Freedom to Read Foundation News

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FTRF Funds Suit in California!

[*The following report is a revised version of the Intellectual Freedom Column by Judith F. Krug and James A. Harvey which appears in the June, 1972 American Libraries. It has been updated and expanded to give Foundation members the most complete and current information available relating to the legal action recently funded by the Foundation.*]

Rumblings in California in early May did not register on the Richter Scale, but—for librarians—may have long-range repercussions. The U.S. District Court for the Central District of California was the scene of legal action funded by the Freedom to Read Foundation, marking the first time—to our knowledge—that librarians have taken the offensive in the courts to challenge censorship and establish in law the principles of the *Library Bill of Rights.*

The occasion was the filing of a class action suit by Everett T. Moore, Albert C. Lake, Chase Dane, Robert Muller, the Rev. Charles J. Dollen, Anita Iceman, the American Library Association, the California Library Association, and the Los Angeles Public Library Staff Association, on behalf of all librarians and library employees in the state of California.

The suit asks for an injunction—a legal bar—against law enforcement agents to prevent prosecution of librarians and library employees under the California Harmful Matter Statute (*California Penal Code,* ss. 313-313.5, *West,* 1969) prohibiting distribution of "harmful matter" to minors. The suit also asks that the court declare the statute, as it applies to library employees, unconstitutional because it deprives them of First Amendment rights and because it is vague and overly broad.

History of Variable Obscenity

Filing the California suit culminates several years of concern, discussion and preparation by individual librarians, the California Library Association, the American Library Association's Intellectual Freedom Committee and Office for Intellectual Freedom, and the Freedom to Read Foundation. Although it was not until 1969 that the *California Penal Code* made it a misdemeanor to distribute or exhibit "harmful matter" to minors, the ALA Intellectual Freedom Committee began studying the question of variable obscenity and the impact of variable obscenity legislation in 1968 when the U.S. Supreme Court, in *New York vs. Ginsberg,* upheld the conviction of Sam Ginsberg for selling girlie magazines to a sixteen-year-old boy. Ginsberg was convicted under New York's obscenity statute—the nation's first variable obscenity law—which established a dual standard, based on age, for judging obscenity.

Mrs. Judith F. Krug
Executive Director
Freedom to Read Foundation

Ginsberg argued that free expression is a constitutional guarantee and that the age of a citizen does not matter. He held that it is unconstitutional for a state to establish a double standard, based on age, for what a person can read or see. Writing the court's majority opinion, Justice William J. Brennan rejected that argument and said the state *has* a legitimate interest in protecting children from influences "which might prevent their growth into free and independent well-developed men and citizens." He also said that legislatures can rationally *assume* that obscene literature is harmful to juveniles and take steps to curtail its availability to them, regardless of whether harm can be proven scientifically.

The question of "scientific proof" deeply concerned the Intellectual Freedom Committee prior to the Supreme Court's *Ginsberg* decision. One result of the 1967 Preconference on Intellectual Freedom and the Teenager, jointly sponsored by the Intellectual Freedom Committee, the American Association of School Librarians, and the Young Adults Services Division, was a recommendation that ALA undertake or fund a definite study to determine if there is a provable cause-and-effect relationship between reading or viewing so-called obscene materials and committing antisocial acts. That recommendation was set aside when President Johnson established the Commission on Obscenity and Pornography to thoroughly explore the entire subject. One of the Commission's major purposes was to establish data to support or refute the thesis that reading or viewing obscene materials is harmful.

The California Statute

Upon receipt of the Supreme Court's decision, the California legislature, among others, chose not to await the Commission's report and proceeded in 1968 to consider legislation similar to the New York State statute under which Sam Ginsberg was convicted. The California Library Association opposed the proposed legislation, as it had in previous sessions, and urged the State Assembly to consider no amendments to the obscenity statute until the Commission on Obscenity and Pornography *Report* had been completed, filed and evaluated. In 1969 the Assembly adopted variable obscenity amendments which took effect in November of that year.

The 1969 amendments make it a misdemeanor to distribute or exhibit "harmful matter" to a minor. "Harmful matter" is defined as:

> Matter, taken as a whole, the predominant appeal of which to the average person, applying contemporary standards, is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion; and is matter which taken as a whole goes substantially beyond customary limits of candor in description or representation of such matters; and is matter which taken as a whole is utterly without redeeming social importance for minors.

