newsletter on intellectual freedom

IFC ALA

Editor: Judith F. Krug, Director
Office for Intellectual Freedom, American Library Association
Associate Editor: Henry F. Reichman

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Supreme Court rulings spark controversy

In the closing weeks of its 1988-89 term, the U.S. Supreme Court issued a series of rulings that provoked intense national controversy. Decisions affecting affirmative action, abortion rights, and the death penalty were widely criticized by civil rights and feminist groups, and most observers saw in them a clear sign that a functioning conservative majority had effectively seized leadership of the high court. At the same time, however, rulings in several First Amendment cases — especially a highly controversial decision in which two conservative justices joined with the Court's three most liberal members to hold that burning the U.S. flag is constitutionally protected political expression — suggested that a majority, albeit a bare one, of the justices remained committed to an essentially libertarian, if still restricted, interpretation of the First Amendment.

Still, the Court's willingness to limit abortion rights and a somewhat confusing "split decision" in two cases involving the state-sanctioned display of religious imagery indicated that the Court had not reached a majority consensus on First Amendment jurisprudence. Moreover, the strong negative reaction to the flag burning decision, including a call by President Bush for a constitutional amendment protecting the flag, made clear the fragility of support for free expression.

In the emotionally charged flag burning case, *Texas* v. *Johnson*, the Court ruled June 21 that the First Amendment protects protesters who burn American flags in political demonstrations. The sweeping 5-4 decision, written by Justice William J. Brennan, Jr., nullified flag desecration laws in 48 states. It came just three months after the U.S. Senate, attempting to strengthen a 1968 federal law, unanimously passed a bill making it a crime to "knowingly display" the flag on the floor or ground. That action came in response to a controversy in Chicago in which an art student displayed a flag in such a manner as to invite spectators to walk on it.

"We do not consecrate the flag by punishing its desecration," Brennan wrote, "for in doing so we dilute the freedom that this cherished emblem represents." Flag burning, the Court suggested, is a form of constitutionally protected expression "at the core of our First Amendment values."

The ruling, which overturned the conviction of a protester at the 1984 Republican National Convention in Dallas, resolved an issue that had split the court for two decades. The decision cut across the usual ideological divisions among the justices, with conservative Reagan appointees Justices Antonin Scalia and Anthony M. Kennedy joining liberal Justices Brennan, Thurgood Marshall, and Harry A. Blackmun.

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Gordon M. Conable, Chairperson.

in this issue

targets of the censor

coming in the November Newsletter:

- **"The Rev. Donald E. Wildmon's Crusade for Censorship, 1977-1989" by Christopher Finan**
- **"Black Authors, Banned Books" by Alice Childress**

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ALA conference

IFC, ALA council adopt new *LBR* interpretation on minors and videos

The following is the edited text of the Intellectual Freedom Committee's report to the American Library Association Council, presented by IFC Chair C. James Schmidt on June 28 at the 1989 ALA Annual Conference in Dallas.

It is my privilege to submit my third annual report as chair of the Intellectual Freedom Committee. Since the 1989 Midwinter Meeting, the IFC has been active in several important legal and policy matters.

1. Child Protection and Obscenity Enforcement Act

You learned from Bob Peck's report for the Freedom to Read Foundation on Sunday (see page 158) that ALA and the Foundation were victorious in *American Library Association* v. *Thornburgh*, the lawsuit challenging the constitutionality of portions of the Child Protection and Obscenity Enforcement Act. The bad news is that on May 18, two days after Judge George H. Revercombe handed down his decision, Senator DeConcini (D-AZ) reintroduced the record-keeping provisions of the Child Protection and Obscenity Enforcement Act in the Senate virtually unchanged (S. 1039). At this time, the bill has not been scheduled.

2. Webster v. Reproductive Health Services

Also from the Foundation's report, you are aware of ALA's and FTRF's collaboration on an *amicus curiae* brief in *Webster* v. *Reproductive Health Services*, focusing on the First Amendment aspects of the controversial abortion case which the Supreme Court is expected to decide within days. [The case was decided on July 3. See page 170].

3. Salman Rushdie

As I'm sure you are all aware, ALA was very vocal concerning the Salman Rushdie affair. On February 22, the American Library Association, together with the Association of American Publishers and the American Booksellers Association, sponsored a full-page ad in the *New York Times* announcing the availability of Salman Rushdie's book, *The Satanic Verses*, at bookstores and libraries throughout the country. In other action, ALA President F. William Summers wrote to President Bush urging that he bring world opinion to bear on the Ayatollah's outrageous behavior; ALA joined several writers groups in a letter to the Iranian Ambassador to the United Nations, affirming the rights of Moslems to *peacefully* express their feelings about the book while demanding that the death threats be immediately and publicly withdrawn; and ALA joined the International Committee for Free Expression, an ad hoc coalition of over 100 individuals and organizations created to take a stand against intellectual terrorism and to reiterate the rights of individuals to express their perspectives without threat of intimidation or reprisal. On February 23, ALA Vice-President, President Elect Patricia Wilson Berger represented ALA at a press conference held upon release of the International Committee for Free Expression statement. The conference was covered by the national networks, and by CNN, which used footage of Pat Berger on its 3, 4 and 5:00 o'clock news broadcasts. President Summers wrote a letter in response to an editorial in the *New York Times* which had suggested that the book world had been slow in responding to the Rushdie affair. President Summers' letter stated that librarians refuse to accede to censorship as a matter of professional routine and that despite extraordinary circumstances, on the very day that the Ayatollah was issuing his threats, librarians all over the country were making it known publicly that Salman Rushdie's book was available from their library. All of the ALA actions in response to the Salman Rushdie affair have been reported in full in the May 1989 issue of the *Newsletter on Intellectual Freedom*. The International Relations Committee has already presented for your adoption a resolution on this matter which the IFC endorsed.

4. Library Awareness Program

Regarding the FBI Library Awareness Program, the American Library Association has received no additional responses to its Freedom of Information Act requests since the Midwinter Meeting. The Federal Bureau of Investigation has agreed, however, in a separate lawsuit to which ALA is not a party, to release additional information about the Library Awareness Program to the National Security Archive. The Bureau's agreement was contingent upon the American Library Association's acceptance of the terms set forth in a stipulation entered into between the Federal Bureau of Investigation and the National Security Archive in this lawsuit to which, I must stress again, ALA was not a party.

Executive Director Tom Galvin, in response to a request from Emil P. Moschella, Chief of the Freedom of Information-Privacy Acts Section of the FBI, wrote to the FBI expressing the sentiment that since ALA was not a party to the lawsuit, it did not care to be entangled in the specifics of that litigation, and declining to "join in a stipulation resolving a discovery dispute in litigation to which ALA is not a party and as to which ALA has no control."

Galvin listed specific modifications to the terms of the stipulation to which ALA would agree, narrowing the scope of ALA's FOIA requests without waiving ALA's rights to enforce its requests should compliance be inadequate. On June 1, the Bureau agreed to Galvin's modifications to ALA's FOIA requests. On Friday, June 23, the Archive received the first of three installments of documents to be released. I reported to you on Sunday our preliminary conclusions on these documents (see page 157). More documents will be released over the next three months.

I should note that three additional states have passed confidentiality of library records statutes and commend the efforts of the state library association intellectual freedom committees in New Mexico, Arkansas and Vermont for their

Access for Children and Young People to Videotapes and Other Nonprint Formats An Interpretation of the Library Bill of Rights

Library collections of videotapes, motion pictures, and other nonprint formats raise a number of intellectual freedom issues, especially regarding minors.

The interests of young people, like those of adults, are not limited by subject, theme, or level of sophistication. Librarians have a responsibility to ensure young people have access to materials and services that reflect diversity sufficient to meet their needs.

To guide librarians and others in resolving these issues, the American Library Association provides the following guidelines.

The *Library Bill of Rights* says, "A person's right to use a library should not be denied or abridged because of origin, age, background, or views."

ALA's *Free Access to Libraries for Minors: An Interpretation of the Library Bill of Rights* states:

> The "right to use a library" includes use of, and access to, all library materials and services. Thus, practices which allow adults to use some services and materials which are denied to minors abridge use based on age.
>
> . . . It is the parents — and only parents — who may restrict their children — and only their children — from access to library materials and services. People who would rather their children did not have access to certain materials should advise their children. The library and its staff are responsible for providing equal access to library materials and services for all library users.

Policies which set minimum age limits for access to videotapes and/or other audiovisual materials and equipment, with or without parental permission, abridge library use for minors. Further, age limits based on the cost of the materials are unacceptable. Unless directly and specifically prohibited by law from circulating certain motion pictures and video productions to minors, librarians should apply the same standards to circulation of these materials as are applied to books and other materials.

Recognizing that libraries cannot act *in loco parentis*, ALA acknowledges and supports the exercise by parents of their responsibility to guide their own children's reading and viewing. Published reviews of films and videotapes and/or reference works which provide information about the content, subject matter, and recommended audiences can be made available in conjunction with nonprint collections to assist parents in guiding their children without implicating the library in censorship. This material may include information provided by video producers and distributors, promotional material on videotape packaging, and Motion Picture Association of America (MPAA) ratings *if they are included on the tape or in the packaging by the original publisher* and/or if they appear in review sources or reference works included in the library's collection. Marking out or removing ratings information from videotape packages constitutes expurgation or censorship.

MPAA and other rating services are private advisory codes and have no legal standing*. For the library to add such ratings to the material if they are not already there, to post a list of such ratings with a collection, or to attempt to enforce such ratings through circulation policies or other procedures constitutes labeling, "an attempt to prejudice attitudes" about the material, and is unacceptable. The application of locally generated ratings schemes intended to provide content warnings to library users is also inconsistent with the *Library Bill of Rights*.

*For information on case law, please contact the ALA Office for Intellectual Freedom. See also: *Statement on Labeling* and *Expurgation of Library Materials*, Interpretations of the *Library Bill of Rights*.

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efforts in seeking passage of those statutes.

5. IFC Response to Minority Concerns Committee in re *Library Bill of Rights*

Between the Midwinter Meeting and this Annual Conference, the Intellectual Freedom Committee has undertaken a review of all of the twelve Statements of Interpretation of the *Library Bill of Rights* in light of a concern expressed by the Minority Concerns Committee that the spirit of free access to library materials and services without regard to language and economic status be reflected. The IFC has not completed this review but we are able to recommend for your approval today revised versions of five of these statements. The Committee will continue this review over the coming months and hopes to report to you at Midwinter on the status of the remaining seven statements. [Council declined to approve the revised Interpretations due to a lack of time to study them.]

6. New Statement of Interpretation in re Minors and Videos

In addition, the Intellectual Freedom Committee has been developing a new Statement of Interpretation of the *Library*

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ALA conference "library awareness" update

The following is the text of a report submitted to the ALA Executive Board and Council by IFC Chair C. James Schmidt on June 25 at the 1989 Annual Conference in Dallas, covering developments regarding the FBI's "library awareness" program since the 1989 ALA Midwinter meeting.

At the 1988 Annual Conference in New Orleans, at the 1989 Midwinter Meeting, and now at this Conference, I have been given an opportunity to report to you, separate from the regular report of the Intellectual Freedom Committee, on developments related to the FBI's Library Awareness Program.

1. Status of visits to libraries

The Office for Intellectual Freedom has received no reports of FBI visits to libraries in 1989. The Bureau reported in its meeting with the Intellectual Freedom Committee on September 9, 1988, that there had been no visits to libraries under the Library Awareness Program since December, 1987. However, in his letter of September 14, 1988, to Congressman Don Edwards (D.-CA), Director William Sessions said that "When deemed necessary, the FBI will continue to contact certain scientific and technical libraries (including university and public libraries) in the New York City area concerning hostile intelligence service activities at libraries." Therefore, although we have no reports of visits, we can expect them to occur.

2. Follow-up from IFC meeting with FBI representatives September 9, 1988

During the meeting between the IFC and representatives of the FBI, both organizations offered to prepare statements expressing their respective concerns for reciprocal distribution. The statement provided to the FBI was prepared by the IFC during and following the 1989 Midwinter Meeting and appears below. We have received no statement for distribution from the FBI.

3. Status of ALA's FOIA requests

In October and December of 1987, ALA filed FOIA requests asking for relevant documents. Replies were received 1) alleging no relevant documents existed and 2) providing copies of documents supplied to the National Security Archive and released during the 1988 Annual Conference. In October, 1988, ALA filed additional requests. Concurrently, the National Security Archive filed suit to compel release of relevant documents. In March, 1989, ALA was urged by the Justice Department to become party to a stipulation which was being negotiated with the Archive to settle its lawsuit. After consulting with counsel and OIF staff, I concluded that ALA's interests would be best served by not becoming involved in the negotiations since ALA was not a party in the Archive's lawsuit.

The Archive and the Justice Department (acting on behalf of the FBI) agreed on a stipulation which will result in the review by the Bureau of several thousand documents by November, 1989, with interim releases of materials in July and September. Below is a press release describing the stipulation. In a May 17 letter ALA agreed to narrow its FOIA request based in part on the terms of the Archive/Justice Department stipulation. The Bureau has accepted the terms outlined in this letter. We, therefore, should expect more released documentation in this matter over the next 4-5 months.

4. Guidelines

The IFC concluded in the fall, 1988, that some guidelines for library administrators for coping with requests from law enforcement agencies for confidential information about library patrons would be helpful. Such guidelines will complement the existing "Policy on Confidentiality of Library Records," the model procedures for implementing this policy, and the "Statement on Professional Ethics." A copy of these guidelines is below.

Conclusion

The next developments in this matter will arise either from reports of further visits or from renewed congressional activity, but will more likely arise from the expected release of additional documents as described (#3) above. If it is the case that the FBI's program of library surveillance has been quiesced at least for the time being, we should have learned two things from this experience. First, the FBI Library Awareness Program of the eighties had ancestors in the seventies and, perhaps, the sixties. Second, the Bureau is but one of many law enforcement agencies which have sought and are seeking personally identifiable information about patrons from libraries. The profession's ethical commitment to confidentiality and the laws of forty-one states and the District of Columbia apply to all such agencies. We must not focus on the FBI and lose sight of others or of the general importance of confidentiality to the profession and the users we serve.

Statement Concerning Confidentiality of Personally Identifiable Information About Library Users (Provided to FBI)

The ethical responsibilities of librarians, and statutes in 38 states and the District of Columbia, protect the privacy of library users. Confidentiality extends to "information sought or received, and materials consulted, borrowed or acquired," and includes database search records, reference interviews, interlibrary loan records and all other personally identifiable uses of library materials, facilities or services.

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ALA conference
FTRF report to ALA council

The following is the text of the Freedom to Read Foundation's report to the ALA Council, presented by FTRF President Robert S. Peck on June 25 at the 1989 ALA Annual Conference in Dallas.

It is with great pleasure that I report to the Council of the American Library Association today. Since the Midwinter Meeting, the Freedom to Read Foundation has participated in several important lawsuits and, in concert with the American Library Association, gained a First Amendment victory in a case in which it represented not only librarians, but also publishers, magazine distributors and photographers.

First, our big victory. On May 16, the Foundation, ALA, and their co-plaintiffs prevailed in *American Library Association* v. *Thornburgh*, successfully challenging the constitutionality of the record-keeping and forfeiture provisions of the Child Protection and Obscenity Enforcement Act. Judge George H. Revercombe of the U.S. District Court for the District of Columbia held that all of the challenged portions of the Act, with the exception of the post-trial forfeiture provisions, were unconstitutional because they unduly burdened a vast array of constitutionally protected speech, while doing very little to combat child pornography (see *Newsletter*, July 1989, p. 135). The judge modified the post-trial forfeiture provisions to require that they may be used only where a pattern of criminal activity has been proven and that before property may be seized following a conviction, a defendant must have the opportunity to seek a stay of seizure pending appeal. This is an impressive victory for First Amendment rights in general, and, specifically, for the protection of the rights of libraries to acquire non-obscene, sexually explicit materials necessary to their collections.

The Foundation also joined ALA on an *amicus curiae* brief filed in *Webster* v. *Reproductive Health Services*, the controversial abortion case now before the U.S. Supreme Court. A decision is expected by Friday. (See page 170.) In this case, a Missouri statute regulating abortion services *and prohibiting agencies which receive public funds from "counseling or encouraging"* a woman to have an abortion not necessary to save her life has been challenged as unconstitutional. The Foundation and ALA's brief discussed solely the First Amendment implications for libraries. Our concerns are with the provisions in the Missouri statute that prohibit the use of public funds or publicly supported health workers or institutions from encouraging or counseling a woman to have an abortion not necessary to save her life. Libraries, of course, do not "counsel" regarding abortion or any other issue. Libraries, however, make available books, magazines, and other materials that express opinions, often in very strong terms. If a pregnant woman — or any woman — wants information from a publicly supported library about abortion, the options available to her, or the places where she might obtain an abortion, the library would, as far as it is able, provide her with the information and the materials she seeks. Such materials might well "counsel" or "encourage" a woman to have an abortion in particular circumstances. Of course, the materials might also counsel against or discourage having an abortion. Regardless, as long as the terms "counsel" or "encourage" are undefined, libraries and librarians are at risk. It was to this point that the American Library Association and the Freedom to Read Foundation focused its brief. The crucial point made to the Court was that, whatever an individual's moral position on abortion, state regulation of medical services cannot lawfully restrict the provision of information and thereby suppress ideas about abortion, available in libraries. The mere provision of ideas and information must be protected from state regulation and restriction.

The Foundation has continued to receive donations in the wake of the Salman Rushdie affair from the Tattered Cover Book Store in Denver, Colorado. Joyce Meskis, owner of that bookstore, pledged $5.00 of the sale of each copy of Rushdie's *The Satanic Verses* to three First Amendment-related organizations, the Foundation being one. To date, the Foundation has received contributions in excess of $1,500 as a result of this pledge.

The Foundation joined in an *amicus* brief in *FW/PBS Inc., d/b/a Paris Adult Bookstore II* v. *Dallas*, challenging an ordinance that prohibits the future operation of any enterprise previously found to have engaged in a single past obscenity violation. Despite our adversarial position in this lawsuit, I commend our host, the City of Dallas, for its hospitality to the Foundation during this conference as we celebrate the Foundation's Twentieth Anniversary.

In other litigation, the Foundation won a victory in *Village Books, et al.* v. *City of Bellingham*, challenging a Bellingham, Washington, ordinance which defined pornography as a violation of women's civil rights. The ordinance was nearly identical to an Indianapolis ordinance which had been previously held unconstitutional by the United States Supreme Court. The Foundation and its co-plaintiffs won on a motion for summary judgment and the ordinance was struck down as unconstitutional.

In another Foundation-supported case, *American Booksellers Association* v. *Commonwealth of Virginia*, the case challenging Virginia's harmful to minors display law, the State of Virginia took the unusual action, during oral argument before the Fourth Circuit Court of Appeals, of agreeing that the state would interpret the statute narrowly to protect booksellers from an undue burden to review their inventory and police minors' perusal of their inventory.

In a case in California entitled *McCarthy* v. *Fletcher*, the California Appellate Court reversed the dismissal of a suit brought by an English teacher challenging the removal of *Grendel* and *One Hundred Years of Solitude* from the Wasco Union High School curriculum. The appellate court held that a lower court must examine the decision under the standards set forth by the United States Supreme Court in *Hazelwood*

v. *Kuhlmeier*, last year's high school newspaper case.

On April 1, the Finance/Fundraising and the Third Decade Committees of the Foundation met in Chicago to consider fundraising and long term planning for the Foundation. As a result of that meeting the Foundation has reiterated its goal of presenting a strategy planning colloquium for the '90s as its first priority. And, the Foundation will vigorously work to expand membership and heighten awareness of the Foundation's mission.

I'd like to take this opportunity to thank President Summers for generously affording the Foundation's 20th anniversary celebration prime time at the Opening General Session here at the ALA Annual Conference. The Foundation has had a tremendously active and successful year. I look forward to future expansion and activity in the years to come.

Thank you. □

Wicker keynotes FTRF 20th anniversary

The Freedom to Read Foundation celebrated its twentieth anniversary at the opening general session of the American Library Association's Annual Conference in Dallas on June 24. Columnist Tom Wicker of the New York Times *presented the keynote address, highlighting current First Amendment controversies and encouraging ALA members to support the foundation and to resist not only "the tyranny of the powerful, but the tyranny of the timid."*

Wicker began his career in journalism as editor of the Sand Hill Citizen *in Aberdeen, North Carolina, and worked later at the* Winston-Salem Journal. *He became Associate Editor of the* Tennesseean *in Nashville in 1959 and joined the Washington Bureau of the* New York Times *in 1960, becoming bureau chief in 1964. In 1966, he began writing his "In the Nation" column. Wicker is also the author of eight novels and four books of non-fiction. The following is the complete text of his address.*

The last time I was in this room it was for the second nomination of Ronald Reagan for President. I hope you will forgive me if I say that I find this a more congenial occasion.

I am happy to be here to share in honoring the Freedom to Read Foundation, and before an audience that obviously is devoted to words and ideas. One of my earliest memories is of the little public library in my hometown, Emma, North Carolina. It probably wasn't very much of a library but it was a world to me. I was fortunate to have parents who encouraged me to read any and everything and defended my right to read what I wanted to read. I have honored them ever since and the values they inculcated in me.

In my line of work, you have to have strong opinions and lots of them. In the *New York Times*, I write two columns a week, 48 weeks a year. I've been doing that for 10 years—that's something like 1,000 columns. Before that, for about 13 years, I was writing three a week—or nearly 2,000 more. That's a lot of opinions, not all of which have proven correct or are justified by events. But on the face of it, I think it shows that I'm a man who ordinarily has very little trouble making up his mind.

Some questions do cause me a lot of difficulty. One that's bothered me for years, for example, is whether the military draft would give us a standing army that could too easily be used as a police force around the world, or whether it would give us a conscripted army of amateur soldiers that can't be used in the same way as a professional army. I can see merit in both arguments, and I'm not sure there is one right answer. When I started thinking about talking to this sophisticated audience on First Amendment questions, I had to face some other troubling questions—those in the area of free expression of ideas, that supreme value which we have gathered here to honor, which your and my professions depend upon, and in the defense of which I consider myself very nearly an absolutist. But troubling questions do arise.

Recently, for example, the Corcoran Gallery of Art in Washington cancelled an exhibition by the late photographer Robert Mapplethorpe (see page 164). The show had been funded by the National Endowment for the Arts and the Corcoran, too, receives federal funds—that is, your tax dollars and mine. I haven't seen this exhibit or any of Mapplethorpe's work, but it is reported to be composed of "homoerotic images of sex and violence," and some of the individual works have been described in ways that, to me at least, seem disgusting, even repellent. I realize that I might find the photographic work itself—and this is important—I might find the work itself and its impact on me quite different from mere descriptions of it, but all I have to go on at the moment are the descriptions.

This celebrated episode raises questions I find difficult to wave away. Art certainly is expression, but not all expression is art. If an expression is not demonstrably art—and who is to decide that?—it's still to be protected. But should such an expression be displayed and promoted as art? If it's not art—and many people consider the Mapplethorpe exhibition to be social commentary rather than art—then does a decision not to display it in an art gallery amount to a suppression of the free expression of ideas?

Beyond these questions, does the involvement of tax dollars make a difference? If a private millionaire had financed the Mapplethorpe show and offered it to the Corcoran, no one would dispute his right to do it or the gallery's right to accept or reject. But does a taxpayer have a right to say that he or she does not want tax dollars devoted to what that person may believe is a disgusting or immoral or irreligious or unpatriotic exhibition? If a rich person spending his or her money for whatever purpose is a protected form of expression—and I believe it is—then isn't a non-rich person refusing to spend his or her money equally engaging in a form of expression worthy of protection?

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ALA conference
freedom to view, instinct to censor

At the American Library Association's 1989 Annual Conference in Dallas, the Intellectual Freedom Committee, the Intellectual Freedom Round Table, the Intellectual Freedom Committees of the American Association of School Librarians, the Association for Library Service to Children, the American Library Trustee Association, the Public Library Association and the Young Adult Services Division sponsored a program entitled "Freedom to View, Instinct to Censor: Video Programming in Libraries." The program featured film and drama critic Judith Crist; Gordon Conable, Director of the Monroe County, Michigan, Library System; and Sally Mason, Director of Video and Special Projects at ALA. Slightly edited versions of their speeches and excerpts from the question and answer session that followed them follow below.

remarks by Judith Crist

Judith Crist holds a Master's in journalism from Columbia University and currently teaches in that university's school of journalism. She held a number of positions including arts editor at the former New York Herald-Tribune *and was film and theater critic for NBC's "Today" show for eight years. The recipient of numerous awards and honors she has written extensively for many other publications, including, for many years,* TV Guide.

I am particularly pleased to be here, not only because I am a card carrying member of my local library, let alone of the ACLU, but in part because it's genetic—I'm the daughter of a New York City public librarian. I cherish my mother's letter of appointment, which in 1912 appointed her as a full-time assistant librarian at the Seward Park Branch at a salary of $10 a month. I hope that there's been a raise or two since, but I wouldn't swear to it!

I'm also delighted to talk about videotapes in libraries. It seems to me a sort of "free at last, free at last," for me and my generation, which came of age in a book reading family and society and for whom movies, in large part, were trash treats. Movies were not an art form in the '30s and '40s; they were largely the opiate of the masses. There were better things to do than go to the movies. There was theater; there was dance; there was music; there were books, of course. And in those days, we even used to talk to each other. Slowly, but surely, those of us who used to sneak to the movies could come out of our closets and finally, by the '60s, we found that we were in love with an art form.

Then an interesting technological history ensued, and I realize that we have lived basically through a revolution. A social scientist pointed out that it took man 500,000 years to go from oral to written communication; it took another 5,000 years to go from writing to print; it took 500 years to get from print to television; and then, in 1975, along came the VCR and the video cassette, and it has presented us with a totally new accessibility to film. I'm not keen on statistics, but I did find some that were simply overwhelming. There are more than 90 million television households in this country, and 67% of them have at least one VCR. Last year, there were 1,664,583,800 videotape rentals. There were more than 142 million video cassettes sold; that was up 12 million from 1985. This, in itself, is overwhelming, but is capped with a final statistic—85% of libraries in cities with population greater than 25,000 have video cassette collections. It's here, and the question is how to cope with it.

Again, one feels one has lived through history. I was reminded of it in the recent controversy over *The Last Temptation of Christ*. I remember, more than 40 years ago, going through a picket line to see a movie called *The Miracle*, which the then Legion of Decency had found highly offensive. If you remember, it was Rossellini's film of a peasant girl who becomes pregnant and thinks the conception has been immaculate. It became the film on which the Supreme Court ruled, in 1951, that film was protected under the First Amendment. There have been picket lines since and there are going to be picket lines and protests, I hope, ever after, because that is essential; that's what qualifies film, to me, as being a form that does on occasion contain art, but on perhaps a few more occasions does contain thought.

We've gone from *The Miracle* through, most recently, a fuss about *Hail Mary* and *The Last Temptation of Christ*, which will be in video cassette on June 29th. Some video stores have already been notified that they should not carry it, and because they have not been notified that they should carry it, by the public—who among us is that kind of activist—some won't carry it. Others—and I particularly like the manager of a New York store who said, "Listen, it's a free country; we're gonna carry it; they don't have to rent it"—have a healthier reaction.

