newsletter on intellectual freedom

IFC ALA

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high court: 'community standards' cannot be defined

In a widely expected but nonetheless dismaying ruling, the U.S. Supreme Court on May 23 upheld the federal conviction of Iowan Jerry Lee Smith and declared that state obscenity law cannot define "local community standards." Smith's appeal was supported by the Freedom to Read Foundation, and friend-of-the-court briefs were filed on his behalf by the American Library Association, the Iowa Library Association, and the Association of American Publishers.

Smith, who was indicted in a U.S. District Court in Iowa for mailing obscene materials in violation of 18 USC 1461 (a Comstock law), sought without success to question the jury panel on voir dire *on their knowledge of the contemporary community standards in their federal district with regard to the depiction of sex and nudity.*

The case proceeded to trial and at the close of the federal prosecutor's case, Smith's attorney unsuccessfully moved for a directed verdict of acquittal on the grounds, inter alia, *that the Iowa obscenity statute in effect at the time of Smith's conduct, which proscribed only the dissemination of so-called obscene materials to minors, set forth the applicable community standard, and that the prosecution had not proved that the materials had offended that standard.*

Upon his conviction, Smith appealed to the U.S. Court of Appeals for the Eighth Circuit, which affirmed his conviction on the grounds that the questions proposed during voir dire *were impermissible since they concerned ultimate questions of guilt or innocence, rather than the jurors' qualifications, and that community standards were properly defined, not by the state law, but rather by the jurors' "inborn and often undefinable" sense of those standards.*

Justice Blackmun delivered the opinion of the Court, in which Chief Justice Burger and Justices White, Powell, and Rehnquist joined. Substantive portions of the opinion are reprinted here (with footnotes and some citations omitted).

In his summary of the proceedings below, Justice Blackmun emphasized that "what the petitioner did clearly was not a violation of state law at the time he did it. It is to be observed, also, that there is no suggestion that petitioner's mailings went to any unconsenting adult or that they were interstate."

The argument of the majority

Part III of the opinion begins: Petitioner was indicted on seven counts of violating 18 USC 1461, which prohibits the mailing of obscene materials. He pleaded not guilty. At

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titles now troublesome

bill to restrict intelligence

A measure to put restrictions on federal intelligence agencies was introduced in Congress in April by several representatives, including Herman Badillo (D.-N.Y.), John Conyers Jr. (D.-Mich.), Ronald V. Dellums (D.-Calif.), Robert F. Drinan (D.-Mass.), and Fortney H. Stark (D.-Calif.). Entitled the Federal Intelligence Agencies Control Act of 1977, the bill would bar the Federal Bureau of Investigation from engaging in political surveillance and would restrict it to the investigation of crimes. In addition, the measure would amend the Freedom of Information Act to restrict the national security exemption, and would create a special prosecutor's office with jurisdiction over crimes committed by intelligence agency employees. Reported in: *Access Reports,* April 5.

U.S. bars Soviet labor delegates

Despite President Carter's pledge to liberalize entry to the U.S., the State Department in April acquiesced in demands of the AFL-CIO and refused to allow three Soviet trade unionists to attend a longshoremen's convention in Seattle.

The decision was reportedly made by Secretary of State Cyrus R. Vance in accordance with one of the oldest policies of the State Department, which allows the AFL-CIO a veto over all applications for visas by Communist unionists. The policy has resulted in the virtually complete elimination of Soviet union officials from labor meetings in the U.S.

In a speech to the United Nations on March 17, President Carter said: "I have just removed all restrictions on American travel abroad, and we are moving now to liberalize almost completely travel opportunities to America." Apparently, the policy of deferring to the AFL-CIO was still under study when the Soviet unionists were barred from the longshoremen's meeting.

Syndicated columnist Garry Wills commented on the State Department's decision:

"When the Helsinki declaration is reviewed in Belgrade

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World War I, ALA, and censorship

By ARTHUR P. YOUNG, Assistant Dean for Public Services, The University of Alabama Library.

When the "guns of August" shattered the fragile European balance of power in 1914, most Americans confidently expected that they would not be drawn into the conflict. For three years President Wilson pursued a frustrating policy of neutrality toward Germany and the Central Powers. Following American intervention in April 1917, the nation embraced Wilson's challenge to "make the world safe for democracy." How did librarians react to the war? What role did the American Library Association play? And, most germane to this essay, to what extent did censorship intrude?

As social agencies, libraries have historically reflected contemporary values, and World War I was no exception. For the majority of Americans, World War I became a morally charged, even spiritualized struggle. Librarians readily absorbed the symbolism and patriotic emotionalism. The sacrificial ideal and the tarnished heritage of the library as a moral arbiter of reading tastes were strong undercurrents in the library profession, and these attributes blended easily with the wartime emphasis on national solidarity and altruistic service. Allied propaganda before America's entry, government surveillance of the media during the war, and the cultural affinity of America and France also contributed to librarians' pro-Ally stance. Along with embracing the national war spirit, librarians were exhilarated by the prospects for spreading the gospel of the library's value to society.

The World War represented a unique opportunity for the American Library Association. Established in 1876, ALA had expended much energy in defining the parameters of librarianship and convincing the public of the library's educational value. By 1917, the Association did not seem strong enough, either in terms of resources or professional maturity, to assume the task of supplying reading matter to an American army of several million men. Membership in ALA had reached 3,300 and the Association conducted its affairs with an annual budget of just over $24,000. Defying the odds, ALA made a contribution of surpassing importance.

Shortly after the American declaration of war in 1917, ALA established a War Service Committee. This Committee accepted an invitation from the War Department's Commission on Training Camp Activities to furnish library materials and service to U.S. soldiers in America, Europe, and other points. The Association was one of seven welfare groups affiliated with the Commission. ALA's wartime program, known as the Library War Service, was directed by Herbert Putnam, Librarian of Congress, and later by Carl H. Milam. Between 1917 and 1920, ALA mounted two financial campaigns and raised $5 million from public donations; erected thirty-six camp libraries with Carnegie Corporation funds; distributed approximately 10,000,000 books and magazines, and provided library collections to 5,000 locations. Nearly 1,200 library workers served in libraries sponsored by the Association. The provision of this service transformed ALA from a sedate professional body into a public service organization.

Delimiting the boundaries of book selection in wartime was a difficult task for librarians. Contemporary discussions of censorship document librarians' cautious approach and discomfiture over the need to debate the issue at all. During neutrality (1914-1917), most librarians proclaimed impartiality toward the warring parties. But librarians' acquisition practices belied their conscience-salving rhetoric. Pro-Allied titles from Wellington House, England's secret propaganda agency, poured into American libraries. Relatively few pro-German books were acquired, and if obtained, were not usually available for circulation. After the American declaration of war, the Library War Service cooperated with the military authorities in a program to monitor the books distributed to the camp libraries administered by the Association.

Beginning in July 1918, officials in the War Department ordered certain titles banned from the camps. The Association, ironically, had been practicing self-censorship from the outset of the war, and willingly collaborated with the War Department in the removal of books. Although the War Department's censorship program was intended as a covert operation, the names of the proscribed books were released in September. The Association was called upon to defend its selection practices, a further embarrassing irony, after several newspapers printed the lists.

The first episode of censorship involving camp libraries was reported in the Albany, New York *Knickerbocker-Press* on February 18, 1918. Three war books by Paul Koenig, Count Ernst von Reventlow, and Hrolf von Dewitz were barred from circulating at the Camp Upton (New York) Library. The books in question had been received from the New York State Library. Apparently the books had been banned by local military authorities since James Wyer, Chairman of the War Service Committee, said he did not know why the books had been withdrawn. Wyer defended the Koenig book, denying the allegation that it was propaganda work favorable to Germany.[1]

Within a week the War Department asked Putnam why Herbert Bayard Swope's *Inside the German Empire* was available at the camp libraries. The book would not be

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This article is adapted from the author's Ph.D. dissertation, "The American Library Association and World War I" (University of Illinois, 1976). Copyright 1976.

removed, Putnam said, since Swope was a Pulitzer Prize winner, the book was not pro-German, and soldiers needed to understand the enemy. As if to forecast his later submission, Putnam promised to "remove any really objectionable books" in the future.[2] A month later Putnam confided to George H. Tripp of the New Bedford (Massachusetts) Public Library that some books should not be sent to the camps. "The question is not [one] of exclusion, but merely one of selection," Putnam asserted, "and that is the only safe attitude for us."[3]

A sharp-eyed newspaperman on the *Detroit News* discovered that ALA was diverting some gift books from the camps. From a publicity pamphlet issued by the Association, he learned that books by Emile Zola, Guy de Maupassant, and Alphonse Daudet were being withheld by sorters at the New York Public Library.[4] Indignant over this practice, he composed a scathing editorial:

> The deadly censorship fever spreads more rapidly in war time than any other mental disease, and America is especially subject to it. In peace days our national literature was puritanized and mollycoddled practically out of existence by the Comstockery of the post office department and the public libraries. Now the camp libraries are threatened by the same malady. It is more important that they be saved from it than that some notion of democracy be injected into the municipal libraries. In an American city one can go across the street and buy or order a book that the public library has refused to furnish. In military camps no such opportunity is open.
>
> Every man and woman should see to it that the books intended for the nation's fighting men go to those men, and not to the junk pile of some "library expert" who thinks he is competent to act as censor over the minds of men whose lives guarantee his security.
>
> It is not easy to comprehend the nature of egotism that permits this "assistant" or any other to set himself up as an "intellectual dietician." This is supposed to be a war for democracy. The fundamental theory of democracy is that the people—not the superior people, but all the people—have a right to rule themselves. Certainly it seems that we should put this notion into practice, at least to the extent of assuming that a man fighting for democracy has a right to choose his own reading matter.[5]

Regrettably, this libertarian plea did not influence subsequent actions of the Association.

Pressure from the War Department to cleanse libraries of pacifist and pro-German titles intensified during the spring and summer of 1918. Concerned that enemy agents might glean technical secrets from *Popular Science* magazine, the chief of the army's Military Intelligence Branch asked the Association not to distribute the periodical to domestic camps or overseas. Army officials finally relented after ALA convinced them of the futility of banning the publication. The men would get it through other channels anyway.[6]

On another occasion, the War Department contacted the Commission on Training Camp Activities, perhaps believing that the Commission would exert pressure on the Association. The book in question, Henri Barbusse's *Under Fire,* had been issued at the Camp Sherman (Ohio) Library. Since the book was being serially published by George S. Viereck, a German sympathizer, the War Department considered it pernicious propaganda and wanted it removed from the campus. Putnam complied with the request, noting that the Barbusse book was no longer being supplied and would be destroyed wherever it surfaced. Further, Putnam said he would welcome additional suggestions from the War Department. We shall "take prompt measures" to eliminate any titles regarded as "objectionable."[7] The capitulation was complete.

On July 31, 1918, the Association issued a list of fourteen books to be removed from the camp libraries. The request, Library War Service officials said, was made by the War Department and full compliance was expected. Camp librarians were asked to maintain a constant vigil, especially for pacifist works published by religious sects and philanthropic societies.[8] No publicity was to be given to the removal program. Five more lists were issued by the War Service during August.[9]

Since the press had leaked some of the banned titles in early September, the "Army Index" was officially released by the War Department in two installments later in the month.[10] Altogether, eighty books and pamphlets were prohibited from the camps. The *New York Tribune* reported that the books had been carefully read by military censors who pronounced some titles as "vicious German propaganda" and others as either "salacious" or "morbid."[11] The list of censored titles was highly selective, omitting many possible candidates. Hundreds of pro-German and pacifist books and pamphlets had been published since 1914.[12]

Apart from the alleged pro-German or pacifist bias of the books, no pattern is discernible. Neither the backgrounds of the authors nor the publishers themselves provide a clue as to why certain books were selected for the list and others excluded. Among the banned books were *Understanding Germany* by Max Eastman; *War and Waste* by David Jordan; *The Heel of War* by George B. McClellan; *England or Germany?* by Frank Harris; and *Why War?* by Frederic C. Howe. The authors defy occupational classification. Eastman was a socialist and editor of the *Masses;* Jordan was the former president of Stanford University; McClellan, son of the famed Civil War general, was a lieutenant colonel in the AEF; Harris was a professional writer and editor; and Howe was a civil reformer and Commissioner of Immigration, Port of New York.[13] Considering the entire list, no publisher was immune from inclusion. Small firms sympathetic to the German point of view, such as the Fatherland Corporation and Open Court Publishing Co., were heavily represented, but the more familiar names of Century, Macmillan, and Putnam's also dotted the list.

Editorial opinion regarding the War Department's censorship was overwhelmingly favorable. The *Boston Evening Transcript* offered this appraisal of the banned books:

> Here is a group of old friends! The pro-German whose motive was money, and the pro-German whose motive may have been less selfish, the none the less sinister. The addleheaded pacifist, working hand-in-hand with the paid servants of absolutism and militarism, and playing—innocently or not—their game for them. The German-born professors, obedient to Potsdam, and ready to snarl at England. The American-born professors, their opinion warped and their historical judgment corrupted by a lunch with Wilhelm II—and a ribbon to stick in their coats. The professional Irish patriot—always remaining safe in New York or Boston, but very warlike against England, and eager to ally himself with the Hun—in the name of liberty! What a crew they are![14]

Asked to comment on the ban, Edwin H. Anderson of the New York Public Library remarked that "if Satan wrote a pro-German book we should want it for our reference shelves."[15] But, he added, objectionable books had been

The text of the Attorney General's letter stated in part: "Freedom of Information Act litigation has increased in recent years to the point where there are over 600 cases

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Florida incident shows value of confidentiality

The following report was prepared by KATHRYN A. STEWART, Library Services Coordinator for Brevard County, Florida. It was first published in Florida Libraries, *March-April 1977.*

Late in the afternoon of March 1, 1976, two young men in their mid-twenties came into the Eau Gallie Public Library to return two books and demanded to know who had checked the books out. They were told by the staff at the circulation desk that library records are confidential and the information could not be made available to them.

The two men persisted and explained that their father had recently been murdered and these two books had been left in their mother's mailbox that same afternoon. The books were: *That None Should Die,* by Frank Slaughter and *No Place for Murder,* by George Harmon Coxe. The circulation staff still refused to give out the information and told the two men that the incident would be reported to the Melbourne Police Department if they would leave their names and phone number. This was unacceptable to them; and as they were leaving they stated they would find out on their own who had checked the books out.

The books had been checked out that same afternoon; and one of the staff members remembered checking the books out to a male patron whom she recognized.

Police arrive

The next morning, a police detective from the Melbourne Police Department came to the Eau Gallie Library and wanted to know who had checked out the two books. He was informed by the circulation supervisor that library records are considered confidential and that the information would not be released without a court order.

The attorney for the Melbourne Police Department immediately called the Melbourne city attorney and complained that the Eau Gallie Library staff was hampering a police investigation.

At this time, the Eau Gallie Library director was attending a meeting with the other library directors at the Melbourne Public Library and had taken the books with her to discuss the matter with with them and Kathryn Stewart, Library Services Coordinator. The city attorney called her and advised her that all library records are public records under Chapter 119 of the Florida Statutes and that she and her staff should cooperate with the police in their investigation.

Mrs. Stewart then called Cecil Beach, State Library Director. He advised Mrs. Stewart that because of Florida Statute 119, confidentiality of circulation records is a matter on "shaky ground." Therefore, the card number was given to the police detective over the phone by the Eau Gallie Library director. He then went to the Eau Gallie Library to get the name of the card holder.

