Freedom to Read Foundation News

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U.S. Court of Appeals Upholds Ruling

Indianapolis Pornography Ordinance Unconstitutional

The U.S. Court of Appeals, on August 27, 1985, affirmed the ruling of Federal District Court Judge Sarah Evans Barker that the "anti-pornography" ordinance passed by the Indianapolis-Marion County City Council is unconstitutional. As reported in earlier issues of the FTRF News (vol. 12, no. 4; vol. 11, no. 1), the Freedom to Read Foundation joined the American Booksellers Association, the Association of American Publishers and others in challenging the constitutionality of the ordinance. The American Library Association, the Indiana Library Association and the Indiana Library Trustee Association filed an amicus curiae *brief in the appeal.*

In his decision, Judge Easterbrook describes the ordinance as unconstitutional because it discriminates on the basis of content. He places special emphasis on the value and importance of free speech: "Under the First Amendment the government must leave to the people the evaluation of ideas. Bold or subtle, an idea is as powerful as the audience allows it to be. . . . Free speech has been on balance an ally of those seeking change. . . . Change in any complex system ultimately depends on the ability of outsiders to challenge accepted views and the reigning institutions. Without a strong guarantee of freedom of speech, there is no effective right to challenge what is."

Excerpts from the decision are included below:

Indianapolis enacted an ordinance defining "pornography" as a practice that discriminates against women. "Pornography" is to be redressed through the administrative and judicial methods used for other discrimination. The City's definition of "pornography" is considerably different from "obscenity," which the Supreme Court has held is not protected by the First Amendment.

To be "obscene" under *Miller v. California*. . . "a publication must, taken as a whole, appeal to the prurient interest, must contain patently offensive depictions or descriptions of specified sexual conduct, and on the whole have no serious literary, artistic, political, or scientific value." Offensiveness must be assessed under the standards of the community. Both offensiveness and an appeal to something other than "normal, healthy sexual desires" . . . are essential elements of "obscenity."

"Pornography" under the ordinance is "the graphic

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President's Report to the ALA Council

In a report to the Council of the American Library Association at the ALA's 1985 Annual Conference, FTRF President Ella Gaines Yates reported on the business transacted by the Foundation trustees at their July 4 meeting in Chicago.

The Foundation Board of 1984-1985 maintained its watch on First Amendment concerns and the protection of the freedom to read. The litigation of constitutional issues is often a long-term commitment. Accordingly, we are continuing our support of key lawsuits. To highlight just a few of these:

• *Bullfrog Films, Inc.* v. *Wick.* To increase awareness of the issues involved in this suit against the United States Information Agency (USIA), the Foundation sponsored an all-day screening (during the ALA conference) of 6 films that have been denied certificates of international educational character by that federal agency. Several of the films have been nominated for, or have won, awards at film festivals throughout the country. Included in the showing were: *In Our Own Backyards; Uranium Mining in the U.S.; Ecocide: A Strategy of War; Peace: A Conscious Choice; Soldier Girls; Save the Planet; Whatever Happened to Childhood?*

The draft complaint for *Bullfrog* is in its final form and will be filed in September, 1985.

• *American Booksellers Association, et. al.* v. *William H. Hudnut, III.* Although this case was won at the trial court level, the concept that pornography is a violation of women's civil rights is not dead, despite Judge Sarah Evans Barker's ruling on the Indianapolis ordinance. The appeal by the City of Indianapolis was argued in the 7th Circuit Court of Appeals, in Chicago, on June 4. We await the Court's decision.

• *American Library Association* v. *Faurer.* (National Security Agency case). The ALA is the lead plaintiff in this suit which presents highly significant issues for libraries and librarians. The case involves the withdrawal and classification of documents belonging to the late William Friedman, a National Security Agency (NSA) cryptologist. The ACLU Foundation National Security Project, attorneys for the plaintiffs, recently received permission to take further discovery to determine the precise history of the NSA's dealings with the Marshall Library. The plaintiffs' position is that the NSA had no authority to

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President's Report *(from p. 1)*

classify documents that were previously available to the public.

A similar incident, relating to the removal by the government of nuclear medical research papers from the University of California at Los Angeles Library, was reported to the Board. The Foundation is monitoring this serious problem.

