

1-1-1987

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## Recommended Citation

Joseph S. Turner III, *Assessing the Constitutionality of North Carolina's New Obscenity Law*, 65 N.C. L. REV. 400 (1987).Available at: <http://scholarship.law.unc.edu/nclr/vol65/iss2/6>

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## Assessing the Constitutionality of North Carolina's New Obscenity Law

For decades the United States Supreme Court has wrestled with the delicate problem of regulating obscenity and pornography. In 1957 the Court in *Roth v. United States*<sup>1</sup> held that materials found obscene were outside the protection of the first amendment<sup>2</sup> and thus subject to state regulation.<sup>3</sup> Determining an objective standard of obscenity, however, has proved a troublesome task. As one commentator has noted, "[o]ne person's obscenity is another's art, and yet another's comedy."<sup>4</sup>

In recent years the problem of setting appropriate standards for the regulation of obscenity has been aggravated by a growing concern over the spread of child pornography and the sexual exploitation of children.<sup>5</sup> Recent increases in the incidence of "kiddie porn"<sup>6</sup> have prompted state legislation that attempts to deal with and control the child pornography problem.<sup>7</sup> Because the welfare of minors is involved, many of these state regulations seek to suppress materials that are outside the legal definition of obscenity.<sup>8</sup>

Although North Carolina has lagged behind other states in recognizing and combatting child pornography,<sup>9</sup> recent amendments to North Carolina's obscenity law have attempted to bring the state into the mainstream regulatory view.

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1. 354 U.S. 476 (1957).

2. The first amendment provides, in part, that "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. CONST. amend. I.

3. *Roth*, 354 U.S. at 485. For a discussion of *Roth*, see *infra* text accompanying notes 49-55.

4. A. DERSHOWITZ, *THE BEST DEFENSE* 163 (1982).

5. See generally *Sexual Exploitation of Children: Hearings on H.R. 4751 Before the Subcomm. on Crime of the House Comm. of the Judiciary*, 95th Cong., 1st Sess. (1977) [hereinafter *Hearings*] (documenting the growing concern over the sexual exploitation of children in this country).

6. See *Hearings*, *supra* note 5; Anson, *The Last Porno Show*, *NEW TIMES*, June 24, 1977, reprinted in *Protection of Children Against Sexual Exploitation: Hearings Before Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 150-58 (1977); Martin, *Child's Garden of Perversity*, *TIME*, Apr. 4, 1977, at 55; *Kiddie Porn*, "60 Minutes," vol. IX, no.33, May 15, 1977, reprinted in *Protection of Children Against Sexual Exploitation, Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 123-30 (1977).

7. See *New York v. Ferber*, 458 U.S. 747, 749 (1982). At the time *Ferber* was decided forty-seven states had enacted legislation aimed at halting the production of child pornography. Thirty-five states had passed statutes prohibiting distribution of these materials. *Id.*

8. *Id.* The *Ferber* Court noted that "20 States prohibit the distribution of material depicting children engaged in sexual conduct without requiring that the material be legally obscene." *Id.*

9. Until 1971 North Carolina's obscenity laws made no mention of child pornography. In 1971 the general assembly added § 14-190.6 to the general statutes. This section, titled "Employing or permitting minor to assist in offense under Article," read:

Every person 18 years of age or older who intentionally, in any manner, hires, employs, uses or permits any minor under the age of 16 years to do or assist in doing any act or thing constituting an offense under this Article and involving any material, act or thing he knows or reasonably should know to be obscene within the meaning of G.S. 14-190.1, shall be guilty of a misdemeanor, and unless a greater penalty is expressly provided for in this Article, shall be punishable in the discretion of the court.

Act Prohibiting the Dissemination of Obscenity, ch. 405, § 1, 1971 N.C. Sess. Laws 334, 338 (codified as amended at N.C. GEN. STAT. § 14-190.6 (Supp. 1985)).

This Note reviews the significant and recent changes in North Carolina's obscenity law and assesses the constitutionality of these changes in light of the United States Supreme Court's decisions in this area. It concludes that, although the new statute generally appears to conform to these decisions, the change from a statewide standard of obscenity to a community standard embodied in the amendments raises equal protection questions that might render the new law unconstitutional.

Prior to the recent amendments to North Carolina's obscenity law,<sup>10</sup> the statute contained several notable provisions. First, the obscenity statute made it unlawful to disseminate obscenity intentionally in any public place.<sup>11</sup> Dissemination was defined broadly to include, among other acts, the sale or delivery of obscene representations, the presentment or direction of an obscene performance, and the publishing or exhibiting of anything obscene.<sup>12</sup> Furthermore, material was considered obscene if: (1) the material depicted actual sexual conduct in a patently offensive way; (2) the average person applying contemporary standards would find that the material as a whole appealed to a prurient interest in sex; and (3) the material lacked serious literary, artistic, political, educational, or scientific value.<sup>13</sup>

Under the prior statute obscenity was judged with reference to typical adults. However, if it appeared from the character of the material or the circumstances of its dissemination that the dissemination was directed at children or other susceptible audiences, the material would be judged with reference to children or the susceptible audience.<sup>14</sup> The statute also provided for an adversary hearing prior to the seizure of materials or leveling of criminal charges.<sup>15</sup> The purpose of the hearing was to determine whether the material or act in question was in fact obscene.<sup>16</sup>

With respect to minors the earlier statute provided penalties for any adult who involved a person under sixteen years of age in an obscenity offense.<sup>17</sup> Adults found disseminating obscene materials to minors were guilty of a misdemeanor;<sup>18</sup> in the event the minor was younger than twelve, the offense constituted a felony.<sup>19</sup> In addition, under the old statute the dissemination of sexually oriented materials to anyone under eighteen years of age was a misdemeanor,<sup>20</sup> as was the public display of sexually oriented materials.<sup>21</sup>

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10. Act of July 11, 1985, ch. 703, 1985 N.C. Sess. Laws 929.

11. Act Prohibiting the Dissemination of Obscenity, ch. 405, § 1, 1971 N.C. Sess. Laws 334, 334 (codified as amended at N.C. GEN. STAT. § 14-190.1(a) (Supp. 1985)).

12. *Id.* (codified as amended at N.C. GEN. STAT. § 14-190.1(a)(1)-(4) (Supp. 1985)).

13. *Id.* § 1, at 334-35 (codified as amended at N.C. GEN. STAT. § 14-190.1(b)-(c) (Supp. 1985)).

14. *Id.* § 1, at 335 (codified as amended at N.C. GEN. STAT. § 14-190.1(d) (Supp. 1985)).

15. *Id.*, repealed by Act of July 11, 1985, ch. 703, § 2, 1985 N.C. Sess. Laws 929, 930.

16. Act Prohibiting the Dissemination of Obscenity, ch. 405, § 1, 1971 N.C. Sess. Laws 334, 335 (codified as amended at N.C. GEN. STAT. § 14-190.1 (Supp. 1985)).

17. *Id.* at 338 (codified as amended at N.C. GEN. STAT. § 14-190.6 (Supp. 1985)).

