Initiated Measure: Regulation of Obscenity

Cooperative Extension South Dakota State University

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Initiated Measure:

Regulation of Obscenity

Cooperative Extension Service
South Dakota State University
U.S. Department of Agriculture
Initiated Measure:
Regulation of Obscenity

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The proposed initiated measure to regulate obscenity, and the law the proposed measure seeks to replace, represent contrasting philosophies of the seriousness of the crime of distributing obscene materials and how the distribution of pornographic materials or obscene entertainment should be controlled.

The U.S. Supreme Court has repeatedly refused to establish any clear standards for judging if any particular material or entertainment is or is not obscene. The Court has declared that such judgments must be based upon local standards.

This means that there is no one standard for determining that which is obscene but that there might be an infinite number of standards. Standards might vary from community to community and state to state. Standards within a given community might also change from one time period to another.

To be constitutional, any law designed to control the dissemination of such materials or to govern the kind of entertainment offered to the public must leave the judgment of what is or is not pornographic or obscene up to the local courts. No material or entertainment can be legally classified as obscene until the local courts have made that judgment.

Under the present South Dakota law there is no material or entertainment which is too obscene for adults to read or see. (We have laws prohibiting indecent exposure and standards for determining indecent exposure.) The penalties for distributing alleged obscene materials to minors are relatively lenient.

In contrast, even though the proposed law does not prohibit pornographic materials or sexually explicit entertainment for adults, it establishes conditions under which few, if any, businesses can both legally and profitably offer such materials or entertainment to adults. The penalties for the distribution of such materials to minors, even if they were obtained by minors by subterfuge or accident, are comparatively harsh and mandatory.

It would appear that sponsors of the proposed measure have written the law in such a manner that vendors of books and magazines or theater managers would not offer any materials which might fall into the hands of, or be seen by, a minor and which in any way might remotely be construed to be offensive to anyone who might lodge a complaint. The law clearly states that regardless of intent to break the law, if a minor gains access to any materials deemed to be obscene the adult responsible is subject to prosecution. Furthermore, if accused persons attempt to defend themselves in court and are convicted, they must pay all court costs.

A similar law authored by the same person was recently declared unconstitutional by the Tennessee courts.

Overview of the Initiated Measure

The initiated act consists of 45 sections which might be divided into seven main parts, the first of which repeals the present statutes on regulating obscenity. The second part defines, within the meaning of the law, 10 terms used in the law. The third part prescribes the conditions under which “a person, corporation or any other taxable entity” might be guilty of the crime of disseminating obscene material “to a person 17 years of age or younger, or to any person in a manner affording no immediately effective opportunity to avoid initial exposure to such material.” The possession with intent to sell, the advertising to sell, the sale and the purchase of such materials are all illegal under the terms of the proposed law. The owner or renter of the building where such materials are stored or sold might even be held liable.

The fourth is a lengthy part which sets forth the procedure for seizing alleged obscene materials as evidence and the rights of the accused to a hearing to determine if the seized materials are indeed obscene.

The next part deals with the conditions under which sexual information might be legally disseminated. Such materials may be disseminated to a minor by his or her parent or legal guardian. They may also be used for educational purposes but only after following the rigid procedure prescribed in the law.

Sections 35-44 pertain to the registration requirements of commercialized sex businesses and the penalties for failure to register and for supplying false information to obtain a certificate of registration. The term “sex business” is not defined, but three separate types are described: (1) those which sell sexually explicit magazines and books and theaters which show such films, (2) massage parlors, and (3) those which offer live entertainment by persons clothed in less than discreet attire.

Section 45 declares the act to become effective on Jan. 1, 1979.

The Initiated Measure in Detail

The initiated act controls the distribution of sexually explicit materials to anyone 17 years of age or younger
and adults under certain circumstances. It prohibits the advertisement of such material and establishes strict conditions under which sexually explicit materials may be used for educational purposes. The law also establishes the procedure and conditions under which sex related businesses might be registered.

Part I - Repeal
The first part (section 1 in the law) repeals the present statutes pertaining to obscenity (SDCL 22-24-25 to 22-24-54).

Part II - Definitions
Ten terms are defined within the meaning of the law; two are probably of most importance: obscene material and contemporary standards.

