newsletter on intellectual freedom

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school librarian opposes censorship in court action

Censorship of *Male and Female Under 18* by the Chelsa (Massachusetts) School Committee was challenged in federal court last summer by Chelsa School Librarian Sonja Coleman and a group which she organized, the Right to Read Defense Committee of Chelsea.

The battle lines in the widely publicized imbroglio were firmly drawn in July when the school committee (the local board), led by Chairperson Andrew Quigley, decided that the poetry anthology should be banned. In response to Coleman's vigorous efforts to defend the work, the school committee also began consideration of a motion to remove Coleman from her duties as school librarian.

In his first ruling on the federal suit, U.S. District Court Judge Joseph L. Tauro issued a temporary restraining order barring the school committee from penalizing Coleman or her colleagues involved in defense of the book. Although Judge Tauro was informed by an attorney representing the school committee that it had decided not to take any punitive action against faculty members, the judge said he wanted to issue the order nonetheless because "this is an intellectual issue, not one people should be hitting people over the head for." Tauro also issued an order returning the book to circulation with the condition that students reading it first receive parental permission. The trial before Tauro was scheduled for October 25.

The action against *Male and Female Under 18* appeared to reflect the school committee's strong dislike of one poem in the anthology, "The City to a Young Girl," written by Jody Caravaglia. Although members of the school committee expressed various objections to the poem, an attorney representing the school committee told the federal court that the formal action of the committee rested on "many valid educational grounds."

In a major brief on the issues of the case, the school committee's attorney declared that under Massachusetts law the school committee has clear authority to approve or disapprove works used in the schools. In addition, the attorney argued that the school committee had legally decided not to include sex education in the curriculum and that the poem represented, in the opinion of the school committee, an effort to introduce the subject improperly into the curriculum.

The brief of the Right to Read Defense Committee contended that *Male and Female Under 18* is fully protected by the First Amendment, that students possess a right to have access to materials fully protected by the First Amendment, and that the school committee's objections to the poem "as vulgar and offensive" cannot constitutionally justify its suppression.

Male and Female Under 18—edited by Nancy Larrick and Eve Merriam—was also

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Published by the ALA Intellectual Freedom Committee, Zoia Horn, Chairperson

titles now troublesome

Moscow fair censored but still surprising

American publishers exhibiting their wares at the first Moscow International Book Fair found that the degree of freedom accorded the participants was greater than they had expected, if not as great as some had hoped.

Using the convention of "Customs problems" to remove objectionable material from the exhibit of 1,200 publishing houses from all over the world, Soviet officials censored twelve books, including George Orwell's *Animal Farm* and *1984.* Other titles "held for consideration" were *The Secret Police in Lenin's Russia* by Leonard D. Gerson, *Le Conflict Sino-Sovietique et L'Europe de L'Est* by Jacques Levesque; *Images of an Era: The American Poster, 1945-1975* from the Smithsonian Institution collection, *Ukrainians in America, Hungarians in America,* and *Jews in America,* three books in a series from Lerner Publications. The officials also held the catalogs of the Oxford University Press for fall 1977, of British publishers Jonathan Cape and Andre Deutsch, and of the American Association of University Publishers.

Although the official policy of the exhibit directors was nonrestrictive, books exhibited at the fair were to comply with Soviet rules proscribing "books preaching war, race or national discrimination, offending the national dignity of other exhibitors, or publications imcompatible with social ethics."

Many of the 6,000 Soviet librarians, publishers, students, and other readers who attended the fair during the first afternoon were surprised and pleased at the quantity and type of material permitted. Several countries having no diplomatic relations with the Soviet Union, such as Israel, were invited to participate in the fair, and other works considered as controversial as the removed titles were available: Daniel Yergin's *Shattered Peace, The Origins of the Cold War and the National Security State;* John F. Kennedy's *Profiles in Courage;* and James Joyce's *Ulysses* all enjoyed unrestricted display. Reported in: *Washington Post,* September 7; *Los Angeles Times,* September 8.

But Soviets crack down on photo exhibit

Unlike the book fair, which suffered less censorship than expected, a traveling show, "Photography USA," was severely affected by Soviet restrictions.

The photography exhibit, touring the Soviet Union las summer as part of a cultural exchange program, was visited by over 1.25 million persons. The souvenir volumes designed as gifts for visitors to the display and the photography library, which was intended for "serious" photographers only, were the most seriously affected parts of the show.

According to Philippe Duchateau, officer in charge of the display material, the reasons for censoring specific materials were unclear, and general rules and standards were difficult to ascertain.

The seven-volume Time-Life *Library of Photography, Alistair Cooke's America,* any books containing photos of Hitler or Mussolini, and some volumes in which photo-

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the Supreme Court: 1976-77 in review

By HENRY R. KAUFMAN, Legal Counsel to the Association of American Publishers and to the AAP Freedom to Read Committee.

It was a disappointing Term, before the Supreme Court, for those seeking to extend or develop individual constitutional rights. Probably the most controversial decisions came in the area of women's rights where the Court refused to find mandate in the Constitution for government funding of "elective" abortions[1] or federal statutory mandate for disability benefits to pregnant workers.[2] Perhaps equally troubling was a series of decisions dealing with alleged racial discrimination in employment and housing where the Court's rulings set back efforts to deal with the continuing effects of past discrimination.[3] A number of other notable decisions during the 1976 Term–upholding corporal punishment in the schools,[4] the warrantless opening of incoming first class letter mail,[5] and the invasion of "informational" privacy through government compilation of computerized medical records[6]–also seem to support the contention of some civil libertarians that the Supreme Court "has forgotten its historical role as the chief protector of individual rights . . . as a check on the power of the majority."[7]

Such failed attempts to secure constitutional protection for important individual rights highlight the remarkable durability of the rights that are of primary concern to publishers and librarians–the First Amendment rights of free speech and a free press. During the 1975 Term a string of landmark First Amendment decisions was handed down by the Court.[8] This Term, by contrast, only a handful of the First Amendment cases decided approach landmark significance. But several rulings in a variety of contexts continued to confirm the supremacy–the "Firstness"–of First Amendment values on the Burger Court. In its continuing development of protection for "commercial speech," in its flexible application of First Amendment analysis to the freedoms of belief and of assembly and association, in its efforts to protect the press and the public from prior restraints, the Court remains a bulwark against the excesses of government authorities hostile to unrestrained freedom of expression.

Of course, the Court's voting record in First Amendment cases is not perfect and the importance of the values at stake and their general recognition undeniably add sting to the lapses in constitutional protection that fuel our continued vigilance. Particularly with regard to "obscenity," the decisions this Term again confirm that the high Court and the book community do not–and will not–always see eye to eye with regard to First Amendment freedoms.

Commercial Speech

Bates v. *State Bar of Arizona*
Linmark v. *Town of Willingboro*
Carey v. *Population Services International*

Probably the most significant development of this Term saw the Court continue to expand its recently-adopted ruling that "commercial speech" is covered by the First Amendment. In three cases involving widely-differing applications of this ruling, the Court upheld the commercial expression in question against traditional forms of government regulation or suppression.[9]

Bates v. *State Bar of Arizona,* reversing the ancient, if not venerable, tradition of restraining advertising within the nation's organized bar,[10] was perhaps the most newsworthy application of the new First Amendment protection. The hopelessness of a First Amendment challenge to state enforcement of the traditional ethic against lawyers' advertising was, until recently, a foregone conclusion since the Supreme Court had long held that purely "commercial" speech such as advertising was simply not constitutionally protected. Last Term, in the *Virginia Pharmacy* case,[11] which saw the commercial speech doctrine overturned in a quite different context–advertisement of drug prices–the Court expressly singled out lawyers' advertising as a possible exception to the new First Amendment coverage.[12] This Term in a five-to-four ruling that provoked strong dissents from Justices Powell (a former president of the American Bar Association), Burger, Stewart and Rehnquist, the Court extended *Virginia Pharmacy* to lawyers' advertising, holding that no justification offered in behalf of the long-standing proscription was strong enough to outweigh the First Amendment interests at stake.[13] In the face of impassioned arguments that the state must intervene to protect unwary citizens from deceptive lawyers' advertising, the majority reaffirmed the eloquent premise of *Virginia Pharmacy* that the Constitution favors a potent alternative to such state "paternalism:"

> "That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." The choice between the dangers of suppressing information and the dangers arising from its free flow was seen as precisely the choice "that the First Amendment makes for us." (citations omitted)[14]

In *Linmark* v. *Town of Willingboro*[15] the Supreme Court ruled that the Township of Willingboro could not constitutionally ban the display of "For Sale" or "Sold" signs on private residential porperty in order to stem what

it perceived as the "flight" of white homeowners from a racially integrated community. The Court rejected the municipality's reliance on the concededly important goal of promoting stable, racially integrated housing, holding that the First Amendment "disable[s] the State from achieving its goal by restricting the free flow of truthful information." The Court noted:

> If dissemination of this information can be restricted, then every locality in the country can suppress any facts that reflect poorly on the locality, so long as a plausible claim can be made that disclosure would cause the recipients of the information to act "irrationally."[16]

The Court also cited Justice Brandeis' famous First Amendment analysis, now to be applied in a commercial context as well as in the political one to which Brandeis referred:

> If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression.[17]

Carey v. *Population Services International,*[18] a case involving "access" to non-prescription contraceptives, is perhaps most significant for its clarification of the right of privacy in matters of child bearing and, in addition, the rights of minors in such matters.[19] However, the case also presented an ancillary question involving commercial speech—i.e., the constitutionality of New York State's total ban on the advertising of contraceptives. On this issue, a total of seven justices joined in ruling that such a flat prohibition violates the First Amendment. But even this relatively narrow question provoked two concurring opinions which highlight significant divergences of analysis even among the justices who agree in principle on the issue of protection for commercial speech.

Justice Brennan, speaking for himself and four others,[20] held that New York's proscription "clearly" fell within the principles of the *Virginia Pharmacy* case. The statute did not merely regulate the "time, place or manner" of expression, but totally suppressed speech. It did not focus on illegal conduct or misleading or deceptive advertising, but sought to ban *all* information on a given product. The majority also rejected the State's arguments that its proscription could be justified because such advertising was "offensive" or "embarrassing," or because permitting such advertising would "legitimize" illicit sexual behavior by minors. The majority noted that mere offense or embarrassment "classically" are held not to justify suppression of non-obscene expression. As for possible "legitimation" of sexual activity, under the traditional First Amendment test, the speech could not be suppressed for this reason because "none of the advertisements in this record can remotely be characterized as "directed to inciting or producing imminent lawless action.' "[21] In any event, the State's "legitimation" argument was "clearly directed not at any commercial aspect of the prohibited advertising but the ideas conveyed and the form of expression—the core of First Amendment values."[22]

The separate concurrences by Justices Powell and Stevens in *Carey* highlight fundamental issues left unresolved thus far in application of the Court's new commercial speech doctrine. In all of the recent commercial cases the Court has been at pains to indicate that commercial speech may be subject to a degree of "regulation" significantly greater than other types of expression. For example, "deceptiveness" is not generally considered a justification for state action against speech in a non-commercial context.[23] First Amendment advocates worry that introduction of such a double standard of protection will tend to undermine the protections accorded to all forms of expression. In *Carey,* however, the majority refused to apply a double standard to the commercial speech at issue. It reaffirmed that even as to commercial speech, total suppression is impermissible; "offensiveness" is irrelevant in the absence of "obscenity"; and suppression of underlying ideas can only be justified by a "clear and present" danger. However, in his concurring opinion, Justice Powell warned against reading these rulings "too broadly" finding "no reason to cast any doubt on the authority of the State to impose carefully tailored restrictions designed to serve legitimate government concerns as to the effect of commercial advertising on the young." "What is entitled to First Amendment protection," Justice Powell noted, "is not necessarily entitled to First Amendment protection in all places . . . [n]or is it necessarily entitled to such protection at all times."[24]

Similarly Justice Stevens, who is known to be an advocate of civil regulation rather than criminal prosecution of pornography and obscenity, carefully delineated his view of the permissible limits of "regulation" involving commercial or sexually-oriented speech:

> The Court properly does not decide whether the State may impose any regulation on the content of contraceptive advertising in order to minimize its offensive character. I have joined Part V of the opinion on the understanding that it does not foreclose such regulation simply because an advertisement is within the zone protected by the First Amendment.
>
> The fact that a type of communication is entitled to some constitutional protection does not require the conclusion that it is totally immune from regulation. Cf. *Young* v. *American Mini Theatres,* 427 U.S. 50, 65-71 (Stevens, J.). An editorial and an advertisement in the same newspaper may contain misleading matter in equal measure. Although each is a form of protected expression, one may be censored while the other may not.
>
> In the area of commercial speech—as in the business of exhibiting motion pictures for profit—the offensive character of the communication is a factor

which may affect the time, place, or manner in which it may be expressed. Cf. *Young* v. *American Mini Theatres, supra.* The fact that the advertising of a particular subject matter is *sometimes* offensive does not deprive all such advertising of First Amendment protection; but it is equally clear to me that the existence of such protection does not deprive the State of all power to regulate such advertising in order to minimize its offensiveness. A picture which may appropriately be included in an instruction book may be excluded from a billboard.[25]

Obviously, the commercial speech doctrine remains a curious yet highly significant indicator of the justices' general attitudes toward First Amendment values. It remains to be seen whether, over the long term, developments in this area have a benign or pernicious effect on enforcement of the First Amendment.

Freedom of Belief and Association

Wooley v. *Maynard*
Lefkowitz v. *Cunningham*
Nixon v. *Administrator of GSA*

Certainly the most enduring facet of First Amendment coverage remains in the area of personal belief and political association. Last Term, such cases were decided both for and against asserted First Amendment interests depending upon the context in which they were presented. Attempts to pursue First Amendment activities on a military compound were rejected [26] as was picketing in a privately-owned shopping area.[27] On the other hand, the right of non-policymaking public employees to partisan political affiliation was upheld[28] and rights of citizens to spend money for the advancement of political expression were given at least partial cognizance in the face of the competing public interest in preventing corruption of the political process.[29] This Term, political and personal rights received generally sympathetic treatment by the Burger Court.

Wooley v. *Maynard*[30] says volumes about individual "freedom of belief" derived by implication from the First Amendment. The individual's right to resist being used to sponsor or disseminate a state-originated or state-enforced ideology or message was reaffirmed. In *Wooley,* the Supreme Court majority held that New Hampshire cannot require its motorists to display the state motto—"Live Free or Die"—that appears on the State's non-commercial vehicle license plates. As the majority characterized it, the issue to be resolved was:

> whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public.[31]

The majority first found that the interests of the plaintiff (and all persons who wish to decline to "foster" a slogan they find "morally objectionable") "implicate" First Amendment protections, reasoning that the

> right of freedom of thought protected by First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. . . . A system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts.[32]

Having found that the First Amendment applied, the majority analyzed the State's "countervailing interests" in requiring display of the motto and found them wanting. The State's interest in "identification of passenger vehicles" could be "more narrowly achieved." The State's desire to promote "individualism and state pride" represents an attempt "to disseminate an ideology." The majority found that "no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message."

A right of free political "association" has been derived by implication from other express provisions of the First

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Carter proposes new secrecy rules

Copies of a proposed executive order on national security classification were circulated by the Carter administration in September. If formally issued, the order would replace Executive order 11652, which has governed the classification of government information since 1972.

Although the proposed order retains much of the language of E.O. 11652, it reduces the number of agencies with classification authority from twenty-five to twenty-one. It also proposes a limit of six years on any classification. Under E.O.11652, the schedule for declassification was ten years for "top secret" information, and eight years for "secret" information.

Definitions of the three categories of secrecy—top secret, secret, and confidential—remain essentially the same in the proposed order, but thirteen criteria are added to be used in deciding whether information should be classified. The criteria establish that information should be classified only if its disclosure could be reasonably expected to: "make the United States or its allies subject to attack, weaken their ability to defend themselves, or reduce the effectiveness of the U.S. armed forces"; "lead to hostile political, economic, or military action against the United States or its allies by a foreign power"; "aid a foreign nation to develop, improve, or refine its military potential"; "deprive the United States of a scientific, engineering, technical, economic, or intelligence advantage directly related to national security"; "cause political or economic instability or civil disorder in a foreign country"; "disclose the identity of a confidential source of a United States diplomatic or consular post." Reported in: *Access Reports,* September 20.

in review

An Intellectual Freedom Primer. Charles H. Busha, ed. Libraries Unlimited, 1977. 220 p. $17.50 in U.S. and Canada; $21.00 elsewhere.

