SFA BILL ANALYSIS

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Senate Bills 330, 331, 332, 338, 339, 340, and 341 (as reported without amendment)
Sponsor: Senator Harmon Cropsey (Senate Bill 330)
Senator Rudy J. Nichols (Senate Bill 331)
Senator Virgil C. Smith, Jr. (Senate Bill 332)
Senator Frederick Dillingham (Senate Bills 338 & 339)
Senator Robert Geake (Senate Bill 340)
Senator Christopher D. Dingell (Senate Bill 341)
Committee: Local Government and Veterans

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RATIONALE

Although Public Act 343 of 1984 was considered by its proponents to be a comprehensive criminal obscenity statute, many are now calling for it to be strengthened. In defining "obscene material", Public Act 343 codified the U.S. Supreme Court's guidelines in Miller v California (1973). Under those guidelines, one of the criteria in determining obscenity is whether "the average person, applying 'contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest". Michigan's 1984 law defined "contemporary community standards" with reference to statewide standards, and established the offenses of obscenity in the first and second degrees, created exemptions for certain employees who distribute obscene material as part of their job, and preempted local obscenity ordinances. Critics of Public Act 343 now claim that prosecutions under the law are impeded because jurors either cannot deduce a statewide standard, or believe that residents elsewhere in the State are more liberal. Instead, they contend, the law should permit both local enforcement and the application of local standards. Critics also believe that the employee exemption operates to insulate business owners from prosecution, and that the misdemeanor status of both first and second degree obscenity minimizes the offense to prosecutors and law enforcement officers.

In addition, proponents of a stricter obscenity law believe that other measures should be taken to curb the inappropriate dissemination of sexually explicit material. These measures include applying the forfeiture law to obscenity violations, providing for the closure of businesses for obscenity violations, requiring video tapes to include their motion picture rating, and strengthening the law that prohibits the dissemination of sexually explicit material to minors.

CONTENT

Senate Bill 330 would amend Public Act 343 of 1984 to:

- **Modify the Act's definitions of "obscene material" and "contemporary community standards".**
- **Eliminate the distinction between first and second degree obscenity, make the offense a felony, and increase the penalty for first and subsequent offenses.**
- **Include in the obscenity offense the dissemination of "hard-core material" or sexual devices, as well as the**

presentation of or participation in an obscene or hard-core performance.

- **Prohibit a person from leasing or loaning a facility he or she owned for the dissemination of obscenity or sexual devices, or for obscene performances.**
- **Create civil liability for persons who violate the Act.**
- **Permit local governments to enact the Act as an ordinance.**
- **Delete the exemption from penalties for individuals who disseminate obscenity as part of a nondiscretionary or nonmanagerial job, but retain and expand the exemption for individuals employed by public libraries.**
- **Establish certain evidentiary standards for obscenity prosecutions.**
- **Repeal provisions that permit a person to seek an advisory opinion as to the legality of the possession or dissemination of material that might be obscene.**

Senate Bill 331 would bring obscenity violations under the criminal forfeiture law. Senate Bill 332 would provide for a penalty for violation of a fourth class city's obscenity ordinance. Senate Bill 338 would provide for the closure of a business for an obscenity offense. Senate Bill 339 would make it a public nuisance to disseminate obscene materials. Senate Bill 340 would prohibit the sale of video movies without a motion picture rating. Senate Bill 341 would prohibit the display to minors of visual matter that depicted sexual intercourse or sadomasochistic abuse.

A detailed description of the bills follows.

Senate Bill 330

Obscene Material/Community Standards

"Obscene material" means material that meets all of the following criteria:

1) The average individual, applying contemporary community standards, would find that the material, taken as a whole, appeals to the prurient interest. ("Prurient interest" means a "shameful or morbid interest in nudity, sex, or excretion"; the bill would define it as a "shameful, morbid, lascivious, unhealthy, or unwholesome interest in nudity or sexual conduct".)
2) The material, taken as a whole, lacks serious literary, artistic, political, or scientific value. The bill would require that the "reasonable individual would find that the material" lacked this value.
3) The material depicts or describes sexual conduct in a patently offensive way. The bill would revise this criterion to require that "the average individual applying contemporary community standards" would find that the material depicted or described sexual conduct in a patently offensive way.

Under the Act, "contemporary community standards" means "the customary limits of candor and decency in this state at or near the time of the alleged violation". The bill would refer, instead, to the customary limits of candor and decency "in the vicinage from which the jury is drawn".

Local Ordinances

Under the current law, a local unit cannot pass an ordinance that regulates any matters covered by the Act. The bill would authorize a municipality, township, village, or city, or an instrumentality of one of these local governments to enact and enforce the Act as an ordinance.

Obscenity Offense

The Act makes it obscenity in the first degree for a person, with knowledge of the material's content and character, to disseminate obscene material or possess it with the intent to disseminate, if dissemination of obscene material is a predominant and regular part of the person's business at a particular theater, store, warehouse, or other establishment, and if obscene materials are a principal or substantial part of the stock in trade there. It is obscenity in the second degree for a person, knowing the content and character of the material, to disseminate obscene material or possess

obscene material with the intent to disseminate it.