18. *Id.* (codified as amended at N.C. GEN. STAT. § 14-190.7 (Supp. 1985)).

19. *Id.* (codified as amended at N.C. GEN. STAT. § 14-190.8 (Supp. 1985)).

20. *Id.* (codified as amended at N.C. GEN. STAT. § 14-190.10 (Supp. 1985)).

21. *Id.* (codified as amended at N.C. GEN. STAT. § 14-190.11 (Supp. 1985)).

In 1985 the North Carolina General Assembly passed significant amendments to the obscenity statute.<sup>22</sup> The amendments made important changes in existing obscenity standards and provided additional protection for minors against harmful sexual materials and conduct.<sup>23</sup> The amendments included both procedural and substantive changes that tended to broaden the scope of materials subject to regulation and to ease obstacles to enforcement.<sup>24</sup>

Substantively, the obscenity standards are affected by the new statutory provisions in several ways. First, the new provisions deleted the public place requirement from the statute, thus allowing enforcement personnel to prohibit dissemination of obscene materials in both public and private places.<sup>25</sup> Prior to this change, enforcement personnel were unable to prohibit dissemination of obscene materials in places that were deemed private. As a result, sellers were able to disseminate obscenity through the ruse of private clubs or organizations.

Second, the new provisions also deleted the statewide standard of obscenity from the statute in favor of a community standard.<sup>26</sup> This change allows local prosecutors to determine what their constituency finds offensive and to enforce the law accordingly. Thus, what may be obscene in one county may be permissible in another.

Third, the new provisions added simulated intercourse to actual intercourse in the obscenity statute's definition of "sexual conduct."<sup>27</sup> This change broadened the category of materials subject to scrutiny under the law and put to rest arguments made by distributors of obscene materials that if the sexual acts depicted are not real; but merely simulated, the materials cannot be legally obscene.

Last, the amendments elevated violations of the obscenity statute to harsher misdemeanors or low-grade felonies.<sup>28</sup> For example, prior to the statute's amendment the sale of an obscene movie would have been a misdemeanor offense.<sup>29</sup> Under the new statute the same act would constitute a class J felony.<sup>30</sup> Similarly, the production of an obscene play, the sale of an obscene book, and the renting of an obscene film all represent felony violations under the amended statute.<sup>31</sup>

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22. Act of July 11, 1985, ch. 703, 1985 N.C. Sess. Laws 929 (codified at N.C. GEN. STAT. §§ 14-190.1 to .20 (Supp. 1985)).

23. See *id.*

24. The amendments to the obscenity statute became effective on October 1, 1985. *Id.* § 10, at 935. For an overview of the amendments and a discussion of the impact they had during the first year they were effective, see Davis, *First year of obscenity law eventful*, News and Observer (Raleigh, N.C.), Sept. 28, 1986, at 39A, col. 1 and *New obscenity law tested in N.C. Courts*, News and Observer (Raleigh, N.C.), Sept. 28, 1986, at 40A, col. 1.

25. Act of July 11, 1985, ch. 703, § 1, 1985 N.C. Sess. Laws 929, 929 (codified at N.C. GEN. STAT. § 14-190.1(c)(1) (Supp. 1985)).

26. *Id.* (codified at N.C. GEN. STAT. § 14-190.1(b)(2) (Supp. 1985)).

27. *Id.* (codified at N.C. GEN. STAT. § 14-190.1(c)(1) (Supp. 1985)).

28. See *id.* § 9, at 931-34 (codified at N.C. GEN. STAT. § 14-190.11 to .16 (Supp. 1985)).

29. Act Prohibiting the Dissemination of Obscenity, ch. 405, § 1, 1971 N.C. Sess. Laws 334, 337 (codified as amended at N.C. GEN. STAT. § 14-190.1(g) (Supp. 1985)).

30. Act of July 11, 1985, ch. 703, § 1, 1985 N.C. Sess. Laws 929, 930 (codified at N.C. GEN. STAT. § 14-190.1(g) (Supp. 1985)).

31. *Id.* (codified at N.C. GEN. STAT. § 14-190.1(a)-(g) (Supp. 1985)).

Procedurally, the amendments deleted the requirement of an adversary hearing prior to a seizure of evidence or criminal prosecution for obscenity violations.<sup>32</sup> The prior statute required law enforcement personnel to submit a complaint to a judge before they could seize evidence or file criminal charges. The judge would then summon the parties for a full adversary hearing on the obscenity issue. If the judge found the materials obscene under the statute, he or she then issued warrants for seizure of the materials and for criminal prosecution of the party in violation of the statute.<sup>33</sup>

By deleting this hearing requirement, the amendments eased the burden on law enforcement personnel seeking prosecutions under the obscenity law. Under the amended statute, warrants for seizure or criminal process now "may be issued only upon the request of a prosecutor."<sup>34</sup> Local district attorneys have discretion under the amended statute to decide what their constituencies consider obscene and enforce the law accordingly. The trier of fact will then make the ultimate determination of obscenity at trial, subject to appellate review.

The amended statute also provides a comprehensive framework for addressing the problem of sexual exploitation of minors. First, the amendments added a definitional section to the statute.<sup>35</sup> The amended statute defines as "harmful to minors . . . any material or performance that depicts sexually explicit nudity or sexual activity [which an] average adult applying contemporary community standards" would find to: (1) "[have] a predominant tendency to appeal to a prurient interest of minors in sex"; (2) "[be] patently offensive . . . concerning what is suitable for minors"; and (3) "[lack] serious literary, artistic, political, or scientific value for minors."<sup>36</sup> The new definition in effect establishes a separate category of obscenity geared toward the protection of minors.

The amended statute defines "material" as "[p]ictures, drawings, video recordings, films, or other visual depictions or representations," but excludes entirely written works.<sup>37</sup> A minor under the amended statute is defined as any "individual who is less than 18 years old and is not married or judicially emancipated."<sup>38</sup> In addition to this, sexual activity<sup>39</sup> and sexually explicit

32. *Id.* § 2, at 930.

33. Act Prohibiting the Dissemination of Obscenity, ch. 405, § 1, 1971 N.C. Sess. Laws 334, 335-37, *repealed by* Act of July 11, 1985, ch. 703, § 2, 1985 N.C. Sess. Laws 929, 930.

34. N.C. GEN. STAT. § 14-190.20 (Supp. 1985).

35. Act of July 11, 1985, ch. 703, § 9, 1985 N.C. Sess. Laws 929, 930-31 (codified at N.C. GEN. STAT. § 14-190.13 (Supp. 1985)).

36. N.C. GEN. STAT. § 14-190.13(1) (Supp. 1985).

37. *Id.* § 14-190.13(2).

38. *Id.* § 14-190.13(3).

