Freedom to Read Foundation News

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Richard L. Darling, President Judith F. Krug, Executive Director

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'Community Standards' Case to Go to Supreme Court

On the basis of authority granted to them at the 1976 midwinter meeting of the Board of Trustees, the members of the Executive Committee voted in early March to petition the U.S. Supreme Court to overturn the obscenity conviction of Iowan Jerry Lee Smith in an important "community standards" case.

Smith and the Foundation, which supported the former's appeal to the U.S. Court of Appeals for the Eighth Circuit, lost round one at the appellate level when the eighth circuit court affirmed the conviction in an opinion filed February 13.

In upholding Smith's conviction, the appellate court ruled that in federal prosecutions, federal law alone applies, and that federal obscenity law permits jurors to use their "inborn" sense of community standards. Smith, who argued that the explicitly defined standards of the Iowa legislature should obtain in his case, was indicted by a federal grand jury on charges of using the U.S. postal service to send "unsuitable" materials from his Des Moines firm to Iowa addresses used by postal inspectors.

The Foundation, which also filled an *amicus* brief in the name of the American Library Association and the Iowa Library Association in support of Smith, called special attention to the fact that "the Iowa legislature has expressly determined that the 'community standards' in Iowa do not require a prohibition of the distribution of sexually oriented, arguably 'obscene' materials to adults and declared that its determination preempts any such prohibition by a lesser Iowa community."

The state legislature's decision is "binding on the Federal District Court for the Southern District of Iowa and precludes the enforcement of 18 U.S.C. 1461 [a federal obscenity statute] against the appellant," the Foundation argued.

Standards 'Not on Sleeves'

The opinion upholding Smith's conviction was issued by an appeals panel consisting of Associate Supreme Court Justice Tom C. Clark, retired, sitting by designa-

(continued on p. 5)

Moore v. Younger

Appeals Panel Says Librarians Have Relief

In an opinion filed at the end of January, the California Court of Appeal, Second District, declared that the plaintiffs in *Moore* v. *Younger* cannot appeal the judgment *"in their favor"* handed down by Superior Court Judge Robert P. Schifferman. Judge Schifferman's January 1975 ruling exempted California librarians from their state's "harmful matter" law.

"Plaintiffs . . . have achieved all that they could expect as a result of their attack on the statute as librarians: the [lower] court held that it does not apply to them," the appeals panel said. "Their arguments against the [constitutionality of the] statute were advanced solely in behalf of librarians and on this appeal they have no standing to raise possible complaints of others."

In commenting on the acknowledgment of the appeals panel that librarians are exempt from the "harmful matter" statute, President Darling said, "The Foundation appears to have won as broad a victory as possible in the California courts. When it agreed one year ago to appeal the decision of Judge Schifferman, the Board of Trustees was aware that it would be difficult to obtain a review of a basically favorable ruling. Nevertheless, before forgoing further legal action, we will attempt to cement our gains through further negotiation with the attorney general."

President Darling also expressed his pleasure that the Court of Appeal had ordered its opinion published. The fact that Judge Schifferman's decision was not published was one of the elements which entered into the decision of the Board of Trustees to appeal his ruling.

Plaintiffs in the action are Librarians Everett T. Moore, Albert C. Lake, Robert E. Muller, and the Rev. Charles J. Dollen; the Board of Library Commissioners of the City of Los Angeles; the Los Angeles Public Library Staff Association; the California Library Association; and the American Library Association. The defendant is Evelle J. Younger, the state attorney general.

From the Executive Director

Our Achievements in Moore v. Younger

At the American Library Association's Midwinter Meeting in January, President Darling announced that oral argument on our appeal in *Moore* v. *Younger* would be held January 28. When he made that announcement, we knew we could be facing the last step in the Foundation's first major undertaking in the courts.

On January 30, two days after the argument, the California Court of Appeal stated that librarians had achieved all the protection they needed in the 1975 Superior Court ruling which exempted them from California's "harmful matter" law. Hence, the appellate panel declared, librarians do not have standing to ask in addition that the statute be voided as unconstitutional.

