Freedom to Read Foundation News

50 EAST HURON STREET, CHICAGO, ILLINOIS 60611 PHONE (312) 944-6780

William D. North, President Judith F. Krug, Executive Director

Volume 11 Winter 1982 No. 1

1982 Slate

Committee Nominates Thirteen for Board of Trustees

Thirteen candidates for the Freedom to Read Foundation's 1982 election have been slated by a committee composed of Trustees Richard P. Kleeman, Ella Gaines Yates-Edwards, and Lester Asheim, chair.

Trustees to fill five scheduled vacancies on the Board of Trustees will be chosen from the following list of candidates:

- Pamela Bonnell, Photo Librarian, *Dallas Morning News,* Dallas, Texas.
- Lee Brawner, Director of the Metropolitan Library System, Oklahoma City, Oklahoma.
- Barbara Bryant, Vice President, Phoenix Films, Inc., New York, New York.
- Daniel Casey, Trustee, Solvay Public Library, Syracuse, New York.
- Margaret Chisholm, Acting Director, University of Washington School of Library Service, Seattle, Washington.
- John Cole, Department of Special Collections, Stanford University Libraries, Stanford, California.
- Joan Collett, Librarian and Executive Director, St. Louis Public Library, St. Louis, Missouri.
- Burton Joseph, Attorney, Lipnick, Barsy & Joseph, Vice-President, Freedom to Read Foundation.
- William North, General Counsel, National Association of Realtors, President, Freedom to Read Foundation.
- Peter Scales, Director of Education, Planned Parenthood Federation of America, Inc., New York, New York.
- Judith Sessions, Director, Learning Resource Center, Mt. Vernon College, Washington, D.C.
- Russell Shank, University Librarian, University of California, Los Angeles.
- Elliot Shelkrot, State Librarian, Pennsylvania State Library, Harrisburg.

According to Freedom to Read Foundation election rules, at least two and no more than three candidates must be nominated for each vacancy on the board.

(Continued on p. 2)

Supreme Court to Consider Limits of 'Child Pornography' Legislation

by Henry R. Kaufman, a New York Attorney and a trustee of the Freedom to Read Foundation

Beginning in the mid-1970s, revelations concerning the sexual abuse of young children in the creation of "pornographic" materials, or in live pornographic performances resulted in an outpouring of moral indignation throughout the nation. This public uproar, in turn, led to a flurry of legislative studies and hearings, followed by the remarkably rapid passage of anti-child pornography laws in as many as forty-seven states, as well as on the federal level.

During this period of intensive legislative activity, no significant group argued that actual sexual abuse of young children should not be deterred and punished. Accordingly, every one of these "child pornography" statutes included provisions making the actual sexual abuse of children a criminal offense. Each authorized the imposition of lengthy prison terms against those found guilty of such child abuse.

In as many as thirty-three of the states, and in the Congress, another aspect of such child pornography legislation was separate provisions proscribing the *dissemination* of materials that might be said to have been produced as a result of sexual child abuse. Because these additional legislative provisions focused on the dissemination of published materials, rather than on the act of child abuse, it seemed clear to many concerned groups, including the ALA, that the First Amendment set important limits on the extent to which such dissemination could be proscribed.

Thus, on June 22, 1977, the ALA Council adopted a "Statement on Legislation to Control Sexual Abuse of Minors," which reads

> The American Library Association is in accord with the *intent* of proposed legislation that would make it illegal for adults to recruit and use minors in circumstances that constitute their sexual exploitation and/or sexual abuse.
>
> Consistent with this intent, the American Library Association is concerned that the legislation, in seeking to suppress the abuse of minors, not suppress the creation and dissemination of educational and scientific works de-

(Continued on p. 3)

1982 Election *(from p. 1)*

Ballots will be mailed on May 1 to all persons holding paid membership in the Foundation on that date.

Nominations by Petition

Persons who wish to *nominate candidates by petition* should submit twenty-five signatures of current members of the Foundation in support of each candidate. Names of petition candidates, statements of consent from the candidates, and the required signatures to support each must be received by the executive director of the Foundation no later than April 19, 1982.