The bill provides, instead, that a person would be guilty of obscenity if the person, with knowledge of content and character, did any of the following:

-- Disseminated or possessed with intent to disseminate any hard-core material.
-- Disseminated or possessed with intent to disseminate any "sexual device". This would not apply to the dissemination of sexual devices for therapeutic purposes by a person licensed under the Public Health Code. ("Sexual device" would mean "an artificial penis, artificial vagina, or artificial rectum, used or intended to be used primarily for the sexual stimulation of human genital organs".)
-- Presented or participated in presenting an "obscene performance" or a "hard-core performance".

A person also would be guilty of obscenity if he or she owned, leased, or managed any theater, building, structure, room, place, or commercial establishment, and knowingly leased it or permitted it to be used for the purpose of disseminating any hard-core or obscene material, for disseminating a sexual device, or for the presentation of a hard-core or obscene performance.

"Hard-core material" and "hard-core performance" would refer to material or a performance (a live or recorded play, dance, act, show, demonstration, or exhibition, displayed or performed before one or more individuals) that "the reasonable individual would find, taken as a whole, lacks serious literary, artistic, political, or scientific value" and that depicts actual sexual intercourse between individuals, if penetration is visible; depicts actual penetration of a person's vagina or rectum with an object, if penetration is visible; depicts actual bestiality, if penetration is visible; or depicts actual masturbation, if genitals are visible, or actual ejaculation.

"Obscene performance" would mean a performance that met all of the following criteria:

-- The average individual, applying contemporary community standards, would find that the performance, taken as a whole, appealed to the prurient interest.
-- The reasonable individual would find that the performance, taken as a whole, lacked serious literary, artistic, political, or scientific value.
-- The average individual, applying contemporary community standards, would find that the performance depicted or described sexual conduct in a patently offensive way.

The bill would redefine "knowledge of content and character", which presently means "having general knowledge or reason to know, or a belief or ground for belief which warrants further inspection or inquiry, of the knowledge and character of the material involved". The bill's definition would be "having general knowledge of the nature and character of the material". The bill also would delete a statement that a "person has such knowledge when he or she knows or is aware that the material contains, depicts, or describes sexual conduct whether or not such a person has precise knowledge of the specific contents of the material".

Penalties

Currently, first degree obscenity is a misdemeanor, punishable by imprisonment for up to one year, a maximum fine of $100,000, or both. Second degree obscenity is a misdemeanor punishable by up to one year's imprisonment and/or a fine of up to $5,000. Under the bill, obscenity would be a felony, punishable by imprisonment for up to four years, a maximum fine of $100,000, or both.

A second or subsequent violation of first degree obscenity is a misdemeanor and the offender can be imprisoned for up to one year and must be fined at least $50,000 and not more than $5 million. The bill specifies that a second or subsequent obscenity violation would be a felony, punishable by imprisonment for up to eight years, a fine of at least $50,000 and not more than $5 million, or both.

Required Resale/Distribution

The bill would include sexual devices and hard-core material in the provisions that make it a misdemeanor to require a purchaser or consignee to receive obscene material for resale or further commercial distribution as a condition of a sale, consignment, or delivery for resale of a publication or other merchandise, or to deny, revoke, or threaten to deny or revoke a franchise or impose a penalty for failing to accept obscene material.

Currently, the offense is punishable by up to one year's imprisonment, a fine of up to $500, or both. The bill would increase the maximum penalty to two years and/or $100,000. A second or subsequent violation would be a felony punishable by imprisonment for up to eight years, a fine of at least $50,000 but not more than $5 million, or both.

Civil Liability

A person who disseminated hard-core material, obscene material, or a sexual device, or presented or participated in presenting an obscene or hard-core performance, in violation of the bill, would be civilly liable for injuries proximately caused by that dissemination or presentation.

Evidence

The bill provides that expert testimony or other ancillary evidence would not be required to determine whether specific material was obscene if the material had been placed into evidence, and that, "The material is the best evidence of what it represents".

The bill also provides that the "fact that sexually explicit material is distributed in the community" would not be admissible as evidence of the local contemporary standards in that community, unless the material enjoyed a reasonable degree of acceptance in the community, and the material was substantially similar to the allegedly obscene material. In determining whether material was substantially similar, the court would have to consider all of the following:

-- The media in which the material and the allegedly obscene material were presented.
-- The type of sexual conduct or activity depicted by the material and by the allegedly obscene material.
-- The sexual explicitness of the material and the allegedly obscene material.

Otherwise admissible evidence regarding the manner in which allegedly hard-core or obscene material was produced, packaged, sold, edited, advertised, or displayed, and otherwise admissible evidence regarding the manner in which an allegedly hard-core or obscene performance was presented, would be admissible to prove or disprove that the material met any of the criteria in the definition of "obscene material", "hard-core material", "hard-core performance", or "obscene performance".

Exceptions

Currently, the Act's first and second degree obscenity provisions do not apply to a person who disseminates obscene material in the course of his or her employment if a) the person does not have discretion over that dissemination or is not involved in the management of the employer; b) the person is employed by a public or private college, university, or vocational school; or c) the person is employed by a State or local library. The bill would delete the exemption for individuals who do not have discretion over dissemination or are not managerial. The library exception would be extended to a library established by a public art museum or public institute of art.

Repealed Provisions

The bill would repeal provisions in the Act that:

-- Permit a person intending to possess or disseminate material that may be considered obscene to request from the Attorney General or from the prosecuting attorney of the county in which the dissemination is intended an advisory opinion as to the legality of the possession or dissemination (MCL 752.371).
-- Require the Attorney General or prosecuting attorney to whom the request for an advisory opinion is made to bear the burden of proving beyond a reasonable doubt that dissemination or

possession with intent to disseminate specified material would violate the Act (MCL 752.372).