A second area deserving close scrutiny and challenge is the trend towards restricted shelving, as evidenced in *Marian English, et. al. v. Evergreen School District, et. al.* (Washington State). Here, books were removed from school collections and replaced on shelves on higher grade levels, or on restricted shelves where students must obtain prior parental consent in order to read the books.

The Foundation is concerned that the insidious route of restricting access in school libraries will become a widespread trend and a means for schools to avoid censorship charges. Such situations are extremely difficult to challenge in court because the materials remain available, though restricted, and ideas are obstructed, but not suppressed.

The Foundation is following with great interest two areas under federal jurisdiction. U.S. Attorney General Edwin Meese 3d, has appointed a Commission on Pornography to study the dimensions and effects of pornography on society and to recommend measures, if the Commission deems them appropriate, to control its production and distribution. The Foundation awaits the findings of the Commission in June, 1986, and the impact they will have on First Amendment concerns.

The proposed revision of the federal tax plan could have a serious impact on the Foundation's ability to support litigation if deductions for charitable contributions are eliminated.

The Foundation confirmed two grants at this session: one to the ACLU Foundation National Security Project of $2,500 in support of the *Faurer* case; and a second grant of $5,000 to the Media Coalition in continued support for its assistance in monitoring and evaluating the activities of state legislatures with regard to obscenity and First Amendment-related legislation.

The Foundation reaffirms its commitment of support to libraries and librarians on intellectual freedom issues, and urges continued and accelerated support from the memberships of national, state and local library associations.

Ella Gaines Yates,
President
Freedom to Read Foundation

1985 Election

3 New Trustees Chosen, 1 Re-Elected

Three new Trustees were elected to serve two-year terms on the Board of Trustees of the Freedom to Read Foundation in balloting held in May.

Neil H. Adelman, Attorney, Chicago, Illinois; Pamela G. Bonnell, Library Manager, Plano Public Library System, Plano, Texas and R. Bruce Rich, General Counsel, Association of American Publishers Freedom to Read Committee, New York, New York, joined the Board of Trustees at the annual meeting on July 4 in Chicago. Dorothy M. Broderick, Managing Editor, *Voice of Youth Advocates,* Virginia Beach, Virginia, was re-elected to a second term.

New Officers Elected

At its initial organizing meeting, the 1985-86 Board elected Lee Brawner, Executive Director, Metropolitan Library System, Oklahoma City, Oklahoma, as President of the Foundation. Judith A. Sessions, University Librarian, California State University-Chico, California, was elected Vice President and J. Dennis Day, Salt Lake City Public Librarian, was re-elected Treasurer.

Elected to serve on the Executive Committee with the officers were Russell Shank, University Librarian, University of California at Los Angeles and Pamela G. Bonnell, Plano Public Library System, Plano, Texas.

Other members of the 1985-86 Board of Trustees are Neil H. Adelman, Attorney, Chicago; Dorothy M. Broderick, Managing Editor, VOYA, Virginia Beach, Virginia; Thomas G. Galvin, ALA Executive Director-Designate; Alice Ihrig, Director of Civic/Cultural Programs, Moraine Valley College, Palos Hills, Illinois; Beverly P. Lynch, ALA President; Reginia U. Minudri, ALA Vice President/President-Elect; R. Bruce Rich, General Counsel, Association of American Publishers Freedom to Read Committee, New York, N.Y.; and C. James Schmidt, Chair, ALA Intellectual Freedom Committee.

At the close of the 1985 Annual Meeting, the terms expired of Elliot Goldstein, Henry R. Kaufman and Ella Gaines Yates.

Nominations for Freedom to Read Foundation Board of Trustees

Nominations for candidates to run in the 1986 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 through June 1, 1986. Nominations should be sent to:

Pamela G. Bonnell, Chair
FTRF Nominating Committee
Plano Public Library System
P.O. Box 356
Plano, TX 75074

Serving with Ms. Bonnell on the Nominating Committee are Neil H. Adelman, Attorney, Miller, Shakman, Hamilton & Nathan, 208 S. LaSalle St., Chicago, IL 60604 and Russell Shank, University Librarian, University of California at Los Angeles Library, Los Angeles, CA 90024.

Nominations must be received by December 31, 1985.