A continuing review of obscenity legislation by the Office for Intellectual Freedom confirmed that several other states were considering, or had approved, similar definitions, using criteria established by the Supreme Court in the 1957 *Roth vs. United States* decision and the *Ginsberg* ruling. At the present time, thirty-nine states have variable obscenity statutes. Only eleven of these statutes specifically exempt libraries from prosecution.

Mr. Keith Doms
President
American Library Association

While all such legislation is, or should be of concern to librarians committed to the principles of intellectual freedom, the California statute is particularly repugnant because of the severe penalties incurred for conviction and because it provides no exemption for libraries. Penalties under the California statute are up to $2,000.00 fines and/or up to one year in prison for the first offense. The second offense becomes a felony and carries penalities of up to $5,000.00 fines and/or up to five years' imprisonment. And—each separate piece of material which is deemed "harmful" constitutes a separate offense.

Librarians and libraries were exempted in early drafts of the California bill, but the exemption was deleted in the final draft. Instead, Section 313.3 states, "It shall be a defense in any prosecution for a violation of this chapter that the act charged was committed in aid of legitimate scientific or educational purposes." In some cases, this section may protect librarians from being convicted of distribution of "harmful matter." But it certainly provides no guarantee that librarians can avoid prosecution. Indeed, the deletion of an exemption for librarians and libraries could be interpreted as an indication of the legislature's intent to *include* this class under the act's provisions.

Furthermore, comments made by a California law enforcement agent indicate that libraries *are* in jeopardy under the statute. A few days after the revised statute took effect in November, 1969, the Los Angeles Public Library Commission spoke with Deputy City Attorney Brian Crahan about the implications of the revisions for libraries. In response to questions from the Commissioners, Crahan said, "If, because the law is new, you have any doubts as to whether any book or perodical is so-called harmful matter, you certainly have the prerogative as a Commissioner to protect yourself from being in violation of the law and to *restrict this matter from minors.*" (Our emphasis.)

Mr. Richard D. Johnson
President
California Library Association

Mr. Everett T. Moore
Assistant Librarian
University of California at Los Angeles

On the specific question of the librarian's potential for prosecution, Crahan said, " Technically, under the law, if he doesn't use reasonable care, he has an implied intent to violate this law. I can't really say because we don't have a case yet . . . This is a brand new law affecting minors as a class. There have been no cases on it, no trials. There will be. At the present time, *it is probably better to err on the side of caution rather than lack of caution.*" (Our emphasis.)

Crahan made another interesting point for librarians regarding issuance of "harmful matter" to minors even with parental consent. He said, ". . . there is no protection for any of the library staff or any departmental staff for issuing harmful books to a minor with his parent's consent. There is no provision that the parent's consent relieves you of criminal responsibility . . . the fact that an adult gives his consent does not give you any defense whatsoever. This consent from adults is meaningless. If they want to come and get the book and take it home and show it to their children, that's their problem. As far as you're concerned, according to the law, you should not give out harmful matter to a minor. The fact that a person is a bona fide and natural parent does not relieve the individual librarian from the responsibility."

