Freedom to Read Foundation News

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"Harmful Matter" Suit Goes to California Courts

At its January 19 meeting the Foundation Board of Trustees voted to "follow the direction of the three-judge federal panel established to review the issues raised in *Moore* v. *Younger*." The suit will be taken to California Superior Court "for a definitive construction of the applicability of the 'harmful matter' statute to libraries and librarians, and for a declaration of the unconstitutionality of the statute on its face and as applied to libraries and librarians." The case will be pursued through appeals as necessary.

This action of the Trustees came as the result of a decision handed down November 29. That decision, issued by a federal panel composed of Ninth Circuit Judge Stanley N. Barnes and District Court Judges Irving Hill and Harry Pregerson, was to abstain on the grounds that "the challenged statute is reasonably susceptible to a construction by state courts that would, in effect, immunize librarians from liability for distributing so-called 'harmful matter' to minors, if the distribution occurs in the course and scope of their duties as librarians." At issue is a provision of the California law that "it shall be a defense in any prosecution for violation of this chapter that the act charged was committed in aid of legitimate scientific or educational purposes."

Because federal courts cannot authoritatively construe state statutes, they must abstain whenever a federal suit requires an interpretation of a state statute before the issues can be resolved. Although abstention judgments of three-judge panels can be appealed, on advice of FTRF Counsel William D. North the Board of Trustees decided that it would be better to go to the state courts where substantive, as opposed to procedural, questions can be raised.

Because the federal judges also voted to retain jurisdiction in *Moore* v. *Younger,* any adverse judgment from the California courts will no doubt result in the Foundation's returning to U.S. District Court. The court's decision to retain jurisdiction was an implicit recognition of the validity of the constitutional issues raised in the original complaint, filed May 1972.

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Court Takes Another Look

Foundation Files Briefs on "Obscenity"

It has been called the "intractable problem." Justice Harlan said it has "produced a variety of views among the members of the [Supreme Court] unmatched in any other course of constitutional adjudication." Justice Black observed that "no person, not even the most learned judge much less a layman, is capable of knowing in advance" what the Supreme Court will decide about it. After having ventured that he knows it when he sees it, Justice Stewart conceded that it may be "indefinable." "It," of course, is obscenity.

The *Roth-Memoirs* test represented the Warren Court's answer to the problem. Unsatisfied, the Burger Court promulgated the new *Miller* test. Still, the problem persists. And recognition of its persistence came twice in December and January when the Supreme Court accepted for review cases from Georgia and the U.S. Court of Appeals for the Ninth Circuit.

The Georgia case (*Jenkins* v. *Georgia*) came to the U.S. Supreme Court on appeal from Georgia's highest bench. A majority of the state court ruled that Mike Nichols' *Carnal Knowledge* is obscene and upheld the conviction of an Albany, Georgia movie exhibitor, Billy Jenkins. Among the issues presented by attorneys for Jenkins is the question of whether it is constitutionally permissible to employ "local," as opposed to statewide, contemporary community standards in evaluating allegedly obscene material.

In an *amicus* brief filed January 24 in the name of the American Library Association, the Foundation argues that a test which permits justices of a state supreme court to find *Carnal Knowledge* obscene is too vague. Quoting a 1972 ruling of the Supreme Court (*Grayned* v. *City of Rockford*), the brief notes that "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them."

The Foundation brief in *Jenkins* recommends a remedy which would help eliminate vagueness, at least insofar as criminal cases are concerned. It is argued that no criminal prosecutions should be permitted un-

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FTRF Report to the ALA Council
January 1974

In accordance with a request from the Council of the American Library Association, the President of the Freedom to Read Foundation reports to the Council at each ALA Annual Conference and Midwinter Meeting. The following report was submitted by President Alex P. Allain at the 1974 Midwinter Meeting in Chicago. It has been edited for publication here.

There no doubt exists somewhere a table of prohibitions which counsels us against quoting our own words. Nevertheless, with your indulgence, I would like to repeat some remarks I made at Midwinter one year ago. When I last stood before you, I said in my report:

> There are at present eight cases of major importance to be decided by the Supreme Court during this term. I should point out that, if our resources had been greater during the last six months, we would have been able to file *amicus* briefs in *Miller* v. *United States* and *Kaplan* v. *California*. In *Miller,* our interest lay in establishing that community standards on obscenity must be national standards. In *Kaplan,* we wanted to support the contention that the printed word enjoys unqualified protection under the First Amendment. . . .

