Freedom to Read Foundation News

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Georgia 'Minors Display' Law Found Unconstitutional

On October 23, U.S. District Court Judge Horace T. Ward found the new Georgia "minors display" law (Act 785) unconstitutional. Passed by the Georgia House of Representatives 127-0 and by the Georgia Senate 54-1 and signed into law by Governor George Busbee earlier in the year, the statute prohibits the sale or display of any item (picture, drawing, sculpture, photograph, book, or magazine) "the cover or content of which contains descriptions or depictions of illicit sex or sexual immorality, or which is lewd, lascivious, or indecent, or which contains pictures of nude or partially nude figures posed or presented in such a manner to provoke or arouse lust or passion or exploit sex, lust or perversion for commercial gain." The suit was filed by the American Booksellers Association, the Association of American Publishers, and the Freedom to Read Foundation, among others.

Having temporarily enjoined enforcement of Act 785 in July, Judge Ward concluded that the law "is not drawn to comport closely with" its concern for minors and with "the applicable constitutional guidelines"—and is therefore overbroad and vague. Despite the defeat, Representative Roger Williams, who sponsored the original bill, said he plans to rewrite it to avoid constitutional violations. Hinson McAuliffe, defendant in the suit, said he would rather wait for a suitable revision than appeal the court's decision. As of September, according to Publishers Weekly, *twelve other states have introduced or passed similar "minors display" legislation. The Freedom to Read Foundation has joined many of the same plaintiffs in a suit against the Pennsylvania "minors display" law (see* FTRF News, *vol. 10, nos. 1-2).*

Excerpts from Judge Ward's opinion follow.

I. Background

. . . Plaintiffs contend that the Act is facially invalid on the grounds, *inter alia*, that it is overbroad and vague, constitutes a prior restraint on speech and press, and unconstitutionally infringes upon their protected rights under the First, Fifth, and Fourteenth Amendments to

(Continued on p. 2)

The *Pico* Case

After the U.S. Court of Appeals for the Second Circuit remanded the case for trial, defendants in Pico *v.* Island Trees *(NY)* Union Free School District, No. 26, *petitioned the U.S. Supreme Court to review the decision (see* FTRF News, *vol. 10, no. 3). On October 12, the high court agreed to determine whether the Court of Appeals was correct in ruling that the rights of students had been violated by a school board directive removing nine books from the Island Trees High School library.*

The granting of certiorari *marks the first time the Supreme Court has been willing to take a case involving a school board's decision to ban books. It refused to review the Second Circuit Court's 1972 decision upholding a school board's right to restrictively shelve a library book in a junior high school* (Presidents Council, District 25 *v.* Community School Board, No. 25). *But since there is no clear delineation of student rights and school board authority in relation to the removal or restriction of school library materials, the issue has continued to plague the courts.*

Briefs were filed on December 31, and a decision is expected before the court's 1982 summer recess. The Freedom to Read Foundation funded a friend-of-the-court brief filed in the names of the American Library Association, the New York Library Association, and the Foundation, excerpts from which are given below. The brief emphasizes that the case deals with library, rather than curricular, decisions. In addition, it seeks to define a standard for federal jurisdiction in cases involving school library censorship.

ARGUMENT

I.

THE LIBRARY EXISTS TO PRESENT AND PRESERVE ALL POINTS OF VIEW.

The school board below banned books from a library. Thus, this case does *not* present an issue concerning the board's control of curriculum, *i.e.* what is taught in the classroom. We freely concede that the school board has

(Continued on p. 4)

Washington State Obscenity Law Struck Down by U. S. Supreme Court

In 1977, the citizens of the state of Washington passed Initiative 335, a "moral nuisance" statute which permitted law enforcement authorities to obtain injunctions against businesses selling or exhibiting "lewd films or publications." Under the statute, bookstores and movie theaters could be closed down *before* the materials in question were found to be obscene and, therefore, not constitutionally protected. Furthermore, the materials could be destroyed and store owners forced to abandon their place of business. Supported by a group called Decency in Environment Today (DIET), the law was originally found unconstitutional in February 1978 by U.S. District Court Judge James Fitzgerald (see *FTRF News,* vol. 7, no. 3). The ruling was upheld by the U.S. Court of Appeals for the Ninth Circuit in October 1980 (see *FTRF News,* vol. 9, nos. 3-4).