My *American Heritage Dictionary* defines a "primer"as an elementary textbook; a book that covers the basic elements of any subject. Busha's new book, actually a collection of related essays by different authors, is a state-of-the-art resume of the nature and typology of intellectual freedom and censorship today. It is also a ringing endorsement and profession of freedom. But a primer it is not, as I will explain.

The book comes out of a shared concern among the contributors for serious and progressive erosion of First Amendment rights. Consisting of essays on such timely topics as freedom of expression in the visual arts, the performing arts, motion pictures, books and television, it is designed for students in library schools, journalism and communications, as well as the interested, undecided reader. It is concerned with attitude-building and has a distinct, palpable point of view.

Busha's introduction sets the tone for the volume as a whole. He begins with the assumption that freedom of expression is (and has always been) in jeopardy from those who would restrict it, for whatever reason, and that it is not unavoidably doomed, so long as we don't just sit around and accept the actions of government, pressure groups, and the media. Busha sees as the greatest threats to freedom (1) undemocratic ideas and trends, (2) bureaucratic governments, (3) collectivism and its restraints on personal liberties, and (4) new threats posed by technology and accelerated industrial change.

Perhaps his finest hour is Busha's discussion and eventual rejection of B. F. Skinner's idea (*Beyond Freedom and Dignity*) that freedom means only "avoidance of and escape from adverse conditions" and not autonomy and self-determination. It doesn't take very long to see that Busha is idealistic and passionate in his rejection of control for the greater good, and he concludes his introduction with a chrestomathy of quotable statements on freedom and suppression, interwoven skillfully with his own commentary.

Here, paraphrased, are the objectives of those who wrote this book: to help students and others more fully understand the meaning of, and the constitutional position on, freedom of expression; to stimulate thinking about intellectual freedom and its antonym, censorship; and, possibly, to motivate the uncommitted reader to become involved in continuing efforts to get both government and pressure groups off our backs in the area of communication and expression.

The essays in this collection cover the recent history of attempts to restrict expression, privacy and security in automated personal data systems, and current censorship practices in the various media of communication. A final chapter by Richard McKee is an intelligent discussion of "censorship research," pragmatic in its willingness to discuss what research is and is not, and what findings may or may not mean. In fact, this essay alone is worth the price of the book as it delineates the pitfalls inherent in saying anything meaningful about such a fugitive and subjective field as measurement of people's deeply held beliefs and perceptions of what is right and wrong. McKee points out that those looking for the "facts" about censorship should remember that conflicting information and evidence about it may be found in all suject literatures. Many "research" reports relating to censorship, he says, "actually contain oversimplifications based upon untested assumptions that in turn color treatment of the topic."

Each essay is well researched, timely, interestingly written, and a good overview in its area of concern, raising numerous questions through effective use of case history and example. Overall it is a well-rounded collection of essays, which, while it may not provide all the answers, does an admirable job of providing the reader with some of the important questions in intellectual freedom and its study. It is not, in the true sense of the word, a primer, however, due to its obvious and ubiquitous bias, its lack of chapter-to-chapter references, and the absence of an index. Beyond that, it is useful as a discussion starter, an information source or a textbook, to those not put off by its rather steep price. The book is strongly recommended.–*Reviewed by Bruce A. Shuman, Associate Professor, School of Library Science, University of Oklahoma.*

Freedom in America: A 200-Year Perspective. Norman A. Graebner, ed. Penn State Press, 1977. 269 p. $12.50.

In these waning years of the eighth decade of the twentieth century, the prospects for freedom in our country are not really encouraging to most observers. The fifteen scholars and activists who led a series of public forums in Pennsylvania from December 1975 to June 1976–out of which this volume emerged–each had individual opinions and perspectives on their important topics–but were in agreement on what the preface-writers refer to as the urgent need for "a reaffirmation of the principles of human dignity and the maintenance of an environment capable of sustaining them."

Pauline Maier defines and clarifies "Freedom, Authority, and Resistance to Authority, 1776-1976," showing that before the American Revolution such rights as freedom of the press or of speech "were traditionally understood as means to assure the people's ability to learn about the

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censorship dateline

libraries

Brockport, New York

The Brockport school board refused in September to ban Norma Klein's *Naomi in the Middle* from an elementary school library. But a five-to-two vote of the board restricted the book's availability to those students whose parents declare in writing that their children may use it.

School Superintendent David Field suggested that the board impose the restriction because he said he found parts of the book offensive and poorly written. "But we should not ban the book," Field stated. "I think that establishes a fairly dangerous precedent."

Board member Anthony Pietrzykolski, who voted against the book, disagreed with Field. "I don't think we should have the book in our library," Pietrzykolski stated. He said he thought the author had failed to "make the point she was trying to make."

The board's vote to restrict use of *Naomi* was contrary to the recommendation of a special review committee composed of local citizens. The committee decided that the book should be retained without restrictions because it deals with family relationships in an "open and forthright" manner. Reported in: *Rochester Times-Union,* September 15.

West Islip, New York

The West Islip Public Library engages in censorship by restricting access to more than forty novels, including works by D.H. Lawrence, Gore Vidal, Henry Miller, and Richard Wright, local citizens charged in August.

In all, the library kept nearly 900 books in a room off limits to patrons unaccompanied by staff members. Library officials explained that access to the books was restricted to prevent theft and defacement. Library Director Darline L. Carter said the restricted collection included 621 reference books, 234 nonfiction books, and forty-two works of fiction. The works were listed in the card catalog with a red notation to "request book at desk."

Board President Eugene Harple defended the restricted access: "It is inconceivable to me that we could eliminate the practice entirely without doing a great disservice to our patrons . . . because when they came here for a particular book it would be gone or all marked up." But he added that the board "would intensely address itself" to the issue at an early meeting.

Harple also admitted that there were inconsistencies in the library's practice. Lawrence's *Lady Chatterley's Lover* was located in the restricted room, although his *Sons and Lovers* circulated normally. Henry Miller's *Tropic of Cancer* was restricted, whereas *Tropic of Capricorn* was left in the open stacks. Reported in: *Newsday,* August 14.

Oil City, Pennsylvania

When students at Allegheny-Clarion Valley High School returned to classes August 30, they discovered that Steinbeck's *Of Mice and Men* was no longer in the high school library or a part of the English program.

During the summer recess, the local school board voted six to two to ban the book. According to an employee of the school district, most copies of the work were burned.

The board's action responded to several written complaints filed by parents, including Shirley Gates. Gates, the mother of two high school students, criticized the work: "I think as a Christian I have to take a stand against a book with language like that. [Steinbeck's] writing—especially this book—is not going to help our children. The book uses the Lord's name in vain, refers to prostitution, and takes a retarded person and makes a big issue of it."

School board member Stanley Texter said he was "definitely in favor of having the book removed, because of the vulgarity and profanity contained in the book." He suggested that younger high school students are not psychologically mature enough to cope with "this type of literature."

School Principal Robert Haas explained that the book was in the curriculum because of its social value and because the school system had attempted "to give students a broad cross-section of literature."

"The book has been in our curriculum for five or six years. A couple of do-gooders decided it wasn't acceptable," Haas stated. Reported in: *Oil City Derrick,* August 4.

schools

Philadelphia, Pennsylvania

The world history curriculum in Philadelphia schools came under fire in September from local German-American groups who criticized its emphasis on the World War II Nazi

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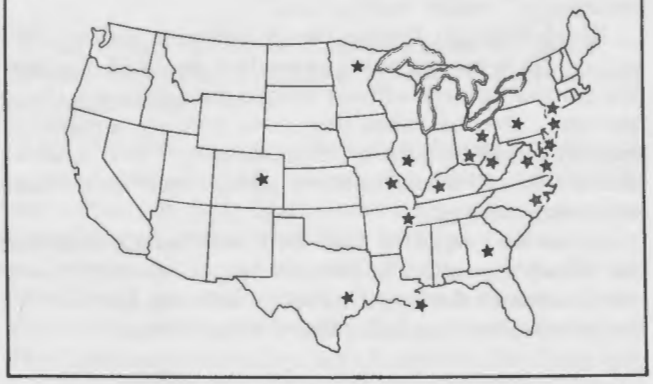
from the bench



filmmakers' rights

Denver, Colorado

In the first ruling of its kind in U.S. constitutional history, the U.S. Court of Appeals for the Tenth Circuit has declared that documentary filmmakers, like news reporters, may keep their sources and working materials confidential.

Handed down on September 23, the ruling of the three-judge federal panel affirmed the rights of Arthur Buzz Hirsch, an independent documentary fillmmaker working on the story of the death of Karen Silkwood (see *Newsletter,* Sept. 1977, p. 141).

Silkwood, a technician at the Kerr-McGee Nuclear Corporation in Oklahoma prior to her death in a highway accident in 1974, had raised questions about safety in the plutonium factory where she worked. After her death, her estate brought suit against Kerr-McGee, contending that the corporation had violated her constitutional rights by conspiring to prevent her from organizing a labor union, and from filing complaints against Kerr-McGee under the Atomic Energy Act. The estate also charged the corporation with "willfully and wantonly contaminating her with toxic plutonium radiation."

In the course of preparing its defense against the suit, Kerr-McGee requested access to the documents, notes, tape recordings, and other materials of Hirsch, which were then subpoenaed by U.S. District Court Judge Luther Eubanks in Oklahoma City.

In voiding the subpoena issued by the lower court, the appellate bench found that Hirsch's "mission in this case was to carry out investigative reporting for use in the preparation of a documentary film." The court said that the protection of sources under the First Amendment was not limited to newspaper reporting, and that the "press comprehends different kinds of publications which communicate to the public information and opinion."

However, the appellate court noted that reporters are not given absolute protection of their sources under the First Amendment. The Hirsch case was sent back to the lower court with instructions that his claims to confidentiality be weighed in a manner consistent with established constitutional law. Under guidelines established by the U.S. Supreme Court, courts confronted with confidentiality cases must weigh the importance of a free press against such considerations as the necessity for access to the information sought and the intensity of the efforts made by persons seeking the information to acquire it by other means. Reported in: *New York Times,* October 2.

news media

New Orleans Louisiana

A Texas judge who ruled in January that television cameras could film executions was reversed in August by a federal court of appeals.

U.S. District Court Judge William M. Taylor Jr. had ruled that an execution is "an act of the state" and therefore constitutionally accessible to all news media (see *Newsletter,* March 1977, p. 41).

The U.S. Court of Appeals for the Fifth Circuit, however, disagreed. In reversing the order, the appeals court noted that while the Supreme Court had held that the First and Fourteenth Amendments "bar government from interfering in any way with a free press," the high court had also held that the Constitution "does not . . . require government to accord the press special access to information not shared by members of the public generally."

Texas policy permits print journalists to view executions and write about them, but cameras and tape recorders are barred, as are members of the general public. Reported in: *Philadelphia Inquirer,* August 4.

Newark, New Jersey

In an August ruling against the right of news reporters to protect the anonymity of their sources, U.S. District Court Judge H. Curtis Meanor declared that attorneys for former Representative Henry Helstoski could subpoena reporters to testify in a civil suit against U.S. Attorney Jonathan L. Goldstein.

Helstoski, who lost his House of Representatives seat in 1976, was indicted by the U.S. Attorney's Office on charges that he had accepted money for promises to enter special legislation in Congress granting citizenship to illegal aliens. Helstoski then filed suit against Goldstein, charging unfair pretrial publicity.

Under Judge Meanor's ruling, reporters will be asked to tell who revealed to them that Helstoski claimed Fifth Amendment rights while testifying before a grand jury. Judge Meanor said the federal courts would have to decide "sooner or later" whether they are going to recognize a privilege for reporters. "As a matter of common law, we might as well get started," Judge Meanor said.

The order allowing the subpoenas was strongly criticized

by the New Jersey chapter of the Society of Professional Journalists, Sigma Delta Chi. Reported in: *Editor & Publisher,* September 3, 10.

New Orleans, Louisiana

A U.S. District Court judge properly withheld information from news reporters at the 1975 bribery trial of former U.S. Senator Edward J. Gurney, according to the U.S. Court of Appeals for the Fifth Circuit.

The *Miami Herald* and the *St. Petersburg Times* had appealed orders issued by Judge Ben Krentzman which prevented reporters and the public from viewing or hearing evidence that was not submitted to the jury and limited and denied access to certain exhibits that were admitted as evidence.

Writing for the appellate court, Judge Walter P. Gewin said the lower court order did not violate the First Amendment's guarantee of a free press in that the right of the news media to gather information is not unrestricted and must at times give way to the rights of defendants. Reported in: *New York Times,* September 13.

the press

Pittsburgh, Pennsylvania

The Commonwealth Court of Pennsylvania, which rules on civil suits involving the state, declared in July that a job seeker has a right to advertise his or her sex, race, religion, ancestry, color, national origin or age in a situation-wanted newspaper advertisement.

The unanimous ruling of the court upheld the *Pittsburgh Press* in its contention that the Pennsylvania State Human Relations Commission could not legally forbid such advertising. The commission had ordered the *Press* to cease publishing situation-wanted ads indicating such personal qualifications.

The seventeen-page opinion of the court, written by Pittsburgh Judge Harry Kramer, said that the commission had failed to show that its order furthered the interests of the state in eradicating discrimination. The court also found that the order significantly impaired the flow of legitimate and truthful commercial information. Reported in: *Editor & Publisher,* August 13.

broadcasting

Washington, D.C.

A Federal Communications Commission rule requiring cable television operators to screen and censor "obscene or indecent matter" was suspended in September by the U.S. Court of Appeals for the District of Columbia. The appellate court remanded the rule to the FCC for the institution of proceedings to repeal it.

Originally adopted in June 1976, the rule was challenged by the American Civil Liberties Union on the gounds that it violated the First Amendment. The National Cable Television Association joined in the case because of the constraints placed upon cable system operators.

Daniel M. Armstrong, a member of the general counsel's office at the FCC, indicated that the rule's requirement of prescreening without any provision for immediate judicial review probably represented "a system of prior restraint without the procedural safeguards that would make such a system legal."

A spokesperson for the National Cable Television Association said, however, that cable operators would still be bound by criminal codes prohibiting the transmission of obscene material over the airwaves. "Cable operators will still remain catious," the spokesperson stated. Reported in: *Wall Street Journal,* September 2; *Variety,* September 7.

Washington, D.C.

A federal statute requiring public broadcasting stations to keep tapes of their programs for sixty days is unconstitutional because it does not apply to commercial stations, according to a September ruling of the U.S. Court of Appeals for the District of Columbia.

The opinion of the court noted that the requirement was added to the Communications Act after Senator Robert Griffin (R.-Mich.) said at a hearing he had been unable to get a tape of a PBS show on an anti-missile system—a program which he had heard was "biased." Griffin had declared that past programs would be available for review by members of the public or Congress if the stations were required to keep tapes.

Writing for himself and U.S. Court Judge Gerhard A. Gesell, Judge J. Skelly Wright said the section "was intended and expected to serve as a means for unprecedented government review—in effect, government censorship—of the specific contents of programs broadcast by noncommercial stations."

The judges noted that even though there had been no evidence that the taping requirement had been used for purposes of censorship, its mere existence could nevertheless have a "chilling effect" on the public system. "The fact remains that a statute whose purpose is to limit First Amendment freedoms is not saved by any lack of success it has achieved in doing so," Judge Wright declared.

The Federal Communications Commission, which had established regulations to enforce the statute, claimed that its only intent was to give taxpayers a means for reviewing the performance of stations supported by tax money. Reported in: *Washington Post,* September 16.

students' rights

Newark, New Jersey

A New Jersey high school student who refused to obey a state law requiring all public school students to stand at

attention during the Pledge of Allegiance was vindicated in August by a federal court ruling. U.S. District Court Judge H. Curtis Meanor held that the law that students "be required to show full respect to the flag while the pledge is being given" illegally compelled "symbolic speech" and violated students' First Amendment rights.