Current Trustees

Elected Trustees currently serving on the Foundation Board are: Lester Asheim (1983), Daniel W. Casey (1982), Joan Collett (1982), Burton Joseph (1982), Henry R. Kaufman (1983), Richard P. Kleeman (1983), William D. North (1982), Ella Gaines Yates-Edwards (1983), and L. B. Woods (1982).

Trustees serving on the Board by virtue of their office in the American Library Association are J. Dennis Day, chair of the Intellectual Freedom Committee; Elizabeth Stone, ALA president, Carol Neymeyer, ALA president-elect; and Robert Wedgeworth, ALA executive director.

Highlights of Denver 1982 Midwinter Meeting

The Board of Trustees of the Freedom to Read Foundation held its annual Midwinter meeting on Friday, January 22. With nearly fifteen cases before it, the Board faced its busiest agenda since its establishment in 1969. Included on the agenda were several information items, such as *Board of Education, Island Trees Union Free School District No. 26, et al.* v. *Pico, et al.* (see *FTRF News,* vol. 10, no. 4), which was scheduled for oral argument before the U.S. Supreme Court on March 2, and the proposal of the ALA's Junior Members Round Table (JMRT) to donate to the Freedom to Read Foundation a portion of each ticket sold to the JMRT Social at the 1982 ALA Annual Conference in Philadelphia.

Action items before the Board of Trustees included a review of Jeanne Layton's financial obligations, which at the time amounted to approximately $1,800.00. The Board voted to contribute this sum to Ms. Layton's defense. As reported in previous issues of the *FTRF News* (see vol. 9, no. 1 and no. 2), Ms. Layton was fired from her job in 1979 for refusing to remove Don DeLillo's novel, *Americana,* from the Davis County (Utah) Library. Litigation resulted in her reinstatement, but through legislative maneuvers, Ms. Layton's future as director of the Davis County Library remains uncertain.

By January, 1982, Ms. Layton had accumulated legal debts of over $35,000.00. Of this amount, $23,000.00 has been raised by the Foundation, including $7,000.00 in "challenge" money from the library community.

Another action item on the Board's agenda concerned the current constitutional status of so-called minors access legislation. Minors access statutes, now in effect in several states, make it illegal to sell or display sexually explicit but non-obscene materials in places to which minors have access. This means that bookstores, convenience stores, and supermarkets may not, under minors access laws, sell or display even classic literary works, art objects, or art history texts which, though not legally obscene, may be considered indecent for minors—without regard to their redeeming social, artistic, or political value. A report was presented on the Georgia minors access law (see *FTRF News,* vol. 10, no. 4), which had recently been found unconstitutional in U.S. District Court. A Foundation-supported suit challenging the constitutionality of a similar law in Pennsylvania, however, has not fared so well. Ruled constitutional in state and federal courts, the case is currently on appeal. If it is lost, no doubt many more states will enact minors access statutes modeled on the Pennsylvania law. Because of this, the Foundation voted to add $500.00 toward the cost of the Pennsylvania litigation. This sum was in addition to the Foundation's initial contribution of $500.00 made last year.

In other actions, the Foundation Board decided to join with several organizations to file an *amicus curiae* brief on behalf of Paul Ira Ferber (an explanation of the case and excerpts of the brief are printed below). The Board also decided to investigate the transfer of six sex education books from the children's section to the adult section of the Tampa-Hillsborough County (Florida) Public Library. Although children have access to the adult section and may withdraw adult books—unless their parents have requested otherwise—the adult section is housed in a separate building of the library and the books are listed only in the adult card catalogue. The order to transfer the books came from the Tampa City Council, which overruled the library board's decision to retain the books in the children's section.

Recognizing the sizable funding of censorship efforts, the substantial increase in censorship activities, and the problem of increasing litigation costs, the Board saw this as a time to focus on the need for expanding membership and possible funding. In response, the Trustees established an endowment fund with the aim of providing an assured base of support for ongoing Foundation activities. In addition, the Foundation discussed means of increasing membership. Herbert Krug, a Chicago-based direct-marketing expert, analyzed the projections of Foundation membership and outlined direct-mail approaches to fundraising. The Trustees voted to invest in an experimental membership promotion and fundraising campaign, the results of which will be reported in future issues of the *FTRF News.*

Child Pornography Legislation *(from p. 1)*

signed to help young people understand their own physiological development and human sexuality.

