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the target is rap

The major record companies agreed in March to place a uniform warning label under the disposable wrapping of recordings whose lyrics may offend some listeners. The labels, which will read "Explicit Lyrics — Parental Advisory," are to be uniformly applied on albums, cassettes and CD packages, making it easier for consumers to identify such recordings. Acting through their 55-member trade group, the Recording Industry Association of America (RIAA), the record companies agreed to adopt the new label after urged to do so during the March annual meeting of another trade organization, the National Association of Record Manufacturers, an 800-member group of retailers and wholesalers. The National Association of Independent Record Distributors and Manufacturers, which represents many smaller labels, is also urging its members to adopt the uniform sticker.

Retailers have been under growing pressure to label rock, and especially rap, albums, with nine states considering bills to require warning stickers on recordings with potentially objectionable lyrics (see page 77). The police departments of some communities have also taken action against sellers of recordings they consider objectionable, charging record store employees under local obscenity laws. These measures have a potentially serious impact on libraries (see page 79).

"We're trying to make our retailers happy," said Patricia Heimers, vice president of public relations for RIAA. "And we want to give parents with legitimate concerns a recognizable sticker."

Warning stickers now appear on many albums, but the stickers are often coordinated with the cover design and their wording varies. What will make the new ones different is their uniformity; all will have the same wording, the same design and the same placement.

In 1985, the record companies agreed to label potentially objectionable albums after a national publicity campaign by the Parents Music Resource Center (PMRC). The group is led by, among others, Tipper Gore, wife of Sen. Albert Gore, Jr. (D-TN), who is a member of the Senate Commerce Committee, which held hearings about rock lyrics in 1985.

"We have long supported voluntary labeling and we think it's a wise move on the industry's part," said PMRC executive director Jennifer Norwood. "I would think that it would offset some of the legislation that is pending. We would certainly like to see this whole thing resolved into a system that everyone could live with, and we think that voluntary labeling is the way to go."

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in this issue

targets of the censor

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legal analysis
record labeling

The following analysis of pending legislation in various states to label records, tapes and CDs with parental advisory warnings was prepared by attorney Roger L. Funk of the Los Angeles firm of Greenberg, Glusker, Fields, Claman and Machtinger. Funk is a former assistant director of ALA's Office for Intellectual Freedom and former assistant editor of the Newsletter.

Bills have been introduced in state legislatures around the nation (including the legislatures in Pennsylvania, Iowa, Florida, and Missouri) that would require persons selling records, tapes, and compact discs to label certain of their products with so-called parental advisory warnings. These labels would advise parents of lyrics relating to drugs, alcohol, sex, and violent crime. In most cases, the proposed laws would prohibit all sales of recordings with the targeted lyrics, *unless* the packaging carried labels bearing prescribed warning language.

analysis

The apparent targets of these bills are popular songs which some people find offensive or dangerous to children because the lyrics supposedly encourage the use of illicit drugs, describe sexual acts in explicit terms, disparage certain ethnic groups, etc.

As a threshold matter, it is important to remember that song is a form of political speech older than pamphlets and newspapers, and continues to this day as an important force in political protests throughout the world. In the United States, "We Shall Overcome" became the anthem of the civil rights movement. Rock songs today sometimes contain subtle themes of political protest and can play a surprisingly large role in galvanizing public opinion. In Poland, for example, a prominent rock group, "Perfect," played a significant role in the events leading to the capitulation of the Communist regime in that country.

Popular songs containing political speech are clearly protected by the First Amendment, which has always been deemed to protect political speech above all. However, even as "entertainment" (that is, as artistic speech without any obvious political implications) popular songs clearly enjoy First Amendment protection along with other forms of creative expression. See, *e.g., Schad v. Mt. Ephraim*, 452 U.S. 61 (1981) (nonobscene nude dancing protected by First Amendment); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (staging of musical production protected by First Amendment).

If the proposed laws were designed simply to ban the targeted songs from any form of dissemination, clearly they would be unconstitutional. However, like bills that would require video merchants to affix "PG," "R," and similar labels to video cassettes of movies, the current bills represent a relatively new form of attempted regulation of speech. The problems they pose are numerous and difficult to analyze. Nevertheless, certain aspects of the present bills are so deficient that they would almost certainly be adjudged unconstitutional on the first court challenge. They suffer from two "cardinal sins" of speech regulation: vagueness and overbreadth.

All of the bills are vague because they would regulate, among other things, speech that ostensibly "encourages" suicide or the illegal or excessive use of alcohol or illicit drugs (to pick but two or three of the bills' many targets). To demonstrate this point, one need only ask a few questions. Would all references to any enjoyment of drugs be deemed impermissible? If so, who is to determine the meaning of songs containing lines like Bob Dylan's "Everybody must get stoned"? Is a ballad about a suicide by a distraught lover an "encouragement" (or even advocacy) of suicide? If so, and if the government is entitled to regulate such songs, is the government also entitled to regulate publications by a society promoting suicide as a humane alternative to a painful terminal illness? It quickly becomes apparent that these bills have no clear boundary, that they encompass not only countless popular songs but also, for example, classical opera, where themes of murder, adultery, violence, and suicide abound.

The bills are also overbroad. They would regulate lyrics which merely *describe* adultery, murder, the use of drugs, etc. Is "Mack the Knife" really a proper target of government regulation? If so, why aren't newspapers describing murder and mayhem also subject to regulation? And if a song describing adultery should be subject to regulation, why isn't Hawthorne's *Scarlet Letter* (not to mention supermarket tabloids) equally subject to the government's control?

The bills have defects in addition to the overbreadth and vagueness. The form of regulation proposed by the bills is extremely troublesome.

From one point of view, the bills could be described as proposing a kind of self-executing licensing scheme. Alternatively, they could be viewed as attempts to compel speech with specified content as a precondition of the dissemination of other speech.

Courts in the United States have struck down certain kinds of licensing schemes as impermissible "prior restraints," the worst of the "cardinal sins" of speech regulation. For example, a city might empower a panel of bureaucrats to determine whether or not a movie can be shown, or whether it can be shown only to adults. In such a situation, a person wanting to exhibit a film would have to apply for a license by submitting the film for prior approval. Such licensing schemes are clearly unconstitutional prior restraints unless they provide strict procedural safeguards and assure almost immediate judicial review. E.g., *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). The current bills, however, would operate with a new twist. The "license" required,

namely, the bright yellow label, is part of a scheme which avoids bureaucrats and requires distributors of sound recordings to "self-license" their recordings by affixing the yellow stickers.

Thus, the effect of the proposed laws is to compel a little "warning" speech as a precondition of other speech — speech which itself is fully protected by the First Amendment as political or artistic speech. The traditional focus of the First Amendment and the cases interpreting it has been the suppression of speech by government, not laws which would compel specified speech to qualify for the dissemination of other speech.

Specified speech apparently can be made a precondition of so-called commercial speech (i.e., speech relating to business and consumer transactions, such as an ad or offer to sell goods.) For example, a securities dealer advertising bonds or shares of stock may be required by law to make certain statements in each ad for the protection of potential investors. See *generally Posadas de Puerto Rico v. Tourism Co.*, 478 U.S. 328 (1986) (commercial speech receives limited protection so long as it is not misleading or fraudulent). With the current labeling bills, however, we are not dealing with commercial speech, but rather political and artistic speech which is given full First Amendment protection. Accordingly, no precondition should be permitted by the courts.

Some of the pending bills would authorize civil actions against performers and producers of music whenever a perpetrator of violence was "motivated" by song lyrics. Due to their "chilling effect" on speech, such provisions are of extremely dubious validity under the First Amendment. See *Olivia N. v. NBC*, 126 Cal.App.3d 488, 178 Cal.Rptr. 888 (1981) (First Amendment bars claim for injury inflicted by person who saw broadcast of act similar to act committed against plaintiff); *McCollum v. CBS*, 202 Cal.App.3d 989, 249 Cal.Rptr. 187 (1988) (First Amendment bars claim that music was cause of teenager's suicide).

impact on libraries

Since the McCarthy era, the American Library Association has opposed all labeling of library materials to identify supposedly "dangerous" works. See *ALA Intellectual Freedom Manual* 27 (3rd ed. 1989). In so doing, the ALA has acted to preserve a fundamental tenet of intellectual freedom in library services: In a democratic society, each person should be permitted to decide for himself or herself what to read or view. The fact that a work is in a publicly funded library means only that it is there for access. No official approval is implied.

From a practical standpoint, history shows that any capitulation to demands for labeling would lead to library materials decorated with as many ribbons and badges as a Russian hero from World War II. The impulse to label communicative materials in libraries is apparently irresistible. During World War I, for example, campaigns were organized to require labels identifying all works by German authors in public libraries. In the early years of the Cold War, particularly during the time of the McCarthy hysteria, "patriots" mounted efforts to have libraries identify by label all books by "pro-communists." More recently, groups have called for warning labels on library works that supposedly promote racism and sexism.

The threat created by laws like the pending bills is the strong support they lend to the labeling movement. Whether or not the proposed laws apply directly to libraries, they would apply to library suppliers and, inevitably, result in labeled works being delivered to libraries. From there, it is but a short step to demands that unlabeled works in libraries be reviewed and "corrected" with an appropriate warning to the supposedly naive public.

Thus, the question becomes one of finding the best way for librarians to defeat such legislation—to protect free expression generally and to shield their collections from labeling. The question is ultimately one which can be answered only in specific political situations by persons with knowledge of particular legislators and the kinds of arguments they find persuasive.

As viewers of C-SPAN know, some legislators do respond to constitutional arguments of the kind outlined above. Others are more persuaded by pragmatic arguments. In such instances, librarians should point to the practical effect of overbreadth and vagueness. Not having any means to determine the scope of the proposed laws, people in the music business would respond by labeling virtually everything, thereby rendering such labeling laws entirely meaningless.

In the case of libraries, the problems created by labeling laws are compounded. If a labeling requirement were imposed on libraries, already limited resources would be overwhelmed. Moreover, to avoid legal liability — even criminal liability — while striving to preserve maximum access to library materials, librarians would be forced to retain attorneys to review labeling decisions.

Thus, librarians in every state where labeling bills are proposed should review them carefully for adverse implications. If necessary, library groups should obtain expert advice on legal issues and on the legislative process in their state. □

Bush opposes arts censorship

President George Bush said March 23 that he opposes government censorship of the arts, and he indicated that he would oppose any legislation restricting arts funding. Bush said he didn't "know of anybody in the government or government agency that should be set up to censor what you write or what you paint or how you express yourself."

Sen. Jesse Helms (R-NC) introduced an amendment to the National Endowment for the Arts (NEA) appropriations legislation last year to severely limit the content of federally supported art. A watered-down version of that amendment is now in effect. Helms and other conservatives have been pressing for additional legislation to control the content of federally funded art. Some have called for the abolition of NEA.

In his strongest statement to date on the subject, Bush expressed his "full confidence" in NEA Chair John Frohnmayer as a "very sensitive, knowledgeable man of the arts" who is "fully capable of handling the delicate matter of NEA's judgment in funding controversial art."

In a gesture to those outraged by what they consider obscene art, the president said, "I am deeply offended by some of the filth that I see into which federal money has gone, and some of the sacrilegious, blasphemous depictions that are portrayed by some to be art. And so, I will speak strongly out opposed to that." Bush added, "I'm against censorship, but I will try to convince those who feel differently in terms of legislation that we will do everything in our power to stop pure blasphemy."

In response to the president's remarks, press representative Kathy Christie of NEA said Frohnmayer reiterated his position, expressed previously in Congressional testimony: "I will be diligent that obscenity will not be funded by the Endowment. . . . I believe in a responsible Arts Endowment, which promotes only the finest art available in this country. I believe it is inappropriate for Congress to micro-manage the Endowment through additional legislation."

Bush's remarks were hailed by Anne Murphy, executive director of the American Arts Alliance, who said it was "very important that the president said that the government should not censor how you express yourself. In his comments today he speaks strongly against censorship and of his firm confidence in Frohnmayer... He acknowledges that some people are offended by certain artworks but says NEA can handle the problem. That's what most of us believe. We don't want the government deciding ahead of time what's offensive."

Although conservative Rep. Dana Rohrabacher (R-CA), who has been a vocal critic of NEA funding of allegedly "obscene" art, welcomed Bush's statement "that he doesn't like government-supported pornography any better than he likes broccoli," most ardent conservatives were critical of the president's stand. The White House switchboard was deluged with telephone calls protesting the administration's position on arts funding. Reported in: *Washington Post*, March 24. □

libraries and record labels

The following is reprinted from the March 1990 OIF Memorandum *produced by ALA's Office for Intellectual Freedom.*

The effect of these proposed laws is to compel a "warning" speech as a pre-condition of speech fully protected by the First Amendment. The proponents of these bills argue that they are simply asking that consumer information be provided. It is true that certain speech can be made a pre-condition of so-called commercial speech, that is, speech relating to business and consumer transactions, *e.g.*, advertisements or offers to sell goods. For instance, securities dealers can be required by law to make certain statements to protect potential investors from fraud. Record labeling, however, deals not with commercial speech, but with political and artistic speech fully protected by the First Amendment.

Capitulations to demands for labeling could threaten to open the door to labeling of entire library collections. Librarians should work to defeat such legislation to protect free expression generally and shield collections from labeling. Some legislators will respond to the constitutional arguments—others are more persuaded by pragmatic arguments. It may be helpful to point out the practical effect of the over-breadth and vagueness of these statutes—not only would they appear to require warning labels on classical operas and recordings of Shakespeare plays, but persons in the recording arts business may respond to labeling statutes by labeling almost everything in order to protect themselves. The labeling laws then become meaningless.

Librarians in every state where labeling bills are proposed should review the bills carefully for adverse implications. We will assist you in this endeavor—as a copy of each bill is received, we will have it analyzed for you. The analysis and a cover memo—containing points that can be used in testifying—if your state library association chooses to do so—will be sent to the chair of the particular state.

In some instances, it may be necessary to obtain expert advice on legal issues and on the legislative process in individual states. For more information on record labeling, contact the Office for Intellectual Freedom. □

new Mapplethorpe furor in Cincinnati

An exhibit of photographs that ignited a ferocious debate last summer on federal funding of sexually explicit art came under fire in March in Cincinnati, a city that has long been a bulwark in the anti-pornography movement. Local law enforcement officials and anti-pornography groups rose up against the exhibit, a retrospective of Robert Mapplethorpe photographs, which includes sexually oriented and homoerotic images. In response, the Contemporary Arts Center, where the exhibit was scheduled to open April 6, went to court seeking a ruling that the photographs were not obscene by community standards. The court, however, declined to rule in advance of the exhibition.

The court action came only after officials of the center were pressured by local business leaders to cancel the opening, with some protesters threatening to withdraw business from board members' employers. The museum's chairman resigned amid boycott threats against his employer, a local bank.

The Cincinnati Police Chief also got into the controversy when he vowed to send officers to examine the exhibition and seize any photographs they found obscene. "These photographs are just not welcome in this community," said Chief Lawrence Whalen. "The people of this community do not cater to what others depict as art."

When the exhibit opened, police brought charges against the Contemporay Arts Center for obscenity violations, although the photographs were not removed. A trial was scheduled for later this spring. [Further details in the July *Newsletter*.]

Explaining why the museum went to court, attorney Louis Sirkin said, "We want to put a stop to the threats that have been going back and forth. We want a decision on whether the work as a whole has serious artistic value. We're not afraid of a fight."

The Corcoran Gallery of Art in Washington canceled the Mapplethorpe retrospective last summer amid a political battle over financing of the National Endowment of the Arts, which partially underwrote the exhibit's cost. The Washington Project for the Arts eventually showed the exhibit before it moved to Hartford, Connecticut, and Berkeley, California. In all three venues, the photographs were seen by record crowds, with little protest.

Cincinnati, however, is the headquarters of the National Coalition Against Pornography, and has a virtual ban on sexually oriented material. Unlike most other large cities, Cincinnati by law has no peep shows, no adult bookstores, no X-rated theaters, no bars that allow nude dancing, no escort services, and no massage parlors. Residents cannot rent adult movies at video stores nor buy magazines like *Hustler*. A recent production of the play *Equus* was reviewed by the police before its opening, and when *The Last Temptation of Christ* was released, no Cincinnati theater dared show it. Reported in: *New York Times*, March 29. □

narrow range of views of TV

The narrow range of people who are invited to speak on television as experts about world and national events has long been criticized in journalistic circles. Now a study reported in *Mother Jones* magazine reveals that although many conservatives charge that the media reflect a "liberal bias," conservative Republicans — overwhelmingly white and male — constitute the great majority of those recruited to speak as "experts" on foreign and domestic policy issues.

The study, conducted by Marc Cooper and Lawrence Soley of the University of Minnesota, focused on the evening news programs of ABC, NBC and CBS. Of the top 16 "news shapers," as the study calls them, 11 were Republican consultants and ex-government officials or from conservative think tanks. Together they accounted for 312 of the 426 appearances, or 73 percent, in 1987 and 1988.

The study found that Henry Kissinger and his associates, including Brent Scowcroft and Lawrence Eagleburger, in particular, were "granted a near monopoly as on-air network foreign policy and national security experts," racking up 108 network appearances in 1987 and 1988. "They were peddled to U.S. viewers as 'objective' political analysts," the study said, "while all were, in fact, hard-line, Cold Warrior Republicans or ex-CIA agents."

In contrast to the minority of Democratic commentators, the study found, the political orientation of Republicans is generally kept from viewers. "The Democrats are almost always billed as Democrats, tipping off the viewership that it is listening to a partisan view."

A telling example of the trend, the study found, is that of Kevin Phillips, who appeared 43 times during the survey period. In three-fourths of Phillips' appearances he was given the neutral title "political analyst," when in fact he is a conservative Republican activist.

The study attributed the domination of conservative Republicans to a combination of laziness and cowardice on the part of network executives, who tend to pick the handiest Republican out of habit and avoid people of opposite views. An executive who reaches out for a less orthodox view of American society than a "safe" one would mark himself as someone who would have to be watched, one producer told the magazine.

Prof. Soley said his study was inspired by a February, 1989, report by Fairness and Accuracy in Reporting (FAIR), which charged ABC's celebrated "Nightline" program with a conservative bias. After surveying 865 "Nightline" broadcasts, encompassing nearly 2,500 guests, FAIR found that 92 percent of the guests were white, and 89 percent were men. Of the 19 guests who were on five times or more, all were men and 13 were either part of or close to the Reagan administration.

"Nightline" host Ted Koppel explained the domination of conservatives by noting that conservatives had been in

power. "If we had a liberal administration in office," he told the *Los Angeles Times*, "you would suddenly see an enormous disparity in the other direction." Soley commented that this was like saying that if you lose an election, you also lose the right to be heard.

The full study from which the *Mother Jones* report was excerpted can be obtained for $2.50 from the School of Journalism and Mass Communication, University of Minnesota, 111 Murphy Hall, 206 SE Church St., Minneapolis, MN 55455. Reported in: *Minneapolis Star-Tribune*, January 29, 30. □

satanism book withdrawn

An alleged autobiographical account of satanic sexual abuse that helped inspire Geraldo Rivera's 1988 satanism special and has played a leading role in much of the hype and hysteria surrounding the occult was withdrawn by its publisher in late January after an independent investigation cast doubt on its credibility.

Satan's Underground, by Lauren Stratford, a pseudonym for Laurel Willson, purported to be the story of a woman who, after her mother began selling her as a prostitute at age 6, became enslaved to a satanic pornography ring. She claimed to have been a "breeder" who gave birth to three children who were murdered in pornographic films and satanic rituals. After the book was published Willson, of Bakersfield, California, appeared as an "expert" on several syndicated talk shows and on Rivera's popular NBC special "Devil Worship: Exposing Satan's Underground."

Cornerstone, an evangelical Christian magazine in Chicago, initiated an investigation of the book late last year. The magazine gathered public records of Willson's life and interviewed people who knew her well. The witnesses quoted by the magazine contradicted the book. Most, including Willson's sister, had never heard of the book.

"We're upset by the number of books that exist within the evangelical Christian marketplace that simply have no evidence to back them," said Jon Trott, editor of *Cornerstone* and a co-author of the article. By publishing *Satan's Underground* without attempting to verify the story through eyewitnesses, "they [the publishers] have done the public a disservice and [Ms. Willson] a disservice," he said.

The *Cornerstone* investigation appeared in early December, and Harvest House, an evangelical publishing firm in Eugene, Oregon, announced in late January that it would withdraw the book. The publisher did not, however, admit any errors in either the text or its own actions.

