become public charges requiring the expenditure of public funds for their future needs for medical expenses, support and maintenance.

Large damage awards in personal injury cases are generally deemed compensation for future inability to be gainfully employed. In view of the public interest in avoiding the need for expending public funds in the event the damage award is dissipated, we believe it to be sound public policy to provide a program requiring the proceeds of such a judgment to be invested with a trust company with periodic payments to the beneficiary as ordered by the court in the light of the needs of the beneficiary and the available funds.

In order to limit the circumstances under which such deferred payment shall be mandated, the proposed bill requires that the judgment shall exceed $100,000. The sum to be deposited in trust would be substantially less than that amount since attorneys' fees, medical and other expenses incurred prior to the time of trial are likely to reach in the neighborhood of 30% to 50% of the sum so awarded. Thus as a practical matter, the trust fund concept is limited to amounts in the range of $50,000 to $60,000 or more.

By the proposed bill, the deferred damages are required to be placed into a trust fund if upon report of the Friend of the Court it is indicated that the prevailing party is likely to require public support or financial assistance in the event he dissipates the proceeds of his judgment. Discretionary power is retained by the court to modify the terms of the deferral as future circumstances may warrant.

The proposed bill follows:

DEFERRED DAMAGE PAYMENTS

AN ACT to provide for deferred damage payments for injuries to the person.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Section 1. As used in this Act, "deferred damages" means all damages awarded in a civil action for injuries to the person, including wrongful death, exceeding the sum of $100,000.00.

Section 2. No deferred damages shall be paid nor shall judgment for deferred damages be entered until a hearing has been held by the court as to the public interest in requiring all or any portion thereof to be held in a trust fund for the

benefit of the prevailing party. Prior to such hearing the court shall request the Friend of the Court to make an investigation and file a report and recommendation to the court as to the future needs of the prevailing party, including his dependents, and whether he is likely to require public support or financial assistance in the event he dissipates the proceeds of the judgment.

Section 3. Upon finding by the court that the prevailing party or his dependents are likely to require public support or financial assistance in the event he dissipates the proceeds of the judgment, the court shall enter judgment for the damages awarded which shall direct all or any portion of the judgment for deferred damages to be deposited as a trust fund with a banking institution having trust powers, to be designated by the prevailing party. Funds deposited in trust shall be invested by the trustee in like manner as other fiduciary funds. In its discretion the court may order the purchase of an insurance annuity providing for monthly payments to the prevailing party or his dependents in lieu of or supplemental to the creation of the trust fund. No part of the damage award shall be placed in the trust fund which represents sums fairly allocable for damages incurred prior to the date of judgment

or which is required for payment or reimbursement of expenses incurred in the litigation, including all sums payable to the attorneys for the prevailing party.

Section 4. The order creating the trust fund shall provide for monthly or other periodic payments to the prevailing party or his dependents in such sums as the court shall deem reasonable, taking into account the best interests of the prevailing party and his dependents as well as the public interest. Such order shall be subject to modification by the court at any future time as circumstances warrant.

RECOMMENDATION RE JUVENILE

OBSCENITY LAW

The Law Revision Commission was requested by Representative Rosenbaum, as chairman of a subcommittee of the House Judiciary Committee studying obscenity provisions, to prepare a study report on juvenile obscenity laws. The Study Report was prepared by Professor Jerold Israel, executive secretary of the Commission, and Rita Burns, a third-year student at the University of Michigan Law School. The Report analyzes various issues presented in drafting a juvenile obscenity statute and notes the treatment of those issues in various statutes and proposed statutes. Among the provisions considered are the current Michigan statutes, the statutes of various states (including California, Florida, Hawaii, Illinois, New York, Ohio, Oregon, Utah, Washington, and Wisconsin), the Detroit Obscenity Ordinance (§39-1-18), and proposals advanced in the Michigan Bar Committee Report on Proposed Changes in the Criminal Code, the Proposed Criminal Code of Massachusetts, and the majority and dissenting Reports of the Presidential Commission on Obscenity and Pornography. Accompanying the Report is a "model statute" prepared by the authors. The statute is not presented as a specific legislative recommendation of the Commission. It is designed solely to supplement the Study Report by providing a framework for the drafting of any legislation that might be introduced by the Subcommittee or individual members of the Subcommittee. The model statute covers the elements that might be included in a juvenile obscenity statute and provides alternative drafts on most areas of controversy. The model statute and Study Report follow:

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Model Statute on Dissemination Of Obscene Matter To Minors*

Section 1. As used 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 person's [clothed or] unclothed genitals, pubic area, buttocks, or, if such person be female, breasts, for the purpose of sexual gratification or 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.

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* Material in brackets arguably should be excluded from the statute. Where alternative wording is proposed, the alternatives are placed in parenthesis and placed alongside each other. See, e.g., lines 2 and 3 of paragraph 1(a). An exception in paragraph 1(e), where the alternatives are so lengthy that they could not be accomodated by use of parentheses. The alternatives there have been stated in separate paragraphs and designated as alternatives A, B, and C.

(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) "Harmful to minors." Sexually explicit matter is "harmful to minors" when the matter meets all of the following criteria:

(i) Considered as a whole, it appeals to the prurient interest of (minors) (persons of the general age of the minor to whom the sexually explicit matter was disseminated) as determined by contemporary (local) (statewide) community standards of (minors) (those persons).

(ii) It affronts contemporary (local) (statewide) community standards of adults as to what is suitable matter for (minors) (persons of the general age of the minor to whom the sexually explicit matter was disseminated).

(iii) Considered as a whole, it lacks serious literary, artistic, political and

scientific value for (minors) (persons of the general age of the minor to whom the sexually explicit matter is disseminated).

[Where circumstances of presentation, sale, distribution, or publicity indicate that 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 is "harmful to minors]."

(e) "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 exist:

[Alternative A of subparagraph (i)]

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

[Alternative B of subparagraph (i)]

(i) The person is aware of the sexually explicit content of the matter and a substantial risk that the matter will appeal to the prurient interest of (minors)

(persons of the general age of the minor to whom the matter is disseminated).

[Alternative C of subparagraph (i)]

(i) The person is aware of the sexually explicit content of the matter and a substantial risk that the matter appeals to the prurient interest, is patently offensive, and lacks serious literary, artistic, political, and scientific value (for minors) (for persons of the general age of the minor to whom the matter is disseminated).

[Alternative A of subparagraph (ii)]

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

[Alternative B of subparagraph (ii)]

(ii) The person recklessly disregards a substantial risk that the matter contains sexually explicit material and that the matter appeals to the prurient interest of (minors) (persons of the general age of the minor to whom the matter is disseminated).

[Alternative C of subparagraph (ii)]

(ii) The person recklessly disregards a substantial risk 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) (for persons of the general age of the minor to whom the matter is disseminated).

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

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

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

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

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

(h) "Nudity" means the lewd showing of the human male or female genitals, or pubic area.

(i) "Prurient interest" means a lustful desire or craving for sexual stimulation or gratification. In determining whether sexually explicit matter appeals to the "prurient interest," the matter shall be judged with reference to average minors unless it appears from the character of the matter that it is designed to appeal to the prurient interest of a particular group of persons, 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 sexual stimulation or gratification, 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 sexual stimulation or gratification, of a person who is nude or clad in undergarments or 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 explict 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, motion picture 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 harmful to minors.

(b) Knowingly exhibits to a minor, unaccompanied by a parent or guardian, a sexually explicit performance that is harmful to 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 an accredited school who disseminates sexually explicit matter to students as part of a school program.

(c) A licensed physician of medicine 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 that person's 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 years of age or older, with the intent to facilitate the dissemination to the minor of sexually explicit matter that is harmful to minors.

[2] Facilitative misrepresentation is a misdemeanor.

Section 4[1]. A prosecuting attorney may institute an action in the circuit court against a person, other than a person described in section 2[2], to enjoin that person from disseminating to minors sexually explicit matter that is harmful to minors.

[2] A person intending to disseminate to minors matter that might be deemed to be sexually explicit may request, from the prosecuting attorney of the county in which the matter is to be disseminated, an advisory opinion as to the legality of

that dissemination. The request for an advisory opinion shall be in writing and shall be accompanied by reasonable and timely opportunity for the prosecuting attorney to examine the matter. Within 5 days after a receipt of a proper request, the prosecuting attorney shall issue to the person making the request an advisory opinion in writing. The advisory opinion shall state in unequivocal terms whether knowing dissemination of the matter to minors would be deemed by the prosecuting attorney to violate section 2.

[3] A person who has requested an advisory opinion may institute an action for a declaratory judgment, in the circuit court in the county in which the matter is to be disseminated, to obtain an adjudication of the legality of the intended dissemination if either of the following conditions exist:

(a) The action is commenced more than 5 days after submission of a proper request, and the prosecuting attorney has failed to issue an advisory opinion.

(b) The prosecuting attorney has issued an advisory opinion and that opinion fails to state in unequivocal terms that knowing dissemination of the

matter to minors would not be deemed by the prosecuting attorney to violate section 2.

[4] The prosecuting attorney shall be made the defendant to any action commenced pursuant to subsection [3]. In responding to the complaint, the prosecuting attorney may institute a counterclaim for injunctive relief pursuant to subsection [1]. If the prosecuting attorney, after commencement of the action, issues an advisory opinion stating in unequivocal terms that knowing dissemination of the matter to minors would not be deemed by him to violate section 2, the action shall be dismissed.

[5] In any action instituted pursuant to subsections [1] or [3], the prosecuting attorney shall bear the burden of proving, by clear and convincing evidence, that knowing dissemination of the specified matter to minors would violate section 2.

[6] In any action instituted pursuant to subsections [1] or [3], the court, upon motion of the prosecuting attorney, may grant, ex parte or upon a hearing, a preliminary injunction barring dissemination of the specified matter to minors. A person enjoined under this subsection is entitled to a trial on the legality of the intended dissemination within 1 day after

joinder of issue, and decision shall be rendered by the court within 2 days after the conclusion of the trial.

[7] In any action instituted pursuant to subsections [1] or [3], the prosecuting attorney shall not be required to file any security before the issuance of a preliminary injunction, shall not be liable for costs, and shall not be liable for damages sustained by reason of the preliminary injunction.

[8] Except as provided in subsections [9] and [10], this section shall not be construed to preclude or impair prosecution for violation of any law of this state.

[9] If, in any action instituted pursuant to subsections [1] or [3], the court has ruled that the knowing dissemination to minors of specified matter does not violate section 2, that ruling is a complete defense for all persons to (i) any prosecution under section 2 based upon the dissemination of that specified matter and (ii) any prosecution for violation of a preliminary injunction based upon the dissemination of that specified matter.

[10] If a prosecuting attorney issues an advisory opinion stating in unequivocal terms that knowing dissemination of

specified matter to minors is not deemed by him to violate section 2, then the recipient of the opinion may be prosecuted under section 2 for the dissemination of that specified matter only after the prosecutor has both withdrawn his opinion and obtained an injunction pursuant to subsection [1] against the dissemination of that specified material by that person.

[11] Proceedings under this section are equitable in nature.

STUDY REPORT -- JUVENILE OBSCENITY LAW[1]

I. INTRODUCTION

Current Provisions. Michigan currently has three criminal statutes dealing specifically with the distribution of obscene matter[2] to minors. M.C.L. §750.142 makes it a misdemeanor for "any person" to "sell" or "give away" to a minor any "printed material" containing obscene language, or obscene prints, pictures, figures, or descriptions tending to corrupt the morals of youth." M.C.L. §750.143 prohibits "exhibition," within the view of "children," of "any book, pamphlet or other printed paper or thing containing obscene language or obscene prints, figures, or descriptions, tending to the corruption of the morals of youth." Finally, M.C.L. §750.343e, adopted in 1962, prohibits the knowing sale or distribution to a minor of "any obscene, lewd, lascivious, filthy or indecent book, magazine, pamphlet, newspaper, story paper, writing, paper, phonograph record, picture, drawing, photograph, motion picture film, figure, image, wire or tape recording of any written, printed or recorded matter of an indecent character which may or may not require mechanical or other means to be transmuted into auditory, visual or sensory representations of such character, manifestly tending to corrupt the morals of youth" or the introduction of such material into a family, school or place of education.

The current provisions may very well be unconstitutional. Indeed, if it were not for a single sentence in People v.

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1 By Jerold Israel and Rita Burns

2 Several statutes, also prohibit distribution of materials describing criminal activities. See M.C.L. §§750.142, 750.143, 740.344. That prohibition probably is unconstitutional under Winters v. New York, 333 U.S. 507 (1947), which held unconstitutionally vague a statute identical to §750.344.

Bloss, 394 Mich. 79 (1975), there would be little question that the three provisions are presently invalid. Bloss itself did not involve dissemination to minors, but to adults. The defendant there had been convicted of violating the general obscenity statute (M.C.L. §750.343). The Michigan Supreme Court reversed his conviction on a narrow ground -- at the time of Bloss's conviction, the state statute had not been construed to comply with federal constitutional standards subsequently established in Miller v. California, 413 U.S. 15 (1973). The Bloss opinion went on, however, to comment briefly on the current status of the various state statutes regulating dissemination to adults and juveniles. The per curiam opinion for the Michigan Court noted:

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

The significance of the Bloss dicta concerning dissemination to juveniles is uncertain. The Court may only have been noting that, in contrast to distribution to consenting adults, distribution to minors clearly is a permissible subject of state regulation and, in that sense alone, the Michigan obscenity statutes (including the three specific juvenile provisions) are "valid and enforceable" as applied to juveniles. On the other hand, the Court's statement arguably might also be viewed as declaring that the current juvenile provisions are valid in all respects -- i.e., that the legislation is acceptable in scope and form as well as in its general subject of regulation. This interpretation, however, requires that the Court's opinion be viewed as adding an interpretive gloss to

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3 With respect to Bloss' view of state authority to regulate distribution to consenting adults, see fn. 8 infra.

the current provisions that cures at least two deficiences of those provisions.

The first deficiency in the current provisions is that, as written, they would appear to extend beyond the constitutional definition of "obscenity" announced by the United States Supreme Court. The Supreme Court has held that the First Amendment prohibits a state from regulating the dissemination of sexually oriented material to adults unless that material meets a tripartite test for characterizing "obscenity." Under that tripartite standard the material must appeal to the prurient interest, be patently offensive, and lack serious social value.[4] Although the tripartite test was established as the prevailing constitutional standard in a case involving a general obscenity statute, Miller v. California, supra, an earlier case concerned with a juvenile statute, Ginsberg v. New York, 390 U.S. 629 (1968), indicates that the basic elements of the tripartite standard also limit state regulation of the dissemination of sex-related materials to minors, (see pp. 164-168 infra). The only distinction is that, as applied to juveniles, each element of the tripartite standard is judged according to the characteristics of the average juvenile audience (e.g., it is sufficient that the material appeals to the prurient interest of juveniles as opposed to adults). None of the three Michigan juvenile statutes are specifically limited to material that falls within the tripartite standard as adapted to minors. Rather, each describes the "obscene" or "indecent"

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4 The three elements of the tripartite test are commonly characterized as the "prurient interest," "patently offensive," and "lack of serious social value" elements. The "social value" phrase is a shorthand reference to literary, artistic, political, or scientific value. It does not refer to a general concept of "social importance," which the Court specifically rejected in Miller v. California, 413 U.S. 12, 25, n. 7 (1973). Miller v. California, supra, more fully describes the three elements 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 (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."

material that may not be distributed thereunder as that "tending to corrupt the morals of youth" -- a standard readily subject to challenge as overly broad and vague. See Winters v. New York, 333 U.S. 507 (1948); Commercial Pictures Corp. v. Regents, 346 U.S. 587 (1954); Interstate Circuit v. Dallas, 390 U.S. 676 (1968).

The Bloss dictum suggests that the Court probably would disregard the breadth of the current statutory language and read that language as applying only to material falling within the tripartite standard. Michigan appellate courts have construed similarly broad language in other Michigan obscenity statutes as limited by First Amendment standards announced in United States Supreme Court opinions.[5] However, the single reference in Bloss to the validity of the current juvenile provisions is not likely to be viewed as itself providing such a definitive interpretation. Even if the Court intended by its brief statement to incorporate the tripartite standard, the statement is far too ambiguous to ensure that lower courts will necessarily adopt the same interpretation of the current provisions.

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5 In People v. Villano, 369 Mich. 428 (1963), the Michigan Supreme Court authoritatively construed M.C.L. §750.343a to reach only that material viewed as "obscene" under the then prevailing First Amendment standard announced in Roth v. United States, 354 U.S. 476 (1957). The Court of Appeals likewise used the Roth definitions in upholding M.C.L. §600.2938 (fn. 6 infra) in Wayne County Prosecutor v. Doerfler, 14 Mich.App. 428 (1968). See also State v. Diversified Theatrical Corp., fn. 7 infra; Kent County Prosecutor v. Goodrich Corp., fn. 6 infra. Courts in other jurisdictions have divided in construing their provisions so as to comply with the requirements of Miller v. California. Some refused to add substantially to the limits of the current statutory provisions and accordingly have held those provisions unconstitutional under Miller, leaving possible adoption of the Miller standard to future legislative consideration. See State v. Diversified Theatrical Corp., 59 Mich.App. at 232-233 (collecting cases); Hunsaker, The 1973 Obscenity-Pornography Decisions, 11 San Diego L.Rev. 906, 934-35 (1974).

A second constitutional deficiency of the current statutes is their failure to meet the "sexual specificity" requirement of Miller v. California, supra. In Miller, the U.S. Supreme Court held that "state statutes designed to regulate obscene materials" may bar 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," 413 U.S. at 24. Miller noted that it was not sufficient that the state statute incorporate the traditional First Amendment standards for defining obscenity (i.e., the tripartite standard); the statute also must give adequate notice by describing the encompassed material in terms of the particular types of sexual conduct it portrayed. The Miller decision applied this standard to a state statute governing distribution to adults, but the Ginsberg decision again suggests the same standard also should apply to statutes governing distribution to minors (see pp. 217-218 infra). The current Michigan provisions, of course, do not meet the Miller standard. They do not refer to the depiction of any particular sexual conduct, but seek to describe the encompassed material only in terms of its general sexual qualities (i.e., "obscene, lascivious").[6] Until the Michigan provisions are either

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6 This deficiency is not limited to the statutes governing dissemination to minors. In Kent County Prosecutor v. Goodrich Corp., 53 Mich.App. 262 (1974), a case decided before Bloss, the Court held invalid an injunction issued under a civil statute, worded similarly to the juvenile provisions, because that statute failed to meet the "sexual specificity" requirement of Miller. The majority noted: "The Michigan civil obscenity statute, M.C.L. §600.2938(1) regulates conduct: '* * * which is obscene, lewd, lascivious, filthy, indecent or disgusting, or which contains an article or instrument of indecent or immoral use or purpose.' This statute is couched in terms of expression rather than specifically defined sexual conduct, as required by Miller." See also State v. Diversified Theatrical Corp., 59 Mich.App. 223 (1975).

amended or authoritatively construed to encompass only depiction of specified conduct, the provisions cannot be applied constitutionally.[7]

The dictum in Bloss suggests that the Michigan Supreme Court would be willing, without further legislature action, to authoritatively construe the current juvenile statutes

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7 Bloss appears to assume that, if the trial judge's charge to the jury fails to limit the statute to the depiction of specified sexual conduct, an authoritative appellate court construction so limiting the statute will not permit the conviction to be sustained even where the material involved clearly depicted such specified sexual conduct. But compare Hamling v. United States, fn. 25 infra. In Kent County Prosecutor v. Goodrich Corp., fn. 6 supra, the Court of Appeals noted that it was inappropriate for the trial court to authoritatively construe a state obscenity statute so as to limit its application to material depicting specific sexual conduct. The Court also refused to adopt such an interpretation on appeal. State v. Diversified Theatrical Corp., 59 Mich.App. 223 (1975), took a contrary position with respect to the role of the Court of Appeals. The Theatrical Corp. opinion distinguished Kent County Prosecutor, noting that in a nuisance action where review is de novo, the Court of Appeals could appropriately hold its construction of the statute applicable to the case before it. In light of past precedent (see fn. 5 supra), the Theatrical Corp. court concluded that it was appropriate to construe the nuisance statute as incorporating the Miller specificity standard, rather than leave the task to the legislature. But cf. the subsequent decision in Bloss.

so as to preserve their constitutionality. The Court of Appeals, in State v. Diversified Theatrical Corp., 59 Mich. App. 223 (1975), provided exactly such an interpretation of a public nuisance provision worded similarly to the current juvenile provisions. The Court of Appeals held that the statute would thereafter be limited in application to depictions of specific sexual conduct that were cited in the Miller opinion as illustrations of what a general state obscenity provision might include.[9] But the Bloss statement that the current statutes "are valid" as "applied to juveniles" does not itself provide a similar construction. The Bloss opinion cited Miller, but did so without reference to any particular portion of the Miller opinion. That citation alone is not likely to be viewed as incorporating the specific examples of prohibited content noted in Miller. In Diversified Theatrical Corp., the Court of Appeals referred specifically to the Miller

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8 After referring to a division among the justices as to whether the Michigan statutes could be authoritatively construed, without further legislation, to proscribe dissemination to "consenting adults," the Bloss opinion cited art. 1, §5 of the Michigan Constitution, which protects freedom of speech. This reference suggests that the division within the Court may relate to the legislature's authority under the state constitution to prohibit dissemination to consenting adults [cf. the dissenting opinion of Brennan, J., in Paris Adult Theatre v. Slaton, 413 U.S. 49 (1973)] rather than to the Court's authority to substantially reconstruct the broad language in a current statute so as to render it constitutionally acceptable. See fn. 5 supra.

9 The Court authoritatively construed the reference to "lewdness" in the public nuisance provision as limited to "those types of potentially offensive depictions or descriptions of hard-core sexual conduct given as examples in Miller v. California, namely: '(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated; (b) patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals. 413 U.S. at 25.'" 59 Mich.App. at 233.

examples and noted that those examples were incorporated in the statute in order to meet the Miller sexual specificity requirement. Courts in other states have been equally explicit in construing obscenity statutes to comply with the Miller standard.[10] Moreover, it is especially unlikely that the Michigan Supreme Court will be viewed as having adopted, without any discussion, the Miller description of content appropriate for an adult obscenity provision as the total content of a juvenile provision. Compare State v. Diversified Theatrical Corp., fn. 9 supra.