I do think that videotapes have affected film in many ways. There was always a great difference between going to a movie house and going to theater. Live theater for us has been, for the most part, a very communal experience. You've been conscious of the people around you. The light from the stage suffuses the auditorium. You know the people on the other side of the stage, unless you're watching something avant-garde like *Jesus Christ Superstar*. The people on the other side of the footlights are your size. You have made a deal when you walk into a theater—a deal of let's pretend. You agree that a wall of a house is missing. You agree that indeed, right out there, there are 500,000 troops storming the barricades. We have a very active participation in theater. In movies, in going to movie houses, we're in the dark and we are, until the small screens and the little theaters took over, basically watching an image that is 30 feet high—it is bigger than we are, it is all embracing and we no longer are pretending. We're overwhelmed by a larger than life reality.

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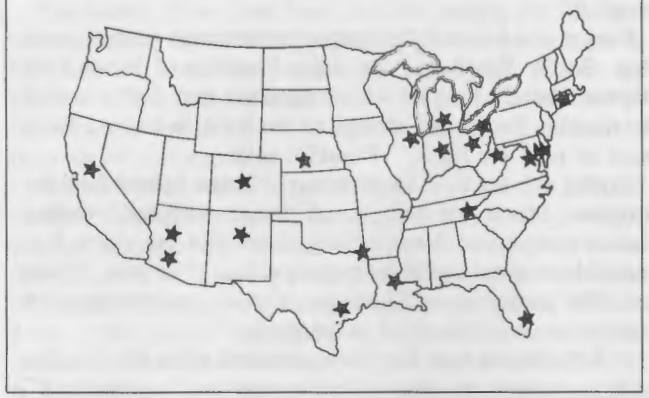
censorship dateline



libraries

Chicago, Illinois

Some fifteen picketers July 4 demanded removal of a controversial painting of a nude baseball batter on exhibit in the Chicago Public Library Cultural Center. They were led by Ziff Sistrunk, who said he is executive director of the Chicago Sports Council, which provides summer activities for children.

"This picture has nothing to do with baseball. If Mayor Richard J. Daley were alive, this exhibit would be clean. I am prepared to die for this issue," Sistrunk told onlookers.

Library officials said they would not close the exhibit, "Diamonds Are Forever," which was organized by the New York State Museum and the Smithsonian Institution. Nor would they remove the 1979 painting, "Boys at Bat," by Eric Fishl.

"We have the support of the mayor to keep the exhibit up," said Madeline Murphy Rabb, executive director of the Chicago Office of Fine Arts. She said the Cultural Center "welcomed" the expression of all opinions, but said Sistrunk's was the only "significant complaint." The exhibit of artists' and writers' views of baseball was one of the center's most popular displays, attracting a thousand viewers a day, a representative said.

A counterdemonstration was briefly mounted by a dozen picketers from the Committee for Artists Rights, which opposes the censorship of controversial art works. Reported in: *Chicago Sun-Times*, July 15.

Weirton, West Virginia

A witch's brew of censorship is simmering in Hancock County, where the West Virginia Education Association in July challenged a school board decision to pull books about the occult from the shelves of the Weir Junior High School library. Of 35 books removed for review in late May, 18 had been returned by the close of the school year. The remaining 17 were to be reviewed by a committee in the fall.

"I'm sure that when school starts again in the fall, there's going to be a mad dash for these books," said school board president Connie Sherensky.

A parent whose 12-year-old son read some of the occult books notified school officials that the boy had become fascinated by passages dealing with live sacrifices and incantations. "They begged us to meet with them and please discuss these problems they were having," Sherensky said.

Stars, Spells, Secrets and Sorcery; Black Magic, White Magic; Demons, Devils, and Djinn and *Witchcraft, Mysticism and Magic in the Black World* were among the books the boy read. Reported in: *Wheeling News-Register*, July 9.

schools

Fort Lauderdale, Florida

Miramar High School students will not be shown a film on abortions to counter instruction they received from a biology teacher, Broward County school officials said in June. Members of the Broward Chapter of the National Organization for Women charged that teacher Bonnie Romono taught inflammatory information about abortion to an honors biology class.

A NOW member whose daughter attends the school had seen a copy of a worksheet Romono used in class. She complained in part that the material gave overly graphic descriptions of abortions. But in a letter to the principal, Romono said NOW members looked at only one part of what she taught. Both sides of the abortion issue are presented in her class, she wrote.

"Several sentences were signaled (sic) out of an entire unit on the reproductive system," Romono wrote. "I must state that to make a judgment on the material presented without benefit of the lectures, reading materials, and films is a totally irresponsible action." The principal said he told Romono to stop using the worksheets because the information they contained was outdated.

NOW representatives asked that the documentary film, *Abortion for Survival*, be shown to students to counter Romono's teaching. But the district said the film was too political for the classroom.

"I felt it was an excellent film to be used in a high school debate class on how to dissect an issue," said Cora Braynon, nursing director for the Broward County Public Health Unit.

"But as a health education film — no. In an educational film, you impart information. This was more examining the issue."

"I am disappointed, naturally, that they decided not to show it," said Maggie Davidson, president of Broward NOW. "I can understand that they felt the film is somewhat political." Davidson said she would ask the district at least to allow a speaker to address the students. Reported in: *Ft. Lauderdale News*, June 8.

Plymouth-Canton, Michigan

A conservative group that tried to make its suspicion of witchcraft and satanism an issue in the Plymouth-Canton schools suffered a setback June 12 as a huge voter turnout saw a board member opposed by the group handily reelected.

Robert Anderson, a challenger backed by Citizens for Better Education (CBE), the group that has claimed the occult is taught in the schools, trailed incumbent David Artley by a 2-1 margin.

CBE has heightened interest in Michigan's 11th-largest school district by repeatedly criticizing the showing of the movies *The Breakfast Club* and *Excalibur* in high school classes and the use of other teaching materials. "We're not interested in personal lifestyles," said Diane Daskalakis, CBE president. "The question is what direction do we as taxpayers want to go in with our schools. Some of us folks want their children sheltered to an extent."

A coalition of local clergy denounced the "vigilante mentality" of CBE, and a citizens election committee waged an aggressive campaign in favor of school tax measures opposed by Daskalakis' group.

Since its formation in 1986, CBE has had limited success in eleven curriculum-related objections filed with the district. It unsuccessfully challenged a Halloween visit by a witch, Gundella, and the school use of the *Metro Times*, a Detroit-area publication with sexually explicit advertising. But the showing of the movies *Teen Wolf* and *Ghostbusters* to middle school students were banned following a CBE protest. Reported in: *Detroit Free Press*, June 9, 13.

Chattanooga, Tennessee

A summer youth program for potential high school dropouts, sponsored by the Private Industry Council, came under fire in July because students were assigned to read Alice Walker's Pulitzer Prize-winning novel, *The Color Purple*.

"The program is fine," said Tricia Beeson, who confiscated her 14-year-old son's copy of the book and refused to return it to instructors. "But this garbage they're dishing out, I don't appreciate. It's just trash garbage to me."

The Private Industry Council's Summer Training and Education Program (STEP) offers morning classroom instruction and afternoon work experience to about a hundred students. The teenagers, who lag one to two years behind grade level and have been identified as at risk of dropping out of school, are paid minimum wage for time spent in the program.

Beeson was joined in her protest by two other parents, state Rep. Bobby Wood and Dr. John Franklin of White Oak Baptist Church, both of whom admitted they had not read the novel. "I read just enough of the book to know I don't want to read the book," Franklin said.

Noting that the U.S. Department of Labor helped fund the program, Wood said he believed "more uplifting" reading should have been chosen. "Any book that taxpayers buy should have some social redeeming values," he said. "I just feel like taxpayers in Chattanooga don't want to pay for children to read this kind of language."

STEP officials said they were shocked when the families of three students objected to the language and "explicitness" in *The Color Purple*. The book was included in a curriculum prepared by Public and Private Venture, a research and development firm specializing in employment training. It was chosen, STEP coordinator Beth Parks said, because of its "potential to grab students' attention. Most of these students have never read a book all the way through."

Rep. Wood said he also objected to two other books suggested by Public and Private Venture for reading by STEP students: *Of Mice and Men*, by John Steinbeck, and *The Contender*, by Robert Lipsyte. "Steinbeck is known to have had an anti-business attitude," Wood explained. "Also, he was very questionable as to his patriotism."

Wood said he was not familiar with *The Contender* but a blurb read to him by a county library worker indicated it was about an adolescent who becomes a champion boxer. "It sounds like pretty explicit stuff, too," he said. Reported in: *Chattanooga Times*, July 19.

Pasadena, Texas

The Pasadena Independent School District has banned the peace symbol made famous by antiwar protesters, saying the sign is now used for devil worship. "It's harder for those of us who lived in the '60s to be told that the peace symbol means something completely different," said Kirk Lewis of the suburban Houston school district. "But the experts are telling us that and it became inappropriate for children to wear them."

The peace symbol is prohibited in at least six Pasadena schools and a districtwide ban may be established in the fall. The nearby Baytown schools also ban the symbol. Pasadena officials said that the drug-and cult-related slayings of fifteen people in Matamoros, Mexico, reinforced their doubts about the symbol. Reported in: *Washington Times*, June 20.

Prince William County, Virginia

A controversial sex education film was shown to Prince William County elementary school children for ten years before school officials acted last spring to ban it. Few peo-

ple knew that it was being shown to 8- and 9-year-olds, one official said.

The movie, *Then One Year*, was not among the 21 films recommended for showing in county elementary schools in the proposed sex education program this fall. "It is in the process of being reevaluated and will not be submitted to the school board at this time," explained Dr. Zuill Bailey, director of curriculum.

The film deals with changes that occur beginning with the onset of puberty, including drawings of the development of the reproductive organs. Most controversial is an animated drawing of a penis that was added during the 1984 revision of the film. During the film, a narrator's voice says, "Before a boy grows up and starts having intercourse, he will produce countless sperm and expel a good deal of semen, some in his sleep during wet dreams and some during masturbation when he may handle his penis."

On May 17, the school board voted unanimously to remove *Then One Year* from elementary schools. A parental complaint prompted the formation of a special committee to examine the 16-minute movie. It may be shown to middle school students if the committee approves.

The film had been approved for grades three through eight since 1978. It was not until the state mandated a family life program two years ago, however, that it reached the limelight. Reported in: *Fairfax Journal*, June 8.

student press

Prescott, Arizona

Administrators at Yavapai College came under fire in May because of their decision to seize and destroy a number of copies of the student newspaper. The action was termed a violation of freedom of speech by newspaper advocates, but was labeled a "necessary decision" by administrators who said the rights of students were violated by a story in the paper.

The May issue of the *Roughrider*, a four-page newspaper produced by students in a journalism class, carried a story telling how two students had been evicted from the men's dormitory for having guns in their rooms. The story carried the names of the students, one of whom complained to the administration that his confidentiality rights had been violated. Administrators then confiscated the remaining copies of the paper.

"We've never exercised any restrictions on any student publication including the *Roughrider*," said college president Paul Walker. "But we had a valid concern with this story."

Disciplinary records of students were the basis for the story, said Ann Highum, director of student development. "And those records are confidential. I was shocked when I saw the names in print."

"This bothered me a lot," countered newspaper adviser Kris Finn. "The story itself struck me as an important one that the students should know about." Reported in: *Arizona Republic*, May 10.

Sacramento, California

Administrators at Rio Americano High School in Sacramento impounded an October, 1988, issue of the school newspaper, the *Rio Mirada*, because of a column comparing Homecoming with the crucifixion of Christ.

Student Vanessa Richardson likened the humiliations associated with the homecoming dance to the pain of Jesus on the cross. "If you believe in God," she wrote, "Homecoming is your salvation. For tomorrow's dance is really a religious ceremony for ones to experience the most humiliating time of their life, so they can experience the pain and suffering that Jesus went through while dying on the cross, for the two experiences are pretty painful."

Administrators called the story "offensive to the religious beliefs of parents, teachers and students." They said the paper would be reviewed by a committee of teachers, students, and administrators. But faculty adviser Dean Baird said the committee was not created because a legal review of the incident by the school attorney supported the students' claim that the seizure was inconsistent with the California Education Code. California and Massachusetts are the only states with statutory protections for student expression. The newspapers were returned to circulation after three days.

"I think the administration realizes now that they can't just pull a story because they don't like it," Baird said. "Their attitude on censorship is a little more clear to them now." Reported in: *SPLC Report*, Spring 1989.

Greenwood Village, Colorado

A bogus, sexually suggestive quote falsely attributed to a Cherry Creek High School student in the school's 1989 yearbook led officials to remove a page from 2,300 of the books. "It's been really unfortunate," said Principal Mary Gill. "The kids worked very hard on this book, and it's like cutting off an arm to cut that page out."

In a story about sexuality in the age of AIDS, a fake quote was attributed to a senior girl, "an outstanding student, a class leader," said Gill. The quote read: "My relationship with my last boyfriend was longer than most of my others. I'm used to going in and out of relationships, over and over. In and out, in and out — it really gets tiring."

Gill said she had no problem with the rest of the sex story, which was written by a senior using a pen name. "But the quote shouldn't have gone into the book."

Some students — including yearbook copy editor Libbi Matthews — criticized the removal as censorship. But others said the decision was probably necessary.

Only yearbooks distributed to juniors, sophomores, and freshmen were affected. Copies were distributed to 800 seniors before the girl and parents noticed the quote and complained. Reported in: *Denver Post*, May 19.

Redding, Connecticut

Five students who bought a full-page advertisement in the Joel Barlow High School yearbook were shocked June 12 to learn that their page had been censored and cut out of all the books on orders from the school administration.

Chris Yatrakis, one of the students involved, said Principal Nelson Quimby and Assistant Principal John Slais made the decision after condemning some of the material as overtly sexual or promoting the use of alcohol. The page showed candid pictures of the five young men, who were close friends throughout high school, and included a page of copy with short phrases describing their time together.

Quimby told the students more than a dozen items were offensive, Yatrakis said, including the phrase "It's Miller time!" and the word "fart." Yatrakis said one of their school coaches ended all practices by shouting "It's Miller time," and he said students hear and read more suggestive words than "fart" from magazines in the school library.

The students want their $125 advertising payment back and a public apology from Quimby. The administration has offered to print a revised insert page to be made available to anyone who wants it.

"Our reputation has been shot," Yatrakis said. "The faculty had been talking among themselves and said we tried to sneak this in the yearbook. This was approved through all the proper channels. We didn't do anything wrong." Yearbook adviser Bob Cox did approve the advertisement, but later made the administration aware of it. Reported in: *Bridgeport Telegram*, June 14.

Cleveland, Ohio

The student yearbook at a Catholic high school was recalled after officials discovered it contained sexual innuendo and insults directed at faculty members. Seniors at St. Ignatius High School in Cleveland were told that, unless they returned their yearbooks, they could not go to graduation ceremonies, while underclassmen were told they could not advance to the next grade if they failed to return the books.

"There were unacceptable captions and unacceptable stories," school President Rev. Robert Welsh said. "There were sexual references, and there was also bad taste and rather insulting remarks to the faculty." The captions were apparently written after the yearbook's adviser was injured in a car accident. Yearbook staffers later showed the adviser phony page proofs, which the teacher approved. Then the real pages were sent to the publisher.

The president said six of eight seniors who worked on the yearbooks apologized to faculty and staff. "I would say the faculty accepted the apology. As a Catholic school, we feel we are called to forgive those who ask for forgiveness," Welsh said. Reported in: *Chicago Tribune*, June 14.

museums and galleries

Washington, D.C.

In an extraordinary move, the Corcoran Gallery of Art June 12 canceled a planned exhibit of photographs, "Robert Mapplethorpe: The Perfect Moment," because of concern that the show would become embroiled in a political battle over federal funding of artistic work that may offend. "It came with a tremendous amount of thought, but we really felt this exhibit was at the wrong place at the wrong time," said Corcoran Director Christina Orr-Cahal.

"For the last 120 years, the Corcoran has maintained an apolitical position," Orr-Cahal said. "We always felt that was critical in a city that has a federal presence. Over the last few weeks, we have seen the discussion become a political one. . . . We could not and would not allow ourselves to be drawn into the debate."

Mapplethorpe, who died of AIDS at the age of 42 in March, has been hailed as one of the preeminent photographers of his generation. Much of his work was sexually explicit, and the exhibit, which was scheduled to open July 1, includes a number of homoerotic and sadomasochistic images, along with nudes of children.

The Corcoran did not receive federal funding for the show, but the University of Pennsylvania's Institute of Contemporary Art, which organized the exhibit, received a $30,000 grant from the National Endowment for the Arts for it. Copies of the Mapplethorpe catalogue circulated among members of Congress just as a controversy was emerging over another photograph — of a crucifix in a jar of urine — by artist Andres Serrano. The fellowship program that funded Serrano had in turn been funded by NEA.

Sen. Alfonse D'Amato (Rep.-N.Y.) and Sen. Jesse Helms (Rep.-N.C.) condemned the picture on the floor of the Senate in May, and 25 senators signed a letter calling for a reevaluation of NEA funding. On July 26, the Senate passed a Helms-sponsored measure that denied funding to the groups that had supported Serrano and Mapplethorpe's work and barring NEA from supporting "obscene or indecent" art (see page 181).

"I'm astounded [by the Corcoran's cancellation]," said Jacob Neusner, a member of the National Council on the Arts, which advises the NEA. Neusner had written to members of Congress criticizing NEA funding procedures, which he said allowed both the Serrano and Mapplethorpe grants to be made without what he considers proper consideration from the National Council.

"I would not have voted for the grant if I had known its content," he said. "But I think once the money is given, and the show is held, to cancel it is. . . an enormous insult to the art and the art world. It opens the door to a kind of censorship through public opinion that we haven't had in this country."

"I don't think there was censorship at all," said Orr-Cahal. "The [show's catalogue] is out, the exhibit has been seen

elsewhere and will be seen elsewhere. I think censorship would have been editing the show."

Orr-Cahal said the Corcoran was "not acceding to congressional pressure." Asked if she or others feared for congressional funding, which the Corcoran receives directly along with other District of Columbia arts institutions through the National Capital Arts and Cultural Affairs program of the Fine Arts Commission, Orr-Cahal said, "I think there are always practical concerns. What else can you make a decision on — you make it on intellectual grounds and practical grounds."

Several days after the Corcoran announcement, another Washington gallery announced that it would show the Mapplethorpe exhibit, which opened in the capital in July to record crowds. The exhibit had previously appeared in Philadelphia and Chicago without problems. It was scheduled to move on to venues in Hartford, Connecticut; Berkeley, California; and Boston. Reported in: *New York Times*, June 13.

Albuquerque, New Mexico

An Albuquerque photographer has charged that a dark cloud of censorship hangs over the city. Chel Beeson was referring to a decision by the Albuquerque Museum to permit him to show only one female nude photograph in a June exhibit and to hesitations by the KiMo Gallery last winter before they allowed three nude photos in a show. Beeson said he sensed city officials had pressured curators to censor nudity in art.

Museum director James Moore denied the allegation. "I've worked for three administrations and there's never been any pressure from city hall, including this one," Moore said. "To think that would be absolutely absurd."

According to Moore, Beeson had initially submitted five art studio nudes. Moore and Ellen Landis, the museum's curator, thought he should submit photographs of other subjects and Beeson sent a sampling of additional photos, from which four clothed fashion models were chosen. "It was a curatorial decision, not censorship," Landis said. But the artist said he was told by the woman who conceived the exhibit of six Albuquerque photographers that the museum had simply refused to exhibit five nudes and that she had to argue to retain one.

Melanie Mills, an artist familiar with Beeson's work, said the photos in the show were "a watered-down representation of his work... The superior pieces of Chel's work are the nudes and they are non-exploitative, non-pornographic."

Beeson said the incident and the previous hesitation of the KiMo Gallery to display his nudes were consistent with other events. When, in May, a man appeared nude on a public access cable channel, the mayor threatened to withdraw the station's city funding. An amendment to the city's topless ordinance requiring dancers and waitresses to wear more than pasties and G-strings was another example of censorship by city hall, Beeson said. Reported in: *Albuquerque Journal*, June 18.

Albuquerque, New Mexico

An Albuquerque poet said June 13 that the New Mexico Museum of International Folk Art was guilty of censorship when it sought to delete a stanza from his poem, "Once A Man Knew His Name," considered for a soundtrack in the permanent exhibit of the museum's new Hispanic Heritage Wing. Museum director Charlene Cerny denied poet E.A. "Tony" Mares' charge. She said the museum recommended that the entire poem — not a stanza — be eliminated from the soundtrack.

"It was a rather high-handed exercise of authority," said Mares. "As far as I'm concerned it was an act of censorship and I don't want to see censorship applied to any work of art."

Cerny said the poem was rejected because it was too long for the soundtrack and as a 20th century piece didn't fit into a reconstruction of 17th century events. "There's nothing to let you know its a 20th century Spanish interpretation of an Indian voice," she said. Finally, she noted that the final stanza was historically inaccurate.

The museum, Cerny said, told Enrique LaMadrid, who organized the track's narration, that the poem should be deleted. LaMadrid, she acknowledged, argued that it should be edited so it could remain on the track.

Mares said he was willing to edit the poem for length, but refused to delete "that offending stanza," which he says is historically accurate. Mares holds a doctorate in regional history from the University of New Mexico.

"They said they would use it if I deleted that section," Mares said. "When Enrique conveyed that to me I decided to withdraw it because it was censorship." Reported in: *Albuquerque Journal*, June 14.

sculpture

Arlington, Virginia

After agonizing over the size of the genitalia on a reclining male figure in a sculpture commissioned for Arlington County's Bluemont Park Sculpture Project, project director Rita Bartolo finally bowed to pressure from her superiors. In mid-June, she took a knife and chopped "about an inch" from the offending organ.

"I tell you, I drove around in the car for about two hours," she said. "I just felt horrible. I don't know what's going on these days, especially with the Corcoran show being canceled and stuff" (see page 164).

Cheryl Casteen, who collaborated with Charles Flickinger on "Double Spiral for a Hillside," said Bartolo never discussed altering the work with the artists.

Arlington Cultural Affairs Director Norma Kaplan said, "We never suspected that the male would have genitals." She remembered that the artists were told the county was also concerned about the size of the breasts on the sculpture's

companion female figure.

"That's news to me," said Flickinger. "In fact, one of the residents of the neighborhood the other day asked us why she didn't have any."

Said Casteen: "No one ever spoke to us about breasts. What we were told was this, way back before we had approval to do the project: We were informed by Rita Bartolo that there was some concern about nudity.... We told them that the pieces would be tasteful, and as far as I'm concerned they are."

When Bartolo realized the sculpture was anatomically correct, she alerted Kaplan and together with Stan Ernst of the Parks Department they took a look. "Our job is to make the park a place where anyone can come," said Ernst, "and there are people out there who will complain about anything." Yet, according to all three officials, not a single complaint was lodged.

"I was afraid they were going to just throw it in the back of a truck or something," Bartolo said. "Stan had this knife, and I was afraid he'd just butcher it. So I took the knife and cut off about an inch."

"Norma loved the piece, but she felt that genitalia were not appropriate for a public park," Bartolo continued. "No one from the neighborhood had complained. It was more the county just being concerned, I think. Arlington is a very conservative community."

Though unhappy, Casteen was philosophical. "I think Rita didn't want to do it, really," she said. "She saved the penis for us, because she would like to get it put back on."

"I feel silly in some respects arguing about an inch," said Flickinger, "but people's rights are taken away from them in small increments." Reported in: *Washington Post*, July 4.

periodicals

Phoenix, Arizona

A letter written by the executive director of the Arizona Catholic Conference resulted in the removal of Steven Benson, the editorial cartoonist of the *Arizona Republic*, from his duties as a local official of the Church of Jesus Christ of Latter-day Saints. Benson, a grandson of Mormon Church President Ezra Taft Benson, stirred a religious furor with a cartoon titled "The Second Coming," which appeared April 7.

The cartoon depicted former Arizona governor Evan Mecham, a Mormon, descending from heaven holding a volume labeled "The Book of Moron by Ev Mecham." The satirical drawing referred to Mecham's announcement that he would try to regain the governorship from which he was ousted by the state Senate last year after being impeached by the state House.

The cartoon annoyed Max Hawkins, a Presbyterian who was Mecham's director of administration and now works for his 1990 campaign. Hawkins telephoned Arlo Nau, administrator for the Executive Round Table, a group of Protestant and Catholic church leaders, and asked the group to protest. Monsignor Edward J. Ryle, executive director of the Arizona Catholic Conference, then drafted a letter asserting that the cartoon "was a direct, insensitive affront to thousands of our brothers and sisters of the Church of Jesus Christ of Latter-day Saints. Mockery of sacred symbols ... plays into the desire of those who promote prejudice and bigotry."

The letter was signed by twelve religious leaders, including Roman Catholic Bishop Thomas J. O'Brien, and sent to local Mormon officials. Benson was then released from his duties as a member of the church's Tempe West Stake High Council.

"I am a devout Mormon," Benson replied to the letter. "Mecham is the Ayatollah of Mormonism. My cartoon wasn't attacking the church. I was attacking Mecham's misuse of the church to further his political agenda." Reported in: *Washington Post*, June 3.

Indianapolis, Indiana

Copies of *Life* magazine commemorating the 100th anniversary of the brassiere and featuring a model revealing her bra on the cover were removed from some Indianapolis area stores after customers complained. Anonymous callers protested to Peoples Drug Stores and Osco Drug, which pulled the June issue from all their outlets. Peoples has 39 stores and Osco 17 stores in the area.

"It's absolutely ridiculous in my opinion; but, hey, it's the buying public," said a Peoples representative. Peoples had enough "nuisance" calls to remove the magazine, the representative said.

A similar incident occurred in Clifton Park, New York, where a supermarket pulled the issue after two mothers dubbed its cover photo featuring model Melissa McKnight in blue jeans with her blouse opened, revealing her bra, "pornographic."

"If I had gone into the supermarket and opened my shirt up, they'd arrest me for indecent exposure," said Elizabeth Etzel. "I was just appalled. It was blatant pornography. There was *Life* magazine with a flasher on the cover." Reported in: *Indianapolis Star*, June 21; *New York Post*, June 20.

Canton, Ohio

Jack Cogan, co-owner of Little Professor Books in Canton, was the target of picketing by a fundamentalist group and was threatened with arrest by a local police detective last spring as part of a citywide "crackdown" on adult bookstores. The protesters want the store to stop selling *Hustler, Velvet* and other sexually-oriented magazines.

Local minister Larry Wilgus of the Christian Life Center has been prominent in a movement calling for enforcement of a broadly defined Ohio obscenity code. On May 16, Wilgus led a group of six pickets at Cogan's store. Then,

on June 17, a Canton vice detective told Cogan, "If you don't do something about these magazines, we're going to buy a *Hustler* and arrest you for pandering obscenity, and we'll make it stick." Cogan said that when he told the detective the magazines are constitutionally protected, the detective said, "We'll send a building inspector and they can always find something wrong with your store."

Frightened, Cogan followed the detective's instructions and installed a locked Plexiglas case, concealed from view by the top of the magazine rack, and put all adult magazines in it. "In my five years of bookselling, I've always kept the adult magazines near the front of the store so we can police who looks at them, and they have always been at the very bottom of the rack, slightly hidden from view. But I felt I had to answer the threat," Cogan said.