Willson's friends and relatives quoted in *Cornerstone* consistently described her as an emotionally troubled woman who gained their sympathy with wild tales of illness or abuse. For instance, a family of Pentecostal evangelists who befriended her in 1962 said Willson had faked blindness for a time.

Among the book's discrepancies reported in *Cornerstone*:

- In *Satan's Underground*, she claimed to have given birth to three children while in her teens and early 20s. But Willson's friends, relatives and teachers from those years — during which she was an honor student in high school, attended college and gave public singing and piano concerts — said she was never pregnant in those years.
- In *Satan's Underground*, she claimed that her father left the family when she was 4 and that she did not see him again until she was 15. She said his death in 1983 enabled her to leave the satanic pornography ring two years later. *Cornerstone* reported, however, that her parents separated when she was 9, but that she saw her father regularly in the following years. Citing public records and relatives, the magazine reported that her father died in 1965, 18 years before the book claims.
- The book mentions no siblings, but Willson has a sister, Willow Nell. She told the magazine their childhood home was troubled, but dismissed tales of child prostitution, bestiality and a pornography ring.

Evangelical defenders of *Satan's Underground* and of the anti-Satanism movement in general, have been less than enthusiastic about *Cornerstone*'s expose, Trott said. "We've already had it suggested that we are in some way linked with Satanists and secular humanists — two groups that I never thought had much to do with each other," he said.

J. Gordon Melton, director of the Institute for the Study of American Religion at the University of California at Santa Barbara, who believes most stories of satanic abuse are mythical, said *Satan's Underground* has "been continually quoted and she made the whole round of talk shows." He said the book has had "a very strong effect, particularly within the Christian community, where there is a sort of will to believe." Reported in: *Pittsburgh Press*, February 18. □

book purge in Romania

On December 27, some 48 hours after Romanian leaders Nicolae and Elena Ceausescu had been executed by firing squad, librarians at the national library were shipping hundreds of books authored by the couple to a paper recycling plant. Angela Sopescu-Bradiceni, director of the Central State Library of the Socialist Republic of Romania, promised she would not order all copies of the Ceausescus' books destroyed. "Perhaps we will keep one copy of each somewhere. After all we are a library."

Among the works removed were the Romanian dictator's 32-volume collected works and the scientific writings of his wife. Spinu Virgil, director of book acquisitions, told the press that the national library had been without funds for foreign book purchases for ten years and had been forbidden to purchase works written or published by Romanians living abroad. The secret police, he said, had investigated anyone applying for permission to read about the last fifty years of Romanian politics. Reported in: *American Libraries*, February 1990. □

AAParagraphs
soviet drafters urged: decide purpose for your press

This column, regularly written for the Newsletter on Intellectual Freedom by the Freedom to Read Committee of the Association of American Publishers, is devoted in this issue to remarks delivered by the Committee's Counsel, R. Bruce Rich, a partner in the New York law firm of Weil, Gotshal & Manges. Under the auspices of the United States Information Agency, and by arrangement of AAP President Nicholas Veliotes with U.S. Ambassador to the U.S.S.R. Jack Matlock, Rich traveled in Eastern Europe for three weeks during February, visiting Moscow, Kiev, Leningrad, Tallin, Bucharest, and other communities. In Moscow, at Spaso House, the Ambassador's residence, Rich delivered the following remarks to an audience of Russian political leaders and journalists, including those currently at work drafting a new press law for the U.S.S.R.

It is fitting that I address you this evening on the eve of the 200th anniversary of the Bill of Rights to the U.S. Constitution — which was enacted in 1791 — at a time when your own nation is deliberating creation of its own law to govern the role of the press in Soviet society.

In preparing these remarks, I have reviewed our own nation's evolution of press freedoms, as they have come to be embodied in the first of the Bill of Rights — what we call the First Amendment to our Constitution.

That review reveals a number of issues relevant to the process you yourselves are now conducting. I say this not because the soil from which our First Amendment developed was essentially similar to that from which your own press law will emerge, but, rather, because our Founding Fathers, and succeeding generation, have struggled with very basic, very core concepts which, I submit, *any* nation intent on creating a viable and effective press must also come to grips with.

It is therefore my intent in the time allotted me to outline some of the roots issues our nation has grappled with in shaping its traditions of press freedom, describe how these issues have been resolved, and indicate, from my own review of your press legislation in its present form, where similar issues arise. It is obvious that, while I come to you as one knowledgeable about our own perspective, heritage and national experience, whatever insights I am able to provide you from that vantage point will have to be analyzed, molded and accepted to whatever degree guided by your own history, objectives and national instincts.

What first bears observation in analyzing the U.S. experience is that there is no detailed statute setting forth the press' rights and responsibilities similar to the approach of the draft press statute your nation is considering. Instead, the source of all "press law" in the United States is the First Amendment itself, as interpreted by hundreds of decisions by the U.S. Supreme Court and lower courts. Any federal or state laws attempting to regulate the press are subject to interpretation for their conformity with the First Amendment.

The words of the First Amendment are spartan in their simplicity:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances."

Only 14 words deal with free speech and free press: "Congress shall make no law . . . abridging the freedom of speech, or of the press." What was the genesis of this language, and why, if it is so fundamental, was it added to the Constitution as an amendment?

Interestingly, the U.S. Constitution itself contains no explicit reference to freedom of expression or freedom of the press. When the Constitution was adopted in 1789, it listed many powers that would be given to the new federal government that was being formed. Among the many activities authorized were the power to collect taxes, to borrow money, to regulate commerce, to coin money, to establish a post office, and to provide for the defense of the nation. The list also includes the power, in the exact words of the document, "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." That grant of authority later became the basis for the nation's copyright and patent laws.

But the Constitution said nothing about any power to regulate speech or the press. Since the Constitution was generally viewed as conferring on the new Government only those powers that were specifically enumerated, for many its silence as to the press was proper recognition that the new Government had *no* authority whatsoever to regulate it. For many of our nation's Founding Fathers, there existed a group of rights, possessed by individual citizens, which were so fundamental that they could not be abridged by any Government. Among those were the rights to freedom of belief, of speech, and of the press. Hence the lack of specific protection for such rights in our Constitution was seen not as reflecting on insensitivity to them, but, rather, as a deliberate affirmation that these matters were simply not the proper subject of federal government regulation.

Many other American colonists were concerned, however, about the tendency of almost any government to expand its powers. They insisted that explicit language be added to the Constitution to assure that their personal freedoms would not be trampled on.

Among the advocates of specific guarantees was James Madison, later the fourth president of the United States, who eventually took the lead in preparing the First Amendment.

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censorship dateline

libraries

Chicago, Illinois

The Chicago Public Library's response to a complaint by Jewish groups about a library-prepared bibliography on the Israeli-Palestinian conflict was criticized by *Chicago Sun-Times* columnist Dennis Byrne. In two columns published January 30 and February 1, Byrne charged that the library had buckled under to political pressure despite an internal review of the bibliography which found it adequate.

According to Byrne, the bibliography, prepared by veteran library staff historian David Williams, was issued in the spring of 1989. Last fall, the Anti-Defamation League of B'nai B'rith (ADL) and the Jewish Community Relations Council of the Jewish United Fund of Metropolitan Chicago (JCRC) criticized it. "At first, Chief Librarian Samuel F. Morrison (who recently left the library) defended the bibliography's balance and 'rigorous' scholarship." However, "after further back and forth, Morrison changed his mind and wrote to the JCRC on January 12 that 'a new bibliography, incorporating more than thirty titles recommended by Mr. Barry Morrison of the ADL and not an update' was being compiled."

In another letter, Morrison told the ADL that the new bibliography would be done by someone other than Williams. The ADL, in a January 5 letter to the library, had raised as an issue Williams' former membership in the Palestinian Human Rights Campaign.

Then, Byrne continued, "after I raised the library issue in my column" the situation changed. "Library Commissioner John Duff called to tell me that Williams now is 'going to do the whole thing and then submit it to me for review.'" Duff also denied receiving any political pressure and said no books would be removed.

"Spokesmen for the Jewish groups say they did not ask that any books be removed," Byrne continued, "and I believe them. I also believe they did the right thing when they complained about something they thought was unfair....Nor, as a non-scholar, can I defend, or criticize, Williams' list..."

"And I'm sure both sides can find scholars to support their viewpoints," added Byrne. "Williams argues that the list reflects a prevailing scholarship that is no longer two-sided, but multifaceted.... But allowing a partisan party to impose its own view of what constitutes balance is to permit a form of academic censorship, he argued."

"And that's my problem," the columnist declared. "If you open up the process to one side, where are we headed? Fadi Zanayed, president of the local chapter of the American-Arab Anti-Discrimination Committee, gave us a clue when he said he'd be watching the outcome. 'If the library board or the administration is going to cave in to the ADL demands, then they have to cave into ours,' he said."

Byrne noted that in a late December memo one Chicago librarian expressed doubt "whether this bibliography will ever be acceptable to such intensely partisan watchdog organizations."

"What we can't afford to do in a city as diverse as Chicago," Byrne concluded, "is to let the interests that get there first, or with the most clout, give us the answer." Reported in: *Chicago Sun-Times*, January 30, February 1.

La Grange, Illinois

The La Grange library's Planning and Policy Committee met January 9 to discuss a request by a La Grange Park resident that the library remove a book that he believes is anti-Semitic. Patrick Spohnholtz said he was shocked by the book, *The Secret of Jonestown: The Reason Why*, by Ed Dieckmann, Jr., which he says promotes "hate" for the Jewish people. "It is a Nazi book and it doesn't belong in La Grange. I would like to see them remove it," he said.

Spohnholtz filed a complaint with the library October 6 after he found the book in its religion section. He said the theme of the book was the alleged existence of a Jewish conspiracy to destroy America and establish a Zionist dictatorship. Spohnholtz also wrote to the Anti-Defamation League of B'nai B'rith, which requested that the library reclassify the book under a heading of racism or anti-Semitism, said librarian Steven Moskal.

Moskal said that his staff recommended that the library board move the book from its classification in the religious sect division to books on brainwashing. Moskal said he read the book and did not believe it was anti-Semitic. "There is some discussion about Zionism in the first ten pages, but the rest of the book is about brainwashing and encountering group therapy," he said. "I asked my staff, and some of them are Jewish, and they did not think the book was anti-Semitic." Reported in: *La Grange Suburban Life Citizen*, January 10.

Frankfort, Kentucky

The parent of an Elkhorn Middle School student filed a formal complaint February 6 calling for the removal of a folklore book about devils and demons from the school's library because it describes devil worship.

Karen Underwood said her seventh-grade daughter brought the book *Demons, Devils and Djinn*, by Olga Hoyt, home from school to do a book report. "I went through it and read parts of it," she said. "It's got things in there that you say to make the devil come, what you have to sacrifice and what time to do it. To me, that is a devil worship book. They take prayer out of the schools, yet they allow this."

Principal David Simpson said the book's fate would be decided according to board of education policy which mandates review first by a six-member school committee consisting of the principal, librarian, two teachers and two parents. Appeals can be made to Superintendent Faurest Coogle and then to the school board.

Coogle said he generally is opposed to pulling books from libraries. "You have the right to read what you want to read, within reason," he said. "But if I object to it because of religious reasons or because of obscene language — whatever — then I have the right not to read it as well." Reported in: *Frankfort State Journal*, February 8.

Spring Lake, Michigan

A school board committee was appointed in March to review a request to remove a book from the library at Jeffers Elementary School. Peter Fries asked Spring Lake school officials March 12 to examine his request that *Zork: The Malifestro Quest*, a fantasy adventure book by Eric Meretzky, be removed from Jeffers.

'I do have a Christian bias and I do feel compelled by God to be here tonight," Fries told the board. "I feel it [*Zork*] is a disgrace to the Lord and to the Spring Lake school system."

In compliance with district policy, Fries' initial request was filed as a written objection and discussed by a committee of teachers, administrators, and librarians, who filed their recommendation with Superintendent Duane Moore. On March 1, Moore rejected Fries' request, noting that the committee recommended retention of the book.

Fries appealed to the school board, saying he felt it was a "mistake" for school officials to permit the book to remain on the shelves. "This whole book is offensive to me," he said. "I strongly disagree with the superintendent that this book is 'subject matter typical in material created to interest young people of these ages.'"

The book is a fantasy/adventure that casts readers in the role of the characters, asking them to select from a field of presented options to bring the story to a conclusion.

"In reality, this book is a brazen attempt to interest young minds in the occult," Fries told the board. "In fact, the theme of this book is that 'good triumphs over evil only through evil.' There is no doubt in my mind this *Zork* adventure fantasy places young minds into a relationship with the devil, and I feel this is dangerous and unacceptable."

Fries added that he was concerned that other "inappropriate" materials may be available in school libraries. "I don't know how many books there are like this one," he said. "I also am of the opinion that parents who do not want their children reading certain types of books should inform the public school system of the kinds of literature they should not be buying. I don't think our tax dollars should be buying this garbage."

Board president Ray Murray appointed members James Huggins, Lorraine VanBeuerking and Judy Noonan to the committee to review the book and make a recommendation to the board. Reported in: *Grand Haven Tribune*, March 13.

St. Peters, Missouri

The mother of a 10-year-old Central School student asked the Francis Howell School Board in March to remove a book about the underworld from the school library because the principal would not do so. Nanette Frank said that after listening to her daughter talk about the new, frightening books in the school library, she told the girl to bring one of them home.

The book, *Cerberus*, by Bernard Evslin, is a story from ancient Greek mythology about Cerberus, the three-headed dog; Hades, the ruler of hell; and a little girl. Frank said the book contained pictures of dead fetuses and babies' skulls, a pig dressed as a nun kissing a naked man, and naked bodies piled one atop another.

"I don't think the book is appropriate either," said superintendent Wanda McDaniel, "but we have a process to deal with such a problem and we are trying to follow that process. If we have a knee-jerk reaction every time a person calls a book inappropriate and start yanking books off the shelves, we wouldn't have any books left. Censorship can get out of control. We plan to have a committee review the book and prepare a recommendation."

Frank first saw the book March 8. After reading it, she said she and two other mothers contacted principal Al Cozzoni, saying they wanted the book removed. "He said we'd have to fill out a form on the book, and then they'd have to form a review committee to decide if the book should be removed," Frank said. "He said I couldn't be on the committee because I'm biased."

She and the other women then asked to see other books in the library. "We found books called *They Travel Outside Their Bodies*; *The Truth About Spoon Bending and Other Phenomena*; and *Devils and Demons*," she said. She said Cozzoni would not allow her to remove those books either. Reported in: *St. Louis Sun*, March 15.

Vancouver, Washington

The Evergreen School Board hoped to put its longstanding controversy over sex education books to rest January 8. But

a decision that evening to end the district's restricted shelf did not silence critics of the books. Angry parents threatened to keep their children out of school after the board voted 3-2 to move sex education books off restricted shelves in elementary school libraries.

Board members Robin Capps, Mary Ellen Anderson, and Andy Marks voted for Marks' proposal to move the books out of library offices. The plan allows parents to ask that their children not be allowed to check out sex education books.

But pro-restriction parents were angered that the board turned down an amendment offered by board member Sharon Long, which would have kept an advisory committee to help parents know which books they might want to keep their children from checking out.

Board member Don Walley, who opposed the new policy, said the vote sent a message that the board is not serious about "building a bridge" to the district's parents. "They're telling you that if you want to review the books, then form committees and start going to libraries and pulling books off the shelves," Walley said immediately after the vote.

"Or maybe we'll just picket the libraries," shouted audience member Marjie Austen.'

"We'll take our kids out of the school system," threatened Jim Currie.

The vote was the latest episode in a long dispute that has affected two school board elections. Marks and Anderson were elected to the board in November on anti-restriction platforms. But their supporters didn't come to the January 8 meeting.

Marks said his proposal was a compromise between parents who wanted their children to have free access to the books and those who wanted some control. But Walley and Long said the plan would be difficult and expensive to administer. Long conjured up images of hundreds of parents coming to school libraries to review all the books in the human development and anatomy section. She said that keeping the committee, which had decided which books would be restricted, would help parents know which books they would want to keep their children away from.

"Any elimination of a pre-screening committee is not a compromise," she said. "I believe I have made a gigantic concession in allowing the books in their normal location."

But Marks said that an internal district memo circulated to board members exaggerated the number of parents already restricting access to the books. "The committee system is flawed and is being abused," he said. "That is the one reason I have trouble with the committee structure." Reported in: *Vancouver Columbian*, January 9.

schools

Stockton, California

Parents in the Lincoln Unified School District in the Stockton area have launched a campaign to remove the "Impressions" reading series, published by Holt, Rinehart & Winston of Canada, from district school classrooms. Like parents in a number of school districts throughout California and the nation, they complain that the series of readers contains too many negative stories, too many witches, too little mention of parents, and frequent references to Satanism.

Supporters of the reading series, including California Superintendent of Public Instruction Bill Honig, say the books contain the best children's literature and traditional folk tales available and have proven hugely successful in getting children interested in reading. Most teachers describe "Impressions" as a tremendous plus for children's literature, which for years, they charge, was "dumbed down" to the point children no longer cared about reading at all.

Moreover, Honig and others allege, opposition to the books is being fanned by the National Association of Christian Educators (NACE), a fundamentalist group, and does not represent most parents' views. "It's pretty clear-cut what's happening here," said Honig. "We've pushed for quality literature and a small group of people are reading whatever they want into these stories."

Jonathan Pearce, Lincoln Unified's assistant administrator, agreed. "Although there are some sincere folk concerned here," said Pearce, "this is just a vehicle for a much, much larger issue, one that is state and national as well as local."

California opponents of "Impressions" succeeded last year in removing the books from a pilot program in Calaveras County and from two small districts in the Whittier area (see *Newsletter*, March 1990, p. 46). The Redondo Beach School board voted in February to keep the series despite parental objections. In Yucaipa, in San Bernardino County, the series was retained in January by a 4-1 vote of the school board, but the controversy continued as "Impressions" opponents sought the recall of school board members. The series was also the subject of controversy in Coeur d'Alene, Idaho, and in Oak Harbor, Washington (see *Newsletter*, March 1990, pp. 46-47). In Nashville, Tennessee, a school district took "Impressions" to the state Supreme Court, which ruled the district had the right to select the readers over parents' objections.

Lincoln Unified parents who want the books removed denied that they were part of anything other than a grassroots effort to improve education. "Everyone wants to label us a radical religious group so they can dismiss us," said Mark Parrott, founder of Parents Working Together, an "Impressions" opposition group. "We all belong to different churches and we are not part of NACE."

Robert Simonds, founder of the Los-Angeles based NACE, said he didn't know Parrott, but acknowledged that his group was fighting to remove the books in up to 100 communities, including Stockton and nearby Modesto and Lodi. "We want them out," he said. "When you have stories with pigs eating excrement. . . Well, it's just sick stuff."

In Lincoln Unified, a mostly white, middle-to upper-class

school district with a good academic reputation, parents have challenged the series on several grounds. They say the stories are negative and do nothing to make children feel good about themselves. They say there are too many Halloween-type themes and too few American values, or good parents, and they argue the stories are just plain scary.

Some parents complain they don't like any references to death or witchcraft. Linda Massod, a parent in the neighboring Ripon Unified district, where the series is also under attack, invited an investigator for ritualistic killings to review the book and speak to parents. "There are occultic overtones and lots of recurring symbols known to Satan worship [in the series]," she charged.

Central to most parents' complaints are stories found mostly in the fourth- and sixth-grade books. They say those stories are frightening. "We know life is not all perfect," said parent Marlene Burruel. "But why so much focus on the negative and death?" Burruel also objected to an offbeat version of the "Twelve Days of Christmas" that includes shadows. "Many children are afraid of their own shadows," she said.

After Parents Working Together asked the schools to remove the books, school trustees directed the district's library council to review the request. Lincoln administrators acknowledged that most parents had no problem with the series. One parent, Judy Monroe, began circulating a flier urging parents to write the board letters in support of "Impressions." She says the issue is censorship.

"Censorship is censorship," Monroe declared. "I don't want quality literature removed from my child's class because of a small group of people." During a school board meeting, Rabbi Richard Shapiro delivered a long letter of support for the series, calling the opposition an effort to introduce "their Christian values" into the public schools. The Lincoln High School student newspaper ran an editorial calling efforts to remove the series "outright censorship."

Allen Dundee, professor of anthropology and folklore at the University of California, Berkeley, called the parents fears about witches, goblins, ghosts and traditional fairy tales an outrage. "All over the world," he said, "children from each culture are exposed to stories of fantasy, from goblins to leprechauns to witches. You cannot keep fantasy away from children. In fact, they need it to work out their own conflicts. Children know Little Red Riding Hood is make-believe."

