



# Freedom to Read Foundation News

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Robert S. Peck, President

Judith F. Krug, Executive Director

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## ELECTION RESULTS

Six trustees were elected to the Freedom to Read Foundation Board in the April elections: E.J. Josey, Susan Pavsner, Robert Peck, Russell Shank, Mark Yudoff, and Nancy Zussy. Of these, Peck, Zussy and Josey were re-elected; Pavsner, Shank and Yudoff are new trustees.

These trustees join the following members to form the Freedom to Read Foundation Board for 1989-90:

Patricia Wilson Berger, ALA President

Richard M. Buck

Gordon M. Conable, Intellectual Freedom Committee Chair

Linda Crismond, ALA Executive Director

Richard M. Dougherty, ALA President-elect

Marcia Pally

Kay K. Runge

C. James Schmidt

Matthew Stark

At the first meeting of the newly constituted Board, Robert S. Peck was elected President, Marcia Pally was elected Vice President, C. James Schmidt was elected Treasurer, and Kay Runge and Nancy Zussy were elected to the Executive Committee.

## FREEDOM TO READ FOUNDATION CELEBRATES ITS 20TH ANNIVERSARY

The Opening General Session of the American Library Association (ALA) Annual Conference, held in Dallas from June 24-28, heralded the 20th anniversary of the Freedom to Read Foundation. Under a 40-foot long banner reading "Freedom to Read Foundation — Protecting You for 20 Years," *New York Times*' columnist Tom Wicker presented the keynote address. Highlighting current First Amendment controversies, Wicker focused the attention of the more than 4,000 attendees on the crucial role of libraries in upholding intellectual freedom and the Freedom to Read Foundation's 20-year commitment to defending these principles. A commemorative program which listed, among other things, the legal cases in which the Foundation has played a role over its 20-year history, was distributed at the session.

Prior to Wicker's address, Foundation president Robert S. Peck thanked ALA president F. William Summers for giving the Foundation such a prominent place in the ALA Annual Conference program. Peck then presented the Freedom to Read Foundation Roll of Honor awards to Jeanne Layton and Alex P. Allain. Layton was recognized for her perseverance, with the Foundation's assistance, in winning reinstatement as director of the Davis County (Utah) Public Library, following her dismissal for refusing to remove Don Dillilo's *AMERICANA*. Allain has been a Foundation fixture throughout its 20-year history, serving in various capacities, including president and now special counsel. He has supplemented his service with generous financial contributions which enabled the

Foundation to establish itself as the preeminent defender of First Amendment freedoms in libraries.

The 20th anniversary festivities continued on Sunday, June 25th, at an elegant reception held at the Adolphus Hotel in downtown Dallas, sponsored by Social Issues Resources Series, Inc. (SIRS). Elliot Goldstein, president of SIRS, generously offered to subsidize \$5.00 of the Foundation's regular \$25.00 annual membership dues for all persons who became members of the Foundation that evening. As a direct result of this pledge, the Foundation garnered more than 120 new members!

During the conference, several commemorative souvenirs were available for purchase at the ALA store. The souvenirs included t-shirts (\$10.00), lapel pins (\$8.00) and paperweights (\$20.00), all bearing the Foundation's logo. All serve as handsome reminders of the Foundation's commitment to resist censorship and defend the Freedom to Read in libraries. Limited quantities of the commemorative souvenirs are still available and can be purchased from Foundation headquarters (50 East Huron Street, Chicago, IL 60611).

## PRESIDENT'S REPORT TO COUNCIL

*The Freedom to Read Foundation reports to the Council of the American Library Association at each Annual Conference and Midwinter Meeting. Following is the text of President Robert S. Peck's 1989 Annual Conference report to Council:*

### FREEDOM TO READ FOUNDATION REPORT TO THE ALA COUNCIL SUNDAY, JUNE 25, 1989

It is with great pleasure that I report to the Council of the American Library Association today. Since the Midwinter Meeting, the Freedom to Read Foundation has participated in several important lawsuits and, in concert with the American Library Association, gained a First Amendment victory in a case in which it represented not only librarians, but also publishers, magazine distributors and photographers.

First, our big victory. On May 16, the Foundation, ALA and their co-plaintiffs prevailed in *American Library Association v. Thornburgh*, successfully challenging the constitutionality of the record-keeping and forfeiture provisions of the Child Protection and Obscenity Enforcement Act. Judge George H. Revercombe of the U.S. District Court for the District of Columbia held that all of the challenged portions of the Act, with the exception of the post-trial forfeiture provisions, were unconstitutional because they unduly burdened a vast array of constitutionally protected speech, while doing very little to combat child pornography. The judge modified the post-trial forfeiture provisions to require that they may be used only where a pattern of criminal activity has been proven and that before property may be seized following a conviction, a

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defendant must have the opportunity to seek a stay of seizure pending appeal. This is an impressive victory for First Amendment rights in general, and, specifically, for the protection of the rights of libraries to acquire non-obscene, sexually explicit materials necessary to their collections.

The Foundation also joined ALA on an *amicus curiae* brief filed in *Webster v. Reproductive Health Services*, the controversial abortion case now before the U.S. Supreme Court. A decision is expected by Friday. In this case, a Missouri statute regulating abortion services and prohibiting agencies which receive public funds from "counseling or encouraging" a woman to have an abortion not necessary to save her life has been challenged as unconstitutional. The Foundation's and ALA's brief discussed solely the First Amendment implications for libraries. Our concerns are with the provisions in the Missouri statute that prohibit the use of public funds or publicly supported health workers or institutions from encouraging or counseling a woman to have an abortion not necessary to save her life. Libraries, of course, do not "counsel" regarding abortion or any other issue. Libraries, however, make available books, magazines, and other materials that express opinions, often in very strong terms. If a pregnant woman — or any woman — wants information from a publicly supported library about abortion, the options available to her, or the places where she might obtain an abortion, the library would, as far as it is able, provide her with the information and the materials she seeks. Such materials might well "counsel" or "encourage" a woman to have an abortion in particular circumstances. Of course, the materials might also counsel against or discourage having an abortion. Regardless, as long as the terms "counsel" or "encourage" are undefined, libraries and librarians are at risk. It was to this point that the American Library Association and the Freedom to Read Foundation focused its brief. The crucial point made to the Court was that, whatever an individual's moral position on abortion, state regulation of medical services cannot lawfully restrict the provision of information and thereby suppress ideas about abortion, available in libraries. The mere provision of ideas and information must be protected from state regulation and restriction.