Even if Bloss arguably could be viewed as an "authoritative construction" that cures the overbreadth of our current provisions, appropriate caution suggests that legislative action be taken to ensure the constitutionality of the state provisions without regard to the uncertain impact of Bloss. Legislative action is especially appropriate with respect to the designation of the specific sexual content of material included within the statute. Courts can readily assume that a broadly phrased state statute should be read as limited by the prevailing First Amendment definition of obscenity; without such a limitation, the statute would be invalid and the legislative purpose defeated. A court cannot so readily be sure that the legislature adopting a broadly phrased statute would have intended to specify as the encompassed content the particular depictions of specific conduct that were listed in Miller only as illustrations of what might be reached by a state statute. That uncertainty is heightened where the state statute is directed toward a special and particularly susceptible audience such as minors. In sum, the task of defining the specific sexual depictions encompassed by the statute is one more suitable for the legislature than the court. The recently adopted juvenile provisions of other states all contain specific descriptions of the encompassed material; they do not leave that task to the courts.

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10 See State v. Diversified Theatrical Corp., 59 Mich.App. at 233 (collecting cases), Hunsaker, fn. 5 supra. See also United States v. 12 200 Ft. Reels of Film, 413 U.S. 123, 130 (1973).

Legislative reconsideration of our current provisions is also suggested by several factors besides the probable unconstitutionality of those provisions. First, juvenile provisions adopted in recent years in other states uniformly reflect a legislative objective of supporting parental control of a child's access to potentially harmful sex-related materials. One aspect of this objective is the recognition that parental control includes the authority of parents to permit their children to examine such material. Closely related is the recognition that professionals acting in place of parents may also appropriately use such material in the education or treatment of the children. In contrast, the Michigan statutes appear to give no consideration to the interests of parents or professionals. Taken literally, the Michigan provisions would make it a crime for a parent or physician to expose a child to obscene material even as part of a program of medical treatment.

Second, statutes recently adopted in other jurisdictions highlight various ambiguities in the current Michigan provisions, relating to such matters as mens rea, that should be resolved in accordance with a policy developed by the legislature. Here again, the courts currently have no basis for determining precisely what the legislature intended -- whether, for example, it intended to apply criminal sanctions to disseminators of obscenity acting within the minimum constitutional requirement as to mens rea, or desired to impose a higher degree of mens rea as is done in many other areas of the Criminal Code.

Third, there has been considerable change in our social attitudes towards sex, including our views on what is suitable for young persons, since the adoption of our current provisions. The National Commission on Obscenity and Pornography viewed the constant shift in community attitude as a factor of sufficient significance to propose requiring legislative reconsideration of basic provisions regulating obscenity every six years.[11] The most recent Michigan provision was adopted over a decade ago.

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11 Report of the Commission on Obscenity and Pornography, William B. Lockhart, Chairman (1972) (hereinafter called Obscenity Commission Report).

Basic Assumptions. As noted supra, Ginsberg v. New York held constitutional a criminal statute restricting distribution of "obscene" material to minors. The Court initially found that the legislature could "rationally conclude" that the exposure of minors to "obscene" material is "harmful" to the youths' "ethical and moral development," although there were no decisive scientific studies supporting that conclusion.[12] Ginsberg did not rely, however, only on the state's rational basis for seeking to prevent potential harm. It noted that the state also could appropriately seek to support the interest of parents in controlling their children's access to obscene material. The New York legislation upheld in Ginsberg served a combination of the public interest in preserving the well-being of its youth and the interest of parents in directing the rearing of their children. Together these interests readily supported the constitutionality of legislation restricting the dissemination of material that could appropriately be classified as "obscene" for youth and therefore was not within the protection of the First Amendment.

This report proceeds on the assumption that adoption of a Ginsberg-type juvenile obscenity statute is not only constitutional but also is an appropriate legislative goal. This assumption is based primarily on the precedent of prior legislative policy decisions. Michigan has long regulated the flow of sexually oriented material to minors

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12 Evidence on the effect of pornography on actions or attitudes remains inconclusive. Robert B. Cains, J.C.N. Paul, and Julius Wishner, "Psychological Assumptions in Sex Censorship: An Evaluative Review of Recent Research (1961-68)," Technical Report of the Commission on Obscenity and Pornography, vol. 1, pp. 5-21 (1971-72); Obscenity Commission Report, 379 (statement of Commissioner's Lipton and Greenwood; "a sufficient 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").

on the ground that at least certain types of such material may be "harmful" to the minors; and no new studies have been produced which significantly change the weight of the evidence on that point. Other Michigan legislation has recognized the importance of implementing parents' control over the exposure of their children to sex-related material (see M.C.L. §340.789c) and there is no indication that parental interest in such legislative support has changed significantly. Moreover, the positions reflected by the past Michigan legislative decisions are commonly shared -- a substantial majority of the states[13] have provisions specifically restricting distribution of obscenity to minors, and the others apparently would apply their general obscenity provisions to such distributions.

The report also assumes that a juvenile obscenity provision should promote both of the interests noted by the Court in Ginsberg, but that 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, the legislation should be limited to obscene materials, but parents and assisting professionals should not be prohibited from showing such materials to minors for whom they have responsibility. The interest of parents should prevail, notwithstanding the potentially harmful impact of obscene materials, because, inter alia, (i) the harmful impact is not so well established as to overcome the usual presumption that the care and development of the minor be left to the discretion of the parent, and (ii) 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. Similar factors also justify recognition of the interests of various professionals (e.g., physicians and teachers) in

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13 See the statutory appendix to the majority opinion in Ginsberg, supra, listing 36 state juvenile provisions at that time.

using obscene materials with minors for educational or scientific purposes. Their professional background provides considerable assurance that the material will be utilized in a controlled context designed to benefit rather than harm the child. Moreover, such professional activity ordinarily is undertaken with the consent of the parents.

Finally, the report also assumes that the juvenile obscenity provision should take the form, at least in part, of a criminal statute. Prior legislation on the subject in Michigan and all the other jurisdictions noted have included criminal provisions. Michigan also has a general obscenity provision providing for injunctive relief, and the report also considers the adoption of a similar provision relating to dissemination to juveniles.

Starting with acceptability of a Ginsberg-type statute, this report seeks primarily to explore issues relating to the proper scope of such a statute. The proper scope should, of course, be determined in light of the legislation's purpose of supporting the parent's interest in controlling their children's access to potentially harmful sex-related material. However, several other objectives should be considered besides the most efficient achievement of that function:

> 1. Consideration should be given to limiting the administrative burden placed upon disseminators. Limiting that burden is not simply for the benefit of the dealers. If dealers find it too difficult to identify what minors may or may not receive, they may simply refuse to sell any sex-related material, including clearly beneficial material, to minors. On the other hand, if the dealers find the burden of identifying customers as minors too great, they may simply refuse to carry sex-related materials prohibited for minors, thereby barring purchase by adults as well as minors.

2. The legislation should seek to avoid placing restrictions on the dissemination of sex-related 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 source of concern has been that statutes not be drafted so that a minor cannot purchase a copy of Time magazine because it contains a picture of a nude or "The Catcher in the Rye" because it discusses sex.

3. The legislation should give appropriate recognition to the authority of parents and assisting professionals to expose minors to material which might be viewed as obscene. As noted supra, that authority exists as one aspect of the basic legislative objective of supporting the parent's control of their children's access to such materials. The legislation should seek to ensure that a substantial burden is not placed upon parents or assisting professionals when they exercise their authority to expose minors to obscene materials. Of course, any restriction placed upon commercial dissemination directly to minors also inhibits, to some extent, the parent's and assisting professional's capacity to expose children to the regulated material -- an impact resulting from both community pressures on the parents and professionals and the extra effort required by them to obtain such material. But at least the statute should clearly recognize the legitimate interest of these persons when they make that effort and thereby relieve them of any fear of criminal prosecution.

Consideration of the three objectives noted above suggest that two principles particularly should be stressed in drafting a Ginsberg-type statute. First, the statute should be as specific in coverage as is possible. The matter encompassed by the statute, the 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 inclusion of a particular class of materials in the restricted category -- either because potential harm or parental interest is doubtful, or because there is a significant potential for over-application of the statute to bar dissemination of beneficial materials -- dissemination of that material should not be regulated. It should be stressed in this regard that no statute will be successful in keeping from minors even all of the statutorily restricted material. At its most effective, state regulation can only assist parents opposed to such material by keeping the flow from becoming a tidal wave.

Another factor supporting non-regulation of doubtful categories of material is the structure of the current market place. Publishers and producers of material exploiting prurient appeal operate largely within a national market. Moreover, it is a market that looks to adults as well as minors. A statute that restricts distribution of a somewhat narrower range of materials than statutes of other jurisdictions may be just as effective in restricting the flow of potentially harmful material while providing less potential for overly broad application. The publishers and producers ordinarily are not in a position to carefully tailor their material so that it retains its prurient appeal but nevertheless depicts only material that is not included in these narrower statutes. If a Michigan provision, for example, does not prohibit the lewd portrayal of nudity, but does prohibit the depiction of sexual acts, the creators of films and magazines (and to some extent even plays) exploiting prurient appeal cannot seek to evade the statute's impact by limiting their material to nudity. The adult market for material stressing prurient appeal requires that far more than nudity be depicted. Moreover, assuming matter could be developed only for minors that was limited to nudity, that matter would have a limited range of distribution even as to

minors since it would run into difficulty in other jurisdictions with youth provisions that prohibit nudity. Thus, in the end, carefully restricting coverage will not only serve the three subsidiary objectives noted above, but it may do so while restricting dissemination of material exploiting prurient appeal as effectively as many statutes with broader coverage.

II. DEFINING OBSCENITY: THE TRIPARTITE TEST

In determining the appropriate scope of the proposed statute, a good starting point is the definition of that material which may not be disseminated to minors without parental approval.[14] The more recently adopted statutes utilize a definition of such material that contains two segments, which are cumulative. The first segment is the specific description of the sexual content of the material, imposed pursuant to the sexual specificity requirement of Miller. If the material meets this description, it is then tested by the second segment of the definition -- the tripartite constitutional standard for defining obscenity, modified for an audience of minors. For more convenient analysis, this report will consider initially various issues relating to the second segment of the definition, the modified tripartite test, and then will treat the first segment.

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14 Statutes commonly describe such material as matter "harmful to minors," so as to avoid any confusion with the category of "obscene" materials proscribed under general statutes dealing with dissemination to adults. Since the general Michigan obscenity provision, M.C.L. §750.343 also uses the term obscene, the phrase "harmful to minors" is used in the proposed statute. However, the definition of matter "harmful to minors" under section 1(d) is limited to matter that is "obscene" for minors under the prevailing constitutional definition of obscenity as adopted to an audience of minors.

Tripartite Test: Application to Minors

Although the Legal Panel Report For The President's Commission might suggest otherwise, application of a tripartite standard, modified to fit an audience of minors, appears to be an essential element in achieving a constitutionally acceptable state regulation of the dissemination of sexually oriented materials to minors.[15] While there is no Supreme Court holding on point, and the Court found it unnecessary to directly rule on the issue in

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15 The Legal Panel Report is somewhat ambiguous on this point. See Obscenity Commission Report, 323: "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 minor statutes conform in their application to this particular definition. Rather, the Court's opinion states that definitions to 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." The model juvenile statute proposed in the Report does not incorporate the tripartite standard, although this omission may be based on the assumption that the courts would incorporate that standard in reviewing the application of the statute. See fn.5 supra. Similar proposals that do not rely upon the tripartite standard are advanced in Hunsaker, fn. 5 supra, at 941; Dibble, Obscenity: A State Quarantine to Protect Children, 39 So.Calif.L.Rev. 345, 354-55 (1966).

Interstate Circuit, the basic rationale of both Miller and Ginsberg suggest that the state may only reach material that may be classified as "obscene for children" under the tripartite test as adapted to minors.

Miller v. California, like previous decisions accepting the constitutionality of adult obscenity provisions, rested on the premise that "obscene" publications do not fall within the protection of the First Amendment.[17] Obscene material, the Court has noted, fails to serve the expository function that the First Amendment is designed to protect. Obscene material constitutes "no essential part of any exposition of ideas" and is "of such slight social value as a step to truth" that its regulation may be permitted without establishing the clear and present danger or other overwhelming state interest needed to regulate protected speech. See 413 U.S. at 20 (quoting from Roth v. United States, supra).[18]

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16 Interstate Circuit v. Dallas, 390 U.S. 678 (1968), held unconstitutionally vague a film classification system that was designed to restrict attendance at films classified as "not suitable for young persons." Footnote 15 of the majority opinion noted: "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."

17 The Court majority's classification of "obscenity" as non-protected 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 Monaghan, Obscenity 1966: The Marriage Of Obscenity Per Se And Obscenity Per Quad, 76 Yale L.J. 127, 131-134 (1966).

18 The fact that speech falls within the protected category does not necessarily prohibit its regulation. The state may still impose certain restrictions if supported by an especially strong showing of need. See Brandenburg v. Ohio, 395 U.S. 444 (1969); Garrison v. Louisiana, 379 U.S. 64 (1964).

While a majority of the United States Supreme Court has continuously adhered to this premise, the Justices were unable to agree, for a substantial period of time, as to what definition of "obscene," material could appropriately distinguish that material from other sexually oriented material that was protected under the First Amendment.[19] In Miller the majority finally agreed upon the tripartite test as the constitutionally required definition of obscenity. Each element of the tripartite standard is designed to ensure that material which meets the complete standard lacks the expository quality of protected speech. The first and second elements (combined with the requirement that the material depict sexual conduct)[20] describe the major characteristics of pornographic material. As the Court has noted, the test for obscenity is basically a test for determining whether material is "obscene pornography." Pornography, by its very nature, will almost invariably fail to make a contribution to the exposition of ideas. Where material depicts "hard-core" sexual conduct, appeals to the prurient

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19 In Miller, three dissenting justices concluded that no "definition or 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. 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...." 413 U.S. at 78.

20 As the Court noted in Miller, 413 U.S. at 18, n. 2, 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," 413 U.S. at 22, or, as Miller also describes it, "'hard-core' pronography," 413 U.S. at 28.

interest, and has the allure of "forbidden fruit" associated with that which violates community standards as to the depiction of sex, these qualities strongly indicate that the material represents no more than an effort to arouse prurient interest for the sake of sexual stimulation alone, -- i.e., that the material does not make a serious contribution to the communication of ideas or artistic value. Application of the third element of the tripartite test provides final assurance that the particular pornographic material in question lacks the quality of protected speech, for it requires a specific finding that the particular material does indeed fail to advance seriously the exposition of literary, artistic, political or scientific ideas or values.

Of course, Miller utilized the tripartite test only to define obscenity for a general adult audience. But Ginsberg v. New York, though decided before Miller, indicates that the First Amendment analysis supporting the tripartite standard is also applicable to juvenile provisions. Ginsberg upheld a New York juvenile statute that utilized a pre-Miller version of the tripartite standard, which was modified to fit an audience of minors. The New York provision sought, in effect, to identify material as "obscene for minors" by applying the prurient interest, patent offensiveness, and social value elements, in light of the experience and capacity of youth. Though the majority opinion in Ginsberg upheld the New York statute, it did not state that a juvenile provision would only be constitutional 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. See 390 U.S. at 636. In holding that the state could distinguish between adults and minors, the Court hardly discussed 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 juvenile formulation.

The Ginsberg majority specifically noted that a juvenile obscenity provision might well be unconstitutional if tested by the "clear and present danger" standard applied to other regulations of speech. 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 the restricted material harmed their development. 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, as the core of its definition, provided such assurance. In light of Miller, it is extremely doubtful that any other standard would do the same. If each element of the tripartite standard is an essential 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 authorizes, each element of the tripartite standard may be measured in terms of the capacity and experience of minors, but the basic elements of analysis should not otherwise differ. Thus, the Ginsberg analysis constitutes a warning, in light of Miller, against attempting to discard any or all elements of the tripartite standard as applied to juveniles[21] -- at least not without the strong scientific evidence (not currently available) needed to sustain a statute regulating material viewed as protected under the First Amendment.

Tripartite Test: Inclusion in Statute

Accepting the premise that the state only may bar material that falls within a 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 always apply the standard as a legal limitation in reviewing a constitutional challenge to a conviction. 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). However, if the test is included as an

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21 Compare the provisions in fn. 5 supra and fn. 22 infra, and the legislative proposal in Hunsaker, fn. 5 supra at 941.

element of the offense, it also will be a factual issue to be decided by the jury as the trier of fact. Almost all of the recently adopted state provisions have taken this approach.[22] Some of the state statutes do not include all of the elements of the current tripartite standard as part of the offense, but the missing elements traditionally have been incorporated as an element of the offense by judicial interpretation.[23] Indeed, the pattern of inclusion is so common that exclusion probably could only be ensured 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.

Excluding the tripartite standard from the basic 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 specifically referred to the tripartite test as a standard to be applied by the trier of fact. Of course, the Miller case did not squarely present this issue since the state provision there specifically incorporated an earlier version of the tripartite standard. Still, the Court's references to jury application of the tripartite standard were not directed at

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22 The Oregon statute and the proposed Massachusetts provision fail to refer to any portion of the tripartite test, but it may be that both were drafted on the assumption that the courts would incorporate the prevailing constitutional standard as part of the offense, Ore. Rev. Stat. §167.060-075; Proposed Mass. Code §6. The Report of the President's Commission, fn. 15 supra, includes a model statute that does not incorporate the tripartite standard, perhaps on the view that it does not apply. See fn. 15 supra; Id. at p. 65. The Model State Obscenity statute, proposed by three dissenting commission members, did include a pre-Miller version of the constitutional definition of obscenity which was adjusted for an audience of minors. See Id. at 463.

23 See Hawaii Pen. Code (Title 37) §1210 (lacking patently offensive); Utah Code §76-10-1202 (lacking serious value element). See also fn. 5 supra.

the 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," 413 U.S. at 24. Later, it noted that "in resolving the inevitable sensitive questions of fact and law [presented under the tripartite standard], we must continue to rely on the jury system." 413 U.S. at 26. 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, 413 U.S. at 30. Ginsberg indicates that the Miller statements regarding jury responsibility would apply also to a juvenile statute; the variation between a juvenile and adult audience would not appear to have a significant bearing on the nature of the jury function.[24] It is noteworthy also that the New York juvenile statute upheld in Ginsberg specifically incorporated a version of the tripartite test as an element of the offense.

Since the issue was not squarely presented in Miller, and the Court has not insisted upon a jury adjudication in non-criminal proceedings in which the tripartite test is

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24 One aspect of jury participation is that the jurors can judge for themselves the prurient appeal, etc. of the material in terms of community standards as they know them. See 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 v. Slaton, 413 U.S. 49, 56, n. 6 (1973); Kaplan v. California, 413 U.S. 115, 121 (1973). The Court did, however, "reserve judgment, . . . in 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." The interests and responses of juveniles do not appear to be so far removed from the jury experience as to fall within this reservation.

applied, perhaps it might be worth the risk of directly challenging the Miller dictum, if excluding the tripartite standard from the statutory offense provided significant administrative or substantive advantages. But neither of these interests support exclusion. From the viewpoint of convenience of trial administration there is little to be gained in excluding jury application of the tripartite standard. Evidence relating to the standard will have to be introduced in any event since the court will have to apply the tripartite test 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 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. Permitting jury application of the standard itself probably serves to eliminate considerable dispute as to whether evidence relating to community standards, etc. is "relevant" to mens rea or other elements of the offense (e.g., whether a depiction of nudity meets the statutory standard of "lewdness").

In terms of the substantive objectives of the statute, there are various advantages in making the tripartite standard an element of the offense. First, inclusion of the standard provides an extra safeguard against restricting dissemination of legitimate materials since it means

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25 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. 437 (1957), Alexander v. Virginia, 413 U.S. 836 (1973). Consider also the significance of the affirmance in Hamling v. United States, 418 U.S. 87 (1974).

that the jury, as well as the judge, must find that the matter in question falls within the standard.[26] Moreover, the jury must be persuaded of the standard's application

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26 The Supreme Court has not had occasion to describe the particular standard that governs the trial court's obligation in applying the tripartite test as a First Amendment limitation. Comparable precedent in other areas suggest that the trial court's obligation is to make its own independent determination as to the application of the tripartite standard, not 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, 396 U.S. 254, 284-85 (1964). Over the years the Court has divided as to 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 was significant evidence supporting that finding. See Paris Adult Theatre v. Slaton, 413 U.S. 49, 101 (1973) (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," see 413 U.S. at 25, 22 n. 3, but some commentators suggested that such independent appellate review is likely to be exercised only as to the social value element of the tripartite test. See Lockhart, Kamisar and Choper, Constitutional Law 1030 (4th ed., 1975); Leventhal, The 1973 Round of Obscenity-Pornography Decisions, 39 A.B.A.J. 1261, 1264. See also Hamling v. United States, 418 U.S. 87, 100 (1974); Kaplan v. California, 413 U.S. 115, 122 (1973). But note Jenkins v. Georgia, 418 U.S. 153, 159-161 (1972). Even if appellate review had been held not to require an independent determination, such review could have been distinguished from that exercised by 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.

beyond a reasonable doubt while the court apparently may apply a less rigorous standard of persuasion in making its First Amendment determination.[27] Jury participation is also valuable because (i) the substance of the tripartite test, at least insofar as it is tied to community standards, is particularly appropriate for jury determination (p. 205 infra), and (ii) 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.[28]

Tripartite Test: Nature Of The Definition

Assuming that the tripartite test will be included as an element of the offense, 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. Those state provisions incorporating the constitutional definition of obscenity have sought to provide a full definition derived from the latest United States Supreme Court decisions.

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27 Assuming that the trial court apply's its own independent judgment, 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 traditional preponderance of the evidence standard. See Lego v. Twomey, 404 U.S. 417 (1972) (involving a determination as to whether a confession was involuntary).

28 Compare, in this regard, the classic debate of the 1790's over the role of the jury in the prosecution of seditious libel. 2 Stephen, History of the Criminal Law in England, 351 (1883); Levy, Legacy of Suppression (1960).

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 invalid or more limited in coverage than is constitutionally necessary.[29] However, the legislature should be able to quickly amend a statute to reflect such change. Moreover, as to several issues relating to the tripartite standard (e.g., definition of the community standard), the legislature constitutionally can choose among several options. If a very general definition is used, decision on these issues 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 circuit courts. (Indeed, many issues of this type have not been resolved under our current statutes). Accordingly, proposed section 1 contains, primarily in paragraphs (d) and (i), a fairly detailed definition of the tripartite standard, derived initially from Miller and then adapted to a youthful audience. The remainder of this section of the Study Report discusses major issues that were considered in the drafting of these two paragraphs.

Tripartite Test: Defining The Prurient Interest Element

As noted by Judge Moore, dissenting in United States v. Darnell, 316 F.2d 813, 816 (2d Cir. 1963), the phrase "'prurient interest' . . . certainly [is] not self-defining."

