

AN ACT TO RESTRICT THE USE OF EROTIC MATERIAL
FOR COMMERCIAL PURPOSES

Robert E. Rodes, Jr.*

Be it enacted, etc.:

Section 1. For purposes of this Act:

- (1) "Private parts" means all or any part customarily kept covered in public of any of the following: the genitals, the pubic area, the buttocks, and, in the case of an adult female, the breasts.
- (2) "Sexual act" means any act of masturbation; any act of copulation, sodomy, bestiality, or other sexual intercourse, natural or unnatural; any caress of any person's private parts; any embrace of a person whose private parts are exposed; or any act of physical violence to a person's private parts, or to any person whose private parts are exposed.
- (3) "Erotic material" means:
 - (a) Any show or performance in which any performer engages in a sexual act or exposes his or her private parts to the audience or to another performer;
 - (b) Any picture representing a sexual act, a person engaged in a sexual act, or a person whose clothing is being or has been removed, opened or disarranged in order to accomplish, permit, or be subjected to, a sexual act. In determining whether a picture falls within this clause, the character of the scene depicted, and any caption or other material accompanying

*A.B., Brown Univ.; LL.B., Harvard Univ.; Professor of Law Notre Dame Law School.

the picture may be considered.

- (c) Any photograph of an adult with his or her private parts exposed to the viewer, or to another person in the photograph, unless it can be shown that the photograph was taken in a public place, and that the subject did not expose his or her private parts for the purpose of being photographed;
 - (d) Any detailed description of a sexual act;
 - (e) Any obscene word, but only for purposes of the provisions of this Act concerning the display of erotic material;
- (4) "Picture" includes any sculpture or other three-dimensional representation. "Photograph" and "picture" both include any motion-picture or video tape. A reproduction of a photograph, by whatever process, is a "photograph." A photograph or photographic reproduction of a picture that is not a photograph is not a "photograph."
- (5) "Commercial purpose" includes any purpose of sale, rental, or other disposition of merchandise; of collecting admission charges; of advertising; or of decorating or enhancing the amenities of premises where goods or services are offered to the public.
- (6) Material is "placed for examination" if it is so placed that it may be examined (or, in the case of audible material, listened to) without specific personal request to the person in charge of it or his representative.
- (7) Premises shall be deemed to be "accessible to minors" if a minor is found there, unless it can be shown that he gained admission by exhibiting false documentary proof of age to the person in charge of the premises or his representative, who in good faith relied on the same.

- (8) Provisions relating to the "display" or erotic material shall apply in the case of a show, exhibition, or performance to showing, exhibiting, or performing it; in the case of audible material to uttering it; in the case of a recording to playing it.
- (9) Erotic material, other than a picture of the genitals during or in preparation for a sexual act, may be disregarded to the extent that such material:
 - (a) Is included in a motion picture or television sequence of not less than thirty minutes duration, and does not amount to more than twenty seconds of such sequence; or
 - (b) Is contained in a book, magazine, pamphlet, or newspaper, and does not appear on the cover, or on more than one-third of the pages, or on more than twenty pages thereof.

Section 2. No one shall for a commercial purpose:

- (1) Engage in or submit to a sexual act in public or in the presence of an audience who have paid money or other consideration to watch.
- (2) Display erotic material in such a way as to attract the attention of persons using any public highway or public park, or of travellers on any system of public transportation, or of persons on private premises unless such display is authorized by the owner or occupant of such premises.
- (3) Sell, rent, lend, or give erotic material to any minor, or permit any minor to examine or listen to such material.
- (4) Display erotic material in premises accessible to minors, or place erotic material for examination in such premises.
- (5) Mingle merchandise constituting erotic material with other merchandise displayed or placed for examination on the

same premises in such a way as to attract the attention of persons who are on the premises for the purpose of buying or examining such other merchandise.

- (6) Distribute erotic material by mail or otherwise to persons who have not asked or consented to receive it.
- (7) Sell, lend, give, display, place for examination, or distribute erotic material which, taken as a whole,
 - (a) Judged by community standards prevailing at the time and place of the act or transaction in question, is patently offensive in its description or depiction of private parts or sexual acts, and appeals to a shameful or morbid interest in nudity, sex, or excretion; and
 - (b) lacks serious literary, artistic, political, or scientific value.