The Foundation has continued to receive donations in the wake of the Salman Rushdie affair from the Tattered Cover Book Store in Denver, Colorado. Joyce Meskis, owner of that bookstore, pledged \$5.00 of the sale of each copy of Rushdie's *THE SATANIC VERSES* to three First Amendment-related organizations, the Foundation being one. To date, the Foundation has received contributions in excess of \$1,500 as a result of this pledge.

The Foundation joined in an *amicus* brief in *FW/PBS Inc., d/b/a Paris Adult Bookstore II v. Dallas*, challenging an ordinance that prohibits the future operation of any enterprise previously found to have engaged in a single past obscenity violation. Despite our adversarial position in this lawsuit, I commend our host, the City of Dallas, for its hospitality to the Foundation during this conference as we celebrate the Foundation's Twentieth Anniversary.

In other litigation, the Foundation won a victory in *Village Books, et al. v. City of Bellingham*, challenging a Bellingham, Washington, ordinance which defined pornography as a violation of women's civil rights. The ordinance was nearly identical to an Indianapolis ordinance which had been previously held unconstitutional by the United States Supreme Court. The Foundation and its co-plaintiffs won on a motion for summary judgment and the ordinance was struck down as unconstitutional.

In another Foundation-supported case, *American Booksellers Association v. Commonwealth of Virginia*, the case challenging Virginia's harmful to minors display law, the State of Virginia took the unusual action, during oral argument before the Fourth Circuit Court of Appeals, of agreeing that the state would interpret the statute narrowly to protect booksellers from an undue burden to review their inventory and police minors' perusal of their inventory.

In a case in California entitled *McCarthy v. Fletcher*, the California Appellate Court reversed the dismissal of a suit brought by an

English teacher challenging the removal of *GRENDL* and *ONE HUNDRED YEARS OF SOLITUDE* from the Wasco Union High School curriculum. The appellate court held that a lower court must examine the decision under the standards set forth by the United States Supreme Court in *Hazelwood v. Kuhlmeier*, last year's high school newspaper case.

On April 1, the Finance/Fundraising and the Third Decade Committees of the Foundation met in Chicago to consider fundraising and long term planning for the Foundation. As a result of that meeting the Foundation has reiterated its goal of presenting a strategy planning colloquium for the '90s as its first priority. And, the Foundation will vigorously work to expand membership and heighten awareness of the Foundation's mission.

I'd like to take this opportunity to thank President Summers for generously affording the Foundation's 20th anniversary celebration prime time at the Opening General Session here at the ALA Annual Conference. The Foundation has had a tremendously active and successful year. I look forward to further expansion and activity in the years to come.

Thank you.

Respectfully submitted,  
Robert S. Peck, President

## FOUNDATION VICTORIOUS IN CHILD PROTECTION AND OBSCENITY ENFORCEMENT LAWSUIT

On May 16, Federal District Court Judge George H. Revercomb struck down the record keeping, criminal presumption and parts of the forfeiture provisions of the Child Protection and Obscenity Enforcement Act of 1988. The judge's decision was a near total victory for the Freedom to Read Foundation, the American Library Association and its co-plaintiffs, the American Booksellers Association, the Magazine Publishers of America, the American Society of Magazine Photographers, the American Society of Magazine Editors, the Council for Periodical Distributors Association, the International Periodical Distributors Association, and the Satellite Broadcasting Communications Association.

Agreeing with the plaintiffs that the record keeping provisions of the new law burdened legitimate speech and did not sufficiently serve the public interest in preventing the production and distribution of child pornography, the judge noted, "To say that the record keeping requirements are onerous is to understate the point. They are not 'incidental' burdens; they are direct burdens imposed on much material that is clearly protected by the First Amendment."

The judge also struck down the provision of the Act which provided that, in any prosecution of a person for an offense under this statute, a failure to comply with the record keeping provisions raised a rebuttable presumption that the performers depicted were minors. The judge noted . . . "[T]he presumptions clearly clash with the constitutionally required presumption that expressive materials are protected by the First Amendment until proven otherwise."

The court further held that pre-trial seizure of First Amendment protected property, based solely on an *ex-parte* showing of "probable cause" that an obscenity violation had occurred, is unconstitutional. Citing the Supreme Court's earlier decision in *Fort Wayne Books, Inc. v. Indiana*, the court noted a clear proscription against pre-trial seizure of material protected by the First Amendment from a business that is primarily engaged in producing or selling expressive material. The judge held that First Amendment material may not be taken out of circulation completely until there has been a judicial determination of obscenity in an adversary proceeding.

As for the criminal forfeiture provisions, Judge Revercomb held that seizure or restraint prior to an adversarial hearing is unconstitutional.

Though the judge did not strike down the post-conviction criminal forfeiture provisions entirely, he did hold that such provisions may be applied only when a pattern of criminal activity has been proven, and also held that a defendant may be able to obtain a stay of destruction or sale of forfeited material pending appeal.

"This is an important First Amendment victory," said Judith F. Krug, the Foundation's Executive Director. "We abhor child pornography, but the provisions of this law fell hardest on nonobscene constitutionally protected materials. Librarians were concerned about loaning books on sexuality to adults. We were also worried about art and photography books involving nudity."