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29 Thus, several of the state statutes examined used the tripartite standard as stated in Memoirs v. Massachusetts, supra, which may provide broader First Amendment protection than the Miller formulation of that standard. 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 the light of Miller.

After describing "obscene material" as "material which deals with sex in a manner appealing to prurient interest," the Court in Roth 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. . . .' * * *" 354 U.S. at 487, n. 20.

The various state obscenity statutes we examined either do not define prurient interest, e.g., Ohio Rev. Code §2907.01 (E)(1), or use the A.L.I. definition, e.g., Ill. Rev. Stat. ch. 38, §11-21(b); Cal. Pen. Code §313(a).

There is no necessity that the statute define prurient interest. While the term should be defined for jury use, the Roth footnote always can be utilized for that purpose. That footnote cites a variety of definitions, however, and it would be desirable to have a single statutory standard that could serve as the foundation for a jury charge in all cases. Proposed paragraph (i) seeks to provide such a standard. It does not follow the A.L.I. definition because

the wording of that definition may be misleading. The reference in the A.L.I. definition to a "shameful" or "morbid" interest in sex may suggest to some that material must arouse a deviant or perverse interest not found in most persons.[30] It would be preferrable to define prurient interest without reference to the moral connotations suggested by terms like "shameful."[31] The Detroit Ordinance provides such a definition in describing prurient interest as a "desire or craving

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30 This clearly was not the purpose of the A.L.I. Code. See Schwartz, Morals Offenses and the Model Penal Code, 63 Col.L.Rev. 669, 679 (1963). The Model Code's reference to a prurient interest in "excretion" explains, perhaps, the Code's description of prurient interest as "morbid." Certain materials may be designed to appeal to a "morbid curiosity" in an average person rather than to sexually stimulate. They may be designed to shock and disgust rather than to arouse (leaving aside those with perverse sexual interests). While an obscenity provision should, perhaps, reach such matter, it is inappropriate to define prurient interest so as to suggest all hard-core pornographic material must have that quality before it can be regulated. Indeed, most does not. See fn. 39 infra. Consider also The Legal Panel Report in the Obscenity Commission Report, at 312, n. 79: "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."

31 If obscenity is viewed as producing a reaction of shamefulness, that reaction is, perhaps, more directly a product of the fact that obscene material violates community standards as to the appropriate depiction of sexual conduct (i.e., is patently offensive) than its capacity to sexually stimulate. See pp. 183-84 infra; Model Penal Code, Tent. Draft No. 6, p. 30-31 (1957).

for sexual stimulation or gratification." See Det. Ord. §39-1-18(14)(B). The Detroit provision's reference to both a "desire" and a "craving" may present difficulties, however, by suggesting that the definition encompasses both a casual sexual interest and the magnification of that interest to an intense yearning. Only the latter quality of interest meets the obscenity requirement. United States v. Stewart, 336 F.Supp. 299 (E.D. Pa. 1971). The proposed definition in paragraph (i) modifies the Detroit standard by adding the term "lustful" to describe the requisite "desire," which, hopefully, will more clearly distinguish a prurient interest from a casual sexual interest.[32]

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 a 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, 383 U.S. 502 (1966). Some of the states do not include a specific provision recognizing the special prurient interests of special audiences, particularly in the statutes regulating distribution to minors. In light of Mishkin (where the statute interpreted also 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.[33] Nevertheless a specific statutory provision is advisible. It would

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32 The term "lustful" was among those used in the Roth footnote. See p. 175 supra. M.C.L. §750.343b, in defining prurient interest, refers to sexual desires or sexually improper thoughts. This standard, particularly the reference to "improper" thoughts, is far too broad if construed literally.

33 The current adult provision, M.C.L. §750.343b, was adopted before Mishkin, and refers only to the average person in the community. This provision surely was not intended to reject the special audience principle of Mishkin, but only to restate the Butler concept that the test cannot be applied in terms of its appeal to the most susceptible person in a general audience.

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 intended 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 of the average person -- not the person who may be most susceptible. (See p. 190 infra).

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." Ill. Rev. Stat. ch. 38, §11-21(c). This goes beyond Mishkin, which spoke of "deviant" sexual groups. A group may be "deviant" because it has a different sexual interest than people generally, but this does not necessarily make it more "susceptible" in the sense that it takes less to arouse its prurient interest. Other provisions follow Mishkin and refer directly to "deviant sexual groups." See Cal. Pen. Code §313(a)(1). The Detroit ordinance avoids any statutory characterization of particular groups as "deviant," but also limits the category, in accordance with Mishkin, to groups having a special sexual interest. It refers to material having prurient appeal to "a particular group of persons," as illustrated by two named groups having special sexual interests (homosexuals and sado-masochists). Det. Ord. §39-1-18(12). This definition is followed in proposed paragraph (i).

In determining whether the material is designed for a special audience, the proposed paragraph directs the trier of fact to consider the "character" of the material distributed. California Penal Code §313(a)(1) permits the determination that material is designed for a deviant group to be based upon either "the nature of the matter or the circumstances of its dissemination, distribution or exhibition." The California alternative appears unnecessary in a statute limited to the depiction of sexual conduct. The nature of the conduct depicted should be sufficient in itself to indicate that the material was aimed at a special group.

The circumstances of distribution are likely to have significant additional evidentiary value where the material depicts persons engaged in activities that might be innocuous on their face, but are clearly aimed at a deviant group. However, the Miller limitation of obscenity coverage to the portrayal of specific sexual conduct, such as ultimate sex acts, masturbation, and sado-masochistic abuse, should bar proscription of material depicting innocuous activity that has a hidden meaning for some group.

Tripartite Test: Defining The Patent Offensiveness Element

The patent offensiveness element of the tripartite test was first recognized as a separate aspect of the constitutional definition of obscenity in Justice Harlan's separate opinion in Manual Enterprises v. Day, 370 U.S. 478 (1962):

> "[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,' . . . ." 370 U.S. at 482.

Justice Harlan noted that the element of patent offensiveness had been included in A.L.I. 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 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)." 370 U.S. at 486.

Opinions of individual justices in subsequent cases sometimes described the element of patent offensiveness in terms of exceeding customary limits of candor, see Jacobellis v. Ohio, 378 U.S. 184, 191 (Brennan, J.), and at other times described it as requiring that the material "affront contemporary community standards relating to the description or representation of sexual matters," Memoirs v. Massachusetts, 383 U.S. 413, 418 (Brennan, J.).[34] 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," 413 U.S. at 24.

The Miller opinion did not discuss the concept of patent offensiveness aside from noting that patent offensiveness was to be determined by contemporary community standards. The trial court in Miller had instructed the jury that material

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34 But note, 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."

is not obscene unless it "goes substantially beyond customary limits of candor and affronts contemporary community standards of decency" in the "State of California." 413 U.S. at 31. 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,[35] it apparently had no objection to the Memoirs description of patent offensiveness as "affront[ing] contemporary community standards" as to the depiction of sexual matters. Thus, Miller does not seem to prescribe any particular description of patent offensiveness provided that description clearly indicates that sexual conduct must be depicted in a manner that places the depiction beyond commonly accepted social conventions and thereby contributes to its presentation as "hard-core pornography."[36]

State obscenity statutes vary in their description of the patent offensive element. Some, like the California juvenile provision, require that the matter "goes substantially beyond customary limits of candor in description or representation" of sexual matters. See Cal. Pen. Code §313(a); Ill. Rev. Stat. ch. 38, §11-21. The Washington juvenile provision refers to 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." See Wash. Rev. Stat. §968.050. The Detroit Ordinance follows

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35 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."

36 See p. 166 supra, discussing the function of the various elements of the tripartite test.

Miller in simply noting that listed sexual conduct must be described "in a patently offensive way." Det. Ord. §39-1-18(11). 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." N.Y. Pen. Law §235.20(6); Fla. Stat. §847.012(f)(2); Ohio Rev. Code §2907.01(E).[37] All of the foregoing provisions are consistent with the basic concept of patent offensiveness as described supra, and should be constitutionally acceptable under Miller.

Proposed paragraph (d)(ii) is patterned after the definitions of patent offensiveness contained in the New York juvenile statute and Justice Brennan's Memoirs opinion. The proposed paragraph requires that the sexually explicit matter "affronts contemporary . . . community standards . . . as to what is suitable matter for minors." The A.L.I. definition was rejected on the ground that the phrase "customary limits of candor" suggests reference only to the "frankness" or "brazeness" 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. On the other hand, a simple statement that sexually explicit matter be presented in a "patently offensive way," as in the Detroit Ordinance, could be even more misleading. If the term "offensiveness" is not tied to a description of the community standard against which offensiveness is measured, the element of offensiveness might be taken as suggesting that the

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37 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 Code §1210(5)(b) with §1210(6)(a). The apparent assumption of the Hawaii legislature is that material which depicts the sexual conduct specified in that statute and appeals to the prurient interest of minors, inevitably goes beyond the customary limits of candor for presentations to minors. Miller proceeded on the assumption that the erotic portrayal even of "ultimate sex acts" was not necessarily patently offensive as to community standards for adults. See, e.g. 413 U.S. at 25, 27. While a stronger case may be made that, for minors, the depiction of ultimate sex acts are almost inevitably patently offensive, exceptions can be noted even for a quite youthful audience. See, e.g., fn. 76 at p. 220 infra. Moreover, the Hawaii provision, like the other state provisions examined, includes depictions of nudity, which often will not be patently offensive for minors. See pp. 229-234 infra.

material must be physically repulsive. That concept of offensiveness had led some to question the consistency of requiring both offensiveness and prurient appeal.[38] Pornographic material, it is argued, commonly stimulates in the average person a reaction of sexual arousal that is inconsistent with physical revulsion.[39] However, to satisfy the requirement of patent offensiveness, the material need "offend" only in the sense that it creates in the viewer the combined feelings of wrongfulness and excitement that comes from viewing what one might find alluring, yet knows to be clearly contrary to the accepted mores of society. Indeed, the very tension created by knowing that the material violates community standards may

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38 Of course, material may be physically repulsive, yet have a morbid, compelling appeal. See Schwartz, Moral Offenses and the Model Penal Code, 63 Colum.L.Rev. 669, 691 (1963) (discussing the Model Code's reference to a prurient appeal in excretion). But the concept of prurient appeal is defined in proposed paragraph (i) in terms of a lustful desire that is not necessarily morbid. (See pp. 175-77).

39 Obscenity Commission Report, at 164, 174, 193 (noting mixed reports on the responses of "arousal" vs. "disgust" or "aversion" to various forms of erotica, including hard-core pornography). See also Schwartz, fn. 30 supra, at p. 691: "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."

add to the sexual arousal. The proposed draft seeks to ensure that the "offensiveness" is viewed only in this narrower sense by stating the requirement in terms of "affronting" the community standard as to the "suitability" of material for minors.[41] The term "affront" encompasses the "patent" element of the offensiveness since it requires a direct and open defiance of the community standard. The relevant community standard is defined as that of "suitability" rather than "decency" (compare Justice Harlan's description in Manual Enterprises, supra) so as to avoid any suggestion that the standard is based solely on moral judgments. The community standard as to what materials are suitable for minors may in fact be based upon various factors, including the likely impact of the material upon the behavior of minors.

Tripartite Test: Defining The Social Value Element

In Miller v. California, supra, 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." In holding that obscenity was not constitutionally protected speech, Roth v. United States, supra, characterized obscenity as having "such slight social value as a step to truth that any benefit that may be derived from [it] is clearly

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40 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 p. 167 supra. See also Model Penal Code, Tent. Draft #6, p. 30 (1957).

41 The term "patently offensive" is not used, but could be included in the paragraph by following the structure of the Memoirs statement: material is "patently offense because it affronts community standards," etc.

outweighed by the state's interest in order and morality."[42] This characterization, Miller noted, did not require that the state prove that the publication in issue is unqualifiedly without any social value; it is sufficient that the publication, "taken as a whole, lacks serious literary, artistic, political or scientific value." If material depicts hard-core 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 -- i.e., it performs such an insignificant function, if any, in the exposition of ideas as to be "utterly without social importance" for First Amendment purposes.[43]

Proposed paragraph (d)(iii) incorporates the Miller social value standard and adapts it to an audience of minors. The proposed paragraph quotes verbatim the Miller description of that standard: "taken as a whole," the matter must lack "serious literary, artistic, political, or 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 social -- "constitute an exhaustive catalogue." Leventhal, The 1973 Round Of Obscenity-Pornography Decisions, 59 A.B.A.J. 1261, 1264 (1973). Judge Leventhal suggests that the list cannot rationally

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42 354 U.S. at 484-85 (emphasis added). The reference is to a quote from Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572 (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."

43 See Roth v. United States, 354 U.S. at 484: "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 guaranties, unless excludable because they encroach upon the limited area of more important interest. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."

be taken as exhaustive. The presence of other values also may establish that material is not the "portrayal of hard-core sexual conduct for its own sake,"[44] 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. Certainly, the failure of Miller to mention educational value does not suggest 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 categorized as having scientific or even political value.

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 did not include sex education, and a special reference to education therefore was required, what significance will be attached to the legislature's failure to add a reference to such subjects as "philosophical" value?[45] If the four Miller categories are not themselves sufficiently elastic, it would be preferrable to add the phrase "or other similar values," rather than additional specific categories. While Miller rejected a broad standard of "social importance" (see 413 U.S. at 25, n. 7), 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.

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44 413 U.S. at 35 (emphasis added). See also pp. 166-67 supra.

45 See Obscenity Commission Report, at p. 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).

The Miller reference to a "serious" literary, artistic, political or scientific value also has been criticized as ambiguous. See Hunsaker, fn. 5 supra, at p. 914. 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. See Leventhal, supra, at p. 1265.

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." 413 U.S. at 23 (emphasis added). 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. 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." 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 merit 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.[46] The reference to a "serious" value is necessary

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46 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. 2 (1966) (Stewart, J., dissenting).

only to ensure that the communication of ideas is a basic aspect of the work.[47] Although hard-core pornography seeks essentially to stimulate and exploit the "emotional tensions arising from the conflict between social convention and the individual's sex drive,"[48] 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 escape coverage because of a patent veneer portraying some artistic or literary objective. 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 could be substituted for "serious," (e.g., "true" "substantial"), they are not likely to be more precise in conveying the thrust of the social value standard. Such ambiguity as 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.

Tripartite Test: Adaptation To Minors--Age Variation

Once the appropriate definition of each element of the tripartite test is determined, those definitions must be

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47 Consider also the explanation of the "predominant appeal" element of the Model Penal Code formulation, Tent. Draft No. 6, p. 42-43. The Illinois juvenile provision, Ill. Rev. Stat. ch. 38, §11-21, requires 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.

48 Model Penal Code, Tent. Draft No. 6, p. 30 (1957).

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, 378 U.S. 184, 201 (1964) (dissenting):

> "[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 distinctions should be drawn between minors of different age levels. Most juvenile statutes 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." See, e.g., N.Y. Pen. Law §235.20(b); Utah Code §76-10-1201. The Illinois juvenile statute and the legislation proposed by Obscenity Commission members Hill and Link,[49] on the other hand, provide 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." Ill. Rev. Stat. ch. 38, §11-21(C).

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, perhaps consideration

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49 See Model State Obscenity Statute, §1(b), contained in appendix II to the Statements of Commissioner's Hill and Link, concurred in by Commissioner Keating, Obscenity Commission Report, at 463.

initially should be given to 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, 352 U.S. 380 (1957), against restricting general access to sexually oriented materials according to its 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 -- i.e., it could not "reduce the adult population to . . . reading only what is fit for children." Similarly, the state cannot bar the adult community as a whole from receiving material simply because that material might appeal to the prurient interest of the most sensitive adults in that community. See Roth v. United States, 354 U.S. 476, 489 (1957). Neither can it appropriately place upon the disseminator the task of determining which of his perspective purchasers from the otherwise indistinguishable adult community are most likely to fall within that especially sensitive category.

The refusal to look at the individual recipient is based, however, on more than the Butler limitation. 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 indeed a totally insensitive one." Miller v. California, 413 U.S. 15, 33 (1973) (emphasis added); Hamling v. United States, 418 U.S. 87, 107 (1973). 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.[50] The refusal to recognize such a defense follows, in part, from the function of the tripartite standard as a test to determine whether sexually oriented material falls within the area of protected speech. 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. See pp. 166-67 supra. The underlying premise of Miller is that "hard-core pornography" does not serve the expository function protected by the First Amendment and the tripartite test will adequately ensure that the state reaches only such "obscene, pornographic material." In determining whether material portraying sexual conduct has a pornographic objective -- i.e., is seeking to sexually stimulate and arouse "for its own sake," 413 U.S. at 35 -- it is appropriate to judge the material in terms of its appeal to the average person in the audience to whom it is offered. But material which has a pornographic objective is not likely to have significant expository value for any member of that audience. Even though hard-core pornographic material happens not to appeal to the prurient interest of a particularly non-susceptible member of the audience, its basic objective ensures that it will not have any more value in the exposition of ideas for him than for the person with the average prurient interest.[51]

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50 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, 847-852 (1964).

51 Again, we put to one side the person making scientific use of the material. See fn. 50 supra.

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 (though not necessarily criminal) conduct.[52] Preventing 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 seeking to make the material available to other adults also.[53] Of

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52 See Paris Adult Theatre v. Slaton, supra, at 58-63: Report of the Commission on Obscenity and Pornography, 390-413 (1970); Roth v. United States, 354 U.S. 476, 501-02 (1957) (Harlan, J., concurring). Arguably, the state's purpose in prohibiting the public dissemination of obscenity is not tied to the impact of the obscenity on the audience but to the public's general concern for communal decency and morality -- without regard to the influence of obscenity on the behavior of the persons involved. See Henkin, Morals And The Constitution, The Sin Of Obscenity, 63 Colum. L.Rev. 391 (1963). This view of obscenity legislation appears to have been recognized at points in Paris Adult Theatre v. Slaton, 413 U.S. 49, 58-59 (1973). Juvenile obscenity provisions, however, generally have not been supported on grounds of morality alone, but on the potential harmful impact upon minors receiving such materials and parental interest in controlling access of their children to such potentially harmful materials. See, e.g., Fagan, Obscenity Controls And Minors, 10 Catholic L.Rev. 270, 274-78 (1964). Schwartz, Morals Offenses And The Model Penal Code, 63 Colum.L.Rev. 669, 681 (1963).

53 In utilizing the standards of the average person in the community, the trial court in Roth noted 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.

course, dealers may sometimes screen their audience so as to exclude persons more likely to find such material repulsive (e.g., through advance warning as to content), but they certainly do not attempt to screen out persons to whom the material might have prurient appeal. 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 to whom the material has a prurient appeal.

Where material is sold to minors, the arguments noted above 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 the personal characteristics of the individual recipient.

A special case may be made, however, for considering the one characteristic of the recipient's age, as is done in the Illinois statute. 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 12 year old may clearly serve that function for the 17 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 experience of the general adult community 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 Butler. Just as the state cannot keep material from adults because it is obscene for minors, perhaps it cannot keep from 17 year olds material that would be obscene only for 10 year olds.

Consideration of the age group of the recipient also is consistent with achieving the state's objective of avoiding the harm that flows from obscenity. If material obscene only for a 12 year old is sold to a 16 year old, no harm will flow from that sale.[54] Moreover, unlike the situation presented in the sale to a particularly insensitive adult, we cannot readily assume that 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 an 11 year old.

Thus, the Illinois approach, although it looks to one characteristic of the recipient, is not inconsistent with the rationale underlying our 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

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54 Consideration is not given to the purchaser's further distribution to a more youthful viewer. See Obscenity Commission Report, at 401 (Hill-Link minority statement); Kaplan v. California, 413 U.S. 115, 120 (1973); United States v. Orito, 413 U.S. 139, 143-144 (1973). However, justification of regulation on that ground alone could lead to rejection of the Butler analysis.

Illinois formulation may not be necessary, however, to avoid this constitutional difficulty or to serve adequately 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." See, e.g., N.Y. Pen. Law §235.20(b). 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 (i.e., excluding the most youthful). Thus, no matter what the age of the particular recipient, the prosecution must show 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 since the tripartite test presumably encompasses its narrowest range of material at the highest age level. The prosecution itself may be at a disadvantage where the particular distribution is to a 12 year old and the state nevertheless must show that the material would have prurient appeal and lack social value for a 16 year old. Such situations would appear to be unusual, however. Most often prosecution is brought where the material would be obscene for a 16 year old as readily as a 12 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 (d) is drafted to offer alternative treatment of the recipient's age. One alternative follows the common formulation and refers to the audience of minors generally. The other alternative refers to the general age group of the particular minor to whom the material was disseminated. 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 minor 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).

Tripartite Test: Adaptation To Minors-- Adult Viewpoint

State juvenile provisions are fairly uniform in adapting the prurient appeal and social value standards to an audience of minors. In each instance, the standard is stated in terms of the experience or capacity of minors.[55] Proposed paragraph (d) follows 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, or scientific value "for minors."

In describing the element of patent offensiveness, several jurisdictions follow the New York provision, upheld in Ginsberg, and provide for determination of that element in light of the community standard of adults as to what is suitable for minors. See, e.g., Fla. Stat. §847.012; Ohio Rev. Code §2907.01(E); Wis. Stat. §944.25(F). In other jurisdictions, patent offensiveness conceivably could be judged in terms of the standards of

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55 Consider, e.g., Fla. Stat. §847.012; N.Y. Pen. Law §235.20 (b); Hawaii Code §1210(6). Some of the state provisions do not refer to minors in describing both the prurient appeal and social value elements. Thus, Wash. Rev. Stat. §968.050 refers to appeal to "the prurient interest of minors in sex," but describes the social value element without referring to minors -- "utterly without redeeming social value" (following Memoirs). Cal. Pen. Code §313(a), on the other hand, describes the social value element as "utterly without redeeming social value for minors" and the prurient appeal element as requiring a "predominant appeal of which to the average person . . . is to prurient interest."

the juvenile community itself, although that is doubtful.[56] Proposed paragraph d(ii) follows the New York standard. 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 can be established as to the contemporary thought of minors in the community 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 largely have absorbed the standards of the adult community.

