newsletter on intellectual freedom

IFC ALA

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Supreme Court upholds newspaper searches

In 1971, Palo Alto police armed with a warrant searched the offices of the Stanford University newspaper, looking for photographic evidence pertaining to a demonstration. The newspaper protested the unannounced intrusion in federal court, arguing that police should have been required to obtain a subpoena.

On May 31, the U.S. Supreme Court reversed two lower courts and held that newspapers have no special constitutional status requiring the subpoena process. In effect, the Court said newspapers are not significantly different from owners of warehouses, who may be required to submit to unannounced searches even when they are innocent third parties.

In the opinion written by Justice Byron R. White, the Court declared its belief that magistrates will be sufficiently sensitive to the needs of newspapers to protect them from unjustified interference by police.

In a stinging dissent joined by Justice Thurgood Marshall, Justice Potter Stewart disputed the majority's belief: "It requires no blind leap of faith to understand that a person who gives information to a journalist only on condition that his identity will not be revealed will be less likely to give that information if he knows . . . his identity may in fact be disclosed. And it cannot be denied the confidential information may be exposed to the eyes of police officers who execute a search warrant. . . ."

In a separate dissent, Justice John Paul Stevens said the decision "rests on a misconstruction of history and of the Fourth Amendment's purposely broad language."

Jack C. Landau, spokesperson for the Reporters Committee for Freedom of the Press, called the ruling "a constitutional outrage." He said, "It allows police to break into newsrooms, rifling through unpublished articles, confidential documents, correspondence, internal memos, reporters' notebooks and film files, and the news organization, its reporters and editors are helpless to protect their information. . . ."

Landau also castigated the Carter administration for its contribution to the decision. Landau referred to the posture adopted by the Justice Department, which supported the position of the Palo Alto police that the subpoena process is not a suitable instrument for gathering evidence. (Police officers can obtain a search warrant from a magistrate by convincing the official that there is probable cause to believe that a crime has been committed and that the evidence to be seized is relevant. A subpoena can be issued by a judge only after a hearing has been held in which the holder of evidence has been allowed to argue that the evidence should not be required. As a practical matter, the subpoena hearing affords time for the holder of evidence to prepare it for presentation to the court.

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Published by the ALA Intellectual Freedom Committee, Frances C. Dean, Chairperson

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'Pretty Baby' not pretty to some Canadian censors

Ontario's film classification board voted in April to ban Louis Malle's *Pretty Baby* on grounds of the picture's theme. Reportedly, the unappealable action was the first ever taken by the censor board on the basis of a cinematic theme, as opposed to cinematic nudity, sex or violence.

The *Toronto Globe and Mail* reacted by citing favorable reviews by prominent U.S. critics, including Vincent Canby of the *New York Times* ("the most imaginative, most intelligent and most original film of the year") and Penelope Gilliat of the *New Yorker* ("the most beautifully intelligent picture to have come out in America so far this year"). The *Globe and Mail's* editorial criticized the policy which put final authority in the censor board's hands:

"The censor board has made a beautiful blunder this time, and not for the first time. It is hardly surprising that this should be so. No body of individuals acting in secret to protect and uphold the moral integrity of the larger society can be expected not to run amuck; it would be unfair in the extreme for us to hold out any other expectation.

"In fairness, then, and out of sympathy for the burden shouldered by Ontario censors, we would suggest that their mandates be limited to classification of films, the formulation of guidelines. We would relieve them of the responsibility for determining with finality what is and is not acceptable entertainment."

In Manitoba, on the other hand, apparently the provincial censors were not so easily dismayed. They not only cleared the picture, but also classified it as "adult," thus indicating that children could attend with parental approval. British Columbia's censors approved the film, challenging only advertising for it. They directed that a line be inserted in all ads to indicate that the film contains scenes with nudity.

In Saskatchewan, the director of film classification said *Pretty Baby* was banned after being turned down by four provincial cabinet ministers and ten of their aides. Reported in: *New York Times*, April 8; *Toronto Globe and Mail*, April 10, 12; *Variety*, April 19, May 10.

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the First Amendment and public libraries

By LOFTUS E. BECKER, Professor of Law at the University of Connecticut Law School. His remarks below were presented as a speech at a program on intellectual freedom sponsored by the Metro Washington Council of Governments' Library Council, the Maryland Library Association, and the Virginia Library Association.

In even the richest of public libraries, someone must decide what books (and other materials) to buy, what books to dispose of, and what books to retain on the shelves. Decisions of this kind, inevitable though they are, raise at least the spectre of censorship. They may give life to worse things than ghosts. It would appear, therefore, that the First Amendment to the Constitution of the United States, designed to prevent censorship by the government, would be quite relevant to public library decisions not to buy certain books, or not to retain certain books already purchased on the shelves. I would like to discuss the question of what the First Amendment has to say on this subject. I will conclude that the answer is, "Not very much." Having stated and answered my question, I would like to use the rest of my space for explanation.

Some background may be helpful. The First Amendment says, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ." Other provisions of the Constitution say that nobody else in the federal government shall make laws about anything whatsoever. So what the First Amendment means in this context is that *nobody* in the federal government shall make any laws "abridging the freedom of speech, or of the press."

The First Amendment applies directly only to the federal government. The Constitution says nothing explicit about limitations on free speech by the governments of the States. However, by a process too lengthy to be described here, the Supreme Court has interpreted some vague language in the Fourteenth Amendment to mean that state and local governments are under precisely the same restrictions as the federal government so far as freedom of speech and press are concerned. The upshot of all this is that the Constitution of the United States says that no government agency or official, of any kind, anywhere in the United States, shall make any law "abridging the freedom of speech." (Or "of the press'—for the sake of brevity I will omit this phrase throughout the rest of the discussion.)

This prohibition is a pretty broad one. With a very few, very narrow exceptions, it prevents any government official from determining that a book cannot be bought or sold, cannot be written or read. "Obscene" books can be prohibited, but these days the definition of "obscenity" is a very narrow one indeed. Despite occasional claims to the contrary, it is really quite clear that the constitutional definition of "obscenity" does not include even the most torrid or explicitly illustrated of the books that are actually considered for purchase by any librarians anywhere in the country. This exception, then, is really a very narrow one. And with this very narrow exception, the First Amendment operates to take the government entirely out of the private citizen's book selection process.

If you think of the matter this way, it will be obvious that we have run up against a dilemma. The First Amendment was written to take the government out of the citizen's book selection process. But public libraries are government agencies; their officials are agents of the government. Libraries must make decisions about what books to buy and retain, and those decisions inevitably affect the ability of citizens to find the books they want on public library shelves. Free speech law developed in other contexts—designed to forbid the government from any such involvement—simply cannot be easily transferred to the problem of public library decisions on purchase and retention of books.

At this point, I imagine, you will see why the question became so interesting to me as a law professor. General principles, developed in other contexts and for other purposes, would not be very helpful in this specific area. Knowing that controversies about library book selection are pretty common these days, and knowing that Americans for more than a century have been in the habit of taking even their most trivial disputes to court, I turned to the cases. I expected to find a large body of case law, in diverse circumstances, discussing the application of the First Amendment to library book selection and retention.

Case law

Much to my surprise, I found almost none—two, to be exact. Now it is possible that I missed something along the way: legal indexing systems aren't perfect. But I doubt that I missed very much. Either such lawsuits simply aren't being brought very often or, more likely, most of the lawsuits brought are settled by agreement of the parties before the case has progressed to the stage at which a court writes an opinion that will be formally printed and published. I've heard of a couple such cases myself. They are, in the jargon, "unreported." An unreported case is as lost to the body of the law as an uncatalogued book in a closed-stack library. So these two cases really do represent the present state of the law on the subject. (Strictly speaking, neither of these cases is directly in point for public libraries in general, since each case involved a public *school* library. As I will indicate later, there may be some relevant differences. But for the moment, let me ignore the

possible differences and talk about the cases.)

The first of these cases arose in Queens County, New York, at the beginning of this decade. After several stormy public hearings and much controversy, the local school board ordered that copies of Piri Thomas's *Down These Mean Streets* be removed from general circulation at local school libraries. It was not destroyed, and it could still be charged out–but only to the *parents* of children in the public schools. A number of people who objected to this action–the losers at the school board level–immediately brought suit in a federal court, seeking an order that the book be returned to general circulation. The case got as high as the local federal appellate court–the United States Court of Appeals for the Second Circuit–and the losers lost again. The Supreme Court was asked to review the decision. It refused.

The Court of Appeals made a number of observations in the course of its opinion upholding the local school board's action. First, it pointed out, the losers had made no use whatsoever of an available process for appealing the school board's action within the New York system. They had come straight to federal court, and the federal court wasn't too happy about that. Second, the court took some pains to point out

(a) That nobody had been fired;

(b) That no teachers had been ordered not to discuss the book in class, or not to assign it as outside reading;

(c) That the book was widely–and cheaply–available in paperback;

(d) That the issue was fought out in public and only decided after a substantial amount of controversy and discussion, by a publicly elected school board.

The court didn't say much about why it considered those various factors important. But a little thought will show that they are at least relevant to the court's apparent conclusion that there was really very little loss to anyone's freedom of expression, or freedom to read, in this particular case. If a teacher had been fired, one might expect other teachers to be quite cautious in the future; but no firing had taken place. No teacher who wanted to discuss the book had been told not to. Any student who wanted to read the book (in this fairly well-to-do school district) could almost certainly afford to buy a copy even if the student's parents wouldn't check it out of the library. And there was no hint of secret censorship.

The court, however, did not really rest its decision on any of the listed factors. Having listed them, it then proceeded to the main body of its analysis. It noted that somebody, sometime, had to make decisions about what books should be retained in public school libraries. It said that there would be nothing improper about a decision, for instance, to remove from the school library shelves all books arguing that the earth was flat. Therefore, the court reasoned, there was nothing improper in removing this particular book about life in Spanish Harlem. In other words, having decided that the school board could properly remove *some* books, the court concluded that the school board could properly remove *any* books. I will have a little more to say about this reasoning later. For the moment it is important simply to remember that this was the basis of the Second Circuit's decision.

The second case came up in a suburb of Cleveland, Ohio. Teachers at the school wanted to use Kurt Vonnegut's *God Bless You, Mr. Rosewater,* and Joseph Heller's *Catch-22* as texts in English literature classes. The school board was horrified. It ordered that the books not be used as texts. It ordered that *God Bless You, Mr. Rosewater* (which was not in the school library) not be purchased. It ordered that *Catch-22* be removed from the library. For good measure, it ordered that Vonnegut's *Cat's Cradle* also be removed from the library. And it appeared to have prohibited any class discussion of any of these books.

Once again, the losing side brought suit in the local federal court. They didn't get very far in the trial court, but this time they won a partial victory on the appeal. The Court of Appeals (for the Sixth Circuit this time) ducked the question of class discussion by concluding that the

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Krug receives Downs Award

We are pleased indeed to announce that the 1978 Robert B. Downs Award has been granted to Judith F. Krug for outstanding contributions to intellectual freedom in libraries. The award will be presented to her in ceremonies at the University of Illinois later this summer.

The award, which carries a $500 prize, honors Judy Krug's achievements as director of the ALA Office for Intellectual Freedom and as executive director of the Freedom to Read Foundation. She has served as the director of the office since its inception in 1967 and as executive director of the Foundation since its organization in 1969.

A graduate of the University of Pittsburgh and of the library school at the University of Chicago, Judy Krug is the co-editor of this *Newsletter,* co-author of the ALA *Intellectual Freedom Manual,* and the author of numerous articles that have appeared in library publications for more than a decade. She was executive producer of the ALA's film on the First Amendment, *The Speaker.*

The Downs Award was established by the University of Illinois to honor the long-time dean of its graduate school of library science, Robert B. Downs. Recipients are chosen by the faculty of the library school. Previous winners of the award include former Freedom to Read Foundation President Alex P. Allain, former FTRF Vice President Everett T. Moore, current FTRF Trustee and former ALA Intellectual Freedom Committee Member Eli M. Oboler, and Irene Turin, also a recipient of the Immroth Memorial Award.

ALA again seeks reform of criminal code

In a statement submitted to the House Subcommittee on Criminal Justice in early May, the American Library Association sought revision of the section on obscenity in the Senate version of the proposed reform of the federal criminal code, S. 1437. That section, 1842, should be modified to give greater protection to librarians and library services, the ALA argued.

The ALA also protested the Senate's attempt to revive Comstock laws against the dissemination of information about abortion. Known as the Allen Amendment, the proposed anti-abortion language would have a drastic impact on the provision of sex education materials through libraries.

The complete text of the ALA statement follows.

Founded in 1876, the American Library Association is the world's oldest and largest national library organization. It is a nonprofit educational organization representing over 35,000 librarians, library trustees, and other individuals and groups interested in promoting library services. The Association is the leader of the modern library movement in the United States and, to a considerable extent, throughout the world. Its principal goal is the establishment of adequate library and information services for all U.S. citizens.

Library services affected by S. 1437

The members of the American Library Association would like to record their opposition to two sections of S. 1437 that would directly and adversely affect library services: Section 1842 and the Allen amendment adding a new section, Section 6035, to Title 39.

In the United States today, under the First Amendment, libraries play a unique social role by fulfilling the right of all citizens to have unrestricted access to the records of the world's cultures. In order to help meet the needs of all citizens, libraries have traditionally resisted censorship of library materials on grounds of partisan or doctrinal disapproval, and have supported the right of all individuals to use the library regardless of age, race, religion, national orgin, or social or political views.

Under the constitutional mandates of freedom of speech and press, librarians have an obligation to provide their patrons with a broader range of ideas than those that may be held or approved by any individual librarian, publisher, government or church. In sum, it is their obligation to make available through library resources any constitutionally protected works that patrons may desire.

Libraries today provide a broad range of fiction and nonfiction materials with sexual themes. Many of these works, especially sex education materials, include sexually explicit descriptions and information about abortion, and may be found in public and school libraries throughout the United States. Adults demand them for themselves and for their children; schools require them as part of mandatory or optional sex education programs; teenagers with sexual problems or inadequate sexual information seek them for themselves.

Section 1842: Disseminating obscene material

Under current law, and that proposed in S. 1437, librarians who disseminate works having sexual content must do so at their peril. They face a dilemma: On the one hand, if they refuse to disseminate a work because they believe it to be obscene, they infringe the First Amendment rights of their patrons if that belief is wrong. On the other hand, if they disseminate a work having sexual content, they are subject to criminal prosecution, fine, and imprisonment if a jury ultimately deems the work obscene. According to the most recent rulings of the U.S. Supreme Court, the "community standards" by which the obscenity of a work will be determined cannot be ascertained until after the prosecution has been initiated, the jury impaneled, and its decision rendered (see, e.g., *Smith* v. *U.S.*, 431 U.S. 291 [1977]).