As soon as we learned of the ruling, the Executive Committee of the Board and Attorneys William D. North and Tefft W. Smith discussed the question of an appeal to the California Supreme Court. In view of the fact that the favorable ruling from the Superior Court would be vacated under California court rules if the California Supreme Court accepted the appeal, and the fact that the Court of Appeal stated that librarians had achieved all that reasonably could be desired, the Executive Committee tentatively decided that further litigation at this point would not be productive.

Obviously, then, we have arrived at a milestone where we can assess what we have achieved in nearly four years of litigation.

The Accomplishments

1. Although we have not succeeded in our efforts to have California's "harmful matter" law invalidated as unconstitutionally vague and overboard, we have achieved for the plantiffs and all California librarians freedom from threats of prosecution—*criminal* prosecution for failure to implement the broad censorship required by a law which we still insist defies understanding.

2. We have won the first legal precedent ever for the *Library Bill of Rights*, and we have won it in one of the most respected court systems in the United States.

3. We have gained, through four years of researching and refining our arguments, the expertise to defend any librarian or library in the United States charged with violating an obscenity or variable obscenity law, as well as the expertise to assist librarians in challenging such laws.

Although we may have come to the end of the road in *Moore* v. *Younger*, we have in effect just begun our journey. We will not stop with California. As this issue goes to press, the Executive Committee is studying the possibility of initiating comparable litigation in other states with laws similar to the California statute.

Thus we are counting on the continued support of the entire Foundation membership as we broaden the program begun with *Moore* v. *Younger*.—JFK

High Court Curbs Press

Ruling on a libel suit against Time, Inc., the U.S. Supreme Court on March 2 restricted the broad First Amendment protection which the Court once gave the press against libel suits filed by so-called public figures. The Court declared that a prominent Florida socialite could not be considered a public figure for the purpose of deciding libel claims arising from reports of her divorce proceedings.

The ruling came in an appeal brought by Time, Inc., from a $100,000 libel award won by Mary Alice Firestone on the basis of *Time* magazine's alleged misreporting of the divorce decree entered at her husband Russell's request at the close of divorce proceedings in 1967.

According to previous Court rulings, public figures are required to make a stronger case against a publisher of alleged libel than are private figures. Ordinarily, public figures must show that the information which they regard as damaging was published with knowledge that it was false or with "reckless disregard" of whether or not it was false.

Review of Obscene Materials

On March 1 the Supreme Court agreed to decide whether appellate judges must themselves look at allegedly obscene materials in the review of obscenity convictions.

The Court agreed to review the case of three individuals and two corporations convicted in U.S. District Court in Kentucky of transporting a number of "obscene" items, including the film *Deep Throat*. (*Marks* v. *U.S.*, no. 75-708)

When the defendants appealed their convictions to the U.S. Court of Appeals for the Sixth Circuit, the appellate judges upheld the district court without looking at any of the "obscene" materials. The defendants have asked the Supreme Court to declare that the appellate judges were obligated to examine the contested items.

In a 1964 opinion, the Supreme Court rejected an argument that judges should give only a limited review in obscenity cases. "The suggestion is appealing," the Court said, "since it would lift from our shoulders a difficult, recurring, and unpleasant task. But we cannot accept it. Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees."

Freedom to Read Foundation News is edited by the staff of the Office for Intellectual Freedom, American Library Association. It is issued quarterly to all members of the Foundation.

President Reports to ALA Council

January 1976

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 Darling at the ALA's 1976 Midwinter Meeting in Chicago. It has been edited slightly for publication here.

The Board of Trustees of the Freedom to Read Foundation met in Chicago on Saturday, January 17, 1976. Two court cases were the major business on its agenda —one, *Moore* v. *Younger*, now familiar to you, members of the Council, and the other, *Smith* v. *U.S.*, new to you.

Smith v. *U.S.* concerns a bookseller from Iowa who was tried and convicted in federal court under the obscenity provisions of the U.S. postal laws. The case came to our attention through the diligence of the staff of the Office for Intellectual Freedom.