Second, assuming that a separable standard of youth might exist, establishing that standard may introduce unnecessary complexity in the trial of obscenity cases. The Supreme Court has held that, with respect to proof of obscenity for adults, the "prosecutor need not as a matter of constitutional law produce 'expert witnesses' to testify as to . . . obscenity." Hamling v. United States, 418 U.S. at 104. Having examined the materials disseminated, the jurors may draw on their own knowledge of what appeals to the prurient interest of average persons in their community,

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56 Several provisions make no reference to minors in describing the patent offensiveness element. See, e.g., Cal. Pen. Code §313(a); Ill. Rev. Stat. ch. 38, §11-21(b); Wash. Rev. Code §9.68.050. No apparent reason exists as to why the element of patent offensiveness should not be modified for minors along with prurient appeal, since the two are so closely connected. Perhaps, a separate reference to minors was viewed as unnecessary in stating the patent offensiveness element on the ground that community standards relating to suitable descriptions automatically adjusted with the audience. If an adjustment for the age of the audience is to be made in these jurisdictions, the manner in which it is to be made apparently is to be left to the jury. For reasons suggested infra, it seems likely that a jury would 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.

or is patently offensive to the standards of their community. Similarly, the material itself may amply illustrate to the jurors the total lack of literary, artistic, political, or social value. Paris Adult Theatre v. Slaton, 413 U.S. 49, 56 (1973). The jury's general familiarity with youth also should permit it to determine, without expert testimony, what appeals to the prurient interest of minors.[58] The lack of literary, artistic, political, or social value for minors similarly requires evaluation of the capacity of youth and the thrust of the material in issue. Determination of the prevailing standard within the juvenile community (as separate from the standard of the adult community) might, however, be viewed by jurors as an issue on which special evidence should be introduced. Arguably, the standard held by minors cannot be assessed solely in terms of the sexually oriented material commonly viewed by minors since their access to such matter is largely controlled by the attitudes of the adult community, not by the minors' own standard as to what they should be allowed to see. Certainly, the prosecution must be prepared to respond to this contention, and the defense may introduce evidence thereon. Thus, even though the prosecutor might not be compelled constitutionally to introduce expert testimony

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57 A special problem may be raised when the local community is not utilized. See pp. 205-06.

58 In Hamling, supra, 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. There are areas of tort law also where the jury may determine, without expert witnesses, the proclivity and capacities of those who are young.

on the youth-standard issue, as a practical matter, use of that standard readily could add to the complexity of the evidence presented, without providing any significant additional shield for protected speech.

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 still is preferable because it more adequately serves the function of the patent offensiveness test. As noted supra, affronting community standards in the depiction of sexual conduct contributes 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."[60] 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.

Tripartite Test: Community Standard

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." 413 U.S. at 24, 30. The relevant community

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59 The Court in Paris Theatre reserved judgment as to the constitutional need for expert testimony only with respect to "an extreme case" where the "contested materials are directed at such a bizzare, deviant group that the experience of the trier of fact would be plainly inadequate." 413 U.S. at 56, n. 6. See also fn. 24 supra.

60 Model Penal Code, Tent. Draft No. 6, p. 30 (1957).

standard, in both instances, is that prescribing the acceptable portrayal of sexual matter. If quite similar publications are generally accepted throughout the community, then the challenged publication should not be "patently offensive" under the standards of that community. Similarly, the common acceptance of similar portrayals of sexual conduct makes it less likely that the publication will appeal to the prurient interest (as opposed to a casual interest in sex).

To a large extent, the use of the community standard in determining appeal to the prurient interest duplicates its use in assessing patent offensiveness. Thus, Justice Brennan's proposed tripartite test in Memoirs referred to community standards only in describing the element of patent offensiveness. See 383 U.S. at 418. Roth had referred to contemporary community standards in describing the prurient interest test (345 U.S. at 489), but Memoirs apparently viewed that reference as an attempt to incorporate the element of patent offensiveness, which was only recognized in post-Roth opinions as a separate feature of the constitutional definition. See also Model Penal Code, Tent. Draft No. 6, p. 30-31 (1957). Some state statutes, following Memoirs, do not refer to community standards in describing the element of prurient appeal. See, e.g., Hawaii Stat. §1210(5); Wash. Rev. Stat. §9.68.050. Since Miller described the prurient appeal element in terms of the determination of the "average person, applying contemporary community standards," and the potential duplication in the use of community standards creates no difficulty, proposed paragraph (d) also refers to community standards in connection with prurient appeal as well as patent offensiveness.

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. In Miller, and two later rulings, Jenkins v. Georgia, 418 U.S. 153 (1974), and

Hamling v. United States, 418 U.S. 87 (1974), the Court settled this question. Those opinions hold that the state is not required constitutionally to apply a national standard. The three opinions are perhaps not as clear as to the different geographic points of reference that would be constitutionally permissible, but at least three different geographic communities appear to be acceptable: (1) the state as a whole; (2) the vicinage from which the jury is selected;[61] and (3) the "local" community, defined in terms of socio-economic factors.[62] Miller upheld jury instructions specifying

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61 It is assumed that prosecution is brought in the district of dissemination.

62 The use of a national standard might be more questionable. Hamling upheld a conviction, under a federal obscenity statute, that was based upon a pre-Miller jury instruction using 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 error in instruction did not require reversal since the "principal concern" in requiring reference to a community standard -- that the jury rely on a community viewpoint rather than the juror's personal opinion -- had been served by the instruction below. In opposing 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 such a standard -- though not requiring reversal in the Hamling case -- might be subject to successful challenge as unduly vague, at least where the jury charge emphasized the need to utilize a national viewpoint. See 418 U.S. at 102-110.

the relevant community standard as that of the state as a whole. 413 U.S. at 30-34. Hamling and Jenkins both indicate that a jury charge utilizing the judicial district from which the jurors were selected would also be acceptable constitutionally. In Hamling, the Court noted 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." 418 U.S. at 105-106.

Jenkins adopted 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."[63]

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63 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."

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 court might be considerably more compact than the federal judicial districts. The Court noted in Jenkins that Miller granted the states "considerable latitude" in determining the appropriate community (418 U.S. at 157). In Hamling, it noted also 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" (418 U.S. at 107). 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 -- as in some Michigan municipal courts.

The Court's analysis of the role of the community standard in Miller, Jenkins, and Hamling also supports the constitutionality of reference to "local" communities defined in the particular case according to socio-economic factors that tie particular geographic areas together. 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 might be sufficiently separate from the rest of the county (e.g., the college town in an otherwise rural community) so as to constitute a separate local community. While the Court did not speak directly to such a "local" community concept, the acceptance of the Jenkins charge indicates that a socio-economic definition of the relevant community would be upheld. The jurors in Jenkins, with the precise community left unspecified, were as likely to have looked to their local socio-economic community as to the particular governmental unit from which the jury was drawn. It also may be significant that the Miller opinion referred to particular cities as

illustrations of separate communities, rather than to counties, which serve as the vicinage for jury selection in most parts of this country.[64]

The various state juvenile provisions examined generally do not specify what community should be utilized in applying contemporary community standards. Most of these provisions were adopted before Miller, when there was doubt as to the leeway allowed the state in designating the relevant community. Judicial decisions interpreting such statutes have utilized a statewide standard, a "local" standard that is not further defined, and a local standard defined by reference to the vicinage for jury selection. See, e.g., Hunsaker, fn. 5 supra, at 931-932. The Detroit ordinance, adopted after Miller, refers to the "contemporary community standards of the city of Detroit." Detroit Ord. §39-1-18(11)(A). The Court of Appeals, in the original Bloss ruling, held that M.C.L. §750-343b, which is part of the adult obscenity statute, required application of a "local" community standard, but the Court did not seek to distinguish between a precise geographical local community (i.e., the vicinage) and a local socio-economic community. The State Supreme Court found it unnecessary to consider the appropriate community standard in disposing of Bloss.[65]

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64 In referring to variations in standards among separate communities, Miller referred to New York City and Las Vegas. 314 U.S. at 32.

65 The Court of Appeals ruling, 28 Mich.App. 687, 707 (1970) was originally reviewed in People v. Bloss, 388 Mich. 409 (1972). The Michigan Supreme Court there noted that Justice Brennan's separate opinion in Jacobellis v. Ohio, 378 U.S. 184 (1964), had disagreed with the Court of Appeals' analysis favoring a local standard, but did not express any opinion on that issue. When Bloss was subsequently remanded after Miller, the Michigan Court reversed on grounds discussed at p. 150 supra.

Proposed paragraph (d) 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 are selected; and (3) define "local" with reference to the county, which is the district from which jurors are selected at the circuit court level. 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." "Our Nation is simply too big and diverse," the Court noted, "to reasonably expect that standards could be articulated for all 50 states in a single formulation, even assuming the prerequisite consensus exists." 413 U.S. at 30. A statewide standard, encompassing metropolitan Detroit and the Upper Penninsula, would not seem to be significantly less hypothetical. 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 taken as a whole. Moreover, evidence of the material acceptable within the local community should be much more readily available to both prosecutor and defense. The use of a statewide standard arguably places greater emphasis on the use of expert testimony. As noted at p. 197 supra, the Supreme Court has held that obscenity need not be established by expert testimony. 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." Hamling v. United States, 418 U.S. 87, 104 (1974). 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,[66] it is

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66 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 deter-

highly questionable that a local jury has the capacity to act as "cross-section of a [a statewide community] with knowledge of its standards." Leventhal, supra, 59 A.B.A.J. at 1263. But compare Pierce v. State, 296 So.2d 218-226 (Ala. 1974).

One advantage of a statewide standard is that it will reduce the burden on the publisher. A local standard, it is argued, places an almost intolerable burden on a publisher by requiring him to be aware of various potentially different community standards throughout the state. A similar argument was advanced in Miller and Hamling in support of a national standard, but the majority held that application of diverse community standards throughout the country did not impose an unconstitutional burden on disseminators of sexually oriented

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footnote 66 continued

mine 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, which reaffirmed that use of expert testimony was not a constitutional requirement, the Court did not suggest 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, 201 N.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.

material.[67] In the area of distribution to minors, there is, perhaps, less need to be concerned as to the burden imposed upon publishers and wholesale distributors. Sexually oriented material ordinarily is not developed for an audience of minors alone nor knowingly sold directly to minors by the general distributors. Sales to minors ordinarily are made by local distributors, who should have greater familiarity with local standards.

A state standard also may minimize, to some extent, the possibility that two persons distributing the same material in different parts of the state are treated differently in terms of criminal liability. Such disparity appears particularly unseemly in applying a state criminal statute.[68]

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67 413 U.S. at 30-34, 418 U.S. at 104-109. See also the statement of Warren, C.J., quoted with approval in Hamling: "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, 200-201 (1964) (dissenting opinion).

68 But note Miller v. California, 413 U.S. at 26, n. 9: "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.'"

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. Both Miller and Hamling hold, of course, that it is constitutional to do so.

Application of a local standard which looks to the vicinage clearly takes into consideration the diversity of community experiences throughout the state. It also permits the jury to operate most effectively in applying the community standards with which the jurors are familiar. Of course, like any local standard, it presents the disadvantages inherent in diversity, such as the added burden on publishers. Moreover, use of the vicinage as the particular "local" community presents additional difficulties that are peculiar to that 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 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, it may not extend throughout the entire district. Admittedly, the prevailing viewpoint of the district in which the dealer is located often will be quite similar to that of the surrounding area, and the difference in community standards would not have a significant impact on the jury's determination. Also, even though the community is limited to the vicinage, the trial court may let the distributor introduce evidence relating to practices in the surrounding area, if such evidence would "assist the jurors." Hamling v. United States, 418 U.S. at 106. Nevertheless, one can easily imagine situations where such evidence would not be admitted, and the distinction between the standards of the vicinage and those of the surrounding area conceivably could have some impact upon the jury's conclusion.

Another disadvantage in using the vicinage as the relevant community relates to the special structure of the Michigan judicial system. The provisions of the proposed statute would permit the issue of obscenity to be tried in various courts. Criminal prosecutions could be tried in Recorder's Court of Detroit, the district court, municipal courts and the circuit court (via trial de novo on appeal from municipal courts). Civil actions would be brought in the circuit court. Each of these courts draws it jurors from a different judicial district. Thus, as an example, material disseminated in the city of Ann Arbor would be judged in terms of the standards of the city in a criminal prosecution (in the district court), but in terms of the standards of the county in a civil proceeding (in the circuit court).[69] So as to eliminate such inconsistency, a single standard using the vicinage of the circuit court -- the county -- could be adopted.

We have already noted the advantages of leaving the concept of "local" standard undefined so as 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 developing an appropriate standard to be applied in individual cases.[70]

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69 While the civil action would be tried without a jury, the concept of community standard presumably would apply. See Alexander v. Virginia, 413 U.S. 836 (1973).

70 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, 431 P.2d 976 (Wash. 1967); E.J. Delaney Corp. v. Bonne Bell, Inc., 5 Fed. Trade cases ¶ 60, 582 (9th Cir. 1975).

Judge Leventhal has raised the question, for example, as to 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." 59 A.B.A.J. at 1263. 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. 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.

If the "local community" standard is to be left undefined so as to permit a case-by-case determination, another issue that must be considered is whether that determination is to be made by the judge or the jury. Arguably, the determination of the relevant socio-economic community is as much a jury function as the determination as to 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 areas. (See fn. 70 supra). If the relevant community is to be decided 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. 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 each juror can take his or her own view as to what the statute means. We anticipate that, if a local community standard is utilized, appropriate jury instruction will be developed as part of the State Bar's Standard Jury Instructions project.

Tripartite Test: "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." See

paragraphs (d)(i) and (d)(ii).[71] The "whole publication" standard follows Miller. See also M.C.L. §750.343b. The primary issues presented in the application of this standard relate to the integration of pornographic material in a work that largely consists of non-pornographic 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. See Kois v. Wisconsin, 408 U.S. 229, 230-231 (1972); Ginzburg v. United States, 383 U.S. 463 (1966). 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 this area. Accordingly, the proposed statute, like those of other jurisdictions, does not go beyond a general statement that the matter be "considered as a whole."

Tripartite Test: The Role Of Pandering

Proposed paragraph (d) includes a provision allowing circumstances showing commercial exploitation of prurient appeal to be used as evidence in determining whether the challenged material falls within the tripartite test. This provision follows the Supreme Court's holding in Ginzburg v. United States, 383 U.S. 463 (1966). 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." 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

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71 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, 413 U.S. at 24.

business of purveying textual or graphic matter openly advertised to appeal to the erotic interest of their customers.'" 383 U.S. at 467 (quoting in part from Roth). 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 determination that the material is obscene even though in other contexts the material would escape such condemnation." Id. at 475-476. 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 * * *. 383 U.S. at 470. The 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." Id. at 474.

Although the Court's opinion at points suggested the relevancy of pandering as it relates to 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." 383 U.S. at 474 (emphasis added). The limited scope of the Court's ruling and the varying analysis offered in support of that ruling renders uncertain the precise role that may be played by evidence of pandering in establishing dissemination of obscene materials. Interstate Circuit v. Dallas, 390 U.S. 676, 670, n. 5 (1968) (Harlan, J., concurring). 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 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 context of that case. In such a situation, the Court indicates, the presence of pandering permits the trier of fact to ignore the potential ideological content of the material and stress 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 (see p. 177 supra). This analysis appears to rest, however, on the premise that the audience was aware of the pandering, either because the pandering was part of the material disseminated or was directed at the same persons who purchased the material. Both circumstances apparently were present in Ginzburg, where the pandering was directed at mail order subscribers. See 383 U.S. at

464-469. In Mishkin, the Court also noted that the material in issue was both "designed for and primarily disseminated to" the special audience. 383 U.S. at 508. Dissemination to minors might present certain difficulties in this regard since pandering frequently would be aimed at an adult audience and contained in advertisements not generally disseminated to minors. While it might be assumed that the 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.

As noted above, 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 "take their own evaluation at its face value." 383 U.S. at 472. See also Mishkin v. New York, 383 U.S. 502, 510 (1966). Of course, the defendant's admission is not conclusive, but in a close case it may tip the balance.[72] The admissions analysis present less difficulty as applied to minors than the special audience analysis. Although the pandering is directed at adults rather than minors, the

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72 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 some social value, it should not protect advertising designed to exploit that material as pornography. The Model Penal Code, in 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 M.P.C. §207.10[1] (Tent. Draft 6, 1957). Schwartz, Morals Offenses And The Model Penal Code, 63 Colum.L.Rev. 669, 680 (1963). 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 Study Report.

acknowledgment that material appeals to the prurient interests of the former group ordinarily would include the latter as well. However, an admissions analysis restricts consideration of pandering to the charges brought against the person engaged in the pandering. 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 (d) proceeds on an admissions analysis. It does not require that the pandering have been directed especially at the minors or that the pandering knowingly was presented so that it 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 these restrictions, the pandering provision may have very limited significance. Ginzburg went no further than to hold evidence of pandering relevant in close cases, but if a case is close as applied to an adult audience, the pornographic nature of the material should be fairly obvious as applied to minors, even without consideration of the pandering. Thus, inclusion of a pandering provision based on either or both analyses of Ginzburg may be inadvisable, at least until the Supreme Court more fully explains the scope of the Ginzburg ruling.

Only two of the juvenile statutes examined, Cal. Pen. Code §313(a)(2) and Ill. Rev. Stat. ch. 38, §11-21(c), provide for consideration of pandering evidence. The wording is similar in both statutes: ". . . [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 matter and can justify the conclusion that the matter is utterly without redeeming social importance for minors." [Illinois does not include "by the defendant"]. The pandering provision included in proposed paragraph (d) largely tracks these two state provisions. Like the California provision, paragraph (d) is limited to pandering by the defendant. Like both provisions, it permits evidence of pandering

to be considered in the application of all elements of the tripartite test. Ginzburg was decided under Roth, which recognized, but did not designate serious social value or patent offensiveness 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 current tripartite test (see the quote at p. 212 supra).[73]

Paragraph (d) would provide the trier of fact considerable leeway in determining the relevancy of pandering to particular aspects of the tripartite test. Unlike the California and Illinois provisions, paragraph (d) notes only that the pandering "may be probative" in applying the tripartite test. Thus, evidence of pandering need not be considered in all cases nor need it necessarily be viewed as relevant to all elements of the tripartite test where considered (see fn. 73 supra). 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." 383 U.S. at 474 (emphasis added). Even aside from the limited language of Ginzburg, the trial court always should have some leeway in determining the relevancy of evidence to the various issues presented in the individual case.

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73 That 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 pandering will necessarily acknowledge also that the material lacks serious social value or that it goes substantially beyond customary limits of candor and therefore is patently offensive. However, the proposed paragraph (d) 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 or all elements of the tripartite test.

III. DEFINING OBSCENITY: SPECIFIC SEXUAL CONTENT

Specific Content Standard: Introduction

At noted at p. 163 supra, the initial element of the definition of obscenity for minors is the specific description of the sexual content that may bring material within the prohibition of the statute. Items may not be classified as "obscene for minors" under the tripartite test unless they first fall within the definitions of "sexually explicit" verbal or visual material or a "sexually explicit" performance. See section 1, paragraphs (n), (o), and (p).

In Miller v. California, supra, the Court held that a general obscenity statute must specifically note the sexual content that will bring material within the statutory prohibition. See p. 153 supra. The Court also held that the only sexual content that could be included in a general obscenity statute is the "depiction" or "description" of "sexual conduct." The Miller Court further offered "a few plain examples of what a state statute could define for state regulation." Those examples are quoted in fn. 9 supra of this Report.

In imposing a requirement of "sexual specifity" in obscenity statutes, Miller noted that specificity served to ensure that obscenity statutes are "carefully limited" to material that is not protected under the First Amendment. The Court also noted that the specificity requirement would provide "fair notice to a dealer [in material depicting 'hard-core' sexual conduct] that his public and commercial activities may bring prosecution." 413 U.S. at 27. These same justifications for sexual specificity are applicable to juvenile obscenity provisions. While Ginsberg did not discuss specificity, the New York statute upheld there was directed at the depiction of defined sexual conduct as required by Miller. Most of the juvenile statutes examined, though enacted before Miller, also include a specific listing of encompassed material described in terms of the depiction of particular sexual conduct. In light of Miller

and Ginsberg,[74] it appears that any juvenile obscenity provision lacking such specificity could only be "saved" constitutionally by incorporation of similar standards through judicial interpretation. See pp. 153-54 supra.

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 most helpful in minimizing the administrative difficulties noted at the outset of this Report (see pp. 160-61 supra). If the listing is carefully limited to the depiction of advanced sexual acts, such as intercourse and masturbation,[75] reliance upon the listing alone, without regard to the tripartite test, should relieve the disseminator of concern in distributing the great bulk

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74 See also Interstate Circuit v. Dallas, 390 U.S. 676, 689-690 (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."

75 As noted in Justice Brennan's dissent in Miller, some of the illustrations of sexual specificity in the majority opinion incorporate terms that are themselves somewhat vague. Thus, the Court refers to "ultimate sex acts" and the "lewd exhibition of genitals." As discussed infra, the use of such phrases can be avoided if the listing is limited to advanced sex acts, as opposed to depictions of "nudity" and "sexual touching." 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 fn. 76 infra. However, the remaining vagueness problems are no greater than those we find in other areas of governmental regulation of speech -- e.g., libel, or advocacy of illegal acts.

of sexually oriented materials that may have prurient appeal for minors but also may have some potential social value. Indeed, the listing should provide far more protection overall for constitutionally protected speech than the Miller tripartite standard. Carefully limiting the encompassed content should be especially effective in preventing the initiation of inappropriate prosecutions and gaining prompt dismissal of those prosecutions that are brought erroneously. The tripartite standard is sufficiently vague that prosecutors cannot readily cite it as an absolute barrier to prosecuting the disseminator of erotic material that may nevertheless be protected constitutionally. The nebulous character of the tripartite standard also makes it a somewhat unreliable basis for gaining prompt dismissal of such a prosecution. See, e.g., Jenkins v. Georgia, supra (where exhibition of the movie Carnal Knowledge was successfully prosecuted at the trial level under an adult obscenity provision). On the other hand, the factual issue as to whether material does or does not depict advanced sexual activity should be capable of resolution with far more dispatch. Of course, where the material does depict such activity, the disseminator must look to the elements of the tripartite test. But the grouping of protected material that includes such depictions should be far narrower than the grouping which has been viewed as potentially subject to prosecution under the juvenile obscenity provisions that Michigan and most states have utilized in the past.

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 1 and are brought together in the definitions of encompassed material in paragraphs (n), (o), and (p) of section 1.

Specific Content Standard: Sexual Intercourse

The easiest category of material to include specifically in a juvenile state is material that depicts what paragraph (l) defines as "sexual intercourse." This category encompasses the depiction of various acts which Miller described

as "ultimate sex acts" in its listing of examples of permissible coverage. All state statutes examined include such content. Similarly, the consensus among commentators is that depictions of such acts presents the easiest case for statutory regulation.