In November, the U.S. Supreme Court, by a vote of 6-3, affirmed the Appeals Court decision in *Spokane Arcades* v. *Ray*, finding the statute unconstitutional on grounds of prior restraint. Dissenting Justices Burger, Powell, and Rehnquist, agreeing with the Spokane County prosecuting attorney's office, said that the case should not have come before the federal courts until the law had been examined in state courts.

Georgia Statute *(from p. 1)*

the United States Constitution. Defendants contend that the plaintiffs do not have standing to litigate the Act's constitutionality, and that in any case the State has fashioned a statute to control the availability of materials to minors in a manner that does not violate constitutional standards. For the reasons below, the court holds that the Act is unconstitutionally overbroad and vague, and enforcement of the Act must be permanently enjoined.

II. Findings of Fact

Plaintiffs are individuals and associations comprised of retailers, bookstores, distributors, publishers and writers who may engage in activities prohibited by the Act. Plaintiffs' witnesses included, among others, two authors, the Acting Director of the Public Library System for Fulton County and the City of Atlanta, and the president of the Association of American Publishers, which is comprised of members who together publish 85% of the books published in the United States. In anticipation of the Act's enforcement and prior to the commencement of this action, a retailer removed books from display in her bookstores, a store buyer placed a hold on orders for new fall season books for all Rich's stores, an author made plans to cancel an autograph session to promote her book at a department store, and the American Booksellers Association, Inc. voted not to return to Georgia for its annual convention and display of books in 1984. The effect of such decisions is to deny adults as well as minors access to communicative materials.

. . . Defendants appear to contend that the Act is not overbroad because it only prohibits dissemination of "harmful, sexually explicit" materials to children. However, because the Act prohibits materials whose cover or contents contain descriptions or depictions of persons of the opposite sex without clothes, or of "illicit sex or sexual immorality which is lewd, lascivious, or indecent," many works of art and literature would have to be removed from display. These materials could include best-seller novels as well as the classic plays and sonnets of Shakespeare and volumes on the history of art.

Defendants also contend that the Act is not vague because it is clearly directed at the "display and sale of pornography to children." Further, defendants state that the prohibited materials are described in "detailed, simple, everyday words" which provide a guide for law enforcement and prevent arbitrary enforcement. There was considerable and convincing evidence, however, that many of the phrases of the Act were uncertain and without specific meaning. Witnesses testified that it was difficult to decide which "nude or partially denuded figures" would "provoke or arouse lust or passion," since people would differ in finding that a particular picture did or did not arouse lust or passion. Witnesses also testified that it was difficult or impossible to determine what materials might be "lewd, lascivious, or indecent" under the Act. The testimony of defendants' witnesses supports the finding that it is difficult to determine what is prohibited under the Act. Those witnesses had differing viewpoints on the general suitability and appropriate placement of materials. It cannot be disputed that many of the terms have more than one dictionary definition or colloquial meaning. Moreover, terms such as passion, lust, immoral and indecent, have some meanings unrelated to sexual conduct. Further, the term "illicit sex or sexual immorality" is inconsistent with the definition in the Act which describes certain conduct that cannot be *per se* "illicit" or "immoral."

III. Conclusions of Law

A. Presence of a Case or Controversy and Standing.

Plaintiffs have invoked the court's jurisdiction under 28 U.S.C. SS1331, 1343(3) and (4), 2201 and 2202. Defendants maintain that the plaintiffs have failed to show that they are subject to prosecution under the Act,

and that therefore a "controversy" is not present and plaintiffs lack standing to litigate the Act's constitutionality. However, plaintiffs' test of the constitutionality of the Act by an action for declaratory judgment is properly before the court. The plaintiffs have demonstrated a "case or controversy" mandated by Article III of the Constitution and they have standing to challenge the Act. . . .