A brief description of the state obscenity law in Iowa is essential background for understanding *Smith* v. *U.S.* and our interest in it. After the *Miller* decision was handed down by the U.S. Supreme Court on June 21, 1973, the Iowa legislature reviewed its obscenity law to determine whether its provisions were constitutional under the new tests required by *Miller*. After due deliberation, the legislature repealed all portions of its obscenity laws relating to adults, retaining only those portions which concerned children. Iowa had taken the stand that its adult population was mature and required no governmental protection.

Jerry Lee Smith, a Des Moines bookseller, began a publication called *The Iowa Swinger*, available by subscription, which he sold only within the borders of Iowa. U.S. government agents, using fictitious names, subscribed to Smith's magazine, received it through the U.S. mail, and brought criminal action against him for violating provisions of the postal law prohibiting the mailing of obscene materials. Smith was tried in federal court in Iowa and convicted.

It was at this point that we became interested in the case, feeling that an important matter of law was involved which stemmed directly from the *Miller* decision.

In *Miller*, you will recall, in stating that, among other things, a work, to be declared obscene, had to be offensive to community standards, the Supreme Court defined community standards as state or local standards. The State of Iowa had in effect, by repealing the provisions of its obscenity laws pertaining to adults, indicated that the community standards of Iowa held that no materials directed only to adults are obscene. The jury which heard the facts in *Smith* v. *U.S.*, therefore, could not be convicting Smith under Iowa standards, but appeared to be applying national standards which the Supreme Court, in *Miller*, said did not exist. *Smith* v. *U.S.* seemed to offer the possibility, through the appeals route, of seeking reconsideration of the contradictions of the *Miller* decision.

The Foundation contacted Smith's lawyer, only to find that Smith was not very interested in appealing his conviction if he could get a suspended sentence, and that, in any case, he lacked funds to support an appeal. The Executive Committee of the Foundation authorized the expenditure of up to $2,000 for out-of-pocket costs in preparing an appeal brief; when Smith was given a jail sentence and a stiff fine, he decided to appeal, with the Foundation's support.

The Foundation, on behalf of the American Library

Nominating Committee Readies Slate

The 1975-76 nominating committee, composed of Trustees Stanley Fleishman, Jean-Anne South, and Frances C. Dean, chairperson, has submitted the names of ten candidates for the 1976 election to fill five vacancies on the Board of Trustees: They are:

Neil H. Adelman, Attorney at Law, Devoe, Shadur and Krupp, Chicago, Illinois.

Janet M. Bowman, Assistant Division Chief, Brooklyn Public Library, Brooklyn, New York.

Dale Brunelle Canelas, Assistant Director of Public Services, Stanford University Libraries, Stanford, California.

Betty Culotta, President, Montgomery County Educational Association, Rockville, Maryland.

Barbara A. Hunt, Acting Dean, School of Library Media, Alabama A & M University, Normal, Alabama.

Eli M. Oboler, University Librarian, Idaho State University, Pocatello, Idaho.

Sophie Silberberg, Director of Advertising and Promotion of Children's Books, Thomas Y. Crowell Company, New York, New York.

John E. Smith, University Librarian, University of California, Irvine, California.

Helen W. Tuttle, Assistant Librarian for Preparations, Princeton University, Princeton, New Jersey.

Sam G. Whitten, Associate Professor, Graduate School of Library Science, University of Texas, Austin, Texas.

Nominated by petition was:

Jean-Anne South, Library Planner, Baltimore County Regional Planning Council, Baltimore, Maryland.

Any member of the Foundation not on the committee's slate may be nominated by petition. In accordance with Foundation bylaws, petitions of nomination must include the signatures of twenty-five members in good standing. Names of nominees and signed petitions should be sent to: Executive Director, Freedom to Read Foundation, 50 East Huron Street, Chicago, Illinois 60611, no later than *April 22*.

The official ballot will be mailed on May 3 to all persons holding membership in the Foundation on that date.