On July 14, the government filed notice that it intends to appeal Judge Revercomb's decision. *Following are excerpts of the decision:*

## OPINION AND ORDER

### I. Introduction

There are few stronger contrasts in the law than the differences in the legal treatment of nude images. If the model in an image is at least 18 years old, the producers and distributors are protected by the full range of rights under the First Amendment, unless the image falls into the narrow category of "obscenity" (footnote omitted). By contrast, if the model has *not* reached the age of eighteen, producers and distributors of the image are subject to criminal punishment. With child pornography, this legal contrast is heightened by the fact that, to paraphrase the late Mr. Justice Stewart, one cannot always tell it when one sees it (footnote omitted).

The distinction in the law exists because of the conflict between two fairly unrelated notions of individual rights. The First Amendment's rights to free speech and free press generally ensure that no citizen will be censured merely because of what he says or puts on paper or film. This right reflects the ideal that no one's expression should be curtailed unless it potentially harms another (footnote omitted), and is subject only to narrow exceptions such as slander, libel, and obscenity, the expressions which extend beyond the speaker and harm others. On the other hand, the proscriptions on child pornography are based on the notion that persons under 18 are presumed not to be mature enough to decide whether to participate in pornography; instead, the government wisely decides for them that such participation is unhealthy (footnote omitted).

Each side in this case argues that the legal contrast in the treatment of nude images justifies its position. The government argues that precisely because it is often so difficult to determine whether a model is under 18 years old, it is necessary to place requirements on all nude imagery, including ones protected by the First Amendment. The plaintiffs argue that the courts must be extra vigilant in ensuring that efforts to ferret out child pornography are not cast so broadly that they improperly and unnecessarily burden protected material.

It is also worth noting at the outset that this is not a typical pornography case, in which the task is to determine where the line is to be drawn between protected First Amendment material and that which may be prohibited. Here, it is clear that much of the material that is protected by the First Amendment will be subject to the record-keeping requirements; the question is whether the strong public policy against child pornography justifies the burden on protected material. Finally, this case, unlike many pornography suits, does not involve the question of local morality or federalism (footnote omitted) — the law at issue here is a national statute, with equal standards imposed from big cities to rural counties.

Although this Court is sensitive to interfering with the vigorous investigation of and prosecution of child pornography, it concludes that the record-keeping requirements at issue here excessively burden First Amendment material and infringe too deeply onto First Amendment rights.

### II. The Child Protection and Obscenity Act in General

Since the Supreme Court of the United States ruled conclusively that nudity involving children is *not* protected by the First Amendment *United States v. Ferber* . . . federal prosecution of child pornography under a number of statutes has grown by leaps and bounds. For example, the number of federal indictments for child pornography offenses rose steadily from fewer than 10 in 1983 to more than 200 in 1987. *Testimony of H. Roberts Showers, Executive Director of the National Obscenity Enforcement Unit* (footnote omitted), *U.S. Department of Justice, before the House Judiciary Committee* at 6, June 8, 1988. Moreover, a number of

recent studies have attested to the harmful psychological effects of pornography on immature participants. . . .

Congress on October 21, 1988, approved the Child Protection and Obscenity Enforcement Act (footnote omitted), which supporters maintained would improve federal prosecution of child pornography. The 1988 Act, enacted as part of the mammoth Anti-Drug Abuse Act . . . added a wide range of weapons to the effort to combat child pornography. Included in the Act were provisions criminalizing "computer porn" . . . criminalizing the transfer of the custody of a minor for use in the production of pornography . . . enabling the Racketeer Influenced and Corrupt Organizations (RICO) statute to be used with child pornography violations . . . criminalizing possession with intent to distribute obscenity that has crossed state lines . . . making possession of child pornography with intent to distribute on federal property a criminal offense . . . restricting "dial-a-porn" businesses and criminalizing violations of these restrictions . . . and numerous other provisions.

None of these provisions are challenged here, and each will be added to the arsenal against child pornography, unaffected by this lawsuit. Rather, the only provisions challenged here are (1) the record-keeping requirements . . . (2) the provisions creating criminal presumptions in child pornography suits for failure to complete the records . . . (footnote omitted) and (3) sections extending the laws for civil and criminal forfeiture in obscenity and child pornography cases. . . . The Court deals with each in turn.

### III. The Record-Keeping Requirements

#### A. What Material is Covered

The record-keeping section of the Child Protection and Obscenity Enforcement Act requires that

[w]hoever produces any book, magazine, periodical, film, videotape, or other matter which —

(1) contains one or more visual depictions made after February 6, 1978 of actual sexually explicit conduct; and

(2) is produced in whole or in part with materials which have been mailed or shipped in interstate or foreign commerce . . . or is intended for [such shipment] . . .

shall create and maintain individually identifiable records pertaining to every performer portrayed in such a visual depiction . . .

The crucial term "sexually explicit conduct" is considerably broader than the dictionary definitions of the words might lead one to believe (footnote omitted). The term, taken from existing child pornography law, covers any "lascivious exhibition of the genitals or pubic area of any person," as well as depictions of various methods of sexual intercourse, bestiality, masturbation, and sadism and masochism. . . . The key term is of course "lascivious", which has been upheld by courts in challenges that it is constitutionally too vague. . . . In addition, courts have held that factors used to determine whether an image is "lascivious" include whether the pose is "sexually suggestive" or "designed to elicit a sexual response in the viewer" among other factors. . . . Thus, it is fair to conclude that any frontal nude image of a person in what might otherwise be called an "erotic" pose is likely to be included as "lascivious".

Accordingly, it is undisputed that the record-keeping requirements are to be imposed on categories of material far broader than the category of "obscenity" as defined in *Miller v. California*. . . . It is clear that the record-keeping requirements are to be imposed on material that the Supreme Court has held is protected by the First Amendment.

#### B. What They Require

Any producer of a book, magazine, periodical, film, videotape or other matter that is covered by the section must

(1) ascertain, by examination of an identification document containing such information, the performer's name and date of birth, and require the performer to provide such other indicia of his or her identity as may be prescribed by [Department of Justice] regulations;

(2) ascertain any name, other than the performer's present and correct name, ever used by the performer including maiden name, alias, nickname, stage, or professional name. . . .