B. Overbreadth and the Rights of Adults

. . . One of the purposes of striking down statutes which are "overbroad" is to assure the public that the dissemination of materials protected by the First Amendment will not be suppressed. The United States Supreme Court has considered the issue of what materials are constitutionally protected or not "obscene." The court set down three basic guidelines for determining whether material could be judged obscene and therefore regulated by the State:

> (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;
>
> (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
>
> (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Miller v. *California,* 413 U. S. 15, 24 (1973). Moreover, certain material has been specifically found to be protected expression and not obscene. *See, e.g., Jenkins* v. *Georgia,* 418 U.S. 153 (1974) (holding the film *Carnal Knowledge* to be constitutionally protected); *Penthouse* v. *McAuliffe,* 610 F.2d 1353 (5th Cir. 1980) (holding a particular issue of the magazine *Penthouse* to be protected); *United States* v. *One Book Entitled Ulysses,* 72 F.2d 705 (2d Cir. 1934) (holding the book *Ulysses* by James Joyce to be protected).

These standards must be applied to the Act in question notwithstanding the fact that it purports to regulate only those materials obscene as to minors. It is true that the State's interest in protecting the well-being of its youth and in aiding parents' right to rear their children permits the State a greater degree of latitude in restricting materials determined to be obscene as to minors. *Ginsberg* v. *New York,* 390 U.S. 629, 640 (1968). However, an examination of the Act reveals that it infringes on the protected rights of adults. The language includes a public display prohibition which necessarily prevents perusual by, and limits sale to, adults. The Act does not contain any standards resembling the *Miller* guidelines, and the Act's failure to incorporate such standards results in the prohibition of non-obscene, protected material. Accordingly, the Act is unconstitutional.

C. Overbreadth and the Rights of Minors

Even if the Act could be said to be solely a regulation of dissemination of materials to minors, the Act would still be overbroad. Minors are accorded significant First Amendment protection. The Supreme Court has upheld a statute regulating the "sale" (not display) of obscene materials to minors. *Ginsberg* v. *New York,* 390 U.S. 629 (1968). . . . The Court stated that it was constitutionally permissible for New York to accord to minors under 17 a more restricted right than that assured to adults to judge and determine for themselves what material they may read or see. *Id.* at 636-37 (footnote omitted). When the New York statute is compared to the Georgia Act, it is clear that the Georgia Act lacks similar guidelines. Specifically, the Act does not restrict a minor's access to material which *taken as a whole* (a) predominantly appeals to the prurient interest of minors; (b) contains patently offensive depictions or descriptions of sexual conduct specifically defined by applicable state law to be unsuitable for minors; and (3) is utterly without redeeming social value (or lacks serious literary, artistic, political or scientific value). Accordingly, the Act is unconstitutional.

D. Vagueness

The Act prohibits dissemination of works which may contain written passages or pictures which describe "sexual immorality" or which are "lewd" or "lascivious" or "indecent," or which are designed "to provoke or arouse lust or passion" or to "exploit sex, lust, or perversion for commercial gain." These phrases are not defined in the statute.

The purpose of striking down statutes which are "vague" is to prevent the arbitrary enforcement of laws that fail to give officials or the public any notice of what is prohibited. In analyzing the Act, the court must apply the same constitutional standards relating to vagueness that it would apply if it were dealing with a statute pertaining to adults. The Supreme Court has stated:

> the permissible extent of vagueness is not directly proportional to, or a function of, the extent of the power to regulate or control expression with respect to children.