Severability

The bill provides that if any part of the Act or any application of the Act were found by a court to be invalid, the court would have to sever that part or that application as provided under MCL 8.5 (which provides that the invalidity cannot affect the remaining portions or applications of an act that can be given effect without the invalid portion or application).

Senate Bill 331

The bill would amend the Revised Judicature Act to include in the Act's forfeiture provisions violations of Public Act 343 of 1984. (The Revised Judicature Act generally provides that personal or real property that is the proceeds or instrumentality of a crime may be seized by and forfeited to the State or a local unit of government.)

Senate Bill 332

The bill would amend Public Act 215 of 1895, which provides for the incorporation of fourth class cities, to create an exception for obscenity offenses to the penalty that is prescribed in the Act for the violation of city ordinances. The current penalty is a fine of up to $500 and/or up to six months' imprisonment. Under the bill, this penalty would apply except as provided in Public Act 343 of 1984.

Senate Bill 338

The bill would amend Public Act 343 of 1984 to:

-- Permit a prosecuting attorney to file a civil complaint with the circuit court for closure of a business or commercial establishment upon a person's conviction of a State or local obscenity offense.
-- Require the court to order a business or commercial establishment closed for violating proposed provisions on the dissemination of hard-core or obscene materials or sexual devices, or presentation of or participation in a hard-core or obscene performance.
-- Require the court to order a commercial establishment closed when the owner, lessor, or manager knew that the establishment was being used for presentation of a hard-core or obscene performance; or, when the owner, lessor, or manager leased or permitted the establishment to be used for dissemination of hard-core or obscene materials or sexual devices, or for presentation of hard-core or obscene performances.
-- Prescribe penalties for violations, including the number of days an establishment could be closed.

Civil Complaint

If a person were convicted of violating provisions on obscenity offenses or a corresponding section of a local ordinance, as proposed in Senate Bill 330, the prosecuting attorney could file a civil complaint with the circuit court to close a business or a theater, building, structure, room, place, or commercial establishment.

Closure

The court would have to order a business, theater, building, structure, room, place, or commercial establishment closed for a violation of provisions, proposed in Senate Bill 330, on dissemination of hard-core or obscene material or sexual devices or a corresponding section of a local ordinance, if the court determined by a preponderance of the evidence that the following circumstances existed:

-- The person convicted was, at the time the violation occurred, an owner, agent, or employee of a business in which hard-core or obscene material was, or sexual devices were, at the time of the violation, a part of the trade of that business at that theater, building, structure, room, place, or commercial establishment.
-- The violation arose out of, and occurred in the course of, the commercial activities of that business at that theater, building, structure, room, place, or commercial establishment.

In addition, the court would have to order a theater, building, structure, room, place, or commercial establishment closed, if the court determined that an owner of that establishment knew, or had reason to know, that the establishment was used, or was intended to be used, for the dissemination of hard-core or obscene material or sexual devices, and the circumstances described above existed.

The court would have to order a business, theater, building, structure, room, place, or commercial establishment closed for violating provisions, proposed in Senate Bill 330, on presenting or participating in a hard-core or obscene performance, if the court determined by a preponderance of the evidence that the following circumstances existed:

-- The person convicted was, at the time the violation occurred, an owner, agent, or employee of that business, or an independent contractor hired by an owner, agent, or employee of that business.
-- The violation arose out of, and occurred in the course of, the commercial activities of that business at that theater, building, structure, room, place, or commercial establishment.

In addition, the court would have to order a theater, building, structure, room, place, or commercial establishment closed, if the court determined that the owner of the establishment knew, or had reason to know, that the establishment was used, or was intended to be used, for the presentation of hard-core or obscene performances, and the circumstances described above existed.

The court also would have to order an establishment closed, if an owner, lessor, or manager of that establishment were convicted of violating provisions, proposed in Senate Bill 330, or a corresponding section of a local ordinance on knowingly leasing or permitting the establishment to be used for the dissemination of hard-core or obscene material or sexual devices, or for presentation of a hard-core or obscene performance.

Penalties

The court would be required to order a business, or a theater, building, structure, room, place, or commercial establishment closed for obscenity violations, as outlined in the bill, as follows: at least 30 days or not more than 60 days for a first violation for the business or establishment in question, at least 60 days or not more than 90 days for a second violation involving the same business or establishment, and at least 90 days or not more than one year for a third or subsequent violation.

Senate Bill 339

The bill would amend Public Act 343 of 1984 to:

-- Provide that it would be a "public nuisance" to disseminate certain obscene materials, participate in an obscene performance, or permit an establishment to be used for the presentation of an obscene performance or the dissemination of certain obscene materials.
-- Permit a person to file a complaint with the circuit court to abate a public nuisance.
-- Permit the circuit court to issue either a temporary restraining order, preliminary injunction, or injunction, upon the filing of a complaint.
-- Provide that a temporary restraining order or a preliminary injunction would expire 60 days after it was issued.

Public Nuisance

The bill specifies that it would be a public nuisance under the Act to do any of the following: disseminate or possess with intent to disseminate any hard-core or obscene material, or sexual device; present or participate in presenting any hard-core or obscene performance; knowingly permit a theater, building, structure, room, place, or commercial establishment to be used for presenting a hard-core or obscene performance, or for the dissemination or possession with the intent to disseminate any hard-core or obscene material, or sexual device.