The producer must ascertain the information from “every performer portrayed” in a visual depiction covered by the requirements. It is unclear to the Court whether bystanders in, for example, a sexual scene in a movie are included in this definition.

The gist of these requirements is that whoever produces or reproduces an image covered by the provision must *personally* contact the model or performer and ascertain that he or she was at least 18 years old when he or she posed or performed. The producer may *not* rely on representations from the photographer or others and may *not* rely on photocopies of identification, such as the model’s driver’s license or birth certificate. The producer must verify the information by personal contact with the model, no matter how long has passed since the photograph or film was first made (footnote omitted).

In addition, the producer must get additional information — maiden name, aliases, nicknames, stage or professional names — from each model or performer. Presumably, this information is required to help authorities verify the age of the model and to enable them to track down the use or employment of under-age models by persons other than the photographer or the producer of the image for which the records are compiled.

In addition, the producer must record the information and maintain it at the place of business for inspection by authorities. . . . The records must be kept in accordance with regulations to be prescribed by the Attorney General. . . . The producer must also affix to every copy of the depiction — every book, magazine, or film print — a statement describing where the records are located and naming the person responsible for maintaining the records. . . .

Finally and significantly, the information in the records may *not* be used as evidence in a criminal prosecution with the exception that incomplete records may lead to a criminal presumption that the model was a minor (footnote omitted). Presumably created to avoid self-incrimination problems, this restriction also appears to take much of the teeth out of the child pornography prosecution goals of the Act — when authorities find through the records that a model was under 18 years old, the records cannot be used directly or indirectly in prosecutions.

### C. To Whom They Apply

The record-keeping requirements are to be imposed on anyone who “produces”, which includes anyone who manufactures, publishes, reproduces, or reissues a book, magazine, periodical, film, videotape, or “other matter.” . . . This coverage is fairly clear and very broad. In the context of a photograph, the definition would clearly include both the photographer and the processor of the film. If the photograph were later reproduced to be placed in a pamphlet, the producer of the pamphlet would be covered and would have to personally contact the model and fulfill the record-keeping requirements. If the photograph is then reproduced in a book years later, the publisher and printer would have to personally re-contact the model. In the context of film production, the definition apparently could include a number of film processors, editors, etc., along the production process, each of whom would have to personally re-contact the performer and fulfill the record-keeping requirements (footnote omitted).

Finally, the record-keeping requirements would *not* apply to libraries or retailers of the image, such as bookstores, newsstands, or movie theaters, unless they were somehow involved in the “production” of the image. These businesses would of course remain subject to prosecution for distribution of child pornography or obscenity (footnote omitted).

### D. Analyzing the Constitutionality

Laws that burden material protected by the First Amendment must be approached from a skeptical point of view and must be given strict scrutiny. . . . Indeed, laws that do not prohibit but do regulate First Amendment material are unconstitutional. . . .

Because of the constitutional requirement that protected material may not be infringed, even indirect governmental burdens imposed on protected material may be permitted only under narrow exceptions. If the burden exists through a law that serves a legitimate governmental interest in a field other than regulating protected speech, the legislation still must be narrowly drawn and must not

“unnecessarily interfer[e] with First Amendment freedoms.” . . . A law that affects protected expression may be upheld only if it furthers an important or substantial governmental interest, the interest is unrelated to the suppression of free expression, the effect on free expression is only “incidental”, and the restriction of First Amendment activity “is no greater than is essential to the furtherance” of the legitimate interest. . . . For example, a government may shut down a bookstore that is a front for a prostitution house; the limitations on the owners’ free speech rights are only incidental. . . . The key in determining the constitutionality of a law that “spills over” from a legitimate governmental interest — such as the effort against child pornography — onto protected material is whether the legislation is “narrowly drawn” to avoid as much interference with protected material as possible while furthering the legitimate governmental interest.

Courts must be especially vigilant in scrutinizing broad legislative efforts that clearly burden protected First Amendment material in the name of attacking things not constitutionally protected. . . . Vigilance in this area is appropriate both because of the requirements of strict scrutiny and narrow tailoring and because courts must protect against legislatures that would enact laws that are intended to infringe on protected speech but that are cloaked in terms of an effort against non-protected material. . . .

Reviewing the record-keeping requirements . . . the Court concludes that they are unconstitutional because they both (1) burden too heavily and infringe too deeply on the right to produce First Amendment protected material and (2) have not been narrowly tailored to fit the legitimate governmental interest of stopping child pornography.

To say that the record-keeping requirements are onerous is to understate the point. They are not “incidental” burdens; they are direct burdens imposed on much material that is clearly protected by the First Amendment. What makes the requirements extraordinarily burdensome is the remarkable breadth of who must fulfill the record-keeping requirements and how much effort many “producers” would have to take to meet the legal requirements. The result of the requirement that each producer along the stream of commerce must *personally* contact the model or performer and *personally* ascertain the model’s or performer’s age, current name, maiden name, professional name, and other information will undoubtedly be the effective prohibition of the distribution of much First Amendment protected material. . . . To take one example, a film distributor who makes copies of films for distribution would be faced with the often insurmountable task of having to track down personally any performer in a “lascivious” scene, *even if* the original producer of the film provided the distributor with his own documentation of the age of every performer.

Moreover, the Act applies to all depictions made since early 1978 and applies even to images made overseas, where a large percentage of “lascivious” images are created. To require a publisher or producer to travel to Europe or Asia to track down every “lascivious” model or performer shown in a book, magazine, or film originally created a decade earlier is overly burdensome.

The Court also concludes that the record-keeping provisions do not fulfill the First Amendment requirement they be narrowly tailored to meet the needs of child-pornography prosecution. The bulk of the record-keeping under the Act would be imposed on “producers” along the stream of commerce that otherwise would not have direct contact with models and performers. . . .