The American Library Association believes that librarians must have the absolute right, free from the chilling effect of the threat of criminal prosecution, to procure and disseminate all works and materials which have not been held obscene by a court of competent jurisdiction, and the right to do so with immunity until they are so held.

In recognition of the Senate Judiciary Committee's perception that "the Federal interest in punishing the dissemination of obscene material" is "less urgent and pervasive" than current law would indicate (Senate Report No. 95-605, Part 1, p. 847), Section 1842 would apply to the noncommercial dissemination of materials (as in libraries) in only certain cases. But this fact does not eliminate the concern of librarians. Section 1842 applies to all cases of dissemination to minors, and library service to minors employs more librarians today than all other forms of library service combined.

Accordingly, the American Library Association *recommends:* That Section 1842 be amended to provide that no criminal prosecutions be allowed except in cases where the work in question has been adjudged obscene in a prior *in rem* civil proceeding or, alternatively, that Section 1842 be amended to exempt librarians.

Allen Amendment

During the late hours of the Senate's consideration of S. 1437, an amendment was proposed by Senator Allen that was described as prohibiting the dissemination of "materials urging abortions or advertising for an abortion." This

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in review

Government and the Mind
By Joseph Tussman. Oxford, 1977. 175 p. $8.95.

The American tradition of freedom of speech is informed by intense distrust of government action in the realm of the mind. This stance is supported by experience, by logic, and by the negative emphasis of the First Amendment ("Congress shall make *no* law . . ,'). Yet it is also in some respects misleading. Taken to an extreme, it may blind us to the obvious fact that government, in a variety of ways, is deeply involved in the life of the mind.

In *Government and the Mind* Joseph Tussman, a distinguished political philosopher, undertakes to cure such blindspots. At the outset he states his thesis with vigor: "Government, we are told—and by the Supreme Court itself—may not invade 'the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.' It would be difficult to find another statement so plausible, so seductively obvious, and yet so utterly, so foolishly, so deeply mistaken."

These are strong words, and Tussman is acutely aware that they touch a sensitive nerve in an American audience. Indeed, judging by the tense and defensive tone of this essay, he expects readers to react negatively. That expectation may well be warranted; many readers will, I suspect, find themselves, as I did, in sharp disagreement with certain of the views he expresses as to the proper role of government under the First Amendment. Yet it would be a mistake to dismiss this book too quickly. For Tussman's argument is among the most challenging that advocates of an expansive reading of the First Amendment must answer.

The task Tussman sets himself is to demonstrate "the necessity and legitimacy" of various sorts of governmental action in the domain of the mind and to fashion "a more adequate theoretical understanding" of such action. He discusses in turn government support of research and the arts, the authority exercised by government in the area of public education, and the multiple roles played by government in what he calls "the forum"—"the whole range of institutions and situations of public communication."

The core of the essay is the discussion of government involvement in education. Tussman argues persuasively that the public education system rests on an inherent power of the state—"the teaching power." This power is awesome in its scope, and it stands in a complex relationship to general principles of free speech. On one hand, "the forum presupposes the school," that is, education is the means by which society produces strong, critical minds to engage in and sustain the ongoing public debate. On the other, the school can hardly be said to be governed by the same principles as the forum: minors are compelled to attend; a largely predetermined curriculum is imposed upon them; and the distinctive requirements of the educational endeavor limit their freedom of speech.

Tussman does not give sustained attention to the various issues turned up by his discussion of public education. (What are the First Amendment rights of the child? in his role as student? in his role as apprentice-citizen? In what *ways* and to what *extent* do the purposes of the school limit the application of the First Amendment?) But he does, I think, succeed in bringing home his central point: The distinction between minors and adults is inescapable, and the existence of some degree of legitimate state authority over the minds of minors in the context of the school, though subject to various constraints, is undeniable. The First Amendment has never been thought to render compulsory public education unconstitutional.

The argument becomes harder to accept when Tussman turns to the forum. Here as elsewhere he writes as a philosopher, not as a student of constitutional history.

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Coleman wins Immroth Award

The ALA Intellectual Freedom Round Table presented its 1978 John Phillip Immroth Memorial Award to Librarian Sonja Coleman at a ceremony during the ALA Annual Conference in Chicago. Coleman, who organized the Right to Read Defense Committee of Chelsea to battle the Chelsea (Mass.) school committee's decision to censor *Male and Female Under 18,* was praised by the IFRT for personal courage, professional integrity, and vigorous defense of the students' right to read while threatened with loss of her position.

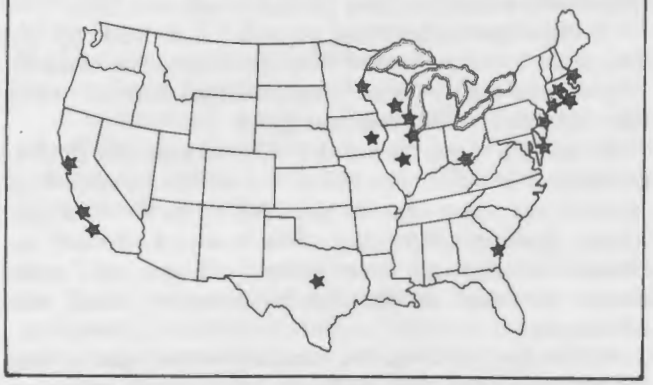
The battle over *Male and Female Under 18* began in 1977 when the school committee took strong exception to one poem in the anthology, "The City to a Young Girl." In the trial of the Right to Read Defense Committee's suit against the school committee, Coleman's defense of the poem received strong support from her colleagues in the library profession and from literary critics.

Coleman gained tenure in the Chelsea school system only after a decision not to grant her tenured status was reversed by the school committee on threat of legal action by the Right to Read Defense Committee. Prior to the trial the federal judge who received the case warned the school committee that it should not attempt to retaliate against its employees in a debate over First Amendment rights.

Coleman, a graduate of Hofstra University and the University of Rhode Island's library school, has served as librarian at Chelsea High School since 1975.

Previous recipients of the Immroth Memorial Award were Irene Turin, head librarian of the Island Trees (Long Island) school system, and I.F. Stone.

censorship dateline



libraries

Chula Vista, California

Problems involving a school library book with a controversial passage about "devil worship" have prompted the local coordinator of school library services to tender his resignation, the Chula Vista Elementary Teachers Association to charge the school district with censorship, and thirty librarians in the district to rally in support of the coordinator, Herbert Weigand.

The book feud began when several district parents and clergy asked that *Whistle in the Graveyard: Folktales to Chill Your Bones* be banned from elementary school libraries. In response to the complaints, a panel was appointed which recommended that the book not be banned, that instead its circulation be limited to "an appropriate grade level, where the children who read it are able to distinguish between fact and fantasy."

Weigand charged that the panel's report described "the results of an exchange of opinions based on extremely limited information." He said thousands of children had read the book, or had had the book read to them, without any complaints of their becoming alarmed.

The panel was composed of a representative of the district's classified employees, a member of the local chamber of commerce, a district teacher, a member of the PTA, the district psychologist, a member of the local ministerial association, and a school principal. Reported in: *San Diego Union,* March 13.

Berkeley, California

Photographs and other materials commemorating the massacre of Armenians in the Ottoman Empire during World War I were restored in April to exhibit cases at the University of California-Berkeley's Doe Library after Armenian students protested their removal. The decision to withdraw the materials was made by Librarian Richard Dougherty after protests were received from the Associated Turkish Students and the Turkish consulate in San Francisco.

Dougherty explained that he had decided to withdraw the materials on the basis of a rule governing library exhibits: "Advocacy of controversial views should not be coupled to the theme." Turkish students and the Turkish consul argued that the massacre of Armenians was "alleged."

In response to complaints from the Armenian Students Association, which charged the library with censoring the exhibit, UC-Berkeley Chancellor Albert Bowker reversed Dougherty's deision after consultation with members of the faculty senate's committee on academic freedom.

Bowker reported that members of the committee had concluded that "external political pressure" had been applied to the university and had resulted in "an infringement of academic freedom of the library staff." Bowker said that he himself was not certain there had been "a violation of academic freedom," but he had decided to restore the materials to the exhibit because "a full investigation and review of this incident would take several weeks and last beyond the scheduled closing of the exhibit."

Bowkers' order left only one pamphlet in limbo, apparently due to some confusion about its ownership by either Berkeley or UCLA libraries. Bowker had directed that only historical materials found in the collections at Berkeley and UCLA could be allowed in the exhibit. Reported in: *Daily Californian,* April 13; *Oakland Tribune,* April 20, 21.

Savannah, Georgia

A "temporary" action in which all copies of *A Hero Ain't Nothin' But a Sandwich* were withdrawn from Savannah Chatham school libraries was pronounced "final" in April by the school poard president, Donald Knapp.

Knapp called the book "garbage." "We don't need people going around and calling other people 'jive-asses' and saying, 'Fuck the society,'" Knapp commented.

Speaking through its Intellectual Freedom Committee, the Georgia Library Association wrote to the Savannah-Chatham schools to urge return of the book to libraries and restoration of "the freedom of your students to read those materials which are, in the opinion of professionals in your system charged with their education, supportive of educational growth and personal development."

The book was challenged by the mother of a student who was assigned the book by a teacher at DeRenne Middle School. The parent complained about "vulgar language" which her children were not allowed to use at home.

The media review committee appointed to examine the book and respond to the complaint agreed with the parent that the book should not have been used as assigned reading. But the committee emphasized that the question

of its presence in libraries was "an entirely different matter." The committee recommended that it be retained.

At a public school board meeting, State Representative Bobby Hill took issue with the school system policy which calls for the removal of books pending the resolution of complaints against them. Hill described the review system as "backward." He explained, "If they have a complaint, they should investigate it--not pull the book and then investigate it." Reported in:: *Savannah Morning News,* April 23, May 12.

Waterloo, Iowa

Two books in the Waterloo Public Library's children's collection should be removed and placed in a restricted area, according to a citizens' group headed by Theola Jay, immediate past president of the Waterloo PTA Council, and a Waterloo priest. The objects of their protest were *Where Did I Come From?* and *What's Happening to Me?*

Library Director Michael Phipps opposed the move, arguing that the library could not restrict access to every volume to which a parent might take exception.

Little seemed to unite the citizens' group beyond the belief that the books should be placed under restricted access. The Rev. Joseph Griffin called the works "offensive, negative, not a good teaching tool" and charged that they use "coarse language and gross illustrations."

Jay said she considered the books "excellent," but she explained that she thought they should be shown to children by their parents.

Other parents who opposed the books complained generally about "moral decay."

In a hearing conducted by the library board, two teachers of Methodist Church sexuality courses said they would recommend the two works. Reported in: *Des Moines Register,* April 14, 15.

Rockville, Maryland

Parents in Citizens United for Responsible Education (CURE) decided in April to appeal a decision of Montgomery County School Superintendent Charles Bernardo to keep Gordon Parks' *A Learning Tree* in high school libraries. A member of CURE decried the book's "vulgar language, cheap explicit passages on sex, and denigrating racial epithets toward both blacks and whites."

CURE, long active in seeking changes in the Montgomery County schools, complained that "what little time there is for English class" should be used to teach "the classics and worthwhile materials--not things that undermine the moral behavior of children." Mary Bailey Bowen, a CURE leader, said her son was assigned the book in a sophomore English class.

In his formal decision defending the book, Bernardo praised it as "significant minority writing" that "serves well to acquaint students with one black person's success in overcoming barriers of poverty, discrimination, and violence." Reported in: *Washington Star,* April 12.

Plainview, Texas

Members of the advisory board of the Unger Memorial Library in Plainview voted in May to put *Wake Up in Bed Together* in a restricted area accessible only to adults.

A Plainview resident had requested that *Wake Up* and five other books be banned from the library. She based her objection to the works on "explicit sexual material" which she contended would harm youngsters.

In separate votes, the board decided to keep *Our Bodies, Ourselves; For Better, For Worse: A Feminist Handbook on Marriage and Other Options; Gay: What You Should Know About Homosexuality;* and *The Redbook Report on Female Sexuality* on open shelves. All were split votes except the vote on the *Redbook* report, which was unanimous.

At the May meeting, the complainant emphasized that she had not asked that the books be destroyed, only that they be "disposed of in a lawful manner."

The city council, which officially governs the library, announced through the mayor that it would not attempt to interfere with the advisory board's recommendations. Reported in: *Amarillo Daily News,* May 3.

schools

Yakutat, Alaska

School board censorship in February of the local ten-watt television station, run by students, resulted in a bitter First Amendment controversy which divided this small community along ethnic lines.

The furor erupted when students began reporting public records of arrests and convictions over their station, one of several small broadcasting operations initiated by the state in 1972 to bring television to villages. The school board voted three to two to order the reports stopped, citing the Tlingit tradition of not shaming other people in public.

"We are merely concerned with a way of living with each other that stems from our native culture," Board President Victoria Demmert said. "It has not been a practice in the past for our people to shame another person in public, and to practice it now on the local TV station or other media is an act that creates separation among people. To make a spectacle of a human being and his wrongdoing is showing him and his family disrespect."

A member of the board minority, Presbyterian Minister Don Smith, replied, "I sympathize with those feelings, but you can't indiscriminately remove items of news because people may be offended."

Tlingits in the community were nearly unanimous in their support of the school board's decision. Reported in: *Washington Post,* April 16.

Darien, Connecticut

A teacher at Mather Junior High School, James M. Kaplan, was warned early this year that his contract would not be renewed because of language on an LP played for his

eighth grade social studies class.

At a public school board meeting in April, during which he was questioned by a school board attorney, Kaplan defended his use of George Carlin's "Seven Words You Never Hear on TV," a cut in his LP *Occupation: Foole*. Kaplan explained that when the record was used students in his class "were discussing how words can create prejudice."

A non-tenured teacher, Kaplan was charged by the school board with "failure to adhere to an acceptable curriculum schedule" and "poor professional judgment in relations with students and peers."

Students at the hearing praised his teaching as "the best." But school officials clearly disagreed, claiming that the Carlin cut dealt in detail "with human sexual and excremental functions and sexual organs in a manner which was totally inappropriate for a class of twelve and thirteen-year-old eighth grade students." Reported in: *Stamford Advocate,* April 27.

Minneapolis-St. Paul, Minnesota

School boards in two nearby school districts—the St. Anthony-New Brighton and Forest Lake districts—voted in April to bar all use of the film *The Lottery* and the accompanying discussion film.