The student, Deborah Lipp, filed suit against the law after she was threatened with suspension in May for refusing to stand during the pledge. "I did it, and I'm glad I did it," Lipp said. "I didn't feel I should be required to make that symbolic gesture." Lipp testified during the brief trial that she had refused to rise because she did not believe there was "liberty and justice for all" in the U.S.

In his oral decision, Judge Meanor said that pupils opposed to the patriotic exercise could remain seated while their classmates voluntarily recited the pledge, so long as those objecting to the exercise did not "whistle, drum, tap dance, or otherwise be disruptive."

Meanor said his ruling was an extension of a 1943 U.S. Supreme Court decision—*West Virginia State Board of Education* v. *Barnette*—that prohibited state education boards from compelling public school students to salute the flag while reciting the pledge. The high bench found that the mandatory salute was an unconstitutionally compulsory affirmation of belief. Reported in: *Hackensack Record,* August 17; *New York Times,* August 17.

New York, New York

A "sex habits" survey proposed by Stuyvesant High School student Jeff Trachtman was vetoed in September by the U.S. Court of Appeals for the Second Circuit. The appellate bench feared its potential psychological damage to students. Trachtman, now graduated from the Manhattan high school, was originally prevented by New York City school authorities from conducting the survey and publishing its results in the *Stuyvesant Voice,* the high school paper.

The decision of the appeals court overrode a ruling in favor of Trachtman by the U.S. District Court. Appellate Judge Murray Gurfein said the survey, which questioned students' habits or thoughts on such topics as birth control, contraception, homosexuality, and premarital sex, could have a traumatic effect on the students, even though responses to the questions were to be voluntary. "While the passing out of a few questionnaires might not provoke a breach of the peace, a blow to the psyche may do more permanent damage than a blow to the chin." In his dissenting opinion, Judge Walter R. Mansfield critized the assumptions of those opposed to publication: "The picture drawn by the defendants of high school freshmen and sophomores (to say nothing of juniors and seniors) as fragile, budding egos flushed with the delicate rose of sexual naivete, is so unreal and out of touch with contemporary facts of life as to lead one to wonder whether there has been a communications breakdown between them and the next generation."

Trachtman planned to appeal the decision to the U.S. Supreme Court. Reported in: *New York Times,* September 2; *Village Voice,* September 26.

libel

Washington, D.C.

A unanimous federal appeals court ruled in mid-September that government officials are immune from civil lawsuits charging them with common law offenses which they might commit in the execution of their official duties.

Writing for the U.S. Court of Appeals for the District of Columbia, Judge Harold Leventhal declared that the immunity of workers from such offenses as libel or slander was required so that they might "speak forthrightly and disclose violations of the law and other activities contrary to the public interest."

The appellate court ruled on a libel suit filed by Expeditions Unlimited against the Smithsonian Institution and Clifford Evans, the chairperson of the institution's department of anthropology. Expeditions Unlimited had charged that it was libeled in a letter written by Evans which was critical of the firm's capabilities in underwater archeological excavations.

The ruling, however, appeared not to prevent private citizens from suing government officials for violations of constitutional rights. The immunity established by the appeals court would probably be qualified under such circumstances.

In a related move, Attorney General Griffin Bell asked Congress to protect federal employees from civil damage suits arising from activities connected with their work, particularly employees of the Federal Bureau of Investigation and other investigative agencies. Reported in: *New York Times,* September 18.

New York, New York

Ruling on a $5 million libel claim against Jack Newfield, the *Village Voice,* and Holt, Rinehart and Winston brought by Judge Dominic S. Rinaldi, the New York State Court of Appeals has declared that Judge Rinaldi had failed to show that Newfield's criticisms of him—published first in the *Village Voice* and then later in a book, *Cruel and Unusual Punishment*—were asserted with the knowledge that they were false or with reckless disregard of their truth. (See full report in "AAParagraphs" in this issue.)

freedom of information

Washington, D.C.

A journalistic institution made famous by former Secretary of State Henry Kissinger—the "background-only" briefing, in which comments on sensitive matters are given to the press with the understanding that the information is

to be attributed only to "a senior U.S. official"—was threatened in August by the U.S. Court of Appeals for the District of Columbia.

Ruling on a case involving a briefing given by Kissinger, the appellate court said the State Department could not properly classify as confidential portions of the transcript of a December 3, 1974 press briefing after a copy was requested five months later through the Freedom of Information Act.

Lawyers for the State Department argued that any revelation of the source of the information, which concerned the course of U.S.-Soviet strategic arms limitation talks after a Ford-Brezhnev meeting at Vladivostok, would be detrimental to national security and jeopardize the position of the U.S. in future negotiations.

The court, consisting of Judges J. Skelly Wright, Carl McGowan, and George E. MacKinnon, declared that press briefings have no statutory privilege under the FoIA.

The court upheld an earlier judgment by U.S. District Court Judge June L. Green, who had ruled without inspecting the document in question that it was unprotected. But the appellate court gave the State Department another chance to protect the document by instructing Green to examine it in order "to determine the truth" of the argument regarding national security.

Commenting on the position of the State Department, the appellate court declared: "One would have thought that in view of the deliberate and extensive, not to say daring, use it has made of [background-only briefings] in the recent past, the Department would have been peculiarly alert to the searching out of all possible legal ramifications bearing on security of the disclosures made at such conferences. . . . It seems evident to us that the State Department failed utterly to anticipate and to identify problems presented by the enactment of the Freedom of Information Act in relation to the background press conference."

The FoIA suit was filed by Morton Halperin, a one-time aide to Kissinger who sued in his current capacity as director of the Center for National Security. Reported in: *Washington Star,* August 17.

Washington, D.C.

Two non-profit public interest groups, the Consumers Union and the Public Citizen's Health Research Group, won an appellate victory in July in their battle to gain access to documents on television safety.

Ruling on the FoIA litigation, the U.S. Court of Appeals for the District of Columbia declared that a lower court in the District of Columbia had erred in dismissing a suit against the Consumer Products Safety Commission, which maintained that release of the documents was barred by a preliminary injunction from the Delaware U.S. District Court.

The case began in 1974, when the public interest groups asked to see the documents, which had been subpoenaed by the commission from several major television manufacturers. After a nine-month delay, the commission decided that the documents could be released. At that time seven manufacturers filed suit in the U.S. District Court for Delaware, and other manufacturers filed suit in three other federal courts.

The appellate court said that a ruling from the court in Delaware could not affect a court in the District, and remanded the case to the court in the District to decide "quite simply, whether or not the document should in fact be disclosed." Reported in: *Acess Reports,* July 26.

teachers' rights

Ocean City, Maryland

The Maryland Board of Education ruled unanimously in September that constitutional guarantees of free expression prohibited the Hartford County school system from penalizing a teacher for a speech supporting a strike last spring.

The state board declared that there was "no legal basis for any sanction being imposed" on a Churchville elemenatry school teacher, George B. Brown Jr., who was suspended from his job for remarks made at a PTA meeting. Brown will be reimbursed for the three days he was suspended and all references to the suspension will be expunged from his personnel record.

Brown was suspended by Hartford County Superintendent Alfonso A. Roberty, whose action was upheld by the local school board.

Chet Elder, a representative of the Maryland State Teachers Association, was elated at the ruling: 'It's a super victory—and obviously a victory for all teachers in their freedom of speech. It's just a shame that the [suspension by the superintendent] was rubber-stamped by the local board in what was obviously an unconstitutional act." Reported in: *Baltimore News American,* September 29; *Baltimore Sun,* September 29.

free expression

Freeport, Illinois

An Illinois Circuit Court judge became so outraged at the legend "Bitch, Bitch, Bitch" on the T-shirt of a visitor to his courtroom that he sentenced her to three days in jail for contempt.

Sue Watts, who wore the T-shirt to the courtroom of Circuit Court Judge Dexter Knowlton, was attending the rape trial of her brother. Judge Knowlton, who warned her to stay out of the courtroom so long as she was wearing the T-shirt, decided to sentence her for contempt after she returned to the courtroom wearing a jacket that covered the offending words.

Judge Knowlton said in his order that Watts' contempt spoke for itself. He declared that she "did impinge on the

dignity of the court and lessen the dignity of the court."

In 1971, the U.S. Supreme Court overruled a California court which had convicted a person of disturbing the peace for wearing a jacket with the phrase "Fuck the Draft" in a courthouse.

The late Justice John Harlan wrote in his opinion on the case, "One man's vulgarity is another man's lyric." The government, Justice Harlan argued, should not try "to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us." Reported in: *St. Louis Post-Dispatch,* August 19.

free assembly

Washington, D.C.

A three-judge federal panel ruled in August that $100 awarded to each of seventeen Quakers arrested in an April 1971 "pray-in" protest in front of the White House was too low.

The Quakers, who had obtained a permit to conduct their prayer vigil, refused to move across Pennsylvania Avenue from the White House to Lafayette Park after being ordered to do so by then-D.C. Police Inspector William C. Trussell. Trussell said he ordered the move when he began to fear that the group would become disorderly.

In 1974, U.S. District Court Judge Oliver Gasch ruled that the Quakers' First Amendment rights had been violated and ordered $100 in damages for each, with $500 to be paid by Trussell himself. The plaintiffs had asked for a total of more than $775,000.

In remanding the award for recalculation, the unanimous panel said it was setting no firm guidelines other than "reasonableness" and "sensitive treatment," and suggested that any such award recognize a minimum of the expense of the Quakers' trip to Washington and a day's pay for those of the group who had spent a day in jail.

Ruling on a similar case, a three-judge federal panel told U.S. District Court Judge William P. Bryant that an award of $7,500 to each of 1,200 protestors arrested at the U.S. Capitol on May Day 1971 was too large. The two-to-one opinion of the court said that a jury "cannot be set loose to work its discretion informed only by platitudes about priceless rights."

U.S. Circuit Court Judges Harold Leventhal and J. Skelly Wright sat on both panels. Reported in: *Washington Star,* August 11.

obscenity law

Atlanta, Georgia

A federal judge in Atlanta declared in August that Fulton County Solicitor Hinson McAuliffe had acted improperly in July in arresting Atlanta news dealers for selling *Penthouse* magazine. U.S. District Court Judge Richard C. Freeman ruled that the August issue of *Penthouse* could not be found obscene under Georgia law. *Penthouse* had asked for such a declaration.

In addition, Judge Freeman said that McAuliffe had tried to impose "an informal system of prior restraint" by arresting six news dealers without first obtaining arrest warrants. Freeman said the relief he granted the publisher would "henceforth circumscribe the authority of the solicitor's office to make wholesale arrests."

Despite the federal court ruling, the Atlanta News Agency paid an $8,000 fine in a state court after entering a "no contest" plea to charges of distributing obscene materials. Fulton State Court Judge Daniel Duke fined the agency $8,000 for distributing the June, July, and August issues of *Hustler, The Best of Hustler II,* and the August issue of *Genesis.* Charges involving *Penthouse* and *Oui* were dismissed by the court.

In a prepared statement, officials representing the Atlanta News Agency said they chose not to contest the charges of obscenity in order to avoid exposing employees "to the rigors, publicity, and expense of being involved in unnecessary and protracted litigation." At the same time the company maintained that all magazines sold by it were protected by the U.S. Constituion.

Prior to the federal court ruling, proponents of First Amendment freedoms in Atlanta vigorously objected to McAuliffe's raids. Among those who attended an August press conference to protest the censorship was Lyn Thaxton, chairperson of the Intellectual Freedom Committee of the Georgia Library Associaton. Reported in: *Atlanta Constitution,* August 3, 24; *Wall Street Journal,* August 25.

Lansing, Michigan

The Michigan Court of Appeals suggested in July that Detroit should rewrite its obscenity ordinance. The appellate bench found portions of the ordinance both vague and overbroad.

The court held that a section of the law defining sexual excitement in terms of "facial expressions, movements, and utterances" went beyond U.S. Supreme Court guidelines for drafting such legislation. Material which is not "hard core" retains its protection under the First Amendment, the court declared.

The appeals court also reversed the conviction at issue in the case before it on the grounds that evidence was lost "at some point in the lower court proceedings." Reported in: *Detroit Free Press,* July 8.

Cincinnati, Ohio

The producers of *Oh! Calcutta!* were rebuffed in August in their attempts to get U.S. District Court Judge Timothy S. Hogan to protect the nude musical from prosecution on obscenity charges.

Judge Hogan refused to view a videotape of the production made in 1969 in order to rule on its obscenity. He said a decision on the obscenity of *Oh! Calcutta!* in the absence of a complaint against it would be an advisory opinion not within the jurisdiction of the court.

During the federal court hearing, the judge also refused to enjoin Hamilton County Prosecutor Simon L. Leis Jr. from taking action against the musical. "This court can't preempt the duty of a prosecuting attorney," Hogan declared. A lawyer representing Broadway Productions, Arnold Morelli, endeavored to establish that statements by Leis about the possibility of prosecution represented intimidation and unconstitutional prior restraint. Reported in: *Cincinnati Post and Times-Star,* August 25.

Cincinnati, Ohio

The obscenity conviction of a projectionist who showed films at a local stag party was upheld in August by the Ohio Court of Appeals.

Police who paid for admission to the 1976 party said they seized the films after they were projected and placed in a bag. Subsequently, they were found obscene by the trial court judge.

In the appeal, the projectionist's attorney, Andy Dennison, argued that the trial court had erred in overruling a motion to reject the films as evidence. "Where motion picture films are seized without the intervention of a magistrate and the issuance of a search warrant, such seizure is unreasonable and repugnant to the First, Fourth, and Fourteenth Amendments of the Constitution of the United States," Dennison declared.

The appeals court disagreed. Writing for the bench, Judge John W. Keefe said that in the situation under review, "police action 'literally must be now or never to preserve the evidence of the crime.' " Keefe quoted a U.S. Supreme Court decision regarding the warrantless seizure of evidence that could disappear or be destroyed if not taken immediately into police custody. Reported in: *Cincinnati Enquirer,* August 26.

Cleveland, Ohio

The city of Cleveland was ordered in August to allow performances of *Oh! Calcutta!* at a municipal auditorium. U.S. District Court Judge William K. Thomas said the city could not violate the rights of the producer of the musical by banning the show.

Judge Thomas also declared that Cleveland Mayor Ralph J. Perk could not determine what is to play at the city-owned facility. If the mayor objected to *Oh! Calcutta!* he should have gone to state court to seek an obscenity ruling, Judge Thomas declared.

Mayor Perk, who has conducted a campaign against nudity and obscenity in Cleveland (see *Newsletter,* Sept. 1977, p. 131), ordered the city's law department to appeal the ruling. "A city should be able to set its own standards," Perk stated. "City officials should have the right to control what is shown in city-owned buildings like Music Hall." Reported in: *Cleveland Press,* August 9; *Cleveland Plain Dealer,* August 10.

Cleveland, Ohio

A second battle over "obscenity" in Cleveland was also lost by Mayor Perk in a federal court suit involving the sale of *Penthouse* at the Cleveland airport. Perk had demanded the removal of all "sexually explicit" periodicals from airport facilities.

In response to a request from *Penthouse,* U.S. District Court Judge Robert B. Krupansky permanently enjoined Cleveland officials from restricting the sale of *Penthouse* and other magazines which have not been found obscene by a judicial determination. Reported in: *Cleveland Plain Dealer,* August 24.

Memphis, Tennessee

Citing a March 1977 ruling of the U.S. Supreme Court prohibiting the *ex post facto* application of obscenity standards, U.S. District Court Judge Robert M. McRae Jr. has ordered a new trial for two men and three corporations convicted by a jury in 1976 of shipping the film *School Girl* across state lines.

In its March ruling, the Supreme Court held that the defendants in a Newport, Kentucky case were unfairly convicted because the obscenity standards applied at their trial were established in 1973, after the conduct for which they were being tried occurred.

In a separate ruling applying to a non-jury trial in 1976, McRae found seven other men and five firms guilty of conspiring to distribute *School Girl* in interstate commerce. Reported in: *Memphis Commercial Appeal,* July 29.

obscenity: convictions, acquittals, etc.

Houston, Texas

After forty minutes of deliberation, a jury in Judge A.D. Azios' County Criminal Court found a bookstore clerk guilty of selling an obscene film. The clerk was fined $500 and sentenced to six months' probation.