Foundation Reaffirms Support of Media Coalition

The Board of Trustees again voted to give a $5,000 grant to the Media Coalition, in recognition of the many services provided by the Coalition to the Foundation.

The Coalition monitors the activities of state legislatures throughout the country with respect to First Amendment/obscenity related legislation and issues reports and bulletins to members. The Coalition also prepares and files *amicus curiae* briefs in First Amend-

ment cases.

The Freedom to Read Foundation and members of the Media Coalition are plaintiffs in *American Booksellers Association* v. *Hudnut,* the suit challenging the Indianapolis "anti-pornography" ordinance.

William D. North Receives Immroth Award

Chicago attorney William D. North, former President of the Board of Trustees of the Freedom to Read Foundation, received the 1985 John Phillip Immroth Memorial Award in Chicago at the 1985 American Library Association (ALA) Annual Conference. The Immroth Award, presented by the ALA Intellectual Freedom Round Table, honors intellectual freedom fighters who have made notable contributions and demonstrated remarkable personal courage.

William D. North helped to incorporate the Foundation in 1969 and acted as its legal counsel until 1980. When Mr. North became General Counsel and Senior Vice President of the National Association of Realtors, he successfully ran for election to the Board of Trustees of the Foundation. He served as president of the Board from 1981-1984, during which time the Foundation became an increasingly more visible leader in the defense of First Amendment freedoms.

Mr. North generously donated the $500 Immroth Award to the Foundation.

Eli M. Oboler Memorial Award

The American Library Association's Intellectual Freedom Round Table has announced the creation of the Eli M. Oboler Memorial Award for the best published work in the area of intellectual freedom. Eli M. Oboler (1915-1983), a founding member of the Freedom to Read Foundation, was one of the library profession's most eloquent and insightful champions of intellectual freedom. He served as the Foundation's vice-president in 1979-80 and is the only person ever elected to the Foundation Board for two consecutive two-year terms on two different occasions.

In naming the award for him, the committee cited Mr. Oboler's service to the library profession as university librarian at Idaho State University, longtime member of ALA Council, president of the Pacific Northwest and Idaho library associations and "champion of intellectual freedom," who "demanded the dismantling of all barriers to freedom of expression." He also was the author of hundreds of articles, reviews and books.

The following criteria have been established for works to be considered:

- It must be an article (including a review article), a series of thematically connected articles, a book or a manual published on the local, state or national level, in English or in English translation. It need not have appeared in the "library press."

- It must have as its central concern one or more issues, events, questions or controversies in the area of intellectual freedom, including matters of ethical, political or social concern related to intellectual freedom.

- It must also be demonstrably relevant to the concerns and needs of members of the library community, including the worlds of publication (print and nonprint) and communication.

- It must, in the opinion of the judges (which is final), meet high standards of literary quality, accuracy and responsibility. The principal focus of evaluation will, of course, be the writing, but other considerations may, in the opinion of the judges, be relevant. These may range from the use of particularly effective illustrations, to recognition of the difficult nature of the background research or the subject itself, or for special courage or persistence displayed in writing and publishing the work.

- The work must have been published within the two-year period ending the December prior to the ALA Annual Conference at which the award is granted.

The biennial award, funded by HBW Associates, Inc., library consultants and planners, consists of $500.00 and a certificate of recognition. It will first be presented at the 1986 ALA Annual Conference in New York, for writing that appeared in print in 1984 and 1985; the 1988 award will cover works published in 1986 and 1987.

Nominated works would be submitted, in triplicate, to Lamar Veatch, Chair, Eli M. Oboler Memorial Award Committee, Irving Public Library System, 915 N. O'Connor Rd., Irving, Texas, 75061. The deadline for submissions is December 15, 1985.

Other Annual Meeting News

Litigation Update

- *American Library Association* v. *Faurer.* The Board of Trustees voted to give an additional $2,500 grant to the American Civil Liberties Union Foundation's National Security Project in support of this suit against the National Security Agency (NSA). The case challenges the withdrawal and classification of documents from the Marshall Library (see *FTRF News*, vol. 12, no. 3; vol. 12, no. 4). ACLU Attorney Mark Lynch reported that depositions have been scheduled with the two NSA officials who handled the document reclassification.