For example, books using photographs of minors for the purpose of furthering the understanding of their sexuality and physical development should not be affected by legislation designed to control the abuse of minors.

Librarians who are aware of proposed legislation which might chill the development and dissemination of information and materials not intended to exploit minors or contribute to their delinquency should counsel with the Office for Intellectual Freedom.

As a result of such statements by ALA and other civil liberties and publishing groups, all but nineteen of the states which passed dissemination provisions limited those provisions to the dissemination of "obscene" materials. While First Amendment advocates are not generally happy with a proliferation of such obscenity laws, these dissemination provisions at least had the benefit of providing obscenity defense to those, including librarians, who wished to disseminate non-obscene materials with serious literary or artistic value.

Despite these efforts to keep child pornography legislation within constitutional bounds, nineteen states chose not to limit their provisions regarding dissemination, and extended them to materials regardless of whether or not they could be found to be legally obscene.[1] One of these states was New York and it is this aspect of the New York statute that is now before the United States Supreme Court for consideration.

Curiously, the case the Supreme Court will consider, *People* v. *Ferber,* involves a criminal prosecution brought against the commercial seller of materials that would be considered by many to be clearly in the category of obscene, "hard-core" pornography. Nonetheless, a jury acquitted Ferber on a second count charging him with dissemination of obscenity. On appeal from Ferber's conviction, New York's highest court, the Court of Appeals, ruled that the non-obscene dissemination offense was unconstitutional. It is this ruling that is currently before the Supreme Court.

Interestingly, an earlier case challenging the same New York provision had been brought by St. Martin's Press, affirmatively to challenge the New York law as it applied to *Show Me!,* a sex education book that is controversial but clearly not legally obscene. A federal district judge ruled that the law was probably unconstitutional, and enjoined its enforcement against *Show Me!* However, a federal appeals court dismissed the case on technical procedural grounds, and this ruling was not appealed further. This is unfortunate in that the St. Martin's Press case might have presented a somewhat more sympathetic context in which the Supreme Court could have considered these issues.

In any event, for better or worse, it is the *Ferber* case that the high court must now decide. To assist the court in this process the Freedom to Read Foundation joined with several other organizations[2] in a friend-of-the-court brief, urging that the New York Court of Appeals decision be upheld and that the unconstitutional portion of the New York statute be overturned.

Excerpts from the brief follow.

INTEREST OF *AMICI*

As representatives of writers, publishers and sellers of non-obscene books and periodicals distributed throughout the United States, as well as members of the public at large who purchase, borrow and read such materials, and the librarians who serve them, *Amici* have a vital interest in assuring that the freedoms guaranteed by the First Amendment to the United States Constitution are neither narrowed nor abridged. In the context of this case, *Amici* AAP, AAUP, ABA, CPDA, IPDA and NACS also seek to protect the rights of their members, many of whom could arguably be subjected to criminal liability pursuant to the statute under attack should the Court of Appeals decision be reversed. *Amicus* St. Martin's Press, Incorporated, is the publisher of a book, *Show Me!,* which could arguably subject it to criminal liability. Indeed, if the decision of the Court of Appeals is reversed, St. Martin's Press would again fear prosecution for the distribution and sale of *Show Me!* even though it has been found not to be obscene by three courts in three different states.[3]

This case represents an effort by a state to carve out a novel, broad and unprecedented exception to the First Amendment. The question presented here is whether, in the interest of protecting youngsters from being exploited "as subjects in sexual performances," New York can proscribe the dissemination of a broad range of non-obscene, constitutionally protected materials.

The Statute

While the Court has often been confronted with attempts by state and local governments to impinge upon

[1]It is interesting to note, however, that under several of these nineteen statutes, librarians have either expressly or impliedly been exempted from coverage under the non-obscene dissemination offense. Nonetheless, at least several of these nineteen provisions would appear to criminalize the ordinary professional activities of librarians without any available defense whatsoever.