In the Forest Lake district, nearly seventy-five parents petitioned to have the films reviewed. They charged that *The Lottery* portrays "an unrealistic form of tradition" in the United States and would cause destruction of the family unit and undermine "values, traditions, and religious beliefs."

After a Forest Lake review committee recommended that use of the films be restricted to the senior high English curriculum and that parents be notified on every occasion of their utilization, the school board responded that the review committee was "a stacked deck" and voted to bar all use. The review committee was composed of media professionals, teachers, administrators, two lay persons, and one student.

When teachers complained about violations of the district's academic freedom policy, Board Member Richard Traugott, who voted against the film, said the basic issue was "accountability"—to the community and what members of the community want taught in their schools.

In the St. Anthony-New Brighton district, there was considerably less controversy. The school district's review committee recommended that the films be banned and the school board agreed. Reported in: *Minneapolis Tribune,* April 29.

Woonsocket, Rhode Island

When the newest member of Woonsocket city council, John R. Dionne, led a group of parents in complaining against *A Hero Ain't Nothin' But A Sandwich* and the film *Tommy,* the Woonsocket school committee responded by appointing a special committee to review the works.

The book and the film, used in the English curriculum at Woonsocket Junior High, are unsuitable for junior high pupils, according to Dionne. He complained at a city council meeting about the book's "foul language," and contended that the film was "about homosexuality."

During the meeting at which the review committee was established, a member of the school committee, John Kulik, blasted Dionne for taking "a cheap shot" at the movie.

Appointed to the review committee were the deputy school superintendent, a junior high teacher representing the teachers guild, the chairperson of the high school English department, and two lay persons. Reported in: *Woonsocket Call,* April 4, 17.

Milwaukee, Wisconsin

Author Studs Terkel threatened a group of parents in southeastern Wisconsin with legal action after they united to ban his book *Working* from high school classrooms in the Kettle Moraine Area School District.

The parents, who complained about the book's "obscene language," in April circulated copies of parts of the book in efforts to gain support for their position. Terkel's contemplated legal action would charge the parents with violating his copyright.

"No, it's never happened. Never dreamed it would," the Chicago author said when informed of the situation by a *Milwaukee Journal* reporter.

Terkel noted that the book, composed of 133 interviews with persons in various occupations, tells the histories those persons in their own words. "But it's mostly about the resilience of the human spirit," Terkel said. "And to have people attack it as obscene is in itself obscene. And it's also a feeling of contempt for their children and themselves."

The parents, led by Kathleen Sumpter, charged that the book would corrupt the morals of children. Sumpter, whose daughter had been given the book to use in an assignment on careers in an English course, complained of the language in interviews with a prostitute, a fire fighter, and four others. "People talk about depressing work conditions and dislikes," she said of the book. Reported in: *Chicago Sun-Times,* April 9.

colleges-universities

Los Angeles, California

Following the feud over the exhibit of Armenian materials at U.C.-Berkeley, 600 members of the Armenian community in Los Angeles held a three-hour demonstration at UCLA to demand the dismissal of Stanford Shaw, professor of history and an authority on the history of the Ottoman Empire.

Members of a group called the Intercollegiate Armenian

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from the bench

U.S. Supreme Court rulings

In a decision reported on the first page of this issue, the U.S. Supreme Court has subjected newspapers and other news media to a grave danger. The Court refused to require subpoenas for searches of editorial files for evidence.

Press may report on judicial inquiries

Seven of the justices of the U.S. Supreme Court decided without dissent in May that a state may not prosecute a newspaper for publishing accurate information about confidential inquiries into judicial conduct. The Court struck down a Virginia criminal statute under which the *Virginian-Pilot* in Norfolk was fined $500 for publishing a report on an investigation conducted by the Virginia Judicial Inquiry and Review Commission.

Writing for the Court, Chief Justice Warren E. Burger concluded "that the publication Virginia seeks to punish under its statute lies near the core of the First Amendment, and the Commonwealth's interest advanced by the imposition of criminal sanctions are insufficient to justify the actual and potential encroachments on freedom of speech and of the press which follow therefrom."

Commenting on the decision of the Virginia Supreme Court which upheld the conviction of the *Virginian-Pilot* for its 1975 story on complaints about Judge Warrington Sharp, Chief Justice Burger said the state court relied on a mechanical application of the "clear and present danger test" laid down by Justice Oliver Wendell Holmes. Quoting a remark of Justice Felix Frankfurter, the chief justice said the Holmes test was never intended "to express a technical legal doctrine or to convey a formula for adjudicating cases."

The decision of the Court was expected to have important ramifications for freedom of the press. The Court took note of the fact that forty-seven states, the District of Columbia, and Puerto Rico have established mechanisms for conducting inquires into judicial disability and conduct. With the exception of Puerto Rico, all impose requirements of confidentiality through constitutional, statutory or administrative provisions.

Chief Justice Burger's opinion was joined by Justices White, Marshall, Blackmun, Rehnquist, and Stevens. Justice Stewart filed a separate concurring opinion. Justices Brennan and Powell took no part in the consideration of the case. *(Landmark Communications* v. *Virginia,* decided May 1)

No "diluted" rights for corporations

Striking down a Massachusetts law barring corporations from spending money to influence the outcome of ballot referenda, the Court in April overturned a holding of the Massachusetts Supreme Judicial Court that the First Amendment rights of corporations are limited to issues that materially affect their businesses, properties or assets.

In an opinion joined by Chief Justice Burger and Justices Stewart, Blackmun, and Stevens, Justice Lewis F. Powell said the Massachusetts court posed the wrong question in asking whether corporations have First Amendment rights. "The Constitution often protects interests broader than those of the parties seeking their vindication," Justice Powell declared. "The First Amendment, in particular, serves significant societal interests. The proper question therefore is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the Massachusetts law] abridges expression that the First Amendment was meant to protect. We hold that it does."

Noting that there is "practically universal agreement" that the First Amendment protects free discussion of governmental affairs, Justice Powell said: "If the speakers here were not corporations, no one would suggest that the state could silence their proposed speech. It is the type of speech indispensable to decision making in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether a corporation, association, union, or individual."

In a dissent joined by Justices Brennan and Marshall, Justice Byron R. White argued that the regulation which Massachusetts would have imposed was designed to serve none other than First Amendment interests, and that the question posed by the case was "whether the state has struck the best possible balance, i.e., the one which it would have chosen, between competing First Amendment interests."

Justice White also observed that the Massachusetts statute in no way forbad "the board of directors of the corporation from formulating and making public what it represents as the views of the corporation even though the subject addressed has no material affect whatsoever on the business of the corporation. These views could be

publicized at the individual expense of the officers, directors, stockholders, or anyone else interested in circulating the corporate view. . . ."

In a separate dissenting opinion, Justice William H. Rehnquist said the Court should have given more credit to "a broad consensus of governmental bodies expressed over a period of many decades" favoring limitations on corporations.

In a separate concurring opinion which evoked considerable controversy, Chief Justice Burger argued that "the large media conglomerates" have no special claim on the First Amendment. "Today," the chief justice stated, "a corporation might own the dominant newspaper in one or more large metropolitan centers and others, a newspaper chain, news magazines with nationwide circulation. . . . Corporate ownership may extend, vertically, to pulp mills and pulp timberlands to insure an adequate, continuing supply of newsprint and to trucking and steamship lines for the purposes of transporting the newsprint. . . ."

Through the invalidated law, Massachusetts had attempted to restrain corporate opposition to legislation enacting a graduated income tax on personal income. The law was challenged by two banks, two technical companies, and a consumer goods firm doing business in Massachusetts. (*First National Bank of Boston* v. *Bellotti,* decided April 26)

Reporters' rights limited

Refusing in April to consider issues that arose during the 1975 trial of former Senator Edward J. Gurney (R.-Fla.) on bribery and fraud charges, the Supreme Court let stand a lower court ruling that authorized special "trial management" techniques used by the federal trial court judge.

During the Gurney trial, U.S. District Court Judge Ben Krentzman ordered closed to the press and the public: exhibits identified but not admitted into evidence; exhibits admitted into evidence but not yet read or shown to jurors; communications between him and the jury after it was sequestered; and nearly 400 conferences at the bench.

Judge Krentzman attempted to justify most of his orders on the grounds that possibly prejudicial information might reach the jurors. He offered no evidence, however, that news coverage could have prejudiced the jury.

According to the U.S. Court of Appeals for the Fifth Circuit, Judge Krentzman "employed reasonable 'remedial measures' far short of prior restraints to prevent possible prejudice and maintain an orderly trial."

In declining to accept two cases arising out of New Mexico and Iowa, the Court in May let stand state court orders requiring reporters to identify sources of information they had sought to keep confidential.

In the New Mexico case, in which four deputy sherriffs charged an Albuquerque radio station with malicious defamation in its news broadcasts, the New Mexico Court of Appeals ordered a reporter to disclose sources of information in order to determine whether they were reliable and accurate. The station claimed on the air that one of the deputies had served a prison sentence, that one had attempted to smuggle an alien from Mexico into the U.S., and that two had used county owned cars for private purposes.

In the Iowa case, a defamation suit filed against the lawyer in a divorce case was based on an article about the divorce that appeared in the *Des Moines Register-Tribune.* The Iowa Supreme Court held that the reporter who wrote the article, Diane Graham, could be required to identify sources for the story if the plaintiff had exhausted other reasonable means of obtaining the information and his suit was not patently frivolous.

Access to Nixon tapes barred

By a seven-to-two vote the Court held in April that broadcasters and record companies have no right to obtain the Nixon tapes played at the Watergate cover-up trial and disseminate them to the public.

The majority justices ruled that the lower court had erroneously relied on "a common law right of access to judicial records." Holding that the right to inspect and copy judicial records is not absolute, the justices said that the case was governed by the 1974 law in which Congress directed the General Services Administration to take custody of the tapes and papers of the Nixon presidency, thus removing them from Nixon's control.

In the view of the majority opinion—delivered by Justice Powell and joined by Chief Justice Burger and Justices Stewart, Blackmun, and Rehnquist—the 1974 Presidential Recordings Act made the case "unique."

Justices White and Brennan dissented in part. Justices Marshall and Stevens filed dissenting opinions. Justice Marshall said "nothing in the act's history suggests that Congress intended the courts to defer to the Executive Branch with regard to these tapes." Justice Stevens said the administrator of the General Services Administration "gained congressional approval for his regulations [for controlling access to the tapes] only by deferring to the expertise displayed by the District Court in this case. For this Court now to rely on the Act as a basis for reversing the trial judge's considered judgment is ironic, to put it mildly." (*Nixon* v. *Warner Communications, Inc.,* decided April 18)

"Community" does not include children

Reversing the conviction of a California man for selling obscene materials, the Court ruled in May that jurors weighing "community standards" may not consider the possible reactions of children but should take into account the views of "sensitive" adults and "deviant sexual groups" without focusing on them.

Writing for the majority, Chief Justice Burger said the Court recognized that "the courts, the bar, and the public are entitled to greater clarity" in obscenity matters. He said: "We elect to take this occasion to make clear that children are not to be included for these purposes as part of

the 'community' as that term relates to 'obscene materials.'

"It may well be that a jury conscientiously striving to define the relevant community of persons, the 'average person' by whose standards obscenity is to be judged, would reach a much lower 'average' when children are part of the equation than they would if they restricted their consideration to the effect of allegedly obscene materials on adults."

Eight of the justices agreed to send the case back to the lower court for a new trial or a possible decision to abandon the prosecution. Only Justice Powell dissented, contending that the trial judge's instruction to the jury to consider "young and old, men, women and children" was an error "harmless beyond a reasonable doubt."

Only five of the justices joined Chief Justice Burger's opinion. Justices Brennan, Stewart, and Marshall, who regularly dissent from the majority's *Miller* views, would have dismissed the indictment in addition to reversing the conviction.

Justice Stevens explained that he agreed to join the chief justice's opinion in order to dispose of the case. He noted that his views, which differ from the *Miller* majority, were not likely to become law, and that the chief justice's reasoning in the case was consistent with the *Miller* line of cases. (*Pinkus* v. *U.S.*, decided May 23)

In other action, the Court:

• Cleared the way for a jury trial in the civil suit of Olivia Niemi against NBC by declining to review a California court ruling that constitutional guarantees of freedom of speech do not automatically bar her claim of damages. The plaintiff charges that NBC was responsible for a sexual assault on her by persons who imitated conduct portrayed in an NBC program, "Born Innocent" (see *Newsletter*, May 1978, p. 60).

• Without comment blocked a lower court order that would have allowed an official observance of Good Friday by the state of New Hampshire. The justices told Governor Meldrim Thomson Jr. to withdraw his directive that would have lowered state flags to half-mast, and to withdraw an official statement which declared: "Today, more than ever, we appreciate the moral grandeur and the strength of Christianity as the bulwark against the forces of destructive ideologies."

• Invalidated a Tennessee statute that barred members of the clergy from seeking elective office, holding that the law conditions the free exercise of religion on a surrender of the right to seek office.

• Refused to review the ruling of a lower court upholding the University of Colorado regents' refusal to hire a literature professor who had been approved by the English department, the dean, and the chancellor, and who was an anti-war activist and an avowed Marxist.

• Declined to review an action of Maryland's highest court that invalidated sections of the state obscenity law that exempted theater employees but not employees of bookstores.

• Overturned the obscenity conviction of an Atlanta man tried by a five-person jury. The justices established a minimum of six jurors for state criminal trials.

• Let stand an appeals court ruling that the obscenity of imported materials is to be judged by the "community standards" of the port of entry, not those of the destination.

• Decided not to review a lower ruling that the Federal Communications Commission cannot use the "fairness doctrine" to compel broadcasters to air criticisms of commercials they carry for "everyday" products.

reporters' rights

Washington, D.C.

A news reporter's legal privilege not to reveal his or her confidential sources may not be invoked by a reporter to frustrate discovery proceedings in a law suit in which the reporter is a plaintiff, the U.S. Court of Appeals for the District of Columbia ruled early this year.

Judge Gerhard A. Gesell held that columnist Jack Anderson could not refuse to reveal the source of his information that former President Richard Nixon and his aides conducted an investigation of Anderson which involved illegal wiretapping and unlawful entries. Anderson sued Nixon and other prominent figures in the Watergate affair charging that they conspired to harass him and deprive him of his rights as a journalist. Reported in: *West's Judicial Highlights*, April 1978.

White Plains, New York

A New York State Supreme Court justice in May barred both the public and news reporters from pre-trial hearings in the case of Richard James Herrin, accused of bludgeoning a Scarsdale woman to death in 1977.