Association and the Iowa Library Association, filed an *amicus* brief in the appeal before the U.S. Court of Appeals for the Eighth Circuit. Oral argument was held before a three-judge panel in St. Louis on January 15, 1976. At this time we do not feel optimistic that the appeals court decision will be favorable. On January 17, however, the Board of Trustees granted standby authority to the Executive Committee to support an appeal to the U.S. Supreme Court if it appears that it will be advantageous to our cause to do so. Since the appeals court decision may not be announced for many months, we can only remain on alert for the present.

Moore v. Younger

January is a full month for the Foundation. In San Francisco last summer I reported that we had filed an appeal in the case of *Moore* v. *Younger* in the California Court of Appeal, Second District. The attorney general of California, Evelle J. Younger, filed a motion to dismiss. The court has scheduled oral argument on Younger's motion to be held January 28.

Since the court will have to consider the merits of the case in considering Younger's motion to dismiss, the January 28 hearing will necessarily involve the substance of our appeal, and will probably be the only opportunity for oral argument before the appellate court.

If we win, Younger will be permitted to file a brief in reply to our appeal brief, and we to answer him. Then we must wait for the decision. If we lose, we shall probably seek relief in the California Supreme Court.

I have been asked why our litigation in *Moore* v. *Younger* has been so protracted. We have been in court since May 1972. Will we not have to fight the same battle in every state that has a variable obscenity law?

Harassment, Delay

The *Moore* v. *Younger* litigation is an example of how legal processes can be used by agencies of the government concerned with law enforcement for purposes of oppression, harassment, and avoidance of issues involving substantive rights. The attorney general of California, notwithstanding assurances to the federal court and notwithstanding representations made to all parties, has utilized a wide variety of procedural stratagems to avoid meeting the substantive question of the constitutionality of the variable obscenity law.

The Freedom to Read Foundation has persisted in this litigation not merely to reach the substantive issue which prompted the filing of the suit originally, but also to establish precedents which may well prevent future use of legal process for delay and harassment.

There is no question that the legal rights which a person cannot afford to assert or defend do not in fact exist. There a few persons or organizations with the economic resources to match the government in terms of dollars or manpower. Therefore, individuals seeking to defend or assert their rights in controversies with agencies of the government must find the way to do so which is within their financial and physical capacity.

The *Moore* v. *Younger* litigation involves an effort to blaze a path through the legal jungle which others can follow expeditiously and economically. The research we have done will provide a pre-packaged set of briefs, requiring only relatively inexpensive up-dating to be used elsewhere. In addition, the California courts are held in unusually high esteem among state courts. A favorable outcome there could make the task easier in the other states.

When we went into the California suit, we knew it could be for a long battle. We will be there as long as it takes.

The Foundation membership is still increasing, continuing to prove the value of including the Freedom to Read Foundation on the ALA membership renewal form, a privilege which Council secured for us. We are grateful, and grateful also that more ALA members have joined us. We welcome all of you who are not yet Foundation members to join in our endeavors, which are for us all.

Respectfully submitted,
RICHARD L. DARLING, President,
for the Trustees of the
Freedom to Read Foundation

BPM Becomes Benefactor

Beta Phi Mu, the international library science honorary society, joined the ranks of the Foundation's benefactors in February with a $500 contribution.

In a letter to Frank B. Sessa, executive secretary of the society and professor of library science at the University of Pittsburgh, President Darling asked on behalf of the Board of Trustees that the Foundation's gratitude be conveyed to the BPM membership. "We are grateful that we can count on your support as we continue to seek legal precedent for the freedom to read," President Darling said.

Freedom to Read Becomes Priority of ACRL

At the American Library Association's 1976 Midwinter Meeting in Chicago, the freedom to read was designated a priority of the Association of College and Research Libraries by the ACRL board of directors. The board also voted to encourage ACRL members to join the Freedom to Read Foundation and directed the ACRL budget and finance committee to explore the possibility of an annual ACRL cash contribution to the Foundation beginning in 1977.

With more than 9,000 members, the ACRL is the largest division of the American Library Association.