"There's nothing that two people can do that wasn't done in that movie," Prosecuting Attorney Rusty Hardin told the jury. Hardin said later the jurors told him they had had "no trouble" in deciding that the movie was obscene.

Gertrude Barnstone, a Rice University professor and a physician, testified that the film had artistic, scientific, and therapeutic value. Defense Attorney Clyde Woody argued that the film was not "sold openly or at a Baptist bookstore" but at a shop which forbad entrance to minors. Reported in: *Houston Chronicle,* June 28.

(Continued on page 164)

is it legal?

in the U.S. Supreme Court

Broadcasters and newspapers in South Carolina have asked the U.S. Supreme Court to rule on a "hopeless disarray" of gag orders limiting coverage of the criminal trial of former State Senator J. Ralph Gasque. It was expected that the Court would rule on the petition in October.

The South Carolina media strenuously objected to U.S. District Court Judge Robert Martin's order sharply restricting coverage of Gasque's trial. Martin's order specifically barred news reporters from speaking with or interviewing witnesses or jurors, mingling with them outside the courthouse or having sketches made "within the environs of the court."

The U.S. Court of Appeals for the Fourth Circuit upheld all portions of the order except those pertaining to contacts with witnesses outside the courthouse and the making of sketches. Reported in: *New York Times,* August 18; *Variety,* August 31; *Editor & Publisher,* September 3.

Illinois courts must rule on Nazis

Acting while the Supreme Court was in summer recess, Justice John Paul Stevens refused to intervene in a legal dispute over whether Nazis in Chicago may be allowed to wear swastikas in planned marches in Skokie, a Chicago suburb whose Jewish residents include many survivors of the Holocaust (see *Newsletter,* Sept. 1977, p. 137).

The Illinois Appellate Court ruled in July that the Nazis could march in the suburb and distribute their literature while wearing their uniforms, but the state bench refused to lift a judicial ban on the wearing of swastikas.

Judge Stevens said he found no reason to believe that the Illinois Supreme Court would fail to render a decision on the issue without unneccessary delay. Reported in: *Chicago Sun-Times,* August 27.

teachers' rights

Fort Scott, Kansas

A journalism teacher at Fort Scott High School who was removed from her position for refusing to censor school newspaper articles by students has filed suit in U.S. District Court to challenge her reassignment. Lily Kober, who permitted her students to publish articles in the *Tiger Times* which were critical of school cafeteria service, was given new duties by the school board.

Principal Bill Weatherbie, whose wife was employed in the school cafeteria, said he was "unhappy" with an editorial and so took control of the *Tiger Times,* deleting several articles dealing with the flap over the cafeteria.

The suit seeks a declaratory judgment affirming the constitution rights of both the teacher and her students, and requests a permanent injunction against the school board's vote to reassign Kober to other duties.

"I guess I had this naive notion about the Constitution of the United States and the rights we have as American citizens," Kober said. "It doesn't say it applies only to Americans over the age of eighteen as far as I'm concerned.

"We have no reason to fear young people who think. It's the ones who don't think who I'm afraid of. If we don't teach them to think, then how are they going to assess what people tell them when they get out of school? How are they really going to evaluate and cope with life?" Reported in: *Topeka Capital-Journal,* July 2.

news media

Ellsworth, Maine

Claiming that an Ellsworth newspaper had acted as the "agent" of city government in its coverage of a union organizing drive, the Teamsters Union asked the Maine Labor Relations Board in July to set aside a vote in which Ellsworth police and fire personnel rejected affiliation with the union.

Responding to the charge that the *Ellsworth American* "transmitted" official city sentiment and "acted on behalf" of the municipality prior to the vote on the affiliation, *American* Editor and Publisher James R. Wiggins called the allegations "absurd, false, and ridiculous."

In its complaint to the Maine Labor Relations Board, the union said the *American* engaged in a "spurious" attempt to "disenfranchise" union recruiters in Ellsworth by publishing stories on alleged Teamsters' links to organized crime. Reported in: *Washington Post,* July 28.

New York, New York

CBS and two of its journalists, Barry Lando and Mike Wallace, have filed briefs with the U.S. Court of Appeals for the Second Circuit arguing that a District Court erred in requiring disclosure of editorial information regarding a CBS documentary. In January 1977, U.S. District Court

Judge Charles S. Haight III ordered CBS to produce editorial documents in a ruling on a libel suit filed by Anthony B. Herbert. Herbert, a decorated Vietnam veteran, alleges that a CBS documentary libeled him.

The CBS brief contends that the District Court "rejected explicitly and totally the relevance of the asserted First Amendment protection and ordered a journalist to respond to a wide range of questions put to him at deposition relating to the editorial-making process of CBS in its preparation of a television documentary."

The American Society of Newspaper Editors, the *Chicago Sun-Times,* the *Chicago Daily News,* the Miami Herald Publishing Company, NBC, the New York Times Company, and the Radio-Television News Directors Association backed CBS in a friend-of-the-court brief. Reported in: *Legal Briefs,* July 1977.

free expression

Greensboro, North Carolina

A Duke University law student from Baltimore has filed suit in U.S. District Court here in defense of his right to write comments on the envelopes in which he mails his monthly utility payments to the Duke Power Company.

The student, Saul E. Kerpelman, decided to take the action after Duke Power filed a complaint against him, resulting in a threat of criminal action under a statute prohibiting obscenities on the outside of mailed items.

Kerpelman said he included comments on his utility bill envelopes "to ridicule, express scorn for, and encourage public awareness of [the] unreasonable, unjust, and unfair profit structures of the Duke Power Company." He described the firm as a "mighty North Carolina monument to capitalistic and bureaucratic indifference and greed." Reported in: *Baltimore Sun,* August 6.

free belief

Austin, Texas

Famed atheist Madalyn Murray O'Hair, who in 1963 won a U.S. Supreme Court decision which outlawed official prayers in public schools, has filed suit in U.S. District Court here attacking the motto "In God We Trust" on U.S. currency.

The suit, filed against W. Michael Blumenthal, secretary of the Treasury, and James A. Conlon, director of engraving and printing, asks that use of the motto on currency be declared unconstitutional.

"Plaintiffs are forced to handle and display with regularity currency and coin which is imprinted by defendants with a religious motto . . . with which plaintiffs disagree," states O'Hair's petition, which was also filed in the name of her two sons.

"This inscription on the currency and coin compels plaintiffs to subscribe to and affirm a belief which is antithetical to plaintiffs' most deeply held convictions and represents an abridgment of their rights under the free exercise clause and establishment clause of the First Amendment." Reported in: *Chicago Tribune,* September 3.

(Censorship dateline . . . from page 155)

extermination of European Jews as a singular example of genocide. But spokesperson Hans R. Haug explained that the German-American Committee, comprised of thirty clubs with memberships of over 5,000, did not recommend censoring the subject entirely.

The committee believes that the genocide which took place during Hitler's reign is too frequently stressed, while other examples of mass extermination are ignored. Haug said he feared that students would believe "that genocide is [only] a Teutonic crime."

I. Ezra Stapler, deputy superintendent for instructional media, replied that the emphasis placed on the Holocaust was justified because it was so recent and so sweeping. Reported in: *Philadelphia Inquirer,* September 13.

broadcasting

Los Angeles, California

Network censorship of the opening show of Richard Pryor's variety series prompted the actor to accuse NBC of violating his rights as an artist. During a press conference Pryor angrily stated that "[the censorship] is an offense to our mentality."

After first approving the opening segment—in which Pryor appears to be completely undressed while maintaining that he gave up nothing to get his own show—the network later informed Pryor that it was unacceptable. Pryor blamed the problem partially on the fact that the show was scheduled during "family viewing hours." Reported in: *New York Times,* September 13.

Washington, D.C.

Richard E. Wiley, chairperson of the Federal Communications Commission, declared in an August statement that he fears recent efforts by the Civil Rights Commission to identify stereotyping in television characters and programs and to involve the FCC as the regulatory body to halt stereotyping. Wiley noted that the Civil Rights Commission did not advocate censorship as such, but he said it was clear to him that "the FCC inevitably would be drawn into such a role if we were to begin down the road suggested by the [Civil Rights] Commission."

Wiley added, "In my opinion, such a role is contrary to the express provisions of the Communications Act and the Constitution and to the overall best interests of our free society."

Chairperson Arthur S. Flemming of the Civil Rights Commission, who disagreed with Wiley's conclusions, said he would continue the attempt to arm the FCC with greater regulatory authority regarding the television portrayal of minority groups and women. Reported in: *Washington Star,* August 17.

etc.

Ferndale, Michigan

At the request of city officials, the operators of a Ferndale theater decided in July to withdraw a planned showing of *In the Realm of the Senses* and replaced it with *Rocky.*

Mayor Robert J. Paczkowski said that he and other city officials, including the city attorney, had discussed *Senses* with the theater management. No overt threats were made, the mayor said. "After giving due consideration to our request, they decided to abide by the wishes of the city and not show the film in Ferndale."

Mayor Paczkowski explained his action: "Our citizens tell us, 'This is not the way our moral values are. We don't want to see perversion and all that type of stuff that goes with these films. We want you to do something about it.' "

In the Realm of the Senses, first shown in the U.S. at a New York film festival, was confiscated by U.S. Customs in New York after it had been admitted to the country by U.S. Customs officers at Los Angeles. A federal judge ruled that the New York seizure was a clear violation of the Constitution and ordered the film released. Reported in: *Detroit Free Press,* July 29.

Fairfax County, Virginia

An ordinance barring the display of sexually explicit magazines where juveniles can examine them was unanimously enacted in September by the Fairfax County Board of Supervisors.

According to Board Chairperson John F. Herrity, the law will apply to "most issues of *Playboy* and certainly all issues of a magazine like *Hustler.*" It was widely expected that the ordinance would force sexually oriented magazines under the counter in all outlets in Fairfax County.

The only opposition to the law came from representatives of the American Civil Liberties Union, who argued that the law should have permitted the display of magazines in sealed wrappers. Reported in: *Washington Post,* September 20.

(From the bench . . . from page 161)

Benton, Kentucky

A decision to sell *Hustler, Oui, Penthouse,* and *Club* in Marshall County, Kentucky could be a very difficult one to make, admitted County Attorney Pal Howard in August. Two Marshall County juries, ruling on separate cases involving sale of the same magazines, acquitted one grocery store manager and convicted another, fining the latter $500 for distributing obscene materials.

It was expected that the guilty verdict would be appealed to the Marshall County Circuit Court. "Perhaps with the Circuit Court decision, we will set a community standard," Howard said. "I still believe the majority of Marshall Countians don't want this stuff being sold here." Reported in: *Paducah Sun-Democrat,* September 1.

North Mankato, Minnesota

A North Mankato grocer was convicted in August of illegally selling two magazines to a police officer. A Nicollet County Court jury of six women deliberated less than thirty minures before returning their verdict against Ed Pettit, who sold copies of *Penthouse* and *Oui* to the officer.

Pettit was convicted under a North Mankato ordinance that prohibits the sale of sexually explicit materials in residential neighborhoods. Reported in: *Minneapolis Tribune,* August 3.

St. Louis, Missouri

More than 2,000 prints of films and 30,000 copies of magazines seized by police at a St. Louis warehouse were declared obscene by a Circuit Court jury in August.

The jury of twelve reviewed more than 1,100 individual exhibits and decided that more than 1,000 of them were obscene. Police said the materials had a retail value of more than $200,000.

The mass of material was reviewed by the jury over a three-week period. Ninety-one items were saved by the jury's inability to agree upon their obscenity or non-obscenity. Of the two items declared not obscene, one was a paperback book and the other was a film—a home movie of someone's Christmas party that appeared to have been mistakenly included in the batch of confiscated films.

Attorneys for the firm that had stored the items in the warehouse said they would appeal the verdicts. Reported in: *St. Louis Globe-Democrat,* August 3.

Houston, Texas

A film sold to a bookseller at a Harris County sheriff's department auction in the execution of a court order to satisfy a debt was later sold by the bookseller to a police vice officer. But the latter sale of the film was illegal because of the film's commercial obscenity, according to a Houston jury. Bookstore owner Ralph Kell was sentenced to 180 days in jail and fined $1,000, following ten minutes of deliberation by the jury.

The verdict, said Prosecutor Bob Shults, will help "stem the tide" of pornography in Harris County. But Kell's attorney, Bob Heacock, argued that the sheriff's department should be prosecuted and convicted on the same charges. Reported in: *Houston Chronicle,* August 25.

Fairfax County, Virginia

In an August decision against Croatan Bookstores Inc., Fairfax County Judge Robert M. Hurst fined the firm $8,000 for illegal exhibitions of eight obscene films. An attorney representing the firm said the decision would be appealed to the Fairfax County Circuit Court in an effort to have the case tried by a jury.

Commonwealth Attorney Robert F. Horan, who prosecuted the case, said similar fines would be sought in the trial of eleven additonal counts against the firm. "We have to take the economic profit out of the activity. The way to do this is by fining them," Horan Stated. Reported in: *Fairfax Journal,* September 1.

Charleston, West Virginia

In the first trial of its kind in West Virginia in six years, a truck driver for a Pittsburgh Company was convicted in July of engaging in the illegal interstate transportation of obscene films. Tried in U.S. District Court, the driver, Richard A. Torch, faced a possible sentence of five years and a $5,000 fine.

Reportedly, discussions were being held with other employees of the Pittsburgh firm in efforts to obtain testimony against highly placed persons in the organization in exchange for grants of immunity from prosecution. Reported in: *Charleston Mail,* July 27; *Variety,* August 3.

'Son of Sam' causes stir over press responsibility

Sensationalism in the press, the public's right to know, and a defendant's right to a fair trial became issues in New York City last summer with the arrest of David Berkowitz and the attendant media coverage. Berkowitz was charged with committing the so-called Son of Sam murders.

In a widely discussed column in the *New Yorker,* Richard Harris accused the New York City press of irresponsible and unethical conduct in exploiting the "Son of Sam" story to boost circulation. In an unsigned comment in the magazine's "Talk of the Town" column, Harris said that "just about everything done by the press here–especially by the *Post* and the *News*–has made a bad situation worse for the residents of New York. By transforming a killer into a celebrity, the press has not merely encouraged but perhaps driven him to strike again–and may have stirred others brooding madly over their grievances to act."

Editors at the *News* and the *Post* were quick to respond. Robert Spitzler, managing editor of the *Post,* said, "Major stories are meant to be covered with all of the resources and energies at your disposal." Referring to the staff at the *New Yorker,* which has for years gathered at the Algonquin Hotel, Spitzler added, "If it offends the delicate sensibilities of the Algonquin crowd, so be it."

Michael J. O'Neill, editor of the *Daily News,* declared: "I would not argue that everything we did was exactly the way I would have liked it. Nevertheless, the fact is that we very carefully consulted with the authorities almost at every step along the way on whether reporting certain facts and certain parts of the investigation would help or hurt the work of the police."

Daily News Columnist Jimmy Breslin, who was singled out for attack by Harris, also responded that he had consulted with police in his efforts to gain evidence to identify the Son of Sam. Breslin declared that the suggestion he was in some way responsible for the last murder attack of the Son of Sam was "like blaming the Johnstown flood on a leaky toilet in Altoona."

"Doonesbury" cut

Strips of Garry Trudeau's "Doonesbury" that satirized Breslin's coverage of the Son of Sam murders were removed from the *Daily News* during the week of August 29. A spokesperson for the *News* issued a statement on a decision to substitute strips from 1971:

"We have carefully reviewed the 'Doonesbury' comic strips scheduled for the week of August 29.... In our judgment it would not be in the best interest of the *News* to publish those strips."

Delighted with its chance to cover the censorship, the *Post* published the strips in its news columns. When threatened with legal action by the *News* for publishing "Doonesbury," the *Post* published descriptive accounts for the strip's regular readers. Reported in: *New York Times,* August 22; *Editor & Publisher,* September 3.

Ontario film board censors festival

Official censorship of films shown in September at the Toronto Festival of Festivals resulted in a threat from its organizer, Bill Marshall, to move the event in order to escape the jurisdiction of the Ontario Censor Board.

After reviewing films to be shown at the festival, the censorship board requested the removal of more than 1,000 feet from a Belgian film, *Je, Tu, Il, et Elle,* but those who submitted the film canceled its showing rather than accept the cut. Two other films were shown with portions removed.

