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Honorable Walter W. Hichens
Maine State Senate
State House Station #3
Augusta, Maine 04333

Dear Senator Hichens:

You have requested the Opinion of this Department with respect to the constitutionality of Legislative Document No. 2092, "AN ACT to Prohibit the Promotion and Wholesale Promotion of Pornographic Material in the State of Maine." We have compared the text of that proposed legislation to the text of the ordinance on the same subject adopted by the City of Portland, since the constitutionality of the Portland ordinance has been recently adjudicated by the Maine Supreme Judicial Court. City of Portland v. Jacobsky, 496 A.2d 646 (Me. 1985).[1/] A comparison of the two measures indicates that they are almost identical. Where differences exist, the language of L.D. 2092 narrows slightly the scope of the offense, offers a more detailed description of the elements of

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[1/] The full text of the Portland ordinance reviewed in Jacobsky is reproduced in 496 A.2d at 659-60.

the offense, and converts the offense from a relatively minor civil violation to a serious crime.[2/]

Since each of these differences from the Portland ordinance reduces the susceptibility of L.D. 2092 to successful constitutional attack or is constitutionally insignificant, this Department concludes that L.D. 2092 would be found to be constitutional, on the same basis that the Law Court used to sustain the Portland ordinance in Jacobsky.

Like the Portland ordinance, L.D. 2092 proscribes the "promotion" or "wholesale promotion" of materials and devices that are defined to be obscene. In Jacobsky, a majority of the Law Court rejected arguments that the proscription of these activities, as defined, was in violation of the guarantees of free speech and expression found in Article I, Section 4 of the Maine Constitution and in the First Amendment to the United States Constitution.[3/] The four Justices of the

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[2/] The scope of the offense is narrowed by adding "for consideration" as an element of the definition of "promoting" obscenity. The additional detail added to several definitions, such as including nudity and excretion as potential objects of a "prurient interest in sex," is unlikely to be of constitutional significance. The only notably different definition is that "patently offensive" [representations or descriptions of ultimate sexual acts . . .] are those that "go substantially beyond customary limits of candor in description or representation of the [particular] conduct . . ." under L.D. 2092, rather than those that are "intolerable to the average person," under the Portland ordinance. L.D. 2092 also adds an affirmative defense for the promotion or wholesale promotion of obscenity "in the course of medical or psychological treatment." The greatest substantive difference is the labeling of the offense as a Class C (up to $2,500 fine and up to 5 years imprisonment) or Class D crime ($1,000; one year), rather than a civil violation with a maximum penalty of $500.

[3/] In pertinent part, Me.Const., art. I, § 4 provides:

> Every citizen may freely speak, write and publish his sentiment on any subject, being responsible for the abuse of this liberty.

The First Amendment to the United States Constitution provides, in relevant part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; . . .

As will be seen, infra, the majority opinion made no analysis of the state constitutional provision. The substantially different language and history of Art. I, section 4 prompted careful and eloquent opinions from both the Superior Court and two dissenting Law Court Justices that the Portland ordinance violated the state constitution's free speech provision, even if the First Amendment were not violated.

Law Court majority reached this conclusion on the grounds that the ordinance's definition of obscene materials "followed the conjunctive three-element test that the United States Supreme Court set forth in Miller v. California, 413 U.S. 15, 24, 93 S.Ct. 2607, 2614, 37 L.Ed.2d 419 (1973), to delineate the scope of obscene expression not protected by the constitutional safeguards of the First Amendment." City of Portland v. Jacobsky, 496 A.2d at 648 (emphasis in original). Accordingly, the Court concluded that "[b]y tracking the Miller definition of obscenity, the Portland ordinance passes muster under the Federal Constitution." Id.

Without offering any analysis of the substantially different language of the relevant provision of the Maine Constitution, the majority of the Jacobsky court proceeded to equate the content of the State Constitution's Article I, § 4 with the First Amendment for purposes of obscenity regulation:

> Any difference in language between the Maine Constitution and the United States Constitution is, in the context of this case, insufficient to justify striking out on our own to develop a unique answer to the difficult definitional problem that has been long and often litigated under the First Amendment. We refuse to extend state constitutional protection to obscene expression that under the Miller test does not enjoy federal constitutional protection. Accordingly, we conclude that the Portland ordinance does not infringe upon the Defendants' freedom of expression guaranteed by Article I, Section 4, of our Maine Constitution.

496 A.2d at 648-49. Since L.D. 2092 employs the Miller test in language that provides no significant deviation from the language of the Portland ordinance, it would be found to satisfy both state and federal "free speech" guarantees.

The most substantial difference between L.D. 2092 and the Portland ordinance is the fact that L.D. 2092 makes "promoting" obscene material or an obscene device a Class D crime, and "wholesale promoting" of obscenity a Class C crime. By virtue of these changes, the penalty for substantially identical behavior is increased from the ordinance's maximum civil penalty of $500 for each violation to the proposed state law's

criminal fines of $1,000 and $2,500 and prison sentences of up to one year and 5 years, respectively, for Class D and Class C offenses.[4/]

At the same time that the penalty is dramatically increased, the change from civil to criminal status of the offense entirely avoids the suggestion that the Portland ordinance offers defendants insufficient procedural protections. As crimes, the proposed state law affords defendants a right to jury trial, proof "beyond a reasonable doubt," a right to counsel, and all of the other protections which are unavailable in the civil proceedings used to enforce the city ordinance. The denomination of these proscribed activities as Class D and Class C crimes assures that any prosecution will require scrupulous adherence to the criminal procedures associated with serious crimes. Thus, the proposed statute is not subject to constitutional attack for lack of any constitutionally guaranteed procedural protection.