[2]American Booksellers Association, Inc., Association of American Publishers, Inc., Council for Periodical Distributors Associations, International Periodical Distributors Association, Inc., National Association of College Stores, Inc., American Civil Liberties Union, The Association of American University Presses, Inc., New York Civil Liberties Union, and St. Martin's Press.

[3]While librarians, with whom *amicus* Freedom to Read Foundation is closely associated, are granted an affirmative defense against prosecution under Section 263.20(2) of the New York statute, a number of other state statutes covering mere dissemination of non-obscene matter, cited in Petitioner's brief (page 13, n.4), do not provide such an exemption and would therefore appear to criminalize the normal professional activities of librarians. *See, e.g.,* Ariz. Rev. Stat. Ann. §13-3553; Hawaii Rev. Stat. §707-751; Ky. Rev. Stat. §§11-9-1.1; Tex. Penal Code Ann. Tit. 9, §43.25(e); Wis. Stat. Ann. §940.203(4).

First Amendment freedoms, it has never, except in the most extraordinary circumstances, upheld a statute that makes it a crime to disseminate First Amendment protected materials based solely on the nature of their content. By enacting Section 263.15, the State of New York has—purely and simply—attempted to engraft into First Amendment doctrine an unprecedented and wholly unjustified exception to well-recognized classes of protected speech. The State has conceded this, boldly asserting that, ". . . *regardless of whether materials which are devoted to depicting the sexual abuse of children fit into any previously recognized category of unprotected speech,* prohibiting dissemination of those materials does not violate the First Amendment if the 'compelling state interest-less restrictive alternative' standard is satisfied. The Court should reject the State's well-intentioned, but constitutionally-misguided, effort to undo the unbroken line of precedent granting full constitutional protection to the speech here at issue—non-obscene depictions of naked children or of adolescent sexual behavior.

For the laudable purpose of protecting children from sexual exploitation, New York has not only made it illegal in §263.05 to use a child in sexual performance and in §263.10 to "manufacture, sell, disseminate or display" *obscene* materials which depict sexual conduct by youngsters under the age of 16, but also, by its enactment of the Statute, has criminalized the dissemination, sale or display of constitutionally protected non-obscene materials which portray juveniles in sexually related roles. While the proscriptions as they pertain to obscene works do not raise constitutional problems, the prohibitions in the Statute banning the dissemination of First Amendment protected materials cannot be supported by any decision of the Court. . . .

The Misconceptions Urged by Petitioner and Its Supporting Amici

Despite the broad claims of petitioner and its supporting *Amici* in briefs filed here in opposition to the Court of Appeals decision, the Statute is not a "child pornography" law. The task of proscribing child pornography is amply taken care of by other sections of the New York Penal Law, specifically §263.05 controlling the creation of such materials and §263.10 prohibiting the dissemination of related obscene works. To the contrary, the Statute reaches beyond the unprotected obscene material prohibited by §263.10. It permits law enforcement officials to enter legitimate bookstores and libraries in order to seek out non-obscene works which arguably fall within the Statute's broad proscriptions of content. . . .

ARGUMENT

THE STATUTE VIOLATES THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

The First Amendment, as interpreted by this Court, is intended to foster a wide open exchange of ideas and expression, free from state interference.

> It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests. *Cohen v. California,* 403 U.S. 15, 24 (1971).

Amici of course recognize that certain sexually explicit speech, if found obscene, is not protected First Amendment expression. New York State, however, does not attempt to justify the Statute's proscriptions based upon an obscenity standard. Its justification, rather, is that in order to protect minors from commercial sexual exploitation, the dissemination of *all* materials containing certain sexually related depictions of children, even those with serious merit, must be banned. Such a drastic measure is unprecedented, finds no support in the previous decisions of the Court, and goes much further than is required to alleviate the perceived harm. Accordingly the Statute, by imposing such overbroad restrictions, should be held unconstitutional as an infringement of First Amendment rights.

A. *Section 263.15 Does Not Fall Within Any of the Established Exceptions to the First Amendment*

In *Roth* v. *United States,* 354 U.S. 476 (1957), the Court noted the obvious: ". . . sex and obscenity are not synonymous" (at 487). For this reason, the Court recognized,

> It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest. *Id.* at 488.