39. "Sexual activity" is defined as any of the following acts:

- a. Masturbation, whether done alone or with another human or an animal.
- b. Vaginal, anal, or oral intercourse, whether done with another human or with an animal.
- c. Touching, in an act of apparent sexual stimulation or sexual abuse, of the clothed or unclothed genitals, pubic area, or buttocks of another person or the clothed or unclothed breasts of a human female.
- d. An act or condition that depicts torture, physical restraint by being fettered or bound, or flagellation of or by a person clad in undergarments or in a revealing or bizarre costume.
- e. Excretory functions.
- f. The insertion of any part of a person's body, other than the male sexual organ, or of any

nudity<sup>40</sup> are specifically defined. Read in conjunction with the "harmful to minors" requirements, the broad definitions of sexual activity and nudity contained in the amended statute provide the framework for offenses punishable under the amended statute.

Offenses under the amended statute flow naturally from the definitions. The new law makes it illegal to display or disseminate to minors materials considered harmful to minors or to exhibit harmful performances to a minor.<sup>41</sup> Also, the direct use of a minor in sexual activity for purposes of a live performance or production of a visual representation is deemed first degree sexual exploitation of a minor and is a class G felony under the amended statute.<sup>42</sup> Moreover, the trier of fact is allowed to infer that a person depicted as a minor is a minor,<sup>43</sup> and the defendant may not allege mistake of age as a defense.<sup>44</sup> The amended statute also contains a second degree sexual exploitation offense. This offense is defined as contributing to the production or dissemination of a visual representation of a minor engaged in sexual activity, and it is subject to the same inferences as first degree sexual exploitation.<sup>45</sup> The amended statute also prohibits the promotion of or participation in the prostitution of a minor.<sup>46</sup>

Overall, the amendments are intended to facilitate the prosecution of those involved in obscene activities, with a special emphasis on eliminating child pornography and the sexual exploitation of children. In providing this special emphasis, the amendments created a subcategory of obscenity—obscenity involving minors—that appears to be outside the bounds of the United States Supreme Court's definition of materials denied first amendment protection due to obscene content. Before assessing the constitutionality of the new law, however, a brief review of past United States Supreme Court decisions in this area is required.

Initially, it must be admitted that "obscenity is what five Justices of the

object into another person's anus or vagina, except when done as part of a recognized medical procedure.

N.C. GEN. STAT. § 14-190.13(5) (Supp. 1985).

40. "Sexually explicit nudity" is defined as the showing of:

- a. Uncovered, or less than opaquely covered, human genitals, pubic area, or buttocks, or the nipple or any portion of the areola of the human female breast; or
- b. Covered human male genitals in a discernibly turgid state.

*Id.* § 14-190.13(6).

41. *Id.* §§ 14-190.14, .15.

42. *Id.* § 14-190.16. A class G felony is punishable by "imprisonment up to 15 years, a fine, or both." *Id.* § 14-1.1. The amended obscenity statute stipulates a sentence of at least six years. *Id.* § 14-190.16(d). Further, good behavior credit may not reduce the term to less than three years, and suspension or probation is prohibited. *Id.*

43. *Id.* § 14-190.16(b).

44. *Id.* § 14-190.16(c).

45. *Id.* § 14-190.17. Second degree sexual exploitation is punishable as a class H felony. *Id.* A class H felony is punishable by "imprisonment up to 10 years, or a fine, or both." *Id.* § 14-1.1(a)(8). The amended statute mandates a sentence of not less than four years. *Id.* § 14-190.17(d). Further, good behavior may not reduce the term to less than two years, and suspension or probation is prohibited. *Id.*

46. *Id.* §§ 14-190.18, .19. Promotion is punishable in the same manner as first degree sexual exploitation. *Id.* § 14-190.16; see *supra* note 42. Participation is punishable in the same manner as second degree sexual exploitation. N.C. GEN. STAT. § 14-190.17 (Supp. 1985); see *supra* note 45.

Supreme Court say it is at any given time.”<sup>47</sup> In the realm of obscenity “[e]very Justice has his own standards, and they are just as likely to reflect individual tastes, hangups, and upbringing as they do constitutional doctrine or precedent.”<sup>48</sup> The purpose of this Note is not to decide what should and should not be afforded the protection of the first amendment. Rather, its purpose is to outline current constitutional doctrines on obscenity and to determine how these doctrines affect North Carolina’s amended obscenity law.

In 1957 the United States Supreme Court held in *Roth v. United States*<sup>49</sup> “that obscenity is not within the area of constitutionally protected speech or press.”<sup>50</sup> For the first time, the Court in *Roth* announced standards for determining obscenity. Under *Roth* obscenity was to be judged by “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.”<sup>51</sup>

In so holding “the Court instituted for issues of obscenity a dual level concept of speech, premised on the assumption that a qualitative distinction exists between obscene speech and speech entitled to the protection of the first amendment.”<sup>52</sup> Writing for the majority, Justice Brennan warned that although the Court was willing to limit constitutionally protected speech to safeguard compelling interests, standards for judging obscenity should be construed so as not to interfere with materials that do not “treat sex in a manner appealing to prurient interest.”<sup>53</sup> Therefore, the Court recognized the fundamental need to distinguish between the two levels of speech in this area: one protected, the other not.<sup>54</sup> Difficulties faced by the lower courts in interpreting this distinction led the Court to infuse additional criteria into the obscenity formula.<sup>55</sup>

Over the next few years the Court announced additional standards and rules that further complicated an already ambiguous obscenity doctrine. In

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47. A. DERSHOWITZ, *supra* note 4, at 164.

48. A. DERSHOWITZ, *supra* note 4, at 164. Professor Dershowitz discusses some of the individual Justices’ standards for obscenity. According to Dershowitz, Justice Stewart used the famous “I know it when I see it” test. Justice White’s clerks referred to his standard as “the angle of the dangle” rule, referring to the degree of erection and penetration the Justice found necessary for a finding of obscenity. Chief Justice Warren applied a “Would my daughters be offended?” test. *Id.* at 163-64.

49. 354 U.S. 476 (1957). Defendant in *Roth* was convicted by the district court for “mailing obscene circulars and advertising, and an obscene book, in violation of the federal obscenity statute.” The Court affirmed his conviction. *Id.* at 503.

50. *Id.* at 485.

51. *Id.* at 489. The Court defined “prurient” as “[i]tching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd . . . .” *Id.* at 487 n.20 (quoting WEBSTER’S NEW INTERNATIONAL DICTIONARY (unabridged 2d ed. 1949)).

52. Hardy, *Miller v. California & Paris Adult Theater I v. Slaton: The Obscenity Doctrine Reformulated*, 6 COLUM. HUM. RTS. L. REV. 219, 220 (1974).

53. *Roth*, 354 U.S. at 488.

54. Hardy, *supra* note 52, at 220.

55. Hardy, *supra* note 52, at 221. The state and lower federal courts found it difficult to draw an accurate dividing line between protected and unprotected speech using the *Roth* standard. Out of sympathy for the lower courts and a desire to limit an excess of obscenity regulation, the Court soon introduced the “patently offensive” requirement, *see infra* notes 56-57 and accompanying text, and the “utterly without social importance” requirement, *see infra* text accompanying notes 58-59. Hardy, *supra* note 52, at 221.