Inclusion of a sexual intercourse category presents a few administrative problems of the type discussed at the outset of this Report (see pp. 160-61 supra). Portrayals of sexual intercourse are rather easily identified by the disseminator. There are, of course, legitimate uses for materials containing depictions of sexual intercourse, e.g., sex education, but such uses would be protected by the exemption for parents and other educators (see section 2[2]), without even being forced to look to the secondary protection of the tripartite test.[76]

Although all state statutes describing sexual content include a sexual intercourse category, descriptions of that category vary. A number of states include the term "sexual intercourse" within a general category of "sexual

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76 We do not suggest that publications other than those aimed at sex education will inevitably constitute obscenity for minors if they depict sexual intercourse. There are, of course, various levels of "depiction." Consider, for example, the non-detailed cartoon or "line drawing" that shows two persons in the position of sexual intercourse with no showing of genitals, as opposed to a film showing the same act. To some extent the term "depiction" may be construed narrowly in light of the context of the statute as a whole, including the requirements of prurient appeal and patent offensiveness. Yet some materials might clearly constitute depictions of sexual intercourse but still be presented in such a fashion as not to fall within the tripartite test as adopted to minors (e.g., in artistic works).

conduct," which may also refer to "homosexuality," "lesbianism," and "bestiality." See, e.g., N.Y. Pen. Law §235.20(3); Ore. Rev. Stat. §167.060(10); Hawaii Pen. Code §1210(7). 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. Ohio Rev. Code §2907.01(A) does so, defining "sexual conduct" as "vaginal intercourse, between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex." (Bestiality is included elsewhere in this statute). This provision has the virtues of clarity and comprehensiveness. Paragraph (1) utilizes a similar definition but avoids use of Latin terminology.

The proposed paragraph (1) definition is based upon the Detroit obscenity ordinance, Det. Ord. §39-1-18(14). The definition includes "genital-genital, oral-genital, anal-genital, and oral-anal" sexual 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 (1) hopefully will suggest a tone of straight-forwardness that is particularly valuable in this type of statute.[77]

The definition of sexual intercourse includes both real and simulated actions. Regulation of the depiction of simulated ultimate sex acts was specifically allowed by the Court in Miller. Several of the specific content 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). See, e.g., Wis. Stat. §944.25(1)(c);

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77 Note, however, that the new Michigan criminal provision on sex offenses, M.C.L. §750.520(a), uses Latin terminology similar to the Ohio statute.

Det. Ord. §39-1-18(14)(C). The inclusion of simulation presents certain difficulties. On the one hand, the impact and offensiveness of realistic simulations does not differ significantly from depictions of the 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.[78] One refinement that would afford such protection is limiting the simulation provision to depiction of actors whose genitals are unclothed. See also the discussion of "erotic fondling," p. 226 infra.

Specific Content Standard: Sado-Masochistic Abuse

Depiction of sado-masochistic abuse, as defined in paragraph (j), is a category also universally included in obscenity statutes. Depictions of sado-masochistic abuse are easily identified, and legitimate uses for materials containing such depictions are minimal, especially for minors.

The definition proposed in paragraph (j) is based upon the standard terminology used by most state statutes defining sado-masochistic abuse. See, e.g., N.Y. Pen. Law §235.20(5). A somewhat more brief definition is used in a few states. See e.g., Hawaii Pen. Code §1210(9) ("flagellation or torture by or upon a person as an act of sexual stimulation or gratification"). The longer form used in paragraph (j) provides

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78 Ordinarily, in productions using such simulation (e.g., in 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 consider Southeastern Promotions Ltd. v. Conrad, 420 U.S. 546 (1974), where an advisory jury found the musical Hair obscene under a general obscenity statute. The district court agreed, noting in part instances of simulated sex that were included in the particular production. See 420 U.S. at 566-68. The Supreme Court reversed on procedural grounds and did not reach the issue of obscenity.

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 commonly appeals to a particular type of deviant audience.

Specific Content Standard: Depiction of Masturbation

All of the statutes examined included the depiction of masturbation, although none sought to define that act. A proposed definition is included in paragraph (f) but may be unnecessary. Paragraph (f) ensures coverage of the manipulation of the genitals of another. The term "masturbation" in common usage tends to refer to self-stimulation only. The definition of "masturbation" in Webster's Third International Dictionary, however, is not so limited. See also Hamling v. United States, 418 U.S. 87, 92-93 (1974). Paragraph (f) also ensures coverage of manipulation through the use of instruments other than the human hand. Again, the term "masturbation" technically should include such activity.

Arguably, if the specific content of a juvenile obscenity statute were limited to depiction of "sexual intercourse," "sado-masochistic abuse" and "masturbation," the statute would reach most of the sexually oriented material presenting the greatest potential harm to juveniles,[79] while automatically excluding the great bulk of constitutionally protected material. Yet, none of the state statutes examined so limit their specific sexual content. Each includes depictions of additional forms of sexual touching and nudity (as discussed infra) in order to provide substantially complete coverage of all material that might be obscene for minors under the tripartite test. It may well be, however, that, in light of the current market place of

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79 The depiction of sexual intercourse and masturbation are among those depictions having the greatest potential for causing sexual arousal, but that grouping also includes certain portrayals of nudity. See the studies cited in the Obscenity Commission Report 166-167 (fn. 39 supra) as to sexual arousal in adults produced by the depiction of different sexual conduct within the same and different mediums.

available material, these additional categories do not provide a substantial increment in coverage. While there is a substantial body of material depicting sexual touching or nudity which clearly could be classified constitutionally as obscene for minors, a large portion of that material also depicts intercourse, masturbation, or sado-masochistic abuse, and would be encompassed by a juvenile obscenity provision even if it included no further categories of specific sexual content. (See the discussion at pp. 231-33 infra).

Specific Content Standard: Sexual Touching

State obscenity provisions commonly include, besides masturbation, the depiction of any "sexual touching" of the major erogenous areas of the body -- the genitals, pubic area, buttocks, and female breasts.[80] Significant arguments can be advanced against inclusion of 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. Pictoral representations and verbal descriptions of the touching of erogenous areas are pervasive in current

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80 The reference here 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 the manipulation and the simple touching of the genitals for the purpose of sexual stimulation. If a decision is made not to include a sexual touching category, there might be value in redefining masturbation to include all touching of the uncovered genitals for the apparent purpose of sexual gratification. On the other side, if a broadly worded 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. Reference to masturbation is included in paragraphs (o) and (p) on the assumption that a sexual touching category may not be included in these provisions. See p. 226 infra.

media in contexts that are non-erotic. Sexual touching cannot be described solely in terms of the physical contact, as can be done with sexual intercourse. The description must be supplemented by a requirement that the act portrayed was undertaken for "sexual gratification or stimulation" and the disseminator must look beyond the mere location of the hands to consider the purpose of the action. But it is not always clear from the context whether the depicted touching was for the purpose of sexual stimulation, particularly where the medium does not portray movement and the erogenous area is clothed.[81] The ultimate judgment as to purpose may depend in large part upon the attitude of the viewer.

Even where the acts portrayed clearly are designed for sexual gratification, 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 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, 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 (which will usually involve masturbation) and, perhaps, 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 looses one of the major advantages of a specific listing of encompassed content in that it requires reliance on the nebulous tripartite test to protect a substantial body of material that may not be "obscene for minors."

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81 While the definitions of "masturbation" and "sado-masochistic abuse" also refer to a purpose of sexual stimulation, that purpose ordinarily is reflected in the basic depiction of the physical activities involved in masturbation and sado-masochistic abuse.

Notwithstanding such difficulties, all of the specific content statutes examined include a broad sexual touching category. The New York provision is typical. It encompasses "physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, breast." N.Y. Pen. Law §235.20(3). Some states add "for the purpose of sexual stimulation, gratification, or perversion," e.g., Hawaii Pen. Code §1210(7), or other similar phrases.

Proposed paragraph (b) is drafted for possible inclusion of a broad sexual touching category. The encompassed sexual conduct is characterized as "erotic fondling," a term culled from Det. Ord. §39-1-18(14)(C). 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 gratification or stimulation." 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 unclothed erogenous zones.[82] Restricting "erotic fondling" to the touching of unclothed genitals, pubic area, buttocks or breast of a female would eliminate much of the potential for over-application. Second, the category may be further limited by applying it only to performances, either live or on film.[83] A substantial difference in impact may exist, due to the added element of movement,

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82 The model statute proposed in the majority statement of the Obscenity Commission Report, at 65, is even more limited in the category of sexual touching. It applies only to depictions of "masturbation," and "direct physical stimulation of unclothed genitals." This proposal could more readily be fitted within the framework of our model by eliminating the category of "erotic fondling" and broadening the definition of "masturbation." See fn. 80 supra.

83 This could be achieved by including the category of erotic fondling only in the definition of "sexually explicit performance." See paragraph (o). If "erotic fondling" is included in that paragraph, a reference to masturbation would be unnecessary. See fn. 80 supra.

between a movie or live performance depicting the touching of unclothed erogenous areas and a photograph capturing a given moment in such action. See the Obscenity Commission Report, at 169. Moreover the context in performances tends to be much clearer and the purpose of sexual gratification 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 alcholic beverages. Movies containing such touching are classified as "X" or "R" and are effectively barred to minors on that basis. See p. 232 infra.[84]

Specific Content Standard: Sexual Excitement

The category of "sexual excitement," as defined in paragraph (k), lies on the boundary between sexual activity and nudity. Two years before Miller, a Federal Court suggested 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." Huffman v. United States, 470 F.2d 386, 400 (D.C. Cir. 1971). The legitimate uses of materials portraying sexual excitement are quite limited, and it is relatively easy to determine whether material depicts sexual excitement, though there may be occasional difficulties as noted in Huffman.

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84 Those movies not within the rating system, yet sexually related, tend to include depictions of sexual intercourse and various other activities that would bring them under the statute even if an "erotic fondling" category were not included.

All the statutes examined which had specific content sections included sexual excitement. Almost all used a definition similar to that in proposed paragraph (k), which refers essentially to depiction of aroused genitals.[85]

The Detroit ordinance is one of the few 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," Det. Ord. §39-1-18(15).[86] The genital arousal described in paragraph (k) is only one of various types of "responses" that would be included under this definition. Most of those other responses would, however, normally be accompanied by the depiction of sexual activities that would otherwise bring material within the specified content of the proposed statute. Thus, a certain variety of nude "go-go dancing" commonly features the type 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 specified content of the juvenile statute otherwise includes depictions of "nudity," then the only additional coverage provided by the Detroit definition of sexual excitement would be as to material that almost always would be protected under the tripartite test.

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85 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 discussion infra). The term "arousal" sufficiently covers possible visual representations.

86 See also Ore. Rev. Stat. §167.060(11) 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."

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 at p. 161 supra, 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 entire statute while giving the disseminator far more firm guidelines.[87]

Specific Content Standard: Nudity

Should a "nudity" category be included? The final category of sex-related content is nudity -- i.e., materials showing unclothed genitals, pubic area, buttocks, or female breasts. In offering of "a few plain examples of what a state statute could define for regulation," Miller cited the "patently offensive representations or descriptions of . . . [the] lewd exhibitions of the genitals." The scope of this reference 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 suggests that the reference to "exhibition" of genitals must be read in light of this limitation, so that "exhibition" refers to "the conduct of exhibiting and not to a passive pose." This concept, he notes, would largely exclude still photographs of a single nude person, unless that person's genitals are depicted in a state of arousal. See 59 A.B.A.J. at 1263.

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 in itself be proscribed under a general obscenity statute. While the Court has noted that the Miller

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87 On the possible use of a definition similar to that of the Detroit ordinance in connection with a nudity provision, see fn. 93 infra.

examples "were not intended to be exhaustive," Hamling v. United States, 418 U.S. at 114, Miller's reference only to the portrayal of genitals certainly appears to reflect a constitutional limitation when read in light of the Court's comment that obscenity encompassed only the depiction of "hard core sexual conduct." See 413 U.S. at 27. Thus, a "nudity" category in a general obscenity statute apparently must be drafted so as to at least exclude the nude "pin-up" that does not reveal the genitals. Whether a juvenile obscenity provision must be so limited is not as clear. The New York statute upheld in Ginsberg included a category of nudity which encompassed "the showing of the human male or female genitals, pubic area or buttocks . . . or the showing of the female breast below the top of the nipple." 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 material in issue in that case -- two so-called girlie magazines that portrayed the nude buttocks and breasts of females.[88] Thus, Ginsberg does not hold that nude "pin-ups" may be obscene for minors. On the other hand, it also clearly does not foreclose that possibility, and the Court's opinion certainly seems to assume that at least some portrayals of nudity can be obscene for minors.

Assuming that a juvenile obscenity statute constitutionally can include a broad nudity provision (i.e., such as the New York provision in Ginsberg), the question remains as to whether adoption of such a provision or even a narrower provision (e.g., one limited to the depiction of nude genitals) reflects sound legislative policy. The basic argument favoring inclusion of a

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88 See 390 U.S. at 632. 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. Justice Fortas dissented on the ground that dissemination of the material was constitutionally protected.

nudity category is that depictions of nudity alone can be presented in a manner that is at least as erotic in emphasis as a depiction of masturbation,[89] and therefore may have an equally adverse impact upon juveniles. Also, while such portrayals may not be as offensive to community standards as erotic portrayals of sexual intercourse, they 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 relating to the pornographic quality of certain portrayals of nudity. Instead, they may stress that a "nudity" category (1) creates a great problem of over-coverage, (2) places a substantial burden on disseminators and (3) is largely unnecessary in light of the other coverage provided by the statute.

The problems of over-coverage and administrative burden flow from the pervasiveness of depictions of nudity. A glance through even the weekly news magazines will show that the rapidly changing sex attitudes have eliminated the nude, as they previously eliminated the well-turned ankle of Victorian days, from the category of items that are viewed as automatically sexually provacative even for minors. An increasing portion of these nude portrayals quite clearly would not meet the "patently offensive" requirement of the tripartite test. Moreover, as minors are exposed more frequently to nudity in constitutionally protected material, the possibility of harm from further exposure in more objectionable forms may be significantly decreased.

Those depictions of nudity which may be categorized as offensive and of potential harm to minors are found almost entirely in "girlie" magazines, movies, "peep" show slides, and certain live performances. But inclusion of a "nudity"

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89 See the studies cited in the Obscenity Commission Report at 166-178 on the types of depictions most likely to cause sexual arousal.

category would not provide substantially greater coverage of such dissemination because these items 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 pictures which portray "masturbation," "sexual excitement," and drawings which depict "sexual intercourse."[90] "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 "Folies" 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 movies) or would be admitted only if accompanied by a parent (R movies). Movies not rated under industry standards usually are made for the national adult market. Even if not shown in "adult-only" theatres, most such films would contain sex-activity putting them within the reach of a juvenile obscenity statute that did not encompass nudity alone. Thus, with respect to "Girlie" magazines, movies, and other performances, a "nudity" category is not needed to restrict the access of minors to that nudity most likely to be viewed as objectionable.[91]

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90 Such magazines also portray various acts of "erotic fondling." For reasons discussed at pp. 224-27 supra, it may be desirable to limit inclusion of the "erotic fondling" category to sexually explicit performances.

91 It is most unlikely that these materials could be altered profitably (by exclusion of all sexual conduct other than nudity) to ensure legality of distribution to the minors in a particular state. Live performances arguably might be more readily tailored to avoid the other statutory categories and include only 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 may be treated in the separate section on performances, section 2[1](b).

Books, on the other hand, might present somewhat different problems. Pictures of potentially objectionable nudity might be found in books that would not also include pictures of sexual intercourse, masturbation, erotic fondling, or sexual excitement. Yet, adding a "nudity" category to the statute is unlikely to significantly restrict the dissemination of such books to minors. There are a large variety of books that may contain visual representations of nudes[92] but not other sexual conduct. Most of these books would be protected under the tripartite standard, and the disseminator would find it both time consuming and difficult to sort out those books that might not be protected. Many disseminators probably would make little effort to draw distinctions, and simply would continue to sell to minors or adults any book that was not likely to contain more than nudity alone.

If, on the other hand, the possibility of prosecution for distribution of books containing objectionable nudity served as a sufficient deterrent to restrict the flow of such books, there could be significant offsetting costs for minors. In light of the heavy burden of inspection and difficulty in determining what nudity is proscribed, the concerned bookseller might simply adopt a policy of refusing to sell any potentially questionable material to minors. Minors could thus be cut off from an increasingly important portion of society's serious efforts (particularly in the artistic area where nudity is frequently utilized).

Definition of nudity. If a nudity category is to be included, the arguments noted above suggest that it should at least be a narrowly defined category. Proposed paragraph (h) limits nudity to the "lewd exhibitions" of genitals. This definition follows (1) the Miller description of that nudity which might be found obscene for adults, and (2) the statute

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92 The problems presented in identifying objectionable nudity would be even more significant if the "nudity" category included verbal description of nudity as well as visual representations. See p. 234 infra for further discussion.

on dissemination to minors proposed by the majority in the Obscenity Commission Report. See also Proposed Massachusetts Criminal Code §6(c)(2) (applying to presentations "which emphasize the depiction of unclothed adult genitals").[93]

The state juvenile obscenity statutes examined generally had broader provisions than proposed paragraph (k). Some were identical to the nudity provision in the New York statute applied in Ginsberg. They applied to the depiction of the nude genitals, pubic area, buttocks, and female breast below the top of the nipple. See N.Y. Pen. Law §235.020; Ohio Rev. Stat. §2907.01(H). One state modified that provision so as not to include the depiction of the nude buttocks. See Ore. Rev. Stat. §167.060(5). The Detroit ordinance is limited to exhibition of the genitals and pubic area, but also contains the broad "sexual excitement" category noted supra.

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. The nude pin-ups of the 50's are today published in the national news magazines as memorabilia of that period. The pin-ups of today reveal the pubic area if not always genitals.

IV. DEFINING OBSCENITY: MISCELLANEOUS MATTERS

Inclusion of Verbal Material

Proposed paragraphs (o) and (p) distinguish between visual and verbal matter. This distinction was made to

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93 Another possible definition would combine the Detroit definition of sexual excitement (see p. 228 supra) with the depiction of nude genitals. The facial expressions and movements accompanying the showing of genitals are often the key factor contributing to the "lewdness" of the depiction of nudity.

raise two issues: (1) whether verbal material regardless of content should be excluded from the statute; and (2) if verbal material is included, whether the encompassed sexual content of 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, 413 U.S. 115 (1973), held that verbal material could be obscene for adults, the Court noted that the regulation of 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 hiearchy of values, and so it should be." 413 U.S. 119.[94]

Of course, as Kaplan held, the fact that we place verbal material on a high plane does not give it constitutional immunization from all regulation. Neither does it mean that a state necessarily should forego applying a juvenile obscenity statute to verbal material.[95] An obscene book arguably may have the same impact

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94 At an earlier point in the opinion, the Court noted that it had "always rigorously scrutinized judgments involving books for possible violation of First Amendment rights." 413 U.S. at 118, n. 3.

95 Consider Obscenity Commission Technical Reports, Vol. I, at 53. 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,

upon a minor as an obscene picture. Yet the special status of verbal material suggests that, as a matter of legislative policy, the showing of need for inclusion of verbal material should be especially rigorous.

Second, regulating the dissemination of verbal material presents greater difficulties than regulating the dissemination of visual materials. Those additional difficulties relate to (1) defining the content of potential harmful materials, and (2) limiting the burden placed upon the disseminator.

When the verbal form is involved, application of the traditional definitions of sex-related content presents considerable difficulty. A definition for visual material may simply refer to any depiction of sexual intercourse, but a similar definition applied to textual material would encompass a single statement referring to people "making love." For textual material, the definition also must consider the degree of detail in the depiction of sexual activity. A requirement that the material be "explicit and detailed" [see paragraph (o)] is helpful in this regard, but still leaves room for considerable variation. It fails to ensure that the class of materials described mainly include only unprotected speech. The definitional problem is similar to that presented in dealing with visual representations of "nudity" and, perhaps, "erotic fondling," but is even more severe.

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footnote 95 continued

however, that expressions of concern relating to the dissemination of obscenity to juveniles appears to center on visual representations, particularly photographs and movies. 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.

Since a workable 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 generally is provided the disseminator of visual representations. Moreover, the burden of inspection placed on 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. Also, if only a portion of a work is patently offensive in the case of a movie, 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.

Considering both administrative difficulties and the need for regulation, the decision as to inclusion of verbal material may rest on the legislative determination as to the type of verbal materials that should be kept from minors without parental consent. If the legislative concern relates primarily to the traditional "porno-novel" 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'" -- are sold largely in adult bookstores. If verbal materials were not 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. On the other hand, if the legislative concern extends to books that are not obscene for adults but contain considerable, quite explicit sexual content (e.g., "The Happy Hooker"), then the current marketing practices could not as readily be relied upon. Such books are available in most bookstores and many drugstores as well.

While the need for legal sanctions is greatest in excluding those books sold outside of adult bookstores, any attempt to reach such materials 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. See, e.g., "The War Between The Tates" and "Rabbit Redux." The vast majority of these books, however, would be protected under the tripartite standard, which provides considerably more room for argument -- especially as to social value -- with most verbal material. While certain books have achieved notoriety as to sexual content (e.g., "Tropic of Cancer"). Others are known simply to have substantial sexual content. Even if the line between the "Happy Hooker" and "Rabbit Redux" could clearly be established in examination of the contents of the book, booksellers are not likely to make that effort. While some may simply take their chances, others are likely to cut off sales to minors[96] of any book thought to have significant sexual content. The chilling effect would be regrettable since there are many books which treat sex more or less explicitly that may be of benefit to minors (as evidenced by their inclusion in school literary collections).

Concerns such as those noted above led the Obscenity Commission Report to suggest that statutes regulating distribution of sex-related materials to minors apply only to visual representations. None of the state statutes examined, however, were so limited.

Assuming the decision is made to include verbal material, consideration should be given to applying a narrower range of sex-related content to verbal material than to visual material. For example, even if a "nudity" category is included for visual materials, it might not be included in verbal. 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 cost of restricting books with value for minors is great.

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96 Or persons thought to be minors, see pp. 271-72 infra.

Several of the statutes examined do not separate verbal material from visual material in terms of content, e.g., Utah Code §76-10-1202(f), Ohio Rev. Code §2907.01(E). A number do draw that distinction, however. These states do not include a nudity category for verbal material. Their definitional sections also impose special requirements of "explicitness" in describing the sexual content of covered verbal material. See, e.g., Ore. Rev. Stat. §67.065(1)(b); N.Y. Pen. Law §235.21(1)(b); Fla. Stat. §847.012(2)(b); Hawaii Pen. Code §1210(6)(a); Wis. Stat. §944.25(j)(2). The definition of covered 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."