The definition of obscene material is over 300 words in the text of the law, but in brief it describes obscene material as "patently offensive hardcore sexual conduct" in any form (descriptive print, reproductions, movies, or live performances) which appeals to prurient interests in sex and does not meet contemporary standards for such material. Such sexually explicit materials are defined as obscene if they portray sexual acts or if they primarily focus attention of the viewer upon the sexual organs, male or female, irrespective of the actual visibility of the genitalia or if they portray the bodily functions of elimination. It is material, which, "taken as a whole, lacks serious artistic, scientific, literary, or political value in the context in which it is found or the manner in which it is used, possessed or disseminated, provided, that the fact, standing alone, that only consenting adults are exposed to the materials does not require a finding that serious value is possessed by the questioned material."

Contemporary standards, in brief, are described as those deemed proper, appropriate, and accepted by society at large.

Part III - Violations
"A person, corporation or any other taxable entity, with knowledge of the general nature and character of the content of the material involved, irrespective of the absence or presence of an evil motive, bad purpose or intent to violate or disregard the law, (would) be guilty of an offense if he, she or it:
1. "Disseminates obscene material
   a. to a person 17 years of age or younger, * or
   b. to any person in a manner affording no immediately effective opportunity to avoid initial exposure to such material, or
2. Commercially disseminates material, or
3. Disseminates advertisements, in either oral or written form
4. Possesses, actually or constructively with intent to commercially disseminate, ...

5. Receives by commercial dissemination any obscene materials...
6. Knowing or having reason to know that it will be commercially disseminated, finances the manufacture or production, produces, manufactures, directs, photographs, poses, acts or in any way assists in the production of visually represented obscene material or advertisements for any obscene material, or
7. Owns, possesses, manages, rents, either as lessor or lessee ... having reason to believe that such real property is being or will be used as a place or establishment where or from which obscene materials, or advertisements for obscene materials, or will be produced, manufactured, exhibited, or disseminated."

Part IV - Prosecution and Penalties
Under the terms of the proposed act defendants charged with violating the terms of the act will not be allowed to plead guilty. They must be tried in court by a jury of 12 people, and the court is instructed to place the highest priority on these proceedings to insure a speedy trial. The defendant, if found guilty, must pay the court costs unless the defendant applied to the court to plead guilty and thereafter took no actions in his or her own defense.

Within 10 days after arrest the defendant must post a secured bond equal to the maximum fine which might be imposed but no more than $100,000. (This amount is subject to adjustment depending upon the defendant's assets.) This is not an appearance bond, but a bond to insure payment of any fines which might be imposed. If the defendant is a corporation and refuses to post the secured bond, the court is instructed to take a first priority lien on all assets of the corporation.

The Governor shall "diligently and expeditiously" make every attempt to extradite persons to the state who have been charged with violating this act but have left the state or who from a place outside the state have violated or caused the violation of the act.

The jury is required to judge not just the guilt or innocence of the defendant but must also determine which items submitted as evidence are obscene even if they find the accused innocent of the charges brought against them. Thereafter, any identical materials are declared contraband and are subject to seizure anywhere in South Dakota for a period of up to 3 years.

Penalties if found guilty: individuals.

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison Sentence</th>
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<tbody>
<tr>
<td>Person - first offense and not convicted anywhere in the U.S. for any crime concerning obscene materials. Not less than previous 6-months gross income, regardless of source, or more than $10,000. Not less than 1 year or more than 5 years.</td>
<td></td>
</tr>
<tr>
<td>Person - second offense, anywhere. Not less than preceding 12-months gross income. Not less than 18 months or more than 10 years.</td>
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</tr>
</tbody>
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* A later section in the law further clarifies this section by stating "... disseminates to or in any way that a person 17 years of age or younger may have displayed to, be exposed to or have access to materials or any type of performance which sets forth patently hardcore sexual conduct...."
Part V - Materials by first obtaining a search and seizure warrant unless voluntarily delivered by the person in possession. The application for a search and seizure warrant must be accompanied by a sworn affidavit describing the obscene materials to be seized, or if the materials are on public display the warrant issuing official may visit the place and inspect the materials to be seized.