Foundation Involvement

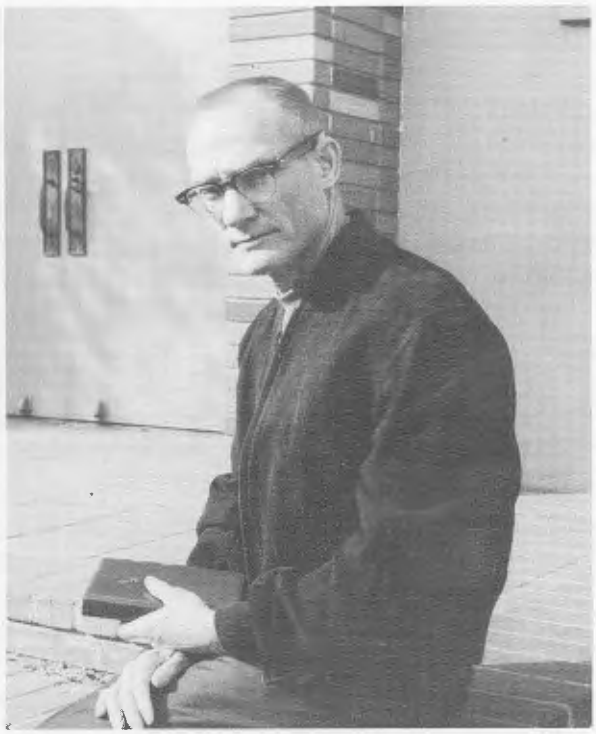
Aware of provisions of the California law, Crahan's comments, and similar laws being enacted in other states, the Freedom to Read Foundation (established in 1969), discussed the entire question of variable obscenity legislation and libraries at its June 1970 meeting in Detroit. Discussion of the matter was considered to be in accordance with the Foundation's purpose "to support the right of libraries to include in their collections and to make available to the public any creative work which they may legally acquire." The Board concluded that statutes such as California's are significantly dangerous to individuals and institutions, for they permit, and even encourage, criminal prosecution of non-commercial interests which have neither the incentive nor the resources to defend the propriety of individual publications. Furthermore, the Board agreed that librarians must not be vulnerable to criminal prosecution for purchasing and disseminating works which have not previously been held illegal through adversary hearings. Such vulnerability would ultimately require every librarian to reject the primary philosophical basis of his role in society—the provision of information and materials to all who need or want them—and to become an arm of law enforcement agencies. Being caught between his professional obligations and the demands of the law, the librarian either knowingly becomes a censor or unknowingly breaks the law. The Board believed this choice to be inimical to the concept of intellectual freedom and a derogation of the professional responsibilities of librarians. The Board also considered the indirect effect of the California statute upon the general public. The statute not only subjects librarians to prosecution but—in the long run—may restrict the volume and range of library materials selected for the entire community. It stands to reason that many libraries—rather than institute cumbersome circulation practices—will simply opt for selecting "safe" materials, avoiding anything that might be deemed "harmful for minors." To formalize its intent to challenge the constitutionality of such laws, the Board adopted the following resolution:

Miss Ann Martin
President
Los Angeles Public Library Staff Association
(Photo courtesy of Los Angeles Public Library)

> WHEREAS, a primary purpose of the Foundation is to support the right of libraries to include in their collections and to make available to the public any literary work which they may legally acquire; and
>
> WHEREAS, this right has been endangered by the enactment of criminal statutes which would subject librarians to criminal prosecution for distributing works which are deemed harmful to minors; and
>
> WHEREAS, such statutes effectively require librarians to become censors in derogation of their responsibilities to the public and in violation of their intellectual freedom; and
>
> WHEREAS, such statutes represent an unconscionable and unjustified deprivation of and interference with the civil rights of librarians;
>
> NOW, THEREFORE, BE IT RESOLVED, that the Foundation undertake a review of all state obscenity statutes for the purpose of identifying those which would deprive librarians of their civil rights;
>
> FURTHER RESOLVED, that when such statutes have been identified, the Foundation sponsor appropriate legal action to restrain or enjoin the enforcement of such statutes against libraries and librarians;
>
> FURTHER RESOLVED, that the officers of the Foundation be and they hereby are authorized to take all action necessary and proper to implement the foregoing Resolutions;
>
> FURTHER RESOLVED, that the Freedom to Read Foundation invites the American Library Association to join as co-plaintiff in this action.

Throughout 1971, the Foundation pursued its study of obscenity legislation and began preparations for challenging such laws, particularly variable obscenity legislation.

In January, 1972, another event underscored the urgency of taking action. Responding to concerns expressed by California librarians, as outlined in the article "Harm—In the Mind or in the Matter?" by Sara Goerke and Betty Gay in the April/July, 1971 *California Librarian,* the California State Librarian, on November 1, 1971 requested an opinion from Attorney General Evelle J. Younger concerning the statute's application to libraries. Four questions were asked of the Attorney General:



Mr. Chase Dane
Director of Libraries and Instructional Materials
Santa Monica Unified School District

