Opinion No. 73-54

July 26, 1973

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: Mr. Joe C. Diaz Bernalillo County Attorney Bernalillo County Courthouse Albuquerque, New Mexico

QUESTIONS

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By enacting Laws of 1973, Ch. 257, did the legislature pre-empt the entire field of legislation pertaining to obscenity and pornography as it affects (a) minors and (b) adults, or may a county or municipality enact ordinances on these subjects?

CONCLUSION

(a) The state has pre-empted this field as far as it pertains to **minors,** and no county or municipality may enact ordinances on this subject matter.

(b) The state has not pre-empted this field as far as it pertains to **adults,** and municipalities and Class A and Class H counties (but not Class B and C counties) may enact ordinances on this subject matter.

OPINION

*{*109}* **ANALYSIS**

By title and content, Laws of 1973, Ch. 257, pertains only to obscenity as it affects minors, that is, unmarried persons under the age of 18 years. Section 8 thereof forbids counties and municipalities to enact ordinances in this field, and invalidates any such ordinances [Illegible Word] inacted, providing:

"In order to provide for the uniform application of this act to all minors within this state, it is intended that the sole and only regulation of the sale, distribution or provision of any matter described in Section 2, or admission to, or exhibition of, any performance described in Section 3, shall be under this act, and no municipality, county or other governmental unit within this state shall make any law, ordinance or regulation relating to the sale, distribution or provision of any matter described in Section 2, or admission to any performance described in Section 3, including but not limited to criminal offenses, classification of suitable matter or performance for minors, or licenses or taxes respecting the sale, distribution, exhibition or provision or matter regulated under this act. All such laws, ordinances, regulations, taxes or licenses, whether enacted before or

after this act, shall be or become void, unenforceable and of no effect upon the effective date of this act."

In order to make the meaning of Section 8 clear, it is necessary to refer to Section 2, which pertains to sale, delivery, distribution, display for sale, or providing to a minor (or possessing with intent to do such acts) pictures, photographs, drawing, sculptures, motion pictures, books, pamphlets, magazines, printed matter or sound recordings which fail to meet certain standards, and Section 3, which pertains to exhibiting to minors, motion pictures and shows which fail to meet similar standards. These sections so fully cover the field that it is not conceivable that a county or municipal ordinance could be drafted that would not offend the prohibitions of Section 8, **supra.** However, since this statute pertains only to such materials as they affect minors, it seems clear that the legislature did not intend to pre-empt this field as it pertains to adults. We turn, then, to other statutes granting counties and municipalities the power to enact ordinances.

Section 14-17-14, N.M.S.A., 1953 Comp. (Repl. Vol. 3), grants municipalities the power to enact ordinances to:

"C. Prohibit and suppress . . . the sale, possession or exhibition of obscene or immoral publications, prints, pictures or illustrations."

Counties are divided into four classes; A, B, C, and H, by Sections 15-43-1 and 15-43-3.1, N.M.S.A., 1953 Comp. (Repl. Vol. 3), on the basis of population except for Class H, which is on the basis of area. It is not necessary for present purposes to go into these classifications in detail, for Bernalillo is the only Class A county, Los Alamos is the only Class H county, and all the others fall into Classes B and C, for which the law is the same, as far as ordinance-making power is concerned.

Under Section 15-36-26, N.M.S.A., 1953 Comp. (Repl. Vol. 3),

"Class A counties are granted the same powers to enact ordinances that are granted to municipalities except for those powers that are inconsistent with statutory or constitutional limitations placed on counties."

Identical language is found in Section 15-36-35, N.M.S.A., 1953 Comp. (Repl. Vol. 3) (1971 P.S.), pertaining to Class B and Class C counties, but followed by a proviso limiting this authority to:

"A. Prescribing safety regulations and speed limits for county roads;

B. Prescribing legal dump sites and sites for refuse disposal and providing *{*110}* penalties for dumping of refuse at sites other than those prescribed by the ordinance;

C. Providing for county park and recreation commissions, and prescribing their powers and duties;

D. Providing for the control and use of lands in flood plains; and

E. Providing for the disposition of abandoned vehicles."

As so limited, Class B and C counties clearly do not have any power to enact ordinances pertaining to obscenity. Class H counties, however, under Sections 15-36-13 and 15-36-14, N.M.S.A., 1953 Comp. (Repl. Vol. 3), are given the broadest grant of power. They not only are given the same powers as municipalities by Section 15-36-13, but are authorized by Section 15-36-14 to make ordinances,

". . . not inconsistent with the laws of the state for carrying into effect or discharging the powers and duties conferred by law and such as shall seem necessary and proper to provide for the safety, preserve the health, promote the prosperity, and improve the morals, order, comfort, and convenience of any H class county and inhabitants thereof."

In enacting Laws of 1973, Ch. 257, the legislature did not amend or repeal any of the other statutes referred to above. Since repeal or amendment by implication is not favored, it must be assumed that the legislature intended for the counties and municipalities to retain any grant of power they have to make ordinances in the obscenity field not inconsistent with the provisions of Section 8 of Ch. 257, **supra.** The validity of separate classifications for minors and adults for purposes of legislative control was explicitly recognized in **Ginsberg v. New York** (1968) 390 U.S. 629, 88 S. Ct. 1274, 20 L. Ed. 2d 195, reh. den. 391 U.S. 971, 88 S. Ct. 2029, 20 L. Ed. 2d 887, which held that minors had a more restricted right than that assured to adults to judge and determine themselves what sex material they may read or see.

Whether the counties and municipalities will find it desirable or feasible to exercise their powers to enact ordinances pertaining to obscenity as it affects adults is of course beyond the scope of this opinion. The criteria to be employed in such ordinances would of necessity have to differ from those for minors.

By: Attorney General