Nor are the record-keeping requirements saved by the small exceptions to the general rule against the constitutionality of laws that burden First Amendment material. First, the defendants cite the Supreme Court’s long-standing doctrine that legislatures may place justifiable restrictions on the time, place, or manner of protected speech. For example, a local government may restrict erotic material to certain districts, in order to maintain a neighborhood’s character. . . . Zoning restrictions, as well as prohibitions against protests through residential streets in the middle of the night, or against protests with excessively loud bullhorns, fulfill the basic conception of the First Amendment that no one will be censored for his opinions, statements, or pictures, but that the state *can*

restrict the speaker if his actions infringe on others' ability to live their own lives — without, for example, being awakened in the middle of the night by a bullhorn. . . . The key to the constitutionality of time, place, and manner restrictions is that the government must permit the speech at *some* time, in *some* place, and in *some* manner. The record-keeping requirements scrutinized here do not provide for such limitation of speech to particular times and places; they burden certain protected material at all times and in all places.

Second, the defendants cite *Buckley v. Valeo* . . . for the proposition that record-keeping requirements on First Amendment speech may be constitutional. The election spending and record-keeping requirements scrutinized in *Buckley*, however, differed significantly from the requirements in the instant case. In *Buckley*, the question was whether the need for removing corruption and ensuring integrity in the political process justified direct regulations on campaign activity, which is generally protected by the First Amendment. . . . The Court upheld the requirements that it found to be both necessary and narrowly tailored, and struck down others that it found excessively burdened free speech. . . . In the instant case, the question again is whether the regulations are justified and are narrowly tailored. This Court concludes that they clearly are not.

Finally, the Court concludes that the record-keeping requirements are not focused narrowly and precisely on helping eliminate the evil of child pornography. Indeed, it is conceivable that these requirements would do as much to hinder protected material as they would to halt child pornography.

First, there is *no* direct sanction for failure to keep or complete the records. Indeed, the information collected by a producer *cannot* “be used, directly or indirectly, as evidence against any person with respect to any violation of law.” . . . It is true that failure to complete the records might lead to a criminal presumption that the performer is under age. . . . However, there can be no sanction if the material is completed and maintained. While a distributor of child pornography would probably think twice about keeping accurate records that certain performers are under 18 years old, this fact in its records *cannot* be admitted as evidence against him. Indeed, prosecutors would have the added burden of proving that its evidence was not tainted by information gleaned from the records. Moreover, it appears that if a producer lies about the age of the performer, the prosecutor would be unable to take advantage of the presumption unless the prosecutor independently ascertains that the performer was under 18 — in which case the records are unnecessary. Indeed, if the producer lies about whether he contacted the performer at all, the prosecution could not take advantage of the presumption unless it somehow could *prove* that the producer lied about contacting the performer. This difficult task appears to be roughly comparable to the task of proving the age of the performer — the difficulty of which presumably was the incentive behind the whole idea for the new law.

Second, it is not true that “mainstream” producers, such as those represented by the plaintiffs, would be free to ignore the record-keeping requirements if they were *sure* that they do not produce child pornography. Because the statute clearly states that all producers “shall” compile the records . . . the Court must assume that law-abiding producers will comply with it — either by trying to fulfill the requirements or by suppressing material. The Court cannot make the law “constitutional” by assuming that producers will violate the requirements of the statute. Moreover, the surmise that prosecutors may be “unlikely” to prosecute mainstream publishers — a prosecution that would come with a presumption that performers are under 18 if the records are not complete — is of little comfort to producers.

Third, the law would not solve the problem that much of child pornography arises from the underground and black markets. . . . While the Court will not accept the plaintiff's invitation to conclude that “mainstream” producers do not create child pornography, it is clear that a successful effort against child pornography must be cognizant of the fact that much child pornography is not created through above-board production means. The fact that

the statute in question here does not address this problem does not of course make it unconstitutional; the fact does, however, add to the conclusion that the law is not narrowly and precisely tailored to meet a compelling governmental need.

Finally, the record-keeping requirements would do little to alleviate the problems associated with the incentive of both producers of pornography involving minors and performers under the age of 18 — such as teenage prostitutes and runaways — to falsify the age of the performers through false identification and other means. The requirements do nothing to stop publishers and film producers from being fooled by false identification or even from participating in the falsification. Again, the law would put as much, if not more, of a burden on reputable producers of adult images than on the child pornography industry.

The Court concludes therefore, that in addition to being overly burdensome on protected material, the record-keeping requirements are not saved by being tailored precisely to the harm of child pornography. Rather, the record-keeping requirements apparently would do more to infringe, hinder, and in some cases effectively prohibit the production and distribution of protected First Amendment “erotic” material than it would to stop the creation and dissemination of child pornography.

In sum, the Court concludes that the record-keeping provisions . . . are unconstitutional under the First Amendment because they infringe too deeply on First Amendment protected material, do not “incidentally” affect protected material, and are not tailored narrowly enough to pass constitutional scrutiny (footnote omitted). . . .

#### IV. The Criminal Presumptions

The record-keeping section also provides for criminal presumptions for failure to complete the record-keeping requirements. It states:

In a prosecution of any person to whom [the record-keeping section] applies for [a child pornography offense] which has as an element the production of a visual depiction of a minor engaging in or assisting another person to engage in sexually explicit conduct and in which that element is sought to be established by showing that a performer within the meaning of this section is a minor —

(A) proof that the person failed to comply with the provisions . . . concerning the creation and maintenance of records, or a regulation issued pursuant thereto, shall raise a rebuttable presumption that such performer was a minor . . .

The subsection also provides that failure to affix to the material the statement of where the records are kept . . . will create the presumption “that every performer in the matter was a minor.” . . .