The person or legal entity from which the materials have been seized may, within 48 hours, demand a court hearing to determine if the materials are indeed obscene. If the court should rule in an adversary hearing that the materials may be obscene the court must hold the materials as evidence in criminal proceedings which must be filed within a specified time. If the court determines the materials are not obscene the court must present the materials to the Grand Jury for its ruling. It two thirds or more of the Grand Jury members determine that the materials are obscene they must then be held as evidence in criminal proceedings which must be filed within a specified time.

Part VI - The Use of Sexually Explicit Materials in Sex Education

Section 34 of the law provides that sexually explicit materials may be disseminated to persons 17 years of age or younger by a parent or legal guardian, and if disseminated as textual material, in a particular course of study and then under strict conditions.

Before sexually explicit materials can be used in a public school the school must notify the parents, in writing, describing in detail the precise content of the course of study. The parents may refuse to allow their child to take the course of instruction. In addition the school board must officially approve the use of the materials after holding at least two public hearings. This procedure must be followed each year the course of instruction is given.

If the school is a private one the school need only obtain the parents' permission in the same manner as required of a public school. No hearings are required.

Part VII - Registration of Commercialized Sex Businesses

Three general types of sex-related businesses are described and required to register with the Secretary of State in the proposed act. The first type is any enterprise “which commercially disseminates patently offensive hardcore sexual conduct.” This would include enterprises which sell pornographic literature and adult theaters. The second type is described as any enterprise “which offers a service including fondling, rubbing or other touching of external or internal human genitalia,...” Businesses in this category are generally grouped under the label of massage parlors. Similar businesses operated by a licensed practitioner for medical purposes are exempted from the provisions of the proposed law.

The third type of business to be registered are those which offer entertainment by “dancers, waitresses, strippers, impersonators or any other persons performing in less than attire which completely and opaquely covers the external genitalia, buttocks, female breasts below a point immediately above the top of the areola and the human male external genitalia in a discernibly turgid state, even if completely and opaquely

Penalties if found guilty: individuals.

<table>
<thead>
<tr>
<th>Fine</th>
<th>Prison Sentence</th>
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Penalties if found guilty: corporations or other taxable entity.

| Corporation, first offense by it or by any of its employees or by anyone anywhere in the U.S. with whom the corporation has a financial interest. | Not less than previous 6-months gross income regardless of source, or more than $50,000. | Report weekly, for 6 months, all names, addresses, and social security numbers of employees and private contractors. A detailed description of all items bought and sold, rented or traded and to whom or from whom bought, sold, rented or traded. Copies of all correspondence and names of all persons with whom there has been oral communication. |
| Corporation - second offense or first offense if any of its employees or anyone anywhere in the U.S., with whom the corporation has a financial interest, has been convicted of a crime concerning obscene materials. | Not less than previous 12-months gross income regardless of source, or more than $100,000. | As above but must report weekly for 12 months. |

Part V - Seizure

Law enforcement officers may obtain obscene materials by first obtaining a search and seizure warrant unless voluntarily delivered by the person in
covered.” Businesses in this category might include certain bars and night clubs.

Any such business must obtain a Certificate of Registration from the Secretary of State. To be eligible for a certificate the applicant must present a sworn statement that he has complied or will comply with the following requirements:

1. He is in compliance with all local ordinances.
2. Business is inside a totally enclosed building located at least ½ mile from any school, church, bus or airline terminal, single or two family dwelling house, or any hotel, motel, inn, boarding house or any similar public lodging places.
3. Three miles from any permanent military base.
4. Will not serve, sell or allow any food or beverages to be consumed during business hours.
5. List the names, addresses and social security numbers of everyone with any financial interest with the business, including all employees.
6. A statement that all persons whose names were listed live within the county where the business is located.
7. None of the people listed have ever been convicted of crime anywhere in the U.S. concerning the dissemination of obscene materials.

Every regulated business during the course of its operations must provide the Secretary of State with the following information:

1. If there has been any change in any of the information provided to obtain the Certificate of Registration, the changes must be reported within 3 days.
2. A monthly report of the amount of money dispersed to each person listed as an employee and those having a financial interest in the business.

Anyone who operates a sex related business without a Certificate of Registration is subject to a fine upon conviction of no more than $5,000 and not more than 3 years in the penitentiary. In addition, he will be fined no less than $250 per day and no more than $1,000 per day for every day of operation in violation of the act.