*Manual Enterprises v. Day*<sup>56</sup> Justice Harlan, writing for the majority, stated that material must be "so offensive on [its] face as to affront current community standards of decency" to be judged obscene.<sup>57</sup> In *Jacobellis v. Ohio*<sup>58</sup> Justice Brennan's plurality opinion introduced the "utterly without redeeming social importance" test into the obscenity arena.<sup>59</sup> In *Jacobellis* Brennan also concluded that "contemporary community standards" translated into a national standard, not a host of local standards.<sup>60</sup>

In 1966 the Court decided two companion cases that further complicated the obscenity doctrine. In *Ginzburg v. United States*<sup>61</sup> the Court added the "pandering" rule, which allowed a finding of obscenity when the marketing of material was designed to appeal to erotic interests.<sup>62</sup> Material advertised in this manner could be found obscene "even though in other contexts the material would escape such condemnation."<sup>63</sup> In *Memoirs v. Massachusetts*<sup>64</sup> the Court, adopting Justice Brennan's *Jacobellis* test, held that allegedly obscene materials must be "utterly without redeeming social value" before first amendment protection might be denied.<sup>65</sup> Writing for the Court, Justice Brennan rejected a test that would weigh the material's social value against its offensive nature and prurient appeal, requiring instead that all three of these criteria be applied independently.<sup>66</sup> However, in this first attempt to synthesize the doctrinal changes since *Roth*, the Court could muster only a plurality of three.<sup>67</sup>

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56. 370 U.S. 478 (1962). In *Manual Enterprises* the Court addressed a ruling by the United States Post Office Department that certain magazines were obscene and thus nonmailable under provisions of 18 U.S.C. § 1461 (1964). The Court reversed the ruling and added a "patent offensiveness" standard to the prurient interest standard of *Roth*. *Manual Enterprises*, 370 U.S. at 479-82.

57. *Manual Enterprises*, 370 U.S. at 482.

58. 378 U.S. 184 (1964). In *Jacobellis* the manager of a motion picture theater in Ohio was convicted at trial of possessing and exhibiting an obscene film in violation of Ohio law. The Court reversed the conviction on the grounds that the film was not obscene under *Roth*. *Id.* at 185-96.

59. *Id.* at 191.

60. *Id.* at 192-94.

61. 383 U.S. 463 (1966). In *Ginzburg* a judge of the Federal District Court for the Eastern District of Pennsylvania convicted Ginzburg and three corporations controlled by him for violations of the federal obscenity statute, 18 U.S.C. § 1461 (1964). The prosecution charged the offense based on the production, sale, and publicity of materials and assumed that, standing alone, the publications might not be obscene. Apparently, Ginzburg had sought mailing privileges from the postmasters of Intercourse, Pennsylvania, and Blue Ball, Pennsylvania. Because these facilities were not capable of handling the volume of mailings, privileges were obtained from Middlesex, New Jersey. *Ginzburg*, 383 U.S. at 464-68. The Supreme Court upheld the conviction on the basis that "[w]here the purveyor's sole emphasis is on the sexually provocative aspects of his publications, that fact may be decisive in the determination of obscenity." *Id.* at 470.

62. *Ginzburg*, 383 U.S. at 474.

63. *Id.* at 475-76.

64. 383 U.S. 413 (1966). In *Memoirs* the Massachusetts Attorney General filed a civil equity action to have the book *Memoirs of a Woman of Pleasure* (commonly known as *Fanny Hill*), written by John Cleland in about 1750, declared obscene. A publisher of the book intervened in the action. The trial court found the book to be obscene and the Massachusetts Supreme Court affirmed the judgment. The United States Supreme Court reversed because the book was not "utterly without redeeming social value." *Id.* at 415-19.

65. *Id.* at 419.

66. *Id.*

67. Six Justices disagreed with this test. Justices Black and Douglas rejected any regulation of speech and press as violative of the first amendment. *Ginzburg*, 383 U.S. at 476 (Black, J., dissenting) (a companion case to *Memoirs*); *Memoirs*, 383 U.S. at 433 (Douglas, J., dissenting). Justice Clark argued for maintaining the *Roth* standard with prurient interest as the keystone. *Memoirs*,



Just when the Court seemed least likely to agree on any uniform standard for treating obscenity issues, it appeared to escape the moral debate of past decisions in favor of a more mechanical approach in *Redrup v. New York*.<sup>68</sup> In a per curiam decision the Court reviewed several obscenity cases—without hearing argument—and, using a “clear and present danger”<sup>69</sup> test, found that none of the works in question were obscene. The Court’s previous definitional approach appeared to have been replaced by a new three-pronged test. The *Redrup* Court noted that in none of the cases before it had the state argued: (1) “a limited state concern for juveniles,”; (2) “an assault upon individual privacy” through obtrusive publication; or (3) the type of “pandering” found in *Ginzburg*.<sup>70</sup> Although it did not expressly overrule *Roth*, the *Redrup* Court appeared to take a new direction in dealing with the obscenity issue.

The 1969 case of *Stanley v. Georgia*<sup>71</sup> implicitly reaffirmed the new approach adopted by the Court in *Redrup*. In holding that the state cannot prohibit obscenity in the privacy of the home, the *Stanley* Court applied a balancing of competing interests test.<sup>72</sup> One commentator noted, “the Court, at least for the time being, had embarked on the new path (new for obscenity cases—traditional for other free speech cases) of balancing the competing interests to determine the difference between legal obscenity and illegal obscenity and using as the counterweight the concept of harm.”<sup>73</sup> Although the Court in *Stanley* appeared to rally around a new approach for deciding obscenity cases, individual Justices still held differing opinions on the obscenity issue.<sup>74</sup>

An infusion of new Justices on the Court<sup>75</sup> led to a further restructuring of obscenity doctrine in 1973. In *Miller v. California*<sup>76</sup> the Court attempted to ease

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383 U.S. at 441-42 (Clark, J., dissenting). Justice Stewart felt that only “hard-core” pornography was outside the first amendment. *Ginzburg*, 383 U.S. at 499 (Stewart, J., dissenting). Justice White argued for application of both the prurient interest and patent offensiveness standards in establishing obscenity. *Memoirs*, 383 U.S. at 462 (White, J., dissenting). Justice Harlan made obscenity a federalism issue, asserting that states have a greater interest than the federal government in curbing obscenity and should therefore be allowed some discretion in determining what is unprotected. *Id.* at 456 (Harlan, J., dissenting). For a discussion of the Justices’ opinions, see Hardy, *supra* note 52, at 222 & n.16.

68. 386 U.S. 767 (1967).

69. Rosenblum, *The Judicial Politics of Obscenity*, 3 PEPPERDINE L. REV. 1, 7 (1975). The Court, through its use of the “clear and present danger” test, attempted to view the obscenity question in terms of recognized concerns and interests of the state rather than from a moral stance. These state interests included juvenile well-being and the right to privacy. *Id.*

70. *Redrup*, 386 U.S. at 769.