Dundee said that stories about ghosts and goblins do not cause nightmares. "Bad parenting does. That, or having the story presented very badly. You want to talk scary? What about a child kneeling beside his bed every night and saying 'If I die before I wake,'... thinking they might die soon. Now that's scary."

Jane Dyer Cook, a children's librarian with the San Joaquin-Stockton Library, called the series the finest selection of children's literature she'd seen. "The authors and artists contained in these books are the standards in their fields," said Cook, who is a Lincoln Unified parent. "Of course, this is an anthology, and some people will like some stories and not like others. But I think it is beholden upon us to expose our children to all kinds of work. We are not giving them enough credit to say 'this is real and this is pretend.'" Reported in: *Stockton Record*, March 11.

Littleton, Colorado

Two parents of Euclid Middle School Students asked the Littleton Public Schools in February to discontinue use of a classroom video that opens with a scene showing an adolescent boy and girl, both nude, facing each other and holding hands. The film, used in an eighth-grade life sciences class on human reproduction, was considered otherwise informative, said Principal Aldis Sides.

The two women's request to pull *The Living Body: Shares in the Future* was submitted to the Littleton Board of Education. One parent complained about the nudity, but the other added that she believed reproduction should be discussed in the home, not the classroom. Reported in: *Littleton Sentinel Independent*, February 15.

Boston, Massachusetts

A top Madison Park High School administrator was threatened with disciplinary action for allowing her husband to distribute copies of his racially and sexually charged art work at a school assembly February 14. School Committee members disagreed about whether the flyers, which contained copies of paintings showing black male genitals in shackles and being "lynched" from a tree and a black arm punching its way out of a white egg, should have been given to students at the assembly, a Black History Month event.

Some called the works "repulsive," racially inflammatory, and inappropriate for students. Others defended the works, saying they are political statements and less offensive than drawings found in virtually every school bathroom.

The flyers were distributed by Dana Chandler, an African-American artist-in-residence and professor at Northeastern University and the husband of Deborah Dancy-Chandler, assistant headmaster at Madison Park who was in charge of the event. School policy mandates that all materials brought by guest speakers be previewed and approved by the school's headmaster or the headmaster's designee. Dancy-Chandler was responsible for the event, but it was not clear whether she had reviewed the flyers.

School Committee President Dan Burke said, "In light of the educational philosophy that Madison Park has represented, that particular piece of literature seems grossly inappropriate." He said he received a number of calls and letters in protest against the flyers.

But others said the works are political and should not be censored. "That art is about American history and some of it is not pretty." Reported in: *Boston Herald*, March 3.

Haverhill, New Hampshire

A Methodist minister demanded in February that Haverhill Cooperative School officials remove a book he considers objectionable from the list of required reading for ninth graders at Woodsville High School. Minister R. Lee Smith said he finds *The Chocolate War*, by Robert Cormier, inappropriate. The book has been on the school's required reading list for thirteen years.

Smith raised his objection at a school board meeting. As a result, Douglas McDonald, superintendent of Administrative Unit 23, suspended use of the book until a district committee could examine the issue. Smith wouldn't say whether he was acting on his own, or on behalf of his church in filing a formal request for the school to reconsider the book as an instructional material.

"A lot of my concern is for my daughter, to protect her," he said. "I just felt something should be done." A two-page list of passages from the book that Smith found objectionable included expletives, references to masturbation and sexual fantasies, and derogatory characterizations of a teacher and of religious ceremonies.

Smith said that he met with McDonald on February 16 and put a stop to a test on the book scheduled for that day. "I felt we had to," Smith said. "I said 'No, there's not going to be a test.' Mr. McDonald said he'd allow my child to be excused. I said, 'No, there's not going to be a test for any student' and he said OK."

McDonald was not available to confirm Smith's claim, but he did say that he had suspended classroom use of the book, pending review. "We have had a formal request that *The Chocolate War* stop being taught to students in ninth grade English," he announced in a formal statement. "The book has been on the required reading list for 13 years. There will be a temporary suspension in use of the book. It is a recognized right of the public to reconsider materials used, and we recognize that right." Reported in: *Lebanon Valley News*, February 19.

The suit asks the court to find that school Principal Charles Bishop and Superintendent of Schools Michael Toscano acted arbitrarily and unreasonably in pulling the reviews. It also seeks an injunction, requiring the school to publish the reviews in the next edition of the school paper — with an explanation for the delay — and to provide legal fees.

"We're very confident about this case," said Edward Martone, executive director of the ACLU of New Jersey. "It looks like a clear case of censorship and prior restraint of speech against the student. We're prepared to stand behind this all the way." Martone said the suit was filed in New Jersey Superior Court, rather than federal court, because the state constitution has a more liberal freedom of speech clause. Reported in: *Philadelphia Inquirer*, February 17; *Newark Star-Ledger*, February 18.

Albuquerque, New Mexico

A teacher who showed the film *Catch-22* to college-bound juniors was suspended with pay in January along with a school librarian because the movie is rated R. The teacher, Joyce Briscoe, did not know about the movie's rating when she showed it. Briscoe had previously drawn criticism from parents last October when she screened *The Last Temptation of Christ* for students who had their parents' permission. Librarian Pauline Jones was suspended for checking the movie out to Briscoe.

Leonard DeLayo, Jr., a school board member, said he was disgusted by the suspension and by two groups' use of the *Last Temptation* issue in an effort to defeat a school tax increase. "I think the suspension was wrong, and I think it's wrong for one group to hold an entire school district hostage because of their beliefs."

Ron Frost, of Albuquerque American Family Coalition, one of the organizations, said his group had nothing to do with the suspension but was pleased by the action. He urged that Briscoe be dismissed.

The furor over Briscoe's showing of *Last Temptation* forced the Albuquerque schools to revise its movie policy. New guidelines require a school committee to review films rated PG-13 or R before they are shown. A representative of the teachers' union said *Catch-22* was not stored with other R rated films. She said the union would file a grievance for Briscoe. Reported in: *New York Times*, February 3.

Salt Lake City, Utah

At the request of the Salt Lake City school board, the corporate sponsor of an exhibit on the Holocaust removed an article on the Nazis' repression of homosexuals from educational materials accompanying the exhibit. But the article was restored after School Superintendent James Moss met with groups opposed to the removal.

The materials were prepared by Geneva Steel of Orem, Utah, for teachers planning field trips to the exhibit, "The World of Anne Frank, 1929-1945," which opened March 25. In acting earlier, Moss cited a State Office of Education guideline based on a Utah law that states the "acceptance of or advocacy of homosexuality as a desirable or acceptable sexual adjustment or lifestyle" may not be taught in Utah.

Geneva Steel removed the article on homosexuals at the urging of school board officials, according to company representative Kathy Bryson. "We were specifically told never to mention the homosexuals," she said.

In declaring that the article would be restored, Moss said the education office's guidelines should be followed. "Any material dealing with homosexuality would need to be approached very carefully by teachers to insure that they conform to those guidelines."

Michele Parish-Pixler of the ACLU, one of the groups that met with Moss, said the incident revealed that one problem with "putting censorship laws on the books and adopting

them into policies" is that the practice makes everyone afraid. "What we're talking about here is fear," she said. Reported in: *New York Times*, March 15.

Ten Sleep, Wyoming

A request to reconsider use of the book *The Color Purple*, by Alice Walker, in Ten Sleep schools was presented to the school board in February. The request followed a complaint by a parent about the book, which was one of several on a list provided by sophomore English teacher Pat Fernow at the beginning of the semester as suggested reading for study of minority education.

Superintendent Les Stencel said the book was not required reading and the students had an opportunity to change the book they chose to read if they or their parents found it offensive. He said no student chose to change books when given the opportunity. Stencel said a review committee had been formed to consider the complaint. Reported in: *Northern Wyoming Daily News*, February 15.

student press

St. Louis, Missouri

A student newspaper's survey on teenage sex got a quick response from the principal of St. Charles High School. Student reporters distributed the survey the week before Christmas. But in less than two hours, Principal Jerry Cook vetoed the survey. He said it should have been cleared with his office and he would not clear it.

The incident disturbed journalism teacher Sharon DePuy, the newspaper's faculty adviser. In more than 25 years of teaching, she said, she "never had to ask permission" for students to take a survey. DePuy said that although she had expected the survey to "raise eyebrows," she hardly expected to be "taken out of my classroom in front of the kids and marched to the office like a disobedient kid."

In the office, DePuy said, Cook asked her when she planned to retire. After she told him she had a year to go, he said he might appoint somebody else as the newspaper adviser next year. DePuy said she felt Cook had threatened her job.

The survey was drawn up by Steve Sherfy, editor of *The S.C. Week*. He said it would have been only one element of a story. "I was going to try to present all sides," he said. Sherfy complained that school officials like Cook "don't want reality in the school paper."

Cook said that several students had objected to the survey. "They just thought the questions were an infringement," he said. "They really didn't see the purpose of the questions and I don't either."

Cook said he might have allowed the survey had the questions been worded appropriately. "I don't want you to get the idea that I'm suppressing controversial issues," he said. "I'm certainly not." Reported in: *St. Louis Post-Dispatch*, January 14.

Gloucester County, New Jersey

A 14-year-old student, backed by the ACLU, is suing a Gloucester County school district after administrators removed two of his movie reviews from a junior high newspaper because the films had R ratings. The suit filed on February 15 alleges that officials at Clearview Junior High School in Mullica Hill violated Brien Desilets' constitutional right to free speech by refusing to publish his reviews of *Mississippi Burning* and *Rain Man*.

Desilets, now a high school freshman, said that he was shocked when school officials removed the reviews in the spring of 1989, a day before the issue of the *Pioneer Press* was published. "I was really surprised that they would do anything like that," he said. "There was nothing offensive in the actual reviews."

newspaper

Tokyo, Japan

The U.S. Air Force officer who is editor of *Pacific Star and Stripes*, the U.S. military's official newspaper in Asia, resigned in February in a dispute over ongoing charges that the military is censoring the paper. The resignation of Col. Edwin J. Montgomery, Jr., as editor came as the Pentagon was receiving a report by an ombudsman investigating the charges. The report was not made public, but newspaper staff members said it stopped short of accusing Col. Montgomery of censorship, although it said he sought to "manage" the news in *Stars and Stripes*.

Last year, after complaints from the paper's civilian reporters and editors, the General Accounting Office issued a report finding "evidence of censorship" and "inappropriate news management." Similar charges were raised last year during Congressional testimony (see *Newsletter*, November 1989, p. 221).

The charges of censorship primarily involve coverage of activities involving troops in Asia that military commanders apparently find unflattering. Several years ago, for example, staff members at *Pacific Stars and Stripes* said they were blocked from pursuing reports that 33 servicemen and their relatives had been sent home from Okinawa after testing positive for the AIDS antibody.

Other reporters said they were discouraged from covering major social issues and conflicts involving troops and local residents. More recently, some staff members expressed displeasure with a new directive saying that base commanders can restrict travel of *Stars and Stripes* reporters.

The independent report commissioned by the Pentagon was being prepared by Philip M. Foisie, a former foreign editor at the *Washington Post* and, until several years ago, executive editor of the *International Herald Tribune* in Paris. Reported in: *New York Times*, February 18.

research

Washington, D.C.

The author of a federal study that found a disturbingly high rate of cancers among workers at the Rocky Flats nuclear weapons plant in Colorado said he was "berated" and pressured by Energy Department officials to suppress or alter his findings. In testimony before a Department of Energy (DOE) advisory committee meeting in Columbia, South Carolina, Gregg S. Wilkinson said he was pressured by his superiors at the Los Alamos National Laboratory, DOE's regional office in Albuquerque, and by a DOE assistant secretary in Washington to withdraw the report or change its conclusions.

"The results were ill-acceptable; they were very unhappy," Wilkinson said. "One of the things that happened was I was called to the director's office at Los Alamos and berated and accused of not having these results properly reviewed. One of the statements that was made to me was that, 'We should not be trying to please peer reviewers, but rather we should be publishing to please the Department of Energy.' This statement was made to me by a deputy director of Los Alamos."

Wilkinson, an experienced epidemiologist, refused to name any of the people who pressured him, but he said he was told he would be demoted if the results were published. In fact, after his study was ultimately published, unaltered, in the February 1987 *American Journal of Epidemiology*, his research group was merged with another operation at Los Alamos, and Wilkinson's direct authority over epidemiological studies was diminished.

Wilkinson's study found higher-than-expected rates of brain cancer, as well as esophageal, stomach, colon and prostate cancers among workers at Rocky Flats exposed to plutonium between 1952 and 1979. Those results contradicted early DOE studies and widely broadcast statements that working at nuclear weapons plants did not bring an increased risk of cancer.

Wilkinson concluded that any research "needs to be moved out of the Department of Energy." Soon after his experience, Wilkinson left Los Alamos, and he said in Columbia that he had never confronted a situation such as the one that engulfed his Rocky Flats study. "I never experienced anything like this [with] National Cancer Institutes contracts, or contracts with other agencies, never. Nothing like this, ever." Reported in: *Columbia State*, February 23.

film

Orlando, Florida

Faced with objections from Christian groups, the trustees of Seminole Community College voted 4-1 in February to permit a screening of *The Last Temptation of Christ* as part of a course on motion pictures. But though more than 250 people were expected to turn out for the showing, college officials moved the film from the 369-seat Fine Arts Concert Hall to a room seating 100. *Last Temptation* was the only film in the series not to be shown in the concert hall.

Trustee Larry Dale denied that the board was censoring the film. "It's still open to the public," he said. But student Julie Puckett, a member of the newly formed Concerned Students Against Censorship, said the trustees were censoring the film and setting a dangerous precedent.

"This is not a religious issue," she said. "This is a First Amendment issue." Puckett said she had collected hundreds of signatures on petitions protesting the decision. Reported in: *Orlando Sentinel*, February 6, 24, 28.

rock music

Tampa, Florida

Heavy metal-meets-rockabilly band Elvis Hitler sparked controversy in February when a Florida college student promoter was fired for refusing to change the band's name on promotional handbills. The incident happened shortly before the Detroit-based band played for about 150 people February 15 at the University of Florida.

Student government president Brian Tannebaum, a member of the campus' Hillel Jewish Student Association, deemed the band's name too controversial and ordered Kristin Loomis to bill the act as Elvis Hiller instead. She refused, and he fired her three days before the show.

"By the name Hitler, I think it will offend a lot of students, even non-Jewish students, even Elvis Presley fans," Tannebaum told the *Oracle*, the school newspaper. Tannebaum also confiscated fliers intended to advertise the concert.

The Tampa incident was not the first time the group provoked a flap over its name, although its songs do not include anti-Semitic, racist or pro-Nazi lyrics. MTV declined to play the group's single "Showdown" because of the band's name.

"It's specifically because they're concerned that the name of the band would create certain objections within certain segments of the community," said David Gerber, of Restless Records, the group's independent label. "I'm Jewish, and I have to admit the first time that you hear the band's name it can be a little mystifying or disconcerting. But when you hear what they're doing has a rockabilly beat — that's where you get the Elvis part. And the certain wackiness and black humor that run through the music, in terms of combining rockabilly with speed metal — that's the other half," Gerber explained.

A promoter at a Chapel Hill, North Carolina, club refused to let the band play last year but had a change of heart after hearing about the turnout for Elvis Hitler shows at other clubs, said the group's agent, Charlie Hewitt. "It's not like these guys are some kind of Nazis. If someone gets offended, it's because they're looking for an opportunity to." Reported in: *Variety*, February 21.

art

Portland, Maine

The removal of five art exhibits depicting homelessness from storefronts on Congress Street in Portland prompted the organizer of the exhibits to charge the stores' managements with "outrageous censorship."

The controversy began when three exhibits were removed from the J.B. Brown block December 29 after the building's owner complained they were in "poor taste and looked like a war scene. They portrayed dismemberment and bloody body parts and it was not anything I wanted to be part of," said Phil Kubiak, owner of the newly renovated building.

The next week, two more displays were removed from the windows of the retail chain of Porteous, Mitchell and Braun because, the firm's president said, they made the windows "look like a recycling center."

The five displays were part of a 20-exhibit project sponsored by the Union of Maine Visual Artists in conjunction with the New Year's/Portland celebration. The exhibits were supposed to induce pedestrians to focus on the problems of the homeless by depicting their plight.

The exhibits in the J.B. Brown building were removed without the artists' knowledge after Kubiak saw them and heard of complaints from tenants, including workers in Sen. George Mitchell's office. "A number of people expressed shock at the bizarre nature of it. It was in very poor taste and communicated nothing to me about the homeless," Kubiak said.

Natasha Mayers, one of the exhibit organizers, called the removals "outrageous censorship." Instead of reacting with shock to unsettling artwork, she said, "I wish people would express shock and outrage about homelessness and take action to end it." Reported in: *Portland Express*, January 3, 6.

Columbia, Maryland

The company that owns a Columbia office building in which a satirical sculpture portraying the corporate ladder had been installed said it gave in to complaints by tenants to have the artwork removed. "It is a bottomline decision, very much so. We are concerned about the tenants in the building who are upset," said Michelle T. Warnke of Principal Financial Group.

Several of the building's 35 tenants called the work insulting and sexist, a "slap in the face" to corporate life. Ed Massey, the 26-year-old New York sculptor of the controversial work, said January 23 that he was "upset because they had the opportunity to review a model of the work, and they knew exactly what they were getting. Also, I feel people of Columbia are being deprived of an important work of art that deals with social commentary," he said. Reported in: *Baltimore Sun*, January 25.

Fredericksburg, Maryland

The painting shows a woman lying on a striped sofa, and in front of her is a vase filled with bright zinnias. Artist Dee McClesky thought it was one of her best works, but it was removed from the Fine Arts Show at the Fredericksburg Woman's Club because the model is nude.

"It does bother me," said McClesky. "I can't understand. To me, it was beautiful."

"I have nothing against nudes . . . but we have to think of some people who would object," club member Natalie Maas said. "This is a small town show, not in Europe, not in Washington."

Maas said the show had featured nudes before, but the club received a lot of complaints from members. This year, the club refused to accept two nude paintings for the display. "We traded in one problem for a bigger one. . . . If we did a boo-boo, we're sorry. But we did what we think is best," Maas said.

"I'm surprised to hear people in Fredericksburg would be shocked by a nude. I can't believe Fredericksburg is so unsophisticated," said 72-year-old Rhoda MacCallum of Warsaw, Virginia, whose work also was rejected. MacCallum, who has won the top award in state art shows three times, said the purpose of an exhibit is to "see what artists are creating. You may not understand it all, you may not like it all, but at least you've seen it," she said. "You don't go to an art show to find a painting that matches your drapes."

Paula Rose, an artist and owner of a local art supply shop, called the decision censorship. She said the name of the show should be changed to "The Woman's Club Pretty Picture Show." She said a group of artists would demonstrate when the exhibit judge was expected to arrive. Reported in: *Washington Times*, March 8.

Frostburg, Maryland

When Frostburg State University officials removed two nude paintings from a display in January, it was to ensure a "smooth orientation" for prospective students and parents visiting the campus. But soon the atmosphere on the western Maryland campus became anything but smooth, with charges of censorship swirling around the school.

"When you take something away from the public view, you're not letting them make the decision about the work, and that's censorship," said Robyn L. Price, the graduate student whose two nudes were removed from a seven-painting display at the school's student center.

"What's most disturbing about a decision like this is that this is supposed to be an institution for higher learning, and by removing those paintings, we're denying our academic freedom and what the university should stand for," said Price.

"The idea of censorship never entered into my mind," responded Daniel C. Pantaleo, vice president of academic affairs, who gave the order to remove the paintings. "My

concern was that we could affront some incoming parents. The only issue I saw was one of sensitivity to the audience coming in."

Price's show ran for six weeks before the two paintings — one a full-length self-portrait and the other a smaller portrait of a pregnant woman whose breast and belly are exposed — were removed January 19 before students and their parents came to the school for a weekend orientation.

"It was the judgment of the administration that the presence of these paintings could be upsetting to the parents of these prospective students," said Philip M. Allen, dean of the School of Arts and Humanities. "The idea was that those people should not necessarily have been exposed to art that would interfere with a smooth orientation." Had the display been in the university gallery and not the student center, the paintings would not have been removed, officials added.

At first, the administration asked art department faculty to remove the paintings, but they refused. The paintings were removed by Mr. Allen and student center officials. They were to have been put back after the weekend, but Price said she did not want the paintings returned to the show and the entire display was removed.

The issue was soon being debated in the school newspaper, at the radio station and in fliers passed around the campus, with many students angry about the action. Reported in: *Baltimore Sun*, February 9.

foreign

Beijing, China

China imposed new restrictions on foreign journalists January 20 and banned articles that in the view of the authorities "distort facts" or violate "the public interest."

