COMMENTARY TO ORS 167.080 (§ 259)
(See also ORS 167.065, ORS 167.070 and 167.075)

A. Summary

Sections 256 to 259 comprise the heart of the obscenity article which is aimed at prohibiting the dissemination of obscene materials to the young. These sections incorporate several of the critical terms defined in section 255, *i.e.,* "minor," "nudity," "obscenities," "obscene performance," "sado-masochistic abuse," "furnishes," "sexual conduct" and "sexual excitement." By carefully defining these terms we can attempt to achieve a clarity that has not heretofore existed in the obscenity statutes.

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

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

The Commission draft uses the broader term, "furnishes" (defined as meaning to sell, give, rent, loan or otherwise provide), and endeavors to get at objectionable materials regardless of the means used to bring them to the attention of minors. Section 256 bans directly furnishing such materials to persons under 18. Sales or deliveries by mail are banned by § 257, while exhibitions and displays are prohibited by §§ 258 and 259.

The proposal's term, "minor," is limited to unmarried persons who are under 18 years of age, *i.e.,* have not reached their 18th birthday. Obviously there is a certain amount of arbitrariness in fixing an age limit in such laws, and reasonable men may differ on this question; however, settling on this particular age corresponds to the age recommendations made with respect to sexual offenses (Art. 13). The draft focuses on two points: the dissemination of certain types of materials to minors, and public displays of certain materials. No attempt is made to control or limit any other adult activity in this area.

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

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

The *mens rea* requirement is "knowing or having good reason to know the character of the material furnished." *Scienter* has been judicially required in obscenity statutes since the decision in *Smith v. California,* 361 US 147 (1959), wherein the Supreme Court held that enforcement of a statute imposing strict liability on a bookseller who sells obscene material without any notice of the character or contents of the publication is an unconstitutional restriction on the freedom of speech and press. The effect of the case is to impose on the state the burden of establishing beyond a reasonable doubt that the purveyor of the material possesses some degree of *scienter* sufficient to protect the First Amendment guaranties. Although the Court found it essential that some element of *scienter* be established, it was careful to say that it was not passing on what sort of mental element was required in such a prosecution to protect the First Amendment guaranties:

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

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

be sufficient. Noting the New York Court of Appeals' decision, the Court said:

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

" 'A reading of the statute [§ 1141] as a whole clearly indicates that only those who are in some manner aware of the character of the material they attempt to distribute should be punished. It is not innocent but calculated purveyance of filth which is exorcised. . . .'

"The Constitution requires proof of *scienter* to avoid the hazard of self-censorship of constitutionally protected material and to compensate for the ambiguities inherent in the definition of obscenity. The New York definition of the *scienter* required by § 1141 amply serves those ends, and therefore fully meets the demands of the Constitution." *Mishkin v. New York,* supra at 510-511.

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

B. Derivation

Sections 256, 257, and 258 are based on the same source as § 255, a proposed statute by Richard H. Kuh in his book, *Foolish Figleaves? Pornography in-and-out of court* (MacMillan, 1967). Also see New York Revised Penal Law, §§ 235.20 to 235.22. The exemption for employes under subsections (2) and (3) of § 258 is similar to ORS 167.151. Section 259 is limited to owners, operators, managers or others acting in a managerial capacity in a business.

C. Relationship to Existing Law

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

Subsequently, in *Jacobellis v. Ohio,* 378 US 184 (1964), the Court reasoned that since only obscenity is excluded from the constitutional protection of the First Ammendment's guaranties, the question of whether or not a particular work is obscene necessarily implicates a question of constitutional law, which requires an independent constitutional judgment on the facts of the case as to whether the material involved is constitutionally protected. Logically, such a determination rests upon a definition of "obscenity" and its application to the facts of a particular case. However, mere possession of obscene material cannot be punished absent an intent to disseminate it unlawfully. *Stanley v. Georgia,* 394 US 557 (1969).