71. 394 U.S. 557 (1969). At issue in *Stanley* were films that were taken from defendant’s private residence.

72. Rosenblum, *supra* note 69, at 9. In *Stanley* the Court balanced first amendment rights and the right of privacy against the competing interest of the state “in protecting its citizens from the abuses of pornography.” *Id.*

73. Rosenblum, *supra* note 69, at 9.

74. The opinion in *Stanley* was written by Justice Marshall and joined by Justices Douglas and Harlan. Justices Stewart, Brennan, and White all concurred on other grounds. See Rosenblum, *supra* note 69, at 9 n.42. For a general discussion of the Justices’ differing views, see *supra* note 67.

75. By 1973, when *Miller v. California*, 413 U.S. 15 (1973), was decided, there were four new Justices who took the place in the majority of the four members of the Warren Court that had rendered the *Stanley* decision in 1969. The four new Justices were Chief Justice Burger, and Justices Powell, Blackmun, and Rehnquist.

76. 413 U.S. 15 (1973). Defendant in *Miller* was convicted for knowingly distributing obscene

its burden of review by establishing new guidelines designed to limit its role as "sole arbiter of what was and was not obscene."<sup>77</sup> Chief Justice Burger, writing for the majority, announced:

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, . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specially defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. . . . If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary.<sup>78</sup>

Although leaving to the states the ultimate task of formulating regulatory legislation,<sup>79</sup> Burger did give some examples of what might be regulated under part (b) of the new standard. These examples included "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated [and] (b) Patently offensive representations or depictions of masturbation, excretory functions, and lewd exhibitions of the genitals."<sup>80</sup> In addition, the *Miller* test expressly rejected the "utterly without redeeming social value" test of *Memoirs* in favor of the more restrictive "literary, artistic, political, or scientific value" test.<sup>81</sup> Further, the Court rejected a "national standard" in favor of the stated "contemporary community standards."<sup>82</sup>

In general, the *Miller* doctrine represented a retreat by the Court from its earlier activist role in the obscenity area.<sup>83</sup> As the Court noted in *Paris Adult Theatre I v. Slaton*,<sup>84</sup> a companion case to *Miller*, it recognized a legitimate state interest in curbing obscenity in society. The Court stated, "[r]ights and interests 'other than those of the advocates are involved.' . . . These include the interest

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matter, a misdemeanor under California's penal code. The conviction centered on defendant's conduct in causing unsolicited brochures advertising four books titled *Intercourse*, *Man-Woman*, *Sex Orgies Illustrated*, and *An Illustrated History of Pornography*, and a film entitled "Marital Intercourse" to be mailed to a restaurant in Newport Beach, California. *Id.* at 16-18. Defendant's conduct was judged under the *Memoirs* test at the trial level, and the Supreme Court remanded the case for review under the newly stated *Miller* standard. *Id.* at 21-37.

77. Hardy, *supra* note 52, at 224.

78. *Miller*, 413 U.S. at 24-25.

79. *Id.* at 25.

80. *Id.*

81. *Id.* at 37.

82. *Id.*

83. Hardy, *supra* note 52, at 224-25.

84. 413 U.S. 49 (1973). In *Paris* the Atlanta, Georgia district attorney filed a civil proceeding to enjoin defendants from exhibiting several films in their movie theater. The outside of the theater had no visual obscene advertisements and it warned that no minors were allowed inside. It also warned that the films depicted nude bodies. The trial judge dismissed the complaints on grounds that exhibiting the films in a commercial theater with requisite notice of their content was constitutionally permissible. *Id.* at 50-53. The Georgia Supreme Court unanimously reversed, finding the films without constitutional protection. *Id.* at 53. The United States Supreme Court supported the Georgia Supreme Court in holding the circumstances of exhibition irrelevant, but vacated and remanded the decision for consideration under the *Miller* standard. *Id.* at 69-70.

of the public in the quality of life and the total community environment, the tone of commerce in the great city centers, and, possibly, the public safety itself.”<sup>85</sup> This broadly stated interest opened the door to constitutional state regulation of obscenity. Thus, the Supreme Court, rather than reviewing each decision on its facts, confined its role to determining the constitutionality of the applicable statutes under the *Miller* test.<sup>86</sup>

Protecting minors from obscenity has long been recognized as a legitimate state interest.<sup>87</sup> In *Mishkin v. New York*<sup>88</sup> the Supreme Court recognized that “the prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of members of that group.”<sup>89</sup> In *Ginsberg v. New York*<sup>90</sup> the Court applied this reasoning to minors in upholding a New York statute defining obscenity on the basis of its appeal to minors.<sup>91</sup> Writing for the majority, Justice Brennan remarked, “[t]hat the State has power to make that adjustment seems clear, for we have 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.’”<sup>92</sup> The holding in *Ginsberg* was, in effect, a reaffirmation of *Redrup*, which had earlier identified a legitimate state concern for juveniles.<sup>93</sup>

More recently, the Supreme Court in *New York v. Ferber*<sup>94</sup> recognized that a state has a compelling interest in protecting its children from sexual exploitation.<sup>95</sup> In *Ferber* a bookstore owner was indicted under a New York statute for selling films showing young boys masturbating.<sup>96</sup> The trial court found Ferber guilty of promoting a sexual performance by a child.<sup>97</sup> The statute defined “sexual performance” as “any performance or part thereof which includes sexual conduct by a child less than sixteen years of age,”<sup>98</sup> and “sexual conduct” as “actual or simulated intercourse, deviate sexual intercourse, sexual bestiality, masturbation, sado-masochistic abuse, or lewd exhibition of the genitals.”<sup>99</sup> After the Appellate Division of the New York Supreme Court affirmed, the New York Court of Appeals reversed, holding the statute violative of the first amendment.<sup>100</sup> New York’s high court found the statute underinclusive and over-

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85. *Id.* at 58.

86. Hardy, *supra* note 52, at 225-26.

87. *See Prince v. Massachusetts*, 321 U.S. 158, 168 (1944).

88. 383 U.S. 502 (1966).

89. *Id.* at 508. In *Mishkin* the group referred to was homosexuals.

90. 390 U.S. 629 (1968).

91. *Id.* at 638.

92. *Ginsberg*, 390 U.S. at 638 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944)).

93. *See supra* text accompanying note 70.

94. 458 U.S. 747 (1982).

95. *Id.* at 756-57.

96. *Id.* at 751-52.

97. *Id.*; *see* N.Y. PENAL LAW § 263.15 (McKinney 1980).

98. N.Y. PENAL LAW § 263.00(1) (McKinney 1980).

99. *Id.* § 263.00(3).