Justice Richard Daronco, acting on a motion filed by the defendant's lawyer, found no "genuine public interest" in the pre-trial phase that would outweigh risks of public disclosures that would prevent a fair trial.

The judge based his ruling on a holding of the New York State Court of Appeals, the state's highest bench, which declared that the press may be excluded from pre-trial hearings except in cases where the press can show "an overwhelming interest" in keeping the proceedings open (see *Newsletter*, March 1978, p. 33). Reported in: *New York Times*, May 9.

Harrisburg, Pennsylvania

An April decision of the Pennsylvania Supreme Court reaffirmed three orders that prohibited news reporters from attending Delaware County pretrial hearings in the murder trial of W.A. (Tony) Boyle, former president of the United Mine Workers, and pretrial hearings in two widely reported murder trials in Montgomery County, one of which in-

volved the homicide of a police officer.

The unanimous high court reaffirmed its 1977 decision, handed down without a written opinion, that the trial judges in the three cases properly barred reporters from pretrial hearings, in which defense attorneys may attempt to prevent the presentation of arguably inappropriate testimony or evidence. That decision was appealed to the U.S. Supreme Court, which in turn sent the cases back to the Pennsylvania court for a written explanation.

Justice Samuel J. Roberts wrote that the Pennsylvania court was aware of the important benefits citizens gain from open trials. But he added: "The most damaging of all information comes from the pretrial suppression hearing. A trial court's ability to afford the accused a fair trial is substantially threatened where challenged inculpatory statements. . . or other information considered at the suppression hearing becomes public information prematurely."

Samuel E. Klein, an attorney who represented one of the three publishers and reporters associations that appealed the secrecy rulings, said that the Pennsylvania court's decision would result in reporters being precluded from sessions "without any right to contest whether the threat to a fair trial is real and substantial." Reported in: *Philadelphia Inquirer,* April 29.

libel

San Mateo, California

A California Superior Court jury decided in April to reject libel charges filed against the *San Mateo Times* by a former municipal court judge. Nine of the jurors, the minimum number necessary for a valid verdict, voted to dismiss the $5 million suit.

The former judge, Roy W. Seagraves, sued the paper over articles published in 1975 alleging that he shirked his duties, used a county photocopying machine for business unrelated to the county, and violated judicial ethics. Attorneys for the paper showed that there were no records indicating that supervisors had given the judge permission to use the photocopying machine, and more than a dozen lawyers and judges testified that Seagraves' reputation was "poor." Reported in: *Editor & Publisher,* April 15.

Palm Beach, Florida

A Palm Beach jury voted in April to award $174,500 in damages to an automobile dealer who claimed he was libeled in a series of stories in the *Palm Beach Post* and *Times.*

An attorney for the two Cox papers contended that the dealer, Wayne Akers, met U.S. Supreme Court criteria for "public figures" by his involvement in politics and community service organizations and thus had to prove that stories about his political campaign contributions and purchases of cars for a county sherriff were defamatory and published with malice.

The jury, which found that Akers was not a public figure, assessed $100,000 in punitive damages against the papers. Reported in: *Editor & Publisher,* April 29.

political speech

Bismarck, North Dakota

Noting that "the glories of our nation's history" include documents written pseudonymously by persons who later held high office in national government, the North Dakota Supreme Court in February struck down a state statute which made it criminal to publish political advertisements without disclosure of the names of sponsors. The holding of the high state bench reversed the conviction of the North Dakota Education Association for distributing a publication which urged a "no" vote on an initiative which would have limited the state's total expenditures in each biennium. Reported in: *West's Judicial Highlights,* April 1978.

freedom of information

Washington, D.C.

Ruling on a Freedom of Information Act request filed by the Church of Scientology, U.S. District Court Judge Charles R. Richey declared in April that the Department of the Air Force could not withhold records simply on the grounds that they were created by another agency.

In the case, in which the Church of Scientology had requested seventeen documents from the Air Force, the Air Force had followed Department of Defense regulations and referred fifteen of the requests back to the originating agencies, the Federal Bureau of Investigation and the Civil Service Commission.

In ruling against the Air Force, Judge Richey noted that the FoIA makes no provision for the exemption of "non-original" records. "Indeed," Judge Richey wrote, "defendants are unable to point to any provision of the FoIA which even arguably authorizes a different procedural treatment for documents that originated with an agency other than the agency possessing the sought documents. . . ." Reported in: *Access Reports,* May 16.

Washington, D.C.

Because Professional Standards Review Organizations (PSROs) have the authority to make binding decisions concerning the expenditure of Medicare and Medicaid money, they are agencies of the federal government and thus subject to the Freedom of Information Act, U.S. District Court Judge Gerhard Gesell declared in April.

Gesell's ruling was handed down in a suit filed under the the FoIA by the Public Citizen Health Research Group, a Nader organization, for access to information compiled by the National Capital Medical Foundation, the PSRO for the Washington, D.C. area.

In ruling against the PSRO, Judge Gesell acknowledged

that there were dangers in allowing public access to its records. But he said Congress would have to provide the solution to the problem: "The court is well aware that the affidavits and attitudes of the medical profession strongly suggest that the peer review mechanism which Congress wisely established in enacting the PSRO program will experience a severe setback, if not fatal blow, should PSRO records become generally available through the FoIA. But the remedy for alleviating these justifiable concerns lies with Congress, not the courts." Reported in: *Access Reports,* May 2.

students' rights

Trenton, New Jersey

Princeton High School's principal did not exceed his authority in ordering a drama teacher and student actors to delete certain words from the text of a play before performing it publicly, a New Jersey Superior Court judge declared in April.

Judge George Y. Schoch rejected arguments that the students' freedom of speech was infringed when the principal, George Petrillo, ordered "vulgarisms" deleted from the play, *The Moon Children,* a drama about campus protests in the 1960s.

In vindicating the principal, the judge said, "It must be clear that these students in performing the play are not expressing their opinions; it is not their speech which Mr. Petrillo has restricted."

The judge added that he did not see how the play's educational benefit could be diluted by the fact that students were prevented from swearing on stage.

In a letter to the *Princeton Packet,* which editorialized in favor of the principal's decision, Greg Davidson, a member of the cast and a junior at the school, challenged the qualifications of the principal to label the play "obscene, bad, and blasphemous." "Mr. Petrillo's lack of a degree in dramatic criticism is noted, and as far as I know, no church has yet ordained him. Was it fair for him to say these things?"

Davidson also noted that whereas the paper had editorialized in favor of the school's enforcing "generally held" moral standards, it had failed to editorialize on the "generally held" moral right of human beings to freedom of speech. Reported in: *Newark Star-Ledger,* April 11, 12; *New York Times,* April 12.

free speech and the Nazis

Chicago, Illinois

The U.S. Court of Appeals for the Seventh Circuit decided in May to reject appeals of suburban Skokie officials that marches by neo-Nazis be banned in their village. The appellate bench upheld an earlier decision by U.S. District Court Judge Bernard M. Decker against three Skokie ordinances (see *Newsletter,* May 1978, p. 62).

Judge Wilbur F. Pell Jr., who wrote the appellate court opinion, confessed that the bench found the goals of the National Socialist Party of America "repugnant." But he held that the case could not be decided on such a personal basis:

"It is, after all, in part the fact that our constitutional system protects minorities, unpopular at a particular time or place, from governmental harassment or intimidation, that distinguishes life in this country from life under the Third Reich."

Skokie Mayor Albert J. Smith immediately announced that the village would appeal the decision to the U.S. Supreme Court. Later, the village agreed to grant permits for both Nazi marches and anti-Nazi counter-marches pending a ruling by the high court. Reported in: *Chicago Sun-Times,* May 23, 31.

Baltimore, Maryland

Efforts of Wolfgang Schrodt to operate what his neighbors considered a neo-Nazi bookstore were declared legal in April by Baltimore City Court Judge David Ross. Ross' decision overturned a city zoning board ruling that banned the bookstore.

The zoning board ruled against Schrodt in 1973, but he was allowed to keep the store open while his case was appealed to the courts by the Maryland Chapter of the American Civil Liberties Union.

In a hearing before the zoning board, Schrodt admitted that he was a member of the National Socialist White People's Party and that he sold books concerning the "philosophy of Adolf Hitler." In his April ruling, Judge Ross declared that the zoning board had erred in finding that Schrodt did not intend to run a legitimate bookstore. Reported in: *Baltimore Sun,* April 20.

commercial speech

Los Angeles, California

A $45 million suit against the Times Mirror Company, filed by the Adult Film Association of America to reverse a decision of the *Los Angeles Times* to refuse advertising for adult movies, was dismissed in March. California Superior Court Judge Vernon G. Foster ruled that the newspaper, in the absence of any legal reason to the contrary, was free to withdraw from a business relationship without liability.

In 1977 *Times* Publisher Otis Chandler said his paper would no longer accept advertising for adult films on the grounds that they were "an indefensible product."

Judge Foster also dismissed an allegation that the *Times* had conspired with other filmmakers to deprive adult filmmakers of advertising space and thus ruin their businesses. Reported in: *Los Angeles Times,* March 31.

(Continued on page 99)

is it legal?

in the U.S. Supreme Court

Acting on a request filed by the Gannett Company, a large newspaper chain which operates two newspapers and a television station in Rochester, New York, the U.S. Supreme Court agreed in May to review a holding of New York State's highest court that trial judges may bar the press and the public from pretrial criminal proceedings unless the press can show that the public has "an overwhelming interest" in keeping the proceedings open (see *Newsletter,* March 1978, p. 33).

The case derives from a 1976 ruling in which Seneca County (New York) Court Judge Daniel A. Depasquale ejected a reporter from a pretrial hearing in a case involving two men indicted in the slaying of a police officer. In upholding Judge DePasquale, the New York Court of Appeals declared: "To allow public disclosure of potentially tainted evidence, which the trial court has the constitutional obligation to exclude, is to involve the court itself in illegality." Reported in: *Washington Post,* May 2.

Employee rights case accepted

The Court agreed in April to review a case involving the First Amendment rights of an employee who complains in private to a supervisor.

The employee in the case to be reviewed was a school teacher in rural Mississippi in 1971 during the early stages of desegregation in the state. According to U.S. District Court Judge Irma R. Smith, the Western Line Consolidated School District refused to renew the contract of an admittedly competent black teacher, Bessie B. Givhan, "almost entirely" because it wanted to get rid of a vocal critic who complained to her principal about practices which she claimed were racially discriminatory.

In its ruling on the case, the U.S. Court of Appeals for the Fifth Circuit disagreed with Judge Smith, noting that the teacher had not tried "to disseminate her view publicly," and arguing that "neither a teacher nor a citizen has a constitutional right to single out a public employee to serve as the audience for his or her privately expressed views. . . ."

One circuit court judge who concurred in the ruling but disagreed with the majority's opinion said Judge Smith "erred in casting this case in First Amendment terms." Reported in: *Washington Post,* April 4.

Kissinger requests protection for papers

In response to a request from former Secretary of State Henry A. Kissinger that transcripts of his official telephone calls be kept secret, attorneys for the Reporters Committee for Freedom of the Press told the Supreme Court in April that invasion of Kissinger's privacy by their release would be minimal.

Kissinger asked Chief Justice Warren E. Burger to stay an order by U.S. District Court Judge John Lewis Smith that directed the State Department to take possession of and begin processing 33,000 pages of transcripts made while Kissinger was secretary of state.

Pending its review of the merits of the case, the U.S. Court of Appeals for the District of Columbia refused to alter Judge Smith's directive (see *Newsletter,* March 1978, p. 34). Reported in: *Access Reports,* April 18.

libel

Columbus, Ohio

An Ohio-based nuclear consulting company which contends it was libeled by an episode of CBS-TV's "Lou Grant" show filed suit against the network in U.S. District Court in April. The firm, Nuclear Consulting Services Inc., doing business as NUCON, asked for $1.5 million in damages.

The suit alleges that the identical pronunciation of a fictitious company (Nuckon) used on the show resulted in the loss of the firm's professional reputation, good name, and standing in the nuclear industry.

The petition filed by NUCON said that the March 6 segment of the "Lou Grant" show "depicted said Ohio nuclear company as being guilty of gross negligence in the use of nuclear materials . . . of covering up . . . nuclear accidents, murder, and bribery of high government officials."

Named as defendants in addition to the network were the writers of the show, the president of CBS Entertainment, and the Columbus station which broadcast the show. Reported in: *Variety,* May 3.

Milwaukee, Wisconsin

A former Madison, Wisconsin judge filed a libel suit in April against two national wire services charging that they unfairly portrayed him as a sexist and caused his removal from the bench in 1977.

The former judge, Archie E. Simonson, asked the U.S. District Court for $3.5 million in damages from the

Associated Press and United Press International. Simonson, who was voted out of office in a special recall election, charges that AP and UPI stories inaccurately reported events at a trial in his courtroom and exposed him to "extraordinary public contempt and ridicule" and caused him "great mental suffering, humiliation, and anguish."

According to the lawsuit, the wire services rewrote a story by Anita Clark, a reporter for the *Wisconsin State Journal,* who reported on the trial of a fifteen-year-old boy charged with rape. The suit contends that AP and UPI inaccurately stated that Simonson "ruled" that the fifteen-year-old was "reacting normally to prevalent sexual permissiveness and women's provocative clothing" when he raped a girl in a stairwell at a public high school. The suit also charges that the AP called him "a county judge who says rape is a normal reaction from juveniles exposed to provocative clothing in a sexually permissive society."

According to transcripts of the trial, Simonson commented that Madison is "well known to be sexually permissive" and asked, "Are we supposed to take an impressionable person fifteen or sixteen years of age who can respond to something like that and punish that person severely because they react to it normally?" Simonson denies that he stated that he considers sexual assault normal. Reported in: *Editor & Publisher,* April 22.

the student press

Silver Spring, Maryland

Two students at Springbrook High School in Silver Spring, frustrated in their efforts to distribute the second issue of their newspaper, filed suit in May in U.S. District Court in Baltimore asking for an injunction against school authorities who want to prohibit its dissemination.

The students, Greg Williams and Mark Gutstein, distributed the first issue of their satirical publication without problem in 1977. In February 1978, however, the two did not fare so well.

Distribution of the second issue was halted by Principal Thomas P. Marshall, who maintained that one cartoon violated a school rule against libel in publications, and that an advertisement for drug paraphernalia violated a rule against "the distribution of material which encourages actions which endanger the health and safety of students."

Marshall said the cartoon of the school's monitor was clearly derogatory in its satirization of black dialect: "Don' smoke dat evil weed, I'll bust yo ass!"