Section 3. Whoever knowingly violates a provision of Section 2 of this Act, causes or procures another to do so, or permits a violation on premises under his control, or by a person in his employ or under his direction shall be guilty of an offense, and, on conviction, may be fined not more than \$2000, or imprisoned not more than one year, or both.

Section 4. For purposes of applying Section 3, and subject to the provisions of Section 5, a person in charge of premises shall have imputed to him:

- (1) Knowledge of the character of any material displayed on the premises;
- (2) Knowledge of the character of any material placed for examination on the premises, except such knowledge of the character of a book, magazine, pamphlet or newspaper as could not have been inferred by a reasonably prudent person examining the cover;

- (3) Knowledge that the premises are accessible to minors, unless he has deputed some responsible person to exclude minors from the premises, and has no reason to suppose that that person is not doing so.

Section 5. Notwithstanding the provisions of Section 4, if any person by whom or by whose authority material is displayed or placed for examination on the premises of another gives a written undertaking as to the character of the material so displayed or placed, knowledge of any breach of that undertaking shall be imputed to the person who gave the undertaking, and not (in the absence of actual knowledge) to the person in charge of the premises.

Section 6. Any person who, with intent to lead another to suppose that material may be displayed, distributed, or placed for examination without violating this Act, wilfully misrepresents (or, being the author, artist, designer, producer, publisher, or distributor of such material, negligently misrepresents) the character of such material shall be guilty of an offense, and, on conviction, may be fined not more than \$2000, or imprisoned not more than one year, or both.

Section 7. Notwithstanding the foregoing provisions:

- (1) A person who keeps original works of art for sale does not violate Subsection (5) of Section 2 by displaying such works of art together or placing them for examination together, even though some are and others are not erotic material.
- (2) Nothing done in carrying out in the usual way the work of a bona fide museum, library, or school not operated for private profit shall be a violation of Section 2.
- (3) If one or more producers of exhibitors of plays, shows, or motion pictures shall effectuate a plan for restricting

attendance at their plays, shows, or exhibitions, which plan, in the opinion of (appropriate administration agency) is adequate to protect minors against exposure to material inappropriate for them, and to protect adults against being unwillingly exposed to material offensive to them, the performance of a play or show, or the exhibition of a motion picture in accordance with that plan shall not be a violation of Section 2. The (appropriate administrative agency) may make regulations for the submission of plans for his approval under this Subsection. Provided, that nothing in this Subsection shall protect the advertising of any play, show, or exhibition. Provided further that this Subsection shall not protect a violation of Subsection (1) or Subsection (7) of Section 2.

Section 8. (Standard severability clause)

Section 9. (Repealer)

Section 10. This Act shall be known and may be cited as the Erotic Material Act of 19__.

NOTES

Section 1 (3): This is the basic provision defining the class of material that is to be restricted.

(a) This covers live performances in the nude.

(b) and (c) I felt that in the case of mere nudity paintings were entitled to more scope than photographs, involving as they do a good deal of our artistic heritage. The exception in (c) is meant to prevent application to bona fide news and travel pictures. I am troubled by a few major works of art that come within (b) on account of the broad definition of "sexual act" in Subsection (2). There

- is a Vermeer that comes to mind, and there is Rodin's "The Kiss." I believe, though, that the restrictions in the draft will not unduly restrict access to such works.
- (4) through (8) are intended to delineate the exact scope of the restrictions imposed in Section 2.
 - (9) is meant to exclude from the coverage of the Act cases where erotic material is not so obtrusive as to offend persons of ordinary sensibility or so concentrated as to appeal strongly to the prurient interest.

Section 2: This contains all the restrictions on the use of erotic material. Note that nothing is covered that is not for a commercial purpose, as defined in Subsection (5) of Section 1.

- (1) covers only live shows where sexual acts as defined in Subsection (2) of Section 1 are performed in the presence of the audience. Mere nudity is not covered by this subsection, though it is subject to the following provisions concerning the display of erotic material.
- (2) covers advertising in subway stations, outside theaters, etc.
- (3) and (4) are intended to protect minors. (4) will also serve to clean up the typical drugstore, whose proprietor would rather limit his displays of paperback books and magazines than keep children out of his store.
- (5) The idea is that I should be able to pick out a book or magazine without wading through a pile of nude magazines or sex books to find what I want.
- (6) is meant to cover mail and door to door distribution of material to people who do not want it.
- (7) forbids entirely the dissemination of material held by the Supreme Court to be outside the protection of the First Amendment.