100. *People v. Ferber*, 52 N.Y.2d 674, 422 N.E.2d 523, 439 N.Y.S.2d 863 (1981), *rev'd*, 458 U.S. 747 (1982).

broad, noting that, as applied, "the statute would . . . prohibit the promotion of materials traditionally entitled to constitutional protection from government interference under the First Amendment."<sup>101</sup>

The United States Supreme Court began its review in *Ferber* by considering whether a state may exercise greater restrictions—beyond those allowed by *Miller*—on works portraying sexual acts or lewd exhibitions of genitalia by children.<sup>102</sup> The Court held that the states could in fact regulate these materials and cited five factors in support of its holding. First, Justice White, writing for the majority, re-emphasized the state's compelling interest in "safeguarding the physical and psychological well-being of a minor."<sup>103</sup> The Court cited studies describing the harm to children from their use as subjects of pornographic materials,<sup>104</sup> and found the judgment of these studies to pass first amendment scrutiny.<sup>105</sup> Second, the Court found that the dissemination of child pornography was "intrinsically related to the sexual abuse of children."<sup>106</sup> Third, the Court cited the economic motive for production of child pornography inherent in the sale and advertising of such materials.<sup>107</sup> Fourth, the Court found that any value in permitting live performances and visual representations of children engaging in lewd sexual conduct was "exceedingly modest, if not *de minimus*."<sup>108</sup> Last, consistent with earlier decisions, the Court found child pornography to be outside the protection of the first amendment,<sup>109</sup> and re-affirmed content as determinative of whether first amendment protection was applicable.<sup>110</sup>

The *Ferber* Court also rejected claims that the New York statute was overly broad and should therefore be held invalid on its face.<sup>111</sup> The overbreadth doctrine is recognized to safeguard protected expression when " 'persons whose ex-

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101. *Id.* at 678, 422 N.E.2d at 525, 439 N.Y.S.2d at 865.

102. *Ferber*, 458 U.S. at 753.

103. *Id.* at 756-57.

104. *Id.* at 758 n.9. "It has been found that sexually exploited children are unable to develop healthy affectionate relations in later life, have sexual dysfunctions, and have a tendency to become sexual abusers as adults." *Id.*; see also sources cited *supra* note 6 (demonstrating harm caused to sexually exploited children).

105. *Ferber*, 458 U.S. at 758.

106. *Id.* at 759. The Court noted that "the materials produced are a permanent record of the children's participation and the harm to the child is exacerbated by their circulation." *Id.* The Court also noted that distribution must be halted if production is to be controlled. *Id.*

107. *Id.* at 761.

108. *Id.* at 762. The Court found it "unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work." *Id.* at 762-63.

109. *Id.* at 763.

110. *Id.* (citing *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 66 (1976)).

111. *Id.* at 773. The New York Court of Appeals—New York's highest court—had struck down the statute for overbreadth. The court of appeals explained:

[T]he statute would prohibit the showing of any play or movie in which a child portrays a defined sexual act, real or simulated, in a nonobscene manner. It would also prohibit the sale, showing, or distributing of medical or educational materials containing photographs of such acts. Indeed, by its terms, the statute would prohibit those who oppose such portrayals from providing illustrations of what they oppose.

*People v. Ferber*, 52 N.Y.2d 674, 678, 422 N.E.2d 523, 525, 439 N.Y.S.2d 863, 865 (1981), *rev'd*, 458 U.S. 747 (1982).

pression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions by a statute susceptible of application to protected expression.'"<sup>112</sup> In *Ferber* the Court reiterated its position that "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep.'"<sup>113</sup> In holding the statute not overly broad, Justice White noted "We consider this the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications."<sup>114</sup>

In sum, when minors are involved the Supreme Court has allowed regulation of materials depicting sexual activity that would not necessarily be deemed obscene under the standard articulated in *Miller*. Also, child pornography statutes will be invalidated for overbreadth only if a showing of *substantial* overbreadth, in contradiction to first amendment freedoms, is made.<sup>115</sup> The Court's recognition of a state's compelling interest in protecting children from the harm attached to child pornography virtually assures that regulatory schemes which seek to control such materials will be upheld.

Having discussed the background of Supreme Court decisions in the obscenity and child pornography areas, it is now appropriate to examine the constitutional ramifications of the recent amendments to North Carolina's obscenity law. The Supreme Court has set up general guidelines for the fashioning of obscenity statutes and has largely distanced itself from the factual determination of obscenity.<sup>116</sup> Therefore, a constitutional analysis of a particular state statute necessarily focuses on the language of the statute.<sup>117</sup>

With respect to the North Carolina amendments, it first should be noted that the deletion of the public place requirement is of little constitutional significance. Although the amendments made the intentional *dissemination* of obscene material unlawful, they did not attempt to prohibit mere possession of such materials.<sup>118</sup> The *Stanley* decision made clear that "mere private posses-

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112. *Ferber*, 458 U.S. at 768 (quoting *Gooding v. Wilson*, 405 U.S. 518, 521 (1972)).

113. *Id.* at 770 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).

114. *Id.* at 773.

115. *Id.* at 769.

116. Hardy, *supra* note 52, at 225-28. Professor Hardy views the *Miller* opinion as "susceptible to two alternative interpretations of the form and scope of the Supreme Court's review." *Id.* at 225. Under the "deferential" interpretation the Court would assume that first amendment values are adequately protected if correct instructions are given to the jury. The Court would therefore restrict its review to the jury charge and the constitutionality of the applicable state statute. *Id.* at 225-26. "[T]he jury finding of obscenity would constitute an issue of fact from which no 'constitutional claim' reviewable by the Supreme Court would arise." *Id.* at 226.

Under the "discretionary de novo" alternative, "the Court will review not only the specificity of obscenity statutes but also undertake a full review of the finding of obscenity when the Court considers it appropriate." *Id.* at 228.

117. The enforcement of a statute may have separate constitutional implications. Enforcement decisions in this area arguably will be subject to question in many situations because of the highly subjective nature of the obscenity standard, which focuses on "patent offensiveness" and "appeal to prurient interest."

118. See Act of July 11, 1985, ch. 703, § 1, 1985 N.C. Sess. Laws 929, 929-30 (codified at N.C. GEN. STAT. § 14-190.1 (Supp. 1985)). The amended statute reads in part, "(a) It shall be unlawful for any person, firm, or corporation to intentionally disseminate obscenity." N.C. GEN. STAT. § 14-190.1 (Supp. 1985).

sion of obscene matter cannot constitutionally be made a crime."<sup>119</sup> Because the amended statute does not attempt to limit possession, no constitutional problem arises. Although the amended statute arguably raises some privacy concerns—for example, whether there is a violation when an individual gives an obscene publication to a friend in his or her home—the likelihood of enforcement in such situations seems to be de minimus.