One year ago few persons were familiar with the First Amendment suits of *Kaplan* and *Miller*. Today you are all acquainted, I trust, with the consequences of these cases, for it was the *Miller* and *Kaplan* cases—decided by the Supreme Court on June 21—that established new First Amendment guidelines for all of us.

It is not for me to say now what might have been. I would simply say that, if there is a lesson to be drawn from our immediate history, it is the lesson of timely action. Timely action on the part of the Foundation of course requires vigorous support from the library community.

At least in the area of support, I am happy to say, there are encouraging signs. Since our meeting in Las Vegas, membership in the Foundation has nearly doubled. Although our membership is not yet large, our new members will afford the Foundation greater latitude in undertaking action on behalf of the freedom to read. So, too, will the type of support which this Council wholeheartedly extended to the Foundation at the Las Vegas meeting. To our members, old and new, and to this Council, I want to express the deep gratitude of the Foundation Trustees.

The June 26, 1973 resolution of the Council mandated "that the American Library Association file a petition to the U.S. Supreme Court for a rehearing of its five decisions . . . involving the First Amendment, and that the Freedom to Read Foundation, the legal defense arm of the American Library Association's intellectual freedom program, conduct the litigation on behalf of the Association." That resolution enabled the Foundation to file a lengthy brief with the Supreme Court. Filed in support of the petition for rehearing of bookseller Murray Kaplan, the brief asked the Court for clarification of its new guidelines. We argued that the right to read is a fundamental *personal* right "implicit in the concept of ordered liberty," and that this right may be exercised in libraries as well as in the home. We also contended that it is a denial of due process of law to subject a disseminator of expressive works to criminal prosecution for distributing them prior to a judicial determination of their status. [On October 9, 1973, the Supreme Court denied the *Kaplan* petition for rehearing.]

The Foundation also went before the Supreme Court in a case involving two New York booksellers who were convicted under a state statute that creates a presumption of knowledge. Under the New York statute, a prosecutor need only prove that unprotected works were disseminated; it is not necessary for the prosecutor to prove in addition that the disseminator had knowledge of the content and character of the material he disseminated. The Court unfortunately denied the appeal of the New York booksellers—in the laconic verdict of the Court—"for want of a substantial federal question."

Issues Before the Supreme Court

However, the problem of the new First Amendment guidelines remains before the Supreme Court. Last July, exactly eleven days after the June 21 rulings of the U.S. Supreme Court, the Supreme Court of Georgia upheld the conviction of a movie exhibitor and ruled that Mike Nichols' film *Carnal Knowledge* is obscene. At that time, one of the justices of the state bench filed a noteworthy dissent. Justice Gunter said:

> My experience with this one case teaches me that "the alarm of repression" was validly sounded; it also teaches me that the *Miller* majority's assumption, that courts can distinguish commerce in ideas . . . from commercial exploitation of obscene material . . . is a too optimistic assumption. The instant case is proof that is in the pudding; material is pornographic and unprotected in the subjective mind and senses of one judge; and that same material has serious literary or artistic value in the subjective mind and senses of another judge. . . .

On December 10, the U.S. Supreme Court agreed to review the decision of the Georgia court. Shortly thereafter the Foundation Trustees voted to file on be-

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FTRF Deplores Censorship by Ohio School Board

In 1972 the Strongsville City School District Board of Education (Cuyahoga County, Ohio) banned from local schools novels by Joseph Heller and Kurt Vonnegut. Shortly thereafter, the American Civil Liberties Union of Ohio filed suit in federal district court on behalf of several students. The Complaint alleged that the conduct of the school board "resulted in an unconstitutional censorship of classroom materials . . . and denied the plaintiffs their right to academic-learning freedom." At the request of the ACLU of Ohio, the Board of Trustees of the Foundation examined the case (Minarcini v. Strongsville City School District) *and issued the following statement.*

The Freedom to Read Foundation views with extreme concern the action of the Board of Education in prohibiting the use of such works as *Catch-22, God Bless You, Mr. Rosewater,* and *Cat's Cradle* as part of the high school literature curriculum after such works were recommended by responsible professional educators. In particular, the Freedom to Read Foundation is disturbed by the action of the Board of Education in banning these works from the school library, thereby limiting access to them, not only as part of the curriculum, but also as available literary resources for students. In the opinion of the Freedom to Read Foundation, the action of the Board of Education in banning these works from the school without a hearing on their merits or the introduction of evidence concerning their quality is an act of censorship and, hence, a violation of the right to read protected by the First Amendment.