Cogan also began circulating a petition opposing censorship and, on July 6, he met with Canton law director Thomas Bernabei who informed him that "the detective was overzealous and was not acting with instructions from the city attorney." Bernabei told Cogan he could remove the Plexiglas case.

Rev. Wilgus said the boycott of the Little Professor store would continue, although he acknowledged that the material in two local adult stores was "one hundred percent worse than the stuff at the Little Professor store." Cogan said the boycott was not working and in fact had "rallied people behind us. I think it's backfired on Wilgus. I think it's ironic," he added, "that the Reverend has bought over $500 worth of anti-abortion books at my store. I guess he's one customer I'll definitely lose."

Oren Teicher, executive director of Americans for Constitutional Freedom, said that the harassment of Cogan's store as part of the Canton crackdown on adult bookstores "shows you how quickly these things spill over to mainstream bookstores." Reported in: *ABA Newswire*, July 17.

broadcasting

Shreveport, Louisiana

Radio station KRMD pulled the plug on a controversial guest May 9 after area car dealers phoned the station while the speaker was on the air and canceled their advertising. Guest Remar Sutton, who advised people on how to buy cars, was taking part in a call-in show when station general manager Gene Dickerson ordered him off the air twenty minutes before the program was to end.

Dickerson said he expected an innocuous show where Sutton would offer advice. Instead, he charged, Sutton "verbally assaulted" car dealers. "As a result of it, the station has had half a dozen car companies call in and cancel their advertising."

Later, the station aired editorials telling listeners that "so-called consumer advocate" Sutton was only out to disparage local car dealers. The editorial went on to say that "KRMD in fact encourages our listeners to buy from our dealers who advertise with us..."

Sutton, a former car dealer, who charges that car dealers are out to make money and hence cannot be trusted to give wholly honest responses to consumer inquiries, was in Shreveport to speak to customers of a credit union. Credit union representatives said the car dealers had asked the Chamber of Commerce to ask them to cancel the visit.

Dickerson said that as a result of the controversy, the station lost tens of thousands of dollars in advertising from car dealers. Reported in: *Shreveport Journal*, May 10.

public reading

Orleans, Nebraska

Marilyn Coffey, a longtime New York City writer and teacher, wanted to return to the Nebraska county she grew up in for a public reading of her first novel, *Marcella*. But the Rev. Perry Holmgren and some other residents of Orleans did not like the idea of Coffey spending eight hours publicly reading a book about a sexually addicted and abused teenage girl. The reading was canceled. The novel, called "haunting" and "moving" by the *New York Times* when published in 1973, was "suppressed" in Orleans, Coffey said.

"I don't feel she was censored," responded Holmgren. "This is a spiritually oppressive book." The minister noted multiple passages on masturbation and the depiction of a minister who sexually abuses the protagonist. "We don't want our town associated with something immoral like this," he said. Reported in: *Omaha World-Herald*, June 11.

recordings

Texarkana, Texas

Hastings Records and Tapes, a chain owned by Amarillo-based Western Merchandisers, Inc., decided in late May that it would no longer distribute recordings by 25 rap bands, comedy performers, and heavy metal groups to patrons under 18-years-old. The lyrics contain words that Western officials say are inappropriate for minors.

"This is horrible," said Tim Dineen, a fan of Motorhead, one of the banned groups. "I don't think it's very fair. When I was 16 I would have bought a Motorhead album. I'd like to know who makes the decision to sell what to whom?"

A committee of executives, along with buyers, make the decision, a company representative said. "Our intent is not to be the Gestapo," said Walter McNeer. "Our intent is to sticker the product and hope customers will work with us. If we remove the product from the store, that is censorship." He said the company was responding to hundreds of letters and phone calls complaining about the sale of offensive records to minors.

Tim Dineen and his younger brother Dan said they doubted the policy would work, arguing that those underage would use false identification or have others buy the records for them. "I wouldn't think twice about it," Dan said. "Some people would think twice about buying beer, but a record? I don't agree with this at all." Reported in: *Texarkana Gazette*, June 13.

foreign

Paris, France

Almost ten months after it first appeared in Britain, the French version of *The Satanic Verses*, by Salman Rushdie, made a timid debut in France's bookstores July 19. The book's translator used a pseudonym and there was none of the customary advertising.

The French publisher, Christian Bourgois, who postponed publication several times, sent copies only to bookstores that requested them instead of following the usual practice of automatic delivery to regular customers. "I am not publishing this book to revive a religious war," said Bourgois.

Despite the apprehension of the authorities and publisher in France, presumably because of the 3-4 million Muslims who live in the country, the book brought little apparent public reaction. Some stores refused to stock the book. However, the publisher said about 60,000 copies of the book were distributed and that sales were good.

The book's publication coincided with the return to Paris of Ali Ahani, the Iranian Ambassador to France. He was recalled during the furor over Ayatollah Khomeini's death threat against Rushdie and his publishers in February. The French Ambassador to Teheran returned a month earlier. Reported in: *New York Times*, July 20.

Port-Au-Prince, Haiti

Military attacks and brutality against journalists continued unabated in Haiti. On April 6, after radio stations defied a censorship order, troops believed to be linked to President Prosper Avril forced four stations off the air by destroying transmitting equipment. Another attack on a journalist occurred May 17 at the scene of an auto accident in which a young child was killed by a car driven by a local military commander. Among the witnesses was radio reporter Ediles Exile Noel, who was beaten with truncheons by soldiers.

Despite the revival of Haiti's news media since President Jean-Claude Duvalier fled into exile in February, 1986, journalists have remained targets of brutality and arrest. One reporter was killed, provoking fear and self-censorship among other journalists.

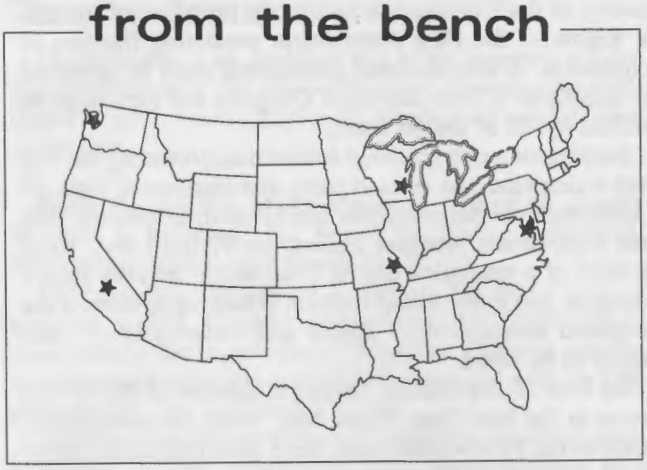
"We're living under a sort of Duvalierism without dictatorship," said Michael Norton of the Associated Press. "It's much more insidious and demoralizing." Reported in: *Journal of Commerce*, June 20.

Nairobi, Kenya

Kenya's parliament, increasingly sensitive to criticism by the nation's press, barred one of the country's three daily newspapers from covering its activities, citing the paper for failing to "correctly" report legislative affairs.

In the latest of several restrictions on press freedom, the *Daily Nation* was barred indefinitely from the parliament, whose members accused the paper of ridiculing them, sowing "discontent" and showing disrespect for the policies of President Daniel arap Moi.

The action came three months after the government permanently banned a magazine, the *Financial Review*, that had published stories about official corruption (see *Newsletter*, July 1989, p. 142). In 1988, a religious magazine, *Beyond*, was banned after it printed stories about the rigging of elections. Reported in: *Washington Post*, June 30. □



U.S. Supreme Court

(from page 153)

It was, as Kennedy said in a brief concurring statement praising Brennan's opinion, "one of those rare cases" where "we are presented with a clear and simple statute to be judged against a pure command of the Constitution. The outcome can be laid at no door but ours," he said.

Kennedy said many people, "including some who have had the singular honor of carrying the flag in battle . . . will be dismayed by our ruling." But "the hard fact is that sometimes we must make decisions we do not like. It is poignant but fundamental that the flag protects those who hold it in contempt."

Chief Justice William H. Rehnquist, joined by Justices Sandra Day O'Connor and Byron R. White, filed an emotional dissenting opinion which included the full text of "The Star-Spangled Banner" and of John Greenleaf Whittier's Civil War poem "Barbara Fritchie," in which a Union sympathizer tells Confederate troops, "Shoot, if you must, this old grey head, but spare your country's flag." Justice John Paul Stevens filed a separate dissent and took the unusual step of reading his opinion from the bench.

In the majority opinion, Brennan said "expressive conduct" is protected by the First Amendment as long as there is no danger of rioting or other breach of the peace. "The way to preserve the flag's special role is not to punish those who feel differently about these matters," Brennan said. "It is to persuade them that they are wrong. . . . We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag-burner's message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag that burned than by, as one witness here did, according its remains a respectful burial."

"Our decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects," the opinion continued, "and of the conviction that our toleration of such criticism such as [the protester's] is a sign and source of our strength." (For an abridged text of the decision and excerpts from the concurring and dissenting opinions see page 171).

Until the June 21 decision, the Court had never outlined the scope of First Amendment protection for those accused of desecrating the flag. In a 1969 decision, *Brandenburg* v. *Ohio*, the court ruled that political speech is protected unless there is a clear danger of violence. That landmark decision was central to the legal arguments offered by Justice Brennan for the majority. In several previous flag-burning cases, however, the justices had managed to avoid directly addressing the issue of whether flag desecration was a form of expression protected under *Brandenburg*. In 1969, the court ducked the issue, even though former Chief Justice Earl Warren and fellow liberal Abe Fortas were prepared to rule that states could criminalize flag desecration.

In 1966, police in Brooklyn, New York, arrested a man for publicly burning the flag as a protest against the shooting of civil rights activist James Meredith. He was convicted of mutilating a flag, but the high court reversed that conviction in 1974 on the narrow ground that it had rested in part on the man's spoken words: "If they can do that to Meredith, we don't need no American flag."

In 1970, Massachusetts police arrested a man for walking around with a small flag sewn to the seat of his pants. The charge was that he had treated the flag "contemptuously." The Supreme Court in 1974 reversed that conviction, but only on the ground that the law was impermissibly vague.

The court failed again in 1974 decisively to resolve the matter when it overturned the conviction of a Seattle college student for "improper use" of the flag. In 1970, the man had affixed a large peace symbol to the flag, and then hung it upside down outside his window to protest the invasion of Cambodia and the killing of students at Kent State University. The court found the state law unconstitutional, but only in the context of clearly political protest aimed at achieving a specific political goal. Justices Rehnquist and White, and former Chief Justice Warren E. Burger dissented, arguing that states have the authority to make misuse of the flag a crime even if it were part of an expression of political views.

In 1987, the nomination of Robert H. Bork to the Supreme Court was defeated because, among other things, Bork hedged his support for the principles enunciated in the *Brandenburg* case. After Bork's defeat, President Reagan nominated Kennedy, who voted with the majority in the Dallas case. In televised interviews following the court decision, Bork said that he would have voted to uphold the Texas flag desecra-

tion law.

Texas v. *Johnson* began during a protest march called the "Republican War Chest Tour," during the 1984 convention. Protesters ripped a flag from a downtown Dallas bank, and an undercover police officer testified that Gregory Lee Johnson, a member of the Revolutionary Communist Youth Brigade, poured lighter fluid on the flag and set it ablaze while fifty protesters chanted, "America, the red, white, and blue, we spit on you."

Johnson was convicted of violating a Texas law against "desecration of a venerated object," sentenced to one year in jail, and fined $2,000. The state law prohibited defacing or damaging the flag in a way that the perpetrator knows will "seriously offend people." Undercover officers at the demonstration said they were so offended.

The Texas Court of Appeals, relying on *Brandenburg*, threw out the conviction last year, voting 5-4 that the law was invalid in this case because the flag-burning was symbolic speech.

Burning the flag became a particularly controversial act of dissent during anti-war protests in the late 1960s and early 1970s, but in recent years the flag reemerged as a volatile political issue. In last year's presidential campaign, President Bush attacked his Democratic opponent, Gov. Michael S. Dukakis of Massachusetts, for vetoing a proposed Massachusetts law requiring school teachers to begin each day with a recitation of the Pledge of Allegiance to the flag.

The bill passed in March by the Senate and a similar bill that was pending in the House at the time of the decision were spurred by a controversial Chicago art exhibit called "What Is the Proper Way to Display the U.S. Flag." That display had included a flag placed on the floor in front of a shelf with a book inviting visitors to write their comments and step on the flag as they did so. The exhibit sparked weeks of protests by outraged veterans and was called "disgraceful" by President Bush. Like Johnson, the artist was affiliated with the Revolutionary Communist Youth Brigade.

Reaction to the decision was swift and emotional. Veterans groups and others quickly denounced the decision and both houses of Congress and at least ten state legislatures passed resolutions against it, generally by large majorities.

On June 27, President Bush endorsed the call for a constitutional amendment that would prohibit desecration of the flag and void the decision. "Flag burning is wrong," the President said. "Protection of the flag — a unique national symbol — will in no way limit the opportunity nor the breadth of protest available in the exercise of free speech rights."

Congressional supporters quickly agreed on the wording of a proposed amendment, which was introduced in the House of Representatives on June 29 by Republican Minority Leader Robert H. Michel of Illinois. The proposed amendment would read: "The Congress and the states shall have the power to prohibit the physical desecration of the flag of the United States."

The flag amendment would be the first in the 200-year history of the Constitution to directly limit one of the Bill of Rights — the First Amendment protecting freedom of expression. A constitutional amendment must be approved by two-thirds of both houses of Congress and then must be ratified by 38 of the 50 states.

Support for a constitutional amendment protecting the flag was widespread and crossed party and ideological lines. In California, even Assemblyman Tom Hayden, a Democrat who was a prominent protester against the Vietnam War, voted in favor of a resolution urging Congress to approve such a measure. But as the initial reaction ebbed, opponents of the proposed amendment — liberal and conservative — also began to be heard.

On June 28, Ira Glasser, executive director of the ACLU, wrote in the New York Times, that "once one exception is made to the First Amendment, there is no principled way to avoid others. . . . Blasphemy might be a crime in Iran, but it ought not to be a crime in America. Yet, in attempting to convert the flag from a political symbol into a religious icon, that is precisely what George Bush has proposed."

"Freedom of expression often is offensive. But that freedom cannot survive if exceptions are made every time someone in power decides certain forms of expression are too offensive to permit. If we allow that, our right to free speech will inevitably depend on what the President or Congress is willing to permit. And that is precisely what the First Amendment was designed to prevent."

Similar sentiments were voiced by nationally syndicated conservative columnist James J. Kilpatrick. "President Bush is dead wrong in calling for a constitutional amendment to overturn the Supreme Court's ruling last week in the flag burning case," he wrote. "Given the undisputed facts, the Texas law and the high court precedents, that case was properly decided. The defendant . . . was engaged in a form of political 'speech' that clearly merits protection under the First Amendment — and that precious amendment ought to be left alone." Reported in: *Washington Post*, June 22, 28, 30; *New York Times*, June 24, 28, July 4.

The Court's most controversial decision came in the abortion rights case, *Webster* v. *Reproductive Health Services*, decided by a 5-4 vote on the final day of the Court's term, July 3. Although the ruling did not directly involve First Amendment rights, it did seriously limit the scope of the 1973 landmark decision in *Roe* v. *Wade* that a woman's access to abortion procedures is protected by an implicit right to privacy guaranteed by the First Amendment. Although the Court stopped just short of overturning *Roe* v. *Wade*, the majority made it clear that the Supreme Court is now prepared to uphold state restrictions on abortion that have been ruled unconstitutional for the past sixteen years. In addition, the Court accepted three new abortion cases for its next term, which begins in October.

In the decision, the majority upheld three provisions of a 1986 Missouri law. The provisions bar public employees from performing or assisting in abortions not necessary to save a

Texas v. Johnson

The following is an abridged text of the majority opinion and excerpts from the concurring and dissenting opinions issued by the Supreme Court in the flag burning case of Texas *v.* Johnson.

From the opinion of the Court, delivered by Justice William J. Brennan, Jr., joined by Justices Marshall, Blackmun, Scalia, and Kennedy:

After publicly burning an American flag as a means of political protest, Gregory Lee Johnson was convicted of desecrating a flag in violation of Texas law. This case presents the question whether his conviction is consistent with the First Amendment. We hold that it is not.

While the Republican National Convention was taking place in Dallas in 1984, respondent Johnson participated in a political demonstration dubbed the "Republican War Chest Tour." As explained in literature distributed by the demonstrators and in speeches made by them, the purpose of this event was to protest the policies of the Reagan administration and of certain Dallas-based corporations. The demonstrators marched through the Dallas streets, chanting political slogans and stopping at several corporate locations to stage "die-ins" intended to dramatize the consequences of nuclear war. On several occasions they spray-painted the walls of buildings and overturned potted plants, but Johnson himself took no part in such activities. He did, however, accept an American flag handed to him by a fellow protestor who had taken it from a flag pole outside one of the targeted buildings.

The demonstration ended in front of Dallas City Hall, where Johnson unfurled the American flag, doused it with kerosene, and set it on fire. While the flag burned, the protestors chanted, "America, the red, white, and blue, we spit on you." After the demonstrators dispersed, a witness to the flag-burning collected the flag's remains and buried them in his backyard. No one was physically injured or threatened with injury, though several witnesses testified that they had been seriously offended by the flag-burning.

Of the approximately 100 demonstrators, Johnson alone was charged with a crime. The only criminal offense with which he was charged was the desecration of a venerated object. After a trial, he was convicted, sentenced to one year in prison, and fined $2,000. The Court of Appeals for the Fifth District of Texas at Dallas affirmed Johnson's conviction, but the Texas Court of Criminal Appeals reversed, holding that the State could not, consistent with the First Amendment, punish Johnson for burning the flag in these circumstances.

The Court of Criminal Appeals began by recognizing that Johnson's conduct was symbolic speech protected by the First Amendment: "Given the context of an organized demonstration, speeches, slogans, and the distribution of literature, anyone who observed appellant's act would have understood the message that appellant intended to convey. The act for which appellant was convicted was clearly 'speech' contemplated by the First Amendment." To justify Johnson's conviction for engaging in symbolic speech, the State asserted two interests: preserving the flag as a symbol of national unity and preventing breaches of the peace. The Court of Criminal Appeals held that neither interest supported his conviction.

Acknowledging that this Court had not yet decided whether the Government may criminally sanction flag desecration in order to preserve the flag's symbolic value, the Texas court nevertheless concluded that our decision in *West Virginia Board of Education* v. *Barnette* (1943), suggested that fur-

(continued on page 178)

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pregnant woman's life; bar the use of public buildings for performing abortions, even if no public funds are involved; and require that doctors perform tests to determine whether the fetus can live outside the womb if they believe a woman requesting an abortion may be at least twenty weeks pregnant.

The Court did not rule on another provision of the Missouri law that barred the use of public funds for counseling women about abortion. The American Library Association and the Freedom to Read Foundation had filed an *amicus curiae* brief urging the Court to strike down that provision of the Missouri law on the grounds that it could restrict the ability of libraries to provide access to information about abortion (see *Newsletter*, July 1989, p. 134). However, the Court accepted Missouri's claim that the provision — invalidated by the lower courts — was "not, at the conduct of any physician or health care provider, private or public" but was "directed solely at those persons responsible for expending public funds." Therefore, the majority ruled, the issue was no longer a matter of controversy.

The broader significance of the Court's decision lay in the way the five justices in the majority reconciled their action upholding the Missouri law with the right to privacy assumed under *Roe* v. *Wade* and previously developed by the Court's benchmark 1965 ruling in *Griswold* v. *Connecticut* that struck down a Connecticut ban on access to contraceptive devices.

Within the majority, there were three different approaches. Justices Byron R. White and Anthony M. Kennedy joined Chief Justice William Rehnquist's lead opinion in all respects. Justices Antonin Scalia and Sandra Day O'Connor joined the Chief Justice for most of his opinion, but each wrote separately and adopted a distinctly different approach on how far to take criticism of *Roe* v. *Wade*.

In upholding the viability test provision of the Missouri law, Rehnquist found fault with *Roe* v. *Wade*'s determination that abortions may be restricted in the interests of protecting the fetus only after viability, assumed to be after the first trimester. The Chief Justice said the "rigid trimester analysis" outlined in *Roe* v. *Wade* made "constitutional law in this area

a virtual Procrustean bed." Declaring that the "key elements" of *Roe* v. *Wade* were "not found in the text of the Constitution or in any place else one would expect to find a constitutional principle," Rehnquist concluded that "we do not see why the State's interest in protecting potential human life should come into existence only at the point of viability."

The Chief Justice and the two justices who voted with him proposed a new standard for reviewing abortion restrictions: whether the requirement "permissibly furthers the State's interest in protecting potential human life." But, the opinion added, since Missouri did not seek to limit abortions before the point of viability, there was no need to overturn *Roe* v. *Wade*. "We leave it undisturbed," Rehnquist said, adding, "We would modify and narrow *Roe* and succeeding cases" in an appropriate case.

In his concurring opinion, Justice Scalia emerged as the justice most eager to overrule *Roe* v. *Wade* and sharply criticized the other justices in the majority for not doing so. By contrast, Justice O'Connor wrote in her concurring opinion that the Court had no occasion in *Webster* to discuss its abortion precedents. Although Justice O'Connor wrote that she continued to view *Roe*'s "trimester framework" as "problematic," her opinion lacked some of the sharp criticism she had previously directed at the 1973 abortion decision. Repeating one of her formulations from a 1983 dissent, she said, "A regulation imposed on a lawful abortion is not unconstitutional unless it unduly burdens the right to seek abortion."

"There will be time enough to reexamine *Roe*," Justice O'Connor added, "and to do so carefully."

In a bitter and passionate dissent, Justice Harry A. Blackmun, who wrote the 7-2 majority opinion in *Roe* v. *Wade*, said he had no doubt that the 1973 ruling was in serious danger. Joined by Justices William J. Brennan and Thurgood Marshall and directing most of his fire at Rehnquist's opinion, he said, "The plurality repudiates every principle for which *Roe* stands."

"With respect to the *Roe* framework, the general constitutional principle — indeed, the fundamental constitutional right — for which it was developed is the right to privacy, a species of 'liberty' protected by the due process clause, which under our past decisions safeguards the right of women to exercise some control over their own role in procreation," Blackmun continued. "Few decisions are 'more basic to individual dignity and autonomy' or more appropriate to that 'certain private sphere of individual liberty' that the Constitution reserves from the intrusive reach of government than the right to make the uniquely personal, intimate and selfdefining decision whether to end a pregnancy. It is this general principle, the 'moral fact that a person belongs to himself and not others nor to society as a whole,' that is found in the Constitution."

In a separate dissent, Justice John Paul Stevens argued that the Court should have invalidated the preamble to the Missouri statute which declares that life begins at conception on the explicitly First Amendment ground that it lacked any secular purpose. He said that such a position could only be reached on theological grounds.

"I am persuaded," Stevens wrote, "that the absence of any secular purpose for the legislative declarations that life begins at conception and that conception occurs at fertilization makes the relevant portion of the preamble invalid under the Establishment Clause of the First Amendment. . . . This conclusion does not, and could not, rest on the fact that the statement happens to coincide with the tenets of certain religions . . . or on the fact that the legislators who voted to enact it may have been motivated by religious considerations. . . . Rather, it rests on the fact that the preamble, an unequivocal endorsement of a religious tenet of some but by no means all Christian faiths, serves no identifiable secular purpose. That fact alone compels a conclusion that the statute violates the Establishment Clause." Reported in: *New York Times*, July 4.

Somewhat overshadowed by the tumult surrounding the abortion decision were two decisions announced the same day in a case involving government-sponsored commemoration of religious holidays. Drawing ever finer distinctions between permissible and impermissible religious displays, the court ruled 5-4 July 3 that the Constitution did not permit Allegheny County, Pennsylvania, to display a nativity scene in its courthouse.

At the same time, however, the court — now by a 6-3 margin — upheld the placement of a Jewish Chanukah menorah next to a Christmas tree in front of the city-county building a block away from the creche.

The critical distinction, said Justice Harry A. Blackmun for the court majority, was a matter of context. Blackmun said the creche, unadorned by more secular symbols of the Christmas season, gave the impression that the county government was endorsing the display's religious message. Under the Court's precedents, Blackmun said, "Government may celebrate Christmas in some manner and form, but not in a way that endorses Christian doctrine. Here, Allegheny County has transgressed this line."

On the other hand, Blackmun said the menorah, placed next to a 45-foot-tall Christmas tree, was part of a display intended not as an official religious endorsement but as recognition that "both Christmas and Chanukah are part of the same winter-holiday season, which has attained a secular status in our society."

Of the nine justices, only Justices Blackmun and Sandra Day O'Connor voted both to strike down the creche and to uphold the menorah. Justices William J. Brennan, Jr., Thurgood Marshall, and John Paul Stevens joined them in striking down the nativity scene. Brennan, Stevens and Marshall dissented from Blackmun's opinion upholding the menorah display.

Justice Anthony M. Kennedy, joined by Chief Justice William H. Rehnquist and Justices Byron R. White and Antonin Scalia, concurred in allowing the menorah display. But they harshly disagreed that the creche was unconstitu-

tional. (For excerpts from the opinions see page 174).

The two rulings in *Allegheny County* v. *Greater Pittsburgh ACLU* and two related cases, together essentially established a case-by-case approach for testing the constitutionality of publicly sponsored religious displays in the holiday season. They also indicated that the Court continued to be divided on the proper approach to what O'Connor called the "delicate task" of reviewing government action under the clause of the First Amendment that says government may not "establish" religion.

In a 1971 case, *Lemon* v. *Kurtzman*, decided unanimously with an opinion by then-Chief Justice Warren E. Burger, the Court developed a three-part test to determine whether or not government action amounts to the "establishment" of religion. In order to be constitutional, the court said, a government action must have a secular purpose, its primary effect must neither advance nor inhibit religion, and it must not foster "excessive entanglement" with religion.

Applying the *Lemon* test in a 1984 ruling, *Lynch* v. *Donnelly*, the Court upheld 5-4 the display of a nativity scene in Pawtucket, Rhode Island. The display, owned by the city and placed in a private park, was upheld because it was part of a larger display that included Santa Claus, reindeer, and snowmen, and other secular holiday items. O'Connor, in that case, provided the fifth vote and outlined the "endorsement" test adopted by the Court in disapproving the Allegheny County creche. She then stressed in a separate opinion that the result in each case should turn on the "unique circumstances" and "particular physical setting" involved.

In his dissent, Justice Kennedy called into question the validity of the *Lemon* test, a position previously enunciated by Justice Scalia in his dissenting opinion in a case involving the teaching of "creationism" in public schools. Kennedy said the majority view of the First Amendment's establishment clause "reflects an unjustified hostility toward religion, a hostility inconsistent with our history and our precedents."

"Substantial revision of our establishment clause doctrine may be in order," Kennedy wrote. He proposed a two-part test for deciding whether a government action amounts to an unconstitutional establishment of religion: whether anyone was "coerced" into supporting religion or participating in a religious observance; and whether the government program "gives direct benefits to religion in such a degree that it in fact establishes a state religion or religious faith." Neither the creche nor the menorah met those definitions, Kennedy said.