The principle enunciated in *Roth*—that treatment of the subject of sex will be accorded constitutional protection unless the material in issue is found to be legally obscene—remains bedrock constitutional doctrine. Thus, in *Miller* v. *California,* the Court unequivocally announced: "[T]oday . . . a majority of this Court has agreed on concrete guidelines to isolate 'hard core' pornography from expression protected by the First Amendment." . . .

It is precisely because non-obscene sexual expression "taken as a whole" contains "serious literary, artistic, political or scientific value," that such expression is entitled to First Amendment protection "regardless of whether the government or a majority of the people approve of the ideas these works represent." . . .

In light of the foregoing, the New York Court of Appeals was entirely correct in finding overbroad the State's total prohibition of the dissemination of "non-obscene sexual performance involving children," and in recognizing that, "no matter what the government's objective, First Amendment standards remain applicable whenever the effect of a government regulation is to curtail pro-

tected modes of expression." This does not mean that a state may not curtail the use of children in the creation of child pornography. It is constitutionally free to do so, as New York has, by punishing those who employ or induce children to engage in proscribed forms of sexual conduct. To the extent a state wishes to curtail the publication or dissemination of materials depicting adolescent sexual activity by those having no relationship in the actual child abuse, it may also constitutionally do so, but only as §263.10 provides, by punishing those who publish or disseminate legally obscene materials depicting such conduct.

Notwithstanding that the speech sought to be curbed by the Statute is non-obscene and hence entitled to constitutional protection, New York urges rejection of such "overly simplistic First Amendment analysis" in favor of the crafting of a massive constitutional loophole. This loophole, however, would enable the government to prohibit otherwise protected expression whenever it arguably promotes illegal activity. Thus, the State asserts, without benefit of any supporting authority: "Section 263.15 . . . is premised on the sound idea that the state can properly forbid distribution of materials produced in a certain manner if the state has properly prohibited that manner of production." It is the State's contention that the ban on dissemination of non-obscene protected expression is constitutional solely because it furthers the State's interest in protecting children from child abuse.

Amici have been unable to find a principled basis on which to justify the State's position; in fact, there is none. In considering the State's position, the Court must of course be guided by the recognition that exceptions to classes of speech entitled to First Amendment protection are few, "well-defined and narrowly limited." The expression proscribed by the Statute fails to fall within the obscenity exception. Neither does that speech fall within any of the other established exceptions, *e.g.*, fighting words, defamation, or incitement to imminent lawless activity. The State is thus asking the Court to adopt an entirely new exception to the First Amendment, unsupported by precedent. To accede to this request would require the Court to exclude from First Amendment protection all speech that has a tendency to make illegal activity more likely, since that is the only connection alleged by the State between the speech to be suppressed and a legitimate state purpose. Such an expansive new exception, however, is both unwise and unwarranted.

The required nexus between the speech sought to be censored and the illegal conduct said to be provoked thereby has previously been addressed by the Court. In *Brandenburg* v. *Ohio,* the Court delineated the limited situations in which speech may be suppressed on the basis that it is likely to cause illegal conduct taking the form of street violence. . . .

There is simply no compelling reason to dilute the *Brandenburg* test to accommodate the Statute. . . . The cost of such a contraction of First Amendment rights is substantial. As the Court stated in *Cohen* v. *California,* "most situations where the State has a justifiable interest in regulating speech will fall within one or more of the various established exceptions." Surely, in an area of First Amendment doctrine as well-explored as the issue of the illegal conduct "caused" by speech, the fact that the Statute fails the established test as completely as it does demonstrate clearly its unconstitutionality.

B. *The Statute's Restriction on Speech Is Not Content Neutral; Nor Is It the Least Restrictive Alternative Available to Promote the State's Purpose*

The Statute, imposing restrictions on the content of First Amendment protected speech, is unconstitutional, especially since there are less restrictive alternatives available. Although the State relies heavily upon this Court's decision in *United States* v. *O'Brien,* to support the Statute, such reliance is misplaced.

O'Brien involved the prosecution of a demonstrator for burning his draft card in public to protest against the Vietnam War. He was tried under the 1965 Amendment to the Universal Military Training and Service Act which makes it a crime "knowingly" to destroy or mutilate a selective service registration certificate. O'Brien argued that the statute violated the First Amendment by effectively denying to him his right to express disapproval of the war by the act of burning his card.