The Supreme Court has been skeptical of presumptions in criminal cases, because of the due process requirement that a person is considered innocent until proven guilty (footnote omitted). Criminal presumptions are permissible only if “it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.” . . . Whether this requirement is met must depend on courts' judgment of human behavior, with the room for error necessarily working against the constitutionality of the presumption. Thus, in a prosecution for illegal possession of weapons, there may be a presumption that a person driving a car “possessed” any weapons in the car. . . . On the other hand, for example, it appears clear that there may *not* be a presumption, if the driver was seen smoking a cigarette, that the cigarette was a marijuana cigarette.

Both the strengths and the faults of the presumptions at issue here arise from the fact that it is often difficult, if not impossible, to determine from looking at a nude image whether the performer is at least 18 years old. The defendants argue that the presumptions are necessary to be able to prosecute child pornographers successfully. Yet, at the same time, the presumptions apparently would often make it impossible for a person prosecuted for failing to properly maintain the records to overcome the presumption without having to find and bring the model, along with his or her identification, into court.

The Court acknowledges that the presumptions would overcome an obstacle to the prosecution of child pornographers — proving

the age of the model or performer. However, just because a provision would help prosecution does not justify it constitutionally. . . . Indeed, even the traditionally strict liability offenses of statutory rape and selling alcohol to minors have not included criminal presumptions that the person involved was a minor — and these offenses do not threaten prosecution for First Amendment protected activity, as would prosecution for failure to complete the records under [the act].

The Court concludes that the criminal presumptions are unconstitutional because of the serious potential for convicting persons who have not engaged in child pornography. The presumptions do not appear to involve a “substantial assurance that the presumed fact is more likely than not to flow from the proved fact.” . . . Moreover, the presumptions here are not saved by the fact that child pornography is hard to prove. The due process right of the accused to be assumed innocent until proven guilty beyond a reasonable doubt must not be cast aside merely because of difficulties in convicting a certain class of criminals. Finally, the presumptions clearly clash with the constitutionally required “presumption that expressive materials are protected by the First Amendment” until proven otherwise. . . .

The Court’s decision is bolstered by the fact that there are other weapons in the government’s arsenal for legal action against child pornographers. For example, forfeiture and other civil penalties, which require a considerably lower standard of proof, are used to fight obscenity . . . and may prove as valuable to the fight against child pornography as the criminal presumptions would be.

The Court’s decision also is compelled by the fact that convictions through use of the presumptions might be obtained for reasons that offend due process. First, the Supreme Court has held that failure to fulfill a record-keeping requirement cannot lead to criminal conviction when there is no “actual knowledge of the duty” to comply with the law. . . . Although it is true that this statute is not a typical record-keeping law, it still offends due process to convict a person of a substantive offense through a presumption of guilt for failure to complete records, without any direct proof of the substantive offense (footnote omitted). Second, the Court notes that although the Supreme Court has upheld general use of the term “lascivious” in connection with child pornography . . . it is another matter altogether to convict a person for a child pornography offense merely because of a presumption created by the person’s mistaken impression that an image was not “lascivious”. When a person makes such a mistake and the model cannot be located, the person may find it impossible to overcome the presumption, even though the prosecution also has no evidence that the model or performer was not 18 years old.

Finally, the presumptions are constitutionally unacceptable because of their remarkably broad scope. The presumptions do not apply merely when the age of the model or performer has not been recorded, but when *any* of the information has not been generated and maintained. Thus, for example, the failure to record a model’s maiden name could lead to a presumption that the model was a minor, even if the records clearly stated that the model or performer was ascertained to be at least 18 years old (footnote omitted). Doubtless this aspect was created to enable authorities to find the model and verify his or her age, and it would be hoped that persons would not be prosecuted for child pornography merely for failing to complete parts of the record not having to do with the age of the model. When dealing with laws that affect the dissemination of First Amendment material, however, a court cannot assume that a law will *not* be enforced in the manner in which it *may* be enforced.

In sum, the criminal presumptions . . . [of this act] take away from the criminal defendant the right to be presumed innocent until proven guilty beyond a reasonable doubt. They are unconstitutional because the presumed fact does not appear more likely than not to flow from the presumed fact. While the problem of proving the age of models and performers in pornography prosecutions is a difficult one, this problem does not alone justify removing from the criminal justice system the basic rights of due process. . . .

## V. The Forfeiture and Seizure Provisions

### C. Civil Forfeiture

The 1988 Act created a civil forfeiture scheme. . . . In addition to providing for forfeiture of “[a]ny visual depiction” of pornography involving minors, the provision authorizes forfeiture of “[a]ny property, real or personal, used or intended to be used to commit or to promote the commission” of the offense. . . . Like the law at issue in *Fort Wayne Books*, the 1988 Act “allow[s] prosecutors to cast wide nets and seize, upon a showing that two obscene materials have been sold, or even just exhibited, all a store’s books, magazines, films, and videotapes — the obscene, those nonobscene yet sexually explicit even those devoid of sexual reference.” . . . The section provides for seizure and forfeiture procedures according to customs laws and the Supplemental Rules for Certain Admiralty and Maritime Claims (“Admiralty Rules”). . . . For a number of reasons, the Court concludes that aspects of the civil forfeiture provision are unconstitutional.

Under this scheme, an authorized federal agent may seize property based on a showing of “probable cause,” which for seizure purposes has been held to be “a reasonable ground for belief of guilt, supported by less than prima facie proof but more than mere suspicion.” . . . A warrant may be issued by filing *ex parte* a complaint with the clerk of the court, who may in turn issue the warrant without referring the matter to a judge or magistrate. . . . Thus, it is clear that a large amount of assets — books, printing presses, films, etc. — may be seized based solely on an *ex parte* showing of probable cause (footnote omitted). The Supreme Court has clearly stated, however, that “while the general rule under the Fourth Amendment is that any and all contraband, instrumentalities, and evidence of crimes may be seized on probable cause (and even without a warrant in various circumstances), it is otherwise when materials presumptively protected by the First Amendment are involved.” . . . Indeed, the Supreme Court cases “firmly hold that mere probable cause to believe that a legal violation has transpired is not adequate to remove books or films from circulation.” . . . First Amendment material may not be taken out of circulation completely until there has been a “judicial determination of the obscenity issue in an adversary proceeding.” . . . The First Amendment’s presumption for expressive materials must apply whether the alleged offense is child pornography or obscenity (footnote omitted).