Religious groups around the country were generally unhappy with the decisions, though for differing reasons. Representatives of the National Legal Foundation, a group with ties to evangelical Christians, welcomed the decision to permit the menorah, but criticized the decision to forbid the nativity scene. Robert K. Skolrood, the foundation's executive director, said the Court was being manipulated by "anti-religious fanatics out to destroy the beliefs and cherished values that made our nation strong."

On the other hand, numerous Jewish groups praised the Court for not allowing the Nativity scene, but expressed concern about the menorah decision because it was held to represent a seasonal rather than a religious symbol. "We are unhappy that the Court strained to give the menorah a secular meaning," said Henry Siegman, executive director of the American Jewish Congress. "In a sense, this denudes the menorah of its truly religious significance." Several other Jewish groups also expressed favor for a total ban on both menorahs and nativity scenes on public property.

Americans United for the Separation of Church and State, which had joined with the American Jewish Committee and the National Council of Churches in an *amicus* brief arguing against permitting the menorah, expressed satisfaction with the decision. But "we would have preferred a clean sweep, that is, no religious symbols at all," said the group's executive director, the Rev. Robert L. Maddox. "This is something we could live with, even if it is another scary 5-4 decision." Reported in: *New York Times*, July 4; *Washington Post*, July 4.

On June 23, the Supreme Court declared unanimously that a federal ban on commercial telephone messages that are "indecent" but not "obscene" violates the First Amendment. At the same time, however, by a 6-3 vote the Court upheld the portion of a 1988 law banning obscene phone messages. The decision, written by Justice Byron R. White, did not define either obscenity or indecency. The constitutional definition of obscenity remains the one the Court adopted in 1973 in *Miller* v. *California*. The Court has never directly defined indecency, but has indicated that speech that is "patently offensive" according to community standards but that falls short of the tests of obscenity, can be considered "indecent."

The ruling was a partial victory for the $2-billion-a-year "dial-a-porn" industry, which offers sexually explicit recorded messages on special telephone exchanges. The industry has been under sustained attack from Congress and federal regulators since it began in 1983.

The Court was considering the latest attempt to shut down the industry. A 1988 law made it a crime to offer both obscene and indecent telephone messages for commercial purposes. The law was challenged by Sable Communications of California, Inc. In a July 1988 ruling, U.S. District Court Judge A. Wallace Tashima in Los Angeles upheld the obscenity portion but declared that the ban on indecent speech violated the First Amendment (see *Newsletter*, September 1988, p. 165).

Both Sable and the Reagan administration appealed directly to the Supreme Court. Sable argued that the entire law was unconstitutional, while the administration argued that the Constitution permitted the ban on indecency as well as obscenity. The decision in *Sable Communications* v. *FCC* affirmed Tashima's ruling in both respects.

"We have repeatedly held that the protection of the First

court opinions on religious displays

The following are excerpts from the Supreme Court's July 3 decision limiting religious displays on government property:

From the opinion of the court delivered by Justice Harry A. Blackmun:

Precisely because of the religious diversity that is our national heritage, the founders added to the Constitution a Bill of Rights, the very first words of which declare: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." Perhaps in the early days of the Republic these words were understood to protect only the diversity within Christianity, but today they are recognized as guaranteeing religious diversity and equality to the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism.

Whether the key word is endorsement, favoritism or promotion, the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief.

The Government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the Government's use of religious symbolism depends upon its context. Accordingly, our present task is to determine whether the display of the creche and the menorah, in their respective particular physical settings, has the effect of endorsing or disapproving religious beliefs.

The creche in this lawsuit uses words, as well as the picture of the Nativity scene, to make its religious meaning unmistakably clear. Here . . . nothing in the context of the display detracts from the creche's religious message . . . The county sends an unmistakable message that it supports and promotes the Christian praise to God that is the creche's religious message.

Government may celebrate Christmas in some manner and form, but not in a way that endorses Christian doctrine. Here, Allegheny County has transgressed this line.

The display of the Hanukkah menorah in front of the City-County Building may well present a closer constitutional question. The menorah, one must recognize, is a religious symbol . . . But the menorah's message is not exclusively religious. The menorah is the primary visual symbol for a holiday that, like Christmas, has both religious and secular dimensions.

Moreover, the menorah here stands next to a Christmas tree and a sign saluting liberty. . . . The display of the menorah is not an endorsement of religious faith but simply a recognition of cultural diversity. For purposes of the Establishment Clause, the city's overall display must be understood as conveying the city's secular recognition of different traditions for celebrating the winter holiday season.

From the dissenting opinion by Justice William J. Brennan, Jr.:

The city's erection alongside the Christmas tree of the symbol of a relatively minor Jewish religious holiday, far from conveying the city's secular recognition of different traditions for celebrating the winter holiday season or a message of pluralism and freedom of belief, has the effect of promoting a Christianized version of Judaism.

From the dissenting opinion by Justice Anthony M. Kennedy:

The majority holds that the County of Allegheny violated the Establishment Clause by displaying a creche in the county courthouse because the principal or primary effect of the display is to advance religion. This view of the Establishment Clause reflects an unjustified hostility toward religion, a hostility inconsistent with our history and our precedents, and I dissent from this holding.

The creche display is constitutional and, for the same reasons, the display of a menorah by the city of Pittsburgh is permissible as well.

Obsessive, implacable resistance to all but the most carefully scripted and secularized forms of accommodation requires this Court to act as a censor, issuing national decrees as to what is orthodox and what is not. What is orthodox in this context means what is secular; the only Christmas the state can acknowledge is one in which references to religion have been held to a minimum. The Court thus lends its assistance to an Orwellian rewriting of history as I understand it. □

Amendment does not extend to obscene speech," Justice White said. On the other hand, he argued, the goal of preventing children from being exposed to indecent telephone messages, while valid, could not justify a complete ban that also prevented adults from access to material that has the protection of the First Amendment.

Justice White said the law "has the invalid effect of limiting the content of adult telephone conversations to that which is suitable for children to hear." He added, "It is another case of burning up the house to roast the pig."

Sable's principal argument on the obscenity issue was that the law, in effect, set a national standard for obscenity, in contrast to the "community standards" approach of *Miller*. But White said the provider could take various steps to avoid this problem, like hiring operators to determine the origin of long-distance calls, tailoring its messages to different areas, or arranging with local telephone companies to block calls.

White's opinion suggested that the Court might uphold a more limited approach to regulating indecent phone messages. He noted that the Federal Communications Commission had at one point endorsed proposals for limiting minors' access through the use of special codes or credit cards. "For all we

know," he said, such methods "would be extremely effective."

Justice William J. Brennan, Jr., dissented from the obscenity portion of the decision. He was joined by Justices Thurgood Marshall and John Paul Stevens. "I have long been convinced that the exaction of criminal penalties for the distribution of obscene materials to consenting adults is constitutionally intolerable," Brennan said. Reported in: *New York Times*, June 24.

In a victory for the news media, the Supreme Court ruled 6-3 June 21 that, except in unusual circumstances, the First Amendment does not allow a newspaper to be sued for damages for printing the name of a rape victim that it obtained lawfully from public records.

Writing for the court, Justice Thurgood Marshall overturned a jury's $97,000 damage award to a Jacksonville, Florida, woman, saying that if a newspaper lawfully obtains truthful information about a matter of public interest, then state officials may not punish its publication without showing that that action was related to "a state interest of the highest order."

Marshall stressed that the "holding today is limited. We do not hold that truthful publication is automatically constitutionally protected, or that there is no zone of personal privacy within which the state may protect the individual from intrusion by the press or even that a state may never punish publication of the name of a victim of a sexual offense."

The case, *Florida Star* v. *B. J. F.*, began after *The Florida Star*, a weekly newspaper primarily serving the black community in Jacksonville, inadvertently published the name of a woman, identified in court only by three initials, who had been robbed and raped. The Sheriff's Department prepared a report identifying her by her full name and put it in the department's press room. A *Star* reporter-trainee copied the report and an editor failed to remove the name. The newspaper has a policy of not printing the names of rape victims. The woman sued, claiming the paper violated a Florida law against publishing the names of such victims.

The jury's verdict was upheld by a state appeals court but the Supreme Court, relying on a 1979 decision, *Smith* v. *Daily Mail Publishing Co.*, reversed. Justice Marshall was joined by Justices Brennan, Blackmun, Stevens, and Kennedy. Justice Antonin Scalia wrote a concurring opinion.

Justice Byron R. White, in a sharp dissent joined by Chief Justice Rehnquist and Justice O'Connor, rejected the view that the ruling was limited. "I do not suggest that the court's decision today is a radical departure from a previously charted course," White wrote, saying the "ruling has been foreshadowed" by a 1967 decision involving Time, Inc., and another in 1975 involving Cox Broadcasting. In the 1975 decision, he said, "we acknowledged the possibility that the First Amendment may prevent a state from ever subjecting the publication of truthful information to civil liability. Today, we hit the bottom of the slippery slope." Reported in: *Washington Post*, June 22.

New York City's noise-control regulation for concerts at the Central Park bandshell was upheld June 22 by a 6-3 vote of the Supreme Court. The decision reversed a lower court ruling that the regulation violated performers' First Amendment right to free expression.

The 1986 regulation, which was aimed at limiting excessive noise from rock concerts but which applies to all musical performances at the Naumburg Bandshell, requires performers to use a city-supplied sound system and sound technician. The regulation was challenged on First Amendment grounds by Rock Against Racism, the promoter of an annual Central Park concert.

In his majority opinion, Justice Anthony M. Kennedy said that the U.S. Court of Appeals for the Second Circuit had used the wrong analysis in striking down the regulation. The appeals court had said that for the regulation to be constitutionally valid, New York City would have to prove that requiring performers to use the city's sound system was the "least intrusive means available" to control excessive noise. But Kennedy said that in cases in which expression was not being banned but simply regulated as to "time, place, and manner," the Constitution did not require the government to choose the "least-restrictive means available."

"So long as the means chosen are not substantially broader than necessary to achieve the government's interest," Kennedy said, "the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative."

Kennedy was joined by Chief Justice Rehnquist and Justices White, O'Connor, and Scalia. Justice Blackmun concurred separately.

In a dissenting opinion, Justice Thurgood Marshall, joined by Justices Brennan and Stevens, said that by refusing to apply the "least restrictive" test, the Court had removed "a key safeguard of free speech." He said the decision "eviscerates the First Amendment" by permitting the government to exercise "exclusive control of the means of communication."

"Unfortunately, the majority plays to our shared impatience with loud noise to obscure the damage that it does to our First Amendment rights," Marshall wrote.

When the case was argued in February, there was a lively debate over the precise role played by the person in charge of mixing the sounds at a concert. Leonard J. Koerner, the city's chief assistant corporation counsel, told the justices, "He's really a technician." But attorney William Kunstler, arguing for Rock Against Racism, said the role was more that of a symphony conductor.

The Court did not resolve the question, although Justice Kennedy appeared to agree somewhat with Kunstler when he said the sound technician "plays an important role in determining the quality of the amplified sound." But Kennedy noted findings by the lower court that the city required its technicians to defer to the wishes of the performers and that other groups had been satisfied with the results.

"We must conclude that the city's guideline has no material impact on any performer's ability to exercise complete artistic control over sound quality," Kennedy said.

"Now art is subject to government control," Kunstler commented about the ruling, "something the framers of the Constitution certainly would not have countenanced." Reported in: *New York Times*, June 23.

On June 21, by a 6-3 vote with no majority opinion, the Supreme Court overruled a decision by the Massachusetts Supreme Judicial Court that a state law prohibiting adults from posing or exhibiting minors "in a state of nudity" was unconstitutional and remanded for trial a man charged under the statute for taking partially nude photographs of his 14-year-old stepdaughter. Justice Sandra Day O'Connor, joined by Chief Justice Rehnquist and Justices White and Kennedy, concluded that an intervening amendment to the statute which added a "lascivious intent" requirement to the "nudity" portion and eliminated certain exemptions had rendered moot the determination by the state court that the law was overbroad.

Justice Scalia filed an opinion concurring in the judgment in part and dissenting in part, in which Justice Blackmun joined. According to Justice Scalia, the overbreadth challenge could not be rendered moot simply because the statute had been amended. In that view he and Blackmun were joined by Justices Brennan, Marshall, and Stevens. But Scalia concluded that even before the amendment the statute was not overbroad, thus forming a majority for the decision to overturn the ruling of the state court and to remand the case for review of how the law was applied in Oakes' case. Justice Brennan filed a dissenting opinion, arguing that the statute was overbroad and that the issue was not moot, in which Justices Marshall and Stevens joined.

The case, *Massachusetts* v. *Oakes*, began in 1984 when Douglas Oakes took the photographs. He was indicted, tried, and convicted of violating the statute, but the conviction was reversed. After holding that Oakes' posing of the stepdaughter was speech for First Amendment purposes, the state high court struck down the statute as substantially overbroad under the First Amendment without addressing whether it had been applied constitutionally to Oakes (see *Newsletter*, May 1988, p. 100; July 1988, p. 130).

Although *Massachusetts* v. *Oakes* originally raised several important unresolved questions in the law governing production of child pornography, the Court's decision to uphold the statute as amended and not as yet to review the legality of Oakes's conviction under it, will have minimal impact because the only proposition to which a majority of five justices agreed was that the overbreadth challenge could not be rendered moot by narrowing the statute after the conduct for which the defendant had been indicted occurred. Reported in: Slip Opinion 87-1651.

In a case decided by a 6-3 vote June 29, the Supreme Court gave state and federal officials broader leeway under the First Amendment to restrict the free speech rights of corporations. The high court ruled that government officials need not adopt the "least restrictive" means of regulating commercial speech, such as advertising.

The decision in *Board of Trustees, State University of New York* v. *Fox* continued the court's three-year-old move in the direction of cutting back First Amendment protection for commercial speech.

In an opinion written by Justice Antonin Scalia, the high court said that government restrictions on commercial speech may be broader than what is absolutely necessary to control a particular kind of message. As long as a restriction is a "reasonable" attempt at regulation, it need not be "a perfect fit," Scalia said.

The decision involved a regulation adopted by the State University of New York restricting commercial access to school dormitories. A dispute arose in 1982 at the Cortland, N.Y., campus when a representative of American Future Systems, a housewares company, was arrested in a dormitory for violating the regulation. That prompted a group of students to challenge the regulation in court, arguing that it violated the students' First Amendment right to hold housewares demonstrations and sales parties.

A federal judge upheld the regulation in 1986. In 1988, the U.S. Court of Appeals for the Second Circuit said it was unclear whether the state used the "least restrictive" means of regulating commercial speech and ordered a new hearing. A federal judge then struck down the regulation last October.

The Supreme Court took no position on whether the regulation is valid, ordering the lower courts to take another look, applying the standard of "reasonableness" rather than that of "least restrictive means." The Supreme Court also said the lower courts should examine whether the regulation is invalid because it restricts some noncommercial speech. The majority opinion strongly suggested that the regulation is too broad because it limits student access in the dormitory to legal services, medical advice, and tutoring.

Justice Harry A. Blackmun, joined by Justices Brennan and Marshall, dissented. They questioned the court's cutback on First Amendment protection of commercial speech, and suggested that the regulation is unconstitutional because it restricts some noncommercial speech.

Harvard Law School Professor Laurence Tribe called the decision "a significant step in moving regulation of commercial speech toward the same kind of regulation that economic activity generally merits." But Henry Reath, lawyer for the students, said the concern expressed by the Court over the impact of the regulation on noncommercial speech was a "victory," Reported in: *Wall Street Journal*, June 30.

child pornography

Washington, D.C.

The Bush administration will appeal a federal court ruling striking down provisions of a 1988 child pornography law that imposed stringent record-keeping requirements on magazine and book publishers, film producers, photographers and possibly even painters and sculptors. The decision to appeal the May 16 ruling by U.S. District Court Judge George H. Revercomb in *American Library Association* v. *Thornburgh* was disclosed in a one-paragraph appeal notice released July 14 by the Justice Department. The decision came on the next to last day the government could give notice of its intention to appeal.

Provisions of the law overturned by Revercomb require that anyone who produces books, magazines, other periodicals, still or motion picture films, videotapes, and other media showing explicit sexual conduct must maintain complete records of the verified identities of all models and actors retroactive to work begun after February 6, 1978 (see *Newsletter*, July 1989, p. 135).

David Ogden, a lawyer for the Freedom to Read Foundation and other groups including the American Library Association that challenged the law, said he was disappointed that the government chose to pursue the case, even though it is common for the Justice Department to press an appeal of statutes that are invalidated at the trial court level. "I guess I was hopeful because this law is so clearly unconstitutional that cooler heads would prevail," Ogden said. Reported in: *Los Angeles Times*, July 18.

obscenity

Milwaukee, Wisconsin

In a blow to Wisconsin's year-old obscenity law, U.S. District Court Judge J.P. Stadtmueller granted a preliminary injunction June 12 that bars the state from enforcing the law. Stores in Milwaukee and Oshkosh had challenged the law, calling it unconstitutional. It was passed in 1988, but no one has been prosecuted under it.

Intended to halt commercial traffic in hard-core pornography, the law calls for jail terms of up to five years and fines of up to $10,000 for pornography wholesalers. In his decision, Stadtmueller said the statute was unconstitutionally vague. The judge said it was difficult to determine whether the law was violated by depicting sexually explicit conduct, by describing sexually explicit conduct, or both. Reported in: *Minneapolis Star-Tribune*, June 13.

zoning

Alameda, California

A state Court of Appeal on July 3 struck down a novel municipal law banning newsrack sales of sexually explicit newspapers from residential neighborhoods. An ordinance adopted by the City of Alameda had sought to limit the location of such vending machines in the same way other communities have restricted adult theaters and bookstores offering material that is explicit but not legally obscene.

The appellate panel found that the city had failed to show that the newsracks created urban blight and held that the ordinance, in restricting expression based on its content, infringed on freedom of the press.

"It may be true that . . . adult entertainment downgrades neighborhoods," Appellate Justice Donald B. King wrote for the court. "But neither prior cases, independent studies nor common sense have yet demonstrated that adult newsracks downgrade neighborhoods."

The city's contention that the newsracks provide a potential meeting place for prostitutes and customers "sounds more like an idea for a Gary Larson cartoon than a plausible constitutional argument," King said. The ruling is binding on all trial courts in California unless overturned by the state Supreme Court.

The ordinance, barring newsracks containing sexually explicit newspapers from within 500 feet of a residential community, was adopted in 1987 after parents complained their grade school children were bringing home copies of the *Spectator*, a tabloid that calls itself "California's Weekly Sex News & Review."

In enacting the measure, the Alameda City Council expanded an existing ordinance that limited theaters and other adult entertainment to certain locales — a legal concept that has been upheld by the U.S. Supreme Court.

But an Alameda County Superior Court judge last year barred the newsrack measure from taking effect, finding it violated the First Amendment (see *Newsletter*, May 1988, p. 99). The appeals court upheld that ruling in an opinion by King that was joined by Appellate Justices Harry W. Low and Zerne P. Haning. Reported in: *Los Angeles Times*, July 4.

etc.

St. Louis, Missouri

The U.S. Court of Appeals for the Eighth Circuit in St. Louis ruled in late May that the Omnibus Crime Control Act does not prohibit interception of cordless telephone conversations. In a unanimous opinion, a three-judge panel said: "Courts have not accepted the assertions of privacy expectation by speakers who were aware that their conversation was being transmitted by cordless telephone."

The ruling arose from a case in Iowa in which criminal charges were filed against a man who had been unaware that a family four blocks from his house was listening to his conversations over his cordless phone. The man, Scott Tyler, filed a civil suit over the matter and said he would press his case to the Supreme Court if necessary. "It's been a five-year battle," he said, "and this is not over by any means."

The case began in 1983 when the neighbors suspected that Tyler was involved in criminal activities from the conversations they overheard on the phone. They notified authorities and were asked to continue eavesdropping. Although no court order was obtained, recordings of Tyler's conversations made by the neighbors led to his conviction of theft, although the trial judge did not permit introduction of the tapes as evidence.

The appeals court said that the 1986 overhaul of federal wiretap laws had changed the definition of wire communications to say that "such term does not include the radio portion of a cordless telephone [call] that is transmitted between the cordless telephone handset and the base unit." Reported in: *Long Beach Press-Telegram*, June 22.

Olympia, Washington

Murals in the state House of Representatives depicting the "Twelve Labors of Hercules" that offended some legislators because they show nudity were to be displayed for the summer and then removed to storage. Washington paid $100,000 to have the murals created in 1981, but after lawmakers objected, the state spent another $100,000 to have them covered with gold drapes and fight a lawsuit seeking their removal. Judge Terrence Carroll ruled in King County Superior Court in December that if the murals could be removed without damage, the state was within its legal rights to take them down and display them elsewhere. Reported in: *New York Times*, June 14. □

(Texas v. Johnson . . . from page 171)

thering this interest by curtailing speech was impermissible. "Recognizing that the right to differ is the centerpiece of our First Amendment freedoms," the court explained, "a government cannot mandate by fiat a feeling of unity in its citizens. Therefore, that very same government cannot carve out a symbol of unity and prescribe a set of approved messages to be associated with that symbol when it cannot mandate the status or feeling the symbol purports to represent." Noting that the State had not shown that the flag was in "grave and immediate danger" of being stripped of its symbolic value, the Texas court also decided that the flag's special status was not endangered by Johnson's conduct.

As to the State's goal of preventing breaches of the peace, the court concluded that the flag-desecration statute was not drawn narrowly enough to encompass only those flag-burnings that were likely to result in a serious disturbance of the peace. And in fact, the court emphasized, the flag burning in this particular case did not threaten such a reaction. " 'Serious offense' occurred," the court admitted, "but there was no breach of peace nor does the record reflect that the situation was potentially explosive. One cannot equate 'serious offense' with incitement to breach the peace." . . .

Johnson was convicted of flag desecration for burning the flag rather than for uttering insulting words. This fact somewhat complicates our consideration of his conviction under the First Amendment. We must first determine whether Johnson's burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment in challenging his conviction. If his conduct was expressive, we next decide whether the State's regulation is related to the suppression of free expression. If the State's regulation is not related to expression, then the less stringent standard we announced in *United States* v. *O'Brien* for regulations of noncommunicative conduct controls. If it is, then we are outside of *O'Brien*'s test, and we must ask whether this interest justifies Johnson's conviction under a more demanding standard. A third possibility is that the State's asserted interest is simply not implicated on these facts, and in that event the interest drops out of the picture.

The First Amendment literally forbids the abridgement only of "speech," but we have long recognized that its protection does not end at the spoken or written word. While we have rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea," we have acknowledged that conduct may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments."

In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it." Hence, we have recognized the expressive nature of students' wearing of black armbands to protest American military involvement in Vietnam; of a sit-in by blacks in a "whites only" area to protest segregation; of the wearing of American military uniforms in a dramatic presentation criticizing American involvement in Vietnam; and of picketing about a wide variety of causes.

Especially pertinent to this case are our decisions recognizing the communicative nature of conduct relating to flags. Attaching a peace sign to the flag, saluting the flag, and displaying a red flag, we have held, all may find shelter under the First Amendment. That we have had little difficulty identifying an expressive element in conduct relating to flags should not be surprising. The very purpose of a national flag is to serve as a symbol of our country; it is, one might say, "the one visible manifestation of two hundred years of nationhood."

> "[T]he flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design."

Pregnant with expressive content, the flag as readily signifies this Nation as does the combination of letters found in "America."

We have not automatically concluded, however, that any action taken with respect to our flag is expressive. Instead, in characterizing such action for First Amendment purposes, we have considered the context in which it occurred. In *Spence*, for example, we emphasized that Spence's taping of a peace sign to his flag was "roughly simultaneous with and concededly triggered by the Cambodian incursion and the Kent State tragedy." The State of Washington had conceded, in fact, that Spence's conduct was a form of communication, and we stated that "the State's concession is inevitable on this record."

The State of Texas conceded for purposes of its oral argument in this case that Johnson's conduct was expressive conduct, and this concession seems to us as prudent as was Washington's in *Spence*. Johnson burned an American flag as part—indeed, as the culmination—of a political demonstration that coincided with the convening of the Republican Party and its renomination of Ronald Reagan for President. The expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent. At his trial, Johnson explained his reasons for burning the flag as follows: "The American Flag was burned as Ronald Reagan was being renominated as President. And a more powerful statement of symbolic speech, whether you agree with it or not, couldn't have been made at that time. It's quite a just position [juxtaposition]. We had new patriotism and no patriotism." In these circumstances, Johnson's burning of the flag was conduct "sufficiently imbued with elements of communication" to implicate the First Amendment.

The Government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. It may not, however, proscribe particular conduct *because* it has expressive elements. "[W]hat might be termed the more generalized guarantee of freedom of expression makes the communicative nature of conduct an inadequate *basis* for singling out that conduct for proscription. A law *directed at* the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires." It is, in short, not simply the verbal or nonverbal nature of the expression, but the governmental interest at stake, that helps to determine whether a restriction on that expression is valid.

Thus, although we have recognized that where " 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms," we have limited the applicability of *O'Brien*'s relatively lenient standard to those cases in which "the governmental interest is unrelated to the suppression of free expression." In stating, moreover, that *O'Brien*'s test "in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions," we have highlighted the requirement that the government interest in question be unconnected to expression in order to come under *O'Brien*'s less demanding rule.

In order to decide whether *O'Brien*'s test applies here, therefore, we must decide whether Texas has asserted an interest in support of Johnson's conviction that is unrelated to the suppression of expression. If we find that an interest asserted by the State is simply not implicated on the facts before us, we need not ask whether *O'Brien*'s test applies. The State offers two separate interests to justify this conviction: preventing breaches of the peace, and preserving the flag as a symbol of nationhood and national unity. We hold that the first interest is not implicated on this record and that the second is related to the suppression of expression.

Texas claims that its interest in preventing breaches of the peace justifies Johnson's conviction for flag desecration. However, no disturbance of the peace actually occurred or threatened to occur because of Johnson's burning of the flag. Although the State stresses the disruptive behavior of the protestors during their march toward City Hall, it admits that "no actual breach of the peace occurred at the time of the flagburning or in response to the flagburning." The State's emphasis on the protestors' disorderly actions prior to arriving at City Hall is not only somewhat surprising given that no charges were brought on the basis of this conduct, but it also fails to show that a disturbance of the peace was a likely reaction to *Johnson*'s conduct. The only evidence offered by the State at trial to show the reaction to Johnson's actions was the testimony of several persons who had been seriously offended by the flag-burning.

The State's position, therefore, amounts to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace and that the expression may be prohibited on this basis. Our precedents do not countenance such a presumption. On the contrary, they recognize that a principal "function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." It would be odd indeed to conclude *both* that "if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection," *and* that the Government may ban the expression of certain disagreeable ideas on the unsupported presumption that their very disagreeableness will provoke violence.

Thus, we have not permitted the Government to assume

that every expression of a provocative idea will incite a riot, but have instead required careful consideration of the actual circumstances surrounding such expression, asking whether the expression "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." To accept Texas' arguments that it need only demonstrate "the potential for a breach of the peace," and that every flag-burning necessarily possesses that potential, would be to eviscerate our holding in *Brandenburg*. This we decline to do.

Nor does Johnson's expressive conduct fall within that small class of "fighting words" that are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." No reasonable onlooker would have regarded Johnson's generalized expression of dissatisfaction with the policies of the Federal Government as direct personal insult or an invitation to exchange fisticuffs.