Age

Two aspects of maturity deserve particular weight in determining the maximum age limit for persons who should be protected under a juvenile obscenity statute. The first relates to youths' special susceptibility to the deleterious influence of erotic publications, and the second relates to the effective exercise of parental control.

In holding that states could reach a broader range of materials in regulating dissemination of obscenity to minors than to adults, Ginsberg noted that the legislature could assume that minors have a special need for protection from the harmful impact of erotic publications. 390 U.S. at 640-641. There is no clear-cut point, however, at which the special susceptibility of minors suddenly ceases. The maturing of attitudes toward sex gradually reduces any special susceptibility of minors. Thus, any chronological line that is drawn must, in part, be arbitrary. But similar lines are drawn elsewhere in the law and they can furnish support for the line that is drawn in this area. Since the maturing of attitudes toward sex may develop at

a different pace than physical maturity or other aspects of social judgment, the age limits utilized in various other areas in which minors are given special protection (e.g., consumption of alchol or ability to bet at the tracks) are not necessarily helpful analogies. On the other hand, the age distinctions that are utilized in other areas relating to sexual actions appear to be quite relevant.

Under the new Criminal Sexual Conduct Act, M.C.L. §750.520(a), a person commits a felony if he "engages in sexual penetration (e.g., intercourse) with another person under 16 even though that person consented to the act. Once both participants reach the age of sixteen, however, there is no criminal liability for consensual intercourse (assuming no adultery). The dividing line of sixteen also is used with respect to marriage of a female (except for the special Secret Marriage Act), M.C.L. §551.51. These statutes appear to reflect a legislative judgment that at sixteen youth has a capacity to make decisions concerning actual sexual conduct that will not be distinguished from that of an adult. Based upon that legislative judgment we arguably also should assume a corresponding maturity in handling materials which depict sexual conduct.

The factor of parental control points to a similar, if not earlier age limit. Legal control of parents over their children generally continues until eighteen. Prior to this point, however, children may undertake various activities away from the home that effectively limit that control. Outside activities are likely to decrease parental control to the point that legislation designed to buttress parental control with respect to sex-related material is of limited value. While there is no precise age at which this stage is reached, sixteen reflects a reasonable estimate. It is the age at which a driver's license may be obtained and the age at which serious work may begin. Both of these significantly affect parental control.[97]

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97 A statutory acknowledgment of this changing status is the limitation of curfew legislation to minors "under the age of 16 years." M.C.L. §772.752.

For the reasons suggested above, proposed paragraph (g) defines "minor" as a person "under 16." Current Michigan juvenile obscenity provisions set the age at "under 18," M.C.L. §§750.142 and 750.343e. Other state statutes regulating obscenity for minors are divided as to the age limit for "minors." Hawaii Pen. Code §1210(3), defines minor as "under 16," Florida, Fla. Stat. §847.012(1)(a), and New York, N.Y. Pen. Law §235.20(1), "under 17" and several statutes examined, like Michigan, use "under 18."

V. DISTRIBUTION

Inclusion of Non-Commercial Dissemination

Proposed section 2 describes the basic juvenile obscenity offense as prohibiting the "dissemination" of obscene materials to a minor. The main issue to be considered in defining the term "dissemination" is whether it should extend only to distribution for monetary consideration. The state apparently has the constitutional authority to regulate non-commercial as well as commercial distribution of obscene materials to minors. Miller and its companion cases (Kaplan and Paris) placed considerable stress on the commercial nature of the dissemination involved in those cases,[98] but the Court, at the same time, also upheld congressional authority 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. United States v. Orito, 413 U.S. 139 (1973). Congress constitutionally could adopt a comprehensive regulation, including private transportation for private use,

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98 See, e.g., Miller, 413 U.S. at 35, noting 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 was specifically limited to such dissemination.

as reasonably necessary to prevent the use of interstate commerce in fostering the potential harm caused by the ultimate exposure of obscene material to juveniles and others.[99] Similarly, state regulation of non-commercial dissemination that occurs outside the home[100] may be sustained as a reasonable supplement to the regulation of commercial distribution in preventing that same harm.

Of course, though constitutional authority exists, the issue remains as to whether regulation of non-commercial dissemination constitutes sound legislative policy. A major consideration in determining appropriate policy should be the need for criminal regulation of non-commercial dissemination in order to serve the basic function of the statute -- supplementing parents' control of their children's access to potentially obscene matter. Unfortunately, no clear-cut answer exists as to the need for such assistance.

On the one hand, the argument is advanced that parental concern itself reflects the lack of any significant need for

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99 See 413 U.S. at 143. See also United States v. 12 200-Ft. Reels of Film, 413 U.S. 123, 128 (1972): "We have already indicated that the protected right to possess obscene material in the privacy of one's home [see fn. 100 supra] does not give rise to a correlative right to have someone sell or give it to others." (Emphasis added).

100 Stanley v. Georgia, 394 U.S. 557 (1969), recognized a zone of privacy within the home that protected 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 (1973).

further regulation of non-commercial distribution.[101] The bulk of such dissemination is between peers. The reaction of parents to peer distribution often differs considerably from their reaction to commercial distribution. In either instance, parent control of the child's access to sex related material is violated, but the peer engaged in non-commercial distribution is not viewed as equally responsible. Moreover, such distribution arguably may be controlled by means other than criminal prosecution (e.g., schools or parents). Of course, not all non-commercial distribution is among peers. A somewhat older person may, for one reason or another, show obscene material to a minor. But the Obscenity

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101 The original Model Penal Code commentary, in support of a general obscenity provision aimed primarily at 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, Tent. Draft #6, 13 (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." The model is drafted on the assumption that Michigan may or may not also adopt a general obscenity provision prohibiting dissemination to consenting adults. See fn. 8 supra. In the absence of such a provision, obscene material certainly will be introduced into commerce in the state, and at least the printed material purchased by consenting 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, p. 190 supra. Thus, we assume throughout this discussion that non-commercial dissemination cannot be eliminated by preventing commercial dissemination to minors.

Commission Report suggests that minors receive material in this manner in only a minute portion of the total instances of distribution.[102]

On the other hand, the argument is advanced that non-commercial distribution constitutes such a major portion of the total distribution scheme that it must be regulated to assure parental control. Available evidence indicates that peer distribution far exceeds direct commercial sales to minors. Obscenity Commission Report, at 123-129. 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 juvenile court, the consequences imposed upon them are less than catostrophic. Although not common, non-commercial dissemination by persons who are neither peers nor relatives 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). The State Bar, as noted by the Committee Notes to the Proposed Revised Criminal Code, viewed non-commercial distribution to minors as presenting "a very serious problem."

Assuming non-commercial 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 non-commercial dissemination would encompass a broad area in which most transactions will not call for prosecution. Certainly, the vast majority of instances involving dissemination

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102 See Traffic and Distribution Panel Report, Obscenity Commission Report, at 123-129. The reference is to adults other than relatives. In one study, members of the family were cited as the most common source of pictures of sexual intercourse by 5% of the respondents.

among peers will not require prosecution. A criminal statute which reaches so far beyond instances of likely prosecution may give rise to complaints of discriminatory enforcement.[103] It also may increase the burden placed upon the prosecutor (and the juvenile court) in dealing with irate parents who demand prosecution in cases that fall within the literal reach of the statute but are best dealt with outside of the criminal process.

Another relevant consideration is the need for providing absolute protection from prosecution for persons who distribute sexually explicit material to minors in connection with legitimate scientific or educational endeavors. Such persons would be protected both by statutory exemptions (see section 2[2], discussed infra) and the tripartite standard. These protections may be viewed as inadequate, however. As noted above (p. 219 supra), the tripartite standard is too uncertain to be relied upon entirely to preclude inappropriate prosecutions. Cf. Huffman v. United States, 470 F.2d 386, 395 (D.C. Cir. 1971) (discussing various cases reversed by the Supreme Court). The exemptions provide more certainty, but they necessarily are built on standards that leave room for disagreement at points. Thus, the person engaged in a scientific or educational enterprise, if not licensed, still might be concerned that he will have to convince the prosecutor that his activity truly is for a "legitimate, scientific, or educational purpose." See section 2[2](e). Frequently, if an activity is scientific or educational, the exhibition of the sexually explicit material will not be for monetary consideration. Restricting the statute to commercial exhibition thus would provide an additional layer of pro-

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103 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 Stewart, J., concurring in Stanley v. Georgia, 374 U.S. 557, 569 (1969). See also Poe v. Ullman, 367 U.S. 487, 522 (1961) (Harlan, J.).

tection that would avoid factual disputes that might be raised under the exemption provisions.[104]

Assuming that the statute is limited to commercial dissemination, describing that limitation presents some difficulty. Paragraph (a) suggests a possible definition of "dissemination" as selling, lending, or showing material "for monetary consideration." State statutes commonly use the phrase "sell or lend for monetary consideration."[105] The term "show" has been added to paragraph (a) to reach commercial establishments that charge for examining pornographic pictures or written material. Admission to performances for monetary consideration would be covered by the definition of "exhibit" in paragraph (c).

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. See, e.g., Proposed Mich. Rev. Crim. Code §6305 (disseminates "for pecuniary gain"). This provision, however, is not quite as precise as the standard

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104 Limiting the statutory coverage to monetary transactions would not afford protection where the individual sells a service which includes the showing of sexually explicit material to a minor. Here the individual would have to rely upon the exemption and the tripartite test. On the other hand, by including the "showing" of sexually explicit material, section 1(a) does prevent evasion of the statutory purpose by persons who attempt to disguise the commercial distribution of obscene material as an aspect of the delivery of a service.

105 Several jurisdictions include the term "distribute" and "publish" in the definition of disseminate. Hawaii Code §1210(1); Det. Ord. §39-1-18(3). A person who publishes or distributes material to retailers knowing that it will be sold to minors is likely to be liable under general principles of accomplice liability. On the other hand, if the person is not aware of the retailer's practice, he would lack the mens rea required for liability under section 2. See pp. 271-73 infra. Accordingly, the proposed statute does not include any special provisions on the liability of publishers and wholesale distributors.

phrasing quoted above. Another possibility is to simply ignore the advertisement on the ground that it is unlikely to present a major difficulty with respect to minors.[106]

States are divided as to the inclusion of non-commercial dissemination. Most of the statutes examined did include such dissemination. Some of these jurisdictions define "distribute" as "transfer possession whether with or without consideration." See, e.g., Ill. Rev. Stat. ch. 38, §11-21(b)(3); Cal. Pen. Code §313(d); Utah Code §76-10-1201(3). Others simply apply to persons who "sell, give, rent, loan or otherwise provide," e.g., Ore. Rev. Stat. §167.075(3), or similarly "lend, distribute, transmit, exhibit, or present," Hawaii Code §1210(1); Proposed Mich. Rev. Crim. Code §6301(a). One statute examined did not specify the nature of the included distribution, but presumably applies to non-commercial transactions as it has a parental exemption, Ohio Rev. Code §2907.31(B)(1).

Three of the states examined included only commercial transactions.[107] They define disseminate as "sell or loan for monetary consideration," Fla. Stat. §847.012(2); N.Y. Pen. Law §235.21(1); Wis. Stat. §944.25(10) (Wisconsin also includes "exhibit" in the dissemination definition; New York and Florida include the phrase "exhibit for monetary consideration," in the body of the statutory provision on performances).

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106 See Obscenity Commission Report, at 126-127 (studies indicating that mails are a comparatively insignificant source of obscenity obtained by minors).

107 It is unclear whether the Washington Statute includes non-commercial transactions; it uses the phrase, "sold, distributed or exhibited." Wash. Rev. Stat. §9.68.060.

Display

Another issue relating to the definition of dissemination is whether the statute should reach the commercial establishment that allows minors (without charge) to leaf through prohibited material (e.g., Playboy) placed on open shelves. Such conduct would not be covered even if the statute were not limited to transactions for monetary consideration. Placement of material in a location where it may be examined by a minor obviously is not "selling" or "lending." Neither is it likely to be viewed as "showing" the material unless the material was clearly designated as available for inspection. The term "show" suggests that the material is purposely spread before the immediate view of another, and only the cover of a book or magazine would ordinarily be "shown" as such.[108]

Only one of the statutes examined clearly reaches the proprietor who allows obscene material to be perused by minors. Ore. Rev. Stat. §167.080 prohibits "displaying obscene material to minors." This provision applies to the "owner, operator, or manager of a business * * * [who] 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 there is visibly displayed any * * * [obscene picture] or any book, magazine * * * or other written or printed material that * * * depicts nudity, sexual conduct, sexual excitement or sado-masochistic abuse."

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108 If the store sold to persons the right to examine the material (see p. 246 supra), it would be "showing" the entire magazine or book, but otherwise the store shows no more than that which is apparent on the surface -- i.e., the cover. But cf. M.C.L. §750.143 (apparently using the term "exhibit" in a broader sense). The term "exhibit" also is used in proposed paragraph (a), but that term is limited under paragraph (c) to activities relating to performances.

The Oregon provision obviously places a greater 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 unavailable to minors.

Performances

The proposed statute deals separately with performances, See paragraphs [1](b) in section 2 and (n) in section 1. A separate provision is necessary to clearly indicate which persons involved in dissemination are to be held liable (e.g., the special definition of "exhibit" includes persons who sell tickets to a performance). The proposed language follows N.Y. Pen. Law §235.21(2). See also Hawaii Code §1215(1)(b); Ore. Rev. Stat. §167.075; Fla. Stat. §847.013. Other states apparently assume that terms like "exhibit" will be broadly construed to reach such persons as ticket sellers. See, e.g., Cal. Pen. Code §313.1(a); Proposed Mich. Rev. Crim. Code §6301(2). This approach is particularly risky in a criminal statute, even though the Criminal Code has a provision rejecting the so-called "strict construction rule." See M.C.L. §750.2; People v. Hall, 391 Mich. 175, 189 (1974).

At least one state specifically exempts projectionists, Utah Code §76-10-1208(2). 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. Aside from that factor, there is no reason to treat the projectionist differently than the clerk in the bookstore or the ticket seller. But cf. State v. J-R Distributors Inc., 82 Wash.2d 584 (1973) (finding sufficient rational basis to support the constitutionality of a statutory distinction between projectionists and a clerk in a bookstore).

VI. EXEMPTIONS

Parental Exemption

A primary thrust of juvenile obscenity statutes 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 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 "harmful to 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 seen 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, 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 on the ground that distributions by parents to their children would not constitute dissemination for "monetary consideration." However, even if the statute is so limited, there might be value in adding an exemption provision to (1) emphasize the basic thrust of the provision

and (2) provide a safeguard against a broad construction of dissemination for "monetary consideration" that might extend to parents under unusual circumstances.[109]

A parental exception is included in every statute examined that reaches non-commercial transactions. The exception is sometimes stated as an exemption.[110] Other jurisdictions make it a defense.[111] The parental exception of the proposed statute, found in section 2[2](a), is stated as an exemption rather than a defense. This formulation would not prevent the court from requiring that the defendant initially raise the exemption issue, but the burden of proof would fall upon the prosecutor in both a criminal prosecution and a civil proceeding.

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109 Thus, where a parent purchases material and later gives it to a child who reimburses the parent, the transaction should not be viewed as a "sale" by the parent, but a parental exemption would avoid any necessity of even examining that issue.

110 See, e.g., Cal. Pen. Code §313.2(a) ("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 Pen. Code §1215(2) ("does not apply to a parent, guardian, or other person in loco parentis to the minor").

111 See, e.g., Ore. Rev. Stat. §167.085(1) ("it is an affirmative defense . . . (1) that the defendant was in a parental or guardianship relationship to minor"); Ohio Rev. Code §2907.31(B)(1) ("affirmative defense" that defendant "is the parent, guardian, or spouse of the juvenile involved").

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 in 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 that 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 parent.[112] Again, as with the parental exception itself, this provision may be stated as an exemption, e.g., Cal. Pen. Code §313.2(10), or a defense, e.g., Ohio Rev. Code §2907.31(B)(2). It may also be placed in the body of the statute, e.g., Ore. Rev. Stat. §167.075(1). The proposed statute follows the latter alternative since the problem relates only to performances and section 2[1](b) contains a special provision on performances.

Other Exemptions

Most of the factors justifying a parental exception also tend to support exceptions for dissemination of sexually oriented material for educational and scientific purposes. Again, the circumstances surrounding dissemination suggest that the material will be presented so as not to be harmful to minors. Also, sufficient institutional checks should exist to ensure that the exceptions will not be abused. Of course, these same considerations suggest that the dissemination also would be protected under the tripartite test of

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112 Arguably, this exception is too narrow. The parent should not be required to accompany the child, but only to grant permission (e.g., 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 at p. 226 supra, the element of movement may give performances a special impact not present in other visual materials. Performances, unlike books, also are examined in the presence of others, but it is questionable whether the statute should take into account the concern of others in the audience that unescorted minors are watching the same performance. See fn. 52 supra.

Miller v. California, supra, but, as noted previously, the general thrust of the statute should be to clearly exclude protected dissemination from coverage without relying on the application of the nebulous Miller standard.[113]

Most of the statutes examined that encompass non-monetary transactions also 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.[114] The second approach is to generally describe appropriate purposes requiring exemption. See, e.g., Proposed Mich. Rev. Crim. Code §6301(b) ("for educational or scientific purposes").

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113 See also Schwartz, Morals Offenses And The Model Penal Code, 63 Colum. L.Rev. 669, 680 (1963); Paris Adult Theatre v. Slaton, 413 U.S. 49, 72 (1973) (Douglas, J., dis.) (commenting upon the need for specific exemption of librarians).

114 See e.g., Wash. Rev. Code §9.68.100 ("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"); Det. Ord. §39-1-18.3 ("(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"); Ore. Rev. Stat. §167.085(2) ("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"); Wis. Stat. §944.25(11)(c) (same wording as Oregon).

The third approach is to specify the primary legitimate disseminators and also include a general description of the exempt purposes.[115] The proposed statute, in section 2[2], uses this third approach, listing specific persons and then adding a "catch-all," broader generalization of proper purposes.

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 (e) 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 as to the existence of that circumstance. Paragraph (e) also provides that a person, to be liable under section 2[1], must act "knowingly" with respect to two circumstances relevant to the offense -- the "nature" of the matter disseminated and the status of the recipient as a minor.[116] Paragraph (e) thus raises basic

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115 See, e.g., Ohio Rev. Code §2907.31(C) ("for a bona fide medical, scientific, educational, governmental, judicial or other proper purpose, by a physician, psychologist, sociologist, teacher, scientist, librarian, clergyman, prosecutor, judge, or other proper person"). Cf. Ill. Rev. Stat. ch. 38, §11-21(e)(1) ("any public library or any library operated by an accredited institution of higher education . . . in aid of a legitimate scientific or educational purpose. . .").

116 The discussion above refers to the requisite mens rea as to surrounding circumstances rather than the actus reus. Of course, to disseminate, the individual must sell, lend, give, exhibit or show, and each of these acts requires a separate element of mens rea as indicated by the terms themselves.

issues as to both the requisite level of mens rea and the scope of the circumstances as to which the mens rea is required. We consider initially a major aspect of the scope of the mens rea requirement.

"Nature" of the material. In Smith v. California, 361 U.S. 147 (1959), the Court found unconstitutional a 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.[117] 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 materials 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 protected as well as obscene literature. Thus, by forcing booksellers to adopt a scheme of self-censorship, the state had violated the First Amendment; it had indirectly imposed a restriction upon protected material that it could not directly impose. The Constitution required, to minimize the impact of self-censorship, that the state not impose liability without requiring some element of scienter.[118]

While Smith held that the state may not impose strict liability, it did not specify that level of mental element that was constitutionally required or those aspects of the

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117 While Smith involved a general obscenity statute, the principle announced there was later viewed in Ginsberg as equally applicable to a juvenile statute.

118 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 ambiguity inherent in the definition of obscenity."

contents of the material that must be encompassed by that mens rea.[119] Later cases, as discussed infra, held that reckless disregard was a constitutionally sufficient level of mens rea, but none clearly went beyond Smith in identifying the scope of the circumstances as to which that mens rea applied. Smith spoke in terms of the need for a mens rea requirement as to the "contents of the book" and the "character of the book." 361 U.S. at 152-153. Later cases used the same terminology.[120] Hamling v. United

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119 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 a bookseller to 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 154-155.

120 In Mishkin v. New York, the Court held a challenge to a general obscenity statute on the basis of Smith was "foreclosed" where the statute had been construed as imposing the following scienter requirement: "[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 exercised . . ." 383 U.S. at 510. (Emphasis is the Court's). In Ginsberg v. New York, supra, the Court upheld the scienter provision of a juvenile obscenity statute. The provision there 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, supra. 390 U.S. at 643-644.

States, 418 U.S. 87, 121 (1974), provides the latest statement on this aspect of the constitutionally requires mens rea. It notes that the state need not require proof that the disseminator know that the materials were legally classified as "obscene," but beyond that, it adds little to what was said in Smith. Thus, Hamling states: "It is constitutionally sufficient that the prosecutor show that a defendant had knowledge of the materials he distributed, and that he knew the character and nature of the materials." 418 U.S. at 123 (emphasis added).

Neither Smith nor subsequent cases clearly indicate the extent to which the constitutionally required mens rea must encompass 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?[121] 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 is aware (or should have been aware) that the material portrayed sexual intercourse, must it also be shown that he 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 (e) is presented in three alternative drafts, each varying in its approach to the resolution of these questions.

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121 Lower courts, interpreting 18 U.S.C. §1465, 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).

Alternative A follows Smith and simply refers 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 mens rea requirement. The state statutes examined follow a similar approach. Some make no reference to the scope of the mens rea requirement, and others simply note that it must extend to the "character" or the "character and content" of the material sold. See, e.g., N.Y. Pen. Law §235.2; Cal. Pen. Code §313(e).

If the chosen legislative policy is to limit the mens rea requirement to the constitutional minimum, 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.[122] 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.[123]

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122 This flexibility may be limited somewhat by employing both the term "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 the particular acts depicted. As noted infra, substantial grounds exist for requiring at least reckless disregard as to this aspect of quality as well as to content.

123 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 fns. 5 and 121 supra.

In permitting adjustment to future decisions, Alternative A provides the disseminator with far less precise guidelines as to his duty to inspect than Alternatives B and C. Assume, for example, that the disseminator is aware that a publication portrays nudes, but has good reason to believe that the portrayals are not of the type encompassed by the statute -- i.e., they do not depict the genitals or any sexual conduct. If the disseminator fails to inspect, and the publication has shifted its editorial policy and now depicts full nudes and sexual conduct, is the disseminator subject to criminal liability for selling that publication to a known minor? Alternative A, unlike Alternatives B and C, offers little assistance on such an issue. While judicial decisions could provide an answer, it may be months or years before these issues are resolved by the appellate courts.

