

newsletter  
on  
intellectual  
freedom



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Editor: Henry Reichman, California State University, East Bay  
Founding Editor: Judith F. Krug (1940–2009)  
Publisher: Barbara Jones  
Office for Intellectual Freedom, American Library Association

ISSN 1945-4546

May 2012 □ Vol. LXI □ No. 3 □ [www.ala.org/nif](http://www.ala.org/nif)

## White House offers online privacy ‘Bill of Rights’

The Obama administration on February 23 unveiled a “Consumer Privacy Bill of Rights” as part of a comprehensive blueprint to improve consumers’ privacy protections and ensure that the Internet remains an engine for innovation and economic growth. Entitled “Consumer Data Privacy in a Networked World: A Framework for Protecting Privacy and Promoting Innovation in the Global Digital Economy,” the blueprint will, the White House promises, guide efforts to give users more control over how their personal information is used on the Internet, and to help businesses maintain consumer trust and grow in the rapidly changing digital environment. The full document may be found at <http://www.whitehouse.gov/sites/default/files/privacy-final.pdf>.

At the request of the White House, the Commerce Department will begin convening companies, privacy advocates and other stakeholders to develop and implement enforceable privacy policies based on the Consumer Privacy Bill of Rights. In addition, advertising networks announced that leading Internet companies and online advertising networks are committing to act on Do Not Track technology in most major Web browsers to make it easier for users to control online tracking. Companies that represent the delivery of nearly 90 percent of online behavioral advertisements—ads that appear on a user’s screen based on browsing and buying habits—including Google, Yahoo!, Microsoft, and AOL have agreed to comply when consumers choose to control online tracking. Companies that make this commitment will be subject to FTC enforcement.

The framework for a new privacy code moves electronic commerce closer to a one-click, one-touch process by which users can tell Internet companies whether they want their online activity tracked. A study released April 3 by *Consumer Reports* found widespread concern about online privacy among consumers (see page 101).

Much remains to be done before consumers can click on a button in their Web browser to set their privacy standards. Congress will probably have to write legislation governing the collection and use of personal data, officials said, something that is unlikely to occur this year. And the companies that make browsers—Google, Microsoft, Apple and others—will have to agree to the new standards.

But because those companies also are the largest competitors in the business of providing advertising to Web sites, and are part of a consortium participating in the development of the principles, administration officials said they expected the standards would give consumers privacy while also allowing electronic commerce to grow.

“American consumers can’t wait any longer for clear rules of the road that ensure their

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Views of contributors to the *Newsletter on Intellectual Freedom* are not necessarily those of the editors, the Intellectual Freedom Committee, nor the American Library Association.

(ISSN 1945-4546 )

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*Newsletter on Intellectual Freedom* is published bimonthly (Jan., Mar., May, July, Sept., Nov.) by the American Library Association, 50 E. Huron St., Chicago, IL 60611. The newsletter is also available online at [www.ala.org/nif](http://www.ala.org/nif). Subscriptions: \$70 per year (print), which includes annual index; \$50 per year (electronic); and \$85 per year (both print and electronic). For multiple subscriptions to the same address, and for back issues, please contact the Office for Intellectual Freedom at 800-545-2433, ext. 4223 or [oif@ala.org](mailto:oif@ala.org). Editorial mail should be addressed to the Office of Intellectual Freedom, 50 E. Huron St., Chicago, Illinois 60611. Periodical postage paid at Chicago, IL and at additional mailing offices. POSTMASTER: send address changes to *Newsletter on Intellectual Freedom*, 50 E. Huron St., Chicago, IL 60611.

personal information is safe online,” President Obama said in a statement. “By following this blueprint, companies, consumer advocates and policy makers can help protect consumers and ensure the Internet remains a platform for innovation and economic growth.”

Even before Congress approves privacy legislation, the Federal Trade Commission will have the ability to enforce compliance with a code of conduct to be developed by the Commerce Department or with advertising industry guidelines that companies would adopt voluntarily, Jon Leibowitz, the chairman of the FTC, told reporters.

But even if a click of a mouse or a touch of a button can thwart Internet tracking devices, there is no guarantee that companies won’t still manage to gather data on Web behavior. Compliance is voluntary on the part of consumers, Internet advertisers and commerce sites.

“The real question is how much influence companies like Google, Microsoft, Yahoo and Facebook will have in their inevitable attempt to water down the rules that are implemented and render them essentially meaningless,” John M. Simpson, privacy project director for Consumer Watchdog, said in response to the administration’s plan. “A concern is that the administration’s privacy effort is being run out of the Commerce Department.”

But Leibowitz noted that the FTC had already been aggressively penalizing companies that did not adhere to their stated privacy programs. Last year it brought charges against both Google and Facebook.

“If you ask what makes businesses want to do this,” Leibowitz said, the answer is, “respecting consumer privacy and protecting data online encourages Internet commerce.”

The Digital Advertising Alliance, a group of marketing and advertising trade groups, said it had committed to following the instructions that consumers gave about their privacy choices by using Do Not Track technology already available in most Web browsers.

Stu Ingis, general counsel for the Digital Advertising Alliance, said the group hoped to reach agreement within about nine months with browser companies on standards for the use of a one-click notification of a consumer’s privacy desires.

Hardly a day goes by without some development in the expansion of privacy standards or the punishment of privacy violations. On February 23, California’s attorney general, Kamala D. Harris, said the state had reached an agreement with Amazon, Apple, Google, Hewlett-Packard, Microsoft and Research in Motion to strengthen privacy protections for smartphone owners who download mobile applications. The agreement will force software developers to post conspicuous privacy policies detailing what personal information they plan to obtain and how they will use it. It also

compels app store providers like Apple and Google to offer ways for users to report apps that do not comply.

Separately, a group of dozens of state attorneys general have raised concerns with Google over the Internet giant’s updated privacy policy, marking the latest public flare-up over the planned changes. In a letter addressed to Google Chief Executive Larry Page on February 22 and signed by more than thirty attorneys general, the National Association of Attorneys General wrote that Google’s new policy of consolidating privacy practices across products “is troubling for a number of reasons.”

In a statement, a Google spokesman said that, “Our updated Privacy Policy will make our privacy practices easier to understand, and it reflects our desire to create a seamless experience for our signed-in users.”

The new White House privacy framework brings together several efforts to develop and enforce privacy standards that have been progressing for the last couple of years on parallel tracks, under the direction of advertisers, Internet commerce sites and software companies. The next step will be for the Commerce Department to gather Internet companies and consumer advocates to develop enforceable codes of conduct aligned with the administration’s planned “Consumer Privacy Bill of Rights.” This would set standards for the use of personal data, including individual control, transparency, security, access, accuracy and accountability.

According to the White House, the Consumer Privacy Bill of Rights provides a baseline of clear protections for consumers and greater certainty for businesses. The rights are:

- Individual Control: Consumers have a right to exercise control over what personal data organizations collect from them and how they use it.
- Transparency: Consumers have a right to easily understandable information about privacy and security practices.
- Respect for Context: Consumers have a right to expect that organizations will collect, use, and disclose personal data in ways that are consistent with the context in which consumers provide the data.
- Security: Consumers have a right to secure and responsible handling of personal data.
- Access and Accuracy: Consumers have a right to access and correct personal data in usable formats, in a manner that is appropriate to the sensitivity of the data and the risk of adverse consequences to consumers if the data are inaccurate.
- Focused Collection: Consumers have a right to reasonable limits on the personal data that companies collect and retain.
- Accountability: Consumers have a right to have personal data handled by companies with appropriate measures in place to assure they adhere to the Consumer Privacy Bill of Rights.

Rep. Mary Bono Mack (R-CA), chair of the Energy and Commerce subcommittee on Manufacturing and Trade, said she would hold a hearing on the White House's plan.

"Protecting consumer privacy online and preserving American innovation are not mutually exclusive, but they do require a very careful juggling act," Bono Mack said. "I am committed to achieving both. While I look forward to working with President Obama and [Commerce] Secretary [John] Bryson on this critically important issue, any rush-to-judgment could have a chilling effect on our economy and potentially damage, if not cripple, online innovation."

Bono Mack warned against enacting tough privacy regulations like European governments have. "That's why my subcommittee has been taking a thoughtful, measured approach to online privacy, which I strongly believe—over the long haul—will benefit both American consumers and the U.S. economy," she said. "Once we have heard from all the stakeholders, we can make an informed decision about the need for legislation."

Bono Mack has been particularly critical of Google and has demanded multiple briefings with Google officials to discuss their privacy policies.

Most reaction to the White House plan was positive. Privacy expert Lisa Sotto said that the decision to let the FTC take a stronger enforcement role shows the administration "is taking a 'trust but verify' approach to designing a new U.S. privacy framework."

"The administration would seek implementation of a Consumer Privacy Bill of Rights by way of enforceable codes of conduct that would be derived through a collaborative process involving multiple stakeholders," she said in a statement. "But the administration does not put its faith entirely in the stakeholders to implement the Bill of Rights through codes of conduct; the administration also calls for legislation to enact the Bill of Rights into law, as well as stronger FTC enforcement authority."

Chris Wolf, the co-chair of the Future of Privacy Forum, echoed those comments, saying this is a "co-regulation" model, and one that he believes will help the U.S. address privacy in an era of changing technological innovation. In a statement, Wolf said he hopes lawmakers in Europe will look to this same model as a potential one for regulation.

Privacy advocate Justin Brookman, of the Center for Democracy and Technology, also called the announcement a step in the right direction. He gave the advertising industry credit for voluntarily implementing "Do Not Track" technology in web browsers.

"The industry deserves credit for this commitment, though the details of exactly what 'Do Not Track' means still need to be worked out," Brookman said.

CDT president Leslie Harris said that she supports the call for a consensus on privacy issues, but added that she believes legislation is still ultimately necessary to protect consumers.

The Software and Information Industry Association said it welcomes the White House's decision to include many stakeholders in crafting the proposal, but ultimately can't "endorse this proposal as a legislative initiative," said SIAA president Ken Wasch in a statement.

"These principles can be made more specific through industry sector codes of conduct, and compliance can be assured through the existing authority of the Federal Trade Commission," he said.

Currently, Internet users who want some fine-grained control and notification over how their data is collected on the web can install a number of plugins for their favorite browsers, including the Do Not Track+ plugin from Abine.

Bill Kerrigan, Abine's CEO, described the White House announcement as an "incredible acknowledgment that consumers do have the right to privacy." But he argued there's so much data collection going on that users don't know about, including data that is now used in loan reviews, that "regulation is probably a small part of solving this puzzle. We have to find a technological way to make this easy for consumers to use."

Some of the things that citizens are likely to see more of in the coming months and years are targeted ads that actually allow people to see how and why that ad was chosen for you, an ostracization of start-ups and companies that collect data on sensitive categories of information such as health, and a generalized move towards greater transparency.

That said, the new rules aren't going to apply to companies like Target or credit card companies. In a *New York Times Magazine* article, Target's data mining was described as actually being able to detect when a teenage customer was pregnant, before even her own father knew. Likewise, credit card companies are able to create detailed profiles of their customers based on their purchases, and even using the kinds of purchases made in order to determine how much of a credit risk a card holder is, according to a 2010 report from the Federal Reserve.

Large Internet companies have been caught in a number of high-profile privacy slip-ups. Facebook Inc. recently agreed to settle charges by the U.S. government that some of its privacy practices had been unfair and deceptive to users. And just a week before the White House announcement, Google acknowledged it had been circumventing the privacy settings of people using Apple Inc.'s Web-browsing software on their iPhones, iPads and computers. It stopped the practice after being contacted by *The Wall Street Journal*.

The new Do-Not-Track button isn't going to stop all Web tracking. The companies have agreed to stop using the data about people's Web browsing habits to customize ads, and have agreed not to use the data for employment, credit, health-care or insurance purposes. But the data can

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## Federal Trade Commission releases final privacy report

The Federal Trade Commission on March 26 outlined a framework for how companies should address consumer privacy, pledging that consumers will have “an easy to use and effective” “Do-Not-Track” option by the end of the year.

The FTC’s report came a little over a month after the White House released a “privacy bill of rights” that called on companies to be more transparent about privacy and grant consumers greater access to their data but that stopped short of backing a Do-Not-Track rule (see page 97).

The FTC also said it plans to work with Web companies and advertisers to implement an industry-designed Do-Not-Track technology so as to avoid a federal law that would mandate it. The Digital Advertising Alliance, which represents 90 percent of all Web sites with advertising, is working with the Commerce Department and FTC to create an icon that would allow users an easy way to stop online tracking.

But the enforcement agency said that if the companies aren’t able to get the technology launched by the end of the year, lawmakers should force those companies to offer consumers a similar option to stop tracking.

“Although some companies have excellent privacy and data securities practices, industry as a whole must do better,” the FTC said.

In its report, the agency called on companies to obtain “affirmative express consent” from consumers before using data collected for a different purpose, and called on Congress to consider baseline privacy legislation and measures on data security and data brokers.

The FTC also reiterated its recommendations that Congress pass legislation to provide consumers with access to their personal data that is held by companies that compile data for marketing purposes.

The 73-page report focused heavily on mobile data, noting that the “rapid growth of the mobile marketplace” has made it necessary for companies to put limits on data collection, use and disposal. According to a recent report from Nielsen, 43 percent of all U.S. mobile phone subscribers own a smartphone.

The commission called on companies to work to establish industry standards governing the use of mobile data, particularly for data that reveals a user’s location.

Commissioner Thomas Rosch dissented from the other commissioners in a 3-1 vote on the privacy report. Rosch said that while he agrees with much of what the agency released, he disagrees with the commission’s approach to the framework, which focuses more on what consumers may deem “unfair” as opposed to actual

deception perpetrated by companies.

“Unfairness is an elastic and elusive concept,” Rosch wrote, saying that it is difficult to determine how consumers feel about privacy. He also said in his dissent that the recommendations were overly broad and would apply to “most information collection practices.”

“It would install ‘Big Brother’ as the watchdog over these practices not only in the online world but in the offline world,” Rosch wrote of the report.

While the FTC is not a rule-making body but an enforcement agency and needs explicit authority from Congress to create new codes, Rosch said he believes that there should be no pretense that the report’s recommendations are “voluntary.” Many firms, he wrote, may “feel obliged to comply with the ‘best practices’ or face the wrath of ‘the Commission’ or its staff.” Reported in: *Washington Post*, March 26. □

## consumers ‘very concerned’ about online privacy

A study released April 3 by *Consumer Reports* found widespread concern about online privacy. The survey found that 71 percent of consumers are “very concerned” about companies selling or sharing information about them. Three out of four smartphone owners said they are very concerned that mobile applications can access their contacts, photos and location without their permission.

Most people also said they are very concerned about advertisers targeting children with personalized ads, companies holding onto data even after they don’t need it and online data being used to prevent someone from getting a job or a loan.

The study found 44 percent of consumers are very concerned about advertisers tracking their online activities and targeting them with ads. And 42 percent of the respondents said they are very concerned that privacy policies are too long and complicated.

Consumers Union, the advocacy arm of *Consumer Reports*, submitted the survey results to the National Telecommunications and Information Administration (NTIA), a Commerce Department agency that is leading discussions between consumer advocates and Web companies about how to better protect consumers’ privacy (see page 97).

“A lot of people are seriously worried about how their personal information is being exploited,” said Ioana Rusu, regulatory counsel for Consumers Union. “Your personal data ought to be treated with respect, and you ought to have more of a say in how it’s used.” Reported in: *The Hill*, April 4. □

## Modern Language Association issues statement on Tucson book removals

*The following is the text of a statement released by the Executive Council of the Modern Language Association in response to the discontinuance of Mexican-American Studies and the consequent removal of books from school classrooms in Tucson, Arizona (see Newsletter, March 2012, p. 50).*

Recent legislative and policy initiatives in the Tucson Unified School District concern us deeply as teachers and scholars of language and literature.

In 2010, the Arizona state legislature passed HB 2281, which was signed by Governor Jan Brewer. The bill forbade any school district to include in “its program of instruction any courses or classes . . . that promote resentment toward a race or class of people[,] . . . are designed primarily for pupils of a particular ethnic group[,] . . . [or] advocate ethnic solidarity instead of the treatment of pupils as individuals.” State Superintendent of Public Instruction John Huppenthal declared in January 2011 that Tucson’s widely admired Mexican American studies program was in violation of HB 2281. The board of the Tucson Unified School District appealed that ruling in June 2011. In December 2011, Judge Lewis Kowal affirmed Huppenthal’s decision, saying that the Mexican American studies program had “one or more classes designed primarily for one ethnic group, promoting racial resentment, and advocating ethnic solidarity” and was thus in violation of state law. Penalties for noncompliance established in HB 2281 would have cost the Tucson Unified School District millions of dollars in state aid.

As a result, the district’s school board voted 4-1 to shut down the Mexican American studies program. The school board president, Mark Stegeman, took several measures to bring that termination about, the most publicized of which involved the removal of several books from ethnic studies classrooms in Tucson and their sequestration in a storage facility.

That removal, in addition to being objectionable, followed from a series of discriminatory acts by Arizona officials, all of which run against principles that the MLA considers vital. Although Arizona HB 2281 was ostensibly passed to ensure that students would be taught as individuals, we see the law as part of an attack on Mexican American citizens and cultures—including, but not limited to, undocumented immigrants. We are unaware of any similar argument or policy initiative aimed at, for instance, Americans of Irish or Polish descent; no one argues that Irish American or Polish American children who learn about their ethnic heritages in school are promoting racial resentment or ethnic solidarity, even though the history of Irish and Polish immigration in the United States is not free of instances of ethnic discrimination. Furthermore,

we contend that the law has been discriminatory in effect, insofar as the superintendent’s ruling, the judge’s decision, and the school board president’s order applied it to target and shut down only Mexican American studies programs. We note that programs in Native American and African American studies seem not to have triggered fears and anxieties among the supporters and enforcers of HB 2281.

We believe that teaching Mexican American children about Mexican American history and heritage is teaching them as individuals—indeed, precisely as the individuals they are. But more important, we believe in teaching all American children about Mexican American history and heritage. We therefore reject the reasoning behind HB 2281 and behind the decisions made by Superintendent Huppenthal, Judge Kowal and President Stegeman, on two counts. First, we reject the idea that Mexican American studies is a subject “designed primarily for pupils of a particular ethnic group.” Throughout the United States, and especially in the Southwest, Mexican American studies is an integral part of the study of American identity and history; ideally, every schoolchild should be acquainted with that fact. Second, we reject the idea that Mexican American studies promotes “resentment toward a race or class of people” or advocates “ethnic solidarity.” Mexican American studies is a field of inquiry, not a form of propaganda. It is designed to lead to a greater understanding of the histories and cultures of the peoples of the United States, not to any partisan political outcome.

Our beliefs about ethnic studies and about curricular reform generally have been formed by forty years of scholarly research, informed debate, and open-ended discussion. As an organization devoted to the study of language and literature, the MLA is allied with primary and secondary school educators who teach in this field and who participate in the long project of questioning and undoing the biases of the traditional curriculum, which for many years ignored or demeaned the histories and cultures of people deemed “ethnic.” We see that project as central to the mission of American education at all levels. As former MLA President Sidonie Smith wrote in her 2010 letter to Governor Brewer, “ethnic studies curricula have provided important gateways for students to learn about the diversity of heritages in the United States, a key educational goal of the liberal arts education that is the bedrock of American higher education. . . . Policies that curtail this vision will weaken the quality of education.”

Finally, we see in these actions a threat to academic freedom and intellectual inquiry. To pursue scholarly inquiries into the histories and cultures of the United States, teachers must be free from legislative and judicial interference. Allowing state officials to declare legitimate branches of history and culture out of bounds—to the point of seizing and sequestering books—is inimical to the principles on which the United States was founded. And to students in

the Tucson Unified School District, such actions send a far more chilling message than anything they might find in the books that have been removed from their classrooms.

We urge all relevant Arizona officials—Governor Brewer, Superintendent Huppenthal, Judge Kowal, and President Stegeman—to reconsider these rulings, reverse these decisions, and reaffirm the freedom of inquiry on which an open society must depend. □

## FBI still struggling with Supreme Court GPS ruling

On January 23, the Supreme Court said police had overstepped their legal authority by planting a GPS tracker on the car of a suspected drug dealer without getting a search warrant (see *Newsletter*, March 2012, p. 68). It seemed like another instance in a long line of cases that test the balance between personal privacy and the needs of law enforcement.

But the decision in *U.S. v. Jones* set off alarm bells inside the FBI, where officials are trying to figure out whether they need to change the way they do business.

Before the Supreme Court ruling in late January, the FBI had about 3,000 GPS tracking devices in the field. Government lawyers scrambled to get search warrants for weeks before the decision, working to convince judges they had probable cause to believe crimes were taking place. But after the ruling, FBI officials said, agents still had to turn off 250 devices that they couldn't turn back on.

FBI Director Robert Mueller addressed the issue at a House Appropriations Committee hearing. He said the ruling will change the way agents work. "It will inhibit our ability to use this in a number of surveillances where it has been tremendously beneficial," Mueller said. "We have a number of people in the United States whom we could not indict, there is not probable cause to indict them or to arrest them who present a threat of terrorism. ... [They] may be up on the Internet, may have purchased a gun, but have taken no particular steps to take a terrorist act."