We thus conclude that the State's interest in maintaining order is not implicated on these facts. The State need not worry that our holding will disable it from preserving the peace. We do not suggest that the First Amendment forbids a State to prevent "imminent lawless action." And, in fact, Texas already has a statute specifically prohibiting breaches of the peace, which tends to confirm that Texas need not punish this flag desecration in order to keep the peace.

The State also asserts an interest in preserving the flag as a symbol of nationhood and national unity. In *Spence*, we acknowledged that the Government's interest in preserving the flag's special symbolic value "is directly related to expression in the context of activity" such as affixing a peace symbol to a flag. We are equally persuaded that this interest is related to expression in the case of Johnson's burning of the flag. The State, apparently, is concerned that such conduct will lead people to believe either that the flag does not stand for nationhood and national unity, but instead reflects other, less positive concepts, or that the concepts reflected in the flag do not in fact exist, that is, we do not enjoy unity as a Nation. These concerns blossom only when a person's treatment of the flag communicates some message, and thus are related "to the suppression of free expression" within the meaning of *O'Brien*. We are thus outside of *O'Brien*'s test altogether.

It remains to consider whether the State's interest in preserving the flag as a symbol of nationhood and national unity justifies Johnson's conviction.

As in *Spence*, "[w]e are confronted with a case of prosecution for the expression of an idea through activity," and "[a]ccordingly, we must examine with particular care the interests advanced by [petitioner] to support its prosecution." Johnson was not, we add, prosecuted for the expression of just any idea; he was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values.

Moreover, Johnson was prosecuted because he knew that his politically charged expression would cause "serious offense." If he had burned the flag as a means of disposing of it because it was dirty or torn, he would not have been convicted of flag desecration under this Texas law: federal law designates burning as the preferred means of disposing of a flag "when it is in such condition that it is no longer a fitting emblem for display," and Texas has no quarrel with this means of disposal. The Texas law is thus not aimed at protecting the physical integrity of the flag in all circumstances, but is designed instead to protect it only against impairments that would cause serious offense to others. Texas concedes as much: "Section 42.09(b) reaches only those severe acts of physical abuse of the flag carried out in a way likely to be offensive. The statute mandates intentional or knowing abuse, that is, the kind of mistreatment that is not innocent, but rather is intentionally designed to seriously offend other individuals.

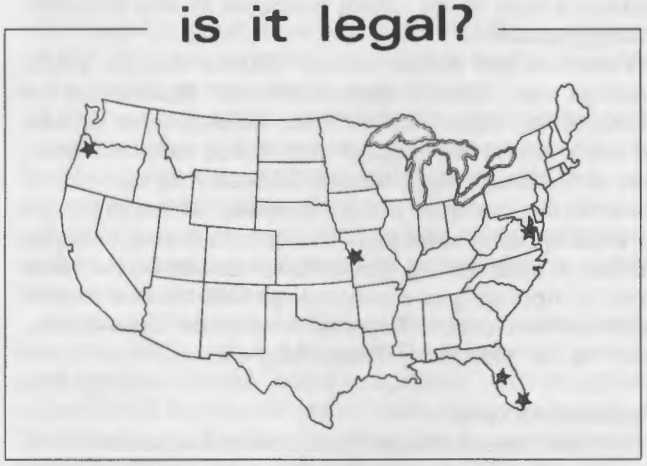
Whether Johnson's treatment of the flag violated Texas law thus depended on the likely communicative impact of his expressive conduct. Our decision in *Boos* v. *Barry* tells us that this restriction on Johnson's expression is content-based. In *Boos*, we considered the constitutionality of a law prohibiting "the display of any sign within 50 feet of a foreign embassy if that sign tends to bring that foreign government into 'public odium' or 'public disrepute.'" Rejecting the argument that the law was content-neutral because it was justified by "our international law obligation to shield diplomats from speech that offends their dignity," we held that "[t]he emotive impact of speech on its audience is not a 'secondary effect'" unrelated to the content of the expression itself.

According to the principles announced in *Boos*, Johnson's political expression was restricted because of the content of the message he conveyed. We must therefore subject the State's asserted interest in preserving the special symbolic character of the flag to "the most exacting scrutiny."

Texas argues that its interest in preserving the flag as a symbol of nationhood and national unity survives this close analysis. Quoting extensively from the writings of this Court chronicling the flag's historic and symbolic role in our society, the State emphasizes the "'special place'" reserved for the flag in our Nation. The State's argument is not that it has an interest simply in maintaining the flag as a symbol of *something*, no matter what it symbolizes; indeed, if that were the State's position, it would be difficult to see how that interest is endangered by highly symbolic conduct such as Johnson's. Rather, the State's claim is that it has an interest in preserving the flag as a symbol of *nationhood* and *national unity*, a symbol with a determinate range of meanings. According to Texas, if one physically treats the flag in a way that would tend to cast doubt on either the idea that nationhood and national unity are the flag's referents or that national unity actually exists, the message conveyed thereby is a harmful one and therefore may be prohibited.

(continued on page 202)

is it legal?



art

Washington, D.C.

Brushing aside objections that Congress should not be deciding what is art or who is an artist, the Senate voted July 26 to bar the National Endowment for the Arts from supporting "obscene or indecent" work and to cut off federal funds to two arts groups because they supported exhibitions of work by two provocative photographers.

In a voice vote, the Senate approved restrictions proposed by Sen. Jesse Helms (Rep.-N.C.) to bar federal arts funds from being used to "promote, disseminate or produce obscene or indecent materials, including but not limited to depictions of sadomasochism, homoeroticism, the exploitation of children, or individuals engaged in sex acts; or material which denigrates the objects or beliefs of the adherents of a particular religion or nonreligion."

The proposal also bars grants for artwork that "denigrates, debases or reviles a person, group or class of citizens on the basis of race, creed, sex, handicap, age or national origin."

Representatives of arts organizations, including the two cited in the legislation — the Southeastern Center for Contemporary Art in Winston-Salem, North Carolina, and the Institute for Contemporary Art at the University of Pennsylvania — said they were appalled by the action, which they said marked the first time Congress had tried to interfere directly in granting money to individual arts groups.

The officials said that the endowment and the groups it supported had faithfully followed the grant-making system approved by Congress. In the system, known as peer review, members of the arts community pass on grant applications in their respective fields. The system was designed to avoid direct government entanglement in the determination of artistic merit.

But Sen. Helms said, "No artist has a preemptive claim on the tax dollars of the American people to put forward such trash." Referring to one controversial work, Helms said: "I don't even acknowledge the fellow who did it was an artist. I think he was a jerk."

The action by the Senate was far more severe than actions taken previously by the House of Representatives against the National Endowment for the Arts. Supporters of the endowment said they were optimistic that the Senate actions could be reversed in conference between the two legislative houses.

The Congress was reacting to the political storm prompted by the works of Andres Serrano and the late Robert Mapplethorpe, whose exhibitions were supported by arts groups that received funds from the endowment. A work by Serrano depicted a plastic crucifix submerged in the artist's urine. Several of Mapplethorpe's photographs depict homoerotic scenes, and an exhibit of his work organized by the Philadelphia museum was canceled by Washington's Corcoran Gallery after it was criticized in Congress (see page 164).

The leadership in the House deflected the political storm against the works by voting a budgetary slap on the wrist, cutting from the endowment's annual $171 million budget the $45,000 that had been granted to support exhibitions of the Serrano and Mapplethorpe work.

The Senate went significantly further, however. Its action, part of a larger appropriations bill, included language barring grants for the next five years to the two arts groups that supported the Serrano and Mapplethorpe exhibitions. An endowment representative estimated that the Winston-Salem group had received $759,400 during the past five fiscal years and that the Institute for Contemporary Art had received $585,000 in the past three fiscal years.

The Senate also accepted the $45,000 cut made by the House and added a specific change with greater impact, cutting the amount the endowment could grant for support of visual arts by $400,000 and increasing the amount for local projects and folk art by $200,000 each.

All of these actions were in the appropriations bill as it arrived on the floor from the Appropriations Committee, which had approved the measures without debate. Supporters of the arts community in the Senate decided against making an issue of these measures on the floor, saying they feared debate would only make matters worse. They said their best hope was to fight to strike the Senate measures in the conference committee.

"We're gradually approaching more and more the Congress telling the art world what is art," said Sen. Howard M. Metzenbaum, (Dem.-Ohio), one of only two Senators to speak on the floor against the action. The other, Sen. John H. Chaffee (Rep.-R.I.) said, "We're getting into a slippery area here."

"The amendment as adopted by the U.S. Senate would be found unconstitutional," contended Anne Murphy, executive director of the American Arts Alliance. If it were

applied, she said, "we certainly couldn't produce most of Shakespeare, certainly not *Richard III*. You couldn't have any anti-Communist art," she added. "I'd guess the Senator is saying the Metropolitan Museum of Art, which receives taxpayer dollars, should take down all religious art."

Murphy said she was confident that both the Helms amendment and the curtailment of funds to the two arts groups could be reversed in the Senate-House conference. Reported in: *New York Times*, July 27.

Miami, Florida

Federal agents kicked in the front door of outspoken art collector Ramon Cernuda's home and raided his office May 5 to seize a truckload of paintings by Cuban artists that Cernuda allegedly bought in violation of the U.S. trade embargo of Cuba. Among the paintings in Cernuda's possession were forty works by dissident Cuban artist Nicolas Guillen-Landrian, brought to the United States by an American diplomat.

Cernuda, a book publisher, said the paintings were meant for exhibit in the U.S. because they had been banned in Cuba. The government alleges that the paintings were brought into the country to be sold for a profit.

Cernuda, a vice president of the Cuban Museum of Arts and Culture in Miami, denounced the searches as part of a politically motivated vendetta designed to punish him for his controversial liberal views. He denied breaking the law. "This is a political crucifixion. This is a return to the McCarthy era in Miami," he said.

Cernuda has been at the center of a bitter, year-long controversy at the museum. It began in April 1988 when he organized a fund-raising auction that included paintings by artists who had not broken with the Castro government (see *Newsletter*, July 1988, p. 126).

Treasury representatives said after the auction that it is illegal for an American to buy or sell art that came out of Cuba after 1963. Violators may be punished by up to $50,000 in fines and ten years in jail.

Cernuda's lawyer, Ted Klein, said his client is innocent and condemned the government's actions as "another indication that Miami is becoming the land of the philistines. It's a disgrace they would seize art, I don't care what the origin of it," Klein said. "To me it's the same as arresting someone for possessing a book or movie from Cuba." Reported in: *Miami Herald*, May 6.

schools

Live Oak, Florida

After receiving a protest from a Jewish activist, the Suwannee County school superintendent May 15 ordered school principals to stop morning Bible readings. In a letter to Mark Freedman, southeast regional director of the American Jewish Congress, Superintendent Charles Blalock said he had instructed each of the school principals to stop the Bible readings in school.

Freedman had earlier warned Blalock that the public readings were "clearly unconstitutional." Blalock said the principals had denied that the Bible readings occur but said he had been told that readings were still an occasional practice at Suwannee High School. Blalock said that county residents may not agree with his decision, but that he wanted to avoid spending taxpayers' money on a lawsuit. Despite the ban on Bible reading, the Suwannee County School board voted in April to ignore court rulings and continue prayers before athletic events. Reported in: *Florida Times-Union*, May 16; *St. Petersburg Times*, May 17.

Portland, Oregon

A federal lawsuit charges that the North Clackamas School District violated the rights of Rex Putnam High School drama students and teachers when it censored a 1987 production of John Steinbeck's *Of Mice and Men*. The lawsuit, filed in early May in U.S. District Court in Portland, seeks a declaration that the district's actions were unlawful. It also seeks an injunction against future similar actions and the maximum monetary damages permitted by law.

The suit was brought by a Rex Putnam drama teacher, the North Clackamas Education Association, the association's former president, a Rex Putnam student-teacher, three drama students, and three parents. Named as defendants were the district, its superintendent and deputy superintendent, the school principal and two assistant principals.

The suit alleges that when administrators ordered the drama teacher and the student cast to eliminate all "offensive" language and references to "the deity," they violated the plaintiffs' constitutional rights under the First Amendment. By ordering the removal of references that might be considered blasphemous by Christians, the district was promoting a specific religion, the suit charges.

The altered play was performed five times in November 1987, despite a recommendation by the Rex Putnam Advisory Committee that it be performed as written. Verbal and written explanations of the censorship to the audience were stopped by the administrators, who wrote their own program, the lawsuit states. Reported in: *Portland Oregonian*, May 6.

access to information

Washington, D.C.

The office of Management and Budget on June 9 released proposed guidelines on dissemination of public information that point to a significant reversal in the federal government's policy of favoring the private sector for publishing government data. A 1985 regulation requires that agencies show that the data they publish are essential and not likely to be gathered and distributed by private interests. The budget

office's new proposal, however, asserts that the government has the obligation to make "information readily available to the public on equal terms to all citizens."

Librarians and public interest groups have clashed with private providers of information in recent years over the role the government should play in making computer data and government information widely available. A number of government agencies are exploring both public and private methods for making data stored on computer more widely accessible to the public.

In January, the budget office published a proposed revision to the 1985 regulation that would have instructed government agencies to avoid "unfair competition" with the private sector. It said they should restrict themselves to information "wholesaling" and refrain from functions like providing software that allows the viewing of data in different ways.

In April, budget office officials said they planned to reconsider the revisions. The June 9 document outlined a new federal information policy, asserting that government information is a public asset.

"It's a bold statement and it's a major step forward," said Gary D. Bass, executive director of OMB Watch, a Washington public interest group. "OMB is repudiating its role as information czar."

The June 9 document acknowledged that most of the 226 public comments received by the agency indicated that the revision proposed in January was heavily biased, "concentrating so much on private sector prerogatives that OMB had failed to elaborate a positive role for federal agencies in the dissemination of government information, even in situations where dissemination of such information was basic to agencies' missions."

"What they've done here is take back the January guidance and said they were misunderstood." said Jerry Berman, director of the ACLU's information technology project. "They've read and heard the criticism, and they've attempted to lay out a positive framework for dissemination of information."

The new document did not, however, represent a final policy statement. The OMB said that it was requesting public comment. Reported in: *New York Times*, June 10.

cable TV

Kansas City, Missouri

The Kansas City Council voted July 13 to restore a local cable television company's public access channel that the city shut off last year after the Ku Klux Klan applied to use it for broadcasts. The Council voted 7-3 to amend its franchise agreement with American Cablevision and restore the channel because city officials had concluded that the city could not win a court action filed against it by the Klan.

The Klan, represented by lawyers of the ACLU, charged that deleting the channel from local cable offerings in June, 1988, violated the Klan's rights to the free speech protection of the First Amendment. When the city decided to eliminate the channel, city officials argued that the action was legal because all users and would-be users were being treated equally and because there was no constitutional right to appear on television. City officials said they thought last year that the public access channel was not a "public forum" and therefore would not be subject to strict First Amendment scrutiny.

The local cable company, which was not sued, said it didn't want the Klan to appear because such programs could hurt the company's business by offending some of its 152,000 subscribers. But the recent decision by the U.S. Supreme Court that flag-burning is protected expression, coupled with a federal judge's memorandum in the case, convinced city officials that chances were slim of winning any possible court battle to keep the Klan off the cable.

"This is a First Amendment issue and we are not going to prevail," said Katheryn Shields, a Council member who voted to restore the public access channel. The vote was delayed more than 20 minutes as members of city minority groups in the chamber sang civil rights songs loud enough to delay the proceedings.

Council member John A. Sharp said the city should continue to fight the case. He said the city needed to set a national precedent on what cities can do when the Klan seeks the right to use cable television. "We shouldn't forfeit before we go onto the field," he said. Reported in: *New York Times*, July 16; *Chicago Tribune*, July 17. □

AAParagraphs

'Middleburg' discovers the Bill of Rights

Take some 70 citizens — teachers; professors; librarians; journalists; publishers; bicentennial, civic and civil rights workers; students; parents; and a sprinkling (but just a sprinkling) of lawyers and judges — put 'em all together, and what have you got? A community, that's what. And if you are the American Bar Association's Commission on Public Understanding About the Law (ABA/PUAL), you'll call that community "Middleburg"; you'll place it for three days in an artsy Chicago clubhouse so unaccustomed to male residents that they are proscribed from floors above the second, and you'll call the whole thing "The Bill of Rights in Action."

During those three packed days, Middleburg underwent many a crisis: a high school orientation got out of hand, a teacher was charged with drug possession, a parent protested a sex education book, a community newspaper (*The Tattler,* what else?) published potential libel and an underground student newspaper told all about the principal ("Dewey Flunks!"), a school board was obliged to consider an AIDS policy and the city council a number of controversial issues. Were solutions to all of these to be found in the Bill of Rights? Possibly, maybe even probably. But the genius of Middleburg was that, although roles of community leaders were pre-assigned and the situations broadly scripted in advance, no solution was pre-ordained: Middleburg citizens possessed "free will" to debate and negotiate their own approaches to their problems. (Thus, for example, the school board's answer to the parent who objected to "A Teen-age Guide to Sex" but hadn't read it through was to order five copies so the full board might pass on it.)

The mayor of this vibrant young community was none other than the editor of this newsletter, Judith F. Krug, director of ALA's Office for Intellectual Freedom and a member of ABA/PUAL. She appeared to relish her role, even when her real-life ALA assistant, portraying "Detective" Ann Levinson, objected to her boss' stand on a youth curfew issue and flamboyantly turned in her badge. A "real" newspaperman, Frank Gibson, metro editor of the *Nashville Tennessean*, played the *Tattler* editor to the hilt. (When taken to task for printing on the back page of one day's edition a small correction of the potentially libelous story he had carried on page one the previous day, he acknowledged that although he was titular editor, the *Tattler* actually was turned out by the ABA meeting-planners to focus attention on community journalism issues.

The school board, faced with the circulating rumor that an enrolled student had tested positive for AIDS, was confronted with adopting a general enrollment policy on the issue. It fell to yours truly, as Middleburg's health commissioner, to tell it like it is to a crowded school board meeting — i.e., that AIDS isn't "contagious" in the same sense as chicken pox or the common cold, and that if there were an AIDS-positive student in Middleburg (which no one ever admitted), schoolmates would not be endangered by casual or even "close" contact under ordinary circumstances. Although not without some grumbling from the audience, the school board adopted a sound AIDS policy.

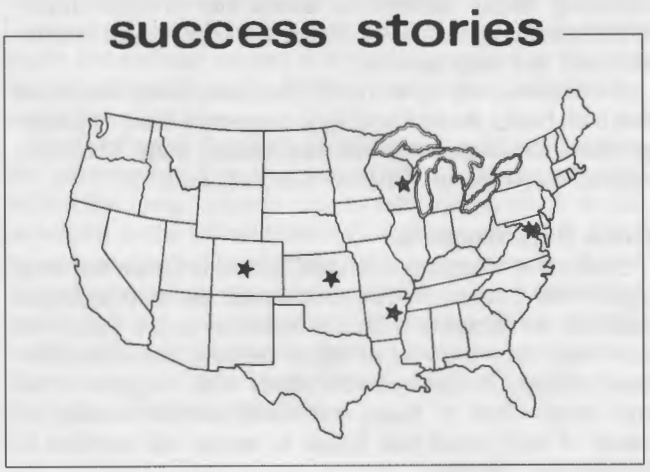
Before the citizens of Middleburg returned to their other homes, they had resolved most of the problems — sometimes positively, sometimes in surprising ways (the teacher was acquitted of both drug and traffic charges and the youth curfew was defeated by a 3-to-2 council vote), sometimes by temporizing. But in the entire, three-day process, this tiny artificial community had developed a surprising esprit de corps: participants tended to carry over their roles into "offstage" hours and to discuss fine points during communal mealtimes.

Why did ABA/PUAL do all this? Perhaps first and foremost to show that community problems are subject to rational discussion, negotiation and sometimes even solution. But there was clearly another objective: the hope that participants, going back to their "real" home communities, might organize other "Middleburgs" — at least one in every state — during the 1989-1991 Bill of Rights bicentennial period and thus provide wider recognition of the importance of that basic law.

PUAL direction was supplied to the Middleburg project by Robert S. Peck from the ABA Washington office and by Susan A. Burk from ABA Headquarters in Chicago, where additional information may be obtained by would-be Middleburg-planners (750 North Lake Shore Drive, Chicago, IL 60611). □

This column is provided by the Freedom to Read Committee of the Association of American Publishers and was written by Richard P. Kleeman, Consultant to the AAP.

success stories



libraries

Wichita, Kansas

Turning down fifteen Moslem men, women, and children, members of the Wichita Public Library board of directors voted May 16 to keep Salman Rushdie's *The Satanic Verses* available to borrowers. "This was a statement for free speech and the principle of the freedom to read," commented Library Director Dick Rademacher.

The Moslems had asked the board to ban the book, which they call blasphemous to the profit Mohammed (see *Newsletter*, July 1989, p. 125). The book has been at the center of an international uproar capped by Iranian Ayatollah Ruhollah Khomeini calling for the assassination of Rushdie, who remains in hiding (see *Newsletter*, May 1989, p. 69).

Library board members unanimously agreed with a staff committee's endorsement of the novel. Committee members said: "Mr. Rushdie has written an original and imaginative satire which can be distasteful to some people. The fact that the book offends some individuals and groups is not sufficient reason to remove it from the collection." A library official said that as of the day of the board vote, 24 people were on a waiting list for the library's 13 copies of the book.

Jamil Agha, an engineer, told board members that their decision would "cause a lot of anguish in the minds of the people." Aircraft worker Faick Mohamad said: "Islam is a very strong advocate to support the freedom of expression and speech. But there are limits."

Mohamad said he would consider legal action to ban the book. "We Muslims have some rights not to expect our religion to be satirized in such a manner," he said. Reported in: *Wichita Eagle-Beacon*, May 17.

Rockville, Maryland

A Gay Pride Week display at the Rockville Library outraged conservative groups and prompted the library to stock several books condemning homosexuality to diversify its collection on the subject. The Concerned Women for America, a national group that espouses "traditional Judeo-Christian values," tried unsuccessfully during the second half of June to persuade the library to remove a display of books about homosexuality, by homosexual authors. The Annapolis-based Family Protection Lobby and a local chapter of the Coalition Against Pornography also protested the display, as did members of several churches in the Rockville area.

The Montgomery County Department of Public Libraries refused to remove the poster and books it displayed to coincide with the national observance of Gay Pride Week. But Library Director Agnes Griffen said the department agreed to suggestions by the groups that it add several books to its permanent collection that treat homosexuality as an immoral lifestyle.

"This is not what a library is about as far as public funding," said Donna Banks, the county coordinator for Concerned Women for America. Banks said she was stunned last week when she visited the library with her 3-year-old daughter and saw the display.

"I don't have a problem with these books being in the library, but I have a problem with the library taking a position on a controversial moral issue," Banks said. "My position is it's an immoral lifestyle and, from what I've read, it's medically not a really healthy lifestyle either."

The display featured about 15-20 books, including works by James Baldwin, Thomas Mann, Truman Capote, and Allen Ginsberg. Titles included *Bridges of Respect: Creating Support for Lesbian and Gay Youth* and *Positive Image: A Portrait of Gay America*. The poster traced the beginnings of Gay Pride Week and the modern gay rights movement.

"It wasn't promoting Gay Pride Week," Griffen said. "It was providing material on the subject of homosexuality and gays and providing some information on how the gay rights movement started." Griffen said attempts to have the display removed smacked of censorship, but she welcomed the contribution by Concerned Women for America of books that condemn homosexuality.

"We don't always have all the different points of view we want to," Griffen said. "We have tried to balance the collection a bit more." The books include *The Unhappy Gays*, by Tim LaHaye, whose wife Beverly heads Concerned Women for America, and a book by two doctors titled *AIDS: The Nation's First Politically Protected Disease.*

Rockville librarian Leila Shapiro, who authorized the display, said the library tries to remain neutral on political and moral issues. She said the display was not advocating homosexuality.

The library received about 80 calls opposed to the display, Griffen said, as well as a petition with 137 signatures. County Executive Sidney Kramer's office reported about 25 calls,

four letters and a petition signed by seven people.

"What we tell people that complain is, 'Next time it could be your favorite topic that people object to,'" Griffen said. "If we gave in to every pressure group, there wouldn't be anything to read in the library. Even the Bible might offend." Reported in: *Montgomery County Journal*, June 22.

schools

Conway, Arkansas

Jim Owen may now use *The Glory and the Dream*, by William Manchester, in his contemporary history class at Conway High School. On May 9, the Conway School Board said that Owen could use only photocopied excerpts of the book challenged by some parents as having inappropriate sexual and racial content (see *Newsletter*, July 1989, p. 129). But after learning from the district attorney that photocopying would violate copyright laws, Superintendent James Clark notified Owen that the restriction was lifted.

Owen can now use the book as "supplemental" material instead of a main text. When the controversy began, *The Glory and the Dream* was replaced with a book on the state Department of Education's approved list. Now both books are supplementing Owen's lectures. The Manchester book's age — it was published in 1974 — prevents it from being on the state list. Material not on the list must be used as "supplements."

Though Owen may now use the book as a supplement, all but three copies have disappeared from their storage boxes at Conway High School. Owen said he was told the district did not have budget resources to replace the volumes. So he wrote the publisher to ask for a waiver of copyright so he can use photocopied material. Reported in: *Arkansas Gazette*, May 19.

Littleton, Colorado

Two books, one called "cheap reading" for middle school students, will remain in local schools despite a challenge by some parents. The Littleton Public Schools Board of Education was asked that *Hoops* be removed from school libraries and that *Julie of the Wolves* be required reading for high school students, not sixth graders. In separate complaints, two women noted that both dealt with mature situations, including sex, drinking, abuse and homosexuality.

"Let's not sell them cheap reading with no moral standards at all," Gayle Ball said of *Hoops*, a story that centers on basketball as told by a boy from the Harlem ghetto. "Do we feed the sexual fantasy of our young children?" she asked. Ball said the book "endorses" drinking, stealing and homosexuality, uses offensive words, and contains a sex scene.

Julie of the Wolves won a Newberry Medal. It is about an Alaskan Eskimo girl who faces a number of problems, including family alcoholism, abuse and divorce. Kathy Watkins believed the subject matter was better suited to older students, not sixth graders.

A committee set up to review the complaints concluded that both books showed how their characters dealt with their problems and hence taught decision-making skills. The board agreed. Reported in: *Littleton Sentinel*, June 29.

Green Bay, Wisconsin

Students at Washington Middle School in Green Bay may again wear T-shirts for two rock bands, but their principal said that the decision to lift a prohibition on the shirts was no victory for those who protested the ban. The school forbade students in April to wear shirts with insignias of the rock bands Guns 'n' Roses and Black Sabbath because the music of both bands was linked to recent cult murders in Matamoros, Mexico.

"It is not a matter of winning or losing, it's a matter of educating youngsters so that we have caring and understanding and educated young people," said Principal J.T. Landes. Reported in: *New York Times*, May 1. □

("library awareness . . . from page 157)

The First Amendment's guarantee of freedom of speech and of the press requires that the corresponding rights to hear what is spoken and read what is written be preserved, free from fear of government intrusion, intimidation or reprisal. Confidentiality is essential to protect the exercise of these rights from governmental invasions of privacy.

