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May 27, 1977

Honorable John W. Jensen
House of Representatives
State House
Augusta, Maine

Honorable Laurier G. Biron
House of Representatives
State House
Augusta, Maine

Re: Opinion Regarding L.D.'s 668 and 894.

Dear Gentlemen:

This letter responds to your requests for an opinion as to whether the provisions of L.D.'s 668 and 894 comport with constitutional requirements.

1. L.D. 668

L.D. 668 would prohibit the

> "retail sale of any book, newspaper or magazine which deals explicitly and expressly with sexual matter unless that boook, newspaper or magazine is sealed with a paper seal or plastic cover which prevents it from being opened until it has been purchased."

Violators of the statutory prohibitions would be subject to a civil penalty of $250.

The United States Supreme Court has held that obscene materials do not enjoy the protection of First Amendment rights. Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957). However, the failure of state statutes to prescribe definitive standards to determine what is obscenity has resulted in the invalidation of such statutes on the basis of either, or both, of two constitutional grounds. First, such statutes may violate the First Amendment, as applied to the states by the Fourteenth Amendment, because they are over broad, prohibiting expression which is not obscenity and which is protected by the First Amendment. Second, such statutes, if too vague, may violate an individual's due process rights under the Fourteenth Amendment since (1) the person is unable to ascertain what conduct is proscribed by the statute, (2) law enforcement officials can arbitrarily select prosecutable behavior in enforcing the statute, and (3) the vagueness may have a "chilling effect" on the exercise of First Amendment rights.

In Miller v. California, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), the Supreme Court established minimum standards, designed to meet challenges of overbreadth and vagueness, for statutes regulating obscene materials:

> "The basic guidelines for the trier of fact must be: (a) whether 'the average person applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest [citation omitted]; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value." 413 U.S. at 24, 93 S.Ct. at 2615, 37 L.Ed.2d at 431.

Applying the Miller standards to L.D. 668, it is apparent that the provisions of the bill would violate the First and Fourteenth Amendments of the United States Constitution. Because the "sexual matter" which the bill seeks to regulate is not specifically defined as required by Miller, the bill suffers from vagueness.* Persons to whom the act would apply are not

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* The language of L.D. 668 could, for example, extend to some statements and pictures which may appear in daily newspapers or national news magazines.

given sufficient notice as to what types of publications must be sealed. Additionally, the bill is over broad. Enactment of the proposed statute would result in the sealing of publications which enjoy First Amendment protection.

The fact that the bill provides for the sealing of books and other publications, rather than an outright prohibition against their sale, does not remove the bill from the protective umbrella of the First Amendment. Such sealing could diminish the public's pre-purchase access to constitutionally protected literature under the instant bill, and in view of economic considerations, it could discourage booksellers from offering such literature.

The fact that the penalty established by the proposed § 2906 is civil rather than criminal would not alter the result since this fact does not correct or neutralize the bill's infringement of First Amendment rights. The threat of financial loss still exists to deter a bookseller from displaying for sale protected materials.

2. L.D. 894

L.D. 894 would impose a criminal sanction upon anyone who "knowingly distributes or exhibits or offers to distribute to a minor, any obscene matter adjudicated obscene" by a jury in a preliminary declaratory judgment action. In defining the "obscene matter" which is the subject of the regulation, the bill relies on the guidelines of Miller (quoted above) and the specific examples of sexual conduct suggested by the Miller Court as satisfying the specificity requirement established in that opinion. However, while attempting to follow Miller the bill digresses from the Miller standards in a critical instance. The bill would apply contemporary community standards to the determination of whether the materials lacks serious literary, artistic, political or scientific value. In such form the bill likely would not withstand constitutional challenge. Unlike the "prurient interest" and "patent offensiveness" elements, the Supreme Court has indicated implicitly that the "serious value" element is not to be judged by contemporary community standards. This conclusion is presumably predicated on the notion that the "serious value" element is directed only at determining whether the material presents ideas, not at an evaluation of the ideas presented, and that value exists in the expression of ideas without regard to the community's evaluation of those ideas.

This infirmity in the bill may be removed if "obscene matter" were to be redefined by revising the initial part of the definition to read as follows:

D. "Obscene matter" means matter which:

(1) Considered as a whole, would be found by the average person, applying contemporary community standards, to appeal to the prurient interest;

Assuming this change is made, L.D. 894 would satisfy constitutional requirements.

Sincerely,

Joseph E. Brennan

JOSEPH E. BRENNAN
Attorney General

JEB/ec
cc: Hon. Walter Hichens
Hon. James P. Elias