Principal Marshall's decision was upheld by all school officials in the Montgomery County school system to whom Williams and Gutstein subsequently appealed their case. Reported in: *Washington Star,* May 4.

Boston, Massachusetts

A Suffolk County Superior Court judge refused in April to grant a preliminary injunction against Boston University as requested by a campus newspaper, the *BU Exposure*. The student paper had sought to have the court order the university administration to release funds which had been allocated for the publication and then frozen (see *Newsletter,* May 1978, p. 63).

In denying the request for an injunction, Judge Alan Dimond said he would not intervene in "what is essentially a policy dispute [within] Boston University." The case was expected to go to trial in July or August.

The *Exposure* contends that the BU administration attempted to suppress a free press on campus by the denial of funding. However, James Brann, chairperson of the BU journalism department, denied the *Exposure's* allegation.

"This is not a freedom of the press case," Brann said. "What is at issue is the arrangement by which the *BU Exposure* might receive its temporary subsidy from the university.

"The *BU Exposure* is free to publish everyday, if it chooses, no one is smashing their printing presses.

"The campus newspaper, the *Daily Free Press,* publishes everyday without funding from the university. The *BU Exposure* likewise is free to publish. The argument . . . is whether they should receive money from the university and how much."

Michael Ponsor, the Massachusetts Civil Liberties Union attorney representing the paper, disagreed. "We don't claim that the university has an obligation to finance anybody," Ponsor said, "but it does have an obligation not to interfere with a publication once it has agreed to finance it."

The *Exposure* has charged the university's administration with interfering with operation of the campus FM station and in engaging in "extortion" in connection with admissions to the BU medical and law schools. Reported in: *Editor & Publisher,* April 15, 29.

teachers' rights

St. Anthony, Idaho

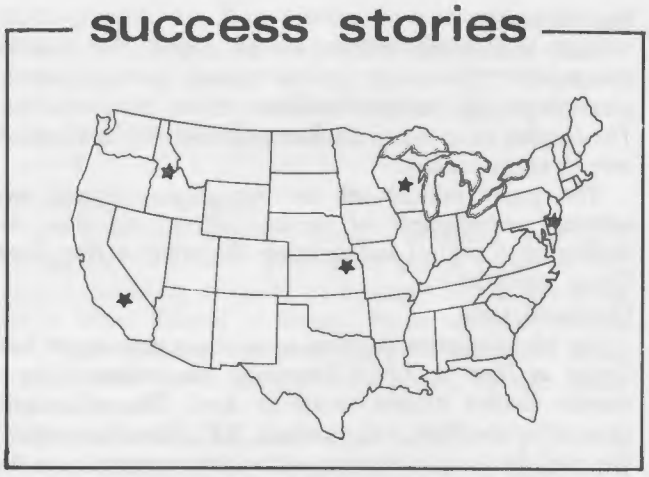
The English teacher who started a controversy at St. Anthony's South Fremont High when he assigned *One Flew Over the Cuckoo's Nest* to his class has been told by the school board that he will not be rehired for the 1978-79 school year (see *Newsletter,* May 1978, p. 57).

The teacher, John Fogarty, has in turn sued the school board and administrative officials at South Fremont, charging them with having violated his First Amendment rights.

Shortly after the school board announced the firing of Fogarty, the Idaho Library Association, acting on the recommendation of its Intellectual Freedom Committee, proclaimed its support of Fogarty and the right of access to the book. The ILA also donated $100 to Fogarty's legal war chest.

(Continued on page 100)

success stories



Riverside, California

Screenings of the controversial classic *Birth of a Nation* at the Riverside Municipal Museum were approved by the Riverside city council in late March under the terms of a compromise. In the compromise, the council called for a historian or sociologist, preferably black, to discuss the film's portrayal of blacks–a portrayal which the Community Relations Commission called racist (see *Newsletter,* May 1978, p. 66).

However, in early April, the council voted five to two to adopt a suggestion of the Community Relations Commission that the movie be screened on private premises, at St. Catherine's Church, using only private funds. Rabbi Philip Posner, commission chairperson, told the council that the issue was not censorship but rather screening at public expense a film which black taxpayers found objectionable.

Later in April, responding to charges from the museum's directors that the city council had engaged in "unreasonable censorship of museum activities," the council voted after lengthy debate to authorize four showings of the film at the museum. Reported in: *Los Angeles Times,* March 25, April 5, 11, 13.

Rupert, Idaho

Senator Frank Church delivered the May commencement address at Minidoka High School, despite the vigorous efforts of certain Rupert citizens to force the school board to cancel the invitation to him. They wanted to protest his "yea" votes on the Panama Canal treaties.

The school board tabled the issue after students made it plain they wanted no interference with their choice of a speaker for the occasion.

Lawrence, Kansas

An exhibit of Nazi memorabilia scheduled to open during Passover at the Spencer Library of the University of Kansas was canceled at the last minute by university officials. Four administrators said they took the action "out of concern for our Jewish students and colleagues." Jeanette Johnson, assistant to the university's vice chancellor, said "it was a matter of bad timing during an important week for the Jewish people."

In May, the university announced that the exhibit had merely been postponed and that there was no official opposition to it. "We wish to state unequivocally that the staff of the Spencer Library is authorized to reschedule this exhibit at an appropriate time," Chancellor Archie R. Dykes said in an official statement.

The statement was released several days after Laird M. Wilcox, who donated to the library a large collection of extremist materials from radical groups in America, expressed fears that his collection might be censored. Following the statement from the chancellor, Wilcox said he was satisfied with the university's response.

Referring specifically to the Wilcox collection, the chancellor declared: "We take the concern raised by the creator and donor of these research materials as an opportunity to reaffirm and reiterate our commitment to the principles of freedom of speech and expression, to the university library's need and right to acquire and exhibit such materials, and to the university community's need and right to inquiry even where the subject matter may be controversial." Reported in: *Kansas City Times,* April 20; *Daily Kansan,* April 21; *Wichita Eagle,* April 28, May 2.

Wauzeka, Wisconsin

At a meeting in March the Wauzeka school board voted to retain Paul Goodman's *Collected Poems* in the high school library. Earlier, in an uncommon move, the members of the board had decided they should read the work before considering the recommendation of several parents that it be banned.

In formal complaints, one parent charged that the work "puts sex in the gutter" with its "rotten vulgar language"; another complained that Goodman was "preoccupied with sex" and recommended that *Collected Poems* and "all other books in this category" be removed from the school library. At a school board meeting, one Wauzeka resident charged that "there's never been so much dirt sold for so little unless it was the Island of Manhattan for $9.00."

In voting to keep the collection, the school board accepted the recommendation of the review committee which received the formal complaints. Reported in: *Prairie du Chien Courier Press,* February 22, 24, March 1, 22.

Elmwood Park, New Jersey

Demands from a parent that Richard Wright's *Native Son* be removed from the reading list of a high school English honors class were rejected in April by the Elmwood Park school board.

At a meeting of the board, the parent, Carol Sroke,

unsuccessfully requested that a three-page typewritten list she had compiled of the book's "profanity" and "explicit sexuality" be read aloud. School Superintendent Edward Dzurinko replied to the request that any parent could obtain a copy of the entire book and read it.

"There is no question but what the book is uncompromising in its narration. It is graphic, strong, and sometimes shocking in its presentation," Duzurinko said. But he noted that the book had been received with acclaim and was considered a classic of American fiction.

Sroke said that in her opinion the book did not fit the dictionary definition of a classic. "I feel that a book which uses God's name in vain . . . and describes prostitution is not indicative of the highest standard of lasting merit," she said.

The board ordered copies of the book returned to the English honors students. Reported in: *Hackensack Record,* April 26.

(Dateline . . . from page 89)

Students Association presented a list of demands to the chairperson of the UCLA history department and to the UCLA vice chancellor for faculty relations, Harold W. Horowitz. They call for dismissal of Shaw from UCLA; discontinuance of the use of his recent book, *History of the Ottoman Empire and Modern Turkey;* the initiation of an inquiry into the validity of Shaw's claims about Turkish history; and elimination of all federal funds for Shaw's research.

Horowitz responded to the demands with the following statement: "It is not a proper function of the university to discipline faculty members for what they write. If there are inaccuracies in scholarly works, those inaccuracies are noted and aired by other scholars and are responded to in the professional literature. Such inaccuracies are factors to be taken into account within the university in the regularly scheduled evaluations of the faculty members in considering advancements in the personnel process."

Shaw's home was bombed in October 1977, allegedly by an Armenian terrorist group. Reported in: *UCLA Daily Bruin,* April 25.

Newton, Massachusetts

The editors of a student newspaper ordered off the campus of Boston College said in April they would fight the decision. Officials at the Roman Catholic institution evicted the student weekly after it printed advertisements for two abortion clinics.

Kevin P. Duffy, the college's vice president for student affairs, explained the eviction: "It is our firm conviction that Boston College has the responsibility to assure that any independent corporation which desires the convenience of leasing space in college quarters respect the basic values of the college."

Paul McPartland, editor of the paper, *The Heights,* responded: "The board [of the paper] has conferred at great length and has not weakened in its conviction that *The Heights* must retain ultimate responsibility and control over its entire content."

The paper printed ads for two clinics without any editorial endorsement of services offered by them, including birth control and abortion. Reported in: *New York Times,* April 20.

Cincinnati, Ohio

An administrative decision canceling a showing of *Last Tango in Paris* at Xavier University was protested by a sharply divided student senate in April. The senate vote came after the Rev. F.C. Brennan, S.J., Xavier's academic vice president, said a showing of the film would damage the university "without the prospect of advancing any noble purpose."

A university spokesperson, Charles J. Carey, said the university was flooded with telephone calls from alumni and "friends" of the university who complained about the proposed showing.

In a statement released by Xavier, Academic Vice President Brennan stated: "As a Catholic institution, Xavier may justifiably decline to provide popular entertainment, especially public entertainment, when such entertainment appears to involve a departure from the institution's stated principles, or to imply that the university adopts a position of moral neutrality, or to suggest that the university is not serious about the Judeo-Christian heritage which it professes to respect. . . ."

Larry Visnic, student film committee president, criticized news reports which he said failed to note that the showing of the film was intended as an academic exercise for Xavier students and faculty. Reported in: *Cincinnati Post and Times-Star,* April 12; *Cincinnati Enquirer,* April 13.

galleries

Lincoln, Illinois

Twenty drawings and four color prints depicting the end of a love affair were removed from the Lincoln College art gallery after visitors to the two-year institution complained about the exhibition. Dale Brummet, acting college president, said the works were withdrawn because "people in the community protested. I walked over to the gallery. I objected to it. . . . It was very distasteful."

The artist, Joel Bujnowski, a graduate student at Northern Illinois University, said he was flabbergasted by the interpretation of his works as pornography. He described the exhibit as "an anti-sexual comment on classic love."

The gallery director, Suzanne Sloan, refused to comment

on the exhibit. But Ross Altman, an assistant professor of English and speech, publicly protested Brummet's decision. He said several magazines which are sexually more explicit could be found in the campus bookstore. Reported in: *St. Louis Post-Dispatch,* March 19.

Providence, Rhode Island

On the day Rhode Island's sweeping new anti-pornography law went into effect police raided an off-campus exhibition of works by students and faculty of the Rhode Island School of Design. Police officials removed forty-three drawings and paintings from the show, which included 110 works, mostly photographs, on the theme "Private Parts."

After reviews of the show appeared in local papers, an outraged member of the city council called for cancellation of the school's tax-exempt status. He accused the artists of "violating every standard of the community under the guise of art."

City Solicitor Ronald Glantz called the raid "absurd." He explained, "The law is unconstitutional. We'd have to put shorts on half the city's statues." Reported in: *Time,* May 29.

West Bend, Wisconsin

Milwaukee artist Duane Unkefer was pleasantly surprised early in the year when he received an invitation from the West Bend Gallery of Fine Arts to mount his first one-artist show. He later was unpleasantly surprised when he was told that seventeen of the forty-five works he had submitted were unacceptable because they depict partial or total female nudity.

Edward G. Kocher, director of the gallery, said he considers Unkefer "a very fine artist . . . a terrific artist." But Kocher added, "We thought he primarily would be showing portraits, not so many nudes."

Kocher explained that a five-member exhibition committee had decided which of Unkefer's works were "objectionable." "We have a tremendous number of children coming through our gallery—school classes, girl scout groups, and the like—and we didn't want to expose the blatant nudity," he said.

Frank Derer, a high school art teacher and the gallery's exhibit chairperson, declined to comment on the matter. But he said, "I didn't have any part in throwing out any of the works."

Thomas Gross, a professor of art at the University of Wisconsin Center–West Bend, called the gallery's decision not to show the nudes "indefensible."

Unkefer speculated that the gallery may have reacted to local pressures against adult bookstores. Kocher attempted to justify the gallery's "unwritten policy on objectionable works" as a stance reflecting the conservative mood of the community. Reported in: *Milwaukee Sentinel,* April 3; *West Bend News,* April 4.

(From the bench . . . from page 94)

New York, New York

A New York City regulation prohibiting advertisements in which medical clinics explain their tests was struck down as unconstitutional by the local federal court. U.S. District Court Judge John M. Cannella declared in April that the regulation unconstitutionally restricted a clinic's freedom of speech.

The city attempted to defend the regulation on the grounds that it protected patients from false hopes and doctors from patients who might urge them to perform tests which in their professional opinion are not needed. Reported in: *West's Federal Case News,* May 5.

violence in media

Chicago, Illinois

In an opinion which affirmed earlier decisions made by Chicago's film review board and the rating appeals board of the Motion Picture Association of America, Cook County Circuit Court Judge Raymond K. Berg in April issued an injunction which prevented persons under eighteen from viewing *Eaten Alive* and *Devil Times Five,* distributed by New World Pictures.

The ruling, believed to be the first of its kind in the country, upheld the constitutionality of an anti-violence ordinance passed in 1976 by the city council at the insistence of the late Mayor Richard J. Daley. The law attempts to define "excessive violence" and bars minors from viewing films containing it.

New World Pictures contended that its films were unfairly singled out. Assistant Corporation Counsel Daniel Pascale disagreed. In *Devil Times Five,* he said, "a bunch of kids on their way to a mental hospital escape from a bus and begin chopping people up and feeding them to piranhas."