The penalty for supplying false information to the Secretary of State to obtain a Certificate of Registration is that he or she “shall be fined no more than $5,000 and imprisoned in the penitentiary no more than 3 years or both.”

The last section of the act declares that it will take effect on January 1, 1979.

Present and Proposed Laws Compared

The present law and proposed law differ in the following respects:*  

1. The proposed law is detailed and comprehensive. The present law is more general in nature. Examples can be observed in the following comparisons:
   - The proposed law makes possession of obscene material by adults a crime under certain conditions. Possession by adults is not a crime under present law unless it is possessed with intent to distribute to minors.
   - The proposed law does not specifically state the crime class a violation would be, but the fines and sentences imposed are in the felony classification. Under the present law anyone guilty of violating the law is guilty of committing a misdemeanor.
   - Under present law it is an allowable defense in court if a minor gains access to obscene materials by misrepresenting his or her age, or is accompanied by a parent or legal guardian or by an adult who represented himself as parent or guardian. If a person misrepresents himself as a parent or legal guardian or the minor misrepresents his age, he is guilty of a misdemeanor.

   Under the terms of the proposed law anyone, “irrespective of the absence or presence of an evil motive, bad purpose or intent to violate or disregard the law, is guilty of an offense if he, she or it disseminates to or in any way that a person 17 years of age or younger may have displayed to, be exposed to or have access to” obscene materials as defined in the law (Section 33). Therefore, if a minor gained access to obscene materials by subterfuge, or through no fault of the accused, this is not a defense in court. Furthermore, the minor is not guilty of any crime under the proposed law.

   - Present law specifically exempts motion picture machine operators from prosecution if their only financial interest in the business is in the wages earned. If obscene materials are used in the course of law enforcement or judicial activities or in “bona fide school, college, university, museum, or public library activities” or any organization or business serving these legal and educational purposes they are exempted from prosecution. Such exemptions are not included in the proposed law.

   - The advertisement of obscene materials is a punishable offense in the proposed law. The advertising of obscene material for sale to minors only is prohibited in present law.

   - If more than one item of obscene material is sold or otherwise disseminated to a minor the sale or distribution of each item to the same person constitutes a separate offense in present law. No such provision is included in the proposed law.

   - Mandatory minimum fines and prison sentences and maximum penalties are prescribed in the proposed law. The present law only imposes a maximum sentence as a misdemeanor of one year in the penitentiary or $1,000 or both.

   - Under present law the determination that matter or materials are obscene is not sufficient cause for the destruction or holding such material for evidence if it is not proved it was distributed, or there was any intent to distribute it to minors. Under the proposed law criminal proceedings must be instituted if the materials are publicly disseminated to anyone.

*The two laws are not exactly comparable because of differences in form and wording. As a result there may be differences not mentioned.
- Present law does not impose any conditions on the use of sexually explicit materials in a school course of study.
- Present law contains no provisions for regulating or certifying sex-related businesses.
- The accused may plead guilty under present law. The proposed law specifically prohibits a guilty plea.
- The defendant, if found guilty, who made any defense on his own behalf in court, must pay all court costs for his trial under the proposed law. There is no such stipulation in the present law although conceivably this could be part of the sentence under present law.
- Present law, contrary to the proposed law, does not specifically mention the requirement that a bond of any kind be posted by the accused.
- If, after a court hearing, seized materials are ruled not obscene, they are returned to the owner under present law. The proposed law requires that if they are ruled not obscene they must be submitted to a Grand Jury for a second ruling.

There are also similarities in the present and proposed law. Some of the most important similarities are:
- Present and proposed law make the sale or distribution of obscene materials to minors, by anyone other than a parent or legal guardian, unlawful.
- The accused has the right to a hearing to determine if the materials are or are not obscene.
- Both laws require the jury in an obscenity trial to return a verdict attesting to which items submitted as evidence are obscene.
- Procedures for the destruction of materials ruled obscene are prescribed.

Impact of Proposed Law

If the proposed law is passed in the referendum, compliance and enforcement might be very costly to state and local government. The reporting procedure for regulated businesses, if they can meet the requirements, demand voluminous amounts of information. For example, it is expected that merely filing this information will require additional staff resources in the office of the Secretary of State. Presumably all the information required to obtain a Certificate of Registration must be verified. This too will require additional staff at either the state or local level.