Finding the statute constitutional, the Court set out the test to be applied when a law regulating conduct is challenged as violative of the First Amendment:

> [A] governmental regulation is justified . . . [1] if it furthers an important or substantial government interest; [2] if the government interest is unrelated to the suppression of free expression; and [3] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

Here the Statute regulates the conduct of *Amici* and others similarly situated by proscribing the dissemination of certain constitutionally protected works. Assuming, arguendo, that such a prohibition is rationally related to the furtherance of a legitimate concern of the State of New York (at least to the extent that the minors protected are residents of the State of New York) and thus complies with the first of the criteria it nonetheless fails to meet the other two.

The harm allegedly protected against is not, as required by the second part of *O'Brien,* unrelated to the suppression of First Amendment rights. The Statute is directed only at materials which portray certain juvenile sexual activities. Consequently, it is the harm perceived to be caused by the message itself which has led to criminalization of the works covered by the Statute.

In similar contexts, the Court has not sanctioned indiscriminate direct invasions of First Amendment freedoms. When students were suspended from school for wearing armbands in protest of the Vietnam War, their

suspensions were overturned. The Court's decision emphasized that the suspensions were invalid because they were made pursuant to a regulation which banned only the specific form of expression chosen by the students.

In another case, when a protestor was convicted of disturbing the peace merely for wearing a jacket containing a disquieting epithet directed toward the military draft, the Court once again found that the state action was unconstitutional. California, by its prosecution of the protestor, unconstitutionally intended to shield the public from the form of the communication chosen.

Only where the regulation of conduct is "content neutral" or where the restriction on expression is "minimal" has the Court tolerated the concomitant abridgment of First Amendment protections.

The Statute is not "content neutral". It is aimed only at certain sexually related speech and ignores other communications or expressions which may similarly cause injury to young juveniles. By singling out only works depicting certain conduct, the Statute is patently unconstitutional. Nor is the restriction minimal; it is, in fact, absolute.

Even if the Court were to find the Statute "content neutral," it still must fall under the third criterion of *O'Brien* in that it restricts First Amendment freedoms to a greater extent than is necessary.

As evidenced by the legislative policy statement issued upon passage of the Statute, New York is primarily concerned with eliminating the sexual exploitation of persons under age 16. This result is still achieved if the Statute is declared unconstitutional in that separate provisions in the New York Penal Law already proscribe the creation as well as dissemination of child pornography. Section 263.05 makes the use of children in the creation of child pornography illegal while §263.10 bans its dissemination. These are sufficient to not only effectuate the state policy of protecting youths from sexual exploitation, but, as a less restrictive alternative, also avoid any infringement of First Amendment freedoms by not also criminalizing non-obscene works.

C. *New York's Interest in Protecting the Welfare of Children Living Within the State Does Not Justify the Denial of First Amendment Rights*

Petitioner claims that New York's interest in the protection of children is sufficiently compelling so that constitutional rights to publish, distribute and sell certain non-obscene materials can be restricted. The State urges that it is "physically, psychologically and emotionally harmful" for a child to be depicted engaging in various categories of sexually related conduct in any work, regardless of its legitimate value.

This very argument, that a state's interest in protecting the reputation and emotional well-being of its youths outweighs First Amendment freedoms, has previously been made to, and rejected by, the Court. In *Smith* v. *Daily Mail Publishing Co.*, a newspaper printed the name of a juvenile offender in violation of a West Virginia law which prohibited such a publication absent the prior written approval of the Juvenile Court. The State urged that the law was a constitutional attempt to protect the welfare of West Virginia youths who become enmeshed in the criminal process at a young age. Chief Justice Burger, writing for seven of the eight justices who heard the case, rejected the argument that such an interest could outweigh First Amendment rights. . . .

Similarly, in *Cox Broadcasting Corp.* v. *Cohn,* the Court denied enforcement of a Georgia statute which, in effect, deprived the media of its right to publish or broadcast the name of a rape victim in order to protect her family's right of privacy.