Enactment of the anti-violence ordinance was opposed by the American Library Association and the Illinois Division of the American Civil Liberties Union. David Hamlin, executive director of the ACLU's Illinois unit, commented: "In our opinion, the ordinance has no basis in either obscenity law or sociology. The Supreme Court has never said that something violent can be considered obscene, and that's the basis of this ordinance." Reported in: *Chicago Tribune,* March 31; *Chicago Sun-Times,* April 6.

obscenity

Mt. Vernon, Illinois

An Illinois appeals bench in May upheld obscenity charges against a Belleville magazine dealer and one of his employees. According to the opinion of the Fifth District Appellate Court, issues of *Viva, Playgirl, Gallery,* and *Dapper* magazines before the court were properly declared obscene under a Belleville anti-obscenity ordinance.

The court reversed one conviction, however, declaring the February 1976 issue of *Playboy* not obscene.

According to the magazine dealer, Larry Kimmel, the magazines were protected by the U.S. Constitution. But the appellate court disagreed, upholding the ruling handed down in a 1976 trial by Associate Judge D.W. Costello.

Appellate Judge Charles Jones, who wrote the decision, thought the February 1976 *Playboy* should have been ruled obscene as well. But he was overruled by his two colleagues, Judges Edward G. Eberspacher and George J. Moran, who concurred in the rest of his opinion. Reported in: *St. Louis Globe-Democrat,* May 11; *St. Louis Post-Dispatch,* May 11.

Salt Lake City, Utah

"Those who, by hook or crook, seek to find loopholes in the law so as to permit traffic in such filth have no place in our society and should be relegated to that class of depraved people who enjoy looking at and reading such disgusting material," said Utah Supreme Court Chief Justice A.H. Ellett in an April decision upholding Utah's anti-pornography statute. The law was challenged by a firm operating an Ogden bookstore and two of its employees.

The state court rejected the argument of Eagle Books Inc. that the statute is vague and overly broad. "It is a valid statute and those who so flagrantly flout it must pay the penalty for doing so. These defendants have thirteen appeals before this court this month alone that involve pornography convictions," Chief Justice Ellett said.

Justice Richard J. Maughan wrote a lengthy concurring statement which he said represented an attempt "to bring something other than an emotional analysis to bear on a recurring problem of constitutional dimensions." Reported in: *Salt Lake City Deseret News,* April 13.

(Is it legal . . . from page 96)

Responding to school officials' charges that he had "blown up" the issue of a book ban to cover up other "personnel problems," Fogarty said at a press conference that he had "very little recourse outside the media" for his complaints once school officials ordered him to withdraw the book and placed him on probation. Reported in: *Idaho Falls Post-Register,* April 17, May 18; *Ogden Standard-Examiner,* May 21.

prisoners' rights

Washington, D.C.

In the April 5 edition of the *Federal Register* the U.S. Postal Service issued regulations to protect the security of first-class mail by preventing warrantless searches "even though such mail may be believed to contain criminal or otherwise nonmailable matter or evidence of the commission of a crime." But in the case of prisoners, the postal service decided to allow authorities to read and censor mail addressed to inmates.

Under the rules, if an inmate consents to receive mail at a prison address, authorities can open and examine it. If the prisoner does not consent, officials may choose to deliver the mail unopened or return it the the post office marked "refused." Reported in: *Access Reports,* April 18.

free speech and the CIA

Alexandria, Virginia

The U.S. Justice Department lost the first round in its civil battle against a former Central Intelligence Agency agent, Frank W. Snepp, when U.S. District Court Judge Oren R. Lewis refused to grant a plea for a summary judgment against Snepp.

Snepp, who published *Decent Interval* without CIA clearance, was charged by the Justice Department with violating his "fiduciary" responsibility not to publish confidential or secret information obtained while working for the government.

In requesting a summary judgment, the Justice Department characterized the case as one involving a simple breach of contract. In rejecting the request, Judge Lewis told Deputy Assistant Attorney General Thomas S. Martin that his department had "better get your machinery ready" for a full trial before a jury.

During oral argument, Judge Lewis indicated that one of the key issues in the case—whether Snepp was guilty of a breach of contract and liable for damages—had possibly been made moot by the government's seeming admission that *Decent Interval* contained no significant disclosures of national secrets. Reported in: *New York Times,* April 1.

commercial speech

Washington, D.C.

New rules permitting the advertising of prices and other information about eye examinations, eyeglasses, and contact lenses were unanimously approved in May by the Federal Trade Commission. Unless successfully challenged, the new regulations will pre-empt laws against such advertising in forty states.

In accordance with established procedures allowing for challenges, the American Optometric Association announced that it would immediately appeal the new regulations, charging that they would not be "in the best interests of consumers."

Commissioner Elizabeth Hanford Dole explained the FTC's decision: "By permitting consumers to receive price and other information . . . and by guaranteeing their right to their own prescription, this rule will greatly facilitate comparison shopping for the best price and quality and should, in addition, promote competition among members

of the industry."

The FTC rules were first proposed in 1975, under new authority granted by Congress in that year. In conducting investigations related to the rules, the FTC found that prices for eyewear were generally twenty-five percent higher in states with advertising bans than in those that permitted some form of advertising. Reported in: *Washington Post*, May 25.

church and state

Washington, D.C.

Two religious organizations filed suit in U.S. District Court in April in an effort to prevent the Smithsonian Institution from "promoting evolution." According to the National Bible Knowledge Association and the National Foundation for Fairness in Education, "Willie the Walrus," a Smithsonian exhibit, is unscientific and hostile to religious beliefs in telling hundreds of thousands of visitors each year that the fins he once had as a fish-like creature evolved into legs.

By presenting such exhibits, the suit contends, the Smithsonian goes beyond the proper role of a museum by presenting displays which are "interpretive."

Dale Crowley Jr., executive director of the National Foundation for Fairness in Education, charged that the Smithsonian unconstitutionally used federal funds to establish "a religion of secular humanism to the complete and utter violation of the government's role of neutrality in religious matters."

Dale Crowley Sr., a Washington radio evangelist since 1941, also involved in the suit, said, "Let them pay for presenting evolution if they feel they must, but let them pay for it with their own money. I don't want them sticking their slimy hands into my pocket to pay for it." Reported in: *Washington Star*, April 12.

obscenity

Minneapolis, Minnesota

The North Central unit of the National Association of Theater Owners in April warned its Minnesota members to closely examine Louis Malle's film *Pretty Baby* before booking it. In the unit's monthly bulletin to members, North Central President Gerald Carisch said the Paramount-distributed film could run afoul of Minnesota's new child pornography law.

"In the state of Minnesota, legislation exists that makes it a gross misdmeanor to disseminate any material which involves a minor in offensive sexual conduct," Carisch reminded theater owners.

Carisch explained the cause of his apprehension: "First, it's possible for your county attorney to bring prosecution against you for displaying *Pretty Baby* on the basis of existing legislation. He may not be successful and, in fact, I'm not trying to suggest that he will or will not be successful, since a lot depends upon the attitudes of the jury selected in your area. . . .

"One of the potential fears with *Pretty Baby* is that if the people in your community are not successful in prosecuting on the basis of existing legislation, they will urge their representatives to create legislation that will be successful in prosecuting on the basis of pictures similar to *Pretty Baby.*" Reported in: *Variety*, May 3.

Nashville, Tennessee

Ruling on an action filed in Davidson County Chancery Court by a coalition of organizations opposed to Tennessee's complex new obscenity statute, Chancellor Robert S. Brandt blocked enforcement of the anti-pornography law—except for provisions on child pornography and obscene telephone calls—pending his judgment on the law's constitutionality.

Arguing that the statute is "the most gigantic prior restraint on the freedom of expression in the history of Anglo-Saxon government," Attorney William R. Willis asked Brandt for a permanent injunction against its enforcement. "It is our opinion that this legislation is, constitutionally, terminally ill," Willis commented.

Signed in April by Tennessee Governor Ray Blanton, the law was drafted by Larry Parrish, famed prosecutor of *Deep Throat* (see *Newsletter*, May 1978, p. 68).

The suit is backed by the American Booksellers Association, the Association of American Publishers, the National Association of College Stores, the Tennessee Library Association, and various Tennessee corporations. They charge that the Parrish definitions of "obscenity" adopted by the Tennessee legislature are "constitutionally inadequate, because they render unintelligible to the average person commonly understood terms which are integral parts of the *Roth-Miller* standards. Apparently something other than the common definitions of these terms is meant, but exactly what is unclear." The suit cites problems with such terms as "unwholesome," which the law defines as "that which . . . would present an obstacle or impairment to culturalization according to the prevailing norms and mores in society. . . ."

The suit also points out that the law is unconstitutional because it does not provide for judicial scrutiny in the determination of obscenity. Reported in: *Nashville Tennessean*, May 29.

(Supreme Court . . . from page 81)

In addition, the holder can argue for limitations on the scope of the material required.)

Justice White's opinion was joined by Chief Justice Warren E. Burger and Justices Harry A. Blackmun, Louis F. Powell Jr., and William H. Rehnquist. Justice William J.

Brennan Jr., who was ill when the case was argued, did not participate in the decision (Zurcher *v.* Stanford Daily).

Portions of the majority opinion and the dissenting opinions appear below.

Majority opinion

. . . We are now asked to reconstrue the Fourth Amendment and to hold for the first time that when the place to be searched is occupied by a person not then a suspect, a warrant to search for criminal objects and evidence reasonably believed to be located there should not issue except in the most unusual circumstances, and that except in such circumstances, a subpoena duces tecum must be relied upon to recover the objects or evidence sought. . . .

[I]t is untenable to conclude that property may not be searched unless its occupant is reasonably suspected of crime and is subject to arrest. And if those considered free of criminal involvement may nevertheless be searched or inspected under civil statutes, it is difficult to understand why the Fourth Amendment would prevent entry onto their property to recover evidence of a crime not committed by them but by others.

As we understand the structure and language of the Fourth Amendment and our cases expounding it, valid warrants to search property may be issued when it is satisfactorily demonstrated to the magistrate that fruits, instrumentalities or evidence of crime is located on the premises.

The Fourth Amendment has itself struck the balance between privacy and public need, and there is no occasion or justification for a court to revise the amendment and strike a new balance by denying the search warrant in the circumstances present here and by insisting that the investigation proceed by subpoena duces tecum, whether on the theory that the latter is a less intrusive alternative, or otherwise. . . .

We do hold that the courts may not, in the name of Fourth Amendment reasonableness, forbid the states from issuing warrants to search for evidence simply because the owner or possessor of the place to be searched is not then reasonably suspected of criminal involvement. . . .

The seemingly blameless third party in possession of the fruits or evidence may not be innocent at all; and if he is, he may nevertheless be so related to or so sympathetic with the culpable that he cannot be relied upon to retain and preserve the articles that may implicate his friends, or at least not to notify those who would be damaged by the evidence that the authorities are aware of its location. . . .

Forbidding the warrant and insisting on the subpoena instead when the custodian of the object of the search is not then suspected of crime involves hazards to criminal investigation much more serious than the district court believed; and the record is barren of anything but the district court's assumptions to support its conclusions. At the very least, the burden of justifying a major revision of the Fourth Amendment has not been carried. . . .

Further, the prior cases do no more than insist that the courts apply the warrant requirements with particular exactitude when First Amendment interests would be endangered by the search.

As we see it, no more than this is required where the warrant requested is for the seizure of criminal evidence reasonable believed to be on the premises occupied by a newspaper. Properly administered, the preconditions for a warrant—probable cause, specificity with respect to the place to be searched and the things to be seized, and overall reasonableness—should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices.

There is no reason to believe, for example, that magistrates cannot guard against searches of the type, scope and intrusiveness that would actually interfere with the timely publication of a newspaper. Nor, if the requirements of specificity and reasonableness are properly applied, policed and observed will there be any occasion or opportunity for officers to rummage at large in newspaper files or to intrude into or to deter normal editorial and publication decisions. . . .

Justice Stewart's dissent

It seems to me self-evident that police searches of newspaper offices burden the freedom of the press. The most immediate and obvious First Amendment injury caused by such a visitation by the police is physical disruption of the operation of the newspaper.

Policemen occupying a newsroom and searching it thoroughly for what may be an extended period of time will inevitably interrupt its normal operations and thus impair or even temporarily prevent the processes of news gathering, writing, editing and publishing. By contrast, a subpoena would afford the newspaper itself an opportunity to locate whatever material might be requested and produce it.

But there is another and more serious burden on a free press imposed by an unannounced police search of a newspaper office: the possibility of disclosure of information received from confidential sources, or of the identity of the sources themselves.

Protection of those sources is necessary to insure that the press can fulfill its constitutionally designated function of informing the public, because important information can often be obtained only by an assurance that the source will not be revealed.

It requires no blind leap of faith to understand that a person who gives information to a journalist only on condition that his identity will not be revealed will be less likely to give that information if he knows that, despite the journalist's assurance, his identity may in fact be disclosed.

And it cannot be denied that confidential information may be exposed to the eyes of police officers who execute a search warrant by rummaging through the files, cabinets, desks and wastebaskets of a newsroom. Since the indisputable effect of such searches will thus be to prevent a

newsman from being able to promise confidentiality to his potential sources, it seems obvious to me that a journalist's access to information, and thus the public's, will thereby be impaired.

If, in the present case, the *Stanford Daily* had been served with a subpoena, it would have had an opportunity to demonstrate to the court what the police ultimately found to be true—that the evidence sought did not exist. The legitimate needs of Government thus would have been served without infringing the freedom of the press.

Perhaps as a matter of abstract policy a newspaper office should receive no more protection from unannounced police searches than, say, the office of a doctor or the office of a bank. But we are here to uphold a Constitution. And our Constitution does not explicitly protect the practice of medicine or the business of banking from all abridgment by Government. It does explicitly protect the freedom of the press.

Justice Stevens' dissent

The novel problem presented by this case is an outgrowth of the profound change in Fourth Amendment law that occurred in 1967, when *Warden* v. *Hayden,* 387 U.S. 294, was decided. The question is what kind of "probable cause" must be established in order to obtain a warrant to conduct an unannounced search for documentary evidence in the private files of a person not suspected of involvement in any criminal activity.

The Court holds that a reasonable belief that the files contain relevant evidence is a sufficient justification. This holding rests on a misconstruction of history and of the Fourth Amendment's purposely broad language.

Today, for the first time, the Court has an opportunity to consider the kind of showing that is necessary to justify the vastly expanded "degree of intrusion" upon privacy that is authorized by the opinion in *Warden* v. *Hayden.*

In the pre-*Hayden* era warrants were used to search for contraband, weapons and plunder but not for "mere evidence." The practical effect of the rule prohibiting the issuance of warrants to search for mere evidence was to narrowly limit not only the category of objects but also the category of persons and the character of the privacy interests that might be affected by an unannounced police search.