The police have never seen the books or the card number stamped on the book card; the card holder (a woman) was not the person who had checked out the books, but had the same last name.

The outcome

As it turned out, one of the two young men was later charged with the murder of his father, and the individual who checked out the books had used another patron's library card for the transaction. If we had given the requested information, we do not know what the results might have been.

(As a result of the events at the Eau Gallie Library, the Brevard County Commission proposed a new ordinance on confidentiality: "All circulation and loan records of libraries shall be confidential information. Except in accordance with proper judicial order, no employee or individual shall make known in any manner any library patron circulation and loan information."

(The Florida House Committee on Governmental Operations also proposed a law establishing criminal penalties for violation of the confidentiality of library records.—Eds.)

in review

Freedom Spent. Richard Harris. Little, Brown, 1976. 460 p. $12.95.

"The simple and overwhelming truth," writes Richard Harris in the prologue of this impressive book, "is . . . that the guarantees of personal liberty contained in the Bill of Rights have rarely been enforced. The myth of freedom has been driven into us incessantly from birth, but the reality of freedom eludes us to this day." This is so, he argues, because the judiciary—"the most conservative branch of government"—"nearly always serves the interests of the state rather than its citizens."

In support of this thesis, Harris recounts three stories of individuals who found themselves involved in protracted and bitter legal struggles when they exercised what they assumed to be their constitutional rights. Originally published as articles in *The New Yorker,* these case studies deal in turn with issues arising under the First, the Fourth, and the Fifth Amendments. In each Harris skillfully interweaves a detailed narrative account of the case as experienced by the individuals involved, and analysis of relevant constitutional doctrine, and an historical sketch of the origins and evolution of that doctrine. Taken together, the three essays constitute an instructive and often alarming report on the present state of civil liberties in this country, and they provide the general reader with an unusually accessible, well-written introduction to three critically important areas of constitutional law.

The opening essay, "A Scrap of Black Cloth," describes the case of Charles James, high school teacher in upstate New York who wore a black armband to class in protest against the Vietnam War. James regarded his symbolic gesture as "a simple statement of conscience" and assumed it was protected by the First Amendment. The local school board, however, saw the matter differently and fired him.

For more than four years James and his family suffered severe financial hardship while the case made its way through the courts. Finally, the Court of Appeals vindicated James by holding that his right to freedom of speech had been violated. The school board was ordered to rehire James and to pay him his salary for the years he had been deprived of his job. Subsequently, James settled his suit for damages against the school board for $55,000.

The second case described by Harris involves a young radical couple, the McSurelys, who were arrested and whose personal papers were seized under a Kentucky statute proscribing the advocacy of "sedition." This patently unconstitutional law was promptly struck down by the federal courts and some months later the McSurelys' papers were returned to them. Their legal difficulties, however, had only begun. The materials seized by the local authorities had included letters and a diary from a period in Mrs. McSurely's life when she was having an affair with the columnist Drew Pearson, a man with many enemies in Washington. Among those who examined the papers while they were in the possession of the state was an assistant to Senator McClellan of Arkansas. Acting in his capacity as Chairman of a Senate subcommittee investigating the urban riots of the late 1960s, McClellan had the McSurelys' papers subpoenaed—ostensibly, to aid in the investigation, but more likely in the hope of using the letters and diary to discredit Pearson.

When they refused to comply with the subpoena, the McSurelys were cited for contempt of Congress. After five years of litigation their contempt convictions were overturned by the U.S. Court of Appeals on the grounds that the seizure of their papers violated their Fourth Amendment right to be secure against "unreasonable searches and seizures," and that the Senate subpoenas were thus based on illegally seized evidence. The McSurelys currently have a suit pending against the subcommittee asking a million dollars in damages.

The final case involves two women, Ellen Grusse and Terri Turgeon, who were suspected of having knowledge of the whereabouts of Susan Saxe, a radical feminist under indictment for bank robbery and murder. When Grusse and Turgeon refused to answer the questions of FBI agents, they were subpoenaed to appear before a federal grand jury and were given "use immunity," a device by which the government compels the individual's testimony with the understanding that that testimony will not be used as evidence against him in a criminal prosecution. For reasons only they themselves know, the women refused to testify before the grand jury, invoking their Fifth Amendment right against self-incrimination. Held in contempt, they spent seven months in prison.

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in our mailbox

Dear Editors:

Concerning your May report of Don Roberts' study of "printism" ("Don't look in catalog for non-print"): We at Weber County Library (Utah) have been working diligently and successfully to have all media represented in our catalogs. We have also done the cataloging of media under Dewey. This has been tremendously valuable to our patrons.

We are one technical service that tries to serve patrons.

Janet Gibbs
Head, Technical Services Department
Weber County Library

censorship dateline

libraries

Palos Verdes Peninsula, California

An art exhibit mounted by twelve women artists in the galleries of the Malaga Cove Branch Library and the Peninsula Center Library in Palos Verdes was removed by the artists in May after police threatened to forcibly remove "offensive" works. Almost immediately following the hanging of the exhibit, residents charged that some of the materials were obscene.

Exhibit curators Sandra McKee and Marilyn Duzy approached the Palos Verdes district library board in September for permission to mount the exhibit. The women explained than that some of the works might be considered erotic and showed the board photographs of representative samples of the materials that would be included. The library's policy on exhibits states that the board will not preview materials to be included with the aim of removing any that might be deemed objectionable.

On May 12, three days after the exhibit opened, the library and the trustees received complaints about three works which included depictions of birth control devices and male and female genitalia. At an emotional meeting of the board of trustees a week later, community residents voiced their complaints. Failing to obtain board approval for the removal of the exhibit, residents signed complaints at the Palos Verdes Estates sheriff's office labeling the show an exhibit harmful to minors. The next day police entered the Palos Verdes library threatening to obtain a search and seizure warrant if they were not allowed to hang a sign prohibiting children under eighteen from entering the library gallery room. Police also requested permission to remove the pictures they felt were unfit for children to see.

Library Director Bruce Langdon was given twenty minutes to contact library board members to seek permission to hang the police-requested sign, but he was unable to reach the trustees. In the interim, curator Sandra McKee called the library and, learning of the police action, voluntarily removed the entire exhibit from both libraries.

"We don't feel the work is at all obscene and didn't except anything like this to happen," McKee said. "But I talked to the artists whose work was considered most objectionable, and they said they didn't want to create trouble and agreed it should be taken down."

The library board, which was deadlocked two to two on the motion to remove the materials (the fifth member of the board was in Europe at the time), will undertake a review of the policy on library exhibits as a result of the incident. Reported in: *Palos Verdes Peninsula News,* May 12, 14, 15; *Los Angeles Times,* May 19.

Loves Park, Illinois

A woman and a minister in this suburban Rockford community asked the city council in April to order the removal of *Von Ryan's Express* and *Super Cops* from the shelves of the North Suburban District Library. In protests to the city council and the district library board, Mrs. Charles Keen and the Rev. James H. Alley described the books as "filthy, obscene, and vulgar."

In his letter to the district library board, Alley cited pages in *Von Ryan's Express* and *Super Cops* which he said contained vulgar sexual expressions, profanity, and a discussion of a scene of "gross immorality."

"I know that your concern for the high moral level of our community is the same as mine," Alley said to the board, "and this is why I have called your attention to these matters. I hope to hear from you concerning these books that I know you would want to remove from the library list. Obviously, neither you nor your community ministers have time to go through every book in the library to check for this sort of thing. It is certainly important that proper screening be exercised in the matter of any books put forth for public consumption and supported by the general public tax dollar."

In her letter to the library board, Mrs. Keen also objected to *Foster and Laurie,* which she said one of her four sons had brought home from the library. She complained as well about "really filthy, obscene, vulgar language" found in books throughout the library.

Florence Hale, librarian at North Suburban, disagreed with the comments of Alley and Keen. She said they could censor what their own children read, but she added that they have no right to censor what other children and other adults read. Reported in: *Rockford Register-Star,* April 26; *Rockford Register-Republican,* April 26.

Rockville, Maryland

Montgomery County School Superintendent Charles M. Bernardo in March ordered the removal of two library books and two textbooks described as sexist, too explicit, or insipid. The two textbooks, readers entitled *Growth in Our Language Today* and *Time to Wonder,* will be allowed to wear out and will be replaced by more recent editions

which have been edited to remove sexist depictions. The two library books, *Naomi in the Middle* by Norma Klein and *Forever* by Judy Blume, were removed immediately from junior and senior high school library shelves.

Frances Dean, director of the Montgomery County school system's division of instructional materials and incoming president of the American Association of School Librarians, said the Klein book was removed because "it is unnecessarily explicit" and that Blume's controversial *Forever* was eliminated because it deals with "adult topics" and is "an insipid story with little depth." Reported in: *Montgomery County Sentinel,* March 24.

St. Marys, Pennsylvania

After hearing complaints against *Sexual Deviance and Sexual Deviants,* the board of the St. Marys Public Library decided earlier this year to order the book destroyed. The action was taken over the objections of the librarian, Ted Smeal, who also objected to the board's first suggestion that the book be placed on a restricted shelf behind the circulation desk.

The action aginst the book represented another step in efforts over two years on the part of the St. Marys board to impose severe restrictions on the general circulation of sex-related fare (see, e.g., *Newsletter,* July 1976, p. 86).

Eagle Pass, Texas

Go Ask Alice was banned from the shelves of the Eagle Pass Junior High School library by unanimous vote of the local school board at a special April meeting.

"You don't have to eat a whole rotten apple to know it's rotten," the board was told by Vincent Duncan, father of a student at the school. "And as far as I'm concerned, that book is rotten! It's just not fit for kids to read!"

Librarian Marie Bixby dissented, citing awards won by the book and the students' right to read controversial materials. "I believe there is more at stake here than whether or not this particular book is banned from the junior high library shelves," Bixby stated. "It will set a precedent. It will determine whether an individual or a group will be able to demand and expect to have a book removed from the availability of all students."

A member of the school board, Alberto Ramon, argued that the school library should "remain a citadel for what the community believes in." Ramon added that he was not "so naive" as to believe that the school library was the only source of reading matter for students. But he added: "Anybody who goes to any bookstore or any grocery store kinows full well that you can get access to even worse material than this. I feel that it does not have a place in schools simply because it's so rampant and open elsewhere. I think we should protect at least that place where we send our children."

In its comment on the action, the local weekly, the *News-Guide,* editorialized:

"No glowing commentary on the pleasures of sin, *Go Ask Alice* is a horrifying and realistic journey into the world of drug addiction which threatens the well-being of every child from elementary age up. Go ask any doctor, law enforcement officer or parent who has had to live the nightmare of a child on drugs.

"If you don't like the TV show, change the channel. If you don't like the radio commentary, turn it off. If you don't like the book or newspaper article, don't read it. But don't attempt to deprive the public of its basic right to freedom of choice.

"Libraries are for everybody and should contain a wide range of subject matter to suit all tastes and needs. If the school board doesn't rescind its arbitrary action in banning *Go Ask Alice,* the public may very well wonder what's next." Reported in: *Eagle Pass News-Guide,* April 28.

Morgantown, West Virginia

Our Bodies, Ourselves, which one Morgantown parent called "anti-Bible, anti-male, and anti-system," has been removed from the Clay-Battelle High School library, school officials announced in April.

The book was reportedly suppressed after the principal at the high school and a librarian met with parents who objected to it. Frank Marino, supervisor of secondary education for local schools, said religious objections made by the parents were taken into consideration in the decision to remove the book.

The book was not used as a textbook at Clay-Battelle High School, nor were students there required to read it. Reported in: *Morgantown Reporter,* April 29.

schools

Hopkinton, Massachusetts

School committee head Frederick S. White said in March that he did not expect the committee to review the actions of Hopkinton teachers who removed one and a half pages from 100 textbooks used in a seventh-grade consumerism course. The excised portion of the book deals with consumer fraud, specifically, advertisements for bust development techniques which appeared in teen-age and adult magazines.

The board learned in early March that the textbook, titled *Dollars and Sense,* was censored by school officials prior to its introduction in the consumer class last September.

Parents protesting the removal felt the decision should have come before the school board so parents could have had a part in the decision-making process. Said Thomas B. Fitzpatrick, whose son was enrolled in the course, "The material should have been left in. The subject isn't as important as teaching the kids about fradulent advertising." Reported in: *South Middlesex News,* March 27.

Bloomington, Minnesota

Three books were pulled from classes at Penn Junior High School after an informal complaint was lodged by a parent who threatened to enroll his children in a private school, according to District Superintendent Fred Atkinson, who asked for a district-wide review of book acquisition procedures. A "grievous error" was made when these books filled with "sexually explicit language" were offered to students in a junior high English class, the superintendent announced in May.

The censored books were *Welcome to the Monkey House,* a collection of short stories by Kurt Vonnegut, and two volumes of a science fiction series called *Again, Dangerous Vision.* They were offered as supplemental reading in a science fiction unit in the English class.

The district administration "deplores the fact that the obscene books . . . were purchased and made available to students," Atkinson wrote to F. W. Hofer, the parent. "We shall take steps to prevent a reoccurrence," Atkinson added.

Hofer, who said he was concerned for some time about materials used in the schools, explained that he "really became uncoiled" when he learned about the contents of the three books." Reported in: *Minneapolis Star,* May 6.

Eldon, Missouri

In April the Eldon board of education banned *The American Heritage Dictionary* because it includes too many four-letter words. The board's decision was in response to a complaint filed by Roy Herren, a Missouri Highway Patrol trooper who was offended by thirty-nine "objectionable" words. According to Herren, "If people learn words like that it ought to be where you and I learned them—in the streets and in the gutter."

Overruling a review committee's recommendation that the dictionary be used despite the protest, the board approved the ban six to zero.

Mary J. Groves, an Eldon resident, protested the board's action. "I think if a kid uses a word whether we like it or not, he has the right to look it up in a dictionary. If they get a dictionary banned, what about the books in the library," she commented. "I think if a kid uses a dictionary that's a good sign. He knows the dictionary has words like 'love,' 'affection,' and 'honesty,' too." Reported in: *St. Louis Dispatch,* April 18.

Omaha, Nebraska

Omaha parents in April requested that the school board ban the film *The Lottery* (based on Shirley Jackson's short story) from the Omaha public school system. The film came to the attention of several parents during a spring convention of the National Congress for Educational Excellence. The Congress had for some time sought removal of *The Lottery* from school systems because of its alleged anti-Christian and anti-tradition approach.

As a result of parental complaints, the school board scheduled a public showing of *The Lottery* and opened its meeting to public comments. Critics alleged that the film contains excessive violence, encourages the destruction of tradition, forces students into role playing situations, violates the constitutional provision of separation of church and state, and is un-American and immoral.

Responding to the criticisms, Assistant Superintendent Craig Fullerton said, "The story is powerful, gripping, and elicits a strong emotional response from many persons. This is probably true to an even greater extent with the film version. That is its value.

"In its depiction of the senseless stoning to death of a human being in such a matter-of-fact way, it brings out the story's message. Mankind is sometimes shockingly inhumane. This is an anti-violence story that is dramatic in conveying its message."

After pondering the statements for and against the film, the school board one week later voted to retain *The Lottery* but to remove a discussion film which accompanies it. In addition the board established strict conditions for the film's use. The film may be used only in eleventh and twelfth-grade English classes in conjunction with the reading of the short story. Teachers using the film must accompany it with a careful introduction and follow-up lessons which will be drafted by the school system. Reported in: *Northwest Sun,* April 21; *Omaha World Herald,* April 19.