The Freedom to Read Foundation totally disagrees with the following statement set forth in Defendant Arthur L. Cain's Answer to the Complaint: ". . . teachers as a group or individual [sic] do not have the skill, knowledge, judgment, common sense, or responsibility to make such selection for and on behalf of the students or the public which employs them. . . ." The Freedom to Read Foundation, while not denying the proper concern and responsibility of the Board of Education with regard to the conduct of schools and content of curricula, cannot in its considered judgment accept the implications of the further statement of Arthur L. Cain, that the recommendation regarding library and curricular materials made in the fulfillment of their professional responsibilities by teachers and school librarians amounts to an exercise of "prejudices, bias and lack of knowledge and understanding."

In similar school-related cases brought to its attention, the Freedom to Read Foundation has supported the following procedures dealing with the selection of learning materials and resources:

1. That a policy statement be prepared and approved by the board of education to govern the selection of curricular and library materials; that criteria, procedures, and responsibilities concerning selection be defined in as much detail as is appropriate and feasible; and that the goals to be fulfilled by the selection of materials for the curriculum and the library be fully detailed.

2. That this policy and all other appropriate policies of the board of education be made available to all concerned persons, including professional staff, students, and parents of students.

3. That the policy governing selection of materials be widely disseminated throughout the community and discussed in appropriate forums by professional staff members, parents, and students so that all will understand how and why materials are selected.

4. That a committee of board members and professional staff members meet regularly to discuss matters of mutual concern so that misunderstandings and distrust can be avoided.

5. That procedures be established to assure the orderly review of complaints about curricular and library materials, and that no materials be proscribed or removed until there has been a competent and fair review; and that review committees include not only staff members but also students and parents.

Since this case is presently at the trial court level, the issues of law have not been decided. When these issues have been decided the Freedom to Read Foundation will review the trial court's decision and take such action as is appropriate, in its view, to vindicate the freedom to read. This statement was developed by the Board of Trustees of the Freedom to Read Foundation at its meeting in Chicago on January 19, 1974 and was unanimously approved.

FTRF Membership Application to Appear on ALA Form

Acting on a resolution endorsed by the Foundation Board of Trustees, the Council of the American Library Association approved a directive "that the application for membership in the Freedom to Read Foundation be made a part of the ALA membership form, beginning with the form for the 1975 membership year."

The Council resolution, adopted January 22, notes that the Freedom to Read Foundation was established to support the ALA's program of intellectual freedom, and that the Foundation "requires continuous and expanded participation from members of the ALA" in order to implement its program in defense of the freedom to read.

Understanding the Courts

Many of the efforts of the Foundation involve the courts. In order to assist members in understanding some of the necessarily complex court actions reported in FTRF News, *the following excerpt from a pamphlet of the League of Women Voters is reprinted here.*

The court system in the U.S. is divided into federal and nonfederal courts. Federal courts consist of ninety-four district courts, eleven circuit courts of appeal, and the Supreme Court. The jurisdiction of federal courts is restricted by Congress and the Constitution, and only certain types of suits can be brought there. Each state determines the number and type of courts that will hear matters of local concern, and state courts usually range from municipal courts through appellate courts to the state supreme court. Appeal can be taken from the highest state court to the U.S. Supreme Court in some suits.

Suits are usually begun at the lowest level of either the state or federal court, with appeal made through the courts of appeal to the state supreme court or the United States Supreme Court. Some suits can be brought in either state or federal court, and the person bringing the suit can choose the forum.

All courts have technical rules of procedure that govern the manner and form in which a matter must be presented to it. The party initiating a lawsuit is the plaintiff, and the party being sued is the defendant. Individuals, corporations, unincorporated associations, and government officials can sue and be sued. There can be several plaintiffs and defendants, or one plaintiff or defendant can sue or be sued as the representative of a large number of similar persons, all of whom will be bound by the court decision. (The latter is known as a class action.) In order to be a party to a suit, an organization must show that its members have some special interest in the subject matter of the suit.

Local rules govern how a suit is begun, but usually the plaintiff files a complaint which sets forth the reasons why he is in court and what he wants the court to do. If the defendant wishes to contest the suit, he must file an answer to the complaint within a specified period of time, in which he sets forth why the relief requested by the plaintiff should not be granted.

Lawsuits are given a number determined by the date of filing, and cases are usually heard by the court in numerical order. However, if the plaintiff can show that for some reason the case cannot wait until the court hears it in the normal order, the court will hear it immediately and render a preliminary decision which will be in effect until the case is heard in its normal order. A lawsuit can also be expedited if one party can convince the court that no material facts are in dispute, and the court can base its decision on arguments of law which the parties submit to it in writing without oral argument.