Before the high court decision, the FBI would have deployed electronic trackers to monitor those people. Now, teams of six or eight agents have to watch them, taxing the agency's resources.

Andrew Weissmann, the top lawyer at the FBI, said the Supreme Court made a distinction about the Fourth Amendment, which guards against unreasonable searches and seizures, ruling that computers that follow suspects are much more intrusive than people doing the same thing.

"The court essentially is saying that you have an expectation of privacy even though if it was done by humans there would be no violation," Weissmann says. "But because it's done by machines, it is."

In the Supreme Court case, FBI agents investigating a cocaine trafficking ring secretly put a GPS tracker on a Jeep belonging to Washington, D.C., nightclub owner Antoine Jones. They kept it there for weeks, without getting approval from a judge.

"In the Jones case, the Supreme Court held that reasonable people do not expect the government to track their location by attaching a GPS device to the bottom of the car for, in that case, 28 days," Catherine Crump of the American Civil Liberties Union said.

The full implications of the decision are still coming into focus.

A concurring opinion by Justice Samuel Alito said that a month was too long to track a suspect by GPS without a warrant, but two days would probably be fine. That leaves a big gap for law enforcement to figure out on its own.

Weissmann said FBI agents in the field need clear rules. So, for now, he's telling agents who are in doubt "to obtain a warrant to protect your investigation." But he says that's not always possible.

"And the problem with that is that a search warrant requires probable cause to be shown and many of these techniques are things that you use in order to establish probable cause," Weissmann says. "If you require probable cause for every technique, then you are making it very very hard for law enforcement."

Government lawyers say the Supreme Court decision reaches well beyond electronic trackers. "That decision is reverberating very quickly into areas that I'm sure lots of you care about: national security, cybersecurity—privacy, more generally," said Solicitor General Don Verrilli at a recent Georgetown University Law Center conference.

The Justice Department is predicting new fights over cars that come with GPS already installed, and cameras the FBI sticks on poles to catch drug dealers and speeders.

Then there's the big enchilada: cellphone data.

The U.S. Court of Appeals for the Fifth Circuit will hear a case this year about whether the government can get access to cellphone location data without a warrant. You might be surprised to know it, but every eight seconds or so, your cellphone can transmit information to a local cell tower signaling where you are. Crump, of the ACLU, says that's a lot more intrusive than putting a tracker on someone's car.

"After all, a cellphone is something you carry with you wherever you go," Crump says. "And we don't think the government should be accessing that type of information without a really good reason, which they can demonstrate by getting a warrant from a judge."

As for Antoine Jones, whose case made Supreme Court history, prosecutors say they'll try him again—maybe using some of the location data from his cellphone. Reported in: [npr.org](http://npr.org), March 21. □

## bird-flu papers released for publication

In a move March 30 that elated many scientists and worried a few others, a U.S. biosecurity panel recommended the publication of two revised papers on the bird-flu virus. The same panel had, back in December, called for the papers to be partly censored before publication because, it said, they contained dangerous information that could trigger a bird-flu pandemic.

“We’ve been saying all along that these papers should be published, so this is good news,” said Vincent R. Racaniello, a professor of microbiology and immunology at Columbia University. One of the authors, Yoshihiro Kawaoka, a virologist at the University of Wisconsin at Madison, said his paper still contains the data and methods that caused concern in the first place, with some elaboration about safety issues. It is possible that both papers could be published online as soon as next week, some speculated.

The papers show that a few mutations in the H5N1 avian influenza virus could make it transmissible through the air among mammals, including human beings. The wild form of the virus now mainly infects birds. The lead authors of each paper, Kawaoka and Ron Fouchier, a virologist at the Erasmus Medical Center, in the Netherlands, were set to publish them in the prominent journals *Nature* and *Science*, respectively.

Then the National Science Advisory Board for Biosecurity, a panel of scientists that was asked to review the papers by the National Institutes of Health, threw a roadblock in the way. It said the list of mutations should be removed from the papers before they were published because the virus had an estimated human fatality rate of 50 to 60 percent, and many labs experimenting with the mutated form would raise the chances of an accidental escape or even give terrorists the chance to use it.

The advisory board’s action was an unprecedented form of censorship, and it set off a storm of controversy, with the authors and scientists like Racaniello arguing that studying those very mutations was the best way to watch for a threatening outbreak of the disease, and to develop ways to combat it. Journal editors decried the interference with communication among scientists.

But some infectious-disease experts like D.A. Henderson, the scientist who led the worldwide effort to eradicate smallpox and is now a distinguished scholar at the Center for Biosecurity of the University of Pittsburgh Medical Center, said the censorship was a good idea because the risks of publishing outweighed the benefits.

After meeting in Washington, D.C. March 29 and 30, the board decided that the benefits now outweigh the risks. “The data described in the revised manuscripts do not appear to provide information that would immediately enable misuse of the research in ways that would endanger

public health or national security,” the board said in a statement. In addition, it said, “new evidence has emerged that underscores the fact that understanding specific mutations may improve international surveillance.”

Part of that evidence, Kawaoka wrote in an e-mail, is contained in his revisions, which “provided a more in-depth explanation of the significance of the findings to public health and a description of the laboratory biosafety and biosecurity.” His paper, he added, would contain descriptions of all the mutations that enhanced transmission of the virus, the very data that initially concerned the board.

Racaniello said that arguments made since the board’s initial decision might have swayed its members. “All of these mutations have already been seen in circulating strains of H5N1,” he said. With the papers, “we now know they contribute to transmissibility. So if you start seeing one of them, or more than one, you should increase surveillance in that geographic region.”

The board also changed its position, Kawaoka suggested, “because the meeting helped everyone to better understand not only the research, but the precautions taken to conduct these studies.”

The board did not focus on claims that the flu’s lethality was exaggerated, though outside scientists repeatedly argued over that point. Dueling papers were published recently about the fatality rate, some asserting that it is lower than the official estimate and that the risk is overstated, and others arguing that those papers are miscalculations.

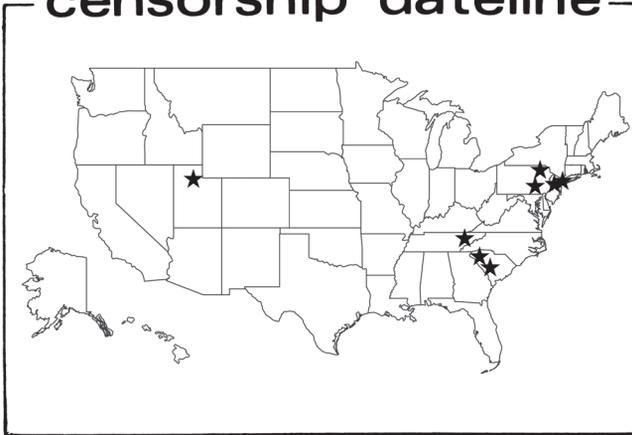
Dr. Henderson, who stands by the official H5N1 fatality estimates, which come from the World Health Organization, appeared disappointed by the decision to publish the papers. The fatality rate is higher than that of smallpox, he said, “and this virus can spread better and faster than anything else we have.”

However, he agreed with Kawaoka that people better understood the safety issues now, and he said that was important. “There’s been an educational process going on here that I’m very pleased about. The risk will be reduced because labs that work with this virus won’t treat it casually, but as something that’s very dangerous.”

He noted that in the debate “there was a lot of emphasis on the modified virus as a bioterror agent. But that’s the least of the problem. It was the many labs that could work with the virus and its possible escape that really concerned me. If this got out of the lab, you are not going to be able to contain it.”

The board has forwarded its new recommendation to the agency that first asked the scientists to withhold publication, the U.S. Department of Health and Human Services. The agency usually follows the board’s advice. And Kawaoka, when asked if he was pleased with the decision, answered in one emphatic word: “Yes.” Reported in: *Chronicle of Higher Education* online, March 30. □

## — censorship dateline



### libraries

#### Salt Lake City, Utah

Wary of accusations of censorship inside institutions founded on principles of intellectual freedom, many library administrators for years relied on staff and patrons to ferret out unsavory elements who might abuse public Internet access for unsavory aims and images.

The Salt Lake City Main Library and its five branches have long filtered Internet access to computers in their children's sections. During a March 22 meeting of the library system's board, however, members voted unanimously to extend those same filtering capabilities to the entire network of computers available for adult use.

Advance notice of the impending decision generated no public comment, in person or otherwise, during the public meeting held on the Main Library's fifth floor.

"Frankly, I was a little surprised," said Kevin Werner, board president. "I was expecting to hear something."

In fact, the procedure was greeted as little less than a speed bump on the way to items the board greeted with far more interest, including next year's budget and plans to build two new branches in the Glendale and Marmalade neighborhoods.

The decision to filter Internet access harbored far more than the urge to protect children and other patrons. In exchange for its compliance under the federal Children's Internet Protection Act (CIPA), the government will reimburse the Salt Lake City library system 80 percent of its costs for telephone and Internet services. The library also becomes eligible for state funds in grant form, specific to technology projects, administered by the Utah State Library.

At a time when circulation numbers for physical materials—books, DVDs and periodicals—are flat, but demand for Internet access, e-books and other downloadable content has soared, that savings is nothing to sniff at. It is money the library system can use to reinvest in the future, said library

spokeswoman Julianne Hancock.

"This year, our federal discounts on telecommunications services will result in about \$80,000 in savings for telecommunications services," Hancock said. "In future years, we will apply to be considered for additional discounts, but this gets us well on our way."

The downtown library has had intermittent reports of people using library computers to access pornography and other material harmful to minors. The problem has never become chronic or unmanageable, but the responsibility of often monitoring patrons diverted staff time from other work. "It always put everyone in an uncomfortable position," Hancock said.

Deadline for installment is June next year, but it's estimated the filter will be installed by the end of this summer, she said.

For public libraries everywhere, Werner said, the struggle to keep current in the new digital world is a more significant concern than the occasional nuisance of patrons surfing the Web for obscene and offensive material. "The filtering issue, while important," he said, "is really an issue outside the greater trend of how libraries are being transformed." Reported in: *Salt Lake Tribune*, March 22.

### schools

#### Westfield, New Jersey

*The Absolutely True Diary of a Part-Time Indian* is the semi-autobiographical novel of author Sherman Alexie. The first-person narrative details the protagonist's quest to take his future into his own hands, leaving his school on the Spokane Indian reservation to attend an all-white high school and combat the challenges that accompany his decision.

The coming-of-age tale earned Alexie the 2007 National Book Award for Young People's Literature, but its content has also led at least three school districts nationwide to ban or limit its presence in student curricula. And now it is the most controversial book in Westfield.

The book—certain passages of which include graphic sexual, discriminatory and violent language—is required reading in at least three freshman English classes at Westfield High School. As parents have grown more familiar with its content, the voices criticizing the book—as well as the process that led to it becoming part of the curriculum—have begun to grow louder.

"This book doesn't represent the standards of Westfield High School," parent Leslie Barmakian told the Board of Education at its February 7 meeting. "This book is completely inappropriate."

"I believe that we can do better," parent Nancy Murray told the Board. "I'm not saying the book should be banned, but that it should be age-appropriate."

Opposition to the book has grown. An email circulated among parents encouraging them to write letters to Superintendent Margaret Dolan and other faculty members expressing their concerns.

“The issue is that there is some very sensitive material in the book including excerpts on masturbation amongst other explicit sexual references, encouraging pornography, racism, religious irreverence, and strong language (including the ‘f---’ and ‘n—’ words),” read the email, signed by parent Nancy Maurer.

“Most parents were not aware of the content of this book, and many of the students were reluctant to tell their parents about it. There is now a growing public outcry by the parents to a) require teachers to notify parents of the content of this book and/or b) to remove this book from the required reading list.”

Maurer said the book has some merit and is thought-provoking, but also that it has placed many children in a “moral dilemma” because they are required to read it for school yet are reluctant to talk about the book with their parents.

Not all parents share such a sentiment. Board member Mitch Slater said that he read the book and that it is not only deserving of the acclaim it has garnered, but is certainly one he would allow his freshman daughter to read. “It’s a great book telling the true story of an injustice,” Slater said. “I would gladly let my ninth-grade daughter read the book and I am not surprised the book won so many awards.”

At a February Board meeting, Dolan detailed the process that leads to books being accepted into the curriculum. Though neither Dolan or the Board said there is any plan to remove the book from the district curriculum, Dolan encouraged parents to send their concerns to teachers as well as to her. “We do listen,” she said. “We understand that children are different and we respect that.”

In her email, Maurer argued that this is not an issue of censorship or of trying to have the book banned. Rather, concerned parents view the issue as one stemming from a parent’s right to have a say in what their child is required to read at school.

“To make this required reading for ninth graders, I believe, crosses a line that denies parents their right to make these determinations as to whether their children are mature enough to read this kind of material,” Maurer said. “Without notifying parents of the content of controversial books such as these, it also denies the right parents and students have of opting out of such books.”

Though they were particularly upset with the book’s content, the parents addressing the Board were most concerned with the way the district did not consult more parents when approving the book for its curriculum. The result was parents being shocked by the book’s language and students being unsure as to how to react to the material.

“This is our responsibility,” parent Anna Githens told the Board. “It’s not [the students’] responsibility to determine

what they are to learn in the classroom.” She said that books, like children, are unique and must be assessed individually.

David Crenshaw said teachers and administrators have an obligation to include parents when deciding what books will be required reading. “We are disappointed and disgusted with the decision to keep the book,” he said. Crenshaw also read a few particularly alarming passages from the book to ensure the BOE and public knew what language was causing the uproar. “The language is, quite frankly, offensive,” he said.

Dolan pointed out that it would be possible to single out passages of a number of books that—out of context—appear similarly gratuitous, but acknowledged that Crenshaw and the other parents have the right to oppose the book’s content. “You have a right to disagree,” she said.

Near the end of the meeting, Board President Richard Mattessich said that parents have had the Board’s attention throughout its decision-making process and said that the Board’s final decision had nothing to do with a lack of regard for public opinion. He also suggested that parents were perhaps not giving the district’s teachers enough credit for being able to take controversial materials—such as the book in question—and teach it in a way that enables students to learn valuable lessons from them.

“We have strong educators in Westfield,” he said. “It’s important not to lose sight of that.” Reported in: *Westfield Patch*, February 16.

### **Troy, Pennsylvania**

The Troy Area School Board tabled a decision February 21 on approving for use in Grade 10 World Literature a critically-acclaimed book that was also one of the most frequently challenged books in 2008. Described as “a moving portrait of modern Afghanistan,” the book, *The Kite Runner*, by Khaled Hosseini, was a number-one *New York Times* Bestseller.

Critics have raved over the novel, which has received several honors such as being named a *San Francisco Chronicle* Best Book of the Year and an American Library Association Notable Book, among other distinctions. However, some in Troy have expressed concern about the novel.

District superintendent W. Charles Young said that three or four people had emailed the district with concerns about the book and one person had called. He said a couple of people alluded to a rape scene in the book. Young said those contacting the district were also concerned about offensive language in the book.

According to Young, the book is proposed to be optional reading for honors students in tenth grade. He said it would help satisfy certain state mandates regarding World Literature and getting into Middle East culture.

*The Kite Runner* was one of the most frequently challenged books in 2008. “Set amid the destruction of

contemporary Afghanistan, this debut novel follows two boys, linked by love, lies, sacrifice, and betrayal, whose friendship endures, despite different life paths,” the Young Adult Library Services Association noted on its website.

Board member Larry Grace made the motion to table approving the book, stating that he wanted a chance to read “what’s in there.”

“I had many emails and letters, and I do not feel comfortable voting on it until I’ve had time to read it,” he said. “I think we ought to talk about that,” board member Ursula Fox said. She was also in favor of tabling a vote on approving the book. Reported in: *Troy Daily Review*, February 22.

### **Aiken, South Carolina**

A Schofield Middle School teacher embroiled in a controversy after reportedly reading to his students from a science fiction book that one parent described as “pornographic” will not face criminal charges, police said. Aiken Public Safety officials said the teacher did not do anything criminal, and the police investigation is closed.

The Aiken County School District’s internal investigation remains under way, Associate Superintendent Dr. Cecelia Hewett said.

On March 12, the teacher was placed on administrative leave while police and school officials investigated whether he breached school policy or the law when he read from three books, among them *Ender’s Game*, by Orson Scott Card, which became the focus of the probe when a 14-year-old student’s mother complained about the subject matter of the book.

She went to school officials on March 9, and then to Aiken Public Safety March 12. In addition to the Card novel, which has won several science fiction awards and is listed on numerous children’s literary review websites as appropriate for children 12 and older, the teacher read excerpts from an Agatha Christie novel and a young adult novel set in the Old West, officials said.

The teacher reportedly selected the books, but may have not followed school policy that would require the books first be reviewed.

Joy Shealy, school district academic officer for middle schools, said there is a policy that defines steps teachers should take when presenting supplemental material.

“One of the things that teachers are supposed to do is preview material for appropriateness for any questions that may come up,” Shealy said. “By doing that, we make sure the materials that are presented to students are age—and instructionally-appropriate—all the things that make a good instructional program.”

The incident came to light after a student’s complaint concerning materials characterized by the student and the parent as pornographic, according to a press release issued by the school district.

“The complaint was communicated to the school Friday and followed by a conference with the school administration Friday afternoon,” according to the district’s statement. The administration gathered a written statement from the student, which is normal procedure, and initiated an immediate investigation, according to the administration.

After reviewing the student’s statement, school officials indicated that the investigation would continue, school administrators stated. Administrators were reportedly concerned with the report that the books had curse words and terms in them that might not be age appropriate.

School officials said they expect the matter will be resolved quickly. Administrators said the investigation will include whether school staff followed district protocol in a timely manner.

“Matters that involve personnel considerations are dealt with promptly but must take into account reasonable measures to protect the privacy of students and staff,” according to the district administrator’s statement. Reported in: *Aiken Standard*, March 15, 21.

### **Liberty, South Carolina**

Some Upstate South Carolina parents are furious about a book their kids are reading in middle school. They say it’s too mature for their kids because of the sex. The book in question is an easy-to-read version of Shakespeare’s *Romeo and Juliet*. It’s sold out at several local book stores, possibly because it’s required reading for many students.

“The book gave descriptions of male and female private parts and talked about sexual acts,” said a Liberty Middle School parent. “I couldn’t believe my child was reading this book.”

*No Fear Shakespeare Romeo and Juliet* is basically a side-by-side, easy-to-understand translation of the original play. The Pickens County School District said they’re looking into the complaints about the book. Reported in: [foxcarolina.com](http://foxcarolina.com), February 21.

### **Knoxville, Tennessee**

The Knox County Board of Education and those who attended the March 7 Knox County Board of Education meeting got an earful when the parent of a 15-year-old Karns High School student read some passages from a book her son was required to read.

“How can I raise my child in a Christian home when he is required to read about this?” Lori Seal, who was accompanied by five other parents, was referring to a book that intimately describes in detail how a girl initiates a sexual experience with a boy and ongoing sexual encounters of teenagers that includes a girl named Alaska in boarding school.

On the list of required reading for Knox County High

Schools' Honors and Advanced Placement outside readings for English II is a book entitled *Looking for Alaska*, by John Green. It is described as a well-written fictional story about kids gone wild with porn, sex, drugs, alcohol, and death at a boarding school.

Seal said she objected not only to her child being required to read this book, but that it is not listed with a warning. On the required reading list for English II Honors are three books in order, *Looking for Alaska*; *A Raisin in the Sun*, by Lorraine Hansberry, and *Twelve Angry Men*, by Reginald Rose. Also on the list are six other books for English III and English IV that have an asterisk with a footnote warning they contain "Mature scene(s) or theme and language may be objectionable." *Looking for Alaska* has no asterisk, leading parents to conclude that it has no such matter.

Out of 216 pages there are 281 occurrences of words Seal considers inappropriate for any 15-year-old. That calculates to 1.3 times per page which indicated to Seal that it is the theme of the book. "If a teacher should get up and say these words in front of a class of students, they would be put in jail, and should be fired," Seal said.

The board members sat speechless at hearing such language. Two from the audience walked out. After reading the passages containing a number of words she termed "inappropriate for high school sophomores" she asked the Board to take appropriate action and remove *Looking for Alaska* from the schools, especially as required reading.

"I not only think they should take it off the required reading list, they should take it out of the schools," Seal added, "What literary benefit would my son gain from reading this book? It is pure porn. I was embarrassed to stand up there and read that, but as a parent I am teaching my son abstinence, then the schools promote and encourage sexual behavior."

Seal who is a labor and delivery nurse, also commented, "They don't warn against sexually transmitted diseases or the risk of pregnancy. I see children having babies after their first and only sexual experience."

The Board, knowing in advance her topic, told her before she spoke that they would listen but not respond. After the meeting, School Superintendent Dr. James P. McIntyre, Jr. said that the parent identified this as an issue a couple of weeks ago and they had already removed the book from the required reading list. He didn't say whether the book was still in the schools.

Seal said he was referring to two emails she sent him February 2 and February 10, to which she said he never responded. She also sent Knox County Schools English Supervisor an email explaining her objection to the book. Nevertheless, she said that after the second email in which she threatened to go to the media, she received an email from the superintendent's Chief of Staff Russ Oaks who referred her to an online "Reconsideration of materials

and alternate materials recommendation" form she could download.

Dr. McIntyre said it was his opinion the matter had been resolved by removing the book as required reading. Reported in: *Knoxville Journal*, March 9.

