Freedom to Read Foundation News

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California Attorney General Responds to FTRF Legal Action

[*The following report is a revised version of an address given by Judith F. Krug to the California Library Association at the Association's annual conference in December, 1972. It has been updated to give Foundation members the most current information.*]

Legal representatives of Evelle J. Younger, Attorney General of California, have responded to the class-action suit, funded by the Foundation, attacking California's "Harmful Matter" Statute. Attorneys for the plaintiffs have filed arguments to counter those set forth on behalf of the Attorney General. Oral arguments will be held before U.S. District Court Judge Harry Pregerson on January 22, 1973.

If successful, *Moore* v. *Younger* (the "official" name of the suit) will establish the first legal precedent for some of the basic principles of the *Library Bill of Rights*. Legal precedent is the ultimate protection of the library's role under the First Amendment. That role —as succinctly stated in *Moore*—is that the library is the only public institution where the First Amendment dictates of freedom of the press and freedom of speech are, and can be, fulfilled.

Attorney General Moves to Dismiss

The initial complaint* was filed on May 5, 1972. It was expected that the Attorney General would request an extension of time in which to file his response, and that is exactly what happened. Following a second extension, Mr. Younger filed a brief on July 31. As anticipated, the response consisted of a Motion to Dismiss the complaint and arguments in opposition to convening a three-judge Federal Court. The Attorney General challenged not only the plaintiffs' right to sue, but their right to sue in federal—as opposed to state—court.

On preliminary analysis, the two procedural arguments in the Motion to Dismiss appeared weak on their face. These arguments concerned abstention (the appropriateness of federal action) and the fact that the State Attorney General, named as defendant in the suit, is not a proper party. By law the Attorney General has responsibility for enforcing or executing the statutes of the state, and, given this responsibility, it would appear that he must be considered a proper party.

The third argument in the Motion to Dismiss was based on the Supreme Court's decision in *Ginsberg* v. *New York* (1968)—the decision that established the "variable obscenity" concept. On preliminary review, the Attorney General's contention that the plaintiffs had no case because the issue—namely, the constitutionality of the Harmful Matter Statute—had been decided, did seem to have surface plausibility. Further analysis, however, revealed that the issue decided in *Ginsberg* had no connection with the issues in *Moore* v. *Younger*. It was decided, therefore, that the brief in opposition to the Motion to Dismiss would be based on two points: first, that the constitutional questions concerning the validity of the California Harmful Matter Statute not only were not foreclosed by the Supreme Court's decision in *Ginsberg,* but, indeed, were in no way touched upon by the Court in that decision; second, that the plaintiffs not only have a right to be in court on this matter, but have a right to be in—and to remain in—*federal* court.

Proposition 18

At this point, the only unanticipated event occurred —the placing of Proposition 18 on the November, 1972 ballot in California. Proposition 18 would have modified certain definitions now contained in the California Penal Code and, more important, would have added new definitions. The significance of the changes and additions lay in the fact that they would have made the term "obscenity" extremely vague and, in addition, variable in meaning according to "prevailing practices" in local communities. The problem was that if Proposition 18 had been approved, not only would the Harmful Matter Statute have been different from the one that is currently the subject of the suit, but the constitution of the State of California also would have been altered. These facts would have undoubtedly meant a

*The plaintiffs are Everett T. Moore, Albert C. Lake, Robert E. Muller, Chase Dane, Rev. Charles J. Dollen, Anita Iceman, American Library Association, California Library Association, and Los Angeles Public Library Staff Association.

withdrawal and revamping not only of the brief opposing the Motion to Dismiss, but, probably, of the initial complaint as well. Fortunately, Proposition 18 was defeated, and the brief in opposition to the Motion to Dismiss was filed on December 1.

Three-Pronged Attack

The thrust of our attack on the California statute, as detailed in the brief opposing the Motion to Dismiss, is three-pronged. To understand the three arguments, it is necessary to review the decision of the U.S. Supreme Court in *Ginsberg* v. *New York*. A careful analysis of the Motion to Dismiss revealed that *Ginsberg* had absolutely no connection with the issues at stake in our case.

In *Ginsberg,* the U.S. Supreme Court affirmed a conviction for the commercial sale of two "girlie" magazines to a sixteen-year-old boy. In so ruling, the Court upheld the constitutionality of a New York Statute which prohibited "any person knowingly to sell or loan for monetary consideration" any harmful matter to minors. The California Statute under attack has a similar *definition* of "harmful matter": (1) predominately appeals to the purient, shameful or morbid interest of minors, and (2) is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors, and (3) is utterly without redeeming social import for minors.

However, similarity with the New York Statute upheld in *Ginsberg* ends at this point. The statute tested in *Ginsberg* prohibited *only commercial distribution* of harmful matter, whereas the California Statute prohibits all distribution, including the *passive, non-commercial distribution* that occurs in public and school libraries. By prohibiting both passive, non-commercial distribution *and* commercial distribution, the Harmful Matter Statute creates, in effect, a total and complete administrative program of censorship—but one without the procedural safeguards absolutely necessary to ensure First Amendment rights. Because the California statute goes beyond the New York Statute decided in *Ginsberg* —beyond in that it includes passive, non-commercial distribution, along with commercial—*Ginsberg* has no relevance in the case at bar.

Non-Commercial Distribution Protected

The first of the three arguments in support of this contention as set forth in the Memorandum of Opposition is that passive, non-commercial distribution of arguably "harmful matter" is constitutionally protected. The Supreme Court has firmly established that the question of whether a piece of material is "harmful" is determined with reference to the mode and manner of its distribution. In *Roth* v. *United States,* Chief Justice Warren (concurring) stated:

> The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in a context from which they draw color and character. A wholly different result might be reached in a different setting.

In *Ralph Ginzburg* v. *United States* (1966), the Supreme Court stated that

> . . . the mode of distribution may be a significant part in the determination of the obscenity of the materials involved.

With this and other U.S. Supreme Court opinions as the basis, it is argued that materials that are not harmful on their face cannot be deemed harmful if distributed in the passive, non-commercial environment of a school or public library. On its face, the California Harmful Matter Statute subjects individuals to criminal prosecution for the mere distribution of material that *might* be argued to be "harmful matter" without regard for the fact that the passive, non-commercial nature of that distribution, as a matter of law, renders the material non-harmful. Such an overbreadth of coverage is constitutionally inpermissible.

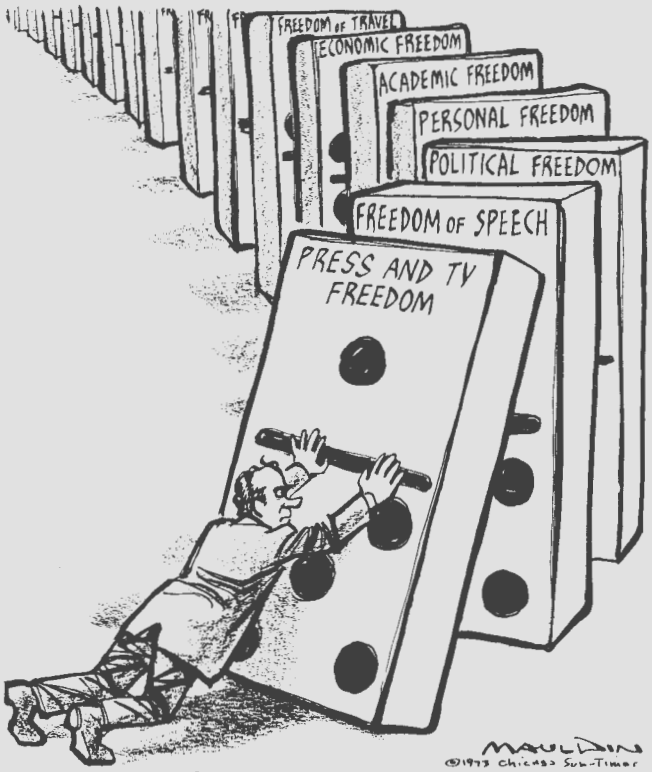
Prior Restraint Alleged

The second prong or argument of the attack concerns the comprehensive system of censorship which the statute establishes and which includes none of the constitutionally required procedural safeguards. The Supreme Court has stated in case after case that any comprehensive system of censorship must provide adequate procedural safeguards. Such safeguards include placing on the censor the burden of initiating judicial review and of proving that the materials are unprotected by the First Amendment; requiring prompt judicial review; and limiting the time any restraint may be imposed before a final judicial determination.

A comprehensive system of prior restraint is established because the California statute prohibits all forms of distribution, rather than just commercial distribution. The fact that this censorship system is informal and non-official does not mean that due process considerations can be forgotten.

In addition, the *coercive* effect of the threat of criminal prosecution under the statute compels all individuals engaged in any distribution of material to minors to act as censors of these materials. The decision not to distribute constitutes a total and final prior restraint. In *Freedman* v. *Maryland* (1965), the U.S. Supreme Court recognized that

> . . . because the censor's business is to censor, there adheres the danger that he may well be



> less responsive than a court part of an independent branch of government to the constitutionally protected interests in free expression. And if it is made unduly onerous, by reason of delay or otherwise, to seek judicial review, the censor's determination may in practice be final.

The system of censorship established by the California statute is constitutionally defective because it fails to meet the requirement of judicial review of censorship decisions. Having made a decision to censor the distribution of a given piece of material, the librarian is under no obligation to seek a review of this decision, nor does he have an economic incentive to do so. In fact, if a librarian were obliged to seek such review, it would be considered unreasonable; and, economically, there is a disincentive to seek such. The system created by the California Statute places censorship decisions in the hands of private individuals, individuals who are not qualified by experience or by training to make them.

Statute Vague

The final portion of the three-pronged attack argues that the statutorially provided definition of "harmful matter" is void for vagueness and overbreadth in the context of *passive, non-commercial distribution.*

These three arguments, then, constitute our attack. They include the constitutionally protected nature of *passive, non-commercial distribution,* the absence of procedural safeguards in the face of a total program of censorship, and the vagueness of the statutory standard. These arguments are greatly expanded in the brief and are fully documented with appropriate legal precedents.

Although the Attorney General was given an opportunity to attack the arguments in a written brief, none was filed. The nature of his response will be revealed in the course of the oral argumentation on January 22.

Reminder: Election Coming

Vacancies on the Board of Trustees will be filled in the election to be conducted during May, 1973. Foundation members who have not paid their dues by May 1 will not be able to vote. Make a reminder to send your check today if you have not renewed your membership. If your contribution is received before February 28, it will not be necessary to drop your name from the roll.

"Social Value" and "Community Standards" Under Attack

Since 1966, the Supreme Court has consistently applied three criteria to determine if a publication, motion picture, etc., is obscene. Obscene material must appeal to prurient interests; be patently offensive in light of community standards; and be utterly without redeeming social value. These criteria, while subjective, have been used throughout the judicial system and have generally protected works of substance from prosecution.

At this time, however, the Court has decided to reargue three cases heard last year before Justices Powell and Rehnquist joined it. The Court also has before it a formal request to reconsider the issues it attempted to resolve in *Memoirs* v. *Massachusetts* (the *Fanny Hill* decision). It was in *Fanny Hill* that the Court ruled that the three elements of prurient appeal, patent offensiveness, and lack of redeeming social merit must "coalesce." It is very likely that two of the three criteria for determining obscenity will come under attack—the definition of community standards and the redeeming social value test.

It is not surprising that these two issues are being raised now. A number of state supreme courts have asked the U.S. Supreme Court for greater clarification of the obscenity issue, and a number of states have openly challenged the accepted definition of obscenity. In April, 1972, the Connecticut House of Representatives asked the state senate to approve a measure which would have deleted the "redeeming social value" test from the state obscenity law. Although this measure was not approved, it is expected to be re-introduced. During 1972, New Jersey amended its obscenity statute, dropping the "redeeming social value" requirement. Subsequently, a federal court declared the entire statute unconstitutional for omitting that test. The question of community standards—whether they are to be determined according to national or local mores—was one of the points raised in Proposition 18 on California's November 7 ballot.

The legal redefinition of obscenity through changes in these two tests would have sweeping effects. One certain result, if consideration of the "redeeming social value" test is not affirmed, is that prosecutions will be easier to secure. Even the most tame reference to sexuality could result in someone's crying "Obscene!" Thus far, precedent has been established for the definition of community standards in terms of national ones. If states and localities are allowed to apply their own local standards, the issue of obscenity will be complicated beyond recognition. Prosecutors would then be permitted to act against material that offends local people, and, of course, this judgment could vary from community to community. Further, publishers, film producers, and television networks would be affected since their distribution is national. An item could be judged obscene in various scattered localities.

Report of the Auditors

The statement of Foundation cash receipts and expenditures for the year ended August 31, 1972, is as follows:

Receipts		
Memberships received	$9,345	
Contributions received	2,354	
Interest on savings account	284	
Total		$11,983
Expenditures		
Legal fees	5,505	
Meeting expenses	390	
Filing fees	2	
Accounting fees	597	
Miscellaneous	17	
Printing and duplicating	1,814	
Stationery	351	
Postage	56	
Travel	85	
Total		8,817
Excess of receipts over expenditures		$ 3,166

The following is the report for the LeRoy C. Merritt Humanitarian Fund:

Fund balance, September 1, 1971	$ 974	
Add: Donations and Memberships for the year ended August 31, 1972	1,391	
Less: Grants paid for the year ended August 31, 1972	1,000	
Balance		$ 1,365

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Freedom to Read Foundation News is prepared by the staff of the ALA Office for Intellectual Freedom.
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