Libraries are impartial resources providing information on all points of view, available to all persons regardless of age, race, religion, national origin, social or political views, economic status, or any other characteristic. The role of libraries as such resources must not be compromised by an erosion of the privacy rights of library patrons.

The American Library Association has received several reports of visits by agents of the Federal Bureau of Investigation to libraries, where agents allegedly have asked for personally identifiable information about library patrons. These visits, whether within the so-called "Library Awareness Program" or not, reflect an insensitivity to the role confidentiality plays in the preservation of First Amendment rights, rights which extend also to foreign nationals while in the United States. The Bureau's interest in library records reflects a dangerous and fallacious equation of what a person reads with what that person believes or how that person is likely to behave. This presumption is a threat to the freedom to read. It is also a threat to a crucial aspect of First Amendment rights: that freedom of speech and of the press include the freedom to hold, disseminate and receive unpopular, minority, "extreme" or even "dangerous" ideas.

The Intellectual Freedom Committee recognizes that under limited circumstances, access to certain information might

be restricted due to a legitimate "national security" concern. However, there has been no showing of a plausible probability that national security will be compromised by the uses foreign nationals make of the *unclassified* information available in libraries.

The Intellectual Freedom Committee also recognizes that law enforcement agencies and officers may occasionally believe that library records contain information which would be helpful to the investigation of criminal activity. If there is a reasonable basis to believe such records are *necessary* to the progress of an investigation or prosecution, our judicial system provides the mechanism for seeking release of such confidential records: the issuance of a court order, following a showing of *good cause* based on *specific facts*, by a court of competent jurisdiction.

National Security Archive Press Release

The FBI has agreed to process for public release under the Freedom of Information Act (FOIA) more than 3,000 pages of internal FBI documents covering controversial visits by FBI agents to libraries, according to a stipulation signed yesterday [May 1] by U.S. District Judge Louis Oberdorfer in *National Security Archive* v. *FBI.*

Archive Executive Director Scott Armstrong praised the FBI's decision to settle the initial part of the Archive's lawsuit, and begin processing the information for public release. Armstrong said, "Full disclosure is vital to allay the fears of the library community, and to explain the actual basis for these library visits, whether they were for specific investigations or for fishing expeditions."

Beginning in the 1960's FBI agents have visited libraries as part of a counterintelligence "awareness" program to warn librarians about possible KGB recruitment or research activities in libraries. After librarians raised objections to such visits because of professional ethics and civil liberties concerns, the National Security Archive filed FOIA requests in July and September 1987 for all FBI documents on what the FBI called the "Library Awareness Program."

The Archive filed suit in June 1988 — after FBI representatives said no record release was imminent — with the Washington D.C. law firm of Covington & Burling as pro bono counsel and the People for the American Way Legal Defense Fund supporting the out-of-pocket legal costs. The FBI promptly (on June 28, 1988) released 22 heavily excised documents, which showed systematic targeting of librarians that the FBI thought might be subject to hostile intelligence recruitment efforts. The 22 released documents also only pertained to the New York City area, even though librarians across the country had reported visits.

The FBI resisted Archive efforts to obtain more records and moved to dismiss the Archive's lawsuit. However, librarian Paula Kaufman (then at Columbia University, now at the University of Tennessee) obtained through the Privacy Act key records on the FBI's visit to Columbia. These records had not been provided to the Archive, which demonstrated the inadequacy of the FBI's response.

Judge Louis Oberdorfer then strongly suggested the parties work out a stipulation on how to process further records for release. After lengthy negotiations with the FBI, key elements of the stipulations ordered yesterday include:

- The FBI admits that documents related to the "Library Awareness Program" that will be processed total more than 3,000 pages.
- The FBI will also process documents on more than 100 internal records searches on persons affiliated with libraries or library organizations.
- The FBI will process briefing and back-up materials pertaining to speeches, media interviews (including ABC Nightline and MacNeil/Lehrer News Hour appearances) and Congressional testimony on this subject by FBI Director Sessions, Assistant Director Geer, and other senior FBI officials.
- All of this material is to be processed by early November 1989, with interim releases to be made in early July and early September.
- The FBI will also provide an accounting of library visits that were part of specific investigations, as opposed to "awareness" activities.
- The Archive has the right to continue to litigate for access to any records that are not released.

The National Security Archive is a non-profit Washington D.C.-based library and research institute which collects, indexes and publishes declassified government documents on contemporary national security and foreign policy issues. The Archive and many of its staff are members of the American Library Association, which has worked closely with the Archive to press the FBI for full disclosure on its library visits.

Confidentiality and Coping with Law Enforcement Inquiries: Guidelines for the Library Administrator

Visits to libraries by law enforcement agents, including FBI, state, county and municipal police, have reached a high level of public awareness and concern, particularly as a result of revelations about the FBI Library Awareness Program. Prompted by inquiries about how to respond to visits by law enforcement officials, the ALA Intellectual Freedom Committee developed the following guidelines. These guidelines should be used with ALA's Policy on Confidentiality of Library Records and Statement on Professional Ethics to assist libraries and library employees in dealing with law enforcement inquiries.

Fundamental Principles

- Librarians' professional ethics require that personally identifiable information about library users be kept confidential. This principle is reflected in Article III of the Code of Ethics which ALA adopted in 1981. Article III states: "Librarians must protect each user's right to privacy with

respect to information sought or received, and materials consulted, borrowed or acquired." This includes borrower registration information.

- All state library associations have adopted the "Statement on Professional Ethics," which includes the Code of Ethics.
- Moreover, as of June 1, 1989, such library records are protected by state law in 41 states and the District of Columbia, and by attorneys-general opinions in two additional states.
- Confidential records should not be made available to any agency of state, federal or local government or any other person (outside the minimum necessary access by library staff), unless a court order requiring disclosure has been entered by a court of competent jurisdiction, after a showing of good cause by the person or agency requesting the records.

General Guidelines

Confidentiality of library records is a basic principle of librarianship. As a matter of policy or procedure, the library administrator should insure that:

- The library staff and governing board are familiar with the ALA Policy on Confidentiality.
- The library staff and governing board are familiar with the state's library confidentiality statute (or attorney general's opinion) if one exists.
- The library adopts a policy on confidentiality.
- The library consults legal counsel to make counsel aware of these guidelines.
- The staff is familiar with the "specific guidelines" which follow.

Specific Guidelines

Library Procedures Affect Confidentiality

Law enforcement visits aside, be aware that library operating procedures have an impact on confidentiality. The following are recommendations to bring library procedures into compliance with ALA's Statement on Professional Ethics and Policy on Confidentiality, and internal library confidentiality policies. Confidentiality statutes vary from state to state, but these suggestions may also assist in compliance with the requirements of such statutes: For example,

- Avoid unnecessary records. Think twice before committing a name to a written record.
- Check with your local governing body to see if the city, county, school board, or other agencies set a time limit on record keeping, then determine what it should be for the library, and destroy records as soon as possible.

If your library uses names on borrower cards, consider using numbers or blacking out the names.

Be aware of information on public view owing to library procedure; e.g., overdue notices or filled-request notices mailed on postcards, names of patrons with overdues posted by the circulation desk, or titles of interlibrary loan or reserve requests provided over the telephone to family members.

Law Enforcement Visits

Recommended steps to take when law enforcement agents visit:

- If a library staff person is approached by a law enforcement agent requesting information on a library user, he/she should immediately ask for identification and refer the agent to the library administrator or responsible officer of the institution.
- The library administrator should explain the library's policy or, if lacking an internal one, ALA's confidentiality policy, and the state confidentiality law where applicable. Most important, the library administrator should state that personally identifiable information about library users is not available under any circumstances, except when a proper court order has been presented.
- In response to appeals to patriotism (e.g., "a good American wants to help us") explain that as patriotic, good citizens, library administrators and library staff value First Amendment freedoms and the corresponding privacy rights of library users.
- Compliance with FBI requests made without a warrant or court order is strictly voluntary. *The library administrator must stress to agents that maintaining professional ethics and complying with state law are principles which are not "voluntarily" surrendered.*
- It is illegal to *lie* to a federal law enforcement officer. Without a court order, however, the FBI has no independent authority to compel cooperation with an investigation or to require answers to questions (other than name and address of the person to whom the agent is speaking). The best thing to say to an agent who has asked for confidential information is, "I'm sorry, but my professional ethics (and state law where applicable) prohibit me from responding to your request."
- Notify the American Library Association's Office for Intellectual Freedom (312-944-6780 or 1-800-545-2433), 50 East Huron Street, Chicago, IL 60611.

Procedure

The library administrator should:

- Meet with the law enforcement agent and a library colleague in the library.
- Be cordial, and explain that libraries support the work of law enforcement agencies and their ethical standards are not intended to be obstructionist; rather, affirm the importance of confidentiality of personally identifiable information in the context of First Amendment rights. Should an agent be persistent, state again that information is disclosed only subject to a proper court order, and that the library's governing body firmly supports this policy, and terminated the interview.
- Report any threats or coercion to legal counsel. Repeated visits by law enforcement agents who have been informed that records will be released only upon receipt of

a proper court order may constitute harassment or other grounds for legal action. Seek the advice of legal counsel on whether relief from such action should be requested from the appropriate court.

- Immediately refer any subpoena received to the appropriate legal officer for review. If there is any defect in the subpoena, including its form, the manner in which it was served upon the library, the breadth of its request for documents, or insufficient evidence that a showing of good cause has been made to a court, legal counsel will advise on the proper manner to resist the subpoena.[1]
- Repeat the entire process, should the party requesting the information be required to submit a new subpoena.
- Through legal counsel, insist that any defects in the subpoena be cured before records are released. Insist that the subpoena be limited strictly to require release of only specifically identified records or documents.
- Together with the library's legal counsel, review any information which may be produced in response to such a subpoena prior to the release of the information. Construe the subpoena strictly and exclude any information which is arguably not covered by a proper subpoena.
- Ask the court, if disclosure is required, for an order that any information produced be kept strictly confidential and that it be used only for the limited purpose of the particular case at hand. Ask that access to it be restricted to the agents working on the case. Sometimes these terms may be agreed to informally by the party seeking the information, but even if such an agreement is reached, ALA strongly recommends that this agreement be entered as a formal order of the court. If there is such a formal order, anyone breaking the terms of the protective order might be subject to a sanction for contempt of court.[2]
- Keep in mind that a polite but firm response is the best way to deflect attempts at persuasion, coercion or misguided appeals to patriotism. When a law enforcement officer realizes that he/she simply will not succeed by such methods, most likely he/she will abandon the effort and take the appropriate course of action by proving to the proper court that he/she has good cause to receive access to such confidential information.
- Be prepared to communicate with local news media. Develop a public information statement which may be distributed to interested members of the public and law enforcement officers detailing the principles behind confidentiality. Such a statement should include an explanation of the chilling effect on First Amendment rights which public access to personally identifiable information about library users would cause. Emphasize that the First Amendment protections of free speech and a free press guarantee the corresponding freedom to read what is written, hear what is spoken, and view other forms of expression. The protection of privacy preserves these rights.

An individual's reading habits cannot be equated with his or her character or beliefs. The First Amendment does not apply only to pre-approved or popular beliefs. The First Amendment guarantees the right to hold and espouse *unpopular* beliefs and ideas. The First Amendment protects dissent. The First Amendment protects against the imposition of a state or community-approved orthodoxy as well as an enforced conformity of expression and belief. The First Amendment protects all Americans' rights to read and view information and decide for themselves their points of views and opinions.

The freedom to read and to consider all types of information without fear of government or community reprisal or ostracism is crucial to the preservation of a free democratic society. The freedom to read fosters and encourages responsible citizenship and open debate in the marketplace of ideas.

The library is a central resource where information and differing points of view are available. Library users must be free to use the library, its resources and services without government interference.

Endnotes

1. Usually, a motion for a protective order, or to suppress or quash the subpoena, is the vehicle used to resist. A showing of good cause is normally made in a hearing on such a motion, and the court hearing such a motion will decide whether good cause exists for the subpoena or it is defective, and will then decide whether or not the library must comply. Be aware that some states require the unsuccessful party on a motion for a protective order or to quash a subpoena to pay the costs for responding to and hearing such a motion. Check with legal counsel on this issue as well.

2. Legal counsel should draft the particular protective language, and the library administrator should review it to be sure it adequately protects the information to be produced. □

Celebrating the

Freedom to Read

Banned Books Week

September 23-30

(IFC report . . . from page 156)

Bill of Rights concerning access to video materials for minors. After the 1989 Midwinter Conference, a draft was circulated to all units — divisions, committees and round tables, as well as all state library association intellectual freedom committees. After reviewing the various comments from those organizations and other members of the profession, the Intellectual Freedom Committee recommends for your approval "Access for Children and Young People to Videotapes and Other Nonprint Formats: an Interpretation of the *Library Bill of Rights*" (See page 156).

7. Other Matters

The Intellectual Freedom Committee is pleased that funding for its planned modular education program on intellectual freedom and confidentiality has been included in the F.Y. '90 budget COPES. The project as conceived consists of five modules covering legal issues, legislative issues, coping with the media, confidentiality, and intellectual freedom policy writing and implementation. The program will be designed to be self-conducted or conducted by a program leader, on-site, for library staff and trustees. It is flexible enough to be used for other types of library-related organizations to foster an understanding of the basic principles of intellectual freedom, First Amendment law, and the essential link that the confidentiality of library records provides in the chain of defense of intellectual freedom and the freedom to read.

At its Saturday session the Committee heard a report from Robert Wedgeworth on a task force visit to the Republic of South Africa. This fact-finding mission, sponsored by the Association of American Publishers, was intended to gain insight into the issue of free flow of ideas to South Africa versus a trade boycott which would include a boycott of books and other printed material. As you are all aware, this is an extremely sensitive issue.

I am pleased to report that activities in fulfillment of the follow-up requirement of the Leadership Development Institute held in the spring of 1988 have been many and varied, and very successful. The Office for Intellectual Freedom has available a summary report of these activities for the Committee and LDI participants.

During this conference the IFC heard reports and read news accounts about the cancellation of the Robert Mapplethorpe exhibition at the Corcoran Gallery. This incident and the related Congressional furor regarding some grants by the National Endowment for the Arts occasioned a resolution which the IFC recommends for your approval (see page 191).

In 1989, intellectual freedom lost two of its best champions. On June 18, in his 82nd year, I.F. Stone died in Boston of a heart attack. Mr. Stone's "integrity was an inspiration to all and an annoyance to many for several decades." He was a tireless defender of civil liberties. Earlier this spring, the author Norma Klein died at age 49. Ms. Klein wrote with humor and tolerance touching the hearts and minds of adults and teenagers with truth. She was also a tireless defender of the freedom to read. I ask that the Council stand in tribute to the passing of these two heros.

8. Summary of Divisional and Round Table IF Activities

Pauletta Bracy reported for AASL that AASL is now exploring the possibility of a publication alternative to "Policies and Procedures for the Selection and Review of Instructional Materials" to be more consistent with the planning process advocated in *Information Power.*

A program entitled "Freedom to Learn . . . Aspects of Academic Freedom and the First Amendment" will be presented at the AASL Conference in Salt Lake City in October, jointly sponsored with AASL's Supervisors' Section.

A Scott Foresman publication entitled *Human Sexuality: A Responsible Approach*, which is manufactured with perforated pages so that certain sections may be deleted, has been brought to the attention of AASL's IFC, the Office for Intellectual Freedom and ALA's IFC. All these groups are following up on the case.

AASL is considering co-sponsorship with YASD of an intellectual freedom program for Chicago in 1990 and is also considering the IFRT Chicago program proposal.

Christine Jenkins reported for ALSC that a proposed YASD intellectual freedom program entitled "Killing Books Softly" is under consideration for co-sponsorship by ALSC, as is the IFRT program proposal for Chicago, 1990. ALSC has tentatively approved a program for Chicago to be entitled "Beginners Luck Has Just Run Out" concerning the first encounter with censorship, to feature a keynote speaker and panelists.

Madeleine Grant reported for ALTA that a program on covert/overt censorship is under consideration for 1990 and the ALTA program committee feels that such a program would complement other IF programs by being scheduled especially to attract trustees who are unable to attend other IF programs which occur generally after trustees depart the conference.

This program is being jointly planned with the PLA/IFC and will focus on covert/overt censorship in public libraries, will include a quiz to highlight practices not in compliance with the *Library Bill of Rights*, and will cover concern over how to deal with external threats to free access in libraries. Gene Lanier has agreed to speak at such a program.

Susan Beck reported that PLA is considering a program on "English Plus" which will take note of the Council resolution on English as the official language adopted at Midwinter and will cover issues concerning library service to non-English speaking or English as a second language speaking library users. PLA is also looking ahead to 1991 and to jointly sponsoring a program with ALTA.

Bob Small reported that YASD's new "Hit List" has been published and copies are available in the ALA Store. He announced the YASD program held at this conference entitled "They Ain't Cute Anymore," on teenagers in libraries, and also reported YASD's support for the IFC's proposed

guidelines on video access, subject to review of the final language of that document. YASD will sponsor a program entitled "Killing Books Softly - Reviewers as Critics" for Chicago, 1990.

Larry Miller reported for IFRT that the program on "Freedom to View, Instinct to Censor: Video Programming in Libraries" featuring Judith Crist, Gordon Conable and Sally Mason was a well attended success, with questions from the audience demonstrating the timeliness and need for such a program (see page 160). This year, the Round Table also sponsored three small informal discussion groups which it its hoped will become annual events for the Round Table membership. On Monday evening, the Round Table co-sponsored with JMRT the First Annual Get to Know Intellectual Freedom Reception for new members of ALA, another effort which will become an annual affair. Larry reported the membership of the Round Table is over 1,600 and has exceeded one division.

Bill Davis, incoming IFRT chair, reported on plans for the 1990 program, "Living the *Library Bill of Rights*" a back to basics program which will, schedule permitting, feature Eric Moon as speaker and include discussions on current practices and compliance with the *Library Bill of Rights*.

1989 — the 50th anniversary of our *Library Bill of Rights* has been an extraordinarily busy, hard-fought and successful year for the Intellectual Freedom Committee, the Office for Intellectual Freedom, and the ALA membership at large. The FBI Library Awareness Program, the Child Protection and Obscenity Enforcement statute, and the Salman Rushdie affair have all presented extraordinary challenges. The dedication, perseverance and unity with which this Association has responded to these challenges has been impressive and gratifying.

I wish to conclude this, my last report to Council as the IFC chair, with a personal reflection. Each of us honors libraries and librarianship everyday through our work. A few of us also have an opportunity to serve the profession through positions in this Association. I have been one of the fortunate few. To three presidents who put their trust in me, to the OIF staff, and to my Committee colleagues who did the work, I want to say "Thank you for this opportunity to serve." I commend to you my successor, Gordon Conable. Under his leadership the IFC will further, with distinction, the intellectual freedom goals of ALA and thus serve the nation. □

Resolution on Intimidation of the National Endowment for the Arts (NEA)

WHEREAS, The American Library Association policy against government intimidation (53.4) states, "the American Library Association opposes any use of government prerogatives which leads to the intimidation of the individual or the citizenry from the exercise of free expression," and

WHEREAS, Current ALA Federal Legislative Policy encourages support of the National Endowment for the Arts (NEA), and

WHEREAS, Two recent occurrences, the cancellation of the Robert Mapplethorpe exhibition at the Corcoran Gallery in Washington, D.C. and the Congressional reaction to a particular photograph in an exhibition of work by Andres Serrano, both of which were funded in part, at least indirectly, by National Endowment for the Arts grants, indicate a potential politicization of the grants-making process of the Endowment, therefore, be it

RESOLVED, That the American Library Association urge the United States Congress to resist any limitations or reductions of appropriations for the National Endowment for the Arts on the basis of partisan or doctrinal disapproval of projects funded by the NEA, and, be it further

RESOLVED, That ALA urge the Acting Chairperson of the National Endowment for the Arts and all of its grants officers to resist strongly Congressional or Executive influence over the grants-making process, and, be it further

RESOLVED, That copies of this resolution be forwarded to the members of the Congressional Arts Caucus, the Budget and Appropriations Committees of both houses of the U.S. Congress, the Office of Management and Budget, the Acting Chairperson of the National Endowment for the Arts and any other appropriate bodies.

Adopted June 28, 1989, by the ALA Council. □

(Wicker . . . from page 159)

This line of questioning leads me to wonder whether, in a democracy, where theoretically the majority rules, and where political representatives certainly pay heed or at least lip service to the majority, whether art and expression should be subsidized by tax dollars. Is it or isn't that an invitation to political promotion of certain kinds of art and certain kinds of expression, or on the other hand, to political suppression of other kinds of art and expression? The Corcoran, for example, has all but conceded that it cancelled Mapplethorpe in fear that if it staged this controversial show Congress might cut off or reduce funds for the gallery and for the arts generally, or at least for other controversial forms of expression. Plenty of politicians, believe me, would be happy to do just that in the expectation of being rewarded at the next election by a constituency of conventional tastes. Can supposedly mediating instruments like the National Endowment for the Arts or the Corporation for Public Broadcasting sufficiently insulate art and free expression from the public's or the politician's ignorance or enthusiasm or prejudice? Or, in our country at least, does the risk outweigh the advantages of public subsidy?

I remember when the Rules Committee of the House of Representatives, many years ago, was confronted with a proposal for the construction in Washington of an abstract, decidedly avant-garde, memorial to Theodore Roosevelt. Judge Howard Smith of Virginia, who then ruled the committee and to a great extent the House, inquired rather plaintively, "Why can't we just have a statue of a man carrying a big stick?" The government, I fear, is always going to ask questions like that.

The defense of free expression is seldom easy, even in this country, where it's constitutionally protected by the First Amendment. Just this week, one of the oddest combinations of conservatives and liberals in Supreme Court history ruled that desecration of the American flag is a constitutional form of expression. Only three United States senators refused to vote for a resolution rebuking the court majority. President Bush declared the decision dead wrong and most of the House of Representatives spent most of a day attacking it. Much of that was for political show, but there is not much doubt that the flag decision offended another value—overt patriotism—that's held in high regard by a majority of Americans. Senator George Mitchell of Maine, the majority leader, even claimed that free expression itself made desecration of the flag offensive. "We have so many other ways to protest and express dissent," he said, "that nobody really needs to burn the flag."

Of course, free expression wouldn't have to be protected if it didn't so often give offense so deeply to honorably held values. We've heard already today about Salman Rushdie's novel, *The Satanic Verses*, but we know that that novel is profoundly and even disgustingly offensive in the world of Islam, which is quite different from our western world. Now I know, and you've proven it by performance, there is not a librarian in this audience who would tolerate the burning or banishment of that book, and certainly not the Islamic death threat that has driven Rushdie into hiding, perhaps for life. Yet, in making *The Satanic Verses* available to Americans, as I congratulate you in doing, we commit an act that a large part of the world's population considers sacrilegious and indefensible. We have made a value judgment, and I hope we'll stick to it, but it is a value judgment, and not a universally accepted truth.

Free expression, moreover, can be annoying as well as a threat to values. The same Supreme Court that defended flag burning has just upheld a New York City statute that's aimed at holding down the noise levels of rock bands performing in Central Park (see page 175). Some of you may agree with our city parks commissioner, who considered that holding a victory for the Eighth Amendment against the cruel and unusual punishment of upper decibel rock music. (No editorial comment!) Most of us today, however, would agree with Mr. Justice Marshall who observed in dissent that the majority of the court plays to our shared impatience with loud noise to obscure the damage that it does to our First Amendment rights.

The rock band decision, whatever one thinks of its substance, raises other difficult questions. If free expression can't be banned altogether, is some level of regulation of expression acceptable? If so, what level and by whom? Certainly you can't stop a rock band from playing in Central Park, but can you tell it how loudly it can play? As in New York, can you dictate what sound equipment is constitutional? "Yes," the Supreme Court tells us, "the city can do just that."

In extending that to a librarian's specific concerns, if you can't ban a book, can the government or some other official body say who can read it or what age person can read it or how it can be displayed or advertised, if at all? Or suppose a decision that suppresses or limits free expression is private. Catholic University in Washington, for example, recently prevented a faculty member from teaching his version of church doctrine. When I defended what I incautiously asserted were his First Amendment rights, a lot of readers informed me of what in the heat of the moment I had overlooked: the First Amendment prohibits certain government behavior, not that of private individuals and institutions. The university and the church, it was asserted, have as much right to propagate their views and not some other views as that faculty member. More important perhaps, they had the power to enforce their judgment and he did not.

What about the huge, private corporation that withdraws its advertising or financial support from a radio or television program because of the program's controversial political or religious or sexual content? That corporation, like the Corcoran Gallery in the Mapplethorpe case, may be acting fundamentally in self-protection—in the corporation's case, against

viewer outrage. Even so, it's making free expression of its views, but in the process it may be suppressing important views and opinions in the content of the program, and I don't see that the First Amendment resolves that inherent dilemma.

Political campaigns are another problem for many Americans. As a political reporter, I am often asked why we can't do something about the interminable length of political campaigns, particularly presidential campaigns. Why can't we have neat, nice, three-week campaigns the way they do in Britain? And why do we have to put up with all those annoying, sometimes reprehensible, political ads on television? The answer in both cases is free expression.

I don't know of any constitutional way to stop a man who wants to start running for President tomorrow, and someone probably will or already has. Besides, those three-week campaigns in Britain are between parties that already have well known leaders and keep shadow governments in place. We don't have that, and we couldn't have that in our constitutional democracy. What we have instead is a system that permits any American to run for mayor or governor or President if he or she wants to do it, and that's a form of free expression none of us should try to change or restrict.

As for all those annoying political ads—and some that are worse than annoying—I also hear it frequently proposed that the government should make the networks give a certain amount of free time to presidential candidates, and that these candidates then should not be allowed to buy advertising spots. Well, aside from the complex questions of local candidates and local stations, I suppose there might be some way that the federal government, through its power to license network-owned stations, might compel the networks to make free time available to presidential candidates. But do we really want that? The time would have to go to all candidates equally, or it should, and that might cause a proliferation of presidential candidates that I doubt would be good for the stability of the country, let alone its sanity.

And what about primaries, where we already have too many candidates competing in each party? Besides, if the government can compel the networks to make free time available to candidates, what else might it be able to make them do? Surely, for example, it could compel free time for the President himself. At the moment, the networks have the right to turn down a presidential request for time that they consider politically motivated. What a remarkable thing, that our greatest communications medium can turn down the President of the United States if he wants to offer his views on those networks, if they think he's politically motivated. I, for one, think they ought to exercise that right more often, and I certainly don't want to see that right restricted.

Finally, if spending one's own money is a protected form of expression, how could you justify a ban on political advertising? And if you could impose such a ban, would that be fair and in the public interest? Like it or not, advertising is one way to make your views known, and I'd be reluctant to see any such means of free expression, however abused, blocked or restricted.

Thus, it seems to me almost all questions of free expression have two or more sides, not necessarily equal, and have passionate opponents and proponents. How to deal with pornography, I suppose is the best—or maybe the worst—example. But I think there is a wise rule that provides relatively firm footing in this tricky terrain. I think we'll seldom go wrong if we put our trust in diversity of views and in the ultimate ability of people to hear and understand what matters and what lasts in a robust marketplace of ideas.