Moreover, the forfeiture provision unconstitutionally authorizes seizure of expressive materials without a warrant when “incident to an arrest,” . . . clearly in violation of the ruling in *Roaden v. Kentucky*. . . . The exception to the Fourth Amendment permitting searches and seizures incident to arrest arose from the need to protect the police officer from attack and to ensure the arrested person was not able to quickly destroy evidence near his grasp before he is taken away. The doctrine was never meant to permit seizure of all the assets of a business — especially one that primarily engages in distributing expressive material.

Finally, Section 2254 also unconstitutionally fails to require that a quick judicial determination be made as to the legality of the seizure. If the value of the seized materials does not exceed \$100,000 in value, the materials may be destroyed unless the person from whom the materials were seized initiates legal proceeding for their return. . . . If the value of the material seized is at least \$100,000, the government may initiate a judicial proceeding to determine whether the material is subject to permanent forfeiture at any time within five years after “the alleged offense was discovered.” . . . While these draconian seizure rules may be appropriate for contraband seized on the oceans, they are intolerable for expressive material that is “presumptively protected by the First Amendment.” . . . Indeed, it is clear that when the government seizes expressive material, the law must provide for prompt judicial review of the seizure “within a specified brief period.” . . . (footnote omitted).

### D. Criminal Forfeiture Before Conviction

The 1988 Act also established forfeiture schemes related to criminal prosecution for obscenity violations . . . and child pornography. . . . Like the civil forfeiture provisions, the criminal forfeiture sections authorize seizure of material used in, to pro-

mote, or obtained from the commission of the offense, based solely on a showing of "probable cause." . . . In addition, the sections provide for *ex parte* restraining orders and injunctions. . . . Because of the reasons expressed in this opinion's treatment of the civil forfeiture provisions — most importantly, the *Fort Wayne Books* opinion — the Court concludes that seizure or restraint under these sections without a prior adversarial hearing is unconstitutional. . . .

#### E. Criminal Forfeiture After Conviction

In addition, the plaintiffs challenge the mandatory post-conviction forfeitures of any property or assets used in, to promote, or obtained by the commission of obscenity or child pornography offense. . . . The scope is not any broader than that for pre-conviction seizure. Indeed, section 1467 (a)(3) contains a minor qualification that the court is to take into consideration "the nature, scope, and proportionality of the use of the property in the offense" — a statement not included in the civil forfeiture law. . . .

First, the plaintiffs argue that the post-conviction forfeiture provisions are facially unconstitutional because they (1) amount to "prior restraint" and (2) improperly "chill" free speech. The Court disagrees.

The seminal decision on "prior restraint," *Near v. Minnesota* . . . involved the state's enjoining a person from publishing defamatory material in the future, based on the fact that the person had printed such material in the past. The Supreme Court held this prior restraint to be unconstitutional, concluding that restraint of future speech based on a finding that past speech was unprotected was "the essence of censorship." . . .

It is true that the forfeiture laws in question here, like the injunction in *Near*, undoubtedly exist in order to ensure that the business is destroyed root and stem. . . . The Court cannot, however, conclude that this policy decision on its face is unconstitutional. In *Arcara*, the Supreme Court ruled that the closure of an entire bookstore for criminal violations in it did not violate the First Amendment. Moreover, in *Fort Wayne Books*, the Supreme Court approved the use of Indiana's RICO law to attack a bookstore. While three justices in *Fort Wayne Books* held that post-trial forfeiture of a bookstore's assets would be unconstitutional, the majority ruled that "we assume without deciding that bookstores and their contents are forfeitable (like other property such as a bank account or a yacht)." . . . Following the logic in *Arcara*, forfeiture may be ordered for assets used in, to promote, or obtained from a criminal violation, whether or not these assets "incidentally" happen to include expressive materials. Under such logic, the forfeiture is *not* "prior restraint."

The Court in the instant case can imagine that some post-conviction forfeitures of bookstores and other businesses that engage primarily in expressive activity could be so broad that they violate the First Amendment by removing from circulation considerable amounts of protected material. For now, such cases can be dealt with on a case-by-case basis.

Another factor distinguishing the forfeiture schemes challenged here from the "prior restraint" doctrine is that forfeiture does not restrain the activities of the person or business in the future; it only takes from them assets that they have accumulated before conviction. Under the schemes at issue here, the convicted person or business is not enjoined from and is legally free to engage in the production and distribution of any expressive material after the forfeiture — even though expressive material may have been seized. Critics might argue that the distinction is splitting hairs, but this is the stuff of First Amendment analysis (footnote omitted).

Finally, the Court does not accept in whole the plaintiffs' argument that the post-conviction laws are facially unconstitutional because they "chill" protected speech. It is true that because the line between material protected by the First Amendment and that sanctionable as unprotected expression often is less than clear to a distributor of expressive materials, a "threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." . . . The potential consequences of a wrong determination whether certain material is protected may force distributors to "steer far wider of the unlawful zone." . . .

Yet this broad deterrent effect exists in any criminal scheme,

including when obscenity itself is penalized by criminal punishment. The courts must attempt to choose which laws have too great a "chilling" or deterrent effect on free speech to survive constitutional scrutiny. It is true that the forfeiture provisions at issue here "arm prosecutors not with scalpels to excise obscene portions of an adult bookstore's inventory but with sickles to mow down the entire undesired use." . . . But it is not clear that forfeiture will "chill" speech any more than do criminal punishment and imprisonment, which is undeniably permitted for obscenity violations. While once again the court can imagine that overly broad interpretations of the post-conviction forfeiture provisions could lead to an intolerable "chill" of First Amendment activity, the Court believes that the sections as written are not facially unconstitutional. Such a standard for a constitutional interpretation of the forfeiture provisions should be drawn after the courts have had an opportunity to evaluate the use of the forfeiture provisions and their effect.