Filing a Complaint

Under the bill, any person could file a complaint with the circuit court to abate a

nuisance. If the person who filed the complaint were someone other than the State Attorney General or the prosecuting attorney for the county, city, village, or township in which the nuisance allegedly existed, the court could allow the Attorney General or the prosecuting attorney to prosecute the complaint.

Restraining Order/Injunction

If a complaint were filed with the circuit court, the court could issue a temporary restraining order, preliminary injunction, or injunction as provided by law. A temporary restraining order issued under the bill only could prohibit a person from altering, removing, or disposing of alleged hard-core or obscene material, sexual devices, or any equipment, devices, or items allegedly used to create or maintain the nuisance.

Except for delay attributable to the defendant, a temporary restraining order or preliminary injunction would expire, and could not be extended, 60 days after the date the temporary restraining order or preliminary injunction was issued. The bill specifies that this provision would not extend the period for which a temporary restraining order or preliminary injunction could be issued before the expiration of the 60-day period, and would not apply to an injunction.

Senate Bill 340

The bill would create a new act to prohibit a "person" (an individual, corporation, partnership, or any other legal or commercial entity) from selling or renting a "video movie", including a videotape, video cassette, or video disc reproduction of a motion picture film, unless the official rating of the motion picture were conspicuously displayed on the outside of the cassette, case, jacket, or other covering of the video movie. ("Official rating" would mean the official rating given to a motion picture by the classification and rating administration of the Motion Picture Association of America.) This provision would not apply to a video movie of a motion picture that had not been given an official rating or that had been altered in any way after receiving an official rating. A person would be prohibited from selling or renting such video movies unless the video movie were conspicuously marked "not rated" on the outside of the cassette, case, jacket, or other covering. A violation of the bill would constitute a misdemeanor punishable by a fine of up to $100 for each violation.

Senate Bill 341

The bill would amend Public Act 33 of 1978, which prohibits the dissemination, exhibition, or display of certain sexually explicit matter to minors, to provide that a person would be guilty of displaying obscene matter to a minor if the person had managerial responsibility for a business selling visual matter that depicted sexual intercourse or sadomasochistic abuse that was harmful to minors, if the matter were knowingly displayed in a manner that made it visible or accessible to a minor. The bill would take effect July 1, 1989.

Currently, under the Act, a person is guilty of displaying obscene matter to a minor if the person has managerial responsibility for a business selling such visual matter, and knowingly permits a minor who is not accompanied by a parent or guardian to examine the matter. The bill would not change this provision.

MCL 752.362 et al. (S.B. 330)
600.4701 (S.B. 331)
89.2 (S.B. 332)
Proposed MCL 752.375b-752.375d (S.B. 338)
MCL 752.361 et al. (S.B. 339)
722.667 (S.B. 341)

BACKGROUND

Miller v California

In Miller v California (413 U.S. 15), the U.S. Supreme Court held that the proper First Amendment standards to be applied by the states in determining whether particular material is obscene and subject to regulation are:

- "whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest";
- "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law"; and

-- "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value".

The Court also held that obscenity is to be determined by applying "contemporary community standards", not "national standards".

Public Act 343 of 1984

Public Act 343 replaced a criminal obscenity law that had been found by the Michigan Supreme Court in 1979 to be unconstitutionally vague and overbroad (People v Neumayer, 405 Mich 341). To avoid leaving Michigan without a valid criminal obscenity law, though, the Court construed the statute to meet the Miller guidelines. Subsequently, Public Act 343 repealed and replaced the earlier statute. In March 1985, the U.S. District Court found provisions of Public Act 343 to be unconstitutional, on the grounds that they were too vague and that the multimillion dollar fines would constitute prior restraint of free speech (511 Detroit St. v Kelley, docket no. 85-40006). In December 1986, however, the U.S. 6th Circuit Court of Appeals overruled that decision, and the U.S. Supreme Court, in June 1987, declined to review the Court of Appeals ruling.

FISCAL IMPACT

Senate Bill 330

The bill would have an indeterminate fiscal impact on State and local government. Costs would depend on the level of enforcement and the number of convictions under this bill.

Senate Bill 331

The bill would have an indeterminate fiscal impact on State and local government. Proceeds from forfeitures would depend on the number of convictions under Public Act 343 of 1984.

Senate Bill 332

The bill would have no fiscal impact on State government and an indeterminate fiscal impact on local units of government. Enforcement costs and fines collected by cities under this bill cannot be estimated.

Senate Bill 338

The bill would have an indeterminate impact on State and local units of government. Costs to the State, if any, would be due to the increased workload of the Wayne County circuit court. Costs to local units of government, if any, would be due to the increased workload of other circuit courts.

Senate Bill 339

The bill would have an indeterminate fiscal impact on State government and local units of government. Costs would be due to the possible increased workload of the Attorney General or the prosecuting attorney for the local unit of government in which the case was brought.

Senate Bill 340

The bill would have an indeterminate impact on State and local law enforcement agencies. Cost incurred by these agencies would depend upon the level of enforcement directed toward the bill's provisions, the number of violations that occurred, and subsequent prosecutions, each of which cannot be determined at this time.

Senate Bill 341

The bill would have no fiscal impact on State or local government.