Roseburg, Oregon

A decision of the South Umpqua school board to discontinue use of *Man: A Course of Study* (MACOS) in a fifth-grade social studies program brought the threat of a lawsuit from the Southwest Uni-Serv Council of the Oregon Education Association.

Uni-Serv consultant Randy Ventgen said the Council had instructed its attorney to review the board's decision and the teachers' contract with the board.

"We're looking at possible violations of the board's own policy regarding . . . academic freedom or a possible violation of its procedure for handling complaints about controversial materials," Ventgen said.

Despite the controversy surrounding MACOS and other learning materials used in the Roseburg area, including the film *The Lottery,* reportedly only eight of approximately 170 students were withdrawn at the request of their parents from a course using MACOS. However, fifth-grade teachers complained that the controversy had scandalized the course and made it much more difficult to teach.

"The propaganda about the course has really filtered down to the kids and given them a mind set that's very difficult to work with," said Myrtle Creek teacher Ed Smith. "They're ready to be titilated by the nasty stuff

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from the bench

U.S. Supreme Court rulings

Ruling in the case of *Smith* v. *U.S.*—supported on appeal by the Freedom to Read Foundation—the Court declared that federal juries in obscenity cases may ignore state law in applying the "local community standards" of the average adult of their "vicinage." In effect, the Court agreed with the lower appellate court, which said that such standards are "inborn" and "often undefinable." (Extensive coverage of this case begins on the first page of this issue.)

Prison libraries or legal assistance required

Ruling on a suit filed by inmates in correctional facilities of the Division of Prisons of the North Carolina Department of Corrections, the Court declared that prison authorities are required to assist inmates in the preparation and filing of meaningful legal papers by providing them with adequate law libraries or adequate assistance from persons trained in the law.

Justice Marshall, who was joined by Justices Brennan, White, Blackmun, Powell, and Stevens, delivered the opinion of the Court:

"It is now established beyond doubt that prisoners have a constitutional right of access to the courts. This Court recognized that right more than thirty-five years ago when it struck down a regulation prohibiting state prisoners from filing petitions for habeas corpus unless they were found 'properly drawn' by the 'legal investigator' for the parole board. *Ex parte Hull,* 312 U.S. 546 (1941). We held this violated the principle that 'the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus.' . . .

"More recent decisions have struck down restrictions and required remedial measures to insure that inmate access to the courts is adequate, effective, and meaningful. Thus, in order to prevent 'effectively foreclosed access,' indigent prisoners must be allowed to file appeals and habeas corpus petitions without payment of docket fees.' . . .

"Although it is essentially true, as [the state of North Carolina argues], that a habeas corpus petition or civil rights complaint need only set forth the facts giving rise to the cause of action, . . . it hardly follows that a law library or other legal assistance is not essential to frame such documents. It would verge on incompetence for a lawyer to file an initial pleading without researching such issues as jurisdiction, venue, standing, exhaustion of remedies, proper parties plaintiff and defendant, and types of relief available. Most importantly, of course, a lawyer must know what the law is in order to determine whether a colorable claim exists, and if so, what facts are necessary to state a cause of action.

"If a lawyer must perform such preliminary research, it is no less vital for *pro se* prisoner."

Chief Justice Burger and Justices Stewart and Rehnquist filed dissenting opinions. Justice Stewart said: "In the vast majority of cases, access to a law library will, I am convinced, simply result in the filing of pleadings heavily larded with irrelevant legalisms—possessing the veneer but lacking the substance of professional competence."

Justice Rehnquist's dissent stated: "The 'fundamental constitutional right of access to the court' which the Court announces today is created virtually out of whole cloth with little or no reference to the Constitution from which it is supposed to be derived." (*Bounds* v. *Smith,* no. 75-915, decided April 27)

"Home for Sale"

Following its recent trend of extending increased First Amendment protection to so-called commercial speech, the Court decided in May to void a Willingboro Township (New Jersey) ordinance prohibiting the posting of real estate "For Sale" and "Sold" signs. The township said it wanted to stem what it perceived as the flight of white homeowners from a racially integrated community.

Justice Marshall delivered the opinion of the Court, in which all members joined except Justice Rehnquist, who took no part in the consideration of the case. Justice Marshall wrote:

"The starting point for analysis of [the First Amendment claim in this case] must be the two recent decisions in which this Court has eroded the 'commercial speech' exception to the First Amendment. In *Bigelow* v. *Virginia* (1975), decided just two years ago, this Court for the first time expressed its dissatisfaction with the then prevalent approach of resolving a class of First Amendment claims simply by categorizing the speech as 'commercial.' . . . After conducting [an analysis of the First Amendment issues] in *Bigelow* we concluded that Virginia could not constitutionally punish the publisher of a newspaper for printing an abortion referral agency's paid advertisement. . . .

"One year later, in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.* (1976), we went

further.... Although recognizing that 'some forms of commercial speech regulation'—such as regulations of false or misleading speech—'are surely permissible,' we had little difficulty in finding that Virginia's ban on the advertising of prescription drug prices by pharmacists was unconstitutional....

"If the Willingboro law is to be treated differently from those invalidated in *Bigelow* and *Virginia Pharmacy*, it cannot be because the speakers—or listeners—have a lesser First Amendment interest in the subject matter of the speech that is regulated here....

"First, serious questions exist as to whether the ordinance 'leaves open ample alternative channels for communication.'... The options to which sellers realistically are relegated—primarily newspaper advertising and listening with realtors—involve more cost and less autonomy than 'For Sale' signs; are less likely to reach pesons not deliberately seeking sales information; and may be less effective media for communicating the message that is conveyed by a 'For Sale' sign in front of the house to be sold....

"[Second,] Willingboro has proscribed particular types of signs based on their content because it fears their 'primary' effect—that they will cause those receiving the information to act upon it. That the proscription applies only to one mode of communication, therefore, does not transform this into a 'time, place, or manner' case....

"The [township] Council has sought to restrict the free flow of this [sic] data because it fears that otherwise, homeowners will make decisions inimical to what the Council views as the homeowners' self-interest and the corporate interest of the township: they will choose to leave the town. The Council's concern, then, was not with any commercial aspect of 'For Sale' signs... but with the substance of the information communicated to Willingboro citizens. If dissemination of this information can be restricted, then every locality in the country can suppress any facts that reflect poorly on the locality so long as a plausible claim can be made that disclosure would cause the recipients of the information to act 'irrationally.' *Virginia Pharmacy* denies government such sweeping powers." *(Linmark Associates, Inc.* v. *Township of Willingboro, no.* 76-357, decided May 2)

"Live Free or Die"

In a seven-to-two decision the Court declared that the state of New Hampshire cannot require individuals to display the motto "Live Free or Die" on auto license plates. The motto, which has been displayed on New Hampshire license plates for private cars since 1969, clashed with the moral and religious beliefs of Jehovah's Witnesses, two of whom challenged the motto in federal court.

In an opinion written by Chief Justice Burger—who was joined by Justices Brennan, Stewart, Marshall, Powell, and Stevens—the Court stated:

"We begin with the proposition that the right of freedom of thought protected by [the] First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.... A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts. The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'... This is illustrated by the recent case of *Miami Herald Publishing Co.* v. *Tornillo* (1974), where we held unconstitutional a Florida statute placing an affirmative duty upon newspapers to publish the replies of political candidates whom they had criticized....

"New Hampshire's statute in effect requires that appellees use their private property as a 'mobile billboard' for the State's ideological message—or suffer a penalty, as [appellee Maynard] already has. As a condition to driving an automobile—a virtual necessity for most Americans—the Maynards must display 'Live Free or Die' to hundreds of people each day. The fact that most individuals agree with the thrust of New Hampshire's motto is not the test; most Americans also find the flag salute acceptable. The first Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in the way New Hampshire commands, an idea they find morally objectionable....

"The State's... claimed interest is not ideologically neutral. The State is seeking to communicate to others an official view as to proper 'appreciation of history, state pride, [and] individualism.' Of course, the State may legitimately pursue such interests in any number of ways. However, where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message."

Justice Rehnquist, joined by Justice Blackmun, dissented:

"As found by the New Hampshire Supreme Court,... there is nothing in state law which precludes appellees from displaying their disagreement with the state motto as long as the methods used do not obscure the license plates. Thus appellees could place on their bumper a conspicuous bumper sticker explaining in no uncertain terms that they do not profess the motto 'Live Free or Die' and that they violently disagree with the connotations of that motto...."

Justice White, joined by Justices Blackmun and Rehnquist, dissented in part, citing technical grounds. (*Wooley* v. *Maynard,* no. 75-1453, decided April 20)

In other action, the Court:

- Denied the appeal of a Jacksonville, Florida woman who claimed that news reporters and photographers violated her right to privacy when they entered her home with local officials after a fatal fire and took pictures of the area where her dead daughter was found.
- Refused to hear the appeal of former Senator Eugene

McCarthy (D.-Minn.) that his rights were violated when he was excluded from the three debates between Candidate Jimmy Carter and then President Gerald R. Ford. McCarthy, then a candidate for the presidency, argued that he was entitled to equal time under the rules of the Federal Communications Commission.

• Without dissent declined to review a decision by the U.S. Court of Appeals for the Fifth Circuit upholding the refusal of a student newspaper at Mississippi State University to print an advertisement by a group called Mississippi Gay Alliance. The ad announced the existence of a gay center offering counseling, legal aid, and a library of gay literature. The appellate court rejected the contention of the Mississippi Gay Alliance on First Amendment grounds, stating that the amendment barred judicial interference with a newspaper's decision not to print.

• Let stand a lower court ruling that Merv Adelson and Irwin Molasky, promoters of the Rancho La Costa resort near San Diego, are not clearly "public figures" and consequently are able to maintain a $540 million libel suit against *Penthouse* magazine for publishing an article entitled "La Costa–The Hundred-Million-Dollar Resort With Criminal Clientele."

• Declined to review a decision of the U.S. Court of Appeals for the Fourth Circuit that certain Equal Employment Opportunity Commission reports, affirmative action reports, and compliance reports filed by Westinghouse Electric, General Motors, and U.S. Steel should not be disclosed under the Freedom of Information Act. Several workers and a legal aid society sought the reports, which were filed with the Departments of Defense and Labor.

news media

Glendale, California

A Glendale ordinance restricting the number of newsracks per block and setting priorities for their use was struck down in April by California Superior Court Judge Robert Weil. He said the law placed "unconstitutionally invalid restrictions on First Amendment rights."

Invalidation of the law, which said the newsracks were abailable first to daily newspapers of general circulation in Los Angeles County, second to other daily newspapers, and third to weeklies, was sought by an attorney for the Socialist Labor Party, publisher of the *Weekly People,* a political paper published since 1891.

One week prior to Judge Weil's decision, the California Supreme Court upheld a Los Angeles ordinance restricting both the numbers and the position of sidewalk newsracks but establishing no order for their use. Reported in: *Los Angeles Times,* April 22.

Los Angeles, California

A controversial ordinance outlawing the front-page display of sexually explicit scenes in sidewalk newsracks was approved in a four-to-one May vote by the Los Angeles County Board of Supervisors.

The ordinance, scheduled to take effect June 3, regulates newsracks in unincorporated areas of the county.

The ordinance was tentatively approved a week before its final adoption amid heated public debate. Supervisor Ed Edelman said he did not believe the regulation was needed because state obscenity laws were sufficient. Kenneth Chotiner, voluntary counsel for the American Civil Liberties Union, said the law was probably preempted by sections of the California Penal Code on obscenity. Reported in: *Los Angeles Daily Journal,* May 4.

Los Angeles, California

Refusing to annul orders of a probate court denying public access to probate files related to the estate of William Randolph Hearst, the California Court of Appeal rejected a contention that such action would constitute a prior restraint on the news media's right to gather and publish information in the public domain.

The appellate body reasoned that a court possesses limited power to restrict the press under exceptional circumstances and on a showing of good cause.

Following the publicity which surrounded the arrest and trial of Patricia Hearst, the estate's trustees asserted that use of material in the probate files would expose hitherto unnoticed persons as members of the family and reveal the locations of their homes and property. Reported in: *West's Judicial Highlights,* May 15.

Tallahassee, Florida

Ruling that a "public figure" is entitled to divorce proceedings from which the public and the press are barred, the Florida Supreme Court reasoned that the right to privacy outweighs the public's right to know in such cases.

The May decision, involving a state legal official and his wife, reversed a circuit court ruling that two years ago allowed reporters to cover the divorce trial of comedian Jackie Gleason and his wife.

"The fact that a person is well known does not necessarily make him a public figure and deprive him of his right to privacy," the Supreme Court held in its four-to-two decision. The majority added, however, that it would not tolerate star chamber proceedings or unnecessary restrictions on public attendance at trials, and they acknowledged that they placed "an awesome burden" on the trial judge to balance the rights of the individual against the public's right to know.

After the decision was announced, the trial judge in the state official's case ordered the entire court file sealed. Reported in: *Editor & Publisher,* May 14.

Tallahassee, Florida

Following "total failure" in its attempts to secure the consent of participants to allow cameras in Florida court-

rooms, the Florida Supreme Court decided in April to initiate a one-year test period beginning July 1.

According to the high court order, the electronic media may at their descretion photograph and televise civil, criminal, and appellate judicial proceedings in all courts in Florida. The order was subject only to the adoption of standards with respect to the equipment, lighting and noise levels, camera placements, and audio pickup and "to the reasonable orders and direction of the presiding judge in any such proceedings," the court said. Reported in: *Chicago Sun-Times,* April 8; *Editor & Publisher,* April 16.

Trenton, New Jersey

In April New Jersey's highest court unanimously struck down as "clearly illegal" orders by trial judges prohibiting the press from reporting proceedings in open court. The ruling overturned appellate court decisions in two cases involving unrelated murder trials in which orders were issued barring publication of arguments within the courtroom but outside the presence of the jury.

The court's nineteen-page decision, written by Justice Mark A. Sullivan, said the cases presented "a common legal issue of fundamental and far-reaching importance to the news media and to the administration of justice."

"The issues are of great public importance and are bound to recur time and again unless and until this court by its decision determines what a trial court may or may not do regarding news media coverage of a public trial," Justice Sullivan stated.

Commenting on what he called the merits of the two cases, Sullivan continued:

"In each case, the trial court entered orders which restrained the press for fixed periods of time from reporting matters which were to take place in open court. These orders were clearly illegal. Proceedings which take place in open court are matters of public record and the news media has an absolute right to report thereon." Reported in: *New York Times,* April 23.

Riverhead, New York

Despite a 1976 U.S. Supreme Court ruling ostensibly barring all gags on press coverage of open court proceedings, a New York State Supreme Court justice in May ordered a *Newsday* reporter not to publish any testimony given in the trial of a $4 million lawsuit filed against Suffolk County by the family of a man who was shot to death by county police.

In his order, which was given in chambers, Justice William L. Underwood Jr. told the reporter he could publish information about persons testifying at the trial but not about what they said until the trial ended.

When the reporter responded that he could not agree to such a request, the judge said, "You've been given an order," and then warned him that he would be held personally responsible for any violation of the order. Reported in: *Newsday,* May 6.

Knoxville, Tennessee

The Tennessee Court of Appeals has upheld the right of newspapers in Tennessee to publish the names of alleged rape victims.

The court in April affirmed a decision by the Anderson County Circuit Court in dismissing a suit by a sixteen-year-old girl who charged that the *Oak Ridger* had invaded her privacy by printing her name after she testified at a preliminary court hearing.