When the court hears the case, both parties can offer evidence to present their sides of the case. In order for the court to accept evidence as proof of a fact, the evidence must conform to technical rules concerning admissibility.

When the court issues a final decision in a suit, the party against whom the decision is rendered can appeal the decision to a higher court (known as an appellate court). Appellate courts do not conduct new trials, and usually no new evidence can be presented to them. They merely hear legal arguments on why the lower court decision should be reversed.

Litigation is a viable, dynamic process for making the nation's laws live and function. It belongs in a repertoire of strategies just as much as lobbying in legislative campaigns or monitoring administration of laws, and in some cases it may be the only strategy to get results. The courts exist, like other branches of government, to serve the people; but unlike the rest of government, courts can't initiate corrective efforts. It is the responsibility of concerned organizations like yours to recognize that litigation is a full-fledged tool for change and to go to the courts in the public interest to achieve that change.

The Federal Court System

U.S. Supreme Court
(Original and Appellate Jurisdiction)

U.S. Circuit Court of Appeals
(Appellate Jurisdiction)

U.S. District Court
(Original Jurisdiction)

A State Court System

(This arrangement will of necessity vary from state to state, but is intended to give some basic idea of a state court system.)

State Supreme Court
(Appellate Jurisdiction)

State Court of Appeals
(Appellate Jurisdiction)

Intermediate Courts
(Original and Appellate Jurisdiction)

Municipal Courts
(Original Jurisdiction; Suit Starts Here)

Criminal and Civil
(Includes Small Claims, Domestic Relations, Landlord and Tenant)

"Understanding the Courts" appeared originally in League of Women Voters publication no. 244, *Going to Court in the Public Interest.* Used with permission.

Report *(from p. 2)*

half of the ALA an *amicus* brief in the case. Through this brief, to be filed with the Court in the very near future, we again raise a number of substantive issues concerning the new guidelines.

At its meeting on Saturday, January 19, the Foundation Board of Trustees reviewed a number of other matters of concern. You will want to know that we voted to file an *amicus* brief with the U.S. Supreme Court in the case of *Hamling* v. *United States*. This case raises so many extremely important procedural questions in the area of the First Amendment that the Trustees felt compelled to take action.

In another area, we would gladly have authorized action—if resources had permitted. There are today 78,217 units of local government in the United States, and it would be highly desirable to challenge their authority to adopt, for example, nuisance statutes that include communicative materials within their scope. The issue of such nuisance statutes is now pending appeal in the federal courts as the result of a Louisiana Supreme Court ruling that they are unconstitutional because of blatant prior restraint.

Moore v. Younger

In addition to these matters, the Trustees also considered the Foundation's next step in its suit challenging California's "harmful matter" statute. On November 29, the three-judge federal panel established to hear the case voted to abstain and to retain jurisdiction. By retaining jurisdiction, the federal judges recognized the validity of the constitutional issues raised in the suit. By abstaining, the judges held that they cannot decide the question of the statute's constitutionality until it has been construed by the state appellate courts. The Foundation will of course pursue this case vigorously in the state courts.

As you now know, litigation on behalf of the freedom to read is both costly and time-consuming. Progress comes in small steps, and often must be measured in the large context of the many social pressures on the judicial and legislative processes that make our laws. Nonetheless, we must never abandon persistent effort. We must continue our challenge to the deplorable sentiments that underlay the June 21 decisions of the Supreme Court.

Speaking of laws that restrict a person's access to plays, movies, and books, Mr. Chief Justice Burger said that "such laws are to protect the weak, the uninformed, the unsuspecting, and the gullible from the exercise of their own volition. . . . [M]odern societies [do not] leave disposal of garbage and sewage up to the individual 'free will,' but impose regulations to protect both public health and the appearance of public places." I submit that the comparison of books and sewage is monstrous, and that there is no constitutional basis for distinguishing gullible citizens from those who are not. Indeed, the Fourteenth Amendment holds that all citizens have *equal* protection under the law.

Can we meet the challenge? I mentioned before that Foundation memberships have increased—since July 1973—from approximately 600 members to nearly 1200 members, including many concerned citizens who are not members of ALA. While heartened by this increase, we are not at all satisfied. By every possible means we will continue our activities to increase participation in the Foundation. During this Midwinter Meeting representatives of the Foundation have scheduled sessions with all ALA division boards in order to become more attuned to their needs and problems, and to cooperate in efforts to reach their members.