Here, like *Smith* and *Cox,* the enunciated state interest cannot prevail over the First Amendment rights of *Amici* and others to disseminate legitimate works which contain non-obscene depictions of juvenile sexual conduct.

D. *The Amended Statute, by Failing to Provide an Exemption for Medical, Scientific or Educational Material, Is Overly Broad and Unconstitutional*

An absolute prohibition of the dissemination of all works which depict children engaged in certain categories of sexually related conduct, regardless of obscenity, clearly regulates protected speech. The State so concedes in its brief. If the Statute is upheld, *Amici's* publisher, distributor, and bookseller members will be denied their right to disseminate a wide range of medical, scientific and educational works which, as an essential part of their content, contain sexually related pictures of naked youths.

This Court has repeatedly stressed that laws are overbroad and unconstitutional when they restrict First Amendment freedoms in the process of regulating unprotected expression." . . .

Amici's members, publishers and distributors of legitimate materials, face the real threat of criminal prosecution pursuant to the Statute's overbroad prohibitions. Apart from actual prosecution, the "chilling effect" of such an overbroad statute is equally real. The New York legislature's failure to include an exemption for medical, scientific and educational works, as well as the coexistence of §§263.10 and 263.15, is conclusive of its intent to regulate, by the Statute, both protected and unprotected expression. In light of this obvious overbroad legislative intent, recognized by the Court of Appeals below, the Statute cannot be construed narrowly. The Court should, therefore, find the Statute unconstitutional on its face and permanently enjoin the State from its enforcement.

E. *By Allowing the Moral Values of Some to Dictate What May Be Read by All, the Statute Impermissibility Infringes Upon the Rights of Parents and Teachers to Educate Children About Sex With the Aid of Materials Designed to Deal With the Subject in a Frank and Non-Obscene Manner*

Among our most sacred freedoms are those protected by the First Amendment to the United States Constitution. They ensure that no person or group will ever be able to set out the subjects about which we can read, think or teach. The State and Petitioner's *Amici,* however, seek to impose their view of morality upon the State of New York by banning the protected works covered by the Statute. . . .

A focal point of the briefs of Petitioner and Petitioner's *Amici* is the emphasis placed upon calling all photographs of young juveniles engaged in certain conduct "child pornography". In the context of the Statute, which proscribes non-obscene works, use of such a term is erroneous and misleading. "Pornography" is defined as "obscene or licentious writing, painting, or the like". Where, however, children are depicted in materials which *have* serious scientific, literary, political or artistic merit, those works are not, by definition, obscene. They should not be categorized as "child pornography."

Within this group of materials, the dissemination of which is criminalized by the Statute, are pictorial texts intended to aid parents and teachers in educating children about anatomy, sex and sexual relationships. The authors of these works uniformly believe that there is a psychological benefit to being exposed to such materials at a young age. It is thought that by seeing pictorial presentations of sex in an open and unembarrassed manner, youths will not need to learn about relationships, birth control and pregnancy on street corners, and, further, can more easily develop into mature, aware adults.

The *President's Commission on Obscenity and Pornography* came to a similar conclusion in its 1970 report where it stated:

> Biological studies indicate that boys and girls enter pubescence earlier than formerly was the case, and, as a result, are aware of their sexual feelings earlier. It is highly desirable at this stage in their development that they receive straightforward information from their parents, from the school, and from qualified community agencies . . .
>
> A study by Offer (1969) defines the levels of sexual development that young people in high school and college experience, and suggests that as interest in the opposite sex begins to crystallize, attitudes are more important initially than overt sexual behavior. These developing attitudes must be based on accurate and complete information regarding sexuality if subsequent behavior is to be responsible and mature.
>
> Sex education, then, must be expanded and more fully developed as an integral element of general health education to insure its adequacy to meet the needs of the whole community. *Both parents and young people require adequate sources of reliable information, and the community should provide these sources through its training personnel and institutions.*" Report, Bantam Books Edition, pp. 312-13. (emphasis added)

Included in such works, of necessity, are depictions of persons under the age of 16 so that the youngsters reading these books can fully understand their own sexual development from childhood to puberty through adulthood. While all Americans may not agree that non-obscene pictorially honest renditions of anatomy and sexual relationships are the best way to educate children about human sexuality, it would be contrary to our Constitutional freedoms to deny those parents who choose to have their children taught with such materials their right to do so. The statute, however, would deny parents this choice. . . .