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 activities described in the proposed definition of "sexually explicit matter," [paragraph (m)]. Thus, the requisite mens rea must be established as to the specific type of activity portrayed rather than just the material's general sexual orientation. This requirement follows from a primary objective of listing the specific sexual content encompassed by the statute -- particularly if that content is carefully limited (e.g., excludes "nudity" and verbal description). 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 activities specified in the listing, the disseminator need not be concerned with the uncertain protection afforded by the tripartite test. Similarly, if the disseminator has good reason to believe that the matter has some sexual content, but does not depict those particular activities specified in the listing (e.g., the material contains only "nudity" or verbal descriptions -- assuming those categories are excluded), 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 a burden of inspecting almost all sexually related material to ensure that it did not contain sexually explicit matter. 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 of reckless disregard applies to the characterization of the material under the tripartite standard. Alternative B requires a mens rea level of "reckless disregard" for the prurient interest element alone. Alternative C requires "reckless disregard" as to each element of 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. No crime has been committed unless the fact-finder 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 standard. It would be sufficient that the disseminator should have been aware of those characteristics of the material reflected in the tripartite standard, even though he mistakenly thought the material was not legally obscene. Criminal statutes often require some level of mens rea with respect to factual elements of legal standards when those facts are also part of the elements of the offense to be determined by the trier of fact.[124]

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124 See, e.g., Screws v. United States, 325 U.S. 91 (1945); Proposed Mich. Rev. Crim. Code §3205 (mens rea requirement for receiving stolen property), §7005 (incest).

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 required constitutionally.[125] 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.[126] 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 have 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.[127]

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125 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 fn. 122 supra. Consider also the language of Mishkin, quoted at fn. 120 supra. Note the Court here also refers to the calculated purveyance of material of a particular quality ("filth") as well as content. See also the quotation from Hamling at p. 257 supra.

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

127 See, e.g., the advertising, etc. noted in Hamling v. United States, supra; United States v. Gundlach, 345 F. Supp. 709 (MD. Pa. 1972). Compare United States v. Stewart, fn. 126 supra.

Nevertheless the theoretical potential for inhibiting the sale of a significant amount 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 threshhold for appeal to their prurient interest,[128] it seems likely that constitutional protection of sexually explicit material distributed to minors will depend more on the presence of serious social value than on 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 on the likelihood that a particular book has some social value for minors than 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

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128 The validity of this assumption has not been adequately investigated. See, Obscenity Commission Report: Technical Report, Vol. 1, p. 16.

upon the prosecution. This position rests, in part, on the premise that, if the statute reaches only a narrow range of sexual content (e.g., does not include "nudity"), material which is both sexually explicit 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 both sexually explicit and erotic in quality. The burden of inspection would apply only to a narrow class of materials that was 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.[129] Surely, the particular jury finding the material obscene is likely to reach that conclusion.[130]

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129 But see Jenkins v. Georgia, supra, where a jury found Carnal Knowledge to be obscene.

130 Where the standard is that of recklessness -- i.e., requiring an awareness of the risk that the material would be patently offensive, etc., -- the jury conceivably could find that the individual lacked the mens rea because, though he acted unreasonably, he was not aware of that risk. This would be most unusual, however, especially with an experienced bookseller.

Where the seller failed to inspect, requiring mens rea as to each element of the tripartite test may make proof of liability difficult. In that situation, the determination of mens rea rests not on 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, the nature of the advertising, etc. If reckless disregard is required as to each element of the tripartite standard, 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, the prosecution ordinarily will rely on 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 sexual 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 on advertising, etc., but at least the evidence typically offered in general obscenity prosecutions has tended to suggest reckless disregard as to those elements as well.[131]

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131 See United States v. Hochman, 175 F.Supp. 881 (E.D. Wis. 1959), aff'd 277 F.2d 631 (7th Cir. 1959) (title, illustration, prices); People v. Weingarten, 50 Misc.2d 635 (1968); reversed on other grounds 25 N.Y.2d 636. (Cover balatantly sado-masochistic); United States v. Mishkin, 317 F.2d 634 (2d Cir. 1963) (clandestine manner of delivery and defendant's apparent familiarity with the scheme).

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, mens rea can be established without showing actual knowledge. None of the proposed alternatives in paragraph (e) require the prosecution to prove actual knowledge. The term "knowingly" is defined as including "reckless disregard" under all three alternatives. The "reckless disregard" standard reflects the same concept of "recklessness" as is employed in the Proposed Mich. Rev. Crim. Code §303(c)[132] and most modern criminal codes; the actor must have been aware of a substantial risk as to the existence of the circumstances (here, the characteristics of the material) as to which mens rea is required.

Alternative A 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 the precise subject of the mens rea, and Alternative A purposely describes that subject matter (the "character and content" of the material) in very general terms. See p. 258 supra. Alternatives B and C provide a more complete definition of the required mens rea. They require that the individual disregard "a substantial and unjustifiable risk that" the

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132 Section 303(c) of the Proposed Code provides: "A person acts 'recklessly' with respect to a * * * circumstance described by a statute defining an offense when he is aware of and consciously disregards 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; N.Y. Pen. Law §15.05.

material depicted the specified sexual conduct and had either prurient appeal alone (Alternative B) or all three characteristics reflected in the tripartite standard (Alternative C).[133]

The standard of reckless disregard clearly satisfies the level of mens rea constitutionally required under the Smith analysis. Although Smith and later opinions referred to the disseminator's "knowledge" of the content of the material sold,[134] those references were not meant 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 there was not suggesting that an individual could avoid liability by "purposely insulating himself against knowledge about an offending book."[135] Yet a person who purposely shuts his eyes as to the existence of a possible circumstance cannot be described as having "knowledge"

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133 Reckless disregard is reflected most commonly in the failure to inspect, but since it is not limited to that situation (see fn. 130 supra), the alternative drafts do not speak of reckless disregard solely in terms of failure to inspect. Compare Ill. Rev. Stat. ch. 38, §11-21(b), described in fn. 143 infra.

134 See 361 U.S. at 151-152; Hamling v. United States, 418 U.S. at 123.

135 361 U.S. at 161. See also People v. Schenkman, 195 N.Y.S. 2d 570, 576 (1960). ("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"), State v. Thompkins, 211 S.E.2d 549 (S.C. 1975); Movies Inc. v. Conlisk, 345 F.2d 780, 788 (N.D. Ill. 1971).

of that circumstance as the concept of "knowledge" is commonly used in modern codes.[136] 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 later cases, 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.[137] In Ginsberg, the Court upheld a New York juvenile statute which specifically stated as sufficient mens rea that the individual had "reason to know" the character of the material. (See fn. 120 supra).[138]

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136 Under Proposed Mich. Rev. Crim. Code §305(b) and most modern criminal codes "knowledge" requires awareness of a fact as actually existing. See A.L.I., Modern Penal Code, Tent. Draft No. 4 (1955) at 125: "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."

137 The New York provision 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, 174 N.E.2d 470 (N.Y. 1961).

138 See also Huffman v. United States, 470 F.2d 386 (1971) upholding the D.C. 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 * * *."

Almost all of the state provisions examined appear to accept reckless disregard as a sufficient level of mens rea. Several of the state statutes speak in terms of a seller acting "knowingly," and do not include any special definitions of "knowingly" that would encompass reckless disregard.[139] Some of these provisions, however, may require knowledge only that the material is sexually oriented;[140] 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 states having a "knowledge" requirement, 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.[141] Finally, judicial interpretations of the term "knowledge" often have viewed it as including reckless disregard as well as actual awareness.[142]

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139 See, e.g., Cal. Pen. Code §313(e) ("being aware of the character of the matter"); Wis. Stat. §944.25(10) ("knowledge of the nature of the material"; Wisconsin also bars any criminal proceeding unless the material initially has been found "harmful to minors" in a civil proceeding).

140 See, e.g., Volkland v. State, 510 S.W.2d 585 (Tex.App. 1974); People v. Adler, 25 Cal.App.3d Supp. 27 (1972). See also the federal cases cited in fn.121 supra.

141 See, e.g., N.Y. Pen. Law §235.22(i); People v. Kirkpatrick, 32 N.Y.2d 17 (1973).

142 See, e.g., the cases cited in fn. 135 supra. This broad view of "knowledge" is not limited to obscenity cases. See LaFave and Scot, 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 for 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."

Other state statutes define mens rea so as to go beyond reckless disregard. They apparently would include a negligent failure to inspect the material disseminated.[143] Unlike the "reckless disregard" standard proposed in paragraph (e), some of these provisions only require that good reason to inspect existed. See, e.g., Utah Code §7-10-1201(4). Under such a standard, the seller need not have been 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 he be aware of the circumstances, but do not require that he appreciate their significance. See, e.g., Fla. Stat. §847.012(1)(g).

Criminal provisions generally impose a higher standard of mens rea than negligence. The provisions of the Proposed Mich. Rev. Crim. Code, for example, ordinarily require either an intent to cause a specific harm or reckless disregard of a substantial risk that the harm will result. In view of the First Amendment concerns noted in Smith, appropriate caution

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143 See, e.g., Utah Code §7-10-1201(4) ("an awareness, whether actual or constructive, of the character of material or of a performance. A person has constructive knowledge if a reasonable inspection or observation under the circumstances would have disclosed the nature of the subject matter and if a failure to inspect or observe is for the purpose of avoiding the disclosure"); Ore. Rev. Stat. §167.065 ("knowing or having a good reason to know the character of the material furnished"); Fla. Stat. §847.012 (1)(g) ("or ground for belief which warrants further inspection of . . . the character and content of any material"). Consider also Ill. Rev. Stat. ch. 38, §11-21(b)(4) ("having knowledge of the contents of the subject matter, or recklessly failing to exercise reasonable inspection which would have disclosed the contents thereof").

suggests that the mens rea level, at least as to sexually explicit content, should not be placed at a level that is only rarely applied in criminal statutes generally.[144] Moreover, as a practical matter, requiring proof of reckless disregard, rather than negligence, is likely to impose an additional burden on the prosecution in only a small group of 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. While a contrary conclusion might be reached upon a showing that defendant lacked the capacity of a reasonable person, the prosecution is rarely required to respond to such a presentation.[145]

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144 It should be noted, however, that Ginsberg v. New York, supra, upheld a statute containing what was essentially a negligence standard. The statute there required a "general knowledge of, a 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." See also Huffman v. United States, fn. 138 supra.

145 To some extent, a similar analysis might be applied to requiring actual "knowledge" -- i.e., where a reasonable person should have known, the jury is likely to find that the defendant did know. However, if the jury literally applies a requirement of actual knowledge, the defendant should find it easier to make a showing that he was not aware of the sexually explicit content (e.g., 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 more dramatic with respect to proof of knowledge of the factors reflected in the tripartite test.

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. 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." 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.[146] Ordinarily, statutes prohibiting dangerous transactions with minors do not require any mens rea as to the victim's status as a minor. See, e.g., M.C.L. §§750.137, 141, 372a; People v. Doyle, 16 Mich.App. 242 (1969). The special First Amendment considerations noted in Smith suggest, however, that a mens rea requirement would be required constitutionally in a juvenile obscenity statute.[147] Since the obscenity standard applicable to minors differs from that applicable to adults, imposition of strict liability as to the age factor would place upon the seller a special burden to determine whether the material being sold was obscene for minors even though the purchaser appeared to be somewhat above the age of a minor. The burden would not be as great as that held invalid in Smith 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. Nevertheless, the burden of examining all material known to have questionable content could be sufficiently inhibiting to lead sellers to refuse to sell to any person who appears to approximate the age limit.

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146 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 245.

147 Commissioners Hill and Link in their minority statement in the Obscenity Commission Report, p. 472, noted that it was doubtful whether absolute liability as to the minor's age would be constitutionally acceptable.

Moreover, where the seller serves a primarily youthful audience, strict liability might lead him to refuse even to stock materials that might be obscene for minors although acceptable for adults (e.g., Playboy). This potential for restricting the distribution of protected material to adults might not, perhaps, be sufficient to render unconstitutional a statute imposing strict liability with respect to the age of the purchaser. (See fn. 119 supra). Even so, the enforcement value of strict liability should be weighed, as a matter of state policy, against the inhibiting impact of such strict liability.[148] As noted below, the various state statutes examined almost universally conclude that strict liability is inappropriate. This includes states which, like Michigan, ordinarily impose strict liability as to age in criminal statutes. See N.Y. Pen. Law §1520(3).

Except for Hawaii, each state statute examined clearly indicates that at least a reasonable mistake as to the purchaser's status as a minor would relieve the seller of liability. See, e.g., Ore. Rev. Stat. §167.085(4). Most specifically make negligence as to age an element of the required mens rea. See, e.g., Cal. Pen. Code §313.1(a); Utah Code §76-10-1206; Ill. Rev. Stat. ch. 38, §11-21(e)(3). Several recognize a special defense where the disseminator "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 not a minor. See, e.g., Wis. Stat. §944.25(11)(a); N.Y. Pen. Code §235.22(2)(b); Ohio Rev. Code §2907.31(B)(3).

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148 That inhibitory impact may be particularly significant, as a matter of state policy, if Michigan adopts the position that dissemination of pornography to consenting adults should never be prohibited. See fn. 8 supra.

The scienter requirement in proposed paragraph (e) applies a standard of "reckless disregard" as to the status of the minor. This standard is somewhat higher than that applied in other jurisdictions, but, as noted supra, 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, etc. Indeed, under a reckless disregard standard, the mistake need only be honest. If the person honestly believed that the draft card was genuine, or that there was a substantial likelihood it was genuine, then he obviously did not consciously disregard a substantial risk.[149]

Mail distributions. There is no separate provision in the proposed statute for mailing. Sales through the mail would be included under either alternative definition of dissemination (see p. 246 supra). 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.

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. See, e.g., Ill. Rev. Stat. ch. 38, §11-21(4). Alternatively, the disseminator might be required to place an "adults only" label on each package shipped. See, e.g., Ore. Rev. Stat. §167.070(2) ("this package contains material that by Oregon law, cannot be furnished to a minor").

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149 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 also requiring a showing as to appropriate reliance thereon. See Wash. Rev. Code §968.070(2).

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, and it is not likely to be an effective deterrent. Such a requirement also would impose a burden on protected dissemination to adults since, even if checking a box on the application is all that is needed, some adults surely will forget to provide an appropriate statement and thereby preventing immediate shipment.

Requiring an "adults only" label on books or film sent through the 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. Moreover, it requires the disseminator to make a judgment on every item shipped, as to whether it would indeed be obscene for minors. The storeowner, on the other hand, only need make that judgment when the prospective purchaser before him appears to be a minor.

VIII. REMEDIES: CRIMINAL AND EQUITABLE

Criminal Penalty: Dissemination

The proposed statute makes distributing obscene material to minors a misdemeanor punishable by imprisonment up to one year and a fine up to $10,000. This proposal follows the Proposed Mich. Rev. Crim. Code §6310. Current Michigan provisions impose a similar maximum term of imprisonment, but the maximum fine is $1,000.00. See M.C.L. §§750.343(a), 343(g).

The justification for including a maximum fine of $10,000 is stated in the Commentary to the Proposed Code: "Because fines are of central significance in enforcing * * * [obscenity statutes], the [proposed statute] provides for extension of the fine beyond $1,000 * * * in a case, e.g., of a mass * * * [distributor] of pornographic material. Although the 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 should rebut any claim that the fine imposes cruel and unusual punishment or is otherwise unconstitutional."[150]

The Oregon penalty provision also authorizes a maximum fine of $10,000, though the usual fine for a class A misdemeanor in that state is $1,000. Ore. Rev. Stat. §167.065 (2). Several states provide a one year maximum on imprisonment, but a $1,000 maximum on fines. See, e.g., Hawaii Code §1215(3); Utah Code §76-10-1206(3) (first offense). Other states provide for imprisonment up to six months and a fine up to $500. See, e.g., Cal. Pen. Code §313.1(a); Wash. Rev. Stat. §9.68.060(3)(d) (first offense). At least one state treats a first offense as a felony punishable by 5 years imprisonment. See Fla. Stat. §847.012(3). See also Utah Code §76-10-1206(3) (2nd offense felony punishable by 5 years imprisonment); Ill. Rev. Code ch. 38, §11-21 (2nd offense punishable by 3 years imprisonment).

Criminal Penalty: Facilitative Misrepresentation

The proposed statute includes a provision, section 3, making it a misdemeanor to falsely represent oneself as a parent or falsely represent that a minor is 16 years of age or older 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.[151] It is possible that the person making the false representation could be held responsible under section 2 for the subsequent dissemination. See, Proposed Mich. Rev.

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150 A $100,000 fine was found not excessive in People v. Mature Enterprises, Inc., 76 Misc.2d 660 (N.Y. 1974), where it was related to the size of the commercial interest.

151 It is not clear that contributing to the delinquency of a minor, M.C.L. §750.145, would apply.

Pen. Code §410 (liability based on conduct of innocent person). However, that theory of liability is most uncertain and limited, in any event, to cases where the falsification was successful. A separate provision is needed to prohibit the misrepresentation alone.[152]

Many states have provisions similar to section 3. Some cover both misrepresentation of a minor's age and status as parent. See, e.g., Fla. Stat. §847.013(2)(c) and (2)(d); Ohio Rev. Stat. §2907.33; Wash. Rev. Stat. §9.68.080. Others cover only misrepresentation as to parental status, e.g., Utah Code §76-10-1206(1)(c); Cal. Pen. Code §313.1(b), or falsification of age, e.g., Ill. Rev. Code ch. 38, §11-21(f). Current Michigan statutes establish a similar offense when the false representation of age is made to obtain alcholic liquor. See M.C.L. §§750.141(c) and 141(d).

The penalty for facilitative misrepresentation is that of the traditional "misdemeanor," i.e., imprisonment up to 90 days or a fine up to $100 or both. M.C.L. §750.504. The difference in the penalties imposed for dissemination of obscene matter and for facilitative misrepresentation is similar to the different penalties for sale of liquor to a minor and misrepresenting a minor's age to obtain liquor. 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.[153]

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152 Section 3 would, of course, apply to misrepresentation by the minor himself as well as misrepresentation by another. A minor violating the provision therefore would be subject to juvenile court jurisdiction. See p. 244 supra. This may be viewed as undesirable, at least where the minor did not use false identification papers.

153 The proposed statute has no provision establishing an offense for permitting a minor to participate in a sexually explicit performance. Regulation of this activity presents concerns quite apart from the potential harmful impact on

Injunction and Declaratory Judgments

Proposed Section 4 and M.C.L. §600.2938. Proposed section 4 follows M.C.L. §600.2938 in providing for civil actions as an alternative to criminal prosecutions under section 2. Section 2938 relates to the distribution of various types of publications having a content that might be obscene, lewd, etc. The section provides for an injunction proceeding initiated by a public official and a declaratory judgment proceeding initiated by a disseminator. Proposed section 4 includes both of these procedures, but is limited to the prospective dissemination of sexually explicit matter to minors. For several reasons, section 2938 cannot safely be relied upon in dealing with such dissemination.

First, section 2938, unlike the proposed provision, does not apply to performances. Such coverage is necessary to provide an adequate civil alternative to proposed section 2.[154]

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footnote 153 continued

the juvenile audience, which is a primary focus of the juvenile obscenity statute. Juvenile participation in dissemination generally may be regulated under contributing to the delinquency of a minor, M.C.L. §750.145, or provisions relating to the employment of a minor in theatrical productions, M.C.L. §§409.22 and 22a. M.C.L. §750.142 bars employment of minors in the distribution of obscene books. If §750.142 is repealed, considerations will have to be given to replacing that portion of §750.142.

154 Films may be covered under the public nuisance act, M.C.L. §600.3801 ("lewdness"). See State v. Diversified Theatrical Corp., 59 Mich.App. 223 (1975). This provision suffers from many of the deficiencies of section 2938, and also does not afford an appropriate remedy where dissemination is made both to adults (legally) and minors (illegally).

Another deficiency of section 2938 is its broad description of the content of the matter that may be the subject of an injunction. Section 2938(1) applies to the distribution of any publication of "an indecent character, which is obscene, lewd, lascivious, filthy, indecent, or disgusting or which contains an article or instrument of indecent or immoral use." As written, this provision presents serious constitutional difficulties. In light of past practice, we may assume that the provision would be construed to reach only materials that could be prohibited under the tripartite standard. (See fn. 5 supra). Presumably, it also would be construed as applying only to depictions of specific sexual conduct. So far, however, the statute has not been "authoritatively construed" in this fashion, and it cannot be used effectively until such a construction is made. See Kent Prosecutor v. Goodrich Corp., fn. 7 supra). But compare State v. Diversified Theatrical Corp., fn. 7 supra.

Moreover, when the statute is authoritatively construed, that construction will probably be tied to dissemination to adults, although a court conceivably could hold the statute covers a range of sexual portrayals depending upon the audience. Even assuming such an interpretation, it would be preferrable that the relevant civil remedy statute, like the relevant criminal statute, itself refer specifically to the variable obscenity standard applicable to distributions to minors. Proposed section 4 does this by utilizing the definitions of proposed section 1.

Other aspects of section 2938 also are so broad as to create possible difficulties in applying that section to prospective disseminations to minors that would be prohibited by the proposed Act. Section 2938 permits an injunction to be sought by the prosecutor or "the chief executive or legal officer of any city, village, [or] charter township." Actions for declaratory judgments may also be brought against such officers. Proposed section 2 creates a state crime, and enforcement of proposed section 2 would be a responsibility solely of the prosecuting attorney. Section 4 accordingly is limited to civil actions brought

by and against the prosecutor. If local governmental units are permitted to adopt ordinances similar to proposed section 2,[155] a procedure similar to section 4 might be adopted with respect to such ordinances.

Section 2938 also provides for destruction of the material found to be obscene after a hearing on the merits. (See M.C.L. §750.346 for the comparable destruction provision following criminal conviction). Automatic destruction is not appropriate for material that is "harmful to minors." Such material could still be sold to adults. Of course, if a final injunction prohibiting sale to minors is violated, the court may order seizure of the material where appropriate. See, e.g., Utah Code §76-10-1209(4)(c).