"Foreign correspondents and news agencies must observe journalistic ethics, and must not distort facts, fabricate rumors or use improper means in their reporting," read the most sweeping of the new rules. "Foreign correspondents and news agencies must not engage in activities that are incompatible with their status, or those that endanger state security, national unification, or the public interest of Chinese society."

The rules specified that they were to be interpreted by the Chinese authorities, so the practical effect was not immediately clear. It would be possible for the Chinese government to expel reporters under the new rules on the vague ground that the reporters' articles harmed the public interest.

The new rules state that all interviews with any "work unit," including any university, factory or government institution, must be officially arranged. A strict interpretation would ban interviews on university campuses, and street interviews might be banned on the ground that they are an "improper" means of reporting. Reported in: *New York Times*, January 21.

London, England

For the first time in more than 70 years, Britain's Board of Film Classification censored a film on the grounds of blasphemy, and the board's appeals committee upheld the decision.'

Visions of Ecstasy, an 18-minute video, depicts erotic visions of Teresa of Avila, the 16th-century Carmelite nun who is the patron saint of Spain. At 39, Teresa began to have visions of Jesus Christ and to experience a "mystical marriage" with him and his presence within her. In one sequence of the video, the nun is shown in a habit kneeling astride Christ, who is wearing a loincloth.

James Ferman, director of the classification body, said that although films such as *The Last Temptation of Christ* and Monty Python's *Life of Brian* presented controversial images of Christ, Nigel Wingrove, the video's writer and director, has made Christ "an object of overt sexual passion to which he responds"; the work is a "contemptuous treatment of the divinity of Christ."

John Stephenson, the video's producer, called the board's decision to refuse a screening certificate a "disgraceful act of censorship . . . . The criminal law of blasphemy should be immediately repealed before it is used again in this way." Reported in: *Christian Century*, January 31.

Jerusalem, Israel

Israel, which is struggling to cope with a potentially massive new wave of Soviet immigration amid mounting protests from the Arab world, imposed military censorship March 2 on domestic and foreign media reports on the issue. The action, announced in a one-line military communique, was one of the broadest extensions of censorship over non-military issues in Israel in recent years. It followed weeks of controversy and protests over the prospect that thousands of the new immigrants would be settled in the occupied West Bank and Gaza Strip.

It was not immediately clear what kinds of information the censorship would ban. The army's statement was broad, saying that "all material pertaining to immigration of Soviet Jews must be submitted to the censor prior to publication." Some reports suggested the measure was primarily aimed at halting the release of figures on the numbers of Jews arriving in Israel and projections of future immigration.

Israel also censored news of immigration in the 1950s, when hundreds of thousands of immigrants poured into the new country from Arab lands. In recent years, however, military censorship has been limited to reports on sensitive defense and security issues. Reported in: *Washington Post*, March 3. □

legal analysis
FW/PBS v. City of Dallas

The following analysis of a recent U.S. Supreme Court decision affecting the regulation of sexually oriented business was prepared for the Freedom to Read Foundation by David W. Ogden, an attorney with Foundation counsel, Jenner & Block.

In what has to be seen as a qualified victory for the pro-First Amendment forces, on January 9, 1990, the Supreme Court struck down a Dallas licensing ordinance in *FW/PBS v. City of Dallas*. The Foundation joined in an *amicus* brief that had urged that the law was unconstitutional.

The ordinance required any "sexually oriented business" in the City of Dallas to obtain a license before doing business. It imposed a series of requirements not imposed on other businesses, including fire and safety inspections and provisions disabling from licensure any person convicted within the past five years of a specified "sexual offense," including obscenity (and also disabling any person who resides with someone convicted of such a crime). This latter disabling provision was the one of primary interest to the Foundation because, like the forfeiture provisions of state and federal RICO laws (and the Child Protection and Obscenity Enforcement Act), the licensure scheme disabled persons from speaking in the *future* based solely upon the fact that they had engaged in unprotected speech in the past. This, we have argued, is a classic prior restraint that must be rejected.

The Court did not reach this latter issue, because it concluded that the plaintiffs had failed to establish that any of them — or anyone living with any of them — had been convicted of one of the predictate offenses within the statutory period. This legal question therefore survives to be decided another day — perhaps when and if the Child Protection Act challenge reaches the Supreme Court.

The *FW/PBS* Court decided that the scheme was unconstitutional for a different reason, namely, that it failed to provide the procedural protections established in *Freedman v. Maryland*. *Freedman* required that any time a State establishes a program that forbids speech pending some official sanction — such as a licensing scheme — it must provide a finite time within which the official decisionmaker must act, must sufficiently constrain the decisionmaker's discretion, and must place the burden on the State to go to a court if it wishes to make the prohibition permanent. Here, the statute failed to prescribe a finite period within which the required fire and safety inspections must be concluded, and forbade the business from engaging in speech until the inspection was performed. Accordingly, the ordinance failed to provide a finite time period within which the application must be approved, and failed to properly cabin the decisionmaker's discretion.

The Court, in Justice O'Connor's majority opinion, thus decided that a licensing scheme like this one must satisfy the first two *Freedman* prongs — finite time periods and limited discretion. But it decided that such a licensing scheme need *not* satisfy the third *Freedman* prong, which imposes on the State the burden of going to court if it wishes to make the prohibition permanent. The omission of the third prong in licensing cases represents the first time the Court has held that less than all three *Freedman* protections are required before a prior restraint may be imposed (and is the reason the case may be counted as only a "qualified" success).

The most important dissent was filed by Justice Scalia, who advanced a frightening rationale for censoring non-obscene speech. He recognized that much sexual speech is non-obscene and therefore fully protected. He recognized, too, that regulation of obscene speech, if too vigorous, chills protected speech. The reason legislatures pass such overzealous legislation, Justice Scalia opined, is that businesses that engage primarily in selling sexual materials harm the community, even if those materials are not obscene. Adult businesses bring unsavory people together, injure property values, etc. In trying to cope with this problem, Justice Scalia suggested, governments occasionally go a bit overboard.

Justice Scalia's solution to this problem is to suggest that an enterprise is engaged in the "business of obscenity," and therefore may be *banned entirely*, if an important objective of the business is to deal in sexually oriented materials — *even if every publication it stocks is fully constitutionally protected*. The Justice purported to find support for this extraordinary proposition in *Ginzburg v. United States*. To excerpt from Justice Scalia's opinion:

> Our jurisprudence supports the proposition that even though a particular work of pornography is not obscene, . . . a merchant who concentrates upon the sale of such works is engaged in the business of obscenity, which may be entirely prohibited and hence (*a fortiori*) licensed as required here. . . . The Constitution does not require a State or municipality to permit a business that intentionally specializes in, and holds itself forth to the public as specializing in, performance or portrayal of sex acts, sexual organs in a state of arousal, or live human nudity.

Thus, while Justice Scalia would find a mainstream bookstore or library has a constitutional right to sell non-obscene erotica, a bookstore, library or publisher specializing in — or having as a significant feature — such literature may be banned outright.

In fact, as Justice Brennan noted in his concurring opinion, *Ginzburg* stands for no such proposition: "In *Ginzburg*, this Court held merely that, in determining whether a given publication was obscene, a court could consider as relevant evidence not only the material itself but also evidence showing the circumstances of its production, sale, and advertising." *Ginzburg* is a bad decision, but not as bad as Justice Scalia would make it. Justice Scalia's claim that businesses that sell nothing but constitutionally protected

(continued on page 100)

from the bench

U.S. Supreme Court

The Supreme Court ruled unanimously March 21 that grand jury witnesses may not be barred permanently from disclosing their secret testimony. In an opinion by Chief Justice William H. Rehnquist, the court said a Florida statute prohibiting grand jury witnesses from discussing the "content, gist, or import" of their testimony, even after the investigation is concluded, violates the First Amendment's guarantee of freedom of speech.

Fifteen other states have similar rules outlawing disclosure of grand jury testimony. Of the remaining states, 21 exempt witnesses from the secrecy obligation and 13 say nothing about the issue.

"The interests advanced by the portion of the Florida statute struck down are not sufficient to overcome [the witness's] First Amendment right to make a truthful statement of information he acquired on his own," Rehnquist wrote for the Court. He noted that the "potential for abuse of the Florida prohibition, through its employment as a device to silence those who know of unlawful conduct or irregularities on the part of public officials, is apparent."

The case, *Butterworth* v. *Smith*, attracted the attention of a number of news organizations, which warned that the Florida rule would permit prosecutors to silence reporters simply by calling them to testify before a grand jury. The case involved Michael Smith, a former reporter for the *Charlotte Herald-News*, who was called to testify before a special grand jury in 1985 and 1986 after writing articles alleging corruption in the office of the state attorney and the county sheriff's department.

The grand jury ended its investigation without issuing any indictments. Smith decided to write a news story, and possibly a book, about the investigation. Concerned about being criminally prosecuted if he disclosed his grand jury testimony, however, he filed suit in federal court in Florida claiming that the grand jury secrecy law was unconstitutional.

The U.S. Court of Appeals for the Eleventh Circuit struck down the statute. In affirming that ruling, Rehnquist acknowledged the state's interests in keeping information from grand jury targets in order to prevent them from fleeing, interfering with witnesses, or being exposed to public contempt in the event there is no indictment. But, he said, "Some of these interests are not served at all by the Florida ban on disclosure, and those that are served are not sufficient to sustain the statute."

Justice Antonin Scalia joined the other justices on the understanding that the Florida statute prohibited the witness from disclosing even "the information contained within the witness's testimony." However, Scalia wrote in a concurring opinion, "Quite a different question is presented . . . by a witness's disclosure of the grand jury proceedings; which is knowledge he acquires not 'on his own' but only by virtue of being made a witness. And it discloses those proceedings for the witness to make public not what he knew, but what it was he told the grand jury he knew."

Scalia said there "may be quite good reasons" for the state to prohibit disclosure of such information even after the expiration of the grand jury, but said that issue was not before the court in the case. Reported in: *Washington Post*, March 22.

The Supreme Court February 20 declined to review a controversial copyright ruling that severely restricts the ability of writers to quote from diaries, letters and other unpublished material. The justices let stand without comment a decision by the U.S. Court of Appeals for the Second Circuit in New York that quotations from letters, diaries, and other documents in a critical biography of Church of Scientology founder L. Ron Hubbard constituted copyright infringement.

The appeals court ruling created alarm among publishers, historians and non-fiction writers because it suggests that such unpublished source materials "normally enjoy complete protection" from being quoted and that courts should generally enjoin publication of books or articles that copy "more than minimal amounts" of such material.

"This is a garrote, a kind of slowly tightening constriction on the First Amendment," said Neil Sheehan, winner of the 1988 National Book Award for *A Bright Shining Lie*. Taylor Branch, who won the 1989 Pulitzer Prize for history with *Parting the Waters*, said, "If that's the new standard, it would be a severe blow to history."

Lawyers for Henry Holt and Co., publisher of the Hubbard biography, had urged the justices to review the appeals court decision, contending that it "has left no breathing room at all for scholars" to uncover and use new material. The "virtual prohibition on the quotation or paraphrase of such materials has now made it impossible for a scholar to practice his craft as it has traditionally been practiced without running a high risk of incurring an injunction and liability

for money damages," the Holt lawyers said.

The appeals court decision in *Henry Holt and Co.* v. *New Era Publications* technically applies only in one circuit, and the Supreme Court's refusal to hear the case does not mean the justices agree with it. But because the ruling is binding in New York, the center of the publishing industry, it essentially represents the last word on the state of copyright law.

The publisher was joined in its effort to win Supreme Court review of the decision by the publishing industry, writers groups, and scholarly organizations. In a brief for the PEN American Center and the Authors Guild, attorney Floyd Abrams said that under the decision "publishers must engage in the most extreme self-censorship to avoid any copyright pitfalls in using unpublished materials" and "ordinary and well-established methods of historical research and writing have been called into question, and biographers and historians are now required to confront a copyright barrier to their use of primary sources — a result contrary to every canon of proper historical analysis and presentation."

Because the copyright law provides copyright protection until the year 2003 for all unpublished material that has not been formally registered for copyrights, the decision could allow the heirs of Thomas Jefferson, Aaron Burr or James Madison to sue for infringement if their letters were quoted, Abrams warned.

U.S. District Court Judge Pierre N. Leval, whose original decisions in the Hubbard case and in a related case involving a biography of author J.D. Salinger were overturned, said in a speech delivered last April that the appeals court failed to give adequate weight to the educational or "public enriching" value of quotations when deciding issues of fair use. "They accord no recognition to the value of accurate quotation as a tool of the historian or journalist," Judge Leval said. "A biographer who quotes his subject is considered simply a parasite, a free rider."

Authors argue that summing up what someone said simply does not have the impact of a direct quote and that it leaves open for debate the accuracy of the words' interpretation. "You can call L. Ron Hubbard a bigot, or you can quote him [using a racial epithet]," said historian Arthur Schlesinger, Jr., referring to actual quotations at issue in the case. Even more significant to some opponents of the decision is the potential it creates for public figures to allow access to their private papers only to those who agree to present them in a flattering light.

The Hubbard biography by Russell Miller was based in part on unpublished letters, memoranda, applications and diaries by Hubbard, who died in 1986. Many of the documents were obtained from the federal government under the Freedom of Information Act. In all, Miller quoted 132 passages containing 3,200 unpublished words, and the trial court found that 41 passages, containing 1,100 words, constituted copyright infringement.

Lawyers for New Era Publications, a Danish publisher affiliated with the Church of Scientology, which holds the copyright to Hubbard's materials, decried the "alarmist tone" of the opposing briefs and described the case as "an unexceptional case of copyright infringement through extensive quotation of unpublished works." They said that nothing in the appellate decision prohibits scholars from reporting on facts they discover, as opposed to quoting precise language, and that therefore "there is no dramatic censorship of critical views."

If the publisher "is correct that the decision below is having an adverse impact on the publishing industry, surely this court can expect that there will be ample opportunity in appropriate cases for clarification," the New Era lawyers told the high court.

Even before the high court refused to hear the case, Holt and other publishers were already encouraging authors to be more diligent in obtaining permission to quote from unpublished sources. Branch, who is working on the second volume of his massive history of Martin Luther King, Jr., and the civil rights movement, said obtaining those permissions would not be simple.

"I'm as apprehensive as I can be," he said. "If the lawyer says you have to have permission before you can use it, then the writer has to contact everyone. In my case, there would have been hundreds of different sources, some living, some dead. It's a really severe disadvantage that heaps a big burden on a job that's difficult already."

The Supreme Court's decision not to hear the case was the second victory for the Scientologists concerning a Hubbard biography in as many months. In January, a federal judge in New York blocked publication of Jonathan Caven-Atack's *A Piece of Blue Sky* unless copyrighted material was removed.

At issue in both cases is the application of a copyright law doctrine known as "fair use." In cases of copyrighted material that has been "published," courts have allowed quotation of portions as a "fair use." But the Supreme Court in 1985, in a case involving publication by *The Nation* magazine of parts of Gerald Ford's autobiography, ruled that the fair use test is far stricter in dealing with unpublished materials.

Relying on that case, the Second Circuit in 1987 barred Random House from publishing an unauthorized biography of author J.D. Salinger unless it deleted brief quotations and paraphrases of several Salinger letters donated by recipients to various university libraries. The Supreme Court also declined to review the Salinger decision.

The trial court in the Hubbard case said the use of the Salinger quotations was different because they were used to "enliven" the text, while the Hubbard quotes were necessary in order to accurately convey facts. But the appeals court rejected that distinction and said an injunction to halt publication of the book would have been warranted but for an "unreasonable and inexcusable delay" in New Era's filing of the suit.

legal analysis
Romano v. Harrington

Freedom to Read Foundation counsel Bruce Ennis, of Jenner & Block, prepared the following memorandum regarding a case involving the student press and having a potential direct impact on intellectual freedom in school libraries.

In the recent case of *Romano v. Harrington*, a district court in New York sharply distinguished the Supreme Court's decision in *Hazelwood School District v. Kuhlmeier*, in a way that will be useful to public school librarians.

In *Romano*, a tenured high school teacher who was faculty advisor to the school's *extra-curricular* student newspaper was fired after the newspaper published a student-written article opposing a federal holiday for Martin Luther King, Jr. The advisor sued the school principal and the board of education, contending that his firing violated the First Amendment. The defendants argued that they were entitled to summary judgment dismissing the complaint because *Hazelwood* allegedly gave them virtually unlimited discretion to exercise editorial control over the content of student newspapers. They argued that the newspaper was a school activity, was a part of the school's "curriculum" in the broad sense of the term, and that firing the faculty advisor because of the controversial article was reasonably related to defendants' legitimate pedagogical goal of minimizing racial tensions among the student body. The district court rejected defendants' contentions, distinguished *Hazelwood*, and relied heavily on the earlier Supreme Court decision in *Board of Education of Island Trees v. Pico*, in denying summary judgment to the board.

The district court first ruled that, for First Amendment purposes, extra-curricular student newspapers are distinguishable from newspapers that are published as part of the school curriculum, as was the newspaper in *Hazelwood*. The district court then equated the extra-curricular student newspaper in *Romano* with the school library in *Pico*, and held that "inroads on the First Amendment in the name of education are less warranted outside the confines of the classroom and its assignments. . . . [P]edagogic concerns allow educators to exercise more control over the content of students' required reading lists than over their voluntary, extra-curricular selections, even though the voluntary and required selections may exist side by side on the school library's shelf." The district court emphasized that "because *Hazelwood* opens the door to significant curtailment of cherished First Amendment rights. . . .[and] [b]ecause educators may limit student expression in the name of pedagogy, courts must avoid enlarging the venues within which that rationale may legitimately obtain without a clear and precise directive."

The *Romano* decision will be very useful in resisting efforts to censor school libraries. It rests on an important "pedagogical" distinction between school curricula and school libraries. Because curriculum decisions are necessarily selective, the discretion of school officials to add or delete particular materials from the curriculum will necessarily be broad. But because the "pedagogical" goal of school libraries is to provide *diversity*, the discretion of school officials to add or delete particular materials from school libraries will be much more limited, and much more subject to First Amendment challenge. □

Despite the alarms raised by the Hubbard case, Jane Kirtley of the Reporters Committee for Freedom of the Press remained optimistic. "I'm not going to be a doomsayer," she said. "Copyright law by its very nature is an intrusion on the First Amendment. It's one we tolerate just as we tolerate libel laws."

But Hubbard biographer Russell Miller was less sanguine: "To me it's absolutely extraordinary that a country that is so proud of its First Amendment finds itself, because of the convolutions of the legal system, in a position where it's virtually impossible to produce a book of serious research. That's what has alarmed writers of all kinds." Reported in: *Washington Post*, February 21; *Los Angeles Times*, March 12.

On March 27, the Supreme Court upheld the power of the federal and state governments to restrict corporate involvement in political campaigns. The Court, which had previously made clear that corporations might be prohibited from giving their own funds directly to political candidates, held that they also could be barred from spending those funds independently, as with newspaper advertisements, on candidates' behalf.

The 6-3 decision left corporations free to make political expenditures through their political action committees, which raise money from stockholders and corporate officials.

Bitterly divided over the scope of First Amendment protection for corporate expression, the Court upheld provisions of a Michigan campaign finance law prohibiting corporations from spending money from their own treasuries. Federal election law and the laws of 20 other states have similar prohibitions. A federal appeals court ruled in 1988 that the Michigan prohibition violated the First Amendment's guarantee of free speech. In his opinion overturning that ruling, however, Justice Thurgood Marshall said the state had a "compelling rationale" for placing limits on "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form."

The decision was the first time the Court had upheld a prohibition on the independent expenditure of funds for political campaigns. Previous decisions upheld limits on direct contributions to candidates but applied a different analysis to spending that is not directed by the campaign.

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In a recent series of decisions dealing with "corporate speech," the Court accorded corporations a substantial measure of First Amendment protection without indicating what distinctions it might ultimately find between the rights of individuals and the rights of corporations. The March 27 decision was thus significant beyond the realm of campaign finance in defining an apparent limit to the corporate free speech doctrine.

That aspect of the decision drew strong dissenting opinions. In a dissent joined by Justices Sandra Day O'Connor and Antonin Scalia, Justice Anthony M. Kennedy said: "The Court's hostility to the corporate form used by the speaker in this case and its assertion that corporate wealth is the evil to be regulated is far too imprecise to justify the most severe restriction on political speech ever sanctioned by this Court."

Justice Scalia also wrote a separate dissent. "The fact that corporations amass large treasuries," he wrote, is "not sufficient justification for the suppression of political speech unless one thinks it would be lawful to prohibit men and women whose net worth is above a certain figure from endorsing political candidates."