During the festival Marshall praised the cooperation he had received from the censorship board, which ran extra shifts to view nearly thirty of the 110 films to be screened. At the close of the festival, however, Marshall lashed out at the board, which has authority to screen every film to be shown publicly or privately in Ontario. Reported in: *Variety,* September 28.

AAParagraphs

Free speech wins a couple

Books about public figures can be written with more candor; publishers will rest easier about their liability for such forthrightness, and library collections will surely benefit indirectly as a result of two libel decisions in cases in which AAP intervened through its Freedom to Read Committee.

The earlier case, involving a crony of Ernest Hemingway who felt he had been defamed by a Spaniard's book about the colorful writer, was decided in the U.S. Court of Appeals for the Second Circuit. The subsequent case, quoting liberally from the first opinion, was decided in New York's highest state court and involved a judge who claimed that a series of newspaper articles, collected in a book, libeled him. In both cases, the court's disagreements with the plaintiffs were written in ringing language that will serve as backing (and perhaps backbone-stiffener) for publishers confronted with manuscripts dealing critically and candidly—perhaps even harshly—with persons in the public eye.

Examining the decisions chronologically, one comes first to the case of A. E. Hotchner, the writer-lecturer and Hemingway pal, who sued Jose Luis Castillo-Puche and Doubleday and Company on account of the Spaniard's portrayal of him in *Hemingway in Spain,* a translation from the Spanish. A federal district court jury found six passages libelous, in that characterizations such as "toady," "hypocrite," "two-faced," and "exploiter" were used about Hotchner (who claimed he had never even met Castillo-Puche—and questioned how close the Spaniard had been to Hemingway). In a quixotic verdict, the lower-court jury found Hotchner entitled to just $1 on each libel count for compensatory damages, but assessed $125,000 in punitive damages against Doubleday.

"When a public figure sues for libel," began the unanimous decision of a three-judge panel in reversing the lower court, "the First Amendment bars recovery unless the defamatory falsehoods were made with knowledge of falsity or with reckless disregard for the truth. . . . Mere negligence is not actionable.

"These strict tests may sometimes yield harsh results. Individuals who are defamed may be left without compensation. But excessive self-censorship by publishing houses would be a more dangerous evil. Protection and encouragement of writing and publishing, however controversial, is of prime importance to the enjoyment of First Amendment freedoms. . . . In areas of doubt and conflicting considerations, it is thought better to err on the side of free speech."

Doubleday, the court added, had no demonstrated reason to suspect that Castillo-Puche's opinions of Hotchner were useless, and Doubleday's "failure to conduct an elaborate independent investigation did not constitute reckless disregard for the truth." Furthermore, the court added, "a writer cannot be sued for simply expressing his opinion of another person, however unreasonable the opinion or vituperous the expressing of it may be."

The New York case of Justice Dominic Rinaldi had been expected to be all the more sensitive because the state's high court was sitting in judgment on the contentions of a confrere: the jurist, having been termed by *Village Voice* writer Jack Newfield (among other things) "one of the ten worst judges in New York." Rinaldi sued, demanding $5 million in damages. One defendant was Holt, Rinehart and Winston, which had published Newfield's newspaper articles as a book entitled *Cruel and Unusual Justice.* Lower court efforts to have the suit dismissed were unavailing, and it fell to the State Court of Appeals to decide it—which it did, in the book publisher's portion of the case, with 7-0 unanimity.

Said the court: "The First Amendment does not recognize the existence of false ideas . . . . Opinions, false or not, libelous or not, are constitutionally protected and may not be the subject of private damage actions, provided that the facts supporting the opinions are set forth . . . . Especially in a state in which judges are elected to office, comments and opinions on judicial performance are a matter of public interest and concern. . . . The expression of opinion, even in the form of pejorative rhetoric, relating to fitness for judicial office or performance while in judicial office, is safeguarded. Erroneous opinions are inevitably made in free debate, but even the erroneous opinion must be protected so that debate on public issues may remain robust and unfettered and concerned individuals may have the necessary freedom to speak their conscience. . . . "

As for the publisher's decision to print certain details and omit others, the court said "this is largely a matter of editorial judgment, in which the courts and juries have no proper function." The book publisher was supported also in having relied on the writer's integrity: "There is no showing that Holt had or should have had substantial reasons to question the accuracy of the articles or the bona fides of its reporter." Finally in perhaps its most resounding defense of free expression, the court declared:

"To be independent of political influence, and to perform its important, yet informal, task, especially valued in

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This column is contributed by the Freedom to Read Committee of the Association of American Publishers. It was written this month by Richard P. Kleeman, the committee's staff director.

this decade, of light-shedding on the activities of government officials, the press must be safeguarded from crippling libel suits brought to punish those who exercise free speech and deter others, by chilling the atmosphere, from expressing disagreement in public forums."

AAP's friend-of-court briefs in support of the two defendant-publishers were principally drafted by Henry Kaufman, the Association's Freedom to Read counsel. AAP was joined in the Rinaldi intervention by the Society of Professional Journalists (Sigma Delta Chi).

(Moscow fair . . . from page 150)

graphs of nudes were found, were all banned.

"I've been on three exhibits here," Duchateau declared, "but the censorship process on this one is the worst I've seen." Soviet censors visited the exhibit almost every day in each city that hosted it. Many photographs also came under fire; a photo of a fashion model in front of a Lenin statue was removed because it fostered disrespect for the Soviet leader. Reported in: *Washington Post,* August 19.

Pentagon now seeks warrants for letter searches

The Pentagon revealed in September that it had begun to obtain search warrants to open mail after a congressional panel disclosed that military investigators were reading some mail without warrants.

Deputy Assistant Secretary of Defense David O. Cooke told a House panel that the contents of open envelopes were used by the Pentagon to investigate cases of military personnel abroad trying to mail illegal drugs into the U.S.

The House Government Operations Subcommittee that revealed the Pentagon practice regarding mail searches heard testimony that the Department of Defense–but not U.S. Customs–was constitutionally prohibited from opening or reading some mail without a search warrant. Reported in: *Washington Post,* September 20.

(School librarian . . . from page 149)

defended in statements submitted to the federal court by the Right to Read Committee. Those who defended the anthology and the poem as proper for the Chelsea High School library included Robert D. Stueart, dean of the Simmons College School of Library Science; Peter Davison, director of Atlantic Monthly Press and author of poems published in *Atlantic,* the *New Yorker, Harper's,* and *Poetry* magazine; Barry Spacks, professor of literature at the Massachusetts Institute of Technology; and Patricia Meyer Spacks, professor of English at Wellesley College.

Cash grants to the Right to Read Defense Committee were given by the Massachusetts Library Association, the New England Library Association, and the Freedom to Read Foundation. Cash was also raised through a benefit performance of a Boston theater group.

The plaintiffs in the suit, in addition to Coleman, include Danna Crowley, chairperson of the Chelsea English Department; Joanna Bartlet, a Chelsea English teacher; students Dorothea Filipowich, Lisa Jarvis, and Sharon Ultsch; the Right to Read Defense Committee of Chelsea; and the Massachusetts Library Association.

The City to a Young Girl

The city is
One million horny lip-smacking men
Screaming for my body.
The streets are long conveyor belts
Loaded with these suckling pigs.
All Begging for
a lay
a little pussy
a bit of tit
a leg to rub against
a handful of ass
the connoisseurs of cunt
Every day, every night
Pressing in on me closer and closer.
I swat them off like flies
but they keep coming back.
I'm a good piece of meat.
–Jody Caravaglia, 15, F.
Brooklyn, New York

(Supreme Court . . . from page 153)

Amendment.[33] Two noted political figures asserted violations of associational rights in two intriguing contexts this Term. The Court accepted one such argument but rejected the other. In *Lefkowitz* v. *Cunningham,*[34] Patrick Cunningham, former New York Democratic State Party Chairman, sought to overturn his ouster from that position for refusing to waive his constitutional privilege against self-incrimination in testimony before a special grand jury. A provision of New York State's election law provided for summary removal from party office (and five-year suspension) in such circumstances. Chief Justice Burger, speaking for the majority, held that enforcement of the New York Statute violated Cunningham's First and Fifth Amendment rights because

> it requires [Cunningham] to forfeit one constitutionally protected right as the price for exercising another.... By depriving [Cunningham] of his offices [the election law] impinges on his right to participate in private, voluntary political associations. That right is an important aspect of First Amendment freedom which this Court has consistently found entitled to constitutional protection.[35]

In *Nixon* v. *Administrator of General Services,*[36] former President Nixon attempted to overturn the Presidential Recordings and Materials Preservation Act, the law by which Congress had sought to override Nixon's effort to retain possession of many of the papers and recordings produced during his years in office. Nixon's challenge was rejected on several grounds, among them: the Congressional act did not transgress the constitutional separation of powers; it did not violate the Bill of Attainder Clause; it did not violate the Presidential (executive) privilege of confidentiality. With regard to a claim of First Amendment privilege by the ex-President, Mr. Justice Brennan, speaking for seven members of the Court,[37] agreed in principle that compelled disclosure of involvement in partisan politics could "infringe on privacy and belief protected by the First Amendment." However, noting that only a fraction of the ex-President's papers and recordings would raise even a colorable First Amendment claim, and assuming that regulations governing review of the papers would adequately protect against access to materials implicating rights of political speech and association, the Court held that the Act would not unduly interfere with or "chill" Nixon's (or some future President's) First Amendment rights. In any event, to the extent it might, the majority found that application of the traditional "balancing" test in this unique case reveals that the compelling public need to protect the integrity of the Presidential papers "clearly outweighs" ex-President Nixon's marginal First Amendment claim.[38]

Obscenity

Marks v. *United States*
Smith v. *United States*
Splawn v. *California*
Ward v. *Illinois*

Not all forms of expression fared equally well this Term. With regard to freedom of sexually-oriented expression, in particular, the news from the Supreme Court, where a seemingly unshakable five-judge majority continues to hold sway in criminal obscenity matters, is not reassuring. This year's series of cases had appeared to present the Court with an opportunity to tinker with—and perhaps to liberalize somewhat—the obscenity standards laid down in *Miller* v. *California.*[39] Instead, in three cases, the *Miller* majority if anything tightened the repressive structure they have established, throwing down the gauntlet to would-be reformers. A fourth case did reverse a criminal obscenity conviction, but only on the ground that the tough *Miller* standards should not have been applied to conduct that predated the *Miller* decision.[40]

In March, the Court decided the *Marks* case,[41] reversing an obscenity conviction secured in Kentucky involving, among others, the notorious but successful film *Deep Throat.* The high Court's decision was a welcome, although only partial, victory for those who oppose such prosecutions on the ground that they conflict with the constitutional guarantees of freedom of speech and of the press. *Marks* concerned conduct that occurred before the landmark *Miller* case was decided in June 1973, but the defendants were tried under the legal standards (including the "serious value" test) defined in *Miller.* On appeal, the defendants contended that they were entitled to rely upon the more lenient *Roth/Memoirs* standards in effect prior to *Miller.* The Sixth Circuit Court of Appeals disagreed, although then-Circuit Judge Wade McCree (now Solicitor General of the United States) dissented from the ruling, arguing that it was improper to try a person using a standard adopted subsequent to the allegedly criminal acts. Interestingly, former Solicitor General Bork, representing the government when the *Marks* case was argued before the Supreme Court, also conceded that such an after-the-fact prosecution was unsupportable. All nine justices agreed with the present and former Solicitor Generals that the *ex post facto* prosecution violated defendant's constitutional right to "due process of law." Speaking for the Court, in an opinion joined by four other justices, Justice Powell reasoned that due process protections, although traditional, were even more important where freedom of speech is at stake:

> We have taken special care to insist on fair warning when a statute regulates expression and implicates First Amendment values.[42]

Although the result in *Marks* was unanimous, the justices divided along all-too-familiar lines in their assessment of the ultimate disposition of the *Marks* prosecution. The five-justice (*Miller*) majority remanded the case for a new trial. The remaining four Justices would have dismissed the case outright. Most unexpectedly, the Court's newest justice, John Paul Stevens (President Ford's only appointee to the high Court), filed his own dissenting opinion—although it appears that he could simply have joined in Justice Brennan's dissent—separately announcing his views on such obscenity cases. It may be recalled that any hope for Justice Stevens to act as a moderate on First Amendment matters seemed to be dashed last term when Stevens wrote the plurality opinion for the Court in *Young* v. *American Mini Theatres,*[42] the Detroit zoning ordinance case. It was in that opinion that Justice Stevens appeared to indicate an insensitivity to First Amendment values by voting to uphold the scatter zoning of sexually explicit materials on the ground, among others, that such expression—although constitutionally protected—was simply not

entitled to the same level of protection as communication on other subjects, suggesting that

> few of us would march off to war to preserve the citizen's right to see "specified sexual activities" exhibited in the theatres of our choice.[44]

Justice Stevens' reasoning in *Marks* with regard to *criminal* obscenity proved substantially more satisfying to First Amendment advocates and is worth quoting in its entirety (citations omitted):

> There are three reasons which, in combination, persuade me that this [federal] criminal [obscenity] prosecution is constitutionally impermissible. First, as the court's opinion recognizes, this "statute regulates expression and implicates First Amendment values." . . . However distasteful these materials are to some of us, they are nevertheless a form of communication and entertainment acceptable to a substantial segment of society; otherwise, they would have no value in the marketplace. Second, the statute is predicated on the somewhat illogical premise that a person may be prosecuted criminally for providing another with material he has a constitutional right to possess. . . . Third, the present constitutional standards, both substantive and procedural, which apply to these prosectuions are so intolerably vague that evenhanded enforcement of the law is a virtual impossibility. Indeed, my brief experience on the Court has persuaded me that grossly disparate treatment of similar offenders is a characteristic of the criminal enforcement of obscenity law.[45]

Unfortunately, the rigid five-to-four split in *Marks* on criminal obscenity held firm throughout the remainder of the Term. Justice Stevens continued to vote with the "liberals" thus substituting his dissenting vote for that of retired Justice William O. Douglas in the four-man minority. The five-man (*Miller*) majority maintained its iron hold over the Court.

In the *Smith* case,[46] the Court was presented with the inconsistency of federal authorities "nullifying" the local standards that are the supposed linch-pin of the *Miller* structure by pursuing a federal criminal obscenity prosecution in a state which had decriminalized dissemination of pornography to consenting adults. The majority affirmed federal pre-emption where the result was to broaden the criminal enforcement of obscenity laws. In so doing, they strengthened the unreviewable discretion of local juries to make their own findings concerning the "community standard" in determining "obscenity," even where such findings ignore state law. Thus, in *Smith,* a federal jury was permitted to convict although the Iowa legislature had decriminalized the sale of pornography to consenting adults.