ARGUMENTS

Supporting Argument

Although the 1984 law was supposed to give the law enforcement community the tools it needs to crack down on purveyors of obscenity, the law has been less effective than anticipated, and the industry continues to flourish. Curtailing the distribution of obscenity is seen as a way to reduce crime, particularly sexually violent crime, that is committed by those who consume obscene material. While there may not be conclusive proof of a causal connection between obscenity and violence, there is substantial evidence of a correlation. According to the supporters of Senate Bill 330, police are finding obscene material at the scene of sex crimes with alarming frequency, especially in

cases involving the sexual exploitation of children, and adult obscenity is the primary tool used to lower the inhibitions of children who are induced to participate in producing obscene material. Even without proof beyond a reasonable doubt, few would seriously question the toll obscenity exacts on our society or the prerogative of the State to limit its sale. As the U.S. Supreme Court said in Paris Adult Theatre I v Salton, "The sum of experience ... affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex" (413 U.S. 49 (1973)). In order to combat these effects, it is essential that Michigan have a strong criminal obscenity statute that can be used effectively to prosecute those who trade in smut. Senate Bill 330 would improve the law in several ways: removing the statewide standard from the definition of "obscene material"; permitting local units of government to enact the law as an ordinance; removing immunity for ministerial employees who distribute obscenity, such as bookstore clerks; making it a felony to commit an obscenity offense; and, establishing certain evidentiary standards that would facilitate the prosecution of offenders.

Supporting Argument

By redefining "contemporary community standards" to refer to the vicinage from which the jury is drawn, and thus removing the law's statewide standard, Senate Bill 330 would make it possible for juries to apply what they considered a local standard in determining whether material was obscene. Not only does the statewide standard confuse jurors, but individuals often tend to believe that people elsewhere are more liberal than they are, and the standard they arrive at is the lowest common denominator. In declining to adopt a national standard in Miller, the U.S. Supreme Court said, "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City." The same holds true at the State level: people in Escanaba or Battle Creek, for example, should not be forced to determine or apply what they think would be acceptable to the residents of Detroit or Flint. As the Court continued in Miller, "...the primary concern with requiring a jury to apply the standard of 'the average person, applying contemporary community standards' is to be certain that, so far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person--or indeed a totally insensitive one".

The Court has made it clear in subsequent cases, too, that local standards are acceptable. In Hamling v United States, the Court stated that, "The result of the Miller cases ... 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" (418 U.S. 87 (1974)). In Jenkins v Georgia, the Court said, "We agree with the Supreme Court of Georgia's implicit ruling that the Constitution does not require that juries be instructed in state obscenity cases to apply the standards of a hypothetical statewide community", and, "...the States have considerable latitude in framing statutes under this element of the Miller decision" (418 U.S. 153 (1974)).

Supporting Argument

Senate Bill 330 in effect would create a per se obscenity rule by prohibiting the dissemination of "hard core material" and the presentation of a "hard core performance", which essentially would be the visual depiction of actual sexual intercourse involving visible penetration. This approach was advocated in an article in the Fall 1987/Winter 1988 volume of the University of Michigan Journal of Law Reform. Not being subject to the three-pronged Miller test, the per se rule would eliminate any vagueness and would enable the public, juries, and distributors to apply an objective test to see if visual material depicted explicit sex. As the article's author pointed out, the per se approach would provide a benchmark by which to slow commercial trafficking in human flesh, and would provide a major degree of uniformity to complement the application of the Miller test. Other types of obscenity that showed simulated sex or described graphic sex would still be judged under Miller, allowing application of the serious value and community standards tests.

Response: Because the constitutionality of a per se rule is unproven, it might be prudent to adopt such a rule in a separate statute altogether, to avoid jeopardizing the constitutionality of the remainder of the obscenity law. Although the bill contains a severability clause, that language would not necessarily guarantee that a judge would sever the per se rule and uphold the rest of the law, since courts tend to apply a broad brush in cases that involve First Amendment rights.

Supporting Argument

Allowing local units to pass an ordinance prohibiting the distribution of obscene material could lead to a greater number of obscenity prosecutions. Under the current law, obscenity cases can be brought only by county prosecutors and the Attorney General, who are already busy prosecuting the results of obscenity--sexual abuse and child-porn activities--and who may not give obscenity prosecutions the priority they might receive from a city attorney more concerned about local offenses. Under current law, local units can attempt to eliminate commercial obscenity only by regulating "obscene" establishments through zoning ordinances. Senate Bill 330 would give communities a greater opportunity for self-determination.

Supporting Argument

Senate Bill 330 would allow the prosecution of individual, ministerial employees who distribute obscene material as part of their job, such as "adult bookstore" clerks or truck drivers. These individuals currently enjoy what the bill's supporters call the "Nazi defense", claiming immunity on the ground that they were only doing what they were told to do, while the people at the top go undetected and unpunished. As experience in combatting the illegal drug trade has shown, law enforcement gets to the kingpin by going after the "little guy". Prosecuting lower level employees also could undermine organized crime: reportedly, supplying obscene material to distribution points is the third largest source of profit for organized crime.

Supporting Argument

Making it a felony, rather than a misdemeanor, to commit an obscenity offense would give this crime greater significance in the eyes of the law enforcement community and could lead to increased prosecutions. At the same time, by increasing the maximum term of imprisonment from one year to four years for a first offense, and eight years for repeated offenses, Senate Bill 330 would bring these crimes under the purview of the Federal Racketeer Influenced and Corrupt Organizations law (RICO). That law makes it a crime to profit from a "pattern of racketeering activity", and racketeering activity includes any act dealing in obscene material, which is chargeable under state law and punishable by imprisonment for more than one year. Violators under RICO can be fined up to $25,000 and imprisoned for up to 20 years (18 USC 1961 et seq.).