As in earlier disputes over campaign finance, the case, *Austin* v. *Michigan State Chamber of Commerce*, blurred the usual ideological divisions on the Court and among groups that filed briefs expressing their views. Chief Justice William H. Rehnquist joined Justice Marshall's opinion, as did Justices William J. Brennan, Jr., Harry A. Blackmun, Byron R. White and John Paul Stevens.

Common Cause and the Federal Elections Commission filed briefs in support of the Michigan law, but the Chamber of Commerce was supported by, among others, the ACLU, which has long viewed most campaign financing restrictions as unconstitutional, the American Medical Association, the National Organization for Women, and Planned Parenthood.

Three years ago the Court invalidated the federal campaign spending limits as applied to a small Massachusetts anti-abortion group, ruling that the group's First Amendment right to advocate its views outweighed governmental interest in regulating its political expenditures. The U.S. Court of Appeals for the Sixth Circuit, which struck down the Michigan law, based its decision largely on that case, *Federal Election Commission* v. *Massachusetts Citizens for Life*.

But Justice Marshall said the Massachusetts case was limited to organizations that, while organized as corporations, were distinguished by their "narrow political focus" and lack of connections to the world of business. Justice Brennan, who wrote the opinion in the Massachusetts case, filed a separate concurring opinion in the Michigan case, noting that the earlier ruling was intended to apply only to a small category of corporations.

Besides Michigan, the other states that prohibit direct corporate campaign spending are Alabama, Connecticut, Iowa, Kentucky, Minnesota, Mississippi, Montana, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, West Virginia, Wisconsin and Wyoming. Reported in: *New York Times*, March 28.

California's imposition of its general 6 percent sales and use taxes on religious merchandise sold in the state by religious organizations does not violate the First Amendment, a unanimous Supreme Court ruled January 17. The court said in *Jimmy Swaggart Ministries* v. *Board of Equalization of California* that imposition of the taxes neither significantly burdens religious practices or beliefs nor creates excessive entanglement with religion.

From 1974 to 1981 the Jimmy Swaggart Ministries conducted "evangelical crusades" in California. Outside the auditoriums where the crusades were held the organization sold religious books, tapes, records, and other religious merchandise. The same goods were sold in the state by mail order, and the state imposed sales and use taxes on these transactions.

Addressing the free exercise clause challenge first, the court, in an opinion by Justice Sandra Day O'Connor, said that a generally applicable sales and use tax, which is not a flat license tax, which constitutes only a small part of the sale price, and which is applied neutrally without regard to the nature of the seller or purchaser, does not place an onerous burden on religious activity. Reported in: *U.S. Law Week*, January 23.

flag burning

Washington, D.C.; Seattle, Washington

In separate decisions, two U.S. District Court judges a continent apart declared unconstitutional the federal law passed last year to outlaw desecration of the American flag. The first ruling was made by U.S. District Court Judge Barbara J. Rothstein in Seattle February 21. The second ruling, by U.S. District Court Judge June Green, came on March 5 in Washington, D.C.

The decision brought new calls from Congress for a constitutional amendment to outlaw desecration of the flag. If such an amendment were passed, it would presumably override the more general First Amendment protections cited by Judges Rothstein and Green. Congress rebuffed President Bush's call for such an amendment last October by passing the Flag Protection Act of 1989. The law itself provides for an expedited appeal directly to the Supreme Court, which could hear the case as soon as May.

In her ruling, Judge Rothstein said, "In order for the flag to endure as a symbol of freedom in this nation, we must protect with equal vigor the right to destroy it and the right to wave it."

In Washington, Judge Green wrote: "The court is acutely aware that those who burn our flag mock and trivialize

this solemn symbol of our nation's soul." But, she added, "the First Amendment . . . would not have been needed if the persons who exercise their right of free expression by word and action were all pleasing, lovable persons with whom [everyone] agreed."

Both decisions were based on the Supreme Court's controversial decision last June in *Texas* v. *Johnson*, which held that flag desecration as part of peaceful political expression is protected by the First Amendment. In the 1989 law, Congress tried to avoid the constitutional issue of free speech by a simple ban on certain specific conduct. The rulings by Judges Rothstein and Green indicated that burning the flag itself is tantamount to speech and so must be protected. The implication is that *any* law written with the purpose of protecting the flag as a symbol is unconstitutional.

Despite the Seattle and Washington, D.C., decisions, on February 26 the U.S. Court of Appeals for the Eighth Circuit ruled that the arrest of a man who burned the flag in front of an Armed Services Recruiting Center was justified. Judge Frank J. Magill said the defendant had voluntarily placed himself in a violent situation constituted by a political protest demonstration, knowingly cast contempt on the flag by publicly burning it and threw the burning flag into the alcove of a federal building, forcing others to rush over and put out the flames so that the building would not catch on fire. Reported in: *New York Times*, February 23; *Washington Post*, March 6; *West's Federal Case News*, March 9.

English only

Phoenix, Arizona

A U.S. district judge in Phoenix declared February 6 that the state's constitutional amendment making English the language "of all government functions and actions" in Arizona is a violation of federally protected free speech rights. The decision, by U.S. District Court Judge Paul G. Rosenblatt, was the first legal setback for the official-English movement, which gathered momentum in the latter part of the 1980s, particularly in the South and Southwest as those areas experienced a large influx of Asian and Hispanic immigrants.

Judge Rosenblatt ruled that the Arizona amendment "is a prohibition on the use of any language other than English by all officers and employees of all political subdivisions in Arizona while performing their official duties." As such, he said, it could inhibit legislators from talking to their constituents or judges from performing marriages in a language other than English.

Gov. Rose Mofford, a Democrat who strongly opposed the 1988 campaign to amend the state constitution with the language provision, said she would not appeal. "I am happy the courts ruled it unconstitutional," she said, adding that the law was "flawed from the beginning."

In the absence of an appeal, Judge Rosenblatt's ruling sets a legal precedent that is binding only in Arizona. Other lawsuits dealing with the language issue around the country either are in embryonic stages or do not directly deal with with constitutional questions. A suit that reached the U.S. Supreme Court last year was dismissed on a technicality.

Fifteen states in addition to Arizona have legal provisions making English the official language. Since 1978, Hawaii has had a constitutional provision making English and Hawaiian the state's official languages. Reported in: *New York Times*, February 8.

begging

New York, New York

A federal judge in Manhattan declared January 26 that poor people have a constitutional right to beg, and struck down the Metropolitan Transportation Authority's ban on panhandling in the New York City subways. The decision was the first by a federal court to find that panhandling is a free speech right protected by the First Amendment. Legal experts suggested that, if upheld, it could signal a sharp change in direction for a legal system that has for centuries monitored, regulated and, sometimes, entirely prohibited begging.

U.S. District Court Judge Leonard B. Sand ruled that the transit agency could not enforce no-begging rules it hoped would bring order to a system that many riders had come to see as chaotic. The decision also invalidated a similar policy of the Port Authority of New York and New Jersey.

"A true test of one's commitment to constitutional principles," Judge Sand said, "is the extent to which recognition is given to the rights of those in our midst who are the least affluent, least powerful and least welcome."

Lawyers for two homeless men who had challenged the no-begging policy said that begging amounted to nothing more than one person asking a question of another and should be protected by the First Amendment. Judge Sand adopted that approach.

"The simple request for money by a beggar or a panhandler," he wrote, "cannot but remind the passerby that people in the city live in poverty and often lack the essentials for survival. Even the beggar sitting in Grand Central Station with a tin cup at his feet conveys the message that he and others like him are in need. While often disturbing and sometimes alarmingly graphic, begging is unmistakably informative and persuasive speech."

A few state courts have dealt with the issue of begging, including an appeals court in Florida that in 1984 recognized a free speech right, but legal experts said no consensus has emerged on the issue. They said Judge Sand's ruling, from the influential U.S. District Court in Manhattan, could frame an issue that is very likely to become more pressing as attention to the problem of homelessness increases.

"In the face of the legions of homeless that face us in the streets," said Paul G. Chevigny, a professor at New York University Law school, "the decision speaks well for the humanity of the federal judiciary that they're willing to recognize the right of the poor person to ask others to help."

Judge Sand also struck down a New York State law that made it illegal to loiter for the purpose of begging. In addition, he invalidated a policy of the Port Authority that denied permits to people who said they wanted to beg in the World Trade Center in lower Manhattan and the Port Authority Bus Terminal.

Tito A. DaVila of the Metropolitan Transportation Authority said transit officials believed they were justified in adopting rules banning begging. "We believed and believe," he said, "that we should have a say about what goes on in the subways and an ability to bring some control over what goes on there. DaVila said transit officials were "very unhappy with the decision" and were evaluating what to do next.

The transit agency could continue to press Judge Sand to overturn the preliminary injunction he issued, could appeal to the U.S. Court of Appeals for the Second Circuit or could adopt new rules that would ban begging selectively. Reported in: *New York Times*, January 27.

schools

Fairfax County, Virginia

A Fairfax County high school teacher, whose pay was frozen after he wrote a satirical letter to the editor of a school newspaper, won $3,898 in back pay raises plus interest January 31 after a federal judge found his right to free speech had been violated. U.S. District Court Judge Albert V. Bryan, Jr., ruled that Donald L. Seemuller's First Amendment rights outweighed the school system's right to carry out its educational mission. A jury then awarded Seemuller damages after finding that his pay raises were frozen as a direct result of the letter.

Seemuller, a physical education teacher at Lake Braddock Secondary School, was placed on probation in 1987 after he wrote a letter satirizing perceptions of sex discrimination. The letter was published in response to an anonymous letter printed in the paper, alleging sex discrimination by unidentified teachers in the Physical Education Department.

Seemuller replied that he respected women's accomplishments, saying he permitted his 16-year-old daughter "to chauffeur my son to and from activities," and referred to his wife as "an adequate cook and housekeeper. My wife also does light yard work, enabling me to play golf and pursue many other masculine activities." Seemuller said he was only trying to "lighten up the system of misperceived sexism."

As a result of the letter, Seemuller's pay was frozen after his evaluation found that he "needs improvement" in professional responsibility.

After exhausting the grievance process in the school system, Seemuller filed suit in U.S. District Court in 1988. The suit was dismissed by a judge who said the letter did not address a matter of public concern and thus was not protected. A three-judge panel of the U.S. Court of Appeals for the Fourth Circuit ruled that the letter was protected speech because it did address sexism in the school, a matter of public concern. The court ordered the case returned to the District Court. Reported in: *Washington Post*, February 2.

loud protest

Annapolis, Maryland

A sharply divided Maryland Court of Appeals ruled February 8 that a sidewalk preacher was justly convicted of disorderly conduct after shouting passages from the Bible outside a Hagerstown abortion clinic, a decision that several judges warned could limit various forms of political protest. In a 4-3 opinion, the state's highest court upheld the 1988 conviction of Jerry Wayne Eanes under an anti-noise statute that traditionally has been used to quell violent or offensive outbursts. The statute specifically bars attempts to "willfully disturb any neighborhood . . . by loud and unseemly noises."

The court said Eanes's peaceful demonstration, which occurred on a busy commercial street and did not involve harassment of the clinic's patrons, would ordinarily be afforded protection under the First Amendment. But, the court said, the irritation his activity caused nearby residents and office workers outweighed his right to free speech in that instance.

"If the state is able to prove that, under the circumstances, the human voice is so unreasonably loud as to be unreasonably intrusive on a captive audience, that is enough," Judge William H. Adkins II wrote for the majority.

A minority of the judges strongly disagreed, arguing that upholding the conviction violated Eanes's First Amendment rights and set a precedent beyond the scope of existing Supreme Court rulings. Those rulings, the minority said, have permitted governments to control the volume of only political or social speeches delivered with microphones, loudspeakers or similar devices.

In a barbed dissent, Judge John C. Eldridge wrote that individuals or groups could invoke the majority's reasoning to halt political speeches or rallies they did not like. "The recent nonviolent anti-government demonstrations in Eastern Europe, which have been generally praised in this country, would undoubtedly have constituted criminal activity if they had occurred in Maryland under the test employed by the

majority," Eldridge wrote.

"More traditional or 'acceptable' speeches by public officials or prominent persons will rarely, if ever, lead to arrests, regardless of the volume level," Eldridge added.

Eanes was arrested for disorderly conduct in downtown Hagerstown on May 18, 1988, the day after he was acquitted on an identical charge by a judge who ruled his ongoing protests enjoyed constitutional protection. The second arrest came after Eanes had been preaching on and off for about an hour, during which police received numerous complaints and already warned Eanes once to lower his voice.

A District Court judge and, later, a Circuit Court judge found Eanes guilty, and he served 45 days in jail for the violation and a related contempt of court charge. Reported in: *Washington Post*, February 9.

privacy

North Haledon, New Jersey

A civil liberties case filed by a student who wrote to the Soviet government for information and was later investigated by the FBI may be headed for the U.S. Supreme Court. The student, Todd Patterson, of North Haledon, was in the sixth grade when he wrote to 169 countries, including the Soviet Union, to gather information for a "world encyclopedia" he was planning to write. The mail he received prompted the interest of FBI agents, who visited his parents in 1983.

In 1987, the youth sought to see his file to determine whether it contained anything that might hamper his plans for a career in the State Department. After the agency would only turn over highly edited portions of his record, Patterson sued to see his entire record. A district court judge dismissed the suit.

On January 8, a panel of the U.S. Court of Appeals for the Third Circuit ruled that the FBI could maintain a file on Patterson and keep it secret even though its investigation was closed.

After an *in camera* inspection, the court said the FBI records describing Patterson's "exercise of First Amendment rights are relevant to an authorized law enforcement activity. Continued maintenance of such records also will not violate any provision of the Privacy Act."

Section 7(e) of the Privacy Act prohibits maintenance of files on individuals exercising their First Amendment rights unless expressly authorized by statute or "unless pertinent to and within the scope of an authorized law enforcement activity." Most federal courts have interpreted Section 7(e) to impose a "relevancy standard" when agencies claim information was collected for a law enforcement investigation. Patterson argued for a tougher standard: agencies should be made to show a "substantial relationship" between the records and the government activity. The "relevancy" standard acted to dilute his First Amendment rights.

The court disagreed. Stating that the relevancy standard was more manageable and consistent with Congressional intent, Judge Carol Lois Mansmann said, "The weight of authority supports a rule requiring a federal agency to establish some nexus between the files and classified activities. A burden as heavy as that suggested by Todd [Patterson] has never been imposed."

The court also rejected Patterson's tort action against unnamed FBI agents, stating it was convinced by *in camera* submissions that no FBI agent violated the law and that the state secrets privilege shielded the FBI from further disclosure. Finally, the court affirmed the FBI's withholding of data to safeguard counterintelligence sources and methods and the privacy of third parties.

Frank Askin, a lawyer for the ACLU who represented Patterson, said the decision "guts" the Privacy Act. Askin said he was considering an appeal to the U.S. Supreme Court. Reported in: *Education Week*, January 24; *Privacy Journal*, January 17.

etc.

Montgomery, Alabama

Flying the Confederate flag above the Alabama state capitol dome did not violate the establishment clause or free speech clause of the First Amendment, the U.S. Court of Appeals for the Eleventh Circuit ruled January 16. Judge Frank M. Johnson, Jr., said the state could reserve the dome of the capitol for its own communicative purpose as long as that reservation was reasonable and was not an effort to suppress expression because public officials opposed a speaker's point of view. In addition, flying the Confederate flag was not a badge or incident of slavery and did not violate the Thirteenth Amendment. Reported in: *West's Federal Case News*, January 26.

Washington, D.C.

The U.S. government is not required to give Soviet and eastern European aliens seeking asylum in the U.S. notice advising them of the offer of the Ukrainian-American Bar Association to provide them free legal advice, a panel of the U.S. Court of Appeals for the District of Columbia ruled January 26. Judge Douglas H. Ginsburg said that the government, once having acted to place the alien in custody, did not violate the First Amendment rights of the bar association members when it declined to make provision for them to contact him. Reported in: *West's Federal Case News*, February 9.

Washington, D.C.

A Washington Metropolitan Area Transit Authority regulation requiring a permit to use authority property for free speech activities was invalid, a panel of the U.S. Court of

Appeals for the District of Columbia ruled January 26. According to Judge Abner J. Mikva, the regulation was not narrowly tailored but, rather, restricted many incidents of free expression that posed little or no threat to the authority's ability to provide safe and efficient transportation and an equitably available forum for public expression. Reported in: *West's Federal Case News*, February 9.

Wichita, Kansas

Planned Parenthood demonstrated a likelihood of success on the merits of its claim that termination of its contract with a city-county board of health to provide family planning services was a violation of the First Amendment freedoms of the organization and its clients, U.S. District Court Judge Patrick F. Kelly ruled January 3. According to Judge Kelly, there was no identifiable rationale for the decision to terminate funding other than a perception that the organization was "a smoke screen for abortion counseling." The resolutions, the court concluded, represented content-based censorship. Reported in: *West's Federal Case News*, February 16.

Newark, New Jersey

A rule prohibiting the distribution at Newark Airport of written expression "relating to commercial activity" without the consent of the Port Authority of New York and New Jersey violated the First Amendment, a panel of the U.S. Court of Appeals for the Third Circuit ruled January 12. Chief Judge John J. Gibbons said the rule gave the Authority the power to grant or deny newspaper publishers the permission to distribute their newspapers at the airport, but said nothing about how that power was to be wielded. There was no indication that content-based judgements were prohibited and no guidelines describing reasons why expressive material could not be distributed at the airport. Reported in: *West's Federal Case News*, January 26.

Dayton, Ohio

An ordinance regulating the design and occupancy of video booths located in "amusement arcades" and in which a "film or video viewing device" is used to exhibit material depicting certain enumerated sexual acts and bodily functions does not violate the First Amendment. U.S. District Court Judge Don L. Crawford ruled January 25 that the ordinance was directed at secondary effects and not at the suppression of speech, and was therefore content-neutral. Reported in: *West's Federal Case News*, February 16.

Philadelphia, Pennsylvania

A Pennsylvania statute requiring adults to apply for an access code to receive sexually explicit recorded telephone messages violated the First Amendment, a panel of the U.S. Court of Appeals for the Third Circuit ruled February 16. Judge Dolores Korman Sloviter said the law burdened the callers' First Amendment rights and chilled the message services' protected speech, and a blocking system would be a less restrictive method to prohibit minors from hearing the messages. Reported in: *West's Federal Case News*, February 23.

Pierre, South Dakota

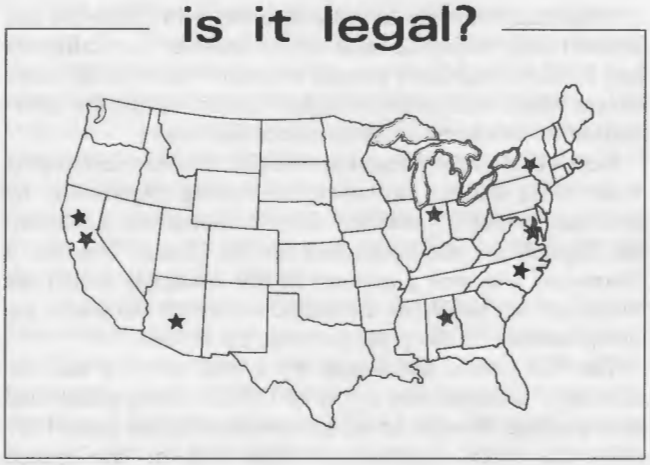
Pierre ordinances prohibiting obstructions on any street, road, alley or sidewalk and prohibiting the placement of any goods merchandised so as to obstruct any sidewalk, as applied to a newsrack, violated the First Amendment, U.S. District Court Judge Donald J. Porter ruled January 19. The safety interest in obstructed vehicular and pedestrian traffic was not clearly advanced by the ordinances as applied to the newsrack in the absence of any evidence of accidents or injuries caused by them, Porter ruled. Reported in: *West's Federal Case News*, February 2. □

(FW/PBS v. Dalls . . . from page 92)

speech may be flatly banned is without any support in the Court's opinions.

The good news is that not a single Justice joined Justice Scalia's opinion, and that a solid six Justice majority rejected any analysis in this case predicated on the claim that sexual speech is "lesser protected" than other speech. (Justice White relied upon this "lesser protection" rationale in his dissenting opinion, joined by the Chief Justice.) Although this "lesser protection" argument is not put entirely to rest by *FW/PBS*, its proponents have been dealt a serious blow. □

is it legal?



library

Glendale, Arizona

When it blocked a prayer group from using meeting rooms at the Glendale Public Library, the city found itself thrust into the middle of a national debate over religious freedom. On March 1, Concerned Women for America sued the city over its decision, claiming that such a prohibition violates constitutionally guaranteed rights to free speech and free exercise of religion.