## **publishing**

### **New York, New York**

A group of scholars and food activists are campaigning against what they say is a decline in scholarly publishing standards. But their emphasis on one publisher and one book raises questions for some observers about what's motivating the campaign.

Led by Frances Moore Lappé, the well-known author of *Diet for a Small Planet* and, most recently, *EcoMind*, the group has set up an online petition and a Web site, Scholarly Standards at Risk. They write, "We have encountered a particularly troubling example of the breakdown in academic-publishing standards, one that appears to be part of a wider decline."

That example is *Food Politics: What Everyone Needs to Know*, by Robert L. Paarlberg, published in 2010 by Oxford University Press. The book appeared as part of the press's "What Everyone Needs to Know" series, which covers a wide variety of subjects in an accessible, Q&A format. Most of the books in the series do not have citations.

That's one of the major objections lodged by members of Lappé's group. On their Web site, they write that the book "lacks citations for its many claims and fails to disclose that the author has been an adviser to the Monsanto Corporation," one of the largest corporate players on the agricultural scene. (Paarlberg and his publisher respond that he did not receive any money from Monsanto.) The Scholarly Standards at Risk petitioners complain that the book is "narrowly argued from one perspective" but that the publisher marketed it as a neutral overview. They call on the press to "uphold its own standards of excellence" and to pledge to use citations in all its books, to disclose authors' potential conflicts of interest, and to accurately represent books when it markets them. They do not include any other books or publishers as examples of a decline in standards.

They and Paarlberg come at the subject of food policy from very different angles. Paarlberg, a professor of political science at Wellesley College, has written about the benefits of so-called green-revolution technology, such as genetically engineered seeds. His previous book, *Starved for Science: How Biotechnology Is Being Kept Out of Africa*, was published by Harvard University Press in 2008. He has published with other university presses, including those of Cornell and Johns Hopkins, and has signed a new contract with Oxford, for a book on the politics of overconsumption.

Lappé is more in sympathy with the agro-ecological approach to food production, which centers on organic, local, traditional methods of farming. Lappé directs the Small Planet Institute, which focuses on grass-roots democratic projects around the world, with an emphasis on alleviating hunger and poverty. The other organizers of the campaign and petition include Molly D. Anderson, a professor of sustainable food systems at the College of the Atlantic, John Gershman, a clinical associate professor of public service at New York University, Philip D. McMichael, a professor of developmental sociology at Cornell University, and Ivette Perfecto, a professor of ecology and natural resources at the University of Michigan. Their online petition has gathered hundreds of signatures, although it's not clear how many of the signers are academics.

In interviews, Lappé, Anderson, and Gershman said that ideological differences with Paarlberg were not driving their campaign. "We really feel this is illustrative of broader concerns about university presses and the role they can play in modeling good academic practice" and informed public debate, Gershman said. "This is something we care about as academics, as scholars, as concerned citizens."

Lappé rejected the idea that books meant for a general readership don't require citations. "We're all part of this society, and an academic press has to model evidence-based discourse," she said. "That's where academic presses have to hold the line."

Paarlberg's book "jumped out for us," Anderson said, "because we know the topic." Asked why the group decided not to raise its objections in reviews or op-eds, Anderson responded, "It seemed to be a bigger issue to us that couldn't just be settled by saying 'There are problems with this book.'"

That's not how it appears to Paarlberg. "Clearly what they're doing is launching a campaign against my book," he said. "They're not launching a campaign against scholarly standards." He pointed out that Lappé is not an academic. "I don't believe she's ever published in a peer-reviewed journal," he said. "I don't believe she's ever published with a university press. It's pretty obvious she doesn't like my book."

When Oxford approached him to write for the series, he said, he was a little skeptical about the Q&A format but not too troubled by the lack of citations, because it was part of the series format. "I was confident that, if challenged, I could lead someone to the source of my information," he said. "So I didn't feel insecure about it."

As for conflicts of interest, Paarlberg pointed out that he was never employed by Monsanto, and that the advisory group he served on was "a notable group of obviously independent people," including the president of the World Wildlife Federation, a former dean of the Tufts school of nutrition, and a Kenyan parliamentarian. "I naively thought this would protect me from accusations of my independence

being compromised," he said.

Paarlberg described himself as pleased with Oxford's response to Lappé, et al. In September 2011, Paarlberg's editor, Angela Chnapko, defended the book and the author in a three-page response to Lappé. The editor pointed out that the book went through Oxford's peer-review process. She noted that the series, aimed at general readers, does not use citations. She reviewed Paarlberg's various associations, including grants from the Rockefeller and Gates foundations, and noted that he declined an honorarium for his dealings with Monsanto. "I do not believe that any of this compromises his scholarly integrity," the editor wrote. The letter is linked to on the Scholarly Standards at Risk site.

Niko Pfund, the press's president and academic publisher, said the publisher had weighed the complaints of Lappé, et al. "We stand firmly behind Robert Paarlberg and the book he has published," Pfund said. "We reject the suggestion that OUP's desire to reach a broader audience with a series of books on issues of current public interest—all of which have been subjected to the same, vigorous pre-publication process which all OUP books undergo—in any way translates to a decline in scholarly rigor or standards."

Pfund added, "Sometimes a difference of perspective is simply that."

Lappé said she and her group remain unsatisfied with Oxford's response. She plans to hand-deliver the petition to the press's British offices in April.

Meanwhile, Paarlberg's book has found its way onto some undergraduate syllabi. At least one professor said it adds a useful balance to the reading mix and that he compensates for the lack of citations by making sure his students know where the author's coming from.

Ike Sharpless, an adjunct professor of political science at the University of Massachusetts at Lowell, assigned Food Politics for his spring 2012 undergraduate course on "The Politics of Food." It's one of seven required-reading texts, along with Raj Patel's *Stuffed and Starved: The Hidden Battle for the World Food System*, Marion Nestle's *Food Politics: How the Food Industry Influences Nutrition and Health*, and Michael Pollan's *The Omnivore's Dilemma*.

He included it as a counterweight to the other reading, he said, particularly *Stuffed and Starved*. "If it were being assigned as the only resource for class discussion, however, I agree that would be a serious problem," he said.

He has found that most of his students disagree with Paarlberg's take on the issues. "Not presenting this perspective would only prevent them from nuancing their own views," he said. "More generally, I'm going to tell my students about his links to Monsanto (and anyone with the most basic Google skills could find such info)." He also makes sure the students know about Patel's and other authors' links to the antiglobalization movement.

Given how charged the subject is, Sharpless harbors some skepticism about what's motivating the Scholarly

Standards at Risk campaign. “I would agree with the concerns raised about citations and conflicts of interest, but would raise a countervailing concern that the core critique may really be that Lappé and others simply disagree with Paarlberg’s conclusions, and that calling for censure on those grounds would be against academic integrity, not for it,” he said. Reported in: *Chronicle of Higher Education* online, March 5.

## prisons

### Harrisburg, Pennsylvania

One man’s art might be another’s pornography. . . but *Field & Stream*?

The list of publications that have been banned from entering state prisons is often surprising:

- A book, *Astral Travel for Beginners*.
- A state-funded tourism brochure prison officials thought advocated insurrection.
- The State Employees’ Retirement Code, on the basis that it was evidence of criminal activity.

Secretary of Corrections John Wetzel said things are going to change. “I’m making some tweaks to how we do business,” Wetzel said.

State prison inmates may receive books, newspapers and magazines, but only if they are sent directly from the publisher or bookseller. Even then, each is reviewed by a local committee of employees in each prison. “We do look at everything,” said Sue Bensinger, a Department of Corrections spokeswoman.

Corrections policy makes clear that printed material may be denied if it’s “a potential threat to security, or contains obscene, pornographic or nude content.” The policy gives detailed criteria—with exceptions—and must be cited when enforced.

“The majority of these magazines are not an issue,” Bensinger said. What’s more, prisons have library systems and participate in interlibrary loans, she added. But books and magazines are withheld: more than 2,000 of them between 2008 and 2010.

An edition of the *Erie Times-News* was barred with no reason given. The offending front page included a story that details how a convicted murderer escaped from the State Correctional Institution at Albion inside a garbage can loaded on a truck and then driven outside the prison.

A book of Pablo Picasso’s art was banned, citing the nudity provision of the policy, which allows for exceptions when the material has artistic value. Picasso apparently did not.

A book containing 104 color plates of Michelangelo’s art was also prohibited—not because of nudity, but rather on

the basis that it was racially inflammatory or could cause a threat to the inmates and staff.

That raises the question of how arbitrary some decisions might be. Magazines such as *Maxim*, *Playboy* and *Penthouse* were often barred, which is little surprise. But so too were issues of *Men’s Health*, *Field & Stream* and *Outdoor Life*.

The reasons for barring an issue of *The New Yorker* magazine appeared well-founded. One page featured a small but gruesomely realistic image of an apparently dead, naked woman half-buried in dirt with a man stalking off into the trees in the background. The issue also contained an article on “the secret life of knives” called “Sharper.”

Likewise with an issue of *Field & Stream* containing a multipage feature entitled “50 Skills: Hunt Better, Fish Smarter and Master the Outdoors.” There are instructions on how to construct and fling a bola, sharpen an ax and start a fire with binoculars.

Several issues of *Popular Mechanics* were banned for similar “manly” features on how to sharpen a knife, how to remove blood stains from fabric and how to “shovel the right way.”

Yet an issue of *Outdoor Life* was barred based on one offending page, which allegedly offered information on the manufacture of a weapon. In fact, the page features a full-page painting of a bear. Another offending page turned out to be an ad for Duracell batteries.

An issue of *Field & Stream* was barred because an article on how to use Google Earth to improve deer hunting strategy contained a map. In fact, there is no map except for a small, stylized graphic on an ad for a Bushnell GPS. Maps are a common basis for withholding material.

An issue of *Outdoor Life* was barred because a full-page ad promoting the Pennsylvania Wilds contained a small—but accurate—map of the Williamsport area of Lycoming County, not far from the Department of Corrections’ Quehanna Boot Camp facility. On the other hand, publications that might well have been barred because of a map were not.

A brochure promoting the “Scenic Route 6 Artisan Trail” featuring a large map of the entire northern tier of the state was prohibited instead under the policy’s pornography section, “where one of the participants is dominating one of the other participants and one of the individuals is in a submissive role or one of the participants is degraded, humiliated or willingly engages in behavior that is degrading or humiliating.”

As the reasons were read to her, Terri Dennison, head of the Pennsylvania Route 6 Tourist Association that publishes the brochures, just kept exclaiming “Oh, my God.” The brochure contains no such material.

Another Route 6 brochure with a similar map was banned because it allegedly advocated “violence, insurrection or guerrilla warfare against the government.” By that

time, Dennison was laughing. “That’s hysterical,” she said, “and I thought it was just promotional writing.”

The evident sloppiness of prison committees in citing reasons for withholding material could have a darker side. While a book such as *Identity Theft* is an obvious candidate for exclusion, a book such as *Astral Travel For Beginners* is not, unless the committee believes astral travel is a means of escape. In fact, the book was prohibited on the basis that it was racially inflammatory or could cause a threat to security. Nothing in the book supports that claim.

*Protection Spells & Charms* was banned because it was deemed to contain “information regarding the manufacture of explosives, incendiaries, weapons, escape devices or other contraband.” It does not. *Wicca for Men* was banned for the same reason. All three deal with Wicca, which is recognized as a legitimate religion by federal courts but is still subject to some degree of prejudice.

Secretary Wetzel would not discuss specifics. All happened before his watch. What he did say is things are changing, notably the policy on who has the final say of what gets banned. Final authority will rest in the policy office, he said, “so we don’t have some cultural stuff at one facility.”

Wetzel said he wants to be sure First Amendment protections are in force. Each book banning is a decision the department might have to defend in court, and “I want to make sure we can defend it,” he said.

He acknowledged the reasons for decisions aren’t always straightforward. The nature of inmates are taken into consideration. “Some [decisions] are real obvious,” Wetzel said. “Some are more nuanced. ... Those are the ones that get you on the front page of the paper.”

Since Wetzel has been in charge, only twice has such a nuanced decision been brought to him. One publication he allowed in, and one he didn’t. “Sometimes,” he said, “a cigar is just a cigar, and it looked like just a cigar to me.” Reported in: *Harrisburg Patriot-News*, February 13.

## foreign

### Beijing, China

The way the Chinese government censors and deletes politically-sensitive terms online has been revealed for the first time.

As expected, the censors are hypersensitive to criticism of the state—but also to people critical of the so-called “Great Firewall,” the network blocking technology that prevents Chinese people browsing the Internet freely. The U.S. study also shows Beijing’s censorship machine works in real time—and can adapt quickly to emerging issues. It’s also location-dependent, being far more active, when required, in dissident regions.

David Bamman, a computer scientist and linguist at Carnegie Mellon University in Pittsburgh, got the idea for

the research last summer when he noticed how quickly false rumours of the death of former Chinese president Jiang Zemin disappeared from China’s Twitter equivalent Sina Weibo.

“I went to check back on some of those messages and it really shocked me to discover that around 70 per cent of them had been deleted,” Bamman said. So with colleagues Noah Smith and Brendan O’Connor he decided to study the censorship mechanism more closely.

They took advantage of the fact that Sina Weibo, China’s biggest commercial microblogging network, publishes an interface to encourage developers worldwide to devise smartphone apps that allow Chinese-speaking people anywhere to read and post Twitter-style 140-character messages. This interface allowed the Carnegie team to download nearly 57 million messages from Sina Weibo between 27 June and 30 September. Once they had these, they then examined Sina Weibo’s archive to see which were later deleted. “We could then see which terms in a message meant it had a higher chance of being deleted,” says Bamman.

As might be expected, criticism of state propaganda was not tolerated. Messages attacking China’s “Ministry of Truth” were zapped, as were ones involving calls for the “resignations” of incompetent government officials, such as that of the railways minister after a horrific train crash. Complaints about Fang Binxing—architect of the web censoring Golden Shield Project, nicknamed the Great Firewall—were also highly deleted, as were mentions of a pair of Communist Party meetings which became a code word for arranging pro-democracy protests last spring.

At least once the censorship seemed to work for the social good: when a false rumour started that eating iodized salt, rather than potassium iodide pills, would protect people from radiation leaks from the Fukushima Daiichi nuclear power station, the censors deleted the messages.

“What was also interesting was that messages you’d expect to have been deleted all the time—like mentions of the Falun Gong [spiritual movement] or the dissident and artist Ai Weiwei—were not done so every time. It would seem to suggest that there is no automatic, blanket deletion going on,” says Bamman. Rather it points to a high level of human involvement and a nuanced approach.

The censorship mechanism is also agile—able to turn its attention to troublespots on demand. “This is the most surprising thing that we saw,” says Bamman. “In Tibet there was an overall deletion rate of 53 per cent—against 12 per cent in Beijing and 11 per cent in Shanghai.”

Pádraig Reidy of the London-based pressure group Index On Censorship said the research throws new light on Chinese information control: “This study displays the remarkably hands-on nature of Chinese political censorship. While we tend to think of communist party censorship purely in terms of the ‘firewall’—blocking external

content—we can now see the intense and swift nature of internal censorship.

“This suggests incredibly close, real-time, manned monitoring of discussions and searches. We know that the Chinese government has thousands of people working on web censorship. This study proves how serious a project that is for the regime.” Reported in: *New Scientist*, March 2012.

### **Copenhagen, Denmark**

Customers of two ISPs in Denmark and Greenland found themselves unable to connect March 1 to Facebook, Google and 8,000 other sites that had been blocked on grounds that the pages contained child pornography. Police in Denmark confirmed that a “human error” led to the accidental censorship for customers of Siminn and Tele Greenland.

A notice on the blocked sites read: “The National High Tech Crime Center of the Danish National Police [NITEC], who assist in investigations into crime on the Internet, has informed Siminn Denmark A/S, that the Internet page which your browser has tried to get in contact with may contain material which could be regarded as child pornography. Upon the request of The National High Tech Crime Center of the Danish National Police, Siminn Denmark A/S has blocked the access to the Internet page.”

According to Danish site Politi.dk, the sites were blocked for more than three hours.

Johnny Lundberg, the head of NITEC, explained that the problem came about when an employee moved from one computer to another. When moving files, the employee accidentally put 8,000 legitimate sites in the wrong folder. Before the error could be realized, the two ISPs—both involved in a voluntary scheme to allow NITEC to automate child porn filtering—had copied the folder.

Lundberg apologized and said that the automation system had been altered and would require two employees to approve a site ban. However, Denmark’s IT-Political Association, an anti-surveillance and consumer rights group, believes that the child porn filter is flawed and could potentially be used as a blanket excuse for the police to ‘accidentally’ sensor anything.

“There is no reason to believe that DNS blocking helps against the spread of child pornography on the Internet, and the filter actually functions as an early-warning system for the organized crime behind websites with child pornography,” the group said in a statement. “Today led a seemingly banal human error by the police for a ‘kill switch’ for the Internet.” Reported in: *Tech Week Europe*, March 2.

### **Bratislava, Slovakia**

A Slovak court’s decision to block publication of an unfinished book about alleged high-level political corruption

written by investigative journalist Tom Nicholson has been described by critics as censorship.

A preliminary injunction issued in early February by the Bratislava 1 District Court ordered Nicholson’s publisher, Petit Press, to desist from publishing the book or any other documents based on the so-called Gorilla file, a document purporting to show high-level corruption between private businessmen and Slovak politicians.

The file is based on leaked information allegedly recorded by the country’s SIS intelligence service between 2005 and 2006. It points to collusion between high-ranking members of Mikoláš Dzurinda’s government and private companies including Penta, a Slovak-owned financial group. The document is accessible on the Internet and has led to large street protests as the country geared up for general elections in March.

An official investigation into the file has been underway since January. It has now gone international after Slovak police sought the assistance of authorities abroad to probe international financial transactions associated with the case, Slovak Interior Minister Daniel Lipšic said.

In addition to banning the publication of his book about the scandal, the court also ordered Nicholson to submit his final manuscript as well as documents he used for research, the daily *Sme* reported. The presiding judge, Branislav Král, said he based the verdict on two issues: the plaintiff’s right to personal protection and Nicholson’s right to free expression.

“It was necessary to judge very sensitively to which right I should attribute greater protection,” Král told *Sme*. “I claim that it is the right to protection [from defamation] of the individual.”

Prime Minister Iveta Radicová called the court’s decision a violation of free speech rights. “[The book] is not *Mein Kampf*,” she said. “I strongly object to [the ruling], but I cannot do anything more lest I interfere with the independence of the courts.”

The court issued the injunction in response to a complaint submitted by Jaroslav Haščák, co-owner of the Penta financial group, whose name figures prominently in the Gorilla file. The file describes his conversations with senior officials from both the ruling coalition and the opposition in 2005 and 2006.

Petit Press Director Alexej Fulmek and the head of the International Press Institute’s Slovak branch, Pavol Múdry, both described the court’s decision as censorship. Múdry described the move as “preventive censorship, since the book has not yet been published, and no one except the author knows what is in it.”

“This is how totalitarian regimes proceed,” Múdry continued. “Suspensions of large-scale corruption are in question, and public funds are involved. In such a case, public

*(continued on page 131)*

## from the bench



## U.S. Supreme Court

Over the course of an hour-long argument February 22, the Supreme Court seemed gradually to accept that it might be able to uphold a federal law that makes it a crime to lie about military honors, notwithstanding the First Amendment's free speech guarantees. The justices were aided by suggestions from the government about how to limit the scope of a possible ruling in its favor and by significant concessions from a lawyer for the defendant.

The case arose from a lie told in 2007 at a public meeting by Xavier Alvarez, an elected member of the board of directors of a water district in Southern California. "I'm a retired Marine of 25 years," he said. "I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy."

That was all false, and Alvarez was prosecuted under a 2005 law, the Stolen Valor Act, which makes it a crime to say falsely that one has "been awarded any decoration or medal authorized by Congress for the armed forces of the United States." Alvarez argued that his remarks were protected by the First Amendment.

His case ran into trouble at the Supreme Court as it emerged that many justices accepted two fundamental propositions. First, most of the justices seemed to accept that the First Amendment does not protect calculated falsehoods that cause at least some kinds of harm. Second, there seemed to be something like a consensus that the government has a substantial interest in protecting the integrity of its system for honoring military distinction.

To arrive at those two propositions, the justices worked through any number of hypothetical questions and worried about the collateral damages to free speech values that a

ruling upholding the law might generate.

Justice Stephen G. Breyer said it was all right to lie, for instance, when asked, "Are there Jews hiding in the cellar?"

Justice Samuel A. Alito, Jr. suggested that it was acceptable to punish a false statement that "your child has just been run over by a bus."

Justice Sonia Sotomayor asked about false statements made while dating. Justice Elena Kagan asked about lies concerning extramarital affairs.

Chief Justice John G. Roberts, Jr. asked whether Congress could make it a crime to lie about having a high school diploma. Solicitor General Donald B. Verrilli, Jr. responded that some states had indeed enacted laws concerning diplomas from public universities, and he indicated that they would be constitutional if they concerned calculated lies about verifiable facts that led to real harm.

Verrilli listed several laws that punish those kinds of falsehoods, including ones prohibiting false statements to federal officials and banning the impersonation of federal officers, as well as perjury. Similarly, he said, the Stolen Valor Act punishes only knowing falsehoods that result in "the misappropriation of the government-conferred honor and esteem," which he called "a real harm and a significant harm."

The hardest hypothetical question for the justices seemed to concern state laws that make it a crime for politicians to lie in some settings. Verrilli said such laws might run afoul of the First Amendment because of their potential to chill truthful speech for fear of prosecution.

Justice Kagan asked a lawyer for Alvarez, Jonathan D. Libby, whether the Stolen Valor Act posed the same problem. "What truthful speech will this statute chill?" she asked. Libby's response seemed to surprise Justice Kagan. "It's not that it may necessarily chill any truthful speech," he said. "We certainly concede that one typically knows whether or not one has won a medal or not."

Justice Kagan considered what she had just heard. "So, boy, I mean, that's a big concession, Mr. Libby," she said.

Libby also acknowledged that the government may punish false speech that is intended to obtain something of value. Chief Justice Roberts asked whether Alvarez, who was politically active, benefited from his lie. Libby said that was possible. The chief justice said this, too, was "an awfully big concession."

Justice Anthony M. Kennedy seemed to summarize the court's conflicting impulses in the case. On the one hand, he said, the government should not establish "a Ministry of Truth." On the other, he said of lies like Alvarez's, "I have to acknowledge that this does diminish the medal in many respects."

The Freedom to Read Foundation and other media groups filed an amicus curiae brief in the case, *United States v. Alvarez*. In their brief, the media groups argue that while defamation and fraud are recognized historic exceptions to

the First Amendment, there has never been an exception for false speech. The media groups point out that briefs in support of the law filed by veterans groups had credited “investigative journalists” and other media with exposing false claims of having received military medals, “resulting in humiliation, shame, exhumation from Arlington National Cemetery, censure, and loss of employment,” demonstrating that the truth is best established through a free press, not criminal prosecution (see *Newsletter*, March 2012, p. 74).

There was universal agreement on one point at the argument. No one spoke up for Alvarez, including his lawyer. “Certainly, people are entitled to be upset by these false claims,” Libby said. “I mean, I’m personally upset by these false claims.” Reported in: *New York Times*, February 22.

The U.S. Supreme Court left intact March 26 two rulings by the federal appeals court in San Francisco that limit the ability of teachers and charter schools to spread religious messages in the classroom.

In one case, the U.S. Court of Appeals for the Ninth Circuit upheld a San Diego County school district’s orders to a high school math teacher to remove large banners declaring “In God We Trust” and “God Shed His Grace on Thee.” Those inscriptions and others that longtime teacher Bradley Johnson displayed on his classroom wall amounted to a statement of religious views that the Poway Unified School District was entitled to disavow, the appeals court said in a 3-0 ruling in September.

Johnson said he had hung the same banners since 1982 and described their messages as patriotic. He accused the district of discriminating against Christians by allowing another teacher to display a poster with the lyrics to John Lennon’s song “Imagine,” which includes a line about imagining no religion.

But the appeals court found that the “Imagine” poster had no religious purpose, and said a teacher has no right to “use his public position as a pulpit.”

In the other case, a different panel of the appeals court ruled 3-0 in August that Idaho’s Public Charter School Commission acted legally when it prohibited a charter school from using religious materials as textbooks.

The Nampa Classical Academy said it was using the Bible and other spiritual texts for cultural education, not religious indoctrination. But the appeals court said the state was entitled to ban the books as texts in order to avoid “governmental promotion of religion.”

The Supreme Court denied review of both cases without comment. They are *Johnson v. Poway Unified School District* and *Nampa Classical Academy v. Gosling*. Reported in: *San Francisco Chronicle*, March 27.

The Obama administration is urging the Supreme Court to halt a legal challenge weighing the constitutionality of a once-secret warrantless surveillance program targeting Americans’ communications that Congress eventually legalized in 2008.

The FISA Amendments Act, the subject of the lawsuit brought by the American Civil Liberties Union and others, allows the government to electronically eavesdrop on Americans’ phone calls and e-mails without a probable-cause warrant so long as one of the parties to the communication is outside the United States. The communications may be intercepted “to acquire foreign intelligence information.”

The administration is asking the Supreme Court to review an appellate decision that said the nearly four-year-old lawsuit could move forward. The government said the ACLU and a host of other groups don’t have the legal standing to bring the case because they have no evidence they or their overseas clients are being targeted.

The case arrived at the high court’s inbox after having two different outcomes in the lower courts. It marks the first time the Supreme Court has been asked to review the eavesdropping program that was secretly employed in the wake of 9/11 by the George W. Bush administration, and eventually largely codified into law four years ago.

A lower court had ruled the ACLU, Amnesty International, Global Fund for Women, Global Rights, Human Rights Watch, International Criminal Defence Attorneys Association, *The Nation* magazine, PEN American Center, Service Employees International Union and other plaintiffs did not have standing to bring the case, because they could not demonstrate that they were subject to the eavesdropping.

The groups appealed to the U.S. Court of Appeals for the Second Circuit, arguing that they often work with overseas dissidents who might be targets of the National Security Agency program. Instead of speaking with those people on the phone or through e-mails, the groups asserted that they have had to make expensive overseas trips in a bid to maintain attorney-client confidentiality.

The plaintiffs, some of them journalists, also claim the 2008 legislation chills their speech, and violates their Fourth Amendment privacy rights.

Without ruling on the merits of the case, the appeals court agreed in March with the plaintiffs that they have ample reason to fear the surveillance program, and thus have legal standing to pursue their claim.

The government disagreed. “Respondents’ inability to show an imminent interception of their communications cannot be cured by the asserted chilling effect resulting from their fear of such surveillance,” the government wrote the Supreme Court.

But even if the Supreme Court rejects the petition by Solicitor General Donald B. Verrilli, Jr., that does not necessarily mean the constitutionality of the FISA Amendments Act will be litigated. The lawsuit would return to the courtroom of U.S. District Court Judge John G. Koeltl in New York, where, if past is prologue, the Obama administration likely would play its trump card: an assertion of

the powerful state secrets privilege that lets the executive branch effectively kill lawsuits by claiming they threaten to expose national security secrets.

The courts tend to defer to such claims. But in a rare exception in 2008, a San Francisco federal judge refused to throw out a wiretapping lawsuit against AT&T under the state secrets privilege. The AT&T lawsuit was later killed anyway, because the same FISA Amendments Act also granted the phone companies retroactive legal immunity for their participation in the NSA program.

The FISA Amendments Act—which passed with the support of then-senator Barack Obama of Illinois—generally requires the Foreign Intelligence Surveillance Act Court to rubber-stamp terror-related electronic surveillance requests. The government does not have to identify the target or facility to be monitored. It can begin surveillance a week before making the request, and the surveillance can continue during the appeals process if, in a rare case, the secret FISA court rejects the surveillance application. Reported in: wired.com, February 22.

## **schools**

### **Tucson, Arizona**

A federal judge has rejected a request to reinstate Tucson Unified School District's contentious Mexican American Studies courses. The request was filed in February by the Mexican American Legal Defense and Educational Fund on behalf of the Latino plaintiffs in TUSD's decades-old desegregation case.

The February 29 ruling by U.S. District Court Judge David Bury was backed by special master Willis Hawley—the man charged with overseeing the development and implementation of TUSD's new plan to bring its schools into racial balance. Judge Bury wrote that the elimination of the courses, decided by the district's governing board in January, didn't intentionally segregate students, nor did it tip the racial or ethnic balance of students in any TUSD school.

For more than thirty years, TUSD operated under a federal court order to desegregate its schools before the order was lifted in 2009. At that time, TUSD began operating under a post-unitary plan that established a good-faith commitment to the future operation of the district. A portion of the plan called for the expansion of Mexican American Studies, which is what the Latino plaintiffs argued in requesting the courses be restored.

Though the post-unitary plan is still in place, Hawley was brought on board to create a new plan after it was determined TUSD did not act in good-faith compliance while it was under the desegregation decree, and that court oversight would be resumed. Despite the plaintiffs' argument, the judge and Hawley agreed that the discontinuation of the

classes does not violate the post-unitary plan.

Hawley reported to Bury that the new plan he is developing will include comprehensive strategies for meeting the academic and social development needs of Mexican-American students in the district. In response to Hawley's memo to Bury, the Latino plaintiffs filed a notice of their intent to object to the decision that the classes not be reinstated. Bury ruled that the plaintiffs can file an objection, but said he would not delay Hawley's work in the development of a new unitary status plan in the meantime.

For Sylvia Campoy, a representative for the Latino plaintiffs, the decision was disappointing. "The injustice pertaining to (Mexican American Studies) seems so very obvious, so painfully tangible—it is difficult to understand why it is not visible to those who could easily remedy the situation," Campoy said.

Tucson Unified School District eliminated the classes in January amid the threat of losing millions of dollars in state funding from Arizona schools chief John Huppenthal, who declared the courses illegal (see *Newsletter*, March 2012, p. 49). Reported in: hispanicbusiness.com, March 6; *Arizona Republic*, March 5.

### **Camdenton, Missouri**

A U.S. district court ruled February 15 that the Camdenton R-III School District must stop censoring web content geared toward the lesbian, gay, bisexual and transgender (LGBT) communities through discriminatory filtering software. The ruling ordered the district to not block content based on the viewpoints expressed by the website.

The American Civil Liberties Union and the ACLU of Western Missouri filed a lawsuit against the district in August 2011 after repeated warnings that its custom-built filtering software discriminates against LGBT content. The filter has a category that blocks LGBT-supportive information, including hundreds of websites that are not sexually explicit in any way. The filter does, however, allow students to view anti-LGBT sites that condemn homosexuality or oppose legal protections for LGBT people.

The lawsuit was filed on behalf of a Camdenton High School student and LGBT organizations whose websites are blocked by the filter: PFLAG National (Parents, Families and Friends of Lesbians and Gays), the Matthew Shepard Foundation, Campus Pride and DignityUSA, a Catholic LGBT organization.

"The court correctly recognized the constitutional rights of all students to viewpoint-neutral access to information," said Joshua Block, staff attorney with the ACLU LGBT Project. "It is absolutely possible to protect children from sexually explicit content while also protecting their First Amendment rights. Like thousands of other school districts across the country, Camdenton R-III will now begin using a filtering system that blocks pornography without

discriminating against LGBT-related content.”

The U.S. District Court for the Eastern District of Missouri said that the district’s filtering system “systematically allows access to websites expressing a negative viewpoint toward LGBT individuals by categorizing them as ‘religion,’ but filters out positive viewpoints toward LGBT issues by categorizing them as ‘sexuality.’”

Although the district argued that it would unblock individual websites upon request the court held that “students may be deterred from accessing websites expressing a positive view toward LGBT individuals either by the inconvenience of having to wait twenty-four hours for access or by the stigma of knowing that viewpoint has been singled out as less worthy by the school district and the community.”

The court also concluded that other filtering systems are available that “are much more effective” at filtering out pornography “and do so without burdening websites that express a positive viewpoint toward LGBT individuals.”

“The filtering system that had been installed at Camdenton R-III was arbitrary, ineffective and discriminatory,” said Anthony Rothert, legal director of the ACLU of Eastern Missouri. “Today’s ruling affirms that students will be free to search for resources for their gay-straight alliance, seek support against bullying and research history as it pertains to LGBT people, just as they would for any other subject.”

In the wake of the ruling, the ACLU and the district on March 28 announced a settlement of the case. The settlement requires the Camdenton School District to stop blocking the sites, submit to 18 months of monitoring to ensure compliance and pay \$125,000 in legal fees.

Over the last year, the ACLLU has asked officials from hundreds of school districts around the country to make changes in their Internet screening systems to eliminate bias, said Robert. All have agreed to, he said, except Camdenton.

The lawsuit—believed to be the first of its kind—did not claim that the rural district of 4,200 students purchased the software with the intent of discriminating. Rather, once there were complaints about the filter last year, school officials refused to replace it. An investigator for the ACLU was able to figure out how the filter works, but not who developed it.

This is known: The creator goes by “Dr. Guardian” and lives in Fareham, England, in a house that, according to a Google Maps image, has children’s bicycles in the front yard. “Some person, nameless and faceless, working out of his house in the United Kingdom, winds up determining what information students in Camdenton will have access to,” said David Hinkle, an expert on software filters with the ACLU. Reported in: ACLU Press Release, February 15; *New York Times*, March 26; *The Hill*, March 28.

## colleges and universities

### Louisville, Kentucky

A former University of Louisville nursing student who was dismissed for writing comments about patients on her MySpace page cannot collect damages as a result of being expelled, because she waived her free-speech rights when she signed an honor code that included a confidentiality agreement, a federal judge ruled April 2.

The former student, Nina Yoder, sued the university three years ago for dismissing her after learning of online postings she wrote that referenced her patients, gun rights, and abortion. A district court decision allowed Yoder to re-enroll, and she earned a bachelor’s degree in nursing in 2010. Yoder sought damages from the university, but U.S. District Judge Charles R. Simpson III ruled that she had “had no constitutional right” to write about what she saw as a student because of the honor code’s confidentiality agreement.

“Because Yoder herself agreed not to publicly disseminate the information she posted on the Internet, she is not entitled to now claim that she had a constitutional right to do so,” Judge Simpson wrote.

In one post, Yoder aired anti-abortion views in describing patients who expressed surprise that they were pregnant. She said the university retaliated against her for what she wrote, and the university countered that she was dismissed because she violated its confidentiality agreement. Judge Simpson ruled that Yoder’s detailed descriptions of patients constituted a “clear violation” of the agreement.

“It is definitely a surprise,” Yoder’s lawyer, Daniel J. Canon, said. “As far as I know, no court in the country has ever approved this degree of control by a university over its students’ speech.”

“This has always been an academic case which was handled appropriately by the university,” a university spokesperson countered. Reported in: *Chronicle of Higher Education* online, April 2.

### Toledo, Ohio

A federal judge on February 6 dismissed the lawsuit of a former University of Toledo administrator who complained that the university violated her rights to free speech and equal protection when it fired her nearly four years ago for writing a column critical of gay rights.

In April 2008, Crystal Dixon, who was associate vice president for human resources, wrote a letter to the editor of the *Toledo Free Press*, in which she objected to the notion that gay people are “civil-rights victims.” Unlike one’s race, homosexuality, she wrote, is purely a choice.

Dixon argued in her lawsuit, among other things, that the university had fired her for speech protected under the First

Amendment. But a court ruled that her remarks, as a public employee, were sufficiently insubordinate for the university to be legally justified in firing her. The judge said that the university had the right to protect its interests in making gay employees feel welcome, attracting prospective employees who may be gay, and avoiding potential discrimination lawsuits, all of which may have been threatened by Dixon's comments.

In his ruling, Judge David A. Katz found that the nature of Dixon's position meant that she did not have First Amendment protections from being punished for expressing her views in a public forum. The "plaintiff's interest in making a comment of public concern is clearly outweighed by the university's interest as her employer in carrying out its own objectives," Judge Katz wrote.

The ruling focused on the rights of Dixon as an administrator—and none of the rationales outlined in the decision would apply to a faculty member or many other employees at the university who did not have positions of authority. While federal courts historically have recognized strong First Amendment rights for employees of public colleges and universities, this case illustrates an area where those rights may be limited: when an official takes a public stand contrary to the university's views on an area of her responsibility. The university's policies specifically bar discrimination based on sexual orientation.

The ruling comes amid a debate—with court rulings going in multiple directions—over the ability of public universities to enforce professional standards that require those being trained as counselors to be supportive of people with different sexual orientations. Many academics say that it is their responsibility to enforce such standards, while students who have been kicked out of two graduate programs have argued that their freedom of expression was compromised by being given the choice of being supportive of gay clients or leaving their programs.

In the Toledo case as well, Dixon claimed that her rights of free expression were violated in ways that limited her ability to make anti-gay statements. Unlike the disputes over the counseling programs, however, the Toledo decision was based on the rights of public entities to dismiss administrators, not students.

Here is what Dixon wrote in the *Free Press*: "As a black woman who happens to be an alumnus of the University of Toledo's Graduate School, an employee and business owner, I take great umbrage at the notion that those choosing the homosexual lifestyle are 'civil rights victims.' Here's why. I cannot wake up tomorrow and not be a black woman. I am genetically and biologically a black woman and very pleased to be so as my Creator intended. Daily, thousands of homosexuals make a life decision to leave the gay lifestyle." She went on to talk about "irrefutable" data showing higher-than-average salaries for gay people, and to discuss the fate of those who "violate God's divine order."

While Dixon did not give her University of Toledo job title in the piece, her role as chief HR officer at the university made her well-known to employees who saw the piece and circulated it. Given the role of the human resources department in promoting equal opportunity and a welcoming environment for all, advocates for gay employees questioned how the division could be led by someone who expressed such views. When Dixon was subsequently dismissed, she charged in her suit that hers were the rights being violated.

But Judge Katz ruled that she was not entitled to First Amendment protections from dismissal, given the nature of her job and the nature of her comments. He noted that her authority over hiring and firing decisions, and over various personnel policies, made her an administrator with significant power. And that made her comments problematic, he said.

"Plaintiff stated that she did not think homosexuals were civil rights victims," he wrote. "Not only does this statement directly contradict the university's policies granting homosexuals civil rights protections (such as the equal opportunity policy), but as [a job] appointing authority, plaintiff was charged with ensuring that the university maintained those protections in employment actions." Therefore, he added, her statements could be viewed as insubordination. Further, Katz noted that the university was reasonable in assuming that Dixon's statements could cause damage to the institution, by undermining the recruitment of gay employees, or by making current gay employees feel that their rights were not respected.

As to Dixon's claim that she was being punished for having religious views that gay people do not deserve protection, Judge Katz rejected that as well, noting that Dixon would not have been fired for having those views alone. But writing about them in a newspaper, he wrote, was more than thinking a particular thought. "In other words, contrary to her assertion, she was not terminated due to defendants discovering her views, but due to the public discovering them," he wrote. Reported in: *insidehighered.com*, February 10; *Chronicle of Higher Education* online, February 9.

### **Charlottesville, Virginia**

Virginia's highest court on March 2 threw out an attempt by the state's attorney general to make the University of Virginia surrender thousands of pages' worth of e-mail messages and other documents related to the work of one of the nation's most prominent climate scientists.

With its ruling, the state Supreme Court handed a definitive defeat to the attorney general, Kenneth T. Cuccinelli, and a victory to the university and the researcher, Michael E. Mann, a former University of Virginia faculty member who is now a professor of meteorology at Pennsylvania State University.

Mann is the creator of an iconic graph that has helped demonstrate the progress of man-made climate change by showing estimates of global temperature records over the past 1,000 years. Cuccinelli is a high-profile Republican who is now running for governor and who said he wanted the documents to search for evidence of research fraud in Mann's work.

"I'm pleased that this particular episode is over," Mann said in a written statement. "It's sad, though, that so much money and resources had to be wasted on Cuccinelli's witch hunt against me and the University of Virginia when it could have been invested, for example, in measures to protect Virginia's coastline from the damaging effects of sea-level rise it is already seeing."

The university spent more than \$570,000, all from private sources, defending the case over the past two years, a spokeswoman said. Its victory, however, was complete. The court made clear the state institution enjoys full exemption from the state's Fraud Against Taxpayers Act, which Cuccinelli had cited as his basis for demanding records of Mann's work.

"The University of Virginia, as an agency of the commonwealth, does not constitute a 'person' under the Fraud Against Taxpayers Act and therefore cannot be the proper subject" of a records demand, the court wrote in its opinion.

It is an "important decision that will be welcomed here and in the broader higher-education community," said Teresa A. Sullivan, president of the University of Virginia, where Mann served as an assistant professor of environmental sciences from 1999 to 2005. The decision also carries great weight for researchers, said Michael H. Halpern, head of the Scientific Integrity Program at the Union of Concerned Scientists, an advocacy group. Cuccinelli "didn't have a legal leg to stand on in his pursuit of Mann's and other scientists' private correspondence," and the university deserves praise for firmly defending that principle, Halpern said.

The seven-member court, in a majority opinion written by Justice LeRoy F. Millette, Jr., said it was dismissing Cuccinelli's case "with prejudice," meaning he cannot bring any further action on the same claim. The majority, in explaining its deference to state institutions, cited "ancient" legal interpretations dating to a time when it was recognized that "the king shall not be bound unless the statute is made by express words or necessary implication to extend to him."

One justice, Elizabeth A. McClanahan, dissented from the majority's dismissal of the lawsuit with prejudice. She agreed that the University of Virginia should be exempt from the fraud statute but said that Cuccinelli should be given other opportunities to seek records that might show fraud by Mann.

Cuccinelli, in pursuing a fraud allegation, suggested that Mann might have intentionally misrepresented scientific findings in order to obtain research grants. In a statement, he said he would now move to dismiss a follow-up request for documents that is still pending in Albemarle County Circuit Court.

"From the beginning," Cuccinelli said, "we have said that we were simply trying to review documents that are unquestionably state property to determine whether or not fraud had been committed. Today, the court effectively held that state agencies do not have to provide state-owned property to state investigators looking into potential fraud involving government funds."

It was not the end of investigations aimed at Mann, who has become a lightning rod for activists seeking to challenge scientific findings about the rise in average global temperatures. The American Tradition Institute, a think tank with roots in the oil and gas industry, has filed its own lawsuit against the university, complaining that it has failed to respond adequately to an open-records request that seeks many of the same e-mails and other documents demanded by Cuccinelli.

The university so far has granted the American Tradition Institute access to about 2,000 of some 14,000 e-mails that it is seeking, said David W. Schnare, a lawyer who heads the institute's Environmental Law Center. That case is pending in Prince William County Circuit Court, with a decision expected within a few months, Schnare said.

Mann recently finished writing a book, *The Hockey Stick and the Climate Wars*, that depicts the efforts by Cuccinelli and the American Tradition Institute as part of a coordinated industry-financed campaign to raise doubts about the science of global warming.

Mann said in his statement that he had faced attacks from "powerful vested interests who simply want to stick their heads in the sand and deny the problem of human-caused climate change, rather than engage in the good-faith debate about what to do about it." Reported in: *Chronicle of Higher Education* online, March 2. □

## is it legal?



### library

#### Seaside, Oregon

A faith-based nonprofit organization has filed a lawsuit against a public library in Oregon for denying the use of a meeting room because of their religious nature. The Florida-based nonprofit organization called Liberty Counsel filed the lawsuit, claiming that the library's policy discriminates on the basis of religious content and viewpoint. The policy, according to the legal brief, is a "blatant violation of Liberty Counsel's constitutional rights."

The lawsuit stems from a request by Benjamin Boyd, of Enterprise, who wrote a letter August 6, 2010 seeking to use the meeting room from 4 to 6 p.m. October 5, 2010. He identified himself as an Oregon volunteer with the Liberty Foundation (now known as the Liberty Counsel).

Boyd said in his letter that the foundation "would like to sponsor a free evangelical outreach in Seaside to help mold children into responsible and respectful citizens by shaping their moral consciousness from a Christian and Biblical viewpoint. We believe there is no better way to accomplish these goals than through interactive presentations, discussions and exercises," Boyd wrote.

Liberty Counsel is seeking a federal judge's order declaring the policy unconstitutional and requiring the library to allow public meetings in its community room "without regard to the religious viewpoint or content of Liberty Counsel's message, on the same terms and conditions as any other group that is permitted to use the room." Allegedly discriminating on the basis of religious content and viewpoint, the Public Library of Seaside faces charges for violating the First Amendment rights of the Liberty Counsel which tried to hold an educational meeting at the library that included religious content, but was denied permission.

"Of all places, a public library is supposed to welcome multiple viewpoints," Mathew Staver, founder and chairman of Liberty Counsel, said. "It is astounding that public libraries continue to have these types of unconstitutional practices."

Under the library's policy, meeting rooms, which are offered free of charge for nonprofit groups like Liberty Counsel, were not to be used for "religious services or proselytizing." The only reason provided by a library employee was that the group's proposed use of the room was considered a "use for religious services or proselytizing," which was strictly prohibited by policy.

A few months later, the group called the library once again inquiring about the possibility of using the meeting room for a presentation in the near future that would be similar to their first proposal. An employee, however, stated that their policy was still in effect and that he saw no reason for the organization to apply for use of the room because it would not be approved.

Liberty Counsel argues that the Seaside Library has permitted other groups and nonprofit organizations to use the library meeting room to discuss social, historical or cultural issues from a secular viewpoint. But their restriction on religious groups appeared to be a "blatant violation of ... constitutional rights."

"The policy, on its face and as applied, denies equal treatment to LC ... shows hostility toward LC's religious beliefs ... discriminates against LC on the basis of content and viewpoint ... [and] violates LC's express constitutional rights," the organization contended.

"LC has and will continue to suffer damages as a result of the library's actions because LC must divert its resources and efforts from its mission of education and legal defense in order to bring this action to protect its own fundamental rights."

"The library must allow LC to hold public meetings in a meeting room without regard to the religious viewpoint or content of LC's message, on the same terms and conditions as any other group that is permitted to use the room," the suit contends. Reported in: *Daily Astorian*, March 2; *Christian Post*, March 1.

### schools

#### Garrett, Indiana

An Indiana high school senior has been expelled for a Tweet he says was posted from home on his personal account.

"One of my tweets was, 'f--- is one of this f---ing words you can f---ing put anywhere in a f---ing sentence and it still f---ing makes sense,'" Garrett High School senior Austin Carroll said. The expulsion came when Carroll was on the home stretch toward graduation. Carroll's mother

Pam Smith said she doesn't agree with her son's Tweet, but doesn't agree with an expulsion either. To her, a suspension lasting several days is more appropriate.

Carroll says he doesn't think he should be punished by the school for what he posts on his own time and on his own computer. The student is finishing high school at an alternative school and will be able to graduate.

"I thought it was pretty funny, the school didn't think so; they thought it was inappropriate," Carroll said. "I think it's inappropriate, too, but I just did it to be funny.... I just want to be able to go back to regular school, go to prom and go to everything that a regular senior would get to do in their senior year."

Carroll's expulsion followed another incident at an Indiana school in which two students faced similar disciplinary action in January for creating fake Twitter accounts impersonating their principal. Tweets from the accounts, the *Indianapolis Star* reported, were sexually and racially charged.

School districts across the country have implemented or are considering policies that opens dialogue on what the school's role is in social media and what action should—or shouldn't—be taken against what students and teachers post online outside of the classroom. A bill that would allow schools to punish students for off-campus activities has advanced in the Indiana legislature, permitting schools to suspend or expel students for engaging in activities away from school and after hours that "may reasonably be considered to be an interference with school purposes or an educational function."

West Virginia recently adopted an anti-bullying policy that would punish students with detention or suspension for "vulgar or offensive speech" online if it disrupts school, and the U.S. Supreme Court last month let stand rulings that said schools could not discipline two Pennsylvania students for MySpace parodies of their principals that the students created at home.

A Kansas high school senior made the news when she tweeted disparaging remarks about Kansas Gov. Sam Brownback, posting to her account, "Just made mean comments at gov brownback and told him he sucked, in person #heblowsalot." Emma Sullivan was called into the principal's office, reprimanded and asked to write the governor a formal apology. Sullivan refused, and Brownback later issued an apology for his staff "overreacting" to the Tweet.

Disciplinary action for disagreeable online posts are not unique to students. A Florida high school's "Teacher of the Year" was suspended last August for an anti-gay post he wrote on his Facebook page. A new policy at the Los Angeles Unified School District states that teachers can be disciplined for "posting inappropriate, threatening, harassing, racist, biased, derogatory, disparaging or bullying comments toward or about any student, employee or associated person on any website." Reported in: [huffingtonpost.com](http://huffingtonpost.com), March 25.

## **Cassopolis, Michigan**

A Michigan teacher's aide is fighting a legal battle with the Lewis Cass Intermediate School District for removing her from her position after refusing to give the district access to her Facebook page.

Kimberly Hester was a teacher's aide at Frank Squires Elementary School in Cassopolis last April when she jokingly posted a photo of a co-worker to her personal Facebook page. The picture shows a pair of shoes and pants around the ankles. "It was very mild, no pornography," Hester said.

A parent who was Facebook friends with Hester, and thus could see her posts, notified the school about the image. A few days later, Lewis Cass ISD Superintendent Robert Colby asked her repeatedly for access to her Facebook. Each time, Hester refused. In response, the district's special education director wrote to her that "...in the absence of you voluntarily granting Lewis Cass ISD administration access to you[r] Facebook page, we will assume the worst and act accordingly."

Hester went on paid administrative leave, to collect workers' compensation, before she was suspended. She is now on unpaid leave and is scheduled for arbitration in May.

"I stand by it," Hester said in a statement. "I did nothing wrong. And I would not, still to this day, let them in my Facebook. And I don't think it's OK for an employer to ask you."

Hester's battle resonates with Michigan Republican state Reps. Matt Lori and Aric Nesbitt, who reportedly contacted the teacher's aide to include her story in House Bill 5523. The legislation would make it illegal for employers to request employees' login information for social networking sites.

But in Washington D.C. the House of Representatives struck down an amendment, titled "Mind Your Own Business On Passwords," that would prevent companies from requiring current or potential employees to surrender their passwords to social networking sites.

In response to widespread controversy over employers' requests for social networking information, Facebook issued a statement March 23 that reinforced its commitment to protecting user privacy, threatening lawsuits against companies who make such requests. Reported in: [huffingtonpost.com](http://huffingtonpost.com), April 1.

## **Minnewaska, Minnesota**

A Minnesota middle school student, with the backing of the American Civil Liberties Union, is suing her school district over a search of her Facebook and e-mail accounts by school employees.

The 12-year-old sixth grade student, identified in court documents only as R.S., was on two occasions punished for statements she made on her Facebook account, and was

also pressured to divulge her password to school officials, the complaint states.

“R.S. was intimidated, frightened, humiliated and sobbing while she was detained in the small school room” as she watched a counselor, a deputy, and another school employee pore over her private communications,” the suit alleges.

The lawsuit claims that her First Amendment rights were violated by employees at Minnewaska Area Middle School, in west-central Minnesota, as well as her Fourth Amendment rights regarding unreasonable search and seizure. The Minnewaska School District denies any wrongdoing.

“The district did not violate R.S.’s civil rights, and disputes the one-sided version of events set forth in the complaint written by the ACLU,” according to a district statement.

According to the complaint, R.S. felt that one of the school’s adult hall monitors was picking on her, so she wrote on her Facebook “wall” that she hated that person because she was mean. The message was not posted from school property or using any school equipment or connections, the lawsuit states. Somehow, the school principal got a hold of a screenshot of the message, and punished R.S. with detention and made her apologize to the hall monitor, the complaint says.

She was in trouble again shortly thereafter for another Facebook post, which asked who turned her in, using an expletive for effect, the lawsuit says. She was given in-school suspension and missed a class ski trip.

In the third incident, according to the complaint, R.S. was called in by school officials after the guardian of another student complained that R.S. had had a conversation about sex on Facebook. The girl was called to a meeting with a deputy sheriff, school counselor and an unidentified school employee, the court documents states. There, she was “intimidated” into giving up her login and passwords to her Facebook and e-mail accounts, the lawsuit says.

“R.S. was extremely nervous and being called out of class and being interrogated,” the lawsuit says.

The officials did not have permission from R.S.’s mother to view her private communications, and they gave the girl a hard time about some of the material they discovered, the lawsuit states.

“Students do not shed their First Amendment rights at the schoolhouse gate,” Charles Samuelson, executive director for the ACLU in Minnesota, said in a statement. “The Supreme Court ruled on that in the 1970s, yet schools like Minnewaska seem to have no regard for the standard.”

The school district maintains that such searches did not cross any boundaries. “The district is confident that once all facts come to light, the district’s conduct will be found to be reasonable and appropriate,” the district said. Reported in: [cnn.com](http://cnn.com), March 10.

### **Brooklyn, New York**

Controversy ensued after the Beth Rivkah all-girl high school in Brooklyn pulled from class every eleventh grade student who used Facebook and handed them a written ultimatum: delete their accounts from the social networking site and pay \$100 to the school, or be expelled. A school official said that the Facebook crackdown was to restore a level of Tznius—the Jewish Orthodox code of modesty—which they claim was on the decline because girls were using the site.

The Jewish newspaper the *Algemeiner* spoke to several students about the incident, all of whom requested to remain anonymous, saying the school felt Facebook wasn’t compatible with their moral code.

“People on the board said it’s not proper for us to have Facebook because girls might be talking to boys on Facebook or they might be putting up immodest pictures,” an unnamed student told the paper.

Shaindel Teichtel, the school’s principal, told the *Algemeiner* that the Facebook policy isn’t new. “There is nothing new about Beth Rivkah’s Facebook policy, which is over two years old,” Teichtel told the paper. “In keeping with the highest quality standards of educating our students, within the context of a pure and sacred Torah (Jewish law) environment.”

A Crown Heights community website reported, however, that students were encouraged to create Facebook profiles last year to vote for the school in a Kohl’s charity giveaway—an accusation Teichtel told the *Algemeiner* is “patently incorrect and hurtful.”

Earlier it was reported that the American Civil Liberties Union was getting involved after a 12-year-old was allegedly forced to hand over her Facebook password when school officials claimed she was having “online conversations about sex with another student.” Despite the ACLU’s claims that the school violated the girl’s First Amendment rights, school officials said they believe they acted responsibly. Reported in: [huffingtonpost.com](http://huffingtonpost.com), March 27.

### **Waynesville, Ohio**

A gay student suing his Ohio high school for prohibiting him from wearing a T-shirt designed to urge tolerance will be allowed to wear the shirt for one day.

Sixteen-year-old Maverick Couch’s lawsuit charges that Waynesville High School and the Wayne Local School District are violating his freedom of expression rights by saying the shirt is sexual in nature and inappropriate for school. Court records show that the district agreed April 4 to let Couch wear the shirt saying “Jesus Is Not A Homophobe” on the April 20 Day of Silence. The annual national event protests bullying of gay students.

The lawsuit is continuing. Couch said he tried to wear the shirt last spring for the Day of Silence and on several

other occasions, but school Principal Randy Gebhardt repeatedly rejected his request. Couch said he was told the shirt was not permitted because it was “indecent and sexual in nature.”

The shirt bears the image of a fish, similar to the religious symbol commonly used by Christians, painted in rainbow colors. The words “Jesus Is Not A Homophobe” appear below the fish.

“I don’t think the shirt is sexual at all. I don’t know how they can say that,” Couch said. “I don’t think it’s indecent.”

The school district’s superintendent, Pat Dubbs, said he believes Gebhardt considered the shirt a distraction and told Couch to turn it inside out when he wore it to school last year. He said the principal has done that on other occasions when students show up wearing potentially distracting or provocative shirts to school.

“We’re in the business of education and our main concern is maintaining an environment that is conducive to education,” Dubbs said. “We want our kids to be able to come to school and learn.” He would not comment on the lawsuit, other than to say it “really caught us off guard.”

Couch’s attorney, Christopher Clark, said Couch tried for months to resolve the dispute without going to court, but school officials wouldn’t budge. Clark said administrators initially said the shirt was disruptive and later that it was too religious. He said they now claim it violates rules prohibiting clothing that is indecent or sexual in nature.

“I think that borders on the absurd,” Clark said. “I do think what the school is doing is bullying. They’re trying to shame him into not wearing this shirt.”

Couch said he has been the victim of teasing and name-calling at school, but he said any bullying he’s experienced has never become physical. He said he wants to wear the shirt to show support for other gay students who do suffer from severe bullying.

Clark said students in other schools across the country wear T-shirts with a variety of images on the Day of Silence, and most have not run into problems.

Couch is asking U.S. District Judge Michael Barrett to order the school to allow him to wear the shirt whenever he wishes. He also is seeking attorney fees and unspecified damages, which Clark described as “nominal.”

Clark said he is unaware of any disruption caused by Couch’s shirt, other than complaints from two students. Couch said other students routinely wear religious-oriented shirts that include Bible verses or other statements. Reported in: Associated Press, April 5: *Cincinnati Inquirer*, April 3.

## colleges and universities

### Davis, California

A California university where campus police pepper-sprayed peaceful student demonstrators last year is facing

a federal lawsuit. Nineteen students and alumni at the University of California, Davis filed the complaint in U.S. District Court in Sacramento February 21.

The lawsuit is the latest fallout from the November 18 incident, when campus police pepper-sprayed sitting protesters who had set up an Occupy camp. Widely viewed online videos of the incident generated national outrage and calls for the chancellor’s resignation.

The lawsuit claims the university violated the demonstrators’ constitutional rights and seeks campus policies to prevent similar responses to non-violent protests, as well as unspecified damages. Reported in: *San Francisco Chronicle*, February 22.

### Rochester, Michigan

The guidelines for the “Writer’s Daybook” in English 380 at Oakland University specified that students should write regularly, using their notebooks to “try out ideas and record observations.” While students were told they had to use it regularly, and have their entries dated, they were generally encouraged to stretch. Spelling and punctuation would not be checked. Students were told to “try to relax and allow this to work for you.”

One of the students may have been too honest in his writing—and he has since been suspended for three semesters, and told to undergo counseling if he wishes to enroll in the future. The university maintains that Joseph Corlett violated a rule that states that “no person shall engage in any activity, individually or in concert with others, which causes or constitutes a disturbance, noise, riot, obstruction or disruption which obstructs or interfered with the free movement of persons about the campus.... [N]or shall any person in any way intimidate, harass, threaten or assault any person engaged in lawful activities on the campus.”

The statements in the student’s journal that set off his suspension came in an entry called “Hot for Teacher” in which he quotes the Van Halen song and then goes on to talk of his affection for an instructor. He writes of her physical characteristics, and says that there’s “no way I’ll concentrate in class,” when he can see “a sexy little mole on her upper lip beckoning....” In another entry, he says he is “not a maniac for every female,” but that he tries to “find something attractive about everyone.”

He writes of a number of female instructors’ physical characteristics. In one entry directed to Pamela Mitzelfeld, his writing instructor, he speculates about how—after the course is over—they might become Facebook friends. While the entries describe various women in ways that might make them identifiable to those on campus, and are written in ways many would find immature or insulting, the entries don’t contain threats against any of the women.

The Foundation for Individual Rights in Education (FIRE) maintains that Corlett’s rights were violated by

the university, and that there was no reason to treat him as threatening. “It is not against the law to be—or to be perceived as—a creep,” said Adam Kissel, vice president of FIRE. Noting that many great writers have expressed their admiration for women in ways that shocked and offended many, Kissel said, “I can hardly imagine what kind of counseling Oakland would have required for Quentin Tarantino, Vladimir Nabokov, or Stephen King.”

Officials at Oakland, a public institution in Michigan, declined to comment on the case, and said that the institution could not do so without violating privacy rules.

FIRE obtained many documents about Corlett’s treatment, and they reference an additional concern that FIRE does not consider valid. An e-mail from Mitzelfeld to various officials, in which she complained that the administration was not acting on her concerns about Corlett, said that he had a “gun obsession” that was public and that made her and other females on the campus feel unsafe. She specifically noted that he had written to the student newspaper defending the right of concealed carry of a weapon on campus.

“I cannot feel safe knowing that he might have a weapon with him at any time. He might have had a gun in his backpack when he sat twenty feet away from me at the writing center last week,” she wrote.

Corlett has in fact written a letter to the editor of the student newspaper about concealed carry. But Kissel of FIRE said that Corlett is entitled to have an opinion on guns. “I understand that the student never carried a weapon on campus or broke any school rules relating to weapons,” he said. “The entirety of this aspect of the concern” is about Corlett’s opinion about an opinion, not anything Corlett did, he added.

The Corlett dispute is one in a series of instances in which students have been scrutinized for their work in writing classes—more typically when the writing is explicitly dealing with violence. Colleges and universities have been criticized both for failing to act on student writing and for overreacting. The issue is complicated, writing instructors say. Instructors note that many students are immature, aren’t good writers and mix fantasy and reality without much attempt to differentiate the two. As a result, many say that if colleges took action about every odd paper or journal, many perfectly harmless students would be treated as dangerous.

But there are instances in which writing instructors do want their institutions to take action. After Cho Seung-Hui, a student at Virginia Tech, killed 32 people there in 2007, word emerged that the co-director of the creative writing program there had warned university officials that he might be dangerous.

In another instance, the Community College of Baltimore County was widely criticized when it told a student, based on an essay he wrote about his feelings as a veteran, that he needed to get counseling to remain at the college. The essay

described the student’s feelings about killing soldiers, but its language worried some at the college. The student opted not to return to the college. Reported in: *insidehighered.com*, February 13.

### **Minneapolis, Minnesota**

The Minnesota Supreme Court heard arguments February 8 in a closely watched case that questions whether the University of Minnesota violated a mortuary-science student’s constitutional right to free speech when it disciplined her for comments she posted on Facebook. Some of the comments referred to a cadaver used in an embalming class in a way that upset donors, and one post expressed a wish to stab someone with an embalming tool.

The student, Amanda Tatro, who received her diploma last fall, had argued that the university had no authority to discipline her for off-campus activities. In a decision last July, however, a state court of appeals ruled in favor of the university.

In arguments before the state Supreme Court Jordan Kushner, a lawyer for Tatro, stated that his client did not identify the cadaver by name or describe the dissection procedure in detail, which student-conduct rules forbid. Because her comments did not violate program rules, he said, “it would not be constitutionally reasonable for the university to restrict that speech.”

Mark Rotenberg, general counsel for the university, argued that the university was enforcing reasonable rules “to meet legitimate pedagogical objectives.”

The justices had questions for both sides, but Kushner seemed to get the bulk of the interrogation. “Do you agree that the mortuary-science program has an interest in the willingness of donors to participate in the program?” asked Justice G. Barry Anderson.

Another justice, Paul H. Anderson, asked why the court should not defer to university officials on a disciplinary matter, saying “they have to provide for the safety of their students.”

Kushner said he was not arguing that the university should have no authority over those matters. But in the case of Tatro, he said, there were “no specific threats. ... That would be a different situation.”

In comments to the Student Press Law Center after the hearing, Rotenberg said the university was not advocating for blanket restrictions on student speech. “This is a case about professional training,” he said. “The university is meeting a narrow interest that is context specific.”

The case will be among the first to analyze the free-expression rights of college students online, the law center said. The court did not announce when it might issue its decision. Reported in: *Chronicle of Higher Education* online, February 9.

## Pullman, Washington

Washington State University's college of journalism has found itself at odds with groups that advocate a First Amendment right to academic freedom after persuading a federal district court to adopt a limited view of the speech rights of faculty members at public colleges.

The case is now pending before the U.S. Court of Appeals for the Ninth Circuit and expected to be heard in the fall. In an amicus curiae brief submitted to that court in February, the American Association of University Professors and the Thomas Jefferson Center for the Protection of Free Expression jointly warned the Ninth Circuit that a ruling upholding the district court's logic would set "a dangerous precedent" jeopardizing academic freedom and the sound governance of public higher-education institutions.

The legal question that attracted the two groups' interest in the case is whether the courts should consider statements by a faculty member at the journalism college to be protected by the First Amendment or exempt from such protections under a 2006 U.S. Supreme Court ruling in the case *Garcetti v. Ceballos*.

In the *Garcetti* decision, dealing with a dispute within a district attorney's office, the Supreme Court majority held that the First Amendment does not protect public employees from being disciplined for statements made in connection with their jobs, but explicitly put off until later the question of whether its logic should apply to public employees' speech related to scholarship or teaching.

Despite the Supreme Court majority's caution that *Garcetti* should not be interpreted as necessarily applying to academic speech, several lower courts have since cited that precedent in decisions holding that public colleges had the right to discipline faculty members for speech deemed to be related to their jobs. Although other courts have declined to apply the decision to disputes involving public-college employees, the legal status of such employees' speech protections remains unsettled enough to generate worry that the courts will eventually eviscerate academic freedom at public higher-education institutions.

The Washington State case involves a lawsuit filed against current and former administrators of the university and its Edward R. Murrow College of Communication by David K. Demers, a tenured associate professor. He claims he suffered illegal retaliation—in the form of poor performance reviews, an "unnecessary" internal audit, and other unfavorable administrative actions related to his employment—for First Amendment-protected statements dealing with the journalism college's leadership and structure and, more broadly, with higher education and the social sciences.

The university, which argues that its actions in connection with Demers were justified, last June persuaded a federal district court judge to dismiss the case. In that summary judgment, Judge Robert H. Whaley of the U.S.

District Court based in Spokane concluded that the speech at issue was not protected by the First Amendment, and that Demers therefore had no case worthy of a trial, based on his conclusion that the speech at issue did not serve a public interest and qualified as employment-related speech covered by *Garcetti*.

Demers's appeal, and the brief submitted by the AAUP and the Thomas Jefferson Center on his behalf, argue that Judge Whaley erred in applying *Garcetti* and finding that no public interest was served by the statements at issue.

The speech in question, the advocacy groups' brief says, deals with "a matter of considerable public concern: the education of future journalists," because how journalists are educated "will in no small part determine how healthy American democracy remains in the Twenty-first Century." If the lower court's ruling is upheld, the groups argue, "other professors who desire to blow the whistle on ineffective or corrupt administrative practices may similarly be silenced."

If the Ninth Circuit overturns Judge Whaley's decision and the lawsuit goes to trial, the outcome will most likely hinge on how the jury sorts out a tangled web of claims and counterclaims related to the dispute between Demers and university administrators.

Washington State University has not yet filed its response to the professor's appeal. But Darin Watkins, a university spokesman, said that his institution was "comfortable with the facts we presented" in the lower court, which, he says, established that Demers was "fairly and fully evaluated."

The defendants named in the lawsuit are Erica W. Austin, a professor at the journalism school who served as its interim director and then its dean from 2006 until 2009, and three administrators whom Demers accuses of participating in or condoning actions taken against him: Erich Lear, who was dean of the university's College of Liberal Arts from 2006 until 2008; Francis K. McSweeney, the university's vice provost for faculty affairs; and Warwick M. Bayly, the university's provost and executive vice president. The journalism school was part of the university's College of Liberal Arts until July 2008, when it was split off as a separate college.

Demers, who began teaching at the journalism school in 1996 and received tenure in 1999, claims in his lawsuit that his job reviews were positive until 2006, when the school's director, Alex Tan, was removed in response to faculty tensions and replaced with Austin. The university had conducted an internal audit in 2004 to look into whether Demers had violated state ethics rules by requiring students to buy publications from Marquette Books, a publishing company that he owned, but it fully exonerated him after finding that he had derived no financial benefit from using the company's books in his class, his lawsuit says.

The lawsuit, filed in 2010, alleges that Austin, upon

taking over as head of the program, gave him unjust and untruthful job evaluations and that the institution's assessment of his performance "plummeted" as a result. She described inadequacies in his teaching, scholarship, and service and accused him of failing to hold classes when required, all criticisms that he denies.

In 2007, the lawsuit says, Austin asked for another, "unnecessary" internal audit to investigate potential problems stemming from Demers's connection with Marquette Books. It did not find he had any financial conflict, but it said he had improperly canceled classes and failed to file required disclosure forms. Demers has challenged those findings and accused the auditor of having had a conflict because she was the sister of a member of Austin's staff.

The professor's lawsuit says Austin also retaliated against him by changing his class assignments, removing him from a committee on the journalism school's reorganization, and in 2008 giving him a formal written warning that he was violating university regulations pertaining to the scheduling of final exams, time commitment to courses, and outside professional activities.

The lawsuit accuses Austin and the administrators to whom she answered of retaliating against him for speech that rubbed them the wrong way. In particular, it says he ran afoul of them by repeatedly requesting that the journalism school seek formal accreditation; vocally opposing the 2006 removal of Dean Tan and the manner in which he was subsequently replaced; expressing concern about the journalism program's shift away from professional training and toward theoretical research; writing and distributing a plan to improve the journalism school; and writing a book, *The Ivory Tower of Babel*, which criticizes university bureaucracies and questions the significance of social science as a force for changing public policy.

At the district-court level, Washington State argued that the negative reviews Austin gave Demers stemmed from her being directed to improve productivity, and that all of the actions the university has taken against him would have been taken regardless of the statements he claims are protected.

Judge Whaley's ruling in the university's favor held that all of the speech at issue was job-related and that, rather than relating to matters of public concern, Demers's statements regarding the accreditation and direction of the journalism school "related to internal matters" at Washington State and his statements related to the school's administration dealt with "personnel-related grievances and a workplace struggle for power."

The Ninth Circuit has not yet issued a decision dealing directly with the application of *Garcetti* to academic speech. It had an opportunity to do so in 2010, in a case involving an emeritus professor at the University of California at Irvine, but it avoided the question in holding that the university leaders named in the lawsuit had immunity from such

litigation. The unanimous decision handed down by a three-judge Ninth Circuit panel in that case said that whether professors have a First Amendment right to comment on administrative matters without fear of retaliation is "far from clearly established." Reported in: *Chronicle of Higher Education* online, March 1.

### **Madison, Wisconsin**

Do public institutions that prepare public-school teachers have the right to keep their education-course syllabi private?

That's essentially the question raised by a lawsuit filed January 26 in Wisconsin by the Washington-based National Council on Teacher Quality, which seeks to compel the University of Wisconsin and several of its campuses to provide such information under the state's open-records law.

The move came as part of the NCTQ's project to rate every school of education on up to eighteen standards. Many institutions are not voluntarily participating in the controversial review, and are turning over materials only in response to open-records requests filed by the council, a private nonprofit research and advocacy organization.

The University of Wisconsin provided some materials in response to the NCTQ's request, but stopped short of releasing course syllabi. "The Wisconsin board of regents and the [University of Wisconsin-Madison] have adopted policies providing that course materials and syllabi are the intellectual property of the faculty and instructors who create them. ... Such intellectual property is subject to the copyright of the creator," a university public-records custodian asserted in a letter to the NCTQ.

All Wisconsin campuses with teacher education programs have sent similar letters or refused to turn over syllabi, university spokesman David Giroux said. So far, the university has not responded to the lawsuit.

"We're looking at this very carefully," Giroux said. "It's very complicated."

Since it announced the review in January 2011, many teachers' colleges and their associations have criticized the NCTQ project, arguing that its methodology is flawed and that the review is ideologically driven. The NCTQ has denied those claims.

The Wisconsin lawsuit was filed in part because so many campuses were involved, said Arthur McKee, the managing director of teacher-preparation studies for the NCTQ. "It seemed very clear it was being coordinated, so we decided the best way to approach it was to take action against the whole system," he said.

Other public universities have made similar assertions, the council says. They include: Arkansas State University; Kansas State University; three Minnesota State University campuses; two Montana State University campuses; the University of Montana; three University of Nebraska

campuses; Southwest Minnesota State University; Southeast Missouri State University; and William Paterson University of New Jersey.

Further lawsuits are possible, but the council would prefer to work out agreements with the institutions, McKee said. Of states' flagship public institutions, 37 of 51 are cooperating with the review, he added.

"We really do not want to go to court if we don't have to. It is absolutely, positively, not the first thing we're going to do," he said.

States' open-records laws differ in the scope of what documents must be produced on request. Generally, they exclude only a narrow range, such as trade secrets or proprietary information. It is not clear where syllabi fall in that range. Other education documents vary by state: Standardized tests, for instance, are considered a trade secret in Ohio, but can be released in some instances in Kentucky.

Copyright documents, in the meantime, typically fall under fair-use exceptions, which allow for the use of such documents for research and noncommercial purposes, said Frank D. LoMonte, an attorney and the executive director of the Arlington, Virginia-based Student Press Law Center, which seeks to protect students' First Amendment rights.

"Copyright is not a secrecy law; it's supposed to protect against exploitation of your work, not the release of your work," LoMonte said. "It's particularly true once you've placed it into distribution."

But Ada Meloy, the general counsel at the Washington-based American Council on Education, a Washington-based higher education advocacy group, offered a different interpretation. "If they can't even get the syllabi in the first place," she said, "I'm not sure claiming fair use would give you access to it."

Some university counsel appear to share that interpretation, according to a memorandum sent by a critic of the NCTQ review. "Several members have raised the important issue of whether syllabi are considered the proprietary property of faculty and, therefore, not allowed to be shared or sold by students back to NCTQ for commercial purposes," Sharon P. Robinson, the president of the Washington-based American Association of Colleges for Teacher Education, wrote in a letter to members last October. "In some circumstances, members have vetted this topic with their institutions' legal counsel and have received confirmation that syllabi are considered proprietary." Reported in: *Education Week*, February 8.

## privacy

### Menlo Park, California

Two prominent Baltimore attorneys, one who is the majority owner of that city's baseball team, have filed a lawsuit against Facebook claiming the company spies on

the Internet activities of members after they have logged off the social network.

The suit filed by Peter G. Angelos, chief executive officer of the Baltimore Orioles, and William "Billy" Murphy, Jr. claims that Facebook's actions broke several local and national privacy laws, including the federal Wiretap Act and the California Internet Privacy Requirements Act.

"The days when online service providers can run roughshod over the privacy rights of their customers are over," Murphy said in a press release.

The Menlo Park company has said in the past that the technology in question does not compromise an individual member's privacy and was used to protect the social network from spammers. "We believe that this case is without merit and we will fight it vigorously," said Facebook spokesman Andrew Noyes.

The suit, filed in U.S. District Court in San Jose, comes at a time when Internet companies in general are coming under fire for privacy concerns.

Plaintiffs Laura Maguire of Charlotte, N.C., and Christopher Simon of Baltimore are seeking class-action status to represent millions of Facebook members. The suit claims Facebook illegally used browser cookies, identified last year by Australian security blogger Nik Cubrilovic, that could track users' Internet activity even after they logged out of Facebook.

The suit noted that Facebook said the tracking was inadvertent and that the company resolved the issue, but had also filed a patent for "tracking information about the activities of users of a social networking system while on another domain." Reported in: *San Francisco Chronicle*, February 24.

### Mountain View, California

The U.S. Federal Trade Commission should force Google to halt its plan to consolidate user identities across its services and fine the company for violating an October privacy settlement with the agency, privacy group the Center for Digital Democracy said in a complaint filed February 21.

Google is not making the changes to its privacy policy to provide convenience to users, as it claims, but to better track them and deliver targeted advertising, the CDD complaint said. "Google has communicated its real plans to expand data targeting throughout all its services, and to better compete against Facebook, to its advertising customers," said Jeffrey Chester, CDD's executive director. "They have failed to tell the truth to consumers."

The FTC should require Google to "accurately and honestly" inform users about the reason for the changes, Chester wrote in his complaint.

*(continued on page 132)*

## success stories



### library

#### Rochester, Minnesota

Superintendent Michael Muñoz admitted March 19 that he and two Rochester School Board members made a mistake and failed to follow district policy when they made an administrative decision to pull the book *And Tango Makes Three* from the shelf at Gibbs Elementary School.

“This was in error. The book should have been reviewed by the entire school board,” Muñoz said. “Again, this was the district’s mistake not to follow district Policy 606—Textbooks and Instructional Materials—and Procedure 606B—Reconsideration of Instructional Materials. We are truly sorry about the problems and issues this has caused. Rochester Public Schools is a district of inclusion and wants to be welcoming to all students and staff,” he added.

Officials say the book will be restored to the school’s library shelf now that a decision by the district’s Committee for Reconsideration of Resources on November 15 to keep the book in its media collection is in effect. “If it has not (been restored to the library shelf), it will be soon,” said district spokeswoman Jennifer Pozanc.

Pozanc said the full school board will reconsider the decision made by the reconsideration committee if a formal written appeal is filed. She was unable to say whether such an appeal had been filed.

The district’s statement was the latest in a controversy that started last fall when a Gibbs Elementary School parent challenged the book as inappropriate for elementary school students and asked to have it removed from the school’s library. The committee rejected the request and decided to keep the book on the school’s shelf. The committee—made up of principals, teachers and librarians—is responsible for reviewing controversial materials and deciding whether

such materials should remain available to students.

Sometime later, a request was made by the Gibbs Elementary School parent to reconsider the decision by the committee. Two school board members—Chairwoman Julie Workman and Vice Chairman Gary Smith—and Muñoz reviewed the book and made the decision to remove it, in contravention of the district’s policies, officials now say.

The book tells the true-life story of two male penguins who hatch and raise a baby chick. But its implied theme of homosexuality has made the book a perennial topic of dispute among parents and board members and in school districts across the nation. In 2010, the book was ranked No. 1 on the American Library Association’s Top Ten List of the Most Frequently Challenged Books. Officials say there is only one such book in the district’s schools.

On March 27, the parents who sought to remove the book decided not to appeal. The “temporary resolution” was reached during a meeting between the parents and Muñoz. But the agreement also requires that one of the parents who challenged the book be present when their child checks out books from the Gibbs media center in the future.

In a prepared statement, Muñoz said that as the district looks for a more permanent solution to the matter, officials also were considering letting parents request a list of the books in their child’s media center so parents can review it and determine if there are any books they do not wish their child to read.

The parents would provide a list to the classroom teacher or media staff member, and they would monitor the books checked out by the student.

“Again, the district expresses its regret for the mistakes it has made in this process,” Muñoz wrote. “We intend to move forward with transparency, to use the policies and procedures outlined, and to work together with the schools and community on this situation.” Reported in: *Rochester Post-Bulletin*, March 20, 28.

### schools

#### Canton, Michigan

Graham Swift’s *Waterland*, a book challenged by two Salem High School parents, will return to Plymouth-Canton classrooms, the district announced February 17. A nine-member complaint review committee voted to recommend keeping the book in the AP English curriculum.

On December 21, 2011, parents Matt and Barb Dame filed a complaint with the district about the use of the text in the Plymouth-Canton Educational Park’s advanced placement English courses, citing the book’s sexual content. Superintendent Jeremy Hughes immediately pulled the book, but later decided to put the book through the district’s review process.

The parents also challenged the use of Toni Morrison’s

*Beloved*, which was reviewed in January by a separate committee that voted to keep the novel in classrooms. While *Beloved* stayed in classrooms while it underwent review, *Waterland* remained pulled until a committee recommendation was made.

The *Waterland* committee met February 8 to hear arguments by both the Dames and park teachers Brian Read and Gretchen Miller. A follow-up meeting, closed to the public, took place February 13 to allow the committee to deliberate, the district's statement said. After the second meeting, the committee members voted to keep the book. The individuals' votes remained anonymous and the tally of votes for and against keeping the books was not made public.

Hughes has said that, much like the *Beloved* review, he would follow the recommendation of the committee.

The challenge and review process drew heavy local and regional interest—as well as national media exposure—and led to several parent and community groups forming to represent both sides of the issue. Supporters of Academic Integrity, a community group in support of keeping the books in classrooms, said in a statement that while its members were happy with the committee's decision, there still is work to do.

"It is now incumbent (upon) Superintendent Dr. Jeremy Hughes to make this book available immediately to AP English students so that they may have the opportunity that was taken away from them to finish reading this critically acclaimed novel if they so choose," the group said in a statement.

"It is also imperative that steps be taken to ensure that one set of parents, no matter how well intentioned they may be, will never again be able to create the confusion, controversy, and discord that this unfortunate series of events has caused students, parents, and the community," the statement read.

Tim Roraback, a Supporters of Academic Integrity member, said the decision was "really great news" and shows that district parents can trust Plymouth-Canton teachers. "I think this second decision, two out of two books, really gives a lot more evidence to that effect that our teachers can be trusted," Roraback said. "They've always gotten great results."

Matt Dame acknowledged the decision on his website, Plymouth-Canton Community Schools & Common Sense, but did not offer an opinion on the book's reinstatement. Before the decision, he wrote on his site that he hopes the challenge will create better lines of communication between the district and parents.

"The district is failing in its duty to make sure that parents are informed of the subject matter being presented to our students," he wrote. "Parents have a right to be accurately informed by teachers if teachers intend to introduce materials that some parents might define as pornographic." Reported in: *Canton Patch*, February 17.

### **Cairnbrook, Pennsylvania**

The Shade-Central City school board allowed a controversial book to remain part of the tenth-grade English curriculum April 2 after a motion to ban *The Glass Castle*, by Jeannette Walls, died for lack of a second. Board member Dr. Beth Lambert introduced a motion to remove the book from classrooms. Chairman Steve Sesack said school policy allows a book to be removed with a two-thirds board vote.

Lambert complained vigorously that no discussion was held after she introduced her motion. "I didn't think I deserved that as a board member," she told her cohorts. "I don't know who decided to railroad that."

None of the other eight board members spoke to the relative merits of the coming-of-age memoir. And—after not banning the book—the board didn't muzzle Lambert either: She got her say.

"In my opinion, it's unhealthy," Lambert said, reading from a prepared statement. She noted that as a pediatrician, it's her job to understand the social and developmental welfare of children up to age 18.

The book is a 2005 best-selling memoir in which Walls describes her hardscrabble upbringing. It includes being subjected to sexual assault, casual profanity, drunkenness, seeing the family cat pitched from a moving car and having to drink ditch water. Even critics of the graphic book praise its theme—overcoming adversity. And Lambert said it would be appropriate for tenth-graders, as well—if an edited copy without the profanity were available, which it isn't.

The book is assigned reading for English classes, though the students must have a parent sign a permission slip to read it. Teachers find another book for students whose parents forbid *The Glass Castle*.

The Rev. Randy Reynolds of the Central City Christian Church read a letter from Lambert's husband, Gary, also seeking to have the book pulled. "No schools in the county use it as a textbook," Reynolds read from the letter. After the motion failed, Reynolds said, "It's just disappointing no one else was willing to stand up against that. It doesn't stop us as parents from taking a stand."

While noting parents still will have an option for an alternate book, he said teaching two books at once will be harder on teachers. Reported in: *Johnstown Tribune-Democrat*, April 2.

### **Easton, Pennsylvania**

A group at Easton Area High School looking to ban a book on minimum wage jobs received no payback for their efforts in late March. About a half a dozen people asked the Easton Area School Board not to allow students to read *Nickel and Dimed: On (Not) Getting By in America*, a 2001 book by Barbara Ehrenreich that traces her experience working at low-wage jobs in America, sometimes in R-rated terms.

The book is on the high school's AP English reading

list. Several residents and persons from outside the district called the book “faddish,” of “no moral value,” and even “obscene.”

Eric Adams of Lower Saucon Township, who has made similar pleas in other districts, read a few paragraphs, describing how a minimum wage earner managed to beat drug testing required for the job. “This is highly objectionable,” he said. Resident William Worsley read passages that made some audience members visibly cringe at some of the material.

However, Erik Ritter, a high school senior who said he has read the book, took issue with the way those passages were presented. “The quotes were taken ridiculously out of context,” Ritter began, then explained why the book’s description of ducking a drug test would never lead young people to do so. “We have the Internet,” Ritter said. If I were looking for a way to beat drug testing, I wouldn’t look through a 300-page book on minimum-wage earners.”

A description of the book’s contents on Amazon.com reads, “Millions of Americans work for poverty-level wages, and one day Barbara Ehrenreich decided to join them. She was inspired in part by the rhetoric surrounding welfare reform, which promised that any job equals a better life. But how can anyone survive, let alone prosper, on \$6 to \$7 an hour?”

“To find out, Ehrenreich moved from Florida to Maine to Minnesota, taking the cheapest lodgings available and accepting work as a waitress, hotel maid, house cleaner, nursing-home aide, and Wal-Mart salesperson. She soon discovered that even the ‘lowliest’ occupations require exhausting mental and physical efforts. And one job is not enough; you need at least two if you intend to live indoors.”

Resident Greg Panto commended the board for listening to the objectors, then threw his approval behind the selection, saying “This book is on the list to promote discussion on this subject.”

Ronnie DeBacco disputed supporters of the book who said opponents are in the business of censoring books. DeBacco said eliminating this book is not a form of book burning, but rather simply choosing another book out of the thousands that must be available. “This is weeding,” he said, “not censoring ... This book is vulgar, non-ethical and I am calling on the board to overrule (district Superintendent Susan) McGinley,” who approved the book. “At best, this is a mediocre, biased, faddish book. At worst, it’s just a piece of propaganda.”

High school AP English student Matthew McCoskey asked just one question of the board: “Has any parent or guardian of any student, or has any student complained about the book?”

He was met with silence.

The board thanked the students for the courage to rise and speak their minds at a public forum. But members took no action on the book.

Following the board’s adjournment *Nickel and Dimed* continued to be talked about in the meeting room and down the hall, and board member Robert Arnts was overheard saying of the book, “It did what it’s supposed to do—promote discussion.” Reported in: *Easton Morning Call*, March 30.

## e-books

### San Francisco, California

PayPal, the online payment service owned by eBay Inc, is backtracking on its policy against processing sales of e-books containing themes of rape, bestiality or incest after protests from authors and anti-censorship activist groups.

PayPal’s new policy will focus only on e-books that contain potentially illegal images, not e-books that are limited to just text, spokesman Anuj Nayar said March 13. The service will still refuse, however, to process payments for text-only e-books containing child pornography themes.

The revised policy will also focus on individual books, rather than entire classes of books, he added. E-book sellers will be notified if specific books violate PayPal’s policy, and the company is working on a process through which authors and distributors can challenge such notifications, the spokesman said.

“This is going to be a major victory for writers, readers and free speech,” said Mark Coker, founder of e-book distributor Smashwords. “They are going to build a protective moat around legal fiction.”

PayPal warned Smashwords and some other e-book publishers and distributors earlier this year that it would “limit” their PayPal accounts unless they removed e-books “containing themes of rape, incest, bestiality and underage subjects.”

PayPal’s original policy was criticized by groups, including the Authors Guild and the National Coalition Against Censorship, which voiced concern that banks and payment companies may be exerting too much control over what books can be written, published and read. PayPal is relaxing the policy after the main credit card companies made a distinction between extreme pornographic images and e-books that explore such topics with only the written word.

PayPal told e-book distributors earlier this year that the original policy was in place partly because the banks and credit card companies it works with restrict such content. However, Doug Michelman, global head of corporate relations for Visa Inc, suggested that the company would not crack down on e-books that explore such topics, according to a letter he wrote that was posted on the blog Banned Writers. A Visa spokesperson confirmed that the letter was real.

“The sale of a limited category of extreme imagery depicting rape, bestiality and child pornography is or is very likely to be unlawful in many places and would be

prohibited on the Visa system whether or not the images have formally been held to be illegal in any particular country,” Michelman wrote. “Visa would take no action regarding lawful material that seeks to explore erotica in a fictional or educational manner.”

A MasterCard spokesman drew a similar distinction, saying that the company “would not take action regarding the use of its cards and systems for the sale of lawful materials that seek to explore erotica content of this nature.”

PayPal’s new policy will still prohibit the use of its service for sale of e-books that contain child pornography, or e-books with text and obscene images of rape, bestiality or incest, the spokesman said. PayPal has not shut down the accounts of any e-books publishers involved in this debate, he added.

PayPal’s continued limit on child pornography is consistent with Smashwords’ existing policies and those of the retailers it works with, Coker said. “Child exploitation is at the center of their concerns —no erotic content for fiction involving underage people,” Coker said.

However, Joan Bertin, executive director of the National Coalition Against Censorship, was still concerned about PayPal’s approach. “Verbal descriptions of child pornography are not illegal. “That’s why we can read Lolita.” she said. “Actual images of child pornography are a different situation all together —if they are photos of actual children.”

“I’m glad they’re moving in the right direction, but I hope they continue to consider potential problems they are creating for themselves and their customers by getting involved in such policing,” Bertin added. “I don’t think we need another quasi police force trolling the Internet.” Reported in: reuters.com, March 13.

## foreign

### Brussels, Belgium

A Belgian court refused February 10 to ban the sale of *Tin-Tin in the Congo*, rejecting arguments by a Congolese man that the iconic comic book was filled with racist stereotypes about Africans. The Brussels court ruled that Belgian anti-racism laws only apply when there is a wilful intention to discriminate against someone, said an attorney for Bienvenu Mbutu Mondondo, the man who tried to get the strip off bookshelves.

The court argued that given the historical context —the book was written during the colonial era in 1931 —the author, Herge, “could not have been motivated by the desire” to discriminate, the lawyer, Ahmed L’Hedim, said.

For the past four years, Mbutu Mondondo had sought to get the book banned or at least force stores to place a warning label on the cover or add a preface explaining that it was written in a different era, as English versions do. “It

is a racist comic book that celebrates colonialism and the supremacy of the white race over the black race,” he said last year.

Both of his requests were rejected but Mbutu’s lawyers said he would appeal the decision.

A representative for French publishing house Casterman and Belgian firm Moulinsart, which holds the rights to the Tintin franchise, welcomed the decision with “great satisfaction.”

“This decision is very sound. You have to take the work in its context and compare it with the information and clichés of its time,” said Alain Berenboom, who had warned that a ban would amount to censorship.

Herge, real name Georges Remi (1907-1983), justified the book by saying it was merely a reflection of the naive views of the time. Some of the scenes were revised for later editions. Reported in: AFP, February 10. □

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### *White House offers online privacy...from page 51)*

still be used for some purposes such as “market research” and “product development” and can still be obtained by law enforcement officers.

The Do-Not-Track button also wouldn’t block companies such as Facebook Inc. from tracking their members through “Like” buttons and other functions.

“It’s a good start,” said Christopher Calabrese, legislative counsel at the American Civil Liberties Union. “But we want you to be able to not be tracked at all if you so choose.”

The Do-Not-Track button has been hotly debated ever since the Federal Trade Commission called for its adoption about two years ago. Mozilla Corp.’s Firefox Web browser was the first to add the Do-Not-Track option early last year. Microsoft Corp.’s Internet Explorer Web browser added it soon after, and Apple included it in the latest version of its operating system, Mountain Lion, which was released to developers this year.

But even people who clicked on the button were still being tracked because advertisers and tracking companies hadn’t agreed to honor the system. The White House announcement means they will work to begin adopting and honoring the system within nine months, according to the coalition, the Digital Advertising Alliance, which represents over 400 companies.

Speaking for the industry, Stuart Ingis, general counsel for the Digital Advertising Alliance, said the decision to adopt Do-Not-Track is an “evolution” of the industry’s approach. Previously, the industry had been pushing for consumers to “opt out” of Web tracking by clicking on

icons in individual advertisements that offered consumers a choice of blocking the customized ads. Ingis said that the industry will continue that approach while it's in the process of adopting the Do-Not-Track system.

Google is expected to enable Do-Not-Track in its Chrome Web browser by the end of this year. Susan Wojcicki, senior vice president of advertising at Google, said the company is pleased to join "a broad industry agreement to respect the 'Do Not Track' header in a consistent and meaningful way that offers users choice and clearly explained browser controls."

White House Deputy Chief Technology Officer Daniel Weitzner said the Do-Not-Track option should clear up confusion among consumers who "think they are expressing a preference and it ends up, for a set of technical reasons, that they are not."

Some critics said the industry's move could throw a wrench in a separate year-long effort by the World Wide Web consortium to set an international standard for Do-Not-Track. But Ingis said he hopes the consortium could "build off of" the industry's approach.

Reported in: *New York Times*, February 23; *The Hill*, February 23; *Washington Post*, February 23; *wired.com*, February 23; *Wall Street Journal*, February 23. □

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*copyright dateline...from page 112)*

interest must be placed above the protection of the reputation of an individual, whoever that person is." Múdry added the ruling could set a chilling precedent if a higher court does not reverse it.

"The Slovak Constitution explicitly states that censorship is banned," he argued. "If the courts adopt this argument in the way the Bratislava District Court has formulated it, then it will be impossible to write about corruption, and investigative journalism will be over in Slovakia."

Critics also pointed to past controversial decisions made by the judge who issued the injunction, claiming it would only further mar the reputations of the parties involved in Gorilla.

Král, the judge in the case, is the same district court judge who last year ordered former Slovak President Michal Kováč to apologize to former Slovak intelligence head Ivan Lexa and pay him 3,319 euros in compensation for accusing him of the 1995 abduction of his son, Michal Kováč Jr.

All investigations into the abduction, and into suspicions Slovak intelligence was involved, were halted by blanket amnesties issued by acting President Vladimír Meciar,

Lexa's political patron, in 1998. *Sme* reported that Král had also ruled favorably in a previous case involving businesses controlled by Penta.

"They [Penta] are more likely to cause harm to themselves than to me by such a ruling," said Nicholson, a Canadian-born investigative reporter who first came across the Gorilla files in 2009. In response to the court's order that he submit his manuscript, Nicholson said he was not certain it was still in his possession.

Fulmek of Petit Press, speaking in a televised interview with TV *Sme*, said his publishing house was prepared to comply with all aspects of the court injunction. "We are people who respect the basic rules of the country and particular bodies, yet it will not prevent us from making comments about it," he said.

"Our interpretation is that [the decision] is not so wide that it binds any of our 31 media outlets, which means that in terms of journalistic proceedings, we will continue to cover this issue as we have been covering it so far." Reported in: *Prague Post*, February 15.

## **Bangkok, Thailand**

Thailand's film censors have banned an adaptation of William Shakespeare's "Macbeth," saying it could inflame political passions in the country where it is taboo to criticize the monarchy. The Thai-language film "Shakespeare Must Die" tells the story of a theater group in a fictional country resembling Thailand that is staging a production of "Macbeth," in which an ambitious general murders his way to the Scottish throne.

One of the film's main characters is a dictator named "Dear Leader," who resembles former Thai Prime Minister Thaksin Shinawatra, whose ouster in a 2006 coup sparked years of political turmoil between his supporters and critics.

Censors at the Culture Ministry issued a brief memo April 3 saying that the film could not be distributed in Thailand because it "has content that causes divisiveness among the people of the nation." The memo did not specify which scenes were deemed offensive. But Ing K., the film's director, said the censorship committee objected to anti-monarchy overtones in the film as well as politically charged content, including a scene based on an iconic photo from Bangkok's 1976 student uprising showing a demonstrator being lynched.

"The committee questioned why we wanted to bring back violent pain from the past to make people angry," Ing K. said. The censors also disliked the attire of a murderer in the film, who wore a bright red hooded cloak—the same color worn by the pro-Thaksin demonstrators known as the "Red Shirts."

The director called the ruling "absurd" and a reflection of the fear in Thai society. "I feel like we are heading to a very dark, dark place right now—a place full of fears and

everyone has to be extra careful about what they say,” Ing said. She said the character resembling Thaksin could represent any leader accused of corruption and abuse of power. “When Cambodians watch this they’ll think it’s Hun Sen. When Libyans watch it they would think it’s Gadhafi,” she added.

Thailand’s censors have targeted a wide range of political and social offenses. They blur out cigarettes and alcohol on television and crack down on criticism of the monarchy. Sensitivity over criticism of the monarchy has increased in recent years as the poor health of the country’s 84-year-old King Bhumibol Adulyadej has elevated concern about a smooth succession. At the same time, sharp partisan political battles in the wake of the 2006 coup have unleashed unprecedented questioning of institutions, including the palace.

Last year, the film board banned a movie about a transgender father struggling to raise two children, called “Insects in the Backyard,” saying it contained scenes that were immoral and pornographic.

Ing K. said she plans to appeal the ban. Reported in: *San Francisco Chronicle*, April 4. □

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*is it legal? ...from page 126)*

Even though Google has not yet rolled out the privacy changes, its plans violate an FTC settlement over Google’s aborted Buzz rollout, Chester said. The Buzz settlement allows the FTC to assess fines of \$16,000 per violation and applies to “future actions,” according to the FTC.

The plan, announced in January, is “a digital fait accompli, so to speak,” Chester said.

Other privacy groups have also complained about the proposed changes. Earlier the Electronic Privacy Information Center filed a lawsuit against the FTC for the agency’s alleged failure to enforce the privacy settlement.

The CDD complaint is not related to recent reports that Google has changed the privacy settings in the Safari and Internet Explorer browsers in order to install cookies. CDD doesn’t plan to file a complaint about those reports, but is instead focused on the proposed changes to the company’s privacy policy, Chester said.

Chester called on the FTC to act quickly to block the privacy changes, and he called on Google to delay the changes until an FTC investigation can be completed. Google will use the new privacy practices to collect more personal data about YouTube, smartphone and computer users so that the company can deliver more personalized ads, the CDD complaint said. Google has rolled out several new initiatives in

the past year focused on delivering better targeted ads, the complaint said.

The FTC settlement requires Google to get “express affirmative consent” from users before sharing their personal information with third parties, and the new privacy policy will allow Google to share more information with Vivaki, a targeted ad company that Google announced a partnership with in November, the complaint said. Reported in: *pcworld.com*, February 22.

### **Mountain View, California**

Attorneys General from 36 states are concerned over the potential implications of Google’s new privacy policy, especially for government users and owners of Android-powered smartphones.

In a sharply-worded letter to Google CEO Larry Page, the officials questioned Google’s commitment to consumer privacy and said the changes would force Internet users to share their data without giving them a proper ability to opt out.

The letter was the latest, and perhaps most dramatic, expression of concern stemming from Google’s announcement that it would create a single privacy policy for all its online products. Under the new policy, which went into effect March 1, Google combines user data from services like YouTube, Gmail and Google search and creates a single merged profile for each user of its services.

Google said the new policy is shorter, easier to understand and will allow the company to deliver better and more targeted services for users of its products. The company also noted that users who do not like the new policy can simply stop using its services.

In their February 22 letter, the attorneys general said, “Google’s new privacy policy goes against a respect for privacy that Google has carefully cultivated as a way to attract consumers. It rings hollow to call [the ability of users] to exit the Google products ecosystem a ‘choice’ in an Internet economy where the clear majority of all Internet users use—and frequently rely on—at least one Google product on a regular basis.”

The letter makes special mention of the potential problems the new privacy policy will have on Android-powered smartphone users, many of whom will find it “virtually impossible” to escape the policy without ditching their phones.

Privacy advocates have blasted the move and said that it will force users to share data about themselves that they may not want shared, given a proper choice. They have said that such data synthesizing will allow Google to look at everything a user does online and tie it back to specific individuals. Some have noted that the user tracking and inference-making Google will be able to do once the data is merged is especially troublesome for government users of Google applications.

Many of those same concerns were echoed by the attorneys general in their letter to Page. Until now, users of different Google products expected that information provided for one service would not be combined with information provided for another, they said.

“Consumers have diverse interests and concerns, and may want the information in their Web history to be kept separate from the information they exchange via Gmail,” the letter said. “Likewise, consumers may be comfortable with Google knowing their search queries but not with it knowing their whereabouts.”

The state officials also focused on concerns by Android users. Under the new privacy policy Google said it will collect device-specific information such as the phone model and operating system version, phone number, calling party number, time, date and duration of calls, SMS routing information and a user’s location data. Google has also noted that the policy allows it to associate a device identifier or phone number to a user’s Google account.

Android smartphone users who do not agree to the tracking would need to buy a new phone, the officials noted. “No doubt, many of these consumers bought an Android-powered phone in reliance on Google’s existing privacy policy,” which touts the ability of users to give their informed consent to privacy changes.

“That promise appears not to be honored by the new privacy policy.” Reported in: [pcworld.com](http://pcworld.com), February 29.

### Washington, D.C.

The Obama administration is moving to relax restrictions on how counterterrorism analysts may retrieve, store and search information about Americans gathered by government agencies for purposes other than national security threats.

Attorney General Eric H. Holder, Jr. on March 22 signed new guidelines for the National Counterterrorism Center, which was created in 2004 to foster intelligence sharing and serve as a terrorism threat clearinghouse. The guidelines will lengthen to five years—from 180 days—the amount of time the center can retain private information about Americans when there is no suspicion that they are tied to terrorism, intelligence officials said. The guidelines are also expected to result in the center making more copies of entire databases and “data mining them” using complex algorithms to search for patterns that could indicate a threat.

Intelligence officials said the new rules have been under development for about eighteen months, and grew out of reviews launched after the failure to connect the dots about Umar Farouk Abdulmutallab, the “underwear bomber,” before his December 25, 2009, attempt to bomb a Detroit-bound airliner.

After the failed attack, government agencies discovered they had intercepted communications by Al Qaeda in the

Arabian Peninsula and received a report from a United States Consulate in Nigeria that could have identified the attacker, if the information had been compiled ahead of time.

The changes are intended to allow analysts to more quickly identify terrorism suspects. But they also set off civil-liberties concerns among privacy advocates who invoked the “Total Information Awareness” program. That program, proposed early in the George W. Bush administration and partially shut down by Congress after an outcry, proposed fusing vast archives of electronic records—like travel records, credit card transactions, phone calls and more—and searching for patterns of a hidden terrorist cell.

But national security officials stressed that analysts could already get the same information under the old rules, just in a more cumbersome way. They cited safeguards to protect against abuse, including audits of searches. The same rules apply to access by other federal agencies involved in counterterrorism.

“There is a genuine operational need to try to get us into a position where we can make the *maximum* use of the information the government already has to protect people,” said Robert S. Litt, the general counsel in the office of the Director of National Intelligence, which oversees the National Counterterrorism Center. “We have to manage to do that in a way that provides protection to people’s civil liberties and privacy. And I really think this has been a good-faith and reasonably successful effort to do that.”

The center has developed a priority list of databases it wants to copy entirely, but he and other officials declined to say which ones they were. (The Department of Homeland Security says it has already shared several entire databases, including records related to refugees, foreign students and international travelers.)

“We’re all in the dark, and for all we know it could be a rerun of Total Information Awareness, which would have allowed the government to make a computerized database of everything on everybody,” said Kate Martin, the director of the Center for National Security Studies, who criticized the administration for not making the draft guidelines public for scrutiny ahead of time.

The guidelines were also signed by the director of national intelligence, James R. Clapper, Jr., and the director of the center, Matthew G. Olsen. The previous guidelines for sharing information with the counterterrorism center were issued by Attorney General Michael Mukasey in 2008.

They set up three tracks by which the center could retrieve information gathered by another agency: by doing a limited search itself for certain data, by asking another agency to perform such a search, or—in cases where neither was sufficient—by replicating the database and analyzing the information itself.

The new guidelines keep that structure in place, but put greater emphasis on the third track, while also relaxing

restrictions on how long data on Americans who have no known tie to terrorism may be stored. The old guidelines said data on innocent Americans must be deleted promptly, which the agency interpreted to mean if no tie to terrorism was detected within 180 days.

The new guidelines are intended to allow the center to hold on to information about Americans for up to five years, although the agencies that collected the information—and can negotiate about how it will be used—may place a shorter life span on it.

Moreover, the first two tracks for searching the databases that remain under the control of the original agencies prohibit “pattern analysis.” But that restriction does not apply to databases the center has copied.

Marc Rotenberg, executive director of the Electronic Privacy Information Center, voiced concerns about how the guidelines would interact with proposals to give the government greater access to telecommunications information in order to protect critical infrastructure from hackers.

The new rules are silent about the use of commercial data—like credit card and travel records—that may have been acquired by other agencies. In 2009, *Wired* magazine obtained a list of databases acquired by the Federal Bureau of Investigation, one of the agencies that shares information with the center. It included nearly 200 million records transferred from private data brokers like ChoicePoint, 55,000 entries on customers of Wyndham hotels, and numerous other travel and commercial records.

Intelligence officials offered a hypothetical scenario to explain one way the change could be helpful: A person from Yemen applies for a visa and lists an American as a point of contact. There is no sign that either person is a terrorist. Two years later, another person from Yemen applies for a visa and lists the same American, and this second person is a suspected terrorist.

Under the existing system, they said, to discover that the first visa applicant now had a known tie to a suspected terrorist, an analyst would have to ask the State Department to check its database to see if the American’s name had come up on anyone else’s visa application—a step that could be overlooked or cause a delay. Under the new rules, a computer could instantly alert analysts of the connection.

The new rules allowing the government to retain domestic intelligence for up to five years not only infringe privacy, they could end up endangering national security, civil liberties advocates warned.

“The decades-old rules limiting the collection and retention of U.S. citizen and resident information by the intelligence community and the military existed for a very good reason: to ensure that the powerful tools designed to protect us from foreign enemies are not turned against Americans,” ACLU senior policy counsel Michael German said in a statement. “Authorizing the ‘temporary’ retention of non-terrorism-related citizen and resident information for five

years essentially removes the restraint against wholesale collection of our personal information by the government, and puts all Americans at risk of unjustified scrutiny.”

Beyond the privacy implications, by expanding the amount of information retained, officials could find themselves overwhelmed with data, he said. “Making the haystack bigger will only make it harder to find the needle, endangering both privacy and security.” Reported in: *New York Times*, March 22; *National Journal*, March 23.

### Washington, D.C.

Rep. Jackie Speier (D-CA) said February 16 she wants the Department of Homeland Security to cease its social-media and news-monitoring operation.

Speaking at a Homeland Security subcommittee hearing, the California lawmaker said she was “outraged” that the agency has hired a contractor to review a variety of social networking sites, including Facebook and Twitter, and that General Dynamics is being tasked with reviewing news sources, blogs and their bylines for all types of articles, including those containing anti-American sentiment and reaction to policy proposals.

“This should not be a political operation,” she said.

Speier said she found it particularly egregious that the department was analyzing the authors behind the online words. “I find that outrageous,” she said during the 90-minute hearing of the Subcommittee on Counterterrorism and Intelligence. She said the agency should amend its \$11 million contract with General Dynamics “to prevent that type of information from being collected.”

The monitoring largely came to light in January after the Electronic Privacy Information Center sued the DHS to obtain information about the little-known program. Some of the sites on its watchlist included WikiLeaks, Drudge Report and, among others, *Wired’s* Threat Level and Danger Room blogs.

Mary Ellen Callahan, the DHS chief privacy officer, said, “We are just focusing on the event, the situation that is going on, and not worrying about the individual.”

But Callahan also said that the agency, indeed, does analyze who the author is of a particular work to determine if the report is “relevant and adds credibility to the report itself.”

Speier countered, saying: “I’m suggesting to you that it is irrelevant and you don’t need it and you should suspend that part of the contract.”

Callahan said, “We don’t collect information on individuals. We don’t monitor them in regards to First Amendment activity.”

Ginger McCall, an EPIC attorney, said that the privacy group wants DHS to abandon the program, which dates to at least 2006. “We have asked for the program to be suspended,” she said. She added that EPIC wants DHS to “suspend the collection of public reaction and reports to policy

proposals that reflect adversely on DHS or the government.”

Speier, during the hearing, said: “I for one wholeheartedly agree with their recommendations.”

Rep. Patrick Meehan (R-PA), the subcommittee’s chair, suggested the program had a “chilling effect” leading to a “forfeit” of “an expectation right of privacy.” Neither he nor anybody else in the 12-member committee went as far as Speier to suggest that the DHS abandon the “Social Networking/Media Capability” program.

According to the records EPIC obtained, the program involves the monitoring of “publicly available online forums, blogs, public websites and message boards.” The documents showed that, in 2009, the DHS monitored residents’ reaction to an Obama administration proposal, now scuttled, to transfer detainees from Guantanamo Bay, Cuba, to a prison in Standish, Michigan.

Richard Chavez, the DHS director of office operations, was asked by the subcommittee why the government even needed to contract with General Dynamics to monitor the Internet, and instead perform that mission with government staff. Chavez said the contractor employed “skilled technicians in surfing the Web.” Reported in: wired.com, February 16.

#### **Washington, D.C.**

The FBI said February 14 that its proposed plans to monitor social media sites as part of a broader strategy to improve real-time situation awareness will be fully vetted by the agency’s Privacy and Civil Liberties Unit. The unit will review the legal implications of the monitoring application and ensure that it meets all privacy and civil rights obligations before it is implemented, the agency said. “Although the FBI has always adapted to meet changes in technology, the rule of law, civil liberties, and civil rights, will remain our guiding principles,” the agency said.

The FBI was responding to questions about its plans to use technology to quickly gather and analyze data posted on sites such as Facebook, Twitter and on blogs using simple keyword searches and phrases. In a Request For Information (RFI), the FBI said that data posted on such sites would let it more quickly detect specific and credible threats, locate those organizing and taking part in dangerous gatherings and predict upcoming events.

It noted that social media networks have been trumping police, firefighters and news media when it comes to communicating news of developing incidents and protests. “Social media is rivaling 911 services in crisis response and reporting,” the RFI noted.

Similar monitoring by the U.S. Department of Homeland Security has already stoked considerable privacy concerns. Groups such as the Electronic Privacy Information Center (EPIC) and the Electronic Frontier Foundation have called for more transparency and oversight of such monitoring activities.

EPIC warned that some of DHS’ monitoring activities appeared to have little to do with public safety; it has expressed similar concerns over the FBI’s plans.

Such concerns prompted the House Committee on Homeland Security to schedule a hearing to examine the privacy implications of DHS’ social media monitoring activities.

In its statement, the FBI said that information gathered from social media networks will support the activities of its Strategic Information and Operations Center (SIOC). “In accordance with its core mission, SIOC has a responsibility to enhance its techniques for collecting and disseminating real-time publicly available open source information to improve the FBI’s overall situational awareness and support of mission requirements,” the FBI said.

Social media monitoring will help the agency stay on top of breaking events, crisis activity or natural disasters that have already occurred or are still in progress, the FBI said. The effort will not focus on specific persons or protected groups, but on words that relate to specific events, crisis scenarios and criminal or terrorist activities.

Examples of the words that the FBI will use in its social media searches will include ‘lockdown,’ ‘bomb,’ ‘suspicious package,’ ‘white powder,’ ‘active shoot’ and ‘school lock down.’

The federal government already uses publicly available open source information to identify immediate or emerging threats to national security. “The type of social media application being researched by the FBI, to view publicly available information, is no different than applications used by other government agencies.” Reported in: pcworld.com, February 14.

#### **Washington, D.C.**

A recent lawsuit filed against the U.S. Food and Drug Administration draws attention to whether employees have a reasonable expectation of privacy when using personal email accounts on workplace computers.

The lawsuit was filed in January by six whistleblowers at the FDA who allege that their private emails were extensively monitored after they began complaining to lawmakers about serious irregularities in the agency’s medical device review process. In the complaint filed in U.S. District Court for the District of Columbia, the six alleged that the FDA installed spyware on their workplace computers to monitor and intercept their communications.

The complaint acknowledges that the intercepted correspondence was created, transmitted, received and viewed on government-issued computers and government-owned networks. But it noted that the email was private, password protected, and sent using third-party, non-governmental email services such as Yahoo and Gmail.

The intercepted communications also included email sent from private email accounts on private equipment by

family members, friends and associates, but viewed on FDA-issued computers.

According to the complaint, the employees had “explicit permission” to use their government-issued computers for personal purposes. Nonetheless, the FDA secretly searched and seized private electronic communications when the plaintiffs “had a reasonable expectation of privacy” the complaint noted.

Documents related to the case, published by the National Whistleblowers Center show numerous instances of the FDA intercepting what appear to be confidential attorney-client communications.

Also captured were email messages between the whistleblowers and a former staff member for the House Committee on Energy and Commerce and a former chief investigator for the Senate Finance Committee. One FDA intercept shows a screen shot of dogs belonging to one of the whistleblowers while another captures an exchange in which one whistleblower exhorts another to “hang in there.”

The intercepted email accounts contained “extremely private and intimate correspondence with family ... friends and loved ones,” the complaint noted. Many of the accounts were used for personal finances, banking and other personal purposes. “Defendants intercepted emails that are considered private by all traditional standards.”

The secret searches and seizures lasted for two years, the complaint alleged. In total the FDA is alleged to have monitored private email conversations of nine scientists and physicians.

Data from their intercepted communications was collected and stored in an internal filing system called FDA9. The lawsuit alleges that FDA used the data to retaliate against the whistleblowers.

The plaintiffs charge the agency with violating their First Amendment rights under the U.S. Constitution to free speech and association, their Fourth Amendment’s rights against unreasonable search and seizure and their Fifth Amendment’s right to due process.

Hanni Fakhoury, staff attorney for the Electronic Frontier Foundation said the case presents some “really interesting questions about the right to use your email at your workplace.”

Many companies have computer use guidelines clearly specifying what employees can and cannot do with their work computers. They are using tools that use filtering and other technologies to make sure that employees do not accidentally or deliberately transmit sensitive documents or illicit material via their email.

Even so, the issue of whether employers have the legal right to actively monitor password protected, private email accounts, just because their computers are being used, remains largely untested in courts, he said.

Fakhoury pointed to a 2010 case where the U.S. Supreme Court ruled that employers can search through text messages, including personal ones, if they have reason to

believe that workplace rules or laws are being violated. That case is slightly different, though, because it involves personal text messages being sent on a workplace pager. The FDA lawsuit refers to messages intercepted from personal, password-protected email accounts. “It is a distinction that has not been looked at in any great detail,” he said.

What adds to the complexity of the case is the fact that the monitoring involved whistleblowers, Fakhoury added. “That may be a whole separate legal issue under First Amendment law,” he said.

Miriam Schulman, director of the Markkula Center for Applied Ethics at Santa Clara University said that whistleblowers could have avoided the whole issue by using their own computers, “But just because you do something dumb, doesn’t remove your privacy rights,” she said. Reported in: [itworldcanada.com](http://itworldcanada.com), February 8.

### **Washington, D.C.**

The Federal Trade Commission on February 16 issued a staff report showing the results of a survey of mobile apps for children. The survey shows that neither the app stores nor the app developers provide the information parents need to determine what data is being collected from their children, how it is being shared, or who will have access to it.

“At the FTC, one of our highest priorities is protecting children’s privacy, and parents deserve the tools to help them do that,” said FTC Chair Jon Leibowitz. “Companies that operate in the mobile marketplace provide great benefits, but they must step up to the plate and provide easily accessible, basic information, so that parents can make informed decisions about the apps their kids use. Right now, it is almost impossible to figure out which apps collect data and what they do with it. The kids app ecosystem needs to wake up, and we want to work collaboratively with industry to help ensure parents have the information they need.”

According to the FTC report, *Mobile Apps for Kids: Current Privacy Disclosures Are Disappointing*, in 2008, smartphone users could choose from about 600 available apps. Today there are more than 500,000 apps in the Apple App Store and 380,000 in the Android Market. “Consumers have downloaded these apps more than 28 billion times, and young children and teens are increasingly embracing smartphone technology for entertainment and educational purposes.”

The report says the survey focused on the largest stores, the Apple App Store and the Android Market, and evaluated the types of apps offered to children, the disclosures provided to users, interactive features such as connectivity with social media, and the ratings and parental controls offered for such apps.

The report notes that mobile apps can capture a broad range of user information from a mobile device automatically, including the user’s precise geolocation, phone

number, list of contacts, call logs, unique identifiers, and other information stored on the device. At the same time, “the report highlights the lack of information available to parents prior to downloading mobile apps for their children, and calls on industry to provide greater transparency about their data practices.”

While there was a diverse pool of kids apps created by hundreds of different developers, there was almost no information about the data collection and sharing on the Apple App store promotion pages and little information beyond general permission statements on the Android Market promotion pages. “In most instances, staff was unable to determine from the information on the app store page or the developer’s landing page whether an app collected any data, let alone the type of data collected, the purpose for such collection, and who . . . obtained access to such data.”

The report recommends:

- All members of the “kids app ecosystem”—the stores, developers and third parties providing services—should play an active role in providing key information to parents.
- App developers should provide data practices information in simple and short disclosures. They also should disclose whether the app connects with social media, and whether it contains ads. Third parties that collect data also should disclose their privacy practices.
- App stores also should take responsibility for ensuring that parents have basic information. “As gatekeepers of the app marketplace, the app stores should do more.”

The report notes that the stores provide architecture for sharing pricing and category data, and should be able to provide a way for developers to provide information about their data collection and sharing practices.

The report also notes that more should be done to identify the best way to convey data practices in plain language and in easily accessible ways on the small screens of mobile devices. The agency will host a public workshop in 2012, in connection with its efforts to update the FTC’s “Dot Com Disclosure” guide, about how to provide effective online disclosures. “One of the topics that will be addressed is mobile privacy disclosures, including how they can be short, effective, and accessible to consumers on small screens.” Reported in: [ftc.gov](http://ftc.gov), February 16.

## surveillance

### Washington, D.C.

Documents newly obtained by the ACLU reveal the extent of surveillance conducted by state and local law

enforcement agencies with the assistance of cell phone companies. Most notably, they show that location-based tracking has become ubiquitous, with cell phone companies offering “tower dumps” of everyone who used a particular cell phone tower during a particular time period. At least one police department, worried about public backlash if the extent of such tracking became widely known, has barred officers from disclosing the use of such tracking capabilities to the media.

The documents were revealed by an ambitious ACLU project to use open-records laws to obtain a deeper understanding of police department practices with regard to cell phone surveillance around the country. ACLU affiliates submitted information requests to dozens of law enforcement agencies; while many refused to provide documents, the ACLU was able to assemble more than 5,500 pages of documents from numerous state and local agencies.

The documents paint a picture of a surveillance free-for-all. While departments seem to have avoided warrantless access to phone calls themselves—which would likely run afoul of wiretapping laws—police departments have sought access to a wide variety of other user information.

The legal standards used for cell phone tracking requests vary widely by police department. Some law enforcement agencies do not track cell phones, or have concluded that the Fourth Amendment requires them to obtain a warrant in order to track user locations. But many more reported obtaining location information with a simple subpoena—which is available without meeting the Fourth Amendment’s “probable cause” standard. The ACLU says that “a number of law enforcement agencies report relying on cell phone providers to tell them what legal process is necessary to obtain location records.”

A *New York Times* report on the documents says that many departments keep their use of cell phone tracking capabilities secret, fearing the backlash that could be generated if the public learned how often they are used. For example, a document published by the Iowa City police department admonishes police officers not to “mention to the public or media the use of cell phone technology or equipment used to locate the targeted subject.” Officers are advised not to include “details of the methods and equipment used to locate the subject” in police reports.

The documents also suggest that selling customer information to law enforcement has become a significant revenue source for cell phone companies. A particularly illuminating cache of documents comes from the Tucson, AZ, police department. It catalogs how much various wireless companies charge for a wide variety of surveillance services.

Telecom carriers have long been required to assist the government with surveillance efforts, and they have been permitted to charge for providing information. But as network providers have offered their users a growing menu of

services, the menu of surveillance capabilities offered to law enforcement has grown accordingly.

For example, a July 2009 price list indicates that Sprint charged \$120 per target number for “Pictures and Video,” \$60 for “E-Mail,” \$60 for “Voicemail,” and \$30 for “SMS Content.” Verizon Wireless charged \$50 for “picture content.” Verizon Wireless could not “preserve voicemail, but can reset pass code to give access to law enforcement,” according to the documents. Resetting a user’s voicemail password cost \$50. AT&T charged \$150 for voicemail, but did not offer “SMS Content” or “Picture Content.”

Probably the most troubling service offered by wireless companies are “tower dumps.” Law enforcement agencies ask for a download of “all activities” on a particular tower. As of 2009, Alltel, AT&T, Verizon, T-Mobile, and Sprint all offered “tower dump” services, with prices ranging from \$50 to \$500 per tower. Only one carrier—Cricket—was refusing to provide such information in 2009.

Cato Institute privacy researcher Julian Sanchez wrote that, until he read these documents, he had been aware of only one instance in which “tower dumps” had been used in an investigation. But the fact that all the major wireless companies have standard list prices for the service suggests that it has become a relatively routine investigative technique.

It’s not clear if the “activity” disclosed in a “tower dump” is limited to phone calls placed through that tower or whether it includes all phones that merely came within range of the tower during the requested time period. Either way, the practice raises serious constitutional issues.

Sanchez wrote that the use of “tower dumps” is “in serious tension with our constitutional tradition of ‘particularity’ in searches. If it were to be permitted under any circumstances, it would require extraordinary safeguards, ideally established by a clear legislative framework—not a patchwork of agencies making up the rules as they go.” Reported in: arstechnica.com, April 3.

### **New York, New York**

Undercover New York Police Department officers attended meetings of liberal political organizations and kept intelligence files on activists who planned protests around the U.S., according to interviews and documents that show how police have used counterterrorism tactics to monitor even lawful activities.

The infiltration echoes the tactics the NYPD used in the run-up to New York’s 2004 Republican National Convention, when police monitored church groups, anti-war organizations and environmental advocates nationwide. That effort was revealed by *The New York Times* in 2007 and in an ongoing federal civil rights lawsuit over how the NYPD treated convention protesters.

Police said the pre-convention spying was necessary to prepare for the huge, raucous crowds that were headed to the city. But documents obtained by The Associated Press show that the police department’s intelligence unit continued to keep close watch on political groups in 2008, long after the convention had passed.

In April 2008, an undercover NYPD officer traveled to New Orleans to attend the People’s Summit, a gathering of liberal groups organized around their shared opposition to U.S. economic policy and the effect of trade agreements between the U.S., Canada and Mexico.

When the undercover effort was summarized for supervisors, it identified groups opposed to U.S. immigration policy, labor laws and racial profiling. Two activists—Jordan Flaherty, a journalist, and Marisa Franco, a labor organizer for housekeepers and nannies—were mentioned by name in one of the police intelligence reports obtained by the AP.

“One workshop was led by Jordan Flaherty, former member of the International Solidarity Movement Chapter in New York City,” officers wrote in an April 25, 2008, memo to David Cohen, the NYPD’s top intelligence officer. “Mr. Flaherty is an editor and journalist of the *Left Turn Magazine* and was one of the main organizers of the conference. Mr. Flaherty held a discussion calling for the increase of the divestment campaign of Israel and mentioned two events related to Palestine.”

The document provides the latest example of how, in the name of fighting terrorism, law enforcement agencies around the country have scrutinized groups that legally oppose government policies. The FBI, for instance, has collected information on anti-war demonstrators. The Maryland state police infiltrated meetings of anti-death penalty groups. Missouri counterterrorism analysts suggested that support for Republican Rep. Ron Paul might indicate support for violent militias—an assertion for which state officials later apologized. And Texas officials urged authorities to monitor lobbying efforts by pro Muslim-groups.

Police have good reason to want to know what to expect when protesters take to the streets. Many big cities, such as Seattle in 1999, Cincinnati in 2001 and Toledo in 2005, have seen protests turn into violent, destructive riots. Intelligence from undercover officers gives police an idea of what to expect and lets them plan accordingly.

“There was no political surveillance,” Cohen testified in the ongoing lawsuit over NYPD’s handling of protesters at the Republican convention. “This was a program designed to determine in advance the likelihood of unlawful activity or acts of violence.”

The result of those efforts, however, was that people and organizations can be cataloged in police files for discussing political topics or advocating even legal protests, not violence or criminal activity.

By contrast, at the height of the Occupy Wall Street protests and in related protests in other cities, officials at

the U.S. Homeland Security Department repeatedly urged authorities not to produce intelligence reports based simply on protest activities.

“Occupy Wall Street-type protesters mostly are engaged in constitutionally protected activity,” department officials wrote in documents obtained under the Freedom of Information Act by the website Gawker. “We maintain our longstanding position that DHS should not report on activities when the basis for reporting is political speech.”

At the NYPD, the monitoring was carried out by the Intelligence Division, a squad that operates with nearly no outside oversight and is so secretive that police said even its organizational chart is too sensitive to publish. The division has been the subject of a series of Associated Press articles that illustrated how the NYPD monitored Muslim neighborhoods, catalogued people who prayed at mosques and eavesdropped on sermons.

The NYPD has defended its efforts, saying the threat of terrorism means officers cannot wait to open an investigation until a crime is committed. Under rules governing NYPD investigations, officers are allowed to go anywhere the public can go and can prepare reports for “operational planning.”

Though the NYPD’s infiltration of political groups before the 2004 convention generated some controversy and has become an element in a lawsuit over the arrest, fingerprinting and detention of protesters, the surveillance itself has not been challenged in court.

Flaherty, who also writes for The Huffington Post, said he was not an organizer of the summit, as police wrote in the NYPD report. He said the event described by police actually was a film festival in New Orleans that same week, suggesting that the undercover officer’s duties were more widespread than described in the report.

Flaherty said he recalls introducing a film about Palestinians but spoke only briefly and does not understand why that landed him a reference in police files. “The only threat was the threat of ideas,” he said. “I think this idea of secret police following you around is terrifying. It really has an effect of spreading fear and squashing dissent.”

Before the terrorist attacks of September 2001, infiltrating

political groups was one of the most tightly controlled powers the NYPD could use. Such investigations were restricted by a longstanding court order in a lawsuit over the NYPD’s spying on protest groups in the 1960s.

After the attacks, Cohen told a federal judge that, to keep the city safe, police must be allowed to open investigations before there’s evidence of a crime. A federal judge agreed and relaxed the rules. Since then, police have monitored not only suspected terrorists but also entire Muslim neighborhoods, mosques, restaurants and law-abiding protesters.

Keeping tabs on planned demonstrations is a key function of Cohen’s division. Investigators with his Cyber Intelligence Unit monitor websites of activist groups, and undercover officers put themselves on email distribution lists for upcoming events. Plainclothes officers collect fliers on public demonstrations. Officers and informants infiltrate the groups and attend rallies, parades and marches.

Intelligence analysts take all this information and distill it into summaries for Police Commissioner Raymond Kelly’s daily briefing, documents show.

The April 2008 memo offers an unusually candid view of how political monitoring fit into the NYPD’s larger, post-9/11 intelligence mission. As the AP has reported previously, Cohen’s unit has transformed the NYPD into one of the most aggressive domestic intelligence agencies in the United States, one that infiltrated Muslim student groups, monitored their websites and used informants as listening posts inside mosques.

Along with the political monitoring, the document describes plans to use informants to monitor mosques for conversations about the imminent verdict in the trial of three NYPD officers charged in the 2006 shooting death of Sean Bell, an unarmed man who died in a hail of gunfire. Police were worried about how the black community, particularly the New Black Panther Party, would respond to the verdict, according to this and other documents obtained by the AP.

The document also contained details of a whitewater rafting trip that an undercover officer attended with Muslim students from City College New York. “The group prayed at least four times a day, and much of the conversation was spent discussing Islam and was religious in nature,” the report reads. Reported in: Associated Press, March 23. □

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