"We sympathize with the plaintiff for the shame and humiliation she has suffered," Judge Oris D. Hyder wrote. "But the law simply does not support her claim for damages."

Hyder stated that Tennessee courts recognize that the press is privileged to publish the reports of a judicial forum with absolute immunity so long as the reports are true and accurate. He noted that there was no contention by the girl that the *Oak Ridger's* report was inaccurate. Reported in: *Little Rock Gazette,* April 8.

Richmond, Virginia

A federal judge in Richmond issued a temporary order in May barring the Richmond prosecutor from bringing further charges against the city's two dailies for publishing stories about judges under review by a state inquiry commission.

U.S. District Court Judge D. Dortch Warriner acted on a request from lawyers for the *Richmond Times-Dispatch* and the *New Leader,* which were fined $2,000 in a state court for violating a Virginia law making it illegal to disclose the commission's proceedings (see *Newsletter,* May 1977, p. 82).

Disagreeing sharply with the six-to-one ruling of the Virginia Supreme Court that upheld the law, Warriner said "the people have a right to know how their servants are performing and judges are their servants under the law."

In a related move (see "Is It Legal?" in this issue), a Norfolk newspaper urged the U.S. Supreme Court to void the state law. Reported in: *Washington Post,* May 4.

broadcasting

Washington, D.C.

The Federal Communications Commission ruled in April that a Texaco television commercial was politically biased and that the stations which aired it must present alternative viewpoints to comply with the FCC's Fairness Doctrine.

The advertisement, which was broadcast when congressional legislation was pending to break up the major oil companies, did not explicitly mention oil company divestiture, but the FCC said it visually and orally showed that it had taken many years to build up the oil company and that it was the various segments coming together efficiently that permitted Texaco to perform economically.

Texaco's comments, the FCC said, "went to the very essence of the divestiture issue."

James F. Flug, director of Energy Action, a public interest group promoting low-cost energy and one of the petitioners to the commission, commented that the decision meant that "broadcasters will now be responsible for looking behind the surface of subtle pseudodocumentary commercials to find the real political message they contain." Reported in: *New York Times,* April 8.

Washington, D.C.

A ruling by an administrative law judge of the Federal Communications Commission ordered in April that the license of the University of Pennsylvania's student radio station be revoked for obscene broadcasts and inadequate supervision.

Filed with the FCC, Judge Walter C. Miller's decision was scheduled to take effect in fifty days. The university was entitled to appeal the issue to the FCC itself.

A spokesperson for University President Martin Myerson said that Myerson regretted the decision and that a committee of the board of trustees would decide whether to appeal.

Judge Miller stated that the students had broadcast "licentious slime and nauseating verbiage" over WSPN-FM and that they continued to do so even after university officials had received complaints.

A talk show entitled "The Vegetable Report" was the subject of an obscenity charge stemming from a 1975 broadcast in which a woman called to complain about her sex life and was given explicit on-the-air suggestions for improving it.

In addition to citing "sordid utterances of the most vile type," Judge Miller found these alleged violations: disc jockeys left the FM control board unattended; hashish, marijuana, and alcohol were used at the station; the station operated at times without a properly licensed engineer; the station's broadcasts sometimes interfered with television reception of its neighbors; and the station failed to respond properly when notified that it had violated FCC rules. Reported in: *Philadelphia Inquirer,* April 5.

libel

San Francisco, California

Former San Francisco Mayor Jeseph Alioto was awarded $350,000 in libel damages in May for an article in the now-defunct *Look* magazine that linked him with Mafia figures.

U.S. District Court Judge William W. Schwarzer, who heard the fourth trial of Alioto's claim against Cowles Communications Inc., publisher of the magazine, awarded Alioto general damages but rejected his claim for punitive damages. The former mayor had asked for $12.5 million.

Schwarzer said, "While there is abundant evidence of actual malice . . . there is not substantial evidence that the defendant had 'a state of mind arising from hatred or ill will toward the plaintiff.' "

The article which prompted the action appeared in a September 1969 issue of *Look* under the title, "The Web That Links San Francisco's Mayor Alioto and the Mafia."

Two previous trials ended with deadlocked juries and a third jury found the article false and defammatory but was unable to agree on the issue of "actual malice" necessary to obtain damages. Reported in: *Chicago Sun-Times,* May 4.

New York, New York

A May decision of the U.S. Court of Appeals for the Second Circuit reversed a libel judgment against the *New York Times* and held that in the public interest the press must be free to report controversial charges "without assuming responsibility for them."

The appellate court reversed a $61,000 libel judgment awarded in June 1976 to three scientists. The three complained that the *Times* reported statements by the National Audubon Society attacking their good faith in supporting use of the insecticide DDT.

Ruling in favor of the newspaper, Chief Judge Irving R. Kaufman wrote, "We do not believe that the press may be required under the First Amendment to suppress newsworthy statements merely because it has serious doubts regarding their truth." Nor, Kaufman continued, "must the press take up cudgels against dubious charges in order to publish them without fear of liability for defamation."

However, Judge Kaufman expressed a serious reservation: "A publisher who espouses or concurs in the charges made by others, or who deliberately distorts these statements to launch a personal attack of his own on a public figure, cannot rely on a privilege of neutral reportage. He assumes responsibility for the underlying accusations." Reported in: *Chicago Daily News,* May 26.

New York, New York

A libel judgment against Jose Castillo-Puche and Doubleday—filed by A. E. Hotchner on the grounds that characterizations of him in *Hemingway in Spain* were defamatory and invaded his privacy—was reversed in March by the U.S. Court of Appeals for the Second Circuit.

"When a public figure sues for defamation," the appellate court stated, "the First Amendment bars recovery unless the defamatory falsehoods were made with knowledge of falsity or with reckless disregard for the truth." Mere negligence, the court continued, is not actionable.

Citing tests established by the U.S. Supreme Court in *New York Times Co.* v. *Sullivan* (1964), *Gertz* v. *Robert Welsh* (1974), and other cases, the appellate court noted that "these strict tests may sometimes yield harsh results. Individuals who are defamed may be left without compensation. But excessive self-censorship by publishing houses would be a more dangerous evil. Protection and encourage-

ment of writing and publishing, however controversial, is of prime importance to the enjoyment of First Amendment freedoms. Any risk that full and vigorous exposition and expression of opinion on matters of public interest may be stifled must be given great weight. In areas of doubt and conflicting considerations, it is thought better to err on the side of free speech."

A friend-of-the-court brief in support of Doubleday was filed by the Association of American Publishers (see *Newsletter,* May 1977, p. 82).

freedom of information

Buffalo, New York

Following *in camera* inspection of personal information withheld by the Department of Justice and the Federal Bureau of Investigation under the Freedom of Information Act and the Privacy Act, U.S. District Court Judge John T. Curtin ordered the release of various documents withheld in order to protect the privacy of confidential sources. Among the "sources" that the government sought to protect from invasion of privacy were a telephone company and the names of police departments used for routine checks of files.

According to the FoIA, records can be withheld whose disclosure would constitute an unwarranted invasion of privacy, or whose disclosure would identify a confidential source used by a criminal law enforcement agency in the course of a bona fide criminal investigation.

In the case of certain documents pertaining to the plaintiff, Richard A. Meisler, Judge Curtin found that the information could be released with the deletion of the names of individual informants. In other cases, he ruled that the names of police departments could not be protected "since they have no claim to confidentiality." He also ruled that "the telephone company cannot be considered a confidential source in this case." Reported in: *Access Reports,* April 19.

New York, New York

A March order of a federal judge directed the Federal Bureau of Investigation to compile an index of various historical documents withheld by it under the Freedom of Information Act.

The case before him, U.S. District Court Judge Charles S. Haight Jr. said, "places in stark and dismaying contrast the bold pronouncements of the Freedom of Information Act . . . [and] the bureaucratic confusion and spirit of grudging acquiescence with which the legislation has been greeted by some of our federal agencies."

The plaintiff in the case, Ben Waknin, has sought to compel disclosure of documents in the National Archives concerning the careers of black intellectuals during the period 1914-1929. From his first request in 1967 until 1975, Waknin received only 250 pages of the "copious amounts of information well in excess of 10,000 copies" which the FBI said it possesed.

On appeal to the Justice Department, Waknin was told by former Deputy Attorney General Harold R. Tyler Jr. that the FBI should supply him with all historical documents more than fifteen years old except those that might be withheld under the FoIA exemption for national security.

Despite Tyler's decision, the FBI continued to withhold materials from Waknin. As a consequence, Judge Haight ordered the compilation of the index—a so-called *Vaughn* index, named after the decision of the U.S. Court of Appeals for the District of Columbia in *Vaughn* v. *Rosen* (1973), which held that FoIA plaintiffs must be given detailed accounts of the exemptions relied upon for each withheld document. Reported in: *Access Reports,* April 19.

picketing

Annapolis, Maryland

Maryland's highest bench ruled in May that picketing a private home is a constitutionally protected action that the state legislature can regulate but cannot totally prohibit.

In its unanimous decision, the seven-member Court of Appeals held that two persons convicted in 1976 on charges of illegal picketing had been within their rights when they held a peaceful three-day vigil outside the Bethesda home of then-Secretary of Defense Donald Rumsfeld.

In the opinion, written by Judge John C. Eldridge, the court declared that "while picketing and parading and the use of streets for such purpose [are] subject to reasonable time, manner, and place regulations, such activity may not be wholly denied."

Gary Simpson, the American Civil Liberties Union attorney who sought the invalidation of the law, noted that courts in the U.S. have differed on the issue. The highest court of Wisconsin and the U.S. Court of Appeals for the Tenth Circuit have upheld anti-picketing statutes almost identical to Maryland's, he explained. Reported in: *Washington Post,* May 7.

teachers' rights

San Francisco, California

Reversing a U.S. District Court judge who in turn had overruled a jury's verdict, the U.S. Court of Appeals for the Ninth Circuit has ordered the reinstatement of a Washington high school teacher who was fired for exercising his First Amendment rights. The teacher, Lawrence Wagle, was also awarded back pay and damages.

Wagle, employed by the Longview, Washington school district in 1962, was terminated in 1970 for controversial statements which included criticisms of religious elements in his school's baccalaureate services and the honor society's annual banquet.

The trial judge who overruled the jury held that the teacher had failed to exhaust his administrative remedies and that the evidence did not prove that he had been terminated for exercising First Amendment rights. The appellate court, which disagreed, cited a minimal state interest in requiring exhaustion of administrative remedies and slight default by the teacher in requesting a remedy. The appellate court also denied the school board's request for a new trial. Reported in: *DuShane Fund Reports,* March 1977.

Boston, Massachusetts

In an advisory opinion issued to Governor Michael Dukakis, the Massachusetts Supreme Judicial Court ruled in May that public school teachers cannot be compelled to lead their pupils in the Pledge of Allegiance to the Flag.

The court's advisory opinion was given on pending legislation that would have fined teachers five dollars for every two weeks they failed to lead the pledge.

Five justices found that the bill (H.B. 5627) would violate teachers' First Amendment rights. "The U.S. Supreme Court has said that teachers do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," the majority justices said.

In a dissenting opinion, two justices argued that a general requirement for teachers to "lead" their classes in the pledge would be constitutional if provisions on fines were removed and if exceptions were allowed for individuals who found the pledge morally objectionable. Reported in: *Boston Globe,* May 17.

church and state

Indianapolis, Indiana

The Indiana Commission on Textbook Adoption in May agreed to comply with a court order that it remove a controversial biology book, *Biology: A Search for Order in Complexity,* from its state-approved list of textbooks. The commission's decision followed Marion County Superior Court Judge Michael Dugan's ruling of April 14 that the book should be removed from the approved list because it promotes a fundamentalist Christian doctrine. Dugan ruled on a lawsuit filed by two parents, E. Thomas Marsh and Robert Hendren, both of whom have children in West Clark, Indiana schools (see *Newsletter,* May 1977, p. 83).

In his opinion, Dugan said: ". . . We face a textbook which, on its face, appears to present a balanced view of evolution and biblical creation. The record and the text itself do not support this assertion. . . .

"The court takes no position as the the validity of either evolution or biblical creationism. That is not the issue. The question is whether a text obviously designed to present only the view of biblical creationism in a favorable light is constitutionally acceptable in the public schools of Indiana. Two hundred years of constitutional government demand that the answer be no.

"The asserted object of the text to present a balanced or neutral argument is a sham that breaches that 'wall of separation' between church and state voiced by Thomas Jefferson."

Dugan explained that any doubts of the book's fairness were dispelled by the teacher's guide, which calls for students to respond with "correct" Christian answers. "The prospect of biology teachers and students alike, forced to answer and respond to continued demand for 'correct' fundamentalist Christian doctrines has no place in the public schools. . . ."

The Indiana Commission on Textbook Adoption's decision to comply with the court order followed tentative discussions of an appeal. In a statement released after its May meeting, the commission said that while it did not agree with the court's decision, it would accept it and would not file an appeal. Reported in: *Louisville Courier Journal,* April 15, May 7.

commercial speech

Augusta, Maine

The Maine Attorney General issued an opinion in April arguing that a state law prohibiting advertisements by dentists is unconstitutional because it restricts freedom of speech. Joseph E. Brennan, the state official, said the ban was similar to ones already overturned by the U.S. Supreme Court.

"Our opinion says there is no problem as far as regulating false, misleading or deceptive advertising," Brennan added. "At the same time it should be clear that it doesn't require anybody to advertise. If they want to, they can, and if they don't, they don't have to."

Dentist Stephen G. Knowlton, whose advertisements of his services in a Portland newspaper led to the request for the opinion, said Brennan's ruling "is fantastic," adding, "We are all relieved." Reported in: *New York Times,* April 3.

obscenity law

Belleville, Illinois

Despite repeated arrests of employees and confiscations of materials at his Belleville bookstore, news dealer Larry Kimmel was unable to convince a court that his business was unconstitutionally harassed by police.

St. Clair County Associate Court Judge Kenneth Juen in April denied Kimmel an injunction prohibiting the city from enforcing its obscenity ordinance against him. Juen said that in a conflict between a person's right to engage in free enterprise and the duty of a police officer, "the duty of the police officer is paramount."

(Continued on page 112)

is it legal?

in the U.S. Supreme Court

A Norfolk newspaper has urged the nation's highest court to free Virginia newspapers to publish the names of state judges who are under investigation for judicial misconduct.

The *Virginian Pilot* in April asked the Court to overturn its conviction and $500 fine for violating a Virginia law designed to keep secret the identity of judges under investigation by the Virginia Judicial Inquiry Commission. The law was upheld by the Virginia Supreme Court on March 4.

Free speech for corporations?

In April the Supreme Court agreed to weigh the extent to which corporations are protected by the First Amendment's guarantee of free speech. It will review a state court decision which upheld a Massachusetts campaign law prohibiting businesses from spending money to promote their views on state ballot questions that concern taxation of individual persons.

Access to prisons

In May the Supreme Court agreed to examine a federal appellate court ruling upholding a district court order that the news media be given greater access to jail facilities and prisoners that that allowed the general public. The appellate court reasoned that the needs of the news media differed from those of the general public: "Media access, on reasonable notice, may be desirable in the wake of newsworthy event, [whereas] the interest of the public in observing jail conditions may be satisfied by formal, scheduled tours."

news media

Harrisburg, Pennsylvania

Seven news organizations have asked the Pennsylvania Supreme Court to overrule a Delaware County judge's order barring the press and the public from pretrial hearings in the murder retrial of W. A. (Tony) Boyle.