In addition, the plaintiffs challenge 18 U.S.C. 1467(j), which authorizes a United States District Court order the forfeiture of property without regard to the location of the property. Thus, for example, a conviction for distributing obscenity in community A would lead to forfeiture of the defendant's property in community B, without any determination whether community B would find the material that was the basis for the conviction to be "obscene" in its eyes. The plaintiffs claim that the provision runs counter to the federalist thrust of the test in *Miller*, which depends on "contemporary community standards." . . . Under *Miller*, a person may be convicted for obscenity violations only if the jury concludes that *its* community would find the material to be "obscene." . . .

The Court concludes that the provision is *not* unconstitutional under the *Miller* doctrine. First, the Court notes that forfeiture is authorized not because the community that has convicted the person has determined that the forfeited assets are "obscene" — this is irrelevant under forfeiture. The only thing that matters is whether the assets were used in, to promote, or obtained from an activity that a certain community has determined involved "obscenity". Indeed, a person who lives in community B but who has distributed material to community A that the latter community finds to be "obscene" may find himself in prison in community A, even though his home community might not have convicted him, and even though he may never physically have entered community A. If a person may be "forfeited" through a conviction in a community other than his own, it appears to the Court that the person's property may be forfeited, even though it is not in the locale that handed down the conviction (footnote omitted). While seizure of assets undoubtedly would involve seizing expressive material, the seizure is done *not* because of a determination that they are "obscene" (footnote omitted).

There are, however, certain aspects of the post-conviction forfeiture scheme that the Court concludes are unconstitutional.

First, after a conviction for an obscenity or child pornography offense, the criminal forfeiture sections state that only persons "other than the defendant or person acting in concert with him or on his behalf" may obtain a stay of "disposition" of the forfeited property pending appeal. . . . (footnote omitted). If this section were interpreted to prohibit a defendant from obtaining a stay with regard to the destruction or sale of the forfeited material pending appeal, it would essentially eviscerate the constitutional right to appeal the forfeiture. It is not typical that forfeiture pursuant to conviction cannot be stayed pending appeal. . . . The unfairness of such an interpretation is heightened by the fact that forfeitures under sections 1467 and 2253 would likely involve expressive material. Therefore, the Court concludes that 18 U.S.C. sections 1467(g) and 2253(g) must be interpreted so as to permit the defendant to obtain a stay pending appeal.

Second, the Court notes that the forfeiture provisions of the 1988 Act — unlike the Racketeering Influenced and Corrupt Practices Act (RICO), to which the government consistently analogizes the statutory scheme at issue here (footnote omitted) and which requires a "pattern" of activity . . . permit forfeiture for *any* violation of the listed obscenity or child pornography laws, regardless of whether or not there was a "pattern" of activity . . . Thus, the

laws at issue here appear to authorize forfeiture of vast amounts of assets — everything from First Amendment protected material to bank accounts — for a single violation.

The general rationale for provisional authorizing forfeiture is that the property to be forfeited is considered to be part of, or obtained through, criminal “enterprises”. *Testimony of H. Robert Showers*. . . . To impose the sweeping forfeiture provisions on persons or businesses that have committed a *single* violation would both unnecessarily chill free speech. Limiting the forfeiture provisions to cases involving “patterns” of criminal behavior — as in RICO — would give the forfeiture provisions their full effect on obscenity and child pornography enterprises, without imposing the specter of the corporate “death penalty” for a single violation of laws for which the line between crime and the First Amendment is “dim and uncertain.” . . .

In sum, the Court concludes that the post-conviction forfeiture provisions are *not* as a whole facially unconstitutional. However, the Court concludes that post-conviction forfeiture may be ordered only when there has been a “pattern” of activity . . . (1) [T]he Court declares that 18 U.S.C. sections 1467(g) and 2253(g) must be interpreted to give the defendant the right to obtain a stay pending appeal, and (2) the Court enjoins the defendants from enforcing the forfeiture provisions of 18 U.S.C. sections 1467 and 2253 unless there has been shown a “pattern” of criminal activity.

#### **SUPREME COURT RULES IN ABORTION CASE**

The United States Supreme Court’s decision in *Webster v. Reproductive Health Services* held that a provision of a Missouri abortion statute which prohibits the use of public funds for abortion counseling is directed only at the state’s fiscal officers and not at the conduct of doctors. The state of Missouri had argued that this was the intent of the statute, and the plaintiffs who had

contended that the statute violated the First Amendment by restricting speech about abortion, agreed that the state’s narrow interpretation would not burden them. Thus, the Court upheld the provision and dismissed the portion of the complaint challenging it as moot, since the parties no longer were in controversy over it. Under this portion of the statute, state lawmakers and administrators must ensure that no public monies support abortion counseling.

Though libraries take no position on issues such as abortion, they do impartially provide information from all points of view. The effect of the statute is uncertain until the state legislators and administrators act. If state legislators decide that by providing information about abortion, libraries are “counseling”, public funding for libraries could be restricted. If that happens, the First Amendment issues may have to be relitigated. Justice O’Connor, in her concurrence, recognized that possibility: “Should it happen that Section 188.205, as ultimately interpreted by the Missouri Supreme Court, does prohibit publicly employed health professionals from giving specific medical advice to pregnant women, the vacation and dismissal of the complaint that has become moot clears the path for further relitigation of the issues between the parties, should subsequent events rekindle their controversy.” The other parts of the statute which directly regulated speech and were held constitutional by the United States Court of Appeals for the Eighth Circuit, were not appealed by the state, and the rulings on these sections stand.

#### **FLAG CONTROVERSY**

In the wake of President George Bush’s call for a constitutional amendment to restrict flag burning, a flurry of bills and proposed constitutional amendments have been proposed in Congress. The Foundation Board is monitoring their development, to identify appropriate avenues for involvement to combat potential censorship.

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