STATE OF KANSAS

Office of the Attorney General

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

Curt T. Schneider
Attorney General

June 7, 1976

ATTORNEY GENERAL OPINION NO. 76- 165

Ms. Ernestine Gilliland
Kansas State Librarian
Kansas State Library
535 Kansas Avenue
Topeka, Kansas 66603

Re: Crimes--Obscenity--Definition

Synopsis: The definition of obscenity found in 1976 Senate Bill No. 327 fully complies with the most recent definitive description thereof by the United States Supreme Court, in *Miller v. California*, 413 U.S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973). Moreover, section 2(2)(b) is not unconstitutionally restrictive by virtue of its omission to include public and private libraries.

* * *

Dear Ms. Gilliland:

You inquire concerning the constitutionality of 1976 Senate Bill No. 327, an act relating to the crime of promoting obscenity and promoting obscenity to minors. The questions which you enclose have been raised initially by Mr. Duane F. Johnson, director of the South Central Kansas Library System.

Section 1(2)(a) of the bill amends the definition of obscenity presently found at K.S.A. 21-4301, to provide as follows:

> "Any material or performance is 'obscene' if the average person applying contemporary community standards would find that such material or performance, taken as a whole, appeals to the prurient interest; that the material or

> performance has patently offensive representations or descriptions of ultimate sexual acts, normal or perverted; and that the material or performance, taken as a whole, lacks serious literary, educational, artistic, political or scientific value."

This definition is precisely that which was approved by the United States Supreme Court in *Miller v. California*, 413 U.S. 15, 37 L. Ed. 2d 419, 93 S. Ct. 2607 (1973). Clearly, the Kansas statutory definition conforms with that approved most recently by the United States Supreme Court, and is not unconstitutionally vague or defective in any other fashion.

Secondly, it is objected that a defense made available to public, private or parochial schools, colleges and universities was not made available to libraries, public and private. Section 2(2)(b) states thus:

> "[I]t shall be an affirmative defense to any prosecution under this section that:
>
> * * *
>
> (b) The allegedly obscene material was purchased, leased or otherwise acquired by a public, private or parochial school, college or university, and that such material was either sold, leased, distributed or disseminated by a teacher, instructor, professor or other faculty member or administrator of such school as part of or incident to an approved course or program of instruction at such school."

It is not clear what legal objection is raised on this point. It may be argued, presumably, that libraries are denied equal protection of the law on the ground that they are denied the benefit of this defense. However, it is clear that the legislature is entitled to make reasonable classifications in the enactment of legislation designed for the protection of public health, morals and welfare. A public or private library is a demonstrably different institution, in many important respects, from public, private or parochial schools, colleges and universities. I cannot conclude purely as a matter of law that the classification drawn by the legislature

in this instance is so patently arbitrary or without foundation so as to constitute a denial of equal protection of the laws.

Accordingly, I cannot but conclude that the definition of obscenity set forth in 1976 Senate Bill 327 complies fully with the most recent definitive statement by the United States Supreme Court, and secondly, that the defense set forth in K.S.A. 21-4301a is not unconstitutionally restrictive by virtue of its omission to include public and private libraries.

Yours very truly,

Curt Schneider

CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj