Zykan v. Warsaw

The Non-Decision Decision

In Zykan v. Warsaw (Indiana) Community School Corporation and Warsaw School Board of Trustees, a high school student brought suit, seeking to reverse school officials’ decision to “limit or prohibit the use of certain textbooks, to remove a certain book from the school library, and to delete certain courses from the curriculum.” The district court dismissed Zykan’s suit, which charged that school officials had violated constitutional guarantees of academic freedom and the “right to know.” The case was appealed to the U.S. Court of Appeals for the Seventh Circuit, in Chicago, which announced its decision on August 22. For excerpts from the decision see p. 3.

By WILLIAM D. NORTH, Vice President, Freedom to Read Foundation.

The decision rendered by the U.S. Court of Appeals for the Seventh Circuit on August 22, 1980 is remarkable only as an archetypal demonstration of the confusion which exists in the courts and among judges as to legal limits of secondary school censorship. The decision is a model of judicial ambiguity. Each of the important issues presented by the case is sententiously considered by the Court but left utterly unresolved and unanswered. One looks in vain for any guidance or insight from the decision.

The case itself presented a truly unique opportunity for the court to clarify the appropriate limits of school board efforts to restrict the secondary school as a marketplace of ideas. Certainly no recent school censorship case has involved a wider range of censorship conduct and techniques, including, but not limited to, teacher dismissal, curricula revision, course cancellation, library purging, and even a classic public “burning of the books” abetted, if not actually sponsored, by the Warsaw School Board.

The Warsaw case was unique in yet another respect. The materials and curricula subject to censorship action by the school board were not alleged to be either obscene or pornographic and, of course, therefore unprotected by the First Amendment. Rather, the materials and curricula...

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Pico v. Board of Education

A Split Decision

On October 2, an important victory was won in Pico v. Board of Education, Island Trees (N.Y.), which arose from one of the most notorious incidents of school library censorship in recent years. On that day, the United States Court of Appeals for the Second Circuit reversed an unfavorable lower court decision and held that the student plaintiffs had stated a sustainable claim for violation of First Amendment rights.

The victory was by no means total, however. Not only did the three-judge panel divide 2 to 1, but the majority itself could not agree to enter final judgment in the students’ favor, merely remanding the case for trial where the plaintiffs will be required to prove their case. Moreover, in the related, if less compelling, case of Bicknell v. Vergennes (Vermont) Union High School Board, decided the same day, the court again split 2 to 1, this time affirming dismissal of student censorship claims.

In the Island Trees decision, all three judges wrote lengthy separate opinions and none entirely agreed with the others on either the facts or the law of the case. In his concurring opinion, Judge John O. Newman frankly acknowledged the court’s division, remarking that Judge Charles P. Sifton (a District Court judge sitting on the panel “by designation”) would have decided for the plaintiffs; that dissenting Judge Walter R. Mansfield would have ruled for the school board; and that he cast the deciding vote to remand for trial.

The Island Trees incident, it will be recalled, began in September 1975 when two officers and another member of the school board attended a conference sponsored by a state-wide conservative parent group, Parents of New York-United (PONY-U). There, they obtained a list of “objectionable” books and in early November, the two officers searched the Island Trees High School library card catalogue, discovering several titles on the list.

These books were removed and the board appointed a review committee consisting of four staff members (not including a librarian) to make recommendations to the board. In July 1976 the board, in partial agreement with the committee report, resolved that one book be returned...

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1980 Election

Five New Trustees Chosen

Five trustees were elected to their first terms on the Foundation Board in balloting by members in May. Burton Joseph, Attorney, Lipnick, Barsy & Joseph, Chicago; Joan Collett, Librarian and Executive Director, St. Louis Public Library; Daniel W. Casey, President, Board of Trustees, Solvay Public Library, Syracuse, N.Y.; and L. B. Woods, Assistant Professor, Graduate Library School, University of Rhode Island, Kingston, formally participated in their first FTRF annual meeting on June 27 in New York.

William D. North, Senior Vice President and General Counsel, National Association of Realtors, and formerly Foundation general counsel, and a non-voting member of the board was also elected as a trustee. North was the Foundation's counsel from its inception until the spring of 1980.