1. ". . . would the term 'distribute' as used in the harmful Matter Statute be interpreted to include the 'lending' of a work in a library collection to a minor?"
2. ". . . if the term 'distribute' as used . . . would be so interpreted and assuming that a librarian allowed a minor to check out a book or periodical which is deemed to constitute 'harmful matter' within the meaning of the . . . statute, who among the following could be prosecuted under that statute:
   a) the library employee who allowed the minor to check out the work
   b) the library employee who authorized the work to be included in the library collection
   c) the county librarian who has immediate authority (and responsibility) for the conduct of the library
   d) the members of the County Board of Supervisors who have ultimate authority (and responsibility) for the conduct of the library?"
3. ". . . if works containing 'harmful matter' are available on open shelves, does the fact that minors have access to such shelves constitute a distribution of such 'harmful matter' to minors within the meaning of the statute, and if so who could be prosecuted . . .?"
4. ". . . assuming that the librarian does not deem himself competent to determine whether or not the works in the library collection contain 'harmful matter,' within the meaning of the . . . statute, what legal authority is empowered to make such determination for the librarian?"

On January 21, 1972, Alan Hager, California Deputy Attorney General, replied to the State Librarian's questions. He said that ". . . the distribution and exhibition of materials proscribed by the Harmful Matter Statute encompasses the checking out to a minor of a work in a library collection, but would not encompass the availability of such books on open shelves in a library, unless a minor took the book from the shelf and read it in the library."

To the question of who could be prosecuted, Hager replied, "The only members of the library who would be liable for prosecution would be *the employee who checked out the work to a minor knowing that it was 'harmful matter'* within the meaning of the statute and the employee who knowingly permitted a minor, while in the library, to read a book he knew to be 'harmful matter.' " (Our emphasis.)

In Hager's opinion, ". . . any librarian or library employee who authorized any work deemed to be 'harmful matter' to be included in the library collection could not be prosecuted under the Harmful Matter Statute. Neither could a county librarian . . . nor members of county boards of supervisors . . . be so prosecuted."

Clarifying his previous statements, Hager said, "If a library employee knew that a minor was reading a work deemed 'harmful matter' under *Penal Code* Section 313 (a), it would be his or her duty to refuse to let the minor read it."

The most dangerous part of Hager's response dealt with the problems of what constitutes harmful matter. He concludes that "determining what matter would or would not be harmful to minors is not easy to do. In obscenity cases, the United States Supreme Court has assumed the role of the ultimate arbiter of what is and what is not obscene, and the Court itself cannot agree in making a determination." He cautions that "this is not to say that legal counsel, for example, cannot reach

Miss Anita Iceman
Coordinator of Young Adult Services
Alameda County Library

a tentative conclusion. However, *often it is merely an exercise in intelligent guesswork."* To allay librarians' fears, he added, *"Local district attorneys* are vested with considerable discretion in determining what prosecutions to initiate. They are not likely to prosecute librarians or library employees who conscientiously strive to serve the reading public. If a local district attorney believes that a librarian or library employee has been distributing 'harmful matter' to minors, he is most apt to advise him to cease than to immediately initiate a criminal prosecution." (Our emphasis.)

Hager's opinion made it imperative that librarians, for a change, take the offensive against repressive legislation designed to curtail public access to library materials. His comments were unambiguous. Librarians are subject to prosecution under the statute. Not only must they screen all materials accessible to minors, but —if the local district attorney decides certain materials are obscene—they must also restrict those in order to avoid prosecution. The only safe course would be to refuse to collect any materials not "safe" for minors, or check identification cards at the entrance to the adult book section and at the circulation desk. Even parental consent is no defense.

Finding the threat of *California Penal Code* Section 313-313.5 to be intolerable for librarians and the public, the Freedom to Read Foundation undertook to support a suit filed by the plaintiffs named above on May 5. Stating that "the efforts dictated by the statute would necessarily have a chilling effect on First Amendment rights and on the free distribution of even constitutionally protected writings and other materials, as librarians are not qualified by training or experience to act as accurate public censors," the suit points out that the statute establishes an unconstitutional prior restraint.

At present, the *Library Bill of Rights* is a statement of professional philosophy—an ethic—albeit a beautifully worded ethic. Still, it is only a piece of paper with no legal standing whatsoever. If successful, the California law suit will, for the first time, establish a precedent lending the weight of judicial opinion to Article V of the *Library Bill of Rights* which states that, "The rights of an individual to the use of a library should not be denied or abridged because of his age."

Father Charles J. Dollen
Library Director
University of San Diego

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