- *People of the State of Illinois* v. *Heinrich.* As reported in the last issue of *FTRF News* (vol. 13, no. 1), the Foundation granted $1,200 towards the appeal of this case which challenges the constitutionality of an Illinois criminal libel statute. According to attorney Jeffrey Shaman, the U.S. Supreme Court did not grant jurisdiction for the appeal, and as is customary, the court did not explain why it declined to take the case. The Supreme Court hears only 8% of the cases appealed to it each year. Unless the state decides not to prosecute Mr. Heinrich, which appears unlikely, the case will return to the circuit court for trial. The attorneys for Mr. Heinrich will continue to present motions based upon the First Amendment and it is possible that further appeals will follow.

Pornography *(from p. 1)*

sexually explicit subordination of women, whether in pictures or in words, that also includes one or more of the following:

(1) Women are presented as sexual objects who enjoy pain or humiliation; or

(2) Women are presented as sexual objects who experience sexual pleasure in being raped; or

(3) Women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt, or as dismembered or truncated or fragmented or severed into body parts; or

(4) Women are presented as being penetrated by objects or animals; or

(5) Women are presented in scenarios of degradation, injury, abasement, torture, shown as filthy or inferior, bleeding, bruised, or hurt in a context that makes these conditions sexual; or

(6) Women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display."

Indianapolis Code # 16-3(q). The statute provides tht the "use of men, children, or transsexuals in the place of women in paragraphs (1) through (6) above shall also constitute pornography under this section." The ordinance passed in April 1984 defined "sexually explicit" to mean actual or simulated intercourse or the uncovered exhibition of the genitals, buttocks or anus. An amendment in June 1984 deleted this provision, leaving the term undefined.

The Indianapolis ordinance does not refer to the prurient interest, to offensiveness, or to the standards of the community. It demands attention to particular depictions, not to the work judged as a whole. It is irrelevant under the ordinance whether the work has literary, artistic, political, or scientific value. The City and many *amici* point to these omissions as virtues. They maintain that pornography influences attitudes, and the statute is a way to alter the socialization of men and women rather than to vindicate community standards of offensiveness. And as one of the principal drafters of the ordinance has asserted, "if a woman is subjected, why should it matter that the work has other value?"

Civil rights groups and feminists have entered this case as *amici* on both sides. Those supporting the ordinance say that it will play an important role in reducing the tendency of men to view women as sexual objects, a tendency that leads to both unacceptable attitudes and discrimination in the workplace and violence away from it. Those opposing the ordinance point out that much radical feminist literature is explicit and depicts women in ways forbidden by the ordinance and that the ordinance would reopen old battles. It is unclear how Indianapolis would treat works from James Joyce's *Ulysses* to Homer's *Iliad;* both depict women as submissive objects for conquest and domination.

We do not try to balance the arguments for and against an ordinance such as this. The ordinance discriminates on the ground of the content of the speech. Speech treating women in the approved way — in sexual encounters "premised on equality" — is lawful no matter how sexually explicit. Speech treating women in the disapproved way — as submissive in matters sexual or as enjoying humiliation — is unlawful no matter how significant the literary, artistic, or political qualities of the work taken as a whole. The state may not ordain preferred viewpoints in this way. The Constitution forbids the state to declare one perspective right and silence opponents.

I

The ordinance contains four prohibitions. People may not "traffic" in pornography, "coerce" others into performing in pornographic works, or "force" pornography on anyone. Anyone injured by someone who has seen or read pornography has a right of action against the maker or seller.

Trafficking is defined in sec. 16-3(g)(4) as the "production, sale, exhibition, or distribution of pornography." The offense excludes exhibition in a public or educational library, but a "special display" in a library may be sex discrimination. Section 16-3(g)(4)(C) provides that the trafficking paragraph "shall not be construed to make isolated passages or isolated parts actionable."

"Coercion into pornographic performance" is defined in sec. 16-3(g)(5) as "[c]oercing, intimidating or fradulently inducing any person . . . into performing for pornography. . . ." The ordinance specifies that proof of any of the following "shall not constitute a defense: I. That the person is a woman; . . . VI. That the person has previously posed for sexually explicit pictures . . . with anyone . . . ; . . . VIII. That the person actually consented to a use of the performance that is changed into pornography; . . . IX. That the person knew that the purpose of the acts or events in question was to make pornography; . . . XI. That the person signed a contract, or made statements affirming a willingness to cooperate in the production of pornography; XII. That no physical force, threats, or weapons were used in the making of the pornography; or XIII. That the person was paid or otherwise compensated."