The suit, filed in May, asked the high court to postpone further hearings in Boyle's case until it had ruled on the challenge, which contends that the order of the trial court judge, Domenic D. Jerome, violates both federal and state constitutional guarantees of freedom of the press.

Participants in the suit are the *Philadelphia Inquirer,* the *Philadelphia Daily News,* the *Deleware County Daily Times,* the Associated Press, the Pennsylvania Society of Newspaper Editors, the Pennsylvania Newspaper Publishers Association, and the Philadelphia Chapter of the Society of professional Journalists, Sigma Delta Chi.

Boyle, former president of the United Mine Workers Union, was convicted in 1975 of three counts of first-degree murder in the 1969 slaying of his union rival, Joseph Yablonski, and his wife and daughter at their home in Washington County. The trial was moved to Deleware County.

Judge Jerome's recent order stated: "In accordance with Rule 323 of Criminal Procedure, both parties have agreed that the hearing be held in the presence of only the defendant, counsel for the parties, court officers, and necessary witnesses." Reported in: *Philadelphia Inquirer,* May 4.

copyright

New York, New York

A three-judge panel for the U.S. Court of Appeals for the Second Circuit in May took under advisement the appeal of a weekly newspaper, the *Wall Street Transcript,* to determine whether copyright law prevents a newspaper from extracting news from copyrighted sources.

The case involves a brokerage firm, Wainwright Securities Inc., which issues copyrighted reports to 900 customers, including major banks, insurance companies, mutual funds, and investment counselors.

The *Transcript* claims that the Wainwright reports contain important news to the investing public. Wainwright, on the other had, maintains that copyrighted materials based upon its research may be properly restricted to subscribing customers. Reported in: *Editor & Publisher,* April 2, May 7.

students' rights

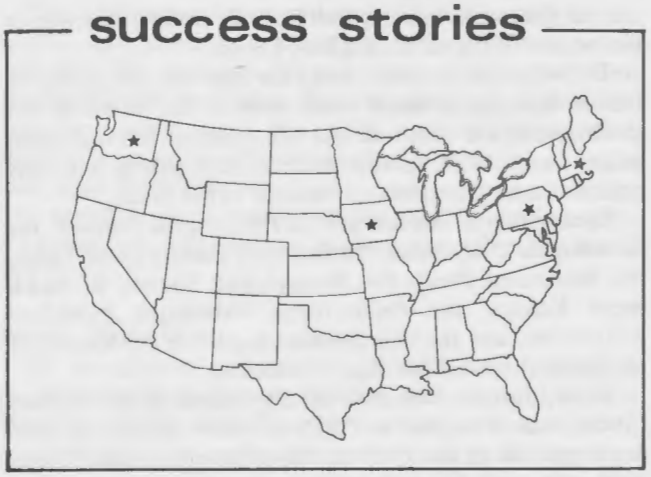
Fairfax County, Virginia

A U.S. court decision barring censorship of a student newspaper at Fairfax County's Hayfield High School (see *Newsletter,* May 1977, p. 79) will be appealed by the county school board, it was announced in March.

A decision to support the school board in the appellate court was also made by the National Association of

(Contineud on page 114)

success stories



Elkader, Iowa

In April parents of several children attending classes in the middle grades of the Central Clayton Community School District asked the school board to remove textbooks which they say "undermine American and Christian principles." Later in the month the board voted to retain the Ginn and Company *360 Reading Series* and the Houghton-Mifflin *Action Series,* as well as *A Piece of the Action* published by New Dimensions.

Parents complained that the books contain profanity and frequently portray "stealing, murder, and violence with no conclusion shown as to what is right or wrong." The materials include the works of Malcolm X, Richard Wright, Woody Guthrie, John Lennon, James Thurber, Ogden Nash, William Saroyan, and Carl Sandburg. Mrs. Robert Sage said the works encouraged children "to question civil law and the authority over them. There also are instances in which our very basic Christian teachings are questioned."

Publisher James R. Squire, Ginn and Company, defended the works, saying, "It is not enough for children to be told about values. They have to think about them and talk about them." Reported in: *Des Moines Register,* April 28.

Orange, Massachusetts

Students at Mahar Regional High School, backed by their teachers, convinced the regional school board early this year of their right to display two murals in the school lobby. Display of the murals had been banned following a complaint to the school administration from Clifford Fournier, school board chairperson.

The murals were intended to depict twentieth century man and nature. One mural, entitled "Of Man," contained depictions of gin and beer labels which Fournier said would cause poor public relations if displayed at the school. Student Janet Swim said that gin and beer are part of the twentieth century and added that she did not think the labels were going to shock anyone. Reported in: *Athol Daily News,* March 2.

Newton, Pennsylvania

The Bucks County Community College board of trustees withdrew its ban on *X*-rated films on campus in the wake of a controversy over their decision (see *Newsletter,* May 1977, p. 74). In turn, student leaders agreed to cancel a showing of *Emmanuelle.*

James E. Morrell, chairperson of the trustees' student-community relations subcommittee, suggested that a student task force be organized to advise the trustees in the formulation of a film policy.

The county commissioners also made headlines in March when they instructed the college trustees not to allow any *X*-rated films on campus, but Morrell said the commissioners would not be consulted on the new film policy. "The commissioners don't speak for the trustees," Morrell said. "We're big boys and girls and we speak for ourselves. They appointed us and we can vote for the issues as we see them." Reported in: *Bucks County Courier,* March 18.

Issaquah, Washington

The Issaquah school board voted in April to retain an anthology, *Responding 3,* as a textbook in the Issaquah High School. Reconsideration of the book began as a result of a complaint filed by Mrs. Paul Hawkins, who objected to a short story her son's ninth-grade English class studied. The story, "The A & P," by John Updike, was cited as being too sexually explicit and insulting to both women and authority.

The board's decision followed a three-hour meeting in which citizens aired their concerns. Judy Suit, another parent, said, "Children come by the lower qualities naturally; they have to be taught the higher ones. Who will teach them if the schools won't?"

Responding to citizens' complaints, Margaret Davis, of the high school English staff, said, "The language is far more subdued than what students hear on TV programs or in movies for a general audience, or what appears in family magazines sold in Issaquah."

But Jim Brooks, the father of six daughters in the school system, replied, "Children are not hothouse plants." He went on to compare their nurture to that of tomatoes he planted in good soil "on the sunny side of the garage. I want clean water for my tomatoes, clean books for my children."

Members of the school board pointed out that no child is required to read "The A & P" or any other material to which his or her parents object. Just before the vote was taken, Board President Robert Parker reported on six reviews of the story. "The worst thing anybody said was that it was brilliant," he said. He went on, "We have to consider the right of others to read it and keep options open for those who object." Reported in: *Seattle Times,* April 7.

AAParagraphs

censorship 'ins' and 'outs'

"The proper place for government is outside the bookstore or theater—not inside." So declared Alan Dershowitz, the distinguished Harvard Law School professor, scholar, and much sought-after legal advocate, assessing the current U.S. climate for intellectual freedom. Dershowitz handled the domestic side of a dual appraisal of human and intellectual rights at home and abroad, during the Seventh Annual Meeting of the Association of American Publishers (AAP) at Bermuda.

"There is more freedom of expression in most of the United States than in any country in the history of the world," was the way Dershowitz opened an address at once hard-hitting and witty. "But that is not to say there is enough—there isn't: we simply must maintain a sense of perspective about what we have achieved and what we aspire to achieve."

There are today restrictions and threats of restriction on complete freedom of expression—some necessary, some undesirable. As to sexually explicit materials, he said, the way the laws of pornography are enforced reminds him of one man's observation about the Prohibition Laws of the 1920s: "It's not as bad as if there were no liquor at all."

Boiled down, the state of current law on sexually frank materials, Dershowitz suggested, is this: "All people connected with the production, distribution, advertising, and even reviewing of books, films, and magazines which depict or describe the sexual act in actual or simulated form in a manner patently offensive to the standards of a community may be prosecuted there as long as the book, film or magazine passed through there." While this standard is subject to the Supreme Court's *Miller* test of "serious literary, artistic, political or scientific value," it is subject also to highly selective application: Dershowitz cited his own article written for *Penthouse* and appearing in an issue that also contained several photographs he considered "a bit extreme":

"That issue was indicted in several areas. I could have been indicted. But I will not be prosecuted. And neither will President Carter be prosecuted for his interview in a magazine that may be found obscene in certain communities. We will not be prosecuted not because of what we did but because of who we are."

Although it seems probable that the Carter-Bell Justice Department will not rank obscenity prosecutions as high as did the department under President Nixon, the situation simply cannot be allowed to continue "unabated," Dershowitz declared, because "publishers and film producers now operate at their own risk."

Thus Dershowitz arrived at his plea for sharp distinction between "externalities" and "internalities"—between theater marquees and bookstore displays and book and magazine covers, on the one hand, and content of books, films, and magazines on the other. More must be done, Dershowitz suggested, to control access to adult materials by children and to protect the rights of the majority of adults who have no wish to view sexually oriented materials. "But there must be virtually no censorship on internalities—that is content," he emphasized.

A few personal sidelights emerged during Dershowitz' talk: he declined to sign the widely published newspaper ad comparing *Hustler* Publisher Larry Flynt to dissident authors in Iron Curtain countries, he reported. "For the first time in my life, I refused to sign a freedom of expression ad," he said. "I found the magazine tasteless, sexist, brutalizing—but I thought it differed only in degree from others.

"But it soon became clear to me that this difference in degree was sufficient to become a matter of a difference in kind."

And, Dershowitz declared, he steadfastly refuses to view any allegedly obscene film he agrees to defend in court. "In the typical trial," he explained, "the prosecutor forces the jury to see a film it would otherwise never have seen. I can truthfully tell the jury that I have not seen the film and that it is the prosecutor who is forcing them to do so."

The international aspects of the discussion, which bore the over-all title of "Monitoring the Helsinki Accords," was handled by Alfred Friendly Jr., deputy staff director of the congressional Commission on Security and Cooperation in Europe.

Friendly, a former newsman once stationed in Moscow, called upon publishers to prod the USSR "privately and politely at first, publicly and insistently if necessary" on changes they seek, such as a U.S. bookstore in Moscow or greater concern for the individual human rights of intellectuals and dissidents.

But he cautioned against overly close publisher-government ties: "I have real unease at the prospect of too close a relationship between private publishers and the U.S. government," he said.

"The government could become a censor—and I would rather see government as the intermediary of last resort."

This column is contributed by the Freedom to Read Committee of the Association of American Publishers.

(Censorship dateline . . . from page 101)

they've been led to believe is there and you have to be ten times as firm as normal to keep their minds on the things that really are there to learn." Reported in: *Roseburg News-Review,* March 21.

Bristol, Rhode Island

An article on contraception reprinted from the *Farm News,* a controversial Fairfax County, Virginia high school newspaper (see *Newsletter,* May 1977, p. 79), resulted in May in the confiscation of the entire press run of the Bristol High School newspaper, *Pegasus.*

The Bristol school administration decided to confiscate the paper because the article was "unauthorized." The student editor, John-Paul Sousa, admitted slipping the article into the paper without the knowledge of either his advisors or members of his own staff.

Although Sousa allowed that his decision to insert the article without anyone's knowledge may have been unethical, he argued that publication of the article was justified "because students should have the information." Reported in: *Providence Journal-Bulletin,* May 8.

Rutland, Vermont

Thomas Chesley, superintendent of the Rutland Public Schools, ruled in March that Rutland High School Principal William Timbers was carrying out a "proper discharge of his duties" when he banned a production of the dramatic version of Ken Kesey's *One Flew Over the Cuckoo's Nest* by seniors. Presenting six reasons for the cancellation of the play, Timbers suggested the substitution of Edgar Lee Masters' *Spoon River Anthology.*

One Flew Over the Cuckoo's Nest was one of three plays submitted to the administration by Robert Smatresk, faculty director of the production. Although initially approved by the administration, Timbers later received "questions from the community," prompting an administrative conference at which *Cuckoo's Nest* was deemed inappropriate for a high school production.

The reasons for banning the play included: the inappropriateness of the bureaucracy of mental institutions for entertainment; the play's one-sided depiction of mental health services and its tendency to disparage the efforts and procedures of mental health agencies; the tasteless dialogue; and the inability of students to portray mentally ill people. Reported in: *Rutland Herald,* March 31.

museums

Richmond, Virginia

Two Richmond artists, one a painter and the other a photographer, charged in April that the Virginia Museum's policies on exhibitions encouraged censorship. A museum spokesperson called the charge "ridiculous" and responded that the museum's policies reflect the traditional right of a museum to exercise judgment on appropriateness of materials for display.

The painter, Gerald Donato, withdrew his scheduled one-man show of ten paintings in an act of protest against what he said was the museum's effort to pressure the photographer, Mike Gochenour, to withdraw a photograph of childbirth from a display of his photos.

Commenting on Donato's decision to withdraw his paintings, William H. Higgins Jr., president of the museum's board of trustees, said: "We haven't seen his paintings. He just decided he wasn't going to send them at all. It's ridiculous to say we are censoring Donato when we haven't seen his pictures." Referring to the withdrawal of Gochenour's photograph from one of a series of eight on childbirth, Higgins said, "We don't think the museum's gallery should have pictures that are offensive or in poor taste."

Another local photographer, Dale Quarterman, said the museum's insistence upon the withdrawal of the photograph seemed to reflect not an "artistic judgment [but] a moral judgment." Reported in: *Richmond News Leader,* April 5.

bookstores

Saginaw, Michigan

Copies of *The Anarchist Cookbook* disappeared early this year from the shelves of the local Waldenbooks outlet after the store's manager received complaints from police and customers. Reportedly, the store continued to sell copies of the book upon request.

Police officials told members of the local branch of the American Civil Liberties Union that a detective had been assigned to examine the book after calls were received from citizens. In addition, police officials stated that the book had been discussed in seminars for police officers conducted by the Federal Bureau of Investigation, and that store owners in nearby Bay City had voluntarily removed the work from their shelves upon police request.

(From the bench . . . from page 108)

Kimmel's suit cited nine of ten obscenity charges of which he and a clerk were convicted in 1976, all under appeal, and ten additional charges on which there had been no trial. Reported in: *East St. Louis Metro-East Journal,* April 26, 28; *Belleville News-Democrat,* April 26, 28.

Boston, Massachusetts

In a decision that was expected to halt hundreds of obscenity prosecutions in Massachusetts, the Massachusetts Supreme Judicial Court dismissed charges against a Boston bookstore for possessing obscene magazines. The high court held that the publications were in fact books, which under the state's 1974 law require a prior civil determination of obscenity.

In finding that the publications of the Boston store were "books and not magazines, as a matter of law," the unanimous court ruled that if a defendant offers proof at a trial that the offending publications are books, prosecutors

must be able to prove either that the publications are not books or that the required preliminary hearing was held.

Suffolk County Assistant District Attorney Timothy P. O'Neill, who handles most Boston-area prosecutions in obscenity cases, said the ruling had "the effect of decriminalizing all printed obscenity materials." Reported in: *Boston Globe,* April 14.

Minneapolis, Minnesota

A contempt of court charge against a presumed Minneapolis theater owner for failure to produce an allegedly obscene film in court was dismissed in April by Hennepin Municipal Court Judge Delila Pierce. She ruled that the order to produce the film was unconstitutional because it violated the Fifth Amendment's guarantee against self-incrimination.