Supporting Argument

Establishing certain evidentiary standards would facilitate successful prosecutions under the obscenity law. Senate Bill 330 would make it clear that expert testimony or other ancillary evidence was not required in an obscenity case, and that obscene material speaks for itself. This would be consistent with the U.S. Supreme Court's holding, in Paris Adult Theatre I v Salton, in which the Court ruled that the trial court did not err in failing to require expert testimony that the materials in question were obscene, and stated that, "The films, obviously, are the best evidence of what they represent." The bill also would make it clear that obscene material was to be tried in the real world, and that the court could admit evidence of the setting in which the material was sold, and the manner of its distribution, sale, and advertising. For example, if a defendant claimed that a particular item was simply a marital aid, the court could examine how it actually was sold. This would be consistent with Ginzberg v New York, in which the U.S. Supreme Court indicated that it was permissible to admit the social realities of obscenity's marketing (390 U.S. 629 (1968)). Finally, if a defendant wanted to introduce comparable material to show that allegedly obscene material met local community standards, the defendant would have to show that the comparable material was in fact similar to the alleged obscenity, and enjoyed a reasonable degree of community acceptance. Those elements were articulated by the U.S. Court of Appeals, D.C. Circuit, in 1961, and have been extensively applied since (Womack v United States, 294 F.2d 204).

Supporting Argument
Senate Bill 330 would bring the obscenity law into line with the general scienter requirements of most other penal statutes, by redefining "knowledge of content and character" to delete reference to a "reason to know, or a belief or ground for belief which warrants further inspection or inquiry". Reportedly, this provision has been held unconstitutional by trial courts in the State, and the issue is pending before the Michigan Court of Appeals. Under criminal law, the prosecutor must prove that the defendant had the requisite guilty knowledge, or scienter, and most criminal statutes rely on actual knowledge instead of a reason to know, belief, or ground for investigation or inquiry standard.

Supporting Argument
Senate Bill 330 would delete a requirement that prosecutors, in a first degree obscenity case, prove that the dissemination of obscene material is the predominant and regular part of the defendant's business, and that the obscene material is a principal and substantial part of the stock in trade at the establishment. Removing this requirement would enable prosecutors to bring a criminal action against any person who knowingly disseminated obscene material even if that distribution did not constitute the predominant part of the business and the material was not a substantial part of the stock in trade. With the deletion of this element, there would no longer be any practical difference between first and second degree offenses, and the bill would remove that distinction.

Response: The bill would be unfair to, and could result in financial difficulties for, legitimate video dealers in the State whose predominant business is the sale and rental of a wide variety of material, with only approximately 6% of their trade reportedly resulting from the sale and rental of adult-oriented films. Furthermore, clarification is needed on which movies could continue to be offered for sale or rental and which could not, so legitimate video dealers could continue to operate within the law.

Supporting Argument
By providing in statute for the use of widely known guidelines, such as the Motion Picture Association of America (MPAA) movie ratings, on video movies and video tapes, Senate Bill 340 would enable consumers to be better informed and more selective about their choices of video entertainment--a concern especially for parents who want to monitor the amount of violence and sex their children are exposed to by the media.

Response: Requiring the MPAA ratings to be used on video movies would not be a panacea for the problem of identifying a video's content. Many movies, including those made before the rating system was instituted in 1968, those made specifically for video sales or television, those produced for educational purposes such as National Geographic movies or instructional films, and those that are pornographic or underground movies, are not rated. Moreover, scenes that are deleted from movies so that the movies will receive an "R" rating rather than an "X" rating are often reinserted in the video version of the movie, which would render the MPAA rating unreliable as an indication of the actual content of the video, and require a "not rated" designation under the bill.

Supporting Argument
It is and should be the responsibility of a store manager to ensure that minors do not have access to sexually explicit material sold in a store. The law already provides for sanctions against a manager who knowingly allows a minor, unaccompanied by a parent, to examine those items. Since children do not possess the experience or maturity to understand or make a purchasing choice regarding sexually explicit material, penalties should be extended to a manager who displays this material in a way that allows open accessibility. The display restrictions proposed in Senate Bill 341 would effectively remove any access that children have to explicit material, without infringing on the rights of adults to examine and purchase it.

Supporting Argument
Limiting the display of sexually explicit material is a public health and public safety issue. Many believe that obscenity can have an adverse effect on the development of a child. Reportedly, there have been incidents of "copycat" sexual crimes by juveniles upon other juveniles after viewing sexually explicit and abusive material. Eliminating children's access to such material not only could be beneficial to individual emotional development, but also could reduce instances of criminal sexual conducted committed by minors.

Opposing Argument

Eliminating the statewide community standard would allow prevailing local sentiment to dictate what publishers, distributors, booksellers, and librarians offer to all, and would make the scope of the individual right to free expression and the permissible prohibition of obscenity nearly impossible to determine. The uncertainty created by local interpretations of obscenity would effectively chill the right to free expression. Further, a balkanized system of obscenity regulation would cause criminal prosecutions to be considerably delayed in the appellate system: a holding by one appellate court that a particular obscenity conviction was valid would not necessarily be dispositive of other convictions, even if they involved the very same material, if the convictions were obtained under different local standards for obscenity. Although it was interpreting an earlier law, the Michigan Supreme Court has come down in favor of statewide standards (People v Llewellyn, 401 Mich 314 (1977)). Even if local ordinances could only parallel the Act, rather than contain individualized provisions, the result would be the same: local obscenity standards across the State.