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

"In the past, obscenity has most often been defined by the courts in terms of its 'tendency' to arouse sexual thoughts or to corrupt the morals of its readers. . . . The test most widely used in this country in a former day was that which Lord Cockburn announced in *Regina v. Hicklin,* LR 2 QB 360 (1868):

" '. . . I think the test of obscenity is this: whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.'

"The test was a failure since a book might be condemned for the chance effect of isolated passages upon the most susceptible, and thus applied would, in the words of Judge Learned Hand, 'reduce our treatment of sex to the standard of a child's library in the supposed interest of a salacious few.' *United States v. Kennerly,* 209 F 119 (DCSDNY 1913) . . . following the decision in *United States v. One Book Entitled Ulysses,* 72 F2d 705 (2d cir 1934) . . . the court adopted a somewhat vague test based on the 'dominant effect' of the book considered as a whole . . . The *Hicklin* rule may fairly be said to have been laid to rest by the decision of the United States Supreme Court in *Butler v. Michigan,* 352 US 380, 77 S Ct 524, 1 L Ed2d 412 (1957). A Michigan statute under which Butler was convicted made it a misdemeanor to sell any book 'containing obscene, immoral, lewd or lascivious language . . . tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth.' The court held that the statute violated due process, in that: "The incidence of this enactment is to reduce the adult population of Michigan to reading only what is fit for children.' If any doubt remained about the *Hicklin* rule, it was laid to rest a few months later when *Roth v. United States,* supra, expressly held it to be unconstitutional." *State v. Jackson,* supra at 356-358.

As noted in the opinion, *Roth* rejected the *Hicklin* formulation as a proper guide for judging material as obscene. In place of the early standard, *Roth* substituted this test: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

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

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

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

Oregon has two statutes dealing directly with the dissemination of obscene material: ORS 167.151, disseminating obscene matter; and ORS 167.152, tie-in sales of indecent or obscene publications. The draft would repeal both of these statutes. The most recent examination of the central obscenity statute, ORS 167.151, by the Oregon Supreme Court can be found in *State v. Childs,* 252 Or 91, 447 P2d 304 (1968). The *Childs* court recognized that before material may be classified as obscene it must meet each and every one of three requirements, listing the three federal criteria laid out in *Memoirs v. Massachusetts,* supra. See also, *State v. Watson,* 243 Or 454, 414 P2d 337 (1966). The *Childs* opinion observes:

> "It is obvious that the legislature has experienced some difficulty in keeping up with the rapidly changing United States constitutional concept of what constitutes obscenity. The present statute was enacted in 1961 and amended in 1963. A prior statute was simultaneously repealed. Legislative history and the statutory language used indicates that the 1961 enactment was for the purpose of making Oregon's statute comply with *Roth* and the 1963 amendment was to bring it up to date because of the decision in *Manual Enterprises v. Day,* 370 US 478, 82 S Ct 1432, 8 L ed2d 639 (1962)." *State v. Childs,* supra at 101.

The New York Law—The "Variable Obscenity" Concept:

The dissemination of indecent material to minors is covered by New York Revised Penal Law §§ 235.20 to 235.22. The statute upon which these sections are based was recently under examination by the United States Supreme Court in *Ginsberg v. New York,* 390 US 629 (1968).

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

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

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

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

dards in the adult community as a whole with respect to what is suitable material for minors.' Moreover, the prohibition against sales to minors does not bar parents who so desire from purchasing the magazines for their children.

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

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

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

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

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

Kuh criticizes the New York statute (§ 235.20), saying:

> "Here we *really* have it: all the words that hardly any two judges seemed to have been able to interpret alike, lifted from the welter of conflicting opinions and peppered liberally with the words 'for minors.'
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> "Judges who have split bitterly in applying traditional obscenity statutes are certain to find themselves at odds under the new laws as to whether *Playboy,* with its nudes, its sex, and its sophistication and veneer, is or is not fit for the young. What about *Lady Chatterley's Lover* or *Memoirs of Hecate County?* And what about the widely advertised 'how-to-do-it' guidebooks to sexual happiness, written by doctors and by psychologist-marriage counselors? Different judges will be certain to decide differently—and to rail at each other in the process.
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> "In legislatively enacting those phrases that have nurtured so much chaos, the lawmakers have assured constitutionality. What can be safer than adulating the highest Justices by molding a new statute in the very words hailed from their special Sinai? But constitutionality is hardly the prime goal of penal legislation. Utility—uniformity of understanding by police and by courts, by prosecutors, by publishers,and by booksellers, *along with hopefully persuasive arguments for constitutionality* —should be the aim.
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> "Although perpetuating some obscurity, New York's new statutes (and others elsewhere emulating them) are not *all* bad. Applying them, courts are almost certain to find at least some items to be unsuitable for the young that some judges might deem permissible for their parents. The most tawdry of the striptease nudes, whether in glossy sets or in magazines, and sado-masochistric pamphlets— worthless smut on the borders of illegality when sold to adults—would clearly seem taboo for youngsters. To that extent the new statutes are a forward step. However they create another of the obscenity laws' paradoxes.
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> "Not telling booksellers and others precisely what it is they may or may not do discourages the cautious from selling questionable materials: materials that may *not* in fact be within the laws' proscriptions. 'The bookseller's self-censorship,' Justice Brennan had noted, commenting on this play-it-safe timidity in his *Smith* case (scienter) opinion, 'would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded: And so the new laws' *interrorem* impact is likely to work a censorship on sales to the young broader than the laws intended, a censorship of a type *not reviewable* in the courts.
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> "How much better off all would be, the prosecuted, the prosecutors, the public, and the judges, were there to be a return in the obscenity area to the customary requirement of penal statutes: that they be precise; that, in so far as is humanly possible, they put everyone on notice of exactly what is, and what is not, prohibited?
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> "Such legislation *is* possible." Kuh, supra at 251-252. (Footnotes omitted.) The Commission's draft subscribes to these views.

Although the Oregon Supreme Court has indicated that a bookseller should not be immune from prosecution absent a prior determination of the book's obscenity and that this should not be the law (State v. Childs, supra at 506), the effect of Senate Bill 92 (1969), had it been enacted, would have been to provide a civil remedy by injunction against a distributor prior to his being charged criminally with selling harmful mate-

rials to minors. The Commission voted against this approach because of the belief that it would be too cumbersome and impractical to be effective, and because of doubts about the constitutionality of such a procedure under the "prior restraint" inhibitions of § 8, Article I, Oregon Constitution:

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

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

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

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167.085 Defenses in prosecutions under ORS 167.065 to 167.080. In any prosecution under ORS 167.065 to 167.080, it is an affirmative defense for the defendant to prove:

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

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

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

(4) That the defendant had reasonable cause to believe that the person involved was not a minor.

COMMENTARY TO ORS 167.085 (§ 260)

A. Summary

Section 260 articulates three affirmative defenses (burden on the defendant to prove by a preponderance of the evidence). In each instance the facts that would establish the defense would be peculiarly within the knowledge of the defendant.

B. Derivation

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

C. Relationship to Existing Law

There are no comparable provisions in existing Oregon law.

Subsections (1) and (2) are largely self-explanatory. While prosecution of a parent or a school, museum or library would be extremely unlikely, the section provides a safety value against any potential abuse of the provisions of the article. Subsection (3) is intended to allow the sale, distribution or display of magazines, books, films, etc., in which the offending items constitute only a minor part thereof and serve some legitimate purpose. Most of the currently popular news magazines occasionally carry articles and pictures which would fall within the definitions set forth in the previous sections, but these items, when they do appear, ordinarily constitute a minor part of an otherwise "inoffensive whole." Such materials would not be prohibited. Likewise, some of today's films which include, for example, a brief and incidental nude scene, would not be prohibited.

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167.090 Publicly displaying nudity or sex for advertising purposes. (1) A person commits the crime of publicly displaying nudity or sex for advertising purposes if, for advertising purposes, he knowingly:

(a) Displays publicly or causes to be displayed publicly a picture,