A director of the American Civil Liberties Union, Burton Joseph is known as a leading defender of First Amendment rights. Having spent thirteen of her last fifteen years in less developed countries, Joan Collett promises to bring a fresh perspective to the Foundation's work. Daniel Casey is a member of the ALA Council and the New York Library Association Council whose work is in public relations, advertising and broadcasting. L. B. Woods recently conducted a survey of high school librarians which indicated that the respondents were often wary of controversial materials; such materials frequently do not appear in collections where their presence might otherwise be expected.

New Officers Installed

At the Foundation's June 27 meeting, the trustees elected new officers for 1980-81. Florence McMullin will serve a second term as President; William D. North was elected Vice President; Joan Collett was selected to serve as Treasurer.

L. B. Woods and Mary K. Chelton, co-editor, Voice of Youth Advocates, were elected to serve on the executive committee with the officers.

Other members of the 1980-81 Board of Trustees are Frances C. Dean, Director of the Department of Instructional Resources, Montgomery County Public Schools, Rockville, Maryland and Chairperson, ALA Intellectual Freedom Committee; Kenneth Donelson, Professor of English at Arizona State University, Tempe; Richard P. Kleeman, Vice President of the Association of American Publishers and Director of the AAP Washington office; Peggy Sullivan, ALA President; Elizabeth Stone, ALA President-elect; and Robert Wedgeworth, ALA Executive Director.

Zykan (from p. 1)

ula related primarily, if not exclusively, to perceptions of the political and social roles and relationships of women in American society.

Far from accepting the opportunities presented by the Warsaw case, the Court's decision appears to have been carefully drawn to provide every proponent of every perspective of the problem of secondary school censorship cause for both hope and discouragement, without suggesting the order of magnitude of either. This ambiguity is readily illustrated. Thus,

1. The Court rejects the School Board's contention that the case is moot but at the same time holds that the plaintiffs' complaint does not state a constitutional claim.

2. The Court recognizes a student's right to academic freedom but immediately suggests that such right, and even the need for it, exists primarily in "the rarified atmosphere of the college or university."

3. The Court recognizes that the discretion placed in school boards to control curricula and secondary education is not "unfettered by constitutional considerations," but proceeds to hold that any challenge to such discretion must "cross a relatively high threshold" before it constitutes a cognizable constitutional claim.

4. The Court recognizes the repeated Supreme Court injunctions against conduct which would cast a "pall of orthodoxy" over the classroom, but then appears to view the function of the secondary school as the "nurturing of those fundamental social, political and moral values that will permit a student to take his place in the community."

While the Warsaw decision has little or no significance as a legal precedent, it is impossible to dismiss the decision as without lessons to teach.

The first lesson is that academic freedom rights are probably more effectively asserted by teachers and librarians than by students.

The second lesson is that a complaint of secondary school censorship must be carefully and precisely drawn to include those "magical legal and factual assertions and conclusions" which appear to be the sine qua non of staying in court.

The third lesson, and perhaps the hardest to accept, is that, somehow, the indoctrinative function of the secondary school has become the judicial rationale for Con-(Continued on next page)
stitutionally protected “educational elitism.” This rationale is clearly articulated by the Court in its assertion that academic freedom has limited “relevance” at the secondary school level and that those limits are defined in the following terms:

First, “the high school students lack of the intellectual skills necessary for taking full advantage of the marketplace of ideas . . .” and

Second, the student’s need for academic freedom “is bounded by the level of his or her intellectual development.”

The theory that access to the marketplace of ideas is reserved to those who have the financial, physical or mental capacity to enter, in the words of the Court, “the ruffled atmosphere of the college or university . . .” seems fundamentally at variance with the tradition of American education. But, perhaps of greatest concern, is the idea that the “need” for academic freedom is a function of intellectual development when most educators recognize academic freedom as indispensable to intellectual development.

It is possible to sympathize with the Court’s reluctance to “second-guess” school board curricular decisions or to repudiate the indoctrinative function of secondary schools. But it is difficult to sympathize with the Court’s refusal to recognize the minimal safeguards required to preserve secondary education from becoming primary brainwashing. Those safeguards should include, at least, two elements.

First, absolute insistence that the school board establish and observe a curricular and materials review procedure to assure broad and considered evaluation, and

Second, repudiation of those indoctrinative techniques which involve the suppression of “unacceptable values” as opposed to those techniques which involve the encouragement and nurturing of “acceptable values.”