Opposing Argument

Allowing local community standards to determine whether material was obscene would lead to a patchwork of regulation and create serious problems for legitimate publishers, booksellers, and distributors. The current statewide standard affords a degree of certainty as to what the law treats as obscene, thus enabling law-abiding businesses to make rational choices about which publications to carry and which to avoid. Without that certainty, these businesses would be forced to "self-censor" and refrain from distributing material they honestly believed was not obscene. Local obscenity regulation also would present due process problems in that an unwary national or statewide distributor of books, periodicals, or films could be subject to criminal prosecution although there was little opportunity to discover the nature of the prohibited conduct. As the Michigan Supreme Court said in Llewellyn, "It is a long-standing rule in this state that criminal offenses must establish with reasonable certainty the elements of the offense so that all persons subject to their penalties may know what acts it is their duty to avoid."

Response: Obscenity offenses would still have an element of scienter: the defendant must know the material's content and character to be guilty of an offense.

Opposing Argument

By allowing local units of government to enact the obscenity law as an ordinance, Senate Bill 330 would give local attorneys the unprecedented authority to prosecute felonies. This change, in conjunction with the establishment of local community standards instead of a statewide standard, could lead to some 450 different standards across the State and chaos in enforcing them. Since many of the complaints about the existing law focus on inadequate enforcement by county prosecutors who have other priorities, why not simply allow prosecutors and the Attorney General to delegate the authority to enforce the State law? The current law has been in effect for less than five years and should be given a chance to work. What is called for now is fact-finding about the existing legislation and why it may not work, not the enactment of new legislation.

Response: The bill would replace the statewide standard with a countywide standard, not hundreds of municipal standards. Since obscenity offenses would be felonies, all violations--including those prosecuted by local attorneys--would be tried in the circuit court or Recorder's Court. As a result, the vicinage of the jury would be a single county, except in places that have multi-county circuits and in the City of Detroit for Recorder's Court prosecutions.

Opposing Argument

Efforts to curb violent behavior by reducing the dissemination of sexually explicit material are misdirected. Not only is there no proven causal connection between such material and abuse, but research shows that it is the violent messages--not the sexual explicitness--that lead to violent behavior. Obviously, no study has used rape as an outcome, because researchers cannot expose one group to obscenity, not expose another group, and see who commits rape. Instead, they look at attitudes about rape, or callousness toward rape victims, as an outcome of exposure to obscenity. What they have found is that there are effects from material that fuses violence and sexual explicitness, but the sexual explicitness is not

needed to find the effects. Further, studies show that the most pronounced effects result from so-called "slasher" films that juxtapose sex and violence in the most gruesome and graphic ways, and these films generally are rated R or PG, not X. In fact, there appears to be less violence in sexually explicit videos than in films rated anywhere from G to X. Although proponents of a stricter obscenity law claim that, since obscenity is not protected by the First Amendment, harm should not be an issue, these proponents also contend that obscenity leads to violence and they use that argument to justify restrictions on the availability of sexually explicit material.

Opposing Argument

The hard core obscenity provisions in Senate Bill 330 represent an attempt to define obscenity wholly outside the Miller standard, and therefore are unconstitutional under that standard.

Response: Although the U.S. Supreme Court has historically struggled with developing a test for obscenity, the majority has always seemed to agree on the illegality of hard core obscenity. As the court wrote in Miller, "...no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law...".

Opposing Argument

By repealing provisions that permit a person to seek an advisory opinion as to the legality of material that might be obscene, Senate Bill 330 would remove an important protection for publishers, booksellers, and distributors of mass market publications. This protection is especially important given all of the vagaries and ambiguities over what is and is not obscene, given the facts that obscenity judgments are very subjective and that courts and juries across the country continue to differ over what is obscene, and given the dictates of fairness. Eliminating the ability to obtain an advisory opinion would result in unnecessary litigation, prosecutions begun without warning, and self-censorship. Further, removing this protection would be particularly damaging if the number of prosecutors who could prosecute obscenity cases were multiplied, as the bill proposes to do.

Opposing Argument

By attempting to ban obscene performances and sexual devices, Senate Bill 330 would go way beyond what the United States Supreme Court has indicated can be criminalized as obscene. Although the definition of "obscene performance" would parallel the Miller guidelines, Miller was limited to material, not performances. Like sexual devices, obscene performances are not necessarily intended for mass audiences: they are not books, films, or magazines. Sexual devices are simply devices, including marital aids, that may be used by consenting adults. The mere fact that some people may be offended by their use is not an appropriate basis for criminalizing their possession or dissemination.

Response: The prohibition against sexual devices is based on court rulings from other jurisdictions that such devices are, per se, obscene. In upholding a Texas law prohibiting sexual devices, the U.S. Court of Appeals, Fifth Circuit, pointed out that the language of the law was patterned on a Georgia statute that was challenged and upheld, and the appeal of that decision was dismissed by the U.S. Supreme Court for want of a substantive Federal question. The appellate court concluded, "Thus, the constitutional propriety of the Texas counterpart to this Georgia obscenity provision is clear" (Red Bluff Drive-In, Inc. v Vance, 648 F. 2d 1020 (1981)).