"Forcing pornography on a person," according to sec. 16-3(g)(5), is the "forcing of pornography on any woman, man, child, or transsexual in any place of employment, in education, in a home, or in any public place." The statute does not define forcing, but one of its authors states that the definition reaches pornography shown to medical students as part of their education or given to language students for translation.

Section 16-3(g)(7) defines as a prohibited practice the "assault, physical attack, or injury of any woman, man, child, or transsexual in a way that is directly caused by specific pornography."

For purposes of all four offenses, it is generally "not . . . a defense that the respondent did not know or intend that the materials were pornography. . . ." Section 16-3(g)(8). But the ordinance provides that damages are unavailable in trafficking cases unless the complainant proves "that the respondent knew or had reason to know that the materials were pornography." It is a complete defense to a trafficking case that all of the materials in question were pornography only by virtue of category (6) of the definition of pornography. In cases of assault caused by pornography, those who seek damages from "a seller, exhibitor

or distributor" must show that the defendant knew or had reason to know of the material's status as pornography. By implication, those who seek damages from an author need not show this.

A woman aggrieved by trafficking in pornography may file a complaint "as a woman acting against the subordination of women" with the office of equal oportunity. Section 16-17(b). A man, child, or transsexual also may protest trafficking "but must prove injury in the same way that a woman is injured. . . ." *Ibid.* Subsection (a) also provides, however, that "any person claiming to be aggrieved" by trafficking, coercion, forcing, or assault may complain against the "perpetrators." We need not decide whether sec. 16-17(b) qualifies the right of action in sec. 16-17(a).

The district court held the ordinance unconstitutional. . . . The court concluded that the ordinance regulates speech rather than the conduct involved in making pornography. The regulation of speech could be justified, the court thought, only by a compelling interest in reducing sex discrimination, an interest Indianapolis had not established. The ordinance is also vague and overbroad, the court believed, and establishes a prior restraint of speech.

II

The plaintiffs are a congeries of distributors and readers of books, magazines, and films. . . . Collectively the plaintiffs (or their members, whose interests they represent) make, sell, or read just about every kind of material that could be affected by the ordinance, from hard-core films to W.B. Yeats's poem "Leda and the Swan" (from the myth of Zeus in the form of a swan impregnating an apparently subordinate Leda), to the collected works of James Joyce, D.H. Lawrence, and John Cleland.

The interests of . . . the members of the organizational plaintiffs are directly affected by the ordinance, which gives them standing to attack it. . . .

The district court prevented the ordinance from taking effect. The expedition with which this suit was filed raises questions of ripeness and abstention. . . . A case is not ripe if the issues are still poorly formed or the application of the statute is uncertain. A challenge may be ripe, however, even when the statute is not yet effective. . . . We gain nothing by waiting. Time would take a toll, however, on the speech of the parties subject to the act. They must take special care not to release material that might be deemed pornographic, for that material could lead to awards of damages. Deferred adjudication would produce tempered speech without assisting in resolution of the controversy.

A state court could not construe this ordinance as an "ordinary" obscenity law; another law serves that function. Ind. Stat. sec. 35-49-1-1 et seq. It is designed to be distinctively different, to prohibit explicitly sexual speech that "subordinates" women in specified ways . . . it is the structure of the statute rather than the meaning of any one of its terms that leads to the constitutional problem.

III

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.". . . Under the First Amendment the government must leave to the people the evaluation of ideas. Bald or subtle, an idea is as powerful as the audience allows it to be. A belief may be pernicious—the beliefs of Nazis led to the death of millions, those of the Klan to the repression of millions. A pernicious belief may prevail. Totalitarian governments today rule much of the planet, practicing suppression of billions and spreading dogma that may enslave others. One of the things that separates our society from theirs is absolute right to propagate opinions that the government finds wrong or even hateful.