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155 The adoption of section 2 would not preempt similar local ordinances, although such ordinances probably could not exceed the coverage of section 2. See Note, 71 Mich. L.Rev. 400, 409-17 (1972) (collecting cases); People v. McDaniel, 303 Mich. 90 (1942); National Amusement Co. v. Johnson, 270 Mich. 613 (1935). However, the permissible penalty for violating any ordinance would be considerably less than that permitted under section 2. See, e.g., M.C.L. §§5.45(3), 66.2, 89.2. That factor alone might support inclusion of a preemption provision. Preemption also would avoid creation of a competitive atmosphere between prosecutor and local attorney in the enforcement of obscenity provisions. The availability of a declaratory judgment procedure which would grant immunity from prosecution also suggests the desirability of a preemption provision. Certainly, if preemption is not provided, the prosecutor should be permitted to intervene in an action brought against a city official since a final judgment in favor of the disseminator would bar subsequent prosecution. See sections 4[9], 4[10], and 4[11].

Another deficiency of section 2938 is that certain procedures provided by that section are of doubtful constitutional validity. As discussed below, section 4 eliminates those procedures and includes further explanation of other procedures that hopefully will ensure their constitutionality.

Prior Restraint. "The presumption against prior restraints is heavier -- and the degree of protection broader -- than that against limits on expression imposed by criminal penalties." Southeastern Promotions, LTD v. Conrad, 95 S.Ct. 1239, 1246 (1975). To be constitutional, a prior restraint "first, must fit within one of the narrowly defined exceptions to the prohibition against prior restraints, and, second, it must have been accomplished with procedural safeguards that reduce the danger of suppressing constitutionally protected speech." Id. at 1247. Dissemination of obscenity has long been recognized as an area that may appropriately be subjected to prior restraint. Accordingly, the primary issue relating to the constitutionality of the prior restraint imposed by section 4 is the adequacy of the procedure provided.

Final injunctions. The injunction procedure authorized in subsection [1] is essentially that upheld by the Supreme Court in Kingsley Books v. Brown, 354 U.S. 436 (1957). See also Blount v. Rizzi, 400 U.S. 410, 420, fn. 7 (1971). Under subsection [1], no legal restraint is imposed until after an adversary judicial proceeding in which the prosecution carries the burden of proof,[156] and the dissemination that may be en-

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156 Once the civil action is filed, the individual is aware that dissemination may be enjoined, but this threat should not be viewed as a prior restraint. If the injunction eventually is issued, no sanction is imposed for dissemination prior to its issuance (unless a temporary injunction has been issued). Of course, subsections [8]-[10] do not bar criminal prosecution, but the request for an injunction ordinarily indicates that the prosecution will not proceed criminally (unless an injunction is violated). Section 2938 includes a subsection noting that any person who disseminates

joined is essentially that which would violate a criminal statute.[157] The primary objection raised against this type of provision is that it fails to provide for a jury trial. The Supreme Court has flatly rejected the contention that a jury trial is constitutionally required for an injunction proceeding against the dissemination of obscenity. See Kingsley Books v. Brown, supra; Alexander v. Virginia, 413 U.S. 836 (1973). As noted by Justice Brennan, dissenting in Kingsley, the jury, at least theoretically, is particularly well suited for application of the patent offensiveness and prurient interest elements of the tripartite

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footnote 156 continued

material after receiving a complaint under subsection [1] relating to that material "is chargeable with knowledge of the contents" of that material. This provision apparently is designed to assist in future prosecutions. It is not included in proposed section 4, so as to eliminate any suggestion that the request for an injunction constitutes a specific threat to proceed by criminal prosecution for any future dissemination (and thereby constitutes a prior restraint). See United Artists v. Wright, discussed infra. Of course, receipt of the complaint probably would establish reckless disregard in any prosecution based upon future dissemination even without a special provision.

157 The only significant distinction is that, in a criminal prosecution, the element of scienter must be established.

test.[158] However, requiring a jury trial could cause considerable delay in trial of the issue and thereby might lead to use of a much longer term preliminary injunction (see p. 283 infra). The delay due to jury selection in obscenity cases is likely to be more substantial than that in jury cases generally. Many prospective jurors often may not be very well suited to trial of an obscenity action. Sitting in a "spotlight" on an issue relating to morals,[159] they may be tempted to take an essentially personal approach that tends to depreciate the function of the tripartite test. Difficulties presented in eliminating such jurors could produce a somewhat more lengthy jury selection process and also have an impact upon the scope of the presentation at trial.

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158 "The jury represents a cross-section of the community and has a special aptitude for reflecting the view of the average person. Jury trial of obscenity therefore provides a peculiarly competent application of the standard for judging obscenity which, by its definition, calls for an appraisal of material according to the average person's application of contemporary community standards." 354 U.S. at 448. Justice Brennan, of course, was referring to the Roth standard, while under proposed paragraph (d) of section 1, the community standard applicable to the prurient interest element is that of minors in the community. Still, the jury will bring to bear a wider range of experience in examining that issue than will a single judge.

159 The moral issue may be more "clear-cut" for jurors in an injunctive proceeding, since they are there looking at the book or movie alone, and not at whether criminal liability should be imposed upon a disseminator such as the proprietor of a small store or a clerk.

Preliminary injunction. The preliminary injunction procedure of subsection [4] was also upheld in Kingsley Books v. Brown, supra. The preliminary injunction presents constitutional difficulties because the injunction may be issued without an adversary hearing.[160] However, subsection [4] does provide for a prompt hearing on the merits (within 1 day after joinder of issue) and a prompt decision (within 2 days after the conclusion of trial). These safeguards were viewed in Kingsley as sufficient to uphold constitutionally the prior restraint imposed by the preliminary injunction. Moreover, consistent with a footnote suggestion in Kingsley, proposed subsection [9] provides that a person who disseminates in violation of a preliminary injunction may not be held in contempt if the court determines, after a hearing on the merits, that the dissemination of the item in question would not violate proposed section 2. This provision reduces somewhat[161] the inhibiting impact of the temporary injunction during the short period prior to the date of the final decision.

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160 See Kingsley Books v. Brown, 354 U.S. at 446 (Douglas, J., dissenting). See also Wayne County Prosecutor v. Doerfler, 14 Mich.App. 428, 457 (1968). Compare Wis. Stat. §944.25(8)(b) ("no preliminary injunction shall be issued without at least 2 days notice to respondants"); Fla. Stat. §847.012(5)(b) (3 days notice).

161 Realistically, the reduction is not likely to be substantial, but it ensures the constitutionality of the proposal if the Kingsley opinion should be limited to statutes which provide for such a defense to a contempt citation. The Court noted in Kingsley that it did not have before it "a case where, although the issue of obscenity is ultimately decided in favor of the bookseller, the state nevertheless attempts to punish him for disobedience of the preliminary injunction." 354 U.S. at 443, fn. 2.

Declaratory judgment procedure. Section 2938 currently provides for a declaratory judgment action under specified conditions. It permits a disseminator initially to seek a ruling from a prosecutor as to the "lawful propriety" of disseminating particular matter. The prosecutor is required to respond in 5 days. If his ruling is negative, the disseminator may then seek a declaratory judgment. The prosecutor may also issue negative rulings on his own initiative. A disseminator receiving such a ruling also may seek a declaratory judgment. Proposed section 4 presents a modified version of the section 2938 procedure. The two major modifications are: (1) eliminating the issuance of rulings on the prosecutor's own initiative, and (2) placing the burden of proof upon the prosecutor once the declaratory judgment action is brought. Both were made in light of constitutional concerns expressed in Supreme Court opinions.

The United States Supreme Court has consistently stressed that "the burden of instituting judicial proceedings, and of proving the material is unprotected, must rest on the censor." Southeastern Promotions, LTD v. Conrad, supra, at p. 1247. This principle has been emphasized primarily in cases that involve formal censorship -- i.e., situations where the disseminator is required by statute to submit his material to the censor. However, the Court also held that prior restraint was imposed where, inter alia, government officials regularly warned dealers of prospective prosecution if they sold certain materials. See Bantam Books v. Sullivan, 372 U.S. 58 (1962).

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161 Realistically, the reduction is not likely to be substantial, but it ensures the constitutionality of the proposal if the Kingsley opinion should be limited to statutes which provide for such a defense to a contempt citation. The Court noted in Kingsley that it did not have before it "a case where, although the issue of obscenity is ultimately decided in favor of the bookseller, the state nevertheless attempts to punish him for disobedience of the preliminary injunction." 354 U.S. at 443, fn. 2.

In United Artists v. Wright, 368 F.Supp. 1035 (D.C. Ala. 1974), a three judge district court held that the combined impact of these rulings invalidated a state procedure under which (1) the prosecutor notified a disseminator of the existence of probable cause to prosecute for the dissemination of specific material, (2) the disseminator was then given an opportunity to seek a declaratory judgment relating to that material, and (3) the disseminator carried the burden of proof in such a declaratory judgment proceeding. Section 2938(2)(d) provides for a similar procedure in authorizing a prosecutor to issue a written opinion on his own initiative and thereafter permitting the disseminator to challenge that opinion by declaratory judgment. Proposed section 4 does not include such a provision because of doubts as to both its value and its constitutionality.

Arguably, the section 2938(2)(d) procedure would be constitutional if the burden of proof were shifted to the prosecutor once the disseminator sought a declaratory judgment. The formal legal opinion of the prosecutor might have a restraining impact upon disseminator, but that impact would be limited by the availability of the declaratory judgment action and the allocation of the burden of proof. The procedure thus could be distinguished from both Bantam Books (where the state had no provision for judicial review of the Commission's warning letters) and United Artists (where the burden of proof was on the disseminator seeking a declaratory judgment). Of course, the disseminator might not contest the prosecutor's ruling and the prosecutor might thereby achieve "censorship" without a judicial hearing. But the Court has indicated that a formal procedure imposing prior restraint is not invalid because it fails to require a legal hearing in every case; it is sufficient that the hearing be available to those who oppose the prior restraint.[162] On the other hand, the Court also has

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162 In Interstate Circuit v. Dallas, 90 U.S. 676 (1968), the city ordinance provided that where a censor classified a movie as "not suitable for young persons," the censor was required to file court action to enforce that classification only if the exhibitor filed a notice of nonacceptance. If the exhibitor did not file such a notice, the censor's order was final

suggested that, where the individual does disagree with the censor must both initiate the legal proceeding and carry the burden of proof. See, e.g., Southeastern Promotions, LTD v. Conrad, supra; fn. 78 supra. And where the prosecutor issues a legal opinion on his own initiative, he may be compared to the censor for the purpose of this rule. See Bantam Books, supra.

Leaving aside doubts as to its constitutionality, a serious question remains as to whether the section 2938(2)(d) procedure has any value. If the prosecuting attorney believes that dissemination of a particular item to minors would violate section 2, he could cimply initiate an injunction proceeding. If it seems likely that the disseminator would not contest the action (i.e., he would prefer not to sell the item), this can be determined through informal conversation. Permitting the prosecutor to issue "legal opinions" on his own initiative does not substantially supplement his legal authority to enforce section 2, unless the prosecutor uses that initiative in a regularized program of censorship, which would be invalid under Bantam Books.

Proposed subsection [3] does retain a declaratory judgment procedure where the action is initiated by the disseminator. This subsection, like the similar provision in section 2938(2)(c), requires that the disseminator initially request a statement of legal opinion from the prosecutor. The prosecutor is required to respond within five days. If the prosecutor's written opinion states that dissemination would violate section 2, the declaratory judgment action may be

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footnote 162 continued

without judicial approval. Although holding the ordinance invalid on other grounds, the Court noted that it is "not constrained to view [this] * * * procedure as invalid in the absence of a showing that it has any significantly greater effect than would the exhibitor's decision not to contest in court the [censorship] Board's suit for a temporary injunction." 390 U.S. at 690, fn. 22.

brought.[163] The burden of proof is then shifted to the prosecutor. The subsection [3] procedure may be challenged because it places the burden of bringing the declaratory judgment on the disseminator in order to neutralize the threatening impact of the prosecutor's opinion.[164] But there are other factors which distinguish this situation from that presented in United Artist or the typical censorship Board. The written opinion is requested initially by the disseminator; the proposed procedure does not permit the prosecutor to issue opinions on his own initiative and thereby take on the role of censor, as was done by the Commission in Bantam Books. Also, the disseminator who takes the initiative and seeks a ruling is not likely to be deterred from challenging a negative response by the fact that he must initiate the declaratory judgment proceeding.[165] Of course, some disseminators may not

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163 If the prosecutor states that dissemination would not be illegal, the statute does not necessarily bar a subsequent prosecution. However, under proposed subsection [10] the prosecutor must first withdraw his opinion and obtain an injunction under subsection [1].

164 In Interstate Circuit v. Dallas, supra, the burden of sustaining its classification was placed upon the censorship board, but the board also had to initiate judicial proceedings once the exhibitor filed a notice of nonacceptance.

165 Arguably, the proposed procedure might require that the prosecutor bring the civil action if the disseminator does not accept the prosecutor's negative opinion. See fn. 162 supra. It seems unlikely, however, that such a requirement would influence significantly the disseminator's decision as to whether to challenge the prosecutor's opinion. The expense to the disseminator is essentially the same whether the challenge is presented by initiating a declaratory judgment act or by defending against a suit brought by the prosecutor. Moreover, requiring the prosecutor to bring an action, even after issuance of a negative opinion, might be viewed as an invasion of the prosecutor's discretion to refuse to proceed even though he believes that a crime is being committed.

persist. They may feel that the cost of a lawyer outweighs the advantage to be gained by further dissemination. But if a provision like subsections [2] and [3] were not available, the same disseminators probably would avoid selling questionable material initially because of a general risk of criminal liability. Subsections [2] and [3], on the whole, would seem to encourage sellers to consider distributing possibly protected materials they would otherwise not consider. Adoption of such a procedure was endorsed in Paris Adult Theatre as providing an exhibitor "the best possible notice" as to the legality of the intended dissemination. 413 U.S. at 54.

One common complaint advanced against both the declaratory judgment and injunction proceedings is that the court's ruling will be made in the abstract. See Kingsley Books v. Brown, 354 U.S. at 447 (Douglas, J., dissenting). In either proceeding, it is argued, the emphasis tends to be upon the quality of the material to be disseminated, and not the circumstances surrounding the dissemination. This objection is less significant as applied to the dissemination of material to minors. Here the injunction is not likely to be sought unless the person has offered or actually sold the material to minors. The mere presence of the material in the seller's stock would not be a sufficient basis for instituting proceedings since the material might still be sold only to adults.[166] In the declaratory judgment procedure also, the

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166 In Wayne County Prosecutor v. Doerfler, 14 Mich.App. 428 (1968), the court held that, under the then prevailing decisions of the United States Supreme Court, regulation of obscenity was limited to dissemination to juveniles, nonconsenting adults and pandering (cf. fn. 8 supra), and injunction proceedings were premature where the allegedly obscene material was in a warehouse and had not yet been offered for sale.

reference will be to dissemination by the particular person seeking the order. Problems of judging content will remain, especially if the tripartite standard is applied according to the general age of the minor to whom the matter is dissiminated (see pp. 188-95 supra).[167] Nevertheless, the problem of judging in context would be reduced under section 4.

Section 2938 reflects a legislative judgment that civil remedies should be available as alternatives to criminal prosecution in this particularly complex area. Many states have similar provisions. At least three have sought to either require or afford the opportunity for civil proceedings prior to criminal prosecution. See Wis. Stat. §944.25(10); Wash. Rev. Code §9.68.060(d); Ala. Code Title 14 §§374(16j); 374(16o) (held invalid in United Artists). Apparently Michigan prosecutors in the past often have used equitable proceedings rather than initiate criminal prosecution. "Regular" dealers exist, however, who shift from selling one item of clear pornography to another. In such instances, at least, the prosecutor should not be required to seek one injunction after another, each limited to a special item, or even to use a nuisance theory to close the store. Criminal prosecution might be quite appropriate in light of its deterrent impact and the individual's obvious knowledge that he is in continuous violation of the law. Accordingly, proposed section 4, like section 2938, does not require that section 4 proceedings be utilized prior to prosecution under section 2.

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167 Consider also the use of evidence relating to pandering (see p. 211 supra).

IX. SUMMARY OF QUESTIONS PRESENTED

The study Report does not utilize a section by section analysis.

The basic issues raised in the study Report, in order of presentation, are:

I. Assuming dissemination of obscene matter to minors should be regulated, whether a new statute is needed.

   A. Whether current provisions are unconstitutional.

   B. Whether current provisions adequately reflect need for specificity, recent developments regarding potential bases for obscenity statutes, etc.

II. Should the statutory definition of obscenity include the Miller v. California tripartite standard of prurient interest, patent offensiveness and lack of serious social value.

III. Assuming the tripartite test is included, how should it be formulated.

   A. Should "prurient interest" be defined.

   B. Assuming a definition for "prurient interest" is included:

      (1) Should the definition be limited to "lustful desire" or should the terms "shameful or morbid" be included;

      (2) Should the definition provide for determination in light of the prurient interest of a special sexual group (e.g. homosexuals) where material is designed for that group.

C. Should the patent offensiveness element be defined in terms of "lack of candor," "affronting community standards," or merely noted.

D. Should the social value element include a reference to "other similar values."

E. Should the standard for prurient interest, patent offensiveness and lack of serious social value relate to all minors or to those of the general age of the particular minor to whom matter was disseminated.

F. In adapting the tripartite test to minors, should the standard for patent offensiveness be that of the adult or minor community.

G. Should the formulation of the tripartite test refer to the community standard.

H. Assuming a reference to community standard is included in the tripartite test:

(1) Should the geographic community be defined.

(2) Assuming the geographic community is defined, should it be statewide or local.

(3) If local is used, should that term be defined as the county of dissemination, the vicinage from which the jurors are selected, or should the reference be to the socio-economic community.

I. Should there be a provision allowing pandering to be used as evidence of the nature of the material.

J. Assuming a pandering provision is included in the statute:

(1) Should pandering to adults be evidence under a statute relating to minors.

(2) Should pandering be evidence only of "prurient appeal" or also of "patent offensiveness" and lack of social value.

(3) Should the admissibility of pandering evidence be mandatory or permissive.

IV. Should the statute include a list of specific sexual activities, the depiction of which may fall within the statutory prohibition.

V. Assuming specific sexual content is listed:

A. Treatment of ultimate sex acts ("sexual intercourse").

(1) Should sexual intercourse be among the listed categories.

(2) Should the acts included in the definition of "sexual intercourse" be described by reference to act, anatomy, and participants, or by use of Latin terms.

(3) Should the definition of sexual intercourse include simulated intercourse.

B. Treatment of "Sado-Masochistic Abuse."

(1) Should a category of sado-masochistic abuse be included.

(2) Should the definition of sado-masochistic abuse refer to the apparel or lack thereof of the participants.

C. Treatment of "Masturbation."

(1) Should a category of masturbation be included.

(2) Should masturbation be defined.

D. Treatment of "Erotic Fondling."

(1) Should touching of erogenous zones, besides masturbation, be included at all, or only for performances.

(2) If such touching is included, should the purpose of the touching be emphasized by including the phrase "for the purpose of sexual gratification or stimulation."

E. Treatment of "Sexual Excitement."

(1) Should a category of physical response indicating sexual excitement be included.

(2) If included, should the definition of sexual excitement be limited to the response of the genitals or include, e.g., facial expressions.

F. Treatment of "Nudity."

(1) Should a category of nudity be included.

(2) Assuming a nudity category is included, should the definition of nudity be limited to "lewd exhibitions" of the genitals.

VI. Should verbal material be subject to regulation under the statute.

VII. Assuming verbal material is included in the statute, should the specific sex content be narrower for it than for visual material.

VIII. Should the age of "minor" be under sixteen.

IX. Treatment of the act of distribution.

A. Should the statute apply only to distribution for monetary consideration.

B. Should the statute apply to those who allow minors to examine prohibited material placed in public display (e.g., newsstands).

C. Should there be a separate section dealing with "dissemination" of performances.

X. Treatment of Exemptions.

A. Should there be an exemption for parents who disseminate otherwise "obscene" matter to their children.

B. Should there be exemptions for those disseminators, such as doctors and teachers, who have legitimate educational and scientific purposes for disseminating to minors.

C. Assuming there is an exemption for legitimate dissemination other than parents, should it be formulated in terms of the status of the person, the purpose of the dissemination, or both.

XI. Treatment of Scienter.

A. Should the requisite mens rea as to the nature of the material distributed be:

(1) As to the material's "character and content,"

(2) As to the material's sexual explicitness,

(3) As to the material's appeal to the prurient interest,

(4) As to the material's patent offensiveness,

(5) As to the material's lack of serious social value,

(6) As to a combination of the above factors (e.g., 2 and 3 or 2, 3, 4, and 5).

B. Should the level of mens rea as to the nature of the matter be:

(1) Actual knowledge;

(2) Reckless disregard;

(3) Negligence.

C. If recklessness as to the nature of the material is included, should the statute make failure to inspect a specific element of recklessness.

D. Should the statute require some level of mens rea as to the age-status of the minor.

E. Assuming some mens rea as to age is required, should the level be:

(1) Actual knowledge;

(2) Reckless disregard;

(3) Negligence.

F. Should the exhibition of an official document, e.g., a drivers license, be explicity stated to be an excuse.

XII. Should there be a separate provision in the statute for mail distributions.

XIII. Should the maximum fine of the criminal penalty provision be $10,000, rather than the usual $1,000.

XIV. Should there be a criminal provision penalizing those who facilitate dissemination of obscene matter to a minor by misrepresentation of parental status or the minor's age.

XV. Should the statute provide a civil remedy of injunctions on request of prosecution, declaratory judgment on request of distributor, or both.

XVI. Assuming provision is made for issuance of injunctions:

A. Should initiation of an action for an injunction be limited to the prosecuting attorney (as opposed to city attorney, etc.).

B. Should the statute permit issuance of temporary restraining orders.

C. Should the statute prohibit holding in contempt a disseminator who disseminates in violation of a preliminary injunction when, after a hearing on the merits, the court determines dissemination would not violate section 2.

D. Should a jury be required for the hearing before issuance of an injunction.

E. Should an injunctive proceeding be a prerequisite to a criminal prosecution.

XVII. Assuming the statute includes a provision for issuance of declaratory judgment:

A. Should distributors be allowed to seek a declaratory judgment only after obtaining a negative legal

opinion from the prosecuting attorney (who must respond within 5 days to written inquiry as to the legality of distributing specified material to minors.)

B. Should the prosecutor be permitted to issue negative rulings on his own initiative with the distributor given an opportunity to seek a declaratory judgment to contest that ruling.

C. Should the prosecutor be required to bring an action for an injunction whenever he issues a negative opinion.

XVIII. Should a state statute in this area preempt local ordinances.