Unlike the deletion of the public place requirement, the change from a statewide standard to a community standard could generate legitimate constitutional challenges. Although *Miller* expressly rejected a national standard in favor of community standards,<sup>120</sup> it is highly doubtful that the Court anticipated a statute authorizing different interpretations of obscenity within an individual state. The fourteenth amendment to the United States Constitution prohibits a state from "[denying] to any person *within its jurisdiction* the equal protection of the laws."<sup>121</sup> Commentators have noted, "if the means the law employs to achieve its ends is the classification of persons for differing benefits or burdens, it will be tested under the equal protection guarantee."<sup>122</sup>

The equal protection clause "introduced a new concept into constitutional analysis by requiring that individuals be treated in a manner similar to others as an independent constitutional guarantee."<sup>123</sup> The essence of an equal protection challenge is that the legislature has created unequal burdens and benefits through the application of an unreasonable classification that does not further a legitimate state interest.<sup>124</sup> Although North Carolina's amended obscenity law does not classify based on gender, race, or religion, it effectively classifies people according to the county in which they live or do business. For example, under the amended statute store owners in Orange County may enjoy first amendment protection in the dissemination of particular works, whereas store owners in Wake County may face prosecution for distributing the same material.<sup>125</sup> This type of regulation goes beyond the scope of allowable prosecutorial discretion and creates uncertainty about what standard will be applied in different areas of the state. It is unreasonable to require distributors of arguably obscene materials to determine those counties in which their publications will be protected by the first amendment and those in which they will not be protected when each county purports to enforce the same law.

The deletion of the word "statewide" in the setting of the new standard evinces clear legislative intent to allow individual communities to apply their

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119. *Stanley*, 394 U.S. at 559.

120. *Miller*, 413 U.S. at 37.

121. U.S. CONST. amend. XIV, § 1 (emphasis added).

122. J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 586 (2d ed. 1983).

123. *Id.* at 585.

124. See Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 365-66 (1949) (describing equal protection as the goal of the legislature and the focal point of judicial review).

125. See Jenkins, *X-rated videos return to Orange, Chatham; local standards cited*, News and Observer (Raleigh, N. C.), Jan. 27, 1986, at 1A, col. 3 (discussing the community standard provision of the amended statute and noting that certain movies found to be obscene in Durham and Wake Counties have been left on the shelves in Orange and Chatham Counties).

own standards. The North Carolina courts, however, may continue to require a statewide standard in their interpretation of the statute. Such an interpretation would protect the statute from an equal protection challenge; however, it would be contrary to the clear legislative intent.

The amended statute's definition of obscenity clearly parallels the *Miller* formulation and appears to define the prohibited materials with the required specificity.<sup>126</sup> The addition of simulated intercourse in the definition of sexual conduct<sup>127</sup> is of limited importance and appears to be aimed at reducing evidentiary problems in the prosecution of obscenity offenses. Thus, even after the amendments, the requirements of patent offensiveness and appeal to prurient interest are still the determinative factors in an obscenity inquiry.<sup>128</sup>

The amendments' elimination of the adversary hearing prior to seizure<sup>129</sup> also should not present a constitutional problem. *Miller* held that the constitution does not require such a hearing, and the discretion of the prosecutor in applying for warrants<sup>130</sup> should curb overzealous police enforcement. The normal requirements inherent in the issuance of a warrant for seizure of materials or criminal process are not disrupted. Thus, due process is not affected. The trier of fact will still make the ultimate determination of obscenity.

The child protection amendments raise another set of constitutional questions. First, can state legislatures constitutionally prohibit the dissemination or display of materials to minors when the materials do not meet the *Miller* definition of obscenity? One commentator has noted:

[I]n *Ginsberg*, the Court held that the determination [of obscenity] is to be made by the state legislature—at least when obscenity with respect to minors is at issue—subject only to the requirement that the Court must find the legislature's judgment rational. . . . [T]he *Ginsberg* Court approved the definition of obscenity for minors in terms of harm.<sup>131</sup>

Therefore, the individual states have considerable authority to regulate what minors may be exposed to when sexual subjects are concerned. The *Ginsberg* ruling is supported by the more recent holding in *Ferber*,<sup>132</sup> which recognized that the *Miller* standard was insufficient to deal with the child pornography problem.<sup>133</sup> Controversy over the rationality of the new amendments will likely focus on the definition of sexually explicit nudity. The amended statutes define sexually explicit nudity as "The showing of: (a) Uncovered, or less than opaquely covered, human genitals, pubic area, or buttocks, or the nipple or any portion of the areola of the human female breast; or (b) Covered human male

126. See *Miller*, 413 U.S. at 24 ("That conduct must be specifically defined by the applicable state law, as written or authoritatively construed.").

127. Act of July 11, 1985, ch. 703, § 1, 1985 N.C. Sess. Laws 929, 929 (codified at N.C. GEN. STAT. § 14-190.1(c)(1) (Supp. 1985)).

128. See N.C. GEN. STAT. § 14-190.1(b) (Supp. 1985).

129. Act of July 11, 1985, ch. 703, § 2, 1985 N.C. Sess. Laws 929, 930.

130. See N.C. GEN. STAT. § 14-190.20 (Supp. 1985).

131. Engdahl, *Requiem for Roth: Obscenity Doctrine is Changing*, 68 MICH. L. REV. 185, 196-97 (1969).

132. See *Ferber*, 458 U.S. at 747.

133. *Id.* at 756.

genitals in a discernibly turgid state.”<sup>134</sup> The level of enforcement will likely determine whether this definition is rational. If the amended statute is strictly construed and literally enforced, certain advertisements and motion pictures could be deemed obscene. Such a result might trigger arguments over the rationality of the amendments. Leaving the “harmful to minors” determination in the hands of the jury should not pose constitutional problems. Such a scheme is sanctioned by *Miller*, which asserts that any first amendment issues should be properly protected by appellate review.<sup>135</sup>

The provisions of the amendments dealing with direct and indirect sexual exploitation of children clearly are sanctioned by the Court’s ruling in *Ferber*. The New York statute<sup>136</sup> reviewed by the Court in *Ferber* is markedly similar to the amended North Carolina law. Both statutes criminalize the use of material showing children in live sexual performances or the production of material showing children engaged in sexual activity.<sup>137</sup> The two statutes diverge, however, in their treatment of the mistake of age defense. The New York statute allows mistake of age as an affirmative defense when the defendant can show a “good faith reasonable belief” that the child was older than sixteen.<sup>138</sup> North Carolina allows no such defense<sup>139</sup> and this rule may raise scienter problems.<sup>140</sup> However, it is likely that the state’s compelling interest in combatting sexual exploitation and assuring the safety and welfare of its children will overcome any defense based on lack of scienter on review.<sup>141</sup>

The New York and North Carolina statutes also differ in their approach to proving that an actor in a visual representation is a minor. New York requires a showing of proof,<sup>142</sup> but North Carolina allows an inference of minority when the material “represents or depicts” a minor.<sup>143</sup> Again, the compelling interest of the state probably justifies this inference. *Ferber* stressed the need for specificity and definition in this type of regulation,<sup>144</sup> and the North Carolina statute

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134. N.C. GEN. STAT. § 14-190.13(6) (Supp. 1985).

135. *Miller*, 413 U.S. at 25.