By permitting books to be banned in the manner contemplated by the Statute, the Court would be impliedly saying to children that sex is a subject which can be discussed openly only in back alleys and on street corners. It is this attitude that the President's Commission concluded must be eliminated if our society is to ever outgrow its preoccupation with pornography:

> "Sex education, *straightforward and adequate begun in the home,* continued in school, and supplemented by community agencies such as religious, medical and other service institutions, can reduce interest in pornography as a source of information and can assist in developing a healthy attitude toward sexuality." Report, p. 312. (emphasis added)

The Court must not allow the moral values of some to be thrust upon all. Individual choice is the cornerstone of a free society. The Statute, as a proscriptive law aimed at eliminating only certain forms of protected speech, should be held unconstitutional as denying New Yorkers of their right to free expression.

F. *The Statute Cannot Be Saved by Analogies to So-Called "Trafficking" and "Contraband" Laws Which Require the Existence of an Underlying Crime and That the Speaker Be Directly Involved in That Criminal Activity*

Amicus curiae Covenant House, in its brief, attempts to support the constitutionality of the Statute by analogy to the so-called "trafficking" and "contraband" laws, i.e., federal criminal statutes which ban certain transmissions and communications involving, or made with the knowledge of, various underlying crimes. The "trafficking" statutes referred to by Covenant House relate to the transmission of wagering information and the promotion of racketeering activities; the contraband statutes referred to prohibit the disclosure of information obtained through illegal wiretapping and the sale of products manufactured with oppressive child labor. These analogies, however, fall wide of the mark for two important reasons.

First, the Statute, as recognized by the Court of Ap-

peals below, bars the dissemination of works even if they contain pictures taken outside New York "in another State or country where such conduct may not be prohibited." Petitioner and Covenant House support this interpretation. Thus, since the photographs may have been taken where their production did not violate any law, there is not necessarily an underlying crime, as is required in all the "trafficking" and "contraband" statutes cited by Covenant House.

In addition, due to its multi-jurisdictional application, the Statute can subject a seller to criminal liability for disseminating works which contain photographs that he reasonably believes were legally taken outside New York State or outside the country since knowledge is not an element of the crime.

Petitioner and Covenant House also assert that the Statute is no different in principle than the prohibition of the products manufactured with child labor in violation of 29 U.S.C. §212. The child labor laws, however, unlike the Statute, clearly do not infringe upon protected speech. It is one thing to say that children cannot be hired to produce a newspaper. It is quite another thing to argue that it cannot be sold because it contains photographs of child labor. . . .

Second, the federal laws cited by petitioner and Covenant House banning certain communications require not only the existence of an underlying crime, but also, contrary to the assertion of Covenant House, the person doing the communicating be involved with, or have knowledge of, the underlying crime. The Statute, to the contrary, subjects a seller to liability even though he may have had nothing to do with the original production of the picture and knows nothing about it.

For this reason, neither newspapers which merely convey information regarding illegal activities nor gambling "tip sheets" are proscribed by either §1084 or §1952. Indeed, it has been held that if statutes such as these did apply to a "speaker" not involved with the underlying crime, they would be in violation of the First Amendment.

In contrast, the Statute does not require any involvement by the disseminator in the actual photographing of a child or any knowledge by him that the photograph was taken in violation of law. The dissemination of a work can be in violation of the Statute even though its production was not in violation of §263.05, and, indeed, even if such production was not a crime of any kind.

It is apparent, therefore, that the analogies drawn by Petitioner and Covenant House to interstate communications and distribution proscriptions where they relate to criminal activities are without merit.

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.

Regular membership in the Freedom to Read Foundation begins at $25.00 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.

Freedom to Read Foundation
50 E. Huron Street
Chicago, IL 60611

First Class Mail

Ballots Coming!

This issue of *FTRF News* announces the slate for the 1982 election. Ballots will be mailed on May 1 to all Foundation members who have paid their 1982 dues by that date. If you have overlooked your 1982 contribution, please send your check today.