Just as the witnesses who participate in an investigation or a trial far outnumber the defendants, the persons who possess evidence that may help to identify an offender, or explain an aspect of a criminal transaction, far outnumber those who have custody of weapons or plunder.

Countless law-abiding citizens—doctors, lawyers, merchants, customers, bystanders—may have documents in their possession that relate to an ongoing criminal investigation. The consequences of subjecting this large category of persons to unannounced police searches are extremely serious.

The *ex parte* warrant procedure enables the prosecutor to obtain access to privileged documents that could not be examined if advance notice gave the custodian an opportunity to object. The search for the documents described in a warrant may involve the inspection of files containing other private matter. The dramatic character of a sudden search may cause an entirely unjustified injury to the reputation of the persons searched.

The only conceivable justification for an unannounced search of an innocent citizen is the fear that, if notice were given, he would conceal or destroy the object of the search. Probable cause to believe that the custodian is a criminal, or that he holds a criminal's weapons, spoils, or the like, justifies that fear, and therefore such a showing complies with the clause. But if nothing said under oath in the warrant application demonstrates the need for an unannounced search by force, the probable cause requirement is not satisfied. In the absence of some other showing of reasonableness, the ensuing search violates the Fourth Amendment.

Soviet dissident sentenced

Physicist Yuri Orlov, an outspoken Soviet dissident, was sentenced in May to hard labor and exile by a Moscow court. On the day of the sentencing, Russia's leading dissident, Nobel Peace Prize-winner Andrei D. Sakharov, and his wife were arrested and held for five hours after they allegedly struck police officers in efforts to enter the courtroom for the sentencing.

Orlov received the maximum sentence—seven years in a labor camp and five years' internal exile, or banishment from Moscow—on charges of anti-Soviet agitation and propaganda. The Soviet prosecutor claimed that Orlov received money from the West in return for "slanderous information" in reports on Soviet compliance with the Helsinki Agreement.

Irina Orlov, the sentenced man's wife, charged that the defense was crippled at the trial when the court rejected Orlov's list of witnesses.

At the time of Orlov's sentencing, two other dissidents, Anatoly Shcharansky and Alexander Ginzburg, awaited trial. Like Orlov and Sakharov, Shcharansky and Ginzburg cooperated in monitoring Soviet violations of the Helsinki pact.

U.S. physicists boycott meeting

Following the announcement of Orlov's sentence, nineteen U.S. physicists associated with the National Academy of Sciences refused to attend a scientific symposium in Moscow in protest. At least two other U.S. scientists scheduled to attend scientific meetings in the USSR announced their intention to boycott Soviet symposia in order to protest Orlov's sham trial. Reported in: *Chicago Sun-Times,* May 16, 19, 24.

AAParagraphs

publishers air 'freedom' issues

Although the international aspects of freedom of expression stimulated more controversy, freedom to read and publish as a domestic issue attracted substantial attention at the recent Eighth Annual Meeting of the Association of American Publishers (AAP).

The love-hate relationship with "freedom" issues that seems endemic to book publishing was dispassionately summarized by Winthrop Knowlton, AAP's incoming chair and the president of Harper & Row:

"Those who are skeptical or resentful about the way AAP addresses these issues," Knowlton told his audience at The Greenbrier, in White Sulphur Springs, W. Va., "feel that:

"–Advocates of free expression (or, more broadly, human rights) are on a sentimental self-serving, 'liberal,' ego-trip;

"–These 'liberals' lack balance and often have no interest in other industry problems, which are perceived as nuts-and-bolts matters that are beneath them;

"–First Amendment problems are of practical concern only to trade publishers.

"–Trade is the only real business of a trade association."

But, Knowlton went on, "those on the other side believe that:

"–The free flow of ideas is so central to our survival as an industry that we cannot spend enough time on it; without free expression, we don't have a publishing industry which can engage in 'trade' (or we have a very different one);

"–The amount of money spent by AAP on these matters is minimal in relation to its overall budget;

"–Other publishing associations and media throughout the world increasingly wish their human rights activities were as vigorous as ours;

"–Efforts to help writers in trouble (wherever they may be) help us with support from authors, legislators and the public at large, who sometimes view us with a jaundiced eye."

Having thus defined the two camps, Knowlton quickly placed himself in one of them: "While I understand the former group's occasional impatience, and while I respect, completely, the integrity of its views, my professional and personal sympathies are with the latter," he said.

He also disclosed that he has asked Alexander J. Burke Jr., president of the McGraw-Hill Book Company and an AAP Executive Committee member, to examine closely "quite a different aspect of the human rights problem which we may have been neglecting as an industry: not the right of authors and publishers to express their ideas but the right of readers to read.

"This is more than a right, it is an urgent, even a desperate need," Knowlton added. "What is the relationship of this industry–or the book–to the staggering modern American problem of functional illiteracy? How can our efforts to disseminate skills, knowledge and information be made to bear greater fruit? . . ."

The annual report to the membership of AAP's Freedom to Read Committee pointed up many of the committee's multi-faceted past activities and future concerns:

–Kenneth D. McCormick (Doubleday), the committee's veteran former chair, outlined the intensive review of AAP policy on obscenity and pornography which the group conducted, by request of AAP management, during the past year. Its conclusion: the policy–calling for repeal of any and all legislation restricting availability of sexually explicit materials to consenting adults, but accepting in principle some restrictions on disseminating such materials to minors or on having them "thrust" upon non-consenting adults–was considered still valid. In fact, the committee concluded that it could imagine no change in policy "that would not do more real harm than any imagined good."

–Jean Karl (Atheneum), the Schools/Libraries Subcommittee chair, in a report read for her, related the FTR members' growing concern with groups that exert pressures on schools and libraries to remove, censor or restrict a wide spectrum of books from availability to young people because such groups "seem to see themselves as the guardians-proponents of the correct ideas." The FTR Committee, allied with other groups, is about to propose to a foundation "a study of book selection practices and pressures, the ultimate objective of which would be to develop model guidelines for all who participate in this process, book publishers included," Ms. Karl stated.

–Henry R. Kaufman, AAP general counsel and counsel to the committee, described the fight against censorship–whether in the courts or in the legislatures–as not merely principled idealism but 'something far more central to our pragmatic commercial and institutional self-interests." Viewing censorship as "state action that impinges upon the publishing industry's access to raw materials and sources of supply," Kaufman pointed out that any industry so threatened "fights back"–and so must publishing, he declared, "as a matter of commercial survival."

–Simon Michael Bessie (Harper & Row), having concluded three active years as committee chair, was presented with a pewter bowl inscribed "for unwavering, eloquent and courageous support of the First Amendment, with admiration and respect" by the committee members and staff. New AAP-FTR chair is Anthony M. Schulte, an executive vice president of Random House and of its subsidiary, Alfred A. Knopf, Inc.

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.

(First Amendment . . . from page 84)

school board's rule hadn't really prohibited anyone from talking about the books in class. The other two issues, however, it squarely faced.

A. *Removal.* On the question of removing books from the library shelves, the court conceded that in some circumstances, some books might have to be removed—for reasons of space, antiquity, and so forth. In this case, however, there wasn't the shadow of a claim that the school library was short of shelf space, that the books were falling apart, or that they contained seriously outdated information. In these circumstances, the court held, the school board had to show some "good reasons" for removing the books. If they didn't, the books had to go back on the shelves.

Now the court didn't say much about what "good reasons" might be. Nor did they say anything at all about what might happen if the board produced some good reasons (shelf space, say) and the plaintiffs argued that the board *really* did it for bad reasons. But the Sixth Circuit *did* conclude that in the total absence of good reasons, the First Amendment was quite relevant to the decision to remove the books, *notwithstanding the fact* that all of the factors mentioned by the Second Circuit (except a state-law appeal) were present—books readily available in paperback, nobody fired, and so on.

B. *Purchase.* Having said all this about removal of books from the library, the court approached the purchase of library books in a substantially different way. It noted that somebody had to decide what books to buy. It noted that under Ohio law, the school board did indeed have the final authority to make those decisions. At that point the court more or less signed off. It did indicate that in an egregious case of general selection policy—for instance, if the board would buy no books mentioning evolution, or no books by democrats, or something like that—it might find that the First Amendment would compel it to intervene. But if the controversy was over only a few books, the court apparently felt that when purchases were at issue it was powerless to intervene once it determined that the decision-maker was properly authorized to make purchase decisions.

There are two important points about this part of the decision. The first one is that so far as purchases are concerned, the Sixth Circuit and the Second Circuit use precisely the same, simple syllogism. Not all books can be bought. Someone has to decide which ones to buy and which ones not to buy. Therefore, that decision is effectively immune to judicial review under the First Amendment. The second point is that this suggests how the court *would* have ruled—even in a removal case—if the board had been able to point to some "good reason"—if, for instance, the library *was* getting overcrowded and some books had to be removed. Once again, the same reasoning would apply. Some books have to go. Somebody has to decide which books go. Therefore, we won't review that decision.

C. *Summary.* What this means is that there really isn't much difference of opinion between the two courts. In situations where a decision has to be made, the courts are in agreement that they will not scrutinize that decision very closely. The only real disagreement is in the limited class of cases where a book already on the shelves is being taken off. The Second Circuit, so far as its opinion is concerned, won't even look at that. The Sixth Circuit takes what seems to me the eminently more sensible position that it will at least look closely enough to see whether there is, in fact, any need to decide to take *any* books off the shelf. If there is, that ends the matter. If there is not, however, the book has to remain there.

Minors

I mentioned before that there might be some differences between school libraries and general public libraries that would make rules applicable to one not necessarily applicable to the other. I would like now to address those differences. Let me raise one only to put it aside. A school library is a special-purpose, limited-access library. That fact may well justify limitations on circulation that would be equally inappropriate in a general library. I am not going to pursue those differences further. The difference I would like to pursue is the controversial one. Grade and high school libraries have a clientele of minors. Children and their parents do not always agree on what the child should read. If they do, should the child's views or the parents' views prevail? And if the parents' views are entitled to prevail, may the library limit access to some books in order to give effect to the parents' views? Or may it be forced to do so? If the child is relatively younger—twelve, say, or thirteen or fourteen—I think that the Supreme Court would hold with the parents.

The first question is whether the child's views must prevail over the parents'. The Supreme Court has talked about parents' rights to make choices for their children for more than half a century. Only recently has it considered children's rights against their parents. The results are not too comforting to the advocates of children's rights. In *Wisconsin* v. *Yoder,* the Court heard the claim of a number of Amish parents that Wisconsin could not force them to send their children to school beyond the eighth grade. The Court agreed with the parents. What is important for present purposes is that a number of parents and children were involved, but only one child had been asked what *he* thought of the matter. Justice Douglas—but only Justice Douglas—thought that the remaining cases couldn't be decided without asking the children.

Two recent cases raise the conflict more directly. A Missouri law required parental consent before a minor could obtain an abortion. A bare majority of the Supreme Court—the case was decided on a five-four vote—held the statute unconstitutional, that is, held that the parents' view

could not *always* prevail. However, two of the bare majority of five (Justices Stewart and Powell) indicated that they believed Missouri *could* require minors to consult with their parents; further, they indicated, Missouri could require parental consent if the state also provided for a prompt procedure in which the child could get a judge to decide where the parents' wishes didn't coincide with the child's. So even in a matter as important as abortion, where an adult's decision is immune from veto by anyone, six justices of the Supreme Court would hold that a child's decision could at least sometimes be countermanded by the parents. Finally, the Supreme Court last year ruled on a New York statute that limited the distribution of contraceptives to minors. Two justices would have upheld the statute. Another agreed that it was unconstitutional, but only because he thought it was clearly no deterrent to fornication. Two others found it unconstitutional because the statute, as it was written, prohibited *parents* from giving contraceptives to *their* children—in other words, because it interfered not with the children's rights to get contraceptives, but because it interfered with the *parents'* rights to make decisions about this kind of thing for their families.

The lesson I take from these cases is that the Supreme Court, at the moment at least, is quite hesitant to recognize a child's rights when the child is opposing its parents. Of course that will depend somewhat on the age of the minor—a seventeen-year-old is likely to receive a much more favorable reception than a twelve-year-old. At the lower ends of the scale—say, the early teenage years—a majority of the Court seems prepared to go with the parents in many cases of parent-child conflict.

"Adults only" shelves

If parents are entitled to control the reading of their young teenage children, and if (as is likely to be the case) some parents do not, but other parents do, want their children to be able to read a particular book or type of book, can libraries constitutionally help out the censoring parents by putting the books involved in some form of limited-access collection? I will assume for this discussion—as is almost always the case—that the book is not "obscene," that is, that government could not forbid adults from buying, selling, or reading it; and also that the book is not even within that slightly broader category of "almost-obscene" books that the government could forbid to minors but not to adults.

The American Civil Liberties Union, in a recently issued position paper on library access, suggests that the answer should be "No." In the ACLU's opinion, if a parent wants to censor his or her child's reading matter, the parent should simply tell the child not to read particular books. Additional cooperation from a public library, the ACLU believes, would be unconstitutional.

With all due respect to the ACLU—and that is a great deal of respect indeed—I think that their resolution of this problem is somewhat fatuous and possibly dangerous to the broad circulation of ideas. First, unless teenagers today are more docile than they have ever been before, in most cases the order alone won't be enough. Second, where the objection is not to one particular book but to a class of books ("salacious novels," for instance) the child isn't likely to be able to tell what's what until he or she is well into the book. (As a hopeful teenage consumer of dirty books I plowed through a lot of bad prose looking for the hot parts—frequently, with no success at all. And I was occasionally delighted to find exactly what I had been looking for in a book I had picked up for the pure pleasure of reading.) Finally, if a parent is genuinely concerned about a child's reading matter, and if the library is unwilling to help out in any way, the parent well may take the path of least resistance and simply discourage—or forbid—the child from going to the library at all.

The real problem is that either solution cuts too broadly. Any system of restricted access will inevitably mean that some children will not read some books that their parents have no objection whatsoever to their reading. On the other hand, unrestricted access means that some children will read some books in the teeth of their parents' most explicit prohibition. In the usual case, the courts would resolve such a conflict in favor of the First Amendment. But this is not the usual case. Here, the interests on the other side are not only important ones, but they are interests that the Supreme Court has concluded are themselves of constitutional magnitude, the interest of parents in rearing their children as they please. I don't think that the proper resolution of these conflicting and important constitutional claims is obvious. I suspect that the Supreme Court would not think it was obvious either. If the Court were to hold for *either* side it would be fastening a questionable and highly debatable balance upon the country as a whole, and fastening it in such a way that it would be immune to change short of overruling (rare) or constitutional amendment (almost impossible). In these circumstances the Court is likely to think that the path of prudence is to keep its own hands off the matter, and let each community work out for itself the precise balance that it wishes to strike between these two conflicting and important rights.

