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ATTORNEY GENERAL OPINION NO. 89- 97

The Honorable Alfred Ramirez
State Representative, Fortieth District
913 Sheidley
Bonner Springs, Kansas 66012

Re: Crimes and Punishments--Kansas Criminal Code;
Crimes Against the Public Morals--Promotion to
Minors of Obscenity Harmful to Minors;
Constitutionality of a Ban on Profane or Obscene
Bumper Stickers or T-Shirts

Synopsis: Obscene bumper stickers or t-shirts are governed by
K.S.A. 21-4301c only if they are displayed by a
person having custody, control or supervision of
any commercial enterprise and only if they meet the
definitional requirements of that statute. A bill
prohibiting public display of profane bumper
stickers and t-shirts entirely would encounter some
constitutional problems. A bill limiting obscene
bumper stickers and t-shirts is more likely to fall
into the parameters of speech that can be regulated
under the Constitution, although courts may see fit
to place additional requirements on restricted
speech. Cited herein: K.S.A. 21-4301c.

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Dear Representative Ramirez:

As State Representative for the Fortieth District, you request
our opinion regarding the application of K.S.A. 21-4301c
governing promotion to minors of obscenity harmful to minors.
Specifically, you want to know whether obscene or profane

bumper stickers and t-shirts fall under the statute. You also request our opinion as to the constitutionality of a bill restricting the display of obscene or profane bumper stickers and t-shirts.

K.S.A. 21-4301c provides that:

"(a) No person having custody, ~~control~~ or supervision of any commercial establishment shall knowingly:

"(1) Display any material which is harmful to minors in such a way that minors, as a part of the invited general public, will be exposed to view such material or device."

This statute would not apply to the public display of obscene or profane bumper stickers on motor vehicles or to the public wearing of obscene or profane t-shirts because the statute only applies to those in "custody, control or supervision of any commercial establishment," and does not apply to the general public.

Regarding commercial enterprises, profane or obscene t-shirts and bumper stickers are governed by K.S.A. 21-4301c only if they qualify as "material" under the statute. Section (d)(3) provides:

"'Material' means any book magazine, newspaper, pamphlet, poster, print, picture, figure, image, description, motion picture film, record, recording tape or video tape."

A bumper sticker or t-shirt message could qualify as a print, figure, image or description and could potentially be considered "material".

In addition, t-shirts and bumper stickers are governed by the statute only if they are "harmful to minors". K.S.A. 21-4301c(d)(2) provides:

"'Harmful to minors' means that quality of any description, exhibition, presentation or representation, in whatever form, of nudity, sexual conduct, sexual excitement or sadomasochistic abuse when the material

or performance, taken as a whole or, with respect to a prosecution for an act described by subsection (a)(1), that portion of the material that was actually exposed to the view of minors, has the following characteristics:

"(A) The average adult person applying contemporary community standards would find that the material or performance has a predominant tendency to appeal to a prurient interest in sex to minors.

"(B) The average adult person applying contemporary community standards would find that the material or performance depicts or describes nudity, sexual conduct, sexual excitement or sadomasochistic abuse in a manner that is patently offensive to prevailing standards in the adult community with respect to what is suitable for minors; and

"(C) a responsible person would find that the material or performance lacks serious literary, scientific, educational, artistic or political value for minors."

To fall under this statute, a t-shirt or bumper sticker would have to depict nudity, sexual conduct, sexual excitement or sadomasochistic abuse.

Generally, the U.S. Supreme Court has been supportive of statutes regulating material that is harmful to minors. "To sustain state power to exclude material defined as obscenity . . . requires only that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors." Ginsberg v. New York, 390 U.S. 629, 88 S.Ct. 1274, 20 L.Ed.2d 195 (1968).

A bill banning the public from wearing profane t-shirts or displaying profane bumper stickers may be unconstitutional. The Supreme Court in 1942 held that "[t]here are certain well-defined and narrowly limited classes of speech, the presentation and punishment of which have never been thought to raise any constitutional problem. These include the leud and obscene [and] the profane." Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942).

Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). However, in 1971 the Court more specifically held that vulgar speech cannot be regulated unless it is obscene, it qualifies as "fighting words", or it is an unwelcome idea that intrudes into the privacy of the home. Cohen v. California, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971). The court held that the State cannot "make the simple public display here involved of this single four-letter expletive a criminal offense." The Court in Cohen held that a jacket bearing the words "Fuck the Draft" was not obscene. "Whatever else may be necessary to give rise to the States' broader power to prohibit obscene expression, such expression must be, in some significant way, erotic." Cohen, 403 U.S. at 20. The court reasoned that vulgar terms are often used for their emotive force and may be an important element of the message. In addition, regulating the use of certain words risks suppressing ideas or banning unpopular views.

The Florida legislature has passed a law banning obscene bumper stickers. Fla. Stat. §847.011(2) provides:

"Any person who knowingly has in his possession, custody, or control any obscene book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing, paper, card, picture drawing, photograph, motion-picture film, film, any sticker, decal, emblem or other device attached to a motor vehicle containing obscene descriptions, photographs, or depictions, any figure, image, phonograph record, or wire or tape or other recording, or any written, printed or recorded matter of any such character which may or may not require mechanical or other means to be transmitted into auditory, visual, or sensory representations of such character, or any article or instrument for obscene use, or purporting to be for obscene use or purpose, without intent to sell, lend, give away, distribute, transmit, show, transmute, advertise the same, is guilty of a misdemeanor of the first degree. . . ."

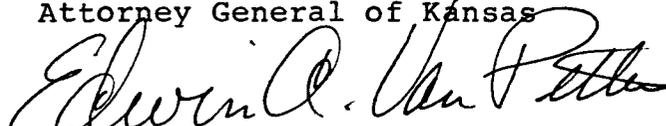
Note that the above statute prohibits obscenity and not profanity.

Other courts have placed additional restrictions on limiting speech. The court in Williams v. District of Columbia, 419 F.2d 638 (D.C. App. 1969) held that a statute prohibiting obscene language in public was invalid unless it required also that the language be spoken in circumstances that threaten a breach of the peace. A breach of the peace would include a situation in which the language creates a substantial risk of provoking violence, or because it is so offensive that it amounts to a nuisance. While the Williams case did not involve language written on shirts or stickers, it does emphasize the court's unwillingness to ban speech for no other reason than because it is profane.

In summary, obscene bumper stickers or t-shirts are governed by K.S.A. 21-4301c only if they are displayed by a person having custody, control or supervision of any commercial enterprise and only if they meet the definitional requirements of that statute. A bill prohibiting public display of profane bumper stickers and t-shirts entirely would encounter some constitutional problems. A bill limiting obscene bumper stickers and t-shirts is more likely to fall into the parameters of speech that can be regulated under the Constitution, although courts may see fit to place additional requirements on restricted speech.

Very truly yours,


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RTS:EVP:jm