The decision was handed down in the case of two brothers, Edward and Ferris Alexander, who were charged with violating obscenity laws by showing the film *Oriental Blue* in 1976.

According to Judge Pierce, an order by Judge Robert Schumacher to produce the film was not issued to find out whether it was the basis for a justified issuance of a criminal complaint because the complaint had already been issued. Reported in: *Minneapolis Star,* April 12; *Variety,* May 4.

Manchester, New Hampshire

Hillsborough County Superior Court Judge William Keller ruled in May that New Hampshire may prosecute *Penthouse* magazine and its national distributor on obscenity charges even though the companies do not directly conduct business in the state. He rejected arguments that New Hampshire had no jurisdiction because the case involved out-of-state corporations.

In all, four companies have been charged with criminal liability in the sale of the July 1976 issue of *Penthouse.* Reported in: *New York Times,* May 25.

obscenity: convictions, acquittals, etc.

Fort Myers, Florida

The sixty-eight-year-old owner of a Fort Myers newsstand faced a possible jail term of two years for selling two magazines that a Lee County jury decided were obscene. Stephen Zaremba, the news dealer, was convicted for selling *Club* and *Genesis* to a Lee County sheriff's deputy. State Attorney Joseph D'Alessandro said Zaremba was the first person to be found guilty of obscenity charges in Lee County. Reported in: *Fort Myers News-Press,* March 17.

Wichita, Kansas

Former Kansas Attorney General Vern Miller, now Sedgwick County Attorney, has vowed to clean up Wichita, threatening to to close all adult theaters and remove at least one magazine, *Hustler,* from all store shelves. He failed, however, in efforts to clean up Wichita State University.

In May WSU student Neil Cook, director of the WSU Erotic Arts Society, was found not guilty of promoting obscenity in connection with a February showing of *The Devil in Miss Jones.*

Cook at first said the verdict surprised and elated him, but later he admitted that he was a bit disappointed in that the acquittal eliminated any possibility of an appeal to higher courts.

"I know it's somewhat of a contradiction to say I'm a little bit sorry that I wasn't convicted," Cook said. "But our whole case was built on the idea that we would be convicted and in the trial we were laying the groundwork for an appeal to a higher court."

District Attorney Miller said there will be no further litigation in the case, but he added that civil action was still pending against the film itself. "Any further showings of the film could result in additional action," Miller said. Reported in: *Topeka State Journal,* February 21; *WSU Sunflower,* May 4.

Wheaton, Maryland

Twenty-one pornographic books, magazines, and films confiscated from a Wheaton bookstore were ruled obscene in April by Montgomery County Circuit Court Judge Richard B. Latham, although he expressed a personal view that anyone over eighteen should be allowed to purchase the items.

The Wheaton bookstore is "obviously being run in a fairly responsible way, with the materials being kept out of the hands of those under eighteen," Latham said. "I personally think anyone over eighteen should be permitted to buy this type of material.

"However, what I think and what the law says are sometimes two different things," he continued.

Latham issued a permanent injunction against the sale of the items, but denied Assistant States Attorney Laurence D. Beck's request for continuing authority to seize "like and related" materials. Reported in: *Washington Star,* April 28.

Grand Forks, North Dakota

Three nationally circulated magazines and the film *Deep Throat* were found obscene in May in Grand Forks County courts.

In a unanimous decision, a three-judge county court panel declared issues of *Swank, Pub,* and *Club* obscene under the standards of the average adult in North Dakota.

Grand Forks County States Attorney Thomas Jelliff initiated action against five magazines in July 1976, including the three found obscene. An issue of *Gallery* was found not obscene by a two-to-one vote, and the publishers of *Climax* magazine agreed to halt distribution in North Dakota if action against an issue of *Climax* was dropped.

In a separate case, County Court Judge Kirk Smith, who

dissented in the *Gallery* ruling, declared the film *Deep Throat* obscene.

The film, which was confiscated on April 13 at the University of North Dakota, had been shown as part of symposium on obscenity and the First Amendment. Judge Smith disregarded the context in which the film was shown, despite objections from Attorney Cynthia Phillips, who represented the student activities committee which presented the film. Reported in: *Grand Forks Herald,* May 19.

Knoxville, Tennessee

A criminal court judge in Knoxville invited several local citizens to view *Misty Beethoven* and then pronounced the film obscene after listening to their reactions.

Misty Beethoven was shown at a Knoxville theater for several weeks last winter before a restraining order was issued and the film was seized. Judge Ford viewed the film and then asked for the viewing by the witnesses, whom he described as "average citizens who represent community feelings."

"I hope we don't reach the point where films of this type become the accepted community standard," Ford said. Reported in: *New York Times,* May 25.

Memphis, Tennessee

Eight men and three corporations convicted in 1976 of conspiring to distribute *Deep Throat* were sentenced in April to prison terms ranging from three months to a year and fined $3,500 to $10,000. U.S. District Court Judge Harry W. Wellford refused defense pleas for probationary sentences.

Former Assistant U.S. District Attorney Larry Parrish, unexpectedly made a special prosecutor by the new Democratic U.S. District Attorney, Mike Cody, argued vigorously for prison sentences. He told Judge Wellford, "If these people walk out of this courtroom without prison sentences, this is a victory for the defendants. This is an offense which was committed in total disregard of the law. Money is no regard."

Defense attorneys announced that they would appeal the convictions. The defendants were allowed to remain free on bond.

All obscenity charges were earlier dropped against Harry Reems, male lead in the film. Reported in: *Memphis Commercial Appeal,* April 30; *New York Times,* May 1; *Variety,* May 4.

Nashville, Tennessee

A Nashville Crinimal Court jury found bookstore operator Kenneth Caharles Kaufman guilty in April of selling obscene material and sentenced him to three months in jail and fined him $5,000. The jury of eight women and four men deliberated for three hours before delivering their verdict.

Assistant District Attorney Rick McCully, one of two prosecutors in the case, said his office "intends to pursue" other pornography prosecutions in the wake of the conviction.

Kaufman's attorney, Larry Woods, announced that he would ask for a new trial on the basis of what he described as "several" errors permitted by Judge John L. Draper. "I think it's a shame, in a metropolitan community such as ours, when the prosecution can verbally assault a person who steps forward to testify about her understanding of community standards, get away with it, congratulate themselves on it, snicker about it outside the courtroom, and then win the case," Woods said.

Woods referred to Assistant District Attorney John Rodgers' grilling of a defense witness about her personal sex life after she testified that she did not consider the magazine Kaufman sold to a police officer to be obscene. The witness, an elementary school librarian, was asked about her personal sexual experiences, including whether she had ever participated in oral sex. Reported in: *Nashville Tennessean,* April 5, 7.

Houston, Texas

The first jury to rule on an obscenity case in a renewed crackdown on obscenity in Houston fined an adult bookstore clerk $100 and gave him six months' probation for selling an obscene film.

After less than an hour of deliberation, the jury in County Criminal Court Judge Bill Ragan's court convicted Frederick W. Pearman on one count of commercial obscenity. Assistant District Attorney Russ Hardin said the quick verdict indicated "that our judgment on the pornography question has been correct so far." Reported in: *Houston Chronicle,* March 26.

(Is it legal . . . from page 109)

Secondary School Principals. "What the courts appear to have forgotten is that no citizen has carte blanche license or authority to write and publish anything," said Owen Kiernan, executive director of the principals' association. "Schools must have review procedures just as the public press does."

The article on contraception in the *Farm News*–the Hayfield paper–may have been "innocuous," said the association's legal counsel, Ivan Gluckman, but the federal court's decision means that "students have broader latitude to communicate their views than do the teachers or administrators of the school" and the "adult employees of the commercial press." Reported in: *Education U.S.A.,* March 21.

prisoners' rights

Washington, D.C.

A homosexual federal prisoner and four publishers of

gay materials filed suit in U.S. District Court in May asking that the U.S. Bureau of Prisons be directed to drop its policy prohibiting gay publications.

Exhibits filed with the court included an exchange of letters between Rep. Edward I. Koch (D.-N.Y.) and Norman A. Carlson, director of the Bureau of Prisons. Koch said two banned publications with which he was familiar were *It's Time* and *The Advocate.*

Rep. Koch stated that both publications "surely must be judged as legitimate" and contended that any decision "regarding the receipt by prisoners of literature relating to homesexuality [should] be based on reasonable criteria." Reported in: *Washington Post,* May 14.

obscenity

Chicago, Illinois

A federal judge issued a temporary restraining order in May that permitted more than twenty adult bookstores in Chicago to reopen after they were locked by the city.

The shops were closed by city inspectors and police officers on charges of violating building, zoning, and fire codes, but U.S. District Court Judge Frank J. McGarr ruled that the stores, some of which were alleged to sell child pornography, could not be closed on that basis.

"The law tells us that no matter how praiseworthy their motives, the city cannot fight obscenity by any actions under the building code," Judge McGarr stated. "If obscenity was the concern of the city in this case, those laws [on obscenity] are still available."

The bookstores were represented by attorney Adam Bourgeois, who said that "if this kind of authority is given to the building commissioner, this creates the possibility of a city dictatorship." City Attorney Frank J. Dolan contended that the shops were closed by a task force of inspectors properly applying Chicago's municipal code. Reported in: *Chicago Tribune,* May 26.

Washington State

A tough Washington ballot initiative supported by Decency in Environment–Entertainment Today would declare "lewd matter" contraband and subject it to immediate confiscation.

The measure defines "lewd matter" in accordance with the U.S. Supreme Court's definition of "obscenity," and declares that any monies paid for "lewd matter," or any fixtures or contents of a place displaying "lewd matter," constitute a moral nuisance.

The Seattle-based Committee for Decency in Environment-Entertainment Today hopes to get enough voters' signatures on its petitions to place the measure on the November 8 state ballot,

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(High court . . . from page 93)

the start of his trial petitioner proposed and submitted six questions for *voir dire.*

The court accepted in substance and utilized the first question; this was designed to reveal whether any juror was connected with an organization devoted to regulating or banning obscene materials. The court declined to ask the other five. One of the questions made inquiry as to whether the jurors had any knowledge of contemporary community standards in the Southern District of Iowa with regard to the depiction of sex and nudity. Two sought to isolate the source of the jurors' knowledge and their understanding of those standards. The remaining two would have explored the jurors' knowledge of Iowa law on the subject.

At the trial the Government introduced into evidence the actual materials covered by the indictment. It offered nothing else on the issue of obscenity *vel non.* Petitioner did not testify. Instead, in defense, he introduced numerous sexually explicit materials that were available for purchase at "adult" bookstores in Des Moines and Davenport, Iowa, several advertisements from the Des Moines Register and Tribune, and a copy of what was then c. 725 of the Iowa Code, prohibiting the dissemination of "obscene material" only to minors. At the close of the Government's case, and again at the close of all the evidence, petitioner moved for a directed verdict of acquittal on the grounds, *inter alia,* that the Iowa obscenity statute, proscribing only the dissemination of obscene materials to minors, set forth the applicable community standard, and that the prosecution had not proved that the materials at issue offended that standard.

The District Court denied those motions and submitted the case to the jury. The court instructed the jury that contemporary community standards were set by what is in fact accepted in the community as a whole. In making that determination the jurors were entitled to draw on their own knowledge of the views of the average person in the community as well as the evidence presented as to the state law on obscenity and as to materials available for purchase.

The jury found petitioner guilty on all seven counts. He was sentenced to concurrent three-year terms of imprisonment, all but three months of which were suspended, and three years' probation.

In his motion for a new trial, petitioner again asserted that Iowa law defined the community standard in a Sec. 1461 prosecution. In denying this motion, the District Court held that Sec. 1461 was "a federal law which neither incorporates nor depends upon the laws of the states"; the federal policy was simply different in this area. Furthermore, the court observed, Iowa's decision not to regulate distribution of obscene material did not mean that the people of Iowa necessarily "approved of the permitted conduct"; whether they did was a question of fact for the jury. The court rejected petitioner's argument that it was error

not to ask the jurors the question about the extent of their knowledge of contemporary community standards. It held that the jurors were entitled to draw on their own knowledge; *voir dire* on community standards would be no more appropriate than *voir dire* on the jurors' concept of "reasonableness." The court refused to hold that the Government was required to introduce evidence on a community standard in order to sustain its burden of proof. The materials introduced "can and do speak for themselves." The court did not address petitioner's vagueness point.

The United States Court of Appeals for the Eighth Circuit, by *per curiam* opinion, agreed with the District Court that the questions submitted by petitioner on community standards, except for the first, were impermissible, since they concerned the ultimate question of guilt or innocence rather than juror qualification. The court noted, however, that it was not holding that no questions whatsoever could be asked in that area. With respect to the effect of state law, the court held that the issue of offense to contemporary community standards was a federal question, and was to be determined by the jury in a federal prosecution. The court noted the admission of Iowa's obscenity statute into evidence but stated that this was designed to give the jury knowledge of the State's policy on obscenity when it determined the contemporary community standard. The state policy was not controlling, since the determination was for the jury. The conviction, therefore, was affirmed.

We granted certiorari in order to review the relationship between state legislation regulating or refusing to regulate the distribution of obscene material, and the determination of contemporary community standards in a federal prosecution.

IV

The "basic guidelines" for the trier of fact in a state obscenity prosecution were set out in *Miller* v. *California* in the form of a three-part test:

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

. . . .

The phrasing of the *Miller* test makes clear that contemporary community standards take on meaning only when they are considered with reference to the underlying questions of fact that must be resolved in an obscenity case. The test itself shows that appeal to the prurient interest is one such question of fact for the jury to resolve. The *Miller* opinion indicates that patent offensiveness is to be treated in the same way. 413 U.S., at 26, 30. See *Hamling* v. *United States,* 418 U.S., at 104-105. The fact that the jury must measure patent offensiveness against contemporary community standards does not mean, however, that juror discretion in this area is to go unchecked. Both in *Hamling* and in *Jenkins* v. *Georgia,* 418 U.S. 153 (1974), the Court noted that part (b) of the *Miller* test contained a substantive component as well. The kinds of conduct that a jury would be permitted to label as "patently offensive" in a Sec. 1461 prosecution are the "hard core" types of conduct suggested by the examples given in *Miller.* See *Hamling* v. *United States,* 418 U.S., at 114; cf. *Jenkins* v. *Georgia,* 418 U.S., at 160-161. Literary, artistic, political, or scientific value, on the other hand, is not discussed in *Miller* in terms of contemporary community standards.

The issue we must resolve is whether the jury's discretion to determine what appeals to the prurient interest and what is patently offensive is circumscribed in any way by a state statute such as c. 725 of the Iowa Code. Put another way, we must decide whether the jury is entitled to rely on its own knowledge of community standards, or whether a state legislature (or a smaller legislative body) may declare what the community standards shall be, and, if such a declaration has been made, whether it is binding in a federal prosecution under Sec. 1461.

Obviously, a state legislature would not be able to define contemporary community standards in a vacuum. Rather, community standards simply provide the measure against which the jury decides the questions of appeal to prurient interest and patent offensiveness. In *Hamling* v. *United States,* the Court recognized the close analogy between the function of "contemporary community standards" in obscenity cases and "reasonableness" in other cases:

> "A juror is entitled to draw on hiw own knowledge of the views of the average person in the community or vicinage from which he comes for making the required determination, just as he is entitled to draw on his knowledge of the propensities of a 'reasonable' person in other areas of the law."