The academic and intellectual communities must take heed of the Warsaw decision even if they cannot take heart from it.

Jeanne Layton Wins Downs Award

The Robert B. Downs Award for 1980 has been given to Jeanne Layton, the Davis County, Utah, librarian whose courageous fight to retain her position as County Library Director and to oppose the censorship efforts of a local politician won broad support.

The Downs award is given annually for “an outstanding contribution to intellectual freedom in libraries” by the Graduate School of Library Science, of the University of Illinois. The award was established in 1968 to honor Downs, now dean emeritus of library administration at Illinois, for his twenty-five years of service to the University. It consists of a citation and a grant of $500.

The award committee paid tribute to Layton for her “steadfastness of purpose and personal courage” and applauded her “support of the First Amendment and the principles of the Library Bill of Rights.”

From the Zykan Decision

Following are excerpts from the Seventh Circuit’s decision in Zykan v. Warsaw.

“Secondary school students certainly retain an interest in some freedom of the classroom, if only through the qualified ‘freedom to hear’ that has lately emerged as a constitutional concept. But two factors tend to limit the relevance of ‘academic freedom’ at the secondary school level. First, the student’s right to and need for such freedom is bounded by the level of his or her intellectual development. A high school student’s lack of the intellectual skills necessary for taking full advantage of the marketplace of ideas engenders a correspondingly greater need for direction and guidance from those better equipped by experience and reflection to make critical educational choices. Second, the importance of secondary schools in the development of intellectual faculties is only one part of a broad formative role encompassing the encouragement and nurturing of those fundamental social, political, and moral values that will permit a student to take his place in the community.

“Educational decisions necessarily involve choices regarding what students should read and hear, and particularly in light of the formative purpose of secondary school education, local discretion thus means the freedom to form an opinion regarding the instructional content that will best transmit the basic values of the community. As a result, it is in general permissible and appropriate for local boards to make educational decisions based upon their personal social, political, and moral views.

“To be sure, the discretion lodged in local school boards is not completely unfettered by constitutional considerations. . . . School boards are for example not

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**Pico (from p. 1)**

to the shelves without restriction; that another be returned with student access conditioned on parental approval, and that the nine remaining titles, including widely acclaimed works like Kurt Vonnegut’s *Slaughterhouse-Five* and Bernard Malamud’s *The Fixer*, “be removed from elementary and secondary libraries and from use in the curriculum.”

**Three Opinions**

In announcing the court’s decision, Judge Sifton labored at great length to establish a procedural mode of analysis for defining a “*prima facie*” case of constitutional violation in school book banning incidents. He found the board’s criteria for removing the books far too general, lacking precision in their definition, and that they were applied without recognition of First Amendment considerations.

In this case, Sifton found, “we are presented with more than the inferences to be drawn from the act of removing controversial texts from library shelves, and more than the clearly understood routine and regular task of selecting titles for a school library. What we have instead is an unusual and irregular intervention in the school libraries’ operations by persons not routinely concerned with their contents. Moreover, this intervention has occurred under circumstances, including the explanations for their actions given by the participants, which so far from clarifying the scope and intentions behind the official action, create instead grave questions concerning both subjects. In circumstances of such irregularity and ambiguity, a *prima facie* case is made out and intervention of a federal court is warranted because of the very infrequency with which it may be assumed such intervention will be necessary and because of the real threat that the school officials’ irregular and ambiguous handling of the issue will, even despite the best intentions, create misunderstanding as to the scope of their activities which will serve to suppress freedom of expression.”

Judge Newman’s separate opinion focuses more on substantive standards and, accordingly, more directly affirms First Amendment rights. He argues: “The use of governmental power to condemn a book touches the central nervous system of the First Amendment, . . .

“The removal of a book from a school library will often be the sort of clearly-defined, school-wide action that carries with it the potential for impermissible suppression of ideas. It is possible, of course, for removal to be a casual, insignificant decision, as when the school librarian replaces an obsolete book, or discards a rarely-used one to make shelf space available for other volumes. But the deliberate decision, taken by leading school officials, that a book is to be removed from the school library because of its ideas can hardly be placed in the same category. Actions such as these can too easily lead to suppression. They signal to the students and the teacher an official message that the ideas presented in those books are unacceptable, are wrong, and should not be discussed or considered. The chilling effect of this message on those who would express the idea is all too apparent.

“The symbolic effect of a school’s action in removing a book solely because of its ideas will often be more significant than the resulting limitation upon access to it. The fact that the book barred from the school library may be available elsewhere is not decisive. What is significant is that the school has used its public power to perform an act clearly indicating that the views represented by the forbidden book are unacceptable. The impact of burning a book does not depend on whether every copy is on the fire. Removing a book from a school library is a less offensive act, but it can also pose a substantial threat of suppression.

“The risk that removing a book from a library will communicate suppression of an idea is markedly increased when the decision to remove is politically motivated. While the mere act of singling out a certain type of speech for disapproval will often be sufficient to render the state’s action impermissible, this is not necessarily true in the context of schools. The latitude properly accorded to teaching must tolerate some expressions of disapproval, not only of inappropriate conduct but even of disfavored ideas. But when the disapproval is political in nature—when exclusion of particular views is motivated by the authorities’ opinion about the proper way to organize and run society in general—then it verges into impermissible suppression.”

In a disappointing dissent, Judge Mansfield systematically catalogued the “indecent matter, vulgarities, profanities, explicit sexual descriptions or allusions, sexual perversion, or disparaging remarks about Blacks, Jews, or Christ” contained in the books to support the board’s action as “a rational exercise of its statutory duty to prescribe appropriate materials for the education of children in the district.”

In *Bicknell*, in which the school librarian and students at the Vergennes Union High School sued the school board for removing *The Wanderers* from the library and placing restrictions on *Carrie* and *Dog Day Afternoon*, Judges Newman and Mansfield joined to affirm the lower court decision, with Judge Sifton in dissent. For the majority, Judge Newman argued, “The attention of the Board was first directed to the two books by complaint about their vulgar and indecent language. There is no suggestion that the books were complained about or removed because of their ideas, nor that the Board members acted because of political motivation.” In his dissent, Judge Sifton contended that the plaintiffs “should be given an opportunity through discovery and a trial to prove that ideas were being suppressed rather than merely vulgar or obscene language.”
Report to ALA Council

FTRF Issues Challenge on Behalf of Jeanne Layton

At their annual meeting on June 27, the Trustees of the Freedom to Read Foundation designated the legal actions involving Jeanne Layton as priority Foundation concerns and issued a challenge to the library and education committee to help defray Layton's legal expenses. On July 2, FTRF President Florence McMullin reported to the Council of the American Library Association, meeting in New York for the ALA's 1980 Annual Conference, presenting a summary of actions taken by the Trustees at their annual meeting:

First, I would like to update you briefly on pending school censorship cases in which the Foundation has been actively involved. The U.S. Court of Appeals for the Second Circuit consolidated Pico v. Board of Education, Island Trees with Bicknell v. Vergennes and heard oral argument on February 6, 1980. A decision has not yet been handed down. (Since July, decisions have been handed down. For a report and excerpts see page 1). The Pico case, as you will recall, involves the removal of nine titles from the Island Trees High School library, one of which was used in the curriculum. The Bicknell case concerns the removal of library materials and the establishment of a restricted shelf.

We are also awaiting the court's decision in Zykan v. Warsaw Community School Corporation, a case involving the cancellation of English courses, as well as the removal of at least one title from the school library. This case was argued before the Seventh Circuit Court of Appeals on May 7, 1980. (Since July, a decision has also been rendered in Zykan. For a report see page 1.)

The Trustees reaffirmed the Foundation's commitment to Jeanne Layton, the Davis County, Utah, librarian who has experienced grave consequences in her continuing battle against censorship. In order to meet Jeanne Layton's considerable legal bills, now rallying over $33,000, the Trustees have issued a challenge to the library and education communities. The Freedom to Read Foundation will match $2.00 for every $1.00 contributed to the defense of Jeanne Layton from June 27, 1980 to December 31, 1980—up to a limit of $10,000 in matching funds from the Foundation.

Those of you who were present at the annual Membership Meeting Monday night heard the first official challenge announcement and responded by donating $1,287.11 on the spot. Your generous contributions, together with the two-to-one matching funds from the Foundation of $2,574.22, bring the current total to $3,861.33. (As of October 15 the total was $10,959.33.)