Cathi Herrod, Arizona director of the group, said the issue is clear. "If the library allows some groups to use its meeting rooms, it may not bar other groups because of what's said in the room. The key point is that Glendale Public Library has decided to let its facilities be used by outside groups. Once they made that decision, they can't say 'no' because of what you're going to talk about in the meeting."

Last November, a local Concerned Women prayer/action group submitted an application to use a library meeting room and was refused by library director Rodean Widom. In denying the request, Widom cited a city policy barring groups from using meeting facilities for religious purposes.

Assistant city attorney Rick Flasen said the policy was based on a 1974 Arizona Supreme Court decision. Since that decision, however, the U.S. Supreme Court ruled in 1981 that a public university must allow a student prayer group the same access to its facilities that it allows other student groups.

The lawsuit asks U.S. District Court Judge Paul G. Rosenblatt to strike down the library's policy and requests that a state constitutional provision, interpreted to restrict access to public facilities by religious groups, be declared unconstitutional. Reported in: *Arizona Republic/Phoenix Gazette*, March 14.

schools

Montgomery, Alabama

Last December 14, the Alabama State Board of Education called on the state Textbook Committee to reconsider a biology book that teaches a theory of "intelligent design" alongside evolution (see *Newsletter*, March 1990, p. 45). On January 8, the committee held a public hearing on the merits of *Of Pandas and People*, which it did not recommend for adoption in December.

Opponents of the book say the book should not be in the classroom because the theory of "intelligent design," the theory that life originated through outside intervention rather than by chance, as evolutionary science holds, has been called fig-leafed creationism by scientists.

The committee was about to vote on the book when the publisher's attorney withdrew the book from consideration. Committee member Norris Anderson, also a member of Citizens for Integrity in Science Education, an organization set up to help push the book's adoption, then told the committee its members would be in legal jeopardy if they voted against the book after it had been withdrawn. The committee then voted to accept the withdrawal of the book and to take no action on it.

The book was withdrawn, the publisher charged, because the textbook committee did not follow legally mandated procedures. "The withdrawal does not reflect a lack of confidence in the contents of the book," said attorney Francis Hare, Jr. The proponents of the book should have been allowed to make opening and closing statements and to cross-examine opponents of the book, he said. Reported in: *Montgomery Advertiser*, January 9.

visas

Washington, D.C.

The U.S. Senate has given final Congressional approval to repealing a provision of a McCarthy-era law that barred foreigners from visiting the United States because of their political beliefs. The law, the McCarran-Walter Immigration Act, was passed in 1952 over the veto of President Harry Truman. Over the years, it was employed to deny entry to such acclaimed figures as the writers Gabriel Garcia Marquez and Graham Greene, actor Yves Montand, and naturalist Farley Mowat.

"For a generation and more these miserable provisions made the United States present itself to other nations as a nation of fearful, muddled, intimidated citizens," said Sen. Daniel Moynihan (D-NY), who sponsored the repeal legislation. "We were not that; we are not that, and now at last our statutes accord with the facts."

The measure was passed 98-0 by the Senate January 30 as an amendment to a State Department spending bill. It was

approved by the House in November and President Bush was expected to sign it. Legislation temporarily repealing the restrictions was passed in 1987 and again in 1988. The State Department objected, warning that repeal could have "potentially serious adverse consequences" for the conduct of foreign policy. But this time, the department raised no objections to permanent repeal of the section of the McCarran-Walter Act that excludes aliens for ideological reasons.

The measure covers only those seeking to enter the U.S. for short visits. Those seeking permanent status can still be barred because of their beliefs or memberships. The new legislation still allows the Secretary of State to deny entry to an alien who is identified as a terrorist or is seen as likely to engage in terrorist activity.

Over the years, thousands of foreigners have been barred by the provision. In 1984, for example, the Immigration and Naturalization Service estimated that it blocked 8,000 people from 98 countries because of their beliefs or political affiliations.

Another portion of the McCarran-Walter Act, dealing with resident aliens, is under legal attack. In December, 1988, a U.S. District Court judge in Los Angeles barred the immigration service from deporting seven Jordanians and one Kenyan. The government had charged them with being members of the Popular Front for the Liberation of Palestine. In preventing the deportations, Judge Stephen V. Wilson declared the language of four sections of the act "unconstitutional on its face." The ruling applied only to the Central District of California and has been appealed by the government. Reported in: *New York Times*, February 2.

journalism

Albany, New York

The New York State Senate March 21 gave final approval to a measure that protects news organizations from having to turn over to the courts virtually any information gathered by their reporters or television crews. The action gives New York one of the strictest protections for journalists' notes of any state in the country. It broadens a statute, known as the Shield Law, that protects news organizations from having to turn over to the courts information gathered from sources that were promised confidentiality.

Under the expanded law, which Gov. Mario Cuomo pledged to sign, prosecutors would be unable to collect information from reporters unless they could prove that it was relevant, necessary to their case and unobtainable from any other source. The protection would apply to reporters' notes, newsroom files and television outtakes, regardless of whether a pledge of confidentiality was given. The new provision shifts the burden of proving the need for information to prosecutors or litigants. Currently, publishers and broadcasters are compelled to demonstrate why information should not be released.

About half the states have shield laws, with California and Pennsylvania having the most comprehensive. The California and Pennsylvania laws protect reporters' notes in all cases except where a criminal defendant can prove that the information is necessary to guarantee a fair trial.

New York's strengthened law would "prevent newspapers from being hauled into court on fishing expeditions by defense attorneys," said Sen. Roy M. Goodman, a Manhattan Republican who sponsored the bill. Steven Sanders, a Democrat who was a sponsor in the Assembly called the measure "a triumph for the public because it reinforces the independence of the press in New York State."

The bill passed the Senate by a vote of 47-5 and the Assembly in January by a vote of 119-11. News groups had been pushing strongly for an expansion of the law since 1987 when the state's highest court ruled that the law applied only to a reporter's right to withhold information given by a source in confidence. The original Shield Law was passed in 1970. Reported in: *New York Times*, March 22.

FOIA

Washington, D.C.

The Department of Justice has been caught inflating the costs of complying with the Freedom of Information Act, Rep. Robert E. Wise Jr. (D-WV) said February 8. The department's violation of the Freedom of Information Act (FOIA) was especially egregious, Wise said, because the target of the misrepresentation was the U.S. Supreme Court.

The issue arose last year when *Tax Analysts*, a weekly magazine, asked the department for copies of federal district court tax opinions regularly compiled by the agency's Tax Division. Officials refused to make the records available under the FOIA, saying the rulings were already publicly available. But the U.S. Court of Appeals for the District of Columbia held that the department's copies, regularly identified in weekly logs, were covered by the FOIA and had been "improperly withheld."

Seeking relief in the Supreme Court, the department told the court that making the rulings available would "impose enormous administrative costs" on the government and would cost nearly $75,000 a year "for search time alone."

The $75,000 estimate, the government claimed, was based on "an actual experiment" in which it took "an experienced paralegal" 80 hours to track down 29 of the court opinions cited in one of *Tax Analysts*' weekly lists. The high court ruled 8-1 last summer that the department was required by law to make copies of the tax decisions available to anyone who wants them.

Wise, chair of the House subcommittee on government information, then asked the General Accounting Office to check on the costs "because there have been persistent complaints that agencies overstate the costs of responding to FOIA requests."

GAO auditors found that instead of having paralegals engage in frenetic searches, the Tax Division simply duplicates all of the tax rulings it gets and sends them to a central reading room open to the public twice a week. The cost, GAO found, is expected to be $23,500 a year, including space rental and duplication costs. That is less than a third of what the Supreme Court was told it would cost just to find the rulings. In addition, revenues from making copies for the public at ten cents a page will offset somewhat "less than a third" of the expense.

"The GAO report," Wise said, "shows that the Justice Department played this same game at the Supreme Court. The lesson to be drawn is that no court anywhere in the country should accept or rely upon any cost figures provided by the Justice Department in an FOIA case. The GAO report suggests that the department's zeal to win cases and to deny information to the public is so strong that the department is not providing reasonable or accurate cost estimates." Reported in: *Washington Post*, February 9.

abortion

Guam

One day after it passed, an American Civil Liberties Union lawyer was charged with violating a new Guam law outlawing abortion except when a pregnancy endangers a woman's life, and forbidding "solicitation" of abortion. Janet Benshoof, Director of ACLU's Reproductive Freedom Project, was charged with a misdemeanor after making a speech in which she advised women that abortion was still legal in Hawaii. She had flown to Guam in an attempt to meet with Governor Joseph F. Ada and convince him not to sign the legislation. She was never allowed to meet with the Governor. On Tuesday, March 25, Benshoof spoke at the press club of Guam announcing that Guamian women should know they could still get legal low-cost abortions in Honolulu. Two government investigators attended and taped Benshoof's speech. Three hours after her speech, Ms. Benshoof was call(ed) by the Attorney General of Guam, asking her to go to court. She complied voluntarily and was charged with violating the solicitation portion of the new statute.

According to Rachel Pine, a colleague of Ms. Benshoof at the ACLU, informing women about he availability of abortion "is not solicitation, but free speech protected by the First Amendment."

The case against Ms. Benshoof will be set for trial on April 2. The new law will be subject to an island-wide referendum on November 6, leaving it up to Guamian voters to decide whether they wish to keep the statute.

Guamian lawyers and journalists responded strongly to the new law. Don Williams, an attorney for the *Pacific Daily News*, said, "I think the statute is so patently unconstitutional in the free speech area that it is better to get it contested immediately and get it resolved." Benshoof, herself, raised the question of whether the law now prevents journalists from reporting the addresses and telephone numbers of abortion clinics outside Guam, and if libraries must remove from their shelves books which mention abortion. Benshoof remains in Guam and intends to challenge the law on constitutional grounds.

The charge against Benshoof for soliciting abortion carries a potential penalty of one year in jail and a $1,000 fine. Benshoof pleaded not guilty. Reported in: *New York Times*, March 20, 21; *USA Today*, March 20, 21; *Washington Post*, March 20, 21, 22; *Pacific Daily News*, March 22.

AIDS

Raleigh, North Carolina

The North Carolina Department of Environment, Health and Natural Resources on February 21 destroyed 15,000 Spanish-language anti-AIDS brochures that graphically depict how to use a condom. About a million otherwise identical English-language brochures were distributed to health clinics across the state. The English brochures were distributed before the state's AIDS control unit came under the department's control.

Don Follmer, public affairs director of the department, said the brochures had been destroyed because they were printed without proper review and not because of their explicit content. But David Jolly, director of the AIDS Control Branch, said concerns about the brochure's graphic pictures had been raised.

"I know that there was concern about the graphics," Jolly said. "Our intention is to put out a brochure on how to use a condom for the Hispanic community, and if it is not this brochure, it will be very similar."

David C. Jones, lobbyist for the N.C. Aids Service Coalition, reacted with anger to the move. "The thing that is offensive is not this brochure," he said. "The thing that is offensive is destroying the brochure. Even if they hadn't gone through proper procedure, they could easily have been embargoed and evaluated before being destroyed. To me, that challenges any assertion that it was procedure [that led to the decision]."

"It's a call I made and I stand by it," said department deputy secretary George H. Rudy. "No decision has been made about the content. I didn't know what was in the Hispanic material, and I didn't want stacks of these sitting around. I don't read Spanish and neither does Don." Reported in: *Raleigh News & Observer*, February 23.

minors' access

Sacramento, California

Sexually explicit adult publications would be banned from vending machines unless adult "guards" oversee their sale to prevent minors from purchasing them under proposed legislation that cleared a key California Assembly committee. The latest attempt to crack down on the sale of adult publications got a boost from an unexpected source — Berkeley Assemblyman Tom Bates, a Democrat widely perceived as perhaps the most liberal legislator in the state.

In a little-noticed action, Bates provided a crucial swing vote January 9 in the Assembly Public Safety Committee to pass a bill to restrict vending machine sales of sexually explicit publications to minors. Under the bill, offered by extreme conservative Assembly member Gil Ferguson (R-Newport Beach), news racks would be prohibited from selling adult newspapers or magazines that depict sex acts unless the racks are supervised by an adult.

Opponents of the bill, including the editor of *Spectator*, an adult periodical published in Bates' district, contend the bill is just another attempt to put adult periodicals out of business under the cover of protecting minors.

"He's [Bates] aiding and abetting the enemy in a way he didn't realize," said *Spectator* editor Layne Winklebeck. "On the surface, it may be easy for him to say, 'We don't want kids to be exposed to this.' But if you don't put your hands in the dike, this will be just the beginning."

"I find the material to be extremely obnoxious and detrimental to children and society in the long run," Bates said. "It breeds violence on women. I don't view it as a free speech issue."

The Assembly Public Safety Committee, controlled by liberal Democrats, routinely kills bills considered to infringe on the First Amendment right to free speech and a free press. However, Bates stunned opponents when he joined three Republicans and one other Democrat in passing the bill on a 5-1 vote.

Committee Chair John Burton (D-S.F.) opposed the bill while two other Democrats declined to vote, apparently to avoid registering a "no" vote on what may be portrayed as an anti-pornography bill in an election year.

"I just don't believe you should restrict people's access to materials," said Burton. "People have a right to read garbage if they want to read garbage." Both Bates and Burton said the bill had a good chance of passing the Assembly. "It got out of my committee, so I don't know how it can be stopped," Burton said. "They wrap it as an anti-child pornography bill." Reported in: *Oakland Tribune*, January 19.

cable television

South Bend, Indiana

The chief local opponent of the White Aryan Resistance's "Race and Reason" cable television show said January 8 that he may go to court to make its airing in South Bend a test case of whether cities can regulate public access cable programming. The comments by Richard Trowbridge of South Bend came after the Board of Public Works rejected his request that it order Heritage Cablevision to stop showing the controversial program.

"This is a disgusting program, a terrible use of the airwaves," board president John E. Leszczynski told Trowbridge. "We would like to put an end to it, but we can't. We agree with you 100 percent, but we have to go with what the law says. If we shut the program down, we'd lose in a court of law. We sympathize with you, but there is nothing we can do about it."

Trowbridge contended that under Federal Communications Commission regulations, the city and Heritage have the authority to control the content of the public access channel. The channel, mandated by the franchise agreement, was established to allow public education and information programs, and "Race and Reason" is neither, Trowbridge said. "This show goes against community standards and has to be taken off the air. It is a direct violation of the rules between Heritage and the city," he said. The show also violates a Heritage public access channel regulation against proselytizing on programs it airs, he added.

"I will put my legal opinion up against yours; this is a First Amendment issue," assistant city attorney Jenny Pitts-Manier responded. "We have in essence created a public forum with the access channel and can't exclude anyone from it because of their viewpoints. Your concerns are felt, but we are constitutionally prohibited from pulling the show. We don't have the authority."

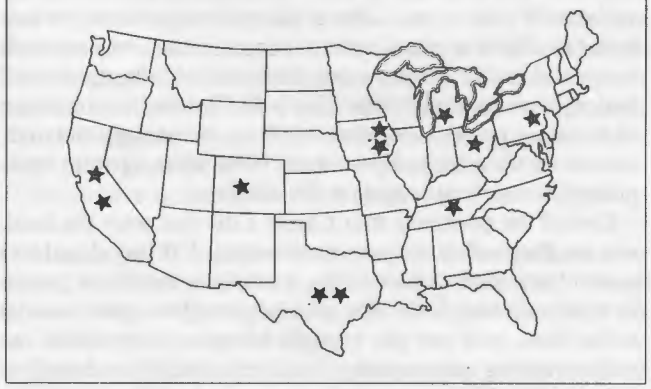
Trowbridge said he would write to the FCC to obtain a ruling that might encourage the Works Board to reverse its decision. If that fails, he said, litigation is also possible. Reported in: *South Bend Tribune*, January 8.

begging

Berkeley, California

Despite a recent New York decision that begging is protected by the First Amendment (see page 97), the Berkeley city attorney ruled in February that panhandling, especially aggressive begging, is not protected expression. City Attorney Manuela Albuquerque issued a memo to Police Chief Ronald D. Nelson which declared that people are prohibited from accosting others. The memo defined "accosting" as any physical approach to another person. Reported in: *Oakland Tribune*, February 18. □

success stories



libraries

Jackson, California

A Jackson Elementary School panel in February rebuffed a parent's request to ban an allegedly offensive picture book from the school library. Parent Susan Vinciguerra had asked the school to remove *Do Not Open*, by Brinton Turkle, because she objected to its pictures of supernatural beings.

A panel of Jackson teachers and administrators reviewed the request and unanimously decided to keep the book on the shelf, said Amador County school Superintendent Clifford Tyler. The book, published in 1981, was nominated for the state's California Young Readers Award. It tells the story of a girl and her cat who find a magic bottle on a beach. The girl dreams she opens the bottle and finds a creature who changes forms in an unsuccessful attempt to scare her. Reported in: *Stockton Record*, February 10.

Modesto, California

After two hours of public discussion, the Modesto City Schools Board of Education voted 6-1 March 5 to retain Shel Silverştein's collection of poems *Where the Sidewalk Ends* in its district libraries and classrooms. Twenty-eight members of the community spoke before the board, the majority asking for the removal of Silverstein's work because, they charged, its content is inappropriate for young readers.

Parent Ron Mullins first complained about the book in April 1989. Among his specific complaints were:

- An illustration for the poem "The Planet of Mars" depicted a man's head growing out of his buttocks.
- The poem "Ma and God" compares what God has given us (raindrops, for example) with what mother tells us ("Don't get wet.")
- The hobby in "My Hobby" is "spitting from the twenty-sixth floor of a building."

"I feel this is one man's perverse view of the world," Mullins said. "It's more like adult humor; it doesn't have any business being taught to children. They talk about their fourth 'R' as responsibility," he continued. "I don't think it's responsible of the district to subject this material to impressionable children. Would you tell a kid to pick his nose, take a pee, stick something in his eye? This is not down-and-out vulgar, but it's planting something in children's minds."

Among those defending the book, however, was district Superintendent Jim Enochs. "Books are like the psychologist's Rorschach test in which people interpret inkblot designs in terms that reveal their intellectual and emotional state of mind," he said. "What one takes out of a book often reveals more about the reader than the writer. When this board committed itself to great libraries, it was committing itself to the rich diversity which is one of the features of great libraries."

"Whatever happened to tolerance?" Enoch asked. "And in the case of this book, a sense of humor?" He said parents have the right to appear before the board and request that their children be excused from any activity involving materials they find objectionable. "But they have no right to impose their values and tastes on everybody else," he said. "The board needs to stop this kind of thing right now. Once you begin to feed this kind of mentality, you will only increase the appetite."

Brad Barker, librarian at Mark Twain Junior High School, also spoke on behalf of retaining the book. "Children sheltered under one point of view are in trouble," he said. "You don't have to agree with every idea in every book. If that were the test, all we would have left are a couple of cookbooks. With diversity, you learn tolerance."

Board members said they were concerned that the ideas of a small group would be forced on the district. "The issue is censorship," said board member Frank Jeans. "I am against that 100 percent."

Board President Margaret Snyder said, "Every parent has the right to say no to their own children, but not the right to say no to my children." Reported in: *Modesto Bee*, March 5, 6.

Maquoketa, Iowa

The following is an edited version of a report submitted by Kathy Geronzin, a librarian at Northeast High School in Goose Lake, Iowa:

In November, 1989, Denise Zirkelbach, mother of an elementary school child, called the principal of her child's school and requested the removal of two books from elementary libraries and classrooms. The books were *Revolting Rhymes* and *The Witches*, both by Roald Dahl.

After a conference with librarian Merry Kahn, Zirkelbach filed a written complaint about the books, objecting to their alleged violence, to use of the word "slut," to the subject

of witches, and to the fact that "the boy who is turned into a mouse by the witches will have to stay a mouse for the rest of his life." Part of the argument used by the parents was that if one child was adversely affected by these books, the books should be removed.

A Reconsideration Committee was formed to handle the complaint. I was contacted for support and called the principal to ask that the books be retained. "I'm against censorship, but I don't consider removing these two books censorship," he said. He also said that he had spent several hours talking to the parents who were objecting to the books "and now I have to talk to you." He assured me that the district selection policy would be followed. The school's policy states that challenged books are to remain in circulation until a review committee decision is reached.

Maquoketa Public Library had both books, but no complaints were filed at the public library. When I visited the public library and spoke to the librarian, she said she would lend her support in keeping *Witches*, but that she was going to withdraw *Revolting Rhymes* from the library because if she had "read it before" she "wouldn't have ordered it." She gave Public Library Board members a chance to read it and the men on the board liked the book, so she decided to keep it in the collection.