Interstate Circuit, Inc. v. *City of Dallas, supra,* 390 U.S. at 689. The findings of fact support a ruling that the Act's language is vague as to materials prohibited and the manner of complying with the Act. Moreover, the Supreme Court has rejected standards for sexually related materials, such as those adopted by this Act, that went beyond the guidelines embodied in legal precedent. See *Interstate Circuit, Inc.* v. *City of Dallas, supra,* 390 U.S. at 686, 684-690. Further, the Supreme Court has held

that certain terms used in the Act are without a definite meaning and are therefore unconstitutionally vague. *See, e.g., Interstate Circuit, Inc.* v. *City of Dallas, supra* ("sexual promiscuity"); *Rabeck* v. *New York, supra* ("magazines which would appeal to the lust of persons under the age of eighteen years"). In sum, Justice Harlan's words are appropriate:

> One man's vulgarity is another man's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style largely to the individual.

Cohen v. *California,* 403 U.S. 15, 25 (1971).

In light of the foregoing, the court concludes as a matter of law that the Act is invalid for overbreadth and vagueness. Further, it cannot be saved by a narrowing judicial construction. The defendants maintain that the Act is designed to "protect children from sexually explicit pornography." That phrase is not contained in the Act. This court could not change the meaning of the Act without changing the language entirely. *See U.S.* v. *Great Northern Ry. Co.,* 343 U.S. 562 (1952). In making the rulings in this opinion, the court is mindful of public concern for the youth of the state. However, the Act is not drawn to comport closely with this concern and the applicable constitutional guidelines. An order will be entered in accordance with this opinion.

Pico *(from p. 1)*

the right and duty to supervise the general content of the school's course of study. However even in the classroom, school board authority, albeit plenary, must give way and yield when there is a pattern of suppression of fundamental rights. *Epperson* v. *Arkansas,* 393 U. S. at 104-105; *Meyer* v. *Nebraska,* 262 U. S. 390 (1923). As a corollary, outside of the classroom, school board discretion is far more circumscribed because the board's prerogatives are less and the individual's rights are greater. *Tinker* v. *Des Moines Indep. Community School Dist.,* 393 U. S. 503 (1969); *Zykan* v. *Warsaw Community School Corp.,* 631 F. 2d 1300, 1305 (7th Cir. 1980) ("control of matters not immediately affecting classroom activities is subject to numerous qualifications").

To the extent that there is judicial deference to the board's control over the classroom and hallways, that accommodation is based on the role of the schools in teaching the basic values of our society. *See, e.g., East Hartford Ed. Ass'n.* v. *Board of Education,* 562 F.2d 838, 859 (2d Cir. 1977) (en banc). Given the electoral process, the community values or standards that find their way into the curriculum are in the main those of the majority, and there is little a court can effectively do (save in the outrageous case) to ensure a minority voice. But while majority rule may be permissible, within constitutional limits, in setting the curriculum and governing the classroom, majority rule dictating the contents of a library is antithetical to the very concept of a society with many voices.

The library has rightly and traditionally been regarded as an "open port," a free marketplace of ideas, popular and unpopular. *Minarcini* v. *Strongsville City School Dist.,* 541 F. 2d 577, 582 (6th Cir. 1976). To whatever degree the classroom, or other government activities or decisions have become vehicles for social, political, cultural, economic or religious indoctrination and propaganda, the library has served as an intellectual armory, supplying facts, concepts and the widest spectrum of knowledge to all without fear or favor. The *raison d'etre* of the library is to serve, present, and preserve all points of view, not just those of the majority. The library, unlike the school curriculum, simply does not exist primarily to teach the majority's values or to socialize the child.

The school library in particular has been recognized as "a mighty resource in the free marketplace of ideas." *Minarcini, supra,* 541 F. 2d at 582. As the Court observed in *Right to Read Defense Comm. of Chelsea* v. *School Comm.,* 454 F. Supp. 703, 715 (D. Mass. 1978):

> [A] student can literally explore the unknown and discover areas of interest and thought *not covered by the prescribed curriculum.* The student who discovers the magic of the library is on the way to a life-long experience of self-education and enrichment. That student learns that a library is a place to test or expand upon ideas presented to him, in or out of the classroom.
>
> The most effective antidote to the poison of mindless orthodoxy is ready access to a broad sweep of ideas and philosophies. There is no danger in such exposure. The danger is in mind control.