Particularly for those of us who make our livings and devote our energies to words, images, ideas, that means that we have to stand up for free expression and for every means of free expression, no matter how troubling some messages may be, no matter how open to abuse some form of communication. I believe those of us who live our ideas have to protect and defend and promote freedom of expression, freedom ultimately of the intellect, which would be of far less value without freedom of expression.

So despite my qualms about social commentary that may masquerade as art, and the use of taxpayers' dollars for purposes taxpayers despise, I think Robert Mapplethorpe's work ought to be available to those who want to see it. I'm not going to burn the flag myself, as far as I know now, but I defend the right of those who somehow feel the need to do it, and I may myself some day. I'm glad those rock bands in Central Park aren't going to keep me awake at night, but I worry that if the law can make them play at a certain sound level, maybe it can make me or someone else do something less desirable. If my rights can be regulated, the regulation could amount, at some point, to prohibition. I think Catholic or any university would serve us better with a diversity of views on its faculty, whatever the rights and powers of institutions. I plan to protest every time a corporation uses its rights of expression to squelch someone else's rights of expression. And I even aim to defend a politician's right to bathe me in blather and my right to judge him on that basis.

Some of the time any of us who try to defend and promote free expression may be wrong. But anyone who believes in ideas, in the power of truth to prevail among clashing views, cannot be afraid to be wrong. Wait to speak out until you're sure you're right, and you may be too late. Besides, there'll always be enough doubters. There'll always be lots of people to take counsel of fear and hesitation. Let them make their own case. Let's not do it for them. Put the burden of truth on the doubters and the fearful; let them prove we're wrong if they can; let them prove some supposed necessity to limit expression, to gag speech, to suppress ideas. Let those who will, try to prove the dangers of freedom. Those of us who believe instead in the power, the truth and the hope of freedom should swear with Thomas Jefferson and devote ourselves with the Freedom to Read Foundation to eternal hostility to every form of tyranny over the mind of man. And I speak not just of the obvious tyranny of the powerful, but to the creeping and insidious tyranny of the timid.

Thank you very much. □

(freedom to view . . . from page 160)

With videotapes, we have retreated from those experiences into the light, and perhaps the loneliness, of our own homes. We have taken what can be essentially a one-on-one experience, and in a way it is very much like the book experience. You are turning the pages or you are controlling the volume, the speed and everything else; you are in charge. But again, you can melt into the experience.

When I began reviewing movies for television, many of my colleagues were scornful. "What, you're gonna watch these great big movies on little screens, all chopped up with commercials? This is terrible." I found that there are not too many movies in the commercial marketplace that do not perhaps improve if they are chopped up into 7½-minute segments, and if they're put on a screen that matches the artistic, creative content.

And then along came the made-for-television movie. There was even more scorn heaped upon that. But that had an extremely interesting effect on film because the economics of theatrical film had become such that no one could afford to take chances; no one could afford to deal with certain social issues, with certain personal problems, with some social trivia, in 35 mm, on a big screen, with big movie stars. While we were then subjected to an awful lot of disease-of-the-week movies, nevertheless, we did get some wonderfully creative and original, fact-based dramas, entertainment and recreations of a certain—well, I hate to call them social experiences—but in a way they were parts of our experience. Also some of the basic problems of our society were dealt with originally, simply because they were not big screen dramatic, in the television movie.

And then—what a dream for film lovers!—along came video cassettes. There is a terrible Joan Crawford movie called *Autumn Leaves*, and we had, as all movie buffs do, an Autumn Leaves Fan Club. We used to phone each other and say, "Hey, at 3 o'clock on CBS, 3:00 a.m. that is, they're running *Autumn Leaves*." We would set our alarms and religiously look at *Autumn Leaves*. Free at last, you can rent *Autumn Leaves*, and you can look at it at your own pleasure.

Basically, what the video cassette has done is make film accessible. If there is a popular movie that you are not going to rush to see, not to worry. If it's a money maker, and even more quickly if it's not, it will be on video cassette. But you can also explore a past. You can see the films that may have made a mark upon you at some time. You can discover so much of your own experience or rediscover it, and you have choices. Just this past week, for the month of June, when I was thinking about this, I thought, "I will take what is coming out in June on cassette and see what you get out of it." And I suddenly found a wonderful menu for the kind of films that libraries can stock on cassette. The big, theatrical film is *The Accidental Tourist*, based on the Ann Tyler book. Forget that Geena Davis won an Oscar. I took a small poll and discovered that 9 out of 12 film critics I asked about the movie, which we New York film critics thought was the best movie of the past year, did not know Ann Tyler. Courtesy of *The Accidental Tourist*, we went to our libraries and we began reading Ann Tyler books. Indeed, this has come out of movies in recent years—as you all know from those rotten little books that are written after the movie is a hit— you've seen the movie, now read the book. I find that this is much truer in recent years than it use to be.

So here's *The Accidental Tourist*, which would fall into, I suppose, the recreational area. There is *Pelle the Conqueror*, which got the Oscar as the best foreign film—a wonderful Danish film. There is not going to be a rush on this at our local video store. But how marvelous within the community that wants it, for a library to give us the outstanding foreign film, available dubbed or subtitled—the form is up to the library, but I would hope it would be the subtitled film. *Bird*, Clint Eastwood's movie about Charlie Parker, which would satisfy the interest not only of the people who admire Clint Eastwood as a film maker, but also of every jazz buff, of every nostalgia buff in your community. Three new issues of *Nova*, a triple header dealing with hibernation in one about the bear, earthquakes and the space race—a wonderful self-help cassette for children.

I was astounded when I saw *When Mom and Dad Break Up*, hosted by Alan Thicke. It has children telling children how they reacted to their parents' separation or divorce, what they learned from it, and so on. It's one of those cassettes that starts out with Alan Thicke saying, "Listen, if you want to watch this by yourself, that's fine." He also says, "You know, if you feel like crying, that's okay, too. I cried a lot when my parents broke up." And then a child in this documentary tells of his crying, and so on. A wonderful how-to-deal-with cassette.

Then there was Greg Norman, *The Complete Golfer, Part II*. We all know that a cassette on how to improve your golf stroke is an awful lot better, frankly, than a book on how to improve your golf stroke. Finally, a great self-help documentary, and one that on viewing turned out to be quite extraordinary, has a very catchy title, *How to Stop the One You Love from Drinking and Using Drugs*. With that kind of suspenseful title, I think you need reassurance that it is an excellent self-help and informative cassette.

Videos may have led to the death of revival houses. But it seems to me that they have led to new life and new interest as far as libraries are concerned. They're here; they're the next step in technology, just as CDs are replacing your good old LPs. This is where we are going. And I think that the library has a major role in stocking cassettes. It has, I think, the same relationship with the local video cassette retailer as your library has with your local bookstore. I think the same standards that a library applies to its acquisitions of books have to be maintained. I think that you have to

realize that in very many cases, a picture is far more effective than words. With video cassettes you can learn not only therapeutic exercise, how to cook crepes Suzette, but also how to repair a plumbing leak. This is a very important part of the self-help books, of the cookbooks, of the variety of how-to manuals. I think this is a very important supplement to the books that we are cherishing.

I do think that there are even further roles to take in video cassettes. One small library I know has a video cassette archives contributed by local citizens who have cameras. They take oral histories, and cover community events. In short, they are providing the library with a local historical archive. In one case, someone even gave the library a camera, which was then lent to teenagers and the teenagers rediscovered the library, simply through their dealing with the archive for the community.

When I say that I feel you apply exactly the same standards to acquiring videotapes that you apply to books, I think you also apply the same philosophies in making these available to your public. Someone had said to me facetiously, and I then repeated it to a librarian, "You get videotapes in the library and then you're gonna get a 7-year-old taking out *Last Tango in Paris*." Well, as the librarian said with a relatively straight face, "First of all, *Last Tango in Paris* is not in the children's room. The children use the children's room until they're 12; then they get their library card. And if a kid takes out *Last Tango in Paris*, it is very much up to his Mom and Dad as to whether he is going to play it on the VCR."

I think that librarians have had experiences with 12-year-olds taking out books that the librarian might not have offered to the 12-year-old. But in my own experience, I have found that we are basically doing censorship for our own sensibility. I'm not talking about pornography. I am not talking about x-rated movies. I don't think these fall into the purview of the library. But I am talking about what I like to call the open bookshelf policy, which I grew up with and have always maintained. Just historically, I came home one night and found my 14-year-old reading Henry Miller's *Tropic of Cancer*, which was still in the plain brown wrapper in which a friend had smuggled it to us from Paris in the '40s. He looked up from the book and said, "Boy, what a boring writer." So much for one's major concerns.

That is the child version of my favorite smut anecdote, which is about the woman who called the police and said, "Come quick, come quick; there is a stark, staring, naked man in the window across the way." The policeman arrived in rather short time and he said, "Madam, I don't see anybody." She said, "Oh, ho, ho. Look, you just get up on this ladder and twist your head around that way and turn around the corner and you'll be able to see him." This essentially is the way our smut finders and would-be censors find objectives for themselves. But let us hope they'll always be there. They essentially are a pain, but they keep us on our toes and renew our own realization that in this law-based society of ours we are not the keepers of our brother's morals. What we are the keepers of are his rights. This, I feel, has to be the primary thought in dealing with a library and with its patrons of all ages—whether it is with books or whether it is with videotapes. I think that is the mission, the one we have to keep in mind.

remarks by Gordon Conable

Gordon Conable is Director of the Monroe, Michigan, public library system. He is the incoming chair of the ALA Intellectual Freedom Committee and has been a member of that committee since 1987. He was formerly chair of the Intellectual Freedom Committee for the state of Washington Library Association.

In some sense, I think that I have seen the future and it's a little hard to know how to deal with it. I am the director of a county-wide library system with 16 branches and a bookmobile, serving a population of 130,000 people. In 1988, videotapes constituted 43% of our total circulation. That percentage means that we are circulating a collection of 7,000 tapes 50,000 times a month, 600,000 times a year. I think that that's what you're going to be doing if you're acquiring videotapes.

I was much struck by the figure of video rentals in this country last year. I have done some surveying of what's going on with videotapes in libraries across the country, and I think that we not only have a tiger by the tail, but also we are at the front end of this. We have yet to really come to terms with, or understand the significance or the impact of, this format on what we do. I'd like to talk to you a bit this afternoon about what I think the trends are and what I think the issues and concerns are.

I got into this as chair of the Intellectual Freedom Committee of Washington State because of growing concern in Washington that the spread of videotapes into public libraries was having a significant impact on intellectual freedom issues. Three such issues emerged. One had to do with access of minors to library services and collections, another with the question of fee-based service, and the third with the fact that videotape, in some settings, seemed to be spurring a reversal of what had been a very positive trend away from dual card systems, back to dual card systems.

Because videos are growing so rapidly and having such an explosive impact, it seemed there was some influence or some significance of video in relation to basic ethical principles within this profession. The impact, furthermore, was occurring faster than we were coming to terms with it or even thinking about it. In fact, some of those trends and choices being made in individual libraries were being made without any thought being given to the philosophical underpinnings of the choices. Those choices were format-based but not format-based in a way which showed any particular

understanding of the format or any particular process of thinking through and examining the implications of those choices.

To find out what was going on in Washington, we surveyed every library in the state serving a population over 5,000. We had a 100% response from the 39 libraries that fit that description in Washington State in 1988. In the last four months, I have conducted a similar survey of a sort of randomly selected, and probably not statistically valid, sample of public libraries across the country. I have received responses from 55 libraries with an average circulation of all materials of about 1.5 million items. What I looked for in the second survey was libraries serving populations over 25,000, with some attempt at representation from all regions of the country to see if that made any difference in the results (it didn't) to see what practice was. These are the things I found.

Videotape collections are still basically very small. Of the 55 libraries in the survey, the average number of videotape titles held by the library and all of its branches is 1,700 titles; the average number of tapes is less than 4,000. When you extrapolate that against the number of outlets that most of those libraries operate—some are single buildings but most are multi-branch systems—you find there is probably not yet, at least not in my survey, a library which has videotape collections in every branch of the system of the same size and quantity which is commonly found in the retail outlets on every corner in the community that a library serves. In that sense, it seems very clear that the hypersensitivity some libraries have shown toward appearing to be in competition with the local retailer renting videotapes is clearly mythological. We don't have enough tapes to provide that kind of a threat, and it is my thought and hope that by the time we do have enough tapes to have significant collections we will have grown up and matured to a point where our relationship with video retailers parallels our relationship with bookstores.

The collections varied in size from 200 tapes, which I think is just barely getting started, to 35,000. As a percentage of circulation, that is, videotape as a portion of circulation, the average was 5.5%; the highest that I have found yet is our library at 43%. I found no other library reporting over 30% of its total circulation in videotapes. But, a significant number of libraries are reporting a proportional increase as their collections reach a significant size, and a range of 15-25% of total circulation in videotapes appears to be common when tape collections reach a size where there is actually some quantity of material available to be accessed.

The tapes are turning over, from this report, an average of 30 times a year, with a high reported of close to 100 times a year. The difference in turnover probably is influenced again by quantity of materials and local borrowing restrictions and procedures.

The makeup of collections seems to be varied, and two basic principles appear dominant. One is, "We will have no best sellers," and the other, "We will have nothing but best sellers." Gradually, as tape collections reach a certain size, both of those extremes tend to move toward the kind of collection balance and diversity which we have had dealing with book material for years and years. If you're starting from scratch and have little money to spend, either approach probably can be justified. But after a certain minimum level of critical mass is reached, if you persist by policy in collection development which is completely dominated either with last year's theatrical releases or with nonfiction public television series in reprint, you are subject to some question as to the philosophical intellectual freedom underpinnings of your collection development decisions.

The primary thrust of interest in my survey, both in Washington and nationally, was to look at how libraries are dealing with videotapes in relation to the *Library Bill of Rights* and basic intellectual freedom issues. Minors' access is one of those issues, and the second issue, which has come up repeatedly, has to do with labeling. Labeling is an issue, of course, in part because of the private industry standard, the Motion Picture Association of American (MPAA) labeling system. You are all familiar with this. Essentially, it is a marketing device used by Hollywood film producers, at least in part—and this may be a fallacious assumption—to ward off and prevent governmental censorship, and in part, as a means of selling their films. The significance of the ratings, which are not governmental and have no force in law, except in a few states which are trying to codify them in law (and more on that later) is to serve as the moral equivalent of the tag on the top of the Clive Barker paperback that says, "The scariest book I read this month—Stephen King." They're marketing devices.

Librarians are real jumpy about labels. We have ethical statements that say we won't label materials; labels are content prejudicial and violate the *Library Bill of Rights*. In terms of videotapes, most libraries, or many libraries, are finessing this issue by what appears to be the much more serious intellectual freedom concern about present practice, namely, age limitations. What I found in my survey was that of the libraries reporting, 62% of them limit access to videotapes on the basis of age. Thirty-two percent of the total, and there is some overlap, require parental permission for the use of videotapes. In some cases, you can be as old as 21 and have to have your parents' permission to borrow a videotape. Fifty percent of the sample will not circulate videotapes to people under the age of 18. And if you set 18 as your minimum level, you have completely finessed the whole issue of MPAA ratings because there are no age restrictions past 18 in that advisory system.

Twenty-five percent of the sample provides some limits on borrowers, based on age, for materials other than videotapes, and most of those restrictions seem to apply to other audiovisual formats and/or equipment. There is a handful of libraries that will not circulate books to people under a certain age. In some cases, it's a minimum age of six; in

other cases, there is a children's card with some mechanism for parental permission involved.

Almost 25% of the sample, however, respects the *Library Bill of Rights*' statement that access will not be denied on the basis of age and provides free and unfettered access to people of all ages to their video collections. That's an encouraging number, but it's a small number. There is some indication in the survey that that number is increasing. Six libraries reported they had either discontinued the age restrictions they had started out with when they began their videotape collections or were seriously contemplating discontinuing age restrictions. I think that's extremely positive.

Interestingly, most of the libraries in the survey believe they are philosophically committed to this profession's commitment to open access and to not having age barriers. Eighty percent of the total have incorporated into their adopted policy the *Library Bill of Rights* and its interpretations—80%. Three quarters of those libraries, however, are violating their own policy in relation to minors' access, and perhaps most disturbing of all, half of those libraries believe that their practices are consistent with the *Library Bill of Rights*—suggesting to me that either they haven't read it lately or they don't know what it means. Functional literacy usually is not something which enters into the professional practice, but maybe it applies.

I also surveyed complaints to see whether or not age restrictions had any impact upon formal complaints in relation to videotape collections and circulations. The good news is that there are few formal complaints about videotapes. Forty percent of the libraries had never received a formal challenge to a videotape. The complaint rate against the whole universe works out to one complaint for every 135,000 videotapes circulated. My experience suggests that that is right in the range of what libraries experience in terms of formal complaints to print material. In other words, videotapes will not subject you to actual formal challenge to any greater degree than anything else in your collection.

The interesting thing is that those libraries which restrict access to videotapes on the basis of age and which have policies in violation of the *Library Bill of Rights* receive complaints at a rate twice that of libraries which provide for open access. Now I don't think that's the reason they restrict access. I think rather the correlation is in the reverse. The reason is that restrictive policies were established at the beginning of the entry into the format; they were not changed to become restrictive in response to controversy. They were set up that way, perhaps in anticipation of potential controversy, but there is no evidence in the volume of complaints or incidents that there was a need to set up that restriction. It's my belief that a library which suggests that censorship is okay, and that deviates from our principles in terms of this particular area, is presenting a defensive and a soft stance, which makes it an inviting target because if you say you are going to restrict material on some basis, you have then invited the discussion of where the line is going to be drawn. You fight over how old is old enough and what material you might need to have. Whereas, if you take our traditional position, which is "We will defend the constitutionally protected," and you go out there unblushingly and forthright and without fear or trepidation, you become a much more imposing target and people will think twice about taking you on.

I think one of the reasons videotapes have been so difficult for us is that it is still such a young format in our collections; that we are dealing with a by and large separate species— something which is an add-on service unrelated to what else it is we're doing. This is creating for libraries all over the country a vast range of perfectly predictable problems that have to do with every aspect of how we handle video. Bibliographic control, physical processing, storage and display, selection criteria, staff time, allocation of scarce resource dollars to this portion of the budget where demand is exploding, borrowing periods, fees, fine policies: all of these are questions that come up because the videotape is both alike and different from everything else we handle. Some of the difficulties we face have to do, I think, with the fact that we don't really yet have a clear understanding of the similarities of the videotape to our other materials and the significant difference. We know they're different; we say they're different, but we haven't really figured out what that means in terms of an intelligent, functional way to handle the material or to integrate it into the system.

In the additional notes that came back in response to my survey, time and time again I heard people saying similar kinds of things. I asked what policy changes had occurred since they started their collections; what I got back was procedural information: "We're now buying more nonfiction." "We're cataloging them." "We're now leaving the tapes in the boxes on the shelf." "We're now taking the tapes out of the boxes on the shelf." "We're interfiling our nonfiction." "We've changed our borrowing period for nonfeature films." "Our fine schedule is under review." All of these comments basically say that for one reason or another, the way the library started to deal with the physical object and the rapid circulation of it didn't work out once they reached a certain volume. We do not yet have enough collective experience to formulate solid models that can tell us how to do this. We're working on those; we're developing them; but they aren't here yet. This is sort of the research and development stage of the whole process, I think, and that's not surprising.

What I think is most important about the videotape is its similarity to the book. I would suggest and leave you with the thought that in terms of dealing with the access questions and the defense against the challenge and the fear that librarians seem to have that this new format is somehow going to subject them to vastly increased quantities of controversy, is that what we have here in part is a reaction to the former medium, the film, as opposed to an understanding of the new medium, the videotape. The film is essentially

an audience form. What we grew up with was going to movie theaters, sitting in the dark, a larger than life image, experience in a time frame and physical setting determined by the exhibitor and the producer of the film, with no control over the experience. It is something we do in groups, even though it may seem you are alone in the dark in the theater. But anybody who deals with the people behind him who are talking or the wet pop on the floor understands that, in fact, this is a social, public experience.

Libraries are built upon private experience. The nature of the book is that it is a one-on-one encounter. And the beauty of the book is that it gives us such fantastic control over that encounter if we choose to exercise that control. You can start it and stop it and open it wherever you want and put it down and deal with it in your time. You can skip over it, you can review it, you can read it as you wish—that is the great joy of the book. The videotape, though the hardware and technology are still cruder than they will be, provides us that kind of control over our encounter with film. We can see it on our own terms, we can skip over the dull parts, we can put it into slow motion, we can put it into freeze frame, we can view it multiple times over, we can stop it in the middle and go have dinner or go out to the movies, and come back and finish it. That takes a format we grew up with, and through the library, makes it available to us in the way libraries have done so well—which is to give us an additional access and means of control over our interaction with and our encounter with a form of expression which has been generated by some other human being or group of human beings. Add to that the facts that the videotape costs about the same as a book, in physical dimension resembles the book, and in terms of transaction handling is much closer to the book than any of the other audiovisual formats that we have to contend with. You don't have to inspect it and splice it after every circulation. You don't have to have special shelving to house it, although some of us do. You have an object which resembles the book in terms of its physical reality and its economic reality. Libraries have turned something which was once under the control and in the hands of a few into a quite different mass medium than it was when it was only available projected on a screen in a theater during the particular three days or week that the exhibitor could afford to put it in front of you.

With that control, the rating systems and the impulse to censor become obsolete because the means by which the individual user can exercise control and responsibility over his dealing with that piece of material is substantially enhanced and altered from what it was when all you could do with your kid was give him the $5.00, leave him at the door of the theater and hope he'd be there two hours later when you came to pick him up.

It seems to me that as we deal with how it is we're going to integrate this format and respond to our critics and get our performance back in line with our most basic principles, we need to find ways to translate in our own understanding and then into ways that we can talk about that make sense to the people who are anxious and concerned and frightened about the impact this format is having on what we do. The videotape in our setting provides the same kinds of checks and empowerment of individual responsibility that the book does and that is what makes the American public library such a valuable and wonderful institution. Thank you.

remarks by Sally Mason

Sally Mason is Director of Video and Special Projects at ALA. She is currently directing the National Endowment for the Humanities' ALA project, "Voices and Visions; Reading, Viewing and Discussion Programs in America's Libraries" and the ALA Carnegie Video Project II. She served as Young Adult Librarian with the Los Angeles County Public Library and as AV Coordinator for the San Diego County Public Library.

One of the reasons I have so enjoyed reading Judith Crist's film reviews over the years is that I almost always like the same movies she likes. I shouldn't be surprised, therefore, that there are certain similarities in what we have to say on this subject. I may even be mentioning some of the same titles!

The juxtaposition of two recent news items directly related to video and intellectual freedom struck me as ironic. First, last winter came the death threat to Salman Rushdie. It was a moment that was certainly frightening, but one could not help but feel pride in our profession. Without hesitation, without lengthy discourse, without even any kind of preconference or council resolution, librarians around the country stood united. We demonstrated in front of bookstores. We ran full-age ads in newspapers. We did what we do best—we stood up for free access to information.

During the lull in that particular storm—and from what I'm hearing on the news the last couple of days it still is a storm—I received in my mail a survey from a major video wholesaler asking librarians whether or not they would purchase *The Last Temptation of Christ* when it was released on video. Can you possibly imagine questions being asked about a book? The example is good, since *The Last Temptation of Christ* is indeed a book which has been in any public library for the past 30 years.

To paraphrase the leading character in what's bound to be this summer's biggest screen hit, "Holy First Amendment, what's going on here?" A double standard is what's going on here. Different rules are being applied to video than to books. Why? I'm certainly not here to lead another attack on the MPAA ratings—although I am certainly prepared to do that—but that's what this is all about.

Think a minute about what would happen if the next time you opened a shipment of brand new books, each one had a great big letter on the cover indicating who should or should not be allowed to read it. And what if the American Booksellers Association (ABA) formed a committee to decide what letter should be on each book, and then ran a huge PR

campaign to convince the public that "PG" should be put right up there next to the flag and apple pie?

I recently received a letter from a colleague whom I like and admire. His request: that ALA back off from a stand on free access to the video collection by minors. His belief is that it's just not worth the fight. I still admire him for his many fine qualities, but I think he's dead wrong. This is simply too important.

It might be useful to look back a bit to understand how we got in this spot. It's a fact that many more libraries than any of us like to admit—and Gordon has just confirmed that—restrict video borrowing to patrons over the age of 18. In many cases, this began in a fairly benign fashion. Many video collections grew out of existing 16 mm collections. Film was expensive and fragile. So was the equipment one used to screen a film. What most libraries did was restrict circulation to adults because of the financial responsibility that was involved. Video has changed all that. I have personally seen a two-year-old successfully load a cassette in a VCR and watch a film. Many titles are selling for under $20; some are selling for under $10. It's best we don't get into a discussion of the relative quality of some of those tapes, but the point is that the financial issue is all but dead. Compare the price of a picture book with the price of a consumer video. We don't have a leg to stand on. I am happy to report that at this conference a working document is being presented by the Intellectual Freedom Committee called "Access for Children and Young People to Videotapes and Other Nonprint Formats: An Interpretation of the *Library Bill of Rights* (see page 156)." I definitely recommend it to you; it's our organization and our profession at its best.

As good as that news is, there is a lot more to do, and of course that's what I was invited to talk about. I'd like to spend a few minutes talking about some of the other aspects of free access to video that might be on future agendas for ALA. First is the syndrome that might be called the AV budget as an easy hit. This is not a new syndrome. Those of us who have been in the audiovisual field are all too familiar with it. It rears its ugly head during times of financial crunch. The library is required by its funding body to cut services. There's that big, fat AV budget, and there are still all of those folks who truly believe that libraries should be for books. Whack! There it goes. A video collection that may have taken years to build is left to decay; its titles become less current, essential titles are not replaced and very soon the collection becomes totally useless.

Another bugaboo is the bargain basement syndrome. This is the one that results when only popular, low-priced home videos are purchased for the collection. God knows, it's a way to satisfy a huge segment of the local population for not too much money, and has spectacular circulation figures to boot. It's very easy to treat video as a kind of pop service, one that has to be self-supporting. (More about that later.)

Many libraries over the last few years gave in to the temptation to become another kind of video store. I think it was a dangerous precedent. Video, already seen as ephemeral, became a money machine. No line item for video expenditure appeared in many library budgets. In the worst cases, libraries had created a monster—the income that ate the selection policy. The video income was so great that standards disappeared and video spending dwarfed the book budget. Even those of us who love the motion media wouldn't recommend that. Wise librarians bit the circulation bullet, so to speak, and made video a regular part of the library's budget. Those of you who are in academic and school libraries haven't had that particular problem; you've more likely had to make tough decisions between purchasing video and other library materials. But a problem you have all shared is that of the baffling, befuddling, bewitching world of video pricing.

Why does *E.T.* cost $19.95 while *Frog and Friends* costs over $200? Because we have two parallel businesses operating. On the one hand, we have Hollywood. Though threatened by home video when it was first introduced, the major studios have jumped on the bandwagon and are now bringing in billions, as Judith pointed out. Deals are now cut with video rights as a major consideration.

The point is that home video has become a very big, very serious business. Many smaller films make most of their money from video rentals. That's because the public is getting choosier about what they'll go out to see in a theater. I read not too long ago that movie prices in New York have gone up to $7.50. It does give one pause. I know that I now make a distinction between what I'm going to pay $6.50 for in Chicago to see in the theater and what I'm going to wait and get for $2.00. But however you slice it, the movie studios make their money back from a potential market of millions.