Contributions and pledges continue to come in, and we have high hopes of reaching our goal by December 31.

On behalf of the Freedom to Read Foundation, I wish to thank you for meeting our challenge both in spirit and substance, and I urge your continued commitment to this important case through your contributions, and by becoming members of the Freedom to Read Foundation.

The Announcement

On June 30, during the first meeting of the ALA Membership during the 1980 Annual Conference, J. Dennis Day, president of the Utah Library Association, announced the Freedom to Read Foundation's challenge in support of Davis County, Utah, Librarian Jeanne Layton, explaining its importance, as follows:

The Freedom to Read Foundation is issuing an unprecedented challenge to each of you as ALA members, to ALA units, and to State Library Associations. The Freedom to Read Foundation will give two dollars for every one dollar donated to the legal defense of one of your colleagues—Jeanne Layton. Many of you have read about the legal battle of Jeanne to regain her job as director of the Davis County Public Library in Utah.

A small but well-funded, ultra rightist organization, The Citizens for True Freedom, is attempting to gain control of the library system. Jeanne has won every public relations and legal battle, except one—the financial battle. Her legal costs are staggering.

Your Executive Director, Mr. Robert Wedgeworth, attended the spring meeting of the Utah Library Association to express his concern. The Freedom to Read Foundation and the ALA Intellectual Freedom Committee have designated this case as a priority for 1980. But funds are limited. The Utah Library Association financial resources are exhausted at this time. Your help is needed—and needed now. Jeanne has laid her job and her resources on the line. She is fighting a battle for all of us. What are you going to do?

Join with me tonight in making a commitment—a commitment to help a colleague in her hour of need; and at the same time, join us in sending a message to those who doubt that librarians will hold their ground when the smell of musketry is in the air.

If each of you here tonight would donate just the price of a carton of cigarettes or even a mixed drink, her battle can continue. We need your help—not the person on your right or left—but your help!

"Challenge" contributions, to be matched $2.00 for $1.00 by the Freedom to Read Foundation, should be sent to the Freedom to Read Foundation, 50 East Huron Street, Chicago, IL 60611 marked "for the defense of Jeanne Layton."
free to fire teachers for every random comment in the classroom. In the case of the students themselves, local school boards must respect certain strictures that for example bar them from insisting upon instruction in a religiously-inspired dogma to the exclusion of all other points of view, or from placing a flat prohibition on the mention of certain relevant topics in the classroom or from forbidding students to take an interest in subjects not directly covered by the regular curriculum. At the very least, academic freedom at the secondary school level precludes a local board from imposing 'a pall of orthodoxy' on the offerings of the classroom . . .

"[Therefore] complaints filed by secondary school students to contest the educational decisions of local authorities are sometimes cognizable but generally must cross a relatively high threshold before entering upon the field of a constitutional claim suitable for federal court litigation. Such a balance of legal interests means that panels such as the Warsaw School Board will be permitted to make even ill-advised and imprudent decisions without the risk of judicial interference. . . Nothing in the Constitution permits the courts to interfere with local educational discretion until local authorities begin to substitute rigid and exclusive indoctrination for the mere exercise of their prerogative to make pedagogic choices regarding matters of legitimate dispute."

Further, with respect to the standing of the student plaintiffs, the court argued that, "It is difficult to conceive how a student may assert a right to have the teacher control the classroom when the teacher herself does not have such a right. As a result, whatever rights secondary school students may have outside the classroom to meet and discuss with a particular teacher, their associational interests do not afford them a right to be taught in the classroom by that instructor or in accordance with that teacher's own sense of the best material. A student's appreciation of a teacher's skills simply does not invest a teacher with a constitutionally based tenure when the actions of the school board have given that teacher none."

As for the issue of library censorship, the court concurred with several other recent unfavorable decisions "in rejecting the suggestion that a particular book can gain a kind of tenure on the shelf merely because the administrators voiced some objections to its contents."

In the court's view "school libraries are small auxiliary facilities often run on limited budgets. They must, despite their limitations, cater to the needs of an often diverse student body, primarily by providing materials that properly supplement the basic readings assigned through the standard curriculum. An administrator would be irresponsible if he or she failed to monitor closely the contents of the library and did not remove a book when an appraisal of its contents fails to justify its continued use of valuable shelf space."