In *Smith,* as in *Marks* and the other two major obscenity cases decided this Term, Justice Brennan filed the briefest of dissents reiterating his firmly held belief that extant criminal obscenity statutes are "clearly overbroad and unconstitutional."[47] Although this approach represents a strong commitment to First Amendment values in such matters, its rigid consistency has led to a disappointing failure by the Brennan block to come to grips with the unique issues presented in each major obscenity case. Justice Stevens, however, declined to ally himself with this passive approach, filing ringing separate dissents in all four major obscenity cases, thus bringing to the dissenting position a welcome intellectual freshness and fervor.[48] In *Smith,* Justice Stevens issued what was probably his most trenchant dissent, laying bare the absurdity and futility of the entire regime of censorship devised by the *Miller* majority. Stevens noted that Smith was being sent to prison for violating a 100-year-old statute, despite the fact that his allegedly criminal acts "offended no one and violated no Iowa law."[49] He concluded his eloquent, yet eminently practical, dissent with the following:

> I am not prepared to rely on either the average citizen's understanding of an amorphous community standard or on my fellow judges' appraisal of what has serious artistic merit as a basis for deciding what one citizen may communicate to another by appropriate means.
>
> I do not know whether the ugly pictures in this record have any beneficial value. The fact that there is a large demand for comparable materials indicates that they do provide amusement or information, or at least satisfy the curiosity of interested persons. Moreover, there are serious well-intentioned people who are persuaded that they serve a worthwhile purpose. Others believe they arouse passions that lead to the commission of crimes; if that be true, surely there is a mountain of material just within the protected zone that is equally capable of motivating comparable conduct. Moreover, the dire predictions about the baneful effects of these materials are disturbingly reminiscent of arguments formerly made about the availability of what are now valued as works of art. In the end, I believe we must rely on the capacity of the free marketplace of ideas to distinguish that which is useful or beautiful from that which is ugly or worthless.
>
> In this case the petitioner's communications were intended to offend no one. He could hardly anticipate that they would offend the person who requested them. And delivery in sealed envelopes prevented any offense to unwilling third parties. Since his acts did not even constitute a nuisance, it necessarily follows, in my opinion, that they cannot provide the basis for a criminal prosecution. (citations omitted)[50]

In the *Ward* case,[51] the majority appeared to renege on its own promise—another central feature of the *Miller* structure—that no one will be subject to criminal obscenity

charges *unless* the regulating state law *"specifically defined"* the "hard core" conduct that would be considered subject to prosecution. *Ward* involved an Illinois criminal obscenity statute without the requisite laundry list of "specifically-defined, hard core sexual conduct." After *Miller* was decided, the Illinois Supreme Court had a number of opportunities to "save" the statute by judicial construction (as the U.S. Supreme Court has saved the Comstock Act time and again). However, according to one authoritative commentator, Illinois did "little more than pay lip service to the specificity requirement in Miller."[52] Nonetheless, the *Miller* majority upheld a criminal conviction under the Illinois statute. Justice Stevens' dissent provides a telling critique of the Court's holding:

> One of the strongest arguments against regulating obscenity through criminal law is the inherent vagueness of the obscenity concept. The specificity requirement as described in *Miller* held out the promise of a principled effort to respond to that argument. By abandoning that effort today, the Court withdraws the cornerstone of the *Miller* structure and, undoubtedly, hastens its ultimate downfall. Although the decision is therefore a mixed blessing, I nevertheless respectfully dissent.[53]

In the *Splawn* case,[54] the majority reaffirmed the ever-dangerous doctrine–first devised in *Ginzburg* v. *United States*[55]–that evidence of "pandering" to prurient interests in the creation, promotion or dissemination of material is relevant in determining whether the material is obscene. Making the majority's ruling all the more disquieting was the fact that the "pandering" allegedly involved in the case was not "thrust" upon unwilling or otherwise disinterested bystanders, but was directed solely at an actively interested consumer of the materials in question.[56] Indeed, as Justice Stevens noted in dissent, under any "sensible" analysis, statements labelling materials as sexually-provocative–and thereby warning consumers of potential offense–ought to be encouraged, not punished.[57]

But perhaps the most disappointing aspect of *Splawn* was the lost opportunity to overturn *Ginzburg* based upon the newly-adopted First Amendment coverage accorded to commercial speech.[58] The commercial speech aspects of the *Ginzburg* pandering doctrine are insightfully summarized, once again by Justice Stevens:

> Truthful statements which are neither misleading nor offensive are protected by the First Amendment even though made for a commercial purpose. *Virginia Pharmacy Board* v. *Virginia Consumer Council,* 425 U.S. 748. Nothing said on petitioner's behalf in connection with the marketing of these films was false, misleading, or even arguably offensive either to the person who bought them or to an average member of the community.[59]

Libel

Unlike so-called "obscene" speech, libelous utterance is accorded First Amendment protection by the Burger Court following a line of reasoning first adopted by the Court under Chief Justice Earl Warren. It was 1964 when the Supreme Court handed down its landmark opinion in the *New York Times* libel case[60] recognizing and attempting to define the First Amendment constraints applicable to libel actions asserted by public officials against private citizens. Over the next decade the Court decided several cases[61] in order to clarify the parameters of the *New York Times* rule and in 1974, in the *Gertz* case,[62] the Court attempted to resolve a troubling split that had left it unable to muster a majority opinion on a number of key aspects of the *New York Times* rule. Since *Gertz,* however, the Court has, with only one exception,[63] taken a three-year break from deciding libel cases. This has left state and lower federal courts free to embark upon a useful period of consolidation and accommodation in response to the Supreme Court's mandate in *Gertz* to rewrite much of the common law of libel in deference to First Amendment constraints. From the media point of view, this has for the most part led to a successful period of generally favorable lower court rulings extending the *New York Times* and *Gertz* rulings.[64]

This past Term the Court continued to abstain from deciding defamation cases, refusing to review a number of significant cases raising issues on a range of topics within the law of libel: the *Buckley* case presenting an important question concerning statements of "opinion;"[65] the *La Costa* case involving further refinements regarding the definition of a public figure;[66] the *Transamerica* case on punitive damages;[67] the *Times Mirror* case on venue in libel actions;[68] and the *Hartley* case on satire.[69] All of these cases could have been, but were not, accepted for review by the Court this Term. But new libel cases will surely be heard by the Supreme Court in upcoming years and it remains to be seen whether generally favorable trends will be spurred or spurned by the high Court.

Prior Restraints

Oklahoma Publishing Co. v. *District Court*
National Socialist Party v. *Skokie*

The 1976 Term was a landmark one for prior restraint litigation before the high Court. The *Nebraska Press Association* case[70] recognized that an almost insuperable burden was upon those who would seek to *enjoin* publication of information gathered by the press. This Term, on the other hand, no case directly involving a "prior restraint" was given full hearing by the Court. However, with regard to judicial "gag orders" (i.e., injunctions)–the subject matter of the *Nebraska* case–the one gag order that came to the Court was summarily reversed in the *Oklahoma Publishing* case.[71] The Oklahoma courts had issued an order enjoining members of the news media from publishing the name or picture of a minor child in connection with a pending juvenile proceeding involving the child. Information concerning the identity of the child had been obtained in a court hearing open to the public. The

Supreme Court ruled that such information came squarely within the rule set forth in the *Nebraska* case and therefore summarily reversed the Oklahoma gag order.[72]

In the only other prior restraint case, *National Socialist Party* v. *Skokie,* [73]—a case involving an injunction against a political demonstration—the Court also issued a summary order attempting to protect First Amendment interests. Yet, in the end, the right of assembly at issue was effectively denied. The *Skokie* case therefore presents a classic instance of an unwarranted prior restraint. The local Nazi party planned to hold a Fourth of July parade in the Village of Skokie, Illinois. At the urging of community leaders outraged by the Nazi party's political views and fearful of violent retaliation to the sight of a Nazi uniform, the Circuit Court of Cook County entered an injunction barring the party from parading in uniform, displaying the swastika or distributing pamphlets "which incite or promote hatred against persons of Jewish faith . . . or against persons of any faith or ancestry, race or religion." The Illinois appellate courts refused to stay this remarkably broad injunction and also refused to grant an expedited hearing on the merits of the case—thereby effectively denying without judicial recourse the Nazi's right to march on July 4. In an extraordinary action, the Supreme Court granted certiorari, reversed the Illinois Supreme Court's denial of a stay of the injunction and remanded the case for further proceedings not inconsistent with the Court's order. Noting that the Illinois courts' delay had effectively determined the Nazi's First Amendment claims adversely, the Court held that a State may not seek to impose a restraint of this kind (read, a total ban on the exercise of First Amendment rights) unless it provides "strict procedural safeguards . . . including immediate appellate review. Absent such review, the State must allow a stay."[74] While the Court did not express any formal view on the merits of the prior restraint, its extraordinary action cutting through procedural formalities, implicitly indicated the strength of its feeling that the Illinois courts had affirmed an unconstitutional injunction.

Unfortuantely, the Supreme Court's aggressive action protective of First Amendment rights did not put an end to the prior restraint since it appears that the Nazi parade was effectively restrained in any event subsequent to the Court's ruling. On remand, an Illinois appellate court modified the injunction upholding only that portion which prevented display of the swastika. The Illinois Supreme Court denied a stay of this order and, although it scheduled a so-called "expedited review" of appellate court action, the review was not scheduled to take place until long after July 4. An application was made to Justice Stevens (sitting as Circuit Justice with the Supreme Court in recess), but he felt constrained to deny further extraordinary relief.[75] Sometimes, it would appear, justice can be denied—even with highly valued First Amendment interests at stake—through grudging and untimely application of the rule of law.

Privacy

Nixon v. *Administrator of GSA*
Zacchini v. *Scripps-Howard*

The so-called "right of privacy" is really a conglomeration of several independent legal, moral or social-policy concepts loosely and at times inadequately grouped under the single descriptive umbrella—privacy. A number of privacy-related "rights" have been accorded legal recognition in varying degrees; others have not. Some aspects of privacy law are of obvious and direct concern to publishers and to a lesser extent librarians; many quite clearly are not.

Interestingly, the first exposition of a legally-enforceable right to privacy under American law (the Brandeis and Warren *Harvard Law Review* article of 1890) was framed as an attack upon the press. Brandeis and Warren sought to make what they referred to as "the right to be let alone" enforceable under common law in civil actions against overzealous publishers. However, since 1890 the notion of the right of privacy has been expanded far beyond the original Brandeis attack upon publishers' excesses. Privacy rights not directly related to the press have come to be broadly, if not fully, recognized in constitutional law and legislative enactment as well as in the common law.

Of the three major branches of the law of privacy—common-law, constitutional and statutory—it is probably the common law, as manifested in civil invasion of privacy actions against private parties, that poses the greatest threat to First Amendment rights as currently understood. However, perhaps the most significant law of privacy developments of the past decade and a half have come in the area of judge-made constitutional law. These developments, although they most certainly have improved the climate for expansion of privacy rights enforceable in civil actions against private parties including publishers, are significantly different from common-law claims in that they do not impose limits on private parties, but instead limit *the power of the state* to intrude upon or invade private conduct.

This Term, the Court continued to flesh out such constitutional privacy rights in a number of contexts. As noted above, the Court expanded upon the constitutional right of privacy in connection with dissemination of information concerning contraception, but it declined to extend the privacy-derived right to an abortion to include government *funding* of elective abortions.[76] The Court continued its general refusal to recognize a constitutional right to "informational privacy."[77] And it failed to recognize a privacy-related Fourth Amendment right to protection from customs searches of incoming letter mail.[78]

In the *Nixon* documents case, in addition to rejecting First Amendment claims,[79] the Court refused to accept the former President's claim that the screening and potential release of his Presidential papers violated Nixon's "funda-

mental" right of privacy. The majority held:

> In sum, appellant has a legitimate expectation of privacy in his personal communications. But the constitutionality of the Act must be viewed in the context of the limited intrusion of the screening process, of appellant's status as a public figure, of his lack of any expectation of privacy in the overwhelming majority of the materials, of the important public interest in preservation of the materials, and of the virtual impossibility of segregating the small quantity of private materials without comprehensive screening. When this is combined with the Act's sensitivity to appellant's legitimate privacy interests, the unblemished record of the archivists for discretion, and the likelihood that the regulations to be promulgated by the Administrator will further moot appellant's fears that his materials will be reviewed by "a host of persons," we are compelled to agree with the District Court that appellant's privacy claim is without merit.[80]

Curiously, only members of the "conservative" block of the Court–Nixon appointees–dissented from this portion of the Court's opinion. The same justices who have found no privacy interests in the release of private information from government data banks or from bank records,[81] and who have denied the existence of an independent constitutional right of privacy in such matters,[82] found the former President's privacy claim "most troublesome" and suggested that the legislation "must be subjected to the most searching kind of judicial scrutiny."[83] It is difficult not to be somewhat cynical about the motivation for this marked change of emphasis.

As distinguished from its continuing evolution of constitutional "privacy" concepts, the Court did not have a particularly busy year with regard to the "common law" right of privacy. Common law invasion of privacy, in the classic formulation by Professor Prosser, now entails at least four distinct kinds of torts tied together by a common name–(i) *appropriation* of another's name or likeness; (ii) *intrusion* upon another's physical solitude or seclusion; (iii) public *disclosure* of true private facts of a highly objectionable kind; and (iv) publicity which places another in a *false light* in the public eye.

The only significant common law privacy case decided this year was the *Zacchini* case.[84] The fact situation in the case, highly amusing and unique, may spell the ultimate fate of this decision as one of a kind, not likely to have serious precedential value in the future. The case is nonetheless worth review as it is indicative of the kind of conflict that is often apparent between enforcement of privacy rights, on the one hand, and freedom of press on the other. Hugo Zacchini, the plaintiff in this invasion of privacy/appropriation or "right of publicity" case, is better known as the "human cannonball." The highlight of his act is a fifteen-second flight shot out of the muzzle of a cannon. In 1972 Hugo was performing his remarkable feat at a fair in Ohio. A local TV station broadcasted a film of Zacchini's performance as part of the local news. Almost inevitably, this coverage included the whole of Hugo's brief flight through the air. Zacchini sued, alleging that this broadcast represented "unlawful appropriation of [his] professional property." Justice White, speaking for a narrow five-man majority, refused to recognize the broadcaster's alleged "constitutional privilege to include in its newscast matters of public interest that would otherwise be protected by the right of publicity." The majority found this right of publicity to be "closely analogous to the goals of the patent and copyright law"[85] and, in recognizing the right over the Scripps-Howard First Amendment claim, concluded:

> There is no doubt that entertainment, as well as news, enjoys First Amendment protection. It is also true that entertainment itself can be important news. *Time, Inc.* v. *Hill, supra.* But it is important to note that neither the public nor respondent will be deprived of the benefit of petitioner's performance as long as his commercial stake in his act is appropriately recognized. Petitioner does not seek to enjoin the broadcast of his performance; he simply wants to be paid for it. Nor do we think that a state-law damages remedy against respondent would represent a species of liability without fault contrary to the letter or spirit of *Gertz, supra.* Respondent knew exactly that petitioner objected to televising his act, but nevertheless displayed the entire film.[86]

The dissenters[87] disagreed, stressing the First Amendment aspects of the case and arguing that the majority's holding has "disturbing implications" and could lead to "media self-censorship." It remains to be seen whether these disturbing implications will or will not be fostered by *Zacchini.*

In another privacy case, the Court denied certiorari in *Fletcher* v. *Florida Publishing Co.*,[88] a case that would have presented a conflict between the aspect of privacy law known as "intrusion" and the First Amendment rights of the press to gather and report the news. The Court's action left standing a favorable (from the press point of view) resolution of this potential conflict by the Supreme Court of Florida.

Finally the Court took no actions in the area of private civil invasion of privacy actions involving the publication of truthful but embarrassing private facts or the publication of discrediting but non-defamatory facts that tend to place the plaintiff in a "false light." This is the body of privacy law, akin to the law of defamation or libel, that is the most unsettled and that threatens the most far-reaching injury to the free functioning of the press under our Constitution.

Other Decisions of Interest

Abood v. *Detroit Board of Education*

City of Wisconsin v. *Wisconsin Employment Relations Commission*
Jones v. *North Carolina Prisoners' Labor Union*

First Amendment issues were presented in still other contexts this Term. In *Abood* v. *Detroit Board of Education,*[89] the Court was called upon to consider whether a Michigan statute providing for *mandatory* payment of dues to the local government employees' union violates the First Amendment rights of those government employees who object to public sector unions or to particular union activities financed by the compulsory dues. Justice Stewart, speaking for himself and four others, held that a State cannot constitutionally compel public employees to contribute to union political activities which they oppose. Such dues may be used to finance collective bargaining, contract administration and grievance adjustments, but compulsory fees from objecting employees may not be used to advance political or ideological causes unrelated to these primary union functions.

In *City of Wisconsin* v. *Wisconsin Employment Relations Commission,*[90] the Court considered another First Amendment claim asserted in the context of government-employee union relations. The question presented was the extent to which the State may require a board of education to prohibit non-union employees from speaking out on issues that may also be the subject of collective bargaining between the union and the board. The Court unanimously held that the Wisconsin courts went too far in permitting the suppression of speech at meetings open to the public. The justices disagreed (along lines similar to those in *Abood*) as to the extent of permissible state censorship during "true contract negotiations" between a public body and its employees.[91]

The Upcoming Term

Obviously, the 1976-77 Term presented a remarkable diversity of First Amendment issues for the Court to resolve. Doubtless the upcoming Term will do likewise, with a few significant cases already on the Supreme Court docket and more sure to come. In an area not touched upon this Term, a number of petitions are pending—and at least some probably will be heard—presenting difficult questions concerning the First Amendment limits on government regulation of television with regard to cable use[92] and so-called cross-ownership of television or radio stations and newspapers.[93] The electronic media have been singled out for special treatment and given a lesser degree of First Amendment protection from government intrusion.[94] It is not unreasonable to believe, however, that the freedom of the print press can be endangered by application of such lesser standards of protection and the cases that may be decided in the upcoming Term could be of major import in this regard.