See Keyishian v. *Board of Regents,* 385 U. S. 589, 603 (1967) ("[t]eachers and students must always remain free to inquire, to study and evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die").

Appellees are not attempting to force anyone to read, use, or purchase the books at issue. Rather, they only are asking that the existing books remain available on the library shelf and not be censored by removal because a group of public officials do not approve of their content. Such censorship in a library—and especially a school library—cuts at the heart of the First Amendment.

As this Court held in *Tinker, supra,* 393 U. S. at 511:

> In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved.

If students know that some books are banned from a school library because of their content, the message is clear that government has declared that the ideas expressed in those books are taboo. Our First Amendment values and tradition of freedom of thought reject such conduct by government.

II.

PUBLIC OFFICIALS MAY NOT BAN BOOKS ON THE BASIS OF THEIR CONTENT.

Few courts have addressed the issue of content-based book banning in school libraries, and those that have done so diverge concerning the standard for a federal court to hear and decide a case like this. *Compare Zykan* v. *Warsaw Community School Corp.*, 631 F. 2d 1300, 1308 (7th Cir. 1980) (court must step in to prevent imposition of orthodoxy) *with Minarcini* v. *Strongsville City School District,* 541 F. 2d 577, 582 (6th Cir. 1976) (removal based on content violates First Amendment) *and* the panel majority below. But all agree that at some point a federal forum must be available to act and protest the First Amendment.

We believe and urge that those who use the library state a federal claim when they plead facts sufficient to show that the constituted authority removed a book that is not in law illegal *(i.e.,* obscene or otherwise outside the protection of the First Amendment) from a library to suppress the ideas in that book. This standard is firmly rooted in First Amendment principles of robust debate and does not burden the Courts with garden-variety, back-fence disputes over local affairs.

A public official cannot ban a publication simply because he does not like the ideas expressed in it. Such conduct is antithetical to a free society and is a reincarnation of Milton's licensor. *Lovell* v. *Griffin,* 303 U. S. 444, 451, 1938). A totalitarian government always restricts newspapers, regulates the use of printing equipment, and controls radio and television broadcasts. Indeed, these were among the very first acts of the Polish authorities last month. *See, e.g.,* "Martial Law—What it Means in Poles' Lives," *Chicago Sun-Times,* December 15, 1981, page 6.

The philosophy espoused by Appellants of purging all works that are in some way inconsistent with "community values" has resulted in such aberrations as the burning of Dante's Divine Comedy by the Florentines, the suppression of Galileo's Dialago in Rome, and the banning of Twain's The Adventures of Huckleberry Finn as "trash and suitable only for the slums." A. Haight & C. Grannis, *Banned Books 387 B.C. to 1978 A.D.* (1978). Unfortunately, from colonial days books have been attacked and sought to be suppressed in this country as well as in dictatorships; one of the early heritages acquired from across the sea was the practice of censorship. Indeed, the First Amendment was adopted because of this noxious practice and the seditious libel trials that ensued; today, our government cannot outlaw writings because the publications are not in favor with the authorities, *i.e.,* this very case. *See New York Times Co.* v. *United States,* 403 U. S. 713, 715-717 (1971); *Lovell* v. *Griffin,* 303 U. S. 444, 451-452 (1938).

Library collections must have range, depth and continuity over time to serve their high purpose. Purging a library collection of books offensive to the majority, as Appellants urge, robs the library of its fundamental nature and has the same chilling effect on the "free marketplace of ideas" as outright censorship of newspapers and radio. The purge in the name of the child fetters the First Amendment's liberty of circulation which this Court, time and again, has held "is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value." *Lovell* v. *Griffin,* 303 U. S. at 452.

Freedom of speech and press includes "not only the right to utter or to print, but . . . the right to receive, the right to read . . . and freedom of inquiry [and] freedom of thought. . . ." *Griswold* v. *Connecticut,* 381 U. S. 479, 482 (1965); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council,* 425 U. S. 748 (1976). The library is a principal place in our society where one can go to explore and find almost every idea imaginable to exercise these rights. The First Amendment necessarily protects the library collection as the primary source of what is received and can be read, the repository of the knowledge and ideas that sustain inquiry and thought.