The ideas of the Klan may be propagated. . . . Communists may speak freely and run for office. . . . The Nazi Party may march through a city with a large Jewish population. . . . People may criticize the President by misrepresenting his positions, and they have a right to post their misrepresentations on public property. . . . People may teach religions that others despise. People may seek to repeal laws guaranteeing equal opportunity in employment or to revoke the constitutional amendments granting the vote to blacks and women. They may do this because "above all else, the First Amendment means that government has no power to restrict expression because of its message [or] its ideas. . . ."

Under the ordinance graphic sexually explicit speech is "pornography" or not depending on the perspective the author adopts. Speech that "subordinates" women and also, for example, presents women as enjoying pain, humiliation, or rape, or even simply presents women in "positions of servility or submission or display" is forbidden, no matter how great the literary or political value of the work taken as a whole. Speech that portrays women in positions of equality is lawful, no matter how graphic the sexual content. This is thought control. It establishes an "approved" view of women, of how they may react to sexual encounters, of how the sexes may relate to each other. Those who espouse the approved view may use sexual images; those who do not, may not.

Indianapolis justifies the ordinance on the ground that pornography affects thoughts. Men who see women depicted as subordinate are more likely to treat them so. Pornography is an aspect of dominance. It does not persuade people so much as change them. It works by socializing, by establishing the expected and the permissible. In this view pornography is not an idea; pornography is the injury.

There is much to this perspective. Beliefs are also facts. People often act in accordance with the images and patterns they find around them. People raised in a religion tend to accept the tenets of that religion, often without independent examination. People taught from birth that black people are fit only for slavery rarely rebelled against that creed; beliefs coupled with the self-interest of the masters established a social structure that inflicted great harm while enduring for centuries. Words and images act at the level of the subconscious before they persuade at the level of the conscious. Even the truth has little chance unless a statement fits within the framework of beliefs that may never have been subjected to rational study.

Therefore we accept the premises of this legislation. Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home,

battery and rape on the streets. In the language of the legislature, "[p]ornography is central in creating and maintaining sex as a basis of discrimination. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempts it produces, with the acts of aggression it fosters, harm women's opportunities for equality and rights [of all kinds]." Indianapolis Code sec. 16-1(a) (2).

Yet this simply demonstrates the power of pornography as speech. All of these unhappy effects depend on mental intermediation. Pornography affects how people see the world, their fellows, and social relations. If pornography is what pornography does, so is other speech. Hitler's orations affected how some Germans saw Jews. Communism is a world view, not simply a *Manifesto* by Marx and Engels or a set of speeches. Efforts to suppress communist speech in the United States were based on the belief that the public acceptability of such ideas would increase the likelihood of totalitarian government. Religions affect socialization in the most pervasive way. The opinion in *Wisconsin v. Yoder* . . . shows how a religion can dominate an entire approach to life, governing much more than the relation between the sexes. Many people believe that the existence of television, apart from the content of specific programs, leads to intellectual laziness, to a penchant for violence, to many other ills. The Alien and Sedition Acts passed during the administration of John Adams rested on a sincerely held belief that disrespect for the government leads to social collapse and revolution—a belief with support in the history of many nations. Most governments of the world act on this empirical regularity, suppressing critical speech. In the United States, however, the strength of the support for this belief is irrelevant. Seditious libel is protected speech unless the danger is not only grave but also imminent. . . .

Racial bigotry, anti-semitism, violence on television, reporters' biases—these and many more influence the culture and shape our socialization. None is directly answerable by more speech, unless that speech too finds its place in the popular culture. Yet all is protected as speech, however insidious. Any other answer leaves the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us.

Sexual responses often are unthinking responses, and the association of sexual arousal with the subordination of women therefore may have a substantial effect. But almost all cultural stimuli provoke unconscious responses. Religious ceremonies condition their participants. Teachers convey messages by selecting what not to cover; the implicit message about what is off limits or unthinkable may be more powerful than the messages for which they present rational argument. Television scripts contain unarticulated assumptions. People may be conditioned in subtle ways. If the fact that speech plays a role in a process of conditioning were enough to permit governmental regulation, that would be the end of freedom of speech.