On January 2, the school Reconsideration Committee met in closed session to study the complaint and to review book reviews, letters from interested persons, and the school's selection policy. They considered each one of the criteria for selection and commented on how the books met all applicable criteria. They then voted to keep both books in the elementary school libraries and curriculum without restriction.

Grand Haven, Michigan

A request by a parent to remove two award-winning elementary story books, *The Headless Cupid* and *The Witches of Worm* from school libraries was rejected February 19. Assistant superintendent for instruction Rick Kent said it was the first incident "in quite some time, I don't know how many years, that's gone to the superintendent." The parent had objected to the books because they "introduce children to the occult and fantasy about immoral acts."

The request was denied, Kent said, due to "the Supreme Court ruling in 1982 [the *Pico* case] and our obligation to be, as a public school system, open to a whole range of ideas. We had to take that stand."

"The minute we start censoring materials and take out a few, where do you stop?", Grand Haven schools' media services director Burton Brooks added in a speech to an anti-censorship group. Reported in: *Grand Haven Tribune*, February 23.

Mansfield, Ohio

A book that was kept off the Mansfield City Schools library shelves for over a year after a complaint against it got lost in the shuffle of a school system reorganization, was returned to open access in January when the Board of Education voted to deny the complaint. *Oh, That's Ridiculous!*, a collection of nonsense poetry, was removed from elementary and middle school libraries in November, 1988, after a parent complained it was inappropriate for children.

One of the problems that Cassie Cole had with the book was an illustration of two naked babies. "If [my daughter] would have made a doodle like that, she would have gotten in trouble," said Cole. She said her daughter, who was 10 at the time, told her she brought home a "dirty book" to do her reading assignment. "I said 'no, that's not dirty, but it isn't right,'" she said.

Cole also questioned a four-line poem called "Josephine," by Alexander Resnikoff: "Josephine, Josephine/ The meanest girl I've ever seen/ Her eyes are red, her hair is green/ and she takes baths in gasoline."

"You can't tell people what to read or what not to read," Cole said, "but little children don't need ideas like that put into their heads."

In March, a committee of teachers, community members, the school principal, and Library Media Center supervisor Louise Lutz concluded that the book "must be looked at in its entirety. In addition to the poems in question, the book also contains poems with themes of anti-war sentiment, manners and unselfishness." While acknowledging that some of the poems lacked literary merit, the committee concluded that this did "not merit removing the books from the libraries."

Lutz explained that the committee's report was not forwarded to the school board because she had to move nine libraries during a summer consolidation and reorganization. Reported in: *Mansfield News-Journal*, November 28; letter from Louise Lutz, March 5.

Brentwood, Tennessee

On March 19, following two and a half hours of discussion, the Brentwood library board voted 6-0, with 1 abstention, to maintain open access to videotapes and other library resources. The library's eight-year-old open access policy was challenged February 20 when a local resident expressed concern about minors having access to the R-rated videotape, *Good Morning, Vietnam*.

Board chair Jack Victory explained that R-rated videos account for 49 of the library's 853 videotapes. Each video is previewed by a panel of local residents and carries its MPAA rating label. Of the four complaints previously received concerning the video collection, none had raised objection to minors' access to R-rated videos.

Brentwood library director Tedgina Bradford pointed out that the library's open access policy had not been challenged previously. "There should be free access to all materials for everybody," she said. One board member, George Woodring, abstained from the vote, stating, "We should help parents control their own children." Board member Joan Curry disagreed, stating that the responsibility for monitoring children's activities lies with parents, not the library. "We all love our children," she said. "I believe our policy works."

In addition to reaffirming their open access policies, the Board members passed a motion placing all books, videos and audiotapes in a single category of library materials, with no differentiation by format.

Brentwood Mayor Joe Sweeney stated he would stand by any decision the Board made. The Brentwood library sets its own policies and is an independent entity, but the City Commission approves partial funding for it. "Whatever happens on this," said Mayor Sweeney, "I'm going to cut and slash the library's budget."

One citizen, Carlton Flatt, head football coach and athletic director at Brentwood Academy, said he was concerned with the Board's reliance upon parental decision making. "All our parents don't make good decisions, and not all parents know what is going on with their own children." Local veterinarian, Mark Ingram, expressed displeasure with the Board's decision, stating, "I'm concerned not only with what my wife and children watch, but I'm interested in what your children watch if they are feeding on trash. Maybe we can't legislate morality, but we can make it more difficult to be immoral."

But Brentwood resident Gene Brooks stated, "There are books in this library should your children choose to take them home that would be much more offensive than R-rated videos. I hope you see it is ridiculous that we should limit children's access to books. Videos are the same. I think the library should not have to be responsible for what your children read and view. You should be responsible for what your children read and view."

The library's policy is reviewed annually by the Board of Trustees and then is forwarded to the Brentwood Board of Commissioners for review. Reported in: *The Tennessean*, March 20; *Brentwood Journal*, March 21.

Odessa, Texas

Charging that four books glorified witches and could lure children into occult worship, Vicki Peacock and John Patterson presented a petition with 400 signatures December 19 and asked the Ector County Independent School District Board of Trustees to ban the book. But the board backed Superintendent Gene Buinger, who said he could not conSciously remove the books from the library because he would allow his own two children to read them.

The books are *Black Magic, White Magic*, by Gary Jennings, and three books by Phyllis Reynolds Naylor: *Witch Water*, *Witch Herself*, and *Witch's Sister*.

"If we were to follow the idea that we remove everything controversial from our libraries, we would remove books about communism, fascism, and drug abuse," Buinger said. "I found nothing in these books that were in any way, shape or form more controversial or raised more of a concern than in other children's fairy tales."

Buinger said board policy states that parents have a right to request that their children not read any school material, but they can't ban material for other children.

"I can tell you now that we're not through with it," said Patterson. "A lot of people are concerned about it . . . a lot of people are afraid of occult groups, and they want to show their support. Reported in: *Odessa American*, December 20.

schools

Adams County, Colorado

A committee of teachers, parents and administrators January 9 voted to deny a request by parent Peter Smith to eliminate a sentence in a fourth-grade science textbook. Smith targeted the following sentence in the book *Concepts in Science*: "Penguins are birds that lost the ability to fly millions of years ago."

"If the author would have just used the phrase 'scientists believe' instead of stating the theory of evolution as fact, I would have been satisfied," Smith said. He asked district officials either to eliminate any implied evolutionary statements, modify the text or give him equal time to teach the creationist theory of existence.

Smith, who did not file an appeal with the school board, said he would return to defend his case "once I've completed my research." He said he could not understand why his request to change one sentence was denied. "I don't want them to throw out the whole book. It's generally quite good. I'm no book-burner." Reported in: *Westminster Sentinel*, January 11.

Cedar Falls, Iowa

The Cedar Falls Board of Education ruled January 8 that a controversial book should remain on the assignment list in a fourth grade reading class. In a unanimous vote, the board upheld a decision by officials of the Orchard Hill Elementary school to continue using *On My Honor*, by Marion Dane Barber. The book had been challenged by a group of parents led by Carol and Jim Eagan because of its use of the words "damn," "hell," and "friggin'" (see *Newsletter*, March 1990, p. 47).

Superintendent James Robinson said parents have the right

to keep their children from reading any book they find objectionable, but not to prevent teachers from using it in the classroom. *On My Honor* is part of an assignment list from which students could choose books to read. It proved to be a popular choice, according to school officials.

Carol Eagan said she was "not very happy" with the ruling. "The board has given us a lot of lip service, but what has happened is that they essentially are going to do nothing," she said. Eagan added that she and her supporters might seek a review of the case by the Iowa state board of education. Reported in: *Waterloo Courier*, January 10.

Tyrone, Pennsylvania

The Tyrone School Board voted 6-3 February 13 to retain in eleventh-grade English classes a short story that parents complained was marred by sexual situations and profanity. The board's vote upheld a recommendation by a special committee formed to review the story.

Three parents filed formal complaints with the school asking that "Where Are You Going, Where Have You Been," by Joyce Carol Oates, be removed from classrooms. The school board received 35 additional letters supporting the complainants and more than 130 people attended the board meeting, almost all supporting removal of the story and other controversial literature from the schools.

The story is on a supplemental reading list which, according to school policy, students are not required to read. According to the review committee's majority opinion, the language and adult situation in the story were necessary to a realistic portrayal of life.

"When characters in fiction use profanity, this does not mean that the author or the teacher advocates the use of such language," the committee said. "By eleventh grade it seems reasonable to assume that students can distinguish when a particular type of language is appropriate and when it is not."

Complaints against the story prompted some parents and community members to examine required, supplementary and suggested reading lists. According to the Rev. Richard Ager of Grace Baptist Church, parents said they objected to quite a few books on the lists. Among the titles Ager said parents did not like were *Couples* and *Rabbit is Rich*, by John Updike; *Cujo*, by Stephen King; and *The Color Purple*, by Alice Walker.

"I know people are going to look at us like a bunch of fanatics, but I blush to read this out loud," Ager said. "Compared to this, *Grapes of Wrath* is mild." Despite Ager's remarks, only one additional challenge was filed, according to school administrators. A parent of an elementary school student requested a review of Judy Blume's *Then Again, Maybe I Won't*.

In an attempt to deal with community concerns, the board agreed to form a committee to review school policies about how literature is handled, and guidelines for reading lists and material not on approved curriculum lists. The advisory committee will consist of two community members, two members of the English department, two administrators, and two school board members.

Parent John Ramsey, who filed one of the original complaints, said the findings of the review committee were invalid because those chosen to decide were among those who originally placed the story in the curriculum. "This is a no-win situation in which the school appears to be trying to resolve the situation on the surface. However, the decision is already determined upon the selection of the panel," he said. Reported in: *Altoona Mirror*, February 9, 14.

student press

Fort Worth, Texas

The Arlington Heights High School newspaper staff on February 20 ended a month-long battle over censorship that sprang from its effort to circulate a survey on homosexuality. The editors and staff of the *Jacket Journal* agreed to a compromise offered by Principal Winifred Taylor: Taylor won't exert editorial control over the paper, but will review all surveys to be distributed by teachers in classes. It remained unclear whether or not the students would conduct the survey on student attitudes and experiences related to homosexuality that triggered the flap.

"This means that we won," said *Jacket Journal* editor Sarah Dalton. "We stood up for our rights and we won."

"I think we feel like it's over," said Donya Witherspoon, the newspaper's faculty adviser, who fought alongside the students to retain control of the award-winning newspaper.

Under the terms of the compromise, the students could circulate the survey to their peers at lunch or after school without prior review by Taylor. If, however, they want the survey distributed by homeroom teachers, they will have to submit their questions to Taylor for approval. The *Jacket Journal* is nationally recognized for tackling controversial and provocative topics rarely addressed in high school publications.

When the controversy began January 11, Taylor said the survey could cause psychological damage to high school students. She ordered its distribution during homeroom periods halted after several teachers expressed objections to it. But the questions were published in the newspaper's February 2 edition in an article about how the survey was halted. "When they did go ahead and publish the survey in the middle of the paper — that changed the situation," said Superintendent Don Roberts. Administrators now warned student editors and staff that all of their articles would have to be reviewed by the principal before publication.

The warning was taken by the students as a signal to escalate the fight. A week later, they sent a letter of appeal to Roberts and asked for a reply within ten days. Roberts assigned high schools director Phil Peregrine to investigate.

Peregrine said he didn't object to the newspaper writing about homosexuality but that he did object to the way the students phrased the questions. He said that all opinion surveys circulated in the schools must be reviewed and approved by the central administration. But Peregrine acknowledged that this survey was singled out because the homosexuality questions could cause what he called cognitive dissonance, causing damage and requiring counseling for confused teenagers. He told the students their stories would be subject to review and their surveys would have to be approved, prior to distribution, by the district's department of research and evaluation.

Peregrine's words left the student journalists frustrated and angry. "The way he [Peregrine] was talking, it sounded like we didn't have the right to get students to think" said *Journal* Managing Editor Angela Sweeney. "It sounded like they just wanted fluff in our newspaper. This basically goes against everything we've been taught in journalism class. Some people say it's a gay issue, but it's not. It's a censorship and freedom of the press issue."

Peregrine's hard-line approach failed to end the conflict. On February 13, about a hundred parents, teachers and students crowded into a school board meeting to champion the newspaper. Student body president Eric Howell said most students rooted for the newspaper. American history teacher Shirley Schuster said that in her classes, the students discussed the survey and the controversy surrounding it. "It was a participatory lesson in democracy," she said. "Not too many places in the world could a group of teenage students stand up and have everyone listen to what they had to say."

On February 16, Taylor wrote a conciliatory letter to the students. "The Arlington Heights faculty and staff have a long tradition of encouraging students to discuss the real issues of the day that we must face," she wrote. "As student journalists, you are responsible for carrying on that tradition while not abusing the trust we place in you." Reported in: *Fort Worth Star-Telegram*, February 8, 17, 21.

(rap . . . from page 75)

The new labels are an attempt to avert legislation now pending in nine states. Last December, the Pennsylvania House of Representatives passed a bill that calls for a fluorescent yellow label, with large type, that reads: "Warning: May contain lyrics descriptive of or advocating one or more of the following: suicide, incest, bestiality, sadomasochism, sexual activity in a violent context, murder, morbid violence, illegal use of drugs or alcohol. Parental advisory." The bill is still in committee in the Pennsylvania Senate. Other states' bills call for varying lists, some with references to nudity, adultery, Satanism and ethnic discrimination.

In Rhode Island, a bill proposes labeling some records with a sticker reading: "Warning: This product contains backmasking that makes a verbal statement when this program is played backward." The Rhode Island legislators, it seems, did not indicate how consumers lacking expensive studio equipment could succeed in playing their albums backward.

In Missouri and Iowa, bills that propose record labeling would also bar minors from any performances in which objectionable lyrics might be sung. In a Florida bill, albums with warning stickers could not be sold to minors. New Iberia, Louisiana, already has a municipal ordinance forbidding the sale of "obscene" albums to people under 17. Different stickers would be required under each state law, which would pose manufacturing problems for the record companies.

Record retailers have been under direct pressure as communities in Florida and Alabama have prosecuted record store employees under city and county anti-obscenity ordinances for selling albums by the 2 Live Crew, a rap group.

The group's current album was released in two versions: *As Nasty as They Wanna Be*, which contains vulgarities and which has the words "Warning: Explicit Lyrics Contained" printed on the album cover, and *As Clean as They Gotta Be*, which eliminates the vulgar words. The *Nasty* version is far more popular.

On March 15, a record store clerk in Sarasota, Florida, was arrested for selling a copy of *As Nasty as They Wanna Be* to an 11-year-old girl. Charged with selling material harmful to minors, a felony, the clerk could face five years in jail and a $5,000 fine.

In Alabama, on June 29, 1988, Tommy Hammond, who owns a record store in Alexander City, Alabama, was arrested by an undercover policeman who had purchased from him a tape called "Move Somethin'" by 2 Live Crew. Hammond had never listened to the tape, but a month later he was convicted and fined $500, becoming the first American ever found guilty of selling recorded obscenity.

Hammond's conviction is being appealed, but Tanya Blackwood of RIAA said it was only "the tip of the iceberg." Among other incidents of censorship of rock and rap music:

- In Sylacauga, Alabama, on December 9, 1989, Bob Hammond (Tommy's brother, and proprietor of Breezeway Record Shop) was fined $3,000 and given a year's suspended sentence for selling a tape with explicit lyrics by a group called Too Short.
- In Georgia, five nationally known artists — including R&B star Bobby Brown and Kiss leader Gene Simmons — were arrested last year for "suggestive" performances.
- In Dade County, Florida, authorities are following up a private "sting" supported by the Rev. Donald Wildmon's American Family Association. Three record stores are accused of possible violations of a state statute banning sales

to minors of recordings depicting "sexual excitement or activities" because two of them sold the 2 Live Crew's *As Nasty as They Wanna Be* and the third sold another 2 Live Crew recording, "Me So Horny." A Fort Myers Judge ordered the Miami-based rap group's recordings removed from stores and Gov. Bob Martinez called for a state prosecutor to investigate the group for violations of obscenity and racketeering laws.

• A song on the rap group N.W.A.'s album *Straight Outta Compton* called "_____ Tha Police" caught the attention of an FBI public affairs officer who sent a "policy" letter to the group's recording company protesting that the song glorifies violence against law enforcement officers. It was the first time the FBI had taken such an action.

"The issue of censorship is when we are not allowed to sell a product, when we have to pull a product from our stores," said Dana Kornbluth, director of public affairs for the National Association of Record Manufacturers. "Stickering a product and just alerting parents to the lyrics is not censorship, that's just responsible business." Some stores, however, refuse to sell albums with warning stickers to minors. Others simply do not stock albums that carry warning stickers.

"We want to try at all times to stop legislation from being enacted," she added. "These bills cross way past the bounds of just obscenity when they talk about things like 'illegal use of drugs or alcohol.' Ultimately, we would hope that they wouldn't hold up in court. And sometimes the stickers themselves are worse than what's on the album. I'd hate to see an 8-year-old asking his father what bestiality is."

Some observers have detected a disturbing element of racism in the expanding controversy over rap music. Although a few years ago critics targeted some white groups like Black Sabbath for alleged Satanism, and while some white heavy metal groups like Guns N' Roses have been repeatedly cited by critics for violent, bigoted and sexually explicit imagery, the criticism directed at them has been considerably less visible than that aimed at the Black rap artists, who have become the main target of record censors. For instance, rap recordings now make up the majority of titles criticized by the PMRC.

Although a few radio stations declined to play Guns N' Roses' music after some of its members appeared intoxicated and mouthed obscenities on a televised music awards show, there has been no effort to stop distribution of the group's *One in a Million* recording, which derogates "niggers and faggots." By contrast, when the rap group Public Enemy released a record that many thought was anti-Semitic — though less explicit than the racism of Guns N' Roses — the Anti-Defamation League of B'nai B'rith called on CBS Records, the group's label, to drop them.

"Racism. It's obvious, isn't it?" asked Bill Adler, director of publicity at Rush Artist Management, which handles many rap acts. "It seems that these acts have taken a disproportionate number of hits from conservative commentators like Tipper Gore. They're smokescreened attacks on black youth."

"I definitely think there's a degree of racism involved," agreed Bryan Turner, president of Priority Records and self-described "middle class white guy." "In the beginning of rap there were only black people buying it, and that was okay. It was being sold primarily in black neighborhoods to black kids. But when the white kids start finding it hip and it starts to spread, suddenly it's not good."

Phyllis Pollack, a writer who's been tracking music censorship for several years, pointed a finger directly at groups like the PMRC. "They are turning rap music into the Willie Horton of the music industry," she said.

Pollack noted that the 456-store Trans World chain, which operates Record Town, Tape World, Coconuts, Good Vibrations and Great American Music stores, has two lists of recordings it won't sell to minors: comedy and rap. "So with rap, of course, almost every artist on the list is black." While stressing her personal opposition to any such list, Pollack continued, "Why isn't [Guns N' Roses] Axl Rose on there? If N.W.A. is on the list because they're 'violent,' then there are certainly white or heavy metal counterparts who could be on the list as well."

Why rap? Adler thinks he knows at least part of the answer: "The black male youth is the most despised and disenfranchised group in America today. He has been essentially invisible and inaudible on the national scene for two decades, but during the '80's that inaudible segment of the population began to be heard. They're speaking of the conditions of their lives. They've had a lot of opposition in this country and there's a lot of anger being expressed because of that. And that's terrifying to people who would rather have popular music address the safest kind of homilies."

What people are missing, adds Turner, "is that they should be more concerned with what the rappers see than with what they say. Why does [N.W.A.'s] Ice Cube write a song like '_____ Tha Police?' *Why* are these things that he's seen and experienced?" Reported in: *Los Angeles Times*, February 11; *New York Times*, February 1, March 29; *Variety*, March 7. □

SUPPORT THE FREEDOM TO READ

(AAParagraphs . . . from page 82)

The Magna Carta of England had not explicitly granted these rights, he reminded the colonists, and they had been secured through the years in England through common law evolution, that is, through the long and unsteady process of court decisions. Madison and others did not want to see a repetition of that struggle. He urged the first U.S. Congress to set down theses rights in black and white.

Ultimately, the Constitution won approval only after its sponsors promised that it would promptly be amended to incorporate a "Bill of Rights" expressly enumerating those individual liberties that were so basic that they could not be the subject of infringement by the government.

When the Bill of Rights was adopted in 1791, five basic rights assumed their place of honor in the First Amendment: (1) freedom of religion, (2) freedom of speech, (3) freedom of the press, (4) the right of the people to assemble peacefully, and (5) the right to petition the government to remedy their grievances.