It would be just as inappropriate for a legislature to attempt to freeze a jury to one definition of reasonableness as it would be for a legislature to try to define the contemporary community standard of appeal to prurient interest or patent offensiveness, if it were even possible for such a definition to be formulated.

This is not to say that state legislatures are completely foreclosed from enacting laws setting substantive limitations for obscenity cases. On the contrary, we have indicated on several occasions that legislation of this kind is permissible. See *Hamling* v. *United States,* 418 U.S., at 1144; *Miller* v. *California,* 413 U.S., at 25. State legislation must still define the kinds of conduct that will be regulated by the State. For example, the Iowa law in effect at the time this prosecution was instituted was to the effect that no conduct aimed at adults was regulated. At the other extreme, a State might seek to regulate all the hard core

pornography that it constitutionally could. The new Iowa law, which will regulate only material "depicting a sex act involving sado-masochistic abuse, excretory functions, a child, or bestiality," provides an example of an intermediate approach.

If a State wished to adopt a slightly different approach to obscenity regulation, it might impose a geographic limit on the determination of community standards by defining the area from which the jury could be selected in an obscenity case, or by legislating with respect to the instructions that must be given to the jurors in such cases. In addition, the State might add a geographic dimension to its regulation of obscenity through the device of zoning laws. Cf. *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976). It is evident that ample room is left for state legislation even though the question of the community standard to apply, when appeal to prurient interest and patent offensiveness are considered, is not one that can be defined legislatively.

An even stronger reason for holding that a state law regulating distribution of obscene material cannot define contemporary community standards in the case before us is the simple fact that this is a *federal* prosecution under Sec. 1461. The Court already has held, in *Hamling*, that the substantive conduct encompassed by Sec. 1461 is confined to "the sort of 'patently offensive representations or descriptions of that specific "hard cord" sexual conduct given as examples in *Miller* v. *California*.' " 418 U.S., at 114. The community standards aspects of Sec. 1461 likewise present issues of federal law, upon which a state statute such as Iowa's cannot have conclusive effect. The kinds of instruction that should be given to the jury are likewise a federal question. For example, the Court has held that Sec. 1461 embodies a requirement that local rather than national standards should be applied. *Hamling* v. *United States, supra.* Similarly, obscenity is to be judged according to the average person in the community, rather than the most prudish or the most tolerant. Both of these substantive limitations are passed on to the jury in the form of instructions.

The fact that the mailings in this case were wholly intrastate is immaterial for a prosecution under Sec. 1461. That statute was enacted under Congress' postal power, granted in Art. I of the Constitution, and the postal power clause does not distinguish between interstate and intrastate matters. This Court consistently has upheld Congress' exercise of that power to exclude from the mails materials that are judged to be obscene.

Our decision that contemporary community standards must be applied by juries in accordance with their own understanding of the tolerance of the average person in their community does not mean, as has been suggested, that obscenity convictions will be virtually unreviewable. We have stressed before that juries must be instructed properly, so that they consider the entire community and not simply their own subjective reactions, or the reactions of a sensitive or of a callous miniority. See *Miller* v. *California*, 413 U.S., at 30. The type of conduct depicted must fall within the substantive limitations suggested in *Miller* and adopted in *Hamling* with respect to Sec. 1461, Cf. *Jenkins* v. *Georgia, supra.* The work also must lack serious literary, artistic, political, or scientific value before a conviction will be upheld; this determination is particularly amenable to appellate review. Finally, it is always appropriate for the appellate court to review the sufficiency of the evidence.

Petitioner argues that a decision to ignore the Iowa law will have the practical effect of nullifying that law. We do not agree. In the first place, the significance of Iowa's decision in 1974 not to regulate the distribution of obscene materials to adults is open to question. Iowa may have decided that the resources of its prosecutors' offices should be devoted to matters deemed to have greater priority than the enforcement of obscenity statutes. Such a decision would not mean that Iowa affirmatively desired free distribution of those materials; on the contrary, it would be consistent with a hope or expectation on the State's part that the Federal Government's prosecutions under statutes such as Sec. 1461 would be sufficient for the State's purposes. The State might also view distribution over the counter as different from distribution through the mails. It might conclude that it is easier to keep obscene materials out of the hands of minors and unconsenting adults in retail establishments than it is when a letter or package arrives at a private residence. Furthermore, the history of the Iowa law suggests that the State may have left distribution to consenting adults unregulated simply because it was not then able to arrive at a compromise statute for the regulation of obscenity.

Arguments similar to petitioner's "nullification" thesis were made in cases that followed *Stanley* v. *Georgia*, 394 U.S. 557 (1969). In *United States* v. *12 200-ft. Reels of Film*, the question was whether the United States constitutionally might prohibit the importation of obscene material that was intended solely for private, personal use and possession. See 19 USC 1305 (a). *Stanley* had upheld the individual's right to possess obscene material in the home, and the argument was made that this right would be virtually meaningless if the Government could prevent importation of, and hence access to, the obscene material. The Court held that *Stanley* had been based on the privacy of the home, and that it represented a considered line of demarcation in the obscenity area. Consequently, despite the incidental effect that the importation prohibition had on the privacy right to possess obscene material in the home, the Court upheld the statute. A similar result was reached in the face of similar argument, in *United States* v. *Orito*. There, 18 USC 1462, the statute prohibiting knowing transportation of obscene material in interstate commerce, was at issue. The Court held that *Stanley* did not create a right to receive, transport, or distribute

obscene material, even though it had established the right to possess the material in the privacy of the home.

In this case, petitioner argues that the Court has recognized the right of States to adopt a laissez-faire attitude toward regulation of pornography, and that a holding that Sec. 1461 permits a federal prosecution will render the States' right meaningless. Just as the individual's right to possess obscene material in the privacy of his home, however, did not create a correlative right to receive, transport or distribute the material, the State's right to abolish all regulation of obscene material does not create a correlative right to force the Federal Government to allow the mails or the channels of interstate or foreign commerce to be used for the purpose of sending obscene material into the permissive State.

Even though the State's law is not conclusive with regard to the attitudes of the local community on obscenity, nothing we have said is designed to imply that the Iowa statute should not have been introduced into evidence at petitioner's trial. On the contrary, the local statute on obscenity provides relevant evidence of the mores of the community whose legislative body enacted the law. It is quite appropriate, therefore, for the jury to be told of the law and to give such weight to the expression of the State's policy on distribution as the jury feels it deserves. We hold only that the Iowa statute is not conclusive as to the issue of contemporary community standards for appeal to the prurient interest and patent offensiveness. Those are questions for the jury to decide, in its traditional role as factfinder.

V

A. We also reject petitioner's arguments that the prospective jurors should have been asked about their understanding of Iowa's community standards and Iowa law, and that Sec. 1461 was unconstitutionally vague as applied to him. The particular inquiries requested by petitioner would not have elicited useful information about the jurors' qualifications to apply contemporary community standards in an objective way. A request for the jurors' description of their understanding of community standards would have been no more appropriate than a request for a description of the meaning of "reasonableness." Neither term lends itself to precise definition. . . .

B. Neither do we find Sec. 1461 unconstitutionally vague as applied here. Our construction of the statute flows directly from the decisions in *Hamling, Miller, Reidel,* and *Roth.* As construed in *Hamling,* the type of conduct covered by the statute can be ascertained with sufficient ease to avoid due process pitfalls. Similarly, the possibility that different juries might reach different conclusions as to the same material does not render the statute unconstitutional. We find no vagueness defect in the statute attributable to the fact that federal policy with regard to distribution of obscene material through the mail was different from Iowa policy with regard to the intrastate sale of like material.

VI

Since the Iowa law on obscenity was introduced into evidence and the jurors were told that they could consider it as evidence of the community standard, petitioner received everything to which he was entitled. To go further, and to make the state law conclusive on the issues of appeal to prurient interest and patent offensiveness, in a federal prosecution under Sec. 1461, would be inconsistent with our prior cases. We hold that those issues are fact questions for the jury, to be judged in light of the jurors' understanding of contemporary community standards. We also hold that Sec. 1461 is not unconstitutionally vague as so applied, and that petitioner's proposed *voir dire* questions were not improperly refused.

The judgment of the Court of Appeals is affirmed.

The dissents

Justices Brennan, Stewart, and Marshall filed their now-traditional dissent in obscenity cases, citing their previous claims that the Comstock laws–under which Jerry Lee Smith was convicted–are "clearly overbroad and unconstitutional." Justice Stevens, the newest member of the Court, filed a lengthy and vigorous dissent. With the exception of the long footnotes, Stevens' opinion is reprinted in full here.

Petitioner has been sentenced to prison for violating a federal statute enacted in 1873. In response to a request, he mailed certain pictures and writings from one place in Iowa to another. The transaction itself offended no one and violated no Iowa law. Nevertheless, because the materials proved "offensive" to third parties who were not intended to see them, a federal crime was committed.

Although the Court's affirmance of this conviction represents a logical extension of recent developments in this area of the law, it sharply points up the need for a principled re-examination of the premises on which it rests. Because so much has already been written in this area, I shall merely endeavor to identify certain weaknesses in the Court's "offensiveness" touchstone and then to explain why I believe criminal prosecutions are an unacceptable method of abating a public nuisance which is entitled to at least a modicum of First Amendment protection.

I

A federal statute defining a criminal offense should prescribe a uniform standard applicable throughout the country. This proposition is so obvious that it was not even questioned during the first 90 years of enforcement of the Comstock Act under which petitioner was prosecuted. When the reach of the statute is limited by a constitutional provision, it is even more certain that national uniformity is appropriate. Nevertheless, in 1963, when Chief Justice Warren concluded that a national standard for judging obscenity was not provable, he suggested the substitution of community standards as an acceptable alternative. He

thereby planted the seed which eventually blossomed into holdings such as *Miller, Hamling,* and today's pronouncement that the relevant stanard "is not one that can be defined legislatively."

The conclusion that a uniformly administered national standard is incapable of definition or administration is an insufficient reason for authorizing the federal courts to engage in ad hoc adjudication of criminal cases. Quite the contrary, it is a reason for questioning the suitability of criminal prosecution as the mechanism for regulating the distribution of erotic material.

The most significant reasons for the failure to define a national standard for obscenity apply with equal force to the use of local standards. Even the most articulate craftsman finds it easier to rely on subjective reaction rather than concrete descriptive criteria as a primary definitional source. The diversity within the nation which makes a single standard of offensiveness impossible to identify is also present within each of the so-called local communities in which litigation of this kind is prosecuted. Indeed, in *Miller* itself, the jury was asked to apply the contemporary community standard of California. A more culturally diverse state of the union hardly can exist, and yet its standard for judging obscenity was assumed to be more readily ascertainable than a national standard.

Indeed, in some ways the community standard concept is even more objectionable than a national standard. As we have seen in prior cases, the geographic boundaries of the relevant community are not easily defined, and sometimes appear to be subject to elastic adjustment to suit the needs of the prosecutor. Moreover, although a substantial body of evidence and decisional law concerning the content of a national standard could have evolved through its consistent use, the derivation of the relevant community standard for each of our countless communities is necessarily dependent on the perceptions of the individuals who happen to comprise the jury in a given case.

The question of offensiveness to community standards, whether national or local, is not one that the average juror can be expected to answer with evenhanded consistency. The average juror may well have one reaction to sexually oriented materials in a completely private setting and an entirely different reaction in a social contest. Studies have shown that an opinion held by a large majority of a group concerning a neutral and objective subject has a significant impact in distorting the perceptions of group members who would normally take a different position. Since obscenity is by no means a neutral subject, and since the ascertainment of a community standard is such a subjective task, the expression of individual jurors' sentiments will inevitably influence the perceptions of other jurors, particularly those who would normally be in the miniority. Moreover, because the record never discloses the obscenity standards which the jurors actually apply, there decisions in these cases are effectively unreviewable by an appellate court. In the final analysis, the guilt or innocence of a criminal defendant in an obscenity trial is determined primarily by individual jurors' subjective reactions to the materials in question rather than by the predictable application of rules of law.

This conclusion is especially troubling because the same image—whether created by words, sounds, or pictures—may produce such a wide variety of reactions. As Mr. Justice Harlan noted, it is " . . . often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because government officials [or jurors] cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." *Cohen* v. *California,* 403 U.S. 15, 25. In my judgment, the line between communications which "offend" and those which do not is too blurred to identify criminal conduct. It is also too blurred to delimit the protections of the First Amendment.

II

Although the variable nature of a standard dependent on local community attitudes is critically defective when used to define a federal crime, that very flexibility is a desirable feature of a civil rule designed to protect the individual's right to select the kind of environment in which he wants to live.

In his dissent in *Jacobellis* v. *Ohio,* 378 U.S. 184, Chief Justice Warren reminded us that obscene material "may be proscribed in a number of ways," and that a lesser standard of review is required in civil cases than in criminal. Moreover, he identified a third dimension in the obscenity determination that is ignored in the Court's current formulation of the standard:

> "In my opinion, the use to which various materials are put—not just the words and pictures themselves—must be considered in determining whether or not the materials are obscene. A technical or legal treatise on pornography may well be inoffensive under most circumstances but, at the same time, 'obscene' in the extreme when sold or displayed to children." 378 U.S., at 201 (footnote omitted).

The standard now applied by the Court focuses its attention on the content of the materials and their impact on the average person in the community. But that impact is not a constant; it may vary widely with the use to which the materials are put. As Mr. Justice Sutherland wrote in a different context, a "nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard." Whether a pig or a picture is offensive is a question that cannot be answered in the abstract.

In *Roth* v. *United States,* 354 U.S. 476, 485, the Court held "that obscenity is not within the area of constitutionally protected speech or press." That holding rests, in part, on the assumed premise that all communications within the protected area are equally immune from governmental restraint, whereas those outside that area are utterly without social value and, hence, deserving of no protection. Last Term the Court expressly rejected that premise. *Young*

v. *American Mini Theatres, Inc.*, 427 U.S. 50, 66-71; *Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U.S. 748, 771-773. The fact that speech is protected by the First Amendment does not mean that it is wholly immune from State regulation. Although offensive or misleading statements in a political oration cannot be censored, offensive language in a courtroom or misleading representations in a securities prospectus may surely be regulated. Nuisances such as soundtrucks and erotic displays in a residental area may be abated under appropriately flexible civil standards even though the First Amendment provides a shield against criminal prosecution.

As long as the Government does not totally suppress protected speech and is faithful to its paramount obligation of complete neutrality with respect to the point of view expressed in a protected communication, I see no reason why regulation of certain types of communication may not take into account obvious differences in subject matter. See *Lehman* v. *City of Shaker Heights*, 418 U.S. 298. It seems to me ridiculous to assume that no regulation of the display of sexually oriented material is permissible unless the same regulation could be applied to political comment. On the other hand, I am not prepared to rely on either the average citizen's understanding of an amorphous community standard or on my fellow judges' appraisal of what has serious artistic merit as a basis for deciding what one citizen may communicate to another by appropriate means.

I do not know whether the ugly pictures in this record have any beneficial value. The fact that there is a large demand for comparable materials indicates that they do provide amusement or information, or at least satisfy the curiosity of interested persons. Moreover, there are serious well-intentioned people who are persuaded that they serve a worthwhile purpose. Others believe they arouse passions that lead to the commission of crimes; if that be true, surely there is a mountain of material just within the protected zone that is equally capable of motivating comparable conduct. Moreover, the dire predictions about the baneful effects of these materials are disturbingly reminiscent of arguments formerly made about the availability of what are now valued as works of art. In the end, I believe we must rely on the capacity of the free marketplace of ideas to distinguish that which is useful or beautiful from that which is ugly or worthless.