It is possible to interpret the claim that the pornography is the harm in a different way. Indianapolis emphasizes the injury that models in pornographic films and pictures may suffer. The record contains materials depicting sexual torture, penetration of women by red-hot irons and the like. These concerns have nothing to do with written materials subject to the statute, and physical injury can occur with or without the "subordination" of women. As we discuss in Part IV, a state may make injury in the course of producing a film unlawful independent of the viewpoint expressed in the film.

The more immediate point, however, is that the imag. of pain is not necessarily pain. In *Body Double,* a suspense film directed by Brian DePalma, a woman who has disrobed and presented a sexually explicit display is murdered by an intruder with a drill. The drill runs through the woman's body. The film is sexually explicit and a murder occurs—yet no one believes that the actress suffered pain or died. In *Barbarella* a character played by Jane Fonda is at times displayed in sexually explicit ways and at times shown "bleeding, bruised, [and] hurt in a context that makes these conditions sexual"—and again no one believes that Fonda was actually tortured to make the film. In *Carnal Knowledge* a woman grovels to please the sexual whims of a character played by Jack Nicholson; no one believes that there was a real sexual submission, and the Supreme Court held the film protected by the First Amendment. . . . And this works both ways. The description of women's sexual domination of men in *Lysistrata* was not real dominance. Depictions may affect slavery, war, or sexual roles, but a book about slavery is not itself slavery, or a book about death by poison a murder.

Much of Indianapolis's argument rests on the belief that when speech is "unanswerable," and the metaphor that there is a "marketplace of ideas" does not apply, the First Amendment does not apply either. The metaphor is honored; Milton's *Aeropagitica* and John Stewart Mill' *On Liberty* defend freedom of speech on the ground that the truth will prevail, and many of the most important cases under the First Amendment recite this position. The Framers undoubtedly believed it. As a general matter it is true. But the Constitution does not make the dominance of truth a necessary condition of freedom of speech. To say that it does would be to confuse an outcome of free speech with a necessary condition for the application of the amendment.

A power to limit speech on the ground that truth has not yet prevailed and is not likely to prevail implies the power to declare truth. At some point the government must be able to say (as Indianapolis has said): "We know what the truth is, yet a free exchange of speech has not driven out falsity, so that we must now prohibit falsity." If the government may declare the truth, why wait for the failure of speech? Under the First Amendment, however, there is no such thing as a false idea. . . . so the government may not restrict speech on the ground that in a free exchange truth is not yet dominant.

At any time, some speech is ahead in the game; the more numerous speakers prevail. Supporters of minority candidates may be forever "excluded" from the political process because their candidates never win, because few people believe their positions. This does not mean that freedom of speech has failed.

The Supreme Court has rejected the position that speech must be "effectively answerable" to be protected by the Constitution. . .

We come, finally, to the argument that pornography is

"low value" speech, that it is enough like obscenity that Indianapolis may prohibit it. Some cases hold that speech far removed from politics and other subjects at the core of the Framers' concerns may be subjected to special regulation. . . . These cases do not sustain statutes that select among viewpoints, however.

At all events, "pornography" is not low value speech within the meaning of these cases. Indianapolis seeks to prohibit certain speech because it believes this speech influences social relations and politics on a grand scale, that it controls attitudes at home and in the legislature. This precludes a characterization of the speech as low value. True, pornography and obscenity have sex in common. But Indianapolis left out of its definition any reference to literary, artistic, political, or scientific value. The ordinance applies to graphic sexually explicit subordination in works great and small. The Court sometimes balances the value of speech against the costs of its restriction, but it does this by category of speech and not by the content of particular works. . . .

Any rationale we could imagine in support of this ordinance could not be limited to sex discrimination. Free speech has been on balance an ally of those seeking change. Governments that want stasis start by restricting speech. Culture is a powerful force of continuity; Indianapolis paints pornography as part of the culture of power. Change in any complex system ultimately depends on the ability of outsiders to challenge accepted views and the reigning institutions. Without a strong guarantee of freedom of speech, there is no effective right to challenge what is.

IV

The definition of "pornography" is unconstitutional. No construction or excision of particular terms could save it. The offense of trafficking in pornography necessarily falls with the definition. We express no view on the district court's conclusions that the ordinance is vague and that it establishes a prior restraint. Neither is necessary to our judgment. We also express no view on the argument presented by several *amici* that the ordinance is itself a form of discrimination on account of sex.