In similar fashion, the definition of obscenity in L.D. 2092 is somewhat differently worded than the Portland ordinance. See note 2, supra. In those respects, the proposed state statute marginally enhances the clarity of the definitions, making it less subject to constitutional attack on the grounds of vagueness than was the Portland ordinance. Since the Portland ordinance was upheld against vagueness attacks in Jacobsky, 496 A.2d at 649, it must be concluded that the proposed state statute will be as well.

Finally, the Superior Court's opinion and the Law Court's two dissenting Justices in Jacobsky raised the possibility that the statutory presumptions contained in the Portland ordinance may violate federal constitutional standards. The Jacobsky majority opinion did not address the question, but since the

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[4/] Unquestionably, the more severe penalties produce a correspondingly more severe "chilling effect"--i.e., the likelihood that people will engage in legally unnecessary self-censorship--than exists under the Portland ordinance. Nevertheless, greater criminal penalties for federal offenses involving obscenity have been sustained as not inconsistent with First Amendment protections. See, e.g., Hamling v. United States, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974). Since Maine's highest court has interpreted the state constitution as affording no broader protection to expression concerning obscenity than does the First Amendment, the same result can be anticipated with respect to the proposed statute's criminal penalties.

proposed state statute contains the same presumptions,[5] the question is addressed by this Opinion. It is firmly established constitutional law that every criminal defendant's right to be considered innocent until proven guilty is violated if a statutory presumption is allowed to operate to relieve the prosecution of the full burden of proving each element of the crime, including any element "presumed" by the statute.[6]

In Maine, the Supreme Judicial Court has sought to avoid this unconstitutional result when presumptions in the criminal law are applied. It has done so by exercising its own legislative power, through the Maine Rules of Evidence, to interpret all presumptions in the criminal statutes in a way that restricts their effect to constitutionally acceptable limits. In effect, the Maine Rules of Evidence have done away with presumptions, as that term is often understood. For example, the proposed statute provides that "a person who

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[5] Section 2934 of the proposed statutes specifies two presumptions:

> 1. Knowledge of content and character. A person who promotes or wholesale promotes obscene material or an obscene device, or possesses obscene material or an obscene device with intent to promote or wholesale promote it, in the course of his business is presumed to do so with knowledge of its content and character.
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> 2. Intent to promote. A person who possesses six or more obscene articles or six or more obscene devices, whether such articles or devices are similar or identical, is presumed to possess them with intent to promote them.

[6] Sandstrom v. Montana, 442 U.S. 510, 524, 99 S.Ct. 2450, 2459, 61 L.Ed.2d 39 (1979) (jury instruction which could have been interpreted as directing jury to find the presumed fact, or to put the burden on the defendant of disproving the presumed fact, upon accepting the foundation fact as proven, violates defendant's due process rights.) By contrast, because of different constitutional considerations, that is precisely the effect of a presumption in civil litigation: the burden of proof is shifted to the opposing party. M.R.Evid. 301.

possesses six or more obscene articles . . . is presumed to possess them with intent to promote them." L.D. 2092, proposed § 2934(2). Under Rule 303 of the Maine Rules of Evidence, this provision cannot be used to provide evidence of intent, nor to shift to the defendant the burden of disproving the element of intent. Instead, reliance on the presumption will invoke the following rule:

> Whenever the existence of a presumed fact against the accused is submitted to the jury, the court in instructing the jury should avoid charging in terms of a presumption. The charge shall include an instruction to the effect that the jurors have a right to draw reasonable inferences from facts proved beyond a reasonable doubt and may convict the accused in reliance upon an inference of fact if they conclude that such inference is valid and if the inference convinces them of guilt beyond a reasonable doubt and not otherwise.

M.R. Evid. 303(c). Such an inference is consistent with constitutional due process guarantees. State v. McNally, 443 A.2d 56, 59 (Me. 1982). Due process values would be compromised only if the possible inference could not rationally be made on the facts of a particular case. This possibility is alleviated by the provisions of Maine Evidence Rule 303(b), directing trial justices to submit questions of the existence of a presumed fact to a jury only if the judge first concludes that the jury could reasonably draw the inference alluded to in the statute. Thus, the statute itself protects due process, as long as the corresponding evidence rule is correctly applied.

A constitutional statute may be unconstitutionally applied. In the opinion of this Department, the ultimate test of this proposed law's constitutionality will be in its application. Only then will it be known whether cases will be successfully prosecuted in spite of the limited effect that must be given to its presumptions. Only in practice will it be determined what falls within the approved definition of obscenity.

In sum, it is the conclusion of this Department that L.D. 2092 would be upheld, on its face, as constitutional legislation. Obviously the significance of this Opinion is

limited by the scope of the question. The Constitution merely describes what lies beyond the reach of the legislative power. It offers no guidance to the wise exercise of the vast power thus circumscribed. No endorsement or statement as to the desirability of the proposed legislation as public policy should be inferred from this Opinion.

If this office may be of further assistance in analyzing the legal aspects of L.D. 2092, please do not hesitate to inquire further.

Sincerely,

JAMES E. TIERNEY
Attorney General

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