'Community Standards' *(from p. 1)*

tion, and Court of Appeals Judges Myron H. Bright and J. Smith Henley. Their opinion said:

"Jerry Lee Smith was convicted in the U.S. District Court for the Southern District of Iowa on seven counts of placing non-mailable matter in the U.S. mails . . . and was sentenced to three years imprisonment on each count to run concurrently, all of which was suspended except for six months. On this appeal Smith asserts two errors by the trial court: (1) In refusing to ask or permit counsel to ask certain questions of the jury panel as to the contemporary community standards existing in the Southern District of Iowa relative to the depiction of sex and nudity in magazines and books; and (2) in not applying Iowa law in the determination of the contemporary community standards applicable to the case.

"1. The questions that Smith wished propounded to the jury panel have to do with the juror's knowledge of the contemporary community standards existing in the Southern District of Iowa; where he acquired such information; his understanding of what the contemporary community standards are; if, in arriving at such understanding, he took into consideration the laws of the State of Iowa regulating obscenity; and finally, what is his understanding of those laws.

"In support of his contention that he had a right to propound such questions to the jury panel on voir dire, Smith seems to say that as a matter of due process he has a 'right to inquire of the juror what "contemporary community standards" the juror has knowledge of, if any, and just which of the multiple "contemporary community standards" the jury will apply to him, and the nature of the "contemporary community standards" which the juror believes have application to him.

"But it is for the jury under the instructions of the trial judge to determine whether the material under scrutiny, taken as a whole, appeals to the prurient interest; whether it depicts sexual conduct in a patently offensive way; and, finally, if taken as a whole, it lacks serious literary, artistic, political or scientific value. But this definition of obscenity is 'one of law . . . a legal term of art,' *Hamling* v. *United States,* 418 U.S. 87, 118 (1974), not one of fact. Jurors pass on facts, not law. The juror reaches his verdict by applying the definition of obscenity given him by the judge to the facts introduced into evidence, on a contemporary community standard. He draws on his own knowledge as to the views of the average person in the community, just as he does when he determines the propensities of the 'reasonable' or 'average" person in other areas of decision making. *Jurors do not have such standards on their tongues; nor do they wear them on their sleeves; they are inborn and often undefinable.* [Emphasis added.]

"This not to say that no questions can be asked the jury panel in this area, but only that specific ones tendered here were impermissible. They smacked of the law, of casuistry, of the ultimate question of guilt or innocence, rather than the qualifications to serve as a juror, bias, etc. . . .

"2. . . . This prosecution deals with a federal statute and state law has no bearing on its decision. On the contrary, the federal statute depends on federal law as laid down by the Supreme Court. It has incorporated contemporary community standards in the determination of obscenity. In this connection we note that the trial court admitted into evidence a copy of Iowa's ob-

scenity statute. This was done so the jury might have the knowledge of the state's policy on obscenity when it determined the contemporary community standard. However, state policy was not controlling since the determination was for the jury, not the state. The jury could have followed state policy if it found that it was the contemporary community standard; but it did not so find as it had a right to do. We are bound by the jury decision."

Everett Moore Honored in Retirement

Everett T. Moore retired in December as the University of California at Los Angeles' associate university librarian for public service after a long career committed to excellence in library service and the defense of the public's right to read.

In tribute to Everett Moore's special contributions to UCLA and the library profession, a seminar on intellectual freedom will be held June 19 at the Clark Library, UCLA's seventeenth- and eighteenth-century rare book library. Speakers at the program will be Attorney Alex P. Allain, former Foundation president, and Professor Robert Harlan of the library school at the University of California at Berkeley.

Members of the Foundation, which Everett Moore helped organize and which he served as vice president until 1974, will heartily agree with John D. Weaver, president of the Friends of the UCLA Library, who last year characterized him as "a librarian's librarian" in a feature article in the *Los Angeles Times*.

In years of service in the cause of civil liberties, Everett Moore has set a remarkable standard of devotion to freedom, a devotion whose many exemplications include his appearance as the lead plaintiff in the Foundation's suit against California's "harmful matter" law.

Everett T. Moore

Basic membership in the Freedom to Read Foundation begins at $10.00 per year. Contributions to the Foundation should be sent to: Freedom to Read Foundation, 50 E. Huron St., Chicago, Ill. 60611. All contributions are tax-deductible.

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