With regard to prior restraints, the Court will be presented with yet another judicial gag order, this time concerning an attempt to report the findings of a Virginia State judicial inquiry and review commission.[95] One assumes this prior restraint—like others in recent years—will find a far colder reception in the Supreme Court than in the state courts of Virginia. In the privacy area, the Court will decide whether newsmen should be permitted broader rights of "access" to prisoners than the general public is permitted, with the likelihood of a favorable ruling not great.[96] At least one obscenity case will be heard,[97] but no basic shift of position by the Court is in sight. In the libel area, this could be a year of renewed activity, although the Court has not yet announced that it will hear any of the cases pending before it.[98] Other cases in the areas of commercial speech, rights and association and belief and freedom of religion[99] will almost certainly reappear on the Court's docket. But this report is already far too long, and my crystal ball far too cloudy, to venture further into the realm of the unknown.

Footnotes

1. *Beal* v. *Doe,* 45 U.S.L.W. 4781; *Maher* v. *Roe,* 45 U.S.L.W. 4787 (1977). (Powell—6 to 3).

2. *General Electric Company* v. *Gilbert,* 45 U.S.L.W. 4031 (1976) (Rehnquist—6 to 3).

3. *International Brotherhood of Teamsters* v. *United States,* 45 U.S.L.W. 4506 (1977); *United Airlines, Inc.* v. *Evans,* 45 U.S.L.W. 4566 (1977). (Both of these employment discrimination cases involved the question of seniority systems and were decided by identical 7-to-2 majorities, with Justices Brennan and Marshall filing dissents.) *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 45 U.S.L.W. 4073 (1977) (housing discrimination; majority opinion written by Powell—5 to 3, Stevens not participating).

4. *Ingraham* v. *Wright,* 45 U.S.L.W. 4364 (1977) (Powell—5 to 4).

5. *United States* v. *Ramsey,* 45 U.S.L.W. 4577 (1977) (Rehnquist—6 to 3).

6. *Whalen* v. *Roe,* 45 U.S.L.W. 4166 (1977) (unanimous-Brennan and Stewart filed concurring opinions).

7. Bruce Ennis, "Supreme Court's 1976-77 Term: A Record of Hostility to Individual Rights," *Civil Liberties* (September 1977).

8. See generally H. Kaufman, "Supreme Court Report, 1975-76 Term," 25 ALA *Newsletter on Intellectual Freedom* 110 (September 1976).

9. In a fourth commercial speech case of some significance, but not involving a full hearing on the merits, the Court refused to disturb a lower court ruling that the First Amendment prevented the Federal Trade Commission from entirely blocking a tax return company's slogan "instant tax refund" based upon a finding of deceptive advertising. The U.S. Court of Appeals had held that the FTC may not impose a prior restraint on protected commercial speech beyond that reasonably needed to prevent the violation. *Federal Trade Commission* v. *Beneficial Corp.,* 542 F.2d 611 (3rd Cir. 1976), *cert.* denied, 45 U.S.L.W. 3707 (1977). Another commercial speech issue was presented in an obscenity case, *Splawn* v. *California,* 45 U.S.L.W. 4574 (1977), discussed in the text at nn. 54-59, *infra.*

10. 45 U.S.L.W. 4895 (1977). The Court unanimously rejected an *antitrust* challenge to the enforcement of such local bar association proscriptions against attorney advertising.

11. *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council,* 425 U.S. 748 (1976).

12. 425 U.S. at 733 n. 25.

13. Of the four dissenting Justices, only Rehnquist—who has refused to accept any First Amendment protection for purely commercial speech—failed to find a constitutional dimension to aspects of attorney advertising. The other three dissenters agreed that *some* lawyers advertising may be protected under *Virginia Pharmacy* but disagreed as to the extent of the protection.

14. 45 U.S.L.W. at 4899.

15. 45 U.S.L.W. 4441 (1977). (Marshall—8 to 0) Rehnquist took no part in the consideration or decision of the case.

16. 45 U.S.L.W. at 4444.

17. *Id.*, citing *Whitney* v. *California,* 274 U.S. 357, 377 (1927).

18. 45 U.S.L.W. 4601 (1977).

19. The majority's offhand references to the lesser protection of the minors' First Amendment rights represent a troubling view of issues implicating free speech in the school library context yet to be squarely faced by the high Court. See 45 U.S.L.W. at 4604-05 and n. 14, n. 15.

20 In addition to Justice Brennan, the majority on this issue included Justices Marshall, Stewart, Blackmun, and White.

21. 45 U.S.L.W. at 4607.

22. 45 U.S.L.W. at 4607 n. 28. So-called "thematic" or "ideological" obscenity—i.e., expression that does not itself arouse "lustful" thoughts even though it may persuade or induce the recipient to engage in "obscene" conduct—has long been held to be protected by the First Amendment. *Kingsley International Pictures Corp.* v. *Regents,* 360 U.S. 684 (1959).

23 "Offensiveness" is another concept that generally does not enter into First Amendment analysis—for obvious reasons—except with regard to so-called "obscene" speech where a double standard is applied.

24. 45 U.S.L.W. at 4609 and n.6, citing *Young* v. *American Mini Theatres, Inc.,* 472 U.S. 50 (1976) (the Detroit pornography zoning case) and the dissenting opinion of Judge Leventhal in *Pacifica Foundation* v. *FCC,* 556 F.2d 9, 30 (D.C.Cir. 1977) (the WBAI/George Carlin case).

25. 45 U.S.L.W. at 4611.

26. *Greer* v. *Spock,* 424 U.S.828 (1976).

27. *Hudgens* v. *NLRB,* 424 U.S. 507 (1976).

28. *Elrod* v. *Burns,* 427 U.S. 347 (1976).

29. *Buckley* v. *Valeo,* 424 U.S. 1 (1976).

30. *Wooley* v. *Maynard,* 45 U.S.L.W. 4379 (1977) (Burger—7 to 1).

31. 45 U.S.L.W. at 4381.

32. 45 U.S.L.W. at 4381. Support for this right to "refrain from speaking" was found in two types of cases—the first, in the press freedom context, *Miami Herald* v. *Tornillo,* 418 U.S. 241 (1974) (Florida "right to reply" unconstitutional); the second, *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624 (1943) (mandatory participation in "flag salute" unconstitutional).

33. See generally Raggi, "An Independent Right to Freedom of Association," 12 *Harvard Civ. Rights—Civ. Lib. L. Rev.* 1 (1977).

35. 45 U.S.L.W. 4635 (1977). The First Amendment aspect of the Chief Justice's opinion commanded the concurrence of six other justices. Only Justice Stevens dissented, arguing that while Cunningham's right to speak and associate freely was deserving of protection, he had no corollary "right" to hold high public office. Justice Rehnquist did not participate in the case.

34. 45 U.S.L.W. 4634 (1977) (Burger—7 to 1).

36. 45 U.S.L.W. 4917 (1977).

37. Justice Brennan wrote the majority opinion in which Justices Stewart, Marshall, and Stevens joined. Justice White concurred in all of the Brennan opinion except with regard to the Bill of Attainder clause; Justices Powell and Blackmun concurred except they analyzed the separation of powers and executive confidentiality in a different manner to reach the same result. Justices Burger and Rehnquist filed dissenting opinions, Justice Burger expressly noting his feeling that the President's First Amendment associational interests should have been given greater weight. 45 U.S.L.W. at 4946. See additional discussion in the text at nn. 79-83, *infra.*

38. 45 U.S.L.W. at 4928-29.

39. 413 U.S. 15 (1973).

40. In the Term just complete, a number of other obscenity cases on the Court's docket were decided without full (plenary) hearing on the merits. One case, involving a federal court injunction, on First Amendment grounds, against enforcement of Indiana's anti-pornography civil nuisance statute, was summarily affirmed on the merits. *Sendak* v. *Nihiser,* 45 U.S.L.W. 3801 (1977). Other cases were summarily disposed of on the basis of the decisions rendered during the Term. *Friedman* v. *United States,* 45 U.S.L.W. 3632 (1977) (vacated and remanded for consideration in light of *Marks*); *Reinhard* v. *Eagle Books, Inc.,* 45 U.S.L.W. 3821 (1977) (vacated and remanded for further consideration in light of *Ward*).

41. *Marks* v. *United States* 45 U.S.L.W. 4233 (1977) (Powell—5 to 4).

42. 45 U.S.L.W. at 4235. The unanimous result reached on the question of retroactive application of *Miller* has a limited, but nonetheless important, impact on the law as applied to a diminishing number of cases involving pre-*Miller* transactions. Most prominent among the pending cases affected was the Harry Reems conviction in Memphis, Tennessee, also involving *Deep Throat.* Reems' conviction was subsequently overturned and the new local U.S. Attorney announced that he would not seek a retrial.

43. See text at n.25, *supra.*

44. *Young* v. *American Mini Theatres,* 427 U.S. 50, 70 (1976).

45. *Marks* v. *United States, supra,* 45 U.S.L.W. at 4235-36.

46. *Smith* v. *United States,* 45 U.S.L.W. 4495 (1977) (Blackmun—5 to 4).

47. Justice Stewart joined with Brennan in all four brief dissents; Justice Marshall joined in three, joining in Justice Stevens' dissent in the *Ward* case. Justice Brennan, along with Stewart and Marshall, also filed a series of similar dissents to the denial of certiorari in several petitions filed this Term indicating that they would have voted to reverse or vacate the convictions. See *Dufault* v. *United States,* 45 U.S.L.W. 3254 (1976); *Taylor* v. *Tennessee,* 45 U.S.L.W. 3328 (1976); *Thevis* v. *United States,* 45 U.S.L.W. 3330 (1976); *Baranov* v. *United States,* 45 U.S.L.W. 3346 (1976); *Cutting* v. *United States,* 45 U.S.L.W. 3464 (1977); *London Press, Inc.* v. *United States,* 45 U.S.L.W. 3572 (1977); *American Threatre Corp.* v. *United States,* 45 U.S.L.W. 3622 (1977); *Kuhns* v. *California,* 45 U.S.L.W. 3806 (1977) (citing *Splawn*); *Christian* v. *United States,* 45 U.S.L.W. 3838 (1977). Justice Stevens joined in none of these dissents.

48. The other three dissenters failed to concur in Justice Stevens' dissents in *Marks* and *Smith;* they joined in his dissents in *Splawn* and *Ward.* Justices Brennan, Marshall, and Stewart are apparently unwilling to associate themselves with Justice Stevens' permissive view toward the *civil regulation* of sexually-explicit speech.

49. *Smith* v. *United States, supra,* 45 U.S.L.W. 4500.

50. *Id.* at 4502-3.

51. *Ward* v. *Illinois,* 45 U.S.L.W. 4623 (1977) (White—5 to 4).

52. F. Shauer, *The Law of Obscenity* 167 (1976).

53. *Ward* v. *Illinois, supra,* 45 U.S.L.W. at 4627.

54. *Splawn* v. *California,* 45 U.S.L.W. 4574 (1977) (Rehnquist—5 to 4).

55. 383 U.S. 463 (1966).

56. Actually, the person to whom Mr. Splawn allegedly pandered was an undercover police agent actively seeking to make a purchase in order to secure evidence for an arrest.

57. At least some attorneys are advising clients to avoid labelling their establishments or products as "adult materials" or "for adults only" for fear that they will fall afoul of the *Splawn-Ginzburg* pandering doctrine. The dilemma is compounded by local, state and federal laws requiring "adult" materials or establishments to be clearly identified for consumer protection.

58. See Section I (Commercial Speech), *supra.* Indeed, the structure of obscenity law is substantially based upon the notion that pornography is no better than commercial pandering for profit and is therefore not worthy of First Amendment protection. It is thus arguable that the entire regime of censorship must fall if "commercialism" becomes irrelevant for purposes of First Amendment analysis.

59. *Splawn* v. *California, supra,* 45 U.S.L.W. at 4576.

60. *New York Times* v. *Sullivan,* 376 U.S. 254 (1964).

61. See, e.g., *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 (1967); *Rosenbloom* v. *Metromedia, Inc.,* 403 U.S. 29 (1971).

62. *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323 (1976).

63. See *Time, Inc.* v. *Firestone,* 424 U.S. 448 (1976).

64. In the past year, for example, at least four significant and generally favorable opinions were handed down in high New York state and federal courts dealing with libel claims asserted under New York law.

65. *Buckley* v. *Littell, Supra,* n. 64.

66. *Penthouse International Ltd.* v. *Rancho La Costa Inc.,* L.A. Co. 6/25/76, *cert.* denied, 45 U.S.L.W. 3764 (1977).

67. *Appleyard* v. *Transamerican Press, Inc.,* 539 F.2d 1026 (4th Cir. 1976).

68. *Times Mirror Co.* v. *Anselmi,* 552 F.2d 316 (10th Cir.), *cert.* denied, 45 U.S.L.W. 3822 (1977). Two justices, Stewart and Powell, indicated that they had voted to grant certiorari.

69. *Los Angeles Times* v. *Hartley, cert.* denied, 45 U.S.L.W. 3255 (1976). The denial of certiorari was due to the "non-finality" of the California state court judgment.

70. *Nebraska Press Association* v. *Stuart,* 423 U.S. 1327 (1976).

71. *Oklahoma Publishing Co.* v. *District Court,* 45 U.S.L.W. 3599 (1977) (unanimous, *per curiam*).

72. The Court also relied on a previously decided case, also involving publication of the name and photograph of a minor child, *Cox Broadcasting Corp.* v. *Cohn,* 420 U.S. 469 (1975).

73. 45 U.S.L.W. 3820 (1977) (*per curiam,* 5 to 4).

74. *Id.* Four justices dissented from the Court's ruling. Justice Rehnquist filed a brief opinion, joined by Justice Stewart and Chief Justice Burger, complaining that the majority's action was procedurally inappropriate because the Court was not presented with a "final judgment" to review. The three justices did not disagree, however, that the provisions of the Illinois injunction were "extremely broad" and would probably have to be "substantially modified" in order to accord with prior First Amendment rulings. Justice White, however, indicated that he would have *denied* the stay.

75. 46 U.S.L.W. 3137 (1977).

76. See nn. 1 and 18, *supra.*

77. See n.6, *supra.*

78. See n.5, *supra.*

79. See text at nn. 36-38, *supra.*

80. 45 U.S.L.W. at 4928.

81. *See, e.g., California Bankers Association* v. *Shultz,* 416 U.S. 21 (1974); *United States* v. *Miller,* 425 U.S. 435 (1976); *Whalen* v. *Roe,* 45 U.S.L.W. 4166 (1977).

82. *See, e.g., Paul* v. *Davis,* 424 U.S. 693 (1976).

83. 45 U.S.L.W. at 4944.

84. *Zacchini* v. *Scripps-Howard Broadcasting Co.,* 45 U.S.L.W. 4954 (1977) (White—5 to 4).

85. *Id.* at 4956-57.

86. *Id.* at 4958.

87. Justice Powell wrote the chief dissent, joined by Justices Brennan and Marshall. Justice Stevens dissented on procedural grounds.

88. 340 So.2d 914 (Florida 1976), *cert.* denied, 45 U.S.L.W. 3764 (1977).

89 45 U.S.L.W. 4473 (1977).

90. 45 U.S.L.W. 4043(1976).

91. Chief Justice Burger delivered the opinion of the Court, in which White, Blackmun, Powell, Rehnquist, and Stevens joined. Brennan and Marshall filed a concurring opinion and Stewart filed a separate concurring opinion.

92. *Federal Communications Commission* v. *Home Box Office,* 45 U.S.L.W. 2466 (D.C. Cir. 1977), *cert.* petition pending, 45 U.S.L.W. 3824.

93. *See, e.g., Federal Communications Commission* v. *National Citizens Committee for Broadcasting,* 45 U.S.L.W. 2410 (D.C. Cir. 1977), *cert.* petition pending, 45 U.S.L.W. 3765; *The Post Co.* v. *National Citizens Committee for Broadcasting, cert.* petition pending, 46 U.S.L.W. 3084; *National Association of Broadcasters* v. *Federal Communications Commission, cert.* petition pending, 45 U.S.L.W. 3781.