136. N.Y. PENAL LAW § 263 (McKinney 1980).

137. Compare N.Y. PENAL LAW § 263.05 (McKinney 1980) (prohibiting use of a child in sexual performance) and N.Y. PENAL LAW § 263.10 (McKinney 1980) (prohibiting promotion of a sexual performance by a child) with N.C. GEN. STAT. § 14-190.16 (Supp. 1985) (prohibiting the use, employment, and inducement of a child in sexual activity for the purpose of producing a visual representation).

138. N.Y. PENAL LAW § 263.20(1) (McKinney 1980).

139. See N.C. GEN. STAT. § 14-190.16(c) (Supp. 1985) (concerning first degree sexual exploitation of a minor); *id.* § 14-190.17(c) (concerning second degree sexual exploitation of a minor).

140. “Scienter” is defined as “knowingly,” and it is “frequently used to signify the defendant’s guilty knowledge.” BLACK’S LAW DICTIONARY 1207 (5th ed. 1979). In *Ferber* Justice White noted, “As with obscenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant.” *Ferber*, 458 U.S. at 765. If the only circumstance that makes an act an offense under the North Carolina obscenity law is the age of a participant, the language in *Ferber* would require that the accused know that he or she was dealing with a minor.

141. See *supra* notes 87-115 and accompanying text (discussing the state’s compelling interest in protecting the health and safety of its minors).

142. N.Y. PENAL LAW § 263.25 (McKinney 1980).

143. N.C. GEN. STAT. §§ 14-190.16(b), .17(b) (Supp. 1985).

144. *Ferber*, 458 U.S. at 764. “The category of ‘sexual conduct’ proscribed must also be suitably limited and described.” *Id.*



appears adequate in this sense. The inclusion of the mistake of age and inference sections in the statute may well be deemed as notice to those involved in the proscribed activities and further strengthens the constitutional legitimacy of the amended statute.

As with similar statutes, overbreadth is an issue that undoubtedly will be raised in attacks on the constitutionality of the amended statute. As Justice White stated in the *Ferber* decision, "the overbreadth doctrine is 'strong medicine' and [we] have employed it with hesitation, and then 'only as a last resort.'"<sup>145</sup> The Supreme Court requires that "substantial" overbreadth be proven before a statute will be found invalid on its face.<sup>146</sup> Any such overbreadth will also be judged against the legitimate purposes of the statute.<sup>147</sup> Once again, it is likely that the North Carolina courts will recognize the compelling interest of the state in protecting its youth and discount the infringement on first amendment freedoms due to overbreadth.

In conclusion, practitioners should be aware that attempts to invalidate the new obscenity statute on equal protection grounds could trigger varying scenarios on review. The *Miller* decision allows state statutes to meet its regulatory guidelines "as written or construed," thus allowing state courts to interpret statutes in a manner consistent with constitutional guarantees. If the North Carolina Supreme Court finds the local community standard approach—as intended by the general assembly—to be inconsistent with equal protection requirements, it will face an interesting problem of statutory construction.

First, the court might choose to interpret the contemporary community standard as a statewide standard. Although this clearly would violate the intent of the general assembly,<sup>148</sup> which is usually deemed controlling in statutory interpretation,<sup>149</sup> it would allow the court to avoid the equal protection attack. The statute would meet the *Miller* test through a constitutional construction of a statute also capable of an unconstitutional construction.<sup>150</sup>

Second, the court might choose to attach the intended meaning to the contemporary community standard and invalidate the obscenity statute as unconstitutional. If the court applies the intended meaning, invalidation of the entire statute would appear necessary due to the inseparability of the unconstitutional standard and the remainder of the statute.<sup>151</sup> In so doing, the court would be

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145. *Id.* at 769 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)).

146. *Id.* at 770.

147. *Id.*

148. The intent of the general assembly clearly was to do away with the statewide standard as evidenced by the deletion of the word "statewide" in the new obscenity standard. Compare Act of July 1, 1971, ch. 405, 1971 N.C. Sess. Laws 334 (adopting the "statewide" element of the obscenity standard), amended by Act of July 11, 1985, ch. 703, 1985 N.C. Sess. Laws 929, with N.C. GEN. STAT. § 14-190.1 (Supp. 1985) (deleting the word "statewide").

149. See *State v. Hart*, 287 N.C. 76, 80, 213 S.E.2d 291, 294-95 (1975); *State v. Johnson*, 278 N.C. 126, 137, 179 S.E.2d 371, 383 (1971).

150. When a statute is susceptible to two interpretations, one constitutional, the other unconstitutional, the constitutional interpretation should be adopted. *In re Arthur*, 291 N.C. 640, 641-42, 231 S.E.2d 614, 615-18 (1977); *Smith v. Keator*, 285 N.C. 530, 534, 206 S.E.2d 203, 206, *appeal dismissed*, 419 U.S. 1043 (1974).

151. When the unconstitutional provisions cannot be separated from the constitutional provi-

striking down a statute that the general assembly supported almost unanimously,<sup>152</sup> forcing the general assembly to amend the law<sup>153</sup> in accordance with equal protection guarantees.

As this analysis suggests, the North Carolina Supreme Court faces an unpleasant dilemma in interpreting the new obscenity statute. The statute in its present form, however, should not be upheld due to the uncertain message it delivers from county to county. The public deserves a higher degree of predictability in the enforcement of criminal statutes, and citizens should not be subjected to unequal applications of state law beyond the scope of permissible prosecutorial discretion. Although the United States Supreme Court has manifested its belief in a state's compelling interest in curbing obscenity and child pornography, it requires that regulatory schemes be specific and adequately defined.

Beyond the equal protection problem, the statute appears to be in line with current obscenity doctrine. Although some will continue to argue that these types of statutes represent censorship and impermissible restrictions on free speech, the Court in its current makeup will continue to distinguish protected from unprotected speech on the basis of content. The level of enforcement will likely determine the perceived rationality of North Carolina's new regulations, and the heightened importance of the district attorney in making enforcement decisions should be noted.<sup>154</sup> The extent to which district attorneys in North Carolina pursue the perpetrators of obscenity and child pornography under the amended statute will largely determine the impact of this legislation.

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sions of a statute, the entire statute must be invalidated. *G.I. Surplus Store, Inc. v. Hunter*, 257 N.C. 206, 214, 125 S.E.2d 764, 769-70 (1962).

152. The North Carolina House of Representatives originally passed the Act by a vote of 97 to 3. The North Carolina Senate subsequently added five amendments to the Act and passed it by a vote of 45 to 2. The Act was returned to the house where each of the senate's amendments were voted on and passed individually. The votes on the amendments ranged from 81 to 0, to 81 to 8. Telephone interview with Ms. Belle Fite, Librarian, North Carolina General Assembly (September 19, 1986).

153. Amending a statute can obviate the constitutional objection and has the effect of reenacting the statute. *See Great Am. Ins. Co. v. High*, 264 N.C. 752, 755, 142 S.E.2d 681, 683 (1965).

154. *See* N.C. GEN. STAT. § 14-190.20 (Supp. 1985); *see also* Jenkins, *supra* note 125 (discussing the community standard provision of the amended statute and the role of district attorneys under this provision).