The first broad point I wish to bring out, then, is that the mandate that the government "shall make no law ... abridging the freedom of speech or of the press" reflects, in the American experience, a deeply rooted sense that unrestrained speech, and an unrestrained press, are fundamental rights which have an exalted place in our society and in our legal system.

This lecture allows little time for philosophy, but a few words are in order as to just what it is about free speech and press that has given them special status in the United States.

First is the belief that the key to effective government is an informed citizenry, one which is not told by the government what is right, but instead itself makes those determinations through its own education. Armed with the knowledge provided it in a free "marketplace of ideas," these citizens elect officials who, with the citizens' informed consent, steer the government on its proper course.

This marketplace of ideas can be, indeed is expected to be, rough and tumble. On the theory that no one, authoritarian voice possesses all wisdom, or the "truth" it has been our perspective that the truth can only emerge through the clash of conflicting ideas. The result of this process can be very strong and passionate debate. Unpleasant, harsh, and unpopular statements will be published, critical of the *status quo* and of current government officials and policy. Such a policy of rejecting one voice in favor of many; of making room for the minority point of view alongside the majority; of not merely tolerating, but actively encouraging, criticism of government, is what our system of free speech and press is all about. As one of our distinguished judges, Learned Hand, wrote of this policy some years ago: "To many this is, and always will be, folly; but we have staked upon it our all."

The second broad point to be made about the American experience is that our understanding and interpretation of press freedoms was not set down in immutable form in 1791. Quite to the contrary. The 14 words I have quoted you were not self-executing. Neither have they been the subject of uniform interpretation or point of view. Our understanding of press freedom has, instead, been almost continually shaped by public and scholarly debate, and by continuing resort to the courts for legal interpretation. This orderly evolution of our press law could not have taken place without a continuing, profound national commitment to press freedom and without the aid of an independent judicial system.

Under our Constitution, our courts operate as an independent branch of government, co-equal with the Legislative and Executive Branches. A critical role which they have been assigned has been to check the unlawful exercise of power by these other branches. In this role, federal judges assigned to their jobs for life, and not subject to removal by any political party, act as the final interpreter of the Constitution — and, in our context, of the meaning of the First Amendment's speech and press guarantees. As another of our great judges, Felix Frankfurter, wrote: "A free press is not to be preferred to an independent judiciary, nor an independent judiciary to a free press. Neither has primacy over the other; both are indispensable to a free society."

Thus, under our legal system, governmental efforts to cut back on free speech — whether through formal enactments of laws or informal techniques of censorship or harassment — are subject to court challenge and, quite often in our experience, such efforts have been declared to be in violation of our First Amendment and thus illegal. The final say in these matters is given to the United States Supreme Court.

A few examples from our history are instructive, both on the evolution of the scope and definition of our press freedoms, and on the central role played by our courts in resolving disputes in this area.

Less than a decade after the Bill of Rights was adopted, some of the very men who voted for it sought to restrain criticism of the government. The nation was close to war with France, and the Federalist Party in power convinced Congress to enact the Sedition Act, a measure designed to quiet opposition. Sedition was defined as activity short of treason that stirred up resistance to law or encouraged conduct that might become treason. The Act itself prohibited the publication of any "false, scandalous, or malicious writing" that would cast contempt upon the government, the President or Congress. Twenty-five men were prosecuted under the act. Ten editors were convicted and fined. Several also served jail terms.

Thomas Jefferson, James Madison and others thought the act was unconstitutional, but the Supreme Court of that era was cautious in flexing its constitutional muscle. It instead was left to the Congress to let the Act expire two years later. Looking back upon that era, later Supreme Court Justices have plainly indicated that, had the act been challenged

today, it would have been found unconstitutional.

More than a century later, as the nation became embroiled in World War I, another Sedition Act was passed, which led to several important court decisions.

In one well-known case, *Schenck v. United States*, the Supreme Court upheld the criminal punishment of several men who had distributed pamphlets that urged men of military age to refuse enlistment into the armed forces. Justice Oliver Wendell Holmes wrote that the pamphleteers would have been within their rights if the nation had not been at war, and later generations of constitutional scholars suggest that this case today would also be decided differently. But the decision is known primarily for the way that Justice Holmes, a vigorous defender of free speech, tried to formulate some standard to judge when a restriction on speech might be justified.

He wrote: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic. . . . [The] question in every case is whether the words . . . create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

Two years later, in *Abrams v. United States*, the Supreme Court upheld the criminal punishment of five men who had urged workers in ammunition factories to go on strike. Justice Holmes was not convinced that their form of protest against the war met his "clear and present danger" standard, however, and dissented from the court's ruling. He wrote, in language that would later help shape the law: "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market. . . . I think we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."

These World War I decisions had many critics. In their view, the bedrock Constitutional commitment was to freedom of expression: freedom for the people to shape their own destinies — by speaking out on public issues and by expressing their will at the ballot box. To these men and women, resistance to war policy through expression of differing political and economic beliefs than our governing capitalist philosophy was fully protected by the Constitution, so long as such advocates respected the rights of the people to make their own choice and not have a system imposed upon them by force.

And, in more recent times, the Government took the *New York Times* to court to try to stop it from publishing the "Pentagon Papers" — classified government materials concerning our decision-making process and policies in relation to the Vietnam War. The government sought to suppress publication on the grounds that disclosure of the material could harm our national security. The U.S. Supreme Court refused to stop publication. Finding little evidence that the government was legitimately trying to protect important secrets, the Court concluded that the more likely motive was to avoid embarrassment. But the Court found that disclosure of embarrassing facts is precisely what the First Amendment is about. It thus rejected muzzling the press "predicated upon surmise or conjecture that untoward consequences may result." The Court continued by suggesting that "only governmental allegation and proof that publication must inevitably, directly and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea" can support a court order prohibiting publication.

To summarize this part of the analysis, then, the proper boundaries of press freedoms have been established only as a gradual process, shaped by our courts and reflecting the normative principles embodied in the First Amendment. That tensions would arise between the interests of a free press and other important interests — such as the national security — is inevitable and healthy. But it has been crucial to have an independent body — our courts — available to resolve — and willing to resolve — those tensions when they arise. Our experience has been that in resolving the tensions, the balance normally tips heavily in favor of promoting and protecting free speech.

A third broad concept emerging from the American experience is our opposition to any system of licensing the press. When printing presses first became available in England, the monarchy had been concerned that printers would spread information that might affect their ability to rule. The answer was to restrict the use of presses to people who had licenses. Among those who fought this approach was the philosopher John Milton, who issued an "Appeal for the Liberty of Unlicensed Printing" in 1644. The Licensing Act finally expired in 1695. Against that background, the United States developed a distaste for prior control over who could publish or over what could be published.

If vigorous debate is to be encouraged, and there is room for everyone to be heard, what legitimate function is to be served by a licensing system? On the other hand, the potential for the exercise of undue discretion in the licensing process to punish those who speak unpopular thoughts makes such a system highly suspect.

Justice Hugo Black perhaps said it best in his opinion in the *Pentagon Papers* case: "The Government's power to censor the press was abolished so that the press would remain forever free to censure the Government. . . . Only a free and unrestrained press can effectively expose deception in government."

In another case, the state of Florida attempted the direct opposite of censorship — passing a law that required newspapers to publish the reply of any candidate for public office who felt the newspaper had treated him unfairly.

The Court said "no" to this approach also. Editing was the job of editors, it concluded. Just as the government could

not look over an editor's shoulder to say what could not be published, the government could not stand there and dictate what should be published. In the Court's words: "The choice of material to go into a newspaper . . . constitutes the exercise of editorial judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press."

This, then, is the notion of press "responsibility" in the United States. It is for journalists and editors, not the government, to determine the bounds of fair and proper expression — with very narrow exceptions I will deal with shortly.

The licensing issue poses a different problem when the "press" in question is a radio or television station. The U.S. government does require a license to operate a broadcast station. The principal reason is a technical one. Because a limited amount of space is available over the airwaves, a public duty is imposed on those fortunate enough to secure a broadcast license to use the airwaves in furtherance of the public interest. At least in theory, this has required broadcasters to deal with all sides of public controversies.

It is interesting to note, however, that in the mid-1980's, the government modified its view somewhat in light of the fact that the number of broadcast and cable television outlets had grown to the point that there was now less opportunity for a few powerful interests to dominate television.

To be sure, there are limits on speech and press freedoms in the United States, and these have evolved over time as the courts have tried to balance free speech interests against other important social interests. Three areas deserve mention: speech possibly harmful to national security; speech that injures individual reputation; and obscenity.

As already noted, our government has often tried to limit the press from publishing confidential information which the government has claimed contains state secrets which would, if published, harm our national security. These efforts have generally failed. The courts have expressed concern that, too often, the government is seeking really to avoid criticism or embarrassment, and that publishers are in business to perform precisely that task. Only where it can be demonstrated that publication will directly and immediately bring about injury to our nation will such speech be suppressed.

In terms of the clash between a free press and injury to individual reputation, our law of defamation is quite developed, and has been "constitutionalized" beginning with the Supreme Court opinion in *New York Times v. Sullivan*. The Court determined in that case that the press should not be held strictly (or even negligently) liable for erroneous statements of fact concerning public officials engaging in official conduct since, to permit often large damage recoveries in such cases would create a climate of fear and timidity in the press. Declaring that a "robust and uninhibited press" required "breathing room" for honest error, the Court interpreted the First Amendment to permit recovery for false speech in such cases only where it could be shown that the statements were made with knowledge that they were false or in total disregard of their truth or falsity. This has served as powerful protection for the press in its criticism of public officials, and this rule has been extended as well to publications concerning "public figures" prominent in social and political events.

In a subsequent opinion, the Supreme Court broadened constitutional protection to cover not merely unintentional falsity, but also the conveying of ideas. "Under the First Amendment," the Court said, "there is no such thing as a false idea. However evil an opinion may seem, we depend for its correction not on the conscience of judges and juries but upon the competition of other ideas."

Pornography — or what our system terms legal obscenity — has been a particularly difficult problem for our courts. The Supreme Court has stated directly that "obscenity is not within the area of constitutionally protected speech or press." However, because different people have different ideas of what constitutes obscenity, the Court has been particularly cautious to insure that overeager prosecutors do not use obscenity as an excuse to impose widespread censorship.

In this vein, the Supreme Court has noted that sex has been a "subject of absorbing interest to mankind through the ages," and that "sex and obscenity are not synonymous." There, easy conclusions end. The Court has struggled for generations to define obscenity, but its members have always been sharply divided on this issue. Since 1973, the court has required that it be shown that the work involved contains patently offensive descriptions or pictures of actual sexual acts; that the work appeals to a shameful or morbid interest in sex; and that the work, taken as a whole, lacks serious literary, artistic, political or scientific value.

Having undertaken this necessarily broad survey of our First Amendment landscape, what thoughts occur to me in relation to your own efforts to formulate a press law? Let me raise several:

(1) You must consider carefully the most basic issue of all: What purpose do you wish your press to serve? In our experience, an unrestrained press has enabled us to have an informed citizenry; an outlet for expression, especially expression that may, at a given time, be unpopular; a means of debating the wisdom of our social policies and thereby guiding and limiting our decision-makers; and, most intangibly, but also fundamentally, a means of arriving at that elusive concept, "truth."

(2) If the press is to have vitality, it will need independence. If the only press is the "official" press, putting forth the party line, goals of the sort I have outlined cannot be achieved. Likewise, if a supposedly "independent" press is subject to censorship, or civil or criminal penalty, or to the cutting off of ink and paper for the act of publishing unpopular opinion — again, you will not have an effective press.

(3) There is the fundamental issue of *who* can be the press. Any citizen or only those who are licensed? History demonstrates that the power to license is the power to censor. The American experience counsels in favor of no prior licensing schemes, of letting anyone with a message deliver that message.

(4) Can one define what is "legitimate" for the press to report on? What is "responsible" reporting? Can the press, at its peril, be limited to publishing "the truth"? Can the press be limited to publishing only "socially significant" commentary? What do these terms mean? Who is to decide?

The American experience has been to let the press, not the government, decide the proper limits of reporting. For the press to be held to unrealistic and subjective standards upon penalty of being shut down, fined or imprisoned for "violating" those standards will create a regime of self-censorship, in which the press will be reduced to being a spokesman for prevailing opinion and for those in power.

(5) And finally, but perhaps most importantly, who is to interpret the law when the press is said to have gone too far? Organs of the government that may be offended by the press? Or an independent court system with the authority and courage not only to hold the press responsible when it has stepped over the line, but also to deny the government a remedy where the press has acted within its rights?

These are complex issues, and the right direction for the Soviet Union can only emerge when additional serious thought is given to them. The press law draft to which I have been exposed seems to make a serious start in the right direction in addressing these and other issues. I urge you to take the necessary time to reach your conclusions; to include in your debates and consideration all points of view; and to provide in whatever measures you enact the breathing room for interpretation and evolution so necessary to ensure that what is enacted today will have relevance and vitality in the years to come. □

(IF Bibliography . . . from page 116)

"1989: Year of Dissension, Intervention and Hypertension." *Chicago Artists News*, Vol. XVI, No. 2, January 1990, p. 4.

Nissenbaum, Stephen. "The Plagiarists in Academe Must Face Formal Sanctions." *The Chronicle of Higher Education*, Vol. 36, No. 28, March 28, 1990, p. A52.

Novick, Sheldon M. *Honorable Justice: The Life of Oliver Wendell Holmes*. Little, Brown, 1990.

Pico, Steven. "An Introduction to Censorship." *School Library Media Quarterly*, Vol. 18, No. 2, Winter 1990, p. 84.

Rice, Charles E. "The Festival of Defiance." [re: Flag burning], *The New American*, Vol. 6, No. 8, April 9, 1990, p. 37.

Ross, Mary Ellen. "Censorship or Education? Feminist Views on Pornography." *The Christian Century*, Vol. 107, No. 8, March 7, 1990, p. 224.

Sanders, Alain L. "Prayers in the Schoolhouse?" *Time*, Vol. 135, No. 3, January 15, 1990, p. 51.

Singer, Daniel. "Czechoslovakia's Quiet Revolution." *The Nation*, Vol. 250, No. 4, January 29, 1990, p. 122.

Solomon, Alisa. "Ma Bell Meets Big Brother." *The Village Voice*, Vol. 35, No. 10, March 6, 1990, p. 29.

Smith, Page. *Killing the Spirit: Higher Education in America*. Viking Penguin, Inc., 1990.

Tatel, David S. "Clear, Narrow Policies on Offensive Speech May Not Run Afoul of the First Amendment." *The Chronicle of Higher Education*, Vol. 36, No. 21, February 7, 1990, p. B1.

Tushnet, Mark. "Sponsors & Censors." *Constitution*, Vol. 2, No. 1, Winter 1990.

Walker, Samuel. *In Defense of American Liberties: A History of the ACLU*. Oxford University Press, 1990.

Wall, James M. "The Media's Failing: News as Entertainment." *The Christian Century*, Vol. 107, No. 10, March 21-28, 1990, p. 292.

Wedgeworth, Robert. "The Book Boycott Against South Africa Must End Now." *The Chronicle of Higher Education*, Vol. 36, No. 23, February 21, 1990, p. A52.

Wiener, Jon. "Free Speech for Campus Bigots?" *The Nation*, Vol. 250, No. 8, February 26, 1990, p. 272.

Willis, Ellen. "Rooney Tunes: In Defense of Uncivil Liberties." *The Village Voice*, Vol. 35, No. 9, February 27, 1990, p. 23.

Wolfe, Alan. "Dirt and Democracy: Feminists, Liberals and the War on Pornography." [Book Review] *The New Republic*, Vol. 202, No. 8, February 19, 1990, p. 27. □

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Compiled by Anne E. Levinson, Assistant Director, Office for Intellectual Freedom

Adler, Mortimer. *Reforming Education*. Collier Books, New York, 1990.

Buchanan, Pat. "Name Calling May Be Illegal, Says New Law." *The Spotlight*, Vol. 16, No. 13, March 26, 1990, p. 4.

Carr, C. "New Attack on Arts Funding: This Witch Hunt's for You." *The Village Voice*, Vol. 35, No. 8, February 20, 1990, p. 55.

Caught Looking: Feminism, Pornography and Censorship. Caught Looking, Inc., ed., Real Comet Press, Seattle, 1990.

Cole David. "McCarran-Walter: A Cold War Congress Acts to Stem the Flow of People — and Ideas — Across Borders." *Constitution*, Vol. 2, No. 1, Winter 1990, p. 51.

Conquest, Robert. *Tyrants and Typewriters: Communiques From the Struggle for Truth*. Lexington Books, Lexington, MA, 1990.

Corn, David. "Dirty Bookkeeping: Charles Keating's Porno Library." *The New Republic*, Vol. 202, No. 14, April 2, 1990, p. 14.

Downs, Donald Alexander. *The New Politics of Pornography*. University of Chicago Press, 1990.

Dunne, Phillip. "Dissent, Dogma and Darwin's Dog." *Time*, Vol. 135, No. 3, January 15, 1990, p. 84.

Dworkin, Andrea. *Pornography: Men Possessing Women*. University of Chicago Press, 1990.

Fujimoto, Jan Dee. "Representing a Document's Viewpoint in Library Collections: A Theme of Obligation & Resistance." *Library Resources & Technical Services*, Vol. 34, No. 1, January 1990, p. 12.

Gephart, Richard. "How Dare I Criticize the President?" *The Washington Post National Weekly Edition*, Vol. 7, No. 21, March 26-April 1, 1990, p. 29.

Ginsberg, Allen. "Censorship Howl." *The Nation*, Vol. 250, No. 14, April 9, 1990, p. 477.

Graves, Bill. "Classrooms Tune In! TV Offers Vast Spectrum of Programs to Teach Public Affairs." *The School Administrator*, March 1990, p. 8.

Gubor, Susan and Joan Hoff. *For Adult Users Only: The Dilemma of Violent Pornography*. Indiana University Press, 1990.

Harden, Blaine. "Really Not Ready for Prime Time: Private Television Makes Its Debut in Poland." *The Washington Post National Weekly Edition*, Vol. 7, No. 21, March 26-April 1, 1990, p. 18.

Harrington, John. "The Availability of Books: An American Tradition Threatened." *CPDA News*, Vol. 36, No. 4, April 1990, p. 6.

Harrington, Richard. "The Furor Over Shock Rock." *The Washington Post National Weekly Edition*, Vol. 7, No. 14, February 5-11, 1990, p. 32.

Hentoff, Nat. "A Very Expensive Letter to the Editor." *The Village Voice*, Vol. 35, No. 7, February 13, 1990, p. 24.

_____. "The Cowardly Lions at CBS News." *The Village Voice*, Vol. 35, No. 12, March 20, 1990, p. 24.

_____. "Has the Cardinal Crossed the Church State Line?" *The Village Voice*, Vol. 35, No. 6, February 6, 1990, p. 18.

_____. "The Insatiable Lust to Suppress Speech." *The Village Voice*, Vol. 35, No. 11, March 13, 1990, p. 22.

_____. "Keeping Letters to the Editor Out of Court." *The Village Voice*, Vol. 35, No. 8, February 20, 1990, p. 22.

Hoffman, Barry, ed. *Gauntlet* (magazine of free expression), premiere issue, March 1990.

"Indecent Request." *The New Republic*, Vol. 202, No. 15, April 9, 1990, p. 5.

Intner, Sheila. "Censorship & Librarians." *Library Resources & Technical Services*, Vol. 34, No. 1, January 1990, p. 7.

Ireland, Doug. "The Fall of the House of Pantheon." *The Village Voice*, Vol. 35, No. 11, March 13, 1990, p. 37.

Jones, Barbara. "Censorship and Schools." *Voice of Youth Advocate*, Vol. 12, No. 6, February 1990, p. 331.

Lardner, George Jr. "No Such Agency: The National Security Agency Thrives on Obscurity." *The Washington Post National Weekly Edition*, Vol. 7, No. 21, March 26-April 1, 1990, p. 6.

_____. "Dragging the NSA Into Court." *The Washington Post National Weekly Edition*, Vol. 7, No. 21, March 26-April 1, 1990. p. 6.

Marshall, Eliot. "USDA Admits 'Mistake' in Doctoring Study." *Science*, Vol. 247, No. 4942, February 2, 1990, p. 522.

McGrory, Mary. "Got an Idea? Better Pass It By The GOP: Lee Atwater Has a Way of Stifling Anything Smacking of Independent Thought." *The Washington Post National Weekly Edition*, Vol. 7, No. 21, March 26-April 1, 1990, p. 25.

Miller, George and John Lawrence. "Muzzled Experts." *The Nation*, Vol. 250, No. 8, February 26, 1990, p. 261.

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