Freedom of inquiry is especially important for the children who are school library users. The school board below must heed this Court's admonition in *West Virginia v. Barnette,* 319 U. S. 624, 637 (1943):

> That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.

The child whose inquiries lead him to explore beyond the curriculum should not have any avenues of inquiry foreclosed. Curiosity is to be encouraged, not suppressed. If we cannot teach our children by example to protect and respect First Amendment values, then we will indeed "strangle the free mind at its source."

That a book may be available elsewhere does not mitigate the First Amendment violation. Restraint on expression cannot be justified by the availability at other times and places of opportunities for such expression. *Southeastern Promotions, Ltd.* v. *Conrad,* 420 U. S. 546, 556 (1975); *Schneider* v. *State,* 308 U. S. 147, 163 (1939). As stated in *Right to Read Defense Committee of Chelsea* v. *School Comm.,* 454 F. Supp. 703, 714 (D. Mass. 1978):

> If this work may be removed by a committee hostile to its language and theme, then the precedent is set for removal of any other work. The prospect of successive school committees "sanitizing" the school library of views divergent from their own is alarming, whether they do it book by book or one page at a time.
>
> What is at stake here is the right to read and be exposed to controversial thoughts and language—a valuable right subject to First Amendment protection.

The bright-line standard we urge here would not burden the Courts. Even before this case, the impact of book banning cases on the federal case load was miniscule; for the twelve-month period ending June 30, 1980, 168,754 civil cases were filed in the federal courts. *1980 Annual Report of the Director* 54 (Administrative Office United States Courts). Yet, over the last *ten years* there have been less than twenty reported decisions in cases such as here.

We do not suggest that a book can never be removed from a library. Once a book has been placed on a shelf someone has made the determination that the book has value—the state has paid money to acquire it. But lack of shelf space, obsolescence, and even possibly improper procurement are all legitimate reasons, among others, for removal. As in any civil rights action, a good faith defense would apply and the removal of a book for non-content related reasons plainly insulates state action from the federal court.

Finally, the standard we urge here fully accommodates the community's interest in inculcating civic values since it does not involve federal judicial review of curriculum. But, if there is any question about the propriety of a publication on the library shelves, in limited circumstances a less suppressive alternative should be sought, such as restricted shelving with access upon parental consent. Exclusion of the book from the library, as occurred below, is never a solution that is either palatable or permissible under our Nation's strongly held First Amendment beliefs.

CONCLUSION

A library, unlike the school curriculum, does not exist to indoctrinate. Rather, the library is a precious resource, a fountainhead of knowledge, and knowledge is the key to our democracy. James Madison, who chaired the committee that drafted the First Amendment, recognized this when he wrote

> A popular government, without popular information or the means of acquiring it, is but a prologue to a farce or tragedy; or, perhaps both. Knowledge will forever govern ignorance; and a people who mean to be their own governors, must arm themselves with the power which knowledge gives.[1]

To allow banning of books by school boards based on the ideas expressed in those books would violate the core purpose of the First Amendment and the very purpose of the library as a "mighty resource in the marketplace of ideas."

For the reasons set forth above, the judgment of the Court of Appeals should be affirmed and the case remanded for trial.

Nominations for Freedom to Read Foundation Board of Trustees

Nominations for candidates to run in the 1982 election for the Board of Trustees of the Freedom to Read Foundation are now being accepted.

Five vacancies on the Board of Trustees will be filled in the election to be held May 1—June 1, 1982. Nominations should be sent to:

Dr. Lester Asheim
School of Library Science
University of North Carolina-Chapel Hill
Chapel Hill, North Carolina 27514

Serving with Dr. Asheim on the Nominating Committee are Richard P. Kleeman, Association of American Publishers, 1707 L Street, N.W., Washington, D.C. 20036; and Ella G. Yates-Edwards, Yates-Edwards and Associates, Library Consultants, P.O. Box 18188, Seattle, Washington 98118.

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