Opposing Argument

It would be patently unfair to eliminate the exemption under the obscenity law for low level employees. Proponents of this change claim that it is sometimes difficult to find a business' owner, but that difficulty does not justify prosecuting someone else who has no say about the business' inventory and no decision-making authority whatsoever.

Opposing Argument

Since the movie ratings of the Motion Picture Association of America are entirely voluntary and do not set official industry standards, use of the MPAA ratings could constitute an unlawful delegation of governmental authority to a private organization. The MPAA is working with video stores to establish stronger monitoring systems, and video stores are encouraged to observe MPAA guidelines on a voluntary basis. The MPAA standards should remain merely guidelines and not be imposed

on store owners under statute, as Senate Bill 340 would provide.

Opposing Argument

Any form of labeling on printed or visual material is a form of censorship. Furthermore, one segment of society should not be allowed to impose a standard on the entire community. To do so runs counter to the ideals of a free society.

Response: Senate Bill 340 is not advocating censorship rights or the abolition of freedom of choice; it is only proposing safeguards for children and other sensitive viewers. Many consumer items are labeled as to content for consumer protection and identification. It is only reasonable that material as potentially influential as video movies should bear some indication as to its content. Furthermore, most video stores already have adopted and enforced policies that restrict access to pornographic or other "adult material" to those customers over 18 years of age.

Opposing Argument

A lawsuit brought by the Motion Picture Association of America (MPAA) and the Video Software Dealers Association against the governor and attorney general of Tennessee and filed in U.S. District Court, in Nashville, Tennessee, could have an effect on the implementation in Michigan of Senate Bill 340. The suit contests the legality of Tennessee's "Rating Restriction Laws", which regulate the distribution and sale of videocassettes in that state. One of these laws requires that the rating standards promulgated by the Classification and Rating Administration (CARA) of the MPAA be applied to videocassettes and prohibits the distribution of videocassettes that have not been marked with the MPAA rating. (In 1968, the MPAA created CARA to administer a rating system that evaluates a film's content for theme, language, nudity, drug use, sensuality, and violence. Under this system, a film is screened and assigned of the five ratings: "G"--general audiences with all ages admitted; "PG"--parental guidance suggested because some material may not be suitable for children; "PG-13"--parents strongly cautioned since some material may be inappropriate for children under 13; "R"--restricted with persons under 17 years having to be accompanied by a parent or adult guardian; and, "X"--no one under 17 years admitted.) The provisions in the Tennessee law are similar to Senate Bill 340, which would prohibit the sale or rental of a video movie unless the official rating of the MPAA was displayed on the outside of the cassette, case, jacket or covering of the video movie. In their lawsuit, the MPAA and Video Software Dealers contend, among other claims, that Tennessee's Rating Restriction Laws constitute a trademark infringement. The suit notes that the rating symbols of "G", "PG", "PG-13", and "R" are Federally registered certification marks, and that the Tennessee laws require retailers and distributors to "wilfully infringe the MPAA's certification marks". In addition, the MPAA and the video dealers argue that the unauthorized and unsupervised application of the MPAA's certification marks will impair the MPAA's ability to enforce its trademark rights against others who misapply the ratings and will undermine the value of the MPAA's certification system. Thus, the suit claims, the Rating Restriction Laws directly conflict with U.S. trademark laws. The suit also notes that the MPAA, along with those in the exhibition industry and independent distributors, created the rating system and the CARA rating board to administer the rating system. The Rating Restriction Laws incorporate and adopt the MPAA rating system, as administered through CARA, as a rule of law. Thus, the suit contends that the Rating Restriction Laws are unconstitutional because they delegate legislative authority to a nongovernmental entity and impermissibly delegate legislative authority to a private entity. The suit further claims that the Rating Restriction Laws violate and impinge upon rights and liberties of the plaintiffs as guaranteed by the First Amendment to the U.S. Constitution.

Opposing Argument

Senate Bills 331 and 338, if enacted, could be challenged on First Amendment grounds. Because Senate Bill 331 would allow the seizure of material for forfeiture purposes, pending the outcome of the criminal prosecution, the bill could be considered an unconstitutional prior restraint on speech. In addition, Senate Bill 338 also could face a strong challenge on the same ground because it would allow the closure of a business or building, after a conviction, which would restrain the dissemination of protected speech

while the business was closed.

Response: Since the issue raised in Senate Bill 331 has not been decided by the U.S. Supreme Court, it is difficult to predict the ultimate resolution of this matter. There is a possibility, however, that Senate Bill 338 would be upheld based on a 1986 U.S. Supreme Court decision in Arcara v Cloud Books, Inc. (478 U.S. 697). This case held that First Amendment considerations do not preclude the closing of a bookstore based on a closure statute of general application that is triggered by clearly illegal activity. The selling of books on the premises, the court said, does not defeat a statute aimed at penalizing and terminating illegal uses of the premises. Thus, the Supreme Court upheld the closure of the bookstore even though the closure would prevent the dissemination of protected speech while the store was closed. (Note, however, that Arcara involved a bookstore that was used for prostitution, or "nonexpressive activity". As the concurring opinion pointed out, "If ... a city were to use a nuisance statute as a pretext for closing down a bookstore because it sold indecent books or because of the perceived secondary effects of having a purveyor of such books in the neighborhood, the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review.")

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SENATE ANALYSIS SECTION

SENATE BILL 331

ANALYSIS Revised First

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SENATE ANALYSIS SECTION

SENATE BILL 332

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