In addition, a resolution endorsed by the Foundation Trustees will be brought before this Council. The resolution concerns adding the Foundation membership application to the ALA membership form. Should this resolution be adopted, we are hopeful that every ALA member will take advantage of the opportunity to participate in our program on behalf of the *Library Bill of Rights*. [The resolution was approved by the Council.]

A rising tide, President Kennedy observed, lifts all boats. What the Foundation accomplishes, it accomplishes for all libraries, librarians, and library patrons. Now the Foundation needs the support of all libraries and librarians. Intellectual freedom—freedom of the mind, freedom of access to all points of view—forms the bulwark of library service in the United States, and it is basic to the fulfillment of our obligation to all citizens.

It hardly needs to be said that ours is an age of crises. Perhaps, in the eyes of some, our concern—the freedom to read—is a minor concern. However, I would venture that no free society beset by crises can survive without the unrestricted dissemination of ideas and information. How many Hitlers and Mussolinis have manipulated the fears of their citizens? How many heads of state have shrouded in mystery their unsavory designs?

In this time of crisis, some people may view the ideals of the *Library Bill of Rights* as far too lofty. We of the Foundation do not. I know that you do not. Give us your support.

Respectfully submitted,
ALEX P. ALLAIN
President

End of "Acquiescence"

In an article recently published in the *University of Cincinnati Law Review*, Prof. Robert M. O'Neil remarks that the Foundation-funded suit challenging

California's "harmful matter" statute marks the end of "an era of acquiescence." O'Neil's article ("Libraries, Liberties and the First Amendment") explores the lack of litigation to establish the legal rights of librarians and library patrons.

O'Neil notes that while a constitutional right to read is widely assumed, most case law in the U.S. is applicable only by analogy. Examples cited include the right to hear controversial speakers and the right of prisoners to receive uncensored mail and specified non-legal publications.

After observing that the courts have addressed themselves to the individual's right to privacy and the rights of booksellers, the author concludes that, "if anything, the public library should be *freer* of governmental control and censorship than the private library or bookstore."

Ballots Coming

The annual election to fill vacancies on the Board of Trustees will be held this spring. Ballots will be forwarded in May to members paid for the year 1973-74.

A notice of the nominations submitted by the committee headed by Dr. Richard L. Darling will be sent to all members. Provisions of the Bylaws allow additional nominations by petitions bearing at least twenty-five signatures of paid members.

Elected trustees now serving on the Board are Alex P. Allain (1974), William D. Cunningham (1974), Richard L. Darling (1975), Stanley Fleishman (1974), Evelyn Levy (1975), Everett T. Moore (1974), Eli M. Oboler (1975), Mrs. Carrie C. Robinson (1974), and Jane Wilson (1975).

"Harmful Matter" *(from p. 1)*

The plaintiffs who in the original complaint alleged violation of their First Amendment rights, as well as the rights of library patrons, were Everett T. Moore, Albert C. Lake, Robert E. Muller, Chase Dane, the Rev. Charles J. Dollen, Anita Iceman, the American Library Association, the California Library Association, and the Los Angeles Public Library Staff Association. All of the individual plaintiffs are California librarians. The defendant, Evelle J. Younger, is California Attorney General.

Court *(from p. 1)*

til there has been a judicial determination of obscenity in a civil proceeding. Such a determination that a challenged work is obscene would give everyone notice that subsequent dissemination carries the risk of criminal penalties.

The case accepted from the Ninth Circuit Court, *Hamling* v. *United States*, involves federal statutes that prohibit, among other things, using the U.S. postal service to mail obscene items. Attorney Stanley Fleishman, who will represent Petitioner Hamling before the Supreme Court, has raised a series of important procedural questions, including whether prospective jurors can be questioned about their prejudices and biases concerning sexual matters, and whether persons can be convicted without any proof that they knew the materials in question were in fact legally obscene (the issue of *scienter*).

Because of the increasing significance of procedural questions in the area of obscenity law, the Foundation Board of Trustees voted, at its meeting on January 19, to file an *amicus* brief in *Hamling*. In the *Miller* decision of June 1973, Chief Justice Burger emphasized that "we must continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence and other protective features provide." However, the Court has not addressed itself adequately to questions concerning many of these "safeguards."

Freedom to Read Foundation News is prepared by the staff of the ALA Office for Intellectual Freedom.
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