Section 8 of the ordinance is a strong severability clause, and Indianapolis asks that we parse the ordinance to save what we can. If a court could do this by surgical excision, this might be possible. . . . But a federal court may not completely reconstruct a local ordinance, and we conclude that nothing short of rewriting could save anything.

The offense of coercion to engage in a pornographic performance, for example, has elements that might be constitutional. Without question a state may prohibit fraud, trickery, or the use of force to induce people to perform—in pornographic films or in any other films. Such a statute may be written without regard to the viewpoint depicted in the work. *New York v. Ferber,* . . . suggests that when a state has a strong interest in forbidding the conduct that makes up a film. . . it may restrict or forbid dissemination of the film in order to reinforce the prohibition of the conduct. A state may apply such a rule to non-sexual coercion (although it need not). . . .

But the Indianapolis ordinance, unlike our hypothetical statute, is not neutral with respect to viewpoint. The ban on distribution of works containing coerced performances is limited to pornography; coercion is irrelevant if the work is not "pornography," and we have held the definition of "pornography" to be defective root and branch. A legislature might replace "pornography" in sec. 16-3(g)(4) with "any film containing explicit sex" or some similar expression, but even the broadest severability clause does not permit a federal court to rewrite as opposed to excise. Rewriting is work for the legislature of Indianapolis. . . .

The offense of forcing pornography on unwilling recipients is harder to assess. Many kinds of forcing (such as giving texts to students for translation) may themselves be protected speech. . . . (A) a state may permit people to insulate themselves from categories of speech. . . but. . . the government must leave the decision about what items are forbidden in the hands of the potentially offended recipients. Exposure to sex is not something the government may prevent. . . We therefore could not save the offense of "forcing" by redefining "pornography" as all sexually-offensive speech or some related category. The statute needs a definition of "forcing" that removes the government from the role of censor.

The section creating remedies for injuries and assaults attributable to pornography also is salvageable in principle, although not by us. The First Amendment does not prohibit redress of all injuries caused by speech. Injury to reputation is redressed through the law of libel, which is constitutional subject to strict limitations. Cases such as *Bradenburg v. Ohio* and *NAACP v. Claiborne Hardware* hold that a state may not penalize speech that does not cause immediate injury. But we do not doubt that if, immediately after the Klan's rally in *Brandenburg,* a mob had burned to the ground the house of a nearby black person, that person could have recovered damages from the speaker who whipped the crowd into a frenzy. All of the Justices assumed in *Claiborne Hardware* that if the threats in Charles Evers's incendiary speech had been a little less veiled and had led directly to an assault against a person shopping in a store owned by a white merchant, the victim of the assault and even the merchant could have recovered damages from the speaker.

The law of libel has the potential to muzzle the press, which led to *New York Times v. Sullivan.* A law awarding damages for assaults caused by speech also has the power to muzzle the press, and again courts would place careful limits on the scope of the right. Certainly no damages could be awarded unless the harm flowed directly from the speech and there was an element of intent on the part of the speaker, as in *Sullivan* and *Brandenburg.*

Much speech is dangerous. Chemists whose work might help someone build a bomb, political theorists whose papers might start political movements that lead to riots, speakers whose ideas attract violent protesters, all these and more leave loss in their wake. Unless the remedy is very closely confined, it could be more dangerous to speech than all the libel judgments in history. The constitutional requirements for a valid recovery for assault caused by speech might turn out to be too rigorous for any plaintiff to meet. But the Indianapolis ordinance requires the complainant to show that the attack was "directly caused by specific pornography" (sec. 16-3(g)(7)), and it is not beyond the realm of possibility that a state court could construe this limitation in a way that would make the statute constitutional. We are not authorized to pre-

vent the state from trying.

Again, however, the assault statute is tied to "pornography," and we cannot find a sensible way to repair the defect without seizing power that belongs elsewhere. Indianapolis might choose to have no ordinance if it cannot be limited to viewpoint-specific harms, or it might choose to extend the scope to all speech, just as the law of libel applies to all speech. An attempt to repair this ordinance would be nothing but a blind guess.

No amount of struggle with particular words and phrases in this ordinance can leave anything in effect. The district court came to the same conclusion.

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