In this case the petitioner's communications were intended to offend no one. He could hardly anticipate that they would offend the person who requested them. And delivery in sealed envelopes prevented any offense to unwilling third parties. Since his acts did not even constitute a nuisance, it necessarily follows, in my opinion, that they cannot provide the basis for a criminal prosecution.

I respectfully dissent.

editorials praise Stevens' dissent

From the Washington Star *(May 26):*

The perverse mechanism of the new "community standards" system is persuasively described by Justice John Paul Stevens in his admirable dissent in the *Smith* case . . . . In fact, the only fresh news in the latest obscenity case—aside from its articulation of the atomistic implications of the "community standards"-jury trial system—is that Justice Stevens has been doing some fresh and careful thinking on the obscenity question.

He sees that what the "community standards"-jury trial system amounts to, essentially, is not a new system of law for controlling offensive forms of expression, but the virtual abandonment of legal rules for the whimsical notions of jurors. Nor is he as sure as the Court's present majority that a "national standard" is difficult to devise or objectionable.

From the Washington Post *(May 29):*

To sum it up, you can now commit a federal crime by mailing certain material from Iowa City to Des Moines even though you bought that material legally in an Iowa City store. You may not think the material is obscene, but you cannot be sure of that. If the post office thinks it is, the jury chosen to hear the charge against you will decide. But even if that jury decides the material is obscene, you can continue to buy it legally in Iowa City. You may even be able to mail it to your friend from some other city without committing another crime because the jury in that other city may not find it obscene.

That, we submit, is absurd. It is time for both the Court and Congress to try to make sense of the situation. We commend to both the dissenting opinion of Justice John Paul Stevens in this case. His attack on the constitutionality of obscenity law is, to us, unanswerable, and his suggestion that regulation in this area be approached in terms of abating nuisances, rather than chasing criminals, is worth exploration. A hundred years of trying to stamp out dirty books and pictures by prosecuting their purveyors is enough. . . .

Columnist Bill Raspberry in the Chicago Sun-Times *(May 31):*

Juries are charged with determining questions of fact. But usually the "fact" questions are of the did-he-do-it variety. In pornography cases, under the Supreme Court's guidelines, the fact question is: Are the twelve of us offended? The answer can change from one day to the next, depending on the taste of a dozen people.

Those who have come to expect that sort of judicial nonsense when the court hears obscenity cases may find solace in the well-reasoned dissent of Justice John Paul Stevens.

(In review . . . from page 98)

Harris' well-crafted accounts of these cases leave one with a vertiginous perception of the fragility of our most fundamental freedoms; and they provoke anger at the hardships imposed on individuals by the glacial pace of the legal process. Yet I question whether they illustrate his thesis that the Bill of Rights has been rendered meaningless by judicial neglect or that they warrant the subtitle of the book—"Tales of Tyranny in America." Too often Harris lapses into sweeping generalizations which dull the bite of his valid and well-documented criticisms: the fiery polemicist is at odds with the perceptive, painstaking journalist.

Consider, for example, the case of Charles James and his "scrap of black cloth." The James case is not the most egregious instance of government abuse of civil liberties reported in this book—that distinction goes to the McSurely case, a truly Kafkaesque episode. Nor is "A Scrap of Black Cloth" the most impressive of the three essays. But it displays more clearly than the other two the interlocking strengths and weaknesses of Harris' approach.

Harris is at his best in evoking the human reality of the case—the story of an individual bewildered and frightened by the complex legal process set in motion by his simple gesture of conscience. The account of the costs of the costs of James' principled stand—the financial hardships, the social ostracism, the impact on his wife and children—is deeply moving. And it conveys a harsh truth which is too often obscured by our absorption in the abstract issues posed by civil liberties cases. As one of James' lawyers puts it: "People in civil liberties cases are the battering rams of freedom. Unfortunately, what happens to them is what happens to battering rams."

Harris performs an important service by reminding us of the human beings behind the legal abstractions. But if the concern and empathy we come to feel for James and his family enlarge our understanding of the reality of the case in some respects, they also distort it in others. Absorbed in the experience of the James family, Harris—and the reader—tend to lose sight of the issue posed by the case. That issue is by no means a simple one, and it is hardly disposed of by observing that Charles James is a good and decent man.

Harris is not unaware of the underlying problem presented by the case; early in the essay he quotes one of James' lawyers: ". . . if you allow [a teacher] to wear an armband, where do you stop? Do you then have to let others wear swastikas or Nazi uniforms or the white sheets of the Ku Klux Klan wherever and whenever they want to?" But he never pauses to give serious consideration to the countervalues that might justify restrictions on James' classroom expression. As a result, the reader has difficulty locating the issue with which the courts were confronted. The story of James' struggle for personal vindication is superbly told, but the parallel story of the law seeking to come to terms with an issue that has implications extending far beyond the particular case never comes into focus.

Harris' historical sketch of the evolution of First Amendment doctrine is similarly perceptive and similarly flawed. On one hand, he provides a valuable perspective by reminding us that freedom of speech was not a pressing concern of the Founding Fathers and by recalling some of the episodes of political intolerance which scar our history—the passage of the Sedition Act of 1798, the thousands of convictions under state and federal sedition statutes during World War I, and the abuses committed in the course of the anti-Communist crusades of the 1950s. On the other hand, he is peculiarly insensitive to the many Supreme Court decisions during recent years which have substantially enlarged the meaning of the First Amendment. While it is important to be reminded of the great distance between our ideals and the reality, it strikes me as wrong-headed to conclude, as Harris does, that the Court "has never laid down any sensible guidelines in this area" and that in America "when words have counted . . . there has been as little freedom of speech as in the meanest tyranny." Such sweeping statements are as dangerous in their way as the "myth" of free speech which, Harris cogently argues, lulls us into a false sense of security. For the maintenance of our freedom depends not only on the distrust of government and the constant vigilance Harris counsels; it also depends in no small part on recognizing and appreciating the many small incremental advances in clarity and principle that the Court has made over time—achievements his rhetoric tends to sweep from sight.

Had Harris complemented his acute sensitivity to the conflicts and tensions suffered by the individuals involved in the cases described in *Freedom Spent* with equal sensitivitiy to the tensions and conflicts which inform legal doctrine and institutions, he might have produced a truly great book. As it is, he has written a very good, if somewhat polemical, book that demands the attention of anyone concerned about the present condition and future prospects of civil liberties in America.—*Reviewed by Jamie Kalven.*

(U.S. bars delegates . . . from page 94)

later this year, the United States will be in a much weaker position than it should have been. One of the principal freedoms defended in the Helsinki compact was freedom of travel. . . .

"But our own moral standing has been undercut in a trivial way by the denial of a visa to three Soviet trade unionists invited to join a longshoremen's tribute to their union organizer, Harry Bridges, on his seventy-sixth birthday. . . . [T]he visa denial is a clear payoff to George Meany, who has trouble recognizing the rights of union officials not affiliated with the AFL-CIO. His vendetta

against longshoremen was allowed to compromise our position on human rights and our Helsinki pledge to uphold them." Reported in: *New York Times,* April 17; *Chicago Sun-Times,* May 4.

Turin wins Downs and Immroth awards

Irene Turin, coordinator of the library department of the Island Trees School District (Long Island, New York), is the 1977 recipient of both the John Phillip Immroth Memorial Award for Intellectual Freedom and the Robert B. Downs Award. The awards, each of which carries a $500 prize, recognize Turin's resistance to the removal of "objectionable" books from school libraries by the Island Trees school board.

The Immroth Award, sponsored by the ALA Intellectual Freedom Round Table, was presented at the IFRT's 1977 membership meeting at the ALA Annual Conference in Detroit, on June 20. The citation of the award praises Turin's "personal courage and professional adherence to intellectual freedom in the face of the Island Trees school board's violation of the district's selection process by removing eleven titles from district libraries."

The Robert B. Downs Award is sponsored by the University of Illinois and honors outstanding contributions to intellectual freedom in libraries. Previous recipients of the Downs Award include former Freedom to Read Foundation President Alex P. Allain, former FTRF Vice President Everett T. Moore, and Idaho State University Librarian Eli M. Oboler.

FBI pressured Catholic U. to halt conference

Previously secret Federal Bureau of Investigation documents made public in May revealed that the Bureau authorized plans in 1971 to coerce the Catholic hierarchy and administrators at the Catholic University of America to cancel a student anti-war conference.

The plans to disrupt a conference of the Student Mobilization Committee Against the War were part of the FBI's "Cointelpro" program, designed to discredit the "new left" and the movement against the war in Vietnam.

"The fact that CU would invite or sponsor a conference in university space is a situation which cries out for every possible counterintelligence technique to be utilized to disrupt or cancel conference," one memorandum from the FBI director said.

Urged to develop "all possibilities of additional counterintelligence techniques to be employed against the Student Mobilization Committee," FBI field officers disseminated "on a confidential basis to cooperative news media" a leaflet entitled "Trotskyists Welcomed at Catholic University."

The leaflet said: "Following in the wake of the bombshell indictments of Catholic priests and nuns in connection with an alleged plot to kidnap a government official and sabotage federal buildings in Washington, D.C., it is now reported that the Catholic University will host a national conference of the Student Mobilization Committee to end the War in Vietnam." The leaflet asked, "Has the Catholic Church been duped again?"

Other plans included anonymous letters to conservative Catholic organizations, an anonymous telephone call campaign to the offices of Patrick Cardinal O'Boyle, then Archbishop of Washington, and "a crude leaflet from the Black Panther Party in which the conference is denounced as a racist, liberal gathering which failed to invite the BPP to participate." Reported in: *Chronicle of Higher Education,* April 11.

brotherly love wields an ax

Twice in April members of the Philadelphia City Council stormed through downtown Philadelphia streets threatening to turn the area's pornography stores "into one big parking lot."

During their first march, the council members carried axes and posters. During the second, they carried signs pledging to drive the shops out of business.

Mayor Frank L. Rizzo praised the council members and pledged that his administration would "clean up" a cluster of adult book and movie shops east of City Hall.

"If I have to, I'll get the fire department to go in there with their axes," Rizzo stated. "I've got a good connection over there, you know. My brother, he's the commissioner." Reported in: *Philadelphia Inquirer,* April 15, 19.

Bell calls for new FoIA policy

In a May 5 letter to the heads of all federal departments and agencies, U.S. Attorney General Griffin Bell announced that the Justice Department would defend them in Freedom of Information cases only when release of disputed information would be "demonstrably harmful."

Citing a growing backlog of 600 FoIA cases, Bell argued that the government should not attempt to keep information from the public unless actual harm would likely result, even if some legal justification could be found for withholding the information.

now pending in federal courts. The actual cases represent only the 'tip of the iceberg' and reflect a much larger volume of administrative disputes over access to documents. I am convinced that we should jointly seek to reduce these disputes through concerted action to impress upon all levels of government the requirements, and the spirit, of the Freedom of Information Act. The government should not withhold documents unless it is important to the public interest to do so, even if there is some arguable legal basis for the withholding. In order to implement this view, the Justice Department will defend Freedom of Information Act suits only when disclosure is demonstrably harmful, even if the documents technically fall within the exemptions in the Act. . . . In the past, we have often filed answers in court without having an adequate exchange with the agencies over the reasons and necessity for the withholding. I hope that this will not occur in the future." Reported in: *Access Reports,* May 17.

(World War I . . . from page 97)

removed from general circulation since the beginning of the war. A spokesman for the Association conceded that some inflammatory pamphlets had reached camp libraries, but denied that any books on the army's list were circulating in the camps. Personnel of of the War Service were "trained librarians of proven loyalty" who were "constantly on the alert against insidious attempts to corrupt our fighting men."[16]

There was almost a complete blackout concerning the banning in the library press. Disregarding ALA's directive to suppress the matter, however, Indiana's *Library Occurrent* listed the books and recommended that all public libraries withdraw the suspect books.[17] Other organizations were pleased by the ban. The American Protective League advised readers of its bulletin, the *Spy Glass,* that the camp library ban should be extended to public libraries as well.[18]

Toward the end of the war, various government officials questioned the desirability of continuing the censorship program. Frederick P. Keppel, Assistant Secretary of War, wanted to restore some unfairly censored titles. Even George Creel of the Committee on Public Information regarded the suppression of certain books as "absurd."[19] Creel had written the preface to *Two Thousand Questions and Answers About the War,* a book cited in the army's index two months after it had been recalled by the publisher for revisions. Professor Claude H. Van Tyne, a University of Michigan historian, stridently denounced the first edition as a "masterpiece of pro-German propaganda" just as the revision was scheduled to appear.[20]

The role of Newton Baker, Secretary of War, in the censorship affair is unclear. He may not have known about the zealous officers in the army's Military Intelligence Branch and Morale Division who issued the various lists. And he was in France in September 1918, the month when the press gave so much coverage to the book banning. Baker rescinded the censorship policy a week after the cessation of hostilities, declaring that "American soldiers could be trusted to read whatever any other citizens could be trusted to read."[21]

The Association's assent to wartime censorship restrictions is explainable, if not excusable. Compliance by the Association with the War Department's censorship policy did not involve a special concession or require the suspension of a professional principle. Censorship was extensive in civilian libraries during neutrality and the war years. Most of the nation's librarians adopted restrictive circulation policies. This paternalism was easily transferred to the more authoritarian environment of the military. There was no ALA right to read doctrine, as there would be in later years, to constrain librarians. Other professional groups and scholars, too, succumbed to the nationalist spirit of the war. Several outstanding historians, for example, wrote propaganda tracts for the government which clearly compromised any claims to scholarly objectivity.[22]

The chance to demonstrate the value of books and libraries on such a grand scale might never occur again. To have challenged the military authorities over censorship almost certainly would have jeopardized this opportunity. A challenge, if ever considered, did not materialize. As late as April 1919, the Library War Service was still recommending the removal and destruction of books in camp libraries.[23]

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5. "Censorship Puts Grip on Camp Libraries," *Detroit News,* 31 March 1918, WSC Clipping File, RG 89/1/18, ALA Archives.

6. Colonel R. H. Van Deman to Joseph L. Wheeler, 24 May 1918; McKendree L. Raney to Van Deman, 19 June 1918; Brigadier General M. Churchill to Wheeler, 25 June 1918, WSC, RG 89/1/5 (vol. 3), ALA Archives.

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8. Library War Service to Camp Librarian, 31 July 1918, WSC, RG 89/1/5 (vol. 8), ALA Archives.

9. These lists are in WSC, RG 89/1/5 (vol.8), ALA Archives.

10. "Books Lauding Huns Barred Out of Army," *New York Tribune,* 26 September 1918, pp. 6-7.

11. *Ibid .,* p. 6.

12. For a representative list of pro-German publications issued in the United States by various German propaganda agencies, see U.S. Congress, Senate, Committee on the Judiciary, *Brewing and Liquor Interest and German Propaganda, Hearings before a subcommittee of the Committee on the Judiciary on S.R. 307,* vol. 2, 65th Cong., 2d & 3d sess., 1919, pp. 1410-18.

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19. Mock, *Censorship 1917,* p. 170.

20. George T. Blakey, *Historians on the Homefront: American Propagandists for the Great War* (Lexington: University Press of Kentucky, 1970), p. 89-87.

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22. Blakey, *Historians on the Homefront,* pp. 82-159.

23. Anne G. Hubbard to A.L.A. Representatives, 21 April 1919, WSC, RG 89/1/65, Box I, ALA Archives.

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