This concern may be unfounded as few, if any, such businesses may be willing to comply with the stringent registration requirements.

The proposed law imposes the requirement upon every school which teaches any courses dealing with sex to persons 17 years of age or younger to hold two separate hearings. In any other law requiring hearings, by the same governing body in the same location, only one hearing is required.

The same section requires the hearings to be held by the "ultimate governing body." The term is not defined and might be construed to mean the State Board of Elementary and Secondary Education. If so, it could be very difficult if not physically impossible for one board of part-time members to hold two separate hearings in every school district in the state.

Under the wording of the proposed law, high school and college trainers and athletic clubs such as the YMCA or YWCA would appear to be in violation if they provide rub-downs after exercise. They cannot meet the regulations imposed upon a sex related business because they are a school or in the case of athletic clubs, many offer housing accommodations. This, of course, is not the intent of the authors of the law. Enforcement of this section upon schools and athletic clubs is possible but unlikely.

The requirement that anyone who in any way has a connection with a sex related business must live within the county where the business is located might be interpreted as discrimination. An owner of any other type of business would be guilty of discrimination because of place of residence if he or she refused to hire anyone living outside the county where the business is located.

Supporters of the proposed law defend this section on the grounds that most night club acts, some of which perform nude or semi-nude, move from state to state and town to town. Seldom do they stay in one place longer than a month. Sex-related businesses would be in violation of the terms of their application for certification if they employed these people, so the effect of this section is to bar transient sex performers from working in the county.

Opponents maintain the penalties are overly harsh and that the impact extends to individuals and firms even remotely associated with pornographic materials. The law states "irrespective of the absence or presence of an evil motive, bad purpose or intent to violate or disregard the law, …” for first offense, the penalty is a minimum sentence of one year in the penitentiary without parole and minimum fine of an amount equal to the accused’s total gross income the previous 6 months "irrespective of source of, or reason for the income, whether earned or the result of gift, trust, dividend, interest or any other form of asset or benefit." Are the penalties overly harsh? This is purely a value judgment.

Proponents of the law maintain the penalties must be high to eliminate pornography. The present law classifies the distribution of obscene materials as a misdemeanor. Conviction is difficult to obtain; when it is, the defendant merely pays a fine and continues in business. There is a provision in the proposed law which declares that other copies of materials judged to be obscene by a jury become contraband and may be seized anywhere in the state for a period of up to 3 years.

This section sets a new precedent for South Dakota courts. In effect, this makes the decision of one jury, in one circuit court, binding upon the whole state. Only the decisions of the South Dakota Supreme Court are binding upon the entire state. This provision also imposes the contemporary standards of one community upon all the communities in the state.
Supporters of the proposed law defend this provision on the basis that without it, to eliminate from the state each copy of obscene material, it will have to be seized by a search and seizure warrant and declared obscene by a jury where seized.

In the same vein is the high priority placed upon the prosecution of a case involving obscenity. The proposed law demands that such cases be prosecuted without delay and be placed ahead of all other cases, whether they be for murder or shoplifting, and if the court is in recess a special session must be called. This again raises the question of the seriousness of the crime. Does it deserve this high priority?

Cases of disseminating obscene materials are accorded this priority, according to the proponents of the law, because of the need to move rapidly to obtain the jury's decision on the obscenity of the materials involved in the case. If they are ruled obscene, identical materials may be seized elsewhere before they are replaced with other materials. Without such priority a particular film might be languishing in court in one city and be showing in another only to be gone and replaced with another film before the decision is rendered.

Because of the U.S. Supreme Court's ruling there are no clear standards for determining obscenity in the proposed or present law. A seller of magazines, printed elsewhere (and legal where printed), must screen every issue of every magazine on his newsstands and he or she still will not know if the advertising to sell or the sale is a violation of the law. The determination can only be made after the violation has occurred. The same observation can be made about librarians in a public library. Some scenes in GP rated films might be objectionable to some people, and if a complaint is lodged the theater owner will be required to defend the film and himself in court.

Thus, the problem of obscenity may be national in scope, but control is left to local jurisdiction because of the Supreme Court's ruling. This law, or any similar law, is merely a tool a community might use in its efforts to control the dissemination of obscene materials. Is this the law you want? This is the question to be decided by the voters of South Dakota on the November ballot.