94. *See, e.g., Red Lion Broadcasting* v. *Federal Communications Commission,* 395 U.S. 367 (1969).

95. *Landmark Communications, Inc.* v. *Virginia* 45 U.S.L.W. 2430, prob. juris. noted, 45 U.S.L.W. 3806 (1977).

96. *Houchins* v. *KQED, Inc.,* 546 F.2d 284 (9th Cir. 1976), *cert.* granted 45 U.S.L.W. 3763 (1977). Unfavorable precedent includes: *Procunier* v. *Martinez,* 416 U.S. 396 (1974) and *Pell* v. *Procunier,* 417 U.S. 817 (1974).

97. *Ballew* v. *Georgia, cert.* granted 45 U.S.L.W. 3508 (1977).

98. *See, e.g., Hotchner* v. *Doubleday, supra* n. 64.

99. *See, e.g., McDaniel* v. *Paty,* 45 U.S.L.W. 2445 (1977), prob. juris. noted. 45 U.S.L.W. 3822 (1977).

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wrongful acts of miscreants in power and to resist them." But, from the 1780s on, the rights of free Americans were intrinsic, basic, "separate ends in themselves." And she itemizes the examples throughout American history—such as the Populists of the 1890s and the radicals of the 1960s—of the continuing influence of "the citizen's right and duty to resist authority."

Writing on the constitutional background and history of American freedom, Gordon S. Wood stresses the primacy of *individual* freedom if constitutional democracy is to survive. There is no guarantee, he says, that rule by the majority cannot turn into at least occasional tyrannies over the minority. His is a salutary reminder that "unless the private rights of individuals and minorities [are] protected against the power of majorities . . . no government [can] be truly free."

The period just after the beginning of the Republic (1789-1801) is highlighted by Merrill D. Peterson, discussing the infamous Alien and Sedition Laws of 1798 and their repudiation by the election of Jefferson as president in 1800. In his inaugural address Jefferson called for the continuance of the Union and its republican form "as monuments of the safety with which error may be tolerated where reason is left free to combat it."

In an essay on "The Moral Foundations of American Constitutionalism," Editor Graebner calls for a reconsideration of what "freedom and fairness" mean in today's society; he sees a lack of "any sufficient common core of conviction, purpose, and moral judgment" to achieve the full measure of civic responsibility our constitutional setup

requires. Indeed, it is lack of individual and governmental morality–at all levels, but especially in Congress and the Executive Branch–which Graebner finds to be at the heart of our problems with growing governmental authoritarianism.

It is disconcerting to find Abraham Lincoln, of all American leaders, named by Don E. Fehrenbacher, in his comments on "Lincoln and the Paradoxes of Freedom," as the president first to provide the model for the "imperial presidency," so unhappily exemplified by several twentieth-century presidents. Lincoln's suspension of *habeas corpus,* his "presidential decrees, arbitrary arrests, [and] military trials" certainly contribute to Fehrenbacher's characterization of this "somewhat ambiguous figure . . . [who] epitomized democracy, but assumed a considerable mearsure of autocratic power," a president who helped keep American popular government intact, but who "in the process impaired some of the substance of American liberty."

Robert K. Murray sees as a hopeful sign that "many Americans still believe that a government which most carefully protects and promotes freedom of thought, expression, action, and criticism has the best chance for survival and for achieving progress, security, and happiness." Political theorist Hans J. Morgenthau is more pessimistic, seeing among other threats to democracy, the possibility that "the forces of the status quo threatened with disintegration will use their vast material powers to try to reintegrate society through totalitarian manipulation of the citizens' minds and the terror of physical compulsion."

Supreme Court specialist Henry J. Abraham–perhaps a little surprisingly to some of us Court-watchers–sees "free speech, both in its symbolic and advocative tenets," as "getting even freer" under the Burger Court than with the Warren Court. He does admit that obscenity and freedom of the press are "possible" exceptions to this, but is optimistic that "in the final analysis, the [Burger] Court will . . . ultimately adopt Mr. Justice Brennan's minority position that 'at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth amendments prohibit the state and federal governments from attempting wholly to suppress sexually-oriented materials on the basis of their allegedly "obscene" contents.' "

In the last section of the book, "Freedom, the Economy, and the Environment," are included searching contributions by Paul K. Conkin, Barry Commoner, Thomas C. Cochran, and Victor Ferkiss on various related topics. Conkin reminds us that "today, as in the past, the most active support for specific expressive freedoms comes from eccentrics, from minorities, from those with an immediate stake in a given freedom [*my note:* librarians, for example!] . . . or from a few intellectuals who embrace broad and abstract principles." Commoner sees freedom of the American people "eroding while the government's power, often without the consent of the governed, has increased." Thomas Cochran traces the historical changes in the American concept of economic freedom, delineating today's society as "still the most competitive in the highly industrialized world" despite "some restraints." Futurist Victor Ferkiss sees the traditional American freedoms as needing an added freedom–"social action for common ends," as "an enlargement, not a diminution, of freedom."

This volume is well worth adding to the personal library of any believer in intellectual freedom, perhaps mostly for its trenchant reminders that intellectual freedom cannot flourish in a vacuum, and that for Americans it is an inextricable part of the whole matrix of related freedoms. As Graebner states in his introduction, "What matters . . . is a public of sufficient awareness to encourage its leaders to design and act in the public interest." And surely librarians do not need to be reminded of their key role in creating and serving such a public.–*Reviewed by Eli M. Oboler, University Librarian, Idaho State Universtiy, Pocatello.*

U.S. grants visa to 'Communist' union member

For the first time in nearly three decades, a member of a foreign union group identified by the U.S. government as Communist has been given a visa to enter the United States to attend a union convention.

The State Department decided in August to reverse its denial of a visa and to permit Jacques Tregaro, a member of a French metalworkers union affiliated with the Confederation General du Travail, to attend the annual convention of the United Electrical Workers in New York in September.

The State Department action came after congressional passage of an amendment to the State Department appropriation bill–an amendment sponsored by Senator George McGovern (D.-S.D.) to ease the way for supposedly Communist trade unionists to enter the U.S. The amendment was passed over the vigorous objections of the AFL-CIO, which has traditionally used its clout to keep Communists away from U.S. union meetings (see *Newsletter,* July 1977, p. 94).

The State Department said Tregaro was originally refused permission to attend the convention because he was a member of "a Communist-dominated union." The president of the Confederation General du Travail–a federation representing more than half of France's trade unions–protested the designation in letters to the U.S. Embassy in Paris and to President Carter. He described the federation as an independent body whose policies are decided by its members. Reported in: *Washington Star,* August 27.

Speaking with regret about the revelations, ACLU Director Aryeh Neier said: "There is absolutely no indication that [these ACLU officers] infiltrated on behalf of the

FBI or got money from the FBI. . . . The larger indication seems to be that they were worried that the ACLU would be labeled as Communist because it was defending the civil liberties of Communists and, therefore, they wanted to be sure there weren't any Communists in the ACLU."

Communist fear

Beginning in the 1940s the ACLU experienced a disruptive intramural debate over communism in its own ranks. Ernst and then-ACLU Vice-chairperson John Haynes Holmes led the national board in adopting a "purge resolution" that prompted the expulsion of ACLU board member Elizabeth Gurley Flynn for membership in the Communist Party.

During the McCarthy era, the national ACLU was criticized for lack of action against the senator. In protest, the California ACLU left the national ACLU.

The FoIA suit which resulted in the revelation of the liaison between the FBI and the ACLU was filed by David Hamlin, director of the Illinois division of the ACLU. Reported in: *Chicago Sun-Times,* August 4; *Chicago Daily News,* August 5.

top ACLU officers gave FBI inside data

Famed civil libertarian Morris L. Ernst and other key officers of the American Civil Liberties Union gave inside information on ACLU activities to the Federal Bureau of Investigation for more than twenty years, beginning in the 1940s, according to FBI files obtained under the Freedom of Information Act.

The record shows that Ernst established a secret relationship with FBI Director J. Edgar Hoover and was on the agency's "special correspondents' list," a select group which corresponded directly with Hoover. Others who gave data to the FBI during the 1950s and 1960s were Irving Ferman, ACLU Washington office director from 1953 to 1959; ACLU staff counsel Herbert Levy; and John Pemberton, ACLU national director from 1962 to 1970.

Ernst, who died in 1976 at age eighty-seven, was ACLU general counsel and a national board member for many years. He was Franklin D. Roosevelt's special envoy to Europe during World War II and later was a member of Harry Truman's Civil Rights Commission. He gained fame as a civil libertarian when he saved Joyce's *Ulysses* from the censors.

'Soap' declared unclean

"Soap," ABC's new "sexcom," achieved notoriety even before its public premiere. Reacting to publicity for the production and the ample news coverage given to the controversy surrounding the show's airing, church and other groups brought pressure to bear on the production by public condemnations and letter-writing campaigns aimed at the program's sponsors.

Groups expressing their displeasure with the show's subject matter included the U.S. Catholic Conference, the Christian Life Commission of the Southern Baptist Convention, and the Board of Rabbis of Southern California.

In calling for an interfaith campaign against "Soap" and similar programs, the USCC questioned the television industry's definition of "adult": If "adult" is to mean "a mature analysis of the complex questions of human behavior . . . 'Soap' might be a welcome innovation," but the "adult" stories portrayed in the series so far indicate that " 'adult' really means a titillating obsession with sex."

ABC, which countered with a statement decrying the attempt at prior restraint, declared: "It is imperative that we maintain our freedom as broadcasters to present responsible entertainment programs and that adults have the similar freedom to watch or not to watch such programs."

Early in the controversy several scheduled sponsors removed advertising from the program, and approximately fifteen ABC-affiliate stations decided not to air it. ABC said the vacant advertising slots were filled with little difficulty by other sponsors. Reported in: *Advertising Age,* August 15; *Variety,* August 17, 31; *New York Times,* August 26, September 4.

'Unfit to print': major dailies follow NYT on movie ads

In the wake of the decision of the *New York Times* to limit the space and "creativity" of *X*-rated movie advertisements in its pages (see *Newsletter,* Sept. 1977, p. 147), other newspapers across the country elected either to limit or eliminate ads for adult entertainment. The *Seattle Times,* the *Los Angeles Times,* and the *Long Beach Independent Press-Telegram* decided to drop all *X*-rated movie accounts, and several others, including the *Sacramento Bee,* implemented policies similar to that in force at the *New York Times.*

Concerned that the ad restrictions would be considered censorship, publishers and editors tried to justify their action:

"Given our long and deep commitment to free expression, the decision to drop this advertising was reached reluctantly and after long and careful deliberation. The truth is, we have been dealing with an indefensible product, one with absolutely no redeeming values," said Publisher Otis Chandler of the *Los Angeles Times.*

"[The theater owners] brought it on themselves," according to C.K. McClatchy, editor of the *Sacramento* and

Fresno Bees. "We tried to police them, but it got too tough. They always had a gimmick."

Challenges to the new policies came from several quarters, including the American Civil Liberties Union and groups of adult film producers. The papers were charged with fostering "elitism," advocating censorship of the press, restricting both the First Amendment and Fourteenth Amendment rights of adult film producers and the general public, and interfering with business and trade. At issue, from the newspapers' standpoint, were the revenue losses to be made up, and the right of a privately owned publication to control its coverage and contents. Reported in: *Variety,* August 10; *Wall Street Journal,* August 24; *Los Angeles Times,* August 25, 26; *New York Times,* August 27; *Editor & Publisher,* September 10; *Time,* September 12.

New York gets new child pornography law

A widely criticized bill to prohibit the use of children in pornography was signed into law by Governor Hugh Carey in August. The law, passed in response to this year's wave of concern over the abuse of children in sexually explicit films, makes it a felony punishable by prison terms of one to fifteen years for any adult who encourages or permits the use of a child under sixteen in sexually explicit materials.

Critics of the New York law contend that it will impose penalties on librarians and others who distribute sex education books with photographs of nude children. At the ALA's 1977 convention in Detroit, the ALA Council endorsed a statement condemning bills which would outlaw legitimate sex education materials (see *Newsletter,* Sept. 1977, p. 127).

Other states which have recently enacted laws to control the abuse of children in pornographic films include Missouri, New Hampshire, and Delaware.

States which have had laws on the books prohibiting children in pornography include Connecticut, North Carolina, North Dakota, Rhode Island, South Carolina, and Tennessee. Reported in: *Chicago Tribune,* August 18; *State Government News,* August 1977.

crime blamed on 'tv intoxication'

Is television-watching a disease? Is "involuntary television intoxication" an occupational hazard of viewers, just as lung disease is a threat to the health of miners? Ellis Rubin, attorney for a fifteen-year-old male accused of the murder of his elderly neighbor in Miami, was confident of positive answers to these questions when the murder trial commenced September 26.

"We are pleading not guilty by reason of insanity," Rubin declared. "And the type of insanity is involuntary television intoxication." Rubin alleged that his client's avid interest in violence on television, gratified by such programs as "Kojak" and "Police Woman," had "diminished his ability to distinguish between what was play-acting on television and what was in fact reality."

Rubin was quick to point out, however, that what was true for his client would not necessarily apply in other cases: "This does not mean that I am advocating that any youngster who watches television for long periods of time and then goes out and kills people can come into court and say, 'Television made me do it.' "

Dr. Michael Gilbert, a psychiatrist who was consulted by Rubin regarding the youth's state of mind, blamed television's unrealistic presentation of murder and bodily injury, and argued that television is uniquely graphic in its portrayal of violence. Asked if a similar response could be triggered by the constant reading of violence-laden books, he replied, "No, television is more graphic. It is a constant repetition [of violence]." Reported in: *Chicago Sun-Times,* August 19; *Atlanta Constitution,* August 21.

Israelis dislike 'Plot'

The Israeli Film Censorship Board has banned showings of the film *The Passover Plot,* declaring that "the board could not possibly endorse the screening of a film offensive to part of the population that hits at the very basis of their Christian faith."

The film, based upon the novel by British scholar Hugh Schonfield, was made in Israel in 1976. The government made it clear that it did not agree with the production of *The Passover Plot* in Israel, but authorities had no legal grounds upon which the requests for the required permits could be refused. The movie, like the book, portrays Jesus as a political revolutionary who engineers his own "death" in order to fulfill the biblical prophesy and achieve political power. Reported in: *Washington Post,* August 26.

Vatican silences Jesuit who opposes old views on gays

The Rev. John J. McNeill, S.J., the leading Roman Catholic speaker and author on the subject of homosexuality and the Catholic Church, has been ordered by the Vatican to "cool down the discussion" his liberal opinions have generated. The "imprimi potest" designation affixed to his book *The Church and the Homosexual* will be removed in all later editions, and Father McNeill has begun

cancelling speaking engagements, in obedience to the orders he received from his superior, the Rev. Eamon Taylor of the New York Province of Jesuits.

McNeill says he feels that progress is being made to involve homosexuals more actively in pastoral life, even though a 1976 Vatican statement still labelled homosexuality "intrinsically disordered." Reported in: *New York Times,* September 2.

British debate violence on the telly

The influence, if any, of televised violence on the behavior of teenagers is the subject of Columbia Broadcasting System-funded research being carried out in England by William Belson, a London professor. The study was prompted by the increased number and circulation of both American imports and British-made television programs, mostly police shows, which depict police and criminals as equally brutal.

Of Belson's population group of 1565 teenaged boys, one of every eight was found to have committed acts which were considered "violent" in varying degrees. Belson noted a direct correlation between television viewing and the violent behavior. "It looks as if television has reduced or broken down the inhibitions against being violent which have been built up in the child by parents and other socializing influences," Belson concluded.

Although Belson's findings have enjoyed support from various media-related quarters, opponents have also been vocal in their disagreement. British children's program manager Monica Sims declared, "If social scientists seek to blame teen-age violence on television, they must also give credit to television for inspiring children to behave thoughtfully."

The British government also joined in the defense. A Home Office paper stated: "Social research has not been able unambiguously to offer any firm assurance that the mass media . . . . exercise a socially harmful effect or that they do not. If film violence can occasionally trigger a violent response, it must be a quite unpredictable response and confined to rather unusual individuals." Reported in: *Chicago Tribune,* September 27.

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