**Vance v. Universal Amusement**

**Prior Restraints Struck Down**

A victory was won in the battle against prior restraints on allegedly obscene material when on March 18, 1980 the U.S. Supreme Court upheld the decision of the Court of Appeals for the Fifth Circuit in the case of **Vance v. Universal Amusement Co., Inc.** By a bare majority the court affirmed the unconstitutionality of a Texas statute which permitted the granting of injunctions prohibiting the future commercial manufacturing, commercial distribution or commercial exhibition of obscene material. The court also held that it did not have to review a related statute permitting the mandatory closure of premises since the Court of Appeals had ruled that statute did not apply to obscenity cases.

The Freedom to Read Foundation joined with the American Booksellers Association, the Association of American Publishers, the Council for Periodical Distributors Associations, the International Periodical Distributors Association, and the National Association of College Stores in filing an *amicus* brief in support of Universal Amusement.

The brief, submitted by attorney Michael Bamberger of Finley, Kumble, Wagner, Heine & Underberg of New York, argued that both statutes imposed prior restraints on constitutionally protected expression. With respect to the injunctive measure, the brief argued, "Even where, as is apparently the case in Texas, such an injunction defines the materials enjoined in terms of the present"

(Continued on next page)

**New OIF Staff**

Two new members have joined the professional staff of the ALA Office for Intellectual Freedom which administers the work of the Freedom to Read Foundation and edits this publication.

Henry Reichman is the OIF's new Assistant Director. He is a 1969 graduate of Columbia University who received his Ph.D. in History from the University of California at Berkeley in 1977. Before coming to ALA, he taught at the University of California at San Diego and at Northwestern University.

Robert P. Doyle has taken over as Assistant to the Director. He is a 1973 graduate of the University of Notre Dame and received his MLS from the University of Wisconsin-Milwaukee School of Library Science in 1975. Previously he was reference supervisor with specialization in business and law at the Oak Lawn (Illinois) Public Library.

The Freedom to Read Foundation welcomes Bob and Hank aboard.
Miller test for obscenity, the injunctive relief includes the prohibition of manufacturing, distribution and exhibition of materials not yet found obscene by a court, placing the responsibility for evaluating the material and the risk of violating the injunction on the retailer or exhibitor. The Court has repeatedly held that speech protected by the First Amendment cannot be enjoined. Speech is protected until it is found in court to be obscene, and therefore outside the scope of the First Amendment.

The brief emphasized “that the concern expressed by the court below as to the dangers of self-censorship is a real and practical concern. Time after time Amici have experienced a direct impact when laws abridging the First Amendment are passed. Until such laws are enjoined, found unconstitutional or repealed, retailers and others face-to-face with the governmental enforcers of such laws have declined to deal in materials which, although not obscene, would cause them to run the risk of expensive litigation and public obloquy.”

In the event of injunctive prohibition “the procedure for trial and punishment upon conviction for contempt includes none of the safeguards available to defendants charged under the criminal law for alleged dissemination of obscene materials. . . . Of equal significance is the loss of the right to jury trial, particularly in light of the Court’s emphasis on the ‘community standards’ test in deciding whether a publication is obscene.”

The majority opinion, joined in by Justices Brennan, Stewart, Marshall, Blackmun and Stevens are written per curiam (not under the name of a single justice), was brief, basically citing the major cases for the proposition that prior restraints are generally suspect. Especially key was a footnote stating that the presumption against prior restraints is heavier and the degree of protection broader than that against limits on expression imposed by criminal penalties.

In a dissenting opinion Justice Burger, joined by Justice Powell, argued for dismissing the appeal only for failure to present a real and substantial question. The dissent of Justice White, joined by Justice Rehnquist, essentially adopted the view of the State of Texas that the injunction is no more a prior restraint than is a criminal proceeding.

Committee Seeks Nominees

Four scheduled vacancies on the Foundation Board of Trustees will be filled in the election to be conducted next spring. Serving on the Board committee to select no fewer than eight nominees are Trustees Daniel W. Casey, Mary K. Chelton, and L. B. Woods, chairperson.

Members of the Foundation are encouraged to submit the names of qualified candidates to the committee before December 31. Write to: L. B. Woods, Graduate Library School, University of Rhode Island, Kingston, Rhode Island 02881.