Conclusion

I think librarians have a more important role than lawyers to play in helping communities strike that balance. For myself, although I do not think it would be unconstitutional to restrict circulation of *Our Bodies, Ourselves* (to choose a recent and controversial example) to children over sixteen, I think it would be somewhat cruel and egregiously stupid. The library profession has thought more than any other about the reasons that broad and open access to information is important. Librarians should be better able than anyone else to mobilize support for that proposition in their communities.

If librarians cannot, I'm afraid that lawyers and judges

won't be able to help out very much. On occasion a court may order that some books be put back on the shelf. They might be persuaded to intervene in some other cases where not only the books, but also the librarians, have been removed. But anyone who has ever been personally involved in a lawsuit knows that is a more trying activity than anything short of agonizing terminal illness. Courts are slow, and they are rarely sure. In the last resort, the rescue for the people of a free society can only come from the people of that society themselves.

(ALA seeks reform . . . from page 85)

amendment, adopted without objection and without full consideration by the Senate (*Congressional Record,* 30 January 1978, p. S756), would prohibit not only advertising for abortions, but also the "mailing, importing, or transporting" of "obscene" or "indecent" or "immoral" communicative materials.

Insofar as it applies to materials on abortion, the new section is, in the opinion of the American Library Association, clearly unconstitutional. In view of the decision of the Supreme Court in *Roe* v. *Wade,* 410 U.S. 113 (1973), it seems unlikely that the Court would hold that discussions of abortion are, per se, obscene and therefore subject to suppression. The American Library Association agrees with the conclusion of the Senate Report (p. 850) that the new section on abortion borrows from statutes that "would appear to be of dubious validity."

Insofar as this new section applies to "obscenity," it deviates from the provisions of S. 1437 in Section 1842; unlike Section 1842, it makes no effort to conform even minimally to the standards established by the Supreme Court in *Miller* v. *California*, 413 U.S. 15 (1973). Insofar as it applies to "indecent" or "immoral" materials, it fails to meet the standards of clarity required by the First Amendment unless these terms are treated as exact synonyms of "obscene," in which case the terms are redundant.

The American Library Association *recommends:* That the Allen amendment be deleted in its entirety.

(In review . . . from page 86)

Although he acknowledges the "complex practical success" of the American system of freedom of speech, he expresses some impatience with First Amendment doctrine. His intention, he tells us, is "to step back from the hopelessly complex (and virtually unintelligible) case-by-case development of free speech doctrine in order to present a coherent analysis of government's role" in the forum.

"To say that government should, in the name of freedom of speech, leave the forum alone," he writes, "is like saying that government should, in the name of justice, have nothing to do with the courts." There is, of course, an obvious sense in which this is true. Government is deeply involved in the operation of the forum. It enforces the right of the unpopular speaker to have his say; and in a variety of ways it administers access to and use of the forum. Apart from several narrow categories of speech crimes, however, there is in American law a fundamental distinction between regulation of the time, place, and manner of speech and censorship of the content of speech. The former is a proper function of government; the latter is barred by the First Amendment. It is precisely this distinction that tends to blur in Tussman's essay.

His prescriptions for a more "coherent" system of freedom of speech are sketchy and elusive. Yet the direction of his thought seems clear enough. Toward the end of the essay he evokes the timeless ideal of the forum as a "great deliberative assembly in which virtue and wisdom display themselves calmly in the dignified service of the common good." This is of course an ideal we all share. The question, however, is whether it is best pursued by means of direct governmental efforts to elevate the level of public discussion. Tussman appears inclined to support such government action. His underlying thesis might be stated as follows: The values embodied in the First Amendment are inadequately served by a purely negative reading of the Amendment as a bar to government censorship. Those values confer upon government an affirmative responsibility to intervene in the forum in an effort to *improve the quality* of public discourse.

At an abstract level this argument has a certain force. It is not intended as a brief against political freedom. On the contrary, it is premised on a passionate commitment to the American experiment in self-government. Yet this is an area where the "coherent analysis" of the philosopher must yield to the practical wisdom of the legal tradition. Modern First Amendment doctrine–however "complex" and "unintelligible" it may be in some respects–has achieved considerable clarity about the dangers that attend government efforts to improve the quality of speech. The philosopher, by contrast, may be carried too far by the momentum of his argument. Like Plato, he may in the end find it necessary to banish the poets from utopia.

In fairness, I should add that it is not always clear that Tussman is advocating direct censorship keyed to the quality of speech. He is peculiarly reticent about the precise form government involvement should take. For example, when he suggests that "truth, misrepresentation, [and] deception" in categories of speech other than commercial advertising may not be "altogether beyond the reach of government," what does he mean by "reach"? When he remarks that the process by which the media fashion "an edited version" of reality for our consumption "cannot remain a private mystery forever" and that "government may someday cast a curious eye on those who are doing the editing and interpreting for us," what does he mean by

"curious"? When he says that government "should not be indifferent about the decay of reason" in public discourse, what does he mean by "not be indifferent"? In these and other instances it is strongly implied, though not explicitly stated, that direct government intervention is called for. Insofar as that is what he is saying, the argument is, to coin a phrase, "plausible . . . seductively obvious, and yet . . . utterly . . . foolishly . . . deeply mistaken."–*Reviewed by Jamie Kalven.*

Unmailable: Congress and the Post Office

By Dorothy G. Fowler. University of Georgia Press, 1977. 266 p. $14.50.

There are three basic varieties of censors: official, unofficial, and self. One of the least written about of the first variety is the U.S. Post Office. Of the sixty volumes listed under "Postal Service" in the 1977-78 *Subject Guide to Books in Print,* not one deals entirely with postal censorship. In fact, the only volume written on this topic in many years was the James Paul and Murray Schwartz book, *Federal Censorship: Obscenity in the Mail,* published in 1961, long out of print, and dealing with the censorship of only one type of material.

So, Ms. Fowler's book is very welcome, indeed. It is too bad, incidentally, that the Library of Congress catalogers didn't bother to read or examine the book more carefully. Somehow they managed to assign only three subjects to it: "United States Postal Service"; "United States Congress"; and "Postal service–United States–History." Fine–but what ever happened to "Censorship," which is incontrovertibly the basic theme of the book? When the Paul-Schwartz book appeared in 1961, at least its assigned LC subjects were "Censorship–U.S." and "Obscenity (Law)–U.S."

Now let's look at what the book has to tell us about official censorship, with the sanction of the U.S. Post Office and of Congress and the president. It is not exactly a secret that for over a century the official censors have been hard at work making sure we are not corrupted by bad words and evil pictures of a sexual nature, from the censorship of Tolstoy's "Kreutzer Sonata" to the attempted barring of Larry Flynt's *Hustler.* But Ms. Fowler adds many illuminating facts to our information on how the powers and the duties of the Post Office gradually expanded.

What began in the 1830s as efforts to bar anti-slavery newspapers and pamphlets from transmission to southern States–via proposals by President Andrew Jackson and Senator John Calhoun–developed by the 1970s to include a wide variety of prohibitions. "Nonmailable matter" now includes such items as obscene matter, fraudulent matter (which includes lotteries), and dangerous items. These are described by Fowler as "matter that might do physical damage to Post Office equipment or personnel as well as written matter that might hurt, financially or morally," Post Office users.

Of more significance to the workings of democracy were attempts by the Post Office, Congress, and several presidents to bar from the mails newspapers and magazines containing material contrary to established beliefs. For example, in 1906 President Theodore Roosevelt, tried to bar the syndicalist weekly *Appeal to Reason* because of one article by Socialist leader Eugene V. Debs. No action was taken, but in 1908 Congress passed a law barring from second-class mailing privileges "anarchistic" (not further defined) publications.

During World War I a law barred "matter of a seditious, anarchistic, or treasonable character" from the mails. Under this law Postmaster General Burleson kept out of the Post Office the handling of several issues of publications which he said contained "articles that might impede recruiting or enlistment." As Ms. Fowler points out, the 1917-1927 decade, "more than any other period in American history, saw immoderate grants of power to the postmaster general, not only over the press but also over correspondence of individuals." And we all know that the Nixon-controlled Postal Service permitted the FBI to keep close surveillance over "enemies" of Nixon.

World War II brought an official Office of Censorship, which existed from 1941 through 1946. Its main target was material of foreign origin which was "inimical to the war effort of the United States or contrary to the interests of the United States or its Allies." A large number of presumably "treasonable" or "seditious" American periodicals were also denied second-class mailing privileges by the postmaster general during this period.

In 1965 the Supreme Court delivered a unanimous opinion (written by Justice William O. Douglas) which for the first time declared an act of Congress concerning mail censorship to be unconstitutional. In ringing, unforgettable words this decision stated: "The United States may give up the post office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongue."

During the 1950s and 1960s, as Fowler details, many Post Office attempts to censor were prevented or appreciably modified by various court orders–including the famous *Esquire, Roth,* and *Sunshine and Health* cases. Several laws were passed (and are now being observed) which require "adults only" labels on ads for so-called adult merchandise, and which permit individuals to file cards with the Post Office to keep out "sexually oriented advertisements."

Little by little, especially in the last few years, the responsibility for deciding what comes into our home mail boxes has been shifted, particularly on printed matter dealing with sex, but even including "junk mail." Whereas in 1865 mail delivery was up to the Post Office, now, as the 1970 Supreme Court decision in *Rowan* v. *U.S. Post Office Department* stated, current practice permits "the parent to police his own mail box."

Thus, of the three varieties of censor described at the beginning of this review, we are back to the only one which really should be acceptable to the practitioners of intellectual freedom: one's own self or, in the case of the family, the parents. And Ms. Fowler's well researched, interestingly written book deserves to be in the library of all students of censorship, its practice and prevention (or, at least, diminution). It fills a great gap in the literature, and should stay in print for many, many years to come.–*Reviewed by Eli M. Oboler, University Librarian, Idaho State University Library, Pocatello.*

Maryland gets new obscenity law

Maryland's obscenity statute was patched up in March when Acting Governor Blair Lee signed a bill which makes subject to prosecution any employee of an operation selling obscene books or films to the public.

The newly enacted law replaced statutory provisions voided in December by the Maryland Court of Appeals, which found them unconstitutional because they "arbitrarily" exempted employees of theaters from prosecution while subjecting bookstore clerks to fines and imprisonment (see *Newsletter,* March 1978, p. 36). Reported in: *Variety,* April 5.

Canadian library board head quits over gay film

The chairperson of the Oakville (Ontario) Public Library board resigned in April following a decision of the board to allow showings of a film on the life of a homosexual. The film, *The Naked Civil Servant,* was produced by the BBC.

The picture was shown on April 26 as part of the library's regular Wednesday night series. The board chairperson, John Beatty, said he had no objection to the film's presence in the library's collection. But he objected to its promotion through the library.

Richard Moses, chief librarian, denied that the library promoted the film through making it available to the public. He also defended the work as a "poignant, well-done portrait" of five years in the life of Quentin Crisp.

The film had been shown previously on station CITY-TV in nearby Toronto.

Mississauga survives the film

When the Mississauga library board's decision not to show *The Naked Civil Servant* was backed by the Mississauga city council, it was screened on March 14 in a program sponsored by Gay Equality Mississauga (GEM).

Originally scheduled as part of the library's "Films for Thinkers" series, the work was dropped on order of the library board. Members of the board, and later members of the city council, expressed fears about the film's possible effect on minors.

GEM invited the members of the city council and the library board to attend the screening, but only three councilors and two board members attended. Although the councilors in attendance had previously backed the library board's decision to ban the film, all three were guardedly positive after viewing it. They retained reservations about showing the film to "the young." Reported in: *The Body Politic,* March 1978, April 1978; *Toronto Globe and Mail,* April 22.

Michigan orders 'red squad' to open files

Under the terms of an April agreement between the Michigan attorney general's office and attorneys for a labor union and three civil rights groups, Michigan will provide access to the files of an estimated 38,000 individuals and 400 political groups whose activities were monitored by a special investigatory unit of the state police, commonly known as the "red squad."

The unit, established in 1950, was disbanded when a Wayne County Circuit Court judge declared it unconstitutional. Lawsuits to open "red squad" files were filed in 1974.

According to the attorney general's office, notices will be mailed to all concerned individuals and groups informing them that they will be given "a reasonable period of time" to examine their files. Reported in: *Access Reports,* April 18.

Nixon allows access to pre-1968 papers

In a March letter to Joel W. Solomon, administrator of the General Services Administration, former President Richard Nixon agreed to allow access to most of the 600,00 documents pertaining to his pre-presidential government career. Nixon explained that he considered broad restrictions no longer necessary.

Nixon's action ended a court fight for access to the materials that was initiated in 1973. Nixon wrote, "I now find that due to the time elapsed since the date of the conveyances [1968 and 1969], the necessity for total closure of the materials no longer exists, and it is now possible to open the materials in certain respects for research and historical use."

Nixon requested exemptions for the following classes of material: "(a) papers and other historical materials that are

specifically authorized under the criteria established by statute or executive order to be kept secret in the interest of national defense or foreign policy . . . (b) papers and other historical materials the disclosure of which would constitute a clearly unwarranted invasion of personal privacy or a libel of a living person."

In a letter to Nixon, Solomon informed the former president that his terms were acceptable and thanked him for having "taken this step to make portions of your valuable historical materials available for public research use."

James B. Rhoads, U.S. archivist, recommended that Solomon accept Nixon's terms for access. Reported in: *Access Reports,* April 4.

Authors League hails 'Dog Day' ruling

A decision of New York State's highest court dismissing a claim that the movie *Dog Day Afternoon* and two books based on the same incident invaded the privacy of persons in the similar real-life situation was hailed by the Authors League of America. Neither the film nor the books gave the names or showed the pictures of persons in the 1972 New York bank robbery.

In urging the New York Court of Appeals not to overturn the lower court decision in the case, the Authors League said reversal of the lower court's holding would abrogate the traditional test of "identification by name" and "impose severe restraints on all authors and publishers and producers of books, plays and films dealing with social issues of contemporary importance, in violation of their First Amendment rights."

According to the league, abandonment of the test of identification by name would have stimulated suits "by persons whose experiences and personal traits parallel to some extent those of characters in a book, play or motion picture even though [they were not] identified by name in the offending work, and even though the work was not defamatory. Indeed, two or more individuals could make the claim with respect to the same character . . . and each of them might persuade a jury to rule in his or her favor." Reported in: *Legal Briefs,* March 1978.

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