On the other hand, the independent film and educational film businesses have to make their money from the school and library and academic markets. That's a sad fact. That translates into sales in the hundreds, if they have a runaway best seller. True, production costs aren't as great, but they're greater than what is made from several hundred copies if the sale price is kept under $100. And very often in the case of independents, it's somebody's life savings and the savings of all their friends and family that are on the line. We have an obligation to make these materials available to both educators and the general public.

How many video stores carry *The Man Who Planted Trees*—perhaps the most honored film of last year? It's a 30-minute, animated version of an obscure short story. It also happens to be one of the loveliest films I've ever seen. How many video stores carry really fine children's materials or specialized information tapes? If you said, "None," you're right on the mark. Where do people go to see films from Africa, documentaries from Central America, film essays with a feminist point of view? As librarians, we have an obligation to make these special materials available, even if they cost more, and they do. I think of the film makers who have gone on to the big time, whose first films came

from the educational and independent industries. Spike Lee is only the latest in a long line that includes David Lynch and Martha Coolidge and Jane Wagner and John Sayles and Roman Polansky to just scratch the surface and only talk about narrative films.

There is a trend that needs our attention. There are libraries—and here I am talking about all types of libraries—which are setting a ceiling on the amount of money they'll spend for a single video. A simple question: What would the response be if a similar proposal were made for reference books? The reference to reference isn't inappropriate; more and more videos are appearing which primarily have a research function.

There are several video encyclopedias on the market, for example. My own favorite is in the field of dance. For generations, dancers had to pass on their knowledge one to another because no system of notation was ever developed that really worked. Video has changed all that. There is now a complete dictionary of classical ballet steps, each one demonstrated by a professional dancer. What a contribution! It also costs $200. Should any self-respecting arts reference collection be without it? And while we're on the subject of reference, video should be accessible to anyone searching the library's catalog for information. Anyone doing research on Martin Luther King should be able to find out during that search that the library has the "I Have a Dream" speech available on video.

Related to the questions of budgets and pricing is the question of the charging of fees—not a new debate, and certainly not exclusive to video service. Again, this is a problem primarily for the public librarian. Is it legitimate to charge a public that is used to it for the rental of video cassettes? The American Library Association says no, so I'll give you three guesses as to what I say. Many libraries are finding that collecting of fees just isn't worth it. For every dollar that comes in, the cost in staff time and effort also have to be considered.

Another distressing syndrome is the one that somehow makes a distinction between "those video borrowers" and the "real" library patrons. I have even seen references to them being "aggressive." Some libraries have surveyed video borrowers to see if they also borrow books, therefore becoming "real" patrons. It seems to me that we're talking here about taxpayers, who may be feeling for the first time that they're getting their money's worth for their library tax dollars. Access also means the freedom to select the format in which we want to receive our information and entertainment.

Enough about problems. I'd like to talk about a few of the things that are wonderful and exhilarating and exciting about video. While it's true that there is no substitute for a gracefully written sentence, there are some things that video does that print can never do. Have you ever tried to learn a manual skill from reading a book, or even from looking at pictures? Whether it's hanging wallpaper or fixing a car or changing a diaper or preparing coq au vin or tap dancing or karate, the motion picture is the next best thing to a live teacher. Not only that, video can be rewound and repeated as many times as necessary until you've got it right, and it never gets exasperated or grades you down for being dense.

Schools have learned that video is a godsend for special education teachers who often burn out because of the necessity of endless repetition when teaching slow learners. A video can be played over and over and over and it delivers exactly the same message every time. *Sunrise at Katmandu, A Trip Through the Canals of France, Pavarotti Live at the Met, The Treasures of King Tut, Wild Animals Running Free in Africa*, all are available at the touch of a button to even the most armchair bound. The speeches of Martin Luther King, the musical plays of Stephen Sondheim, the brilliant humor of the late Gilda Radner, the tragedy of the Kennedy assassination, the live theater of Watergate and Oliver North—the arts and humanities are there with an immediacy that print cannot duplicate. Theories of physics can be demonstrated. The miracle of life developing in the womb can be shown. The conversations of Joseph Campbell and Bill Moyers live on.

The tragedy of illiteracy is receiving a great deal of attention at the moment and perhaps the clout of the First Lady will help to really accomplish something in this area. In the meantime, what about those who can't read? Video offers a range of vital information and entertainment. For those new to the United States, video often helps them learn to speak English and keeps them in touch with the movies from their own cultures and helps the rest of us become acquainted with those cultures. Parents who can't read to their children can share *The Mouse and the Motorcycle* or *Ann of Green Gables* or *Curious George* or *Where the Wild Things Are* with their children, and perhaps instill an interest in literature that can break the tragic pattern.

The real contribution of video is that it gives us options. How is certain information or instruction best transmitted—print, audio tape or motion pictures? Of course, it's been proven conclusively that people learn differently. Some of us learn best from print, some of us from listening and some of us from visuals. At last we can give people a choice.

Actually, everything I've said can be boiled down to a simple formula. Next time you're asked a question about video access, ask yourself, "What would my answer be if this were a question about a book?" Thank you.

question and answer session

Question: I am the president of a 5,000 population library and we charge for videos; we redline the ones that somebody has complained about; we do everything you tell us we shouldn't do. I have somebody on our board who whites out "get laid" from *Sammy and Rosie Get Laid*. I'd love to say to my board that we should do with videos what we do with books, but they don't buy it. And my community doesn't buy it, because they visualize 7-year-olds sticking in a video

and seeing things where if they could read a book that would describe them, they'd have to use imagination and experience they don't yet have. It's the question of children's inadvertently seeing material on video, I think, that really bothers a lot of otherwise intellectually free people.

Conable: It's a tough question. Illustrated books sometimes present more problems or concerns than unillustrated books. But libraries are generally comfortable defending illustrated material. There is a format distinction and a double standard which is being applied here. The other reality is that there is a presumption with tapes and films that their existence in the library means that 7-year-olds will seek them out. I think our experience demonstrates both with books and also with tapes that that may be more fear than reality. We house our children's books in children's sections. We advocate access by children to the entire library collection. Children are incredibly effective self-censors. They know what their interests are and their interests are not the interests which are often imputed to them. Beyond that, there is the overriding issue of who is responsible for guiding that child's viewing and that is the parent, and only the parent, of that particular child. Now, lots of parents who are comfortable or relatively comfortable guiding their kids in relation to books seem to have great fear in relation to videotapes if the tape is available in the library. Many of the same people don't express or demonstrate any of those qualms in relation to the child's ability to access exactly the same material on the cable television, to access exactly the same material when the neighbor's kids pull it out when it's been rented by somebody else's parent at the neighborhood video store. The protective impulse is there but the charge and the requirement and the challenge is to find ways we can deal with this, leaving the responsibility where it belongs and not establishing the library as the intermediary between the parent and the child. And it's tough.

Question: I'm getting ready to do a review of a feature film called *Devil in the Flesh*, by Marco Boloccio, and Reinholm Video is going to be releasing this film in an X-rated version, which is the original version of the film. It's not a pornographic film except it contains one pornographic scene. I don't know how to review this film. I know none of you are going to buy it and no matter what we say here today nobody is going to buy the original artist's version of this film. Everybody is going to buy the R-rated version. How do we deal with that?

Crist: I think that considering the movie in its artistic terms, a librarian might choose to buy that video if you had, say, a foreign language collection. I don't see why it would not be bought. I don't see why one would not buy *Last Tango in Paris*, because it was so interesting in the 60s, in its time. I think you'd find it extremely funny now. And that is the whole joke of the ratings. Things that were rated "R" and things that were rated "X" 10-15 years ago, or even 20 years ago are nothing to us. They're the Bobbsey twins. The sensational movie of yesterday, like *Last Tango*, is just funny. It isn't even pornographic. One era's pornography becomes the next decade's joke, somehow. But I think that one has to regard the rating system as something the industry dreamed up in order to protect itself from possible government censorship. They're very frank about saying they did that on behalf of the industry and theater owners. So, as I say, if I were running a foreign language film collection, I'd buy it—not to worry.

Conable: I'd like to challenge your assumption as well. I think it's a film which is unlikely in either version to make it into the first 200 films purchased by a library serving a population of 5,000, but we have libraries that have collections in excess of 30,000 titles, and I think that when you reach a certain size and the diversity of your collection development is such, films like that are going to be acquired for several reasons. One is that a lot of the people selecting films for libraries are film buffs. They love film; they want to be able to see and provide access to film which has not been provided access to before. For your review I would suggest that you identify this as the restored version.

Question: In regard to the issue of parents' responsibility and the role of the library, it seems to me that we are giving parents a somewhat divided message. We say, "It is up to you to be responsible for your child," and then we say, "but we will not tell you what your child is getting from the library." Can you help with that at all?

Conable: We say the same thing in relation to books. The question gets tougher because of the sensitivities and the marketing pattern of films in theaters as opposed to those of books. I think this is one of the areas in which the change in patterns of family living are also having an impact. There are more kids at home without an adult in the home now, than there have been at any time in our history. As a result, parents are expressing substantial amounts of difficulty and anxiety in terms of how they control or even know what their children are doing when they are not present. On this issue, probably to a greater extent than other formats that libraries deal with, we are catching the backlash and concern about it. I don't know that we have an answer; I think this is one we need to think through and talk about. I am extremely concerned about the library putting itself in the position of saying in any way that we have the ability to exercise that monitoring or that control over the child's behavior when the parent is throwing up his hands and turning to us and saying, "I can't do it; you do it." There is clear indication in a variety of areas outside the context of the library that the child has access to a wide range of material, and that his parents have no effective means of preventing his access. In the original Presidential Commission on Obscenity and Pornography in '69 there was data which indicated that the greatest exposure to pornographic materials occurred in the adolescent years, and that material was primarily accessed by kids who found it in their own homes. I think this same

behavior pattern exists in relation to videotapes, film, magazines, sexual imagery in general and sexual material in general. But I don't think there is anything we can do practically that will change the behavior of millions of Americans or deal with the natural curiosity which is a part of adolescence. The fact that people are anxious about it is not new. The presumption that we can do anything more about it now than we have done in the past is unrealistic. □

(Texas v. Johnson . . . from page 180)

If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.

We have not recognized an exception to this principle even where our flag has been involved. In *Street* v. *New York* (1969), we held that a State may not criminally punish a person for uttering words critical of the flag. Rejecting the argument that the conviction could be sustained on the ground that Street had "failed to show the respect for our national symbol which may properly be demanded of every citizen," we concluded that "the constitutionally guaranteed 'freedom to be intellectually. . .diverse or even contrary,' and the 'right to differ as to things that touch the heart of the existing order,' encompass the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptuous." Nor may the Government, we have held, compel conduct that would evince respect for the flag. "To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind."

In holding in *Barnette* that the Constitution did not leave this course open to the Government, Justice Jackson described one of our society's defining principles in words deserving of their frequent repetition: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." In *Spence*, we held that the same interest asserted by Texas here was insufficient to support a criminal conviction under a flag-misuse statute for the taping of a peace sign to an American flag. . . .

In short, nothing in our precedents suggests that a State may foster its own view of the flag by prohibiting expressive conduct relating to it. To bring its argument outside our precedents, Texas attempts to convince us that even if its interest in preserving the flag's symbolic role does not allow it to prohibit words or some expressive conduct critical of the flag, it does permit it to forbid the outright destruction of the flag. The State's argument cannot depend here on the distinction between written or spoken words and nonverbal conduct. That distinction, we have shown, is of no moment where the nonverbal conduct is expressive, as it is here, and where the regulation of that conduct is related to expression, as it is here. In addition, both *Barnette* and *Spence* involved expressive conduct, not only verbal communication, and both found that conduct protected.

Texas' focus on the precise nature of Johnson's expression, moreover, misses the point of our prior decisions: their enduring lesson, that the Government may not prohibit expression simply because it disagrees with its message, is not dependent on the particular mode in which one chooses to express an idea. If we were to hold that a State may forbid flag-burning wherever it is likely to endanger the flag's symbolic role, but allow it wherever burning a flag promotes that role—as where, for example, a person ceremoniously burns a dirty flag—we would be saying that when it comes to impairing the flag's physical integrity, the flag itself may be used as a symbol—as a substitute for the written or spoken word or a "short cut from mind to mind"—only in one direction. We would be permitting a State to "prescribe what shall be orthodox" by saying that one may burn the flag to convey one's attitude toward it and its referents only if one does not endanger the flag's representation of nationhood and national unity.

We never before have held that the Government may ensure that a symbol be used to express only one view of that symbol or its referents. Indeed, in *Schacht* v. *United States*, we invalidated a federal statute permitting an actor portraying a member of one of our armed forces to " 'wear the uniform of that armed force if the portrayal does not tend to discredit that armed force.' " This proviso, we held, "which leaves Americans free to praise the war in Vietnam but can send persons like Schacht to prison for opposing it, cannot survive in a country which has the First Amendment."

We perceive no basis on which to hold that the principle underlying our decision in *Schacht* does not apply to this case. To conclude that the Government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries. Could the Government, on this theory, prohibit the burning of state flags? Of copies of the Presidential seal? Of the Constitution? In evaluating these choices under the First Amendment, how would we decide which symbols were sufficiently special to warrant this unique status? To do so, we would be forced to consult our own political preferences, and impose them on the citizenry, in the very way that the First Amendment forbids us to do.

There is, moreover, no indication—either in the text of the Constitution or in our cases interpreting it—that a separate juridical category exists for the American flag alone. Indeed, we would not be surprised to learn that the persons who framed our Constitution and wrote the Amendment that we now construe were not known for their reverence for the Union Jack. The First Amendment does not guarantee that

other concepts virtually sacred to our Nation as a whole—such as the principle that discrimination on the basis of race is odious and destructive—will go unquestioned in the marketplace of ideas. We decline, therefore, to create for the flag an exception to the joust of principles protected by the First Amendment.

It is not the State's ends, but its means, to which we object. It cannot be gainsaid that there is a special place reserved for the flag in this Nation, and thus we do not doubt that the Government has a legitimate interest in making efforts to "preserv[e] the national flag as an unalloyed symbol of our country." We reject the suggestion, urged at oral argument by counsel for Johnson, that the Government lacks "any state interest whatsoever" in regulating the manner in which the flag may be displayed. Congress has, for example, enacted precatory regulations describing the proper treatment of the flag, and we cast no doubt on the legitimacy of its interest in making such recommendations. To say that the Government has an interest in encouraging proper treatment of the flag, however, is not to say that it may criminally punish a person for burning a flag as a means of political protest. "National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement."

We are fortified in today's conclusion by our conviction that forbidding criminal punishment for conduct such as Johnson's will not endanger the special role played by our flag or the feelings it inspires. To paraphrase Justice Holmes, we submit that nobody can suppose that this one gesture of an unknown man will change our Nation's attitude towards its flag. Indeed, Texas' argument that the burning of an American flag " 'is an act having a high likelihood to cause a breach of the peace,' " and its statute's implicit assumption that physical mistreatment of the flag will lead to "serious offense," tend to confirm that the flag's special role is not in danger; if it were, no one would riot or take offense because a flag had been burned.

We are tempted to say, in fact, that the flag's deservedly cherished place in our community will be strengthened, not weakened, by our holding today. Our decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that our toleration of criticism such as Johnson's is a sign and source of our strength. Indeed, one of the proudest images of our flag, the one immortalized in our own national anthem, is of the bombardment it survived at Fort McHenry. It is the Nation's resilience, not its rigidity, that Texas sees reflected in the flag—and it is that resilience that we reassert today.

The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong. "To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." And, precisely because it is our flag that is involved, one's response to the flag-burner may exploit the uniquely persuasive power of the flag itself. We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag-burner's message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag that burned than by—as one witness here did—according its remains a respectful burial. We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.

Johnson was convicted for engaging in expressive conduct. The State's interest in preventing breaches of the peace does not support his conviction because Johnson's conduct did not threaten to disturb the peace. Nor does the State's interest in preserving the flag as a symbol of nationhood and national unity justify his criminal conviction for engaging in political expression. The judgment of the Texas Court of Criminal Appeals is therefore *Affirmed*.

From the concurring opinion by Justice Anthony M. Kennedy:

I write not to qualify the words Justice Brennan chooses so well, for he says with power all that is necessary to explain our ruling. I join his opinion without reservation, but with a keen sense that this case, like others before us from time to time, exacts its personal toll. This prompts me to add to our pages these few remarks.

The case before us illustrates better than most that the judicial power is often difficult in its exercise. We cannot here ask another branch to share responsibility, as when the argument is made that a statute is flawed or incomplete. For we are presented with a clear and simple statute to be judged against a pure command of the Constitution. The outcome can be laid at no door but ours.

The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision. This is one of those rare cases.

Our colleagues in dissent advance powerful arguments why respondent may be convicted for his expression, reminding us that among those who will be dismayed by our holding will be some who have had the singular honor of carrying the flag in battle. And I agree that the flag holds a lonely place of honor in an age when absolutes are distrusted and simple truths are burdened by unneeded apologetics.

With all respect to those views, I do not believe the Constitution gives us the right to rule as the dissenting members of the Court urge, however painful this judgment is to announce. Though symbols often are what we ourselves make of them, the flag is constant in expressing beliefs Americans share, beliefs in law and peace and that freedom which sustains the human spirit. The case here today forces recognition of the costs to which those beliefs commit us. It is poignant but fundamental that the flag protects those who hold it in contempt.

For all the record shows, this respondent was not a philosopher and perhaps did not even possess the ability to comprehend how repellent his statements must be to the Republic itself. But whether or not he could appreciate the enormity of the offense he gave, the fact remains that his acts were speech, in both the technical and the fundamental meaning of the Constitution. So I agree with the Court that he must go free.

From the dissenting opinion by Chief Justice William H. Rehnquist, joined by Justices White and O'Connor:

In holding this Texas statute unconstitutional, the Court ignores Justice Holmes' familiar aphorism that "a page of history is worth a volume of logic." For more than 200 years, the American flag has occupied a unique position as the symbol of our Nation, a uniqueness that justifies a governmental prohibition against flag burning in the way respondent Johnson did here. . . .

The flag symbolizes the Nation in peace as well as in war. It signifies our national presence on battleships, airplanes, military installations, and public buildings from the United States Capitol to the thousands of county courthouses and city halls throughout the country. Two flags are prominently placed in our courtroom. Countless flags are placed by the graves of loved ones each year on what was first called Decoration Day, and is now called Memorial Day. The flag is traditionally placed on the casket of deceased members of the Armed Forces, and it is later given to the deceased's family. Congress has provided that the flag be flown at half-staff upon the death of the President, Vice President, and other government officials "as a mark of respect to their memory." The flag identifies United States merchant ships, and "[t]he laws of the Union protect our commerce wherever the flag of the country may float."

No other American symbol has been as universally honored as the flag. In 1931, Congress declared "The Star Spangled Banner" to be our national anthem. In 1949, Congress declared June 14th to be Flag Day. In 1987, John Philip Sousa's "The Stars and Stripes Forever" was designated as the national march. Congress has also established "The Pledge of Allegiance to the Flag" and the manner of its deliverance. The flag has appeared as the principal symbol on approximately 33 United States postal stamps and in the design of at least 43 more, more times than any other symbol. . . .

The American flag, then, throughout more than 200 years of our history, has come to be the visible symbol embodying our Nation. It does not represent the views of any particular political party, and it does not represent any particular political philosophy. The flag is not simply another "idea" or "point of view" competing for recognition in the marketplace of ideas. Millions and millions of Americans regard it with an almost mystical reverence regardless of what sort of social, political, or philosophical beliefs they may have. I cannot agree that the First Amendment invalidates the Act of Congress, and the laws of 48 of the 50 States, which make criminal the public burning of the flag.

More than 80 years ago in *Halter* v. *Nebraska* (1907), this Court upheld the constitutionality of a Nebraska statute that forbade the use of representations of the American flag for advertising purposes upon articles of merchandise. The Court there said:

> "For that flag every true American has not simply an appreciation but a deep affection. . . . Hence, it has often occurred that insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot.". . .

But the Court insists that the Texas statute prohibiting the public burning of the American flag infringes on respondent Johnson's freedom of expression. Such freedom, of course, is not absolute. . . .

Here it may equally well be said that the public burning of the American flag by Johnson was no essential part of any exposition of ideas, and at the same time it had a tendency to incite a breach of the peace. Johnson was free to make any verbal denunciation of the flag that he wished; indeed, he was free to burn the flag in private. He could publicly burn other symbols of the Government or effigies of political leaders. He did lead a march through the streets of Dallas, and conducted a rally in front of the Dallas City Hall. He engaged in a "die-in" to protest nuclear weapons. He shouted out various slogans during the march, including: "Reagan, Mondale which will it be? Either one means World War III"; "Ronald Reagan, killer of the hour, Perfect example of U. S. power"; and "red, white and blue, we spit on you, you stand for plunder, you will go under." For none of these acts was he arrested or prosecuted; it was only when he proceeded to burn publicly an American flag stolen from its rightful owner that he violated the Texas statute. . . .

As with "fighting words" so with flag burning, for purposes of the First Amendment: It is "no essential part of any exposition of ideas, and [is] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed" by the public interest in avoiding a probable breach of the peace. The highest courts of several States have upheld state statutes prohibiting the public burning of the flag on the grounds that it is so inherently inflammatory that it may cause a breach of public order.

The result of the Texas statute is obviously to deny one in

Johnson's frame of mind one of many means of "symbolic speech." Far from being a case of "one picture being worth a thousand words," flag burning is the equivalent of an inarticulate grunt or roar that, it seems fair to say, is most likely to be indulged in not to express any particular idea, but to antagonize others. . . .The Texas statute deprived Johnson of only one rather inarticulate symbolic form of protest—a form of protest that was profoundly offensive to many—and left him with a full panoply of other symbols and every conceivable form of verbal expression to express his deep disapproval of national policy. Thus, in no way can it be said that Texas is punishing him because his hearers—or any other group of people—were profoundly opposed to the message that he sought to convey. Such opposition is no proper basis for restricting speech or expression under the First Amendment. It was Johnson's use of this particular symbol, and not the idea that he sought to convey by it or by his many other expressions, for which he was punished. . . .

The Court concludes its opinion with a regrettably patronizing civics lecture, presumably addressed to the Members of both Houses of Congress, the members of the 48 state legislatures that enacted prohibitions against flag burning, and the troops fighting under that flag in Vietnam who objected to its being burned: "The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong." The Court's role as the final expositor of the Constitution is well established, but its role as a platonic guardian admonishing those responsible to public opinion as if they were truant school children has no similar place in our system of government. The cry of "no taxation without representation" animated those who revolted against the English Crown to found our Nation—the idea that those who submitted to government should have some say as to what kind of laws would be passed. Surely one of the high purposes of a democratic society is to legislate against conduct that is regarded as evil and profoundly offensive to the majority of people—whether it be murder, embezzlement, pollution, or flag burning.

Our Constitution wisely places limits on powers of legislative majorities to act, but the declaration of such limits by this Court "is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case." Uncritical extension of constitutional protection to the burning of the flag risks the frustration of the very purpose for which organized governments are instituted. The Court decides that the American flag is just another symbol, about which not only opinions pro and con be tolerated, but for which the most minimal public respect may not be enjoined. The government may conscript men into the Armed Forces where they must fight and perhaps die for the flag, but the government may not prohibit the public burning of the banner under which they fight. I would uphold the Texas statute as applied in this case.

From the dissenting opinion by Justice John Paul Stevens:

As the Court analyzes this case, it presents the question whether the State of Texas, or indeed the Federal Government, has the power to prohibit the public desecration of the American flag. The question is unique. In my judgment rules that apply to a host of other symbols, such as state flags, armbands, or various privately promoted emblems of political or commercial identity, are not necessarily controlling. Even if flag burning could be considered just another species of symbolic speech under the logical application of the rules that the Court has developed in its interpretation of the First Amendment in other contexts, this case has an intangible dimension that makes those rules inapplicable.

A country's flag is a symbol of more than "nationhood and national unity." It also signifies the ideas that characterize the society that has chosen that emblem as well as the special history that has animated the growth and power of those ideas. . . .The message conveyed by some flags—the swastika, for example—may survive long after it has outlived its usefulness as a symbol of regimented unity in a particular nation.

So it is with the American flag. . . .It is a symbol of freedom, of equal opportunity, of religious tolerance, and of goodwill for other peoples who share our aspirations. The symbol carries its message to dissidents both at home and abroad who may have no interest at all in our national unity or survival.

The value of the flag as a symbol cannot be measured. Even so, I have no doubt that the interest in preserving that value for the future is both significant and legitimate. Conceivably that value will be enhanced by the Court's conclusion that our national commitment to free expression is so strong that even the United States as ultimate guarantor of that freedom is without power to prohibit the desecration of its unique symbol. But I am unpersuaded. The creation of a federal right to post bulletin boards and graffiti on the Washington Monument might enlarge the market for free expression, but at a cost I would not pay. Similarly, in my considered judgment, sanctioning the public desecration of the flag will tarnish its value—both for those who cherish the ideas for which it waves and for those who desire to don the robes of martyrdom by burning it. That tarnish is not justified by the trivial burden on free expression occasioned by requiring that an available, alternative mode of expression—including uttering words critical of the flag—be employed.

It is appropriate to emphasize certain propositions that are not implicated by this case. The statutory prohibition of flag desecration does not "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." The statute does not compel any conduct or any profession of respect for any idea or any symbol.

Nor does the statute violate "the government's paramount

obligation of neutrality in its regulation of protected communication." The content of respondent's message has no relevance whatsoever to the case. The concept of "desecration" does not turn on the substance of the message the actor intends to convey, but rather on whether those who view the *act* will take serious offense. Accordingly, one intending to convey a message of respect for the flag by burning it in a public square might nonetheless be guilty of desecration if he knows that others—perhaps simply because they misperceive the intended message—will be seriously offended. Indeed, even if the actor knows that all possible witnesses will understand that he intends to send a message of respect, he might still be guilty of desecration if he also knows that this understanding does not lessen the offense taken by some of those witnesses. Thus, this is not a case in which the fact that "it is the speaker's opinion that gives offense" provides a special "reason for according it constitutional protection." The case has nothing to do with "disagreeable ideas." It involves disagreeable conduct that, in my opinion, diminishes the value of an important national asset.

The Court is therefore quite wrong in blandly asserting that respondent "was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values." Respondent was prosecuted because of the method he chose to express his dissatisfaction with those policies. Had he chosen to spray paint—or perhaps convey with a motion picture projector—his message of dissatisfaction on the facade of the Lincoln Memorial, there would be no question about the power of the Government to prohibit his means of expression. The prohibition would be supported by the legitimate interest in preserving the quality of an important national asset. Though the asset at stake in this case is intangible, given its unique value, the same interest supports a prohibition on the desecration of the American flag.

The ideas of liberty and equality have been an irresistible force in motivating leaders like Patrick Henry, Susan B. Anthony, and Abraham Lincoln, schoolteachers like Nathan Hale and Booker T. Washington, the Philippine Scouts who fought at Bataan, and the soldiers who scaled the bluff at Omaha Beach. If those ideas are worth fighting for—and our history demonstrates that they are—it cannot be true that the flag that uniquely symbolizes their power is not itself worthy of protection from unnecessary desecration.

I respectfully dissent. □

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